WHAT REALLY HAPPENED: *IBANEZ* AND THE CASE FOR USING THE ACTUAL TRANSFER DOCUMENTS

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I. INTRODUCTION

By now, most of us have heard of the meltdown on Wall Street involving the securitization of subprime loans.[1] Unsurprisingly, investor suits have followed,[2] as have suits brought by governmental entities.[3] There is another side effect of the mort-

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1. *See N.J. Carpenters Health Fund v. Residential Capital, LLC*, 272 F.R.D. 160, 162–163 (S.D.N.Y. 2011) (denying class certification to a group of over six hundred plaintiffs who alleged that offering documents for securities they purchased from two mortgage companies were materially misleading). Subprime loan pools, which are secured by some type of collateral, have many acronyms: ABS (asset-backed securities) cover car loans and other collateralized loans and have several subdivisions, including MBS (mortgage-backed securities); RMBS (residential mortgage-backed securities); and CMBS (commercial mortgage-backed securities). *In re MBIA, Inc.*, 700 F. Supp. 2d 566, 570 (S.D.N.Y. 2010).

2. *See* Peter Lattman, *Ex-Lehman Officials to Pay $90 Million to Settle Suit*, http://dealbook.nytimes.com/2011/08/25/former-lehman-officials-to-pay-90-million-to-settle-suit/?ref=litigation (Aug. 25, 2011) (discussing lawsuits filed by investors against Lehman Brothers for "conceal[ing] the true extent of the company's exposure to subprime-related assets and financial positions, and materially misle[ading] the investing public"); Reuters, *Wells Fargo Settles Wachovia Lawsuit for $590 Million*, http://www.cnbc.com/id/44032695 (Aug. 5, 2011) (discussing settlement of a lawsuit filed by investors against Wachovia, alleging that the company led investors to believe its securities portfolio was pristine, when in fact the portfolio was largely made up of subprime loans).

3. *See* Shahien Nasiripour, *U.S. Banks Offered Deal over 'Robosigning' Lawsuit*s, http://www.cnbc.com/id/44403367/US_Banks_Offered_Deal_Over_Robosigning_Lawsuits (Sept. 5, 2011) (discussing negotiations between several large U.S. banks and state prosecutors that would limit the banks' liability for employing the prohibited practice of "robosigning," in exchange for a multibillion-dollar settlement); *e.g.* Compl., *Del. v. Merscorp, Inc.*, http://4closurefraud.org/2011/10/28/complaint-state-of-delaware-v-merscorp-inc/ (Del. Ch. Oct. 27, 2011) (No. 6987); Compl., *Mass. v. Bank of Am.*, www.mass.gov/ago/docs/press/ag-complaint-national-banks.pdf (Mass. Cmmw. Dec. 1, 2011) (No. 11-4363); Compl., *Nev. v. Lender Processing Servs., Inc.*, http://4closurefraud.org/2011/12/16/lps-complaint-state-of-nevada-vs-lender-processing-services-fidelity-national-docx/ (Nev. Dist. Dec. 15, 2011) (No. A-11-653289-B).

gage crisis that was not necessarily foreseen—securitization's effect on the foreclosure process. Perhaps because securitization often involved the federally created entities Fannie Mae and Freddie Mac, among others,[4] securitization repeatedly ignored or circumvented state procedures, such as recording assignments.[5]

The most famous of these circumventions was the creation of a computer database to substitute for the county clerk of court and other state registrars, the Mortgage Electronic Registration System (MERS).[6] In an effort to speed up the process and avoid fees, the industry created its own registry and gave it certain powers.[7] Most laws were never changed to incorporate MERS, however, and litigation has erupted with different results around the country.[8] More importantly, the usual ownership records for real property were pushed aside or destroyed in the name of efficiency.[9] The result has been the introduction of "robosigning."[10] Robosigning most often refers to the process of mass-producing affidavits for foreclosures without having knowledge of or verifying the facts, but will be used here to describe all mass-produced documents for foreclosures, which include allonges and assignments, in addition to affidavits.[11] These documents are frequently

4. *See* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 Yale J. on Reg. 1, 17 (2011) (explaining how the mortgage securitization market is segmented into several governmental and private entities).

5. Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L. Rev. 1359, 1370 (2010); *see e.g.* Asset Backed Securities Corp. Home Equity Loan Trust, Series MO-2006-HE6, *Form 8-K*, http://www.secinfo.com/d13f21.u33.htm at Ex. 99.1, Art. II, § 2.01(a)(iii) (Jan. 25, 2007) (calling for a blank assignment even though several states have made notarizing documents with blanks illegal (*e.g.* Cal. Gov. Code § 8205(a)(2) (2012); Colo. Rev. Stat. § 12-55-110(3) (Lexis 2011); 5 Ill. Comp. Stat. 312/6-104(c) (2011))).

6. Peterson, *supra* n. 5, at 1368.

7. *Id.*; Nolan Robinson, *The Case against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) to Initiate Foreclosure Proceedings*, 32 Cardozo L. Rev. 1621, 1622–1624 (2011).

8. Peterson, *supra* n. 5, at 1385; Robinson, *supra* n. 7, at 1624.

9. *See In re Merscorp, Inc. v. Romaine*, 861 N.E.2d 81, 88 (N.Y. 2006) (Kaye, C.J., dissenting in part) (arguing that MERS makes local recording systems useless by eliminating public records of assignments); Comments of Fla. Bankers Ass'n, *In re: Amends. to R. of Civ. Proc. & Forms for Use with R. of Civ. Proc.*, http://www.floridasupremecourt.org/clerk/comments/2009/09-1460_093009_Comments%20(FBA).pdf at 4 (Fla. Sept. 28, 2009) (No. 09-1460) (explaining that physical records of ownership are often destroyed upon conversion to an electronic file to prevent confusion).

10. Levitin & Twomey, *supra* n. 4, at 29–30.

11. H.R. Subcomm. on Hous. & Community Opportunity, of Fin. Servs. Comm., *Robo-Signing, Chain of Title, Loss Mitigation, and Other Issues in Mortgage Servicing*, 111th Cong. 13–14 (Nov. 18, 2010) (providing the written testimony of Adam J. Levitin, Associate

used to provide a basis for standing in a foreclosure action.[12] Unfortunately, haste has made waste, and the documents are often inaccurate and misleading. The Maine Supreme Court reviewed the robosigning practices of GMAC and Fannie Mae and made the following comment:

> The affidavit in this case is a disturbing example of a reprehensible practice. That such fraudulent evidentiary filings are being submitted to courts is both violative of the rules of court and ethically indefensible. The conduct through which this affidavit was created and submitted displays a serious and alarming lack of respect for the nation's judiciaries.[13]

The industry practice of giving signing authority and titles to the personnel of foreclosure mills and their agents has added to the mess, resulting in a consent order between MERS and a number of federal financial agencies.[14]

Professor of Law, Georgetown University Law Center) (available at http://financialservices.house.gov/Media/file/hearings/111/Levitin111810.pdf). There are many entities that produce, or formerly produced, litigation documents in this fashion, but the term grew from the deposition of GMAC robosigner Jeffery Stephan and his description of his duties as a GMAC employee. *See* Transcr. Depo. Jeffrey Stephan, 6:08–7:20 (Dec. 10, 2009) (available at http://uniset.ca/pdfs/091210gmacmortgagevsannmneu1.pdf) (testifying that he signed approximately ten thousand affidavits and other documents per month on behalf of GMAC in his role as "team lead of the document execution unit"); *see also* Robbie Whelan, *Niche Lawyers Spawned Housing Fracas*, http://online.wsj.com/article/SB10001424052702304410504575560072576527604.html (Oct. 20, 2010) (describing how the term "robosigner" was coined by Florida foreclosure attorney Matthew Weidner in response to the Jeffrey Stephan deposition). Stephan was later deposed in another case and admitted to signing affidavits without reading them. *See Fed. Nat'l Mortg. Ass'n v. Bradbury*, 32 A.3d 1014, 1015, 1016–1017 (Me. 2011) (denying defendant's motion seeking a finding that Fannie Mae and GMAC were in contempt of court for submitting a bad faith affidavit).

12. H.R. Subcomm. on Hous. & Community Opportunity, *supra* n. 11, at 14.

13. *Fed. Nat'l Mortg. Ass'n*, 32 A.3d at 1016.

14. *In re Merscorp, Inc.*, 2011 WL 2411344 at **1–3 (U.S. Off. of Comptr. of Currency Apr. 13, 2011). The agencies found that MERS failed to provide adequate oversight, training, and legal resources inter alia in providing services to members, such as tracking and registering ownership, executing documentation, and training those who act on its behalf. *Id.* at 5. It was not the only consent order concerned with robosigning. The same day of the MERS consent order, Lender Processing Services (LPS), which creates assignments for mortgage servicers, entered into an agreement regarding quality control with the same federal agencies. *In re Lender Processing Servs., Inc.*, 2011 WL 6941545 at **3–6 (U.S. Off. of Comptr. of Currency Apr. 13, 2011). There are complaints that these measures have proved insufficient. Certainly, assignments from corporations that have gone bankrupt continue to be manufactured. *See e.g.* Assignment of Mortg., Instrument # 2011004437 (recorded Jan. 7, 2011) (available at http://ori2.polk-county.net/wb_or1/details.asp?doc_id=7619221&file_num=2011004437&doc_status=V); Assignment of Mortg., Instrument #

Robosigning has led to the inclusion in public records of assignments and other documents that are false and may result in bad title.[15] Most homeowners walk away from a foreclosure, however, instead of fighting it.[16] Thus, when the banks say that wrongful foreclosures are rare, we are forced to rely on their self-serving statements. Suits by two different entities over the same house are not unheard of,[17] however, and homes without mortgages have faced foreclosure.[18] The result is a monumental mess that feeds into our economic quagmire.[19] Unraveling this mess in

20110075937 (recorded Mar. 5, 2011) (available at http://oris.co.palm-beach.fl.us/or_web1/details.asp?doc_id=18409793&index=0&file_num=20110075937). Although these mortgages were assigned in 2011, New Century Mortgage Corporation went bankrupt in 2007. Julie Creswell, *Mortgage Lender New Century Financial Files for Bankruptcy*, http://www.nytimes.com/2007/04/02/business/worldbusiness/02iht-loans.5.5118838.html (Apr. 2, 2007).

15. H.R. Subcomm. on Hous. & Community Opportunity, *supra* n. 11, at 12.

16. Julie Schmit, *Homeowners Use 'Show Me the Note' to Fight Foreclosure*, http://www.usatoday.com/money/economy/housing/2010-12-21-mortgagenote21_CV_N.htm (Dec. 21, 2010) (reporting that "[m]ore than 90% of homeowners don't fight their foreclosures").

17. Susannah Nesmith, *Retired Cook Fights Two Banks to Save Home of 47 Years from Foreclosure*, http://www.lsgmi.org/content/retired-cook-fights-two-banks-save-home-47-years-foreclosure (accessed July 22, 2012); *e.g.* Notice of Lis Pendens, *Nationstar Mortg., LLC v. Truman Williams*, http://www.duvalclerk.com/oncoreweb/ImageBrowser/pdf.aspx?strDocuments=26261591,26261592&Download=1 (Fla. 4th Cir. Mar. 30, 2009) (No. 2009-CA-005217); Notice of Lis Pendens, *GMAC Mortg., LLC v. Truman Williams*, http://www.duvalclerk.com/oncoreweb/ImageBrowser/pdf.aspx?strDocuments=25262637,25262638&Download=1 (Fla. 4th Cir. June 23, 2008) (No. 2008-CA-008261).

18. *See generally* Andrew Martin & Motoko Rich, *Homeowners Facing Foreclosure Demand Recourse*, N.Y. Times B1 (Oct. 27, 2010) (detailing several cases in which banks foreclosed on homes without mortgages); *see e.g.* Or. Denying Exceptions & Adopting Rep. & Recommendations of Mag., *Bank of Am. v. Nyerges*, http://apps2.collierclerk.com/CORPublicAccess; *select* Document Search, *search* Instrument # 4544312, *select* document to open (Fla. 20th Cir. Dec. 22, 2010) (No. 10-1178-CA) (adopting recommendations of the magistrate, which concluded that the lawsuit had no basis because the defendants had purchased the property from Bank of America with cash); First Amend. Compl., *Cardoso v. Bank of Am.*, http://www.scribd.com/doc/27370429/Cardoso-v-Bank-of-America (D. Mass. Feb. 10, 2010) (No. 1:10-CV-10075 RGS) (alleging damages resulting from wrongful foreclosure by Bank of America on plaintiff's rental property). In a strange twist, the Nyerges later obtained a judgment against Bank of America, allowing them to seize bank assets in satisfaction of their attorney's fees. Alan Farnham, *Bank of America in Florida Foreclosed on by Angry Homeowner*, http://abcnews.go.com/Business/bank-america-florida-foreclosed-angry-homeowner-bofa/story?id=13775638 (June 8, 2011).

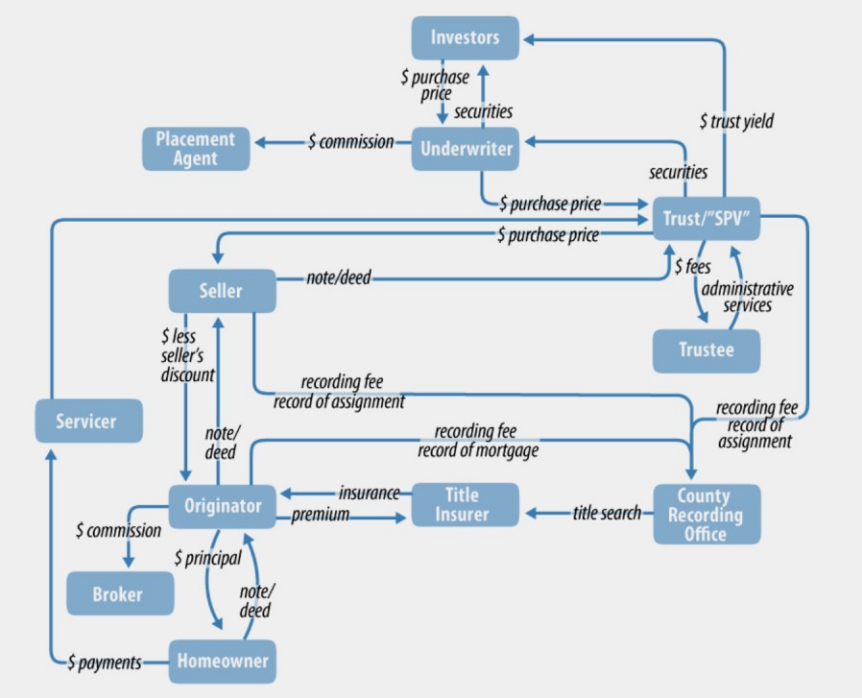
19. H.R. Subcomm. on Hous. & Community Opportunity, *supra* n. 11, at 3.

> Securitization is the legal apotheosis of form over substance, and if securitization is to work it must adhere to its proper, prescribed form punctiliously. The rules of the game with securitization, as with real property law and secured credit are, and always have been, that dotting "i's" and crossing "t's" matter, in part to ensure the fairness of the system and avoid confusions about conflicting claims to property. Close enough doesn't do it in securitization; if you don't do it right, you cannot ensure that securitized assets are bankruptcy remote and thus you cannot get the

a manner that is fair to both the homeowner and the true debtor will mean starting from the beginning and making an honest effort to find out who really holds the loan. It will require a shift in the law to match reality.

II. THE BEGINNING: MBS

This graphic[20] illustrates the basic securitization process:



To simplify, in the "good old days," community banks made loans and often held on to them.[21] This tied up capital and made it

ratings and opinion letters necessary for securitization to work. Thus, it is important not to dismiss securitization problems as merely "technical;" these issues are no more technicalities than the borrower's signature on a mortgage. Cutting corners may improve securitization's economic efficiency, but it undermines its legal viability.

Id.

20. Peterson, *supra* n. 5, at 1367.

21. Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 Yale J. on Reg. 143, 189 (2009); Levitin & Twomey, *supra* n. 4, at 11.

harder to obtain credit.[22] The lender was taking a risk when it made the loan, so the lender made sure the loan applicant's income met certain underwriting standards.[23] This made it difficult for the self-employed and others with nontraditional income to obtain loans, so a "better" securitization method was created.[24] Lenders and lenders' lenders would sell loans.[25] Although this had been going on for some time, the opening of the process to the public by turning loans into securities was a new concept.[26] Lenders did this by putting the loan into a trust with other loans, creating a pool of loans, and selling the rights to the pool's proceeds to the public and participating parties.[27] The government encouraged this procedure by providing tax breaks for those pools meeting certain criteria.[28] These tax-advantaged pools were called Real Estate Mortgage Investment Conduit (REMIC) trusts.[29] Congress passed statutes and regulations that created a few basic conditions for getting a tax break and subjected public REMIC trusts to registration with the Securities and Exchange Commission (SEC).[30]

These REMIC trusts had specific rules for inclusion in the pool to protect investors' tax status[31] and to protect the pool from the bankruptcy of participating lenders.[32] There were also stand-

22. Gareth Marples, *The History of Home Mortgages—A "Dead Pledge"*, http://www.thehistoryof.net/history-of-home-mortgages.html (Sept. 11, 2008).

23. Ben S. Bernanke, Chairman, F. Reserve Bank, Speech, *The Subprime Mortgage Market* (F. Reserve Bank of Chi.'s 43rd Annual Conf. on Bank Structure & Competition, Chi., Ill. May 17, 2007) (transcript available at http://www.federalreserve.gov/newsevents/speech/bernanke20070517a.htm).

24. Levitin & Twomey, *supra* n. 4, at 11.

25. Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 Wis. L. Rev. 565, 584–585.

26. Levitin & Twomey, *supra* n. 4, at 11.

27. Peterson, *supra* n. 5, at 1367–1368.

28. Sheila C. Bair, Chairman, FDIC, Remarks, *Native Sons and Daughters of Kansas, Distinguished Kansan Award* (Topeka, Kan. Jan. 28, 2011) (transcript available at http://www.fdic.gov/news/news/speeches/chairman/spjan2811.html).

29. H.R. Subcomm. on Hous. & Community Opportunity, *supra* n. 11, at 5.

30. 26 U.S.C. §§ 860A–860G (2006); 26 C.F.R. §§ 1.860A-1 to 1.860G-3 (2011); 17 C.F.R. §§ 229.1100–229.1123 (2011).

31. Chris Ferns, Student Author, *Taking the Credit Subordination Mix out of REMICs: A Proposal for Lifting the Fog from High-Risk MBSs*, 29 Rev. Banking & Fin. L. 601, 623 (2010).

32. H.R. Subcomm. on Hous. & Community Opportunity, *supra* n. 11, at 19; David Reiss, *Subprime Standardization: How Rating Agencies Allow Predatory Lending to Flourish in the Secondary Mortgage Market*, 33 Fla. St. U. L. Rev. 985, 1003 (2006); *see generally* John Patrick Hunt, Richard Stanton & Nancy Wallace, *All in One Basket: The*

ards for the loans to prevent default and prepayment.[33] Most of the pooling agreements came under New York's strict trust law, which provided that any action taken by the trustee outside of the pooling agreement was void.[34] The credit risk was also reduced by insurance, interest-rate swaps, and overcollaterization, either separately or in combination.[35] These safeguards, in theory, protected the trust from misdeeds by the trustee or its agents. Unfortunately, the protections were illusory.

III. SUBPRIME MORTGAGE POOLS

Investors' suits often allege that too many inappropriate loans were included in the trusts.[36] The appropriateness of a loan is determined by the pooling and servicing agreement (PSA).[37] The PSA was usually filed with the SEC as an exhibit to the Form 8-K[38] and was described in the prospectus and prospectus supplement.[39] The PSA was typically a large document that described

Bankruptcy Risk of a National Agent-Based Mortgage Recording System (UC Davis Legal Studies Research Paper No. 269, Feb. 3, 2012) (available at http://ssrn.com/abstract =1908893) (arguing that the mortgages MERS owns on paper could be included as part of MERS's bankruptcy estate if MERS becomes insolvent).

33. *See e.g.* 26 C.F.R. § 1.860G-2 (defining "principally secured" and setting a standard for acceptable mortgages); 17 C.F.R. § 229.1111 (requiring disclosure of information regarding pool assets and pool selection criteria); 26 C.F.R. § 1.860G-1(b) (authorizing prepayment penalties).

34. N.Y. Est. Powers & Trusts Law § 7-2.4 (McKinney 2012); *e.g. Teachers Ins. & Annuity Ass'n of Am. v. Criimi Mae Servs. L.P.*, 681 F. Supp. 2d 501, 505 (S.D.N.Y. 2010).

35. *See generally* Frank J. Fabozzi, *The Handbook of Mortgage-Backed Securities* 113–126 (6th ed., McGraw-Hill 2006) (describing various types of credit enhancements that reduce credit risk). Interest-rate swaps are devices whereby one entity changes its interest rate with another. *Id.* at 123.

36. *See* Nelson D. Schwartz, *U.S. Is Set to Sue a Dozen Big Banks over Mortgages*, N.Y. Times A1 (Sept. 2, 2011) (reporting that suits expected to be filed by the Federal Housing Finance Agency on behalf of investors will argue that banks failed to exercise due diligence in selecting borrowers); *see e.g. N.J. Carpenters Health Fund*, 272 F.R.D. at 162–163 (denying class certification to a group of investors alleging that loans included in securities they purchased did not meet proper underwriting standards).

37. *See* Levitin & Twomey, *supra* n. 4, at 31 (explaining that the PSA governs how servicers carry out their duties, but the servicer has discretion in determining loss mitigation options). The PSA requires the servicer to manage the loans in the trust "as if for [his] own account." *Id.*

38. U.S. Sec. & Exch. Comm'n, *Form 8-K*, http://www.sec.gov/answers/form8k.htm (accessed July 22, 2012). The Form 8-K is a report that "companies must file with the SEC to announce major events that shareholders should know about." *Id.*

39. *E.g.* Ameriquest Mortgage Securities Trust 2006, *Form 8-K* at Ex. 4.1, http://www .secinfo.com/dqTm6.vnv.d.htm (Feb. 8, 2006); Ameriquest Mortgage Securities Trust 2006, *Prospectus Supplement*, http://www.secinfo.com/dqTm6.v343.htm (Sept. 27, 2006).

the classes or tranches of certificates that the trust would issue, the loans that made up the pool, and most importantly, the entities making up the trust.[40] This document was often the contract wherein the parties actually transferred the loans to the trust from the entity known as the depositor.[41] It was designed to provide certain protections for the investor. For example, the PSA provided for a bankruptcy remote vehicle and required a chain of title from the sponsor to the depositor, and finally to the trustee.[42] The PSA also provided for a closing date for the pool of loans, after which the trust would not accept loans and underwriting standards for the trustee.[43] Loans that did not conform to these standards were to be bought back by the depositor along with early defaulting loans.[44]

The Federal Reserve identified numerous areas that posed a "moral hazard" in the securitization process in March of 2008.[45] For example, the report stated:

> The second friction in the process of securitization involves an information problem between the originator and arranger. In particular, the originator has an information advantage over the arranger with regard to the quality of the borrower. Without adequate safeguards in place, an originator can have the incentive to collaborate with a borrower in order to make significant misrepresentations on the loan application, which, depending on the situation, could be either construed as predatory lending . . . or predatory borrowing . . . .[46]

40. *See* Levitin & Twomey, *supra* n. 4, at 31–35 (detailing the PSA and its rules and guidelines).

41. *See id.* at 13–14 (describing a "depositor" as a "special-purpose subsidiary" that contains neither assets nor liabilities).

42. H.R. Subcomm. on Hous. & Community Opportunity, *supra* n. 11, at 4–5, 19.

43. *See LaSalle Bank Nat'l Ass'n v. Citicorp Real Est., Inc.*, 2003 WL 22047891 at **1–2 (S.D.N.Y. Aug. 29, 2003) (discussing PSA provisions that pertain to underwriting standards and closing dates).

44. *See id.* at *1 (describing the depositor's obligation to repurchase any defective loan within ninety days of discovery of a defect).

45. Adam B. Ashcraft & Til Schuermann, *Understanding the Securitization of Subprime Mortgage Credit* 1 (Fed. Reserve Bank of N.Y. Staff Rpt. No. 318, 2008) (available at http://www.newyorkfed.org/research/staff_reports/sr318.pdf).

46. *Id.* at 5–6.

The Federal Reserve looked to the arranger of the pool to exercise due diligence to prevent this hazard but noted that if an arranger does not exercise due diligence (as Reuters had reported was occurring),[47] there was little to stop such malfeasance.[48] In other words, without strong oversight there was nothing to prevent nonconforming loans from entering the pools. Meanwhile, in spite of PSAs calling for a complete chain of endorsements on the mortgage notes and requiring an inspection to make sure the complete file complied with numerous requirements, these loans were being transferred by computer (sometimes with the PSA's blessing).[49] The physical documents were considered surplusage, so much so that some notes were actually destroyed.[50] Not only were investors left unprotected, but there was no way of making the determinations required by the trusts.

IV. MERS

> Many of the problems in the mortgage securitization market . . . are highly technical, but they are extremely serious. At best they present problems of fraud on the court and questionable title to property. At worst, they represent a systemic risk of liabilities in the trillions of dollars, greatly exceeding the capital of the US's major financial institutions.[51]

MERS started out with the benign purpose of serving as a database to keep track of mortgage owners.[52] It hardly sounded like the makings of a disaster. MERS was also an alternative to recordation with county clerks of court or other state registrars,

47. Patrick Rucker, *Wall Street Often Shelved Damaging Subprime Reports*, http://www.reuters.com/article/2007/07/27/us-usa-subprime-diligence-idUSN2743515820070727 (July 27, 2007).

48. Ashcraft & Schuermann, *supra* n. 45, at 6.

49. H.R. Subcomm. on Hous. & Community Opportunity, *supra* n. 11, at 2–3 (discussing the concern that MERS improperly transfers mortgages, causing investors to hold nonconforming mortgages).

50. Comments of Fla. Bankers Ass'n, *supra* n. 9, at 4; *see In re Amends. to Fla. R. of Civ. P.*, 44 So. 3d 555, 556 (Fla. 2010) (discussing an amendment to the Florida Rules of Civil Procedure that encourages plaintiffs to verify ownership of a note before inappropriately pleading that the note is lost).

51. H.R. Subcomm. on Hous. & Community Opportunity, *supra* n. 11, at 3 (footnote omitted).

52. Robinson, *supra* n. 7, at 1622–1623.

which saved lenders a nominal amount of money per mortgage;[53] however, MERS records often do not reflect actual ownership. Some of the loans in the database may not have started as MERS loans, or MERS may be unable to audit the chain of title properly, as it does not store copies of ownership records or act as the document custodian.[54] Owners often fail to inform MERS of a change in ownership because there is no penalty for failure to do so.[55]

MERS is the proper source of ownership information for loans in its database, but its records are potentially incomplete and therefore unreliable.[56] MERS becomes the nominee for the mortgage owner but never acquires an interest in the note.[57] With nominee status, MERS becomes responsible for executing satisfactions, assignments, and even bringing foreclosures for thousands of mortgages.[58] If MERS records are incomplete, these documents become meaningless. MERS has had only about fifty employees to cover the eight million foreclosures that have occurred since 2007.[59] The solution to this lack of manpower has been a corporate resolution authorizing MERS members and others to execute documents as Vice Presidents of MERS.[60] But the company did not instruct or supervise these members, and the

53. Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 111, 117 (2011); Robinson, *supra* n. 7, at 1632 (explaining that MERS saves lenders "approximately $30 per loan").

54. Peterson, *supra* n. 53, at 127.

55. *Id.*

56. The Attorney General of Delaware found that twenty-one percent of the owners of notes listed in foreclosures of New Castle County did not match MERS records. Compl., *Del. v. Merscorp, Inc.*, *supra* n. 3, at 5. MERS CEO William Beckmann described the situation as follows:

> Take one of the consent order requirements. We did not have a robust process to make sure that all the data on our system was accurate, timely and reliable. Our view was that is the servicer's data and they're relying on it for their own transactions, they're using their own systems, so we don't have to double check. They're performing those transactions, so they're performing it that way.

Austin Kilgore, *The New Man at MERS*, 18 Mortg. Tech. 13, 15 (2011) (available at http://www.nationalmortgagenews.com/pdfs/MTSeptember2011.pdf) (interview with Bill Beckmann).

57. Peterson, *supra* n. 5, at 1361–1362, 1375–1376.

58. Robinson, *supra* n. 7, at 1633.

59. H.R. Subcomm. on Hous. & Community Opportunity, *supra* n. 11, at 1; Scot J. Paltrow, *Life on MERS: Archive is at Center of Mortgage Mess*, http://www.reuters.com/article/2011/07/18/us-foreclosure-banks-mers-idUSTRE76H5Z620110718 (July 18, 2011).

60. Peterson, *supra* n. 5, at 1391–1392.

result was documents signed by persons who had no idea of the significance of their actions.[61]

The most controversial power bestowed on MERS was the power to bring foreclosure actions.[62] Essentially, an entity that had no interest in the debt, no duty to the investors in the trust, and had not serviced the loan, was bringing suit. Because MERS was not the document custodian for the trusts, however, it did not have the note, which encouraged the misuse of lost-note affidavits and made a non-holder (MERS) appear like a holder.[63] In reality, the servicer was the party bringing suit because it had the payment records.[64] MERS became a mask for the servicer and the owner.[65] At best, MERS could be viewed as acting as an agent for the trustee but without clearly delineated authority. When Florida's District Courts of Appeal approved standing for MERS,[66] the courts did not envision the disaster to come. In fact, the Third District Court of Appeal wrote:

> "It is the incongruity between the needs of the modern electronic secondary mortgage market and our venerable real property laws regulating the market that frames the issue before us." Because, however, it is apparent—and we so hold—that no substantive rights, obligations[,] or defenses are affected by the use of the MERS device, there is no reason why mere form should overcome the salutary substance

61. *See* H.R. Subcomm. on Hous. & Community Opportunity, *supra* n. 11, at 13 (describing how MERS led many banks to hire "professional affiants," who often signed affidavits without personal knowledge of the underlying facts).

62. *See id.* at 13–14 (explaining that the initiation of foreclosure proceedings based upon robosigned affidavits perpetrates a fraud on the court).

63. *Id.* at 14.

64. The PSA usually would contain a contractual obligation for the servicer to bring suit because it was in the best position to do so. *See e.g.* CWABS Inc. Asset Backed Certificates Series 2005-7, *Form 8-K*, http://www.secinfo.com/drjtj.z3kh.d.htm#bust at Ex. 4.1, Art. III, § 3.12(b) (June 1, 2005).

65. *See Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2 A.3d 289, 295 (Me. 2010) (noting that MERS only had the right to record the mortgage at issue and that only the bank, as mortgagee, could bring a foreclosure action on the note); *Landmark Nat'l Bank v. Kesler*, 216 P.3d 158, 166 (Kan. 2009) (arguing that "[t]he relationship that MERS has to [the creditor] is more akin to that of a straw man than to a party possessing all the rights given a buyer").

66. *Mortg. Elec. Registration Sys., Inc. v. Azize*, 965 So. 2d 151, 154 (Fla. 2d Dist. App. 2007); *Mortg. Elec. Registration Sys., Inc. v. Revoredo*, 955 So. 2d 33, 34 (Fla. 3d Dist. App. 2007).

> of permitting the use of this commercially effective means of business.[67]

The Third District's decision treats MERS' nominee status as an adequate substitution for an injury in fact or a specific authorization to bring suit.[68] MERS simply abused the trust shown in modernization with sloppy and fraudulent actions. While not all the faulty paperwork is caused by MERS, much of it is, and the vast majority of deficient mortgage documents were created by MERS signing officers.[69] Fortunately, at least for a while, MERS is out of the business of bringing foreclosures.[70]

V. THE PROBLEM HITS HOME

Faulty paperwork has led to foreclosure filings based on assignments that have very little to do with reality.[71] Even if the last owner is correctly identified, the assignments rarely show the actual chain of title. In fact, employees from DOCX, a company that manufactured such documents, actually used "Bogus Assignee" as a place holder and were so sloppy that some of these documents were filed in the public records with the assignee listed as "Bogus Assignee."[72] In Florida alone, a casual search revealed five such assignments.[73] Assignments have come from

67. *Revoredo*, 955 So. 2d at 34 (parentheses omitted) (quoting *Romaine*, 861 N.E.2d at 86 (Kaye, C.J., dissenting in part)).

68. Peterson, *supra* n. 5, at 1381; Robinson, *supra* n. 7, at 1635.

69. H.R. Subcomm. on Hous. & Community Opportunity, *supra* n. 11, at 13.

70. MERSCORP, Inc., *Rules of Membership* 25–27, http://www.mersinc.org/files/filedownload.aspx?id=172&table=ProductFile (Feb. 2012).

71. H.R. Subcomm. on Hous. & Community Opportunity, *supra* n. 11, at 18.

72. *Id.*

73. Assignment of Mortg., Instrument # 2008121713 (recorded Aug. 20, 2008) (available at http://www.pascoclerk.com/public-online-services-forms-or-search.asp; *search* Instrument # 2008121713, *select* View Document) (assigning a mortgage from MERS to Bogus Assignee for Intervening Asmts); Assignment of Mortg., Instrument # 2008000220909 (recorded Aug. 18, 2008) (available at http://apps.leeclerk.org/OR/ImageBrowser/pdf.aspx?strDocuments=25982713,25982714&Download=1) (same); Assignment of Mortg., Instrument # 2009000130214 (recorded May 13, 2009) (available at http://apps.leeclerk.org/OR/ImageBrowser/pdf.aspx?strDocuments=26911347&Download=1) (assigning a mortgage from A Bad Bene to Bogus Assignee for Intervening Asmts); Assignment of Mortg., Instrument # 200829363 (recorded Nov. 5, 2008) (available at http://www.nassauclerk.com/publicrecords/oncoreweb/ImageBrowser/image.aspx?ImageId=2360953&jpg=-1) (assigning a mortgage from American Home Mortgage Acceptance, Inc. to Bogus Assignee for Intervening Asmts); Assignment of Mortg., Instrument # 2009065648 (recorded Apr. 15, 2009)

dissolved corporations, and foreclosures have been pursued by dissolved banks.[74] After March 2009, IndyMac Federal Bank ceased to exist[75] but somehow obtained judgments of foreclosure in late 2009 and even as late as 2010.[76] Should the proceeds belong with the FDIC, the bankruptcy claimants, or the trustee, Onewest? Did they ever get there? The question of how the incredibly sloppy and false paperwork is affecting title has not yet been extensively probed, and the effects on foreclosures in Florida similarly have not yet been properly explored.

Allowing bogus documentation misleads the homeowner, the investors in the trust, the court, and the future purchaser of the home.[77] Part of the cure is to require accurate documents. The courts should require trusts or servicers representing trusts to

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(available at http://www.clerk.org/or/or_inq/summary_tab.jsp?recordID=2009065648; *select* PDF) (assigning a mortgage from MERS to Bogus Assignee for Intervening Asmts).

74. *See* June M. Clarkson, Theresa B. Edwards & Rene D. Harrod, PowerPoint, *Unfair, Deceptive and Unconscionable Acts in Foreclosure Cases* slides 68–73 (Fla. Atty. Gen. Econ. Crimes Div. 2011) (available at http://southfloridalawblog.com/wp-content/uploads/2011/01/46278738-Florida-Attorney-General-Fraudclosure-Report-Unfair-Deceptive-and-Unconscionable-Acts-in-Foreclosure-Cases.pdf) (providing an irreverent look at the various and sundry problems robosigning has created).

75. FDIC, *Failed Bank Information: Information for IndyMac Bank, F.S.B., and IndyMac Federal Bank, F.S.B., Pasadena CA*, http://www.fdic.gov/bank/individual/failed/IndyMac.html (updated Dec. 15, 2010) (noting that IndyMac was acquired by OneWest Bank on March 19, 2009).

76. *See e.g. IndyMac Fed. Bank FSB v. Fogt*, No. 58-2008-CA 019248-NC (Fla. 12th Cir. Jan. 8, 2010) (available at http://www.clerk.co.sarasota.fl.us/oprapp/oprimage.asp?instrument=2010003074) (granting foreclosure after IndyMac had been acquired by OneWest); *IndyMac Fed. Bank FSB v. Campbell*, No. 2009-CA-001901-NC (Fla. 12th Cir. Dec. 18, 2009) (available at http://www.clerk.co.sarasota.fl.us/oprapp/oprimage.asp?instrument=2009156669) (same).

77. David H. Carpenter, *"Robo-Signing" and Other Alleged Documentation Problems in Judicial and Nonjudicial Foreclosure Processes* 17 (Cong. Research Serv. Nov. 15, 2010) (available at http://digital.library.unt.edu/ark:/67531/metadc29633/m1/1/high_res_d/R41491_2010Nov15.pdf).

> If widespread mortgage assignment/sale problems among commercial banks, investment banks, and other finance companies exist, then title problems could haunt even subsequent bona fide purchasers of foreclosed properties who thought they purchased the property free and clear of encumbrances on the property. Homeowners of properties may have difficulty selling their properties if they are unable to show that they hold valid mortgages, and potential buyers may fear that others have valid security interests in the properties. These fears could be allayed to some degree if buyers are able to secure title insurance on the property, but some title insurers seem to be concerned about the potential problems. For instance, one major title insurer at least temporarily stopped extending new policies on properties foreclosed upon by GMAC Mortgage, Ally Bank, or Ally Financial.

Id. (footnote omitted).

provide relevant documents such as PSAs and purchase contracts as part of their prima facie case because true standing cannot be shown without them. There are few decisions on point, as most foreclosure defendants are unrepresented due to limited means.[78] Foreclosure litigation assistance is sometimes available through legal aid and legal service organizations, but most homeowners simply do not have the funds to fight these matters.[79]

In re Kemp v. Countrywide Home Loans, Inc.[80] illustrates the problems that have arisen in individual cases. The court in *Kemp* disallowed Countrywide's proof of claim in the mortgagor's bankruptcy proceeding for two reasons.[81] First, the court found that the note's owner, the Bank of New York, as trustee, was never in possession of the note and therefore did not qualify as a "holder" under the UCC.[82] At trial, Countrywide employee Linda DeMartini testified that it was not Countrywide's policy to transfer notes when it retained servicing rights and that the note in question had in fact never been transferred to the trust's possession.[83] Second, the court found that the Bank of New York never endorsed the note, as required by the PSA.[84] In anticipation of trial, Countrywide prepared an allonge, purporting to endorse the note, but the court concluded that the allonge could not cure the lack of endorsements because the PSA required the trust to receive all of its loans by the closing date.[85] The court further found that the trust's lack of holder status from the failure to possess the note precluded enforcement as a non-holder under the UCC as well.[86] Countrywide has denied DiMartini's testimony about its policy not to transfer notes,[87] but it was clear to the

78. H.R. Subcomm. on Hous. & Community Opportunity, *supra* n. 11, at 12–13.

79. *See id.* at 13 (explaining that most borrowers in foreclosure actions do not appear in court because they cannot afford legal counsel and are accordingly "among the most vulnerable of defendants").

80. 440 B.R. 624 (Bankr. D.N.J. 2010).

81. *Id.* at 629.

82. *Id.* at 629–630.

83. *Id.* at 628.

84. *Id.* at 629–630.

85. *Id.* at 629, 631.

86. *Id.* at 632. The court was not persuaded by Countrywide's argument that it should qualify as a non-holder not in possession of the note because Countrywide's lost-note certification filed with the court contained factual inaccuracies. *Id.*

87. Abigail Field, *At Bank of America, More Incomplete Mortgage Docs Raise More Questions*, http://finance.fortune.cnn.com/2011/06/03/at-bank-of-america-more-incomplete-mortgage-docs-and-more-questions (June 3, 2011).

bankruptcy court that Countrywide had not transferred the note; therefore, the trust could not enforce the loan.[88]

VI. IBANEZ

One of the more significant cases decided concerning PSAs is *U.S. Bank National Ass'n v. Ibanez*.[89] The court in *Ibanez* held that the post-foreclosure sale assignments submitted by the plaintiff did not create clear title to the loans, but that the loans' ownership could be proven by providing the proper PSA or other transfer documents with the schedule, which the PSA referred to, indicating the subject loan had been included in the pool.[90] These documents were made contemporaneously with the transaction and were used in the actual transfer.[91] Properly presented, the documents would meet the business records exception to the hearsay rule.[92] While Massachusetts law is strict regarding proof of ownership,[93] having courts rely on the documents the industry itself relied upon to transfer the documents makes sense for other states too. The superiority as proof of contemporaneous records over those created for litigation has long been known—even without the comical "Bogus Assignee" filings.[94] The only purpose for which these created assignments are allowed is as public records.

Ibanez illustrates the proper understanding of the PSA. As used in foreclosures, the PSA is an element of proof.[95] In *Ibanez*, the banks wanted to use PSAs to show standing but could not because the PSAs were missing schedules showing which loans were transferred.[96] This is not an effort at enforcement but evidence: instead of accepting an assignment that was invalid on its face, the court recognized that the PSA is evidence of the transfer.

88. *In re Kemp*, 440 B.R. at 633–634.

89. 941 N.E.2d 40 (Mass. 2011).

90. *Id.* at 52–53.

91. *Id.* at 47.

92. *See e.g. HSBC Mortg. Servs., Inc. v. Murphy*, 19 A.3d 815, 820 (Me. 2011) (explaining the requirements in Maine for admitting mortgage documents via the business records exception to the hearsay rule).

93. *Ibanez*, 941 N.E.2d at 49.

94. *See e.g. Potamkin Cadillac Corp. v. B.R.I. Coverage Corp.*, 38 F.3d 627, 632 (2d Cir. 1994) (explaining that records created pursuant to "regular business practice" are admissible as business records, but documents compiled for litigation are not because they lack sufficient indicia of trustworthiness).

95. *Ibanez*, 941 N.E.2d at 53.

96. *Id.* at 52.

It is not an effort by the party presenting it to enforce the agreement as a beneficiary.[97]

The net result of not using the documents that represent the actual transfer has been an entirely new business of manufacturing them.[98] It seems absurd to insist on the traditional forms when those forms are a convenient fiction. The only virtue of using these assignments is that it is quicker and easier to read the average assignment than it is to read the PSA. On the other hand, as long as the industry manufactures documentation, defaulting homeowners have a basis for fighting the foreclosure. The assignments are most likely false because only rarely did the assignments actually occur.[99] The document manufacturers are not careful, and it is often easy to demonstrate the falsity of the loan documents. Even if the industry turns over a new leaf and makes a greater effort to get it right, an examination of the PSA will probably produce discrepancies. PSAs, after all, are often hundreds of pages long and highly technical. Finally, given that

97. *But see Ware v. Deutsche Bank Nat'l Trust Co.*, 75 So. 3d 1163, 1170 (Ala. 2011) (disallowing mortgagor-beneficiary of trust to enforce provisions of the PSA because she was not a party to the agreement). The privity of contract issue did not arise in *Ibanez* because the banks were parties to the PSA. Moreover, *Ibanez* involved using the PSA as evidence of ownership rather than enforcing the PSA. A beneficiary should likewise be able to use the PSA as evidence, regardless of the beneficiary's relation to the contract. When a bank forecloses on a nonconforming loan using bogus documents, it makes a bad problem worse. If a homeowner can raise the argument that the assignment says "Bogus Assignee," then the homeowner should be able to raise the PSA as evidence. Anything else invites and validates robosigning. Allowing beneficiaries to use the PSA promotes confidence in the courts to allow both parties to present their evidence.

98. *See* H.R. Subcomm. on Hous. & Community Opportunity, *supra* n. 11, at 18 (explaining that the creation of counterfeit loan documents might in fact be "an integral part of the foreclosure business" in the modern world).

99. *See e.g. Pino v. Bank of N.Y. Mellon*, 57 So. 3d 950, 952 (Fla. 4th Dist. App. 2011) (denying mortgagor's motion to strike bank's voluntary dismissal in prior foreclosure proceeding on grounds of fraud on the court and mortgagor's ancillary motion to dismiss subsequent foreclosure action as a sanction because bank never received any affirmative relief in the initial proceeding; thus, mortgagor had not been harmed by the dismissal). In the original foreclosure proceeding in *Pino*, the bank had failed to present any record of assignment and alleged that the original promissory note had been lost. *Id.* at 951. The bank later amended its complaint with a false unrecorded assignment but voluntarily dismissed the complaint after the mortgagor moved for sanctions. *Id.* at 951–952. Although the parties have settled the matter, the issue of whether a court has jurisdiction to grant relief from a voluntary dismissal where the plaintiff has received no affirmative relief is being decided by the Florida Supreme Court due to its public importance. *Pino v. Bank of N.Y.*, 76 So. 3d 927, 929 (Fla. 2011). Germane to the Court's decision to exercise jurisdiction despite the parties' settlement was the Fourth District Court of Appeal's notation that "'many, many mortgage foreclosures appear tainted with suspect documents.'" *Id.* (quoting *Pino*, 57 So. 3d at 954–955).

sixty-five percent of all outstanding residential mortgages are securitized, most foreclosures are affected by this problem.[100]

VII. THE FUTURE

How should we handle the unbelievable mess the mortgage industry has made? Investors' suits and regulatory action might help. Courts can issue stronger rules as to standing and proper documentation. Courts can protect the unrepresented and remain unbiased by simply stating that documentation of ownership must be an original or copy of a document executed at the time of the transaction. The Florida Supreme Court is about to decide what, if any, sanctions are available to a mortgagor in the face of a voluntary dismissal due to false documents.[101] While sanctions are a powerful tool, courts have been reluctant to apply them without clear guidelines.[102] Sanctions clearly are warranted for this sort of malfeasance, but they will not reach enough cases to act as a meaningful deterrent for any plaintiff not being sanctioned.

Defense attorneys should insist on reviewing the schedules of the PSA to compare and contrast the assignments with important details, such as closing dates. Excluding documents prepared just for litigation as evidence of a previous transaction is an old but good concept that deserves enforcement. Placing the assignment in the public record once meant a document was reliable, but the evidence is overwhelming that MERS has made such an assumption untenable in the modern world.

Meanwhile, legislation should be considered as to how to secure good title when inaccurate or "bogus" assignments have been filed.[103] The legislature might also consider imposing severe penalties for filing such documents, including giving the attorney

100. Levitin & Twomey, *supra* n. 4, at 12.

101. *See supra* n. 99 (discussing *Pino*, 76 So. 3d at 929).

102. Courts have been hesitant to use their inherent contempt powers for this behavior. *See e.g. Fed. Nat'l Mortg. Ass'n*, 32 A.3d at 1015, 1016–1017 (finding plaintiff's behavior in submitting a bad faith affidavit fraudulent and approving trial court's award of defendant's attorney fees incurred in demonstrating bad faith, but denying defendant's motion seeking contempt).

103. Florida law already allows suits for the filing of a false claim. Fla. Stat. § 712.08 (2011). These inaccuracies might also be considered deceptive and unfair trade practices, but litigation is necessary under either theory. Fla. Stat. §§ 501.201–501.213 (2011).

general or another agency the power to order statewide cleanups or giving clerks authority to reject obviously defective documents. Most consumers cannot afford to litigate these issues, and the full extent of their damages will be unknown until there are problems.