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

Working Paper

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ABSTRACT

The economic crisis gripping the United States began when large numbers of homeowners defaulted on poorly underwritten subprime mortgage loans. Demand from Wall Street seduced mortgage lenders, brokers, and other players to churn out mortgage loans in extraordinary numbers. Securitization, the process of utilizing mortgage loans to back investment instruments, not only fanned the fire; the parties to these deals often handled and transferred the legally important documents that secure the resulting investments—the loan notes and mortgages—in a careless manner.

The consequences of this behavior are now becoming evident. All over the country, courts are scrutinizing whether the parties initiating foreclosures against homeowners legally possess the authority to repossess those homes. When the authority is absent, foreclosure sales may be reversed. The concern about authority to foreclose is most acute in the majority of states where foreclosures occur with little or no judicial oversight before the sale, such as Massachusetts. Due to the decision in *U.S. Bank N.A. v. Ibanez,* in which the Supreme Judicial Court voided two foreclosure sales where the foreclosing parties did not hold the mortgage, Massachusetts is the focal jurisdiction where an important conflict is unfolding.

This article explores the extent to which the *Ibanez* ruling may have traction in other nonjudicial foreclosure states and the likelihood that clear title to foreclosed properties is jeopardized by shoddy handling of notes and mortgages. I focused on Arizona, California, Georgia, and Nevada because they permit nonjudicial foreclosures and they are experiencing high seriously delinquent foreclosure rates. After comparing the law in these states to that of Massachusetts, I conclude that *Ibanez* should be persuasive authority in the four nonjudicial foreclosure states highlighted herein. However, property title trouble resulting from defective foreclosures may be more limited in Arizona and Nevada. The article also provides a roadmap for others to assess the extent to which title to properties purchased at foreclosure sales or from lenders' REO inventories might be defective in other states. Finally, the article addresses the potential consequences of reversing foreclosure sales and responds to the securitization industry's worry about homeowners getting free houses.

PROPERTY TITLE TROUBLE IN NON-JUDICIAL FORECLOSURE STATES: THE *IBANEZ* TIME BOMB?

Elizabeth Renuart[1]

I. INTRODUCTION

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

Without a ready source of cash and the resulting massive volume of subprime originations, the havoc might have been contained. Securitization not only fanned the fire; the parties to these deals often handled and transferred the legally important documents that secure the resulting investments—the loan notes and mortgages—in a careless manner. The consequences of this behavior are now becoming evident. All over the country, courts are scrutinizing whether the parties initiating foreclosures against homeowners legally possess the authority to repossess those homes. When the authority is absent, foreclosure sales may be reversed.

The concern about authority to foreclose is most acute in the majority of states where foreclosures occur with little or no judicial oversight before the sale, such as Massachusetts. Due to the decision in *U.S. Bank N.A. v. Ibanez*, in which the Supreme Judicial Court voided two foreclosure sales where the foreclosing parties did not hold the mortgage, Massachusetts is the focal jurisdiction where an important conflict is unfolding.[2] On one side of the contest are the integrity of the law and the related public policy in favor of strict compliance with nonjudicial foreclosure procedures designed to ensure that only the proper party ousts homeowners from their homes. The securitization industry, including the trustee banks who must answer to the investors and who claim the right to foreclose, present their contrary view that: these rules are technical, substantial

[1] Assistant Professor of Law, Albany Law School. The following professor and practicing attorneys knowledgeable of the foreclosure law in the five states highlighted in this article were kind enough to share their expertise: Professor Frank Alexander (GA), Clinical Instructor Roger Bertling (MA), Maeve Elise Brown (CA), Geoffrey Giles (NV), Elizabeth Letcher (CA), Beverly Parker (AZ), Lori Wilson (AZ), and Noah Zinner (CA). My colleagues at Albany Law School offered helpful suggestions and critical feedback, especially James Gathii. Finally, I had the pleasure of working with three wonderful law students who supplied essential research and editing assistance: Mark Apostolos, Gina Caprotti, and John Forbush. I thank Kathleen Carroll for creating the figures that track the seriously delinquent rates appearing in this paper. Any mistakes or errors are my own.

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

compliance is sufficient, court rulings can endanger clear title, and, most worrisome of all, homeowners might get a free lunch (*i.e.*, a free home).

This article explores the extent to which the *Ibanez* ruling may have traction in other nonjudicial foreclosure states and the likelihood that clear title to foreclosed properties is jeopardized by shoddy handling of notes and mortgages. In particular, I selected Arizona, California, Georgia, and Nevada to compare to Massachusetts because they permit nonjudicial foreclosures and they are experiencing high seriously delinquent foreclosure rates. I conclude that *Ibanez* should be persuasive authority in the four nonjudicial foreclosure states highlighted herein. However, property title trouble resulting from defective foreclosures may be more limited in Arizona and Nevada than in California and Georgia.

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

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

II. THE SCOPE OF THE PROBLEM

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

As more and more homes went into foreclosure, the effects of this disaster triggered a broader financial crisis.[5] As of the beginning of 2011, over twenty-six million

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

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

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

Americans had no jobs, could not find full-time work, or had given up looking for work.[6] Almost four million families had lost their homes to foreclosure. Nearly $11 trillion in household wealth had vanished, including retirement accounts and life savings.[7]

As the financial catastrophe heads into its fifth year, its origins and consequences remain popular topics of analysis. Well-documented causes include the collapse of the housing bubble fueled by low interest rates, easy and available credit, negligible regulation, and toxic mortgages.[8] Securitization stimulated the conditions leading to the collapse due to the enormous volume of money it pumped into the production of subprime mortgage loans, its failure to accurately police the quality of the underlying mortgage loans, and its inability to accurately assess the ensuing heightened risks.[9]

The capital to fund most residential mortgages in the United States is created by securitization. The securitization story germane to this article began in earnest in 1994 when private label securitizations of subprime mortgage loans increased dramatically.[10] In that year, $11.05 billion of these loans were securitized. By 2005 and 2006, the height of the subprime mortgage market, $507.65 and $483.05 billion of subprime residential

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

[7] *Id.*

[8] *Id.* at xvi. More specifically, the Commission found: widespread failures in financial regulation and supervision by key federal agencies; failures of corporate governance and heightened risk-taking; excessively leveraged financial institutions and high consumer debt-loads; deterioration of mortgage-lending standards; loosening of due diligence standards applied in the securitization process; the re-packaging and sale of questionable mortgage-backed securities into collateralized debt obligations and the sale of credit default swaps to hedge against the collapse of the securities; failures of the credit rating agencies; and an unprepared government that responded inconsistently to the crisis. *Id.* at xviii-xxvii (summary). See also *FDIC Oversight: Examining and Evaluating the Role of the Regulator during the Financial Crisis and Today: Hearing before the Subcommittee on Financial Institutions and Consumer Credit of the House Fin. Servs. Comm.* May 26, 2011, 5-12 (testimony of Sheila C. Bair)(identifying the roots of the financial crisis—excessive reliance on debt and financial leverage, misaligned incentives in financial markets, failures and gaps in financial regulation, and erosion of market discipline due to "too big to fail"), available at http://financialservices.house.gov/UploadedFiles/052611bair.pdf (accessed 9/7/11).

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

[10] In private label securitizations, private parties issue the securities. By contrast, in "agency" securitizations, either Ginnie Mae, Fannie Mae, Freddie Mac, or the Federal Home Loan Banks issue the securities. Inside Mortgage Finance, The 2008 Mortgage Market Statistical Annual, Vol. I, Glossary. When referring to "securitizations" in this article, I refer only to private label securitizations because note and mortgage ownership problems do not arise in agency securitizations to the same degree, if at all. *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing: Hearing Before the Subcomm. on Housing and Community Opportunity of the House Fin. Servs. Comm.*, 111th Cong. 19, n. 77 (2010) (statement of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center), [hereinafter Levitin Testimony], *available at* http://financialservices.house.gov/Media/file/hearings/111/Levitin111810.pdf (explaining that the agency guarantee coupled with the right to remove the loan from the pool and foreclose on it reduces the consequences of any transfer glitches); United States Government Accountability Office, Mortgage Foreclosures: Documentation Problems Reveal Need for Ongoing Regulatory Oversight GAO -11- 433 49050 (2011) [hereinafter GAO Report], *available at* http://www.gao.gov/new.items/d11433.pdf (discussing Fannie Mae and Freddie Mac procedures that reduce or eliminate note and mortgage transfer problems).

mortgage loans, respectively, found their way into securitizations.[11] For all residential mortgage securitizations, the average rate of securitization was just over 64% between 2000 and 2007.[12] The dollar volume of the mortgages securitized for the same period exceeded $14.166 trillion.[13] This data clearly shows the enormous amount of money flowing into the origination of mortgage loans from investors.

The complexities of the securitization process contributed to a breakdown in the transfer of the mortgage loans from one entity to the next along the chain of players.[14] Evidence of these glitches is less systematically documented than the volume of securitized mortgage loans. Nonetheless, examples have appeared in federal and state court decisions, in the findings of one state attorney general investigation, in studies by law professors, in news reports, in Congressional testimony, and in shareholder lawsuits. What follows is a sample of that evidence.

The problem initially triggered public attention in the context of foreclosure lawsuits. The federal courts in Ohio were among the first to question standing in numerous foreclosure actions when plaintiffs could not produce relevant documents demonstrating they possessed the right to enforce the loans and mortgages at the time of filing the action.[15] Since then, several state courts have noted the failure to properly transfer notes and mortgages in foreclosure cases involving securitized mortgage loans.[16]

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

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

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

[14] Unless otherwise noted, the phrase "mortgage loan" refers to both the loan note and the mortgage. Unless otherwise noted, the word "mortgage," refers to the instrument that secures the debt represented by the loan note by taking an interest in real property and includes all forms of these instruments, such as, mortgages, deeds of trust, and security deeds. Later sections of this article discuss the similarities and differences between mortgages, deeds of trust, and security deeds where relevant. The securitization process is dissected in section xx below.

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

[16] *E.g.*, U.S. Bank Nat. Ass'n. v. Ibanez, 458 Mass. 637, 941 N.E.2d 40 (Mass. 2011)(describing two different securitization transactions; finding that the trust agreements did not contain attached schedules showing that the specific mortgage loans were part of the deal and mortgages were not assigned to the plaintiff trustee banks); Davenport v. HSBC Bank USA, 275 Mich. App. 344, 739 N.W.2d 383 (Mich. Ct. App 2007)(reversing summary judgment against the homeowner seeking to void the sale and holding the sale void as HSBC Bank did not own the indebtedness at the time it foreclosed; Note—that the mortgage loan was securitized is only evident when reviewing the caption of the case in the brief filed in the appeal, see Plaintiff-Appellant's Brief on Appeal, 2006 WL 6364462); Deutsche Bank Nat'l Trust Co., v. Mitchell, 27 A.3d 1229 (N.J. Super. Ct. App. Div. 2011)(vacating the sheriff's sale and remanding due to lack of evidence that the plaintiff possessed the loan note at the time of filing the foreclosure action); Bank of New York v. Silverberg, 86 A.D.3d 274, 926 N.Y.S.2d 532 (N.Y. App. Div. 2011)(reversing the lower court's refusal to dismiss the foreclosure complaint where the assignee only obtained the mortgage from MERS

Furthermore, bankruptcy judges regularly are confronted with consumer challenges to the creditors' standing to be paid or to lift the automatic stay where malfunctions occurred in the transfer of securitized mortgage loans.[17] In particular, a decision from the bankruptcy court in New Jersey recounted the testimony of a Bank of America witness that "it was customary for Countrywide to maintain possession of the original note and related loan documents" in loan transactions it originated.[18] This statement raised eyebrows because it cast doubt on the validity of foreclosures commenced upon mortgage loans issued by the largest originator in the United States during the years leading up to the financial crisis.[19] The "eyebrows" included those of the rating agency Moody's. In response to this testimony, Moody's issued a short report attempting to dispel concerns about whether the failure to indorse loan notes, assign the mortgages, and physically deliver them to the trustee in securitizations was systematic in Countrywide deals.[20] Bank of America shareholders became alarmed enough to o sue the

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and not the note); HSBC Bank USA, Nat. Ass'n. v. Miller, 889 N.Y.S.2d 430, 432-33 (N.Y. Sup. Ct. 2009)(dismissing the foreclosure because the plaintiff failed to show that the note was transferred to it before filing the foreclosure action); *In re* Adams, 693 S.E.2d 705 (N.C. Ct. App. 2010)(ruling the evidence of transfer of the note to the trustee bank insufficient); Wells Fargo Bank Nat. Ass'n. v. Lupori, 8 A.3d 919, 921-22 (Pa. Super. Ct. 2010)(reversing the trial court's order denying the homeowner's petition to strike the default judgment against them and setting aside the sheriff's sale because the bank offered no evidence to show the mortgage had been assigned to it); U.S. Bank Nat. Ass'n. v. Kimball, 27A.3d 1087, 1092-93 (Vt. 2011)(affirming summary judgment to the mortgagor when the bank failed to prove that it was the holder of the note).

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

[18] Kemp v. Countrywide Home Loans, Inc. (*In re* Kemp), 440 B.R. 624, 628 (Bankr. D.N.J. 2010) (holding that the note was never transferred to the trust pursuant to the securitization documents). Bank of America announced the planned purchase of Countrywide in early 2008. *Bank of America to Acquire Countrywide* MSNBC.COM Jan. 11, 2008, http://www.msnbc.msn.com/id/22606833/ns/business-real_estate/t/bank-america-acquire-countrywide (last visited Aug. 23 2011).

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

[20] *Weekly Credit Outlook*, MOODY'S INVESTORS SERVICE (Moody's), Jan. 10, 2011, at 37-38 *available at* http://www.institutionalinvestorchina.com/arfy/uploads/soft/110127/1_0734402621.pdf (last visited July 22, 2011)(finding that a "majority" of mortgage loans contained in a "sample" of Countrywide securitization deals was properly delivered to the trustee but failing to state whether the sample was random and reviewing only the initial trustee certifications, not the final versions; reporting that the initial

company in the New York state court. In their complaint, the shareholders seek damages from the company's directors due to alleged breaches of their fiduciary duty and for gross mismanagement by concealing from the public information about defects in the recording of mortgages which severely complicated the foreclosure process.[21]

An investigation by the Florida Attorney General identified significant glitches in the handling and transfer of loan notes and mortgages in Florida, including forgery and fraud.[22] The proof included actual documents showing: forged signatures on mortgages and on "indorsements" of notes; falsifications of dates on mortgage assignments; bogus grantees and grantors listed on mortgage assignments; lack of knowledge of bank employees who signed transfers of notes and mortgages; and, lack of authority to transfer notes and mortgages.[23] Moreover, the investigators discovered that the agents or attorneys for the foreclosing parties recorded many of these defective documents and relied upon them in court.

Evidence that documents purporting to transfer mortgage loans and other affidavits filed in foreclosure cases were suspect sparked national attention in the fall of 2010 when the "robo-signing" scandal broker. One court defined "robo-signing narrowly: "A 'robo-signer' is a person who quickly signs hundreds or thousands of foreclosure documents in a month, despite swearing that he or she has personally reviewed the mortgage documents and has not done so."[24] In common parlance, the term came to include a variety of questionable or illegal behavior, such as that reported upon by the Florida Attorney General, including the mishandling of notes and mortgages. Following these revelations, the major mortgage servicers froze foreclosures proceedings in many states and undertook internal reviews.[25] The federal banking agencies that supervise the federally-chartered depository institutions conducted an evaluation of the

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certifications in the securitization that included the Kemp loan showed that 9.6% of the loans were not properly delivered to the trustee).

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

[22] Office of the Attorney General of the State of Florida, Economic Crimes Division, "Unfair, Deceptive and Unconscionable Acts in Foreclosure Cases: Presentation to the Florida Association of Court Clerks and Controllers" (2010), http://southfloridalawblog.com/wp-content/uploads/2011/01/46278738-Florida-Attorney-General-Fraudclosure-Report-Unfair-Deceptive-and-Unconscionable-Acts-in-Foreclosure-Cases.pdf *(*last visited Aug. 8, 2011).

[23] *Id.* at 27-35 (highlighting the example of Linda Green whose signature appears on "hundreds of thousands" of mortgage assignments and who is listed as an officer of dozens of banks and mortgage companies; presenting documents in which her signature was forged on many documents). I use the spelling of the word "indorsement" as it appears in the Uniform Commercial Code, Article 3.

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

[25] Federal Deposit Insurance Corporation, *Regulatory Actions Related to Foreclosure Activities by Large Servicers and Practical Implications for Community Banks*, SUPERVISORY INSIGHTS, May 2011, at 2, *available at* http://www.fdic.gov/regulations/examinations/supervisory/insights/sise11/SI_SE2011.pdf (last visited Aug. 8, 2011) (finding no incidents of "robo-signing" in its review of state-chartered banks).

servicers' performance.[26] The Office of the Comptroller of the Currency and the Office of Thrift Supervision signed consent orders with several banks and two third party providers due to unsafe and unsound practices related to residential mortgage loan servicing and foreclosure processing.[27]

Legal scholars provide additional evidence of the slipshod handling of the notes and mortgages. For example, Professor Levitin examined a small sample of foreclosure complaints filed in Allegheny County, Pennsylvania in May 2010 and found that the loan note was not filed with the complaint in over 60% of the cases.[28] "Failure to attach the note appears to be routine practice for some of the foreclosure mill law firms, including two that handle all of Bank of America's foreclosures."[29] He concluded that those foreclosure complaints were facially defective.

Professor Whitman posited that: "While delivery of the note might seem a simple matter of compliance, experience during the past several years has shown that, probably in countless thousands of cases, promissory notes were never delivered to secondary

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[26] FEDERAL RESERVE SYSTEM, OFFICE OF THE COMPTROLLER OF THE CURRENCY, OFFICE OF THRIFT SUPERVISION, INTERAGENCY REVIEW OF FORECLOSURE POLICIES AND PRACTICES, (April 2011), *available at* http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-47a.pdf (last visited July 22, 2011). These agencies focused on fourteen servicers that represented more than two-thirds of the servicing industry and about 36.7 million mortgages of the 54 million first –lien mortgages outstanding on December 31, 2010. *Id.* at 5. Of the total mortgage files, the agencies reviewed only 2,800 borrower foreclosure files collectively, or 200 per servicer, that were in some stage of foreclosure between January 1, 2009 and December 31, 2010. *Id.* at 1; GAO Report, *supra*, note 10 at 25 (observing that the banking agencies reviewed only about 200 files from each servicer). Overall, the examiners found: "[M]ost servicers had inadequate staffing levels and training programs throughout the foreclosure-processing function and that a large percentage of the staff lacked sufficient training in their positions.." .FEDERAL RESERVE SYSTEM at 7. More specifically, however, examiners generally found that loan notes appeared to be properly indorsed and mortgages properly assigned, with some exceptions, and that the servicers generally had possession and control over these documents. *Id.* at 8-9. However, the bank reviewers did not sample actual foreclosure flings to determine any procedural defects due to the failure in chain of title of the notes and mortgages. Levitin Testimony, *supra* note 10 at 19. The GAO noted that banking agency regulatory officials reported that "examiners did not always verify…whether documentation included a record of all previous mortgage transfers from loan origination to foreclosure initiation, as may be required by some state law or contracts." GAO Report, *supra* note 10, at 29. Finally, it is impossible to tell who should hold the notes and mortgages until a foreclosure is commenced. Even then, for the securitized mortgage loans, the examiner would need to see the trust document to determine if the trustee bank possesses the authority to foreclose at the legally relevant moment.

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

[28] Levitin Testimony, *supra* note 10, at 18.

[29] *Id.*

market investors or securitizers, and, in many cases, cannot presently be located at all."[30] Professor Whitman also described efforts to "fix" these oversights by executing lost note affidavits permitted under state law as problematic because those affidavits are perjured in "many cases."[31]

A study conducted by Professor Porter into mortgage servicer filings in bankruptcy courts provides additional insight into paperwork glitches. She reviewed the proofs of claims filed by the purported mortgage loan holders and their agents when seeking to establish their right to payment under the loan notes in consumer bankruptcies.[32] Mortgage creditors must file a proof of claim in a Chapter 13 bankruptcy if they wish to receive payments from the bankruptcy estate for arrearages.[33] The Bankruptcy Rules of Procedure require such creditors to provide a copy of the writing evidencing the claim, *i.e.*, the loan note, and evidence of the creditor's security interest in property of the debtor if perfected, *i.e.*, the mortgage or deed of trust.[34]

These mandates represent two fundamental public policies embodied in the Bankruptcy Code: "ensur[ing] the accuracy and legality of the claim…and that any payments on mortgage claims are made in accordance with the Bankruptcy Code." Despite these obligations, Professor Porter found that 41.1% of the proofs of claims she reviewed did not include the loan note. Moreover, the mortgage or deed of trust was not attached to about 20% of these proofs of claim.[35] This evidence does not conclusively show that the parties filing the defective proofs of claims had no right to payment nor does it prove that that these parties could never produce these documents. At a minimum, though, these findings support claims of sloppiness in the handling of important legal documents by lenders and/or their agents and transferees.

Federal banking supervisors admit to serious problems in the foreclosure process. Before Sheila Bair, Chair of the Federal Deposit Insurance Corporation, left office, she testified before a Senate Committee and opined that flawed banking processes, including faulty transfers of loan documentation, "have potentially infected millions of foreclosures, and the damages to be assessed against these operations could be significant

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[30] Dale A. Whitman, *How Negotiability Has Fouled up the Secondary Mortgage Market, and What to Do About It*, 37 Pepp. L. Rev. 737, 758 (2010). See also Tamar Frankel, *Securitization: The Conflict Between Personal and Market Law (Contract and Property)*, 18 Ann. Rev. Banking L. 197, 205 (1999)(noting that the servicer of the loan portfolio often is the loan originator and payee on the notes; in practice, lenders retain the notes and do not indorse them).

[31] *Id.* at 761. See also Levitin Testimony, *supra* note 10, at 14-15 (observing that the large number of lost note affidavits filed in foreclosure cases are not based upon personal knowledge of the affiants and opining that the lack of personal knowledge occurs because the affiants do not know or fail to determine if the trustee bank actually possesses the notes and mortgages).

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

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

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

[35] Porter, *supra* note 32 at 146.

and take years to materialize."[36] Acting Comptroller of the Currency, John Walsh, noted "improper practices in foreclosure processing and mortgage servicing" in the context of announcing an independent review process that will "identify borrowers who suffered financial injury as a result of errors, misrepresentations, or other deficiencies in the foreclosure process."[37]

Finally, news reports contributing evidence about flawed mortgage loan documentation and the related plights of homeowners fighting to save their homes began to appear regularly in 2008.[38] One article quoted a banking analyst regarding the seriousness of the paperwork problems caused by securitization: "[T]here's a possible nightmare scenario here that no foreclosure is valid."[39] Moreover, the Wall Street Journal noted that court cases arose over the last year in Alabama, California, Florida, Massachusetts, Maine, New Jersey, New York, North Carolina, and Texas in which questions about ownership of the notes were raised.[40] Finally, an American Banker article released in August 2011 noted evidence that some of the largest servicers were

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

[37] John Walsh, Acting Comptroller of the Currency, Remarks Before The American Banker Regulatory Symposium, Washington, D.C. 3, 5-6 (Sept. 19, 2011), available at http://www.occ.treas.gov/news-issuances/speeches/2011/pub-speech-2011-120.pdf (accessed 9/23/11). Section VIII, *infra*, describes this homeowner review and claim process in more detail.

[38] *E.g.*, Gretchen Morgenson, *How One Borrower Beat the Foreclosure Machine*, N.Y. TIMES, July 27, 2008, *available at* http://www.nytimes.com/2008/07/27/business/economy/27gret.html?pagewanted=all(recounting the six-year battle of 74-year-old Ms. Palmer to save her modest Atlanta, Georgia home from foreclosure when the trustee in the securitization involving her mortgage loan did not obtain the loan note until two months after it began foreclosure proceedings; describing a New York judge's dismissal of thirteen of fourteen cases decided since January of 2008 due to lack of proper documentation); Mitch Stacy, *Sliced, Diced Mortgages Buy Owners Time*, ORLANDO SENT., Feb. 18, 2009, at A2 (noting that Florida mortgagor defaulted on her payments, but requested that the bank show her the original mortgage paperwork, and the foreclosure proceedings stopped when the bank was unable to produce the loan note); Gretchen Morgenson, *If Lenders Say 'The Dog Ate Your Mortgage*,' N.Y. TIMES, Oct. 25, 2009, *available at* http://www.nytimes.com/2009/10/25/business/economy/25gret.html?pagewanted=all (discussing a federal bankruptcy judge who eliminated the mortgage debt because PHH Mortgage could not prove its right to the foreclose; attributing missing loan notes and the related failure to track these important document to securitization).

[39] Brady Dennis & Ariana Eunjung Cha, *In foreclosure controversy, problems run deeper than flawed paperwork*, WASH. POST , Oct. 7, 2010 (quoting Nancy Bush, a banking analyst with NAB Research and noting the observation of Janet Tavakoli, founder and president of Tavakoli Structured Finance, a Chicago-based consulting firm, that when banks were creating mortgage-backed securities as fast as possible over the last decade, there was little time to assure the paperwork was in order).

[40] Nick Timiraos, *Banks Hit Hurdle to Foreclosure*, WALL ST. J., June 1, 2011 (quoting the former chief executive of subprime lender Ownit Mortgage Solutions as stating: "Am I surprised? Absolutely not. I knew this assignment problem was going to be an issue."). *See also*, Gretchen Morgenson, *Guess What Got Lost in the Loan Pool?*, N.Y. TIMES, Mar. 1, 2009 (describing cases in Florida and California in which the original loan notes were lost or improperly transferred; quoting Judge Bufford, a federal bankruptcy court judge in Los Angeles: "My guess is it's because in the secondary mortgage market they have been sloppy…The people who put the deals together get paid for the deals, but they don't get paid for the paperwork.").

still fabricating documents that should have been signed years ago and submitting them as evidence to support the trustee bank's authority to foreclose, even after the banking agency investigation conducted in late 2010 and early 2011.[41]

Now that we have some sense of the scope of the problem, we turn to a discussion of securitization and the travel routes that loan and mortgages should take.

III. ABCs OF SECURITIZATION

Mortgage-backed securitizations are addressed in greater detail elsewhere.[42] For purposes of this article, a basic description of the goals of the transaction, the players, and the path along which the loan notes and mortgages should travel is important to an understanding of why and how this journey never occurred or became interrupted.

At its most basic level, securitization is the process of utilizing mortgage loans to back investment instruments. Mortgage securitizations are extremely complex and involve a number of players. Nonetheless, the goals of the parties to any given securitization are relatively straightforward. First, lenders obtain capital to make mortgage loans and investors want to buy bonds backed by the loans.[43] Second, the claims and defenses that the homeowner may have against the original lender should not follow the documents as they travel to the trustee who holds them in trust for the investors.[44] Third, the transaction must include a true sale of the mortgage loans to protect the investors against claims that the note and mortgages are assets of the estate of the original lender in a bankruptcy proceeding.[45] Fourth, the tax consequences are limited by the intended creation of real estate investment mortgage conduits.[46]

When mortgage loans are sold, they most often are packaged together in groups ("pools"), sold, and held in trust for the benefit of the investors according to the terms of the operative trust document.[47] This process begins with a mortgage lender that originates the loans and sells them to an investment bank or other entity, called an arranger, sponsor, or underwriter.[48] The sponsor may be affiliated with the mortgage

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

[42] *E.g.*, Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitizaiton, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 548-49 (2002) (hereinafter "Eggert II"); Frankel, *supra* note 30; Kathleen C. Engel & Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039 (2007).

[43] Engel & McCoy, Subprime Virus, *supra* note 5, at 43.

[44] Eggert II, *supra* note 42 at 548-49; Kathleen C. Engel & Patricia A. McCoy, *Predatory Lending: What Does Wall Street Have to Do with It?*, 15 HOUSING POL'Y DEBATE 715, 724-725 (2004).

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

[46] *Id.* at 32-33.

[47] The trust agreement may be included in the pooling and servicing agreement ("PSA"). *See* Affidavit and Testimony of Professor Ira Mark Bloom at ¶ 7, U.S. Bank Nat. Ass'n. v. Congress, Case No. CV-2009-901113 (Cir. Ct. of Jefferson Cty., Alabama) (hereinafter "Bloom Testimony") (stating that he found the trust agreement in the PSA) (on file with author). When the securitization involves a public offering of securities, the deal's PSA usually is posted as part of the Prospectus in the Edgar database on the website of the Securities and Exchange Commission. *See* Search the Next-Generation EDGAR System, http://www.sec.gov/edgar/searchedgar/webusers.htm (last visited Sept. 23, 2011).

[48] Engel & McCoy, Subprime Virus, *supra* note 5, at 44. The sale agreement between these two parties is generally called a mortgage loan purchase and sale agreement. Levitin & Twomey, *supra* note 45, at 13, n. 32.

lender. Next, the sponsor sells the pool of loans to a special-purpose subsidiary, called the "depositor" that has no other assets or liabilities in order to separate the loans from the sponsor's assets and liabilities.[49] Then, the depositor transfers the loans to a specially created, special-purpose vehicle ("SPV"), usually a trust that holds the loans for the benefit of the investors.[50]

The trustee of the trust (a bank) holds the mortgage loans on behalf of the trust and is entitled to the income from the payments by the homeowners to pass along to the investors. The pooling and servicing agreement (PSA) normally identifies a document custodian to take physical possession of the loan notes and mortgages on behalf of the trustee and a servicer to collect the monthly payments from the homeowner and transfer those monies to the trustee.[51] As a result of the terms of these deals, the loan notes and mortgages in each pool should travel from the originating lender to the sponsor, thence to the depositor, and finally to the trust.

To illustrate, let us review a securitization of Countrywide Home Loans, Inc. loans pooled in 2005 into Mortgage Pass-Through Certificates, Series 2005-J9.[52] In this transaction, the Countrywide Home Loans, Inc. originated mortgage loans through its retail offices and acquired additional loans from correspondent lenders using Countrywide Home Loans' underwriting standards.[53] The Prospectus identified the seller as either Countrywide Home Loans, Inc. or "to-be-identified" entities established by Countywide Financial Corporation or one of its subsidiaries which, in turn, acquired those mortgage loans directly from Countrywide Home Loans, Inc. The depositor was CWALT, Inc., a limited purpose subsidiary of Countrywide Financial Corp. The Bank of New York took the role of the trustee. The master servicer was listed as Countrywide Home Loans Servicing LP.[54] The deal documents did not list a specific document custodian, though the custodian's role is mentioned throughout.[55]

According to the Prospectus, the depositor was to purchase the pool of mortgage loans from the sellers pursuant to the PSA. The depositor should have assigned them to the trustee (or its custodian) for the benefit of the certificate holders (the investors).[56] In this deal, therefore, the mortgage loans were to move from the corresponding lender to the seller; from the seller to the depositor; and, from the depositor to the trustee (or its custodian and/or the servicer). If the loans followed this path, at least four entities handled (or mishandled) them.

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

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[49] This transfer typically is governed by the PSA. Levitin & Twomey, *supra* note 45, at 13, n. 33.
[50] *Id*. at 13-14.
[51] *Id*. at 15. The remainder of the transaction is relevant primarily to the investors and is described by Levitin and Twomey in their article. *Id.* at 14.
[52] CWALT, Inc. Mortgage Pass-Through Certificates, Series 2005-j9 Supplement Prospectus, http://www.sec.gov/Archives/edgar/data/1269518/000112528205004023/0001125282-05-004023.txt.
[53] *Id*. at S-38.
[54] *Id*. at S-3-4.
[55] *Id*. at S-3-4, S-37.
[56] *Id*. at S15-16. In this deal, there was no "sponsor" as described above. Apparently, Countrywide arranged the deal itself.

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

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

A "mortgage loan" consists of two distinct documents: a note and a security agreement.[57] The loan note represents the legal obligation to repay money advanced by the lender for use by the borrower.[58] In many states, a mortgage or deed of trust creates a security interest in the borrower's real property and permits the mortgagee or beneficiary to foreclose in the event of non-payment or a breach of other duties listed in the document.[59] The transfer of the note is governed by the law of contract and by the Uniform Commercial Code; whereas, the transfer of the mortgage generally is governed by the state law of conveyance and real property.[60]

B. Transferring the Note and Potential Problems

This section describes the legal infrastructure that governs the transfer of loan notes and mortgages and highlights the points at which proper transfers can fail. Notes can be transferred in one of three ways. First, the note can be sold or assigned by contract and the resulting transaction is governed by the terms of the contract and related common law. Next, if the note is a negotiable instrument, it can be transferred according to the rules in Article 3 of the Uniform Commercial Code (UCC). Alternatively, the note could be sold pursuant to Article 9 of the UCC, regardless of whether it was a negotiable instrument.[61] Since mortgage loan securitizations attempt to transfer the notes in compliance with the UCC, I will review those rules and the ways in which non-compliance occurs.[62]

1. Article 3

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[57] Grant S. Nelson & Dale A. Whitman, 1 REAL ESTATE FINANCE LAW § 5.27 (4th ed. 2002) (hereinafter Nelson & Whitman).

[58] The notes used in mortgage loan transactions usually are "promissory notes" as defined in UCC § 9-102(a)(65) (" 'Promissory note' means an instrument that evidences a promise to pay a monetary obligation, does not evidence an order to pay, and does not contain an acknowledgment by a bank that the bank received for deposit a sum of money or funds.").

[59] 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 37.03 (Michael Allan Wolfe ed., LexisNexis Matthew Bender 2010) (hereinafter "4 Powell on Real Property"). In "title" states, the mortgage or a security deed vests legal title in the mortgagee or beneficiary. In this section, I will use "mortgage" generically to include mortgages, deeds of trust, and security deeds.

[60] JOHN RAO, ET AL, FORECLOSURES: DEFENSES, WORKOUTS, AND MORTGAGE SERVICING § 4.4.4.1 (National Consumer Law Center 3d ed. 2010).

[61] Levitin Testimony, *supra* note 10 at 20-21.

[62] For example, in the securitization of Countrywide loans discussed in Section III, supra, the PSA states the following related to the transfer of the notes: "In addition, the depositor will deliver or cause to be delivered to the trustee (or to the custodian) for each mortgage loan
o the mortgage note endorsed without recourse in blank or to the order of the trustee, except that the depositor may deliver or cause to be delivered a lost note affidavit in lieu of any original mortgage note that has been lost…" CWALT, Inc. Mortgage Pass-Through Certificates, Series 2005-j9 Pooling and Servicing Agreement, *supra* note 55 at 43-44.

The transfer of and the right to enforce "negotiable" loan notes are governed by several provisions of Article 3 of the UCC.[63] Under UCC § 3-104, a "negotiable instrument": 1) contains an unconditional promise to pay a fixed amount of money; [64] 2) is payable to bearer or to order at the time it is issued or first comes into possession of a holder; 3) is payable on demand or at a definite time;[65] and, 4) does not state any other undertaking or instruction by the promisor to do any action in addition to the payment of money. If any one of these conditions is not met, the loan note is not "negotiable" and its transfer does not qualify as a "negotiation."[66]

Negotiability is important for two reasons. First, Article 3 creates rights to enforce the note only if it is negotiable.[67] Second, a negotiable instrument that is transferred to a third party under certain circumstances and who takes the instrument for value, in good faith, without notice that it is overdue or that a party has a defense or claim in recoupment can become a "holder in due course."[68] Holder-in-due-course status creates a shield against certain claims and defenses that the obligor (the homeowner in the context of mortgage loans) could raise against the original payee (lender).[69] In other words, the transferee of a loan note will be immune from many claims and defenses which the borrower could raise against the lender.[70]

As discussed previously, achieving this status is one of the goals of securitizaton. This section explores negotiation as it is relevant to the pivotal question in a foreclosure—does the foreclosing party possess the right to enforce the note.[71] This issue is relevant to, but not the same as, whether the one possessing the right to enforce the note also acquired the protections of a holder-in-due-course.

Transfer of a negotiable note occurs either by way of "negotiation" or by assignment or sale. If via negotiation, the transfer must include delivery of the note containing the indorsement of the current holder if the note is payable to an identified

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

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

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

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

[67] UCC §§ 3-203(b); 3-301.

[68] UCC § 3-302(a).

[69] UCC § 3-305(a) and (b).

[70] If the note is not "negotiable," the assignee acquires all rights and is subject to all liabilities of the assignor upon the transfer. RESTATEMENT (SECOND) OF CONTRACTS § 336 (1981); Eggert II, *supra* note 42 at 613. Although the original parties to the note can agree that provisions of Art. 3 apply to determine their respective rights, the transferor of the note cannot amend or eliminate the rights of the original parties in an assignment document.
See UCC § 3-104(Comment 2,¶ 4).

[71] The relevant question is whether the party relying on the note has the right to enforce it, not which claims and defenses to payment on the note a homeowner could raise against that party.

person.[72] If the instrument is payable to bearer, transfer by possession alone suffices.[73] By this process, the recipient becomes a "holder."[74]

If a negotiable instrument is not "negotiated," it can, nevertheless, be transferred by delivery for the purpose of giving the recipient the right to enforce it.[75] This often occurs through purchase and sale agreements in securitizations or via written assignments. A transfer that complies with § 3-203(a) vests in the transferee any right of the transferor to enforce the instrument.[76] The crucial element common to both negotiation and a mere transfer is possession of the instrument by the transferee.

The relevant consequence of becoming a "holder" or a transferee in possession of the note who has the rights of a holder (i.e., a "holder" transferred it to the non-holder) is that Article 3 bestows on that party the right to enforce the negotiable instrument.[77] In the event of a default, such a person can sue on the mortgage note.

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

Second, if the note is negotiable, the foreclosing party may not have possession of the note and, hence, have no authority to enforce the note.[78] Third, if the instrument requires a chain of indorsements, the transferee must be a named payee. If there is a broken chain or the chain does not lead to the foreclosing party, it cannot enforce the note. If the note is not payable to the transferee, that party must, nonetheless, account for possession of the instrument "by proving the transaction through which the transferee acquired it."[79] Such evidence may not be available. Fourth, the foreclosing party may not qualify to file a lost note affidavit if it cannot show that it had the right to enforce the note at the time it lost possession.[80]

Are mortgage notes usually negotiable instruments and, hence, subject to Article 3? Professor Mann contends that mortgage notes often are non-negotiable for a variety of reasons.[81] He concludes that there is no useful role for negotiability in the modern financial world.[82] If he is correct regarding notes used in mortgage transactions, the issue becomes what law governs the transfer of non-negotiable notes.

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[72] UCC § 3-201. *See also* UCC § 3-204(a) (defining indorsement as the signature that is made for the purpose of negotiating the instrument). The UCC uses the word "indorsement," not "endorsement."
[73] UCC § 3-201.
[74] UCC § 1-201(b)(21) (2001). All but ten states have adopted this version of Article 1.
[75] UCC § 3-203(a).
[76] UCC § 3-203(b).
[77] UCC § 3-301. Article 3 permits a person without possession to enforce a note where it has been lost, stolen, or destroyed provided certain conditions are met. UCC §§ 3-301(iii); 3-309.
[78] A person not in possession of the note may be entitled to enforce it only if the note was lost, stolen, or destroyed when in the person's possession. UCC § 3-309(a). In this situation, the person seeking to enforce the note must prove its terms and the person's right to enforce the note and provide adequate protection against loss to the borrower if a third party subsequently claims the right to enforce the note.
[79] UCC § 3-203 (Comment 2).
[80] UCC § 3-309.
[81] Ronald J. Mann, *Searching for Negotiability in Payment and Credit Systems*, 44 UCLA L. REV. 951, 962-973 (1996). *See also*, Whitman, *supra* note 30 at 749-51 (observing that, at best, the negotiability of the notes used by the secondary market giants, Fannie Mae and Freddie Mac, is "uncertain").
[82] *Id.* at 1004-1005.

2. Article 9

This trail leads us to Article 9 of the UCC. Article 9 typically governs secured transactions.[83] The definition of a security interest appears in Article 1 and was expanded in 2001 to include "any interest of…a buyer of…a promissory note in a transaction that is subject to Article 9."[84] In forty-nine states, Article 9 covers the sale of promissory notes by relying upon this broader definition of a "security interest."[85] In addition, the seller and buyer must enter into a signed agreement that provides a description of the promissory notes, the buyer must give value, and the seller must have rights in the property being transferred.[86] The result from an Article 9 sale is ownership of the notes and the right to enforce the sale agreement between the seller and buyer and as against third parties claiming an ownership right in the notes.[87] If the loan note qualifies as a negotiable instrument, however, the Article 9 buyer only can enforce the note under Article 3 if the note maker (the homeowner) defaults.[88]

While the Article 9 process appears to provide smoother sailing for non-negotiable notes, carelessness occurred in the securitization context. For example, the PSA may fail to meet the section 9-203(b) prerequisites to enforceability. Two such issues arose in *U.S. Bank Nat'l Ass'n v. Ibanez*.[89] In one of the consolidated cases, the sale agreement did not constitute an actual sale of the notes or assignment of the mortgages. Rather, it represented only a desire to sell. In both cases, the PSAs failed to adequately describe the specific mortgage loans contained in the deal.

C. Transferring the Mortgage and Potential Problems

Historically, the loan note and mortgage traveled together. "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

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[83] UCC § 9-101.

[84] UCC § 1-201(b)(35). For more information related to the revisions to Article 1, *See* UCC Article 1, General Provisions (2001), UNIFORM LAW COMMISSION, http://www.nccusl.org/Act.aspx?title=UCC%20Article%201,%20General%20Provisions%20%282001%29

[85] South Carolina has not adopted this expanded definition upon which Article 9 relies.

[86] UCC § 9-203(b).

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

[88] UCC § 9-308 (Comment 6) ("For example, if the obligation is evidenced by a negotiable note, then Article 3 dictates the person whom the maker must pay to discharge the note and any lien securing it. See Section 3-602."); § 3-203 (Comment 1) ([A] person who has an ownership right to an instrument might not be the person entitled to enforce the instrument."); § 3-602(a) ("[A] [negotiable] instrument is paid to the extent payment is made by or on behalf of a party obligated to pay the instrument, and to a person entitled to enforce the instrument."); § 3-301 (defining under what circumstances a person is entitled to enforce an instrument); § 9-607 (Comment 8) ("Of course, the secured party's rights derive from those of its debtor. Subsection (b) would not entitle the secured party to proceed with a foreclosure unless the mortgagor also were in default or the debtor (mortgagee) otherwise enjoyed the right to foreclose.").

[89] 458 Mass. 637, 941 N.E.2d 50 (Mass. 2011).

alone is a nullity."[90] In addition, the Restatement (Third) Property (Mortgages) states that: A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures."[91] As a result, the party who possesses the right to enforce both the note and the mortgage may sue on the debt and/or foreclose on the security upon default by the borrower. However, if the note and mortgage are split between different parties, the assignee of only the mortgage holds a worthless piece of paper.[92] Nonetheless, state statutes of frauds usually mandate that transfers of interests in real property, including mortgages, be in writing.[93] For this reason, transfers of mortgages occur via written assignments. State real estate law also may require the recordation of the assignment because it involves an interest in land, at least before a party can foreclose.[94]

A controversial player utilized in many securitizations is the Mortgage Electronic Registration System (MERS). Other than a brief description of its role and the issues it has created related to mortgage assignments, a full discussion of MERS is beyond the scope of this article.[95]

Created by Mortgage Banker Association member companies in 1995, MERS operates a computer database on behalf of its members to track servicing and ownership rights in mortgages originated anywhere in the United States.[96] Members of MERS include mortgage loan originators and secondary market players who "pay membership dues and per-transaction fees to MERS in exchange for the right to use and access MERS records."[97] As of 2007, MERS was involved in the origination of about 60% of mortgage loans in the United States.[98]

Beyond its record-keeping role, mortgage lenders often list MERS as either the nominee of the mortgagee or as the actual mortgagee or both.[99] Under these mantles of purported authority, MERS has foreclosed on properties in its own name and assigned mortgages and notes even though it rarely, if ever, possesses the right to enforce the loan note.[100] Courts are split on whether MERS can foreclose in its own name.[101] Challenges

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[90] Carpenter v. Longan, 83 U.S. 271, 274-275 (1872); UCC § 9-203(g) (applying this principal to transactions to which Article 9 applies); RESTATEMENT (THIRD) OF PROPERTY (MORTGAGE) § 5.4(c); 4 POWELL ON REAL PROPERTY § 37.27[2]. When only the note is transferred, at minimum, an equity interest in the mortgage automatically follows. The transfer of the mortgage typically is completed upon the execution of a formal written assignment. *Id.* at §§ 37.27[2] and [3].

[91] RESTATEMENT (THIRD) OF PROPERTY (MORTGAGE) § 5.4(c).

[92] RESTATEMENT (THIRD) OF PROPERTY (MORTGAGE) § 5.4. cmt. e; 4 POWELL ON REAL PROPERTY § 32.27[2].

[93] 4 POWELL ON REAL PROPERTY § 37.27[1].

[94] *Id.* at § 37.27[1]; Ga. Code Ann. § 44-14-162(b)(requiring the assignment of the deed of trust to be recorded before the trustee sale).

[95] For two articles describing MERS and its Achilles heel(s), *see* Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359 (2010) (hereinafter "Peterson I"); Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory,* 53 WM. & MARY L. REV. 111(2011) (hereinafter Peterson II).

[96] Peterson I, *supra* note 95, at 1361, 1368, 1370. For a list of the charter members of MERS, see *id.* at 1370, n. 61.

[97] *Id.*

[98] *Id.* at 1362 (citing to Kate Berry, *Foreclosures Turn Up the Heat,* Am. Banker, July 10, 2007, at 1).

[99] *Id.* at 1375.

[100] *Id.* at 1379.

to MERS' right to foreclose in its own name have led the government-sponsored secondary mortgage market giants, Fannie Mae and Freddie Mac, to forbid MERS from initiating foreclosures on their behalf in its own name.[102] More importantly, courts also are split on the question of whether MERS can transfer the authority to foreclose to an assignee.[103]

The mere presence of MERS in a mortgage loan transaction increases the likelihood of legal challenges to the authority to foreclose. Delaware Attorney General Biden noted confusion created by MERS and its consequences in his suit against MERS alleging that its practices and lack of oversight of its private registry system amount to deceptive practices.[104]

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[101] *Compare* Mortgage Elec. Registration Sys. v. Revoredo, 955 So. 2d 33 (Fla. Dist. Ct. App. 2007) (ruling that MERS has standing to foreclose in its name); Jackson v. Mortgage Elec. Registration Sys., 770 N.W.2d 487 (Minn. 2009) (same as *Revoredo*); Adamson v. Mortgage Electronic Registration Systems, Inc., 28 Mass. L. Rptr. 153 (Mass. Super. Ct. 2011) (recognizing that MERS may foreclose when it is listed at the mortgagee and the nominee on behalf of the lender in the mortgage, when the mortgage grants MERS the authority to exercise the power of sale and to foreclose, and when the lender or its assignee holds or has the right to enforce the loan note), *with* Landmark Nat'l Bank v. Kesler, 216 P.3d 158 (Kan. 2009) (finding no standing to intervene as a necessary party in a foreclosure case where it did not own the note and mortgage); Mortgage Elec. Registration Sys. v. Saunders, 2 A.3d 289 (Me. 2010) (deciding that MERS cannot foreclose because it is not a mortgagee under Maine law; distinguishing the holding in *Jackson v. Mortgage Elec. Registration Sys*. on the grounds that authority to foreclose in non-judicial foreclosure states, such as Minnesota, differs from the concept of standing that applies in judicial foreclosure states, such as Maine); LaSalle BankNat'l Ass'n v. Lamy, 12 Misc.3d 1191(A), 824 N.Y.S.2d 769 (N.Y. Sup. Ct. 2006) (stating that MERS does not have standing to foreclose because it does not own the note and mortgage); *See also In re* Hawkins, 2009 WL 901766 (Bankr. D. Nev. March 31, 2009) (discussing the problems created by using MERS as they relate to standing).

[102] Fannie Mae Announcement SVC-2010-05, FANNIE MAE (Mar. 30, 2010), *available at* https://www.efanniemae.com/sf/guides/ssg/annltrs/pdf/2010/svc1005.pdf (last visited July 26, 2011); Fannie Mae Single Family Servicing Guide pt. VIII, ch. 1, § 105 (2010); Freddie Mac Bulletin Number 2011-5, FREDDIE MAC (Mar. 23, 2011) *available at* http://www.freddiemac.com/sell/guide/bulletins/pdf/bll1105.pdf (last visited July 26, 2011). For a discussion of the challenges to MERS's standing to foreclose and its standing in bankruptcy proceedings, *see* Rao, *supra* note 60 at § 4.6.2.

[103] *Compare In re* Tucker, 441 B.R. 638, 644-46 (Bankr. W.D. Mo. 2010) (distinguishing *Bellistri* and holding that the deed of trust states that MERS holds legal title "as nominee for the Lender and the Lender's successors and assigns," and this is sufficient to create an agency relationship between MERS and the lender and its successors); Crum v. LaSalle Bank N.A., 55 So. 3d 266 (Ala. Ct. Civ. App. 2009) (deciding that, under the terms of the mortgage, MERS could transfer the rights of the lender to the assignee; noting that the homeowner failed to present evidence of whether the loan note was a negotiable instrument and, hence, would not automatically travel with the mortgage) *with In re* Agard, 444 B.R. 231, 246-53 (Bankr. E.D.N.Y. 2011) (opining that MERS, as nominee, did not have the authority to assign the mortgage); Bellistri v. Ocwen Loan Serv., LLC, 284 S.W.3d 619 (Mo. Ct. App. 2009) (holding that MERS could not transfer the note to Ocwen as it was held by another party at the time MERS assigned the deed of trust to Ocwen, rendering language in the deed of trust purporting to give MERS the authority to transfer the note ineffective); Bank of New York v. Silverberg, 926 N.Y.S.2d 532 (N.Y. App. Div. 2011) (finding that because MERS was never the lawful holder or assignee of the note, it could not assign the power to foreclose to the plaintiff). *See also* Peterson II, *supra* note 95, at 8-11 (arguing that MERS legally cannot be the mortgagee or beneficiary under a deed of trust because it had no property rights related to the loan); Culhane v. Aurora Loan Servs. of Nebraska, __F. Supp. 2d__, 2011 WL 5925525 *14-16 (D. Mass. Nov. 28, 2011)(ruling that MERS is only a limited agent of the mortgagee and may assign the mortgage only upon the request of the mortgagee who also is the current holder of the note or its servicer and if this action is necessary to comply with law or custom).

[104] "MERS engaged and continues to engage in deceptive trade practices that sow confusion among

D. New York Trust Law

Moreover, the parties in many securitization deals chose to apply New York law to the creation and operation of the trust into which the mortgage loans are to be transferred.[105] The trust agreement, often embodied in the pooling and servicing instrument, contains a closing date by which the mortgage loans must be transferred to the trust and after which the trust is prohibited from accepting any additional assets into the trust.[106] Under New York trust law, an asset does not become trust property until the asset is delivered to the trustee.[107] Moreover, if the trustee's act is contrary to the trust agreement, that act is void.[108] Consequently, if the mortgage loans are transferred to the trustee after the closing date, the trustee cannot accept them. If the trustee violates this prohibition, its act of acceptance is void. The legal result is that the trustee does not possess the right to enforce the loan note or the assignment of the mortgage, yet another potential glitch in the ability of a party to foreclose.[109] The outcome of this issue may depend on whether the homeowner has the right to enforce the PSA, at least in cases where the homeowner affirmatively sues to enforce that contract.[110]

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

[105] Levitin Testimony, *supra* note 10, at 22.

[106] Bloom Testimony, *supra* note 47. The trust agreement may permit exceptions to the cut-off date if an opinion of a designated attorney or firm states that the contribution to the trust will not cause adverse tax consequences. *Id.* at ¶ 10(C) and (D).

[107] "It has long been the law in New York that to subject an asset to the terms of a trust that has an independent trustee (rather than the grantor serving as sole trustee), a grantor must have the intent to make a present gift to the trust and must make sufficient delivery of the assets of the trust to the trustee. WARREN'S HEATON ON SURROGATE'S COURT PRACTICE 13 App. 4-46 (Linda B. Hirschson et al. eds., 7th ed. 2006).

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

[109] This issue is percolating through the courts. *E.g.*, Horace v. LaSalle Bank NA, Case No. CV 08-362 (Cir. Ct. Russell Cty., Ala. March 30, 2011)(Order)(granting a permanent injunction preventing LaSalle Bank from foreclosing and deciding, without discussion, that LaSalle Bank did not comply with the PSA and New York Law in attempting to obtain assignment of the homeowner's note and mortgage; U.S. Bank NA as Trustee v. Congress, Civil Action No. CV 09-901113 JSV (Cir. Ct. Jefferson Cty. Ala. Feb. 23, 2011)(Final Judgment)(refusing to apply New York law to decide whether the trustee bank could foreclose because the dispute before the court involved the mortgagor and assignee of the mortgagee to which Alabama law applies; finding that the trustee bank was the holder of the note at the time of foreclosure); Hendricks v. US Bank NA as Successor Trustee to Bank of America, Case No. 10-849-CH (Washtenaw Cty. Trial Ct., Mich., June 6, 2011)(Opinion and Order Denying in Part and Granting in Part Defendant's Motion for Summary Disposition and Granting Plaintiff's Motion for Summary Disposition)(holding that the note was not transferred to the trustee bank on or before the closing date and the note did not include all intervening indorsements as required by the PSA). See also GAO Report, *supra*, note 10 at 47-48 (discussing opposing viewpoints on this issue).

[110] *Compare* Correria v. Deutsche Bank Nat'l Trust Co. (*In re* Correria), 452 B.R. 319 (B.A.P. 1st Cir. 2011)(noting that the debtor filed an adversary proceeding to challenge the validity of the transfer of the note and mortgage on the grounds that transfers occurred in violation of the PSA; ruling that debtor was not a party nor a third party beneficiary to the PSA); Wittenberg v. First Independent Mortgage Co., 2011 WL 1357483 (N.D.W. Va. April 11, 2011)(dismissing homeowner's breach of the PSA claim because she was

V. JUDICIAL V. NON-JUDICIAL FORECLOSURE

This section provides a short comparison between the judicial and nonjudicial foreclosure procedures regimes common throughout the United States. Use of the nonjudicial method prevails in slightly more than half of the states; whereas, utilizing the court process is the common method in the other states. The possibility of uncertainty in title to real property in nonjudicial foreclosure states is much more likely for the reasons stated below.

Foreclosures usually occur when real property is sold to satisfy an unpaid debt or when the borrower breaches another obligation specified in the mortgage. Almost all mortgages or deeds of trust are foreclosed by judicial or non-judicial process in the United States.[111]

In the judicial foreclosure states, the mortgage holder must file an action in court and obtain a court decree authorizing a foreclosure sale. Generally, the party seeking to foreclose must establish its standing to do so. The plaintiff must show that there is a valid mortgage between the parties and that it is the holder of the mortgage or, otherwise, is a proper party with authority to foreclose.[112] The homeowner may respond to the lawsuit in a fashion similar to other civil cases and raise defenses to the foreclosure.[113] If the homeowner defaults or the plaintiff otherwise prevails, the court may enter a judgment of foreclosure and order the sale to proceed.[114] Once the judgment is final, the usual doctrines related to finality apply.[115] While finality doctrines eliminate the mortgagor-homeowner's opportunity to overturn the sale, they also protect the rights of the purchaser at the sale and stabilize title.

In contrast, lenders foreclose by exercising the power of sale included in the mortgage or deed of trust in nonjudicial foreclosure states.[116] These foreclosures proceed

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not a party to the contract) *with* Schwartz v.Homeeq Serv. (*In re* Schwartz), __B.R.__, 2011 WL 3667494 (Bankr. D. Mass. Aug. 22, 2011)(ruling that, although the debtor filed an adversary proceeding to set aside a pre-petition foreclosure sale, the defendants bore the burden of proving that it held the mortgage prior to the date that the first foreclosure sale notice was published; as such, the defendants introduced and relied upon the purchase and sale agreements and PSA which the court considered). *But cf.* Ware v. Deutsche Bank Nat'l Trust Co., __So. 3d__, 2011 WL 2420031*6-7 (Ala. June 17, 2011)(rejecting former homeowner's use of the PSA in the eviction proceeding to rebut trustee bank's documentation supporting its right to foreclose because homeowner did not respond to the argument that she cannot enforce the PSA; finding that other relevant arguments were not raised below and, therefore, were waived).

[111] A process called "strict foreclosure" is allowed in only two states, Connecticut and Vermont, and will not be discussed in this article. For a description of this type of foreclosure, *see* Rao, *supra* note 60 at § 4.2.4. A fourth procedure, "foreclosure by entry," is described in the discussion of Massachusetts law below in section VI.

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

[113] 4 POWELL ON REAL PROPERTY § 37.38[2].

[114] *Id.* at § 37.40.

[115] Nelson & Whitman, *supra* note 57, at § 7.18.

[116] John Rao & Geoff Walsh, *Foreclosing a Dream: State Laws Deprive Homeowners of Basic Protections* NAT'L CONSUMER LAW CENT, 6-8 (Feb. 2009), *available at*

with little or no judicial oversight. Following a default by the homeowner, the holder of the mortgage or the trustee named in a deed of trust must give notices according to the terms of the mortgage or deed of trust and applicable statutes in order to sell the home.[117] Required notices include notification of default, of acceleration, and of the sale. In addition to sending notice of the sale to the homeowner and others who have an interest in the real estate, nearly all states require some form of public advertisement of the sale through a newspaper or posting.[118]

Once the foreclosing entity has complied with these procedural mandates, it schedules the sale usually with an auctioneer that it hires. The sale may occur at the real estate or some other location permitted by law.[119] In order to stop this type of foreclosure, the burden is on the homeowner to seek an injunction and raise legal claims and defenses by initiating an affirmative action.[120] Alternatively, a qualified homeowner may file a bankruptcy and obtain a stay of the foreclosure sale.[121]

The power of sale process benefits lenders because it provides an inexpensive and quick remedy against defaulting homeowners. Such sales can be completed in twenty to one hundred twenty days, depending upon state law. On the other hand, the nonjudicial foreclosure process is harsh in its treatment of homeowners because they lose their homes without judicial oversight.[122] Defects in title to foreclosed homes and the possibility of post-sale challenges are greater because the finality doctrines, such as *res judicata,* do not apply.

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

The recent decision of the Massachusetts Supreme Judicial Court in *U.S. Bank Nat'l Ass'n v. Ibanez*[123] creates the possibility of lingering title issues to real property acquired by either the foreclosing entity or by *bona fide* purchasers (BFP) following a residential foreclosure in non-judicial foreclosure states. What is the potential impact of this decision beyond the borders of Massachusetts? The remainder of this article will address this question by: analyzing the *Ibanez* ruling and the Massachusetts statutes it interpreted and relied upon; describing the foreclosure regimes in four non-judicial foreclosure states facing high rates of delinquency and foreclosures; comparing those

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http://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/foreclosing-dream-report.pdf (accessed 9/21/11).

[117] 4 POWELL ON REAL PROPERTY § 37.42[4].

[118] *Id.*

[119] Molly F. Jacobson-Greany, *Setting Aside Nonjudicial Foreclosure Sales: Extending the Rule to Cover Both Intrinsic and Extrinsic Fraud or Unfairness*, 23 EMORY BANKR. DEV. J. 139, 147-150 (2006).

[120] Rao, *supra* note 60 at § 5.4. In this instance, court rules or state statutes may require the homeowner to post a bond or tender the arrearage or total amount due, a significant hurdle that may discourage or prevent some plaintiffs from pursuing an injunction.

[121] *Id.* at Ch. 9 (detailing the steps the debtor must take to file and the possible benefits afforded by the bankruptcy forum). *See also* Henry J. Sommer, *Consumer Bankruptcy Law and Practice Vol. I* ch. 6, NAT'L CONSUMER LAW CENT. (9th ed. 2009) (discussing when and how bankruptcy provides the best solution for consumer debtors).

[122] Jacobson-Greany, *supra* note 119 at 150-151 (arguing for an expansion of the equitable grounds available to challenge a wrongful foreclosure).

[123] *Ibanez*, 458 Mass. 637, 941 N.E.2d 50.

legal regimes to that of Massachusetts; and discussing the extent to which the *Ibanez* holding has traction in these sister states and could affect title on foreclosed real estate held in REO or sold to third parties.[124] First, we turn to *Ibanez* and the related ruling in *Bevilacqua v. Rodruguez.*[125]

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

The issue raised in two cases consolidated in the trial court was whether the foreclosing parties, trustees for trusts purportedly holding residential mortgage loans for the benefit of the investors in securitization deals, possessed the authority to foreclose at the relevant time under state law.[126] Each trustee bought the property at the foreclosure sale it held under the Massachusetts non-judicial foreclosure procedures.[127] Subsequently, each trustee brought an action in the Land Court to quiet title and to establish title in fee simple because each had become the holder of the mortgage through an assignment made *after* the foreclosure sale.[128] The inability to obtain title insurance drove the trustees to file these actions.[129]

The court concluded that neither trustee possessed authority to foreclose at the time of the notice of sale and at the subsequent sale because neither could show it held the mortgage, although each had possession of the loan note.[130] In Massachusetts, the mortgage transfers legal title to secure the debt, rather than merely creating a lien. The mortgagor-homeowner retains equitable title in the home until the mortgage is retired.[131] Consequently, an assignment deed is required to convey that interest.[132]

The court applied the "familiar rule that 'one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power and the sale is wholly void.'"[133] In the context of the securitization of a pool of mortgage

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[124] A foreclosing party who purchases the subject property at its own sale for purposes of re-sale holds it as part of its "REO" (real-estate-owned) inventory.

[125] Bevilacqua v. Rodriguez, 460 Mass. 762, 955 N.E.2d 884, (Mass. 2011).

[126] U.S. Bank was the trustee in the securitization deal that was to include the Ibanez mortgage loan. Rose Mortgage, Inc. originated the loan. The mortgage allegedly passed from Rose Mortgage, Inc. to Option One Mortgage Corp., thence to Lehman Brothers Bank, thence to Lehman Brothers Holdings, Inc. (the seller), next to Structured Asset Securities Corporation (depositor) and, finally, to U.S. Bank. Wells Fargo Bank was the trustee in the securitization that included the Larace mortgage loan. The originator, Option One Mortgage Corp. purportedly passed the mortgage to Bank of America. The mortgage then allegedly traveled to Asset Backed Funding Corporation (depositor) and then to the trustee. 458 Mass. at 641, 941 N.E.2d at 46.

[127] Mass. Gen. Laws ch. 183, § 21; Mass. Gen. Laws ch. 244, § 14.

[128] Ibanez, 458 Mass. at 638-39, 941 N.E.2d at 44.

[129] U.S. Bank Nat'l Ass'n v. Ibanez, 2009 WL 3297551 at *1 (Mass. Land Ct. Oct. 14, 2009).

[130] The Land Court took as true, for purposes of the motion to vacate the judgment, that each note had been indorsed to Option One who then indorsed each in blank. The notes then came into the possession of the plaintiffs. As a result, the plaintiffs had possession of the notes at the relevant time, that is, when they initiated the foreclosure process. 2009 WL 3297551 *5.

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

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

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

loans, the court noted that a pooling and servicing agreement could suffice as an assignment of the security instrument so long as: 1) it actually assigned the mortgages (as opposed to expressing only an intent to do so); 2) it included a schedule of the mortgage loans that "clearly and specifically" identified each mortgage loan covered; and 3) the assignor itself held the mortgage prior to the transfer.[134]

Regarding the Ibanez mortgage loan, U.S. Bank submitted an unsigned "private placement memorandum" that did not constitute an actual assignment, failed to produce the schedule of mortgages loans covered by the agreement, and failed to show that the depositor, Structured Asset Securities Corporation, ever held the mortgage to be assigned to U.S. Bank. In the Larace case, Wells Fargo did produce a pooling and servicing agreement that could be construed as an actual assignment but the loan schedule failed to identify the Larace mortgage. Further, Wells Fargo could not show that the depositor, Asset Backed Funding Corporation, held the Larace mortgage that it purported to assign to Wells Fargo via the PSA.[135]

The trustees advanced three arguments, all of which the court rejected. They are worth noting here because they bear on the issue of the authority to foreclose. First, the trustees argued that they had the authority to foreclose because they held the loan note prior to initiating the foreclosures. The court rejected this claim stating: "In the absence of a valid written assignment of the mortgage…, the mortgage holder remains unchanged."[136] Merely having the status of an equitable beneficiary of a mortgage held by another is not sufficient.[137]

Second, the trustees contended that an assignment of a mortgage in blank, *i.e.*, no assignee listed, is an effective assignment of the mortgage. This occurred in the Larace transaction when Option One executed a blank assignment. The trustees later conceded, and the court confirmed, that an assignment that fails to list the assignee's name "conveys nothing and is void."[138]

Finally, the trustees maintained that their authority to foreclose could arise from post-sale assignments, relying on a Title Standard issued by the Real Estate Bar Association for Massachusetts. The court responded that post-sale assignments cannot cure the problem because an assignment of legal title "becomes effective with respect to the power of sale only on the date of transfer..."[139]

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[134] Ibanez, 458 Mass. at 651, 941 N.E.2d at 53. The assignment need not be in a recordable form nor recorded, although the court cautioned that recording is better practice. "A foreclosing entity may provide a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage." *Id.*

[135] Ibanez, 458 Mass. at 640-50, 941 N.E.2d at 52.

[136] Ibanez, 458 Mass. at 653, 941 N.E.2d at 54.

[137] *Id*. Relying upon this part of the *Ibanez* ruling, two federal judges in Massachusetts agreed that a note holder must first exercise its equitable right to obtain a written assignment or a court order of assignment in order to validly foreclose. Culhane v. Aurora Loan Servs. of Nebraska, __F. Supp. 2d__, 2011 WL 5925525 *8-9 (D. Mass. Nov. 28, 2011); Kiah v. Aurora Loan Servs., LLC, 2011 WL 841282 *4 n. 6 (D. Mass. March 4, 2011)(finding that Aurora Loan Services held the note, had the right to enforce it, and was the assignee of record of the mortgage).

[138] Ibanez, 458 Mass. at 651, 941 N.E.2d at 53.

[139] Ibanez, 458 Mass. at 653-654, 941 N.E.2d at 54-55. However, the court noted that a post-sale confirmatory assignment of an earlier valid assignment made before the publication and sale may be effective. This situation arises when the earlier assignment bears some defect or is not in recordable form.

In its conclusion, the court refused to apply its ruling prospectively on the grounds that the ruling did not make any significant changes to the common law. "The legal principles and requirements we set forth are well established in our case law and our statutes. All that has changed is the plaintiffs' apparent failure to abide by those principles and requirements in the rush to sell mortgage-backed securities."[140]

Importantly, *Ibanez* did not address the effect of an invalid foreclosure upon a BFP, *i.e.*, a purchaser who takes title for value and without notice of any defects in the foreclosure, a concern raised by two justices in a concurrence.[141] The justices did face this issue in a subsequent case, *Bevilacqua v. Rodriguez*.[142]

That case arose in the context of a purchaser of a foreclosed property who sued the mortgagor to clear title.[143] The facts showed that: the homeowner mortgaged his property on March 18, 2006; U.S. Bank recorded a foreclosure deed on June 29, 2005 transferring the property to U.S. Bank, as trustee of an identified securitization trust even though it did not receive the assignment of the mortgage until July 21, 2006; U.S. Bank as trustee then deeded the property to plaintiff on October 17, 2006. The court addressed whether the plaintiff had standing as the record holder of the deed to pursue the "try title" cause of action, finding he did not. Relying upon its decision in *Ibanez*, the court reasoned that the foreclosure sale was void because U.S. Bank was not the assignee of the mortgage at the time of the foreclosure. The plaintiff's title was defective because his grantor, U.S. Bank, could not pass effective title to him.[144]

The plaintiff also argued that he acquired BFP status. Consequently, he acquired good title from U.S. Bank. In rejecting this claim, the court recognized the rule in Massachusetts that the purchaser must have no actual or constructive knowledge of a defect in the exercise of the power of sale.[145] Moreover, it found that the plaintiff had record notice of the defect because the assignment of the mortgage to U.S. Bank occurred after the foreclosure deed was recorded—the exact situation addressed in *Ibanez.* Finally,

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"A confirmatory assignment, however, cannot confirm an assignment that was not validly made earlier or backdate an assignment being made for the first time." *Id.*

[140] Ibanez, 458 Mass. at 655, 941 N.E.2d at 55.

[141] Ibanez, 458 Mass. at 656, 941 N.E.2d at 56.

[142] Bevilacqua v. Rodriguez, 460 Mass. 762, 766-67, 955 N.E.2d 884, 888-89 (Mass. 2011).

[143] This particular cause of action was framed under the Massachusetts "try title" statute. Mass. Gen. L. ch. 244, §§ 1-5. Under this cause of action, the plaintiff must prove that it is in possession of the property and that it holds record title. Bevilacqua, 2011 WL 4908845 at *3.

[144] Bevilacqua, 460 Mass. at 772-74, 955 N.E.2d at 892-83.

[145] Bevilacqua, 460 Mass. at 777, 955 N.E.2d at 896. *See also* Mass. Gen. Laws ch. 183, § 21(stating that if the entity authorized to exercise the power of sale strictly complies "with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale…, [it] may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity"). "Strict" compliance is required by judicial decisions. *E.g.*, Ibanez, 458 Mass. at 646-647, 941 N.E.2d at 49-50; Moore v. Dick, 187 Mass. 207, 72 N.E. 967 (Mass. 1905)(requiring strict compliance; holding that if the foreclosing entity does not strictly comply with the terms of the power of sale, the sale is void; laches not a defense to a petition to redeem filed three years after the sale where mortgagor retained the right to redeem; court not explicit as to whether the purchaser was a third party). Note that a mortgagor currently has no right to redeem after the land has been sold pursuant to a power of sale contained in the mortgage deed. Mass. Gen. Laws ch. 244, §18.

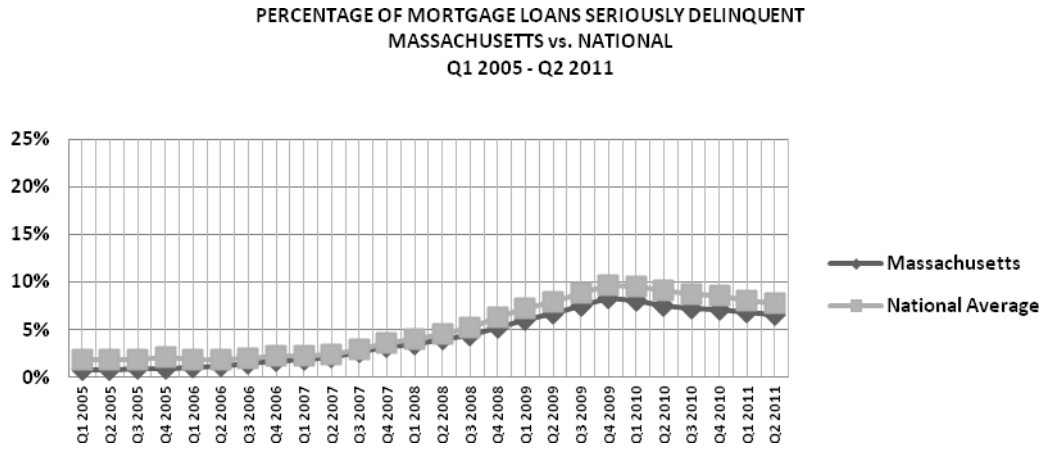
the foreclosure sale was void, not merely voidable, in which case the purchaser cannot acquire good title.[146]

B. Massachusetts Foreclosure Law Relied Upon by the Court

1. Introduction

In Massachusetts, the mortgage is the instrument used to secure a debt or other obligation by taking an interest in the obligor's real property.[147] As discussed in *Ibanez*, the mortgage constitutes a transfer of legal title in the property. Legal title vests in the mortgagee while the mortgagor retains equitable title.[148] Hence, Massachusetts is a title theory state.

Massachusetts is experiencing the foreclosure crisis to a similar degree as the nation as a whole. Figure 1 compares the seriously delinquent rates for all types of residential mortgage loans in Massachusetts to that of the national rates from 2005 to the present, as reported by the Mortgage Bankers Association.[149] Among the nonjudicial foreclosure states, it ranks ninth. As of the second quarter of 2011, 6.57% or 52,866 loans were seriously delinquent in Massachusetts.[150]



Source: Mortgage Bankers Association National Delinquency Survey

The Supreme Judicial Court relied upon several Massachusetts statutes that relate to the following issues: 1) who has authority to foreclose; 2) whether the notice of sale properly identifies the current mortgagee; 3) what is the effect upon a completed

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[146] Bevilacqua, 460 Mass. at 778, 955 N.E.2d at 897.
[147] 28 Mass. Prac., Real Estate §§ 9.1, 9.4.
[148] 458 Mass. at 649, 941 N.E.2d at 51; Faneuil Investors Group v. Board of Selectmen of Dennis, 458 Mass. 1, 6, 933 N.E.2d 918, 922 (2010)(affirming that Massachusetts embraces the title theory of mortgages, *i.e.*, legal title to the mortgaged real property remains in the mortgagee until the mortgage is satisfied or foreclosed; citing to older cases establishing and applying this principle).
[149] Mortgage Bankers Association, National Delinquency Survey, Q1 2005 to Q2 2011.
The Survey defines "seriously delinquent" to include the percent of loans with installments that are 90 days or more past due plus the percent of loans in foreclosure inventory as of the end of the quarter.
[150] Mortgage Bankers Association, National Delinquency Survey Q2 2011 at 4.

foreclosure sale if a party lacks the authority to foreclose. Below is a short summary of each relevant statute and related court decisions that will provide the basis of comparison with the other four states.

2. Authority to Foreclose

The Massachusetts foreclosure statute lists the parties that may perform the acts authorized by the power of sale clause in the mortgage, including, the mortgagee and any person acting in the name of the mortgagee.[151] Another provision requires the following language to be contained in the power of sale provision in the mortgage: "[U]pon any default in the performance or observance of the foregoing or other condition [listed in the mortgage], the mortgagee or his executors, administrators, successors or assigns may sell the mortgaged premises…"[152]

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

In addition, the foreclosing party must have possession of the loan note or have the right to enforce it.[153] The mortgage is incident to the note.[154] The transfer of only the note vests in the note-holder the right to obtain a conveyance of the mortgage but the mortgagee retains legal title in trust for the purchaser of the debt.[155] In other words, although the mortgage follows the note in Massachusetts, the note-holder only has a beneficial interest in the mortgage until an actual assignment occurs.[156]

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

[152] Mass. Gen. Laws ch. 183 § 21.

[153] Crowley v. Adams, 226 Mass. 582, 585, 116 N.E. 241, 242 (Mass. 1917)("[P]ossession of the note was essential to an enforceable mortgage, without which neither mortgage could be effectively foreclosed…"); Mass. Gen. Laws ch. 106, § 3-301; Arthur L. Eno, *et al.*,28 Mass. Prac., Real Estate Law § 10.2 (4th ed.). The Supreme Judicial Court will revisit this issue in *Eaton v. Federal Nat'l Mortgage Ass'n*, 2011 WL 3322892 (Mass. Super. Ct. June 17, 2011) (granting preliminary injunction to stop eviction of former homeowner and analyzing statutory authority and the state court decisions that supports the rule that the one foreclosing must have the right to enforce the note, commonly via possession, and be the mortgagee or its assignee; distinguishing recent federal court decisions on this issue). At least one other federal judge applied this rule in a recent case. Culhane, 2011 WL 5925525 *12. Some federal judges disagree. *E.g.*, Valerio v. U.S. Bank, N.A., 176 F. Supp. 2d 124, 128 (D. Mass. 2010)(denying motion for a temporary restraining order to prevent eviction following the foreclosure sale in a case removed to federal court when plaintiffs were unable to provide supporting law on the issue of whether the foreclosing party must have the right to enforce the note; finding that the relevant foreclosure statute, Mass. Gen. Laws ch. 244, § 14, applies to mortgagees, not note holders); Aliberti v. GMAC Mortgage, LLC, __F. Spp. 2d __, 2011 WL 1595442 (D. Mass. Apr. 28, 2011)(observing that GMAC, assignee of the mortgagee MERS, need not also hold the note, citing to *Valerio*); Kelly v. Deutsche Bank Nat. Trust Co., __F. Supp. 2d__, 2011 Wl 2262915 (D. Mass. June 9, 2011)(relying on *Valerio*); McKenna v. Wells Fargo Bank, N.A., 2011 WL 1100160 (D. Mass. March 21, 2011)(relying on *Valerio*).

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

[155] Howard J. Alperin, 14C Mass. Prac., Summary of Basic Law § 15.126 (2010-2011).

[156] Kiah v. Aurora Loan Servs., LLC, 2011 WL 841282 *4 n. 6 (D. Mass. March 4, 2011)(noting that a note-holder must first exercise its equitable right to obtain a written assignment or a court order of assignment in order to validly foreclose); Culhane, 2011 WL 5925525 *8-9. .

3. Statutorily Required Notices and Relevant Contents

The foreclosing party must send a notice sale to owners of the equity of redemption (ordinarily, the mortgagor) and it must state the name of the "present holder" of the mortgage accurately.[157]

4. Effect of Defective Foreclosure

If the foreclosing party does not possess the authority to foreclose or the notice does not accurately identify the mortgagee or its successors or assigns, the sale is void, at least where the purchaser is the foreclosing entity.[158]

Prior to a foreclosure sale or before title is transferred to the purchaser, the mortgagor-homeowner may challenge a foreclosure proceeding by filing an independent action against the foreclosing party and other relevant parties in the superior court or land court, depending upon the relief sought.[159] The homeowner may request an injunction to prevent the sale pending a resolution of the challenge.[160]

Following a sale, the mortgagor-homeowner may defend herself against eviction when the purchaser brings a summary action for possession because title to the property is at issue.[161] Outside of the housing court context, the mortgagor-homeowner may file an affirmative action in either land court or superior court challenging the validity of the sale and contesting the resulting cloud on title.[162]

5. Effect of Defective Foreclosure on Bona Fide Purchasers

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[157] Mass. Gen. Laws ch. 244 , § 14. This language makes clear that the mortgagor is entitled to know who is foreclosing and selling the property. Further, the notice cannot be altered to identify anyone other than the present holder. U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. at 648, n. 17, 941 N.E.2d at 50, n. 17.

[158] *Id.* (relying upon Mass. Gen. Laws ch. 244 , § 14 which states: "but no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale, notice thereof has been published once in each of three successive weeks…"). The *Ibanez* court also relied upon several of its previous rulings to support this holding. *See, e.g.*, Moore v. Dick, 187 Mass. 207, 72 N.E. 967 (Mass. 1905)(voiding a sale because it was never valid in law and, hence, title to it never passed to the purchaser; distinguishing a sale that is merely voidable, for example, one in which literal compliance with the legal prerequisites occurred but there may be equitable reasons to set aside the sale); *Roche v. Farnsworth*, 106 Mass. 509 (Mass. 1871)(voiding the sale due to a defect in the notice even as to a purchaser although the mortgagor filed the petition to redeem after the sale but before the property was conveyed to the purchaser).

[159] Mass. Gen. Laws ch. 214, § 1(superior court); ch. 185, § 1(k) (land court). *See also* Adamson v. Mortgage Electronic Registration Systems, Inc., 28 Mass.L.Rptr. 153, 2011 WL 1136462 (Mass. Super. Mar. 23, 2011)(filing in superior court, the mortgagor-homeowner sought an injunction to prevent the foreclosing party from transferring the sale deed to the purchaser).

[160] 28 Mass. Prac., Real Estate Law §10.2(2) (4th ed.).

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

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

As discussed above, *Bevilacqua* confirmed an important principle under Massachusetts law. A purchaser who takes title without actual or constructive notice of a defect in the sale and pays value, nonetheless, may face challenges to title when the foreclosing party did not possess the authority to foreclose at the relevant time and could not grant the purchaser good title.[163] Importantly, purchasers cannot acquire BFP status if the public records show the defect.[164]

Foreclosing parties may "correct" defects in their authority to foreclose after a completed sale either by re-foreclosing if they obtain the right to enforce the note and the mortgage or by utilizing Massachusetts' "foreclosure by entry" procedure.[165]

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

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

A. Arizona

1. Introduction

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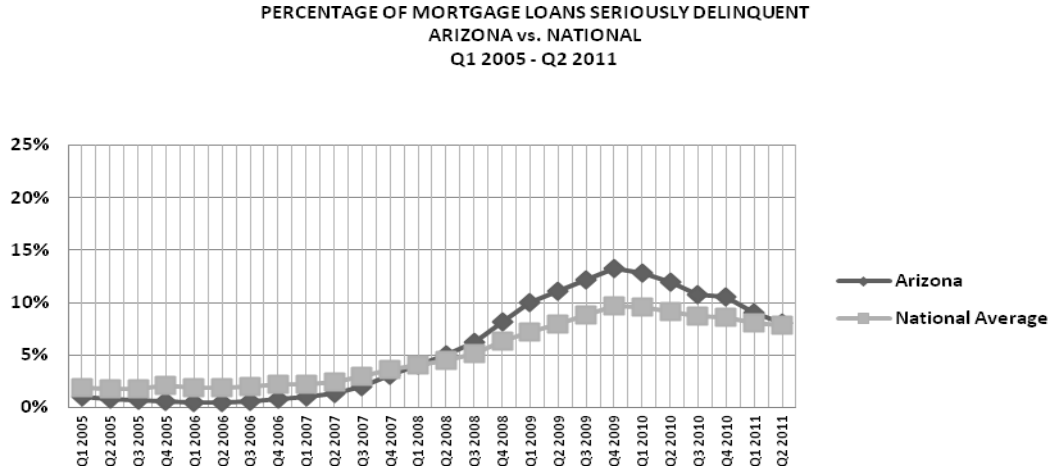
[163] Bevilacqua, 460 Mass. at 777, 955 N.E.2d at 896.

[164] *Id.* at *5 (recognizing that the effect of recordation is to put the world on notice).

[165] This latter type of foreclosure is accomplished by the mortgagee "peaceably" entering onto the mortgaged premises, following a default, and declaring that entry is being made for the purpose of foreclosing on a mortgage. Mass. Gen. Laws ch. 244, §§ 1, 2. The declaration must be made in the presence of two witnesses who sign a certificate swearing that they witnessed the entry. Alternatively, the mortgagor may sign a memorandum of entry confirming the entry. Once the certificate or memorandum is recorded, a three year period commences, during which time the mortgagor-homeowner may continue to live on the premises. Singh v. 207-211 Main Street, LLC, 78 Mass. App. Ct. 901, 902-03, 937 N.E.2d 977, 879-80 (2010)(ruling that the assignee of the mortgage continuously possessed the property because it made peaceable entry and the mortgagor never challenged entry during the three-year period even though the mortgagor lived on the premises during the three years and even though the assignee attempted but failed to evict the mortgagor for non-payment of rent during that period). Upon the expiration of three years of uninterrupted peaceable possession, the mortgagee acquires title to the property. *Id.*; 28 Mass. Prac., Real Estate Law § 10.12 (stating: "Commonly, a foreclosure by entry…is made at the time of a foreclosure sale, with a certificate of entry recorded immediately following the foreclosure deed and affidavit, so that any defect in a foreclosure sale becomes irrelevant after expiration of the three year right of redemption…."). Recently, the Supreme Judicial Court suggested that the mortgage "holder" may use foreclosure by entry as an alternative to power of sale statutory procedure. Ibanez, 458 Mass. at 646, n. 15, 941 N.E.2d at 49, n. 15. The use of the word "holder" implies that the foreclosing party either must be the mortgagee listed on the instrument or must obtain a valid assignment *before* it can utilize this procedure. This reading of the statute is consistent with an earlier ruling in Lamson & Co. v. Abrams, 305 Mass. 238, 241, 25 N.E.2d 374, 376 (1940). However, the foreclosing party must be the mortgagee at the time of "entry." Bank of New York v. Bailey, 460 Mass. at 332, n. 10, 951 N.E.2d at 335, n. 10. Thus, a foreclosing party can resort to foreclosure by entry only after it acquires a valid assignment of the mortgage.

The instrument predominantly used in Arizona to secure a debt or obligation is the deed of trust.[166] Unlike a mortgage, a deed of trust is a three party instrument in which the trustor (borrower) conditionally conveys title to a third party trustee who holds it as security for the debt owed to the beneficiary (lender).[167] A deed of trust vests in the trustee bare legal title sufficient only to permit it to convey the property at a non-judicial sale.[168] Nonetheless, under Arizona law, there is no significant difference between a mortgage "lien" and the trustee's "title."[169] For this reason, Arizona is a lien theory state.

Arizona's seriously delinquent foreclosure rate exceeded that of the nation as a whole leading up to and during the financial crisis. Figure 2 illustrates this comparison. Among the nonjudicial foreclosure states, it ranks third. As of the second quarter of 2011, 8.06% or 89,262 loans were seriously delinquent in Arizona.[170]



Source: Mortgage Bankers Association National Delinquency Survey

2. Authority to Foreclose

A power of sale provision in the deed of trust allows the trustee (or its successor) or the beneficiary to exercise the power of sale clause permitting a private sale of the property upon default.[171] All sales or transfers of real estate or any legal or equitable interest therein must be recorded by the transferor within sixty days of the transfer.[172]

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[166] Baxter Dunaway, 1 L. Distressed Real Est. § 9-4.1 (Clark, Boardman Co. 1991)); Kent E. Cammack, *et al.*, Ins and Outs of Foreclosure 1-11 (State Bar of Arizona 3d ed. 2010)(hereafter Ins and Outs of Foreclosures). Mortgages exist in Arizona but must be foreclosed upon by judicial process. Ariz. Rev. Stat. § 33-721.

[167] Ariz. Rev. Stat. § 33-801 (defining "beneficiary," "trustee," and "trustor."

[168] Bisbee v. Security Nat'l Bank & Trust Co. of Norman, Oklahoma, 157 Ariz. 31, 34, 754 P.2d 1135, 1138 (Ariz. 1988)

[169] *Id.*; Ariz. Rev. Stat. § 33-805 ("[d]eeds of trust may be executed as security for the performance of a contract…").

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

[171] Ariz. Rev. Stat. §§ 33-807(A), 33-801(10).

[172] Ariz. Rev. Stat. 33-411.01. As an alternative to recording, the transferor must indemnify the transferee's interest in the property against certain losses.

The beneficiary may substitute the trustee with another for any reason but the substitution must be acknowledged by all beneficiaries named in the deed of trust and recorded at the time of substitution. The beneficiary must give written notice of the substitution to the trustor.[173]

In Arizona, the mortgage (or deed of trust) follows the note.[174] In 1938, the Arizona Supreme Court ruled that an assignment of the deed of trust without the debt transfers no right upon the assignee and is a nullity.[175] Without mentioning the *Hill* decision and in apparent conflict with it, the intermediate appellate court recently suggested that the standards applicable to negotiable instruments regarding the right to enforce them found in Arizona's version of Article 3 of the UCC are irrelevant to a foreclosure sale conducted under a power of sale.[176] Rather, they apply to a suit on the debt.

3. Statutorily Required Notices and Relevant Contents

The trustee shall record the notice of sale.[177] The notice must contain, *inter alia*, the original principal balance as shown on the deed of trust; name and address of each beneficiary and of the current and original trustees; and a statement that a breach or nonperformance of the deed of trust has occurred and the nature of the breach.[178] The trustee must send a copy of the notice of sale to the parties to the deed of trust at the addresses listed on the instrument within five business days after recordation. The statement of breach or non-performance shall be signed by the beneficiary or its agent.[179]

4. Effect of Defective Foreclosure

An error or omission in the information to be contained in the notice of sale under subsections (C) and (D) of section 33-808 shall not invalidate the trustee sale.[180] This provision does not apply to the failure to comply with section 33-809(C) which covers

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[173] Ariz. Rev. Stat. § 33-804.

[174] Ariz. Rev. Stat. § 33-817 ("The transfer of any contract or contracts secured by a deed of trust shall operate as a transfer of the security for the contract or contracts."); Hill v. Favour, 52 Ariz. 561, 84 P.2d 575, 578-79 (Ariz. 1938).

[175] Hill, 84 P.2d at 578-79.

[176] Hogan v. Washington Mutual Bank, N.A., __P.3d__, 2011 WL 1434698 *3 (Ariz. App. Apr. 14, 2011), *appeal pending.* Several federal courts do not require presentation of the note prior to a foreclosure or to a suit on the debt in cases not involving bankruptcy. *E.g.*, Mansour v. Cal-Western Reconveyance Corp., 618 F. Supp. 2d 1178 (D. Ariz. 2009)(relying on court decisions from California and Nevada); Diessner v. MERS, 618 F. Supp. 2d 1184 (D. Ariz. 2009)(citing to Ariz. Rev. Stat. § 33-807 which provides that the trustee of a deed of trust may foreclose pursuant to the power of sale or via a judicial action). On their face, these cases do not tackle the important question of why beneficiaries would not have to possess the note or the right to enforce it under Article 3 or 9 of the UCC before foreclosing on the underlying security.

[177] Ariz. Rev. Stat. §§ 33-808(A); 33-809(C). The address of the beneficiary cannot be in care of the trustee.

[178] Ariz. Rev. Stat. § 33-808(C)-(D).

[179] Ariz. Rev. Stat. § 33-809(C).

[180] Ariz. Rev. Stat. § 33-808(E). Two federal courts have interpreted this provision. Bowman v. Wells Fargo Bank, N.A., 2010 WL 1408893 (D. Ariz. Apr. 7, 2010)(failing to list the current trustee in the notice of sale does not void the sale); Mundinger v. Wells Fargo Bank, 2011 WL 1559423 (D. Ariz. Apr. 25, 2011)(failing to name the correct beneficiary in a notice of substitution of trustee and in the notice of sale does not void the sale).

the timing of the mailing of the notice of sale, to whom it must be sent, and its publication and posting. Arizona's Supreme Court unequivocally has held that a sale held without strictly complying with the statutory notice requirements is void.[181] . Based upon the plain language of the statute, the provision should not bar a challenge to a foreclosure sale on the grounds that the trustee deed could not transfer title to the purchaser or that the beneficiary or trustee had no authority to foreclose because neither of these grounds is listed in that provision.

Once the trustee issues a deed to the purchaser following a foreclosure sale, a presumption of compliance with the contract provisions in the deed of trust and the statutory provisions in "this chapter" relating to the exercise of the power of sale and the conduct of the sale arises.[182] The trustee's deed is not conclusive, unless the purchaser is a BFP.[183]

These provisions are designed to ensure finality of title. In addition, section 33-811(C) instructs the trustor and certain specified parties to whom the trustee mailed a notice of the sale to bring an action seeking an injunction before 5:00 P.M. on the last business day *before* the scheduled sale[184] Failure to do so constitutes a waiver of all defenses and objections to the sale.[185] This provision places the trustor-homeowner on as extremely short leash—either raise objections before the sale or potentially lose all rights to attack the sale. Arizona state courts have not applied this provision in the context of an attack to a completed sale based upon lack of authority to foreclose and an allegedly void sale, at least in published decisions.[186] One federal judge recently sought additional briefing related to the legislative history, the effect of other provisions in section 33-811, and the statutory construction analysis that Arizona courts apply before entering a ruling.[187]

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[181] Patton v. First Federal Savings and Loan Assn., 118 Ariz. 473, 476-77, 578 P.2d 152, 155-56 (1978). However, this decision predated the enactment of the safe harbor for certain notice violations, section 33-808(E), in 1992. Laws 1992, Ch. 179, § 2, 1992 Ariz. Legis. Serv. Ch. 179 (H.B. 2390)(West). The Arizona Supreme Court has not yet addressed the effect of this statutory amendment on its ruling in *Patton.*

[182] Ariz. Rev. Stat. § 33-811(B).

[183] Silving v. Wells Fargo Bank, N.A., __F. Supp. 2d__, 2011 WL 2669246 *6 (D. Ariz. July 7, 2011)(making this distinction).

[184] Ariz. Rev. Stat. § 33-811(C).

[185] Id.

[186] In one unpublished memorandum opinion, the Arizona Court of Appeals applied § 33-811(C) strictly to affirm summary judgment against the homeowner who filed suit after the foreclosure sale to quiet title because, among other reasons, the trustee was not a successor in interest to the original trustee and did not possess authority to foreclose. Maher v. Bank One, N.A., 2009 WL 2580100 (Ariz. Ct. App. Aug. 20, 2009)(discussing the enactment of § 33-811(C) in 2002 and its effect on the decision in *Patton)*. Two other unpublished Arizona appellate memorandum opinions applied § 33-811(C) to affirm dismissals of actions brought to challenge completed foreclosure sales, though not on the grounds of lack of authority to foreclose. Lovenberg v. Deutsche Bank Trust Co., American, 2011 WL 2236601 *2-3 (Ariz. Ct. App. June 7, 2011)(dismissing claim that the defendant breached a forbearance and modification agreement; noting that the trustee sale is intended to be final, regardless of any defect, absent actual knowledge by the purchaser); Luciano v. WMC Mortgage Corp., 2010 WL 1491952 (Ariz. Ct. App. April 13, 2010)(dismissing claim of lack of notice of the sale). It is noteworthy that, according to the Arizona Supreme Court Rules, a memorandum opinion is not regarded as precedent nor to be cited in any court except for limited purposes. Ariz. Rev. Stat. Sup. Ct. R. 111.

[187] Silving, 2011 WL 2669246 *5. The court did not discuss the possibility of certifying this question to the state court.

5. Effect of Defective Foreclosure on Bona Fide Purchasers

If the purchaser pays value without actual notice of non-compliance with the contract provisions in the deed of trust and the statutory requirements to foreclose, the trustee deed constitutes "conclusive evidence" of validity.[188] The trustee deed may not be conclusive where "the notice was insufficient because of fraud, misrepresentation, or concealment."[189] According to a federal district court, even if the trustor cannot undo the sale, she may seek damages for a wrongful foreclosure in certain circumstances.[190] In another case, a federal judge refused to dismiss a quiet title action against the bank acting as trustee for the securitized trust that purchased the house at the foreclosure sale.[191]

6. Ibanez Traction in Arizona

Based upon this understanding of Arizona law, *Ibanez* may be persuasive authority in Arizona on two issues. First, like Massachusetts, Arizona requires the assignment of the deed of trust to be written because it mandates recordation of the assignment within sixty days of the transfer.[192] Further, in practice, most, if not all, assignments will be recorded before the sale.[193] For this reason, the fact that Massachusetts is a title theory state is irrelevant to the application of the *Ibanez* holding

[188] Ariz. Rev. Stat. § 33-811(B). The purchaser must be without actual notice, as opposed to constructive notice. Main I Ltd. Partnership v. Venture Capital Const. & Dev. Corp., 154 Ariz. 256, 259-60, 741 P.2d 1234, 1237-38 (Ariz. App. 1987)(holding that even the named beneficiary in a deed of trust who purchased at the sale may acquire BFP status where it had no record or actual notice that entities who were not parties to the deed of trust were sent the notice of sale one day late). The bankruptcy court in Arizona applied § 33-811(B) and refused to overturn a sale to a bona fide purchaser on the grounds that the initial bid was not properly available. Hills v. Ocwen Fed. Bank, FSB (In re Hills), 200 B.R. 581, 585-586 (Bankr. D. Ariz. 2002).

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

[190] Herring v. Countrywide Home Loans, Inc., 2007 WL 2051394 *5-6 (D. Ariz. July 13, 2007) (noting that Arizona state courts have not recognized this tort but, nonetheless, denying summary judgment to the defendant where plaintiff alleged not a notice violation but that she cured the default and complied with a repayment agreement). *See also* Schrock v. Fed. Nat'l Mortgage Ass'n., 2011 WL 3348227 *6-8, n. 7 (D. Ariz. Aug. 3, 2011) (discussing in detail the "draconian results" of the legislative foreclosure regime that favors recognizing the tort of wrongful foreclosure and stating the court "would welcome such guidance" from the state courts but, nevertheless, not certifying this question; ruling that the plaintiff pled the elements adequately).

[191] Silving v. Wells Fargo Bank, N.A., 2011 WL 2669246 *11.

[192] Ariz. Rev. Stat. 33-411.01.

[193] This conclusion is based on the following analysis. The recorded notice of sale must contain the current name and address of the beneficiary. Ariz. Rev. Stat. 33-808(C). The sale cannot occur until at least ninety days pass between the recordation of the notice of sale and the sale. Ariz. Rev. Stat. 33-807(D). Given these timeframes, an assignment must be recorded before the sale in most cases because if the sale notice is to contain the current name of the beneficiary as of the date of the notice, assignments occurring on the same date of recordation of the sale notice must be recorded within sixty days, whereas the sale cannot occur for at least ninety days. This issue is before the Arizona Supreme Court in Vasquez v. Saxon Mortgage Inc., No. CV-11-0091CQ (Ariz. Sup. Ct.) on certified questions from the United States Bankruptcy Court.

in Arizona. In other words, even though the note follows the deed of trust in Arizona, assignments of the deed of trust must be recorded before the sale.

The second issue addresses the consequences of failing to possess the right to foreclose upon a completed sale. Here, both Massachusetts and Arizona require strict compliance with the power of sale clause and with additional legal requirements. The court in *Ibanez* voided the sale. In Arizona, the Supreme Court agreed that notice defects, at the very least, void a sale.

However, section § 33-811(C) waives all defenses the trustor may have to the sale if she fails to file an action challenging the sale by 5:00 P.M. on the day prior to the sale. If this provision cuts off the rights of homeowners to challenge the authority to foreclose following the sale, the finality of title in Arizona is absolute. If this provision does not waive authority-to-foreclose defects that void a sale, other finality provisions in Arizona law, such as the effect of the execution of the trustee's deed to a BFP arguably eliminates only objections relating to non-compliance with notice provisions in the deed of trust and specific statutory provisions.[194] Challenging a sale as void on the grounds of lack of authority to foreclose may remain viable.

B. California

1. Introduction

The deed of trust is the preferred real property security device in California.[195] The California deed of trust involves three parties: the trustor, the trustee, and the beneficiary who perform the same functions as in Arizona.[196] Despite transfer of nominal title to the real estate, California treats the deed of trust as a lien.[197]

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

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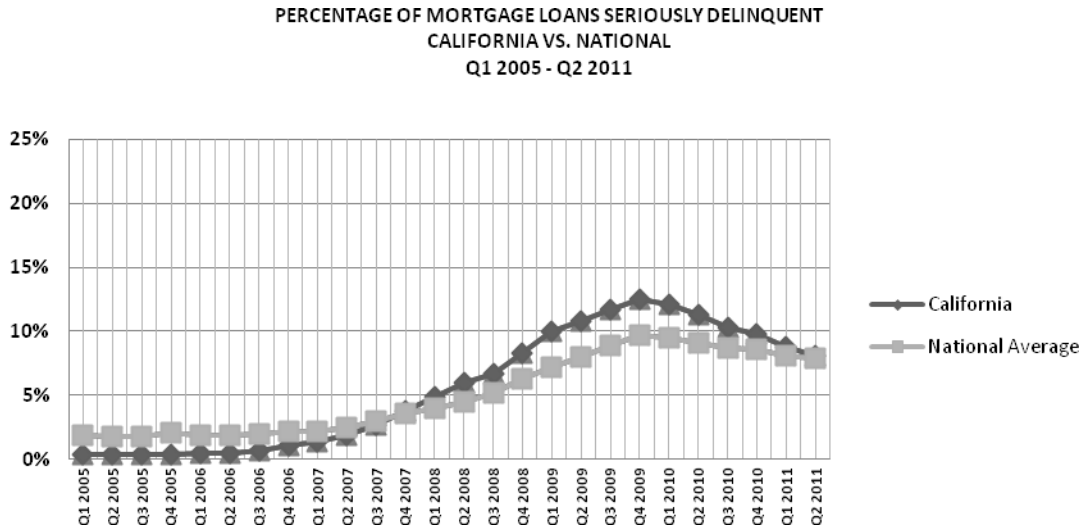
[194] Ariz. Rev. Stat. § 33-811(B).

[195] Henry D. Miller and Marvin B. Starr, 4 Cal. Real Estate § 10:1 (3d. ed. updated Oct. 2010)(hereafter Miller & Starr). The original distinctions between mortgages and deeds of trust no longer exist and these instruments are identical, for practical purposes. "[D]eeds of trust are not true trusts but are practically and substantially only mortgages with power of sale." *Id.* at § 10:2.

[196] *Id.* at § 10:3.

[197] Monterey S. P. Partnership v. W.L. Bangham, Inc., 49 Cal. 3d 454, 460, 261 Cal. Rptr. 587 (Cal. 1989).

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



Source: Mortgage Bankers Association National Delinquency Survey

2. Authority to Foreclose

California law requires the trustee or the beneficiary or their authorized agents to follow certain procedures in order to enforce a power of sale clause in a deed of trust.[199] Normally, however, the trustee conducts the "trustee" sale under its authority in the power of sale.[200] If the beneficiary appoints a new trustee, it must record the substitution.[201] Prior to any sale, a notice of the sale containing accurate information about the substituted trustee must be provided and recorded or the sale conducted by the substituted trustee is void.[202] If the beneficiary assigns its interest in the deed of trust, the assignment need not be recorded, although recordation operates as constructive notice to all persons.[203] But if the assignee has reason to exercise the power of sale provision, the assignment must be recorded so that the assignee's right to instruct the trustee to sell appears in the public record.[204] Despite the plain language of the statute, the California Court of Appeals recently reaffirmed that this provision applies only to mortgages and not to deeds of trust.[205]

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[199] Cal. Civ. Code § 2924(a).
[200] Cal. Civ. Code § 2934a(a)(1).
[201] Cal. Civ. Code § 2934a(a)(1). If the substitution occurs after the recordation of the notice of default but prior to the recording of the notice of sale, the beneficiary or its authorized agent shall cause a copy of the substitution to be mailed, prior to, or concurrently with its recordation to the trustee then of record and to all persons to whom a copy of the notice of default would be required to be mailed by §2924b. An affidavit shall be attached to the substitution that notice has been given to those persons and in the manner required by this subdivision.
[202] Cal. Civ. Code § 2934a(e).
[203] Cal. Civ. Code § 2934.
[204] Cal. Civil Code §§ 2932.5, 2934; Miller & Starr, § 10:39, text accompanying note 17. This provision applies when "a power to sell real property is given to a mortgagee, or *other encumbrancer*, in an instrument intended to secure the payment of money…" (emphasis added).).
[205] Calvo v. HSBC Bank USA, N.A., 199 Cal.App.4th 118, 130 Cal.Rptr.3d 815 (Cal. Ct. App. 2011)(relying on *Stockwell v. Barnum*, 7 Cal. App. 413, 94 P. 400 (1908)), *petition for review pending*. *Contra* Cruz v. Aurora Loan Serv. LLC (*In re* Cruz), __B.R.__, 2011 WL 3583115 (Bankr. S.D. Cal. Aug.

In California, the deed of trust follows the note.[206] Hence, an assignment or transfer of the note carries with it the deed of trust.[207] An attempt to assign the deed of trust without the debt has no effect.[208] The California Court of Appeals has squarely ruled that the deed of trust can only be foreclosed by the owner of the note.[209]

3. Statutorily Required Notices and Relevant Contents

California creates several hoops that the trustee, beneficiary, or their authorized agents must jump through before selling property at a foreclosure sale.[210] First, the beneficiary or authorized agent must attempt to contact the homeowner in person or by telephone to assess his financial situation, to explore options to avoid foreclosure, and to offer a meeting that must occur within fourteen days of the request.[211] Once the beneficiary complies with these requirements, it or the trustee may proceed to the next step.

Second, at least thirty days after this initial contact or within thirty days after diligently attempting to contact the homeowner, if there is a default and the trustee, beneficiary or their authorized agents wish to proceed, one of them must record a notice of default that includes certain information, including the name, address, and telephone number of the beneficiary, and a statement describing each breach actually known to the beneficiary.[212] The party recording the notice of default must mail it to the trustor within

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11, 2011)(detailing the basis for the court's opinion that the state supreme court was likely to rule that § 2932.5 applies equally to deeds of trust).

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

[207] Cal. Civ. Code §§ 2936 (addressing mortgages), 1084; Cockerell v. Title Ins. & Trust Co., 42 Cal. 2d 284, 291, 267 P.2d 16, 20 (Cal. 1954)(applying this rule to deeds of trust); Domarad v. Fisher & Burke, Inc., 270 Cal. App. 2d 543, 553, 76 Cal. Rptr. 529 (Cal. Ct. App. 1969)(applying this rule to deeds of trust).

[208] Domarad, 270 Cal. App. at 553-54.

[209] Santens v. Los Angeles Fin. Co., 91 Cal. App. 2d 197, 201-02, 204 P.2d 619 (Cal. Ct. App. 1949)(resolving who had a superior interest in the property at issue—a judgment creditor who executed or the owner of the note and deed of trust and deciding in favor of the owner of the note and deed of trust because he acquired his rights before the judgment creditor). *See also* Cockerell, 42 Cal. 2d at 291, 267 P.2d at 20(approving the holding in Santens that the deed of trust can only be foreclosed by the owner of the note). *Cf.* Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256 (Cal. Ct. App. 2011)(implicitly agreeing that the beneficiary must own the note to authorize the trustee to proceed with a foreclosure but ruling that MERS had the authority, as agent, to assign the note and the deed of trust). Federal courts sitting in California routinely require neither presentation nor possession of the note by the trustee or beneficiary prior to a foreclosure in cases not involving bankruptcy. *E.g.*, Sicairos v. NDEX West, L.L.C., 2009 WL 385855 (S.D. Cal. Feb. 13, 2009)(relying on Cal. Civ. Code § 2924 and *Moeller v. Lien*, 25 Cal. App. 4th 822, 830, 30 Cal. Rptr. 2d777 (1994) for the proposition that " ' [t]he foreclosure process is commenced by the recording of a notice of default and election to sell by the trustee.'"); Wood v. Aegis Wholesale Corp., 2009 WL 1948844 (E.D. Cal. July 6, 2009)(relying on Sicairos, Moeller, and § 2924). A few dozen federal district court decisions cite to these case with little or no analysis. *E.g.*, Geren v. Deutsche Bank Nat., 2011 WL 3568913, *8 (E.D. Cal. Aug 12, 2011).

[210] The California Legislature has amended several provisions, some more than once, since 2007. For this discussion, I rely upon the foreclosure statutes in effect on January 1, 2011.

[211] Cal. Civ. Code § 2923.5(a).

[212] Cal. Civ. Code §§ 2924(a), 2924c(b)(1). The notice also must state information about how to obtain a written itemization of the amount the homeowner must pay to cure.

ten business days to his or her last known address if different than the address specified in the deed of trust or mortgage with power of sale.[213]

Third, a notice of sale must be recorded and posted on the property no earlier than three months after the filing of the notice of default and no later than twenty days before the sale.[214] In addition to information about the sale itself, the notice of sale must include the name, street address in California, and toll-free telephone number of the trustee or its agent.[215]

4. Effect of Defective Foreclosure

The state foreclosure scheme "provide[s] a comprehensive framework for the regulation of a nonjudicial foreclosure sale pursuant to a power of sale contained in a deed of trust."[216]

> The purposes of this comprehensive scheme are threefold: (1) to provide the creditor/beneficiary with a quick, inexpensive and efficient remedy against a defaulting debtor/trustor; (2) to protect the debtor/trustor from wrongful loss of the property; and (3) to ensure that a properly conducted sale is final between the parties and conclusive as to a bona fide purchaser.[217]

Consistent with these principles, the foreclosing party must strictly comply with these rules, otherwise the sale is invalid.[218] Nonetheless, once the trustee delivers the deed to the purchaser containing recitals of compliance with the requirements related to mailing, posting, and publication of the notice of default and the notice of sale, California law creates a presumption in favor of the purchaser.[219] This presumption is not absolute and can be overcome by the challenger.[220] In addition, the presumption does not arise when the basis of the challenge relates to non-notice issues, such as, lack of authority to foreclose and agreements to postpone or cancel the sale while the parties are negotiating a loan modification or where the trustor is making payments under a repayment plan.[221]

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[213] Cal. Civ. Code § 2924b(b)(1).
[214] Cal. Civ. Code §§ 2924(a)(2); 2924f(b)(1)
[215] Cal. Civ. Code § 2924f(b)(1).
[216] Moeller v. Lien, 25 Cal. App. 4th 822, 830, 30 Cal. Rptr. 2d 777, 782 (Cal. Ct. App. 1994)
[217] *Id.*
[218] *E.g.*, Bank of America v. La Jolla Group II, 129 Cal. App. 4th 706, 713-14, 28 Cal. Rptr. 3d 825, 830-31 (Cal. Ct. App. 2005)(holding the sale void where the beneficiary had no right to sell because the trustor was current on an agreement to cure); Miller v. Cote, 127 Cal. App. 3d 888, 894, 179 Cal. Rptr. 735 (Cal. Ct. App. 1982)(invalidating the sale).
[219] Cal. Civ. Code § 2924(c).
[220] Moeller v. Lien, 25 Cal. App. 4th at 831, 30 Cal. Rptr. 2d at 783.
[221] *E.g.*, Bank of America v. La Jolla Group II, 129 Cal. App. 4th 706, 713-14, 28 Cal. Rptr. 3d 825, 830-31 (Cal. Ct. App. 2005)(holding no presumption where the loan was current due to an agreement to cure; beneficiary had no right to foreclose under these circumstances; ruling that the § 2924(C) presumption arises only to notice requirements and not to every defect or inadequacy short of fraud); Melendez v. D & I Inv., Inc., 127 Cal. App. 4th 1238, 1255-56, 26 Cal. Rptr. 3d 413, 428 (Cal. Ct. App. 2005)(ruling that the § 2924 presumption arises when the challenge to the sale relates to notice issues but not to other matters;

The trustor-homeowner may file an action to cancel the deed and quiet title and/or allege wrongful foreclosure, seeking injunctive and declaratory relief.[222] Since this action is equitable in nature, the trustor-homeowner must offer to pay the secured debt, the amount delinquent and costs, or plead the conditions showing that tender is inequitable or the sale is void and not merely voidable.[223]

5. Effect of Defective Foreclosure on Bona Fide Purchasers

If the purchaser qualifies as a BFP, the recitals in the foreclosure deed constitute conclusive evidence of compliance.[224] This presumption does not arise until the trustee's deed is delivered.[225] In order to achieve *bona fide* status, a purchaser must pay value in good faith and without actual or constructive notice of another's rights.[226] The element of constructive notice eliminates purchasers who fail or refuse to check the real property records and review the relevant recorded documents.[227] The conclusive presumption in this context is limited to irregularities related to notice, as with a non-BFP.[228] The California Supreme Court also recognizes fraud, rigging the bidding process, and other misbehavior as reasons to set aside a sale even if the trustee deed to a BFP is recorded. [229]

6. Ibanez Traction in California

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finding, however, that repayment agreement was not orally modified and, consequently, there was no procedural irregularity in the sale process).

[222] *E.g.*, Melendez v. D & I Inv., Inc., 127 Cal. App. 4th at 1247, 26 Cal. Rptr. 3d at 421 (affirming the judgment that the plaintiffs could not prove their case rather than that the cause of action was not applicable). If the trustor files to enjoin the sale before the sale date, at least one court held that such a case is not appropriate. Gomes v. Countrywide Home Loans, Inc., 192 Cal. App. 4th 1149, 1157-58, 121 Cal. Rptr. 3d 819, 825-27 (Cal. Ct. App. 2011), petition for cert. filed Aug. 11, 2011(affirming dismissal of cause of action filed before the sale based on the authority of the agent of the beneficiary to foreclose but suggesting that there may be a cause of action where the party recording the notice of default was not the beneficiary at that time, citing Ohlendorf v. American Home Mortgage, 2010 U.S. Dist. LEXIS 31098 (E.D. Cal. March 31, 2010)). *See also* Ferguson v. Avelo Mortgage, LLC, 195 Cal. App. 4th 1618, 1623, 126 Cal. Rptr. 3d 586, 591 (Cal. Ct. App. 2011), review filed July 21, 2011(identifying the elements of a quiet title action where former tenants of the trustor sued on grounds that trustor deeded them the property). The trustor-homeowner may sue for damages rather than a return of title. Munger v. Moore, 11 Cal. App. 3d 1, 7, 89 Cal. Rptr. 323 (Cal. Ct. App. 1970).

[223] Miller & Starr, *supra* note xx at § 10:212. *See also* Ferguson v. Avelo Mortgage, LLC, 195 Cal. App. 4th 1618, 1623-24, 126 Cal. Rptr. 3d 586, 591-92 (Cal. Ct. App. 2011), *review filed* (noting that an offer to pay the full amount is necessary but agreeing that the equities must be considered and tender not required if the sale is void).

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

[225] Moeller v. Lien, 25 Cal. App. 4th at 832, 30 Cal. Rptr. 2d at 783.

[226] Melendez v. D & I Inv., Inc., 127 Cal. App. 4th at 1251-52, 26 Cal. Rptr. 3d at 424-25(rejecting argument that a purchaser cannot achieve BFP status if the purchaser is a speculator who frequents foreclosure sales and pays substantially less than the value of the property).

[227] *Id.* 127 Cal. App. 4th at 1252, 26 Cal. Rptr. 3d at 425(discussing the notice rationale and stating that the purchaser must make "reasonable inquiry").

[228] See cases and discussion in note 230, *supra*.

[229] Bank of America Nat. Trust & Sav. Ass'n v. Reidy, 15 Cal. 2d 243, 248, 101 P.2d 77 (1940)(involving alleged fraud in the bidding process).

Ibanez may be persuasive authority in California regarding on two issues, depending on whether the state's highest court accepts the *Calvo* case and affirms. First, the foreclosing party must be acting on behalf of the original beneficiary or an assignee that derives its rights from a written assignment before the sale. Like Massachusetts, California requires the assignment of the deed of trust to be written. If the California Supreme Court affirms *Calvo*, *Ibanez* will have little traction there because the operative assignment of the deed of trust need not be recorded and transferring the note will automatically transfer the deed of trust. Therefore, a beneficiary who possesses the right to enforce the note may enforce both instruments. On the other hand, if the Supreme Court reverses *Calvo*, the analysis is similar to that described above regarding Arizona. Merely transferring the note will not be enough to grant the beneficiary or its assignee the right to foreclose unless the assignment is recorded.

The second issue addresses the consequences of failing to possess the right to foreclose. Both Massachusetts and California require strict compliance with the power of sale clause and with additional requirements set forth in law. The court in *Ibanez* voided the sale. In California, certain defects also will void a sale even as to a BFP.[230] For these reasons, title defects could be significant in California.[231]

C. Georgia

1. Introduction

In Georgia, the most commonly used instrument to secure a real estate loan is the security deed.[232] However, like the Massachusetts mortgage instrument, the security deed conveys title of the real property to secure the debt and requires the creditor to reconvey the property upon payment of the debt.[233] The uniform security deed used in Georgia by Fannie Mae and Freddie Mac labels the homeowner-grantor as the "borrower." The grantee is referred to as the "lender."[234]

Georgia's seriously delinquent foreclosure rate essentially has tracked the national average since 2005, as shown in Figure 4. Among the nonjudicial foreclosure states, it

[230] Bank of America v. La Jolla Group II, 129 Cal. App. 4th 706, 713-14, 28 Cal. Rptr. 3d 825, 830-31 (Cal. Ct. App. 2005)(voiding a sale to a BFP where the beneficiary had no right to sell).

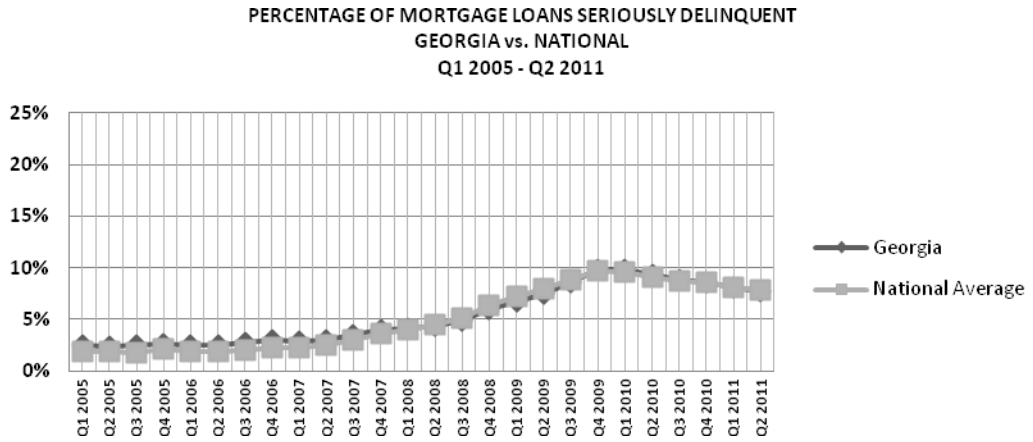
[231] As a practical matter, challenges to title of property held by purchasers are less likely because loan notes are not recorded. If *Calvo* stands, assignments of deeds of trust will not be recorded either, making it difficult for homeowners to detect authority to foreclose defects before or after the sale.

[232] Frank S. Alexander, Georgia Real Estate Finance and Foreclosure Law § 8:1 (2011-2012 ed.). Though Georgia has a legal history (pre-Civil War) and statutory framework that treated mortgages as liens, the dominant statutory framework and practice for almost 150 years has been that of a title theory state through the use of the security deed. *Id.* at § 1:5.

[233] Ga. Code § 44-14-60. (permitting the use of "security deeds" and stating: "[s]uch conveyance shall be held by the courts to be an absolute conveyance, with the right reserved by the grantor to have the property reconveyed to him upon the payment of the debt or debts intended to be secured agreeably to the terms of the contract, and shall not be held to be a mortgage). For a discussion of the historical reasons that spawned the birth of security deeds, see Frank S. Alexander, *supra* note 232 at § 1:5.

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

ranks fifth. As of the second quarter of 2011, 7.70% or 124,125 loans were seriously delinquent in Georgia.[235]



2. Authority to Foreclose

Unless the instrument creating the power of sale specifies otherwise, only the grantee in a security deed or an assignee or successor may exercise the power of sale.[236] The security deed or the final assignment must be recorded before the foreclosure sale.[237] Transfers of security deeds must be in writing and may be endorsed on the original deed or by a separate document and shall be witnessed as required by deeds.[238]

Where a debt evidenced in a note is secured by a security deed, the note holder may sue on the debt or exercise the power of sale upon a default.[239] In this latter situation, the Georgia's highest court unequivocally held that the holder of the security deed must establish that it also holds the note in order to foreclose.[240] On the issue of whether the security deed follows the note, Professor Alexander states in his treatise: "Since a security instrument is of little value without evidence of the obligation which it secures, security deeds are usually, but not invariably, transferred and assigned in tandem

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

[236] Ga. Code § 23-2-114. A personal representative, heir, legatee, or devisee of the grantee may also exercise the power of sale.

[237] Ga. Code Ann. § 44-14-162(b). The Georgia Legislature added this subsection in 2008 to ensure that a foreclosure be conducted by the current owner or holder of the mortgage, as reflected by public records. 2008 Georgia Laws Act 576 (S.B. 531). Alexander, *supra* note 232, at § 5:3.

[238] Ga. Code § 44-14-64.

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

[240] Weems v. Coker , 70 Ga. 746, 1883 WL 3099 *3 (1883). *See also* Morgan v. Ocwen Loan Serv., LLC, __F. Supp. 2d__, 2011 WL 2650194 *5 (N.D. Ga. July 7, 2011)(relying upon *Weems v. Coker* to deny dismissal of claims for injunctive relief and wrongful foreclosure, among others). *But see* Final Report and Recommendation, Smith v. Saxon Mortgage, Civil Action No. 1:09-CV-3375-WCO-JFK (N.D. Ga. Feb. 2, 2011), *aff'd per curiam*, 2011 WL 5375063 (11th Cir. Nov. 8, 2011)(unpublished)(relying upon Ga. Code § 44-14-64(b) and ruling that a transfer of the security deed also transfers the note); Jackman v. Hasty, 2011 WL 854878 *4 (N.D. Ga. March 8, 2011)(relying on the fact that the homeowner provided no Georgia authority on this issue and holding that a foreclosure may proceed even if the holder of the security deed is unable to demonstrate possession of the note). See also the discussion in Alexander, *supra* note 232 at § 3:7.

with the transfer of the promissory notes which are secured."[241] It appears that Georgia courts have not expressly adopted the rule that the security instrument always follows the note, perhaps, because Georgia is a title theory state and the security deed should be separately assigned..

3. Statutorily Required Notices and Relevant Contents

The "secured creditor" must give the grantor-homeowner notice of the "initiation of proceedings to exercise the power of sale" no later than thirty days before the date of the sale.[242] An assignee of the "secured creditor" also may provide this notice.[243] The notice must state the name, address, and telephone number of the individual or entity who shall have full authority to negotiate, amend, and modify all terms of the mortgage with the debtor.[244] The statute does not explicitly require the name, address, and contact information for the secured creditor.

4. Effect of Defective Foreclosure

The power of sale provision in security deeds "shall be strictly construed and…fairly exercised."[245] Where a foreclosing grantee or assignee under the security deed fails to comply with the statutory duty to provide notice of sale to the grantor-homeowner, the grantor-homeowner may either seek to set aside the foreclosure or sue for damages for the tort of wrongful foreclosure.[246] A claim of wrongful exercise of power of sale can arise when the grantee has no legal right to foreclose.[247] For example, if the purported assignment of a security deed is not a valid assignment, the purported assignee has no right to foreclose and the sale is null and void.[248] Similarly, according to

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[241] Alexander, *supra* note 232 at § 5:3. *See also id.* at § 3:7 (discussing the relevance of the Restatement (Third) of Property (Mortgages) § 5.4 (1997) on the issue of the note and security deed travelling together but citing no Georgia cases that have adopted the Restatement).

[242] Ga. Code § 44-14-162.2. The statute uses "debtor" which it defines to mean the grantor. Ga. Code. § 44-14-162.1. However, the Code does not define "secured creditor." One court interprets "secured creditor" to be the holder of the debt obligation. Morgan, 2011 WL 2650194 *5 (*quoting Weems v. Coker*, 70 Ga. 746, 749 (1883))

[243] Jackson v. Bank One, 287 Ga. App. 791, 652 S.E.2d 849 (2007). Without seeking guidance from the state courts, a federal court held that an agent of the secured creditor also may send the notice. LaCosta v. McCalla Raymer, LLC., 2011 WL 166902 (N.D. Ga. Jan. 18, 2011).

[244] Ga. Code Ann. § 44-14-162.2.

[245] Ga. Code Ann. § 23-2-114.

[246] Moore v. Bank of Fitzgerald, 266 Ga. 190, 465 S.E.2d 445 (1996); Calhoun First Nat. Bank v. Dickens, 264 Ga. 285, 286, 443 S.E.2d 83, 8387 (1994); Roylston v. Bank of America, *N.A.*, 290 Ga. App. 556, 660 S.E.2d 412 (2008).

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

[248] Cummings v. Anderson *(In re* Cummings*)*, 173 B.R. 959, 962 (Bankr. N.D. Ga. 1994), *aff'd*, 112 F.3d 1172 (11th Cir. 1997)(table)(holding that the person conducting the sale obtained its assignment of the security deed after its assignor gave notice to the grantor-homeowner and advertised the sale and finding that the purported assignment contained merely an intent to assign rather than language of conveyance).

a federal court, a homeowner may request an injunction to stop a foreclosure sale where the assignee of the security deed does not also hold the promissory note.[249]

In specific contexts, some cases hold that the sale will be treated as voidable, rather than void. For example, the foreclosure is voidable where the party conducting the sale purchases the property in contravention of the power of sale.[250] On the other hand, a foreclosure is void where the underlying debt obligation is tainted by usury.[251]

In an equitable action to cancel a security deed, the one who seeks equity must do equity.[252] Applying this principle, the Georgia Supreme Court has required the homeowner to pay off the promissory note.[253] Laches may bar an equitable action to set aside the sale.[254]

5. Effect of Defective Foreclosure on Bona Fide Purchasers

The general rule in an equitable action to void a foreclosure is that: "A bona fide purchaser for value without notice of an equity will not be interfered with by equity."[255] Nonetheless, the Georgia Supreme Court has held that a BFP may not prevail when: 1) the grantee fraudulently obtains the deed being held by an escrow agent and conveys it to a BFP;[256] 2) the grantee's deed is forged and vests no title in the grantee or those holding under the grantee even though the purchaser paid value and had no notice the forgery;[257] or, 3) the purchaser at a foreclosure sale had actual or constructive notice of a defect.[258]

See also Morgan, 2011 WL 2650194 *4- 5 (denying motion to dismiss wrongful foreclosure claim and a request for an injunction to stop the sale where the secured creditor was not the holder of the note).

[249] Morgan, 2011 WL 2650194 *4- 5 (relying on Weems v. Coker, 70 Ga. 746 (1883)).

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

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

[252] Taylor, Bean & Whitaker Mortgage Corp. v. Brown, 276 Ga. 848, 583 S.E.2d 844 (Ga. 2003)(relying on Ga. Code § 23-1-10).

[253] *Id.* at 276 Ga. at 850, 583 S.E.2d at 846. But where the homeowner is seeking to void a sale that occurred due to the homeowner's default in mortgage loan payments, a court should require the homeowner to tender only the actual amount past due. *See* Frank S. Alexander, *supra* note 232 at § 8:10(c).

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

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

[256] Brown v. Christian, 276 Ga. 203, 576 S.E.2d 894 (Ga. 2003)(holding that the purchaser who filed an ejectment action to oust the grantor cannot prevail because the deed subject to the security deed was void).

[257] Aurora Loan Services, LLC v. Veatch, 288 Ga. 808, 710 S.E.2d 744 (Ga. 2011)(ruling that whether the bona fide purchaser had notice of the forgery is irrelevant because the security deed held by the lender or any assignee was a nullity, relying upon *Brock v. Yale*, 287 Ga. 849, 700 S.E.2d 583 (Ga. 2010)).

[258] MPP Inv., Inc. v. Cherokee Bank, 288 Ga. 558, 563-564, 707S.E.2d 485, 490 (2011)(finding the purchaser had actual and constructive notice of challenges to title; also ruling that failure to send notice of right to cure pursuant to the power of sale renders the foreclosure proceeding "invalid").

No Georgia appellate court has squarely addressed the rights of a BFP at a foreclosure sale where the foreclosing entity did not have the authority to foreclose and whether the mortgagor can undo such a sale. Georgia does recognize the tort of wrongful foreclosure, a claim that provides for damages but not equitable relief.[259]

6 Ibanez Traction in Georgia

Based upon this understanding of Georgia law, *Ibanez* should be persuasive authority in Georgia regarding three issues. First, the foreclosing party must be acting on behalf of the original grantee or an assignee that derives its rights from a written assignment before the sale. Georgia is stricter than Massachusetts because it mandates recordation of the assignment prior to the sale. Moreover, both states are title theory states. In Georgia, this should mean that the security deed does not automatically follow the note.

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

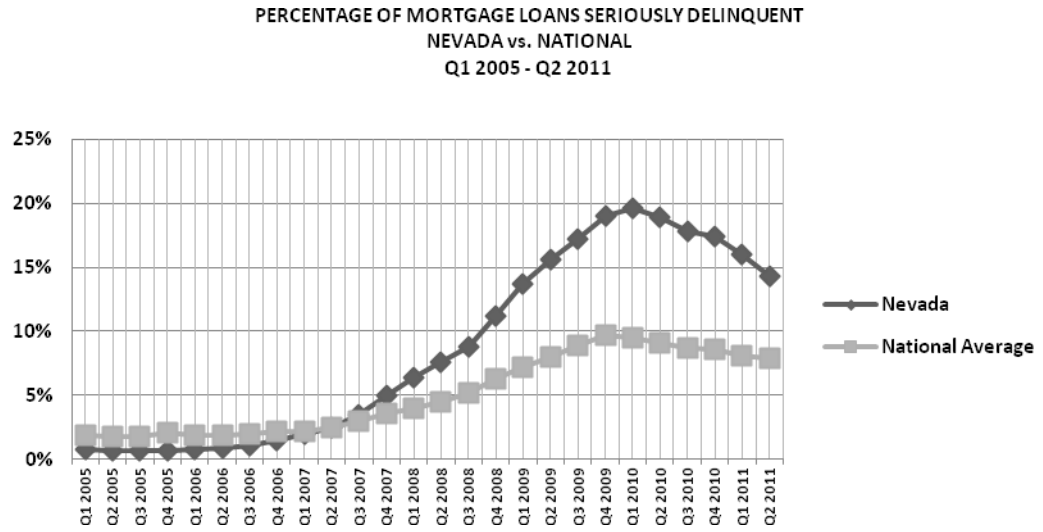
D. Nevada

1. Introduction

Nevada allows the use of mortgages or deeds of trust. However, lenders typically utilize deeds of trust because they permit nonjudicial foreclosure.[260] The parties to the contract, the beneficiary (lender), the trustor (homeowner-borrower), and the trustee, play the same roles in Nevada as they do in Arizona and California. Nevada is a lien theory state.[261]

Nevada's seriously delinquent foreclosure rate has dramatically exceeded the national average since late 2006, as illustrated in Figure 5. Currently, Nevada's rate (14.34%) is second only to Florida's rate (18.68%) among *all* states. Among the nonjudicial foreclosure states, it ranks first. As of the second quarter of 2011, 14.34% or 72,099 loans were seriously delinquent in Nevada.[262]

[259] Heritage Creek Dev. Corp. v. Colonial Bank, 268 Ga. App 369, 601 S.E.2d 842, 844 (Ga. Ct. App. 2004).
[260] Nev. Rev. Stat. § 107.080; Mary J. Drury, *et al.*, Foreclosure in Nevada: The Basics, 17-APR Nev. Law 6 (2009). In contrast, real property secured by mortgages must be foreclosed upon judicially. Nev. Rev. Stat. § 40.430.
[261] Nev. Rev. Stat. § 40.050 (codifying this principle in relation to mortgages). Nev. Rev. Stat. § 40.033 states that a "mortgage or other lien" includes a deed of trust for purposes of § 40.050.
[262] Mortgage Bankers Association, National Delinquency SurveyQ2 2011 at 4.



Source: Mortgage Bankers Association National Delinquency Survey

2. Authority to Foreclose

Under a deed of trust, the beneficiary, successor in interest of the beneficiary, or the trustee may foreclose.[263] An assignment of the deed of trust must be in writing.[264] The assignment need not be recorded although recordation operates "as constructive notice of the contents thereof to all persons."[265] If the deed of trust so provides, the beneficiary may substitute the trustee but there is no statute that governs this process.[266]

In two recent decisions, the Nevada Supreme Court tackled the issue of authority to foreclose.[267] In the published *en banc* opinion, the court held that "[a]bsent a proper assignment of a deed of trust, the [assignee of the beneficiary] lacks standing to foreclose"[268] Further, the court discussed the applicability of Article 3 of the Uniform Commercial Code to mortgage notes and described the methods to transfer them. It concluded that the assignee of the beneficiary must be entitled to enforce the loan note.[269]

In the unpublished opinion, the homeowners appealed the dismissal of their complaint in which one count alleged that the purported assignee of the beneficiary

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[263] Nev. Rev. Stat. § 107.080(2)(c) and (d).
[264] Nev. Rev. Stat. § 111.205(1).
[265] Nev. Rev. Stat. §§ 106.210(1); 107.010.
[266] Foust v. Wells Fargo, N.A., 2011 WL 3298915 *2, n. 5 (Nev. July 29, 2011)(unpublished order)(observing that there is no state statute governing the substitution of the trustee and applying a provision in the deed of trust).
[267] Foust v. Wells Fargo, N.A., 2011 WL 3298915 (Nev. July 29, 2011)(unpublished order); Leyva v. National Default Serv. Corp., __Nev.__, 255 P.3d 1275 (Nev. 2011)(en banc)
[268] Leyva, 255 P.3d at 1279. In this case, the homeowner appealed the denial of the homeowner's petition to sanction the purported assignee of the beneficiary due to its failure to produce required documents to the mediator, *i.e.*, assignments of the deed of trust and note. The mediation rules require their production "to ensure that whoever is foreclosing 'actually owns the note' and has authority to foreclose." *Id.*
[269] *Id.* at 1281. The precise issue was whether the party appearing at a mediation following the initiation of non-judicial foreclosure had demonstrated authority to mediate the note. *Id.* Nonetheless, the most reasonable inference from the court's ruling is that the beneficiary or its assignee must possess the authority to foreclose via a written assignment and via a properly transferred loan note.

lacked the authority to foreclose on the note.[270] In the context of reversing the dismissal, the court noted that possessing only the deed of trust does not create any right to enforce the underlying note. "To enforce a debt secured by a deed of trust and mortgage note, a person must be entitled to enforce the note pursuant to Article 3 of the Uniform Commercial Code."[271] While this latter opinion does not constitute precedent and cannot be cited as legal authority in Nevada, it provides insight into the likely ruling of the court on the issue of authority to foreclose in a subsequent published opinion.[272]

There appears to be no Nevada state court opinion holding that the deed of trust automatically follows the note, as in California.[273]

3. Statutorily Required Notices and Relevant Contents

The beneficiary, successor in interest of the beneficiary, or the trustee must record a notice of breach and of election to sell the property if the grantor fails to make good a deficiency.[274] This notice must describe the deficiency and include a statement of an intent to accelerate, if permitted by the obligation secured by the deed of trust.[275] In addition, for residential, owner-occupied housing, the trustee must include contact information which the grantor may use to reach a person with authority to negotiate a loan modification on behalf of the beneficiary and information regarding mediation and how to elect or waive it.[276] As of October 1, 2011, the notice also must include a notarized affidavit of authority to exercise the power of sale based on personal knowledge and signed under the penalty of perjury.[277]

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

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

[272] Nev. Sup. Ct. Rule 123. Before *Leyva* was decided, some federal court opinions hold, without discussion or citation to Nevada court opinions, that the lender-beneficiary, the servicer, and other parties need not produce the original note in order to foreclose. Rather, they simply cite to Nev. Rev. Stat. § 107.080.*See, e.g.,* Urbina v. Homeview Lending Inc., 681 F. Supp. 2d 1254, 1257-1258 (D. Nev. 2009).

[273] In a recent decision, the Nevada Supreme Court refrained from expressing an opinion "concerning the effect on the mortgage of the note having been transferred or the reverse." Leyva v. National Default Serv. Corp., __Nev.__, 255 P.3d 1275, 1281, n. 7 (Nev. 2011)(en banc). Prior to the release of the *Leyva* and *Foust* decisions, at least one federal district judge noted that the Nevada court have not adopted the "mortgage-follows-the-note" theory. See Vega v. CTX Mortg. Co., LLC, 761 F.Supp.2d 1095, 1097 (D. Nev. 2011).

[274] Nev. Rev. Stat. § 107.080(2)(c). *See also* North v. Bank of America Corp., 2011 WL 34 6070 (D. Nev. Feb. 2, 2011)(dissolving the state court injunction issued before removal which stopped the foreclosure on several grounds, including that the party recording the notices of default and of the sale may be an authorized agent of the beneficiary, trustee, or their assigns). I will use "trustee" in the remainder of the Nevada discussion to refer to any of the parties identified in this provision as having the obligation to record the notices, unless otherwise noted in the text.

[275] Nev. Rev. Stat. § 107.080(3)(a).

[276] Nev. Rev. Stat. § 107.086.

[277] Nev. Rev. Stat. § 107.080(c)(1)-(6); 2011 Nevada Laws Ch. 81 (A.B. 284). Among other things, the affidavit must state: (1) the full name and business address of the trustee or the trustee's personal representative or assignee, the current holder of the note secured by the deed of trust, the current beneficiary of record and the servicers; (2) the full name and last known business address of every prior known beneficiary of the deed of trust; 3) that the beneficiary, successor in interest of the beneficiary or the trustee is in actual possession of the note secured by the deed of trust; 4) that the trustee possesses the authority to exercise the power of sale; 5) the amount in default, the principal amount of the debt secured

The trustee or "other person authorized to make the sale under the terms of the deed of trust" must wait at least three months from the date of the recording of this notice before proceeding to sale. The trustee also must record a notice of the sale and mail it to the homeowner-trustor.[278]

4. Effect of Defective Foreclosure

A court must declare a sale void so long as: 1) the trustee or other person authorized to make the sale did not "substantially comply" with the provisions listed in sections 107.080, 107.086, and 107.087 which include notice, recordation, and mediation requirements; and 2) the action is commenced within ninety days after the date of the sale and a *lis pendens* is noted within thirty days after commencement of the case.[279] The Nevada state courts have not fleshed out what "substantially complies" means in the context of voiding a foreclosure sale, at least not in published opinions. Where the issue is authority to foreclose, either the foreclosing party possesses that right or it does not. More specifically, the foreclosing party has ht right to enforce the note and the deed of trust or it does not. Arguably, then, "substantial compliance" in this context meand fully possessing this right. In addition, the Nevada courts have not addressed whether a claim of lack of authority to foreclose is restricted to an action under section 107.080(5) since it does not involve a violation of the enumerated statutes.

A trustor-mortgagor may sue for the tort of wrongful foreclosure for damages.[280] When raising this claim, the Supreme Court requires the trustor-mortgagor to show that she had not breached any condition under the deed of trust that could trigger a default and

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by the deed of trust and a good faith estimate of all fees to be charged due to the default and those fees imposed in connection with the exercise of the power of sale.

[278] Nev. Rev. Stat. § 107.080(4).

[279] Nev. Rev. Stat. 107.080(5). The period to file is extended when proper notice is not provided to the grantor. Nev. Rev. Stat. § 107.080(6). The Nevada Legislature amended this provision, effective October 1, 2011, to require that a court declare the sale void, if the plaintiff can prove the other statutory elements, *i.e.*, compliance was not substantial. 2011 Nevada Laws Ch. 81 (A.B. 284). In addition to the remedy of voiding the sale, the Legislature added a mandatory damage award for violations of subsections 2, 3, or 4 of § 107.080. Nev. Rev. Stat. §107.080(7), effective October 1, 2011. Finally, the Legislature beefed up the criminal and civil consequences for any person who claims an interest or lien in real property and who knows or has reason to know that the document is forged or groundless, contains a material misstatement or false claim, or is otherwise invalid; for any person who executes or notarizes such a document that is recorded in the office of the county recorder in which the real property is located and who knows or has reason to know that the document is forged or groundless, contains a material misstatement or false claim or is otherwise invalid. Nev. Rev. Stat. § 205.395, effective October 1, 2011. *See also* Shields v. First Magnus Fin. Corp., 2011 WL 1304734 *1 (D. Nev. Apr. 1, 2011)(refusing to dismiss cause of action under this statute in a case removed to federal court but dismissing the claims for declaratory relief and quiet tile as redundant).

[280] *See, e.g.*, Schrantz v. HSBC Bank N.A., 2011WL 26327771 (D. Nev. July 5, 2011)(dismissing the plaintiff's wrongful foreclosure case because the homeowner was in default but refusing to dismiss her claim based on a defective foreclosure under Nev. Rev. Stat. § 107.080); DeMarco v.BAC Home Loans Servicing LP, 2011 WL 2462209 (D. Nev. June 17, 2011)(distinguishing between the tort of wrongful foreclosure and an action under § 107.080) . Other cases dismissed by federal court judges in Nevada appear to have sought injunctive and declaratory relief based upon a wrongful foreclosure claim and did not raise a separate equitable claim under § 107.080(5). *See, e.g.*, Erickson v. PNC Mortgage, 2011 WL 1743875 (D. Nev. May 6, 2011)(amended complaint available at 2011 WL 2661791).

authorize the foreclosure.[281] Although the rule seems harsh, the court created some latitude on the issue of whether the trustor-mortgagor's claims against the foreclosing party can offset an alleged delinquency. Nonetheless, federal district courts apply the *Collins* condition literally and often without discussion.[282] Lower state court opinions interpreting and applying *Collins* are non-existent. The most likely reason is that trustor-mortgagor cases filed in state court are often removed to federal court.[283]

5. Effect of Defective Foreclosure on Bona Fide Purchasers

"Every sale made under the provisions of [§ 107.080] and other sections of this chapter vests in the purchaser the title of grantor and any successors in interest without equity or the right of redemption."[284] Unlike other nonjudicial foreclosure states, Nevada does not expressly create an absolute rule in favor of BFPs. As discussed immediately above, the Legislature granted the trustor-mortgagor the opportunity to challenge a completed sale. On the other, the Legislature opened the courthouse door for only a short period of time, thereby creating certainty for purchasers upon the expiration of a mere ninety days following the sale.[285]

6. Nevada's Pre-Sale Mediation Program

Nevada's Legislature created a Foreclosure Mediation Program for owner-occupied residential properties that are subject to foreclosure notices filed on or after July 1, 2009. "Its purpose is to address the foreclosure crisis head-on with the hope of keeping Nevada families in their homes."[286]

Upon notice that a homeowner has elected to participate in the program, lenders must participate in good faith and provide certain documentation to the mediator and homeowner, including: the original or certified copy of the deed of trust; the mortgage note; and, each assignment of the deed of trust and mortgage note.

The data released by the Nevada Judiciary shows that when the homeowner elects mediation, the program often has prevented foreclosures and kept homeowners in their homes, at least for some period of time. From September 14, 2009 through June 3, 2010 (approximately the first nine months of the program's operation), 4,212 mediations were held and of these, 3,767 did not proceed to foreclosure (89% of cases) because the mediator did not issue a certification for foreclosure. Of the 3,767 cases with no foreclosure certification, the parties reached an agreement in 61%; in the remainder, a

[281] Collins v. Union Fed. Sav. & Loan Ass'n, 99 Nev. 284, 304, 662 P.2d 610, 623 (Nev. 1983)(reversing dismissal and providing the plaintiff an opportunity to prove that he was not in default when the power of sale was exercised by the defendants because they charged interest in excess of the contractual rate).
[282] *See, e.g.*, Thomas v. Wachovia Mortgage, F.S.B., 2011 WL 3159169 *4 (D. Nev. July 25, 2011); Simon v. Bank of America, N.A., 2011 WL 2609436 *9 (June 23, 2010). *But see* Pimentel v. Countrywide Home Loans, Inc., 2011 WL 2619093, *2 (D. Nev. July 1, 2011)(suggesting that *Collins* allows a case to proceed if there is a dispute of fact about whether nonpayment was appropriate).
[283] Email from Geoffrey Giles, Attorney in Nevada, to Elizabeth Renuart, Assistant Professor of Law, Albany Law School (Nov. 1, 2011, 03:16 P.M. EST).
[284] Nev. Rev. Stat. § 107.080(5).
[285] *Id.*; Nev. Rev. Stat. § 107.080(6).
[286] See the Nevada Judiciary Foreclosure Mediation website: http://www.nevadajudiciary.us/index.php/about-foreclosure-mediation (last visited on August 3, 2011).

certification for foreclosure was not issued because of non-compliance with rules or the case was withdrawn.[287] However, the data does not reflect whether the homes stay out of foreclosure temporarily or permanently and how often the foreclosures are restarted.

Nonetheless, the program has the potential of motivating all lenders and their assignees to get their documents in order before proceeding with residential foreclosures in Nevada, regardless of whether the homeowner requests mediation. The possibility of having to document the authority to foreclose in a mediation process should induce lenders and assignee to put the time into meeting these requirements. Those that cannot legitimately present these documents may be less likely to foreclose. This is especially true after the Nevada Supreme Court's recent decisions. There, the court required strict compliance with the mediation production of documents rule. Further, the court approved mediator denials of certifications for foreclosure and remanded for consideration of sanctions for non-compliance.[288]

7. Ibanez Traction in Nevada

Based upon this understanding of Nevada law, *Ibanez* should be persuasive authority in Nevada on two issues. The first is whether the foreclosing party must be the original beneficiary or an assignee via a written assignment before the sale. Like Massachusetts, Nevada requires the assignment of the deed of trust to be written.[289] The Nevada Supreme Court recently decided that that the assignee of the beneficiary lacks standing to foreclose absent a proper assignment of the deed of trust, without citing to *Ibanez*.[290]

The second is whether the failure to possess the authority to foreclose renders the sale void. These states differ on the issue of the type of compliance necessary to void a sale: Massachusetts requires strict compliance; whereas, Nevada requires only substantial compliance.[291] Nonetheless, lacking the right to foreclose likely voids the sale, given the court's rulings in the *Leyva* decision.

Moreover, by statute, Nevada courts must void sales if a challenge relating to notice, recordation, and mediation requirements is filed within ninety days following the sale. As previously noted, it is not clear whether this limited right applies to contests on the ground of lack of authority to foreclose or whether this issue can be raised at any time, subject to laches or another statute of limitations.

Finally, Nevada's mediation program should reduce the number of foreclosures that proceed where the foreclosing entity does not possess the right to foreclose. The

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

[288] Pasillas v HSBC Bank USA, 255 P.3d 1281 (Nev. 2011); Leyva v. National Default Serv. Corp., 255 P.3d 1275 (Nev. 2011).

[289] Nev. Rev. Stat. § 111.205(1).

[290] Leyva, 255 P.3d at 1279.

[291] Ibanez, 458 Mass 646-647, 941 N.E.2d 49-50. Interestingly, the Nevada Supreme Court recently applied a "strict compliance" standard to the mandates of the pre-foreclosure mediation program. Leyva v. National Default Serv. Corp., 2011 WL 2670183 (Nev. July 7, 2011)(rejecting a "substantial compliance" standard).

mediation documentation requirements should reduce concerns about defective title of property in the hands of purchasers.

VIII. POTENTIAL CONSEQUENCES AND MORAL HAZARDS

A. Positive Consequences

The *Ibanez* and *Bevilacqua* rulings should trigger positive results for several reasons. First, the decisions foster diligent compliance with foreclosure requirements in states without readily available judicial oversight.[292] Typically, nonjudicial foreclosure is a quicker, easier, and less costly method to repossess a borrower's home than accomplishing the same result through the judicial procedure.[293] In effect, nonjudicial foreclosure is a form of self-help repossession of one of the most important assets a person can own--her home. The bottom line is that the borrower who mortgages her property can lose it without easy access to the courts.[294]

Contrast this situation with that of tenants and of borrowers who owe unsecured debt. In the first scenario, the landlord normally must file a lawsuit in the appropriate court to terminate the tenancy based upon non-payment of the rent and seek an order of eviction.[295] Essentially. the landlord must prove its right to possession of the premises.[296] Likewise, in the second situation, the unsecured creditor must pursue collection through the judicial system if its borrower defaults on the debt and fails to repay the arrears.[297] Like the landlord, the creditor must prove its right to collect on the debt. Only after the court enters a judgment against the borrower may the creditor execute on the judgment by obtaining writs to attach the borrower's property to satisfy the judgment.[298]

The integrity of our legal system depends upon all parties following the rules. The nonjudicial foreclosure rules favor the foreclosing party but that party must possess the authority to sell the home by following the state law governing the ownership and transfer of the notes and mortgages—just like landlords and unsecured creditors must

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[292] See discussion in section VII. above related to the strict compliance standards applicable in Arizona, California, Georgia, and Massachusetts.

[293] Nelson & Whitman, *supra* note 57, at §§ 7.11, 7.19.

[294] As noted above, the burden rests on the homeowner to challenge the initiation of a nonjudicial foreclosure either by filing an affirmative action seeking an injunction or by filing a bankruptcy to obtain the automatic stay, if eligible to do so. If the homeowner is strapped for cash, the cost of pursuing these remedies pre-sale is daunting. Once the sale occurs, the burden remains on the homeowner to challenge the validity of the sale on the grounds available under state law. The same cost roadblock arises. However, the challenges that a (former) homeowner can raise shrink to those permitted by statutory and common law that render the sale voidable as against non-BFPs or void as against BFPs.

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

[296] *Id.* § 6:17, at 421.

[297] Elizabeth Warren & Jay Lawrence Westerbrook, The Law of Debtors and Creditors 33-34 (Aspen Publishers 2009).

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

prove their right to evict or to a money judgment. To permit otherwise opens the door to abuse.[299]

Second, the Massachusetts rulings support the public policy that only the party having the right to foreclose may do so and, thereby, reduce the possibility that homeowners will lose their homes to the wrong party. Foreclosing parties and their agents should carefully verify ownership of the notes and mortgages before commencing foreclosures or risk the consequences.[300] At least two outcomes should occur: 1) the integrity of the legal and property title recordation systems will be enhanced;[301] and 2) the extra time it takes to verify will afford some homeowners the opportunity to find another solution, such as a loan modification or short sale.[302]

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

B. Resulting Headaches

There are several challenges facing trustee banks and foreclosure sale purchasers due to the sloppy paperwork occurring in the securitization context. First, clear title may be uncertain on foreclosed properties, at least in Massachusetts. Those who purchase at such sales, investors and non-investors alike, must concern themselves with questions such as: Do I really own this property? How do I research possible title defects? Will I be able to refinance or resell this property in the future?

Second, trustee banks cannot resell their REO properties until the title question for each is resolved, at least in Massachusetts[303] These banks must either re-foreclose, if

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[299] Grupo Mexicano de Desarrollo, 527 U.S. at 330 (raising the issue of abuse in the context of refusing to freeze assets in the hands of the debtor before first obtaining a judgment and *quoting* Wait, Fraudulent Conveyances § 73, at 110-111).

[300] See GAO Report, *supra* note 10, at 38 (noting that the completed foreclosure rate has slowed due to foreclosure documentation missteps but stating that many foreclosures will be completed eventually); Paul McMorrow, *A new act in foreclosure circus*, Boston Globe, Jan. 14, 2011, 13; 2011 WLNR 822042.

[301] In discussing the lawsuit that Delaware recently filed against MERS, Attorney General Biden stated: " A man or woman's home is not just his or her largest investment, it's their castle. Rules matter. A homeowner has the obligation to pay the mortgage on time, and lenders must follow the rules if they are seeking to take away someone's house through foreclosure." Press Release, Delaware Attorney General, Biden: Private National Mortgage Registry Violates Delaware Law (Oct. 27, 2011), http://attorneygeneral.delaware.gov/media/releases/2011/law10-27.pdf.

[302] GAO Report, *supra* note 10, at 41 (noting that the additional time may also allow homeowners to obtain employment and to cure their arrearages but discussing that fees and interest continue to accrue, making it more difficult for homeowners to catch up).

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

they can obtain the proper paperwork, or obtain insurance to cover any title defects. A major title insurer, First American Financial Corporation, will write title insurance in limited circumstances in Massachusetts where there was no recorded title to the mortgage at the time of the sale.[304]

Delayed foreclosures and constipated REO inventory can drag down communities. Homeowners may vacate their homes to find other housing when a foreclosure appears imminent. Increased vacancies create problems in communities, including crime, blight, and declining property values.[305] Local governments share in the pain due to the increased costs in policing and securing vacant homes. These outcomes may negatively affect the national economy if foreclosure delays and title uncertainty stalls the recovery of the U.S. housing prices in the long run. [306]

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

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

Rather than attempting to navigate the legal system, former homeowners may request a review of their foreclosure by the Office of the Comptroller of the Currency and file a claim for damages.[307] That agency created this procedure after conducting examinations of the largest mortgage servicers and uncovering significant paperwork problems related to foreclosures.[308] It is unclear how well this process will work for former homeowners because reviews will not be completed and public reports released

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programs to keep distressed owners in their homes while providing fair value to banks and servicers. See http://pametventures.com/home.html (last visited 10/26/11).

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

[305] GAO Report, *supra* note 10, at 42.

[306] *Id.*

[307] Office of the Comptroller of the Currency, Interim Status Report: Foreclosure-Related Consent Orders 7-10 (Nov. 2011), available at http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011-139a.pdf (last visited 11/29/11).

[308] See note 27, *supra*.

until well after the filing deadline of April 30, 2012. The fact that the OCC created this remedy is significant because it recognizes that not all homeowners were in default and not all foreclosures were lawful.

Two other interventions, one at the federal level and one at the state level, should lessen the likelihood of title problems by reducing the number of foreclosure sales. At the federal level, President Obama launched the federal Home Affordable Modification Program in 2009 as a part of a broad, comprehensive strategy to get the economy and the housing market back on track.[309] This program allows homeowners to modify their monthly payments and get back on track. HAMP has assisted far fewer homeowners than intended.[310] Nonetheless, based on data obtained from the Department of Treasury, the program resulted in the following number of active permanent loan modifications in the five states highlighted in this article as of May 31, 2011: Arizona—29,439; California—152,500; Georgia—22,153; Massachusetts—15,920; Nevada—16, 263.[311] To the extent that the homeowners remain current on their payments under these modification agreements, title concerns in these states will be eased.

State and local governments and judiciaries have created about thirty pre-foreclosure mediation or conference programs throughout the country.[312] Some of these regimes, such as Nevada's, require the production of the note and mortgage and all assignments, indorsements, and related documents. If the party initiating the foreclosure can produce these documents at the front end of the process, post-sale title concerns should diminish.

C. The Moral Hazard

"Moral hazard" refers to the situation where a party is insulated from the consequences of its actions and has little or no incentive to behave differently.[313] Related to the subprime mortgage crisis, some criticized giving bailout money to large investment

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

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

[311] HAMP Trial Period Starts Report by Servicer and State as of 5/31/2011, on file with author.

[312] Geoffrey Walsh, National Consumer Law Ctr., State and Local Foreclosure Mediation Programs: Can They Save Homes? (Sept. 2009)(analyzing the strengths and weakness of twenty-five of these programs), http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs.pdf; Geoffrey Walsh, National Consumer Law Ctr., State and Local Foreclosure Mediation Programs: Updates and Developments (Jan. 2010), http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs-update.pdf (discussing several additional mediation programs created in 2009, including Nevada's).

[313] Frank Ahrens, *'Moral Hazard': Why Risk Is Good*, Wash. Post., March 19, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/03/18/AR2008031802873.html

firms because their risky activities brought them to the brink of financial collapse.[314] In the context of defective foreclosures, some fear that so-called "deadbeat" homeowners might get a free lunch (home) due to legal technicalities. There are at least two responses to this concern.

First, wrongful foreclosures do occur to homeowners who are current on their payments as evidenced by the fact that the OCC set up a procedure to review such cases and compensate harmed former homeowners. The extent to which foreclosed homeowners were not in default, i.e.,"deadbeats," is not yet clear though news reports have described the havoc these homeowners are experiencing.[315] Moreover, as one federal judge recently put it: It is clear…that [the homeowner] is substantially behind in her payments and appears unable to remediate her default. This, however, does not render an outlaw, subject to having her home seized by whatever bank or loan servicer may first lay claim to it. She still has legal rights."[316]

Second, actual cases where the courts voided mortgages and granted borrowers a "free house" are unusual.[317] Professor Porter argues this is an "urban myth" which serves the banks' political agenda in two ways: by encouraging legislators to complain about the moral hazards of holding the foreclosing party to the law and by pitting homeowners who are paying on their mortgages against those who cannot.[318] In dissecting the "free house" claim, she notes that halting a foreclosure or reversing a defective sale does not equate to a free house for the homeowner because there is still a valid loan note and a mortgage encumbering the property. "The free house is political handwringing, not legal reality."[319]

IX. CONCLUSION

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[314] *Id.*

[315] Chris Arnold, *After Bank Mistakes, Homeowners Pick Up Pieces*, NPR News (Nov. 14, 2011)(describing the ordeal of Christina King and her family), *available at* http://www.npr.org/2011/11/14/142300563/after-banks-mistakes-homeowners-pick-up-pieces.

[316] Culhane, 2011 WL 5925525 *5.

[317] In one reported case, the legal issue that led to the free house was unrelated to a defective foreclosure sale . Adam Belz, *Iowa loophole voids mortgage, gives couple a 'free house*', Des Moine Register, A1 March 17, 2011, A1; 2011 WLNR 5252424(reporting that Iowa law resulted in a void mortgage where both spouses did not sign the mortgage and legislative efforts to make sure this does not happen again). A second case presents an extreme situation. Greg Cergol, *Homeowner Handed 'Free' House*, NBC New York (March 8, 2010)(reporting that a judge stripped the mortgage after a homeowner's ten-year ordeal involving the lender's refusal to accept her payments, the lender going out of business, and the disappearance of the account and supporting records and mortgage; ruling occurred in the context of a suit filed by the homeowner to clear title to which the defendants defaulted), *available at* http://www.nbcnewyork.com/news/local/Homeowner-Handed-Free-House-93167629.html.

[318] Posting of Katie Porter to Credit Slips blog, http://www.creditslips.org/creditslips/2011/07/the-free-house-myth.html (July 18, 2011, 4:22 A.M.).

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

This article compared Massachusetts foreclosure law to that of four other nonjudicial foreclosure states and opined as to the potential applicability of *Ibanez* and *Bevilacqua* in those states. I conclude that these cases should be persuasive authority in Arizona, California, Georgia, and Nevada. However, property title troubles resulting from the application of these rulings may be more limited in Arizona and Nevada than in California and Nevada.

This comparison can be conducted in the other nonjudicial foreclosure states. For that reason, the article provides a roadmap for academics, practitioners, the financial services industry, title insurers, and others to assess the extent to which title to properties purchased at foreclosure sales or from lenders' REO inventories might be defective in other states. It should be clear from this article, though, that the legal landscape is not static. A large number of cases is percolating through the courts which release new decisions regularly. My assessment of the law of the states highlighted here is based on a snapshot of the law. Nonetheless, this guide should be helpful to assess how new developments fit into the current state of the law.

The decisions in *Ibanez* and *Bevilacqua* are not remarkable in the sense that the court applied well-established law to the facts before it and ruled in conformity with that law. Justice Cordy underscored this point in his concurrence in *Ibanez*: "[W]hat is surprising about these cases is not the statement of principles articulated by the court regarding title law and the law of foreclosure in Massachusetts, but rather the utter carelessness with which the plaintiff banks documented title to their assets."[320] Indeed, other courts, both state and federal, have ruled that notes and mortgages were not properly transferred through the securitization players, rendering the trustee impotent to foreclose at the time it took that action.[321]

The feathers it appears to ruffle are those of the secondary market.[322] Perhaps they both protest too much. The responsibility for the problems that arise when foreclosures are delayed or overturned due to defects rest with the those same secondary market participants, not with the courts, as Justice Cordy so aptly observed.[323]

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[320] 458 Mass. at 655; 941 N.E.2d at 55.

[321] See discussion in notes 15-18, *supra*. The *Ibanez* opinion appears to be one of the most well-known decisions, however. Peter Pitegoff & Laura Underkiller, American Constitution Society for Law and Policy, An Evolving Foreclosure Landscape: The *Ibanez* Case and Beyond 1 (Oct. 2011), http:// http://www.acslaw.org/sites/default/files/Pitegoff_Underkuffler_-_An_Evolving_Foreclosure_Landscape.pdf (last visited 10/24/11).

[322] Kerri Panchuk, *Alabama judge denies securitization trustee standing to foreclose,* Housingwire.com April 1, 2011, http://www.housingwire.com/2011/04/01/alabama-judge-denies-securitization-trustee-standing-to-foreclose (reporting the response of the attorney representing the trustee who bemoaned the decision and raised the specter of the free house hazard).

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