

NOTES

WHO CAN ENFORCE? THE MURKY WORLD OF ROBO-SIGNED MORTGAGES

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I. INTRODUCTION

Robo-signing constitutes a pervasive crisis in the United States, negatively impacting homeowners, lending institutions, and the judicial system. As of 2014, all attempts to resolve the robo-signing controversy have left hanging questions as to the enforceability of mortgage documents that have been robo-signed. There is a pressing need to find a resolution that considers the needs of all stakeholders involved. An analysis of ineffective solutions suggests that the best option is a legislative act specifically addressing the enforceability of robo-signed mortgage loans. An ideal bill should allow for the enforcement of robo-signed mortgages, while still providing some measure of financial relief for aggrieved homeowners. This proposal establishes a realistic solution with the potential to offer long-term relief for all affected stakeholders.

In 2008 the subprime mortgage industry imploded, plunging the Western World into the worst economic crisis since the Great Depression.¹ In the aftermath of the mortgage meltdown, large banking institutions have faced a multitude of high-profile lawsuits, scandals, and skepticism about their lending practices.² One of the most controversial practices uncovered during the mortgage crisis is “robo-signing,” the use of “fake signatures to power through [mortgage transfer paperwork and] foreclosure documents.”³ Robo-signing has been the centerpiece of homeowner lawsuits,⁴ criminal prosecutions,⁵ and multibillion-dollar settlements.⁶ While numerous courts, politicians, and social commentators have

1. See, e.g., Jon Hilsenrath et al., *Worst Crisis Since '30s, with No End Yet in Sight*, WALL ST. J. (Sept. 18, 2008, 12:01 AM), <http://online.wsj.com/news/articles/SB122169431617549947>.

2. See Robb Mandelbaum, *Wells Fargo Bankers Answer Criticism of Lending Practices*, N.Y. TIMES, May 26, 2011, at B6 (discussing the negative criticism faced by banks following the subprime mortgage crisis).

3. Audie Cornish, *States Debate Foreclosure Robo-signing Settlement*, NPR (Feb. 8, 2012, 2:00 PM), <http://www.npr.org/2012/02/08/146585967/states-debate-foreclosure-robo-signing-settlement>.

4. See, e.g., Christine Stapleton, *Widespread 'Robo-signer' Errors Spur Lawsuit Seeking Class Status*, PALM BEACH POST (Jan. 13, 2011, 4:43 PM), <http://www.palmbeachpost.com/news/business/real-estate/widespread-robo-signer-errors-spur-lawsuit-seeking/nLnPn/>.

5. See, e.g., Christian Conte, *Robo-signing Indictment Adds to LPS Woes*, JACKSONVILLE BUS. J. (Feb. 10, 2012 6:00 AM), <http://www.bizjournals.com/jacksonville/print-edition/2012/02/10/robo-signing-indictment-adds-to-lps.html?page=all> (discussing criminal charges faced by alleged facilitators of robo-signing).

6. Ronald D. Orol, *U.S. Breaks Down \$9.3 Bln Robo-signing Settlement*, MARKETWATCH (Feb. 28, 2013, 11:27 AM), <http://www.marketwatch.com/story/us-breaks-down-93-bln-robo-signing-settlement-2013-02-28>.

addressed the use of improper signatures, little has been said about how such issues could affect the enforceability of the notes and mortgages at issue. This Note will address how robo-signing may impact the enforceability of outstanding mortgage loans. Furthermore, this Note will examine the shortcomings of prior attempts to clarify what robo-signing means for outstanding mortgage loans and the policy issues inherent in finding a satisfactory solution. The aim of this Note is to suggest a practical, long-term solution that will benefit all stakeholders.

Section II of this Note provides background information regarding the mortgage crisis, mortgage securitization, robo-signing, and the various stakeholders involved. Section II also sets the groundwork for understanding notes and mortgages as negotiable instruments, a designation which has a substantial impact upon the transfer and enforceability of these documents. Section III details the political and legislative reactions to the robo-signing crisis. Section IV focuses upon the judicial reactions and issues raised by robo-signing, with a special focus on the problems faced by aggrieved homeowners in robo-signing challenges. Section V of this Note addresses the policy concerns of potential resolutions, with a discussion of what robo-signing should mean for the enforceability of disputed mortgages.

II. BACKGROUND

There were many causes of the subprime mortgage collapse, including the long-term push for mortgage securitization, the rise of mortgage-backed securities trading, loosened lending standards, and government-aided home ownership programs.⁷ In order to fully understand the robo-signing crisis, it is essential to first look at how some of these issues unfolded.

A. Securitization

Any robo-signing discussion first warrants an introduction to mortgage securitization. This Note will focus on the two most common legal documents involved in traditional home loans: the promissory note and the mortgage, which “secures the borrower’s payment of the promissory note.”⁸ For example, suppose that Jane

7. An in-depth analysis of each particular cause of the United States housing collapse is beyond the scope of this article. For a more thorough analysis of the causes of the housing bubble and subsequent recession, please see BETHANY MCLEAN & JOE NOCERA, *ALL THE DEVILS ARE HERE* (2010); JOSEPH E. STIGLITZ, *FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY* (2010); and GILLIAN TETT, *FOOL’S GOLD: HOW THE BOLD DREAM OF A SMALL TRIBE AT J.P. MORGAN WAS CORRUPTED BY WALL STREET GREED AND UNLEASHED A CATASTROPHE* (2009).

8. AMERICAN SECURITIZATION FORUM, *TRANSFER AND ASSIGNMENT OF RESIDENTIAL MORTGAGE LOANS IN THE SECONDARY MORTGAGE MARKET 2* (2010)

Homebuyer goes to her local bank branch and secures the funds to purchase her dream home, Greenacre. Homebuyer will typically take out a promissory note, which promises that she will pay set amounts of money at certain interest rates by a specified time, and a mortgage deed, which contains a security interest in Homebuyer's real property (typically the property itself), securing her promise to make payments.⁹

What Homebuyer may not realize is that once this transaction has occurred, additional transactions may take place with her note and mortgage. If Homebuyer's mortgage is securitized, the original loan provider may "sell[], assign[], and transfer[] the mortgage loan[] to a 'sponsor,' which is typically a financial services company or a mortgage loan conduit or aggregator."¹⁰ The sponsor then repeats this process, selling, assigning, and transferring the mortgage to a "depositor," who sells, assigns, and transfers the mortgage to a trustee, "which will hold the loans in trust for the benefit of the certificateholders."¹¹ The trustee finally issues a mortgage backed security (MBS) with Homebuyer and multiple other homeowners' mortgages, subject to a pooling and servicing agreement (PSA).¹² A pooling and servicing agreement is a trust agreement "entered into by the depositor, the trustee, and a master servicer or servicers."¹³ The PSA typically sets out the necessary steps for assignment and transfer of the note.¹⁴ In this manner, Homebuyer's note and mortgage may be sold, assigned, and transferred between different entities without Homebuyer's knowledge.¹⁵

B. Negotiability

Residential mortgage notes in this market are characterized as negotiable instruments, falling under the ambit of Article 3 of the Uniform Commercial Code.¹⁶ A negotiable instrument is defined as "[a] written instrument that (1) is signed by the maker or drawer, (2) includes an unconditional promise or order to pay a specified sum of money, (3) is payable on demand or at a definite time, and (4) is

[hereinafter ASF WHITE PAPER], available at http://www.americansecuritization.com/uploadedfiles/asf_white_paper_11_16_10.pdf.

9. *Id.* at 7.

10. *Id.*

11. *Id.*

12. *Id.* at 8.

13. *Id.*

14. *Id.* at 3-4.

15. *Id.* at 5, 8.

16. *Id.* at 9; see also Swindler v. Swindler, 584 S.E.2d 438, 442 (S.C. Ct. App. 2003); Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637, 653 (2013).

payable to order or to bearer.”¹⁷ A central feature of negotiable instrument law is the “holder in due course” doctrine, which eliminates liability of a noteholder who takes a note without any notice of defenses that the maker of the note may have.¹⁸

The underlying purpose of negotiable instruments is to make assets more liquid and easily transferable.¹⁹ Before discussing robo-signing, it is imperative to address how a standard negotiable instrument can be transferred, and who has the right to enforce it.²⁰

A negotiable instrument is transferred when given to someone other than the issuer, providing the transferee with the right to enforce the instrument.²¹ Transfer via “negotiation” is a voluntary or involuntary transfer, requiring both a “transfer of possession of the instrument and . . . indorsement²² by the holder.”²³ For mortgage note purposes the holder will be the payee, or the entity to which the mortgage payments are due.²⁴ A key point for the transfer of mortgages is that the indorsement in such a transfer can either be “special,” in which case the indorsement identifies who it is payable to, or “blank,” in which case the “instrument becomes payable to bearer” and negotiable by possession alone until indorsed.²⁵ According to the American Securitization Forum, most residential mortgage transfers are negotiated via blank indorsements, with transferors relying upon their “possession” being interpreted as constructive.²⁶ The U.C.C. also provides a set of defenses for consumers who face the enforcement of a negotiable instrument, which will be elaborated upon in Section IV.²⁷

There are three different categories of those who may enforce a negotiable instrument: (1) “the holder of the instrument,” (2) “a nonholder in possession of the instrument who has the rights of a holder,” and (3) a person not in possession of the instrument who is entitled to enforce said instrument, such as where the instrument

17. BLACK’S LAW DICTIONARY 1064 (8th ed. 2004) (summarizing U.C.C. § 3-104(a)).

18. U.C.C. § 3-302(a) (2014) (“Holder in Due Course”); *see also* Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503, 508 (2002) (discussing the “cutting off” of note maker defenses in the holder in due course doctrine).

19. *See* Eggert, *supra* note 18, at 508; *see also* ASF WHITE PAPER, *supra* note 8, at 9 (citations omitted).

20. For a more comprehensive analysis of this process and each corresponding provision of the U.C.C. *see* ASF WHITE PAPER, *supra* note 8, at 12-23.

21. U.C.C. § 3-203(a)-(b) (2014).

22. This article will follow the spelling or “indorsement” used in the U.C.C.

23. U.C.C. § 3-201(a)-(b) (2014).

24. ASF WHITE PAPER, *supra* note 8, at 11.

25. U.C.C. § 3-205 (a)-(b) (2014).

26. ASF WHITE PAPER, *supra* note 8, at 11-12.

27. U.C.C. § 3-305 (2014).

has been lost, stolen, or destroyed.²⁸ Per the official comments to the U.C.C., if a transferee falls into the second category, he may still enforce the rights that a holder would be able to (barring fraud or illegality), even if the instrument was not indorsed by the transferor.²⁹ One added caveat to this scenario is that, since “the transferee’s rights are derivative of the transferor’s rights, those rights must be proved.”³⁰ This situation, as well as the “lost, stolen, or destroyed” scenario, arises frequently in robo-signing lawsuits.³¹

Some legal scholars, such as Adam J. Levitin, attribute the fierce debate over mortgage assignments to the “competing” recording systems of negotiable instrument law under: U.C.C. Article 3; public land recording systems; recordings within the Mortgage Electronic Registration Systems database; and sales of notes via U.C.C. Article 9.³² The validity of such a position is beyond the scope of this Note. For the purposes of this Note, the focus will remain primarily on U.C.C. Article 3 negotiation of mortgage notes, as this is the authority most courts look to when deciding robo-signing cases.³³

C. Mortgage Electronic Registration Services (MERS)

One actor who has consistently been at the forefront of the mortgage note securitization process is Mortgage Electronic Registration Services (MERS).³⁴ MERS is an electronic servicing company that was created in an attempt to streamline the mortgage assignment process as technology made the jump from traditional paper to electronic mortgage assignments.³⁵ As mortgage securitization and transfers became more popular, MERS took on a more substantial role in the assignment process.³⁶ A typical MERS mortgage process followed several steps: (1) a multitude of loans were assigned to MERS, making MERS “the mortgagee of record[;]” (2) MERS was then “listed as the record title holder of the mortgage[;]” (3) MERS then “track[ed]” all of the transfers electronically, until the

28. U.C.C. § 3-301 (2014) (referencing U.C.C. section 3-309 and discussing generally persons entitled to enforce instruments).

29. U.C.C. § 3-203 cmt. 2 (2014).

30. *Id.*

31. *See, e.g.*, ASF WHITE PAPER, *supra* note 8, at 12-13.

32. Levitin, *supra* note 16, at 655-97.

33. *See, e.g.*, Veal v. Am. Home Mortg. Servicing, Inc. (*In re Veal*), 450 B.R. 897, 908-12 (B.A.P. 9th Cir. 2011).

34. *See* Adam Leitman & Dov Treiman, *The Brewing MERS Crisis: Everyone Loses*, N.Y. L.J., Aug. 10, 2011, available at <http://www.alblawfirm.com/siteFiles/News/1650784D1F2067C47E91C78A65F7730D.pdf>.

35. Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 IDAHO L. REV. 805, 806-09 (1995) (discussing the origins of MERS).

36. *See* ASF WHITE PAPER, *supra* note 8, at 8.

note and mortgage were transferred to a non-MERS member.³⁷ A significant problem with MERS has been that reporting new assignments is not compulsory, and “involves voluntary self-reporting . . . [which] fails to incentivize timely, accurate reporting.”³⁸ In practice, this process has provided little encouragement to keep track of mortgage transfers,³⁹ as MERS and other mortgage servicers have struggled to monitor the vast amount of data involved. Indeed, MERS was not the only mortgage company with strong incentives to take shortcuts when faced with a staggering amount of mortgage documents.⁴⁰

D. The Crisis

The Great Recession was set into motion in 2007 when banks started to realize their massive exposure to default-prone mortgage securities.⁴¹ Although a broader discussion of the recession is beyond the scope of this Note, it should suffice to state that the global economy experienced a sharp spike in unemployment,⁴² as well as an enormous loss of wealth.⁴³

One of the primary causes of the recession, mortgage defaults, soared in the face of rising unemployment and loss of personal net worth.⁴⁴ Frequent defaults created a cyclical foreclosure crisis, in which Americans would first lose their jobs due to layoffs, then “fall behind on their house payments, triggering a new round of foreclosures.”⁴⁵ This cycle created a situation in which the holders of many notes began to seek enforcement by making demands upon homeowners who were late for their payments, and ultimately

37. *Id.*

38. Levitin, *supra* note 16, at 680.

39. See Olga Kogan, *Infinite Loop: Robo-signers and Ethics in Bankruptcy Mortgage Cases*, 25 GEO. J. LEGAL ETHICS 645,645-46 (2012).

40. See Pallavi Gogoi, *Robo-signing Practices Older, More Pervasive than First Thought*, HUFFINGTON POST (Sept. 1, 2011, 9:50 PM), http://www.huffingtonpost.com/2011/09/01/robo-signing-practices-1990s_n_945867.html (“Companies that process mortgages said they were so overwhelmed with paperwork that they cut corners.”).

41. See, e.g., Hilsenrath et al., *supra* note 1 (discussing the progression of the recession from a few banks making “bad bets” on mortgages to a much deeper crisis).

42. See BUREAU OF LABOR AND STATISTICS, U.S. DEPT OF LABOR, BLS SPOTLIGHT ON STATISTICS: THE RECESSION OF 2007-2009 2 (2012), available at http://www.bls.gov/spotlight/2012/recession/pdf/recession_bls_spotlight.pdf.

43. See Chris Isidore, *America's Lost Trillions*, CNN MONEY (June 9, 2011, 1:03 PM), http://money.cnn.com/2011/06/09/news/economy/household_wealth/; Tim Paradis, *The Statistics of the Great Recession*, HUFFINGTON POST (Oct. 10, 2009, 2:28 PM), http://www.huffingtonpost.com/2009/10/10/the-statistics-of-the-gre_n_316548.html.

44. E. Scott Reckard & Ronald D. White, *Mortgage Defaults Soar to record 13%*, L. A. TIMES (Aug. 21, 2009), <http://articles.latimes.com/2009/aug/21/business/fi-mortgage-defaults21>.

45. *Id.*

through the foreclosure process.⁴⁶ This chain of events ultimately helped robo-signing rise to the American consciousness.

E. Robo-signing Explained

The signature improprieties commonly referred to as robo-signing first came into public view as a result of seemingly standard foreclosure cases.⁴⁷ In Fall of 2010, defense attorneys representing delinquent homeowners began to uncover evidence that important affidavits relating to mortgage transfer and foreclosure processes had been mishandled.⁴⁸ Initially, the scandal involved only General Motors Acceptance Corporation's (GMAC) execution of foreclosure affidavits without the required personal knowledge of loan information.⁴⁹ This discovery led to questions about how other large banks, perhaps most notably J.P. Morgan Chase & Co., were handling mortgage transfer paperwork and foreclosure affidavits.⁵⁰ The automatic signing of documents led one *New York Times* blogger to christen the process "robo-signing."⁵¹

The uncovering of inconsistencies in foreclosure affidavit signatures led banks and town registries to take a closer look at mortgage transfer documents.⁵² Further investigations revealed that "illegal or questionable mortgage paperwork [was] . . . more widespread than [initially] thought, tainting the deeds of tens of thousands of homes dating to the late 1990s."⁵³ In one North Carolina county, a probe revealed that as many as seventy-four percent of mortgage documents filed between 2006 and 2011 contained "questionable signatures."⁵⁴ These discoveries sent the mortgage and insurance industries reeling, as courts became

46. *Id.* (discussing the "rising tide" of foreclosures resulting from the recession).

47. See Robbie Whelan, *Niche Lawyers Spawned Housing Fracas*, WALL ST. J. (Oct. 20, 2010, 12:01 AM), <http://online.wsj.com/article/SB10001424052702304410504575560072576527604.html>.

48. *See id.*

49. See Jon Prior, *Former GMAC Servicer Ally Cleans Up Foreclosure Process, Citing Defects*, HOUSINGWIRE (Sept. 21, 2010, 1:42 PM), <http://www.housingwire.com/articles/former-gmac-servicer-ally-cleans-foreclosure-process-citing-defects>.

50. See Alistair Barr, *'Robo-signer' Controversy Spreads*, MARKETWATCH (Sept. 29, 2010, 6:39 PM), <http://www.marketwatch.com/story/robo-signer-controversy-spreads-2010-09-29>.

51. Ben Schott, Op-Ed., *Robo-signers: Nickname for Those Who Processed Large Numbers of Foreclosure Affidavits*, N.Y. TIMES (Oct. 6, 2010, 10:00 AM), http://schott.blogs.nytimes.com/2010/10/06/robo-signers/?_r=0&pagewanted=print.

52. Gogoi, *supra* note 40.

53. *Id.*

54. *Id.* (citing a study of Guilford County, North Carolina).

skeptical of such companies' ability to enforce mortgage loans.⁵⁵ This deep sense of uncertainty led major banking institutions to place comprehensive or partial moratoriums on their foreclosure and eviction processes.⁵⁶ These moratoriums, or holds, provided mortgage companies with the opportunity to "address[] procedural issues" related to mortgage documents."⁵⁷

Most banks resumed foreclosures after spending several months reviewing their transfer and signature procedures.⁵⁸ During this period there were many strong reactions from homeowners, politicians, and the judiciary, as will be discussed in Sections III and IV. As this Note will explain, none of these reactions have provided a satisfactory answer to the question of what robo-signing ought to mean for the enforceability of residential mortgage loans.

Initially coined in reference to complications associated with foreclosures, robo-signing has come to encompass a multitude of signature and transfer problems.⁵⁹ Today, the term robo-signing may refer to: mortgage transfer documents that were signed/indorsed without proper verifying information, forged signatures on mortgage documents, mortgage documents signed by bank or servicer employees with false job titles, and numerous other improper signature practices.⁶⁰ Robo-signing problems arise not only in foreclosure scenarios, but are frequently discovered by homeowners who are in good standing on their mortgages.⁶¹ Although much of the robo-signing scandal revolves around large banks acting as mortgage servicers, these are not the only parties in such disputes.⁶² In

55. *See id.*

56. *See Barr, supra* note 50 (discussing J.P. Morgan Chase & Co. putting a hold on some of their foreclosures); *see also* William Alden, *Bank of America Stops Foreclosures in All 50 States*, HUFFINGTON POST (May 25, 2011, 11:28 AM), http://www.huffingtonpost.com/2010/10/08/bank-of-america-halts-foreclosures_n_755737.html; Prior, *supra* note 49 (discussing GMAC's order of a pause in evictions of homeowners allegedly in default).

57. Prior, *supra* note 49.

58. *See* Aaron Smith, *Bank of America to Resume Foreclosures*, CNN MONEY (Dec. 10, 2010, 8:19 AM) http://money.cnn.com/2010/12/10/real_estate/bank_of_america_foreclosure/; *see also* Elinor Comlay, *JP Morgan to Resume Foreclosures This Month*, REUTERS (Nov. 4, 2010, 5:43 PM) <http://www.reuters.com/article/2010/11/04/us-jpmorgan-foreclosures-idUSTRE6A33PM20101104>.

59. *See "Robo-signing" of Mortgages Still a Problem*, CBS NEWS (July 18, 2011, 8:54 PM), http://www.cbsnews.com/2100-201_162-20080533.html.

60. *Id.*

61. *Id.*; *see also* *Dernier v. Mortg. Network, Inc.*, 87 A.3d 465 (Vt. 2013) (involving a preemptive robo-signing challenge by homeowners not yet in foreclosure).

62. *See* Marian Wang, *Who's Who in the Foreclosure Scandal: A Primer on the Players*, PROPUBLICA (Oct. 18, 2010, 8:57 AM), <http://www.propublica.org/blog/item/whos-who-in-the-foreclosure-scandal-a-primer-on-the-players>.

addition to banks and servicing companies, robo-signing may refer to actions taken by law firms that specialize in foreclosure, referred to derogatively as “foreclosure mills.”⁶³ Others key players in the robo-signing saga are outside contractors hired to manage mortgage transfer and foreclosure information, such as Lender Processing Services (LPS).⁶⁴ Hence, the term robo-signing now refers to a variety of practices by a multitude of parties.

III. NON-JUDICIAL REACTIONS TO ROBO-SIGNING, AND THEIR SHORTCOMINGS

As one might imagine, the uncovering of robo-signing practices led to widespread outrage amongst politicians, the press, state Attorneys General, prosecutors, and legislators. This section details some of the more pronounced reactions to robo-signing, and why such responses have done little to inform homeowners and courts of what the status and enforceability of their mortgages are.

A. Reactions from the Public and the Press:

In the wake of the robo-signing scandal, major lenders and servicers faced a wide range of negative publicity. Such negative press included personalized accounts of the perpetrators of robo-signing,⁶⁵ harsh criticism of MERS,⁶⁶ in-depth investigations of foreclosure law firms,⁶⁷ and descriptions of investor fears triggered by the robo-signing crisis.⁶⁸ After the press published a story about

63. *Id.*

64. *Id.* On January 2, 2015, LPS was acquired by Fidelity National Financial. Brad Finkelstein, *Fidelity National Closes Purchase of LPS*, NAT'L MORTGAGE NEWS (Jan. 2, 2015, 5:16 PM), <http://www.nationalmortgagenews.com/dailybriefing/fidelity-national-closes-purchase-of-lps-1040477-1.html>. LPS previously billed itself as “a leading provider of mortgage and consumer loan processing services, mortgage settlement services, default solutions and loan performance analytics, as well as solutions for the real estate industry, capital markets investors and government offices.” *About Us, LENDER PROCESSING SERVICES*, <http://www.lpsvcs.com/LPSCorporateInformation/AboutUs/Pages/default.aspx> (website now defunct; document on file with the author).

65. *See, e.g.*, Barr, *supra* note 50.

66. *See, e.g.*, Kerri Ann Panchuk, *Mass Media Takes MERS by Storm and Misses the Big Picture*, HOUSINGWIRE (May 13, 2012), <http://www.housingwire.com/articles/print/mass-media-takes-mers-storm-and-misses-big-picture> (rebutting such mass criticism).

67. *See, e.g.*, Sarah Mueller, *Florida Law Firms Scrutinized in Robo-signing Scandal*, HOUSINGWIRE (Oct. 1, 2010, 6:03 PM), <http://www.housingwire.com/articles/florida-law-firms-scrutinized-robo-signing-scandal>.

68. *See* Jill Treanor & Julia Kollwe, *Robo-signing Eviction Scandal Rattles Wall Street*, GUARDIAN (Oct. 14, 2010, 1:11 PM), <http://www.theguardian.com/business/2010/oct/14/wells-fargo-mortgage-foreclosure-robo-signer>; *see also* Dave Clarke & Steve Eder, *Investor Fears Grow over Foreclosure*

Xee Moua, an employee of Wells Fargo, who “had pushed through 500 foreclosures a day,” the shares of many major banking institutions plunged in value.⁶⁹ There was a well-publicized fear that, with thousands of mortgages left in limbo, there would be a domino effect that would eat away at bank profits, erode the ability for lenders to seek recourse in the event of default, and depress the general housing market even more.⁷⁰ The negative press was also fueled by the parties themselves, such as when a New York foreclosure law firm held a “costume party” where employees dressed up as distressed homeowners.⁷¹ The public reaction to the robo-signing crisis was also vigorous, drawing large protests such as the Occupy Wall Street affiliated shut-down of Wells Fargo in Los Angeles.⁷² The negative press and public outcry provided an incentive for politicians and legislators to step in.

B. Attorney General Probes and Joint Investigations:

Soon after the robo-signing crisis reached the media, state attorneys general around the country began concerted efforts to investigate such practices.⁷³ All fifty states participated in a joint investigation, looking into allegations of robo-signing and reviewing documents for fraud or other deceptive acts.⁷⁴ While these attorney generals’ offices worked towards a proposed settlement, a few states decided to branch off and pursue their own investigations and lawsuits.⁷⁵

Two well-known instances in which state attorneys general

Mess, REUTERS (Oct. 14, 2010, 6:17 PM), http://www.reuters.com/article/2010/10/14/us-usa-foreclosures-idUSTRE69B4UY20101014?loomia_ow=t0:s0:a49:g43:r3:c0.080000:b38326994:z0.

69. Treanor & Kollwe, *supra* note 68.

70. See Clarke & Eder, *supra* note 68.

71. Aaron Katersky, *N.Y. Foreclosure “Costume Party” Firm Settles for \$4M*, ABC NEWS BUS. BLOG (Mar. 22, 2015, 5:28 PM), <http://abcnews.go.com/blogs/business/2012/03/n-y-foreclosure-costume-party-firm-settles-for-4m/>.

72. Yael Chanoff, *OccupySF Protesters Shut Down Wells Fargo HQ*, SAN FRANCISCO BAY GUARDIAN ONLINE (Oct. 12, 2011, 4:14 PM), <http://www.sfbg.com/politics/2011/10/12/occupysf-protesters-shut-down-wells-fargo-hq>.

73. Corey Dade, *Officials in 50 States Launch Foreclosure Probe*, NPR (Oct. 13, 2010, 11:20 AM), <http://www.npr.org/templates/story/story.php?storyId=130536042>.

74. *Id.*

75. See Jon Prior, *Massachusetts AG Launches Probe into MERS*, HOUSINGWIRE (July 25, 2011), <http://www.housingwire.com/articles/print/massachusetts-ag-launches-probe-mers> (explaining that Massachusetts Attorney General Martha Coakley decided to pursue her own probe); see also Ilya Marritz, *One Year in, Schneiderman Goes His Own Way on Mortgages*, WNYC NEWS (Jan. 20, 2012), <http://www.wnyc.org/story/182228-one-year-ag-schneiderman-emerges-voice-accountability/> (reporting that New York Attorney General Eric Schneiderman decided to pursue his own probe).

chose to pursue their own probes into robo-signing are that of Massachusetts AG Martha Coakley, and New York AG Eric Schneiderman.⁷⁶ Refusing to wait and see what kind of settlement the joint efforts could garner, Coakley brought suit against five major lenders for a myriad of alleged violations, with the behavior of MERS and robo-signing central features of the complaint.⁷⁷ At the time, Coakley stated that she was seeking “real relief” for the homeowners facing foreclosure in her state.⁷⁸ In her lawsuit Coakley alleged that, due to improper transfer practices, banks had made false claims when they asserted that they were holders of various mortgages and notes.⁷⁹ Ultimately, Coakley and Schneiderman were persuaded to join forty-nine other states in a larger settlement with favorable terms, while still pursuing some individual charges against bank and servicers.⁸⁰ New York and Massachusetts, along with a few other states such as Florida, joined joint settlements but also received additional compensation for separate suits against banks and servicers.⁸¹

Coakley and Schneiderman were persuaded to join other states in February 2012 when the attorneys general of every other state (except Oklahoma) had finally found common terms that they could agree upon for a robo-signing settlement.⁸² What ensued was a 25

76. Marritz, *supra* note 75; Prior, *supra* note 75.

77. Julia La Roche, *Massachusetts AG on How Much She Wants from the Banks: “I Think It Will Be a Lot,”* BUSINESS INSIDER (Dec. 1, 2011, 1:53 PM), <http://www.businessinsider.com/martha-coakley-blasts-banks-with-massive-lawsuit-2011-12>.

78. *Id.*

79. Jon Prior, *Coakley Promises Large Penalties for Robo-Signing*, HOUSING WIRE (Dec. 1, 2011), <http://www.housingwire.com/articles/print/coakley-promises-large-penalties-robo-signing>.

80. *See About the National Mortgage Settlement*, OFF. OF MORTGAGE SETTLEMENT OVERSIGHT, <https://www.jasmithmonitoring.com/oms/about-the-national-mortgage-settlement/> (last visited Feb. 16, 2015) (describing the terms of settlement forged by the attorneys general in 49 states); *State Attorneys General Who Signed the Joint State-Federal Mortgage Settlement by State*, NAT’L MORTGAGE SETTLEMENT, <http://www.nationalmortgagesettlement.com/states> (last visited Feb. 16, 2015).

81. Ruth Simon & Nick Timiraos, *New York to Settle Some Mortgage Claims with 5 Banks*, WALL ST. J. (Mar. 13, 2012, 10:13 PM), <http://online.wsj.com/news/articles/SB10001424052702303717304577279953721486914> (detailing the bank settlement negotiated by the state of New York); *see also* Jennifer B. McKim, *Massachusetts AG Martha Coakley Reaches \$1.6 Million Settlement with Company Tied to ‘Robosigning’*, BOS. GLOBE (Jan. 31, 2013, 5:58 PM), <http://www.boston.com/businessupdates/2013/01/31/massachusetts-martha-coakley-reaches-million-settlement-with-company-tied-robo-signing/qERQsVrmwSYZko34uoP4PM/story.html> (detailing servicer settlement negotiated by the state of Massachusetts).

82. Daniel Fisher, *Here’s What’s In the \$25 Billion Mortgage Settlement*, FORBES (Feb. 9, 2012, 10:30 AM), <http://www.forbes.com/sites/danielfisher/2012/02/09/states-feds-to-announce-25-billion-mortgage-settlement/>.

billion dollar settlement from major lending institutions such as Bank of America and Wells Fargo, covering a wide range of issues not limited to robo-signing.⁸³ Per the explanation provided by the state attorneys general, “[t]he agreement holds the banks accountable for their wrongdoing on robo-signing and mortgage servicing,” but did not purport to be a complete fix to the problems caused by robo-signing.⁸⁴ According to the joint statement, this settlement was attractive because of the protracted costs of further litigation, the backing of a federal court order, and because the banks could still potentially be held criminally liable for their transgressions.⁸⁵

This settlement came under fire from critics for a number of reasons, including the small size of the fines relative to the massive size of the companies, the decision not to demand immediate criminal penalties, and even for failing to phrase the terms in a harsh enough manner.⁸⁶ For some commentators, these settlement negotiations embodied a systemic problem with the finance industry: that banks can somehow “pay-off” investigators to get out of paying for the true price of their misdeeds.⁸⁷ However, the state attorneys general made it clear that criminal prosecutions could still proceed after the settlement, and that there would be new guidelines established for future mortgage lending processes, such as a requirement that homeowners be allowed to see their documents in order to raise potential questions about their legitimacy.⁸⁸ In addressing the “limited” scope of the overall settlement, the state attorneys general explained that robo-signing and the issues the settlement addresses are “major, complex issues in themselves,” and that they could not tackle the entire securitization process in a timely and efficient manner.⁸⁹

In 2013, federal regulators reached another settlement exclusively addressing robo-signing, in which major banks paid 9.3

83. See *Joint State-Federal Mortgage Servicing Settlement FAQ*, NAT’L MORTGAGE SETTLEMENT, <http://www.nationalmortgagesettlement.com/faq> (last visited Feb. 16, 2015); see also Heather Morton, *National Mortgage Settlement Summary*, NAT’L CONF. OF ST. LEGIS., <http://www.ncsl.org/research/financial-services-and-commerce/national-mortgage-settlement-summary.aspx> (last updated Sept. 4, 2013) (providing a summary of the settlement and listing what each individual state received).

84. *Joint State-Federal Mortgage Servicing Settlement FAQ*, *supra* note 83.

85. See *id.*

86. Simon Johnson, *Too Big to Jail*, PROJECT SYNDICATE (Feb. 24, 2012, 4:22 PM), <http://www.project-syndicate.org/commentary/too-big-to-jail>.

87. See, e.g., Dennis M. Kelleher, *Robo-signing Bank Settlement Is a Criminal Sell Out*, HUFFINGTON POST (Feb. 9, 2012, 11:06 AM), http://www.huffingtonpost.com/dennis-m-kelleher/foreclosure-settlement-mortgage-crisis_b_1264998.html.

88. *Joint State-Federal Mortgage Servicing Settlement FAQ*, *supra* note 83.

89. *Id.*

billion dollars to affected homeowners.⁹⁰ This new settlement replaced the foreclosure review process created by the previous settlement, with regulators stating that “the complexity of the foreclosure and loan modification processes [was] delaying and adding significant costs to the review process.”⁹¹ These concerns speak to the immense difficulty of carrying out an adequate response to robo-signing or—for that matter—any attempt to resolve the mortgage crisis.⁹²

C. Criminal Charges

Another way in which government agencies have addressed robo-signing is to bring criminal charges against companies and individuals involved. This approach has been taken in a limited number of cases by both federal and state officials.⁹³ Criminal investigations into robo-signing allegations have met with some level of success, resulting in both convictions⁹⁴ and substantial settlement figures.⁹⁵ Despite these successes, criminal charges have not been as widely utilized as other methods of addressing robo-signing, due to the high costs of prolonged litigation, the uncertainty of obtaining convictions,⁹⁶ and the difficulties of sorting out who is responsible and what their punishment should be.⁹⁷ The resources and uncertain

90. Orol, *supra* note 6.

91. *Id.*

92. Both Coakley and Schneiderman have expressed frustration at the results of these settlements, accusing banks and servicers of flouting the terms of mortgage settlements. See Jessica Silver-Greenberg, *New York to Sue Wells Fargo over Mortgage Settlement*, N.Y. TIMES (Oct. 1, 2013, 7:00 PM), <http://dealbook.nytimes.com/2013/10/01/new-york-set-to-sue-wells-fargo-over-mortgages/>.

93. See, e.g., Nick Timiraos, *Guilty Plea Comes in ‘Robo-signing’ Scandal*, WALL ST. J. (Nov. 20, 2012, 6:56 PM), <http://online.wsj.com/news/articles/SB10001424127887323713104578131642510972604> (describing federal case brought against former servicer executive); see also James O’Toole, *Two Indicted in ‘Massive’ Nevada Robo-Signing Case*, CNN MONEY (Nov. 17, 2011, 8:06 PM), http://money.cnn.com/2011/11/17/news/economy/nevada_robosigning/ (detailing case brought by Nevada attorney general’s office against former supervisors of robo-signing).

94. See, e.g., Andrew Harris, *Ex-DocX Head Gets at Least 40 Months in Robo-sign Case*, BLOOMBERG NEWS (May 3, 2013, 12:12 PM), <http://www.bloomberg.com/news/2013-05-03/ex-docx-head-gets-at-least-40-months-in-robosign-case.html>.

95. *Robo-signing Fraud Case Is Settled*, N.Y. TIMES, Feb. 16, 2013, at B3 (describing 35 million dollar settlement paid out by LPS).

96. See Ken Ritter, *Judge Tosses Mortgage ‘Robosigning’ Case in Vegas*, YAHOO NEWS (Feb. 26, 2013, 9:09 PM), <http://news.yahoo.com/judge-tosses-mortgage-robosigning-case-232656772.html> (describing lengthy criminal case against supervisors in a mortgage lending company resulted in all 204 felony and 102 misdemeanor charges dismissed).

97. A more comprehensive discussion of the merits and problems associated with

results involved have impeded criminal prosecutions from becoming a more common tool of the opponents of robo-signing.

D. Legislative Responses

The mortgage meltdown led to a plethora of new legislation addressing mortgage issues. New laws have typically been directed at addressing loans already in default, attempting to help homeowners avoid foreclosure⁹⁸ or helping tenants remain in foreclosed homes.⁹⁹ Though largely ignored in new legislation, some states did decide to tackle the issue of robo-signing, with California enacting a Homeowner Bill of Rights¹⁰⁰ in 2012.¹⁰¹ Addressing robo-signing, the California statute set forth requirements for recording mortgage related documents, along with other new requirements such as creating a single point of access for homeowners.¹⁰²

The California ban on robo-signing will likely have a positive effect on processing services, and foreclosures have already slowed as servicers work to comply with the new terms.¹⁰³ On its face, there seems to be a balance struck here, with homeowners being entitled to money damages if improper procedures are followed, but not

criminally charging those previously involved with robo-signing is beyond the scope of this article. It should suffice to note that the criminal cases have been long, expensive processes that have yielded limited, mixed results.

98. See Margaret Chadbourn, *Obama Signs Mortgage Law Expanding FDIC Credit Line*, BLOOMBERG NEWS (May 20, 2009, 6:40 PM), <http://www.bloomberg.com/apps/news?sid=atNQjZHJhqc&pid=newsarchive> (discussing new mortgage bill that makes it easier for homeowners to receive funding for loan refinancing at lower mortgage rates and for some servicers to cooperate).

99. For example, Massachusetts's Protecting Tenants at Foreclosure Act allows bona fide tenants to remain inside of foreclosed houses if they are willing to stay and make regular rental payments. MASS GEN. LAWS ANN. ch. 186A, § 1 (West 2010).

100. President Obama has advocated for a federal Homeowner's Bill of Rights, but the bill has yet to gain much traction. Megan Slack, *Everything You Need to Know: Helping Responsible Homeowners Refinance*, WHITE HOUSE BLOG (Apr. 18, 2012, 11:45 AM), <http://www.whitehouse.gov/blog/2012/04/18/everything-you-need-know-helping-responsible-homeowners-refinance#rights>; see also Press Release, The White House Office of the Press Secretary, FACT SHEET: President Obama's Plan to Help Responsible Homeowners and Heal the Housing Market (Feb. 1, 2012), available at <http://www.whitehouse.gov/the-press-office/2012/02/01/fact-sheet-president-obama-s-plan-help-responsible-homeowners-and-heal-h> (including provision for "[p]rotection for families against inappropriate foreclosure, including right of appeal").

101. Alejandro Lazo, *California Foreclosure Overhaul Signed into Law*, L.A. TIMES (July 11, 2012), <http://articles.latimes.com/2012/jul/11/business/la-fi-mo-foreclosure-laws-20120711>. The series of provisions amounting the "Homeowner Bill of Rights" may be accessed at CAL. CIV. CODE §§ 2923.5-2923.6 (West 2013).

102. CAL. CIV. CODE § 2923.5-2923.6 (West 2013).

103. Esther Cho, *Impact of the California Homeowner Bill of Rights on Foreclosures*, DSNEWS (Apr. 15, 2013, 11:51 AM), <http://www.dsnews.com/articles/impact-of-california-homeowner-bill-rights-on-foreclosures-2013-04-15>.

necessarily forgiving homeowner defaults.¹⁰⁴ Such legislation is one potential solution, but it still leaves open questions about robo-signing that occurred prior to the Homeowner Bill of Rights. The law also fails to directly address the *status* of mortgages that have been robo-signed during the transfer or foreclosure process. Legislators may have intended for these issues to be left to the courts. However, courts too have exhibited hesitation to provide firm answers to these questions.

Despite record settlements, aggressive lawsuits, and various attempts to punish and prevent robo-signing, the overwhelming majority of non-judicial “solutions” fail to address what the status of a robo-signed mortgage note should be. Most of these efforts have focused upon punishing past misdeeds or discouraging further violations in a general sense. Access to some share of settlement money, or knowledge that robo-signing will be strictly scrutinized in the future may give homeowners some peace of mind. However, it does not resolve what should happen when their mortgage documents have been robo-signed, either at the transfer stage or during the foreclosure process. As the next section will explore, both state and federal courts have also struggled to resolve these hanging questions.

IV. JUDICIAL RESPONSES TO ROBO-SIGNING LITIGATION, AND THE NEED FOR A MORE COMPREHENSIVE APPROACH

As one might expect, a barrage of private lawsuits followed in the wake of the robo-signing scandal.¹⁰⁵ Homeowners have initiated litigation asserting that robo-signing invalidated their mortgage or foreclosure documents by: (1) violating Pooling and Servicing Agreements that the banks and servicers previously entered into,¹⁰⁶ (2) violating statutes such as the Consumer Fraud Act (CFA)¹⁰⁷ and the Real Estate Settlement Procedures Act (RESPA),¹⁰⁸ and (3) failing to follow proper state and federal procedures in the process of transferring notes.¹⁰⁹

As this section will discuss, homeowners who challenge their

104. Lazo, *supra* note 101.

105. See *Butler v. Deutsche Bank Trust Co. Americas*, 748 F.3d 28, 30 (1st Cir. 2014) (“In the wake of the foreclosure crisis, litigants have increasingly sought out clarification regarding the validity of mortgage transfers precipitated by [MERS].”).

106. See, e.g., *McLaughlin v. Wells Fargo Bank, N.A.*, No. SA CV 12-114-DOC-(RNBx), 2012 WL 5994924, at *3-4 (C.D. Cal. Nov. 30, 2012).

107. See, e.g., *Dernier v. Mortg. Network, Inc.*, 87 A.3d 465, 467 (Vt. 2013).

108. See, e.g., *In re Sia*, No. 10-41873, 2013 WL 4547312, at *1 (Bankr. D.N.J. Aug. 27, 2013).

109. See, e.g., *Juarez v. Select Portfolio Servicing, Inc.*, 708 F.3d 269 (1st Cir. 2013) (alleging an invalid transfer due to unclear timing as to who held the note at the time of foreclosure).

mortgage documents on robo-signing grounds face uphill and oftentimes uncertain battles. Analyzing case law, this section will show that the judicial system has failed to produce a clear guide for what robo-signing means for the enforcement of mortgage notes. Even though a significant minority of courts has allowed robo-signing allegations to proceed to trial,¹¹⁰ there has yet to be a breakthrough at the judicial level that resolves these remaining questions.

A. PSA Violations and Standing:

Homeowners often contend that the improper indorsement of their notes violates the Pooling and Servicing Agreements (PSA)¹¹¹ entered into when their loans were first securitized. Homeowners assert that such PSA violations render their notes unenforceable.¹¹² These PSA violation claims have brought forth serious questions as to whether or not homeowners have adequate standing to bring such cases.¹¹³

Homeowner suits alleging violations of PSA contracts have generally struggled to find a receptive audience in the judicial system. One common barrier to claims concerning PSA violations is that homeowners must first show that they have standing to bring such claims. The United States Supreme Court has explained that “[i]n essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”¹¹⁴ Standing in robo-signing PSA claims hinges on whether the homeowner has established a “case or controversy”¹¹⁵ between themselves and the defendants, who are parties to the PSA. To establish standing for a cause of action, plaintiffs must demonstrate the following three elements: (1) injury in fact (being personally affected), (2) a causal connection between the conduct complained of and the alleged injury, and (3) that there is a likelihood of the alleged injury being redressed by a favorable decision.¹¹⁶

110. *See, e.g., Dernier*, 87 A.3d at 468.

111. Each PSA typically has certain dates and procedures for transfers that may be violated via robo-signing, transfers occurring after the final date allowing for transfers, etc. *See* ASF WHITE PAPER, *supra* note 8.

112. *See* Rajamin v. Deutsche Bank Nat'l Trust Co., 757 F.3d 79, 82-83 (2d Cir. 2014); *see also* Reinagel v. Deutsche Bank Nat'l Trust Co., 735 F.3d 220, 224 (5th Cir. 2013); Berezovskaya v. Deutsche Bank Nat'l Trust Co., No. 12 CV 6055(KAM), 2014 WL 4471560, at *1-2 (E.D.N.Y. 2014); McLaughlin v. Wells Fargo Bank, N.A., No. SA CV 12-114-DOC-(RNBx), 2012 WL 5994924, at *3-4 (C.D. Cal. Nov.30, 2012); *Dernier*, 87 A.3d at 470, 472-73.

113. *See, e.g., Dernier*, 87 A.3d at 115 (citations omitted).

114. Warth v. Seldin, 422 U.S. 490, 498 (1975).

115. Correia v. Deutsche Bank Nat'l Trust Co., 452 B.R. 319, 324 (B.A.P. 1st Cir. 2011) (quoting Warth v. Seldin, 422 U.S. 490, 498 (1975)).

116. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (citations omitted).

The Second Circuit of the United States Court of Appeals had occasion to address standing questions in a robo-signing matter in *Rajamin v. Deutsche Bank National Trust Co.*¹¹⁷ In *Rajamin*, the court considered various arguments asserted by homeowner plaintiffs that allegations of robo-signing and PSA violations provided them with adequate standing.¹¹⁸ The court held that the plaintiffs lacked traditional Article III standing because they were never asked to pay more than they owed under the terms of the original mortgage, they were never asked to make duplicate payments, and because the plaintiffs had defaulted upon their mortgage several years prior to bringing suit.¹¹⁹ *Rajamin* provides what is perhaps the strongest support for the proposition that homeowners lack traditional standing to sue banks and servicers for robo-signing allegations.

Even if such requirements are met, a homeowner PSA claim may be barred by prudential standing considerations, including prohibitions of generalized grievances and third party standing.¹²⁰ Parties are only able to assert their own legal rights and interests, not those “shared in substantially equal measure by all or a large class of citizens.”¹²¹ In addition, parties are prohibited from resting “claim[s] to relief on the legal rights or interests of third parties.”¹²² For homeowners challenging PSA violations, this is a very high bar to meet.

PSA violation claims have stumbled in both state and federal courts, as homeowners are “neither a party to, nor a third party beneficiary of, [Pooling and Servicing Agreements].”¹²³ As the prior discussion of PSA has indicated, homeowners are not one of the parties that enter into such agreements. This prudential standing limitation “has been applied to preclude claims where mortgagors have sought relief from their loan obligations on [robo-signing] grounds.”¹²⁴ Due to prudential standing limitations, homeowners are also barred from asserting PSA violation claims either on behalf of third parties who are involved with the PSA, or on behalf of

117. *Rajamin*, 757 F.3d 79.

118. *Id.* at 85-86.

119. *Id.*

120. See *Gladstone, Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99-100 (1979) (“[A] plaintiff may still lack standing under the prudential principles by which the judiciary seeks to avoid deciding questions of broad social import where no individual rights would be vindicated and to limit access to the federal courts to those litigants best suited to assert a particular claim.”).

121. *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

122. *Id.*

123. *McLaughlin v. Wells Fargo Bank, N.A.*, No. SA CV 12-114-DOC-(RNBx), 2012 WL 5994924, at *4 (C.D. Cal. Nov. 30, 2012) (quoting *Sami v. Wells Fargo Bank*, C-12-00108 DMR, 2012 WL 967051, at *5 (N.D. Cal. Mar. 21, 2012)).

124. *Rajamin*, 757 F.3d at 86.

aggrieved homeowners in general.¹²⁵

There have been limited instances in which courts have ruled in favor of homeowners who challenge alleged PSA violations via robo-signing, notably in the case of *Johnson v. HSBC Bank USA*.¹²⁶ However, this case was motivated more by policy reasons than a thorough standing analysis.¹²⁷ These policy considerations are evident in the court's assertion that "violations of law associated with the loan's securitization [cannot] go unchecked because Plaintiff is not a party to the PSA."¹²⁸ Such a statement indicates that this court was straining to find a rationale to allow this homeowner suit to move forward, despite overt standing complications. The more recent case of *Rajamin v. Deutsche Bank National Trust Co.* devoted considerable time to issues surrounding the prudential standing limitations on homeowner PSA claims, concluding that such homeowners lack standing under all theories.¹²⁹ Despite this holding, an unequivocal majority of courts have dismissed homeowner suits alleging PSA violations via robo-signing transfers.¹³⁰

Homeowner PSA claims are therefore one of many ways in which the judicial system has left the consequences of robo-signing unresolved.

B. Statutory Claims

Another strategy homeowners have pursued is asserting that robo-signing violates federal statutes such as the Consumer Fraud Act (CFA),¹³¹ the Fair Debt Collection Practices Act (FDCPA),¹³² and

125. *See id.* at 86-87.

126. *Johnson v. HSBC Bank USA*, No. 3:11-cv-2091-JM-WVH, 2012 WL 928433, at *3-4 (S.D. Cal. Mar. 19, 2012) (refusing to dismiss PSA claim for lack of standing). Although standing requirements may vary by state, robo-signing claims have generally struggled to fulfill standing criteria in both state and federal courts. *See, e.g., Rajamin*, 757 F.3d at 83-84; *Dernier v. Mortg. Network, Inc.*, 87 A.3d 465, 467 (Vt. 2013).

127. *See Johnson*, 2012 WL 928433, at *7.

128. *Id.* at *3.

129. *Rajamin*, 757 F.3d at 86-92.

130. *See id.* at 88-89 (discussing the weight of authority against PSA violations voiding mortgages); *see also In re Sia*, No. 10-41873, 2013 WL 4547312, at *11-12 (Bankr. D.N.J. Aug. 27, 2013) (noting that "[t]he issue has been considered by a number of courts, and the weight of authority supports [dismissal for lack of standing]" and relying upon this precedent to dismiss a homeowner claim regarding violations of a PSA agreement); *Dernier v. Mortg. Network, Inc.*, 87 A.3d 465, 473-75 (explaining that the weight of authority tends toward lack of standing, and dismissing PSA claim for lack of standing).

131. *See, e.g., Dernier*, 87 A.3d at 468; *see also Beals v. Bank of Am., N.A.*, No. 10-5427 (KSH), 2011 WL 5415174, at *4 (D.N.J. Nov. 4, 2011).

132. *See In re Sia*, 2013 WL 4547312, at *12; *see also Johnson*, 2012 WL 928433, at *6.

the Real Estate Settlement Procedures Act (RESPA).¹³³ Although these claims vary widely in different cases, the theme running through each argument is that signature improprieties in the transfer or foreclosure process have resulted in some form of fraud against the homeowners. As is the case with homeowner PSA claims, attempts to hold banks and servicing companies responsible for violating these statutes has met with limited success.

Homeowners asserting consumer fraud claims are prone to having their cases dismissed for failure to state a claim.¹³⁴ One recent case illustrating this trend is the Vermont Supreme Court's decision in *Dernier v. Mortgage Network, Inc.* In this particular action, the homeowner plaintiffs brought several claims stemming from the alleged robo-signing of their mortgage note, including violations of the applicable PSA,¹³⁵ a lack of enforceability due to fraudulent transfer,¹³⁶ and a violation of the Consumer Fraud Act.¹³⁷

The plaintiff in *Dernier* purchased a home by executing a promissory note in favor of Kittredge Mortgage Corporation.¹³⁸ After the note and mortgage had been executed, the instruments entered the secondary market.¹³⁹ Ultimately, the documents landed in a trust administered by U.S. Bank.¹⁴⁰ The plaintiffs subsequently fell behind on their monthly payments and brought suit against Mortgage Network, Inc. (MNI), which was named in the chain of title, and MERS, which was named as a "nominee" for MNI in the chain of title.¹⁴¹ The plaintiffs contended that their mortgage was void on several grounds,¹⁴² notably because "no party with the right to foreclose the mortgage had recorded its interest."¹⁴³ The plaintiffs presented evidence that they were sent at least one letter misidentifying U.S. Bank as the current holder of the note.¹⁴⁴ The

133. See *In re Sia*, 2013 WL 4547312, at *13; see also *Johnson*, 2012 WL 928433, at *5-6.

134. Defendants in federal courts are entitled to assert a defense of failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Each state has its own analogue of this rule.

135. *Dernier*, 87 A.3d at 473-75.

136. *Id.* at 475-80 (reversing prior dismissal and finding standing on such grounds).

137. *Id.* at 480-82; The Consumer Fraud Act has been adopted in Vermont at VT. STAT. ANN. tit. 9, § 2461(b).

138. *Dernier*, 87 A.3d at 467.

139. *Id.*

140. *Id.*

141. *Id.* at 467-68.

142. The plaintiffs' arguments included: (1) that MERS never had any beneficial interest in the mortgage as nominee; (2) that MNI had assigned its interest in the mortgage and note without notifying the plaintiffs; and (3) that no party with the right to foreclose had recorded their interest. *Id.*

143. *Id.*

144. *Id.* at 480-81.

plaintiffs maintained that this letter was inaccurate due to robo-signing complications, amounting to fraudulent misrepresentations.¹⁴⁵ After U.S. Bank was successfully added as a defendant in the case, the trial court dismissed for failure to state a claim.¹⁴⁶

The Vermont Supreme Court held that, although the plaintiffs made out a prima facie case that the letter was a “deceptive act,” they failed to qualify under the second requirement of Vermont’s adoption of the Consumer Fraud Act.¹⁴⁷ Vermont’s version of the Consumer Fraud Act demands a showing of “either (1) reliance on a deceptive act in contracting for goods or services or (2) damages or injury from an unfair or deceptive act.”¹⁴⁸ The court cited the lack of discernible injury or damages that the homeowners suffered as a result from the deceptive letter, holding that the “[p]laintiffs do not offer an explanation as to what injury or damages the letter caused.”¹⁴⁹ Although this case specifically addresses the Vermont statute for consumer fraud, the court also surveyed various other courts that have dismissed similar claims for failing to demonstrate actual injury stemming from deceptive acts.¹⁵⁰ As *Dernier* demonstrates, damages are a necessary element of a consumer fraud claim, which can be a very difficult showing for homeowners who are still obligated to make payments on their mortgages.¹⁵¹

Homeowners bringing robo-signing claims under the Real Estate Settlement Procedures Act¹⁵² or the Fair Debt Collections Practice Act¹⁵³ have similarly fallen short. As with consumer fraud claims, RESPA claims have failed due to an inability of homeowners to assign concrete damages to the improper signature procedures.¹⁵⁴

145. *Id.*

146. *Id.* at 468.

147. *Id.* at 481.

148. *Id.* (quoting VT. STAT. ANN. tit. 9, § 2461(b)).

149. *Id.* at 482.

150. *Id.* (citing *Gervais v. Riddle & Assocs., P.C.*, 479 F. Supp. 2d 270, 279-80 (D. Conn. 2007)); see *Gathuru v. Credit Control Services, Inc.*, 623 F. Supp. 2d 113, 123 (D. Mass. 2009) (distinguishing from the *Dernier* context, as *Gathuru* found damages when a debt alleged did not actually exist); *Goins v. JBC & Assocs., P.C.*, 352 F. Supp. 2d 262, 276 (D. Conn. 2005).

151. At a glance, *Beals v. Bank of America* appears to refute this line of cases, as it held that a New Jersey Consumer Fraud Act claim could move forward in a case that involved robo-signing allegations. See *Beals v. Bank of Am., N.A.*, No. 10-5427 (KSH), 2011 WL 5415174, at *16-17 (D.N.J. Nov. 4, 2011). However, *Beals* is distinguishable because the consumer fraud claim arose from a problematic loan modification contract in which the homeowner was attempting to make payments but was nevertheless foreclosed upon. *Id.* at *16-17.

152. 12 U.S.C. § 2605 (2013).

153. 15 U.S.C. 1692 (2014).

154. See, e.g., *In re Sia*, No. 10-41873, 2013 WL 4547312, at *13 (Bankr. D.N.J. Aug. 27, 2013) (explaining that even if procedures failed to comply with RESPA, “[p]laintiffs

Even when damages are construed liberally, RESPA claims still require a concrete loss to have been incurred, which is frequently a difficult bar to meet as a homeowner bringing a robo-signing challenge.¹⁵⁵

Perhaps unsurprisingly, Fair Debt Collection Practices Act claims based on robo-signing allegations have also tended to fail for not satisfying statutory requirements such as proving damages.¹⁵⁶ Some courts have allowed FDCPA claims to move beyond the summary judgment stage for allegedly false payment demands, based upon a party unlawfully misrepresenting himself as the note holder.¹⁵⁷ However, these cases have been limited to situations where: (1) a demand for payment has been sent by the “wrong” note owner or servicer, and (2) the case has been filed in a district that does not typically dismiss robo-signing allegations for being too conclusory.¹⁵⁸ Given these difficulties faced by homeowner plaintiffs, statutory claims have had minimal impact in determining the enforceability of a robo-signed mortgage note.

C. General Robo-signing Allegations: The “No Free House” Policy

Despite the rise of robo-signing litigation and increased scrutiny of bank and servicer procedures, most courts have maintained firm policies against forgiving the debt owed on mishandled mortgages. This position, which I refer to as the “no free house policy,” stands for the notion that even if a homeowner has been wronged by banks or servicers via robo-signing, the proper course of action is not to reward the (often delinquent) homeowners by awarding them the property free and clear of the debt owed. While courts may be generally sympathetic to the plight of wronged homeowners, they are very hesitant to provide them with a windfall simply because their mortgage documents were mishandled by robo-signers. Although courts may allow robo-signing claims to make it beyond the summary judgment stage or delay hearings until banks provide accurate chain of title documents, ultimately it is the homeowner’s obligation to make regular payments which holds sway in the courtroom.

The holding of *Dernier v. Mortgage Network, Inc.* presents a clear

have not identified any actual damages which they suffered as a consequence of the alleged noncompliance”).

155. See, e.g., *Johnson v. HSBC Bank USA*, No. 3:11-cv-2091-JM-WVG, 2012 WL 928433, at *5-6 (S.D. Cal. Mar. 19, 2012) (holding that a RESPA claim *could* move forward, but basing that holding on a failure to provide information that led to overly large payments, rather than on robo-signing grounds).

156. See, e.g., *In re Sia*, 2013 WL 4547312, at *12 (finding conclusory allegations that servicer or bank violated FDCPA are insufficient to survive summary judgment).

157. See, e.g., *Johnson*, 2012 WL 928433, at *5-6 (allowing allegations of unlawful collection procedures to move forward).

158. *Id.*

instance of the no free house policy. In this case the court held that the homeowners had adequate standing to challenge the enforcement of the note at issue because they claimed that the note was fraudulently transferred via a forged signature indorsement.¹⁵⁹ The court recognized that this claim made the enforcement of the note challengeable through an exception in Vermont's negotiable instrument law, under which negotiable instruments may be challenged as "lost or stolen."¹⁶⁰ However, this decision also references the applicability of *U.S. Bank National Association v. Kimball*,¹⁶¹ stating that "a mortgagee can [still] cure a deficiency in its standing to bring a foreclosure action."¹⁶² This clarifies that, even though the homeowners may proceed with their robo-signing challenge to the enforceability of the note, the defendants will still be able to foreclose for default should they cure the title problems with the note. As the court in *Kimball* explained, such small victories may be "ephemeral" for the homeowner, as they remain accountable for payment of their loan obligations.¹⁶³ *Dernier* provides just one example of a court allowing a robo-signing challenge to proceed, but standing firm to their view that robo-signing will not result in windfalls for homeowners.

Other courts have taken a harsher stance, holding that robo-signing allegations are insignificant in the face of the need for defaulting homeowners to make their regular payments.¹⁶⁴ Such decisions have played down the significance of robo-signing claims, finding them nothing but conclusory allegations that detract from the true issue at hand: the homeowner's obligation to pay.¹⁶⁵ Some jurisdictions have taken this approach one-step further, dismissing claims about improper signatures as being inconsequential to foreclosure matters.¹⁶⁶ Although these may be extreme cases, there is generally a strong sentiment that refusal to enforce a mortgage note and thereby granting a "free house" is an improper solution for homeowners who have been wronged by robo-signers.

159. *Dernier v. Mortg. Network, Inc.*, 87 A.3d 465, 473-75 (Vt. 2013).

160. *Id.* at 480 (citing VT. STATE. ANN. tit 9A, § 3-305(c)).

161. *U.S. Bank Nat'l Ass'n v. Kimball*, 27 A.3d 1087 (Vt. 2011).

162. *Dernier*, 87 A.3d at 478-79.

163. *Kimball*, 27 A.3d at 1095.

164. *See, e.g., Cercedes v. U.S. Bankcorp*, No. CV 11-219 CAS (FMOx), 2011 WL 2711071, at *5 (C.D. Cal. July 11, 2011).

165. *See id.*; *see also Rajamin v. Deutsche Bank Nat'l Trust Co.*, 757 F.3d 79, 86 (2d Cir. 2014).

166. *See, e.g., In re Veal*, 450 B.R. 897, 912-13 (B.A.P. 9th Cir. 2011) (holding that the homeowners "should not care who actually owns the Note," as long as they "know who they should pay").

D. Summary

In conclusion, the judicial system has yet to identify a uniform, workable, long-term solution to the questions posed by robo-signing. Courts have taken many different approaches in addressing various robo-signing claims made by homeowners, but a suitable remedy is still lacking. Homeowners who know or suspect that they have been wronged by robo-signers are still left wondering what these improprieties mean for their outstanding or defaulted upon mortgages. This raises valid questions as to whether the judicial system is the proper venue to resolve such broad issues.

V. SUGGESTIONS FOR POTENTIALLY RESOLVING THE ROBO-SIGNING CONTROVERSY

Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity [sic] of being a good man. There will still be business enough.

—Abraham Lincoln, Lincoln's Notes for a Law Lecture.¹⁶⁷

This Note has explored several means of addressing robo-signing, through settlements, criminal prosecutions, legislative activity, and the judicial system. The persistent question running through each of these methods is: what happens to the mortgage that is left over? Should the homeowner be able to get a pass on an initial default, or should the bank be able to foreclose anyway? Should there be some sort of settlement figure that negates any claims against enforcing the mortgage? These are complex questions, and accordingly there is no simple answer to them.

Formulating an appropriate response to what the status of a mortgage should be once documents have been robo-signed may appear unattainable. Indeed, numerous experts have struggled to devise a satisfying response to the multi-faceted mortgage crisis, even for seemingly narrow issues such as slowing down the foreclosure rate.¹⁶⁸ However, by analyzing and understanding the shortcomings of previous attempts to “fix” the robo-signing crisis, one can strategically organize a program that will actually address these controversial, hanging issues. By indentifying the shortfalls of other

167. ABRAHAM LINCOLN, FRAGMENT: NOTES FOR A LAW LECTURE (1850), reprinted in THE COLLECTED WORKS OF ABRAHAM LINCOLN ABRAHAM LINCOLN 19 (Roy P. Basler, ed. 1953) (emphasis omitted).

168. See, e.g., Christopher Foote et al., *Reducing Foreclosures: No Easy Answers* (Nat'l Bureau of Econ. Research, Working Paper No. 15063, 2009) (criticizing various ineffective arguments surrounding the foreclosure crisis, admitting how difficult the issue is and ultimately recommending aid such as unemployment benefits to try to slow foreclosures).

resolutions, it becomes possible to draw a plan that is refined, and ultimately more workable long-term. This Note contends that such a resolution will involve a combination of well-drafted public legislation, a narrow focus upon what issues are being targeted, efficient and timely means of implementation, and an honest look at what the average homeowner has experienced in terms of damages.

A. The Proper Venue for Resolving the Robo-signing Controversy

As prior sections have touched upon, each potential venue for a proposed robo-signing resolution has its individual pitfalls. A brief comparison of these shortcomings leads to the conclusion that the legislature is the proper arena for resolving the robo-signing controversy.

Prosecutions by state attorneys general and homeowner lawsuits have demonstrated that the judiciary is ill-equipped to provide answers to the questions posed by robo-signing. One of the largest disadvantages to utilizing the judicial process is the slow speed at which decisions are made.¹⁶⁹ This slow speed stems from a multitude of factors including court delays, large increases in mortgage-related litigation,¹⁷⁰ and devastating budget cuts.¹⁷¹ This sluggish pace advises against looking to the judicial system to efficiently resolve these questions.¹⁷² Considering the complex arguments for each side in these cases, particularly regarding disputes over chains of title and the chronology of the securitization and transfer processes, each claim presents a case-specific and fact intensive process that consumes resources of both the parties and the court. For situations in which peoples' homes and livelihoods are at stake, this is not a preferable option.

Another reason why the judicial system is a less than optimal

169. See *The Judicial System: The Feeblest Branch*, ECONOMIST, Oct. 1, 2011, at 69, available at <http://www.economist.com/node/21530985> (stating that while the typical lawsuit takes a couple of years to get to trial, the amount of time could soon more than double because of changes in the judicial system).

170. David Streitfeld, *Backlog of Cases Gives a Reprieve on Foreclosures*, N.Y. TIMES, June 19, 2011, at A1 (citing the rise of foreclosure litigation as delaying the foreclosure process in California up to sixty-two years).

171. See *The Judicial System*, *supra* note 167 (stating that budget cuts have resulted in reduced services for both state and federal courts); see also Rhona McMillion, *Funding Cuts Threaten Federal Courts' Ability to Do Their Work*, ABA CAUTIONS CONGRESS, YOUR ABA BLOG (Dec. 1, 2013, 1:40 AM), http://www.abajournal.com/magazine/article/scary_numbers/.

172. It is worth noting that some states, notably Florida, have attempted to enact means of "speeding up" the judicial process for foreclosure litigation. However, limiting the procedural requirements does not go any further in providing suitable answers for the status of mortgages in a robo-signing situation. See Michael Corkery, *A Florida Court's 'Rocket Docket' Blasts Through Foreclosure Cases*, WALL ST. J. (Feb. 18, 2009, 12:01 AM), <http://online.wsj.com/articles/SB123491755140004565>.

venue from which to address robo-signing is that the process is unpredictable by nature. As case law demonstrates, courts are at odds with how to address robo-signing, with the results often depending upon where suit is brought.¹⁷³ This means that the ability of homeowners to receive reliable or adequate relief will frequently depend upon where their home is located. For state attorneys general, any decision to pursue criminal charges against alleged robo-signers is likely to consume a massive amount of financial resources and human capital, while facing a strong risk of dismissal.¹⁷⁴ Even colossal settlements, which may appear to be victories for homeowners, are costly to arrive at, inapplicable to millions of homeowners,¹⁷⁵ and difficult to enforce.¹⁷⁶

The crawling speed of the judicial process, wild fluctuations in results, and rampant consumption of precious resources make clear that the courts are the wrong venue for resolving the issues raised by robo-signing.

An extensive reflection concerning the impact of robo-signing on the enforceability of mortgage loans leads to the conclusion that the legislature is the proper venue for a workable resolution. The advantages of a legislative solution include: accelerated speed, the ability to address specific issues, and transparent processes.

It would be misleading to recommend legislative action without first acknowledging that there are disadvantages to such a proposal. One problem readily apparent in calling upon the legislature, whether state or federal, to craft a solution is the seemingly endless political deadlock afflicting the United States.¹⁷⁷ Although gridlock at the federal level has recently caused a government shutdown,¹⁷⁸ and

173. *Compare* Johnson v. HSBC Bank USA, No. 3:11-cv-2091-JM-WVG, 2012 WL 928433, at *2-3 (S.D. Cal. Mar. 19, 2012) (allowing a homeowner claim to proceed despite the homeowner not being a party to the PSA sued upon), *with* Dernier v. Mortg. Network, Inc., 87 A.3d 465, 467 (Vt. 2013) (rejecting homeowner standing to bring a very similar claim).

174. *See* Ritter, *supra* note 96 (robo-signing prosecution dismissed for prosecutorial misconduct in Nevada).

175. Nelson D. Schwartz & Julie Creswell, *Mortgage Plan Gives Billions to Homeowners, but with Exceptions*, N.Y. TIMES, Feb. 9, 2012, at B1 (discussing the limited reach of the \$25 billion settlement).

176. *See* Bruce Judson, *The Mortgage Settlement's Huge Missing Piece: Do Detailed Enforcement Provisions Exist?*, HUFFINGTON POST BLOG (Feb. 13, 2012, 1:34 PM), http://www.huffingtonpost.com/bruce-judson/mortgage-settlement_b_1268978.html (questioning the ability of federal and state government officials to hold banks and servicers accountable for carrying out their end of the settlement).

177. *See, e.g., Political Deadlock Rises, and the Debt Ceiling Doesn't*, NPR (July 2, 2011, 4:22 PM), <http://www.npr.org/2011/07/02/137573479/political-gridlock-rises-and-the-debt-ceiling-doesnt> (describing the recent rise of political gridlock in passing legislation).

178. Tom Cohen et al., *Obama Signs Bill to End Partial Shutdown, Stave Off Debt Ceiling Crisis*, CNN (Oct. 17, 2013, 12:51 AM),

continues to encumber the economy,¹⁷⁹ this does not mean that a legislative resolution is hopeless. While much attention has been paid to the inability of Congress to pass meaningful legislation, one should not ignore the recent progress made with spending compromises,¹⁸⁰ and the willingness of Congress to address homeowner mortgage issues during the Great Recession.¹⁸¹ These are encouraging signs that a federal law could be passed to address the impact of robo-signing on outstanding mortgages. Even if the federal system proves to be a difficult venue for such legislation, state legislatures may take up the cause, potentially circumventing the political deadlock that has afflicted the United States Congress. The pros and cons of smaller, state level solutions will be explored later in this section.

The potential disadvantages of utilizing the legislative process are strongly outweighed by the possible benefits. For instance, although bills do not move through Congress at a particularly high rate of speed, the timeline for a successful bill's passage trumps that of the judicial process by a substantial margin. Bills can stagnate in the Senate for about ten months after passage by the House of Representatives;¹⁸² this is still a reasonable timeframe compared to the multi-year process of filing a lawsuit, conducting discovery, and disputing individual robo-signing allegations in the courtroom.¹⁸³ Timeliness is of particular concern in robo-signing contexts, as homeowners frequently require an expedient, concrete answer as to whether their mortgage is enforceable. If a bill were passed into law establishing the status of robo-signed mortgages, the aggrieved homeowners could decide whether to pursue a complaint or whether to just move on with their lives.

<http://www.cnn.com/2013/10/16/politics/shutdown-showdown/> (describing the sixteen day shutdown).

179. Jack Ewing, *U.S. Budget Battles Seen as a Global Drag on Growth*, N.Y. TIMES, Nov. 19, 2013, at B4.

180. For example, Congress recently passed a budget bill that will avoid additional shutdown scenarios for several years. Lori Montgomery & Ed O'Keefe, *Lawmakers Unveil Massive \$1.1 Trillion Spending Bill in Bipartisan Compromise*, WASH. POST (Jan. 14, 2014), http://www.washingtonpost.com/business/economy/members-of-congress-to-unveil-massive-spending-bill-in-bipartisan-compromise/2014/01/13/71db3a8c-7c9e-11e3-9556-4a4bf7bcbd84_story.html.

181. Most notably, the Home Affordable Modification Program (HAMP) and the Home Affordable Refinance Program (HARP) were enacted to help homeowners modify loans and avert foreclosure. *Home Affordable Modification Program: Overview*, HOME AFFORDABLE MODIFICATION PROGRAM, <https://www.hmpadmin.com/portal/programs/hamp.jsp> (last visited Feb. 15, 2015); *The Home Affordable Refinance Program: About H.A.R.P.*, HARPPROGRAM.ORG, <http://harpprogram.org/about.php> (last visited Feb. 15, 2015).

182. Hilary Worden, *The Bills Left Behind*, OPENCONGRESS BLOG (Sept. 11, 2010), <http://www.opencongress.org/articles/view/2044-The-Bills-Left-Behind>.

183. Streitfeld, *supra* note 168.

Another benefit to pursuing a legislative solution is that it would allow lawmakers to focus on the narrow issue of what a homeowner's remedy, if any, ought to be when there is evidence that their mortgage note was robo-signed. The judicial system is subject to limitations of what issues they can hear, such as when a party lacks standing¹⁸⁴ or when a controversy has yet to ripen.¹⁸⁵ Even if a robo-signing lawsuit is allowed to proceed, such suits tend to raise a wide array of claims, some meritorious,¹⁸⁶ and others frivolous.¹⁸⁷ In contrast, the legislative process has the ability to address narrow issues that have been debated in the judiciary for years; legislatures are not bound by the specific cases presented to them. This flexibility presents an opportunity for state or federal legislatures to settle what robo-signing means for the enforcement of mortgages in general, not just for the facts as presented in a particular case.

Another benefit to a legislative venue is that the process can be made transparent. For example, a bill being considered by Congress can be watched live by the public on C-SPAN or read about in the news media. In contrast, most judicial decision-making takes place behind closed doors in chambers, a process that has garnered its fair share of public disdain.¹⁸⁸ Debating a potential robo-signing bill publicly would allow the American public to have a voice in the matter, particularly through the ability to lobby their respective representatives.¹⁸⁹ Although a public voice carries risks of politicizing proposals or subjecting them to gridlock, it possesses the advantages of providing disclosure to the public and opportunities for the public to influence the process. Politicization may also be tempered by maintaining a narrowly focused objective, in addition to being several years removed from the turmoil of the Great Recession.¹⁹⁰ Properly

184. *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (finding lack of injury to the parties prevented judicial review).

185. *City of Los Angeles v. Lyons*, 449 U.S. 934 (1980) (finding no case or controversy in regard to potential future violations of civil rights).

186. *See, e.g., Juarez v. Select Portfolio Servicing, Inc.*, 708 F.3d 269, 277-80 (1st Cir. 2013) (timing issue revealed by a cursory review of the documents meant that homeowner claim was colorable and to be explored further).

187. *See, e.g., Cercedes v. U.S. Bankcorp*, No. CV 11-219 CAS (FMOx), 2011 WL 2711071, at *5 (C.D. Cal. July 11, 2011) ("The majority of plaintiffs' allegations regarding 'robo-signing' are pled in a conclusory fashion without any factual support.")

188. Opinion polls have demonstrated that approval of the United States Supreme Court, which is closed to the public, is near an all-time low. Andrew Dugan, *Americans' Approval of Supreme Court Near All-Time Low*, GALLUP (July 19, 2013), <http://www.gallup.com/poll/163586/americans-approval-supreme-court-near-time-low.aspx?version=print>.

189. Public opinion continues to have a demonstrable influence upon the legislative process. *See Benjamin I. Page & Robert Y. Shapiro, Effects of Public Opinion on Policy*, 77 AM. POL. SCI. REV. 175 (1983).

190. Catherine Rampell, *The Recession Has (Officially) Ended*, N.Y. TIMES ECONOMIX BLOG (Sept. 20, 2010, 10:45 AM),

conveying to the public their collective interest in such legislation could also help to avoid gridlock.¹⁹¹

The substantial benefits of utilizing a legislative venue outweigh the potential disadvantages. Crucially, the legislative arena offers a workable alternative to the gradual, case-specific approach taken by the judiciary.

B. What a Solution Should Look Like:

Now that we have identified the proper venue, the next step is to determine how a proper resolution for homeowners who have been wronged by robo-signing should look. There is no shortage of proposed solutions; they range from restricting land recordings to one primary system,¹⁹² replacing document affidavits with live in-court testimony,¹⁹³ strongly revising MERS policies,¹⁹⁴ enacting a more expansive homeowner's bill of rights,¹⁹⁵ to abolishing the holder in due course doctrine to discourage servicer abuse.¹⁹⁶ Many of these proposals have unique benefits to recommend them. However, any true attempt to decide what robo-signing *should* mean for homeowners first calls for an honest look at what damages homeowners have allegedly suffered at the hands of robo-signers. From there, we will need to explore the pros and cons of a uniform approach versus a case-specific approach.

A difficult but necessary consideration for any decision as to what robo-signing should mean for the enforcement of mortgages is what the measure of damages ought to be. The truth of the matter is that, in many cases, a note will be robo-signed during transfer or foreclosure processes without the homeowner ever becoming aware of the faulty signature. This lack of awareness raises important questions, such as: if a mortgage note is transferred via signature improprieties, should it matter as long as the homeowner knows who

<http://economix.blogs.nytimes.com/2010/09/20/the-recession-has-officially-ended/>.

191. See 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, 391-92 (2013) (discussing how a better remedy and enforcement system would benefit most stakeholders and the U.S. economy as a whole).

192. Levitin, *supra* note 16, at 717-23 (advocating a simplification of land recording, via either a single process or a hierarchy among existing processes).

193. Kogan, *supra* note 39, at 657-58 (asserting that such regulations would "significantly curtail robo-singing as an industry").

194. Liddell & Liddell, *supra* note 189, at 393-94.

195. President Obama has advocated for the adoption of a federal Homeowner's Bill of Rights, extending to all U.S. homeowners. See Press Release, *supra* note 100.

196. Eggert, *supra* note 18, at 630-40 (discussing different means of using the legislature to abolish the holder in due course doctrine so that banks and servicers can no longer use it as a defense in robo-signing cases).

to make payments out to?¹⁹⁷ In a foreclosure process, should a homeowner who has clearly defaulted on their payments be entitled to claim damages?¹⁹⁸

While human nature may lead some to write off challengers of robo-signing as irresponsible homeowners who over-borrowed during boom times, this sentiment is misguided. A sober view of the totality of the circumstances leads one to understand that the entire American public stands to gain from ending the sloppy procedures inherent in robo-signing, reaping benefits such as: general economic recovery,¹⁹⁹ lower costs for their own homeownership ambitions,²⁰⁰ and a more efficient judicial system.²⁰¹ Additionally, splitting hairs over which homeowners suffered “real” damages and which did not could detract from the potential benefits of any true resolution.

If the experiences of the past six years have demonstrated anything, it is the enduring need for pragmatic, workable solutions. In an ideal world, any proposed solution would have a “weeding out process,” akin to the judiciary’s rejection of homeowner PSA claims and overly conclusive robo-signing allegations. In the real world one must remain practical: any resolution that carefully parses out the details of individual situations will devour resources, slow economic progress,²⁰² and proceed at a crawl. If it were practical to enact a case-by-case solution, the judicial system would start to look more appealing; for the aforementioned reasons, that route is too burdened by its own shortcomings.

The need for pragmatism can be gleaned from prior unworkable attempts to resolve the mortgage crisis. In a related area of the law,

197. Courts have grappled with the problem of whether any damages can be suffered as long as homeowners know who to make checks out to. *See, e.g., In re Veal*, 450 B.R. 897, 912-13 (B.A.P. 9th Cir. 2011) (stating that it is irrelevant “who actually owns the Note – and it is thus irrelevant whether the Note has been fractionalized or securitized – so long as [the homeowners] know who to pay”)

198. The *Sia* court, for instance, offered sharp criticism of the bank and servicer practices, but would not grant relief to the homeowners since they were obviously in default. *In re Sia*, No. 10-41873, 2013 WL 4547312, at *11-12 (Bankr.D.N.J. Aug.27, 2013).

199. Liddell & Liddell, *supra* note 189 at 391-92 (explaining that the U.S. economy would benefit from a more stable process).

200. Ben Hallman, *Three Reasons Why Non-Foreclosed People Should Care About the Foreclosure Crisis*, HUFFINGTON POST BLOG (Jan. 18, 2013, 9:08 PM), http://www.huffingtonpost.com/ben-hallman/three-reasons-why-nonfore_b_2508245.html (discussing the public stake in resolving the foreclosure crisis, including better home values and lower borrowing costs).

201. *See The Judicial System*, *supra* note 167.

202. The potential for these drawn out processes to weigh on the U.S. economy was recognized early on, and remains a persistent problem. *See James R. Hagerty, The Foreclosure Pain May Drag on for Years*, WALL ST. J. (Sept. 23, 2009, 1:33 PM), <http://blogs.wsj.com/developments/2009/09/23/the-foreclosure-pain-may-drag-on-for-years/>.

a few cities across the U.S. have considered a radical approach to “resolve” the problems of underwater homeowners (those who owe more on their mortgages than their homes are worth), by seizing homes under eminent domain powers and forcing lenders to refinance at more favorable rates.²⁰³ This is an example of a solution that looks great to a select group of regulators when proposed, but has failed to gain traction due to being totally impractical.²⁰⁴ The lack of success that this strategy has met with serves as a cautious lesson to those crafting a robo-signing resolution: the ideas with the most potential will be practical, and will not write off stakeholders who could waive influence over the passing and implementation processes.²⁰⁵

The most practical resolution is the enactment of a single uniform statute. The benefits of a uniform approach are many: the economy gets to move forward, court dockets open up to hear pending cases, and homeowners get to move on with their lives.²⁰⁶ Although a uniform approach will not satisfy every aggrieved homeowner, such a solution does not necessarily mean that particularly egregious actions, such as harassing servicer phone calls amounting to extreme infliction of emotional distress will escape legal repercussions. Perhaps the most important aspect of a uniform approach is that it will create a firm ground upon which all stakeholders may stand.

Although there are many different suggestions that could resolve the impact of robo-signing on the enforceability of a mortgage loan, this Note seeks to lay out a framework for a workable solution that considers all of the major stakeholders involved. This proposal consists of: (1) setting a standard for what a party must show to properly demonstrate evidence of robo-signing; (2) establishing that

203. See *America's Housing Market: Not Waving but Drowning*, ECONOMIST, Jan. 4, 2014, at 33, available at <http://www.economist.com/news/finance-and-economics/21592644-radical-plan-help-underwater-homeowners-makes-comeback-not-waving>; see also Shaila Dewan, *Eminent Domain: A Long Shot Against Blight*, N.Y. TIMES, Jan. 12, 2014, at BU1.

204. Dewan, *supra* note 201 (explaining that under pressure from lending institutions, “at least four other cities that considered the eminent domain strategy have backed away.”)

205. In the case of eminent domain usage, as well as a prior attempt by Georgia to take a strong stance against predatory lending, regulators initially failed to take notice of the impact drastic solutions have on the lending market; the threat of lenders pulling out of such areas could be catastrophic. *Id.* (discussing the pressures against utilizing eminent domain and the failed attempt to institute serious lending reforms in Georgia).

206. One should not downplay the benefits of allowing homeowners to put poor mortgage scenarios behind them. The detriments of going through foreclosure or a prolonged lawsuit can bring negative health effects, as well as detrimental effects on society as a whole. See Dustin A. Zacks, *The Grand Bargain: Pro-Borrower Responses to the Housing Crisis and Implications for Future Lending and Homeownership*, 57 LOY. L. REV. 541 (2011).

robo-signing alone will not bar a noteholder or a holder in due course from enforcing the outstanding loan obligations; (3) establishing a set amount of money to be paid to those affected by robo-signing; and (4) enacting legislation that prevents these problems in the future.

Establishing a robo-signing “standard” would be a much needed first step towards clarifying the confusion surrounding robo-signing. A best-case scenario would involve establishing a uniform definition of what robo-signing encompasses, preferably covering both mortgage transfers via negotiable instrument law and foreclosure processes.²⁰⁷ While being wary of overbreadth, an ideal definition would encompass: improper procedures under negotiable instrument law,²⁰⁸ forged signatures, and affidavits signed without requisite knowledge of the facts.²⁰⁹ The evidence necessary to establish an occurrence of robo-signing could mirror the persuasive evidence used by homeowners in court: documents showing genuine confusion or doubt that the note was properly negotiated;²¹⁰ that a “known robo-signer” signed the documents;²¹¹ or that the servicing company has been implicated in robo-signing investigations for the time period in which the note was serviced by said company. Any legislation would have to provide more specific details than these terms, but setting out what actions will be considered robo-signing and what is needed to demonstrate a robo-signing claim will grant much-needed certainty to this nebulous area of law.

In terms of the overarching question of enforceability, ideal legislation would settle once and for all that robo-signing, sans any additional and egregious misdeeds, will not render a mortgage unenforceable. This is the most logical conclusion to the problem of robo-signing. No matter how faulty the signatures are on a note

207. Covering both processes is ideal because the signature issues are largely the same, the violators are largely the same (financial institutions), and because the homeowner lawsuits as well as the American media have tended to lump them together. See *“Robo-signing” of Mortgages Still a Problem*, *supra* note 59.

208. This would apply to cases such as *Dernier*. *Dernier v. Mortg. Network, Inc.*, 87 A.3d 465, 475-80 (claiming irregularities with the chain of title of the note that secured the homeowner’s mortgage).

209. This is often considered the “traditional” definition of robo-signing. See *Beals v. Bank of Am., N.A.*, No. 10-5427 (KSH) 2011 WL 5415174, at *3 (D.N.J. Nov. 4, 2011) (citations omitted) (discussing robo-signing as “complet[ion of] affidavits and other essential foreclosure documents without personal knowledge of the documents’ veracity and without verification of the documents’ contents.”); see also *Kogan*, *supra* note 39, at 648-50 (describing the failure of Lender Processing Service to have personal knowledge of affidavits as robo-signing).

210. See, e.g., *Dernier*, 87 A.3d at 475-80.

211. While not always successful, many homeowners have challenged documents relating to their mortgage note on the basis of “known” robo-signers having handled the documents. See, e.g., *Cercedes v. U.S. Bankcorp*, No. CV 11-219 CAS (FMOx), 2011 WL 2711071, at *5 (C.D. Cal. July 11, 2011) (alleging that known robo-signers Lucile McCord and Kim Stewart signed foreclosure documents for their property).

transfer or on foreclosure documents, denying the enforceability of a mortgage that homeowners willingly took out would be to grant an enormous windfall.²¹² This is not to say that banks and servicers who circumvent rules and proper procedures should escape reprimand, but only that homeowners should not reap benefits that fly in the face of equity.

The best option for a homeowner remedy lies in monetary settlement. As this Note makes clear, any “one size fits all” solution will occasionally fall short. However, the most workable solution is to come up with a set monetary figure that accounts for those who have suffered harm from robo-signing as well as those who may just be seeking a recovery. Perhaps the best guide for individual settlement figures is the financial relocation assistance currently provided to those occupying foreclosed properties, commonly referred to as “Cash for Keys.”²¹³ Cash for Keys offers generally range between \$1,000 and \$5,000, and function as a means of assisting with moving costs,²¹⁴ as well as discouraging damage to properties in foreclosure.²¹⁵ Although Cash for Keys is a foreclosure-oriented program that does not consider robo-signing specifically, the figures involved provide a reasonable guide for what reasonable robo-signing settlement figures should be.²¹⁶ Providing \$2,500-\$5,000 for homeowners who have been wronged by robo-signers will largely compensate those homeowners for such wrongs,²¹⁷ whether the signature problems arose in a negotiation of the note or in the foreclosure process.²¹⁸

212. This is aptly noted by the Vermont Supreme Court: “Absent adjudication on the underlying indebtedness, the dismissal [of a foreclosure action for lack of bank standing] cannot cancel [the homeowner’s] obligation arising from an authenticated note, or insulate her from foreclosure proceedings based on proven delinquency.” U.S. Bank Nat’l Ass’n v. Kimball, 27 A.3d 1087, 1095 (Vt. 2011).

213. Yuwanda Black, “Cash for Keys” Can Help If You Have a House in Foreclosure & Can’t Afford to Move, FORECLOSURE BUS. NEWS (Jan. 24, 2011), <http://www.foreclosurebusinessnews.com/what-is-cash-for-keys-program-details/>.

214. *Id.* (discussing price differences and how certain banks have set figures around \$2,500); David Streitfeld, *As Homeowners’ Dreams Die, He’s the Undertaker*, N.Y. TIMES, May 6, 2010, at A1 (discussing cash for keys offers going up to \$5,000).

215. Michael M. Phillips, *Buyer’s Revenge: Trash the House After Foreclosure*, WALL ST. J. (Mar. 28, 2008, 11:59 PM), <http://online.wsj.com/news/articles/SB120665586676569881> (discussing how brokers use cash for keys offers to discourage destruction of homes in foreclosure).

216. This is particularly true when one considers that the average homeowner now has to hire attorneys and pay legal fees in the *hope* that they will be able to recover from banks and servicers.

217. In contrast, a recent class-action robo-signing suit that was dismissed would have provided a mere \$17.38 for aggrieved homeowners involved in the suit. Daniel Fisher, *Court Rejects Robosigning Settlement That Would Pay Borrowers \$17.38 Each*, FORBES PERS. FIN. (Mar. 12, 2013, 1:17 PM), <http://www.forbes.com/sites/danielfisher/2013/03/12/court-rejects-robosigning-settlement-that-would-pay-borrowers-17-38-each/>.

218. For example, a homeowner who is in foreclosure could potentially receive twice

Ideally, the funding and administration of such a remedy would be carried out under existing settlements. However, the major settlement plans have already allocated where funds will be used.²¹⁹ There are numerous options as to how the funds could be procured and dispersed in this plan, not limited to: reserving fines from future lender infractions, enacting policies that encourage banks to pool money for such a program, using federal funding, or applying some combination of these options. Details for such a program could be considered in conjunction with President Obama's proposed Homeowner's Bill of Rights.²²⁰

C. Looking Ahead

This proposal serves a fairly narrow purpose: establishing the consequences of robo-signing. Such a statute would provide certainty for homeowners, lenders, and the judicial system. Robo-signing remains a cause for concern as banks have persisted in violating the terms of mortgage settlements.²²¹ Tying in with these recommendations, any legislation that is part of a long-term plan should involve increased federal regulations regarding robo-signing, including an outright federal ban²²² on the practice.²²³ Other long-term goals worth integrating include a drastic simplification of the land recording system,²²⁴ and the furtherance of reforms for organizations such as MERS.²²⁵ These changes would make a proposal such as the one advocated for in this Note much easier to

the amount offered for cash for keys under this plan—helping move out of a home, plus pay the fees to obtain a lease for an apartment. Those homeowners who are not in foreclosure will be granted a small windfall for the banks' or servicers' misdeeds, but it will be nowhere near as inequitable as the windfall of a "free" house.

219. See Morton, *supra* note 83.

220. See Slack, *supra* note 100 (describing the proposal as it currently stands).

221. See, e.g., Christie Smythe, *Wells Fargo Sued by New York Over Mortgage-Service Accord*, BLOOMBERG NEWS (Oct. 2, 2013, 3:10 PM), <http://www.bloomberg.com/news/2013-10-01/wells-fargo-said-to-face-suit-over-loan-accord-violation.html> (discussing case against Wells Fargo for shirking their responsibilities taken on during the mortgage settlement).

222. See Editorial, *Robo-Redux*, N.Y. TIMES, Aug. 20, 2012, at A18 ("[A]s the foreclosure robo-signing experience showed, big money can mean big abuses that will not end without stronger enforcement of existing law by state attorneys general as well as new laws and regulation at the state and federal levels.").

223. This would make such a proposal easier to fund via robo-signing specific fines.

224. Levitin, *supra* note 16, at 717-23 (providing the framework for a more streamlined and efficient land recording process).

225. MERS has already taken some steps towards a more transparent and accessible recording system as a result of a Delaware lawsuit. See Tory Barringer, *MERS Agrees to Reforms in Delaware Settlement*, DSNEWS (July 13, 2012), http://dsnews.com/mers-agrees-to-reforms-in-delaware-settlement-2012-07-13/#.Uu_IV_ldXzl; see also Liddell & Liddell, *supra* note 189, at 393-94 ("MERS itself will no doubt need to revise its procedures so that its role in the foreclosure process is of a less menacing nature.").

implement.

VI. CONCLUSION

The robo-signing crisis has caused great upheaval in the U.S. lending market. Evidence of officials forging signatures, failing to follow basic guidelines, and churning out documents has undermined public confidence in our legal and financial institutions. Even at a time when financial scandals unravel at a record rate, robo-signing stands out as a uniquely pernicious practice. It is unsurprising that this scandal has drawn such severe reactions from government officials, the public, and the judiciary.

The responses to robo-signing thus far have fallen short of resolving the enforceability of robo-signed mortgage notes. This uncertainty is costly for lenders, homeowners, and the general public. Questions of enforceability have slowed the U.S. economic recovery and clogged courts with homeowner suits. It has become abundantly clear that a more comprehensive resolution would be beneficial for all stakeholders involved.

As this Note suggests, the legislature provides the most appropriate venue for a solution to the enforceability of robo-signed mortgages documents. This position is supported by both time and subject matter considerations. Ideal legislation should define standards for robo-signing claims and declare robo-signed mortgage notes enforceable by noteholders or holders in due course, while also granting reasonable financial settlements to aggrieved homeowners. Such legislation should also enact stiff penalties for future robo-signing infractions. Although it may leave some homeowners feeling dissatisfied, a uniform approach provides the best chance for a workable solution.

The road to a robo-signing resolution will be an uphill battle, filled with complex obstacles. However, such action is necessary in order to avoid persistent instability. At some level, every American possesses a stake in the outcome of these questions. Adopting a proper resolution will place the right foot forward for the entire country.