FORECLOSURE TRAPS, PITFALLS, AND SWINDLES

HOW TO SET THEM AND HOW TO AVOID THEM

Discover HOW TO STOP “Fraud-Closures” Using the AMERICAN Judicial System

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Foreclosure Traps, Pitfalls, and Swindles

How to Set Them & How to Avoid Them

Discover HOW TO STOP Mortgage and Foreclosure Fraud and Save Your Piece of The American Dream Using the Rule of Law and the American Judicial System

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READ THIS FIRST

Knowledge is power.

But knowledge without action is powerless!

You have legal rights that you can use to gain the remedy that you deserve. However, these legal rights cannot work for you unless you have knowledge of them, and you know how to use them.

“My people are destroyed for a lack of knowledge…” Hosea 4:6

I have researched the foreclosure epidemic and have discovered that banks and mortgage lenders are relentlessly violating state and federal laws (and homeowner’s legal rights) in order to illegally foreclose on properties, they have no legal right to!

Fortunately, there are legal remedies for homeowners struggling with foreclosure. Most mortgage loans contain legally problematic issues that can render the mortgage loan contract void.

I’m just an average Joe and was reluctant to write this report; but after I discovered the truth behind the foreclosure epidemic, I knew something had to be done.

This report exposes some of the inside secrets that the big banks and Wall Street Insiders do not want you to discover and can give you the power you need to fight back against mortgage and foreclosure fraud.

Hopefully you will find the information useful. If you do please play it forward and share it with others, so together we can all get the legal remedy we deserve.

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# TABLE OF CONTENT

Read This First ..........3
Table of Content ...........4
Introduction and Short Stories ......5
Traps, Pitfalls, and Swindles...........9
A Primer on Mortgages ..........................17
A Brief History of Time ..........................20
Table Funded Loans...............................22
How Banks Win........................................30
The Cheshire Cat & Dr. Who ......................38
Setting Traps ...............................40
How to Win in Court ..........................46
Lawyers, Liars, & Losers...........56
How FRAUD STOPPERS Can Help ...59
Make Money Helping Others ...........63
Winning Lawsuits & Free Houses ...........65

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INTRODUCTION & SHORT STORIES

America is currently experiencing an economic and foreclosure crisis. Unfortunately, Millions of innocent hard-working people have lost their homes to foreclosure, and millions more are in danger of the same fate.

No Government Help! Government bailouts and forbearance programs have done NEXT TO NOTHING to help homeowners that are struggling with foreclosure. Mega-banks and mortgage lenders have been caught red-handed breaking state and federal laws, committing mortgage fraud, foreclosure fraud, securities fraud, bank and insurance fraud, tax evasion, swindling trillions in bailout money, and using every dirty trick in the book to profit from fraudulent illegal mortgages. Unfortunately, our Government has done little to stop the banks. So, if anything is going to be done it must be done by us.

Across the country, banks are committing outrageous crimes, including illegally foreclosing on homes. Banks have even been caught stealing people’s belongings and changing the locks on the doors before a foreclosure is even filed!

Elderly homeowners are tricked into foreclosure. Consumer Digest reported in March 2011 about two elderly homeowners in Wood River, IL who were hoodwinked by their mortgage servicer into foreclosure. Reportedly after spending $350 for an unexpected furnace repair, they realized they didn’t have enough money to make their monthly mortgage payment; which they had been paying (on time) for nearly 25 years.
So, they did what any responsible person would do, and they called their mortgage servicer, PNC Mortgage, to give them a “heads up” and ask for a little leniency.

**According to the homeowner’s attorney, PNC Mortgage would modify the terms of their loan on one condition: that they stopped making their monthly payments.**

Trusting their mortgage company, they did what they were told to do and applied for a loan modification. Only to be rewarded with PNC filing a foreclosure on them. That’s right, with over 25 years of equity in their home, their greedy mortgage company couldn’t wait to foreclose on them and sell the property for top dollar.

**Bank of America tries to foreclose on a home paid for in cash, with NO mortgage on it:** A local news agency in Florida reported on this case where Bank of American tried to foreclose on a property that never even had a mortgage on it.

The property was purchased in cash, but that did not stop Bank of America from trying to foreclose on the property. Fortunately, the homeowners hired a lawyer and were able to save their home from this illegal foreclosure attempt. With a court order in hand the homeowner’s attorney showed up to the local Bank of America branch accompanied by Sheriff Deputies and a moving company to foreclose on the bank.

After the BOA branch manager realized that the Sheriff Deputies were going to allow the moving company to remove everything out of the bank (including the cash in the drawers) he called Bank of America’s corporate offices and quickly had the issue resolved. It’s amazing what can happen when you overturn the tables on these Money-Changers!

**Charlie and Maria also paid for their home in cash -- and they also got foreclosed on:** Charlie and Maria Cardoso paid for their future Florida retirement home with cash in 2005.
The couple, who still lives in Massachusetts, had their home foreclosed on by Bank of America five years later this past February... but the bank had the wrong house.

The tenant renting the house from the Cardoso’s called the couple last July when three men showed up to clean out the house and change the locks. Charlie Cardoso talked to the Bank of America real estate agent who said he would tell the bank that they had the wrong house. But a month later a landscaper hired by Bank of America showed up to mow the lawn, causing the tenant to get worried and move before Christmas.

It gets worse. In January the bank put a lock box on the front door. When Charlie Cardoso drove down to Florida to convince the bank they had the incorrect address on the foreclosure documents, he missed his son’s homecoming from Iraq.

The couple had kept photos, clothes, tools and other items at the home. Everything had been removed and was presumably lost, they say. The Cardoso’s have filed a suit against Bank of America for $500,000 and charging the company with defamation and libel.

**Dan Smith got tricked by a teaser rate:** Dan Smith is a 33-year-old electrician living in Oakview, California. He devised a carefully thought out budget and decided he could pay $2,700 monthly payment on a home. He bought a home for his family and signed all the documents thinking everything was fine. Then the third month he received a mortgage bill for $3,600.

They thought it was a mistake and they called up their broker, who said 'Didn’t I tell you that was a teaser rate?’ Smith said if he had known the mortgage payment was going to be that much, he never would have bought the house. He lost his home and was left with "huge debt and a horrible credit score."
Anna Ramirez was foreclosed on by mistake: Florida resident Anna Ramirez came home last year to find her belongings strewn across her yard, after JPMorgan Chase held an auction on her home. Initially, the WSJ reported that the incident was due to a mistake in the clerk's office and a Chase spokesman was investigating the situation.

But the Journal later updated the story saying Ramirez had not paid her mortgage in some time, but court clerical errors led to her eviction. This complicated story proves just how inept our banks' reporting keeping processes are.

Active duty Navy Officer was illegally foreclosed on and evicted on Memorial Day: Mr. Worrell, an active duty Naval Officer from Florida, was illegally foreclosed on by Emigrant Bank while he was deployed overseas, and while he was in an active bankruptcy.

Emigrant Bank violated two federal laws when they illegally foreclosed on Mr. Worrell. Then they evicted Mr. Worrell from his home on Memorial Day, while he was in his Navy Uniform.

Serendipitously the local Channel 12 News team was on his block filming the Memorial Day parade and caught the illegal eviction on camera. The reporter told Mr. Worrell Channel 12 News would air his story all weekend long. Unfortunately, after airing the story only once, Channel 12 News received a call from the bank and quickly canned the story.

How can instances of mortgage and foreclosure fraud like these be happening?

To understand how and why stories like these can be happening all over America, you first must understand the difference between common law mortgage loan contracts and table funded securitized mortgage loan contracts. But before we discuss that, there are some common pitfalls and traps to be aware of.
TRAPS, PITFALLS, AND SWINDLES

If you are facing foreclosure choosing the wrong plan of action can be disastrous. Depending on what path you decide to take, there are often some common dangers to avoid.

One question people in foreclosure have is whether to try and sell the property. Prior to the 2008 economic meltdown selling was usually relatively easy for most homeowners because the housing economy was stable, and they had equity.

However, due to the downturn in the housing market many parts of the country’s real estate markets have fallen below 50% of the value, they were just a few short years ago, more and more homeowners are discovering that selling their house is next to impossible. For homeowners in this situation, selling their house often requires asking their mortgage lender to agree to a short sale. A short sale occurs when a mortgage lender agrees to accept less than the total amount owed, as payment in full.

The danger with a short sale is your lender can come after you for the outstanding balance using a deficiency judgment. So even though your mortgage lender agrees to let you sell the property for less than the full amount owned on the loan, you could still be on the hook for any deficiencies. For example, if you owe $100,000 on your mortgage and you sold it for the short sale amount of $50,000, the bank may issue you an IRS form 1099 for the $50,000 they have lost. So, if you’re considering a short sale, make sure your lender agrees, in writing, not to seek a deficiency judgment.
If your lender isn’t willing to agree to NOT seek a deficiency judgment, then you could consider a **deed-in-lieu** instead. A deed-in-lieu is when your mortgage lender allows you to sign the property over to them, and you simply walk away. In return, they agree to stop the foreclosure and not seek a deficiency judgment. This option may be preferable to a short sale, because with a deed-in-lieu you can avoid any future collection efforts or 1099 forms.

If you are thinking about trying a **Short Sale** or **Deed-in-Lieu** its best to get the help of a Realtor who has a **Short Sales** and **Foreclosure Resource (SFR) certification**. The SFR certification means that the agent has received formal training concerning issues related to foreclosures and short sales and can help you avoid some common mistakes that unrepresented buyers/sellers make.

The thing that both a **Short Sale** and a **Deed-in-Lieu** have in common is that the homeowner does NOT receive any money from the transaction! If you sell the house for less than the amount owed there is no money paid to you at the closing because the sale amount falls short. And in a Deed-in-Lieu you simply sign the property over to the bank and walk away, empty-handed.

However, if you are considering a short sale or deed-in-lieu there might be a way for you to enjoy the benefits of both a short sale and deed-in-lieu, and profit at the same time by working with a local investor who is willing to short sale the property and then sell it back to you at a reduced rate using owner financing or a lease with option to purchase agreement. If you find an honest, ethical, private investor you might be able to create a win-win situation where you can walk away from your foreclosure with profits in your pockets.

FRAUD STOPPERS PMA has acquired a list of ethical investors who can help you create a win-win scenario. For more information visit: [https://www.fraudstoppers.org/real-estate-investor-joint-venture-and-private-equity-refinance-programs/](https://www.fraudstoppers.org/real-estate-investor-joint-venture-and-private-equity-refinance-programs/)
The foreclosure prevention specialist: The “specialist” really is a phony counselor who charges high fees in exchange for making a few phone calls or completing some paperwork that homeowners could easily do for themselves. These actions rarely result in saving the house. This scam gives homeowners a false sense of hope, delays them from seeking qualified help, and exposes their personal financial information to a fraud. Some of these companies even use names with the word HOPE or HOPE NOW in them to confuse borrowers who are looking for assistance from the free 888-995-HOPE hotline.

The Mortgage Assistance Relief Services (MARS) Rule makes it illegal for someone to charge upfront fees for loan modification and other foreclosure prevention services, requires specific disclosures in ads, and outlines other restrictions that are designed to protect you from people or companies that would like to take advantage of you. Although there are some organizations and individuals that are exempt from this law. However, the rule of thumb is to steer away from any person or company operating in the public that is demanding large upfront fees for foreclosure prevention services that claim they are going to help you “save your home from foreclosure”.

The lease/buyback: Homeowners are deceived into signing over the deed to their home to a scam artist who tells them they will be able to remain in the house as a renter and eventually buy it back. Usually, the terms of this scheme are so demanding that the buyback becomes impossible, the homeowner gets evicted, and the “rescuer” walks off with most or all the equity. There are honest decent private investors out that... but as with everything buyer/seller beware. IF you are considering this type of transaction you should always have a licensed attorney review and approve the contract before signing.

The bait and switch: Homeowners think they are signing documents to bring the mortgage current. Instead, they are signing over the deed to their home. Homeowners usually don’t know they’ve been scammed until they get an eviction notice.
**The phantom landlord scam:** This scam is simple to spot and easy to defeat. A property is listed for rent, usually online. The so-called "landlord" tells you to send them the rental deposit, and they will send you the keys. Scam artist locate homes that are vacant (usually foreclosures), change the locks, clean them up, and list them for rent. Do NOT rent a house from anyone, unless you are sure the so-called “landlord” is the legitimate owner of the property.

Besides scam companies taking advantage of homeowners, the Banks business model is to take advantage of them too. Securitization is the reason banks want to foreclose on homeowners. When a bank assigns the risk of a loan to the investors (certificate holders) of a Real Estate Investment Conduit Trust (SPV), the “bank” is no longer a traditional bank that gets the benefit of mortgage payments; but they can make big profits when they foreclose on a property!

Mortgage banks give as few modifications as possible and comply minimally with statutes put in place to protect borrowers, all while employing tricks to “cash in” on homeowners’ defaults, pushing them to foreclosure. Banks benefit from foreclosures more than loan modifications because of something called “creaming the debt.” If the Banks modify the loan, their penalties and fees might not get paid to them. When they foreclose, they get their penalties first, before the investors– which is the “creaming.” The mortgage banks make more money from foreclosure than servicing the homeowner’s payment.

When foreclosure becomes a possibility, like when a borrower misses a payment or asks for a modification, the banks seize the opportunity for increased profit by foreclosure. Foreclosure is clearly the fattest pot of gold possible and it’s for this reason foreclosure is the bank’s primary goal. The banks take the risk of litigation because few people sue but getting legal information as soon as possible can make the difference between homeowners asserting their rights or losing their homes while being bulldozed by the bank. **Here are some common tricks the banks and loan servicers use against unsuspecting homeowners:**

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Bank Trick #1: Refusing Payments: The bank refuses the check a homeowner sends in. The bank may offer a reason (for example, there’s a mistake on the account) or it might offer no explanation at all. The bank may even offer the homeowner a loan modification. The bank does this to delay the homeowner from immediately contacting an attorney to pursue a breach of contract claim.

Alternately, the bank may take trial payments to further delay the homeowner until the arrears (also known as the forbearance) becomes so great that the homeowner is ineligible for a loan modification or unable to repay the debt. Eventually, the servicer combines this trick with other tricks, such as changing servicers, to draw the homeowner further into default.

Bank Trick #2: Switching Services during Modification: A homeowner gets a loan modification with one servicer and makes trial payments. The servicer advises the homeowner that it is switching servicing rights to another servicer.

The new servicer claims to know nothing about the modification and delays the homeowner for months waiting to get the relevant “paperwork.” No matter how many times the homeowner sends proof of the modification, the new servicer refuses to honor it. It is a violation of California law to not honor a modification from a prior servicer, but servicers know that most people will not pursue litigation.

Bank Trick #3: Breaching a Modification Contract: The homeowner gets a loan modification that includes a balloon payment of, for example, $50,000 after 20 years. After paying on this loan modification for a year and a half, the homeowner gets a new modification in the mail from the same servicer with a balloon payment of $150,000. No matter how many times the borrower calls the servicer, or tries to forward the existing modification, the agent will respond with a fixed script that does not acknowledge the prior modification but only talks about the new one. The confused borrower will feel like he or she is talking to a robot (on a recorded line, being
monitored by a supervisor). Eventually, if the borrower does not sign and execute the new modification, the bank will begin to refuse their payments on the old modification.

The servicer will also create a paper trail that tells a different story than what is happening. If the bank is trying to stick a borrower with a new modification, the paper trail will show the borrower is refusing the modification and mention nothing about the old one. Eventually, the servicer will stop accepting payments unless the homeowner acquiesces to the new modification.

**Bank Trick #4: Extra Fees & Escrow Accounts:** The homeowner receives a bill for extra fees out of nowhere so that the mortgage payment becomes something the homeowner suddenly can’t afford. The servicer refuses to accept any “partial payment.” After that, the bank continues adding on fees each month, increasing the amount the borrower must pay to reinstate. They may offer the homeowner a loan modification as a distraction to trick the homeowner into a longer default. Because the borrower thinks they are getting a modification, they will spend the money they would have put towards their mortgage and be unprepared to pay their arrears if the modification falls through, as it most likely will. The servicer does all this while telling the borrower they are there to help.

The servicer may pay homeowner taxes early and then accuse the homeowner of not paying them. The servicer may point to a clause in the mortgage that says if the homeowner doesn’t pay the taxes, they can raise the interest rate. They may begin charging the homeowner for forced place insurance at a high rate even though the homeowner already has insurance. This is something the homeowner only finds out after-the-fact when trying to pay property taxes.

**Bank Trick #5: False Notices:** In a non-judicial foreclosure state, such as California, foreclosure is done by recorded notice. The Notice of Default states the amount of arrears that a homeowner must pay back to reinstate the loan.
Servicers uniformly overstate this amount by up to $20,000, which serves two purposes: (1) It scares borrowers with an inflated amount of arrears that they believe they can’t cure; and (2) It creates a paper trail for the bank, so they can claim more money from investors.

**Bank Trick #6: Multiple Modifications and Dual Tracking:**
The bank must respond to the loan modification application with a denial or approval within a definite period. A denial must be in writing and must inform the borrower of the right to appeal. The bank cannot “dual track” a borrower by posting Notices of Foreclosure and Trustee’s Sale while reviewing the borrower for a modification.

There are big penalties for “dual tracking” by the bank, but only if it is the borrower’s first time applying. Therefore, a servicer will often deny a modification over the phone or encourage a borrower to apply again. Once a borrower becomes a serial modifier, the bank can dual track the borrower all it wants without statutory penalties. And, they will!

**Bank Trick #7: Zombie Foreclosures:**
Sometimes banks will foreclose on properties, and then never actually take possession of the property. This practice is often referred to as “Zombie Titles”. As a result, many former homeowners now find themselves stuck with thousands of dollars in unpaid bills for property maintenance. Sometimes under the threat of arrest!

**Here are some additional things to remember:**

✓ Avoid any firm that guarantees it can halt the foreclosure process. In the foreclosure prevention business, there are no guarantees. My advice to you is this: If anyone guarantees you anything, don’t walk away from them, run away! Now having said that I can guarantee you one thing: If you don’t fight, you cannot win!

✓ Steer clear of any firm that tells you not to contact your lender, lawyer, or credit or housing counselor. Firms that shell out that
advice know those professionals will spot a scam right away and warn you.

✓ Avoid any foreclosure prevention company that wants to charge a large fee before helping, especially payments by cashier’s check, money-dot cards, or a wire transfer.

✓ Stay away from any firm that encourages you to sign the home over to them so you can lease your home or buy it back over time.

✓ Reject any firm that recommends that you make your mortgage payments directly to them, rather than your lender.

✓ Avoid a foreclosure firm that demands you transfer your property deed or title to them.

✓ Try to save money if you are not paying your mortgage, because you will need it later.

✓ Make sure you’re keeping informed about your foreclosure. Keep track of any court dates or auction dates. You do not want to find out your house was sold at the auction after it happens, and now you only have two weeks to move out. So, stay on top of the situation. For more information on what to do if you receive a notice of default, or foreclosure notice, watch this video https://www.fraudstoppers.org/default-notice/

✓ **Make sure you get legal advice from a competent local attorney.** **Do NOT** take legal advice from a non-attorney, or so called “foreclosure expert”. FRAUD STOPPERS recommend that you get access to a competent local attorney in your state to get all your legal questions answered and get legal advice. Even if your attorney is not a so-called “mortgage fraud expert” or “foreclosure fraud expert” it doesn’t matter, because advice from a licensed attorney is almost always better than advice from a non-attorney.
A PRIMER ON MORTGAGES

When a person takes out a loan to buy a home, they sign two separate and totally distant contracts.

One contract is the Promissory Note (aka: the loan agreement) and the other is the Security Instrument (aka: the mortgage-or-deed of trust).

The Note states that the lender is loaning you money and you agree to pay it back over a time, typically 30 years.

The Mortgage or Deed of Trust states that if you do not pay back the loan, the bank can foreclose on your home.

These two separate and totally distinct contracts come together to form one single contract, which is called the mortgage loan contract.

Under common law a basic concept is that "the mortgage follows the note". This was pronounced by the Supreme Court of the United States in 1872 in Carpenter v. Longan, 83 US. 271, 274 as follow: "...the note and mortgage are inseparable..., the assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity". A nullity is the state of having NO Legal Validity. In other words, it’s legally void!

Remember it is the Security Instrument (the Mortgage-or-Deed of Trust) that gives someone the legal authority to foreclose on a property. ASSIGNMENT OF A MORTGAGE WITHOUT TRANSFER OF THE DEBT IS A NULLITY. Lawyers for the foreclosure mills are often using MERS assignments as a substitute for transfer of the debt.
Under common law the Note and Mortgage are supposed to stay together as one contract. Otherwise if a bank was to sell or transfer the note to another entity, but they failed to properly transfer or assign the mortgage along with the note, the party that holds the note (without the mortgage) would have no legal authority to foreclose on the property, if the borrower defaulted on the note; because it’s the mortgage (security instrument, aka: the lien) that gives you the legal authority to foreclose on the property if the loan is not paid.

On August 28, 2009 the Supreme Court of the State of Kansas stated in **LANDMARK NATIONAL BANK v. KESLER** that “the splitting of the note and mortgage creates an immediate and fatal flaw in title”.

The fatal flaw results in no one having the legal authority to foreclose on a property, because the party that sold the note would have received consideration (money) when they sold it, and therefore they cannot foreclose on the property because they were paid off, because to do so would be *Double Dipping*, which is illegal.

Furthermore, the party that paid for (and received) the note, without having the security instrument (mortgage or deed of trust), could not legally foreclose either because it’s the security instrument that gives someone the right to foreclose if the borrower defaults on the note.

So, if the note and mortgage were separated no one would have the right to foreclose. Remember under common law the note and the mortgage must stay together.

Some lawyers representing foreclosing entities have argued that under common law “the mortgage follows the note” means that if they are in possession of the note, they are also in possession of the mortgage, because the two are inseparable. So, by default if they hold the note, they hold the mortgage and have legal rights to foreclose. However, *without a contract in writing executed with the formalities required for transfer of interests in real property, it is highly probable that any*
instrument executed on behalf of MERS means nothing without the necessity of drilling into the authority or knowledge of the signor. In fact, it might just be that the execution of an assignment might be the utterance of a false instrument for purposes of recording, which in and of itself constitutes illegal activity. Neil Garfield

Now the bank’s lawyers claim that under UCC 3-205b because they are in possession of the note in bearer form, and the borrower defaulted on the note, they have the right to foreclose on the property; end of story!

But wait, what the banks do not want you to understand is that it is legally impossible to attach article 9 to the UCC receivables (securities) to enforce a lien on real property. You will discover why as you keep reading. For now, just keep in mind that in a common law mortgage loan contract the borrower creates the promissory note (it was the borrower’s instrument---they were the creators of it, and they owned it); then the borrower gives the promissory note to the lender who excepts it for value and loans the borrower money. After the borrowers pays back the loan, the lender should issue a Release of Mortgage, thereby releasing their claim over the collateral.

In a Normal Common Law Mortgage Loan Transaction:
- The borrower creates a note (promise to pay).
- The borrower gives the note to the lender.
- The lender accepts the note.
- The lender gives consideration (money) to the borrower.
- The borrower uses the money to buy the property.
- The borrower pledges the property as collateral on the loan agreement by granting the lender a mortgage.
- The borrower pays off the loan.
- When the loan is paid off the lender issues a Release of Mortgage releasing their interest over the collateral.

This is how mortgages worked for hundreds of years!
A BRIEF HISTORY OF TIME

In 1933, in the wake of the 1929 stock market crash and during a nationwide commercial bank failure and the Great Depression, Congress passed a law known as the Glass-Steagall Act in order to safeguard the Country from repeating another Great Depression!

This law separated investment and commercial banking activities. At the time, "improper banking activity," or what was considered overzealous commercial bank involvement in stock market investment, was deemed the main culprit of the financial crash. According to that reasoning, commercial banks took on too much risk with depositors' money.

The Glass–Steagall Act describes the four provisions of the U.S. Banking Act of 1933 that limited securities, activities, and affiliations within commercial banks and securities firms. This law acted as a firewall that protected the American People against “improper banking activities” for 70 years and made what the banks are doing today a felony!

The Glass–Steagall separation of commercial and investment banking prevented commercial Federal Reserve member banks from:

- Dealing in non-governmental securities for customers
- Investing in non-investment grade securities for themselves
- Underwriting or distributing non-governmental securities
- Affiliating (or sharing employees) with companies involved in such activities
Conversely, Glass–Steagall prevented securities firms and investment banks from taking deposits. The law gave banks one year after the law was passed on June 16, 1933 to decide whether they would be a commercial bank or an investment bank. They could be one or the other, but not both.

There were several "loopholes" that regulators and financial firms were able to exploit during the lifetime of Glass–Steagall restrictions. Neither savings and loans nor state-chartered banks that did not belong to the Federal Reserve System were restricted by Glass–Steagall. Glass–Steagall also did not prevent securities firms from owning such institutions.

So, starting in the 1960’s banks began chipping away at the Glass–Steagall Act. Unfortunately, it would only be a matter of time before the Wall Street bankers would find a way to overcome the Glass–Steagall Act.

Then in 1999 it finally happened; and the last thing that Congress did before they went on Christmas break in 1999 was repeal the Glass–Steagall Act. This gave the banks the number one thing on their Christmas wish list.

Now with Glass–Steagall out of the way the banks would be able to convert our mortgages into Mortgage Backed Securities (MBS) that could be sold and traded on Wall Street. Coincidentally once the Glass–Steagall Act was repealed it only took eight short years for the banks to nearly crash the entire economy again. Except this time the banks engineered an sinister plan to profit from the economic ruin they were going to create!
When Congress repealed the Glass-Steagall Act they passed the Gramm–Leach–Bliley Act also known as the Financial Services Modernization Act of 1999.

During debate in the House of Representatives, Rep. John Dingell (Democrat of Michigan) argued that the Gramm–Leach–Bliley Act would result in banks becoming "too big to fail." Dingell further argued that this would necessarily result in a bailout by the Federal Government and the American tax payers. Unfortunately, he would be proven right!

Now the banks could exploit new mortgage transactions called Table Funded Securitized Loans, wherein a mortgage loan contract could be digitized into a Mortgage Backed Security (MBS) to be sold and traded on Wall Street.

A mortgage-backed security (MBS) is a type of asset-backed security that is secured by a mortgage or collection of mortgages. The mortgages are sold to a group of individuals (a government agency or investment bank) that securitizes, or packages, the loans together into a security that investors can buy.

However, to do this, the banks would have to induce borrowers into signing mortgage loan documents using fraud and deception. You see if you purchased a property in last 10 to 15 years then you probably thought that you were signing a normal common law mortgage loan contract, where your “lender” was loaning you money to buy your home. However, if your mortgage loan contract was one of the approximately 70,000,000 mortgages digitized into an electronic file in the Mortgage Electronic Registration System (MERS) then you probably have a securitized loan!
The next few pages will describe some of the technical problems with securitized mortgage loan contracts. If you have a hard time understanding this material, don’t worry, many attorneys are not 100% familiar with this subject matter. Just keep in mind that if your mortgage loan was part of a securitized table funded transaction there is probably legal violations, breaches of contract, and fraud that could give you legal standing to sue for financial compensation and possible quiet title (clear and free) title to your home.

Securitization occurs when the Mortgage Loan Originator offers as consideration the mortgage loan instrument to an Account Debtor (Sponsor/Seller) who swaps the intangible payment stream for certificates that are sold to investors who are paid the income from the certificates.

When the Tangible Obligation (Promissory Note) and the Security Instrument (Mortgage, Deed of Trust or Security Deed) is sold in the secondary market to an Intangible Account Obligee (REMIC Trust) an Intangible Obligation is created under UCC Article 8. The existence of the Intangible Obligation under UCC Article 8 depends on the Tangible Instrument secured by a properly and continuously perfected security interest requiring the tangible Security Instrument be filed with the County Recorder’s Office.

Digitizing the tangible Promissory Note and the tangible Security Instrument into electronic data creates an electronic file called a Mortgage Loan Package. This electronic file is presented to various parties for evaluation and rating and appears legal. The Electronic Mortgage Loan Package is commonly, but incorrectly identified as the “Mortgage Loan Package” and is nothing more than an interest in the payment stream from the Intangible Payment Obligation originating from the Tangible Promissory Note obligation.
The electronic digitized version of the Security Instrument is often filed with the County Recorder’s Office and gives the illusion of legitimacy by allegedly providing a security interest for an alternate method of collecting value for the UCC Article 8 Intangible Obligation. In reality, the maker of the Intangible Obligation pledged the digitized version of a UCC Article 3 Security Instrument which is not perfected as it is recorded without the purchaser’s identity.

The Account Debtor claims to execute a True Sale of the Tangible Obligation and the Security Interest to the purchaser of the Intangible Obligation. This is impossible as the purchaser never obtained legal rights to an alternate method of collection using the Security Instrument to secure the obligation.

The First Electronic Sale happened when the Loan Originator offers the Electronic Mortgage Loan Package to a prospective Buyer (Intangible Obligor/Seller/Securitizer) to offset a pre-arranged line-of-credit for the benefit of the Loan Originator.

The Buyer of the Electronic Mortgage Loan Package conditionally agreed to accept as a tender of funds the conveyance of the Electronic Mortgage Loan Package and takes control of the Electronic Mortgage Loan Package as a transferable record that is not supported by law.

Pursuant to UCC Article 3-3203(d), when the First Transfer of Personal Property (UCC 8 Note-Payment Intangible) and the First Sale of the Intangible Obligation (payment stream, rights to future payments or beneficial interest) are bifurcated from the Tangible Obligation, rights to enforce the Tangible Obligation cease as the Tangible Obligation was not properly negotiated from the Loan Originator to the Intangible Obligor. The only rights conveyed are the rights to hold and possess the Tangible Obligation. An Intangible Obligor (Seller/Securitizer) cannot be a holder in due course of a properly secured UCC 3 instrument when the laws governing the Security Instrument are not followed.
UCC Article 9 does not govern the signatures on the Intangible Security Interest, Tangible Note or the Tangible Security Interest. UCC Article 9 governs the collection rights but the negotiation and transfer of an Intangible Obligation (payment stream) is governed by UCC Article 8. Therefore, negotiation of the UCC Article 8 instrument cannot be negotiated with an electronic signature attempting to transfer under UCC Article 9 and would therefore be invalid.

As future legal actions were not anticipated, the paper documents were either placed in storage (Custodial and Non-Custodial Custody) or destroyed.

This could be a major problem for parties attempting to foreclose because you must be in possession of the UCC Article 3 Paper Tangible Instruments (the wet ink signature note and mortgage) in order to foreclose on a piece of real property!

You not only have to have the Paper Tangible Instruments in your possession, you also must be the true “Holder in Due Course with Rights to Enforce”. **Meaning you must have the legal rights to enforce the security provisions of the mortgage or deed of trust.** However, if there you have a broken chain of title or clouded title due to the improper negotiating, transfer, and delivery of the mortgage loan contract then there may have been a lost of legal rights to enforce the mortgage lien.

Moreover, the electronic version of the paper documents is stored electronically as an eNote and tracked on a national database. The electronic database tracks who the UCC Article 8 Intangible Obligee is with personal property rights to the UCC Article 9. The electronic database does not track who has a vested legal interest in the Security Instrument as this is governed by State statutory law and typically remains vested in the name of the Mortgage Loan Originator.
If Mortgage Electronic Registration Systems (MERS) is involved, MERS is named as beneficiary or nominee agent to the Mortgage Loan Originator. Registration on the MERS system is required and when registered, an 18-digit Mortgage Identification Number “MIN” is created. The first seven digits identify the registering lender and the last digit is a checksum number. If the Electronic Mortgage Loan Package is registered in the MERS registry, there is no physical transfer of the Electronic Mortgage Loan Package.

The MERS Registry updates information as to who has control and ownership rights of the electronic digitized file. If a Notice of Assignment reflecting the electronic negotiation is not filed with the County Recorder’s Office rights to the Security Instrument does not occur. There is no law requiring notice to be filed with the County Recorder’s Office upon the selling or buying of an eNote when dealing with personal property. However, when dealing with real property, compliance with UCC Article 9, the ESIGN Act and the UETA is required.

The Second Electronic Sale happens when the Seller/Securitizer of the Investment Vehicle sells or assigns the Electronic Mortgage Loan Package to the Buyer (depositor of the Investment Vehicle). The recipient of the Electronic Mortgage Loan Package accepts the transfer and takes control of the Electronic Mortgage Loan Package under the terms of the Trust.

The Third Electronic Sale occurs when the Buyer sells or assigns the Electronic Loan Package to the Trustee of the Investment Vehicle and takes control of the Electronic Mortgage Loan Package. The Depositor of the Investment Vehicle takes control of the Investment Trust’s
Electronic Certificates under the rules of the Trust in exchange for selling or assigning the Electronic Mortgage Package.

Under UCC Article 8, the Intangible Obligee (REMIC Trust) must comply with State statutory requirements in order to have a perfected Security Interest and a continuous alternate method to collect future payments pledged by the Account Debtor. The Intangible Obligee must be assigned the rights to the Security Instrument according to State statutory law.

If the UCC Article 8 Intangible Obligee attempts to apply UCC Article 9 laws of perfection to support a legal claim to the Security Instrument, the claim is untenable as it is unlawful. This system of securitization is flawed as it provides the Account Debtor (Intangible Obligor) and the Original Account Debtor (Tangible Obligor) rights to the same instrument which is a legal and logical impossibility.

Upon default on the Intangible Obligation a Notice of Assignment is filed with the County Recorder’s Office. This Notice of Assignment allegedly transfers lien rights from the Original Mortgage Loan Originator (Tangible Obligee) to a third Intangible Assignee (Subsequent Intangible Obligor) who is usually the Trustee of the Mortgage Servicer. These filings are a fraud upon public records.

The perfection of lien rights (Perfected Chain of Title) does not match the Chain of Negotiation of the Tangible Note shown by endorsements or lack thereof and shows the Tangible Note is no longer secured by the Security Instrument as the Security Instrument becomes a nullity as an operation of law. The Trust is conveyed a transferrable record, leaving the Tangible Note, less the rights securing it which include the power of sale as would exist if the Security Instrument securing the UCC Article 3 Tangible Note was assigned in accordance to State statute. The ESIGN Act – 15 USC §7003 excludes instruments governed by the UCC Article 3, 8 and 9 or the State equivalent. Therefore, the intangible claim cannot be negotiated electronically.
The Tangible Note and the continuous perfection of the Security Interest can only be pledged as an intangible interest in the payment stream of the UCC 8 instrument. The Intangible Payment Obligation can only be negotiated in paper form.

The fact is the requirements set forth in the pooling and servicing agreements were not followed, and they were not followed in the following way. The pooling and servicing agreements says that when the notes are transferred to the trust there needs to be an endorsement in blank to the trust, as well as a complete chain of endorsements for all proceeding transfers.

That means that the originator of the loan must have a specific endorsement transferring it from the securitization sponsor, the sponsor to the depositor, and then the depositor in blank to the trust. What I am told is that in most of the cases that chain of endorsements is not there. There is simply a single endorsement in blank. That creates a problem because it does not comply with the trust documents.

That is a severe problem because most pooling and servicing agreements are trust that are governed by New York law, and New York law says that if you are not punctilious in following the trust documents for a transfer, the transfer is void. It doesn’t matter if you intended it or not, it’s void. That transfer is void, even if that transfer would have otherwise complied with law. And if the transfer is void that would mean that the trust does not own the mortgages, and therefore lacks standing to foreclose. It’s axiomatic that in order to bring a foreclose action the plaintiff must have legal standing. **Only the mortgagee has such standing.**

Thus, various problems like false or faulty affidavits, as well as back dated mortgage assignments, and altered or wholly counterfeited notes, mortgages, and assignments all relate to the evidentiary need to prove standing. Because without standing you have no authority to bring a foreclosure action in the first place!
HOW BANKS WIN

The banks and their attorneys are going to succeed by not having a properly perfected lien or Chain of Title, by stating that they negotiated the note in Bearer Form under Article UCC 3205 Sub section B with no payee named as a bearer instrument.

This essentially gives them a purported temporary perfection of the original holder, while they physically transfer the instrument, by daisy chain, which doesn't require for them to maintain a Chain of Title, until the instrument is specially endorsed.

This is how the banks and their attorneys beat almost everybody from New York to California on standing, and whether or not they had a secured interest over the lien; because nobody has a the way to argue against whether or not they made the instrument of bearer paper and physically negotiated it, because they weren’t required to maintain a Chain of Title in that aspect.

So that’s how the banks and their attorneys can win nine times out of ten. Because what they're saying is that in the negotiation under 3205 B, the security followed the note, whenever the custodian of record received the instrument prior to the cut-off date, making the note and the security securing trust property before the cut-off date. Here is the lie that the banks almost always defeat homeowners with: "Here's a copy of the note your honour, the security follows the obligation we all know that."
Yes, that’s accurate, under common law and U.S. Supreme Court. *Carpenter v. Longan* (1872) 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.

Furthermore, under revised article 9 of the Uniform Commercial Code (UCC) the banks do not necessarily have to record each transfer of the mortgage loan contract in public records; all they must do is be in possession of the note and they can claim rights to enforce it. That's how the banks and their attorneys can beat you.

So, let’s reverse engineer this, let's take that note all the way back to the closing, and reverse the whole concept and transaction. What you must be able to show is that you have one purported transaction, concealing the realistic transaction.

Did the lien’s beneficial interest maintain perfection, and was it therefore eligible to be negotiated with the note in that capacity, as statutorily required?

However, what that would require that you were the actual creditor and that you made that note as a *maker issuer*, for the purposes of being the beneficiary of the debt that was created. This is what the banks and their attorneys want you to believe in the matter of equity:

1. That your signature was as a maker issuer and therefore created value to the instrument
2. You negotiated with the party that you sat down at closing with
3. They accepted the instrument by negotiation
4. They were a federal reserved depository institution that could accept article three instruments by deposit
5. They gave you consideration in the form of cash, not *Ultra Vires*, for your promise to pay instrument executing an underlying indebtedness contract
Well in an IRC 1031 Like Kind Exchange, Table Funded Securitized Mortgage Loan Transaction, that didn't happen. That did not happen; that negotiation, acceptance and consideration is not what a table funded securitization transaction is!

So, the money is not created from your signature, negotiated and then the note negotiated between state to state physically, that doesn’t happen in a table funded transaction. Rather it’s in direct reverse engineer - the money was created from the sale of the certificates and the special deposit, special purpose vehicle on Wall Street.

They take the certificate holders funds to the securities to special deposit the pool of assets. That pool of assets is used in the SPV alternative investment opportunity through the warehouse line of credit, and that's what the sponsor bank is using as the table funding credit in the transaction itself.

So yes, we would have some arguments like robo-signing and the improper negotiation, transfer, and delivery of the mortgage loan contract all the way through the securitization scheme, as part of the material defects found in the transactional scheme itself - but what we don't want to do is provide any language as an admission to you being the account debtor.

You also want to make sure you understand what is meant by using terms like the “alleged debt”, because you're going to piss the Judge off, badly; a lot of people do it. Because, they don’t know how to speak to the transaction as it relates to what that means.

So, let me give you the perspective that the Judge is going to have. The Judge is only looking at the intent of the contract.

So, all the little details, the semantics of this right now, the first thing the Judge is going to do, is look at it from a cursory equity standpoint.
Q: Did you intend to get a home
A: Yes

Q: Are you in a home?
A: Yes

Q: Okay, so you’re in the collateral.
A: Yes

Q: Okay and did you intend whenever you went to go get the home to get an obligation or a loan associated to that.
A: Yes

Okay, yes that's obvious or else you wouldn't be in the collateral

Q: Okay so you’re in the collateral - an obligation exists - and you also pledged a lien to encumber your property to secure that obligation, so that if you couldn't perform on the contractual payment obligation the holder of the obligation would have the lien to enforce, do a foreclosure sale to enforce an ultimate means of collection.
A: Yes.

Okay. So just looking at the intent of the contract, you are in the collateral, you know that you signed something at the closing- there's an obligation – and it's in default. The institutions claiming to be the holder of that obligation and to be the secured party of record via an assignment of the security instrument perfected in public record.

Are there any other parties that are involved in this transaction?

No! And if some other financial institution was holding an obligation and saw that deed of trust or signed with a deed of trust recorded on public record, they would immediately file to acquire the title and they would be there defending their right to the obligation and the collateral itself.
So, because there’s no other financial institution showing up claiming to be the holder and to having a subsequent assignment of deed of trust or mortgage recorded for enforcing through a foreclosure action - than nine times out of ten - the Judge is going to give the party holding the obligation the benefit of the doubt as a matter of the intent of the contract. Therefore, in terms of the intent of the contract, this is where it becomes so viable for you to understand, what your capacity into the transaction is. When the judge asks you:

“Did you sign the note - in the effort to get the collateral?”

Your answer is “Yes.” - But you need to be able to specify the answer to yes as “well yes your honour but I’m not the account debtor. I signed into this transaction as an accommodation party or guarantor. The party that I signed as a guarantor for, made available the obligation through a securitization transaction without my knowledge and purportedly negotiated the security evidence by the deed of trust/mortgage lien that I pledged to them, uniquely, to secure these receivables in this transaction as well.

What I need to know your honour is does my lien secure the tangible contractual obligation or does it secure the receivables?”

The answer to the receivables is no. You cannot attach article 9 to the UCC receivables (securities) to enforce a lien on real property. A lien on real property under revised article nine is not secured by a lien on real property, so article nine does not fit the common law argument that the transfer of an obligation carries the beneficial interest of the lien and the lien itself.

Therefore, you need to be able to explain (and prove) how your capacity is to the obligation. “Your honour I am not the account debtor. I was a guarantor to this party. I am not a guarantor to everybody else that claims to be the holder of the obligation"

And it’s their capacity of an accommodated party to the certificate holders on Wall Street. They’re not the real creditors. Their job is to
put the certificate holders into funds associated to your payment string. All of this is predicated on laying the proper order of operations, in line with statutory capacities, that clearly part and parcel and separate the root question of: Does revised article nine and liens on real property secured defaulted receivables in a securitization transaction?

That's your root question. You just must be able to have it all put in the proper sequence in statutory capacities, as it relates to your state, and what took place in order to defend the lien itself the property. How have you been harmed?

In pre-foreclosure it's not so much that you've been harmed, it's whether they have clean hands in the transaction. So, this, at its root is an Equitable Estoppel issue. In the like kind exchange transactional scheme there is a senior secured party and a junior secured party – the originator of the loan (named on the note as the lender) is the senior secured party, and the trustee for the REMIC trust is the junior secured party.

But it's one transactional scheme, it’s one organism, so you must be able to show that they - in the race of diligence - that the junior secured party made sure that the originator recorded that underlying security of trust, so they could perform the rest of the transaction. But ten years later upon default of the receivables, to cause an assignment of the beneficial interest of evidence about your underlying security instrument, that security instrument doesn't maintain perfection from now, until infinity. You can lose perfection over that lien.

So, having the proper capacity, order of operations, and then statement of facts of how they lost perfection, and to show that it is inequitable for the holder of the receivables to attempt to cause an assignment of the underlying security instrument, because they were only negotiated the receivables, with unclean hands. That’s what you must show that they don't have an equitable claim to.
Hypothecation is a third-party pledging collateral on your behalf. So, let's say for instance, if you pledged the real property to the originator party on the ten thirty-one exchange transaction scheme you specifically gave legal title to that party. Not to the trustee under that instrument, and the beneficiary of the security instrument. The beneficiary of the security instrument then in turn pledged a separate and subsequent value - which is the proceeds of the real property.

Let me give you an example. Consider a wheat field. The land is the real property, but the Wheat and the Harvest are the proceeds of the real property. In this securitization transaction the original secured party is granting the proceeds, the actual required collateral to the real property and hypothecating that proceed as the payment intangible, which is the transferable record on the obligation.

So, you must be able to show that it's under revised article nine; it does not apply to liens on real property. It may apply to title loans, student loans, and unsecured obligations, but it does not apply to liens on real property.

Remember, it's either you sold the contract in its entirety to a successor and interest through a true sale; or you sold the underlying tangible value of the contract. Remember when people paid off their loans and they received their notes and their deed back, and they would have deed burning parties?

That doesn't happen anymore because that transactional scheme where that was your note, that you made and negotiated with a bank that could accept it, deposit it, and give you real money for a loan so you could purchase the property. That's the savings and loan model. In that transaction the bank you contracted with risked giving you real money and was going to hold that thirty-year instrument until its full rate of return. Its portfolio division wanted to buy that obligation and they underwrote you as your credit worthiness and they gave you the loan. You had skin in the game, you qualified financially, and they were willing to take a risk on you. That was a real contract between you and the bank.
But what happened with the securitization bubble is they lifted the Glass–Steagall Act and the Gramm Bliley Leach Act and they made way for this transactional scheme were they could divert the risk of creating the money, which was done by lying and cheating the certificate holders through a perspective supplement which was pre-fabricated on the yield spread of those securities, under the nineteen thirty three, thirty four Security and Exchange act.

So, they went to Standards & Poor’s and they got all those credit enhancements and they pre-sold those securities. Well that’s what the special deposit is for the REMIC trust, the trust vehicle; the special purpose vehicle. So, through special deposit, they generated those funds with the sale of the securities, that’s what makes the credit swaps available for the sponsor bank, to work with the originator to the table fund transaction.

Once you’re able to understand the blue print of the transaction and then you set the order of operations in place, and then you couch the interested parties, and then couch their capacity, and then what are they negotiating and what’s its statutory intangible interest, and what governs that, and once you set the mouse trap in place, and it can follow the order of operation it’s not that complicated.

To get to the root question you just must be able to see all of that and to be able to understand the root question. The root question is “in what capacity did you sign the note (as maker/issuer) or as an (accommodation party/guarantor)?

If your loan was part of a table funded securitized transaction where the note and mortgage were converted into a mortgage backed security and sold to a Wall Street trust, then you signed the note as a guarantor, accommodation party, not the account debtor; and therefore, the security instrument (mortgage/deed of trust) is void ab initio (from the beginning). The security instrument would be meaningless without an underlying indebtedness between the parties to the contact.
Even though everything in the last few chapters is true, many judges are not open to entertaining this fact pattern or legal argument, perhaps because they think that could undermine the entire housing market and U.S economy. However, there is simple more straightforward way to challenge a foreclosure sale and overturn the tables on the money-changers!

**Standing is the ability of a party to bring a lawsuit in court based upon their stake in the outcome.** A party seeking to demonstrate standing must be able to show the court enough connection to and harm from the law or action challenged. Standing cannot be proven out of the mouth of the Agent. Standing can only be proven out of the mouth of the Principal! So, if someone is attempting to foreclose on your real property the first question you should ask is: Who Are You?

Many homeowners have asked their lenders/servicers to show them the note, only to discover they cannot produce them. We have good reason to believe that many of the notes were destroyed because the Bankers Association testified to the Florida Supreme Court in case NO. 09-1460, that “the reason many firms file lost note counts as a standard alternative pleading in the complaint is because the physical document was deliberately eliminated to avoid confusion immediately upon its conversion to an electronic file.”

Unfortunately, some judges have decided banks and servicers can foreclose without the original wet ink signature note. Federal courts however require creditors to have the real promissory note(s) if they wish to claim that they are a secured party of interest. But it’s not just about having the wet ink signature note, more important is dose the party foreclosing have a properly perfected lien, or are they the holder of the note in due course with rights to enforce?
To help you determine if the party attempting to collect on the note or foreclose on your home has a perfected lien (mortgage / deed of trust) and if they are the holder of the note in due course with rights to enforce FRAUD STOPPERS PMA can conduct a mortgage fraud analysis, Bloomberg securitization audit, or chain of title investigation.

Another way to get to the bottom of the rabbit hole is to challenge the legal standing, capacity, and agency of the party claiming they hold the note, or are attempting to foreclose, in federal court under the Fair Debt Collections Practices Act (FDCPA).

Recent lawsuits filed against law firms who collect debts under the FDCPA reveals the liabilities assumed by lawyers who, knowing that there are defects in their clients legal standing, pursues it anyway. In many foreclosure cases lawyers have entered into contracts with loan servicers and banks to foreclosure on properties knowing their clients lack the legal standing to initiate the foreclosure proceedings.

These law firms had to know that documents that they referenced or attached to their pleadings were either fabricated by the banks or fabricated by others on behalf of the banks. The lawyers had to know that the “client” was not the real Plaintiff or Claimant. Nevertheless, they dishonestly continued acting as if the named Plaintiff existed and had a valid claim. The reason they had to know is because lawyers are required to do due diligence to know with 100% certainty that the named plaintiff exists and that filing a lawsuit or sending out notices on behalf of such clients without having been retained by them, is legal and valid.

For example, naming Bank of New York Mellon as trustee, when there is no trust is a breach of fiduciary responsibility. Naming or implying the existence of a trust when it does not exist is also a breach and cause of action against the lawyers representing the foreclosing party. Such actions are violations of the FDCPA. The banks have seemingly suckered lawyers into handling debt collection and foreclosure actions without disclosing the fact that they (the lawyers) can be held liable for multiple violations of state and Federal laws.
SETTING TRAPS

“Victory comes from finding opportunities in problems.” – Sun Tzu, The Art of War.

“Never interfere with your enemy when he is making a mistake.”

If you want to stop foreclosure and mortgage fraud you need to find out what cards the other side is holding. One of the first things we recommend you do is demand that your lender or current loan servicer give you a copy of every document they have for your loan file. Often loan servicers do not have the documents they need to foreclose. Sometimes they give fabricated, forged, documents with robo-signed signatures and incorrect fraudulent information. In fact, when one of our Private Members requested their loan servicer provide them copies of all the documents they had on file, the loan servicer sent a copy of their alleged promissory note that contained different loan amounts and different closing dates than those that were on their original loan agreement. Can you imagine what how a bank’s lawyer would explain this to a judge and jury?

You can begin to ask this important **Who Are You** question by way of sending informal discovery “demand letters” that can include:

- Error Resolution & Information Request (ERIR) Letters
- Federal Debt Validation Letters
- Qualified Written Request (QWR) Letters
- Tort Letters
- Truth in Lending Act (TILA) Rescission Letters

FRAUD STOPPERS, PMA
Email: Info@FraudStoppers.org
Website: www.FraudStoppers.org
If you are the defendant in a foreclosure lawsuit you can (and should) challenge your opponents’ Standing with motions and discovery tools such as: Request for Admissions, Request for Productions, Interrogatories, Depositions, and Subpoenas.

The main question to ask is: Who Are You? and What Legal Rights Do You Have to Foreclose on My Property? Show me the note, and prove to me that you have legal Standing, Capacity, and Agency to bring this foreclosure action in front of the court.

FRAUD STOPPERS Private Administrative Process is a targeted approach to Informal Discovery under UCC 3-501. PRESENTMENT or your States equivalent.

We start with a Mortgage Error Resolution/Request for Information (ERIR Letter). If you believe there is an error on your mortgage loan statement or you’d like to request information related to your mortgage loan servicing, you must exercise certain rights under Federal law related to resolving errors and requesting information about your mortgage loan. If you think your credit report, bill or your mortgage loan account contains an error, or if you need more information about your mortgage loan, you send a written letter concerning your error and/or request.

Usually the loan servicers will not respond to your “informal discovery requests” in accordance to law. And that’s a good thing! Remember to never interrupt your opponent when they are screwing up. This can give you an advantage when you take legal action. The courts are supposed to be a remedy of last resort: meaning they want you to try and work things out administratively before bringing the issue to the court.

If you are forced to take legal action against your lender or loan servicer, and you can show the judge that you tried to work things out, but they were nonresponsive to your lawful request, or left you no other option but to file suit, you can start off on better footing, rather than if you just filed the lawsuit to start with. Plus, in conducting your
informal discovery process you may be able to obtain damning evidence and material facts needed to exhibit to your complaint and win your case. Remember “Never interfere with your enemy when he is making a mistake.”

When dealing with the banks there are two rules to remember:
1. We never ask them to do anything that we expect them to do.
2. We never ask them to do anything they’re not required by law to do.

So, I’m going to ask you to do this thing…
But I’m really hoping you don’t do what I am asking you to do. Because then I can land on you like a ton of bricks!

However, if you are going to try this you must always be at least two moves in front of your opponent. FRAUD STOPPERS can help you.

One of the advantages of using this technique is it can prevent you from getting frustrated if (and when) the bank doesn’t do what you are asking them to do. Instead you might even get excited, because if, and when, they violate the law by not responding properly to your informal discovery request you could end up with even more leverage against them.

We have found the banks and loan servicers almost never respond to our informal discovery “demand letters” the way the law dictates they respond. They usually send you a non-responsive answer.

FRAUD STOPPERS Administrative Process (Informal Discovery) is designed to catch the banks screwing up, so you can increase your odds of success. This process can help you stop or stall the banks collection efforts (including stopping a foreclosure sale if one is imminent) and buy you the necessary time to lay the necessary groundwork for a lawsuit demanding special or compensatory damages and equitable relief for clear and marketable title to your home.
Now let’s talk about the foreclosure laws as they relate to everybody. If you have received a Notice of Default (NOD) or Notice of Acceleration (NOA), then time is short, and you need to do something fast. And the only thing that will get the banks attention is a lawsuit. If you have an impending sale there are several things you can do. If you haven’t done anything concerning the foreclosure process yet, there are some things you must do simultaneously.

The first thing you want to do is send out several letters. Whoever is attempting to foreclosure on you, on that person you should send a debt validation letter (DVL). Often, a debt validation letter (DVL) will stall the foreclosure. Because when a debt validation letter is filed, the lender is obligated by the Fair Debt Collections Practices Act (FDCPA) to validate the debt.

A presentment under the Uniform Commercial Code (UCC) is defined as a demand for payment on a debt in us dollars. If your sent a presentment (a demand for payment) from anyone, you may dispute the debt with that person, and if you send them a letter stating that you dispute the debt and a demand that the claimant prove up their claim, then the debt collector is required to seize all collection efforts until they have proved up the claim.

So, if your lender is in the process of foreclosure, and you send them a debt validation letter, they’re going to claim that in this case they are not debt collectors, but in fact they are merely attempting to recover collateral. The courts across the country are split on this issue. Some states say yes, they are a debt collector, and some say no they are not a debt collector. For our purpose we don’t care either way, because we’re going to make the claim and by law once the demand is made, they must prove up their position either way. The issue that we’ve been making with the lawsuits we’ve been helping people produce is that they are a debt collector until they show that they are not a debt collector. Usually they like to reply with a Rule 12 (motion to dismiss for failure to state a claim), alleging that they are NOT debt collectors and therefore they do not fall under the FDCPA.
So, the argument that we’re making here is that in order to implement the intent of the legislator (and that intent was to prevent someone with no claim on a debt from collecting on a debt), you are demanding they prove their position.

If you have a debt with GMAC and I call you from Joe Blow collections or send you a letter claiming I’m collecting for GMAC and you need to send all your future payments to me. Well if you send your payments to them and they are not collecting for GMAC the payments you send to them do not extinguish the debt; and that’s in the Uniform Commercial Code.

You see the foreclosure mills and the banks agents are trying to squeeze in under that exclusion and claim that they are not trying to collect money; rather they are attempting to recover property. But in order to recover the property you must get a notice of intent to foreclose in the form of a notice of default (NOD) and opportunity to cure the default (by paying money). This is stated in the mortgage.

Now we are saying that makes you a debt collector. Because the bank is saying you better pay a certain amount in U.S. dollars, or else they will become a collateral collections agent, and take the property as collateral. So, the argument you will be making to the court is even if the jurisdiction says that the debt collector, and the foreclosure agent falls under the exclusion, until such time as they prove that they are in that position, they fall under the FDCPA.

That’s why one of the things you get when you join FRAUD STOPPERS PMA is a Federal FDCPA complaint that challenges your opponent’s Standing, Capacity, and Agency under the federal law and demands $100,000 in financial compensation!

**These informal discovery documents include:**
- ✓ A Tort Letter to stop a foreclosure sale, if one is imminent.
- ✓ An Error Resolution & Information Request Letter (ERIR Letter): that demands physical inspection of the original, wet-ink-signature loan documents

FRAUD STOPPERS, PMA
Email: [Info@FraudStoppers.org](mailto:Info@FraudStoppers.org)
Website: [www.FraudStoppers.org](http://www.FraudStoppers.org)
✓ A Professionally prepared Qualified Written Request Letter (QWR Letter): to uncover and verify accounting errors & violations
✓ Two Federal Debt Validation Letters to help you get the material facts needed to exhibit to complaint and lay the necessary groundwork for a federal FDCPA lawsuit.
✓ And a TILA Rescission Letter that you can use to rescind or cancel your mortgage loan contract using the federal Truth in Lending Act (TILA) and recent groundbreaking United States Federal Supreme Court Case Decision Jesinoski v. Countrywide

Regarding the TILA Rescission Letter, the supreme court ruled unanimously in Jesinoski v. Countrywide that the moment your TILA Rescission Letter is mailed your mortgage loan contracted is rescinded (or canceled). They cease to exist as a matter of law. Furthermore, if the bank, creditor, or servicer wants to challenge the rescission they only have 20 days to do so and that must be done in federal court.

We have never seen the banks do this. What they almost always do is send a letter to you stating that you cannot rescind the loan because you are past the 3-year status of limitations (SOL). The banks standard response to a TILA rescission letter states: “TILA provides that if required notices or material disclosures are not delivered to the consumer, the right to rescind shall expire three (3) years after consummation of the loan...” and therefore you are past the SOL and cannot rescind this loan.

However, under paragraph (i) of TILA the SOL clock resets upon a notice of default (NOD) or foreclosure notice. Moreover, what if there was never an actual loan consummated within the appropriate legal definition of consummation? FRAUD STOPPERS TILA rescission letter claims that no real loan between the alleged borrower and loan originator ever existed in the first place, and no loan has been consummated within the appropriate legal definition of consummation, and therefore the bank’s SOL defense would be a meaningless argument.
If you go into court Pro Se (without an attorney), and you are ignorant about due process or how to win a lawsuit, you can bank of the fact that the judge will probably rule against you, out of hand, and at every turn, just because your pro se. On the other hand, if you go into court with an attorney ignorant about how to win a lawsuit, your attorney could screw you royally, because they could end up losing your case, and make you pay for it too!

Therefore, legal education is paramount! After all, if you are playing a game and you didn’t know what the rules of the game are, how can you win? What if your opponent is cheating, how can you stop them, if you don’t know what the rules of the game are? If you go into court against the banks (with an attorney or without) and you are legally ignorant, absent some miracle, you are not going to win. And if you do win, you will not win as big as you could, if you knew how to win in court!

Every day we hear “the courts are corrupt”, “judges are on the side of the banks”, “lawyers are liars”, and “you can’t win against the banks”.
However, there are hundreds of thousands of winning cases against the banks. One of the strategies to winning is learning how to properly lay your case out, documenting all the appealable errors, so you can win on appeal.

In fact, one of the insider’s secrets is that when the judge realizes what you are doing, (laying the case out for appeal) and they will, they will often rule in your favor, even if they weren’t going to initially, just so they are not overturned at the appellate level. Having too many overturned cases could hinder a judge’s career advancement opportunities. Yes, it’s true some judges that are on the verge of retirement may not care about career advancement opportunities, but for the most part the average judge does.

If you knew your opponent was going to violate the rules, every chance they got, that is not necessarily a bad thing, if you know what the rules are, and you know how to land on them like a ton of bricks when they do. In order to do that you must get legally educated.

For over 20 years the [How to Win in Court](#) legal education curriculum has been teaching Pro Se litigants how to win their cases. At this point we have thousands of testimonials of average everyday people who have won their case without an attorney after taking and learning this material. You see the fact is that our legal system has checks and balances built into it that can afford you the legal remedy you deserve, if you take the time to learn the rules of the game.

If you go into court Pro Se, and you are ignorant, you are going to lose. If you go into court with an attorney, and you are ignorant, you could lose and pay for it too! **Therefore, do not go into court ignorant.**

Now you can learn how to win your case with or without a lawyer! If you have a lawyer, you can learn how to control your lawyer so that you’re properly represented. If you don’t have a lawyer, you can learn what you must do for yourself to win. All the basics of how to deal with the court system in an easy 24-hour course. This is a must for all pro-se litigants, or anyone fighting to stop a foreclosure or sue the banks.
for mortgage fraud and foreclosure fraud. The [How to Win in Court](#) includes:

- ✓ 3 In-Depth Video Tutorials
- ✓ 25 Downloadable MP3 Audio Clips
- ✓ Free Online Legal Research
- ✓ Legal Research Hints & Tips
- ✓ How to Use Evidence Rules
- ✓ Effective Written Motions
- ✓ Effective Spoken Motions
- ✓ Affirmative Defenses
- ✓ Complaints & Causes of Action
- ✓ Essential Courtroom Objections
- ✓ Appeals Procedure with Forms
- ✓ Summary Judgment Motions
- ✓ Summary Judgment Defenses
- ✓ Trial Procedure
- ✓ How to Handle Witnesses
- ✓ Frequently Used Forms
- ✓ Criminal Defense
- ✓ Property Law
- ✓ Contract Law
- ✓ How to Collect Judgments
- ✓ Official Rules of Court
- ✓ Standard Pleadings
- ✓ Discovery of Evidence
- ✓ How to Hire a Lawyer
- ✓ How to Control Lawyers and Judges
- ✓ Common Law Maxims
- ✓ Natural Law Theory
- ✓ Final Exam
- ✓ Plus, Much More!

If you have a lawyer ... get what you’re paying for. If you don’t have a lawyer ... know what YOU must do to win! Learn simplified time-tested strategies to winning. Sample forms with complete explanations. Step-by-step instructions written in plain English!

**FRAUD STOPPERS, PMA**
Email: [Info@FraudStoppers.org](mailto:Info@FraudStoppers.org)
Website: [www.FraudStoppers.org](http://www.FraudStoppers.org)
✓ Learn how to control your attorney.
✓ Learn how to control your opponent’s attorney.
✓ Learn how to control the judge.
✓ Learn everything you need to know to win your case (with or without an attorney) from A to Z
✓ Learn how to enforce due process and enforce your legal rights in less than 30 hours of studying. If you study one hour a day, in less than a month, you can learn how to win your case.
✓ Learn State or federal courts – civil or criminal. Foreclosure, debt collection, family law, fraud, breach of contract, tax problems ... all cases!

Over 10,000 people have already learned how to win their case with this program. Here are a few testimonials:

I am an attorney. Impressive. Eric Olsen

A valuable public service. University of Florida law professor.

Useful. I highly recommend it. The Alliance, Boynton Beach

A guide to the rules attorneys follow in civil lawsuits. The Charlotte Observer

A simplified course in the basics. Sun-Sentinel, Fort Lauderdale.

The prose is readable, flowing, and sometimes breathless. Times Union, Albany, NY

A seemingly gargantuan project to reverse ill feelings and disconnect between the public and the legal community. World Net Daily

Your page was chosen to be highlighted as Web-Star’s What’s Hot Now for Wednesday 7/22/98. Continued success for your superb site. H. Barton, V.P., Web-Star

Wow! A lot got unknotted through the use of simple language, for which I cannot thank you enough. M. Bock.

Thank you for your tremendously valuable help to the common man. Mark Moorehouse

I can't thank you enough for sharing the many wisdoms enclosed in your Jurisdictionary materials. They have helped me a great deal in understanding not only law but Justice as well. Thank you. You are a rare credit to the profession, and I want you to know you have an appreciative customer and fan. Eddy Spencer

Your idea is exactly what this country needs, and we will get the word out! You are on the right track. Judy B.
My wife and I just want to let you know that we are so grateful to have come across your class Evidence Simplified. You did an excellent job. It is well written and very easy to understand. It is just wonderful! The way you explained the application of the rules was so effective that we as plaintiffs pro se came away empowered and with some good ammunition ready to apply with confidence for our upcoming motion hearing. We are energized and ready to fight for what's right and fair. We thank you for sharing your knowledge of the American Justice System the way you do. We definitely will tell all our friends about this found knowledge. Arcenio A.

My compliments. The information and depth of knowledge are truly remarkable. You are doing a valuable public service. M. Collins

What a great site! Thanks for helping all of us who study law. N. Schumacher.

I want to thank the attorney for Jurisdictionary. In a law suit I filed in Superior Court about a probate matter, my attorney deliberately failed to do discovery, although the other side forged documents and lied. My principle lawsuit was in the Superior Court. But I was also a beneficiary in an open probate of a will whose co-executors were also the defendants in the Superior Court. By familiarizing myself on probate rules for discovery and using Jurisdictionary, I was able to file a motion for production of documents and got some of the documents which my attorney should have requested through discovery through the Superior Court. Thanks again. Byron Miller

Thank you for all your hard work. J. Lowry

Thank you for the excellent tutorials from Jurisdictionary. They've been a tremendous help in understanding what it's all about. I recommend them to friends interested in learning the principles of law and legal processes. E. Johnson

Thank you for the great teachings. Truly inspiring. L. Calejo

Wonderful information presented in a light-hearted and very realistic way. Very helpful. I REALLY UNDERSTAND. Keep up the good work. Patty

Thank you for the magnificent work you have done ... a true legacy of great value to posterity. D. Wilson

I am very impressed with how it simplifies matters yet explains thoroughly - a great handbook for the fundamentals. J.D. Wheeler

Wow! I wish I'd found this several weeks ago! Tremendously helpful! DKH

The concept of 'The Rules' is great! H. Taylor

What is most compelling is how simple it is. It really strikes me as 'self-evident', just as you say. I think you're onto something! Douglas W.

I'm amazed by what I've read. Thank you for your simple explanations. Carrie K.

Good Stuff! I'm still going through it, but it’s helped a lot so far. J.E. Dixon
Your writings on these topics are so straightforward, it’s exhilarating to read them. Clearly this is from your heart via your head, with your full attention at both points. Excellent work. *Jamie J.*

Thank you very much for your great work. *D. Wilson*

I am so impressed with the simplicity. For us legal dummies your breakdown of terminology and attractive format are most appreciated. Thank you, thank you, thank you. *Alice S.*

I enjoy your writings. Well thought. Well said. *D. Meador*

Thanks. Jurisdictionary has increased my understanding several hundred-fold. *V. Wright*

I've been empowered by your unselfish outlay of civil procedure rules and principles. Thanks. *Barbara*

The information is immensely helpful. Thank you. *Paulette H.*

Great! *Joe & Cheryl B.*

Thank you. Thank you. Thank you. Jurisdictionary is wonderful! *Lena W.*

Thank you. Thank you. Thank you - for providing this valuable work. I refer to it often. It has helped me on many occasions to get a grasp of the litigation process and to increase my understanding of the use of strategies. Most importantly it has helped me stay centered when I drift off course. *J. Harvey*

I am truly impressed. You have included some very helpful information. No one can afford to be ignorant about legalities these days. Keep up the good work. Thank you. *Melissa H.*

I would like to thank you for making this material available to everyone seeking truth and justice. Thanks for teaching us to Lift the Lamp Higher! *H.R. Dal Dosso*

I applaud your efforts. Best wishes. *R. Jark*

I write to express my gratitude for the invaluable information and effort you give to make education available regarding justice. *Debra H.*

Very appealing. Nice job. *Jerry M.*

I'm learning as I go. Jurisdictionary has provided such a clear view of what lies ahead I cannot thank you enough. What can I do to help you continue to provide support and understanding? *J. Rice*

Jurisdictionary is a very creative and refreshing idea. It's a great community service. *Betty P.*

Great idea! I agree wholeheartedly with your mission. *Gino F.*

Thank you for all you're doing. You're an inspiration! *May A.*

You are to be commended for your work letting people know their rights. *S. Rize*
Wonderful!  R. Williams

Great information!  L.B. Davidson

We are very thankful for the information. It gives us focus and information we have not been able to obtain anywhere. Thank you.  M. Czerniakowski

Thank you for the Jurisdictionary. It has certainly been helpful for me to be able to learn more about the judicial system.  D. Fletcher

I think you have a great idea and that it will grow.  Patricia M.

This is the kind of 'education' that will really help people.  Douglas
I will finish reading the Jurisdictionary. It is very interesting and worthy of my time.  Laurel

You are a great help!  A. Hunt

It is my sincere hope that your project gets the support it needs.  ... Debbie

Definitely gives me hope.  Jeff N.

I love your work.  Brent B.

Great idea!  Gino

I want to help spread the word!  Derby

Wish I had read your Jurisdictionary at 20 instead of at 40.  J. Roberts
Very helpful. Thank you!  Jerry
Please keep up the great work. I will pass the word. Outstanding.  M. Sinclair

I will do what I do best: spread the word to individuals in need. Like a chain letter, it may start out small, but it will do some very personal good to everyone it touches. Thank you!  Katherine B.

I will carry your message wherever I can. We are seeking justice.  R. Bibace

What you are doing is great! Keep it up. Ordinary citizens, like myself, should have an easy and inexpensive way to learn and understand the legal system to which we are required to conform.  Jeffrey E.

Jurisdictionary wisdom is pointing me in the right direction. Thanks.  Gail H.

A new tool that cracks the code of procedural rules that has been needed for years.  Hans K.
Empowering people by making legal recourse economically available can save lives. Capt. S. Carr

I am energized. The maxims hit home with me. Joe F.

Extremely helpful. You have helped me understand the need (and given the how-to) to focus my legal complaint. This is great information. I will be sure to let others know. Very understandable and informative. Great job. Deborah L.

Jurisdictionary has helped me learn about the judicial system. Dean F.

Salute! As a former journalist, I wish every major media organization would make the MAXIMS required reading! Chuck

It has given me new hope that we will be able to obtain justice in the case that we are involved in at this time. Thank you. W. Tomkinson

Thank you for giving me that little glimmer of hope that someone in the law does care about justice of the people and for the people. M. Petersen

I am enjoying your work. After I spent an hour looking it over, I called a friend and got him to check it out. He is enjoying it now, too. Rest assured I will refer others. D. Phillips

A job well done. Richard

You are performing a great service! I wish there was a way to get this information to those who most desperately need it. I'll do my part by telling others. Katherine

I believe everyone would benefit from it and appreciate knowing about it. D. Phillips

I commend your goals. Gene

What a wonderful happenstance I found this site. P. Girardin

Thank you for the magnificent work you have done. A true legacy of great value to posterity. D. Wilson

You are to be commended for your work in letting the people know what their individual rights are. S.D. Rize

The ability to make people think in a positive way. Yes, we are on the same page. T. Burns

As others have already noted ... great. Al & Sandy M.
I would like to express my appreciation for the time and effort you expended. The information you provided was well organized and written. It really clarifies many of the intricacies of wading through the legal system for me. In fact, I intend to share it with my children. I know it will help many people. B. Rosenthal

I wish to applaud your superb efforts. Congratulations! Thankfully someone has taken on this important initiative. C.G. Rigney

I congratulate you on your efforts to make law more accessible. Ron

Well written for lay people. It's not putting us lawyers out of work, fortunately. It might even help us. Oktavia

Finally! I will never again find myself behind the legal 8-ball. Keep up the good work. Ed

Thank you! Continued success with your fine resource. Howard

Jurisdiction is valuable for those in need of encouragement and advice in things of the legal system. I will pass the word. I've been thinking about having my 11-year-old son check it out. He won't understand all of it, but some of it would make sense to him. Michael H.

I was impressed. Lindy

More power to you. We needed this. Allen

Admirable. Ralph

Excellent. J. Kreimer

I am impressed! Arthur

Thank you and God bless you! S. Poindexter

I love your work. Sheryl P.

Just the thing for many people needing to understand how the system works. Thanks. Bob M.

You have an admirable mission. We hope you will succeed. Please add my name to your mailing list. J.H. Guth, PhD

It's wonderful. Thank you for what must be a labor of love. D. Brown

I would really like to take a moment of my time to extend a round of applause to Jurisdiction. While driving to Miami, I noticed your billboard from the corner of my eye. It struck a chord with me. I was totally amazed about how little I actually know of
my rights. I just want to thank you for helping me to be better informed as to how to handle situations that have caused disruption in my life from my ignorance of the system. I strongly believe the information I obtained from Jurisdictionary will enhance my chances in the future for better representation and understanding how to work the system in my favor. Sincerely. ... M. Lewandowski

I’m really glad I purchased Jurisdictionary. ... Capt. W. Brown

Jurisdictionary works! Went to court today and won as a pro se litigant against a silver tongued, high profile, powerful attorney. Even the other attorneys in the gallery were buzzing about it. Thanks for showing me how to win in court on facts rather than fighting on issues that don’t work. ... K. Anderson

Wow! I wish I’d found this several weeks ago! Tremendously helpful. ... DKH

I’m amazed. Thank you for your simple explanations. Carrie K.

Thank you for simplifying and reinforcing what I had to go to graduate and law school to learn. L. Dixon

What student of the law would not love Jurisdictionary? Michelle

If only I’d known this information 6 weeks sooner! Bryan

Learn How to Save Time and Money, and Increase Your Odds of Success, with the #1 Selling Pro-Se Legal Education Course since 1997.

Get Yours Right Now for Only $249

FRAUD STOPPERS, PMA
Email: Info@FraudStoppers.org
Website: www.FraudStoppers.org
LAWYERS, LIARS, & LOSERS

Now even after you learn *How to Win in Court* you will undoubtedly have legal questions that pop up from time to time that are best answered by a competent local attorney. You should not take legal advice from a non-attorney, no matter how smart they sound.

However, when it comes to lawyers there are two problems to consider: The first problem is NO lawyer on earth is an expert in every area of law. The second problem is most lawyers charge around $250 per hour for their time. Fortunately, FRAUD STOPPERS has found a simple affordable solution that solves both problems.

What if you could pick up your phone and call a quality attorney in your state to get all your legal questions answered, and get legal advice, any time you needed without getting a big bill in the mail, would you?

If so we recommend you consider joining Legalshield because for about a $1/day (around $25/month) you can get instant access to a quality law firm in your state that can assist you with all your legal needs. Legalshield attorneys have an average of 19 years of experience and are paid in advance which means they are motivated and obligated to provide the best possible legal assistance.

If you do not already have an attorney (or even if you do) we recommend that you get a membership to Legalshield; because for about a $1/day your Legalshield appointed law firm can give you:

FRAUD STOPPERS, PMA
Email: Info@FraudStoppers.org
Website: www.FraudStoppers.org
✓ Unlimited Advice and Consultation
✓ Letters and Phone Calls on Your Behalf
✓ Personal Document Review
✓ Trial Defense
✓ Document Preparation
✓ Standard Will Preparation
✓ Residential Loan Document Assistance
✓ Auto Accidents
✓ Moving Traffic Violations
✓ Family Matters
✓ Adoption Representation
✓ Separation Representation
✓ Divorce Representation
✓ IRS Audit Legal Services
✓ And More!

These are just some of the things that are covered by your Legalshield plan. But one of the best parts of your plan is that you get 60 hours of trial representation for any covered claims. For any legal issue that is not covered by your Legalshield Plan you can get a 25% discount on attorney fees.

Legalshield has been providing affordable legal protection for over 40 years. Now with over 4 million users, LegalShield not only provides legal services in 49 states and 4 Canadian Provinces; but also, it provides confidence and peace of mind for families everywhere. For one low monthly fee our members gain access to quality law firms without having to worry about high hourly costs. Because Legalshield attorneys are all paid in advance, they provide the same level of service for trivial or traumatic legal situations.

With humble beginnings in Ada, Oklahoma, LegalShield has now grown to a 170,000-square-foot corporate office on an 80-acre campus with over 650 dedicated employees. Legalshield leaders
have decades of experience and our goal remains the same, to create a world where everyone can access legal protection, and everyone can afford it. Legalshield is taking legal representation and making some revisions—in the form of accessible, affordable, full service coverage. Finally, you can live life knowing you have a law firm in your back pocket who, at the same time, isn’t emptying it.

Legalshield also offers the world-class identity theft protection and credit monitoring service because Identity theft impacts millions of people each year. Criminals are using a variety of scams & hacks to collect & steal your personal information. Dark web, social and identity and credit monitoring are all part of our service. Should your identity be stolen, we offer full restoration services as part of your membership.

In addition to benefiting from all the membership benefits you will get as a Legalshield member, you can also enroll as a Legalshield associate so you can sell Legalshield as a solo associate or lead your own team. The flexibility of Legalshield’ sales model means however you choose to sell, you define your business opportunity with fast cash upfront commissions directed deposited into your checking account daily, and long-term walk-a-way residual income wealth building opportunities that can impact your financial wellbeing for generations to come.

Get your Legalshield membership right now and get instant access to a local attorney who can answer all your legal questions and help you with your all your legal needs. Plus, you can also become a LegalShield representative and make money for helping others get affordable legal protection. Learn more and activate your plan at
HOW FRAUD STOPPERS CAN HELP

FRAUD STOPPERS Private Members Association (PMA) is dedicated to helping you learn how to stop foreclosure and mortgage fraud. We have a proven way to help you save time and money and increase your odds of success in getting the legal remedy that the law entitles you too and that you deserve! Stop Foreclosure Fraud & Mortgage Fraud; and Cancel Secured and Unsecured Debt Obligations through Strategic Litigation.

FRAUD STOPPERS Private Members Association’s Mortgage Fraud Investigator can analyze your mortgage loan documents for violations of the Uniform Commercial Code (UCC) and other signs of mortgage fraud to help you determine if your current mortgage loan situation qualifies for one of our Private Members Only foreclosure defense and mortgage fraud products or services.

Our primary focus is helping our members get clear and marketable title to their property by arguing that the actions of the banks have made the security provisions of the mortgage/deed of trust unenforceable as a matter of law.

Our Association of member’s main objective is to maintain and improve the civil rights, constitutional guarantees and political freedom for every member and citizen of the United States of America. We believe that the First Amendment of the Constitution of the United States of America guarantees our members free speech, petition, assembly, and the right to gather together for the lawful purpose of advising and helping one another in asserting our rights under the Federal and State Constitutions and Statutes.

FRAUD STOPPERS, PMA
Email: Info@FraudStoppers.org
Website: www.FraudStoppers.org
Your FRAUD STOPPERS PMA Membership includes:

✓ Mortgage Fraud Analysis & Bloomberg Securitization Search
✓ A UCC Mortgage Fraud Report (if applicable)
✓ Potential Cause of Action Consultation
✓ Federal FDCPA Debt Validation Letters
✓ Qualified Written Request (QWR) Letter
✓ Error Resolution and Information Request (ERIR) Letter
✓ Federal FDCPA lawsuit
✓ FBI Bank Fraud Package
✓ Tort Letter (to stop a foreclosure sale)
✓ Federal Truth in Lending Act (TILA) Rescission Letter
✓ Bankruptcy Package & Forms
✓ How to Win Quiet Title & Foreclosure Defenses Training Videos
✓ Bonus Reports that include insider banking secrets
✓ And access to Member only products and services, including:
  o Mortgage Fraud Audits
  o Bloomberg Securitization Audits
  o Mortgage Forensic Audits
  o Robo-Signing Audits
  o Chain of Title Investigations
  o Custom Court Ready Legal Documents & Forms
  o Trail Ready Evidence & Exhibits
  o Expert Witness Affidavits
  o Expert Witness Testimony
  o Pro Se Legal Education & Training
  o Pro Se Paralegal Support
  o Dedicated Attorney Network
  o Professional Mediation Services
  o Private Investor Programs
  o Credit Repair
  o Income Opportunities
  o And more!
TURNKEY QUIET TITLE & WRONGFUL FORECLOSURE LAWSUITS

As a member of FRAUD STOPPERS PMA we can provide you with a court ready, turnkey, quiet title or wrongful foreclosure lawsuit and a supporting evidence package that can save you time and money (and increase your odds of success) suing the banks for mortgage and foreclosure fraud, wrongful foreclosure, and quiet title.

What is a quiet title lawsuit? A quiet title is a lawsuit brought in a court having jurisdiction over property disputes, in order to establish a party's title to real property, or personal property having a title, of against anyone and everyone, and thus "quiet" any challenges or claims to the title.

If your loan was part of a table funded securitized transaction then you have a broken chain of title, and your property is basically “unsecured”, just like an unsecured credit card debt. And if that’s the case than a quiet title lawsuit is the action for you!

Our quiet title action seeks monetary damages for fraud and clear and free title to your home.

The Quiet Title Lawsuit Package:
✓ Court Ready Complaint (Petition for Damages)
✓ Bloomberg Securitization Audit
✓ Application for Temporary Restraining Order
✓ Lis Pendens
✓ Signed and Notarized Expert Witness Affidavit
✓ How to Win Quiet Title Videos
✓ FRAUD STOPPERS PMA Membership Included

FRAUD STOPPERS, PMA
Email: Info@FraudStoppers.org
Website: www.FraudStoppers.org
The Bloomberg Securitization Audit includes:
✓ Time Stamped Bloomberg Screenshot[s] verifying the Trust Vehicle associated with your specific loan
✓ Pooling & Servicing Agreement (Trial Ready Material Evidence of Securitization)
✓ Complete Mortgage Fraud and Robo-Signing Check
✓ Credit Default Swap Analysis
✓ A Full Chain of Title Analysis of all the ASSIGNMENTS & TRANSFERS of your mortgage loan contract
✓ Signed and Notarized EXPERT WITNESS AFFIDAVIT from one of the top experts in the entire country, who is available to provide expert witness testimony at trial.

The Court Ready Turnkey Quiet Title Complaint includes:
✓ A Full Petition for Damages listing 12-15 Different Causes of Action based on the findings from your securitization audit report; including: Fraud in the Inducement; Fraud in the Concealment; Declaratory Relief; Emotional Distress; Lack of Standing to Foreclose and/or Wrongful Foreclose; Slander of Title; Rescission of Mortgage Loan Contract; and Quiet Title.
✓ An Application for a Temporary Restraining Order (to STOP A SALE – if one is imminent)
✓ A Lis Pendens - to Cloud the Marketability of Title.

The How to Win Quiet Title DVDs cover:
✓ How to Win Quiet Title
✓ How to Cancel Secured and Unsecured Debts through Strategic Litigation
✓ Achieving Principle Reductions by Creating Leverage
✓ Mortgage Securitization
✓ Contract Litigation and UCC
✓ Advanced Foreclosure Techniques
✓ And MUCH, MUCH, MORE
MAKE MONEY HELPING OTHERS

FRAUD STOPPERS PRIVATE MEMBERS ASSOCIATION (PMA) has a referral affiliate program that can pay you for helping other people fight mortgage and foreclosure fraud and learn how to fight for the legal remedy they deserve! In addition to FRAUD STOPPERS’ referral affiliate program you can also earn extra money helping others for:

- Get paid referring people to attorneys
- Get paid promoting the How to Win in Court program
- Get paid referring people for credit repair
- Get paid referring people for FRAUD STOPPERS programs

All of FRAUD STOPPERS PMA products and services are commissionable and you can make money helping others by referring them to these products and services.

To make money simply refer someone to us for help. When a sale is made, you get paid. It’s as easy as that!

FRAUD STOPPERS PMA is constantly striving to improve our business and the services we offer and promote.

FRAUD STOPPERS PMA is dedicated to helping the American People learn how to stand up and fight for their legal rights, due process, and their God given freedoms that are recognized and protected by the United States Constitution and the State Constitutions.

The FRAUD STOPPERS Private Members Association main objective is to maintain and improve the civil rights, constitutional guarantees and political freedom for every member and citizen of the United States of America.
We believe that the First Amendment of the Constitution of the United States of America guarantees our members free speech, petition, assembly, and the right to gather together for the lawful purpose of advising and helping one another in asserting our rights under the Federal and State Constitutions and Statutes.

The FRAUD STOPPERS PMA declares that we are exercising our right of “freedom of association” as guaranteed by the 1st and 14th Amendments of the U.S. Constitution and equivalent provisions of the various State Constitutions. This means that our association activities are restricted to the private domain only.

Our purpose as members is to educate and assist members in solving their legal concerns and problems as a preventative measure or as a solution to a present situation or condition through research, providing information and education, or directing the member to the proper resources. You can make money with:

✓ Attorney Referral Program
✓ Credit Repair Program
✓ Legal Education Program
✓ Mortgage Fraud & Foreclosure Defense Programs

**Potential Income Opportunities:**

- Credit Repair. 1 sale a day = $27,375 a year
- How to Win in Court program. 1 sale a day = $45,000 a year
- Legalshield. 1 sale a day could earn you = $65,700 a year
- Joint Venture Wrongful Foreclosure Program. 1 sale a day could earn you = $250,000 a year or MORE!
Based upon the record, the Court finds this sum to be fair and reasonable and supported by the evidence adduced at trial. IT IS FURTHER ORDERED ADJUDGED AND DECREED that judgment is entered for punitive damages in favor of Plaintiffs David and Crystal Holm, husband and wife, and against Defendant Wells Fargo Home Mortgage, Inc. in the amount of TWO MILLION, NINE HUNDRED FIFTY-NINE THOUSAND, ONE HUNDRED TWENTY-THREE DOLLARS ($2,959,123.00).

Case No. 08CN-CV00944

JUDGMENT
NOW, THEREFORE, this matter having been tried before the Court, commencing on the 14th day of January, 2015, and, further, the Court having taken this matter under advisement upon its submission on the 16th day of January, 2015, and WHEREAS, Plaintiffs appeared in person and by and through counsel, Gregory Leyh, and Defendants appeared by and through counsel, Martin Blanchard, Janet McKillip, and Andrew Jones, and WHEREAS, Plaintiffs having dismissed Count III, the Court finds on Count II and Count I as follows:

GENERAL FINDINGS
Plaintiffs Crystal G. Holm and David E. Holm were, at all times relevant to this proceeding, husband and wife residing in Clinton County, Missouri. Further, Plaintiffs were, until the foreclosure sale at issue, owners of real property situate in Clinton County, Missouri, commonly known as 3800 Timberlake Drive, Holt, Missouri, more particularly described as follows: LOT SIXTEEN (16) IN WOODRAIL, A SUBDIVISION IN CLINTON COUNTY, MISSOURI, ACCORDING TO THE RECORDED PLAT THEREOF

In 2008, a dispute arose as to Plaintiffs’ debt on the property. The property also sustained Substantial damage from a storm and the application of insurance proceeds was at issue. Plaintiffs had numerous communications (both verbal and written) with various Representatives of Defendant Wells Fargo.
Home Mortgage, Inc. (hereinafter referred to as Wells Fargo), and various representatives of Kozeny & McCubbin, L.C. (legal counsel for both Defendants in this proceeding and hereinafter referred to as Kozeny & McCubbin).

Plaintiffs were still seeking to resolve the disputed debt issues when Kozeny and McCubbin, acting, as Successor Trustee, and/or as legal counsel for the Successor Trustee, and/or as legal counsel for Defendant Wells Fargo, commenced foreclosure proceedings against Plaintiffs relating to the above-referenced property. Undisputed evidence reveals Plaintiffs family received a dollar amount to stop the foreclosure from Kozeny & McCubbin and Defendant Wells Fargo. Plaintiffs procured the necessary funds per the agreement.

Regardless, on August 15, 2008, Kozeny & McCubbin proceeded to foreclosure, selling the property to Defendant Federal Home Loan Mortgage Corporation (hereinafter referred to as Freddie Mac) for the sum of $141,792.30. Plaintiffs’ efforts to set aside the foreclosure and/or reinstate the Joan were in vain. Ultimately, Freddie Mac filed an action in Unlawful Detainer (14CN-CV00501), currently pending against Plaintiffs, and Plaintiffs filed the instant lawsuit. The Court will first address Plaintiffs’ claim for quiet title relief set forth in Count II

**COUNT II**

Uncontroverted evidence at trial establishes Plaintiffs possessed title to the subject property until the date of the foreclosure sale. Prior to the sale, June 26, 2008, the “Foreclosure Department” of Kozeny & McCubbin sent a letter to Plaintiffs “in response to your correspondence disputing the validity of the debt” on the subject property. (It is unclear to the Court whether Kozeny & McCubbin issued the letter in their capacity as Successor Trustees, Attorneys for Successor Trustees, Attorneys for Wells Fargo, or in some other capacity.) The correspondence indicated they were providing Plaintiffs with “1. A copy of the deed of trust, and 2. A copy of the note” to “verify the debt which is owed.”

The promissory note (included in Plaintiffs’ Exhibit 26) was a promise to pay the original lender, Commercial Federal Mortgage Corp., and contained no endorsements, either in blank or to a specific party. The undisputed facts are neither Wells Fargo nor Freddie Mac had the right to enforce the note rendering the foreclosure sale void. In *Williams v. Kimes*, 996 S.W. 2nd 43, 4S (Mo. 1999), the Missouri Supreme Court indicated “no title is conveyed through the sale” when a party who lacks a right to enforce the note proceeds with foreclosure sale. Based upon the evidence, the Court finds neither Wells Fargo nor Freddie Mac had the right to enforce the unendorsed note incorrectly described by Kozeny & McCubbin as evidence to “verify the debt which is owed.” **This Court finds Freddie Mac did not obtain title to the instant property through the foreclosure sale and title to the instant property should be quieted in the name of Plaintiffs.**

**COUNT I**

In Count II Plaintiffs seek both compensatory and punitive damages for wrongful foreclosure of their property by Defendant Wells Fargo. Based upon the facts presented at trial, including, but not
limited to, the facts set forth herein, the Court finds the foreclosure sale of the subject property on August 15, 2008, was wrongful.

Compensatory Damages
The uncontroverted evidence is that on August 15, 2008, Freddie Mac paid $141,762.30 to purchase Plaintiffs’ property. Due to the actions of Defendant Wells Fargo, Plaintiffs have spent the last six and one-half years having in limbo. This Court is acutely aware of a pending unlawful detainer suit against David and Crystal Holm (Clinton County Case No, 14CNCVOOSO 1). An unlawful detainer case was initially filed -y Freddie Mac against David and Crystal Holm on September 8, 2008, less than one month following the foreclosure sale (Clinton County Case No. 08CN-CV00729). Mr. and Mrs. Holm have been under the threat of eviction for well over six years. Upkeep and maintenance are constants when it comes to property.

It would be ludicrous to spend large sums of money to maintain a home titled to Freddie Mac and to which Plaintiffs might never regain title. Plaintiff David Holm testified that the current value of the property is $52,000. Mr. Holm’s testimony was uncontroverted. The difference in value is $89,762.30, which constitutes reasonable lost value to Plaintiffs' property. In addition, Plaintiffs testified they made repairs in the amount of $6,150 to the property to prevent even greater deterioration or diminution in value.

Mr. Holm made the repairs himself and paid for the necessary materials. The cost of past home repairs to prevent additional loss of the value of his home was $6,150. Exhibit 40 was received as additional evidence of the cost of past home repairs. Crystal Holm testified to her role in preparing Exhibit 40 and to the accuracy of the costs identified.

The Court finds Plaintiffs sustained actual damages as set forth herein above in the amount of NINETY-FIVE THOUSAND NINE HUNDRED TWELVE DOLLARS AND THIRTY CENTS ($95,912.30).

The evidence further established Plaintiffs suffered considerable emotional distress and mental and physical anxiety attributable to, or as a direct result of, Defendant Wells Fargo’s actions. Plaintiff David Holm suffered panic attacks, heart problems requiring a heart monitor, high blood pressure, and daily anxiety due to the circumstances relating to the wrongful foreclosure. Plaintiff Crystal Holm testified regarding her “fear” of losing her family’s, home, and the impact of such a loss on her 12-year-old daughter, Liberty, and family. Mrs., Holm recounted her loss of optimism regarding a property that she hoped would be populated by horses and other animals. Both Plaintiffs testified about the substantial stress on their marriage resulting from the Defendants’ predatory and extreme and outrageous conduct.

Based upon the uncontroverted facts presented at trial, and including, but not limited to, the facts set forth herein above, the Court finds Plaintiffs are entitled to damages for emotional distress against Defendant Wells Fargo Home Mortgage, Inc. in the amount of TWO HUNDRED THOUSAND
DOLLARS ($200,000,00), Based upon the record, the Court finds this sum to be fair and reasonable and Supported by the evidence adduced at trial.

Punitive Damages
The evidence established that Wells Fargo intentionally promised a reinstatement to Plaintiffs and told David Holm that no foreclosure sale would take place if he accepted the reinstatement. MI. Holm immediately accepted the offer, but Wells Fargo deliberately ignored the reinstatement deal and, in an egregious and deceitful manner, intentionally foreclosed on David and Crystal Holm’s family home. Through its agent Kozeny & McCubbin, Wells Fargo received a facsimile copy of Plaintiffs’ reinstatement check on the date of the foreclosure sale. Kozeny & McCubbin received the physical reinstatement check on August 16, 2008.

Plaintiffs fully and completely complied with the instructions provided by Wells Fargo and Kozeny & McCubbin regarding payment of the reinstatement check. Defendant Freddie Mac’s representative, Dean Meyer, testified that there is nothing in the Freddie Mac servicing guide stating that a reinstatement check must be received before the foreclosure sale. This is particularly true when the servicer and trustee make explicit promises to a borrower that they will not foreclose. Notwithstanding these promises, contracts, and commitments to Plaintiffs, Wells Fargo refused to stop the foreclosure. Further, Wells Fargo refused to cash the reinstatement check and reinstate Plaintiffs’ loan. The Court finds Defendant Wells Fargo’s attitude toward Plaintiffs unfathomable. The incredible effort made by Plaintiffs to keep the property they so clearly love should have been commended, not condemned. Wells Fargo’s decisions to renege on its promises and contract, and to deceive Plaintiffs with the pledge to cancel the foreclosure sale, were outrageous and reprehensible.

The Court finds Defendant Wells Fargo was deceitful in its dealings with David and Crystal Holm. Defendant Wells Fargo’s deceptive and intentional conduct displayed a complete and total disregard for the rights of David and Crystal Holm. Dean Meyer testified Freddie Mac considered reinstatement of the Holm note to be the most desirable of all possible outcomes. Freddie Mac’s servicing guide champions reinstatement and requires that servicers comply with its guidelines. Freddie Mac demands 111 at its servicers must go “the extra mile” to obtain a reinstatement whenever possible. Defendant Wells Fargo could easily have kept its word and reinstated the loan. Instead, Wells Fargo and its agents expended immeasurable, if not incomprehensible, time and effort to avert reinstatement.

The result of Wells Fargo’s egregious conduct was to impose approximately six and one-half years of uncertainty, lost optimism, emotional distress, and paralysis on Plaintiffs’ family. The evidence established that Wells Fargo’s intentional choice to foreclose arose from its own financial incentives. Dr, Kurt Krueger testified that Wells Fargo had financial incentives to seek reimbursement of its fees at a foreclosure sale. This economic motivation collided with the well-being of David and Crystal Holm and was clearly contrary to the interests of Freddie Mac.
In other words, in this case, a powerful financial company exerted its will over a financially distressed family in Clinton County, Missouri. The result is predictable. Plaintiffs were severely damaged; Wells Fargo took its money and moved on, with complete disregard to the human damage left in its wake, Defendant Wells Fargo is an experienced servicer of home loans. Wells Fargo knew that its decision to foreclose after reinstatement was accepted would inflict a devastating injury on the Holm family. Wells Fargo’s actions were, knowing, intentional, and injurious.

Defendant Wells Fargo operated from a position of superiority provided by its enormous wealth. Wells Fargo’s decision took advantage of an obviously financially vulnerable family, and there is no evidence of remorse for the harm caused to David and Crystal Holm. In fact, the Court recalls the lack of remorse and humanity illustrated by Wells Fargo’s corporate representative who testified, “I’m not here as a human being. I’m here as a representative of Wells Fargo.”

Based upon the facts presented at trial, and including, but not limited to, the facts set forth herein above, the Court finds Plaintiffs are entitled to punitive damages against Defendant Wells Fargo Home Mortgage, Inc., in the amount of TWO MILLION NINE HUNDRED FIFTY- NINE THOUSAND ONE HUNDRED TWENTY- THREE DOLLARS ($2,959,123.00).

Based upon the record, the Court finds this sum to be fair and reasonable and supported by clear and convincing evidence adduced at trial. IT IS THEREFORE ORDERED ADJUDGED AND DECREED that judgment is entered for damages in favor of Plaintiffs David and Crystal Holm, husband and wife, and against Defendant Wells Fargo Home Mortgage, Inc., in the amount of TWO HUNDRED NINETY, FIVE THOUSAND NINE HUNDRED TWELVE DOLLARS AND THIRTY CENTS ($295,912.30).

IT IS FURTHER ORDERED ADJUDGED AND DECREED that judgment is entered in favor of Plaintiffs David and Crystal Holm, husband and wife, and against Defendant Federal Home Mortgage Corporation (Freddie Mac) on the claim for quiet title relief. Title to the property is quieted in the name of Plaintiffs David and Crystal Holm, husband and wife, who are hereby vested with fee simple title in and to the property commonly known as 3800 Timberlake Dr., Holt, Missouri 64048.
Comment

In Defense of “Free Houses”

Eight years after the start of America’s housing crisis, state courts are increasingly confronting an unanticipated consequence: what happens when a bank brings a foreclosure suit and loses? Well-established legal principles seem to provide a clear answer: the homeowner keeps her house, and res judicata bars any future suit to foreclose on the home. Yet state courts around the country resist this outcome.

Banks have lost many foreclosure cases for two reasons, both resulting from recent changes in the mortgage market. First, securitization has created widespread errors in mortgage notes’ chains of assignment, making it difficult for banks to prove that they in fact own any particular mortgage. Second, securitization contracts incentivize banks to use “foreclosure mill” law firms to keep up with the flood of defaults, despite the fact that these firms are unable and sometimes unwilling to detect and rectify basic legal errors.

When addressing faulty foreclosures, courts are afraid to bar future attempts to foreclose—that is, afraid of giving borrowers “free houses.” While courts rarely explain the reasoning behind this aversion, it seems to arise from a reflexive belief that such an outcome would be unjust. Courts are therefore

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1. See, e.g., Washington v. Specialized Loan Servicing, LLC (In re Washington), No. 14-14573-TBA, 2014 WL 5714586, at *1 (Bankr. D.N.J. Nov. 5, 2014) (“No one gets a free house.”) This Court and others have uttered that admonition since the early days of the mortgage crisis, where homeowners have sought relief under a myriad of state and federal consumer protection statutes and the Bankruptcy Code. Yet, with a proper measure of disquiet and chagrin, the Court now must retreat from this position, as Gordon A. Washington (“the Debtor”) has presented a convincing argument for entitlement to such relief. So, with figurative hand holding the nose, the Court, for the reasons set forth below, will grant Debtor’s motion for summary judgment.”), rev’d, No. 2:14-cv-8063 -SDW, 2015 WL 4757924 (D.N.J. Aug. 12, 2015); Singleton v. Greymar Assocs., 882 So. 2d 1004, 1007-08 (Fla. 2004) (“If res judicata prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note. The adjudication of the earlier default would essentially insulate her from future foreclosure...
quick to sidestep well-established principles of res judicata in favor of ad hoc measures meant to protect banks against the specter of “free houses.”

This Comment argues that this approach is misguided; courts should issue final judgments in favor of homeowners in cases where banks fail to prove the elements required for foreclosure. Furthermore, these judgments should have res judicata effect—thus giving homeowners “free houses.” This approach has several benefits: it is consistent with longstanding res judicata principles in other forms of civil litigation, it provides a necessary market-correcting incentive to promote greater responsibility among foreclosure litigators, and it alleviates the tremendous costs of successive foreclosure proceedings.

This Comment proceeds as follows. Part I explains basic foreclosure and mortgage-acceleration law. Part II describes how systemic banking behaviors and market forces have resulted in banks increasingly losing foreclosure suits after the 2008 financial crisis. Part III then describes how state courts have struggled to develop their jurisprudence on “free houses,” often ignoring these significant market problems. Finally, Part IV contends that the application of res judicata in foreclosure litigation is essential for two reasons: (1) it would uniformly apply civil rules of finality to foreclosure cases, and (2) it would have a much-needed positive behavioral effect on a mortgage-foreclosure market run amok.

I. THE FORECLOSURE LAW BACKDROP

Foreclosures begin with a mortgage note’s “acceleration clause.” Under a mortgage note, the homeowner is required to make a certain payment every month for a fixed period. In judicial-foreclosure states, if the homeowner defaults on at least one payment for a specified amount of time, the bank has a choice: it can bring suit to recover just the missed payments, or it can exercise actions on the note—merely because she prevailed in the first action. Clearly, justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.


3. This time period may be specified in the note itself or it may be fixed by statute. See, e.g., CAL. CIV. CODE § 2924c (West 2011) (requiring a minimum of ninety days between notice of default and sale date and providing for a right to cure until five days before the sale date); IOWA CODE § 654.2D (2015) (providing for a thirty-day right to cure); ME. REV. STAT. ANN. tit. 14, § 6111 (2015) (providing for a thirty-five-day right to cure); MASS. GEN. LAWS ch. 244, § 35A(b) (2015) (providing for a right to cure of at least ninety days).

4. This is the lender’s only remedy in contracts without acceleration clauses. See Restatement (Third) of Prop. (Mortgs.) § 8.1 cmt. a (AM. LAW. INST. 1997) (“[I]n the absence of an
the acceleration clause in the note and bring the entire remaining loan balance due. Under the mortgage contract, only acceleration allows the bank to foreclose on the mortgage.

In a foreclosure suit, the bank must generally prove the following: (1) the homeowner has signed both the note (the underlying loan) and the mortgage assigning the house as collateral for that note; (2) the bank owns the note and mortgage; (3) the homeowner still owes a debt to the bank; (4) the homeowner is behind on that debt; and (5) the bank has accelerated that remaining debt in accordance with the terms of the note itself. When a bank fails to prove these elements, a judge is legally required to rule in favor of the homeowner.

Recently, courts have been inundated with suits where homeowners question the bank’s ability to prove the second element. Litigation over “proof-of-ownership” issues in foreclosures is a growing nationwide problem; sampling suggests a ten-fold increase between the periods immediately preceding and following the 2007 collapse of the housing market.

Cases

5. Acceleration clauses are routine in mortgage notes. Id. (“Virtually all mortgages today contain acceleration clauses.”).

6. This option only exists where the acceleration clause is discretionary. In some rare cases, the note is automatically accelerated once the borrower defaults. Id. (“While [the] ‘option’ type [acceleration] provision is almost universally used, on rare occasion mortgage documents may contain language that makes acceleration automatic on mortgagor default or on the basis of a specific event . . .”).

7. Foreclosure can be either judicial or nonjudicial; judicial foreclosures require a successful suit prior to sale, whereas lenders may only go to court in a nonjudicial foreclosure to enforce an eviction after sale. See id. § 8.2 cmt. a.


addressing this kind of “failed foreclosure” have reached state supreme and appellate courts, including—recently—the Maine Supreme Court. In certain states, including Florida, New Jersey, and New York, courts have also been confronted with cases where, after accelerating the note and initiating a foreclosure proceeding, the bank abandons the proceeding and the statute of limitations on the accelerated debt expires, calling the third element into question.

This massive increase in cases where banks’ prima facie case is challenged or outright fails is not the product of novel foreclosure law or changes in its application. Rather, we argue, it is due to fundamental changes in how banks handle mortgages—the same changes that facilitated the financial crisis of 2008—and banks’ unwillingness to invest in sufficient legal services to adapt to these underlying structural changes when pursuing foreclosures.

II. WHY HOMEOWNERS WIN THEIR FORECLOSURE CASES:
SEcurITIZATION AND ITS MARKET FAILURES

To successfully bring a foreclosure suit a bank must produce very little evidence. Why has this proven so difficult? The answer lies with banks’ own practices. In the last twenty years, banks have significantly altered how they profit from mortgages; however, they failed to adequately adapt their record keeping and customer-service practices.

In the 1990s, banks began to convert long-term mortgages, familiar to most Americans, into short-term financial commodities, a process called securitization. Rather than keep mortgages on the books, mortgagees (banks) sought to sell the mortgages immediately to financial entities that would

10. See Bank of Am., 96 A.3d at 700; see also, e.g., Lizio v. McCullom, 36 So. 3d 927, 928 (Fla. Dist. Ct. App. 2010).


14. See, e.g., Bartram, 140 So. 3d at 1008; In re Washington, 2014 WL 5714586, at *1; see also Michael Corkery, Foreclosure to Home Free, as 5-Year Clock Expires, N.Y. TIMES (Mar. 29, 2015), http://www.nytimes.com/2015/03/30/business/foreclosure-to-home-free-as-5-year-clock-expires.html [http://perma.cc/LXD5-TM5J] (“[I]n a growing number of foreclosure cases filed when home prices collapsed during the financial crisis, lenders may never be able to seize the homes because the state statutes of limitations have been exceeded.”).
transform thousands of individual mortgages into securities—financial instruments that entitled the bearer to homeowners’ mortgage payments and that could be arbitrarily restructured or resold. After securitization, although a homeowner would continue to make mortgage payments to the originating bank, that bank ceased to have a financial interest in receiving these payments. Instead, a variety of investors owned an interest in the pool of mortgage payments of which the homeowner’s is a part.

Securitization gave rise to widespread errors in the documentation of mortgage ownership. To allow a variety of investors to own portions of a mortgage pool, originating banks entered into pooling and servicing agreements, which authorized “servicers”—sometimes large commercial banks, but often companies who were primarily or exclusively engaged in servicing—to act as the diffuse investors’ agents in receiving payments from and pursuing foreclosures against homeowners. Because actual ownership of the mortgage note became independent of servicing and the relationship with the mortgagor, a loan, or the right to receive part of the payments on that loan, might be sold several times while the homeowner still interacted with the same servicer. Conversely, the servicer might change while the loan remained part of the same investment pool. Throughout this reshuffling of title ownership and servicing, banks frequently made errors in how they documented and recorded their ownership of mortgages.

Common mortgage fee structures set up in pooling and servicing agreements also disincentivized servicers and their attorneys from devoting adequate resources to foreclosures. Each servicing agreement paid servicers a flat annual fee of around 0.25% of the loan’s total value (for example, $500 per year on a $200,000 loan), but the cost of pursuing a single foreclosure cost servicers around $2,500. When foreclosures began climbing precipitously in 2007, servicers were unprepared to handle the sudden increase in volume and


16. An excellent explanation of the process by which securitization took place, and of its role in the initial financial crisis of 2007, can be found in the podcast This American Life: The Giant Pool of Money, CHI. PUB. MEDIA (May 9, 2008), http://www.thisamericanlife.org/radio-archives/episode/355/the-giant-pool-of-money [http://perma.cc/H37H-YHN4].


had no incentives to devote additional resources to prove their banks’ ownership over each mortgage. To demonstrate ownership without expending more resources than pooling and servicing agreements allotted, bank employees signed hundreds of thousands of affidavits asserting that they had seen and could attest to the contents of original documents demonstrating ownership of the underlying mortgage. Although such affidavits were a legally acceptable means of demonstrating such ownership, a significant number of them were actually fraudulent.

Similarly, servicers’ attorneys also relied on sloppy paperwork—and, at times, on fraudulent and unethical practices in foreclosure proceedings. For example, one New Jersey foreclosure law firm operated without any method of contacting its mortgage-servicer clients. Instead, the firm received all work orders through a one-way computer system, along with a requested timeline and documents the servicer had determined were necessary.

This underresourcing and the resulting ethical transgressions have affected hundreds of thousands of foreclosures.

Fannie Mae foreclosures increased to historic levels. Fannie Mae foreclosed on 262,078 properties in 2010, an 80% increase from 2009 and a 433% increase from 2007.

20. See Ariana Eunjung Cha & Brady Dennis, Under Piles of Paperwork, A Foreclosure System in Chaos, WASH. POST (Sept. 23, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/22/AR2010092206146.html [http://perma.cc/QB59-PWGF] (noting that “as millions of Americans are being pushed out of the homes they can no longer afford, the foreclosure process is producing far more paperwork than anyone can read and making it vulnerable to fraud”).


23. For example, in 2012, New York Attorney General Eric Schneiderman announced a four-million-dollar settlement with the Steven J. Baum law firm and Pillar Processing, who had filed more than a hundred thousand foreclosure cases between 2007 and 2010. See Press Release, N.Y. State Office of the Att’y Gen., A.G. Schneiderman Announces $4 Million Settlement with New York Foreclosure Law Firm Steven J. Baum P.C. and Pillar Processing LLC (Mar. 22, 2012), http://www.ag.ny.gov/press-release/ag-schneiderman-announces-4-million-settlement-new-york-foreclosure-law-firm-steven-j [http://perma.cc/Q8ZA-QYSA]. Similarly, the Federal Housing Finance Agency (FHFA) issued a 2011 report that faulted Fannie Mae for its reliance on “foreclosure mills” and failure to intervene in the face of mounting evidence of attorney abuses, and described additional examples of firms perpetrating abuses in their efforts to do large volumes of foreclosures on the cheap. See FED. HOUS. FIN. AGENCY OFFICE OF INSPECTOR GEN., supra note 19, at 14. The FHFA report described cases where courts levied “significant financial sanctions against the abusive firms and—in some cases—their clients, which included Fannie Mae.” Id. These included a 2006 New Jersey bankruptcy where the judge issued a $125,000 sanction against a mill that had “filed 250 motions seeking permission to seize homes using pre-signed certifications of default executed by an employee who had not worked at the firm for more than a year.” Id. (citing Gretchen Morgenson & Jonathan D. Glater, Foreclosure Machine Thrives on Woes, N.Y. TIMES (Mar. 30, 2008), http://www.nytimes.com/2008/03
IN DEFENSE OF “FREE HOUSES”

The result of securitization contracts’ underresourcing of mortgage servicers and their attorneys has been a “factory-line approach to litigation,” rife with abuses. In many individual cases, these litigation strategies have been unsuccessful. Homeowners, their attorneys, and sometimes judges have successfully prevented foreclosure by demonstrating the falsity of an affidavit or simply by forcing the mortgagee to produce actual documentation that it owned the mortgage. As an increasing number of foreclosure suits are lost on the merits for lack of documentation, or for failure to prosecute within the statute of limitations, courts face a new problem: what happens next?

III. THE COURTROOM SOLUTION: ANYTHING BUT “FREE HOUSES”

In many states, longstanding principles of res judicata, when taken with the state law’s treatment of acceleration clauses, require courts to grant homeowners “free houses” when banks lose their foreclosure cases. But many courts have declined to give these cases preclusive effect.

Whether servicers lose because they fail to prove ownership or because their lawyers simply stop litigating, the first choice courts face is whether to dismiss the case with prejudice. Typically, once parties have a full and fair opportunity to present their cases, failure to prove one’s case results in

\[30/\text{business/30mills.html} \text{[http://perma.cc/7N4G-QI67]. In 2010, a judge sanctioned an Orlando law firm employed by Fannie Mae, imposing a fine of $33,500 for filing sixty-seven faulty motions to remove borrowers from their homes. Id. A Texas bankruptcy judge found problems in all eight of the foreclosure cases carried out by a mill it reviewed, including the use of “inaccurate information about defaults [and] fail[ure] to attach proper documentation when it moved to seize borrowers’ homes.” Id. The judge imposed seventy-five thousand dollars in sanctions. Id.}\]

24. Morgenson & Glater, supra note 23.

25. See, e.g., In re Foreclosure Cases, No. 07CV2532, 2007 WL 3232430, at *2-3 (N.D. Ohio Oct. 31, 2007) (finding mortgagee documentation inadequate and asserting the federal court’s authority to rule in the case); U.S. Bank Nat’l Ass’n v. Ibanez, 941 N.E.2d 40, 55 (Mass. 2011) (holding that ownership of the note without title was an insufficient basis to foreclose, that this result was simply an application of the current law, and that “[a]ll that has changed is the plaintiffs’ apparent failure to abide by those principles and requirements in the rush to sell mortgage-backed securities”). Judge Schack, a trial judge sitting in the New York Supreme Court for Kings County, has repeatedly sanctioned law firms for bringing improper foreclosure suits when he has independently discovered the inadequacy of the plaintiffs’ evidence as to defendants’ indebtedness or plaintiffs’ ownership of the note. See, e.g., Argent Mortg. Co. v. Maitland, 958 N.Y.S.2d 306 (Sup. Ct. 2010); Wells Fargo Bank v. Hunte, 910 N.Y.S.2d 409 (Sup. Ct. 2010); NetBank v. Vaughn, 841 N.Y.S.2d 827 (Sup. Ct. 2007).
dismissal with prejudice.\textsuperscript{26} In addition, dismissal with prejudice can be used as a sanction. Judges in foreclosure cases have issued dismissals with prejudice due to a lender’s failure to appear at case-management conferences\textsuperscript{27} or mediation,\textsuperscript{28} lack of prosecution,\textsuperscript{29} or a lender’s failure to meet court-imposed deadlines.\textsuperscript{30} If banks attempt a subsequent foreclosure, courts must then determine whether that dismissal with prejudice bars only an attempt to collect on the particular missed payments that led to the initial foreclosure suit, or whether the dismissal bars a future attempt to collect on any default on the debt.

While the latter holding may seem extreme, it is in accordance with settled principles of lending law in many states. In these states, acceleration is irrevocable—exercising the acceleration clause in the mortgage note turns an obligation to make installment payments into an “indivisible” obligation.\textsuperscript{31} Logically, after acceleration, there are no more monthly payments. A foreclosure is an action to recover the entire loan balance, and a loss bars any future attempt to collect on the note. In effect, the borrower gets to keep his...

\textsuperscript{26} Restatement (Second) of Judgments ch. 1, at 6 (Am. Law. Inst. 1982) (“The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so.”). Res judicata attaches whenever the parties have had a “full and fair” opportunity to litigate, including the “freedom to present substantive contentions and full and fair access to evidence.” Id. at 9. When these procedural predicates are satisfied, then “under that system of procedure there must be compelling reasons to sustain a plea for a second chance.” Id.


\textsuperscript{28} See, e.g., Bayview Loan Servicing, LLC v. Bartlett, 2014 ME 37, ¶ 4, 87 A.3d 741, 745 (noting the lower court’s dismissal of a foreclosure with prejudice, in part because the plaintiff failed to attend mediation sessions).


\textsuperscript{30} See, e.g., Johnson v. Samson Constr. Corp., 1997 ME 220, ¶ 4, 704 A.2d 866, 868 (noting the lower court’s dismissal of a foreclosure with prejudice because the plaintiff’s attorney failed to file the report of conference of counsel within ten days).

house without being subject to a continuing obligation on the mortgage—a “free house.” Courts in irrevocable acceleration states that considered the issue before the 2008 financial crisis applied res judicata to subsequent foreclosures in this way.  

Recently, however, judges have avoided applying res judicata to foreclosure cases and have bent the rules to favor banks. For example, in Maine, where longstanding precedent established that a failed foreclosure bars any future attempt to collect on the debt, two trial courts recently refused to dismiss cases with prejudice, even after the cases were tried to completion and the banks had lost. The judges in those cases were explicit that they did so to allow any subsequent actions the banks might want to bring and to avoid giving the homeowners a windfall.

On appeals from those cases, the Maine Supreme Court went even further than the trial courts in changing the law to favor foreclosing banks. The court held that the bank’s ownership of the mortgage, which has long been recognized as an element of the bank’s prima facie case for foreclosure, is actually an element of standing. Thus, whenever a bank fails to prove

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32. Although we refer colloquially to these houses as “free,” the homeowner may have paid the equivalent of a significant portion of the mortgage—or even close to the entirety—prior to falling behind on payments and incurring the foreclosure action, depending on when in the life of the mortgage the foreclosure claim is brought.

33. See, e.g., Stadler v. Cherry Hill Developers, Inc., 150 So. 2d 468, 472 (Fla. Dist. Ct. App. 1965) (“[A]n election to accelerate puts all future installment payments in issue and forecloses successive suits.”); Johnson, 1997 ME 220, ¶ 8, 704 A.2d at 869 (“Once Johnson triggered the acceleration clause of the note and the entire debt became due, the contract became indivisible. The obligations to pay each installment merged into one obligation to pay the entire balance on the note.”).

34. See Johnson, 1997 ME 220, ¶ 8, 704 A.2d at 869.

35. See Order After Remand for Dismissal With Conditions, Bank of Am., N.A. v. Greenleaf, No. BRIDC-RE-11-109 (Me. Super. Ct. 2014) (“[T]he court is hard pressed to award the defendant the extraordinary benefit of a judgment or dismissal with prejudice that would preclude future enforcement of the mortgage security interest.”); Homeward Residential, Inc. v. Gregor, No. RE11108, 2014 WL 7802864, at *3 (Me. Super. Ct. Aug. 15, 2014) (“[T]he court is entering judgment for Defendant, but the court is reserving the right for both parties to relitigate the issues discussed herein so that this action does not act as a bar to a future action.”), vacated, 2015 ME 108, 122 A.3d 947.


37. While this conclusion may appear reasonable on its face, consideration of other cases where elements of the plaintiff’s prima facie case overlap with elements of standing reveals the court’s error. For example, injury in fact is an element of standing while proof of damages is an element of many different causes of action. These two concepts are often closely related. See, e.g., F. Andrew Hessick, Standing, Injury in Fact, and Private Rights, 93 CORNELL L. REV. 275, 307 (2008) (“Injury in fact asks whether the plaintiff suffered a factual injury, such as pain, the loss of money, or some other harm.”). However, when a suit is tried to completion
ownership of the mortgage, even if that occurs after a full trial on the merits, the complaint must be dismissed without prejudice for lack of subject-matter jurisdiction.\textsuperscript{38} In other words, the court’s ruling granted banks potentially infinite bites at the apple in foreclosure proceedings.\textsuperscript{39}

In Florida, where intermediate courts had similarly barred subsequent foreclosures on res judicata grounds,\textsuperscript{40} the state supreme court in 2004 determined that irrevocable accelerations did not bar subsequent foreclosures. Instead, in \textit{Singleton v. Greymar Associates}, the court held that the second action could go forward because it was based on a “subsequent default.”\textsuperscript{41} In other words, despite the acceleration of the mortgage, the court presumed a continuing obligation by the homeowner to make monthly payments.\textsuperscript{42}

In \textit{Singleton}, the Florida Supreme Court declared without analysis that barring subsequent foreclosures would produce inequitable results.\textsuperscript{43} In the next Part, we argue that state courts like the \textit{Singleton} court are wrong on this and the fact finder determines that the plaintiff has failed to prove any injury, courts do not generally dismiss without prejudice for lack of subject-matter jurisdiction. Rather, they might award nominal damages. See Coastal Power Int’l, Ltd. v. Transcon. Capital Corp., 10 F. Supp. 2d 345, 364 (S.D.N.Y. 1998) \textit{aff’d}, 182 F.3d 163 (2d Cir. 1999) (“Although any breach of contract entitles the injured party at least to nominal damages, he cannot recover more without establishing a basis for an inference of fact that he has been actually damaged.” (quoting 11 \textsc{Samuel Williston}, \textsc{A Treatise on the Law of Contracts} § 1345, at 231 (3d ed. 1968))). Similarly, when a plaintiff fails to prove causation, which is also an element of standing, courts rule against the plaintiff rather than dismissing the case. See, \textit{e.g.}, Russo v. Baxter Healthcare Corp., 140 F.3d 6, 12 (1st Cir. 1998) (affirming entry of judgment as a matter of law for the defendant on the ground that the plaintiff failed to prove causation).


\textsuperscript{39} See \textit{infra} Part IV.

\textsuperscript{40} See Stadler v. Cherry Hill Developers, Inc., 150 So. 2d 468, 472 (Fla. Dist. Ct. App. 1963) (“[A]n election to accelerate puts all future installment payments in issue and forecloses successive suits.”).


\textsuperscript{42} The \textit{Singleton} court did not engage with the reasoning in \textit{Stadler v. Cherry Hill Developers, Inc} that acceleration places the entire balance at issue. \textit{Singleton}, 882 So.2d 1004.

\textsuperscript{43} Id. at 1008 (“Clearly, justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.”).
score. By focusing on the immediate consequence of a ruling for homeowners, the courts ignore perverse incentives created by allowing banks to continue to externalize the costs of their mistakes.

IV. THE CASE FOR “FREE HOUSES” AS MARKET CORRECTION

So what should courts do when banks lose their foreclosure cases? As described above, one approach—that taken by the Florida and Maine Supreme Courts—is to bend the rules of res judicata to avoid a windfall for homeowners. This approach creates few benefits and significant economic problems. In this Part, we argue that further subsidizing banks’ poor litigation practices results in deadweight loss by contributing to negative public-health outcomes and by disincentivizing banks from improving their servicing and litigation techniques. We also explain how granting winning homeowners “free houses” will not negatively affect the mortgage market.

First, giving systematic permission to mortgagees and their attorneys to engage in repeated attempts to foreclose upon properties results in a broader social subsidization of irresponsible behavior. And these subsidies are large. As economists recognize, prolonged foreclosure proceedings create negative social externalities, depressing surrounding homes’ resale value, reducing local governments’ tax revenues, and increasing criminal activity. 44 Foreclosures also appear to have significant effects on community members’ physical and mental health, and correlate with increased rates of depression, anxiety, suicide, cardiovascular disease, and emergency-care treatment. 45 In fact, scholars who

44. See, e.g., GEOFFRy WALSH, NAT’L CONSUMER LAW CTR., STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS: CAN THEY SAVE HOMES? 3 (2009) (reporting that on every completed foreclosure in November of 2008, investors lost an average of fifty-seven percent of their initial investment); Dan Immergluck & Geoff Smith, The External Costs of Foreclosure: The Impact of Single-Family Mortgage Foreclosures on Property Values, 17 HOUSING POL’Y DEBATE 57, 58 (2006) (finding that “for the entire city of Chicago, the 3,750 foreclosures that occurred in 1997 and 1998 are estimated to have reduced nearby property values by more than $598 million, or an average of $159,000 per foreclosure”); Dan Immergluck & Geoff Smith, The Impact of Single-Family Mortgage Foreclosures on Neighborhood Crime, 21 HOUSING STUD. 851, 863 (2006) (suggesting that “[h]igher neighborhood foreclosure rates lead to higher levels of violent crime at appreciable levels”); see also Zhenguo Lin et al., Spillover Effects of Foreclosures on Neighborhood Property Values, 38 J. REAL EST. FIN. & ECON. 387 (2009) (finding significant spillover effects from foreclosed property within a ten-block radius that persisted for five years); Jenny Schuetz et al., Neighborhood Effects of Concentrated Mortgage Foreclosures, 17 J. HOUSING ECON. 306 (2008) (finding that home prices decreased with proximity to foreclosures on the basis of a 2000–2005 New York dataset).

track the health effects of the 2008 crisis found that foreclosures might have even greater negative health effects than unemployment.\textsuperscript{46} Although these studies analyze the general phenomenon of foreclosures and do not specifically address how relitigation of foreclosures might impact homeowners or their neighbors, they make clear that prolonged foreclosures can have dire economic and social effects.

Second, the threat of a “free house” also provides leverage for homeowners to negotiate a voluntary settlement, whether through a modification or a “graceful exit” like a short sale.\textsuperscript{47} In a world where mortgagees truly risk forfeiting their claim by bringing illegitimate or rushed suits, homeowners will have more time up front to regain their financial footing and negotiate a modification or repayment plan. Enforcing finality rules may dissuade mortgagees “from filing until they have their paperwork ready” and encourage potential plaintiffs “to look favorably on loan renegotiation.”\textsuperscript{48} Servicers of

\textsuperscript{46}See Currie & Tekin, supra note 45, at 64 (finding “strong evidence” that increases in foreclosures are associated with increased hospital visits, noting that hospital visits increased from 2005 to 2007, a period during which foreclosures rates but not unemployment rates were increasing).

\textsuperscript{47}See Levitin, supra note 9, at 631 (“[E]nforcement of bargained-for procedural requirements such as standing gives homeowners leverage to achieve negotiated solutions to loan defaults, such as a loan modification . . . [or] can buy the homeowner time to relocate, enabling a softer landing with fewer social dislocations and externalities.”).

\textsuperscript{48}Victoria V. Corder, Homeowners and Bondholders as Unlikely Allies: Allocating the Costs of Securitization in Foreclosure, 30 No. 5 BANKING & FIN. SERVICES POL’Y REP. 19, 24 (2011).
securitized loans typically believe mortgage foreclosures are faster and cheaper than loan renegotiation, yet securitized-loan investors suffer greater financial losses in foreclosures than in renegotiation and repayment. Courts’ adhesion to traditional res judicata principles in the foreclosure process has the added benefit of making negotiated settlements with borrowers more appealing to banks. By realigning incentives through the increased risk of failure, courts can induce banks to act in their own long-term interest.

Finally, although judges have expressed concern about homeowner windfalls, the alternative creates a windfall for banks that cut corners in managing and prosecuting foreclosures. The risk and costs of losing foreclosures should already be internalized in the price of current mortgages. Empirical studies suggest that greater protection for mortgagors historically corresponds to slightly higher mortgage rates among lenders. These studies indicate that lenders adjust the price of mortgages based on what they anticipate the cost, and not just the likelihood, of foreclosures will be. In addition, lenders are more likely to extend subprime mortgages where there are fewer legal hurdles to foreclosure. Because the requirements to bring a successful foreclosure suit and the legal rules concerning acceleration were well

49. See Sumit Agarwal et al., The Role of Securitization in Mortgage Renegotiation, 102 J. FIN. ECON. 559, 559 (2011) (“[B]ank-held loans are 26-36% more likely to be renegotiated than comparable securitized mortgages . . . [and] bank-held loans have 9% lower post-modification default rates . . .”); Tomasz Piskorski et al., Securitization and Distressed Loan Renegotiation: Evidence from the Subprime Mortgage Crisis, 97 J. FIN. ECON. 369, 369 (2010) (“[T]he foreclosure rate of delinquent bank-held loans is 3% to 7% lower in absolute terms (13% to 32% in relative terms) [than that of securitized loans].”).


51. See supra note 1 and accompanying text.


53. Quinn Curtis, State Foreclosure Laws and Mortgage Origination in the Subprime, 49 J. REAL EST. FIN. & ECON. 303, 321 (2013) (“The provisions that make foreclosure easier—nonjudicial process and readily available deficiency judgments—lead to increased applications and accepted applications in the subprime market . . .”).
established at the time banks priced the mortgages currently in foreclosure, the mortgage agreements already had a chance to incorporate both the costs of pursuing foreclosure under irrevocable acceleration laws and the risks of homeowners prevailing—even though they often failed to do so.

Although a full discussion of the relationship between foreclosure procedure and mortgage costs is beyond the scope of this Comment, we reject the suggestion that lower mortgage costs and looser markets are ultimately beneficial, for at least two reasons. First, as described above, a growing body of empirical evidence suggests that the public-health and social costs of foreclosure are as widespread as the benefits of lower mortgage prices, suggesting that broader social allocation of the risk of foreclosure is appropriate. Second, the 2008 crisis that gave rise to the very problem this Comment addressed was caused in significant part by the loosening of underwriting standards and an increase in subprime lending.54 In light of a crisis precipitated by precisely these lending practices, and given the link between the ease of foreclosures and lenders’ proclivity for subprime loans, there is good reason to increase the price of socially harmful lending practices.

Therefore, a liberalization of rules governing foreclosure after the relevant loans have been issued would result in a broad windfall for lenders. When courts bypass res judicata and allow mortgagees a second shot at foreclosure, they are facilitating a shift of the risk associated with foreclosures—a risk that banks had, or should have, already priced into the cost of the mortgages themselves—onto homeowners.

Res judicata is generally justified as promoting respect for law because it tends to reduce social conflict and uncertainty.55 These broader policy arguments for imposing claim preclusion are particularly strong in the foreclosure context, where banks have demonstrated a lack of respect for law through their reliance on “robo-signing” and where the economic, social, and public-health costs of legal uncertainty not only are especially dire for litigants but also extend well beyond the parties themselves.


55. See RESTATEMENT (SECOND) OF JUDGMENTS ch. 1, at 11 (AM. LAW. INST. 1982) (“Indefinite continuation of a dispute is a social burden. It consumes time and energy that may be put to other use, not only of the parties but of the community as a whole. It rewards the disputatious. It renders uncertain the working premises upon which the transactions of the day are to be conducted. The law of res judicata reduces these burdens even if it does not eliminate them, and is thus the quintessence of the law itself: A convention designed to compensate for man’s incomplete knowledge and strong tendency to quarrel.”).
CONCLUSION

Mortgagees, their servicers, and their attorneys currently face a crisis of their own making. They failed to allocate the necessary resources to maintain accurate records of homeowners’ indebtedness while pursuing the profits of securitization. Then they brought foreclosures in unprecedented numbers—on compressed timeframes and on the cheap—in an attempt to recover quickly their unanticipated losses. At trial, they received forgiveness for their mistakes and abuses, obtaining a highly unusual legal outcome: judgment or dismissal of a case, fully heard on its merits, without prejudice.

In asking courts to allow subsequent foreclosure attempts, banks ask states and homeowners to bear the psychological and economic costs of lenders’ self-interested behavior. But if state courts refused to create an exception to the rule of res judicata—that is, dismissed these cases with prejudice and enforced res judicata—they would do more than enforce the rule of law. They would also create a counterweight to current perverse incentives, encourage alternative dispute resolution where possible, reduce negative public-health consequences from prolonged foreclosure litigation, and ultimately promote greater social outcomes in future foreclosure suits.

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CASE LAW

"The main argument urged against it is founded upon the maxim, that 'a person cannot grant a thing which he has not': ille non habet, non dat; and many authorities are referred to at law to prove the proposition, and many more might have been added from cases in equity, for equity no more than law can deny it. The thing itself is an impossibility. It may, at once, therefore, be admitted, whenever a party undertakes, by deed or mortgage, to grant property, real or personal, in presenti, which does not belong to him or has no existence, the deed or mortgage, as the case may be, is inoperative and void, and this either in a court of law or equity." Pennock v. Coe (1859), 64 U.S. (23 How.) 117, 127-128, 16 L.Ed. 436.

QUIET TITLE IN THE FORECLOSURE CONTEXT: TENDER ISSUES

Under California law, a plaintiff seeking to quiet title in the face of a foreclosure must allege tender or an offer of tender of the amount borrowed. See Arnolds Management Corp v. Eischen, 158 Cal.App.3d 575, 578, 205 Cal.Rptr. 15 (1984). This may make Quiet Title a more difficult proposition in a foreclosure case.

"The practice of law cannot be licensed by any State. The practice of law is an occupation of common right." Sims vs Aherns, 271 S.W.720;


In Cox v. Helenius, 103 Wn.2d 383,*693 P.2d 683 (1985), in which the trustee knew that the right to foreclose was disputed the court held that the trustee should have delayed foreclosure. As a result of the trustee's failure to do so, the sale was held void.


State vs. Sutton, 63 Minn. 147, NW 262,30 J.A.R. 630 AM. St 459 " When any Court violates the
Clean and unambiguous language of the Constitution, a fraud is perpetrated and no one is bound to obey it”. and also violates your right to contract,(Case) Hale vs Henkle, 201 U.S. 43.279

Patton v. Diemer, 35 Ohio St. 3d 68; 518 N.E.2d 941; 1988). A judgment rendered by a court lacking subject matter jurisdiction is void ab initio. Consequently, the authority to vacate a void judgment is not derived from Ohio R. Civ. P. 60(B), but rather constitutes an inherent power possessed by Ohio courts. I see no evidence to the contrary that this would apply to ALL courts.

"A party lacks standing to invoke the jurisdiction of a court unless he has, in an individual or a representative capacity, some real interest in the subject matter of the action. Lebanon Correctional Institution v. Court of Common Pleas 35 Ohio St.2d 176 (1973).

"A party lacks standing to invoke the jurisdiction of a court unless he has, in an individual or a representative capacity, some real interest in the subject matter of an action." Wells Fargo Bank, v. Byrd, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722 (2008). It went on to hold, "If plaintiff has offered no evidence that it owned the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law."

(The following court case was unpublished and hidden from the public) Wells Fargo, Litton Loan v. Farmer, 867 N.Y.S.2d 21 (2008). "Wells Fargo does not own the mortgage loan. Therefore, the matter is dismissed with prejudice."

(The following court case was unpublished and hidden from the public) Wells Fargo v. Reyes, 867 N.Y.S.2d 21 (2008). Dismissed with prejudice, Fraud on Court & Sanctions. Wells Fargo never owned the Mortgage.

(The following court case was unpublished and hidden from the public) Deutsche Bank v. Peabody, 866 N.Y.S.2d 91 (2008). EquiFirst, when making the loan, violated Regulation Z of the Federal Truth in Lending Act 15 USC §1601 and the Fair Debt Collections Practices Act 15 USC §1692; "intentionally created fraud in the factum" and withheld from plaintiff. "Vital information concerning said debt and all of the matrix involved in making the loan".

(The following court case was unpublished and hidden from the public) Indymac Bank v. Boyd, 880 N.Y.S.2d 224 (2009). To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and the mortgage note. It is the law's policy to allow only an aggrieved person to bring a lawsuit . . . A want of "standing to sue," in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy, and a simple syllogism takes us from there to a "jurisdictional" dismissal:

(The following court case was unpublished and hidden from the public) Deutsche Bank National Trust Co v.Torres, NY Slip Op 51471U (2009). That "the dead cannot be sued" is a well established principle of the jurisprudence of this state plaintiff's second cause of action for declaratory relief is denied. To be entitled to a default judgment, the movant must establish, among other things, the existence of facts which give rise to viable claims against the defaulting defendants. "The doctrine of ultra vires is a most powerful weapon to keep private corporations within their legitimate spheres and punish them for violations of their corporate charters, and it probably is not invoked too often. " Zinc Carbonate Co. v. First National Bank, 103 Wis. 125, 79
NW 229 (1899). Also see: American Express Co. v. Citizens State Bank, 181 Wis. 172, 194 NW 427 (1923).

(The following court case was unpublished and hidden from the public) Indymac Bank v. Bethley, 880 N.Y.S.2d 873 (2009). The Court is concerned that there may be fraud on the part of plaintiff or at least malfeasance Plaintiff INDYMAC (Deutsche) and must have "standing" to bring this action.

(The following court case was unpublished and hidden from the public) Wells Fargo v. Reyes, 867 N.Y.S.2d 21 (2008). Case dismissed with prejudice, fraud on the Court and Sanctions because Wells Fargo never owned the Mortgage.

(The following court case was unpublished and hidden from the public) Wells Fargo, Litton Loan v. Farmer, 867 N.Y.S.2d 21 (2008). Wells Fargo does not own the mortgage loan. "Indeed, no more than (affidavits) is necessary to make the prima facie case." United States v. Kis, 658 F.2d, 526 (7th Cir. 1981).


In determining whether the plaintiffs come before this Court with clean hands, the primary factor to be considered is whether the plaintiffs sought to mislead or deceive the other party, not whether that party relied upon plaintiffs' misrepresentations. Stachnik v. Winkel, 394 Mich. 375, 387; 230 N.W.2d 529, 534 (1975).

"Indeed, no more than (affidavits) is necessary to make the prima facie case." United States v. Kis, 658 F.2d, 526 (7th Cir. 1981). Cert Denied, 50 U.S. L.W. 2169; S. Ct. March 22, (1982).

"Silence can only be equated with fraud where there is a legal or moral duty to speak or when an inquiry left unanswered would be intentionally misleading." U.S. v. Tweel, 550 F.2d 297 (1977).

"If any part of the consideration for a promise be illegal, or if there are several considerations for an un-severable promise one of which is illegal, the promise, whether written or oral, is wholly void, as it is impossible to say what part or which one of the considerations induced the promise." Menominee River Co. v. Augustus Spies L & C Co., 147 Wis. 559 at p. 572; 132 NW 1118 (1912).


Mortgage Electronic Registration Systems, Inc. v. Chong, 824 N.Y.S.2d 764 (2006). MERS did not have standing as a real party in interest under the Rules to file the motion. The declaration also failed to assert that MERS, FMC Capital LLC or Homecomings Financial, LLC held the Note.
Landmark National Bank v. Kesler, 289 Kan. 528, 216 P.3d 158 (2009). "Kan. Stat. Ann. § 60-260(b) allows relief from a judgment based on mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence that could not have been timely discovered with due diligence; fraud or misrepresentation; a void judgment; a judgment that has been satisfied, released, discharged, or is no longer equitable; or any other reason justifying relief from the operation of the judgment. The relationship that the registry had to the bank was more akin to that of a straw man than to a party possessing all the rights given a buyer."

Also in September of 2008, a California Judge ruling against MERS concluded, "There is no evidence before the court as to who is the present owner of the Note. The holder of the Note must join in the motion."


DLJ Capital, Inc. v. Parsons, CASE NO. 07-MA-17 (2008). A genuine issue of material fact existed as to whether or not appellee was the real party in interest as there was no evidence on the record of an assignment. Reversed for lack of standing.

Everhome Mortgage Company v. Rowland, No. 07AP-615 (Ohio 2008). Mortgagee was not the real party in interest pursuant to Rule 17(a). Lack of standing.

In Lambert v. Firstar Bank, 83 Ark. App. 259, 127 S.W. 3d 523 (2003), complying with the Statutory Foreclosure Act does not insulate a financial institution from liability and does not prevent a party from timely asserting any claims or defenses it may have concerning a mortgage foreclosure. A.C.A. §18-50-116(d)(2) and violates honest services Title 18 Fraud. Notice to credit reporting agencies of overdue payments/foreclosure on a fraudulent debt is defamation of character and a whole separate fraud.

A Court of Appeals does not consider assertions of error that are unsupported by convincing legal authority or argument, unless it is apparent without further research that the argument is well taken. FRAUD is a point well taken! Lambert Supra.

No lawful consideration tendered by Original Lender and/or Subsequent Mortgage and/or Servicing Company to support the alleged debt. "A lawful consideration must exist and be tendered to support the Note" and demand under TILA full disclosure of any such consideration. Anheuser-Busch Brewing Company v. Emma Mason, 44 Minn. 318, 46 N.W. 558 (1890).

"It has been settled beyond controversy that a national bank, under Federal law, being limited in its power and capacity, cannot lend its credit by nor guarantee the debt of another. All such contracts being entered into by its officers are ultra vires and not binding upon the corporation." It is unlawful for banks to loan their deposits. Howard & Foster Co. vs. Citizens National Bank, 133 S.C. 202, 130 S.E. 758 (1926),

"Neither, as included in its powers not incidental to them, is it a part of a bank's business to lend its credit. If a bank could lend its credit as well as its money, it might, if it received compensation and was careful to put its name only to solid paper, make a great deal more than
any lawful interest on its money would amount to. If not careful, the power would be the mother of panics . . . Indeed, lending credit is the exact opposite of lending money, which is the real business of a bank, for while the latter creates a liability in favor of the bank, the former gives rise to a liability of the bank to another. I Morse. Banks and Banking 5th Ed. Sec 65; Magee, Banks and Banking, 3rd Ed. Sec 248." American Express Co. v. Citizens State Bank, 181 Wis. 172, 194 NW 427 (1923). I demand under TILA full disclosure and proof to the contrary.

UCC § 2-106(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

"There is no doubt but what the law is that a national bank cannot lend its credit or become an accommodation endorser." National Bank of Commerce v. Atkinson, 55 F. 465; (1893).

National Banks and/or subsidiary Mortgage companies cannot retain the note, "Among the assets of the state bank were two notes, secured by mortgage, which could not be transferred to the new bank as assets under the National Banking Laws. National Bank Act, Sect 28 & 56" National Bank of Commerce v. Atkinson, 8 Kan. App. 30, 54 P. 8 (1898).

"A bank can lend its money, but not its credit." First Nat'l Bank of Tallapoosa v. Monroe, 135 Ga 614, 69 S.E. 1123 (1911).

It is not necessary for rescission of a contract that the party making the misrepresentation should have known that it was false, but recovery is allowed even though misrepresentation is innocently made, because it would be unjust to allow one who made false representations, even innocently, to retain the fruits of a bargain induced by such representations." Whipp v. Iverson, 43 Wis. 2d 166, 168 N.W.2d 201 (1969).


"Any conduct capable of being turned into a statement of fact is representation. There is no distinction between misrepresentations effected by words and misrepresentations effected by other acts." (The seller or lender) "He is liable, not upon any idea of benefit to himself, but because of his wrongful act and the consequent injury to the other party." Leonard v. Springer, 197 Ill 532. 64 NE 299 (1902).

"If any part of the consideration for a promise be illegal, or if there are several considerations for an un-severable promise one of which is illegal, the promise, whether written or oral, is wholly void, as it is impossible to say what part or which one of the considerations induced the promise." Menominee River Co. v. Augustus Spies L & C Co.,147 Wis. 559 at p. 572; 132 NW 1118 (1912).

"The contract is void if it is only in part connected with the illegal transaction and the promise single or entire." Guardian Agency v. Guardian Mut. Savings Bank, 227 Wis. 550, 279 NW 79 (1938).
"It is not necessary for rescission of a contract that the party making the misrepresentation should have known that it was false, but recovery is allowed even though misrepresentation is innocently made, because it would be unjust to allow one who made false representations, even innocently, to retain the fruits of a bargain induced by such representations." Whipp v. Iverson, 43 Wis.2d 166, 279 N.W. 79 (1938).

In a Debtor's RICO action against its creditor, alleging that the creditor had collected an unlawful debt, an interest rate (where all loan charges were added together) that exceeded, in the language of the RICO Statute, "twice the enforceable rate." The Court found no reason to impose a requirement that the Plaintiff show that the Defendant had been convicted of collecting an unlawful debt, running a "loan sharking" operation. The debt included the fact that exaction of a usurious interest rate rendered the debt unlawful and that is all that is necessary to support the Civil RICO action. Durante Bros. & Sons, Inc. v. Flushing Nat'l Bank, 755 F.2d 239 (1985). Cert. denied, 473 U.S. 906 (1985).

The Supreme Court found that the Plaintiff in a civil RICO action need establish only a criminal "violation" and not a criminal conviction. Further, the Court held that the Defendant need only have caused harm to the Plaintiff by the commission of a predicate offense in such a way as to constitute a "pattern of Racketeering activity." That is, the Plaintiff need not demonstrate that the Defendant is an organized crime figure, a mobster in the popular sense, or that the Plaintiff has suffered some type of special Racketeering injury; all that the Plaintiff must show is what the Statute specifically requires. The RICO Statute and the civil remedies for its violation are to be liberally construed to affect the congressional purpose as broadly formulated in the Statute. Sedima, SPRL v. Imrex Co., 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

A violation such as not responding to the TILA rescission letter, no matter how technical, it has no discretion with respect to liability. Holding that creditor failed to make material disclosures in connection with loan. Title 15 USCS §1605(c) Wright v. Mid-Penn Consumer Discount Co., 133 B.R. 704 (Pa. 1991).

Moore v. Mid-Penn Consumer Discount Co., Civil Action No. 90-6452 U.S. Dist. LEXIS 10324 (Pa. 1991). The court held that, under TILA's Regulation Z, 12 CFR §226.4 (a), a lender had to expressly notify a borrower that he had a choice of insurer.


Steinbrecher v. Mid-Penn Consumer Discount Co., 110 B.R. 155 (Pa. 1990). Mid-Penn violated TILA by not including in a finance charge the debtors' purchase of fire insurance on their home. The purchase of such insurance was a condition imposed by the company. The cost of the insurance was added to the amount financed and not to the finance charge.


application to remove the mortgage foreclosure proceedings to the United States District Court pursuant to 28 USCS §1409. It is strict liability in the sense that absolute compliance is required and even technical violations will form the basis for liability. Lauletta v. Valley Buick Inc., 421 F. Supp. 1036 at 1040 (Pa. 1976).

Johnson-Allen v. Lomas and Nettleton Co., 67 B.R. 968 (Pa. 1986). Violation of Truth-in-Lending Act requirements, 15 USCS §1638(a)(10), required mortgagee to provide a statement containing a description of any security interest held or to be retained or acquired. Failure to disclose.


McCausland v. GMAC Mortgage Co., 63 B.R. 665, (Pa. 1986). GMAC failed to provide information which must be disclosed as defined in the TILA and Regulation Z, 12 CFR §226.1


Schultz v. Central Mortgage Co., 58 B.R. 945 (Pa. 1986). The court determined creditor mortgagor violated the Truth In Lending Act, 15 U.S.C.S. § 1638(a)(3), by its failure to include the cost of mortgage insurance in calculating the finance charge. The court found creditor failed to meet any of the conditions for excluding such costs and was liable for twice the amount of the true finance charge.

Solis v. Fidelity Consumer Discount Co., 58 B.R. 983 (Pa. 1986). Any misgivings creditors may have about the technical nature of the requirements should be addressed to Congress or the Federal Reserve Board, not the courts. Disclosure requirements for credit sales are governed by 15 U.S.C.S. § 1638 12 CFR § 226.8(b), (c). Disclosure requirements for consumer loans are governed by 15 U.S.C.S. § 1639 12 CFR § 226.8(b), (d). A violator of the disclosure requirements is held to a standard of strict liability. Therefore, a plaintiff need not show that the creditor in fact deceived him by making substandard disclosures. Since Transworld Systems Inc. have not cancelled the security interest and return all monies paid by Ms. Sherrie I. LaForce within the 20 days of receipt of the letter of rescission of October 7, 2009, the lenders named above are responsible for actual and statutory damages pursuant to 15 U.S.C. 1640(a).

Lewis v. Dodge, 620 F.Supp. 135, 138 (D. Conn. 1985);

Porter v. Mid-Penn Consumer Discount Co., 961 F.2d 1066 (3rd Cir. 1992). Porter filed an adversary proceeding against appellant under 15 U.S.C. §1635, for failure to honor her request to rescind a loan secured by a mortgage on her home.

New Maine Nat. Bank v. Gendron, 780 F.Supp. 52 (1992). The court held that defendants were entitled to rescind loan under strict liability terms of TILA because plaintiff violated TILA's provisions.

Dixon v. S & S Loan Service of Waycross, Inc., 754 F.Supp. 1567 (1990); TILA is a remedial statute, and, hence, is liberally construed in favor of borrowers. The remedial objectives of TILA are achieved by imposing a system of strict liability in favor of consumers when mandated disclosures have not been made. Thus, liability will flow from even minute deviations from the requirements of the statute and the regulations promulgated under it.

Woolfolk v. Van Ru Credit Corp., 783 F.Supp. 724 (1990) There was no dispute as to the material facts that established that the debt collector violated the FDCPA. The court granted the debtors' motion for summary judgment and held that (1) under 15 U.S.C. §1692(e), a debt collector could not use any false, deceptive, or misleading representation or means in connection with the collection of any debt; Unfair Debt Collection Practices Act.

Jenkins v. Landmark Mortg. Corp. of Virginia, 696 F.Supp. 1089 (W.D. Va. 1988). Plaintiff was also misinformed regarding the effects of a rescission. The pertinent regulation states that "when a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge." 12 CFR §226.23(d) (1).


Searles v. Clarion Mortg. Co., 1987 WL 61932 (E.D. Pa. 1987); Liability will flow from even minute deviations from requirements of the statute and Regulation Z. failure to accurately disclose the property in which a security interest was taken in connection with a consumer credit transaction involving the purchase of residential real estate in violation of 15 USCs §1638(a)(9). and 12 CFR §226.18(m).

Dixon v. S & S Loan Service of Waycross, Inc., 754 F.Supp. 1567, 1570 (S.D. Ga. 1990). Congress's purpose in passing the Truth in Lending Act (TILA), 15 USCs §1601(a). was to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him. 15 USCs §1601(a). TILA is a remedial statute, and, hence, is liberally construed in favor of borrowers.;


Wright v. Mid-Penn Consumer Discount Co., 133 B.R. 704 (E.D. Pa. 1991) Holding that creditor failed to make material disclosures in connection with one loan;

Cervantes v. General Electric Mortgage Co., 67 B.R. 816 (E.D. Pa. 1986). The court found that the TILA violations were governed by a strict liability standard, and defendant's failure to reveal
in the disclosure statement the exact nature of the security interest violated the TILA.


Porter v. Mid-Penn Consumer Discount Co., 961 F.2d 1066 (3rd Cir. 1992). Adversary proceeding against appellant under 15 U.S.C. §1635, for failure to honor her request to rescind a loan secured by a mortgage on her home. She was entitled to the equitable relief of rescission and the statutory remedies under 15 U.S.C. §1640 for appellant's failure to rescind upon request.

Solis v. Fidelity Consumer Discount Co., 58 B.R. 983 (Pa. 1986). Any misgivings creditors may have about the technical nature of the requirements should be addressed to Congress or the Federal Reserve Board, not the courts. Disclosure requirements for credit sales are governed by 15 U.S.C.S. § 1638 12 CFR § 226.8(b), (c). Disclosure requirements for consumer loans are governed by 15 U.S.C.S. § 1639 12 CFR § 226.8(b), (d). A violator of the disclosure requirements is held to a standard of strict liability. Therefore, a plaintiff need not show that the creditor in fact deceived him by making substandard disclosures. Rowland v. Magna Millikin Bank of Decatur, N.A., 812 F.Supp. 875 (1992),

Even technical violations will form the basis for liability. The mortgagors had a right to rescind the contract in accordance with 15 U.S.C. §1635(c). New Maine Nat. Bank v. Gendron, 780 F.Supp. 52 (D. Me. 1992). The court held that defendants were entitled to rescind loan under strict liability terms of TILA because plaintiff violated TILA's provisions.

US Bankruptcy Court, Eastern Dist. Of California: Honorable Ronald H. Sargis, Sacramento, Ca., May 20, 2010, Case No.10-21656-E-11 Ricky Walker; To wit: "Under California law, to perfect the transfer of mortgage paper as collateral the owner should physically transfer the Note to the transferee. Bear v. Golden Plan of California, Inc., 829 F.2d 705, 709(9th Cir.1986). Without physical transfer, the sale of the Note could be invalid as a fraudulent conveyance, Cal. Civil Code 3440, or as unperfected Cal. Comm. Code 9313-9314, see Roger Bernhardt, California mortgage and Deed of Trusts, and foreclosure litigation 1.26 (4th Ed. 2009)". Since it is well settled law that the Note and the Deed are inseparable, any and all assignees of the Deed, as an incident to the Note, are invalid on their face and constitute evidence of the fraud perpetrated upon Plaintiff, the People of California and this Court.

Section 362(a) of the Bankruptcy Code provides that the filing of a bankruptcy petition operates as a stay of collection and enforcement actions. 11 U.S.C. § 362(a). The purpose of the automatic stay is "to give the debtor a breathing spell and to prevent a race by creditors against the debtor's assets until such time as the bankruptcy court can sort out the respective interests of the debtor, the bankruptcy estate, and creditors." In re Jones, 348 B.R. 715, 717-18 (Bankr. E.D. Va. 2006).

Section 362(d) allows the court, upon request of a "party in interest," to grant relief from the stay, "such as terminating, annulling, modifying, or conditioning such stay." 11 U.S.C. § 362(d)(1).
The court may grant relief "for cause, including the lack of adequate protection." Id. The court may also grant relief from the stay with respect to specific property of the estate if the debtor lacks equity in the property and the property is not necessary to an effective reorganization. 11 U.S.C. § 362(d)(2) "[a]ll motions for relief from stay . . . are contested matters and are governed by FRBP 9014, 11 U.S.C. § 362[] and [the] Local Bankruptcy Rules." the following elements "must be included in a motion for relief from stay: . . . (4) a description of the security interest and its perfection; (5) a statement of the basis for the relief claimed . . . . The specific facts constituting cause shall be set forth if a motion is brought for cause." (Emphasis added.) Thus, this Court's rules of procedure require that each lift-stay motion contain certain indispensable elements, the absence of which should result in a denial of such motion, just like a complaint failing to state a claim would be subject to dismissal on a 12(b)(6) motion.

As noted above, lift-stay motions are contested matters governed by, inter alia, Rule 9014. Rule 9014, in turn, makes such motions subject to Rule 7017, which, in turn, incorporates Fed. R. Civ. P. 17 providing that an "action must be prosecuted in the name of the real party in interest." As previously noted, "[i]t is axiomatic that in federal courts a claim may only be asserted by the real party in interest. Rule 7017 of the Federal Rules of Bankruptcy Procedure incorporates the provisions of Rule 17 of the Federal Rules of Civil Procedure. The purpose of Rule 17 is to ensure that the person bringing a lawsuit has the right to enforce the asserted claim." In re Smith, 419 B.R. 622, 628 (Bankr. E.D. Va. 2008)

Since a movant seeking relief from stay is seeking to exercise a right stayed by § 362(a), a movant for relief from stay bears the burden of proof that it has standing to bring the motion. See, e.g., In re Wilhelm, 407 B.R. 392 (Bankr. D. Idaho 2009).

"To obtain stay relief, each Movant must have standing, and be the real party in interest under Federal Rule of Civil Procedure 17." Id. at 398. "Standing" and "real party in interest" are concepts that are related but not identical. Standing encompasses two major components: "constitutional limitations on federal court jurisdiction and prudential limitations on its exercise," Warth v. Seldin, 422 U.S. 490, 498 (1975), while "real party in interest" is generally part of "standing," as discussed below.

 Constitutional standing concerns whether the plaintiff's personal stake in the lawsuit is sufficient to have a "case or controversy" to which the federal judicial power may extend under Article III. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992). Prudential standing includes the idea that a party must assert its own claims, rather than another's. See, e.g., Warth, 422 U.S. at 499. The purpose of this rule is to require that an action be brought in the name of the party who possesses the substantive right being asserted under the applicable law. Smith, 419 B.R. at 629. Thus, the requirement of Fed. R. Civ. P. 17, made applicable to stay relief motions by Rule 9014, "generally falls within the prudential standing doctrine." In re Wilhelm, 407 B.R. at 398; accord. In re Taylor, 252 B.R. 346 (Bankr. E.D. Va. 1999) (discussing Rule 17 and "real party in interest" as part of "standing"); In re Dove, 199 B.R. 342 (Bankr. E.D. Va., 1996) (applying Rule 7017 and finding lack of standing); In Re Sposa, 31 B.R. 307 (Bankr. E.D. Va. 1983) (similar).

 Finally, to obtain relief in federal court, a party must meet both the constitutional requirements (Article III) and the prudential requirements (including "real party in interest") of standing. See,
e.g., Morrow v. Microsoft Corp., 499 F.3d 1332, 1339 (Fed. Cir. 2007).

Mortgage notes are commercial paper (whether negotiable or non-negotiable) covered by the Uniform Commercial Code as adopted by each of the Fifty States, including Virginia. Va. Code § 8.1A-101 et seq.; First Nat. Exchange Bank v. Johnson, 355 S.E.2d 326 (Va. 1987) When a party seeks to enforce a note against a debtor, the debtor not only has the right, but also has the responsibility to demand production of the note. See, e.g., Lambert v. Baker, 348 S.E.2d 214, 216-17 (Va. 1986) ("payor may protect himself by demanding production of the instrument and refusing payment to any party not in possession unless in an action on the obligation the owner proves his ownership; . . . it is Jeff's responsibility to raise and establish this affirmative defense").

In re Wilhelm, 407 B.R. 392 (Bankr. Idaho 2009), where the bankruptcy court denied several lift stay motions, holding that none of the several banks posing as secured creditors actually had standing to enforce the mortgage notes against the debtors. Id. at 405.

Similarly, in In re Weisband, 4:09-bk-05175 (Bankr. Ariz., March 29, 2010), the court denied a stay relief motion where the movant, even though in possession of the note "failed to demonstrate that the Note is properly payable to [it]."

"An attorney for the plaintiff cannot admit evidence into the court. He is either an attorney or a witness".


Subject: Trinsey v Pagliaro, 229 F.Supp. 647: when you read it you will find that it is THE case cited for FRCivP 12(b) (6).

Now, while what it says at 12(b) (6) is good, notice how I have highlighted some items from the actual decision, it goes MUCH further than 12(b) (6) does and we should also. Keep in mind the two Maxims in Law that are opposite sides of the same coin: Truth is Expressed in the Form of an Affidavit, & An Unrebutted Affidavit stands as Truth in the Matter.

Now, while keeping these in mind, think about when someone like an attorney for the IRS comes forward and "testifies" about how you did such-and-such. Are they a First-Hand-Witness, or simply a "Statement of Counsel in Brief or Argument?" Shut them down! Hit them with Trinsey and get the "Judge" to take official Judicial Notice of it. If the "Judge" does not sustain your object, you need to immediately file an oral "Affidavit of Prejudice" against the "Judge" as he has shown his prejudice and then file the same Affidavit in writing into the record with witnesses to the same. Once your Affidavits are filed, get a record of what has been filed and show that you
are the only one who has actually introduced FACTS into the case and move for Summary Judgment upon the Facts... while reminding the "Judge" that the ONLY thing he is to consider is the FACTS of the case ON THE RECORD, that the opposing "counsel" has only been "enlightening" to the Court, but not sufficient to rise to the level of FACT.

This applies both with Federal Rules of Evidence and State Rules of Evidence.... there must be a competent first hand witness (a body). There has to be a real person making the complaint and bringing evidence before the court. Corporations are paper and can't testify.

"Manifestly, [such statements] cannot be properly considered by us in the disposition of [a] case." United States v. Lovasco (06/09/77) 431 U.S. 783, 97 S. Ct. 2044, 52 L. Ed. 2d 752,

"Under no possible view, however, of the findings we are considering can they be held to constitute a compliance with the statute, since they merely embody conflicting statements of counsel concerning the facts as they suppose them to be and their appreciation of the law which they deem applicable, there being, therefore, no attempt whatever to state the ultimate facts by a consideration of which we would be able to conclude whether or not the judgment was warranted." Gonzales v. Buist. (04/01/12) 224 U.S. 126, 56 L. Ed. 693, 32 S. Ct. 463.

"No instruction was asked, but, as we have said, the judge told the jury that they were to regard only the evidence admitted by him, not statements of counsel", Holt v. United States, (10/31/10) 218 U.S. 245, 54 L. Ed. 1021, 31 S. Ct. 2,

"The prosecutor is not a witness; and he should not be permitted to add to the record either by subtle or gross improprieties. Those who have experienced the full thrust of the power of government when leveled against them know that the only protection the citizen has is in the requirement for a fair trial." Donnelly v. Dechristoforo, 1974.SCT.41709 <http://www.versuslaw.com> ¶ 56; 416 U.S. 637 (1974) Mr. Justice Douglas, dissenting.

"Care has been taken, however, in summoning witnesses to testify, to call no man whose character or whose word could be successfully impeached by any methods known to the law. And it is remarkable, we submit, that in a case of this magnitude, with every means and resource at their command, the complainants, after years of effort and search in near and in the most remote paths, and in every collateral by-way, now rest the charges of conspiracy and of gullibility against these witnesses, only upon the bare statements of counsel. The lives of all the witnesses are clean, their characters for truth and veracity un-assailed, and the evidence of any attempt to

"Statements of counsel in brief or in argument are not sufficient for motion to dismiss or for summary judgment," Trinsey v. Pagliaro, D. C. Pa. 1964, 229 F. Supp. 647.

"Factual statements or documents appearing only in briefs shall not be deemed to be a part of the record in the case, unless specifically permitted by the Court" - Oklahoma Court Rules and Procedure, Federal local rule 7.1(h).

Trinsey v Pagliaro D.C.Pa. 1964, 229 F. Supp. 647. "Statements of counsel in brief or in argument are not facts before the court and are therefore insufficient for a motion to dismiss or for summary judgment." Pro Per and pro se litigants should therefore always remember that the majority of the time, the motion to dismiss a case is only argued by the opposing attorney, who is not allowed to testify on the facts of the case, the motion to dismiss is never argued by the real party in interest.

"Where there are no depositions, admissions, or affidavits the court has no facts to rely on for a summary determination." Trinsey v. Pagliaro, D.C. Pa. 1964, 229 F. Supp. 647.

Frunzar v. Allied Property and Casualty Ins. Co. (Iowa 1996)+ 548 N.W.2d 880 Professional statements of litigants attorney are treated as affidavits, and attorney making statements may be cross-examined regarding substance of statement. [And, how many of those Ass-Holes have "first hand knowledge"? NONE!!!]

Porter v. Porter (N.D. 1979 ) 274 N.W.2d 235 ñ The practice of an attorney filing an affidavit on behalf of his client asserting the status of that client is not approved, inasmuch as not only does the affidavit become hearsay, but it places the attorney in a position of witness thus compromising his role as advocate.

Deyo v. Detroit Creamery Co (Mich 1932) 241 N.W.2d 244 ñ Statutes forbidding administering of oath by attorney's in cases in which they may be engaged applies to affidavits as well.
Farmers and Miners Bank v. Bluefield National Bank, 11 F 2d 83, 271 U.S. 669. "In the federal courts, it is well established that a national bank has not power to lend its credit to another by becoming surety, indorser, or guarantor for him."

Bowen v. Needles Nat. Bank, 94 F 925 36 CCA 553, certiorari denied in 20 S.Ct 1024, 176 US 682, 44 LED 637. "A national bank has no power to lend its credit to any person or corporation."

Zinc Carbonate Co. v. First National Bank, 103 Wis 125, 79 NW 229. American Express Co. v. Citizens State Bank, 194 NW 430 "The doctrine of ultra vires is a most powerful weapon to keep private corporations within their legitimate spheres and to punish them for violations of their corporate charters, and it probably is not invoked too often."

Barnsdall Refining Corn. v. Birnam Wood Oil Co.. 92 F 26 817. "Any false representation of material facts made with knowledge of falsity and with intent that it shall be acted on by another in entering into contract, and which is so acted upon, constitutes 'fraud,' and entitles party deceived to avoid contract or recover damages."

Leonard v. Springer 197 Ill 532. 64 NE 301. "Any conduct capable of being turned into a statement of fact is representation. There is no distinction between misrepresentations effected by words and misrepresentations effected by other acts."

Guardian Agency v. Guardian Mut. Savings Bank, 227 Wis 550, 279 NW 83. "The contract is void if it is only in part connected with the illegal transaction and the promise single or entire."

Whipp v. Iverson, 43 Wis 2d 166. "It is not necessary for rescission of a contract that the party making the misrepresentation should have known that it was false, but recovery is allowed even though misrepresentation is innocently made, because it would be unjust to allow one who made false representations, even innocently, to retain the fruits of a bargain induced by such representations."

F& PR v. Richmond, 133 SE 898; 151 Va 195. "When a contract is once declared ultra vires, the fact that it is executed does not validate it, nor can it be ratified, so as to make it the basis of suitor action, nor does the doctrine of estoppel apply."

Howard & Foster Co. v. Citizens Nat'l Bank of Union, 133 SC 202, 130 SE 759(1926) "It has been settled beyond controversy that a national bank, under federal Law being limited in its powers and capacity, cannot lend its credit by guaranteeing the debts of another. All such contracts entered into by its officers are ultra vires."

(Public Law 106-122). To me, this is very good evidence that promissory notes created for the purpose of buying property have been directly exchanged for FRN's and those notes are what in fact paid the seller.
In reference to the note please read: UCC 3-104e, 3-106d last sentence, 3-302, 3-305, 3-306 and 3-308. Why not do a counterclaim under 3-305 and 3-306 since there cannot be a holder in due course if the promise or order is an instrument 3-106d. The note is an instrument (3-104e) and after they indorse it "pay to the order of" they've converted into a draft/check. Doesn't 3-306 say we have rights to claim to the proceeds and recovery of the instrument? But related to your state statutorily UCC.

When the note is split from the deed of trust, "the note becomes, as a practical matter, unsecured." RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 cmt. a (1997).

A person holding only a note lacks the power to foreclose because it lacks the security, and a person holding only a deed of trust suffers no default because only the holder of the note is entitled to payment on it. See RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 5.4 cmt. e (1997).
"Where the mortgagee has `transferred' only the mortgage, the transaction is a nullity and his ‘assignee,’ having received no interest in the underlying debt or obligation, has a worthless piece of paper." 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY, § 37.27[2] (2000).

Assignment omitting reference to debt.

An assignment of the mortgage security, apart from the debt, is a nullity. And this appears to be so without reference to whether the mortgagee has the legal title. If he has the latter, he can in some states transfer it without the debt, but the mortgage lien, that is, the right to proceed against the land as security, can exist only in favor of the holder of the debt secured.

It has been decided in a number of cases, apparently, that a transfer or assignment in terms of the "mortgage," is insufficient to transfer the debt secured, and is therefore a nullity, in the absence of a specific transfer of the debt, or of the note or bond given for the debt.21 These decisions purport to be based on the principle above referred to, that a transfer of the "mortgage" without the debt is a nullity.

The law of real property and other interests in land, Volume 3

By Herbert Thorndike Tiffany

US SUPREME COURT SAYS IN

CARPENTER V. LONGAN, 83 U. S. 271 (1872)
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.

citing Jackson v. Blodget, 5 Cowan 205; Jackson v. Willard, 4 Johnson 43

B. PROOF OF CLAIM - CASE LAW - A BANK MUST PROVIDE THE ORIGINAL "WET INK" SIGNATURE NOTE WHEN DEMANDED.

1. STATE STREET BANK AND TRUST COMPANY v. HARLEY LORD
   851 SO. 2ND 790 (2003)

2. W.H. DOWNING v. FIRST NATIONAL BANK OF LAKE CITY
   81 SO. 2ND 586 (1955)

3. NATIONAL LOAN INVESTORS, L. P. v. JOYMAR ASSOCIATES
   767 SO. 2ND 549,551 (2000)

5. DASMA INVESTMENTS, LLC v. REALTY ASSOCIATES FUND III
   459 F. SUPP. 2D 1294 (2006)

6. SHELTER DEVELOPMENT GROUP, INC. v. MMA OF GEORGIA
   50 BR 588,590 BANKRUPTCY COURT (1985)

7. FLORIDA STATUTES 90.953 - (2002)

8. BANKRUPTCY ACT OF 1914 SECTION 30(1) - PROOF OF CLAIM - DEMANDS FOR PROOF CAN ONLY BE BROUGHT BY CONTRACT

C. UNIVERSAL POSTAL UNION - PAGES 73, 74, 80, 96, 103, 186, 195

D. TITLE18 USC SECTION 7

E. JACKSON v. MAGNOLIA - 20 HOW 296, 315, 342 US

F. SUPPLEMENTAL RULES OF ADMIRALTY - FOUND IN 28 USC - Rule 55, AND 56 - DEFAULT AND SUMMARY JUDGEMENTS
G. TITLE 18 USC PART 1 CHAPTER 1 SECTION 11 PAGE 13 - DEFINES FOREIGN GOVERNMENT.

H. TITLE 18 USC CHAPTER 1 SECTION 7(1) - MARITIME JURISDICTION

I. TITLE 15 USC CHAPTER 9-A - WEATHER MODIFICATION

N. TITLE 12 USC CHAPTER 21 - BANKING ASSOCIATIONS

O. FEDERAL RULES OF EVIDENCE 201(d)

P. UCC 3-603 - TENDER OF PAYMENT

Q. UCC 3-503 (c) - NOTICE OF DISHONOR

R. MODERN MONEY MECHANICS - HOW BANKS CREATE MONEY
   WITHOUT RISK.

S. MEMORANDUM OF LAW

No License needed to practice law, non-attorney can represent another as next of friend, Litigants may be assisted by unlicensed layman during judicial proceedings. ....

REFERENCE COURT CASES

Picking v. Pennsylvania R. Co. 151 Fed. 2nd 240; Pucket v. Cox 456 2nd 233. Pro se pleadings are to be considered without regard to technicality; pro se litigants pleadings are not to be held to the same high standards of perfection as lawyers. Platsky v. C.I.A. 953 F.2d. 25. Additionally, pro se litigants are to be given reasonable opportunity to remedy the defects in their pleadings. Reynoldson v Shillinger 907F .2d 124, 126 (10th Cir. 1990); See also Jaxon v Circle K. Corp. 773 F.2d 1138, 1140 (10th Cir. 1985) (1)

2. Haines v. Kerner (92 S. Ct. 594). The respondent in this action is a non-lawyer and is moving forward in Propria persona.
3. NAACP v. Button (371 U.S. 415); United Mineworkers of America v. Gibbs (383 U.S. 715); and Johnson v. Avery 89 S. Ct. 747 (1969). Members of groups who are competent non-lawyers can assist other members of the group achieve the goals of the group in court without being charged with "Unauthorized practice of law."


6. Federal Rules Civil Proc., Rule 17, 28 U.S.C.A. "Next Friend" A next friend is a person who represents someone who is unable to tend to his or her own interest...

7. Oklahoma Court Rules and Procedures, Title 12, sec. 2017 (C) "If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem."


9. Warnock v. Pecos County, Tex., 88 F3d 341 (5th Cir. 1996) Eleventh Amendment does not protect state officials from claims for prospective relief when it is alleged that state officials acted in violation of federal law.

11. Oklahoma is a "Right to Work" State! Bill SJR 1! Its OK to practice God’s law with out a license, Luke 11:52, God’s Law was here first! "There is a higher loyalty than loyalty to this country, loyalty to God" U.S. v. Seeger, 380 U.S. 163, 172, 85 S. Ct. 850, 13 L. Ed. 2d 733 (1965)

12. "The practice of law can not be licensed by any state/State. Schware v. Board of Examiners, United States Reports 353 U.S. pgs. 238, 239. In Sims v. Aherns, 271 S.W. 720 (1925) "The practice of law is an occupation of common right." A bar card is not a license, its a dues card and/or membership card. A bar association is that what it is, a club, A association is not license, it has a certificate though the State, the two are not the same........ ..

(2) Under the legal theories that purport to support non-judicial foreclosure, it is said that non judicial foreclosure is a matter of private contract and not state action. Thus, the theory goes, parties are free to contract amongst themselves for authority to sell the property when the loan is reported by some party (alleging to be the beneficiary under the Deed of Trust). So anything the Trustee does that is wrong is really a matter of breach of contract, not violation of due process. If the Trustee on the deed of trust lacks authority, if the beneficiary is out of business and some other party is alleging it is now the new beneficiary, if anyone with or without knowledge alleges that the loan is in default and they are wrong or acting wrongfully, it is a matter of private contract, not subject to the rules of civil procedure governing the conduct of lawsuits in state or Federal Court. It is a contract authorizing "self-help". Thus I conclude that the homeowner is equally entitles to utilize self-help to preserve his interest in his real property. Of course filing a notice of intent to preserve interest in real property, a notice of non-compliance with statute, or some other instrument that clouds title could force the conversion to a judicial foreclosure where the Trustee and beneficiary would be required to step forward and reveal the true holder in due course, account for the flow of the funds paid thus far, etc. But adding the force of Federal Law (TILA, RESPA and HOEPA), and applicable state laws on deceptive lending practices, and applicable common law to the permission to use self-help gives the homeowner greater power than the entities that seek to use self-help to foreclose. By filing a Qualified Written Request, Federal Law requires an answer and resolution. Barring that resolution, and using the common law doctrine of tacit procurement as a tool of enforcement at the end of the QWR, the homeowner has a legal right under color of state and federal law to file an instrument or reconveyance as attorney in fact for the "beneficiary" of record - forcing the "pretender lender" to either back off or prove their case.
REMEMBER, YOUR GOAL IS NOT TO ALLEGE THAT YOU DON'T OWE THE MONEY AT ALL. YOUR GOAL IS TO ALLEGE THAT IF YOU DO OWE MONEY IT IS NOT TO THE TRUSTEE OR THE PARTY PRETENDING TO BE THE BENEFICIARY. BASED UPON THE SEC FILINGS THERE IS PROBABLE CAUSE TO BELIEVE THAT YOUR LOAN WAS HANDLED AND TRANSFERRED, SOLD, SLICED AND DICED MANY TIMES. DESPITE THE CURRENT TREND OF COUNTRYWIDE AND OTHERS TO SAY THIS INFORMATION IS CONFIDENTIAL, THERE ARE VERY FEW JUDGES THAT WOULD AFFIRM THAT YOU HAVE NO RIGHT TO KNOW THE IDENTITY OF YOUR
REAL LENDER. YOUR POINT IN GOING TO COURT IS NOT TO SAY THAT YOU AUTOMATICALLY WIN AND THEY LOSE. YOUR POINT IS TO SAY THAT YOU WISH TO BE HEARD ON THE MERITS OF THE DEFENSES, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS YOU HAVE AND THAT YOU WANT TO HAVE THE RIGHT OF DISCOVERY ALL UNDER THE RULES OF CIVIL PROCEDURE.

Sent from my iPad

"Even when the person who makes the constitutionally required "Oath or affirmation" is a lawyer, the only function that she performs in giving sworn testimony is that of a witness.", "The Fourth Amendment requires that arrest warrants be based "upon probable cause, supported by Oath or affirmation" -- a requirement that may be satisfied by an indictment returned by a grand jury, but not by the mere filing of criminal charges in an unsworn information signed by the prosecutor. GÖ>Gerstein v. Pugh, 420 U.S. 103, GO>117 (1975); see also GO>Čoolidge v. New Hampshire, 403 U.S. 443 (1971)." Kalina v. Fletcher, 522 U.S. 118 (1997) verified

Take a look at FRCP Rule 60 (b) (3) (4) Void judgments, Fraud, Mistake . The fraud lies in that their foreign, copyright statutes/codes/rules are all corporate and these charges do not apply to and cannot reach us, so it appears that even by their own rules everything they do is void

Defendant U.S. Bank, N.A., as Trustee for the LXS2007-4N Trust ("U.S. Bank"), seeks dismissal under Federal Rule of Civil Procedure 12(b)(6) of a complaint filed by plaintiff homeowner Henry Botelho. Specifically, U.S. Bank claims that Botelho cannot state a claim for rescission of his mortgage loan under the Truth in Lending Act, 15 U.S.C. § 1601 et seq., unless he alleges a present ability to tender the loan proceeds. As discussed in further detail in the Order, such an allegation is not necessary for Botelho's case to survive the pleading stage. Accordingly, U.S. Bank's motion is denied.


In Re Hwang, 396 B.R. 757 (U.S.B.C., 2008) "Hence, 'a defect in standing cannot be waived; it must be raised, either by the parties or by the court, whenever it becomes apparent"; Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619 (Missouri Court of Appeals, 2009), "Lack of standing cannot be waived and may be considered by the court sua sponte.". "Plaintiff has the burden of establishing its standing". Novastar Mortgage, Inc v. Snyder 3:07CV480 (2008).

LaSalle Bank Natl. Assn. v Ahearn (59 AD3d 911), the Court held that the assignment must be effective prior to commencement of the action. An assignee of such a mortgage does not have standing to foreclose unless the assignment is complete at the time the action is commenced (see Bankers Trust Co. v Hoovis, 263 AD2d 937, 938 [1999];

An assignment of a mortgage does not have to be in writing and can be effective through physical delivery of the mortgage (see Flyer v Sullivan, 284 App Div 697, 699 [1954]). However, if it is in writing, the execution date is generally controlling and a written assignment claiming an earlier effective date is deficient unless it is accompanied by proof that the physical
delivery of the note and mortgage was, in fact, previously effectuated (see Bankers Trust Co. v Hoovis, 263 AD2d at 938).

"The plaintiff has no standing to maintain this action" see Citigroup Global Markets Realty Corp. v Randolph Bowling, 25 Misc 3d 1244[A], 2009 NY Slip Op 52567[U] [2009].

"One without a pecuniary interest in the mortgage loan is not an obligee under the debt and thus, has no standing to foreclose ab initio." See Watkins v. Bryant (1891) 91C 492, 27 P 77

"MERS never held the promissory note, thus its assignment of the deed of trust to Ocwen separate from the note had no force." 284 S.W.3d at 624; see also In re Wilhelm, 407 B.R. 392 (Bankr. D. Idaho 2009), In re Vargas, 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008)

." If MERS is only the mortgagee, without ownership of the mortgage instrument, it does not have an enforceable right. See Vargas, 396 B.R. 517 "[w]hile the note is 'essential,' the mortgage is only 'an incident' to the note" Carpenter v. Longan, 16 Wall. 271, 83 U.S. 271, 275, 21 L. Ed 313 (1872). A transfer of interest in the Deed of Trust alone is void.

Further, several courts have recently acknowledged that MERS is not and cannot be the owner of the underlying note and therefore could not transfer the note, the beneficial interest in the deed of trust, or foreclose upon the property secured by the deed. See In re Foreclosure Cases, In re Vargas, 396 B.R. 511, 520 (Bankr. C.D. Cal. 2008) ; Landmark Nat'l Bank v. Kelser, 216 p.3d 158 (Kan. 2009) ; Lasalle Bank v. Lamy, 824 N.Y.S2d 769 (N.Y. Sup. Ct. 2006) .

"[f]oreclosure of a mortgage may not be brought by one who has no title to it" Kluge v Fugazy, (145 AD2d 537, 538 [1988]).

"When a court is deciding a motion for summary judgment, it can search the record and, even in the absence of a cross motion, may grant summary judgment to a non-moving party "(CPLR 3212[b]; Dunham v Hilco Constr. Co., Inc., 89 NY2d 425 [1996]).
Wells Fargo Quiet Title, Wrongful Foreclosure, Punitive Damages Lawsuit

Wells Fargo Quiet Title, Wrongful Foreclosure, Punitive Damages Lawsuit DAVID and CRYSTAL HOLM V. Wells Fargo Results in $2,959,123.00 in financial damages to homeowners and Quite Title to their property.

Based upon the record, the Court finds this sum to be fair and reasonable and supported by the evidence adduced at trial. IT IS FURTHER ORDERED ADJUDGED AND DECREED that judgment is entered for punitive damages in favor of Plaintiffs David and Crystal Holm, husband and wife, and against Defendant Wells Fargo Home Mortgage, Inc. in the amount of TWO MILLION, NINE HUNDRED FIFTY NINE THOUSAND, ONE HUNDRED TWENTY THREE DOLLARS ($2,959,123.00).

Case No. 08CN-CV00944

JUDGMENT

NOW, THEREFORE, this matter having been tried before the Court, commencing on the 14th day of January, 2015, and, further, the Court having taken this matter under advisement upon its submission on the 16th day of January, 20] S, and WHEREAS, Plaintiffs appeared in person and by and through counsel, Gregory Leyh, and Defendants appeared by and through counsel, Martin Blanchard, Janet McKillip, and Andrew Jones, and WHEREAS, Plaintiffs having dismissed Count III, the Court finds on Count II and Count 1 as follows:

GENERAL FINDINGS

Plaintiffs Crystal G. Holm and David E. Holm were, at all times relevant to this proceeding, husband and wife residing in Clinton County, Missouri. Further, Plaintiffs were, until the foreclosure sale at issue, owners of real property situate in Clinton County, Missouri, commonly known as 3800 Timberlake Drive, Holt, Missouri, more particularly described as follows:

LOT SIXTEEN (16) IN WOODRAIL, A SUBDIVISION IN CLINTON COUNTY, MISSOURI, ACCORDING TO THE RECORDED PLAT THEREOF

In 2008, a dispute arose as to Plaintiffs’ debt on the property. The property also sustained Substantial damage from a storm and the application of insurance proceeds was at issue. Plaintiffs had numerous communications (both verbal and written) with various Representatives of Defendant Wells Fargo Home Mortgage, Inc. (hereinafter referred to as Wells Fargo), and various representatives of Kozeny & McCubbin, L.C. (legal counsel for both Defendants in this proceeding and hereinafter referred to as Kozeny & McCubbin).

Plaintiffs were still seeking to resolve the disputed debt issues when Kozeny and McCubbin, acting, as Successor Trustee, and/or as legal counsel for the Successor Trustee, and/or as legal counsel for Defendant Wells Fargo, commenced foreclosure proceedings against Plaintiffs relating to the above-referenced property. Undisputed evidence reveals Plaintiffs family received a dollar amount to stop the foreclosure from Kozeny & McCubbin and Defendant Wells Fargo. Plaintiffs procured the necessary funds per the agreement.

Regardless, on August 15, 2008, Kozeny & McCubbin proceeded to foreclosure, selling the property to Defendant Federal Horne Loan Mortgage Corporation (hereinafter referred to as Freddie Mac) for the sum of $141,792.30. Plaintiffs’ efforts to set aside the foreclosure and/or reinstate the Joan were in vain. Ultimately, Freddie Mac filed an action in Unlawful Detainer (14CN-CV00501), currently pending against Plaintiffs, and
Plaintiffs filed the instant lawsuit. The Court will first address Plaintiffs’ claim for quiet title relief set forth in Count II

COUNT II

Uncontroverted evidence at trial establishes Plaintiffs possessed title to the subject property until the date of the foreclosure sale. Prior to the sale, June 26, 2008, the “Foreclosure Department” of Kozeny & McCubbin sent a letter to Plaintiffs “in response to your correspondence disputing the validity of the debt” on the subject property. (It is unclear to the Court whether Kozeny & McCubbin issued the letter in their capacity as Successor Trustees, Attorneys for Successor Trustees, Attorneys for Wells Fargo, or in some other capacity.) The correspondence indicated they were providing Plaintiffs with “1. A copy of the deed of trust, and 2. A copy of the note” to “verify the debt which is owed.” The promissory note (included in Plaintiffs’ Exhibit 26) was a promise to pay the original lender, Commercial Federal Mortgage Corp., and contained no endorsements, either in blank or to a specific party. The undisputed facts are neither Wells Fargo nor Freddie Mac had the right to enforce the note rendering the foreclosure sale void. In Williams v. Kimes, 996 S.W. 2nd 43, 4S (Mo. 1999), the Missouri Supreme Court indicated “no title is conveyed through the sale” when a party who lacks a right to enforce the note proceeds with foreclosure sale. Based upon the evidence, the Court finds neither Wells Fargo nor Freddie Mac had the right to enforce the note rendering the foreclosure sale void. In Williams v. Kimes, 996 S.W. 2nd 43, 4S (Mo. 1999), the Missouri Supreme Court indicated “no title is conveyed through the sale” when a party who lacks a right to enforce the note proceeds with foreclosure sale. Based upon the evidence, the Court finds neither Wells Fargo nor Freddie Mac had the right to enforce the unendorsed note incorrectly described by Kozeny & McCubbin as evidence to “verify the debt which is owed.” This Court finds Freddie Mac did not obtain title to the instant property through the foreclosure sale and title to the instant property should be quieted in the name of Plaintiffs.

COUNT I

In Count II Plaintiffs seek both compensatory and punitive damages for wrongful foreclosure of their property by Defendant Wells Fargo. Based upon the facts presented at trial, including, but not limited to, the facts set forth herein, the Court finds the foreclosure sale of the subject property on August 15, 2008, was wrongful.

Compensatory Damages

The uncontroverted evidence is that on August 15, 2008, Freddie Mac paid $141,762.30 to purchase Plaintiffs’ property. Due to the actions of Defendant Wells Fargo, Plaintiffs have spent the last six and one-half years having in limbo. This Court is acutely aware of a pending unlawful detainer suit against David and Crystal Holm (Clinton County Case No, 14CNCVOOSO 1). An unlawful detainer case was initially filed —y Freddie Mac against David and Crystal Holm on September 8, 2008, less than one month following the foreclosure sale (Clinton County Case No. 08CN-CV00729). Mr. and Mrs. Holm have been under the threat of eviction for well over six years. Upkeep and maintenance are constants when it comes to property. It would be ludicrous to spend large sums of money to maintain a home titled to Freddie Mac and to which Plaintiffs might never regain title. Plaintiff David Holm testified that the current value of the property is $52,000. Mr. Holm’s testimony was uncontroverted. The difference in value is $89,762.30, which constitutes reasonable lost value to Plaintiffs’ property. In addition, Plaintiffs testified they made repairs in the amount of $6,150 to the property to prevent even greater deterioration or diminution in value.

Mr. Holm made the repairs himself and paid for the necessary materials. The cost of past home repairs to prevent additional loss of the value of his home was $6,150. Exhibit 40 was received as additional evidence of the cost of past home repairs. Crystal Holm testified to her role in preparing Exhibit 40 and to the accuracy of the costs identified.

The Court finds Plaintiffs sustained actual damages as set forth herein above in the amount of NINETY-FIVE THOUSAND NINE HUNDRED TWELVE DOLLARS AND THIRTY CENTS ($95,912.30).
The evidence further established Plaintiffs suffered considerable emotional distress and mental and physical anxiety attributable to, or as a direct result of, Defendant Wells Fargo’s actions. Plaintiff David Holm suffered panic attacks, heart problems requiring a heart monitor, high blood pressure, and daily anxiety due to the circumstances relating to the wrongful foreclosure. Plaintiff Crystal Holm testified regarding her “fear” of losing her family’s, home, and the impact of such a loss on her 12-year-old daughter, Liberty, and family. Mrs., Holm recounted her loss of optimism regarding a property that she hoped would be populated by horses and other animals. Both Plaintiffs testified about the substantial stress on their marriage resulting from the Defendants’ predatory and extreme and outrageous conduct.

Based upon the uncontroverted facts presented at trial, and including, but not limited to, the facts set forth herein above, the Court finds Plaintiffs are entitled to damages for emotional distress against Defendant Wells Fargo Home Mortgage, Inc. in the amount of TWO HUNDRED THOUSAND DOLLARS ($200, 000, 00), Based upon the record, the Court finds this sum to be fair and reasonable and Supported by the evidence adduced at trial.

Punitive Damages

The evidence established that Wells Fargo intentionally promised a reinstatement to Plaintiffs and told David Holm that no foreclosure sale would take place if he accepted the reinstatement. MI. Holm immediately accepted the offer, but Wells Fargo deliberately ignored the reinstatement deal and, in an egregious and deceitful manner, intentionally foreclosed on David and Crystal Holm’s family home. Through its agent Kozeny & McCubbin, Wells Fargo received a facsimile copy of Plaintiffs’ reinstatement check on the date of the foreclosure sale. Kozeny & McCubbin received the physical reinstatement check on August 16, 2008.

Plaintiffs fully and completely complied with the instructions provided by Wells Fargo and Kozeny & McCubbin regarding payment of the reinstatement check. Defendant Freddie Mac’s representative, Dean Meyer, testified that there is nothing in the Freddie Mac servicing guide stating that a reinstatement check must be received before the foreclosure sale. This is particularly true when the servicer and trustee make explicit promises to a borrower that they will not foreclose.

Notwithstanding these promises, contracts, and commitments to Plaintiffs, Wells Fargo refused to stop the foreclosure. Further, Wells Fargo refused to cash the reinstatement check and reinstate Plaintiffs’ loan. The Court finds Defendant Wells Fargo’s attitude toward Plaintiffs unfathomable. The incredible effort made by Plaintiffs to keep the property they so clearly love should have been commended, not condemned. Wells Fargo’s decisions to renege on its promises and contract, and to deceive Plaintiffs with the pledge to cancel the foreclosure sale, were outrageous and reprehensible.

The Court finds Defendant Wells Fargo was deceitful in its dealings with David and Crystal Holm. Defendant Wells Fargo’s deceptive and intentional conduct displayed a complete and total disregard for the rights of David and Crystal Holm.

Dean Meyer testified Freddie Mac considered reinstatement of the Holm note to be the most desirable of all possible outcomes. Freddie Mac’s servicing guide champions reinstatement, and requires that servicers comply with its guidelines. Freddie Mac demands 111at its servicers must go “the extra mile” to obtain a reinstatement whenever possible. Defendant Wells Fargo could easily have kept its word and reinstated the loan. Instead, Wells Fargo and its agents expended immeasurable, if not incomprehensible, time and effort to avert reinstatement.

The result of Wells Fargo’s egregious conduct was to impose approximately six and one-half years of uncertainty, lost optimism, emotional distress, and paralysis on Plaintiffs’ family.
The evidence established that Wells Fargo’s intentional choice to foreclose arose from its own financial incentives. Dr. Kurt Krueger testified that Wells Fargo had financial incentives to seek reimbursement of its fees at a foreclosure sale. This economic motivation collided with the well-being of David and Crystal Holm, and was clearly contrary to the interests of Freddie Mac.

In other words, in this case, a powerful financial company exerted its will over a financially distressed family in Clinton County, Missouri. The result is predictable. Plaintiffs were severely damaged; Wells Fargo took its money and moved on, with complete disregard to the human damage left in its wake, Defendant Wells Fargo is an experienced servicer of home loans. Wells Fargo knew that its decision to foreclose after reinstatement was accepted would inflict a devastating injury on the Holm family. Wells Fargo’s actions were, knowing, intentional, and injurious.

Defendant Wells Fargo operated from a position of superiority provided by its enormous wealth. Wells Fargo’s decision took advantage of an obviously financially vulnerable family, and there is no evidence of remorse for the harm caused to David and Crystal Holm. In fact, the Court recalls the lack of remorse and humanity illustrated by Wells Fargo’s corporate representative who testified, “I’m not here as a human being. I’m here as a representative of Wells Fargo.”

Based upon the facts presented at trial, and including, but not limited to, the facts set forth herein above, the Court finds Plaintiffs are entitled to punitive damages against Defendant Wells Fargo Home Mortgage, Inc., in the amount of TWO MILLION NINE HUNDRED FIFTY- NINE THOUSAND ONE HUNDRED TWENTY- THREE DOLLARS ($2,959,123.00).

Based upon the record, the Court finds this sum to be fair and reasonable and supported by clear and convincing evidence adduced at trial. IT IS THEREFORE ORDERED ADJUDGED AND DECREED that judgment is entered for damages in favor of Plaintiffs David and Crystal Holm, husband and wife, and against Defendant Wells Fargo Home Mortgage, Inc., in the amount of TWO HUNDRED NINETY, FIVE THOUSAND NINE HUNDRED TWELVE DOLLARS AND THIRTY CENTS ($295,912.30).

Based upon the record, the Court finds this sum to be fair and reasonable and supported by the evidence adduced at trial. IT IS FURTHER ORDERED ADJUDGED AND DECREED that judgment is entered for punitive damages in favor of Plaintiffs David and Crystal Holm, husband and wife, and against Defendant Wells Fargo Home Mortgage, Inc. in the amount of TWO MILLION NINE HUNDRED FIFTY, NINE THOUSAND ONE HUNDRED TWENTY, THREE DOLLARS ($2,959,123.00).

Based upon the record, the Court finds this sum to be fair and reasonable and supported by clear and convincing evidence adduced at trial.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that judgment is entered in favor of Plaintiffs David and Crystal Holm, husband and wife, and against Defendant Federal Home Mortgage Corporation (Freddie Mac) on the claim for quiet title relief. Title to the property is quieted in the name of Plaintiffs David and Crystal Holm, husband and wife, who are hereby vested with fee simple title in and to the property commonly known as 3800 Timberlake Dr., Holt, Missouri 64048 and legally described as follows:

LOT SIXTEEN (16) IN WOODRAIL A SUBDIVISION IN CLINTON COUNTY MISSOURI ACCORDING TO THE RECORDED PLAT THEREOF

IT IS FURTHER ORDERED ADJUDGED AND DECREED that costs are assessed against Defendant Wells Fargo Home Mortgage Inc., and Defendant Federal Home Loan Mortgage Corporation. Dated this 26th day of January, 2015 R. Brent Elliott Circuit Judge Division II 43rd Judicial Circuit, Missouri.
FINAL JUDGMENT FOR PLAINTIFF

On June 3, 2015, the Court heard arguments on Plaintiff Seedergy Ventures, Inc.'s Motion for Final Summary Judgment and on Defendant Everbank’s Motion for Summary Judgment. After considering the pleadings and papers on file in this cause, and the arguments of Plaintiff and Defendant, the Court hereby GRANTS Plaintiff’s Motion for Final Summary Judgment and affirms its prior denial of Defendant Everbank’s Motion for Summary Judgment.

Therefore, the Court ORDERS, JUDGES and DECREES that Plaintiff Seedergy Ventures, Inc. is the sole owner of 11545 Walnut Meadow Dr., Houston, Texas 77066, legally described as:

LOT 16 BLOCK 1 OF PARTIAL REPLET OF CHAMIONS POINT VILLAGE, SECTION 2, A SUBDIVISION IN HARRIS COUNTY, TEXAS ACCORDING TO THE MAP OR PLAT THEREOF RECORDED UNDER VOLUME 346, PAGE 105 OF THE MAP RECORDS OF HARRIS COUNTY, TEXAS

as to Defendant Everbank, N.A., now and forever.

The Court further ORDERS, JUDGES and DECREES that the Deed of Trust filed of record with the Harris County, Texas Real Property Records under file number S258393, is void and of no force or effect whatsoever, as to Defendant Everbank, now and forever.

The Court further ORDERS, JUDGES and DECREES that the Deed of Trust filed of record with the Harris County, Texas Real Property Records under file number S258393, is
REMOVED from the title to 11545 Walnut Meadow Dr., Houston, TX 77066, as to Defendant Everbank, a., now and forever.

The Court further ORDERS Defendant Everbank, a., to pay cost to Plaintiff.

The Court further ORDERS execution to issue for this Judgment.

SIGNED this 15 day of June, 2015.

[Signature]

JUDGE PATRICIA J. KERRIGAN
SUMMARY ORDER

¶ 1 Defendant, Surgeen Development LLC (Surgeen), appeals from a ruling of the circuit court of Du Page County finding that intervenor, John P. Dawson, was entitled to protection as a bona fide purchaser (BFP) under section 2-1401(e) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401(e) (West 2014)). Because the record affirmatively showed that jurisdiction was
lacking, Dawson was not entitled to protection under section 2-1401(e), and we therefore reverse and remand.

¶ 2

I. BACKGROUND

¶ 3 Plaintiff, First Chicago Bank and Trust (First Chicago), filed a foreclosure action against, among others, Surgeen. On October 8, 2008, First Chicago issued an alias summons that named, among others, Surgeen’s registered agent, Michael Konewko.

¶ 4 Mary Jo Brooks, an employee of Midwest Process Service & Investigations, filed her affidavit of service. The affidavit of service identified the person to be served as “Surgeen Development LLC Michael R. Konewko R/A.” However, it named the person actually served as Kelly Mullay, the “Secretary for [the] Registered Agent.”

¶ 5 On December 6, 2008, the trial court granted First Chicago’s motion for a default judgment of foreclosure and sale. On May 19, 2009, First Chicago purchased the property at a judicial sale, and the court approved the sale.

¶ 6 On or about July 28, 2010, First Chicago sold the property to Dawson. Dawson obtained a mortgage and moved into the property.

¶ 7 On December 30, 2014, Surgeen filed a petition to quash service under section 2-1401 of the Code (735 ILCS 5/2-1401 (West 2014)). Dawson filed a motion to intervene and a motion to dismiss the petition to quash. The trial court allowed Dawson to intervene.

¶ 8 Dawson’s motion to dismiss asserted that he was a BFP under section 2-1401(e) and, alternatively, that, because both Christopher Geen and Bryan Hanson, as the sole members of Surgeen, had listed the underlying mortgage as a secured debt and obtained a discharge in bankruptcy, they could not seek to repossess the property.
The trial court found that Dawson was a BFP for purposes of section 2-1401(e) and granted Dawson’s motion to dismiss on that basis. The court never reached the issue regarding the bankruptcy of Geen and Hanson. Surgeen filed a timely notice of appeal.

II. ANALYSIS

In a companion case to this one, this court held that a similarly-situated third-party intervenor was not a BFP. See First Chicago Bank & Trust v. Surgeen Development LLC, 2016 IL App (2d) 150928-U. We did so because, as here, the affidavit of service showed that the person served was the secretary of the agent, and therefore the record affirmatively showed that the service was improper and that the trial court lacked jurisdiction of Surgeen. See First Chicago Bank & Trust, 2016 IL App (2d) 150928-U, ¶ 18. The same logic applies here. For the same reasons set forth in our prior decision, the affidavit of service here, on its face, affirmatively showed that jurisdiction was lacking. Therefore, Dawson was not a BFP within the meaning of section 2-1401(e).

III. CONCLUSION

For the foregoing reasons, we reverse the judgment of the circuit court of Du Page County and remand for further proceedings.

Reversed and remanded.

Although Dawson contends that we may affirm the trial court on the basis of his alternative assertion regarding Geen’s and Hanson’s bankruptcy, that issue was never developed below, and thus there are factual issues that remain undecided. See Leoris & Cohen LLC v. McNiece, 226 Ill. App. 3d 591, 597 (1992).
CAUSE NO. 2011-36476

MARY ELLEN WOLF AND
DAVID WOLF

v.

WELLS FARGO BANK, N.A.,
AS TRUSTEE FOR CARRINGTON
MORTGAGE LOAN TRUST, TOM
CROFT, NEW CENTURY MORTGAGE
CORPORATION, AND CARRINGTON
MORTGAGE SERVICES, LLC

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS

151ST JUDICIAL DISTRICT

CHARGE OF THE COURT

MEMBERS OF THE JURY:

After the closing arguments, you will go to the jury room to decide the case, answer the questions that are attached, and reach a verdict. You may discuss the case with other jurors only when you are all together in the jury room.

Remember my previous instructions: Do not discuss the case with anyone else, either in person or by any other means. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or on the Internet. Do not post information about the case on the Internet. Do not share any special knowledge or experiences with the other jurors. Do not use your phone or any other electronic device during your deliberations for any reason. I will give you a number where others may contact you in case of an emergency.

Any notes you have taken are for your own personal use. You may take your notes back into the jury room and consult them during deliberations, but do not show or read your notes to your fellow jurors during your deliberations. Your notes are not evidence. Each of you should rely on your independent recollection of the evidence and not be influenced by the fact that another juror has or has not taken notes.

You must leave your notes with the bailiff when you are not deliberating. The bailiff will give your notes to me promptly after collecting them from you. I will make sure your notes are kept in a safe, secure location and not disclosed to anyone. After you complete your deliberations, the bailiff will collect your notes. When you are released from jury duty, the bailiff will promptly destroy your notes so that nobody can read what you wrote.

Here are the instructions for answering the questions.

1. Do not let bias, prejudice, or sympathy play any part in your decision.
2. Base your answers only on the evidence admitted in court and on the law that is in these instructions and questions. Do not consider or discuss any evidence that was not admitted in the courtroom.

3. You are to make up your own minds about the facts. You are the sole judges of the credibility of the witnesses and the weight to give their testimony. But on matters of law, you must follow all of my instructions.

4. If my instructions use a word in a way that is different from its ordinary meaning, use the meaning I give you, which will be a proper legal definition.

5. All the questions and answers are important. No one should say that any question or answer is not important.

6. Answer “yes” or “no” to all questions unless you are told otherwise. A “yes” answer must be based on a preponderance of the evidence. Whenever a question requires an answer other than “yes” or “no,” your answer must be based on a preponderance of the evidence.

The term “preponderance of the evidence” means the greater weight of credible evidence presented in this case. If you do not find that a preponderance of the evidence supports a “yes” answer, then answer “no.” A preponderance of the evidence is not measured by the number of witnesses or by the number of documents admitted in evidence. For a fact to be proved by a preponderance of the evidence, you must find that the fact is more likely true than not true.

7. Do not decide who you think should win before you answer the questions and then just answer the questions to match your decision. Answer each question carefully without considering who will win. Do not discuss or consider the effect your answers will have.

8. Do not answer questions by drawing straws or by any method of chance.

9. Some questions might ask you for a dollar amount. Do not agree in advance to decide on a dollar amount by adding up each juror’s amount and then figuring the average.

10. Do not trade your answers. For example, do not say, “I will answer this question your way if you answer another question my way.”

11. The answers to the questions must be based on the decision of at least ten of the twelve jurors. The same ten jurors must agree on every answer. Do not agree to be bound by a vote of anything less than ten jurors, even if it would be a majority.

As I have said before, if you do not follow these instructions, you will be guilty of juror misconduct, and I might have to order a new trial and start this process over again. This would waste your time and the parties’ money, and would require the taxpayers of this county to pay for another trial. If a juror breaks any of these rules, tell that person to stop and report it to me immediately.
A fact may be established by direct evidence or by circumstantial evidence or both. A fact is established by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proved.

A party’s conduct includes conduct of others that the party has ratified. Ratification may be express or implied. Implied ratification occurs if a party, though he may have been unaware of unauthorized conduct taken on his behalf at the time it occurred, retains the benefits of the transaction involving the unauthorized conduct after he acquired full knowledge of the unauthorized conduct. Implied ratification results in the ratification of the entire transaction.
DEFINITIONS

"David Wolf" means the plaintiff David Wolf.

"Mary Wolf" means the plaintiff Mary Ellen Wolf.

"Plaintiffs" means the plaintiffs David Wolf and Mary Ellen Wolf.

"Wells Fargo" means defendant Wells Fargo Bank, N.A., as Trustee for Carrington Mortgage Loan Trust, Series 2006-NC3 Asset Backed Pass-Through Certificates.

"Carrington" means defendant Carrington Mortgage Services, LLC.

"PSA" means the Pooling And Servicing Agreement dated August 1, 2006 between Stanwich Asset Acceptance Company, L.L.C. (Depositor), New Century (Servicer), and Wells Fargo (Trustee).
QUESTION NO. 1

Did any defendant make, present, or use a document with:

(1) knowledge that the document was a fraudulent lien or claim against real property, or an interest in real property; and
(2) the intent that the document be given the same legal effect as a valid lien or claim against real property, or an interest in real property; and
(3) the intent to cause the Plaintiffs to suffer financial injury or mental anguish or emotional distress?

A lien is “fraudulent” if the person who files it has actual knowledge that the lien was not valid at the time it was filed.

“Lien” means a claim in property for the payment of a debt and includes a security interest.

Answer “Yes” or “No” as to the following:

Wells Fargo:  Yes

Carrington:  Yes
If you answered "Yes" to Question No. 1, then answer the following question. Otherwise, do not answer the following question and skip to Question No. 4.

**QUESTION NO. 2**

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the Plaintiffs for their damages, if any, that resulted from such conduct?

Consider the following elements of damages, if any, and none other. Answer separately in dollars and cents for damages, if any.

In answering questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of your answer to any other question about damages. Do not speculate about what any party’s ultimate recovery may or may not be.

Any recovery will be determined by the court when it applies the law to your answers at the time of judgment. Do not add any amount for interest on damages, if any.

“Mental anguish or emotional distress” means a high degree of mental pain and distress that is more than mere worry, anxiety, vexation, embarrassment, or anger that resulted in a substantial disruption of the Plaintiffs’ daily routine.

Answer separately in dollars and cents for damages, if any:


**ANSWER:** $75,000.00

b. Financial injury sustained in the past by Mary Ellen Wolf.

**ANSWER:** $75,000.00

c. Financial injury that, in reasonable probability, will be sustained in the future by David Wolf.

**ANSWER:** $0.00
d. Financial injury that, in reasonable probability, will be sustained in the future by Mary Ellen Wolf.

**ANSWER:** $0.00

e. Mental anguish or emotional distress experienced by David Wolf in the past.

**ANSWER:** $20,000.00

f. Mental anguish or emotional distress experienced by Mary Ellen Wolf in the past.

**ANSWER:** $20,000.00

g. Mental anguish or emotional distress that, in reasonable probability, will be sustained by David Wolf in the future.

**ANSWER:** $0.00

h. Mental anguish or emotional distress that, in reasonable probability, will be sustained by Mary Ellen Wolf in the future.

**ANSWER:** $0.00
Only answer Question No. 3 if you awarded damages to Plaintiffs in response to Question No. 2 and unanimously answered “Yes” to Question No. 1 as to any defendant. Otherwise, do not answer the following question.

**QUESTION NO. 3**

Do you find by clear and convincing evidence that any of the Defendants engaged in the conduct that you found in answering Question No. 1?

“Clear and convincing evidence” means the measure or degree of proof that produces a firm belief or conviction of the truth of the allegations sought to be established.

Answer “Yes” or “No” as to the following:

**Wells Fargo:**  yes

**Carrington:**  yes

To answer “Yes” to Question No. 3, your answer must be unanimous. You may answer “No” to Question 3 only on a vote of ten or more jurors. Otherwise, you may not answer Question 3.
QUESTION NO. 4

Were any of the Defendants unjustly enriched by the Plaintiffs?

"Unjustly enriched" means the entity has obtained a benefit from another by fraud, duress, or the taking of an undue advantage.

Answer "Yes" or "No" as to the following:

Wells Fargo:  

Carrington:  

response: yes
If you answered "Yes" as to any part of Question No. 4, then answer the following question. Otherwise, do not answer the following question and skip to Question No. 6.

**QUESTION NO. 5**

How much money, if any, did the Defendant(s) receive from the Plaintiffs as a result of unjust enrichment?

Answer separately in dollars and cents for damages, if any:

<table>
<thead>
<tr>
<th>Bank</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Wells Fargo:</td>
<td>$0.00</td>
</tr>
<tr>
<td>Carrington:</td>
<td>$0.00</td>
</tr>
</tbody>
</table>
QUESTION NO. 6

Do any of the Defendants hold money that, in equity and good conscience, belongs to the Plaintiffs?

Answer “Yes” or “No” as to the following:

Wells Fargo: ______ NO ______

Carrington: ______ NO ______
If you answered "Yes" to any part of Question No. 6, then answer the following question. Otherwise, do not answer the following question and skip to Question No. 8.

**QUESTION NO. 7**

How much money, if any, do the Defendants hold that, in equity and good conscience, belongs to the Plaintiffs?

Answer separately in dollars and cents for damages, if any:

**Wells Fargo:** $_____________

**Carrington:** $_____________
QUESTION NO. 8

Did Plaintiffs fail to comply with the terms of the Texas Home Equity Fixed/Adjustable Rate Note (Defendants’ Exhibit 2)?

Answer “Yes” or “No”: Yes
If you answered “Yes” to Question No. 8, then answer the following question. Otherwise, do not answer the following question and skip to Question No. 10.

QUESTION NO. 9

How much money, if any, do Plaintiffs owe under the Texas Home Equity Fixed/Adjustable Rate Note (Defendants’ Exhibit 2) as of November 6, 2015?

Answer in dollars and cents: $65,191.73
QUESTION NO. 10

Is Wells Fargo a Holder of the Texas Home Equity Fixed/Adjustable Rate Note (Defendants’ Exhibit 2)?

“Holder” means the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession.

“Bearer” means a person in control of a negotiable electronic document of title or a person in possession of a negotiable instrument, a negotiable tangible document of title, or a certificated security that is payable to bearer or indorsed in blank.

Answer “Yes” or “No”: Yes
QUESTION NO. 11

Does Wells Fargo own the Texas Home Equity Fixed/Adjustable Rate Note (Defendants’ Exhibit 2) and/or Texas Home Equity Security Instrument (Defendants’ Exhibit 3)?

Answer “Yes” or “No” as to each:

Texas Home Equity Fixed/Adjustable Rate Note: NO

Texas Home Equity Security Instrument: NO
QUESTION NO. 12

Was the "Transfer of Lien" (Plaintiffs' Ex. 23) filed on October 20, 2009 from New Century to Wells Fargo void?

"Void" with respect to Question No. 12 means, those documents that are of no effect whatsoever, and those that are an absolute nullity.

Answer "Yes" or "No."

ANSWER: Yes
QUESTION NO. 13

Did Wells Fargo or Carrington violate the PSA?

Answer "Yes" or "No" as to each:

Wells Fargo: ______ Yes ______

Carrington: ______ Yes ______
If you answered “Yes” to Question No. 1, then answer the following question. Otherwise, do not answer the following question.

**QUESTION NO. 14**

What is a reasonable fee for the necessary services of the Plaintiffs’ attorneys in this case, stated in dollars and cents?

Factors to consider in determining a reasonable fee include:

- The time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal services properly.
- The likelihood that the acceptance of the particular employment will preclude other employment by the lawyer.
- The fee customarily charged in the locality for similar legal services.
- The amount involved and the results obtained.
- The time limitations imposed by the client or by the circumstances.
- The nature and length of the professional relationship with the client.
- The experience, reputation, and ability of the lawyer or lawyers performing the services.
- Whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Answer with an amount for each of the following:

1. For representation through trial and the completion of proceedings in the trial court.
   
   ANSWER: $140,000

2. For representation through appeal to the court of appeals.
   
   ANSWER: $30,000

3. For representation at the Supreme Court of Texas.
   
   ANSWER: $20,000
Presiding Juror:

1. When you go into the jury room to answer the questions, the first thing you will need to do is choose a presiding juror.

2. The presiding juror has these duties:
   a. have the complete charge read aloud if it will be helpful to your deliberations;
   b. preside over your deliberations, meaning manage the discussions, and see that you follow these instructions;
   c. give written questions or comments to the bailiff who will give them to the judge;
   d. write down the answers you agree on;
   e. get the signatures for the verdict certificate; and
   f. notify the bailiff that you have reached a verdict.

Do you understand the duties of the presiding juror? If you do not, please tell me now.

Instructions for Signing the Verdict Certificate:

1. You may answer the questions on a vote of ten jurors. The same ten jurors must agree on every answer in the charge. This means you may not have one group of ten jurors agree on one answer and a different group of ten jurors agree on another answer.

2. If ten jurors agree on every answer, those ten jurors sign the verdict. If eleven jurors agree on every answer, those eleven jurors sign the verdict. If all twelve of you agree on every answer, you are unanimous and only the presiding juror signs the verdict.

3. All jurors should deliberate on every question. You may end up with all twelve of you agreeing on some answers, while only ten or eleven of you agree on other answers. But when you sign the verdict, only those ten or eleven who agree on every answer will sign the verdict.

4. There are some special instructions before Question No. 3 explaining how to answer this question. Please follow the instructions. If all twelve of you answer this question, you will need to complete a second verdict certificate for this question.

Do you understand these instructions? If you do not, please tell me now.

Judge Mike Engelhart, Presiding
VERDICT CERTIFICATE

Check one:

☐ Our verdict is unanimous. All twelve of us have agreed to each and every answer. The presiding juror has signed the certificate for all twelve of us.

☐ Our verdict is not unanimous. Eleven of us have agreed to each and every answer and have signed the certificate below.

☐ Our verdict is not unanimous. Ten of us have agreed to each and every answer and have signed the certificate below.

Printed name of Presiding Juror

Signature of Presiding Juror

Ryan Hurst

Signed

NAME PRINTED

1. ____________________________

2. ____________________________

3. ____________________________

4. ____________________________

5. ____________________________

6. ____________________________

7. ____________________________

8. ____________________________

9. ____________________________

10. ____________________________

11. ____________________________
ADDITIONAL VERDICT CERTIFICATE

I certify that the jury was unanimous in answering the following questions:

Question No. 1

Question No. 3

All twelve of us agreed to the answer. The presiding juror has signed the certificate for all twelve of us.

[Signature]
Signature of Presiding Juror

Ryan Horst
Printed Name of Presiding Juror
CAUSE NO. 2011-36476

MARY ELLEN WOLF AND
DAVID WOLF

v.

WELLS FARGO BANK, N.A.,
AS TRUSTEE FOR CARRINGTON
MORTGAGE LOAN TRUST, TOM
CROFT, NEW CENTURY MORTGAGE
CORPORATION, AND CARRINGTON
MORTGAGE SERVICES, LLC

IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

151ST JUDICIAL DISTRICT

ADDITIONAL INSTRUCTION FOR BIFURCATED TRIAL

MEMBERS OF THE JURY:

In discharging your responsibility on this jury, you will observe all the instructions that have been previously given you.

[Signature]

Judge Mike Engelhart, Presiding
QUESTION NO. 15

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

What sum of money, if any, should be assessed against one or more of the following Defendants and awarded to Plaintiffs as exemplary damages for the conduct found in response to Question Nos. 1 and 3?

“Exemplary damages” means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages includes punitive damages.

Factors to consider in awarding exemplary damages, if any, are:

1. The nature of the wrong.
2. The character of the conduct involved.
3. The degree of culpability of the wrongdoer.
4. The situation and sensibilities of the parties concerned.
5. The extent to which such conduct offends a public sense of justice and propriety.
6. The net worth of the defendant.

Answer in dollars and cents, if any.

Wells Fargo: $2,500,000.

Carrington: $2,500,000.
ADDITIONAL CERTIFICATE

I certify that the jury was unanimous in answering the following question:

Question No. 15

All eleven of us agreed to each of the answers. The presiding juror has signed the certificate for all eleven of us.

Signature of Presiding Juror

Ryan Hurst

Printed Name of Presiding Juror
IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

WEST SUBURBAN BANK, ) Appeal from the Circuit Court
   Plaintiff-Appellee, ) of Du Page County.

v. ) No. 10-CH-2609

2340 FRANKLIN PARK, LLC, )
   Defendant-Appellant

(J. William Carlson, Small Business Growth )
Corporation, The United States Small )
Business Administration, Demco, Inc., )
Hazchem Environmental Corporation, The )
Finishing Company, Unknown Owners and )
Nonrecord Claimants, Defendants; Giagnorio )
& Robertelli, Ltd., Alfred J. Chiappano, )
MPSI, Inc., Fred Bucholz, not personally, but ) Honorable
as Du Page County Recorder of Deeds, TFC ) Bonnie M. Wheaton,

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Birkett concurred in the judgment.

ORDER

¶ 1 Held: Because notice of the foreclosure was not properly served, the trial court erred in
dismissing the defendant’s section 2-1401 petition. Instead, it should have
vacated the default judgment. The trial court correctly determined that the defect
in service was not apparent from the face of the record.
The plaintiff, West Suburban Bank, issued a commercial mortgage loan to the defendant, 2340 Franklin Park, LLC. The defendant defaulted on the loan, and the plaintiff filed a foreclosure action against the property. After the plaintiff obtained judgments and the property was sold, the defendant filed a petition under section 2-1401 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2014)) to set aside the judgment for lack of personal jurisdiction. The defendant further argued that the jurisdictional defect appeared on the face of the record. The plaintiff filed a motion to dismiss the defendant’s petition. The trial court granted the plaintiff’s motion to dismiss and the defendant appealed. We reverse in part, affirm in part and remand.

BACKGROUND

On September 24, 2007, the defendant entered into a commercial loan with the plaintiff secured by a mortgage on the property located at 136 Commercial Avenue in Addison. The defendant defaulted on the loan. On May 10, 2010, the plaintiff filed a complaint for commercial foreclosure. On May 11, 2010, the plaintiff filed a motion to appoint MPSI, Inc., License No. 117-000774, as the special process server for the case. The affidavit from MPSI in support of the motion was signed by “Alfred J. Chiappano, Pres.” On May 11, 2010, the trial court granted the plaintiff’s motion and appointed MPSI as the special process server.

Chiappano served process upon the defendant. The affidavit of service stated as follows: “I, Alfred J. Chiappano, being duly sworn on oath state that I am an Illinois Licensed Private Detective, License # 115-001110.” Chiappano stated in his affidavit that service of the summons and complaint was made on the defendant through its registered agent on June 9, 2010, at 630 Dundee Road, #120, in Northbrook.

On August 10, 2010, the plaintiff filed a motion for an order of default against the defendant. The trial court granted the motion and entered an order of default the same day. On
September 16, 2010, the property was sold at a judicial auction to a third party. The plaintiff filed a motion to confirm the sale. On October 16, 2010, the trial court entered an order approving the sale. The third party purchaser ultimately conveyed the property to a fourth party, who subsequently conveyed the property to a fifth party, TFC Properties, LLC, the owner as of May 2014.

¶ 7 In December 2015, about five years after the foreclosure sale, the defendant filed a section 2-1401 petition for relief from judgment. The petition alleged that service was defective because MPSI was not certified to act as a process server, as its license had expired, at the time the defendant was served. Accordingly, the defendant argued that the trial court had never acquired personal jurisdiction and the orders subsequently entered in the foreclosure action were void. The defendant further argued that the defect appeared on the face of the record because the affidavit of service indicated that Chiappano, in his individual capacity as an Illinois Licensed Private Detective, had served the defendant, rather than the appointed process server, MPSI. Finally, the defendant argued that since the jurisdictional defect appeared on the face of the record, the subsequent purchasers were not bona fide purchasers. The defendant requested that all orders in the foreclosure action be vacated; that the trial court make a finding that all subsequent purchasers were not bona fide purchasers; and that it be awarded damages, attorneys’ fees and costs.

¶ 8 On January 4, 2016, the plaintiff filed a motion to dismiss under section 2-619(a)(9) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(9) (West 2014)). The plaintiff conceded that the underlying default judgment was void because MPSI’s license had expired at the time it was appointed as process server. However, the plaintiff argued that any further relief requested by the defendant was barred by section 2-1401(e) (735 ILCS 5/2-1401(e) (West 2014))
because the lack of personal jurisdiction did not appear on the face of the record and, thus, subsequent purchasers’ rights could not be affected.

¶ 9 On March 9, 2016, following a hearing, the trial court found that there was nothing on the face of the record that would have indicated that service was improper and thus any subsequent purchasers were *bona fide* purchasers. The trial court entered an order granting the plaintiff’s motion and dismissing the defendant’s section 2-1401 petition with prejudice.¹

¶ 10 Thereafter, the defendant filed a timely notice of appeal.

¶ 11 ANALYSIS

¶ 12 At the outset, we note that the plaintiff argues that we lack jurisdiction to address this appeal. The plaintiff notes that the Notice of Appeal indicates that the defendant is appealing from “the Order entered on March 1, 2015 denying Defendants section 2-1401 petition *** to quash service.” The plaintiff argues that the Notice of Appeal is deficient as there was neither a court order dated March 1, 2015, nor a ruling denying a section 2-1401 petition. The plaintiff argues that there was only a March 9, 2016 order granting a section 2-619 motion to dismiss the defendant’s section 2-1401 petition.

¶ 13 Supreme Court Rule 303(b)(2) provides that a notice of appeal “shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court.” Ill. S. Ct. R. 303(b)(2) (eff. Sept. 1, 2006). “The filing of a notice of appeal ‘is the jurisdictional step which initiates appellate review.’” *People v. Smith*, 228 Ill. 2d 95, 104 (2008) (quoting *Niccum v. Botti, Marinaccio, DeSalvo & Tameling, Ltd.*, 182 Ill. 2d 6, 7 (1998)).

¹ The defendant’s section 2-1401 petition also contained a second count, based on fraud, against certain third-party defendants. That count was also dismissed and is not part of this appeal.
Unless there is a properly filed notice of appeal, the appellate court lacks jurisdiction over the matter and is obliged to dismiss the appeal. *Id.*

¶ 14 A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts thereof specified in the notice of appeal. *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 433 (1979). However, a notice of appeal must be liberally construed. *Id.* As stated by our supreme court:

“The notice of appeal serves the purpose of informing the prevailing party in the trial court that the unsuccessful litigant seeks a review by a higher court. Briefs, and not the notice of appeal itself, specify the precise points to be relied upon for reversal. Courts in this State and the Federal courts have repeatedly held that a notice of appeal will confer jurisdiction on an appellate court if the notice, when considered as a whole, fairly and adequately sets out the judgment complained of and the relief sought so that the successful party is advised of the nature of the appeal. [Citations.] Unless the appellee is prejudiced thereby, the absence of strict technical compliance with the form of the notice is not fatal, and where the deficiency in the notice is one of form only, and not of substance, the appellate court is not deprived of jurisdiction. [Citations.]” *Id.* at 433-34.

¶ 15 In the present case, reading the notice of appeal liberally, as we must, the defendant made clear that it was appealing from the order denying its section 2-1401 petition to quash service. The defendant only filed one section 2-1401 petition. The only order entered that denied the relief requested in that petition was the March 9, 2016, order granting the plaintiff’s motion to dismiss the section 2-1401 petition. Accordingly, we hold that the notice of appeal was sufficient to advise the plaintiff of the nature of the appeal and thus sufficient to confer jurisdiction on this court to review the propriety of the trial court’s March 9, 2016 order.
¶ 16 On appeal, the defendant argues that the trial court erred in dismissing its section 2-1401 petition. The defendant notes that the plaintiff conceded that service of process was improper. The defendant argues that the trial court, due to the defective service, should have entered an order vacating the default judgment, not dismissing its petition. The defendant further argues that the trial court erred in finding that the defect in service was not apparent on the face of the record. The defendant asserts that the defective service was apparent on the face of the record because the affidavit of service indicated that it was served by Chiappano, not the appointed process server, MPSI, and, thus, any subsequent purchaser would not be a *bona fide* purchaser.

¶ 17 “Section 2-1401 establishes a comprehensive, statutory procedure that allows for the *vacatur* of a final judgment older than 30 days.” *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). The purpose of a section 2-1401 petition is to bring to the attention of the trial court facts that, if known at the time of judgment, would have precluded its entry. *Paul v. Gerald Adelman & Associates, Ltd.*, 223 Ill. 2d 85, 94 (2006). When a trial court enters a judgment on the pleadings or a dismissal in a section 2-1401 proceeding, review is *de novo*. *Vincent*, 226 Ill. 2d at 18. Additionally, appeals from dismissals pursuant to section 2-619 of the Code are also subject to *de novo* review. *Rogalla v. Christie Clinic, P.C.*, 341 Ill. App. 3d 410, 413 (2003).

¶ 18 Typically, to be entitled to relief under section 2-1401, the petitioner must set forth specific factual allegations supporting: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting the defense or claim to the circuit court in the original action; and (3) due diligence in filing the petition. *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 220-21 (1986). In general, a section 2-1401 petition must be filed within two years of the entry of judgment. 735 ILCS 5/2-1401(c) (West 2014). However, when the petitioner alleges that the judgment is void, the allegation of voidness “substitutes for and negates the need to allege a meritorious defense and due diligence” and the two-year limitations period does not apply. *Sarkissian v. Chicago*
Board of Education, 201 Ill. 2d 95, 103-104 (2002). A judgment that is entered without personal jurisdiction over a party is void and can be attacked directly or collaterally at any time.


¶ 19 Personal jurisdiction may be established by service of process in accordance with statutory requirements. BAC Home Loans Servicing, LP v. Mitchell, 2014 IL 116311, ¶ 18. Strict compliance with the statutes governing the service of process is required before a court will acquire personal jurisdiction over the person served. Sarkissian, 201 Ill. 2d at 109. A foreclosure judgment entered without valid service of process is void. Bank of New York Mellon v. Karbowski, 2014 IL App (1st) 130112, ¶ 12. “Where service of process is not obtained in accordance with the requirements of the statute authorizing service of process, it is invalid, no personal jurisdiction is acquired, and any default judgment rendered against a defendant is void.” Schorsch v. Fireside Chrysler-Plymouth, Mazda, Inc., 172 Ill. App. 3d 993, 998 (1988).

¶ 20 Subsection (a) of the statute that governs who may service process in Illinois provides that “[p]rocess shall be served by a sheriff” or, in counties with populations of less than 2 million, “process may be served, without special appointment, by a person who is licensed or registered as a private detective under the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Act of 2004 [(Private Detective Act) (225 ILCS 447/5-5 et seq. (West 2008))] or by a registered employee of a private detective agency certified under that Act as provided in Section (a-5).” (Emphasis added.) 735 ILCS 5/2–202(a) (West 2008).

¶ 21 Subsection (a-5) governs the service of process through special process servers appointed by the court, and it provides:

“Upon motion and in its discretion, the court may appoint as a special process server a private detective agency certified under the Private Detective Act. Under the appointment, any employee of the private detective agency who is registered under that
Act may serve the process. The motion and the order of appointment must contain the number of the certificate issued to the private detective agency by the Department * * *. A private detective or private detective agency shall send, one time only, a copy of his, her, or its individual private detective license or private detective agency certificate to the county sheriff in each county in which the detective or detective agency or his, her, or its employees serve process, regardless of size of the population of the county. As long as the license or certificate is valid and meets the requirements of the Department * * *, a new copy of the current license or certificate need not be sent to the sheriff.” (Emphasis added.) 735 ILCS 5/2-202(a-5) (West 2008).

The provision also defines who is a “registered employee” of a private detective agency and requires the agency to maintain a list of such employees and to provide the list under certain circumstances. Id.

¶ 22 Here, the plaintiff conceded that service on the defendant was improper. As MPSI’s license had expired before the plaintiff moved to appoint it as special process server, its certificate was invalid. It therefore was not eligible for appointment under section 2-202(a-5) of the Code. West Suburban Bank v. Advantage Financial Partners, LLC, 2014 IL App (2d) 131146, ¶ 18. Accordingly, MPSI could not legally act as a licensed private detective agency at the time of its appointment as a special process server, and any service by MPSI or any of its employees upon the defendant was invalid. Id. ¶¶ 18-19. The defect in the service of process was sufficient to render the default judgment void. Id. ¶ 21. Accordingly, the trial court erred in dismissing the defendant’s section 2-1401 petition. To the extent the petition sought to have the default judgment vacated, it should have been granted.

¶ 23 The defendant further argues that the trial court erred in finding that the defect in service was not apparent on the face of the record. This is important because section 2-1401(e) of the
Code provides that where the underlying judgment is void but the lack of jurisdiction did not affirmatively appear in the record when judgment was entered, the subsequent vacating of the judgment does not affect any “right, title or interest” in any real property acquired by third parties. 735 ILCS 5/2-1401(e) (West 2012). A bona fide purchaser, one who takes title “in good faith for value,” takes “free of any interests of third persons, except such interests of which he has notice.” Daniels v. Anderson, 162 Ill. 2d 47, 57 (1994). If bona fide purchasers were not so protected, “our laws requiring the registration of deeds would be useless if not worse.” Petta v. Host, 1 Ill. 2d 293, 304 (1953).

¶ 24 The defendant argues that the defect was apparent on the face of the record because the affidavit of service was signed by Chiappano in his individual capacity, and not as an employee of MPSI. The defendant contends that because the affidavit of service did not indicate that Chiappano was an employee of MPSI, the appointed process server, the defect was apparent to a third-party purchaser.

¶ 25 We agree with the trial court that the defect in service was not apparent on the face of the record. Under section 2-202 of the Code, a private detective agency can be appointed as a special process server and any employee of that private detective agency may serve process. 735 ILCS 5/2-2-2(a-5) (West 2014). However, section 202 does not require that a process server state, in the affidavit of service, in what capacity he or she served the summons. Moreover, the May 11, 2010, order appointing MPSI as process server, was signed by “Alfred J. Chiappano, Pres.” The face of the record thus indicated that Chiappano was an employee of MPSI. As such, the affidavit of service signed by Chiappano appeared on its face to comply with the provision in section 2-202(a-5) that allowed an employee of the appointed private detective agency to serve process.
¶ 26 Further, the affidavit of service in this case complied with section 2-204. Pursuant to section 2-204 of the Code (735 ILCS 5/2-204 (West 2008)), service upon a private corporation is obtained “(1) by leaving a copy of the process with its registered agent or any officer or agent of the corporation found anywhere in the State; or (2) in any other manner now or hereafter permitted by law.” 735 ILCS 5/2-204 (West 2012). In the present case, the affidavit of service indicated that the defendant’s registered agent was served with the summons and complaint. Accordingly, on the face of the record, the service of process appeared to comply with the requirements of sections 2-202 and 2-204, and nothing in either of those sections required the process server’s employment status to be included in the affidavit of service.

¶ 27 In arguing that the defect in service appeared on the face of the record, the defendant relies on Concord Air, Inc. v. Malarz, 2015 IL App (2d) 140639. In Malarz, service was attempted on the wrong person at the wrong address, with the defect evident from the materials filed along with the plaintiff’s affidavit of nonservice. Id. at ¶ 44. Malarz is easily distinguished on the facts because the issue in the present case is not whether the proper person was served. Rather, the issue is the legal status of the process server. Unlike Malarz, the defect in service in the present case was not apparent on the face of the record.

¶ 28 CONCLUSION

¶ 29 For the foregoing reasons, we reverse the trial court’s order granting the plaintiff’s motion to dismiss and remand for an order vacating the default judgment of foreclosure. However, we affirm the trial court’s finding that the defect in service was not apparent on the face of the record and that the subsequent purchasers were bona fide. The cause is remanded for further proceedings consistent with this order.

¶ 30 Affirmed in part and reversed in part; cause remanded.
Concord Air, Inc. v. Malarz

Supreme Court of Illinois

January 20, 2016, Decided

No. 120084

Reporter
2016 Ill. LEXIS 213

Concord Air, Inc., respondent, v. Marcin Malarz, et al., etc. (Chicago Title Land Trust Company, etc., petitioner).

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: [*1] Leave to appeal, Appellate Court, Second District. (2-14-0639).


Opinion

Petition for leave to appeal denied.
FINAL DEFAULT JUDGMENT QUIETING TITLE
AGAINST AMERICA'S WHOLESALE LENDER

THIS CAUSE came before the Court upon the Complaint to Quiet Title filed by the Plaintiffs, WILLIAM D. PIGOZZI AND LINDA W. PIGOZZI, against the Defendant, AMERICA'S WHOLESALE LENDER. The complaint includes a detailed record of dated and certified request to the defendant to prove it has any valid and enforceable interest in the purported loan encumbering the title on the said property owned by the Plaintiffs. The Court finds that the defendant, AMERICA'S WHOLESALE LENDER, was served with a Summons; Notice of Lis Pendens; Verified Complaint To Quite Title; an Extensive Composite Exhibit herein on February 27, 2013. No response was filled and the Clerk has entered a default. The Court further finds that AMERICA'S WHOLESALE LENDER has no valid lien against the real property of the plaintiffs. Therefore, it is,

ORDERED AND ADJUDGED as follows:

1. That the Final Judgment is hereby entered in favor of the Plaintiffs, WILLIAM D. PIGOZZI AND LINDA W. PIGOZZI, and against AMERICA'S WHOLESALE LENDER as to the Complaint to Quiet Title filed by the Plaintiffs.

STATE OF FLORIDA, COUNTY OF SARASOTA
I hereby certify that the foregoing is a true and correct copy of pages 1 through 2 of the instrument filed in this office. The original instrument filed contains 2 pages.
☐ This copy has no redactions. ☐ This copy has been redacted pursuant to law.
Witness my hand and official seal this 21st day of May, 2013.

KAREN E. RUSHINS, CLERK OF THE CIRCUIT COURT
By: [Signature]
Deputy Clerk
FINAL JUDGMENT

This case came before the Court for Non-jury Trial on May 15, 2014. The Plaintiff called one witness to testify in its case in chief. That witness established that, at present, the named Plaintiff, JP MORGAN CHASE BANK, N.A., is neither the owner or the holder of the Note or, for that matter, the mortgage. Based upon the evidence, the Defendants, PIERCE, by counsel, moved for an involuntary dismissal which the Court granted. It is, therefore

ORDERED and ADJUDGED:

1. This entire action is dismissed with prejudice.

2. The Defendants late filed Motion for Leave to Amend their Affirmative Defenses is denied. Horacio O. Ferrera North American Division, Inc. v. Moroso Performance Products, Inc., 553 So.2d 336 (Fla. 4th DCA 1989).

ORDERED on this 15th day of May, 2014 at Ocala, Florida.

[Signature]
BRIAN D. LAMBERT
Circuit Judge
RELEASE OF MORTGAGE

The undersigned, Affinity Federal Credit Union of 73 Mountain View Boulevard, Basking Ridge, New Jersey 07920, hereby certifies that the mortgage, dated 1/18/2007, executed by Anthony Johns & Ana D Freay; as mortgagor, Affinity Federal Credit Union, as mortgagee, and recorded on 1/24/2007, in the office of the County of Sussex, State of New Jersey, in the official records as Instrument Number:20070124010002588, Book 974, Pages 112, together with the debt secured by said mortgage, has been fully paid, satisfied, released, and discharged, and that the property secured thereby has been released from the lien of such mortgage.

IN WITNESS WHEREOF, the undersigned has executed this release on July 19, 2012.

Affinity Federal Credit Union

Officer Signature: 

Officer Name: Robert Mackintosh Title: AVP of Lending

Witness Signature: 

Witness' Name: Linda Palitto

STATE OF New Jersey

COUNTY OF Somerset

July 19, 2012

On this date of __________, before me, the undersigned authority, a Notary Public duly commissioned, qualified and acting within and for the aforementioned

Robert Mackintosh

State and County, personally appeared within named __________, known to me (or identified to me on the basis of satisfactory evidence) that he or she is the AVP __________ of Affinity Federal Credit Union and was duly authorized in his or her capacity to execute the foregoing instrument for and in the name of said corporation and that said corporation executed the same, and further stated and acknowledged that he or she has so signed, executed and delivered said instrument for the consideration, uses and purposes therein mentioned and set forth.

WITNESS my hand and official seal.

Notary Public: Carolyn Cheele

Affiant: 

Known: 

My Commission Expires Apr. 19, 2015

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CAUSE NO. \red{2015-72329} IN THE DISTRICT COURT OF  

HARRIS COUNTY, TEXAS 

190TH JUDICIAL DISTRICT

FINAL JUDGMENT FOR PLAINTIFF

On June 3, 2015, the Court heard arguments on Plaintiff \red{Seedergy Ventures, Inc.} Motion for Final Summary Judgment and on Defendant Everbank's Motion for Summary Judgment. After considering the pleadings and papers on file in this cause, and the arguments of Plaintiff and Defendant, the Court hereby GRANTS Plaintiff's Motion for Final Summary Judgment and affirms its prior denial of Defendant Everbank's Motion for Summary Judgment.

Therefore, the Court ORDERS, JUDGES and DECREES that Plaintiff Seedergy Ventures, Inc. is the sole owner of 11545 Walnut Meadow Dr., Houston, Texas 77066, legally described as:

\red{SECTION 24.02 HARRIS COUNTY, TEXAS ACCORDING TO THE MAP OR PLAT THEREOFRecorded Under 2015-00042, HARRIS COUNTY, TEXAS}

as to Defendant Everbank, N.A., now and forever.

The Court further ORDERS, JUDGES and DECREES that the Deed of Trust filed of record with the Harris County, Texas Real Property Records under file 2015-00042, is void and of no force or effect whatsoever, as to Defendant Everbank, N.A., now and forever.

The Court further ORDERS, JUDGES and DECREES that the Deed of Trust filed of record with the Harris County, Texas Real Property Records under file number 2015-00042, is
REMOVED from the title to University Dr., Houston, TX 77066, as to Defendant Everbank, now and forever.

The Court further ORDERS Defendant Everbank to pay cost to Plaintiff.

The Court further ORDERS execution to issue for this Judgment.

SIGNED this _____ day of June _______

[Signature]
JUDGE PATRICIA J. KERRIGAN
FINAL DEFAULT JUDGMENT QUIETING TITLE  
AGAINST AMERICA'S WHOLESALE LENDER

THIS CAUSE came before the Court upon the Complaint to Quiet Title filed by the Plaintiffs, [redacted], against the Defendant, AMERICA'S WHOLESALE LENDER. The complaint includes a detailed record of dated and certified request to the defendant to prove it has any valid and enforceable interest in the purported loan encumbering the title on the said property owned by the Plaintiffs. The Court finds that the defendant, AMERICA'S WHOLESALE LENDER, was served with a Summons; Notice of Lis Pendens; Verified Complaint To Quite Title; an Extensive Composite Exhibit herein on February 27, 2013. No response was filled and the Clerk has entered a default. The Court further finds that AMERICA'S WHOLESALE LENDER has no valid lien against the real property of the plaintiffs. Therefore, it is,

ORDERED AND ADJUDGED as follows:

1. That the Final Judgment is hereby entered in favor of the Plaintiffs, [redacted] and against AMERICA'S WHOLESALE LENDER as to the Complaint to

   Quiet Title filed by the Plaintiffs.

STATE OF FLORIDA, COUNTY OF SARASOTA
I hereby certify that the foregoing is a true and correct copy of pages 1 through 2 of the instrument filed in this office. The original instrument filed contains 2 pages.
☐ This copy has no redactions. ☐ This copy has been redacted pursuant to law.
Witness my hand and official seal this 21st day of May, 2013.

By: Karen E. Rushins, Clerk of the Circuit Court
Deputy Clerk
FINAL JUDGMENT

This case came before the Court for Non-jury Trial on May 15, 2014. The Plaintiff called one witness to testify in its case in chief. That witness established that, at present, the named Plaintiff, JP MORGAN CHASE BANK, N.A., is neither the owner or the holder of the Note or, for that matter, the mortgage. Based upon the evidence, the Defendants, PIERCE, by counsel, moved for an involuntary dismissal which the Court granted. It is, therefore

ORDERED and ADJUDGED:

1. This entire action is dismissed with prejudice.

2. The Defendants late filed Motion for Leave to Amend their Affirmative Defenses is denied. Horacio O. Ferrera North American Division, Inc.

ORDERED on this ___ day of May, ___ at Ocala, Florida.

BRIAN D. LAMBERT
Circuit Judge
RELEASE OF MORTGAGE

The undersigned, Affinity Federal Credit Union of 73 Mountain View Boulevard, Basking Ridge, New Jersey 07920, hereby certifies that the mortgage, dated 1/18/2007, executed by [redacted] as mortgagor, Affinity Federal Credit Union, as mortgagee, and recorded on 1/24/2007, in the office of the County of Sussex, State of New Jersey, in the official records as Pages 112, together with the debt secured by said mortgage, has been fully paid, satisfied, released, and discharged, and that the property secured thereby has been released from the lien of such mortgage.

IN WITNESS WHEREOF, the undersigned has executed this release on [redacted].

Affinity Federal Credit Union

Officer Signature: [redacted]

Officer Name: [redacted] Title: AVP of Lending

Witness Signature: [redacted]

Witness’ Name: Linda Palitto

STATE OF

New Jersey

COUNTY OF

Somerset

On this date of [redacted], before me, the undersigned authority, a Notary Public duly commissioned, qualified and acting within and for the aforementioned State and County, personally appeared within named [redacted], known to me (or identified to me on the basis of satisfactory evidence) that he or she is the AVP of Affinity Federal Credit Union and was duly authorized in his or her capacity to execute the foregoing instrument for and in the name of said corporation and that said corporation executed the same, and further stated and acknowledged that he or she has so signed, executed and delivered said instrument for the consideration, uses and purposes therein mentioned and set forth.

WITNESS my hand and official seal.

Notary Public: Carolyn Cheele

Affiant: [redacted]

Known: [redacted]

My Commission Expires Apr. 19, 2015

Recording Fee: $40.00
IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

David Earl Mobley, )
) )
) Plaintiff, ) CIVIL ACTION
) ) FILE NO. 2015CV2
) )
V. ) PROSPECT MORTGAGE, LLC and all
) ) persons unknown who claim or might claim
) ) adversely to Petitioner’s title to
) ) Atlanta, Georgia,
) )
) Defendants.
) )

FINAL ORDER GRANTING DEFENDANT’S MOTION TO DISMISS

The matter came before the Court on Prospect Mortgage, LLC’s (“Defendant”) Motion to Dismiss (“Motion”), filed January 13, 2016 wherein Defendant moved this Court to dismiss this case, with prejudice, pursuant to O.C.G.A. § 9-11-12(b)(6), arguing that Plaintiff failed to state a claim for quiet title upon which relief could be granted.

The Court having considered the complaint, the arguments set forth in the motion, and applicable authority, and it appearing that the Court has jurisdiction over this matter, that the motion has been properly served, that Plaintiff has failed to file a response to the motion, and that good cause has otherwise been shown for the relief sought in the motion; it is hereby

ORDERED that this case is DISMISSED WITH PREJUDICE pursuant to O.C.G.A. § 9-11-12(b)(6). It is further DIRECTED that the Clerk of Court CLOSE the above-styled case.

SO ORDERED this 29th day of February, 2016.

Judge Kimberly M. Esmond Adams
SUPERIOR COURT OF FULTON COUNTY

CAFN: 2015CV2
COURT OF APPEAL, FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

LAURA SATERBAK,
Plaintiff and Appellant,

v.

JP MORGAN CHASE BANK, N.A. as attorney-in-fact for CITIBANK, N.A. as Trustee for STRUCTURED ASSET MORTGAGE INVESTMENT II TRUST 2007-AR7 MORTGAGE PASS-THROUGH CERTIFICATES 2007-AR7,

Defendant and Respondent.

APPEAL from a judgment of the Superior Court of San Diego County,
Joel R. Wohlfeil, Judge. Affirmed.

Law Offices of Plaintiff and Appellant.

for Defendant and Respondent.
Laura Saterbak appeals a judgment dismissing her first amended complaint (FAC) after the sustaining of a demurrer without leave to amend. Saterbak claims the assignment of the deed of trust (DOT) to her home by Mortgage Electronic Registration Systems, Inc. (MERS) to Structured Asset Mortgage Investment II Trust 2007-AR7 Mortgage Pass-Through Trust or Defendant) was invalid. Arguing the assignment occurred after the closing date for the 2007-AR7 trust, and that the signature on the instrument was forged or robo-signed, she seeks to cancel the assignment and obtain declaratory relief. We conclude Saterbak lacks standing and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2007, [redacted] purchased real property on [redacted] in a grant deed. She executed a promissory note (Note) in [redacted] in the amount of $1 million, secured by the DOT. The DOT named MERS as the beneficiary, "solely as nominee for Lender and Lender's successors and assigns." It acknowledged MERS had the right "to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property."

On December 27, 2011, MERS executed an assignment of the DOT to "Citibank, N.A. as Trustee for [2007-AR7 trust]." The assignment was recorded nearly a year later, on December 17, 2012. It is this assignment that Saterbak challenges. The 2007-AR7 trust is a real estate mortgage investment conduit (REMIC) trust; its terms are set forth in a pooling and servicing agreement (PSA) for the trust, which is governed under New
York law. Pursuant to the PSA, all loans had to be transferred to the 2007-AR7 trust on or before its September 18, 2007, closing date.

On Citibank N.A. substituted and appointed National Default Servicing Corporation (NDS) as trustee under the DOT. The substitution of trustee form was executed by JPMorgan Chase Bank, N.A. (hereafter Chase) as attorney-in-fact for Citibank N.A., trustee for the 2007-AR7 trust. NDS recorded a notice of default on December 17, 2012. By that point, had fallen behind in payments. On March recorded a notice of trustee's sale, scheduling a foreclosure sale for April 10, 2013. By that point, owed an estimated . She alleged the DOT was transferred to the 2007-AR7 trust four years after the closing date for the security, rendering the assignment invalid. She further alleged the signature on the assignment document was robo-signed or a forgery. She sought to cancel the assignment as a "cloud" on her title pursuant to Civil Code section 3412. She also sought declaratory relief that the same defects rendered the assignment void.

In May 2014, the trial court sustained Chase's demurrer. It held lacked standing to sue based on alleged noncompliance with the PSA for 2007-AR7 trust

1 The parties do not dispute in arrears on her debt obligations and a foreclosure sale has yet to take place.

2 All further statutory references are to the Civil Code unless otherwise specified.
because she did not allege she was a party to that agreement. The court granted leave to amend to plead a different theory for cancellation of the DOT.

Saterbak filed the FAC in May 2014. The FAC asserted the same causes of action for cancellation of the assignment and declaratory relief premised on the same theories of untimely securitization of the DOT and robo-signing. However, it claimed it "emphatically does not within this action seek to challenge . . . any Foreclosure Proceedings and or Trustee's Sale."

Chase demurred and requested judicial notice of the following instruments: the DOT, the corporate assignment DOT, substitution of trustee, notice of default, and notice of trustee sale. The trial court granted Chase's request for judicial notice and sustained its demurrer. The court held, "Despite the arguments made by Plaintiff, the FAC does, in fact, allege that the assignment is void because the loan was not moved into the securitized trust in a timely manner." As it had previously, the court held lacked standing to sue based on alleged noncompliance with the PSA, as she was not a party to that agreement. The court also rejected robo-signing theory for lack of standing, stating she had not alleged that she "relied" on the assignment or sustained injury from it. The court denied leave to amend, noting the FAC was second attempt and concluding there was no possibility she could remedy her standing deficiencies through amendment.

The court entered judgment for Chase timely appealed.
DISCUSSION

"On appeal from a judgment of dismissal entered after a demurrer has been sustained, this court reviews the complaint de novo to determine whether it states a cause of action. [Citation.] We assume the truth of all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law." (Folgelstrom v. Lamps Plus, Inc. (2011) 195 Cal.App.4th 986, 989-990.) We may consider matters that are properly judicially noticed. (Four Star Electric, Inc. v. F & H Construction (1992) 7 Cal.App.4th 1375, 1379.)

"If the trial court has sustained the demurrer, we determine whether the complaint states facts sufficient to state a cause of action. If the court sustained the demurrer without leave to amend, as here, we must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment. [Citation.] If we find that an amendment could cure the defect, we conclude that the trial court abused its discretion and we reverse; if not, no abuse of discretion has occurred. [Citation.] The plaintiff has the burden of proving that an amendment would cure the defect." (Schifando v. City of Los Angeles (2003) 31 Cal.4th 1074, 1081.)

Central to this appeal is whether as a borrower, has standing to challenge the assignment of the DOT on grounds that it does not comply with the PSA for the securitized instrument. A similar issue is currently pending before the California Supreme Court in Yvanova v. New Century Mortgage Corp. (2014) 226 Cal.App.4th 495,
Based on the current state of the law, we conclude [redacted] the assignment as invalid under the PSA or the product of robo-signing. For the reasons discussed below, the trial court properly sustained Defendant's demurrer to the FAC without leave to amend.

I. STANDING

A. Saterbak Bears the Burden to Demonstrate Standing


Saterbak contends the 2007-AR7 trust bears the burden of proving the assignment in question was valid. This is incorrect. As the party seeking to cancel the assignmen

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3 The California Supreme Court is reviewing this issue: "In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void?" (Yvanova v. New Century Mortgage Corp. (2014) 331 P.3d 1275 (Yvanova II).) Unlike this case, Yvanova involved a challenge to a foreclosure sale that had already occurred. (Yvanova I, supra, 226 Cal.App.4th at p. 498.) However, the Supreme Court also granted review in Keshtgar v. U.S. Bank, N.A., review granted October 1, 2014, S220012, which involved a preforeclosure challenge based on alleged deficiencies in the assignment of the deed of trust. The Supreme Court has deferred the appeal in Keshtgar pending disposition of Yvanova I. (Keshtgar v. U.S. Bank, N.A. (2014) 334 P.3d 686.)
through this action, "must be able to demonstrate that . . . she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical."  


authorities do not suggest otherwise. She cites Fontenot, but that case actually held "MERS did not bear the burden of proving a valid assignment"—instead, "the burden rested with plaintiff affirmatively to plead facts demonstrating the impropiety." (Fontenot v. Wells Fargo Bank, N.A. (2011) 198 Cal.App.4th 256, 270 (Fontenot).) also cites Cockerell and Neptune, but those cases merely held that an assignee who files suit to enforce an assigned right bears the burden of proving a valid assignment. (Cockerell v. Title Ins. & Trust Co. (1954) 42 Cal.2d 284, 292; Neptune Society Corp. v. Longanecker (1987) 194 Cal.App.3d 1233, 1242.)

B. Challenge the Assignment

alleges the DOT was assigned to the 2007-AR7 trust in an untimely manner under the PSA. Specifically, she contends the assignment was void under the PSA because MERS did not assign the DOT to the 2007-AR7 trust until years after the closing date. also alleges the signature of "Nicole M. Wicks" on the assignment document was forged or robo-signed.

These theories fail because has not shown that she has standing to challenge the 2007-AR7 trust's claim to title. "As an unrelated third party to the alleged securitization, . . . lacks standing to enforce any agreements, including the investment trust's pooling and servicing agreement, relating to such transactions."

(Jenkins v. JPMorgan Chase Bank, N.A. (2013) 216 Cal.App.4th 497, 515 (Jenkins).)
Even were we to assume the assignment was invalid, the true victim was not [redacted] but the original lender, which suffered the unauthorized loss of the security tied to its promissory note.

*Jenkins* is instructive. In that case, a borrower brought a preemptive action to challenge a defendant's ability to foreclose. "The crux of Jenkins's lawsuit [was] based on her theory her loan was pooled with other home loans in a securitized investment trust, which is purportedly now managed by B of A, as the acting trustee, without proper compliance with the investment trust's pooling and servicing agreement." (*Jenkins*, *supra*, 216 Cal.App.4th at p. 505.) The borrower sought an order declaring the untimely assignment of the promissory note to the investment trust "'void and a legal nullity.' " (*Id.* at p. 511.) However, the court held she could not show an actual controversy between herself and the defendant. Even if an improper securitization (or any other invalid assignment of the promissory note) occurred, the court concluded the relevant parties were the transferors and transferees of the note. Therefore, Jenkins lacked standing to enforce the pooling and servicing agreement, as "an unrelated third party to the alleged securitization." (*Id.* at pp. 514-515.) Moreover, "Jenkins [was] not the victim of such invalid transfers because her obligations under the note remained unchanged." (*Ibid.*)

Here, the relevant parties to the assignment were MERS and the 2007-AR7 trust. Even if the DOT was transferred to the 2007-AR7 trust after the closing date specified in the PSA, [redacted] is an "unrelated third party to the alleged securitization" and lacks standing to enforce the PSA. (*Jenkins, supra*, 216 Cal.App.4th at p. 515.) She likewise
lacks standing to challenge the assignment on robo-signing grounds because she is a nonparty to the assignment whose rights were not affected by it.

Critically, [redacted] cannot show she was the victim of any invalid transfer because her obligations under the note remained unchanged. (Jenkins, supra, 216 Cal.App.4th at p. 515.) "Absent any prejudice, [borrowers] have no standing to complain about any alleged lack of authority or defective assignment." (Siliga v. Mortgage Electronic Registration Systems, Inc. (2013) 219 Cal.App.4th 75, 85 (Siliga).) There is no prejudice to Saterbak because "an assignment merely substituted one [trustee] for another, without changing her obligations under the note." (Fontenot, supra, 198 Cal.App.4th at p. 272 [no prejudice from assignment of note]; Herrera v. Federal National Mortgage Assn. (2012) 205 Cal.App.4th 1495, 1507 (Herrera) [same]; see Siliga, supra, at p.85 [no prejudice, and hence no standing, where borrowers did not dispute they were in default and assignment did not change their debt obligations].)4

Saterbak cites Glaski v. Bank of America (2013) 218 Cal.App.4th 1079, which held that a borrower could challenge a nonjudicial foreclosure based on alleged defects in the assignment pursuant to a securitized trust's pooling and servicing agreement.

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4 A federal district court reached the same conclusion in Saterbak's parallel case against the loan servicer. (Saterbak v. National Default Servicing Corp. (S.D.Cal. Oct. 1, 2015, Civ. No. 15-CV-956-WQH-NLS) 2015 WL 5794560, at *7 ["Plaintiff was not party to the assignment of the deed of trust, and her rights were not affected by it. Plaintiff's obligations under the Deed of Trust were only affected by the assignment . . . insofar as they altered the party to whom the Plaintiff was obliged. Therefore, Plaintiff does not have standing to challenge the securitization of her loan or any subsequent assignment of the Deed of Trust."].)
However, no California court has followed *Glaski* on this point, and the New York case upon which *Glaski* relied has been overturned. (*Wells Fargo Bank, N.A. v. Erobobo* (N.Y. App. Div. 2015) 127 A.D.3d 1176, 1178 ["Erobobo, as a mortgagor whose loan is owned by a trust, does not have standing to challenge the plaintiff's possession or status as assignee of the note and mortgage based on purported noncompliance with certain provisions of the PSA"]; see *Rajamin v. Deutsche Bank Nat'l Trust Co.* (2d Cir. 2014) 757 F.3d 79, 86-87 [rejecting *Glaski*'s interpretation of New York law].) We conclude *Jenkins, supra*, 216 Cal.App.4th 497 is the more persuasive authority and decline to follow *Glaski*. **Saterbak** lacks standing to challenge alleged defects in the MERS assignment of the DOT to the 2007-AR7 trust.

C. *The DOT Does Not Confer Standing*

**Saterbak** argues "clear language" in the DOT and "the rules of adhesion contracts" confer standing. We disagree. In signing the DOT, **Saterbak** agreed the Note and DOT could be sold "one or more times without prior notice." She further agreed:

"Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument."\(^5\)

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\(^5\) As the court explained in *Fontenot*: "MERS is a private corporation that administers a national registry of real estate debt interest transactions. Members of the MERS System assign limited interests in the real property to MERS, which is listed as a grantee in the official records of local governments, but the members retain the promissory notes and mortgage servicing rights. The notes may thereafter be transferred..."
"The authority to exercise all of the rights and interests of the lender necessarily includes the authority to assign the deed of trust." (Siliga, supra, 219 Cal.App.4th at p. 84; see Herrera, supra, 205 Cal. App.4th at p. 1504 [interpreting language identical to DOT to give MERS "the right to assign the DOT"]). The federal court adjudicating parallel case against her loan servicer cited the above-quoted language in the DOT to reject the same securitization theory proffered here. v. National Default Servicing Corp., supra, 2015 WL 5794560, at *7.)

nevertheless points to language in the DOT that only the "Lender" has the power to declare default and foreclose, while the "Borrower" has the right to sue prior to foreclosure in order to "'assert the non-existence of a default or any other defense of Borrower to acceleration and sale.' " But these provisions do not change her standing obligations under California law; they merely give the power to argue any defense the borrower may have to avoid foreclosure. As a nonparty to the assignment, cannot challenge the assignment as invalid under the PSA. (Jenkins, supra, 216 Cal.App.4th at p. 515.)

also points to the presuit notice provisions in the DOT to argue the DOT contemplates her action. She quotes language in the DOT requiring the Borrower and Lender to provide notice and a reasonable opportunity to repair before "any judicial among members without requiring recordation in the public records. [Citation.] Under the MERS System, however, MERS is designated as the beneficiary in deeds of trust, acting as 'nominee' for the lender, and granted the authority to exercise legal rights of the lender." (Fontenot, supra, 198 Cal.App.4th at p. 267.)
action . . . that arises from the other party's actions pursuant to this Security Instrument."
However, by [redacted] own theory, her action does not arise "pursuant to this Security Instrument"; it is premised instead on a violation of the PSA. The presuit notice provisions in the DOT do not contemplate her action.

Finally, [redacted] contends the deed of trust is an adhesion contract, and, therefore, restrictive language that "deprives a borrower of the right to argue her loan has been invalidly assigned" must be "conspicuous and clear." She claims, "If the assignment clause was intended by the drafter to cutoff the borrower's right to challenge the assignment, it should have used clear language to that effect. It did not." As a rule, "contracts of adhesion are generally enforceable according to their terms, [but] a provision contained in such a contract cannot be enforced if it does not fall within the reasonable expectations of the weaker or 'adhering' party." (Fischer v. First Internat. Bank (2003) 109 Cal.App.4th 1433, 1446 (Fischer).) However, "[b]ecause a promissory note is a negotiable instrument, a borrower must anticipate it can and might be transferred to another creditor" (Fontenot, supra, 198 Cal.App.4th at p. 272), together with the deed of trust securing it. [redacted] property to the Lender; recognized that MERS (as nominee) had the right "to exercise any or all" of the interests of the Lender; and agreed that the Note, together with the DOT, could be sold one or more times without notice to her. There is no reasonable expectation from this language that [redacted] future assignments made to unrelated third parties. (Cf. Fischer, supra, 109 Cal.App.4th at pp. 1448-1449 [holding there was a triable issue of fact "as to whether the parties
mutually intended to permit cross-collateralization" on two separate loans, given ambiguity between the broadly worded dragnet clause and a "'Related Document[]' " incorporated by reference into the loan agreement as to whether the parties mutually intended it].)6

The to bring a preemptive action to determine whether the 2007-AR7 trust may initiate a nonjudicial foreclosure. She argues, "If the alleged 'Lender' is not the true 'Lender,' it "has no right to order a foreclosure sale." However, California courts do not allow such preemptive actions because they "would result in the impermissible interjection of the courts into a nonjudicial scheme enacted by the California Legislature." (Jenkins, supra, 216 Cal.App.4th at p. 513; see Gomes v. Countrywide Home Loans, Inc. (2011) 192 Cal.App.4th 1149, 1156 (Gomes) "California's nonjudicial foreclosure law does not provide for the filing of a lawsuit to determine whether MERS has been authorized by the holder of the Note to initiate a foreclosure").) As the court reasoned in Gomes:

"[The borrower] is not seeking a remedy for misconduct. He is seeking to impose the additional requirement that MERS demonstrate in court that it is authorized to initiate a foreclosure. . . . [S]uch a requirement would be inconsistent with the policy

6 Haynes v. Farmers Ins. Exchange (2004) 32 Cal.4th 1198, which involved a dispute over auto insurance coverage. The court stated the general rule that "to be enforceable, any [insurance] provision that takes away or limits coverage reasonably expected by an insured must be 'conspicuous, plain and clear.' " (Id. at p. 1204, italics added.) Even if Haynes were relevant to the current context, there is no reasonable expectation created in the DOT challenge assignments made to unrelated third parties. (Fontenot, supra, 198 Cal.App.4th at p. 272.)
behind nonjudicial foreclosure of providing a quick, inexpensive and efficient remedy." (Gomes, supra, at p. 1154, fn. 5.)

D. Section 3412 Does Not Change Saterbak's Standing Obligations

Saterbak seeks to cancel the assignment pursuant to section 3412. She argues that to withstand a demurrer, she merely needs to allege the assignment was void or voidable and that it could cause serious injury. We disagree; nothing in section 3412 changes Saterbak's standing obligations.

To state a cause of action under section 3412, the assignment was void or voidable against her. (§ 3412 ['A written instrument, in respect to which there is reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled'], italics added; see also Johnson v. PNC Mortg. (N.D.Cal. 2015) 80 F.Supp.3d 980, 990 (Johnson III) [section 3412 requires "the challenged instrument be void or voidable against the party seeking to cancel it"]).

Johnson III dismissed a similar cause of action under section 3412 because the plaintiffs, failed to "allege a plausible case that the assignment is 'void or voidable' against them." (Johnson III, supra, at p. 990.)

7 The case holds "that a borrower can challenge the power of an alleged loan purchaser to foreclose if [the borrower] can allege specific facts showing the assignment is invalid." As discussed, Gomes holds that under California law, plaintiffs may not bring preemptive actions to challenge a defendant's power to foreclose. (Gomes, supra, 192 Cal.App.4th at p. 1156.)
cause of action under section 3412 because she cannot allege that MERS's assignment of the DOT to the 2007-AR7 trust was void or voidable against her. She argues she "faces the prospect of losing her home due to the actions of an entity that has no power to foreclose because it does not own her [DOT]." However, even if the assignment was invalid, it could not "cause serious injury" because her obligations under the Note remained unchanged. (§ 3412, italics added.)

We again find support in Johnson III, supra, 80 F.Supp.3d 980. Borrowers in that case sought to cancel an invalid assignment of their deed of trust, claiming it cast a shadow on their title and continued to ruin their credit. The court rejected this theory of "serious injury" under section 3412 because nothing about the alleged infirmities in the assignment or notice documents changed the borrowers' payment obligations, and the borrowers did not deny they had defaulted. The court concluded: "It is not really the assignment, then, or its challenged provenance, that has stained their credit report. It is the fact that they defaulted." (Johnson III, at p. 989.) Likewise, here, the allegedly defective assignment did not change obligations under the Note. She does not deny she default or that her debt remains in arrears. Consequently, she cannot demonstrate how the allegedly invalid assignment could "cause serious injury" within the meaning of section 3412 if left outstanding. (§ 3412, italics added.)

More fundamentally, nothing in section 3412 changes Saterbak's standing obligations under California law. As discussed in detail above, "[a]bsent any prejudice,
[borrowers] have no standing to complain about any alleged lack of authority or defective assignment." (Siliga, supra, 219 Cal.App.4th at p. 85.)

E. *The Homeowner Bill of Rights Does Not Confer Standing*

For the first time on appeal, Saterbak relies on the California Homeowner Bill of Rights (HBOR) to claim standing. She argues sections 2924.17 and 2924.12 allow her to challenge the alleged defects in MERS's assignment of the DOT to the 2007-AR7 trust. In relevant part, section 2924.17, subdivision (a), provides an "assignment of a deed of trust . . . shall be accurate and complete and supported by competent and reliable evidence." Section 2924.12, subdivisions (a) and (b) allow borrowers to bring an action for damages or injunctive relief for "a material violation of Section . . . 2924.17."

As the HBOR went into effect on January 1, 2013, was assigned on December 27, 2011, and recorded on December 17, 2012, to any provision suggesting that the California Legislature intended for the HBOR to apply retroactively. (Myers v. Philip Morris Companies, Inc. (2002) 28 Cal.4th 828, 841 ["California courts comply with the legal principle that unless there is an 'express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application' "]). Therefore, we conclude the HBOR does not confer standing.

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8 Notice of trustee's sale was recorded after the HBOR went into effect. However, the FAC challenges MERS's assignment of the DOT to the 2007-AR7 trust, not the notice of trustee's sale. We further that the
Even were it otherwise, there is no basis to conclude the HBOR has dispensed with standing requirements under California law. For example, section 2924.12 authorizes a borrower to enjoin a "material" violation of section 2924.17. To allege any violation that was material. We agree with the analysis in *Johnson v. PNC Mortgage* (N.D.Cal. Aug. 12, 2014, Civ. No. C 14-02976 LB) 2014 WL 3962662, at *13 (*Johnson I*):

"[E]ven if Plaintiff[] were correct, and the assignment was a sham, the assignment would not have changed [her] payment obligations. It would have affected the lender and notice to future encumbrancers and purchasers (not Plaintiff[]). [Citation.] The court might reach a different result if, for example, Plaintiff[] contested the validity of the underlying debt or were a party to the assignment. [Citations.] On this record, however, the court finds that even if there were a violation [of the HBOR], it was immaterial."

In summary, for all the reasons discussed above, we conclude Saterbak lacks standing to challenge MERS's assignment of the DOT to the 2007-AR7 trust.

HBOR "overruled" *Jenkins* and cases citing it: *Jenkins* was decided *after* the HBOR went into effect. (*Jenkins, supra*, 216 Cal.App.4th 497 [decided May 17, 2013].)

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9. Section 2924.17 would become a "nullity." To the contrary, this ruling does not impact the ability of a government entity to pursue civil or administrative remedies pursuant to section 2924.17, subdivision (c). Moreover, section 2924.12 a nullity, by reading the word "material" out of the statute. (*Johnson v. PNC Mortg.* (N.D.Cal. Nov. 21, 2014, Civ. No. C 14-02976 LB) 2014 WL 6629585, at *9-*10 (*Johnson II*) ["The court thinks that it is the Johnsons' position that makes part of § 2924.19 nugatory. They would read the term 'material' out of § 2924.19. The legislature could have made any 'violation' of the robo-signing law actionable; but it made actionable only 'material violation[s]' "].) Saterbak tries to distinguish *Johnson III, supra*, 80 F.Supp.3d at page 990 by claiming it did not involve claims under section 2924.17. Actually, it did, but the court dismissed these claims in its rulings on prior complaints. (See *Johnson I, supra*, 2014 WL 3962662, at *13-*14; *Johnson II, supra*, at *9-*10.)
II. TENDER

A cause of action to cancel a written instrument under section 3412 sounds in equity. As a result, a debtor must generally allege tender or offer of tender of the amounts borrowed as a prerequisite to such claims. The tender requirement "is based on the theory that one who is relying upon equity in overcoming a voidable sale must show that he is able to perform his obligations under the contract so that equity will not have been employed for an idle purpose." (Dimock v. Emerald Properties (2000) 81 Cal.App.4th 868, 878, italics omitted.) However, the tender rule is not absolute. Tender is not required to cancel a written instrument that is void and not merely voidable, as a void instrument is a "nullity with no force or effect as opposed to one which may be set aside." (Id. at p. 876; see Smith v. Williams (1961) 55 Cal.2d 617, 620-621 [offer to restore not required in an action to cancel a void instrument under section 3412].)

Thus, a basic question is whether the alleged deficiencies in the assignment rendered MERS's assignment of the DOT to the 2007-AR7 trust void or voidable. Whereas "minor or technical defects" would not render a foreclosure sale void, substantial defects, "such as when there has been a failure to give notice of sale to the trustor or to specify the correct default in the notice of default," would. (Ram v. OneWest Bank, FSB (2015) 234 Cal.App.4th 1, 11.) "Similarly, a sale is rendered void when the foreclosure sale is conducted by an entity that lacks authority to do so." (Ibid.)

Ram is a wrongful foreclosure case. Where, as here, the foreclosure sale has yet to occur, typically have not required tender. (See, e.g., Pfeifer v. Countrywide Home Loans, Inc. (2012) 211 Cal.App.4th 1250, 1280; Intengan
Because we affirm the judgment on standing grounds, we do not decide whether Saterbak was required to plead the ability or willingness to tender to cancel the assignment pursuant to section 3412.

III. LEAVE TO AMEND

We must also consider whether Saterbak has demonstrated a reasonable probability that she could cure the defects that we have identified. (Schifando v. City of Los Angeles, supra, 31 Cal.4th at p. 1081.) Saterbak contends she could amend her complaint to "argue that the language in her [DOT] gives her the right to attack a void assignment of her loan." As discussed in detail above, we conclude the DOT does not confer this right. Because Saterbak has not shown how she could remedy her lack of standing to challenge MERS's assignment of the DOT to the 2007-AR7 trust, we conclude the trial court properly sustained Defendant's demurrer to the FAC without leave to amend.
DISPOSITION

The judgment is affirmed. Respondent 2007-AR7 trust shall recover its costs on appeal.

WE CONCUR:

CONNELL, P. J.

HALLER, J.

MINTYRE, J.
Exactly three years after borrowing money from respondent Countrywide Home Loans, Inc., to refinance their home mortgage, petitioners Larry and Cheryle Jesinoski sent Countrywide and respondent Bank of America Home Loans, which had acquired Countrywide, a letter purporting to rescind the transaction. Bank of America replied, refusing to acknowledge the rescission’s validity. One year and one day later, the Jesinoskis filed suit in federal court, seeking a declaration of rescission and damages. The District Court entered judgment on the pleadings for respondents, concluding that a borrower can exercise the Truth in Lending Act’s right to rescind a loan, see 15 U. S. C. §1635(a), (f), only by filing a lawsuit within three years of the date the loan was consummated. The Jesinoskis’ complaint, filed four years and one day after the loan’s consummation, was ineffective. The Eighth Circuit affirmed.

**Held:** A borrower exercising his right to rescind under the Act need only provide written notice to his lender within the 3-year period, not file suit within that period. Section 1635(a)’s unequivocal terms—a borrower “shall have the right to rescind . . . by notifying the creditor . . . of his intention to do so” (emphasis added)—leave no doubt that rescission is effected when the borrower notifies the creditor of his intention to rescind. This conclusion is not altered by §1635(f), which states when the right to rescind must be exercised, but says nothing about how that right is exercised. Nor does §1635(g)—which states that “in addition to rescission the court may award relief . . . not relating to the right to rescind”—support respondents’ view that rescission is necessarily a consequence of judicial action. And the fact that the Act modified the common-law condition precedent to rescission at
Syllabus

law, see §1635(b), hardly implies that the Act thereby codified rescission in equity. Pp. 2–5.

729 F. 3d 1092, reversed and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.
The Truth in Lending Act gives borrowers the right to rescind certain loans for up to three years after the transaction is consummated. The question presented is whether a borrower exercises this right by providing written notice to his lender, or whether he must also file a lawsuit before the 3-year period elapses.

On February 23, 2007, petitioners Larry and Cheryle Jesinoski refinanced the mortgage on their home by borrowing $611,000 from respondent Countrywide Home Loans, Inc. Exactly three years later, on February 23, 2010, the Jesinoskis mailed respondents a letter purporting to rescind the loan. Respondent Bank of America Home Loans replied on March 12, 2010, refusing to acknowledge the validity of the rescission. On February 24, 2011, the Jesinoskis filed suit in Federal District Court seeking a declaration of rescission and damages.

Respondents moved for judgment on the pleadings, which the District Court granted. The court concluded that the Act requires a borrower seeking rescission to file a lawsuit within three years of the transaction’s consum-
Opinion of the Court

Information. Although the Jesinoskis notified respondents of their intention to rescind within that time, they did not file their first complaint until four years and one day after the loan’s consummation. 2012 WL 1365751, *3 (D Minn., Apr. 19, 2012). The Eighth Circuit affirmed. 729 F. 3d 1092, 1093 (2013) (per curiam).

Congress passed the Truth in Lending Act, 82 Stat. 146, as amended, to help consumers “avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing.” 15 U. S. C. §1601(a). To this end, the Act grants borrowers the right to rescind a loan “until midnight of the third business day following the consummation of the transaction or the delivery of the [disclosures required by the Act], whichever is later, by notifying the creditor, in accordance with regulations of the [Federal Reserve] Board, of his intention to do so.” §1635(a) (2006 ed.).* This regime grants borrowers an unconditional right to rescind for three days, after which they may rescind only if the lender failed to satisfy the Act’s disclosure requirements. But this conditional right to rescind does not last forever. Even if a lender never makes the required disclosures, the “right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever comes first.” §1635(f). The Eighth Circuit’s affirmance in the present case rested upon its holding in Keiran v. Home Capital, Inc., 720 F. 3d 721, 727–728 (2013) that, unless a borrower has filed a suit for rescission within three years of the transaction’s consummation, §1635(f) extinguishes the right to rescind and bars relief.

That was error. Section 1635(a) explains in unequivocal

*Following the events in this case, Congress transferred the authority to promulgate rules implementing the Act to the Consumer Finance Protection Bureau. See Dodd-Frank Wall Street Reform and Consumer Protection Act, §§1061(b)(1), 1100A(2), 1100H, 124 Stat. 2096, 2107, 2113.
terms how the right to rescind is to be exercised: It pro-
vides that a borrower “shall have the right to rescind . . .
by notifying the creditor, in accordance with regulations of
the Board, of his intention to do so” (emphasis added). The
language leaves no doubt that rescission is effected when
the borrower notifies the creditor of his intention to re-
scind. It follows that, so long as the borrower notifies
within three years after the transaction is consummated,
his rescission is timely. The statute does not also require
him to sue within three years.

Nothing in §1635(f) changes this conclusion. Although
§1635(f) tells us when the right to rescind must be exer-
cised, it says nothing about how that right is exercised.
Our observation in Beach v. Ocwen Fed. Bank, 523 U. S.
410, 417 (1998), that §1635(f) “govern[s] the life of the
underlying right” is beside the point. That case concerned
a borrower’s attempt to rescind in the course of a foreclo-
sure proceeding initiated six years after the loan’s con-
summation. We concluded only that there was “no federal
right to rescind, defensively or otherwise, after the 3-year
period of §1635(f) has run,” id., at 419, not that there was
no rescission until a suit is filed.

Respondents do not dispute that §1635(a) requires only
written notice of rescission. Indeed, they concede that
written notice suffices to rescind a loan within the first
three days after the transaction is consummated. They
further concede that written notice suffices after that
period if the parties agree that the lender failed to make
the required disclosures. Respondents argue, however,
that if the parties dispute the adequacy of the disclo-
sures—and thus the continued availability of the right to
rescind—then written notice does not suffice.

Section 1635(a) nowhere suggests a distinction between
disputed and undisputed rescissions, much less that a
lawsuit would be required for the latter. In an effort to
sidestep this problem, respondents point to a neighboring
provision, §1635(g), which they believe provides support for their interpretation of the Act. Section 1635(g) states merely that, “[i]n any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.” Respondents argue that the phrase “award relief” “in addition to rescission” confirms that rescission is a consequence of judicial action. But the fact that it can be a consequence of judicial action when §1635(g) is triggered in no way suggests that it can only follow from such action. The Act contemplates various situations in which the question of a lender’s compliance with the Act’s disclosure requirements may arise in a lawsuit—for example, a lender’s foreclosure action in which the borrower raises inadequate disclosure as an affirmative defense. Section 1635(g) makes clear that a court may not only award rescission and thereby relieve the borrower of his financial obligation to the lender, but may also grant any of the remedies available under §1640 (including statutory damages). It has no bearing upon whether and how borrower-rescission under §1635(a) may occur.

Finally, respondents invoke the common law. It is true that rescission traditionally required either that the rescinding party return what he received before a rescission could be effected (rescission at law), or else that a court affirmatively decree rescission (rescission in equity). 2 D. Dobbs, Law of Remedies §§9.3(3), pp. 585–586 (2d ed. 1993). It is also true that the Act disclaims the common-law condition precedent to rescission at law that the borrower tender the proceeds received under the transaction. 15 U. S. C. §1635(b). But the negation of rescission-at-law’s tender requirement hardly implies that the Act codifies rescission in equity. Nothing in our jurisprudence, and no tool of statutory interpretation, requires that a

The clear import of §1635(a) is that a borrower need only provide written notice to a lender in order to exercise his right to rescind. To the extent §1635(b) alters the traditional process for unwinding such a unilaterally rescinded transaction, this is simply a case in which statutory law modifies common-law practice.

* * *

The Jesinoskis mailed respondents written notice of their intention to rescind within three years of their loan’s consummation. Because this is all that a borrower must do in order to exercise his right to rescind under the Act, the court below erred in dismissing the complaint. Accordingly, we reverse the judgment of the Eighth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.
IN THE CIRCUIT COURT OF CLINTON COUNTY, MISSOURI
DIVISION II

DAVID and CRYSTAL HOLM, 
Plaintiffs,

v.

WELLS FARGO HOME MORTGAGE INC.

and

FEDERAL HOME LOAN MORTGAGE CORPORATION (FREDDIE MAC),

Defendants.

Case No. 08CN-CV0944

JUDGMENT

NOW, THEREFORE, this matter having been tried before the Court, commencing on the 14th day of January, 2015, and, further, the Court having taken this matter under advisement upon its submission on the 16th day of January, 2015, and

WHEREAS, Plaintiffs appeared in person and by and through counsel, Gregory Leyh, and Defendants appeared by and through counsel, Martin Blanchard, Janet McKillip, and Andrew Jones, and

WHEREAS, Plaintiffs having dismissed Count III, the Court finds on Count II and Count I as follows:

GENERAL FINDINGS

Plaintiffs Crystal G. Holm and David E. Holm were, at all times relevant to this proceeding, husband and wife residing in Clinton County, Missouri. Further, Plaintiffs were,
until the foreclosure sale at issue, owners of real property situate in Clinton County, Missouri, commonly known as 3800 Timberlake Drive, Holt, Missouri, more particularly described as follows:

LOT SIXTEEN (16) IN WOODRAIL, A SUBDIVISION IN CLINTON COUNTY, MISSOURI, ACCORDING TO THE RECORDED PLAT THEREOF.

In 2008, a dispute arose as to Plaintiffs' debt on the property. The property also sustained substantial damage from a storm and the application of insurance proceeds was at issue. Plaintiffs had numerous communications (both verbal and written) with various representatives of Defendant Wells Fargo Home Mortgage, Inc. (hereinafter referred to as Wells Fargo), and various representatives of Kozeny & McCubbin, L.C. (legal counsel for both Defendants in this proceeding and hereinafter referred to as Kozeny & McCubbin).

Plaintiffs were still seeking to resolve the disputed debt issues when Kozeny and McCubbin, acting as Successor Trustee, and/or as legal counsel for the Successor Trustee, and/or as legal counsel for Defendant Wells Fargo, commenced foreclosure proceedings against Plaintiffs relating to the above-referenced property.

Undisputed evidence reveals Plaintiffs finally received a dollar amount to stop the foreclosure from Kozeny & McCubbin and Defendant Wells Fargo. Plaintiffs procured the necessary funds per the agreement. Regardless, on August 15, 2008, Kozeny & McCubbin proceeded to foreclosure, selling the property to Defendant Federal Home Loan Mortgage Corporation (hereinafter referred to as Freddie Mac) for the sum of $141,792.30. Plaintiffs' efforts to set aside the foreclosure and/or reinstate the loan were in vain. Ultimately, Freddie Mac filed an action in Unlawful Detainer (14CN-CV00501), currently pending against Plaintiffs, and Plaintiffs filed the instant lawsuit.
The Court will first address Plaintiffs’ claim for quiet title relief set forth in Count II.

COUNT II

Uncontroverted evidence at trial establishes Plaintiffs possessed title to the subject property until the date of the foreclosure sale. Prior to the sale, June 26, 2008, the “Foreclosure Department” of Kozeny & McCubbin sent a letter to Plaintiffs “in response to your correspondence disputing the validity of the debt” on the subject property. (It is unclear to the Court whether Kozeny & McCubbin issued the letter in their capacity as Successor Trustees, Attorneys for Successor Trustees, Attorneys for Wells Fargo, or in some other capacity.) The correspondence indicated they were providing Plaintiffs with “1. A copy of the deed of trust, and 2. A copy of the note”, to “verify the debt which is owed.” The promissory note (included in Plaintiffs’ Exhibit 26) was a promise to pay the original lender, Commercial Federal Mortgage Corp., and contained no endorsements, either in blank or to a specific party. The undisputed facts are neither Wells Fargo nor Freddie Mac had the right to enforce the note rendering the foreclosure sale void. In Williams v. Kimes, 996 S.W. 2nd 43, 45 (Mo. 1999), the Missouri Supreme Court indicated “no title is conveyed through the sale” when a party who lacks a right to enforce the note proceeds with foreclosure sale.

Based upon the evidence, the Court finds neither Wells Fargo nor Freddie Mac had the right to enforce the unendorsed note incorrectly described by Kozeny & McCubbin as evidence to “verify the debt which is owed.” This Court finds Freddie Mac did not obtain title to the instant property through the foreclosure sale and title to the instant property should be quieted in the name of Plaintiffs.
COUNT I

In Count I, Plaintiffs seek both compensatory and punitive damages for wrongful foreclosure of their property by Defendant Wells Fargo. Based upon the facts presented at trial, including, but not limited to, the facts set forth herein, the Court finds the foreclosure sale of the subject property on August 15, 2008, was wrongful.

Compensatory Damages

The uncontroverted evidence is that on August 15, 2008, Freddie Mac paid $141,762.30 to purchase Plaintiffs' property. Due to the actions of Defendant Wells Fargo, Plaintiffs have spent the last six and one-half years living in limbo. This Court is acutely aware of a pending unlawful detainer suit against David and Crystal Holm (Clinton County Case No. 14CN-CV00501). An unlawful detainer case was initially filed by Freddie Mac against David and Crystal Holm on September 8, 2008, less than one month following the foreclosure sale (Clinton County Case No. 08CN-CV00729). Mr. and Mrs. Holm have been under the threat of eviction for well over six years. Upkeep and maintenance are constants when it comes to property. It would be ludicrous to spend large sums of money to maintain a home titled to Freddie Mac and to which Plaintiffs might never regain title.

Plaintiff David Holm testified that the current value of the property is $52,000. Mr. Holm's testimony was uncontroverted. The difference in value is $89,762.30, which constitutes reasonable lost value to Plaintiffs' property. In addition, Plaintiffs testified they made repairs in the amount of $6,150 to the property to prevent even greater deterioration or diminution in value.
Mr. Holm made the repairs himself and paid for the necessary materials. The cost of past home repairs to prevent additional loss of the value of his home was $6,150. Exhibit 40 was received as additional evidence of the cost of past home repairs. Crystal Holm testified to her role in preparing Exhibit 40 and to the accuracy of the costs identified.

The Court finds Plaintiffs sustained actual damages as set forth hereinabove in the amount of NINETY-FIVE THOUSAND NINE HUNDRED TWELVE DOLLARS AND THIRTY CENTS ($95,912.30).

The evidence further established Plaintiffs suffered considerable emotional distress and mental and physical anxiety attributable to, or as a direct result of, Defendant Wells Fargo’s actions. Plaintiff David Holm suffered panic attacks, heart problems requiring a heart monitor, high blood pressure, and daily anxiety due to the circumstances relating to the wrongful foreclosure. Plaintiff Crystal Holm testified regarding her “fear” of losing her family’s home, and the impact of such a loss on her 12-year-old daughter, Liberty, and family. Mrs. Holm recounted her loss of optimism regarding a property that she hoped would be populated by horses and other animals. Both Plaintiffs testified about the substantial stress on their marriage resulting from the Defendants’ predatory and extreme and outrageous conduct.

Based upon the uncontroverted facts presented at trial, and including, but not limited to, the facts set forth hereinabove, the Court finds Plaintiffs are entitled to damages for emotional distress against Defendant Wells Fargo Home Mortgage, Inc. in the amount of TWO HUNDRED THOUSAND DOLLARS ($200,000.00). Based upon the record, the Court finds this sum to be fair and reasonable and supported by the evidence adduced at trial.
Punitive Damages

The evidence established that Wells Fargo intentionally promised a reinstatement to Plaintiffs and told David Holm that no foreclosure sale would take place if he accepted the reinstatement. Mr. Holm immediately accepted the offer, but Wells Fargo deliberately ignored the reinstatement deal and, in an egregious and deceitful manner, intentionally foreclosed on David and Crystal Holm's family home.

Through its agent Kozeny & McCubbin, Wells Fargo received a facsimile copy of Plaintiffs' reinstatement check on the date of the foreclosure sale. Kozeny & McCubbin received the physical reinstatement check on August 16, 2008. Plaintiffs fully and completely complied with the instructions provided by Wells Fargo and Kozeny & McCubbin regarding payment of the reinstatement check.

Defendant Freddie Mac's representative, Dean Meyer, testified that there is nothing in the Freddie Mac servicing guide stating that a reinstatement check must be received before the foreclosure sale. This is particularly true when the servicer and trustee make explicit promises to a borrower that they will not foreclose.

Notwithstanding these promises, contracts, and commitments to Plaintiffs, Wells Fargo refused to stop the foreclosure. Further, Wells Fargo refused to cash the reinstatement check and reinstate Plaintiffs' loan. The Court finds Defendant Wells Fargo's attitude toward Plaintiffs unfathomable. The incredible effort made by Plaintiffs to keep the property they so clearly love should have been commended, not condemned. Wells Fargo's decisions to renege on its promises and contract, and to deceive Plaintiffs with the pledge to cancel the foreclosure sale, were outrageous and reprehensible.
The Court finds Defendant Wells Fargo was deceitful in its dealings with David and Crystal Holm. Defendant Wells Fargo's deceptive and intentional conduct displayed a complete and total disregard for the rights of David and Crystal Holm.

Dean Meyer testified Freddie Mac considered reinstatement of the Holm note to be the most desirable of all possible outcomes. Freddie Mac's servicing guide champions reinstatement, and requires that servicers comply with its guidelines. Freddie Mac demands that its servicers must go "the extra mile" to obtain a reinstatement whenever possible. Defendant Wells Fargo could easily have kept its word and reinstated the loan. Instead, Wells Fargo and its agents expended immeasurable, if not incomprehensible, time and effort to avert reinstatement. The result of Wells Fargo's egregious conduct was to impose approximately six and one-half years of uncertainty, lost optimism, emotional distress, and paralysis on Plaintiffs' family.

The evidence established that Wells Fargo's intentional choice to foreclose arose from its own financial incentives. Dr. Kurt Krueger testified that Wells Fargo had financial incentives to seek reimbursement of its fees at a foreclosure sale. This economic motivation collided with the well-being of David and Crystal Holm, and was clearly contrary to the interests of Freddie Mac. In other words, in this case, a powerful financial company exerted its will over a financially distressed family in Clinton County, Missouri. The result is predictable. Plaintiffs were severely damaged; Wells Fargo took its money and moved on, with complete disregard to the human damage left in its wake.

Defendant Wells Fargo is an experienced servicer of home loans. Wells Fargo knew that its decision to foreclose after reinstatement was accepted would inflict a devastating injury on the Holm family. Wells Fargo's actions were knowing, intentional, and injurious.
Defendant Wells Fargo operated from a position of superiorit provided by its enormous wealth. Wells Fargo's decision took advantage of an obviously financially vulnerable family, and there is no evidence of remorse for the harm caused to David and Crystal Holm. In fact, the Court recalls the lack of remorse and humanity illustrated by a Wells Fargo's corporate representative who testified, "I'm not here as a human being. I'm here as a representative of Wells Fargo."

Based upon the facts presented at trial, and including, but not limited to, the facts set forth hereinaabove, the Court finds Plaintiffs are entitled to punitive damages against Defendant Wells Fargo Home Mortgage, Inc., in the amount of TWO MILLION NINE HUNDRED FIFTY-NINE THOUSAND ONE HUNDRED TWENTY-THREE DOLLARS ($2,959,123.00). Based upon the record, the Court finds this sum to be fair and reasonable and supported by clear and convincing evidence adduced at trial.

IT IS THEREFORE ORDERED ADJUDGED AND DECREED that judgment is entered for damages in favor of Plaintiffs David and Crystal Holm, husband and wife, and against Defendant Wells Fargo Home Mortgage, Inc., in the amount of TWO HUNDRED NINETY-FIVE THOUSAND NINE HUNDRED TWELVE DOLLARS AND THIRTY CENTS ($295,912.30). Based upon the record, the Court finds this sum to be fair and reasonable and supported by the evidence adduced at trial.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that judgment is entered for punitive damages in favor of Plaintiffs David and Crystal Holm, husband and wife, and against Defendant Wells Fargo Home Mortgage, Inc. in the amount of TWO MILLION NINE HUNDRED FIFTY-NINE THOUSAND ONE HUNDRED TWENTY-THREE DOLLARS
($2,959,123.00). Based upon the record, the Court finds this sum to be fair and reasonable and supported by clear and convincing evidence adduced at trial.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that judgment is entered in favor of Plaintiffs David and Crystal Holm, husband and wife, and against Defendant Federal Home Mortgage Corporation (Freddie Mac) on the claim for quiet title relief. Title to the property is quieted in the name of Plaintiffs David and Crystal Holm, husband and wife, who are hereby vested with fee simple title in and to the property commonly known as 3800 Timberlake Dr., Holt, Missouri 64048 and legally described as follows:

LOT SIXTEEN (16) IN WOODRAIL, A SUBDIVISION IN CLINTON COUNTY, MISSOURI, ACCORDING TO THE RECORDED PLAT THEREOF.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that costs are assessed against Defendant Wells Fargo Home Mortgage Inc., and Defendant Federal Home Loan Mortgage Corporation.

Dated this 26th day of January, 2015

R. Brent Elliott
Circuit Judge Division II
43rd Judicial Circuit, Missouri
The collapse in 2008 of the housing bubble and its accompanying system of home loan securitization led, among other consequences, to a great national wave of loan defaults and foreclosures. One key legal issue arising out of the collapse was whether and how defaulting homeowners could challenge the validity of the chain of assignments involved in securitization of their loans. We granted review in this case to decide one aspect of that question: whether the borrower on a home loan secured by a deed of trust may base an action for wrongful foreclosure on allegations a purported assignment of the note and deed of trust to the foreclosing party bore defects rendering the assignment void.

The Court of Appeal held plaintiff Tsvetana Yvanova could not state a cause of action for wrongful foreclosure based on an allegedly void assignment because she lacked standing to assert defects in the assignment, to which she was not a
party. We conclude, to the contrary, that because in a nonjudicial foreclosure only the original beneficiary of a deed of trust or its assignee or agent may direct the trustee to sell the property, an allegation that the assignment was void, and not merely voidable at the behest of the parties to the assignment, will support an action for wrongful foreclosure.

Our ruling in this case is a narrow one. We hold only that a borrower who has suffered a nonjudicial foreclosure does not lack standing to sue for wrongful foreclosure based on an allegedly void assignment merely because he or she was in default on the loan and was not a party to the challenged assignment. We do not hold or suggest that a borrower may attempt to preempt a threatened nonjudicial foreclosure by a suit questioning the foreclosing party’s right to proceed. Nor do we hold or suggest that plaintiff in this case has alleged facts showing the assignment is void or that, to the extent she has, she will be able to prove those facts. Nor, finally, in rejecting defendants’ arguments on standing do we address any of the substantive elements of the wrongful foreclosure tort or the factual showing necessary to meet those elements.

**Factual and Procedural Background**

This case comes to us on appeal from the trial court’s sustaining of a demurrer. For purposes of reviewing a demurrer, we accept the truth of material facts properly pleaded in the operative complaint, but not contentions, deductions, or conclusions of fact or law. We may also consider matters subject to judicial notice. *(Evans v. City of Berkeley (2006) 38 Cal.4th 1, 6.)*

1 The superior court granted defendants’ request for judicial notice of the recorded deed of trust, assignment of the deed of trust, substitution of trustee, notices of default and of trustee’s sale, and trustee’s deed upon sale. The existence and facial contents of these recorded documents were properly noticed in the trial court under Evidence Code sections 452, subdivisions (c) and (h), and 453. (See

*footnote continued on next page*
the trial court should, in sustaining the demurrer, have granted the plaintiff leave to amend, we consider whether on the pleaded and noticeable facts there is a reasonable possibility of an amendment that would cure the complaint’s legal defect or defects. *(Schifando v. City of Los Angeles (2003) 31 Cal.4th 1074, 1081.)*

In 2006, plaintiff executed a deed of trust securing a note for $483,000 on a residential property in Woodland Hills, Los Angeles County. The lender, and beneficiary of the trust deed, was defendant New Century Mortgage Corporation (New Century). New Century filed for bankruptcy on April 2, 2007, and on August 1, 2008, it was liquidated and its assets were transferred to a liquidation trust.

On December 19, 2011, according to the operative complaint, New Century (despite its earlier dissolution) executed a purported assignment of the deed of trust to Deutsche Bank National Trust, as trustee of an investment loan trust the complaint identifies as “Msac-2007 Trust-He-1 Pass Thru Certificates.” We take notice of the recorded assignment, which is in the appellate record. *(See fn. 1, ante.)* As assignor the recorded document lists New Century; as assignee it lists Deutsche Bank National Trust Company (Deutsche Bank) “as trustee for the registered holder of Morgan Stanley ABS Capital I Inc. Trust 2007-HE1 Mortgage Pass-Through Certificates, Series 2007-HE1” (the Morgan Stanley investment

trust). The assignment states it was prepared by Ocwen Loan Servicing, LLC, which is also listed as the contact for both assignor and assignee and as the attorney in fact for New Century. The assignment is dated December 19, 2011, and bears a notation that it was recorded December 30, 2011.

According to the complaint, the Morgan Stanley investment trust to which the deed of trust on plaintiff’s property was purportedly assigned on December 19, 2011, had a closing date (the date by which all loans and mortgages or trust deeds must be transferred to the investment pool) of January 27, 2007.

On August 20, 2012, according to the complaint, Western Progressive, LLC, recorded two documents: one substituting itself for Deutsche Bank as trustee, the other giving notice of a trustee’s sale. We take notice of a substitution of trustee, dated February 28, 2012, and recorded August 20, 2012, replacing Deutsche Bank with Western Progressive, LLC, as trustee on the deed of trust, and of a notice of trustee’s sale dated August 16, 2012, and recorded August 20, 2012.

A recorded trustee’s deed upon sale dated December 24, 2012, states that plaintiff’s Woodland Hills property was sold at public auction on September 14, 2012. The deed conveys the property from Western Progressive, LLC, as trustee, to the purchaser at auction, THR California LLC, a Delaware limited liability company.

Plaintiff’s second amended complaint, to which defendants demurred, pleaded a single count for quiet title against numerous defendants including New Century, Ocwen Loan Servicing, LLC, Western Progressive, LLC, Deutsche Bank, Morgan Stanley Mortgage Capital, Inc., and the Morgan Stanley investment trust. Plaintiff alleged the December 19, 2011, assignment of the deed of trust from New Century to the Morgan Stanley investment trust was void for two reasons: New Century’s assets had previously, in 2008, been transferred to a bankruptcy trustee; and the Morgan Stanley investment trust had closed to new
loans in 2007. (The demurrer, of course, does not admit the truth of this legal conclusion; we recite it here only to help explain how the substantive issues in this case were framed.) The superior court sustained defendants’ demurrer without leave to amend, concluding on several grounds that plaintiff could not state a cause of action for quiet title.

The Court of Appeal affirmed the judgment for defendants on their demurrer. The pleaded cause of action for quiet title failed fatally, the court held, because plaintiff did not allege she had tendered payment of her debt. The court went on to discuss the question, on which it had sought and received briefing, of whether plaintiff could, on the facts alleged, amend her complaint to plead a cause of action for wrongful foreclosure.

On the wrongful foreclosure question, the Court of Appeal concluded leave to amend was not warranted. Relying on Jenkins v. JPMorgan Chase Bank, N.A. (2013) 216 Cal.App.4th 497 (Jenkins), the court held plaintiff’s allegations of improprieties in the assignment of her deed of trust to Deutsche Bank were of no avail because, as an unrelated third party to that assignment, she was unaffected by such deficiencies and had no standing to enforce the terms of the agreements allegedly violated. The court acknowledged that plaintiff’s authority, Glaski v. Bank of America, supra, 218 Cal.App.4th 1079 (Glaski), conflicted with Jenkins on the standing issue, but the court agreed with the reasoning of Jenkins and declined to follow Glaski.

We granted plaintiff’s petition for review, limiting the issue to be briefed and argued to the following: “In an action for wrongful foreclosure on a deed of trust securing a home loan, does the borrower have standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void?”
DISCUSSION

I. Deeds of Trust and Nonjudicial Foreclosure

A deed of trust to real property acting as security for a loan typically has three parties: the trustor (borrower), the beneficiary (lender), and the trustee. “The trustee holds a power of sale. If the debtor defaults on the loan, the beneficiary may demand that the trustee conduct a nonjudicial foreclosure sale.” (Biancalana v. T.D. Service Co. (2013) 56 Cal.4th 807, 813.) The nonjudicial foreclosure system is designed to provide the lender-beneficiary with an inexpensive and efficient remedy against a defaulting borrower, while protecting the borrower from wrongful loss of the property and ensuring that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser. (Moeller v. Lien (1994) 25 Cal.App.4th 822, 830.)

The trustee starts the nonjudicial foreclosure process by recording a notice of default and election to sell. (Civ. Code, § 2924, subd. (a)(1).) After a three-month waiting period, and at least 20 days before the scheduled sale, the trustee may publish, post, and record a notice of sale. (§§ 2924, subd. (a)(2), 2924f, subd. (b).) If the sale is not postponed and the borrower does not exercise his or her rights of reinstatement or redemption, the property is sold at auction to the highest bidder. (§ 2924g, subd. (a); Jenkins, supra, 216 Cal.App.4th at p. 509; Moeller v. Lien, supra, 25 Cal.App.4th at pp. 830–831.) Generally speaking, the foreclosure sale extinguishes the borrower’s debt; the lender may recover no deficiency. (Code Civ. Proc., § 580d; Dreyfuss v. Union Bank of California (2000) 24 Cal.4th 400, 411.)

2 All further unspecified statutory references are to the Civil Code.
The trustee of a deed of trust is not a true trustee with fiduciary obligations, but acts merely as an agent for the borrower-truster and lender-beneficiary. (Biancalana v. T.D. Service Co., supra, 56 Cal.4th at p. 819; Vournas v. Fidelity Nat. Tit. Ins. Co. (1999) 73 Cal.App.4th 668, 677.) While it is the trustee who formally initiates the nonjudicial foreclosure, by recording first a notice of default and then a notice of sale, the trustee may take these steps only at the direction of the person or entity that currently holds the note and the beneficial interest under the deed of trust—the original beneficiary or its assignee—or that entity’s agent. (§ 2924, subd. (a)(1) [notice of default may be filed for record only by “[t]he trustee, mortgagee, or beneficiary”]; Kachlon v. Markowitz (2008) 168 Cal.App.4th 316, 334 [when borrower defaults on the debt, “the beneficiary may declare a default and make a demand on the trustee to commence foreclosure”]; Santens v. Los Angeles Finance Co. (1949) 91 Cal.App.2d 197, 202 [only a person entitled to enforce the note can foreclose on the deed of trust].)

Defendants emphasize, correctly, that a borrower can generally raise no objection to assignment of the note and deed of trust. A promissory note is a negotiable instrument the lender may sell without notice to the borrower. (Creative Ventures, LLC v. Jim Ward & Associates (2011) 195 Cal.App.4th 1430, 1445–1446.) The deed of trust, moreover, is inseparable from the note it secures, and follows it even without a separate assignment. (§ 2936; Cockerell v. Title Ins. & Trust Co. (1954) 42 Cal.2d 284, 291; U.S. v. Thornburg (9th Cir. 1996) 82 F.3d 886, 892.) In accordance with this general law, the note and deed of trust in this case provided for their possible assignment.

A deed of trust may thus be assigned one or multiple times over the life of the loan it secures. But if the borrower defaults on the loan, only the current beneficiary may direct the trustee to undertake the nonjudicial foreclosure process. “[O]nly the ‘true owner’ or ‘beneficial holder’ of a Deed of Trust can bring to
completion a nonjudicial foreclosure under California law.” (Barrionuevo v. Chase Bank, N.A. (N.D.Cal. 2012) 885 F.Supp.2d 964, 972; see Herrera v. Deutsche Bank National Trust Co. (2011) 196 Cal.App.4th 1366, 1378 [bank and reconveyance company failed to establish they were current beneficiary and trustee, respectively, and therefore failed to show they “had authority to conduct the foreclosure sale”]; cf. U.S. Bank Nat. Assn. v. Ibanez (Mass. 2011) 941 N.E.2d 40, 51 [under Mass. law, only the original mortgagee or its assignee may conduct nonjudicial foreclosure sale].)

In itself, the principle that only the entity currently entitled to enforce a debt may foreclose on the mortgage or deed of trust securing that debt is not, or at least should not be, controversial. It is a “straightforward application[] of well-established commercial and real-property law: a party cannot foreclose on a mortgage unless it is the mortgagee (or its agent).” (Levitin, The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title (2013) 63 Duke L.J. 637, 640.) Describing the copious litigation arising out of the recent foreclosure crisis, a pair of commentators explained: “While plenty of uncertainty existed, one concept clearly emerged from litigation during the 2008-2012 period: in order to foreclose a mortgage by judicial action, one had to have the right to enforce the debt that the mortgage secured. It is hard to imagine how this notion could be controversial.” (Whitman & Milner, Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note (2013) 66 Ark. L.Rev. 21, 23, fn. omitted.)

More subject to dispute is the question presented here: under what circumstances, if any, may the borrower challenge a nonjudicial foreclosure on the ground that the foreclosing party is not a valid assignee of the original lender? Put
another way, does the borrower have standing to challenge the validity of an assignment to which he or she was not a party? We proceed to that issue.

II. Borrower Standing to Challenge an Assignment as Void

A beneficiary or trustee under a deed of trust who conducts an illegal, fraudulent or willfully oppressive sale of property may be liable to the borrower for wrongful foreclosure. (Chavez v. Indymac Mortgage Services (2013) 219 Cal.App.4th 1052, 1062; Munger v. Moore (1970) 11 Cal.App.3d 1, 7.) A foreclosure initiated by one with no authority to do so is wrongful for purposes of

3 Somewhat confusingly, both the purported assignee’s authority to foreclose and the borrower’s ability to challenge that authority have been framed as questions of “standing.” (See, e.g., Levitin, The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title, supra, 63 Duke L.J. at p. 644 [discussing purported assignee’s “standing to foreclose”]; Jenkins, supra, 216 Cal.App.4th at p. 515 [borrower lacks “standing to enforce [assignment] agreements” to which he or she is not a party]; Bank of America Nat. Assn. v. Bassman FBT, LLC (Ill.App. Ct. 2012) 981 N.E.2d 1, 7 [“Each party contends that the other lacks standing.”].) We use the term here in the latter sense of a borrower’s legal authority to challenge the validity of an assignment.

4 It has been held that, at least when seeking to set aside the foreclosure sale, the plaintiff must also show prejudice and a tender of the amount of the secured indebtedness, or an excuse of tender. (Chavez v. Indymac Mortgage Services, supra, 219 Cal.App.4th at p. 1062.) Tender has been excused when, among other circumstances, the plaintiff alleges the foreclosure deed is facially void, as arguably is the case when the entity that initiated the sale lacked authority to do so. (Ibid.; In re Cedano (Bankr. 9th Cir. 2012) 470 B.R. 522, 529–530; Lester v. J.P. Morgan Chase Bank (N.D.Cal. 2013) 926 F.Supp.2d 1081, 1093; Barrionuevo v. Chase Bank, N.A., supra, 885 F.Supp.2d 964, 969–970.) Our review being limited to the standing question, we express no opinion as to whether plaintiff Yvanova must allege tender to state a cause of action for wrongful foreclosure under the circumstances of this case. Nor do we discuss potential remedies for a plaintiff in Yvanova’s circumstances; at oral argument, plaintiff’s counsel conceded she seeks only damages. As to prejudice, we do not address it as an element of wrongful foreclosure. We do, however, discuss whether plaintiff has suffered a cognizable injury for standing purposes.
such an action.  (*Barrionuevo v. Chase Bank, N.A., supra*, 885 F.Supp.2d at pp. 973–974; *Ohlendorf v. American Home Mortgage Servicing* (E.D.Cal. 2010) 279 F.R.D. 575, 582–583.) As explained in part I, *ante*, only the original beneficiary, its assignee or an agent of one of these has the authority to instruct the trustee to initiate and complete a nonjudicial foreclosure sale. The question is whether and when a wrongful foreclosure plaintiff may challenge the authority of one who claims it by assignment.

In *Glaski, supra*, 218 Cal.App.4th 1079, 1094–1095, the court held a borrower may base a wrongful foreclosure claim on allegations that the foreclosing party acted without authority because the assignment by which it purportedly became beneficiary under the deed of trust was not merely voidable but void. Before discussing *Glaski’s* holdings and rationale, we review the distinction between void and voidable transactions.

A void contract is without legal effect. (Rest.2d Contracts, § 7, com. a.) “It binds no one and is a mere nullity.” (*Little v. CFS Service Corp.* (1987) 188 Cal.App.3d 1354, 1362.) “Such a contract has no existence whatever. It has no legal entity for any purpose and neither action nor inaction of a party to it can validate it . . . .” (*Colby v. Title Ins. and Trust Co.* (1911) 160 Cal. 632, 644.) As we said of a fraudulent real property transfer in *First Nat. Bank of L. A. v. Maxwell* (1899) 123 Cal. 360, 371, “‘A void thing is as no thing.’”

A voidable transaction, in contrast, “is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.” (Rest.2d Contracts, § 7.) It may be declared void but is not void in itself. (*Little v. CFS Service Corp.*, *supra*, 188 Cal.App.3d at p. 1358.) Despite its defects, a voidable transaction, unlike a void one, is subject to ratification by the

In Glaski, the foreclosing entity purportedly acted for the current beneficiary, the trustee of a securitized mortgage investment trust. The plaintiff, seeking relief from the allegedly wrongful foreclosure, claimed his note and deed of trust had never been validly assigned to the securitized trust because the purported assignments were made after the trust’s closing date. (Glaski, supra, 218 Cal.App.4th at pp. 1082–1087.)

The Glaski court began its analysis of wrongful foreclosure by agreeing with a federal district court that such a cause of action could be made out “‘where a party alleged not to be the true beneficiary instructs the trustee to file a Notice of Default and initiate nonjudicial foreclosure.’” (Glaski, supra, 218 Cal.App.4th at p. 1094, quoting Barrionuevo v. Chase Bank, N.A., supra, 885 F.Supp.2d at p. 973.) But the wrongful foreclosure plaintiff, Glaski cautioned, must do more than assert a lack of authority to foreclose; the plaintiff must allege facts “show[ing] the defendant who invoked the power of sale was not the true beneficiary.” (Glaski, at p. 1094.)

Acknowledging that a borrower’s assertion that an assignment of the note and deed of trust is invalid raises the question of the borrower’s standing to

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5 The mortgage securitization process has been concisely described as follows: “To raise funds for new mortgages, a mortgage lender sells pools of mortgages into trusts created to receive the stream of interest and principal payments from the mortgage borrowers. The right to receive trust income is parceled into certificates and sold to investors, called certificateholders. The trustee hires a mortgage servicer to administer the mortgages by enforcing the mortgage terms and administering the payments. The terms of the securitization trusts as well as the rights, duties, and obligations of the trustee, seller, and servicer are set forth in a Pooling and Servicing Agreement (‘PSA’).” (BlackRock Financial Mgmt. v. Ambac Assur. Corp. (2d Cir. 2012) 673 F.3d 169, 173.)
challenge an assignment to which the borrower is not a party, the Glaski court cited several federal court decisions for the proposition that a borrower has standing to challenge such an assignment as void, though not as voidable. (Glaski, supra, 218 Cal.App.4th at pp. 1094–1095.) Two of these decisions, Culhane v. Aurora Loan Services of Nebraska (1st Cir. 2013) 708 F.3d 282 (Culhane) and Reinagel v. Deutsche Bank Nat. Trust Co. (5th Cir. 2013) 735 F.3d 220 (Reinagel),6 discussed standing at some length; we will examine them in detail in a moment.

Glaski adopted from the federal decisions and a California treatise the view that “a borrower can challenge an assignment of his or her note and deed of trust if the defect asserted would void the assignment” not merely render it voidable. (Glaski, supra, 218 Cal.App.4th at p. 1095.) Cases holding that a borrower may never challenge an assignment because the borrower was neither a party to nor a third party beneficiary of the assignment agreement “‘paint with too broad a brush’” by failing to distinguish between void and voidable agreements. (Ibid., quoting Culhane, supra, 708 F.3d at p. 290.)

The Glaski court went on to resolve the question of whether the plaintiff had pled a defect in the chain of assignments leading to the foreclosing party that would, if true, render one of the necessary assignments void rather than voidable. (Glaski, supra, 218 Cal.App.4th at p. 1095.) On this point, Glaski held allegations that the plaintiff’s note and deed of trust were purportedly transferred into the trust after the trust’s closing date were sufficient to plead a void assignment and hence to establish standing. (Glaski, at pp. 1096–1098.) This last holding of Glaski is not before us. On granting plaintiff’s petition for review, we limited the scope of

6 The version of Reinagel cited in Glaski, published at 722 F.3d 700, was amended on rehearing and superseded by Reinagel, supra, 735 F.3d 220.
our review to whether “the borrower [has] standing to challenge an assignment of the note and deed of trust on the basis of defects allegedly rendering the assignment void.” We did not include in our order the question of whether a postclosing date transfer into a New York securitized trust is void or merely voidable, and though the parties’ briefs address it, we express no opinion on the question here.

Returning to the question that is before us, we consider in more detail the authority Glaski relied on for its standing holding. In Culhane, a Massachusetts home loan borrower sought relief from her nonjudicial foreclosure on the ground that the assignment by which Aurora Loan Services of Nebraska (Aurora) claimed authority to foreclose—a transfer of the mortgage from Mortgage Electronic Registration Systems, Inc. (MERS),7 to Aurora—was void because MERS never properly held the mortgage. (Culhane, supra, 708 F.3d at pp. 286–288, 291.)

Before addressing the merits of the plaintiff’s allegations, the Culhane court considered Aurora’s contention the plaintiff lacked standing to challenge the assignment of her mortgage from MERS to Aurora. On this question, the court first concluded the plaintiff had a sufficient personal stake in the outcome, having shown a concrete and personalized injury resulting from the challenged assignment: “The action challenged here relates to Aurora’s right to foreclose by

7 As the Culhane court explained, MERS was formed by a consortium of residential mortgage lenders and investors to streamline the transfer of mortgage loans and thereby facilitate their securitization. A member lender may name MERS as mortgagee on a loan the member originates or owns; MERS acts solely as the lender’s “nominee,” having legal title but no beneficial interest in the loan. When a loan is assigned to another MERS member, MERS can execute the transfer by amending its electronic database. When the loan is assigned to a nonmember, MERS executes the assignment and ends its involvement. (Culhane, supra, 708 F.3d at p. 287.)
virtue of the assignment from MERS. The identified harm—the foreclosure—can be traced directly to Aurora’s exercise of the authority purportedly delegated by the assignment.” (Culhane, supra, 708 F.3d at pp. 289–290.)

Culhane next considered whether the prudential principle that a litigant should not be permitted to assert the rights and interest of another dictates that borrowers lack standing to challenge mortgage assignments as to which they are neither parties nor third party beneficiaries. (Culhane, supra, 708 F.3d at p. 290.) Two aspects of Massachusetts law on nonjudicial foreclosure persuaded the court such a broad rule is unwarranted. First, only the mortgagee (that is, the original lender or its assignee) may exercise the power of sale,8 and the borrower is entitled to relief from foreclosure by an unauthorized party. (Culhane, at p. 290.) Second, in a nonjudicial foreclosure the borrower has no direct opportunity to challenge the foreclosing entity’s authority in court. Without standing to sue for relief from a wrongful foreclosure, “a Massachusetts mortgagor would be deprived of a means to assert her legal protections . . . .” (Ibid.) These considerations led the Culhane court to conclude “a mortgagor has standing to challenge the assignment of a mortgage on her home to the extent that such a challenge is necessary to contest a foreclosing entity’s status qua mortgagee.” (Id. at p. 291.)

The court immediately cautioned that its holding was limited to allegations of a void transfer. If, for example, the assignor had no interest to assign or had no authority to make the particular assignment, “a challenge of this sort would be sufficient to refute an assignee’s status qua mortgagee.” (Culhane, supra, 708 F.3d at p. 291.) But where the alleged defect in an assignment would “render it

8 Massachusetts General Laws chapter 183, section 21, similarly to our Civil Code section 2924, provides that the power of sale in a mortgage may be exercised by “the mortgagee or his executors, administrators, successors or assigns.”
merely voidable at the election of one party but otherwise effective to pass legal title,” the borrower has no standing to challenge the assignment on that basis. (Ibid.)

In Reinagel, upon which the Glaski court also relied, the federal court held that under Texas law borrowers defending against a judicial foreclosure have standing to “‘challenge the chain of assignments by which a party claims a right to foreclose.’” (Reinagel, supra, 735 F.3d at p. 224.) Though Texas law does not allow a nonparty to a contract to enforce the contract unless he or she is an intended third-party beneficiary, the borrowers in this situation “are not attempting to enforce the terms of the instruments of assignment; to the contrary, they urge that the assignments are void ab initio.” (Id. at p. 225.)

Like Culhane, Reinagel distinguished between defects that render a transaction void and those that merely make it voidable at a party’s behest. “Though ‘the law is settled’ in Texas that an obligor cannot defend against an assignee’s efforts to enforce the obligation on a ground that merely renders the assignment voidable at the election of the assignor, Texas courts follow the majority rule that the obligor may defend ‘on any ground which renders the assignment void.’” (Reinagel, supra, 735 F.3d at p. 225.) The contrary rule would allow an institution to foreclose on a borrower’s property “though it is not a valid party to the deed of trust or promissory note . . . .” (Ibid.)

9 On the merits, the Culhane court rejected the plaintiff’s claim that MERS never properly held her mortgage, giving her standing to challenge the assignment from MERS to Aurora as void (Culhane, supra, 708 F.3d at p. 291); the court held MERS’s role as the lender’s nominee allowed it to hold and assign the mortgage under Massachusetts law. (Id. at pp. 291–293.)

10 The Reinagel court nonetheless rejected the plaintiffs’ claim of an invalid assignment after the closing date of a securitized trust, observing they could not enforce the terms of trust because they were not intended third-party beneficiaries.

(footnote continued on next page)
Jenkins, on which the Court of Appeal below relied, was decided close in time to Glaski (neither decision discusses the other) but reaches the opposite conclusion on standing. In Jenkins, the plaintiff sued to prevent a foreclosure sale that had not yet occurred, alleging the purported beneficiary who sought the sale held no security interest because a purported transfer of the loan into a securitized trust was made in violation of the pooling and servicing agreement that governed the investment trust. (Jenkins, supra, 216 Cal.App.4th at pp. 504–505.)

The appellate court held a demurrer to the plaintiff’s cause of action for declaratory relief was properly sustained for two reasons. First, Jenkins held California law did not permit a “preemptive judicial action[] to challenge the right, power, and authority of a foreclosing ‘beneficiary’ or beneficiary’s ‘agent’ to initiate and pursue foreclosure.” (Jenkins, supra, 216 Cal.App.4th at p. 511.) Relying primarily on Gomes v. Countrywide Home Loans, Inc. (2011) 192 Cal.App.4th 1149, Jenkins reasoned that such preemptive suits are inconsistent with California’s comprehensive statutory scheme for nonjudicial foreclosure; allowing such a lawsuit “‘would fundamentally undermine the nonjudicial nature of the process and introduce the possibility of lawsuits filed solely for the purpose of delaying valid foreclosures.’” (Jenkins, at p. 513, quoting Gomes at p. 1155.)

This aspect of Jenkins, disallowing the use of a lawsuit to preempt a nonjudicial foreclosure, is not within the scope of our review, which is limited to a

(footnote continued from previous page)

The court’s holding appears, however, to rest at least in part on its conclusion that a violation of the closing date “would not render the assignments void” but merely allow them to be avoided at the behest of a party or third-party beneficiary. (Reinagel, supra, 735 F.3d at p. 228.) As discussed above in relation to Glaski, that question is not within the scope of our review.
borrower’s standing to challenge an assignment in an action seeking remedies for wrongful foreclosure. As framed by the proceedings below, the concrete question in the present case is whether plaintiff should be permitted to amend her complaint to seek redress, in a wrongful foreclosure count, for the trustee’s sale that has already taken place. We do not address the distinct question of whether, or under what circumstances, a borrower may bring an action for injunctive or declaratory relief to prevent a foreclosure sale from going forward.

Second, as an alternative ground, Jenkins held a demurrer to the declaratory relief claim was proper because the plaintiff had failed to allege an actual controversy as required by Code of Civil Procedure section 1060. (Jenkins, supra, 216 Cal.App.4th at p. 513.) The plaintiff did not dispute that her loan could be assigned or that she had defaulted on it and remained in arrears. (Id. at p. 514.) Even if one of the assignments of the note and deed of trust was improper in some respect, the appellate court reasoned, “Jenkins is not the victim of such invalid transfer[] because her obligations under the note remained unchanged. Instead, the true victim may be an individual or entity that believes it has a present beneficial interest in the promissory note and may suffer the unauthorized loss of its interest in the note.” (Id. at p. 515.) In particular, the plaintiff could not complain about violations of the securitized trust’s transfer rules: “As an unrelated third party to the alleged securitization, and any other subsequent transfers of the beneficial interest under the promissory note, Jenkins lacks standing to enforce any agreements, including the investment trust’s pooling and servicing agreement, relating to such transactions.” (Ibid.)

For its conclusion on standing, Jenkins cited In re Correia (Bankr. 1st Cir. 2011) 452 B.R. 319. The borrowers in that case challenged a foreclosure on the ground that the assignment of their mortgage into a securitized trust had not been made in accordance with the trust’s pooling and servicing agreement (PSA). (Id.
at pp. 321–322.) The appellate court held the borrowers “lacked standing to challenge the mortgage’s chain of title under the PSA.” (Id. at p. 324.) Being neither parties nor third party beneficiaries of the pooling agreement, they could not complain of a failure to abide by its terms. (Ibid.)

Jenkins also cited Herrera v. Federal National Mortgage Assn. (2012) 205 Cal.App.4th 1495, which primarily addressed the merits of a foreclosure challenge, concluding the borrowers had adduced no facts on which they could allege an assignment from MERS to another beneficiary was invalid. (Id. at pp. 1502–1506.) In reaching the merits, the court did not explicitly discuss the plaintiffs’ standing to challenge the assignment. In a passage cited in Jenkins, however, the court observed that the plaintiffs, in order to state a wrongful foreclosure claim, needed to show prejudice, and they could not do so because the challenged assignment did not change their obligations under the note. (Herrera, at pp. 1507–1508.) Even if MERS lacked the authority to assign the deed of trust, “the true victims were not plaintiffs but the lender.” (Id. at p. 1508.)

On the narrow question before us—whether a wrongful foreclosure plaintiff may challenge an assignment to the foreclosing entity as void—we conclude Glaski provides a more logical answer than Jenkins. As explained in part I, ante, only the entity holding the beneficial interest under the deed of trust—the original lender, its assignee, or an agent of one of these—may instruct the trustee to commence and complete a nonjudicial foreclosure. (§ 2924, subd. (a)(1); Barrionuevo v. Chase Bank, N.A., supra, 885 F.Supp.2d at p. 972.) If a purported assignment necessary to the chain by which the foreclosing entity claims that power is absolutely void, meaning of no legal force or effect whatsoever (Colby v. Title Ins. and Trust Co., supra, 160 Cal. at p. 644; Rest.2d Contracts, § 7, com. a), the foreclosing entity has acted without legal authority by pursuing a trustee’s sale,
and such an unauthorized sale constitutes a wrongful foreclosure. (*Barrionuevo v. Chase Bank, N.A.*, at pp. 973–974.)

Like the Massachusetts borrowers considered in *Culhane*, whose mortgages contained a power of sale allowing for nonjudicial foreclosure, California borrowers whose loans are secured by a deed of trust with a power of sale may suffer foreclosure without judicial process and thus “would be deprived of a means to assert [their] legal protections” if not permitted to challenge the foreclosing entity’s authority through an action for wrongful foreclosure. (*Culhane, supra*, 708 F.3d at p. 290.) A borrower therefore “has standing to challenge the assignment of a mortgage on her home to the extent that such a challenge is necessary to contest a foreclosing entity’s status qua mortgagee” (*id. at p. 291*)—that is, as the current holder of the beneficial interest under the deed of trust. (Accord, *Wilson v. HSBC Mortgage Servs., Inc.* (1st Cir. 2014) 744 F.3d 1, 9 [“A homeowner in Massachusetts—even when not a party to or third party beneficiary of a mortgage assignment—has standing to challenge that assignment as void because success on the merits would prove the purported assignee is not, in fact, the mortgagee and therefore lacks any right to foreclose on the mortgage.”].)\(^{11}\)

*Jenkins* and other courts denying standing have done so partly out of concern with allowing a borrower to enforce terms of a transfer agreement to which the borrower was not a party. In general, California law does not give a party

\(^{11}\) We cite decisions on federal court standing only for their persuasive value in determining what California standing law should be, without any assumption that standing in the two systems is identical. The California Constitution does not impose the same “‘case-or-controversy’” limit on state courts’ jurisdiction as article III of the United States Constitution does on federal courts. (*Grosset v. Wenaas* (2008) 42 Cal.4th 1100, 1117, fn. 13.)
personal standing to assert rights or interests belonging solely to others.\(^\text{(12)}\) (See Code Civ. Proc., § 367 [action must be brought by or on behalf of the real party in interest]; Jasmine Networks, Inc. v. Superior Court (2009) 180 Cal.App.4th 980, 992.) When an assignment is merely voidable, the power to ratify or avoid the transaction lies solely with the parties to the assignment; the transaction is not void unless and until one of the parties takes steps to make it so. A borrower who challenges a foreclosure on the ground that an assignment to the foreclosing party bore defects rendering it voidable could thus be said to assert an interest belonging solely to the parties to the assignment rather than to herself.

When the plaintiff alleges a void assignment, however, the Jenkins court’s concern with enforcement of a third party’s interests is misplaced. Borrowers who challenge the foreclosing party’s authority on the grounds of a void assignment “are not attempting to enforce the terms of the instruments of assignment; to the contrary, they urge that the assignments are void ab initio.” (Reinagel, supra, 735 F.3d at p. 225; accord, Mruk v. Mortgage Elec. Registration Sys., Inc. (R.I. 2013) 82 A.3d 527, 536 [borrowers challenging an assignment as void “are not attempting to assert the rights of one of the contracting parties; instead, the homeowners are asserting their own rights not to have their homes unlawfully foreclosed upon”].)

Unlike a voidable transaction, a void one cannot be ratified or validated by the parties to it even if they so desire. (Colby v. Title Ins. and Trust Co., supra, 160 Cal. at p. 644; Aronoff v. Albanese, supra, 446 N.Y.S.2d at p. 370.) Parties to

\(^{12}\) In speaking of personal standing to sue, we set aside such doctrines as taxpayer standing to seek injunctive relief (see Code Civ. Proc., § 526a) and “‘public right/public duty’” standing to seek a writ of mandate (see Save the Plastic Bag Coalition v. City of Manhattan Beach (2011) 52 Cal.4th 155, 166).
a securitization or other transfer agreement may well wish to ratify the transfer agreement despite any defects, but no ratification is possible if the assignment is void ab initio. In seeking a finding that an assignment agreement was void, therefore, a plaintiff in Yvanova’s position is not asserting the interests of parties to the assignment; she is asserting her own interest in limiting foreclosure on her property to those with legal authority to order a foreclosure sale. This, then, is not a situation in which standing to sue is lacking because its “sole object . . . is to settle rights of third persons who are not parties.” (Golden Gate Bridge etc. Dist. v. Felt (1931) 214 Cal. 308, 316.)

Defendants argue a borrower who is in default on his or her loan suffers no prejudice from foreclosure by an unauthorized party, since the actual holder of the beneficial interest on the deed of trust could equally well have foreclosed on the property. As the Jenkins court put it, when an invalid transfer of a note and deed of trust leads to foreclosure by an unauthorized party, the “victim” is not the borrower, whose obligations under the note are unaffected by the transfer, but “an individual or entity that believes it has a present beneficial interest in the promissory note and may suffer the unauthorized loss of its interest in the note.” (Jenkins, supra, 216 Cal.App.4th at p. 515; see also Siliga v. Mortgage Electronic Registration Systems, Inc. (2013) 219 Cal.App.4th 75, 85 [borrowers had no standing to challenge assignment by MERS where they do not dispute they are in default and “there is no reason to believe . . . the original lender would have refrained from foreclosure in these circumstances”]; Fontenot v. Wells Fargo Bank, N.A., supra, 198 Cal.App.4th at p. 272 [wrongful foreclosure plaintiff could not show prejudice from allegedly invalid assignment by MERS as the assignment “merely substituted one creditor for another, without changing her obligations under the note”].)
In deciding the limited question on review, we are concerned only with prejudice in the sense of an injury sufficiently concrete and personal to provide standing, not with prejudice as a possible element of the wrongful foreclosure tort. (See fn. 4, ante.) As it relates to standing, we disagree with defendants’ analysis of prejudice from an illegal foreclosure. A foreclosed-upon borrower clearly meets the general standard for standing to sue by showing an invasion of his or her legally protected interests (Angelucci v. Century Supper Club (2007) 41 Cal.4th 160, 175)—the borrower has lost ownership to the home in an allegedly illegal trustee’s sale. (See Culhane, supra, 708 F.3d at p. 289 [foreclosed-upon borrower has sufficient personal stake in action against foreclosing entity to meet federal standing requirement].) Moreover, the bank or other entity that ordered the foreclosure would not have done so absent the allegedly void assignment. Thus “[t]he identified harm—the foreclosure—can be traced directly to [the foreclosing entity’s] exercise of the authority purportedly delegated by the assignment.” (Culhane, at p. 290.)

Nor is it correct that the borrower has no cognizable interest in the identity of the party enforcing his or her debt. Though the borrower is not entitled to object to an assignment of the promissory note, he or she is obligated to pay the debt, or suffer loss of the security, only to a person or entity that has actually been assigned the debt. (See Cockerell v. Title Ins. & Trust Co., supra, 42 Cal.2d at p. 292 [party claiming under an assignment must prove fact of assignment].) The borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the security.

It is no mere “procedural nicety,” from a contractual point of view, to insist that only those with authority to foreclose on a borrower be permitted to do so. (Levitin, The Paper Chase: Securitization, Foreclosure, and the Uncertainty of
Mortgage Title, supra, 63 Duke L.J. at p. 650.) “Such a view fundamentally misunderstands the mortgage contract. The mortgage contract is not simply an agreement that the home may be sold upon a default on the loan. Instead, it is an agreement that if the homeowner defaults on the loan, the mortgagee may sell the property pursuant to the requisite legal procedure.” (Ibid., italics added and omitted.)

The logic of defendants’ no-prejudice argument implies that anyone, even a stranger to the debt, could declare a default and order a trustee’s sale—and the borrower would be left with no recourse because, after all, he or she owed the debt to someone, though not to the foreclosing entity. This would be an “odd result” indeed. (Reinagel, supra, 735 F.3d at p. 225.) As a district court observed in rejecting the no-prejudice argument, “[b]anks are neither private attorneys general nor bounty hunters, armed with a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank’s deed of trust.” (Miller v. Homecomings Financial, LLC (S.D.Tex. 2012) 881 F.Supp.2d 825, 832.)

Defendants note correctly that a plaintiff in Yvanova’s position, having suffered an allegedly unauthorized nonjudicial foreclosure of her home, need not now fear another creditor coming forward to collect the debt. The home can only be foreclosed once, and the trustee’s sale extinguishes the debt. (Code Civ. Proc., § 580d; Dreyfuss v. Union Bank of California, supra, 24 Cal.4th at p. 411.) But as the Attorney General points out in her amicus curiae brief, a holding that anyone may foreclose on a defaulting home loan borrower would multiply the risk for homeowners that they might face a foreclosure at some point in the life of their loans. The possibility that multiple parties could each foreclose at some time, that is, increases the borrower’s overall risk of foreclosure.
Defendants suggest that to establish prejudice the plaintiff must allege and prove that the true beneficiary under the deed of trust would have refrained from foreclosing on the plaintiff’s property. Whatever merit this rule would have as to prejudice as an element of the wrongful foreclosure tort, it misstates the type of injury required for standing. A homeowner who has been foreclosed on by one with no right to do so has suffered an injurious invasion of his or her legal rights at the foreclosing entity’s hands. No more is required for standing to sue. *(Angelucci v. Century Supper Club, supra, 41 Cal.4th at p. 175.)*

Neither *Caulfield v. Sanders* (1861) 17 Cal. 569 nor *Seidell v. Tuxedo Land Co.* (1932) 216 Cal. 165, upon which defendants rely, holds or implies a home loan borrower may not challenge a foreclosure by alleging a void assignment. In the first of these cases, we held a debtor on a contract for printing and advertising could not defend against collection of the debt on the ground it had been assigned without proper consultation among the assigning partners and for nominal consideration: “It is of no consequence to the defendant, as it in no respect affects his liability, whether the transfer was made at one time or another, or with or without consideration, or by one or by all the members of the firm.” *(Caulfield v. Sanders, at p. 572.)* In the second, we held landowners seeking to enjoin a foreclosure on a deed of trust to their land could not do so by challenging the validity of an assignment of the promissory note the deed of trust secured. *(Seidell v. Tuxedo Land Co., at pp. 166, 169–170.)* We explained that the assignment was made by an agent of the beneficiary, and that despite the landowner’s claim the agent lacked authority for the assignment, the beneficiary “is not now complaining.” *(Id. at p. 170.)* Neither decision discusses the distinction between allegedly void and merely voidable, and neither negates a borrower’s ability to challenge an assignment of his or her debt as void.
For these reasons, we conclude *Glaski, supra*, 218 Cal.App.4th 1079, was correct to hold a wrongful foreclosure plaintiff has standing to claim the foreclosing entity’s purported authority to order a trustee’s sale was based on a void assignment of the note and deed of trust. *Jenkins, supra*, 216 Cal.App.4th 497, spoke too broadly in holding a borrower lacks standing to challenge an assignment of the note and deed of trust to which the borrower was neither a party nor a third party beneficiary. *Jenkins’s* rule may hold as to claimed defects that would make the assignment merely voidable, but not as to alleged defects rendering the assignment absolutely void.\(^{13}\)

In embracing *Glaski’s* rule that borrowers have standing to challenge assignments as void, but not as voidable, we join several courts around the nation. *(Wilson v. HSBC Mortgage Servs., Inc., supra, 744 F.3d at p. 9; Reinagel, supra, 735 F.3d at pp. 224–225; Woods v. Wells Fargo Bank, N.A. (1st Cir. 2013) 733 F.3d 349, 354; Culhane, supra, 708 F.3d at pp. 289–291; Miller v. Homecomings Financial, LLC, supra, 881 F.Supp.2d at pp. 831–832; Bank of America Nat. Assn. v. Bassman FBT, LLC, supra, 981 N.E.2d at pp. 7–8; Pike v. Deutsche Bank Nat. Trust Co. (N.H. 2015) 121 A.3d 279, 281; Mruk v. Mortgage Elec. Registration Sys., Inc., supra, 82 A.3d at pp. 534–536; Dernier v. Mortgage Network, Inc. (Vt. 2013) 87 A.3d 465, 473.)* Indeed, as commentators on the issue have stated: “[C]ourts generally permit challenges to assignments if such challenges would prove that the assignments were void as opposed to voidable.” *(Zacks & Zacks,*

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Not a Party: Challenging Mortgage Assignments (2014) 59 St. Louis U. L.J. 175, 180.)

That several federal courts applying California law have, largely in unreported decisions, agreed with Jenkins and declined to follow Glaski does not alter our conclusion. Neither Khan v. Recontrust Co. (N.D.Cal. 2015) 81 F.Supp.3d 867 nor Flores v. EMC Mort. Co. (E.D.Cal. 2014) 997 F.Supp.2d 1088 adds much to the discussion. In Khan, the district court found the borrower, as a nonparty to the pooling and servicing agreement, lacked standing to challenge a foreclosure on the basis of an unspecified flaw in the loan’s securitization; the court’s opinion does not discuss the distinction between a void assignment and a merely voidable one. (Khan v. Recontrust Co., supra, 81 F.Supp.3d at pp. 872–873.) In Flores, the district court, considering a wrongful foreclosure complaint that lacked sufficient clarity in its allegations including identification of the assignment or assignments challenged, the district court quoted and followed Jenkins’s reasoning on the borrower’s lack of standing to enforce an agreement to which he or she is not a party, without addressing the application of this reasoning to allegedly void assignments. (Flores v. EMC Mort. Co., supra, at pp. 1103–1105.)

Similarly, the unreported federal decisions applying California law largely fail to grapple with Glaski’s distinction between void and voidable assignments and tend merely to repeat Jenkins’s arguments that a borrower, as a nonparty to an assignment, may not enforce its terms and cannot show prejudice when in default on the loan, arguments we have found insufficient with regard to allegations of void assignments. While unreported federal court decisions may be cited in California as persuasive authority (Kan v. Guild Mortgage Co. (2014) 230 Cal.App.4th 736, 744, fn. 3), in this instance they lack persuasive value.
Defendants cite the decision in *Rajamin v. Deutsche Bank Nat. Trust Co.* (2nd Cir. 2014) 757 F.3d 79 (*Rajamin*), as a “rebuke” of *Glaski*. *Rajamin*’s expressed disagreement with *Glaski*, however, was on the question whether, under New York law, an assignment to a securitized trust made after the trust’s closing date is void or merely voidable. (*Rajamin*, at p. 90.) As explained earlier, that question is outside the scope of our review and we express no opinion as to *Glaski*’s correctness on the point.

The *Rajamin* court did, in an earlier discussion, state generally that borrowers lack standing to challenge an assignment as violative of the securitized trust’s pooling and servicing agreement (*Rajamin*, *supra*, 757 F.3d at pp. 85–86), but the court in that portion of its analysis did not distinguish between void and voidable assignments. In a later portion of its analysis, the court “assum[ed] that ‘standing exists for challenges that contend that the assigning party never possessed legal title,’ ” a defect the plaintiffs claimed made the assignments void (*id.* at p. 90), but concluded the plaintiffs had not properly alleged facts to support their voidness theory (*id.* at pp. 90–91).

Nor do *Kan v. Guild Mortgage Co.*, *supra*, 230 Cal.App.4th 736, and *Siliga v. Mortgage Electronic Registration Systems, Inc.*, *supra*, 219 Cal.App.4th 75 (*Siliga*), which defendants also cite, persuade us *Glaski* erred in finding borrower standing to challenge an assignment as void. The *Kan* court distinguished *Glaski* as involving a postsale wrongful foreclosure claim, as opposed to the preemptive suits involved in *Jenkins* and *Kan* itself. (*Kan*, at pp. 743–744.) On standing, the *Kan* court noted the federal criticism of *Glaski* and our grant of review in the present case, but found “no reason to wade into the issue of whether *Glaski* was correctly decided, because the opinion has no direct applicability to this preforeclosure action.” (*Kan*, at p. 745.)
Siliga, similarly, followed Jenkins in disapproving a preemptive lawsuit. (Siliga, supra, 219 Cal.App.4th at p. 82.) Without discussing Glaski, the Siliga court also held the borrower plaintiffs failed to show any prejudice from, and therefore lacked standing to challenge, the assignment of their deed of trust to the foreclosing entity. (Siliga, at p. 85.) As already explained, this prejudice analysis misses the mark in the wrongful foreclosure context. When a property has been sold at a trustee’s sale at the direction of an entity with no legal authority to do so, the borrower has suffered a cognizable injury.

In further support of a borrower’s standing to challenge the foreclosing party’s authority, plaintiff points to provisions of the recent legislation known as the California Homeowner Bill of Rights, enacted in 2012 and effective only after the trustee’s sale in this case. (See Leuras v. BAC Home Loans Servicing, LP (2013) 221 Cal.App.4th 49, 86, fn. 14.) Having concluded without reference to this legislation that borrowers do have standing to challenge an assignment as void, we need not decide whether the new provisions provide additional support for that holding.

14 Plaintiff cites newly added provisions that prohibit any entity from initiating a foreclosure process “unless it is the holder of the beneficial interest under the mortgage or deed of trust, the original trustee or the substituted trustee under the deed of trust, or the designated agent of the holder of the beneficial interest” (§ 2924, subd. (a)(6)); require the loan servicer to inform the borrower, before a notice of default is filed, of the borrower’s right to request copies of any assignments of the deed of trust “required to demonstrate the right of the mortgage servicer to foreclose” (§ 2923.55, subd. (b)(1)(B)(iii)); and require the servicer to ensure the documentation substantiates the right to foreclose (§ 2924.17, subd. (b)). The legislative history indicates the addition of these provisions was prompted in part by reports that nonjudicial foreclosure proceedings were being initiated on behalf of companies with no authority to foreclose. (See Sen. Rules Com., Conference Rep. on Sen. Bill No. 900 (2011–2012 Reg. Sess.) as amended June 27, 2012, p. 26.)
Plaintiff has alleged that her deed of trust was assigned to the Morgan Stanley investment trust in December 2011, several years after both the securitized trust’s closing date and New Century’s liquidation in bankruptcy, a defect plaintiff claims renders the assignment void. Beyond their general claim a borrower has no standing to challenge an assignment of the deed of trust, defendants make several arguments against allowing plaintiff to plead a cause of action for wrongful foreclosure based on this allegedly void assignment.

Principally, defendants argue the December 2011 assignment of the deed of trust to Deutsche Bank, as trustee for the investment trust, was merely “confirmatory” of a 2007 assignment that had been executed in blank (i.e., without designation of assignee) when the loan was added to the trust’s investment pool. The purpose of the 2011 recorded assignment, defendants assert, was merely to comply with a requirement in the trust’s pooling and servicing agreement that documents be recorded before foreclosures are initiated. An amicus curiae supporting defendants’ position asserts that the general practice in home loan securitization is to initially execute assignments of loans and mortgages or deeds of trust to the trustee in blank and not to record them; the mortgage or deed of trust is subsequently endorsed by the trustee and recorded if and when state law requires. (See Rajamin, supra, 757 F.3d at p. 91.) This claim, which goes not to the legal issue of a borrower’s standing to sue for wrongful foreclosure based on a void assignment, but rather to the factual question of when the assignment in this case was actually made, is outside the limited scope of our review. The same is true of defendants’ remaining factual claims, including that the text of the investment trust’s pooling and servicing agreement demonstrates plaintiff’s deed of trust was assigned to the trust before it closed.
CONCLUSION

We conclude a home loan borrower has standing to claim a nonjudicial foreclosure was wrongful because an assignment by which the foreclosing party purportedly took a beneficial interest in the deed of trust was not merely voidable but void, depriving the foreclosing party of any legitimate authority to order a trustee’s sale. The Court of Appeal took the opposite view and, solely on that basis, concluded plaintiff could not amend her operative complaint to plead a cause of action for wrongful foreclosure. We must therefore reverse the Court of Appeal’s judgment and allow that court to reconsider the question of an amendment to plead wrongful foreclosure. We express no opinion on whether plaintiff has alleged facts showing a void assignment, or on any other issue relevant to her ability to state a claim for wrongful foreclosure.
DISPOSITION

The judgment of the Court of Appeal is reversed and the matter is remanded to that court for further proceedings consistent with our opinion.

WERDEGAR, J.

WE CONCUR:

CANTIL-SAKAUYE, C. J.
CORRIGAN, J.
LIU, J.
CUÉLLAR, J.
KRUGER, J.
HUFFMAN, J.*

* Associate Justice of the Court of Appeal, Fourth Appellate District, Division One, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.
Name of Opinion: Yvanova v. New Century Mortgage Corporation

Unpublished Opinion
Original Appeal
Original Proceeding
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Unpublished Winning Cases

*Patton v. Diemer*, 35 Ohio St. 3d 68; 518 N.E.2d 941; 1988). A judgment rendered by a court lacking subject matter jurisdiction is void ab initio. Consequently, the authority to vacate a void judgment is not derived from Ohio R. Civ. P. 60(B), but rather constitutes an inherent power possessed by Ohio courts. I see no evidence to the contrary that this would apply to ALL courts.

“A party lacks standing to invoke the jurisdiction of a court unless he has, in an individual or a representative capacity, some real interest in the subject matter of the action. *Lebanon Correctional Institution v. Court of Common Pleas* 35 Ohio St.2d 176 (1973).

“A party lacks standing to invoke the jurisdiction of a court unless he has, in an individual or a representative capacity, some real interest in the subject matter of an action.” *Wells Fargo Bank, v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722 (2008). It went on to hold, “If plaintiff has offered no evidence that it owned the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law.”

(The following court case was unpublished and hidden from the public) *Wells Fargo, Litton Loan v. Farmer*, 867 N.Y.S.2d 21 (2008). “Wells Fargo does not own the mortgage loan… Therefore, the… matter is dismissed with prejudice.”

(The following court case was unpublished and hidden from the public) *Wells Fargo v. Reyes*, 867 N.Y.S.2d 21 (2008). Dismissed with prejudice, Fraud on Court & Sanctions. Wells Fargo never owned the Mortgage.

(The following court case was unpublished and hidden from the public) *Deutsche Bank v. Peabody*, 866 N.Y.S.2d 91 (2008). EquiFirst, when making the loan, violated Regulation Z of the Federal Truth in Lending Act 15 USC §1601 and the Fair Debt Collections Practices Act 15 USC §1692; "intentionally created fraud in the factum" and withheld from plaintiff... "vital information concerning said debt and all of the matrix involved in making the loan".

(The following court case was unpublished and hidden from the public) *Indymac Bank v. Boyd*, 880 N.Y.S.2d 224 (2009). To establish a prima facie case in an action to foreclose a mortgage, the plaintiff must establish the existence of the mortgage and the mortgage note. It is the law's policy to allow only an aggrieved person to bring a lawsuit... A want of "standing to sue," in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy, and a simple syllogism takes us from there to a "jurisdictional" dismissal:

(The following court case was unpublished and hidden from the public) *Deutsche Bank National Trust Co v.Torres*, NY Slip Op 51471U (2009). That "the dead cannot be sued" is a well established principle of the jurisprudence of this state plaintiff's second cause of action for declaratory relief is denied. To be entitled to a default judgment, the movant must establish, among other things, the existence of facts which give rise to viable claims against the defaulting defendants. “The doctrine of ultra vires is a most powerful weapon to keep private corporations within their legitimate spheres and punish them for violations of their corporate charters, and it probably is not invoked too often…” *Zinc Carbonate Co. v. First National Bank*, 103 Wis. 125,
79 NW 229 (1899). Also see: American Express Co. v. Citizens State Bank, 181 Wis. 172, 194 NW 427 (1923).

(The following court case was unpublished and hidden from the public) Indymac Bank v. Bethley, 880 N.Y.S.2d 873 (2009). The Court is concerned that there may be fraud on the part of plaintiff or at least malfeasance Plaintiff INDYMAC (Deutsche) and must have "standing" to bring this action.

(The following court case was unpublished and hidden from the public) Wells Fargo v. Reyes, 867 N.Y.S.2d 21 (2008). Case dismissed with prejudice, fraud on the Court and Sanctions because Wells Fargo never owned the Mortgage.

(The following court case was unpublished and hidden from the public) Wells Fargo, Litton Loan v. Farmer, 867 N.Y.S.2d 21 (2008). Wells Fargo does not own the mortgage loan. "Indeed, no more than (affidavits) is necessary to make the prima facie case." United States v. Kis, 658 F.2d, 526 (7th Cir. 1981).

(The following court case was unpublished and hidden from the public) Indymac Bank v. Bethley, 880 N.Y.S.2d 873 (2009). The Court is concerned that there may be fraud on the part of plaintiff or at least malfeasance Plaintiff INDYMAC (Deutsche) and must have "standing" to bring this action.


In determining whether the plaintiffs come before this Court with clean hands, the primary factor to be considered is whether the plaintiffs sought to mislead or deceive the other party, not whether that party relied upon plaintiffs' misrepresentations. Stachnik v. Winkel, 394 Mich. 375, 387; 230 N.W.2d 529, 534 (1975).

"Indeed, no more than (affidavits) is necessary to make the prima facie case." United States v. Kis, 658 F.2d, 526 (7th Cir. 1981). Cert Denied, 50 U.S. L.W. 2169; S. Ct. March 22, (1982).

“Silence can only be equated with fraud where there is a legal or moral duty to speak or when an inquiry left unanswered would be intentionally misleading.” U.S. v. Tweel, 550 F.2d 297 (1977).

“If any part of the consideration for a promise be illegal, or if there are several considerations for an un-severable promise one of which is illegal, the promise, whether written or oral, is wholly void, as it is impossible to say what part or which one of the considerations induced the promise.” Menominee River Co. v. Augustus Spies L & C Co., 147 Wis. 559 at p. 572; 132 NW 1118 (1912).


Mortgage Electronic Registration Systems, Inc. v. Chong, 824 N.Y.S.2d 764 (2006). MERS did not have standing as a real party in interest under the Rules to file the motion… The declaration
also failed to assert that MERS, FMC Capital LLC or Homecomings Financial, LLC held the Note.

*Landmark National Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158 (2009). “Kan. Stat. Ann. § 60-260(b) allows relief from a judgment based on mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence that could not have been timely discovered with due diligence; fraud or misrepresentation; a void judgment; a judgment that has been satisfied, released, discharged, or is no longer equitable; or any other reason justifying relief from the operation of the judgment. The relationship that the registry had to the bank was more akin to that of a straw man than to a party possessing all the rights given a buyer.” Also In September of 2008, A California Judge ruling against MERS concluded, “There is no evidence before the court as to who is the present owner of the Note. The holder of the Note must join in the motion.”


*DLJ Capital, Inc. v. Parsons*, CASE NO. 07-MA-17 (2008). A genuine issue of material fact existed as to whether or not appellee was the real party in interest as there was no evidence on the record of an assignment. Reversed for lack of standing.

*Everhome Mortgage Company v. Rowland*, No. 07AP-615 (Ohio 2008). Mortgagee was not the real party in interest pursuant to Rule 17(a). Lack of standing.

In *Lambert v. Firstar Bank*, 83 Ark. App. 259, 127 S.W. 3d 523 (2003), complying with the Statutory Foreclosure Act does not insulate a financial institution from liability and does not prevent a party from timely asserting any claims or defenses it may have concerning a mortgage foreclosure A.C.A. §18-50-116(d)(2) and violates honest services Title 18 Fraud. Notice to credit reporting agencies of overdue payments/foreclosure on a fraudulent debt is defamation of character and a whole separate fraud.

A Court of Appeals does not consider assertions of error that are unsupported by convincing legal authority or argument, unless it is apparent without further research that the argument is well taken. FRAUD is a point well taken! *Lambert Supra*.

No lawful consideration tendered by Original Lender and/or Subsequent Mortgage and/or Servicing Company to support the alleged debt. “A lawful consideration must exist and be tendered to support the Note” and demand under TILA full disclosure of any such consideration. *Anheuser-Busch Brewing Company v. Emma Mason*, 44 Minn. 318, 46 N.W. 558 (1890).

"It has been settled beyond controversy that a national bank, under Federal law, being limited in its power and capacity, cannot lend its credit by nor guarantee the debt of another. All such contracts being entered into by its officers are ultra vires and not binding upon the corporation." It is unlawful for banks to loan their deposits. *Howard & Foster Co. vs. Citizens National Bank*, 133 S.C. 202, 130 S.E. 758 (1926),

"Neither, as included in its powers not incidental to them, is it a part of a bank's business to lend its credit. If a bank could lend its credit as well as its money, it might, if it received compensation
and was careful to put its name only to solid paper, make a great deal more than any lawful interest on its money would amount to. If not careful, the power would be the mother of panics. Indeed, lending credit is the exact opposite of lending money, which is the real business of a bank, for while the latter creates a liability in favor of the bank, the former gives rise to a liability of the bank to another. *I Morse. Banks and Banking* 5th Ed. Sec 65; *Magee, Banks and Banking*, 3rd Ed. Sec 248. "American Express Co. v. Citizens State Bank," 181 Wis. 172, 194 NW 427 (1923). I demand under TILA full disclosure and proof to the contrary.

UCC § 2-106(4) "Cancellation" occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of "termination" except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

"There is no doubt but what the law is that a national bank cannot lend its credit or become an accommodation endorser." *National Bank of Commerce v. Atkinson*, 55 F. 465; (1893).

National Banks and/or subsidiary Mortgage companies cannot retain the note, "Among the assets of the state bank were two notes, secured by mortgage, which could not be transferred to the new bank as assets under the National Banking Laws. National Bank Act, Sect 28 & 56" *National Bank of Commerce v. Atkinson*, 8 Kan. App. 30, 54 P. 8 (1898).


It is not necessary for rescission of a contract that the party making the misrepresentation should have known that it was false, but recovery is allowed even though misrepresentation is innocently made, because it would be unjust to allow one who made false representations, even innocently, to retain the fruits of a bargain induced by such representations." *Whipp v. Iverson*, 43 Wis. 2d 166, 168 N.W.2d 201 (1969).


"Any conduct capable of being turned into a statement of fact is representation. There is no distinction between misrepresentations effected by words and misrepresentations effected by other acts." (The seller or lender) "He is liable, not upon any idea of benefit to himself, but because of his wrongful act and the consequent injury to the other party." *Leonard v. Springer*, 197 Ill 532. 64 NE 299 (1902).

"If any part of the consideration for a promise be illegal, or if there are several considerations for an un-severable promise one of which is illegal, the promise, whether written or oral, is wholly void, as it is impossible to say what part or which one of the considerations induced the promise." *Menominee River Co. v. Augustus Spies L & C Co.*, 147 Wis. 559 at p. 572; 132 NW 1118 (1912).

"The contract is void if it is only in part connected with the illegal transaction and the promise single or entire." *Guardian Agency v. Guardian Mut. Savings Bank*, 227 Wis. 550, 279 NW 79 (1938).

"It is not necessary for rescission of a contract that the party making the misrepresentation should have known that it was false, but recovery is allowed even though misrepresentation is innocently made, because it would be unjust to allow one who made false representations, even innocently,
to retain the fruits of a bargain induced by such representations.” Whipp v. Iverson, 43 Wis.2d 166, 279 N.W. 79 (1938).

In a Debtor's RICO action against its creditor, alleging that the creditor had collected an unlawful debt, an interest rate (where all loan charges were added together) that exceeded, in the language of the RICO Statute, "twice the enforceable rate." The Court found no reason to impose a requirement that the Plaintiff show that the Defendant had been convicted of collecting an unlawful debt, running a "loan sharking" operation. The debt included the fact that exaction of a usurious interest rate rendered the debt unlawful and that is all that is necessary to support the Civil RICO action. Durante Bros. & Sons, Inc. v. Flushing Nat 'l Bank, 755 F.2d 239 (1985). Cert. denied, 473 U.S. 906 (1985).

The Supreme Court found that the Plaintiff in a civil RICO action need establish only a criminal "violation" and not a criminal conviction. Further, the Court held that the Defendant need only have caused harm to the Plaintiff by the commission of a predicate offense in such a way as to constitute a "pattern of Racketeering activity." That is, the Plaintiff need not demonstrate that the Defendant is an organized crime figure, a mobster in the popular sense, or that the Plaintiff has suffered some type of special Racketeering injury; all that the Plaintiff must show is what the Statute specifically requires. The RICO Statute and the civil remedies for its violation are to be liberally construed to affect the congressional purpose as broadly formulated in the Statute. Sedima, SPRL v. Imrex Co., 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

A violation such as not responding to the TILA rescission letter, no matter how technical, it has no discretion with respect to liability. Holding that creditor failed to make material disclosures in connection with loan. Title 15 USCS §1605(c) Wright v. Mid-Penn Consumer Discount Co., 133 B.R. 704 (Pa. 1991).

Moore v. Mid-Penn Consumer Discount Co., Civil Action No. 90-6452 U.S. Dist. LEXIS 10324 (Pa. 1991). The court held that, under TILA's Regulation Z, 12 CFR §226.4 (a), a lender had to expressly notify a borrower that he had a choice of insurer.


Steinbrecher v. Mid-Penn Consumer Discount Co., 110 B.R. 155 (Pa. 1990). Mid-Penn violated TILA by not including in a finance charge the debtors' purchase of fire insurance on their home. The purchase of such insurance was a condition imposed by the company. The cost of the insurance was added to the amount financed and not to the finance charge.


Johnson-Allen v. Lomas and Nettleton Co., 67 B.R. 968 (Pa. 1986). Violation of Truth-in-Lending Act requirements, 15 USCS §1638(a)(10), required mortgagee to provide a statement containing a description of any security interest held or to be retained or acquired. **Failure to disclose.**


McCausland v. GMAC Mortgage Co., 63 B.R. 665, (Pa. 1986). GMAC failed to provide information which must be disclosed as defined in the TILA and Regulation Z, 12 CFR §226.1


Schultz v. Central Mortgage Co., 58 B.R. 945 (Pa. 1986). The court determined creditor mortgagor violated the Truth In Lending Act, 15 U.S.C.S. § 1638(a)(3), by its failure to include the cost of mortgage insurance in calculating the finance charge. The court found creditor failed to meet any of the conditions for excluding such costs and was liable for twice the amount of the true finance charge.

Solis v. Fidelity Consumer Discount Co., 58 B.R. 983 (Pa. 1986). Any misgivings creditors may have about the technical nature of the requirements should be addressed to Congress or the Federal Reserve Board, not the courts. Disclosure requirements for credit sales are governed by 15 U.S.C.S. § 1638 12 CFR § 226.8(b), (c). Disclosure requirements for consumer loans are governed by 15 U.S.C.S. § 1639 12 CFR § 226.8(b), (d). A violator of the disclosure requirements is held to a standard of strict liability. Therefore, a plaintiff need not show that the creditor in fact deceived him by making substandard disclosures. Since Transworld Systems Inc. have not cancelled the security interest and return all monies paid by Ms. Sherrie I. LaForce within the 20 days of receipt of the letter of rescission of October 7, 2009, the lenders named above are responsible for actual and statutory damages pursuant to 15 U.S.C. 1640(a).

Lewis v. Dodge, 620 F.Supp. 135, 138 (D. Conn. 1985);

Porter v. Mid-Penn Consumer Discount Co., 961 F.2d 1066 (3rd Cir. 1992). Porter filed an adversary proceeding against appellant under 15 U.S.C. §1635, for failure to honor her request to rescind a loan secured by a mortgage on her home.


New Maine Nat. Bank v. Gendron, 780 F.Supp. 52 (1992). The court held that defendants were entitled to rescind loan under strict liability terms of TILA because plaintiff violated TILA’s provisions.
TILA is a remedial statute, and, hence, is liberally construed in favor of borrowers. The remedial objectives of TILA are achieved by imposing a system of strict liability in favor of consumers when mandated disclosures have not been made. Thus, liability will flow from even minute deviations from the requirements of the statute and the regulations promulgated under it.

There was no dispute as to the material facts that established that the debt collector violated the FDCPA. The court granted the debtors' motion for summary judgment and held that (1) under 15 U.S.C. §1692(e), a debt collector could not use any false, deceptive, or misleading representation or means in connection with the collection of any debt; Unfair Debt Collection Practices Act.

Plaintiff was also misinformed regarding the effects of a rescission. The pertinent regulation states that "when a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge." 12 CFR §226.23(d) (1).

monetary damages for the plaintiffs pursuant to the Racketeer Influenced and Corrupt Organization Act, 18 USC §1961. (Count I); the Truth-in-Lending Act, 15 USC §1601.

Liability will flow from even minute deviations from requirements of the statute and Regulation Z. failure to accurately disclose the property in which a security interest was taken in connection with a consumer credit transaction involving the purchase of residential real estate in violation of 15 USC §1638(a)(9). and 12 CFR §226.18(m).

Defendant failed to accurately disclose the security interest taken to secure the loan.

Shroder v. Suburban Coastal Corp., 729 F.2d 1371, 1380 (11th Cir. 1984). disclosure statement violated. 12 CFR §226.6(a),

Wright v. Mid-Penn Consumer Discount Co., 133 B.R. 704 (E.D. Pa. 1991) Holding that creditor failed to make material disclosures in connection with one loan;

Cervantes v. General Electric Mortgage Co., 67 B.R. 816 (E.D. Pa. 1986). The court found that the TILA violations were governed by a strict liability standard, and defendant's failure to reveal in the disclosure statement the exact nature of the security interest violated the TILA.

Porter v. Mid-Penn Consumer Discount Co., 961 F.2d 1066 (3rd Cir. 1992). Adversary proceeding against appellant under 15 U.S.C. §1635, for failure to honor her request to rescind a loan secured by a mortgage on her home. She was entitled to the equitable relief of rescission and the statutory remedies under 15 U.S.C. §1640 for appellant's failure to rescind upon request.


Even technical violations will form the basis for liability. The mortgagors had a right to rescind the contract in accordance with 15 U.S.C. §1635(c). New Maine Nat. Bank v. Gendron, 780 F.Supp. 52 (D. Me. 1992). The court held that defendants were entitled to rescind loan under strict liability terms of TILA because plaintiff violated TILA's provisions.
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

VALERIE NORWOOD §
v. § A-09-CA-940-JRN
CHASE HOME FINANCE LLC §

REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE

TO: THE HONORABLE JAMES NOWLIN
UNITED STATES SENIOR JUDGE

Before the Court are: Defendant Chase Home Finance LLC’s Motion for Summary Judgment and Brief in Support Thereof (Clerk’s Doc. No. 19); Plaintiff’s Response to Defendant’s Motion for Summary Judgment (Clerk’s Doc. No. 20); and Defendant Chase Home Finance LLC’s Reply Brief in Support of its Motion for Summary Judgment (Clerk’s Doc. No. 22). The District Court referred all pending and future motions to the undersigned Magistrate Judge for report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(A), Federal Rule of Civil Procedure 72, and Rule 1(c) of Appendix C of the Local Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges. After reviewing the parties’ briefs, relevant case law, as well as the entire case file, the undersigned submits the following Report and Recommendation to the District Court.

I. Introduction

Valerie Norwood filed the instant suit seeking a declaratory judgment that Chase Home Finance (CHF) lacks the authority to foreclose on her mortgage. Norwood signed a Note and Deed of Trust with Chase Bank USA, N.A., and after she stopped making her monthly payments on the loan, CHF sought to enforce the lien on her home through its agents at Barrett Daffin Frappier
Turner & Engel, LLP. Norwood concedes that she defaulted on the loan, but argues that only Chase Bank, not CHF, has the authority to foreclose on her home. Whether the Court may grant summary judgment hinges on a single question: Does CHF have the requisite authority to enforce the lien?

II. Legal Standard

Summary judgment shall be rendered when the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 323–25 (1986); Washburn v. Harvey, 504 F.3d 505, 508 (5th Cir. 2007).

A dispute regarding a material fact is “genuine” if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When ruling on a motion for summary judgment, the court is required to view all inferences drawn from the factual record in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986); Washburn, 504 F.3d at 508. Further, a court “may not make credibility determinations or weigh the evidence” in ruling on a motion for summary judgment. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000); Anderson, 477 U.S. at 254–55.

Once the moving party has made an initial showing that there is no evidence to support the nonmoving party’s case, the party opposing the motion must come forward with competent summary judgment evidence of the existence of a genuine fact issue. Matsushita, 475 U.S. at 586. Mere conclusory allegations are not competent summary judgment evidence, and thus are insufficient to defeat a motion for summary judgment. Turner v. Baylor Richardson Med. Ctr., 476 F.3d 337, 343 (5th Cir. 2007). Unsubstantiated assertions, improbable inferences, and unsupported speculation are
not competent summary judgment evidence. *Id.* The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports his claim. *Adams v. Travelers Indem. Co. of Conn.*, 465 F.3d 156, 164 (5th Cir. 2006). Rule 56 does not impose a duty on the court to “sift through the record in search of evidence” to support the nonmovant's opposition to the motion for summary judgment. *Id.* “Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 248. Disputed fact issues which are “irrelevant and unnecessary” will not be considered by a court in ruling on a summary judgment motion. *Id.* If the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case and on which it will bear the burden of proof at trial, summary judgment must be granted. *Celotex*, 477 U.S. at 322–23.

**III. Factual Background**

The factual basis stems mainly from a series of documents: the original Note and Deed of Trust signed by Norwood and Chase Bank, the assignment of the Note from Chase Bank to CHF, the power of attorney signed by a bank executive, and the partnership resolution of Barrett Daffin Frappier Turner & Engel, LLP. There are no factual disputes regarding these transactions. The documents indicate that Norwood took out a home equity loan with Chase Bank, N.A. on May 17, 2007, for $83,500. She secured the loan with her home. After encountering financial difficulties, she stopped making her mortgage payments. On May 29, 2009, CHF sent Norwood a notice of default and intent to accelerate.

CHF, not Chase Bank, sent notice of the default and intent to accelerate because Chase Bank “assigned and transferred” its rights to CHF via a written assignment. The assignment purports to
be effective as of May 12, 2009, but it was signed before a notary on June 16, 2009. Norwood does not allege that the notice was deficient nor that she was not in default on her loan; however, she argues that the assignment from Chase Bank to CHF was ineffective and therefore CHF cannot enforce the mortgage.

The crux of Norwood’s argument centers on possession of the Note. Norwood argues that CHF has not demonstrated that it possessed the Note throughout the contested period. In response, CHF denies her allegations, yet it noticeably fails to offer any evidence regarding who possessed the Note during this period, or who currently possesses the Note. In a footnote in its brief, CHF alludes to the Note’s location by stating that “CHF provided [CHF’s counsel] with the original Note executed by Plaintiff, so that it could be made available for Plaintiff’s inspection.” CHF’s Reply at 3 n.1. This statement is unsworn, and there is no summary judgment evidence to support the statement. The Court is not under a duty to “sift through the record in search of evidence,” Adams, 465 F.3d at 164, and thus it will not draw a factual inference based on an unsworn footnote, particularly given that it must take all evidence in the light most favorable to Norwood.

Rather than provide summary evidence proving it had or presently has possession of the Note, CHF offers legal arguments to demonstrate that it is exempt from the possession requirement. Because CHF centers its motion on whether it is legally required to have possession of the Note before it may enforce it, the Court will focus its analysis on that question.

IV. Analysis

The law authorizing who can enforce a negotiable instrument remains unsettled. Statutorily, the Texas Business and Commercial Code sets out an apparently straightforward list of four types of entities that may enforce an instrument: (1) a holder of the instrument, (2) a nonholder in
possession of the instrument who has the rights of a holder, (3) a person not in possession of the instrument who is entitled to enforce it as a lost, destroyed, or stolen instrument, or (4) a person not in possession of an instrument from whom a prior payment on the instrument has been recovered. **Tex. Bus. & Com. Code §§ 3.301, 3.309, 3.418(d).**

These statutory provisions focus on possession. The Texas case law elaborating who is authorized to enforce a negotiable instrument, however, expands beyond the four provided categories in certain circumstances and departs from a possession requirement. For example, “even if a person is not the holder of a note, he may still be able to prove that he is the owner and entitled to enforce the note, foreclose on collateral and obtain a deficiency judgment under common-law principles of assignment.” *Leavings v. Mills*, 175 S.W.3d 301, 309 (Tex.App.—Houston [1st Dist.] 2004, no pet.). Common law principles of agency may also allow enforcement of a note by one not in possession. *Aquaduct, L.L.C. v. McElhenie*, 116 S.W.3d 438, 443 (Tex.App.—Houston [14th Dist.] 2003, no pet.). This led at least one court to state that “we cannot say a court would never uphold enforcement of a note by an owner who was not in possession of an original note.” *Nelson v. Regions Mortg., Inc.*, 170 S.W.3d 858, 864 (Tex.App.—Dallas 2005, no pet.).

Both sides rely most heavily upon this latter case. Yet *Nelson* contains a factual scenario so dissimilar from the instant case that it does not answer whether CHF must have possession to enforce the Note. Nelson purchased his son’s note from Regions to prevent foreclosure after Regions accelerated the maturity of the note and listed the property for foreclosure. *Id.* at 860. Nelson received an assignment of the mortgage and copies of the note and deed of trust. *Id.* His son stayed in the home, although he did not make payments to Nelson, and Nelson never attempted to enforce the note against his son. *Id.* Four years later, Nelson filed suit against Regions attempting to rescind
the transaction, arguing that because he never received possession of the original note, he was not legally entitled to enforce it, and thus he did not receive consideration and could rescind the contract. *Id.* at 863–64. The court disagreed, stating that while Nelson was not a “holder” of the note under the Texas Business & Commerce Code, Texas law provides that “even if a person is not the holder of a note, he may still be able to prove that he is the owner and entitled to enforce the note, foreclose on collateral and obtain a deficiency judgment under common-law principles of assignment.” *Id.* at 864. Importantly, the court did not address whether Nelson had the authority to enforce the note because he never attempted to do so. If Nelson had attempted to enforce the note, then the court would have a factual record on which to base its decision. By refusing to attempt to enforce the note, Nelson waived his argument that he could not have enforced it if he had tried.

CHF argues that *Nelson* grants a party lacking possession of a negotiable instrument the authority to enforce a note. CHF reads *Nelson* too expansively. The *Nelson* court relied on two cases creating exceptions to the rule requiring possession: (1) *Leavings*, where the court allowed an assignee to enforce a note, *Leavings*, 175 S.W.3d at 309; and (2) *Aquaduct*, where the court allowed an agent to enforce a note, *Aquaduct*, 116 S.W.3d at 443. Both of these courts justified their departure on common law principles, one on principles of assignment, the other on principles of agency. *Nelson*, 179 S.W.3d at 864. The *Nelson* court only concluded that if another common law principle applied, notably equity, a court *might* allow another exception from the possession requirement. *Id.* However, it did not need to reach that issue, and was instead noting only that Nelson could not rescind his acquisition of the note on the basis of his inability to enforce it without possession when he had not actually attempted to do so.
Other courts have offered examples of when a person is authorized to enforce a note when he is not a holder. These cases examine the authority of “owners” and people who have “acquired” a note by “transfer.” For example, CHF cites a Fifth Circuit case, applying Texas law, in which the court allowed an “owner” who was not a “holder” to enforce a note. *SRSB-IV, Ltd. v. Cont’l Sav. Ass’n*, No. 93-2377, 1994 WL 487237, at *4 (5th Cir. Aug. 18, 1994) (“Even if the FDIC is not the holder, it can enforce the note if it is the owner.”) (unpublished) (emphasis added). In the *SSRB-IV* case, however, the FDIC had possession of the note. *Id.* at 5. Even with possession, the FDIC did not automatically become an owner. *See id.* at 5 n.17 (“Mere possession of a note payable to the order of another is not sufficient evidence to prove that one is the holder or owner.”) (citing *RTC v. Camp*, 965 F.2d 25, 29 (5th Cir. 1992)). The court emphasizes the importance of possession: “A transferee of a note who has not yet acquired possession of it is not the holder of the note and therefore does not have a holder’s right to receive payment of the note.” *Id.* at 4 n.13 (emphasis added).

Even without the “holder’s right to receive payment,” an owner may enforce a note. *Id.* at 4. But this requires a party to “prove the transaction through which the note was acquired.” *Id.* (emphasis added). While these cases allow non-holders to enforce a note, they do not eliminate possession requirements. The rationale for the strict requirement of possession is to protect the obligor from being subject to multiple demands for payment on a single note. *See Camp*, 965 F.2d at 29 (explaining that mere possession is insufficient because a later party may demand payment). Without procedural safeguards, multiple parties could force the debtor to pay the note. If the original note is a prerequisite for enforcement, however, then a later party faces a significant hurdle before it may enforce the note. The exceptions listed above follow this reasoning. If the original note was
destroyed, then no one has possession and the debtor would not have to repay the loan. If the principal has possession of the note, then the agent has constructive possession and may enforce it. While the courts do not always require possession, the scenarios where they depart from the general rule relate to an alternative form of possession. The cases CHF relies on for its legal arguments stem from unique circumstances: in *Nelson*, a father purchased his son’s note and then never attempted to enforce it; in *SRSB-IV*, the Government took possession of the notes after the savings and loan crisis; and in *Aquaduct*, the assigned servicing company failed to forward the borrower’s payments to the lender. The instant case, however, does not involve a similar fact pattern.

At first glance, it might be argued that requiring proof of possession in this case would not further the policy behind requiring possession. CHF and Chase Bank are related entities, so the risk of duplicative payments seems slight. However, banks often sell blocks of notes to other banks. The close relationship between CHF and Chase Bank does not grant CHF clemency from demonstrating that it possesses the Note. Because CHF fails to present any evidence regarding possession of the Note, it is not a holder in due course. **Tex. Bus. & Com. Code § 3.201.**

CHF’s last ditch attempt at summary judgment is based on the assertion that even if it is not a holder, it was still authorized to enforce the Note as an assignee of Chase Bank. On October 2, 2008, Ralph Garardi,¹ a vice president of three entities—CHF, Chase Bank, and JP Morgan Bank—signed a limited power of attorney. This document grants the law firm Barrett Daffin Frappier Turner & Engel, LLP the authority to prosecute and dispose of loans, including Norwood’s Note. CHF argues that this assignment provides sufficient authorization for its attempt to foreclose

¹The Court did its best to decipher the vice president’s last name. CHF, perhaps realizing the difficulty in decrypting his name from either his signature, his printed name, or the notary public’s statement, simply refers to him as “a vice president.”
on Norwood’s home. This agreement may create an agency relationship between Chase Bank and the law firm, which could allow the law firm to enforce the Note as an agent of Chase as in Aquaduct, but it does not create an agency between Chase Bank and CHF, nor does CHF argue in its motion that it does so. Rather, CHF asserts that it owns Norwood’s Note. See Declaration of Thomas Reardon ¶ 6 (“Pursuant to an Assignment of Note and Deed of Trust, CHF is the current owner and mortgage servicer of the Note and Deed of Trust.”) (emphasis added). More to the point, the problem with Garardi’s declaration is that it fails to demonstrate—indeed the entirety of CHF’s summary judgment evidence fails to demonstrate—which, if any, of these entities possesses the Note. For our purposes, proof of agency is irrelevant without proof that the principal possesses the negotiable instrument.

Because CHF has not produced evidence when, if ever, it had possession of the Note, or that the instrument was lost, destroyed, or stolen, or that any other recognized exception to the requirement of possession exists, it has failed to carry its burden in demonstrating an entitlement to summary judgment. CHF denies Norwood’s contention that a physical transfer was not made from Chase Bank to CHF, but it does not affirmatively demonstrate that the Note was in fact transferred. CHF, as movant, bears the burden of demonstrating its entitlement to summary judgment. It has failed to carry this burden.

VI. Recommendation

For the reasons set forth above, the undersigned RECOMMENDS that the District Court DENY CHF’s Motion for Summary Judgment on Norwood’s claim for relief.
VII. Warnings

The parties may file objections to this Report and Recommendation. A party filing objections must specifically identify those findings or recommendations to which objections are being made. The District Court need not consider frivolous, conclusive, or general objections. Battles v. United States Parole Comm'n, 834 F.2d 419, 421 (5th Cir. 1987).

A party’s failure to file written objections to the proposed findings and recommendations contained in this Report within fourteen (14) days after the party is served with a copy of the Report shall bar that party from de novo review by the district court of the proposed findings and recommendations in the Report and, except upon grounds of plain error, shall bar the party from appellate review of unobjected-to proposed factual findings and legal conclusions accepted by the district court. See 28 U.S.C. § 636(b)(1)(C) (2006); Thomas v. Arn, 474 U.S. 140, 150–153 (1985); Lisson v. O’Hare, 326 F. App’x 259, 260 (5th Cir. 2009). To the extent that a party has not been served by the Clerk with this Report & Recommendation electronically pursuant to the CM/ECF procedures of this District, the Clerk is directed to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested.

SIGNED this 19th day of January, 2011.

[Signature]

ANDREW W. AUSTIN
UNITED STATES MAGISTRATE JUDGE
MEMORANDUM AND ORDER

This is a suit to prevent foreclosure of real property. Defendants Homecomings Financial, LLC (“Homecomings”), GMAC Mortgage, LLC (“GMAC”), and Bank of New York Mellon Trust Company (“Mellon”) have moved to dismiss for failure to state a claim (Dkt. 6). The motion is denied, although plaintiffs are directed to replead several of their causes of action as explained below.

Background

In April 2003 Plaintiff Joan Miller took out a home equity loan from lender Homecomings Financial Network, Inc. in the amount of $184,800, secured by a home equity

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1 These facts are taken from Plaintiffs’ Original Petition, and are assumed as true for purposes of this 12(b)(6) motion.

2 The record is not clear whether this entity is the same as the named defendant Homecomings Financial, LLC, or, assuming they are not the same, how they are related to one another, if at all.
lien duly filed in the county clerk’s office of Montgomery County, Texas. (Dkt. 1-1, Ex. B). On July 19, 2007, Joan Miller conveyed her interest in the property to plaintiff David Miller by special warranty deed, also duly recorded. (Dkt. 1-1, Ex. C). Subsequently, plaintiffs “ran in to financial hard times,” and on June 10, 2011 defendant Mellon obtained an order under Texas Rule of Civil Procedure 736 to proceed with a foreclosure sale under Texas Property Code § 51.002. (Dkt. 1-1, Ex. E). Earlier that year Mellon had received an assignment of a deed of trust on the property from “JPMorgan Chase Bank as Trustee, c/o Residential Funding Corporation,” also filed with the county clerk (Dkt. 1-1, Ex. G). However, there is no indication that the original lender, Homecomings Financial Network, Inc., ever assigned the note or security interest to Chase, Mellon, or anyone else.

Plaintiffs brought this suit in state court for declaratory judgment and an injunction preventing foreclosure on October 28, 2011. They argue that defendants lack the authority to foreclose because they cannot show proper chain of title of the note and security instrument. (Dkt. 1-1). The state court issued a temporary restraining order on December 1, 2011. Defendants removed the case to federal court on December 15, 2011 (Dkt. 1), and the parties have consented to magistrate judge jurisdiction. (Dkt. 13).

Standard of Review

Rule 12(b)(6) allows a court to dismiss a plaintiff’s complaint if it “fails to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Rule 12(b)(6) dismissals

3 The petition does not describe the relationship, if any, between the two named plaintiffs.
are proper only if the plaintiff fails to plead “enough facts to state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1960 (2009) (quoting *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007)). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 129 S. Ct. at 1949. It is the plaintiff’s responsibility to actually “plead specific facts, not mere conclusional allegations, to avoid dismissal.” *Kane Enters. v. MacGregor (USA), Inc.*, 322 F.3d 371, 374 (5th Cir. 2003).

When the plaintiff does plead such specific facts, the court must assume that they are true, *Twombly*, 550 U.S. at 555, and draw all reasonable inferences from them in the plaintiff’s favor. *Elsensohn v. Tammany Parish Sheriff’s Office*, 530 F.3d 368, 371–72 (5th Cir. 2008). As a general rule courts must “afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal.” *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002).

**Analysis**

Plaintiffs raise a number of theories of relief in their Original Petition, all of which are premised on the same basic contention: that none of these defendants have the authority to foreclose on plaintiffs’ property. The institutional defendants move for dismissal under Rule 12(b)(6) essentially on three grounds: (1) plaintiffs’ claim that defendants lack the
authority to foreclose is not based on a cognizable legal theory; (2) plaintiffs have no standing to contest the assignment by which Mellon claims the right to foreclose; and (3) plaintiffs' other state law causes of action are also insupportable as a matter of law.

1. **A Cognizable Legal Claim**


Debtors may challenge a foreclosure sale on various grounds: no default in payment by the debtor, *Slaughter v. Qualls*, 162 S.W. 2d 671, 675 (Tex. 1942); violation of the conditions and limitations of the trustee's power of sale under the deed of trust (*id.*); non-compliance with the statutory notices and other requirements for a non-judicial sale, *Lido Intern., Inc. v. Lambeth*, 611 S.W.2d 622 (Tex. 1981); and, most significantly for the present case, no “contractual standing” by the party seeking to foreclose, *Martin*, 2012 Tex. App.
Under the Texas Property Code, the only party with standing to initiate a non-judicial foreclosure sale is the mortgagee, or the mortgage servicer acting on behalf of the current mortgagee. Determining mortgagee status is easy when the party is named as grantee or beneficiary in the original deed of trust, mortgage, or contract lien. But factual disputes may arise when the party seeking to foreclose is not the original mortgagee, as is most often the case these days. In such cases the foreclosing party must be able to trace its rights under the security instrument back to the original mortgagee. *Leavings v. Mills*, 175 S.W.3d 301, 310 (Tex. App. – Houston [1st Dist.] 2004, no pet.).

One way the foreclosing party can do this is by showing that it is the “holder” of the note secured by the deed of trust. “A person can become the holder of an instrument when the instrument is issued to that person; or he can become a holder by negotiation.” *Leavings* 175 S.W.3d at 309. Negotiation is the “transfer of possession of the instrument . . . by a person other than the issuer to a person who thereby becomes a holder.” Tex. Bus. & Com.

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4 Mortgagee is defined as “(A) the grantee, beneficiary, owner, or holder of a security instrument; (B) a book entry system; or (C) if the security interest has been assigned of record, the last person to whom the security interest has been assigned of record.” § 51.0001(4). In other words, there are several ways by which an entity can acquire mortgagee status with the power to foreclose. In this case, Mellon asserts that it has the right to foreclose as the owner of deed of trust by virtue of an assignment from a third party.

5 A mortgage servicer is “the last person to whom the mortgagor has been instructed by the current mortgagee to send payment for the debt secured by the security instrument.” Tex. Prop. Code § 51.0001(3). A mortgagee may be the mortgage servicer. *Id.* A mortgage servicer may administer the foreclosure on behalf of the current mortgagee provided there is a servicing agreement disclosed to the debtor along with the other required notices. § 51.0025.
Code Ann. § 3.201. If the instrument is payable to an identified person, negotiation requires both transfer of possession and written indorsement by the holder. Id. at § 3.201(b). In order to enforce the note as a holder, a party who is not the original lender must prove “successive transfers of possession and indorsement” establishing an “unbroken chain of title.” Leavings, 175 S.W.3d at 310. Thus, with certain exceptions, possession of the note is typically required in order for a holder to enforce it. Millet v. JP Morgan Chase, N.A., 2012 WL 1029497 at *3 (W.D. Tex. 2012).

Standing to foreclose may also be shown by proof that the foreclosing party is the “owner” of the note under common law principles of assignment. Martin, 2012 Tex. App. LEXIS 4705 at *11. The owner of a note need not be a holder, because the two issues are separate and distinct. SMS Financial, LLC v. ABCO Homes, Inc., 167 F.3d 235, 239 (5th Cir. 1999). A person not identified in a note who is seeking to enforce it as the owner must prove the transfer by which he acquired the note. Leavings, 175 S.W. 3d at 309. Such a transfer may be proved by testimony as well as by documentation. Preismeyer v. Pacific Southwest Bank, F.S.B., 917 S.W.2d 937, 939 (Tex. App. – Austin 1996). In such cases a party is “required to prove the note and an unbroken chain of assignments transferring to him the right to enforce the note according to its terms.” Leavings, 175 S.W. 3d at 310. An unexplained gap in the chain of title may present a fact issue on the question of ownership.

6 The owner of a lost note may foreclose on property securing a debt, if there is evidence showing why the missing note cannot be produced and what its terms were. See O.J. & C. Co. v. Johnson, 1997 WL 167866 at *4 (Tex.App.– Houston [1st Dist.] 1997).

As a matter of Texas law, then, homeowners such as the Millers do have a cognizable cause of action7 to challenge a party’s right to foreclose on their property. In their motion, defendants ignore this well-established Texas precedent, and focus instead on recent federal court decisions dealing with a legal theory dismissively dubbed as “show me the note.” See, e.g., Wells v. BAC Home Loans Servicing, L.P., 2011 WL 2163987, at *2 (W.D. Tex. April 26, 2011). Those cases are correct, so far as they go. As discussed above, holding the original note is one way to establish the right to foreclose, but it is not the only way. See, e.g., Crear v. JP Morgan Chase Bank N.A., No. 10-10875, 2011 WL 1129574 (5th Cir. Mar. 28, 2011) (Texas Property Code allows a mortgage servicer to administer a deed of trust foreclosure without producing the original note). Defendants contend that plaintiffs’ petition is based on nothing more than the legal theory rejected by those cases.

While plaintiffs’ petition at one point (¶ 24) does suggest that possession of the original note is a necessary rather than a sufficient basis to foreclose, the balance of their pleading (¶¶ 19-23, 26) is broader than that. The crux of plaintiffs’ claim is that none of the defendants can show a proper chain of title to establish a right to foreclose under the Texas Property Code as mortgagee or mortgage servicer. It is undisputed that defendant Mellon,

7 Variously termed wrongful foreclosure, trespass to try title, or quiet title.
which obtained the order to proceed with the foreclosure, was neither the original lender or mortgagee. Instead, Mellon claims to be the current mortgagee by virtue of an assignment from a third party dated January 25, 2011. (Dkt. 1-1, Ex. G). Plaintiff claims (¶ 19) that there is no public record of any assignment or transfer to that third party (or anyone else) from the original mortgagee.

The traditional way to prove chain of title is via filings of record in the county clerk’s office. The Texas Property Code provides that “if the security interest has been assigned of record, the last person to whom the security interest has been assigned of record” is the mortgagee. § 51.001(4)(C). A Texas statute declares that any transfer or assignment of a recorded mortgage must also be recorded in the office of the county clerk:

To release, transfer, assign, or take another action relating to an instrument that is filed, registered, or recorded in the office of the county clerk, a person must file, register, or record another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded.

Texas Local Government Code § 192.007(a) (emphasis added.) No reported case has interpreted this 1989 law. The legal consequences of failing to comply with this statutory command are unclear, and the subject of current litigation. See Dallas County v. Merscorp, Inc., 11-CV-2733 (N.D. Tex.). In any event, the absence of such required filings is arguably some evidence that no such assignment or transfer has occurred, as the plaintiffs here contend.
It is true, as Mellon notes, that the last assignment of the deed of trust, from JP Morgan Chase to Mellon, was filed and recorded in the county clerk's office. But that is only one link in a chain of unknown length, and does nothing to bridge the remaining gap to the original lender. If Mellon's assignor had no valid rights in the note or deed of trust, then no such rights were conveyed to Mellon by the assignment.\(^8\) When a party seeking to foreclose fails to show an unbroken chain of title, then the homeowner may be entitled to an injunction against the threatened foreclosure. *Leavings v. Mills*, 175 S.W.3d 301, 310 (Tex. App. – Houston [1st Dist.], 2004, no pet.).

For these reasons, the Court finds that plaintiffs' petition states a claim for cognizable legal relief based on theories of wrongful foreclosure, trespass to try title and quiet title.

2. *Standing to Challenge Assignment of Security Interest*

Defendants argue alternatively that plaintiffs have no standing to challenge an assignment of the security interest because they were not parties to the assignment. In support of their argument defendants cite nine recent decisions from federal district courts in this state (six of which were issued by the same magistrate judge), which do indeed affirm that proposition.\(^9\) However, none of these decisions cite any Texas case law or statute, and

\(^8\) 6 Am. Jur.2d Assignments § 108 (assignee acquires no greater rights than were possessed by assignor). The Latin phrase is "Nemo dat quod non habet."


In fact, Texas has long followed the common law rule which permits a debtor to assert against an assignee any ground that renders the assignment void or invalid. *See Tri-Cities Const., Inc. v. American Nat. Ins. Co.*, 523 S.W. 2d 426, 430 (Tex. Civ. App. – Houston [1st Dist. 1975, no writ); *Glass v. Carpenter*, 330 S.W. 2d 530, 537 (Tex. Civ. App.– San Antonio 1959, writ ref’d n.r.e.). The *Glass* court endorsed as authoritative the following summary of the rule, which still appears in the current version of Corpus Juris Secundum:

> A debtor may, generally, assert against an assignee all equities or defenses existing against the assignor prior to notice of the assignment, *any matters rendering the assignment absolutely invalid or ineffective*, and the lack of plaintiff’s title or right to sue; but if the assignment is effective to pass legal title, the debtor cannot interpose defects or objections which merely render the assignment voidable at the election of the assignor or those standing in his or her shoes.

6A C.J.S. Assignments § 132 (database updated May 2012) (emphasis added). The current edition of American Jurisprudence states the same rule more succinctly, while adding the rationale:

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The obligor of an assigned claim may defend a suit brought by the assignee on any ground that renders the assignment void or invalid, but may not defend on any ground that renders the assignment voidable only, because the only interest or right that an obligor of a claim has in the assignment is to ensure that he or she will not have to pay the same claim twice.


Plaintiffs here do not assert these or any other “voidable” defenses to Mellon’s assignment. Instead, plaintiffs assert that, standing alone, this single assignment from a third party is ineffective to establish a right to foreclose, because it does not show a proper assignment of the original security instrument to the third party. Texas courts routinely allow a homeowner to challenge the chain of assignments by which a party claims the right to foreclose. See Martin v. New Century Mortgage Co., 2012 Tex. App. LEXIS 4705 (Tex. App Houston [1st Dist.] 2012); Austin v. Countrywide Home Loans, 261 S.W. 3d 68 (Tex. App.– Houston[1st Dist.] 2008); Leavings v. Mills, 175 S.W. 3d 301 (Tex. App.– Houston [1st Dist.] 2004, no pet.); Shepard v. Boone, 99 S.W. 3d 263 (Tex. App. – Eastland 2003); Priesmeyer v. Pacific Southwest Bank, F.S.B., 917 S.W. 2d 937 (Tex. App. – Austin 1996).

Defendants’ final (and weakest) argument is that homeowners like plaintiffs “will not be prejudiced” if the chain of assignments from original lender to foreclosing entity were immune to debtor challenge. After all, the argument apparently goes, the Millers owe the money to somebody. In truth, the potential prejudice is both plain and severe – foreclosure by the wrong entity does not discharge the homeowner’s debt, and leaves them vulnerable to another action on the same note by the true creditor. Banks are neither private attorneys general nor bounty hunters, armed with a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank’s deed of trust. MasterCard has no right to sue for debts rung up on a Visa card, and that remains true even if MasterCard has been assigned the rights of another third party like American Express. Unless and until a complete chain of transactions back to the original lender is shown, MasterCard remains a stranger to the original transaction with no claim against the debtor. And that is a fair description of this case in its present posture.

In sum, a standing issue is lurking here, but only as to the defendants, not the plaintiffs. The court concludes that under Texas law homeowners have legal standing to
challenge the validity or effectiveness of any assignment or chain of assignments under which a party claims the right to foreclose on their property. Accordingly, plaintiffs have properly stated claims for declaratory and injunctive relief based on wrongful foreclosure, trespass to try title and quiet title.

3. Other claims

Plaintiffs' state court petition includes a variety of other causes of action, all more or less centered upon the threatened foreclosure. These include breach of contract, tortious interference with existing contract, violations of the Texas Deceptive Trade Practices Act, statutory fraud/fraud in real estate, and violation of the federal Fair Debt Collection Practices Act. Plaintiffs have requested the opportunity to replead these claims in accordance with the federal rules. In light of the court's foregoing ruling, it may well be that some or all of these claims are now superfluous and need not be pursued. Rather than engage in an extended and possibly futile analysis of these vaguely pleaded claims, the court will simply order the plaintiffs to replead any of these claims they still wish to pursue, paying careful attention to Rule 11 of the Federal Rules of Civil Procedure as well as the substantive elements of these state and federal causes of action.

Conclusion

For the foregoing reasons, defendants' motion to dismiss is denied. However, if plaintiffs intend to seek relief based on any claims other than wrongful foreclosure, trespass to try title and quiet title, they are directed to file an amended complaint asserting such claims.
on or before September 7, 2012.

Signed at Houston, Texas on August 8, 2012.

Stephen Wm. Smith
United States Magistrate Judge
In The

Fourteenth Court of Appeals

NO. 14-10-00090-CV

MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., AS NOMINEE FOR
GREENSPoint FUNDING, Appellant

V.

NANCy GROVES, Appellee

On Appeal from the 334th District Court
Harris County, Texas
Trial Court Cause No. 2009-29112

MEMORANDUM OPINION

Nancy Groves sued Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Greenspoint Funding, to invalidate a deed of trust securing MERS’s alleged lien on Groves’s property. The trial court entered a default judgment against MERS, which then filed this restricted appeal. We affirm.

BACKGROUND

Groves filed her original petition against MERS on May 8, 2009. She alleged that she owns a certain tract of land subject to a lien secured by a deed of trust “accepted and recorded” by MERS. She further alleged that the deed of trust is invalid and asked the trial court to remove it and quiet title in Groves. MERS was served with process but failed to file an answer, and Groves filed a motion for default judgment. The trial court signed a default judgment against MERS stating that (1) Groves owns the property in question; (2) the deed of trust is “void and of no force or effect;” and (3) the deed of trust be removed from the property title.

MERS filed a timely notice of restricted appeal, arguing that (1) “Groves failed to properly state a cause of action and such failure is plain on the face of Groves’s petition;” and (2) “no justiciable controversy is alleged in Groves’s petition.”

ANALYSIS

A restricted appeal is available when (1) it is filed within six months after the trial court signed
A restricted appeal is available when (1) it is filed within six months after the trial court signed the judgment; (2) by a party to the suit; (3) who, either in person or through counsel, did not participate at trial and did not timely file any post-judgment motions or requests for findings of fact and conclusions of law; and (4) error is apparent from the face of the record. Tex. R. App. P. 26.1(c), 30; Alexander v. Lynda’s Boutique, 134 S.W.3d 845, 848 (Tex. 2004). The face of the record consists of all papers on file in the appeal. Osteen v. Osteen, 38 S.W.3d 809, 813 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

MERS, a party to this suit, did not participate in the trial court and did not file any post-judgment motion or request for findings of fact or conclusions of law. MERS filed its notice of restricted appeal on January 26, 2010, less than six months after the trial court signed the default judgment on September 25, 2009. Accordingly, the only issue in this restricted appeal is whether error is plain on the record’s face. See Tex. R. App. P. 26.1(c), 30; Alexander, 134 S.W.3d at 848.

I. Groves’s Pleadings

MERS argues in its first issue that error is plain on the record’s face because Groves’s pleading does not properly raise a claim for which the trial court could grant relief. According to MERS, Groves’s pleading does not raise a viable claim because Groves (1) failed to base her claim on the superiority of her own title to the property; and (2) requested only declaratory relief under the Declaratory Judgment Act.

Groves stated in her petition:

Nancy Groves, Plaintiff, petitions the court pursuant to the Declaratory Judgment Act . . . for a declaration of the invalidity of certain documents and claim held by the Defendant, [MERS], in order to quiet title to the property in which Plaintiff has an interest, and for cause of action shows:

*                                  *

3. Plaintiff’s Interest in Property. The plaintiff is the owner of a certain tract of land located in Harris County, Texas, as shown in the Assessment Lien Deed recorded under document number V230924 in the official Public records of Tarrant County, Texas, and more particularly described as Lot Thirteen (13), in Block Two (2), of Summerwood, Section 4, Seven Oaks Village, an addition in Harris County, Texas, according to the map or plat thereof recorded in Film Code No. 388 of the Map Records of Harris, County, Texas.

*                                  *

5. Invalidity of Defendant’s Claim. The Deed of Trust under which the Defendant or the Lender or Lender’s assigns asserts an interest that interferes with Plaintiff’s title, although appearing valid on its face, is in fact invalid and of no force or effect. The Plaintiff will show that Defendant nor the Lender’s assigns is not the holder of the original Real Estate Lien note that is secured by the Deed of Trust.

Groves also requested “other and further relief for which Plaintiff may be justly entitled” based on
allegations that (1) she owns the property in question; (2) MERS accepted and recorded a deed of trust securing an alleged lien on the property; and (3) the deed of trust “is in fact invalid and of no force or effect.”

The trial court’s judgment states:

[T]he court Orders and Adjudges, that [Groves] is the owner of [the property].
The court further Orders and Adjudges that the Deed of Trust filed is void and has no force or effect.
The court further orders the deed of trust removed from the title to the property made the subject of this litigation.

A. Strength of Title

MERS first argues that the judgment was in error because Groves pleaded “a quiet title (or trespass-to-try-title) claim” but did not “base her claim solely on the strength of her own title.” MERS argues that suits to quiet title must be based on the strength of the claimant’s own title, rather than the weakness of the adverse claimant’s title. See, e.g., Fricks v. Hancock, 45 S.W.3d 322, 327 (Tex. App.—Corpus Christi 2001, no pet.). Resolution of this contention requires consideration of the different types of claims that have been characterized as suits to quiet title. The case law is not entirely consistent on this issue.

A suit to quiet title is equitable in nature, and the principal issue in such suits is “‘the existence of a cloud on the title that equity will remove.’” Florey v. Estate of McConnell, 212 S.W.3d 439, 448 (Tex. App.—Austin 2006, pet. denied) (quoting Bell v. Ott, 606 S.W.2d 942, 952 (Tex. Civ. App.—Waco 1980, writ ref’d n.r.e.)). A “cloud” on legal title includes any deed, contract, judgment lien or other instrument, not void on its face, that purports to convey an interest in or makes any charge upon the land of the true owner, the invalidity of which would require proof. Wright v. Matthews, 26 S.W.3d 575, 578 (Tex. App.—Beaumont 2000, pet. denied). A suit to quiet title “‘enable[s] the holder of the feeblest equity to remove from his way to legal title any unlawful hindrance having the appearance of better right.’” Florey, 212 S.W.3d at 448 (quoting Thomson v. Locke, 1 S.W.112, 115 (Tex. 1886)).

Courts have used the term “suit to quiet title” to refer to legal disputes regarding (1) title to and possession of real property; and (2) the validity of other “clouds” on an undisputed owner’s title to real property. Compare Alkas v. United Sav. Ass’n of Tex., Inc., 672 S.W.2d 852, 855–56 (Tex. App.—Corpus Christi 1984, writ ref’d n.r.e.) (suit to adjudicate ownership of property to determine whether creditors of original owner retained interest in property purportedly conveyed to new owner was action “to quiet title”), with Sw. Guar. Trust Co. v. Hardy Rd. 13.4 Joint Venture, 981 S.W.2d 951, 956–57 (Tex. App.—Houston [1st Dist.] 1998, pet. denied) (undisputed property
owner’s action to invalidate lien and deed of trust securing lien constituted suit “to quiet title”); see also Florey, 212 S.W.3d at 449 (distinguishing between “suits to quiet title that are equivalent to trespass-to-try-title actions” and suits to quiet title involving interests that only “indirectly impact” title to and possession of real property).

The first type of claim, which involves title to and possession of real property, is essentially “the equivalent to [a] trespass-to-try-title action[].” See Florey, 212 S.W.3d at 449; see also Sani v. Powell, 153 S.W.3d 736, 746 (Tex. App.—Dallas 2005, pet. denied) (quiet title claim involving allegedly invalid tax sale of property characterized as trespass to try title action). “A trespass to try title action is the method of determining title to lands, tenements, or other real property.” Tex. Prop. Code Ann. § 22.001 (Vernon 2000). A trespass to try title action “is typically used to clear problems in chains of title or to recover possession of land unlawfully withheld from a rightful owner.” See Martin v. Amerman, 133 S.W.3d 262, 265 (Tex. 2004), superseded by statute, Tex. Civ. Prac. & Rem. Code Ann. § 37.004 (Vernon 2008) (reversing Martin’s holding that relief under the Declaratory Judgment Act was unavailable for boundary dispute). It is the exclusive remedy by which to resolve competing claims to property. Jordan v. Bustamante, 158 S.W.3d 29, 34 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). Courts require claimants bringing this type of “suit to quiet title” to base their claims on the strength of their own title. See Kennedy Con., Inc. v. Forman, 316 S.W.3d 129, 135 (Tex. App.—Houston [14th Dist.] 2010, no pet.); Alkas, 672 S.W.2d at 857. To recover, a claimant must establish a prima facie right of title by proving one of the following: (1) a regular chain of conveyances from the sovereign; (2) a superior title out of a common source; (3) title by limitations; or (4) prior possession, which has not been abandoned. Kennedy Con., Inc., 316 S.W.3d at 135.

The second type of claim, which involves other “clouds” on an undisputed owner’s title to real property, challenges an adverse interest that impacts title and possession only indirectly. See Florey, 212 S.W.3d at 449; see also Max Duncan Family Inv., Ltd. v. NTFN Inc., 267 S.W.3d 447, 453–54 (Tex. App.—Dallas 2008, pet. denied) (undisputed property owner’s suit to invalidate promissory note and lien securing note “involve[d] more than just title and possession of real property”); Cadle Co. v. Ortiz, 227 S.W.3d 831, 837–38 (Tex. App.—Corpus Christi 2007, pet. denied) (undisputed property owner’s post-foreclosure suit to invalidate mechanic’s lien distinguished from trespass to try title action); Sw. Guar. Trust Co., 981 S.W.2d at 957 (undisputed property owner’s action to declare lien invalid was “really one to quiet title”). A claim is sufficiently adverse if its assertion would cast a cloud on the owner’s enjoyment of the property. See Katz v. Rodriguez, 563 S.W.2d 627, 629 (Tex. Civ. App.—Corpus Christi 1977, writ ref’d n.r.e.). To remove such a cloud, a plaintiff must “allege right, title, or ownership in herself with sufficient certainty to enable the court to see she has a right of ownership that will warrant judicial interference.” Wright, 26 S.W.3d at 578.
MERS does not dispute that Groves holds title to the property subject to the deed of trust. Groves does not dispute that the deed of trust securing the lien belongs to MERS. Groves’s claim that the deed is invalid does not directly implicate any issues to be resolved by a trespass to try title suit. See Tex. Prop. Code Ann. § 22.001 (Vernon 2000) (“A trespass to try title action is the method of determining title to lands, tenements, or other real property.”); Martin, 133 S.W.3d at 265 (trespass to try title statute is “typically used to clear problems in chains of title or to recover possession of land unlawfully withheld from a rightful owner”); see also Deutsche Bank Nat’l Trust Co. v. Stockdick Land Co., No. 14-09-00617-CV, 2011 WL 321742, at *10 (Tex. App.—Houston [14th Dist.] Feb. 3, 2011, no pet.) (“If the Bank succeeds in its arguments . . . then the Property is subject to the Bank’s lien. If not, then the Property is not subject to the lien. In any event, title to the Property or to the liens is not in question . . . . [The Bank] is not required to pursue a trespass-to-try-title action.”). Therefore, Groves’s claim is not in the nature of a trespass to try title action and she was not required to base her claim upon the strength of her own title.

Groves alleged in her pleading that she owns the property by virtue of her recorded deed. This satisfies the requirement that she “allege right, title, or ownership in herself with sufficient certainty to enable the court to see she has a right of ownership that will warrant judicial interference” in the issue of the deed of trust’s validity. Wright, 26 S.W.3d 575. Therefore, Groves’s pleadings do not establish error on the face of the record.

B. Relief under Declaratory Judgment Act

MERS alternatively argues that “the trespass-to-try-title statutes [are] Groves’s sole remedy” and complains that Groves “did not raise a cause of action under those statutes” because she requested only declaratory relief under the Declaratory Judgment Act. MERS bases its argument on Martin v. Amerman, 133 S.W.3d at 267–68. The holding in Martin rested upon the court’s characterization of section 22.001 of the Texas Property Code as the exclusive remedy for trespass to try title actions. See id.

We need not decide whether Martin precludes Groves’s request for declaratory relief under the Declaratory Judgment Act in this case.Groves requested relief under the Declaratory Judgment Act, as well as “other and further relief to which [she] may be justly entitled.” The trial court’s judgment does not indicate that it granted her request to “quiet title” exclusively under the Declaratory Judgment Act. Accordingly, no error appears on the face of this record. See Tex. R. App. P. 26.1(c), 30; Alexander, 134 S.W.3d at 848.

We overrule MERS’s first issue.

II. Justiciable Controversy

MERS argues in its second issue that the trial court lacked jurisdiction over the action because
Groves “failed to allege a justiciable controversy under the Declaratory Judgment Act.”

A justiciable controversy between the parties must exist at every stage of the legal proceedings. *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex. 2001). We cannot decide moot controversies. *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex. 1999). “In order to maintain a suit to quiet title, there must be an assertion by the defendant of a claim to some interest adverse to plaintiff’s title; and the claim must be one that, if enforced, would interfere with the plaintiff’s enjoyment of the property.” *Mauro v. Lavlies*, 386 S.W.2d 825, 826–27 (Tex. Civ. App.—Beaumont 1964, no writ) (internal quotation omitted) (no justiciable controversy existed because the judgments defendants obtained against plaintiffs asserted no claims against plaintiffs’ property and defendants made no attempt to create a lien upon property or to have property sold to satisfy judgments).

Groves alleged in her petition that MERS’s deed of trust “purported to create a lien for security purposes on Plaintiff’s property as described.” This alleged lien constitutes an adverse interest to Groves’s title, which, if enforced, would interfere with her enjoyment of the property. See id. Therefore, a justiciable controversy existed, and the trial court had subject matter jurisdiction over the case. See *Williams*, 52 S.W.3d at 184; *Mauro*, 386 S.W.2d at 826–27.

We overrule MERS’s second issue.

CONCLUSION

Having overruled both of MERS’s issues on appeal, we affirm the trial court’s judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Brown, Boyce, and Jamison.


[2] Even assuming for argument’s sake that Groves’s suit is properly characterized as a trespass to try title suit, the rule that a claimant in such an action must base her claim on the superiority of her own title concerns Groves’s burden of proof. See *Kennedy Con., Inc.*, 316 S.W.3d at 135 (“To recover [in trespass to try title action], Forman must establish a prima facie right of title by proving [strength of Forman’s own title by one of four ways].”) (emphasis added). Any
alleged error relating to this issue would be one of proof and is not apparent from Groves’s petition or on the face of this record. See Tex. R. App. P. 26.1(c), 30; Alexander, 134 S.W.3d at 848.

[3] Although Martin addressed exclusivity of relief under the Texas Property Code for trespass to try title claims, courts of appeals are split on whether exclusivity of relief under the Texas Property Code applies to all suits characterized as suits to quiet title. Compare Sw. Guar. Trust Co., 981 S.W.2d at 957 (action to quiet title brought to invalidate lien on property was governed exclusively by trespass to try title statute), with Florey, 212 S.W.3d at 449 (Martin does not preclude relief under the Declaratory Judgment Act for actions to quiet title that only indirectly impact title and possession and therefore are not not equivalent to trespass to try title actions).

[4] MERS also argues: “All Groves alleged is MERS lacked an enforceable security interest in the property at the time she filed her petition because MERS was not then holder of the original note secured by the deed of trust. . . . [T]his one fact shows Groves’s action is based entirely on facts subject to change” and therefore fails to manifest the “ripening seeds of a controversy” between Groves and MERS. MERS argues that a justiciable controversy does not exist because it “may or may not be required to hold the original note” to enforce the security interest and could “acquire noteholder status through assignment” if so required. This argument goes to the merits of Groves’s argument for invalidating the deed of trust and does not affect whether a controversy existed as to the validity of the deed of trust.
COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 2-08-088-CV

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, AS
NOMINEE FOR LENDER AND
LENDER’S SUCCESSORS AND
ASSIGNS

APPELLANT

V.

KIM YOUNG AND ALL
OCCUPANTS OF 289 CR 4764,
BOYD, TEXAS 76023

APPELLEES

FROM THE COUNTY COURT AT LAW OF WISE COUNTY

MEMORANDUM OPINION

Appellant Mortgage Electronic Registration Systems, as Nominee for
Lender and Lender’s Successors and Assigns, (“MERS”) appeals from the

See Tex. R. App. P. 47.4.
judgment of the county court at law of Wise County on its forcible detainer action against Appellees Kim Young and All Occupants of 289 CR 4764, Boyd, Texas 76023 (“Young”). MERS brings two issues on appeal. In its first issue, MERS argues that the trial court erred by granting judgment for possession in favor of Young on the basis of estoppel because the defense of estoppel cannot control the outcome in a forcible detainer action. In its second issue, MERS argues that the trial court erred by granting judgment for possession in favor of Young because the evidence showed that MERS owned the property and had a superior right of possession of the property. Because we hold that the evidence does not demonstrate that MERS owned the property at the time of its forcible detainer action and that the county court did not have jurisdiction to determine the issue of possession because that determination rested on the resolution of title, we reverse the judgment of the county court and render a judgment of dismissal.

Young bought the property at issue in 2002. She executed a note on the property, secured by a deed of trust. Home Loan Corporation was listed on the deed of trust as the lender and MERS was named as nominee. The deed of trust noted that MERS held legal title and had the right to foreclose and sell the property. The deed of trust did not mention Wells Fargo Home Mortgage, Inc. (“WFHM”), and no record of assignment of the note was introduced at the
hearing on MERS’s forcible detainer action, but Young alleged that she made her monthly mortgage payments to WFHM in 2002 and 2003.

According to Young’s testimony at the hearing in the county court, sometime in 2004, she sold the property, and she obtained information from WFHM about how the buyers could assume the debt. She testified that she followed the instructions given and paid an assumption fee and that she never received any communication from WFHM that the assumption did not go through. But she did not testify that she ever received confirmation from WFHM that the assumption had gone through, and no deed conveying the property to the buyers was introduced at the hearing. Young’s attorney had the sale contract with her at the hearing, but it was not introduced into evidence.

Young testified that in 2005, she received notice that Wells Fargo Bank, N.A. had procured insurance on the property in Young’s name. She stated that she then contacted the insurance company and informed it of the sale of the property and the buyer’s assumption of the note.

On January 3, 2006, unbeknownst to Young, a substitute trustee conveyed the property to MERS after a nonjudicial foreclosure sale. The deed was recorded in the Wise County records. On January 12, 2006, MERS conveyed the property to the Secretary of the Department of Housing and Urban Development (“HUD”).
In April and June of 2006, Standard Guaranty Insurance Company sent letters to Young notifying her that it had paid Wells Fargo Bank, N.A. for claims made under an insurance policy on the property. On August 30, 2006, WFHM sent Young a notice that it was renewing the insurance on the property.

Young testified that when she received this letter (which was after the nonjudicial foreclosure sale and the transfer of the property to HUD), she contacted “Wells Fargo.” She testified that she was told that the property had been abandoned by the buyers; the note was in default; foreclosure proceedings had been commenced on January 3, 2006, but had not been finalized; and she was still the owner of the property. She testified that an employee of “Wells Fargo” agreed to reinstate the note and send her the paperwork for reinstatement, but that she never received the paperwork despite repeated telephone calls to “Wells Fargo” and “Wells Fargo” repeatedly telling her that the note could be reinstated. Despite never receiving the paperwork, she moved back onto the property and made repairs to it.

On May 10, 2007, HUD conveyed the property under a deed without warranty to Wells Fargo Home MTG–Prudential (“WFHM–Prudential”). On June 27, 2007, a law firm acting on behalf of Wells Fargo Bank, N.A. sent Young a

\(^2\) Young did not specify which Wells Fargo entity she contacted.
notice to vacate the property. When she refused, MERS filed a forcible detainer action against her in the justice court. After the justice court granted possession of the property to MERS, Young appealed to the statutory county court. There she entered a plea to the jurisdiction and several affirmative defenses, including estoppel and a claim that the foreclosure had not complied with statutory requirements. At the conclusion of the hearing, the county court stated that estoppel applied and that it was denying the detainer on that ground. The court’s judgment for Young, however, did not state the specific grounds for denying MERS’s forcible detainer. MERS now appeals.

We consider MERS’ second issue first because it is dispositive. MERS argues that the trial court erred by granting judgment for possession in favor of Young because the evidence showed that MERS owned the property and had a superior right of possession of the property. Young argued in the county court and in the alternative on appeal that the county court did not have jurisdiction over the forcible detainer action because the court could not determine whether MERS had a superior right to immediate possession without determining title. We agree with Young.

\[\text{See Tex. R. App. 47.1.}\]
A forcible detainer action addresses only the question of who is entitled to immediate possession of a premises. A person commits forcible detainer when the person refuses to surrender possession of real property on demand and the person is a tenant by sufferance. A plaintiff in a forcible detainer action must present sufficient evidence of ownership to demonstrate a superior right to immediate possession of the premises. A plaintiff does not, however, have to prove ownership of the property; rather, a court may determine which party has a superior right to possession without determining title when there exists a landlord-tenant relationship between the parties. A court does not have to determine title in such a case because the existence of the landlord-tenant relationship provides a basis for determining the right to possession without resolving the issue of who owns the property.

\begin{quote}
\begin{itemize}
\item Cattin v. Highpoint Village Apartments, 26 S.W.3d 737, 738–39 (Tex. App.—Fort Worth 2000, pet. dism’d w.o.j.).
\item Rice v. Pinney, 51 S.W.3d 705, 709, 712 (Tex. App.—Dallas 2001, no pet.).
\item See Salaymeh v. Plaza Centro, LLC, 264 S.W.3d 431, 436 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (stating that in forcible detainer action, landlord-tenant relationship presents “an independent basis on which the trial court [can] determine the right to immediate possession without resolving
\end{itemize}
\end{quote}
In a forcible detainer case, the only issue that may be determined is the right to actual possession; the issue of title to the property cannot be adjudicated.\(^9\) The losing party in a forcible detainer action brought in the justice court may appeal to the county court for a trial de novo.\(^{10}\) The taking of such an appeal vacates the judgment of the justice court.\(^{11}\) In an appeal from a justice court, the county court does not have jurisdiction if the justice court did not have jurisdiction, and justice courts do not have jurisdiction to decide issues of title.\(^{12}\) Significantly, although the existence of a title dispute will not deprive a justice court of jurisdiction in a forcible detainer action, the court does not have jurisdiction when the right to possession cannot be determined without resolving the title issue.\(^{13}\) Thus, the county court did not have jurisdiction in underlying title issues”); *Brown v. Kula-Amos, Inc.*, No. 02-04-00032-CV, 2005 WL 675563, at *3 (Tex. App.—Fort Worth 2005, no pet.) (mem. op.) (noting that forcible detainer action based on contract for deed depends upon landlord-tenant relationship and that contract for deed may provide for party to become tenant at sufferance upon default).


\(^{10}\) See *Cattin*, 26 S.W.3d at 739; Tex. R. Civ. P. 574b.


\(^{12}\) See *Gibson*, 138 S.W.3d at 522; *Rice*, 51 S.W.3d at 708–09.

\(^{13}\) See *Rice*, 51 S.W.3d at 713.
this forcible detainer case if the court could not determine the right to possession without determining title.

MERS based its claim for the right to possession on an alleged landlord-tenant relationship created by a deed from the substitute trustee’s sale and the provision in the deed of trust that made Young a tenant at sufferance upon default and foreclosure. MERS submitted to the trial court a copy of the deed of trust that secured the note to Young and listed MERS as the nominal mortgagee for the lender and its successors and assigns. The deed of trust provided that if Young defaulted on the note and the property was sold at a foreclosure sale under the deed of trust, Young would become a tenant at sufferance. This kind of provision in a deed of trust is generally sufficient to establish a landlord-tenant relationship between the mortgagor and the purchaser of the property at a foreclosure sale. MERS also introduced evidence of the substitute trustee’s deed showing that it purchased the property at a foreclosure sale. MERS argued in the county court that with this evidence—the substitute trustee’s deed showing that MERS owned the property after purchasing it at the foreclosure sale and the deed of trust creating a landlord-tenant relationship between it and Young and showing that Young was

\[14\] See Scott v. Hewitt, 127 Tex. 31, 90 S.W.2d 816, 818 (1936).
a tenant at sufferance—the county court could have determined MERS’s right to possession without determining title, despite Young’s arguments with respect to the propriety of the foreclosure proceedings.15

But Young brought a plea to the jurisdiction, disputing MERS’s assertion that it owned the property. At the hearing, Young introduced two deeds executed after the substitute trustee’s deed: a deed conveying the property from MERS to HUD and another deed conveying the property from HUD to WFM–Prudential. The deed from HUD does not mention MERS at all, as nominee for WFM–Prudential or in any other capacity. All the other documents MERS introduced relating to this property did, however, specifically mention MERS. The deed of trust listed MERS, as nominee for the lender, as the beneficiary of the instrument. The substitute trustee’s deed listed MERS, as nominee for the lender, as the mortgagee. The deed to HUD listed MERS, “as nominee for [the] Lender,” as the grantor. But no evidence before the county court indicated that WFM–Prudential designated MERS to act as its nominee with respect to this property after HUD conveyed it to WFM–Prudential.

15 See Reynolds v. Wells Fargo Bank, N.A., 245 S.W.3d 57, 60 (Tex. App.—El Paso 2008, no pet.) (stating that argument that notice of foreclosure was improper was beyond scope of forcible detainer action because only issue in such action was right to possession).
On appeal, MERS argues that it brought the forcible detainer action on behalf of “Wells Fargo.” It argues that it is a “book entry system” as that term is defined in section 51.0001 of the property code\textsuperscript{16} and contends that under the deed of trust, MERS could act on behalf of “Lender and Lender’s successors and assigns” and that WFM–Prudential, as the current owner of the property, is “Lender’s successor or assign with regard to the [p]roperty.” Thus, MERS argues, it had authority to bring this suit on behalf of WFM–Prudential.

MERS did not introduce evidence in the county court about the nature of its business, but it has been discussed by other courts. MERS was created for the purpose of tracking ownership interests in residential mortgages.\textsuperscript{17} Entities such as mortgage lenders “subscribe to the MERS system and pay annual fees for the electronic processing and tracking of ownership and transfers of mortgages.”\textsuperscript{18} These MERS members “contractually agree to appoint MERS to act as their common agent on all mortgages they register in the MERS system.”\textsuperscript{19} When a mortgage is executed through a MERS member and


\textsuperscript{17} MERSCORP, Inc. v. Romaine, 8 N.Y.3d 90, 861 N.E.2d 81, 83 (2006).

\textsuperscript{18} Id.

\textsuperscript{19} Id.
registered in the MERS system, it is recorded in the real property records with MERS named on the instrument as nominee or mortgagee of record.\textsuperscript{20} While the mortgage is in effect, the original lender may transfer the beneficial ownership or servicing rights on the mortgage to another MERS member, with MERS tracking these electronic transfers; these assignments are not recorded in the real property records.\textsuperscript{21} If a MERS member assigns its interest in a mortgage to a non-MERS member, this assignment is recorded in the real property records and MERS deactivates the loan within its system.\textsuperscript{22}

MERS has “no rights whatsoever to any payments made on account of such mortgage loans, to any servicing rights related to such mortgage loans, or to any mortgaged properties securing such mortgage loans.”\textsuperscript{23} MERS acts as the agent only for its members; once a note is transferred out of the MERS system to a non-member, MERS cannot act as the agent.\textsuperscript{24}

\begin{itemize}
\item \textsuperscript{20} \textit{Id.}
\item \textsuperscript{21} \textit{Id.}
\item \textsuperscript{22} \textit{Id.} at n.4.
\item \textsuperscript{24} \textit{Id.} at *4.
\end{itemize}
The evidence in the county court showed that MERS was named as nominee for Home Loan Corporation, the original lender on the note. After Young defaulted on the note, MERS purchased the property at the substitute trustee’s sale and subsequently conveyed the property to HUD. HUD later conveyed the property to WFM–Prudential. The record did not establish that WFM–Prudential was a member of MERS, that MERS was acting for WFM–Prudential in bringing the forcible detainer action, or that WFM–Prudential’s ownership of the property was the type of interest that could be registered with MERS such that MERS could record the interest in its name in accordance with the property code or bring this action. 25

According to the property records of Wise County, WFM–Prudential holds title to the property. MERS does not. MERS did not assert in the county court that WFM–Prudential owned the property under a deed from HUD or that it acted on behalf of WFM–Prudential. It asserted instead that MERS itself owned the property under the substitute trustee’s deed naming it as grantee “as nominee for Lender and Lender[s] Successors and Assigns.” It stated that it was a nominee for “Lender” but did not specify who “Lender”

was or show (or even assert) that it had any authority to bring a forcible detainer action on behalf of WFM–Prudential, the owner of record of the property. It mentioned “Wells Fargo” only as having been the servicer of the loan obtained by Young. And the evidence shows that WFM–Prudential has an interest in the property, not because of a deed of trust granting WFM–Prudential an interest that was then registered with MERS, but rather through a deed from HUD conveying the property to Wells Fargo outright. Thus, the fact that MERS may be a “book entry system” does not establish that it has a landlord-tenant relationship with Young with respect to the property. The county court had no evidence before it establishing that after HUD transferred the property to WFM–Prudential, that entity nominated MERS to act for it with respect to this property. And at the hearing, MERS made no attempt to explain the subsequent deeds to and from HUD and relied exclusively on the substitute trustee’s deed to assert its right to possession.

Young introduced evidence disputing both MERS’s interest in the property and any landlord-tenant relationship between her and MERS. Based on the pleadings and evidence before it, the county court would have had to determine who owned the property in order to determine whether MERS had the superior
right to possession.\textsuperscript{26} Accordingly, because the county court had no jurisdiction to determine title, and because title may not be adjudicated in a forcible detainer action, the county court did not have jurisdiction to determine if MERS had a superior right to immediate possession of the property. We overrule MERS’s second issue. Because we have held that the county court did not have jurisdiction to determine MERS’s claim, we do not address MERS’s remaining issue.\textsuperscript{27}

Having held that the county court had no jurisdiction to determine MERS’s right to possession, we reverse the judgment of the county court and render judgment dismissing this case.\textsuperscript{28}

LEE ANN DAUPHINOT
JUSTICE

PANEL: LIVINGSTON, DAUPHINOT, and MCCOY, JJ.

DELIVERED: June 4, 2009


\textsuperscript{27} See Tex. R. App. P. 47.1.

\textsuperscript{28} See City of Wichita Falls v. Pearce, 33 S.W.3d 415, 417 (Tex. App.—Fort Worth 2000, no pet.) (reversing trial court judgment and rendering judgment of dismissal because trial court had no jurisdiction over claims).
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFIED FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

IN

KRISTIN BAIN,

Plaintiff,

v.

METROPOLITAN MORTGAGE GROUP, INC., INDYMAC BANK, FSB; MORTGAGE ELECTRONICS REGISTRATION SYSTEMS; REGIONAL TRUSTEE SERVICE; FIDELITY NATIONAL TITLE; and DOE Defendants 1 through 20, inclusive,

Defendants.

KEVIN SELKOWITZ, an individual,

Plaintiff,

v.

LITTON LOAN SERVICING, LP, a Delaware limited partnership; NEW CENTURY MORTGAGE CORPORATION, a California corporation; QUALITY

Defendants.

No. 86206-1
(consolidated with No. 86207-9)

En Banc

Filed August 16, 2012
LOAN SERVICE CORPORATION OF  
WASHINGTON, a Washington corporation;  
FIRST AMERICAN TITLE INSURANCE COMPANY, a Washington corporation;  
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC., a Delaware corporation; and DOE Defendants 1 through 20,  

Defendants.  

CHAMBERS, J. — In the 1990s, the Mortgage Electronic Registration System Inc. (MERS) was established by several large players in the mortgage industry. MERS and its allied corporations maintain a private electronic registration system for tracking ownership of mortgage-related debt. This system allows its users to avoid the cost and inconvenience of the traditional public recording system and has facilitated a robust secondary market in mortgage backed debt and securities. Its customers include lenders, debt servicers, and financial institutes that trade in mortgage debt and mortgage backed securities, among others. MERS does not merely track ownership; in many states, including our own, MERS is frequently listed as the “beneficiary” of the deeds of trust that secure its customers’ interests in the homes securing the debts. Traditionally, the “beneficiary” of a deed of trust is the lender who has loaned money to the homeowner (or other real property owner). The deed of trust protects the lender by giving the lender the power to nominate a trustee and giving that trustee the power to sell the home if the homeowner’s debt is
not paid. Lenders, of course, have long been free to sell that secured debt, typically by selling the promissory note signed by the homeowner. Our deed of trust act, chapter 61.24 RCW, recognizes that the beneficiary of a deed of trust at any one time might not be the original lender. The act gives subsequent holders of the debt the benefit of the act by defining “beneficiary” broadly as “the holder of the instrument or document evidencing the obligations secured by the deed of trust.” RCW 61.24.005(2).

Judge John C. Coughenour of the Federal District Court for the Western District of Washington has asked us to answer three certified questions relating to two home foreclosures pending in King County. In both cases, MERS, in its role as the beneficiary of the deed of trust, was informed by the loan servicers that the homeowners were delinquent on their mortgages. MERS then appointed trustees who initiated foreclosure proceedings. The primary issue is whether MERS is a lawful beneficiary with the power to appoint trustees within the deed of trust act if it does not hold the promissory notes secured by the deeds of trust. A plain reading of the statute leads us to conclude that only the actual holder of the promissory note or other instrument evidencing the obligation may be a beneficiary with the power to appoint a trustee to proceed with a nonjudicial foreclosure on real property. Simply put, if MERS does not hold the note, it is not a lawful beneficiary.

Next, we are asked to determine the “legal effect” of MERS not being a lawful beneficiary. Unfortunately, we conclude we are unable to do so based upon the record and argument before us.
Finally, we are asked to determine if a homeowner has a Consumer Protection Act (CPA), chapter 19.86 RCW, claim based upon MERS representing that it is a beneficiary. We conclude that a homeowner may, but it will turn on the specific facts of each case.

FACTS

In 2006 and 2007 respectively, Kevin Selkowitz and Kristin Bain bought homes in King County. Selkowitz’s deed of trust named First American Title Company as the trustee, New Century Mortgage Corporation as the lender, and MERS as the beneficiary and nominee for the lender. Bain’s deed of trust named IndyMac Bank FSB as the lender, Stewart Title Guarantee Company as the trustee, and, again, MERS as the beneficiary. Subsequently, New Century filed for bankruptcy protection, IndyMac went into receivership,¹ and both Bain and Selkowitz fell behind on their mortgage payments. In May 2010, MERS, in its role as the beneficiary of the deeds of trust, named Quality Loan Service Corporation as the successor trustee in Selkowitz’s case, and Regional Trustee Services as the trustee in Bain’s case. A few weeks later the trustees began foreclosure proceedings. According to the attorneys in both cases, the assignments of the promissory notes were not publically recorded.²

¹ The FDIC (Federal Deposit Insurance Corporation), in IndyMac’s shoes, successfully moved for summary judgment in the underlying cases on the ground that there were no assets to pay any unsecured creditors. Doc. 86, at 6 (Summ. J. Mot., noting that “the [FDIC] determined that the total assets of the IndyMac Bank Receivership are $63 million while total deposit liabilities are $8.738 billion.”); Doc. 108 (Summ. J. Order).
² According to briefing filed below, Bain’s “[n]ote was assigned to Deutsche Bank by former defendant IndyMac Bank, FSB, and placed in a mortgage loan asset-backed trust pursuant to a
Both Bain and Selkowitz sought injunctions to stop the foreclosures and sought damages under the Washington CPA, among other things. Both cases are now pending in Federal District Court for the Western District of Washington. Selkowitz v. Litton Loan Servicing, LP, No. C10-05523-JCC, 2010 WL 3733928 (W.D. Wash. Aug. 31, 2010) (unpublished). Judge Coughenour certified three questions of state law to this court. We have received amici briefing in support of the plaintiffs from the Washington State attorney general, the National Consumer Law Center, the Organization United for Reform (OUR) Washington, and the Homeowners’ Attorneys, and amici briefing in support of the defendants from the Washington Bankers Association (WBA).

CERTIFIED QUESTIONS

1. Is Mortgage Electronic Registration Systems, Inc., a lawful “beneficiary” within the terms of Washington’s Deed of Trust

Pooling and Servicing Agreement dated June 1, 2007.” Doc. 149, at 3. Deutsche Bank filed a copy of the promissory note with the federal court. It appears Deutsche Bank is acting as trustee of a trust that contains Bain’s note, along with many others, though the record does not establish what trust this might be.

While the merits of the underlying cases are not before us, we note that Bain contends that the real estate agent, the mortgage broker, and the mortgage originator took advantage of her known cognitive disabilities in order to induce her to agree to a monthly payment they knew or should have known she could not afford; falsified information on her mortgage application; and failed to make legally required disclosures. Bain also asserts that foreclosure proceedings were initiated by IndyMac before IndyMac was assigned the loan and that some of the documents in the chain of title were executed fraudulently. This is confusing because IndyMac was the original lender, but the record suggests (but does not establish) that ownership of the debt had changed hands several times.
Act, Revised Code of Washington section 61.24.005(2), if it never held the promissory note secured by the deed of trust? [Short answer: No.]

2. If so, what is the legal effect of Mortgage Electronic Registration Systems, Inc., acting as an unlawful beneficiary under the terms of Washington’s Deed of Trust Act? [Short answer: We decline to answer based upon what is before us.]

3. Does a homeowner possess a cause of action under Washington’s Consumer Protection Act against Mortgage Electronic Registration Systems, Inc., if MERS acts as an unlawful beneficiary under the terms of Washington’s Deed of Trust Act? [Short answer: The homeowners may have a CPA action but each homeowner will have to establish the elements based upon the facts of that homeowner’s case.]

Order Certifying Question to the Washington State Supreme Ct. (Certification) at 3-4.

ANALYSIS


Deeds of Trust

6
Private recording of mortgage-backed debt is a new development in an old and long evolving system. We offer a brief review to put the issues before us in context.

A mortgage as a mechanism to secure an obligation to repay a debt has existed since at least the 14th century. 18 William B. Stoebuck & John W. Weaver, Washington Practice: Real Estate: Transactions § 17.1, at 253 (2d ed. 2004). Often in those early days, the debtor would convey land to the lender via a deed that would contain a proviso that if a promissory note in favor of the lender was paid by a certain day, the conveyance would terminate. Id. at 254. English law courts tended to enforce contracts strictly; so strictly, that equity courts began to intervene to ameliorate the harshness of strict enforcement of contract terms. Id. Equity courts often gave debtors a grace period in which to pay their debts and redeem their properties, creating an “equitable right to redeem the land during the grace period.” Id. The equity courts never established a set length of time for this grace period, but they did allow lenders to petition to “foreclose” it in individual cases. Id. “Eventually, the two equitable actions were combined into one, granting the period of equitable redemption and placing a foreclosure date on that period.” Id. at 255 (citing George E. Osborne, Handbook on the Law of Mortgages §§ 1-10 (2d ed. 1970)).

In Washington, “[a] mortgage creates nothing more than a lien in support of the debt which it is given to secure.” Pratt v. Pratt, 121 Wash. 298, 300, 209 P. 535 (1922) (citing Gleason v. Hawkins, 32 Wash. 464, 73 P. 533 (1903)); see also
18 Stoebuck & Weaver, *supra*, § 18.2, at 305. Mortgages come in different forms, but we are only concerned here with mortgages secured by a deed of trust on the mortgaged property. These deeds do not convey the property when executed; instead, “[t]he statutory deed of trust is a form of a mortgage.” 18 Stoebuck & Weaver, *supra*, § 17.3, at 260. “More precisely, it is a three-party transaction in which land is conveyed by a borrower, the ‘grantor,’ to a ‘trustee,’ who holds title in trust for a lender, the ‘beneficiary,’ as security for credit or a loan the lender has given the borrower.” *Id.* Title in the property pledged as security for the debt is not conveyed by these deeds, even if “on its face the deed conveys title to the trustee, because it shows that it is given as security for an obligation, it is an equitable mortgage.” *Id.* (citing Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 1.6 (4th ed. 2001)).

When secured by a deed of trust that grants the trustee the power of sale if the borrower defaults on repaying the underlying obligation, the trustee may usually foreclose the deed of trust and sell the property without judicial supervision. *Id.* at 260-61; RCW 61.24.020; RCW 61.12.090; RCW 7.28.230(1). This is a significant power, and we have recently observed that “the [deed of trust] Act must be construed in favor of borrowers because of the relative ease with which lenders can forfeit borrowers’ interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales.” *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 915-16, 154 P.3d 882 (2007) (citing *Queen City Sav. & Loan Ass’n v. Mannhalt*, 111 Wn.2d 503, 514, 760 P.2d 350 (1988) (Dore, J., dissenting)). Critically under
our statutory system, a trustee is not merely an agent for the lender or the lender’s successors. Trustees have obligations to all of the parties to the deed, including the homeowner. RCW 61.24.010(4) (“The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.”); *Cox v. Helenius*, 103 Wn.2d 383, 389, 693 P.2d 683 (1985) (citing George E. Osborne, Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law § 7.21 (1979) (“[A] trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.”)).⁴ Among other things, “the trustee shall have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust” and shall provide the homeowner with “the name and address of the owner of any promissory notes or other obligations secured by the deed of trust” before foreclosing on an owner-occupied home. RCW 61.24.030(7)(a), (8)(l).

Finally, throughout this process, courts must be mindful of the fact that “Washington’s deed of trust act should be construed to further three basic objectives.” *Cox*, 103 Wn.2d at 387 (citing Joseph L. Hoffmann, Comment, *Court Actions Contesting the Nonjudicial Foreclosure of Deeds of Trust in Washington*,

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⁴ In 2008, the legislature amended the deed of trust act to provide that trustees did not have a fiduciary duty, only the duty of good faith. Laws of 2008, ch. 153, § 1, codified in part as RCW 61.24.010(3) (“The trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust.”). This case does not offer an opportunity to explore the impact of the amendment. A bill was introduced into our state senate in the 2012 session that, as originally drafted, would require every assignment be recorded. S.B. 6070, 62d Leg., Reg. Sess. (Wash. 2012). A substitute bill passed out of committee convening a stakeholder group “to convene to discuss the issue of recording deeds of trust of residential real property, including assignments and transfers, amongst other related issues” and report back to the legislature with at least one specific proposal by December 1, 2012. Substitute S.B. 6070, 62d Leg., Reg. Sess. (Wash. 2012).
59 Wash. L. Rev. 323, 330 (1984)). “First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles.” *Id.* (citation omitted) (citing *Peoples Nat’l Bank of Wash. v. Ostrander*, 6 Wn. App. 28, 491 P.2d 1058 (1971)).

**MERS**

MERS, now a Delaware corporation, was established in the mid 1990s by a consortium of public and private entities that included the Mortgage Bankers Association of America, the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), the Government National Mortgage Association (Ginnie Mae), the American Bankers Association, and the American Land Title Association, among many others. *See In re MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90, 96 n.2, 861 N.E.2d 81, 828 N.Y.S.2d 266 (2006); Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. 805, 807 (1995); Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L. Rev. 1359, 1361 (2010). It established “a central, electronic registry for tracking mortgage rights . . . [where p]arties will be able to access the central registry (on a need to know basis).” Slesinger & McLaughlin, *supra*, at 806. This was intended to reduce the costs, increase the efficiency, and facilitate the securitization of mortgages and thus increase liquidity. Peterson, *supra*, at 1361.5 As the New York high court described the process:
The initial MERS mortgage is recorded in the County Clerk’s office with “Mortgage Electronic Registration Systems, Inc.” named as the lender’s nominee or mortgagee of record on the instrument. During the lifetime of the mortgage, the beneficial ownership interest or servicing rights may be transferred among MERS members (MERS assignments), but these assignments are not publicly recorded; instead they are tracked electronically in MERS’s private system.

Romaine, 8 N.Y.3d at 96. MERS “tracks transfers of servicing rights and beneficial ownership interests in mortgage loans by using a permanent 18-digit number called the Mortgage Identification Number.” Resp. Br. of MERS at 13 (Bain) (footnote omitted). It facilitates secondary markets in mortgage debt and servicing rights, without the traditional costs of recording transactions with the local county records offices. Slesinger & McLaughlin, supra, at 808; In re Agard, 444 B.R. 231, 247 (Bankr. E.D.N.Y. 2011).

Many loans have been pooled into securitization trusts where they, hopefully, produce income for investors. See, e.g., Pub. Emps’ Ret. Sys. of Miss. v. Merrill Lynch & Co., 277 F.R.D. 97, 102-03 (S.D.N.Y. 2011) (discussing process of pooling mortgages into asset backed securities). MERS has helped overcome what had come to be seen as a drawback of the traditional mortgage financing model:

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5 At oral argument, counsel for Bain contended the reason for MERS’s creation was a study in 1994 concluding that the mortgage industry would save $77.9 million a year in state and local filing fees. Wash. Supreme Court oral argument, Bain v. Mortg. Elec. Registration Sys., No. 86206-1 (Mar. 15, 2012), at approx. 44 min., audio recording by TVW, Washington’s Public Affairs Network, available at http://www.tvw.org. While saving costs was certainly a motivating factor in its creation, efficiency, secondary markets, and the resulting increased liquidity were other major driving forces leading to MERS’s creation. Slesinger & McLaughlin, supra, at 806-07.
lack of liquidity. MERS has facilitated securitization of mortgages bringing more money into the home mortgage market. With the assistance of MERS, large numbers of mortgages may be pooled together as a single asset to serve as security for creative financial instruments tailored to different investors. Some investors may buy the right to interest payments only, others principal only; different investors may want to buy interest in the pool for different durations. *Mortg. Elec. Registration Sys., Inc. v. Azize*, 965 So. 2d 151, 154 n.3 (Fla. Dist. Ct. App. 2007); Dustin A. Zacks, *Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures*, 29 Quinnipiac L. Rev. 551, 570-71 (2011); Chana Joffe-Walt & David Kestenbaum, *Before Toxie Was Toxic*, Nat’l Pub. Radio (Sept. 17, 2010, 12:00 A.M.)⁶ (discussing formation of mortgage backed securities). In response to the changes in the industries, some states have explicitly authorized lenders’ nominees to act on lenders’ behalf. See, e.g., *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 491 (Minn. 2009) (noting Minn. Stat. § 507.413 is “frequently called ‘the MERS statute’”). As of now, our state has not.

As MERS itself acknowledges, its system changes “a traditional three party deed of trust [into] a four party deed of trust, wherein MERS would act as the contractually agreed upon beneficiary for the lender and its successors and assigns.” MERS Resp. Br. at 20 (Bain). As recently as 2004, learned commentators William Stoebuck and John Weaver could confidently write that “[a] general axiom of

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⁶ Available at http://www.npr.org/blogs/money/2010/09/16/129916011/before-toxie-was-toxic.
mortality law is that obligation and mortgage cannot be split, meaning that the
person who can foreclose the mortgage must be the one to whom the obligation is
due.” 18 Stoebuck & Weaver, supra, § 18.18, at 334. MERS challenges that
general axiom. Since then, as the New York bankruptcy court observed recently:

In the most common residential lending scenario, there are two
parties to a real property mortgage—a mortgagee, i.e., a lender, and a
mortgagor, i.e., a borrower. With some nuances and allowances for the
needs of modern finance this model has been followed for hundreds of
years. The MERS business plan, as envisioned and implemented by
lenders and others involved in what has become known as the
mortgage finance industry, is based in large part on amending this
traditional model and introducing a third party into the equation.
MERS is, in fact, neither a borrower nor a lender, but rather purports to
be both “mortgagee of record” and a “nominee” for the mortgagee.
MERS was created to alleviate problems created by, what was
determined by the financial community to be, slow and burdensome
recording processes adopted by virtually every state and locality. In
effect the MERS system was designed to circumvent these procedures.
MERS, as envisioned by its originators, operates as a replacement for
our traditional system of public recordation of mortgages.
Agard, 444 B.R. at 247.

Critics of the MERS system point out that after bundling many loans together,
it is difficult, if not impossible, to identify the current holder of any particular loan,
or to negotiate with that holder. While not before us, we note that this is the nub of
this and similar litigation and has caused great concern about possible errors in
foreclosures, misrepresentation, and fraud. Under the MERS system, questions of
authority and accountability arise, and determining who has authority to negotiate
loan modifications and who is accountable for misrepresentation and fraud becomes extraordinarily difficult.\textsuperscript{7} The MERS system may be inconsistent with our second objective when interpreting the deed of trust act: that “the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure.” \textit{Cox,} 103 Wn.2d at 387 (citing \textit{Ostrander,} 6 Wn. App. 28).

The question, to some extent, is whether MERS and its associated business partners and institutions can both replace the existing recording system established by Washington statutes and still take advantage of legal procedures established in those same statutes. With this background in mind, we turn to the certified questions.

I. Deed of Trust Beneficiaries

Again, the federal court has asked:

1. Is Mortgage Electronic Registration Systems, Inc., a lawful “beneficiary” within the terms of Washington’s Deed of Trust Act, Revised Code of Washington section 61.24.005(2), if it never held the promissory note secured by the deed of trust?

Certification at 3.

A. Plain Language

\textsuperscript{7}MERS insists that borrowers need only know the identity of the servicers of their loans. However, there is considerable reason to believe that servicers will not or are not in a position to negotiate loan modifications or respond to similar requests. \textit{See generally} Diane E. Thompson, \textit{Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications,} 86 Wash. L. Rev. 755 (2011); Dale A. Whitman, \textit{How Negotiability Has Fouled Up the Secondary Mortgage Market, and What To Do About It,} 37 Pepp. L. Rev. 737, 757-58 (2010). Lack of transparency causes other problems. \textit{See generally U.S. Bank Nat’l Ass’n v. Ibanez,} 458 Mass. 637, 941 N.E.2d 40 (2011) (noting difficulties in tracing ownership of the note).
Under the plain language of the deed of trust act, this appears to be a simple question. Since 1998, the deed of trust act has defined a “beneficiary” as “the holder of the instrument or document evidencing the obligations secured by the deed of trust, excluding persons holding the same as security for a different obligation.” Laws of 1998, ch. 295, § 1(2), codified as RCW 61.24.005(2). Thus, in the terms of the certified question, if MERS never “held the promissory note” then it is not a “lawful ‘beneficiary.’”

MERS argues that under a more expansive view of the act, it meets the statutory definition of “beneficiary.” It notes that the definition section of the deed of trust act begins by cautioning that its definitions apply “‘unless the context clearly requires otherwise.’” Resp. Br. of MERS at 19 (Bain) (quoting RCW 61.24.005). MERS argues that “[t]he context here requires that MERS be recognized as a proper ‘beneficiary’ under the Deed of Trust [Act]. The context here is that the Legislature was creating a more efficient default remedy for lenders,

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8 Perhaps presciently, the Senate Bill Report on the 1998 amendment noted that “[p]ractice in this area has departed somewhat from the strict statutory requirements, resulting in a perceived need to clarify and update the act.” S.B. Rep. on Engrossed Substitute S.B. 6191, 55th Leg., Reg. Sess. (Wash. 1998). The report also helpfully summarizes the legislature’s understanding of deeds of trust as creating three-party mortgages:

**Background:** A deed of trust is a financing tool created by statute which is, in effect, a triparty mortgage. The real property owner or purchaser (the grantor of the deed of trust) conveys the property to an independent trustee, who is usually a title insurance company, for the benefit of a third party (the lender) to secure repayment of a loan or other debt from the grantor (borrower) to the beneficiary (lender). The trustee has the power to sell the property nonjudicially in the event of default, or, alternatively, foreclose the deed of trust as a mortgage.

*Id.* at 1.
not putting up barriers to foreclosure.” *Id.* It contends that the parties were legally entitled to contract as they see fit, and that the “the parties contractually agreed that the ‘beneficiary’ under the Deed of Trust was ‘MERS’ and it is in that context that the Court should apply the statute.” *Id.* at 20 (emphasis omitted).

The “unless the context clearly requires otherwise” language MERS relies upon is a common phrase that the legislative bill drafting guide recommends be used in the introductory language in all statutory definition sections. See Statute Law Comm., Office of the Code Reviser, Bill Drafting Guide 2011.⁹ A search of the unannotated Revised Code of Washington indicates that this statutory language has been used over 600 times. Despite its ubiquity, we have found no case—and MERS draws our attention to none—where this common statutory phrase has been read to mean that the *parties* can alter statutory provisions by contract, as opposed to the act itself suggesting a different definition might be appropriate for a specific statutory provision. We have interpreted the boilerplate: “The definitions in this section apply throughout the chapter unless the context clearly requires otherwise” language only once, and then in the context of determining whether a general court-martial qualified as a prior conviction for purposes of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. *See State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998). There, the two defendants challenged the use of their prior general courts-martial on the ground that the SRA defined “conviction” as ““an adjudication

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of guilt pursuant to Titles 10 or 13 RCW.’” Morley, 134 Wn.2d at 595 (quoting RCW 9.94A.030(9)). Since, the defendants reasoned, their courts-martial were not “pursuant to Titles 10 or 13 RCW,” they should not be considered criminal history. We noted that the SRA frequently treated out-of-state convictions (which would also not be pursuant to Titles 10 or 13 RCW) as convictions and rejected the argument since the specific statutory context required a broader definition of the word “convictions” than the definition section provided. Id. at 598. MERS has cited no case, and we have found none that holds that extrastatutory conditions can create a context where a different definition of defined terms would be appropriate. We do not find this argument persuasive.

MERS also argues that it meets the statutory definition itself. It notes, correctly, that the legislature did not limit “beneficiary” to the holder of the promissory note: instead, it is “the holder of the instrument or document evidencing the obligations secured by the deed of trust.” RCW 61.24.005(2) (emphasis added). It suggests that “instrument” and “document” are broad terms and that “in the context of a residential loan, undoubtedly the Legislature was referring to all of the loan documents that make up the loan transaction • i.e., the note, the deed of trust, and any other rider or document that sets forth the rights and obligations of the parties under the loan,” and that “obligation” must be read to include any financial obligation under any document signed in relation to the loan, including “attorneys’ fees and costs incurred in the event of default.” Resp. Br. of MERS at 21-22 (Bain). In these particular cases, MERS contends that it is a proper beneficiary
because, in its view, it is “indisputably the ‘holder’ of the Deed of Trust.” Id. at 22. It provides no authority for its characterization of itself as “indisputably the ‘holder’” of the deeds of trust.

The homeowners, joined by the Washington attorney general, do dispute MERS’ characterization of itself as the holder of the deeds of trust. Starting from the language of RCW 61.24.005(2) itself, the attorney general contends that “[t]he ‘instrument’ obviously means the promissory note because the only other document in the transaction is the deed of trust and it would be absurd to read this definition as saying that “‘beneficiary means the holder of the deed of trust secured by the deed of trust.’”” Br. of Amicus Att’y General (AG Br.) at 2-3 (quoting RCW 61.24.005(2)). We agree that an interpretation “beneficiary” that has the deed of trust securing itself is untenable.

Other portions of the deed of trust act bolster the conclusion that the legislature meant to define “beneficiary” to mean the actual holder of the promissory note or other debt instrument. In the same 1998 bill that defined “beneficiary” for the first time, the legislature amended RCW 61.24.070 (which had previously forbidden the trustee alone from bidding at a trustee sale) to provide:

(1) The trustee may not bid at the trustee’s sale. Any other person, including the beneficiary, may bid at the trustee’s sale.

(2) The trustee shall, at the request of the beneficiary, credit toward the beneficiary’s bid all or any part of the monetary obligations secured by the deed of trust. If the beneficiary is the purchaser, any amount bid by the beneficiary in excess of the amount so credited shall
be paid to the trustee in the form of cash, certified check, cashier’s check, money order, or funds received by verified electronic transfer, or any combination thereof. If the purchaser is not the beneficiary, the entire bid shall be paid to the trustee in the form of cash, certified check, cashier’s check, money order, or funds received by verified electronic transfer, or any combination thereof.

Laws of 1998, ch. 295, § 9, codified as RCW 61.24.070. As Bain notes, this provision makes little sense if the beneficiary does not hold the note. Bain Reply to Resp. to Opening Br. at 11. In essence, it would authorize the non-holding beneficiary to credit to its bid funds to which it had no right. However, if the beneficiary is defined as the entity that holds the note, this provision straightforwardly allows the noteholder to credit some or all of the debt to the bid. Similarly, in the commercial loan context, the legislature has provided that “[a] beneficiary’s acceptance of a deed in lieu of a trustee’s sale under a deed of trust securing a commercial loan exonerates the guarantor from any liability for the debt secured thereby except to the extent the guarantor otherwise agrees as part of the deed in lieu transaction.” RCW 61.24.100(7). This provision would also make little sense if the beneficiary did not hold the promissory note that represents the debt.

Finding that the beneficiary must hold the promissory note (or other “instrument or document evidencing the obligation secured”) is also consistent with recent legislative findings to the Foreclosure Fairness Act of 2011, Laws of 2011, ch. 58, § 3(2). The legislature found:

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[(1)] \text{(a) The rate of home foreclosures continues to rise to unprecedented levels, both for prime and subprime loans, and a new wave of foreclosures has occurred due to rising unemployment, job}
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loss, and higher adjustable loan payments;

(2) Therefore, the legislature intends to:

(b) Create a framework for homeowners and beneficiaries to communicate with each other to reach a resolution and avoid foreclosure whenever possible; and

(c) Provide a process for foreclosure mediation.

Laws of 2011, ch. 58, § 1 (emphasis added). There is no evidence in the record or argument that suggests MERS has the power “to reach a resolution and avoid foreclosure” on behalf of the noteholder, and there is considerable reason to believe it does not. Counsel informed the court at oral argument that MERS does not negotiate on behalf of the holders of the note. If the legislature intended to authorise nonnoteholders to act as beneficiaries, this provision makes little sense. However, if the legislature understood “beneficiary” to mean “noteholder,” then this provision makes considerable sense. The legislature was attempting to create a framework where the stakeholders could negotiate a deal in the face of changing conditions.

We will also look to related statutes to determine the meaning of statutory terms. Dep’t of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002). Both the plaintiffs and the attorney general draw our attention to the definition of “holder” in the Uniform Commercial Code (UCC), which was adopted in the same year as the deed of trust act. See Laws of 1965, Ex. Sess., ch. 157 (UCC); Laws of 1965, ch. 74 (deed of trust act); Selkowitz Opening Br. at 13; AG

1 Wash. Supreme Court oral argument, supra, at approx. 34 min., 58 sec.
Br. at 11-12. Stoebuck and Weaver note that the transfer of mortgage backed obligations is governed by the UCC, which certainly suggests the UCC provisions may be instructive for other purposes. 18 Stoebuck & Weaver, supra, § 18.18, at 334. The UCC provides:

“Holder” with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. “Holder” with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

Former RCW 62A.1-201(20) (2001). The UCC also provides:

“Person entitled to enforce” an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to RCW 62A.3-309 or 62A.3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

RCW 62A.3-301. The plaintiffs argue that our interpretation of the deed of trust act should be guided by these UCC definitions, and thus a beneficiary must either actually possess the promissory note or be the payee. E.g., Selkowitz Opening Br. at 14. We agree. This accords with the way the term “holder” is used across the deed of trust act and the Washington UCC. By contrast, MERS’s approach would require us to give “holder” a different meaning in different related statutes and

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11 Several portions of chapter 61.24 RCW were amended by the 2012 legislature while this case was under our review.
construe the deed of trust act to mean that a deed of trust may secure itself or that the note follows the security instrument. Washington’s deed of trust act contemplates that the security instrument will follow the note, not the other way around. MERS is not a “holder” under the plain language of the statute.

B. Contract and Agency

In the alternative, MERS argues that the borrowers should be held to their contracts, and since they agreed in the deeds of trust that MERS would be the beneficiary, it should be deemed to be the beneficiary. E.g., Resp. Br. of MERS at 24 (Bain). Essentially, it argues that we should insert the parties’ agreement into the statutory definition. It notes that another provision of Title 61 RCW specifically allows parties to insert side agreements or conditions into mortgages. RCW 61.12.020 (“Every such mortgage, when otherwise properly executed, shall be deemed and held a good and sufficient conveyance and mortgage to secure the payment of the money therein specified. The parties may insert in such mortgage any lawful agreement or condition.”).

MERS argues we should be guided by Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034 (9th Cir. 2011). In Cervantes, the Ninth Circuit Court of Appeals affirmed dismissal of claims for fraud, intentional infliction of emotional distress, and violations of the federal Truth in Lending Act and the Arizona Consumer Fraud Act against MERS, Countrywide Home Loans, and other financial institutions. Id. at 1041. We do not find Cervantes instructive. Cervantes was a putative class action that was dismissed on the pleadings for a variety of reasons,
the vast majority of which are irrelevant to the issues before us. *Id.* at 1038. After dismissing the fraud claim for failure to allege facts that met all nine elements of a fraud claim in Arizona, the Ninth Circuit observed that MERS’s role was plainly laid out in the deeds of trust. *Id.* at 1042. Nowhere in *Cervantes* does the Ninth Circuit suggest that the parties could contract around the statutory terms.

MERS also seeks support in a Virginia quiet title action. *Horvath v. Bank of N.Y., N.A.*, 641 F.3d 617, 620 (4th Cir. 2011). After Horvath had become delinquent in his mortgage payments and after a foreclosure sale, Horvath sued the holder of the note and MERS, among others, on a variety of claims, including a claim to quiet title in his favor on the ground that various financial entities had by “‘splitting . . . the pieces of’ his mortgage . . . ‘caused the Deeds of Trust [to] split from the Notes and [become] unenforceable.’” *Id.* at 620 (alterations in original) (quoting complaint). The Fourth Circuit rejected Horvath’s quiet title claim out of hand, remarking:

It is difficult to see how Horvath’s arguments could possibly be correct. Horvath’s note plainly constitutes a negotiable instrument under Va. Code Ann. § 8.3A–104. That note was endorsed in blank, meaning it was bearer paper and enforceable by whoever possessed it. See Va. Code Ann. § 8.3A–205(b). And BNY [(Bank of New York)] possessed the note at the time it attempted to foreclose on the property. Therefore, once Horvath defaulted on the property, Virginia law straightforwardly allowed BNY to take the actions that it did. *Id.* at 622. There is no discussion anywhere in *Horvath* of any statutory definition of “beneficiary.” While the opinion discussed transferability of notes under the
UCC as adopted in Virginia, there is only the briefest mention of the Virginia deed of trust act. *Compare Horvath*, 641 F.3d at 621-22 (citing various provisions of Va. Code Ann. Titles 8.1A, 8.3A (UCC)), *with id.* at 623 n.3 (citing Va. Code. Ann. § 55-59(7) (discussing deed of trust foreclosure proceedings)). We do not find *Horvath* helpful.

Similarly, MERS argues that lenders and their assigns are entitled to name it as their agent. *E.g.*, Resp. Br. of MERS at 29-30 (Bain). That is likely true and nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents. *See, e.g.*, former RCW 61.24.031(1)(a) (2011) (“A trustee, beneficiary, or authorized agent may not issue a notice of default . . . until . . . .” (emphasis added)). MERS notes, correctly, that we have held “an agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to his control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control.” *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1970) (citing *Matsumura v. Eilert*, 74 Wn.2d 369, 444 P.2d 806 (1968)).

But *Moss* also observed that “[w]e have repeatedly held that a prerequisite of an agency is control of the agent by the principal.” *Id.* at 402 (emphasis added) (citing *McCarty v. King County Med. Serv. Corp.*, 26 Wn.2d 660, 175 P.2d 653 (1946)). While we have no reason to doubt that the lenders and their assigns control MERS, agency requires a specific principal that is accountable for the acts of its
agent. If MERS is an agent, its principals in the two cases before us remain unidentified.\textsuperscript{12} MERS attempts to sidestep this portion of traditional agency law by pointing to the language in the deeds of trust that describe MERS as “acting solely as a nominee for Lender and Lender’s successors and assigns.” Doc. 131-2, at 2 (Bain deed of trust); Doc. 9-1, at 3 (Selkowitz deed of trust.); e.g., Resp. Br. of MERS at 30 (Bain). But MERS offers no authority for the implicit proposition that the lender’s nomination of MERS as a nominee rises to an agency relationship with successor noteholders.\textsuperscript{13} MERS fails to identify the entities that control and are accountable for its actions. It has not established that it is an agent for a lawful principal.

This is not the first time that a party has argued that we should give effect to its contractual modification of a statute. \textit{See Godfrey v. Hartford Ins. Cas. Co.}, 142 Wn.2d 885, 16 P.3d 617 (2001); \textit{see also Nat’l Union Ins. Co. of Pittsburgh, Pa. v. Puget Sound Power & Light}, 94 Wn. App. 163, 177, 972 P.2d 481 (1999) (holding

\textsuperscript{12}At oral argument, counsel for MERS was asked to identify its principals in the cases before us and was unable to do so. Wash. Supreme Court oral argument, \textit{supra}, at approx. 23 min., 23 sec.

\textsuperscript{13}The record suggests, but does not establish, that MERS often acted as an agent of the loan servicer, who would communicate the fact of a default and request appointment of a trustee, but is silent on whether the holder of the note would play any controlling role. Doc. 69-2, at 4-5 (describing process). For example, in Selkowitz’s case, “the Appointment of Successor Trustee” was signed by Debra Lyman as assistant vice president of MERS Inc. Doc. 8-1, at 17. There was no evidence that Lyman worked for MERS, but the record suggests she is 1 of 20,000 people who have been named assistant vice president of MERS. \textit{See Br. of Amicus National Consumer Law Center} at 9 n.18 (citing Christopher L. Peterson, \textit{Two Faces: Demystifying the Mortgage Electronic Registration System’s Land Title Theory}, 53 Wm. & Mary L. Rev. 111, 118 (2011)). Lender Processing Service, Inc., which processed paperwork relating to Bain’s foreclosure, seems to function as a middleman between loan servicers, MERS, and law firms that execute foreclosures. Docs. 69-1 through 69-3.
a business and a utility could not contract around statutory uniformity requirements); *State ex rel. Standard Optical Co. v. Superior Court*, 17 Wn.2d 323, 329, 135 P.2d 839 (1943) (holding that a corporation could not avoid statutory limitations on scope of practice by contract with those who could so practice); *cf. Vizcaino v. Microsoft Corp.*, 120 F.3d 1006, 1011-12 (9th Cir. 1997) (noting that Microsoft’s agreement with certain workers that they were not employees was not binding). In *Godfrey*, Hartford Casualty Insurance Company had attempted to pick and chose what portions of Washington’s uniform arbitration act, chapter 7.04A RCW, it and its insured would use to settle disputes. *Godfrey*, 142 Wn.2d at 889. The court noted that parties were free to decide whether to arbitrate, and what issues to submit to arbitration, but “once an issue is submitted to arbitration . . . Washington’s [arbitration] Act applies.” *Id.* at 894. By submitting to arbitration, “they have activated the entire chapter and the policy embodied therein, not just the parts that are useful to them.” *Id.* at 897. The legislature has set forth in great detail how nonjudicial foreclosures may proceed. We find no indication the legislature intended to allow the parties to vary these procedures by contract. We will not allow waiver of statutory protections lightly. MERS did not become a beneficiary by contract or under agency principals.

C. Policy

MERS argues, strenuously, that as a matter of public policy it should be allowed to act as the beneficiary of a deed of trust because “the Legislature certainly did not intend for home loans in the State of Washington to become unsecured, or to
allow defaulting home loan borrowers to avoid non-judicial foreclosure, through manipulation of the defined terms in the [deed of trust] Act.” Resp. Br. of MERS at 23 (Bain). One difficulty is that it is not the plaintiffs that manipulated the terms of the act: it was whoever drafted the forms used in these cases. There are certainly significant benefits to the MERS approach but there may also be significant drawbacks. The legislature, not this court, is in the best position to assess policy considerations. Further, although not considered in this opinion, nothing herein should be interpreted as preventing the parties to proceed with judicial foreclosures. That must await a proper case.

D. Other Courts

Unfortunately, we could find no case, and none have been drawn to our attention, that meaningfully discusses a statutory definition like that found in RCW 61.24.005(2). MERS asserts that “the United States District Court for the Western District of Washington has recently issued a series of opinions on the very issues before the Court, finding in favor of MERS.” Resp. Br. of MERS at 35-36 (Bain) (citing Daddabbo v. Countrywide Home Loans, Inc., No. C09-1417RAJ, 2010 WL 2102485 (W.D. Wash. May 20, 2010) (unpublished); St. John v. Nw Tr. Ser., Inc., No. C11-5382BHS, 2011 WL 4543658 (W.D. Wash. Sept. 29, 2011, Dismissal Order) (unpublished); Vawter v. Quality Loan Servicing Corp. of Wash., 707 F. Supp. 2d 1115 (W.D. Wash. 2010)). These citations are not well taken. Daddabbo never mentions RCW 61.24.005(2). St. John mentions it in passing but devotes no discussion to it. 2011 WL 4543658, at *3. Vawter mentions RCW 61.24.005(2)
once, in a block quote from an unpublished case, without analysis. We do not find these cases helpful.\(^\text{14}\)

Amicus WBA draws our attention to three cases where state supreme courts have held MERS could exercise the rights of a beneficiary. Amicus Br. of WBA at 12 (Bain) (citing Trotter v. Bank of N.Y. Mellon, No. 38022, 2012 WL 206004 (Idaho Jan. 25, 2012) (unpublished), withdrawn and superseded by 152 Idaho 842, 275 P.3d 857 (2012); Residential Funding Co. v. Saurman, 490 Mich. 909, 805 N.W.2d 183 (2011); RMS Residential Props., LLC v. Miller, 303 Conn. 224, 226, 32 A.3d 307 (2011)). But see Agard, 444 B.R. at 247 (collecting contrary cases); Bellistri v. Ocwen Loan Servicing, LLC, 284 S.W.3d 619, 623-24 (Mo. App. 2009) (holding MERS lacked authority to make a valid assignment of the note). But none of these cases, on either side, discuss a statutory definition of “beneficiary” that is similar to ours, and many are decided on agency grounds that are not before us. We do not find them helpful either.

We answer the first certified question “No,” based on the plain language of

\(^{14}\) MERS string cites eight more cases, six of them unpublished that, it contends, establishes that other courts have found that MERS can be beneficiary under a deed of trust. Resp. Br. of MERS (Selkowitz) at 29 n.98. The six unpublished cases do not meaningfully analyze our statutes. The two published cases, Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, 121 Cal. Rptr. 3d 819 (2011), and Pantoja v. Countrywide Home Loans, Inc., 640 F. Supp. 2d 1177 (N.D. Cal. 2009), are out of California, and neither have any discussion of the California statutory definition of “beneficiary.” The Fourth District of the California Court of Appeals in Gomes does reject the plaintiff’s theory that the beneficiary had to establish a right to foreclose in a nonjudicial foreclosure action, but the California courts are split. Six weeks later, the third district found that the beneficiary was required to show it had the right to foreclose, and a simple declaration from a bank officer was insufficient. Herrera v. Deutsche Bank Nat’l Trust Co., 196 Cal. App. 4th 1366, 1378, 127 Cal. Rptr. 3d 362 (2011).
the statute. MERS is an ineligible ‘‘beneficiary’ within the terms of the Washington Deed of Trust Act,’’ if it never held the promissory note or other debt instrument secured by the deed of trust.

II. Effect

The federal court has also asked us:

2. If so, what is the legal effect of Mortgage Electronic Registration Systems, Inc., acting as an unlawful beneficiary under the terms of Washington’s Deed of Trust Act?

We conclude that we cannot decide this question based upon the record and briefing before us. To assist the certifying court, we will discuss our reasons for reaching this conclusion.

MERS contends that if it is acting as an unlawful beneficiary, its status should have no effect: “All that it would mean is that there was a technical violation of the Deed of Trust Act that all parties were aware of when the loan was originally entered into.” Resp. Br. of MERS at 41 (Bain). “At most . . . MERS would simply need to assign its legal interest in the Deed of Trust to the lender before the lender proceeded with foreclosure.” Id. at 41-42. The difficulty with MERS’s argument is that if in fact MERS is not the beneficiary, then the equities of the situation would likely (though not necessarily in every case) require the court to deem that the real beneficiary is the lender whose interests were secured by the deed of trust or that lender’s successors.15 If the original lender had sold the loan, that purchaser would

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15 See 18 Stoebuck & Weaver, supra, § 17.3, at 260 (noting that a deed of trust “is a three-party transaction in which land is conveyed by a borrower, the ‘grantor,’ to a ‘trustee,’ who holds title
need to establish ownership of that loan, either by demonstrating that it actually held the promissory note or by documenting the chain of transactions. Having MERS convey its “interests” would not accomplish this.

In the alternative, MERS suggests that, if we find a violation of the act, “MERS should be required to assign its interest in any deed of trust to the holder of the promissory note, and have that assignment recorded in the land title records, before any non-judicial foreclosure could take place.” Resp. Br. of MERS at 44 (Bain). But if MERS is not the beneficiary as contemplated by Washington law, it is unclear what rights, if any, it has to convey. Other courts have rejected similar suggestions. Bellistri, 284 S.W.3d at 624 (citing George v. Surkamp, 336 Mo. 1, 9, 76 S.W.2d 368 (1934)). Again, the identity of the beneficiary would need to be determined. Because it is the repository of the information relating to the chain of transactions, MERS would be in the best position to prove the identity of the holder of the note and beneficiary.

Partially relying on the Restatement (Third) of Property: Mortgages § 5.4 (1997), Selkowitz suggests that the proper remedy for a violation of chapter 61.24 RCW “should be rescission, which does not excuse Mr. Selkowitz from payment of any monetary obligation, but merely precludes non-judicial foreclosure of the
subject Deed of Trust. Moreover, if the subject Deed of Trust is void, Mr. Selkowitz should be entitled to quiet title to his property.” Pl.’s Opening Br. at 40 (Selkowitz). It is unclear what he believes should be rescinded. He offers no authority in his opening brief for the suggestion that listing an ineligible beneficiary on a deed of trust would render the deed void and entitle the borrower to quiet title. He refers to cases where the lack of a grantee has been held to void a deed, but we do not find those cases helpful. In one of those cases, the New York court noted, “No mortgagee or oblige was named in [the security agreement], and no right to maintain an action thereon, or to enforce the same, was given therein to the plaintiff or any other person. It was, per se, of no more legal force than a simple piece of blank paper.” *Chauncey v. Arnold*, 24 N.Y. 330, 335 (1862). But the deeds of trust before us names all necessary parties and more.

Selkowitz argues that MERS and its allied companies have split the deed of trust from the obligation, making the deed of trust unenforceable. While that certainly *could* happen, given the record before us, we have no evidence that it did. If, for example, MERS is in fact an agent for the holder of the note, likely no split would have happened.

In the alternative, Selkowitz suggests the court create an equitable mortgage in favor of the noteholder. Pl.’s Opening Br. at 42 (Selkowitz). If in fact, such a split occurred, the *Restatement* suggests that would be an appropriate resolution. *Restatement (Third) of Property: Mortgages* § 5.4 reporters’ note, at 386 (1997) (citing *Lawrence v. Knap*, 1 Root (Conn.) 248 (1791)). But since we do not know
whether or not there has been a split of the obligation from the security instrument, we have no occasion to consider this remedy.

Bain specifically suggests we follow the lead of the Kansas Supreme Court in *Landmark National Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158 (2009). In *Landmark*, the homeowner, Kesler, had used the same piece of property to secure two loans, both recorded with the county. *Id.* Kesler went bankrupt and agreed to surrender the property. *Id.* One of the two lenders filed a petition to foreclose and served both Kesler and the other recorded lender, but not MERS. *Id.* at 531. The court concluded that MERS had no interest in the property and thus was not entitled to notice of the foreclosure sale or entitled to intervene in the challenge to it. *Id.* at 544-45; accord Mortg. Elec. Registration Sys., Inc. v. Sw Homes of Ark., Inc., 2009 Ark. 152, 301 S.W.3d 1 (2009). Bain suggests we follow *Landmark*, but *Landmark* has nothing to say about the effect of listing MERS as a beneficiary. We agree with MERS that it has no bearing on the case before us. Resp. Br. of MERS at 39 (Bain).

Bain also notes, albeit in the context of whether MERS could be a beneficiary without holding the promissory note, that our Court of Appeals held that “‘[i]f the obligation for which the mortgage was given fails for some reason, the mortgage is unenforceable.’” Pl. Bain’s Opening Br. (Bain Op. Br.) at 34 (quoting *Fid. & Deposit Co. of Md. v. Ticor Title Ins. Co.*, 88 Wn. App. 64, 68, 943 P.2d 710 (1997)). She may be suggesting that the listing of an erroneous beneficiary on the deed of trust should sever the security interest from the debt. If so, the citation to
Fidelity is not helpful. In Fidelity, the court was faced with what appeared to be a scam. William and Mary Etter had executed a promissory note, secured by a deed of trust, to Citizen’s National Mortgage, which sold the note to Affiliated Mortgage Company. Citizen’s also forged the Etters’ name on another promissory note and sold it to another buyer, along with what appeared to be an assignment of the deed of trust, who ultimately assigned it to Fidelity. The buyer of the forged note recorded its interests first, and Fidelity claimed it had priority to the Etters’ mortgage payments. The Court of Appeals properly disagreed. Fidelity, 88 Wn. App. at 66-67. It held that forgery mattered and that Fidelity had no claim on the Etters’ mortgage payments. Id. at 67-68. It did not hold that the forgery relieved the Etters of paying the mortgage to the actual holder of the promissory note.

MERS states that any violation of the deed of trust act “should not result in a void deed of trust, both legally and from a public policy standpoint.” Resp. Br. of MERS at 44. While we tend to agree, resolution of the question before us depends on what actually occurred with the loans before us and that evidence is not in the record. We note that Bain specifically acknowledges in her response brief that she “understands that she is going to have to make up the mortgage payments that have been missed,” which suggests she is not seeking to clear title without first paying off the secured obligation. Pl. Bain’s Reply Br. at 1. In oral argument, Bain suggested that if the holder of the note were to properly transfer the note to MERS, MERS could proceed with foreclosure. This may be true. We can answer questions of

16 Wash. Supreme Court oral argument, supra, at approx. 8 min., 24 sec.
The trustee, Quality Loan Service Corporation of Washington Inc., has asked that we hold that no cause of action under the deed of trust act or the CPA “can be stated against a trustee that relies in good faith on MERS’ apparent authority to appoint a successor trustee, as beneficiary of the deed of trust.” Br. of Def. Quality Loan Service at 4 (Selkowitz). As this is far outside the scope of the certified question, we decline to consider it.

III. CPA Action

Finally, the federal court asked:

3. Does a homeowner possess a cause of action under Washington’s Consumer Protection Act against Mortgage Electronic Registration Systems, Inc., if MERS acts as an unlawful beneficiary under the terms of Washington’s Deed of Trust Act?

Certification at 4. Bain contends that MERS violated the CPA when it acted as a beneficiary. Bain Op. Br. at 43. 17

To prevail on a CPA action, the plaintiff must show “(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.” Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986). MERS does not dispute all the elements. Resp. Br. of MERS at 45; Resp. Br. of MERS (Selkowitz) at 37. We will consider only the ones that it does.

A. Unfair or Deceptive Act or Practice

As recently summarized by the Court of Appeals:

17 The trustee, Quality Loan Service Corporation of Washington Inc., has asked that we hold that no cause of action under the deed of trust act or the CPA “can be stated against a trustee that relies in good faith on MERS’ apparent authority to appoint a successor trustee, as beneficiary of the deed of trust.” Br. of Def. Quality Loan Service at 4 (Selkowitz). As this is far outside the scope of the certified question, we decline to consider it.
To prove that an act or practice is deceptive, neither intent nor actual deception is required. The question is whether the conduct has “the capacity to deceive a substantial portion of the public.” Hangman Ridge, 105 Wn.2d at 785. Even accurate information may be deceptive “if there is a representation, omission or practice that is likely to mislead.” Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 50, 204 P.3d 885 (2009) (quoting Sw. Sunsites, Inc. v. Fed. Trade Comm’n, 785 F.2d 1431, 1435 (9th Cir. 1986)). Misrepresentation of the material terms of a transaction or the failure to disclose material terms violates the CPA. State v. Ralph Williams’ N.W. Chrysler Plymouth, Inc., 87 Wn.2d, 298, 305–09, 553 P.2d 423 (1976).

Whether particular actions are deceptive is a question of law that we review de novo. Leingang v. Pierce County Med. Bureau, 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

State v. Kaiser, 161 Wn. App. 705, 719, 254 P.3d 850 (2011). MERS contends that the only way that a plaintiff can meet this first element is by showing that its conduct was deceptive and that the plaintiffs cannot show this because “MERS fully described its role to Plaintiff through the very contract document that Plaintiff signed.” Resp. Br. of MERS at 46 (Selkowitz). Unfortunately, MERS does not elaborate on that statement, and nothing on the deed of trust itself would alert a careful reader to the fact that MERS would not be holding the promissory note.

The attorney general of this state maintains a consumer protection division and has considerable experience and expertise in consumer protection matters. As amicus, the attorney general contends that MERS is claiming to be the beneficiary “when it knows or should know that under Washington law it must hold the note to be the beneficiary” and seems to suggest we hold that claim is per se deceptive and/or unfair. AG Br. at 14. This contention finds support in Indoor
Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 170 P.3d 10 (2007), where we found a telephone company had committed a deceptive act as a matter of law by listing a surcharge “on a portion of the invoice that included state and federal tax charges.” Id. at 76. We found that placement had “‘the capacity to deceive a substantial portion of the public’” into believing the fee was a tax. Id. (emphasis omitted) (quoting Hangman Ridge, 105 Wn.2d at 785). Our attorney general also notes that the assignment of the deed of trust that MERS uses purports to transfer its beneficial interest on behalf of its own successors and assigns, not on behalf of any principal. The assignment used in Bain’s case, for example, states:

FOR VALUE RECEIVED, the undersigned, Mortgage Electronic Registration Systems, Inc. AS NOMINEE FOR ITS SUCCESSORS AND ASSIGNS, by these presents, grants, bargains, sells, assigns, transfers, and sets over unto INDYMAC FEDERAL BANK, FSB all beneficial interest under that certain Deed of Trust dated 3/9/2007.

Doc. 1, Ex. A to Huelsman Decl. This undermines MERS’s contention that it acts only as an agent for a lender/principal and its successors and it “conceals the identity of whichever loan holder MERS purports to be acting for when assigning the deed of trust.” AG Br. at 14. The attorney general identifies other places where MERS purports to be acting as the agent for its own successors, not for some principal. Id. at 15 (citing Doc. 1, Ex. B). Many other courts have found it deceptive to claim authority when no authority existed and to conceal the true party in a transaction. Stephens v. Omni Ins. Co., 138 Wn. App. 151, 159 P.3d 167 (2007); Floersheim v. Fed. Trade Comm’n, 411 F.2d 874, 876-77 (9th Cir. 1969).
In *Stephens*, an insurance company that had paid under an uninsured motorist policy hired a collections agency to seek reimbursement from the other parties in a covered accident. *Stephens*, 138 Wn. App. at 161. The collection agency sent out aggressive notices that listed an “amount due” and appeared to be collection notices for debt due, though a careful scrutiny would have revealed that they were effectively making subrogation claims. *Id.* at 166-68. The court found that “characterizing an unliquidated [tort] claim as an ‘amount due’ has the capacity to deceive.” *Id.* at 168.

While we are unwilling to say it is per se deceptive, we agree that characterizing MERS as the beneficiary has the capacity to deceive and thus, for the purposes of answering the certified question, presumptively the first element is met.

B. Public Interest Impact

MERS contends that plaintiffs cannot show a public interest impact because, it contends, each plaintiff is challenging “MERS’s role as the beneficiary under Plaintiff’s Deed of Trust in the context of the foreclosure proceedings on Plaintiff’s property.” Resp. Br. of MERS at 40 (Selkowitz) (emphasis omitted). But there is considerable evidence that MERS is involved with an enormous number of mortgages in the country (and our state), perhaps as many as half nationwide. John R. Hooge & Laurie Williams, *Mortgage Electronic Registration Systems, Inc.: A Survey of Cases Discussing MERS’ Authority to Act*, Norton Bankr. L. Advisory No. 8, at 21 (Aug. 2010). If in fact the language is unfair or deceptive, it would have a broad impact. This element is also presumptively met.
C. Injury

MERS contends that the plaintiffs can show no injury caused by its acts because whether or not the noteholder is known to the borrower, the loan servicer is and, it suggests, that is all the homeowner needs to know. Resp. Br. of MERS at 48-49 (Bain); Resp. Br. of MERS at 41 (Selkowitz). But there are many different scenarios, such as when homeowners need to deal with the holder of the note to resolve disputes or to take advantage of legal protections, where the homeowner does need to know more and can be injured by ignorance. Further, if there have been misrepresentations, fraud, or irregularities in the proceedings, and if the homeowner borrower cannot locate the party accountable and with authority to correct the irregularity, there certainly could be injury under the CPA. ¹⁸

Given the procedural posture of these cases, it is unclear whether the plaintiffs can show any injury, and a categorical statement one way or another seems inappropriate. Depending on the facts of a particular case, a borrower may or may not be injured by the disposition of the note, the servicing contract, or many other things, and MERS may or may not have a causal role. For example, in Bradford v. HSBC Mortg. Corp., 799 F. Supp. 2d 625 (E.D. Va. 2011), three different companies attempted to foreclose on Bradford’s property after he

¹⁸ Also, while not at issue in these cases, MERS’s officers often issue assignments without verifying the underlying information, which has resulted in incorrect or fraudulent transfers. See Zacks, supra, at 580 (citing Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing: Hearing Before Subcomm. on H. and Cmty. Opportunity H. Fin. Servs. Comm., 111th Cong. 105 (2010) (statement of R.K. Arnold, President and CEO of MERSCORP, Inc.). Actions like those could well be the basis of a meritorious CPA claim.
attempted to rescind a mortgage under the federal Truth in Lending Act, 15 U.S.C. § 1635. All three companies claimed to hold the promissory note. Observing that “[i]f a defendant transferred the Note, or did not yet have possession or ownership of the Note at the time, but nevertheless engaged in foreclosure efforts, that conduct could amount to an [Fair Debt Collection Practices Act, 15 U.S.C. § 1692k] violation,” the court allowed Bradford’s claim to proceed. Id. at 634-35. As amicus notes, “MERS’ concealment of loan transfers also could also deprive homeowners of other rights,” such as the ability to take advantage of the protections of the Truth in Lending Act and other actions that require the homeowner to sue or negotiate with the actual holder of the promissory note. AG Br. at 11 (citing 15 U.S.C. § 1635(f); Miguel v. Country Funding Corp., 309 F.3d 1161, 1162-65 (9th Cir. 2002)). Further, while many defenses would not run against a holder in due course, they could against a holder who was not in due course. Id. at 11-12 (citing RCW 62A.3-302, .3-305).

If the first word in the third question was “may” instead of “does,” our answer would be “yes.” Instead, we answer the question with a qualified “yes,” depending on whether the homeowner can produce evidence on each element required to prove a CPA claim. The fact that MERS claims to be a beneficiary, when under a plain reading of the statute it was not, presumptively meets the deception element of a CPA action.

CONCLUSION

Under the deed of trust act, the beneficiary must hold the promissory note
Bain (Kristin), et al. v. Mortg. Elec. Registration Sys., et al., No. 86206-1

and we answer the first certified question “no.” We decline to resolve the second question. We answer the third question with a qualified “yes;” a CPA action may be maintainable, but the mere fact MERS is listed on the deed of trust as a beneficiary is not itself an actionable injury.
AUTHOR:
Justice Tom Chambers

WE CONCUR:
Chief Justice Barbara A. Madsen    Justice James M. Johnson
Justice Charles W. Johnson    Justice Debra L. Stephens
Justice Charles K. Wiggins
Justice Susan Owens    Justice Steven C. González
Justice Mary E. Fairhurst