EMORY | LAW

Emory Law Journal

Volume 67 | Issue 6

Article 8

2018

Kicked While They're Down: Deficiency Judgments and the Great Recession

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Recommended Citation

Ariel Olson, *Kicked While They're Down: Deficiency Judgments and the Great Recession*, 67 Emory L. Rev. 1273 (2018).
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KICKED WHILE THEY'RE DOWN: DEFICIENCY JUDGMENTS AND THE GREAT RECESSION

ABSTRACT

In the District of Columbia and forty-two states, if a borrower defaults on her mortgage payments, the lender may be able to take more than just her home. If the foreclosed property sells for less than the total amount of outstanding debt, the lender can file a claim for the outstanding balance to obtain a deficiency judgment.

When the economy is in crisis and housing prices are depressed, deficiency judgments can reach hundreds of thousands of dollars. Lenders can wait to collect these judgments until interest has accrued, further increasing the hardship on the defaulting borrower. For most borrowers who default because they can no longer afford their loans, a deficiency judgment is unmanageable—their only option is to file for bankruptcy.

State legislatures enacted various forms of anti-deficiency laws after the foreclosure crisis of the Great Depression, with the goal of protecting borrowers from losing their homes and being forced to file for bankruptcy by deficiency judgments. However, fewer than ten states currently have laws that achieve this goal for all residential borrowers who default due to financial hardship.

Although some scholars argue that prohibiting deficiency judgments will lead to increased strategic default by borrowers who still have the financial resources to make their monthly payments, several recent studies discount this hypothesis. The ability of lenders to predict and protect themselves from losses related to borrower default, as well as the increase in predatory lending practices leading unsuspecting borrowers to take out unsustainable loans, necessitate a legislative response. This Comment argues that states have a valid interest in protecting their citizens from financial ruin—and in encouraging recovery over punishment—and should enact legislation prohibiting deficiency judgments for residential borrowers.

INTRODUCTION 1275
I. BACKGROUND 1278
A. Mortgage and Foreclosure Basics 1278
B. Borrower's Rights of Redemption 1281
C. Evolution of State Mortgage Law 1283
D. The Great Recession 1284
II. STATE LAWS 1287
A. The Three Broad Categories 1288
B. Anti-Deficiency Variations 1289
C. No Limit: New Hampshire & Maryland 1292
D. Confirmation Requirements & Statutory Redemption: Georgia & Iowa 1295
E. Prohibitions: Oregon & North Dakota 1299
III. RESIDENTIAL BORROWERS NEED PROTECTION FROM DEFICIENCY JUDGMENTS 1303
A. The Original Goal of Depression-Era Statutes Remains Important 1303
B. Borrowers Do Not Walk Away Willingly 1304
C. Borrowers Are Still Vulnerable to Predatory Practices 1307
D. Modified Anti-Deficiency Laws Do Not Protect Borrowers 1309
CONCLUSION 1310

INTRODUCTION

Jose Santos Benavides had finally achieved the American dream.[1] After emigrating from El Salvador to the United States, he worked for years as a landscaper before he had saved enough money to make a down payment on a four-bedroom home in Rockville, Maryland in 2007.[2] Unfortunately, the economy took a downturn over the next year, and Benavides was unable to make his monthly mortgage payments.[3] By the end of August 2008, Benavides and his family moved out of their dream home and into a cramped two-bedroom apartment, just days before the bank foreclosed on their home.[4] In 2011, Benavides was shocked to learn that he still owed $115,000—for a mortgage on a home his family had not set foot in in over three years.[5]

In the District of Columbia and forty-two states, if the sale of the foreclosed home does not yield enough money to cover the entire mortgage debt, the lender[6] can sue the borrower in a personal action to recover the remaining balance, also called the deficiency.[7] If the lender succeeds, it is awarded a deficiency judgment, and can collect from any of the borrower's other assets or income.[8] Many borrowers, Benavides included,[9] do not understand that they may lose more than their homes if they cannot make their mortgage payments.[10] In times

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1 Kimbriell Kelly, *Lenders Seek Court Actions Against Homeowners Years After Foreclosure*, WASH. POST (June 15, 2013), https://www.washingtonpost.com/investigations/lenders-seek-court-actions-against-homeowners-years-after-foreclosure/2013/06/15/3c6a04ce-96fc-11e2-b68f-dc5c4b47e519_story.html.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 In this Comment, the term "lender" refers to the party who loaned funds and is synonymous with "mortgagee" or "creditor." The lender is also known as the mortgage originator. "Borrower" refers to the individual who receives the loaned funds, synonymous with "mortgagor" or "debtor." Often, the lender will sell the mortgage after origination. In that case, a third party will be the one to file the deficiency action. Except where otherwise noted, lender will be used generally to refer to the party seeking to recover the mortgage debt, even if that party was not the originator of the loan. For further discussion, see *infra* Part I.

7 In some states, lenders can sue the borrower in a personal action before foreclosing on the mortgaged property. The laws that enable this option are discussed in further detail, *infra*, Part II.

8 Some states do not allow lenders to garnish wages to collect a deficiency judgment. *See, e.g.*, S.C. CODE ANN. § 37-5-104 (2015).

9 *See* Kelly, *supra* note 1.

10 *See* Debra Pogrund Stark et al., *Dodd-Frank 2.0: Creating Interactive Home-Loan Disclosures to Enable Shrewd Consumer Decision-Making*, 27 LOY. CONSUMER L. REV. 95, 126–27 (2014) (surveying borrowers' knowledge of the actions available to mortgage lenders in case of default).

of economic crisis, this loss may be insurmountable:[11] in 2011, for example, the average deficiency balance remaining after foreclosure in seven states was $100,000.[12]

Although the market has recovered in part since the worst of the financial crisis,[13] deficiency judgments remain a serious problem for many residential borrowers.[14] They have a harmful effect on borrowers like Benavides who default on their mortgage payments due to job loss or other financial hardship.[15] When the process server gave him notice of the $115,000 deficiency, Benavides was terrified.[16] He explained, "I can't pay."[17] Shortly thereafter, just five days before Christmas, Benavides filed for bankruptcy.[18]

Some scholars argue that lenders must be allowed to pursue deficiency judgments to deter borrowers from engaging in what is known as strategic (or "ruthless") default.[19] A borrower is said to engage in strategic default when she decides to stop making her mortgage payments despite having the financial

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[11] *See* JOHN RAO & GEOFF WALSH, FORECLOSING A DREAM: STATE LAWS DEPRIVE HOMEOWNERS OF BASIC PROTECTIONS 3, 5 (2009).

[12] *See* Jessica Silver-Greenberg, *House Is Gone but Debt Lives On*, WALL ST. J. (Oct. 1, 2011), http://www.wsj.com/articles/SB10001424053111904060604576572532029526792. Even in a stable housing market, a house sold at a foreclosure sale usually fetches a lower price than it would if listed through traditional channels. *See infra* Part I.

[13] *See* Andrea Riquier, *The Lopsided Recovery in the Housing Market*, MARKETWATCH (Dec. 19, 2016, 4:06 PM), http://www.marketwatch.com/story/the-lopsided-recovery-in-the-housing-market-2016-12-19; *see also* BD. OF GOVERNORS OF THE FED. RESERVE SYS., FINANCIAL ACCOUNTS OF THE UNITED STATES: THIRD QUARTER 2016 i (2016) (noting an increase in household net worth since 2008). Riquier argues that the financial accounts released by the Federal Reserve in early December 2016 show an incomplete picture of the U.S. housing market: although net worth reached an "all-time high," and home equity rose to "just a hair below its level in 2006," this overlooks the "hollowed-out middle class" and borrowers with mortgages almost underwater. Riquier, *supra*.

[14] This Comment focuses on a narrow group of borrowers: those with a mortgage loan secured by the borrower's primary residence. Mortgage loans made to purchase investment properties or vacation homes are excluded, unless otherwise noted.

[15] *See generally* Ron Harris & Asher Meir, *Non-Recourse Mortgages—A Fresh Start*, 21 AM. BANKR. INST. L. REV. 119 (2013) (discussing the advantages of state laws that prohibit deficiency judgments).

[16] *See* Kelly, *supra* note 1.

[17] *Id.*

[18] *Id.*

[19] *See, e.g.*, Grant S. Nelson & Gabriel D. Serbulea, *Strategic Defaulters Versus the Federal Taxpayer: A Brief for the Preemption of State Anti-deficiency Law for Residential Mortgages*, 66 ARK. L. REV. 65 (2013); Dov Solomon, *From the Great Depression to the Great Recession: On the Failure of Regulation in the Mortgage Market*, 42 J. LEGIS. 162 (2016).

resources to do so.[20] These scholars argue that without the threat of deficiency judgments, borrowers will simply walk away from their mortgages when the value of the home drops too far below the outstanding debt balance.[21] However, the most recent empirical studies addressing this subject find that borrowers are not more likely to engage in strategic default in states that prohibit deficiency judgments.[22]

This Comment proposes that the lender's remedy after a residential borrower defaults should be limited to foreclosure of the mortgaged real estate.[23] A few states already have laws to this effect: what are commonly called anti-deficiency laws, or non-recourse laws.[24] Anti-deficiency laws emerged during the Great Depression to help alleviate some of the financial hardship faced by borrowers nationwide.[25] The goal was to protect borrowers from losing their homes and being pushed toward filing for bankruptcy by the imposition of a deficiency judgment.[26] This rationale remains sound. Even when the economy is relatively stable, deficiency judgments work an unnecessary hardship on residential borrowers. Lenders are in a better position to reduce their exposure to losses

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[20] *See* Nelson & Serbulea, *supra* note 19, at 66. Nelson and Serbulea note that strategic default is often defined more narrowly to require a borrower to go from current on her mortgage payments to 180 days late, while remaining current on all her other non-mortgage debts. *Id.* at n.6 (citing Brent T. White, *Take This House and Shove It: The Emotional Drivers of Strategic Default*, 63 SMU L. REV. 1279, 1284 (2010)).

[21] *See, e.g.*, Nelson & Serbulea, *supra* note 19. When the value of the home is below the total outstanding debt balance, the home is said to have "negative equity." This is also referred to as being "underwater."

[22] *See, e.g.*, Neil Bhutta et al., *Consumer Ruthlessness and Mortgage Default During the 2007 to 2009 Housing Bust*, 72 J. FIN. 2433, 2436 (2017); Wenli Li & Florian Oswald, *Recourse and Residential Mortgages: The Case of Nevada* 3 (Fed. Reserve Bank of Phila., Working Paper No. 15-02, 2015); Tien Foo Sing et al., Impact of Foreclosure Laws on Mortgage Loan Supply and Performance 6 (Sept. 11, 2016) (unpublished manuscript), http://ssrn.com/abstract=2837333. This is because household default decisions are based on more than just equity and the legal remedies available to the lender.

[23] This proposal is limited to residential borrowers with mortgages secured by single-family, owner-occupied primary residences. Although this will typically involve a purchase money mortgage—where the loaned funds were used to finance the purchase of the residence—it should also apply to refinanced loans. For further discussion of purchase money mortgages, see *infra* Part III. Guarantor liability, however, is beyond the scope of this Comment.

[24] In this Comment, the term "non-recourse state" will refer to a state that prohibits lenders from seeking deficiency judgments after foreclosing on a residential borrower's mortgaged real estate.

[25] *See* FRANK S. ALEXANDER ET AL., GEORGIA REAL ESTATE FINANCE AND FORECLOSURE LAW § 9:1, Westlaw (database updated Oct. 2016).

[26] *See id.*

from default prior to originating residential mortgage loans.[27] Lenders are also better able to absorb post-default losses due to declining property values.[28]

This Comment proceeds in three parts. Part I describes the basic attributes of mortgage loans and state foreclosure procedures that make deficiency judgments possible. Part I also discusses the origins of anti-deficiency laws during the Great Depression and explains the rationale behind the laws at the time. Finally, Part I concludes by briefly explaining why deficiency judgments were particularly staggering in the wake of the 2008 financial crisis. Part II reviews in more detail the different types of anti-deficiency laws that have remained in place since the Great Depression. Part II also discusses the laws of six jurisdictions in more detail to highlight the disparities in borrower protection between different statutory schemes. Part III presents the most compelling arguments for prohibiting deficiency judgments after residential foreclosure. Finally, Part III analyzes and responds to the main arguments offered against such prohibitions.

I. BACKGROUND

This Part first describes the two components of a mortgage loan, the process of foreclosure, and the two most common types of foreclosure used in the United States. Next, it describes redemption, the process by which a borrower may save her home, both before and after a foreclosure sale. It then discusses the origins of anti-deficiency laws during the Great Depression. Finally, it reviews the factors that contributed to increased instances of deficiency judgments during the Great Recession.

A. *Mortgage and Foreclosure Basics*

A mortgage is created when a lender provides funds to a borrower in exchange for two assets: the borrower's promise to repay the loan, and the transfer of a security interest in real property as collateral for that promise.[29] This

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27 *See, e.g.*, Kristen Barnes, *"Pennies on the Dollar": Reallocating Risk and Deficiency Judgment Liability*, 66 S.C. L. REV. 243, 246 (2014); Ron Harris & Asher Meir, *Recourse Structure of Mortgages: A Comparison Between the US and Europe*, CESIFO DICE REP., Winter 2015, at 15, 17; *cf.* John Mixon, *Deficiency Judgments Following Home Mortgage Foreclosure: An Anachronism that Increases Personal Tragedy, Impedes Regional Economic Recovery, and Means Little to Lenders*, 22 TEX. TECH L. REV. 1, 11 (1991) ("Mortgage lenders as a class have more money and power than borrowers. They dictate the terms of the particular contract and use law to force compliance by the less-powerful home buyer.").

28 *See* Mixon, *supra* note 27, at 17, 19–20.

29 *See* GRANT S. NELSON ET AL., REAL ESTATE FINANCE LAW 1 (6th ed. 2014). Although a mortgage can be created when funds are loaned in exchange for a promise to repay, coupled with a security interest in personal

is evidenced by two distinct legal instruments: a promissory note[30] and a security interest.[31] The promissory note represents the borrower's promise to perform an obligation—in this case, repay the money loaned by the lender.[32] The security instrument represents the lender's interest in the borrower's home—the real estate as collateral for her performance.[33] In the absence of any anti-deficiency laws, these instruments give rise to two different forms of liability if the borrower defaults. The promissory note gives rise to personal liability, which means that a judgment on the note can be collected from any of the borrower's assets or income.[34] The security instrument gives rise to an action in rem, which the lender exercises by foreclosing on the mortgaged property.[35]

There are two major methods of foreclosure used today: judicial foreclosure and nonjudicial foreclosure.[36] Judicial foreclosure is available in all United States jurisdictions,[37] and is the only method prescribed by statute in fifteen states.[38] Judicial foreclosure is usually more expensive and time-consuming than

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property, rather than real property, this Comment will not discuss the former. Specifically, this Comment will focus on mortgage loans created to fund the borrower's purchase of real property, in exchange for both the borrower's promise to repay, and a security interest in that same property. This type of mortgage is also known as a purchase money mortgage. *See id.*

[30] The Restatement notes that it can also be a contract or a bond. RESTATEMENT (THIRD) OF PROP.: MORTGS. intro. (AM. LAW INST. 1997).

[31] *See, e.g.*, NELSON ET AL., *supra* note 29, at 1. The security instrument has different names (and slightly different functions) in different jurisdictions. It is most commonly called a mortgage, a security deed, a deed of trust (or trust deed), or deed to secure debt. This Comment will use the term "mortgage" to generally refer to all security instruments, unless otherwise noted.

[32] *See id.*

[33] *Id.*

[34] *See id.* at 705–06.

[35] *Cf. id.*

[36] *Id.* at 8. A minor form, called strict foreclosure, provides for a direct transfer of the mortgaged property to the lender if the borrower does not have money to pay off the total balance owed by a certain date. *See id.* at 7–8. Only two states still commonly use a strict foreclosure proceeding: Connecticut and Vermont. *See* CONN. GEN. STAT. ANN. § 49-24 (West 2017); VT. STAT. ANN. tit. 12, § 4941 (West Supp. 2017); RESTATEMENT (THIRD) OF PROP.: MORTGS. § 3:1 cmt. a (AM. LAW INST. 1997).

[37] *See* BAXTER DUNAWAY, LAW OF DISTRESSED REAL ESTATE § 13:3, Westlaw (database updated Nov. 2017).

[38] These states are: Connecticut, Delaware, Florida, Illinois, Indiana, Kentucky, Louisiana, Maryland, New Jersey, New York, North Dakota, Ohio, Pennsylvania, and Wisconsin. *See* CONN. GEN. STAT. ANN. § 49-24; DEL. CODE. ANN. tit. 10, § 5061 (West Supp. 2018); FLA. STAT. ANN. § 702.01 (West 1994); 735 ILL. COMP. STAT. ANN. 5/15-1405 (West 2011); IND. CODE ANN. §§ 32-29-1-2 to -3 (West 2013); KY. REV. STAT. ANN. § 426.005 (West 2006); LA. CODE CIV. PROC. ANN. arts. 2631, 3721, 3722 (2002 & 2003); MD. CODE ANN., REAL PROP. §§ 14-204, -207(2) (West 2012 & Supp. 2017); N.J. STAT. ANN. § 2A:50-2 (West 2014); N.Y. REAL PROP. ACTS. LAW § 1301 (McKinney 2009); N.D. CENT. CODE ANN. § 32-19-01 (West 2008); OHIO REV. CODE ANN. §§ 2323.07, 2329.01 (West 2017); PA. R.C.P. NO. 1141(a); WIS. STAT. ANN. § 846.01 (West 2007). New Jersey

nonjudicial foreclosure because it requires the "normal incidents of litigation": service of process, filing a complaint, a full trial, and a court-supervised sale.[39] Nonjudicial foreclosure requirements vary by state: some only require notice by publication,[40] while others require mailed notice to all parties with a junior interest in the mortgaged real estate.[41] Lenders usually foreclose through nonjudicial foreclosure pursuant to a "power of sale" provision in the mortgage document.[42] For that reason, nonjudicial foreclosure is often referred to as power of sale foreclosure.

Judicial foreclosure is thought to offer better protection to borrowers during the foreclosure process for several reasons.[43] First, because it usually has a longer timeline than nonjudicial foreclosure,[44] the borrower has more time to find alternate housing.[45] Second, because a full judicial hearing is required, the borrower is better able to defend against improper or fraudulent foreclosure, or cure the default before judgment, if financially possible.[46] Third, because of the

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allows a lender to foreclose without sale under certain circumstances. *See* N.J. STAT. ANN. §§ 2A:50-63, -73 (West 2014). Maryland technically allows foreclosure pursuant to a power of sale, but requires the mortgagee to file an order to commence proceedings. *See* MD. CODE ANN., REAL PROP. § 7-105(b) (West 2012); MD. CODE ANN., MD RULE § 14-207(1) (West 2015). North Dakota only allows foreclosure of mortgages containing a power of sale provision if they are held by the state or state agencies. *See* N.D. CENT. CODE ANN. § 35-22-01 (West 2008). Although Maine and Vermont provide by statute for a nonjudicial foreclosure process, both states prohibit its use to foreclose a mortgage secured by a residential dwelling. *See* ME. REV. STAT. ANN. tit. 14, § 6203-A(1) (Supp. 2016); VT. STAT. ANN. tit. 12, § 4961 (West Supp. 2017).

[39] *See* GRANT S. NELSON ET AL., LAND TRANSACTIONS AND FINANCE 320 (5th ed. 2016). Judicial foreclosure is thought to produce "the most marketable title." *Id.*

[40] *See id.* at 320, 329. A sheriff or other public official often conducts the sale. *Id.* If the mortgage form used is a deed of trust, then a trustee will conduct the sale. *Id.* at 320, 333.

[41] *See id.* at 320, 329. These are called necessary parties. *See id.* at 322–23. A necessary party is anyone with an interest in the property that will be terminated by proper foreclosure; any creditor who holds a lien on the property that is subordinate to the mortgage being foreclosed is considered a necessary party. *See id.* at 323. These creditors are most often other lenders that originated a second or a third mortgage on the property. The reason that subordinate, or junior, liens are terminated by foreclosure is to allow the foreclosure sale purchaser to acquire the land in the same state it was in when the borrower acquired it, just before the first mortgage was created—i.e., completely unencumbered. *See id.* at 322–23. If junior lienors are not made parties to the judicial foreclosure proceeding (or not given notice of a nonjudicial foreclosure sale) they are said to be omitted junior lienors (OJLs), and their interests are *not* terminated by the foreclosure. *Id.* at 325. OJLs can either foreclose on their liens or exercise their right to redeem by paying off the senior mortgage; redemption gives them ownership of the senior debt, not the land, as it would if the mortgagor was the redeeming party. *Id.* at 326.

[42] *See id.* at 320. Some states do not require a power of sale provision for the lender to foreclose nonjudicially. *See, e.g.*, VA. CODE ANN. § 55-59(7) (West 2010); W. VA. CODE ANN. § 38-1-3 (West 2002).

[43] *See* RAO & WALSH, *supra* note 11, at 12, 42–43.

[44] *See* NELSON ET AL., *supra* note 39, at 320–21.

[45] *See supra* note 39 and accompanying text.

[46] *See* RAO & WALSH, *supra* note 11, at 11–13, 20–22, 29, 30.

judicial supervision, the sale price may be higher than it would be with a nonjudicial foreclosure.[47] Several states only allow deficiency actions after judicial foreclosure to discourage mortgagees from selecting the less borrower-friendly nonjudicial foreclosure.[48]

In practice, both judicial and nonjudicial foreclosure proceedings usually fail to bring an adequate sale price for the foreclosed property.[49] The lender has several advantages over potential third-party bidders, and is frequently the only party in attendance at the sale.[50] The lender can bid up to the amount the borrower owes without using any cash, while the third party will incur an "out-of-pocket expense from the first dollar bid."[51] Although foreclosure statutes require the lender to advertise the sale, in many areas the notice is published in a legal newspaper that is not widely read.[52] Even if the advertisement includes all of the information required by statute, it may still be too technical for the average third party to determine what property is being offered for sale.[53] Third parties may also be discouraged from bidding on foreclosed real estate because they doubt the quality of the title being auctioned.[54] They may also have a difficult time inspecting the property prior to the sale if the borrower occupying the property is uncooperative.[55] Statutory rights of redemption, discussed in the next section, can also discourage third-party bidding.

B. Borrower's Rights of Redemption

Whether the lender uses judicial or nonjudicial foreclosure, the borrower may "redeem" the property prior to foreclosure by tendering the full balance

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[47] *See id.* at 39. Some states require the court to set a minimum bid amount for the sale based on the appraised value of the real estate. *See id.* Other states require judicial review of the sale before ratification. *See id.* at 12, 42–44.

[48] *Cf.* Barnes, *supra* note 27, at 255–57, 269, 271 n.167; Harris & Meir, supra note 15, at 124 n.21 (describing a similar approach under California law).

[49] *See* Grant S. Nelson, *The Impact of Mortgagor Bankruptcy on the Real Estate Mortgagee: Current Problems and Some Suggested Solutions*, 50 MO. L. REV. 217, 248 (1985).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.*

[55] *Id.* Nelson notes that although it is probably in the borrower's interest to allow third parties to see the property—especially if the borrower has made improvements since moving in—one can imagine why she might be less than inviting to these potential purchasers. *See id.* The borrower may assume that third parties who visit her property are agents of her lender, there to evict or harass her for money she does not have, and may be too fearful or angry to come to the door to learn otherwise.

due.[56] This right is known as the borrower's equity of redemption, and its existence is sacrosanct in American mortgage law.[57] The borrower's equity of redemption terminates upon foreclosure.[58] A few states provide for a corollary redemption right that begins at the time of foreclosure: the statutory right of redemption (SRR). Unlike the equity of redemption, which is exercised by tendering the full mortgage debt owed to the lender, the SRR has a potentially lower price tag. A borrower may redeem the property under an SRR by tendering the foreclosure sale price.[59] The statutory period ranges from thirty days up to a full year following the sale.[60]

SRRs are thought to not only benefit borrowers during the foreclosure process, but also to provide post-foreclosure protection from deficiency judgments, for a few reasons. The borrower may have more time to find alternate housing before she is forced to vacate the property. She may even redeem the property at a discount, if the foreclosure sale price was much lower than the total debt balance. Conversely, the threat of borrower[61] redemption is thought to encourage competitive bidding by parties attending the sale, who wish to avoid losing the property during the post-foreclosure statutory period.[62] Some states that offer statutory periods of redemption also use this right as a replacement for an effective anti-deficiency law.[63]

SRRs rarely accomplish their intended goals. Borrowers who default on their mortgage payments are rarely illiquid for a short time. To illustrate: Benavides, his wife, and their two daughters were still living in a cramped two-bedroom

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[56] *See* RESTATEMENT (THIRD) OF PROP.: MORTGS. §§ 3:1, 6:4 (AM. LAW INST. 1997).

[57] *See* GRANT S. NELSON ET AL., REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT: CASES AND MATERIALS 126–29 (9th ed. 2015); *see also* RESTATEMENT (THIRD) OF PROP.: MORTGS. §§ 3:1, 6:4 (AM. LAW INST. 1997).

[58] *See* RESTATEMENT (THIRD) OF PROP.: MORTGS. §§ 3:1, 6:4 (AM. LAW INST. 1997); *see also* NELSON ET AL., *supra* note 57, at 128–29.

[59] *See* NELSON ET AL., *supra* note 29, at 9.

[60] *See, e.g.*, KAN. STAT. ANN. § 60-2414(a) (West Supp. 2016) (providing for a twelve-month statutory redemption period); *cf.* S.C. CODE ANN. § 15-39-720 (2005) (providing that the sale "shall remain open" to other bidders, including the lender, for thirty days after the day of the judicial sale).

[61] The borrower is not the only party who may exercise a statutory right of redemption. *See* S.C. CODE ANN. § 15-39-720. Other creditors may also redeem the property during the statutory period, depending on the state. Some states provide for an exclusive period of borrower redemption, before allowing other creditors to redeem. *See, e.g.*, IOWA CODE ANN. § 628.3 (West 1999) (limiting redemption during the first six months following foreclosure to the borrower exclusively).

[62] *See* Nelson, *supra* note 49, at 248.

[63] *See, e.g.*, IOWA CODE ANN. § 654.26 (West 1995); MINN. STAT. ANN. § 582.32 (West 2010); *see also* Mixon, *supra* note 27, at 23 n.67; *infra* notes 123–27 and accompanying text.

apartment when the process server called more than three years after foreclosure.[64] He could not pay the deficiency judgment of $115,000, let alone the foreclosure sale price of $279,700.[65] Extending the redemption period by a month—or even a year—after foreclosure is not a realistic time frame for a borrower to recover her finances and redeem her home. Instead, SRRs put downward pressure on the foreclosure sale price by creating title uncertainty among potential third-party purchasers and by discouraging competitive bidding.[66]

C. Evolution of State Mortgage Law

Anti-deficiency laws emerged during the Great Depression in response to the widespread financial ruin plaguing borrowers.[67] Between 1928 and 1932, real estate lost over 50% of its value.[68] By 1933, the unemployment rate rose to 25%,[69] and the foreclosure rate almost quadrupled.[70] Not only were borrowers unable to make their mortgage payments, but their homes were also selling for nominal amounts at foreclosure sales, and lenders were suing for staggering amounts in deficiency actions. Often, this was a direct result of lender behavior: the lender would buy the property at foreclosure for well below market value before it obtained a deficiency judgment for the remaining debt balance.[71] Then, the lender would turn around and sell the property on the open market for a higher price, thus realizing a windfall, or "double recovery."[72] However, depressed housing prices also meant that the foreclosure sale was likely to produce a significant deficiency, even absent lender misconduct.

To protect borrowers from the devastation of both losing their homes and being forced into bankruptcy by deficiency judgments, state legislatures responded with a variety of different anti-deficiency laws.[73] The laws took

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[64] *See* Kelly, *supra* note 1.

[65] *See id.*

[66] *See* Nelson, *supra* note 49, at 248. SRRs may also lead to property deterioration if the borrower neglects upkeep or vacates the property before the end of the redemption period, another deterrent to potential bidders.

[67] *Cf.* David C. Wheelock, *Changing the Rules: State Mortgage Foreclosure Moratoria During the Great Depression*, 90 FED. RES. BANK ST. LOUIS REV. 569, 574 (2008).

[68] Tom Nicholas & Anna Scherbina, *Real Estate Prices During the Roaring Twenties and the Great Depression*, 41 REAL EST. ECON. 278, 280 (2013).

[69] *See* Wheelock, *supra* note 67, at 570.

[70] *See* Andra C. Ghent, *Securitization and Mortgage Renegotiation: Evidence from the Great Depression*, 24 REV. FIN. STUD. 1814, 1816 (2011). This rate refers to non-farm properties only. *Id.*

[71] *See* Solomon, *supra* note 19, at 170–71.

[72] *See id.*

[73] The different forms of anti-deficiency laws that developed are discussed in more detail, *infra* Part II.

different forms—some prohibited deficiency judgments outright, while others simply limited the amount a lender could recover—but the policy objectives were consistent: after the trauma of foreclosure, the borrower should not be hit with a crippling deficiency judgment.[74]

Lenders challenged the anti-deficiency laws as a violation of the U.S. Constitution, claiming the laws were an impermissible impairment of contracts by the states.[75] The Supreme Court disagreed,[76] more than once.[77] It distinguished between a contractual obligation and a contractual remedy, finding the latter outside the ambit of protection prescribed by Article I.[78] More importantly, the Court concluded that states have the authority under their police powers to modify "existing contract rights" as necessary to protect their citizens.[79] This power may be used to "protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts."[80]

D. The Great Recession

The Great Recession has illuminated the need for re-evaluation of state foreclosure laws. Although the arguments in favor of banning deficiency judgments may be more persuasive during a widespread foreclosure crisis, the need to protect borrowers from foreclosure and unnecessary financial ruin does not disappear as the economy recovers.[81] Unfortunately, very few states seized the opportunity to revisit their laws related to residential mortgage foreclosure. The changed nature of residential mortgage lending since the Great Depression makes it even more important to protect borrowers from the unnecessary hardship of a deficiency judgment. Today there are more ways for lenders to induce borrowers into taking out unsustainable loans that inevitably lead to

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[74] *See* ALEXANDER ET AL., *supra* note 25, § 9:1.

[75] *See* Mixon, *supra* note 27, at 58–59; *see also* U.S. CONST. art. I, § 10, cl. 1.

[76] *See* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

[77] *See* Gelfert v. Nat'l City Bank of N.Y., 313 U.S. 221 (1941); Honeyman v. Jacobs, 306 U.S. 539 (1939).

[78] *See Blaisdell*, 290 U.S. at 429 n.8 (citation omitted).

[79] *See id.* at 437.

[80] *See id.* (quoting Manigault v. Springs, 199 U.S. 473, 480 (1905)). The court later held that this reasoning was valid even absent a declared state of emergency. *Gelfert*, 313 U.S. at 235.

[81] Determining whether the economy has recovered is outside the scope of this Comment, but reports show that the nationwide foreclosure rate has dropped since its peak in 2012. *See* CORELOGIC, NATIONAL FORECLOSURE REPORT NOVEMBER 2016 4 (2017) ("The foreclosure rate, currently at 0.8 percent, is back to June 2007 levels.").

severe negative equity and foreclosure.[82] These conditions developed in the mortgage industry over the course of the last century, contributing to both individual borrower hardship and the widespread financial collapse of the Great Recession.

Deregulation of the mortgage market occurred during the second half of the twentieth century, allowing the residential mortgage market to evolve from a conservative industry to one that tolerated (and often encouraged) riskier lending.[83] Deregulation helped alleviate the "immediate pressures" faced by the banking industry in the 1970s and 1980s.[84] But it also led to the adoption of less prudent underwriting standards, the proliferation of riskier types of mortgage loans, and a practice of targeting borrowers who did not have the ability to repay the debt they incurred.[85] Because lenders could securitize mortgages after origination, the risk of default was shifted to investors on the secondary market, and the traditional incentives for risk-averse lending were abated.[86] This, combined with government initiatives in the 1990s and early 2000s advocating for increased homeownership, led more individuals to seek out home mortgage loans.[87]

The increased demand for home mortgage loans was met with an increased supply in the form of predatory and subprime loan products.[88] Lenders induced borrowers who could not qualify for prime loans to instead take out adjustable-rate mortgages (ARMs) with low initial rates that increased substantially after a few years.[89] Borrowers were assured that they could refinance when the rates reset—at that point, the lenders returned and refinanced the loans with more fees

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[82] Negative equity—when the value of the mortgaged property is less than the total debt balance—is dangerous for borrowers because it often leads to a deficiency after foreclosure. If the borrower owes $200,000 on the loan, and the home has a market value of $160,000, the borrower is said to have $40,000 in negative equity. The foreclosure sale price is likely to be even lower than the estimated market value, putting the borrower in a recourse state at risk for a substantial deficiency judgment.

[83] *See, e.g.*, KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 16 (2011); Joseph William Singer, *Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How to Fix Them*, 46 CONN. L. REV. 497, 507 (2013). To be fair, deregulation occurred in part due to Congress's response to the "faltering" banking industry and the drought of real estate sales in the 1970s and early 1980s. *See* ENGEL & MCCOY, *supra*, at 16.

[84] *See* ENGEL & MCCOY, *supra* note 83, at 16.

[85] *See id.*

[86] *See id.* at 18.

[87] *See id.* at 20–21. The initiative began under President Clinton, and was then championed by President Bush when he took office in 2001 as the new "Ownership Society." *See id.*

[88] *See id.* at 22–25.

[89] *See id.* at 23.

that tacked onto the principal, raising the monthly payments.[90] In the subprime market, lenders would use a "bait and switch" technique to describe favorable loan terms to borrowers without making an actual offer;[91] when borrowers arrived at closing, closing agents would hurry them through a large stack of documents and dismiss concerns if they questioned any of the changed terms.[92] When major investment banks began buying subprime lenders in the early to mid 2000s, they claimed to put an end to the abusive practice the lenders had previously used.[93]

One of those investment banks, Lehman Brothers, was the lender who originated Benavides's loan.[94] Lehman Brothers had already filed for bankruptcy by the time Benavides was hit with the $115,000 deficiency.[95] Benavides had no idea why he was being sued three years after the foreclosure; after getting no information from an attorney in the suit and the process server, he finally called a local bank.[96] The bank told him there was nothing to be done.[97] Freddie Mac was the insurer for Benavides's loan, and—although it and Fannie Mae both claim to only pursue deficiencies when they suspect the borrower of strategic default[98]—it assigned Benavides's mortgage to Dyck-O'Neal for collection instead.[99]

Another change in the mortgage industry is the ability of lenders to sell loans once they are in various stages of delinquency, or to sell bundles of deficiencies after obtaining the judgments.[100] Lenders sell the distressed assets for "pennies

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[90] *See id.* After housing prices fell sharply, borrowers were unable to refinance their loans, and were left paying fixed interest rates as high as 18%. *See id.*

[91] Federal disclosure laws only prohibited lenders from changing the terms if they had made a "binding offer." *Id.* at 24.

[92] *See id.*

[93] *Id.* at 26. The former CEO of Lehman Brothers, Richard Fuld, testified before the House Committee on Government Oversight and Reform that when they bought the subprime lenders, "[they] changed management, [they] changed underwriting standards to make them much more restrictive, to improve the quality of the loans that we did in fact originate so that those loans that we did then put into securitized form would be solid investments for investors." *Id.*

[94] *See* Kelly, *supra* note 1.

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Deficiency Collections Overview*, FANNIE MAE (July 8, 2015), https://www.fanniemae.com/content/fact_sheet/deficiency-collections-overview.pdf; *see also* Kelly, *supra* note 1.

[99] *See* Kelly, *supra* note 1.

[100] *See* Gary Blankenship, *Foreclosure Deficiencies Less than Expected, but Still Raise Questions*, FLA. B. NEWS (Jan. 15, 2015), https://www.floridabar.org/news/tfb-news/?durl=/DIVCOM%2FJN%2Fjnnews01%2

on the dollar" because investors understand that most of the deficiencies are uncollectable.[101] One attorney representing sixty borrowers in Florida stated that none of his clients had the financial resources to pay the deficiencies Dyck-O'Neal sought to collect from them, which averaged around $100,000 each.[102] Some of these borrowers had moved out of state since their foreclosure, but Dyck-O'Neal sued them in Florida to collect unsecured debt; the borrowers' attorney asserted that this practice violated the Fair Debt Practices Act.[103]

Even if recent federal legislation and increased news coverage have reduced the instances of abusive lending and post-foreclosure practices, borrowers remain in need of protection. In the absence of lender misconduct, some borrowers will inevitably default on their mortgage payments due to unavoidable and unforeseeable financial constraints from job loss, unexpected medical bills, or death of an income-providing family member. While states may not be able to prevent these borrowers from losing their homes to foreclosure under such circumstances, they can protect them from the additional and unnecessary hardship of a deficiency judgment—a hardship regardless of whether it is pursued immediately following foreclosure, or just shy of twenty years later. The next Part highlights the dearth of borrower protections in many states.

II. STATE LAWS

This Part first breaks state anti-deficiency judgment laws into three broad categories: (1) states with no anti-deficiency laws, (2) states that ban deficiency judgments outright for certain groups of borrowers, and (3) states with modified forms of anti-deficiency laws. Then, it reviews the most common forms of modified anti-deficiency laws. Next, it discusses the laws in New Hampshire, Maryland, Georgia, and Iowa to highlight the inadequacy of residential borrower protection in those (and other similarly legislated) jurisdictions. Finally, for comparison, it discusses the anti-deficiency laws in North Dakota and Oregon, both of which provide an example of a statutory scheme that adequately protects residential borrowers.

Ensf%2Fcb53c80c8fabd49d85256b5900678f6c%2F665edb7b7c924db985257dc400481e98%21OpenDocument; *see also* Barnes, *supra* note 27, at 263–64 n.121 (citing Silver-Greenberg, *supra* note 12).

[101] Blankenship, *supra* note 100.

[102] *Id.*

[103] *Id.*

A. The Three Broad Categories

In the District of Columbia and Alabama, Delaware, Indiana, Kentucky, Missouri, New Hampshire, Rhode Island, Virginia, West Virginia and Wyoming, lenders can seek deficiency judgments with no limitations.[104] In this Comment, "no limitations" means that the legislation is either silent as to statutory limitations on deficiency judgments, or merely reiterates that lenders can seek a deficiency if the sale of the property does not cover the full balance of the debt. In Illinois, lenders can pursue deficiency judgments if they request it in the complaint, subject to judicial discretion.[105]

Arizona, California, Montana, Nevada, North Carolina, North Dakota, and Oregon prohibit deficiency judgments following foreclosure of either a specific type of mortgage, or specific type of secured property.[106] These are either purchase money mortgages, or mortgages secured by residential property. A purchase money mortgage is generally defined as a loan made to fund the unpaid purchase price of real property.[107] Purchase money mortgages are distinguished from mortgage loans a borrower acquires after purchasing her home, which may

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[104] *See* ALA. CODE § 35-10-1 (2014); DEL. CODE ANN. tit. 10, § 5065 (West 2006); D.C. CODE ANN. § 42-816 (West 2013); IND. CODE ANN. § 32-29-1-2 (West 2013) (allowing a deficiency judgment without limitation if the mortgage contains an express "covenant for the payment of the sum intended to be secured by the mortgage"); KY. REV. STAT. ANN. § 426.005 (West 2006); MO. ANN. STAT. § 443.420 (West 2000); N.H. REV. STAT. ANN. § 479:25 (Supp. 2017); 34 R.I. GEN. LAWS ANN. § 34-27-1 (West 2006); VA. CODE ANN. §§ 55-59, -61 (West 2010); W. VA. CODE ANN. § 38-1-7 (West Supp. 2017); WYO. STAT. ANN. §§ 1-18-113, 34-4-113(c) (West 2007); *see also* DUNAWAY, *supra* note 37, at app. 19A (2016) (describing Delaware law as having no "specific statutory provision" for deficiency judgments but that the "court controls this through confirmation of sale"); Grant S. Nelson, *Deficiency Judgments After Real Estate Foreclosures in Missouri: Some Modest Proposals*, 47 MO. L. REV. 151, 157 (1982) (discussing Missouri Law).

[105] *See* 735 ILL. COMP. STAT. ANN. 5/15-1511 (West 2011). Although one source suggests that deficiency judgments are rarely granted in Illinois because they are subject to judicial discretion, another scholar proposes that this pattern has changed in recent years. *Compare State Anti-deficiency Laws & Non-recourse Laws*, BILLS.COM (Feb. 18, 2015), https://www.bills.com/anti-deficiency (stating that deficiency judgments are rarely granted due to judicial discretion), *with* Barnes, *supra* note 27, at 249–50 (citing Honorable Mathias W. Delort, Assoc. Judge, Cook Cty. Circuit Court, Keynote Address at the University of Northern Illinois Law Review Symposium: The Mortgage Foreclosure Crisis (Apr. 20, 2012)) (noting that "[t]here is evidence to suggest that Illinois judges are moving away from this practice").

[106] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 33-725(B), -727(A), -729(A) (2014); CAL. CIV. PROC. CODE §§ 580b, 726(b) (West 2015 & Supp. 2018); MONT. CODE ANN. §§ 71-1-222(2), -232 (West 2009); NEV. REV. STAT. ANN. § 40.459(3) (West Supp. 2017); N.C. GEN. STAT. ANN. § 45-21.38 (West 2013); N.D. CENT. CODE ANN. § 32-19-03 (West 2008); OR. REV. STAT. ANN. § 88.103 (West Supp. 2017). Some of these states also have laws similar to the modified anti-deficiency laws discussed *infra* Section II.B.

[107] *See Purchase-Money Mortgage*, BANKRATE, https://www.bankrate.com/glossary/p/purchase-money-mortgage (last visited Mar. 21, 2018). Purchase money mortgages can be financed by a third-party lender, such as a bank, or by the individual who sells the property. This Comment focuses on third-party loans.

include a smaller second mortgage, or a refinanced first mortgage, or a home equity line of credit.

The remaining thirty-three states fall into the third broad category: they have a form of anti-deficiency legislation in place. These states limit lender access to deficiency judgments more than the states in category one, but offer far less protection to residential borrowers than the states in category two that ban deficiency judgments. These anti-deficiency variations were enacted at the same time as the outright bans, but reflect the choice of the state legislatures to only address a narrow part of the problem.

B. Anti-Deficiency Variations

Although no two states share the exact same catalogue of anti-deficiency laws, most fall into one of the following categories: (1) laws prohibiting deficiency judgments after nonjudicial foreclosure, (2) fair value laws, (3) time limitations to file a deficiency, (4) one action rules, and (5) laws that prohibit deficiency judgments if the lender chooses a shortened SRR.

Alaska, Hawaii, Oklahoma and Washington all prohibit deficiency judgments if the lender chooses nonjudicial foreclosure.[108] The rationale behind this type of anti-deficiency law is that the judicial foreclosure process benefits borrowers by providing them a longer time frame, a judicial hearing to protect them from improper or fraudulent foreclosure, and a higher foreclosure sale price.[109] In contrast, the states that prohibit lenders from seeking a deficiency judgment after nonjudicial foreclosure reason that lenders will rarely choose the judicial process because of the added cost; but if they do, borrowers will be protected from deficiency judgments because the sale price will be higher.[110] Although the added cost and inconvenience of judicial foreclosure may cause fewer lenders to seek deficiency judgments in these states, this type of statute offers no protections to the borrowers from whom they do seek to recover. The foreclosure sale price will likely still reflect the lack of competitive bidding at the auction, and the borrower will still be left without a home and with the crushing financial burden of a deficiency judgment.

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[108] *See* ALASKA STAT. ANN. § 34.20.100 (West 2007); HAW. REV. STAT. ANN. § 667-38 (West Supp. 2017); WASH. REV. CODE ANN. § 61.24.100(1) (West 2004). Oklahoma prohibits deficiency judgments after nonjudicial foreclosure if the property qualifies as a homestead and the borrower notifies the lender of this at least ten days prior to the sale. *See* OKLA. STAT. ANN. tit. 46, § 43(A)(2)(c) (West 2014).

[109] *See supra* Section I.A.

[110] *See supra* Section I.A.

Fair value laws limit the maximum amount that a lender can recover in a deficiency judgment.[111] They vary by state, but the most common approach is to limit the deficiency to the difference between the fair market value of the property and the total balance owed on the debt—even if the property sells at foreclosure for less than fair market value.[112] As of this writing, there are eighteen states that impose some type of fair value limit on the amount that a lender can recover in a deficiency judgment.[113] Although these statutes may lessen the hardship to the borrower imposed by a deficiency judgment, they will have no effect in a depressed market, in which the value of the borrower's home is still significantly less than the amount she owes. And even when these statutes do succeed in lessening the amount of the deficiency, they fail to achieve the goal of the states' respective legislatures: to protect borrowers from losing their homes and then being forced into bankruptcy by a deficiency judgment.[114]

Currently, fourteen states limit the time in which a lender can file a deficiency judgment after foreclosure and sale of the property.[115] The limits range from ninety days to six years.[116] Although these laws restrict the time that the lender has to *file* a claim for a deficiency, they do not similarly restrict the time the lender has to *collect* a deficiency judgment, if one is awarded. For example, although Maryland shortened its statute of limitations for filing a deficiency action from twelve to three years, it did not change the statutory

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[111] *See* Mixon, *supra* note 27, at 33–34.

[112] *See, e.g.*, ARK. CODE ANN. § 18-50-112(b)(2) (West 2004).

[113] *See id.*; COLO. REV. STAT. ANN. § 38-38-106(6) (West Supp. 2017); CONN. GEN. STAT. ANN. § 49-14(a) (West 2006); FLA. STAT. ANN. §§ 45.031(8), 702.06 (West Supp. 2017); GA. CODE ANN. § 44-14-161(a) (West 2003); IDAHO CODE ANN. §§ 6-101(1), -108, 45-1512 (West 2006); KAN. STAT. ANN. §§ 60-2415(b), -2417(b) (West 2008); NEB. REV. STAT. ANN. § 76-1013 (West 2009); N.J. STAT. ANN. § 2A:50-1 to -2 (West 2014); N.Y. REAL PROP. ACTS. LAW § 1371(1)–(2) (McKinney 2009); OHIO REV. CODE ANN. § 2329.20 (West Supp. 2017); OKLA. STAT. ANN. tit. 12, § 686 (West 2015); S.C. CODE ANN. §§ 29-3-660, -740 (2007); S.D. CODIFIED LAWS §§ 21-47-16, -48-14 (2004); TENN. CODE ANN. § 35-5-118(a)–(c) (West 2017); TEX. PROP. CODE ANN. §§ 51.003–004 (West 2014); UTAH CODE ANN. § 57-1-32 (West 2016); WIS. STAT. ANN. §§ 846.04(1), .10(1), .165(2) (West 2007 & Supp. 2017).

[114] *See* ALEXANDER ET AL., *supra* note 25, § 9:1.

[115] *See* ARK. CODE ANN. § 18-50-112(a)(1); CONN. GEN. STAT. ANN. § 49-14(a); GA. CODE ANN. § 44-14-161(a); IDAHO CODE ANN. §§ 6-101(1), 45-1512; MD. CODE ANN., REAL PROP. § 7-105.13(d) (West Supp. 2017); MD. CODE ANN., MD. RULES § 14-216(b) (West 2015); MASS. GEN. LAWS ANN. ch. 244, § 17A (West 2004); MISS. CODE ANN. §§ 11-5-111, 15-1-23 (West 2008 & 2013); NEB. REV. STAT. ANN. § 76-1013; N.J. STAT. ANN. § 2A:50-2; N.M. STAT. ANN. § 48-10-17(A) (West Supp. 2016); N.Y. REAL PROP. ACTS. LAW § 1371(2); OHIO REV. CODE ANN. § 2329.08 (West 2004); OKLA. STAT. ANN. tit. 12, § 686; TENN. CODE ANN. § 35-5-118(d); TEX. PROP. CODE ANN. §§ 51.003(a), .004(b); UTAH CODE ANN. § 57-1-32.

[116] *See, e.g.*, N.J. STAT. ANN. § 2A:50-2 (proscribing a ninety-day or three-month statute of limitations); N.M. STAT. ANN. § 48-10-17(A), (E) (proscribing a six-year statute of limitations).

period for judgment collection; the collection period is still twelve years, and lenders may extend it for another twelve years before the first period expires.[117]

The one-action-rules category encompasses three different, but related, types of anti-deficiency laws: (1) election-of-remedies rules, (2) security-first rules, and (3) one-action rules. Election-of-remedies rules require the lender to choose between foreclosure of the mortgaged property or an action on the note.[118] Security-first rules require the lender to exhaust the secured property before pursuing the borrower's unsecured assets.[119] They do not prohibit a deficiency judgment; they merely require the lender to foreclose and sell the property before filing a claim on the note for a deficiency.[120] One-action rules require the lender to assert all claims against the borrower in one action; these laws aim to protect the borrower from multiple actions that could have been settled at one time.[121] They do not, however, prohibit deficiency judgments by themselves. There is disagreement over the exact number of states with laws in one of these categories, but there is a general consensus that at least the following six states qualify: California, Idaho, Nevada, New Jersey, Oregon, and Utah.[122]

Finally, twenty-seven states grant borrowers an SRR after foreclosure.[123] The primary rationale for these grants is that SRRs result in much higher

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[117] *See infra* note 155 and accompanying text.

[118] *See, e.g.*, OR. REV. STAT. ANN. § 88.103 (West Supp. 2017); Banteir v. Harrison, 485 P.2d 1073, 1075 (Or. 1971) ("If the purchase money mortgagee elects to foreclose the mortgage, he is barred from bringing an action on the mortgage debt, or he may obtain a judgment on the mortgage debt, in which case he loses his mortgage lien." (citation omitted)). *But see* Magnolia Lumber Corp. v. Lithia Lumber Co., 404 P.2d 190, 193–94 (Or. 1965) (holding that the lender may foreclose on the mortgaged real estate *and* bring an action on the note if the mortgage was secured by both real and personal property at origination).

[119] *See* PATRICK E. MEARS ET AL., STRATEGIES FOR SECURED CREDITORS 136 (2d ed. 2012).

[120] *See id.*

[121] *See id.*

[122] *See* CAL. CIV. PROC. CODE § 726(a) (West 2015); IDAHO CODE ANN. § 6-101(1) (West 2006); NEV. REV. STAT. ANN. § 40.430(1) (West Supp. 2017); N.J. STAT. ANN. § 2A:50-2 (West 2014); OR. REV. STAT. ANN. § 86.752(4) (West. Supp. 2017); UTAH CODE ANN. § 78B-6-901(1) (West 2009). Montana has a foreclosure statute that was modeled after California's, and the Montana Supreme Court has stated that the state has "adopted the construction given to the statute by the Supreme Court of California." David J. Dietrich, *The Montana Judicial and Non-judicial Foreclosure Sale: Analysis and Suggestions for Reform*, 49 MONT. L. REV. 285, 297–98 (1988). Minnesota, New York, and Washington have also been cited as states with one action or security first rules. *See* MEARS ET AL., *supra* note 119, at 136.

[123] ALA. CODE § 6-5-248(a)–(b) (Supp. 2017); ALASKA STAT. ANN. §§ 09.35.250, .45.190 (West 2007); ARIZ. REV. STAT. ANN. §§ 12-1283(A), -1566(C) (2016); ARK. CODE ANN. § 18-49-106(a) (West 2004); CAL. CIV. CODE § 2931 (West 2012); CAL. CIV. PROC. CODE §§ 729.010(a), .030 (West 2015); 735 ILL. COMP. STAT. ANN. § 5/15-1603 (West 2011); IOWA CODE ANN. § 628.3 (West 1999); KAN. STAT. ANN. § 60-2414(a) (West Supp. 2016); KY. REV. STAT. ANN. §§ 426.220(1), .530(1) (West Supp. 2017); MASS. GEN. LAWS ANN. ch. 244, § 35 (West 2004); MICH. COMP. LAWS ANN. § 600.3140(1) (West Supp. 2017); MINN. STAT. ANN. §§ 580.23,

foreclosure sale prices,[124] allowing the lenders to recover the full debt owed from the property alone. Because SRRs more often cause less competitive foreclosure sale bidding,[125] they fail to offer borrowers any meaningful protection from deficiency judgments. Some states allow borrowers to waive or limit their SRRs in exchange for the lender's agreement to waive its right to a deficiency judgment.[126] Although these statutes could potentially offer borrowers adequate protection from deficiency judgments, they require the borrower to have knowledge and comprehension of state laws beyond that of the average borrower. These statutes are also ripe for lender abuse: if the lender does not formally cancel the mortgage debt after the borrower agrees to waive her SRR, the lender can still pursue a deficiency judgment after foreclosure.[127]

C. No Limit: New Hampshire & Maryland

In New Hampshire, lenders exclusively use nonjudicial foreclosure.[128] After the lender confirms that the mortgage document contains a power of sale provision, the lender must determine whether there are other lienholders or interested parties entitled to notice of foreclosure.[129] Residential borrowers are entitled to receive notice at least forty-five days prior to the foreclosure sale.[130]

.25, 582.32(5)(d) (West 2010 & Supp. 2018); MO. ANN. STAT. § 443.290, .410, .420 (West 2000); MONT. CODE ANN. §§ 25-13-710, -801(1)(a), -802 (West 2009); NEB. REV. STAT. ANN. § 25-1530(1) (West 2009); N.J. STAT. ANN. § 2A:50-4 (West 2014); N.M. STAT. ANN. §§ 39-5-18(A), -21, 48-10-16(A)–(B) (West 2010 & Supp. 2016); N.Y. REAL PROP. ACTS. §§ 1352, 1353(3) (McKinney 2009 & Supp. 2018); N.D. CENT. CODE ANN. § 32-19-18 (West 2008); OR. REV. STAT. ANN. §§ 18.964(1), .966, .975, 88.106 (West Supp. 2017); S.C. CODE ANN. §§ 15-39-720, -760 (2005); S.D. CODIFIED LAWS §§ 21-47-23, -52-4 to -52-5, -52-7, -52-11, -52-14, -52-23 (2004); TENN. CODE ANN. §§ 66-8-101 to -103 (West 2002); UTAH CODE ANN. § 78B-6-906(1) (West 2009); UTAH R. CIV. P. 69C (West 2016); VT. STAT. ANN. tit. 12, § 4941(c)–(d) (West Supp. 2017); WASH. REV. CODE ANN. §§ 6.21.080, .23.010, .23.020 (West 2009 & Supp. 2018); WYO. STAT. ANN. § 1-18-103(a) (West Supp. 2017).

[124] *See supra* Section I.B.

[125] *See supra* note 66 and accompanying text.

[126] IOWA CODE ANN. § 654.26 (West 1995); MINN. STAT. ANN. § 582.32.

[127] *See, e.g.*, IOWA CODE ANN. §§ 654.20, 654.26; MINN. STAT. ANN. § 582.32. This problem arises with short sales and agreements for a deed-in-lieu of foreclosure as well.

[128] Judicial foreclosure is technically available through an equitable proceeding, but this rarely occurs. *See* N.H. REV. STAT. ANN. § 479:25 (Supp. 2017); *see also* COMM'N TO STUDY N.H. MORTG. FORECLOSURE LAW, NEW FED. REGULATIONS, & FAIR FORECLOSURE PRACTICES, FINAL REPORT ON SB 306, CHAPTER 198, LAWS OF 2014 5–6 (2014) [hereinafter FINAL REPORT]. Comparing the merits of judicial versus nonjudicial foreclosure is outside the scope of this Comment; however, the Final Report notes that judicial foreclosure is "the gateway to mediation" and it "slows the process down enough to allow *both parties* to explore the benefits of loss mitigation." *Id.* at 7.

[129] N.H. REV. STAT. ANN. § 479:25.

[130] *Id.*

If the borrower fails to petition the superior court in her county prior to the sale, she is forever barred from asserting any claim regarding the validity of the foreclosure.[131]

New Hampshire has no fair value law, SRR, or statute of limitations on deficiency judgments.[132] A lender in the state can pursue a borrower for a deficiency judgment up to twenty years after the foreclosure and sale of the home.[133] One case, *Cadle Co. v. Dejadon*, is particularly illustrative.[134] In *Cadle*, the borrower executed a mortgage for $222,900 to a local bank in September 1989.[135] After the borrower defaulted, the mortgaged property was foreclosed in October 1993 and sold to a third party in November 1993 for $97,000.[136] The plaintiff sought a deficiency judgment for $248,937.86 in September 2004.[137] The superior court granted the borrower's motion to dismiss for expiration of the statute of limitations.[138] The New Hampshire Supreme Court reversed, holding that the twenty-year statute of limitations for mortgages applied to the action to recover the deficiency.[139] The court explained that a cause of action may be maintained on the mortgage unless it has been discharged by "payment in fact of the debt, or a release by the [lender]."[140] A promissory note that has not been repaid "remains actionable until the running of the statute of limitations on the mortgage."[141]

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131 *Id.* The borrower can also file for bankruptcy prior to the sale to stay the foreclosure. *See* FINAL REPORT, *supra* note 128 at 6.

132 *See* N.H. REV. STAT. ANN. § 479:25.

133 *See* N.H. REV. STAT. ANN § 508:2 (2010); Cadle Co. v. Dejadon, 904 A.2d 605 (N.H. 2006) (holding that New Hampshire's twenty-year statute of limitations applies to notes secured by mortgages).

134 *See Cadle*, 904 A.2d at 605.

135 *Id.* at 606.

136 *Id.* at 607.

137 *Id.*

138 *Id.* at 606–07.

139 *Id.* at 609.

140 *Id.* at 608 (quoting Ladd v. Wiggin, 35 N.H. 421, 426 (1857)).

141 *Id.* Defendants in a later case argued that *Cadle* should be overturned because it conflicted with an older case, *Cross v. Gannet*, 39 N.H. 140 (1859). Premier Capital, LLC v. Skaltsis, 934 A.2d 496, 498–99 (N.H. 2007) (citing *Cross*, 39 N.H. at 140). The New Hampshire Supreme Court distinguished *Cross*: the twenty-year limitations period for mortgages only applies to an action on the note if the note and the mortgage were executed at the same time, by the same individual. *Id.* at 499–500. Thus, under a limited number of circumstances a borrower *may* only be liable for a deficiency for three years following the foreclosure sale of her home. *See id.* However, it would be nearly impossible for these circumstances to arise within the narrowly defined group of borrowers (and narrowly defined mortgages) this Comment submits should be protected from deficiency judgments.

In 2014, the New Hampshire legislature enacted S.B. 306, which established a commission tasked with studying New Hampshire foreclosure law, new federal regulations issued by the Consumer Financial Protection Bureau, and "fair foreclosure practices" more generally.[142] A group of housing counselors proposed that the commission support shortening the statute of limitations for deficiency judgments on promissory notes secured by residential mortgages from twenty to six years.[143] They argued that the twenty-year statute of limitations overly burdened borrowers:

> It is truly unfortunate that after foreclosure, consumers face up to 20 years of uncertainty, never quite knowing when or if the Mortgagee will file a suit for deficiency or cancel the debt triggering mortgage debt forgiveness (IRS Form 1099-C). After losing a home, many folks work diligently, often for years, to overcome their financial hardship, gain adequate income, repair their credit, and begin saving for retirement. If a Mortgagee is permitted 20 years after foreclosure to determine what action they will take with regard to the note and mortgage, the consumer's options become limited.[144]

Although a majority of the commission voted in favor of this proposal, no legislative action to that effect has been taken as of this writing.[145]

Maryland—where Benavides found himself subject to a $115,000 deficiency judgment over three years after the lender foreclosed upon and sold his home[146]—similarly does not protect borrowers from lengthy deficiency collections. Between 2008 and 2012, 400 families in Maryland were sued for deficiency judgments.[147] At least 144 of those families filed for bankruptcy as a result.[148] This was a marked change from pre-recession statistics: in 2006, only nineteen deficiency actions were filed in the state.[149] The total recovery amount

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[142] *See* 2014 N.H. Laws 256.

[143] *See* FINAL REPORT, *supra* note 128, at 19.

[144] *Id.* at 18.

[145] *See id.* at 19 (voting in favor of a proposal to amend section 508:6 to add a six-year statute of limitations to deficiency actions); *see also* N.H. REV. STAT. ANN. § 508:6 (2010).

[146] *See* Kelly, *supra* note 1. Note that the party that attempted to collect the deficiency judgment was not the original lender, but the assignee, Dyck-O'Neal, Inc. *See id.*

[147] *See What Is a Deficiency Judgment?*, MD. CONSUMER RTS. COALITION, http://www.marylandconsumers.org/issues/housing/deficiency_judgement (last visited Mar. 23, 2018).

[148] *Id.*

[149] *See HB 274: Frequently Asked Questions*, MD. CONSUMER RTS. COALITION, http://www.marylandconsumers.org/penn_station/folders/issues/housing/deficiency_judgement/_2_defciencyjudgmentsfaqfinal2.pdf (last visited Mar. 23, 2018).

sought was $432,115.[150] In contrast, in 2012, 120 deficiency actions were filed, and the amount sought was $13.6 million.[151] As of November 2016, Maryland's foreclosure inventory was equal to 1% of all homes in the state, the sixteenth highest percentage in the country.[152]

Until July 1, 2014, Maryland allowed lenders to wait up to twelve years before filing a deficiency action, one of the longest statutory periods in the nation.[153] With the enactment of section 7-105.13, the period was shortened to three years.[154] However, the 2014 law only changes the amount of time the lender has to file the deficiency claim; it does not change the amount of time the lender has to collect the judgment, which remains twelve years unless the lender renews for another twelve years before the end of the period.[155] Maryland allows lenders to garnish wages to collect a deficiency judgment.[156] If the borrower manages to recover enough to buy a new home before the lender attempts to collect the judgment, a lien will attach to her new property and prohibit her from selling it until the judgment is satisfied.[157]

D. Confirmation Requirements & Statutory Redemption: Georgia & Iowa

Georgia allows lenders to foreclose through nonjudicial power of sale, traditional judicial foreclosure, and through an equitable proceeding.[158] The nonjudicial power of sale form is used most often.[159] Power of sale foreclosure in Georgia allows the lender to terminate the borrower's interest in her home through an auction "on the courthouse steps."[160] The lender must run an advertisement for the sale in a local newspaper for four weeks leading up to the scheduled date.[161] If the lender follows the minimum statutory requirements for

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[150] *Id.*

[151] *Id.*

[152] CORELOGIC, *supra* note 81, at 7. Georgia's foreclosure inventory was 0.5%, Iowa's was 0.6%, New Hampshire's was 0.4%, North Dakota's was 0.4%, and Oregon's was 0.7%. *Id.* at 8–9.

[153] *See HB 274: Frequently Asked Questions*, *supra* note 149.

[154] MD. CODE ANN., REAL PROP. § 7-105.13 (West Supp. 2017).

[155] MD. CODE ANN., MD. RULES § 2-625, 14-216(b) (West 2015 & Supp. 2017).

[156] *Id.* § 3-646 (West 2015).

[157] *Id.* § 3-621.

[158] *See* GA. CODE ANN. § 44-14-49, -180, -187 (West 2003). *See generally* ALEXANDER ET AL., *supra* note 25, §§ 1:3, 7:1, 8:1.

[159] *See* ALEXANDER ET AL., *supra* note 25, § 8:1.

[160] *See id.*

[161] *See* GA. CODE ANN. § 9-13-140(a) (West 2003).

advertising the sale, the advertisement cannot be defective as a matter of law.[162] In most cases, the lender purchases the property at the sale after little to no competitive bidding.[163]

Although defects in the advertisement may prevent confirmation of the sale, this result will only occur if there is evidence that bidding was chilled because of the defects.[164] The lender must have the sale confirmed to pursue a deficiency judgment following a power of sale foreclosure.[165] To obtain the confirmation, the lender must report the sale within thirty days to the superior court of the county in which the property is located.[166] The lender must prove that the property sold for its true market value.[167]

Although Georgia's confirmation requirement may appear to offer sufficient protection to borrowers from deficiency judgments, it has several shortcomings. First, there is confusion over the nature of the statutory requirements[168]: the text states that the court shall not confirm the sale unless the lender provides evidence that "the property so sold brought its true market value."[169] But it also states that the court shall "pass upon the legality of the notice, advertisement, and regularity of the sale."[170] In some cases, courts have concluded that the only issue to be determined at a confirmation hearing is the value of the property on the date of the sale.[171] However, more recent cases have held that both tests must be met for the court to confirm the sale.[172]

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162 *See* Diplomat Constr., Inc. v. State Bank of Tex., 726 S.E.2d 140, 146 (Ga. Ct. App. 2012) ("The minimum legal requirements of a foreclosure advertisement are prescribed in OCGA § 9–13–140(a), and only a failure to properly include those items will render the advertisement defective as a matter of law." (quoting Se. Timberlands v. Sec. Nat'l Bank, 469 S.E.2d 454, 456 (Ga. Ct. App. 1996))).

163 *See* ALEXANDER ET AL., *supra* note 25, § 8:1.

164 *See Diplomat Constr.*, 726 S.E.2d at 146.

165 *See* GA. CODE ANN. § 44-14-161 (West 2003).

166 *See id.*

167 *See id.*

168 *See* ALEXANDER ET AL., *supra* note 25, § 9:3.

169 *See* GA. CODE. ANN. § 44-14-161(b).

170 *Id.* § 44-14-161(c).

171 *See* ALEXANDER ET AL., *supra* note 25, § 9:3; *see also* Hamilton Mortg. Corp. v. Bowles, 237 S.E.2d 198, 200 (Ga. Ct. App. 1977) (citing Aaron v. Life Ins. of Ga., 226 S.E.2d 96, 97 (Ga. Ct. App. 1976)) (noting that the "sole issue in the confirmation procedure is the evaluation of the real estate as of the date of the sale").

172 *See* ALEXANDER ET AL., *supra* note 25, § 9:3 (first citing Martin v. Fed. Land Bank of Columbia, 325 S.E.2d 787, 788 (Ga Ct. App. 1984); then citing Peters v. CertusBank Nat'l Ass'n, 763 S.E.2d 498 (Ga. Ct. App. 2014)) (noting two cases that determined the court must confirm both the value of the property and the legality of the procedures).

In addition to confusion over the nature of the confirmation requirements, the statute also does not set out any "particular method for appraising property" that must be followed to determine true market value at the time of the sale.[173] This means that a court may still affirm the sale despite the property selling for less than the borrower paid two years earlier if there is evidence of a "depressed or declining real estate market."[174] While the confirmation requirement may prohibit the lender from obtaining a windfall, or double recovery,[175] it does not protect the borrower from "being forced into bankruptcy by [a] deficiency judgment[]."[176] Even if the housing market remained relatively stable since the borrower purchased her home, any number of factors could result in the court confirming a sale price far below the outstanding debt balance: (1) the lender overvalued the property at the time the loan was made,[177] (2) other foreclosures in the same neighborhood reduced overall property values,[178] or (3) the principal balance increased after origination when the lender later modified the loan, to name a few.[179]

If a lender uses judicial foreclosure, it is not required to apply for confirmation prior to seeking a deficiency judgment.[180] Confirmation is also not required if the lender chooses to obtain a judgment on the underlying promissory note before foreclosing on the mortgaged real estate—even if the lender forecloses nonjudicially.[181] A leading treatise explains that because the confirmation requirement is a statute "in derogation of the common law," it will be strictly construed—i.e., its protections will not be "expanded beyond its narrow application."[182] This loophole, then, undermines the original goal of the

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173 *See id.* (citing Powder Springs Holdings, LLC v. RL BB ACQ II-GA PSH, LLC, 754 S.E.2d 655 (Ga. Ct. App. 2014)).

174 *See id.* (citing Peterson v. First Nat'l Bank of Atlanta, 412 S.E.2d 579 (Ga. Ct. App. 1991)).

175 *See id.* § 9:1.

176 *See id.* (noting the circumstances surrounding the enactment of the statute during the Great Depression, the purpose of which was to provide "relief to debtors from the economic depression of the times" (quoting First Nat'l Bank & Tr. Co. v. Kunes, 199 S.E.2d 776, 778 (Ga. 1973))).

177 *See* RAO & WALSH, *supra* note 11, at 38.

178 *See* Michael G. Bradley et al., *Strategic Mortgage Default: The Effect of Neighborhood Factors*, 43 REAL EST. ECON. 271, 277 (2015).

179 U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, REPORT TO CONGRESS ON THE ROOT CAUSES OF THE FORECLOSURE CRISIS xii (2010). The report found that many modified subprime loans re-defaulted because the modifications failed to lower monthly payments, "virtually none involved a reduction in principal," and instead "typically increased a borrower's principal debt." *Id.*

180 *See* ALEXANDER ET AL., *supra* note 25, § 7:1.

181 *See id.* § 9:4 (first citing Ga. R.R. Bank & Tr. Co. v. Griffith, 335 S.E.2d 417 (Ga. Ct. App. 1985); then citing First Fed. Sav. & Loan Ass'n of Rochester v. Fisher, 422 F. Supp. 1 (N.D. Ga. 1976)).

182 *See id.*

Depression-era statute: to protect borrowers from losing their homes and being forced into bankruptcy by crippling deficiency judgments.[183] The borrower's only way to avoid this outcome is an action to set aside foreclosure; the borrower must show not only that the sales price was grossly inadequate, but also that the lender's actions amounted to fraud or chilled bidding.[184]

Iowa does not prohibit deficiency judgments for residential borrowers.[185] However, Iowa grants borrowers an SRR after both judicial and nonjudicial foreclosure. Following nonjudicial foreclosure, the borrower has one year to occupy and redeem the property.[186] The price of redemption is the amount "paid by the holder of the certificate."[187] Following judicial foreclosure, the borrower has up to ten years to redeem the property.[188] Iowa also provides several options to lenders and borrowers to expedite foreclosure, forego deficiency actions, and waive redemption rights.[189]

Under section 654.18, the borrower exchanges her statutory right of redemption for a deficiency judgment waiver from the lender.[190] The statute requires the borrower to convey all her interest in the mortgaged property to the lender.[191] The lender, in return, waives all its rights to a deficiency or any other claim arising from the mortgage.[192] The borrower waives her right to a surplus.[193] The lender is also given immediate possessory rights to the property, to "maintain and protect" it.[194] The statute provides that the lender must give

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183 *See id.*

184 *See id.* § 8:10.

185 *See* IOWA CODE ANN. § 654.6 (West Supp. 2017).

186 *See id.* § 628.3 (West 1999).

187 *See id.* § 628.11 (West 1999). This also includes costs and interest.

188 The statute does not specify a limitations period. See *id.* § 654.5 (West Supp. 2017). Case law has established that the property may be redeemed within ten years. *See* Ritz v. Rea, 135 N.W. 645, 648 (Iowa 1912); Mahaffy v. Faris, 122 N.W. 934, 936 (Iowa 1909); Crawford v. Taylor, 42 Iowa 260, 263–64 (1875); Gower v. Winchester, 33 Iowa 303, 305–06 (1871).

189 *See* IOWA CODE ANN. §§ 654.18, .20, .26 (West 1995 & Supp. 2017).

190 *See id.* § 654.18.

191 *See id.* § 654.18(1)(a).

192 *See id.* § 654.18(1)(b). This statute is the functional equivalent of a deed-in-lieu of foreclosure, discussed *supra* Section I.A.

193 *See* IOWA CODE ANN. § 654.18(1)(f). Just as the lender is entitled to a deficiency if the property sells for less than the outstanding debt balance, the borrower is normally entitled to the surplus—i.e., if the property sells for *more* than the outstanding debt balance, the surplus is distributed as follows: first, to any junior lienholders, and any amount remaining goes to the borrower. Even when the economy is healthy, however, surpluses are rare. *See generally* Section I.A (discussing why foreclosure sale prices are usually lower than fair market value).

194 IOWA CODE ANN. § 654.18(1)(c).

notice to any junior lienholders that they have thirty days in which to exercise their redemption rights.[195] Finally, the lender must give the borrower a form titled "DISCLOSURE AND NOTICE OF CANCELLATION," which formally extinguishes the mortgage debt.[196]

Although this statute may appear to offer borrowers an effective way to avoid deficiency judgments, it has several drawbacks. Borrowers must be careful to follow the statutory requirements precisely, or they may end up waiving both their SRR and protection from a deficiency judgment. In one case, after the borrower defaulted, the lender agreed to accept a deed-in-lieu of foreclosure[197] in partial satisfaction of the debt.[198] Although the deed-in-lieu of foreclosure resembled the procedural result of section 654.18, the borrower was unable to take advantage of the post-default protection that statute affords "because [the lender was] not seeking foreclosure."[199] The court held that the lender could pursue a deficiency judgment for the remaining debt.[200]

The statute has other drawbacks as well. Even if the borrower fully comprehends the statutory requirements, she may be unable to take advantage of them because of a lack of alternate housing options. If the lender is unwilling to waive its right to a deficiency judgment in exchange for the borrower's statutory waiver, the redemption period may discourage bidding and lower the ultimate foreclosure sale price.[201]

E. Prohibitions: Oregon & North Dakota

Oregon uses both deeds of trust and mortgages.[202] Mortgages must be foreclosed with judicial procedures, and lenders may not obtain a deficiency

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195 *Id.* § 654.18(1)(e)(1). The redemption price under these circumstances would be the outstanding balance on the senior mortgage. *Id.* § 628.29 (West 1999).

196 *Id.* § 654.18(1)(f).

197 A deed-in-lieu of foreclosure is a procedure by which the borrower agrees to convey the mortgaged real estate to the lender in exchange for the lender's agreement to extinguish the mortgage debt. *What Is a Deed-in-Lieu of Foreclosure?*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/ask-cfpb/what-is-a-deed-in-lieu-of-foreclosure-en-291/ (last updated Sept. 25, 2017). It is thought to benefit both parties in that the lender avoids the time and expense of foreclosure proceedings, and the borrower avoids a deficiency judgment if the lender eventually sells the property for less than the loan amount. *See id.*

198 *See* Nash Finch Co. v. Corey Dev., Ltd., 669 N.W.2d 546, 547 (Iowa 2003).

199 *See id.* at 549–50.

200 *See id.* at 550.

201 *See supra* Section I.B.

202 *See* DUNAWAY, *supra* note 37, at app. 19A.

judgment after the foreclosure of a purchase money mortgage.[203] The judicial foreclosure prohibition requires that the lender engage in an election of remedies if the borrower defaults: it must choose between foreclosure of the mortgage or a judgment on the promissory note.[204] However, the lender is not prohibited from pursuing "all statutory remedies, concurrently or successively."[205] The lender is not required to choose the remedy *prior* to judgment, and thus, can plead in the alternative.[206]

Oregon also prohibits lenders from obtaining deficiency judgments after judicial and non-judicial foreclosure of "residential trust deeds,"[207] and bankruptcy courts have held that the election-of-remedies doctrine also applies.[208] Lenders cannot circumvent the state's deficiency judgment prohibitions by suing on the promissory note and then foreclosing on the residential trust deed.[209] One judge stated that the reason for the judicially created doctrine is that "the mortgagee or trust deed beneficiary should be prevented from doing indirectly what the anti-deficiency statutes prohibit, directly."[210]

The major problem with Oregon's anti-deficiency statutes is that they do not protect a borrower who refinances the mortgage or trust deed secured by her home. This is problematic whether the borrower was induced to refinance the loan at predatory terms, or refinanced to take advantage of lower interest rates; under either circumstance, the borrower unknowingly gives up her statutory protection from a deficiency judgment. This problem arises in other states that disqualify refinanced loans from purchase money mortgage status and deficiency judgment protection.

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[203] OR. REV. STAT. ANN. § 88.103 (West Supp. 2017). However, this prohibition does not apply if the note and mortgage were given to purchase both real estate and personal property. *See* Magnolia Lumber Corp. v. Lithia Lumber Co., 404 P.2d 190, 193–94 (Or. 1965). In that case, the lender can pursue a deficiency judgment for uncollected payment of the personal property. *Id.*

[204] *See, e.g.*, Banteir v. Harrison, 485 P.2d 1073, 1075 (Or. 1971) ("If the purchase money mortgagee elects to foreclose the mortgage, he is barred from bringing an action on the mortgage debt, or he may obtain a judgment on the mortgage debt, in which case he loses his mortgage lien." (citation omitted)).

[205] *See* Family Bank of Commerce v. Nelson, 697 P.2d 216, 218 (Or. Ct. App. 1985).

[206] *Cf. id.*

[207] OR. REV. STAT. ANN. §§ 88.103, 86.797 (West Supp. 2017).

[208] *See, e.g.*, *In re* Daraee, 279 B.R. 853, 858 (Bankr. D. Or. 2002); *In re* Knight, No. 690-63779-Rll, 1992 Bankr. LEXIS 2573, at *12–13 (Bankr. D. Or. June 26, 1992).

[209] *See In re* Daraee, 279 B.R. at 857–58.

[210] *Id.* at 858 (citing *In re* Knight, 1992 Bankr. LEXIS 2573).

North Dakota's statutory scheme, however, avoids this issue by prohibiting deficiency judgments following the foreclosure of all one-to-four-family residences situated on fewer than forty acres of land, where the borrower occupies one of the residences as a homestead.[211] Some common criticisms of borrower-friendly legislation are that it leads to increased instances of foreclosure and default and higher interest rates.[212] However, the following tables illustrate that neither foreclosure rates nor default rates—those reflected by the "serious delinquency rate," at least—are higher in North Dakota when compared to the other five jurisdictions reviewed.[213]

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211 N.D. CENT. CODE ANN. § 32-19-03 (West 2008). While this statute unfortunately leaves agricultural land open to deficiencies, the judgment is limited to the fair value of the property. *See id. See generally* Jon W. Backes, Comment, *Mortgages—North Dakota's Anti-deficiency Statute Defined*, 65 N.D. L. REV. 127 (1989) (discussing the calculation of fair values of agricultural property). Further discussion of agricultural mortgage lending is beyond the scope of this Comment.

212 *See supra* notes 19–21.

213 *See* CORELOGIC, *supra* note 81, at 8–9; CORELOGIC, NATIONAL FORECLOSURE REPORT: JUNE 2015 8–9 (2015) [hereinafter CORELOGIC, 2015 REPORT]; CORELOGIC, NATIONAL FORECLOSURE REPORT: MARCH 2014 7–8 (2014) [hereinafter CORELOGIC, 2014 REPORT]; CORELOGIC, NATIONAL FORECLOSURE REPORT: AUGUST 2013 7–8 (2013) [hereinafter CORELOGIC, 2013 REPORT]; CORELOGIC, NATIONAL FORECLOSURE REPORT: SEPTEMBER 2012 (2012) [hereinafter CORELOGIC, 2012 REPORT].

State	2016 Foreclosures | Delinquency Rate		2015 Foreclosures | Delinquency Rate	
North Dakota	260	1%	313	0.9%
Oregon	7,102	1.8%	5,657	3.2%
Maryland	5,916	3.5%	9,119	5.0%
New Hampshire	1,452	1.7%	1,651	2.5%
Georgia	19,552	2.7%	26,909	3.4%
Iowa	2,846	1.8%	4,210	2.2%

State	2014 Foreclosures | Delinquency Rate		2013 Foreclosures | Delinquency Rate		2012[214]
North Dakota	414	1.1%	463	1.2%	583
Oregon	3,635	4.2%	3,206	4.7%	9,629
Maryland	6,633	6.7%	4,474	7.3%	3,400
New Hampshire	2,002	3.2%	2,099	3.5%	2,786
Georgia	33,232	4.8%	39,827	5.3%	54,778
Iowa	4,900	3.1%	4,374	3.3%	3,380

The data for completed foreclosures may be somewhat misleading, however, as it does not account for the smaller population and potentially smaller number of outstanding loans in North Dakota relative to the other states.[215] However, the serious delinquency rate is calculated as a percentage of outstanding mortgage loans within each state.[216] Comparison across this statistic, then, reveals that North Dakota does not have higher instances of default as a result of its statutory prohibition on deficiency judgments after foreclosure of qualifying residential

[214] The 2012 report did not include the serious delinquency rate statistic. *See* CORELOGIC, 2012 REPORT, *supra* note 213.

[215] As of February 2017, North Dakota's population was 659,858, while Oregon's population was 3,761,925, New Hampshire's population was 1,313,939, Maryland's population was 5,696,423, Georgia's population was 9,468,815, and Iowa's population was 3,016,267. *See generally Georgia Foreclosure & Foreclosed Homes*, REALTYTRAC, http://www.realtytrac.com/mapsearch/foreclosures (last visited Mar. 24, 2018).

[216] *See* CORELOGIC, *supra* note 81, at 11.

properties. This also suggests that there are not more instances of strategic default in North Dakota than there are in Maryland, New Hampshire, Georgia, and Iowa—states that allow lenders to pursue deficiency judgments after foreclosing on residential mortgage loans. The delinquency rate in Oregon, although higher than the rate in New Hampshire and Iowa in all years but 2016, is still significantly below that of Maryland and Georgia in all five years surveyed.

III. RESIDENTIAL BORROWERS NEED PROTECTION FROM DEFICIENCY JUDGMENTS

This Part identifies the main arguments supporting the widespread prohibition of deficiency judgments following foreclosure of residential mortgage loans. It also responds to the major arguments proposed by critics of anti-deficiency laws.

A. The Original Goal of Depression-Era Statutes Remains Important

During the Great Depression, state legislatures enacted laws prohibiting deficiency judgments after residential foreclosure because they determined that protecting their citizens from financial collapse was a crucial policy objective.[217] After lenders challenged the laws as improperly impairing contract obligations, the Supreme Court held that the states had reasonably exercised their police powers to protect the welfare of their citizens.[218] Protecting borrowers from the unnecessary hardship of deficiency judgments remains important even as the economy recovers.

Contrary to one scholar's assertion, foreclosure is far from a "weak sanction."[219] For many Americans, a home is more than just an asset, investment, or shelter. Owning a home is a critical part of their identity.[220] Losing that home, then, signals much more than just financial hardship: it is "a failure to maintain or achieve the American Dream."[221] Numerous studies have found a direct correlation between foreclosure rates and depression, suicide, and deteriorating

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[217] *See* ALEXANDER ET AL., *supra* note 25, § 9:1; Harris & Meir, *supra* note 27, at 16–17.

[218] *See, e.g.*, Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

[219] *See* Tess Wilkinson-Ryan, *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 VAND. L. REV. 1547, 1552 (2011).

[220] *See* Jason N. Houle, *Mental Health in the Foreclosure Crisis*, 118 SOC. SCI. & MED. 1, 2 (2014).

[221] *Id.* (citing Kimberly Libman et al., *Housing and Health: A Social Ecological Perspective on the US Foreclosure Crisis*, 29 HOUSING THEORY & SOC'Y 1 (2012)).

physical health.[222] One foreclosure defense attorney anecdotally observed depression and suicide as a result of foreclosure firsthand.[223] After foreclosure, a borrower's credit score may be so damaged that no landlord will approve her application for a lease, forcing her and her family into homelessness.[224]

The financial recovery of a borrower after foreclosure is not just important to that individual, it is important to her local community as well.[225] Individuals who are forced into bankruptcy by deficiency judgments may end up having more than just their mortgage debt extinguished.[226] Creditors from the borrower's local community may end up having their debts discharged as well—debts the borrowers could have paid, but for the imposition of the deficiency.[227] The National Consumer Law Center notes that the recipients of deficiency judgment payments are often "distant holders of securitized loan obligations," which provide no stimulus to distressed local communities.[228] Borrowers who end up filing for bankruptcy may require public support, further draining state resources, local resources, or both.[229]

B. Borrowers Do Not Walk Away Willingly

Prohibiting deficiency judgments after foreclosure of a borrower's primary residence will not lead to increased strategic default because borrowers invest far more than just their financial resources in the mortgaged real estate. The real estate is not just collateral for a loan; it is their home—for some, their children's home—and walking away from that home is a last resort.[230] One scholar, Professor Brent White, notes that many borrowers with underwater mortgages during the peak of the financial crisis stayed in their homes despite the

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[222] *See* Katherine A. Fowler et al., *Increase in Suicides Associated with Home Eviction and Foreclosure During the US Housing Crisis: Findings from 16 National Violent Death Reporting System States, 2005–2010*, 105 AM. J. PUB. HEALTH 311, 314 & fig.2 (2015); Jason N. Houle & Michael T. Light, *The Home Foreclosure Crisis and Rising Suicide Rates, 2005 to 2010*, 104 AM. J. PUB. HEALTH 1073, 1077 & fig.2 (2014); William C. Kerr et al., *Economic Recession, Alcohol, and Suicide Rates: Comparative Effects of Poverty, Foreclosure, and Job Loss*, 52 AM. J. PREVENTIVE MED. 469, 472 & tbl.2–3 (2017) (finding that foreclosure rates increased suicides among borrowers aged 45–64).

[223] *See* Judith Fox, *The Foreclosure Echo: How Abandoned Foreclosures Are Re-entering the Market Through Debt Buyers*, 26 LOY. CONSUMER L. REV. 25, 34 (2013).

[224] *See* RAO & WALSH, *supra* note 11, at 37.

[225] *See* Harris & Meir, *supra* note 27, at 18–19.

[226] *See id.*

[227] *See* RAO & WALSH, *supra* note 11, at 38.

[228] *See id.*

[229] *See* Harris & Meir, *supra* note 27, at 18–19.

[230] *See id.* at 17.

significant savings they would have realized if they had simply stopped paying.[231] Economists typically consider this behavior irrational.[232]

Some scholars argue that prohibiting deficiency judgments after foreclosure of residential mortgages will lead to significant increases in instances of strategic default precisely because they consider it a rational decision for a borrower to abandon her home and stop payment once her negative equity drops below a certain threshold.[233] But this analysis overstates the weight of financial calculations in the decision-making process of the average borrower.[234] While several well-documented cognitive biases may contribute to this "irrational" decision making,[235] emotions most likely play the largest role.[236] Not only are individuals incredibly emotionally invested in and attached to their homes, they are equally averse to the idea of defaulting on their mortgage payments.[237] Most borrowers consider mortgage default to be "immoral," and feelings of guilt or shame keep them from walking away until long after financial calculations would consider the decision rational.[238] Finally, for many borrowers, fear may be the most powerful factor.[239] Foreclosure is considered the worst-case scenario: "financial suicide to be avoided at all costs."[240]

Several recent studies present further evidence discounting the argument that strategic default will increase if the threat of deficiency judgments for residential borrowers is removed. Although some older studies proposed that non-recourse

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[231] *See* Brent T. White, *Underwater and Not Walking Away: Shame, Fear, and the Social Management of the Housing Crisis*, 45 WAKE FOREST L. REV. 971, 983–85 (2010).

[232] *See id.* at 986.

[233] *See supra* note 21 and accompanying text.

[234] *See* White, *supra* note 231, at 987–88.

[235] For example, White explains that biases such as status quo bias (the tendency to "keep one's head in the sand"), myopia (the tendency to "overvalue up-front cost and undervalue long-term gain"), and selective perception (which results in their failure "to see evidence . . . that would suggest a steep fall in their home's value") all contribute to borrowers' decisions to remain in their homes long after economic analysis suggests that it is in their best interests to walk away. *See id.*

[236] *See id.*

[237] *See id.* at 990–91 (discussing the need for more research focusing on the emotional hurdles to strategic defaults).

[238] *See id.* at 991. Older or disabled borrowers may be unable to leave their homes because of mobility issues as well.

[239] *See id.* at 995 ("People not only fear losing their homes, but also fear having ruined credit for life and not being able to find a decent place to live, to buy a car, to get a credit card, to get insurance, to ever buy a house, or even to get a job. Foreclosure is seen as the end of life as one knows it—financial suicide to be avoided at all costs.").

[240] *Id.*

states had higher instances of strategic default,[241] more recent studies have refined the early statistical models and reached a different result.[242] For example, a recent study found that the average borrower does not default until her equity drops to -74%, when previous models predicted that default would occur at -20%.[243] The study finds that even in two non-recourse states, Arizona and California, most borrowers have a high threshold for negative equity before they are pushed to walk away.[244] The authors conclude that "nonfinancial costs and behavioral factors must" contribute to the default decision,[245] confirming White's argument,[246] among others.[247]

In fact, a study that focused specifically on the effect of a 2009 Nevada statute which prohibited deficiency judgments after foreclosure of residential mortgages explicitly cautioned that using deficiency judgments to *deter* strategic default was ill-advised, given the absence of increased strategic default in the wake of the statutory change.[248] The authors identify three main findings of the study: (1) lenders reduced approval rates and loan sizes after the law change, but did not increase interest rates significantly; (2) applications for one- to four-

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[241] *See, e.g.*, Andra C. Ghent & Marianna Kudlyak, *Recourse and Residential Mortgage Default: Evidence from US States*, 24 REV. FIN. STUD. 3139, 3140 (2011) (finding higher instances of strategic default for properties valued between $500,000 and $750,000 at the time of origination in non-recourse states than in recourse states).

[242] *See supra* note 22 and accompanying text.

[243] *See* Bhutta et al., *supra* note 22, at 2434 (citing James B. Kau et al., *Default Probabilities for Mortgages*, 35 J. URB. ECON. 278 (1994)).

[244] *Id.* at 2436.

[245] *Id.* at 2463.

[246] *See generally* White, *supra* note 231, at 972.

[247] *See, e.g.*, Harris & Meir, *supra* note 27, at 17 ("The deal is predicated on the assumption that borrowers will be very reluctant to give up their primary residence, which means uprooting their family from familiar surroundings, incurring significant moving costs, and in all likelihood having to change neighbourhoods. These factors make lenders confident that the non-recourse feature will be exploited only in cases of severe financial distress. If this assumption is fulfilled, the expected number of non-recourse foreclosures will be small and, as a result, the cost premium of non-recourse loans will be minimal. Published research tends to confirm both the assumption and the result."); Mixon, *supra* note 27, at 7 (noting that most borrowers are unaware of many of the consequences of default); *cf.* Singer, *supra* note 83, at 507–09 (explaining that the foreclosure process was the product of "banks develop[ing] a business model that exploited vulnerable people by leading them to take out loans they could not afford," and that "[n]one of this would have been possible unless both homeowners and investors had been misled into believing these investments were safer than anyone had a right to believe").

[248] *See* Li & Oswald, *supra* note 22, at 3. Delinquency rates are also not higher in non-recourse states, as some critics suggest. *See* Fernando Lopez Vicente, *The Effect of Foreclosure Regulation: Evidence for the US Mortgage Market at State Level* 27 (Banco De España, Working Paper No. 1306, 2013). Vicente found that the states with the lowest delinquency rates were North Dakota, South Dakota, and Montana. *Id.* North Dakota and Montana are both non-recourse states. *Id.*

family purchase money loans did not increase significantly; and (3) default behavior did not change in any "statistically significant way."[249]

C. Borrowers Are Still Vulnerable to Predatory Practices

Although the federal government attempted to curb some of the predatory lending that dominated the early 2000s—and which led to increased foreclosure, negative equity, and larger and more numerous deficiency judgments—with legislation aimed at increasing lender disclosure and improving underwriting standards,[250] it did not eliminate the need for increased state statutory protection. The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) only affects lender behavior during mortgage origination; it does not protect borrowers from foreclosure or from being forced into bankruptcy by deficiency judgments.

Dodd-Frank does not eliminate the lenders' incentives to sell loans that are most attractive to potential secondary-market buyers but less sustainable for borrowers making the monthly payments.[251] And although it prohibits some abusive lender practices such as charging duplicate fees for credit life insurance or capping prepayment penalties, it only encourages lenders not to engage in others.[252] If a lender wants a loan to meet the requirements of a "qualifying mortgage," it cannot make a loan involving negative amortization,[253] interest only payments, excessive fees or points, or prepayment charges.[254] The only benefit to the lender of securing the designation of a qualifying mortgage is gaining the rebuttable presumption that it complied with the requirements ensuring the borrower's ability to repay the loan.[255]

It is highly unlikely that borrowers will be able to successfully litigate claims that their lenders violated any of these laws.[256] The standard of proof is high,

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[249] *See* Li & Oswald, *supra* note 22, at 3.

[250] 15 U.S.C. § 1639b (2012).

[251] *See* Stark et al., *supra* note 10, at 100.

[252] *See id.* at 100–01; *see also* 15 U.S.C. § 1639c.

[253] Negative amortization means the principal increases over the life of the loan. *What Is Negative Amortization?*, CONSUMER FIN. PROTECTION BUREAU, https://www.consumerfinance.gov/ask-cfpb/what-is-negative-amortization-en-103/ (last updated Sept. 25, 2017).

[254] *See* Stark et al., *supra* note 10, at 102 n.30.

[255] *See id.* at 102.

[256] *See* Robin P. Myers, *Consumer Damages and Remedies for Truth in Lending Act and Regulation Z Violations*, FED. RES. BANK PHILA. (2006), https://www.philadelphiafed.org/bank-resources/publications/compliance-corner/2006/fourth-quarter/q4cc1_06 [https://web.archive.org/web/20170515230523/https://www.philadelphiafed.org/bank-resources/publications/compliance-corner/2006/fourth-quarter/q4cc1_06].

and requires the borrower to show that the disclosure statement was inaccurate, that it caused her not to find a lower-priced loan, and that she would have obtained a lower-priced loan if the disclosure statement was accurate.[257] In addition to the challenging evidentiary burden, borrowers who are victims of lending behavior that violates these statutes are unlikely to have the resources to pursue such litigation. A borrower who just lost her home to foreclosure—and depending on her state, was sued for a deficiency—because she could not sustain her predatory and expensive loan does not have the financial resources or the energy to sue her lender.

A recent study also determined that even with the new mandatory disclosure requirements, borrowers still do not understand how to identify less expensive loans, nor can they consistently identify inherently risky terms.[258] On the other hand, lenders are equipped with software, data, and years of lending experience that can help them determine just how likely a borrower is to default on a loan.[259] If the risk is too high, the lender can decline, or take steps to reduce exposure to loss in the event of default. Ron Harris and Asher Meir describe non-recourse loans as providing "'financial distress' insurance" and highlight the benefits of shifting the risk of default to the parties who make or insure the loans:

> The advantages of such "financial distress" insurance are evident. Risk is transferred to financial institutions such as banks and insurance companies, which are typically far less risk-averse than individual homeowners; furthermore, their ability to foresee, manage and hedge the risk are greater due to greater financial sophistication and large economies of scale in risk management.[260]

The harm to lenders from uncollected deficiencies is minor. A former chief economist for Freddie Mac stated that while it might be "worthwhile to hire some lawyers and some people to try to [collect deficiency judgments,] . . . it's not going to make or break the companies."[261]

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[257] *Id.*

[258] *See* Stark et al., *supra* note 10, at 117. Borrowers were only able to identify lower priced loans at a "chance" rate (44% of the time). *Id.*

[259] *See supra* notes 27, 83.

[260] *See* Harris & Meir, *supra* note 27, at 17.

[261] *See* Kelly, *supra* note 1 (quoting Robert Van Order, a chief economist for Freddie Mac from 1987 to 2002).

D. Modified Anti-Deficiency Laws Do Not Protect Borrowers.

The modified forms of anti-deficiency laws used in many states do not adequately protect borrowers from losing their homes to foreclosure and being forced into bankruptcy by deficiency judgments. They may reduce the overall number of borrowers who have an experience similar to Benavides's, but they do not eliminate this outcome entirely. SRRs may appear to benefit the borrower, but they are just as likely to lower foreclosure sale prices than encourage competitive bidding.[262] Allowing borrowers to avoid a deficiency judgment by waiving this statutory right is only effective if the borrower both understands the strict statutory requirements she must follow to ensure this protection, and if the lender agrees.[263]

Prohibiting deficiency judgments following nonjudicial foreclosure may reduce the overall incidence of deficiency actions filed, but it does nothing to help the borrowers' lenders decide to pursue. The judicial foreclosure process is no more likely than the nonjudicial power of sale foreclosure to encourage competitive bidding and bring a fair price for the property.[264] While fair value laws may partially alleviate the negative effect a forced sale has on the property's sale price, these laws often have difficult burdens of proof, and do not offer any relief when a depressed market reduces home values far below the outstanding debt amount.[265]

Statutes that shorten the time in which a lender may file a deficiency claim may end up barring some lenders from recovering, but they still do not prevent lenders from obtaining the judgment and then waiting years to collect.[266] Interest can increase the judgment by thousands or even tens of thousands of dollars after only a few years.[267] Even when collection efforts would be impractical for lenders, the debt can survive through sales of distressed asset bundles to investors or debt collectors.[268]

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[262] *See supra* notes 123–126 and accompanying text.

[263] *See supra* notes 126–127 and accompanying text.

[264] *See supra* notes 108–109 and accompanying text.

[265] *See supra* notes 113–114 and accompanying text.

[266] *See supra* notes 115–117 and accompanying text.

[267] John P. Dickson, *Will You Owe After Foreclosure? Deficiency Judgment Basics*, DICKSON L. GROUP (July 20, 2015), http://dicksonlawgroup.com/will-you-owe-after-foreclosure-deficiency-judgment/ (noting that under Illinois law a deficiency judgment accumulates interest at a rate of 9% per year).

[268] *See supra* notes 100–103 and accompanying text.

Security-first statutes and one-action rules also fail to protect borrowers from deficiency judgments. While security-first statutes ensure that lenders do not sue on the promissory note before foreclosing on the mortgaged property, they do not ultimately offer any protection to borrowers from chilled bidding at the foreclosure sale, or from declining home values due to a depressed housing market.[269] And while one-action rules prevent the borrower from a multiplicity of actions, they do nothing to prohibit or even abate the harshness of a deficiency judgment.[270]

CONCLUSION

This Comment argues that states need to adopt legislation prohibiting deficiency judgments for residential borrowers. The original anti-deficiency laws of the Great Depression were enacted to protect borrowers from the unnecessary hardship of losing their homes and subsequently being forced into bankruptcy by deficiency judgments. Opponents argue that the threat of deficiency judgments is needed to deter borrowers from strategically defaulting; they assert that this will lead to an increase in the cost of loans. But recent empirical studies reveal that neither of these hypotheses are true in states that have prohibited deficiency judgments. Borrowers are incredibly attached to their homes, and will avoid defaulting on their mortgage payments as long as possible—even when it would be in their interest to walk away.

Currently, too few states have laws in place that prohibit lenders from seeking a deficiency judgment after foreclosing on a borrower's home. Although some of the modified anti-deficiency laws in use may reduce the amount and the frequency of deficiency judgments, they fail to achieve their intended purpose. States determined that it was critical to protect borrowers from the trauma of foreclosure and enormous deficiency judgments during the Great Depression. The Supreme Court held that these laws were constitutional, and that states had a valid interest in protecting the welfare of their citizens—even if contract remedies were impaired.

Although the economy has recovered in part from the worst of the 2008 financial crisis, deficiency judgments remain a problem. Borrowers are still vulnerable to predatory lending practices that induce them into taking out expensive loans that lenders know they cannot afford long-term. And the secondary market, while increasing lending capital, allows lenders to externalize

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[269] *See supra* notes 102–103 and accompanying text.

[270] *See supra* notes 102–103 and accompanying text.

the risks of default. But lenders, mortgage insurers, and secondary-market investors are much better positioned to bear the loss from a deficiency after the foreclosure of a borrower's home. Public policy and statistical analysis, therefore, favor the widespread adoption of effective anti-deficiency laws.

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* Managing Editor, *Emory Law Journal*; Emory University School of Law, J.D., 2018; Virginia Commonwealth University, B.A., 2012. I am exceptionally grateful to my comment advisor and mentor, Professor Frank S. Alexander, for sparking my love of property law and real estate finance; for his patience, encouragement, and consistent guidance throughout this project; and especially for his resolute and unequivocal high standards, which ultimately pushed me to produce a comment worth publishing. I would like to thank the editors of the *Emory Law Journal*, especially Janiel Myers and Matthew Demartini, who edited and prepared my Comment for publication. I would also like to thank my father, Jonathan Olson, and my mother, Kathy Sukenis, for reading my first draft and kindly reassuring me that it "wasn't that bad." I want to thank my brother, Baxter Olson, for listening to me talk about deficiency judgments during his winter break, and for believing in me, nevertheless. Finally, I would be remiss to neglect my dearest friends, who listened, advised, motivated, and reassured me throughout the entire process, and to whom I am indebted and exceedingly grateful.