4-1-2015

A Standing Question: Mortgages, Assignment and Foreclosure

Eric A. Zacks
Wayne State University, ezacks@wayne.edu

Dustin A. Zacks
King, Nieves, & Zacks PLLC

A Standing Question: Mortgages, Assignment, and Foreclosure

Eric A. Zacks and Dustin A. Zacks*

"Banks are neither private attorneys general nor bounty hunters, armed with a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank's deed of trust."[1]

This Article examines the judicial treatment of mortgage assignments across various jurisdictions in the foreclosure context. Although some courts do permit debtors to challenge suspicious or problematic assignments, most have ignored such problems and denied standing to debtors attempting to assert assignment-based defenses. This is particularly surprising given the widespread and well-documented problems with foreclosure "robo-litigation," including backdated documents, fraudulent notarizations, and unauthorized signatures. Despite the abuse of process by foreclosing entities, courts have permitted foreclosures to continue unabated and, in some instances, have even precluded the possibility of discovery to debtors seeking to ensure that title and assignments are legally valid. Judicial ambivalence about formal compliance by mortgage assignors and assignees in the foreclosure context is somewhat ironic given most courts' routine enforcement of instruments against debtors who do not formally comply with all contractual terms. Current adjudicative approaches to mortgage assignment are seemingly disconnected from the devastating reality of the home mortgage crisis and its causes. Moreover, there are several rationales that would support a more robust enforcement of technical compliance with assignment procedures, including the need for procedural equity, title certainty, and public records integrity. Thus, as evidence exists that banks are still making many of the same problematic mistakes regarding transfer documentation, courts can perform an essential monitoring role as an important spur towards reform. Although it would not address all of the underlying causes of the housing crisis, an adjudicative approach that liberally permits challenges to mortgage assignments would encourage lenders and servicers to be more circumspect in their foreclosure processes.

---

* Eric A. Zacks is an Assistant Professor of Law at Wayne State University Law School. B A., University of Michigan, 1998; J.D., Harvard Law School, 2002 Dustin A. Zacks is a member of King, Nieves, & Zacks PLLC in West Palm Beach, Florida, B.A., University of Michigan, 2004; J.D., University of Michigan Law School, 2007. The authors are grateful to Weiling Chou for fantastic research assistance. Portions of this Article first appeared in the essay *Not a Party. Challenging Mortgage Assignments*, 59 ST. LOUIS U. L.J. 175 (2014)).

1 Miller v. Homecomings Fin., LLC, 881 F. Supp. 2d 825, 832 (S.D. Tex. 2012).

INTRODUCTION

Determining when to require strict and formal compliance with procedures or process when adjudicating substantive rights is, admittedly, a difficult problem. The procedures protecting contract or property rights can be administered conservatively or liberally, depending on the adjudicator's disposition or opinion regarding the proper substantive outcome. When important or even fundamental rights are involved, adjudicators, in their ostensibly neutral or impassive roles, should reasonably be expected to refrain from prejudging the merits of any such litigation. This may be particularly true in those instances when the ex ante transaction process, as well as the ex post enforcement process, was dominated by only one party.

This dilemma has played out in fantastic fashion during the mortgage foreclosure crisis. First, lenders and their originators were able to assign and transfer loans with few, if any, restrictions.[2] When the housing market crashed, mortgagees and their assignees, again utilizing the formal instruments of contract that dictate when a party has defaulted under an obligation, sought to foreclose upon the residential properties.[3] In the rush to originate and assign as many mortgages as possible, and in the face of an overwhelming volume of foreclosures to be processed, mortgagees and their assignees often failed to assign the mortgages properly and, in some instances, committed fraud or other unauthorized acts in order to correct the assignment paper trail.[4]

These are not merely hypothetical or isolated issues. The crash of the housing bubble brought countless documentation issues to light in the foreclosure context.[5] One such

2. Alan M. White, *Losing the Paper - Mortgage Assignments, Note Transfers and Consumer Protection*, 24 LOY. CONSUMER L. REV. 468, 486 (2012) (detailing the many methods for transferring notes and mortgages).

3. Nolan Robinson, *The Case Against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) to Initiate Foreclosure Proceedings*, 32 CARDOZO L. REV. 1621, 1623 (2011) ("One unfortunate byproduct of the subprime mortgage crisis has been a dramatic increase in the number of American homeowners facing foreclosure."); Ruth Simon, *Banks Ramp Up Foreclosures—Increase Poses Threat to Home Prices; Delinquent Borrowers Face New Scrutiny*, WALL ST J., Apr. 15, 2009, at A1 ("Some of the nation's largest mortgage companies are stepping up foreclosures on delinquent homeowners. That will likely lead to more Americans losing their homes just as the Obama administration's housing-rescue plan gets into gear. J.P. Morgan Chase &Co. [sic], Wells Fargo &Co. [sic], Fannie Mae and Freddie Mac all say they have increased foreclosure activity in recent weeks. Those companies say they have lifted internal moratoriums which temporarily halted foreclosures.").

4. *See generally* White, *supra* note 2, at 492 (detailing the questionable methods of assignment with respect to home mortgages).

5. *See, e.g.*, Dustin A. Zacks, *Robo-Litigation*, 60 CLEV. ST. L. REV. 867 (2013) (describing assignment problems caused by lenders, law firms, and their respective agents).

"lightning rod" for criticism was Mortgage Electronic Registration Systems, Inc. (MERS), the corporation utilized as a mechanism by which lenders and servicers were able to document loan transfers electronically and to produce assignments more easily while avoiding recording requirements.[6] Even law firms representing allegedly malfeasant lenders did not escape the foreclosure documentation problems unscathed.[7]

The oft-alleged documentation errors are not relevant solely to individual litigants and law firms, but to the housing market as a whole. The factory-like production of assignments assisted lenders in securitizing loans more easily and inexpensively, which ostensibly lowered mortgage costs and increased home ownership during the rise of the American real estate market in the 2000s.[8] These increased numbers of assignments mean that increased enforcement of formality in assignments, then, could potentially affect the housing market in a significant way through altering the foreclosure process on a large number of delinquent loans.

If a judicial system intends to treat debtors as being responsible for complying with the terms of the mortgage contract itself, it would be reasonable to expect that system to demand that the other parties to the contract abide by similar formalism. In somewhat counterintuitive fashion, however, courts have permitted mortgagees and their assignees to subvert, supplant, and circumvent the very formalities that they utilize to foreclose upon the debtors in the first place.[9] The legal system attempts to enforce loan contracts and the underlying mortgages against debtors in almost each instance, regardless of the predatory, subprime, complex, or hidden nature of the terms of the home loan.[10] The basis for this enforcement is that the debtor executed a formal instrument, and one of the basic rules of contract law is that the executing party will be bound by the contract that she executes even if she did not read it.[11] Regardless of how substantively unfair the home loan transaction may appear, classical and neo-classical contract law theory, as well as certain economic schools of thought, suggest enforcement is appropriate based on the "voluntariness" of the transaction.[12] Nevertheless, the concern for enforcement and formalism unexpectedly

---

6. Scot J. Paltrow, *Facing Criticism, MERS Cuts Role in Foreclosures*, REUTERS (July 27, 2011), http://www.reuters.com/article/2011/07/27/us-mers-foreclosure-idUSTRE76Q67L20110727

7. Zacks, *supra* note 5, at 867.

8. Robinson, *supra* note 3, at 1634 ("MERS's popularity among its members is not surprising, given that over ninety-five percent of residential mortgages are securitized. Mortgage industry leaders are quick to point out the system's benefits to both lenders and borrowers. As noted above, before MERS was created, the process of assigning a mortgage was burdensome and costly, as each assignment had to be individually drafted and recorded in the proper county clerk's office. Lenders incurred substantial transactional costs, which they passed on to their customers. By one account, these expenses added an extra thirty dollars to the price of the average residential mortgage transaction, and even more if mistakes were made.").

9 *See infra* Section III (discussing the challenges that debtors face in raising defenses to foreclosures).

10. *See infra* Section III (discussing the challenges debtors face in raising issues of fraud and voidability with respect to home loan contracts).

11. E. ALLAN FARNSWORTH, CONTRACTS § 4.26 (4th ed. 2004) ("A party that signs an agreement is regarded as manifesting assent to it and may not later complain about not having read or understood it, even if the agreement is on the other party's standard form").

12. Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 300 (1986) ("In sum, legal enforcement [of a contract] is morally justified because the promisor voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights."); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 9 (2004) ("[E]conomists in general and legal economists in particular have indeed applied dispositionist assumptions

melts away when it is the foreclosing party that has not complied with all of the formalities of the contracting process.[13]

Accordingly, this Article examines the judicial treatment of mortgage assignments across various jurisdictions in the foreclosure context. To date, courts have been unable to generate a cohesive framework for addressing deficiencies in assignments of mortgage-related documents.[14] Courts have adopted a variety of approaches, none of which appears to recognize the need for procedural fairness, title certainty, and public records integrity.[15] Although some courts do permit debtors to challenge suspicious or problematic assignments, most courts have ignored such problems and prevented debtors from ensuring and demanding contractual compliance.[16]

For example, many courts begin with the basic proposition that a third party cannot assert rights or defenses under a contract that belong to another party.[17] Accordingly, if a court views the contract assignment as a distinct contract between the assignee and the assignor, then the obligor under the original contract cannot complain about defects in the purported assignment.[18] The right to raise such complaints would belong to the assignor and, in the absence of such complaints, the assignee is free to enforce the contract against the obligor as if the assignee were the assignor.[19] In the mortgage assignment context, this has led many courts to conclude that debtors do not have any standing to raise questions about the validity of mortgage assignments, regardless of whether such assignments occurred prior to the commencement of the foreclosure proceedings.[20]

The basic problem in this approach, however, is that it assumes that the assignment is valid. It is not (as some have claimed) as though the debtor is demanding that the assignee prove that the assignment is valid; instead, the debtor herself is asking permission to

---

unflinchingly—that is, without the self-suspicion and rigorous inspection that social science would demand. . . . [B]ecause their dispositionist assumptions seem so intuitively plausible, and so fundamental to our sense of ourselves, that they are beyond question."); Elaine A. Welle, *Freedom of Contract and the Securities Laws: Opting Out of Securities Regulation by Private Agreement*, 56 WASH. & LEE L. REV. 519, 576 (1999) (observing that "[t]he classical ideal of 'freedom of contract' depends entirely on an obviously unrealistic model of contract formation where all transactions are negotiated by sophisticated, fully-informed parties of equal bargaining power, capable of protecting their own self-interests and of arriving at mutually beneficial agreements that will maximize utility for both parties. . . . Unfortunately, this model and its underlying assumptions do not reflect reality") (citation omitted).

13. *See infra* Section III (discussing difficulties debtors face raising defenses to enforcing a contract when title certainty, procedural fairness, or public records issues arise).

14. *See infra* Section III (discussing issues debtors face in voiding contracts where there are title deficiencies).

15. *Infra* Sections III and IV.

16. *See infra* Section III (discussing most courts' reluctance to allow such challenges during foreclosure proceedings).

17. *See, e.g.*, Livonia Prop. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC, 717 F. Supp. 2d 724, 735 (E.D. Mich. 2010) (noting that a party must generally "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties" (quoting Warth v. Seldin, 422 U.S. 490, 499 (1975))).

18. *See, e.g.*, RICHARD A. LORD, 29 WILLISTON ON CONTRACTS § 74:50 (4th ed. 2003) ("[T]he debtor has no legal defense [based on invalidity of the assignment] . . . for it cannot be assumed that the assignor is desirous of avoiding the assignment.").

19. *Livonia Prop. Holdings*, 717 F. Supp. 2d at 737.

20. *See id.* (holding that the borrower did not have standing to challenge whether the assignments were valid); *see infra* Part III (describing how a plaintiff can establish standing).

demonstrate that as a matter of law the assignment is not valid. It is not clear why a debtor, particularly one in the circumstances of being foreclosed upon, should not have the chance to prove assertions that a fundamental document permitting the foreclosure is invalid.

Some courts, of course, have recognized this problem and have sought to find a middle ground by distinguishing between void and voidable assignments.[21] Under this line of reasoning, a debtor would have standing to raise defenses that would demonstrate that an assignment was void and without legal effect.[22] Correspondingly, a debtor would not have standing to raise a defense voiding the assignment if the assignor would have to exercise the defense to void the assignment (i.e., that the assignment would be legally valid if the assignor did not decide to raise the voidable defense).[23]

The void versus voidable distinction has had appeal across a number of jurisdictions, but it has sometimes led to confusing and inconsistent results. For example, in some courts, an unauthorized signature on an assignment would render an assignment void, while in other courts it would merely render it voidable.[24] Similarly, some courts have held that a false signature does not render an assignment void while others have found that it does.[25] Based on their conclusions about void versus voidable defenses, courts then either permit or deny debtors the standing to raise such defenses in their foreclosure proceedings.

This approach has some significant drawbacks as well as the aforementioned inconsistencies. To a large extent, the distinction merely begs the question of what kind of assignment should be respected to permit an assignee to enforce the contract against the obligor. The principle that a void assignment, unlike a voidable assignment, should not be respected does not suggest how to make a sensible distinction between the two in the context of mortgage assignments. Many courts appear to conclude that there are many fewer defenses that render an assignment void as opposed to voidable, which leaves the system in much the same place as the basic approach outlined above of denying standing to debtors.

In similar fashion, some courts use a "chain of title" approach, wherein a debtor has standing to raise a defense if it could demonstrate that the assignee never had good legal

---

21. *See, e.g.*, Dernier v. Mortg. Network, Inc , 87 A.3d 465, 473 (Vt. 2013) ("While we have never so held, courts in other states have qualified this strong proposition in the case of assignment of debts, explaining that a debtor may challenge the assignment of his or her debt if it is void or entirely ineffective—even if that means allowing a 'stranger to a contract' to assert reasons related to the breach of that contract. They have been careful to emphasize, however, that this exception does not allow a debtor to challenge an assignment of the debt that is merely *voidable*.").

22. *Id* at 474.

23. *Id.*

24. Chhun v. Mortg. Elec. Registration Sys., Inc , 84 A.3d 419, 423 (R.I. 2014) (noting that plaintiffs "alleged that the one person who signed the mortgage assignment did not have the authority to do so. . . . These allegations, if proven, could establish that the mortgage was not validly assigned, and, therefore, Aurora did not have the authority to foreclose on the property"); *but see* Reinagel v. Deutsche Bank Nat'l Trust Co , 735 F.3d 220, 226 (5th Cir. 2013) ("[T]he Texas Supreme Court clarified that a contract executed on behalf of a corporation by a person fraudulently purporting to be a corporate officer is, like any other unauthorized contract, not void, but merely voidable at the election of the defrauded principal").

25. Mruk v. Mortg. Elec. Registration Sys., Inc., 82 A.3d 527, 537 (R.I. 2013) ("If correct [that, *inter alia*, the signature was false], any assignment of the mortgage and subsequent foreclosure would be invalid, ineffective, or void."); *but see* Davis v. Countrywide Home Loans, Inc., 1 F. Supp. 3d 638, 644 (S.D. Tex. 2014) (finding no standing for the debtor based on forgery allegations (on the part of the assignor's purported agent)).

title.[26] As with the void versus voidable distinction, the chain of title analysis turns on what kinds of defenses a court considers sufficient to impair legal title. Courts disagree whether a missing or defective assignment is sufficient, and different jurisdictions have different standards for determining chain of title as well.[27] The fact that MERS is utilized as the nominal mortgagee for many note holders also has led to conflicting opinions.[28] As with the other approaches above, many courts have found that very few types of defects impair title, and often courts severely restrict the type of evidence of that can be utilized or investigated by the debtor to contest title.[29]

More problematically, these approaches are plagued by the transparent (and often admitted) governmental motivation to clear backlogs of foreclosure cases as soon as possible for funding or political reasons.[30] As a result of this desire, the judicial approach often appears to be based on doing a preliminary assessment of whether the debtor is in fact delinquent in repaying the loan, and if so, denying many, if not all, procedural defenses or even the initial standing to raise such defenses. In this view, given that the foreclosure *should* happen in a particular instance (because the debtor is delinquent), and that the judiciary and other public officials have determined that foreclosure cases need to be handled expeditiously to reduce the backlog, judges apparently decide that it makes sense to permit the purported assignee to foreclose regardless of irregularities in the assignment process or chain of title.

For example, even courts that follow the general rule precluding third-party standing to challenge a contract seem to evaluate the merits of the complaint before finding a lack of standing to challenge assignments.[31] In some instances, debtors may lack standing where

---

26. *See, e.g.*, Ortiz v. Citimortgage, Inc., 954 F. Supp. 2d 581, 587 (S.D. Tex. 2013) (recognizing such a defense); Miller v. Homecomings Fin., LLC, 881 F. Supp. 2d 825, 832 (S.D. Tex. 2012) (same).

27 Woods v. Wells Fargo Bank, N.A., 733 F.3d 349, 354 (1st Cir. 2013) (debtor had standing to challenge because the debtor alleged "that MERS, as a mere 'nominee' for [the lender], never possessed a legally transferable interest in Woods's mortgage, rendering any attempted assignments void," but ultimately the court concluded that MERS did have such a legally transferrable interest); *Miller*, 881 F. Supp. 2d, at 832 (allowing challenges to chain of assignments through which a lender asserts the right to foreclose); *but see* Livonia Prop. Holdings v. Farmington Rd. Holdings, LLC, 717 F. Supp. 2d 724, 746–47 (E.D. Mich. 2010) (chain of title is established exclusively through review of public records).

28 *Woods*, 733 F.3d at 354 (concluding that MERS did have a recognizable legal interest in the mortgage to transfer); *but see* Bank of N.Y. v. Silverberg, 86 A.D.3d 274, 283 (2011) ("In sum, because MERS was never the lawful holder or assignee of the notes described and identified in the consolidation agreement, the corrected assignment of mortgage is a nullity, and MERS was without authority to assign the power to foreclose to the plaintiff. Consequently, the plaintiff failed to show that it had standing to foreclose."); *In re* Agard, 444 B.R. 231, 250 (Bankr. E.D.N.Y. 2011) (holding MERS was not a proper mortgagee, therefore, it could not legally assign mortgage).

29. *See infra* Part III (arguing that courts generally do not permit debtors to assert defenses relating to the validity of assignment of notes unless there are special circumstances).

30. *See, e.g.*, FORECLOSURE INITIATIVE WORKGROUP, FORECLOSURE BACKLOG REDUCTION PLAN FOR THE STATE COURTS SYSTEM, FLORIDA COURTS (Apr. 10, 2013), *available at* http://www.flcourts.org/core/fileparse.php/251/urlt/RecommendationsForeclosureInitiativeWorkgroup.pdf [hereinafter FORECLOSURE INITIATIVE WORKGROUP] (establishing proposals to assist in clearing a backlog of foreclosure cases, including actively propelling cases towards judgment).

31. *See* Rishoi v. Deutsche Bank Nat'l Trust Co., No. 13-1119, 2013 WL 6641237, at *6 (6th Cir. Dec. 17, 2013) ("Even when all of the Rishois' allegations on appeal are accepted as true, they cannot prevail. . . . The Rishois have made no showing of fraud, nor have they pleaded or proved prejudice resulting from any irregularity in the foreclosure proceedings as would warrant setting the sheriff's sale aside").

they fail to show "prejudice as a result of any lack of authority of the parties participating in the foreclosure process," especially when debtors "do not dispute that they are in default under the note."[32] Since the debtors are in default, there is skepticism about permitting the debtor to assert defense of the original lender (assignor), as "there is no reason to believe that . . . the original lender would have refrained from foreclosure in these circumstances."[33] This kind of previewing is not unique to homeowner claims regarding assignments; rather, this kind of judicial skepticism has been noted in the context of MERS' ability to foreclose in its own name as well.[34]

These largely deferential judicial approaches to mortgage assignees are particularly troubling given the widespread and well-documented problems with foreclosure "robo-litigation," including backdated documents, fraudulent notarizations, and unauthorized signatures.[35] Despite the abuse of process by mortgage assignees, courts have permitted foreclosures to continue unabated and, in some instances, may even foreclose the possibility of discovery to debtors seeking to avoid an improper foreclosure.[36] The lack of insistence on formal compliance by mortgage assignees in the foreclosure context is somewhat ironic given most courts' routine enforcement of instruments against debtors who do not comply in all technical respects with their loan agreements. Current adjudicative approaches to mortgage assignment are seemingly disconnected from the reality of the home mortgage crisis, its causes, and the abuses within the foreclosure process.

Moreover, there are several rationales that would suggest a more robust enforcement of technical compliance with assignment procedures, including the need for procedural equity, title certainty, and public records integrity. Thus, as ample evidence exists that banks are still making many of the same transfer documentation mistakes, courts can provide an important spur towards reform.[37] Although allowing such challenges may not provide a solution to the underlying causes of the housing crisis, the benefits of allowing such challenges provide a sound rationale for allowing challenges. Elsewhere in the real estate context, tenant protection statutes providing procedural protections evolved from judicial and legislative recognition of the need to protect the less sophisticated and weaker party.[38] Nevertheless, these same concerns are not necessarily considered by the judiciary

---

32. Siliga v. Mortg. Elec. Registration Sys., Inc, 161 Cal. Rptr. 3d 500, 508 (Cal. Ct. App. 2013).

33. *Id.*

34. Dustin A. Zacks, *Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures*, 29 QUINNIPIAC L. REV 551, 571 (2011) (In one case, "the court reasoned that the original lender would not have disbursed the loan funds if it had not assented to MERS being named as nominee on the related mortgage. Similarly, many courts will correctly assume that a lender or successor owner would not buy a MERS loan if it did not assent to MERS remaining its nominee with the associated rights to foreclose.").

35 *See generally* Zacks, *supra* note 5.

36 *See infra* Part III (describing how courts first look at if debtors have standing prior to determining the validity of debtors' claims regarding invalid assignments).

37. Elizabeth Renuart, *Property Title Trouble in Non-Judicial Foreclosure States: The Ibanez Time Bomb?*, 4 WM. & MARY BUS. L. REV. 111, 127 (2013) (suggesting that banks have not reformed their practices in the years after the robo-signing scandal).

38. Mary B. Spector, *Tenants' Rights, Procedural Wrongs: The Summary Eviction and the Need for Reform*, 46 WAYNE L. REV. 135, 165 ("During the last half of the twentieth century, courts and legislatures greatly expanded the scope of tenants' rights by imposing numerous new obligations on landlords, during the term of the lease, that were unknown at common law.").

in their foreclosure decisions, which can result in the loss of an individual's domicile.[39] Similarly, shoddy documentation has led to title concerns, yet faulty title implications are often downplayed by courts.[40] Finally, scholars have argued that faulty assignments have contributed to the undemocratic downgrading of public records integrity.[41] In this view, accurate public records are a public right implicating transparency and accuracy requirements that have been democratically enacted.[42] Allowing faulty assignments to be recorded and enforced, unchallenged, may eliminate the courts as a functional monitor enforcing public records accuracy and transparency.[43]

This Article proceeds as follows: Part II examines how contract assignments are relevant in the foreclosure process as well as different abuses or errors in the mortgage assignment process. Part III examines different adjudicative approaches to problematic or defective assignments and critiques the deference courts have shown to suspicious assignment procedures in the name of easing backlogged foreclosure dockets. Part IV explains the repercussions arising from such judicial treatment and makes a normative case for a more liberal standing recognition for debtors challenging mortgage assignments. Part V concludes by offering alternative approaches to examining assignments that respect the contract rights of both mortgage holders or assignees and the mortgagor.

II. ASSIGNMENTS AND MORTGAGES

Aside from notes and mortgages themselves, perhaps no agreement is as pivotal to the modern foreclosure process as the written assignment. Mortgage originators have used assignments to transfer title and the rights to enforce notes and mortgages.[44] As a result of the assignability of these instruments and agreements and of the newly emergent MERS, lenders were able to securitize loans more easily and inexpensively, which ostensibly lowered mortgage costs and increased home ownership during the rise of the American

---

39. Stephanie Armour, *Foreclosures Take an Emotional Toll on Many Homeowners*, USA TODAY (May 16, 2008), *available at* http://usatoday30.usatoday.com/money/economy/housing/2008-05-14-mortgage-foreclosures-mental-health_N.htm?csp=99 ("People tend to catastrophize, and that leads to depression. Suicide rates go up. We see an increase in drinking, outbursts at work, violence toward kids."); Aleatra P. Williams, *Real Estate Market Meltdown, Foreclosures and Tenants' Rights*, 43 IND. L. REV. 1185, 1190 (2010) ("Scholars have described security of tenure as 'a critically important human need.' [citation omitted]. Tenants vested with security of tenure have certain benefits, such as a sense of community and roots.").

40 White, *supra* note 2, at 496; Siliga v. Mortg. Elec. Registration Sys. Inc., 161 Cal. Rptr. 3d 500, 508 (Cal. Ct. App. 2013) (downplaying the risk of an improper assignment where the debtors have admitted to defaulting on the underlying loan).

41 *See, e g.*, Christopher Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359 (2010) (discussing the history and issues of the MERS system); Dustin A. Zacks, *Revenge of the Clerks: MERS Confronts County Clerk and* Qui Tam *Lawsuits*, BANKING & FIN. SERV. POL'Y REP. 32:1 (Jan. 2013) (describing challenges to the MERS system).

42 *See* Peterson, *supra* note 41, at 1397 (analyzing the legislative goals behind MERS).

43 White, *supra* note 2, at 495–96 (describing title problems that arise due to the validity of mortgage satisfactions); Peterson, *supra* note 41, at 1405 (describing title issues that can arise from MERS involvement in the mortgage assignment process).

44. White, *supra* note 2, at 471 ("Most mortgage loans made between 1990 and 2007 were sold on the secondary market, and then ultimately resold to securities investors through a process known as securitization. As a result, the bank or mortgage company to whom the homeowner originally promised to make payments had to assign its rights in the Note, which is the contract promising payment, and the Mortgage, which is the conveyance of an interest in real estate as security for the loan.").

real estate market in the 2000s.[45] Of course, hindsight has led many to question if lenders overlooked the creditworthiness of borrowers in the rush to originate loans for securitization or if those loans were based on properties being systematically overvalued.[46] Much like the securitization process itself, the foreclosure process often relies on the assignability and assignments of mortgages.[47]

A mortgage is generally construed under the rules of construction applicable to contracts; accordingly, this Section addresses the basic contract law treatment of assignability and assignment of contracts.[48] A contract right is generally understood and accepted as being freely assignable.[49] These rights could include all rights of the assignor under the contract, including the right to receive the benefits of the obligor's performance as well as the ability to seek damages if the obligor fails to perform. In the context of most mortgages, the mortgagor has granted a security interest in the real property to the mortgagee, which security interest is intended to secure the mortgagee's payment or performance obligations under a promissory note. The obligations of the mortgagor as well as the rights of the mortgagee under the mortgage, including with respect to foreclosing upon that security interest, would thereby be expected to be assignable. Accordingly, under state law, there generally is nothing impermissible with a mortgage originator assigning its rights with respect to the mortgage or other agreements.[50]

Moreover, even if the default or presumption were against assignability, most lender-originated documents, including notes and mortgages, expressly permit the lender to assign its rights under the agreements to third parties.[51] Given the importance of the ability to assign such loans, particularly in the era of securitization, it would be important for loan

---

45. Robinson, *supra* note 3, at 1622 ("As the market for mortgage-backed securities grew, mortgage lenders and investment banks sought to make the transfer of residential mortgages cheaper and easier, and so MERS was born.").

46 *Former Citigroup CEO's Subprime Folly Cost $120B, Investors Say*, 14 No.10 ANDREWS DERIVATIVES LITIG. REP. 9 at *1 (Mar. 31, 2008) ("During the housing market boom, many lenders gave out billions of dollars in mortgages to borrowers with shaky credit or overvalued homes and issued securities called 'collateralized debt obligations' and 'structured investment vehicles' that were tied to the value of the subprime loans.").

47. White, *supra* note 2, at 472 ("If a homeowner defaults on a mortgage loan, the party that purchased the rights to the loan will want to enforce the mortgage by foreclosure, to obtain valid title to the home and to sell it. Purchasers of the foreclosed home likewise will expect that the party foreclosing and selling the house had the legal right to do so and that the resulting title is valid and not subject to later challenges. Invalid transfers of the mortgage or note may or may not impair the validity of title, depending on various rules that balance policies of accuracy and integrity against policies of finality and certainty."); David E Peterson, *Cracking the Mortgage Assignment Shell Game*, 85 FLA. B.J. 10, 14 (Nov. 2011) ("It should come as no surprise that the holder of the promissory note has standing to maintain a foreclosure action. Further, an agent for the holder can sue to foreclose. The holder of a collateral assignment has sufficient standing to foreclose.")

48. 5 BANKING LAW § 120.02 ("Construction of a mortgage is governed by the same rules of interpretation applicable to contracts generally . . . .").

49 RESTATEMENT (SECOND) OF CONTRACTS § 317(2) (providing that "[a] contractual right can be assigned" except in a few instances); ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 870 (1952) ("The effectiveness of an assignment does not depend on the assent of the obligor.").

50 *See generally* Peterson, *supra* note 47 (describing the multiple ways to assign a mortgage under various laws).

51 *See, e.g.*, Form 3023, Michigan Single Family Uniform Instrument, FANNIE MAE (2001), *available at* https://www fanniemae.com/singlefamily/security-instruments (Section 20 states: "The Note or a partial interest in the Note (together with this Security Instrument) can be sold one or more times without prior notice to Borrower.").

originators to secure this contract right. Accordingly, each time a loan is sold, an assignment contemplating the transfer may be executed.

In addition, notes and mortgages often allow for MERS to be deemed the mortgagee as the nominee for the lender and its eventual successors or assigns.[52] In effect, this translates to homeowners assenting not only to loan and mortgage transfers, but also to consenting to MERS remaining the mortgagee no matter how many times the loan is transferred.[53] This consent arguably eliminated the need to produce and record many assignments that otherwise would have previously been required upon each transfer, rendering securitization easier and less expensive in time and costs.[54]

In both MERS and non-MERS mortgages, assignments may be produced in a number of circumstances. First, as described above, a simple sale of the loan may result in a mortgage assignment being produced and recorded, either at the time of the transfer or later. Second, in the case of MERS loans, MERS will assign the mortgage out of its name and into the name of the eventual foreclosing entity.[55] Finally, assignments may be produced in conjunction with the requirements of pooling and servicing agreements governing residential mortgage-backed securities.[56] When confronting these assignments in courts, litigants and judges often disregard their importance.[57] Yet in many cases, beyond the notes and mortgages themselves, assignments will be the key piece of evidence proving or disproving a bank or servicer's right to sue upon a defaulted loan.

Purported assignments may be suspect or doubtful for a number of reasons. First, loans may have been assigned in a tardy fashion, meaning that the effective date of the assignment was after the date a foreclosure action was initiated or otherwise not in compliance with the timelines required by the terms of pooling and servicing agreements.[58] Either of these failures can have severe implications for the foreclosing entity. In some cases, the failure of the entity to show that it acquired the loan before the inception of foreclosure proceedings can prove fatal to proving standing to foreclose.[59] As such,

---

52. Robinson, *supra* note 3, at 1622–23 ("[T]he lender names MERS as mortgagee, but 'solely as nominee'—meaning only as an agent—for the lender, and for the lender's 'successors and assigns ' If the lender subsequently assigns the mortgage to another MERS member, the assignment need not be recorded because the new owner is among the original lender's 'successors and assigns.'").

53 For a comprehensive description of the development and basic tenets of the MERS pathway, see generally Peterson, *supra* note 41 (outlining the creation of the MERS pathway as a response to the subprime mortgage crisis); Zacks, *supra* note 34 (providing a detailed analysis of the history and role of MERS).

54. Zacks, *supra* note 34, at 555 ("Recording a mortgage in the name of MERS as nominee for the lender and its assigns means that lenders do not have to deal with the lengthy, error-prone, and expensive process of drafting and recording assignments every time the underlying ownership of the mortgage changes. Regardless of how many times the underlying ownership in the loan is transferred, MERS remains the mortgagee of record.").

55. *Id.* at 551 ("MERS's name is also brought into [foreclosure] actions when an assignment of a mortgage is produced from MERS to the foreclosing or moving entity."); White, *supra* note 2, at 486–87 ("[T]here seems to be a general practice among foreclosure attorneys to record a mortgage assignment from MERS to the party bringing the foreclosure action, shortly before or after filing the foreclosure . . . .").

56. *Id.* at 594 n.232.

57. *Id.* at 582–83 ("The mere fact that the foreclosing bank or servicer now has possession of an alleged original note is enough for many courts to ignore the finer distinctions of MERS assignments.").

58. Bradley T. Borden & David J. Reiss, *Dirt Lawyers, Dirty REMICs*, 27 PROB. & PROP. (May/June 2013), *available at* http://www.americanbar.org/publications/probate_property_magazine_2012/2013/may_june_2013/article_borden_reiss_dirt_lawyers_and_dirty_remics.html.

59. *See, e.g.*, McLean v. JPMorgan Chase Bank, N.A., 79 So. 3d 170, 173 (Fla. Dist. Ct. App. 2012) ("[A] party's standing is determined at the time the lawsuit was filed.").

homeowners' attorneys may attack assignments that post-date foreclosure proceedings to argue that the assignee cannot prove standing.[60] While assignees may eventually be able to refile or reinstitute proceedings dismissed on such a basis, the cost of extending the foreclosure process is an expensive externality of assignments that post-date foreclosure filings.[61]

A related challenge concerning timing of assignments implicates the securitization process. In some cases, delinquent borrowers can argue that a pooling and servicing agreement itself cannot effectively replace a valid assignment as proof that a particular loan is owned by a securitized trust.[62] In other cases, borrowers may argue that an assignment that post-dates a trust's "closing date" (the date after which a trust may not accept new loans into the trust in order to avoid tax implications) is invalid or ineffective, given the terms of the trust's governing pooling and servicing agreement.[63] Although few such arguments appear capable of ultimately preventing foreclosure, the potential liability and cost of potential dismissals or defeated foreclosures remains, and the faulty timing and documentation of securitization has opened lenders up to massive investor lawsuits alleging negligent securitization processes.[64]

"Robo-signing" has also occurred in the assignment context.[65] To date, scholars have typically only considered robo-signing as it pertains to sworn affidavits submitted to courts in foreclosure cases.[66] Scholars have cited these affidavits because the affiants failed to view any documentation before signing affidavits containing factual allegations, referred to incomplete or incorrect payment histories, permitted other persons to sign their names to affidavits, or failed to adhere to notarization requirements.[67] But others have asserted similar challenges in the context of assignments as well.[68] In one notable case, attorneys from the Florida State Attorney General's office alleged that in some instances, the individuals who executed particular assignments may not have had authority to execute assignments, may not have actually signed the assignments themselves, or may have

60. *See, e.g* , Jeff-Ray Corp. v. Jacobson, 566 So. 2d 885, 886 (Fla. Dist. Ct. App. 1990) ("When the alleged assignment was finally produced, it was dated . . . some four months after the lawsuit was filed . . . . [A]ppellees' complaint could not have stated a cause of action . . . based on a document that did not exist some four months later." (emphasis omitted)).

61. Dustin A. Zacks, *The Grand Bargain: Pro-Borrower Responses to the Housing Crisis and Implications for Future Lending*, 57 LOYOLA L. REV. 541, 567 (2011) (noting that "such cost increases are verifiable and not insubstantial")

62. Renuart, *supra* note 39, at 136 (discussing cases where "the PSA [pooling and servicing agreement] failed to describe adequately the specific mortgage loans specified in the deal" and as a result "the foreclosure sales by the trustee bank were not lawful").

63. *See, e.g.*, Roy D. Oppenheim & Jacquelyn K. Trask-Rahn, *Deconstructing the Black Magic of Securitized Trusts*, 41 STETSON L. REV. 745, 757 (2012) ("[M]ortgage[s must] be transferred to the trust within a certain time frame . . . . After such time, the trust and any subsequent transfers are invalid.").

64. Borden & Reiss, *supra* note 58.

65. FLORIDA STATE ATT'Y GEN. REPORT, UNFAIR, DECEPTIVE AND UNCONSCIONABLE ACTS IN FORECLOSURE CASES (2011), *available at* http://www.scribd.com/doc/46278738/Florida-Attorney-General-Fraudclosure-Report-Unfair-Deceptive-and-Unconscionable-Acts-in-Foreclosure-Cases.

66. *See, e.g.*, Raymond H. Brescia, *Leverage: State Enforcement Actions in the Wake of the Robo-Sign Scandal*, 64 ME. L. REV. 17 (2011) (analyzing the robo-signing scandal in the context of several foreclosure cases).

67. *Id* at 26.

68. FLORIDA STATE ATTN'Y GEN. REPORT, *supra* note 65.

simply signed the assignments without having any knowledge of what they were signing.[69]

The Florida State Attorney General's report exemplifies such challenges through an explication of one particularly notorious assignment-signer, Linda Green, whose signature appears on "hundreds of thousands of mortgage assignments."[70] Ms. Green was apparently appointed to sign assignments on behalf of dozens of companies.[71] Her signature's appearance varies widely from assignment to assignment.[72] In a national television interview, Ms. Green asserted that she was appointed as a vice president for so many banks because "her name was short and easy to spell."[73] Concerns regarding robo-signing in the assignment context are therefore significant, even if not as notorious in the popular press as challenges to foreclosure affidavits.

Aside from what may be procedural or technical errors or faults, there are questions about the substance of the transfers assignments purport to represent. For example, the Florida Attorney General Report highlights instances of assignees improperly named or documented with unlikely effective dates far in the future such as "9/9/9999."[74] Questionable assignments have appeared in cases where the assignee also signed as the assignor, in cases where multiple assignments conflict with one another, and in cases where assignments were not executed.[75] Accordingly, not merely formalities or dates of transfer may cause minor problems to foreclosing entities; rather, some assignments may not assign to anyone, or may not have an effective date that is supported in fact.

The development of the MERS system has also generated novel challenges to assignments. First, some advocates have challenged assignments on the basis that MERS signed as nominee of the original lender, long after that original lender became defunct.[76] Second, MERS registry's listing of who the investor is on a given loan does not always match the entity foreclosing in court, giving rise to obvious questions about the veracity of any corresponding MERS assignment.[77]

In addition, some have challenged the MERS appointment system, in which servicers or other subscribers to the MERS system, including law firms, can appoint their own

---

69. *See* Gregg H. Mosson, *Robosigning Foreclosures: How It Violates Law, Must Be Stopped, and Why Mortgage Law Reform Is Needed to Ensure the Certainty and Values of Real Property*, 40 W. ST. U. L. REV 31, 41 (2012) ("Robosigning is most completely constituted in four phenomena: (1) a conspiracy to mass-manufacture documents; (2) often accompanied by sworn affidavits signed under false pretense, and falsely verifying the documents as genuine and supported by the signer's review of their factual grounds; (3) to create the appearance of procedural compliance as a condition precedent to enforcing a legal right; (4) and then attorneys submit these falsifications to courts to hasten and win judgments for their own and clients' benefit").

70. FLORIDA STATE ATTN'Y GEN. REPORT, *supra* note 65.

71. *Id.*

72. *Id.*

73. Shira Ovide, *Watch '60 Minutes' Take on Foreclosure Crisis*, WALL ST. J. DEAL JOURNAL BLOG, (Apr. 4, 2011), *available at* http://blogs.wsj.com/deals/2011/04/04/watch-60-minutes-take-on-foreclosure-crisis/).

74. FLORIDA STATE ATTN'Y GEN. REPORT, *supra* note 65 (highlighting questionable assignments, including one where the assignee was named as "BOGUS ASSIGNEE FOR INTERVENING ASMTS").

75. *See generally* White, *supra* note 2 (detailing questionable assignment practices).

76. *See* Zacks, *supra* note 34, at 553 ("In the public records, MERS remains the mortgagee or beneficiary for the life of the loan, regardless of how many times the original lender transfers the underlying interest . . . . This informational disparity created by MERS means that, for example, homeowners cannot look to the public records to determine who currently owns the beneficial interest in their loan, as they could before the ascendancy of MERS.").

77. White, *supra* note 2, at 487.

employees as officers of MERS for the purpose of executing assignments.[78] This unique system has led to various bank witnesses admitting that they have little, if any, knowledge of MERS or of what interests in loans, if any, MERS possessed before or after assignment.[79] MERS also has admitted that it does not receive consideration for assignments, yet such assignments routinely list a nominal sum.[80] Finally, some MERS assignments state that they transfer the mortgage together with the note, yet MERS has admitted that such language is without meaning, as MERS never has an interest in promissory notes to transfer.[81]

Thus, when the purported transferee or its agent attempts to foreclose upon the subject property under the mortgage, the debtor may raise a number of defenses that essentially stem from a title issue, specifically, whether the transferee has valid title to the contract such that it may be permitted to exercise the foreclosure remedy specified in the contract. Moreover, even prior to the defenses being raised, the debtor may request discovery with respect to these assignment issues so that it may determine whether any such defenses are available. It may be intuitive that the party purporting to exercise a particular right (the foreclosure rights afforded to it under the contract) should be forced to prove that it has valid title to such right (in this instance, that the assignment of an admittedly valid contract was valid).

For example, an individual would generally be permitted to assert a lack of title or possessory interest (and to seek discovery on the issue) against a party that is seeking to assert a trespassing claim against her arising from her incursion into a particular piece of real property.[82] Even in the contract world, one would expect to be able to raise an issue of proof (and to seek discovery on the issue) with respect to the rights that another party is asserting have been exercised. For example, if a contract party asserted that it has properly exercised a particular option in a contract (e.g., an option to terminate the contract), the other party would be permitted in court to challenge and seek discovery regarding whether the option was properly exercised in accordance with the terms of the contract.[83] In this light, assignment and assignability is simply a permission option under the terms of the contract, one perhaps of many options permitted thereunder. Whether such option was actually exercised would seem to be a properly contestable issue in the litigation context. Of course, with respect to assignments, the challenge will be made against the assignee (not the original party to the contract), but it is not immediately apparent why the rights under the contract should be any less contestable because there is a purported successor-

78. *Id.* at 488.

79. Zacks, *supra* note 34, at 588.

80. *Id.*

81. MERS' Statement Explaining the Nature of Its Business and Providing a Status Report on Its Case Audits at n. 20, *In re* Cartier, Case No. 04-15754 (Bankr. N.D. Ohio June 12, 2008).

82. DAVID A. THOMPSON, THOMPSON ON REAL PROPERTY § 68.06 (Thomas ed., 2013) ("Not only could such a defendant not make an unauthorized entry on property owned by the defendant (except in certain landlord/tenant situations), but a plaintiff without ownership or right of possession of that land would not have the right to bring such a trespass action. For this defense, however, it is required that the defendant affirmatively establish title rather than merely show weaknesses in the plaintiff's title.").

83 *See, e.g.*, Marens v. Carrabba's Italian Grill, Inc., 196 F.R.D. 35, 41 (D. Md. 2000) (allowing plaintiff to seek discovery of "documents relating to defendant's exercise of an option to purchase an interest in the defendant . . . limited partnership," albeit in a more reasonable alternative method of discovery than originally requested).

in-interest.[84] Nevertheless, state courts use a number of approaches to address the assignment issue with respect to mortgages and related agreements, many of which favor the assignor and assignee and prevent the debtor from asserting defenses or even seeking discovery relating the validity of the assignment.

III. JUDICIAL TREATMENT OF MORTGAGE ASSIGNMENTS

A. Standing: A General Absence

When debtors raise the defense of an improper assignment, courts typically begin by examining whether the debtor has standing to assert such a defense. It is generally understood that third parties generally cannot assert rights or defenses under another's contract.[85] The obligor under the contract may be entitled to raise particular defenses to the extent that such defenses arise under the contract itself, but the obligor may not object to the assignment of the contract because the obligor is *not* a party to the assignment contract.[86] This does not apparently deprive the obligor of any rights because the obligor still retains all of the original defenses it had under the original contract.[87] The assignment, however, does not increase the obligor's number of defenses simply because the assignor chose to assign the contract.[88]

---

84. Zacks, *supra* note 34, at 562 (finding that, in the cases analyzed, "MERS rarely, if ever, plead holder in due course status"). This is particularly so because so few foreclosing entities are apparently availing themselves of suing in the capacity of Holder in Due Course, which would allow successors immunity from claims against the original lender.

85. *See* Livonia Property Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, LLC, 717 F. Supp. 2d 724, 737 (E.D. Mich. 2010) (holding that a "litigant who is not a party to an assignment lacks standing to challenge that assignment").

86. *See, e.g.*, LORD, *supra* note 18, at § 74:50 ("[T]he debtor has no legal defense [based on invalidity of the assignment] . . . for it cannot be assumed that the assignor is desirous of avoiding the assignment "); Pagosa Oil & Gas, LLC v. Marrs & Smith P'ship, 323 S.W.3d 203, 212 (Tex. App. 2010) (finding lessor lacked standing to challenge assignment of lessee's breach of lease action because lessor was not party or third-party beneficiary to assignment contract); Woods v. Ayres, 39 Mich. 345, 347 (1878) (holding that, where the parties to an assignment act in accordance with the assignment, and there is no evidence that either party to the assignment objects so as to create a hostile title, a third party to the assignment cannot challenge its validity).

87. 7 SUMMARY OF PENNSYLVANIA JURISPRUDENCE § 14:30 (2d ed. 2007) ("By the assignment of a contract, the debtor cannot be deprived of any legal or equitable defenses that subsist in the contract, unless the assignment provides that the debtor is precluded from asserting against the assignee any defense that the debtor may have or acquire."); LORD, *supra* note 18, at § 74:56 ("[T]he assignee steps into the shoes of the assignor, and, unless the transaction is a commercial transaction in which the account debtor has agreed in advance by way of an enforceable waiver of defense clause, not to assert any claim or defense it may have against the assignor as against the assignee, the assignee will be subject to claims, claims in recoupment, and defenses of the account debtor."); B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, Ch. 1 § 735 (4th ed. 2005) ("The assignment merely transfers the interest of the assignor. The assignee 'stands in the shoes' of the assignor, taking his or her rights and remedies, subject to *any defenses* that the *obligor* has against the assignor prior to notice of the assignment.")

88. *See, e.g.*, Glass v. Carpenter, 330 S.W.2d 530, 537 (Tex. Civ. App. 1959) ("In a suit by the assignee on a claim against the obligor, the defense that the assignee occupied a fiduciary relationship to the assignor cannot be urged by the obligor, nor can the defense of lack of consideration for the assignment be urged by the obligor in a suit on the assigned claim.") (internal citations omitted); RESTATEMENT (FIRST) OF CONTRACTS § 167 (1932) ("An assignee's right against the obligor is subject to all limitations of the obligee's right, to all absolute and temporary defenses thereto, and to all set-offs and counterclaims of the obligor which would have been available against the obligee had there been no assignment, provided that such defenses and set-offs are based on facts existing at the time of the assignment, or are based on facts arising thereafter prior to knowledge of the assignment

Using this line of reasoning, courts have been generally reluctant to permit debtors to assert defenses relating to the validity of an assignment of a note or mortgage absent special circumstances. For example, Michigan courts have held that a contract party "may not challenge the validity of assignments to which it was not a party or third-party beneficiary, where it has not been prejudiced, and the parties to the assignments do not dispute (and in fact affirm) their validity."[89] This theory is based on a "prudential limitation" on standing that a party must generally "assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[90] A mortgagor's interest is in avoiding foreclosure, whereas the assignment only touches on to *whom* the mortgagor is obligated, not *whether* the mortgagor owes the obligation.[91] Therefore, the mortgagor cannot step into the shoes of the mortgagee to assert the mortgagee's rights.[92]

---

by the obligor.").

89. *Livonia Property Holdings*, 717 F. Supp. 2d at 737; *see also* Maraulo v. CitiMortgage, Inc., No. 12-CV-10250, 2013 WL 530944 (E.D. Mich. Feb. 11, 2013) (holding that Plaintiffs do not have standing to challenge assignment especially "[g]iven that the assignor does not exist, Plaintiffs are not at any risk of paying the same claim twice, and have never alleged that they are at risk of such double payment."). Other jurisdictions have followed substantially similar approaches. *See, e.g.*, Silving v. Wells Fargo Bank, N.A., No. CV 11-0676-PHX-DGC, 2012 WL 135989 (D. Ariz. Jan. 18, 2012) (dismissing the case for lack of standing because "Plaintiffs have alleged no facts to show they suffered a concrete and particularized injury from the Substitution that allowed First American, rather than MERS, to initiate foreclosure. Nor have Plaintiffs alleged facts to show that MERS, as the principal party to the Substitution, has sought to have it voided for lack of authorization."), *aff'd sub nom.* Silving v. America's Servicing Co., 552 F. App'x 684, 685 (9th Cir. 2014); Lizza v. Deutsche Bank Nat'l Trust Co., No. CIV. 13-00190 HG-BMK, 2014 WL 794752 (D. Haw. Feb. 27, 2014) (holding Plaintiffs lack standing because "Hawaii's foreclosure law, like Michigan law, does not permit mortgagor-plaintiff standing to challenge an assignment. Courts interpreting Hawaii law have only permitted a plaintiff-mortgagor to challenge an assignment that was made by an entity that no longer existed at the time of the assignment, as such an assignment would be void"); Brown v. Fed. Nat'l Mortgage Ass'n, No. 2:13-CV-02107-JTF, 2013 WL 4500569 (W.D. Tenn. Aug. 19, 2013) (holding that Plaintiffs lack standing because "Plaintiff's myriad of arguments regarding the validity of the assignments never allege that his duties have altered or that he may risk double liability. In fact, it is not clear from the Complaint what detrimental effect any of the assignments allegedly would have upon Plaintiff.").

90. *Livonia Property Holdings*, 717 F. Supp. 2d at 735. *See also* Lansing Sch. Educ. Ass'n v Lansing Bd. of Educ., 487 Mich. 349, 378 (2010) (discussing Michigan's long-standing prudential approach); HSBC Bank USA, NA v. Young, No. 313212, 2014 WL 3529418, at *3 (Mich. Ct. App. July 15, 2014) (holding that debtor lacked standing when she failed to redeem within redemption period: "once the six-month redemption period expires without the mortgagor having exercised her right to redeem, all of the mortgagor's 'right[s], title, and interest' in and to the property are extinguished."); Gregory v. Shurtleff, 299 P.3d 1098, 1106 (Utah 2013) (noting that Utah follows Michigan's prudential approach; "The same is true of Utah's constitution and jurisprudence.").

91. Ifert v. Miller, 138 B.R. 159, 166 (Bankr. E.D. Pa. 1992) (applying Texas law) ("[The underlying contract] is between [Obligor] and [Assignor]. [Assignor's] assignment contract is between [Assignor] and [Assignee]. The two contracts are completely separate from one another. As a result of the assignment contract, [Obligor's] rights and duties under the [underlying] contract remain the same: The only change is *to whom* those duties are owed. . . . [Obligor] was not a party to [the assignment], nor has an cognizable interest in it. Therefore, [Obligor] has no right to step into [Assignor's] shoes to raise [its] contract rights against [Assignee]. [Obligor] has no more right than a complete stranger to raise [Assignor's] rights under the assignment contract").

92. Liu v. T & H Mach., Inc., 191 F.3d 790, 797 (7th Cir. 1999) (determining that a party to an underlying contract lacks standing to "attack any problems with the reassignment" of that contract); Blackford v. Westchester Fire Ins. Co., 101 F. 90, 91 (8th Cir. 1900) ("As long as no creditor of the assignor questions the validity of the assignment, a debtor of the assignor cannot do so."); LORD, *supra* note 18, at § 74:50 ("[T]he debtor has no legal defense [based on invalidity of the assignment] . . for it cannot be assumed that the assignee is desirous of avoiding the assignment."); Popov v. Deutsche Bank Nat'l Trust Co., No. 1:12-CV-00170-DCN, 2012 WL 5364301, at *3 (N.D. Ohio Oct. 30, 2012) ("In the instant case, the only party challenging the assignment of the mortgage is the Plaintiff, Paul Popov. As the Plaintiff is not a party to the assignment, he lacks standing to

Although this approach, on its face, makes intuitive sense and comports with longstanding contract law doctrine, it is inherently incomplete. In this context, it is not necessarily logical to assume that the assignor would never (or would not often) want to raise particular assignment defenses. For example, assume that the original lender never actually assigned the mortgage, the assignment was signed without authority, or the assignment was forged or fraudulent. In any of those instances, one would assume that the assignor *would* actually want to raise the defense.

The larger point here is that the assumption that an assignor would not want to raise a particular defense only makes sense if the assignor is alive or exists (if a corporate entity, like many lenders) and is aware of the purported assignee's exercise of the contractual rights. If neither of those facts is true, then it does not make sense to assume that the assignor would forego raising defenses related to the propriety of the assignment. If the assignor no longer exists, then the absence of any objection to the assignment or the exercise of the contractual rights by the purported assignee actually means nothing. Since the assignor has no ability to communicate, it does not make sense to make an assumption—that the assignment is acceptable to the assignor—based on the assignor's lack of communication.

Similarly, if the assignor exists but is not aware of the proceeding in which the purported assignee is asserting that the assignment is valid, the assignor's lack of communication regarding the assignment does not signify acceptance or ratification of the assignment. Since the assignor, not typically a party to foreclosure proceedings, is thereby precluded from indicating one way or another whether the assignor would like to raise a defense to the assignment, it is illogical to assume that the assignor would refrain from doing so. Moreover, the question of the assignment's validity is not simply an issue of whether a third party to the assignment (the obligor) should be able to exercise another party's (the assignor's) defenses. It also concerns whether a third party to the original mortgage (the purported assignee) should be able to exercise another party's (the assignor's) rights against another third party (the obligor). In this instance, the obligor is not a disinterested third party seeking to enjoy the benefits of an assignment contract to which it is a party; instead, it is attempting to ensure the obligations of the original contract, to which the assignment contract relates, are actually owed to the party demanding performance. In the abstract, it certainly does not make sense for a third party to enjoy the benefit of another's contract. In the foreclosure context, though, it certainly seems intuitive that the debtor should be able to defend itself by asserting that the purported assignee is not a proper assignee, particularly when the assignor no longer exists or is not a party to, or is otherwise unaware of, the proceeding.

B. Void v. Voidable: A Deferential Approach

Many courts attempt to structure their approach to debtor standing to challenge assignments based on an analysis of whether the defense would render the assignment void or voidable. Under this line of analysis, a debtor would have standing to raise defenses that

challenge the transfer of the mortgage from MERS to Deutsche Bank. . . . Plaintiff is not discharged of his contractual obligation to pay that mortgage just because it has been transferred from one mortgagee to another."), *appeal dismissed* (June 19, 2013).

would demonstrate that an assignment was void ab initio.[93] On the other hand, a debtor would not have standing to raise a defense voiding the assignment if the assignment would be valid unless the assignor voluntarily decided to raise the defense.[94]

This line of analysis appears defensible because it is consistent with the contract law theory discussed previously,[95] specifically that third parties should not have the ability to assert rights or defenses under another party's contract. Accordingly, if the assignor would have to assert affirmatively the defense to void the assignment, then the obligor should not be able to defend its obligations under the contract by asserting such defense when the assignor has refrained from doing so. The right to assert the defense is personal to the assignor, and the assignor's abstention from asserting the defense suggests that the assignment should be respected as legally binding.

On the other hand, this line of analysis does recognize that certain types of purported assignments should not and do not have legal effect, regardless of the intention or desire of the assignor. Such purported assignments are void ab initio and it would be appropriate, under this approach, to permit an obligor to raise a defense to that effect.[96] This approach

---

93. *See, e g* , Dernier v. Mortg. Network, Inc., 87 A.3d 465, 473 (Vt. 2013) ("While we have never so held, courts in other states have qualified this strong proposition in the case of assignment of debts, explaining that a debtor may challenge the assignment of his or her debt if it is void or entirely ineffective—even if that means allowing a 'stranger to a contract' to assert reasons related to the breach of that contract. They have been careful to emphasize, however, that this exception does not allow a debtor to challenge an assignment of the debt that is merely *voidable*.").

94. *See* Calderon v. Bank of Am. N.A., 941 F. Supp. 2d 753, 767 (W.D. Tex. 2013) (where plaintiffs did "not have standing to challenge an assignment to which they were not a party unless that assignment was void. Because the transfer of the Note, if indeed it violated the PSA, would merely be voidable, Plaintiffs [did] not have standing to challenge it."); Coleman v. Bank of New York Mellon, No. 3:12–CV–4783–M–BH, 2014 WL 3827493, at *1 (N.D. Tex. Aug. 4, 2014) (holding that a plaintiff-debtor lacked standing because lack of actual signing authority makes the transaction merely voidable); 17 C.J.S. CONTRACTS § 4 (noting "a void contract . . . is no contract whatsoever . . . and cannot be validated by ratification" and "[a] contract that is merely voidable is capable of being confirmed or ratified by the party having the right to avoid it"); Onyekwere v. Bank of Am., N.A., No. 3:13–CV–2557–B, 2014 WL 1032447, at *1 (N.D. Tex. Mar. 18, 2014) ("For instance, an assignment is voidable in circumstances involving the statute of frauds, fraud in the inducement, lack of capacity as a minor, and mutual mistake. An assignment is void when it is completely invalid, meaning the assignee did not have authority under the deed to foreclose.") (internal citations omitted); Clark v. Mortg. Elec. Registration Sys., Inc., C.A. No. 12–802–M, 2014 WL 1259954, at *1 (D.R.I. Mar. 27, 2014) ("Rhode Island Supreme Court applied the void versus voidable distinction in the context of a mortgage and held that a mortgage is only voidable by the mortgagee even if the agent of the mortgagee acted without authority."); *In re* Holden, 271 N.Y. 212, 2 N.E.2d 631 (1936) ("The assignments were valid upon their face. The assignee was the legal owner of the claims assigned. No one could question the validity of the assignments except the assignors."); Wood v. Germann, 331 P.3d 859 (Nev. 2014) ("although a post-closing-date loan assignment violates the terms of the PSA, these courts conclude that such an assignment is not void, but is merely voidable, because the trustee has the option of accepting the loan assignment despite its untimeliness."); Giuffre v. Deutsche Bank Nat'l Trust Co., No. CIV.A. 12-11510-JLT, 2013 WL 4587301 (D. Mass. Aug. 27, 2013), *aff'd* 13-2222, 2014 WL 3512860 (July 17, 2014) ("Giuffre has most likely sufficiently alleged that the mortgage originated from fraud in the inducement. But this only renders a mortgage voidable, not void.").

95. *Supra* Part III.A.

96. *See Dernier*, 87 A.3d at 473 (agreeing with the reasoning that "a debtor may assert as a defense any matter which renders the assignment void or invalid" (citing Tri-Cities Constr., Inc. v. American Nat'l Ins. Co., 523 S.W.2d 426, 430 (Tex. Civ. App. 1975))); Culhane v. Aurora Loan Servs. of Neb., 708 F.3d 282, 291 (1st Cir. 2013) ("We hold only that a mortgagor has standing to challenge a mortgage assignment as invalid, ineffective, or void (if, say, the assignor had nothing to assign or had no authority to make an assignment to a particular assignee). If successful, a challenge of this sort would be sufficient to refute an assignee's status qua

is seemingly more flexible than the general approach discussed above (that does not recognize an obligor's ability to challenge assignments) because the former at least recognizes the possibility of standing when purported assignments are void (as opposed to voidable).

This analysis, however, is subject to many of the same flaws outlined previously.[97] For example, in instances where the assignor does not exist or is unaware of the foreclosure proceeding, it does not necessarily make sense to assume that the assignor would not desire (or would not have desired) to raise the voidable defenses had the assignor still been in existence or been aware of the foreclosure proceeding. In addition, the obligor is not a disinterested third party attempting to assert rights or defenses of another that are unrelated to the third party, but instead is attempting to ensure that a separate third party (the assignee) is in fact entitled to assert rights against, or impose duties upon, the obligor.

Moreover, this approach merely begs the question of what kind of assignment should be respected to permit an assignee to enforce the contract against the obligor. Based on their conclusions about void versus voidable defenses, courts then either permit or deny debtors the standing to raise such defenses in their foreclosure proceedings. If it is a potentially void assignment, then the court may grant standing to challenge the assignment, while the court may deny standing in the case of a voidable assignment. In practice, many courts appear to conclude, particularly in this newly developing area of law, that there are few defenses that render an assignment void as opposed to voidable, which leaves the system in much the same place as the basic approach outlined above of denying standing to debtors.[98] Accordingly, although the void versus voidable distinction has had appeal across a number of jurisdictions, it has sometimes led to confusing and questionable results.

For example, courts do not agree regarding whether a false or forged signature (on behalf of the assignor) causes an assignment to be void as opposed to voidable.[99] The

---

mortgagee."); *Giuffre*, 2013 WL 4587301, at *3 ("To show that the mortgage is void, Giuffre must demonstrate that it was procured through fraud in the factum. But Giuffre has not alleged any facts suggesting that the parties failed to understand the 'essential nature of the document[s]' they signed."); *In re* Sutter, 665 F.3d 722, 728 (6th Cir. 2012) ("[U]nder Michigan law, a forged mortgage is void ab initio. . . . More recent Michigan cases have confirmed this principle and emphasized that parties that take possession of interests granted by the forged instrument, even if they do so innocently, have no rights under the forged document. . . . Mortgages are treated in the same manner as deeds under Michigan law, and equally grant no interests to the holder of a forged mortgage."); GMAC Mortg. Corp. v. Chan, 56 A.D.3d 521, 522 (N.Y. App. Div. 2008) ("A deed based on forgery or obtained by false pretenses is void ab initio, and a mortgage based on such a deed is likewise invalid.").

97. *Supra* Part III.A.

98. *See, e.g.*, Kim v. JPMorgan Chase Bank, N.A., 825 N.W.2d 329, 336–37 (Mich. 2012) ("We have long held that defective mortgage foreclosures are voidable. . . . (citing Kuschinski v. Equitable & Central Trust Co., 277 Mich. 23, 268 N.W. 797 (1936)) '*The better rule seems to be that such sale is voidable and not void.* . . . The total lack of equity in plaintiff's claim, his failure to pay anything on the mortgage debt and his laches preclude him from any relief in a court of equity.' Similarly, in *Feldman v. Equitable Trust Co.*, the Court held that a foreclosure commenced without first recording all assignments of the mortgage is not invalid if the defect does not harm the homeowner.").

99. Mruk v. Mortg Elec. Registration Sys., Inc., 82 A.3d 527, 537 (R.I 2013) ("If correct [that, *inter alia*, the signature was false], any assignment of the mortgage and subsequent foreclosure would be invalid, ineffective, or void."); *GMAC Mortg. Corp.*, 56 A.D.3d at 522 ("A deed based on forgery or obtained by false pretenses is void ab initio, and a mortgage based on such a deed is likewise invalid"); Witelson v. Jamaica Estates Holding Corp. I, 56 A.D.3d 328, 328 (N.Y. 2008) ("Those plaintiffs . . . are not entitled to foreclose because, crediting Kanoff's testimony, the court found that the signature on those assignments was forged and that therefore the assignments are unenforceable."); U.S. Bank, N.A., v. Arizmendy, 44 Misc 3d 1223, *2 (2014) (the court found

underlying theory regarding denying standing to an obligor challenging an assignment falls apart when a document that is not based on the consent of the assignor can be used to impose obligations on the obligor. The presence of a forged or falsified signature completely undermines the rationale's underlying assumptions about the assignor's intentions or desires to assert particular contract defenses, particularly where the assignor is not aware of the foreclosure proceedings or the assignor no longer exists. It also paints a very different picture about the obligor as a disinterested third party attempting to assert another party's contractual rights or defenses. Where the obligor is going to have duties to another party imposed upon it based on a falsified document, the obligor appears to be an interested and relevant figure. Accordingly, the void versus voidable dichotomy may not be very helpful if it is merely a way for courts to characterize preconceived notions about the propriety of a particular foreclosure proceeding.

Similarly, courts have disagreed about whether an unauthorized signature on behalf of the assignor invalidates the assignments or merely makes it voidable.[100] As with forged

---

defendant failed to raise this defense in the statutorily prescribed period, but the court noted that "[a]lthough the Defendant does not offer forensic handwriting analysis or expert testimony to validate its allegations of forgery, the markedly different signatures may reasonably be deemed a forgery by the trier of fact. As such, the Defendant has a meritorious defense."). *Cf.* Davis v. Countrywide Home Loans, Inc., 1 F. Supp. 3d 638, 643 (S.D. Tex. 2014) (finding no standing for the debtor based on forgery allegations (on the part of the assignor's purported agent)); *Coleman*, 2014 WL 3827493, at *1 (holding that the assignment was not void because "Plaintiff's allegation that the assistant secretary's signature does 'not match,' fails to raise a reasonable inference that she has standing to challenge MERS's assignment to BNYM "); Gorski v. CTX Mortg. Co., No. 12-CV-12250, 2013 WL 1316931, *5 (E.D. Mich. Mar. 29, 2013) (holding that the plaintiff lacked standing to challenge assignment where the plaintiff alleged fraudulent documents signed by robo-signers: "Specifically, Plaintiff fails to set forth facts showing that the robo-signing of the documents has tainted the foreclosure by actionable fraud. Without factual support, these allegations are conclusory and vague.").

100. Chhun v. Mortg. Elec. Registration Sys., Inc., 84 A.3d 419, 423 (R.I. 2014) (noting that plaintiffs "alleged that the one person who signed the mortgage assignment did not have the authority to do so. . . . These allegations, if proven, could establish that the mortgage was not validly assigned, and, therefore, Aurora did not have the authority to foreclose on the property"); *Mruk*, 82 A.3d at 527 (finding that the lack of authority by signer on behalf of assignor would invalidate the assignment), Sullivan v. Kondaur Capital Corp., 7 N.E. 3d 1113, 1116 (Mass. App. Ct. 2014) (holding that a mortgagor had standing to challenge assignments because of an unauthorized signature: "[N]owhere on the face of the instrument is there any indication or evidence that Flowers [the signer] was, or in any manner purported to be, an officer or other authorized agent of Saxon. Nor can the notarial acknowledgment supply the missing evidence; it merely recited that Flowers acknowledged that she executed the assignment 'in [her] duly authorized capacity,' without describing what that capacity might be, or with whom. Proof of Flowers's authority to assign the mortgage on Saxon's behalf (to the extent she was authorized) accordingly requires more evidence than appears either on the face of the second assignment or in the record." *Cf.* Reinagel v. Deutche Bank Nat'l Trust Co., 735 F.3d 220, 226 (5th Cir. 2013) ("[T]he Texas Supreme Court clarified that a contract executed on behalf of a corporation by a person fraudulently purporting to be a corporate officer is, like any other unauthorized contract, not void, but merely voidable at the election of the defrauded principal."); Applin v. Deutsche Bank Nat'l Trust, No. CIV.A. H-13-2831, 2014 WL 1024006, at *5 (S.D. Tex. Mar. 17, 2014) (finding that "[MERS's] alleged lack of authority, even accepted as true," did not provide standing to challenge the assignment); *In re* Lopez, 486 B.R. 221, 229 (Bankr. D. Mass. 2013) (Although the court upheld debtor's standing based on debtor's injury, court found there was no unauthorized signature because "[u]nder Massachusetts law, an assignment of a mortgage is effective without the need to independently establish the [signatory] authority of the assignor to make the assignment."); Portillo v. HSBC Mortg. Servs., Inc., No. CIV. 13-2370 DWF/JSM, 2014 WL 1431394, at *6 (D. Minn. Apr. 14, 2014) (held that plaintiffs failed to provide evidence of any unauthorized signatures. Even if plaintiffs alleged false signatures, "plaintiffs suffered no injury in fact as a result and therefore, lack standing to pursue a quiet title claim on this basis."); *Coleman*, 2014 WL 3827493, at *2 (holding that plaintiff-debtor lacked standing because lack of actual signing authority

signatures, the presence of an unauthorized signature undercuts the basis for the law's assumption that an unaware or defunct assignor would not have desired to assert particular contract defenses. In addition, it suggests that the debtor is in fact an innocent third party seeking to ensure that an unauthorized document does not require it to render services to an improper party.

The void versus voidable line of analysis has theoretical appeal because of its consistency with the law's reluctance to permit third parties to assert personal rights under another party's contract. As discussed above, however, this approach rests on suspicious foundations, particularly where the assignor is not aware of the enforcement action or the assignor no longer exists. In addition, the lack of understanding or discussion surrounding the basis for using the dichotomy has emboldened courts to render decisions that completely undercut that basis. By so doing, courts eliminate the desirability of using it. Thus, where fraudulent or unauthorized signatures and similar troubling fact patterns fail to impress upon the judiciary that the obligor is not a disinterested third party attempting to gain the advantage of another party's contractual rights or defenses, the void versus voidable line of analysis proves unhelpful at best and destructive at worst.

C. Legal Title: Few Standing Issues

Another defense that a debtor seemingly would be able to raise is whether the assignee of a mortgage has proper title to the property interest reflected thereby. If, for example, the assignor never had legal title to the property interest, then the assignee would not have been able to receive legal title because the assignor did not have any legal interest to convey.[101] Similarly, if the title to the property interest has not been recorded as required by statute, this could destroy the requisite chain of title.[102] This is more of a statutory claim suggesting that a defect in procedurally demonstrating that recorded title has passed from each assignor to the purported assignee threatens the last assignee's ability to exercise property rights. In the most egregious instances, a court may recognize standing where no assignment exists.[103] In one instance, a court determined that the debtor's assertion that the

---

makes the transaction merely voidable).

101. Bowen v. Brogan, 119 Mich. 218, 220 (Mich. 1899) ("If this amount was paid, it is evident there was nothing due upon the mortgage when it was foreclosed, and the right to foreclose it did not exist, and no legal title was obtained by the foreclosure"); 59 C.J.S. MORTGAGES § 419 ("The transfer of a forged note will give the transferee no rights in the mortgage securing it."); MetLife Home Loans v. Hansen, 48 Kan. App. 2d 213, 213 (Kan. Ct. App. 2012) ("[I]n order to grant summary judgment in a mortgage foreclosure action, the district court must find undisputed evidence in the record that the defendant signed a promissory note secured by a mortgage, that the plaintiff is the valid holder of the note and the mortgage, and that the defendant has defaulted on the note.").

102. U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 651 (Mass. 2011) (holding that the foreclosing party lacked recordable interest in mortgage: "A foreclosing entity may provide a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage. . . . The key in either case is that the foreclosing entity must hold the mortgage at the time of the notice and sale in order accurately to identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale) (internal citations omitted); Minn. Stat. § 580.02(3) (standing to foreclose under Minnesota's non-judicial foreclosure law requires . . . "that the mortgage has been recorded and, if it has been assigned, that all assignments thereof have been recorded . . .").

103. Ortiz v. Citimortgage, Inc., 954 F. Supp. 2d 581, 587 (S.D. Tex. 2013) (holding that debtor had standing to challenge whether the assignment was invalid because "the court must accept the pleaded facts as true" that there was no "evidence regarding the assignment of the note and deed of trust, and the assignment was not

purported assignee could not demonstrate an assignment would provide standing to challenge the validity of the assignment.[104] If the assignment is legally ineffective as a matter of law because the assignor never had a property interest to convey, or because the assignment does not exist, then the debtor would have standing to assert the defense. As with defenses that render an assignment void, the assignor's presupposed intent with respect to making an effective assignment is irrelevant when the issue is whether an assignment actually exists or whether the assignor ever owned title to the property interest in the first place.

A court could also recognize standing to challenge the assignment when the assignee cannot demonstrate proper chain of title. If the assignee cannot demonstrate that the mortgage was actually owned and then properly transferred by each successive assignee, then the debtor should be permitted to challenge the assignee's title to the mortgage.[105] As in an instance where no assignment exists, these sorts of defenses rely on the inability of an assignor somewhere in the chain of title to have conveyed title or lack of evidence that an assignor conveyed title at all. Again, the assumed intent of the assignors to have conveyed title is not relevant to the legal issue of whether the assignor conveyed title where no evidence of such transfers exist.

Nevertheless, courts typically limit the ability of a debtor to raise legal title or chain of title defense because of the prevailing assumption that the debtor is not harmed if an improper party forecloses when the debtor is in default.[106] Courts appear to assume that

---

recorded in the Harris County property records"); Johns v. Gillian, 134 Fla. 575, 581 (Fla. 1938) ("Although the assignment of the mortgage from Everglade Lumber Company to Gillian was defectively executed, it may be taken as evidence to show that the company had, before the commencement of the suit, sold and transferred to Gillian its entire interest in the note and mortgage. A mere delivery of a note and mortgage, with intention to pass the title, upon a proper consideration, will vest the equitable interest in the person to whom it is so delivered.") (internal citations omitted); Ogilvie v. First Nat'l Bank, 179 Okla. 111, 111 (Okla. 1937) ("Neither does the failure to allege the assignment of the mortgage from the original mortgagee to plaintiffs render the judgment void. The mortgage securing a note is merely incident and accessory to the note, partakes of its negotiability so that the indorsement and delivery of the note secured by the mortgage carries the mortgage with it without formal assignment thereof."). 59 C.J.S MORTGAGES § 419 ("Ordinarily, the assignment of a note evidencing a debt automatically carries with it, as an incident, the assignment of the mortgage or deed of trust upon real estate or chattels that secure its payment, provided that there is nothing in the contract to the contrary. Under this rule it is not necessary that there be a transfer or delivery of the mortgage papers or, in order that the beneficial interest shall pass, that a separate written or formal assignment be made.").

104. *See supra* Part III.B (discussing defenses which render an assignment void as opposed to voidable).

105. Miller v. Homecomings Fin. LLC, 881 F. Supp. 2d 825, 832 (S.D. Tex. 2012) (allowing challenges to chain of assignments through which a lender asserts the right to foreclose); SunTrust Mortg. Inc. v. Giardina, No. 109,840, 2014 WL 1193433, at *7 (Kan Ct. App. Mar. 21, 2014) (unpublished opinion) ("Because the holder of a note retains a beneficial interest in the mortgage, a formal assignment from MERS, as nominee, is unnecessary to secure the right to foreclose."); Berry v. Main St. Bank, 977 F. Supp 2d 766, 773 (E.D. Mich. 2013) ("While [p]laintiff has standing to challenge whether Wells Fargo held record chain of title, [p]laintiff 'lacks standing to challenge that assignment.'"); *In re* Samuels, 415 B.R. 8, 17 (Bankr. D. Mass. 2009) ("Consequently, the documents submitted with the proof of claim do not by themselves show a valid assignment of rights from Argent to Deutsche Bank and do not fully support the asserted claim. It follows that the proof of claim is not supported by documents adequate to establish the assignment of rights on which it is based, and therefore that the claim does not enjoy prima facie validity. In the alternative, whatever prima facie validity the claim initially enjoyed was rebutted by the Debtor's pointing out of the defect in the chain of title that was evident in the documents submitted with the proof of claim.").

106 Bowen v. Brogan, 119 Mich. 218, 220 (Mich. 1899) ("If this amount was paid, it is evident there was nothing due upon the mortgage when it was foreclosed, and the right to foreclose it did not exist, and no legal

foreclosure should happen if the debtor is in default, even if the foreclosing party is not the correct party to foreclose.[107] Accordingly, debtors may lack standing where they fail to show "prejudice as a result of any lack of authority of the parties participating in the foreclosure process," especially when debtors "do not dispute that they are in default under the note."[108]

Similarly, there is skepticism about permitting the debtor to assert a defense of the original lender (assignor), when "there is no reason to believe that . . . the original lender would have refrained from foreclosure in these circumstances."[109] This kind of previewing is not unique to homeowner claims regarding assignments; rather, this kind of judicial skepticism has been noted in the context of MERS' ability to foreclose in its own name as well.[110] Based on such skepticism, courts have declined to permit challenges to MERS' ability to receive or convey legal title, even though its ability may be very dubious.[111]

---

title was obtained by the foreclosure"); *but see* Keyes v. Deutsche Bank Nat'l Trust Co., 921 F. Supp. 2d 749, 757 (E.D. Mich. 2013) ("The complaint supports the concern that the plaintiffs might be subject to double liability because the mortgage and note have been assigned to different parties. The plaintiffs allege in their complaint that the note was sold to a trust, and that the mortgage was assigned to defendant Deutsche Bank as trustee for that trust. However, the foreclosure process was initiated, although not completed, by defendant Bank of America. In order to complete the foreclosure, the mortgage would have to be assigned to Bank of America. The note would then be in the hands of the Trust and the mortgage in the hands of Bank of America. In such a situation, the plaintiffs will be permitted to challenge the validity of the assignment."); Bambas v. CitiMortgage, Inc., No. 13-2195, 2014 WL 4057857, at *2 (6th Cir. Aug. 18, 2014) ("Although the record of the mortgage is muddled with irregularities, none of them supports setting aside the foreclosure as Bambas requests. The recorded chain of title in this case is messy, with various unrecorded and unexplained assignments, one recorded but nonetheless technically invalid assignment that had to be corrected and recorded again, and one link in the chain of title missing for a few years. However, because the redemption period has expired, Bambas's right to challenge the foreclosure is narrowly circumscribed by Michigan law, and none of the possible grounds of relief announced in the case law supports his claim."); Hunt v. Select Portfolio Servicing, Inc., No. 11-14067, 2012 WL 6193865, at *4 (E.D. Mich. Dec. 12, 2012) ("Even if there were defects in the assignments discussed above, and even if such defects would destroy the chain of title, Plaintiff nevertheless lacks standing to raise such defects. Plaintiff is not a party to the assignments in question.").

107. Maraulo v. CitiMortgage, Inc., No. 12-CV-10250, 2013 WL 530944, at *7 (E.D. Mich. Feb. 11, 2013) ("Furthermore, none of the facts alleged indicate that the assignment may subject Plaintiffs to a risk of having to pay their mortgage twice. In fact, Plaintiffs' complaint alleges that the assignor of the mortgage, American, went out of business in 2008 and ceased to exist as a corporate entity. Given that the assignor does not exist, Plaintiffs are not at any risk of paying the same claim twice, and have never alleged that they are at risk of such double payment.") (internal citations omitted); Shumake v. Deutsche Bank Nat'l Trust Co., No. 1:11-CV-353, 2012 WL 366923, at *3 (W.D. Mich. Feb. 2, 2012) ("Really, Shumake's injury is fairly traceable to the fact that he failed to make his mortgage payments . . . whether Shumake made his mortgage payments on time had nothing to do with whether Chase validly assigned the mortgage to Deutsche Bank. Either way, Shumake still had to make the same payments-the assignment only altered to whom he made the payments; the assignment had no other consequence to Shumake.") (internal citations omitted).

108. Siliga v. Mortg. Elec. Registration Sys., Inc., 161 Cal. Rptr. 3rd 500, 508 (Cal. Ct. App. 2013).

109. *Id.*

110. Zacks, *supra* note 34, at 571 (In one case, "the court reasoned that the original lender would not have disbursed the loan funds if it had not assented to MERS being named as nominee on the related mortgage. Similarly, many courts will correctly assume that a lender or successor owner would not buy a MERS loan if it did not assent to MERS remaining its nominee with the associated rights to foreclose").

111. Woods v Wells Fargo Bank, N.A., 733 F.3d 349, 354 (1st Cir. 2013) (holding that the debtor had standing to challenge because the debtor "that MERS, as a mere 'nominee' for [the lender], never possessed a legally transferable interest in Woods's mortgage, rendering any attempted assignments void, but ultimately the court concluded that MERS did have such a legally transferrable interest"); Livonia Prop. Holdings v. 12840–

D. Discovery Requests

Perhaps even more problematic than the disparate and inconsistent treatment of assignments in foreclosure proceedings is the preliminary denial of debtor discovery requests with respect to the validity of assignments. Since courts commonly discount the viability of assignment-based defenses themselves, courts would be expected to deny the availability of discovery on these issues as well.[112] This is unsurprising, given the concerted judicial effort to facilitate foreclosures as expeditiously as possible, and given the "previewing" of the merits of cases before ruling on assignment-based defenses.[113] Accordingly, debtors may be prevented from determining whether grounds even exist to challenge the ability of the assignee to foreclose upon the property, which undercuts the substantive law granting the debtors such rights.

Such denials also undermine the very jurisprudence that this Article has analyzed. In order to determine whether a debtor has standing to contest an assignment, courts often look to the aforementioned void versus voidable distinction. But before discovery is requested, it will often be impossible to predict what kind of defect an assignment might have. Judges cannot, therefore, base their rulings on the assumption that an assignor would not contest the assignment, or that any potential challenge would only make the assignment voidable, rather than void, when they have not allowed a debtor to request any documents, for example, that correspond with the events represented on the face of an assignment. It is difficult indeed to discern how a judge would know whether a challenge to an assignment is serious without seeing any corresponding discovery.

E. Foreclosure as a Foregone Conclusion

Under these lines of analysis, if the foreclosure is inevitable because the debtor is in default and the lender would necessarily desire a foreclosure, then the courts should not put up unnecessary roadblocks to foreclosure by permitting procedural challenges. These approaches, however, are deeply flawed because they are both predicated on an underlying assumption that foreclosure would and should occur whenever the debtor is in default. This Section discusses the reasons why this assumption often proves untrue in practice.

First, foreclosure is not an inevitable outcome. Foreclosure is only one of the myriad of remedies or transactions that a lender may seek. For example, upon a debtor's default under a note secured by a mortgage, the lender may be permitted to charge a higher rate of interest or to demand additional fees.[114] A lender could also agree to forbear and not pursue

---

12976 Farmington Road Holdings, LLC, 717 F. Supp. 2d 724, 746–51 (E.D. Mich. 2010) (chain of title is established exclusively through review of public records); Berry v. Main Street Bank, 977 F. Supp. 2d 766, 773 (E.D. Mich. 2013) (the court found that "even if the assignment were invalid, the record chain of title 'would not be disturbed[,]' and therefore, would still reflect that Wells Fargo as the mortgagee," and a "'challenge to the assignment on the grounds that it destroys the required chain of title lacks merit'") (internal citations omitted).

112. Indeed, it has been the experience of one of the co-authors that Florida courts routinely deny requests for discovery with respect to assignments and the contexts in which they were made, regardless of the underlying law governing assignments in those jurisdictions.

113. *See, e.g.*, Greg Allen, *Fast-Paced Foreclosures: Florida's Rocket Docket*, NAT'L. PUB. RADIO, (Oct. 21, 2010), *available at* http://www.npr.org/templates/story/story.php?storyId=130729666 (describing shortcuts that some Florida courts took to facilitate fast resolution at the expense of many homeowners).

114. Melissa B. Jacoby, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261, 2272 (2008) ("Lenders do not initiate, let alone complete, a formal

its remedies under the loan agreement if it received further assurance from the debtor of her ability to pay through additional upfront payments or third party guaranties, or if the debtor agreed to pay additional fees to the lender.[115] A lender could also agree to modify the loan that is secured by the mortgage if it determined that the new terms of the loan were better than the alternative remedies it could seek.[116]

As the above examples suggest, foreclosure is not inevitable, or even desirable, from a lender's perspective. In most instances, the foreclosure process is very costly to the lender.[117] The lender typically has to utilize the services of an attorney to pursue the foreclosure and to pay the expenses associated with doing so. In addition, the value of the property securing the loan may, at the time of the foreclosure, be worth less than the outstanding amount of the loan.[118] If the property were to be resold by the lender, the lender might expect to receive a price that is well below fair market value.[119] Lenders are not in the business of buying and selling properties and typically would prefer not to own land.[120]

---

foreclosure process in response to every breach of a mortgage obligation. Likewise, borrowers do not initiate bankruptcy in response to every serious delinquency. Time permitting, a lender could allow a home owner to sell property privately and use the proceeds to pay off the loan—the optimal approach to home exit within the existing framework. Even if sale proceeds would not fully cover the loan, a lender could agree to a "short sale" and to waive pursuit of the deficiency.").

115. 1 LAW OF DISTRESSED REAL ESTATE § 3B:7 ("When circumstances make it impossible for the borrower to make any payments at all for some time, a lender might consider a "forbearance plan" that would allow the borrower to suspend payments or make reduced payments for a specified length of time In most cases the borrower must have established a record of prompt payments with the lender before the onset of the present difficulty, and it generally must be feasible to bring the loan out of default in no longer than 18 months. Normally the lender will add the missed payments plus interest to the loan balance."); 30 N.J. PRAC., LAW OF MORTGAGES § 23.10 (2d ed. 2014) ("In some cases the mortgagee may (either before or after electing to accelerate) want to enter into an agreement with the mortgagor to "forbear" to exercise its right to foreclose in return for the mortgagor's promise to "make up" the delinquent mortgage payments and resume regular payments at the end of the period of forbearance.").

116. 30 NEW JERSEY PRACTICE, LAW OF MORTGAGES § 23.10 (2d ed. 2014) ("[T]he mortgagee may prefer to enter into an agreement "recasting" the mortgage contract either to allow amortization of the entire unpaid indebtedness in larger installments over the remaining term of the mortgage or to allow amortization over a longer term without increasing the period installment payments.").

117. Ralph Roberts, *How Much Does A Foreclosure Cost?*, REALTYTIMES.COM (Mar. 15, 2009), *available at* http://realtytimes.com/agentnews/agentadvice1/item/3788-20090316_foreclosure ("Mortgage Bankers Association (MBA) released a policy report in May, 2008, in which it supports the fact that lenders are often the biggest losers in foreclosure: 'While losses can vary widely, several independent studies find them to be generally quite significant: over $50,000 per foreclosed home or as much as 30 to 60 percent of the outstanding loan balance.'").

118. Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 722 (2008) (stating that studies have "determined that in 90% of examined foreclosure sales, the fair market value of the property was less than the outstanding loan amount").

119. *Id.* at 722 ("After taking title to the property, foreclosing lenders re-sold the property for an amount greater than their investment in about half of the cases, but lost money overall after re-selling the properties.") (citing Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure—An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 CORNELL L REV. 850, 865 (1985).

120. Eric Dash, *As Lenders Hold Homes in Foreclosure, Sales Are Hurt*, N.Y. TIMES (May 22, 2011), http://www.nytimes.com/2011/05/23/business/economy/23glut.html?pagewanted=all (Lenders "do not have the staff and infrastructure to manage and sell" foreclosure properties. By holding property, lenders incur stigmatized property and maintenance fees.); Jacoby, *supra* note 114, at 2262 ("Perhaps more significantly, real estate finance experts no longer assume that delinquency on a mortgage should be equated with mortgage termination and a borrower's home loss."); Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial*

Consequently, foreclosing upon the mortgage and reselling the property may cost the lender more than modifying the loan agreement with the debtor.[121] For example, the modification may have economic terms that would ensure that the debtor would pay some portion of the outstanding principal amount of the loan that is higher than that which the lender would realize if the lender resold the property (or perhaps even equal to or less than such amount, given lender reluctance to own and resell property).

It does not follow, therefore, that judges should assume that all lenders would desire foreclosure in the event of a default and that it does not matter which entity forecloses upon a mortgage. Instead, it is at best unclear whether purported assignors of a mortgage would desire foreclosure upon default. This suggests that a more flexible standard for debtor standing to challenge assignments would be appropriate.

What is clear, though, is that foreclosure is desirable from a judicial perspective. Judges have been, implicitly or explicitly, charged with the task of clearing the backlog of foreclosures and have accordingly carved a legal path that enables foreclosures to occur more quickly and with less attorney effort.[122] In some instances, the funding for the courts may be tied to their ability to reduce the backlog.[123] This creates an incentive for judges to ignore documentary irregularities that would be questioned in an ordinary commercial dispute. Whether clearing the backlog of mortgage cases is explicitly tied to funding for, or is otherwise the express charge of the courts, judges may be reluctant to impose procedural hurdles upon the purported assignee, particularly where the judge is not sympathetic to a debtor that is admittedly delinquent in payments on the loan.[124] Of course, the drive for speed with little regard to other considerations ignores some of the most significant lessons of the housing crisis.

In the rush to originate loans for securitization, creditworthiness was given less and less attention with the resulting effect that many homeowners were not able to make their payments when, for example, adjustable interest rate loans eventually adjusted to market rates.[125] Similarly and relatedly, as loans were increasingly bundled together in securitized trusts, corollary documentation was not effectively monitored.[126] Then, when the crash

---

Foreclosure Act, 53 DUKE L.J. 1399, 1463 (2004) ("Most lenders do not want to foreclose, and do so only as a last resort.").

121. *See* Dash, *supra* note 120 (mentioning the significant costs of foreclosure and noting lenders recent willingness to negotiate with renters living in foreclosed homes).

122. *See, e.g.*, FORECLOSURE INITIATIVE WORKGROUP, *supra* note 30 (establishing proposals to assist in clearing a backlog of foreclosure cases, including actively propelling cases towards judgment); *see also* Matt Taibbi, *Invasion of the Home Snatchers*, ROLLING STONE (Nov. 10, 2010), http://www.rollingstone.com/politics/news/matt-taibbi-courts-helping-banks-screw-over-homeowners-20101110 (providing a general description of expedited court procedures' effects on due process).

123. *See* FORECLOSURE INITIATIVE WORKGROUP, *supra* note 30 (noting the need for courts to keep their docket clearance rate statistics).

124. Adolfo Pesquera, *Miami-Dade Aggressively Pushes Foreclosure Cases Through System*, DAILY BUS. REV. (Aug. 2, 2013), http://www.dailybusinessreview.com/id=1202613700227/MiamiDade-Aggressively-Pushes-Foreclosure-Cases-Through-System?slreturn=20150028155007 (access required) (quoting one judge as saying "If you can't do [the trial] within an hour, you're not a trial attorney.").

125. *See, e.g.*, Annamaria Andriotis & Shayndi Rice, *Adjustable Rate Mortgages Make a Comeback*, WALL ST. J. (Mar. 16, 2014), http://online.wsj.com/news/articles/SB10001424052702303546204579439171591130740 ("the [adjustable rate] loans were last popular during the housing bubble and were fingered as a cause for many foreclosures").

126. *See generally* Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty Of*

necessitated legal services for a seismic number of foreclosure proceedings, foreclosure attorneys and their clients' unceasing quest for faster litigation and resolution resulted in robo-signing and a host of other ethical lapses, resulting in billions of dollars in settlements.[127] Nonetheless, judges and court administrators seem to be wedded to the idea that speeding up foreclosure cases is the only optimal policy.

Yet this approach, as with the other housing crisis issues driven largely by a demand for faster results, is ultimately shortsighted. First, although a longer foreclosure process costs lenders and servicers more, these costs may help incentivize servicers to settle more cases, rather than enduring a long slog through the court system.[128] Similarly, the longer time period may assist borrowers in bolstering their financial resources or in weathering a financial hardship, again making settlement more likely.[129] Encouraging more settlements benefits society as a whole, particularly those jurisdictions that have had higher numbers of foreclosures. This is because preventing foreclosures can help eliminate significant negative externalities. The normal neighborhood-level effects of foreclosed homes are significant in terms of crime, blight, and reduced property values.[130] Producing settlements, therefore, both alleviates those negative externalities and alleviates the foreclosure backlog. Yet while some court systems have at least paid lip service to pro-borrower assistance, such as mandatory mediation regimes, the typical judicial response to a large number of cases lagging through a system has nonetheless remained in line with a quicker process-at-all-costs mantra.[131]

In addition to the error of this policy on utilitarian grounds, it may also lead to many courts giving unsympathetic treatment to defenses such as the challenges to assignments raised here. Just as judges and court administrators seem to assume, without empirical backing, that faster foreclosures are better for their respective jurisdictions, judges also make assumptions regarding assignment-based defenses to foreclosure. In particular, judges may assume that the purported assignee is in fact (or should be considered as) a legally valid assignee and that the purported assignor knows about the purported assignment and foreclosure proceedings, or that the assignor would be indifferent as to the exercise of the foreclosure right. Each of these assumptions is questionable, and the judicial employment of such assumptions is made even more dubious by the extrinsic desire of the judicial system to reduce the number of foreclosure cases. The next Part addresses the

---

Mortgage Title, 63 DUKE L.J. 637, 662 (2013) (equating this documentation to a "myriad" of opinion letters).

127. Zacks, *supra* note 5, at 869–70.

128. Zacks, *supra* note 61, at 560.

129. *Id.* at 564.

130. *Id.* at 545.

131. *See, e.g.*, FORECLOSURE INITIATIVE WORKGROUP, *supra* note 30 (explaining how the Florida court system can reduce the backlog of cases). It should also be noted that these speed-oriented policies can negatively affect the borrower, in a number of respects. The vast majority of homeowners do not retain counsel. *See, e.g.*, Maggie Barron & Melanca Clark, *Foreclosures: A Crisis in Legal Representation*, BRENNAN CTR. FOR JUSTICE (Oct. 6, 2009), *available at* http://www.brennancenter.org/publication/foreclosures-crisis-legal-representation (citing a study that showed that in Stark County, Ohio, 86% of defendants in foreclosure cases lacked legal counsel). The fact that a large number of cases lay dormant in many judicial foreclosure jurisdictions therefore seems to indicate inattentive or incompetent legal counsel for banks and servicers. *See* Pesquera, *supra* note 124 (noting that "nothing happened when judges left the resolution of foreclosure cases up to the lenders and homeowners"). As such, forcing cases to trial while knowing that most homeowners will be unrepresented is an overwhelmingly pro-lender response, and completes much of the foreclosing entities' work for them whether they actually want to proceed with their case or not.

normative basis for granting debtors broader standing to challenge mortgage assignments in the foreclosure context.

IV. JUSTIFYING DEBTOR STANDING TO CHALLENGE ASSIGNMENTS

Many justifications favor an approach permitting debtors to challenge the validity of assignments on a broader basis and, at the very least, to permit discovery on the issues presented. Some have expressed concern at the prospect of homeowners facing double liability.[132] Scholars in other foreclosure contexts have made similar observations.[133] Put simply, no litigant wants to face a lawsuit on a claim he has already paid to another party. Challenges to assignments can help to ensure that the correct party is foreclosing and that the borrower will not have to pay another eventual claimant. If one allows the proposition that the foreclosing entity should be entitled to enforce the debt, then surely allowing questions regarding transfers that can change that fact ought to be encouraged. It has been suggested that this risk is particularly acute in the case of warehouse lending fraud, "in which a crooked mortgage company sells the same note to multiple parties."[134] Nevertheless, critics suggest, and even debtor-friendly scholars concede, that the double liability issue rarely presents itself.[135] But that possibility, no matter how remote, should remain grounds for finding assignment transfer issues relevant to the ultimate facts of a case, given the significance of a home foreclosure event.[136]

Some courts have recognized the disconnect between the law's desire to exclude third parties from exercising rights under another party's contract, and the application of the law in the mortgage assignment and foreclosure situation. For example, the Rhode Island Supreme Court has a more permissive policy, permitting debtor challenges "to the extent necessary to contest the foreclosing entity's authority to foreclose."[137] Accordingly, there may be an "exception to the general rule precluding third-party standing to challenge a contract . . . to the circumstances of a mortgagor challenging an 'invalid, ineffective, or void' assignment of the mortgage . . . [and not one that] render[s] it merely

---

132. Miller v. Homecomings Financial, LLC, 881 F. Supp. 2d 825, 832 (S.D. Tex. 2012) ("In truth, the prejudice is both plain and severe—foreclosure by the wrong entity does not discharge the homeowner's debt, and leaves them vulnerable to another action . . by the true creditor"); LORD, *supra* note 18, at § 74:50 ("The only way to protect the rights of all persons is to require the debtor to join, by way of interpleader, the assignee and the person who may be defrauded, offering to pay to whichever of these parties may be held entitled to receive payment, and unless the debtor takes this course he should be liable to a defrauded third person.").

133 Elizabeth Renuart, *Uneasy Intersections. The Right to Foreclose and the UCC*, 48 WAKE FOREST L. REV. 1205, 1261 n.267 (2013) (arguing that standing is not a minor issue because of the possibility of double liability); White, *supra* note 2, at 494–95.

134. White, *supra* note 2, at 494.

135. 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 432 n.82 (1st ed. 1920) ("Wherever the debtor may otherwise be liable again he should be allowed to interplead"). Williston cites cases where the debtor is held liable where the debtor had notice of that the party enforcing the contractual right did not have good title to it. *Id. See also* Renuart, *supra* note 133, at 1243 n 195 (listing 17 states that "join the right to foreclose on a mortgage that secures the negotiable note" and have held that only the person entitled to enforce the note can foreclose on the property).

136. *Miller*, 881 F. Supp. 2d at 832 ("Banks are neither private attorneys general nor bounty hunters, armed with a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank's deed of trust.").

137. Chhun v. Mortg. Elec. Registration Sys., Inc., 84 A.3d 419, 423 (R.I. 2014).

voidable . . . ."[138] This reasonable exception seems to protect against the possibility of double liability. Without proof that a foreclosing entity owns a particular loan, courts ought not be issuing final judgments given the risk that another party could potentially sue the very same debtors on the very same loan.

Aside from the double liability rationale, courts should not "preview" merits of foreclosure cases before ruling upon assignment challenges in light of the scholarly observations that courts are overwhelmingly likely to find in favor of banks and lenders. Given that foreclosure is a uniquely traumatic outcome resulting from the court system, the forcible removal of a person from their home should not be given any less fundamental fairness than a criminal proceeding. Thus, the rapid escalation of court time frames, with rapidly paced foreclosure trials set up for the convenience of lenders' counsel, or the previewing of cases to assume away assignment issues, should be avoided.

Legislatures have democratically enacted judicial foreclosure frameworks in many states, which should be respected in light of the harsh remedy that foreclosure represents. Judges, therefore, should not downplay or seek to avoid the serious consumer protection concerns that judicial foreclosure frameworks represent. Minimizing assignment challenges given the previewing of a case's merits, as in the cases discussed in this Article, simply dissolves the robust right to defense that legislators would seem to have had in mind when enacting judicial oversight of the foreclosure process. Put more simply, courts must afford foreclosure defendants the same rights that legislators expect in all judicial proceedings: the right not to be judged before all the relevant and admissible facts have been discovered, or at least been made discoverable.

A more procedural point supporting the allowance of assignment challenges stems from the posture in which assignments are sometimes presented in cases. Most of the cases examined for these issues involved cases where the assignment formed a major, if not the only, piece of evidence proving (or disproving) a bank's standing after a loan transfer. Thus, homeowners may be presented with these assignments as evidence, yet not be able to—reciprocally—take discovery or ask relevant questions at trial. This suggests a procedural inequality in which banks and foreclosing entities can propose a theory of transfer that is above reproach and not subject to question, despite banks' previously publicized issues with improper documentation.

An analogy can be made to the rights of leaseholder tenants. Courts and legislatures have recognized the need for the security of tenure.[139] Courts, in particular, have expanded the ability of tenants to raise particular defenses against wrongful or troubling evictions over time.[140] Although some have argued that summary eviction statutes do not go far

138. Mruk v. Mortg. Elec. Registration Sys., Inc., 82 A.3d 527, 536 (R.I. 2013) (finding such an exception but limiting it to "private residential mortgagors challenging the foreclosure of their homes").

139. Deborah Hodges Bell, *Providing Security of Tenure for Residential Tenants: Good Faith as a Limitation on the Landlord's Right to Terminate*, 19 GA. L. REV. 483, 490 (1985) ("Although imposition of the warranty of habitability has been the most dramatic aspect of the landlord-tenant 'revolution,' other changes have also significantly increased the rights of tenants. Procedural devices previously available to landlords, such as self-help eviction, distraint of goods, and summary eviction, have been abolished or drastically altered."); Spector, *supra* note 38, at 165 (noting court and legislative action to limit landlord power to evict tenants); Williams, *supra* note 39, at 1191 ("Protecting a tenant's tenure is not a foreign or unusual action for federal and/or state governments. Both have taken steps to shelter tenants from unmerited ejections by landlords.").

140. Williams, *supra* note 39, at 1191 ("For many years, jurisdictions have struggled to provide protection to tenants against the whims of their landlords. Jurisdictions have focused on: (1) eviction—being physically or

enough to secure the tenure of tenants, the historical involvement of courts in tenant-landlord conflicts and the development of tenant protection law both suggest that courts are well-positioned to protect debtors from improper foreclosures and to interpret the assignment and other contract law issues presented.[141]

Notably, empirical literature demonstrates that foreclosure can produce physical health effects; emotional health effects such as depression, stress, and shaming; and severe credit effects that can, in some instances, restrict a homeowner's future job prospects.[142] Accordingly, foreclosure should trigger robust due process protections. At their most basic, these would include the right to ask questions about key pieces of evidence that will be introduced at trial or in a final judgment hearing. Yet, as we have seen, many courts are reluctant to allow discovery regarding assignments, even though proving that a given assignment is invalid may defeat the immensely consequential foreclosure judgment.

Beyond due process or tenure protections, the most significant benefit accruing to individual homeowners permitted to challenge assignments may be thought of in terms of time and leverage. As to time, such challenges would likely increase the time necessary to foreclose, which in turn increases costs to lenders.[143] Thus, homeowners would accrue more opportunities to work out a settlement. Further, the increased costs to lenders may provide additional incentives to lenders to grant more favorable concessions to homeowners.[144] It is possible, as some contend, that lengthening the foreclosure process could spur a delay in the resolution of the real estate market.[145] Nevertheless, many of the problems associated with foreclosures—like crime, blight, and depressed surrounding housing values—have been shown to be caused primarily by vacancies, not foreclosure filings themselves.[146]

Such an expansion of the hurdles to foreclosure, and the resultant delays, may increase borrowing costs and decrease credit offers to potential homeowners in the future.[147] This

---

constructively evicted; (2) rent—preventing tenants from capricious rent increases; and (3) discrimination—protecting classes of tenants from discrimination in obtaining housing."); Spector, *supra* note 38, at 171 (finding many jurisdictions expanded the defenses available to tenants "not only by imposing warranties of habitability, but also by permitting tenants to assert them defensively within the summary eviction proceeding without any meaningful change to existing procedures.").

141. Spector, *supra* note 38, at 209 ("Just as courts and legislatures adopted changes in the substantive law to reflect the similarities of residential housing transactions to transactions for general consumer goods and services, they must now insure [sic] that the procedures used to resolve disputes accommodate those similarities. So long as summary proceedings continue to isolate the issue of possession from other issues related to the tenancy, they diminish the benefits tenants have achieved through changes in the substantive law.").

142. Zacks, *supra* note 61, at 544–45.

143. *Id.* at 567 (citing empirical studies showing that "longer foreclosure times increase lender losses").

144. *See* Renuart, *supra* note 133, at 1212–13 (noting that the ability to challenge mortgages would provide borrowers with better negotiating leverage); David A. Dana, *Why Mortgage "Formalities" Matter*, 24 LOY. CONSUMER L. REV. 505, 508–09 (2012) (suggesting that the increased cost to banks of complying with procedural requirements would encourage them to negotiate modifications or other workout transactions with borrowers)

145. Dana, *supra* note 144, at 505–06 (noting that banks would argue that strict judicial treatment with respect to procedural requirements would "slow down the foreclosure process and delay the elimination of the huge backlog of mortgages in default.").

146. Zacks, *supra* note 61, at 547–48 ("[W]e should not necessarily equate foreclosure filings with crime. Rather, it is vacancy itself—including vacancies that may result from foreclosures—that can lead to increased crime").

147. *See generally id* (providing an in-depth discussion on the impact of pro-borrower legislation on individual homeowners and society).

argument fails to account for the democratic nature of judicial oversight of foreclosure processes. That is to say, many state legislatures have enacted a process by which foreclosures are afforded the same processes and procedures as any other civil lawsuit, regardless of potential future credit rationing externalities. Efforts to curtail the routine discovery questions asked in any given case, or to restrict the number of defenses a defendant may raise, therefore, represent a unilateral judicial action not in accordance with the planned foreclosure framework.

If judges and court administrators do not appreciate that banks and lenders' attorneys have to prove cases in the same way as any other civil lawsuit, and that, correspondingly, foreclosure cases take longer than in non-judicial states, this is a question that the legislature can easily address. In this arena, it does not behoove the courts to remake what the legislature has already deliberated upon and purposely enacted. One could presume, after all, that legislators have wrestled with the question of whether lending is more restricted or expensive in a more consumer-friendly foreclosure regime, and whether those costs are worth the benefit in turn of having more accurate and fair proceedings. Accordingly, any increase in borrowing costs may already have been weighed against the costs imposed upon debtors that are unable to combat an improper foreclosure. Thus, any additional time required by allowing assignment challenges, and any resultant increases in lending costs, would seem to have already been deemed an acceptable risk by legislatures. The potential benefits to such challenges are worth exploring further.

Aside from advantages accruing to individual homeowners, permitting challenges more liberally could improve court systems. First, allowing challenges would promote the integrity of the public records. This point has been made repeatedly in the context of MERS,[148] and no persuasive rationale can be given for failing to give the same consideration to assignment issues generally. Surely public records should be accurate and correct, and one would think that it is a duty of courts to ensure that improper assignments have not been recorded. In fact, MERS has already faced multi-million dollar lawsuits for its failure to record assignments that were, under some theories, required to have been recorded.[149] Given the sheer number of faulty documents that were brought to light during the height of the "robo-signing" crisis, courts should be more, and not less, vigilant against possibly fraudulent recordings in public records.

These public records goals are also backed by concerns regarding possible title issues in eventual sales or purchases of foreclosed properties. Such problems have been raised in regards to, for example, satisfactions of mortgages.[150] In turn, these difficulties affect a large portion of the population that has not been foreclosed. Viewing assignment challenges in the prism of debtors trying to "win a free home" ignores the detrimental effects that many commentators allege that MERS and faulty assignments may have on unrelated parties.

Such title issues could be the "single most troubling legal question that remains

148. *See, e.g.*, Peterson, *supra* note 41, at 1405 (describing a MERS senior vice president acknowledging that "MERS is owned and operated by and for the mortgage industry.").

149. *See generally* Zacks, *supra* note 41 (describing the recent surge of county clerk and *qui tam* lawsuits challenging MERS' role in foreclosures and MERS' effect on the transparency of public records).

150 *See* White, *supra* note 2, at 495–96 (describing title problems that arise due to the validity of mortgage satisfactions).

unanswered with respect to MERS's legal foundation."[151] Specifically, these concerns regard whether MERS mortgages will protect lienors against subsequent purchasers or bankruptcy trustees. Again, these effects do not merely concern the specific debtor or homeowner, but may cause chaos on title transfers in society at large. Allowing assignment challenges and discovery on such issues can ensure that loan transfers were properly completed, thereby increasing the accuracy of the public records and helping to prevent future title problems.

On a related point, such increased scrutiny may help to incentivize better documentation practices from banks and servicers in the future. If entities processing securitization documentation, producing assignments, or filing these documents in court know that courts will be vigilant on assignment issues, they will assumedly take care to ensure that their assignments are proper and correct.[152] Aside from the foreclosure "industry" itself, other areas of law that use assignments may also increase their efforts towards quality control. Debt collection, for example, has also attracted criticism for its questionable documentation in courts.[153] Thus, as evidence exists that banks are still making many of the same problematic mistakes regarding transfer documentation, courts can provide an important spur towards reform.[154]

This prediction has been borne from the course of events concerning MERS-related controversies and concerning foreclosure law firm practices. In regards to MERS, most of its reforms have been directly related to challenges brought in courts. For instance, when the housing crisis became acute, the myriad of challenges to MERS' right to bring a foreclosure action in its own name produced a widely disparate and conflicting jurisprudence.[155] As a result of the growing controversy, MERS eventually changed its procedures so it would not foreclose in its own name.[156] Without courts allowing such challenges to MERS' standing, MERS would have had no reason to alter its practices. Similarly, faced with the embarrassing revelations that many of its "officers" could not name basic facts about MERS, the company apparently enacted some form of basic training for persons signing their names to assignments.[157] Yet without the depositions requested as part of routine discovery in civil litigation, these shortcomings and reforms would not have occurred.

To paint a rather different scenario, consider the alternative. With a disinterested judiciary interested mainly in clearing cases, high volume foreclosure law firms were able to commit a significant number of errors and frauds.[158] In some cases attorneys and their firms were able to file false lost-note claims, to sign affidavits on behalf of clients without

151. Peterson, *supra* note 41, at 1394–95.

152. *See* Donald J. Kochan, *Certainty of Title: Perspectives After the Mortgage Foreclosure Crisis on the Essential Role of Effective Recording Systems*, 66 ARK. L. REV. 267, 312 (2013) (stating that "[i]f courts begin insisting on formalities, financial institutions will be encouraged to adopt a higher standard of care ").

153. *See* Dana, *supra* note 144, at 104 (suggesting that, during the next wave of securitizations, banks would show more care with respect to procedural requirements).

154. Renuart, *supra* note 37, at 127 (suggesting that banks have not reformed their practices years after the robo-signing scandal).

155. *See generally* Zacks, *supra* note 34 (examining the role and issues surrounding MERS).

156. *Id.*

157. *Id.*

158. *See generally* Zacks, *supra* note 5 (examining numerous instances of misconduct in high-volume foreclosure firms).

the authority to do so, to file documents signed by attorneys who had already left the particular firm, signing blank documents with information to be filled in later, among other violations.[159] Yet these same attorneys faced little, if any, consistent pressure from courts to reform their ways. Accordingly, many of the bad acts continued for years before any consequences were meted out.

One way to evaluate such ethical lapses is to be guilty of the same previewing that courts partake in when analyzing assignment challenges; if the debtor is in default, then it should not matter if false or inappropriate documents have fouled up the court system. Such a notion, though, would probably offend those who value the basic integrity of the courts. Disregarding assignment challenges, and disallowing discovery on such issues, as in the case of foreclosure firm misconduct, can have a detrimental effect. Without asking questions about the assignments, the courts will never discover whether the scale of problematic assignments is indeed daunting, or whether it is a rare phenomenon. Conversely, as in the case of MERS controversies, court monitoring and litigant challenges can result in reform.

V. CONCLUSION

Scholars have made various suggestions addressing mortgage transfer concerns. First, lenders could, as a prerequisite to foreclosure, be required to produce a full loan transfer history with supporting documentation. This would presumably eliminate many of the transparency concerns noted above.[160] Other scholars accord with this idea as a key protection to borrowers seeking to avoid questionable foreclosures.[161] Alternatively, the government could merge notes and mortgages into one document, rendering assignments less necessary and relevant.[162] Finally, MERS could be re-designed or nationalized as a national recording database, again rendering assignments less relevant.[163]

This Article's ultimate suggestions are more cautious and incremental, in part because of the controversy and political wrangling that either of the significant aforementioned proposals would entail. First, to the extent necessary, appellate courts and legislatures could take measures to ensure that discovery on mortgage assignments are treated as discovery in any other civil litigation. Put another way, the court should reinforce the notion that the scope of discovery is relatively wide, especially given the direct relevance assignments have to the ultimate question of standing to foreclose. If judges are sufficiently confident that foreclosure will be granted in the vast majority of cases anyway, then it makes little sense to prevent slight delays in the process to allow for discovery. Such discovery would prevent fraud, whether a common or rare occurrence, and also may have the positive benefit of encouraging settlement where appropriate, as explained above. To the extent necessary, legislatures also could enact corollary documentation requirements when

159. *Id.* at 870.

160. White, *supra* note 2, at 497 (suggesting that legislatures require lenders to document the complete transfer history of mortgage documents prior to foreclosing); *but see* Levitin, *supra* note 126, at 662 (2013) (arguing that such requirements would make transfers hard and increase borrower costs).

161. John P. Hunt et al., *Rebalancing Public and Private in the Law of Mortgage Transfer*, 62 AM. U. L. REV. 1529, 1564 (2013) (outlining the problems with American mortgage transfer law).

162. White, *supra* note 2, at 498.

163. Zacks, *supra* note 34, at 607–08.

assignments are used as evidence, and appellate courts could stress, again, that judicial foreclosure litigants are to be afforded the same rights as litigants in other commercial disputes.

Legislatures and court administrators also should resist the urge to speed up foreclosure processes and, more specifically, to tie court funding to specific case resolution time frames. Having such goals can lead to improper incentives for judges to hustle cases along at the risk of denying basic procedural safeguards and ignoring questionable documentation. Ignoring ubiquitous calls to expedite proceedings, along with the threat of defunding, may be helpful in ensuring that assignment challenges, when valid, will be given a fair hearing.

Finally, state bar associations and state attorney generals should focus their attention in the "robo-signing" context on assignments. Although most of the robo-signing scandals and servicer settlements to date stemmed from questionable affidavits, this Article has argued that assignments give rise to potentially even more significant consequences for society at large. Whereas affidavits may only affect a given case, improper assignments will be on the public records in perpetuity and have implications for title insurance and future purchasers. State bar associations and state attorney generals can, with proper investigations of law firms and document processing firms involved with such questionable assignments, encourage reform of the very system that churned out such problematic documentation.

This Article asserts that adjudicators should be more willing to grant debtors in foreclosure standing to contest questionable mortgage assignments. Current adjudicative approaches contribute to a system where certain litigants, merely due to the subject area of their dispute (foreclosures), are at risk of being afforded less procedural protection than similarly situated litigants in other disputes. The substantive protections afforded by standing to protect one's rights should not depend solely upon the nature of the lawsuit at issue or an adjudicator's perception of the importance or likely outcome of such lawsuits.

***