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BANKS, BREAK-INS, AND BAD ACTORS IN MORTGAGE FORECLOSURE

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I. INTRODUCTION

"They had learned nothing and forgotten nothing."[1]

A number of years have passed since the housing crisis of 2007–2008, and by many accounts the overall economy is slowly but surely recovering. Unemployment is generally decreasing, employers are beginning to add new jobs, and lenders and other financial institutions are easing up their hold on credit.[2] And importantly—a mere five short

1. DAVID LAWDAY, NAPOLEON'S MASTER: A LIFE OF PRINCE TALLEYRAND (2007) (the phrase is attributed to the prince de Talleyrand, the famous foreign minister of France, who commented that despite having been violently driven from the throne on account of generations of abuse, greed, and neglect of duty, upon the restoration of the French crown to the Bourbon royal family they evidenced that they had learned nothing from the revolution, and quickly settled back into their prior despotic and corrupt ways).

2. Patrice Hill, *Jobs: U.S. Private Sector Finally Makes Up Recession's Losses*, WASH. TIMES (Apr. 4, 2014), http://www.washingtontimes.com/news/2014/apr/4/us-employers-add-192k-jobs-rate-stays-67-percent/.

years since the crisis—private sector employment levels have reached above what they were prior to the Great Recession.[3] As of this writing, the unemployment rate hovers around 6.7% (down from its one-time high of over 10%),[4] and various areas of the private sector are on the rise—including construction, healthcare, hospitality, and an array or professional business services.[5] And lastly, due to a surge in consumer spending, employers have increased their workweek by 0.2 hours.[6]

Because of this upswing in the economy, however unhurried it might be, it is tempting to push aside the abusive practices of past, mostly perpetrated by many of the nation's largest financial institutions and lenders, which brought the economy to its knees in the first place.[7] With a feeling of renaissance, revival, and optimism in the air, letting bygones be bygones seems to roll off the tongue.

Looking back to the aftermath of the crash, when the housing bubble burst and a massive wave of mortgage defaults and accompanying foreclosures swept across the United States, the national economy—so intimately tied to the housing market through the widespread trading of mortgage-backed securities—was substantially broken.[8] In an effort to deal with widespread and unprecedented foreclosures, banks began engaging in various practices in order to help speed up the foreclosure process—even when those practices included foreclosures that were either illegal or fraudulent.[9] In response to the economic crisis the federal government stepped in and passed several rounds of financial bailouts aimed at stabilizing the financial sector and stemming the ongoing damage to the economy.[10] Further, in an effort to prevent a

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3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. Joseph William Singer, *Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How to Fix Them*, 46 CONN. L. REV. 497, 500 (2013).

8. *Id.* (citations omitted).

9. Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565 (2009); Gregg H. Mosson, *Robosigning Foreclosures: How it Violates Law, Must be Stopped, and Why Mortgage Law Reform is Needed to Ensure the Certainty and Values of Real Property*, 40 W. ST. U. L. REV. 31 (2012); Tami Luhby, *Robo-Signing: Just the Start of Bigger Problems*, CNN MONEY (Oct. 22, 2010), http://money.cnn.com/2010/10/22/real_estate/foreclosure_paperwork_problems/; Christopher L. Peterson, *Predatory Structured Finance*, 28 CARDOZO L. REV. 2185 (2007); Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359 (2010).

10. *See* Robert Chote, *Financial Crisis: Someone Will Have to Dig Us Out of All This Debt*, DAILY TELEGRAPH (Oct. 8, 2008 10:57PM), http://www.telegraph.co.uk/finance/comment/3161595/Financial-Crisis-Someone-will-have-to-dig-us-out-of-all-this-debt.html; Landon Thomas & Eric Dash, *Seeking Fast Deal, JPMorgan Quintuples Bear Stearns Bid*, N. Y. TIMES (Mar. 25, 2008), http://www.nytimes.com/2008/03/25/business/25bear.html?_r=0; Joe Nocera, *Propping Up a House of*

future crash, Congress also passed comprehensive legislation known as the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act).[11] This act, among other things, amended a host of federal lending and banking statutes and established a new federal agency, the Consumer Financial Protection Bureau, to protect consumers in all forms of financial transactions going forward.[12]

Although virtually nothing was done to directly reform the secondary mortgage market[13] and despite the criticism of many that the new law did not go far enough,[14] its proponents lauded the Dodd-Frank Act as having made major inroads toward reigning in financial sector abuses.[15] However, as for those unscrupulous lenders whose practices led to the disaster, few have been punished and most have received only a simple slap on the wrist for their transgressions.[16] As markets and financial institutions adjust themselves to this new regulatory landscape, for many it appears that the housing market and the economy has returned, at least in part, to business as usual.[17]

Cards, N.Y. TIMES (Feb. 27, 2009), http://www.nytimes.com/2009/02/28/business/28nocera.html?dbk; Deborah Solomon, *Light At the End of the Bailout Tunnel*, Wall St. J. (Apr. 12, 2010 12:01AM), http://www.wsj.com/articles/SB1000142405270230484650457517795002988669; CONG. BUDGET OFFICE, THE TROUBLED ASSET RELIEF PROGRAM: REPORT ON TRANSACTIONS THROUGH DECEMBER 31, 2008 (2009), *available at* http://www.cbo.gov/publication/41754.

11. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, 15, and 31 U.S.C); *see also* Damian Paletta, *It Has A Name: The Dodd/Frank Act*, WALL STREET J. (Jun. 25, 2010), http://blogs.wsj.com/washwire/2010/06/25/it-has-a-name-the-doddfrank-act/; Reza Dibadj, *Dodd-Frank: Toward First Principles?*, 15 CHAP. L. REV. 79 (2011); Gary L. Goldberg, *Dodd-Frank Act at One Year: An Overview*, 65 CONSUMER FIN. L.Q. REP. 229 (2011).

12. Alan S. Kaplinsky, *CFPB Announces 2013 Regulatory Agenda*, 66 CONSUMER FIN. L.Q. REP. 418 (2012); Steve Forry, *The CFPB in Review: A Healthy Dose of Enforcement and a Dash of Setting Boundaries*, BANKING & FIN. SERVICES POL'Y REP., Oct. 2013, at 1; Jean Eaglesham, *Warning Shot On Financial Protection*, WALL STREET J., Feb. 9, 2011 12:01AM), http://www.wsj.com/articles/SB1000142405274870350780457613037086226325.

13. Nathan A. Hertzog, *Regulatory Future of Fannie Mae and Freddie Mac*, 31 REV. BANKING & FIN. L. 62 (2011).

14. Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951 (2011).

15. *See* Forry *supra* note 12; Adam J. Levitind, Andrey D. Pavlovdd, & Susan M. Wachter, *The Dodd-Frank Act and Housing Finance: Can it Restore Private Risk to the Securitization Market?*, 29 YALE J. ON REG. 101, 155 (2012).

16. *See Another Slap on the Wrist for Big Banks*, N.Y. TIMES (Jan. 8, 2013), http://www.nytimes.com/2013/01/09/opinion/another-slap-on-the-wrist-for-big-banks.html?_r=0; Erika Eichelberger, *JPMorgan Chase Gambles Away $6B, Gets "Slap on the Wrist"*, MOTHER JONES (Jan. 15, 2013 6:33PM), http://www.motherjones.com/mojo/2013/01/jpmorgan-chase-federal-reserve-enforcement-action-london-whale-money-laundering; Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283 (2013); *Still No Justice for Mortgage Abuses*, N.Y. TIMES (Sept. 1, 2012), http://www.nytimes.com/2012/09/02/opinion/sunday/still-no-justice-for-mortgage-abuses.html.

17. *See* Paul Wiseman, *A Recovering US is Outpacing Other Major Economies*, CNS News (Apr. 6, 2014 10:03AM), http://www.cnsnews.com/news/article/recovering-us-outpacing-other-major-economies; Frank Islam & Ed Crego, *Let's Grow Wall Street and Main Street Together in 2014*,

But imagine Barry Tatum of Cook Country, Illinois, who, like so many American homeowners, fell behind on his mortgage payments during the economic downturn when his appraisal business began to struggle.[18] Despite attempts to achieve a loan modification, the mortgage servicer began foreclosure proceedings.[19] During the pendency of these proceedings Mr. Tatum continued to live in his home and continued exploring ways to avoid foreclosure.[20] In the meantime, the mortgage servicer hired a third party property management firm, Safeguard, to "determine the occupancy status of the property and perform property preservation services" on the premises.[21] One day when Mr. Tatum returned home from work prior to foreclosure, he found a note pinned to his front door that stated Safeguard—acting through one of its subcontractors—had determined that the mortgaged property was vacant.[22] Mr. Tatum contacted Safeguard and notified them that the property was not vacant and that, indeed, he was still living in the property.[23] Over the course of the following weeks vacancy notices continued to appear posted to his front door.[24] After several months of this, Mr. Tatum stated that he returned home one day to find that his front door had been broken down by a sledgehammer, allegedly at the order of Safeguard who determined that the property was vacant and who then sent its subcontractor to secure the premises.[25]

In a similar story, Sherry Eubanks of Will County, Illinois, defaulted on her mortgage loan payments because the preschool that she operated fell on hard times.[26] The mortgage servicer thereafter foreclosed on her home.[27] Nine days after the foreclosure sale, while Ms. Eubanks was out of the house but her fifteen year old daughter was at home alone, she claimed that subcontractors of Safeguard—again, hired by the mortgage servicer to "preserve the property if vacant"—knocked on the door with orders to winterize the "vacant" premises.[28] Not recognizing the men

HUFFINGTON POST (Feb. 3, 2014 2:06PM), http://www.huffingtonpost.com/frank-islam/lets-grow-wall-street-and_b_4698301.html; Reuters, *U.S. Economy Grows At Fastest Pace In Almost 2 Years*, Huffington Post (Dec. 20, 2013 8:40AM), http://www.huffingtonpost.com/2013/12/20/economic-growth-q3-2013_n_4479330.html.

18. *See* Complaint at *7, The People of the State of Ill. v. Safeguard Properties, L.L.C., 2013 WL 5290237 (Ill. Cir. Ct. 2013).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *See id.*

knocking on the door, Ms. Eubanks' daughter hid in an interior room of the house and called 9-1-1.[29] Not to be deterred, one of the subcontractors allegedly broke a window and entered the house and thereafter unlocked the back door for the others to enter.[30] Shortly thereafter, the police arrived and arrested the subcontractors.[31] These alarming stories form part of the allegations against one major bank contractor that have been filed by the Attorney General of Illinois based on numerous complaints of break-in forecloses across that state.[32]

As the economy continues to recover and the horrors and abuses of the financial crash of 2007–2008 begin to fade into the background, it is easy, perhaps even enticing, to embrace feelings of normality, calm, and business as usual.[33] After the many bailouts, new laws, and public scolding accorded to mortgage lenders and other financial institutions after the crash, one would seem to think that the atrocities which pervaded the housing market and ultimately brought about the greatest economic downturn since the Great Depression would have signaled that these abusive practice were a thing of the past; indeed, lessons had been learned.[34] In fact, in the face of the Dodd-Frank Act and other state consumer protection laws enacted after the crash, many declared that this new legal and regulatory framework would ensure that abuses similar to those in the past were unlikely to occur again.[35]

Nevertheless, a number of lenders, through their third party property management firms, appear to be once again utilizing overly aggressive—and illegal—practices in order to expedite the foreclosure

29. *Id.*

30. *Id.*

31. *See id.*

32. *See infra* Part II.C.

33. Wiseman, *supra* note 17; Islam et al., *supra* note 17; Reuters, *supra* note 17.

34. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1400–32, 124 Stat. 1376, 2136–63 (addressing mortgage reform and predatory lending practices); John C. Dugan, Comptroller of the Currency, Remarks before the American Securitization Forum (Feb. 2, 2010) (transcript *available at* http://www.occ.gov/news-issuances/speeches/2010/pub-speech-2010-13.pdf; *see also* Kaplinsky *supra* note 12; Forry *supra* note 12; Eaglesham, *supra* note 12.

35. *See generally* Kevin Drawbaugh, *White House Recommits to "Volcker Rule" Rank Trade Ban*, REUTERS (Feb. 23, 2010 7:28PM), http://www.reuters.com/article/2010/02/24/us-financial-regulation-idUSTRE61L3UL20100224; Gretchen Morgenson, *Strong Enough for Tough Stains?*, N.Y. TIMES, June 26, 2010, at BU1; Binyamin Appelbaum & Brady Dennis, *Legislation by Senator Dodd Would Overhaul Banking Regulators*, WASHINGTON POST (Nov. 11, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/11/09/AR2009110901935.html; *Wall Street Reform: The Dodd-Frank Act*, The White House, https://www.whitehouse.gov/economy/middle-class/dodd-frank-wall-street-reform (last visited May 28, 2015); *President Obama Signs Dodd-Frank Act Into Law*, NAT'L L. REV. (July 21, 2010), http://www.natlawreview.com/article/president-obama-signs-dodd-frank-act-law; Sarah N. Lynch, *Obama To Meet with Financial Regulators on Wall Street Reform Law*, REUTERS (Aug. 18, 2013 9:55PM), http://www.reuters.com/article/2013/08/19/us-usa-financial-obama-idUSBRE97I00V20130819; Michael Tomasky, *Obama's Big Success—Sort Of*, N.Y. NAT'L REV. OF BOOKS, April 25, 2013, at 417.

process.[36] The issues arising from these practices have become so pervasive that lawsuits have been filed in over thirty states, most aggressively in Illinois,[37] and legal aid organizations in California, Florida, Michigan, Nevada, and New York report that complaints against lender-engaged property managements firms, particularly Safeguard Properties, Inc., number among their top complaints.[38]

Just as many noted commentators have written, the foreclosure crisis was caused in great part by a lack—or daresay a willful rejection—of legal formalities in order to steamroll foreclosure processes.[39] These same motivations are driving the new foreclosure practices that have been allegedly utilized against distressed borrowers like Barry Tatum, Sherry Eubanks, and so many others.[40] The use of third party property management firms by mortgage lenders/servicers to deal with defaulted mortgaged properties—without proper oversight or safeguards to ensure the fair treatment of borrowers and adherence to the law—has caused yet again another foreclosure scandal to emerge in the still-recovering housing market.[41] Such abuse, so shortly after the crash and the enactment of a host of consumer protection and regulatory safeguards, exemplifies the ongoing need to closely monitor and supervise the mortgage finance market, both by the government and housing advocates and watchdog groups.[42] It particularly shows the inadequacies of the so-called new and improved consumer protection laws against foreclosure abuses, and subsequently highlights how fragile the state of homeownership in this country remains.[43]

36. Jessica Silver-Greenberg, *Invasive Tactic in Foreclosures Draws Scrutiny*, N.Y. TIMES (Sept. 9, 2013, 8:23PM), http://dealbook.nytimes.com/2013/09/09/invasive-tactic-in-foreclosures-draws-scrutiny/; *Bank Contractors Illegally Break Into Homes Across the US*, RT NEWS (July 19, 2012, 9:22PM), http://rt.com/usa/us-bank-home-safeguard-617/; Jeff Rossen & Avni Patel, *Home Break-ins: Bank Contractors Accused of Cleaning Out Wrong Homes*, TODAY (Oct. 2, 2013, 7:46AM), http://www.today.com/news/home-break-ins-bank-contractors-accused-cleaning-out-wrong-homes-8C11296802; Chris Morran, *Homeowners Win Lawsuit Over Fraudulent Foreclosure But May Still Lose House*, CONSUMERIST (Nov. 1, 2012), http://consumerist.com/2012/11/01/homeowners-win-lawsuit-over-fraudulent-foreclosure-but-may-still-lose-house/; Melissa Yeager, *Safeguard Properties Faces Lawsuits in Five States*, 7NEWSDENVER (April 30, 2013), http://www2.thedenverchannel.com/web/kmgh/news/local-news/safeguard-properties-faces-lawsuits-in-five-states.

37. *See* Yeager, *supra* note 36.

38. Silver-Greenberg, *supra* note 36.

39. Singer, *supra* note 7; David A. Dana, *Why Mortgage "Formalities" Matter*, 24 LOY. CONSUMER L. REV. 505 (2012); Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 WM. & MARY L. REV. 111 (2011); Jean Braucher, *Form and Substance in Consumer Financial Protection*, 7 BROOK. J. CORP., FIN., & COM. L. 107 (2012).

40. Silver-Greenberg, *supra* note 36.

41. *See id.*

42. *See generally id.*

43. *See* Dorothy A. Brown, *Shades of Homeownership*, 87 WASH. U. L. REV. 329 (2009) (noting

This Article explores these lender-engaged third party property management firms—seemingly the next installment in the ongoing saga of housing market exploitations—and their abusive foreclosure practices. Part II gives an overview of the fraudulent practices that precipitated the housing crash of 2007–2008.[44] This includes a discussion of both the federal government's response to the crash, as well as the ways in which federal and state prosecutors attempted to call banks to task and prohibit future abuses through the National Mortgage Settlement of 2012.[45] Part III explores this new wave of mortgage abuses—break-in foreclosures—and investigates the connection between property management firms and the banks that hire them.[46] This part also investigates more closely the recent litigation that has spawned from these incidents of break-in foreclosures.[47] Part IV criticizes current laws and regulations that purport to provide a remedy to or protection against homeowner abuse in the foreclosure process, pointing out their inadequacies, lack of reliability, and systemic deficiencies in remedying and preventing the problem.[48] Lastly, Part V calls for state and federal action as it relates to break-in foreclosures by making a three-part recommendation for the implementation of third party provider oversight regulations, the creation of a private cause of action for aggrieved homeowners, and for the stricter regulation of property preservation clauses in mortgage contracts.[49]

II. AN OVERVIEW OF PAST FORECLOSURE FRAUD AND ABUSE

Prior to subprime lending and mortgage securitization, banks were genuinely concerned about the financial status of their borrowers because the bank itself was incurring a real risk by extending credit.[50] However, this system of having "skin in the game" would soon fade away as banks and financial institutions found innovative ways to unload mortgages and thereby shift the risk in the long term and obtain upfront capital in the short term.[51]

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that other government programs nominally aimed at enhancing and protecting homeownership—such as the mortgage interest deduction—produce paradoxically opposite results).

44. *See infra* Part II.

45. *Id*.

46. *See infra* Part III.

47. *Id*.

48. *See infra* Part IV.

49. *See infra* Part V.

50. *See* David R. Greenberg, *Neglected Formalities in the Mortgage Assignment Process and the Resulting Effects on Residential Foreclosures*, 83 TEMP. L. REV. 253 (2010); *See* Singer, *supra* note 7.

51. *See* Greenberg, *supra* note 50, at 256–58.

A. Abusive Practices Leading Up to the Housing Crisis

The mortgage lending abuses that led to the housing crisis were born out of a combination of subprime lending and the securitization of mortgages.[52] Both of these together helped form the basis for a system that would ultimately speed toward a crashing and disastrous end.[53]

1. Subprime Lending—Stacking the Deck

Beginning in or around the early 1990s, individuals who lacked the ability to qualify for credit under customary underwriting standards were nevertheless granted mortgage loans by banks across the country.[54] These subprime borrowers—who almost always failed to understand the nature of the documents they were signing or the obligations they were incurring—were enticed to enter into these credit agreements by promises of low interest rates on the front end, which would only adjust to a higher rate a few years into the term of the loan.[55]

Although these borrowers lacked the ability to make their mortgage payments once the interest rates spiked, they often thought they would be able to refinance their debt for another low interest rate before that time would arrive.[56] Under these auspices, subprime mortgage lending flourished such that "subprime mortgages grew from five percent to over twenty percent of all new mortgages" between the years 1994 to 2004.[57]

2. Mortgage Securitization—Building the House of Cards

The securitization process involved a labyrinthine scheme of buying, selling, swapping, and insuring intricate—and almost always poorly conceived—legal instruments that comprised a host of mortgage/credit rights through various nominees of the true parties.[58] This system started with the lending institution that initially made the loan to the borrower.[59] This could be either a banking institution or a mortgage

52. *See id.* at 256–58.

53. *See id.*

54. *Id. See also* Gerald Korngold, *Legal and Policy Choices in the Aftermath of the Subprime and Mortgage Financing Crisis*, 60 S.C. L. REV. 727 (2009).

55. *See* Greenberg, *supra* note 50 (citations omitted).

56. *Id.*

57. *Id.* at 254–55.

58. ANDREW DAVIDSON, ANTHONY SANDERS, LAN-LING WOLFF, & ANNE CHING, SECURITIZATION: STRUCTURING AND INVESTMENT ANALYSIS (2003).

59. *Id.*

broker (in either case, this party was called the mortgage originator).[60] The originator would, nominally at least, review the credit history, employment status, and other financial indicators of the borrower and assess whether the prospective borrower had the ability to repay the loan.[61] It was at this stage of the transaction that subprime borrowers—those who, by all accounts, could not repay the loan—were nevertheless approved for credit.[62] The borrower would receive the purchase funds in the form of loan proceeds and would contemporaneously sign a promissory note and a mortgage on the property.[63]

Next, almost immediately, the mortgage originator would sell the mortgage and the note to a third party called an issuer or an arranger.[64] These arrangers would purchase hundreds and thousands of mortgages and notes from various mortgage originators from across the country and, by combining them together, created a form of security (like stock or a bond) that could then be bought, sold, or traded on the open market to third party investors, typically through buying a nominal interest in a trust that would have ownership of the mortgage pool.[65] From this point, although nothing had changed in terms of the borrower's position, the mortgage payments no longer were directed at the originator.[66] Rather, the third party investors who purchased interests in the securitized pool of mortgages rely upon yet another third party—a mortgage-servicing agent—to handle the monthly collection of note payments and to otherwise deal directly with the borrower.[67]

Naturally, the ability of mortgage lenders to off-load their risk to third parties almost immediately upon making the risky loan removed a major protection for borrowers.[68] Under historical lending practices the bank assumed the risk that a default might occur if the borrower was unable

60. *Id.; see also* Greenberg, *supra* note 50.

61. *See* Singer, *supra* note 7 (citing Yuliya Guseva, *Evolutionary Developments in Mortgage Securitization: Financial Law Reforms, Putative Beneficiaries, and Archetypal Economic Risks,* 21 TRANSNAT'L L. & CONTEMP. PROBS, 395, 435–36, 464 (2012)).

62. *Id.*

63. *See* Greenberg *supra* note 50.

64. *See id.*; *see also* Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121 (2009).

65. ADAM B. ASHCRAFT & TIL SCHUERMANN, UNDERSTANDING THE SECURITIZATION OF SUBPRIME MORTGAGE CREDIT 5 (2008); *see also generally* DAVIDSON ET AL, *supra* note 58.

66. Nolan Robinson, Note, *The Case Against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) to Initiate Foreclosure Proceedings*, 32 CARDOZO L. REV. 1621, (2011); *see* Singer, *supra* note 7; *see also* Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN L. REV. 1359 (2010).

67. *See* Greenberg, *supra* note 50; *see also* Porter, *supra* note 64. For a fuller discussion and overview of the events that precipitated the housing crisis, see CHRISTOPHER SERKIN, THE LAW OF PROPERTY: CONCEPTS AND INSIGHTS (2012).

68. *See* Singer, *supra* note 7.

to pay.[69] Due to this risk, banks were very concerned about the creditworthiness of their borrowers, since a failure to adequately assess a borrower's financial position could result in a direct hit to the bank.[70]

But, with the ability to sell the loan immediately after making it, this borrower protection, originally built into the system of lending, was completely eviscerated.[71] A bank need not worry about the quality of the borrower since a subsequent default would be someone else's problem.[72] This was especially true since in the early years of adjustable rate subprime loans the borrower was indeed able to make the monthly payments.[73] It would not be until about two to three years into the loan, when the originator bank had long since sold the loan to a third party, that the rate would adjust and become too high for the borrower to make the debt service.[74] And to add yet another defective wheel to the cart, the mortgage servicer who was charged with dealing with the borrower—including addressing any issues that may arise if the borrower became behind on his payments—was financially incentivized by virtue of the servicing agreement to work in favor of neither the interest of the borrower nor the owner of the loan.[75]

3. The Housing Bubble's Burst—When It All Came Crashing Down

This defective system, underpinned by greed and buttressed by artificial home prices, finally came crashing down beginning in 2006.[76] As property values decreased, subprime borrowers, who up until now believed they could refinance their debt before the adjustable interest rates spiked, found themselves unable to do so.[77] Because they could not continue to enjoy their relatively low monthly payments, and because they could not sustain these now adjusted and much higher debt

69. *Id.*

70. *Id.*

71. *Id.*

72. *See id.* (citing David Reiss, *Subprime Standardization: How Rating Agencies Allow Predatory Lending to Flourish in the Secondary Mortgage Market*, 33 FLA. ST. U. L. REV. 985 (2006)).

73. *Id.*

74. *Id.*

75. *See id.* (citations omitted).

76. *See* Chad D. Emerson, *A Troubled House of Cards: Examining How the Housing and Economic Recovery Act of 2008 Fails to Resolve the Foreclosure Crisis*, 61 OKLA. L. REV. 561 (2008); Singer, *supra* note 7; Brooksley Born, *Foreword: Deregulation: A Major Cause of the Financial Crisis*, 5 HARVARD L. & POL'Y REV. 231, 233 (2011); Gregory Zuckerman et al., *U.S. Charges Goldman Sachs With Fraud—SEC Alleges Firm Misled Investors on Securities Linked to Subprime Mortgages; Firm Vows to Fight the Charges*, WALL STREET J., Apr. 17, 2010, at A1; *see* Greenberg, *supra* note 50, at 259–62.

77. *See* Singer, *supra* note 7, at 507.

obligations, they defaulted *en masse*.[78] In turn, banks—or, rather, their mortgage servicers—began to foreclose on these defaulted properties across the United States.[79] However, because these properties were underwater—meaning that the mortgage debt encumbering these properties was far in excess of the actual value of the property that it secured—foreclosure sales failed to bring in an amount sufficient for the banks to recover their loss.[80] As a result, banks were forced to purchase the mortgaged property themselves, which thereby created a situation where lending institutions became the owners of a massive number of foreclosed properties—a role for which they were entirely unfit and unprepared.[81]

Since borrowers were no longer making payments under their loans, the market for the many mortgage-backed securities that were now in the hands of various financial institutions, pension funds, and other investors came crashing down.[82] In essence, these mortgage-backed securities that had come to permeate the entire United States economy and reach into every sector became almost valueless. As one noted commentator stated, this set off "a disastrous chain of events affecting the secondary mortgage markets, the broader financial sectors, and the entire United States—and global—economy."[83] Moreover, many individuals lost their jobs as a result of this chain of events and, although previously financially capable of making their monthly mortgage payments, also defaulted.[84] This resulted in yet more foreclosures and more bank-owned properties.[85] By one estimate these otherwise prime borrowers comprised sixty percent (60%) of all mortgage defaults in 2006 alone.[86]

4. Foreclosures Fraud—The Rise of Robosigning

As the massive wave of defaults swept across the country, lenders were forced to initiate foreclosure proceedings quickly in an attempt to rehabilitate the defaulted properties and sell them to third party

78. *See* Greenberg, *supra* note 50, at 260–63 (citations omitted).

79. *See id.*

80. Richard H. Thaler, *Underwater, but Will They Leave the Pool?*, N.Y. TIMES, Jan. 24, 2010, at BU3; *see also* Singer, *supra* note 7, at 534 (citing Robert C. Hockett, *Paying Paul and Robbing No One: An Eminent Domain Solution for Underwater Mortgage Debt*, 19 CURRENT ISSUES IN ECON. & FIN. 1, 6–7 (2013)).

81. *See* Singer, *supra* note 7, at 534; *see also* Korngold, *supra* note 54.

82. *See* Greenberg, *supra* note 50; *see also* Korngold, *supra* note 54.

83. *See* Greenberg, *supra* note 50.

84. *Id.*

85. *Id.*

86. *Id.*

purchasers, thereby recouping their losses.[87] Interestingly, as many scholars have noted,[88] mortgage lenders were attempting to create a sort of nation-wide system of real estate transfers through the mortgage securitization system. In this way, interests in property (mortgage interest, to be exact) were sold, bought, and traded far and wide across different markets through a fairly informal system.[89] However, property law—including the law of mortgages—is governed primarily by state law, which varies depending on the jurisdiction.[90] This extends, in turn, to the ways in which mortgagees can foreclosure on property.[91] Although foreclosures can occur either through a judicial or extrajudicial process—the availability of which depends upon the jurisdiction[92]—each type of process involves a strict adherence to state law procedural steps and necessary borrower safeguards to ensure that there is no overreaching by the creditor.[93]

Since the process of foreclosing on property is so elaborate and requires the observance of so many requirements, foreclosing lenders are charged with conducting a great deal of due diligence and exercising great prudence before initiating such proceedings against a defaulting borrower.[94] "These procedures reflect the need to assure that ownership rights in property are neither extinguished nor created in an environment with inadequate legal circumscriptions."[95] As a general matter, the foreclosing party must ensure that they have the legal authority to enforce the mortgage, that they have the correct description of the

87. Gloria J. Liddell & Pearson Liddell, Jr., *Robo Signers: The Legal Quagmire of Invalid Residential Foreclosure Proceedings and the Resultant Potential Impact upon Stakeholders*, 16 CHAP. L. REV. 367, 371–73 (2012).

88. *See* Singer, *supra* note 7; *see also* Tanya Marsh, *Foreclosures and the Failure of the American Land Title Recording System*, 111 COLUM. L. REV. SIDEBAR 19, 23 (2011); Dale A. Whitman, *Reforming the Law: The Payment Rule as a Paradigm*, 1998 BYU L. REV. 1169; Dustin A. Zacks, *Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures*, 29 QUINNIPIAC L. REV. 551, 559–60 (2011); Dale A. Whitman, *Are We There Yet? The Case for a Uniform Electronic Recording Act*, 24 W. NEW ENG. L. REV. 245 (2002); David E. Woolley & Lisa D. Herzog, *MERS: The Unreported Effects of Lost Chain of Title on Real Property Owners*, 8 HASTINGS BUS. L.J. 365, 401 (2012).

89. *See generally* Singer, *supra* note 7 ("One of the striking features of the subprime era is that banks acted without adequate regard for state property law. They were intent on serving the national and international financial markets with new and more profitable products, and they treated state property law as an obstacle to get around rather than a foundation on which to build.").

90. *See* Liddell & Liddell, *supra* note 87, at 371–73.

91. *Id.*

92. *Id.* ("Twenty states allow only judicial foreclosures, five states allow only non-judicial foreclosures, with the remaining states allowing for both procedures.").

93. *Id.* (citing Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 698 (2008)). Additional foreclosure protections also exist under federal law. *See id.*

94. *See* Liddell & Liddell, *supra* note 87.

95. *Id.* at 376.

mortgaged property, that the actions of the borrower validly constitute a default and therefore trigger a right to foreclose, and that the proper parties who are entitled to notice of the foreclosure according to state law and constitutional due process considerations are served.[96] Any defect in the process or failure to follow the necessary procedural steps can result in an illegal foreclosure.[97]

In the wake of the housing crisis, as more and more properties came up for foreclosure, lenders and their mortgage servicers began to realize that, by virtue of the overly informal—and some say haphazard—documentation of the transfer of mortgages from one party to another over the course of time that many of the essential documents required to foreclosure, such as the original promissory note, were unable to be found.[98] Then a host of additional issues arose over whether the mortgage servicer had the right to foreclose on the property at all if the nominee listed on the mortgage was MERS, a privately-run clearing house which operated in lieu of proper assignments of the promissory notes secured by the mortgages.[99] There were broken chains in the transfers of the mortgage from one investor to the next, therefore cutting off the ability to show a clean chain of title to the promissory note all the way back to the original lender.[100] Additional questions arose as to whether, although the note continued to be transferred nominally through the MERS system, the note and the mortgage had been impermissibly separated from one another, thereby causing the holder of only the security right (the mortgage) to lack the ability to enforce the device due to its failure to also hold the principal obligation (the note).[101]

Lenders and their mortgage servicers began to realize that the system they had created produced a framework of defects and broken parts that would ultimately render them unable to foreclose through the traditional legal process.[102] In order to accommodate this defective system and

96. *Id.*

97. *Id.* (citing Jones v. Flowers, 547 U.S. 220 (2006); Henry N. Butler & Jason S. Johnson, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 COLUM. BUS. L. REV. 1, 74 (2010)).

98. *See* Singer, *supra* note 7, at 522–23.

99. *See id.* at 525 (citing Carpenter v. Longan, 83 U.S. 271, 274 (1872) ("The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity . . . A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures.")).

100. *See* Woolley & Herzog, *supra* note 88.

101. *See* Singer, *supra* note 7, at 515–18; *see also* Robinson, *supra* note 66; Peterson, *supra* note 66; Dale A. Whitman, *A Proposal for a National Mortgage Registry: MERS Done Right*, 78 MO. L. REV. (2013); Merscorp, Inc. v. Romaine, 861 N.E.2d 81, 83 (N.Y. 2006).

102. Singer, *supra* note 7.

thereby still allow lenders to foreclose on their mortgages, courts began allowing the submission of affidavits whereby the foreclosing party would swear to the court, under oath, that it was indeed the legal title holder of the promissory note and had the full authority to foreclose on the property.[103]

Of course, this abbreviated procedure was dependent upon the assumption that the foreclosing party had conducted the necessary due diligence to ensure that the information to which they were swearing in the affidavit was indeed correct.[104] This would involve going through various documents, assignments, MERS records, and records contained in the various state recording systems to ensure that title to the debt could be validated.[105]

Nevertheless, banks faced with so many foreclosures and hemorrhaging money from their immense losses would often hire only a few individuals to investigate the foreclosure records and sign the affidavits.[106] Quickly these individuals would begin signing the affidavits without conducting any due diligence at all—asserting the lender's right to the promissory note without the slightest clue as to whether this could be substantiated.[107] This practice became known as "robosigning" since the bank official would sign the affidavits, almost as a mere matter of course, with relatively little concern as to their authenticity.[108] Oftentimes a bank would "employ only one person to sign up to 10,000 foreclosure affidavits per month."[109]

The first litigation involving robosigning began in Florida[110] and thereafter spread to a host of states across the country with financial watch-dogs and housing advocates decrying this practice as stemming from the very same type of fraud and neglect that caused the crash in the

103. *See id.* at 524–25.

104. *Id.*

105. *Id.* ("For this to work the way it is supposed to, the banks actually have to research each mortgage, find the note, and explain the evidence that leads the bank to believe that it actually has the right to foreclose on the property. But if there is no clear chain of title and the note has been lost, what evidence would suffice?").

106. *Id.*

107. *Id.*

108. Richard E. Gottlieb et al., *The Foreclosure Firestorm: "Robo-Signing" Allegations Have More Bark than Bite*, 67 BUS. LAW. 649 (2012); Matthew B. Banks, *Prima Facie Validity of Proofs of Claims in the Age of "Robo-Signers"*, 29 AM. BANKR. INST. J. 54 (2011); Olga Kogan, *Infinite Loop: Robo-Signers and Ethics in Bankruptcy Mortgage Cases*, 25 GEO. J. LEGAL ETHICS 645 (2012); Raymond H. Brescia, *Leverage: State Enforcement Actions in the Wake of Robo-Sign Scandal*, 64 ME. L. REV. 17 (2011).

109. *See* Greenberg, *supra* note 50 (citing See Ariana Eunjung Cha, *Ally Financial Legal Issue with Foreclosures May Affect Other Mortgage Companies*, WASH. POST (Sept. 22, 2010, 5:37 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/09/21/AR2010092105872.html).

110. *See* Liddell & Liddell, *supra* note 87 (citation omitted).

first place.[111] Thus began the precursor to break-in foreclosures whereby many property management firms forcibly and illegally maneuvered the foreclosure system so as to essentially divest the owner of his rights in without the observance of the necessary legal protections.[112]

B. Federal Intervention and the Bank Bailouts

In response to the ongoing crisis, and while robosigning still persisted, the federal government stepped in to try and blunt the harsh effects of the subprime mortgage meltdown.[113] Various financial institutions, retirement funds, and pension funds across the country—touching upon every facet of American life—had invested in these pools of mortgage-backed securities, believing them to be safe investments and assured of their financial health by a corrupt system created and perpetuated by mortgage originators and rating agencies.[114] For instance, in a 2008 report Merrill Lynch acknowledged that as a result of its investments in these mortgage-backed securities that $30.6 billion of the institution's holdings were only worth a fifth of their original value.[115] Thus, when many mortgage-backed securities became valueless as a result of the tremendous wave of defaults, the cancer spread quickly throughout the entire economy.[116] In order to help stabilize this growing economic malignancy, in October of 2008 Congress passed the Emergency Economic Stabilization Act (EESA) and the Housing and Economic Recovery Act (HERA).[117]

111. *See* Gottlieb et al., *supra* note 108; *see also* Banks, *supra* note 108.

112. *See* Goldberg v. Kelly, 397 U.S. 254, 263 (1970) ("[C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.").

113. Archit Shah, *Emergency Economic Stabilization Act of 2008*, 46 HARV. J. ON LEGIS. 569 (2008); Stephen F.J. Ornsteina et al., *The Housing and Economic Recovery Act of 2008*, 61 CONSUMER FIN. L.Q. REP. 944 (2007); Adam Veness, *The Emergency Economic Stabilization Act of 2008*, 28 REV. BANKING & FIN. L. 384 (2009).

114. *See* Singer, *supra* note 7 (citing Andrew Ross Sorkin & Mary Williams Walsh, *U.S. Accuses S & P of Fraud in Suit on Loan Bundles*, N.Y. TIMES, Feb. 5, 2013, at A1; John M. Griffin & Dragon Yongjun Tang, *Did Subjectivity Play a Role in CDO Credit Ratings?*, 67 J. FIN. 1293–96 (2012)).

115. Bradley Keoun, *Merrill Sells $8.55 Billion of Stock, Unloads CDOs (Update2)*, BLOOMBERG (July 29, 2008, 5:06PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=atfHM8sh2xtw&refer=us.

116. *See* Greenberg, *supra* note 50; *see also generally* BETHANY MCLEAN & JOE NOCERA, ALL THE DEVILS ARE HERE: THE HIDDEN HISTORY OF THE FINANCIAL CRISIS (2010).

117. *See* Housing and Economic Recovery Act of 2008, Pub. L. No. 110–289, 122 Stat. 2654 (2008) (commonly referred to as HERA); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110–343, 122 Stat. 3765 (commonly referred to as EESA); *see also* Ornsteina et al., *supra* note 113.

1. Government Purchasing of Toxic CMS from Financial Institutions

Among other things, ESSA authorized the Department of the Treasury to spend up to seven hundred billion ($700,000,000.00) to purchase toxic mortgage-backed securities from various financial institutions in order to help clear their books and return these entities to some form of economic health.[118] The formal name to this purchasing initiative was known as the Troubled Asset Repurchase Program, but it is more frequently known by its more popular moniker: TARP.[119] EESA also allowed the secretary of the Treasury to use some of these funds to help distressed homeowners avoid foreclosure.[120]

Various lending institutions—most of whom participated actively in the system of mortgage securitization and subprime lending that caused the crisis, as well as engaged in the robosigning epidemic that followed thereafter—received remarkable amounts of taxpayer money in order to stay afloat.[121] For instance, Bank of America, JPMorgan Chase, and Wells Fargo all received twenty-five billion dollars and both Morgan Stanley and Goldman Sachs received ten billion dollars.[122] In exchange for the purchasing of these asset-backed securities, the financial institutions were made to issue equity warrants whereby the federal government would take a type of ownership interest in the company that could then later be redeemed by the institutions by repaying the TARP monies.[123]

2. Relief to Distressed Homeowners and the Secondary Market

HERA, also passed in an effort to help heal the effects of the subprime mortgage crisis, attempted to create a program whereby the Treasury would again inject capital—amounting to roughly $300

118. *See* Shah, *supra* note 113 (citing See David Cho & Neil Irwin, *Crises of Confidence in the Markets; Federal Reserve's Rescue of Bear Stearns Exposes Cracks in Financial System*, WASH. POST, Mar. 18, 2008, at A1).

119. *Id.; see also* Jane K. Storero & Lawrence R. Wiseman, *To Redeem or Not to Redeem: Considerations in Determining Whether to Exit the TARP Capital Purchase Program*, 126 BANKING L.J. 625 (2009); Tae Yeon Kim, *Pay It Back (TARP Developments)*, 30 REV. BANKING & FIN. L. 538 (2011); Daniel G. Murray & William H. Quirk, III, *Rethinking Accepting TARP Capital Purchase Program Funds*, 62 CONSUMER FIN. L.Q. REP. 25 (2008).

120. *See* Shah, *supra* note 113.

121. *Id.*

122. Matthew Ericson, Elaine He, & Amy Schoenfeld, *Tracking the $700 Billion Bailout*, N.Y. TIMES, http://www.nytimes.com/packages/html/national/200904_CREDITCRISIS/recipients.html (last visited May 28, 2015); *see also Bailed Out Banks*, CNN MONEY, http://money.cnn.com/news/specials/storysupplement/bankbailout/ (last visited May 28, 2015).

123. *See* Shah, *supra* note 113. For an update of those financial institutions that have repaid their TARP funds, see CNN MONEY, *supra* note 122.

billion—into the mortgage market in order to entice lenders to forgive a portion of the unpaid debt owed by many distressed homeowners on their mortgage loans.[124] Once again, lenders were given taxpayer money to make up for their own poor lending decisions.[125] However, due to poor loan modification standards and bad timing, the general view was that the program came too little too late in the process to have a meaningful impact.[126]

The other particularly important aspect of HERA was the government's bailout of yet another set of financial institutions that had been at the heart of the subprime crisis—Fannie Mae and Freddie Mac.[127] These two bodies, collectively called government-sponsored entities (GSEs), exist as a power player in the secondary mortgage market as both entities purchase mortgage-backed securities from financial institutions in order to increase liquidity in the mortgage finance market.[128] However, unlike other private lending institutions, Fannie Mae and Freddie Mac are quasi-public bodies with their shares being privately traded on the stock exchange.[129] It was always implied that those who invested in these two entities were, in essence, obtaining a government guarantee that their investment would not fail.[130]

As a result of HERA, the GSEs were put into conservatorship by a new oversight agency created within the Department of Housing and Urban Development.[131] And, once again, the Department of the Treasury was authorized to spend up to $100 billion dollars in taxpayer money to purchase equity in Fannie Mae and Freddie Mac and to also purchase toxic mortgage backed securities so that the two entities could

124. Ornsteina et al., *supra* note 113.

125. *See id.*

126. *See* Emerson, *supra* note 76 (explaining the reasons for the various failures of HERA to make a meaningful impact on the housing crisis).

127. *Id.* (citing Rob Alford, *What Are the Origins of Freddie Mac and Fannie Mae?*, HISTORY NEWS NETWORK (Dec. 8, 2003), http:// hnn.us/articles/1849.html).

128. *Id.*; *see also* Kate Pickert, *A Brief History of Fannie Mae and Freddie Mac*, TIME (July 14, 2008), http://content.time.com/time/business/article/0,8599,1822766,00.html.

129. *See* Pickert, *supra* note 128; *see also* Emerson, *supra* note 76.

130. *See* VIRAL V. ACHARYA ET AL., GUARANTEED TO FAIL: FANNIE MAE, FREDDIE MAC, AND THE DEBACLE OF MORTGAGE FINANCE (2011); *see also generally* OONAGH MCDONALD, FANNIE MAE AND FREDDIE MAC: TURNING THE AMERICAN DREAM INTO A NIGHTMARE (2012); CONG. BUDGET OFFICE, FANNIE MAE, FREDDIE MAC, AND THE FEDERAL ROLE IN THE SECONDARY MORTGAGE MARKET (2010).

131. *See* Winston Sale, *Effect of the Conservatorship of Fannie Mae and Freddie Mac on Affordable Housing*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 287 (2009); *see also* Cynthia M. Hajost, *From Oversight to Conservatorship: What Does the Housing and Economic Recovery Act of 2008 Hold for GSES Fannie Mae and Freddie Mac?*, 18 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 3 (2008); Richard Scott Carnell, *Handling the Failure of a Government-Sponsored Enterprise*, 80 WASH. L. REV. 565 (2005).

remove these nonperforming assets from their books.[132] Without the bailout of these two entities—both of which had played a part in the housing crisis—both would have gone under.[133]

Taken in context, it is rather extraordinary that in the midst of all these astonishing expenditures of public taxpayer money that the abusive practices related to break-in foreclosures, as further discussed below, have nevertheless taken root and spread.[134]

C. State/Federal Litigation and the National Mortgage Settlement

Finally, after years of standing by and allowing the subprime mortgage industry to flourish—as well as in reaction to revelations regarding robosigning—in October of 2010 the attorneys general of forty-nine states, as well as the U.S. Departments of Justice and Housing and Urban Development, filed suit against several of the country's largest mortgage lenders—Citigroup, JPMorgan Chase, Wells Fargo, Ally Financial, and Bank of America.[135] The plaintiffs sought civil damages from these lending giants, premised on the fact that their "misconduct resulted in the issuance of improper mortgages, premature and unauthorized foreclosures, violation of service members' and other homeowners' rights and protections, the use of false and deceptive affidavits and other documents, and the waste and abuse of taxpayer funds."[136] The claim that these banks had engaged in premature and unauthorized foreclosure practices is particularly noteworthy since, as touched upon above and noted below, some of these same lenders would soon find themselves, through third party contractors, in the middle of yet another scandal involving foreclosure abuse.[137]

In February of 2012, the defendants reached a $26 billion settlement with the states and the federal government.[138] The settlement, at least in theory, was meant to not only impose penalties upon the banks, but also to create a new framework whereby the abuses of the past would be

132. *See* Ornsteina et al., *supra* note 113; Nestor M. Davidson & Rashmi Dyal-Chand, *Property in Crisis*, 78 FORDHAM L. REV. 1607 (2010).

133. *See* Davidson et al., *supra* note 132.

134. *See infra* Part III.

135. *See* Jessica Ziehler, *The 2012 Mortgage Settlement with Large Banks*, 32 REV. BANKING & FIN. L. 286 (2013).

136. *Id.* (citation omitted).

137. *See generally id.*

138. *Id.*; *see also* Chris Isidore & Jennifer Liberto, *Mortgage Deal Could Bring Billions in Relief*, CNN MONEY (Feb. 15, 2012, 3:17PM), http://money.cnn.com/2012/02/09/news/economy/mortgage_settlement/; *Foreclosures (2012 Robosigning and Mortgage Servicing Settlement)*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/f/foreclosures/index.html (last visited May 28, 2015).

prevented through prospective safeguards and new consumer-friendly regulations.[139] But as seen from the allegations of break-ins and foreclosure intimidation experienced by the likes of Barry Tatum and Sherry Eubanks and others described below, the settlement's goals were hardly met.

1. Subsidies for Direct Homeowner Mortgage Relief

The most significant aspect of the national mortgage settlement involved allocating $17 billion in direct aid to homeowners to assist them in paying down their mortgage principal.[140] The theory being that since so many homeowners owed more on their homes than what their homes were actually worth, by allowing some of the debt to be forgiven it might be possible to "right size" these residential loans so that they would become healthy assets, both for the bank and for the borrower.[141]

Additional funds were allocated to assist eligible borrowers in refinancing their home loans, as well as opening up the possibility of civil recourse for those homeowners who had lost their homes through wrongful foreclosure proceedings.[142] Commentators noted that while these numbers sounded immense, the actual impact would prove to be *de minims* since so much of the damage had already been done and so many homeowners had long since lost their homes or would otherwise fail to meet the still stringent requirements to refinance.[143]

2. Subsidies for Housing Planning Initiatives

Further, nearly $3 billion was allocated from the settlement to various states to assist them in creating and enforcing more robust and strategic housing strategies.[144] Some states used these funds for demolition of blighted areas, while others used the monies to fund more consumer protection prosecutions in pursuit of foreclosure abuse claims.[145]

Under this portion of the settlement states were, in essence, given

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139. *See* Nelson D. Schwartz & Julie Creswell, *New York Times, Mortgage Plan Gives Billions to Homeowners, but With Exceptions*, N.Y. TIMES (Feb. 9, 2012), http://www.nytimes.com/2012/02/10/business/states-negotiate-26-billion-agreement-for-homeowners.html.

140. *See* Ziehler, *supra* note 135; *see also About the National Mortgage Settlement*, OFFICE OF MORTGAGE SETTLEMENT OVERSIGHT, https://www.mortgageoversight.com/about-the-mortgage-settlement/#settlement-documents (last visited May 28, 2015) [hereinafter *Mortgage Monitor*].

141. *See generally* Ziehler, *supra* note 135.

142. *Id.* at 289.

143. *Id.* (citation omitted).

144. *Id.*

145. *Id.* at 289–90.

discretionary funds for the purposes of testing ways in which a new and improved housing sector could be created, both to combat existing failures and to plan for the future.[146] However, whether these funds were used in a meaningful way remains in question and only time will tell as to whether states have spent these one-time monies wisely.[147]

3. A New Regulatory Framework for Mortgage Servicing

But perhaps most importantly for purposes of this Article—and so as to better understand the legal and economic environment that led to break-in foreclosures—the settlement called for these five mortgage giants to reform the way in which they handled mortgage servicing.[148] Since a system of corruption, short cuts, and fraud—leading to practices such as robosigning, subprime lending, and misrepresentations as to the financial quality of mortgage-backed securities—had previously reigned over the mortgage market, the settlement called for new safeguards and disincentives to be implemented.[149]

i. Putting a Stop to Robosigning

The first mortgage servicing reform measure was meant to guarantee that affidavits could no longer be submitted in furtherance of foreclosure unless they were based on the signor's personal knowledge of the facts that underlie the assertions in the document.[150] This of course means that banks cannot claim to have legal title to the note and mortgage, and thus possess the right to foreclosure, unless they can actually substantiate such claims.[151]

Furthermore, those within a mortgage servicing institution that are charged with signing the affidavits are now required to be under the supervision of trained employees to ensure the truthfulness of the

146. *See generally id.*

147. *See generally id.*

148. *Id.* at 290 (citing Press Release, The White House, President Obama Speaks on Landmark Housing Settlement with Banks (Feb. 9, 2012) (transcript available at http://www.whitehouse.gov/photos-and-video/video/2012/02/09/president-obama-speaks-landmark-housing-settlement-banks#transcript).

149. *Id.*; *see also* Andrew R. Johnson, *Regulators Pressure Mortgage Servicers*, WALL STREET J. (Feb. 19, 2014, 6:31PM), http://www.wsj.com/articles/SB10001424052702303636404579393340339246310.

150. NAT'L MORTGAGE SETTLEMENT, RETURN INTEGRITY & ACCURACY TO FORECLOSURE AND BANKRUPTCY PROCEEDINGS 1 (2013), *available at* https://d9klfgibkcquc.cloudfront.net/Servicing%20Standards%20Highlights.pdf [hereinafter MORTGAGE SERVICING PROVISIONS].

151. *See id.*

assertions.[152] Banks are also required to provide an adequate number of signors so as to prevent having one person be charged with signing too many affidavits.[153] Also, any compensation incentives to employees that encourage speedy signing or the production of high volumes are strictly prohibited.[154] Lastly, foreclosing banks or servicers must specifically plead their authority to foreclosure when they initiate proceedings, and they must conduct quarterly reviews of foreclosure documents to ensure compliance.[155]

ii. Oversight of Third Party Contractors

Last, banks or servicers are required to "adopt procedures to oversee foreclosure trustees, *independent contractors*, and its agents including foreclosure firms, sub-servicers, agents, subsidiaries and affiliates."[156] This last settlement provision was meant to ensure that those who act on behalf of foreclosing banks are properly monitored and supervised for compliance with the law.[157]

These new third party oversight standards include the obligation of the servicer to conduct appropriate due diligence as to the qualifications, expertise, capacity, reputation, complaints, information security, document custody practices, business continuity, and financial viability of any third party contractors.[158] The settlement also demands that the servicer must guarantee that agreements, contracts, or policies between the servicer and the third party provide for adequate oversight, which includes measures to enforce contractual rights and remedies and to provide timely action with regard to failures in performance.[159] In the event of a bank contractor's failure to perform its obligations or failure to meet the standards set forth by or imposed upon the servicer itself, the mortgage servicer must have a process for reviewing and addressing any customer complaints it receives in connection with these third party vendors.[160]

In sum, the five defendant banks agreed in the settlement to put in place a host of new processes and internal protections so as to ensure the

152. *Id.*

153. *Id.* at 1–2.

154. *Id.* at 1.

155. *Id.* at 1–2.

156. *Id.* at 2 (emphasis added).

157. *Id.*

158. *See, e.g.*, Exhibit A at A-12, U.S. v. Bank of America, No. 1:12-cv-00361-RMC (D.D.C. Feb. 12, 2013), *available at* https://www.jasmithmonitoring.com/omso/wp-content/uploads/sites/4/2014/05/Servicing-Standards.pdf [hereinafter *Settlement Term Sheet*].

159. *Id.*

160. *Id.* at A-13.

proper and legal administration of mortgage lending and foreclosures going forward.[161] The rules in the settlement were drafted so as to be comprehensive, far-reaching, and systemic so that the types of abusive practices of the past would not happen again in the future.[162] And, in light of such stringent oversight and political (as well as prosecutorial) pressure, one would surmise that mortgage lenders and their servicers would be on their best behavior (and ensure that their contractors would do the same) so as to prove that the sins of the past should be forgiven and the slate wiped clean. But did the national mortgage settlement achieve these laudable goals, as the settlement's oversight monitor claims?[163] Or did it leave cracks in the walls, which would, over time, let in the same greed, fraud, and aggression that had plagued the residential mortgage market in the past?[164]

III. THE NEW FACE OF FORECLOSURE ABUSE: PROPERTY MANAGEMENT CONTRACTORS

In mid-2013, a flurry of articles began cropping up in newspapers and media outlets across the country telling stories of people returning to their homes at the end of a long day to find that all of their belongings had been taken and their property damaged.[165] After investigating these break-ins, homeowners discovered that it was not a random thief that had been the intruder and caused the damage, but rather it was property management contractors, hired by the homeowners' mortgage servicer, that had committed the acts.[166] These bank contractors had been charged by the mortgage servicer to clean out and secure the premises until such time that the property could be sold at foreclosure.[167] Although in almost all cases the homeowner had defaulted or fallen

161. *See id.*

162. *See* Margaret Sullivan, *Banking Troubles, but Not a Word About Fraud Claims*, N.Y. TIMES (Apr. 21, 2014, 3:42PM), http://publiceditor.blogs.nytimes.com/2014/04/21/banking-troubles-but-not-a-word-about-fraud-claims/.

163. Associated Press, *Monitor: Big Banks Satisfy Mortgage Settlement*, DAILY HERALD (Mar. 19, 2014, 7:25AM), http://www.dailyherald.com/article/20140319/business/140318207/.

164. *Id.*; *see also* Charlene Crowell, *Mortgage Crisis Continues for Too Many*, PHIL. TRIBUNE (Apr. 15, 2014, 12:00AM), http://www.phillytrib.com/commentary/mortgage-crisis-continues-for-too-many/article_5567a480-68d0-53f6-bdca-295c1f7c5dff.html.

165. *See supra* note 36 and accompanying text.

166. *See* Silver-Greenberg, *supra* note 36. Throughout this Article the terms "property preservation firm/contractor," "property management firm/contractor," or just "contractor" are used interchangeably to mean those companies that comprise the group of businesses who provide services to financial institutions in connection with their management of property subject to foreclosure or bank-owned properties (REO). *Id.* This industry is collectively known as the Mortgage Field Services Industry. *See id.*

167. *Id.*

behind on his mortgage payments, many times negotiations were pending with the mortgage lender or there was a tenant lawfully residing on the premises.[168]

As 2013 progressed, stories like those of Sherry Eubanks, Barry Tatum, and others continued to surface in the news media.[169] To date, lawsuits have been filed against property management firms who were acting on behalf of foreclosing lenders in roughly thirty states.[170] And so, only a little over a year and a half since the February 2012 national mortgage settlement, the same types of foreclosure abuses—albeit in a different form and through different players—have again taken hold in the housing market.[171] This time, however, it is not merely the banks or mortgage servicers—as in the case of robosigning—that are engaging in wrongful foreclosure practices.[172] Rather, foreclosure abuse has a new face—the large group of bank-engaged property contractors known as the mortgage field services industry.[173] To make matters worse, included among those banks that have engaged these aggressive third party property management firms are the same mortgage giants who are parties to the national mortgage settlement.[174]

A. The Lender-Property Management Firm Structure

The relationship between mortgage lenders/servicers and these third party contractors is rife with incentives for abuse. In theory, the arrangement is typical of the many situations in which a contractor or third party vendor is hired to perform a task that the principal does not wish or is not equipped to carryout.[175] However, the nuances of the law governing foreclosures—which vary state by state—and the recent history of out-right abuse and fraud provides an overlay to these

168. Yeager, *supra* note 36; Rossen & Patel, *supra* note 36.

169. *Yeager, supra note 36; Rossen & Patel, supra note 36.*

170. *See* Silver-Greenberg, *supra* note 36.

171. *See generally id.*

172. *Id.*

173. Ben Hallman, *Banks Keep Breaking Into Houses, and Homeowners Are Fighting Back*, HUFFINGTON POST (Oct. 3, 2013, 11:58AM), http://www.huffingtonpost.com/2013/10/02/bank-contractor-lawsuits-safeguard_n_3975574.html.

174. *Id.* ("It's also unclear how much legal liability the banks that hire companies like Safeguard have for such alleged abuses. In the past, banks have tried to shunt liability onto the contracting companies. But the $25 billion settlement struck with state attorney generals last year requires that five of the largest banks 'perform appropriate due diligence' in examining any third-party contractors' 'expertise, complaints and qualifications.' Failure to do so could hypothetically lead to fines or other penalties. No public actions have been taken yet.").

175. *See generally* Complaint, The People of the State of Ill. V. Safeguard Properties, L.L.C., No. 2013-CH-20175, 2013 WL 5290237 (Ill. Cir. Ct. Sept. 9, 2013).

relationships that cannot be ignored.[176]

1. The Purpose of Property Management Companies in Foreclosures

As the housing crisis resulted in a massive number of home loans going into default, banks were confronted with a new and unfamiliar volume of properties for which foreclosure was a necessity.[177] While banks certainly had past experience with how to handle the foreclosure of mortgaged properties, the sheer volume during the height of the crisis was staggering.[178] In fact, it was through this desperation and sense of exasperation that many large banks turned to robosigning and other questionable practices in order to expedite the process.[179]

And even after the height of the crisis had passed and foreclosure rates started to decline, lenders still had to deal with the tremendous backlog of homes awaiting foreclosure or those properties that because of their substantially decreased values could not successfully be sold at a foreclosure sale at all.[180] Over time lenders began to increasingly engage third party contractors—the mortgage field services industry—to assist them in managing these foreclosed or about-to-be foreclosed properties on the bank's behalf.[181] These firms—with supposed expertise in the management and preservation of real estate—would take charge of a large swathe of distressed properties to ensure, both post-default/pre-foreclosure and post-foreclosure, that the property was preserved and maintained.[182] Contractors might visit the properties as often as once a month or more to make sure that there was no damage, deterioration, or vandalism during the foreclosure period.[183]

Interestingly, however, the actual labor and work performed under these agreements are not generally untaken by the property preservation firm itself.[184] Rather, the firm hires additional third party subcontractors who are allocated various portions of the job.[185] The most well-known, or perhaps, notorious, of these property preservation firms is Safeguard Properties, which has been the subject of most of the litigation involving

176. *See generally id.*
177. *See generally id.*
178. *See generally id.*
179. *See* Mosson, *supra* note 9.
180. *See generally* Complaint, *Safeguard*, No. 2013-CH-20175, 2013 WL 5290237.
181. *Id.*; *see also* Silver-Greenberg, *supra* note 36.
182. Silver-Greenberg, *supra* note 36.
183. *Id.*
184. *Id.*
185. *Id.*

these alleged practices.[186]

2. Terms and Conditions in Property Preservation Contracts

The contractual agreements entered into between mortgage servicing institutions and these third party property preservation firms, by their very terms, tempt the contractor to dance at the edges of what is legal or allowed.[187] In general, what banks most feared during the height of the foreclosure crisis (and still do) were those situations whereby the defaulting homeowner would walk away from the property and leave it abandoned to the elements or to criminal activity.[188] In doing so, the collateral could be greatly damaged and subsequently decline in value significantly.[189]

In that vein, these property management firms were charged with traveling to the mortgaged property in question, inspecting the premises from the street without entering on to the property—which was, legally speaking, still owned by the borrower—and determining whether the property was still occupied or if it had been abandoned by the distressed homeowner.[190] If it was determined that the property was abandoned, then the firm (or its subcontractor) would "secure the property by boarding up the doorway, turning off the water and winterizing the home, and placing lockboxes or padlocks on the door."[191] These acts of preservation sometimes even involved removing personal property and other effects from the home.[192] Further, these periodic inspections and services often continued "throughout the foreclosure process and after the mortgage lender purchase[d] the property in the foreclosure auction."[193]

A review of some of the typical provisions contained in property preservation contracts between property management firms and their subcontractors are instructive of the overall environment that exists in these multi-party structures. In one form agreement the subcontractor represents to the firm that it has the required "skills, ability, knowledge, experience, and qualifications" to provide the contracted for services.[194]

186. *See* Yeager, *supra* note 36.

187. Complaint, *Safeguard*, No. 2013-CH-20175, 2013 WL 5290237.

188. *See* Silver-Greenberg, *supra* note 36.

189. *Id.*

190. Hallman, *supra* note 173.

191. Complaint, *Safeguard*, No. 2013-CH-20175, 2013 WL 5290237, at ¶34.

192. *Id.* at ¶51.

193. *Id.* at ¶35.

194. REPORESPONSE, INC., VENDOR CONTRACT AND MASTER AGREEMENT FOR REPORESPONSE, INC. § 1 (J2011), *available at* http://www.docstoc.com/docs/86439143/Property-Preservation-Service-Contract [hereinafter REPO PROPERTY PRESERVATION CONTRACT].

Further, the services are represented as being provided in a "thorough, accurate, timely, professional, and workmanlike manner."[195] However, nothing in the agreement indicates that the vendor is actually verifying or providing any follow-up diligence as to whether these representations or warranties are fulfilled or have a history of being fulfilled by the subcontractor in similar prior transactions.[196]

Additionally, the agreement provides that the subcontractor will comply with all applicable regulatory guidelines, such as those promulgated through Fannie Mae, HUD, or other applicable governmental entities; however, the contract further states that there may be times when the firm may require that the subcontractor act in such a way as to depart from the norms under one or more of these guidelines.[197] In such cases, the vendor is to notify the subcontractor as such and the contractor in prompted to perform the services anyway.[198] If the subcontractor believes it is violating the law by performing the services, it must notify the institution and provide accompanying reasoning (including a citation to the applicable law).[199] By the very language of these provisions it is anticipated that the subcontractor may be asked to engage in activities that are outside the legal parameters of what is permissible.[200] And, the burden is placed on the subcontractor to not only know the intricacies of the law, but also to be specific—almost in a lawyer-like way—when refusing to comply by virtue of an illegality.[201]

Another particularly nebulous and ill-defined provision states that if the subcontractor makes a home inspection it must "visually inspect the properties so specified . . . to determine the occupancy status and physical condition of such properties" and then further instructions will be given as to whether the inspection should consist of the interior as well as the exterior.[202] Of course, since it is under the authority of the mortgage servicer that the firm, and in turn the subcontractor, is acting, it would seem that guidelines and precautionary protocols would be provided by the mortgage institution itself to aid in making those determinations.

The contract also states that if the subcontractor is uncertain as to whether the dwelling is occupied, it should contact the firm for further

195. *Id.* § 2.
196. *Id.*
197. *Id.* § 2.1.
198. *Id.*
199. *Id.* § 2.2.
200. *Id.*
201. *Id.*
202. *Id.* § 2.5.

instructions.[203] However, in one prominent suit against the well-known property management firm Safeguard, it is alleged that the actual fee schedule for how these subcontractors are paid is based on how many homes are inspected[204] and that subcontractors are, at least indirectly, encouraged to be swift in making occupancy determinations.[205] Also, the contract is noticeably absent of guidelines to advise subcontractors as to how these occupancy determinations should be made.[206]

In another firm's contract, once the subcontractor determines that the dwelling is not occupied, although the subcontractor may not "kick in door[s], break door handles or force entry" he is nonetheless required to enter the home and if "locked, look for windows or sliding patio doors that are not secure and may be opened to permit entry."[207] So while the agreement pays lip service to protecting the owner's property, in the same sentence it indirectly suggests that unauthorized entry is still permissible.[208] Although one should not break down the front door, a sliding glass patio or window that is "not secure" (i.e., easily forced open) can provide an approved point of access.[209] Thus, while the prohibitions on breaking-in would seem geared toward protecting the rights of the homeowner, the additional language appears to give the silent nod to behavior of a more aggressive nature.[210]

203. *Id.* § 2.6.1.

204. Complaint at ¶30, The People of the State of Ill. V. Safeguard Properties, L.L.C., No. 2013-CH-20175, 2013 WL 5290237, at *5 (Ill. Cir. Ct. Sept. 9, 2013); *see also* ZION RESTORATIONS, PRESERVATION MANUAL AND CONTRACTOR AGREEMENT (2013), *available at* http://www.zion1.org/resources/Preservation+Manual+and+Contractor+Agreement.pdf [hereinafter ZION PROPERTY PRESERVATION AGREEMENT] ("Bonuses will be paid on a case by case basis based on the travel requirements, turn time, and *number of assignments completed* by Sub-Contractor. All bonuses will be awarded by the Field Services Manager and must be approved prior to your acceptance of the assignment.") (emphasis added); *Id.* ("Some assignments, such as initials, property condition reports, rush inspections, or securitizations will require 1–2 days turnaround time, or as stated in the work order. Other work, such as scheduled routines are due in 8–12 days. All specific instructions will be made clear to you and if an early or rush turn time is required it will be noted on the work order. It is critical that you keep ZION informed of any circumstances that may cause delays. *Assignments not completed by the due date will affect your Sub-Contractor rating and may result in fewer assigned work orders*.") (emphasis added).

205. Complaint at ¶45, *Safeguard*, No. 2013-CH-20175, 2013 WL 5290237, at *5.

206. *Id.* at ¶44, 49 ("Safeguard or its subcontractors often deem property to be vacant despite clear signs that the property is not vacant, such as a barking dog inside the home, a car in the driveway, garbage cans placed outside for pickup, a neighbor's statement that the property is occupied or even the actual presence of a legal occupant in the home when the subcontractors arrive at the: property.").

207. *See* ZION PROPERTY PRESERVATION AGREEMENT, *supra* note 204, at 14.

208. *Id.*

209. *Id.*

210. *Id.*

3. Determinations of Abandonment and Acts of Preservation

Interestingly, the ability of mortgage servicers and their third party contractors to enter onto mortgaged property for the purposes of conducting acts of preservation is not unusual or without some authority.[211] In fact it is rare, if not impossible, to find a residential or commercial mortgage instrument today that does not include what is known as a property preservation clause.[212] These clauses are typically broad and far-reaching and stipulate that if the homeowner intentionally or through his negligence allows the mortgaged property to be damaged or subjected to deterioration, then the mortgagee or its agent has the authority to enter onto the premises.[213] For instance, the Fannie Mae/Freddie Mac uniform single-family residential mortgage includes the following provisions:

> **7. Borrower's Obligations to Maintain And Protect The Property And to Fulfill Any Lease Obligations.**
> **(a) Maintenance and Protection of the Property**. I will not destroy, damage or harm the Property, and I will not allow the Property to deteriorate. Whether or not I am residing in the Property, I will keep the Property in good repair so that it will not deteriorate or decrease in value due to its condition. Unless it is determined under Section 5 of this Security Instrument that repair is not economically feasible, I will promptly repair the Property if damaged to avoid further deterioration or damage . . .
> **(b) Lender's Inspection of Property**. *Lender, and others authorized by Lender, may enter on and inspect the Property. They will do so in a reasonable manner and at reasonable times. If it has a reasonable purpose, Lender may inspect the inside of the home or other improvements on the Property. Before or at the time an inspection is made, Lender will give me notice stating a reasonable purpose for such interior inspection . . .*
> **9. Lender's Right to Protect Its Rights in The Property.** If: (a) I do not keep my promises and agreements made in this Security Instrument; . . . or (c) I have abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and Lender's rights under this Security Instrument.

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211. *See, e.g.*, *Security Instruments*, FREDDIE MAC: NEW YORK MORTGAGE: FORM 3033, http://www.freddiemac.com/uniform/doc/3033-NewYorkMortgage.doc (last visited June 9, 2015).

212. *See id.*

213. *See id.*

> Lender's actions may include, but are not limited to: (a) protecting and/or assessing the value of the Property; (b) *securing and/or repairing the Property*; . . . *Lender can also enter the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, have utilities turned on or off, and take any other action to secure the Property*. Although Lender may take action under this Section 9, Lender does not have to do so and is under no duty to do so. *I agree that Lender will not be liable for not taking any or all actions under this Section 9*.[214]

Notably, the language above stipulates that the lender's ability to enter the property is limited. Specifically, the lender may only make a *reasonable* inspection of the property.[215] Further, *reasonable cause* must exist in order for the lender to enter the premises and inspect the inside, and must be preceded by notice to the owner.[216] By providing such rights and (at least nominal) accompanying protections, the borrower warrants that it will preserve and maintain the property vis-à-vis the mortgagee, and that the mortgagee, vis-à-vis the homeowner, is allowed to preserve the property in the event the homeowner fails to do so.[217] On the surface, it would seem that if all parties act in accordance with the spirit of the agreement, then nothing will go wrong and the rights of both will be respected and preserved.[218]

B. Abusive and Fraudulent Practices by Property Management Firms

But, unfortunately, quite a bit went wrong with these arrangements.[219] Instead of following the parameters and safeguards for how the lender should engage in acts of preservation, allegations abound that mortgage servicers, through third party vendors, undertook a much more aggressive and, in many cases, unauthorized approach to dealing with foreclosed properties.[220] In many of the reports the determination of

214. *Id.* § 7, 9 (emphasis added). Each of the various template mortgages for each of the states listed contains an identical clause which allows the mortgagee to, essentially, assume some level of control and dominion over the mortgaged property in the event the mortgagee makes a determination that the property is being damaged or allowed to deteriorate. However, it is notable that the mortgagee is the one who determines what is reasonable, both in terms of the entry process and in terms of the reasons for cause.

215. *Id.*

216. *Id.*

217. *Id.*

218. *See id.*

219. *See* Silver-Greenberg, *supra* note 36; *see also* Yeager, *supra* note 36.

220. Rossen & Patel, *supra* note 36; Morran, *supra* note 36.

occupancy was a mere pretext for intimidating the homeowner and chasing him off the property, not to mention the destruction of personal property and the shame and feelings of violation that occur when one's home is broken into.[221]

1. Defaulted Homeowners as Victims

In one report out of Tampa, Florida, homeowner Deanna Tedone alleged that she returned to her home at the end of the day only to find that a contractor, sent by her mortgagee U.S. Bank, was smashing holes in the walls of her house.[222] His purported reason was that he was inspecting the mortgaged property for Chinese-drywall, all in an effort by U.S. Bank to protect its collateral.[223] Although Tedone had indeed fallen behind on her mortgage payments, neither U.S. Bank nor its contractor contacted the homeowner prior to the visit to alert her to this invasive inspection.[224] The so-called inspection left debris and rubble scattered about the home, thereby diminishing Tedone's ability to sell the property at a short sale and thereby avoid damaging her ability to obtain loans and other forms of credit in the future.[225]

In another account, Majorie Principe of Illinois claimed that she returned home one day to find that her bank's contractor had "taken her furniture, books, savings bonds, and electronics."[226] Another homeowner who had defaulted on his loan out of Cleveland, Ohio, purports to have been deprived of his clothing by a property preservation sweep, and an Atlanta man was actually arrested when he tried to "force his way back into his home after a Safeguard contractor locked him out."[227] In the end, it was discovered that the worker had actually gone to the wrong house.[228]

2. Third Party Possessors as Victims

Furthermore, homeowners are not the only casualties of these practices; rather, tenants of homeowners who have defaulted on their mortgage payments have also been victims. For instance, Nicole Corum of Independence, Missouri, stated that she returned to her rented

221. *See generally* Hallman, *supra* note 173.
222. *Id.*
223. *See id.*
224. *Id.*
225. *See id.*
226. *Id.*
227. *Id.*
228. *Id.*

home—for which she was current on all rental obligations—to find that all of her belongings were missing, including her 7-year old son's toys, and the premises was left greatly damaged.[229] Neighbors reported seeing a man emptying the house earlier in the day and, when confronted, answered that he had "an order. I work for Safeguard, deal with them."[230] Upon calling Safeguard, Corum states that she was told that all her belongings were "out in the dump" and that Safeguard was not in the business of keeping things in storage which were the subject of a property preservation order.[231]

The possibility for even more episodes like those described above endless. By one account, over three million homes across the country are in some form of default or foreclosure proceeding and are subject to regular inspections by property management firms.[232]

C. Private and State Litigation

Over the past several years since the outbreak of the housing foreclosure crisis over two hundred fifty lawsuits have been filed against various property preservation firms, and these cases span across thirty-one states.[233] Moreover, the height of these abuses appears to be rather recent, since the majority of the two hundred fifty lawsuits were initiated within only the latter part of 2012 and throughout 2013.[234]

However, despite such tragedies these lawsuits have been met with differing levels of success. Although the stories are all similar—tales of homeowners, behind on their payments and often still in negotiations with the mortgagee, experiencing varying levels of aggressive and intimidating behavior by third party property management companies hired by the mortgagee to perform certain inspection and securitization services—and even the pleadings bear a striking resemblance to one another, the results often are mixed and inconsistent.

An overview of some of the cases in which plaintiffs have successfully obtained judgments against the mortgagee, the property

229. *See* Yeager, *supra* note 36.

230. *Id.*

231. *Id.* Ms. Corum and two other families who experienced similar treatment at the hands of this bank contractor have filed suit against Safeguard. *See id.* The attorney representing the plaintiffs stated "Imagine having your family heirlooms, things that you may have been given from a grandparent, something that you hold dear, something you want to hand down to your children or whatever and all of a sudden one day all of that is snatched from you." *Id.*

232. *See* Hallman, *supra* note 173 (citing a report by the online real estate enterprise RealtyTrac).

233. *Id.* Although many of the suits have occurred during the past two years, some of the earliest break-in style foreclosures occurred as far back as 2010. *See* Andrew Martin, *In a Sign of Foreclosure Flaws, Suits Claim Break-Ins by Banks*, N.Y. TIMES, Dec. 21, 2010, at A1.

234. *See* Hallman, *supra* note 173.

management firm, subcontractors, or any combination thereof, helps ferret out the attitude of courts with regard to these types of abuses, as well as reveals those areas of the law that have the potential to provide a just remedy and which do not. In almost all cases instituted on the basis of these break-in foreclosures the requested relief arises from the same set of legal theories—invasion of privacy, conversion, intentional infliction of emotional distress, negligence, breach of contract, sometimes state consumer protection laws, and all in combination with agency theories in order to impute liability up the chain to the mortgage servicer. However, there is no uniformity as to whether any single or combination of theories leads to a victory for the distressed homeowner.

In the Main Supreme Judicial Court case of *Lougee Conservancy v. Citimortgage, Inc. et al*, the beneficiaries of a trust that held title to land and a residence located thereon, filled with family heirlooms, sued CitiMortgage and its property preservation contractor and subcontractor for breaking into the home and damaging property.[235] In fact, it was not the trust property, but rather another parcel some several miles away that was actually the subject of the default to CitiMortgage.[236] It was only through the error of Safeguard and its subcontractor that the inspector erroneously arrived at the trust property in the first place.[237]

When the subcontractor first arrived at the trust property he was unsure as to whether this was the right location, but later concluded based on conversations with Safeguard that this was indeed the mortgaged property.[238] Despite the presence of a number of "no trespassing" signs posted around the trust property, the inspector gained entry to the residence and "emptied shelves and cupboards and moved items around."[239] It was also alleged by the plaintiffs that the subcontractor "damaged a door, a doorframe, and an antique desk that belonged to Maine's first governor."[240] Before leaving, the subcontractor placed a lockbox on the door and placed a board across the entryway.[241] The plaintiffs returned to the property thereafter and, after a short period of time, were able to gain reentry into the home and assess the break-in.[242]

The plaintiffs brought a host of actions, mostly all based in tort,

235. 48 A.3d 774 (Me. 2012).

236. *Id.* at 778.

237. *Id.*

238. *Id.*

239. *See id.*

240. *Id.*

241. *Id.*

242. *See id.* at 779.

against all the parties involved.[243] As to the issue of whether the acts of the subcontractor could be imputed to Safeguard and subsequently up the chain to CitiMortgage, the court held that even though the relationship between the parties was styled as that of independent contractors, the hiring agent could still be held liable under agency law "if the principal controls the contractor's performance, thereby making the contractor an agent of the principal."[244] The court went on to find that, under the master services agreement between CitiMortgage and Safeguard, the mortgagee alone was authorized under the mortgage preservation clause to entry the property.[245] Therefore, the authority of Safeguard and any of its subcontractors to do the same was solely derived from the power and authority granted by contract to CitiMortgage.[246] Further, the mortgagee exercised a certain level of control over the contractor by way of a scorecard system that monitored and rated the work performed.[247] Thus, there were enough facts that could substantiate holding CitiMortgage liable for the acts of its agent, Safeguard, and thereby for the acts of Safeguard's subcontractor also.[248]

In analyzing the action for relief under invasion of privacy, the court held that despite the defenses raised by the defendants it was not necessary for the plaintiffs to actually "occupy" the premises in order to bring the claim.[249] Rather, their equitable title by virtue of their beneficiary status under the land trust was enough to give them a legally protected property interest.[250] "An individual is not required to own or live on the premises to be considered its 'occupant' or to maintain an expectation of privacy within its walls."[251] However, the court concluded that the subcontractor did not actually intend that his entry onto the premises result in the invasion of the plaintiffs "solitude or seclusion."[252] Rather, he was there to secure and winterize the premises and the disruption of the privacy of the trust beneficiaries was only

243. *Id.*

244. *Id.* at 780 (citing Baker Bus Serv., Inc. v. Keith, 416 A.2d 727, 730–31 n.2 (Me.1980); State Farm Mut. Auto. Ins. Co. v. Koshy, 995 A.2d 651 (Me. 2010)).

245. *Id.*

246. *Id.* at 781 ("The mortgage states that if the mortgagee abandons the property, 'Lender may do and pay for whatever is necessary to protect the value of the Property and the *Lender's* right in the Property,' which specifically includes securing the property. The Master Services Agreement describes specific tasks that Safeguard or its subcontractors must perform, and CitiMortgage supervises Safeguard's work and the quality of its work through a 'Score Cards' system, work updates, and memos.") (emphasis added).

247. *Id.*

248. *See id.*

249. *See id.*

250. *Id.*

251. *See id.* at 782.

252. *Id.*

incidental thereto.[253]

With respect to the claim of conversion, the court stated that the plaintiffs must prove that their property rights were "seriously interfered with."[254] And since the plaintiffs were able "to gain entry to the Homestead within a matter of hours" a claim for conversion could not be sustained since the duration of exclusion was so brief.[255] Lastly, the court refused to uphold the plaintiffs' claim for intentional infliction of emotional distress as well.[256] Although they both experienced "general feelings of upset and defeat" these were not "substantial enough to qualify as emotional distress."[257]

And lastly, with respect to the negligence claim, the court held that CitiMortgage, Safeguard, and the subcontractor all owed a duty to the plaintiffs to "act with care when identifying and securing mortgaged property in order to avoid securing or damaging property that they have no legal right to enter."[258] In this case, the court stated, a *prima facie* case was established that a breach of such a duty had occurred.[259]

In a similar case, an Illinois federal court held partially for the plaintiffs on the basis of many of the same claims as those at issue in *Lougee Convervancy*.[260] In *Jackson v. Bank of New York*, the plaintiff filed suit against the Bank of New York, Litton Loan Servicing, LP, the bank's loan servicer, Safeguard, Litton's contractor, and a host of subcontractors also engaged for the purposes of foreclosure-related activities.[261] The facts which preceded the suit were as follows: after an alleged default, Litton instructed Safeguard to travel to the property where it proceeded to change the locks, winterize the house, and remove personal property belonging to the owner, "all without prior notice or judicial authorization."[262]

As to the issue of agency, the court held that there appeared to be enough allegations to at least establish a *prima facie* case for an agency relationship between Bank of New York and Litton, and between Litton and Safeguard.[263] This was based on the fact that Bank of New York was the holder of the mortgage and the plaintiff worked with the bank, through Litton, in his attempts to modify the mortgage which, when

253. *See id.*
254. *Id.* at 783.
255. *See id.*; *see also id.* at 779.
256. *Id.* at 784.
257. *See id.*
258. *Id.* at 785.
259. *Id.*
260. Jackson v. Bank of N.Y., No. 11-CV-6410, 2012 WL 2503956 (N.D. Ill. June 28, 2012).
261. *Id.* at *1.
262. *Id.*
263. *Id.* at *2.

those attempts did not come to a resolution, resulted in Safeguard being sent to conduct post-default/pre-foreclosure activities relative to the property.[264] The court also held in favor of the plaintiff in stating that he had made out a valid claim for trespass due to the defendants "intrusion on to the plaintiff's interest in exclusive possession of the land."[265] The court also found that the plaintiff should prevail, based on the lack of evidence to the contrary, on the claim that the defendants had also effected conversion of the plaintiff's personal possessions when the items were removed by the subcontractor and not returned after demand.[266] Further, the court upheld the plaintiff's claim for invasion of privacy because the defendants had entered into his home, unauthorized, where he kept his private information and personal documents.[267]

However, the court struck down the claim for intentional infliction of emotional distress on the basis that, although offensive to the plaintiff, the winterization of the house and the damage to the personal property was not outrageous conduct within the meaning of the tort.[268] Also, the court refused to uphold the claim for negligence because title to the home was held in the name of the plaintiff's wife and the lack of a contractual relationship with the plaintiff precluded recovery under the negligence analysis.[269] As a final example, the bankruptcy court in *In re Carpenter* upheld claims for invasion of privacy in stating that "a person of ordinary sensibilities could have been highly offended, shamed, humiliated or suffered emotionally from having her residence entered unlawfully and all the contents thereof, including those of the most private nature, removed without her knowledge or consent" but was unwilling to validate the other accompanying claims for intentional infliction of emotional distress and trespass.[270]

Various other courts have allowed, at least in part, some form of recovery to plaintiffs who have suffered the destruction of personal property and the invasion of home and personal integrity at the hands of unscrupulous contractors.[271] In *Gordon v. Bank of New York Mellon Corp.* the distressed and defaulted homeowner returned home to find that "all of the doors in the house were damaged, and the inside of the house was trashed. . . . Most of plaintiffs' personal property was gone, and there were signs that the house had been winterized by a

264. *Id.* at *2.
265. *Id.* at *3.
266. *Id.*
267. *Id.* at *5.
268. *Id.* at *4.
269. *See id.* at *3–4.
270. No. 11-20896-TPA, 2013 WL 1953275, at *15 (Bankr. W.D. Pa. May 7, 2013).
271. *See, e.g.*, Hodges v. U.S. Bank Home Mortgage, No. 10-C-5928, 2011 WL 211343 (N.D. Ill. Jan. 20, 2011).

contractor."[272] The court upheld the plaintiffs claim for intentional infliction of emotional distress and stated that, although the parties failed to plead the proper authority for their positions, the court reasoned that the defendant "knew that severe emotional distress was "certain, or substantially certain, to result from [its] conduct."'[273]

The cases above illustrate that while few litigants prevail on all cause of actions, a number of courts are at least willing to provide some avenue of recourse—however limited it might be. But by the same token many other courts have also shown an unwillingness to impose any form of liability, or at least any substantial liability, on financial institutions and/or their contractors when confronted with break-in forecloses lawsuits. These cases range from those where the court finds that the parties have failed to allege the necessary facts to meet the elements needed for relief[274] or the courts themselves evidence hostility toward the defaulted homeowner and are unwilling to make the mortgagee or its agents out to be the villain.

In the 2013 decision of *Kheder v. Seterus, Inc.*, the Michigan appeals court used the property preservation clause in the plaintiff's mortgage as a shield to protect the mortgagee and the contractor from most all allegations of wrongdoing.[275] The court dismissed the claim for conversion, stating that the destruction of the locks, the water meters, and the door all comprised damage to fixtures which, as a part of real estate, were precluded from recovery under conversion.[276] The claim for trespass met a similar fate as the court noted that the owner had consented to such entry pursuant to the clause in the mortgage: "Keller Williams's actions were reasonable and appropriate to protect the lender's interest and were, therefore, authorized by plaintiffs."[277]

In *Robison v. Litton Loan Servicing, L.P.*, the mortgagee's contractor entered the plaintiff's home with instructions to winterize the property.[278] The plaintiff arrived home later that day only to find that it "was sealed shut and the locks changed."[279] Further, the homeowner alleged that when she did gain access to the property she discovered that "locks had been broken, the home was uninhabitable, and several items were missing."[280] The court, in reviewing the same types of causes of

272. 964 F. Supp. 2d 937, 940 (N.D. Ind. 2013).

273. *Id.* at 947.

274. *See, e.g.*, Coble v. Suntrust Mortgage Inc., No. C13-1878-JCC, 2014 WL 631206 (W.D. Wash. Feb. 18, 2014).

275. No. 308227, 2013 WL 1286020, at *5 (Mich. Ct. App. Mar. 28, 2013).

276. *See id.* at *4.

277. *Id.* at *5.

278. No. 09-CV-02677-WYD-MJW, 2011 WL 1135369, at *1 (D. Col. Mar. 29, 2011).

279. *Id.*

280. *Id.*

action as articulated in each of the break-in foreclosure cases described above, held that the emotional distress claim was unmerited since the winterization of the home was not "outrageous conduct"[281] and denied the claim that the mortgagee violated its contractual obligation to act in good faith because the language of the loan documents specifically allowed the mortgagee to act in this manner[282]—evidently regardless of how over-reaching such terms might be.

As yet another illustration of the importance some courts have placed on mortgage preservation clauses, the plaintiff in the 2013 case of *McCray v. Specialized Loan Servicing* was sent notice that she had fallen behind on her mortgage payments and thereafter entered into negotiations with the bank to begin payments again the following month.[283] Five days into the succeeding month the bank sent its property preservation firm, LPS Field Services, Inc., to inspect the plaintiff's residence and determine whether it was abandoned.[284] After a finding of vacancy, the contractor made a second visit to the premises and proceeded to change the locks, shut off the water meter, winterize the home, and allegedly damage the screen and front door.[285] Based on these actions, the plaintiff filed suit alleging chiefly trespass and damages resulting therefrom.[286]

In deciding the case, the court held that while trespass on the property of another can give rise to liability, by virtue of the property preservation clause contained in the deed of trust mortgage and in combination with the plaintiff's default under her loan, the plaintiff was deprived of her right to possession.[287] The mortgage clause stated that the if the "[b]orrower fails to perform the covenants and agreements contained in this Security Instrument...the Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument. . . ."[288] The deed of trust further stated that the "[b]orrower shall have possession of the Property until Lender has given Borrower notice of default. . . ."[289]

281. *Id.* at *7.

282. *Id.* at *9.

283. No. CIV.A RDB-12-02200, 2013 WL 1316341, at *1 (D. Md. Mar. 28, 2013).

284. *Id.* at *2.

285. *Id.* ("At this time the contractor placed a notice on the door of the residence which stated 'Notice—LPS Field Services, Inc. inspected this property and found it to be vacant or abandoned. The mortgage holder has the right and duty to protect this property accordingly. It is likely that the mortgage holder will have the property secured and/or winterized within the next few days.'").

286. *Id.*

287. *Id.* at *5.

288. *See id.* at *4 ("Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned off.").

289. *See id.*

The court reasoned that since the plaintiff had received notice of default she no longer had a legal right of possession in the property under the deed of trust.[290] And, in fact, it was the mortgagee that now had the right to possess the property, which included the "authority to inspect, secure and winterize it. Thus, Plaintiff fail[ed] to state a claim of trespass."[291]

Although all of the cases above concern private individuals asserting claims against mortgagees and their contractors (and sometimes even their subcontractors) based on break-in foreclosures, individual states have also become involved in trying to call these actors to task. On September 9, 2013, the Illinois Attorney General filed suit against a particularly notorious property preservation firm[292] in *People of the State of Illinois v. Safeguard Properties, LLC* based on a series of successive break-in-style foreclosure actions spanning across that state.[293] The attorney general based her public class action-style claims on violations of the Illinois Consumer Fraud Act.[294]

The state's petition requests that the court "permanently enjoin[] [Safeguard] from engaging in the deceptive and unfair acts and practices . . . including a permanent injunction barring [it] from engaging in the business of advertising, soliciting, offering for sale, and selling property management and preservation services . . . in the State of Illinois."[295] This was in addition to requesting civil penalties in the amount of $50,000, another $50,000 penalty for each consumer fraud violation, and a final $10,000 penalty for each consumer fraud violation "found to have been committed against a person 65 years of age or older."[296]

Like the language of many other state consumer fraud statutes, the Illinois act addresses deceptive practices as including:

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290. *Id.* at *5.

291. *Id.*

292. *See generally* Complaint, The People of the State of Ill. V. Safeguard Properties, L.L.C., No. 2013-CH-20175, 2013 WL 5290237 (Ill. Cir. Ct. Sept. 9, 2013) (The company's website states that "Safeguard is a turnkey resource for all aspects of default property management. Through continuous training of internal staff and local contractors, Safeguard ensures that all work performed meets investor/insurer requirements and agreed-upon timeframes, in the most cost-effective manner, to help save money and prevent curtailment penalties. We offer a full spectrum of inspection, preservation, valuations, and title services. As an industry leader, we pride ourselves on our attention to detail, our quick turnaround times, and our high levels of quality service in the field and in our corporate office."). *Id.* at ¶26.

293. *See generally* Complaint, *Safeguard*, No. 2013-CH-20175, 2013 WL 5290237.

294. *Id.* at ¶¶ 6–7 ("The Illinois Attorney General believes this action to be in the public interest of the citizens of the State of Illinois and brings this lawsuit pursuant to the Illinois Consumer Fraud Act.").

295. *Id.*

296. *Id.*

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use or employment of any deception, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use or employment of any practice . . . in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby.[297]

The petition goes on to specifically enumerate those acts, committed by Safeguard under the direction of the applicable mortgage servicer, which constituted an unfair or deceptive trade practice.[298] These include representing to homeowners that they no longer have a right to occupy their homes, as well as engaging in acts of intimidation in order to entice legal possessors to vacate the premises.[299]

The petition further alleges that the property preservation firm took unlawful possession of mortgaged property, including through acts of breaking and entering legally occupied homes, and thereafter changing locks, depriving owners of access, and turning off utilities.[300] Lastly, it is alleged that the defendant unlawfully removed the personal property of many homeowners, all the while without proper judicial authority, and failed to train, hire, and supervise its subcontractors who engaged in these activities on its behalf.[301]

In response to the lawsuit, Safeguard's chief executive officer released a statement to all of the company's clients, which included various mortgagees and mortgage servicers, defending the embattled company's position.[302] The contractor stated that it adhered to a "rigorous procedure of checks and balances to verify occupancy prior to securing a vacant property."[303] As to allegations of poor hiring or supervision, Safeguard stated that it conducts "background checks of all contractors and crews, carefully monitor[s] the performance of inspectors, and take[s] immediate corrective action if policies are violated."[304] As of this writing the case is still pending in Illinois state

297. *Id.* (citing Section 2 of the Illinois Consumer Fraud Act, 815 ILL. COMP. STAT. 505/2).

298. *See id.*

299. *Id.*

300. *See id.*

301. *See id.*

302. *Safeguard Client Communication in Response to Illinois Attorney General's Lawsuit*, TODAY NEWS (Oct. 1, 2013, 8:05PM), http://www.today.com/news/safeguard-client-communication-response-illinois-attorney-generals-lawsuit-8C11311715.

303. *See id.*

304. *Id.*

court and, although no other states have yet to take any similar action, the Ohio Attorney General has reported a number of complaints relative to break-in foreclosure practices in the latter part of 2013.[305]

IV. LIABILITY AND ACCOUNTABILITY: AN APPRAISAL OF BREAK-IN FORECLOSURES

Despite the far-reaching and substantial damage caused by the housing crisis and the accompanying public backlash against the financial institutions that brought it about, overreaching foreclosure practices still persist.[306] Despite the $25 billion settlement with the nation's largest banks on account of robosigning and other wrongful mortgage practices, meaningful oversight of bank foreclosures is still lacking.[307] And despite the expenditure of billions of American tax dollars to help stabilize the financial sector, the instability of which was caused by the creation and trading of toxic housing-related instruments, break-in foreclosures have nevertheless emerged and spread across the country.[308]

Reacting to these abuses, in March of 2014 the inspector general of the Department of Housing and Urban Development issued a report that sharply criticized the lack of government oversight in connection with the use of third party property management firms by mortgage servicers.[309] "Overall, several servicers reviewed during the audit did not have quality controls in place to ensure contractors provided accurate, complete, and consistent information in property inspection reports."[310] The report further stated that many of the audited inspection reports revealed "inconsistent and inaccurate information; missing or blurry photographs; manipulated date and time stamps on the photographs; and unnecessary inspections that did not provide useful information about the properties."[311] And lastly, the report found that "[t]he pre-foreclosure property inspection industry is largely unregulated" and further stated that "there are no specific federal or state laws that govern property inspections of homes securing mortgage loans

305. Michelle Jarboe McFee, *Safeguard Properties of Valley View Sued by Illinois Attorney General Over Treatment of Foreclosures*, CLEVELAND.COM (Sept. 12, 2013), http://www.cleveland.com/business/index.ssf/2013/09/safeguard_properties_of_valley.html.

306. *See supra* Parts I–II.

307. *See supra* Parts I–II and accompanying discussion.

308. *See supra* Parts I–II.

309. *See* FED. HOUSING FIN. AGENCY, AUDIT REPORT: FHFA OVERSIGHT ENTERPRISE CONTROLS OVER PRE-FORECLOSURE PROPERTY INSPECTIONS (2014), *available at* https://origin.www.fhfaoig.gov/Content/Files/AUD-2014-012.pdf.

310. *Id.* at 1.

311. *Id.* at 1–2.

in default" which includes a lack of standards for servicers "to require their inspectors to maintain minimum education requirements, experience level, or qualifications."[312]

However, in response to this torrent of criticisms and critiques from the federal housing watchdog agency, the actual Department of Housing and Urban Development, through the Federal Housing Finance Agency, stated that it would direct the GSEs to "assess and manage risks related to property inspections" but declared that "The [housing agency] does not believe the report findings and examples of deficiencies provide compelling support for the imposition of uniform standards."[313]

A. Critique of Existing Laws and Regulations

As evidenced above, the laws, regulations, and other legal frameworks currently in place to deal with foreclosure abuses of this kind have proved inadequate.[314] Despite findings of poor controls and a lack of regulation to ensure quality and adherence to the law, the federal agencies charged with monitoring the housing market have been unwilling to address the problem. And while many of the legal protections and safeguards that exist under current law—such as under tort and contract theories—can sometimes provide recourse for the distressed homeowner, these remedies are far from being consistent or reliable.[315]

Similarly, the provisions of the national mortgage settlement that are geared toward ensuring that financial institutions adequately hire and supervise their contractors, although well intentioned, have not proved effective.[316] Understanding the loopholes, inadequacies, and deficiencies in these existing laws and regulations reveal, in starker terms, the serious and immediate need to adopt a more robust and muscular approach to deal with mortgagee-contractor behavior in connection with foreclosures.[317]

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312. *Id.* at 11.

313. *See* Ben Hallman, *Housing Watchdog Slams Massive Property Inspection Industry*, HUFFINTGON POST (Mar. 25, 2014), http://www.huffingtonpost.com/2014/03/25/property-inspection-industry_n_5029000.html; *see also* Press Release, Nat'l Assoc. of Mortgage Field Servs., Inc., NAMFS Offers an Alternate Perspective on Performance of Pre-Foreclosure Inspections (April 12, 2014), *available at* http://www.namfs.org/Portals/0/2014_04_12_NAMFS_OIG_Audit_Final.pdf (describing the response by the National Association of Mortgage Field Services and that body's creation of an academy to train and certify mortgage field service providers).

314. *See supra* Part II.C.

315. *See id.*

316. *See id.*

317. *See id.*

1. Deficiencies in Settlement Enforcement and Scope

Part II of the servicing standards portion of the national mortgage settlement[318] stipulates that mortgage servicers must enact policies to supervise and manage "foreclosure firms, law firms, foreclosure trustees, subservicers and other agents, independent contractors, entities and third parties (including subsidiaries and affiliates)" that are retained by the servicer.[319] The obvious motivation behind this provision is to ensure that, to the extent third party contractors are engaged in assisting in the foreclosure of distressed properties, the mortgagee will ensure that these parties respect the rights of the borrower and do not engage in any fraudulent activities.[320] This would include regulating third party contractors charged with signing affidavits of proof that the foreclosing mortgagee had the proper authority to act (thereby guarding against additional robosigning), as well as providing that other foreclosure professionals are adequately supervised and credentialed so as to prevent violations of state foreclosure laws (including the observance of notice, cure, and consumer protection safeguards).[321]

And, although probably not in the forefront at the time of the settlement, part III of the mortgage servicing standards would also cover the activities of those third party property management firms who had been and continue to be retained by financial institutions to assist in determining the occupancy of foreclosed properties and to guard against undue damage to the collateral.[322]

Although well intentioned, enforcement of these servicing standards is another matter. In general, enforcement of the national settlement agreement is delegated to a monitoring committee comprised of representatives from the various plaintiff state attorneys general and federal agencies.[323] In connection with the monitoring committee an individual is appointed as the "monitor" who is charged with the overall

318. The servicing standards constitute an omnibus set of uniform agreements that each of the defendants entered into relative to mortgage servicing rules, regulations, and processes. This document is appended to each of the consent judgments as Exhibit A. *See, e.g.*, Consent Judgment, U.S. v. Bank of America, No. 1:12-cv-00361-RMC (D.D.C. Apr. 4, 2012), *available at* https://www.jasmithmonitoring.com/omso/wpcontent/uploads/sites/4/2014/05/Consent_Judgment_Chase_4.11.122.pdf [hereinafter Chase Consent Judgment].

319. *Id.*

320. *See supra* Part I.A.1–4.

321. *See supra* Part I.A.1–4.

322. *See* Chase Consent Judgment, *supra* note 318; *see also supra* Part II.

323. *See* Exhibit E, Chase Consent Judgment, *supra* note 318, at B ("A committee comprising representatives of the state Attorneys General, State Financial Regulators, the U.S. Department of Justice, and the U.S. Department of Housing and Urban Development shall monitor Servicer's compliance with this Consent Judgment (the "Monitoring Committee").").

administration of the settlement.[324] This individual is commissioned with determining whether the defendant banks are in compliance with the servicing standards, as well as their implementation, according to individually approved work plans with each of the defendants.[325] These work plans are subject to quarterly reviews for compliance by yet another third party reviewer known as the internal review group.[326] This second bureaucratic entity is comprised of auditors and compliance officers who are not involved in the direct mortgage servicing line of business.[327]

As to work plan accountability, each servicer is subject to a compliance metric that charts goals and assigns values to the mortgage servicing standards.[328] By periodically assessing the level of compliance that each institution has achieved the metric allows the monitor, the internal review group, and the defendant to nominally measure, in an objective fashion, the extent to which the consent decree is being adhered.[329] Throughout this process the bank defendants must provide information and access to the monitor for purposes of ensuring compliance and on-track fulfillment of the work plans.[330]

For purposes of this Article, the third party contractor oversight provisions of the consent decree are most directly applicable to preventing or remediating break-in foreclosure practices.[331] This benchmark requirement is listed in item 5 of the work plan metric.[332] It requires that the internal review group and the monitor judge compliance by looking at whether there is evidence that the servicer has "documented oversight policies and procedures demonstrating compliance with vendor oversight provisions," whether there is "evidence of periodic sampling and testing of foreclosure documents," whether there has been a review of "fees and costs assessed by vendors," and whether servicers have implemented scorecards "to evaluate vendor performance."[333]

324. *Id.*

325. *Id.* at E.5 ("Servicer and the Monitor shall reach agreement on the terms of the Work Plan within 90 days of the Monitor's appointment, which time can be extended for good cause by agreement of Servicer and the Monitor. If such Work Plan is not objected to by the Monitoring Committee within 20 days, the Monitor shall proceed to implement the Work Plan.").

326. *Id.* at E.3.

327. *See id.* at E.4.

328. *Id.* at E.4.7.

329. *Id.* ("Servicer's compliance with the Servicing Standards shall be assessed via metrics identified and defined in Schedule E-1.").

330. *Id.* at E.7.

331. *Id.* at Exhibit A, Part III.

332. *Id.* at E.1.8.

333. See *id.* for a description of the measurements, the loan level tolerance for error, the threshold error rate for penalties, and the test population, error definitions, and testing questions.

But the obvious question becomes what happens if one of the defendant financial institutions violates the terms of the consent decree or fails to implement or adhere to the mortgage servicing requirements per its work plan? The enforcement terms that govern the monitor's oversight abilities state that "if the Monitor becomes aware of facts or information that lead the Monitor to reasonably conclude that Servicer may be engaged in a pattern of noncompliance with a material term of the Servicing Standards that is reasonably likely to cause harm to borrowers or tenants residing in foreclosed properties" then the monitor must engage the servicer in a review of the facts to determine their veracity.[334] Then, and only then, can the monitor propose additional, although limited, metric benchmarks for the servicer to achieve as part of its on-going work plan.[335]

And it is only after the monitor and the defendants have engaged in these good faith attempts to resolve the dispute that either of them may return to the federal district court for a resolution, which of course can involve a protracted period of delay.[336] All the while homeowners such as those who have experienced break-in foreclosures may be deprived of access to their homes and/or their personal property.[337]

Thus, while it might seem that the monitor has substantial authority to ensure compliance with the consent decree, in reality this power is far more limited and circumscribed. First, compliance is very standardized through the use of the work plan metric and does not leave much room for less tangible and unpredictable but still egregious forms of lending abuse. Secondly, the compliance process is subject to the review of multiple groups and entities that must all collaborate in order to bring down the hammer on a violating servicer. And third, the monitor's power in connection for when a violation has occurred is relegated to adding additional benchmarks to the violator's work plan, but the monitor is limited in how far he can go in making such additions.[338]

Perhaps most relevant for those homeowners who have experienced break-in foreclosures, only the parties to the consent decree and the monitoring committee have the authority to enforce its provisions, and enforcement can only occur in the federal district court for the District of Columbia.[339] Therefore, these remedies provide no meaningful

334. *See id.* at E.8.

335. For the limitations on the monitor's ability to add new benchmarks to the work place, see *id.* at E.8–E.9.

336. *Id.* at E.14.

337. *See supra* Part II.B.

338. *See id.* at E.8–E.9.

339. *Id.* Harmed borrowers are granted some relief for instances of violations of the work plan, but that right to "remediation" is ill-defined and does not appear as a center piece of the goals of the consent decree. *See id.* at E.12 ("In addition to the Servicer's obligation to cure a Potential Violation

individual recourse for those homeowners who have seen their homes broken into, their personal effects taken or destroyed, and who have suffered intimidation by repeated notices of vacancy and abandonment.[340] The national mortgage settlement gives these individuals no avenue to enforce the contractor oversight standards directly and, even if they could, a multi-tiered enforcement mechanism that involves a protracted colloquy between the enforcer and the violator prior to obtaining a remedy still stands between the distressed homeowner and any significant relief.[341] While this trifurcated enforcement structure—between monitoring committee, monitor, and internal review group—might guard against an abuse of discretion by the monitor or any one group, it creates an administrative lag and fashions a system of enforcement that lacks the ability to respond quickly to new abuses.[342]

And lastly, what makes the national mortgage settlement a particularly inadequate path for recourse in instances of break-in foreclosures is that the various provisions of the consent decree, and all its intricate mortgage servicing standards, apply solely to the five financial institution—Citigroup, JPMorgan Chase, Wells Fargo, Ally Financial, and Bank of America—that were parties to the litigation.[343] It does not sweep into its ambit the many other mortgage servicers who contract with third party property management firms to assist in pre-foreclosure activities, and thereby leaves many homeowners without even the possibility of seeing meaningful change to a financial system that is already substantially one-sided.[344]

2. Mixed and Inconsistent Results in Litigation

Just as with the national mortgage settlement, the chances of an aggrieved homeowner finding justice through existing statutory or common law remedies are similarly lacking. As described in the cases above, homeowners can never be quite sure exactly what decision will

through the Corrective Action Plan, Servicer *must remediate any material harm to particular borrowers* identified through work conducted under the Work Plan. In the event that a Servicer has a Potential Violation that so far exceeds the Threshold Error Rate for a metric that the Monitor concludes that the error is widespread, Servicer shall, under the supervision of the Monitor, identify other borrowers who may have been harmed by such noncompliance and remediate all such harms to the extent that the harm has not been otherwise remediated.") (emphasis added).

340. *See generally id.*

341. *See id.* at E.8–E.9.

342. *See generally id.*

343. *See, e.g.*, Chase Consent Judgment, *supra* note 318.

344. *See generally* Peter S. Goodman, *Lucrative Fees May Deter Efforts to Alter Loans*, N.Y. TIMES, July 29, 2009, at A1; *see also* Gretchen Morgenson, *Flawed Paperwork Aggravates a Foreclosure Crisis*, N.Y. TIMES, Oct. 3, 2010, at A1.

result from filing suit against either the bank or its contractors.[345] The results from such litigation are both mixed and inconsistent.[346] Decisions are varied depending upon the cause of action, as well as upon the jurisdictional venue where the suit is brought.[347] Sometimes a party will prevail on some or just one claim, but others will be dismissed, and at other times all claims are dispensed with.[348] Further, each of the lawsuits involves a piece-meal, bootstrapping of mostly tort law theories in hopes that at least one theory will be viable.[349] And, even when the property preservation contractor or the subcontractor is deemed liable, the case law varies as to whether liability may be imputed up the chain to other parties, such as the bank itself.[350] For a distressed homeowner already in an economically weakened state, facing the fear of losing his home and with little resources, the chances of success in court appear quite grim.[351]

As a threshold matter, the authority for these break-in foreclosures is the mortgage preservation clause—now so commonplace in nearly every mortgage document across the country.[352] These clauses allow the mortgagee to enter the property for purposes of inspection and remediation if there is a belief that the property is in danger of being damaged.[353] Although the occasional "reasonable determination" and "reasonable notice" may make its way into the provision, it is by and large at the mortgagee's discretion as to whether to exercise these powers.[354] Often courts who are confronted with these break-in foreclosure cases will hold that the mortgage preservation clause acts as a shield for the bank and its agents.[355] In theory, the bank cannot be deemed to violate the property rights of the owner when the owner has expressly consented to granting the bank the authority to enter onto the premises.[356]

From the bank's perspective, if the owner has defaulted then typically the association between the parties as one of a joint venture-style relationship now shifts to a more adversarial posture.[357] Banks often

345. *See supra* Part II.C.
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.*
350. *Id.*
351. *Id.*
352. *See supra* Part II.A.3.
353. *See supra* Part II.C.
354. *See supra* Part II.A.3.
355. *See supra* Part II.C and accompanying discussion.
356. *Id*.
357. *See supra* Part II.A–B.

take the position that it is in its best interest to ensure that it has the authority to access and inspect the property to guard against the collateral being intentionally damaged.[358] As some courts have stated, a "default trigger[s] the lender's authority to do whatever was reasonable and appropriate to protect its interest" and "in accordance with the terms [of the mortgage, the bank] had the right and authority to secure and winterize the Property."[359]

But the courts, while citing this mortgage provision, neglect to discuss the overriding duty of good faith that is implicit in all contracts.[360] While the mortgagee might have the authority to enter onto the premises if it has a reasonable belief that the collateral is being damaged, the existence of that reasonable belief is still a significant prerequisite.[361] And even if the bank did indeed have the requisite reasonable belief such that it would be justified in inspecting the property, entering into the premises on a false belief that the property is abandoned, much less breaking in the front door and smashing windows, are far beyond the good faith obligation that overlays any such authority.[362] Nevertheless, none of the courts that have cited to the mortgage clause as a shield to trespass or invasion of privacy have taken into account the long-standing common law contractual requirement of good faith.[363]

Another deficiency in current law regarding break-in foreclosures deals with the ability of the plaintiff to ultimately reach the mortgage servicer. While the contractor may himself be liable for trespass, conversion, or any of the other claims, imposing liability on the bank itself is not so easily achieved. This is equally true with respect to imposing liability on the property preservation firm itself when the damage or illegal acts are done by subcontractors. In other words, often times the parties involved in these break-in style foreclosures appear in the form of a chain of various parties with the subcontractors at the bottom, the property management firm in the middle, and the mortgage servicing bank at the top. The ability to impose liability should revolve

358. *See supra* Part II.A.3.

359. Kheder v. Seterus, Inc., No. 308227, 2013 WL 1286020 (Mich. App. Ct. 2013).

360. *See, e.g., id.*; McCray v. Specialized Loan Servicing, No. RDB-12-02200, 2013 WL 1316341 (D. Md. 2013); Robison v. Litton Loan Servicing, L.P., No. 09-cv-02677-WYD-MJW, 2011 WL 1135369 (D. Colo. 2011).

361. *See, e.g., McCray*, No. RDB-12-02200, 2013 WL 1316341; *Robison*, No. 09-cv-02677-WYD-MJW, 2011 WL 1135369.

362. RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

363. *See Kheder*, No. 308227, 2013 WL 1286020; *McCray*, No. RDB-12-02200, 2013 WL 1316341; *Robison*, No. 09-cv-02677-WYD-MJW, 2011 WL 1135369; *see also* Chunlin Leonhard, *Subprime Mortgages and the Case for Broadening the Duty of Good Faith*, 45 U.S.F. L. REV. 621 (2011).

around the law of agency—or so one might think.

The principal must exercise control over the agent.[364] The principal employs the agent "to perform a service in [the principal's] affairs and who controls or has the right to control the physical conduct of the other in the performance of the service."[365] It is through this relationship of control and oversight that liability may be imputed to the principal for the wrongful acts of the agent.[366]

However, typically agreements between banks and property management firms and between property management firms and their subcontractors explicitly state that the relationship between the parties is that of an independent contractor.[367] Unlike in the principal-agent relationship, the principal does not control the acts of the independent contractor with respect to his physical conduct in the performance of the task.[368] Therefore, depending upon the circumstances, an independent contractor may be considered an agent, but there are many cases where he may not, and thus not subject to the same standard of vicarious liability—it is a purely factual question.[369]

In addressing this issue in the property management firm context, some courts have held that the use of scorecards by a servicer to review the effectiveness of the contractor is sufficient evidence of a level of control that would give rise to a principal-agent relationship.[370] Similarly, other courts have held that although it may not be clear that the bank controlled the method by which the inspection and winterization of the property was to be carried out, the fact that the contractor received its orders to go to the property from the bank and would not have engaged in the alleged wrongful acts otherwise was sufficient to create an inference of agency.[371]

But most of the time courts are hesitant to find an agency relationship without more of a heavy, factual showing of control.[372] And,

364. RESTATEMENT (SECOND) OF AGENCY § 1 (1958) ("Agency is the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.").

365. *Id.* § 2.

366. *See id.*

367. *See supra* Part II.A.2.

368. RESTATEMENT (SECOND) OF AGENCY § 2 (1958).

369. *Id.; see also Lincoln Ben. Life Co. v. Edwards*, 966 F.Supp. 911 (D. Neb. 1997).

370. Lougee Conservancy v. Citimortgage, Inc., 48 A. 3d 774 (Me. 2012).

371. Jackson v. Bank of N.Y., No. 11-cv-6410, 2012 WL 2503956 (N.D. Ill. 2012).

372. *See, e.g.*, Tauwab v. Huntington Bank, 2012-Ohio-923, at ¶10 (Oh. Ct. App.) ("Generally, a principal, such as Huntington Bank, is not liable for the acts of an independent contractor, such as Safeguard, or the independent contractor's servants."); *see also* Kelley v. Southern Pacific Co., 419 U.S. 318 (US 1974); State Police Ass'n of Mass. v. C.I.R., 125 F.3d 1, (Ms. 1998); Lincoln Ben. Life Co. v. Edwards, 148 F.3d 999 (8th Cir. 1998); Shenker v. Baltimore & Ohio R. Co., 374 U.S. 1 (1963); Standard Oil Co. v. Anderson, 212 U.S. 215 (1909).

sophisticated banks and property management firms will craft the contract language in such a way as to evidence an independent contractor status, arguing that although the inspection and winterization of the property is done at the bank's behest, the method of these activities and the tools and other internal processes used by the contractor are entirely outside the purview of the bank's control.[373] Thus, it is not easy for an aggrieved homeowner to reach the mortgagee, which is evidenced by the fact that many of the cases filed with respect to break-in foreclosures are aimed at only the contractor or subcontractor—including the 2013 suit filed by the Illinois attorney general—and not the bank also.[374]

Trespass claims and invasion of privacy claims also meet a varied end. A claim for trespass arises when an individual intentionally enters onto the land of another, without consent, regardless of whether any actual harm is caused.[375] As discussed above, sometimes courts will completely disregard a discussion of the mortgage clause and deem the contractor to have effected "intrusion on to the plaintiff's interest in exclusive possession" of his property.[376] But many other times the court will dismiss the trespass claim by virtue of the contractual consent granted by the mortgage to the bank, and thus to any of its representatives or surrogates.[377] Generally, a claim for invasion of privacy occurs when there is an intentional physical intrusion upon "the solitude or seclusion" of another "or his private affairs or concerns" provided that "the intrusion would be highly offensive to a reasonable person."[378] But here again the courts vary widely as to whether they will grant recovery under this theory. Some courts have stated that although the contractor wrongfully entered into the property, he lacked the requisite intent to intrude into the owner's privacy and seclusion.[379] Yet others have found a claim for invasion of privacy nonetheless in stating that the "[p]laintiff alleges that Defendants invaded his home, where he kept private papers containing personal information. These facts are sufficient to allege that the matter intruded upon was private."[380]

Conversion claims based on an individual exercising domination or control over the personal property of another so as to interfere with the

373. *See supra* Part II.A.2.

374. *See supra* Part II.C.

375. RESTATEMENT (FIRST) OF TORTS § 158 (1934).

376. Jackson v. Bank of New York, 2012 WL 2503956 (N.D. Ill. 2012).

377. *See e.g.*, McCray v. Specialized Loan Servicing, 2013 WL 1316341 (D. Maryland 2013).

378. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

379. *Lougee*, 48 A.3d 774.

380. *Jackson*, No. 11-cv-6410, 2012 WL 2503956.

owner's control also succeed on a variable basis.[381] These claims are brought in connection with damage to chattels—such as furniture, household items, or other personal property—that occur during the contractor's entry into the home.[382] Some courts have held that, although the contractor took dominion or control over the owner's property, if the property was returned within a reasonable period of time thereafter then it could not be said that the taking caused a "serious" interferences with the owner's rights in that property.[383]

Similarly, negligence theories in break-in foreclosure cases sometimes prevail based on the notion that the contractor owes a duty to act with care when executing its inspection and winterization duties,[384] but sometimes specific state-related nuances of the negligence analysis have mitigated against imposing tort-based negligence liability. One such instance of the latter includes a case where the court held that when the duty of the contractor arises out of the contractual duty originating from the mortgage between the bank and the borrower, a claim for a breach of the duty of care is barred.[385]

And lastly, intentional infliction of emotional distress is the least prevailing theory typically brought in connection with break-in foreclosure suits.[386] This action requires that the plaintiff show that the extreme or outrageous conduct was intentionally done to cause severe emotional distress.[387] Courts generally state that, while certainly upsetting, the winterization of one's home or minimal damage to one's personal property does not constitute extreme or outrageous conduct.[388] Further, while having one's home broken into might cause one to feel upset, embarrassed, or defeated, those feelings do not rise to the level of severe emotional distress.[389] Very few courts have been willing to recognize the often significant psychological and emotional trauma, at least in the minds of the victims, which occurs when arriving home to find one's house has been invaded, one's personal belongings damaged or missing, or the doors, locks, and windows of the home damaged.[390]

381. *See supra* Part II.C.

382. RESTATEMENT (SECOND) OF TORTS § 222A (1965).

383. *See Lougee*, 48 A.3d 774.

384. *See id; see also* RESTATEMENT (FIRST) OF TORTS § 281 (1934).

385. *Jackson*, No. 11-cv-6410, 2012 WL 2503956.

386. *See supra* Part II.C.

387. *See generally* RESTATEMENT (SECOND) OF TORTS § 46 (1965) ("One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.").

388. *Jackson*, No. 11-cv-6410, 2012 WL 2503956.

389. *In re* Carpenter, No. 11-20896-TPA, 2013 WL 1953275, at *15 (Bankr. W.D. Pa. May 7, 2013).

390. *Lougee*, 48 A.3d 774; *see also* Gordon v. Bank of N.Y. Mellon Corp., 964 F. Supp. 2d 937

So while various existing legal theories might provide an occasional avenue of recourse for aggrieved homeowners, success is anything but certain.[391] The nuances and complexities of these contract and tort-based legal theories vary from state to state and are often superimposed with special statutory or jurisprudential overlays that can limit or modify the ability to achieve a just result.[392] Courts view the severity of these break-in foreclosures differently, and thus differ on whether relief should be granted.[393] Furthermore, courts have been extremely mixed on whether liability can be imputed up the chain to the property management company or even the bank/mortgage servicer itself.[394] Lastly, sometimes courts uphold the validity of the mortgage preservation clauses—the centerpiece of these pre-foreclosure practices—while neglecting to discuss the overriding obligation of good faith, while at other times they choose not to discuss these provisions altogether.[395] The only thing that is certain is that homeowners who experience break-in foreclosure are left feeling lost and helpless, and, as it turns out, existing laws have very little to offer them in the way of justice.[396]

B. A Call for Action: Proposed Solutions

The extent to which the American economy, particularly the housing market, has rebounded is still unclear.[397] And despite a host of reforms, bailouts, and public shaming regarding the housing crisis and its originators, more robust and meaningful laws and regulations are needed to ensure these the types of abusive break-in-style foreclosures are halted.[398] The national mortgage settlement, while having the possibility of making seismic changes in the mortgage lending and servicing industry, is a long-term process of systemic reform and only

(N.D. Ind. 2013).

391. *See supra* Part II.C.

392. *See id.* and accompanying case law discussion.

393. *See id*.

394. *See id*.

395. *See id.*

396. *See generally id*.

397. *See* Hill, *supra* note 2; *see also* Elvina Nawaguna, *U.S. Sees Fewer Foreclosures as Banks Reclaim More Homes*, DAILY FIN. (May 15, 2014, 6:00AM), http://www.dailyfinance.com/2014/05/15/fewer-home-foreclosures/; Lucia Mutikani, *Small-Business Confidence Springs Back to Pre-Crisis Levels*, DAILY FIN. (May 13, 2014, 7:46AM), http://www.dailyfinance.com/2014/05/13/small-business-confidence-back-precrisis-levels/; *A Rickety Rebound*, THE ECONOMIST (Apr. 17, 2013), http://www.economist.com/news/leaders/21583686-global-economy-gaining-momentum-only-america-acceleration-likely-last.

398. *See supra* Part II and accompanying discussion.

directly impacts five major US banks.[399] Further, unfortunately the settlement offers very little in the way of immediate relief or practical recourse for everyday homeowners who find themselves aggrieved by these aggressive and abusive foreclosure practices.[400]

By the same token, litigation by private individuals against banks and their third party contractors have provided little in the way of solid results.[401] Case law is mixed as to whether relief can be granted, with some courts refusing to impute liability to the ultimate mortgage servicer while others upholding the property preservation clause in the mortgages as a way to undercut the claims of the plaintiff.[402] While existing state law concepts might hold the possibility of relief to distressed homeowners, the chances of success are shaky and any such attempts involve the expenditure of substantial sums in attorney's fees and court costs on the front end.[403] A more dynamic and immediate series of reforms are needed to address current claims by distressed homeowners, as well as prevent future abuses of this kind.[404]

Such a framework must be broad-based so as to avoid a piece-meal approach that invites loop holes or forum shopping; it must be effective so that a violation does not result in a toothless remedy, and it must be comprehensive such that it impacts not only the subcontractor who breaks into the home and removes the personal items, but also the mortgagee/lender on whose authority the property preservation firm and all lower contractors are acting.[405] The entity that is best posed to help achieve these wide-ranging goals, in part, is the Consumer Financial Protection Bureau (CFPB).[406] This newly formed federal watchdog agency is charged with making markets "for consumer financial products and services work for Americans—whether they are applying for a mortgage, choosing among credit cards, or using any number of other consumer financial products."[407]

399. *See supra* Part I.C.

400. *See supra* Part III.A.I.

401. *See supra* Part III.A.II.

402. *See id.*

403. *See id.*

404. *See supra* Part III.A.

405. *See id.*

406. *See* Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881 (2012); Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893 (2011); Edmund L. Andrews, *Banks Balk at Agency Meant to Aid Consumers*, N.Y. TIMES, July 1, 2009, at B1.

407. *About Us*, CONSUMER FIN. PROTECTION BUREAU, http://www.consumerfinance.gov/the-bureau/ (last visited May 28, 2015); *see also* Michael C. Nissim-Sabat, *Capturing this Watchdog? The Consumer Financial Protection Bureau Keeping the Special Interests Out of its House*, 40 W. ST. U. L. REV. 1 (2012).

Although the law of mortgage foreclosures is chiefly the domain of the states,[408] various federal laws interact with state law in governing the process whereby banks foreclosure on their mortgages.[409] Among the various powers accorded to the CFPB by the Dodd-Frank Act include the ability to regulate the operations, policies, and processes of mortgage servicers and mortgage originators.[410] It is through this power that the CFPB has the greatest potential to make a firm stand in bringing break-in foreclosures to an abrupt halt. The following are recommendations as to how the CFPB, through their regulatory authority over mortgage servicers and mortgage originators, as well as state legislatures can bring an end to these types of foreclosure abuses.

1. Enacting Broad Third Party Provider Oversight Regulations

The first thing that should be done is that certain aspects of the third party provider oversight provisions of the national mortgage settlement should be promulgated into industry-wide standards by the CFPB. These standards and their metrics provide a helpful framework of checks and balances that should assist banks—who perhaps many times may be unaware of the misdeeds of their contractors and subcontractors—to have processes and systems in place to police misconduct.[411] These standards would help ensure that contractors are properly interviewed, credentialed, hired, and supervised throughout the course of their service.[412]

The CFPB, through their auditors and analysts, should be charged with ensuring that mortgage servicers who engage these third party contractors are able to provide the proper documentation to substantiate that a system of checks and balances has been put in place for each of their contractors. This would be in the same vein as how it is envisioned that the national mortgage settlement monitor and the internal review

408. *See, e.g.*, Higley v. Flagstar Bank, FSB, 910 F. Supp. 2d 1249 (D. Or. 2012).

409. *See, e.g.*, Mortgage Forgiveness Debt Relief Act of 2007, Pub. L. No. 110-142, 121 Stat. 1803 (2007); The Servicemembers Civil Relief Act of 2003, 50 App. U.S.C. §§ 501-597 (2003); Protecting Tenants at Foreclosure Act, Pub. L. No. 111-22, §§ 701-704, 123 Stat. 1632, 1660-1663 (2009).

410. Eric J. Mogilnicki & Melissa S. Malpass, *The First Year of the Consumer Financial Protection Bureau: An Overview*, 68 BUS. LAW. 557 (2013); Adam J. Levitin, Andrey D. Pavlovd, & Susan M. Wachter, *The Dodd-Frank Act and Housing Finance: Can It Restore Private Risk Capital to the Securitization Market?*, 29 YALE J. ON REG. 155, 163 (2012) ("The CFPB has the ability to regulate mortgage origination practices beyond the reforms in title XIV of the Dodd-Frank Act. It has the power to make rules under the Real Estate Settlement Procedures Act, the Truth in Lending Act, the SAFE Mortgage Licensing Act, the Interstate Land Sales Act, and Fair Debt Collection Practices Act, and also a broad power to proscribe unfair, deceptive, and abusive acts and practices.").

411. *See supra* Part III.A.1.

412. *See id.*

group would conduct periodic tests and inspections for the five banks subject to the mortgage foreclosure settlement.[413] It might also be advantageous, if sufficient regulatory authority is present, for the CFPB to impose quality standards on the Mortgage Field Services Industry as a whole, thereby addressing the break-in foreclosure threat both indirectly through the servicer's duties and directly through obligations imposed on the contractors themselves. These tasks and functions would fall squarely within the goals of the CFPB because ensuring the safety and fairness of the mortgage market—which would include the foreclosure of mortgages and the treatment of homeowners after default, both by servicers and those who support them—is a substantial part of the agency's mission.[414]

2. Creating a Private Cause of Action for Break-in Foreclosures

The second thing that could be done is for state legislatures—if not Congress itself or the CFPB if sufficient regulatory authority exists—to fashion a private cause of action that distressed homeowners could avail themselves of when faced with unfair foreclosure practices. In the spirit of the various state laws prohibiting unfair trade practices,[415] this action would be specifically tailored to those instances whereby homeowners suffer from aggression, intimidation, or over reaching by their mortgage servicers or any of their agents or contractors. Many state unfair trade practices acts provide specific examples of activities that fall within the statute's prohibited acts, and break-in foreclosure activities could be similarly added to these enumerations.

Furthermore, this cause of action should allow for the homeowner to go directly against the banking institution and other indirect contractors, without the need to show the traditional agency relationship between the bank and the subcontractors and between any intervening parties.[416] Since the mortgage servicer is the party in whose interest and on whose instruction the contractor is conducting the inspection and/or winterization activities, it only makes sense that the bank should be

413. *See id.*

414. *See generally* Joseph J. Reilly & Shara M. Chang, *An Overview of the CFPB's Ability-to-Repay/Qualified Mortgage Rule*, 32 No. 7 BANKING & FIN. SERVICES POL'Y REP. 1 (2013).

415. *See* CAROLYN L. CARTER, CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES (2009), *available at* https://www.nclc.org/images/pdf/car_sales/UDAP_Report_Feb09.pdf. It should be noted that state consumer protection laws vary greatly and do not all provide the same level of protection to consumers. *Id.* For instance, "[i]n addition to Michigan and Rhode Island, three states—Louisiana, New Hampshire, and In addition to Michigan and Rhode Island, three states—Louisiana, New Hampshire, and Virginia—exempt most lenders and creditors from UDAP statutes, while another 15 leave significant gaps or ambiguities in their coverage of creditors." *See id.* at 3.

416. *See supra* Part III.2.

ultimately responsible for supervising, in substantial part, the activities of its contractor.[417] This is particularly true since the bank holds such a superior position of power and resources vis-à-vis the economically weak and distressed homeowner in default.[418] And lastly, this form of automatic liability already exists in the context of Uniform Commercial Code article nine in connection with violations of the peace by contractors hired by secured parties in the self-help repossession process, as well as the prohibition on allowing the secured party to contractually define what constitutes a violation of the peace.[419]

And lastly, this civil cause of action should provide for attorney's fees and court costs so that attorneys will be incentivized to take on these cases of break-in foreclosures. Distressed homeowners will have little financial resources available to hire lawyers and file expensive lawsuits so the action must allow for recovery of these costs by the prevailing party.[420] However, the award of attorney's fees should be reciprocal so as to discourage homeowners or plaintiffs' attorneys from making frivolous claims in an attempt to delay the legitimate foreclosure process.

Similarly, it would also be beneficial if the government (either by the state attorney general in the case of an expansion of state unfair trade practices law or by the CFPB under an administrative action) could bring an action on behalf of aggrieved homeowners—much like as was done by the Illinois attorney general—if it so chooses.[421] In this way the government can go after particularly egregious instances of abusive foreclosures on behalf of homeowners and make a broader statement about the impermissibility of such practices. By providing a civil cause of action homeowners will be able to obtain immediate relief while the wheels of the larger reform efforts continue to turn.

3. Curtailing the Use of Property Preservation Clauses

Finally, the use of property preservation clauses in residential mortgages should be substantially curtailed. In many ways these provisions cause the property owner to essentially forfeit some of the major and most essential elements of ownership in favor of the

417. *See supra* Part II.A–B.

418. *See* Nicole Lutes Fuentes, *Defrauding the American Dream: Predatory Lending in Latino Communities and Reform of California's Lending Law*, 97 CAL. L. REV. 1279 (2009); Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, 98 VA. L. REV. 1665 (2012).

419. *See* U.C.C. § 9-609(b)(2) (2010); U.C.C. § 9-602(6) (2010).

420. *See generally* Todd J. Zywicki & Joseph D. Adamson, *The Law & Economics of Subprime Lending*, 80 U. COLO. L. REV. 1, 2 (2009).

421. *See supra* Part II.C.

mortgagee.[422] For instance, the typical language states that the lender may make reasonable entries upon and inspections of the Property.[423] This "property" is not a commercial building or an industrial facility; rather, this is someone's home. It is where they sleep at night, keep all their personal effects, eat their meals, and experience some of the most intimate moments of life. No one should have the authority to make entries onto the premises whenever they deem it to be "reasonable." Furthermore, the only qualification to an otherwise unfettered right to entry is a determination of reasonableness which is made at the sole discretion of the party seeking to enter.[424] Such a one-sided determination invites abuse and overreaching.

Also, the mortgage preservation provision typically allows the lender to enter the interior of the improvements on the property if the bank believes they have reasonable cause.[425] Assumedly reasonable cause would mean that the property is under threat of eminent damage or if the property has been abandoned and, by virtue of its vacancy, will be subject to eminent damage.[426] However, as discussed above, many times bank contractors are deeming property to be abandoned when there are a myriad of external signs to indicate that the occupants are merely away from the home at the moment.[427]

The CFPB—in conjunction with the Federal Housing Finance Agency that regulates Fannie Mae and Freddie Mac—should prohibit the unfettered use of overreaching mortgage preservation clauses and reform the existing uniform property preservation provisions so as to set limits regarding what kinds of unilateral entries a mortgagee can make onto the mortgaged property. As a creditor, taking steps to protect collateralized property that may be damaged or destroyed is entirely reasonable and fair. This right should be made clear and should be preserved. However, it should only be done when balanced against the property rights of the homeowner. Baring a situation where the threat of damage or destruction of the property is eminent, the servicer should have to give a specifically stipulated period of notice—at least forty-two hours—prior to having the right to disturb the possession of the homeowner during this pre-foreclosure phase. To otherwise grant a mortgagee (or its contractors) such cavalier rights to the homeowner's property undermines the foreclosure process and the safeguards that have been put in place under state and constitutional law to prohibit

422. *See supra* Part II.A.
423. *See* FREDDIE MAC: NEW YORK MORTGAGE: FORM 3033 , *supra* note 211.
424. *See id.*
425. *See id.*
426. *See supra* Part II.B.
427. *See id.*

overreaching and abuse.[428]

V. CONCLUSION

As time goes by—and home buying has started to inch up and the squeeze on credit has begun to loosen—it is easy to forget the horrors and abuses of the financial crisis.[429] Settling back into a calm sense of normalcy is both comforting and easy. In many ways such a sense of calm and security is quite predictable. With the substantial expenditure of public funds used in order to stabilize and steady the financial sector,[430] coupled with reforms to financial markets and the ways in which mortgage loans are made, bought, and sold,[431] as well as with the settlement of a massive, nation-wide lawsuit against some of the largest contributors to the housing crash,[432] one would be entirely justified in believing that these events would have caused a systemic change in the way the U.S. housing and financial markets operate. Long gone would be the days of subprime lending, the fraudulent marketing of mortgage securities, and practices such as robosigning—or so it would seem.[433]

Nonetheless, it is at these times of perceived calm that lawmakers, policy advocates, and lawyers should be the most vigilant. A wave of abusive and overreaching break-in foreclosures has swept across the country over the course of the past year and a half.[434] Financial institutions, faced with a significant and still growing number of properties awaiting foreclosure, have taken to hiring third party contractors to help manage their properties.[435] These acts include determinations of homeowner abandonment and damage to the collateral, which often entails entering the premises and securing the property.[436] While such practices seem completely justifiable—and, for that matter, advisable for the creditor—the realities of how these activities are being carried out are far from how they were intended.[437] These property preservation contractors, and often through additional subcontractors, have in many cases been found to have illegally broken

428. For an overview of the foreclosure process and its procedural safeguards, see FORECLOSURE OVERVIEW: REALTYTRAC.COM (last visited May 26, 2014), http://www.realtytrac.com/real-estate-guides/foreclosure/.

429. *See* Mutikani, *supra* note 397.

430. *See supra* Part I.B.

431. *See id.*

432. *See supra* Part I.C.

433. *See supra* Part I.A.

434. *See supra* Part II.B.

435. *See supra* Part II.A.

436. *See supra* Part II.A.1–3.

437. *See supra* Part II.B.

into homes, engaged in acts of intimidation, destroyed personal property, and effectively deprived the lawful owner of possession and control of his property, all without proper process.[438] The crux of this power, exercised by mortgage servicers through this hierarchy of contractors, lies in an obscure but universally used clause in almost all mortgage contracts.[439] This clause grants the lender almost unfettered authority to enter into the property, subject only to its self-determined reasoned discretion.[440]

And despite the fact that financial institutions have seen a tremendous backlash, both in the form of public opinion and through the national mortgage settlement regarding abusive foreclosure practices, these new practices by bank contractors has become wide-spread.[441] As of the time of this writing private party litigation is pending in over thirty states and a class-action style suit has been filed by the state of Illinois on behalf of dozens of its aggrieved citizens.[442] But a review of the third party oversight provisions in the national mortgage settlement, as well as the disposition of those cases involving break-in foreclosures that have already been decided across the country, evidence that current laws and regulations are significantly lacking.[443] Neither provide an adequate remedy for homeowners who have faced the indignity and damage associated with these break-in foreclosures.[444]

In order to better provide an avenue of recourse for these homeowners, this Article recommends that a new regulatory framework be adopted by the Consumer Financial Protection Bureau to govern the responsibilities of financial institutions with regard to the hiring, credentialing, supervision, and oversight of third party contractors.[445] Further, a private cause of action should be created which would allow aggrieved homeowners—or the public prosecutors on their behalf—to seek recourse against third party contractors and the mortgage servicers who engage them under an unfair housing practices theory of recovery.[446] Lastly, mortgage preservation clauses should be strictly curtailed so as to stamp out the current use of overreaching language in mortgages that has essentially caused many borrowers to give away their most important home ownership rights—exclusive possession and

438. *See id.*
439. *See supra* Part II.A.3.
440. *See id.*
441. *See supra* Part II.C.
442. *See id.*
443. *See supra* Part III.A.
444. *See id.*
445. *See supra* Part III.B.1.
446. *See supra* Part III.B.2.

control—prior to being accorded due process.[447]

Through the enactment of such a scheme of reforms, financial institutions, which play such an integral and necessary part in the housing sector, will be better incentivized to police the authority they bestow on third party contractors and the activities that these contractors carry out in the bank's name.[448] Further, homeowners will be given an adequate judicial remedy when faced with a break-in foreclosure.[449] And finally, the use of overreaching clauses in mortgages contracts will be curtailed so as to hinder these practices from occurring, under color of consent, in the future.[450]

447. *See supra* Part III.B.3.

448. *See supra* Part III.B.

449. *See id.*

450. *See id.*