EMORY | LAW

Emory Law Journal

Volume 65 | Issue 3

2016

Amidst the Walking Dead: Judicial and Nonjudicial Approaches for Eradicating Zombie Mortgages

Andrea Clark

AMIDST THE WALKING DEAD: JUDICIAL AND NONJUDICIAL APPROACHES FOR ERADICATING ZOMBIE MORTGAGES[†]

ABSTRACT

The collapse of the residential housing market in 2007 brought with it a wave of foreclosures. Subprime borrowers, who were once elated by loans they secured from lenders, suddenly found themselves strangled by the predatory terms of their newfound loans and ultimately became unable to pay their outstanding loan balance. Amidst a growing number of residential foreclosures, lenders discovered the financial downside of foreclosing on residential properties—though this realization often surfaced after the foreclosure proceeding had commenced—and began to delay, or halt, foreclosure sales altogether. These purposeful maneuvers by lenders resulted in borrowers' continued legal liability for a residential property, a property which borrowers believed they had lost as a result of the lender's foreclosure; in other words, a "zombie mortgage."

This Comment analyzes the different circumstances under which lenders can foster the creation of zombie mortgages. Particularly, this Comment focuses on stalled and incomplete residential foreclosure sales and failures to execute deeds of sale, tactics which serve to maintain legal liability of the mortgaged property on a borrower. Notwithstanding a lender's right to foreclose on residential property to satisfy the obligations that it is owed under a promissory note, this Comment argues that strategic delays in completing a foreclosure sale entitle state courts and legislatures to either (1) force a lender to complete a sale or (2) divest a lender from both its right to foreclose and its security interest. Though some other solutions for zombie mortgages have been proposed, this Comment urges courts and legislatures to look outside criminal sanctions and nuisance abatement actions when developing strategies to eradicate zombie mortgages. Through judicial and legislative intervention, lenders would be incentivized to complete the foreclosure proceeding, or risk losing their security interests in the mortgaged property.

[†] This Comment received the 2015 Myron Penn Laughlin Award for Excellence in Legal Research and Writing.

INTRODUCTION

Like many homeowners in the United States, Joseph Keller fell behind on his mortgage payments and found himself subject to a foreclosure judgment.[1] Once Keller received notice of the foreclosure sale, he and his family packed up their belongings and moved out, assuming that they would never "have anything to do with the house again."[2] Unfortunately, Keller was wrong.

About two months after Keller's receipt of the auction notice, "[his] bank filed to dismiss the foreclosure judgment and the order of sale."[3] The result was a "zombie mortgage"—a property that remained in Keller's name as if the foreclosure proceedings had never started.[4] Keller was also legally liable for back taxes, sewer fees, waste removal, and the overall maintenance of a decrepit property that he had not occupied in years and thought was no longer his own.[5] Though abandoned foreclosures were once rare, the creation of zombie mortgages—like the one held by Keller—has been increasingly replicated in several cities across the nation, particularly in cities struggling economically after the downfall of the housing market.[6]

Despite the fact that lenders have several options to avoid foreclosure, including home retention workouts or helping borrowers refinance their loans, many of them choose to begin foreclosure proceedings while they are still negotiating with borrowers.[7] Throughout this process, lenders engage in an

---

[1] Michelle Conlin, *Special Report: The Latest Foreclosure Horror: The Zombie Title*, REUTERS (Jan. 10, 2013, 1:58 PM), http://www.reuters.com/article/2013/01/10/us-usa-foreclosures-zombies-idUSBRE9090G92 0130110.

[2] *Id.*

[3] *Id.*

[4] For a more complete definition of the term "zombie mortgage" as is used in this Comment, see *infra* Part I.B.

[5] Conlin, *supra* note 1 ("Then the tax collector started sending Keller notices about mounting back taxes, sewer fees and bills for weed and waste removal."); Ilyce Glink, *"Zombie" Foreclosures Hit Ex-Homeowners*, CBS: MONEYWATCH (Apr. 2, 2013, 2:31 PM), http://www.cbsnews.com/news/zombie-foreclosures-hit-ex-homeowners/ ("Hundreds of thousands of homes in the U.S. are now labeled as "zombie" foreclosure. That's when the owner of the foreclosed home leaves only to find out years later that he or she still legally owns and is on the hook for property taxes and other fees.").

[6] U.S. GOV'T ACCOUNTABILITY OFF., GAO 11-93, MORTGAGE FORECLOSURES: ADDITIONAL MORTGAGE SERVICER ACTIONS COULD HELP REDUCE THE FREQUENCY AND IMPACT OF ABANDONED FORECLOSURES 1, 14, 23 (2010).

[7] *Id.* at 10 & n.12.

equity analysis "to decide whether to foreclose on a loan or conduct a charge-off in lieu of a foreclosure."[8]

Whether it was a judicial or a nonjudicial foreclosure, lenders increasingly began to delay the foreclosure proceedings after either obtaining a judgment from the court for the sale of the property, after setting a date for the auction of the same, or even after the auction occurred.[9] By ceasing all additional steps to complete the foreclosure proceeding, lenders attempted—and continue to attempt—to bypass legal liability for maintaining the property while retaining the ability to foreclose on the same mortgaged property in the future.[10] More importantly, title to such property remained with the borrower given that the mortgaged property was never actually sold.[11]

Though many scholars have proposed mediation, nuisance abatement, and criminal sanction strategies,[12] these proposed solutions have not been sufficient on their own to eradicate zombie mortgages in the residential real estate arena.[13] Therein, the solution to the zombie mortgage crisis lies in analyzing a lender's right to foreclose and subsequently using judicial and legislative approaches to transform that right into a legal obligation to finalize the foreclosure sale it voluntarily commenced.

In Part I, this Comment presents a brief explanation of judicial and nonjudicial foreclosure proceedings. It also presents the definition of zombie mortgage, which will be used throughout this Comment. Part II then analyzes the rights of the lender, both when the borrower is in possession of the mortgaged property and when the property is unoccupied. Part II concludes by exploring the circumstances under which a lender's rights can become obligations.

---

[8] *Id.* at 15.

[9] Judith Fox, *The Foreclosure Echo: How Abandoned Foreclosures Are Re-entering the Market Through Debt Buyers*, 26 LOY. CONSUMER L. REV. 25, 34–43 (2013); *see infra* Part I.B.

[10] Creola Johnson, *Fight Blight: Cities Sue to Hold Lenders Responsible for the Rise in Foreclosures and Abandoned Properties*, 2008 UTAH L. REV. 1169, 1186–87.

[11] FED. HOUS. FIN. AGENCY, OFFICE OF INSPECTOR GEN., AN OVERVIEW OF THE HOME FORECLOSURE PROCESS 5, 16 (2011), http://fhfaoig.gov/Content/Files/SAR%20Home%20Foreclosure%20Process_0.pdf ("Until title passes to the foreclosure sale purchaser, the homeowner typically remains liable."); Fox, *supra* note 9, at 42 (describing a borrower's personal story when the bank canceled the sheriff sale, "presumably because it determined that the home was not worth selling," and the property remained in the borrower's name).

[12] *See* Johnson, *supra* note 10, at 1169, 1187–233.

[13] *See generally id.* (discussing the mechanics of civil proceedings for nuisance abatement and individual criminal nuisance actions).

Next, Part III outlines the foundation that will underpin the solutions proposed in this Comment. Though a lender has a right to foreclose on the mortgaged property to satisfy the sum owed under a promissory note, purposeful delays in conducting such foreclosure sale could trigger judicial use of equitable discretion. Part III also discusses current legislative loopholes that permit lenders to delay the foreclosure sale indefinitely. This Part demonstrates that state judicial and legislative branches can interfere with a lender's right to foreclose if such lender's exercise of the right has been unduly delayed.

Lastly, Part IV draws from the judicial and legislative intervention analysis discussed in Part III to recommend solutions for the zombie mortgage crisis. Though different solutions are presented for judicial and nonjudicial foreclosure states, the underlying goal of eradicating zombie mortgages can be accomplished in both types of jurisdictions.

I. ZOMBIE MORTGAGES

Zombie mortgages evolved from three primary sources: the subprime lending crisis, lenders' subsequent discoveries that foreclosures on residential mortgages would often be more costly than the value of the property, and lenders' desires to avoid legal ownership and liability of the property.[14] This Part explains the differences between judicial and nonjudicial foreclosures and the underlying characteristics that subject them to different zombie mortgage solutions. This Part then defines the term zombie mortgage for purposes of this Comment and identifies the stages during which a zombie mortgage can arise.

A. Judicial and Nonjudicial Foreclosures

A zombie mortgage can exist in both judicial and nonjudicial foreclosure states.[15] A judicial foreclosure jurisdiction is one in which a lender must go through the court system to foreclose on a residential property.[16] Such a lender is usually required to give a borrower notice before filing the foreclosure complaint.[17] After a borrower has had time to respond, the lender can serve the

---

[14] *See* Fox, *supra* note 9, at 39–43.

[15] For a detailed overview of the different foreclosure processes, see FED. HOUS. FIN. AGENCY, *supra* note 11.

[16] Frank Alexander et al., *Legislative Responses to the Foreclosure Crisis in Nonjudicial Foreclosure States*, 31 REV. BANKING & FIN. L. 341, 343 (2011).

[17] *Id.*

complaint.[18] If the borrower does not respond to the complaint, then "the [presiding] court authorizes a foreclosure sale."[19] In the event a borrower does file a response to the complaint, the case proceeds to trial.[20] Nevertheless, most judicial foreclosures of residential mortgages are "not contested and result in default judgments against the homeowner" because courts are only obligated to look at the sufficiency of a lender's filings.[21]

Alternatively, a nonjudicial foreclosure jurisdiction—also referred to as a power-of-sale foreclosure jurisdiction[22]—is one in which a lender only needs to comply with notice and advertisement requirements before it can auction the property for sale.[23] The lender does not need the permission of the court to commence the sale. In nonjudicial foreclosure states, the burden is on the borrower to commence judicial action if it wishes to stop the sale.[24]

Approximately thirty-three states and the District of Columbia are classified as predominantly nonjudicial, while seventeen states are classified as predominantly judicial.[25] In all states that permit nonjudicial foreclosure, a

---

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] FED. HOUS. FIN. AGENCY, *supra* note 11, at 11.

[22] To have the option of a nonjudicial foreclosure, both the loan documents and the respective state must permit the process. GARRY M. GRABER, CRAIG T. LUTTERBEIN & STEVEN W. WELLS, UNDERSTANDING FORECLOSURE OF REAL PROPERTY (2014), LexisNexis (database updated May 15, 2014) ("[A] power of sale foreclosure is usually effectuated pursuant to a private power of sale contained in a deed of trust (although some states do authorize power of sale foreclosures pursuant to a provision in a mortgage)."); KARL B. HOLTZSCHUE, PURCHASE AND SALE OF REAL PROPERTY § 36.07 (Matthew Bender & Co. 2015) (1987) (explaining that "[m]any states have adopted statutes dealing with deeds of trust, which prescribe the power of sale as one of the regular incidents of the trust deed relationship" and that in most states "the power of sale must be conferred by clear language in the mortgage"). The loan documents that permit nonjudicial foreclosures often involve a deed of trust as the security interest to the promissory note, as compared to the security instrument used for judicial foreclosures. GRABER ET AL., *supra*, at 5.

[23] Alexander et al., *supra* note 16, at 343. The lender needs to send notice to the homeowner and place an advertisement in the local paper before proceeding with a foreclosure sale. Some argue that vague notification factors, handled by government-subsidized servicers, are unconstitutional because they deprive the homeowner of due process. For an interesting discussion on whether nonjudicial foreclosures as a component of state action are unconstitutional, see Florence Wagman Roisman, *Protecting Homeowners From Non-Judicial Foreclosure of Mortgages Held by Fannie Mae and Freddie Mac*, 43 REAL EST. L.J. 125 (2014).

[24] Alexander et al., *supra* note 16, at 343.

[25] *Id.* at 350. Professor Alexander's article classifies nonjudicial foreclosure states as Alabama, Alaska, Arkansas, Arizona, California, Colorado, Georgia, Hawaii, Idaho, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. *Id.* at 350 n.25. *But cf.* FED. HOUS. FIN. AGENCY, *supra* note 11, at 19–21 fig.12

lender "always has the option of pursuing foreclosure through a judicial process."[26]

B. Understanding What a Zombie Mortgage Is and When One Occurs

The term "zombie mortgage" refers to a mortgage on a residential property for which enforcement of foreclosure proceedings were commenced but never finalized—plus the externalities such an action creates.[27] Although zombie mortgages produce numerous problems, this Comment focuses on the uncertainty surrounding ownership of the property in the period of time after foreclosure proceedings have commenced and after the lender has ceased enforcing its rights to the security interest. As a result of these initiated foreclosure actions, zombie mortgage victims believe they have lost ownership of the mortgaged property, but they are in fact still the legal owners of record several years later.

Accordingly, zombie mortgages result from a series of lender-created scenarios, all which serve to maintain legal ownership and liability of the property in a borrower.[28] In judicial foreclosure jurisdictions, a zombie mortgage exists in two circumstances: (1) when a lender commences a foreclosure sale by filing a foreclosure action with a court, gets a judgment in its favor granting the foreclosure sale, but then fails to conduct the sale; or (2) when a lender conducts the foreclosure sale but elects not to execute or

---

(distinguishing North Dakota as primarily judicial and the District of Columbia and West Virginia as primarily nonjudicial).

[26] Alexander, *supra* note 16, at 350.

[27] This Comment defines zombie mortgage in a different manner than the public currently uses it by focusing on the lender's refusal to enforce its right of foreclosure after it voluntarily commenced such proceedings. *Cf.* Fox, *supra* note 9, at 30–43 (combining the terms "[a]bandoned foreclosure, bank walkaway, 'zombie title' and 'limbo loan' . . . to describe a situation where a homeowner is in default, but the foreclosure does not proceed in the normal fashion to the eventual sale of the [property]" and identifying several stages during which the zombie mortgage can arise, but failing to distinguish between a zombie mortgage that occurs prior to the foreclosure sale and one that occurs after the sale but before recordation). This Comment's definition encompasses a specific set of zombie mortgages but excludes those that are created through borrower abandonment—*before* the lenders' decision to foreclose on the mortgaged property. *See* Conlin, *supra* note 1 (referring to situations where the bank walks away as a "zombie title" but not distinguishing the different points in time at which the lender can refuse to complete the foreclosure). *But see* Johnson, *supra* note 10, at 1186 (identifying a lender's refusal to record deeds in their name after the foreclosure period as "toxic titles" that create dubious chain of legal ownership).

[28] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 6, at 15; FED. HOUS. FIN. AGENCY, *supra* note 11, at 16; Fox, *supra* note 9, at 31–32.

record its foreclosure deed after it is the winning bidder at its own auction.[29] In nonjudicial foreclosure jurisdictions, the main concern is with lenders' decision not to execute and record the deed of sale to finalize the sale.

The first circumstance—a kind of "pre-auction zombie"—is created when a lender commences a foreclosure proceeding but ceases all attempts to conduct the sale after the entry of judgment authorizing the foreclosure action.[30] The foreclosure process "usually starts with a summons and a complaint and requires a court order prior to the sale of the mortgaged property."[31] A lender is then required to conduct service of process on a borrower, though the requirements for this kind of notice vary by state.[32] Additionally, lenders will often send notice to a borrower informing him or her that foreclosure proceedings will commence along with a demand to vacate the premises.[33] If a borrower does not respond to the foreclosure complaint, or a lender is successful at trial, the presiding court enters a judgment of record in favor of a lender authorizing the sale.[34]

Upon receiving notice from the lender, the borrower vacates the property, often believing that such property will be sold and that the sale will transfer legal ownership of the property to another party—relieving the borrower from further legal liability and ownership of the property.[35] Contrary to the borrower's beliefs, at some point after an entry of the order of sale but prior to the actual sale of the property, the lender conducts an equity analysis to justify

---

[29] *See* Fox, *supra* note 9, at 39–43 (defining stalled foreclosures and foreclosures abandoned after judgment but before sale). This Comment is concerned with the effects of a lender filing a foreclosure action, obtaining a judgment in its favor, and then ceasing all attempts to complete it.

[30] *Id.* at 39.

[31] Prentiss Cox, *Foreclosure Reform amid Mortgage Lending Turmoil: A Public Purpose Approach*, 45 HOUS. L. REV. 683, 699 (2008).

[32] *Id.* at 700 & n.110; *see* FED. HOUS. FIN. AGENCY, *supra* note 11, at 10–11.

[33] David P. Weber, *Zombie Mortgages, Real Estate, and the Fallout for the Survivors*, 45 N.M. L. REV. 37, 42 (2014).

[34] Alexander et al., *supra* note 16, at 343.

[35] Raymond L. Pianka, *Zombie Mortgages and Zombie Titles*, CLEV. MUN. CT. HOUSING DIVISION, http://www.clevelandmunicipalcourt.org/docs/default-source/default-document-library/cleveland-municipal-court-zombie-mortgages-and-zombie-titles.pdf (last visited Jan. 13, 2016). Transfer of ownership in the property should not be confused with the borrower's obligation to pay back the sum stated in the promissory note. *See id.* Though the borrower might not be legally liable for the property, taxes, and other costs incurred after the sale is completed, the borrower, per the loan agreement documents, is often still liable for the outstanding balance of the loan. *See id.*

halting any and all attempts to finalize a foreclosure sale that will not yield sufficient proceeds to pay the borrower's outstanding loan balance.[36]

A lender will typically fail to send notice to borrowers informing them that it has stopped or delayed the foreclosure proceedings, and the foreclosure sale never occurs.[37] Though lenders' failure to notify borrowers of their decision to cease foreclosure proceedings has been criticized, there is no present legal obligation to provide notice of such decision to a borrower.[38] Meanwhile, the property remains under the borrower's name and he or she remains legally liable and subject to property taxes, maintenance fees, and other costs related to the outstanding mortgage even though the home is legally unoccupied and often has been for several years.[39]

Before it decides to not continue with the foreclosure proceeding, a lender engages in an equity analysis to determine whether a foreclosure sale will yield a sum sufficient to cover the outstanding debt plus foreclosure costs.[40] If a lender's equity analysis indicates that the "[cost] of foreclosure exceed[s] the expected proceeds from selling the property," the lender will generally cease all attempts to complete the foreclosure sale.[41] Often, a lender makes this decision before initiating the foreclosure sale, but "in many cases [does] not discover that foreclosure would not be financially beneficial until after initiating the process."[42] By starting the foreclosure proceeding and later deciding not to conduct the sale, a lender can charge-off the loan and can "take advantage of insurance, tax, and accounting benefits from the monetary loss without the financial obligations of ownership."[43]

In contrast to pre-auction zombie mortgages in judicial foreclosure jurisdictions, the obvious component missing in a nonjudicial foreclosure is judicial oversight.[44] The absence of judicial hearings at the outset of a foreclosure process only means that a *borrower* has to be proactive and

---

36 *Id.*; Weber, *supra* note 33, at 42.

37 *See* Fox, *supra* note 9, at 41–43.

38 Weber, *supra* note 33, at 42.

39 *Id.* at 42–43.

40 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 6, at 15.

41 *Id.*

42 *Id.* at 14.

43 Fox, *supra* note 9, at 31 n.23; Weber, *supra* note 33, at 40–41.

44 U.S. GOV'T ACCOUNTABILITY OFF., GAO 12-34, VACANT PROPERTIES: GROWING NUMBER INCREASES COMMUNITIES' COSTS AND CHALLENGES 5 (Nov. 2011).

actively seek judicial intervention.[45] Without a borrower's request for judicial intervention prior to the foreclosure sale, the typical nonjudicial foreclosure process does not call for a hearing until the completion of the sale, if at all.[46]

The second circumstance—a kind of post-auction zombie—occurs when the lender fails to execute and record the deed of sale after the foreclosure sale is conducted.[47] Once a sale occurs, the execution and recordation of the deed of sale is necessary to perfect the legal transfer of the property from a borrower to a foreclosure sale buyer.[48] After the sale, liability for maintenance, taxes, and other costs associated with homeownership transfers to the new owner.[49]

Should few bidders appear at a lender's auction sale, the lender may become the highest bidder and, consequently, the property's new owner, making the residential property real estate owned (REO).[50] Ownership of the property by a foreclosure sale purchaser shifts future legal title and liability from the borrower onto the purchaser.[51] If the property is unoccupied or legally uninhabited, either through the borrower's independent decision or as a result of the lender's notice of impending foreclosure,[52] a foreclosure sale purchaser's ownership of this property also imposes on it a duty to clean up the property and resolve any nuisance, environmental, and health hazard issues associated with the property.[53] Unsurprisingly, a lender has an incentive to

---

45 Elizabeth Renuart, *Property Title Trouble in Non-Judicial Foreclosure States: The Ibanez Time Bomb?*, 4 WM. & M. BUS. L. REV. 111, 141 (2013).

46 *Id.*

47 *See* Pianka, *supra* note 35.

48 *See* Johnson, *supra* note 10, at 1186 n.98.

49 *Cf.* Conlin, *supra* note 1 ("Banks say that because they are not the legal owners of these homes, they aren't required to maintain them, pay taxes on them, or take any legal responsibility for them. Homeowners legally own their properties until the day of the sale. And it's not until that day, the banks point out, that a homeowner's name vanishes from the title.").

50 Weber, *supra* note 33, at 44 (noting that when the home becomes property of the lender, it "is known in the trade as real estate owned (REO) property").

51 Once a property becomes an REO, such lender is deemed to have possession and control of the mortgaged property. As such, a lender must "maintain the mortgaged premises in good condition to prevent its deterioration." Landau v. W. Pa. Nat'l Bank, 282 A.2d 335 (Pa. 1971).

52 Fox, *supra* note 9, at 43 ("A Woodstock Institute Study of vacant properties in Chicago found that homes were more likely to become vacant when a foreclosure was initiated, but not followed through to sale.").

53 *Id.* This Comment recognizes that a typical homeowner has a duty to maintain his property in conformity with health, nuisance, and environmental laws. *E.g.*, Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(a) (requiring potentially responsible parties (PRPs) to conduct or pay for the cleanup of contaminated property and classifying any current "owner or operator" of a "facility" as a PRP); Johnson, *supra* note 10, at 1195 & n.159 ("Under the Property

strategically refuse to execute the deed as a way to escape any liability that comes from owning the vacant home.[54]

C. Problems Caused by Zombie Mortgages

The easiest problem to identify is the financial burden zombie mortgages create for unsuspecting borrowers. A borrower, believing he had lost the property as a result of a lender's foreclosure initiation, now finds that he is the owner of record on the mortgaged property. As the owner of record, he is legally liable for back taxes and any other fees associated with the period during which the home was not occupied by any of the parties.[55]

Yet, the effects of zombie mortgages reach far beyond the financial ramifications imposed on a borrower. Zombie mortgages create negative socioeconomic effects on cities that house those affected properties.[56] Particularly in low-income neighborhoods, neighboring homeowners are concerned by the health hazards abandoned homes pose.[57] These zombie mortgages are "magnets for crime and drug use . . . . [a]nd they suck the life out [of] the valuations of other homes on the street."[58]

While some communities have pushed for legislation to impose fines on lenders that do not comply with cleanup during the vacancy period,[59] others

---

Maintenance Code of New York State, an 'owner' is a responsible party in a nuisance action and is described as the person holding legal title of the property." (citing N.Y. PROPERTY MAINTENANCE CODE ch. 2, § 202 (2007), which "specifies the responsibilities of owners, operators, and occupants regarding the proper maintenance of residential and non-residential buildings")). This Comment then infers that once the foreclosure sale purchaser buys the property, it becomes the legal owner of the property, and legal ownership imposes onto this new owner a duty to care for the property.

[54] Kristin M. Pinkston, *In the Weeds: Homeowners Falling Behind on their Mortgages, Lenders Playing the Foreclosure Game, and Cities Left Paying the Price*, 34 S. ILL. U. L.J. 621, 633 (2010). By not recording the deed, "lenders hide their identity until the sale of the property is near." *Id.*

[55] *See* Linda Finley, *Walking Dead? Beware the Zombie Foreclosure*, NAT'L MORTGAGE NEWS (Aug. 6, 2014, 3:32 PM), http://www.nationalmortgagenews.com/blogs/lens/walking-dead-beware-the-zombie-foreclosure-1042296-1.html ("The borrower, zombie-like, unknowingly continues to accrue tax and code violation liability and technically still owes the money on the [promissory] note.").

[56] Weber, *supra* note 33, at 46.

[57] *See* Barbara Livingston Nackman, *'Zombie' Homes Continue to Gather Weeds*, LOHUD (July 11, 2014, 10:50 PM), http://www.lohud.com/story/news/2014/07/10/neighbors-complain-zombie-homes/12486409/. The average condition of a property that has fallen victim to a zombie mortgage can include graffiti, tepid pools, pests and insect infestations, overgrown weeds, and vagrant squatter occupations. *Id.*

[58] Don Walker, *Hundreds of Zombie Homes Plague Milwaukee Neighborhoods*, MILWAUKEE J. SENTINEL (May 25, 2014), http://www.jsonline.com/news/milwaukee/hundreds-of-zombie-homes-plague-milwaukee-neighborhoods-b99276701z1-260613161.html.

[59] Nackman, *supra* note 57.

have imposed criminal sanctions on homeowners.[60] Nuisance abatement and tax foreclosures have been successful at retuning properties to productive use, but these proceedings are often too time consuming to rehabilitate a large number of zombie mortgages.[61] Similarly, sanctions imposed on lenders for failing to comply with property oversight and maintenance requirements include a maximum fine of $1,000 or up to six months in jail.[62] Imposing those monetary sanctions, however, does not truly injure a lender because a $1,000 fine is miniscule when compared to the potential costs of bringing the vacant property up to health and safety code standards.[63] Though a judge in Cleveland, Ohio, has attempted to impose a $5,000 fine on a lender for each day out of compliance, guidelines for this type of penalty still indicate that this could only be applied against a lender already in possession of the mortgaged property.[64]

A growing number of jurisdictions have fought back against zombie mortgages by adopting Vacant Property Registration Ordinances (VPROs). VPROs "seek to create a mechanism for identifying the potentially responsible parties for unoccupied buildings and impose appropriate costs upon those parties by requiring registration of [the] vacant property with the local government."[65] Yet the uncertainty of vacant property registration periods[66]

---

[60] Conlin, *supra* note 1 ("In some cities, people with zombie titles can be sentenced to probation—with the threat of jail if they don't bring their houses into compliance."). However, some jurisdictions have shifted the criminal focus from the borrower to the lender. *See* Johnson, *supra* note 10, at 1187 (explaining that some cities have "resorted to using criminal nuisance lawsuits to get lenders to abate nuisances at individual properties").

[61] Johnson, *supra* note 10, at 1188.

[62] Arthur B. Axelson, *Go Directly to Jail? Las Vegas Joins Other Jurisdictions in Imposing Burden of Upkeep of Vacant Properties on Lenders*, DYKEMA (Dec. 8, 2011), http://www.dykema.com/resources-alerts-imposing-burden-of-upkeep.html.

[63] Johnson, *supra* note 10, at 1195 (stating that often "civil fines associated with a single property are not sufficient to change the behavior of national lenders," forcing cities to come up with stronger sanctions).

[64] *Id.* at 1197.

[65] Benton C. Martin, *Vacant Property Registration Ordinances*, 39 REAL EST. L.J. 6, 9 (2010); *Property Registration*, COMMUNITY CHAMPIONS, http://cchampions.com/property-registration/ (last visited Oct. 12, 2015).

[66] The triggering event—when the nuisance is abated—is inherently ambiguous because there is no exact time period or deadline to abate the nuisance. Because there is no clear guideline as to what is considered "failure to abate," courts struggle with ambiguity in trying to enforce vacant property registration ordinances. *See* Johnson, *supra* note 10, at 1243–44.

suggests that these ordinances' cannot be "standalone solutions" to urban blight or zombie mortgages.[67]

Due to the difficulty of identifying the owner of the mortgaged property, cities often assume the cost of property maintenance, inspection, and crime prevention.[68] As a result, some communities are letting the affected residential properties decay, refusing to spend "public funds on securing, cleaning and stabilizing houses that generate no tax revenue."[69] To prevent the externalities zombie mortgages create, new approaches focusing on lenders' right to foreclose must be considered.

II. THE RIGHTS OF A LENDER PRIOR TO FORECLOSURE

In the absence of language articulating the rights of a lender in a single-family residential contractual agreement, U.S. courts have predominantly looked to two different theories: title theory and lien theory.[70]

Rooted in English law, title theory gives legal title of the property to a lender until the mortgage is satisfied, at which point, title would be conveyed back to a borrower.[71] With the development of borrowers' equity of redemption,[72] modern courts have interpreted title theory to give lenders theoretical title to the mortgaged property while borrowers remain in possession and, for practical purposes, are considered the true owners of such property.[73] Lenders could still exercise their rights to possession but they were

---

[67] *See generally* Benton C. Martin, *Federalism and Municipal Innovation: Lessons from the Fight Against Vacant Properties*, 46 URB. LAW. 361, 370 (2014) (stating that although neither land banks nor VPROs alone were perfect solutions to urban blight, both could be combined with state and federal government tools to strengthen their effectiveness).

[68] Walker, *supra* note 58 (noting that in the previous year, a quarter of the Department of Neighborhood Services's resources for abatement were used to inspect homes fallen victim to zombie mortgages).

[69] Conlin, *supra* note 1. In at least three states, some properties have exploded because the gas had not been shut off prior to such lender and borrower's abandonment. *Id.*

[70] GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW §§ 4.1–4.5, at 135–44 (5th ed. 2007) (discussing and comparing title theory, lien theory, and intermediate theory).

[71] *Id.* at 135 (citing Robert Kratovil, *Mortgages—Problems in Possession, Rents, and Mortgage Liability*, 11 DEPAUL L. REV. 1, 4–5 (1961)).

[72] The equity of redemption doctrine states that "every mortgage borrower has the right, at any time after default, to redeem the collateral by repaying the debt until the lender has completed a 'foreclosure' on the collateral." Marshall E. Tracht, *Renegotiation and Secured Credit: Explaining the Equity of Redemption*, 52 VAND. L. REV. 599, 600 (1999).

[73] RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1 cmt. a (AM. LAW INST. 1997) (arguing that although significant limitations have been placed on the title theory, "in the absence of agreement to the

often held to stricter standards.[74] Title theory still exists today; a lender has a right to immediate possession against a borrower, often after such borrower has defaulted.[75]

Under lien theory, followed by the majority of U.S. jurisdictions, a lender acquires only a lien on the mortgaged real estate and the borrower retains both legal and equitable title and the right to possession until foreclosure.[76] Because a borrower is considered the legal owner of the mortgaged property, the lender has no right to possession of the property unless it becomes the legal owner by bidding on the property at the foreclosure sale, or the borrower abandons it.[77]

Today, courts give primary consideration to the language in the mortgage, or security deed, to determine the rights of a lender.[78] Although almost every jurisdiction's standard form mortgage contains non-uniform clauses—which give a lender the right to accelerate payment of the debt, to prevent waste by a borrower, and to come into possession of the property after a borrower's abandonment—it often does not contain language delineating the lender's right to possess the property.[79] Hence, with the exception of those lenders' rights explicitly established in the mortgage instrument, the underlying lien and title theories have guided the judiciary's decisions in the absence of contractual language indicating the rights of a lender in residential property transactions.

A. Rights When a Borrower Is Still in Possession of the Mortgaged Property

Typically, lenders have various rights with respect to their security interest on the mortgaged property. These rights stem from both title and lien theories, as well as from contractual provisions in the mortgage document.[80] Some of

---

contrary, the mortgagee has a right to immediate possession against the mortgagor"). This assertion can be important where the borrower seeks to divert rent profits to service the underlying loan obligation. *Id.*

[74] *See* Maglione v. BancBoston Mortg. Corp., 557 N.E.2d 756 (Mass. App. Ct. 1990) (holding that the borrower, for practical and theoretical purposes, is to be regarded as the owner of the land).

[75] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 183, § 26 (West 2014).

[76] NELSON & WHITMAN, *supra* note 70, § 4.2, at 139; *see* Martinez v. Continental Enters., 730 P.2d 308, 312, 314 (Colo. 1986) (en banc).

[77] NELSON & WHITMAN, *supra* note 70, § 4.2, at 139–41.

[78] *See generally* Fannie Mae–Freddie Mac Deed of Trust §§ 18–19, https://www.fanniemae.com/content/legal_form/3048w.doc. Fannie Mae and Freddie Mac forms contain substantial limitations and provisions that may vary from state to state.

[79] *See Security Instruments*, FANNIE MAE, https://www.fanniemae.com/singlefamily/security-instruments (last visited Jan. 23, 2015).

[80] *See supra* note 79; *cf.* Beckford v. Empire Mut. Ins. Grp., 525 N.Y.S.2d 260, 263 (App. Div. 1988) (discussing the lender's right to insure the mortgaged property but refusing to turn that right into an affirmative

the rights enjoyed by lenders include the right to prevent waste on the mortgaged property, the right to pay for property insurance or taxes to protect its security interest, the right to accelerate the collection of the mortgages debt, and, most importantly, the right to foreclose on the property.[81] Additionally, when a borrower is still in possession of the mortgaged property, the rights of a lender take into consideration the physical occupancy and possession of the borrower.[82]

First, if a borrower intentionally causes physical damage to the mortgaged property he or she has created waste.[83] Borrowers may use the property in its usual and proper manner and may incur some damage to the property resulting from normal use and exposure, as long as it does not result in significant diminution of the value of the property.[84] Over time, courts have increasingly expanded the concept of waste to encompass situations wherein waste occurs as a result of a borrower's actions, either negligent or intentional, which reduce the value of the mortgaged property or the security interest of the lender.[85]

Second, a lender has a right to obtain any insurance necessary to protect its security interest and to add the cost of procuring this coverage to the balance owed on the loan.[86] Courts have traditionally interpreted this right as an option,

---

obligation); Prudential Ins. Co. of Am. v. Spencer's Kenosha Bowl Inc., 404 N.W.2d 109, 113 (Wis. Ct. App. 1987) (holding that lien theory lenders are permitted to recover for passive waste in addition to voluntary waste); Julia Patterson Forrester, *Still Crazy After All These Years: The Absolute Assignment of Rents in a Mortgage Loan Transaction*, 59 FLA. L. REV. 487, 492–93 (2007) (noting that while a foreclosing lender may have a legal right to rent proceeds during foreclosure, as a practical matter, this income is typically still realized by the borrower in default); David A. Leipziger, *The Mortgagee's Remedies for Waste*, 64 CALIF. L. REV 1086 (1976) (discussing both contractual and common law remedies for lenders).

81 *See supra* note 80 and accompanying text.

82 Forrester, *supra* note 80, at 493.

83 Leipziger, *supra* note 80; *see Prudential Ins. Co. of Am.*, 404 N.W.2d at 113.

84 *See* Kruger v. Horton, 725 P.2d 417 (Wash. 1986) (en banc).

85 *See* RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.6(a) (AM. LAW INST. 1997) (including negligent physical changes to the property which reduce its value, failure to maintain and repair the property in a reasonable manner, failure to pay taxes or governmental assessments, failure to maintain insurance on the property, failure to comply with the covenants of the mortgage as to the physical care and maintenance of the property, or retention of rents to which the lender is entitled).

86 Beckford v. Empire Mut. Ins. Grp., 525 N.Y.S.2d 260, 263 (App. Div. 1988); *Security Instruments*, FANNIE MAE, https://www.fanniemae.com/singlefamily/security-instruments (last visited Jan. 24, 2016) (listing security instruments, including the Single Family Uniform Instrument Form for Michigan, which includes the following provision: "If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense. Lender is under no obligation to purchase any particular type or amount of coverage."). Though both parties have an interest in the property, there is usually only one policy taken out—often by the borrower for the benefit of the lender. *See* Tech Land Dev., Inc. v. S.C. Ins. Co., 291 S.E.2d 821, 823 (N.C. Ct. App. 1982).

and not an obligation, to obtain insurance.[87] Any liability must arise from a positive duty imposed on a lender, ensuing from either a contractual relationship between the former and the borrower, or "because of the negligent manner in which some act which the contract provides for is done."[88] Similar to the lender's right to step in to obtain property insurance, most loan documents indicate that failure by a borrower to pay property taxes will trigger a lender's right to accelerate repayment of the debt.[89]

Third, a lender has a right to foreclose on a mortgaged property. This is one of the lender's most significant rights. A lender can either enter and take possession the property, or sell the mortgaged property at an auction and apply the proceeds of the sale to reduce the outstanding loan balance. If a lender exercises its right to take possession of the property prior to a foreclosure sale, it becomes the "mortgagee in possession."[90] In the past, this right has not been interpreted to impose an obligation on the lender to take possession of the mortgaged property.[91]

The right to possession and the respective mortgagee-in-possession status can often deter lenders from taking possession because it exposes those lenders to obligations and potential liabilities.[92] Any act of destruction against the property, including mismanagement, will be considered waste, which in turn imposes strict accountability upon the lender.[93] In fact, a lender in possession is "bound to use reasonable means to preserve the [mortgaged property] from loss or injury" and prevent any deterioration arising its failure to act after it comes into possession.[94]

---

87 *Beckford*, 525 N.Y.S.2d at 263.

88 *Id.*

89 In most security instruments, the borrower is creating a covenant by promising that he will provide for taxes and assessments into an escrow account. A breach of this covenant is grounds for acceleration. *See, e.g.*, *Security Instruments*, *supra* note 86. Sections 4 and 22 of Alabama's Single Family Uniform Instrument, for example, include such a covenant.

90 *See, e.g.*, Valley Int'l Props., Inc. v. Brownsville Sav. & Loan Ass'n, 581 S.W.2d. 222, 223–25 (Tex. Civ. App. 1979).

91 NELSON & WHITMAN, *supra* note 70, § 4.24, at 200.

92 *See* Woodview Condo Ass'n v. Shanahan, 917 A.2d 790, 793 (N.J. Super. Ct. App. Div. 2007).

93 *See id.* at 792–94; Smith v. Stringer, 155 So. 85, 86 (Ala. 1934); American Freehold Land Mortg. Co. of London v. Pollard, 82 So. 630, 630–31 (Ala. 1902) (holding for strict accountability for timber removed). The measure of damages will be the diminution in the value of the estate caused by the destruction. *Id.*

94 NELSON & WHITMAN, *supra* note 70, § 4.29, at 212; *see* United Nat'l Bank v. Parish, 750 A.2d 238, 241 (N.J. Super. Ct. Ch. Div. 1999) ("[T]he duty of the mortgagee in possession is that of a provident owner." (citation omitted)); Coleman v. Hoffman, 64 P.3d 65 (Wash. Ct. App. 2003); Matthew H. Ahrens & David S.

Certainly, imposing on lenders the obligations that come alongside the mortgagee-in-possession title is theoretically simple, as long as the lender has exercised ownership or possession of the mortgaged property.[95] A lender is considered to be in possession of a residential property when it "exercise[s] dominion and control over the [mortgaged] property."[96] Similarly, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) suggests that possession includes "exercise of control and active participation in management."[97] Though an argument could be made that a foreclosure filing could be considered an exercise of control over the mortgaged property[98]—making a foreclosing lender a mortgagee in possession and consequently liable for the mortgaged property—this Comment focuses on judicial and legislative termination of lenders' rights to foreclose.

Alternatively, if a lender is not in possession of the mortgaged property, it may evoke its right to petition for a judicially appointed receiver.[99] As an impartial third party, a receiver is judicially appointed at the request of a lender to take possession of the mortgaged property to repair it, preserve it, and collect any rents it produces.[100] A receiver's position as an officer of the court enables him to take possession of the property—owing a fiduciary duty to both the lender and the borrower—but also shields him from legal liability.[101] By

---

Langer, *Lender Liability Under CERCLA, Environmental Risks for Lenders Under the Superfund: A Refresher for the Economic Downturn*, 3 BLOOMBERG CORP. L.J. 482, 486 (2008).

[95] *See Coleman*, 64 P.3d at 68 (explaining that a lender "who properly acquire[d] 'mortgagee in possession status' is held accountable for that possession . . . to third parties" (alteration in original) (quoting RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1, at 189 (AM. LAW INST. 1997))).

[96] *Id.* (describing different circumstances under which a lender can be considered to have indicia of control, including but not limited to leasing, making repairs, and making management decisions); *see* Bank of Am. Nat'l Trust & Sav. Ass'n v. Bank of Amador Cty., 28 P.2d 86, 89 (Cal. Ct. App. 1933).

[97] Under CERCLA, a lender has an obligation to maintain and clean up the property if it "participates in management" of the property, such as when it "(1) undertakes decision-making control or responsibility for the facility's hazardous substance handling or disposal practices; or (2) exercises control at the level of a manager over . . . day-to-day decision-making or . . . operational functions." Ahrens & Langer, *supra* note 94, at 485–86. Though CERCLA establishes safe harbor provisions that protect a lender from liability of the polluted property, a lender can only take advantage of such provisions if it has refrained from coming into possession of the property or has not engaged in management of such property. *See* 42 U.S.C. § 9601(20) (2012).

[98] An argument has previously been made that by "sending letters threatening eviction or foreclosure against defaulting homeowners, the lenders have asserted control over the property, triggering a responsibility to maintain the home." Johnson, *supra* note 10, at 1195. It is unclear whether this argument has prevailed.

[99] CAL. CIV. PROC. CODE. § 564(b) (West 2015); GA. CODE. ANN. § 9-8-3 (West 2011); OHIO REV. CODE. ANN. § 2735.01 (West 2006).

[100] NELSON & WHITMAN, *supra* note 70, § 4.33, at 217.

[101] *See, e.g.*, Four Strong Winds, Inc. v. Lyngholm, 826 P.2d 414 (Colo. App. 1992); Zeligman v. Juergens, 762 P.2d 783 (Colo. App. 1988).

requesting a receiver, a lender avoids taking possession of the property and consequently escapes any liability to own it, maintain it, and repair it while it is vacant.[102]

B. Lenders' Rights When the Mortgaged Property Is Unoccupied

The lender's rights once a mortgaged property is legally unoccupied are similar to the rights it holds when a borrower is in possession. The lender's rights to accelerate the debt, foreclose on the mortgaged property, prevent waste, and collect rents remain.[103] A lender also has a right to enter and possess the property, not just in a title theory jurisdiction but also under lien theory.[104]

But possession does not necessarily mean occupation; a lender can be considered a mortgagee in possession if it exercises dominion and control over the mortgaged property.[105] A lender is often deterred from taking possessory action for fear that it will incur an affirmative duty to maintain the property.[106] Though it is true that the borrower remains contractually and legally liable for the mortgaged property, possession by the lender could translate into its own liability to third parties.[107]

C. When Lenders' Rights Turn into Obligations

A lender's right to foreclose includes an obligation to inform the borrower of the foreclosure proceeding at the outset.[108] While the majority of judicial foreclosure states impose notice requirements on the lender at the beginning of the foreclosure proceeding, there is no notice requirement if the lender later elects to reschedule the sale.[109] The Federal Reserve has previously

---

[102] *See* Patrick A. Randolph Jr., *The Mortgagee's Interest in Rent: Some Policy Considerations and Proposals*, 29 KAN. L. REV. 1, 38 (1980).

[103] *See supra* note 82 and accompanying text.

[104] NELSON & WHITMAN, *supra* note 70, § 4.24, at 200–01. The rationale behind this right to possession stems from the public's interest in protecting the property from decay, natural or man-made.

[105] *See supra* note 96 and accompanying text.

[106] *See* Coleman v. Hoffman, 64 P.3d 65, 68 (Wash. Ct. App. 2003) ("A mortgagee who properly acquires mortgagee in possession status is held accountable for that possession . . . to third parties." (ellipses in original) (quoting RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1, at 189 (AM. LAW INST. 1997))).

[107] Essex Cleaning Contractors Inc., v. Amato, 317 A.2d 411, 412 (N.J. Super. Ct. App. Div. 1974).

[108] Cox, *supra* note 31, at 700 & n.110; Weber, *supra* note 33, at 41–42.

[109] *See* Weber, *supra* note 33, at 42 & n.28; LEXISNEXIS, 50 STATE SURVEYS OF STATUTES & REGULATIONS: JUDICIAL FORECLOSURE (Jan. 2015).

emphasized the importance of informing the borrower of the postponed, or cancelled, foreclosure sale to prevent additional zombie mortgages.[110]

In both judicial and nonjudicial foreclosure jurisdictions, there is no question that property maintenance liability will arise if a lender gains ownership of the property by placing the highest bid at its own foreclosure sale, and then promptly executes and records the deed of sale.[111] Such a clear scenario sits in stark contrast to the lender-created circumstances under which zombie mortgages surface.[112] The next Part will demonstrate that, in those instances, a lender's right to foreclose should turn into an obligation to complete the foreclosure sale.

III. FORECLOSING ON LENDERS' RIGHTS

As mentioned in Part II of this Comment, most lenders are cautious not to be considered a mortgagee in possession so as not to incur any affirmative obligations to maintain mortgaged property or to foreclose.[113] Nonetheless, the externalities arising from lenders' calculated decisions—decisions to abandon a foreclosure sale halfway through its execution—are far too severe to ignore.[114] This Comment calls for increased judicial and legislative action to foreclose on the rights of a "sleeping" lender.[115]

The banking industry has insisted—successfully thus far—that they cannot be held liable for the maintenance of a property that they do not own.[116] They argue that they should not be forced to foreclose and effectively become the

---

[110] Letter from Michael S. Gibson & Sandra F. Braustein, Dirs., Bd. of Governors of the Fed. Reserve Sys., to the Officer in Charge of Supervision at Each Federal Reserve Bank (July 11, 2012), http://www.federalreserve.gov/bankinforeg/srletters/sr1211.pdf (listing the subject as "Guidance on a Lender's Decision to Discontinue Foreclosure Proceedings" and recommending that a lender should notify a borrower when decision to not pursue foreclosure action is made, their rights to occupy the property until the sale is completed, the financial obligations outstanding, and outlining maintenance responsibilities).

[111] *See infra* Part IV.

[112] *See supra* Part I.B.

[113] In the case of foreclosure, the lender is particularly worried about being the highest bidder at its own foreclosure auction, which would make the lender the legal owner of the property, subject to ownership duties and liabilities. This often happens when the amount of the outstanding debt is greater than the fair market value of the property.

[114] *See* Conlin, *supra* note 1 (describing the effects of zombie mortgages on their respective neighborhoods and cities).

[115] CAL. CIVIL CODE § 3527 (West 2012).

[116] Conlin, *supra* note 1 ("Banks say that because they are not the legal owners of these homes, they aren't required to maintain them, pay taxes on them, or take any legal responsibility for them.").

owner of the property.[117] In some respects, the lenders' comments are correct: a lender, in theory, has the right to foreclose on the mortgaged property, sue on the promissory note, or undertake both options simultaneously as a way to recuperate the outstanding balance of the loan.[118] And while the lender cannot be forced to pursue one option over the other at the outset,[119] this protection may evaporate when the lender voluntarily chooses to pursue a foreclosure action.

In exploring solutions to the zombie mortgage crisis, this Comment highlights the necessity of creating frameworks for both judicial and nonjudicial jurisdictions since both types of jurisdictions have created conditions in which zombie mortgages can thrive. This Part first analyzes previous judicial action that can potentially provide an answer to the zombie mortgage crisis and then explores the current legislative pitfalls that exacerbate zombie mortgages.

A. Affirmative Judicial Action in Judicial Foreclosure Jurisdictions

In a primarily judicial foreclosure jurisdiction, a foreclosure sale usually occurs anytime between 360 to 990 days from the date the action was commenced.[120] Most jurisdictions do not actually set maximum statutory periods within which a lender must conduct the foreclosure sale or finalize the sale after the auction takes place.[121] These factors foster an environment in which zombie mortgages thrive.

To combat zombie mortgages arising from ambiguous foreclosure time lines, affirmative judicial action must center around using equitable discretion, sua sponte or otherwise, to require that a lender complete foreclosure

---

117 *See generally In re* Perry, No. 12-01633-8-RDD, 2012 WL 4795675 (Bankr. E.D.N.C. Oct. 9, 2012) (holding that a creditor cannot be forced to into accepting surrendered collateral or be required to foreclose).

118 RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 8.2 cmt. a (1997) ("Once the mortgage goes into default and the obligation is accelerated, this section gives the [lender] the choice to proceed initially on the underlying personal obligation or to foreclose on the mortgaged real estate. . . . This section does not require, as do a few states, that the [lender] exhaust the mortgaged real estate prior to proceeding on the personal obligation.").

119 *See id.*

120 *Foreclosure Time Frames and Compensatory Fee Allowable Delays Exhibit*, FANNIE MAE (2014), https://www.fanniemae.com/content/guide_exhibit/foreclosure-timeframes-compensatory-fees-allowable-delays.pdf. Fannie Mae classified South Dakota as having the quickest foreclosure time frame, at 360 days, while New York City delays extended to an average of 990 days. *Id.*

121 *See* LEXISNEXIS, 50 STATE SURVEYS OF STATUTES & REGULATIONS: JUDICIAL FORECLOSURE (Jan. 2015).

proceedings within a specific time frame from the date of the order authorizing the sale, or alternatively risk losing its security interest. This section explains the doctrine of equitable discretion—a concept that this Comment later applies to require a lender to conduct a foreclosure sale.

1. Past Use of Equitable Discretion to Prevent Foreclosure Delays

A zombie mortgage analysis requires recognizing the distinction between statutes of limitation and the doctrine of laches. A statute of limitations in the residential mortgage context establishes the time period within which the lender must *commence* a cause of action, if any.[122] A statute of limitations is no longer relevant once a zombie mortgage exists because the lender has already filed an action with the court and obtained a judgment authorizing a foreclosure sale.[123] Thus, once a lender has judicial authorization to proceed with a foreclosure action, the analysis shifts from limiting a lender's time to file a cause of action, to creating a time frame for a lender to conduct the foreclosure sale. To successfully achieve the latter, it is imperative for state courts to emphasize the equitable principle that "[t]he law helps the vigilant, before those who sleep on their rights."[124]

A court's equitable discretion draws force from the doctrine of laches, which provides that a party's right will not be enforced or allowed if that party's extensive delay in asserting its right or claim has prejudiced another party.[125] The doctrine is not solely concerned with the act of delay but also with the reason for the delay and the delay's effect on a borrower.[126] The delay

---

[122] *See* ALA. CODE § 6-2-33 (2014) (cause of action relating to a contract, real estate, or a foreclosure must be commenced within ten years); DEL. CODE ANN. tit. 10 § 7902 (West 2006) (statute of limitations for a cause of action is twenty years).

[123] *See, e.g.*, *supra* note 122. A statute of limitations analysis would only be appropriate if a lender has not commenced the foreclosure proceeding. *See id.* While lender-friendly statutory frameworks bestow on a lender a vast amount of time to even file a foreclosure action—often allowing a lender's statute of limitations to trigger at the end of the amortization schedule—this Comment will not address this aspect of legislative shortcomings.

[124] CAL. CIVIL CODE § 3527 (West 2012).

[125] Deirdre R. Wheatley-Liss, *Doctrine of Laches Means You Are "Out of Time,"* LEXISNEXIS LEGAL NEWSROOM: EST. & ELDER L., http://www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/archive/2012/01/26/doctrine-of-laches-means-you-are-quot-out-of-time-quot.aspx.

[126] Samuel L. Bray, *A Little Bit of Laches Goes a Long Way: Notes on* Petrella v. Metro-Goldwyn-Mayer, Inc., 67 VAND. L. REV. EN BANC 1, 2 (2014), https://www.vanderbiltlawreview.org/wp-content/uploads/sites/89/2014/01/Bray-Essay.pdf.

must be unreasonable or cause prejudice.[127] And though a lender has the right to foreclose on the mortgaged property, the doctrine of laches explains that a "mortgage foreclosure, being equitable in nature, may be denied, even within such period, if it appears that an unreasonable delay has misled the [borrower]."[128]

State and federal courts alike have often refused to allow the doctrine of laches to shorten lenders' statute of limitations period to *file* a foreclosure action.[129] Nevertheless, courts have not necessarily extended this treatment to lenders who have *already filed and commenced* a foreclosure action.[130] It follows that under some circumstances courts could utilize their equitable discretion, entrenched in the doctrine of laches, to require a lender to complete the exercise of its right to foreclose, especially after such lender has already started to exercise that right but has recklessly wasted judicial resources by delaying the sale.[131]

Judicial use of equitable discretion is not a new premise. In *Boorstein v. Miller*, the Court of Chancery of New Jersey prevented undue harm to the mortgage assignor by enjoining a mortgage assignee from seeking indemnity from the assignor on a foreclosure deficiency action when such assignee failed to exercise reasonable diligence in completing a foreclosure proceeding.[132] In a manner true to the doctrine of equitable judicial discretion, this court stated that the assigned lender, "after the [borrower's] defaults, [was] obligated to use

---

[127] *Id.* ("It is this focus on considerations other than the mere passage of time that strongly distinguishes laches from statutes of limitations.").

[128] Verna v. O'Brien, 356 N.Y.S.2d 929, 932–33 (Sup. Ct. 1974).

[129] *See* Kaminski v. Wayne Cty. Bd. of Auditors, 287 Mich. 62 (1938); BRUCE J. BERGMAN, 1–5 BERGMAN ON NEW YORK MORTGAGE FORECLOSURES § 5.10 (Matthew Bender & Co. 2015) (1990) ("[A] delay of one year after default in instituting foreclosure cannot defeat the action where opposition is founded upon a claim of laches.").

[130] *See* BERGMAN, *supra* note 129, § 5.10.

[131] *See id.* (stating that while laches cannot by used by the borrower as a typical defense to a foreclosure action against him, it can be asserted where the exercise of the mortgagee's right "would be inequitable after the passage of a lengthy time period").

[132] 3 A.2d 87, 91 (N.J. Ch. 1938) (holding that a mortgage assignee was not eligible for indemnification from the assignor when such assignee had voluntarily subordinated the second mortgage to a new first mortgage and delayed the process of obtaining the funds it was owed). Though an injunction has been referred to as the "quintessential equitable remedy," it is but one form of judicial equitable discretion. *See* David W. Raack, *A History of Injunctions in England Before 1700*, 61 IND. L.J. 539, 539 (1986).

diligence and reasonable care to realize on the security of their mortgage."[133] The court understood that allowing the assignee-lender to recover its security interest "would be to impose an unwarranted penalty upon a helpless and innocent complainant; it would be tantamount to putting 'in reverse' an old equitable maxim to read 'Equity helps not the vigilant but him who sleeps.'"[134]

Parallel to the use of equitable discretion in *Boorstein*, several courts have used their discretionary power to prevent lenders from acting contrary to the duty of good faith and fair dealing.[135] Under this premise, a lender "cannot act with complete impunity toward assets which he has under his control, and which [are] available to reduce [a borrower's] liability."[136]

These examples support the proposition that though the doctrine of laches has not been often used to shorten a lender's period to file a foreclosure action,[137] it could, and should, be used to prevent unfair and inequitable actions of a lender.[138]

2. Using Equitable Discretion to Force the Completion of the Sale

Though it has been a gradual transition, courts have become increasingly supportive of affirmative judicial action to conduct foreclosure sales.[139] The proposition that local judiciaries hold a certain amount of power to order a foreclosure sale—after a lender intentionally ceases all actions to complete the sale—has been supported by various bankruptcy courts.[140]

---

[133] *Boorstein*, 3 A.2d at 90. Additionally, the court also held that, notwithstanding the mortgagee's "fair dealing" obligations to use diligence and reasonable care to realize its security interest, it could not collect on a deficiency in the security without conducting a foreclosure (an action which the mortgagee had not taken). *Id.*

[134] *Id.* (quoting McMurray v. Noyes, 72 N.Y. 523 (1878)). *But cf.* Anabarasan v. 53–54 Palisades Hudson Assocs., LLC, No. L-63-09, 2012 WL 1108418, at *4 & n.4 (N.J. Super. Ct. App. Div. Apr. 4, 2012) (distinguishing the case where defendants could not show the sort of prejudice suffered by the Guarantor in *Boorstein* from the lender's failure to provide notice).

[135] *See* New Amsterdam Cas. Co. v. Lundquist, 198 N.W.2d 543, 549–51 (Minn. 1972).

[136] *Id.* at 550.

[137] *See* Kaminski v. Wayne Cty. Bd. of Auditors, 282 N.W. 902 (Mich. 1938); BERGMAN, *supra* note 129 ("[A] delay of one year after default in instituting foreclosure cannot defeat the action where opposition is founded upon a claim of laches.").

[138] *See Boorstein*, 3 A.2d at 90.

[139] *See* Pigg v. BAC Home Loans Servicing, LP (*In re* Pigg), 453 B.R. 728, 736 (Bankr. M.D. Tenn. 2011).

[140] Weber, *supra* note 33, at 59–61.

Indeed, bankruptcy courts have focused on the lender's inaction and the intent behind it. In *Pigg v. BAC Home Loans Servicing, LP* (*In re Pigg*), a bankruptcy court in Tennessee used its equitable powers and held that it had the authority to order the sale free and clear of liens when it finds the lender and homeowners association (HOA) to have consented to the sale through inaction.[141] Though the borrower originally sought to make the HOA fees that accrued during her vacancy of the property dischargeable under a bankruptcy statute, she then sought to compel the lender to instigate foreclosure proceedings to stop the HOA fees from accruing while the lender took no action.[142]

Similarly, other courts have looked to the lender's intent behind its delay of the sale to craft their opinions. In *In re Perry*, the bankruptcy court in the Eastern District of North Carolina entered an order that required a lender to foreclose or be forced to accept a quitclaim deed.[143] Citing delays in foreclosure, the court used its discretionary power to hold that if the lender did not act timely to foreclose on the property, then the borrower was authorized to "execute, deliver and record a quitclaim deed of the property to [the lender]."[144] The *In re Perry* court used its discretionary power to force the lender to either sell the property or be forced to become the new owner.[145]

The bankruptcy courts' holdings in both *In re Pigg*[146] and *In re Perry*[147] demonstrate the concept of judicial intervention to force a lender to foreclose when inaction by the same imposes an unjust result on a borrower and takes unfair advantage of the foreclosure right it was given. Though there has been opposition to the broad use of judicial powers to force a lender to exercise its foreclosure rights,[148] such judicial equitable powers could be narrowed and applied only to situations in which a lender has started a foreclosure action and has voluntarily come under the jurisdiction of a court.

---

141 453 B.R. at 736.

142 *Id.* at 730.

143 No. 12-01633-8-RDD, 2012 WL 4795675, at *2 (Bankr. E.D.N.C. Oct. 9, 2012).

144 *Id.*

145 *See id.*

146 *In re Pigg*, 453 B.R. at 736.

147 2012 WL 4795675, at *2.

148 *See generally In re* Fristoe, No. 10-32887, 2012 WL 4483891, at *3 (Bankr. D. Utah Sept. 27, 2012) (holding that the court lacked equitable power to approve a sale free of liens without the lender's consent); *In re* Arsenault, 456 B.R. 627, 631 (Bankr. S.D. Ga. 2011) (holding that a bankruptcy court's ability to utilize equitable remedies "is constrained by the provisions of the Bankruptcy Code" and that the Code does not permit the courts to create substantive rights).

Hence, despite having roots in bankruptcy law, the idea of judicial equitable power to force a foreclosure sale can easily branch into the concept of zombie mortgages by carefully tailoring the holdings of *In re Pigg* and *In re Perry* into a narrower, yet more just and efficient, concept. The Supreme Court of Wisconsin recently held in *Bank of New York Mellon v. Carson* that a Wisconsin statute[149] gave the circuit court the power to order a lender to sell the residential property upon the expiration of the redemption period.[150] In *Carson*, a lender filed a foreclosure action against Carson, the borrower.[151] Carson vacated the property after the lender commenced the foreclosure action and soon after the lender received a judgment from the court in its favor.[152] Not only did the bank not inspect or maintain the property through the redemption period, but it also failed to schedule a sheriff's sale.[153] During this time, Carson remained the legal owner of the property despite the fact that she no longer occupied the property and had to pay fines to the city relating to unaddressed building code violations and health hazards.[154] More than sixteen months after the entry of the judgment for foreclosure in favor of the lender, Carson filed an action to order the sale of the property.[155]

The trial court concluded that it did not have the authority to hold the sale.[156] The Wisconsin Court of Appeals reversed the trial court's holding and stated that the Wisconsin statute at hand "directs the court to ensure that an abandoned property is sold without delay, and it logically follows that if a party to a foreclosure moves the court to order a sale, the court may use its contempt authority to do so."[157] The Supreme Court of Wisconsin affirmed, focusing on the intent of the Wisconsin statute at hand.[158] In arriving at its decision, the Supreme Court of Wisconsin concentrated on two issues: whether

---

149 WIS. STAT. ANN. § 846.102 (West Supp. 2015). At the time of publication of this Comment, a new assembly bill had been introduced in the Wisconsin House of Representatives. H.R. 720, 102d Gen. Assemb., Reg. Sess. (Wis. 2015). The proposed bill would amend the statute at issue in *Carson* by permitting a court to declare a mortgaged property abandoned, and then to order the lender to sell the property and have the sale confirmed within 12 months after the judgment is entered, or release the mortgage lien and vacate the foreclosure judgment. *Id.* § 7.

150 859 N.W.2d 422, 424 (Wis. 2015).

151 *Id.* at 424.

152 *Id.* at 424–25.

153 *Id.* at 425.

154 *Id.*

155 *Id.*

156 Bank of N.Y. v. Carson, 841 N.W.2d 573, 574 (Wis. Ct. App. 2013).

157 *Id.* at 578.

158 *Carson*, 859 N.W.2d. at 426–27 (interpreting WIS. STAT. ANN. § 846.102 (West Supp. 2012)).

a Wisconsin statute authorized the circuit court to order a lender to sell the property at an auction, and whether a court can require a lender to sell the property at a specific point in time.[159]

Using the plain language rule of statutory construction, the trial court interpreted the legislature's use of the word "shall" in the Wisconsin statute at issue as entrusting power to the court to order a lender to sell the mortgaged property after the expiration of the redemption period.[160] The Supreme Court of Wisconsin acknowledged this interpretation, but recognized that it has previously stated that "'shall' will be construed as directory if necessary to carry out the intent of the legislature."[161]

The *Carson* court understood that any ruling to the contrary would permit the lender to leave the property in legal limbo indefinitely and would strip the borrower from any remedies at law.[162] It also rejected the lender's argument that vague statutory language stating the minimum wait time to conduct the sale should be interpreted as permitting the lender to foreclose at any time after the minimum redemption period.[163] A pure exercise of its equitable discretion,[164] the *Carson* court's refusal to interpret vague statutory language to the lender's benefit could easily be extrapolated and applied to other ambiguous state statutes[165] to hold that a lender does not have an unlimited period of time to complete the foreclosure sale, as this would be unreasonable.

Further, the *Carson* court knew that, in the absence of a clear maximum time frame for the completion of the foreclosure sale, it would have to step in to fashion a fair decision based on the intent of the legislature—not just be

---

159 *Id.* at 426.

160 *Id.* The court stated that the plain language of the statute grants the circuit court the authority to order a bank to sell the property and that if the court makes a finding of abandonment then "judgment *shall* be entered as provided in § 846.10 except that the sale of such mortgaged premises *shall* be made upon the expiration of 5 weeks from the date when such judgment is entered." *Id.* at 426–27; GMAC Mortg. Corp. v. Gisvold, 572 N.W.2d 466, 475 (Wis. 1998) ("The general rule in interpreting statutory language is that 'the word "shall" is presumed mandatory when it appears in a statute.'" (quoting Karow v. Milwaukee Co. Civil Serv. Comm'n, 263 N.W.2d 214 (1978))).

161 *Carson*, 859 N.W.2d. at 428 (citing State v. R.R.E., 162 Wis. 2d 698, 707 (1991)).

162 *Id.* at 431; *Carson*, 841 N.W.2d at 578.

163 *Carson*, 859 N.W.2d. at 430.

164 Bray, *supra* note 126, at 2; *see* Wheatley-Liss, *supra* note 125.

165 *See* N.H. REV. STAT. ANN. § 477:14 (2013). New Hampshire's statute is ambiguous; the trigger, forcing the deed to be recorded, is subject to a written request for recordation from a person having an interest in the mortgaged real estate. *See id.* If a third party does not provide such a request in writing, a lender is not subject to the statute. *Id.*

swayed by the technicalities of the law that contradict the intent of the statute.[166] By looking at the Wisconsin statute that established the reasoning behind the five-week redemption period, the court discerned that the ordinance was designed to "help municipalities deal with abandoned properties in a timely manner" and prevent further neighborhood blight.[167] This reasoning helped the court conclude that the Bank of New York's actions violated the intent of the statute and warranted judicial intervention.

3. *Judicial Appointment of Receivers as a Channel to Force the Completion of the Foreclosure Sale*

At the core of the zombie mortgage problem is the fact that a lender has no affirmative obligation to maintain or take possession of the property.[168] Though a lender has a pre-foreclosure right to come into the property, take possession of it, and maintain it to protect the value of its security interest, it does not currently have a formal obligation to maintain or repair the property before it becomes the owner of the same or takes possession of it.[169]

Accordingly, many scholars have raised concerns about common law and property rights violations from imposing property ownership obligations on a lender that does not legally own the property.[170] Such imposition of duties could be a violation to the mortgagee-in-possession principle.[171] However, even if the direct imposition of ownership and maintenance obligations on a lender is problematic, courts can utilize their equitable discretion to intervene and allow third parties—affected by the blighted residential properties—to move for a judicial appointment of a receiver. By passing authority onto a receiver to repair the property and later conduct the foreclosure sale, the judiciary might be able to "force" the completion of the sale nonetheless.

---

166 *Carson*, 859 N.W.2d at 430–31 ("Four individuals spoke at the public hearing on the bill . . . . Each individual referenced that the bill's intent was to help municipalities deal with abandoned properties in a timely manner.")

167 *Id.* at 431–32; *see* MILWAUKEE, WIS. MUN. CODE § 200-22.5 (2015).

168 Johnson, *supra* note 10, at 1186–87 (describing the dubious ownership status of the property as a result of lenders' ownership avoidance strategies).

169 *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 44, at 29.

170 Axelson, *supra* note 62.

171 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 44, at 59 ("[S]ome advocates . . . have suggested that the costs of maintaining properties should be formally imposed on servicers, although the feasibility of such an approach is unknown, and it may have unintended consequences if implemented.").

A successful receivership primarily depends on two factors: (1) permitting individuals or entities other than a lender to petition the court for a receiver; and (2) making a receiver's costs of the property's repair and maintenance a super-priority lien—a lien which would have priority over any other mortgages, liens, and judgments already placed on the mortgaged property. At a foreclosure sale, assuming that notice was given to both the borrower and the lender,[172] a bid equal to the amount of a receiver's lien would eliminate the now-junior lender and convey free and clear title to the foreclosure sale purchaser.[173]

Third-party standing to petition for receiverships allows communities to prevent abandoned properties from becoming public hazards, despite the lender's neglect. In some cities, "second-generation . . . receivership statutes vest[] direct authority in tenants and community groups to initiate receivership[s]."[174] In vacant building receiverships, community residents are the actual petitioners requesting judicial relief.[175] The goal of these statutes is to enable third parties to correct health and safety code violations on properties they inhabit or live near—though it can also be argued that allowing third parties to accelerate the repair of the property through a receiver opens the door to accelerating the foreclosure sale process.[176] Ohio, for example, has created statutory authorization for third-party receivership requests; if the mortgaged property can be classified as a public nuisance, then "the municipal corporation, township, neighbor, tenant, or nonprofit corporation may apply in its complaint for an injunction, receiver appointment, or other form of relief."[177] Before a sale can take place, the receiver must certify that the nuisance has been abated.[178]

---

[172] If notice has not been given to both parties, then the foreclosure sale may be subject to omitted junior lienor or omitted borrower consequences and procedure. *See* Monarch Condo. v. Raskin, 831 N.Y.S.2d 369 (App. Div 2007); U.S. Bank v. Hursey, 806 P.2d 245, 247 (Wash. 1991); RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 7.1 cmt. b (1997) ("Where the holder of a junior interest is not made a party . . . that interest is neither terminated nor otherwise prejudiced by the foreclosure.").

[173] For the impact of a non-clear title upon the receiver's sale, see Matthew J. Samsa, Note, *Reclaiming Abandoned Properties: Using Public Nuisance Suits and Land Banks to Pursue Economic Development*, 56 CLEV. ST. L. REV. 189 (2008).

[174] James J. Kelly, Jr., *Refreshing the Heart of the City: Vacant Building Receivership as a Tool for Neighborhood Revitalization and Community Empowerment*, 13 J. AFFORDABLE HOUS. 210, 216 (2004).

[175] *Id.* at 227.

[176] *See* N.Y. REAL. PROP. ACTS. LAW § 770 (McKinney Supp. 2015).

[177] OHIO REV. CODE ANN. § 3767.41 (West 2006).

[178] *Id.* § 3767.41(I)(1).

Though third-party standing to petition for receiverships is important for zombie mortgage eradication, lenders may stop such appointment under special circumstances. For example, Baltimore's receivership ordinance enables a lender to oppose the appointment of a receiver by demonstrating its own ability to rehabilitate the property without further delay.[179] On the other hand, Baltimore's ordinance also gives super-priority status to a receiver's lien for property rehabilitation expenses.[180] This super-priority status would mean that if the costs of maintenance and repair were reasonable and below the amount of the outstanding debt, more people would be encouraged to bid on the property for just the amount of a receiver's lien and take the property unencumbered by a lender's interest.[181] Las Vegas has similarly imposed city liens on abandoned property, "preventing a sale of the property until they are paid."[182] The city would appoint a receiver to fix and maintain the property and later add those costs to the lien on the mortgaged property.[183]

The receivership solution might be ideal except for a lender's ability to delay the sale—preventing the receiver's lien from being paid and the property from being sold—which can in turn continue to create zombie mortgages. To alleviate some of these concerns, several states have enacted statutes that relinquish a lender's interest if it does not start foreclosure proceedings within a specified time period after the end of a receiver's rehabilitation.[184] Statutes like that in Missouri have allowed courts to transfer the property deed when a lender does not take any action for two years after the appointment of the receiver.[185] In a more drastic fashion, Baltimore's ordinance permits a receiver to foreclose on its lien "before rehabilitation work has even begun and auction the property off to a developer who has demonstrated the ability to rehabilitate the property immediately."[186]

---

179 Kelly, *supra* note 174, at 217.

180 *Id.*

181 *Id.* at 223.

182 Axelson, *supra* note 62.

183 *Id.*

184 MO. ANN. STAT. § 441.641 (West 2000).

185 *Id.* (stating that if any other party with an interest in the property does not take action to regain possession of the property within two years of the appointment of the receiver, then the court may transfer title to the property to the receiver or to a non-profit organization); Kelly, *supra* note 174, at 217 n.32.

186 *Id.* at 217.

B. Legislative Action in Judicial Foreclosure Jurisdictions in the Face of a Lender's Inaction

A lender has the right to foreclose on the property and recuperate the outstanding balance of the debt.[187] However, the absence of maximum time frames for conducting foreclosure sales—from the date of judicial authorization of the sale—gives a lender, in essence, an undefined and unlimited period to do so.[188]

Only a few states have used statutory guidelines to regulate the sale once authorized by the court.[189] Of those few state statutes, most have been stripped of their effectiveness through the enactment of statutory loopholes that enable lenders to continue exercising control over the foreclosure sale timeline. For example, a Florida statute governing the judicial sales procedure mandates that a mortgaged property must be scheduled and sold within a maximum of thirty-five days from the date of final judgment.[190] Yet, the statute also permits the sale to exceed the thirty-five-day time frame should a lender consent to it.[191] This statutory loophole defeats the purpose of establishing a maximum time frame because it is subject to the lender's one-sided consent. Similarly, New Jersey's statute creates a statutory limitation for a foreclosing lender to

---

[187] The lender has a right to bring a cause of action for foreclosure of the mortgaged property as long as it is filed within the statute of limitations period. Currently, the majority of states' statutes of limitations give a lender a wide range of time within which to file its foreclosure action. *See* ALA. CODE § 6-2-33 (2014) (requiring a cause of action relating to a contract, real estate, or a foreclosure to be commenced within ten years); DEL. CODE ANN. tit. 10, § 7902 (West 2006) (prescribing the statute of limitations for a cause of action is twenty years). Lengthy statutes of limitations in relation to foreclosure actions are problematic when the borrower has vacated the property in anticipation of foreclosure. Because this Comment is concerned with zombie mortgages created once a lender files a foreclosure action but fails to complete such action, statutes of limitation are outside the scope of this discussion.

[188] Bank of N.Y. Mellon v. Carson, 859 N.W.2d 422, 430 (Wis. 2015).

[189] *See* LEXISNEXIS, 50 STATE SURVEYS OF STATUTES & REGULATIONS: JUDICIAL FORECLOSURE (Jan. 2015). States like Illinois, Maryland, New Mexico, Oklahoma, and Puerto Rico only specify that the sale cannot occur sooner than a certain time period after giving notice of foreclosure. *Id.* To decrease delays in conducting foreclosure sales after a residential property becomes unoccupied, some states have passed laws to attempt to "fast-track" vacant property foreclosures. Though currently insufficient to prevent zombie mortgages, the fast-track proceeding would, in theory, increase the efficiency of foreclosures by shortening the amount of time properties are vacant and "eliminating the deadweight losses lenders suffer." Kyle Fee & Thomas J. Fitzpatrick IV, *Economic Commentary: Estimating the Impact of Fast-Tracking Foreclosures in Ohio and Pennsylvania*, FED. RES. BANK CLEV. (Mar. 6, 2014), http://www.safeguardproperties.com/News/Community_Initiatives/2014/03/Cleveland_Federal_Reserve_Estimates_Impact_of_Fast-Tracking_Foreclosures_in_OH_PA.aspx.

[190] FLA. STAT. § 45.031(1)(a) (West Supp. 2015).

[191] *Id.*

schedule the sale within 120 days of the sheriff's receipt of any writ of execution, but it later creates a loophole for the same lender to apply for a hold on the sale.[192]

Indiana's statute parallels Florida's but with one key difference: it does not permit a lender to modify the time frame for the sale.[193] Rather, the Indiana Code provides that the sheriff shall schedule the sale to occur no later than 120 days after the final judgment.[194] The language of the code provides additional safeguards by requiring written notice to the borrower when the sale of the mortgaged property is cancelled and imposing the cost of sending the notice on the party cancelling the sale.[195] It is possible that the effect of a zombie mortgage could be negated by a borrower's knowledge that the property is still rightfully under his or her name, regardless of whether he or she has vacated it or remained on the property.

Despite the need for statutes that establish a maximum time period within which a lender must conduct a foreclosure sale, importance must also be placed on creating statutes that empower local courts to deal with zombie mortgages. One of the most illustrative examples is New York's statute for want of prosecution.[196] Under this statute, when a party "unreasonably neglects to proceed" or delays the prosecution of another party, "the court, on its own initiative or upon motion, . . . may dismiss the party's pleadings on terms."[197] This statute targets three issues applicable to zombie mortgages: it sets specific requirements before a court can proceed with such dismissal, it creates a cause of action for a borrower by allowing his petition for dismissal, and it establishes an explicit delegation of power for courts presiding over foreclosure cases to dismiss such action.[198]

---

192 N.J. STAT. ANN. § 2A:50-64(a)(3) (West 2014). The statute requires the sheriff to schedule a sale within 120 days: lenders often interpret "schedule" to mean that they must only schedule the sale by such deadline, and not necessarily conduct the sale.

193 IND. CODE ANN. § 32-29-7-3 (West 2015).

194 *Id.* § 32-29-7-3(c)(1).

195 *Id.* § 32-29-7-3(i).

196 N.Y. C.P.L.R. § 3216 (McKinney Supp. 2015).

197 *Id.* § 3216(a).

198 *Id.* § 3216(b).

C. *Legislative Action in Both Judicial and Nonjudicial Post-Auction Zombie Mortgages*

In both judicial and nonjudicial jurisdictions, the primary concern regarding post-auction zombie mortgages involves a lender's failure to execute and record the deed of sale after a foreclosure sale has taken place.[199] In the event a property's value is below the outstanding debt—and there are no bidders at the auction—a lender may likely tender a bid on its own behalf, or on behalf of a related entity, at its own foreclosure sale.[200] When this occurs, lenders could forgo executing and recording the deed after the sale to avoid issues of ownership and legal liability.[201] Both kinds of post-auction zombie mortgages create uncertainty in the minds of the public regarding ownership of the property. This section focuses on two factors permitting lenders to delay finalizing the sale: (1) ambiguity as to what constitutes the completion of the foreclosure sale, and (2) vague statutory timelines for the execution of the deed of sale.

1. *Ambiguity as to What Constitutes the Completion of the Sale*

Ambiguity as to what constitutes the completion of a foreclosure sale has enabled lenders to play a real estate shell game with regard to ownership of the property. Lenders have long held onto the idea that recording a deed, as opposed to its execution and delivery, constitutes the last step to finalize the sale.[202] Yet, cities can look to the recording acts to argue that a lender's belief—that by refusing to record the deed it will avoid becoming the owner after the foreclosure sale[203]—is incorrect.

The legal fallacy is challenged by the fact that, by virtue of the recording acts, recording the deed after a foreclosure sale only serves to promote "notoriety of land ownership and preserve the muniments of title by

---

199 *See* Johnson, *supra* note 10, at 1185.

200 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 44, at 5–6.

201 *See* Johnson, *supra* note 10, at 1185 (explaining how such lenders usually wait until they can find a seller before executing the deed in such interested party's name); Kelly, *supra* note 174, at 226 ("Lenders had developed their own strategies for avoiding direct liability for code violations. Sometimes they would commence foreclosure proceedings in which they would buy the property at the sale but would not record a deed until they were ready to sell the property.").

202 Kelly, *supra* note 174, at 226.

203 *Id.*

encouraging grantees to record their deeds."[204] All recording does is make the transfer public knowledge and determine priority rights between successive grantees of the same grantor.[205] Various jurisdictions, like Arkansas and Colorado, have established that deeds for the transfer of real estate *may* be recorded, which further supports the theory that recordation is not necessary to transfer ownership to a lender.[206]

With no one contesting successive ownership rights in the zombie mortgage scenario, courts must focus on what constitutes an effective transfer of a property: whether it is the acceptance of a high bid or the execution of the deed. The Georgia Court of Appeals held that the acceptance of the high bid alone is not sufficient to complete the foreclosure sale; rather, courts look for acceptance of the high bid in conjunction with the transfer of the debtor's right to possession and the application of the sales proceeds.[207] Similarly, the Supreme Court of Georgia has held "that the foreclosure is complete only upon acceptance of bid, execution and delivery of a deed under power of sale and transfer of consideration."[208] In New York, a grant of real estate takes effect only after its delivery and execution, suggesting that the high bid is insufficient on its own to transfer ownership.[209]

2. *Vague Statutory Timelines for Finalizing the Sale Enable Lenders to Delay the Transfer*

The absence of statutory guidelines—time limits on the execution, delivery and recordation of the deed after the auction takes place—enables lenders to delay finalizing the sale.[210] Connecticut, for example, has no statutory

---

[204] John H. Scheid, *Down Labyrinthine Ways: A Recording Acts Guide for First Year Law Students*, 80 U. DET. MERCY L. REV. 91, 102 (2002).

[205] *See* ME. REV. STAT. ANN. tit. 33, § 202 (Supp. 2015) (stating that recordation prevents the party's defeasance by any other person other than the maker); Scheid, *supra* note 204, at 102 ("Without a recording act, the grantee has no way of knowing whether the grantor truly possesses the interest he purports to have.").

[206] ARK. CODE ANN. § 18-12-209 (West 2004); COLO. REV. STAT. § 38-35-109 (2015) (establishing that Colorado also uses the permissive "may" for recordation).

[207] Bldg. Block Enters. v. State Bank & Trust Co., 723 S.E.2d 467, 469–70 (Ga. Ct. App. 2012).

[208] Tampa Inv. Grp. Inc. v. Branch Banking & Trust Co., Inc., 723 S.E.2d 674 (Ga. 2012); FRANK S. ALEXANDER, SARA J. TOERING & SARAH BOLLING MANCINI, GEORGIA REAL ESTATE FINANCE AND FORECLOSURE LAW § 8:8(a), Westlaw (database updated Oct. 2015).

[209] N.Y. REAL PROP. § 244 (McKinney 2006).

[210] *See* FLA. STAT. § 45.031(1)(a) (West Supp. 2015), http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0000-0099/0045/Sections/0045.031.html; N.J. STAT. ANN. § 2A:50-64(a)(3) (West 2014); IND. CODE ANN. § 32-29-7-3 (West 2015).

requirement for conducting a foreclosure sale; it only maintains that the endorsement of the sale "should be delivered to the court as soon as possible."[211] Unlike the Connecticut legislature, the Georgia legislature, primarily guided by power-of-sale foreclosures, sought to solve this problem by imposing a statutory requirement for the recordation of the deed within ninety days of the sale.[212] Though this statute was later enacted without enforcement mechanisms or sanctions for noncompliance, earlier drafts of the bill highlighted growing legislative desires to impose legal and financial liability on lenders for delaying the execution and recordation of a deed of sale.[213]

Aside from creating statutes that delineate the time frame for post-sale recordation, a lone effort by the New Hampshire legislature has effectively extracted the court's theory in *Carson*[214] and applied it to the execution of a deed of sale.[215] If a lender refuses to record the deed after a borrower has requested its recordation, the New Hampshire statute would allow courts to order a lender to record the deed of sale.[216] The law states that if a person, or lender, neglects or refuses to record the deed of sale within thirty days after being requested to do so by a person having an interest in the mortgaged property at issue, then the court can determine whether there is sufficient cause for such neglect or refusal and has the power to either force the lender to record such deed or commit the person to jail until such recordation is performed.[217]

IV. HOW TO PREVENT ZOMBIE MORTGAGES

The differences between judicial and nonjudicial foreclosure jurisdictions highlight the fact that there is no single, standard solution for zombie

---

211 MICHELLE L. BIBEAU & MICHAEL D. O'CONNELL, A PRACTICAL GUIDE TO RESIDENTIAL REAL ESTATE TRANSACTIONS AND FORECLOSURES IN CONNECTICUT § 9.5.3 (2012).

212 GA. CODE. ANN. § 44-14-160(a) (West. Supp. 2015).

213 H.R. 903, 2014 Gen. Assemb. § 3, Reg. Sess. (Ga. 2014) (describing how failure to comply with the statutory requirements results in shifting any costs, fees, and fines incurred upon the property after the scheduled sale date onto the lender). The proposed statute would have also prevented the creation of zombie mortgages by allowing the borrower to remain on the property until the recordation of the sale. *Id.* § 2.

214 Bank of N.Y. Mellon v. Carson, 859 N.W.2d 422, 432–33 (Wis. 2015) (holding that the court had the power to force a lender to foreclose on a property if such lender had already invoked judicial action on the same matter).

215 N.H. REV. STAT. ANN. § 477:14 (2013).

216 *Id.*

217 *Id.*

mortgages applicable in all jurisdictions. With respect to pre-auction zombie mortgages in judicial foreclosure jurisdictions, eradication of zombie mortgages can be accomplished by empowering courts to use equitable discretion to force lenders to conduct a foreclosure sale after an untimely delay, all while the state legislative branch creates mandatory maximum time frames to supplement the judiciary's efforts.[218] For pre-auction zombie mortgages in nonjudicial foreclosure jurisdictions, solutions center on the creation of maximum statutory time frames to complete the foreclosure sale. As for post-auction zombie mortgages in both judicial and nonjudicial foreclosures, state legislative branches can create statutes that both clarify what constitutes the final step of the foreclosure sale and create a maximum time period for execution and recordation after the auction is conducted.[219] To eradicate zombie mortgages, the state judicial and legislative branches need to work together to require that the lender conduct and finalize the foreclosure sale or lose its security interest on the mortgaged property. This Part addresses the application of this solution in different jurisdictional contexts.

A. Solutions for Pre-Auction Zombie Mortgages in Judicial and Nonjudicial Foreclosure Jurisdictions

Taking advantage of the built-in judicial role, judicial foreclosure jurisdictions have a unique opportunity, both by statute or judicial decision, to force a lender to conduct the foreclosure sale and impose maximum time frames within which to conduct the sale.

Judicial foreclosure jurisdictions can empower courts to utilize their equitable judicial discretion to foreclose the rights of a lender when it has "slept on its right" to complete a foreclosure sale.[220] As previously stated in *Boorstein v. Miller*, the lender is obligated to use "diligence and reasonable care to realize on the security of [such lender's] mortgage."[221] The effects of a lender's uncompleted foreclosure sale parallels the effects of the lender's undue delay in *Boorstein* in that both the borrower and the city that fronts the costs of the zombie mortgage eradication suffer at the hands of a lender who has not used reasonable diligence to realize its security interest.[222]

---

218 *See supra* Part III.A–B.
219 *See supra* Part III.C.
220 CAL. CIV. CODE § 3527 (West 2012).
221 3 A.2d 87, 90 (N.J. Ch. 1938).
222 *See id.*

Further, a lender violates the "diligence and reasonable care" standard in *Boorstein* because it is negligent in filing a foreclosure action before conducting its equity analysis.[223] By filing a foreclosure action, a lender has exercised its right to foreclose on the mortgaged property and should then be subject to an obligation to use reasonable diligence to conduct the sale.[224] Like *Boorstein*, a lender's failure to use reasonable diligence—to complete the foreclosure sale after it has been judicially authorized—would prevent it from realizing its security interest in the mortgaged property.[225] Courts faced with potential zombie mortgage actions should first determine whether a foreclosure delay has been unreasonable, unjust, and unwarranted.[226]

But the premise of judicial equitable discretion has grown since *Boorstein*. Growing support for judicial equitable discretion suggests that courts can continue to use and tailor this action to effectively combat zombie mortgages. Consequently, courts can, and should, use equitable discretion to effectively force a lender to conduct and complete a foreclosure sale that has already been judicially authorized.

To implement this solution, this Comment first looks to *In re Pigg*, which held that a bankruptcy court has authority to order the sale of the property when it found that the lender had consented to it through inaction. As applied to zombie mortgages, courts could reason that lenders who failed to act to conduct the sale after judicial authorization consented to the sale of the property through their inaction.[227] Similarly, *In re Perry* provides guidance in judicial foreclosure jurisdictions by suggesting that courts can give the option of foreclosing in a timely manner or accepting a quitclaim deed of the property.[228]

The decisions in *In re Pigg* and *In re Perry* pave the way for the holding of *Carson*. The decision in *Carson* demonstrates that a court can intervene and require the lender to complete the foreclosure proceeding that it started voluntarily.[229] Taken a step further, this Comment suggests that if a lender

---

223 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 6, at 15.

224 *See Boorstein*, 3 A.2d at 91.

225 *Id.*

226 *See id.* at 90.

227 *See* Pigg, v. BAC Home Loans Servicing, LP (*In re* Pigg), 453 B.R. 728, 736 (Bankr. M.D. Tenn. 2011).

228 No. 12-01633-8-RDD, 2012 WL 4795675, at *2 (Bankr. E.D.N.C. Oct. 9, 2012).

229 *See* Bank of N.Y. Mellon v. Carson, 859 N.W.2d 422, 432 (Wis. 2015).

failed to conduct the sale within a certain number of days from the date of the court order, then the same court would have to either force the lender to conduct the sale or could dismiss the case with prejudice. Otherwise, as the *Carson* court highlighted, the result would give lenders an indefinite time period within which to conduct the sale.[230]

Employing this modified equitable discretion doctrine should result in the dismissal of the foreclosure action—though this dismissal would not automatically clarify the title worries that encompass the zombie mortgage crisis—or the release of the security interest in the mortgaged property. Forcing the completion of the sale would have a stronger effect on zombie mortgages because dismissing the action would likely trigger a circular statute of limitations problem,[231] where a lender would simply have to re-file for foreclosure and the property might remain abandoned in the interim.[232] A lender would also be able to wait to file for foreclosure until the end of the statute of limitations period, often years from the date of dismissal.[233] Though a dismissal with prejudice might seem to solve this problem at first glance—assuming it bars a lender from filing a new foreclosure action after its undue delay in completing the first sale—such type of dismissal does not actually preclude a lender from initiating a new foreclosure proceeding.[234]

Accordingly, the most effective solution leaves lenders with two choices: conduct and complete the foreclosure sale, or risk losing the security interest in the property. Releasing the security interest would prevent lenders from later foreclosing on the same mortgaged property[235] while providing an incentive for such lenders to undertake an equity analysis prior to filing for foreclosure.[236] But, insofar as there is doubt of the equitable power of a judge to deem a security interest released of record, the simplest solution is to explicitly delineate such judicial authority in the statutory amendments.

---

230 *Carson*, 859 N.W.2d at 430.

231 *See supra* note 187 and its accompanying text.

232 Afolabi v. Atl. Mortg. & Inv. Corp., 849 N.E.2d 1170, 1173 (Ind. Ct. App. 2006).

233 *See supra* note 187 and its accompanying text.

234 *Afolabi*, 849 N.E.2d at 1173 (holding that there was neither res judicata or claim preclusion preventing the lender from initiating a new foreclosure action after previous foreclosure have been dismissed with prejudice or lost in summary judgment).

235 Releasing the security interest on the mortgaged property would mean that a lender has unsecured debt at most. As the holder of unsecured debt, a lender's only avenue of recuperating the outstanding balance of the loan would be to sue the borrower on the underlying promissory note, if permitted by the respective jurisdiction.

236 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 6, at 10.

Though this solution takes a drastic approach, it is not a wide deviation from other zombie mortgage eradication proposals. For example, the Home Foreclosure Procedures Act[237] aims to authorize courts to dismiss, stay, or bar future foreclosure actions on the same property when the lender commits a material violation of the act, such as undue delay in conducting the foreclosure sale and failure to act in good faith.[238] Courts would determine whether a lender's violation would "unfairly burden the homeowner," and, since the proposed act does not define the parameters of "unfair burden," judges would have infinite discretion to define the term.[239]

This Comment is *not* suggesting that courts should eliminate all of a borrower's debt liability held by a lender.[240] Rather, it is encouraging courts to invoke equitable discretion only when a lender voluntarily commences a foreclosure action and later delays the foreclosure sale, creating confusion with regards to legal ownership of the mortgaged property.[241] Judicial application of equitable discretion would be a fair and effective solution because, even if a lender's own delay results in the relinquishment of its security interest, the lender may still have the option of personally suing the borrower for liability under the promissory note.[242] At the very least, canceling a lender's security interest through equitable discretion serves as an incentive for the lender to not delay the foreclosure sale.[243]

---

237 The Uniform Law Commission, a group of non-profit judges, lawyers, and state legislators, is drafting the act. To be effective, the act would need to be passed by each respective state legislature. Kate Berry, *Banks Halting Foreclosures to Avoid Upkeep*, AM. BANKER (Apr. 23, 2013), http://www.americanbanker.com/issues/178_78/banks-halting-foreclosures-to-avoid-upkeep-1058558-1.html.

238 NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAW, HOME FORECLOSURE PROCEDURES ACT § 7019(a) (Draft 2014), http://www.uniformlaws.org/shared/docs/Residential%20Real%20Estate%20Mortgage%20Foreclosure%20Process%20and%20Protections/2014nov_HFPA_Mtg%20Draft_Clean.pdf.

239 *See* Letter from Laurence E. Platt, K&L Gates, to William R. Breetz, Jr., Chairman, Unif. Law Comm'n Drafting Comm., at 2 (Nov. 3, 2014), http://www.uniformlaws.org/shared/docs/Residential%20Real%20Estate%20Mortgage%20Foreclosure%20Process%20and%20Protections/2014nov13_HFPA_Comments_Platt.pdf.

240 *See* Mitchell v. Auto. Owners Indem. Underwriters, 118 P.2d 815 (Cal. 1941) (holding that the bar on the statute of limitations affects only the remedy and does not impair the obligation).

241 *See generally* Bank of N.Y. Mellon v. Carson, 859 N.W.2d 422, 432 (Wis. 2015) (holding that the circuit court had the power and discretion to order the lender to sell the property within a certain period of time when the lender had voluntarily commenced foreclosure).

242 Finley, *supra* note 55.

243 The idea behind this is that a lender will be dissuaded from delaying the completion of the sale if it otherwise would lose its security interest. Because a lender stands to lose its security, the assumption is that it will either (1) complete the sale if it believes it to be even slightly financially beneficial, or (2) walk away from the security interest, release it, and increase the alienability of the blighted property.

But it is likely that judicial intervention on its own will lack the necessary power to prevent future zombie mortgages from developing. In conjunction with judicial intervention, several legislative changes are necessary to fully eradicate zombie mortgages. First, state legislatures could introduce statutory time frames detailing the maximum length of time a lender has to conduct the auction after receiving a judgment authorizing the sale.[244] Though this Comment does not suggest that the same length of time might work for all jurisdictions, some states have previously proposed a ninety-day time frame to conduct the sale after receipt of the court's judgment.[245] To create effective time frames for the completion of the sale, it might be imperative for legislatures to analyze the average length of time during which the unoccupied property becomes blighted in that respective jurisdiction. It might also be beneficial to identify permissible, reasonable delays by a lender, taking into consideration their efforts to locate a new buyer and to auction the property in a timely manner. Creating a statutory maximum time frame that ignores reasonable delays by a lender might only muster more opposition from lenders and hinder its passage.[246]

Ideally, the statute created would eliminate the loopholes that enable lenders to indefinitely extend the sales period.[247] Primarily, state legislatures should seek to eliminate statutory language that permits lenders to unilaterally extend the time frame to complete the sale.[248] By requiring both lender and borrower to consent to the delay of the sale, legislatures would essentially impose a notification requirement as well as lessen the likelihood of extending the sale time frame.[249]

Further, legislatures need to create statutes that expand the power of the judiciary and better enable it to either dismiss the foreclosure action or force a lender to conduct the foreclosure sale. By creating a comprehensive outline of courts' powers, the legislature could eliminate ambiguity as to what courts can do to eradicate zombie mortgages. Not only would this enhance uniformity for future court decisions, but it would also decrease lenders' risky delay tactics

---

244 *See supra* notes 189–95 and accompanying text (discussing the few jurisdictions that have enacted some form of legislative constraint on delayed foreclosure sale as well as their shortcomings).

245 S.B. 275, 115th General Assemb., Reg. Sess. (Ind. 2008).

246 *See* Johnson, *supra* note 10, at 1246 n.437 (describing lenders' lobbying efforts to thwart attempts to impose duties on lenders to maintain vacant properties).

247 *See supra* Part III.B.

248 *See* FLA. STAT. § 45.031(1)(a) (West Supp. 2015).

249 *See id.*; H.R. 903, 2014 Gen. Assemb. § 3, Reg. Sess. (Ga. 2014).

because they could anticipate that courts will not rule in their favor in the face of such blatant nonfeasance.

Specifically, the new statutes would give courts the power to levy sanctions such as the release of the security interest in the mortgaged property. To make this effective, the statutory language would need to deem the security interest ineffective at the expiration of the statutory period within which to conduct the sale. For example, if the statutory maximum time frame requires the sale to be conducted within 120 days of the judgment authorizing the foreclosure sale, then a lender's failure to comply with the time frame would make the security interest invalid on the 121st day after the judgment was entered.

Even if the state legislature fails to incorporate explicit statutory language permitting judges to release the security interest in the mortgaged property, the two-part coalition between the state judicial and legislative branches could still collectively improve time-frame ambiguity and judicial equitable discretion, thereby achieving the desired result: judicial enforcement of a maximum statutory time frame to force lenders to conduct the auction after it is judicially authorized. Both releasing the security interest in the mortgaged property and requiring the completion and finalization of the sale eradicate confusion as to ownership of the property—the primary externality created by zombie mortgages.

Further, abandoned property receivership ordinances have played a significant role in enabling community members to take action and correct property blight in their neighborhoods.[250] Using state statutes to create third-party standing for community members creates a more effective system for maintaining the vacant properties.[251] Neighbors, driven partly by austerity and partly by the negative effect of the vacant property on their own home valuations, are encouraged to repair the property.[252] The idea behind this strategy is that the earlier a receiver can fix and maintain the property, the lesser the cost of repairs and damage suffered by the community.[253] By bringing an action for receivership separate from that of a lender, community members can ensure that the community itself is not harmed by a lender's

---

250 *See* Kelly, *supra* note 174, at 217.

251 *Id.*

252 *Id.*

253 *Id.* This Comment acknowledges that an inherent weakness of even a strong receivership statute is the lack of available funds to remediate the defects of vacant homes.

decision to delay a foreclosure sale.[254] Additionally, the super-priority status of a receiver's lien facilitates the sale of the property and potentially clears the title from subordinate liens.[255] A receiver's super-priority lien would facilitate the transfer of rehabilitated property—by eliminating a lender's lien on the property through a properly conducted foreclosure sale—and prevent ownership confusion.[256]

Though other possible approaches are available, such as imposing criminal sanctions on lenders or creating statutory notice requirements for a borrower regarding the status of the foreclosure sale,[257] this Comment explains how these tactics are insufficient to decrease the number of zombie mortgages currently in existence.[258] Judicial foreclosure jurisdictions demand the two-part approach this Comment puts forth.

Though the discussion in this subsection has focused on solutions for pre-auction zombie mortgages in judicial jurisdictions, the legislative solutions outlined for the former are similar to the solutions proposed for pre-auction zombie mortgages in nonjudicial jurisdictions. In nonjudicial foreclosure jurisdictions, it is imperative for legislatures to create maximum statutory time frames for the completion of the foreclosure sale. Similar to the legislative goal in judicial foreclosure jurisdictions, primarily nonjudicial states should seek to eliminate statutory loopholes that enable lenders to delay conducting the sale. These jurisdictions would also benefit from clear, statutory sanctions for non-compliance with the maximum time frame.

---

254 *Id.*

255 *Id.*

256 *See id.*; Johnson, *supra* note 10, at 1186–87.

257 Such notice requirement would encourage the borrower to remain on the property until the foreclosure sale is officially completed. For an example of proposed statutory notice requirements, see H.R. 903, 2014 Gen. Assemb. § 2, Reg. Sess. (Ga. 2014). The Bank of America consent judgment, part of the National Mortgage Settlement, declares that if a lender makes a determination not to pursue foreclosure action on a property, then it is obligated to notify the borrower of a lender's release of the lien, the decision not to foreclose, and the borrower's right to remain in possession of the property. Order Consent Judgment, United States v. Bank of Am. Corp., No. 12-0361 (D.D.C. Apr. 4, 2012), http://www.justice.gov/crt/about/hce/documents/ scra_boa_settle.pdf.

258 *See* Martin, *supra* note 65.

B. Judicial and Nonjudicial Foreclosure Solutions for Post-Auction Zombie Mortgages

Because post-auction zombie mortgages in judicial jurisdictions are similar to post-auction zombie mortgages in nonjudicial jurisdictions,[259] both types of zombie mortgages can be eradicated by: (1) drafting statutes that both clarify what constitutes the final step in the foreclosure sale and that create a maximum time frame for executing and recording the deed of sale after the auction is conducted, and (2) imposing heavier sanctions on noncompliant lenders.[260] In judicial foreclosure jurisdictions, an additional solution is available: empowering courts to force lenders to record the deed after the sale occurs.

First, though it is likely that the acceptance of a lender's bid does not constitute the perfection of the sale,[261] jurisdictions would greatly benefit from being more transparent about the execution and recordation requirements. Establishing a clear rule that determines the point at which the transfer is complete facilitates the creation of the maximum time frame for recordation.

Despite the fact that recordation of the deed of sale is not essential to the completion of a foreclosure sale,[262] such failure to record nonetheless exacerbates legal ownership problems.[263] If a foreclosure sale were completed with the acceptance of the high bid, the transfer would still pose a series of problems in identifying the legal owner of a mortgaged property, since the borrower would still be the owner of record[264]—though, in theory, this method would more easily pass ownership onto a lender who bid on the property but failed to record the deed of sale. While equating the high bid with the completion of the sale is enticing, this inability to trace ownership (due to failure to record) prevents the city from communicating with the legal owner, which could encourage blight.[265]

---

259 *See supra* notes 199–200 (demonstrating the similarities between post-auction zombie mortgages in judicial foreclosure jurisdictions and general zombie mortgages in nonjudicial foreclosure jurisdictions).

260 *See supra* notes 189–93 and its accompanying text.

261 Scheid, *supra* note 204, at 102.

262 *See id.* (explaining that recording acts only affect priority and do not affect the rights of the grantee against the grantor).

263 Johnson, *supra* note 10, at 1186–87.

264 *Id.*

265 *Id.*

Further, statutory time frames for executing and recording the deed of sale—after the auction is conducted—are crucial to preventing delays in completing the sale, particularly if recordation (and not the high bid) is considered the mark of property ownership transfer. Some jurisdictions have anticipated the problems arising from the failure to record the deed of sale and have required the deed to be recorded within sixty days of the execution and delivery of such deed.[266] State legislatures need to incorporate a statutory provision similar to that of New Hampshire, which bestows power on its courts to order lenders to record the deed of sale if the lender neglects or refuses to record within 30 days after being requested to do so by an interested party.[267] Georgia's statute, requiring recordation of the deed of sale within ninety days of the sale, is also a strong starting point for other legislatures looking to create recordation time frames.[268] Legislatures drafting these time frames should avoid common pitfalls, such as permitting a one-sided extension of the time frame for the benefit of the lender.

In judicial foreclosure jurisdictions only, judges should also use the rationale in *Carson* to order the sheriff conducting the foreclosure sale to bring the deed to be recorded shortly after the sale occurs.[269] Because criminal sanctions have not been particularly effective on lenders,[270] this Comment suggests that an ideal statute would permit courts to force lenders in its jurisdiction to record the deed but would deviate from New Hampshire's criminal alternative[271] by permitting courts to also record the deed of sale in the lender's name.[272]

---

266 S.B. 3104, 98th General Assemb., Reg. Sess. (Ill. 2014).

267 N.H. REV. STAT. ANN. § 477:14 (2013). Though the statute allows a court to issue a warrant, bring a person before the jurisdiction of the court, and order him to record the deed, such judicial action may be pursued only after a person having an interest in the property requests recordation and the person holding the unrecorded deed fails to act within thirty days of such request. *Id.*

268 GA. CODE. ANN. § 44-14-160(a) (West. Supp. 2015).

269 *See also* Sam Spatter, *Some Banks Don't Record Deed in Foreclosure, Neglect Property*, TRIBLIVE (July 4, 2013, 12:01 AM), http://triblive.com/business/headlines/3945229-74/property-deed-banks#axzz3EIB6viQV (explaining that a new Allegheny County ordinance states that "when the time period expires and [the lender has not] sold the property, the sheriff's officer will bring the deeds to be recorded with the $150 recording fee").

270 Johnson, *supra* note 10, at 1195–96 (stating that lenders often evade criminal summons).

271 N.H. REV. STAT. ANN. § 477:14 (2013).

272 *See, e.g.*, Johnson, *supra* note 10, at 1249 n.458 ("A bill pending at the [Rhode Island] Statehouse would require the sheriff to quickly register the deeds of those buying property at the sheriff's sales—usually lenders foreclosing on loans—making it easier to find those responsible for the houses." (quoting Mark Ferenchik, *Foreclosure's Ripple Effects: Who Owns Problem Homes?*, COLUMBUS DISPATCH, Oct. 27, 2007, at A1)).

Second, imposing stricter sanctions on noncompliant lenders would improve the statute's enforceability by giving lenders another incentive to complete the sale. Similar to the legislative solutions for pre-auction zombie mortgages, an effective sanction might involve statutory language that would deem the security interest in the mortgaged property ineffective at the expiration of the recordation period.

C. Implications

The two-part approach put forth—combining legislative and judicial resources to force a lender to complete the foreclosure sale at the risk of losing its security interest on the property—will not only facilitate foreclosure proceedings, it will also clarify legal ownership of a mortgaged property at every stage in the proceedings. Additionally, due to the severe consequences a lender faces for its failure to complete the sale, the solutions proposed might decrease the probability that a lender will file a foreclosure action without first conducting the equity analysis[273] or without being fully committed to seeing the action to the end.

Yet, it is possible that each court's ability to rule on whether the delay can be considered unjustified and unreasonable could create ambiguity as to the threshold length of time that constitutes an unreasonable sale delay.[274] This seemingly subjective determination could potentially be solved by drafting comprehensive definitions for abandonment and blight: if the property meets either threshold[275] after the foreclosure sale has been postponed, then the court presiding over the foreclosure sale could proceed with an order to force the lender to complete the sale at the risk of losing its security interest in the property.

Despite its potential to abolish zombie mortgages, this Comment's approach will likely have some critics. One key point of criticism might be this

---

[273] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 6, at 15.

[274] This recognizes that equitable discretion of one judge will differ from that of another judge. *See* Boorstein v. Miller, 3 A.2d 87, 90–91 (N.J. Ch. 1938). *But cf.* Anabarasan v. 53-54 Palisades Hudson Assoc., LLC, No. L-63-09, 2012 WL 1108418 (N.J. Super Ct. App. Div. Apr. 4, 2012) (distinguishing the case where defendants could not show the sort of prejudice suffered by the Guarantor in *Boorstein* from the lender's failure of notice).

[275] *See generally* CHULA VISTA, CAL., MUN. CODE. §§ 15.60.040–15.60.050 (2008), http://www.cacities.org/UploadedFiles/LeagueInternet/5c/5cbdbacd-10fb-4407-9644-30a521011297.pdf (describing specific conditions of vacant and blighted property, including overgrown vegetation, accumulated mail, trash, and other debris).

Comment's extension of equitable judicial discretion to force a lender to act in a manner contrary to its rights.[276] This Comment, however, has differentiated between judicial actions forcing a lender to foreclose when it had *not yet filed for foreclosure* from actions forcing a lender to foreclose when it has *already*, voluntarily, come under the jurisdiction of the presiding court.[277] Unlike the former use of judicial action—rejected for its broad scope—the latter use is carefully curtailed, designed to incentivize lenders who earlier petitioned the court for a foreclosure judgment on the property but then wastefully depleted judicial resources when they decided to abandon the sale and leave the court's docket in limbo.

CONCLUSION

Homeowner Joseph Keller and many others like him are haunted daily by the effects of zombie mortgages.[278] Keller, in particular, was hit with bills for back taxes, property maintenance, and the outstanding balance of the debt, which has continued to accrue interest, after finding out that he was still legally liable for his home in Columbus, Ohio.[279] Like many homeowners facing foreclosures, Keller was not in a financial position to pay back increasing fines for city code violations or city taxes owed on the property.[280]

Keller's situation is commonplace today. Though the rate of zombie mortgages is slowly decreasing as the problem garners more attention, it is still a prevalent concern in about sixteen states and sixty metro areas.[281] The zombie mortgage numbers will remain steady as long as legislatures foster ambiguous auction time frames, sale completion, and recordation requirements.

In these situations, the party in the best position to avoid both home-ownership limbo and the decay of the property is the lender. To curtail the number of zombie mortgages, courts need to curb lenders' refusal to

---

276 Conlin, *supra* note 1 ("Banks say that because they are not the legal owners of these homes, they aren't required to maintain them, pay taxes on them, or take any legal responsibility for them.").

277 Pigg v. BAC Home Loans Servicing, LP (*In re* Pigg), 453 B.R. 728, 736 (Bankr. M.D. Tenn. 2011); *In re* Fristoe, No. 10-32887, 2012 WL 4483891, at *3 (Bankr. D. Utah Sept. 27, 2012) (emphasis added).

278 Conlin, *supra* note 1.

279 *Id.*

280 *Id.*

281 Quentin Fottrell, *Zombie Foreclosures Rise in 16 States and 60 Metro Areas*, MARKETWATCH (Oct. 30, 2014, 12:02 AM), www.marketwatch.com/story/zombie-foreclosures-rise-in-16-states-and-60-metro-areas-2014-20-30.

complete the foreclosure sale by requiring the timely completion of the process once the action is filed, and only giving lenders the alternative of releasing the security interest on the mortgaged property. It seems inequitable to allow lenders to benefit from the strategic delay while borrowers and municipalities bear the cost of a lender's inaction.

This Comment has argued that judicial equitable discretion can bar a lender from enforcing its rights to the security interest on a mortgaged property when a lender has strategically delayed a foreclosure sale it voluntarily commenced. The equitable doctrine serves to provide some justice to borrowers who would be otherwise be continually, and indefinitely, liable for the decay and repair of a property they no longer possess. More importantly, this doctrine and the approaches that flow from it would help clarify who has legal ownership of the property, a problem that is at the heart of the zombie mortgage crisis.

Though the zombie mortgage crisis seems daunting to localities and municipalities suffering from it, there are many available judicial and nonjudicial solutions to decrease the number of blighted properties. This Comment urges these entities to take affirmative steps to prevent foreclosure limbo by enacting changes in maximum foreclosure time frames, and by encouraging courts to utilize their equitable judicial discretion. The suggested solutions would likely require increased judicial oversight at the outset of the proceedings, but it would substantially decrease the number of backlogged cases and blighted properties. Without implementing immediate changes, as suggested by this Comment, stories like Keller's will be replicated across more states and, soon, many homeowners will also find themselves victims of the real estate walking dead.

ANDREA CLARK*

* Executive Managing Editor, *Emory Law Journal*; Emory University School of Law, J.D., 2016; University of Florida, B.A., 2010. I am grateful to my mentor and comment advisor, Professor Frank S. Alexander, for his guidance as I worked to understand the concept of zombie mortgages and for his invaluable contributions to my research and drafting processes. I would like to thank the editors of the *Emory Law Journal*, especially Matt Johnson and Rebecca Hall, who edited and prepared my Comment for publication. I would also like to thank my family, both old and new, for all of their love and encouragement. Last, but not least, I want to thank my husband, Jordan, for his unconditional love, constant support, and incredible patience.