

## NOTE

### FORECLOSURE MADNESS: USING MORTGAGE DECELERATION TO EVADE THE STATUTE OF LIMITATIONS

#### I. INTRODUCTION

It was 1988 when Lilla Roberts moved into her small, two-story house in Jamaica, Queens.<sup>1</sup> To an outside observer, it looked no different than any other house in the neighborhood: “part brick, part faded gray siding, with a red awning out front and a large backyard.”<sup>2</sup> But for Ms. Roberts, this was not just any house.<sup>3</sup> Aside from the work that she put into it and the use she made of it—the basement that she renovated, the rotting wood that she replaced, the attic that she rented out, and the garden that she maintained in the backyard—she spent nearly two decades in her home developing “her life’s memories.”<sup>4</sup> But all the indelible experiences that come with long-term home ownership, and everything that Lilla worked her entire life for, would ultimately be put on the line.<sup>5</sup> In 2007, the seventy-year-old Lilla Roberts suffered a “temporary setback” which caused her to undergo one of the most painful experiences of her life: home foreclosure.<sup>6</sup>

After experiencing serious financial difficulties, Ms. Roberts found herself unable to afford her monthly mortgage payments.<sup>7</sup> “Given her situation—steady income, a history of reliability—you would think that she would be a perfect candidate for a mortgage modification.”<sup>8</sup> But her lender, Bank of America, did not see it that way.<sup>9</sup> Instead of giving

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1. Joe Nocera, *A Happy Ending to a Raw, but Common, Tale*, N.Y. TIMES, Dec. 4, 2010, at B1.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

Ms. Roberts a second chance, the bank promptly foreclosed on the property and assigned it to Fannie Mae.<sup>10</sup> Ms. Roberts only became aware of the foreclosure when she discovered Fannie Mae's eviction notice taped to her front door.<sup>11</sup>

Lilla Roberts's story is not unusual.<sup>12</sup> After the turn of the century, widespread changes in the mortgage lending industry combined with a lack of government regulation triggered a national foreclosure crisis,<sup>13</sup> which in turn caused an estimated ten million homeowners across the nation to lose their homes.<sup>14</sup> After the crisis began in 2007, banks quickly began foreclosing on mortgages and assigning them to various third-party loan servicers.<sup>15</sup> Many of those mortgages underwent several assignments before ending up in the hands of powerhouse foreclosure firms that specialized in churning out tens of thousands of foreclosure cases every year.<sup>16</sup> Some of those firms, along with the nation's largest financial institutions that they represented, gained notoriety for their improper handling of foreclosure cases.<sup>17</sup> Due in large part to their misconduct, including widespread fraud and malpractice, many foreclosure cases were ultimately discontinued or dismissed,<sup>18</sup> and a growing number of mortgages are now uncollectable due to the

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10. *Id.*

11. *Id.*

12. See Emily Badger, *How the Housing Crisis Left the U.S. More Racially Segregated*, WASH. POST, May 10, 2015, at A14; Laura Kusisto, *After Foreclosure, Fewer Buy Homes*, WALL ST. J., Apr. 21, 2015, at A2.

13. See Barry Ritholtz, *What Caused the Financial Crisis? The Big Lie Goes Viral*, WASH. POST, Nov. 5, 2011, [https://www.washingtonpost.com/business/what-caused-the-financial-crisis-the-big-lie-goes-viral/2011/10/31/gIQAXISOqM\\_story.html?utm\\_term=.a7569ef94110](https://www.washingtonpost.com/business/what-caused-the-financial-crisis-the-big-lie-goes-viral/2011/10/31/gIQAXISOqM_story.html?utm_term=.a7569ef94110). But see *infra* note 86 and accompanying text (explaining that there is sharp disagreement over the extent to which government deregulation of Wall Street was to blame).

14. See Badger, *supra* note 12; Kusisto, *supra* note 12.

15. See Megan Wachspress et al., Comment, *In Defense of "Free Houses"*, 125 YALE L.J. 1115, 1119-20 (2016); see also Allan L. Hill & Nickolas Karavolas, *A Note on Mortgage Assignments in New York*, LAW360 (Jan. 25, 2017, 11:03 AM), <https://www.law360.com/articles/880759/a-note-on-mortgage-assignments-in-new-york> (explaining that the commonality of mortgage assignments is due in part to "the waiver of a portion of tax imposed for recording such mortgage [assignment]").

16. See Peter Lattman, *Foreclosure Firm Steven J. Baum to Close Down*, N.Y. TIMES (Nov. 21, 2011, 2:51 PM), <https://dealbook.nytimes.com/2011/11/21/foreclosure-firm-steven-j-baum-to-close-down/>; see also Gretchen Morgenson, *New York Subpoenas 2 Foreclosure-Related Firms*, N.Y. TIMES, Apr. 9, 2011, at B1 (explaining that one such firm, Steven J. Baum, P.C., once handled roughly forty percent of New York's foreclosure cases and has filed more than 50,000 foreclosure cases in New York throughout the last decade). For more on these foreclosure firms, see *infra* Part II.B.

17. Lattman, *supra* note 16; Morgenson, *supra* note 16, at B1, B4; *infra* Part II.B.

18. See *infra* Parts II.B, III.A–B.

expiration of the statute of limitations.<sup>19</sup> If the original borrower is still in possession of the house, they are eligible to gain title to the house for “free.”<sup>20</sup> Even if the original borrower no longer lives in the house, their debt can now be extinguished.<sup>21</sup>

Confronting this problem, lenders have developed a novel argument to revive these dead foreclosure cases.<sup>22</sup> This argument posits that, when the prior foreclosure action was discontinued, the acceleration of the mortgage—the triggering event for the accrual of the statute of limitations—was revoked.<sup>23</sup> In foreclosure parlance, this concept is known as “deceleration.”<sup>24</sup> In the absence of controlling precedent from the New York appellate courts,<sup>25</sup> the lower courts have split on this issue, with some holding in favor of the lenders<sup>26</sup> and others in favor of the borrowers.<sup>27</sup> Allowing lenders to revive these claims, which would have otherwise expired under the statute of limitations, poses serious consequences, including: (1) the courts will continue to be bogged down with languishing cases with questionable merit; (2) the revival of these

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19. See N.Y. C.P.L.R. § 213(4) (McKinney 2018) (providing for a six-year statute of limitations); *Saini v. Cinelli Enters., Inc.*, 733 N.Y.S.2d 824, 826 (App. Div. 2001) (noting that the statute of limitations on a foreclosure action “run[s] six years from the due date for each unpaid installment or the time the mortgagee is entitled to demand full payment, or when the mortgage has been accelerated by a demand or an action is brought” (citations omitted)); *Wachspress et al.*, *supra* note 15, at 1117-18, 1121.

20. *Wachspress et al.*, *supra* note 15, at 1121. However, even though courts are required in these cases by *res judicata* and “the state law’s treatment of acceleration clauses . . . to grant homeowners ‘free houses,’” many courts have refrained from doing so. *Id.*

21. See N.Y. REAL PROP. ACTS. LAW § 1501(4) (McKinney 2009); *BSD 265, LLC v. HSBC Bank USA N.A.*, No. 504656/16, 2017 WL 2778454, at \*5-8 (N.Y. Sup. Ct. June 27, 2017).

22. Andrew J. Bernhard, Feature, *Deceleration: Restarting the Expired Statute of Limitations in Mortgage Foreclosures*, 88 FLA. B.J. 31, 31 (2014); see *infra* text accompanying notes 128-31.

23. *Wells Fargo Bank, N.A. v. Burke*, 943 N.Y.S.2d 540, 542 (App. Div. 2012) (citations omitted); *BSD 265, LLC*, 2017 WL 2778454, at \*5-8.

24. Bernhard, *supra* note 22, at 31 (“Deceleration is the act of undoing a mortgage note’s acceleration and the accrual of the limitations period to return the lending arrangement to status quo ante—an installment agreement maturing in the distant future.”).

25. *BSD 265, LLC*, 2017 WL 2778454, at \*7 (acknowledging that there is no controlling authority on this issue); Laura M. Greco & Mitra P. Singh, *NY’s Statute of Limitations and Mortgage Foreclosures: How to Revoke Acceleration*, N.Y.L.J. (Aug. 8, 2016), <https://www.law.com/newyorklawjournal/almID/1202764328981/?slreturn=20180007195026> (“No appellate court has weighed in on whether a voluntary discontinuance is sufficient to revoke acceleration of the debt.”).

26. See, e.g., *U.S. Bank Nat’l Ass’n v. Deochand*, No. 702859/16, slip op. at 4-5 (N.Y. Sup. Ct. Mar. 1, 2017) (holding that the voluntary discontinuance of a foreclosure action operates as a revocation of the acceleration of a mortgage, and allowing a subsequent foreclosure action to be brought by the same lender against the same borrower over the same mortgage, notwithstanding the statute of limitations); *U.S. Bank Nat’l Ass’n v. Wongsonadi*, No. 703762/2015, 2017 WL 1333442, at \*2, \*4 (N.Y. Sup. Ct. Apr. 5, 2017) (same).

27. See, e.g., *BSD 265, LLC*, 2017 WL 2778454, at \*7-8 (holding that the voluntary discontinuance of a foreclosure action, without more, does not revoke a mortgage acceleration).

mortgages will create title issues that could forestall the free transfer of property, a basic tenet of property ownership; (3) such property will be burdened with title issues for a longer period of time than necessary; and (4) abandoned houses will continue to blight neighborhoods across the state, a consequence the New York State Legislature has already attempted to address by passing comprehensive legislation to prevent abandoned homes from falling into disrepair.<sup>28</sup>

This Note argues that mortgage lenders and loan servicers should not be allowed to bypass the statute of limitations by showing only that a prior foreclosure action was discontinued or dismissed.<sup>29</sup> Part II begins by examining the primary causes of the 2007 home foreclosure crisis.<sup>30</sup> It then explains how banks, loan servicers, and large foreclosure law firms engaged in widespread fraud and malpractice, resulting in the discontinuances and dismissals of many foreclosure cases throughout New York.<sup>31</sup> Part III starts by explaining what the statute of limitations is, and how the statute of limitations, along with many of the other foreclosure rules of procedure, were designed to protect homeowners' property interests.<sup>32</sup> This Part then discusses lenders' recent efforts to use deceleration to revive many of the foreclosure cases which would otherwise be time-barred by the statute of limitations.<sup>33</sup> Part IV analyzes the public policy implications of allowing deceleration to reset the statute of limitations, and it proceeds to argue: (1) a rule allowing a voluntary discontinuance or dismissal, without more, to reset the statute of limitations would be catastrophic to New York's courts, its neighborhoods, and its housing market; and (2) that such a rule would be wholly inconsistent with New York's legislatively established public policy.<sup>34</sup> Part IV then proposes an amendment to Article 13 of New York's Real Property Actions and Proceedings Law to prevent lenders, their successors and assignees, from evading the statute of limitations; to streamline foreclosure actions; and to further the goal that real property situated throughout the state is put to the best possible use.<sup>35</sup>

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28. See *infra* Part IV.A for a discussion on each of these public policy concerns.

29. See *infra* Part IV.A–B.

30. See *infra* Part II.A.

31. See *infra* Part II.B.

32. See *infra* Part III.A.

33. See *infra* Part III.B.

34. See *infra* Part IV.A.

35. See *infra* Part IV.B.

## II. THE CAUSES OF THE FORECLOSURE CRISIS AND ITS UNRELENTING EFFECTS

Not so long ago, the national housing market was markedly different than it is today—a mortgage would be issued by a single lender to an individual borrower who would then make payments on that mortgage directly to the lender.<sup>36</sup> But alas, the mortgage industry is no longer that simple.<sup>37</sup> This Part describes this transformation and answers the question: how did the mortgage industry go from what it was to what it is today?<sup>38</sup> Subpart A provides an overview of the events that triggered the mortgage meltdown,<sup>39</sup> while Subpart B describes how banks, servicers, and some of the largest foreclosure law firms responded to it.<sup>40</sup>

### A. *The Foreclosure Crisis: History Still in the Making*

For nearly a century prior to the foreclosure crisis, mortgage lending was considered by most banks as one of the “least risky” practices they could be a part of.<sup>41</sup> Lenders would loan money to a borrower in the form of a mortgage and then sell the mortgage to Fannie Mae, a shareholder-owned company, or Freddie Mac, a privately owned company, both of which were created by Congress “to provide liquidity, stability and affordability to the mortgage market.”<sup>42</sup> By the mid-nineties, many of these mortgages were securitized by banks, a process which involves consolidating the mortgages and then selling them to other investors for resale to the public in the form of securities.<sup>43</sup>

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36. MARK ZANDI, FINANCIAL SHOCK: GLOBAL PANIC AND GOVERNMENT BAILOUTS—HOW WE GOT HERE AND WHAT MUST BE DONE TO FIX IT 11 (updated ed. 2009).

37. *Id.*

38. *See infra* Part II.A–B.

39. *See infra* Part II.A.

40. *See infra* Part II.B.

41. ZANDI, *supra* note 36, at 1.

42. *About Fannie Mae and Freddie Mac*, FEDERAL HOUSING FINANCE AGENCY, <https://www.fhfa.gov/SupervisionRegulation/FannieMaeandFreddieMac/Pages/About-Fannie-Mae--Freddie-Mac.aspx> (last visited Aug. 23, 2018); *accord About Us*, FREDDIE MAC, <http://www.freddie.com/about> (last visited Aug. 23, 2018); *Who We Are*, FANNIE MAE, <http://www.fanniemae.com/portal/about-fm/who-we-are.html> (last visited Aug. 23, 2018).

43. Wachspress et al., *supra* note 15, at 1118-19; Gary Anderson, *How to Assign Blame for the Housing Crisis*, BUSINESS INSIDER (Oct. 17, 2011, 7:32 AM), <http://www.businessinsider.com/how-to-assign-blame-for-the-housing-crisis-2011-10> (“[S]ecuritization can be traced to Basel 2 in 1998.”); Steve Denning, *Lest We Forget: Why We had a Financial Crisis*, FORBES, (Nov. 22, 2011, 11:28 AM), <https://www.forbes.com/sites/stevedenning/2011/11/22/5086/#774b52b8f92f> (“The Glass-Steagall legislation . . . was repealed in 1998. This allowed banks . . . to engage in highly risky business,” including mortgage securitization by regular banks and investment banks.). When a security is backed by a mortgage, it can also be called a “mortgage-backed security.” *Mortgage-Backed Security*, BLACK’S LAW DICTIONARY 1561

Through securitization, investors routinely “flood[ed] the markets with toxic assets while simultaneously obscuring just how bad those assets were.”<sup>44</sup> In 2007, these practices came to a head when homeowners suddenly began defaulting on their mortgages in record numbers.<sup>45</sup> It seemed as though, in the blink of an eye, the mortgage industry went from booming to imploding.<sup>46</sup> Of course, this is an oversimplification.<sup>47</sup>

Traditionally, prime mortgage-backed securities were considered such a safe investment that many of those securities were given an “AAA” rating, the most creditworthy rating.<sup>48</sup> Prime mortgages were considered safe investments because they were only given to creditworthy borrowers.<sup>49</sup> In contrast, subprime mortgages were considered riskier investments because they were given to borrowers with a poor credit history, and subprime interest rates were substantially higher to compensate for the increased risk.<sup>50</sup> In 2007, the Federal Reserve lowered the discount rate, the rate at which banks borrow money from the Federal Reserve overnight.<sup>51</sup> This lowered interest rates across all sectors of the national economy and greatly contributed to mortgage-backed securities receiving lower yield rates.<sup>52</sup> The resulting

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(10th ed. 2014) (“The cash flow from these securities depends on principal and interest payments from the pool of mortgages.”).

44. INDEPENDENT DEMOCRATIC CONFERENCE & ASSEMBLYWOMAN HELENE WEINSTEIN, STATE OF THE FORECLOSURE CRISIS: THE ONGOING NEED FOR HOMEOWNER DEFENSE 1 (2017), [https://www.nysenate.gov/sites/default/files/foreclosure\\_prevention\\_whitepaper.pdf](https://www.nysenate.gov/sites/default/files/foreclosure_prevention_whitepaper.pdf) [hereinafter INDEPENDENT DEMOCRATIC CONFERENCE].

45. See ZANDI, *supra* note 36, at 175-78.

46. See Denning, *supra* note 43 (noting that, in the early 2000’s, the mortgage industry had experienced “an apparent boom” from the low interest rates, which “caused a spiral in anything priced in dollars (i.e., oil, gold) or credit (i.e., housing) or liquidity driven (i.e., stocks)”).

47. See, e.g., Ritholtz, *supra* note 13 (addressing the popular misconception that the blame lies primarily on Congress for triggering or failing to prevent the foreclosure crisis, and describing various factors that contributed to the crisis).

48. AAA, INVESTOPEDIA, <http://www.investopedia.com/terms/a/aaa.asp> (last visited Aug. 23, 2018); Denning, *supra* note 46; Ritholtz, *supra* note 13 (explaining that credit-rating agencies such as Fitch, Moody’s, and S&P claimed that mortgage-backed securities were “as safe as U.S. Treasuries” and gave those securities an AAA rating, which fund managers relied on after conducting little if any due diligence on their own).

49. Prime, INVESTOPEDIA, <http://www.investopedia.com/terms/p/prime.asp> (last visited Aug. 23, 2018).

50. JOHN E. MARTHINSEN, MANAGING IN A GLOBAL ECONOMY: DEMYSTIFYING INTERNATIONAL MACROECONOMICS 685 (2d ed. 2015); *High-Yield Bonds*, FIDELITY, <https://www.fidelity.com/fixed-income-bonds/individual-bonds/high-yield-bonds> (last visited Aug. 23, 2018); *Subprime*, INVESTOPEDIA, <http://www.investopedia.com/terms/s/subprime.asp> (last visited Aug. 23, 2018).

51. *Discount Rate*, INVESTOPEDIA, <http://www.investopedia.com/terms/d/discountrate.asp> (last visited Aug. 23, 2018); *Fed Lowers Discount Rate to Calm Markets*, NPR (Aug. 17, 2007, 9:00 AM), <http://www.npr.org/templates/story/story.php?storyId=12866844>.

52. See *What are the Implications of a Low Federal Funds Rate*, INVESTOPEDIA (Mar. 27,

low interest rates led homeowners to apply for mortgages in increasing numbers.<sup>53</sup>

At the time, Wall Street was the envy of virtually all financial systems abroad.<sup>54</sup> Wall Street investors were cognizant of this, and when they saw a potentially lucrative opportunity with seemingly low risks, they did not hesitate to take it.<sup>55</sup> Due to the low interest rates, many investors turned to high-yield mortgage-backed securities.<sup>56</sup> As these securities became more popular, there were not enough prime mortgages to securitize.<sup>57</sup> To make up the difference, banks began bundling subprime mortgages—which, again, were considered risky investments—together with prime mortgages, claiming the bundled securities were as safe an investment as the purely prime mortgage-backed securities.<sup>58</sup> The banks then sold those bundled securities to global investors.<sup>59</sup> “In many communities, houses were being traded like stocks, bought and sold purely on the speculation that they would continue to go up” in price.<sup>60</sup> And they did go up, for a time.<sup>61</sup> The increase in property prices made it easier for homeowners to refinance their mortgages, and like clockwork, homeowners across the country began to do just that.<sup>62</sup> Because of the large demand for mortgage-backed securities, it became extremely profitable to originate mortgages.<sup>63</sup> Subprime mortgages in particular were highly gainful for lenders, who “earn[ed] yield spread premiums for [these] loans” and

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2015, 12:11 PM), <http://www.investopedia.com/ask/answers/032715/what-are-implications-low-federal-funds-rate.asp>.

53. See ZANDI, *supra* note 36, at 81-82.

54. See *id.*

55. See *id.*

56. Denning, *supra* note 46 (“This market was dominated by non-bank originators exempt from most regulations.”).

57. See Ryan Barnes, *The Fuel that Fed the Subprime Meltdown*, INVESTOPEDIA, <http://www.investopedia.com/articles/07/subprime-overview.asp> (last visited Aug. 23, 2018); *Underwater Mortgage*, INVESTOPEDIA, <http://www.investopedia.com/articles/07/subprime-overview.asp> (last visited Aug. 23, 2018).

58. *Id.*

59. See MARTHINSEN, *supra* note 50, at 682 (noting that the global investors were unaware of how risky these investments were).

60. ZANDI, *supra* note 36, at 5.

61. *Id.*

62. *Id.*; Alain Sherter, *Did Home Refinancing Boom Trigger the Financial Crisis?*, CBS NEWS (Oct. 6, 2009, 4:15 PM), <https://www.cbsnews.com/news/did-home-refinancing-boom-trigger-the-financial-crisis> (explaining that the rising costs of houses made it easier for homeowners to refinance their mortgages, which in turn caused “a \$1.5 trillion loss in the housing market”).

63. Barnes, *supra* note 57; see also *Tr. for the Certificate Holders of the Merrill Lynch Mortg. Inv'rs, Inc. Mortg. Pass-Through Certificate, Series 1999-C1 v. Love Funding Corp.*, 556 F.3d 100, 102 (2d Cir. 2009) (noting that mortgage-backed securities are “held by Wall Street banks in an approximate amount of \$100 billion” (citations omitted)).

therefore had strong incentives to seek out willing borrowers.<sup>64</sup> Banks were actively encouraged to originate as many mortgages as possible, even without proof of income or a down payment.<sup>65</sup>

As a growing number of homeowners applied to refinance their loans, many of them conspired with their lenders to “fudge or lie on loan applications,” secure in the belief that the “appreciating property values would make it all right in the end.”<sup>66</sup> Lenders received even greater profits from this refinancing in the form of fees, which further incentivized investment bankers to create increasingly elaborate and profitable securities that enabled the rapid expansion of the nation’s housing markets.<sup>67</sup> This combination of securitizing subprime mortgages and selling those mortgages to overseas investors made financial calamity all but inevitable.<sup>68</sup> Yet, few of these actors were able to comprehend the risks of subprime mortgage securitization until the meltdown struck.<sup>69</sup>

By the middle of 2006, home sales began to stagnate, and default rates began to climb, making mortgage-backed securities less attractive to investors.<sup>70</sup> This lack of demand for mortgage-backed securities caused housing prices to plummet.<sup>71</sup> This in turn caused borrowers to begin defaulting on their mortgages, which led housing prices to further depreciate, which prompted more borrowers to default.<sup>72</sup> The skyrocketing number of borrowers defaulting on their mortgages produced a sharp increase in the number of home foreclosures and vacant houses on the market.<sup>73</sup> The increase in the foreclosure rate further decreased the demand for homes, which further decreased

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64. U.S. DEP’T OF HOUSING AND URB. DEV., REPORT TO CONGRESS ON THE ROOT CAUSES OF THE FORECLOSURE CRISIS 33 (2010), [https://www.huduser.gov/portal/publications/foreclosure\\_09.pdf](https://www.huduser.gov/portal/publications/foreclosure_09.pdf) [hereinafter HUD].

65. Barnes, *supra* note 57; see also MARTHINSEN, *supra* note 50, at 681 (explaining that banks had changed their lending strategies to “increase [the] volume” of mortgages issued, even though doing so involved failing to conduct checks on borrowers’ credit and “ma[king] loans on properties that did not exist”).

66. ZANDI, *supra* note 36, at 5.

67. *Id.*

68. See MARTHINSEN, *supra* note 50, at 684.

69. See *id.* at 682.

70. Barnes, *supra* note 57.

71. *Underwater Mortgage*, *supra* note 57.

72. See Sherter, *supra* note 62.

73. See Kaitlin Thomas, *Stemming the Spiral of Foreclosures*, YALE L. REP. 36, 37 (2009), [ylr.law.yale.edu/pdfs/v56-2/S09\\_MortgageForeclosure.pdf](http://ylr.law.yale.edu/pdfs/v56-2/S09_MortgageForeclosure.pdf) (“With eviction come vacant properties . . . which often results in vandalism, which leads to plummeting property values in surrounding neighborhoods, which leads to more foreclosure—a spiraling effect of neighborhood depreciation and home foreclosures.”).

property values.<sup>74</sup> Once property values dropped from their inflated rates, borrowers found themselves in underwater mortgages.<sup>75</sup> That is to say they owed more money on their mortgages than their homes were worth.<sup>76</sup> The end result was inescapable: many homeowners decided to walk out on their mortgages and cut their losses.<sup>77</sup> As property values crumbled all over the country, the financial world scrambled to pick up the pieces, but it was too late.<sup>78</sup> The sudden depreciation of housing prices caused borrowers to default and properties to foreclose en masse.<sup>79</sup>

In the aftermath of the foreclosure crisis, an estimated ten million families lost their homes due to foreclosure.<sup>80</sup> A. Gail Prudenti, then-New York State Chief Administrative Judge, issued a report in 2013 in which she detailed the increase in foreclosure case filings in New York's courts: a projected 44,035 new foreclosure filings for that year, more than the previous two years combined.<sup>81</sup> Mortgage servicers were woefully unprepared to manage the staggering number of foreclosure cases coming before the courts, and they lacked the necessary "incentives to devote additional resources to prove their banks' ownership over each mortgage."<sup>82</sup> The effects of the meltdown are being felt still, with 72,000 foreclosure actions pending before the New York State courts and 111,789 properties in New York in "pre-foreclosure status" as of February 2017.<sup>83</sup> A full decade has elapsed since the crisis,

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74. See Sherter, *supra* note 62.

75. *Underwater Mortgage*, *supra* note 57.

76. *Id.*

77. David Streitfeld, *No Aid or Rebound in Sight, More Homeowners Just Walk Away*, N.Y. TIMES, Feb. 3, 2010, at A1, A3 (explaining that many borrowers purposefully walked out on their mortgages even though they could still afford their mortgage payments).

78. See MARTINSEN, *supra* note 50, at 685-86 (describing how investors experienced "substantial losses as these [mortgage-backed] investments eroded in value," that housing prices depreciated significantly, and "mortgage delinquencies skyrocketed").

79. See Barnes, *supra* note 57.

80. Badger, *supra* note 12; Kusisto, *supra* note 12.

81. A. GAIL PRUDENTI, 2013 REPORT OF THE CHIEF ADMINISTRATOR OF THE COURTS 2 (2013), <https://www.nycourts.gov/publications/pdfs/2013ForeclosureReport.pdf>. Judge A. Gail Prudenti is now the Dean of the Maurice A. Deane School of Law at Hofstra University. *Judge A. Gail Prudenti: Dean and Executive Director of the Center for Children, Families and the Law*, MAURICE A. DEANE SCHOOL OF LAW AT HOFSTRA UNIVERSITY, <http://law.hofstra.edu/directory/administration/prudenti/index.html> (last visited Aug. 23, 2018).

82. Wachspress et al., *supra* note 15, at 1119-20 (footnote omitted).

83. INDEPENDENT DEMOCRATIC CONFERENCE, *supra* note 44, at 3-4.

Pre-foreclosure properties are properties that are in the early stages of being repossessed due to a homeowner's inability to pay an outstanding mortgage obligation. Properties are placed into this status when the lender files a pre-foreclosure notice with the Department of Financial Services and sends the homeowner the 90-day pre-foreclosure notice required by the legislation. If homeowners cannot afford to pay the amount owed to the

and yet tens of thousands of homeowners across the state are still at risk of losing their homes.<sup>84</sup>

Many commentators have openly speculated about the extent to which the federal government was complicit in the foreclosure crisis by failing to properly regulate the subprime mortgage industry.<sup>85</sup> While there has been much disagreement over the extent to which government deregulation of Wall Street was to blame,<sup>86</sup> it is more or less undisputed that large banks, mortgage servicers, and irresponsible investors played a significant role.<sup>87</sup> Not only did the combined conduct of these actors cause the mortgage meltdown; their questionable collection practices exacerbated it.<sup>88</sup> For example, in *In re Schuessler*,<sup>89</sup> the court sanctioned a mortgage servicer for creating the debtor's default by ordering the servicer's branches to refuse the debtor's payments; for forcing the debtor to accrue arrears on the debt when, before the servicer's refusal of payments, the debtor was at most one payment behind at all relevant times; and for omitting certain material facts from its motion to lift the automatic stay,<sup>90</sup> which the court recognized was likely filed only to allow the servicer to commence foreclosure proceedings in state court—a practice which would effectively deny the debtor their legally protected right to a fresh start.<sup>91</sup> Practices like these had the effect of

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lender, the home moves into foreclosure status and the lender attempts to recapture the property and remove the homeowner from the home.

*Id.* at 4 (referring to N.Y. REAL PROP. ACTS. LAW § 1304 (McKinney 2009)).

84. *Id.* at 3-5.

85. HUD, *supra* note 64, at 42.

86. See, e.g., Richard M. Salsman, *The Financial Crisis was a Failure of Government, Not Free Markets*, FORBES (Sept. 19, 2013, 8:00 AM), <https://www.forbes.com/sites/richardsalsman/2013/09/19/the-financial-crisis-was-a-failure-of-government-not-free-markets/#e61018d51c39>.

Some observers have blamed Washington for enabling Wall Street's poor financial decisions, namely the Federal Reserve for manipulating interest rates and Congress for subsidizing mortgages and failing to properly regulate the mortgage industry. See, e.g., Jill Drew, *Frenzy: The Crash – What Went Wrong*, WASH. POST, Dec. 16, 2008, at A1, A6; Salsman, *supra*. Others have argued that the foreclosure crisis precipitated largely from irresponsible practices on Wall Street. See, e.g., Anderson, *supra* note 43; Ritholtz, *supra* note 13.

87. See Wachspress et al., *supra* note 15, at 1119-20; Denning, *supra* note 46; Ritholtz, *supra* note 13. But see Victoria V. Corder, Note, *When Securitization Complicates the Issue: What are the Homeowner's Defenses to Foreclosure*, 16 WASH. & LEE J.C.R. & SOC. JUST. 299, 303 (2009) (“Deregulation enabled financial institutions to carry high debt-to-equity ratios, create complex financial instruments, and trade those instruments in opaque markets.” (footnotes omitted)).

88. See Zach Carter, *Foreclosure Mills: Wall Street's Latest Fraud Scheme*, HUFFINGTON POST (Aug. 5, 2010, 10:36 AM), [https://www.huffingtonpost.com/zach-carter/foreclosure-mills-wall-st\\_b\\_671732.html](https://www.huffingtonpost.com/zach-carter/foreclosure-mills-wall-st_b_671732.html).

89. 386 B.R. 458 (Bankr. S.D.N.Y. 2008).

90. *Id.* at 463. When a debtor files for bankruptcy, a stay automatically comes into effect, which operates as a bar to all debt collection efforts by creditors. 11 U.S.C. § 362(a) (2012).

91. *Schuessler*, 386 B.R. at 463-64.

forcing some homeowners into foreclosure when they could have otherwise remained in their homes, continuing to make mortgage payments.<sup>92</sup> With the benefit of hindsight, there can be little doubt that these dubious practices aggravated the foreclosure crisis and made any meaningful response to it that much more difficult.<sup>93</sup>

*B. The Foreclosure Mills: Exacerbation of a Crisis that was  
Already Difficult to Contain*

In the wake of the subprime mortgage meltdown, banks began to outsource the handling of their foreclosure matters to powerhouse foreclosure law firms, which are commonly called “foreclosure mills.”<sup>94</sup> Steven J. Baum, P.C. is one example—it was once the largest foreclosure mill in New York and one of the largest in the country; it handled roughly forty percent of New York’s foreclosure cases and filed more than 50,000 foreclosure cases in New York throughout the last decade.<sup>95</sup> For good reason, it is now nonexistent.<sup>96</sup> The Baum firm was accused of “robo-signing”<sup>97</sup> thousands of mortgages, bank notes, affidavits, pleadings, and various other legal documents.<sup>98</sup> But foreclosure mills were not the only players in the mortgage industry engaged in widespread “robo-signing.”<sup>99</sup> Some of the largest financial

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92. Jane Quinn, *Foreclosure Fraud: How You Can Be Driven to Default Even if You Pay on Time*, CBS NEWS (Oct. 13, 2010, 2:06 PM), <https://www.cbsnews.com/news/foreclosure-fraud-how-you-can-be-driven-to-default-even-if-you-pay-on-time>.

93. See Carter, *supra* note 88.

94. See, e.g., Wachspress et al., *supra* note 15, at 1115 (“[S]ecuritization contracts incentivize banks to use ‘foreclosure mill’ law firms to keep up with the flood of defaults, despite the fact that these firms are unable and sometimes unwilling to detect and rectify basic legal errors.”); Carter, *supra* note 88 (explaining that foreclosure mills have a long history of “forg[ing] documents, backdat[ing] signatures, slap[ping] families with thousands of dollars in illegal fees and even foreclos[ing] on borrowers who haven’t missed a payment”).

95. Morgenson, *supra* note 16, at B1.

96. See Lattman, *supra* note 16.

97. Matthew D. Weidner & Michael Fuino, *Foreclosing in a Hurricane: Florida Courts Struggle to Deal with a Crisis of Epic Proportions*, 41 STETSON L. REV. 679, 716 (2012) (“Robo-signing is the process through which various documents, including affidavits, assignments, and possibly verifications of foreclosure complaints, are mass-signed by agents of foreclosing plaintiffs.”).

98. Morgenson, *supra* note 16, at B1, B4. These robo-signing practices led “a state court judge in Brooklyn [to] call[] one foreclosure filing from the Baum firm ‘incredible, outrageous, ludicrous and disingenuous.’” Lattman, *supra* note 16; see also Tami Luhby, *I Was a Robo-Signer*, CNNMONEY (Oct. 28, 2010, 8:47 PM), [http://money.cnn.com/2010/10/28/real\\_estate/robosigner/index.htm?iid=EL](http://money.cnn.com/2010/10/28/real_estate/robosigner/index.htm?iid=EL) (describing how robo-signing led judges to “increasingly question[] whether the servicers have their paperwork in order”).

99. Michelle Conlin, *Banks’ Foreclosure ‘Robo-Signers’ Were Hair Stylists, Teens, Walmart Workers: Lawsuit*, HUFFINGTON POST, (Oct. 13, 2010, 4:42 PM), [https://www.huffingtonpost.com/2010/10/13/meet-banks-robosigners-fo\\_n\\_761698.html](https://www.huffingtonpost.com/2010/10/13/meet-banks-robosigners-fo_n_761698.html).

behemoths engaged in the same, including JPMorgan Chase, Bank of America, GMAC Mortgage Corporation, and Litton Loan Servicing, a division of Goldman Sachs.<sup>100</sup>

It seems as though anyone less than qualified was hired as a robo-signer.<sup>101</sup> Teenagers, Walmart employees, assembly line workers, and hairdressers were among those “entrusted as the records custodians of homeowners’ loans,” even though they received “no formal training.”<sup>102</sup> They were hired based on their inexperience, ignorance, and propensity to do as they were told without question.<sup>103</sup> In rapid-fire sequence, they blindly signed one legal document after another, amounting to 10,000 or more documents signed by each employee in any given month; documents which were then filed with state courts to the detriment of hundreds of thousands of homeowners across New York and beyond.<sup>104</sup>

The United States Attorney’s Office for the Southern District of New York and the New York Attorney General’s Office investigated the Baum firm for “fil[ing] misleading pleadings, affidavits, and mortgage assignments in state and federal courts in New York,” alleging that the documents were riddled with factual inaccuracies and unsupported allegations.<sup>105</sup> These criticisms were echoed by borrowers’ attorneys, at least one bankruptcy judge in the Southern District of New York who expressly refused to continue accepting any papers filed by Baum’s firm, and a law professor from Albany Law School.<sup>106</sup> In November 2011, only one month after entering into a \$2 million settlement with the

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100. *Id.*; David Streitfeld, *JPMorgan Suspending Foreclosures*, N.Y. TIMES, Sept. 29, 2010, at B1.

101. See NORMAN A. KATZ, DETECTING AND REDUCING SUPPLY CHAIN FRAUD 118 (Routledge 2016) (2012) (citations omitted); Conlin, *supra* note 99; *Foreclosure “Robo-Signers” Unqualified?* (CBS television broadcast Oct. 14, 2010).

102. KATZ, *supra* note 101, at 118; Conlin, *supra* note 99; *Foreclosure “Robo-Signers” Unqualified?*, *supra* note 101.

103. See Conlin, *supra* note 99 (reporting that bank employees were unable to “define basic terms like promissory note, mortgagee, lien, receiver, jurisdiction, circuit court, plaintiff’s assignor or defendant . . . [and] . . . didn’t know why a spouse might claim interest in a property, what the required conditions were for a bank to foreclose or who the holder of [a] mortgage note was”).

104. See Jesse Soslow, Comment, *Incentivizing Deeds in Lieu of Foreclosure: An Argument for the Expansion of the Home Affordable Foreclosure Alternatives (“HAFAs”) Program*, 14 U. PA. J. BUS. L. 583, 585-86 (2012); Streitfeld, *supra* note 100.

105. Morgenson, *supra* note 16, at B4 (noting that, when Baum’s firm was unable to identify every link in a property’s title history, it “prepared inaccurate papers to fill in what was missing”); Press Release, U.S. Attorney’s Office S. Dist. N.Y., Manhattan U.S. Attorney Announces Agreement with Mortgage Foreclosure Law Firm to Overhaul its Practices and Pay \$2 Million Fine (Oct. 6, 2011), <http://www.appellate-brief.com/images/stories/PDF/10-6-11USAAttyPR.pdf> [hereinafter U.S. Attorney’s Office].

106. Morgenson, *supra* note 16, at B4.

United States Attorney's Office,<sup>107</sup> Baum announced that his firm was permanently shutting its doors, but not before leaving thousands of unresolved foreclosure cases in serious doubt.<sup>108</sup>

### III. EXTENDING THE STATUTE OF LIMITATIONS THROUGH MORTGAGE DECELERATION

As the foreclosure crisis reached its apex, massive robo-signing scandals plagued thousands of foreclosure cases with misfiled, factually inaccurate documents.<sup>109</sup> That, coupled with the complex mortgage assignment schemes which pervaded the securities and housing markets, made proving ownership of these mortgages considerably difficult for lenders and loan servicers.<sup>110</sup> As a result, many foreclosure cases have been left to languish in court, only to eventually become discontinued or dismissed.<sup>111</sup> Some of those cases are now time-barred by New York's six-year statute of limitations, and consequently, the related mortgages are now uncollectable.<sup>112</sup> Subpart A explains what the statute of limitations is, and how, in the foreclosure context, it was designed to protect homeowners' property interests.<sup>113</sup> Subpart A also describes the procedural obstacles that every foreclosure case must go through for this purpose.<sup>114</sup> Subpart B begins by analyzing the concept of "deceleration," a novel argument that lenders are now raising in their persistent attempts to evade the statute of limitations bar to successive foreclosure

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107. U.S. Attorney's Office, *supra* note 105.

108. Lattman, *supra* note 16; *see* Morgenson, *supra* note 16, at B1, B4.

109. *See* Bernhard, *supra* note 24, at 31; *supra* notes 97-104, 105-06 and accompanying text.

110. *See* Corder, *supra* note 87, at 319 (explaining that, in many cases, assignments were never recorded, and quite possibly, "original mortgages were assigned without the [promissory] notes"); Nolan Robinson, Note, *The Case Against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) to Initiate Foreclosure Proceedings*, 32 CARDOZO L. REV. 1621, 1643 (2011) (illustrating the complexity of the assignment processes that mortgages undergo before legal action is taken to foreclose); *infra* Part III.A (describing how complex mortgage assignment schemes have made it difficult for banks and loan servicers to prove ownership of mortgages).

111. *See* Wachspress et al., *supra* note 15, at 1121 ("In many individual cases . . . [h]omeowners, their attorneys, and sometimes judges have successfully prevented foreclosure by demonstrating the falsity of an affidavit or simply by forcing the mortgagee to produce actual documentation that it owned the mortgage." (footnote omitted)); Bernhard, *supra* note 22, at 31 (describing how robo-signing led to "mass misfilings" in Florida courts, which in turn prompted foreclosing plaintiffs to voluntarily discontinue thousands of foreclosure cases so as to give themselves time to gather the necessary paperwork and "refile another day"); *see also infra* Part III.B (discussing several cases that involved such dismissals and discontinuances).

112. *See* N.Y. C.P.L.R. § 213(4) (McKinney 2018); Saini v. Cincelli Enters., Inc., 733 N.Y.S.2d 824, 826 (App. Div. 2001); Wachspress et al., *supra* note 15, at 1117-18.

113. *See infra* Part III.A.

114. *See infra* Part III.A.

actions.<sup>115</sup> Subpart B then proceeds to illustrate the sharp divide among the courts on this issue: whether a voluntary discontinuance can be made to decelerate a mortgage without any additional proof that the mortgage was decelerated.<sup>116</sup>

#### A. *Procedural Mechanisms that Protect Homeowners' Property Rights*

Since antiquity, statutes of limitation have played an important role in protecting defendants' property rights.<sup>117</sup> Through the passage of time, defendants are entitled to live their lives in peace, secure in the knowledge that the slate has been wiped clean and what they own is rightfully theirs.<sup>118</sup> They should not be forced to litigate after "evidence has been lost, memories have faded, and witnesses have disappeared."<sup>119</sup> As the New York Court of Appeals observed: "Our statutes of limitation serve the same objectives of finality, certainty and predictability that New York's contract law endorses. Statutes of limitation not only save litigants from defending stale claims, but also 'express[] a societal interest or public policy of giving repose to human affairs.'"<sup>120</sup> Moreover, the right to exclude others from intruding on one's land, being generally considered "one of the most essential sticks in the bundle of rights that are commonly characterized as property,"<sup>121</sup> would be of little value if property owners were made to go about their days sleeplessly waiting to be evicted.<sup>122</sup>

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115. See *infra* Part III.B.

116. See *infra* Part III.B.

117. See *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1177-80, 1185 (1950) [hereinafter *Developments in the Law*] (detailing the history and purpose of statutes of limitation). But see Note, *Tolling the Statute of Limitations on Mortgage Foreclosures*, 51 COLUM. L. REV. 1030, 1031 (1951) [hereinafter *Tolling the Statute of Limitations*] (noting, however, that although "[s]tatutory limitations on legal actions to recover property are of ancient origin . . . [s]tatutes barring equitable actions are . . . strictly modern").

118. *Tolling the Statute of Limitations*, *supra* note 117, at 1030; Oliver Wendell Holmes, Jr., *The Path of Law*, 10 HARV. L. REV. 457, 477 (1897) ("A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.").

119. *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944); *Developments in the Law*, *supra* note 117, at 1185.

120. *ACE Secs. Corp. v. DB Structured Prods., Inc.*, 36 N.E.3d 623, 627-28 (N.Y. 2015) (quoting *John J. Kassner & Co., Inc. v. City of New York*, 389 N.E.2d 99, 103 (N.Y. 1979)).

121. *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); accord Thomas W. Merrill, Essay, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 753 (1998) ("[T]o the extent one has the right to exclude, then one has property; conversely, to the extent one does not have exclusion rights, one does not have property.").

122. See CAL. CIV. CODE § 3527 (West 2016) ("The law helps the vigilant, before those who sleep on their rights."); FRANCIS T. TALTY, ET AL., 5 MASS. PRAC., METHODS OF PRACTICE § 13:11

Notwithstanding these principles, there are cases where exceptions must be made, lest there be unconscionable injustice inflicted upon an unwitting plaintiff.<sup>123</sup> Although homeowners have an interest in remaining in their homes, lenders also have a property interest in collecting on outstanding debt.<sup>124</sup> To protect the latter, the law has carved out tolling exceptions.<sup>125</sup> For example, the statute of limitations may be tolled when a debtor affirmatively acknowledges the debt by a signed writing, the theory being that “an unqualified admission of the debt implies a new promise to pay it.”<sup>126</sup> When a debtor files for bankruptcy, the statute of limitations for filing a foreclosure action is tolled for the duration of the automatic stay.<sup>127</sup> It is also currently possible, depending on which jurisdiction the parties find themselves in, for the statute of limitations to be reset upon the discontinuance of a foreclosure action.<sup>128</sup> The reasoning underlying this rule proceeds as follows: since the statute of limitations starts to run on the entire debt at the time of the mortgage acceleration,<sup>129</sup> and because the mortgage may automatically be accelerated upon the filing of a foreclosure action,<sup>130</sup> the voluntary discontinuance of a foreclosure action operates to revoke the acceleration, thereby resetting the statute of limitations to the state it

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(4th ed. 2000) (“[T]he entry to foreclose . . . involves the right to exclude and dispossess the owner of the equity and even treat him as a trespasser.”).

123. *Tolling the Statute of Limitations*, *supra* note 117, at 1030-31.

124. *See Aurora Loan Servs., LLC v. Weisblum*, 923 N.Y.S.2d 609, 618 (App. Div. 2011); *Tolling the Statute of Limitations*, *supra* note 117, at 1031.

125. *Tolling the Statute of Limitations*, *supra* note 117, at 1031, 1033-35; D. KIRK DRUSSEL ET AL., 2 MORTGAGES AND MORTGAGE FORECLOSURE IN N.Y. § 35:2 (2017).

126. 31 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 79:77 (4th ed. 2004); *see* N.Y. GEN. OBLIG. LAW. § 17-105(1) (McKinney 2006); *Petito v. Piffath*, 647 N.E.2d 732, 735 (N.Y. 1994); *see also* 75A N.Y. JUR. 2D LIMITATIONS AND LACHES § 337 (2012) (explaining that the writing must “contain[] nothing inconsistent” with the debtor’s intention to pay the debt (footnote omitted)).

127. 11 U.S.C. § 108(c) (2012); N.Y. C.P.L.R. § 204(a) (McKinney 2003); *see also* PAMELA KO & JENEAN TARANTO, BOWMAR MORTGAGE LIENS IN NEW YORK § 18:4 (2017) (explaining that the courts are currently divided on whether the time in which the automatic stay was effective is added to the remaining time for filing an action under the statute of limitations).

128. *See* U.S. Bank, Nat’l Ass’n v. Wongsonadi, No. 703762/2015, 2017 WL 1333442, at \*2 (N.Y. Sup. Ct. Queens Cnty. Apr. 5, 2017); U.S. Bank Nat’l Ass’n v. Deochand, No. 702859/16, slip op. at 4-5 (N.Y. Sup. Ct. Queens Cnty. Mar. 1, 2017). *But see* BSD 265, LLC v. HSBC Bank USA N.A., No. 504656/16, 2017 WL 2778454, at \*7-8 (N.Y. Sup. Ct. Kings Cnty. June 27, 2017) (holding that the discontinuance of a foreclosure action does not, by itself, operate as a revocation of a mortgage acceleration and therefore cannot estop a defendant from asserting a statute of limitations defense to a later foreclosure action).

129. *Saini v. Cincelli Enters., Inc.*, 733 N.Y.S.2d 824, 826 (App. Div. 2001).

130. *See Wells Fargo Bank, N.A. v. Burke*, 943 N.Y.S.2d 540, 542-43 (App. Div. 2012) (“Commencement of a foreclosure action may be sufficient to put the borrower on notice that the option to accelerate the debt has been exercised.” (citations omitted)).

would have been in had the mortgage not been accelerated.<sup>131</sup> When applied broadly, these tolling exceptions impede the alienability of land by increasing the potential for litigation, thus creating a “conflict between the policy of real property law and the policy upon which tolling exceptions rest.”<sup>132</sup> It is therefore of little wonder why tolling exceptions are made to be applied under narrow, specifically delineated circumstances.<sup>133</sup>

The point at which the statute of limitations begins to run on an unpaid mortgage depends entirely on whether the mortgage was accelerated.<sup>134</sup> After a mortgage is originally issued on real property, the underlying debt is made payable in individual installments.<sup>135</sup> “A separate cause of action arises on each installment, and the statute of limitations runs separately against each.”<sup>136</sup> When a mortgage is accelerated, however—either automatically pursuant to the terms of the mortgage agreement, or by the creditor pursuant to an optional acceleration clause—the entire amount becomes due and the statute of limitations begins to run on the entire debt.<sup>137</sup> Through acceleration, a mortgagee can collect on the whole debt in one foreclosure action, whereas without acceleration, the mortgagee would only be able to collect on the arrears due in unpaid past installments, discounting any future payments that may or not be paid.<sup>138</sup> Most often, mortgages are accelerated automatically upon the commencement of a foreclosure action.<sup>139</sup> However, it is not at all clear whether a mortgage may automatically be decelerated solely by a lender’s voluntary discontinuance or a court’s involuntary dismissal.<sup>140</sup> It is far from

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131. Bernhard, *supra* note 24, at 32. Compare *Wongsonadi*, 2017 WL 1333442, at \*2 (accepting this argument), and *Deochand*, slip op. at 4-5 (same), with *BSD 265, LLC*, 2017 WL 2778454, at \*7-8 (rejecting this argument). This argument is the primary focus of this Note and is addressed *infra* Parts III.B and IV.A in greater depth.

132. *Tolling the Statute of Limitations*, *supra* note 117, at 1031.

133. See, e.g., *Salois v. Dime Sav. Bank of N.Y., FSB*, 128 F.3d 20, 25 (1st Cir. 1997) (quoting *Heideman v. PFL, Inc.*, 904 F.2d 1262, 1266 (8th Cir. 1990)) (“[E]quitable tolling of a federal statute of limitations is ‘appropriate only when the circumstances that cause a plaintiff to miss a filing deadline are out of his hands.’”).

134. *Wells Fargo Bank, N.A. v. Burke*, 943 N.Y.S.2d 540, 542 (App. Div. 2012).

135. *Id.*

136. *WILLISTON & LORD*, *supra* note 126, § 79:17; accord *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal., Inc.*, 522 U.S. 192, 208-09 (1997).

137. *Costa v. Deutsche Bank Nat’l Tr. Co.*, 247 F. Supp. 3d 329, 340 (S.D.N.Y. 2017) (citing *EMC Mortg. Corp. v. Patella*, 720 N.Y.S.2d 161, 162 (App. Div. 2001)); *Burke*, 943 N.Y.S.2d at 542; *WILLISTON & LORD*, *supra* note 126, § 79:18; *Greco & Singh*, *supra* note 25.

138. *Greco & Singh*, *supra* note 25.

139. See *id.*

140. See *infra* Part III.B (discussing several cases that address this question); *infra* Part IV.B (proposing a solution that, if applied, would answer this question in the negative).

hyperbolic to say that the answer to this question may either reinforce or fatally undermine the statute of limitations and all the policy reasons for its existence.<sup>141</sup>

The statute of limitations is not the only procedural impediment to lenders' eviction efforts; numerous other procedural safeguards exist for the purpose of protecting homeowners in foreclosure actions.<sup>142</sup> Typical foreclosure proceedings include:

[T]he filing of a foreclosure complaint and *lis pendens* notice;<sup>143</sup> the service of process on all parties whose interests may be prejudiced by the proceeding; a hearing before a judge . . . ; the entry of . . . judgment; the notice of sale; a public foreclosure sale, usually conducted by a sheriff; the postsale adjudication as to the disposition of the foreclosure proceeds; and, if appropriate, the entry of a deficiency judgment. An appeal may follow in some cases.<sup>144</sup>

Like the statute of limitations, these proceedings were designed largely, if not primarily, to protect homeowners' property rights.<sup>145</sup> Before a foreclosure action is even commenced, the homeowner must be served with a notice that clearly indicates that he or she is "at risk of losing [the] . . . home" and provides the homeowner with certain contact information for "free or very low-cost" housing counseling services, as well as other vital information.<sup>146</sup> At least ninety days thereafter,<sup>147</sup> the

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141. See *infra* Part IV.A.

142. See Erica Braudy, Note, *Tax a Bank, Save a Home: Judicial, Legislative, and Other Creative Efforts to Prevent Foreclosures in New York*, 17 CUNY L. REV. 309, 317-18 (2014) (emphasizing the benefits of effective legal representation in foreclosure proceedings).

143. See Jeanne M. Naffky, 54 C.J.S. *Lis Pendens* § 18 (2010) ("Ordinarily, the doctrine of *lis pendens* operates to charge a subsequent purchaser of property and third parties having an interest in property with notice of actions concerning that property." (footnote omitted)).

144. Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1403 (2004) (footnote omitted). Deficiency judgments provide lenders with a mechanism for obtaining the remainder of unpaid debt after a foreclosure sale has been made, so long as the price the property sold for amounted to less than the total amount owed. N.Y. REAL PROP. ACTS. LAW § 1371(1)-(2) (McKinney 2009).

145. See *Aurora Loan Servs., LLC v. Weisblum*, 923 N.Y.S.2d 609, 614-15 (App. Div. 2011) (citing *First Nat'l Bank of Chi. v. Silver*, 899 N.Y.S.2d 256, 258-59 (App. Div. 2010)) (finding that the purpose underlying the Home Equity Theft Prevention Act, and by extension, sections 1303 and 1304 of New York's Real Property Actions and Proceedings Law, was to "protect[] . . . homeowners confronted with foreclosure"); Eloisa Rodriguez-Dod, *Stop Shutting the Door on Renters: Protecting Tenants from Foreclosure Evictions*, 20 CORNELL J.L. & PUB. POL'Y 243, 248-65 (2010) (discussing the legal developments that have taken place to curb the foreclosure crisis and protect homeowners from losing their homes).

146. REAL PROP. ACTS. § 1304 (requiring such notice to be made at least ninety days prior to commencement of a foreclosure action); *Weisblum*, 923 N.Y.S.2d at 614-15; see also Rodriguez-Dod, *supra* note 145, at 255-56 (noting that states differ as to what type of notice is required and when (e.g., "notice of . . . default, notice of the foreclosure proceeding, notice of sale, notice to

homeowner must be served with a copy of the summons and complaint, as in any other civil action, so as to be given notice of the lawsuit and a fair opportunity to mount a defense.<sup>148</sup> When service of process is contested, the court may hold a traverse hearing, at which the defendant makes a special appearance to contest the validity of service and where both parties submit evidence to establish whether service was sufficient.<sup>149</sup> After proper service has been established, the plaintiff must then prove five distinct elements before it is permitted to evict the homeowner.<sup>150</sup> On the whole, the process in New York takes an average of 934 days from the date the foreclosure action is commenced to the date a foreclosure sale is ordered.<sup>151</sup> Like the statute of limitations, this process, as time-consuming as it is, has been carefully designed to thwart frivolous foreclosure efforts and to help homeowners stay in their homes or otherwise avoid homelessness.<sup>152</sup>

To further protect homeowners' property interests from being placed in jeopardy without good cause, the law requires lenders to demonstrate that they also have a property interest; namely, an interest in

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vacate, and notice of eviction"), and that "[t]he more forms of notice a tenant receives, especially if notice is sent at varied intervals in the foreclosure proceeding, the more the tenant is protected" (footnotes omitted).

147. See REAL PROP. ACTS. § 1304.

148. As in all civil actions in law and equity, due process requires service of process as an essential prerequisite to the court's exercise of personal jurisdiction over the homeowner and its authority to render a final judgment on the homeowner's right to remain in the home. See N.Y. C.P.L.R. § 308 (McKinney 2010); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314-15 (1950); *Brown v. Giesecke*, 338 N.Y.S.2d 967, 968 (App. Div. 1972).

149. See, e.g., *NYCTL 1998-1 Tr. v. Rabinowitz*, 777 N.Y.S.2d 483, 484 (App. Div. 2004) ("[A] sworn non-conclusory denial of service by a defendant is sufficient to dispute the veracity or content of the affidavit [of service], requiring a traverse hearing."); *Styllanou v. Tsourides*, 422 N.Y.S.2d 748, 749 (App. Div. 1979).

150. *Wachspress et al.*, *supra* note 15, at 1117.

In a foreclosure suit, the bank must generally prove the following: (1) the homeowner has signed both the note (the underlying loan) and the mortgage assigning the house as collateral for that note; (2) the bank owns the note and mortgage; (3) the homeowner still owes a debt to the bank; (4) the homeowner is behind on that debt; and (5) the bank has accelerated that remaining debt in accordance with the terms of the note itself. When a bank fails to prove these elements, a judge is legally required to rule in favor of the homeowner.

*Id.* (footnote omitted).

151. N.Y. ST. DEP'T OF FIN. SERVS., REPORT ON NEW YORK'S FORECLOSURE PROCESS 4-5 (2015), [http://www.dfs.ny.gov/reportpub/fore\\_proc\\_report\\_052015.pdf](http://www.dfs.ny.gov/reportpub/fore_proc_report_052015.pdf) (comparing this figure with the national average of 604 days).

152. See *Rodriguez-Dod*, *supra* note 145, at 248-52 (describing various policies of Fannie Mae and Freddie Mac, which involved suspending foreclosures and evictions while providing opportunities for mortgage modifications and offering financial incentives to homeowners so that they may move into another home).

recovering unpaid debt owed on the property.<sup>153</sup> This is the standing doctrine, which, in the foreclosure context, demands that lenders furnish a true copy of the promissory note that clearly shows the total amount of money owed to them.<sup>154</sup> Standing can be satisfied only by the “plaintiff [showing that she] . . . is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced.”<sup>155</sup> Most critical to a standing analysis is whether the plaintiff is in possession of the note.<sup>156</sup> Once a promissory note is tendered to and accepted by an assignee, “the mortgage passes as an incident to the note.”<sup>157</sup> For an assignment to be properly effectuated, the note must be physically delivered to the assignee or a written instrument must be executed.<sup>158</sup>

In securitized mortgage transactions, negotiable instruments are typically assigned pursuant to custodial systems created by pooling and servicing agreements (“PSA”).<sup>159</sup> Under these agreements, a trust or a custodian holds the promissory note throughout the life of the loan.<sup>160</sup> In the event of a default, the note is transferred to a servicer, who then seeks immediate repayment of the debt.<sup>161</sup> If the debtor fails to pay once notified of the default, the PSA authorizes the servicer to bring a foreclosure action.<sup>162</sup> Even where the PSA has clearly designated the party required to hold the note, servicers have nonetheless filed foreclosure actions without possession of the note and without any proof that the note is in the trust’s possession.<sup>163</sup> Compounding this problem,

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153. See *Aurora Loan Servs., LLC v. Weisblum*, 923 N.Y.S.2d 609, 618 (App. Div. 2011).

154. *Aurora Loan Servs., LLC v. Taylor*, 34 N.E.3d 363, 366 (N.Y. 2015); *Weisblum*, 923 N.Y.S.2d at 618.

155. *U.S. Bank Nat’l Ass’n v. Dellarmo*, 942 N.Y.S.2d 122, 124 (App. Div. 2012) (quoting *Bank of N.Y. v. Silverberg*, 926 N.Y.S.2d 532, 537 (App. Div. 2011)).

156. *Taylor*, 34 N.E.3d at 366 (“[T]he note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law.”).

157. *Id.* (internal quotation marks omitted) (quoting *Silverberg*, 926 N.Y.S.2d at 537); *Mortg. Elec. Registration Sys., Inc. v. Coakley*, 838 N.Y.S.2d 622, 623 (App. Div. 2007) (citing *Payne v. Wilson*, 74 N.Y. 348, 354-55 (1878)).

158. N.Y. REAL PROP. LAW § 244 (McKinney 2010); *Weisblum*, 923 N.Y.S.2d at 618; *Indymac Bank v. Bethley*, No. 9615/08, 2009 WL 279304, at \*3 (N.Y. Sup. Ct. Feb. 6, 2009).

159. See *Tran v. Bank of N.Y.*, No. 13 Civ. 580 (RPP), 2014 WL 1225575, at \*1 (S.D.N.Y. Mar. 24, 2014), *aff’d*, 592 F. App’x 24 (2d Cir. 2015); *Wachspress et al.*, *supra* note 15, at 1119.

160. See *Rajamin v. Deutsche Bank Nat’l Tr. Co.*, 757 F.3d 79, 82-83 (2d Cir. 2014); *Tran*, 2014 WL 1225575, at \*1.

161. *Rajamin*, 757 F.3d at 82-83; *Tran*, 2014 WL 1225575, at \*1.

162. See *Tran*, 2014 WL 1225575, at \*1; *Wachspress et al.*, *supra* note 15, at 1119.

163. See, e.g., *In re Mims*, 438 B.R. 52, 56-57, 58 (Bankr. S.D.N.Y. 2010) (denying the creditor’s motion to lift the automatic stay where the creditor presented no evidence of standing to pursue their state law foreclosure remedy, i.e., that the note was properly transferred to the creditor); *Wachspress et al.*, *supra* note 15, at 1119 (explaining how the application of these pooling and

the securitization process has subjected many mortgages and notes to a convoluted series of assignments, making tracking of the notes' ownership exceedingly difficult.<sup>164</sup>

Beyond just authorizing loan servicers to commence foreclosure proceedings, PSAs also created fee structures that discouraged those servicers and their attorneys from allocating the appropriate resources to pursue foreclosures successfully.<sup>165</sup> When the amount of foreclosures surged in 2007, the servicers did not bother expanding additional resources; rather, they tasked their employees with robo-signing "hundreds of thousands of affidavits" which purportedly proved the servicers' ownership of the mortgages, although in reality, many of those affidavits did no such thing.<sup>166</sup>

The servicers' natural next step was to attempt to foreclose on those mortgages, but with "sloppy paperwork" and no proof of ownership, they often failed to satisfy the threshold standing requirement.<sup>167</sup> Consequently, courts have denied orders of reference, withheld default judgments, and have even dismissed some cases with prejudice.<sup>168</sup> *IndyMac Fed. Bank, FSB v. Meisels*<sup>169</sup> is one example.<sup>170</sup> There, the

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servicing agreements led banks to make mistakes when documenting their ownership of mortgages).

164. Wachspress et al., *supra* note 15, at 1119; *see also* U.S. Bank, N.A. v. Greenpoint Mortg. Funding, Inc., No. 600352/09, 2010 WL 841367, at \*1 (Sup. Ct. Mar. 3, 2010) (describing one such assignment scheme where more than 30,000 loans, valued at least \$1.8 billion, underwent multiple assignments before being deposited into a trust and securitized).

165. Wachspress et al., *supra* note 15, at 1119 ("Each servicing agreement paid servicers a flat annual fee of around 0.25% of the loan's total value (for example, \$500 per year on a \$200,000 loan), but the cost of pursuing a single foreclosure cost servicers around \$2,500." (footnote omitted)).

166. *Id.* at 1119-20.

167. *Id.* at 1120-21.

168. *See, e.g.*, U.S. Bank Nat'l Ass'n v. Merino, 836 N.Y.S.2d 853, 854-55 (Sup. Ct. 2007) (denying an order of reference and holding that the plaintiff failed to prove standing where it submitted an affidavit and a dubious, hand-altered assignment which were purportedly signed by two different individuals, respectively, but which were not accompanied with any evidence that the individuals had the authority to act on behalf of the bank); *IndyMac Fed. Bank, FSB v. Meisels*, No. 8752/09, 2012 WL 4748473, at \*4-9, \*11 (N.Y. Sup. Ct. Oct. 4, 2012) (finding that the plaintiff lacked standing to bring a foreclosure action and dismissing the action with prejudice); *Indymac Bank, FSB v. Bethley*, No. 9615/08, 2009 WL 279304, at \*7, \*14 (N.Y. Sup. Ct. Feb. 6, 2009) (denying the plaintiff's motion for summary judgment and order of reference where standing had not been proven because the mortgage assignment was "retroactively predate[d]" to a date prior to the filing of the summons and complaint). An order of reference is a motion made by a plaintiff directing the court to appoint a referee to compute the total amount owed on the mortgage, and to determine whether the mortgaged property "can be sold in parcels." N.Y. REAL PROP. ACTS. LAW § 1321 (McKinney 2009). An order of reference is "a preliminary step towards obtaining a judgment of foreclosure." *Home Savs. of Am., F.A. v. Gkanios*, 646 N.Y.S.2d 530, 531 (App. Div. 1996).

169. 2012 WL 4748473.

170. *Id.* at \*29.

“failed” bank IndyMac, which was previously sold by the Federal Deposit Insurance Corporation and therefore ceased to exist when the foreclosure action was filed, was nonetheless assigned a mortgage by the “infamous robo-signer Erica Johnson-Seck” and represented by counsel who was attempting to collect on the mortgage debt.<sup>171</sup> Because the assignment was ineffectual, the loan servicer was unable to prove that it was the owner of the note and therefore lacked standing to foreclose.<sup>172</sup> Accordingly, the court dismissed the case with prejudice.<sup>173</sup> In similar situations, it has not been unusual for a lender to refile a foreclosure action at a later date, and when confronted with a motion to dismiss the later action as time-barred, to argue that the later action was filed within the time prescribed by the statute of limitations.<sup>174</sup>

Aside from those occasions where a case is dismissed or discontinued due to chain of title and standing issues, there is at least one other instance where the applicability of the statute of limitations may be called into question.<sup>175</sup> After the statute of limitations for bringing a foreclosure action has expired, the homeowner may bring an action to quiet title to the property.<sup>176</sup> From a policy perspective, quiet title actions promote the alienability of property.<sup>177</sup> If the quiet title action is successful, any encumbrances and liens resulting from the unpaid mortgage—which the lender would not be able to foreclose on due to the statute of limitations—are removed.<sup>178</sup> Because the expiration of the statute of limitations is a condition precedent to the commencement of a quiet title action, creditors have argued for the dismissal of quiet title actions, insisting that the statute of limitations has not expired because the mortgage was decelerated by the discontinuance of an earlier

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171. *Id.* at \*4-9, \*10, \*14.

172. *Id.* at \*14-15.

173. *Id.* at \*29.

174. *Id.* The author of this Note is not referring here to cases that were dismissed with prejudice, but to cases with facts otherwise similar to the facts in *Meisels*. See Bernhard, *supra* note 24, at 32.

175. See *BSD 265, LLC v. HSBC Bank USA N.A.*, No. 504656/16, 2017 WL 2778454, at \*1, \*5 (N.Y. Sup. Ct. June 27, 2017).

176. N.Y. REAL PROP. ACTS. LAW § 1501(4) (McKinney 2009).

177. Sonja Larsen, 65 Am. Jur. 2d *Quieting Title and Determination of Adverse Claims* § 1 (2011) (“[T]he purpose of a quiet title statute has been set forth as being to free the land of the cloud resting upon it and make its title clear and indisputable, so that it may enter the channels of commerce and trade unfettered and without the handicap of suspicion.” (footnote omitted)); *Tolling the Statute of Limitations*, *supra* note 117, at 1036 (explaining that quiet title statutes were enacted to allow for the destruction of a lien “after a certain period of time” because legislatures in various jurisdictions, including New York, recognized that “tolling provisions to the statute of limitations prevent the free alienability of land and are often unfair to bona fide purchasers”).

178. REAL PROP. ACTS. § 1501(4).

foreclosure action.<sup>179</sup> If this argument is universally accepted, many quiet title actions (which might otherwise be successful) are likely to be dismissed, and any encumbrances on the land resulting from the subject mortgages would then remain, at least until the lenders prevail in later foreclosure actions.<sup>180</sup>

*B. Uncertainty in the Law: Can Deceleration be Used to Circumvent the Statute of Limitations?*

Whether the discontinuance or dismissal of a foreclosure action can operate as a revocation of a lender's election to accelerate a mortgage is an open question and a source of ongoing debate among courts and practitioners.<sup>181</sup> Although the New York Court of Appeals has not yet weighed in on this issue,<sup>182</sup> lenders did receive strong support from the Florida Supreme Court in *Bartram v. U.S. Bank National Ass'n*.<sup>183</sup> In *Bartram*, the plaintiff's prior foreclosure action was dismissed with prejudice because the plaintiff failed to appear for a case management conference.<sup>184</sup> Florida's five-year statute of limitations was said to have expired after the mortgage was accelerated but before the plaintiff brought a second foreclosure action.<sup>185</sup> Rejecting the borrower's claim that the second foreclosure action was time-barred, Florida's high court held that the dismissal of the first foreclosure action was by itself sufficient to decelerate the mortgage.<sup>186</sup> The court reasoned that the dismissal of the first case returned the parties to their *status quo ante*, and that the borrower had the right to resume making monthly installment payments after the dismissal.<sup>187</sup> If the borrower defaulted on those payments when they became due, the statute of limitations was said to run separately on each subsequent payment.<sup>188</sup> In short, the plaintiff was permitted to evade the statute of limitations without

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179. *See id.*; *BSD 265, LLC v. HSBC Bank USA N.A.*, No. 504656/16, 2017 WL 2778454, at \*5 (N.Y. Sup. Ct. June 27, 2017).

180. *See* REAL PROP. ACTS. § 1501(4).

181. *See BSD 265, LLC*, 2017 WL 2778454, at \*7; Greco & Singh, *supra* note 25.

182. *BSD 265, LLC*, 2017 WL 2778454, at \*7 (recognizing that there is no controlling authority in New York on the issue of whether a mortgage acceleration may be revoked by the discontinuance of a foreclosure action); Greco & Singh, *supra* note 25 (same).

183. 211 So.3d 1009 (Fla. 2016).

184. *Id.* at 1016.

185. *See id.* at 1015.

186. *Id.* at 1021.

187. *Id.* at 1021-22.

188. *Id.* at 1022.

presenting any evidence that it took affirmative steps to revoke the prior acceleration.<sup>189</sup>

Unlike the current state of the law in Florida, New York law is not so clear on this issue.<sup>190</sup> In the recent case of *BSD 265, LLC v. HSBC Bank USA N.A.*,<sup>191</sup> Kings County Supreme Court Justice Lawrence Knipel found that a voluntary discontinuance of a prior foreclosure action did not operate as a revocation of the mortgage acceleration.<sup>192</sup> Citing to the New York Appellate Division, Second Department, and quoting the Third Department, the court held:

[A] . . . voluntary discontinuance of [a] . . . foreclosure action alone . . . [does] not revoke the acceleration of the mortgage debt and reset the statute of limitations period. A lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in the borrower's position in reliance thereon. After the mortgage debt has been accelerated, the acceleration may only "be revoked through an affirmative act occurring within the limitations period."<sup>193</sup>

Even though the court in *BSD 265, LLC* rejected the lender's argument in no uncertain terms, other lower courts have held differently.<sup>194</sup> For example, in *U.S. Bank N.A. v. Wongsonadi*,<sup>195</sup> Queens County Supreme Court Justice Robert McDonald held that the lender's voluntary discontinuance of a prior foreclosure action, by itself, did constitute a revocation of the mortgage acceleration.<sup>196</sup> Quoting the Second Department, Justice McDonald wrote: "'When an action is discontinued, it is as if [*sic*] had never been; everything done in the action is annulled and all prior orders in the case are nullified.' Thus, the election to accelerate contained in the complaint was nullified when plaintiff voluntarily discontinued the prior action."<sup>197</sup> The

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189. *See id.*

190. *See* *BSD 265, LLC v. HSBC Bank USA N.A.*, No. 504656/16, 2017 WL 2778454, at \*7 (N.Y. Sup. Ct. Kings Cnty. June 27, 2017); Greco & Singh, *supra* note 25.

191. 2017 WL 2778454.

192. *Id.* at \*1, \*6.

193. *Id.* at \*6 (first citing *Fed. Nat'l Mortg. Ass'n v. Mebane*, 618 N.Y.S.2d 88, 89 (App. Div. 2d 1994); and then quoting *Lavin v. Elmakiss*, 754 N.Y.S.2d 741, 743 (App. Div. 3d 2003)). In *Mebane*, the Second Department held that a mortgage acceleration could not be revoked after the statute of limitations for filing a new foreclosure action has expired. 618 N.Y.S.2d at 89.

194. *See* *BSD 265, LLC*, 2017 WL 2778454, at \*7-8; *U.S. Bank, Nat'l Ass'n v. Wongsonadi*, No. 703762/2015, 2017 WL 1333442, at \*2 (N.Y. Sup. Ct. Queens Cnty. Apr. 5, 2017); *U.S. Bank Nat'l Ass'n v. Deochand*, No. 702859/16, slip op. at 5 (N.Y. Sup. Ct. Queens Cnty. Mar. 1, 2017).

195. 2017 WL 1333442.

196. *Id.* at \*2.

197. *Id.* (quoting *Newman v. Newman*, 665 N.Y.S.2d 423, 424 (App. Div. 1997)).

discontinuance of the prior foreclosure action was therefore considered “an affirmative act of revocation,” and the subsequent foreclosure action was held to have been filed “timely.”<sup>198</sup>

Another example of a court accepting the lender’s argument can be found in *U.S. Bank National Ass’n v. Deochand*,<sup>199</sup> where Queens County Supreme Court Justice Howard Lane concluded that the discontinuance of a prior foreclosure action was enough to revoke the mortgage acceleration and that the statute of limitations did not bar a second foreclosure action.<sup>200</sup> After coming to this conclusion, the court went on to find that the bank proved standing as well as its prima facie entitlement to foreclosure; that the plaintiff’s motion for summary judgment therefore had to be granted; and that the defendant’s motion for summary judgment had to be denied.<sup>201</sup> In sum, these holdings amount to a significant difference of opinion among the lower courts.<sup>202</sup>

Ancillary to the deceleration issue are two preliminary questions that must also be addressed.<sup>203</sup> The first is whether a distinction should be made between voluntary discontinuances and involuntary dismissals, and the second is what the standard of proof should be for a lender to prove deceleration.<sup>204</sup> To answer these questions, *NMNT Realty Corp. v. Knoxville 2012 Trust*<sup>205</sup> presents a convenient starting point.<sup>206</sup> There, the Second Department found that, although a mortgage acceleration can be revoked, some form of proof tending to show an “affirmative act of revocation” is required.<sup>207</sup> Distinguishing between cases involving a prior foreclosure action that was involuntarily dismissed by a court and cases where a prior foreclosure action was voluntarily discontinued by a plaintiff, the court recognized that, although a dismissal does not amount to an “affirmative act” of revocation, a voluntary discontinuance “do[es] not disprove” that such an affirmative act occurred.<sup>208</sup>

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198. *Wongsonadi*, 2017 WL 1333442, at \*2.

199. Slip op. at 4-5.

200. *Id.* at 4-5 (citing 4 *Cosgrove 950 Corp. v. Deutsche Bank Nat’l Tr. Co.*, No. 152225/2015, slip op. at 3 (N.Y. Sup. Ct. May 11, 2016)).

201. *Deochand*, slip op. at 2, 5.

202. *See supra* text accompanying notes 190-201.

203. *See infra* text accompanying note 204.

204. *See infra* text accompanying notes 207-16. In the Second Department, it is now clear that, at a minimum, a bank must prove standing as “a necessary element, when raised, to a valid deceleration . . .” *Milone v. U.S. Bank Nat’l Ass’n*, No. 100268/15, slip op. at 4 (N.Y. App. Div. 2d Aug. 15, 2018).

205. 58 N.Y.S.3d 118 (App. Div. 2d 2017).

206. *See id.*

207. *Id.* at 120.

208. *Id.* at 121 (internal quotation marks omitted) (first quoting *Fed. Nat’l Mortg. Ass’n v. Mebane*, 618 N.Y.S.2d 88, 89 (App. Div. 2d 1994); then citing *Kashipour v. Wilmington Savs.*

The court in *NMNT Realty Corp.* did not explain what quantum of proof would be enough for proving deceleration,<sup>209</sup> but more recently, the Second Department clarified that a stipulation of discontinuance is not enough.<sup>210</sup> Likewise, to prove that a mortgage was accelerated, many jurisdictions have only recognized evidence of a “clear and unequivocal” act as sufficient,<sup>211</sup> and some New York courts have held the same.<sup>212</sup>

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Fund Soc’y, FSB, 41 N.Y.S.3d 738, 739 (App. Div. 2d 2016); then citing Clayton Nat’l, Inc. v. Guldi, 763 N.Y.S.2d 493, 493-94 (App. Div. 2d 2003); and then citing EMC Mortg. Corp. v. Patella, 720 N.Y.S.2d 161, 162-63 (App. Div. 2d 2001)).

209. See generally *NMNT Realty Corp.*, 58 N.Y.S.3d 118 (neglecting to specify how an “affirmative act” of revocation can be proven).

210. *Freedom Mortg. Corp. v. Engel*, No. 1139/15, 2018 WL 3371696, at \*2 (N.Y. App. Div. 2d July 11, 2018) (citing *Mebane*, 618 N.Y.S.2d at 89-90) (holding that a stipulation of discontinuance is not enough to prove deceleration where it says nothing about the “revocation of the election to accelerate, and d[oes] not otherwise indicate that that the plaintiff would accept installment payments from the defendant”); *Deutsche Bank Nat’l Tr. Co. v. Adrian*, No. 506198/14, 2018 WL 635941, at \*2 (N.Y. App. Div. 2d Jan. 31, 2018) (first citing *JBR Constr. Corp. v. Staples*, 897 N.Y.S.2d 223, 224 (App. Div. 2d 2010); and then quoting *Beneficial Homeowner Serv. Corp. v. Tovar*, 55 N.Y.S.3d 59, 61 (App. Div. 2d 2017)) (“[T]he [lender] . . . failed to raise a triable issue of fact as to whether it affirmatively revoked its election to accelerate the mortgage debt within the six-year limitations period. . . . The plaintiff voluntarily discontinued the prior foreclosure action . . . after the statute of limitations had expired, and it failed to demonstrate that its . . . notice, as a matter of law, ‘destroy[ed] the effect of the sworn statement that the plaintiff had elected to accelerate the maturity of the debt.’”).

It is still unclear whether a revocation letter can be enough to decelerate a mortgage. See, e.g., *Soroush v. CitiMortgage, Inc.*, No. 706506/15, 2018 WL 2325222, at \*2 (N.Y. App. Div. 2d May 23, 2018). The Second Department recently refused to recognize such a letter as an “affirmative act of revocation,” but it left open the possibility that a revocation letter may be sufficient to prove deceleration if the mailing date appears on the face of the letter. *Id.* Thus, it may be possible for a lender to avoid the statute of limitations altogether simply by mailing a deceleration letter to the homeowner just one day prior to the expiration date. See *id.* Even so, the Second Department clarified that a deceleration letter cannot be valid if it serves only as a pretext for circumventing the statute of limitations. See *Milone v. U.S. Bank Nat’l Ass’n*, No. 100268/15, slip op. at 4 (N.Y. App. Div. 2d Aug. 15, 2018). As the court explained:

[A] de-acceleration letter is not pretextual if . . . it contains an express demand for monthly payments on the note, or, in the absence of such express demand, it is accompanied by copies of monthly invoices transmitted to the homeowner for installment payments, or, is supported by other forms of evidence demonstrating that the lender was truly seeking to de-accelerate and not attempting to achieve another purpose under the guise of de-acceleration. . . . In contrast, a “bare” and conclusory de-acceleration letter, without a demand for monthly payments toward the note, or copies of invoices, or other evidence, may raise legitimate questions about whether or not the letter was sent as a mere pretext to avoid the statute of limitations.

*Id.* (citing *Deutsche Bank Nat’l Tr. Co. v. Bernal*, 59 N.Y.S.3d 267, 273-74 (Sup. Ct. 2017)).

211. *What Amounts to a Sufficient Act*, 5 A.L.R.2d 968, 972, § 4 (1949) (listing many cases from a wide variety of jurisdictions).

212. See, e.g., *Bank of N.Y. v. Hutchinson*, No. 501471/2016, 2017 WL 4273201, at \*5-6 (N.Y. Sup. Ct. Kings Cnty. Sept. 18, 2017) (citing *Goldman Sachs Mortg. Co. v. Mares*, 23 N.Y.S.3d 444, 445 (App. Div. 3d 2016)). Notably, the Second Department recently applied the “clear and unambiguous” standard to deceleration notices as well. *Milone*, slip op. at 4.

Take for example *Goldman Sachs Mortgage Co. v. Mares*,<sup>213</sup> where the lender sent a letter to the homeowners informing them that nonpayment “may result in acceleration of the sums secured by the mortgage.”<sup>214</sup> The Third Department refused to recognize this letter as an election to accelerate the mortgage because the letter only gave the homeowners notice of “a possible future event,” “fall[ing] far short of providing clear and unequivocal notice to defendants that the entire mortgage debt was being accelerated.”<sup>215</sup>

As these cases demonstrate, the issue here is not only whether a discontinuance or dismissal should be allowed to retroactively reset the statute of limitations; rather, this question necessarily turns on two related issues: (1) whether the plaintiff’s burden should be the same for proving deceleration as it is for proving acceleration; and (2) whether the analysis should depend on the disposition of the initial foreclosure action.<sup>216</sup> To meaningfully address each of these questions, a discussion of New York’s public policy will be instructive.<sup>217</sup>

#### IV. A LEGISLATIVE FIX TO PROTECT HOMEOWNERS AND PROMOTE GOOD-FAITH LENDING PRACTICES

The statute of limitations would be seriously undermined if the law were to allow a mortgage to be decelerated solely by the discontinuance or dismissal of a foreclosure action.<sup>218</sup> The public policy of the State of New York would be in constant tension with such a rule.<sup>219</sup> Because there is an absence of controlling authority in New York on the deceleration issue, litigants are currently faced with unpredictability and

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213. 23 N.Y.S.3d at 444.

214. *Id.* at 445.

215. *Id.* (internal quotation marks omitted) (quoting *Pidwell v. Duvall*, 815 N.Y.S.2d 754, 756-57 (App. Div. 3d 2006)); *see also Milone*, slip op. at 3 (holding that an acceleration letter, which notified the homeowner that “failure to cure her delinquency within 30 days ‘will result in the acceleration’ of the note” fell far short of “clear and unequivocal” evidence that the mortgage debt was accelerated (emphasis added)); *Chase Mortg. Co. v. Fowler*, 721 N.Y.S.2d 184, 184 (App. Div. 4th 2001) (explaining that the plaintiff’s letter of default to the defendant did not accelerate the mortgage because it failed to “clearly and unequivocally” inform the defendant that “all sums due under the note and mortgage were immediately due and payable”). *But see Deutsche Bank Nat’l Tr. Co. v. Royal Blue Realty Holdings, Inc.*, 48 N.Y.S.3d 597, 597 (App. Div. 1st 2017) (memorandum) (holding that “clear and unequivocal notice” of acceleration was shown by a letter because it indicated that the bank “‘will’ accelerate the loan balance and proceed with a foreclosure sale” (emphasis added)).

216. Both of these questions are addressed *infra* Part IV.B.

217. *See infra* Part IV.A–B.

218. For a discussion about the purpose of the statute of limitations, *see supra* Part III.A.

219. *See infra* Part IV.A.

uncertainty regarding the outcomes of foreclosure cases.<sup>220</sup> Subpart A explains the public policy implications of deceleration and concludes that the policies underlying the statute of limitations—namely homeowners’ and society’s interests, in the aggregate—outweigh the interests of banks and loan servicers in collecting on their debts.<sup>221</sup> Subpart B then proposes an amendment to Article 13 of New York’s Real Property Actions and Proceedings Law to expressly define the circumstances when a mortgage may be decelerated.<sup>222</sup>

*A. The Public Policy Case Against Deceleration of Mortgages in New York*

In the aftermath of the foreclosure crisis, neighborhoods throughout New York State were blighted with “zombie properties,” vacant properties that were either already foreclosed or had yet to be foreclosed and which had fallen into disrepair due to a lack of regular maintenance.<sup>223</sup> Increases in the amount of vacant homes have been shown likely to result in corresponding increases in vandalism, which in turn cause sharp reductions in property values throughout affected neighborhoods.<sup>224</sup> Eventually, this increase-decrease effect culminates in a further increase in the foreclosure rate.<sup>225</sup> In 2016, the New York State Legislature and Governor Andrew Cuomo sought to address this “epidemic” by passing comprehensive legislation which imposes new requirements and strengthens existing requirements on mortgagees, their agents, and lower court judges.<sup>226</sup>

One component of this legislation is Section 1308 of the Real Property Actions and Proceedings Law.<sup>227</sup> That statute requires mortgage servicers to conduct routine exterior inspections of one-to-four family residential properties within ninety days after the mortgage becomes delinquent and to conduct follow-up inspections on the exteriors of those properties every twenty-five to thirty-five days

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220. See Greco & Singh, *supra* note 25; *supra* text accompanying notes 190-202.

221. See *infra* Part IV.A.

222. See *infra* Part IV.B.

223. 2016 Foreclosure Legislation Home Page, N.Y. ST. DEP’T OF FIN. SERVS., [http://www.dfs.ny.gov/banking/zombie\\_prop\\_legislation.htm](http://www.dfs.ny.gov/banking/zombie_prop_legislation.htm) (last updated Dec. 7, 2016); see Thomas, *supra* note 73, at 37.

224. See Thomas, *supra* note 73, at 37; *supra* text accompanying notes 73-79.

225. See Thomas, *supra* note 73, at 37; *supra* text accompanying notes 75-79.

226. 2016 Foreclosure Legislation Home Page, *supra* note 223.

227. N.Y. REAL PROP. ACTS. LAW § 1308 (McKinney Supp. 2018); 2016 Foreclosure Legislation Home Page, *supra* note 223.

thereafter.<sup>228</sup> Where, based on at least three consecutive inspections, the servicer has reason to believe the property is vacant or abandoned, the statute requires the servicer to “post a notice on an easily accessible portion of the property,” in a location where it is likely to be seen by the homeowner, within seven days after discovering that the property is likely vacant or abandoned.<sup>229</sup> If the property owner has not notified the servicer within seven days after the notice is posted “that the property is not vacant or abandoned, or if an emergent property condition that could reasonably damage, destroy or harm the property arises,” the servicer is required to make various repairs to the property, as defined in Section 1308, to prevent any further damage or decay thereto.<sup>230</sup>

After the plaintiff has conducted the inspections required by Section 1308, the plaintiff may move the court, pursuant to Section 1309, for an expedited judgment of foreclosure and sale, providing that several conditions are met.<sup>231</sup> First, the plaintiff must show that defendant has not appeared in court to contest the foreclosure proceedings and that the defendant’s time for filing an answer has expired.<sup>232</sup> Second, the plaintiff must prove—by photographs, inspection reports, utility bills, and other documentary evidence—that the property is vacant and abandoned.<sup>233</sup> Third, service of the motion must be made at the defendant’s last known address, and the court must notify the defendant of the plaintiff’s motion and its basis—that the property is vacant and abandoned—before expedited judgment of foreclosure can be ordered.<sup>234</sup> Once the foreclosure and sale have been ordered, the plaintiff must proceed to auction the property within ninety days of the judgment.<sup>235</sup> If the plaintiff purchases the property at the auction, the plaintiff must then “place the property back on the market for sale or other occupancy” within 180 days after the deed of sale to the property

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228. REAL PROP. ACTS. § 1308(1).

229. *Id.* § 1308(3); N.Y.S. DEP’T OF FIN. SERVS., INDUSTRY BEST PRACTICES: INSPECTING, SECURING, AND MAINTAINING VACANT AND ABANDONED PROPERTIES IN NEW YORK 2 (2015), [http://www.dfs.ny.gov/banking/best\\_practices\\_vac\\_aban\\_properties\\_nys.pdf](http://www.dfs.ny.gov/banking/best_practices_vac_aban_properties_nys.pdf).

230. REAL PROP. ACTS. § 1308(4); *see* N.Y.S. DEP’T OF FIN. SERVS., *supra* note 229, at 2-3.

231. REAL PROP. ACTS. § 1309(1); *2016 Foreclosure Legislation Home Page*, *supra* note 223.

232. REAL PROP. ACTS. § 1309(1), (5); *see also* N.Y. C.P.L.R. § 320(a) (McKinney 2010) (requiring an answer or notice of appearance to be served “within twenty days after service of the summons”).

233. REAL PROP. ACTS. § 1309(1)(b); *see also* *Teacher’s Fed. Credit Union v. Gergel*, No. 615410/2016, 2017 WL 5986454, at \*1-2 (N.Y. Sup. Ct. Dec. 1, 2017) (finding that copies of three inspection reports, photographs of the property, and proof that electricity to the property had been shut off was sufficient evidence that the property was abandoned and vacant).

234. REAL PROP. ACTS. § 1309(a), (d).

235. *Id.* § 1351(1); *2016 Foreclosure Legislation Home Page*, *supra* note 223.

is executed, or within ninety days after any necessary construction and renovation to the property is completed, whichever comes first.<sup>236</sup>

The amount of properties awaiting foreclosure at any given time can have a serious impact on the rate of vacant properties in New York's neighborhoods.<sup>237</sup> By allowing for the expedited collection of outstanding debt, this legislation provides banks with an incentive to inspect property that may be abandoned or vacant; if it is abandoned or vacant, to repair and maintain the property; and to provide for the seamless transition of the property back into the housing market.<sup>238</sup> Moreover, by requiring mortgagees to convince the court with documentary evidence that the property is vacant and abandoned, and by providing strict notice requirements to avail the homeowner of the opportunity to appear in court and contest the proceedings, this legislation also seeks to ensure that expedited judgments will not be had unless the homeowner truly has relinquished all of their interest in the property.<sup>239</sup> This legislation does not allow the interests of banks in collecting on their debts to contravene the interests of homeowners in remaining in their homes.<sup>240</sup> The policy rationales underlying this legislation can thus be summarized as follows: to curtail the amount of vacant or abandoned properties in New York's neighborhoods by facilitating the free alienability of vacant properties; to ensure that those

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236. REAL PROP. ACTS. § 1353; *2016 Foreclosure Legislation Home Page*, *supra* note 223.

237. INDEPENDENT DEMOCRATIC CONFERENCE, *supra* note 44, at 2 (“Many homes become vacant and abandoned following or in the process of foreclosure.”); *see also* Thomas, *supra* note 73, at 37 (noting that foreclosures lead to an increase in vandalism, causing property to depreciate and the amount of foreclosures to rise); Lin Cui & Randall Walsh, *Foreclosure, Vacancy and Crime* 25 (Nat’l Bureau of Econ. Research, Working Paper No. 20593, 2014), <http://www.nber.org/papers/w20593.pdf> (“[P]resence of houses vacant for longer than 6 months increases violent crime rates, with the impact increasing with duration of vacancy and possibly plateauing somewhere between 12 and 18 months.”); *Vacant and Abandoned Properties: Turning Liabilities into Assets*, U.S. DEP’T OF HOUSING & URB. DEV. (2014), <https://www.huduser.gov/portal/periodicals/em/winter14/highlight1.html> (“Both residential and commercial foreclosures are at high risk of becoming vacant or abandoned.”); *Post Foreclosure Timeline Home Page*, N.Y.S. DEP’T OF FIN. SERVS., [http://www.dfs.ny.gov/banking/zombie\\_prop\\_postfore\\_timeline.htm](http://www.dfs.ny.gov/banking/zombie_prop_postfore_timeline.htm) (last updated Dec. 7, 2016) (explaining that it takes more than 150 days, on average, for a property to move “from judgment of foreclosure and sale to auction,” and that borrowers are often forced to vacate their homes before the judgment of foreclosure and sale is even ordered, thereby leaving properties to deteriorate throughout the foreclosure proceedings).

238. *See* REAL PROP. ACTS. §§ 1308(1)–(7), 1309(1), 1351, 1353; *2016 Foreclosure Legislation Home Page*, *supra* note 223.

239. *See* REAL PROP. ACTS. §§ 1308(3), (4)(j), 1309(1), (5).

240. *See id.* §§ 1308(3), (4)(j), 1309(1), (5).

properties are put to the best possible use; and to achieve those objectives while still protecting homeowners from foreclosure.<sup>241</sup>

Society also has an interest in maximizing judicial economy and lifting the burden foreclosure cases place on judicial resources.<sup>242</sup> Since the 2008 foreclosure crisis, state courts all over the country have struggled to find new ways to ease the strain that mass amounts of foreclosure filings have placed on court dockets.<sup>243</sup> “There is a certain capacity of judges, of court staff, of clerks, of filing space, of hearing time, of courtrooms, even of hours in the day. Year in, year out, that capacity flexes with the caseload traffic to afford reasonable, prompt, efficient and fair justice.”<sup>244</sup> New York courts are inundated with 72,000 pending foreclosure cases, and the state government is still searching for new ways to decrease that number and relieve judges and court personnel of the enormous burden that comes with adjudicating them.<sup>245</sup> To avoid the tremendous costs of successive foreclosure proceedings, courts should be hesitant to allow the revival of defunct foreclosure cases.<sup>246</sup> If the law were to permit lenders to evade the statute of limitations by showing only that a prior foreclosure case was voluntarily discontinued or dismissed, the floodgates would likely swing open—a great number of foreclosure cases that would otherwise be time-barred could be heard on their merits—with the expenses ultimately being subsidized by New York taxpayers.<sup>247</sup>

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241. See *id.* §§ 1308(1)–(7), 1309(1), 1351(1), 1353(1); 2016 Foreclosure Legislation Home Page, *supra* note 223.

242. See INDEPENDENT DEMOCRATIC CONFERENCE, *supra* note 44, at 4.

243. Sharon Press, Symposium, *Mortgage Foreclosure Mediation in Florida—Implementation Challenges for an Institutionalized Program*, 11 NEV. L.J. 306, 306-07 (2011) (explaining that the foreclosure crisis has left in its wake an “increased demand for judicial resource[s]” and that courts are “without any excess capacity to absorb those cases”).

244. *Id.* at 306 (quoting TASK FORCE ON RESIDENTIAL MORTGAGE FORECLOSURE CASES, FLA. SUP. CT., FINAL REPORT AND RECOMMENDATIONS ON RESIDENTIAL MORTGAGE FORECLOSURE CASES 4 (2009), [http://www.floridasupremecourt.org/pub\\_info/documents/Filed\\_08-17-2009\\_Foreclosure\\_Final\\_Report.pdf](http://www.floridasupremecourt.org/pub_info/documents/Filed_08-17-2009_Foreclosure_Final_Report.pdf)).

245. INDEPENDENT DEMOCRATIC CONFERENCE, *supra* note 44, at 4; *supra* text accompanying notes 81, 83-84.

246. See Wachspress et al., *supra* note 15, at 1121 (describing the courts’ reluctance to give foreclosure cases “preclusive effect”).

247. See N.Y. ST. DEP’T OF FIN. SERVS., *supra* note 151, at 16 (stating that an increased volume of foreclosure cases results in “congestion in the court system and requires expending more of the court’s already limited resources”); Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J. ON LEGIS. 123, 123 (1992) (“Although the judicial system exists to resolve society’s legal controversies, taxpayers would need to pay for fewer courts, judges, and court personnel if society had fewer statutory issues to settle.”); Wachspress et al., *supra* note 15, at 1117 (explaining that “‘proof-of-ownership’ issues” have increased “ten-fold” during the time period surrounding the 2007 mortgage meltdown).

This discussion would be incomplete without considering the policy underlying the statute of limitations: defendants must be protected from being made to defend against stale claims.<sup>248</sup> If the statute of limitations were to be made inoperative, homeowners could be made to wait many months, if not years, sleeplessly waiting to be foreclosed upon.<sup>249</sup> Those homeowners' right to exclude others from trespassing on or possessing their property would be made virtually meaningless, at least inasmuch as that right is applied to mortgage lenders and servicers.<sup>250</sup> When a second foreclosure action is eventually brought, homeowners may be unable to effectively defend against what would otherwise be provable usurpations on the part of foreclosing plaintiffs.<sup>251</sup> By that time, "evidence . . . [may be] lost, memories . . . [may have] faded, . . . witnesses . . . [may have] disappeared," and homeowners may find themselves at an unsurmountable disadvantage.<sup>252</sup>

To be sure, lenders do have two arguments weighing in their favor.<sup>253</sup> First, prohibiting deceleration altogether would preclude banks from recovering on their debt in cases that are barred by the statute of limitations.<sup>254</sup> As the Florida Supreme Court said in *Bartram*, banks would have "only one opportunity to enforce the mortgage despite the occurrence of any future defaults. . . . '[J]ustice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.'"<sup>255</sup> While banks do have a strong property interest in the money owed to them, that interest should not be dispositive on the deceleration question.<sup>256</sup> The court's decision in *Bartram* was premised on the borrower's alleged default on an installment payment that occurred after the dismissal of the prior foreclosure action—a default which could only

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248. See Wachspress et al., *supra* note 15, at 1125 ("Foreclosures . . . appear to have significant effects on community members' physical and mental health, and correlate with increased rates of depression, anxiety, suicide, cardiovascular disease, and emergency-care treatment." (footnote omitted)); Holmes, *supra* note 118, at 477.

249. See CAL. CIV. CODE § 3527 (West 2016); ACE Secs. Corp. v. DB Structured Prods., Inc., 36 N.E.3d 623, 627-28 (N.Y. 2015).

250. See *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); TALTY, *supra* note 122; Merrill, *supra* note 121, at 753; *supra* note 122 and accompanying text.

251. See *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944); *Developments in the Law*, *supra* note 117, at 1185.

252. See *Order of R.R. Telegraphers*, 321 U.S. at 349; *Developments in the Law*, *supra* note 117, at 1185.

253. See *infra* text accompanying notes 254-69.

254. See *Bartram v. U.S. Bank Nat'l Ass'n*, 211 So. 3d 1009, 1021 (Fla. 2016).

255. *Id.* (quoting *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1008 (Fla. 2004)).

256. See Bernhard, *supra* note 22, at 36 (suggesting that homeowners should argue in favor of a "case-by-case factual analysis of acceleration and deceleration").

have occurred if the mortgage had been decelerated by said dismissal.<sup>257</sup> In other words, the court presupposed that the parties were brought back to the position they were in prior to the acceleration of the mortgage.<sup>258</sup> Rather than addressing whether a dismissal or a discontinuance should be enough to decelerate a mortgage, the *Bartram* court begged the question and assumed the answer to be in the negative.<sup>259</sup> That is to say the court failed to adequately address the countervailing policy considerations discussed above.<sup>260</sup>

Lenders may also argue that a wholesale rejection of the deceleration argument would effectively provide foreclosure defendants with “free” houses.<sup>261</sup> While there is a degree of truth to this argument, its effect may be overstated.<sup>262</sup> Courts have been loath to permit homeowners to obtain free houses,<sup>263</sup> but such situations can be best avoided by encouraging lenders to file foreclosure actions sooner rather than later and to submit the correct documents to the courts, free of any defects.<sup>264</sup> If lenders were to have advance notice that a discontinuance or dismissal is not enough to recover a foreclosure action, they would have more reason to exercise due diligence and act reasonably in their foreclosure efforts.<sup>265</sup> In addition, homeowners would have more leverage when negotiating short-sales or mortgage modifications.<sup>266</sup> Both of these alternatives would likely cost lenders less money as opposed to litigating through protracted foreclosure proceedings.<sup>267</sup> If

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257. *Bartram*, 211 So. 3d at 1012, 1021-22.

258. *Id.* at 1023 (Lewis, J., concurring in judgment) (lamenting the majority’s failure to explain how a subsequent default occurred giving rise to a new cause of action, and for neglecting to specify how a mortgage can be reinstated after an on-the-merits dismissal of a previous foreclosure action).

259. *See id.* at 1023 (Lewis, J., concurring in judgment).

260. *See id.* at 1021; *supra* text accompanying notes 237-52.

261. Wachspress et al., *supra* note 15, at 1126.

262. *See id.* at 1126-27 (arguing that “the threat of a ‘free house’” would have the effect of incentivizing banks to negotiate with homeowners for mortgage modification agreements or short-sales of their homes).

263. *See, e.g.*, *Washington v. Specialized Loan Servicing, LLC (In re Washington)*, No. 14-14573-TBA, 2014 WL 5714586, at \*1 (Bankr. D.N.J. Nov. 5, 2014) (“‘No one gets a free house.’ This Court and others have uttered that admonition since the early days of the mortgage crisis, where homeowners have sought relief under a myriad of state and federal consumer protection statutes and the Bankruptcy Code.”), *rev’d*, No. 2:14-cv-8063-SDW, 2015 WL 4757924 (D.N.J. Aug. 11, 2015); *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1007-08 (Fla. 2004) (declining to apply *res judicata* to preclude a subsequent foreclosure action on the theory that “the mortgagor would have no incentive to make future timely payments on the note”).

264. *See* Wachspress et al., *supra* note 15, at 1126.

265. *See id.*

266. *See id.*

267. *See* Eric A. Posner & Luigi Zingales, *A Loan Modification Approach to the Housing Crisis*, 11 AM. L. & ECON. REV. 575, 592 (2009).

this holds true, homeowners would not receive free houses nearly as much as the argument suggests.<sup>268</sup> Instead, judgments of foreclosure could be avoided altogether, a result which could cause a decrease in the amount of subprime mortgages extended to borrowers and a greater likelihood that another financial disaster akin to the 2008 foreclosure crisis will be averted.<sup>269</sup>

In summary, banks certainly have an interest in recovering on their debt, but their interests must be balanced against the interest of homeowners who are facing the imminent risk of homelessness.<sup>270</sup> Procedural safeguards were implemented to provide those homeowners with greater opportunities to defend themselves against foreclosure.<sup>271</sup> The risk that those opportunities will be lost through the passage of time seems great, especially when lenders wait years before commencing initial foreclosure proceedings.<sup>272</sup> The law should not protect plaintiffs who “sleep on their rights” any more than it protects defendants from losing their homes.<sup>273</sup> Moreover, society’s interest in combatting the spread of “zombie properties” would be impeded by a rule allowing a voluntary discontinuance, without more, to operate as a mortgage deceleration.<sup>274</sup> If the vacancy rate is elevated, crime rates are more likely to increase, which may in turn cause property values to decrease.<sup>275</sup> The end result would be a further increase in the foreclosure rate, the exact opposite of what the State Legislature intended when it

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268. See Wachspress et al., *supra* note 15, at 1126-27.

269. See Quinn Curtis, *State Foreclosure Laws and Mortgage Origination in the Subprime*, 49 J. REAL EST. FIN. & ECON. 303, 321 (2013) (“The provisions that make foreclosure easier—nonjudicial process and readily available deficiency judgments—lead to increased applications and accepted applications in the subprime market . . . .”); Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489, 491 (1991) (“[T]he relatively modest costs associated with state mortgagor protection laws do suggest that mortgagor protections may indeed promote economic efficiency.”); *supra* Part II.A (explaining how the inclusion of subprime mortgages in mortgage-backed securities all but guaranteed the mortgage meltdown).

270. Compare *Bartram v. U.S. Bank Nat’l Ass’n*, 211 So. 3d 1009, 1021 (Fla. 2016), with Wachspress et al., *supra* note 15, at 1128, and Ariana Eunjung Cha & Brady Dennis, *Under Piles of Paperwork, A Foreclosure System in Chaos*, WASH. POST, Sept. 23, 2010, at A1 (“[A]s millions of Americans are being pushed out of the homes they can no longer afford, the foreclosure process is producing far more paperwork than anyone can read and making it vulnerable to fraud.”).

271. See *supra* text accompanying notes 142-44, 146, 150-52, 234, 239-41; *supra* notes 145, 149 and accompanying text.

272. See *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348-49 (1944); *Developments in the Law*, *supra* note 117, at 1185.

273. CAL. CIV. CODE § 3527 (West 2016); see *supra* text accompanying notes 249-52.

274. See *supra* note 237 and accompanying text.

275. See Cui & Walsh, *supra* note 237, at 27 (concluding that the presence of vacant homes increases the violent crime rate by roughly nineteen percent within 250 feet surrounding the homes); Thomas, *supra* note 73, at 37; *supra* text accompanying note 73.

enacted Sections 1308 and 1309 of the Real Property Actions and Proceedings Law.<sup>276</sup> Finally, by allowing stale cases to move forward, notwithstanding the statute of limitations, the ultimate burden would be placed on the courts' already limited resources.<sup>277</sup> Thus, a rule that permits a lender to decelerate a mortgage by showing only that a previous foreclosure action had been discontinued or dismissed would be inconsistent with the public policy of New York.<sup>278</sup>

### B. *Recommending a Statutory Fix*

To date, the New York State Legislature has provided no clarity on whether a lender's election to accelerate a mortgage can be revoked by the discontinuance or dismissal of a foreclosure action.<sup>279</sup> With a lack of guidance from the New York Court of Appeals, the lower courts are sharply divided on this issue, and litigants have no viable way of predicting whether a voluntary discontinuance may be used to reset the statute of limitations.<sup>280</sup> Such uncertainty runs counter to the fundamental principle that the law should provide litigants with advance notice as to what is expected of them.<sup>281</sup>

As the New York Appellate Division, Second Department recognized, the answer to the deceleration question should depend on whether the prior foreclosure action was voluntarily discontinued or dismissed.<sup>282</sup> This would make sense, as the word "election," by definition, implies a voluntary act on the part of the lender.<sup>283</sup> A dismissal, on the other hand, is involuntary and thus cannot reasonably be considered an *affirmative act* by a lender to revoke its *election* to accelerate a mortgage.<sup>284</sup> Allowing an involuntary dismissal to qualify as

276. Thomas, *supra* note 73; see 2016 Foreclosure Legislation Home Page, *supra* note 223.

277. See INDEPENDENT DEMOCRATIC CONFERENCE, *supra* note 44, at 4; N.Y. ST. DEP'T OF FIN. SERVS., *supra* note 151, at 16; Wachspress et al., *supra* note 15, at 1117; *supra* text accompanying notes 81, 83-84, 242-47.

278. See *supra* text accompanying notes 237-52.

279. See BSD 265, LLC v. HSBC Bank USA N.A., No. 504656/16, 2017 WL 2778454, at \*7 (N.Y. Sup. Ct. June 27, 2017).

280. See *supra* Part III.B.

281. Matthew A. Schwartz, Comment, *A Critical Analysis of Retroactive Economic Legislation: A Proposal for Due Process Revitalization in the Economic Arena*, 9 SETON HALL CONST. L.J. 935, 972-73 (1999).

282. NMNT Realty Corp. v. Knoxville 2012 Tr., 58 N.Y.S.3d 118, 120-21 (App. Div. 2d 2017).

283. Albertina Realty Co. v. Rosbro Realty Corp., 180 N.E. 176, 177 (N.Y. 1932) ("To elect is to choose."); *Election*, BLACK'S LAW DICTIONARY 631 (10th ed. 2014).

284. See *Dismissal*, BLACK'S LAW DICTIONARY 569 (10th ed. 2014). *But cf.* Bartram v. U.S. Bank Nat'l Ass'n, 211 So. 3d 1009, 1012 (Fla. 2016) (stating that, under Florida law, "[a]bsent a contrary provision in the residential note and mortgage," an involuntary dismissal does operate as a

an “affirmative act” would not only strain the imagination, it would effectively give courts the ability to, *sua sponte*, intrude on parties’ freedom of contract.<sup>285</sup> Once a lender has elected to exercise its contractual right to accelerate a mortgage debt, allowing a court’s dismissal to revoke that election would be tantamount to a judicial arrogation of the lender’s contractual rights.<sup>286</sup>

This Note offers a solution to the deceleration issue that recognizes the distinction between voluntary discontinuances and involuntary dismissals.<sup>287</sup> This solution provides specific conditions whereby the former can decelerate a mortgage,<sup>288</sup> and it expressly prohibits the latter from operating as a mortgage deceleration under any circumstance.<sup>289</sup> To address all the public policy considerations discussed above, and to provide guidance and certainty to the courts, lenders, and homeowners,<sup>290</sup> the New York State Legislature should amend Article 13 of the Real Property Actions and Proceedings Law to provide the following:

1. Voluntary discontinuances as revocations of elections to accelerate mortgages on real property.

(A) A voluntary discontinuance of an action to foreclose on a mortgage on real property shall not operate as an election or an affirmative act to revoke the acceleration of that mortgage unless the following conditions are satisfied:

(i) the option for revoking the acceleration of the mortgage debt shall have been agreed to by the parties, in a writing signed by both parties, with or without consideration, prior to the commencement of the foreclosure action,<sup>291</sup>

(ii) a stipulation of discontinuance shall be made between and signed by the mortgagor and mortgagee and shall be submitted

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“revocation of acceleration”).

285. See *supra* text accompanying note 137 (describing how “acceleration” is a lender’s optional exercise of a right guaranteed to the lender by the terms of a mortgage agreement).

286. See *supra* text accompanying note 137.

287. See *infra* text accompanying notes 291-96.

288. See *infra* text accompanying notes 291-96.

289. See *infra* text accompanying note 297.

290. See *supra* Part IV.A.

291. This provision would be similar to the requirement that an acknowledgment of an existing debt or a promise to pay it be in writing in order for that acknowledgment or promise to toll the statute of limitations. See N.Y. GEN. OBLIG. LAW § 17-101 (Consol. 2006); see also *Lee Morris Demolition Co., Inc. v. Bd. of Ed. of City of N.Y.*, 355 N.E.2d 369, 371 (N.Y. 1976) (citing *Conn. Tr. & Safe Deposit Co. v. Wead*, 65 N.E. 261, 261 (N.Y. 1902)) (“The writing, in order to constitute an acknowledgment, must recognize an existing debt and must contain nothing inconsistent with an intention on the part of the debtor to pay it.”).

to the court, which stipulation shall state, and shall contain nothing inconsistent with, the following language:

“This stipulation of discontinuance is an affirmative act to revoke the acceleration of the mortgage that is the subject of this foreclosure action. The mortgage was accelerated on [date of acceleration], and the mortgage was executed on [date of mortgage agreement] between [mortgagor] and [mortgagee] in the principle amount of [dollar amount due under the mortgage agreement] on a certain premises, known as [mailing address of the real property secured under the mortgage agreement]. Immediately upon signing this stipulation, [mortgagor] shall have the right to continue making monthly installment payments, and [mortgagee] agrees to accept such payments.”<sup>292</sup>

(iii) the stipulation required by paragraph (A)(ii) of this subdivision shall provide, at a minimum:

“an explanation, of: (a) when, and by what authority, the noteholder acquired the note; (b) the authority by which the servicer [if any] was authorized to act for the noteholder; and [(c)] the authority by which counsel was authorized to act for either or both the servicer and the noteholder.”<sup>293</sup> and

(iv) the statute of limitations for filing a new foreclosure action with a court of competent jurisdiction on the same mortgage would continue to accrue if the election to accelerate the mortgage debt were not revoked.<sup>294</sup>

(B) For purposes of this subdivision, the statute of limitations shall be calculated under section two hundred and thirteen of the Civil Practice Laws and Rules,<sup>295</sup> and shall accrue from the date designated in section twenty of the General Construction Law.<sup>296</sup>

292. This language is fully consistent with the Second Department’s recent holding that a stipulation of discontinuance cannot constitute an “affirmative act of revocation” if it is “silent on the issue of revocation” and does not inform the homeowner of their right to continue making installment payments. *Freedom Mortg. Corp. v. Engel*, No. 1139/15, 2018 WL 3371696, at \*2 (N.Y. App. Div. 2d July 11, 2018) (citing *Fed. Nat’l Mortg. Ass’n v. Mebane*, 618 N.Y.S.2d 88, 89-90 (App. Div. 2d 1994)); *supra* note 210 and accompanying text.

293. This language is taken directly from *Deutsche Bank National Trust Co. Americas v. Bernal*, 59 N.Y.S.3d 267, 273 (Sup. Ct. 2017), and is in conformity with the Second Department’s recent holding in *Milone v. U.S. Bank National Ass’n*, No. 100268/15, slip op. at 4 (N.Y. App. Div. 2d Aug. 15, 2018) (“We hold for the first time in the Appellate Division, Second Department, that just as standing, when raised, is a necessary element to a valid acceleration, it is a necessary element, when raised, to a valid de-acceleration as well.”). For the reasons provided below, there is sound justification for codifying this language. *See infra* text accompanying notes 330-31.

294. *See EMC Mortg. Corp. v. Patella*, 720 N.Y.S.2d 161, 163 (App. Div. 2001) (citing *Fed. Nat’l Mortg. Ass’n v. Mebane*, 618 N.Y.S.2d 88, 89 (App. Div. 1994)) (holding that a mortgage cannot be decelerated after the statute of limitations for filing a new foreclosure action has expired).

295. N.Y. C.P.L.R. § 213 (McKinney 2003) (providing for a six-year statute of limitations).

296. N.Y. GEN. CONSTR. LAW § 20 (McKinney 2009). The statute of limitations accrues on the day after the date when the action is filed. *Id.* (“The day from which any specified period of time is

2. Involuntary dismissals as revocations of elections to accelerate mortgages on real property. An involuntary dismissal of an action to foreclose on a mortgage on real property shall not operate as an election or an affirmative act to revoke the acceleration of that mortgage, nor shall an involuntary dismissal of an action to foreclose on a mortgage on real property be construed as evidence of an election or affirmative act in favor of the revocation of the acceleration of that mortgage.<sup>297</sup>

There are several important points of this proposed statute worth expounding.<sup>298</sup> First, subparagraph (A)(i) of subdivision 1 is necessary if this statute is to be consistent with section 17-101 of the General Obligations Law.<sup>299</sup> Section 17-101 requires a promise to be “in a writing” before that promise can “take an action out of the operation of the” statute of limitations, and subparagraph (A)(i) requires the same.<sup>300</sup> The inclusion of this requirement would leave a court with no doubts that both parties clearly and unequivocally agreed that a revocation of acceleration may be effectuated by option of the mortgagee.<sup>301</sup> Second, subparagraph (A)(i) would ensure that the homeowner is placed on notice of the possibility that an acceleration might be revoked, while

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reckoned shall be excused in making the reckoning.”); *Greco v. Bank of Am., N.A.*, No. 16-CV-2196 (AMD), 2017 WL 1483524, at \*3-5 (E.D.N.Y. Apr. 25, 2017) (applying section twenty of the New York General Construction Law and holding that the date of filing is excluded from the calculation of the statute of limitations, that the statute of limitations expired one day after the bank’s notice of deceleration was mailed, and that said notice was therefore timely).

297. *Kashipour v. Wilmington Savs. Fund Soc’y, FSB*, 41 N.Y.S.3d 738, 739 (App. Div. 2016) (citing *EMC Mortg. Corp.*, 720 N.Y.S.2d at 162-63) (holding that a dismissal of a foreclosure action “d[oes] not constitute an affirmative act” of revocation). This proposed legislation would be a novel development in New York law, as neither the courts nor the legislature have expressly defined the exact circumstances where a voluntary discontinuance can decelerate a mortgage (the courts have only generally addressed whether a voluntary discontinuance can decelerate a mortgage and have split on that issue). *See supra* Part III.B. For the reasons explained *supra* Part IV.A., this statute would assist the State as it attempts to respond to the effects of the foreclosure crisis and prevent its resurgence. If this statute were enacted, it would make the most sense for a Section 1350 of the Real Property Actions and Proceedings Law to be created for its codification. *See generally* N.Y. REAL PROP. ACTS. LAW § 1351 (McKinney 2009) (providing rules applicable where a judgment of foreclosure sale is rendered). Section 1350 can be titled “Revocations of Elections to Accelerate Mortgages on Real Property.”

298. *See infra* text accompanying notes 299-317.

299. *See supra* note 291 and accompanying text.

300. N.Y. GEN. OBLIG. LAW § 17-101 (Consol. 2006); *supra* note 292 and accompanying text.

301. *See supra* notes 211-15 and accompanying text (explaining that courts in other jurisdictions and some courts in New York have held the standard for proving revocation to be “clear and unequivocal” evidence, and that in New York, “clear and unequivocal” evidence is the standard for proving acceleration).

subparagraph (A)(ii) would guarantee the homeowner notice that the acceleration is being revoked.<sup>302</sup>

In the pursuit of clarity, subparagraphs (A)(ii) and (iii) go a step further by enumerating the exact language that must be contained in a stipulation of discontinuance before one can be made to decelerate a mortgage.<sup>303</sup> This would be a useful substitute of the vague “affirmative act” requirement.<sup>304</sup> The latter standard, as it is currently employed, leaves the courts to inject their own definition of “affirmative act” into a case-by-case analysis.<sup>305</sup> This invariably leads to uncertainties and inconsistencies among both courts and litigants.<sup>306</sup> By providing a precise framework for how a stipulation of discontinuance must be drafted, these provisions would guarantee that trivial issues (e.g., determining the parties’ intent, if the homeowner properly agreed to the deceleration, whether notice of the deceleration was properly conveyed to the homeowner, and if the lender or its agent had the authority to decelerate) would no longer be litigated—at least where a voluntary discontinuance is said to have revoked a mortgage acceleration.<sup>307</sup> This could save litigants an appreciable amount of time and money in motion practice, and it could save the courts time and money in the judicial resources that are necessary to answer such questions.<sup>308</sup> The recent disagreements among the lower courts on whether a voluntary discontinuance constitutes an “affirmative act” illustrate the need for such clarity.<sup>309</sup>

Subparagraph (A)(iv) is perhaps the most important for purposes of this Note.<sup>310</sup> Once enacted, it would ensure that lenders exercise their

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302. See *supra* notes 291-92 and accompanying text.

303. See *supra* note 292 and accompanying text.

304. Compare *NMNT Realty Corp. v. Knoxville 2012 Tr.*, 58 N.Y.S.3d 118, 120-21 (App. Div. 2017) (citing *Kashipour v. Wilmington Savs. Fund Soc’y*, FSB, 41 N.Y.S.3d 738, 739 (App. Div. 2016)) (holding that a dismissal is not an “affirmative act” of revocation, but stopping short of clarifying whether a voluntary discontinuance is an “affirmative act”), with *Freedom Mortg. Corp. v. Engel*, No. 1139/15, 2018 WL 3371696, at \*2 (N.Y. App. Div. July 11, 2018) (holding that a voluntary discontinuance is not an “affirmative act” of revocation where the stipulation of discontinuance makes no mention of the lender’s intent to revoke the mortgage acceleration and fails to indicate whether the lender will continue to accept monthly installment payments from the homeowner).

305. See, e.g., *NMNT Realty Corp.*, 58 N.Y.S.3d at 121; *Freedom Mortg. Corp.*, 2018 WL 3371696, at \*2.

306. See *supra* Part III.B (discussing various cases that are inconsistent as to whether a voluntary discontinuance of a foreclosure action constitutes an “affirmative act” of revocation).

307. See *Maggs*, *supra* note 247, at 123 (“Ambiguous statutes hinder planning, promote litigation, confound judicial decision-making, and impose a variety of other costs on society.”).

308. See *id.* at 126-27.

309. See *supra* Part III.B.

310. See *supra* Parts III.A–IV.A; *supra* text accompanying note 294.

options to revoke accelerations before the statute of limitations has expired, and it would encourage the prompt filing of foreclosure actions and the submission of complete and accurate documents to the courts.<sup>311</sup> Lenders, loan servicers, and their agents would know or have reason to know that waiting to file a foreclosure action would increase the risk that a voluntary discontinuance, should one come to pass, will occur after the statute of limitations has expired.<sup>312</sup> To avoid having successive foreclosure actions dismissed as time-barred, lenders would be encouraged to submit complete and accurate documents to a court in the first instance, including the mortgage, the note, copies of all assignments of the note, together with copies of all documents showing that the assignors had the power of attorney to make such assignments.<sup>313</sup> If all the necessary documentation is submitted in a timely fashion, a case would not be discontinued or dismissed for the lender's inability to prove standing.<sup>314</sup> The result would be an increase in efficiency, leading to less time spent by lenders and homeowners litigating successive foreclosure actions and less time spent by the courts adjudicating them.<sup>315</sup> Finally, to ensure that these objectives are met, paragraph (B) would leave no ambiguity as to how the statute of limitations is to be calculated; it simply provides that the statute of limitations is to be calculated in the same manner as it would be for any other action sounding in foreclosure.<sup>316</sup>

It must be emphasized that subdivision 1 would only be operative in cases where a voluntary discontinuance is alleged to have revoked a mortgage acceleration; it would be inapplicable to cases where an acceleration is said to have been revoked by some other means.<sup>317</sup>

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311. See Wachspress et al., *supra* note 15, at 1127 (suggesting that, by using res judicata to bar banks from commencing successive foreclosure actions on the same mortgage, banks would be incentivized “to act in their own long-term interest”); *supra* note 294 and accompanying text.

312. Because the language of this statute is unambiguous, lenders would know or have reason to know what is expected of them. See *supra* note 307 and accompanying text.

313. See Wachspress et al., *supra* note 15, at 1126.

314. See, e.g., *In re Mims*, 438 B.R. 52, 56-57 (Bankr. S.D.N.Y. 2010); *Aurora Loan Servs., LLC v. Taylor*, 34 N.E.3d 363, 366 (N.Y. 2015); *U.S. Bank, N.A. v. Dellarmo*, 942 N.Y.S.2d 122, 124 (App. Div. 2012); *U.S. Bank Nat'l Ass'n v. Merino*, 836 N.Y.S.2d 853, 855 (Sup. Ct. 2007); *Indymac Bank v. Bethley*, No. 9615/08, 2009 WL 279304, at \*3 (Sup. Ct. Feb. 6, 2009).

315. See Maggs, *supra* note 247, at 127; Wachspress et al., *supra* note 15, at 1126-27 (explaining that barring successive foreclosure actions is likely to encourage lenders to “look favorably upon loan renegotiation” and to “provide[] leverage to homeowners to negotiate a voluntary settlement, whether through a modification or a ‘graceful exit’ like a short sale” (internal quotation marks omitted) (footnotes omitted)).

316. See N.Y. GEN. CONSTR. LAW § 20 (McKinney 2009); N.Y. C.P.L.R. § 213(4) (McKinney 2018); *Greco v. Bank of Am., N.A.*, No. 16-CV-2196 (AMD), 2017 WL 1483524, at \*3 (E.D.N.Y. Apr. 25, 2017); *Saini v. Cincelli Enters., Inc.*, 733 N.Y.S.2d 824, 826 (App. Div. 2001).

317. See *supra* text accompanying note 291.

Although the Second Department has held that lenders cannot exercise their option to revoke a mortgage acceleration by a letter to the homeowner after the statute of limitations has expired,<sup>318</sup> codification of this rule would help to ensure that homeowners' property interests are properly safeguarded.<sup>319</sup> The Legislature can provide this assurance while striving to achieve its public policy objectives by further amending Article 13 of the Real Property Actions and Proceedings Law as follows:

3. Revocations of elections to accelerate mortgages on real property.

(A) A revocation of an election to accelerate a mortgage on real property shall be ineffective unless the following conditions are satisfied:

(i) the option for revoking the acceleration of the mortgage debt shall have been agreed to by the parties, in a writing signed by both parties, with or without consideration;<sup>320</sup>

(ii) a written notice shall be made by the mortgagee to the mortgagor, informing the mortgagor of the mortgagee's election to revoke the acceleration of the mortgage, which notice shall state, and shall contain nothing inconsistent with, the following language:

"This notice is an affirmative act by [mortgagee] to revoke the acceleration of the mortgage agreement. The mortgage was accelerated on [date of acceleration], and the mortgage was executed on [date of mortgage agreement] between you and [mortgagee] in the principle amount of [dollar amount due under the mortgage agreement] on a certain premises, known as [mailing address of the real property secured under the mortgage agreement]. At this time, you have the right to continue making monthly installment payments, and [mortgagee] is willing to accept such payments."<sup>321</sup>

(iii) the notice required by paragraph (A)(ii) of this subdivision shall provide, at a minimum:

"an explanation, of: (a) when, and by what authority, the

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318. See *EMC Mortg. Corp. v. Patella*, 720 N.Y.S.2d 161, 162-63 (App. Div. 2d 2001) (holding that an "affirmative act" by the lender could have been sufficient to revoke its election to accelerate but for its failure to do so within the six-year statute of limitations); *Fed. Nat'l Mortg. Ass'n v. Mebane*, 618 N.Y.S.2d 88, 89 (App. Div. 2d 1994) (same).

319. See *Maggs*, *supra* note 247, at 126-30 (identifying many of the consequences of ambiguity in statutory language); *supra* Parts III.B-IV.A.

320. See *supra* note 291.

321. See *Deutsche Bank Nat'l Tr. Co. Ams. v. Bernal*, 59 N.Y.S.3d 267, 274-75 (Sup. Ct. 2017) (holding that the lender's notice of revocation was ineffective because, *inter alia*, the notice failed to let the borrower know that future installment payments could be made and would be accepted); *supra* note 291.

noteholder acquired the note; (b) the authority by which the servicer [if any] was authorized to act for the noteholder; and [(c)] the authority by which [the signor of the notice] . . . was authorized to act for either or both the servicer and the noteholder.”<sup>322</sup> and

(iv) the statute of limitations for filing a new foreclosure action with a court of competent jurisdiction on the same mortgage would continue to accrue if the election to accelerate the mortgage debt were not revoked.<sup>323</sup>

(B) For purposes of this subdivision, the statute of limitations shall be calculated under section two hundred and thirteen of the Civil Practice Laws and Rules,<sup>324</sup> and shall accrue from the date designated in section twenty of the General Construction Law.<sup>325</sup>

(C) Notwithstanding any other provision of this section, this subdivision shall not be applicable to discontinuances and dismissals of actions to foreclose on mortgages on real property.<sup>326</sup>

Subdivision 3 mostly parallels subdivision 1, except for two minor differences.<sup>327</sup> Most notably, subdivision 3 would apply not to cases involving voluntary discontinuances but to all other cases where deceleration is attempted.<sup>328</sup> It would also require a notice to be made to the homeowner in lieu of a stipulation to discontinue a foreclosure action.<sup>329</sup> Aside from these two differences, subdivision 3 is substantially the same as subdivision 1; both subdivisions require notice that clearly explains: (1) how the lender or its agent has the authority to revoke the acceleration of the mortgage; and (2) that the homeowner is entitled to continue making installment payments which the mortgagee will accept.<sup>330</sup> Without this information, the homeowner could not, in any real sense, be placed in the same position as they were in prior to the

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322. *Bernal*, 59 N.Y.S.3d at 273; see *Milone v. U.S. Bank Nat’l Ass’n*, No. 100268/15, slip op. at 4 (N.Y. App. Div. 2d Aug. 15, 2018); *infra* text accompanying notes 330-31.

323. This provision would codify existing common law principles to ensure that no revocations, no matter how they are made, will be effective if they are made after the statute of limitations for filing a foreclosure action has expired. See *supra* notes 193, 318 and accompanying text.

324. N.Y. C.P.L.R. § 213 (McKinney 2003).

325. N.Y. GEN. CONSTR. LAW § 20 (McKinney 2009).

326. This paragraph would ensure that subdivision 3 is not construed as inconsistent in any way with subdivisions 1 and 2. See *supra* text accompanying notes 291-97.

327. See *infra* text accompanying notes 328-30; *supra* text accompanying notes 291-92.

328. See *supra* text accompanying notes 320, 326.

329. See *supra* text accompanying note 321.

330. See *Deutsche Bank Nat’l Tr. Co. Ams. v. Bernal*, 59 N.Y.S.3d 267, 273-74 (Sup. Ct. 2017); *supra* text accompanying notes 291-96; *supra* note 322 and accompanying text.

mortgage acceleration; they would have no way of knowing whether the revocation is valid, and they may be left completely unaware of their option to continue making mortgage payments.<sup>331</sup>

Taken as a whole, subdivisions 1 and 3 would foreclose lenders' ability to use the deceleration of a mortgage as a means of bypassing the statute of limitations.<sup>332</sup> After the statute of limitations for filing a foreclosure action has expired, homeowners would have the unencumbered right to quiet title to their property, sell or transfer ownership of their property to a third party, and provide for their property's occupancy and upkeep.<sup>333</sup> To be sure, homeowners would receive "free" houses, but only after banks have "sle[pt] on their rights."<sup>334</sup> The inevitability of this outcome would encourage lenders to properly and promptly foreclose on property while they have the chance to do so.<sup>335</sup> Insofar as lenders choose to act timely, reasonably, and with due diligence, they would remain free to collect on any debt owed to them.<sup>336</sup> In short, homeowners' property rights would be protected and the alienability of property would be facilitated, all without impinging on lenders' interest in collecting on their debt.<sup>337</sup>

For the foregoing reasons, the New York State Legislature should codify this proposed legislation and settle the conflict among the lower courts once and for all.<sup>338</sup>

## V. CONCLUSION

Due to the improprieties that were all too common in the mortgage industry in the years leading up to the financial crisis, a substantial number of foreclosure cases were unable to hold their weight in court, because, under the law, they were baseless, meritless, factually unfounded, tainted with fraud and malpractice, and had to be dismissed.<sup>339</sup> Lenders' motivations for attempting to revive these cases

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331. *See id.* at 274.

332. *See supra* notes 294, 323 and accompanying text.

333. N.Y. REAL PROP. ACTS. LAW § 1501(4) (McKinney 2009).

334. *See* CAL. CIV. CODE § 3527 (West 2016).

335. *See* Wachspress et al., *supra* note 15, at 1127.

336. *See, e.g.,* Greco v. Bank of Am., No. 16-CV-2196, 2017 WL 1483524, at \*1, \*3-4, \*6 (E.D.N.Y. Apr. 25, 2017) (granting the defendant's motion for summary judgment and dismissing the complaint in a quiet title action on the grounds that, *inter alia*, the defendant's notice of revocation was timely mailed to the plaintiff and the statute of limitations for filing a new foreclosure action had not yet expired).

337. *See* REAL PROP. ACTS. § 1501(4); Larsen, *supra* note 177; *supra* text accompanying notes 175-80.

338. *See supra* Part IV.A; *supra* text accompanying notes 291-97, 320-26.

339. *See supra* Parts II.B; *supra* text accompanying notes 163-73; *supra* note 168.

are understandable; they simply wish to recover the money they were owed.<sup>340</sup> However, the interests of property owners, the state court system, and New York's citizenry significantly outweigh lenders' pecuniary interests.<sup>341</sup> The people of New York—including the tens of thousands who have already lost their homes to foreclosure as well the over 100,000 who are still awaiting foreclosure<sup>342</sup>—deserve legislative action to ensure that abandoned houses will not continue to blight their neighborhoods; that their homes will not continue to await foreclosure *ad infinitum*; that the free transfer of property will not be unduly hindered; and perhaps most importantly, that the effects of the foreclosure crisis will be a thing of the past and will linger no longer.<sup>343</sup> Nor should those lenders responsible for contributing to the foreclosure crisis be rewarded for their improper behavior with a rule allowing them to evade the statute of limitations.<sup>344</sup> If such a rule were to gain uniform recognition across New York, there would be little incentive for those lenders to reform their policies and procedures and take better care in their issuance of and foreclosure on mortgages, lest history repeat itself.<sup>345</sup>

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340. *See supra* Part IV.A.

341. *See supra* Part IV.A.

342. INDEPENDENT DEMOCRATIC CONFERENCE, *supra* note 44, at 4-5; *see supra* Part II.A.

343. *See supra* Part IV.A.

344. *See supra* Parts II.B, IV.A.

345. *See supra* Part IV.A.

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