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CAN WE TRUST TRUSTEES? PROPOSALS FOR REDUCING WRONGFUL FORECLOSURES

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Imagine that a homeowner sends a check to her mortgage company every month. Nonetheless, she receives a notice from the mortgage company that it is initiating a foreclosure proceeding. The proceeding does not require a judge, jury, or court. Rather, a designated trustee is the only neutral party who stands between the homeowner and an illegal, wrongful foreclosure. However, there is one problem: under current law, the trustee is unregulated and almost always financially connected to the same bank that errantly initiated the foreclosure. The result is almost always the same: the homeowner loses her home.

This problem, to which advocates sometimes refer as "housejacking," is the result of the modern foreclosure system's failure to provide meaningful investigation into the mistakes of the foreclosing banks.[1] "Housejacking" can result if banks mishandle files, lose payments, or even engage in mass perjury to produce documents supporting illegal foreclosures.[2] Yet, despite a well-documented history of gross negligence and outright fraud, over half of all states still allow banks to foreclose on homes without first going to court or

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1. Telephone Interview with Erich Vieth, Consumer Attorney, Simon Law Firm (Aug. 15, 2012) (on file with author).

2. *See* Louis S. Pettey, *Ethics in Foreclosure*, 26 PROB. & PROP. 47, 47–48 (2012).

offering any proof that the foreclosure is valid.[3] In the majority of these "non-judicial foreclosures," a trustee stands in for the judicial system and is meant to act as a neutral party to the transaction—with duties to both parties—to assess the legitimacy of the bank's claim.[4] This dependence on a "neutral" trustee is misplaced because trustees present no meaningful safeguard against wrongful foreclosure.[5]

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3. *See* JOHN RAO & GEOFF WALSH, NAT'L CONSUMER LAW CTR. INC., FORECLOSING A DREAM, 12 (2009), *available at* http://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/foreclosing-dream-report.pdf. Rao and Walsh suggest that thirty states are non-judicial foreclosure states. *Id.* However, this depends to some degree on how states are counted and what the common practice actually is in the state. Some states, such as Louisiana, are difficult to count because they utilize multiple foreclosure processes that involve the court in varying ways. *Id.* at 39.

4. *See generally id.* This Article rests upon the idea that trustees should be neutral. The law generally recognizes this principle. *See, e.g.*, McHugh v. Church, 583 P.2d 210, 214 (Alaska 1978) ("The trustee under a deed of trust generally is regarded as owing a fiduciary duty to both the trustor and the beneficiary and is required to perform his duties impartially."); Perry v. Va. Mortg. & Inv. Co., 412 A.2d 1194, 1197 (D.C. 1980) (quoting S & G Inv. Inc. v. Home Fed. Sav. & Loan Ass'n, 505 F.2d 370, 377 n.21 (D.C. Cir. 1974)) ("In this jurisdiction 'a trustee under a deed of trust owes fiduciary duties both to the noteholder and to the borrower.'"); Lake Hillsdale Estates, Inc. v. Galloway, 473 So. 2d 461, 465 (Miss. 1985) ("In a deed of trust the trustee is under a duty to perform his duties in good faith and act fairly to protect the rights of all parties equally."); Smith v. Haley, 314 S.W.2d 909, 913 (Mo. 1958) ("The trustee sustains a fiduciary relationship to the debtor and the creditor. Reason and justice exact of him the most scrupulous fidelity in transferring one man's property to another."); Bonilla v. Roberson, 918 S.W.2d 17, 21 (Tex. Ct. App. 1996) ("When exercising a power contained in a deed of trust, the trustee becomes a special agent for both parties, and he must act with absolute impartiality and with fairness to all concerned. . . ."). Even states that do not use the word "neutral" to describe the duty of a trustee impose an approximate version of this duty. *See, e.g.*, Russell v. Lundberg, 120 P.3d 541, 546 (Utah Ct. App. 2005) (quoting Five F, L.L.C. v. Heritage Sav. Bank, 81 P.3d 105, 108 (Utah Ct. App. 2003)) ("While a trustee's primary duty and obligation is to the beneficiary of the trust, 'the trustee's duty to the beneficiary does not imply that the trustee may ignore the trustor's rights and interests.'"). Additionally, a few states do not explicitly recognize a duty of neutrality, but still impose statutory requirements on trustees for which they can be liable. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-807(E) (2007) (explaining that the trustee can be named as a party in legal actions for breaching his obligations under the statute). It is unclear whether this type of statute prohibits a trustee from proceeding with a foreclosure sale in the face of evidence that the homeowner was not in default.

However, this Article does not rest upon a legal analysis of existing trustee law. Instead, it suggests that there is not enough law governing trustees and that the law that does exist is difficult to follow. Consequently, improving legislative and litigation methods could alter the role of the trustee.

5. Foreclosures occur in two legal regimes: lien theory jurisdictions and title theory jurisdictions. Title theory states typically utilize a deed of trust, which is the document that names the trustee who holds bare legal title and, in the event of default, initiates foreclosure, provides notice, and carries out the foreclosure sale. *See* Elizabeth Renuart, *Property Title Trouble in Non-Judicial Foreclosure States: The* Ibanez *Time Bomb?*, 4 WM & MARY BUS. L. REV. 111, 131, 140, 151 (2013). Additionally, nineteen states and the District of Columbia are both non-judicial and require a trustee. *See Security Instruments*, FREDDIE MAC, http://www.freddiemac.com/uniform/unifsecurity.html (last visited February 5, 2014) (listing the standard security instruments for each state). Importantly, two of these states rank as the two most populous states in the country: Texas and California. PAUL MACKUN & STEVEN WILSON, U.S. CENSUS BUREAU, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010 (2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf. This Article is most applicable in those states. Any state

The lack of protection from wrongful foreclosure is especially troubling because of what is at stake. The home is at the center of the American dream and is the subject of much of American jurisprudence. No piece of property is treated as more sacred or more worthy of protection from intrusion. Indeed, in many states, homeowners can quite literally shoot someone who enters their home unlawfully,[6] and in all states, the police must behave differently if they wish to search a person's home.[7] How then is it true that over half of the states in America allow a bank to take a person's home in foreclosure without entering a courtroom? And how is it true that the only neutral in such an extrajudicial proceeding can also be the attorney for the bank?

These questions are especially salient in light of the behavior of national banks in the last two decades.[8] During that time, banks participated in, or, in many cases caused, the subprime crisis (the worldwide market collapse due to mortgage securitization),[9] the creation of shell recording companies to avoid the cost of public recording of property ownership,[10] robo-signing (an automated signature process that is simply perjury in relation to foreclosures),[11] widespread servicing abuse leading to a $25 billion settlement with the federal government,[12] and rampant questionable foreclosures, including foreclosures on

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that allows a deed of trust at least has the potential for trustees to be involved. Together, these states account for roughly 138 million Americans, or about forty-five percent of the population. *Id.*

6. *See, e.g.*, COLO. REV. STAT. § 18-1-704.5 (2012). Many states have enacted "Make My Day" immunity laws that provide an affirmative defense to a homeowner who shoots, or uses other physical force against, an intruder. *See* People v. Tomlins, 107 N.E. 496, 497 (N.Y. 1914) (misquoting 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 485 (1800)) ("In case a man 'is assailed in his own house, he need not flee as far as he can, as in other cases of se defendendo, for he hath the protection of his house to excuse him from flying, as that would be to give up the protection of his house to his adversary by flight.' Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home."); *see also* Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century,* 4 RUTGERS J.L. & PUB. POL'Y 504, 530 (2007) (describing the castle doctrine in Florida).

7. *See* Steagald v. United States, 451 U.S. 204, 212 (1981) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.").

8. *See* Telephone Interview with Erich Vieth, *supra* note 1 (describing questionable bank behavior).

9. *See* Renuart, *supra* note 5, at 118.

10. *See* Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 111, 149 (2011).

11. *See* Pettey, *supra* note 2 (describing the various actions to which the term "robo-signing" refers).

12. Jim Puzzanghera & E. Scott Reckard, *Banks Report $51 Billion in Consumer Relief in Mortgage Settlement*, L.A. TIMES (Aug. 22, 2013, 9:00 AM), http://articles.latimes.com/2013/aug/22/business/la-fi-mo-mortgage-settlement-banks-foreclosure-20130822 (describing Bank of America's, JP Morgan Chase's, and Wells Fargo's settlement of state and federal allegations of illegal foreclosures).

homes that had never been subject to loans.[13] These problems demonstrate that banks, at least as currently formulated, cannot police themselves. However, despite growing concerns, banks have initiated in excess of ten million foreclosures since 2008.[14]

In the majority of states, trustees stand between banks and the homeowner.[15] Because of their vital role, courts watch the "proceedings [of trustees] with a jealous and scrutinizing eye,"[16] and require that the trustee provide "the most scrupulous fidelity."[17] However, in reality trustees are almost never held accountable for failing to fulfill their duties.[18] Trustees are routinely untrained, unregulated, and many times closely tied to the banks that initiate foreclosures.[19] In the best cases, trustees are unprepared to handle the complex questions that securitization has created. In the worst, trustees have a financial incentive to authorize foreclosures as quickly as possible, regardless of what evidence of fraud or negligence may be available.[20] Moreover, the lack of regulation of

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13. *See* Harriet Johnson Brackey, *Lauderdale Man's Home Sold Out from Under Him in Foreclosure Mistake*, SUN SENTINEL (Ft. Lauderdale, Fla.) (Sept. 23, 2010), http://articles.sun-sentinel.com/2010-09-23/business/fl-wrongful-foreclosure-0922-20100921_1_foreclosure-defense-attorney-foreclosure-case-jumana-bauwens; Joshua Rhett Miller, *Bank of America to Pay Florida Couple in Mistaken Foreclosure Case*, FOX NEWS (June 6, 2011), http://www.foxnews.com/us/2011/06/06/bank-america-pays-florida-couple-in-mistaken-foreclosure-case.

14. *See* Press Release, RealtyTrac, Record 2.9 Million U.S. Properties Receive Foreclosure Filings in 2010 Despite 30-Month Low in December, (Jan. 12, 2011), *available at* http://www.realtytrac.com/content/press-releases/record-29-million-us-properties-receive-foreclosure-filings-in-2010-despite-30-month-low-in-december-6309 (reporting the number of foreclosures and increase in the foreclosure rate since 2006).

15. Peter W. Salsich, Jr., *Homeownership—Dream or Disaster?*, 21 J. AFFORDABLE HOUSING 17, 33 (2012).

16. West v. Axtell, 17 S.W.2d 328, 334 (Mo. 1929).

17. Edwards v. Smith, 322 S.W.2d 770, 777 (Mo. 1959).

18. Telephone Interview with Erich Vieth, *supra* note 1.

19. Erich Vieth, *Mortgage Crisis in a Nutshell—Presented by John Campbell*, YOUTUBE (Apr. 21, 2012), at 26:06, http://www.youtube.com/watch?v=YBbwb6Sv4PM (laying out the root causes of the modern mortgage crisis and providing an in-depth understanding of fundamental changes in the mortgage industry that make the role of the trustee even more vital). Many states do not even impose minimum requirements regulating who can be named a trustee. Telephone Interview with Erich Vieth, *supra* note 1.

20. In many cases, the trustee is also the attorney for the bank. *See, e.g.*, *In re* Vogler Realty, Inc., 722 S.E.2d 459, 460–61 (N.C. 2012); Interview with Bruce Neas, Legislative Coordinator, Columbia Legal Servs. (July 24, 2012) (on file with author) (explaining that, although the attorneys for the banks are not usually the trustees in Washington, the relationship is still very close). Additionally, the law firms that represent foreclosing banks often have ownership interests in trustee companies. *See, e.g.*, *Company Profile*, NORTHWEST TRUSTEE SERVS., INC., http://www.northwesttrustee.com/profile.aspx (last visited Feb. 5, 2013) (describing Northwest Trustee Corporation, which is owned, in part, by the law firm that represents most of the foreclosing banks in Washington).

trustees and their financial ties to the foreclosing banks combine to cause even more serious problems.[21]

These problems are unique to our times. Although the role of trustees has always been critical, it was not always complicated. In a typical lending situation, it was evident who owed what to whom, and the fundamental elements required for a legal foreclosure—that default occurred and that the party foreclosing had standing to foreclose—were not in question.[22] Modern foreclosures are drastically different. The mortgage crisis has revealed an alarming number of questionable foreclosures.[23] Indeed, it is often unclear who owns the note,[24] who is secured, what is owed, and whether it was paid.[25]

One may wonder why these problems are not being discussed more often, why courts are not carefully scrutinizing the work of trustees, and why legislators are not responding to these problems. There are several reasons why the problem has gone largely unexplored. First, homeowners are vulnerable at the time of foreclosure, often lacking the time, money, or energy to wage a fight.[26] Second, there are very attorneys who represent homeowners in such matters and there is a lack of oversight because no court is directly involved.[27] Third, the problem is new and complex, so a relatively small number of have pierced the veil of the modern mortgage era sufficiently to detail it and identify problems. Finally, characterizing trustees as unregulated and often outright unfair actors is an assertion that attorneys are engaged in wrongdoing. This is unpopular because many attorneys believe it is uncouth to sue or otherwise criticize other attorneys.

The result of the confluence of the modern mortgage era with ineffectual trustees is that the fox is in charge of the chicken coop. Banks that have had their credibility called into question are directing foreclosures with little to no supervision.[28] To say that this is producing tragic results for homeowners is to understate the problem. In many cases, there is no certainty that the homeowner failed to pay nor is there certainty that the party who is foreclosing is the party with the legal right to do so. In the more egregious cases, in which there is solid

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21. An independent search revealed that, with the exception of public trustees in Colorado, trustees are not truly free of ties to the banks. Consequently, although not every trustee seeks to be unfair, the lack of training and regulation, coupled with the gravitational pull of the banks that pay the trustees, indicates that the lack of regulation and the potential for bias work in concert and must be discussed together.

22. Vieth, *supra* note 19, at 35:30. *See generally* Renuart, *supra* note 5, at 436 (providing an overview of the foreclosure process).

23. *See* Aletra P. Williams, *Foreclosing Foreclosure: Escaping the Yawning Abyss of the Deep Mortgage and Housing Crisis*, 7 NW. J.L. & SOC. POL'Y 455, 457 & n.8 (2012).

24. *See* Tanya Marsh, *Foreclosures and the Failure of the American Land Title Recording System*, 111 COLUM. L. REV. 19, 19–20 (2011).

25. *See* Williams, *supra* note 23, at 467.

26. *See id.* at 468.

27. *See* Telephone Interview with Erich Vieth, *supra* note 1.

28. Brackey, *supra* note 13.

proof that the homeowner was current on his payments but his house was taken regardless, the circumstances are even more troubling.[29]

This Article is a response both to the need for exposition of the problem and for constructive suggested solutions. It is meant to be a marriage of storytelling (about the real people who are suffering harm), investigative journalism regarding the role of trustees (because it draws from interviews with practitioners to reveal facts that do not appear in books or articles), diagnosis and analysis of the fundamental problems with the current trustee structure, and proposal of meaningful and realistic reform.[30]

Part I of this Article provides background of the current foreclosure problem by recounting the story of a specific homeowner and tracking media reports and scholarly literature that chronicle the wave of wrongful foreclosures sweeping the country. Part II considers how the modern mortgage era differs from how the process operated in the past. Part III discusses how the current non-judicial foreclosure regime works and the role of the trustee in this process. It also identifies a number of specific problems that relate to the role, or non-role, of trustees. Finally, Part IV proposes reforming the role of trustees through a combination of strategic legislation, litigation, and ethical inquiries and complaints.

I. THE FORECLOSURE CRISIS

Homeownership increased throughout the twentieth century, and, by 2000, over two-thirds of Americans owned their homes.[31] As home values rose, homeowners took out larger loans to purchase larger houses.[32] However, when home values suddenly dropped, these loans far exceeded the value of the

29. *See, e.g.*, *id.*

30. It is beyond the scope of this Article to address every question and present every solution to what is a multifaceted, institutional failure. There is undoubtedly a need for true reform of home lending, the securitization process, and public and internal recordkeeping. There are also multiple solutions to the wrongful foreclosure problem that could be implemented, including mediation programs utilized by several states. *See generally* Geoff Walsh, *The Finger in the Dike: State and Local Laws Combat the Foreclosure Tide*, 44 SUFFOLK U. L. REV. 139, 158–59 (2011) (discussing legislation Massachusetts, New York, Washington, Nevada and Illinois passed to curb wrongful foreclosure and foreclosures in general); *see also* Williams, *supra* note 23, at 458 (summarizing a variety of responses by state legislatures to the foreclosure crisis). Another interesting solution proposes a unified electronic recording system and the merger of the note and mortgage into one viewable document. Alan M. White, *Losing the Paper—Mortgage Assignments, Note Transfers and Consumer Protection*, 24 LOY. CONSUMER L. REV. 468, 498 (2012). Finally, the proposed Uniform Nonjudicial Foreclosure Act (UNFA) contains some novel suggestions for addressing the hodgepodge of divergent state substantive and procedural rules relating to foreclosure. Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1401 (2004).

31. *See* Salsich, *supra* note 15, at 25.

32. *See id.* at 28.

homes.[33] At the same time, the rates on many of the loans increased and consumed more of the homeowners' income.[34] As a result, homeowners began to default on loans, and, because their loans were "underwater," they could not refinance.[35]

The consequences were staggering. In early 2007, 2.23% of homeowners were seriously delinquent on their mortgages, resulting in approximately 980,000 overdue loans.[36] By the end of 2009, the percentage of delinquent mortgages rose to 9.67%, representing 4.3 million overdue loans.[37] By the end of the second quarter of 2012, the rate was still 7.58%.[38]

These delinquencies led to a devastating number of foreclosures. In 2008, were 2.3 million properties were in foreclosure.[39] In 2009, as the mortgage crisis continued to build, an estimated 2.9 million properties were in foreclosure.[40] In 2010, the number was roughly the same.[41] In 2011, approximately 2.7 million homes were in foreclosure.[42] In 2012, roughly 1.8 million homes were in foreclosure.[43] Although there may be some overlap in the properties that were in foreclosure from year to year, the number of completed foreclosures is equally shocking. Over 3.4 million families have actually been foreclosed upon and displaced.[44]

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33. *See id.* The rate at which home values dropped when the housing bubble burst in 2008 was faster than the rate at which home prices dropped during the Great Depression. *Id.* at 24.

34. Vieth, *supra* note 19, at 8:45.

35. *See* Salsich, *supra* note 15, at 20 (defining an underwater loan as a loan obligation that is higher in value than the property for which the loan was issued).

36. Renuart, *supra* note 5, at 117 & n.6 (citing MORTG. BANKERS ASS'N, NATIONAL DELINQUENCY SURVEY Q1 (2007)) (defining "seriously delinquent" mortgage loans as those that are "ninety days or more delinquent or in foreclosure").

37. MORTG. BANKERS ASS'N, NATIONAL DELINQUENCY SURVEY Q4 2 (2009), *available at* http://media.oregonlive.com/frontporch/other/NDS_Q409.pdf.

38. Press Release, Mortg. Bankers Ass'n, Mortgage Delinquencies Increase in Latest MBA Survey, MORTGAGE BANKERS ASSOCIATION (Aug. 9, 2012), *available at* http://www.mortgagebankers.org/NewsandMedia/PressCenter/81589.htm.

39. *See* Press Release, RealtyTrac, Foreclosure Activity Increases 81 Percent in 2008 (Jan. 15, 2009), *available at* http://www.realtytrac.com/content/press-releases/foreclosure-activity-increases-81-percent-in-2008-4551.

40. *See* Press Release, RealtyTrac, *supra* note 14.

41. *See id.* (reporting that between 2009 and 2010 the number of properties in foreclosure increased by two percent).

42. *See* Press Release, RealtyTrac, 2011 Year-End Foreclosure Report: Foreclosures on the Retreat (Jan. 9, 2012), *available at* http://www.realtytrac.com/content/foreclosure-market-report/2011-year-end-foreclosure-market-report-6984.

43. *See* Press Release, RealtyTrac, 1.8 Million U.S. Properties with Foreclosure Filings in 2012 (Jan. 14, 2013), *available at* http://www.realtytrac.com/Content/foreclosure-market-report/2012-year-end-foreclosure-market-report-7547.

44. *See* Chris Guldi, *3.4 Million Completed Foreclosures Since Sept. 2008, CoreLogic Reports*, GULDI GROUP (Apr. 10, 2012), http://www.guldigroup.com/2012/04/3-4-million-completed-foreclosures-since-sept-2008-corelogic-reports/ (discussing a CoreLogic report that measured data from 2008 to April of 2012).

The loss of these homes not only affected families, but it also had an impact on the global community. For example, foreclosures damage the property value of nearby properties, resulting in over $1.86 trillion in lost property value during the recovery years.[45] Foreclosures also affect credit scores and can lead to bankruptcy.[46] As a result, homeownership is becoming increasingly difficult,[47] and communities are struggling to recover from the burst of the housing bubble.[48] Alarmingly, the data suggests that millions of additional foreclosures are still to come.[49]

The risky loans and predatory terms that lead to foreclosure in many cases also apply for the life of the loan. Although some of these terms are being modified, modification has proven to be a far from perfect fix.[50] Additionally, the underlying challenges that securitization presents to identifying who can foreclose and who is in default will persist indefinitely, as questionable practices continue to be legal and commonplace. A solution that would curb wrongful foreclosures is needed immediately and will have long-term future benefits.

A. Wrongful Foreclosures Abound

It is important to note at the outset that media reports and scholarly work address both judicial and non-judicial foreclosures because the same errors relating to record keeping, standing, and outright fraud exist in both settings. The only notable difference is that in judicial foreclosure states, the court has at least some opportunity to examine the validity of foreclosures.[51] Given the massive number of foreclosures, the involvement of a neutral party is far from a complete solution. However, there is reason to believe that the involvement of a neutral makes a difference. For example, in Florida, fraudulent, robo-signed documents caused a number of egregious foreclosures.[52] After a Florida court discovered the problem during foreclosure litigation, the state promulgated new rules that required attorneys to verify the authenticity of documents supporting foreclosure.[53] It follows that, if wrongful foreclosures can occur under a court's watchful eye, the problems in states without a

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45. Alexander Bader, Note, *Truly Protecting the Consumer in Light of the Subprime Mortgage Crisis: How Generally Applicable State Consumer Protection Laws Must be a Key Tool in Keeping Lending Institutions Honest*, 25 J. C.R. & ECON. DEV. 767, 768 (2011).

46. *See* Williams, *supra* note 23, at 470–71 (noting the correlation between foreclosure filings and bankruptcy filings).

47. *See* Salsich, *supra* note 15, at 23.

48. *See* Renuart, *supra* note 5, at 117.

49. *See* Williams, *supra* note 23, at 456.

50. Approximately 5.7 million loans have been modified since 2007. HOPE NOW, SUPPORT AND GUIDELINES FOR HOMEOWNERS (2012), *available at* http://www.hopenow.com/pdf/HN%20Brochure%20Final_spreads.pdf.

51. *See* Telephone Interview with Erich Vieth, *supra* note 1.

52. Brackey, *supra* note 13.

53. *Cf.* Vieth, *supra* note 1 (discussing the impact of the Bank of America foreclosure crisis in Florida).

meaningful neutral party must exist, and they are likely to be worse. Additionally, interjecting a meaningful neutral into non-judicial foreclosure will not stop all wrongful foreclosures, but it help to reduce their frequency.

B. Real-Life Example: Ron Meehow Loses His Home Despite Making All of His Mortgage Payments

Ron Meehow obtained a refinanced loan from LoanQuest, a subprime lender that subsequently went out of business.[54] Within months, Ron received notice to begin making payments to National Bank and Trust, the servicer of the loan. Even though Ron was unsure of why he should pay a third party, he continued to make the payments because he did not want to lose his home. Ron made timely payments for six years.

Around seven years after the original loan, Ron received a notice from American Bank, which informed him that he was behind on his payments. Although unsure of how American was connected to his loan, Ron called the bank. He informed the representative that he had electronic confirmation of every single payment. The representative could not explain the mistake, but suggested that the bank would rectify problem. A few days later, Ron received a promotional packet in the mail offering to refinance his loan to reduce his monthly payments. Ron had not requested a modification, but the deal sounded fair. Ron immediately signed the paperwork and returned it to American at the address provided in the packet. About a week later, he received a signed copy of the modification. Thereafter, he began making payments at the modified rate. Ron and his wife stopped worrying about the notice of default and felt secure with a signed contract from American and a lower monthly payment.

However, three months later, Ron received a letter from the law firm of Huck & Fole attempting to collect a debt on behalf of American and claiming that Ron was in default on his home loan and at risk of foreclosure. Ron was both furious and afraid. Ron called American and spoke to two customer service representatives and the foreclosure department, but no one could help him. Frustrated after two hours of calls, he hung up. He called again several days in a row, but no one could explain what was happening, and some representatives even suggested it was a clerical error that would be resolved soon.

Huck then sent Ron another letter, informing him that Huck was the successor trustee, and that his house would be sold in foreclosure in three weeks. After searching the internet, Ron learned that a trustee was a neutral party who carried

54. Although the names are fictitious, the following example is based on a case that was litigated in St. Charles County, Missouri. *See* First Amended Petition, Rippy v. Chase Bank, No. 1111-CV0667 (Mo. Cir. Ct. Dec. 1, 2011) (providing the factual basis of *Rippy v. Chase Bank*, on which Ron Meehow's story is based). This case is only one of countless others throughout the country that allege that a bank foreclosed in the absence of default or in direct conflict to the promises it made to modify a loan. These same allegations, along with many others, gave rise to the $25 billion settlement between five of the largest national loan servicers and the United States. *See supra* note 12 and accompanying text.

out a foreclosure after a homeowner defaulted on his loan. Ron wondered how Huck could represent American and be the neutral party at the same time.

Ron hired an attorney and he provided him with all relevant documentation of his loan and the payments he had made. The attorney did not specialize in mortgage law, but believed the case should not be too difficult because the situation appeared to be a clear mistake. The attorney knew that a foreclosure could not occur if the homeowner made the requisite payments. He called an attorney at Huck and offered to send proof of the signed modification and Ron's payments. However, the lawyer at Huck told him that the firm did exactly what American told it to do. Ron's attorney was shocked and explained that Huck was required to be neutral party and had a fiduciary duty to Ron under state law. The attorney at Huck only reiterated that he could not stop a foreclosure without American's permission.

The attorney at Huck told Ron's attorney that he needed to contact American directly. Ron's attorney called American and sent a letter. American suggested that the modification simply needed to be sent to its "Fulfillment Center," after which American would cancel the foreclosure. However, Ron soon received notice that foreclosure would proceed. Ron and his attorney made more calls, and were successful in postponing the foreclosure. However, American soon set a new date, and the foreclosure continued, with Huck's assistance throughout the proceedings. Despite Ron's and his attorney's efforts, the foreclosure took place and Ron lost his home. Ron never had a chance to be heard in court because American was not required to use judicial process to complete the foreclosure, and he could not afford to pay his attorney to file a lawsuit.

In addition to losing his home, Ron was legally responsible for the difference between the price of the house at the foreclosure sale and the amount he owed on the loan. This "deficiency" had the potential to bankrupt Ron. In an effort to reduce the deficiency, state law required the trustee (Huck) to sell Ron's home for the highest possible price. However, despite the fact that there was a paper in Ron's town with a circulation of over 500,000 people, Huck only published notice of the sale in a paper with less than one thousand readers and that was only targeted to lawyers. Huck sold the house to the only bidder, Government Mortgage Corporation (Govie Mo), and Huck's long-time client. Govie Mo purchased the house for $120,000, which was about $30,000 less than the amount Ron owed on the house.

Five days after the sale, Huck posted a notice on Ron's door notifying him that he was living in the house illegally and that he must move out or Huck would involve the sheriff. Ron told his wife and son they had to move. Ron's wife worried about how the foreclosure would affect their credit score, and how they would afford a new home. They had spent what little extra money they had on the attorney. Ron's son worried about whether he would need to leave his school and his friends. Despite Huck's notice, Ron's family could not move out immediately because they had nowhere else to go.

A few days later, the sheriff's office sent notice that, because Ron and his family had not yet left, they were unlawfully detaining the house. Additionally, Govie Mo was suing Ron for $1,000 per month in rent, plus additional fines to punish Ron for illegally living the house. Ron noticed that Huck, the trustee from his foreclosure proceeding, was also representing Govie Mo.

The court ordered Ron's family to vacate their home, on which they continued to make payments. A month later, the court ordered Ron to pay $4,800 in back rent. The foreclosure also promptly appeared on Ron's credit report. Less than two weeks later, the sheriff forced Ron and his family to leave the house. Ron was forced to move his family to a small apartment in a bad part of town. They had to dispose of some of their belongings because they could not fit in the new apartment. Ron's son had to change schools. Ron's wife was embarrassed by their situation. Ron was depressed. Their entire lives had changed. Eventually, Govie Mo notified Ron that it would begin to garnish his wages. All he could do was despair.

C. Ron's Story Is Not Unique: Reports of Wrongful Foreclosures Are Widespread

As the number of home foreclosures rises, so does the potential for wrongful foreclosures.[55] A few have garnered media attention, but many more go unnoticed. One of the most shocking foreclosures to receive press coverage involved a Florida man who discovered that Bank of America had foreclosed his home, despite the fact that he had never taken out a loan from that bank.[56] The homeowner learned of the foreclosure only after it was complete and title had been transferred to a government-backed agency.[57] The homeowner filed a lawsuit and ultimately got his home back.[58] The case is especially troubling because Florida is a judicial foreclosure state, which requires Bank of America to file documents supporting its right to foreclosure.[59] Bank of America could only have produced the documents through robo-signing.[60]

In another Florida case, a couple purchased a home in full and consequently presumed they would have no further interaction with the bank.[61] However, a year after the purchase, Bank of America notified the couple that their home was under foreclosure.[62] Although Bank of America acknowledged that the foreclosure was a mistake after the couple filed a lawsuit, the battle continued

55. *See* Elizabeth Renuart, *Toward A More Equitable Balance: Homeowner and Purchaser Tensions in Non-Judicial Foreclosure States*, 24 LOY. CONSUMER L. REV. 562, 562–63 (2012).

56. Brackey, *supra* note 13 (noting that the homeowner purchased the home with cash).

57. *Id.*

58. *See* Telephone Interview with Erich Vieth, *supra* note 1 (discussing the Bank of America foreclosure crisis).

59. *See generally id.* (providing an overview of Florida's foreclosure process).

60. *Id.*

61. *See* Miller, *supra* note 13.

62. *See id.*

because Bank of America was reluctant to pay the couple's attorney's fees.[63] The Bank paid the fees only after the couple's ambitious attorney secured a lien, went to a Bank of America branch with a police officer to enforce the lien, and threatened to seize the branch's physical assets.[64]

Scholars have noted similar problems. For example, Professor Katy Porter discusses the consequences of abusive mortgage servicing, highlighting cases in which the servicing was incorrect or inaccurate.[65] Porter explains that, in *Rawlings v. Dovenmuehle Mortgage, Inc.*, the servicer repeatedly asserted that the homeowners had failed to make payments even though the servicer itself had erred by applying the payments to the wrong account. After the servicer sent notices of default and imposed late fees, the homeowners spent over seven months attempting to resolve the servicer's error. In another instance, *Islam v. Option One Mortgage Corp*., the borrowers refinanced, but the prior servicer continued to threaten to foreclose on the borrowers' home and to report adverse information to credit bureaus.[66]

Similarly, according to the *Boston Globe*, "mortgage companies typically include projected foreclosure costs in payoff amounts given to borrowers in default," even if the costs are never actually incurred.[67] According to a member of the industry, this practice is "'pretty much industry standard.'"[68]

Porter's reports are consistent with other studies of and reports on the mortgage crisis,[69] including the actions of the Federal government. For example, on January 7, 2013, the Office of the Comptroller of Currency (OCC) reported that ten servicing companies—the companies that collect payments on mortgages—agreed to pay $8.5 billion in compensation for servicing errors to over 3.8 million borrowers.[70] Before this agreement, a previous OCC

63. *See id.*

64. *Id.*

65. *See generally* Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121 (2008).

66. *Id.* at 131–32 (discussing Rawlings v. Dovenmuehle Mortg., Inc., 64 F. Supp. 2d 1156 (M.D. Ala. 1999), *and* Islam v. Option One Mortg. Corp., 432 F. Supp. 2d 181 (D. Mass. 2006)).

67. *Id.* (citing Sacha Pfeiffer, *Hidden Legal Fees Push Some Into Foreclosure*, BOSTON GLOBE, Jan. 18, 2007, at D1).

68. *Id.*

69. *See, e.g.*, Williams, *supra* note 23, at 467 ("Irrespective of whether a jurisdiction is a judicial or non-judicial foreclosure system, the foreclosure process seems to be riddled with systemic flaws. Common foreclosure errors include: a) a mortgage servicer's inadvertent misapplication of a debtor's mortgage payments; b) failure to recognize a debtor's exemption from foreclosure under the Servicemembers Civil Relief Act; c) failure to prove a foreclosing party's title to a promissory note; d) improper endorsements of mortgage notes; e) backdating paperwork or assignments; f) affidavits without signatures filed or personal knowledge of its contents; g) claiming inflated legal fees associated with foreclosure; or h) lost or missing promissory notes.").

70. *See* Press Release, Bd. of Governors of the Fed. Reserve Sys. & Office of the Comptroller of Currency, Independent Foreclosure Review to Provide $3.3 Billion in Payments, $5.2 Billion in Mortgage Assistance (Jan. 7, 2013), *available at* http://www.occ.gov/news-issuances/news-releases/2013/nr-ia-2013-3.html.

initiative—the Independent Foreclosure Review—required servicers like Bank of America, Citibank, JPMorgan Chase, U.S. Bank, and Wells Fargo to pay to audit every individual foreclosure they initiated.[71] OCC's imposition of broader enforcement is evidence that there are other potential problems with foreclosures in all states, even those that use trustees.

Interviews with attorneys, reviews of press reports and the scholarly literature, and the author's personal experiences as a practicing consumer attorney are consistent with the documented cases and reach the same conclusion: wrongful foreclosures happen every day.

II. THE MODERN MORTGAGE ERA AND NON-JUDICIAL FORECLOSURE

The mortgage industry has become immensely complex. There are vast differences between the way the industry operated for close to two hundred years and the current system.[72] Understanding the differences is essential to understanding why the current non-judicial foreclosure model, with its use of unregulated and untrained trustees, is ineffective. Specifically, the mortgage industry has transformed from a transparent system with only a few moving parts to an immensely complicated system with more actors, documents, transfers of notes, and questions about recordkeeping, resulting in far less certainty and transparency.[73] This increasing uncertainty underscores the need for trustees to be trained, careful, and, most importantly, fair.

A. The Previous Lending Scheme

Thirty years ago, almost every home loan originated from a local bank and was made to a local borrower.[74] The bank issued a loan only if it believed the borrower could repay the loan, the house was worth more than the loan, and terms were favorable enough to allow the bank to earn a profit over the life of

71. *Id.*

72. *See, e.g.,* Marsh, *supra* note 24, at 20–21 (describing the differences in title recording in recent years).

73. For an interesting way to conceptualize the changes in the mortgage field, see generally James Charles Smith, *The Structural Causes of Mortgage Fraud*, 60 SYRACUSE L. REV. 473, 480 (2010) (suggesting that there is geographic distance, transaction distance, and financial distance in the new home lending model). Today, companies making loans are farther away, which limits appraisals and underwriting to paper reviews and makes it far more likely that the lender does not understand property values or recognize fraudulently high appraisals. *See id.* at 480–88 (discussing geographic distance). Additionally, one party brokers the loans, while another party makes the loans, and a third party holds the loans. *See id.* at 488–94 (discussing transactional distance). This reduces the incentive and ability of the original lender to ensure performance of the loan. *See id.* Finally, the holders of the loans have less incentive to research and resolve potential payment problems because they own a fraction of the interests in loans (due to tranches from securitization) than they did when they held an interest in the entire note. *See id.* at 494–98 (discussing financial distance). These three "distances" lead to more fraud, more negligence, fewer work-outs, and more foreclosures. *Id.* at 476–77.

74. Telephone Interview with Erich Vieth, *supra* note 1.

the loan.[75] If the debtor defaulted, the bank's only recourse was to foreclose, which was not an especially profitable outcome.[76] If it foreclosed, the bank could not collect thirty years of interest, inevitably incurred foreclosure costs,[77] and became responsible for the property until it sold again.[78] Consequently, banks independently investigated the ability of the borrower to repay by checking his credit and references or analyzing his debt to income ratio.[79] The bank also appraised the home to ascertain its real value.[80] Additionally, banks typically required a ten percent down payment to ensure that the value of the loan was less than the value of the house.[81] Finally, the bank would contract for a reasonable interest rate to set payments that the borrower could hopefully make for the next thirty years.[82]

The transaction was also simple. The borrower gave the bank security in the house in return for the loan.[83] He knew exactly who to pay and exactly what would happen if he failed to make his payments. If the borrower missed a payment, the bank would call him.[84] If the bank was mistaken, the borrower could prove the error by providing proof of payment.[85] Therefore, the borrower had an incentive to inform the bank if he experienced problems or a disruption in income, and the bank had an interest in working with the borrower to avoid foreclosure and ensure that the borrower continued to make payments.[86] The bank also made a clear record of its security interest with the recorder of deeds office, which was public and readily accessible to interested parties.[87]

Under this system, the interests of the borrower and the bank were largely aligned. The bank had no interest in making a loan that a borrower could not

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75. Vieth, *supra* note 19, at 46:30.

76. Telephone Interview with Erich Vieth, *supra* note 1.

77. Sally Pittman, Comment, *Arms, But No Legs to Stand On: "Subprime" Solutions Plague the Subprime Mortgage Crisis*, 40 TEX. TECH. L. REV. 1089, 1100 (2008) (noting that banks report that the average cost of a home foreclosure is $60,000).

78. *Cf.* Telephone Interview with Erich Vieth, *supra* note 1 (indicating that banks were far more involved with the loan and foreclosure process in the past).

79. Vieth, *supra* note 19, at 49:40; *see also* Juliet M. Moringiello, *Mortgage Modification, Equitable Subordination, and the Honest but Unfortunate Creditor*, 79 FORDHAM L. REV. 1599, 1601 (2011) (explaining that, in the past, banks "required full documentation of the borrower's income"); Telephone Interview with Erich Vieth, *supra* note 1 (noting that "banks recorded everything" in reference to the loans they issued).

80. *See* Vieth, *supra* note 19, at 45:30 (explaining that, in some small communities, a bank employee would personally walk through the home to assess the value of the property).

81. *See id.* at 46:10.

82. *See id.* at 46:20.

83. *See id.* at 46:40; *see also* Renuart, *supra* note 55, at 565 (explaining that a mortgage loan "consists of two distinct documents, a note and a security agreement").

84. Vieth, *supra* note 19, at 47:45.

85. *See* Telephone Interview with Erich Vieth, *supra* note 1.

86. *See* Vieth, *supra* note 19, at 48:00; *see also* Pittman, *supra* note 77, at 1099.

87. *See* Vieth, *supra* note 19, at 48:25.

afford, overstating the value of the home, or having someone else collect the money on the loan.[88]

The trustee's role in this setting was often simple and did not create a conflict between the bank and the homeowner. The bank would notify the trustee of the default, and the trustee gained only a nominal fee for overseeing the foreclosure and typically had a separate and unrelated full-time job.[89] If the homeowner was actually in default, the sale proceeded.[90] However, if the homeowner was not in default, neither the trustee nor the bank was inclined to proceed with the foreclosure, especially if the borrower could resume payments.[91]

If a sale did occur, it was in both the bank's and the borrower's interests to sell the house for the highest possible price.[92] A higher sale price allowed the bank to recover the loan debt and the borrower to avoid potential deficiency.[93] The trustee owed a duty to both parties, but because there was no real conflict between the interests of the bank and the borrower, the trustee could easily fulfill its duties.[94]

B. The Modern Mortgage Era

The modern mortgage era bears almost no resemblance to the previous lending scheme. Instead, subprime lending, mass securitization, non-transparent recording of transfers and the fractionalization of responsibilities for loan servicing and foreclosure have fundamentally altered how and when foreclosure occurs and what is required to ensure those foreclosures are appropriate.

1. The Rise of Subprime Lenders

The mortgage industry began to change dramatically in the late 1990s, and, by the early 2000s, the changes were everywhere.[95] Traditional banks were no longer the only banks that made loans; non-traditional lenders—companies such

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88. *Id.* at 48:30; Roy D. Oppenheim and Jacquelyn K. Trask-Rahn, *Deconstructing the Black Magic of Securitized Trusts: How the Mortgage-backed Securitization Process is Hurting the Banking Industry's Ability to Foreclose and Proving the Best Offense for a Foreclosure Defense*, 41 STETSON L. REV. 745, 751 (2012). Many local, community banks still operate in this manner. Telephone Interview with Erich Vieth, *supra* note 1. The first home loan the author ever received was in 2002, and the process worked exactly as described above.

89. *See* Telephone Interview with Erich Vieth, *supra* note 1.

90. *See id.*

91. *See id.*

92. *See id.*

93. *Id.*

94. *Id.*

95. Vieth, *supra* note 19, at 4:26.

as Ameriquest and Countrywide—soon became some of the largest lenders in the country.[96] These lenders made loans in large part to "subprime" borrowers.[97]

New lenders, many of which had minimal lending experience, issued loans by the hundreds of thousands.[98] Mortgage brokers often cold called borrowers to entice them to buy a house or refinance a pre-existing loan, and they continually reached out to these borrowers to encourage additional refinancing.[99] These mortgage brokers received commissions and kickbacks based on the size of the loan and if they could encourage customers to take out loans with higher interest rates than those for which the customer qualified.[100]

Additionally, lenders were no longer local. Rather, the typical lender became a national organization that was often headquartered in California or Illinois.[101] Non-local lenders appraised properties through "desk appraisals,"[102] by which the lender searched for comparable sales in the same neighborhood and used the basic information of other homes, such as the age, condition, and size of the home, to complete the application.[103] Similarly, the process of underwriting was reduced to accepting lower credit scores and reliance upon "no doc"[104] or "liar's loans,"[105] which no longer required proof of income.[106] Even if the loan did require proof of income, the agent would still extend the loan to borrowers whose income did not meet the lender's standards by simply listing a "home business" or other source of income to inflate the numbers.[107] The borrower often didn't see the final numbers until the time of closing. Loans were often closed at restaurants or in people's homes because the loan companies were rarely local.[108] In many cases, a notary with no knowledge of the documents brought the loan materials to the lender and executed the loan.[109] Loans closed

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96. *See id.* at 4:30.

97. *See id.* at 5:07; *see also* Pittman *supra* note 77, at 1092 (explaining that subprime loans were created for individuals with low income or poor credit).

98. *See* Telephone Interview with Erich Vieth, *supra* note 1.

99. *See* Baher Azmy & David Reiss, *Modeling a Response to Predatory Lending: The New Jersey Home Ownership Security Act of 2002*, 35 RUTGERS L.J. 645, 656, 660 (2004); *see also* HENDRICK SMITH, WHO STOLE THE AMERICAN DREAM? 200–01 (2012) (noting that the goal of loan flipping is to "lock the borrower into [an] abusive loan").

100. *See* Azmy & Reiss, *supra* note 99, at 653.

101. Smith, *supra* note 73, at 485–86.

102. *See* Vieth, *supra* note 19, at 50:15.

103. *See id.* at 7:35.

104. *See* Bader, *supra* note 45, at 773.

105. SMITH, *supra* note 99, at 206–07. Other types of exotic loans included the NINJA, a loan that required no assets, no income, and no job. *Id.* at 201–02; *see also* Vieth, *supra* note 19, at 6:40.

106. *See* Azmy & Reiss, *supra* note 99, at 657.

107. *See id.* at 657; *see also* SMITH, *supra* note 99, at 207–09 (chronicling the total absence of quality control for loans).

108. *See* Vieth, *supra* note 19, at 9:20.

109. *See id.*

quickly and typically consisted of dozens or even hundreds of pages.[110] This led to seriously flawed loans that were destined to result in foreclosure.

The loans themselves were also different. Instead of fixed rates, or even adjustable rates that varied up or down with market forces, these new loans were "exotic mortgages," with adjustable rates that could increase, but could never fall below the original starting level.[111] Many of these loans were exploding adjustable rate mortgages (exploding ARMs), which carried rates that were scheduled to adjust in two or three years.[112] Other loans artificially lowered the borrower's payments for the first two years, only requiring him to pay the interest and fixing the amount of the principal for the two-year period.[113] Lenders also utilized negative amortization loans, under which the borrower made payments for two or three years, but at the end of that time still owed more than when they started.[114] These loans had one thing in common: the payments could increase dramatically in only a few years.[115] Even if a borrower could afford the first two years of payments, there was no guarantee that he could afford the new payments when the adjustment occurred.[116] As mortgage broker Kathryn Keller explained, "'[t]he banks are playing to brokers who specialize in driving people into loans that people don't understand. . . . They take a product that was exotic and move it to the category of a weapon—seriously. These loans go from being an exotic product to a hand grenade.'"[117] As the loans explode, the foreclosure crisis grows, the casualties mount, and the need for neutral trustees deepens.

2. The Rise of Mass Loan Securitization

As the mortgage process changed, non-traditional lenders were less motivated to ensure that borrowers would actually make payments for the full thirty

110. *See* Telephone Interview with Erich Vieth, *supra* note 1.

111. *See* Vieth, *supra* note 19, at 8:45.

112. SMITH, *supra* note 99, at 202–04 (explaining that these are often called 2/28 ARMs); *see also* Pittman, *supra* note 77, at 1090 (describing the practical consequences of exploding ARMs); Vieth, *supra* note 19, at 8:55.

113. *See* Pittman, *supra* note 77, at 1096.

114. Azmy & Reiss, *supra* note 99, at 662.

115. Pittman, *supra* note 77, at 1095–96 ("[P]redatory loans typically have at least one of the following characteristics: (1) they charge higher interest and fees than required to cover the added risk of lending to borrowers with credit problems[,] (2) they contain abusive terms and conditions that trap borrowers and lead to increased indebtedness, (3) they fail to consider the borrower's ability to repay the loan, or (4) they violate fair lending laws by targeting women, minorities or the elderly.").

116. *See* Peter W. Salsich, *National Affordable Housing Trust Fund Legislation: The Subprime Mortgage Crisis Also Hits Renters*, 16 GEO. J. ON POVERTY L. & POL'Y 11, 32 (2009).

117. SMITH, *supra* note 99, at 192–93.

years.[118] This was largely due to an increase in mortgage securitization,[119] a process by which notes on homes are bundled together, rated, and sold to investors.[120] The lenders received cash payments for the loans, often hundreds of millions of dollars.[121] From 1990 to 2007, most mortgage loans were securitized.[122]

The growth of securitization and its eventual scope are shocking. In 1994, $11.05 billion worth of subprime loans were securitized.[123] In 2005 and 2006, the total value of securitized subprime loans reached roughly $990 billion.[124] Hungry investment banks and a false sense that the investments were solid facilitated this rapid growth. In most cases, the rating agencies gave the bundles of securitized loans an AAA rating, the highest score available, which endorsed the bundles as safe investments.[125] This created an incentive for non-traditional lenders to make as many large-sum loans as possible.[126] As a result, making exotic loans became attractive because such loans ensured that initial payments were lower so customers could—and would—borrow more.[127] The lenders in no way expected that they would collect on the loans for the full thirty years, but the lenders' agents and loan brokers had a financial incentive to place borrowers in expensive loans.[128]

Furthermore, Wall Street created sophisticated ways to turn notes into securities, which generated new problems.[129] In order to avoid regulations that would limit what a bank or company could earn, the bank or company could split responsibilities for bundles of notes.[130] This created mass confusion. There

118. *See* Azmy & Reiss, *supra* note 99, at 657.

119. *See* Oppenheim & Trask-Rahn, *supra* note 88, at 751–52 (explaining that the appeal of securitization is that it eliminates the risk to the lenders who sell the loans to investors).

120. *See* Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 CONN. L. REV. 1257, 1266 (2009); *see also* Renuart, *supra* note 5, at 117 n.11.

121. Wall Street, for a variety of reasons beyond the scope of this article, gobbled up the notes and called for more. *See* David E. Woolley & Lisa D. Herzog, *MERs: The Unreported Effects of Lost Chain of Title on Real Property Owners*, 8 HASTINGS BUS. L.J. 365, 380 (2012) (quoting Yasha Levine, *How An Obscure Outfit Called MERS Is Subverting Our Entire System of Property Rights*, ALTERNET (Dec. 15, 2010), http://www.alternet.org/story/149189/how_an_obscure_outfit_called_mers_is_subverting_our_entire_system_of_property_rights).

122. White, *supra* note 30, at 471–72.

123. *See* Renuart, *supra* note 5, at 118.

124. *See id.*

125. Woolley & Herzog, *supra* note 121, at 380 & n.79.

126. *See* Bader, *supra* note 45, at 774–75.

127. *See* Salsich, *supra* note 15, at 19.

128. SMITH, *supra* note 99, at 222–23 (explaining that "When Risk Is Everywhere, It's Nowhere"). Smith explains that, because the original lenders did not retain risk, they did not care about the risk of default. *See id.* Similarly, because the investment bank that bought the loans sold the returns to investors, it did not care about the risk either. *See id.*

129. Vieth, *supra* note 19, at 12:00.

130. *See* Eggert, *supra* note 120, at 1263. In a traditional deal, a depositor would gather the notes and place them in a trust managed by a trustee, typically a large bank. Renuart, *supra* note

is evidence that lenders often mishandled endorsements of notes, resulting in a number of problematic practices, including the forgery of necessary assignments (robo-signing).[131] During the height of subprime lending, many notes were neither endorsed nor delivered to the parties who were meant to "hold the note."[132] This created situations in which banks sued other banks for foreclosing on properties for which each believed it was the holder of the note.

The net result was that mass securitization exacerbated the problem of making risky loans without underwriting by discouraging review of the loan's validity and by creating an environment in which note transfers and collection of payments were often problematic.

3. The Rise of Private Recordings and the Resulting Loss of Land Recording Transparency: Mortgage Electronic Registration Systems

Securitization also affected the recordings of notes and deeds. Traditionally, the recorder of deeds documented the transfer of a deed from one party to another, which required a fee.[133] This fee, which averages thirty-five dollars, was not a large expense to local banks.[134] However, deeds that could pass from a lender to a subsequent buyer to a depositor to a trust could cost hundreds of dollars per borrower.[135] Also, because notes were pooled into bundles of thousands, and because those bundles could be from every state and represent hundreds of counties, recording was both expensive and complex.[136] Consequently, the financial industry commissioned studies to determine how much could be saved by creating a private recording system.[137] The result of this evaluation was Mortgage Electronic Registration Systems, Inc. (MERS). As Dean Christopher Peterson explains,

> In the mid-1990s, some mortgage bankers decided they no longer wanted to pay recording fees for assigning mortgages. Securitization-a process of pooling many mortgages into a trust and selling income from the trust to investors on Wall Street-drove this decision. . . . To avoid the hassle and expense of paying county recording fees, these mortgage bankers formed a plan to create a single shell company that would pretend to own all the mortgages in the country. According to the plan, the mortgage bankers would never have to record assignments again because the same company would always "own"

5, at 118–19. A second bank, the servicer, would collect the payments, and a third bank, the trust custodian, would hold the notes. *Id.*

131. *See* White, *supra* note 30, at 474–75.

132. *Id.*

133. Peterson, *supra* note 10, at 114–15.

134. *Id.* at 115.

135. *Cf. id.* (explaining that a new recording system was created because mortgage bankers did not want to pay the several recording fees associated with assigning loans).

136. *See id.* at 116 (discussing the consequences of securitization).

137. *See id.* at 147.

> all the mortgages. They incorporated the shell company in Delaware and called it Mortgage Electronic Registration Systems, Inc. . . . Because the new system cut out payment of county recording fees, recording was significantly cheaper for intermediary mortgage companies and the investment banks that packaged mortgage securities. Acting on the impulse to maximize profits by avoiding payment of fees to county governments, much of the national residential mortgage market shifted to the new proxy recording system in only a few years.[138]

The financial industry has saved billions of dollars by using MERS.[139]

MERS is pervasive. Today, MERS records approximately sixty percent of residential mortgages.[140] The consequence of MERS is that homeowners are unable to use a public office to track who owns the titles to their mortgages.[141] That information is restricted to the private members of MERS.[142] For example, before MERS, homeowners could potentially track the ownership their property back to the 1700s; however, if the same individual purchased a home in 2007 or 2008, he may not even be able to determine who currently holds the note.[143] As Peterson points out, "[f]or the first time in the nation's history, there is no longer an authoritative, public record of who owns land in each county."[144]

MERS's lack of transparency is a serious problem. Although complications could perhaps be avoided if MERS's private records were accurate, it is clear that they are not.[145] According to one survey, of 396 cases from six judicial foreclosure states, only twenty percent of those listing MERS as the mortgagee of record correctly identified the individual or entity with the right to foreclose on the property.[146] Another study revealed that MERS's electronic records of holders of notes and deeds of trusts only match the public records about twelve percent of the time.[147] Similarly, a study conducted by the San Francisco Office of the Assessor-Recorder reported that the identity of the deed of trust beneficiary in the public records only matched the investor identified in the

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138. *Id.* at 116–17 (internal citations omitted).

139. *Id.* at 114.

140. *Id.* at 117 (noting that "the mortgages are recorded in the name of MERS Inc., rather than [in the name of] the bank, trust, or company that actually has a meaningful economic interest in the repayment of the debt").

141. *See* Salsich, *supra* note 15, at 35.

142. Peterson, *supra* note 10, at 132.

143. *See id.* at 114–15 ("Since the founding of the American republic, each county in the United States has maintained records of who owns the land within that county").

144. *Id.* at 117.

145. *See* Marsh, *supra* note 24, at 24–25 (proposing a new recording system that encourages transparency).

146. White, *supra* note 30, at 486.

147. *Id.* at 502.

MERS database forty-two percent of the time.[148] The disconnect between MERS's internal records and the public recordings may result from MERS's failure to supervise its internal database.[149] Currently, MERS simply grants access to members to record transfers if they wish to do so.[150] The use of MERS in the vast majority of loans leads to confusion regarding who has standing to foreclose. This makes the job of a trustee both more critical and more difficult.

4. The Rise of Foreclosure Rates and the Collapse of the World Economy

The impact of reckless lending and poor record keeping is well known. As loan rates were adjusted, fewer and fewer borrowers could repay, and many were forced to refinance.[151] However, as home values stagnated, lenders did not want to refinance because the property, in many cases, was worth less than the note. These "underwater" notes became common, and default rates hit historic highs.[152] The results were crushing for more than just homeowners.

By 2008, many of the major companies in the financial industry reported earnings losses and other financial difficulties.[153] Since then, companies have gone out of business completely.[154] The broader market collapse was historic and just as severe. After the Dow Jones Industrial average reported a record

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148. *See* AEQUITAS, FORECLOSURE IN CALIFORNIA: A CRISIS OF COMPLIANCE 13 (2012), *available at* http:// aequitasaudit.com/images/aequitas_sf_report.pdf. The study found that in twenty-seven percent of cases, the mortgage assignment was signed by the servicer or trustee rather than the original lender, and in eleven percent of cases, the assignee signed the assignments on behalf of the assignor. *Id.*

149. Peterson, *supra* note 10, at 127.

150. *Id.* Compounding the problem is the fact that MERS's private records are not only inaccurate, but they are also opaque. *Id.* at 130. Although the MERS database can be searched, doing so often reveals the following message: "Investor: This investor has chosen not to display their information. For assistance, please contact the servicer." *Id.* As a result, many of MERS's records are truly private. *Id.* Furthermore, MERS keeps no physical copy of any documents that support the entry. *Id.* at 129. The result is an unreliable recording system. Interestingly, MERS does not dispute this characterization, but rather issues a disclaimer to all members who search the database:

> DISCLAIMER: MERS makes no representations or warranties regarding the accuracy or reliability of the information provided. MERS disclaims responsibility or liability for errors, omissions, and the accuracy of any information provided. MERS does not input any of the information found on the MERS System, but rather the MERS Members have that responsibility regarding mortgage loans in which they hold an interest. Users of this information have the responsibility to verify the accuracy, currency and completeness of the information. The information does not constitute the official legal record and is for informational purposes only. The servicer listed should be contacted for further information.

Id. at 127–28.

151. *See* Vieth, *supra* note 19, at 18:45.

152. Salsich, *supra* note 15, at 20.

153. Pittman, *supra* note 77, at 1103.

154. *Id.* (noting that Morgan Stanely, Washington Mutual, UBS, Freddic Mac, Bank of America, Wachovia, Bear Stearns, Countrywide, Merril Lynch, and Wells Fargo all reported decreased earnings and record-breaking write downs).

high of 14,164.53 on October 9, 2007, it fell to below 7,000 by March 2, 2009.[155] Although this decline was not as deep as the Great Depression, it was actually steeper because values declined in half the time.[156] Mortgage securitization, coupled with subprime lending and poor risk analysis by lenders and investors, drove the global economy into recession.[157]

As a result of the market collapse, several major banks, insurers, and lenders failed, and those that did not fail required a government bailout to stay afloat. Meanwhile, millions of families faced foreclosure.[158] Despite government efforts to encourage loan modifications, the foreclosure rate was at its historic highest, and foreclosures continue to occur at staggering rates.[159]

5. Flaws of the Modern Mortgage Era

There are a multitude of potential problems with the modern foreclosure system that make the trustee's job more difficult. Trustees are often faced with loans that might have been fraudulent from the outset, lost documents, servicers that collect payments but are not note holders, opaque recording, and other issues.[160] There are fundamental questions about the validity of many foreclosures because of the likelihood that problems exist.[161] These problems give rise to cases like Ron Meehow's and the Bank of America phantom foreclosure.

155. *Dow Jones Industrial Average*, DOW JONES INDEXES (Dec. 31, 2011) http://www.djindexes.com/mdsidx/downloads/brochure_info/Dow_Jones_Industrial_Average_Brochure.pdf.

156. The Great Depression caused a ninety-percent loss in value, which was much deeper than the 2008 decline. *Compare id.*, *with Market Turbulence Questions and Answers*, THE STANDARD 1 (March 2009), http://www.standard.com/pensions/publications/QA-Market-Turbulence.pdf (reporting a ninety-percent loss in value). However, the Great Depression's decline spanned over three years, which was a much more gradual decline than 2008's eighteen-month drop. MARC LABONTE, CONG. RESEARCH SERV., R40198, THE 2007-2009 RECESSION: SIMILARITIES TO AND DIFFERENCE FROM THE PAST 1, 8 (2010).

157. *See* Renuart, *supra* note 5, at 115.

158. *Id.* at 4.

159. *See* Vieth, *supra* note 19, at 19:35.

160. *See* Renuart, *supra* note 55, at 564 (noting that the non-exhaustive list of problems includes: "the failure to provide contractually or legally required notices; lack of authority for foreclose; fraud in the process; rigging the sale; grossly inadequate sale price; and other irregularity or unfairness"). There is no reason to believe these problems will be solved in the near future. Instead, they have proven relatively intractable. Recently, the Consumer Financial Protection Bureau has created more rigorous standards for foreclosures, focusing on the servicer's role. *See* Morgan Brennan, *Could New, Tighter Mortgage Rules Actually Ease Lending?*, FORBES (Jan. 1, 2013, 6:24 PM), http://www.forbes.com/sites/morganbrennan/2013/01/10/could-the-new-mortgage-rules-actually-ease-tight-lending/. However, if past governmental programs in the mortgage industry are any indication, the industry will struggle to comply and problems will persist. *See id.*

161. *See* Renuart, *supra* note 55, at 564.

III. NON-JUDICIAL FORECLOSURE AND THE ROLE OF TRUSTEES

An examination of non-judicial foreclosure procedure highlights the importance of the trustee and why it is likely that the most egregious foreclosure abuses are occurring in non-judicial foreclosure states.[162]

A. Non-Judicial Foreclosure

The first time a borrower learns that foreclosure might occur is usually when they receive a debt collection notice.[163] The lender sends notice, usually in the form of a letter, indicating that the homeowner is behind on the loan and that, if he does not pay a specified amount, the lender will initiate foreclosure.[164] The actual foreclosure process begins with specific notice that the homeowner is in default and foreclosure proceedings have commenced.[165] The type of notice and how much time must elapse following the notice before a foreclosure sale can occur differs from state to state. Most states require some form of published notice, as well as notice mailed directly to the borrower.[166] Notice periods differ drastically; depending on state law, the entire foreclosure process can be completed in twenty days or in one hundred and twenty days.[167] Often, the trustee who is responsible for initiating the foreclosure proceedings sends notice.[168] This trustee is usually not the original trustee named in a deed of trust, but rather is a trustee typically appointed by the lender pursuant to its power to appoint a successor trustee.[169]

Homeowners in every non-judicial foreclosure state struggle to find legal representation, both because of their financial situations and because there is a genuine deficit of consumer lawyers who are able to navigate foreclosure law.[170] The shorter the notice period is, the more likely it is that a homeowner will be

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162. For a far more detailed review of non-judicial foreclosure, particularly the lack of judicial oversight, and its contrast with judicial foreclosure, see Renuart, *supra* note 5, at 139–41.

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

164. Renuart, *supra* note 5, at 140.

165. Jacobson-Greany, *supra* note 163; *see also* Mark S. Pécheck & Kelsey M. Lestor, *The ABCs of California Foreclosure Law*, L.A. LAW., Jan. 2012, at 13 (providing a comprehensive overview of how judicial foreclosure is comparable to non-judicial foreclosure in most states, focusing especially on California).

166. Jacobson-Greany, *supra* note 163, at 148.

167. Renuart, *supra* note 55, at 564. California has one of the longest notice periods with three months. CAL. CIV. CODE § 2924(a)(2) (West 2012). Conversely, Missouri has one of the shortest, with twenty days. MO. ANN. STAT. § 443.325.3 (West 2013).

168. Renuart, *supra* note 5, at 140.

169. Vieth, *supra* note 19, at 26:45.

170. MELANCA CLARK WITH MAGGIE BARRON, BRENNAN CTR. FOR JUSTICE, N.Y.U. SCH. L., FORECLOSURES: A CRISIS IN LEGAL REPRESENTATION 12, 14 (2009), *available at* http://www.brennancenter.org/sites/default/files/legacy/Justice/Foreclosure%20Report/ForeclosuresReport.pdf.

unable to obtain the legal help necessary to take meaningful steps to stop the foreclosure.[171] Even non-profit organizations are often forced to turn homeowners away because by the time notice is received, read, and the borrower realizes he needs help, the sale is often less than ten days away. It is common for homeowners to contact the trustee to request more time, contest the amount owed, or inquire about the foreclosing party.[172]

The homeowner can stop foreclosure in only a few ways.[173] He can reinstate the loan by paying a specified amount, hire a lawyer and seek a temporary restraining order or preliminary injunction,[174] file bankruptcy,[175] attempt to convince the lender to delay or cancel the foreclosure,[176] or ask the trustee to delay the sale.[177] In any other situation the foreclosure proceeds to sale, often referred to as "auction."[178] The "English auction," in which potential bidders gather in a common, public place, is the most common method of sale.[179] At the sale, it is the trustee's duty to obtain the highest possible price for the home.[180] In theory, it is in the best interests of both the foreclosing bank and the homeowner to sell the home for a high price. A high sales price helps the bank recover most or all of the cost of the loan and may allow the homeowner to avoid or limit a deficiency.[181] The trustee is also charged with taking bids at the sale and executing a trustee's deed that conveys the property to new the buyer.[182] Depending on the state, the homeowner may have up to one year to attempt to redeem the property.[183] In many states, if the homeowner does not redeem, he is liable for the deficiency, while other states prohibit deficiencies altogether.[184]

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171. For example, in Missouri, which requires only a twenty-day notice, homeowners almost never obtain representation prior to the foreclosure sale. MO. ANN. STAT. § 443.325.3 (West 2013).

172. *See* Jacobson-Greany, *supra* note 163, at 148.

173. *See* Pécheck & Lestor, *supra* note 165, at 14.

174. Timothy J. Peterkin, *Getting to the Arguments: How Legitimate Defenses to Foreclosure are Raised*, 3 CHARLOTTE L. REV. 253, 261 (2012).

175. Williams, *supra* note 23, at 470–71 (describing the parallel between the rise in foreclosure filings and the rise bankruptcy filings).

176. Pécheck & Lestor, *supra* note 165, at 14.

177. *Id.*

178. Nelson & Whitman, *supra* note 30, at 1415.

179. *Id.* at 1416.

180. JUDON FAMBROUGH, REAL ESTATE CTR., TEX. A&M U., A HOMEOWNER'S RIGHTS UNDER FORECLOSURE 3 (2009) ("Regardless of who serves as trustee, the trustee's sole duty is to conduct the sale in a prescribed manner to reduce the loan as much as possible by securing a fair price."); *see also* Jacobson-Greany, *supra* note 163, at 149 (noting that the auctioneer typically sells the property to the highest bidder).

181. Nelson & Whitman, *supra* note 30, at 1404–05.

182. *See* Jacobson-Greany, *supra* note 163, at 149–50.

183. Nelson & Whitman, *supra* note 30, at 1404 ("A concept commonly termed 'statutory redemption' allows the mortgagor-debtor—and, in many states, junior lienholders—up to a year or longer to regain title after the foreclosure sale by paying the foreclosure purchaser the sale price plus accrued interest and other expenses.").

184. *Id.* at 1404–05.

In reality, the auction format is inefficient and homes are routinely sold for far less than their actual worth.[185] This is primarily because there is no real market created for the home. The publication notice is often printed in obscure publications and only contains a legal description of the property, without providing the address, a photograph, or description of the home.[186] Additionally, the trustee does not typically show the home to potential buyers, both because the homeowner is often still living there, and, because notice periods are often relatively short, leaving little time for buyers to become aware of or even consider purchasing the property.[187]

Consequently, the bidders at foreclosure sales are almost exclusively professional homeflippers or the very financial institutions that foreclosed on the properties up for sale.[188] For example, a common sale may involve Chase Bank initiating foreclosure, the trustee offering the property for sale, Chase Bank placing the only bid, and the trustee selling the home for significantly less than both the outstanding balance of the loan and the fair market value of the home.[189] Chase is then free to clean the house, advertise it meaningfully by listing it with an agent, show it to prospective buyers, wait for a fair offer, and sell the house at a profit.

Any difference between the sales price and the balance of the loan is addressed in one of three ways. In some states, the difference between the sales price and the amount owed on the note is a deficiency that can be collected against the homeowner.[190] This adds insult to injury because the homeowner loses his home, has his credit destroyed, and then faces additional crushing debt.[191] Some states limit the deficiency to the difference between the fair market value of the home and the balance of the loan.[192] Others prohibit deficiencies entirely to ensure that, if homeowners are foreclosed upon, they can start over without a burdensome debt.[193]

After a foreclosure sale, the buyer must often send the former homeowner a notice by mail or post a notice on his door informing him that he must vacate the house.[194] If the former homeowner does not leave, either because he does not believe that the foreclosure was valid or because he has nowhere else to go, the

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185. *See id.* at 1417–18 (explaining some of the reasons why homes fail to sell for full market value at auction sales).

186. *See* Telephone Interview with Erich Vieth, *supra* note 1.

187. *See id.*

188. Vieth, *supra* note 19, at 28:40.

189. *See id.* at 28:50 (providing a similar example).

190. Nelson & Whitman, *supra* note 30, at 1404–05.

191. *Id.* at 1429.

192. Walsh, *supra* note 30, at 144.

193. *See* Telephone Interview with Erich Vieth, *supra* note 1.

194. *See* Wells Fargo Bank, N.A. v. Smith, 392 S.W.3d 446, 449 (Mo. 2013) (en banc) (noting that the successor trustee sent notice of the foreclosure sale by registered mail to the homeowner).

buyer will initiate an unlawful detainer action.[195] This is typically a summary proceeding in which the buyer asks a court to evict the former owner and to award damages for the amount of time the former owner held over.[196] As a result, in non-judicial foreclosure states, the first time a homeowner in default is likely to come before the court is when he is sued for failing to vacate his former home.[197]

Unlawful detainers pose significant hurdles for homeowners.[198] In some states, homeowners are prohibited from asserting that the foreclosure was wrongful and therefore void.[199] In other states, homeowners can challenge title, but this presumes the homeowner can obtain a qualified lawyer.[200] In either case, the most common result is a local sheriff removing the former owner under a court order that requires him to pay for living in his own home.[201]

B. The Current Role of Trustees in Non-Judicial Foreclosures

In many states, trustees are deeply imbedded in every step of the foreclosure process. While the law requires the trustee to act as a neutral, the trustee typically takes on multiple roles, many of which are contradictory.[202] It is not uncommon for the trustee to serve as a debt collector, the attorney for the bank,[203] the party with the power to appoint a successor trustee, the successor trustee, an agent for MERS who assigns mortgage documents during the foreclosure, the attorney who opposes the homeowner if he attempts to stop the

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195. *See, e.g.*, Brief for Appellant at 12, 19–20, 392 S.W.3d 446 (No. 92649) (describing a case in which the homeowner refused to leave after the foreclosure sale, causing the trustee to commence an unlawful detainer action).

196. *See Smith*, 392 S.W.3d at 453–54 (considering a challenge to the "summary nature" of Missouri's unlawful detainer statute and describing an unlawful detainer action as one against a party who "began possession lawfully but remained on the land wrongfully after their possessory right ended"); Brief for Appellant, *supra* note 195, at 20 (noting that the trial court required the appellants to pay damages for the time they remained their home during the unlawful detainer action brought against them by the foreclosing bank); *see also* Telephone Interview with Erich Vieth, *supra* note 1 (characterizing the "action to kick the homeowner out of the house after the foreclosure sale" as an unlawful detainer action).

197. Telephone Interview with Erich Vieth, *supra* note 1.

198. *See* Brief for Appellant, *supra* note 195, at 57 (noting that, following foreclosure, "[t]he homeowner suffers irreparable harm, as the house is almost invariably sold, and the homeowner can face garnishments for double damages due to the unlawful detainer judgment").

199. *See* Telephone Interview with Erich Vieth, *supra* note 1.

200. *See id.*

201. *See* Williams, *supra* note 23, at 472 (noting that local sheriffs often deliver eviction notices, writs of possession, or writs of unlawful detainer).

202. Peterkin, *supra* note 174, at 274. Timothy Peterkin seems to be the only author who has clearly suggested that the trustee is a central part of the foreclosure problem. *Id.* at 283–84. Peterkin undoubtedly discovered this fact in his practice at the Foreclosure Defense Project. *See id.* at 253 n.1. He proposes that borrowers should be informed of the role of the trustee as a neutral who may have conflicts of interest with the borrower because the trustee is also a representative of the foreclosing entity. *Id.* at 277. However, this is only a mild solution to the larger problem.

203. *See id.* at 274; *see also* Telephone Interview with Erich Vieth, *supra* note 1.

foreclosure, the coordinator and direct or indirect provider of title services, the attorney who represents the buyer after foreclosure, and the coordinator of "default services"—the process of removing the homeowner from the home, cleaning up the home, and preparing it for sale.[204] This is a staggering number of roles to fill, which causes conflicts that are at the heart of some of the most egregious foreclosure problems.[205]

A debt collection notice is usually the first contact a homeowner has with an entity other than the lender regarding the status of his loan.[206] Often, a law firm who is also the trustee or owns a trustee corporation sends the notice.[207] If the homeowner does not dispute the debt or reinstate the loan, the next document the homeowner receives is a foreclosure notice from the trustee.[208] In many cases, the trustee and the debt collector are the same law firm.[209]

How can the attorney for the bank become the trustee? A deed of trust, which is created at the time a loan is made, lists a third party trustee to whom both the homeowner and the lender agreed at the time of contract.[210] However, that trustee almost never oversees the foreclosure because the deed of trust contains a provision that allows the lender to appoint a successor trustee.[211] The deed of trust typically delegates this power to the bank's attorney, who then appoints himself as the trustee.[212] Accordingly, the successor trustee is almost always either the bank's foreclosure attorney, who works for a foreclosure mill,[213] or a trustee who works for a trustee company owned by the attorneys for the bank. There is a conflict in either case, but the situation is even more complex in the modern mortgage era. Not only does the bank hand pick the theoretically neutral trustee to carry out foreclosure, the bank, in some cases, authorizes the successor

204. *See* Vieth, *supra* note 19, at 41:50.

205. Peterkin, *supra* note 174, at 275.

206. *See* Jacobson-Greany, *supra* note 163, at 147.

207. Interview with Bruce Neas, *supra* note 20.

208. Telephone Interview with Erich Vieth, *supra* note 1.

209. Vieth, *supra* note 19, at 26:15.

210. Renuart, *supra* note 55, at 575.

211. *See, e.g.*, Brief for Appellant, *supra* note 195, at 15 (describing the deed of trust in question, which permits the lender to appoint a successor trustee).

212. Vieth, *supra* note 19, at 26:45.

213. The term "foreclosure mill" describes large firms that handle foreclosures in bulk and that regularly file or produce inaccurate or incomplete documentation to support the foreclosures. *See Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing: Hearing Before the Subcomm. On Housing and Cmty. Opportunity of the H. Comm. on Fin. Servs.*, 111th Cong. 282, at 18 (2010) (statement of Adam J. Levitin, Associate Professor of Law, Georgetown University Law Center) (explaining that, in one survey of foreclosure filings in Pennsylvania—a judicial foreclosure state—the note was not filed with the complaint in over sixty percent of the cases and suggesting that "[f]ailure to attach the note appears to be routine practice for some of the foreclosure mill law firms"); *see also* Renuart, *supra* note 5, at 122 (referring to "foreclosure mills"); Woolley & Herzog, *supra* note 121, at 372 (defining a foreclosure mill as a law firm "that specialize[s] in quick processing of thousands of foreclosures for banks").

trustee to appoint itself.[214] Similarly, the parties to the foreclosure also require title work if the property is deeded to the new buyer. In some states, the foreclosure mills that serve as trustees also perform this title work.[215]

If the homeowner believes that the foreclosure is improper, he often raises his concerns to the trustee.[216] However, because the trustee works for the bank, he routinely fails to answer calls and letters and ignores serious factual complaints.[217] In Ron Meehow's case, the trustee attorney admitted that he deferred to whatever the bank told him to do. This is a questionable position for the only neutral in a non-judicial foreclosure.

It is also not uncommon for a supposedly neutral trustee to appear at a trial against homeowners who have filed for temporary restraining orders.[218] It is difficult to comprehend that a trustee who advocates against the homeowner is simultaneously fulfilling his duty of neutrality. However, this is permissible in many states.[219]

If the foreclosure sale goes forward, the trustee carries out the sale.[220] Although the trustee has a legal duty to sell the home for the highest possible price, there is commonly only one bid at the foreclosure sale, which is often is placed by a trustee on behalf of the foreclosing bank.[221] In other cases, Fannie Mae or another large institution, also potential clients of the trustee's law firm, buy the home.[222] These conflicts call into question whether the trustee would ever postpone the foreclosure sale in order to solicit a higher price, which is

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214. *See, e.g.*, Wells Fargo Bank, Appointment of Successor Trustee (Oct. 8, 2008) (example of loan document) (on file with author) (appointing a successor trustee to the proceeding). The bank appoints a sucessor trustee by giving the law firm a limited power of attorney, which includes the power to self-appoint. The law firm, as the attorney for the bank, then files the appropriate document appointing itself the successor trustee. *See id.* (providing an example). The attorney who signed the example Appointment of Successor Trustee is also an employee of Kozeny & McCubbin, the entity being appointed successor trustee. *See id.* Coincidentally, Kozeny & McCubbin is also a regular attorney for Wells Fargo. *See id.*

215. For example, in Missouri, one of the largest foreclosure mills and successor trustees is Millsap & Singer, a law firm owned by Vern Singer. Another large foreclosure mill and successor trustee outfit in Missouri is South & Associates, a law firm owned by Allen South. A public records search reveals Allen South and Vern Singer own a title company together, *see* Robin Carnahan, Mo. Sec'y State, 2012 Annual Registration Report (Mar. 8, 2012), *available at* https://www.sos.mo.gov/BusinessEntity (search for "Continental Title Holding Co."), which provides foreclosure services, *Information for Borrowers*, MILLSAP & SINGER, LLC, http://web.archive.org/web/20101218074117/http://msfirm.com (last visited Feb. 5, 2014).

216. *See* Telephone Interview with Erich Vieth, *supra* note 1.

217. *Id.*

218. Peterkin, *supra* note 174, at 275.

219. *See, e.g.*, *id.* (noting that this behavior is permissible under the North Carolina Rules of Professional Conduct).

220. *See* Telephone Interview with Erich Vieth, *supra* note 1 (explaining that the trustee often works for the foreclosing bank and initiates and carries out proceedings on behalf of the bank).

221. *See id.* (noting that the foreclosing bank normally does not even send its own representative and instead relies on the trustee to make the bid).

222. *Id.*

allowed by most state laws.[223] They also call into question whether the trustee, who has discretion in where and how to publish notice of the sale,[224] will work diligently to obtain the highest price, which likely involves finding bidders who would compete with the trustee's own clients.

Once the home is sold, the trustee files a trustee's deed.[225] This deed affirms that the underlying conditions for foreclosure—as set out in the deed of trust—were met, affirms that the property was sold at the sale, and vests title in the buyer.[226] The trustee's affirmative attestation that the homeowner defaulted and that the proper party foreclosed is potentially improper, given that it is likely the trustee has no actual knowledge of whether default occurred. And, in cases liked Ron's, the trustee has ample reason to question default.

To conclude the foreclosure proceedings, the trustee charges a "trustee fee" to the homeowner.[227] This is sometimes in addition to attorney's fees, for which the homeowner is also responsible.[228] The result is that the homeowner could potentially pay the trustee for being both an attorney and a trustee.

After foreclosure, the buyer of the foreclosed property typically retains a law firm to file a lawsuit to evict the homeowner.[229] The new owner, often a large bank (and sometimes the same bank that foreclosed), hires the same attorney that served as the trustee or owned the trustee company.[230] Consequently, the trustee who owed a duty of neutrality to the homeowner now represents the buyer against the former owner. The buyer's attorney appears in court, seeks to evict the homeowner, and then requests damages from the homeowner for continuing to occupy the home. This routinely occurs even if the homeowner questioned the validity of the foreclosure, and even if the trustee had questionable information about whether default occurred, the lender induced the default, or the lender had standing to foreclose at all.

After the court orders the homeowner to vacate, some foreclosure firms provide "default servicing," by which the firm coordinates with companies to remove any remaining belongings from the home and prepare the house for sale.[231] This often includes throwing out whatever the homeowner did not have the time or money to remove.[232]

223. *Id.*

224. *See id.*

225. Jacobson-Greany, *supra* note 163, at 149.

226. *Id.* at 149–50.

227. Telephone Interview with Erich Vieth, *supra* note 1.

228. *See id.*

229. *See id.*

230. *See, e.g.*, *Eviction*, MILLSAP & SINGER, LLC, http://web.archive.org/web/20101218074434/http://msfirm.com/EvictionMO.html (last visited Feb. 5, 2014) ("Millsap & Singer, LLC routinely handles eviction related matters for mortgage lenders after foreclosure."). These are the same "mortgage lenders" that appoint Millsap as a "neutral" trustee.

231. Telephone Interview with Erich Vieth, *supra* note 1.

232. *See id.*

C. The Structural Dynamics That Prevent Trustees From Remaining Neutral

Under the current law, trustees have the potential to act unfairly because of the lack of regulation by both state governments and the courts. At a minimum, the current structure makes it highly unlikely that trustees will serve as a true neutral that provides a check on the sometimes-unreliable representations of banks.

There are several reasons trustees are ineffective. First, there is the repeat player effect. Even if trustees do not work for banks, they regularly interact with banks. Conversely, for the homeowners, relationships with trustees are brief and isolated. It is widely accepted in cognitive science that repetition builds trust, drawing the inference that repeat business between trustees and banks inherently develops trusting relationships.[233]

Second, trustees are unregulated and untrained. Because no law describes what trustees must review in order to proceed with a foreclosure, there is no one to supervise trustees' actions. Furthermore, trustees are not formally trained,making it unlikely that even a well-meaning trustee could—or would—ask the right questions. Foreclosure is no longer a simple matter. It involves complex transfers of notes and deeds of trust,[234] complicated servicing records, and a variety of other matters.

Third, the current economic structure does not encourage trustees to work fairly or carefully. Instead, all economic incentives encourage aggressive foreclosures without any evidence that the foreclosures are proper.[235] Trustees have major incentives to ignore complaints from homeowners regarding potential issues with the foreclosure proceedings.

There are both external and internal financial pressures on trustees. Externally, the bank pays the foreclosure firm. There are many firms available for the bank to hire. The bank is most interested in fast, easy foreclosures and reducing costs. The bank also pays the foreclosure mill for the debt collection work, the appointment of successor trustee work, the trustee work itself, and the unlawful detainer work. The foreclosure mill may also receive payment for title work and default servicing. All of this is built on a model that requires volume. Foreclosure mills openly advertise bulk rates for foreclosures with surprisingly low costs. For example, a conventional foreclosure costs approximately $650,

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233. DANIEL KAHNEMAN, THINKING, FAST AND SLOW 66–67 (2011) (explaining that "repetition induces cognitive ease and a comfortable feeling of familiarity" and that "[t]he link between positive emotion and cognitive ease . . . has a long evolutionary history").

234. For a comprehensive explanation of the significant number of cases that have revealed problems with the transfer of notes and the security instrument, see Renuart, *supra* note 5, at 120 nn.17–18.

235. *See* Peterkin, *supra* note 174, at 275–76 (arguing that a "trustee had no incentive to be a neutral, passive participant" during the foreclosure process because he will only collect commission if the matter is resolved in favor of the lender).

and an unlawful detainer action may cost an additional $350.[236] The attorneys will not get rich working on one foreclosure, but they are getting rich working on thousands. If the firm were to start asking hard questions of banks, such as, "Where is the proof that this note was transferred to you?" or "Why is the homeowner providing payment records that don't match yours?" or "Why aren't you the party that appears in the recording records?" or "Are you sure that using MERS is appropriate?" it would risk losing very profitable repeat business. As a result, the firm's interests align with the bank's, at the expense of homeowners.

Internally, there are additional pressures on trustees. Foreclosure mills function on a model that has a relatively low number of attorneys and a larger support staff.[237] The foreclosure process is meant to be form driven, and unlawful detainer work is largely a matter of taking defaults. Many foreclosure firms hire attorneys with limited experience in other fields of law and young attorneys hungry for work to attend the bulk docket calls related to evictions.[238] These attorneys lack the time, inclination, incentives, and resources to investigate each foreclosure and to consider the homeowners' factual disputes.[239] Often, these attorneys even lack the time and inclination to return calls to homeowners or their attorneys when foreclosure is imminent.

Some foreclosure mills make no secret of the fact that they operate as bulk practices that seek to expedite foreclosures for banks. The former homepage of

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236. *See, e.g.*, *Fees and Expenses Schedule*, MILLSAP & SINGER, LLC, http://web.archive.org/web/20101218074634/http://msfirm.com/FeesAndCosts.html (last visited Feb. 5, 2014).

237. *See, e.g.*, *Directory*, MILLSAP & SINGER, LLC, http://web.archive.org/web/20101218074901/http://msfirm.com/Directory.pdf (last visited Feb. 5, 2014) (listing eighteen attorneys and eighty support staff). Millsap & Singer is representative of the typical staff structure of a foreclosure mill. The titles are interesting, as people at a firm that provides trustee services along with representation to banks are identified under categories such as "sales," "evictions," and "title," revealing the true "one-stop-shop" nature of many foreclosure firms. *Id.*

238. Bulk dockets are court dockets that can contain hundreds of cases, all set for the same time. *See, e.g.*, *Foreclosure Cases: Orange County*, NINTH JUD. CIRCUIT FLA. (Nov. 27, 2012), http://www.ninthcircuit.org/programs-services/foreclosures/Downloads/ForeclosureProcedures-11-5-2012.pdf. This type of docket works because most of the defendants fail to appear or are convinced to accept a consent judgment by the plaintiffs' attorneys. Bulk dockets are especially common in debt collection cases and unlawful detainers because one plaintiff, such as a large bank that buys homes at foreclosure, may have dozens of cases on the docket that relate to the same subject matter but have different defendants. The plaintiff files the cases all at once so that they will be set on the same day, thereby reducing the expense to the plaintiff because one attorney can handle all of the cases.

239. Peterkin, *supra* note 174, at 275–76.

Millsap & Singer,[240] one of the largest foreclosure mills in the Midwest,[241] proudly asserted that Millsap "provides comprehensive default servicing" and has done so for the "mortgage banking industry since 1970."[242] The website also noted that Millsap "actively and aggressively pursue[s] all possible avenues to reduce timeframe and expenses"[243] when foreclosing or removing debtors from their homes. The website also contained prices for many of the services the firm offered.[244]

The Millsap story is not unique. Similarly, Northwest Trustee Services is a separate trustee company that conducts foreclosures in Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon and Washington, and also has close ties to a large foreclosure law firm.[245] Northwest's website, although not quite as egregious as Millsap's, is similarly telling. For example, Northwest openly states on its website that it maintains an alliance with Routh Crabtree Olsen, P.S.[246] Northwest makes the relationship even more explicit on another page, stating that it is "[a]ssociated with sister law firm, Routh Crabtree Olsen, P.S., which conducts judicial foreclosures in our coverage area."[247] These statements make neutrality hard to imagine, given that Routh Crabtree's website identifies the firm as a "full service mortgage banking law firm dedicated to representing creditor's rights."[248] Northwest's website also advertises that "Northwest Trustee Services, Inc. is a full-service trustee company providing default services to mortgage lenders in the Western United States."[249] Northwest promises to provide a fee schedule to anyone who fills out the form, which requires a listing of the financial institution with which the person or institution is affiliated.[250] Of course, Northwest's website does not contain promises to be

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240. In theory, Millsap & Singer, P.C. and Millsap & Singer, LLC are separate entities, one claiming to handle foreclosures and one claiming to be a trustee. An Internet search returns different results for each. However, the search for both entities returns the same website, which indicates that the firms have the same website, the same leadership, the same address, the same employees, and the same phone numbers. *See Home*, MILLSAP & SINGER, LLC, http://www.msfirm.com (last visited Feb. 5, 2014). At a minimum, the firms are closely affiliated.

241. Joe Harris, *Class Blows Whistle on Foreclosure Firm*, COURTHOUSE NEWS (Nov. 22, 2011, 8:11 AM), http://www.courthousenews.com/2011/11/22/41641.htm.

242. *Information for Borrowers*, *supra* note 215.

243. *Id.*

244. *Fees and Expenses Schedule*, *supra* note 236.

245. *Home*, NORTHWEST TRUSTEE SERVS. INC., http://www.northwesttrustee.com/ (last visited Feb. 5, 2014) [hereinafter *Northwest Home*].

246. *Id.*

247. *Company Profile*, *supra* note 20.

248. *Welcome to RCO*, RCO, http://www.rcolegal.com/# (last visited Feb. 5, 2014).

249. *Northwest Home*, *supra* note 245.

250. *Fee Schedule*, NORTHWEST TRUSTEE SERVS. INC., http://www.northwesttrustee.com/FeeSchedule.aspx (last visited Feb. 5, 2014).

neutral to borrowers, nor does it proudly announce an alliance with a consumer right's law firm.[251]

The examples of Millsap and Northwest demonstrate that the current system is inadequate to protect homeowners and to assure society as a whole that rule of law is governing foreclosures. The problem is immense, but simple, practical solutions can offer immediate improvement by converting trustees from a significant part of the problem to an integral part of the solution.

IV. RE-ENVISIONING THE ROLE OF THE TRUSTEE

The role of the trustee in non-judicial foreclosures is central, but neither case law nor literature examines it in the context of modern mortgage structure. This is likely because, until recently, foreclosures were rarely controversial. However, given the current realities, it is time to rethink the role of the trustee. The trustee is a gatekeeper who, if marshaled for the cause, can serve as a stop-gap for many of the abuses that occur throughout the foreclosure process. This will not replace the need for pre-foreclosure mediation[252] or the need to reform and regulate the bad loans, sloppy recordkeeping[253] and robo-perjury that created the foreclosure crisis, but it will provide immediate relief for affected homeowners like Ron Meehow. Empowering the trustee to verify the legitimacy of foreclosures is also valuable because it enlists an already-existing third party, which addresses the concern that the existing programs that require the foreclosing entity advise homeowners about modification before foreclosure but do not require the involvement of a third party, leave homeowners vulnerable.[254] For example, in the case of Ron, who lost his home despite making payments, a neutral trustee could have avoided the entire problem by listening to Ron's

251. For an interesting commentary on Northwest, see *The Face of Evil: Northwest Trustee Services—The West's "David J. Stern"*, SOCIAL APOCALYPSE (Jan. 18, 2013), http://theresalbaker.typepad.com/social_apocalypse/2013/01/the-face-of-evil-northwest-trustee-services-the-wests-david-j-stern.html (alleging that Steven Routh, the CEO of Northwest, buys and creates newspapers to publish foreclosures, and also brags about the money to be made from the business of foreclosure); *see also* Jeff Manning, *Northwest Trustee Services Squeezes More Profits From Home Foreclosures with One-stop Model*, OREGON BUSINESS NEWS (Jan. 14, 2012, 10:27 PM), http://www.oregonlive.com/business/index.ssf/2012/01/northwest_trustee_squeezes_mor.html (criticizing Routh). Interestingly, the Social Apocalypse blog includes a simple declarative statement that has some implications for the role of trustees: "Foreclosure should not be able to be initiated, facilitated, perpetuated or adjudicated by ANY entity who PROFITS from it. Period." *The Face of Evil*, *supra*.

252. *See* Renuart, *supra* note 55, at 576 (noting that many states have adopted a pre-foreclosure mediation requirement to help mitigate the consequences of foreclosure); *see also* Renuart, *supra* note 5, at 167–68 (discussing the Nevada foreclosure statute and its mediation requirement).

253. *See* Renuart, *supra* note 5, at 173 (discussing the challenges parties to a foreclosure face because of sloppy or incorrect paperwork).

254. Walsh, *supra* note 30, at 160 (arguing that programs in California, Michigan, Massachusetts, and Oregon do not require the involvement of third parties and are therefore insufficient to protect homeowners).

concerns and asking basic questions to discern who had the right to foreclose and what evidence of default existed. Empowering the trustee to do these things will facilitate a better system.

The role of the trustee can be reformed in three ways: (1) legislative reform, (2) impact litigation, and (3) ethical complaints. These methods of reform can be combined if appropriate.

First, state governments should pass legislation that would make trustees effective gatekeepers who require essential proofs, ask basic questions, and, when factual disputes arise between the foreclosing party and the homeowner, refer those questions to the courts. The challenge is that may simply not be an option some states.

Second, courts in some states may be ready to consider legal arguments that challenge the current behavior of trustees. Such cases would be aimed at providing courts with factual scenarios like Ron's and asking them to apply the existing law to these new and challenging modern mortgage dilemmas.

Finally, in states in which legislation and litigation may not be viable solutions, state bar associations and legal ethics bodies can address the ethical concerns that arise when an attorney represents a bank versus a homeowner. States can consider ethical issues through advisory opinions and specific complaints about attorneys who have engaged in potentially unethical behavior.

A. Legislation

Legislation is the most comprehensive and desirable way to change the role of the trustee. It would allow for clear standards, regulation, and penalties. The specific language of any bill must be crafted to fit the nuances that exist in each state. Legislation regulating trustees has the potential to create a ripple effect in the foreclosure world, causing banks to consider more carefully whether they should initiate foreclosure and providing homeowners with meaningful rights to question suspicious and invalid foreclosures.[255] Ultimately, the proposed legislation provides a mechanism by which to resolve difficult cases in which homeowners and banks disagree so that valid foreclosures can still proceed. In situations in which the homeowner has challenged the validity of the foreclosure, the bank would have an incentive to consider carefully whether modifying the loan or dropping the matter entirely would be more appropriate or more profitable.[256]

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255. *See* Willis Carpenter, *A Brief History of Colorado's Public Trustee System*, COLO. LAW, Feb. 2002, at 67 (noting that Colorado, the only state with a public trustee system, has created a framework to provide for truly neutral trustees who have no financial incentive to obey the banks and who have the necessary training and oversight).

256. The National Conference of Commissioners on Uniform State Laws is currently drafting a proposed uniform body of law for foreclosures titled "Residential Real Estate Mortgage Foreclosure Process and Protections." NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAW, RESIDENTIAL REAL ESTATE MORTGAGE FORECLOSURE PROCESS AND PROTECTIONS (2012), *available at* http://www.uniformlaws.org/shared/docs/Residential%20Real%20Estate

1. A Six-Prong Reform Proposal

An effective trustee reform statute has six prongs: (1) a record requirement; (2) insulation from other parties; (3) prohibition of foreclosure if legal or factual disputes arise; (4) penalties; (5) licensing; and (6) education.

a. Record Requirement

Many problems relating to records can cause questionable or illegal foreclosures. The first problem is the failure to keep adequate records of notes transferred into securitized trusts.[257] In some cases, the original notes were destroyed, or the transfers were botched, giving rise to questions about who has the right to foreclose.[258] In other cases, various documents were falsified.[259]

Second, the inherent problems of MERS[260] and issue with the public recording system in general[261] give rise to troubling fact patterns; it is not uncommon for the party foreclosing to suddenly appear in the land records, with no chain of title explaining how they came to be the secured party.[262]

In other cases, the records themselves are inconsistent. The appointment of the successor trustee may have occurred after the foreclosure, or the self-appointed trustee may not have had the power of attorney to do so.[263] Additionally, in some foreclosures, no record indicates that the foreclosing party has the legal standing to foreclose.[264] In any case, the trustee rarely seeks documentation; he simply trusts the bank's representation.[265]

Finally, there are serious problems with keeping records of payments. The federal government recently alleged that the country's largest loan servicers engaged in negligent and unfair practices,[266] such as losing payments, refusing

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%20Mortgage%20Foreclosure%20Process%20and%20Protections/2013feb4_RREMFPP_MtgDraft.pdf. The committee consists of a variety of individuals, including consumer advocates, lender advocates, and others. *See id.* However, a review of the draft indicates that it does not address the trustee problem is. *See id.* Draft Section 601 states that a borrower in a non-judicial foreclosure state would need to seek an injunction in order to stop a sale, rather than utilize the trustee as a gatekeeper. *Id.* at 59.

257. Renuart, *supra* note 5, at 119.

258. *See* Renuart, *supra* note 55, at 564 (describing the problems that can arise during the foreclosure process).

259. Woolley & Herzog, *supra* note 121, at 373. In these cases, servicers re-created documents that were missing from files and employees with no training or personal knowledge of the matter often signed affidavits attesting to the fact that all the documents were in order. *Id.* at 372–73.

260. *See supra* notes 145–150 and accompanying text (discussing the problems with MERS).

261. Telephone Interview with Erich Vieth, *supra* note 1.

262. *See* Woolley & Herzog, *supra* note 121, at 381 (detailing the various public recording problems related to foreclosures).

263. *See* Telephone Interview with Erich Vieth, *supra* note 1.

264. *See id.*

265. *See id.*

266. Press Release, Bd. of Governors of the Fed. Reserve Sys. & Office of the Comptroller of Currency, *supra* note 70.

to provide debtors information about how much they owed on their loans, dual-tracking—one department promises a modification while the other forecloses—and failing to fulfill valid modification requests.[267] Although the servicers settled the claims for $25 billion,[268] this is unlikely to resolve the problems completely. Consequently, there are still serious questions about whether debtors are actually in default. In some cases, homeowners were promised modifications, made the trial period payments, and then did not receive the permanent modification they were promised. In other cases, the homeowner may be current on payments but, due to a change in his loan servicer, there is no record of his payments.

To address these problems, a trustee reform statute must explicitly require trustees to maintain physical records that verify essential facts of the transaction. Specifically, a statute should require:

> 1. Proof of the transfer of the original note from the original lender to the foreclosing party, including any and all intervening assignments. The foreclosing party should be required to produce a copy of the original note and attest in a sworn affidavit that it holds the note in its original form.[269]
>
> 2. Proof that the foreclosing party is the secured party of public record. Additionally, the secured party of record should be required to produce all records that show how it became secured.
>
> 3. Detailed financial records that show when default occurred and how much money the homeowner currently owes.[270]
>
> 4. Documents detailing any modification discussions that occurred and documents showing the results of each modification review.
>
> 5. Documents proving that the bank had the power to appoint the successor trustee.

If the trustee were required by law to demand these documents, it would be a simple task. Trustee firms could train employees to review document packets presented by the foreclosing party. If the documents are deficient, the trustee would send them back to the lender with instructions to cure.

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267. Williams, *supra* note 23, at 468–69 (describing the dual-track process).

268. Press Release, Dep't of Justice, $25 Billion Mortgage Servicing Agreement Filed in Federal Court (Mar. 12, 2012), *available at* http://www.justice.gov/opa/pr/2012/March/12-asg-306.html.

269. Nevada has enacted a law that has similar requirements. NEV. SUPER. CT. MEDIATION R. 11; Renuart, *supra* note 55, at 576. It provides for voluntary pre-foreclosure mediation. NEV. SUPER. CT. MEDIATION R. 11. If the homeowner demands mediation, the foreclosing entity must provide "the original or certified copy of the deed of trust; the loan note; and each assignment or transfer of the deed of trust and note." Renuart, *supra* note 55, at 576.

270. This would be similar to the data the Consumer Financial Protection Bureau (CFPB) has recently indicated it will require servicers to provide to homeowners. *See* 12 C.F.R. § 1070.1–4 (2013) (providing an overview of the CFPB).

This simple requirement would stop the most egregious foreclosures. Ron, who made all of his payments, would still be in his home because the bank could not have produced records of missed payments. Either the trustee would have rejected the bank's paperwork, or, as the bank learned the system, it would never have initiated foreclosure in the first place.

b. Insulation From Other Parties

The proposed recording requirements will be most effective if the trustee is truly neutral. Otherwise, close questions would likely be resolved in favor of the banks. Insulation of the trustee from the banks is relatively easy to achieve. A trustee reform statute should prohibit any attorney who has served as counsel for either party in the foreclosure from serving as trustee. This ensures that the trustee does not have a conflict of interest. At the same time, this still leaves a vast array of attorneys who are qualified to be a trustee. This statutory requirement could inspire trustee firms to develop solid foreclosure practices. Firms could still handle foreclosures in bulk, but they would have clear guidance concerning the required documentation.

c. Prohibition of Foreclosure If Legal or Factual Disputes Arise

Requiring trustees to cease foreclosure activity when legal or factual disputes arise should be common sense. However, no statute explicitly requires this result. Trustees are not trained to resolve disputes that arise between the parties, but, in practice, the trustee resolves a dispute every time he accepts the bank's version of the facts over the borrower's.[271]

Typically, a homeowner argues that he was promised a modification and that he made the requisite payments, but the bank claims that it has no record of the modification or the payments. This presents a legal question (whether the promise to modify the loan is a binding contract) and a factual question (whether the bank made a promise and whether the homeowner accepted). If the bank breached a binding promise to the homeowner, foreclosure is inappropriate. However, under the current system, the trustee normally proceeds with the foreclosure and ignores the homeowner's complaint, as many trustees believe that they have no duty to investigate.[272] This may be true, but as soon as he believes one party's story over the other's, the trustee has ceased to be neutral.

The solution to this problem is simple. A trustee reform statute should require that, if a dispute between the parties arises concerning the right to foreclose, the trustee must file a document in the public record stating that the foreclosure cannot proceed until the dispute is resolved. As a result, both the bank and the homeowner will be forced to consider whether their claims are valid. If the bank determines it has a legal right to foreclose, it can proceed in court with a judicial foreclosure. If the bank prevails, the statute should allow the bank to recover

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271. *See* Telephone Interview with Erich Vieth, *supra* note 1.

272. *See id.*

damages for the time the homeowner remained in the home. This will discourage homeowners from filing frivolous claims only to cause delay. This solution puts legal and factual disputes where they belong: in courts that have considerable expertise in deciding such matters.[273]

d. Penalties

The first three prongs of the trustee reform statute carefully explain what a trustee must and must not do. However, there is always the potential for a rogue trustee. Therefore, a trustee reform statute should include penalties for any violation of the statute. The statute should also include a right of action for homeowners, to recover actual and punitive damages as well as attorney's fees.[274] In this way, the statute would mirror consumer fraud statutes, such as the Fair Debt Collection Practices Act (FDCPA),[275] the Fair Credit Reporting Act (FCRA),[276] and many state consumer fraud acts. The statute should also explicitly state that, if the state's civil procedure rules are satisfied, a class action is an available remedy.

e. Licensing

A trustee reform statute should also contain a provision detailing how trustees are licensed and regulated. The contours of this provision would depend on the state. At a minimum, trustees should be bonded[277] and should be required to meet basic standards, such as refraining from any affiliation with commercial lenders, declining to represent consumers or homeowners, and complying with the statutory requirements. States should develop and administer a basic licensing exam for trustees, and should task a particular entity, such as a division of finance or its equivalent, with trustee oversight and the annual inspection of trustee files. Regulatory penalties for the failure to meet licensing requirements coupled with the statute's private right of action will provide the best

273. This portion of the proposal bears some resemblance to one of the more interesting rescue measures put in place during the Great Depression, an era in which many state legislators sought to curb foreclosures. *See* Walsh, *supra* note 30, at 139–40. In some states, homeowners were given the power to convert non-judicial foreclosures to judicial foreclosures. *Id.* at 140. In this proposal, the trustee triggers this change in order to avoid factual disputes about a person's home being resolved extra-judicially.

274. *Cf.* Timothy A. Froehle, Note, *Standing in the Wake of the Foreclosure Crisis: Why Procedural Requirements Are Necessary to Prevent Further Loss to Homeowners*, 96 IOWA L. REV. 1719, 1743 (2011) (making a similar suggestion to allow attorney's fees under general foreclosure statutes for any cause of action related to foreclosures).

275. *See* Fair Debt Collection Practices Act, Pub. L. No. 95-109, § 813, 91 Stat. 874, 881 (1977) (codified as amended at 15 U.S.C. § 1692k (2012)) (providing for civil penalties).

276. *See* Act of Oct. 26, 1970, § 125, 84 Stat. 1114, 1117 (codified as amended at 15 U.S.C. § 1681n–*o* (2012)) (providing for civil penalties).

277. A bond provides some guarantee that, if the trustee breaks the law, the injured party can recover. It also requires the trustee to have an interest and helpsensure that the state is aware of who the trustee is on any given mortgage. *See, e.g.*, MO. ANN. STAT. 456.7-702 (West 2013) (requiring a trustee "to give bond to secure performance" at the request of the court).

enforcement scheme. The need for a combination of public and private enforcement is apparent in fields as varied as employment law, debt collection, environmental protection, and securities.[278]

f. Education

Both trustees and the public require more education. If states create licensing requirements for trustees, and preferably licensing structures, the market will likely create classes and courses to train trustees. Educating trustees is essential; however, educating the public is just as important. An ideal trustee reform statute should specifically provide for the implementation of basic campaigns to educated the public about new protections for homeowners.

2. The Promise of a Trustee Reform Statute and the Challenges That Must Be Addressed

A trustee reform statute would almost immediately alter the landscape of foreclosures. Things would improve if banks could no longer handpick trustees to facilitate quick foreclosures. If trustees act as true neutrals, an unfair and untrained trustee will no longer decide disputed foreclosures. Instead, the dispute would be sent to the courts, which have developed sophisticated mechanisms for resolving factual and legal disputes. Similarly, requiring the trustee to obtain essential foreclosure documents from banks would help to keep the banks honest. If the bank has a problem with its records, it will need to correct the error or contact the homeowner and attempt to modify the loan.

The suggested trustee reform statute would reduce the number of illegal foreclosures, and in some cases, prolong the foreclosure process. Many government programs, lawsuits, and other efforts have been aimed at keeping people in their homes.[279] This is beneficial to the homeowner, but it is also beneficial to the broader economy. Home prices plummeted after the market meltdown and the unprecedented foreclosure rate. Requiring banks to carefully consider whether they should remove people from homes, rather than forcing out homeowners as quickly as possible, is a fair result. And if foreclosure is appropriate, the courts can resolve the matter and award damages to the bank. There is no downside to requiring trustees to act as true neutrals. The only possible result is a reduction in wrongful foreclosures, an increase in modifications, and overall increase in the certainty that property rights are being appropriately protected.

Implementing a trustee reform statute has many challenges. First, it is essential to educate lawmakers about current problems. Second, the field must

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278. *See* Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1196–97 (1982) (recognizing the importance of a combination of public and private enforcement).

279. *See* Susan Jaffe, *Caregivers Aim to Trim Costs by Helping Seniors Stay at Home*, WASH. POST, Dec. 21, 2010, at E1, E5 (describing PACE, a federal program aimed at keeping seniors in their homes).

find ways to attract competent trustees. Currently, trustees in most states are compensated with percentage of the home's sale price.[280] This structure rewards foreclosure and discourages the investigation of potential problems. One possible solution would require the bank to compensate the trustee if the foreclosure is initiated but does not proceed, and require the homeowner to pay the trustee if the foreclosure does proceed. The compensation rates should be established state by state and be based market demands. This structure may require an increase in trustees' fees because they could no longer be paid by several parties in the same action. Another possibility for compensation is to implement a public employee program, like the system in Colorado.[281]

Finally, some may argue that these proposals will increase the length of foreclosure and the overall costs to banks, which could pass on costs to consumers. However, it is important to remember that banks currently foreclose haphazardly, thereby avoiding the costs it would normally bear.[282] At a macroeconomic level, the glut of foreclosed homes, the ever-present specter of litigation over the foreclosures, and the economic harm foreclosed families experience are devastating to the economy.[283] Reducing wrongful foreclosure could have a number of positive impacts on the economy as a whole.

B. Litigation

In many states, the legislatures are unlikely to pass a trustee reform statute.[284] However, the judiciary in these states may allow for partial reform through

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280. *See, e.g.*, MO. ANN. STAT. § 443.360 (West 2013) (providing the trustee with "a commission on the amount of sales not exceeding two percent on the first one thousand dollars, and one percent on all sums over that amount and under five thousand dollars, and one-half of one percent on all sums over that amount"). One may think that because trustees are paid based on the sales price at the foreclosure sale, there is an incentive to sell the house for the highest possible price. However, the auction system discourages competition and thereby reduces the sales price. Second, trustees make far more for the other services they provide to the bank than they do for selling the home. For example, in Missouri, a home that sells for $100,000 at a foreclosure sale would produce a return of $535. *See id.* This law also discourages a trustee from seeking to maximize the sales price because, as the bid goes up, the return to the trustee is proportionally less, so that increased effort results in decreased gains. *See id.* If the trustee made a special effort, and sold the house for $150,000 instead of $200,000, the increased return would only be $250. *See id.* The trustee could instead invest this same effort in taking on another case for a bank, involving debt collection, foreclosure work, unlawful detainer work, default servicing, title work, and publication of notice. The current system is not incentivizing trustees to seek the highest bid, especially if doing so would risk a steady, lucrative stream of businesses from banks.

281. COLO. REV. STAT. § 38-37-101 (2012) (establishing a public trustee system in Colorado).

282. *See, e.g.*, Jessica Silver-Greenberg & Ben Protess, *Big Banks Are Told to Review Their Own Foreclosures*, N.Y. TIMES, Feb. 13, 2013, at B1 (highlighting the problems caused by imperfect foreclosure procedures).

283. Pittman, *supra* note 77, at 1104.

284. *See, e.g.*, HOME, 2011 LEGISLATIVE OUTCOMES REPORT (2011), *available at* http://www.phonehome.org/Portals/0/Images/PDF/Legislative%20Outcomes%202011.pdf (noting that, in Virginia, "most of the various foreclosure reform bills were killed outright").

litigation. Although it is beyond the scope of this Article to document the law in every state, it is helpful to consider the law in a few example states.

1. California

a. California Law

Of the four states surveyed, California demands the least of trustees. California law is unique because trustees do not have fiduciary duties to both parties, and they have limited statutory immunity.[285] *Kachlon v. Markowitz* demonstrates the range of claims that can be pursued against trustees in California, revealing a small window of permissible actions, such as claims of genuine bias.[286] In *Kachlon*, a homeowner sued the trustee and the note holder, alleging that the trustee incorrectly recorded a notice of default.[287] The homeowner further alleged that he provided proof to the trustee that the $53,000 promissory note at issue had been satisfied.[288] In response, the trustee refused to proceed with the foreclosure and refused to withdraw the notice of default.[289] Essentially, the trustee refused to take sides.[290] The plaintiffs brought a slander of title claim and a negligence claim.[291] The court ultimately upheld a directed verdict in favor of the trustee, explaining that "[t]he trustee in nonjudicial foreclosure is not a true trustee with fiduciary duties, but rather a common agent for the trustor and beneficiary. The scope and nature of the trustee's duties are exclusively defined by the deed of trust and the governing statutes. No other common law duties exist."[292]

The court also explored California's statutory "privilege," which provides immunity to trustees for actions taken within the scope of their ordinary duties, such as mailing, publication, and the delivery of notice.[293] The court concluded that the statute provides limited immunity, specifically excluding malicious conduct.[294] The court clarified that "[m]ere negligence in making 'a sufficient

285. *See* CAL. CIV. CODE § 2924(b) (West 2013); *see also* Kachlon v. Markowitz, 85 Cal. Rptr. 3d 532, 546 (Cal. Ct. App. 2008). Arizona has a similar limited immunity statute. *See* ARIZ. REV. STAT. ANN. § 33-807(E) (2012) ("If the trustee is joined as a party in any [action other than one alleging the trustee breached its duties under the statutory scheme], the trustee is entitled to be immediately dismissed and to recover costs and reasonable attorney fees from the person joining the trustee."). *Id.*

286. 85 Cal. Rptr. 3d 532.

287. *Id.* at 538–42.

288. *Id.* at 541.

289. *Id.* at 553.

290. *Id.* at 554.

291. *Id.* at 553.

292. *Id.* at 546.

293. CAL. CIV. CODE § 2924 (b), (d) (West 2013).

294. *Kachlon*, 85 Cal. Rptr. 3d at 550–51 ("Granting absolute immunity from such wrongdoing would wholly sacrifice the trustor's interest in favor of the trustee. The qualified common interest privilege, on the other hand, would provide a significant level of protection to trustees, leaving

inquiry into the facts on which the statement [about default] was based' does not, of itself, relinquish the privilege."[295]

The *Kachlon* court's decision is instructive. Although it makes clear that a trustee is not liable for negligence, it leaves open the possibility that a claim could be brought in California against a trustee who is working for the bank, and who disregards information provided by the homeowner. As such, although a claim to curb the practices by some abusive trustees may be difficult, it does not seem impossible.

b. Could Ron Meehow's Claim Survive in California?

In *Kachlon*, the court noted that the trustee stopped the foreclosure procedure after the homeowner provided evidence that he was not in default.[296] The court relied heavily upon this behavior to determine that the trustee did not act with malice.[297] In Ron's case, the trustee continued the foreclosure, despite evidence that Ron did not default on his loan. The trustee even affirmatively explained his behavior, suggesting it was because he worked for the bank.

California law leaves room for claims like Ron's. The trustee's actions in his case would likely be sufficient to establish malice. Such claims would serve the high purpose of defining the parameters for trustees and curbing some of their more egregious behavior.

2. Missouri

a. Missouri Law

The law governing trustees in Missouri is ripe for review. Trustees in Missouri are rarely held accountable for illegal behavior, in large part because wronged homeowners have not pursued cases in the modern mortgage era. However, Missouri law seems to support claims against trustees. An early Missouri case described the role of the trustee as follows:

> Trustees are considered as the agents of both parties-debtor and creditor-and their action in performing the duties of their trust should be conducted with the strictest impartiality and integrity. They are intrusted with the important function of transferring one man's property to another, and therefore both reason and justice will exact of them the most scrupulous fidelity. Courts of equity have always watched their proceedings with a jealous and scrutinizing eye; and where it is clearly shown that they have abused their trust, or combined with one party to the detriment of the other, relief will be granted. Not

them open to liability only if they act with malice. At the same time, it preserves the ability of trustors to protect against the wrongful loss of property caused by a trustee's malicious acts.").

295. *Id.* at 554 (quoting Roemer v. Retail Credit Co., 83 Cal. Rptr. 540, 542 (Cal. Ct. App. 1970)).

296. *Id.* at 553.

297. *Id.* at 554.

> that a sale made by them will be set aside on slight and frivolous grounds; but where it appears that substantial injury has resulted from their action, where, in pursuance of their powers, they have failed or neglected to exercise a wise and sound discretion, equity will interfere. It is impossible in the very nature of things to lay down any precise rule applicable alike to all cases which may arise, but every case must be decided on the especial facts and circumstances which surround it and upon which it is founded.[298]

Other Missouri case law seems to suggest that a trustee has, at least, a duty to conduct a "reasonable investigation" into default.[299] And since 1846, Missouri courts have rejected the notion that the trustee does not have specific duties and is merely the agent of the lender.[300]

Missouri courts describe the role of the trustee as sacred. Missouri's vision of the trustee is representative of the ideal trustee of the modern mortgage era. The decisions seem to suggest that a trustee could never openly promote itself as an agent for the lender, nor could a trustee choose to ignore information from the homeowner regarding fraud or negligence by the lender. Thus, if a claim is pursued against a trustee who has acted in this manner, he should be liable. Whether the law will produce these results remains to be seen.

b. Could Ron Meehow's Claim Survive in Missouri?

The case on which Ron's story is based was filed in Missouri, and it survived a motion to dismiss.[301] This was appropriate under Missouri law and suggests that Missouri is ripe for claims against trustees that allege overt bias. These claims would be beneficial to Missourians facing foreclosure because they would define the parameters of the trustee and serve to curb some of the more offensive and troubling behaviors of trustees.

3. Washington

Washington law provides an unusual amount of detail and precedent regarding trustees. However, there are few cases that have tested that law in the modern mortgage era. Additionally, Washington is home to Northwest Trustee Services, a company that raises serious questions about the relationship between trustees and foreclosure attorneys. As a result, claims in Washington may be

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298. Goode v. Comfort, 39 Mo. 313, 325 (1866).

299. *See* Edwards v. Smith, 322 S.W.2d 770, 777 (Mo. 1959) (noting that there was no evidence that a reasonable investigation would have turned up a reason not to foreclose, but seeming to suggest that the trustee could have been liable had such evidence existed).

300. Vail v. Jacobs, 62 Mo. 130, 133–34 (1876) ("Neither the law nor the parties intend that the trustee shall be a nose of wax, a mere figure-head, in the hands of the creditor and of the auctioneer. He is placed in a position to act fairly by all interested, and when he fails in his duty in this regard, the sales he makes will be set aside.").

301. Order, Rippy v. Chase Bank, No. 1111CV06677 (Mo. Cir. Ct. Mar. 29, 2012) (denying the defendant's motion to dismiss).

especially effective in more fully defining the role of the trustee and preventing some of the more serious problems associated with the foreclosure process.

a. Washington Law

Washington is unique because it has clear precedent that sets forth principles to guide the interpretation of its deed of trust statute, and because two cases, separated by over twenty years, hold trustees liable for breaching their duty of neutrality.[302] Washington courts have articulated three principles to guide the interpretation of the deed for trust act: "First, the nonjudicial foreclosure process should remain efficient and inexpensive. Second, the process should provide an adequate opportunity for interested parties to prevent wrongful foreclosure. Third, the process should promote the stability of land titles."[303] Similarly, Washington law indicates that a trustee is a fiduciary to both the lender and the borrower.[304]

These principles require trustees to be truly neutral. In Washington, if the trustee is merely an agent for the lender, the trustee can be individually liable for the breach of its duties. For example, in *Cox v. Helenius*, the court held that the trustee, who was the attorney for both the homeowner and the bank, breached his fiduciary duty by foreclosing on the homeowner's property and selling the home despite knowing that the homeowner mistakenly believed that a pending action for damages against the creditor had stopped the foreclosure.[305] Interestingly, the court noted that the breach may have been a result of the trustee's dual role.[306] The court further suggested that, when such a conflict arises, the party should either act as the trustee or the attorney, but not both.[307]

302. *See* Klem v. Wash. Mut. Bank, 295 P.3d 1179 (Wash. 2013) (en banc); Cox v. Helenius, 693 P.2d 683 (Wash. 1895) (en banc).

303. *Cox*, 693 P.2d at 685–86.

304. *Id.* at 686 ("Washington courts do not require a trustee to make sure that a grantor is protecting his or her own interest. However, a trustee of a deed of trust is a fiduciary for both the mortgagee and mortgagor and must act impartially between them.").

305. *Id.* at 684–85.

306. *Id.* at 687.

307. *Id.* The court explained that

> the dual responsibility of trustee and attorney for the beneficiary precipitated at least some of the trustee's breaches. Although the dual role this trustee had troubles us, the Legislature specifically amended the statute in 1975 to allow an employee, agent or subsidiary of a beneficiary to also be a trustee. The amendment furthers the general intent of the act that nonjudicial foreclosure be efficient and inexpensive, and in the ordinary case would present no problem. However, the statute may not allow attorneys to do that which the Code of Professional Responsibility prohibits. The spirit of CPR DR 5–105(B) would seem to condemn action of the nature that occurred here. Where an actual conflict of interest arises, the person serving as trustee and beneficiary should prevent a breach by transferring one role to another person.

Id.

In 2013, *Klem v. Washington Mutual Bank* confirmed that *Cox* is still good law.[308] In *Klem*, Dorothy Halstien, through her legal guardian, filed claims for negligence, breach of contract, and violation of Washington's Consumer Protection Act (CPA).[309] The jury returned a verdict for Ms. Halstein on all three counts.[310]

Ms. Halstein owned a home worth approximately $235,000 on which she owed roughly $75,000.[311] Washington Mutual (WaMu) held the note and Quality Loan Services (Quality) was the trustee.[312] Ms. Halstein also suffered form dementia and, due to the cost of her care, her guardian was unable to pay her mortgage.[313] Consequently, WaMu instructed Quality to initiate foreclosure.[314] On the first day the law allowed, Quality sold the home for $84,087.67, a dollar more than Ms. Halstien owed in principle, fees, and costs.[315] To accomplish the sale, a notary employed by Quality falsely predated the notice of sale, which authorized the sale to occur earlier than it should have.[316]

Before the sale, Halstien's guardian secured a signed purchase and sale agreement for the home from a buyer who committed to pay $235,000.[317] The parties could not close the sale before the foreclosure sale, so the guardian requested a postponement of the sale.[318] Although Washington law gives the trustee absolute authority to postpone the sale, the trustee declined to do so, explaining that it would not postpone the sale without WaMu's permission.[319] Evidence revealed that the trustee, in a confidential exchange between it and WaMu, promised to never postpone a foreclosure unless WaMu agreed.[320] Similarly, Quality's chief operating officer confirmed that Quality did what "WaMu told it to do."[321] The trial court entered a judgment in favor of Ms. Halstein's guardian.[322] On appeal, the Washington Supreme Court concluded that the CPA applied to trustees and that a trustee could be held responsible for acting unfairly.[323] The court also held that a trustee could be liable for negligence.[324]

308. *See* 295 P.3d 1179, 1188 (Wash. 2013) (en banc) (citing *Cox* with approval).
309. *Id.* at 1183.
310. *Id.* at 1184.
311. *Id.* at 1181.
312. *Id.*
313. *Id.*
314. *Id.* at 1181, 1183.
315. *Id.* at 1181.
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.* at 1182–83.
321. *Id.* at 1183.
322. *Id.* at 1184.
323. *Id.* at 1190.
324. *Id.* at 1181 (affirming the intermediate appellate court).

The court reasoned that, because the trustee has enormous power over another individual's home, the law and equity demand that the trustee be fair and just.[325] The court also noted that lenders, servicers, and their affiliates routinely appoint trustees,[326] giving the trustees an incentive to accommodate the wishes of the entity that appoints them.[327] Additionally, the court emphasized that trustees should act as neutrals, commenting that the laws of Washington do not permit the "theft" of a person's home by a lender "under the guise of a statutory nonjudicial foreclosure."[328] The court explicitly rejected the argument that the trustee may follow the beneficiary's direction, reasoning that the transaction would no longer involve three distinct parties because the trustee would merely serve as the beneficiary's agent.[329] Finally, the court indicated that a trustee's failure to act as an independent and neutral party exercise is an unfair or deceptive practice.[330] To prevent further abuse, the court ordered an injunction to prevent Quality from continuing to violate the law and remanded the matter to the trial court.[331]

These two cases establish fundamental principles that, if accepted by other states, would change foreclosure procedure. Accordingly, state courts should construe deed of trust laws in favor of the borrower, require trustees to exercise independent discretion as a true third party, and carefully scrutinize a trustee's close ties to the lender to address any issues with impartiality. *Klem* and *Cox* indicate that courts will establish real limits on trustees *if* attorneys bring compelling cases against them.

b. Could Ron Meehow's Claim Survive in Washington?

Although the ultimate fate of Ron's claim turns on several factors, including venue, the judge, and the attorneys, it is likely that Ron's claim would survive if filed in a Washington court. The Washington Supreme Court explicitly concluded that failure to act as an independent decision maker exposes a trustee to liability.[332] Like the trustee in *Klem*, Ron's trustee admitted that it does what the bank instructs it to do. This is a breach of the trustee's duty.

Washington stands as the clearest example of the value of bringing claims against trustees who are tethered to banks and unwilling to act as a true third party. If advocates bring similar claims in other states that have similar laws,

325. *Id.* at 1188 ("[T]he power to sell another person's property, often the family home, is a tremendous power to vest in anyone's hands." As a result, "common law and equity require[] [a] trustee[] to be evenhanded to both sides and to strictly follow the law.").

326. *Id.*

327. *Id.* at 1188–89.

328. *Id.* at 1189.

329. *Id.*

330. *Id.* at 1192.

331. *Id.* at 1188–90.

332. *Id.* at 1190.

such as Missouri, it is likely that courts can play a role in curbing the harmful behavior of many modern day trustees.

4. *Specific Factual Scenarios That Are Ripe for Pursuit*

Although the trustee problems that are ripe for litigation differ by state, basic issues that should be considered include:

> close financial ties between trustees and banks, including potential indemnity agreements;
>
> the conflict between advocating zealously for a bank (required under most ethical rules) and the legal duty to be completely neutral;
>
> a trustee's willingness to actually advocate against a homeowner in temporary restraining order or bankruptcy proceedings;
>
> a trustee's failure to require proof of the right to foreclose, including documents that would prove standing, security, and default;
>
> a trustee's decision to resolve factual or legal disputes about standing or default in favor of the bank;
>
> a trustee's refusal to talk with a homeowner; and
>
> a trustee's decision to give advice to homeowners, which could create an attorney/client relationship.

Pursuing these types of issues will have a number of salutary effects. First, litigation will provide much needed guidance and answers. Second, clarification of these issues will help to stop illegal or unethical behavior. Third, addressing these issues will allow for discovery that could better illuminate the relationship between banks and trustees. And fourth, considering these issues will likely cause those who are acting as attorneys and as trustees to scrutinize their own practices more carefully.

This reformation process is already beginning. In the case on which Ron's story is based, the trustee was named and the claim survived a motion to dismiss.[333] Ron's case, and other cases like it, could provide much-needed clarification of the trustee's duties in the modern era.

C. *Ethics Complaints*

Because most trustees are also lawyers, they are subject to the professional conduct rules in their jurisdictions.[334] Moreover, most states allow attorneys to seek advisory opinions in potentially unethical situations.[335] Therefore, filing appropriate ethical complaints and ethical inquiries may help to address the most overt forms of abuse by trustee attorneys.

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333. Order, Rippy v. Chase Bank, No. 1111CV06677 (Mo. Cir. Ct. Mar. 29, 2012) (denying the defendant's motion to dismiss).

334. Cox v. Helenius, 693 P.2d 683, 687 (Wash. 1985).

335. *See, e.g.*, *Committee on Mediator Ethical Guidance*, AMERICAN BAR ASSOCIATION (June 6, 2013), http://apps.americanbar.org/dch/committee.cfm?com=DR018600.

1. Ethical Rules on Which to Base Complaints Against Trustees

The *Cox* court pointed out that, although Washington allows attorneys to both represent banks and serve as the trustee, the attorney must still not engage in activity prohibited by the state's code of professional responsibility.[336] The court further suggested that the trustee in *Cox*, who served the interests of the bank to the detriment of the homeowner, may have violated the American Bar Association's Model Rules of Professional Conduct (MPRC).[337] According to section 5-105, "[a] lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests."[338] The court's reference to this rule suggests an interesting possibility. The court implied that when an attorney elects to become a trustee and thereby takes on a legal fiduciary duty to a borrower, the attorney becomes the legal representative of the borrower.[339]

Although the court did not identify at what point the borrower and the trustee enter into an attorney-client relationship, guidance is available. Typically, courts look to the client's intent in determining if an attorney-client relationship exists.[340] If this is true, then a borrower, who contacts a trustee knowing that the trustee is a lawyer and that the trustee is required to help him, may have a reasonable expectation that the trustee is acting as his lawyer.

Similarly, the MRPC dictate how the trustee should interact with the borrower, even absent an attorney-client relationship. MRPC 4.3 explains that

> [i]n dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.[341]

Under this rule, if the homeowner is represented, the attorney should not speak with him. At the same time, the trustee still owes a duty to the homeowner and must provide him with information. If the homeowner is unrepresented, the

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336. *Cox*, 693 P.2d at 687.

337. *Id.* (discussing the Washington professional conduct rules).

338. MODEL CODE OF PROF'L RESPONSIBILITY DR 5-105 (1980).

339. *Cox*, 693 P.2d at 687.

340. Douglas K. Schnell, Note, *Don't Just Hit Send: Unsolicited E-Mail and the Attorney-Client Relationship*, 17 HARV. J.L. & TECH. 533, 540 (2004).

341. MODEL RULES OF PROF'L RESPONSIBILTY R. 4.3 (2012).

trustee must disclose its adverse interests, and the only advice it may give to the homeowner is to seek counsel. Telling the homeowner to reinstate the loan by paying the back due amounts if the homeowner does not believe he is in default could be interpreted as giving legal advice. Telling the homeowner to call the bank for more information seems equally inappropriate. The ethical duties related to unrepresented parties illustrate the untenable schizophrenia that exists when an attorney for the bank is also charged with being the neutral trustee in a disputed matter.

The formation of an attorney-client relationship between the borrower and the attorney-trustee poses similar challenges. For example, if the debtor becomes the attorney-trustee's client, the trustee runs the risk of breaching the duty of confidentiality if it shares information from the borrower with the bank.[342] Similarly, the attorney-trustee's failure to provide advice to the borrower could constitute malpractice. Finally, it is unclear whether the inclusion of an "attorney fee" or a "trustee fee" in the homeowner's deficiency creates an attorney-client relationship between the borrower and the attorney-trustee.

Interestingly, the most obvious conflict the attorney-trustee may have is with the bank. The attorney is required to represent the bank "zealously" so long as it is "within the bounds of the law."[343] At the same time, the attorney-trustee is required by most states to be a neutral party between the bank and the borrower. If the attorney-trustee took this duty seriously, it would have to disclose this conflict to the bank.[344] By disclosing that it could not advocate for the bank, or even accept the bank's story as true if challenged by a homeowner, the attorney-trustee would likely convince the bank it needed new counsel. However, there is no evidence that any attorney-trustee has ever made such a disclosure to any bank. This speaks to the fact that most trustees either do not see the conflict or do not care that a conflict exists.

These issues can be addressed without questioning the ethics of any specific attorney. Rather, attorneys should pose ethical questions to and seek advisory opinions from their state bar associations and ethical boards in order to determine what an attorney-trustee may and may not do. The attorney could ask:

> 1. May a neutral attorney-trustee decide an issue in favor of its client and against a homeowner, to whom the attorney-trustee owes a fiduciary duty, if there is a dispute between the parties as to law or fact?
>
> 2. May an attorney hold a duty of zealous advocacy for one party while simultaneously owing a duty of neutrality to a party whose interests

342. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980) (listing the standards governing the duty to preserve a client's information).

343. *See* MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1 (1980).

344. MODEL CODE OF PROF'L RESPONSIBILITY EC 5-16 (1980).

> are adverse to the attorney's client? Would this require written disclosure to one or both parties?
>
> 3. May a trustee for a homeowner in a foreclosure also appear in court to advocate against the homeowner and in favor of foreclosure?
>
> 4. Does an attorney who serves as a trustee and has a legally recognized fiduciary duty to a borrower enter into an attorney-client relationship if the borrower shares information with the trustee or seeks advice from the trustee because the he believes that the trustee is an attorney and is required to be fair to the borrower?
>
> 5. If an attorney agrees to serve as a trustee in a foreclosure, and, in the process of that foreclosure, obtains information from a borrower to whom the trustee owes a fiduciary duty, is the trustee prohibited from later using that information in a subsequent action against the borrower?
>
> 6. If an attorney agrees to serve as a trustee in a foreclosure, and, in the process of that foreclosure, obtains information from a borrower to whom the trustee owes a fiduciary duty, is the trustee prohibited from later representing another party against the borrower in a related transaction?

In addition to advisory opinions, attorneys who commit ethical violations could be reported to the state bar association or ethics committee. Adverse opinions in this setting could deter future misconduct. Similarly, if attorneys continue to engage in practices prohibited by advisory rulings, there would be little reason for them to escape punishment. Overall, it is likely that some states would issue advisory opinions that would be inconsistent with some current practices, which could help to eradicate some of the questionable conduct of modern trustees.

2. A Real Example On Which to Build

This proposal is more than theory. The North Carolina State Bar has already considered the ethical duties of the attorney-trustee in a foreclosure action. The Ethics Committee concluded that "[s]o long as the attorney serves as trustee, he may not be involved in any proceeding arising from or connected with the deed of trust."[345] More specifically, the Committee explained that

> [t]he proper rule is that the trustee/attorney cannot ethically represent either the lender or the borrower in a role of advocacy at any state of the foreclosure proceeding. The trustee in his fiduciary capacity is charged with the duty of preserving the interests of both, and in that sense he represents both. If, during the existence of the fiduciary relationship, he should act in an adversary capacity for either, he

345. N.C. R. PROF'L CONDUCT 82 (1990).

> would violate his fiduciary duty to the owner, and this would offend the Code provision against conflict of interest.[346]

The problem is that the Ethics Committee provided this guidance in 1978.[347] Consequently, there is a pressing need for an examination of the ethics of the dual role of the attorney and the trustee to be in the modern mortgage era. Clear inquiries and precise answers would have an immediate impact on the behavior of trustees. Although it is difficult to predict what ethics boards will say in response to questions about relatively new, sometimes poorly understood situations, it seems likely that, at a minimum, ethics decisions could serve as a check on the most egregious behaviors of some attorney-trustees.

V. CONCLUSION

Presently, the very banks that collapsed the world economy are being trusted, with no judicial oversight and no meaningful neutral party, to remove people from their homes. The same companies responsible for robo-signing, derivatives, MERS, the bailout, and exotic loans that were designed to fail are trusted to carry out foreclosures fairly. The banks' actions go unchecked because trustees are unregulated and, in some cases, unfair. There is no doubt that this system is broken, and that costs of wrongful foreclosures are immense. Fortunately, there are some simple solutions that can convert trustees from potential accomplices to wrongful foreclosures into meaningful parts of the solution. Legislation, litigation, and ethical inquiries are all means to accomplish this goal. Reforming the role of the trustee protects property rights, promotes certainty, reduces the number of wrongful foreclosures, and encourages modifications of loans. These results are good for homeowners, but, more importantly, are net positives for the broader economy and society as a whole.

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346. N.C. State Bar, Ethics Op. CPR 166 (Jul. 14, 1978), *available at* http://www.ncbar.com/ethics/ethics.asp?id=695.
(responding to the inquiry, "[i]f foreclosure proceedings have been instituted against a debtor . . . may Attorney A, who serves as Substitute Trustee in the foreclosure . . . file a motion in the Bankruptcy Court to set aside the automatic stay?").

347. *Id.*