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Addressing the Foreclosure Crisis through Law School Clinics

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Addressing the Foreclosure Crisis Through Law School Clinics

Nathalie Martin* & Max Weinstein**

INTRODUCTION

Since the 2008 financial crisis, unprecedented numbers of homes have been lost to foreclosure in the United States, all while public funds for free or reduced fee legal representation in some communities have all but disappeared. This means that most homeowners in foreclosure are unable to find lawyers to represent them. At the same time, clinical legal education, especially in subjects related to business and commercial law, is on the rise.

This convergence offers a unique opportunity for law school clinics to give students valuable training in both litigation and financial law and also help fill the deep need for legal representation by homeowners in foreclosure. Each of us has experience representing homeowners in foreclosure, Max at Harvard Law School

* Frederick M. Hart Chair in Consumer and Clinical Law, University of New Mexico School of Law. The author thanks Brian Parrish and Josh Schwartz for their research assistance and Sean Fitzpatrick for his fine clinical law performance. The author thanks Ernesto Longa for his fine research prowess. The author deeply thanks Thomas Cox and Brian Thomas for making us think we could actually do these cases, despite a lack of experience with them, and UNM colleague Jim Butler for steadily steering the course in these cases. This paper memorializes comments made by Nathalie Martin at the 2013 annual meeting of the Association of American Law Schools (AALS), on a panel sponsored by the Clinical Legal Education and Poverty Law sections, entitled The Debt Crisis and the National Response: Big Changes or Tinkering at the Edges, as well as remarks made by both Professors Martin and Weinstein at a panel held in connection with the Houston Law Center’s Teaching Consumer Law Conference in May of 2012, entitled Defending Home Mortgage Foreclosures Through Law School Clinics. © 2013, Nathalie Martin & Max Weinstein.

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   Between 2007 and 2010, average annual foreclosures increased 200% to 3.6 million. Id.


   In some states, the resulting settlement money is being used to provide legal representation for homeowners. See id.
in the Predatory Lending and Consumer Protection Clinic, and Nathalie in the University of New Mexico School of Law’s Business and Tax Clinic.

In this Article, we discuss our experiences and offer advice and insights for clinics considering taking cases of this kind. Part I provides a very brief overview of the conditions that led to the financial crisis, a description of the extent of the problem, and a few ways clinical law programs can help. Part II discusses the practical and philosophical reasons why law school clinics play such a pivotal role in stemming the effects of the crisis on homeowners, through examples of cases litigated in Max’s clinic. Part III attempts to give readers a few of the basic tools they need to add this practice to their clinics for the benefit of individual homeowners and their communities.

I. BACKGROUND OF THE PROBLEM

A. Changes in Lending Practices

Relatively recent lending practices have changed the entire world of mortgage lending, not to mention foreclosure defense.3 In the decades following the Second World War, mortgage lending was relatively uneventful. Mortgage loans largely conformed to conservative guidelines to ensure affordability and timely repayment, and mortgage borrowers defaulted in historically modest numbers.4 As a result, few courts had occasion to reflect at great length on the law of mortgage foreclosure.

The lending market of the past decade could hardly have been more different. Gone are the days when borrowers obtained mortgages from bankers who knew them and who used pencils, paper, and local reputation to determine whether borrowers would repay their loans. Rather, virtually all recent mortgages were made by a lender who did not continue to have a relationship with the borrower but instead immediately sold the resulting notes and mortgages, and securitized them, bundling the mortgages and selling off the resulting income streams to investors.5 Given the fees lenders could make originating loans, the quantity of the loans rose in spectacular fashion.6 Given lenders’ disinterest in whether borrowers would actually be able to pay back the loans, the quality of loans decreased.7 At the same time, interest rates were historically low and housing

6. See id.
7. See id.
prices were abnormally high. These interrelated factors dramatically increased the number and the size of home loans. When the availability of mortgage credit suddenly tightened in 2007, the resulting wave of mortgage defaults nearly crippled the global economy and put millions of mortgage borrowers at risk of foreclosure, against which many homeowners found themselves defenseless.

B. Recent Foreclosure Rates

While recent data show a slight downward trend in foreclosures, millions of homeowners have lost their homes to foreclosure nationally since 2008, and there are more foreclosures to come. Approximately 1.3 million homes, or 3.2% of all homes with a mortgage, were in foreclosure nationally as of August of 2012. Some states require lenders to obtain judicial authorization before taking a home in foreclosure, while others allow foreclosures to proceed without the court process. Judicial foreclosure states tend to have a higher foreclosure inventory percentage than non-judicial foreclosure states. Twenty states allow only judicial foreclosures. Although twenty-six states allow a combination of both, the majority of the foreclosures in most states is accomplished by the non-judicial process.

11. Five states account for 48.1% of all completed foreclosures nationally: California, Florida, Michigan, Texas, and Georgia. Id. at 2. The five states with the highest foreclosure inventory as a percentage of mortgages homes were: Florida, New Jersey, New York, Illinois, and Nevada. Id.; see also National Real Estate Trends, REALTYTRAC, http://www.realtytrac.com/trendcenter/ (last visited Oct. 12, 2012).
13. See Hearing, supra note 9, at 12 (statement of Prof. Adam J. Levitin). Since Massachusetts is a non-judicial foreclosure state, see MASS. GEN. LAWS ch. 244, § 14 (2004), and New Mexico is a judicial foreclosure state, the process for representing homeowners in the places we each teach is different, as well as representative of the ways in which these cases proceed nationwide.
16. Id. The majority of foreclosures are accomplished by the non-judicial process in twenty-two of those states: Alabama, Alaska, Arizona, California, Colorado, Georgia, Idaho, Iowa, Minnesota,
C. Some of the Many Ways Clinics Can Help

While most of this Article discusses clinical models for representing homeowners in court throughout their entire foreclosure proceedings, there are other ways clinics can help homeowners. Some clinics, like one supervised by Jean Braucher at the James E. Rodgers College of Law at the University of Arizona, focus on helping homeowners modify their mortgages. These clinics do not represent homeowners in court, but they do provide valuable training for students in patience, perseverance, and dealing with red tape. Other clinics help homeowners through limited representation at pre-trial conferences and by helping large numbers of homeowners file pro se answers. Recently, a non-profit in Albuquerque, the United South Broadway Corporation, successfully sought to change the court rules for the entire state to cure a deficiency in the local summons form. Inexplicably, the New Mexico court summons did not contain the address of the court to which defendants were summoned, so unrepresented debtors who sought to defend themselves frequently mailed their answers only to opposing counsel and neglected to file them with the court. This type of project would be ideal for clinic students, and even perhaps for a doctrinal class. The many ways clinical law programs can help with the crisis are limited only by the students’ and the supervisors’ creativity in finding and using resources.

II. How and Why Clinics Are Uniquely Suited to Litigate Important Foreclosure Defense Cases

Law school clinics can play an essential and leading role in litigating pressing issues in foreclosure law, in part because courts have not recently addressed numerous fundamental questions. Beginning in 2006, subprime mortgage loans failed on an astonishing, unprecedented scale. Flooded with foreclosures, courts suddenly confronted issues they had not considered for decades—in some instances not since the nineteenth century. What entity has authority to foreclose on a borrower’s home? What evidence of that authority is necessary for a valid
foreclosure? Of what significance to foreclosure proceedings are the unfair and deceptive lending practices characteristic of subprime mortgage loans?

The foreclosure crisis poses at least two systemic challenges for the consumer advocates and law school clinics that seek to assist struggling homeowners. First, the sheer number of homeowners facing foreclosure presents a daunting task. Legal services attorneys and public interest advocates—already too few to meet the needs of low-income families before the crisis—are now wholly overwhelmed. Prior to the crisis, few legal services offices had developed expertise in foreclosure litigation. For most organizations, foreclosure defense represents a new area of practice.

Of course, legal representation is of little benefit to struggling homeowners unless advocates are able to assert meritorious defenses on their behalf. The development of a robust consumer protection law in the mortgage foreclosure context is no less of a crucial systemic challenge inherent in foreclosure defense. In relative contrast to traditional legal services practices, such as family law or eviction defense, many legal protections for homeowners facing foreclosure are fundamentally unsettled and open to debate. Not only is it a struggle to supply sufficient resources for advocates to defend mortgage borrowers, advocates must also demonstrate that foreclosure defense itself is a conceptually viable practice.

The Predatory Lending and Consumer Protection Clinic at Harvard Law School ("Harvard Clinic") is focused on the latter challenge. The Harvard Clinic seeks to identify and litigate unaddressed issues of fundamental importance to foreclosure defense. Law student advocates and their supervising attorneys commence targeted affirmative lawsuits, but also monitor other cases brought by pro se litigants or by other legal services offices in the state appellate system. Through its mortgage litigation, the Harvard Clinic aims to make favorable law that facilitates successful advocacy for larger numbers of homeowners by other organizations and attorneys.

Contesting a purported mortgagee’s standing to foreclose has been central to this effort. The Harvard Clinic served as counsel to Antonio Ibanez in *U.S. Bank Nat’l Ass’n v. Ibanez.* In that case, the Massachusetts Supreme Judicial Court confronted a widespread practice: foreclosures conducted and homes sold at foreclosure auctions before the foreclosing party obtained an assignment of the underlying mortgage. The court held the practice invalid and reaffirmed the seemingly simple proposition that only a mortgagee—the original lender or the present and actual holder of a valid, written assignment of the

22. This practice was not confined to Massachusetts alone. *See, e.g., Countrywide Home Loans, Inc. v. Taylor*, 843 N.Y.S.2d 495, 497 (N.Y. Sup. Ct. 2007) (stating that “[s]uch [an] attempt at retroactivity, however, is insufficient to establish Countrywide’s ownership interest at the time the action was commenced. Indeed, foreclosure of a mortgage may not be brought by one who has no title to it”); *Deutsche Bank Trust Co. Americas v. Peabody*, 866 N.Y.S.2d 91 (N.Y. Sup. Ct. 2008) (referring to several other trial courts that found retroactive dating to be insufficient).
The Harvard Clinic continues to litigate issues arising out of Massachusetts's non-judicial foreclosure process, but an equal focus of its trial and appellate advocacy are the marketing and underwriting practices associated with subprime mortgage loans. Massachusetts courts have recognized that "the origination of a home mortgage loan that the lender should recognize at the outset the borrower is not likely to be able to repay" violates Massachusetts's unfair and deceptive acts and practices (UDAP) statute. No appellate court, however, has yet held whether such a violation provides a defense against foreclosure by the original lender's assignee—an issue that will likely be addressed in a pending Supreme Judicial Court case for which the Harvard Clinic is counsel, Drakopoulos v. U.S. Bank National Ass'n. Because subprime lenders almost universally assigned their loans shortly after origination, resolution of this issue will prove critical to whether borrowers can assert UDAP violations to defend against foreclosure.

A. Law Clinics are Uniquely Positioned to Help

As a clinical practice, complex, issue-oriented litigation offers relatively unusual advantages. Complex foreclosure litigation can augment the experiences available to students in clinics focused on traditional legal services subject areas by exposing them to a different style of practice, centered less on trial practice and more on the manifold variety of modern civil litigation. At the same time, complex litigation can make the most of the skills and resources of law students.

23. U.S. Bank Nat'l Ass'n, 941 N.E.2d at 50.
25. Id. at 888.
26. Id. at 897.
27. Frappier v. Countrywide Home Loans, Inc., 645 F.3d 51, 56 (1st Cir. 2011) (citing Commonwealth v. Fremont Inv. & Loan, 897 N.E.2d 548 (2008)).
enhancing advocacy on behalf of the clients. Finally, the investment of time and resources necessary to litigate factually and legally intricate cases is often inconsistent with the mission of non-clinical legal services organizations to provide representation to as many clients as feasible, and economically impractical for private practitioners. Thus, law school clinics can play a crucial role in developing foreclosure law, a role that might otherwise go unfilled.

1. Complex Litigation Provides Law Students with Educational Opportunities Particularly Characteristic of Contemporary Civil Litigation

With increasing frequency, commentators have called on law schools to place greater emphasis on preparing their students for the practice of law.29 In these discussions, clinical education rightfully receives praise for providing exposure to and training in the fundamental skills required for litigation and other forms of legal advocacy.30 Complex foreclosure cases, however, offer educational opportunities relatively uncommon even in clinical contexts and are particularly rewarding in light of the realities of contemporary civil litigation.

Civil litigation has developed into a process in which trials are uncommon, having been replaced by a variety of smaller, varied adversarial encounters, any or all of which may be crucial to resolution of the case. In the New York Supreme Court, for instance, approximately half a million trial-level civil matters reached disposition in 2010.31 Only 3% of these dispositions resulted from a jury verdict or a decision issued after trial.32 More than half of civil matters were resolved before the parties filed their “note of issue,” indicating the case’s readiness for trial, but not by means of a settlement between parties.33 These cases were won or lost in a variety of different ways—on dispositive motions, by default adjudications, or through any number of miscellaneous procedural devices. As a result of these litigation conditions, litigators must now advocate in a wide variety of relatively unstructured and unpredictable settings.

Litigation of complex foreclosure issues offers students exposure to a style of practice characteristic of this contemporary trend. Clinicians tackling unsettled legal issues must confront a variety of dispositive motions. The Ibanez case, for instance, was primarily litigated in the trial court on a motion to vacate a default judgment, for which U.S. Bank submitted three supplemental memoranda of law.34 Discovery periods are frequently extensive and just as frequently offer

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30. See, e.g., Ethan Bronner, To Place Graduates, Law Schools are Opening Firms, N.Y. Times, Mar. 8, 2013, at A14.
32. Id.
33. Id.
advocates the opportunity to litigate disputes over the scope of document production and deposition practice. The variety of motions, hearings, and conferences featured in foreclosure litigation allows students to experience and gain proficiency in modern civil litigation.

2. Law Student Clinicians Are Especially Suited to Complex Litigation Practice

Law school clinics and law students sometimes possess resources in abundance that are ordinarily scarce for private practitioners and legal services attorneys—time and personnel. Clinics can be structured to assign multiple student advocates to cases without regard to profitability or efficiency, and those advocates can devote large amounts of time, relatively unconstrained by other obligations, even to ancillary legal and factual details. Such capacities are, of course, especially well-suited to complex litigation.

The contemporary mortgage market ensures that foreclosure litigation will entail voluminous document discovery. Resolving standing issues, discussed in more detail in Part IV below, can involve delving into mortgage securitization and the large prospectuses, regulatory filings, and the myriad of contractual documents associated with that process. For example, even though the parties did not engage in full discovery in *Ibanez*, the record appendix on appeal exceeded 2500 pages, consisting largely of dense securitization documents. Sometimes only a law school clinic can provide a large enough team of advocates to master an extensive record on behalf of a struggling homeowner.

Similarly, litigating UDAP claims often requires a broad-based discovery strategy, since such claims put at issue a defendant’s general practice beyond the scope of any individual client’s case. The Harvard Clinic regularly seeks and obtains discovery of hundreds of other mortgage loans of borrowers similarly situated to its client to demonstrate the existence of a subprime lender’s unfair and deceptive practice as well as the existence of a joint venture amongst the participants in the securitization process.

While law school clinics are recognized for preparing students for the actual practice of law, that recognition is sometimes tempered by the labor-intensive nature of clinical education. Law school clinics may provide precisely the targeted education now thought desirable, but, it is claimed, such education can only be offered to a lucky few. A clinical practice focused on factually and legally complicated cases, however, can require and provide opportunities for

35. While the Harvard Clinic takes this approach, the University of New Mexico School of Law typically provides students with more direct client contact and assigns each student his or her own cases, wherever possible.
37. See, e.g., Steven M. Davidoff, *The Economics of Law School*, N.Y. Times, Sept. 25, 2012, at F8 (noting that “law students do need more training in practical skills, but [that] is probably only going to make law school more expensive . . . [A] clinical professor is limited to six to [ten] people a class. If reducing costs is the goal, then more clinical education will only increase it.”).
relatively high numbers of students for each case, augmenting the educational opportunities the clinic provides without necessarily increasing a clinic’s cost. Law school clinics can be the ideal counsel for complex cases, and students can benefit from focusing on such a practice.

3. In Focusing on Complex Litigation, Law School Clinics Can Address a Crucial Need That Neither Legal Services Offices Nor Private Counsel Are Able to Meet

While insufficient resources for representing homeowners facing foreclosure is a major inadequacy in the civil justice system, advocates dedicated to development of foreclosure law are in no greater supply and are no less urgently needed. The issues of most significance to struggling homeowners are most frequently unresolved, at least recently, in state law. In one recent case for which the Harvard Clinic served as amicus, the parties, the court, and multiple amici devoted considerable attention to a decision issued in 1860.38 Moreover, even when state legislatures have been able to pass consumer protection legislation to combat subprime lending, few or no borrowers are able to muster counsel to litigate cases under an entirely new law. The Massachusetts legislature, for instance, had the foresight to enact the Predatory Home Loan Practices Act39 in mid-2004, long before the foreclosure crisis struck. That act provided substantially greater protection to Massachusetts homeowners than federal consumer protection law, yet it was not until 2010 that the Harvard Clinic litigated the first case to actually to find a violation of the statute.40

Devoting a disproportionate share of scarce resources to a single case may be unrealistic for a legal services organization or inconsistent with a mission of serving as many low-income clients as possible. Moreover, foreclosure litigation—a new practice area that is relatively unproven as financially viable—has attracted few private practitioners. Law school clinics, by contrast, have greater flexibility to design their own practice and have at least a less pressing need to be independently financially viable. They can accordingly play a vital role few others are equipped to fill.

III. A BIT MORE DETAIL ON DEFENDING FORECLOSURES FOR HOMEOWNERS41

While Part II explained why clinics are well-suited to engage in mortgage foreclosure defense and described some of the high-impact cases litigated by the Harvard Clinic, this Part contains some basic information needed to start such a

41. This Part was written primarily by Nathalie Martin.
practice. It describes the practice model of the students at the Business and Tax Clinic of the University of New Mexico School of Law (UNM Clinic) in representing homeowners. The goal in this Part is to provide helpful nuts and bolts to clinical professors and students who have just begun these representations, as well as those who are considering taking them on in the future.

This type of representation can be incorporated into a clinic's practice in one of a number of ways—by adding foreclosure cases to any civil litigation clinic, by taking on foreclosure defense in the context of a business or consumer law clinic,\footnote{At the University of New Mexico School of Law, we do foreclosure defense mostly through our Business and Tax Clinic.} or by forming a separate clinic devoted exclusively to foreclosure defense. With a few attorneys in the community who are willing to help with questions that arise\footnote{In New Mexico, we have a foreclosure defense working group composed of local lawyers who share resources with one another and meet once a month. I am happy to share information about the group with anyone who would like it.} and a few carefully selected resources in the clinic library,\footnote{The National Consumer Law Center publishes extremely helpful manuals. See Nat'l Consumer Law Ctr., Foreclosures: Mortgage Servicing, Mortgage Modifications, and Foreclosure Defense (4th ed. 2012); Nat'l Consumer Law Ctr., Why Responsible Mortgage Lending Is a Fair Housing Issue (2012); see also David A. Dana, Why Mortgage "Formalities" Matter, 24 Loy. Consumer L. Rev. 505 (2012); Alan M. White, Losing the Paper Mortgage Assignments, Note Transfers and Consumer Protection, 24 Loy. Consumer L. Rev. 468 (2012); Brescia, supra note 5; Adam J. Levitin & Tara Twomey, Mortgage Servicing, 28 Yale J. on Reg. 1 (2011); Christopher L. Peterson, Two Faces: Demystifying the Mortgage Electronic Registrations System's Land Title Theory, 53 Wm. & Mary L. Rev. 111 (2011); Dustin A. Zacks, Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures, 29 Quinnipiac L. Rev. 551 (2011); Hearing, supra note 9 (statement of Prof. Adam J. Levitin); David R. Greenberg, Neglected Formalities in the Mortgage Assignment Process and the Resulting Effects on Residential Foreclosures, 83 Temp. L. Rev. 253 (2010).} any law school clinical program in the country can help to ameliorate the foreclosure crisis.

The UNM Clinic only began taking foreclosure defense cases once the situation became especially dire. Ninety-five percent or more of foreclosure defendants were pro se and the lack of foreclosure attorneys in New Mexico even drew national attention.\footnote{David Streifeld, Foreclosed Homeowners Go to Court on Their Own, N.Y. Times, Feb. 2, 2011, http://www.nytimes.com/2011/02/03/business/economy/03class.html?pagewanted=all&_r=0.} The goal of the UNM Clinic was not only to help homeowners, but also to train students to undertake foreclosure defense practices once they graduated. When the UNM Clinic began taking foreclosure defense cases, it also established an externship program allowing students to work in foreclosure defense firms for credit in the summer after their first year. The externship program trained students in foreclosure defense before they reached the clinic, developed further relationships with local foreclosure defense attorneys, and began to build a pipeline of future foreclosure defense attorneys. Many of the attorneys that hired an extern also now help with clinic cases. Other attorneys help because they too hope to improve the representation rate for homeowners in New Mexico and because they enjoy working with students.
A detailed description of two prominent topics in foreclosure law follows, drawn primarily from pleadings filed in New Mexico courts, to serve as a point of departure for students and supervisors in their research. Naturally, because foreclosure doctrine is matter of state law and because new cases in this area are decided every day, this outline will only get one started.46 Over the several years in which the UNM Clinic has taken foreclosure defense cases, it has focused much of its defense practice on two common problems: (1) abuses in the modification process and (2) defects in a foreclosure plaintiff’s standing, both of which are discussed in more detail below.

A. Abuses in the Modification Process: A Primer

The Home Affordable Mortgage Program (HAMP) requires banks that received federal bailout or Troubled Asset Relief Program (TARP) funds to offer qualified homeowners affordable modifications of their mortgage loans. HAMP was designed to stem the foreclosure crisis and give homeowners an opportunity to modify their mortgages permanently in order to avert foreclosure. Many of the most prominent mortgage lenders and servicers have received the benefits of TARP and thus must comply with HAMP. Nevertheless, many lenders and servicers fail to comply with HAMP, providing borrowers with a powerful defense to foreclosure. This reality also deservedly strikes many students as palpably unfair, motivating them to advocate on behalf of homeowners.

In order to qualify for a HAMP modification, borrowers must first submit a myriad of financial data to lenders to attain eligibility. Once eligible, lenders offer borrowers a HAMP trial modification payment plan. The homeowner must then make the trial payments in a timely fashion while lenders verify the financial representations made by the homeowner.

The UNM Clinic has observed numerous examples of cases in which borrowers make all of their trial plan payments and comply with numerous, redundant requests for verification of borrower information. Often borrowers provide the same information over and over, as in one of the clinic’s cases in which a lender made eleven requests for more information, all the while making repeated assurances to the borrower that the borrower’s application was being reviewed. The lender then commenced a foreclosure action while the borrower was in the midst of the modification process. This process, known as “dual tracking,” violates the terms of HAMP, as well as new Consumer Financial Protection Bureau (CFPB) rules for mortgage servicers, the forty-nine state

46. As in any other litigation, in a judicial foreclosure state a case starts by complaint and service to the homeowners, who then file an answer and counterclaims. The litigation process will proceed like any other with which the clinical supervisor is familiar. Several months after the complaint is answered, the lender may move for summary judgment, claiming that there are no material facts in dispute and that the case should be resolved in the lender’s favor without a trial. At the summary judgment stage, a mortgagor can assert various defenses that are also applicable at trial.
attorneys' general settlement with the five largest national servicers, various common law doctrines, the Uniform Commercial Code (U.C.C.), and most state unfair practices laws. Dual tracking, or even just repeatedly asking a borrower for the same documents without justification, is deeply demoralizing for borrowers. It creates false hope and breaks people's spirits. While dual tracking is painful for clients, it can mobilize students who witness the deep human costs of these practices.

In cases involving HAMP violations, counsel for a mortgagor should consider pleading counterclaiims for breach of contract, breach of the implied warranty of good faith and fair dealing, and state Unfair Practices Act violations. While lenders will undoubtedly respond that all private claims related to HAMP violations are barred because HAMP provides no private right of action, multiple courts have rejected this argument. Many courts have not yet decided this issue, giving clinics another opportunity to establish a precedent. Similarly, while servicers may argue that trial payment plans fall short of the status of a formal contract, courts have found that complying with a trial period plan is adequate consideration for a permanent loan modification agreement.


The covenant of good faith and fair dealing can arise out of either a contract or a special relationship between two parties. The implied covenant of good faith and fair dealing "requires that neither party do anything that will injure the rights of the other to receive the benefit of their agreement. Denying a party its rights to


48. This point was made orally after our AALS panel by Professor Prentiss Cox, Univ. of Minn. Sch. of Law.


those benefits will breach the duty of good faith implicit in the contract."\(^{52}\)

Similarly, the U.C.C. requires that all commercial transactions be conducted in good faith and with fair dealing.\(^{53}\) Evading the spirit of the bargain and interfering with or failing to cooperate in the other party’s performance constitutes bad faith and violates the obligation of good faith in performance.\(^{54}\)

2. Unfair and Deceptive Practices Act Violations

In addition to common law claims, in many states, borrowers can recover under unfair practices acts (UPA) or unfair and deceptive acts and practices laws (UDAP), for violations of HAMP.\(^{55}\) Even though HAMP does not itself provide a private cause of action, a violation of HAMP regulations may nevertheless be actionable under the applicable unfair practices statute.\(^{56}\)

Each jurisdiction’s UPA or UDAP statute will require proof of a number of elements. For example, in New Mexico a homeowner must prove that: (1) the defendant made an oral or written statement that was either false or misleading; (2) the defendant knew or should have known that the representation made in connection with the extension of credit or collection of debts was false or misleading; (3) the false or misleading representation must have occurred in the regular course of the representor’s trade or commerce; and (4) the representation must have been of the type that may, tends to, or does, deceive or mislead any person.\(^{57}\) A single occurrence of certain conduct is enough to

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56. Boyd, 2011 WL 1374986, at *4. Nor is preemption a concern: in New Mexico, for example, the UPA is not preempted by federal law. Ashlock v. Sunwest Bank of Roswell, N.A., 753 P.2d 346, 348 (N.M. 1988), overruled on other grounds by Gonzales v. Surgidev Corp., 899 P.2d 576 (N.M. 1995). In Ashlock, the federal unfair practices law did not conflict with the UPA and did not explicitly exclude state legislation concerning unfair trade practices by banks. Ashlock, 753 P.2d at 349. Nor does any other argument for preemption apply. Id. The federal unfair or deceptive acts or practices law provides that any remedies available under that law are in addition to any other remedy or right of action provided for under state law. 15 U.S.C. § 57b(e) (2006).
57. Stevenson v. Louis Dreyfus Corp., 811 P.2d 1308, 1311-12 (N.M. 1991) (stating that the last requirement is met “if a party . . . in the exercise of reasonable diligence should have been aware that the statement was false or misleading.”). A defendant’s conduct need not actually deceive, but may only tend to deceive. Id. A plaintiff is not required to prove detrimental reliance or a causal connection between the defendant’s conduct and the plaintiff’s acceptance of the service to prevail in a UPA claim, but must merely show a causal connection between the defendant’s conduct and the plaintiff’s loss. Smoot v. Physicians Life Ins. Co., 2004-NMCA-027, ¶ 20, 135 N.M. 265, 87 P.3d 545 ("Causation and reliance are distinct concepts.").
constitute a violation of the UPA.\(^\text{58}\)

Typical misconduct in the modification process that could constitute a UPA violation includes: promising to provide a modification if the homeowner complies with the trial plan and then foreclosing anyway, despite compliance; promising in the modification documents not to foreclose during the modification period and then foreclosing anyway; or repeatedly requesting the same or additional information relating to the modification, assuring a borrower that the loan is being considered for permanent modification—and even accepting additional payments—and foreclosing anyway. Settlement of these claims can result in large principal reductions for homeowners. In one of the UNM Clinic’s particularly egregious HAMP violation cases, the client’s claims were settled for a principal reduction of $100,000.

**B. Standing Defenses: A Primer**

As discussed above in connection with the *Ibanez* and *Bevilacqua* cases, foreclosure defense counsel must ensure that the party attempting to enforce the note and mortgage has the legal right to do so. Given the securitization of mortgages and the frequent transfer of alleged rights in securitization transactions, standing problems have become very common in residential foreclosure cases.\(^\text{59}\)

When a foreclosing party does not prove rights under the note and mortgage, the foreclosing party has not proven standing and has no right to foreclose or even to collect on the basis of a borrower’s liability.\(^\text{60}\)

Somewhat understandably, standing issues do not always spark the same outrage in students and colleagues as other forms of servicer misconduct. Sometimes a homeowner has not paid his or her mortgage for a very long time and as some students will note, someone has a right to foreclosure even if this plaintiff does not. As one court recently articulated, however, this does not excuse a plaintiff’s lack of standing:

> In truth, the potential prejudice [of having the wrong party suing] is both plain and severe—foreclosure by the wrong entity does not discharge the homeowner’s debt, and leaves them vulnerable to another action on the same note by the true creditor. Banks are neither private attorneys general nor bounty hunters, armed with a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank’s [mortgage].\(^\text{61}\)

Once students understand that a lender’s lack of standing has significant consequences for homeowners, they often become incensed at the sloppiness and

\(^{58}\) *Ashlock*, 753 P.2d at 348.

\(^{59}\) *See Hearing, supra* note 9, at 2 (statement of Prof. Adam J. Levitin).

\(^{60}\) *Id.* at 2-3.

inequality involved.

Promissory notes are typically (though not always) transferred by endorsements on, or attached to, the note, so counsel must examine the note itself to determine if the foreclosure plaintiff is the valid owner of the note.62 The mortgage contract or deed of trust, by contrast, cannot be transferred through endorsement, but only through a valid written assignment, so counsel must ensure that a chain of assignments of the mortgage exists.

Many states require that a full chain of mortgage assignments exist in order for a plaintiff to have the right to foreclose.63 Generally speaking, these assignments must be recorded like any other real estate transfer for maximum protection to the lender.64 Timing also matters. Some courts have forbidden foreclosing lenders and servicers from maintaining suits when they have not proven that they are valid holders and assignees of the notes or mortgages at the time of a suit’s commencement.65 Standing is a jurisdictional question that can be raised by the parties or by the court sua sponte at any time.66 Moreover, the plaintiff bears the burden of proving standing.67

1. More About the Note

Defense counsel should immediately seek production of the original note and not a copy.68 When enforcing a negotiable note, only a “person entitled to enforce the instrument” has standing under U.C.C. § 3-301.69 Absent a valid endorsement on or attached to the original note itself, the mere assignment of a note does not give a person standing to sue on the instrument.70 In a recent case in New Mexico, the lender/servicer attached what it called a copy of an “original” note to its complaint, which contained no endorsements and was made payable to

62. White, supra note 44, at 472 n. 15 (stating that “the touchstone of proper acquisition of the right to enforce a negotiable instrument is physical delivery of the original note, endorsed by the prior payee either in blank or to the new owner”) (citing Gee v. U.S. Bank Nat’l Ass’n, 72 So. 3d 211, 213-14 (Fl. Dist. Ct. App. 2011)).
63. Id. at 483-84.
64. Id.; see also Hearing, supra note 9, at 12 (statement of Prof. Adam J. Levitin).
68. See generally Peter Holland, Defending Junk-Debt-Buyer Lawsuits, 46 CLEARINGHOUSE REV. 12 (2012) for a superb description of how to carefully review these documents in another setting—basic debt collection. These same techniques can be used in the mortgage foreclosure context and are perfectly suited for training students to engage in careful document review.
69. U.C.C. § 3-301 (2010).
70. Id.; see also Hearing, supra note 9, at 11 (statement of Prof. Adam J. Levitin) (stating that the original physical note is itself the right to payment).
someone other than the foreclosing party. The lender produced a different “original” note at trial, with two endorsements but none to the foreclosing party. A lender in this situation has not proven it has a right to foreclose. Given that only those who are “person[s] entitled to enforce” an instrument can bring suit on a negotiable note, three types of individuals have this standing: (1) those who are holders of the note, (2) non-holders in possession of the note who have the rights of a holder, and (3) those who are not in possession because the note has been lost or stolen.

To be a holder, a party must be in possession of a note payable to bearer or payable specifically to that identified party. The most common type of bearer note is one that is payable “to bearer.” An order instrument is one payable to the order of an identified person. Initially, the person to whom the instrument is payable is a holder, but even that person is not a holder unless he or she is in possession of the instrument. No one other than the identified payee can ever be a holder of an order instrument unless the identified payee endorses the instrument.

The identified payee can endorse either “in blank” or “specially.” The identified payee makes a blank endorsement by simply signing his name on the back. When the instrument is endorsed in blank, it becomes a bearer instrument and anyone in possession of it is a holder. A special endorsement includes the name of the person to whom the instrument is transferred, and the instrument becomes an order instrument with the transferee as the identified payee.

The second type of person entitled to enforce an instrument is a non-holder in possession with the rights of a holder—typically, when an order instrument has been transferred but the identified payee has neglected to endorse the instrument.

When one corporate entity acquires the assets of a defunct entity, such as the FDIC as receiver for a failed bank, the acquiring entity must prove the chain of title giving it the rights of a holder of the note. For example, In re Wilhelm consolidated five foreclosure cases, all of which involved notes neither made out

72. U.C.C. § 3-301.
73. U.C.C. §§ 3-205, 1-201(b)(21)(A).
74. U.C.C. § 3-109(a).
75. U.C.C. § 3-109(b).
76. U.C.C. §§ 3-301; 1-201(b)(21) (definition of “holder”).
77. U.C.C. § 3-205(a).
78. U.C.C. § 3-205.
79. U.C.C. §§ 3-204, 205.
80. U.C.C. § 33-109(a) (listing ways in which an instrument can be made payable to bearer).
81. U.C.C. § 3-205(a).
82. U.C.C. § 3-203(b).
to the party seeking to foreclose nor endorsed in blank or to a specific payee. In Wilhelm, the court denied non-holder in possession status to the parties seeking to enforce the notes without proof of the transactions by which the notes were acquired and proof of possession.

Some courts require the foreclosing party entitled to enforce the note at the time of commencement to produce sufficient supporting documentation of that status. The lender must demonstrate the entire chain of title to the note to demonstrate its standing to foreclose.

2. More About the Mortgage and Mortgage Assignments

A foreclosure plaintiff must be the valid assignee of the mortgagee’s contractual rights, as well as a person entitled to enforce the note, to have the right to foreclose. In some states, failing to demonstrate a full and complete chain of assignments of the mortgage prior to filing the complaint may also require dismissal of the complaint. Again, clinicians should examine the mortgage assignments with utmost care—if a plaintiff cannot demonstrate the existence of a clear chain of assignments, he or she may lack standing to foreclose.

85. Id. at 402.
87. See White, supra note 44, at 489 (stating that New York and Ohio courts in particular, have consistently held that the foreclosing plaintiff must be the assignee of the mortgage prior to filing judicial foreclosure, and that the preferred practice in most judicial foreclosure states is to record a valid assignment from the prior record mortgagee or assignee to the foreclosing entity prior to filing a foreclosure complaint, or at least prior to a judicial sale, to ensure a complete record chain of title); Christopher L. Peterson, Losing Our Homes, Losing Our Way, or Both? Foreclosure, County Property Records, and the Mortgage Electronic Registration System, 40 COLUM. L. REV. 821, 844 n.110 (2012); Kevin M. Hudspeth, Clarifying Murky MERS: Does Mortgage Electronic Registration Systems, Inc., Have Authority to Assign the Mortgage Note in a Standard Illinois Foreclosure Action?, 31 N. ILL. L. REV. 1, 2 (2010) (stating that under the Illinois Mortgage Foreclosure Law (IMFL), a mortgage foreclosure complaint must attach both the mortgage and the note, and that even though the plaintiff must plead its capacity to bring the action, it need not attach any assignments); Kondaur Capital Corp. v. Hankins, 2011 ME 82, ¶ 5, 25 A.3d 960, 962; Saratoga Cnty. Chamber of Commerce, Inc. v Pataki, 798 N.E.2d 1047, 1052 (N.Y. 2003) (stating “if standing is denied, the pathway to the courthouse is blocked”); Citigroup Global Mktgs. Realty Corp. v Randolph Bowling, No. 12817/07, 2009 WL 4893940, at *2 (N.Y. Sup. Ct. Dec. 18, 2009); Wells Fargo Bank, N.A. v. Jordan, No. 91675, 2009 WL 625560, at *3-4 (Ohio Ct. App. Mar. 12, 2009); U.S. Bank Nat’l Ass’n v. Kimball, 2011 VT 81, ¶ 12, 190 Vt. 210, 27 A.3d 1087; Works v. Winkle, 234 S.W.2d 312, 315 (Ky. Ct. App. 1950); Morgan v. HSBC Bank USA, NA, No. 2009-CA-000597-MR, 2011 WL 3207776, at *3-4 (Ky. Ct. App. July 29, 2011).
89. White, supra note 44, at 489; Peterson, supra note 87, at 844 n.110; Hudspeth, supra note 87, at 2.
90. See Holland, supra note 68.
3. Documentation and “Robo-Signing”

When examining a plaintiff’s purported proof of its status as holder of the note and assignee of the mortgage, advocates should be mindful of the national “robo-signing” scandal.\(^91\) Individuals, typically hired by a mortgage servicer, sign necessary foreclosure documents without reviewing their contents.\(^92\) In some cases, “robo-signing” has involved forged signatures.\(^93\) Mere affidavits and testimony of employees of servicers with no personal knowledge of the facts do not constitute sufficient proof of a plaintiff’s right to foreclose.\(^94\) Finally, courts have held that affidavits filed in support of foreclosure documents that are not based on personal knowledge are insufficient.\(^95\)

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91. Issues related to robo-signing are discussed in more detail in Professor Raymond Brescia’s seminal article Leverage: State Enforcement Actions in the Wake of the Robo-Signing Scandal, in which Professor Brescia describes in detail the application of state UDAP statutes to the false affidavits, reckless claims, and improper notarizations that are so commonplace in the home foreclosure mess. See Brescia, supra note 44, at 17.

92. See Hearing, supra note 9, at 13-14 (statement of Prof. Adam J. Levitin).


[A]s made apparent through the revelations from the robo-sign scandal, lenders, servicers and other entities processing foreclosure filings engaged in a range of deceptive acts, all of which would qualify as acts violating the key provisions of UDAP laws: filing false and misleading affidavits; forging and improperly notarizing those affidavits; and making claims that they had the authority to foreclose on mortgages when, at least in some instances, they possessed neither the ability to prove such claims or even the knowledge to assert them).

94. For example, in DL Mortg. v. Parsons, No. 07-MA-17, 2008 WL 697400 (Ohio Ct. App. Mar. 13, 2008), the trial court granted the plaintiff summary judgment on a record that consisted of the original mortgage and note, along with an affidavit by the vice president of the servicer claiming that she maintained the records on the loan account and that her company held the note and mortgage. The note and mortgage remained in the name of the original lender, not the foreclosing party. Upon a standing objection by the homeowners, the appellate court reversed the summary judgment, holding that there was a genuine issue of fact as to whether the foreclosing party had standing. Id. at *3-4; see also In re Foreclosure Cases, 521 F. Supp. 2d 650 (S.D. Ohio 2007); In re Foreclosure Actions, Nos. 1:07cv1007 et al., 2007 WL 4034554 (N.D. Ohio Nov. 14, 2007); In re Foreclosure Cases, Nos. 1:07CV2282 et al. 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007) (discussing the standing rules in detail); Deutsche Bank Trust Co. Americas v. Peabody, No. 2007-2065, 2008 WL 2548733, at *1 n.1 (N.Y. Sup. Ct. June 26, 2008) (“[S]ince there is no showing the attorney has personal knowledge . . . the affidavit is useless.”); United Nat’l Bank Ass’n v. Kosak, No. 1083-2007, 2007 WL 2480127, at *1 (N.Y. Sup. Ct. Sept. 4, 2007) (rejecting affidavit by attorney in fact, employee of non-party servicer); Wells Fargo Bank, N.A v. Ford, 15 A.3d 327, 331 (N.J. Super. App. Div. 2011) (summary judgment precluded where lender’s attorney in fact did not indicate the source of knowledge in certification stating that lender was holder and owner of the note and mortgage).

IV. CONCLUSION

Most communities lack adequate representation for homeowners in foreclosure, many of whom have legitimate defenses to foreclosure. Law school clinics can help bridge this gap in legal services. Clinics that want to help have many options. First, they can serve a substantial number of homeowners through targeted but limited intervention, with or without litigation, using just a few straightforward doctrinal tools. Second, a foreclosure clinic can focus on identifying and litigating unresolved issues fundamental for foreclosure defense, serving only a few homeowners directly but making law that other foreclosure defense lawyers can use.

The practices of most clinics, including those at UNM and Harvard, fall somewhere in the between these two alternatives. Numerous opportunities exist to meet specific curricular needs, particular student or faculty interests, and available resources at any given institution. Regardless of the particular cases and strategies chosen, any law school clinical initiative can greatly improve outcomes for individual homeowners and communities now facing the gravest crisis since the Great Depression while simultaneously providing the practice-oriented educational opportunities vital for educating lawyers.

Ct. App. 2011 (per curiam), in which the court held that a foreclosure affidavit of indebtedness submitted by a bank employee was inadmissible hearsay because the person relied on computerized information and did not have personal knowledge of “who, how, or when” the data was entered, notwithstanding Florida’s rules for the admission of business records which, in part, allow a qualified witness to attest to the accuracy of computerized records).