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## **STANDING TO FORECLOSE: A MASSACHUSETTS CASE STUDY AND MULTI-JURISDICTION SURVEY**

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## Introduction

As a result of the collapse of the housing market in this country in or around 2008, the number of residential foreclosures has increased exponentially, putting unprecedented strains on the system.<sup>1</sup> Although most foreclosures are uncontested, since there is rarely any doubt that the borrower has defaulted in repayment of the debt, in the past several years a cottage industry has developed challenging the creditor's "standing" to foreclose, sometimes colloquially known as the "show me the Note" defense.

The Commonwealth of Massachusetts has seen its share of this phenomenon, maybe more than its share. The author of these materials personally has been involved representing lenders in many foreclosure-related litigation matters in the Massachusetts state and federal courts. In a recent piece in the Boston Bar Journal, my co-author and I questioned whether some of the case law in this area might fairly be characterized as a solution in search of a problem.<sup>2</sup>

This paper will briefly review the string of Massachusetts judicial decisions over the past several years addressing various aspects of the foreclosure standing question, and will use those cases to "issue-spot" and frame questions that practitioners in every state should consider and perhaps need to answer before moving ahead with foreclosures or to defend past foreclosures in litigation, whether in defense of borrowers' lawsuits or in eviction proceedings. We will then also survey some notable decisions from other jurisdictions to flesh out the issues and arguments further, without attempting to be exhaustive of the subject or to present the proverbial 50-State survey.<sup>3</sup>

### ***The Massachusetts Story***

We begin with the Massachusetts foreclosure story. In early 2009, a judge on our specialized Land Court called into question a title standard of the State's Real Estate Bar Association that had been relied upon by the Massachusetts foreclosure Bar. REBA Title Standard No. 58 said that a foreclosure was not defective so long as an assignment of the mortgage was obtained at any time before or after the foreclosure. In other words, the title could be cleared by obtaining an assignment even after the conduct of the foreclosure auction sale.

Land Court Judge Keith Long in *U.S. Bank, N.A. v. Ibanez*, 2009 WL 795201 (Mass. Land Ct. Mar. 26, 2009), held that the title standard did not correctly state Massachusetts law, and that under the Massachusetts foreclosure statute, M.G.L. c. 244, a creditor had to be the mortgagee to foreclose. In 2011, the Massachusetts Supreme Judicial Court in *U.S. Bank, N.A. v. Ibanez*, 458 Mass. 637 (2011), affirmed, holding that a foreclosing entity, if not the original mortgagee, must hold an assignment of the mortgage at the time it first published the notice of sale.<sup>4</sup> If the assignment of the mortgage was obtained after publication of the notice, a subsequently-completed foreclosure is unlawful and void.<sup>5</sup>

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<sup>1</sup> The views and commentary contained in this article are those of the author alone, and not of his clients or of the clients of Goodwin Procter LLP.

<sup>2</sup> R. Oetheimer and D. Tillotson, *Eaton v. Federal National Mortgage Association, Additional Burdens Provide Little Consumer Benefit*, BOSTON B.J., Winter 2013, Vol. 57 #1, available at <http://bostonbarjournal.com/2012/12/19/eaton-v-federal-national-mortgage-association-additional-burdens-provide-little-consumer-benefit/>.

<sup>3</sup> The author wishes to gratefully acknowledge the assistance of Goodwin Procter LLP associates David Kantrowitz of the firm's Boston office and Allen Myers and Daniel Zytneck of the firm's Washington, D.C. office in preparing these materials.

<sup>4</sup> The Court qualified its holding to clarify that the assignment need not be recorded, or even in recordable form, though it must be in writing to satisfy the Statute of Frauds because Massachusetts is a mortgage "title theory" state. 458 Mass. at 649, 651.

<sup>5</sup> The Supreme Judicial Court subsequently held in *Bevilaqua v. Rodriguez*, 460 Mass. 762 (2011), that a purchaser at foreclosure (or later in the chain of title) could not bring a statutory try title action if the foreclosure was void under the *Ibanez* holding because then the foreclosure deed is ineffective to convey the fee. However, subsequent lower court decisions suggest the deed may nonetheless operate as an equitable assignment of the mortgage. See *Cavanaugh v. GMAC Mortgage*, No. 11 MISC. 447901 (Mass. Land Ct. Dec. 21, 2012).

Because Massachusetts is a non-judicial foreclosure jurisdiction, the foreclosing creditor does not have available a *res judicata* defense to a post-foreclosure challenge to title or possession.<sup>6</sup> Thus, the Massachusetts Court has held that a borrower or other defendant in an eviction action can defend by contesting the validity of a purchaser's title if it stems from an invalid foreclosure, even if the mortgagor had done nothing to contest the foreclosure itself. *Bank of New York v. Bailey*, 460 Mass. 327 (2011).

The plaintiffs in *Ibanez* were securitization trustees and while the evidence in the record was incomplete, contributing to the result, the trustees were presumed to have held the notes in the respective loan pools, including the defendants' notes, for the benefit of the investors. The *Ibanez* Court required the mortgagee to hold an assignment, and implicitly found that it would not be sufficient to confer standing to foreclose to hold the note without also holding the mortgage or obtaining an assignment, but nothing in the decision presaged a requirement that the mortgagee possess the note.

The argument that the mortgagee must also hold the note to foreclose was pressed to the Massachusetts high court almost immediately in the wake of *Ibanez*. This issue arises in Massachusetts because, contrary to the majority and longstanding American rule that the mortgage is mere security for the note and follows the note as a matter of law, *Carpenter v. Longan*, 83 U.S. 271 (1872), Massachusetts is a title-theory state that allows for the note and mortgage to be held separately. Under Article 3 of the Uniform Commercial Code ("UCC"), a note can be transferred by delivery of possession of an endorsed note, but Massachusetts, as a title theory state, requires a signed instrument to convey a mortgage, "which represents legal title to someone's home." *Ibanez*, 458 Mass. at 649. Comparable to the equity of redemption residing in the mortgagor, to reclaim legal title by repaying the debt and redeeming the mortgage, the owner of the note under Massachusetts law holds beneficial ownership of the mortgage and has the right to compel an assignment of the mortgage by the mortgagee, who holds the mortgage in trust for the holder of the note, in what has been described as a resulting trust implied by law. *Id.* at 652.

In *Eaton v. Fannie Mae*, 462 Mass. 569 (2012), the Court laid down a new rule that foreclosing mortgagees must *either* (a) hold the note, or (b) be acting on behalf of the note holder. In other words, the Court held that "one who, although not the note holder himself, acts as the authorized agent of the note holder," may exercise the power of sale. *Id.* at 586. Notably, unlike in *Ibanez* where the Court rejected entreaties for prospective application of its decision, the *Eaton* court chose to apply its holding prospectively only to foreclosures noticed after the date of the decision out of "concern for litigants and others who have relied on existing precedents," this being a "new rule."<sup>7</sup> *Id.* at 588.

Massachusetts courts, like courts elsewhere, have also considered the standing of Mortgage Electronic Registration Systems, Inc. ("MERS") to foreclose mortgages and to assign mortgages for foreclosure. MERS, discussed in greater detail below, holds title to mortgages as nominee for MERS Members. The *Eaton* court discussed MERS in several footnotes, *see* 462 Mass. 569 nn. 5, 7, 27 & 29, and implicitly accepted MERS' pre-foreclosure assignment of the mortgage to the mortgage servicer.<sup>8</sup> In a federal court appeal earlier this year, the First Circuit Court of Appeals in Boston held expressly that MERS has the authority to assign mortgages it holds as nominee. *Culhane v. Aurora Loan Services*, --- F.3d ---, 2013 WL 563374 (1st Cir., Feb. 15, 2013). Indeed, in the District Court decision the Court of Appeals affirmed, District Judge William Young remarked that "the MERS system fits perfectly into the

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<sup>6</sup> Lenders in Massachusetts typically do commence an action under the Servicemembers Civil Relief Act ("SCRA"), 50 U.S.C. App. §§ 501-596, but the Supreme Judicial Court has held that the SCRA is not part of the foreclosure process and the only issue is whether the mortgagor is an active member of the military entitled to the protections of the Act. In a recent decision, the Supreme Judicial Court held that only a mortgagee has standing to institute an action under the Act (and only a defendant protected by the Act has standing to answer it). *HSBC Bank USA, N.A. v. Matt*, 464 Mass. 193 (2013).

<sup>7</sup> The author participated as an amicus in *Eaton* on behalf of the national Mortgage Bankers Association and urged prospective application, and also participated and was invited to and did present oral argument to the Supreme Judicial Court as an amicus in *Bevilaqua*, also for the Mortgage Bankers Association.

<sup>8</sup> The ability of MERS to foreclose a mortgage in its own name is presented in appeals currently before the Massachusetts Supreme Judicial Court, *Galiastro v. Mortg. Elec. Reg. Sys., Inc.*, No. SJC-11299, and the intermediate Massachusetts Appeals Court, *Lyons v. Countrywide Home Loans, Inc.*, No. 2011-P-0560.

Massachusetts model for the separation of legal and beneficial ownership of mortgages.” *Culhane v. Aurora Loan Services*, 826 F. Supp. 2d 352, 371 (D. Mass. 2011).

The recent Massachusetts mortgage foreclosure decisions were surprising, bordering on shocking, both to lenders and the Massachusetts real estate and foreclosure bars. In *Ibanez*, the Court disapproved a title standard of the well-respected statewide real estate bar group that conveyancers and others looked to for guidance, and in *Eaton* the Massachusetts Court for the first time announced a requirement that a foreclosing mortgagee be able to demonstrate its relationship to the mortgage note notwithstanding that there is no requirement under Massachusetts law to record or file notes or note transfers. 462 Mass. at 586; *see also Wells Fargo Bank, N.A. v. McKenna*, 2011 WL 6153419, at \*2 n.1 (Mass. Land Ct. Dec. 8, 2011) (“There never has been recording of notes at the registries of deeds at any time. Notes are never recorded—not (as they may be in some other states) when the initial mortgage is recorded, nor at any time after that, including at the time, following the auction sale, when the foreclosure deed and affidavit are put on at the registry.”). Whether the greater numbers of foreclosures and the perceived financial excesses and highly publicized alleged “sloppiness” of the mortgage industry have caused some courts to be more “pro-consumer,” or it is only that some of the legal doctrines underlying foreclosure standing had not been closely examined in a century or more, the rulings were unexpected. In part, they may represent the challenge of adapting historical, and in some cases ancient, property law to modern commerce, or vice versa. But they point out the critical need to understand state law, and to not take for granted that traditional custom and practice will be upheld, or that courts will not struggle applying that law or those established customs and practice to non-traditional modern mortgage ownership structures.

Mortgage notes, representing the debt for which the mortgages are collateral, will generally qualify as negotiable instruments whose ownership and transfer is governed by the principles of Article 3 of the UCC, adopted largely intact in most American jurisdictions. But despite the efforts of the UCC Commissioners to harmonize the law of security interests, including in some respects in real property,<sup>9</sup> mortgage law and mortgage foreclosure in particular remains predominantly a creature of local state law. Thus, for mortgage foreclosure purposes, where the foreclosing creditor stands, in the legal vernacular, may depend on where the house sits. The discussion below frames some of the key standing inquiries suggested by the Massachusetts experience, and surveys some recent case law from across the country addressing the same or similar questions, and compares and contrasts the judicial precedents. Although subsidiary questions such as whether the state is a title theory or lien theory jurisdiction, and whether the mortgage is deemed to follow the note as a matter of law, may affect how the questions are answered in any particular state, the core questions remain the same and can generally be framed in the following terms:

1. What relationship must the foreclosing entity have to the mortgage (or to the corresponding deed of trust in jurisdictions that know the security instrument by that terminology), and at what time must it hold or have it?
2. What relationship, if any, must the foreclosing entity have to the promissory note secured by the mortgage (or by the deed of trust), and at what time?
3. Does MERS when it holds the mortgage as nominee (or when it is named as beneficiary under a deed of trust) have standing to foreclose, or the ability to assign the mortgage (or deed of trust) to the lender, trustee or servicer for foreclosure?
4. Who has standing to foreclose in the securitization context, given the legal relationships under the standard Pooling and Servicing Agreement between and among the securitization trustee, the mortgage servicer and, where applicable, MERS as nominee under the mortgage (or deed of trust)?

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<sup>9</sup> See Report of the Permanent Editorial Board for the Uniform Commercial Code, Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes, American Law Institute (Nov. 14, 2011). UCC Article 9 has only limited application to real property interests. See, e.g., Mass. Gen. L. c. 106, § 9-109(d).

There is a large body of case law nationwide on all of these questions, with additional decisions being handed down on virtually a daily basis; what follows below is only a representative sampling intended to illustrate the more significant issues and arguments, to inform the analysis of applicable local state law.<sup>10</sup>

## 1. Relationship Between Foreclosing Entity and Mortgage.

In *U.S. Bank, N.A. v. Ibanez*, 458 Mass. 637 (2011), as discussed above, the Massachusetts Supreme Judicial Court held that a foreclosing entity must hold an assignment of the mortgage at the time of the publication of the notice of sale. Other states differ on whether they require a foreclosing party to hold the mortgage either at the time of the foreclosure sale itself or when notice is issued.

In considering any question of a party's status in the foreclosure process, it is first important to note whether jurisdictions are judicial or non-judicial jurisdictions:

- **Judicial** foreclosure states require the foreclosing party to initiate a court proceeding in order to foreclose. The foreclosure complaint seeks permission from the court to foreclose on the secured property.
- **Non-judicial** foreclosure jurisdictions do not require court involvement. Instead, the foreclosing entity must follow certain practices as set by state statute, such as mailing notices of acceleration and default, and publishing notice in the local papers. That entity often is the deed of trust trustee, under state law. If the borrower wishes to contest the sale, he or she may seek to enjoin it before the sale occurs.

Twenty-two states are considered judicial foreclosure jurisdictions, whereas 28 are deemed non-judicial.<sup>11</sup>

In New York, where foreclosures are conducted judicially, one court recently stated that “a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced.” *Wells Fargo Bank, N.A. v. Wine*, 90 A.D.3d 1216, 1217 (N.Y. App. Div. 3d Dep't 2011).

To a similar effect, one Florida court has said a party must “present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action.” *Gee v. U.S. Bank N.A.*, 72 So. 3d 211, 213 (Fla. Dist. Ct. App. 5th Dist. 2011). But a different Florida appellate court has held that an assignment of the mortgage may not be necessary at the time a complaint is filed. Standing to bring a judicial foreclosure requires “either an assignment or an equitable transfer of the mortgage prior to the filing of the complaint.” *McLean v. JP Morgan Chase Bank N.A.*, 79 So. 3d 170, 172 (Fla. Dist. Ct. App. 4th Dist. 2012). Because ownership of a mortgage follows an assignment of the debt under that case, the mortgage does not need to be assigned to the plaintiff before the Complaint is filed if it proves ownership of the note at that time.

New Jersey, also a judicial state, has said that if a foreclosing creditor bases standing to foreclose on assignment of the mortgage, the assignment must precede filing of the foreclosure complaint; however, if the foreclosing creditor held the note at the time of filing the complaint, assignment of the mortgage is unnecessary to establish standing to foreclose. *Deutsche Bank Nat'l Trust Co. v. Mitchell*, 422 N.J. Super. 214, 222-25 (App. Div. 2011). There, although Deutsche Bank had not proved its standing because the mortgage assignment it relied on was executed a day after it filed its complaint, the Court remanded to allow Deutsche Bank to demonstrate standing by proving that it possessed the note prior to filing the complaint.

Contrast state filing rules with the law of a non-judicial state like Michigan, which allows a foreclosing party to be “either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing

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<sup>10</sup> Since this area of law is fluid and most decisions discussed in this article are not by state supreme courts (the ultimate arbiter of local law), any attempt to state ‘what the law is’ in any jurisdiction – particularly to summarize complicated concepts in a short paper – is hazardous. So, while the cited cases are illustrative, they are not something to rely upon for purposes of representing a client or analyzing the law in the state. This paper is intended to issue-spot, not to resolve the issues spotted.

<sup>11</sup> See *Judicial Versus Non-Judicial Foreclosure*, Mortgage Bankers Association, available at <http://www.mbaa.org/files/ResourceCenter/ForeclosureProcess/JudicialVersusNon-JudicialForeclosure.pdf>.

agent of the mortgage.” MCL 600.3204(1)(d)). Thus, under the statute, a loan servicer is expressly authorized to foreclose regardless of whether it holds the note or mortgage. However, by the date of the foreclosure sale, the mortgage must be assigned to the foreclosing party if it is not the original mortgagee. MCL 600.3204(3).

Where an assignment of the mortgage may be required in order to foreclose, there are differences regarding whether the assignment of mortgage is required to be *recorded*.

- **Massachusetts:** In *U.S. Bank, N.A. v. Ibanez*, 458 Mass. 637 (2011), although the Court required the foreclosing entity to *hold* the mortgage, it notably did *not* require the assignment of mortgage be recorded – or even be in recordable form.
- **California**, likewise, does not require that assignments of a deed of trust be recorded prior to foreclosure, despite a statutory pre-foreclosure recording requirement for mortgage assignments (mortgages are uncommon in California). *Calvo v. HSBC Bank USA, N.A.*, 199 Cal. App. 4th 118, 122-2 (Cal. App. 2d Dist. 2011).
- In **New York**, recording is also not required. See, e.g., *Bank of NY v. Silverberg*, 86 A.D.3d 274, 280 (N.Y. App. Div. 2nd Dep’t 2011) (rejecting contention that absence of recorded assignment allowed inference that plaintiff did not own the note and mortgage; “an assignment of a note and mortgage need not be in writing and can be effectuated by physical delivery”).

But some non-judicial states require that assignments of deeds of trusts or mortgages be **recorded before** a foreclosure can occur:

- **Oregon:** Ore. Rev. Stat. § 86.735(1)
- **Idaho:** Idaho Stat. § 45-1505(1)
- **Minnesota:** Minn. Stat. § 580.02(3)
- **Montana:** Mont. Code Ann. § 71-1-313(1)
- **Wyoming:** Wyo. Stat. § 34-4-103(a)(iii)<sup>12</sup>

Regardless of any requirement, assignees typically record mortgage assignments to put the world on notice of their interest. See *MetLife Home Loans v. Hansen*, 48 Kan. App. 2d 213 (Kan. Ct. App. 2012) (“The assignment of the Mortgage was merely recorded notice of a formal transfer of the title to the instrument as required by recording statutes, which are primarily designed to protect the mortgagee against other creditors of the mortgagor for lien-priority purposes, not to establish the rights of the mortgagee vis-à-vis the mortgagor.”)

### ***Need for Correct Corporate Names***

When an assignment of mortgage is required, it must also be assigned to the correct corporate entity. Confusion over corporate names can impede foreclosures.

For example, the servicer of a loan filed a judicial foreclosure action alleging that it was the assignee of the original lender. *Bayview Loan Servicing, L.L.C. v. Nelson*, 382 Ill. App. 3d 1184 (Ill. App. Ct. 5th Dist. 2008). Reversing the trial court’s judgment in favor of the servicer (Bayview Loan Servicing, L.L.C.), the Court of Appeals held that the servicer was not allowed to foreclose because the mortgage was not assigned to it. Rather, the mortgage had been assigned to an affiliated entity, Bayview Financial Trading Group, L.P. *Id.* at 1187. Without any evidence that the foreclosing entity held the note or mortgage, the fact that it was servicer was insufficient to allow it to foreclose. *Id.* at 1188.

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<sup>12</sup> What constitutes an “assignment” that needs to be recorded is another subject of litigation. See, e.g., *Hooker v. Bank of America, N.A.*, No. 10-3111-PA, 2011 U.S. Dist. LEXIS 57005 (D. Or. May 25, 2011).

But the situation was different in a judicial foreclosure filed in the same state by Standard Bank, which was the successor to the originator of the loan as a result of several mergers and name changes. *Std. Bank & Trust Co. v. Madonia*, 964 N.E.2d 118 (Ill. App. Ct. 1st Dist. 2011). The mortgagors argued that the plaintiff bank was required to show a mortgage assignment or endorsement of the note to it. Rejecting that argument, the Court held that the plaintiff bank retained all of the interests of the originator, including those under the note and mortgage, as a result of the mergers. *Id.* at 123.

A court may require proof of a merger. The note and mortgage in this case were assigned to Wells Fargo Home Mortgage, Inc. *Wells Fargo Bank, N.A. v. deBree*, 2012 ME 34 (Me. 2012). Upon the borrowers' default, Wells Fargo Bank, N.A. filed a complaint as "Successor by Merger to Wells Fargo Home Mortgage, Inc." The trial court granted summary judgment for Wells Fargo Bank. On appeal, the Maine Supreme Judicial Court held that Wells Fargo Bank had not proved its ownership of the mortgage note and mortgage because there was no evidence that it, as opposed to Wells Fargo Home Mortgage, Inc., owned the instruments. *Id.* at ¶ 9. The Court rejected the Bank's arguments that the borrowers had waived their argument, and it declined to take judicial notice that Wells Fargo Home Mortgage had merged into Wells Fargo Bank. *Id.* at ¶¶ 9-10. The showing of ownership was necessary for the Bank to prevail on summary judgment, so the foreclosure judgment was vacated. *Id.* at ¶ 11.

## 2. Relationship Between Foreclosing Entity and Note

In *Eaton v. Fannie Mae*, 462 Mass. 569 (2012), discussed above, the Massachusetts Supreme Judicial Court announced a new rule, applicable to foreclosures noticed after June 22, 2012 (the date of the decision), requiring that foreclosing mortgagees must *either* (a) hold the note; or (b) be acting on behalf of the noteholder, at the time of foreclosure. In other words, the Court held that "one who, although not the note holder himself, acts as the authorized agent of the note holder" may exercise the power of sale.

Various courts in other states are split as to whether a foreclosing entity must hold the note.

California, for example, allows by statute non-judicial foreclosure by the "trustee, mortgagee, or beneficiary, or any of their authorized agents." *Debrunner v. Deutsche Bank National Trust Co.*, 204 Cal. App. 4th 433, 440 (Cal. App. 6th Dist. 2012) (quoting Cal. Civ. Code § 2924(a)(1)). The party foreclosing need not have possession of or a beneficial interest in the note because no such prerequisite appears in comprehensive statutory framework. *Id.* at 440-42.<sup>13</sup>

In Idaho, a non-judicial foreclosure state, the state supreme court expressly rejected the idea that a party must have ownership of the note and mortgage. *Trotter v. Bank of N.Y. Mellon*, 152 Idaho 842, 861-62 (2012). Rather, "the plain language of the [deed of trust foreclosure] statute makes it clear that the trustee may foreclose on a deed of trust if it complies with the requirements contained within the Act." *Id.* at 862.

Despite these states' rejections of any requirement to hold the note, some courts in other jurisdictions **do** seem to require the foreclosing party to also be the noteholder, for example, or perhaps at least an agent or authorized person:

- **New York:** According to this intermediate appellate division, judicial foreclosure plaintiff must both hold the note and the mortgage at the time the action is commenced. *Wells Fargo Bank, N.A. v. Wine*, 90 A.D.3d 1216, 1217 (N.Y. App. Div. 3d Dep't 2011).
- **Florida:** In Florida, the holder of a note, or its representative, may foreclose. *Gee v. U.S. Bank N.A.*, 72 So. 3d 211, 213 (Fla. Dist. Ct. App. 5th Dist. 2011). If the plaintiff is not the payee of the note, it must be endorsed to the plaintiff or in blank. *Id.*
- **Maryland:** The transferee of an unendorsed promissory note has the burden of establishing its rights under the note by proving the note's prior transfer history, especially where the mortgagor requests an injunction to

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<sup>13</sup> The same can be true even for judicial foreclosures in California, which in certain circumstances can be filed by a loan servicer. *Arabia v. BAC Home Loans Servicing, L.P.*, 208 Cal. App. 4th 462 (Cal. App. 4th Dist. 2012).

stop foreclosure. *Anderson v. Burson*, 424 Md. 232, 245 (2011). Thus, the Court held that although the agent of the substitute trustee under the mortgage had physical possession of the note, it was not a holder of the note because there was no valid endorsement; it could nevertheless still enforce the note based on concessions from the mortgagors. *Id.* at 251-52.

- **Oklahoma:** “To commence a foreclosure action in Oklahoma, a plaintiff must demonstrate it has a right to enforce the note and, absent a showing of ownership, the plaintiff lacks standing.” *Wells Fargo Bank, N.A. v. Heath*, 2012 OK 54, ¶ 9 (Okla. 2012).
- **Washington:** Under Washington’s non-judicial foreclosure statute, the trustee is required to “have proof that the beneficiary is the owner of any promissory note or other obligation secured by the deed of trust.” RCW 61.24.030(7)(a). Note, however, that borrowers cannot bring a judicial action based on a beneficiary or trustee’s failure to prove to the borrower that the beneficiary owns the note. *Frazer v. Deutsche Bank Nat. Trust Co.*, 2012 WL 1821386, at \*2 (W.D. Wash. May 18, 2012) (“[T]he Washington Deed of Trust Act requires that a foreclosing lender demonstrate its ownership of the underlying note to the trustee, not the borrower.”).

Some jurisdictions more clearly take an **either/or** approach to foreclosing. In **Michigan**, for example, the foreclosing entity must be “**either** the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage **or** the servicing agent of the mortgage.” *Residential Funding Co., LLC v. Saurman*, 490 Mich. 909 (2011) (quoting MCL 600.3204(1)(d)). The question in *Saurman* was whether foreclosures by MERS, as a mortgagee that did not hold the note, were proper. The Michigan Supreme Court upheld the foreclosures because the mortgagee’s interest in the note—even though not an ownership interest—was a sufficient interest in the indebtedness to allow it to foreclose.

There are other state courts that follow the either/or approach as well, for example:

- **Ohio:** In *CitiMortgage, Inc. v. Patterson*, 2012 Ohio 5894 (Ohio Ct. App., Cuyahoga County Dec. 13, 2012), the Ohio Court of Appeals held that a party has standing if “at the time it files its complaint of foreclosure, it either (1) has had a mortgage assigned or (2) is the holder of the note.” *Id.* at ¶ 21. Thus, the plaintiff in *Patterson* had standing because it possessed the note when it filed its complaint, even though the mortgage was not assigned until later. *Id.* at ¶ 22.
- **Alabama:** In *Sturdivant v. BAC Home Loans Servicing, LP*, --- So.3d ----, 2011 Ala. Civ. App. LEXIS 361 (Ala. Civ. App. Dec. 16, 2011), the Alabama Court of Civil Appeals ruled that a party lacked standing to foreclose because it was not yet the assignee of a mortgage when it initiated foreclosure. In *Perry v. Fannie Mae*, 100 So. 3d 1090 (Ala. Civ. App. 2012), the Court explained that the mortgage need not be assigned to a foreclosing party at the time it initiates foreclosure if it is a holder of the note. Because the evidence showed that the foreclosing party held the note at the time it initiated foreclosure proceedings, the foreclosure was proper. *Id.* at 1094-96.
- **New Jersey:** As noted in the preceding section, New Jersey recognizes standing to file a complaint to foreclose based on either assignment of the mortgage or possession of the note. *Deutsche Bank Nat’l Trust Co. v. Mitchell*, 422 N.J. Super. 214, 222 (App. Div. 2011).

### 3. Standing of MERS

#### *What is MERS?*

MERS is a system for electronically tracking interests in mortgages that are traded on the secondary market. MERS members (approximately 6,000) agree that MERS serves as mortgagee or beneficiary,<sup>14</sup> and when loan ownership or servicing rights are sold from one MERS member to another, MERS remains the titleholder to the security

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<sup>14</sup> The language on a standard mortgage or deed of trust reads: MERS is the mortgagee [or beneficiary] of this security instrument. MERS is a separate corporation that acts solely as nominee on behalf of the lender and its successors and assigns.

instrument as nominee on behalf of whomever owns the loan. MERS is modeled on the “book entry system” used to track ownership in stock exchanges.

The use of nominees predates MERS: “The use of a nominee in real estate transactions, and as mortgagee in a recorded mortgage, has long been sanctioned as a legitimate practice.” *In re Cushman Bakery*, 526 F. 2d 23, 30 (1st Cir. 1975) (collecting cases). However, the concept of a nominee serving as agent for one member of a group of possible principals—where the principal may change in a way not reflected in the public record—has fostered a range of reactions, from commendation to criticism to confusion, but ultimately MERS (and its members) have repeatedly prevailed in foreclosure challenge litigation.

### ***Authority of MERS to Foreclose***

Most courts to consider the issue have ruled that MERS may serve as mortgagee or beneficiary and foreclose,<sup>15</sup> for example:

- **Texas:** *Athey v. MERS*, 314 S.W. 3d 161, 166 (Tex. App. 2010) (MERS could foreclose, though it never held the note).
- **Utah:** *Burnett v. MERS*, 2009 WL 3582294 (D. Utah Oct. 27, 2009) (“MERS had authority under the Deed of Trust to initiate foreclosure proceedings”).
- **Nevada:** *Croce v. Trinity Mortg. Assurance Corp.* 2009 WL 3172119, at 3 (D. Nev. Sept. 28, 2009) (collecting cases from Georgia, California, Florida, and Colorado rejecting argument “that MERS does not have standing as a beneficiary under the Note and Deed of Trust, and therefore, is not authorized to participate in the foreclosure proceedings.”); see also *Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249, 254 (Nev. 2012) (“The deed of trust also expressly designated MERS as the beneficiary... it is an express part of the contract that we are not at liberty to disregard, and it is not repugnant to the remainder of the contract.”).
- **Michigan:** *Residential Funding Corp. v. Saurman*, 805 N.W. 2d 183 (Mich. 2011) held that MERS had a sufficient interest to foreclose because it owned “legal title to a security lien whose existence is wholly contingent on the satisfaction of the indebtedness.”

In addition, at least two states—Minnesota (Minn. Stat. § 507.413) and Texas (Tex. Prop. Code § 51.0001)—have enacted statutes recognizing that MERS can foreclose.

Some state courts, nevertheless, have raised various questions about MERS’s role as it relates to foreclosures.

- **Oregon:** In *Niday v. GMAC Mortg.*, 284 P. 3d 1157 (Or. App. 2012), the Oregon Court of Appeals ruled that MERS did not meet Oregon’s statutory definition of “beneficiary,” disagreeing with the majority of trial court rulings that had ruled MERS could serve as beneficiary. *Niday* is on appeal to the Supreme Court of Oregon; oral argument was heard January 8, 2013.
- **Maine:** The Maine Supreme Court has ruled that MERS cannot meet its definition of “mortgagee,” and thus had no standing to foreclose judicially. *MERS v. Saunders*, 2 A. 3d 289 (Me. 2010) (“MERS is not in fact a ‘mortgagee’ within the meaning of our foreclosure statute”).
- **Washington:** *Bain v. Metro. Mortg. Group, Inc.*, 285 P.3d 34, 46 (Wash. 2012) ruled that MERS did not meet the statutory definition of deed of trust beneficiary, though *Bain* did not explain whether this impaired foreclosure proceedings.

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<sup>15</sup> It is somewhat of a misstatement to refer colloquially to the “ability” of MERS (or any other party) “to foreclose.” The foreclosure procedures of any given state require various steps. So, having “the ability to foreclose” may in some states be asking the question of whether the entity can accelerate, or provide notice of sale, or direct the activities of a deed of trust trustee, or file a judicial foreclosure, etc.

Nearly two years ago, MERS changed its rules of membership to provide that the noteholder must arrange for an assignment to be executed from MERS to the foreclosing entity prior to commencement of any foreclosure proceeding, judicial or non-judicial. So, this issue may be a legacy question after all.

### ***Authority of MERS to Assign Mortgage***

Even before the change in the membership rules, MERS often assigned mortgages to the foreclosing entity so that entity could foreclose. Some borrowers have argued that, as nominee, MERS does not have the power to assign the mortgage. These challenges have been almost universally rejected, as the security instruments expressly authorize MERS, as nominee, to take any action required of its principal and refer to the mortgagee or beneficiary as MERS and its “successors and assigns.” Indeed the First Circuit recently rejected this very argument. See *Culhane v. Aurora Loan Services*, --- F.3d ----, 2013 WL 563374 (1st Cir., Feb. 15, 2013).<sup>16</sup>

Likewise, the fact that an assignment of the security instrument may occur after the transfer of the note is not problematic, and makes sense under the MERS model: “[MERS] members often wait until a default or bankruptcy case is filed to have a mortgage or deed of trust assigned to them so that they can take steps necessary to seek stay relief and/or to foreclose.... [T]he reason they wait is that, if a note is paid off eventually, as most presumably are, MERS is authorized to release the [deed of trust] without going to the expense of ever recording any assignments.” *Edelstein*, 286 P.3d at 254.

Borrowers have also claimed that MERS lacks authority to assign the note. Since MERS typically does not hold notes,<sup>17</sup> language in MERS assignments referencing the note in addition to the mortgage likely reflects a lack of precision. Insofar as MERS did not hold a note the issue is immaterial.

### ***“Splitting” the Note and Mortgage***

Some borrowers have alleged that the naming of MERS as holder of title to the mortgage, while the lender holds title to the note, separates the note from the security instrument thereby rendering assignments void and the security instrument unenforceable. As one court has colorfully described it, the debt is the cow, and the mortgage the cow’s tail—while the debt can survive without the security instrument, the instrument has no independent vitality without the debt. See *Commonwealth Prop. Advocates, LLC v. MERS*, 263 p.3d 397, 403 (Utah App. 2011).

As noted, in Massachusetts, those arguments have been squarely rejected as Massachusetts permits the note and mortgage to be held separately. Indeed the District of Massachusetts remarked that the “MERS system fits perfectly into the Massachusetts model for the separation of legal and beneficial ownership of mortgages.” *Culhane v. Aurora Loan Services*, 826 F. Supp. 2d 352, 371 (D. Mass. 2011), *aff’d* --- F.3d ----, 2013 WL 563374 (1st Cir. Feb. 15, 2013).

This theory has typically been rejected elsewhere as well, as, if successful, it would “confer[] an unwarranted windfall on the mortgagor.” *Id.* (citing Restatement (Third) of Prop.: Mortgages § 5.4 cmt. a). In *Edelstein*, 286 P.3d 249, 255 (Nev. 2012), for example, the court held that in Nevada, “to have standing to foreclose, the current beneficiary of the deed of trust and the current holder of the promissory note must be the same.” However, under the MERS system, the parties agree that MERS holds the security instrument while the note is transferred among its members—as long as the two instruments are united in the foreclosing entity prior to foreclosure, the Nevada court held, the foreclosing entity has standing to foreclose in that state.

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<sup>16</sup> Some borrowers have challenged the manner in which MERS assignments are executed, because the person who executes the assignment is typically an employee of a financial institution associated with the loan (e.g., the loan servicer), or foreclosure counsel. Courts have routinely rejected such claims as well, because entities such as MERS and lenders may confer signing authority upon whomever they deem fit. *E.g.*, *Culhane* (1st Cir. Slip Op. at 21-22) (rejecting argument that signer’s employment by loan servicer prohibited her from signing for MERS as “wishful thinking”).

<sup>17</sup> When MERS formerly conducted foreclosures in its own name, MERS sometimes would be assigned the note or be its holder for purposes of conducting the foreclosure.

Along similar lines, some borrowers allege that operation of MERS makes it impossible to identify who the proper noteholder is, because only the security instrument (not the note) was assigned by MERS. “A ‘show me the note’ plaintiff typically alleges a foreclosure is invalid unless the foreclosing entity produces the original note.” *Stein v. Chase Home Fin., LLC*, 662 F. 3d 976, 978 (8th Cir. 2011). Of course, when the foreclosing entity is able to produce the note, the claim is typically defeated on summary judgment, *id.*, and many courts considering “show me the note” arguments in the MERS context have dismissed them as a matter of law without any inquiry into note ownership. *E.g.*, *Diessner v. MERS*, 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009) (“district courts have routinely held that Plaintiff’s ‘show me the note’ argument lacks merit”) (collecting cases from California, Nevada, and Arizona) (internal quotations omitted).<sup>18</sup>

### ***Unrecorded Assignment Theories***

Some states (including Massachusetts after November 1, 2012)<sup>19</sup> statutorily require that, in order to bring a non-judicial foreclosure, all assignments of the security instrument must be recorded. *E.g.*, ORS 86.735(1) (Oregon) (trustee sale may proceed only if “any assignments of the trust deed by the trustee or the beneficiary ... are recorded”). In Oregon, a few borrowers have successfully argued that, because the security follows the debt as a matter of law, transfers of the debt while MERS remains lienholder of record result in assignments that go unrecorded, precluding non-judicial foreclosure. *See Niday*, 284 P. 3d at 1169 (“any assignments” language in ORS 86.735(1) includes “assignment by transfer of the note,” and that all such assignments from the initial lender to subsequent lenders must be recorded prior to commencement of a non-judicial foreclosure proceeding). *Niday* is under review by the Supreme Court of Oregon, which heard oral argument on January 8, 2013.

Other courts considering the same argument have rejected it. For instance, Minnesota, Idaho, and Arizona have the same statutory requirement that assignments must be recorded, but have not found note transfers to trigger an obligation to create and record an assignment of the corresponding security instrument. *E.g.*, *Jackson v. MERS*, 770 N.W.2d 487 (Minn. 2009) (answering “no” to certified question: “Where an entity, such as defendant MERS, serves as mortgagee of record as nominee for a lender and that lender’s successors and assigns and there has been no assignment of the mortgage itself, is an assignment of the ownership of the underlying indebtedness for which the mortgage serves as security an assignment that must be recorded prior to the commencement of a mortgage foreclosure by advertisement under Minn. Stat. ch. 580?”); *Homeyer v. Bank of America, N.A.*, 2012 WL 4105132, at \*4 (D. Idaho Aug. 27, 2012) (“Idaho law does not require recording each assignment of a trust deed based upon transfer of the underlying note.”); *Ciardi v. Lending Co., Inc.*, 2010 WL 2079735, at \*3 (D. Ariz. May 24, 2010) (“Plaintiffs have failed to cite any Arizona statute that requires the recording of a promissory note or even the assignment of a promissory note.”). These cases ruled that a transfer of a promissory note does not create an “assignment” for purposes of those statutes.

## **4. Securitization Standing**

### ***What is Securitization?***

Securitization is the packaging of debt into instruments broadly referred to as “mortgage-backed securities”; one court has described it with analogies: “One could analogize this process to taking raw ingredients and combining them to make bread then selling the slices individually, or putting different kinds of meat into a sausage grinder then selling the individual sausages. What is born from this process are new debt instruments, sold on the open market, that have pooled-and-sliced home loans as their ingredients. Different debt instruments work in different ways, but the basic concept is that home loan debt gets repackaged and sold to other investors rather than being held by the

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<sup>18</sup> In a judicial foreclosure state, however, some courts have found that failure to show one’s authority to enforce the note can be fatal. *See, e.g.*, *Onewest Bank, F.S.B. v. Drayton*, 910 N.Y.S.2d 857, 859 (N.Y. Sup. 2010) (Schack, J.) (“the Court requires proof of the grant of authority from the original mortgagee...to its nominee, [MERS], to assign the subject mortgage and note on March 16, 2009 to INDYMAC”); *Saunders*, 2 A.3d at 296 (Me. 2010) (“In order to enforce a debt obligation secured by a mortgage and note, a party must be in possession of the note.”).

<sup>19</sup> Massachusetts recently enacted such legislation in August 2012. *See* House No. 4323. The new law requires that in order to foreclose, the entire chain of mortgage assignments from original mortgagee to foreclosing entity be recorded. Previously, although the foreclosing entity had to hold the mortgage, there was no recording requirement.

bank that originated the loan.” *Bisson v. Bank of America, N.A.*, --- F.Supp.2d ----, 2013 WL 325262, at \*1 (W.D. Wash. Jan. 15, 2013).

The securitization market emerged to facilitate the inflow of capital to fund home loans, and it “allows banks to spread mortgage risk across the financial system rather than hold it all themselves.” *Id.* Although securitization has fallen well off its peak of approximately \$1 trillion in originations in 2006, it is projected to rise from \$4 billion in 2012 to \$25-30 billion in 2013.

There are several parties to a securitization agreement, but the borrower is not one of them. A typical securitization arrangement involves the following parties:

- **Originator:** The originator is the party identified as “lender” on note and mortgage (or deed of trust).
- **Depositor:** The depositor is either the originator or someone that buys loans from originators and pools them into securities pursuant to a **Pooling and Servicing Agreement (“PSA”)** to which the **depositor, trustee, and master servicer** are parties.
- **Trust:** Entity into which loans are pooled (e.g., “Structured Asset Securities Corp. Mortgage Pass-Through Certificates, Series 2006-Z”). Sometimes referred to as a “Special Purpose Vehicle,” “Real Estate Mortgage Investment Conduit” or “REMIC,” or simply a “Mortgage-Backed Security.”
- **Trustee/Custodian:** The trustee of the securitization trust (not to be confused with the trustee of a deed of trust, which conducts non-judicial foreclosure sales in deed of trust states) holds loans on behalf of the individual security holders, receiving the borrower’s payments from the loan servicer.
- **Individual Investors:** Shares of mortgage-backed securities are purchased by investors who, when loans are paid on schedule, ultimately benefit from borrowers’ mortgage payments.
- **Master Servicer:** The master servicer under the PSA services the individual loans in the pool, interfacing with borrowers, collecting loan payments and transferring them to the trust, and often handling foreclosures and post-foreclosure property management.

### ***The Effect of Securitization on Foreclosure***

Securitization adds complexity to chain of title to the mortgage, and chain of ownership of the note. See, e.g., *In re Almeida*, 417 B.R. 140, 142-45 (Bankr. D. Mass. 2009) (describing chain of title to a mortgage securing a securitized note); *In re Samuels*, 415 B.R. 8, 16-22 (considering challenge to direct assignment of mortgage from originator to trustee, not including an intervening assignment to the trust).

Some borrowers have claimed that insurance contracts or credit default swap agreements preclude default—i.e., the trust was insured against loss, collected the insurance when the borrower defaulted, and should not be allowed to foreclose as well because such foreclosure would grant a “double recovery.” *Larota-Florez v. Goldman Sachs Mortg. Co.*, 719 F. Supp. 2d 636, 642 (E.D. Va. 2010). These arguments have not gained traction. *Horvath v. Bank of N.Y., N.A.*, 641 F.3d 617, 626 n.2 (4th Cir. 2011) (rejecting argument that trustee of securitization trust “should not have been able to foreclose on his property because they did not suffer any losses from his default,” because “that defense does not allow individuals in default on a mortgage to offset their outstanding obligations by pointing to the mortgagee’s unrelated investment income”); *Commonwealth*, 2011 UT App 232 ¶¶ 3, 10 (rejecting argument “that defendants, having been paid off in the sale of the loan, could not seek a second payoff by foreclosure of the Trust Deed” as a “mere conclusory allegation” that could not sustain a viable claim).

Other borrowers have commissioned “securitization audits,” which purportedly trace the history of the loan in an attempt to cast doubt upon whether the foreclosing entity has standing. These arguments have also generally failed. E.g., *Norwood v. Bank of America*, 2010 WL 4642447 (Bankr. N.D. Ga. Oct. 25, 2010); *Dye v. BAC Home Loans Servicing, LP*, 2012 WL 1340220 (D. Or. Apr. 17, 2012) (granting motion to dismiss despite findings of “Mortgage Securitization Audit”).

Still other borrowers have challenged the foreclosing entity's compliance with the PSA. As noted above, borrowers are not parties to these agreements; as such, courts have generally found that borrowers do not have standing to challenge the foreclosing entity's compliance or lack thereof with it. See, e.g., *In re Correia*, 452 B.R. 319, 324 (1st Cir. B.A.P. 2011) (stating that debtors, who were not parties to the PSA or third-party beneficiaries thereof, lacked standing to challenge defendants' compliance with PSA); *Sami v. Wells Fargo Bank*, 2012 WL 967051, at \*5-6 (N.D. Cal. Mar. 21, 2012) (rejecting claim "that Wells Fargo failed to transfer or assign the note or Deed of Trust to the Securitized Trust by the 'closing date,' and that therefore, 'under the PSA, any alleged assignment beyond the specified closing date' is void").<sup>20</sup>

### ***Which Securitization Parties May Foreclose?***

As discussed above, there are several parties to a securitization. The parties most likely to be involved in a foreclosure are the **trustee** and **servicer**. On occasion, foreclosures have been conducted in the name of MERS.

As the party interfacing with the borrowers on a day-to-day basis, the **servicer** is often in best practical position to handle foreclosure proceedings, but may be required, under some states' laws, to demonstrate its entitlement to foreclose on behalf of the securitization trustee. So, for example, in Maine, a judicial foreclosure state, the servicer must show its authority to enforce the note. See *Bank of America, N.A. v. Cloutier*, 2013 WL 453976, at \*3 (Me. Feb. 7, 2013) (foreclosure plaintiff must "identify the owner or economic beneficiary of the note and, if the plaintiff is not the owner, to indicate the basis for the plaintiff's authority to enforce the note pursuant to Article 3-A of the UCC").

Most non-judicial states do not apply special requirements to loan servicers; the only significant inquiry is whether the trustee of the deed of trust was properly appointed by the beneficiary of record. In Utah, for example, "the statute governing non-judicial foreclosure in Utah does not contain any requirement that the trustee demonstrate his or her authority in order to foreclose. The court declines to create a requirement where the legislature chose not to include one. Therefore, the court holds that, under the terms of the relevant documents and the current statute, [a trustee] is not required to demonstrate its authority to foreclose before initiating a foreclosure proceeding." *Hoverman v. CitiMortgage, Inc.*, 2011 U.S. Dist. LEXIS 86968, at \*16-17 (D. Utah Aug. 4, 2011); see also *Trotter*, 275 P.3d at 861 (Idaho 2012) ("A trustee is not required to prove it has standing before foreclosing on a deed of trust" as long as "the Appointment of Successor Trustee, Notice of Default, and Notice of Trustee's Sale complied with the statutory requirements and were recorded as specified in the statute").

The situation can change, however, if the loan becomes involved in a judicial proceeding, such as a bankruptcy. To move for relief from stay in bankruptcy—even in a deed of trust state—a servicer must somehow show authority to enforce the note, though assignment of the security instrument may not be necessary. E.g., *In re Tucker*, 441 B.R. 638, 645 (Bankr. W.D. Mo. 2010) ("even if, as here, the deed of trust is recorded in the name of the original lender ..., the holder of the note, whoever it is, would be entitled to foreclose, even if the deed of trust had not been assigned to it").<sup>21</sup> And, conversely, failure to show authority to enforce the note can lead to denial of motions for relief from stay. E.g., *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009) (denying relief from stay to group of movants that included both servicers and securitization trustees because they presented insufficient proof that they owned the notes in question); *In re Mims*, 438 B.R. 52, 57 (Bankr. S.D.N.Y. 2010) (servicer that held title to the mortgage but did not show it had been assigned the note was not a "real party in interest" in proceeding to lift stay).

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<sup>20</sup> Massachusetts courts have also considered and rejected arguments challenging standing to foreclose based on alleged non-compliance with the terms of Pooling and Servicing Agreements governing loan securitizations. *In re Samuels*, 415 B.R. 8 (Bankr. D. Mass. 2009), a case the author won in Massachusetts Bankruptcy Court, is an example.

<sup>21</sup> However, not all courts agree. See *In re Hwang*, 396 B.R. 757 (Bankr. C.D. Cal. 2008), *rev'd*, 438 B.R. 661 (C.D. Cal. 2010). In *Hwang*, the Bankruptcy Court ruled that although the loan servicer had constitutional standing, it did not have Rule 17 "real party in interest" status. The district court then reversed, ruling that servicer had a right to enforce the claim on behalf of the loan owner.

In addition to the servicer, the **trustee** is often the foreclosing party. As the party holding title to the loan on behalf of the loan investors, the trustee is certainly a proper party to foreclose—if it has the right to do so under state law, which may require that it have been formally assigned the mortgage.

In **Massachusetts**, for instance—and as discussed more above—the trustee must also hold an assignment of the mortgage. In *Ibanez*, the trustee commenced foreclosures before they had been assigned the mortgages, and did not record assignments until after the foreclosure was completed. The trustee argued it had already received the note when the loan had been securitized years earlier, and that gave it all it needed to foreclose. The court rejected that argument—Massachusetts, as a “**title theory**” state, requires assignment of mortgage to foreclose. Securitization may have showed *intent* to assign mortgages, but was not an actual assignment.<sup>22</sup>

**Lien-theory** states often take a different position, and do not require a trustee to also hold the mortgage, which is nothing more than the right to enforce a lien. See, e.g., *Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249, 254 (Nev. 2012); *KCB Equities, Inc. v. HSBC Bank USA, N.A.*, 2012 Tex. App. LEXIS 4418, at \*4-5 (Tex. App.—Dallas).

### Conclusion

The recent Massachusetts foreclosure case law is likely somewhat atypical, driven as it has been by some relatively unusual aspects of Massachusetts law.

But the questions the Massachusetts Supreme Judicial Court has been called upon to answer, concerning the necessary relationship between the lien of the security interest, the debt and the foreclosing creditor, are universal and have been the subject of considerable litigation across the country during the recent “foreclosure crisis.” And the questions are controlled for the most part by state law, and state property and foreclosure law are much less uniform than the law governing the notes themselves as negotiable instruments. This paper has identified the principal issues and arguments so practitioners can ask the right questions and try to determine the law in their particular jurisdiction before proceeding.

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<sup>22</sup> Although the PSA said mortgages were actually assigned, the foreclosing trustee did not produce evidence that the individual mortgage in question was one of the mortgages assigned. The Massachusetts high court accepted that on a proper record securitization documents could suffice to assign the mortgage and confer standing to foreclose.



*The Foreclosure Crisis Puzzle: Navigating the Changing Landscape of Foreclosure*

# True Crime and Standing in Foreclosure Actions: How the Real Life Fugitive Story Leads to Years of Litigation

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**TRUE CRIME AND STANDING IN FORECLOSURE ACTIONS: HOW THE REAL LIFE *FUGITIVE* STORY LEADS TO YEARS OF LITIGATION**

## Introduction

More than any other subject matter of litigation in the past five years, foreclosure cases returned the requirement of establishing “standing” to the procedural forefront of litigation. With

the advent of securitized trusts and Mortgage Electronic Registration Systems, Inc. (“MERS”), it became a fairly routine practice for mortgagees in Ohio to file suit before recording the assignment of mortgage and without attaching a copy of an indorsed note to the Complaint. Prior to 2008, this posed only minor issues, as previous Ohio Supreme Court precedent appeared to establish the principle that standing need only be proven prior to judgment.

In 2008, two Ohio appellate district courts departed from this standard, holding that a plaintiff must prove standing at the time the complaint was filed, that standing to foreclose included proof not only that the plaintiff was a person entitled to enforce the note but had also a recorded assignment of mortgage, and that a failure to prove that status mandated dismissal of the complaint. The majority of the remaining districts rejected this distinction, holding that standing could be proven prior to judgment.

In 2012, the Ohio Supreme Court resolved a portion of this issue in *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 979 N.E.2d 1214, 2012-Ohio-5017, holding that standing must be proven to exist at the time of filing the complaint, and suggesting that standing could be proven through either having the rights to enforce the note or the mortgage.

This article will track the historical background of these cases, along with the U.C.C. principles used to establish standing law in Ohio, culminating in the Supreme Court’s decision in *Schwartzwald*. The article will then discuss the questions left unresolved in *Schwartzwald*, before addressing how other states have handled similar issues.

### ***Suster* Sets the Standard**

For nearly fifteen years, standing challenges were addressed by foreclosure counsel and courts alike by relying on *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 701 N.E.2d 1002 (1998). The *Suster* case has a Hollywood pedigree—it was brought by the Estate of Dr. Sam Sheppard (whose murder conviction and reversal formed the basis of *The Fugitive*).

Sheppard had been convicted in 1954, released from jail in 1966, and passed away in 1970. Twenty five years later, in 1995, the Administrator of Sheppard’s Estate filed a Petition

for Declaration of Innocence in the Cuyahoga County Common Pleas Court, a prerequisite for a suit against the state for damages for wrongful incarceration. The Cuyahoga County prosecutor filed a petition for a writ of prohibition in the Ohio Supreme Court seeking to block the action on the theory that the Administrator of Sheppard's Estate lacked standing to prosecute the action. In Ohio, writs of prohibition are a shortcut past the normal appeal process, but can only be granted if the trial court lacks subject matter jurisdiction.

A plurality of the Ohio Supreme Court (a fact which comes into importance later) held that a lack of standing was not a jurisdictional defect:

Although a court may have subject matter jurisdiction over an action, if a claim is asserted by one who is not the real party in interest, then the party lacks standing to prosecute the action. The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter. Unlike lack of subject matter jurisdiction, other affirmative defenses can be waived. Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court.

*Id.* at 77. The plurality's holding was straightforward: a lack of standing does not deprive the court of subject matter jurisdiction, and can be cured under Rule 17. The plurality therefore denied the petition, as the argument that the plaintiff lacked standing did not prohibit the trial court from exercising jurisdiction over the matter.

### ***Byrd and Jordan Change the Game, But Find No Followers***

In 2008, the Ohio First District Court of Appeals decided for the first time that to establish standing, a foreclosing plaintiff (a) must be the recorded mortgagee; and (b) this status must exist at the time of filing. *Wells Fargo Bank, N.A. v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722 (1st Dist.). The Eighth District followed shortly thereafter in *Wells Fargo Bank, N.A. v. Jordan*, 8th Dist. No. 91675, 2009-Ohio-1092. In both cases, the foreclosing plaintiff had *both* their claim on the promissory note and to foreclose the mortgage dismissed, because at the time of filing the plaintiff was not the recorded mortgagee.

In *Byrd*, Wells Fargo did not receive an assignment of the mortgage until after the complaint was filed and the promissory note attached to the complaint was payable to a third

party. Citing the Ninth Circuit's decision in *United States v. CMA, Inc.*, 890 F.2d 1070, 1074 (9th Cir. 1989), the First District held Rule 17(A) does not apply to allow the plaintiff to cure a defect. Citing *Feist v. Consolidated Freightways Corp.*, 100 F.Supp.2d 273, 274 (E.D.Pa.1999), the First District held that under Rule 17, cure was limited to situations where there was an understandable mistake in identifying the real party in interest. Reasoning that a plaintiff should know whether it is entitled to enforce the mortgage, the First District held that a lack of standing was not a "curable" defect. *Jordan* then adopted both *Byrd* holdings.

The remaining Ohio appellate districts refused to follow suit. These courts first rejected the conclusion that standing must exist as of the date of filing as being inconsistent with *Suster*. In *U.S. Bank Nat'l Ass'n v. Bayless*, 5th Dist. No. 09 CAE 01 004, 2009-Ohio-611, the defendant executed a note in favor of Norwest Bank, secured by a mortgage. On February 28, 2008, U.S. Bank filed a complaint to recover the balance due on the note and to foreclose the mortgage. The note was not formally transferred to U.S. Bank until April 1, 2008, and the assignment of mortgage was not recorded until April 14, 2008, both well after the date that U.S. Bank filed the Complaint. *Bayless*, ¶ 5.

The Fifth District held that any defect in standing was cured: "Pursuant to Rule 17(A), the real party of interest shall 'prosecute' the claim. The rule does not state 'file' the claim." The court affirmed judgment in favor of U.S. Bank. *Bayless*, ¶ 23.

Similarly, in *Countrywide Home Loan Servicing, L.P. v. Thomas*, 10th Dist. No. 09AP-819, 2010-Ohio-3018, the defendant executed a note in favor of America's Wholesale Lender and a mortgage in favor of MERS. On December 10, 2008, Countrywide filed a complaint alleging it that held the note executed by Thomas. *Id.*, ¶ 2. On December 11, 2008 (after the filing of the Complaint), MERS executed an assignment of the mortgage to Countrywide. On March 24, 2009, Ocwen was substituted as the plaintiff, based on an assignment of the note and mortgage from Countrywide. *Id.*, ¶ 7.

On appeal, Thomas argued that because Countrywide was not the recorded assignee of the mortgage, it lacked standing to invoke the jurisdiction of the court at the time the complaint was filed. *Id.*, ¶ 8. The Tenth District held that it was undisputed that Countrywide held the note and that Countrywide transferred it to Ocwen prior to summary judgment. *Id.*, ¶ 11. This was all that was required to enforce the mortgage.

Ohio's Second, Sixth, Ninth, Eleventh, and Twelfth Districts all issued similar decisions. *JPMorgan Chase Bank Tr. v. Murphy*, 2d Dist. No. 23927, 2010-Ohio-5285; *Deutsche Bank Natl. Trust Co. v. Greene*, 6th Dist. No. E-10-006, 2011-Ohio-2959; *BAC Home Loans Servicing, L.P. v. Cromwell*, 9th Dist. No. 25755, 2011-Ohio-6413; *Aurora Loan Servs., LLC v. Cart*, 11th Dist. No. 2009-A-0026, 2010-Ohio-1157; *Wash. Mut. Bank, FA v. Wallace*, 194 Ohio App.3d 549, 2011-Ohio-4174, 957 N.E.2d 92 (12th Dist.). By 2011, eight Ohio appellate districts had held that any defect in standing could be cured by a post-complaint assignment, while two (the First and Eighth Districts in *Byrd* and *Jordan*) held in could not.

Other Ohio appellate districts also rejected the conclusion of *Byrd* and *Jordan* that an assignment of mortgage was necessary. In *U.S. Bank N.A. v. Marcino*, 181 Ohio App.3d 328, 2009-Ohio-1178, 908 N.E.2d 1032, ¶¶ 47-54 (7th Dist.), the defendant executed a note in favor of BNC Mortgage; attached to the note was an allonge, indorsed in blank, making the note "bearer" paper. *Id.*, ¶ 4. However, an assignment of mortgage was never entered into the record.

The Seventh District first acknowledged that a blank indorsement created bearer paper, making the plaintiff a person entitled to enforce the note and mortgage as a party in possession. *Id.*, ¶¶ 50-51. The Seventh District went on to hold that under both the U.C.C. and the common law "the owner of a promissory note should be recognized as the owner of the related mortgage." *Id.*, ¶¶ 52-53; citing Ohio's versions of U.C.C. 9-109, 9-102, and 9-203. The plaintiff was permitted to enforce the mortgage, even though its assignment had never been recorded.

By 2011, the law of the State of Ohio was splintered by appellate district: in the First and Eighth Districts (Cincinnati and Cleveland, respectively), a foreclosing bank was required to have an assignment of mortgage or be the original mortgagee, and had to show that status as of the time of filing the complaint. Everywhere else, it was only required to demonstrate an interest in the note or the mortgage prior to receiving judgment, and in some districts, no assignment of mortgage was required.

### ***Schwartzwald Rejects Suster***

That leads to the Ohio Supreme Court's decision in *Schwartzwald*. On April 15, 2009, Freddie Mac filed suit against Duane and Julie Schwartzwald, but the complaint did not attach a copy of the promissory note. Shortly thereafter, foreclosure counsel filed an unauthenticated "Notice of Filing Note," attaching a copy of the note containing a blank indorsement, rendering it bearer paper, but the notice was not filed under oath, and therefore was not sufficient under Rule 56. On May 15, 2009, the prior creditor executed an assignment of mortgage, assigning both the note and the mortgage to Freddie Mac. Thus the only evidence in the record was that Freddie Mac did not have an interest in either the note or the mortgage until after the complaint was filed.

Freddie Mac filed for summary judgment. The Schwartzwalds opposed and filed their own, arguing that Freddie Mac had failed to prove that Freddie Mac had standing at the initiation of the complaint, in contravention of *Byrd* and *Jordan*, and that a showing of standing as of the date of the filing of the complaint was a jurisdictional prerequisite.

In 2011, the Second District Court of Appeals held that none of this mattered. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 194 Ohio App.3d 644, 2011-Ohio-2681. The Second District noted the split between *Byrd* and *Jordan* and the other Ohio appellate districts, but ultimately concluded "the lack of standing or a real-party-in-interest defect can be cured by the assignment of the mortgage prior to judgment." *Id.*, ¶ 75.

On October 31, 2012, the Supreme Court reversed the Second District, and potentially modified the *Byrd* and *Jordan* analysis. *Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 979 N.E.2d 1214, 2012-Ohio-5017.

The Court began its opinion by dismissing the *Suster* analysis as not only being non-binding, but not even worthy of discussion due to its status as a plurality opinion. *Id.*, ¶ 9. The Court went on to hold (contrary to the opinions of the majority of the appellate districts) that a lack of standing may not be cured under Rule 17(A). Opinion, ¶ 38. The Court summed up the controversy: “the lack of standing at the commencement of a foreclosure action requires dismissal of the complaint.” *Id.*, ¶ 40.

The Court stated that a plaintiff who lacked standing should not invoke a court’s jurisdiction: “It is an elementary concept of law that a party lacks standing to *invoke the jurisdiction* of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action.” (Emphasis in original.) *Schwartzwald*, 2012-Ohio-5017, ¶ 22, quoting *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas*, 35 Ohio St.2d 176, 179, 298 N.E.2d 515 (1973). It went on to reject the argument that Rule 17 could be used to demonstrate standing after the filing of the complaint. *Id.*, ¶ 37.

Despite *Byrd* and *Jordan*’s insistence that a mortgage foreclosure required the plaintiff to be the recorded mortgagee, and despite the lower court’s holding that standing is based on being the person entitled to enforce the promissory note under the U.C.C., the Supreme Court did not directly reach the issue, holding that “because [Freddie Mac] failed to establish an interest in the **note or mortgage** at the time it filed suit, it had no standing to invoke the jurisdiction of the common pleas court.” *Id.*, ¶ 28.<sup>1</sup>

The Court then held that the trial court should have sustained the Schwartzwalds’ cross-motion for summary judgment. However, this only meant that the Court was dismissing the

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<sup>1</sup> The Eighth District has now held that this language obviated its earlier requirement that a plaintiff be the recorded mortgagee, holding that demonstrating an enforceable interest in the promissory note at the time of filing is **also** sufficient to establish standing. *CitiMortgage, Inc. v. Patterson*, 8th Dist. No. 98360, 2012-Ohio-5894, ¶ 21.

case without prejudice, noting “because there has been no adjudication on the underlying indebtedness, our dismissal has no effect on the underlying duties, rights, or obligations of the parties.” *Id.*, ¶ 40.

### ***Schwartzwald*'s Unresolved Questions**

Literally within hours of the release of the *Schwartzwald* opinion by the Ohio Supreme Court, borrowers began filing motions for relief from judgment. These motions argued that the Supreme Court held that standing is a “jurisdictional” defect, and that a lack of jurisdiction can be challenged at any time, even after judgment. Borrowers have attempted to use *Schwartzwald* to challenge cases where the borrowers had raised the standing issue and lost, in cases where they had defaulted and never raised any motion at all, and in many cases where the property had already been sold at judicial sale to a third party, and the proceeds distributed.

*Schwartzwald* is ambiguous on this point. While the Supreme Court held that a plaintiff without standing should not “invoke the jurisdiction” of a court, it does not address what happens when a plaintiff is alleged to have done precisely that but the defendant either failed to challenge the issue, or challenged but then chose not to appeal. Perhaps not surprisingly, the Ohio District Courts of Appeal have already split on this issue. *Bank of Am. v. Kuchta*, Ninth Dist. App. No. 12CA0025-M, 2012-Ohio-5562; *PNC Bank, Nat'l Assn. v. Botts*, Tenth Dist. App. No. 12AP-256, 2012-Ohio-5383.

In *Kuchta*, a borrower who raised the standing issue in the answer, but did not oppose the bank's motion for summary judgment, filed a motion for relief from judgment under Ohio Rule 60(B), arguing that the foreclosing bank did not possess standing at the initiation of the complaint. The trial court denied the motion. The Ninth District summarily reversed on the basis of *Schwartzwald*.

Faced with nearly identical facts in *Botts*, the Tenth District reached the opposite conclusion. In *Botts*, the homeowner defaulted and did not appeal. *Id.*, ¶ 4. Instead, the homeowner filed a motion for relief from judgment under Rule 60(B), claiming that the plaintiff

lacked standing to initiate the action, and a motion to dismiss under Rule 12(B)(1), arguing that a lack of standing deprived the trial court of subject matter jurisdiction. *Id.*, ¶ 5. The trial court denied both motions. *Id.*, ¶ 6.

The Tenth District affirmed, finding that a lack of standing at the initiation of the complaint “is a matter that should have been presented as a claim or defense by Botts in the underlying foreclosure action.” *Id.*, ¶ 16. The Tenth District found that “Botts was not prevented from fully and presenting his defense due to any fraud by” the plaintiff under Civil Rule 60(B)(3), and, therefore, the lack of standing was not grounds for relief. *Id.*, ¶ 18. The Tenth District cited *Schwartzwald*, but went on to hold that it did not change prior law on this point.

How the Ohio Supreme Court will resolve these issues remains unclear. In the past, the Supreme Court has carefully differentiated between a court's lack of subject matter jurisdiction over a particular class of cases, and a plaintiff's erroneous invocation of that jurisdiction:

Where it is apparent from the allegations that the matter alleged is within the class of cases in which a particular court has been empowered to act, jurisdiction is present. Any subsequent error in the proceedings is only error in the “exercise of jurisdiction,” as distinguished from the want of jurisdiction in the first instance.

*State v. Filiaggi*, 86 Ohio St.3d 230, 240, 1999-Ohio-99, 714 N.E.2d 867, quoting *In re Waite*, 188 Mich. App. 189, 199-200, 468 N.W.2d 912 (1991). See also *Miller v. Nelson-Miller*, 132 Ohio St.3d 381, 2012-Ohio-2845, 972 N.E.2d 568, ¶ 12, citing *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, ¶ 10 (“A judgment is generally void only when the court rendering the judgment lacks subject-matter jurisdiction or jurisdiction over the parties; however, a voidable judgment is one rendered by a court that lacks jurisdiction over the particular case due to error or irregularity.”).

### **Ohio is Not Alone**

Like Ohio, other states have also wrestled with the requirements of mortgagee standing. In *United States Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 638, 941 N.E.2d 40 (2011), the Massachusetts Supreme Court held that the foreclosing entity must be the recorded mortgagee

to proceed with nonjudicial foreclosure. In *Eaton v. Federal National Mortgage Association*, 462 Mass. 569 (2012), the court held that the plaintiff must not only be the recorded mortgagee, but also must be the person entitled to enforce the note.

The Washington Supreme Court has also held that the focus is not on being the recorded mortgagee, but rather on being the person entitled to enforce the note. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wash.2d 83, 285 P.3d 34. In that case, because MERS was not the person entitled to enforce the note, the court held that it had no standing to commence foreclosure proceedings.

In *Hogan v. Washington Mut. Bank, N.A.*, 277 P.3d. 781, 783 (Ariz. 2012), the Arizona Supreme Court held that the plaintiff must only be the mortgagee, and that there was no requirement that the plaintiff be the person entitled to enforce the note. The Minnesota Supreme Court and California intermediate courts have issued similar decisions. *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487 (Minn. 2009); *Herrera v. Federal National Mortgage Association*, 205 Cal.App.4th 1495 (2012). These courts reasoned that the legislature had set the requirements for foreclosure of a mortgage, and that the state statutes did not include a requirement that the plaintiff be a person entitled to enforce the note.

In *Deutsche Bank National Trust Company v. Brumbaugh*, 2012 OK 3 (2012) and *Deutsche Bank National Trust Company v. Byrams*, 2012 OK 4 (2012), the Oklahoma Supreme Court held that standing was demonstrated by being a party entitled to enforce the note, and not merely being the recorded mortgagee. In *Brumbaugh* and in *Byrams*, the court held such standing must be proven at the time the complaint was filed, and that a lack of standing could be raised at any time. A Kentucky appeals court similarly placed the focus on the plaintiff's status as a party entitled to enforce the note under the U.C.C. *Stevenson v. Bank of America*, 359 S.W.3d 466 (Ky. App. 2011).

## **Conclusion**

Ohio's experience is hardly unique. The law on mortgagee standing continues to evolve as to what must be proven and when it must be proven. All parties—the courts, borrowers and lenders—would benefit from clearly defined rules on what seems to be an elementary concept.

# CHICAGO

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*A Survey of Foreclosure-Related Class Action:*

## **A Survey of Foreclosure-Related Class Action:**

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**A SURVEY OF**  
**FORECLOSURE-RELATED CLASS ACTIONS**

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**April 4, 2013**

## **I. Introduction**

The foreclosure crisis which began in the fall of 2008 spawned a wide variety of litigation, including numerous class action lawsuits. This paper provides an overview of several significant types of foreclosure-related class actions: (i) HAMP Trial Period Plan contract class actions; (ii) force-placed insurance class actions; (iii) illegal military servicemember foreclosure class actions; (iv) MERS class actions; and (iv) the Lender Processing Services, Inc. “robo-signing” class action.

## **II. Home Affordable Mortgage Program (“HAMP”) Contract Class Actions**

Due to the national foreclosure crisis, by late 2008, homeowners were seeking mortgage modifications in record numbers. In April 2009, a federal program known as the Home Affordable Mortgage Program (“HAMP”) was created to provide financial assistance to homeowners so that they could avoid foreclosures and obtain affordable monthly mortgage payments. Upon successful completion of a HAMP trial modification, homeowners were supposed to receive permanent loan modifications. Unfortunately, vast numbers of people seeking HAMP modifications did not receive any determination of eligibility at the conclusion of their three-month trial periods. Often these borrowers were strung along in prolonged trial modifications that lasted a year or more, only to end up being rejected for a permanent modification. Thereafter, these homeowners faced large arrearages that had accrued during their trial modifications and damaged credit, thus leaving them in a worse position than before they sought relief under HAMP. Numerous lawsuits ensued.

### **A. Background Concerning The Home Affordable Mortgage Program**

In response to rapidly deteriorating financial market conditions in the late summer and early fall of 2008, Congress enacted the Emergency Economic Stabilization Act, P.L. 110-343, 122 Stat. 3765. The centerpiece of the Act was the Troubled Asset Relief Program (“TARP”), which required the Secretary of the Treasury, among many other duties and powers, to “implement a plan that seeks to maximize assistance for homeowners and ... encourage the servicers of the underlying mortgages ... to take advantage of ... available programs to minimize foreclosures.” 12 U.S.C. § 5219(a). Congress also granted the Secretary the authority to “use loan guarantees and credit enhancements to facilitate loan modifications to prevent avoidable foreclosures.” *Id.*

Pursuant to this authority, in February 2009, the Secretary of the Treasury set aside up to \$50 billion of TARP funds to induce lenders to refinance mortgages with more favorable interest rates and thereby allow homeowners to avoid foreclosure. The Secretary negotiated Servicer Participation Agreements (“SPAs”) with dozens of home loan servicers, including the five largest loan servicers, Wells Fargo, JPMorgan Chase, CitiMortgage, Bank of America, and GMAC. Under the terms of the SPAs, servicers agreed to identify homeowners who were in default or would likely soon be in default on their mortgage payments, and to modify the loans of those eligible under the program. In

exchange, servicers would receive a \$1,000 payment for each permanent modification, along with other incentives. The SPAs stated that servicers “shall perform the loan modification ... described in ... the Program guidelines and procedures issued by the Treasury ... and ... any supplemental documentation, instructions, bulletins, letters, directives, or other communications ... issued by the Treasury.” In such supplemental guidelines, Treasury directed servicers to determine each borrower’s eligibility for a modification by following what amounted to a three-step process:

- First, the borrower had to meet certain threshold requirements, including that the loan originated on or before January 1, 2009; it was secured by the borrower’s primary residence; the mortgage payments were more than 31 percent of the borrower’s monthly income; and, for a one-unit home, the current unpaid principal balance was no greater than \$729,750.
- Second, the servicer calculated a modification using a “waterfall” method, applying enumerated changes in a specified order until the borrower’s monthly mortgage payment ratio dropped “as close as possible to 31 percent” of the borrower’s monthly income.
- Third, the servicer applied a Net Present Value (“NPV”) test to assess whether the modified mortgage’s value to the lender would be greater than the return on the mortgage if unmodified. The NPV test is “essentially an accounting calculation to determine whether it is more profitable to modify the loan or allow the loan to go into foreclosure.” *Williams v. Geithner*, No. 09-1959 ADM/JJG, 2009 WL 3757380, at \*3 n. 3 (D. Minn. Nov. 9, 2009). If the NPV result was negative – that is, the value of the modified mortgage would be lower than the servicer’s expected return after foreclosure – the servicer was not obliged to offer a modification. If the NPV was positive, however, the Treasury directives said that “the servicer MUST offer the modification.” Supplemental Directive 09–01.

**B. The Trial Period Plan**

Where a borrower qualified for a HAMP loan modification, the modification process itself consisted of two stages. After determining a borrower was eligible, the servicer implemented a Trial Period Plan (“TPP”) under the new loan repayment terms it formulated using the waterfall method. The trial period under the TPP lasted three or four months, during which time the lender “must service the mortgage loan ... in the same manner as it would service a loan in forbearance.” Supplemental Directive 09-01. After the trial period, if the borrower complied with all terms of the TPP Agreement – including making all required payments and providing all required documentation – and if the borrower’s representations remained true and correct, the servicer had to offer a permanent modification. *See* Supplemental Directive 09-01 (“If the borrower complies with the terms and conditions of the Trial Period Plan, the loan

modification will become effective on the first day of the month following the trial period....”).

In June 2010, Treasury modified its directives on the timing of the verification process. Under the original guidelines that were in effect between April 2009 and June 2010, a servicer could initiate a TPP based on a borrower’s undocumented representations about her finances. *See* Supplemental Directive 09-01 (“Servicers may use recent verbal [sic] financial information to prepare and offer a Trial Period Plan. Servicers are not required to verify financial information prior to the effective date of the trial period.”). Those guidelines were part of a decision to roll out HAMP very quickly.<sup>1</sup>

**C. HAMP Trial Period Plan Litigation**

Borrowers have filed numerous individual and class action lawsuits against mortgage servicers alleging even though they fully complied with their TPP agreements by making all required trial payments and providing all requested financial documents, they were wrongfully denied permanent HAMP modifications.

Such lawsuits allege that the servicers have: (1) breached the terms of TPP agreements by failing to grant borrowers permanent HAMP loan modifications; (2) breached the TPP agreements by failing to provide the borrowers with a written notice of denial stating the reason they did not qualify for the permanent modification under HAMP before the expiration of the trial period; (3) promised borrowers a permanent modification or timely written notice of denial upon which borrowers detrimentally relied (*i.e.*, promissory estoppel); and (4) engaged in deceptive conduct which violates state consumer protection statutes.

**1. Defenses Typically Raised by Servicer Defendants**

**a. No Private Right of Action Under HAMP**

Courts have held that there is no private right of action under HAMP. *See, e.g., Cleveland v. Aurora Loan Servs., LLC*, 2011 WL 2020565, at \*4 (N.D. Cal. May 24, 2011) (“[HAMP] does not provide borrowers with a private cause of action against lenders for failing to consider their application for loan modification, or even to modify an eligible loan.”) (*citing Simon v. Bank of Am.*, 2010

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<sup>1</sup> Treasury changed this policy in 2010, however, to allow servicers to offer a trial modification only after reviewing a borrower’s documented financial information. The reason for the change was that loan servicers were converting trial modifications to permanent ones at a rate far below Treasury’s expectations. Treasury originally projected that 3 to 4 million homeowners would receive permanent modifications under HAMP. Yet one year into the program, only 170,000 borrowers had received permanent modifications – less than 15 percent of the 1.4 million homeowners who had been offered trial plans.

WL 2609436, at \*10 (D. Nev. June 23, 2010)); *accord McCurdy v. Wells Fargo Bank*, 2010 WL 4102943, at \*2 (D. Nev. Oct. 18, 2010); *Rivera v. Bank of Am. Home Loans*, 2011 WL 1533474, at \*7 (E.D.N.Y. Apr. 21, 2011); *Brown v. Bank of N.Y. Mellon*, 2011 WL 206124, at \*2 (W.D. Mich. Jan. 21, 2011) (“All of the district courts that have considered the issue have held that homeowners do not have a private right of action under HAMP for denial of a loan modification.”).

Consequently, servicers have argued that a borrower cannot bring a claim against a servicer that is premised on the servicer’s failure to consider the borrower’s application for a HAMP modification or to modify an otherwise eligible loan. Defendants contend that common law claims like breach of contract are an improper attempt to circumvent that bar by pleading state law claims. Some courts have accepted this argument. *See, e.g., Vida v. One West Bank, F.S.B.*, 2010 WL 5148473, at \*4-5 (D. Or. Dec. 13, 2010) (borrower “fail[ed] to state a cause of action independent of HAMP” because “the alleged offer to modify came about and was made wholly under the rubric of HAMP, as were [her] alleged actions in acceptance”).

**b. Servicers Argue that HAMP TPPs are Not Enforceable Contracts**

**i. The TPP Does Not Provide an Unconditional Offer to Modify the Mortgage Loan**

Servicers have argued that borrowers cannot state a claim for breach of the TPP because the servicers have not offered to permanently modify their loans. Rather, the TPP is simply part of the HAMP application process, which borrowers were willing to complete in the hope that the lender would modify their loans. *See, e.g., Sherman v. Litton Loan Servicing, L.P.*, 2011 WL 2634097, at \*8 (E.D. Va. July 5, 2011) (“[The TPP] was merely an offer to consider plaintiff’s application for a loan modification, not an outright offer to modify plaintiff’s mortgage, under HAMP or otherwise”).

**ii. The TPP Lacks Consideration**

Servicers have argued that the TPP agreements are not enforceable contracts because the borrowers did not provide consideration. According to the servicers, agreeing to make modified payments under the TPP is not bargained-for consideration, but rather is a pre-existing

duty under the existing mortgage loan. *See, e.g., Cade v. BAC Home Loans Servicing, LP*, 2011 WL 2470733, at \*5 (S.D. Tex. June 20, 2011) (“[C]ontinuation of [TPP] payment is a pre-existing obligation and does not amount to detrimental reliance; [plaintiffs] were bound to make mortgage payments long before applying for HAMP consideration.”).

iii. **The TPP Lacks Material Terms and is Merely an Unenforceable Agreement to Agree**

Servicers contend that the TPP lacks sufficiently definite terms for a permanent loan modification, such as the principal amount of the modified loan, the loan’s duration, the interest rate, any escrow payments owed, or the amount of any balloon payment due at maturity or upon payoff. Thus, the TPP lacks the essential terms necessary for it to be an enforceable contract. *See, e.g., In re Salvador*, 2011 WL 1833188, at \*6 (Bankr. M.D. Ga. May 12, 2011) (“It is clear from the terms of the TPP Agreement that the document is nothing more than an agreement to negotiate further with respect to the terms of a proposed loan modification.”).

iv. **Plaintiffs Have No Cognizable Damages**

Servicers argue that borrowers sustained no cognizable damages, which is a required element of a breach of contract claim. Servicer defendants contend that alleged harm such as increased interest, longer loan payoff times, higher principal balances, damage to credit, and expenses incurred to prevent or fight foreclosure, were the result of the plaintiffs defaulting on their loans. *See Adams v. U.S. Bank*, 2010 WL 2670702, at \*4 (E.D. Mich. July 1, 2010) (no injury because plaintiff was already obligated to make her mortgage payments).

c. **Servicers Contend that Borrowers Cannot State a Claim For Promissory Estoppel**

Servicer defendants have argued that homeowners cannot establish that the TPP is a sufficiently definite promise to offer a permanent HAMP modification upon which they reasonably relied to their detriment. *See, e.g., Salvador*, 2011 WL 1833188, at \*9 (“[T]he alleged promise [*i.e.*, TPP] to provide a loan modification was too vague to support a promissory estoppel claim”); *Ortiz v. Am.’s Servicing Co.*, 2012 WL 2160953, at \*7 (C.D. Cal. June 11, 2012)

("[P]lain language of the HAMP trial plain did not guarantee that plaintiff would be granted a permanent loan modification").

**d. Servicers Argue that Borrowers Cannot State Claims for Violations of State Consumer Protection Laws**

Generally, servicers argue that they have not engaged in deceptive or unfair trade practices, and therefore, have not violated various state consumer protection statutes. In particular, servicers contend that the TPP made no promise to permanently modify the borrower's loan, therefore, the borrower could not have been deceived. *See, e.g., Silver v. Countrywide Home Loans, Inc.*, 760 F. Supp. 2d 1330, 1343 (S.D. Fla. Jan. 13, 2011) (dismissing consumer protection claim because "loan terms were disclosed in the loan documents signed at closing" and thus "[n]o reasonable consumer would be deceived in this situation.").

**2. The 7th Circuit Rejects Servicers' Arguments for Dismissal**

In *Wigod v. Well Fargo Bank*, 673 F.3d 547 (7th Cir. 2012) the 7th Circuit reversed the district court's dismissal, and weighed in on the defenses raised by servicer defendants in HAMP litigation, and rejected those arguments, upholding borrowers' claims for, *inter alia*, breach of contract and promissory estoppel arising from TPP contracts.

- Factually, the plaintiff in *Wigod* found herself in financial distress, and submitted a written request to Wells Fargo for a HAMP modification in April 2009. *Wigod*, 673 F.3d at 558. *Wigod* provided all required financial documentation and in mid-May 2009, Wells Fargo sent her a Trial Period Plan Agreement ("TPP"). *Id.* *Wigod* signed the TPP and returned it to the bank, along with additional documents and the first of four modified trial period payments. *Id.* Wells Fargo then executed the TPP Agreement and sent a copy to *Wigod* in early June 2009. *Id.* *Wigod* timely made, and Wells Fargo accepted, all four payments due under the TPP. *Id.* Nevertheless, Wells Fargo declined to offer *Wigod* a permanent HAMP modification, informing her only that it was "unable to get you to a modified payment amount that you could afford per the investor guidelines on your mortgage." *Id.* Over the next few months, *Wigod* protested Wells Fargo's decision in a number of telephone conversations, but to no avail. During that time, she continued to make mortgage payments in the reduced amount due under the TPP, even after the trial term ended on November 1, 2009. In the meantime, Wells Fargo sent *Wigod* monthly notices threatening to foreclose if she failed to pay the accumulating amount of delinquency based on the original loan terms. *Id.*

- On these facts, the Court of Appeals found that Wigod stated a claim for breach of the TPP, promissory estoppel and violations of the Illinois Consumer Fraud and Deceptive Business Practices Act.
- Wells Fargo argued that Wigod did not state a breach of contract claim because there was no unconditional offer to permanently modify plaintiffs' loan. The *Wigod* Court disagreed, stating:

“Here the TPP spelled out two conditions precedent to Wells Fargo's obligation to offer a permanent modification: Wigod had to comply with the requirements of the trial plan, and her financial information had to remain true and accurate. But these were conditions to be satisfied by the promisee (Wigod) rather than conditions requiring further manifestation of assent by the promisor (Wells Fargo). These conditions were therefore consistent with treating the TPP as an offer for permanent modification.

\* \* \*

Once Wells Fargo signed the TPP Agreement and returned it to Wigod, an objectively reasonable person would construe it as an offer to provide a permanent modification agreement if she fulfilled its conditions.”

*Id.* at 562-63.

- Wells Fargo moved to dismiss Wigod's breach of contract claim based on its contention that any purported promise to provide a loan modification lacked material terms and would be, at most, an unenforceable agreement to agree. The *Wigod* Court rejected this notion, stating:

“It is true that Wigod's trial period terms were an “estimate” of the terms of the permanent modification and that Wells Fargo had some limited discretion to modify permanent terms based on its determination of the “final amounts of unpaid interest and other delinquent amounts.” TPP §§ 2, 3. But this hardly makes the TPP a mere “agreement to agree.”

\* \* \*

In this case, HAMP guidelines provided precisely this “existing standard” by which the ultimate terms of Wigod's permanent modification were to be set.... These HAMP guidelines unquestionably informed the reasonable expectations of the parties to Wigod's TPP Agreement.... In Wigod's reasonable reading of the agreement, if she “qualif[ied] for the Offer” (meaning, of course, that she qualified under HAMP) and complied with the terms of the TPP, Wells Fargo would offer her a permanent modification. TPP ¶ 2. To calculate Wigod's trial modification terms, Wells Fargo was obligated to use the NPV test and the waterfall method to try to bring her monthly payments down to 31 percent of her gross income. Although the trial terms were just an “estimate” of the permanent

modification terms, the TPP fairly implied that any deviation from them in the permanent offer would also be based on Wells Fargo's application of the established HAMP criteria and formulas."

*Id.* at 564-65.

- Wells Fargo moved to dismiss on grounds that the TPP lacked valid consideration, and thus, could not support a breach of contract claim. The Court rejected this argument, stating:

"Here the TPP contained sufficient consideration because, under its terms, Wigod (the promisee) incurred cognizable legal detriments. By signing it, Wigod agreed to open new escrow accounts, to undergo credit counseling (if asked), and to provide and vouch for the truth of her financial information. Wigod's complaint alleges that she did more than simply agree to pay a discounted amount in satisfaction of a prior debt. In exchange for Wells Fargo's conditional promise to modify her home mortgage, she undertook multiple obligations above and beyond her existing legal duty to make mortgage payments. This was adequate consideration, as a number of district courts adjudicating third-generation HAMP cases have recognized."

*Id.* at 564 (citing *In re Bank of America Home Affordable Modification Program (HAMP) Contract Litig.*, 2011 WL 2637222, at \*4 (D.Mass. July 6, 2011); *Ansanelli v. JP Morgan Chase Bank, N.A.*, 2011 WL 1134451, at \*4 (N.D. Cal. Mar. 28, 2011)).

- The 7th Circuit upheld the plaintiff's promissory estoppel claim. Wells Fargo moved to dismiss the plaintiff's promissory estoppel claim based on its assertion that no plaintiff could reasonably have relied on a promise in the TPP to modify her loan because the TPP contained numerous conditions precedent which plaintiff failed to fulfill. The *Wigod* court rejected this argument, finding that:

"Wigod has adequately alleged her claim of promissory estoppel. She asserts that Wells Fargo made an unambiguous promise that if she made timely payments and accurate representations during the trial period, she would receive an offer for a permanent loan modification calculated using the required HAMP methodology. She also alleges that she relied on that promise to her detriment by foregoing the opportunity to use other remedies to save her home (such as restructuring her debt in bankruptcy), and by devoting her resources to making the lower monthly payments under the TPP Agreement rather than attempting to sell her home or simply defaulting. A lost opportunity can constitute a sufficient detriment to support a promissory estoppel claim.... Wigod's complaint therefore alleged a sufficiently clear promise, evidence of her own reliance, and an explanation of the injury that resulted. She also contends that Wells Fargo

ought to have anticipated her compliance with the terms of its promise. This was enough to present a facially plausible claim of promissory estoppel.”

*Id.* at 566.

- Finally, the *Wigod* court rejected Wells Fargo’s argument that plaintiff’s state law claims cannot go forward because her allegations are an impermissible “end-run” around the lack of a private right of action under HAMP. Specifically, the 7th Circuit concluded:

“The issue here, however, is not whether federal law itself provides private remedies, but whether it displaces remedies otherwise available under state law. The absence of a private right of action from a federal statute provides no reason to dismiss a claim under a state law just because it refers to or incorporates some element of the federal law.... To find otherwise would require adopting the novel presumption that where Congress provides no remedy under federal law, state law may not afford one in its stead.”

*Id.* at 581.

#### **D. Significant HAMP Class Actions**

1. ***In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation, Case No. 10-md-2193-RWZ (D. Mass.)***
  - By order of the Judicial Panel on Multidistrict Litigation (“JPML”) dated October 26, 2010, this case was designated as an MDL matter and assigned to Judge Rya W. Zobel of the District of Massachusetts. Thereafter, numerous class action lawsuits against Bank of America from across the country were transferred to this District for coordinated pre-trial proceedings.
  - Plaintiffs filed a consolidated class action complaint in January 2011, which Bank of America moved to dismiss. By Memorandum of Decision dated July 6, 2011, Judge Zobel denied the defendants’ motion to dismiss as to plaintiffs’ claims for breach of contract, breach of the duty of good faith and fair dealing, promissory estoppel, and violations of state consumer protection laws. *See In re Bank of America Home Affordable Modification Program (HAMP) Contract Litig., Case No. 10-md-2193-RWZ, 2011 U.S. District LEXIS 72079 (D. Mass. July 6, 2011).*
  - Pretrial discovery in this case is continuing and the Court recently set a schedule for briefing on class certification.

2. ***In re CitiMortgage Home Affordable Modification Program (“HAMP”) Litigation, Case No. 2:11-ml-02274-DSF (C.D. Cal.)***

- By order of the JPML dated October 6, 2011, this case was designated as an MDL matter and assigned to Judge Dale S. Fischer of the Central District of California. Thereafter, numerous class action lawsuits against CitiMortgage from across the country were then transferred to this District for coordinated pre-trial proceedings.
- Plaintiffs filed a consolidated class action complaint in January 2012, which CitiMortgage moved to dismiss. By Memorandum and Order dated April 17, 2012, Judge Fischer denied Citi’s motion to dismiss as to plaintiffs’ claims for breach of contract, breach of the duty of good faith and fair dealing, promissory estoppel, and violations of state consumer protection laws. *See In re CitiMortgage Home Affordable Modification Program (“HAMP”) Litig., Case No. 2:11-ml-02274-DSF, 2012 U.S. Dist. LEXIS 67056 (C.D. Cal. April 17, 2012).*
- Pretrial discovery in this case is continuing and the Court recently set a schedule for briefing on class certification.

3. ***In Re: JPMorgan Chase Mortgage Modification Litigation, Case No. 11-md-02290-RGS (D. Mass)***

- This is a MDL case, which consolidates in the District of Massachusetts homeowner lawsuits brought in a number of jurisdictions alleging that JPMorgan Chase Bank, N.A. (“Chase”), breached the terms of plaintiffs’ trial mortgage modification agreements, made false and misleading promises to homeowners about the prospects of a mortgage modification, managed the modification process with gross ineptitude, and, in some cases, foreclosed on homes despite promises to homeowners that they could remain in their homes while negotiating new payment terms with Chase.
  - a. ***Chase Sought Dismissal Based on Consent Order with Regulators***
    - In April of 2011, Chase entered into a Consent Order with the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve, and the Office of Thrift Supervision (OTS), pursuant to 12 U.S.C. § 1818(b). The Consent Order, which covers Chase and thirteen other mortgage loan servicers, is meant to remedy improper mortgage servicing and foreclosure practices like those alleged in the class action complaint.

- In its motion to dismiss, Chase argued this Consent Order precludes subject matter jurisdiction over the majority of the class claims because the Financial Institution Supervisory Act (“FISA”) § 1818 prohibits any action that “could affect” the enforcement of an OCC consent order.

**b. The Court Denied Chases Motion**

- In an Opinion issued on July 22, 2012, the Court rejected this argument, holding that FISA § 1818, is not intended to prohibit non-parties to the Consent Decree, including the plaintiffs and the proposed class, from exercising their separate remedies at law. *Chase*, 2012 U.S. Dist. LEXIS 104486, at \*20. In particular, the court ruled that FISA § 1818 does not preclude the court from acting to remedy the alleged breach of the plaintiffs’ TPP contracts or the plaintiffs’ claims under state consumer protection acts. *Id.* at \*26.
- The court also denied Chase’s motion to dismiss plaintiffs’ breach of contract claims, Washington, New Jersey, and California UDAP claims, California’s Rosenthal Fair Debt Collection Practices Act claims, and the federal Fair Debt Collection Practices Act claims.

**E. Class Certification Has Not Yet Been Determined in HAMP Class Actions**

- Since in all the major HAMP class action cases, motions to dismiss were defeated, the next major juncture will be class certification after considerable discovery is completed.
- All the major class action cases are engaged in discovery.
- The stakes are high for both sides and it remains to be seen whether any of these cases will settle before class certification.

**III. FORCE-PLACED INSURANCE CLASS ACTIONS**

**A. Background Concerning the Force-Placed Insurance Industry**

- Mortgage lenders require borrowers to carry certain forms of property insurance. If a borrow fails to procure or maintain the required insurance coverage, loan documents often allow the lender to obtain such insurance coverage (“force-placed insurance”). The borrower pays all costs associated with placement of this type of insurance, which are higher than the borrower would pay in the marketplace.
  - There are several types of force-placed insurance. The most common is hazard or general homeowner’s insurance.

- Flood insurance is usually only applicable where the home is located in a flood zone.
- Fannie Mae and Freddie Mac, which together currently support approximately 60 percent of all mortgage originations in the United States, require continuous coverage on all properties that serve as collateral.
- Only a few insurers underwrite lender-placed policies, and two insurers, Assurant and QBE Insurance, control about 90 percent of the market.
- Many financially distressed homeowners stop paying their insurance premiums, which results in a loss of coverage. However, the high price of force-placed insurance increases their debt burden and tips them toward foreclosure.
- Dozens of class and individual actions have been filed against lenders, loan processors and insurers with respect to the force-placement of hazard, flood and wind insurance.
- Plaintiffs’ allegations, generally, are that, when force-placing insurance, lenders obtain excessive coverage and receive unlawful kick-backs from force-placed insurers, the costs of which are passed onto the borrowers.

**B. Overview of Force-Placed Insurance-Related Class Actions**

Suits generally directed at the lenders and the loan servicers, although the insurers who wrote the force-placed policies are sometimes also named as defendants.

**1. Claims Typically Alleged against Lenders and Loan Services:**

**a. Breach of Contract**

- Force-placing greater coverage than called for by the terms of the loan documentation.
  - The primary distinction between hazard insurance-related claims and flood insurance-related claims is that lenders have discretion to determine the amount of hazard insurance, whereas the National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001-4130 (2006) (“NFIA”), generally governs the amount of flood insurance coverage. Thus, lenders have less discretion as to the appropriate amount of flood insurance coverage.<sup>2</sup>

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<sup>2</sup> Under the NFIA, lenders must ensure that appropriate flood insurance coverage is maintained if a loan is secured by improved property located within a Special Flood Hazard Area. *See* 42 U.S.C. § 4012a(a). Such coverage must be “in an amount at least equal to” the lesser of: (1) the outstanding principal balance

- Charging borrowers for kickbacks paid by force-placed insurers in the form of bogus “commissions” for the procurement of policies.
- Backdating force-placed policies for time periods during which there were no adverse events
- Breach of the duty of good faith and fair dealing where the lender obtained additional force-placed insurance coverage despite not believing it was authorized under the loan documents, and/or the lender force-placed coverage as a money-making opportunity rather than out of concern for protecting its security.

**b. Unjust Enrichment**

Plaintiffs allege that it is inequitable for lenders or loan servicers to retain commissions and other payments at the expense of the borrowers.

**c. Breach of Lender’s Fiduciary Duty**

Plaintiffs allege that lenders have breached their fiduciary duties in their management of escrow accounts by charging borrowers for excessive force-placed insurance.

**d. Violation of the Truth-in-Lending Act (“TILA”)**

Plaintiffs allege that lenders have violated the TILA by changing the insurance requirement for borrowers after signing agreements.

**e. Violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”)**

Plaintiffs allege that lenders have violated RICO by fraudulently inflating the stated premiums on force-placed insurance.

**f. Violation of the Real Estate Settlement Procedures Act (“RESPA”)**

Plaintiffs allege that lenders have violated RESPA by receiving premiums and commissions that were not for services actually furnished or performed or that exceeded the value of such services.

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of the loan; or (2) the maximum insurance coverage available under the NFIA, which is currently \$250,000. *Id.* §§ 4012a(b)(1), 4013(b)(2).

**g. Violation of State Consumer Protection Laws**

Plaintiffs allege that lenders have violated state consumer protection laws by profiting from the forced placement of insurance policies at the expense of the borrowers and misrepresenting their actions in doing so.

**h. Common Law Fraud**

Plaintiffs allege that lenders have engaged in fraud by falsely advising borrowers that their homeowner's insurance was inadequate, necessitating the forced placement of hazard insurance.

**2. Claims Typically Alleged Against the Insurers**

Plaintiffs assert various claims based on allegations that the force-placed insurers provided "kickbacks" to the lenders or loan servicers.

**C. Major Decisions in Force-Placed Insurance Class Actions**

**1. The Judicial Panel on Multidistrict Litigation Declines to Consolidate Actions**

On September 28, 2012, the JPML denied a motion to centralize, in the Southern District of Florida, 31 actions pending in 14 districts.

- Since the filing of the motion, the JPML has been notified of more than 25 additional related actions pending in various federal districts.
- The JPML noted that all actions focus on an alleged industry-wide practice among banks and insurers concerning abuses in force-placed insurance policies covering homeowner properties.
- Notwithstanding, the panel found that the conduct was not sufficiently uniform to support industry-wide centralization. Common questions of fact did not predominate because the cases involved different defendants, different lender agreements with insurers, different alleged abuses, and different mortgage loan documents.
- Thus, there are numerous cases pending throughout the country aimed at the specific lender and the insurer who allegedly placed the insurance and gave the kickback.

2. **Decisions of Motions to Dismiss in Force-Placed Insurance Class Actions**

Courts have reached mixed results with respect to motions to dismiss complaints regarding force-placed flood insurance.

a. **Kolbe v. BAC Home Loans Servicing, LP, 695 F.3d 111 (1st Cir. 2012)**

- The First Circuit Court of Appeals reversed the District of Massachusetts' dismissal of plaintiff's claims for breach of contract and breach of the implied duty of good faith and fair dealing.
- The district court concluded that the contract unambiguously permitted the lender to require increased flood insurance coverage. The First Circuit found that a rational jury could construe the contract's meaning in favor of plaintiff's interpretation that it does not permit a lender to demand insurance beyond the amount required by HUD.
- The First Circuit also found that the lender's warning that if the plaintiff didn't purchase additional coverage, force-placed insurance would be obtained that may be more expensive and provide less coverage than insurance purchased by the plaintiff, could construe bad faith depending on the lender's state of mind when making that warning. Based upon this, the First Circuit reversed the district court's dismissal of plaintiff's claim for breach of the duty of good faith and fair dealing.
- While this opinion is instructive, it is not binding. On November 1, 2012, the First Circuit agreed to rehear this case *en banc*, thereby vacating the panel decision. The *en banc* hearing is scheduled for April 3, 2013.

b. **Casey v. Citibank, N.A., No. 5:12-cv-820 (N.D.N.Y)**

- Plaintiffs' amended complaint asserted various causes of action, including TILA violations, breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty, conversion, and violations of the New York Deceptive Trade Practices Act, N.Y. Gen. Bus. Law § 349.
- The court denied the motion to dismiss on all counts. *Casey v. Citibank, N.A.*, 2013 U.S. Dist. LEXIS 36 (N.D.N.Y Jan. 2, 2013).

**i. Plaintiffs Stated Claims for Breach of Contract**

One of the issues was whether, as defendants asserted, the mortgage agreements permitted the lender to determine the required amount of flood insurance or whether such amount was limited to the minimum amount required by HUD regulations (an amount equal to the outstanding balance of the mortgage). The mortgage agreement stated that the borrower was required to maintain flood insurance “to the extent required by the Secretary [of HUD].” The court determined that plaintiff’s interpretation of the mortgage agreement was reasonable, and that plaintiff need only maintain flood insurance coverage in an amount equal to the outstanding principal balance of his loan (\$17,000), pursuant to HUD regulations. Thus, the court denied defendants’ motion to dismiss plaintiff’s breach of contract and conversion claims. *See Casey*, 2013 U.S. Dist. LEXIS 36, at \*11-\*13.

With respect to a plaintiff whose mortgage was *owned* by Fannie Mae and *serviced* by CitiMortgage, the primary question was whether defendant CitiMortgage was considered a “lender” under the terms of the mortgage. The mortgage agreement at issue provides that the “lender” has discretion set and change the amount of required flood insurance coverage during the term of the loan. *Id.* at \*14. Plaintiff argued that Fannie Mae, the owner of the loan, is the “lender,” not CitiMortgage, which is only the servicer of the loan. The court denied the motion to dismiss plaintiff’s breach of contract and conversion claims, finding that there was nothing in the mortgage agreement providing the servicer with discretion to set and change the amount of flood insurance required under the loan. Thus, Fannie Mae was the only “lender” with such discretion. *Id.* at \*15-\*16

**ii. Plaintiffs Stated a Claim for Unjust Enrichment**

With respect to unjust enrichment claims, the court noted that HUD and Fannie Mae regulations specifically prohibit receiving commissions or kickbacks in relation to force-placed insurance. Thus, the court found that it was arguably inequitable for defendants to benefit from such practice.

iii. **Plaintiffs Stated a Claim for Breach of Fiduciary Duty**

The court denied defendants' motion to dismiss plaintiffs' breach of fiduciary duty claims. The court found that plaintiffs stated a claim where they alleged that defendants owed plaintiffs a fiduciary duty in the management of their escrow accounts and misused the funds in those accounts to pay unauthorized or excessive force-placed insurance premiums.

iv. **Plaintiffs Stated a Claim for Violation of Consumer Protection Statute**

The court found that the New York plaintiff stated a claim for violation of the New York Deceptive Practices Act by profiting from undisclosed commissions or kickbacks. The court also found that defendant's actions of accepting lower insurance coverage for 8 years, then demanding much higher coverage would likely mislead a reasonable consumer.

v. **Plaintiffs Stated a Claim for TILA Violations**

Finally, the court denied defendants' motion to dismiss plaintiffs' TILA claims, finding allegations that the force-placed insurance was not contemplated or authorized in the mortgage agreements was sufficient to allege that the force-placed insurance premiums constituted new credit transactions that raised overall indebtedness and were "finance charges" that defendants were required to disclose under TILA. The court rejected defendant Citi's argument that TILA, which applies to creditors, did not apply to it as a loan servicer, noting that Citi arguably became a creditor by force-placing unauthorized insurance.

c. **McKenzie v. Wells Fargo Home Mortg., Inc., No. C-11-04965-JCS (N.D. Cal.)**

Plaintiffs brought claims for breach of contract, unjust enrichment, breach of fiduciary duty, conversion, violation of the New Mexico Unfair Trade Practices Act, TILA violations with respect to force-placement of flood insurance.

The court granted defendants' motion to dismiss as to all claims. *McKenzie v. Wells Fargo Home Mortg., Inc.*, 2012 U.S. Dist. LEXIS 155480 (N.D. Cal. Oct. 30, 2012).

**i. Plaintiffs Failed to State a Claim for Breach of Contract**

- With respect to the breach of contract claim, the court noted that the key dispute between the parties was whether their agreement limited defendant to requiring insurance only in the amount of the loan balance. The court granted the motion to dismiss the breach of contract claim, finding that the language, “This insurance [for any hazards] shall be maintained in amounts ... that the Lender requires,” was not limited language that the “Borrower shall also insure ... against loss by floods to the extent required by the [HUD] Secretary.”
- The court also found that plaintiffs’ allegations the defendants breached the contracts by receiving kickbacks and commissions were too conclusory to withstand the motion to dismiss.
- The court’s reasons for dismissing the breach of contract claims also formed its basis for dismissing plaintiffs’ unjust enrichment, conversion claims, state unfair trade practices act, and TILA claims.

**ii. Plaintiffs Failed to State a Claim for Breach of Fiduciary Duty**

- With respect to breach of fiduciary claims, the court found that no duty exists under applicable law with respect to payments from escrow accounts to meet insurance obligations. The court also noted that even if such duty existed, the claim would fail for the same reasons as the breach of contract claim.

**3. Decisions on Motions for Class Certification in Force-Placed Insurance Class Actions**

Courts have also reached mixed results with respect to motions for class certification

**a. *Hofstetter v. Chase Home Fin., LLC*, 2011 U.S. Dist. LEXIS 38124 (N.D. Cal. Mar. 31, 2011)**

- Court granted class certification under both Rule 23(b)(2) and Rule 23(b)(3).
- Court found that the force-placement of flood insurance was adopted as a general policy that defendants applied

indiscriminately to home-equity borrowers. Restitution of the allegedly inflated premiums borrowers were charged for force-placed insurance may become a primary component of the remedy for this claim, and it is apparent that the predominance and superiority requirements of Rule 23(b)(3) are satisfied. The alleged self-dealing can be litigated without reference to factual differences among individual borrowers, and the force-placed premiums can be mathematically compared to their corresponding coverage values without considering individual borrowers' other financial or contractual circumstances.

b. ***Kunzelman v. Wells Fargo Bank, N.A.*, 11-cv-81373, 2013 U.S. Dist. LEXIS 3962 (S.D. Fla. Jan. 10, 2013)**

- Court denied motion for class certification.
- Court found plaintiff atypical because, among other things, he voluntarily paid the premium for his lender-placed insurance after consulting with legal counsel. However, many if not most of the putative class members were more than 60 days in arrears on their mortgage, in foreclosure, or post-foreclosure proceedings, and had not paid such premiums. *See Kunzelmann*, 2013 U.S. Dist. LEXIS 3962, at \*15-\*18.
- The court also found that variations among state laws with respect to claims for unjust enrichment and with respect to whether the filed-rate doctrine would be applicable to the claims of class members defeated a finding that common issues would predominate. *Id.* at \*31-\*40.

c. ***Williams v. Wells Fargo Bank, N.A.*, 280 F.R.D. 665, 669 (S.D. Fla. Feb. 21, 2012)**

- Without discussion of *Kunzelman*, which was decided by the same court (the Southern District of Florida) a little more than a month earlier, the court granted class certification.
- Noted the ultimate issue about the Wells Fargo's and QBE's collusion, in bad faith, to develop a scheme involving kickbacks and commissions relating to force-placed insurance and that the purported scheme was systemic as to all policies of property-insurance that were held by and/or serviced by Wells Fargo Bank. The court determined that the alleged unlawful scheme was not specific to any individual borrower, but was organized and implemented uniformly, across the board to any lender whose homeowners' property-insurance policy had lapsed.

d. **Gordon v. Chase Home Fin., LLC, 2013 U.S. Dist. LEXIS 15461 (M.D. Fla. Feb. 5, 2013)**

- Court denied motion for class certification.
- Court stated that plaintiffs fell short of satisfying the required element of commonality because they had not demonstrated the existence of a common contract signed by all members of the proposed classes.
- In light of the court's finding with respect to commonality, it is not surprising that the court also found that plaintiffs failed to meet their burden with respect to the predominance and superiority requirements of Rule 23(b)(3)

4. **Settlements in Force-Placed Insurance Class Actions**

a. **Hofstetter v. Chase Home Finance, No. 3:10-cv-01313 (N.D. Cal.)**

- After the court certified national classes for violations of TILA and California classes for violation of CUTPA, Chase agreed to pay approximately \$10 million to the classes and to certain injunctive relief.
- The court granted final approval of the settlement on November 14, 2011, including awarding approximately \$2.2 million in attorneys' fees which was two times lodestar (counsel had requested approximately \$3.2 million)
- On November 2, 2012, the court granted final approval to a supplemental settlement of approximately \$500,000. The supplemental settlement resulted from Chase reporting that it had inadvertently excluded certain class members from the master class list for the original settlement.

IV. **ILLEGAL FORECLOSURES ON MILITARY SERVICEMEMBERS**

Despite mortgage and foreclosure protections afforded to active members of the U.S. Military under the Servicemembers Civil Relief Act ("SCRA"), servicemembers have alleged in individual and class actions that lenders violated the SCRA by, among other things, improperly foreclosing their mortgages and failing to provide them with the required interest rate protections.

A. **Protections Afforded to Servicemembers by the SCRA**

- The SCRA provides certain protections to servicemembers' mortgage loans and home equity loans and lines of credit while a servicemember is on active duty and for some period following active duty.
  - The SCRA requires lenders to limit to six percent the interest rate on certain home equity and mortgage loans held by a servicemember, once a servicemember provides notice of his or her active duty status and a copy of orders verifying the same.
  - The interest rate limitation is to be in place for a servicemember's period of active duty, and, beginning July 31, 2008, one year thereafter.
  - The interest rate limitation applies only to home equity and mortgage loans that were originated prior to active duty, and for which a servicemember provided notice and orders of active duty within 180 days of the end of his or her active duty period.
  - The SCRA also provides protection from foreclosure on certain home equity and mortgage loans while a servicemember is on active duty and, beginning July 31, 2008, for nine months following active duty. The SCRA prohibits lenders from foreclosing upon active duty servicemembers without first obtaining court orders.
  - The SCRA also protects servicemembers from any adverse reporting related to their creditworthiness based solely on invocation of SCRA protection.

**B. Plaintiffs' Allegations of SCRA Violations:**

Lenders did not systematically or properly reduce the interest rate for eligible loans, and foreclosed upon and negatively reported the creditworthiness of SCRA protected borrowers.

Lenders subjected SCRA-protected borrowers to improper collection calls that were the result of lenders' failure to adequately apply SCRA protections.

**C. United States Justice Department Settlements Concerning SCRA Violations**

- On May 26, 2011, the U.S. Justice Dept. announced settlements with two lenders under the SCRA to resolve allegations that the lenders wrongfully foreclosed upon active duty servicemembers without first obtaining court orders, in violation of the SCRA. Combined, the settlements provide more than \$22 million in monetary relief for the victims.
  - BAC Home Loans Servicing LP, formerly known as Countrywide Home Loans Servicing LP, a subsidiary of Bank of America Corporation, agreed to

pay \$20 million to resolve a lawsuit alleging that Countrywide improperly foreclosed on approximately 160 servicemembers between January 2006 and May 2009, without court orders. In addition, Countrywide agreed to pay compensation to any servicemember wrongfully foreclosed in the period from June 2009 through 2010. The complaint alleges that Countrywide did not consistently check the military status of borrowers on whom it foreclosed through at least May 31, 2009.

- Saxon Mortgage Services Inc., a subsidiary of Morgan Stanley, agreed to pay \$2.35 million to resolve a lawsuit alleging that Saxon improperly foreclosed on approximately 17 servicemembers between January 2006 and June 2009, without court orders. In addition, Saxon agreed to pay compensation to any servicemember wrongfully foreclosed in the period from July 2009 through 2010. The complaint alleges that Saxon failed to consistently or accurately check the military status of borrowers on whom it foreclosed through at least June 30, 2009.

**D. Class Actions Alleging Violations of the SCRA**

In the wake of government settlements, service members filed several class actions against lenders alleging violations of the SCRA.

1. **Harry v. HSBC Mortgage Services, Inc., Case No. 12-cv-00990-SRN-JJK (D. Minn.)**
  - Plaintiff, on behalf of a proposed class of similarly situated servicemembers, alleged that defendant HSBC foreclosed on active duty servicemembers' mortgages without giving them an opportunity to seek a judicial stay of the proceedings.<sup>3</sup> Plaintiff also alleged that defendant's misconduct included the filing of false and improper affidavits as to the military status of the homeowners.
  - Defendant moved to compel arbitration, which the court granted on September 7, 2012. Plaintiff acknowledged that he was required to arbitrate so long as his mortgage was never transferred to Fannie Mae or Freddie Mac. Defendant provided an affidavit stating that it purchased the mortgage directly from the original mortgagee and that it was never transferred to Fannie Mae or Freddie Mac.
  - Case settled confidentially on January 17, 2013. Since the settlement is confidential, presumably it is not on a class-wide basis. *See* Dkt. No. 32 (noting that terms of settlement were stated on the record).

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<sup>3</sup> The proposed class excluded servicemembers who executed a valid written waiver of the rights and protections provided under SCRA (*see* 50 U.S.C. App. §517).

2. **Murphy v. Bank of America, 2:12cv2520 (D. Ala.)**

- Plaintiff alleged that defendant failed to apply the statutorily-mandated interest rate to his loan, that it improperly required him to regularly reaffirm his active military status to receive SCRA protections, that it violated the SCRA's anti-retaliation provisions by engaging in credit reporting activities contrary to the Act and by initiating a foreclosure.
- The court granted defendant's motion to dismiss for failure to state a claim on November 28, 2012. The court found that the plaintiff failed to state an SCRA claim for retaliation because he did not allege that defendant acted "because [plaintiff] applied for, or received, a stay under the SCRA." Conversely, the court noted that defendant had a valid and alternative reason for its actions in that plaintiff was seven months behind on his mortgage. The Court dismissed plaintiff's claims with respect to the statutory interest rate finding that it was undisputed that plaintiff's interest rate was a fixed-rate below the statutory rate.
- Plaintiffs filed a Notice of Appeal on January 3, 2013.

3. **Rodriguez v. CitiMortgage, Inc., Case No. 11-cv-04718 (S.D.N.Y.)**

- Court granted preliminary approval of settlement, January 16, 2013
  - Class consists of all current and former members of the United States Armed Forces with Eligible Loans whose real property securing the Eligible Loan was sold by Defendant at a completed foreclosure sale from January 1, 2006 through June 30, 2012, where: (i) the mortgage securing the loan on the property originated before the servicemember's military service; (ii) the sale occurred during the servicemember's period of active duty military service or within the applicable grace period, as defined and protected by the SCRA; and (iii) the sale occurred without prior court approval or a written waiver of the rights and protections provided by the SCRA, or without otherwise complying with Sections 533, 521 or any other mortgage foreclosure related provisions of the SCRA.
  - Each individual class member will be permitted to claim a monetary recovery of \$116,785, plus the amount of any lost equity in the foreclosed property, plus interest accrued on such lost equity calculated from the date of the foreclosure sale.
  - Class Counsel are permitted to request approval of attorneys' fees and costs in an amount not to exceed \$3,525,000.

4. **Rowles v. Chase Home Finance LLC, 10-1756-MBS (D. S.C.)**

- Plaintiffs claimed that Chase failed to properly reduce the interest rate for eligible loans, and foreclosed upon and negatively reported the creditworthiness of SCRA-protected borrowers. Plaintiffs further claimed that Chase subjected SCRA-protected borrowers to improper collection calls that were the result of Chase's failure to adequately apply SCRA protections. Plaintiffs sought actual, consequential, and punitive damages, in addition to injunctive and declaratory relief.
- Upon learning of the complaint, Chase conducted an internal investigation. Where that investigation revealed that a servicemember potentially did not receive the full protection afforded by the SCRA in connection with the servicing of a home loan since January 1, 2005, the servicemember has been issued a refund check. As of the time of settlement, refunds exceeding \$6,000,000 for approximately 6,000 loans had been issued. Chase has also corrected any negative credit reporting that occurred during a servicemember's period of SCRA protection. Chase also enhanced its SCRA compliance procedures and created programs to further assist servicemembers.
- The parties reached a settlement before a motion to dismiss was filed. The court granted final approval of settlement, January 10, 2012.
  - Class consists of borrowers whose mortgage loan, or secured home equity loan or home equity line of credit, was active and serviced by EMC, Washington Mutual, or Chase as of January 1, 2005, and who were sent or will be sent a refund from Chase in connection with its investigation of potential SCRA compliance breaches.
  - Settlement fund will provide a common fund of \$35 million and additional class benefits worth an estimated \$31 million.
  - The court approved attorneys' fees of \$8 million, and incentive payments of \$25,000 and \$10,000 to the class representatives.

V. **MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC. ("MERS")  
CLASS ACTIONS**

A. **What is MERS?**

- Each time a mortgage is sold from one bank to another, an assignment is prepared and recorded in the county land records. The assignment transfers all of the interests the original lender had under the mortgage to the new bank.

- MERS is a company that was created by the mortgage banking industry to simplify this process.
  - MERS maintains a database that tracks mortgages for its members as they are transferred from bank to bank.
  - In some mortgage transactions, the mortgage will designate MERS as the mortgagee (solely as a nominee for the lender).
  - In other cases, the loan may be assigned to MERS (solely as a nominee for the lender) at some point later in its life cycle after the loan closes.
  - MERS then tracks the transfers of the loan, acting as the nominee for each holder, eliminating the need for separate assignments when the loan is transferred.

**B. MERS’ Role in Foreclosures**

- Prior to 2011, in judicial foreclosure states MERS (solely as a nominee for the lender) was named as the plaintiff in foreclosure lawsuits filed by the lender.
- Prior to 2011, in non-judicial foreclosure states, MERS was named as the beneficiary (solely as a nominee for the lender), when the lender provided limited notice of the foreclosure, usually by mailing, publishing, and/or posting the notice.
- In 2011, MERS changed its rules so that foreclosures may no longer be filed in its name.

**C. Class Actions by Borrowers Concerning MERS**

Plaintiffs generally allege that MERS lacks standing to conduct foreclosures in its own name, that naming MERS as the mortgagee improperly splits the note and the mortgage, thus invalidating the mortgage, and that the MERS system is a fraudulent sham.

**1. *In re MERS Litigation, MDL Docket No. 09-2119-JAT (D. Ariz.)***

- The JPML transferred all allegations within the constituent actions that “the various participants in MERS formed a conspiracy to commit fraud and/or that security instruments are unenforceable or foreclosures are inappropriate due to MERS’ presence as a party” or that otherwise concerned the “formation and operation of MERS.”
- In an order dated October 3, 2011, the court dismissed, with prejudice, plaintiffs’ consolidated complaint and all 72 members cases.

- The court noted: “Fundamentally, all of Plaintiffs’ claims turn on their contention that naming MERS as a beneficiary on the deeds of trust, and the subsequent operation of the MERS system, splits the MERS deeds of trust from their promissory notes and renders these notes unsecured and unenforceable.”
- The court disagreed with plaintiffs that naming MERS as the beneficiary destroys the security and bars attempts at non-judicial foreclosure. The Court quoted *Cervantes v. Countrywide Home Loans*, No. 09-17364, 2011 U.S. App. LEXIS 18569, at \*20 (9th Cir. Sep. 7, 2011), for the proposition that “even granting that ‘MERS is a sham beneficiary and the note is split from the deed’” plaintiffs’ alleged conclusion that, ‘as a necessary consequence, no party has the power to foreclose’ does not hold.”
- The court also disagreed with plaintiffs’ contention that MERS’ assignments purported to transfer the promissory notes which MERS never possessed and could not assign and, thus, the assignments were null and void. Instead, the court found that, pursuant to the deeds of trust, MERS held legal title to the secured interests and was the beneficiary or lienholder of record, as the nominee or agent for plaintiffs’ lenders and the lenders’ successors and assigns – *i.e.*, MERS served as the beneficiary on plaintiffs deeds of trust, as the nominee or agent for any valid note holder.
- Plaintiffs in the member cases have filed a Joint Notice of Appeal to the Ninth Circuit, which is pending. *See* Court of Appeals Dkt. No. 11-17615.

## **VI. Lender Processing Services, Inc. “Robo-Signing” Class Action**

### **A. Nature of the Claims**

This is a proposed class action asserting claims for violations of the Ohio Consumer Sales Practices Act (“OCSPA”), and the federal Fair Debt Collection Practices Act (“FDCPA”) on behalf of Ohio homeowners who were: (a) defendants in foreclosure actions that were purportedly held by securitization trusts, and that were initiated and prosecuted by the defendants on behalf of parties that lacked legal standing to do so, and (b) who were damaged by the defendants’ abusive debt collection practices, including preparing, executing, and notarizing fraudulent court documents and assignments of mortgages and other property records that were used to initiate and prosecute such foreclosures (also known as “robo-signing”).

**B. The Defendants**

Plaintiffs have sued two categories of defendants for their respective roles in the alleged robo-signing:

**1. The LPS Defendants**

The first category is comprised of defendants LPS and its subsidiaries LPS Default Solutions and DocX, which are vendors or sub-servicers to the vast majority of national mortgage servicers and manage all default servicing for those servicers. LPS alone handles more than half of the nation's foreclosures.

**2. The Law Firm Defendants**

The second category is comprised of law firms that specialize in prosecuting a high volume of foreclosure cases, and are commonly known as "foreclosure mills." The law firm defendants entered into contracts with LPS called a "Network Agreement." The Network Agreement requires these law firms to pay quid pro quo consideration to LPS for referrals of foreclosure cases and other default related matters and allows LPS to exercise control of its network firms. These law firms were not only retained by defendant LPS, they were also supervised and directed by LPS, and used forged and fabricated documents created by or at the direction of LPS and/or its subsidiaries.

**C. The Plaintiffs' Allegations**

The plaintiffs' Second Amended Class Action Complaint, which is presently before the U.S. District Court for the Northern District of Ohio, alleges the following:

- In order to foreclose on a home in Ohio, a foreclosing entity must establish that it is the owner, holder, or nonholder with the rights of a holder, of the promissory note and the mortgage securing the debt at issue.
- In most cases, the original lender did not retain ownership of the loan, but instead sold the loan to another entity. Often the loan originator sold the loan to an aggregator, which in turn sold it to a sponsor, which pooled the loan with other loans, and in turn sold them to a depositor, which in turn sold them to a trust or a trustee to be held for the benefit of the trust. The trust issued and sold securities to raise money to pay for the loans. Where the securities earn income from repayment of loan notes secured by private homes, they are called "residential mortgage backed securities" ("RMBS"). Those loans not sold to the Federal National Mortgage Association ("Fannie Mae"), the Federal Home Loan Mortgage

Corporation (“Freddie Mac”), or another government entity are known as “private label” securitizations.

- These private-label securitizations of mortgages are governed by a series of contracts including Mortgage Loan Purchase Agreements (“MLPA”), Pooling and Servicing Agreements (“PSA”), Custodial Agreements and, in some cases, Trust Indentures between the depositors, servicers and the trusts (collectively, the “governing documents”).
- The vast majority of PSAs provide that in connection with the transfer and assignment of each mortgage loan, the depositor must deliver, within the specified cut-off date, to the trustee or trust custodian, the following documents:
  - the original note endorsed in blank, without recourse, with all intervening endorsements showing a complete chain of endorsement; and
  - the original mortgage or certified copy thereof evidencing its assignment to MERS.
- PSAs contain strict cut-off dates for the notes and corresponding mortgages to be delivered to the trust or its designated custodian. With limited exceptions, these deliveries are normally required to be made no later than 90 days after the closing of the trust. The strict cut-off date is designed to ensure that the trust will qualify for pass-through tax treatment (*i.e.*, the investors in the mortgage-backed securities pay the taxes rather than the trust), which is a material feature of mortgage-backed securities.
- However, in a large number of cases the notes and mortgages were neither timely delivered nor delivered in properly endorsed form to the trust, the trustee or its designated custodian.
- Plaintiffs contend that the failure timely and properly to deliver the notes and mortgages cannot be remedied retroactively. The trustees of the securitization trusts may not violate the terms of their appointment by waiving the material provisions of the PSAs. Accordingly, without timely and proper delivery of the subject notes and mortgages, the securitization trusts and their trustees do not lawfully own or hold the notes and mortgages, and can never own or hold such assets.
- Plaintiffs allege that the defendants knew that unless their clients owned or held both the note and the mortgage, they would not have standing to foreclose. They also knew that unless they fabricated and submitted documentation (typically note indorsements and mortgage assignments)

purporting to establish standing, they could not effect foreclosures on behalf of their clients.

- The Defendants have engaged in a widespread conspiracy to deceive the Ohio courts and borrowers by engaging in unfair and deceptive debt collection practices, including fabricating thousands of mortgage assignments and affidavits. These fraudulent documents purported to establish the required intervening note endorsements and transfers of the mortgages to the trusts, thereby giving the illusion of “standing”. If these transfers had actually occurred on the dates the documents were inasmuch as they were not made pursuant to the terms of the governing documents and the Trustees were not permitted to accept late and out of time assignments.
- Since 2006, the defendants have prepared and filed or caused to be filed these fabricated mortgage assignments and other mortgage documents with courts and county recorder of deed’s offices across the country, including in Ohio, and have produced them to borrowers across the nation, including in Ohio.
- The defendants have used these fabricated note indorsements, mortgage assignments and affidavits to conceal the fact that the trusts, which purport to hold the notes and mortgages, are missing critical documents, namely, properly endorsed notes and valid mortgage assignments that were supposed to have been delivered to the trusts within 90 days of the closing of the trust.
- Many of the Ohio homeowners who comprise the proposed class lacked the resources to discover on their own that the documents used in their foreclosures were forged and that the foreclosing parties lacked standing. Such homeowners have been wrongfully required to defend foreclosure actions and have incurred substantial legal fees and inflated foreclosure-related fees (including title search fees, property appraisal fees, and property inspection fees) charged by the foreclosing plaintiffs, who lacked the standing to institute the foreclosure proceedings.

**D. Relief Sought by Plaintiffs**

**1. Injunctive Relief**

Plaintiffs seek injunctive relief, including: (i) a judgment declaring that defendants’ practices constitute violations of the FDCPA and OCSPA; (ii) a judgment declaring that mortgage assignments executed after the cutoff date specified in the trusts’ governing documents are invalid; (iii) an order defendants to provide notice to homeowners and the Courts regarding forged and/or invalid mortgage assignments that were used in foreclosure proceedings against such homeowners; and (iv) an order requiring

defendants to provide an accounting of fees charged to homeowners in tainted foreclosure actions.

**2. Monetary Damages**

Plaintiffs seek an award of statutory damages under the FDCPA and OCSPA, as well as trebling of non-economic damages under the OCSPA and punitive damages under the OCSPA.