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No Brakes: Loan Acceleration and Diminishing Foreclosure Defenses

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**NO BRAKES: LOAN ACCELERATION AND DIMINISHING
FORECLOSURE DEFENSES**

Eric A. Zacks & Dustin A. Zacks[†]

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The high volume of foreclosures during and following the Great Recession in the United States led to the revelation of many troubling lending practices. It also led to problematic judicial decisions that erode borrower protection by curtailing or eliminating procedural requirements and substantive defenses with respect to foreclosure. This Article examines the treatment of statute of limitation and res judicata defenses after a loan has been accelerated following a borrower default. Some courts ignore the traditional rule that acceleration under a contract starts the clock for statute of limitation purposes or that acceleration consolidates the loan instrument into a single obligation as opposed to an installment obligation. Instead, these courts have permitted lenders to accelerate loans repeatedly without triggering the statute of limitations or res judicata defenses. Consequently, lenders are permitted to assert foreclosure claims with respect to the same underlying debt amount over and over again. Rather than being used as a last resort, acceleration and the subsequent foreclosure process can now be wielded as a significant threat to borrowers throughout the life of their home loan. Consistent with favoritism demonstrated in our prior research, we argue that creating exceptions for lenders in the application of statutes of limitation and res judicata defenses provides little incentive for banks and servicers to reform questionable lending and collection practices.

I. INTRODUCTION

This Article examines the treatment of statute of limitation and res judicata defenses after a loan has been accelerated following a default and is in foreclosure. The Great Recession resulted in a sizable wave of foreclosures that led commentators to compare the era (and the policy responses) to the Great Depression.¹ The enormous amount of cases filed placed a strain on courts, court administrators, legislators, and of course the parties to these suits.² This strain meant delayed resolutions for thousands of cases.³ This increased caseload meant that many state

¹ See, e.g., Monica D. Armstrong, *From the Great Depression to the Current Housing Crisis: What Code Section 108 Tells Us About Congress's Response to Economic Crisis*, 26 AKRON TAX J. 69, 97, 105 (2011).

² See generally Aleatra P. Williams, *Foreclosing Foreclosure: Escaping the Yawning Abyss of the Deep Mortgage and Housing Crisis*, 7 NW. J.L. & SOC. POL'Y 455, 470–71 (2012) (discussing the effects of the large amount of foreclosure cases on courts and legislatures following the Great Recession).

³ Krista Franks Brock, *Moody's: Foreclosure Timelines on the Rise; More Losses to RMBS*, DSNEWS, <http://dsnews.com/news/foreclosure/03-23-2012/moodys-foreclosure-timelines-on-rise-more-losses-to-rmbs-2012-03-23> (last visited Mar. 27, 2018) (noting that judicial foreclosure timelines average 654 days, whereas non-judicial foreclosures age an average of 297 days).

court systems were inundated with an untenable number of cases that few judges wanted to hear.⁴ With many court systems' funding tied to case clearance numbers, courts and court administrators attempted numerous changes in an effort to process thousands of cases efficiently and fairly.⁵

Some of these procedures were aimed at diverting parties from litigation and, for example, encouraging or even mandating early mediation.⁶ Although some scholars have argued that certain efforts were successful,⁷ other research suggests that these programs were not a panacea because banks and their representatives attending mediations often lacked the authority to settle, basic information about the given case at hand, and basic flexibility, such as the ability to contemporaneously review borrower financial information as a basis to provide an offer of settlement.⁸

Aside from diversion programs aimed at moving parties towards settlement early in the foreclosure process, courts also set up additional court procedures and structures to process the large number of foreclosures.⁹ These procedures included, for example, temporarily rehiring additional retired judges to help process the cases and setting up trial and summary judgment calendars with hundreds of cases scheduled during a single day or afternoon.¹⁰ While such actions undoubtedly assisted in reducing the number of pending foreclosure cases, the creation of parallel or shadow court systems strictly for foreclosure matters meant that borrowers' counselors were met with

⁴ See, e.g., Andrew J. Kazakes, *Protecting Absent Stakeholders in Foreclosure Litigation: The Foreclosure Crisis, Mortgage Modification, and State Court Responses*, 43 LOY. L.A. L. REV. 1383, 1401 (2010) (describing how this overwhelming increase in caseload has led to rubber stamping and an abbreviated foreclosure process).

⁵ See, e.g., Greg Allen, *Fast-Paced Foreclosures: Florida's 'Rocket Docket'*, NPR (Oct. 21, 2010, 4:17 PM), <http://www.npr.org/templates/story/story.php?storyId=130729666> (describing a Florida court which hears about 200 foreclosure cases a day).

⁶ Alan M. White, *Foreclosure Diversion and Mediation in the States*, 33 GA. ST. U. L. REV. 411, 412, 415 (2017).

⁷ See *id.* at 412, 416.

⁸ Adolfo Pesquera, *State Mediation Program Helps Few Homeowners*, DAILY BUS. REV. (June 29, 2011, 12:00 AM), <https://www.law.com/dailybusinessreview/almID/1202498811107/State-mediation-program-helps-few-homeowners/> ("There were 63,019 mortgage holders eligible for mediation between the program's launch in March 2010 and the end of the year. Of those, there were 26,150 reported contacts and 8,669 mediations conducted. Mediations leading to some sort of agreement totaled 2,309, or 3.7 percent of the eligible population.").

⁹ Allen, *supra* note 5.

¹⁰ *Id.*

immense judicial skepticism, with pressure to conduct trials in extremely short amounts of time, and with limited judicial consideration of cases.¹¹ The lack of safeguards for litigants triggered harsh criticism, including accusations of implementing procedures that “almost uniformly disadvantage homeowners.”¹²

At a bare minimum, faster foreclosure case processing times meant that judges often ignored or did not have sufficient time to devote to accusations of fraud and other unethical behavior by foreclosing entities and their attorneys.¹³ Furthermore, research suggests that courts across the country, and not merely in the states with the highest number of foreclosures, have systematically reduced the availability of debtor defenses, debtor discovery, and consequences to banks for fraud upon courts.¹⁴ Not only that, but even years into the foreclosure crisis, some courts lack basic understanding of how modern mortgage developments function.¹⁵

The judicial practice of “previewing” foreclosure cases, discussed in our previous research, also creates additional problems.¹⁶ Previewing occurs where judges begin a foreclosure case or decision, regardless of the actual issue being appealed or argued, by noting that a default under a note has not been disputed, or that a certain party has not made a mortgage payment in a certain amount of time.¹⁷ This

¹¹ Petition for Writ of Certiorari or Writ of Prohibition at 2, *Merrigan v. Bank of N.Y. Mellon*, 64 So. 3d 685 (Fla. Dist. Ct. App. 2011) (No. 09–CA–055758), 2011 Fla. App. LEXIS 11139.

¹² *Id.* at 13.

¹³ *See id.* at 16, 33–34.

¹⁴ *See* Eric A. Zacks & Dustin A. Zacks, *Not a Party: Challenging Mortgage Assignments*, 59 ST. LOUIS U. L.J. 175, 179–83 (2014) [hereinafter *Not a Party*].

¹⁵ In the case of Mortgage Electronic Registration Systems, Inc. (“MERS”), for example, a company expressly created *not* to physically possess, store, or hold promissory notes has repeatedly explained that it is never the holder of promissory notes. *See Frequently Asked Questions*, MERS, <https://www.mersinc.org/about/faq> (last visited Apr. 3, 2018). Despite MERS itself admitting it does not hold notes, this has not dissuaded courts from proclaiming exactly the opposite. *See, e.g., Taylor v. Deutsche Bank Nat’l Tr. Co.*, 44 So. 3d 618, 623 (Fla. Dist. Ct. App. 2010) (concluding that MERS could arguably be a holder of promissory notes).

¹⁶ *See* Dustin A. Zacks, *Standing in Our Own Sunshine: Reconsidering Standing, Transparency, and Accuracy in Foreclosures*, 29 QUINNIPIAC L. REV. 551, 571 (2011) [hereinafter *Standing in Our Own Sunshine*] (“[M]any courts will correctly assume that a lender or successor owner would not buy a MERS loan if it did not assent to MERS remaining its nominee with the associated rights to foreclose.”).

¹⁷ *See generally* Eric A. Zacks & Dustin A. Zacks, *A Standing Question: Mortgages, Assignment, and Foreclosure*, 40 J. CORP. L. 706, 727 (2015) [hereinafter *A Standing Question*] (explaining how “previewing” is not unique to a particular type of claim).

previewing almost always is followed by a rejection of the borrowers' legal arguments. The judicial reaction to the foreclosure crisis thus appears largely disinterested in procedural safeguards for debtors and generally disposed toward the interests of banks and lenders.¹⁸

Mixed empirical data shows the possibility that reducing case numbers at the expense of basic due process might still be seen as a net gain for the wellbeing of the public and of the economy. For example, some research offers that additional foreclosure processing time results in lenders making future credit offers more expensive.¹⁹ Similarly, other data produced during the Great Recession shows that greatly elongated foreclosure time frames, by providing an opportunity for continuing dilapidation of properties and neighborhoods, might increase crime and decrease surrounding property values.²⁰

Whatever economic and societal benefits have been made by the acceleration of foreclosure procedures and the short attention given to foreclosure cases, quicker judicial foreclosures gave cover to a wide variety of bank and lender malfeasance.²¹ Courts largely failed to address or remedy the many allegations of robo-signing, service of process deficiencies, forced-placed insurance scams, and other problematic practices that came to light during the foreclosure boom.²² The lack of oversight, whether willful or not, reflected poorly on courts when it was revealed that thousands of fraudulent or perjured documents had been filed in litigation around the country, when attorneys general instituted revealing investigations into high volume foreclosure law firms, when national banks and government-sponsored enterprises were forced to halt foreclosures to internally assess their foreclosure practices, and when certain lenders ultimately paid millions in fines arising from their foreclosure practices.²³

As mentioned, a corollary to, or perhaps an outgrowth from, court systems' general orientation towards speeding up foreclosure cases has

¹⁸ See *Not a Party*, *supra* note 14, at 179, 182, 186.

¹⁹ 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, 562 (2011).

²⁰ *Id.* at 546–54.

²¹ *A Standing Question*, *supra* note 17, at 706.

²² See, e.g., Dustin A. Zacks, *Robo-Litigation*, 60 CLEV. ST. L. REV. 867, 891–92 (2013) [hereinafter *Robo-Litigation*] (examining judges' muted reactions to misconduct in response to the foreclosure crisis).

²³ See *id.* at 875–76, 878, 884–90, 904–05 (describing multiple instances of attorney misconduct in light of the foreclosure crisis); David Dayen, *Another Slap on the Wrist for a Company That Abused Homeowners*, NEW REPUBLIC (Dec. 20, 2013), <https://newrepublic.com/article/116010/ocwen-mortgage-fraud-settlement-servicer-fined-homeowner-abuse>.

been the systematic narrowing of borrower defenses.²⁴ In response to debtor defenses related to Mortgage Electronic Registration Systems, Inc. (“MERS”) and its capacity to foreclose, or to assign, transfer, or negotiate mortgage notes, courts largely deferred to whatever argument MERS sought to assert.²⁵ Again, this occurred despite publicly available evidence that MERS and its attorneys were propounding diametrically opposing positions to courts around the country regarding exactly what ownership or agency interest, if any, MERS held.²⁶ Courts, accordingly, generally acceded to MERS’s ascendance as a prominent placeholder on the public record of millions of homes and to the detriment of hundreds of years of traditional recording rules, despite the fact that MERS was created undemocratically by private parties (including banks and lenders) expressly for the purpose of avoiding statutory recording requirements.²⁷

In other related areas of contentious foreclosure litigation, courts also tended to downplay or ignore borrower defenses based on faulty assignments of notes and mortgages.²⁸ Although standing is a primary defense against a foreclosing entity that did not make the original loan, many courts not only downplayed such defenses based on assignment issues, but they also refused to allow discovery on assignments and transfers of their mortgage loan.²⁹ Again, this general trend appears to have ignored the readily available evidence that thousands of assignments were fraudulent or otherwise problematic.³⁰

This Article extends this previous body of research to yet another area of defense to foreclosure and debt in which judges appear to proceed along the same continuum described above. We examine the treatment of statute of limitation and *res judicata* defenses after a loan has been accelerated following a default. Some courts have ignored the traditional rule that acceleration under a contract starts the clock for statute of limitation purposes or that acceleration consolidates the loan instrument into a single obligation as opposed to many separate installment obligations.³¹ Instead, these courts have permitted lenders to accelerate loans repeatedly without triggering the statute of

²⁴ See *A Standing Question*, *supra* note 17, at 708–11.

²⁵ See, e.g., *Standing in Our Own Sunshine*, *supra* note 16, at 570.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *A Standing Question*, *supra* note 17, at 708.

²⁹ See *id.* at 711.

³⁰ See *id.*

³¹ See, e.g., Allen, *supra* note 5 (describing “shortcuts” that some courts have taken to “hear[] as many as 200 foreclosure cases each day” that “deny many homeowners their right to due process”).

limitations or res judicata defenses.³² Consequently, lenders are permitted to assert foreclosure claims with respect to the same underlying debt amount over and over again.³³ Rather than being used as a last resort, acceleration and the subsequent foreclosure process can now be wielded as a significant threat to borrowers throughout the life of their home loan.³⁴

When presented with new and novel statute of limitations and res judicata defenses to foreclosure, courts have again shown their propensity to preview and predict the ultimate outcome of a lender's claim before wrestling with whatever legal issue is actually being appealed or argued.³⁵ Such previews inevitably damage homeowners and result in exceptions and special treatment for banks, lenders, servicers, and other foreclosing entities.³⁶ Such decisions provide another powerful example of courts ignoring longstanding procedural and substantive rules in favor of foreclosing entities in the name of judicial expediency.³⁷

As we have done in previous research, we argue that this continuation of courts' general anti-homeowner orientation, even in the face of years of lender malfeasance, produces serious negative externalities.³⁸ Just as judicial refusal to entertain robo-signing claims or to grant discovery on such issues gave cover to high-volume foreclosure firms and their clients and kept questionable ethical practices in the dark for years, new exceptions for banks and lenders in the application of statutes of limitation and res judicata defenses have provided little incentive for banks and servicers to reform questionable

³² See *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1006–07 (Fla. 2004).

³³ See *id.* at 1007–08 (“[A]n acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue The ends of justice require that the doctrine of res judicata not be applied so strictly as to prevent mortgagees from being able to challenge multiple defaults on a mortgage.”).

³⁴ See David Hahn, *The Roles of Acceleration*, 8 DEPAUL BUS. & COM. L.J. 229, 244 (2010) (“Acceleration is the means of action. Through its right to accelerate the debt, the creditor can materialize the consequences of a covenant violation and inflict severe harm to the borrower's operations and survival as a viable entity. It is the ultimate threat of a creditor against the borrower”).

³⁵ Joseph K. Gilligan, Note, *Acceleration Clauses in Notes and Mortgages*, 88 U. PA. L. REV. 94, 107–10 (1939).

³⁶ *Id.* at 109.

³⁷ *Id.*

³⁸ *Id.*; see generally *A Standing Question*, *supra* note 17, at 730 (“Encouraging more settlements benefits society as a whole, particularly those jurisdictions that have had higher numbers of foreclosures. This is because preventing foreclosures can help eliminate significant negative externalities. The normal neighborhood-level effects of foreclosed homes are significant in terms of crime, blight, and reduced property values.”).

lending or foreclosure practices.³⁹ Because these court-created exceptions can revive a bank's claim that was previously dismissed in part because the foreclosure was questionable, we again argue that courts have continued to contribute to the many problematic ways in which banks litigate foreclosure cases.

II. STATE LAW TREATMENT OF ACCELERATION CLAUSES, RES JUDICATA AND THE STATUTE OF LIMITATIONS

Acceleration clauses are contractual provisions designed to provide lenders with additional protection in the event that a borrower repeatedly fails to pay.⁴⁰ These clauses provide, either automatically or at the option of the lender, for the entire loan amount to become due and payable following a default under the note, such as a borrower's failure to make a monthly payment.⁴¹

In the absence of an acceleration clause, a lender would be forced to bring separate claims against the borrower each time the borrower failed to make an additional monthly payment (since each monthly payment would not otherwise be due until the stated due date in the promissory note).⁴² An acceleration clause also is helpful to lenders because it provides them with an opportunity to exit the transaction immediately (by accelerating the loan and foreclosing) once the borrower's ability to pay is threatened.⁴³ This could be more advantageous than waiting until

³⁹ See *Robo-Litigation*, *supra* note 22, at 869.

⁴⁰ See Gilligan, *supra* note 35, at 95 (describing the evolution of acceleration clauses during the nineteenth century).

⁴¹ *Mitchell v. Fed. Land Bank of St. Louis*, 174 S.W.2d 671, 676–77 (Ark. 1943) (describing various formulations of acceleration clauses); Gilligan, *supra* note 35, at 109 (“They contend that the acceleration clause is for the benefit of the creditor—it is another arrow in his quiver. The debtor has done wrong. He has defaulted.”).

⁴² Gilligan, *supra* note 35, at 94 (“It is universally accepted that the failure of a mortgagor to meet installments of principal or interest, or to pay taxes, assessments and insurance will not cause the whole debt to mature at once upon default, absent a provision in the bond or mortgage to that effect.”); Hahn, *supra* note 34, at 231 (“A priori, acceleration may be conceived as an enforcement clause, facilitating the collection of the loan. By modifying the original terms of the agreement and making the entire amount payable on demand, the creditor may move forward and use collection measures sanctioned by the applicable debtor-creditor law. In this sense, acceleration is an accessory of the contractual remedy of enforcement.”).

⁴³ See, e.g., 9 ALFRED TARTAGLIA, WARREN'S WEED NEW YORK REAL PROPERTY § 95.50[12] (Matthew Bender 2018) (“Acceleration clauses have been used in mortgage instruments and deemed valid and enforceable in a wide range of conditions. The most common provisions for acceleration of the mortgage debt result from the mortgagor's failure to pay an installment of principal or interest; or the failure to pay taxes, water rates, or assessments; or the failure of the mortgagor to keep the premises insured.” (citations omitted)); Hahn, *supra* note 34, at 231 (“A

the borrower breaches each monthly payment obligation before the entire loan amount is due, at which point the borrower may have no ability to pay and the underlying property may be worth less.⁴⁴

The implicit threat of acceleration is also important with respect to deterring borrower default.⁴⁵ Borrowers know that if they breach one monthly installment, the entire loan may become due and they could lose the house in foreclosure.⁴⁶ This provides borrowers with incentives to pay regularly.⁴⁷ The threat of loan acceleration can also be useful in pre-foreclosure negotiations with buyers who are delinquent with respect to their monthly payment obligations.⁴⁸ Disclosures mandated in many form mortgages attempt to dull the sharp blade of acceleration, including specific language that informs borrowers that the entire amount of the loan might be demanded presently at once if a default is not cured.⁴⁹

One issue that has divided courts is how to rule on attempts by lenders to accelerate the loan and bring foreclosure proceedings in repetitive fashion.⁵⁰ This Article addresses two approaches regarding how particular defenses should apply once a loan has been accelerated but the original claim for breach of the promissory note is dismissed or otherwise lost. For example, if a first action on a note accelerated by

second entity a creditor must worry about, which has been widely neglected by the financial literature, are other self-interested creditors who rush to dismantle the common debtor upon the latter's financial distress. Creditors whose claims are payable in the future lack the fundamental legal tools to practically protect their interests against a run on the debtor's assets.”).

⁴⁴ SCOTT T. TROSS, *NEW JERSEY FORECLOSURE LAW & PRACTICE 4–5* (N.J. Law Journal Books 2001) (“Most mortgages contain acceleration clauses, which give the mortgagee the right to foreclose the entire indebtedness in the event the mortgagor defaults under the loan documents. Where the mortgage contains such a clause, the mortgagee is authorized to require payment of the entire mortgage debt upon default. Absent an acceleration clause, the mortgagee is without power to alter the maturity date of the outstanding principal balance of the loan upon default.”).

⁴⁵ Hahn, *supra* note 34, at 244 (“Acceleration is the means of action Absent the creditor’s contractual power to call the entire loan back the force of the covenants would diminish. A borrower who is aware of the limited enforcement options of its creditors would attach a lower price tag to a potential covenant violation. Acceleration is, thus, the complementary measure that adds credibility to the covenants’ intended deterrence. It perfects the threat by signaling to the borrower that it better not dare even think about violating the covenants.”).

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ *See id.*

⁴⁹ *See, e.g.*, FANNIE MAE, MORTGAGE UNIFORM INSTRUMENT ¶ 22, <https://www.fanniemae.com/singlefamily/security-instruments> (last visited Apr. 3, 2018).

⁵⁰ *See* U.S. Bank Nat’l Ass’n v. Gullotta, 899 N.E.2d 987, 990 (Ohio 2008); *see also* Singleton v. Greymar Assocs., 882 So. 2d 1004, 1005–06 (Fla. 2004).

continued . . .

the lender was dismissed, but the borrower subsequently breaches again, should the lender be permitted to accelerate and sue on the note again? Ordinarily, claims litigated and lost on the merits cannot be brought again under the doctrine of *res judicata*.⁵¹ Secondly, if the party accelerated the note but took too long to file or attempt to refile its claim, the applicable statute of limitations could prevent a claim from being brought.⁵²

In the foreclosure context, the issue often turns on whether the earlier and subsequent claims for breach and acceleration are treated as one and the same.⁵³ If the two claims for breach are deemed to be the “same,” then the doctrine of *res judicata* may apply and prevent the lender from attempting to collect on the loan “again” if the lender lost the first claim on the merits.⁵⁴ Similarly, if the lender accelerated the loan but did not pursue its claim in a timely fashion, the statute of limitations may bar subsequent claims for breach and acceleration.⁵⁵ If the two claims are treated as separate and distinct claims, however, then neither *res judicata* nor the statute of limitations will apply, and the lender will be permitted to accelerate the entire loan again based upon subsequent breaches of the promissory note and pursue foreclosure.⁵⁶ This section describes how different courts approach this issue.

A. One Bite at the Apple

The traditional rule in installment contracts, such as home loans, is that individual breaches of installment obligations are treated separately, but that acceleration of the entire amount due following a breach under the installment contract changes that treatment.⁵⁷ Many cases hold that once acceleration of the entire home loan occurs, the entire outstanding indebtedness under the promissory note should be treated as becoming due (by nature of the acceleration clause) and, more

⁵¹ RESTATEMENT (FIRST) OF JUDGMENTS § 48 (AM. LAW INST. 1942).

⁵² H. A. Wood, Annotation, *Acceleration Provision in Note or Mortgage as Affecting the Running of the Statute of Limitations*, 161 A.L.R. 1211 (1946).

⁵³ See *Singleton*, 882 So. 2d at 1008.

⁵⁴ See *Stadler v. Cherry Hill Developers, Inc.* 150 So. 2d 468, 471 (Fla. Dist. Ct. App. 1963).

⁵⁵ See *Deutsche Bank Tr. Co. Ams. v. Beauvais*, No. 3D14–575, 2014 Fla. App. LEXIS 20422, at *20 (Fla. Dist. Ct. App. Dec. 17, 2014), *rev'd on reh'g en banc*, 188 So. 3d 938 (2016).

⁵⁶ See *Singleton*, 882 So. 2d at 1008.

⁵⁷ 9 TARTAGLIA, *supra* note 43, § 95.50[1] (“An acceleration clause in a mortgage, bond or note will generally provide that all unpaid principal, along with any accrued interest and other charges, becomes immediately due and payable upon the happening of any condition or conditions specified in the instrument.”).

importantly, as indivisible.⁵⁸ This means that if a lender accelerates the loan and loses on the merits, then the lender cannot sue again, even if the borrower subsequently “defaults” by not making a monthly payment.⁵⁹ Courts so holding have relied upon *res judicata*, which provides that:

[T]he judgment of a court of concurrent jurisdiction directly upon a matter is conclusive between the same parties as to that matter when drawn in question in another court. The rule rests on the ground that once a party has litigated, or has had the opportunity to litigate, the same matter in a court of competent jurisdiction, that party or its privy should not be permitted to litigate it again to the harassment and vexation of its adversary.⁶⁰

Res judicata, then, exists to prevent harassment of a person when a claim was already litigated or could have been litigated in another court.⁶¹ Without it, claimants could simply attempt to bring their claims in different jurisdictions until finding one that agrees with them.⁶² This is particularly important with regard to mortgage contracts, where the disparity in bargaining power and litigation resources is vast.⁶³

⁵⁸ See *U.S. Bank Nat’l Ass’n v. Gullotta*, 899 N.E.2d 987, 990 (Ohio 2008); see also *Johnson v. Samson Constr. Corp.*, 704 A.2d 866, 869 (Me. 1997).

⁵⁹ See *Johnson*, 704 A.2d at 869; see also *Stadler*, 150 So. 2d at 472–73.

⁶⁰ John F. Wagner, Jr., Annotation, *Proper Test to Determine Identity of Claims for Purposes of Claim Preclusion by Res Judicata Under Federal Law*, 82 A.L.R. Fed. 829, Art. 1 § 2(a) (1987); see also, e.g., LA. STAT. ANN. § 13:4231 (2017) (“A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.”); VA. SUP. CT. R. 1:6 (2018) (“A party whose claim for relief arising from identified conduct, a transaction, or an occurrence, is decided on the merits by a final judgment, shall be forever barred from prosecuting any second or subsequent civil action against the same opposing party or parties on any claim or cause of action that arises from that same conduct, transaction or occurrence . . .”).

⁶¹ 1 RICHARD W. BOURNE & JOHN A. LYNCH, JR., *MODERN MARYLAND CIVIL PROCEDURE* § 12.2(a) (3d ed. 2017) (“[A] judgment between the same parties and their privies is a final bar to any other suit upon the same cause of action, and is conclusive not only as to all matters that have been decided in the original suit, but as to all matters which with propriety could have been litigated in the first suit . . .” (citation omitted)).

⁶² Wagner, Jr., *supra* note 60, § 2(a) (“Claim preclusion will therefore apply to bar a subsequent action on *res judicata* principles where parties or their privies have previously litigated the same claim to a valid final judgment. In most cases, the key question to be answered in adjudging the propriety of a claim preclusion defense appears to be whether in fact the claim in the second action is ‘the same as,’ or ‘identical to,’ one upon which the parties have previously proceeded to judgment.”).

⁶³ See Frank S. Alexander et al., *Legislative Responses to the Foreclosure Crisis*
continued . . .

Typically, *res judicata* analysis turns on a court's determination regarding whether the subsequent claim arises out of the same transaction that was the subject of the earlier claim.⁶⁴

Accordingly, under traditional application, once the entire indebtedness had been accelerated and had become due, then the borrower only had one contractual obligation: to pay the entire loan amount.⁶⁵ The lender's failure to prevail with respect to the borrower's breach of that singular contractual obligation could therefore doom future claims against the borrower, even if those future claims related to subsequent monthly installment obligations.⁶⁶

Res judicata traditionally may also be invoked through the "two-dismissal" rule, which treats the second voluntary dismissal of a claim as a loss on the merits.⁶⁷ Accordingly, if the debt is treated as indivisible once accelerated, then the second voluntary dismissal can prevent lenders from bringing a third claim based upon a subsequent breach of the note, even if the original two claims were dismissed voluntarily and were not disposed of on the merits.⁶⁸ In this instance, it would not

in Nonjudicial Foreclosure States, 31 REV. BANKING & FIN. L. 341, 360 (2011) (noting the financial restraints that often bar borrowers from obtaining proper legal counsel in foreclosure litigation).

⁶⁴ See *Hamlin v. Peckler*, No. 2005-SC-000166-MR, 2005 WL 3500784, at *1 (Ky. Dec. 22, 2005) ("The only difference between the 1999 claim and the 2004 claim was that MERS asserted a subsequent default on the note. Significantly, however, the 1999 complaint and the 2004 complaint allege that the entire debt became due on the same date, May 23, 1998. Hamlin pled *res judicata* and the trial court initially sustained this plea in open court and dismissed the subsequent action. Under authority of CR 60.02, however, the trial court, *sua sponte*, vacated its dismissal order and reinstated the 2004 claim.").

⁶⁵ *United States v. Boozer*, 732 F. Supp. 20, 22 (N.D.N.Y. 1990) ("By contrast, defendant contends that the government's right of action accrued upon defendant's initial default on each loan. . . . This court's review of the case law reveals that the government's right of action accrues in a case such as this when the government first makes a demand for payment in full.").

⁶⁶ *U.S. Bank Nat'l Ass'n v. Gullotta*, 899 N.E.2d 987, 992 (Ohio 2008) ("The obligations to pay each installment merged into one obligation to pay the entire balance on the note."); *Stadler v. Cherry Hill Developers, Inc.*, 150 So. 2d 468, 472 (Fla. Dist. Ct. App. 1963) ("The essential question is whether the election to accelerate put the entire balance, including future installments at issue. . . . There can be no doubt that the accelerated balance was at issue and that the prayer of the complaint sought, not one interest installment, but the entire amount due. Accordingly, it seems clear that the actions are identical.").

⁶⁷ *Gullotta*, 899 N.E.2d at 991 ("Because the second dismissal here functioned as an adjudication on the merits, *res judicata* would bar an action 'based upon any claim arising out of the transaction or occurrence that was the subject of the previous action.'" (quoting *Grava v. Parkman Twp.*, 653 N.E.2d 226, 227 (Ohio 1995))).

⁶⁸ *Cadle Co. II v. Fountain*, No. 49488, 2009 WL 1470032, at *1 (Nev. Feb. 26, 2009) ("Because an affirmative act is necessary to accelerate a mortgage, the same is

continued . . .

matter that the relief sought in the original two claims were different or based on subsequent actions.⁶⁹

In addition, the lender only has a certain amount of time to bring a claim for acceleration and foreclosure following a breach of the mortgage.⁷⁰ The statute of limitations in each state sets this amount of time and can vary.⁷¹ Typically, the statute of limitations for foreclosures is tied to a breach of the underlying promissory note that the mortgage secures.⁷² This is because the mortgage usually provides for foreclosure rights in the event that the borrower breaches the promissory note.⁷³ For example, in New York, the statute of limitations

needed to decelerate. Accordingly, a deceleration, when appropriate, must be clearly communicated by the lender/holder of the note to the obligor. Here, if CIT intended to revoke the acceleration of the debt due under the note, it should have done so in a writing documenting the changed status. The voluntary dismissal did not decelerate the mortgage because it was not accompanied by a clear and unequivocal act memorializing that deceleration.”); *Beneficial Ohio, Inc. v. Lemaster*, No. 2008 CA 0100, 2009 WL 2457710, at *4 (Ohio Ct. App. July 30, 2009) (“In the case sub judice, all of the complaints arose from the same note, the same mortgage and the same default. From the time of appellants’ original default, the entire principal became due as a result of the acceleration clause in the note. The terms of the note and/or mortgage were never changed. As in the *Gullotta* case, from the time of appellants’ original breach, appellant’s [sic] owed the entire amount of the principal because of the acceleration clause.”).

⁶⁹ *Gullotta*, 899 N.E.2d at 993 (“Although U.S. Bank’s complaint changed, the operative facts remained the same. Plaintiffs cannot save their claims from the two-dismissal rule simply by changing the relief sought in their complaint. Allowing U.S. Bank to do so would be like allowing a plaintiff in a personal-injury case to save his claim from the two-dismissal rule by amending his complaint to forgo a couple of months of lost wages.”); *Parish*, 2012 WL 966640, at *6 (“[W]e agree with the Parishes’ position that when a borrower defaults on a note and the holder invokes an acceleration clause, the holder cannot file and dismiss an unlimited number of lawsuits solely because the borrower makes payments after the holder files each suit. In this scenario all claims would still arise from ‘the same note, the same mortgage, and the same default.’” (quoting *Gullotta*, 899 N.E.2d at 991)).

⁷⁰ 10 ARTHUR L. CORBIN ET AL., *CORBIN ON CONTRACTS* § 53.9 (Matthew Bender 2017) (“No doubt there is much authority for the statement that where separate actions would lie for a series of such breaches, the statute operates against each one separately as of the time when each one could have been brought, and that this rule is not affected by the fact that after two or more such breaches have occurred the plaintiff must join them all in one action. Of course, if an action for a first installment is barred by the statute, it cannot properly be included in an action for later installments that are not yet barred.”).

⁷¹ *Id.*

⁷² *Id.* (“The period fixed by a statute of limitations begins to run from the ‘accrual of the cause of action.’”).

⁷³ 12 KARL B. HOLTZSCHUE, *PURCHASE AND SALE OF REAL PROPERTY* § 36.07 (Matthew Bender 2017) (“The most important feature of the mortgage relationship is the power of the mortgagee to force the sale of the mortgaged land. The proceeds of the sale are first used to cover any loss the mortgagee may have incurred because of

continued . . .

to bring a foreclosure action following failure to pay on the underlying promissory note is six years.⁷⁴ This means that if the borrower fails to make a payment on the note, then the lender only has six years from the borrower's breach of the obligation to make that payment to bring a foreclosure action, or it essentially waives the claim.⁷⁵

For statute of limitation purposes, treating the debt as indivisible following acceleration means that the statute of limitations with respect to all claims for payment under the promissory note begins to run once the loan has been accelerated.⁷⁶ If the lender fails to pursue all claims for payment under the promissory note before the statute of limitation expires (as triggered by the loan acceleration), then the lender will be barred from bringing future claims under the promissory note or from foreclosure under the mortgage.⁷⁷ This is in fact the traditional rule.⁷⁸

the debtor's default in meeting the terms of the mortgage obligation. 'Foreclosure' became the process for transferring title to the mortgaged interest out of the mortgagor—or the successor—to the purchaser at the mortgagee's foreclosure sale, which may be, and in most cases is, the mortgagee itself.'").

⁷⁴ Fed. Nat'l Mortg. Ass'n v. Mebane, 618 N.Y.S.2d 88, 89 (N.Y. App. Div. 1994) (citing the applicable statute).

⁷⁵ 35 JEFFERSON JAMES DAVIS & CHARLES J. NAGY, FLORIDA JURISPRUDENCE § 73 (West 2d ed. 2013) ("This rule is consistent with the policy behind the statute of limitations, which is to prevent unreasonable delay in the enforcement of legal rights and to protect against the risk of injustice.").

⁷⁶ *In re Bennett Funding Grp., Inc.*, 292 B.R. 476, 480 (N.D.N.Y. 2003) ("[In addressing a line of credit claim], causes of action seeking to recover the entire contractual amount on installment contracts containing an optional acceleration clause do not accrue until the option is exercised." (alteration in original)); *Loiacono v. Goldberg*, 658 N.Y.S.2d 138, 139 (N.Y. App. Div. 1997) ("The law is well settled that with respect to a mortgage payable in installments, there are 'separate causes of action for each installment accrued, and the Statute of Limitations [begins] to run, on the date each installment [becomes] due' unless the mortgage debt is accelerated." (alteration in original) (quoting *Pagano v. Smith*, 608 N.Y.S.2d 268, 270 (N.Y. App. Div. 1994); then citing *Khoury v. Alger*, 571 N.Y.S.2d 829, 830 (N.Y. App. Div. 1991))); *Mebane*, 618 N.Y.S.2d at 90 ("Once the mortgage debt was accelerated, the borrowers' right and obligation to make monthly installments ceased and all sums became due and payable. Therefore, the six-year Statute of Limitations began to run at that time. Consequently, this foreclosure action is time-barred." (citations omitted)).

⁷⁷ *Hamlin v. Peckler*, No. 2005-SC-000166-MR, 2005 WL 3500784, at *2 (Ky. Dec. 22, 2005) ("No Kentucky case appears to squarely address whether there can be subsequent defaults after suit is brought on an accelerated debt. However, the answer would appear to be 'no' as one of the principal purposes of pleadings is to develop the precise point in dispute by formulating the true issues. Thus, when the mortgagee sought recovery of the entire unpaid indebtedness and sought to subject the real property upon which the mortgage lien had been granted to payment of the indebtedness, a default was asserted with respect to every installment of the debt, foreclosing assertion of some subsequent claim of default.").

⁷⁸ There does, however, appear to be a split in jurisdictions when the

continued . . .

U.S. Bank National Ass'n v. Gullotta, an Ohio Supreme Court case, is an illustrative example of the traditional application of contract law principles and *res judicata* with respect to acceleration clauses and foreclosure.⁷⁹ In 2003, Giuseppe Gullotta had taken out a mortgage from MILA, Inc. to buy a home in Canton, Ohio.⁸⁰ As in many mortgages, Gullotta's contained an acceleration clause that could be exercised upon default of a monthly installment payment.⁸¹ After Gullotta missed several payments, U.S. Bank accelerated the loan in April 2004 and demanded the entire amount due under the note, seeking interest from November 1, 2003.⁸² Three months later, U.S. Bank voluntarily dismissed this first case against Gullotta.⁸³

In late 2004, U.S. Bank once again filed for foreclosure by accelerating the debt and asked for interest from December 1, 2003, one month apart from the allegation or demand in the first suit.⁸⁴ U.S. Bank dismissed this second case in 2005.⁸⁵ U.S. Bank filed for foreclosure a third time, in October 2005, seeking foreclosure of the entire loan amount with interest from November 1, 2003, as in the first attempted foreclosure case.⁸⁶ Gullotta's motion to dismiss, treated as a motion for summary judgment,⁸⁷ argued that under the two-dismissal rule, U.S.

acceleration clause operates automatically, as opposed to by the voluntary election of the mortgagee. 55 AM. JUR. 2D *Mortgages* § 428 (1973); *see also* Cook v. Merrifield, 335 So. 2d 297, 299 (Fla. Dist. Ct. App. 1976) (holding that a mortgage-acceleration clause providing that "failure to pay any installments herein promptly when due shall cause the entire indebtedness to become immediately due and payable" is self-executing and acceleration was automatic upon default); Miles v. Hamilton, 189 P. 926, 927–28 (Kan. 1920). *But see* Atkinson v. Kirby, 117 So. 2d 392, 395–96 (Ala. 1960); Fed. Land Bank of Omaha v. Wilmarth, 252 N.W. 507, 511–12 (Iowa 1934); Lawman v. Barnett, 177 S.W.2d 121, 123 (Tenn. 1944) (holding that the rule that a provision for acceleration of the maturity of a debt secured by mortgage upon default of payment of an installment does no more than confer an option upon the holder of the indebtedness is applicable where a statute provides for an acceleration); Walker Bank & Tr. Co. v. Neilson, 490 P.2d 328, 328–30 (Utah 1971).

⁷⁹ *U.S. Bank Nat'l Ass'n v. Gullotta*, 899 N.E.2d 987 (Ohio 2008).

⁸⁰ John Weber, *Ohio Lenders Precluded from Bringing Third Complaint on Same Note*, REAL EST. ADVISOR L. BLOG (May 11, 2009), <http://www.realestateadvisorlawblog.com/2009/05/articles/ohio-lenders-precluded-from-bringing-third-complaint-on-same-note/>.

⁸¹ *'Two Dismissal Rule' Applies to Mortgage Foreclosure Suit When Dismissed Actions Based on Same Default*, SUP. CT. OHIO & OHIO JUD. SYS. (Dec. 10, 2008), <https://www.supremecourt.ohio.gov/PIO/summaries/2008/1210/071144.asp>.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *U.S. Bank Nat'l Ass'n v. Gullotta*, 899 N.E.2d 987, 989 (Ohio 2008).

Bank had already failed to prevail on the same claim twice and could not bring another suit.⁸⁸ U.S. Bank maintained each missed loan payment was a separate actionable claim.⁸⁹

U.S. Bank argued that its third claim was different from the first two cases, insofar as: (i) U.S. Bank alleged and sought interest starting from different default dates (November 2003 in the first foreclosure case, December 2003 in the third foreclosure case, and April 2005 in its Amended Complaint in the third foreclosure case); and (ii) each suit contained and encapsulated new payments that had become due in the time since the previous cases were filed.⁹⁰ Gullotta, naturally, argued that each suit contained a common nucleus of facts that would preclude the third suit from being maintained.⁹¹

The trial court found for U.S. Bank, stating that when the first case was voluntarily dismissed the note decelerated, and U.S. Bank's second claim involved a different timeline (December 2003 in the second suit; November 2003 in the first) not litigated in the first action and therefore res judicata did not apply.⁹² Accordingly, U.S. Bank's motion for summary judgment was granted.⁹³ The Ohio Fifth District Court of Appeals affirmed the trial court, but did note conflict with previous case law regarding res judicata in installment note claims.⁹⁴ The Ohio Fifth District Court of Appeals stated that it disagreed with previous case law and that "each new missed payment on an installment note is a new claim."⁹⁵ Therefore, the Ohio Fifth District Court of Appeals held the two-dismissal rule and res judicata did not apply.⁹⁶

In explaining the public policy grounds for its decision, the appellate court argued that if Gullotta were to escape judgment, lenders would

⁸⁸ *See id.*

⁸⁹ *See id.*

⁹⁰ *See id.* at 988–89.

⁹¹ *Id.* at 989 ("On February 10, 2006, the trial court converted Gullotta's motion to dismiss into a motion for summary judgment because the motion was 'founded on matters outside the pleadings.' The trial court also granted U.S. Bank's motion for leave to file an amended complaint. In its amended complaint, U.S. Bank brought alternative claims. First, the bank sought judgment against Gullotta in the amount of \$164,390.91 plus interest at the rate of 7.35 percent per year from December 1, 2003. In the alternative, the bank sought judgment against Gullotta in the amount of \$164,390.91 plus interest at the rate of 7.35 percent per year from April 1, 2005. That April 1, 2005 date moved the start date for the collection of interest on the overall debt to a time after U.S. Bank's second dismissal.").

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 990; *see also* EMC Mortg. Co. v. Jenkins, 841 N.E.2d 855, 862–63 (Ohio Ct. App. 2005).

⁹⁵ U.S. Bank Nat'l Ass'n v. Gullotta, No. 2006CA00145, 2007 WL 1248407, at *5 (Ohio Ct. App. Apr. 30, 2007), *rev'd*, 899 N.E.2d 987 (Ohio 2008).

⁹⁶ *Id.*

have less incentive to try and settle foreclosure suits with borrowers, as dismissal of the action upon settlement would require a full examination of whether the foreclosing entity waives all future foreclosure rights.⁹⁷ Gullotta subsequently filed a motion to certify the conflict between the Ohio District Courts of Appeals.⁹⁸

The Ohio Supreme Court disagreed with the lower court rulings and instead determined that U.S. Bank had in fact made the same claim each time it accelerated the debt and brought a case.⁹⁹ The court held that the entire note was due upon the breach due to acceleration, not just the installment payments missed.¹⁰⁰ In other words, once acceleration of a debt occurs, the entire debt then becomes indivisible and all of the individual installments merged into one balance.¹⁰¹ All of U.S. Bank's claims were the same, and trying to skirt around *res judicata* by adding interest charges would not change the "common nucleus of operative facts."¹⁰² The court analogized this situation to a personal injury case: if U.S. Bank could avoid *res judicata* or the two-dismissal rule merely by amending its damages demand by a few months, then a personal injury plaintiff presumably could avoid *res judicata* simply by reducing his or her demand for future lost wages by a couple of months, a seemingly nonsensical result.¹⁰³ The court clarified, though, that should a renegotiation of the loan and its terms occur, causing a material change after a default and foreclosure action, then the next claim would not be the same.¹⁰⁴

Subsequent Ohio courts have struggled to deal with *Gullotta's* open-ended statement about whether a mortgage loan had materially changed.¹⁰⁵ Lower courts have found ways to avoid the extreme application implications of *Gullotta* and the double dismissal defense, particularly when a subsequent payment is made by the debtor or if acceleration is not automatic.¹⁰⁶ Similar to the reasoning discussed in

⁹⁷ *See id.*

⁹⁸ *Gullotta*, 899 N.E.2d at 990.

⁹⁹ *See id.* at 990, 993–94.

¹⁰⁰ *Id.* at 992.

¹⁰¹ *Id.*

¹⁰² *Id.* at 993.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *See, e.g., Beneficial Ohio, Inc. v. Parish*, No. 11CA3210, 2012 WL 966640, at *6–7, *9 (Ohio Ct. App. Mar. 16, 2012) (finding that, in a third foreclosure action, the trial judge erred in awarding summary judgment to the holder because genuine issues of material fact existed as to whether the complaints arose from the same transaction or occurrence, and as to whether *res judicata* applied based on the double dismissal rule).

¹⁰⁶ *See, e.g., Bridge v. Ocwen Fed. Bank FSB*, No. 1:07 CV 2739, 2013 WL 4784292, at *9 (N.D. Ohio Sept. 6, 2013) ("The facts of *Gullotta* could not be more

Stadler v. Cherry Hill Developers, Inc., subsequent payments on the mortgage or materially altering the mortgage contract may result in a new claim.¹⁰⁷

It should be noted, however, that courts wrestling with these questions often expressly state that making an additional payment alone is not enough to prevent *res judicata*.¹⁰⁸ In *Bank of America v. Gaizutis*, for example, the Ohio Eleventh District Court of Appeals held that Gaizutis's subsequent payment on the debt reworked the contract and decelerated the loan at that point.¹⁰⁹ The only material difference between *Gaizutis* and *Gullotta* was that in the former, the debtor made a payment on the debt which included a letter stating it would bring the loan up to date and the initial suit could be dismissed, which according

dissimilar than the facts presently before the Court. In this case, after the initial default, the Lisa Bridge cured and Deutsche Bank did not accelerate the loan. Further, Lisa Bridge made numerous additional payments after the initial default, and at times, was current on her payments. Moreover, in this lawsuit, Deutsche Bank does not demand the same principal payment as it would have demanded in foreclosure based upon the cured 2002 default.”)

¹⁰⁷ See *id.*; *Stadler v. Cherry Developers, Inc.*, 150 So. 2d 468 (Fla. Dist. Ct. App. 1963); see also *Deutsche Bank Nat'l Tr. Co. v. Smith*, No. C-140514, 2015 WL 4508449, at *3 (Ohio Ct. App. July 24, 2015) (“The court would have also been right to deny amendment on the basis that it would be a futile act. In support of her argument that *res judicata* applies, Ms. Smith relies upon [*Gullotta*], a case in which the two-dismissal rule was applied to dismiss a foreclosure action. But in *Gullotta*, the court explained that ‘Civ. R. 41(A) would not apply to bar a third claim if the third claim were different from the dismissed claims.’ In fact, ‘[h]ad there been any change as to the terms of the note or mortgage, had any payments been credited, or had the loan been reinstated *res judicata* would not be in play.’ Here, Ms. Smith admits that she paid Deutsche Bank \$4,755.56 to cure any default in 2007. Because a payment had been credited, the present claim is different than the previously dismissed claims, and the two-dismissal rule would not apply.” (alteration in original) (quoting *Gullotta*, 899 N.E.2d at 993)).

¹⁰⁸ See *Parish*, 2012 WL 966640, at *6 (“[T]he holder cannot file and dismiss an unlimited number of lawsuits solely because the borrower makes payments after the holder files each suit. In this scenario all claims would still arise from ‘the same note, the same mortgage, and the same default.’” (quoting *Gullotta*, 899 N.E.2d at 991)).

¹⁰⁹ See *Bank of America, N.A. v. Gaizutis*, No. 2014-G-3176, 2014 WL 4825371, at *8 (Ohio Ct. App. Sept. 30, 2014) (“Instead of filing the agreed judgment entry of dismissal signed by appellant’s attorney, appellee’s then-attorney filed a unilateral dismissal, pursuant to Civ. R. 41(A)(1). However, if there was a claim that a material term of the letter agreement had been breached, no such claim appears in this record. The one thing that is clear from the correspondence is that the parties agreed to have the suit dismissed upon payment of a significant lump sum that would be applied to the amount due on the loan. While the documentation suggests a clear intention to ‘reinstate’ the loan, based on the discussion from the Supreme Court in *Gullotta*, *supra*, whether it was actually reinstated or not matters little.”).

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to the *Gaizutis* court materially changed the contract.¹¹⁰ As a result, the *Gaizutis* court affirmed the lower court's ruling for the bank.¹¹¹

Although the Ohio Fifth Circuit District Court of Appeals suggested that harsh rules on dismissal might dissuade lenders from renegotiating with borrowers, the traditional *Gullotta* approach to res judicata and the two-dismissal rule described above arguably would provide more encouragement to lenders to negotiate with borrowers.¹¹² Banks and servicers would have to seriously consider settling with borrowers before accelerating and suing on the loan, because any action on that acceleration may only be permitted once.¹¹³ Similarly, the higher stakes for bearing a dismissal on the merits might mean that lenders will act

¹¹⁰ *See id.*

¹¹¹ *Id.* (“The amount of the payment and documentation contained in the record reflects the parties’ desire to have the foreclosure dismissed and the appellants back to a position where they could remain in their home. Further, the mortgage at issue contemplates the right of a borrower to reinstate the mortgage after acceleration contingent upon the borrower meeting certain conditions outlined in the mortgage. The mortgage further states that upon reinstatement by the borrower, ‘this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred.’”).

¹¹² *See* U.S. Bank Nat’l Ass’n v. Gullotta, No. 2006CA00145, 2007 WL 1248407, at *5 (Ohio Ct. App. Apr. 30, 2007) (“In addition, the application of Rule 41(A) per the *EMC* case would discourage a lender, such as appellant, from working with a borrower, such as appellee, when the borrower defaults on a mortgage. Frequently, after filing a foreclosure action, a lender will work with the buyer so that the buyer can retain his or her property. The lender will then dismiss the foreclosure action. A lender would not be inclined to do so if a dismissal precluded a bank from eventually foreclosing on a borrower’s property after a default. As a result, the number of foreclosures would increase as would the number of individuals losing their homes.”), *rev’d*, 899 N.E.2d 987 (Ohio 2008).

¹¹³ *See Parish*, 2012 WL 966640, at *6 (“Nonetheless, we agree with the Parishes’ position that when a borrower defaults on a note and the holder invokes an acceleration clause, the holder cannot file and dismiss an unlimited number of lawsuits solely because the borrower makes payments after the holder files each suit. In this scenario all claims would still arise from ‘the same note, the same mortgage, and the same default.’” (quoting *Gullotta*, 899 N.E.2d at 991)); *see also* Deutsche Bank Tr. Co. Ams. v. Beauvais, 188 So. 3d 938, 969 (Fla. Dist. Ct. App. 2016) (Scales, J., dissenting) (“The expiration of a statute of limitations, however, generally results in a windfall for the escaping defendant. In my view, neither the moral imperative that borrowers pay their obligations, nor *Singleton*, has abrogated decades of Florida jurisprudence governing the statute of limitations in foreclosure cases.”); U.S. Bank Nat’l Ass’n v. Gullotta, 899 N.E.2d 987, 993 (Ohio 2008) (“Although U.S. Bank’s complaint changed, the operative facts remained the same. Plaintiffs cannot save their claims from the two-dismissal rule simply by changing the relief sought in their complaint. Allowing U.S. Bank to do so would be like allowing a plaintiff in a personal-injury case to save his claim from the two-dismissal rule by amending his complaint to forgo a couple of months of lost wages.”).

more conservatively in undertaking oft-criticized servicing activities.¹¹⁴ For example, some lenders have been accused of inducing missed payment defaults by fraudulently charging force-placed insurance policies and demanding large sums for escrow, or by telling homeowners that loss mitigation assistance will not be made available until they fall behind on their payments.¹¹⁵

In a jurisdiction where a dismissal on a fact dispute about default might preclude a future foreclosure action, perhaps lenders would be less likely to bring marginal cases to court. In this way, the risk of a dismissal on future actions may spur banks and servicers to be additionally diligent about following servicing guidelines before electing for the severe remedy of acceleration and foreclosure.

Justice Cardozo long ago recognized the blatant oppression that can occur to the mortgagor when the mortgagee is allowed to unsheathe its acceleration sword without considering external factors.¹¹⁶ In light of the many irregularities and abuses of lenders with respect to foreclosure practices we have noted elsewhere, it seems that such external factors remain relevant.¹¹⁷ Thus, while our research seems to suggest that some courts are creating exceptions to harsh rules like *res judicata* and the double dismissal rule, these exceptions only seem to engage with one side of *Gullotta*'s implications, specifically that banks might face harsh results.¹¹⁸ Such allowances, however, do not address potentially harsh results for other parties, namely that failure to strictly enforce longstanding principles like *res judicata* will encourage lenders to bring cases with flimsy or fraudulent evidence, to induce defaults with no ultimate consequences, and to otherwise repeatedly impair a

¹¹⁴ See *Parish*, 2012 WL 966640, at *6.

¹¹⁵ See *id.*; see also *Beauvais*, 188 So. 3d at 960 n.19.

¹¹⁶ Gilligan, *supra* note 35, at 94 n.3 (citing and quoting *Graf v. Hope Bldg. Corp.*, 171 N. E. 884, 889 (1930) (Cardozo, J., dissenting)) (“There, through an error in a bookkeeper’s arithmetic, payment of what should have been an installment of \$6,121.56 was \$401.87 short of the correct amount. Enforcement of the acceleration provision (as sustained by the majority) meant that because of the \$401.87 deficiency, the mortgagor’s interest was foreclosed in a property mortgaged for \$335,000. ‘In this case, the hardship is so flagrant . . . the oppression so apparent, as to justify a holding that only through an acceptance of the tender will equity be done. . . . The deficiency, though not so small as to be negligible within the doctrine of *de minimis*, was still slight and unimportant when compared with the payment duly made.’”).

¹¹⁷ *A Standing Question*, *supra* note 17, at 706 (“In the rush to originate and assign as many mortgages as possible, and in the face of an overwhelming volume of foreclosures to be processed, mortgagees and their assignees often failed to assign the mortgages properly and, in some instances, committed fraud or other unauthorized acts in order to correct the assignment paper trail.”).

¹¹⁸ See *supra* notes 106–07 and the accompanying text.

homeowner's peace and wellbeing, regardless of the merits of the claims the lender repeatedly brings.¹¹⁹

It also bears mentioning that these exceptions that do not adapt the *Gullotta* reasoning ignore the fact that dismissals, whether voluntary or involuntary, are exceedingly avoidable in foreclosure litigation.¹²⁰ In many judicial foreclosure jurisdictions, the burden of proof is low, court procedures have been enacted specifically for the benefit of banks and their attorneys,¹²¹ and very few documents are needed to prove entitlement to foreclose.¹²² In light of such incredibly low litigation burdens, the fact that a bank even faces a two-dismissal rule bar, in the absence of renegotiation or other intervening circumstances, is an astonishing de facto admission of either basic incompetence by lender attorneys or the complete lack of pertinent evidence supporting foreclosure. It is unclear why courts feel obligated to reward such conduct in allowing repetitive successive actions.¹²³ While some scholars, and indeed judges, fear giving “free” houses to mortgagors,¹²⁴ logic does not dictate that procedural predictability, longstanding precedent, and incentivizing good litigation practices should be totally abandoned.¹²⁵ *Gullotta* and similar cases recognize that while

¹¹⁹ See *Parish*, 2012 WL 966640, at *6.

¹²⁰ *Cf.* *Wells Fargo Bank, N.A. v. Drayer*, No. CV–2015–105086, 2016 Ohio Misc. LEXIS 10334, at *2 (Ohio C.P. Summit Cty. Oct. 19, 2016) (“Lenders like the Plaintiff would be more willing to discuss alternatives that require the dismissal of foreclosure if they had assurances that their dismissals would not threaten the long-term contractual relationship between the parties. Therefore, it is in the best interests of the parties to dismiss this action without prejudice.”).

¹²¹ *Petition for Writ of Certiorari*, *supra* note 11, at 17–19.

¹²² *Id.* at 27–28.

¹²³ See *infra* Section III.A.

¹²⁴ See, e.g., *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1007–08 (Fla. 2004) (“If *res judicata* prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note. The adjudication of the earlier default would essentially insulate her from future foreclosure actions on the note—merely because she prevailed in the first action. Clearly, justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.”).

¹²⁵ Even the mere fact that judges sometimes reference “free” houses is evidence of the previewing bias effect that we have covered in previous research and herein. See *infra* Part IV. Only reflexive, unthinking preconceptions could lead a fact-finder to enter a proceeding believing that a pro-homeowner ruling means a house is actually obtained for free, when many homeowners faced foreclosure after years of regular payments, when many put their life savings into the purchase of the home, when any homeowner asserting defenses undoubtedly will have to expend sums on attorneys, and when any such pro-homeowner ruling—even if ultimately successful—will likely result in appeal and more legal costs to the homeowner. See *infra* Section III.C. In the case of *res judicata* and the two-dismissal rule in

exceptions should exist for real world application of a harsh remedy like *res judicata* or the statute of limitations, the opposite can also mean the harsh result of innumerable successive actions, regardless of the merits of the claims repeatedly litigated.

B. Multiple and Nearly Unlimited Bites at the Apple

Over time, some courts have narrowed the application of *res judicata* and the statute of limitations to permit lenders to bring multiple foreclosure claims after accelerations of the promissory note.¹²⁶ For example, erosion of the traditional rules in Florida began with courts rejecting holdings that suggest acceleration of an installment obligation creates a single indivisible obligation, at least with respect to home mortgages.¹²⁷ In this view, a lender's earlier acceleration of a loan can be ignored because the lender's subsequent voluntary dismissal of the earlier claim means that the lender actually elected not to accelerate and demand the full amount due under the note.¹²⁸ Accordingly, *res judicata* may not bar future claims if they are based on different dates of default.¹²⁹

particular, homeowners will have had to pay an attorney to defend more than one lawsuit. *See* U.S. Bank Nat'l Ass'n v. Gullotta, 899 N.E.2d 987, 990–91 (Ohio 2008) (explaining that the two-dismissal rule requires repetitive litigation); *see also* Wagner, Jr., *supra* note 60, § 2(a) (explaining that *res judicata* rests on the existence of repetitive litigation).

¹²⁶ *See, e.g.*, Olympia Mortg. Corp. v. Pugh, 774 So. 2d 863, 866 (Fla. Dist. Ct. App. 2000).

¹²⁷ *See id.* (finding that the decision to accelerate did not affect the lender's ability to bring claims for subsequent defaults); *see also* Singleton, 882 So. 2d at 1006 ("While it is true that a foreclosure action and an acceleration of the balance due based upon the same default may bar a subsequent action on that default, an acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue.").

¹²⁸ *See Pugh*, 774 So. 2d at 866 ("By voluntarily dismissing the suit, [the lender] in effect decided not to accelerate payment on the note and mortgage at that time." (alteration in original)); *see also* Mitchell v. Fed. Land Bank, 174 S.W.2d 671, 677 (Ark. 1943) ("[T]he declaration of plaintiff's election by bringing the first action did not put it out of his power to waive the penalty, which he did by accepting the interest and dismissing the action." (quoting Cal. Sav. & Loan Soc'y v. Culver, 59 P. 292, 294 (Cal. 1899))).

¹²⁹ *See, e.g.*, Bartram v. U.S. Bank Nat'l Ass'n, 211 So. 3d 1009, 1012, 1023 (Fla. 2016) ("[W]hen a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by *res judicata*. . . . [A]n acceleration and foreclosure based upon subsequent and different defaults present a separate and distinct issue." (quoting Singleton, 882 So. 2d at 1006–07)), *reh'g denied*, 2017 Fla. LEXIS 593 (Fla. Mar. 17, 2017); *see also* Afolabi v. Atl. Mortg. & Inv. Corp., 849 N.E.2d 1170, 1175 (Ind. Ct. App. 2006) ("[W]e conclude that . . . *res judicata* does

continued . . .

This evolving exception to longstanding doctrine is said to “[rest] upon a recognition of the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship.”¹³⁰ If res judicata precluded a lender from bringing future lawsuits based upon future defaults, courts fear there would be no penalty for borrowers failing to pay amounts when due under the contract, which would lead to inequitable results.¹³¹ A “subsequent and separate alleged default”

not bar successive foreclosure claims, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first claim.”). As discussed *infra* Part II, courts disagree on how and whether lenders can revoke acceleration. John A. Walker, Jr., *Simple Real Estate Foreclosures Made Complex: The Byzantine Tennessee Process*, 62 TENN. L. REV. 231, 242 (1995) (“Even if the deed of trust contains an acceleration clause, the mortgagor may be able to defeat it by properly tendering an overdue payment before the mortgagee actually accelerates the indebtedness. However, tendering the overdue amount after acceleration has occurred, even if done before the sale, will not revoke acceleration unless so agreed by the parties. The Tennessee Supreme Court succinctly posited the above rules in *Lee v. Security Bank & Trust Co.*” (citations omitted)); *see also* 1 BRUCE J. BERGMAN, BERGMAN ON NEW YORK MORTGAGE FORECLOSURES § 5.02 (Matthew Bender 2017) (“Thus, the mere acceptance of a post-acceleration partial payment does not represent an affirmative act revoking acceleration.”). *But see In re Taddeo*, 685 F.2d 24, 26 (2d Cir. 1982) (“First, we think that the power to cure must comprehend the power to ‘de-accelerate.’ This follows from the concept of ‘curing a default.’ A default is an event in the debtor-creditor relationship which triggers certain consequences -- here, acceleration. Curing a default commonly means taking care of the triggering event and returning to pre-default conditions. The consequences are thus nullified.”); *Callan v. Deutsche Bank Tr. Co. Ams.*, 93 F. Supp. 3d 725, 734 (S.D. Tex. 2018) (discussing whether Texas law permits unilateral notices of rescission of acceleration, thereby restarting the statute of limitations); *Fed. Nat’l Mortg. Ass’n v. Mebane*, 618 N.Y.S.2d 88, 89 (N.Y. App. Div. 1994) (“It cannot be said that a dismissal by the court constituted an affirmative act by the lender to revoke its election to accelerate.”). The right to rescind acceleration may also be limited. *See Coca-Cola Bottling Co. v. Citizens Bank of Portland*, 583 N.E.2d 184, 190 (Ind. Ct. App. 1991) (“An election to accelerate a debt may become irrevocable if the election causes the defaulting party to rely and act upon the acceleration to its detriment.”). The mortgage itself also may address the issue and permit reinstatement of the installment nature of the contract. *Deutsche Bank Tr. Co. Ams. v. Beauvais*, 188 So. 3d 938, 962 (Fla. Dist. Ct. App. 2016) (en banc) (citing the reinstatement provisions of the mortgage as continuing the installment nature of the contractual obligations even after acceleration and filing of a foreclosure claim).

¹³⁰ *Singleton*, 882 So. 2d at 1007 (alteration in original). *But see* FDIC v. Massingill, 24 F.3d 768, 777–78 (5th Cir. 1994) (discussing how various states determine whether acceleration has been properly rescinded); *Johnson vs. Samson Constr. Corp.*, 704 A.2d 866, 869 (Me. 1997); *Snyder v. Exum*, 315 S.E.2d 216, 218 (Va. 1984) (“[W]e see no valid distinction between an acceleration clause in a lease and one contained in a note.”).

¹³¹ *Singleton*, 882 So. 2d at 1008 (“Clearly, justice would not be served if the mortgage was barred from challenging the subsequent default solely because he

thus can provide “a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action.”¹³²

The two-dismissal rule can be defeated under this approach as well, since each claim made with respect to different default dates will be treated as separate and distinct, even if acceleration previously occurred.¹³³ Accordingly, lenders will not be prevented from repeatedly filing and dismissing claims as long as the claims involve subsequent defaults that are separate and distinct.¹³⁴ As Part IV will discuss, this analysis is not compelled by traditional two-dismissal rule analysis and, in fact, would render the two-dismissal rule “meaningless in the context of foreclosure actions because every successive attempt to foreclose a mortgage could be construed as a new claim.”¹³⁵

This exception to *res judicata* and the two-dismissal rule also potentially applies to statute of limitations analysis. If each default starts its own individual statute of limitations, then the expiration of the statute of limitations with respect to an earlier claim will have no bearing on whether the lender can bring other claims, even if the loan had been accelerated when the first claim was filed.¹³⁶ This would

failed to prove the earlier alleged default.”). There is also a fear that borrowers could enter into settlement with the lender that, coupled with a dismissal with prejudice, would “insulate the mortgagor from the consequences of a subsequent default.” *Fairbank’s Capital Corp. v. Milligan*, 234 Fed. App’x 21, 24 (3d Cir. 2007). Again, these points of view completely ignore the light burden that foreclosing entities bear and the immediate questions and doubts that should arise when any foreclosing entity is forced to continually retry its cases. *See supra* notes 120–25 and accompanying text.

¹³² *Singleton*, 882 So. 2d at 1008.

¹³³ *See, e.g., Pugh*, 774 So. 2d at 863 (finding that the decision to accelerate did not affect the lender’s ability to bring claims based on different dates of default).

¹³⁴ *See id.*

¹³⁵ *U.S. Bank Nat’l Ass’n v. Gullotta*, 899 N.E.2d 987, 992 (Ohio 2008). The Ohio Supreme Court noted that nothing in the two-dismissal rule (as in effect in Ohio) “indicates that it should not apply to foreclosure actions.” *Id.*; *see also Deutsche Bank Tr. Co. Ams. v. Beauvais*, 188 So. 3d 938, 963 (Fla. Dist. Ct. App. 2016) (Scales, J., dissenting) (“Explicit in *Singleton* is that, in order to reinstate the parties’ previous contractual relationship so that subsequent defaults may occur, the trial court’s adjudication of the first foreclosure action must deny the lender’s acceleration. Otherwise . . . the lender’s affirmative, contractually prescribed acceleration remains unaffected.”).

¹³⁶ 10 CORBIN ET AL., *supra* note 70, § 53.9 (“[U]nder an installment contract the statute of limitations runs only against each installment at the time it becomes due. ‘In essence,’ the court explained, ‘this rule treats each missed or otherwise deficient payment as an independent breach of contract subject to its own limitations period.’” (quoting *Pierce v. Metro. Life Ins. Co.*, 307 F. Supp. 2d 325, 328–29 (D.N.H. 2004)). *But see Beauvais*, 188 So. 3d at 965 (Scales, J., dissenting) (“[The majority holds] that payment default and not acceleration constitute the last element of a foreclosure cause of action. . . . [T]his holding marks an upheaval of well-

apply even where the first claim, after acceleration of the loan and demand for the entire amount due on the note, had been lost on the merits.¹³⁷

Recent cases in Florida illustrate how the traditional approach has been transformed in the foreclosure context so as to essentially eviscerate the protection of the statute of limitations and *res judicata*.¹³⁸ In *Singleton v. Greymar Associates*, the Florida Supreme Court confronted an appellate circuit split regarding acceleration and foreclosure after a first foreclosure case was dismissed.¹³⁹ On one side, the Florida Fourth District Court of Appeal held in *Singleton* that the earlier dismissal did not bar the present suit under *res judicata*.¹⁴⁰ The Florida Second District Court of Appeal, by contrast, held in *Stadler v. Cherry Hill Developers, Inc.* that a mortgagee who had their first lawsuit dismissed with prejudice was barred from filing a future suit by *res judicata*.¹⁴¹

In *Singleton*, Gwendolyn Singleton had a mortgage on her home that

established Florida law.” (alteration in original)).

¹³⁷ See *Collazo v. HSBC Bank USA, N.A.*, 213 So. 3d 1012, 1013 (Fla. Dist. Ct. App. 2016) (“This Court’s decision issued on rehearing en banc in the case of [*Beauvais*], holds that the five-year statute does not bar a second foreclosure suit filed on a subsequent payment default occurring within the five-year statutory period preceding the commencement of the second suit. . . . The record in the present case discloses that HSBC asserted the same payment default date and basis for acceleration in both the 2008 and 2014 complaints, a date over five years preceding the commencement of the 2014 case in the circuit court. As a result, we reverse the final judgment of foreclosure and remand the case for dismissal without prejudice in accordance with this Court’s recent opinion on rehearing en banc in *Beauvais*.” (alteration in original) (citations omitted)); see also *Beauvais*, 188 So. 3d at 938 (finding that each default has a separate statute of limitation, even if the loan had been previously accelerated and regardless of whether the claim was dismissed with or without prejudice); *U.S. Bank Nat’l Assoc. v. Bartram*, 140 So. 3d 1007, 1014 (Fla. Dist. Ct. App. 2014) (“Therefore, we conclude that a foreclosure action for default in payments occurring after the order of dismissal in the first foreclosure action is not barred by the statute of limitations found in section 95.11(2)(c), Florida Statutes, provided the subsequent foreclosure action on the subsequent defaults is brought within the limitations period.”), *aff’d*, 211 So. 3d 1009 (Fla. 2016), *reh’g denied*, 2017 Fla. LEXIS 593 (Fla. Mar. 17, 2017).

¹³⁸ See *Singleton v. Greymar Assocs.*, 882 So. 2d 1004 (Fla. 2004).

¹³⁹ See *id.*

¹⁴⁰ See *id.* at 1005 (“On appeal, the Fourth District affirmed the circuit court’s decision, finding that “even though an earlier foreclosure action filed by appellee was dismissed with prejudice, the application of *res judicata* does not bar this lawsuit. . . . The second action involved a new and different breach.” (alteration in original) (quoting *Singleton v. Greymar Assocs.*, 840 So. 2d 356, 356 (Fla. Dist. Ct. App. 2003), *aff’d*, 882 So. 2d 1004 (Fla. 2004))).

¹⁴¹ See *Stadler v. Cherry Hill Developers, Inc.*, 150 So. 2d 468, 473 (Fla. Dist. Ct. App. 1963).

continued . . .

contained an acceleration clause.¹⁴² Greymar Associates brought an action alleging default that extended from nonpayment from September 1, 1999, to February 1, 2000.¹⁴³ After Greymar failed to appear at a case management conference, the circuit court dismissed the case with prejudice.¹⁴⁴ Greymar brought a second action and alleged different default dates, claiming damages from April 1, 2000, onward.¹⁴⁵ The trial court rejected the mortgagor's res judicata defense.¹⁴⁶ The Florida Fourth District Court of Appeal affirmed the trial court's decision because the second lawsuit alleged what the court termed a new and separate breach.¹⁴⁷ Singleton then petitioned the Florida Supreme Court to deal with the "express and direct conflict between the Fourth District's decision and the Second Circuit's decision" in *Stadler*.¹⁴⁸

In *Stadler*, the foreclosing Plaintiff, Cherry Hill Developers ("Cherry Hill"), missed a deadline to preserve testimony or set a trial under a later-expired Florida rule of procedure.¹⁴⁹ As a result, the trial court granted Stadler's motion for a final judgment.¹⁵⁰ The second lawsuit filed by Cherry Hill was "essentially identical" to the claims made in the first lawsuit, except for allegations of a different default date.¹⁵¹ The default alleged against Stadler in the first case was May 1960, but the default date alleged in the second suit was August 1960.¹⁵² In the Florida Second District Court of Appeal, Cherry Hill argued that the dismissal of the first claim was not clearly on the merits and not related to default or acceleration, and that res judicata should therefore not apply.¹⁵³ While recognizing longstanding exceptions to the harsh application of res judicata, such as unjust enrichment or possible misunderstanding of the finality and effect of the first order or judgment, the Florida Second District Court of Appeal reasoned:

The essential question is whether the election to accelerate put the entire balance, including future installments at issue. If it was at issue then the second action seeks the same relief under the same contract and

¹⁴² *Singleton*, at 1009.

¹⁴³ *Id.* at 1005.

¹⁴⁴ *See id.*

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Stadler v. Cherry Hill Developers, Inc.*, 150 So. 2d 468, 469 (Fla. Dist. Ct. App. 1963).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 470–72.

is predicated on a failure to comply with the same requirement. There can be no doubt that the accelerated balance was at issue and that the prayer of the complaint sought, not one interest installment, but the entire amount due. Accordingly, it seems clear that the actions are identical.¹⁵⁴

The *Stadler* court noted that this holding, as researched in its 1960 decision, was based on near unanimity among authorities determining the effect of acceleration.¹⁵⁵ That is, electing to accelerate a loan necessarily entails demanding the entire amount of the loan, which “puts all future installment payments in issue and forecloses successive suits.”¹⁵⁶ Accordingly, the court upheld the dismissal of the second suit on res judicata grounds because the two foreclosure suits against Stadler were identical.¹⁵⁷

Significantly, the Florida Supreme Court in *Singleton* did not describe how the Second District’s definition of acceleration and its legal effect was wrong or unfounded, or describe any development in jurisprudence or change in mortgage term definitions that would suggest acceleration does not mean that the entire agreement is integrated into one claim or demand or that future installments are necessarily part of any accelerated claim.¹⁵⁸ Instead, the court merely noted discontent with *Stadler*’s “stricter and more technical” view of acceleration.¹⁵⁹ The support cited in favor of this novel view of acceleration, provided by the Florida Supreme Court, was a single citation to a Florida appellate opinion, which the Florida Supreme Court quoted as authority to suggest that acceleration does *not* place any future installments at issue.¹⁶⁰

In this sole case cited for this brand-new conception of acceleration, *Olympia Mortgage Corp. v. Pugh*, the foreclosing entity, Olympia Mortgage Corporation (“Olympia Mortgage”), had filed three successive foreclosure actions.¹⁶¹ The first alleged a default date of April 1995 and was voluntarily dismissed.¹⁶² The appellate court noted that at the time of the first suit, Olympia Mortgage had not been

¹⁵⁴ *Id.* at 472.

¹⁵⁵ *See id.* at 472–73.

¹⁵⁶ *Id.* at 472.

¹⁵⁷ *See id.* at 473.

¹⁵⁸ *See Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1007 (Fla. 2004).

¹⁵⁹ *Id.* at 1006.

¹⁶⁰ *See id.* at 1006 (citing *Olympia Mortg. Corp. v. Pugh*, 774 So. 2d 864, 866 (Fla. Dist. Ct. App. 2000)).

¹⁶¹ *See Pugh*, 774 So. 2d at 864.

¹⁶² *See id.* at 865.

assigned the mortgage loan it sought to enforce.¹⁶³ The second suit alleged a default date of May 1995 and was also voluntarily dismissed, as Olympia Mortgage again failed to complete basic pre-suit requirements necessary to maintain its claim.¹⁶⁴ The third case alleged the same May 1995 default date as alleged in the second suit; and, even without the difference in the April and May 1995 default dates as described in the case history, the parties apparently stipulated that “the parties agreed that both [the first and second foreclosure] actions alleged April 1, 1995 as the initial date of default.”¹⁶⁵

Confronting this set of confusing facts brought on by lack of proof and by incompetent litigation in the first two suits, the *Pugh* court hunted for a coherent reason to determine why the traditional definition of acceleration, in light of the authority that acceleration places future installments at issue, should not be respected.¹⁶⁶ In a remarkable bit of trying to fit a square peg into a round hole, the Florida Fourth District Court of Appeal produced something akin to a verbal representation of an Escher painting:

[I]f we treat Olympia’s voluntary dismissal of the first foreclosure action as an adjudication on the merits against Olympia, then the payment on the note and mortgage could not have been accelerated. Although Olympia sought to accelerate, had Olympia gone through with the suit and lost on the merits, then the court would have necessarily found that the Pughs had not defaulted on the payments due to date. If the Pughs had not defaulted, then Olympia would not be entitled to accelerate payment on the note and mortgage. By voluntarily dismissing the suit, Olympia in effect decided not to accelerate payment on the note and mortgage at that time.¹⁶⁷

The *Pugh* court thus opened the door to two concepts previously unknown in acceleration. First, it implicates that in every dismissal for whatever cause, any alleged default is necessarily disproven, rendering acceleration a factual impossibility.¹⁶⁸ This is apparently so by virtue of the Fourth District’s judicial fiat, *regardless of whether the actual*

¹⁶³ *See id.*

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* at 865 n.1 (alteration in original).

¹⁶⁶ *Stadler v. Cherry Hill Developers, Inc.*, 150 So. 2d 468, 472 (Fla. Dist. Ct. App. 1963).

¹⁶⁷ *Pugh*, 774 So. 2d at 866.

¹⁶⁸ *See id.*

*default date was a contested issue in the case.*¹⁶⁹ It is entirely unclear how a dismissal on the merits of a case seen through to a verdict, in the *Pugh* reasoning's example above, would necessarily mean that default was disproven. Nothing inherent in a dismissal, whether voluntary or involuntary, means a default was disproven, because defeat of a foreclosing entity's claims can be defeated on innumerable grounds not involving a default question that would be deemed "on the merits."¹⁷⁰

The second fiction in the *Pugh* court's decision is that acceleration is only a fact if ratified by a court. In other words, the *Pugh* court declared that acceleration, the demand for all payments due under a note, only occurs if a court reaches a final judgment in favor of a bank or foreclosing entity.¹⁷¹ This, of course, is contradicted by longstanding jurisprudence on acceleration and *res judicata*, as noted above.¹⁷² In its supposition that "voluntary dismissal of a suit" always means that a foreclosing entity "in effect decided not to accelerate payment on the note and mortgage at that time,"¹⁷³ the Florida Supreme Court constructed the only possible legal reading that would give banks continual opportunities to file suit, regardless of the actual reason for dismissal.¹⁷⁴ It is extremely rare for a voluntary dismissal to contain language that indicates mortgagors are thereafter not being demanded to pay the full amount of their loans, as would be implied by this artificial, automatic deceleration rule.¹⁷⁵ Judicial dismissal under this theoretical approach actually performs a significant service to foreclosing banks' claims, as courts consequently deem the note decelerated and the bank can continue to bring defective claims *ad infinitum*.¹⁷⁶

¹⁶⁹ See *id.* (emphasis added).

¹⁷⁰ *Id.* These would include conditions precedent, standing, fraud, etc. For example, a party may fail to comply with an order of court to produce discovery and have their case dismissed. See FLA. R. CIV. P. 1.420(b) ("Any party may move for dismissal of an action or of any claim against that party for failure of an adverse party to comply with . . . any order of court."). Although such decision would be "on the merits" of the case, the *Pugh* court would apparently reason that a dismissal based upon failure to respond to discovery would also mean that default was disproven, even if it had never been at issue in the case and had never been litigated. See *Pugh*, 774 So. 2d. at 866.

¹⁷¹ See *Pugh*, 774 So. 2d at 867.

¹⁷² See *supra* notes 65–66 and accompanying text.

¹⁷³ *Pugh*, 774 So. 2d at 866.

¹⁷⁴ See *id.* at 867.

¹⁷⁵ See *id.* at 866 ("[W]hether the mortgagor will make future installment payments is not at issue in a foreclosure action.").

¹⁷⁶ Among other questionable propositions in the *Pugh* decision is the assertion that "whether the mortgagor will make future installment payments is not the issue in a foreclosure action. The issue is whether there has already been a default." *Pugh*, 774 So. 2d at 866. If payment of future installments is not at issue in

The *Pugh* court's liberalized judicial approach, then, laid the groundwork for the Florida Supreme Court in *Singleton* to overrule longstanding rules of acceleration and to declare that acceleration, in foreclosure or installment payment cases only, should not be given strict or technical enforcement as in *Stadler*.¹⁷⁷ Unsurprisingly, the *Singleton* court, citing other cases that held that a second and separate action on a different alleged default date does not necessarily bar successive suits, ruled against the application of res judicata and ruled in favor of the foreclosing entity.¹⁷⁸ In effect, the *Singleton* court eliminated the effect of res judicata in foreclosures in one decision: "acceleration and foreclosure predicated upon subsequent and different defaults present a separate and distinct issue."¹⁷⁹ *Singleton* thus implicitly opened the floodgates to the kind of slight, *de minimis*, variation in pleadings and claims the *Gullotta* court worried about.¹⁸⁰ That is, the *Singleton* court decision authorizes foreclosing entities to file suit to claim 29 years or 348 months of payments, and then change their allegations to demand, for example, 347 months of payments, to create a "separate and distinct claim" necessary to avoid res judicata.¹⁸¹

The *Singleton* court attempted to minimize the implications of its ruling. Specifically, the court stated:

We conclude that the doctrine of res judicata does not necessarily bar successive foreclosure suits, regardless of whether or not the mortgagee sought to accelerate payments on the note in the first suit. *In this case* the subsequent and separate alleged default created a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action. Thus, we approve the Fourth District's decision in

foreclosure actions, then why do foreclosure judgments grant entitlement to the entire amount of the loan not due for 30 years? *See, e.g., Beneficial Ohio, Inc. v. Lemaster*, No. 2008 CA 0100, 2009 WL 2457710, at *4 (Ohio Ct. App. July 30, 2009). Indeed, the entire point of acceleration is to place future payments at front and center of any case—as banks should not have to file a separate action for every month a payment is missed. *See Hahn, supra* note 34. And, in actual fact, this results in the scenario presented by *Beauvais*: later courts have piggybacked on this absurd notion and opined that a dismissal not only means automatic deceleration, but also that the homeowners are placed back into a situation where they can resume their normal payments. *See infra* Part IV. This is highly dubious.

¹⁷⁷ *See Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1006–08 (Fla. 2004).

¹⁷⁸ *Id.* at 1007.

¹⁷⁹ *Id.*

¹⁸⁰ *See id.* at 1006; *U.S. Bank Nat'l Ass'n v. Gullotta*, 899 N.E.2d 987, 992–93 (Ohio 2008).

¹⁸¹ *Singleton*, 882 So. 2d at 1006–07.

Singleton, and disapprove of the Second District's holding in *Stadler*.¹⁸²

Again, given that the *Singleton* court ruled on a case where the difference in default date allegations was one month, it would seem that its assertion that res judicata “may, but does not necessarily” apply is misleading.¹⁸³ The court phrased the ruling as an exception to res judicata, but the practical effect of this ruling means that the exception is now the rule. In other words, any competent attorney in a successive foreclosure suit now will allege a separate default date and thereby successfully avoid res judicata (even if the subsequent suit is the tenth successive attempted claim relating to the same loan). Although the court did pay lip service to the “tension” between the harsh remedy of res judicata and the equities of a given foreclosure case, it is patently clear the court felt the “ends of justice” lay with banks and lenders, not homeowners.¹⁸⁴

Along the same lines, the Florida Supreme Court eradicated the effect of the statute of limitations in foreclosure actions in *Deutsche Bank Trust Co. Americas v. Beauvais*.¹⁸⁵ Harry Beauvais took out a mortgage note from American Home Mortgage Servicing, Inc. (“AHMSI”) in February 2006.¹⁸⁶ After Beauvais missed a few monthly payments, AHMSI initiated a foreclosure proceeding in January 2007 and accelerated the debt.¹⁸⁷ AHMSI ignored a court order to appear at a case management conference and thus the case was dismissed in December 2010.¹⁸⁸ In a separate action, Beauvais’s condominium association, Aqua Master Association, Inc., commenced its own foreclosure proceeding and took title to the property in 2011.¹⁸⁹ In December 2012, Deutsche Bank, the new putative owner of the mortgage loan, commenced a foreclosure action citing Beauvais’s initial default as well as every payment after.¹⁹⁰ The condominium

¹⁸² *Id.* at 1008 (emphasis added).

¹⁸³ *Id.* at 1007 (quoting *Capital Bank v. Needle*, 596 So. 2d 1134, 1138 (Fla. Dist. Ct. App. 1992)).

¹⁸⁴ *Id.* at 1008 (“We must also remember that foreclosure is an equitable remedy and there may be some tension between a court’s authority to adjudicate the equities and the legal doctrine of res judicata. The ends of justice require that the doctrine of res judicata not be applied so strictly so as to prevent mortgagees from being able to challenge multiple defaults on a mortgage.”).

¹⁸⁵ *Deutsche Bank Tr. Co. Ams. v. Beauvais*, 188 So. 3d 938 (Fla. Dist. Ct. App. 2016) (en banc).

¹⁸⁶ *Id.* at 954–55.

¹⁸⁷ *Id.* at 940.

¹⁸⁸ *Id.* at 941.

¹⁸⁹ *Id.* at 940.

¹⁹⁰ *Id.*

association raised an affirmative defense that the statute of limitations had run, as Deutsche Bank's December 2012 filing date was at least five years past the date of the acceleration claim in AHMSI's Complaint filed in January 2007.¹⁹¹ The condominium association thus argued that the debt was never decelerated.¹⁹² Deutsche Bank, taking the lead from *Singleton*, argued that each subsequent payment was a separate default and thus a separate claim, each with its own statute of limitations.¹⁹³

The trial court granted the condominium association's motion to dismiss, holding that the statute of limitations barred the claim.¹⁹⁴ The trial court also stated that *Singleton* had no application to the present case because *Singleton* involved a decision based on res judicata and not the statute of limitations.¹⁹⁵ On appeal, the Florida Third District Court of Appeal affirmed the trial court's order barring the claim under the statute of limitations.¹⁹⁶ The court distinguished earlier Florida law by stating in this case the initial claim was dismissed without prejudice, which meant that the debt was not decelerated.¹⁹⁷ Therefore there were no "new payments" due because after acceleration there was only one payment due: the entire amount of the accelerated loan.¹⁹⁸ This holding was consistent with *Gullotta*, which meant that after acceleration there would only be one claim for the entire debt, not one for each installment payment.¹⁹⁹

On rehearing en banc, the Florida Third District Court of Appeal reversed, citing *Singleton*.²⁰⁰ The court expanded *Singleton*'s holding based on res judicata to apply to statute of limitations cases.²⁰¹ Largely adopting the *Singleton* approach, the court held that each installment payment was a separate claim, and therefore it had its own statute of limitations as well.²⁰² Thus, as in res judicata scenarios, the bank was

¹⁹¹ *Id.*

¹⁹² *Id.* at 940–41 (alleging once the debt was accelerated, the bank had five years to pursue a foreclosure action, thus in essence stating the debt had never decelerated).

¹⁹³ *Id.* at 941 (quoting the lower court's opinion).

¹⁹⁴ *Id.* (quoting the lower court's opinion).

¹⁹⁵ *Id.* (quoting the lower court's opinion).

¹⁹⁶ *Deutsche Bank Tr. Co. Ams. v. Beauvais*, No. 3D14–575, 2014 Fla. App. LEXIS 20422, at *12 (Fla. Dist. Ct. App. Dec. 17, 2014), *rev'd on reh'g en banc*, 188 So. 3d 938 (2016).

¹⁹⁷ *Id.* at *9–10.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Beauvais*, 188 So. 3d at 941.

²⁰¹ *Id.* at 944 ("Here we follow that choice. And, as have numerous post-*Singleton* courts before us, we apply this determination, while made in the context of a res judicata defense, to a statute of limitations defense.").

²⁰² *Id.*

not precluded from seeking missed installment payments within the statute of limitations.²⁰³ Perhaps an even more explicit expansion of *Singleton* (and a not very subtle clue to the *Beauvais* court's view of foreclosure litigation) is provided in the court's express assertion that whether a prior foreclosure suit was dismissed with or without prejudice is irrelevant for res judicata and statute of limitations analysis purposes.²⁰⁴ In other words, in this 2016 decision, years after Florida's courts and the state bar association were nationally embarrassed by exposure that the courts had permitted the filing of thousands of fraudulent documents and claims,²⁰⁵ the Florida Third District Court of Appeal essentially concluded that even a case of dismissal with prejudice for any reason, including fraud on the court, would not preclude a bad actor from continually refile against a given homeowner.²⁰⁶

After concluding that the "foreclosure exception" to res judicata also applies to statute of limitations cases, and after ordering future courts to ignore the reasons a prior unsuccessful claim might have been dismissed, the *Beauvais* court cited factual statements of Fannie Mae, Freddie Mac, the Business Law Section of the Florida Bar, and the Real Property Probate and Trust Law Section of the Florida Bar in support of the court's conclusions.²⁰⁷ While distinguishing and diminishing cases presented by borrower and consumer advocates, the court thus relied upon lending industry and lender bar statements as support for the proposition that dismissal of an action for any reason means automatic deceleration—the idea suggested by the earlier *Pugh* decision.²⁰⁸ The court, while finding that dismissal does act as an automatic deceleration without any affirmative act requirement on the part of banks or lenders, did not cite or discuss other decisions holding that an affirmative act *was* required to accelerate a loan.²⁰⁹ Thus, under

²⁰³ *Id.*

²⁰⁴ *Id.* at 945.

²⁰⁵ See generally *Robo-Litigation*, *supra* note 22, at 872–80, 884–88 (examining the "sketchy" foreclosure practices of various Florida law firms and the responses from the Florida Attorney General and State Bar).

²⁰⁶ See *Beauvais*, 188 So. 3d at 946 ("[T]he 'with' or 'without' prejudice' dismissal is a distinction without a difference." (citations omitted)). Again, this appears to be a statement that the Third District only applies to foreclosure litigation. See *U.S. Bank Nat'l Ass'n v. Bartram*, 140 So. 3d 1007, 1012 (Fla. Dist. Ct. App. 2014), *aff'd*, 211 So. 3d 1009 (Fla. 2016), *reh'g denied*, 2017 Fla. LEXIS 593 (Fla. Mar. 17, 2017).

²⁰⁷ *Beauvais*, 188 So. 3d at 947–50.

²⁰⁸ *Id.*; see *Olympia Mortg. Corp. v. Pugh*, 774 So. 2d 863, 867 (Fla. Dist. Ct. App. 2000) (confirming that voluntary dismissal of foreclosure action on an accelerated mortgage and note did not bar a subsequent action on a later default).

²⁰⁹ *Beauvais*, 188 So. 3d at 947–50.

the *Beauvais* court's reasoning, a statute of limitations clock for acceleration does not occur until a foreclosing entity takes an affirmative act.²¹⁰ Yet to decelerate, no such requirement is needed.²¹¹ Unsurprisingly, both of these inconsistent holdings are to the sole detriment of homeowners raising any sort of statute of limitations defense.²¹²

The dissent of Judge Scales pointed out the many deficiencies in the majority's decision and noted its singular expansion of *Singleton*—a case which the dissent notes does not even mention the statute of limitations once.²¹³ Aside from disagreeing with this extension of a res judicata case to a statute of limitations issue, Judge Scales noted several compelling disagreements with the majority opinion.²¹⁴ First, the dissent understood *Beauvais* to improperly suggest that the installment nature of a contract is unaffected by the acceleration of the note.²¹⁵ The majority opinion, in Judge Scales's view, created a "court-imposed fiction that, after acceleration, subsequent monthly installment payments somehow continue to become due."²¹⁶ In other words, a loan could be accelerated, tied up in court for years, and a bank or lender could continuously demand the full accelerated amount. Yet upon dismissal, the same bank may sue for any one of the defaults during that same time period in which they demanded the full amount.²¹⁷ This is "irreconcilable," in Judge Scales's view, with "decades of case law holding that a loan acceleration—whether automatic or exercised at the option of the lender—causes the entire indebtedness immediately to become due."²¹⁸

Aside from creating the "fiction" of continuous installment payments coming due regardless of acceleration, Judge Scales noted, as noted above, that the *Beauvais* majority extends to every dismissal, no matter the reason or the issues adjudicated in such dismissal, the presumption that acceleration and/or default has been disproven and that the installment payment duties are reinstated automatically.²¹⁹ Again, this simplistically "discounts the dramatic variances that can

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 959; see *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1007 (Fla. 2004).

²¹³ *Beauvais*, 188 So. 3d at 966–68 (Scales, J., dissenting).

²¹⁴ *Id.* at 959, 967.

²¹⁵ *Id.* at 963.

²¹⁶ *Id.* at 962.

²¹⁷ *Id.* at 962–63 n.21.

²¹⁸ *Id.*

²¹⁹ *Id.* at 959.

result from different dismissal orders.”²²⁰ Further, Judge Scales noted inconsistency between the majority’s view that acceleration does not end the installment nature of a loan and its view that dismissal automatically places parties back in their pre-acceleration places: “If acceleration does not terminate the installment nature of the loan, then dismissal is also irrelevant because acceleration has not altered the parties’ status quo in the first place.”²²¹

Judge Scales also suggested that automatic reinstatement of the loan upon dismissal is not something that would be granted in the event a borrower moved for it at the end of a case where acceleration and default were not at issue.²²² The majority, in what Scales deems a procedurally unfair fashion, nevertheless grants automatic reinstatement to lenders, which is a benefit when seeking to avoid the harsh statute of limitations preclusion.²²³

Finally, Judge Scales noted the incredible deference granted to lenders and foreclosing entities by the wholesale extension of *Singleton* to statute of limitations cases.²²⁴ He noted that “it seems that equitable considerations—rather than any explicit pronouncement in *Singleton*—fuel the majority opinion’s sweeping construction of *Singleton*.”²²⁵ Such equitable considerations may have been appropriate for a res judicata case like *Singleton*, but statutes of limitation are purely legislative processes predicated on public policy, not any judicially intuited sense of fairness.²²⁶ Accordingly, Judge Scales posits, the majority’s equitable powers should not interfere with what is supposed to be a “province of the legislative branch.”²²⁷

Eventually, the Florida Supreme Court, in *Bartram v. U.S. Bank National Ass’n*, adopted the holding in *Beauvais* that the installment nature of the contract continued despite acceleration and that *Singleton* fully applies to statute of limitations cases.²²⁸ Lewis Bartram, obligated

²²⁰ *Id.* at 961 n.19.

²²¹ *Id.* at 959 n.15.

²²² *Id.* at 964.

²²³ *See id.* at 964–65 (“In my view, this conclusion turns procedural fairness on its head by giving the sanctioned party (the lender) the after-the-fact benefit of reinstatement: a remedy that the prevailing party (the borrower) never would receive.”).

²²⁴ *See id.* at 966 (“[B]y allowing the lender’s acceleration and potential re-accelerations to keep delaying the operation of the statute of limitations, the majority establishes the note’s maturity date as the only date that can trigger application of the five-year statute of limitations.”).

²²⁵ *Id.* at 968.

²²⁶ *Id.* at 967.

²²⁷ *Id.* at 967.

²²⁸ *Bartram v. U.S. Bank Nat’l Ass’n*, 211 So. 3d 1009, 1022 (Fla. 2016), *reh’g denied*, 2017 Fla. LEXIS 593 (Fla. Mar. 17, 2017).

to purchase his ex-wife's interest in their property pursuant to a divorce agreement, obtained a loan through Finance America LLC in the amount of \$650,000 in February 2005.²²⁹ That loan was subsequently assigned to U.S. Bank.²³⁰ On January 1, 2006, Bartram stopped making payments.²³¹ In May 2006, U.S. Bank filed a foreclosure complaint and accelerated the debt.²³² Nearly five years later, the suit was involuntarily dismissed after the bank failed to appear at a case management conference.²³³

Following that dismissal, which occurred more than five years after acceleration, Bartram filed a motion to cancel the promissory note and to release the lien of the mortgage.²³⁴ The trial court denied this request due to lack of jurisdiction given that an adjudication on the merits had already occurred.²³⁵ Bartram filed a similar crossclaim against U.S. Bank a year later in a separate foreclosure action that his ex-wife had brought against U.S. Bank and Bartram.²³⁶ The trial court granted summary judgment and quieted title to Bartram.²³⁷ The court denied a rehearing and U.S. Bank appealed to the Florida Fifth District Court of Appeal, which essentially adopted *Singleton* wholesale.²³⁸

Accepting jurisdiction as a question of great public importance, the Florida Supreme Court held that subsequent suits were not barred and accepted *Beauvais*'s reasoning that the installment nature of the contract remained.²³⁹ The court, citing a number of state court and federal court

²²⁹ *Id.* at 1013.

²³⁰ *Id.*

²³¹ *Id.* at 1014.

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.* at 1014–15.

²³⁶ *Id.* at 1015 (“Approximately a year later, after the dismissal of the foreclosure action and almost six years after the Bank filed its foreclosure complaint, Bartram filed a crossclaim against the Bank in a separate foreclosure action Patricia had brought against Bartram, the Bank, and the HOA. Bartram’s crossclaim sought a declaratory judgment to cancel the Mortgage and to quiet title to the Property, asserting that the statute of limitations barred the Bank from bringing another foreclosure action.”).

²³⁷ *Id.*

²³⁸ *U.S. Bank Nat’l Ass’n v. Bartram*, 140 So. 3d 1007, 1014 (Fla. Dist. Ct. App. 2014), *aff’d*, 211 So. 3d 1009 (Fla. 2016), *reh’g denied*, 2017 Fla. LEXIS 593 (Fla. Mar. 17, 2017).

²³⁹ *Bartram*, 211 So. 3d at 1019 (“Consistent with the reasoning of *Singleton*, the statute of limitations on the balance under the note and mortgage would not continue to run after an involuntary dismissal, and thus the mortgagee would not be barred by the statute of limitations from filing a successive foreclosure action premised on a ‘separate and distinct’ default. Rather, after the dismissal, the parties are simply placed back in the same contractual relationship as before, where the

decisions since *Singleton*, adopted the expansion and extension of res judicata analysis to statute of limitations questions.²⁴⁰

The *Bartram* court next wrestled with the many criticisms of *Singleton*'s singular disregard of the various effects that different dismissals can implicate.²⁴¹ Instead of describing the innumerable reasons dismissal could occur and the various implications of any such dismissal, the court broadly stated that whether a dismissal is with or without prejudice only affects a lender's ability to collect on past defaults, not any future defaults.²⁴² Accordingly, it would not be hyperbole to say that under this interpretation, a bank can lie, cheat, and steal²⁴³ during the pendency of a foreclosure case, receive a dismissal of its cause (which requires payment of all sums due under the entire note and mortgage for the life of the loan) with prejudice as a sanction for repugnant conduct, and emerge relatively unscathed with a new lawsuit based upon an arbitrarily picked later default date.²⁴⁴ And while the court relies upon uniform mortgages' reinstatement provisions to assert that dismissal places the parties back in the positions they were in prior to the lawsuit, this is patently misleading—the reinstatement clause typically requires, for example, that borrower pay lenders all of their legal expenses in the first lawsuit before reinstatement can be given effect.²⁴⁵ Again, this is without any regard to why the suit was dismissed in the first place and independent of the presence of fraud, disregard of court orders, or any other improper foreclosure litigation practices.²⁴⁶

Perhaps most remarkable is the *Bartram* court's contention that its decision is in fact pro-borrower: failure to agree with its interpretations of the reinstatement clause would mean borrowers still owe the accelerated amount even after a dismissal, which could “[lead] to an unavoidable default.”²⁴⁷ Of course, this decision completely ignores

residential mortgage remained an installment loan, and the acceleration of the residential mortgage declared in the unsuccessful foreclosure action is revoked.”).

²⁴⁰ *Id.* at 1018–19.

²⁴¹ *Id.* at 1020.

²⁴² *Id.*

²⁴³ See *Robo-Litigation*, *supra* note 22, at 885.

²⁴⁴ *Bartram*, 211 So. 3d at 1020 (“Whether the dismissal of the initial foreclosure action by the court was with or without prejudice may be relevant to the mortgagee's ability to collect on past defaults. However, it is entirely consistent with, and follows from, our reasoning in *Singleton* that each subsequent default accruing after the dismissal of an earlier foreclosure action creates a new cause of action, regardless of whether that dismissal was entered with or without prejudice.”).

²⁴⁵ *Id.* at 1013.

²⁴⁶ *Id.* at 1020.

²⁴⁷ *Id.* at 1021 (alteration in original).

that in a dismissal scenario, months or years after a case was filed, many months of payments and expenses will be owed.²⁴⁸ Thus, there is no functional difference for the average distressed borrower (many of whom are too impoverished even to afford legal counsel) between demanding an accelerated sum and demanding a reinstatement sum of years of defaults and accompanying expenses.²⁴⁹ Worse, the court describes a world in which banks might accept regular monthly payments immediately after a dismissal that, under the revised doctrine, automatically decelerates the loan.²⁵⁰ Again, reinstatement requires payment of all past due amounts and all expenses so far incurred by the bank.²⁵¹ Accordingly, it is inconceivable that a bank would be required to, or would actually accept, a borrower's regular monthly payment amount immediately after protracted litigation.

Each installment payment, the *Bartram* decision held, could be a separate default, meaning it was its own claim for res judicata purposes and thus each claim had its own statute of limitations.²⁵² In so doing, the court implicitly rejected *Stadler*.²⁵³

Finally, the *Bartram* court held that whether an involuntary dismissal occurred with or without prejudice did not matter for purposes of the new lawsuit.²⁵⁴ The distinction only mattered if banks wanted to pursue the same defaulted payment as before.²⁵⁵ If the first lawsuit was dismissed with prejudice, then that default could not be pursued again, however any future payments were recoverable in future lawsuits.²⁵⁶ A dismissal without prejudice would allow the bank to pursue the same default as the first lawsuit.²⁵⁷

²⁴⁸ *Id.* at 1020.

²⁴⁹ *Id.* at 1021.

²⁵⁰ *Id.* at 1023.

²⁵¹ *Id.* at 1020.

²⁵² *Id.* at 1019.

²⁵³ *Id.* at 1016 (“*Stadler* also involved two successive foreclosure actions where the first foreclosure action had been dismissed with prejudice. The mortgagee brought a second foreclosure action that was identical except for alleging a different period of default. That action was successful, and the mortgagor appealed. The Second District reversed the judgment of foreclosure entered on the basis of res judicata and concluded that the ‘election to accelerate put the entire balance, including future installments at issue.’ Therefore, even though different periods of default were asserted, the ‘entire amount due’ was the same and thus the ‘actions are identical.’ Accordingly, the Second District concluded that res judicata barred the second foreclosure action.” (quoting and citing *Stadler v. Cherry Hill Developers, Inc.*, 150 So. 2d 468, 469, 472–73 (Fla. Dist. Ct. App. 1963))).

²⁵⁴ *Id.* at 1020.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

Judge Lewis's concurrence in *Bartram* noted apprehension at the approach that gives any sort of dismissal, for any reason, the effect of automatic deceleration.²⁵⁸ This was particularly troubling where there are no facts in the record to show even a hint of "de facto reinstatement" following the initial dismissal.²⁵⁹ Judge Lewis echoed the dissent of Judge Scales in the *Beauvais* case, pointing out again that the equitable considerations that led courts in Florida to create exceptions for banks and lenders should not govern statute of limitations cases.²⁶⁰

III. UNDERSTANDING ACCELERATION AND RES JUDICATA AND STATUTE OF LIMITATION CASES

Our previous research has established a number of patterns in judicial treatment of foreclosure cases.²⁶¹ We have noted that an unceasing drive for faster foreclosure processing time resulted in less procedural and substantive due process protections for homeowners, and undoubtedly contributed to the impressive number of false and fraudulent documents filed in state courts around the country.²⁶² We also described an overall trend of courts narrowing novel defenses to foreclosures that have arisen in the wake of the Great Recession.²⁶³ As a result, our research has painted a picture of a specific and narrow area of law in which the party with the most resources seems to largely receive the benefit of any judicial doubt. The virtual destruction of the statute of limitations and res judicata in Florida as to foreclosure cases, and the singularly expansive rulings given in favor of banks and foreclosing entities in the cases discussed *supra* fit neatly into the

²⁵⁸ *Id.* at 1023 (Lewis, J., concurring in the result) ("Given the procedural posture of this matter and the relatively sparse record before this Court, the decision today fails to address evidentiary concerns regarding how to determine the manner in which a mortgage may be reinstated following the dismissal of a foreclosure action, as well as whether a valid 'subsequent and separate' default occurred to give rise to a new cause of action. See *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1008 (Fla. 2004). Instead of addressing these concerns, the Court flatly holds that the dismissal itself—for any reason—'decelerates' the mortgage and restores the parties to their positions prior to the acceleration without authority for support.").

²⁵⁹ *Id.* ("In this case, there is no evidence contained in the record before this Court to show whether the parties tacitly agreed to a 'de facto reinstatement' following the dismissal of the previous foreclosure action. Further, despite the assumption of the majority of the Court to the contrary, the mortgage itself did not create a right to reinstatement following acceleration and the dismissal of a foreclosure action.").

²⁶⁰ *Id.* at 1024.

²⁶¹ See, e.g., *A Standing Question*, *supra* note 17, at 708–11.

²⁶² See *id.* at 729; *Not a Party*, *supra* note 14, at 182–83.

²⁶³ See *Not a Party*, *supra* note 14, at 179–80, 182–83.

pattern we have established.²⁶⁴ Ultimately, as we have argued previously, the failures of the judiciary lead to negative externalities that were ignored or downplayed in the lender-friendly opinions we examined.²⁶⁵

A. The Typical Frame of Foreclosure

We begin by attempting to shed light on why research seems to show that judges are inclined to overlook irregularities in the foreclosure process or to modify doctrine to liberally permit foreclosures.²⁶⁶ As discussed in the sections above, courts often cite equitable concerns, particularly the desire to avoid awarding “free houses” to debtors that have defaulted on their mortgages.²⁶⁷ These equitable concerns, however, are necessarily rooted in a particular and narrow view of the mortgage and foreclosure process.²⁶⁸ Accordingly, it is important to discuss the “frames” themselves.

Upon examination, it is clear that judges may be predisposed to discount debtor defenses because of how foreclosure cases are situated within the judicial system. Given the backlog of foreclosures during the height of the housing crisis, judges were under apparent pressure to resolve these cases as expeditiously as possible.²⁶⁹ The courts’ ability to do so may even be tied to the funding for the courts.²⁷⁰ Judges unsurprisingly may be reluctant to seriously consider defenses, particularly those that merely act as a “stall” to an otherwise valid claim.²⁷¹

²⁶⁴ See *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1005 (Fla. 2004); *Olympia Mortg. Corp. v. Pugh*, 774 So. 2d 863, 866 (Fla. Dist. Ct. App. 2000) (illustrating recent cases in Florida that have essentially eviscerated the protections of the statute of limitations and *res judicata*); *Stadler v. Cherry Hill Developers*, 150 So. 2d 468, 469–70 (Fla. Dist. Ct. App. 1963).

²⁶⁵ See *A Standing Question*, *supra* note 17, at 730; see also *infra* text accompanying note 304.

²⁶⁶ *A Standing Question*, *supra* note 17, at 729.

²⁶⁷ *Singleton*, 882 So. 2d at 1008.

²⁶⁸ *Id.*

²⁶⁹ See, e.g., *Foreclosure Initiative Workgroup, Foreclosure Backlog Reduction Plan for the State Courts System*, FLA. CTS. 6 (Apr. 10, 2013), <http://www.flcourts.org/core/fileparse.php/251/urlt/RecommendationsForeclosureInitiativeWorkgroup.pdf> (proposing a process to clear foreclosure backlogs).

²⁷⁰ See *id.* at 4 (discussing docket clearance rates and their link to court funding).

²⁷¹ Allen, *supra* note 5 (describing shortcuts that some Florida courts took to facilitate fast resolution at the expense of many homeowners); Adolfo Pesquera, *Miami-Dade Aggressively Pushes Foreclosure Cases Through System*, DAILY BUS. REV. (Aug. 2, 2013), <http://www.dailybusinessreview.com/id=1202613700227/MiamiDade-Aggressively-Pushes-Foreclosure-Cases-Through-System?slreturn=20150028155007> (quoting one

We have previously noted immense judicial skepticism to debtor defenses based on the assumed underlying culpability of debtors.²⁷² For example, with rare exception courts were largely silent and unobtrusive amid the marching onslaught of MERS, the electronic placeholder that acts as nominal mortgagee for lenders for the life of loans, eliminating the need for many assignments of loans to be recorded.²⁷³ This new tracking system reduced recording revenues by millions, and reduced transparency in public records by lowering the likelihood of any given homeowner being able to access the correct current owner of his or her loan.²⁷⁴ Similarly, its development led to inaccurate and contradictory pleadings all across the nation.²⁷⁵ Yet it appears that in the majority of jurisdictions, judges have ruled that MERS will not face significant financial liability for its conduct and judges have largely accepted the arguments of MERS and its attorneys at face value.²⁷⁶

Similarly, we have noted that courts have tended to ignore debtor defenses based on standing.²⁷⁷ Again, with rare exception, many courts imply, or indeed occasionally express, the posture that to whom the debt is owed is largely irrelevant, as long as a given case seems plausible.²⁷⁸ Discovery may also be routinely denied based upon the existence of the debtors' default.²⁷⁹

judge as saying, "If you can't do [the trial] within an hour, you're not a trial attorney").

²⁷² *A Standing Question*, *supra* note 17, at 711.

²⁷³ *Standing in Our Own Sunshine*, *supra* note 16, at 551–52, 555.

²⁷⁴ *Id.* at 552.

²⁷⁵ *Id.*

²⁷⁶ *Cf. Taylor v. Deutsche Bank Nat'l Tr. Co.*, 44 So. 3d 618, 623 (Fla. Dist. Ct. App. 2010) (finding that MERS could arguably be a proper holder of promissory notes).

²⁷⁷ *See, e.g., Not a Party*, *supra* note 14, at 182; *Pino v. Bank of N.Y. Mellon*, No. SC11–697, 2011 WL 1537260, at *1 (Fla. Apr. 15, 2011).

²⁷⁸ *Maraulo v. CitiMortgage, Inc.*, No. 12–CV–10250, 2013 WL 530944, at *7 (E.D. Mich. Feb. 11, 2013) ("Furthermore, none of the facts alleged indicate that the assignment may subject Plaintiffs to a risk of having to pay their mortgage twice. In fact, Plaintiffs' complaint alleges that the assignor of the mortgage, American, went out of business in 2008 and ceased to exist as a corporate entity. Given that the assignor does not exist, Plaintiffs are not at any risk of paying the same claim twice, and have never alleged that they are at risk of such double payment." (citations omitted)); *Shumake v. Deutsche Bank Nat'l Tr. Co.*, No. 1:11–CV–353, 2012 WL 366923, at *3 (W.D. Mich. Feb. 2, 2012) ("Really, Shumake's injury is fairly traceable to the fact that he failed to make his mortgage payments . . . whether Shumake made his mortgage payments on time had nothing to do with whether Chase validly assigned the mortgage to Deutsche Bank. Either way, Shumake still had to make the same payments—the assignment only altered to whom he made the payments; the assignment had no other consequence to Shumake." (citations omitted)).

²⁷⁹ Consider, as one example, a sitting judge recently submitted an article to the

Such foreclosure decisions, as with other judicial decisions, are often framed and influenced by the perceived primary actor in the conflict.²⁸⁰ In other words, judges often appear to imagine the most likely counterfactual scenario that would have avoided the foreclosure situation and thereby determine the “but for” cause of foreclosure.²⁸¹ It may seem obvious, then, that judges would perceive debtors’ default to be the primary cause for the situation and therefore be inclined to be more sympathetic to the mortgagee, the aggrieved party in this instance.

For example, in many states, there are judges assigned to particular areas of the law, such as foreclosures.²⁸² Their repeated exposure to similar cases perhaps causes cynicism and skepticism regarding borrower defenses. Judges consequently choose to frame the issues as one of “deadbeat” borrowers that are seeking to take advantage of a bank that inadvertently failed to follow up on a claim after acceleration within the statute of limitations.²⁸³ There may be some truth to this stereotype, of course; homeowners may readily admit that they are seeking legal counsel in order to gain as much time as possible before having to settle, whether through a loan modification or a short sale.²⁸⁴ This can be particularly true of investors in rental property, who may

Florida bar that suggests that all notes are negotiable. See William H. Burgess, III, *Negotiability of Promissory Notes in Foreclosure Cases: Ballast Is Not Luggage*, 88 FLA. B.J., 8, 10, 18 (2014). This is troubling on a number of levels, (1) that a sitting judge—and the previous head of all foreclosure cases for a Florida county—felt impelled to dissuade others from attempting to assert a defense based on failure to meet holder status under the Uniform Commercial Code in foreclosure cases, and (2) that he also would clearly attempt to influence other judges to preclude any inquiry in individual cases regarding whether or not a given note is a negotiable instrument by making broad pronouncements about all uniform promissory notes based largely on out-of-state cases. See *id.* at 18.

²⁸⁰ See *A Standing Question*, *supra* note 17, at 708.

²⁸¹ See *id.* at 725–26.

²⁸² See, e.g., Alison Fitzgerald, *Homeowners Steamrolled as Florida Courts Clear Foreclosure Backlog*, CTR. FOR PUB. INTEGRITY (Sept. 10, 2014), <https://www.publicintegrity.org/2014/09/10/15463/homeowners-steamrolled-florida-courts-clear-foreclosure-backlog>; Juan Gonzales, *Brooklyn Court Overwhelmed by Way of Foreclosures*, N.Y. DAILY NEWS (Mar. 8, 2016), <http://www.nydailynews.com/new-york/brooklyn/brooklyn-court-overwhelmed-wave-foreclosures-article-1.2557744>.

²⁸³ See *In re Washington*, No. 14–14573–TBA, 2014 WL 5714586, at *1 (Bankr. D.N.J. Nov. 5, 2014) (“No one gets a free house.”), *rev’d sub nom.*, *Specialized Loan Servicing, LLC v. Washington*, 2:14–CV–8063–SDW, 2015 WL 4757924 (D.N.J. Aug. 12, 2015), *aff’d sub nom.*, *In re Washington*, 669 Fed. App’x 87 (3d Cir. 2016).

²⁸⁴ See generally Lambros Politis, *How Can I Slow or Stop the Foreclosure Process?*, ARK L. GROUP (Nov. 25, 2013), <https://www.arklawgroup.com/blog/how-can-i-slow-or-stop-the-foreclosure-process> (providing general advice on foreclosure delay tactics).

heavily leverage to finance the initial purchase of the real estate and then lease it to tenants.²⁸⁵ The investors have very little skin in the game and may collect rent while delaying an otherwise valid foreclosure claim, with very little downside.²⁸⁶

Judges also are undoubtedly aware of the financial arrangements for many foreclosure defense attorneys, which can contribute to reluctance to seriously consider debtor defenses.²⁸⁷ When foreclosure proceedings have begun, many foreclosure defense attorneys in judicial foreclosure states offer to defend the proceedings for a monthly fee that is substantially less than the mortgage payment.²⁸⁸ In other words, one way of conceptualizing foreclosure defense is as an inexpensive option to lengthen proceedings and stall the inevitable. Any delay by virtue of defending a cause, however, is valuable to debtors that consequently will be permitted to stay in their homes for a monthly fee that is a fraction of their monthly mortgage payment.²⁸⁹ Judicial distaste for the stalling of an otherwise valid claim, particularly in light of the underlying financial arrangement that benefits both the debtor and the debtor's attorney the longer the claim is stalled, may affect the reception of asserted foreclosure defenses. In some instances, this distaste has even manifested itself in the court's willingness to rely on the unsworn amici of the banking bar as to the proper interpretation of the contract and acceleration rights.²⁹⁰

Confirming this assertion, in response to debtor assertions of defenses or even at the outset of the case, judges often seek to confirm that the debtor did not in fact pay as required (e.g., "But your client did

²⁸⁵ See *A Standing Question*, *supra* note 17, at 727–28 n.114.

²⁸⁶ See *id.*

²⁸⁷ See generally *id.* at 705 (providing examples of judges' skepticism toward debtor defenses).

²⁸⁸ See *How Much Will a Foreclosure Attorney Charge?*, NOLO, <https://www.nolo.com/legal-encyclopedia/how-much-will-foreclosure-attorney-charge.html> (last visited Mar. 29, 2018).

²⁸⁹ *Id.*

²⁹⁰ *Deutsche Bank Tr. Co. Ams. v. Beauvais*, 188 So. 3d 938, 948 (Fla. Dist. Ct. App. 2016) (en banc) ("Adding support to our conclusion, both The Business Law Section of The Florida Bar and The Real Property Probate & Trust Law Section of The Florida Bar confirm that the custom and practice in Florida is to treat a dismissal of a foreclosure action as 'decelerating' an acceleration made in a foreclosure action."); see *Cooke v. Commercial Bank of Miami*, 119 So. 2d 732, 735 (Fla. Dist. Ct. App. 1960) ("Although customs and usages of the banking business may have a binding force as between banks, and between a bank and the person with whom it deals in the absence of an express agreement to the contrary."); see also *Sabatino v. Curtiss Nat'l Bank of Miami Springs*, 446 F.2d 1046, 1053 (5th Cir. 1971) ("Absent instructions or an express agreement to the contrary, general customs and usage of the banking business may have a binding effect between banks, and between a bank and the person with whom it deals.").

not actually pay, correct?") or to express a concern about awarding free houses to someone that defaulted (e.g., "We are not going to be awarding free houses").²⁹¹ While this sentiment may seem appropriate, it actually is misplaced in that it unfairly previews the case outcome. In other civil contexts, it would be intuitively inappropriate for a judge at the outset (or in response to an asserted defense) to assert the propriety or likelihood of victory of the plaintiff's claim.²⁹² In a more extreme example, it would clearly strike us as improper if a judge blithely dismissed or ignored access to counsel or discovery in a criminal case because "your client committed the crime, right?"²⁹³ This is not, of course, to suggest that previewing does not occur in these other circumstances but instead to assert that it is improper in each instance.

B. A New "Systemic" Frame of Foreclosure

In light of this Article's discussion of yet another longstanding substantive area of law being changed, modified, or amended post-Great Recession for the benefit of banks and lenders, another frame must also be discussed. Separate and apart from individual judges "previewing" a case's merits before making substantive decisions, in the manner we have discussed above and in previous research, we may also posit that judicial systems and court administration create what we may call a new "systemic" frame in which judges view foreclosure. In this new conception of a systemic frame, we posit that judicial systems as a whole, in response to the Great Recession, created structures, procedures, and requirements that were largely to the detriment of borrowers. Accordingly, we may say that court systems, before a given case is even assigned to a judge, have primed the judiciary, or framed the proceedings, for what the "optimal" reaction to foreclosure litigation should be.

In some jurisdictions, special foreclosure procedures, rules, and

²⁹¹ See, e.g., Michael Corkery, *Foreclosure to Home Free, as 5-Year Clock Expires*, N.Y. TIMES (Mar. 29, 2015), <https://www.nytimes.com/2015/03/30/business/foreclosure-to-home-free-as-5-year-clock-expires.html> ("No one gets a free house," Judge Michael B. Kaplan of the United States Bankruptcy Court in Trenton wrote in an opinion late last year, reflecting what he characterized as a longstanding 'admonition' he and others made during the foreclosure crisis."); Fox 4 News Investigates Lee County's "Rocket Docket" Program, 4CLOSUREFRAUD (Sept. 16, 2010), <http://4closurefraud.org/2010/09/16/fox-4-news-investigates-lee-countys-rocket-docket-program/> ("I was specifically told by one judge, counselor stop. I have 180 cases on my docket this morning. I've heard all the evidence I'm going hear. The defendant didn't pay the mortgage, we're done here.").

²⁹² See MODEL CODE OF JUDICIAL CONDUCT r. 2.10 (Am. Bar Ass'n 2011).

²⁹³ See *id.*

even court divisions were created, wherein cases would be sent to trial en masse, leaving little time for each individual case, even for a judge so inclined to hear cases on their merits.²⁹⁴ Pejoratively termed the “rocket docket,” the American Civil Liberties Union (“ACLU”) challenged one instance of such a mass foreclosure docket, noting that the special procedures were not authorized by “statute, local rule, or administrative order.”²⁹⁵ The ACLU’s brief exposed what many have argued: that judges facing immense caseloads, in the face of what are seen as “simple” cases of defaulting homeowners, may disregard application of what may be seen as technicalities. One judge in particular is cited as saying, “I have 180 cases on my docket this morning. . . . The defendant didn’t pay the mortgage, we’re done here.”²⁹⁶

While this is obviously an example of an individual judge framing an entire case and its proof on one anti-homeowner fact (“didn’t pay the mortgage”), we suggest that the court system already framed the case by virtue of scheduling it at once with 179 other cases. In other words, before a given case reaches a judge’s desk, court administration has already framed the case so as to be by necessity tilted against any effective defense to foreclosure.²⁹⁷ Similarly, creating entire divisions dedicated solely to foreclosure cases may contribute to the inherent idea that such cases are less important than other divisions, especially when such divisions often employ retired, unelected judges to assist in processing large numbers of cases.²⁹⁸ Such judges were not presumably called up by the court system to assist in discovering the truth of each individual case or to sniff out possible fraud or misconduct on either side—rather, they were explicitly called in to assist in closing cases.²⁹⁹

²⁹⁴ See, e.g., Allen, *supra* note 5.

²⁹⁵ Petition for Writ of Certiorari, *supra* note 11, at 1–2.

²⁹⁶ *Id.* at 16.

²⁹⁷ It should also be posited here that in facing unprecedented numbers of foreclosures, it was by no means clear that the court system would take the sharp turn towards pro-lender overtures. In light of the credible accounts of thousands of false documents soiling court records, courts surely could have taken a different tack and forced procedures and requirements on banks to ensure that cases with lack of proof are not brought to court. Faced with thousands of complaints that falsely claimed original notes were lost, for example, Florida required lenders to begin having their complaints verified under penalty of perjury by their clients. See FLA. STAT. § 702.015 (2017). While this requirement could have created a systemic frame of priming judges to be aware and vigilant towards possible bank misconduct, it may have actually contributed to the further “ghettoization” of foreclosure litigation in the sense that any reputable practice area worth expending time upon would not have required such a new rule of procedure.

²⁹⁸ See Allen, *supra* note 5.

²⁹⁹ See *id.* (“[J]udges [were] brought back from retirement specifically to hear

Thus, while we have previously posited that judges preview the merits of individual foreclosure claims and discount homeowner claims accordingly,³⁰⁰ we now suggest that the overall systemic frame of court administration responses to the foreclosure crisis enforced and created an atmosphere of almost ministerial enforcement or of a collection mechanism rather than serving any truth-seeking function.

Framing lawsuits primarily in terms of efficiency rather than fact-finding renders foreclosure a foregone conclusion, especially when judges have an incentive to clear a large backlog of foreclosure cases such as those pending after the 2008 financial crisis.³⁰¹ While perhaps easier or faster than dealing with every case as it should be, this type of thinking can be crushing for debtors when there are many other options for lenders that promote an efficient mortgage market.³⁰² It is particularly bad for society in the long haul, whether it leads to increased crime rates in neighborhoods, blight, or other negative externalities.³⁰³ Within these two frames, therefore, the story of the creation of brand new exceptions to *res judicata* and the statutes of limitation solely for foreclosure cases are altogether unsurprising.

C. An Equitable Approach Where Equity Does Not Apply

Almost ninety years ago, then-Chief Judge Cardozo protested, to no avail, a formalistic approach to mortgage enforcement that ignored the

foreclosures in Fort Myers.” (alteration in original)).

³⁰⁰ See *A Standing Question*, *supra* note 17, at 727.

³⁰¹ *Id.* at 729 (“What is clear, though, is that foreclosure is desirable from a judicial perspective. Judges have been, implicitly or explicitly, charged with the task of clearing the backlog of foreclosures and have accordingly carved a legal path that enables foreclosures to occur more quickly and with less attorney effort.”).

³⁰² *Id.* at 727 (“Under these lines of analysis, if the foreclosure is inevitable because the debtor is in default and the lender would necessarily desire a foreclosure, then the courts should not put up unnecessary roadblocks to foreclosure by permitting procedural challenges. These approaches, however, are deeply flawed because they are both predicated on an underlying assumption that foreclosure would and should occur whenever the debtor is in default.”).

³⁰³ *Id.* at 730 (“Yet this approach, as with the other housing crisis issues driven largely by a demand for faster results, is ultimately shortsighted. First, although a longer foreclosure process costs lenders and servicers more, these costs may help incentivize servicers to settle more cases, rather than enduring a long slog through the court system. Similarly, the longer time period may assist borrowers in bolstering their financial resources or in weathering a financial hardship, again making settlement more likely. Encouraging more settlements benefits society as a whole, particularly those jurisdictions that have had higher numbers of foreclosures. This is because preventing foreclosures can help eliminate significant negative externalities. The normal neighborhood-level effects of foreclosed homes are significant in terms of crime, blight, and reduced property values.”).

continued . . .

impact of foreclosure.³⁰⁴ In *Graf v. Hope Building Corp.*, through an error in a bookkeeper's arithmetic, payment of what should have been an installment of \$6,121.56 was \$401.87 short of the correct amount.³⁰⁵ Enforcement of the acceleration provision (as sustained by the majority) meant that because of the \$401.87 deficiency, the mortgagor's interest was foreclosed in a property mortgaged for \$335,000.³⁰⁶ The majority chose to permit acceleration and foreclosure based on the clear terms of the contract.³⁰⁷ In his dissent, Chief Judge Cardozo argued:

In this case, the hardship is so flagrant, the oppression so apparent, as to justify a holding that only through an acceptance of the tender will equity be done. . . . The deficiency, though not so small as to be negligible within the doctrine of *de minimis*, was still slight and unimportant when compared with the payment duly made.³⁰⁸

As Chief Judge Cardozo's view did not prevail, one would expect the formalism that was used to justify foreclosure would also be employed when lenders fail to comply with statutory, common law, or contractual requirements with respect to mortgage assignment, enforcement, acceleration, or foreclosure.

In each instance, however, lenders are often instead protected by a contextual or equitable approach that seeks to preserve their right to foreclose.³⁰⁹ As we have suggested elsewhere, courts use a formalistic approach with respect to debtor accountability, but not mortgagee accountability, under the contract.³¹⁰ Mortgagees are permitted to enforce loan and mortgage instruments under virtually all circumstances, even where the contracting circumstances are suspect or where the mortgagee's title to the underlying instruments is questionable.³¹¹

³⁰⁴ *Graf v. Hope Bldg. Corp.*, 171 N.E. 884, 886 (N.Y. 1930) (Cardozo, C.J., dissenting).

³⁰⁵ *Id.* at 884 (majority opinion).

³⁰⁶ *Id.* at 885.

³⁰⁷ *Id.* ("We feel that the interests of certainty and security in real estate transactions forbid us, in the absence of fraud, bad faith or unconscionable conduct, to recede from the doctrine that is so deeply imbedded in equity.").

³⁰⁸ *Id.* at 889 (Cardozo, C.J., dissenting).

³⁰⁹ See Basil H. Mattingly, *The Shift from Power to Process: A Functional Approach to Foreclosure Law*, 80 MARQ. L. REV. 77, 92–93 n.76 (1996).

³¹⁰ *A Standing Question*, *supra* note 17, at 707 ("In somewhat counterintuitive fashion, however, courts have permitted mortgagees and their assignees to subvert, supplant, and circumvent the very formalities that they utilize to foreclose upon the debtors in the first place.").

³¹¹ *Id.*

In the context of *res judicata* and the statute of limitations, courts have pursued a contextual or equitable approach to preserve the ability of mortgagors to foreclose.³¹² As seen in *Beauvais*, courts create a legal fiction that all dismissals, voluntary or not, of foreclosure of an accelerated debt, represent a judicial adjudication that acceleration was improper or ineffective, thereby permitting mortgagors to accelerate and seek foreclosure innumerable times.³¹³ As seen in *Bartram*, courts permit a contractual vagueness with respect to the deceleration of a debt to be construed in favor of the drafter, despite the disparity in bargaining power or the inability of a debtor to negotiate the underlying contracts.³¹⁴

One way to understand the inclination of some courts to permit the erosion of *res judicata* and statute of limitations defenses is ensuring consistency with their equitable inclination in other doctrinal contexts to liberalize the foreclosure process and to prevent debtors in default from being awarded “free houses.”³¹⁵ This equitable inclination, however, is particularly problematic in the context of the defenses of *res judicata*, double-dismissal rules and statute of limitations. Equity

³¹² *Deutsche Bank Tr. Co. Ams. v. Beauvais*, 188 So. 3d 938, 943 (Fla. Dist. Ct. App. 2016) (en banc).

³¹³ *Id.* at 947 (“Stated another way, despite acceleration of the balance due and the filing of an action to foreclose, the installment nature of a loan secured by such a mortgage continues until a final judgment of foreclosure is entered and no action is necessary to reinstate it via a notice of ‘deceleration’ or otherwise.”).

³¹⁴ *Bartram v. U.S. Bank Nat’l Ass’n*, 211 So. 3d 1009, 1024 (Fla. 2016) (Lewis, J., concurring in the result) (“The majority opinion rewrites the parties’ note and mortgage to create a reinstatement provision—i.e., reinstating the installment nature of the note, as if acceleration never occurred, upon any dismissal of any lawsuit—that the parties did not include when drafting their documents. *Singleton* does not say this; the parties’ contract documents certainly do not say this; and Florida law is repugnant to the majority’s insertion of a provision into the parties’ private contract that the parties themselves most assuredly omitted.” (quoting *Beauvais*, 188 So. 3d at 963)), *reh’g denied*, 2017 Fla. LEXIS 593 (Fla. Mar. 17, 2017).

³¹⁵ *Fairbank’s Capital Corp. v. Milligan*, 234 F. App’x 21, 24 (3d Cir. 2007) (“If we were to so hold [that dismissal of a former lawsuit prevented the bank from going after the mortgagor later], it would encourage a delinquent mortgagor to come to a settlement with a mortgagee on a default in order to later insulate the mortgagor from the consequences of a subsequent default. This is plainly nonsensical.” (alteration in original)); *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1007–08 (Fla. 2004) (“If *res judicata* prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note. The adjudication of the earlier default would essentially insulate her from future foreclosure actions on the note—merely because she prevailed in the first action. Clearly, justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.”).

should not be relevant in these instances because it is the very nature of such defenses to create inequitable results.³¹⁶ The proper application of res judicata or the double-dismissal rules will result in instances where a valid substantive claim will be dismissed.³¹⁷ That is indeed inequitable. Similarly, the proper application of the statute of limitations will necessary result in the dismissal or preclusion of valid substantive claims.³¹⁸ It is unclear why a court would understand the inequitable result arising from a disallowed foreclosure to be more compelling than the inequitable results arising in other circumstances, such as criminal acts or intentional torts that cannot be prosecuted or pursued because of res judicata or statute of limitations defenses.

Further, upon examination and analysis of the preceding cases and their development, it seems clear that many judges tend to see equity lying with only one side of foreclosure litigation. In the majority opinions we have discussed *supra*, the decisions consistently note the “free house” scenario and warn against the inequities if homeowners behaved opportunistically in the face of strict claim preclusion rules.³¹⁹ These same decisions often accept at face value whatever factual proclamation bank and lender industry groups pronounce.³²⁰ Yet, these same decisions neither discuss—nor mention in their concurring or dissenting opinions—the inequities that their pro-lender expansions may produce.³²¹

The conception of “free houses” suggests a lack of practical knowledge of foreclosure litigation and, indeed, homeownership in general. The cases we have discussed herein have been decided only

³¹⁶ *Beauvais*, 188 So. 3d at 969 (Scales, J., dissenting) (“The expiration of a statute of limitations, however, generally results in a windfall for the escaping defendant. In my view, neither the moral imperative that borrowers pay their obligations, nor *Singleton*, has abrogated decades of Florida jurisprudence governing the statute of limitations in foreclosure cases.”).

³¹⁷ See Ronald D. Weiss, *Who Wants a Free House? Applying Res Judicata to Foreclosure Cases*, RONALD D. WEISS P.C. (Mar. 24, 2017), <http://www.ny-bankruptcy.com/who-wants-a-free-house-applying-res-judicata-to-foreclosure-cases-2/>.

³¹⁸ Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 465 (1997) (“[I]t may be more unjust to permit an old claim to be revived than it would be to extinguish it.” (citation omitted)).

³¹⁹ See *Bartram*, 211 So. 3d at 1017; *Beauvais*, 188 So. 3d at 943–44; *Singleton*, 882 So. 2d at 1007.

³²⁰ See *Bartram*, 211 So. 3d at 1007; *Beauvais*, 188 So. 3d at 945; *Singleton*, 882 So. 2d at 1012.

³²¹ See *Bartram*, 211 So. 3d at 1025–26 (Lewis, J., concurring in the result) (noting that the majority’s holding may lead to inequities to borrowers); *Beauvais*, 188 So. 3d at 964–65 (Scales, J., dissenting) (stating that the majority gives the lender a benefit the borrower would never receive); see generally *Singleton*, 882 So. 2d at 1008 (discussing only inequities to the lender).

after years of protracted litigation, multiple lawsuits, and presumably extensive legal bills.³²² The homeowner will have borne the costs of the litigation and the deleterious health effects of foreclosure.³²³ And, in many cases, the homeowner will have paid their loan faithfully for years before any financial difficulties caused default, and others will have been induced into default by servicers informing them that loss mitigation assistance will not be available until they actually stop making regular payments.³²⁴

In addition, in light of the case law development we have discussed, it appears that banks and foreclosing entities will have nearly unlimited chances to attempt foreclosure in those jurisdictions that have adopted multiple-bites-at-the-apple positions.³²⁵ In such jurisdictions, while it now appears nearly impossible to win an actual “free” house through a dismissal, we hold little hope that judges will suddenly stop believing and asserting that a “free house” is the ultimate outcome of any dismissal, and that therefore homeowner defenses must be viewed with skepticism.

Likewise, we do not expect courts to suddenly demand foreclosing entities cease filing lengthy cases that are ultimately dismissed for malfeasance or lack of proof—the very cases which, when refiled, can sometimes implicate *res judicata* and statute of limitations considerations. That is to say, having expanded the exceptions to claim preclusion and the statute of limitations to give banks nearly unlimited chance to foreclose without regard to the effects on homeowners, courts still remain unlikely to change their allegiance to more thoroughly consider the equities that lie with a given homeowner.³²⁶ In light of our previous research and the continuing points made in this Article, we do

³²² See *Bartram*, 211 So. 3d at 1014–15; *Beauvais*, 188 So. 3d at 940–41; *Singleton*, 882 So. 2d at 1005.

³²³ See *Foreclosure Process Takes Toll on Physical, Mental Health*, ROBERT WOOD JOHNSON FOUND. (Oct. 21, 2011), <https://www.rwjf.org/en/library/articles-and-news/2011/10/foreclosure-process-takes-toll-on-physical-mental-health.html> (identifying a link between foreclosure and a decline in overall health); *What Will a Foreclosure Lawyer Cost Me?*, LEGALMATCH.COM, <https://www.legalmatch.com/law-library/article/how-much-will-a-foreclosure-lawyer-cost.html> (last updated Jan. 31, 2017) (stating that usually each party pays its own costs but that in some cases homeowners must pay the lender’s legal fees as well).

³²⁴ See, e.g., Aldo Svaldi, *Foreclosure Paperwork Miscues Piling Up*, DENVER POST, <https://www.denverpost.com/2010/11/12/foreclosure-paperwork-miscues-piling-up/> (last updated May 5, 2016, 3:46 AM) (identifying foreclosures brought on by injury and misleading statements by the lender).

³²⁵ See *Bartram*, 211 So. 3d at 1012 (following the *Singleton* rule); *Beauvais*, 188 So. 3d at 944 (following the *Singleton* rule).

³²⁶ See *supra* Section III.C.

not expect judges to begin to recognize the extensive damage that repetitive successive lawsuits can cause.³²⁷ Indeed, in this new landscape where foreclosure appears inevitable—even in the face of a previous dismissal with prejudice for severely troubling conduct—one may well expect forthcoming opinions to say it is inequitable to force a foreclosing entity, who might otherwise win a suit, to have to refile for the same relief later, despite any wrongdoing in the present case.

Finally, and again as we have discussed in prior research, we note that foreclosing entities cannot be said to have earned the sympathies of foreclosure courts to merit such one-sided examinations of the equities of a given case.³²⁸ In other words, one cannot reasonably say that strategic homeowners knowingly and wittingly created a backlog on court systems in an effort to bilk lenders out of money despite banks' best efforts to assist.³²⁹ While ample evidence certainly exists to suggest that many homeowners defaulted strategically,³³⁰ the far more accurate scenario writ large is that millions of Americans faced financial hardship through no fault of their own.³³¹

Banks, lenders, and their attorneys, by contrast, have earned every bit of disapprobation received in the past decade.³³² Even if courts ignored the substantial research on bank misconduct in the years before the great recession, courts would have to be exceptionally inattentive not to have noticed a similar amount of reportage on attorney misconduct in foreclosure litigation:

Among a host of problematic practices, foreclosure attorneys have been cited for signing documents on behalf of servicers without having the authority to do so, changing affidavits without knowledge of servicers, filing a myriad of false or inappropriate claims in pleadings, filing documents signed by attorneys who had already left the firm, signing blank documents with information to be filled in later, repeatedly missing hearings without notifying other parties or the court, and ignoring notarization requirements.³³³

³²⁷ See *supra* Section III.C.

³²⁸ See *A Standing Question*, *supra* note 17, at 711.

³²⁹ *Id.* at 710.

³³⁰ Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 979 (2010).

³³¹ *Id.* at 976–77.

³³² See generally *Robo-Litigation*, *supra* note 22, at 888–90 (listing numerous examples of misconduct by attorneys representing banks and servicers).

³³³ *Id.* at 869–70 (citations omitted).

Yet, despite these many documented problematic practices, it appears that recent jurisprudence clings to the notion that precluding a bank or servicer's ability to collect on a loan is the most serious equitable consideration courts face in foreclosure.³³⁴ This ignores the pertinent and troubling issues of whether or not a bank or servicer is the proper party to sue, is seeking unsubstantiated damages or charges, or is bringing a claim when previous suits were dismissed for flagrant misconduct.³³⁵

Even in cases specifically discussing acceleration, *res judicata*, and statutes of limitation, banks and foreclosing entities behave opportunistically and have done so for as long as cases have been reported on such issues.³³⁶ Again, even though in these specific sub-areas of foreclosure litigation jurisprudence, it is homeowners who are not seen to have equity on their side.³³⁷ The expansion of the exceptions to *res judicata*, the double dismissal rule, and statutes of limitation are simply more evidence of the pervasive view among the judiciary that equities in foreclosure cases only lie with banks and lenders.³³⁸

D. Inefficient Efficiency

As we have noted here and in previous research, judges and court administrators seem to be wedded to the idea that speeding up foreclosure cases is the only optimal policy.³³⁹ Yet, we have noted, this approach, as with the other housing crisis issues driven largely by a demand for faster results, is ultimately shortsighted.³⁴⁰ Although a longer foreclosure process costs lenders and servicers more, these costs may help incentivize servicers to settle more cases, rather than enduring a long slog through the court system.³⁴¹ Similarly, the longer time period may assist borrowers in bolstering their financial resources or in weathering a financial hardship, again making settlement more likely.³⁴²

Even if a more efficient foreclosure system were recognized as the most important goal of foreclosure litigation, rather than fact finding, the efficiency arguments are completely undercut by the factual circumstances that give rise to the burgeoning foreclosure statute of

³³⁴ See *Fairbank's Capital Corp. v. Milligan*, 234 F. App'x 21, 24 (3d Cir. 2007); *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1007–08 (Fla. 2004).

³³⁵ See *supra* text accompanying notes 318–19.

³³⁶ See *supra* text accompanying notes 305–06, 312–13.

³³⁷ See *supra* text accompanying notes 314–19.

³³⁸ See *supra* text accompanying notes 314–19.

³³⁹ *Robo-Litigation*, *supra* note 22, at 867.

³⁴⁰ *A Standing Question*, *supra* note 17, at 730.

³⁴¹ *Id.*

³⁴² *Id.*

limitations jurisprudence.³⁴³ On one hand, we have noted that judges may give little attention to borrower defenses or discovery because of this unceasing drive for speed and efficiency in court systems.³⁴⁴ On the other hand, the mere fact that a foreclosure action faces a five-year statute of limitations bar potentially signals a significant level of incompetence, nonfeasance, or malfeasance on the part of banks and their attorneys. A typical judicial state foreclosure may only produce one or two witnesses and five to ten exhibits, and such trials typically do not entail jury selection.³⁴⁵ It is unclear then, in this fact pattern, why the efficiency argument would lie in favor of the party that was not prepared for trial or had its case dismissed after years and years of litigation.

Allowing banks to continuously refile these cases only incentivizes the leisurely and cavalier manner in which their attorneys have prosecuted actions in the past.³⁴⁶ If banks were certain that statute of limitations defenses would apply in a dismissal of a cause proceeding for longer than five years, one would expect banks to wait to file their cases until absolutely ready to prosecute, and would not require more than five years to obtain a judgment or dismissal.

Similarly, affording foreclosing banks the exceptions to claim preclusion we have explored herein further incentivizes the shoddy work that created such large numbers of dismissals.³⁴⁷ As with the statute of limitations, if banks knew that they would not be able to bring unlimited lawsuits, they would be less apt to file questionable suits based on questionable documents that get dismissed and ultimately waste the time and resources of the court and all parties. Ultimately, however, it seems that the fact that a foreclosure case might take more than five years is seen more as a result of homeowners' dilatory tactics (which should not be rewarded), rather than incompetence on the part of foreclosing entities (which for practical purposes is ignored when creating exceptions for the statute of limitations and *res judicata*).³⁴⁸

³⁴³ See *supra* Section III.C.

³⁴⁴ See Allen, *supra* note 5; *supra* text accompanying note 294.

³⁴⁵ See Petition for Writ of Certiorari, *supra* note 11, at 24.

³⁴⁶ See *supra* notes 332–33 and accompanying text.

³⁴⁷ See, e.g., *Deutsche Bank Tr. Co. Ams. v. Beauvais*, 188 So. 3d 938, 969 (Fla. Dist. Ct. App. 2016) (Scales, J., dissenting) (“The expiration of a statute of limitations, however, generally results in a windfall for the escaping defendant. In my view, neither the moral imperative that borrowers pay their obligations, nor *Singleton*, has abrogated decades of Florida jurisprudence governing the statute of limitations in foreclosure cases.”).

³⁴⁸ See generally Petition for Writ of Certiorari, *supra* note 11, at 16 (arguing that the mass foreclosure docket has revealed judicial bias against mortgagors).

IV. CONCLUSION

We have described elsewhere the myriad of actors who either ignored, downplayed, or incentivized problematic practices in foreclosure litigation.³⁴⁹ These include the government-sponsored entities retaining attorneys for foreclosure based on speed ratings, state bar associations ignoring misconduct for years, and state attorneys general completing showpiece settlements with banks and servicers that did not require substantial reforms.³⁵⁰ In theory, at least in judicial foreclosure states, judges might be, or ought to be, the preeminent disciplinarian in the foreclosure process. It is judges who see daily the human misery in-part created by banks' lending policies leading up to the Great Recession, and it is judges who see the questionable, and in many cases, outrageous conduct in the prosecution of foreclosure claims.³⁵¹ And it is only judges' orders, rulings, and jurisprudence that could eliminate the most common malfeasance in foreclosure litigation. Yet, we have posited here and in previous research that judges largely previewed foreclosure cases to the detriment of borrowers, set up a system to process foreclosure cases in a less scrutinizing fashion than other comparable civil litigation that encourages that very previewing, and have narrowed borrower defenses and expanded anti-bank exceptions to longstanding rules.³⁵²

We note that the fact that a state provides judicial review of foreclosures or is a power-of-sale state is a product of the state legislature.³⁵³ We also note that the applicable statute of limitations is created by the legislature.³⁵⁴ Yet, by individually previewing cases, creating a system designed for efficiency rather than truth-seeking, and downplaying debtor defenses while expanding exceptions for banks so as to be meaningless, the judiciary in many instances has short-circuited these legislative creations. Our findings lead us to believe that, if given a choice, many judges overseeing foreclosure cases in judicial-foreclosure jurisdictions would simply do away with the legislative creation of judicial foreclosure altogether, and, to some extent, they may already have substantively succeeded.

³⁴⁹ See, e.g., White, *supra* note 6, at 414.

³⁵⁰ See, e.g., *A Standing Question*, *supra* note 17, at 730.

³⁵¹ Matt Taibbi, *Invasion of the Home Snatchers*, ROLLING STONE (Nov. 10, 2010), <http://www.rollingstone.com/politics/news/matt-taibbi-courts-helping-banks-screw-over-homeowners-20101110>.

³⁵² See, e.g., *A Standing Question*, *supra* note 17, at 727.

³⁵³ See Alexander et al., *supra* note 63, at 342–43.

³⁵⁴ See FLA. STAT. § 95.281 (2017).