Does MERS Have Standing to Foreclose?: Neighborly Advice from Michigan to Illinois

Ben Shipper[*]

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[*] Loyola University Chicago School of Law, J.D. expected May 2013. This Article is an unpublished manuscript. Please contact the author prior to any citation of the Article at bshipper@luc.edu.

INTRODUCTION

If one purchased real property during the last two decades with a loan from a trusted local bank, there is a good chance that bank is no longer listed in real property records as the legal holder of the loan.[1] In fact, the chances are greater than one in two that a single Delaware corporation[2] purports to be the legal holder of the mortgage securing that loan.[3] As of October 2010, approximately sixty percent of

1. A brief summary of the market for residential mortgages is helpful here. The market for residential mortgages is broken down into two separate but related entities: the primary market and the secondary market. *See, e.g.*, DANIEL J. MCDONALD & DANIEL L. THORNTON, FEDERAL RESERVE BANK OF ST. LOUIS, A PRIMER ON THE MORTGAGE MARKET AND MORTGAGE FINANCE 34 (2008), http://research.stlouisfed.org/publications/review/08/01/McDonald.pdf [hereinafter ST. LOUIS FED PRIMER]. The primary market is a market where new mortgages are originated and the secondary market is a market in which existing mortgages are bought and sold. ST. LOUIS FED PRIMER, *supra*, at 34. Historically, the secondary mortgage market was small and relatively inactive. *Id.*; *see* R.K. Arnold, *Yes, There Is There Life on MERS*, 11 PROB. & PROP. 33, 34 (July/August 1997) (stating that one holder of a mortgage note can sell their interest to an interested party "in what has become a gigantic secondary market"). However, because of the creation of government-sponsored enterprises like Fannie Mae and Freddy Mac, and the increased sophistication of U.S. financial markets more generally, the secondary market in residential mortgages expanded rapidly in the 1990s and now plays a major role in residential finance. ST. LOUIS FED PRIMER, *supra*, at 34 (stating that these firms were charted by Congress to create a secondary market in residential mortgages); *see* FRANK J. FABOZZI & FRANCO MODIGLIANI, MORTGAGE AND MORTGAGE-BACKED SECURITIES MARKETS 19-20 (1992) (stating that, by purchasing mortgage loans and mortgage-related securities for investment, and by issuing guaranteed mortgage-related securities, Fannie Mae provides needed liquidity to the secondary mortgage market); FREDDIE MAC: COMPANY PROFILE, http://www.freddiemac.com/corporate/company_profile/ (last visited Oct. 1, 2011) ("Freddie Mac was chartered by Congress in 1970 with a public mission to stabilize the nation's residential mortgage markets and expand opportunities for homeownership and affordable rental housing. Our statutory mission is to provide liquidity, stability and affordability to the U.S. housing market. . . . We participate in the secondary mortgage market by purchasing mortgage loans and mortgage-related securities for investment and by issuing guaranteed mortgage-related securities . . . . We do not lend money directly to homeowners."). Before the growth of the secondary mortgage market, banks and savings and loan associations made most of the residential real estate loans, serviced the loan contracts, and actually lent the money. ST. LOUIS FED PRIMER, *supra*, at 35-36. Now, it is often the case that the originator does not hold the loan until maturity. *Id.* at 36; *see* ADAM B. ASHCRAFT & TIL SCHUERMANN, FEDERAL RESERVE BANK OF NEW YORK, UNDERSTANDING THE SECURITIZATION OF SUBPRIME MORTGAGE CREDIT 7 (Dec. 17, 2007), http://www.newyorkfed.org/research/economists/ashcraft/subprime.pdf (highlighting that between 2001 and 2006 banks originated $9.586 trillion in mortgage loans and issued $7.549 trillion in mortgage-backed securities secured by those mortgages. Thus, over this 6-year span, approximately 78.75% of mortgages issued by banks were securitized for resale on the secondary market.). While the mortgage originator initially takes applications and does all of the necessary credit checks and paper work, their intention is to sell the loan quickly. ST. LOUIS FED PRIMER, *supra*, at 36. This is because such firms generate earnings from the origination fees they charge. *Id.* at 36.

2. *See*, R.K. Arnold, *Yes, There Is There Life on MERS*, 11 PROP AND PROB. 33, 33, 36 (July/August 1997) (identifying that MERS is a corporation registered in Delaware and operated out of McLean, Virginia).

3. Strictly speaking, a real estate loan takes the form of a note; a mortgage, *per se*, is an

all mortgage contracts in the United States appear in local records as being owned by Mortgage Electronic Registration System, Inc. ("MERS").[4] In total, this percentage equates to approximately sixty-five million mortgage loans.[5] While the size of these numbers may be astounding, one can still expect the percentage, as well as the absolute number, of American homes registered under MERS's corporate name to rise.[6]

For centuries, counties in the United States have maintained real property records; when a change occurred with respect to ownership or lien rights, the transaction was submitted to county clerks, who recorded it in the public record.[7] These records ensured that the history of a property's ownership was complete and that the priority of multiple liens placed on the property—a home acquisition loan[8] and a home

agreement that secures the note by pledging the real estate as collateral. ST. LOUIS FED PRIMER, *supra* note 1, at 32. It is commonplace to refer to both the note and mortgage agreement that secures the note as the "mortgage." *Id.* Because this difference is particularly important with respect to this Comment, the term "mortgage" will be used only if both the loan and collateral agreement are both encompassed in the meaning; otherwise, the terms "loan" and "agreement" will modify the word "mortgage" appropriately. *See, e.g.*, *Mortgage Electronic Registration Systems (MERS)*, N.Y. TIMES (Oct. 14, 2010), http://topics.nytimes.com/top/news/business/companies/mortgage_electronic_registration_systems_inc/index.html (stating that about 60 percent of mortgages in the United States currently show up in county records as being owned by MERS); Christopher Lewis Peterson, Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory 5 (forthcoming 2010) *available at* http://ssrn.com/abstract=1684729 (stating, also, that 60% of the nation's residential mortgages are recorded in the name of MERS, Inc. rather than the bank, trust, or company that actually has a meaningful economic interest in the repayment of the debt).

4. *See, e.g.*, *Mortgage Electronic Registration Systems (MERS)*, *supra* note 3 and accompanying text (describing the percentage of residential mortgages recorded in MERS name); Peterson, *supra* note 3 and accompanying text (describing the percentage of residential mortgages recorded in MERS name).

5. *See, e.g.*, Brady Dennis, *'MERS Morass' Is Hanging Up Negotiations On Foreclosure Settlement*, WASHINGTON POST (Aug. 24, 2011), http://www.washingtonpost.com/business/economy/mers-morass-is-hanging-up-negotiations-on-foreclosure-settlement/2011/08/24/gIQAX6jNcJ_story.html (MERS' "controversial registry contains roughly 65 million mortgages"). The number grew from approximately sixty million in 2009 to sixty-five million in 2011. Compare Dennis, *supra* (stating that MERS registry contains sixty five million mortgages), with Mike McIntire, *Tracking Loans Through a Firm that Holds Millions*, N.Y. TIMES (Apr. 23, 2009), http://www.nytimes.com/2009/04/24/business/24mers.html?ref=mortgageelectronicregistrationsystemsinc ("Although the average person has never heard of it, MERS . . . holds 60 million mortgages on American homes").

6. MORTGAGE ELECTRONIC REGISTRATION SYSTEM, http://www.mersinc.org/about/index.aspx (last visited September 16, 2011) [hereinafter MERSINC.ORG - About] (proclaiming that, "[o]ur mission is to register every mortgage loan in the United States on the MERS System"). See also *supra* note 5 and accompanying text and parantheticals (between 2009 and 2011, the number of mortgages registered in MERS' electronic registry rose from sixty million to sixty-five million).

7. *See* 1 JOYCE PALOMAR, PATTON AND PALOMAR ON LAND TITLES § 4 (3d ed. 2003).

8. Illustrating this type of loan through a taxation lens, "acquisition indebtedness" refers to the

equity loan,[9] for example—was accurate.[10] This complete record also aided individuals and businesses contemplating the purchase or financing of real property when investigating (or hiring a title insurer to investigate) whether a seller or mortgagor actually owned the land that they offered for sale or pledged as security for a mortgage.[11] Further, it has been demonstrated that a complete record of property ownership is necessary to protect property rights, encourage commerce, expose fraud, and avoid disputes.[12]

During the lending spree, however, home loans changed hands constantly.[13] Those that ended up securitized[14]—packaged inside of mortgage pools, for instance—were often involved in an astonishing

loan secured by a qualified residence which is incurred by the taxpayer in acquiring, constructing or substantially improving a qualified residence. JAMES J. FREELAND, DANIEL J. LATHROPE, STEPHEN A. LIND & RICHARD B, STEPHENS, FUNDAMENTALS OF FEDERAL INCOME TAXATION 514 (16th ed. 2011). What qualifies a residence is not important in order to understand loan recordation; however for comprehension, a qualified residence is a homeowner/taxpayer's principal residence and one other residence (interpreted broadly) of that homeowner/taxpayer or their spouse. *Id.*

9. A home equity loan is any loan, other than a home acquisition loan, *see supra* note 8, which is secured by a qualified residence. FREELAND, *supra* note 8, at 515. There are additional federal income tax deduction qualifications that affect the full definition of a home equity loan, but to understand loan recordation, the stated definition, *supra*, is sufficient. *See id.* (stating that the home equity indebtedness includes any loan, other than a home acquisition loan, which is secured by a qualified residence, "*to the extent the aggregate amount of such debt does not exceed the fair market value of the residence reduced by the outstanding acquisition indebtedness incurred by the taxpayer with respect to such a property"* (emphasis added)).

10. *See Mortgage Electronic Registration Systems (MERS)*, *supra* note 3 (discussing the importance of maintaining a complete history of property's ownership).

11. *See* AMERICAN LAND TITLE ASSOCIATION, TITLE INSURANCE: A COMPREHENSIVE OVERVIEW 2, http://www.alta.org/about/TitleInsuranceOverview.pdf (last visited Oct. 2, 2011) (stating that the objective of investigating land ownership is to help the parties in a real estate transaction determine their rights and interests, and assure that land transfer is expeditious and secure); *Mortgage Electronic Registration Systems (MERS)*, *supra* note 3 (describing the benefits of a complete record of property ownership).

12. *See* Peterson, *supra* note 3, at 12 (describing the benefits of a complete record of property ownership).

13. *See Academics on What Caused the Financial Crisis*, WSJ BLOGS – REAL TIME ECONOMICS (Feb. 27, 2010, 6:33 PM), http://blogs.wsj.com/economics/2010/02/27/academics-on-what-caused-the-financial-crisis/ (Pierre-Olivier Gourinchas suggests that decreased lending standards, and thus increased lending to prospective homebuyers resulted from profound structural changes in the banking system, with the emergence of the 'originate-and-distribute' model, coupled with an increased securitization of credit instruments). For more on the "originate-and-distribute" model, see *supra* note 1 and accompanying text (outlining the differences between the primary and secondary markets and how the primary market lenders originated residential home loans for distribution to secondary market purchasers).

14. *See, e.g.*, ST. LOUIS FED PRIMER, *supra* note 1, at 36 (stating that securitization is the practice of consolidating loans or other debt instruments into single assets or securities); ANDREW DAVIDSON ET AL., SECURITIZATION: STRUCTURING AND INVESTMENT ANALYSIS 3 (2003) (defining securitization as "the process of packaging financial promises and transforming them into a form whereby they can be freely transferred among a multitude of investors").

number of transactions.[15] To avoid the costs and complexity of tracking all these transactions, several government-sponsored enterprises ("GSEs") and the mortgage industry considered the use of a system to record loan assignments electronically.[16] The internal and electronic nature of mortgage recordation was intended to lower the costs associated with mortgage transfer by means of circumventing county land record fees and related transactional costs.[17] MERS does not own, in the traditional sense of the word, the mortgage contracts it registers, but it is listed in public records either as a nominee for the actual owner of the note or as the original mortgage holder.[18] MERS' internal electronic recordation system has caused county land records to cease being the authoritative source on land ownership in the United States.[19] As a result, foreclosures by the loan holder for lack of payment can be problematic and expensive.[20]

15. *See, e.g.*, Glenn Setzer, *Mortgage Servicing Rights: Traded Like Baseball Cards?*, MORTGAGE NEWS DAILY, Jun 6, 2005, http://www.mortgagenewsdaily.com/662005_Mortgage_Servicing.asp (stating that the transfer of a mortgage loan can happen the day after closing, and that in "today's market, mortgage [loans] are sold more often than baseball cards" are traded); DAVIDSON, *supra* note 14, at 8 (stating that "liquidity is one of the goals of securization and reflects the degree to which the securities can be transferred from one investor to another" and "by packaging loans in standardized packages, with credit enhancement that protects investors, loans can be sold more readily, hence improving liquidity").

16. *See* Arnold, *supra* note 1, at 34 ("The MERS project formally began in October 1993 when Fannie Mae, Freddie Mac and Ginnie Mae published the Whole Loan Book Entry White Paper, which analyzed the need for an electronic mortgage registration system for mortgage rights. The acronym MERS was coined soon thereafter.").

17. *See* Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 810–12 (1995) (reviewing an Ernst & Young study which delineated the cost savings to be achieved by creating a book entry system for the residential mortgage industry); Arnold, *supra* note 1, at 34 (stating that membership fees as high as $7,500 are more than offset by the document preparation and filing costs that MERS eliminates). *See also* MERS – WHY MERS? – MERS FREQUENTLY ASKED QUESTIONS, http://www.mersinc.org/why_mers/faq.aspx (last visited Nov., 6 2011) [hereinafter MERSINC.ORG – FAQ] ("[a] large national broker of servicing has estimated the MERS premium to be approximately $25 to $50 per loan").

18. *See* Arnold, *supra* note 1, at 34 ("The borrower executes a traditional paper mortgage naming the lender as mortgagee, and the lender executes an assignment of the mortgage to MERS. Both documents are . . . recorded in the public land records, making MERS the mortgagee of record. From that point on, no additional mortgage assignments will be recorded because MERS will be the mortgagee of record throughout the life of the loan. In states where deeds of trust are used instead of mortgages, MERS is typically named as beneficiary of the deed of trust.").

19. *See* Michael Powell & Gretchen Morgenson, *MERS? It May Have Swallowed Your Loan*, N.Y. TIMES, Mar. 5, 2011, http://www.nytimes.com/2011/03/06/business/06mers.html?pagewanted=all (stating that in 2010, Alan M. White, a law professor at the Valparaiso University School of Law, attempted to match MERS' ownership records against those in the public domain and found that "[f]ewer than 30 percent of the mortgages had an accurate record in MERS"). Further, Janis Smith, a Fannie Mae spokeswoman, stated that "[w]e would never rely on [MERS] to find ownership." *Id.*

20. *See* Powell & Morgenson, *supra* note 19 (interviewing Alan M. White who states that,

Considering the pervasiveness of MERS in the national real estate market, this Comment examines the legal implications of MERS' role in the ownership of financial instruments fundamental to loan origination and subsequent loan repayment or foreclosure, and proposes a revised analysis of a leading Illinois case on the subject in light of the persuasive theory of loan notes and mortgage contracts as separate documents expressed by Michigan appellate courts. In order to provide an adequate perspective on the matter, Part I of this Comment gives a brief history of the mortgage recordation process, a description of how MERS operates, as well as a brief explanation of the traditional mortgage recordation and foreclosure practices in Michigan and Illinois.[21] Part II considers two recent Michigan court cases, *Residential Funding Co., LLC v. Saurman* and *Richard v. Schneiderman & Sherman, P.C.*, that reject MERS' right to foreclose by advertisement, holding that MERS is the only the legal holder of the mortgage, and thus it has no right to the mortgage indebtedness.[22] Part

because MERS does not keep an accurate record of mortgage foreclosures, MERS "is going to make solving the foreclosure problem vastly more expensive"). As an example, on August 17, 2011, an order was granted on motions for immediate consideration and for stay of trial court proceedings, including attempts to enforce an eviction order, in a MERS foreclosure case. Order at 1, PB Reit, Inc. v. Debabneh, 801 N.W.2d 380 (Mich. 2011) (No. 143308). Previously in 2011, the appellate court in *Residential Funding Co., LLC v. Saurman* held that MERS, which has participated in thousands of foreclosures in Michigan, is not an entity that qualifies under Michigan law to foreclose by advertisement, and thus the foreclosures it had initiated were void. Order at 1, *Debabneh*, 801 N.W.2d 380 (No. 143308) (Markman, J., concurring) (citing Residential Funding Co., LLC v. Saurman, No. 290248, 2011 Mich. App. LEXIS 719, at *9 (Apr. 21, 2011), *cert. granted*, 803 N.W.2d 693 (Mich. 2011)). An amicus brief by the Michigan Association of Realtors to the Michigan Supreme Court in *Debabneh* warned that:

> The Court of Appeals opinion—in attempting to rewind thousands of foreclosures—will create chaos in the housing market. Many of the homes involved in these allegedly "void" foreclosures have been resold to bona fide purchasers, who have taken out their own mortgages on the homes. These new homeowners have spent money on these homes in the form of the purchase price, real estate taxes, insurance, maintenance and improvements. Counties and the State of Michigan have collected transfer taxes on subsequent conveyances. Any homeowner with a MERS foreclosure in his chain of title may find it difficult or even impossible to sell their home because of the uncertainty in the chain of title.

Order at 1-2, *Debabneh*, 801 N.W.2d 380 (No. 143308) (Markman, J., concurring). Taking heed of these warnings concerning *Saurman*'s potential impact "upon the integrity of [Michigan's] real estate laws, and in order to further consider the arguments raised by the dissenting judge in that decision," the concurring judge in the *Debabneh* order suggested that he would go further than staying trial court proceedings and would additionally issue an order granting leave to appeal in both *Debabneh* and in *Saurman*, and would also expedite the consideration of these appeals. Order at 2, *Debabneh*, 801 N.W.2d 380 (No. 143308) (Markman, J., concurring).

21. *See infra* Part I (discussing a brief history of the mortgage recordation process, a description of how MERS operates, as well as a brief explanation of the traditional mortgage recordation and foreclosure practices in Michigan and Illinois).

22. *See infra* Part II.A (discussing *Residential Funding Co., LLC v. Saurman* and *Richard v.*

III will also examine an Illinois case, *Mortgage Electronic Registration System, Inc. v. Barnes*, in which an appellate court held that MERS did in fact have standing to bring a judicial foreclosure.[23] Then, Part III will discuss why the Michigan cases were decided correctly,[24] and will examine the reasoning in *Barnes*, providing an analysis in line with the Michigan cases' theory of MERS' loan and mortgage contract ownership which would deny MERS standing to foreclose upon a homeowner because it does not have an interest in the indebtedness.[25] Part IV will recommend that, in an expectant future suit, Illinois courts should disallow MERS, Inc. from bringing judicial foreclosure proceedings because it lacks standing to bring such a suit, taking into account legal standing questions, legal formality, and homeowner protection rationales.[26]

I. BACKGROUND

MERS is a complicated and relatively new organization, especially when viewing it in the context of the history of property rights in the United States.[27] This section begins with a brief history of mortgage recordation.[28] Next, this section considers MERS' electronic and internal registration system of mortgages and how MERS operates.[29] Finally, this section will describe a traditional foreclosure process.[30] This Part contains background information on the historical setting of mortgage foreclosure,[31] how to commence a foreclosure by judicial

Schneiderman & Sherman, P.C., two Michigan appellate court cases that held that MERS was only holder of the indebtedness and thus not entitled to foreclose under Michigan foreclosure by advertisement statutes).

23. *See infra* Part II.B (discussing *Mortgage Electronic Registration System, Inc. v. Barnes*, an Illinois case that held that MERS had standing to foreclose).

24. *See infra* Part III.A (analyzing why the two Michigan cases were decided correctly).

25. *See infra* Part III.B (analyzing the rationale for the holding in *Barnes* considering the Michigan theory of separate notes and mortgage contracts).

26. *See infra* Part IV (recommending that Illinois courts reverse *Barnes* by disallowing MERS from bringing judicial foreclosure proceedings for lack of standing, taking into account legal standing questions, hypothetical situations, and consumer policy rationale).

27. Compare *infra* Part I.B (describing how MERS operates), with Part I.A (describing a brief history and the process by which real estate mortgage contracts are recorded).

28. *See infra* Part I.A (describing a brief history and the process by which real estate mortgage contracts are recorded).

29. *See infra* Part I.B (describing how MERS operates).

30. *See infra* Part I.C (describing traditional foreclosure procedures including a history of foreclosure, the judicial foreclosure process under the Illinois Mortgage Foreclosure Law, and the non-judicial foreclosure by advertisement process pursuant to Michigan law).

31. *See infra* Part I.C.1 (describing traditional foreclosure procedures including a history of foreclosure).

proceeding under the Illinois Mortgage Foreclosure Law (IMFL),[32] and how to commence a foreclosure by advertisement under Michigan law.[33] Only in the context of past practices of land record maintenance can one grasp the impact of the introduction of MERS system.[34]

A. A Brief History and the Process of Real Estate Mortgage Recordation

Since the beginning of colonial life in America, local counties have maintained the records of land ownership within each respective county.[35] County real property records are the oldest and most stable metric of tracking homeownership.[36] Other than just the counties, more than half of all states also track transactions affecting land ownership, such as mortgages and deeds of trust, by maintaining composite records which are indexed by the names of either the grantor or the grantee, or both.[37] Because these important tasks are required and done at a local level, and often further reified at a state level, a reliable real-estate transaction record system has been established.[38] This has enabled proper analysis for decisions about transferring, financing and valuing real property, evaluating the construction of residential and commercial buildings, investing in real property, as well as the services related to renting, leasing, and managing homes and other real property, and has

32. *See infra* Part I.C.2 (describing the judicial foreclosure process under the Illinois Mortgage Foreclosure Law).

33. *See infra* Part I.C.3 (describing the non-judicial foreclosure by advertisement process pursuant to Michigan law).

34. Compare Part I.C.1 *infra* (describing traditional foreclosure procedures including a history of foreclosure), with *infra* Part I.B (describing how MERS operates).

35. *See* 1 PALOMAR, *supra* note 7, at § 4.

36. William Dollarhide, *Foreword* to E. WADE HONE, LAND & PROPERTY RESEARCH IN THE UNITED STATES, xi, xi (1997). Further, demonstrating the lengths at which counties go to maintain complete land records, "at the county level – unlike birth and death records and civil court records, probates, and other typical court records – courthouse-stored land records were the first to be reconstructed or at least partially reconstructed after loss from a fire, flood, or other disaster." *Id.*

37. 14 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 82.03[2][b] (Michael Allan Wolf ed., LexisNexis 2010) (1949). A grantor-grantee index is a general term for the two lists of real property transfers maintained by county recorders, each listed in alphabetical order of the last name of the parties transferring the property. BLACK'S LAW DICTONARY 840 (9th ed. 2009). One list is the grantor index, an alphabetic list of sellers (grantors); the other list is the grantee index, an alphabetic list of purchasers (grantees). *Id.*

38. *See* Gary A. Jeffress & Lynn C. Holstein, *An International Survey of Real Property Recording Costs and Some Characteristics: A Preliminary Evaluation*, 5 URISA J. 53, 53 (1993) (stating that the large share of gross national product that the real estate industry contributes would not have been possible without a reliable real estate transaction recording system). *See* BLACK'S LAW DICTONARY 840 (9th ed. 2009) (defining a grantor-grantee index and commenting on its status as a reliable state-ordained record of property ownership)

allowed the process to proceed with dependability, security and efficiency.[39]

In order to accommodate this time and labor-intensive process, county recorders charge fees on documents they record.[40] The total amount and method of calculating these fees varies, however the fee is invariably quite miniscule in the context of a real estate transaction.[41] Many county recorders use these fees to fund their offices and to contribute to county and state court, legal aid, school, and police department budgets.[42]

B. How MERS Operates

In the early 1990s, a group of mortgage bankers collectively decided that the costs of conducting securitized residential mortgage transfers were too high.[43] The mortgage bankers sought to avoid paying such

39. *See* Jeffress & Holstein, *supra note* 38, at 63 ("an efficient land registration system is a precondition for the operation of an efficient land market").

40. *See, e.g.*, Jeffress & Holstein, *supra* note 38, at 60 (counties "charge fees for the various services provided for real property transaction recording"); DAVID A. SCHMUDDE, A PRACTICAL GUIDE TO MORTGAGES & LIENS § 2.03(d) (2004) (stating that many jurisdictions impose a recording fee and tax for the actual recordation of the title and mortgage documents, and that these fees can range from "as little as $15" to as much as two percent of the mortgage principal amount).

41. *See, e.g.*, WAYNE COUNTY, MICHIGAN – DOCUMENT RECORDING, http://www.waynecounty.com/deeds_resources_recordingreq.htm (last visited Oct. 2, 2011) ("The fee to record a real estate document is $15.00 for the first page and $3.00 for each additional page or side."); TRAVIS COUNTY, TEXAS – CLERK RECORDING FEES, http://www.co.travis.tx.us/county_clerk/recording_schedule2.asp (last visited Oct. 2, 2011) ("First Page . . . $16.00 (If there is less than 3 inches of space at the bottom of the last page, add an additional $4.00) . . . Each additional page, part of page or rider. . .$4.00"); LOS ANGELES COUNTY, CALIFORNIA – PROPERTY DOCUMENT RECORDING, http://www.lavote.net/Recorder/Document_Recording.cfm (last visited Oct. 2, 2011) (delineating all of the various charges for different recordation documents and convenience fees); SCHMUDDE, *supra* note 40, and accompanying parenthetical.

42. S*ee* Jeffress & Holstein, *supra* note 38, at 60 (finding, in a study of international recording fees, that while the fees in U.S. states generate income and bear expenditures in the form of salaries, office maintenance, utilities and equipment, the states also appear to have a mandate that the recording offices generate income in excess of expenditures); Powell & Morgenson, *supra* note 19 (Mark Monacelli, the St. Louis County recorder in Duluth, Minnesota stated that mortgage bankers' use of MERS caused his county to lose their revenue stream, and further, "Americans lost the ability to immediately know who owned a piece of property"); 14 POWELL, *supra* note 37, at § 82.03[2][b] (explaining what recording fees collected by counties are used towards).

43. *See* Slesinger & McLaughlin, *supra* note 17, at 810-12 and accompanying text; Residential Funding Co., LLC v. Saurman, No. 290248, 2011 Mich. App. LEXIS 719, at *2 (Apr. 21, 2011), *cert. granted*, 803 N.W.2d 693 (Mich. 2011) (finding that "over the last two decades, the buying and selling of loans backed by mortgages after their initial issuance had accelerated to the point that those operating in that market concluded that the statutory requirement that mortgage transfers be recorded was interfering with their ability to conduct sales as rapidly as the market demanded"); Scott J. Paltrow, *Exclusive: Facing criticism, MERS cuts role in*

high transactions costs by creating a clearinghouse to track mortgage ownership changes after loan closing, thereby bypassing the traditional county requirements of recording fees.[44] With the encouragement of the Mortgage Bankers Association of America, and several leading mortgage banking agencies, including Fannie Mae, Freddie Mac, and Ginnie Mae, MERS awarded a contract for the development of a national computer network database, which it now controls.[45] This network database electronically tracks the ownership and servicing rights of mortgages.[46] In exchange for the right to use and access MERS system records, originators and secondary market investors pay membership dues, per-transaction fees, and various other charges to MERS.[47] These membership fees vary according to a company's size, annual production, or transaction and servicing volumes and they range from $264.00 to $7,500.00.[48]

foreclosures, REUTERS, July 27, 2011, http://www.reuters.com/article/2011/07/27/us-mers-foreclosure-idUSTRE76Q67L20110727 ("Mortgage loan giants Fannie Mae and Freddie Mac and several of the largest U.S. banks established MERS in 1995 to circumvent the costly and cumbersome process of transferring ownership of mortgages and recording the changes with county clerks.").

44. *See* Slesinger & McLaughlin, *supra* note 17, at 810-12 ("In October 1993, the [Mortgage Bankers Association]'s InterAgency Task Force . . . published a "white paper" at the MBA's Annual Convention that describes an electronic book entry system for the residential mortgage industry"); *see also* Arnold, *supra* note 16 and accompanying text; MERSINC.ORG – About, *supra* note 6 ("MERS was created by the mortgage banking industry to streamline the mortgage process by using electronic commerce to eliminate paper.")

45. Arnold, *supra* note 1, at 33-34. *See Mortgage Electronic Registration Systems (MERS)*, *supra* note 3 ("to avoid the costs and complexity of tracking all these exchanges, Fannie Mae, Freddie Mac and the mortgage industry set up MERS to record loan assignments electronically").

46. *See* Arnold, *supra* note 1, at 33-34 (describing the function of the MERS electronic database). *See Mortgage Electronic Registration Systems (MERS)*, *supra* note 45 and accompanying parenthetical.

47. *See* MORTGAGE ELECTRONIC REGISTRATION SYSTEM PRICING, http://www.mersinc.org/MersProducts/pricing.aspx?mpid=1 (last visited September 16, 2011) [hereinafter MERSINC.ORG PRICING] (generally delineating the pricing for other charges including MERS corporate seals, excess mail fees, external research fees (there is a $95.00 charge for each loan requiring additional research because the MERS System does not reflect the correct information), and employee training charges (training by conference call: $150; at the MERSCORP corporate office: free; at a member's site: $750, plus trainers' travel expenses; web seminars: $35 per standard session)). For more information on membership fees, see *infra* note 48 and accompanying text.

48. MERSINC.ORG PRICING, *supra* note 47. MERS offers three types of memberships: General Memberships, Lite Memberships, and Patron Memberships. *Id.* General Memberships are for lenders who typically service loans. *Id.* Pricing for General Memberships depends on the "Annual Production Volume" (APV) or the "Size of the Servicing Portfolio" (SSP), whichever is greater. *Id.* For Tier 1 Memberships (an APV under $250 million, or an SSP under $2 billion), the fee is $500.00. *Id.* For Tier 2 Memberships (an APV between $250 million and $1 billion, or an SSP between $2 billion and $10 billion), the fee is $2,000.00. *Id.* For Tier 3 Memberships (an APV between $1 billion and $10 billion, or an SSP between $10 billion and $50 billion), the fee is $5,500.00. *Id.* For Tier 4 Memberships (an APV greater than $10 billion, or an SSP greater

A mortgage may only be registered on the MERS internal recording system if MERS is either the original mortgagee or an assignee of the mortgage assigned.[49] For MERS to be the original mortgagee, the borrower executes a traditional paper mortgage naming "MERS" as the mortgagee.[50] MERS suggests that the following language, approved by Fannie Mae and Freddie Mac, be included on the security instrument:

> "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.[51]

To register a mortgage in the MERS system after the loan has been closed in the lender's name, MERS permits lenders to assign those mortgages to MERS using the same paper assignment process the lender currently uses.[52] Regardless of whether the lender chooses to convey the mortgage by naming MERS as the nominee in the original mortgage, or by assignment of the original mortgage to MERS, both are executed according to state law and recorded in the public land records making MERS the mortgagee of record.[53] From that point on, no

than $50 billion), the fee is $7,500.00. *Id.* A Lite Membership costs $264.00 and is "[f]or lenders who originate and sell loan servicing rights on a flow basis within 30 days." *Id.* A Patron Membership costs $1,000.00 and is "[f]or vendors and other organizations (e.g., warehouse lenders, investors, trustees) who work with MERS loans but do not typically register them." *Id.*

49. Compare MERS – WHY MERS? – MERS AS ORIGINAL MORTGAGEE (MOM), http://www.mersinc.org/why_mers/mom.aspx (last visited Oct. 4, 2011) [hereinafter MERSINC.ORG – ORIGINAL MORTGAGEE] with MERS – WHY MERS? – MERS BY ASSIGNMENT (NON-MOM LOANS), http://www.mersinc.org/why_mers/byassignment.aspx (last visited Oct. 4, 2011) [hereinafter MERSINC.ORG – BY ASSIGNMENT] (inferring that MERS can either be designated as the original mortgagee, or can be assigned a mortgage after the lender has closed on the loan, and no other way).

50. *See* Arnold, *supra* note 1, at 34 (outlining the process by which a mortgage contract can come to be registered on the MERS electronic registry by naming MERS as the original mortgagee).

51. MERSINC.ORG – ORIGINAL MORTGAGEE, *supra* note 49. At the bottom of the page, there is a note regarding this language warning that, "[t]his is representative language only. Consult official Fannie Mae and Freddie Mac Announcements for specific language for your state. Other changes also may be required in the body of the Deed of Trust or Mortgage." *Id.*

52. *See* MERSINC.ORG – BY ASSIGNMENT, *supra* note 49 (outlining the process by which a mortgage contract can come to be registered on the MERS electronic registry by subsequently assigning the original mortgage to MERS). MERS encourages lenders to name MERS as the original mortgagee because (according to MERS), compared to assigning to MERS after a closing in the lender's name, it is faster, it reduces shipping time and expenses, it eliminates documentation errors, it simplifies the loan closing process, and saves money on assignments, correction costs, tracking costs, and correspondent or broker document penalties. MERSINC.ORG – ORIGINAL MORTGAGEE, *supra* note 49.

53. Arnold, *supra* note 1, at 34. *See* MERSINC.ORG – FAQ, *supra* note 17 (discussing how MERS is the mortgagee of record whether named as original mortgagee, subsequently assigned

subsequent mortgage assignments are recorded with the county public records because MERS remains the mortgagee of record throughout the life of the loan, from origination to foreclosure or repayment.[54] In states where deeds of trust are used instead of mortgages, MERS is typically named as beneficiary of the deed of trust.[55]

MERS, Inc., as the mortgagee of record, tracks the lender's servicing rights and ownership interests in mortgage loans subject to subsequent assignments on its electronic registry.[56] This allows banks to buy and sell the loans without having to record the transfer within the county for each transaction.[57] In order to track each loan and its subsequent assignments, MERS assigns each loan a unique 18-digit Mortgage Identification Number (MIN).[58] Traditionally, each time a loan not registered on MERS is sold on the secondary market, it receives a new loan number from the entity that purchased the loan.[59] With MERS, one MIN stays with the original loan for the entirety of its existence.[60]

According to MERSCORP Inc.'s Rules of Membership, when the holder of the indebtedness, or their servicer, decides to foreclosure on the borrower for failure to pay the mortgage loan of which MERS is named as the nominee, MERS is the mortgagee beneficiary, or grantee in the Security Instrument on behalf of and for the benefit of the note

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the mortgage, or using a deed of trust).

54. Arnold, *supra* note 1, at 34. *See* MERSINC.ORG – About, *supra* note 6 ("[a]ny loan registered on the MERS® System is inoculated against future assignments because MERS remains the mortgagee no matter how many times servicing is traded").

55. Arnold, *supra* note 1, at 34. *See* MERSINC.ORG – FAQ, *supra* note 17 (stating that MERS does not replace the role of the trustee in deed of trust states and instead, "[s]ervicers perform substitution of trustee and satisfactions just as they do without MERS except that they prepare these documents via a Corporate Resolution from MERS since MERS is the Mortgagee of Record").

56. *See* Thom Weidlich, *Merscorp Lacks Right to Transfer Mortgages, Judge Says*, BLOOMBERG, Feb. 14, 2011, http://www.bloomberg.com/news/2011-02-14/merscorp-has-no-right-to-transfer-mortgages-u-s-judge-says.html (explaining how MERS utilizes its electronic registry instead of using county recorder services). *See also* MERSINC.ORG – About, *supra* note 6 (in addition to monitoring the just the lender's servicing rights, MERS also provides rights and interests benefits to "mortgage originators, servicers, warehouse lenders, wholesale lenders, retail lenders, document custodians, settlement agents, title companies, insurers, investors, county recorders and consumers").

57. *See* Weidlich, *supra* note 56 (stating that MERS played a major role in "Wall Street's ability to quickly bundle mortgages together in securitized trusts").

58. MERSINC.ORG – FAQ, *supra* note 17.

59. Arnold, *supra* note 1, at 34.

60. Arnold, *supra* note 1, at 34. The introduction of a unique MIN to mortgage contracts already in existence does not require an organization to abandon use of its own loan number system. *See* MERSINC.ORG – FAQ, *supra* note 17 (explaining the benefits of the MIN). While MERS suggests that an organization might eventually find that their own loan numbering system is no longer needed, mortgage origination organizations can use their existing loan number together with their unique MERS organizational ID to generate a MIN. *Id.*

owner.[61] A nominee is "[a] person designated to act in place of another, usually in a very limited way."[62] This means, essentially, that when MERS is designated as a nominee, according to its own rules, MERS is permitted to act in place of the note holder to bring the foreclosure proceeding, either judicially or non-judicially.[63]

C. The Traditional Foreclosure Process

This section will examine how the foreclosure process operates. An understanding of the foreclosure procedures used in *Saurman* and *Richard*— the two Michigan cases[64]—and *Barnes*—the Illinois case[65]—is helpful for understanding how the cases proceed. Foreclosure law depends on the state in which the real estate is situated and thus general laws of foreclosure are unascertainable.[66] Because non-judicial foreclosure by advertisement is the foreclosure process utilized in *Saurman* and *Richard*, this Part will proceed by considering this process under Michigan law.[67] Then, because this Comment seeks to apply the Michigan cases' theoretical conception of the difference between a note and mortgage contract to *Barnes*, and because foreclosure by a judicial proceeding is constructively the only type permitted in Illinois,[68] this section will continue by examining judicial

61. *MERSCORP Inc. Rules of Membership Rule 8(1)(b)*, 1, 25 (July 2011) *available for download at* http://www.mersinc.org/Foreclosures/index.aspx ("[t]he Member agrees and acknowledges that when MERS is identified as nominee (as a limited agent) of the note owner in the Security Instrument, MERS, as nominee, is the mortgagee, beneficiary, or grantee (as applicable), in the Security Instrument on behalf of and for the benefit of the note owner").

62. BLACK'S LAW DICTIONARY 1149 (9th ed. 2009). Alternatively, a nominee is "[a] party who holds bare legal title for the benefit of others or who receives and distributes funds for the benefit of others." *Id.*

63. Compare *MERSCORP Inc. Rules of Membership Rule 8(1)(b)*, *supra* note 61 and accompanying paranthetical, with BLACK'S LAW DICTIONARY at 1149, *supra* note 62 (restating the MERS rule with the expanded definition of "nominee").

64. Residential Funding Co., LLC v. Saurman, No. 290248, 2011 Mich. App. LEXIS 719, at *1 (Apr. 21, 2011), *cert. granted*, 803 N.W.2d 693 (Mich. 2011); Richard v. Schneiderman & Sherman, P.C., No. 297353, 2011 Mich. App. LEXIS 1522 at *1 (Aug. 25, 2011).

65. Mortg. Elec. Registration Sys., Inc. v. Barnes, 940 N.E.2d 118, 118 (Ill. App. Ct. 2010).

66. Judicial foreclosure is "available in all jurisdictions and is the exclusive or most common method of foreclosure in at least [twenty] states." BLACK'S LAW DICTIONARY 719 (9th ed. 2009). A power-of-sale foreclosure is "authorized and used in more than half the states" and the use of strict foreclosure is "limited to special situations except in those few states that permit this remedy generally. *Id.* Consequently, because each state has special rules for which procedures it specifically allows and disallows, a unified law of foreclosure is unascertainable. *Id.*

67. *See infra* Part I.C.2 (discussing the Michigan cases' theoretical conception of the difference between a note and mortgage contract).

68. THE ILLINOIS HOUSING DEVELOPMENT AUTHORITY – STAGES OF FORECLOSURE, http://www.ihda.org/ViewPage.aspx?PageID=264 (last visited Oct. 21, 2011) (stating that foreclosure is a judicial proceeding by the lender or servicer to obtain judgment against the borrower or the borrower's breach of promise to pay, and to take the borrower's interest in the

foreclosure under the Illinois Mortgage Foreclosure Law (IMFL).[69]

1. Historical Setting of Mortgage Foreclosure

Under the common law, the mortgage transaction involved the mortgagee securing a fee interest in the mortgaged real estate in exchange for a loan to the mortgagor.[70] There were no rights of redemption[71] or reinstatement[72] under the common law.[73] As a result,

house, which was given as security for the promise); JAMES V. NOONAN, ILLINOIS MORTGAGE FORECLOSURE LAW, 1-26 (2010), https://www.iicle.com/SmartBooks/pdfs/3876/MFP10-Ch1.pdf [hereinafter NOONAN, IMFL] (citing 735 ILL. COMP. STAT. ANN. 5/15-1106 (West 2011); 735 ILL. COMP. STAT. ANN. 5/15-1401) (stating that the "Illinois Mortgage Foreclosure Law codified the rule that the only method by which a mortgagee can enforce a mortgage, other than with the mortgagor's consent, is through a foreclosure action brought in accordance with the IMFL"). Further, power-of-sale foreclosures are expressly prohibited, and strict foreclosures are severely limited by the IMFL. *Id.* A power-of-sale foreclosure allows the mortgagee to sell the real estate, provided that there is a power-of-sale clause in the mortgage, on default after providing comparatively loose public notice of the auction. *Id.* Power-of-sale foreclosures are favored by mortgagees because they are far easier and less expensive than judicial foreclosures because there is no competitive bidding. *Id.* Under a strict foreclosure, there is no judicial sale of the property. *Id.* Instead, the foreclosure decree itself serves to vest title in the mortgagee on the failure of the mortgagor to clear his or her debt within the period of the equity of redemption. *Id.*; Great Lakes Mortg. Corp. v. Collymore, 302 N.E.2d 248, 250 (1973). The IMFL sill allows the use of strict foreclosures, but only under very limited circumstances. NOONAN, IMFL, *supra* note 68, at 1-26 (citing 735 ILL. COMP. STAT. ANN. 5/15-1403; Brahm v. Dietsch, 15 Ill. App. 331, 334 (1884) (holding that, although strict foreclosure of a real estate mortgage is not favored, it may be decreed in the discretion of the court where the interest of both parties manifestly required it, but not otherwise)).

69. *See generally* 735 ILL. COMP. STAT. ANN. 5/15-1101, *et seq.* (stating that the Article beginning at 5/15-1101 can be cited as the Illinois Mortgage Foreclosure Law).

70. NOONAN, IMFL, *supra* note 68, at 1-6. *See* SCHMUDDE, *supra* note 40, at § 1.03 (stating that mortgages have their roots in Roman law, but the American system has developed form the English common law; further, because the charging of interest was not permissible due to its perceived usurious qualities during medieval times (up through the fifteenth century), the mortgage concept developed as a way to secure repayment of property by allowing the lender to retain possession of the land until full payment was completed).

71. If a mortgagor does not pay a debt timely, the mortgagee's fee interest in the property becomes absolute to the detriment of the mortgagor. NOONAN, IMFL, *supra* note 68, at 1-58 to -59. Redemption is the process by which a mortgagor can make a payment after the due date to redeem his land. *Id.* at 1-59. Prior to the IMFL, the mortgagor's statutory right to redeem lasted six months after the foreclosure sale was confirmed. *Id.* at 1-59 (citing Ill. Rev. Stat. (1985) c. 110 ¶ 12-128 (repealed)). Currently, the statutory right of redemption for residential real estate now ends either seven months from service of the foreclosure complaint, or three months from the entry of foreclosure. 735 ILL. COMP. STAT. ANN. 5/15-1603(b)(1).

72. Before the enactment of the IMFL, a mortgagor in Illinois had the right to reinstate a mortgage by tendering all amounts in arrears, plus costs and attorneys' fees, within ninety days from the date of service of summons or prior to the entry of a judgment of foreclosure, whichever was earlier. NOONAN, IMFL, *supra* note 68, at 1-53 (citing Ill. Rev. Stat. 1985, c. 95, ¶ 57 (repealed)). The IMFL introduced two substantive changes to the rule: firstly, the language regarding the judgment of foreclosure was removed, thereby allowing reinstatement to occur after the judgment of foreclosure has been entered; secondly, the mortgagor is now permitted to engage in reinstatement more often than only once every five years as the law previously stated. *Id.* at 1-

if a mortgagor failed to comply with any term of the mortgage contract, specifically including the obligation to repay the loan, the consequences could be disastrous for the mortgagor.[74] The mortgagee was entitled to possession of the mortgaged real estate and to have the mortgagor removed from the title upon the owner's default.[75] Equity courts ultimately developed law that ameliorated the harsh consequences at common law, but it was not until state lawmakers began to codify foreclosure rules that mortgagors began to obtain protection against these consequences with the force of law.[76]

The first legislative foreclosure rules were enacted around the year 1900.[77] The earliest of these laws granted mortgagors the right to satisfy their indebtedness at some point, the specific time for which depending on the state, before the mortgagee could repossess the home with full legal title.[78] The right to satisfy one's indebtedness became known as the "equity of redemption" and, until recently, gave the mortgagor the legal right to pay the indebtedness months after the property was sold at foreclosure sale.[79]

Lawmakers eventually discovered that mortgagors rarely took advantage of their right to redeem.[80] The consequence of these unexercised rights was that foreclosures were delayed to the detriment of mortgagees who were unable to recover their collateral—sometimes for months—until the equity of redemption period expired.[81]

53.

73. *Id.* at 1-6. *See* SCHMUDDE, *supra* note 40, at § 1.03 (stating that the harshness of the process which gave the mortgagee full title to the property if the mortgagor had not made all payments by the due date led the Chancery court to develop the "equity of redemption").

74. NOONAN, IMFL, *supra* note 68, at 1-6; *see* SCHMUDDE, *supra* note 73 and accompanying parenthetical.

75. NOONAN, IMFL, *supra* note 68, at 1-6; *see* SCHMUDDE, *supra* note 73 and accompanying parenthetical.

76. NOONAN, IMFL, *supra* note 68, at 1-6. *See* SCHMUDDE, *supra* note 40, at § 1.03 (stating that lawmakers began to develop foreclosure procedures in the latter part of the eighteenth century in order to curb the abuses of the "equity of redemption"); 1 GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 1.3 (4th ed. 2002) ("[t]he excesses and harshness of the common law mortgage inevitably yielded to the moderating influence of English Chancery").

77. NOONAN, IMFL, *supra* note 68, at 1-6. *See* SCHMUDDE, *supra* note 76 and accompanying parenthetical.

78. NOONAN, IMFL, *supra* note 68, at 1-6.

79. *See id.* (discussing the equity of redemption); SCHMUDDE, *supra* note 40, at § 1.03 (stating that the "equity of redemption . . . . allowed the late payer to redeem the property so long as the amount due was tendered within a reasonable period after law day"). "Law day" was the day that the balance was due. *Id.*

80. NOONAN, IMFL, *supra* note 68, at 1-6. This is because a mortgagor who has not paid what they owe has likely not done so for lack of funds and thus a mortgagor in default is similarly unlikely to have or be able to get money to satisfy the default. *Id.*

81. *Id. See* SCHMUDDE, *supra* note 40, at § 1.03 (stating that purchasers often put off payment

Responsively, legislators across the United States began to curtail the mortgagor's power to redeem based on the belief that because the right of redemption was rarely used, a more expeditious sale of the property would benefit the mortgagor in the end.[82] Further, it was hypothesized that a shorter redemption period would make the foreclosure process less expensive and would attract more bidding, thereby giving the mortgagor a better chance to recover the maximum amount of its equity possible.[83]

The financial crisis of 2007 and 2008 prompted state legislatures and the federal government to examine foreclosure laws to see if there was more they could do to alleviate the crisis's effect on debt-laden mortgagors.[84] In legislatures across the country, including Michigan and Illinois[85], new rules on pre-suit notice, mandatory arbitration and workouts, court-supervised loan moderation programs, and post-foreclosure possession rights were enacted.[86]

2. Commencing Non-Judicial Foreclosure by Advertisement under Michigan Law

Foreclosure by advertisement is considerably faster and more streamlined than judicial foreclosure.[87] In Michigan, mortgage foreclosure by advertisement is governed by section 600.3201 of the Michigan Compiled Laws (MCL).[88] The requirements for foreclosure by advertisement are governed by section 600.3204.[89] First, the mortgagor must default – most often by a failure to pay – on the

for many years, relying on the equity of redemption).

82. NOONAN, IMFL, *supra* note 68, at 1-6. *See* SCHMUDDE, *supra* note 40, at § 1.03 (stating that foreclosure fixed "the rights of the parties and set a time for the cessation of the right to redeem").

83. NOONAN, IMFL, *supra* note 68, at 1-6.

84. *Id.*

85. *See id.* at 1-6, -7 (stating that since 2007, "the IMFL has been amended at least eight times each time with the express purpose of assisting residential mortgagors, and in some cases, tenants.").

86. *Id.*

87. *MSHDA – Stages of Foreclosure*, MICHIGAN.GOV (last visited Oct. 22, 2011), http://www.michigan.gov/mshda/0,1607,7-141-45866_47905-177816—,00.html (stating that borrowers in states with judicial foreclosures, or those in which lenders have to retake property titles via the court system, can get almost a year to straighten out their affairs before the sale while those in non-judicial states have as little as two months). See also supra note 68 and accompanying text (describing the judicial foreclosure process).

88. MICH. COMP. LAWS ANN. § 600.3201, *et seq.* (West 2000 & Supp. 2010) ("Every mortgage of real estate . . . upon default being made in any condition of such mortgage, may be foreclosed by advertisement, in the cases and in the manner specified in this chapter.").

89. MICH. COMP. LAWS ANN. § 600.3204(1)(a)-(d)

mortgage contract.[90] Other requirements include that no action or proceeding may have been commenced[91] and that the mortgage containing the power-of-sale[92] clause has been properly attached to the complaint.[93] It should also be noted that section 600.3204(1)(d) requires that "the party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage."[94]

Once the section 600.3204(1) requirements are met,[95] the mortgagee must then provide notice[96] that the mortgage contract will be foreclosed by a sale[97] of the mortgaged real estate.[98] This is done by publishing the notice for four successive weeks, with at least one publication each week, in a newspaper published in the county where the real estate subject to the mortgage contract is situated.[99] After the mortgaged real estate is sold[100] the balance of the loan owed to the holder of the

90. MICH. COMP. LAWS ANN. § 600.3204(1)(a).

91. MICH. COMP. LAWS ANN. § 600.3204(1)(b).

92. A power-of-sale clause is a clause commonly inserted in a mortgage or deed of trust that grants the creditor or trustee the right and authority, upon the mortgagor's default in the payment of the debt, to advertise and sell the property at public auction "without the stringent notice requirements, procedural burdens, or delays of a judicial foreclosure." BLACK'S LAW DICTIONARY 719 (9th ed. 2009).

93. MICH. COMP. LAWS ANN. § 600.3204(1)(c).

94. MICH. COMP. LAWS ANN. § 600.3204(1)(d)

95. MICH. COMP. LAWS ANN. § 600.3204(1)(a)-(d).

96. For the requirements of what the notice must specify, see 10A MICHIGAN PLEADING & PRACTICE § 74:35 (2d ed. 1974) (citing MICH. COMP. LAWS ANN. § 600.3214, 600.3216) ("The foreclosure notice must specify: (1) the names of the mortgagor, the mortgagee, and the foreclosing assignee of a recorded assignment of the mortgage; (2) the date of the mortgage, and when recorded; (3) the amount claimed to be due on it at the date of the notice; (4) a description of the mortgaged premises, conforming substantially with that contained in the mortgage; (5) the length of the redemption period as determined under the applicable statutory provision; and (6) the time and place of sale.").

97. MICH. COMP. LAWS ANN. § 600.3216 ("The sale shall be at public sale, between the hour of 9 o'clock in the forenoon and 4 o'clock in the afternoon, at the place of holding the circuit court within the county in which the premises to be sold, or some part of them, are situated, and shall be made by the person appointed for that purpose in the mortgage, or by the sheriff, undersheriff, or a deputy sheriff of the county, to the highest bidder.").

98. MICH. COMP. LAWS ANN. § 600.3208.

99. MICH. COMP. LAWS ANN. § 600.3208. If no newspaper is published in the county, the notice must be published in a newspaper published in an adjacent county. *Id.* In every case, within fifteen days after the first publication of the notice, a true copy of the notice must be posted in a conspicuous place on any part of the premises described in the notice. *Id.* The purpose of posted notice is to inform the mortgagor so that he or she may see that a price adequate to protect his or her interests is obtained at the sale. Schulthies v. Barron, 167 N.W.2d 784, 785 (Mich. App. 1969).

100. *See supra* note 97 and accompanying text (describing how a sale of real estate will occur).

indebtedness is paid,[101] with attorneys fees,[102] and the surplus, if any, is paid over to the mortgagor unless, before the surplus is paid, the holder of a subordinate mortgage or lien files a written and duly verified claim.[103]

In Michigan, the homeowner has the right to reacquire their home during the redemption period; this occurs after the property has already been sold at a sheriff sale.[104] The redemption period is normally six months[105] but can range from three months to one year depending on different factors including abandonment of the property, the type of structure, and the amount of indebtedness unpaid.[106] In order to redeem the property, the mortgagor must pay off the mortgage, all interest and late fees, court costs, attorney fees, titles and appraisal fees and, if the sheriff deed holder paid taxes or insurance after the sheriff sale, the mortgagor must pay those fees as well.[107]

3. Commencing Judicial Foreclosure Under the Illinois Mortgage Foreclose Law ("IMFL")

In Illinois, until the enactment of the IMFL, foreclosures were mostly governed by statute, but case law applied as well.[108] The IMFL, which now governs all mortgage foreclosures in Illinois that are filed on or after July 1, 1987, irrespective of the date the security instrument was created,[109] is a comprehensive set of laws intended to simplify the

101. MICH. COMP. LAWS ANN. § 600.3252.

102. *See MSHDA – Stages of Foreclosure, supra* note 87 (the Michigan State Housing Development Authority reports that, on average, attorney fees will add about $2,000 to the amount due on the balance of the loan).

103. MICH. COMP. LAWS ANN. § 600.3252.

104. *See* MICH. COMP. LAWS ANN. § 600.3240 (describing the process by which a redemption after a sheriff's sale occurs). *See also supra* note 71 and accompanying text and *infra* note 107 and accompanying text regarding the right of redemption.

105. MICH. COMP. LAWS ANN. § 600.3240(8) ("Subject to subsections (9) to (11), for a mortgage executed on or after January 1, 1965, on residential property not exceeding [four] units and not more than [three] acres in size, if the amount claimed to be due on the mortgage at the date of the notice of foreclosure is more than [sixty-six and two-thirds percent] of the original indebtedness secured by the mortgage, the redemption period is [six] months.").

106. *See* MICH. COMP. LAWS ANN. § 600.324(9)-(12) (defining the redemption period length depending on different factors).

107. *See MSHDA – Stages of Foreclosure, supra* note 87 (listing a multitude of financial requirements required as a prerequisite to redeem one's property after a foreclosure).

108. *See, e.g.*, NOONAN, IMFL, *supra* note 68, at 1-7 (citing Ill. Rev. Stat. (1987) c. 110 ¶ 15-101 through 15-311(repealed); Ill. Rev. Stat. (1985), c. 95, ¶¶ 55-57 (repealed)).

109. 735 ILL. COMP. STAT. ANN. 5/15-1106(a) (West 2011). *See also* 735 ILL. COMP. STAT. ANN. 5/15-1106(f) ("[a] complaint to foreclose a mortgage filed before July 1, 1987, and all proceedings and third party actions in connection therewith, shall be adjudicated pursuant to the Illinois statutes and applicable law in effect immediately prior to July 1, 1987. Such statutes shall remain in effect with respect to such complaint, proceedings and third party actions

mortgage foreclosure process and to integrate all Illinois mortgage foreclosure law into one statute.[110]

To begin a foreclosure action in Illinois, the mortgagor must first be in default of a loan which he was obliged to pay, and which is secured by real estate.[111] Upon a mortgagor's default, although it is not an IMFL requirement, a typical contract requirement[112] is that the mortgagee sends written notice that the loan will be accelerated[113] if the default is not cured.[114] Once the mortgagor is in default on the loan for thirty days, the IMFL requires that a residential mortgage lender or servicer send a "grace period notice"[115] urging the mortgagor to seek housing counseling.[116] The grace period notice also grants the mortgagor an additional 30-day grace period to cure his default before the mortgagee may take legal action.[117]

notwithstanding the amendment or repeal of such statutes on or after July 1, 1987.").

110. NOONAN, IMFL, *supra* note 68, at 1-7; *see also* Steven C. Lindberg & Wayne F. Bender, *The Illinois Mortgage Foreclosure Law*, 76 ILL. B.J. 800, 801 (1987) (stating that lawmakers thought that codification would make the foreclosure process easier to understand and provide more statewide uniformity in court decisions).

111. *See* SCHMUDDE, *supra* note 40, at § 5.01 (stating that the mortgagee must take steps to foreclose on the property in order to realize value from the mortgage if "the mortgagor is unable to maintain payments, work-out a new payment schedule, or redeem the property").

112. *See* Strauss v. Georgian Bldg. Corp., 261 Ill. App. 284, 287-88 (1931) (in a suit to foreclose a trust deed securing bonds and providing for the acceleration of maturity of all of the bonds, a complaint failing to allege that written notice had been given or that the default continued for 30 days thereafter contained an insufficient allegation of a right to accelerate the payment of an entire bond issue and was insufficient to justify the appointment of a receiver in a suit).

113. An acceleration clause is "a loan agreement provision that requires the debtor to pay off the balance sooner than the due date if some specified event occurs, such as failure to pay an installment or to maintain insurance." BLACK'S LAW DICTIONARY 12-13 (9th ed. 2009). *See also* SCHMUDDE, *supra* note 40, at § 3.08 (stating that most mortgages include an acceleration clause).

114. NOONAN, IMFL, *supra* note 68, at 1-33.

115. 735 ILL. COMP. STAT. ANN. 5/15-1502.5 (West 2011).

116. NOONAN, IMFL, *supra* note 68, at 1-34. If at any time during the original 30-day grace period an approved counseling agency provides written notice to the mortgagee that the mortgagor is seeking counseling services, no foreclosure may be initiated for 30 days after the counseling agency notice date. *Id.* at 1-33 to -34 This means that after the mortgagor's failure to pay the amount due for that period on their loan, they have up to ninety days – thirty until the grace period notice, thirty during the grace period, and an extra thirty to seek counseling – until foreclosure proceedings can be legally initiated. *Id.* An approved counseling agency is defined as one that has been approved by the U.S. Department of Housing and Urban Development. 735 ILL. COMP. STAT. ANN. 5/15-1502.5. With the help of the mortgage counseling agency, the mortgagor and mortgagee intend to work towards agreeing to a "sustainable loan workout plan" which includes, but is not limited to, "(1) a temporary suspension of payments, (2) a lengthened loan term, (3) a lowered or frozen interest rate, (4) a principal write down, (5) a repayment plan to pay the existing loan in full, (6) deferred payments, or (7) refinancing into a new affordable loan." *Id.*

117. NOONAN, IMFL, *supra* note 68, at 1-34.

If the mortgagor exceeds the grace period without either curing the default, or without securing housing counseling, the party bringing the suit should contemporaneously record a notice of foreclosure along with a complaint for foreclosure.[118] A notice of foreclosure is filed with the county recorder in the county in which the real estate pledged as loan security is located.[119] By filing notice, every person asserting an interest in the real estate after the notice is recorded will be deemed to have constructive notice of the pending foreclosure proceeding.[120]

The party bringing the suit must file, along with the notice of foreclosure, a complaint for foreclosure.[121] Section 1504 of the IMFL sets out a sample form of a complaint,[122] however filing a complaint in that exact form is not required.[123] The prescribed form begins by recommending that the plaintiff identify itself and state that it intends to foreclose a security instrument.[124] The form also dictates that the plaintiff allege that it seek to join "the following person as defendants."[125] Next, the complaint should state that the plaintiff has attached a copy of the mortgage and a copy of the note secured by the mortgage.[126] The most important factual allegations of the complaint are prescribed in Section 1504(a)(3).[127] One particularly important part

118. 735 ILL. COMP. STAT. ANN. 5/15-1503(a). *See* Applegate Apartments, LP v. Commercial Coin Laundry Sys., 657 N.E.2d 1172, 1179 (1995) (stating that, in order to bring a foreclosure suit, the party bringing the suit should the should contemporaneously record a notice of foreclosure along with a complaint for foreclosure).

119. NOONAN, IMFL, *supra* note 68, at 1-36.

120. 735 ILL. COMP. STAT. ANN. 5/15-1503(a). In order to constructively notify all those subsequently claiming an interest in the property with consistency and formality, 735 ILL. COMP. STAT. ANN. 5/15-1503 specifies the form the notice of foreclosure should take. *Id.* The notice must (a) be executed by the party or the party's attorney, (b) set forth the plaintiff's name, (c) identify the case number, (d) identify where the action is brought, (e) contain a legal description of the property, (f) contain the common address or a sufficient description or location of the property, and (g) identify the security interest or mortgage that is the subject of the foreclosure action. *Id.*

121. 735 ILL. COMP. STAT. ANN. 5/15-1503(a).

122. 735 ILL. COMP. STAT. ANN. 5/15-1504(a).

123. Compare 735 ILL. COMP. STAT. ANN. 5/15-1504(a) (stating that "[a] foreclosure complaint may be in substantially the following form" and then proceeding to list the requirements) with 735 ILL. COMP. STAT. ANN. 5/15-1105(a) ("[t]he word 'may' as used in this Article means permissive and not mandatory.").

124. 735 ILL. COMP. STAT. ANN. 5/15-1504(a)(1).

125. 735 ILL. COMP. STAT. ANN. 5/15-1504(a)(1).

126. *See* 735 ILL. COMP. STAT. ANN. 5/15-1504(a)(1) (specifically, the provision requests that a copy of the mortgage be attached as "Exhibit 'A'" and a copy of the note be attached as "Exhibit 'B'" to the complaint).

127. 735 ILL. COMP. STAT. ANN. 5/15-1504(a)(3). Specifically, the prescribed form recommends that the plaintiff include: "(A) Nature of instrument: (here insert whether a mortgage, trust deed or other instrument in the nature of a mortgage, etc.); (B) Date of mortgage; (C) Name of mortgagor; (D) Name of mortgagee; (E) Date and place of recording; (F)

of this section in relation to this Comment is Section 1504(a)(3)(N) which recommends that the plaintiff plead the capacity in which the plaintiff brings the foreclosure.[128] More specifically, "the capacity" entails whether the plaintiff is the legal holder of the indebtedness, a pledgee, an agent, a trustee under a trust deed or otherwise, as appropriate.[129] Identifying the capacity in which one brings the complaint does not require that the plaintiff plead sufficient standing.[130] Lack of standing is an affirmative defense that the defendant must always plead and prove.[131]

After a complaint is filed, as with any other civil proceeding, the defendant in a foreclosure action must answer or otherwise respond to the complaint within the time required by law or be subject to the entry of a default judgment pursuant to Section 1506(a)(1).[132] A mortgage foreclosure is very similar to a suit for breach of contract.[133] Like the

Identification of recording: (here insert book and page number or document number); (G) Interest subject to the mortgage: (here insert whether fee simple, estate for years, undivided interest, etc.); (H) Amount of original indebtedness, including subsequent advances made under the mortgage; (I) Both the legal description of the mortgaged real estate and the common address or other information sufficient to identify it with reasonable certainty; (J) Statement as to defaults, including, but not necessarily limited to, date of default, current unpaid principal balance, per diem interest accruing, and any further information concerning the default; (K) Name of present owner of the real estate; (L) Names of other persons who are joined as defendants and whose interest in or lien on the mortgaged real estate is sought to be terminated; (M) Names of defendants claimed to be personally liable for deficiency, if any; (N) Capacity in which plaintiff brings this foreclosure (here indicate whether plaintiff is the legal holder of the indebtedness, a pledgee, an agent, the trustee under a trust deed or otherwise, as appropriate); (O) Facts in support of redemption period shorter than the longer of (i) 7 months from the date the mortgagor or, if more than one, all the mortgagors (I) have been served with summons or by publication or (II) have otherwise submitted to the jurisdiction of the court, or (ii) 3 months from the entry of the judgment of foreclosure, if sought (here indicate whether based upon the real estate not being residential, abandonment, or real estate value less than 90% of amount owed, etc.); (P) Statement that the right of redemption has been waived by all owners of redemption, if applicable; (Q) Facts in support of request for attorneys' fees and of costs and expenses, if applicable; (R) Facts in support of a request for appointment of mortgagee in possession or for appointment of receiver, and identity of such receiver, if sought; (S) Offer to mortgagor in accordance with Section 15-1402 to accept title to the real estate in satisfaction of all indebtedness and obligations secured by the mortgage without judicial sale, if sought; (T) Name or names of defendants whose right to possess the mortgaged real estate, after the confirmation of a foreclosure sale, is sought to be terminated and, if not elsewhere stated, the facts in support thereof." 735 ILL. COMP. STAT. ANN. 5/15-1504(a)(3)(A)-(T).

128. 735 ILL. COMP. STAT. ANN. 5/15-1504(a)(3)(N).

129. 735 ILL. COMP. STAT. ANN. 5/15-1504(a)(3)(N).

130. *See* U.S. Bank Nat'l Ass'n v. Sauer, 913 N.E.2d 70, 73 (2009) (stating that "[u]nder Illinois law, a plaintiff need not allege facts establishing standing").

131. *Id.*

132. 735 ILL. COMP. STAT. ANN. 5/15-1506(a)(1).

133. *See* Citicorp Sav. of Ill. v. Rucker, 692 N.E.2d 1319, 1324 (1998) (stating that a "mortgage is merely a contract as between the immediate parties . . . . [t]he rules of contract provide that the parties to a contract are presumed to have intended what their language clearly

trial of a breach of contract, the foreclosure trial is conducted in accordance with the civil practice rules governing trials generally: the rules of evidence, the burdens of proof, and the courtroom protocol are all the same.[134] Few, if any, foreclosures are tried under these trial rules, however, because factual disputes often do not arise and thus trials do not reach that stage.[135] As such, courts have recognized that mortgage foreclosures are particularly well suited for summary judgment.[136]

After a judgment of foreclosure is entered, either by summary judgment, or by a full trial if necessary, the real estate that is the subject of the judgment is sold at judicial sale[137] unless the mortgagee accepts a deed in lieu of foreclosure.[138] A foreclosure sale cannot take place until all redemption rights have expired or been waived and a judgment of foreclosure has been entered.[139]

II. DISCUSSION

Part II begins by considering MERS' rights as legal holder and as indebtedness holder under Michigan law.[140] It then proceeds to

imports so that a court has no discretion to require parties to accept any terms other than those in their contract").

134. *See generally* 735 ILL. COMP. STAT. ANN. 5/2-1101, *et seq.*(signaling the beginning of the IMFL code); 735 ILL. COMP. STAT. ANN. 5/15-1107 (stating that the mode of procedure will be in accordance with the Illinois Code of Civil Procedure).

135. Questions like "whether a contract existed," "whether that contract was breached," and "whether the mortgagee is entitled to the relief sought" do not leave much room for factual dispute in mortgage foreclosure cases. NOONAN, IMFL, *supra* note 68, at 1-67. Because mortgage contracts are so common, and remedies—usually a fee absolute in the property securing the note—are often non-monetary, there is often no reason for a trial to be held to determine facts. *Id.*

136. *See, e.g.*, First Fed. Sav. & Loan Ass'n of Chi. v. Chi. Title & Trust Co., 508 N.E.2d 287, 289 (1987); Midfirst Bank v. Robinson, No. 92 C 3908, 1993 WL 147422, at *3 (N.D. Ill. May 3, 1993) (two illustrative cases in which plaintiff- mortgagees were awarded summary judgment because the defendant-mortgagors could not proffer any argument demonstrating a genuine issue of material fact). *See also supra* note 135 and accompanying text.

137. 735 ILL. COMP. STAT. ANN. 5/15-1507(a). The real estate is sold at a section 1507(a) judicial sale so long as the judgment did not result from either a consent foreclosure, 735 ILL. COMP. STAT. ANN. 5/15-1402, or a strict foreclosure, 735 ILL. COMP. STAT. ANN. 5/15-1507(a). A consent foreclosure is a form of uncontested foreclosure in which the mortgagor agrees not to protest the proceeding or the eventual sale of the real estate involved. 735 ILL. COMP. STAT. ANN. 5/15-1402. *See supra* note 68 for an explanation of a strict foreclosure.

138. NOONAN, IMFL, *supra* note 68, at 1-79 (citing 735 ILL. COMP. STAT. ANN. 5/15-1401). A deed in lieu of foreclosure is an agreement between the mortgage and mortgagee which terminated th mortgagor's interest in the mortgaged real estate after the mortgagor's default. 735 ILL. COMP. STAT. ANN. 5/15-1401.

139. 735 ILL. COMP. STAT. ANN. 5/15-1507(b); 735 ILL. COMP. STAT. ANN. 5/15-1506.

140. *See infra* Part II.A (explaining MERS' rights as legal holder and as indebtedness holder through MICH. COMP. LAWS ANN. § 600.3204(1)(d)).

examine the background facts and holding in *Barnes* to explain Illinois' conception of MERS' rights as legal holder and as indebtedness holder.[141]

A. MERS' Rights as Legal Holder and as Indebtedness Holder in Michigan

Residential Funding Co., LLC v. Saurman is a consolidated case in Michigan comprised of two cases, each involving a foreclosure instituted by Mortgage Electronic Registration System (MERS) as the mortgagee.[142] In each case, the defendant purchased real property, financing the transaction with a loan from a financial institution.[143] The financing transactions included loan documentation in the form of a note, and security for the loan in the form of a mortgage contract.[144] The original lender in both cases was Homecoming Financial, LLC.[145]

Each note established the loan amount, the interest rate, methods and requirements of repayment, the lender's identity, the borrower and all other traditional loan information.[146] Each mortgage instrument provided for the mortgagee's rights of foreclosure of the property in the event of the borrower's default on the loan.[147] Homecoming Financial was named as the lender in the note and in the mortgage instrument, but was not designated in the security instrument as the mortgagee.[148] Instead, the mortgage stated that "MERS is the mortgagee under this Security Instrument" and it contained several other provisions addressing the relationship between MERS and the lender including: "'MERS' is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns."[149]

The note in each case was assigned by Homecoming Financial to another financial institution which became the legal owner of the indebtedness.[150] Each defendant eventually defaulted on their

141. *See infra* Part II.B (explaining MERS' rights as legal holder and as indebtedness holder through 735 ILL. COMP. STAT. ANN. 5/15–1504(a)(1)-(3)).

142. Residential Funding Co., LLC v. Saurman, No. 290248, 2011 Mich. App. LEXIS 719, at *1 (Apr. 21, 2011), *cert. granted*, 803 N.W.2d 693 (Mich. 2011).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at *1-2.

148. *Id.* at *2.

149. *Id.*

150. *See id.* *1 (regarding the first defendant, Saurman, Homecoming Financial assigned the note to Residential Funding Co., LLC; Homecoming Financial assigned the note of the second defendant, Corey Messner, to Bank of New York Trust Company).

respective notes.[151] After the defaults, MERS began non-judicial foreclosure proceedings by advertisement as permitted under section 600.3204(1)(d) of the MCL, purchased each property at the subsequent sheriff's sales and then quit-claimed the properties to each plaintiff as respective successor lenders.[152] When the respective lenders subsequently began eviction actions, each defendant challenged their respective foreclosure as invalid, asserting, among other things, that MERS did not have authority under section 600.3204(1)(d) to foreclose by advertisement because MERS did not fall within any of the three permissible categories of mortgagees to do so.[153]

Foreclosure by advertisement is governed by section 600.3204(1)(d) of the MCL which provides, in pertinent part, that "a party may foreclose a mortgage by advertisement if all of the following exist,"[154] including that, "[t]he party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage."[155]

The appellate court held that the plaintiff's mutual argument that having an "interest in the mortgage" was sufficient to maintain a foreclosure under section 600.3204(d)(1) was incorrect.[156] Expounding, the appellate court stated that, although the note—the indebtedness—and the mortgage contract are typically employed or considered together,[157] they are actually two different legal transactions providing for two different sets of rights.[158] Further, the appellate court stated that a mortgage is "a conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms"; a mortgagee only has an interest in the physical real estate property.[159] The mortgagor agrees, pursuant to the mortgage

151. *Id.* at *3.

152. *Id.*; MICH. COMP. LAWS ANN. § 600.3204(1)(d) (West 2000 & Supp. 2010).

153. *Saurman*, 2011 Mich. App. LEXIS 719, at *3; MICH. COMP. LAWS ANN. § 600.3204(1)(d).

154. *Saurman*, 2011 Mich. App. LEXIS 719, at *8 (citing MICH. COMP. LAWS ANN. § 600.3204(1)).

155. *Id.* (citing MICH. COMP. LAWS ANN. § 600.3204(1)(d)).

156. *Id.* at *9.

157. *Id.*; *see also* Michael Bergin, *Do You Know the Difference Between a Note and a Mortgage?,* GWSLEPTHERE.COM (May 26th, 2009), http://gwslepthere.com/2009/05/26/do-you-know-the-difference-between-a-note-and-a-mortgage/ (highlighting that real estate is filled with terms that are often used interchangeably and erroneously; specifically, the terms loan, mortgage, deed of trust, and note are among those frequently misused).

158. *Saurman*, 2011 Mich. App. LEXIS 719, at *9.

159. *Id.* at *9-10 (citing Citizens Mtg. Corp. v. Mich. Basic Prop. Ins. Assoc., 314 N.W.2d 635, 637 (Mich. Ct. App. 1981) (referencing the "mortgagee's interests in the property")).

contract, that if the money borrowed under the note is not repaid, the mortgagee will retain only an interest in the property.[160] Thus, while a note evidences a debt and represents the obligation to repay, a mortgage conversely represents an interest in real property contingent on the failure of the borrower to repay the lender.[161] Therefore, the note and the mortgage are two different things.[162]

In each financing transaction, the homeowners were the mortgagors and MERS was named the mortgagee in the mortgage instrument.[163] Homecoming Financial originated the loan that was evidenced by each note.[164] MERS, as mortgagee, only held an interest in the property as security for the note, not an interest in the note itself.[165] MERS was not legally capable of enforcing the notes; similarly, it could not obtain any payment on the loans on its own behalf or on behalf of the lender.[166] Moreover, the mortgage contract specifically stated that, although MERS was named as the mortgagee, MERS held "only legal title to the interest granted" by the defendants and, as such, the interest in the mortgage represented, at most, a future interest in each defendants' property.[167] Given that the notes and mortgages are separate documents, evidencing separate obligations and separate interests, MERS' interest in the mortgage did not give it an interest in the debt.[168]

A second case to deal with MERS' rights as legal and indebtedness holder in Michigan is *Richard v. Schneriderman & Sherman, P.C.*[169] This case was initiated by a homeowner to challenge the foreclosure and sheriff's sale of property he owned in Detroit.[170] Richard purchased the property, obtaining a loan from Homecomings Financial Network, Inc.[171] The loan was secured by a mortgage contract with MERS, as the nominee of Homecomings.[172] The Schneiderman law firm, acting as the mortgage company's agent, mailed Richard a notice stating that his loan was in default and informing him of his rights, including a request

160. *Id.* at *10.
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.* at *10-11.
166. *Id.* at *11.
167. *Id.*
168. *Id.*
169. Richard v. Schneiderman & Sherman, P.C., No. 297353, 2011 Mich. App. LEXIS 1522 at *1 (Aug. 25, 2011).
170. *Id.*
171. *Id.*
172. *Id.*

for mediation.[173] The outstanding debt owed to the lender was $50,267.78.[174] Eventually, MERS began non-judicial foreclosure by advertisement under section 600.3204(d)(1) of the MCL and purchased the property at the subsequent sheriff's sale.[175] Richard filed suit during the redemption period,[176] alleging that the sheriff's sale was "flawed" on numerous grounds and asserted that MERS did not hold any rights to the repayment.[177] MERS filed for summary disposition, asserting, among other things, that the sheriff's sale was both legal and valid because all required procedures were followed.[178] The trial court granted summary disposition in favor of Richard and dismissed MERS' claim.[179] The appellate court held that, under *Saurman*, MERS is not entitled to utilize foreclosure by advertisement where it does not own the underlying note, reversed the trial court's grant of summary disposition, vacated the foreclosure proceeding, and remanded the case for further proceedings.[180]

B. MERS' Rights as Legal Holder and as Indebtedness Holder in Illinois

Except for rare instances, Illinois permits foreclosure only through the judicial process, unlike Michigan's foreclosure by advertisement.[181] In *Mortgage Electronic Registration Systems, Inc. v. Barnes*, MERS filed a complaint to foreclose a mortgage against Barnes, pursuant to sections 15–1504(a)(1) through (a)(3) of the Illinois Mortgage Foreclosure Law.[182] MERS alleged, among other things, that it was the mortgagee, that Barnes was in default of her residential mortgage loan for $278,113.44 in unpaid principal, and that MERS was bringing suit as the legal holder of the indebtedness.[183] MERS attached a copy of the

173. *Id.*

174. *Id.*

175. *Id.* at *2.

176. For information about the redemption period, see *supra* note 71 and accompanying text.

177. *Richard*, 2011 Mich. App. LEXIS 1522, at *2.

178. *Id*.

179. *Id.*

180. *Id.* at *5-6 (citing Residential Funding Co., LLC v. Saurman, No. 290248, 2011 Mich. App. LEXIS 719, at *1(Apr. 21, 2011), *cert. granted*, 803 N.W.2d 693 (Mich. 2011)).

181. *See supra* note 68 and accompanying text (explaining the permissible judicial foreclosure process in Illinois and how power-of-sale foreclosures are expressly prohibited and strict foreclosures are severely limited). S*ee also supra* note 87 (discussing the extensive time commitment required by judicial foreclosure compared with non-judicial foreclosure). *See generally* Part I.B (explaining the non-judicial foreclosure by advertisement process in Michigan)

182. Mortg. Elec. Registration Sys., Inc. v. Barnes, 940 N.E.2d 118, 120 (Ill. App. Ct. 2010); 735 ILL. COMP. STAT. ANN. 5/15–1504(a)(1)-(3) (West 2011).

183. *Barnes*, 940 N.E.2d at 120.

mortgage contract to its complaint, the terms of which which defined Barnes as the borrower, First NLC Financial Services, L.L.C. as the lender, and MERS as the nominee of the lender and of the lender's successors and assigns.[184] MERS also attached the note.[185] The definitions section of the mortgage contract also stated that "MERS is the mortgagee under this Security Instrument."[186] Further, the third page of the mortgage contract provided, in relevant part:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell a Property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument.[187]

MERS served Barnes with the complaint on January 31, 2008.[188] Barnes failed to file an answer and so a default order and a judgment of foreclosure were entered in May 2008.[189] In August 2008, Barnes filed an appearance, and the trial court granted her emergency motion to stay the foreclosure sale until September 29, 2008.[190] On September 30, 2008, MERS offered the highest and best bid of $221,000, and the property was sold to MERS.[191] In May 2009, MERS moved the circuit court for an order approving the report of sale and distribution.[192] Barnes, however, filed a petition to vacate the foreclosure judgment and sale and to deny the confirmation of the sale, arguing that the foreclosure and sale judgment was void because MERS had no interest in the debt secured by the mortgage on the property.[193] According to Barnes, MERS was merely a for-profit electronic registration and tracking system that some note owners and holders used to avoid making paper transfers upon the sale of notes and mortgages.[194] Barnes asserted that MERS was not the true owner or holder of the note and mortgage; instead, MERS just acted as a library or holder of information regarding the true owners and holders of notes and

184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 121.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.*

mortgages.[195] Barnes further argued that MERS failed to attach any document to its complaint showing that the promissory note had been assigned to MERS for value.[196]

Noting that the foreclosure judgment was a final and appealable order, in July 2009, the circuit court denied Barnes' petition to vacate the judgment and to deny confirmation of the sale.[197] The circuit court also granted MERS' motion for an order approving the sale but stayed execution of the order until August 20, 2009.[198] Thereafter, Barnes moved the circuit court to stay enforcement of its July 2009 orders pending disposition of her appeal.[199] The circuit court denied Barnes' motion to stay, however, noting that no notice of appeal had been filed yet.[200] On September 16, 2009, the appellate court allowed Barnes' motion to file a late notice of appeal.[201] The appellate court also granted Barnes a stay of enforcement of the circuit court's July execution order past its original August 2009 expiration date until the appellate court ordered otherwise.[202]

The appellate court concluded that, even though Barnes did not articulate her assertion well, she was essentially arguing that the circuit court lacked jurisdiction because MERS failed to plead proof of standing.[203] Barnes acknowledged that she failed to answer the complaint, was defaulted, and did not attempt to remedy her default until after MERS filed a motion to confirm the sale.[204] Regardless of these mistakes, however, she argued that standing was a jurisdictional issue that could be challenged at any time.[205] The court disagreed, explaining Illinois' conception of standing: "'[t]he doctrine of standing is designed to preclude persons who have no interest in a controversy from bringing suit,' and 'assures that issues are raised only by those parties with a real interest in the outcome of the controversy.'"[206] Further, the court reaffirmed that "standing requires some injury in fact to a legally cognizable interest,"[207] and continued by stating that the

195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.* at 123.
204. *Id.*
205. *Id.*
206. *Id.* (citing Glisson v. City of Marion, 720 N.E.2d 1034, 1039 (Ill. 1999)).
207. *Id.* (citing Glisson, 720 N.E.2d at 1039-40).

Illinois Supreme Court has determined that a lack of standing pleading in a civil case is an affirmative defense and it will be waived if not raised in a timely fashion in the trial court.[208] The court found that the defendant failed to timely raise the standing issue before the circuit court when the defendant failed to answer the properly served complaint, was defaulted, and thereafter participated in the proceedings only by petitioning the court for a continuation of the sale, and subsequently attempted to raise the standing issue after the foreclosure and sale and in response to MERS's motion to confirm the sale.[209] In sum, the defendant forfeited the standing issue through her default.[210]

Further, the court noted that Barnes' default resulted in her admission that MERS had standing because of the principle that all well-pleaded allegations of a complaint are considered admitted by a defendant who is held in default for failure to answer the complaint.[211] Accordingly, when Barnes was held in default, she admitted the well-pleaded allegations of MERS' complaint, including the allegation that MERS held an interest in the subject property.[212] Finally, the court held that MERS did have standing because a plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person,[213] and Illinois does not require that a foreclosure be filed by the owner of the note and mortgage.[214] Moreover, the court found that section 15–1504(a)(3)(N) of the Foreclosure Law indicates that the legal holder of the indebtedness, a pledgee, an agent, or a trustee may file the case.[215] Finally, the court held that the mortgage contract signed by the parties indicated that MERS was the mortgagee, and that MERS satisfied the statutory definition of a mortgagee, which goes beyond just note holders to also encompass "any person designated or authorized to act on behalf of such holder."[216] For all these reasons, the appellate court held that

208. *Id.* (citing Greer v. Ill. Hous. Dev. Auth., 524 N.E.2d 561, 582 (Ill. 1988); *see also* Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895, 916 (Ill. 2010) (stating that the defendant has the burden to plead and prove the affirmative defense of lack of standing, which will be forfeited if not timely raised in the trial court, and, under Illinois law, issues of standing do not implicate the court's subject matter jurisdiction)).

209. *Id.* at 123-24.

210. *Id.* at 124.

211. *Id.* at 124 (citing Eckel v. Bynum, 608 N.E.2d 167, 173 (Ill. App. Ct. 1992); Colonial Penn Ins. Co. v. Tachibana, 369 N.E.2d 177 (1977)).

212. *Id.*

213. *Id.* (citing Kazunas v. Wright, 4 N.E.2d 118, 120 (Ill. App. Ct. 1936)).

214. *Id.* (citing Stalzer v. Blue, 38 N.E.2d 788, 790-91 (Ill. App. Ct. 1942); Replogle v. Scott, 20 N.E.2d 124, 126 (Ill. App. Ct. 1939); Bourke v. Hefter, 66 N.E.2d 1084, 1085-86 (Ill. 1903)).

215. *Id.*; 735 ILL. COMP. STAT. ANN. 5/15–1504(a)(3)(N) (West 2011).

216. *Barnes*, 940 N.E.2d at 124; 735 ILL. COMP. STAT. ANN. 5/15–1208.

MERS did have standing to bring a foreclosure action against Barnes.[217] Finally, the appellate court affirmed the circuit court's judgment confirming the sale of the property, and vacated its own stay of enforcement of the circuit court's July execution order.[218]

III. ANALYSIS

This Part will discuss the implications of *Saurman* and *Richard* and in light of those decisions, examine *Barnes*. First, this Part explains why Michigan courts have correctly concluded that notes and mortgages are separate instruments, which evidence separate obligations and separate interests.[219] Similarly, this Part will support the Michigan court's rationale that an entity with an interest in the mortgage does not necessarily have an interest in the debt.[220] This Part will further consider why, despite the narrow holdings which only affect non-judicial foreclosures by advertisement in Michigan, this theoretical conception is more widely prescriptive.[221] Then, this Part will apply the Michigan note and mortgage theory to *Barnes*, finding that, given that notes and mortgages are separate documents, the court misinterpreted Illinois law for several reasons, and concluding that MERS did not have standing to foreclose.[222]

A. The Theoretical Significance of the Michigan Cases

The Michigan appellate court decisions in *Saurman* and *Richard* broke new ground in the interpretation of the parallelism of residential home loans and mortgage contracts.[223] In fact, the *Richard* court devoted a substantial portion of its opinion to evaluating the *Saurman* decision, which held that notes and mortgages are separate documents, evidencing separate obligations and separate interests and that an interest in the mortgage did not give necessarily also provide an interest

217. *Barnes*, 940 N.E.2d at 123-24.

218. *Id.* at 125.

219. *See infra* Part III.A (describing Michigan's change in its understanding of the difference between loan notes and mortgage contracts).

220. *See infra* Part III.A (describing why Michigan's change in its understanding of the difference between loan notes and mortgage contracts is sound).

221. *See infra* Part III.A (the theoretical significance of *Saurman* and *Richard* decisions).

222. *See infra* Part III.B (analyzing the three main arguments put forth in *Barnes* in support of MERS' standing to bring a foreclosure suit considering Michigan's theoretical understanding of the difference between loan notes and mortgage contracts)

223. *See infra* notes 225-226 and accompanying text (describing how unprecedented the *Saurman* holding was considering that prior to *Saurman*, the note and the mortgage contract were treated as inseparable and thus, though a malapropism, case law dictated that only the record holder of the mortgage contract had the power to foreclose).

in the debt.[224] Specifically, *Richard* discussed whether *Saurman* clearly established a new principle of law or, instead, merely vindicated controlling legal authority.[225] In Michigan, prior to these decisions, residential home loans and mortgage contracts, with respect to foreclosure, were treated as indispensable from one another.[226] That is, it was rarely conceived that the legal holder of the mortgage in a foreclosure was a different entity from the indebtedness holder.[227] The increased prevalence of this scenario can largely be attributed to the development of the secondary market for residential home loans described in the Introduction;[228] however, the increased trading in the secondary market factor required the 2008 financial crisis, and consequently the mass foreclosures that followed, to bring a critical mass of examples to the courts steps.[229]

224. Richard v. Schneiderman & Sherman, P.C., No. 297353, 2011 Mich. App. LEXIS 1522 at *4-6 (Aug. 25, 2011).

225. *Id* at *4-5. Whether a new principle of law was being established, as opposed to whether the decision just vindicated existing legal authority, affected the retroactivity of the decision. *Id* at *4. Cases given limited retroactivity apply in pending cases where the issue had been raised and preserved. *Id.* Cases with full retroactivity apply to all cases pending at the time of the decision. *Id.* In *Richard*, although the plaintiff contested the foreclosure, he did not specifically raise and preserve the issue of whether MERS had the authority to foreclose by advertisement. *Id.* Thus, the Saurman decision was only applicable in the *Richard* case if it was granted full retroactivity. *Id.*

226. Residential Funding Co., LLC v. Saurman, No. 290248, 2011 Mich. App. LEXIS 719, at *19-20 (Apr. 21, 2011), *cert. granted*, 803 N.W.2d 693 (Mich. 2011) (citing Davenport v. HSBC Bank USA, 739 N.W.2d 383 (2007)). The plaintiffs suggested that, because the Michigan Supreme Court had explicitly held in *Davenport* that only the record holder of the mortgage had the power to foreclose under section 600.3204(1)(d) of the MCL, then the *Davenport* rule should have been applied and thus MERS, as record holder, should have been permitted to foreclose. *Id.* The *Saurman* court found, however, that the facts in Davenport did not reflect that the party who held the note was a different party than the party who was the mortgagee. *Id.* at *20. Further the *Davenport* court used the term "mortgage" interchangeably with "indebtedness," thereby indicating that the same party held both the note and the mortgage. *Id.* The *Saurman* court continued, stating that, because the instant cases involved a situation where the note holder and mortgage holder were separate entities, and that there was nothing in Davenport which held that a party that owns only the mortgage and not the note has an ownership interest in the debt, the general proposition set forth in Davenport did not apply. *Id.*

227. *See supra* note 226 and accompanying text (stating that, prior to *Saurman* and *Richard*, the note and the mortgage contract were rarely treated as separable from one another and thus, though a malapropism, case law dictated that only the record holder of the mortgage contract had the power to foreclose).

228. *See supra* note 1 and accompanying text (describing the growth of the secondary market for residential home loans).

229. *See* Paltrow, *supra* note 43 ("Since the collapse of the housing boom, many foreclosure cases were filed in MERS's name, even though the registry doesn't really own either the mortgage or the promissory note, the document which states the terms of the mortgage loan. MERS's role in foreclosure cases has made it a lightning rod in recent months in court decisions which have held that loan servicers' use of the registry violates basic real estate and mortgage laws.").

The court's reasoning in *Saurman*, which was upheld in *Richard*, is sound.[230] MERS, as a mortgagee, only holds an interest in the property it claims to legally own as security for the note rather than owning or having a beneficial interest in the note itself.[231] Thus, MERS could not try to enforce a note nor obtain any payment from the borrower on its own behalf or on behalf of the lender.[232] Moreover, the Fannie Mae and Freddie Mac approved mortgage language that MERS suggested to include on all mortgage instruments specifically stated that MERS acts "solely as a nominee for the Lender."[233] As such, MERS' interest in the mortgage represents, at most, an interest in the mortgagor's property.[234] Given that the notes and mortgages are separate documents, evidencing separate obligations and separate interests, MERS' interest in the mortgage does not give it an interest in the debt.[235]

However, the *Saurman* holding only applies to non-judicial foreclosures by advertisement in Michigan pursuant to MCL section 600.3204.[236] While this narrow holding interpreting a particular Michigan statute would not ordinarily be widely prescriptive, the separate mortgage contract and note theory behind it is. [237]

230. *See infra* notes 231-235 (describing why the court's reasoning in *Saurman*, which was upheld in *Richard*, was sound).

231. *See Saurman*, 2011 Mich. App. LEXIS 719, at *25-26 (identifying the rights MERS held when owning only the legal title and not having an interest in the indebtedness).

232. *Id.* at *10-11.

233. *See supra* note 51 and accompanying text (quoting the nominee language affixed to the mortgage contract and describing how the language has been approved by the major GSEs and that a mortgage originator should contract either Fannie mae or Freddie Mac directly for specific language relevant to the state in which the property resides); The same language from the website, supra, was affixed to both mortgage contracts in *Saurman*. 2011 Mich. App. LEXIS 719, at *2.

234. *Saurman*, 2011 Mich. App. LEXIS 719, at *11.

235. *Id.*

236. *See id.* at *27 (noting that the "[d]efendants were entitled to judgment as a matter of law because . . . MERS did not own the indebtedness, own an interest in the indebtedness secured by the mortgage, or service the mortgage" pursuant to section 600.3204(1)(d) of the MCL).

237. A binding precedent is a decided case that furnishes a basis for determining later cases involving similar facts or issues. BLACK'S LAW DICTIONARY 1295-96 (9th ed. 2009). Because *Saurman* is only precedential to non-judicial foreclosures by advertisement in Michigan pursuant to section 600.3204 of the MCL, other forms of foreclosure in either Michigan or any other state, including Illinois, are not affected by the literal holding. *See id.* (applying the definition of "precedent" to the holding in *Saurman*). However, the theory that an interest in the mortgage contract represents, at most, an interest in the mortgagor's property, and that, given that the notes and mortgages are separate documents which evidence separate obligations and separate interests, can be viewed as persuasive while not being precedential over a wider variety of cases. *See, e.g.*, Chad Flanders, *Toward a Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 56 (2009) (stating that persuasive authority is not binding and as such can be cited insofar as it is helpful and illuminating to the issue); see also Black's Law Dictionary 1296 (stating that persuasive precedent is "[a] precedent that is not binding on a court, but that is entitled to respect and careful

B. MERS Ownership Theory and Barnes

In *Barnes*, the First District Appellate Court of Illinois held that the jurisdictional issue of standing has restrictions by which it can be challenged.[238] Specifically, it determined that the defendant in *Barnes* forfeited her ability to raise the affirmative defense that the plaintiff lacked standing.[239] The forfeiture arose because she failed to answer a complaint that was properly served upon her, defaulted, and then participated in the proceedings by successfully petitioning the court for a continuation of the sale.[240] Not until after the foreclosure and in response to MERS' motion to confirm the sale, did she subsequently attempt to raise the standing issue.[241] The court noted that her default resulted in her admission that MERS had standing because all well-pleaded allegations of a complaint are considered admitted when the defendant is held in default for failure to plead to the complaint.[242]

Courts generally refrain from opining on constitutional legal issues, like standing, when a procedural issue dispenses with the need to do so.[243] In *Barnes*, however, the court proceeded to analyze whether MERS had standing to bring the foreclosure suit despite that they held that MERS had standing as a result of the plaintiff's failure to respond to MERS' complaint.[244]

1. *Barnes*' "Valid Standing Without Beneficial Ownership" Proposition is Too Broad

The court's first proposition in support of MERS' adequate standing was that "a plaintiff can maintain a lawsuit although the beneficial

consideration . . . .For example, if the case was decided in a neighboring jurisdiction, the court might evalutate the earlier court's reasoning without being bound to decide the same way").

238. Mortg. Elec. Registration Sys., Inc. v. Barnes, 940 N.E.2d 118, 120 (Ill. App. Ct. 2010).

239. *Id.*

240. *Id.* at 123.

241. *Id.*

242. *Id.* at 124 (citing Eckel v. Bynum, 608 N.E.2d 167, 173 (1992); Colonial Penn Ins. Co. v. Tachibana, 369 N.E.2d 177, 178 (1977)).

243. *See* Rescue Army v. Municipal Court of City of L.A., 331 U.S. 549, 568 (stating that the Supreme Court has followed a policy of strict necessity in disposing of constitutional issues and that this policy has not been limited to jurisdictional determinations). This strict necessity policy is substantive, "grounded in considerations which transcend all such particular limitations . . . . Like the case and controversy limitation itself and the policy against entertaining political questions, it is one of the rules basic to the federal system and this Court's appropriate place within that structure." *Id.* at 569-70. For a more extensive discussion on the principles of "judicial minimalism" and their change over time, see generally Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 Va. L. Rev. 1753 (2004).

244. *Barnes*, 940 N.E.2d at 123.

ownership of the note is in another person."[245] For this proposition, *Barnes* cites *Kazunas v. Wright*, which in turn cites four more cases.[246] Further analysis of these cases,[247] however, demonstrates that the *Barnes* and *Kazunas* courts' mutual rule of law was not as broad as it appeared to be and does not apply to the way MERS conducts business.[248]

a. *Caldwell v. Lawrence*

The first of these cases, *Caldwell v. Lawrence,* involved a situation in which the payee of a promissory note endorsed and delivered that note to the plaintiff.[249] The payee alleged that the plaintiff subsequently delivered the note back to him for "a valuable consideration" and "thereby had parted with all his right and interest in the note, and that the right of action had revived in the payee."[250] The plaintiff pled a demurrer,[251] with which the Court agreed.[252] Accepting the payee's averment, the court stated that, at most, the payee would be equitably entitled to the proceeds.[253] Further, the court held that a legal holder of the debt, while not having an equitable interest, still has a legal right to the indebtedness.[254] Thus, the rule that "a plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person,"[255] holds only so far as the plaintiff is the legal holder of the

245. *Barnes*, 940 N.E.2d at 124 (citing Kazunas v. Wright, 4 N.E.2d 118, 120 (Ill. App. Ct. 1936).

246. The citation provided for the court's proposition was Kazunas v. Wright, 4 N.E.2d 118, 118 (Ill. App. Ct. 1936). *Kazunas*, in turn, cites four cases in support of the same proposition: (1) Caldwell v. Lawrence, 84 Ill. 161, 161 (1876); (2) Bourke v. Hefter, 66 N.E. 1084, 1084 (Ill. 1903); (3) Dillon v. Elmore, 198 N.E. 128, 128 (Ill. 1935); and (4) Ewen v. Templeton, 148 Ill. App. 46, 46 (1909).

247. *See supra* note 246 and accompanying text (referring to the direct and indirect cites that the Barnes court made regarding their proposition that "a plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person").

248. *See infra* Part III.B.1.a-d (analyzing the four cases cited by *Kazunas*, *supra* note 246, and why their mutual proposition that *Barnes* cites is not as broad as stated by *Barnes*).

249. *Lawrence*, 84 Ill. at 161.

250. *Id.*

251. A demurrer is "[a] pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer. BLACK'S LAW DICTIONARY 498 (9th ed. 2009). Specifically, the plaintiff conceded that he did deliver the note back to the payee for "a valuable consideration," but that this did not revive the right of action in the payee. *Lawrence*, 84 Ill. at 161.

252. *Lawrence*, 84 Ill. at 161.

253. *Id.* at 161-62.

254. *Id.* at 162.

255. Mortg. Elec. Registration Sys., Inc. v. Barnes, 940 N.E.2d 118, 124 (Ill. App. Ct. 2010). (citing Kazunas v. Wright, 4 N.E.2d 118, 120 (Ill. App. Ct. 1936).

note.[256]

b. *Bourke v. Hefter*

The second case cited, *Bourke v. Hefter*, involved a suit to foreclose upon a promissory note made by Bourke, extensions of the note at maturity, semiannual interest notes for the last extension, and a trust deed which, like a mortgage, secured the payment of the note and interest.[257] While there was no evidence as to the real owner of the notes, a law firm, Greenebaum Bros., was named as trustee in the trust deed and held possession of the notes.[258] The notes that Greenbaum Bros. held were made payable to the loan originator—that is, the originator of the loan had ownership of the indebtedness—but were unconditionally endorsed to be made payable to Hefter, thus giving him title to the indebtedness.[259] Greenbaum Bros., as trustee, subsequently delivered the notes to Hefter for the purpose of bringing the suit, thereby giving him legal title.[260] This means that Hefter owned both the indebtedness and the legal title.[261] Similarly to *Lawrence*, the rule that "a plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person,"[262] holds only so far as the plaintiff is also the legal holder of the note.[263]

c. *Dillon v. Elmore*

The third case, *Dillon v. Elmore*, involved a foreclosure suit on a trust deed that conveyed improved real estate contingent on the failure of the mortgagor to repay one hundred and seventy five $1000 bonds with interest.[264] Joseph Dillon, for himself and all other bondholders, claimed a default in interest payments from the bonds, that this default continued for more than sixty days, and that the bondholders elected to declare the whole of the principal indebtedness and interest to be due.[265] Dillon also alleged a default with respect to an alleged nonpayment of general taxes on the mortgaged real estate two consecutive years, charging that the real estate was sold for nonpayment of a special

256. *Lawrence*, 84 Ill. at 162.
257. Bourke v. Hefter, 66 N.E. 1084, 1085 (Ill. 1903).
258. *Id.* at 1085.
259. *Id.*
260. *Id.*
261. *Id.*
262. Mortg. Elec. Registration Sys., Inc. v. Barnes, 940 N.E.2d 118, 124 (Ill. App. Ct. 2010). (citing Kazunas v. Wright, 4 N.E.2d 118, 120 (Ill. App. Ct. 1936).
263. *Bourke*, 66 N.E. at 1085.
264. Dillon v. Elmore, 198 N.E. 128, 130 (Ill. 1935).
265. *Id.*

assessment.[266]

One of the appellees, Kilpatrick, alleged in his intervening petition that the receiver, Gilruth, resigned on behalf of the Englewood Trust & Savings Bank as trustee because the Bank became insolvent; Kilpatrick was subsequently appointed as successor trustee by a majority of the bond holders; after Kilpatrick's appointment, one bondholder wrote to him declaring the whole indebtedness secured by the trust deed due and payable and requested Kilpatrick to foreclose the trust deed for the benefit of the owners or holders of all of the unpaid bonds secured; and that Kilpatrick filed a foreclosure suit.[267] Kilpatrick further contended that Dillon's suit showed on its face that the exclusive right of action to foreclose is in the trustee duly appointed under the trust deed.[268] Dillon, as an individual bondholder, claimed he had an absolute right to file a foreclosure suit.[269] However, the court held that because of the contractual restrictions in the trust deed, Dillon did not have an absolute right.[270]

Dillon also contended that when Gilruth was appointed receiver to oversee the Bank's bankruptcy proceedings, there was an actual or "practical" vacancy because the Bank, being insolvent, became incompetent to act as trustee.[271] As such, the title to all its assets passed immediately to the receiver, and the receiver was not given authority by state statute to administer the bank's trusts.[272] The court disagreed because Dillion's supporting cases relied on state statutes whose provisions were dissimilar to section 11 of the Banking Act.[273] The controlling Banking Act section stated that the receiver could, on behalf of the bank, provide for an accounting and resignation of trusts.[274]

In favor of the successor trustee, Kilpatrick, the court reaffirmed

266. *Id.*

267. *Id.* at 130-31.

268. *Id.* The trust deed provided that:

> The exclusive right of action hereunder shall be vested in said trustee until refusal on its part to act, and no bondholder shall be entitled to enforce these presents in any proceeding in law or in equity until after demand has been made upon the trustee, accompanied by tender of indemnity, as aforesaid, and said trustee has refused to act in accordance with such demand. Said trustee shall not be bound to recognize any person as a bondholder until his bonds have been deposited with said trustee and until his title thereto has been satisfactorily established.

Id.

269. *Id.* at 131.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 132.

274. *Id.*

Hefter, holding that an individual may be the holder of a note and as such maintain a suit on that note, or a suit to foreclose a mortgage securing that note, even though such holder has no beneficial interest in the note.[275] However, the bonds[276] in this case were bearer bonds.[277] Since possession of bearer bonds is prima facie evidence of ownership,[278] the holders were the legal owners for the purpose of appointing a trustee, even though the equitable ownership of the bonds may have been in another.[279] Thus, the present holders of the bearer bonds had the legal right to make a trustee appointment; as a result, the appointment was valid.[280] Furthermore, the valid appointment allowed the trustee and only the trustee to bring a suit for foreclosure pursuant to the trust deed.[281] However, like *Hefter* and *Lawrence*, the proposition that "a plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person,"[282] is not as broad as such a general statement suggests.[283]

In *Dillon*, the entity capable of bringing suit was a trust whose trustee dictated that it was not required to recognize any person as a bondholder until that person deposited his bonds with the trust and until the equitable ownership of the depositor could be established.[284] Thus, the trust as a legal construction, while not having any beneficial ownership

275. *Id.*

276. That is, the contracts providing for the right to be repaid by the bond issuer, or rather, the ownership of indebtedness. *See, e.g.*, N. GREGORY MANKIW, PRINCIPLES OF ECONOMICS 556-57 (6th ed. 2011) (stating, generally, that a bond is a formal contract to repay borrowed money with interest at fixed intervals). Thus, a bond is like a loan in that the holder of the bond is the lender (creditor) and the issuer of the bond is the borrower (debtor). *Id.* at 557

277. *See, e.g.*, DEP'T OF THE TREAS., BUREAU OF THE PUB. DEBT, INFORMATION CONCERNING THE LOSS, THEFT, OR DESTRUCTION OF UNITED STATES BEARER OR REGISTERED SECURITIES ASSIGNED AS PAYABLE TO BEARER (Feb. 2007), *available at* http://www.treasurydirect.gov/forms/sec3987.pdf ("Bearer securities" are definitive paper securities which state they are payable to the "bearer", that is, the physical holder of the security, at maturity or at call for redemption before maturity in accordance with their terms. The ownership is not recorded.)

278. *See supra* note 277 and accompanying text (describing what a security that contains bearer characteristics is).

279. *Dillon*, 198 N.E. at 135.

280. *Id.*

281. *Id.*

282. Mortg. Elec. Registration Sys., Inc. v. Barnes, 940 N.E.2d 118, 124 (Ill. App. Ct. 2010). (citing Kazunas v. Wright, 4 N.E.2d 118, 120 (Ill. App. Ct. 1936).

283. *See infra* notes 284-287 (describing why the *Dillon* proposition that "a plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person," is not as broad as such a general statement suggests).

284. *Dillon*, 198 N.E. at 131. It is important to understand that a trust is a relationship in which one person holds title to property subject to an obligation to keep or use the property for the benefit of another. *See Definition of a Trust*, IRS.GOV (last updated Sept. 6, 2011), http://www.irs.gov/charities/article/0,,id=96116,00.html (defining a trust).

in the bond indebtedness, brought suit on behalf of the bond holders who had beneficial ownership *only* after the trustee, on behalf of the trust, gained physical possession of the bearer bonds and consequently became the legal holder of the indebtedness.[285] Thus, like *Hefter* and *Lawrence*, the proposition that "a plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person,"[286] is valid but with restrictions; specifically in *Dillon*, the trust had to retain legal title to the indebtedness before the trust could legally proceed with what was, in effect, a foreclosure on the bond debtor for defaulting on interest payments owed to the creditor.[287]

d. *Ewen v. Templeton*

The final case cited in support of the proposition that "a plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person"[288] was *Ewen v. Templeton*.[289] The suit revolved around two promissory notes, each for the sum of $1,500, payable to E. H. Bingham.[290] The notes contained a statement by F. W. Rockwell that he deposited twenty-eight shares of stock with Bingham as collateral security for the two notes together.[291] The stocks were in Bingham's name and authorized him, or his agent or assignee, to sell the stock on the maturity of the note, or in the event the security decreased in value.[292]

Frederick Brown, the plaintiff's attorney, testified that he claimed an interest in the notes, but that he claimed no rights other than those held by the original payee.[293] Brown claimed to have received the notes from Bingham, paid nothing for them, and was prosecuting the suit for the benefit of Bingham and himself.[294] Ewen, Brown's office assistant, testified that he acquired title to the notes when Brown turned them over to him; he stated that Brown asked him to bring the foreclosure suit in his own name.[295] Further, Ewen testified that the last endorsement, "E. H. Bingham," was on them when he received them, and also that he

285. *Dillon*, 198 N.E. at 131.
286. *Barnes*, 940 N.E.2d at 124 (citing *Kazunas*, 4 N.E.2d at 120).
287. *Dillon*, 198 N.E. at 131.
288. *Barnes*, 940 N.E.2d at 124 (citing *Kazunas*, 4 N.E.2d at 120).
289. Ewen v. Templeton, 148 Ill. App. 46, 47 (1909).
290. *Ewen*, 148 Ill. App. at 47.
291. *Id.* at 47-48.
292. *Id.*
293. *Id.* at 49.
294. *Id.*
295. *Id.* at 48-49.

paid no money or other consideration for the notes.[296]

The defendant, Templeton, claimed Ewen did not hold requisite legal title to the notes to bring a collection suit on them.[297] The court disagreed, holding that the notes were endorsed in blank—with only a signature and without a payee[298]—and thus were to be treated like any other form of bearer financial instrument: notes endorsed in blank by the last endorser create legal title for the one in physical possession of the notes.[299] Therefore the one in possession of the notes may maintain a suit even though he has no pecuniary interest in the notes.[300] The rule that "a plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person,"[301] is stretched thinnest in this case as it is only applicable for financial instruments that possess bearer characteristics;[302] in this case the court held that the party bringing the suit had to gain legal title to the indebtedness, but anyone in possession of the note had such title.[303]

The one common element of all these cases cited by the *Barnes* court is that the plaintiff must be the legal holder of the indebtedness to bring a foreclosure suit.[304] In both *Lawrence* and Bourke, the rule that "a plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person,"[305] held only so far as the plaintiff was also the legal holder of the note.[306] Similarly, in *Dillon,* the trust that brought the suit had to retain legal title to the indebtedness before it could legally proceed with a foreclosure.[307] Lastly, in *Ewen*, the rule proffered was only applicable for financial instruments possessing bearer characteristics[308] and even though anyone in physical possession

296. *Id.* at 48.

297. *Id.* at 52.

298. A blank endorsement is an endorsement "that names no specific payee, thus making the instrument payable to the bearer and negotiable by delivery only." BLACK'S LAW DICTIONARY 844 (9th ed. 2009).

299. *See id.* (defining a blank endorsement)

300. *Ewen*, 148 Ill. App. at 53.

301. Mortg. Elec. Registration Sys., Inc. v. Barnes, 940 N.E.2d 118, 124 (Ill. App. Ct. 2010) (citing Kazunas v. Wright, 4 N.E.2d 118, 120 (Ill. App. Ct. 1936).

302. *See supra* note 277 and accompanying text (describing what a security that contains bearer characteristics is).

303. *Ewen*, 148 Ill. App. at 53.

304. Compare Caldwell v. Lawrence, 84 Ill. 161, 162 (1876), Bourke v. Hefter, 66 N.E. 1084, 1085 (Ill. 1903), Dillon v. Elmore, 198 N.E. 128, 131 (Ill. 1935), and *Ewen*, 148 Ill. App. at 53 (all sharing the mutual requirement that the plaintiff in a foreclosure suit be the legal holder of the indebtedness).

305. *Barnes*, 940 N.E.2d at 124 (citing *Kazunas*, 4 N.E.2d at 120).

306. *Lawrence*, 84 Ill. at 162; *Bourke*, 66 N.E. at 1085.

307. *Dillon*, 198 N.E. at 131.

308. *See supra* note 277 and accompanying text.

of the note has such title, the plaintiff still had to gain legal title to the indebtedness prior to filing a suit.[309]

In *Barnes*, however, MERS was not the legal holder of the indebtedness.[310] Although it brought suit as the legal holder of the indebtedness,[311] as mortgagee, it only held, at most, an interest in the property it claimed to legally own as security for the note.[312] As a result, MERS could not have enforced the note nor could it have obtained any payment on the loans on its own behalf or on behalf of the lender.[313] Given that notes and mortgage contracts are separate financial instruments, MERS' interest in the mortgage did not give it an interest in the indebtedness.[314] As such, the *Barnes* court misinterpreted the broad proposition that "a plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person"[315] to the detriment of the mortgagor. Without an interest in the indebtedness, as required by the four cases *Barnes* cites, MERS cannot maintain a foreclosure suit.[316]

2. Illinois Requirements to File a Foreclosure

Illinois does not have an explicit law stating that the owner of both the note and mortgage be the same person in order to file a foreclosure, but the doctrine of standing does require that one have some injury in fact to a legally cognizable interest,[317] unless another statute prescribes a method by which to bring a suit without such an injury.[318] In *Barnes*,

309. *Ewen*, 148 Ill. App. at 53

310. *See infra* notes 311-315 (describing why, in *Barnes*, MERS was not the legal holder of the indebtedness as it claimed to be in its foreclosure suit).

311. Mortg. Elec. Registration Sys., Inc. v. Barnes, 940 N.E.2d 118, 120 (Ill. App. Ct. 2010).

312. *See* Residential Funding Co., LLC v. Saurman, No. 290248, 2011 Mich. App. LEXIS 719, at *11 (Apr. 21, 2011), *cert. granted*, 803 N.W.2d 693 (Mich. 2011) (stating that MERS only held, at most, an interest in the property it claimed to legally own as security for the note).

313. *See id.* at *10-11 (stating that MERS could not enforced the note nor could it obtain any payment on the loans on its own behalf or on behalf of the lender).

314. *See* i*d.* at *11 ("Given that the notes and mortgages are separate documents, evidencing separate obligations and interests, MERS' interest in the mortgage did not give it an interest in the debt.").

315. *Barnes*, 940 N.E.2d at 120.

316. *See supra* notes 311-315 (describing why, in *Barnes*, MERS was not the legal holder of the indebtedness as it claimed to be in its foreclosure suit).

317. *See* Greer v. Ill. Hous. Dev't Auth., 524 N.E.2d 561, 575-76 (Ill. 1999) (holding that standing in Illinois requires only some injury in fact to a legally cognizable interest. More precisely, the claimed injury, whether "actual or threatened" must be: (1) "distinct and palpable"; (2) "fairly traceable" to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief.).

318. *See, e.g.*, 735 ILL. COMP. STAT. ANN. 5/15–1504(a)(3)(N) (West 2011) (permitting the legal holder of the indebtedness, a pledgee, an agent, or a trustee to file a foreclosure suit). These statutory categories permit a plaintiff to bring a foreclosure suit even though the plaintiff might

MERS filed suit as the legal holder of the indebtedness.[319] If it had been the legal holder, the standing doctrine and section 15-503(a)(3)(N) of the Foreclosure Law, which permits the legal holder of the indebtedness to bring a foreclosure suit, would permit MERS to sue.[320] However, MERS was not actually the legal holder of the indebtedness; instead, it merely possessed, at most, a legal title to the properties secured by the mortgage contract.[321]

a. MERS' Standing

Had MERS been the legal holder of the indebtedness, there would be a valid argument that the mortgagor's default would constitute a pecuniary injury in fact.[322] Because MERS would be owed money, the mortgagor's nonpayment would cause a pecuniary injury to MERS.[323] The MERS system, however, is merely an electronic registry of residential real estate mortgage contracts to avoid complicated paperwork and associated fees of recording many transactions.[324] The members of MERS that use this electronic registry pay membership fees which vary with the size of the member's portfolio.[325] They do not depend on whether a mortgagor repays its loan in full or defaults and moves to another country, never to be heard from again; regardless of the outcome of the loan—full repayment or default—MERS collects its membership fees.[326] Thus, the default of a mortgagor causes no injury to MERS, and MERS cannot have standing to bring a foreclosure suit.[327]

not have "some injury to a legally cognizable interest". *Greer*, 524 N.E.2d at 575-76.

319. *Barnes*, 940 N.E.2d at 120.

320. *See infra* Part III.B.2.a-b (describing how, if MERS was the legal holder of the indebtedness, both standing doctrine and section 15-503(a)(3)(N) of the IMFL would permit MERS to bring a judicial foreclosure).

321. *See* Residential Funding Co., LLC v. Saurman, No. 290248, 2011 Mich. App. LEXIS 719, at *11 (Apr. 21, 2011), *cert. granted*, 803 N.W.2d 693 (Mich. 2011) (stating that MERS only held, at most, an interest in the property it claimed to legally own as security for the note).

322. *See infra* notes 323-327 (describing how a mortgagor's default would constitute an injury in fact to the holder of the indebtedness, and how this does not apply to MERS' status as an electronic registry of mortgage contracts).

323. Compare *Greer*, 524 N.E.2d at 575-76 (stating the requirements for standing in Illinois), with

324. *See* Part I.B, *supra* (describing how MERS operates).

325. *See supra* notes 47-48 and accompanying text (stating that, in order to belong to the electronic registry, MERS mortgage contract originators and secondary market investors pay flat-fee membership dues which vary according to a company's size or annual production volume).

326. *See* i*d.* (the membership dues are flat fees paid prior to being permitted to use the electronic registry and thus do not depend on successful mortgage repayment).

327. Compare *supra* note 47 and accompanying text (stating that, in order to belong to the electronic registry, MERS mortgage contract originators and secondary market investors pay flat-fee membership dues which vary according to a company's size or annual production volume)

b. Rights to Foreclose under Section 15-1504(a)(3)(N) of the IMFL

Aside from an injury in fact, a statute could prescribe that MERS has standing.[328] The statute the *Barnes* court cited permitting MERS to bring the foreclosure action was section 15-503(a)(3)(N) of the Foreclosure Law.[329] Section 15-503(a)(3)(N) provides that a foreclosure complaint must state the "[c]apacity in which plaintiff brings this foreclosure (here indicate whether plaintiff is the legal holder of the indebtedness, a pledgee, an agent, the trustee under a trust deed or otherwise, as appropriate)."[330] But, again, MERS brought the claim as the holder of the indebtedness,[331] which it was not.[332] Thus, the court erred when it concluded that section 15-503(a)(3)(N) of the IMFL permitted MERS to bring foreclosure.[333]

MERS did not claim to bring the foreclosure as a pledgee, agent or trustee under a trust deed.[334] However, to be thorough, these capacities to bring foreclosure should be examined as well. First, a pledgee is a creditor with whom a debtor makes a bailment or deposits personal property to secure repayment for a debt.[335] Not only is MERS not a creditor – it merely is an electronic registry of property titles[336] – the subject of the mortgage contract is not personal property, but real

with Greer v. Ill. Hous. Dev't Auth., 524 N.E.2d 561, 575-76 (Ill. 1999) (holding that standing in Illinois requires only some injury in fact to a legally cognizable interest. More precisely, the claimed injury, whether "actual or threatened" must be: (1) "distinct and palpable"; (2) "fairly traceable" to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief). If a mortgagor fails to repay their loan, MERS is not injured in a "distinct" way, nor is the injury "fairly traceable" to the mortgagor's failure to repay. *Greer*, 524 N.E.2d at 575-76. In fact, MERS is not injured at all because they were never entitled to receive the mortgagor's loan repayments and thus the non-payment of the loans does not affect MERS even minimally. *Id.*

328. *See supra* note 318 and accompanying text (stating how the plaintiff as the legal holder of the indebtedness, a pledgee, an agent, or a trustee may file a foreclosure suit even though the plaintiff might not have "some injury to a legally cognizable interest").

329. Mortg. Elec. Registration Sys., Inc. v. Barnes, 940 N.E.2d 118, 120 (Ill. App. Ct. 2010); 735 ILL. COMP. STAT. ANN. 5/15–1504(a)(3)(N) (West 2011).

330. 735 ILL. COMP. STAT. ANN. 5/15–1504(a)(3)(N).

331. *Barnes*, 940 N.E.2d at 120. (citing Kazunas v. Wright, 4 N.E.2d 118, 120 (Ill. App. Ct. 1936)).

332. *See* Residential Funding Co., LLC v. Saurman, No. 290248, 2011 Mich. App. LEXIS 719, at *11 (Apr. 21, 2011), *cert. granted*, 803 N.W.2d 693 (Mich. 2011) (stating that MERS' interest in the mortgage represents, at most, an interest in the mortgagor's property and given that notes and mortgage contracts are separate documents, evidencing separate obligations and separate interests, MERS' interest in the mortgage contract does not give it an interest in the debt).

333. *Barnes*, 940 N.E.2d at 124.

334. *See Barnes*, 940 N.E.2d at 120. (citing Kazunas, 4 N.E.2d at 120 (Ill. App. Ct. 1936)) (stating that MERS brought suit as the legal holder of the indebtedness).

335. BLACK'S LAW DICTIONARY 1272 (9th ed. 2009).

336. *See supra* Part I.B (describing how MERS operates).

property.[337] Therefore, MERS could not bring a foreclosure suit as a pledgee.[338]

Secondly, the assignee of a mortgage and the indebtedness secured by the mortgage ordinarily has the right to foreclose, even if the transfer took place after the default of the mortgagor.[339] However, assignment of the note, and thus ownership of the indebtedness, is a prerequisite to bring a foreclosure suit.[340] Since MERS was not assigned the note to accompany its legal title holding of the mortgage instrument, MERS would not have been entitled to foreclose as an assignee under section 15-503(a)(3)(N) of the IMFL.[341]

Lastly, in accordance with the provisions of a trust deed, the trustee, or the legal owner or holder of the indebtedness secured by the trust, may be entitled to foreclose the trust deed.[342] MERS, however, is strictly an electronic registry of property titles and as such does not enter into formal trust agreements as a trustee.[343] If MERS, as a corporation, formally created a trust, naming itself as the trustee and the indebtedness holder as the beneficiary of the trust, MERS would be permitted to bring foreclosure suits under section 15-503(a)(3)(N) of the IMFL.[344] However, as MERS operates—by erroneously bringing suit

337. See MERSINC.ORG – About, *supra* note 6 (stating that "MERS was created by the mortgage banking industry to streamline the mortgage process by using electronic commerce to eliminate paper."

338. *See supra* notes 335-337 (describing why MERS does not qualify as a pledgee for the purposes of bringing foreclosure under 735 ILL. COMP. STAT. ANN. 5/15–1504(a)(3)(N) (West 2011)).

339. *See* 27A ILL. LAW AND PRAC. *Mortgages* § 193 (2003) (describing the foreclosure rights of an assignee or transferee of mortgage and secured debt).

340. *See* Part III.B.1.a-d, *supra* (demonstrating that ownership of the indebtedness, regardless of the capacity in which you bring the foreclosure, is a prerequisite to bring the foreclosure).

341. Compare Part III.B.1.a-d, *supra* (stating that ownership of the indebtedness is a prerequisite to bring a foreclosure) with *Barnes*, 940 N.E.2d at 120 (MERS did not have ownership of the indebtedness).

342. *See* 27A ILL. LAW AND PRAC. *Mortgages* § 194 (2003) (citing Witting v. Claras, 274 Ill. App. 449, 451-52 (1934) (holding that a bank's trust officer who was in possession of notes secured by a trust deed for the purpose of bringing a foreclosure was a permissible party to bring foreclosure proceedings despite that the trust officer did not know who the beneficiaries of the trust were and against the contention that he had no beneficial interest in, nor was he the legal holder of, the notes)); *see also* 735 ILL. COMP. STAT. ANN. 5/15–1504(a)(3)(N) (stating specifically that a trustee may bring a foreclosure suit).

343. *See supra* Part I.B (giving an overview of how MERS operates); *see also* MERSINC.ORG – FAQ, *supra* note 17 (stating *specifically* that MERS does not replace the role of the trustee in deed of trust states and instead, "[s]ervicers perform substitution of trustee and satisfactions just as they do without MERS except that they prepare these documents via a Corporate Resolution from MERS since MERS is the Mortgagee of Record").

344. 735 ILL. COMP. STAT. ANN. 5/15–1504(a)(3)(N) (West 2011) (stating that a trustee on behalf of a trust is one of the capacities by which a party can bring a foreclosure suit).

as the holder of the indebtedness, like in *Barnes*[345]—MERS is not permitted to bring a foreclosure action under section 15-503(a)(3)(N) of the IMFL as a trustee under a trust.[346]

3. Rights to Bring Foreclosure as Mortgagee in Illinois

The *Barnes* court further held that the mortgage signed by the parties indicated that MERS was the mortgagee, and MERS satisfied the statutory definition of a mortgagee, which states that "'Mortgagee' means (i) the holder of an indebtedness or obligee of a non-monetary obligation secured by a mortgage or any person designated or authorized to act on behalf of such holder," thereby going beyond just note holders.[347]

In *Barnes*, MERS was neither the "holder of an indebtedness," nor, "designated or authorized to act on behalf of the holder," of the indebtedness.[348] While MERS brought suit as the legal holder of the indebtedness, MERS only holds, at most, an interest in the property it claims to legally own as security for the note.[349] MERS could not attempt to enforce the note nor could it obtain any payment on the loans on its own behalf or on behalf of the lender.[350] Given that notes and mortgage contracts are separate documents, evidencing separate obligations and separate interests, MERS' interest in the mortgage did not give it an interest in the indebtedness.[351]

Further, the relevant clause the *Barnes* court cites to permit foreclosure states that:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise

345. *See, e.g.*, *Barnes*, 940 N.E.2d at 120 (MERS brought suit as the legal holder of the indebtedness even though it did not hold title to the indebtedness).

346. *See, e.g.*, *Barnes*, 940 N.E.2d at 120 (MERS brought suit as the legal holder of the indebtedness and not as a trustee under a trust deed).

347. *Barnes*, 940 N.E.2d at 120; 735 ILL. COMP. STAT. ANN. 5/15–1208.

348. *See* 735 ILL. COMP. STAT. ANN. 5/15–1208 (stating that, under the IMFL, "'Mortgagee' means (i) the holder of an indebtedness . . . or any person designated or authorized to act on behalf of such holder").

349. *See* Residential Funding Co., LLC v. Saurman, No. 290248, 2011 Mich. App. LEXIS 719, at *11 (Apr. 21, 2011), *cert. granted*, 803 N.W.2d 693 (Mich. 2011) (stating that since MERS only has a legal title to the mortgage contract but no legal title to the indebtedness, MERS owns, at most an interest in the property).

350. *See id.* (stating that, because MERS owns, at most, an interest in the property, but not an interest in the indebtedness, MERS cannot enforce the note).

351. *See id.* and accompanying parenthetical.

> any or all of those interests, including, but not limited to, the right to foreclose and sell a Property.[352]

The *Barnes* court misreads this clause to allow foreclosure, however.[353] Because the above section that was appended to the mortgage contract is complexly written with many clauses and circuitous references to previous statements, a mechanical break down of the section is helpful. The section begins by stating that the Borrower understand and agrees that MERS holds only legal title to the interests granted by the Borrower under this Security Instrument.[354] It continues by stating that, if necessary to comply with laws or customs, however, MERS, as nominee for the Lender, has the right to exercise the legal title interests granted by the Borrower under this Security Instrument, including the right to foreclose.[355] The *Barnes* court understands this section to mean that the ability to foreclose is included in the rights given to MERS to comply with law or custom.[356] The court skips an important step though: the right to foreclose is not included in the ownership of merely the legal title in property interests.[357] Even if this section conveys to MERS the right as nominee to exercise the interests it possesses, namely an interest in property, an interest in property is insufficient to bring a foreclosure action.[358] One must have an interest in the indebtedness or be authorized to act by the holder of the indebtedness.[359] This section does not state that the indebtedness holder is authorizing MERS to foreclose; instead, it states that MERS is permitted to exercise the rights accompanying ownership

352. *Barnes*, 940 N.E.2d at 120.

353. *See infra* notes 354-364 (explaining why the *Barnes* court misread the clause appended to the mortgage contract and wrongfully concluded that the right to foreclose is included in the ownership of merely the legal title in property interests).

354. *Barnes*, 940 N.E.2d at 120.

355. *Id.*

356. See *Barnes*, 940 N.E.2d at 124 (stating that under the appended terms of the mortgage contract stating that "'[i]f necessary to comply with law or custom,' MERS had the right to exercise any or all of the interests granted by the borrower in the mortgage, 'including, but not limited to, the right to foreclose and sell [the] property'" and thus holding that the parties agreed that MERS could bring foreclosure suits in its own name).

357. *See* Schifferstein v. Allison, 15 N.E. 275, 276 (Ill. 1888) (A mortgage (or deed of trust) confers upon the holder of the debt secured by the mortage, but not the holder of the mortgage itself, the right to resort to the property described for its payment; thus, it is impossible for a potential plaintiff to bring a foreclosure action while holding only legal title). Further, notes and mortgage contracts are separate financial instruments; an interest in a mortgage contract does not also convey an interest in the indebtedness secured by the mortgage contract. Residential Funding Co., LLC v. Saurman, No. 290248, 2011 Mich. App. LEXIS 719, at *11 (Apr. 21, 2011), *cert. granted*, 803 N.W.2d 693 (Mich. 2011).

358. *See id.* and accompanying parenthetical.

359. *See* Part III.B.1.a-d, *supra* (demonstrating that ownership of the indebtedness is a prerequisite to bring the foreclosure).

of legal title in the property.[360] The "including" language, suggests that the right to foreclose is found in ownership of legal title.[361] Had the contract stated that the right to foreclose was "in addition to" the rights conferred by legal title, this foreclosure provision would be a supplementary right to the rights accompanying ownership of legal title.[362] Because foreclosure is not a right that accompanies ownership of legal title in the property—there must be more, namely legal standing, or some other congressional allowance[363]—this contract language is insufficient to permit MERS to bring a foreclosure suit.[364]

IV. PROPOSAL

MERS purports to hold legal title to mortgages on more than sixty million residential homes[365] and growing[366] across the nation. As the

360. See supra notes 354-357 (explaining how the *Barnes* court misunderstood the language appended to the mortgage contract which the court assumed gave MERS the right to foreclose, when it instead only gave MERS the rights inherent legal title ownership of the mortgage contract).

361. *See* People v. Perry, 864 N.E.2d 196, 207-08 (Ill. 2007) (explaining Illinois' conception of "including" language). Although *Perry* is a criminal case and involved statutory language interpretation, the merit of its analysis lies in the court's explanation about what language using the word "including" entails. *Id.* Following a debate between parties about what the word "includes" means in a statutory scheme, the Illinois Supreme Court held that, unless a statute prescribes an ulterior meaning, the word "including" when followed by a listing of items, means that the preceding general term is to be construed as a general description of the listed items and other similar items. *Id.* In *Barnes*, there was no statute defining the word "including." *See generally* Mortg. Elec. Registration Sys., Inc. v. Barnes, 940 N.E.2d 118, 118 (Ill. App. Ct. 2010). However, applying the court's interpretation of the word "including" to *Barnes*, the term preceding the word "including"—any or all of the interests encompassed in possessing legal title—is construed to be a general description of the listed items—namely, the right to foreclose and sell a property. Compare *Perry*, 864 N.E.2d at 207-08 (explaining the interpretation of the word "including"), with *Barnes*, 940 N.E.2d at 120 (citing the language of the mortgage contract which the court construed to give MERS the right to foreclose).

362. *See Perry*, 864 N.E.2d at 207-08 (construing the word "including" to be non-restrictive, but rather illustrative of all members of a group, the contract language "in addition to" would place a right which one sought to convey outside of the representative group; thus the words "in addition to" make a right specifically not included in a representative group, and instead a right which supplements the group).

363. *See supra* Parts IV.B.2.a-b (describing how legal standing or permissive statutory language are the only ways to bring a foreclosure suit).

364. Compare *supra* Parts IV.B.2.a-b (describing how legal standing or permissive statutory language are the only ways to bring a foreclosure suit in Illinois) with *Barnes*, 940 N.E.2d at 120 (citing contract language which does not meet the requirements of either legal standing or one of the plaintiff-characterizations approved by Illinois law to bring a foreclosure suit. 735 ILL. COMP. STAT. ANN. 5/15–1504(a)(3)(N) (West 2011).).

365. *See, e.g.*, *Mortgage Electronic Registration Systems (MERS)*, *supra* note 3 (stating that MERS holds legal title in county property records to sixty million homes); Peterson, *supra* note 3 (stating that MERS holds legal title in excess of all homes across the nation).

366. *See* MERSINC.ORG – About, *supra* note 6 (proclaiming that, "Our mission is to register every mortgage loan in the United States on the MERS System.").

number of foreclosures after the 2007 and 2008 financial crisis has hit record highs,[367] fundamentally affecting so many,[368] attention to MERS' role in bringing foreclosures has surprisingly remained outside of the public sphere.[369] Further, given the concurrent growth in those county records that specify MERS as a mortgagee and the number of homes being foreclosed upon,[370] the probability is significant that another case very similar to or the same as *Barnes* is pending in a trial court, or will be soon. As such, the flawed *Barnes* holding that MERS had standing to foreclose must be reconsidered because of its very real and temporal effect for homeowners in Illinois.

This Section begins by placing the *Barnes* decision amongst the broader nationwide debate and considers why a change in the interpretation of Illinois statutes in this context would be beneficial.[371]

367. *See* Dina ElBoghdady & Nancy Trejos, *Foreclosure Rate Hits Historic High*, THE WASHINGTON POST, June 15, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/06/14/AR2007061400513.html (stating that, according to the Mortgage Bankers Association, the percentage of U.S. mortgages entering foreclosure in the first three months of 2007 was the highest in more than 50 years).

368. The cultural, practical and financial epitome of the American dream—homeownership—has suffered greatly recently. *See* Mortimer B. Zuckerman, *The American Dream of Home Ownership Has Become a Nightmare*, U.S. News, Sept. 23, 2010, http://www.usnews.com/opinion/mzuckerman/articles/2010/09/23/the-american-dream-of-home-ownership-has-become-a-nightmare ("Culturally a decent house has been a symbol of middle-class family life. Practically, it has been a secure shelter for the children, along with access to a good free education. Financially it has been regarded as a safe store of value, a shield against the vagaries of the economy, and a long-term retirement asset. Indeed, for decades, a house has been the largest asset on the balance sheet of the average American family."); *Census: American Dream of Homeownership May Be Gone for Good*, AOL REAL ESTATE, Oct. 7, 2011, http://realestate.aol.com/blog/2011/10/07/census-american-dream-of-home-ownership-may-be-gone-for-good ("The analysis by the Census Bureau found the homeownership rate fell to 65.1 percent last year. While that level remains the second highest decennial rate, analysts say the U.S. may never return to its mid-decade housing boom peak in which nearly 70 percent of occupied households were owned by their residents."); SNOB SCRILLA, *There You Go Again*, *on* DAY BEFORE (Phantom Sound & Vision 2008) (a play on the established theme of the American dream, the lyrics state that although the woman the artist is dating "wants one thing from [his] life: that's a white picket fence, two and a half kids, and a wife," the artist claims that such a "dream" life is not for him).

369. *See* Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1390 (2009) ("One of the puzzling, and arguably suspicious, ironies behind MERS's business model is the combination of its remarkable breadth in market share with translucent depth in market participation.").

370. Compare McIntire, *supra* note 5 (stating that, in 2009, MERS holds legal title to sixty million mortgage contracts in the United States), with Dennis, *supra* note 5 (stating that, in 2011, MERS' "controversial registry contains roughly 65 million mortgages"). *See also* MERSINC.ORG – ABOUT, *supra* note 6 (stating that MERS' mission is to register every mortgage loan in the United States on the MERS system; MERSINC.ORG – ORIGINAL MORTGAGEE, *supra* note 49 (MERS holds legal title to the sixty million mortgages and has a process by which it can be named as the original mortgagee on all new forthcoming mortgage contracts).

371. *See infra* Part IV.A (placing the *Barnes* decision amongst the broader nationwide MERS

The benefits of identifying the difference between notes and mortgage contracts will then be discussed.[372] Lastly, and perhaps most importantly, the costs and benefits of a reversal of the *Barnes* decision will be considered, particularly with respect to the effects on homeowners, the foreclosure process, and the court system.[373]

A. Barnes *and the Broader Debate*

Understanding the debate surrounding MERS' role in foreclosures requires evaluating and classifying the plethora of decisions in which MERS is a party to the litigation.[374] In fact, there are so many court cases in which MERS is a party, or at least affect MERS, that MERS publishes both a cumulative Quarterly Case Law Outline and a monthly Litigation Digest newsletter detailing recent decisions that affect the company.[375] Parsing through this ream of litigation reveals three primary categories of cases with respect to this Comment: first, there are cases which support MERS' right to bring foreclosures actions;[376] second, there are cases which forbid MERS from bringing foreclosure actions;[377] and third, there are cases involving MERS in ways not relevant to this discussion.[378] The third category will not be discussed

foreclose debate and considering why a change in the interpretation of Illinois statutes in this context would be beneficial).

372. *See infra* Part IV.B (highlighting the benefits of identifying the difference between notes and mortgage contracts).

373. *See infra* Part IV.C (highlighting the costs and benefits of a reversal of the *Barnes* decision particularly with respect to the effects on the foreclosure process, homeowners, MERS and the principle of legal formality).

374. *See infra* note 375 and accompany text.

375. MERS – DOWNLOADS – CASE LAW OUTLINES, http://www.mersinc.org/downloads/index.aspx?id=21 (last visited Oct. 24, 2011) [hereinafter CASE LAW OUTLINES]; MERS – DOWNLOADS – MERSCORP/MERS LITIGATION DIGEST, http://www.mersinc.org/downloads/index.aspx?id=20 (last visited Oct. 24, 2011) [hereinafter LITIGATION DIGEST]. The most recent Quarterly Case Law Outline covers court decisions across all fifty states and is one hundred and thirty nine pages long in PDF form. CASE LAW OUTLINES, *supra*. The most recent available Litigation Digest (August 2011) contains summaries of decisions from fourteen different states including six in Michigan, four in California, three in Oregon, and one in Illinois. LITIGATION DIGEST, *supra*. While advertising the extent to which one's services are litigation inducing may seem to be a poor technique to garner business, MERS claims to provide these services in order to offer guidance to their members about the "foreclosure of a MERS mortgage and other legal issues that may arise during the foreclosure process." MERS – FORECLOSURES, http://www.mersinc.org/Foreclosures/index.aspx (last visited Oct. 24, 2011).

376. CASE LAW OUTLINES, *supra* note 375; LITIGATION DIGEST, *supra* note 375. For examples, see *infra* notes 380 and 382.

377. CASE LAW OUTLINES, *supra* note 375; LITIGATION DIGEST, *supra* note 375. For examples, see *infra* notes 383.

378. CASE LAW OUTLINES, *supra* note 375; LITIGATION DIGEST, *supra* note 375. *See, e.g.*, Cervantes v. Countrywide Home Loans, Inc., —- F.3d ——, *5 (9th Cir. 2011) (in which the

because it is not important to the issue of foreclosure; however, it should be recognized MERS faces additional legal challenges to its business practices.[379]

Courts have upheld MERS' right to foreclose for a host of very different reasons. The Third District Court of Appeals in Florida held that deficiencies in the "mere form" of standing should not negatively affect a commercially effective means of business, and further stated that the problem other courts have with disallowing MERS to bring foreclosure actions arise "from the difficulty of attempting to shoehorn a modern innovative instrument of commerce into nomenclature and legal categories which stem essentially from the medieval English land law."[380] New York's appellate court, the New York Supreme Court, Appellate Division,[381] recently held in *Mortgage Electronic Registration Systems, Inc. v. Coakley* that MERS has standing to bring a foreclosure action when, at the time of the commencement of the action, the promissory note had been transferred to MERS, thereby making MERS the lawful holder of the note and of the mortgage contract.[382] Conversely, decisions holding that MERS does not have standing to foreclosure generally share the reasoning that (disregarding the wording differences between specific states' conceptions of standing) MERS has not suffered an injury from the homeowner's failure to make payments on the loan secured by the MERS mortgage.[383] A reversal of *Barnes*

court held that the mere use of MERS was not common law fraud on the borrowers after finding that the "[p]laintiffs have failed to allege what effect, if any, listing the MERS system as a 'sham' beneficiary on the deed of trust had upon their obligations as borrowers"); Sakugawa v. Mortg. Elec. Regis. Sys., Inc., No. 10-00028, 2011 U.S. Dist. WL 776051, at *3-5 (D. Haw. Feb. 25, 2011) (the court granted summary judgment in favor of MERS regarding the plaintiff-homeowner's claims for fraud and state law violations regarding loan origination. The court found that MERS was not involved in the loan origination process and had no contact with the plaintiff regarding the transaction; therefore, that there was "no basis to find that MERS committed any fraudulent, unfair or deceptive acts regarding the loan consummation"). For a cumulative list of cases affecting MERS in 2011, see CASE LAW OUTLINES, *supra* note 375.

379. *See supra* note 378 and accompanying text.

380. Mortg. Elec. Registration Sys., Inc. v. Revoredo, 955 So. 2d 33, 33-34 (Fla. Dist. Ct. App. 2011) (holding that MERS' electronic registration system does not affect any substantive rights, obligations or defenses and that there is no reason why "mere form should overcome the salutary substance of permitting the use of this commercially effective means of business").

381. *See* The New York Supreme Court is the appellate level court in the State of New York, while the New York Court of Appeals is the state's highest court. NEW YORK STATE COURT OF APPEALS, http://www.courts.state.ny.us/CTAPPS/ (last visited Nov. 7, 2011) (stating that the Court of Appeals is New York State's highest court).

382. 838 N.Y.S.2d 622, 623 (2011).

383. *See, e.g.*, Mortg. Elec. Registration Sys., Inc. v. Graham, No. 101,848, slip op. at *11-12 (Kan. Ct. App. Apr. 30, 2010) (holding that MERS, as nominee for the mortgagee, did not suffer an injury as a result of homeowners' failure to make payments or pay their promissory note; thus, MERS did not have standing to bring a foreclosure action); Mortg. Elec. Registration Sys., Inc. v.

would not only be proper considering the case law,[384] but it would also aid national coherency and understanding of the MERS foreclosure process by adding support to the large body of states which dictate that, except for state statutes that particularly provide otherwise, standing to bring a foreclosure requires an interest in the indebtedness.[385]

B. The Difference Between a Note and a Mortgage Contract

Colloquially, residential home loan notes and mortgage contracts are referred to as one combined entity; hence, people discuss a coworker's inability to "pay his mortgage" or the quintessential American family with a white picket fence, two and a half kids, a wife[386] and a "mortgage."[387] While perhaps unimportant in the pop culture sense, this malapropism of crucial terms is evident in court proceedings as well[388] and has greatly affected the regular disposition of real estate at

Chong, No. 2:09-CV-00661-KJD-LRL, 2009 WL 6524286, at *3 (D. Nev. Dec. 4, 2009) (holding that "MERS provided no evidence that it was the agent or nominee for the current owner of the beneficial interest in the note" and thus "it has failed to meet its burden of establishing that it is a real party in interest with standing").

384. *See supra* Part III.B.1-3 (delineating the arguments for a reversal of *Barnes* by rebutting the *Barnes* court's reasoning).

385. *See, e.g.*, *Coakley*, 838 N.Y.S.2d at 623 (MERS has standing to bring a foreclosure action when, at the time of the commencement of the action, the promissory note had been transferred to MERS, thereby making MERS the lawful holder of the note and of the mortgage contract); *Graham*, No. 101,848, at *11-12 (Kan. Ct. App.) (holding that MERS, as nominee for the mortgagee, did not suffer an injury as a result of homeowners' failure to make payments or pay their promissory note; thus, MERS did not have standing to bring a foreclosure action); *Chong*, 2009 WL 6524286, at *3 (holding that "MERS provided no evidence that it was the agent or nominee for the current owner of the beneficial interest in the note" and thus "it has failed to meet its burden of establishing that it is a real party in interest with standing").

386. *See* SNOB SCRILLA, *supra* note 368, and accompanying parenthetical (stating that a white picket fence, two and a half kids, and a wife are part of the American dream).

387. *See, e.g.*, Sandra Block, More Parents Finance Their Kids' Mortgage, USA TODAY, Oct. 5, 2010, http://www.usatoday.com/money/perfi/housing/story/2011-10-04/mom-and-pop-mortgages/50662308/1 (stating, for example, that a couple that wanted to buy a house had trouble because "the lowest *mortgage rate* they could find was 9%" and that one of the couples' parents who was retired, "financed his $75,000 *mortgage* at a 6% rate") (emphasis added). The author meant that the lowest *loan* interest rate was nine-percent, and that the parents offered to finance their son's *loan* at a six-percent rate of interest. Compare ST. LOUIS FED PRIMER, *supra* note 1, at 32 (stating that a residential home loan note is essentially a promise by the borrower to repay their loan plus interest, and a mortgage contract is a security instrument contingent on the failure of the mortgagor to repay their loan), with Block, *supra* (use of the term mortgage to describe financing arrangements, including an interest rate). *See also* Viral V. Acharya, *White Picket Fence? Not So Fast*, N.Y. TIMES, Aug. 16, 2011, http://www.nytimes.com/2011/08/17/opinion/why-we-should-end-homeownership-subsidies.html (stating that, as evidence of the notion that Americans love the idea of a house and a white picket fence, the government encourages ownership through housing subsidies, believing that it stabilizes communities).

388. *See, e.g.*, *supra* notes 224-227 and accompanying text (stating how, in Michigan, prior to the *Richard* and *Saurman* decisions, residential home loans and mortgage contracts, with respect to foreclosure, were treated as indispensable from one another; that is, it was rarely conceived that

foreclosures.[389]

It is important to remedy these discrepancies as soon as possible and a reversal of *Barnes* would effectuate that. Prior to the securitization of mortgages, it was the rule that an assignment of the note carried with is an assignment of the mortgage contract.[390] Post-securitization, these financial instruments have been separated and sold at a fast rate[391] and the rights to each ownership interest confounded.[392] It is unlikely that those who created MERS[393] envisioned the current nomenclature problem with MERS' standing to bring foreclosures.[394] A major difficulty with contingency planning is that the problems that really need to be considered are not apparent until they happen.[395] Law makers and the courts that uphold those laws may now attempt to prevent the recurrence of these unforeseen problems.

A better solution, though, is to clear up logical discrepancies so that a clean answer is apparent when some inevitable and un-planned for problem occurs. An Illinois holding that acknowledges the inherent differences between a loan note and a mortgage contract would help fix the current MERS foreclosure quandary by providing for a more regular

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the legal holder of the mortgage in a foreclosure was a different entity from the indebtedness holder). This was important because whether a new principle of law was being established, as opposed to whether the decision just vindicated existing legal authority, affected the retroactivity of the decision. Richard v. Schneiderman & Sherman, P.C., No. 297353, 2011 Mich. App. LEXIS 1522 at *4-5 (Aug. 25, 2011).

389. *See supra* note 20 and accompanying text (describing how some courts and justices have stayed court proceedings because of the devastating repercussions of deciding a case one way, and advocating for the parties to appeal in order to settle the question with finality).

390. A basic tenet of property law is that "the mortgage follows the note." Carpenter v. Longan, 83 U.S. 271, 274 (1872) ("t]he note and mortgage are inseparable; the former as essential, the latter as an incident . . . . [a]n assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity").

391. *See supra* note 15 (demonstrating the ease and speed by which securitized packages of mortgages can be transferred from one investor to another).

392. *See, e.g.*, Residential Funding Co., LLC v. Saurman, No. 290248, 2011 Mich. App. LEXIS 719, at *9 (Apr. 21, 2011), *cert. granted*, 803 N.W.2d 693 (Mich. 2011) (stating that MERS initiated a non-judicial foreclosure by advertisement when it was not the indebtedness holder); Richard v. Schneiderman & Sherman, P.C., No. 297353, 2011 Mich. App. LEXIS 1522 at *4-5 (Aug. 25, 2011) (stating that MERS initiated a non-judicial foreclosure by advertisement when it was not the indebtedness holder); Mortg. Elec. Registration Sys., Inc. v. Barnes, 940 N.E.2d 118, 120 (MERS brought a foreclosure suit as the holder of the indebtedness when it was not).

393. *See supra* note 16 (describing the process by which MERS was conceived).

394. *See supra* note 17 (describing the cost savings and time management rationales behind the creation of MERS).

395. *See, e.g.*, *Preparing Unknown Problems in Contingency Planning*, NEW BUSINESS IDEAS AND CONCEPTS (Mar. 27, 2011), http://www.newbornrodeo.com/2011/03/preparing-unknown-problems-contingency-planning.html (stating that one cannot plan for every single possibility—only the major things likely to happen)

disposition of property: clear recognition that each financial instrument evidences separate obligations and separate interests would expedite the court's conclusion that MERS' interest in the mortgage does not give it an interest in the debt.[396] An unobstructed theory of the difference between the two financial instruments would also permit an easier resolution for unseen problems in the future because the clarification of the rights and interests implicit in each instrument will have been established.[397]

C. Reversing Barnes*: Legal Coherency and Protection for Homeowners*

MERS routinely brings foreclosure actions in Illinois; a future decision by an Illinois court overruling *Barnes* and holding that MERS does not have standing to bring foreclosure when it does not hold the indebtedness would cause minimal substantive changes or costs to the judicial foreclosure process. The foreclosure process would not change; the IMFL statutes would not change either. Instead, the judiciary would merely be applying the same statutes with a new interpretation of what it means to be an indebtedness holder. On the other hand, the benefits of coherency to the judicial system and protection of homeowners

396. A bottleneck effect occurs when judicial system resources are inadequate to deal with the influx of filed claims. *See* DONALD RUTHERFORD, DICTIONARY OF ECONOMICS 45, (1992) (defining a bottleneck as the effective constraint on the maximum speed or level of an activity; the use of the term in economics is a physical analogy to the maximum rate at which a liquid can be poured through the neck of a bottle). Two possible actions can aid in more even flow: either lessening the flow, or widening the neck. *Id.* Lessening the flow would mean curbing permissible claims; this is unlikely because it would result in meritorious claims being denied for purposes of efficient judicial management. *See id.* (applying the principles of an economic or transportation bottleneck to the facts of judicial case management). Widening the judicial system's neck involves either providing more resources to manage the constant or growing influx of cases, or involves simplifying the process by which cases are adjudicated, thereby allocating fewer resources to any particular case. *See id.* and accompanying parenthetical. Reallocating an increased amount of state resources from already thinly stretched state budgets to an overworked judiciary is an unlikely and economically deficient scenario. *See, e.g.*, Andrew Cohen, *At State Courts, Budgets are Tight and Lives Are in Limbo*, THE ATLANTIC, Sept. 23, 2011, http://www.theatlantic.com/national/archive/2011/09/at-state-courts-budgets-are-tight-and-lives-are-in-limbo/245558/# (concluding that slashed funding and judicial layoffs have left too many Americans waiting for their cases to be heard). The most efficient scenario would be to simplify the process by which MERS foreclosure claims are brought. *See* RUTHERFORD at 45 (applying the principles of an economic or transportation bottleneck to the facts of judicial case management). This would result in legal coherency and judicial efficacy. *See id.* and accompanying parenthetical. Thus, simplifying the foreclosure process by drawing a clear distinction between the rights inherent in loan notes and mortgage contracts would allow courts to utilize improved case management without allowing meritorious claims to suffer. *Id.*

397. *See supra* note 396 (applying the bottleneck effect theory of judicial management to unforeseen future legal challenges).

would be vast.[398]

The several Illinois court holdings behind the proposition that "a plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person"[399] fail to consider that the proposition is only true if the plaintiff is also the legal holder of the indebtedness.[400] An opinion contrary to *Barnes* and supporting the misquoted precedent which *Barnes* cites would disallow MERS from bringing a foreclosure suit when it is not the holder of the indebtedness. Thereafter, any party bringing foreclosure would be required to own the right to the indebtedness and a property interest in the mortgage contract. To comply, MERS would either have to convey the legal title back to the holder of the note, or, alternatively, the note holder could convey their indebtedness interest to MERS.[401] This extra step would have two main advantages. First, whether MERS or the original note holder brings the suit, that party would be the correct party to the foreclosure because either party would be the note holder.[402] Bringing the foreclosure suit in proper legal form would eliminate unnecessary and costly trials and resulting appeals, especially considering that most foreclosures go uncontested or are easily dispensed through summary judgment.[403] Second, the change would improve homeowner protection because the extra conveyance would put a halt to robotic real estate transactions that were so prevalent prior to, and arguably the cause of, the real estate bubble and resulting crisis.[404]

398. *See infra* notes 399-404 (describing how the benefits of overruling *Barnes* by holding that an interest in the indebtedness is required to bring a foreclosure suit would benefit judicial system coherency and homeowner protection policy).

399. Mortg. Elec. Registration Sys., Inc. v. Barnes, 940 N.E.2d 118, 118 (Ill. App. Ct. 2010) (citing Kazunas v. Wright, 4 N.E.2d 118, 120 (Ill. App. Ct. 1936)).

400. *See supra* Part III.B.1 (explaining that the quoted proposition is too broad and only applies when the plaintiff is also the holder of the indebtedness).

401. For an example of one case in which the promissory note holder conveyed the note to MERS, which already held legal title as mortgagee of record, see Mortgage Electronic Registration Systems v. Coakley, 838 N.Y.S.2d 622, 623 (2011). The New York Supreme Court held that MERS, having ownership of both financial instruments, had standing to foreclose. *Id.* at 623.

402. If MERS chose to not to pursue one of those avenues, it could alternatively receive a formal assignment of the note from the note holder, or construct a trust naming MERS as a trustee on behalf of the note holder. *See* Part III.B.2.b (discussing whether MERS could alternative bring a foreclosure suit as an assignee or trustee under a trust deed). Since a a pledge is a creditor with whom a debtor makes a bailment or deposit of personal property to secure repayment for a debt, and MERS only deals in real estate, MERS could not bring a foreclosure suit as a pledgee. BLACK'S LAW DICTIONARY 1272 (9th ed. 2009).

403. *See supra* notes 135-136 (stating that few foreclosures are fully tried because factual disputes often do not arise during initial pleadings; as such, courts have recognized that mortgage foreclosures are particularly well suited for summary judgment).

404. *See, e.g.*, *"Robo-signing" of Mortgages Still a Problem*, CBS NEWS, July 18, 2011,

MERS would undeniably be more burdened if required to undertake these extra steps.[405] However, it is superficial and simplistic to consider the use of MERS as "mere form," contrary to what some courts have concluded.[406] Formality is important on two primary levels. First, it sets up a sieve to avoid an overflow of unwarranted claims, thereby allowing only those with merit to reach the court steps and to do so in an orderly fashion.[407] Second, formality creates a strict set of rules for the expeditious and fair processing of those meritorious claims.[408] If

http://www.cbsnews.com/stories/2011/07/18/national/main20080533.shtml ("robo-signing" —a portmanteau of the words "robot" and "signing" —is the occurrence of mortgage industry employees signing documents they haven't read or using fake signatures to sign documents in order to speed up the mortgage origination process, thereby generating additional fees for the originator; this report states that "robo-signing" is still a rampant problem even after large banks and mortgage companies vowed to crack down on the pricess). Dory Rand, *Special Care Needed in Robo-signing Settlement*, HOUSINGWIRE.COM, (Sept 7th, 2011, 11:02AM) http://www.housingwire.com/2011/09/07/special-care-needed-in-robo-signing-settlement (stating that struggling Illinois homeowners "would clearly benefit from the modest gains in equity, affordable payments, and local housing market stabilization that effective servicer oversight" could provide).

405. MERS was designed to eliminate paper work and streamline real estate finance transactions. *See supra* notes 16-17 (explaining the purpose behind the creation of MERS). An extra paper conveyance for each of over a hundred thousand expected loans in default would be costly and burdensome. Compare Dennis, *supra* note 5 (stating that MERS holds legal title to sixty five million mortgage contracts), with *National Foreclosure Rate on the Rise in August, But Down 1/3 Since 2010*, NATIONAL MORTGAGE PROFESSIONAL (Sept. 15, 2011, 12:36 PM), http://nationalmortgageprofessional.com/news26586/national-foreclosure-rate-rise-august (reporting that RealtyTrac's U.S. Foreclosure Market Report for August 2011 showed that one in every 570 housing units would suffer a foreclosure filing in August 2011).

406. Mortg. Elec. Registration Sys., Inc. v. Revoredo, 955 So. 2d 33, 33-34 (Fla. Dist. Ct. App. 2011) (holding that MERS' electronic registration system does not affect any substantive rights, obligations or defenses and that there is no reason why "mere form should overcome the salutary substance of permitting the use of this commercially effective means of business").

407. One of the reasons that the Federal Rules of Civil Procedure, and similarly, the Illinois Rules of Civil Procedure, have been established is so potential plaintiffs can prepare their claims prior to filing them, thus allowing for a streamlined and fair adjudication on the merits. *See, e.g.*, 28 U.S.C. § 1331, 1332 (2006) (describing the jurisdictional prerequisites to file a federal claim). By dictating the rules and regulations before the start of a trial, courts seek to permit those claims that are prepared and have meritorious arguments to continue to the detriment of those claimants that are not ready or have claims not suited for disposition by that particular court. *Id.*

408. *See generally, e.g.*, ARTHUR L. STINCHCOMBE, WHEN FORMALITY WORKS: AUTHORITY AND ABSTRACTION IN LAW AND ORGANIZATIONS (2001) (stating, on a theoretical level, that when a plan is designed to correct itself and keep up with the reality it is meant to govern, it can be remarkably successful). Applying this to the instant case, a more modern interpretation of the previously disregarded difference between the rights inherent in loan notes and mortgages can be successful in managing judicial foreclosures. *Id. See also* Duncan Kennedy, *Legal Formality*, J. LEGAL STUD. 351, 358-59 (1973) (stating that legal formality is a characteristic of any legal system that can be described in the following way: "(a) the purpose of the system is to serve the conflicting ends of a legitimately representative lawmaker; (b) a substantively rational law-making process produces a body of rules to achieve these ends; (c) rule appliers apply the rules to cases presented to them by disputing private parties"). Further, the essence of rule application is that is it mechanical. *Id.* at 359. A mechanical set of rules for the disposition of foreclosure

the Illinois legislature wishes to accommodate MERS by specifically designating it as an entity entitled to bring foreclosure, then one cannot quibble with that decision on a due process of law basis.[409] However until that time, MERS, like all other corporations and individuals in society, must comply with existing laws.

As in Michigan, the retroactivity of the decision would affect both those wrongfully foreclosed upon by MERS, as well as the bona fide purchasers[410] of recently foreclosed upon homes.[411] There are many questions about how a change would affect those who have already been foreclosed upon and moved on with their lives. Would those former homeowners be entitled to reclaim their home? Would MERS be liable for compensatory damages, like moving expenses or origination charges, on new home loans? Further, many of the foreclosed homes have been resold to bona fide purchasers, who have taken out their own mortgages.[412] The bona fide purchasers have spent large sums of money, not only through the purchase price, but also through real estate taxes, insurance, maintenance and improvements.[413] A homeowner with a MERS foreclosure in his chain of title may find it difficult or even impossible to sell his home because of the uncertainty in the chain of title.[414]

These questions pose very serious challenges to the ability of the housing market to accommodate such a colossal mismanagement of homeownership records. Although an in-depth evaluation of the consequences to homeowners previously wrongfully foreclosed upon,

matters ensures quick and fair claims processing. *Id.*

409. *See* Kennedy, *supra* note 408, at 359 (in Kennedy's legal formality system, in order to change the outcome of the cases, the lawmaker should change the body of rules to achieve the ends desired). More concretely, if the goal is to ensure quick and fair foreclosure claims processing, but still permit MERS the ability to bring foreclosure suits, the legislature should change the body of rules to reflect the desired ends. *Id.*

410. A bona fide purchaser is one who has purchased an asset, such as a mortgage contract, for a stated value, innocent of any fact which would cast doubt on the right of the seller to have sold it in good faith. BLACK'S LAW DICTIONARY 1355 (9th ed. 2009).

411. *See supra* notes 223-227 (discussing how, depending on whether the *Saurman* ruling clearly established a new principle of law or, instead, merely vindicated controlling legal authority and how the answer to this question affect whether the case would apply to all cases pending at the time of decision or only heading forward).

412. *See* Order at 1, PB Reit, Inc. v. Debabneh, 801 N.W.2d 380 (Mich. 2011) (No. 143308) (citing an amicus brief by the Michigan Association of Realtors warning of the some of the possible negative outcomes of an affirmation of the appellate court's ruling in Residential Funding Co., LLC v. Saurman, No. 290248, 2011 Mich. App. LEXIS 719, at *9 (Apr. 21, 2011), *cert. granted*, 803 N.W.2d 693 (Mich. 2011) which stated that all non-judicial foreclosures by advertisement brought by MERS pursuant to Michigan law were void).

413. *See supra* note 412 and accompanying parenthetical.

414. *See supra* note 412 and accompanying parenthetical.

and to bona fide purchasers of those homes, is beyond the scope of this Comment, the interests of the external benefits of maintaining legal formality and those of homeowner protection trump the costs of MERS increased burden to bring a foreclosure suit and the effects on victimized homeowners and bona fide purchasers.

CONCLUSION

Misstating the difference between a loan note and a mortgage contract was less important to the outcome of a foreclosure proceeding prior to mortgage loan securitization and secondary market resale. However, the increase in the rate of securitization and the creation of MERS has caused problems in determining which party is entitled to foreclose upon a homeowner for failing to repay his residential home loan. Considering Michigan court holdings which dictate that MERS is only the legal holder of the mortgage, and thus it does not possess a right to the mortgage indebtedness, courts in Illinois should similarly acknowledge the different inherent rights in these financial instruments and conclude MERS does not have standing to bring a judicial foreclosure under the Illinois Mortgage Foreclosure Law. Such a conclusion would provide for a more regular and cost effective disposition of property at the time of foreclosure and would also allow for an easier resolution of unseen future problems. It also would contribute to the legal coherency of mortgage and foreclosure law in Illinois and would protect bona fide purchasers of homes containing MERS in the chain of title by establishing homeowner rights with finality.