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Eric A. Zacks

Wayne State University Law School, [ezacks@wayne.edu](mailto:ezacks@wayne.edu)

Dustin A. Zacks

[dustin@knzlaw.com](mailto:dustin@knzlaw.com)

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## NOT A PARTY: CHALLENGING MORTGAGE ASSIGNMENTS

ERIC A. ZACKS\* AND DUSTIN A. ZACKS\*\*

### INTRODUCTION

Aside from notes and mortgages themselves, perhaps no agreement is as pivotal to the modern foreclosure process as the written assignment. Mortgage originators have utilized assignments to transfer both title and the rights to enforce notes and mortgages. As a result of the assignability of these instruments and agreements and of the newly emergent Mortgage Electronic Registration Systems, Inc. (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 real estate market in the 2000s.<sup>1</sup> Of course, hindsight has led many to question if lenders overlooked the creditworthiness of borrowers in the rush to originate loans ripe for securitization or if those loans were based on properties being systematically overvalued.<sup>2</sup> Much like the securitization process itself, the foreclosure process often relies on the assignability and assignments of mortgages.<sup>3</sup>

The crash of the housing bubble brought many troubling documentation issues to light in the foreclosure context. As a result of the dizzying multitude of loan transfers that occurred during the rise of the market, homeowners raised several issues with respect to proving that such loan transfers occurred or that valid assignments were made. To date, however, courts have been unable to generate a cohesive framework for addressing deficiencies in

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\* Assistant Professor of Law, Wayne State University Law School; B.A., University of Michigan, 1998; J.D., Harvard Law School, 2002.

\*\* 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 exemplary research assistance. The authors are also grateful for feedback received during presentations of this piece at the 9th Annual International Conference on Contracts on February 21, 2014 (held at St. Thomas University School of Law, Miami, Florida), and The Law and Society Association 2014 International Meeting on May 31, 2014 (held in Minneapolis, Minnesota).

1. See Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1359–62, 1371–73 (2010).

2. See, e.g., Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L.J. 1177, 1182–83 (2012).

3. See, e.g., *Livonia Prop. Holdings, L.L.C. v. 12840–12976 Farmington Rd. Holdings, L.L.C.*, 717 F. Supp. 2d 724, 731 (E.D. Mich. 2010).

assignments of mortgage-related documents. Courts have adopted a variety of approaches, none of which appear to recognize the need for procedural fairness, title certainty, and public records integrity. This brief Article is intended to provide an overview of the assignment issue as well as the possible repercussions arising from inconsistent or improper judicial treatment.

### I. CHALLENGING MORTGAGE ASSIGNMENTS

By way of introduction, a contract right is generally understood and accepted as being freely assignable.<sup>4</sup> Accordingly, there is nothing impermissible about a mortgage originator assigning its rights with respect to the mortgage or other agreements.<sup>5</sup> Moreover, even if the default or presumption was against assignability, most lender-originated documents, including notes and mortgages, expressly permit the lender to assign its rights under the agreements to third parties.<sup>6</sup> Thus, each time a loan is sold, an assignment contemplating the transfer may occur.

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. In effect, this translates to homeowners not only assenting to loan and mortgage transfers, but also consenting to MERS remaining the mortgagee no matter how many times the loan is transferred.<sup>7</sup> 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.<sup>8</sup>

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4. RESTATEMENT (SECOND) OF CONTRACTS § 317(2) (1981) (providing that “[a] contractual right can be assigned” except in a few instances); ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 870 (1952) (“The effectiveness of an assignment does not depend upon the assent of the obligor.”); E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 11.2 (3d ed. 2004) (“Today most contract rights are freely transferable.”).

5. See, e.g., David E. Peterson, *Cracking the Mortgage Assignment Shell Game*, FLA. B.J., Nov. 2011, at 10, 11–12 (describing the multiple ways to assign a mortgage under various laws).

6. See, e.g., FANNIE MAE, MICHIGAN SINGLE FAMILY UNIFORM INSTRUMENT FORM 3023 (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.”).

7. For a comprehensive description of the development and basic tenets of the MERS pathway, see Peterson, *supra* note 1; Dustin A. Zacks, *Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures*, 29 QUINNIAC L. REV. 551 (2011).

8. Zacks, *supra* note 7, 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.”).

In both MERS and non-MERS mortgages, assignments may be produced in a number of circumstances. First, as mentioned, a simple sale of the loan may result in an assignment being produced and/or recorded, either at the time of the transfer or later.<sup>9</sup> Secondly, before foreclosure proceedings begin, MERS will assign the mortgage out of its name and into the name of the foreclosing entity.<sup>10</sup> Finally, assignments may be produced in conjunction with the requirements of pooling and servicing agreements governing residential mortgage-backed securities.<sup>11</sup> When confronting these assignments in courts, litigants and judges often disregard their importance.<sup>12</sup> 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.<sup>13</sup>

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.<sup>14</sup> Secondly, "robo-signing" has also occurred in the assignment context. In some instances, some signers on assignments may not have had authority to execute assignments, they may not have actually signed assignments themselves, or they may have simply signed the assignments without having any knowledge of what they were signing.<sup>15</sup>

Next, questionable assignments have been found in cases where the assignee also signed as the assignor, where multiple assignments conflict with

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9. Peterson, *supra* note 5.

10. Zacks, *supra* note 7, 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.").

11. *Id.* at 594 n.232.

12. *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.").

13. See, e.g., *Livonia Prop. Holdings, L.L.C. v. 12840–12976 Farmington Rd. Holdings, L.L.C.*, 717 F. Supp. 2d 724, 731 (E.D. Mich. 2010).

14. Bradley T. Borden & David J. Reiss, *Dirt Lawyers and Dirty REMICs*, PROB. & PROP., May–June 2013, at 12, 14–15.

15. 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, 39–41 (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.").

one another, and where assignments were not executed at all.<sup>16</sup> First, some advocates have challenged assignments on the basis that MERS signed as nominee of the original lender, years after that original lender went defunct.<sup>17</sup> Others have challenged the appointment of the persons executing the assignments, given that some robo-signers have been discovered to be officers of dozens of corporations.<sup>18</sup>

Thus, when the purported transferee 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.<sup>19</sup> 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. From a property law standpoint, it may be intuitive that the party purporting to exercise a property right (the foreclosure rights afforded to it under the contract) should be forced to prove that it has valid title to such property right (in this instance, that the assignment of an admittedly valid contract was valid).

For example, an individual would generally be expected to be able 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.<sup>20</sup> Even in the contract world, when the other party has asserted that rights have been exercised, one would expect to be able to raise an issue of proof (and to seek discovery on the issue). For example, if a contract party asserted that it has properly exercised a particular option in a contract (e.g., the option to terminate the contract), the

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16. See Alan M. White, *Losing the Paper—Mortgage Assignments, Note Transfers and Consumer Protection*, 24 LOY. CONSUMER L. REV. 468, 485 (2012) (detailing questionable assignment practices).

17. See Zacks, *supra* note 7, at 552–53, 567–68 (“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.”).

18. OFFICE OF THE ATTORNEY GEN. OF THE STATE OF FLA., ECON. CRIMES DIV., UNFAIR, DECEPTIVE AND UNCONSCIONABLE ACTS IN FORECLOSURE CASES (2010), available at <http://www.scribd.com/doc/46278738/Florida-Attorney-General-Fraudclosure-Report-Unfair-Deceptive-and-Unconscionable-Acts-in-Foreclosure-Cases>.

19. White, *supra* note 16, at 472–76.

20. 8 THOMPSON ON REAL PROPERTY § 68.06 (David A. Thomas ed., 2014) (“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.”).

other party presumably 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. 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 in interest.<sup>21</sup>

Nevertheless, state courts utilize 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.

## II. STATE COURT TREATMENT OF ASSIGNMENTS

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 understood that third parties generally cannot assert rights or defenses under another's contract.<sup>22</sup> Accordingly, courts often have been reluctant to permit debtors to assert defenses relating to the validity of an assignment of a note or mortgage absent special circumstances. For example, a federal district court in Michigan has 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."<sup>23</sup> 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

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21. Zacks, *supra* note 7, at 562 ("In the cases analyzed . . . MERS rarely, if ever, pleads 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. *Id.*

22. *See, e.g.*, 29 RICHARD A. LORD, WILLISTON ON CONTRACTS § 74:50 (4th ed. 2010) ("[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."). *See also* Woods v. Ayres, 39 Mich. 345, 346–47 (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); Pagosa Oil & Gas, L.L.C. v. Marrs & Smith P'ship, 323 S.W.3d 203, 212 (Tex. App. 2010) (finding lessor lacked standing to challenge the assignment of lessee's breach of lease action because lessor was not a party or third-party beneficiary to the assignment contract).

23. Livonia Prop. Holdings, L.L.C. v. 12840–12976 Farmington Rd. Holdings, L.L.C., 717 F. Supp. 2d 724, 737 (E.D. Mich. 2010).

third parties.”<sup>24</sup> 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.<sup>25</sup> Therefore, the mortgagor cannot step into the shoes of the mortgagee in order to assert the mortgagee’s rights.<sup>26</sup>

#### A. *Void v. Voidable Contract*

On the other hand, courts generally permit challenges to assignments if such challenges would prove that the assignments were void as opposed to voidable.<sup>27</sup> If the challenge is that the assignment would be voidable, then such challenge may not be permitted since only the assignor would have the ability to void the contract.<sup>28</sup> There may be, though, “[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 voidable.”<sup>29</sup>

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24. *Id.* at 735. *See also* Lansing Sch. Educ. Ass’n v. Lansing Bd. of Educ., 792 N.W.2d 686, 699 (Mich. 2010) (discussing Michigan’s long-standing prudential approach).

25. *Ifert v. Miller*, 138 B.R. 159, 166 n.13 (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 any 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.”).

26. *See Liu v. T & H Mach., Inc.*, 191 F.3d 790, 797–98 (7th Cir. 1999) (holding that the 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.”).

27. *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.”).

28. *See Calderon v. Bank of Am. N.A.*, 941 F. Supp. 2d 753, 765–67 (W.D. Tex. 2013) (“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.”).

29. *Mruk v. Mortg. Elec. Registration Sys., Inc.*, 82 A.3d 527, 536–37 (R.I. 2013) (finding such an exception but limiting it to “private residential mortgagors challenging the foreclosure of their homes”).

The distinction between void and voidable assignments is still a developing area within the law and has not been interpreted consistently across jurisdictions. For example, courts do not agree whether a false signature causes an assignment to be void as opposed to voidable.<sup>30</sup> Similarly, courts have disagreed about whether an unauthorized signature on behalf of the assignor invalidates the assignment or merely makes it voidable.<sup>31</sup> The Rhode Island Supreme Court has a more permissive policy, permitting challenges by debtors “to the extent necessary to contest the foreclosing entity’s authority to foreclose.”<sup>32</sup>

### B. Chain of Title

Courts also may recognize standing to challenge whether the assignee held record chain of title. For example, standing may exist for challenges that contend that the assigning party never possessed legal title and, as a result, no valid transferable interest ever exchanged hands.<sup>33</sup> Of course, there is even disagreement as to what constitutes legal title or a proper chain of title, and, in

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30. Compare *id.* at 537 (“If correct [that, *inter alia*, the signature was false], any assignment of the mortgage and subsequent foreclosure would be invalid, ineffective, or void.”), with *Davis v. Countrywide Home Loans, Inc.*, No. H-13-623, 2014 WL 838146, at \*4 (S.D. Tex. Mar. 3, 2014) (finding no standing for the debtor based on forgery allegations on the part of the assignor’s purported agent).

31. Compare *Chhun v. Mortg. Elec. Registration Sys., Inc.*, 84 A.3d 419, 423 (R.I. 2014) (“[P]laintiffs have 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.”), and *Mruk*, 82 A.3d at 537 (finding that the lack of authority by signer on behalf of assignor would invalidate the assignment), with *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 . . .”), and *Applin v. Deutsche Bank Nat’l Trust*, No. 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).

32. *Chhun*, 84 A.3d at 423.

33. *Ortiz v. Citimortgage, Inc.*, 954 F. Supp. 2d 581, 584, 586–87 (S.D. Tex. 2013) (finding the 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 recorded in the Harris County property records”); cf. *Berry v. Main St. Bank*, 977 F. Supp. 2d 766, 772–73 (E.D. Mich. 2013) (“[E]ven 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. . . . [Thus, a] challenge to the assignment on the grounds that it destroys the required chain of title lacks merit.”).



particular, whether MERS as nominee ever possesses legal title (and is thereby able to receive or make effective assignments).<sup>34</sup>

Nevertheless, even courts that follow the general rule precluding third-party standing to challenge a contract seem to evaluate the merits of the complaint before holding a lack of standing.<sup>35</sup> For example, 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.”<sup>36</sup> Since the debtors are in default, there is skepticism about permitting the debtor to assert a 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.”<sup>37</sup> 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’s ability to foreclose in its own name as well.<sup>38</sup>

### C. *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

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34. *Compare* *Woods v. Wells Fargo Bank, N.A.*, 733 F.3d 349, 354–55 (1st Cir. 2013) (finding the 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 [the debtor’s] mortgage, rendering any attempted assignments void,” but ultimately concluding that MERS did have such a legally transferrable interest), *and* *Miller v. Homecomings Fin., LLC*, 881 F. Supp. 2d 825, 829–30 (S.D. Tex. 2012) (allowing challenges to chain of assignments through which a lender asserts the right to foreclose), *with* *Livonia Prop. Holdings, L.L.C. v. 12840–12976 Farmington Rd. Holdings, L.L.C.*, 717 F. Supp. 2d 724, 746 (E.D. Mich. 2010) (holding that chain of title is established exclusively through review of public records).

35. *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.”).

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

37. *Id.*

38. *Zacks*, *supra* note 7, 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.”).

these issues as well.<sup>39</sup> This is unsurprising given the concerted judicial effort to facilitate foreclosures as expeditiously as possible.<sup>40</sup> 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.

### III. THE NORMATIVE CASE FOR CHALLENGING ASSIGNMENTS

Many cogent 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. First, some have expressed concern at the prospect of homeowners facing double liability.<sup>41</sup> Scholars in other foreclosure contexts have made similar observations.<sup>42</sup> 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, in fact, 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. Critics suggest and even generally homeowner-friendly articles concede, however, that the double liability issue rarely presents itself.<sup>43</sup> But that possibility, no matter how remote, should be relatively obvious grounds for finding assignment transfer issues relevant to the ultimate facts of a case.<sup>44</sup>

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39. 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.

40. See, e.g., Greg Allen, *Fast-Paced Foreclosures: Florida's 'Rocket Docket,'* NPR (Oct. 21, 2010, 4:17 PM), <http://www.npr.org/templates/story/story.php?storyId=130729666>.

41. *Miller v. Homecomings Fin., LLC*, 881 F. Supp. 2d 825, 832 (S.D. Tex. 2012) (“In truth, the potential prejudice is both plain and severe—foreclosure by the wrong entity does not discharge the homeowner’s debt, and leaves them vulnerable to another action by the true creditor.”); LORD, *supra* note 22, § 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 it should be liable to a defrauded third person . . .”).

42. Elizabeth Renuart, *Uneasy Intersections: The Right to Foreclose and the U.C.C.*, 48 WAKE FOREST L. REV. 1205, 1212 (2013) (arguing that standing is not a minor issue because of the possibility of double liability); White, *supra* note 16, at 494–95.

43. See 1 SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 432 n.82, at 819 (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 when the debtor had notice that the party enforcing the contractual right did not have good title to it. *Id.* at 818–19. See also Renuart, *supra* note 42, at 1240–50, 1255.

44. *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.”).

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.<sup>45</sup> 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 previously publicized issues with banks' improper documentation.

Ultimately, the most significant benefit accruing to individual homeowners who are 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.<sup>46</sup> 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.<sup>47</sup> Critics may posit that additional length of the foreclosure process could spur a delay in the resolution of the real estate market.<sup>48</sup> But 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.<sup>49</sup> Thus, any additional time required by assignment challenges would be an acceptable risk, especially in light of the further benefits described below.

Aside from the advantages accruing to individual homeowners, sound public policy reasons support courts allowing further challenges and theories. First, allowing challenges would promote the integrity of public records. This point has been made repeatedly in the context of MERS,<sup>50</sup> and no persuasive

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45. See, e.g., *Livonia Prop. Holdings, L.L.C. v. 12840–12976 Farmington Rd. Holdings, L.L.C.*, 717 F. Supp. 2d 724, 732 (E.D. Mich. 2010).

46. Dustin A. Zacks, *The Grand Bargain: Pro-Borrower Responses to the Housing Crisis and Implications for Future Lending and Homeownership*, 57 LOY. L. REV. 541, 567 (2011) (citing empirical studies showing that “longer foreclosure times increase lender losses.”).

47. See Renuart, *supra* note 42, at 1212–13 (noting that the ability to challenge mortgages would provide borrowers with better negotiating leverage). See also 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 workout other transactions with borrowers).

48. Dana, *supra* note 47, at 506 (noting that banks would argue that strict judicial treatment with respect to procedural requirements would slow down the resolution of the market).

49. Zacks, *supra* note 46, 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.”).

50. See, e.g., Peterson, *supra* note 1, at 1395–97.

rationale can be given for failing to give the same consideration to assignment issues generally. Surely public records should have the primary goal of being accurate and correct, and one would think that it is the duty of courts to ensure that improper assignments have not been recorded.

Further, these public records goals are backed by concerns regarding title issues in eventual sales or purchases of foreclosed properties. Such problems have been raised in regards to satisfactions of mortgages.<sup>51</sup> In turn, these difficulties affect a large portion of the population that has not been foreclosed. Ensuring that loan transfers were properly completed would go a long way towards increasing the accuracy of public records.

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.<sup>52</sup> And aside from the foreclosure “industry” itself, other areas of law that utilize assignments may also increase their efforts towards quality control. Debt collection, for example, has also attracted criticism for its questionable documentation.<sup>53</sup> 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.<sup>54</sup> While allowing such challenges may not provide a solution to the underlying causes of the housing crisis, the sum total of their positive externalities provides a sound rationale for allowing challenges.

#### CONCLUSION

We would offer a few preliminary suggestions to address existing mortgage assignment and foreclosure process 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 concerns noted above.<sup>55</sup> Alternatively, the note and mortgage could be merged

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51. White, *supra* note 16, at 495–96 (describing title problems that arise due to the validity of mortgage satisfactions).

52. 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).

53. See Dana, *supra* note 47, at 508 (suggesting that, during the next wave of securitizations, banks would show more care with respect to procedural requirements).

54. 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 years after the robo-signing scandal).

55. White, *supra* note 16, at 497 (suggesting that legislatures require lenders to document the complete transfer history of mortgage documents prior to foreclosing). *But see* Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE

into one document, rendering assignments less necessary and relevant.<sup>56</sup> Finally, MERS could be redesigned or nationalized as a national recording database, again rendering assignments less relevant.<sup>57</sup> Whichever solution seems most effective, the current state of the law is not consistent or procedurally equitable, the issues presented are founded in lender misconduct in the past, and judicial reasoning does not seem to be supported by current realities.

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L.J. 637, 662–63 (2013) (arguing that such requirements would make transfers hard and increase borrower costs).

56. White, *supra* note 16, at 498.

57. Zacks, *supra* note 7, at 610.