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SPLITTING THE BABY: AVOIDING FORECLOSURE WHEN HOMEOWNERS HAVE UNCERTAIN OR CONFLICTING INTERESTS

DANIEL BAHLS*

And the king said, “[d]ivide the living child in two, and give half to the one, and half to the other.” Then the woman whose son was alive said to the king, because her heart yearned for her son, “Oh, my lord, give her the living child, and by no means slay it.” But the other said, “[i]t shall be neither mine nor yours; divide it.”¹

INTRODUCTION

Cleaving an infant in twain results in a substantial loss of utility for both the baby and those who hold it dear.² The threat of forcing such a result can give one party an extraordinary and inequitable amount of control over another. As the story illustrates, this result should be avoided whenever possible.³ An analogous, albeit less gruesome, problem arises where one party is threatened with the loss of a home and the shelter it provides through foreclosure due to the concern that a co-owner might lose a trivial amount of home equity. Preventing foreclosure can avert significant losses to homeowners, their families, lenders, and the surrounding community.⁴ This Article explores how homeownership can be preserved in cases where a homeowner is not able to secure the full cooperation of all borrowers on the account.⁵ This

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1. 1 *Kings* 3:25-26 (Rev. Standard Version).
2. GARY S. BECKER, A TREATISE ON THE FAMILY 135, 154 (1991).
3. See 1 *Kings* 3:27 (Rev. Standard Version).
4. See, e.g., Daniel Bahls & Katherine Hunt, *Abhorring a Forfeiture: The Importance of Equitable Jurisdiction in a Foreclosure Crisis*, 41 *STETSON L. REV.* 779, 782 (2012).
5. For the purpose of this Article, the term “owner” is used expansively to include any and all title claimants, even if a formal interest in the estate is incomplete. For example, if a home is a marital asset in a contested divorce, this Article considers both spouses “owners” even if only one spouse is on the deed. Similarly, an heir or devisee would be considered an owner even if a probate process is incomplete. By contrast, a “borrower” is used to refer to a person who is named as the account holder of the lender (i.e. the person who borrowed the money, whether or not that person still owns the house).

includes cases where one co-owner wants to retain a home but is hampered by another co-owner who is unresponsive, uncooperative, or even openly hostile, as well as cases where an owner claiming title is not the original borrower on the account.

Avoiding preventable foreclosure has become a common theme for lenders, consumer advocates, and policymakers.⁶ Finding alternatives to foreclosure has been difficult, even in the best of circumstances.⁷ Past scholarship has explored conflicts of interest between the various lender-side entities and suggested ways to promote foreclosure alternatives despite these conflicts.⁸ Thus far, insufficient attention has been given to avoiding foreclosure where homeowners are similarly unable to speak with a clear and united voice.

Part I of this Article begins with a brief survey of the foreclosure prevention landscape and the relatively recent changes that have altered the calculus of when foreclosure can be averted. It reviews existing literature on situations where internal conflicts on the lender's side prevent or inhibit foreclosure avoidance.

Part II addresses the circumstances in which borrowers might be unable to present a united front in negotiations with the lender. This section includes a discussion of why these problems are of particular societal concern and why, in many cases, the most equitable result requires one owner or the other to retain ownership of the property. Finally, Part II discusses the cases of special concern where domestic abusers try to force a home into foreclosure as an extension of a pattern of abuse and control.

Part III of this Article will address the mechanics that make foreclosure prevention particularly challenging where full cooperation from all borrowers or owners cannot be secured.

Part IV begins with a discussion of partial solutions that advocates, judges, or other interested parties may be able to use to solve or avoid problems with existing law and prevailing policies. It will also highlight specific policies that lenders could change to resolve these problems in mutually beneficial ways. Part V argues that the diverse rights and interests of parties involved in a mortgage foreclosure cannot be

6. See, e.g., Heather Scheiwe Kulp & Jennifer Shack, *A (Mortgage) Crisis in Communication: Foreclosure Dispute Resolution As Effective Response?*, 66 ARK. L. REV. 185, 186 (2013); Geoff Walsh, *The Finger in the Dike: State and Local Laws Combat the Foreclosure Tide*, 44 SUFFOLK U. L. REV. 139, 158 (2011).

7. Adam J. Levitin, *Resolving the Foreclosure Crisis: Modification of Mortgages in Bankruptcy*, 2009 WIS. L. REV. 565, 624 (2009).

8. See, e.g., Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 802 (2011).

adequately protected without joining all interested parties in one judicial action. The stakes are too high for non-judicial foreclosure.

I. FORECLOSURE, HOME PRESERVATION, AND NON-COOPERATIVE BORROWERS

A. *Avoiding Foreclosure in 2014*

Due to the wide expansion of foreclosure alternatives over the past six years, a foreclosure requires two failures. First, a borrower fails to make some payment that the lender believes is due.⁹ Second, the lender and borrower must fail to arrive at some alternative to foreclosure.¹⁰ Although this Article focuses on preserving homeownership, foreclosure alternatives such as short-sales or deeds-in-lieu are similarly more efficient than foreclosure.¹¹

Because state law governs the foreclosure process,¹² the precise timeline and process varies significantly from state to state.¹³ Some states require a court judgment for a foreclosure while other states require no judicial process.¹⁴ Responses by state legislatures have similarly varied.¹⁵ Claims and defenses available to homeowners opposing foreclosure and resources available to struggling homeowners

9 See, e.g., *Security Instruments: Form 3022: Massachusetts Mortgage*, Freddie Mac, ¶ 22, available at <http://www.freddiemac.com/uniform/unifsecurity.html> (last visited May 13, 2014).

10 See generally Grace B. Pazdan, *How Foreclosure Mediation Legislation Can Keep Vermonters in Their Homes (and Money in the Pockets of Mortgage Holders)*, 36 VT. B.J. 24, 25 (Spring 2010) (discussing foreclosure alternatives and common barriers to reaching them in mediation); Samuel C. Waters, *A View from the Trenches: The Legal Practitioner and Loss Mitigation*, 60 S.C. L. REV. 807, 808 (2009) (noting that the cost of foreclosure exceeds that of “any alternative to foreclosure”).

11 Zachary T. Brumfield, *The “Short Cut” to the Stabilization of the Underwater Housing Market: How the New FHFA Short Sale Guidelines Promote Economic Efficiency*, 41 REAL EST. L.J. 456, 457 (2013); Stephen F.J. Ornstein et al., *Eligibility and Foreclosure Alternatives in the HAMP Home Affordable Refinancing and Foreclosure Alternatives Programs*, 64 CONSUMER FIN. L.Q. REP. 415, 419 (2010).

12 *Mabry v. Super. Ct.*, 110 Cal. Rptr. 3d 201, 217 (Cal. App. 4th Dist. 2010); Lydia Nussbaum, *ADR’s Place in Foreclosure: Remedying the Flaws of a Securitized Housing Market*, 34 CARDOZO L. REV. 1889, 1894 (2013). Cf. MASS. GEN. LAWS ch. 244, § 14 and OHIO REV. CODE § 2323.07.

13 Grant S. Nelson, *Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law*, 37 PEPP. L. REV. 583, 587 (2010).

14 Frank S. Alexander, *Federal Intervention in Real Estate Finance: Preemption and Federal Common Law*, 71 N.C. L. REV. 293, 305 (1993).

15 MASS. GEN. LAWS ch. 244, §§ 35A-35C; Brandon Rehkopf, Comment, *Saving the American Dream in Ohio: Crafting Incentives and Disincentives to Promote a Responsible Foreclosure Process*, 43 U. TOL. L. REV. 437, 450 (2012) (discussing Ohio’s amendments to its Consumer Sales Practices Act regulating mortgage origination—but exempting state and national banks).

likewise differ from state to state.¹⁶

Despite these state-by-state variations, the desire to avoid unnecessary¹⁷ foreclosure has been nearly universal. In a foreclosure, homeowners lose both a home, and, in most cases, any accumulated home equity. Lenders and investors take a significant financial hit through the reduced value of the collateral, the costs of the foreclosure itself, and costs associated with carrying and offloading distressed properties.¹⁸ Communities are harmed through lost tax revenue, increased crime, reduced property values,¹⁹ and a plethora of issues associated with high rates of foreclosed or vacant properties.²⁰ Due to the overwhelming need to address the foreclosure crisis, many states and localities have implemented special legislation or programs to address the issues.²¹

The best known and most common foreclosure avoidance programs are loan modification efforts such as the Home Affordable Modification Program (HAMP).²² The goal of such programs is to use a combination

16. See, e.g., *Hardest Hit Foreclosure Initiative*, NAT'L COUNS. OF ST. HOUSING AGENCIES, <https://www.ncsha.org/advocacy-issues/hardest-hit-foreclosure-initiative> (last visited May 13, 2014) (describing a federal commitment of \$7.6 billion to different proposals by different state housing finance agencies in eighteen states and the District of Columbia). The resources are not available in other jurisdictions.

17. Much effort has been spent on avoiding “unnecessary” foreclosure—though little has been written on what constitutes a “necessary” foreclosure. For the purpose of this Article, a “necessary” foreclosure will be a foreclosure where 1) the foreclosing entity can anticipate a substantially larger recovery from foreclosure than from any achievable alternative to foreclosure once all costs, including reputational costs, are taken into account, or 2) a property has been abandoned by a borrower for reasons unrelated to the threat of an unnecessary foreclosure.

18. Waters, *supra* note 10, at 808 (noting an average investor loss of 30% to 60% of the outstanding balance of the loan).

19. Debbie Gruenstein Bocian, Peter Smith & Wei Li, *Collateral Damage: The Spillover Costs of Foreclosures*, CTR FOR RESPONSIBLE LENDING (Oct. 24, 2012), <http://www.responsiblelending.org/mortgage-lending/research-analysis/collateral-damage.pdf> (estimating a total reduction in property values of \$1.95 trillion caused by proximity to foreclosed homes).

20. Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally Supported Lenders*, 74 U. CIN. L. REV. 1303, 1315 (2006); Bahls & Hunt, *supra* note 4, at 79.

21. Walsh, *supra* note 6, at 158.

22. The Home Affordable Modification Program (HAMP) is one of many loan modification programs. Other programs such as proprietary modifications or modifications pursuant to the National Mortgage Settlement tend to roughly mirror the terms of the HAMP modifications. The detailed guidelines for HAMP are laid out in the Making Home Affordable Handbook for Non-GSE Servicers. U.S. DEP'T OF TREASURY, MAKING HOME AFFORDABLE PROGRAM: HANDBOOK FOR NON-GSE MORTGAGES (version 4.3, 2013) [hereinafter “U.S. DEP'T OF TREASURY”], available at https://www.hmpadmin.com/portal/pr ograms/docs/hamp_servicer/mhahandbook_43.pdf. Fannie Mae's version of HAMP is included in Section 609 of the FANNIE MAE SINGLE FAMILY 2012 SERVICING GUIDE (2012),

of interest-rate decreases, term extensions, and principle forgiveness or forbearance to reduce the monthly payment of a loan to something a borrower can afford while ensuring that the lender comes out ahead of where the lender would had it simply pursued foreclosure.²³ Because HAMP has been a model for foreclosure prevention, the strengths and weaknesses of its particular directives are likely to redound across the industry as a whole.

B. Lender-Side Challenges to Home Preservation

Loan modification is challenging even in the best of circumstances. Servicers²⁴ frequently lose documents,²⁵ request the wrong documents,²⁶ or over represent the probability of a loan modification to borrowers.²⁷ Servicers have been unable or unwilling to invest in competent staff to address the problem.²⁸ The application process has been plagued by uncertainty and prolonged delays.²⁹ This uphill fight for struggling borrowers is partially a consequence of perverse incentives favoring foreclosure to other resolutions.³⁰

Part of the challenge arose from the reality that the mortgagee was no longer the unified entity many programs assumed it to be.³¹ The servicer, investor, mortgagee, and originator of any given mortgage are frequently separate entities.³² If the foreclosure process advances and a

available at <https://www.fanniemae.com/content/guide/svc031412.pdf> (last visited May 13, 2014). Freddie Mac's version of HAMP is included in the FREDDIE MAC SINGLE-FAMILY SELLER/SERVICER GUIDE (Volume 2, C65, updated June 14, 2013).

23. John R. Chiles & Matthew T. Mitchell, *HAMP: An Overview of the Program and Recent Litigation Trends*, 65 CONSUMER FIN. L. Q. REP. 194, 196 (2011).

24. Mortgage Servicers are the entities responsible for communicating with and collecting payments from borrowers and distributing those payments to investors, hazard insurers, and taxing authorities. The decision of when and whether to foreclose is usually also handled by the servicer. Nussbaum, *supra* note 12, at 1898.

25. Nussbaum, *supra* note 12, at 1901.

26. Kulp & Shack, *supra* note 6, at 220.

27. Jean Braucher, *Humpty Dumpty and the Foreclosure Crisis: Lessons from the Lackluster First Year of the Home Affordable Modification Program (HAMP)*, 52 ARIZ. L. REV. 727, 773 (2010).

28. Kurt Eggert, *Foreclosing on the Federal Power Grab: Dodd-Frank, Preemption, and the State Role in Mortgage Servicing Regulation*, 15 CHAP. L. REV. 171, 178 (2011) (citing a leaked Consumer Financial Protection Bureau estimate suggesting that mortgage servicers stood to save \$20 billion by inadequately staffing loss-mitigation efforts); Waters, *supra* note 10, at 814 (identifying staffing concerns and the presence of offshore call centers that "offer little assistance in loan resolution").

29. Braucher, *supra* note 27, at 773.

30. Thompson, *supra* note 8.

31. Thompson, *supra* note 8, at 764; Nussbaum, *supra* note 12, at 1890.

32. See, e.g., Nestor M. Davidson, *New Formalism in the Aftermath of the Housing Crisis*, 93 B.U. L. REV. 389, 400 (2013).

law firm is charged with completing a foreclosure, the entry of the foreclosure firm adds yet another player to the mix. The entity charged with making a decision on whether foreclosure is a good idea in any given situation is often a computer program.³³ The interactions of the investor and homeowner, the ultimate stakeholders, are filtered through a mortgage servicer that may have structural incentives against assisting these stakeholders in reaching a mutually beneficial arrangement.³⁴ Servicers have been less likely to modify mortgages serviced on behalf of an outside investor than they have been to modify loans held in their own portfolio.³⁵ Restrictions regarding timing or permissible ways to modify loans placed on servicers by investors can further limit the ability of servicers to avert foreclosure, even where this is in the investor's financial interests.³⁶ Changing restrictions in servicing agreements may require the unanimous consent of an impossibly large group of investors.³⁷ The investors themselves have disparate interests and incentives, depending on the seniority of the tranches they hold.³⁸

Even communications from the same company can be disjointed and inconsistent.³⁹ In some instances, one employee of a servicer will direct a borrower to stop making payments in order to receive help while another employee in another department determines that the borrower does not qualify and initiates foreclosure proceedings.⁴⁰ As a result, mortgage servicers often press forward with foreclosure, even where a

33 *In re Taylor*, 407 B.R. 618, 627 (Bankr. E.D. Pa. 2009), *rev'd*, No. 09-cv-2479-JF, 2010 WL 624909 (E.D. Pa. 2010), *aff'd in part, rev'd in part*, 655 F.3d 274 (3rd Cir. 2011).

34. Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 70 (2011).

35. Patricia A. McCoy, *Barriers to Foreclosure Prevention During the Financial Crisis*, 55 ARIZ. L. REV. 723, 752 (2013).

36. Margaret R.T. Dewar, Comment, *Regulation X: A New Direction for the Regulation of Mortgage Servicers*, 63 EMORY L.J. 175, 187 (2013); U.S. DEP'T OF TREASURY, *supra* note 22, at ch. 2, § 1.3.

37. Christopher Mayer, Edward Morrison & Tomasz Piskorski, *A New Proposal for Loan Modifications*, 26 YALE J. ON REG. 417, 419 (2009).

38. McCoy, *supra* note 35, at 764. McCoy concludes that the "tranche warfare" problem is not likely a primary barrier to loan modification. It may, however, contribute to the lower modification rates of private-label securitized loans. *Id.*

39. Robert G. Gibson, *Advising Distressed Homeowners*, DCBA BRIEF (Feb. 2011) at 24, available at <http://www.dcbabrief.org/flipbook/0211/index.html>. Judge Gibson identifies "Kafkaesque bureaucracy as well as lender understaffing, employee turnover, and/or incompetence at the frontline" as impediments to borrowers seeking loan modifications. *Id.*

40. Amy B. Parker, Note, *Mending Broken Promises: Allowing Homeowners to Pursue Claims of Promissory Estoppel Against Lenders When Denied Loan Modifications*, 47 NEW ENG. L. REV. 985, 985 (2013); *see also* *Dixon v. Wells Fargo Bank, N.A.*, 798 F. Supp. 2d 336, 339 (D. Mass. 2011) (discussing a homeowner's allegation that Wells Fargo instructed a borrower who was current on a loan to stop making payments on the loan in anticipation of modification, failed to review the borrower for a modification, and began foreclosure proceedings).

loan modification is in the best interests of both the homeowners and the investors who ultimately own the debts.⁴¹

Increasingly aggressive efforts to get the parties to come to the same table and work out the problem have been an ongoing theme in legislative foreclosure-prevention efforts.⁴² Homeowners and their advocates often struggle to identify who on the lender's side has authority to modify a loan.⁴³ Attorneys retained to conduct a foreclosure sale rarely have any authority beyond collecting information to send to a contact at the servicer. The contact at the servicer rarely has any authority beyond determining whether a packet of information is complete and sending it to another department. Communication breakdowns can and do occur at every step of the process.

As the foreclosure crisis has stretched on and more options have become available, the modification landscape has improved. This may have to do with increased experience for the servicers. It may have to do with greater staffing relative to the need. It almost certainly has to do with aggressive monitoring following the forty-nine state settlement.⁴⁴ However, as this Article will argue, requests for loan modifications are usually denied. The homeowners are not able to act with a united front with full and unquestionable authority to modify the mortgage.

C. *Subordinate Lien Holders*

The presence of a subordinate lienholder can interfere with efforts to avoid foreclosure.⁴⁵ The presence of a second lien could also interfere with foreclosure alternatives such as a refinance, short-sale, or deed-in-lieu.⁴⁶ Second mortgages also complicate efforts to modify loans.⁴⁷

Often both the first and second liens are serviced by the same entity—but owned by different investors.⁴⁸ The conflict escalates where a borrower can afford to pay one, but not both, mortgages.⁴⁹ A first lienholder has little incentive to modify a loan in order to give a

41. Eggert, *supra* note 28, at 173.

42. Nussbaum, *supra* note 12, at 1908.

43. Waters, *supra* note 10, at 815.

44. *See, e.g.*, United States v. Bank of America Corp, Settlement Term Sheet, Case 1:12-cv-00361-RMC, A-17 (D.C. Dist. 2012), available at <https://www.mortgageoversight.com/wp-content/uploads/2012/03/Servicing-Standards.pdf>.

45. Vicki Been, Howell Jackson & Mark Willis, *Essay: Sticky Seconds—the Problems Second Liens Pose to the Resolution of Distressed Mortgages*, 9 N.Y.U. J.L. & BUS. 71, 95 (2012).

46. *Id.* at 84.

47. McCoy, *supra* note 35, at 768.

48. McCoy, *supra* note 35, at 768.

49. Mayer et al., *supra* note 37, at 419.

borrower more income to allocate to a lower-priority loan.⁵⁰ Servicers following vaguely-written servicing requirements may insist that second liens be re-subordinated any time the first lien is modified—not because the law requires them to do so but because they believe that an investor requires this extra hurdle.⁵¹ A second lienholder has no incentive to agree to a modification that extinguishes the second lien. Often the servicer is also the second investor, which can create conflicting incentives.⁵²

The presence of second liens also contributes to homeowner confusion. Often borrowers will have first and second mortgages on the same property, serviced by the same company. Borrowers who seek assistance recount being told that the first lien cannot be modified because of the second, and that the second lien cannot be modified until the first is addressed. Because second liens are often smaller, some borrowers will dutifully continue to remit payments on a second lien, even as the first lienholder has begun foreclosure proceedings.

II. NON-UNIFIED BORROWERS

This Article argues that just as homeowners have, out of necessity, dealt with the fractured and confusing realities of the contemporary mortgage market, the lenders should work with borrowers, even where the borrowers present a similarly disjointed or inconsistent front. Even in cases where the ultimate solution to the conflict involves the homeowners leaving the property, there are likely to be foreclosure alternatives that work better for all parties. As discussed in Section III, below, loan modification becomes nearly impossible if all owners are unable or unwilling to present a united front. Because foreclosure is often preceded by triggering events such as the death or incapacity of a homeowner or a divorce,⁵³ it is not surprising that foreclosure cases frequently include contested titles to the home and disagreements regarding how a delinquency should be addressed.

A. *When Homeowners Are Not Unified*

Problems arise when a homeowner submits an application for assistance with a mortgage loan and the lender determines that the name

50. Mayer et al., *supra* note 37, at 419.

51. Been et al., *supra* note 45, at 97.

52. McCoy, *supra* note 35, at 768.

53. See, e.g., Christopher Tarver Robertson, Richard Egelhof & Michael Hoke, *Get Sick, Get Out: The Medical Causes of Home Mortgage Foreclosures*, 18 HEALTH MATRIX 65, 86 (2008).

or names on the application do not match the name or names on its account.⁵⁴ The maker or makers of a mortgage note may not be the owner or owners of the real estate securing that note, perhaps because the current owner of the home is a child or surviving spouse of a deceased account-holder. The successor in ownership and successor mortgagee may be different than the original borrower.

Alternatively, two joint-borrowers might have conflicting intentions regarding the debt or the property. One co-borrower may be unwilling to participate in efforts to save the home—usually after a divorce or other separation. Divorce is another of the most common triggers of foreclosure.⁵⁵ An initial default could be triggered by a lack of household income prior to the entry of a final divorce judgment, because homeowners undergoing divorce may be pre-occupied with matters other than the mortgage, or, in some cases, because the homeowner occupying the house has less experience paying bills.

Cases involving both domestic violence and potential foreclosure are an area of particular concern. Pressure to speak to the mortgage servicer with one voice could exacerbate violence or be used by an abuser as another way to control a victim.⁵⁶ Although anecdotal evidence abounds, it is difficult to pin precise numbers to the overlap between domestic violence and foreclosure. A 2008 study found that slightly over half of a surveyed set of domestic violence survivors reported either an eviction or foreclosure.⁵⁷ The same study found that 54 percent of respondents reported that a lease or mortgage had been in the abuser's name only.⁵⁸ Due to the safety concerns of that study, detailed data is hard to obtain.⁵⁹

Divorce and domestic violence are not the only cases where borrowers might have substantial disagreements over how to handle the property. Separated or unmarried couples may also disagree on what to do with a jointly owned home. A contested probate or contested bankruptcy could lead to a similar result.

54. See, e.g., U.S. DEP'T OF HOUS. & URBAN DEV., 2009 Mortgagee Letter 09-23, available at <http://portal.hud.gov/huddoc/09-23mlatach.doc> (last visited May 13, 2014).

55. See, *inter alia*, Robertson et al., *supra*, note 53, at 86.

56. *Foreclosures and Domestic Violence Survivors*, 27 NCLC REPORTS: BANKRUPTCY AND FORECLOSURES EDITION 15 (Jan./Feb. 2009), available at http://www.nclc.org/images/pdf/domestic_violence/nclc-rpts-bankr-jan-feb-2009.pdf.

57. Adrienne E. Adams, Cris M. Sullivan, Deborah Bybee, & Megan R. Greeson, *Development of the Scale of Economic Abuse*, 14 VIOLENCE AGAINST WOMEN 563, 577 (2008), available at http://www.wbg.org.uk/GBA_Present_2_2951060362.pdf.

58. *Id.*

59. Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. REV. 951, 969 (2012).

Contacting a co-owner may be difficult or impossible. A co-owner might have moved out of the state without a forwarding address and abandoned the home. Unmarried couples may have broken up without dividing the house and largely lost contact with each other. A homeowner who dies intestate may have potential heirs who cannot be easily contacted or would need to be served by publication. This process could take a very long time. If the claimants seeking to save the home are not represented by counsel, it could be functionally impossible.

It is also common for lenders to move forward with foreclosure where a homeowner dies and the lender declines to identify and communicate with the new owner. Following the death of a borrower, lenders frequently refuse to communicate with successor homeowners. The Attorney General of New Mexico recently settled a case where Green Tree Servicing was accused of fraudulently having itself nominated as the personal representative of the estates of deceased borrowers, even when Green Tree knew how to locate surviving spouses or children.⁶⁰ In *ABN AMRO Mortgage Group Inc. v. McGahan*, the Illinois Supreme Court found that a mortgage foreclosure was a *quasi in rem* action and thus needed to be brought against a personal representative of an estate rather than, as certain lenders had previously done, against the property itself with no required notice to heirs.⁶¹ In reaching this conclusion, the court rightly noted that a foreclosure judgment in Illinois was binding only against the parties joined in the suit.⁶²

Although Federal law prohibits acceleration of a mortgage based on a transfer on death to a relative,⁶³ some lenders have sent borrowers in a circle where they would not modify the loan until it was assumed, would not consider a loan assumed until it was current, and would not consider a loan current until it was modified. Although recent changes in HAMP Guidelines attempt to address this issue by directing servicers to process modifications and assumptions simultaneously,⁶⁴ it is too early to determine whether this will be successful. Guidelines for the Home Affordable Modification Program also provide servicers some discretion to “use good business judgment” in “determining whether to accept a

60. Press Release, Office of New Mexico Attorney General, Mortgage Lender Accused of Foreclosing on Deceased: AG Stops Practice by Green Tree Servicing in New Mexico (May 6, 2013), available at <http://www.nmag.gov/News?place=msg%2Fnews-list%2FBSIO2pIFpTc%2Fj8cvZ6a8k18J>.

61. *ABN AMRO Mortg. Group, Inc. v. McGahan*, 931 N.E.2d 1190, 1198 (Ill. 2010).

62. *Id.* at 1197.

63. 12 U.S.C. § 1701j-3(d)(5) (1983).

64. U.S. DEP'T OF TREASURY, *supra* note 22, at § 8.8.

document without a co-borrower's signature," in cases such as mental incapacity, military deployment, or contested divorce, but offer no further guidance.⁶⁵

B. *The Interests and Motivations of Homeowners*

Balancing and protecting the divergent interests of homeowners requires an understanding of those interests. A home can be a financial asset, a source of shelter, and a piece of personal or family history. A home loan contributes both to current debt and to future creditworthiness. None of the many interests homeowners have in a home and mortgage should be ignored or understated.

1. Financial Interests

A home may be the largest asset of its owners.⁶⁶ Where one borrower wants to sell the house to liquidate any equity and the other does not, the borrower wishing to sell may have a very compelling reason to push for a sale. If there is \$300,000 of equity in the home, one owner might wish to sell while the other owner wishes to maintain ownership in order to live in the home. Unless the owner wishing to retain the home has the assets to buy the other owner out, it is probably unreasonable to ask one owner to forgo \$150,000 for the sake of the other's housing preference.

Because foreclosed properties sell at a fraction of fair market value,⁶⁷ averting foreclosure has substantial financial benefits for both homeowners and lenders. Failure to cooperate in efforts to avert foreclosure has been held to constitute dissipation of a marital asset.⁶⁸ It is highly unlikely that a loan modification with an interest rate reduction will materially detriment the interests of a co-owner, even if substantial past-due interest is capitalized.⁶⁹

65 U.S. DEP'T OF TREASURY, *supra* note 22, at § 5.7.

66. Martha F. Davis, Comment, *The Marital Home: Equal or Equitable Distribution?*, 50 U. CHI. L. REV. 1089, 1097 (1983).

67. Thomas W. Mitchell, Stephen Malpezzi & Richard K. Green, *Forced Sale Risk: Class, Race, and the "Double Discount"*, 37 FLA. ST. U. L. REV. 589, 609 (2010).

68. Lewis Becker, *Conduct of a Spouse that Dissipates Property Available for Equitable Property Distribution: A Suggested Analysis*, 52 OHIO ST. L.J. 95, 112 (1991); J. Thomas Oldham, "Romance Without Finance Ain't Got No Chance": *Development of the Doctrine of Dissipation in Equitable Distribution States*, 21 J. AM. ACAD. MATRIMONIAL LAWS. 501, 509 (2008) (citing *Porath v. Porath*, 855 N.E.2d 511 (Ohio Ct. App. 2006)); Richard W. Zuckerman, *Dissipation of Marital Assets in Illinois: A Review*, 91 ILL. B.J. 440, 444 (2003).

69. See Been, Jackson & Willis, *supra* note 45, at 83 n.41 (discussing the improbability that a loan modification could materially prejudice a second lienholder). A similar analysis applies to loan modification and joint-owners. Any amount capitalized already constituted a

Of course, if a mortgage is delinquent and a foreclosure could be imminent, there may not be adequate time to optimally market the property. This is doubly true if the property is not in optimal condition. A realtor's commission will take another chunk out of any anticipated proceeds. Until the housing market substantially improves, many properties facing foreclosure will have a relatively low expected payout at sale. A homeowner's financial stake in the home may be less significant than the other interests.

2. Shelter, Safety, and Non-Economic Concerns

The value of a home far exceeds its fair market price.⁷⁰ Unlike financial assets, a home is a shelter.⁷¹ A roof keeps out the rain. A sturdy lock keeps out the neighbors. Homeowners may have nowhere to go after foreclosure, particularly where monthly rental payments are higher than monthly mortgage payments.⁷² Home preservation is an important element of avoiding displacement or community disruption and protecting homeowners with children whose health or education could be substantially harmed by an avoidable relocation.⁷³ A home is also an inextricable element of personal identity and community belonging.⁷⁴ Scholarship has connected homeownership with increased happiness and life satisfaction⁷⁵ and the loss of homeownership with increased mortality.⁷⁶ Lost home equity, while more easily quantified, is only a portion of what homeowners lose in foreclosure. Initiatives to

debt secured by the mortgage. While capitalization could result in a higher interest-bearing principal, a reduction in the interest-rate is almost certain to lead to a net-reduction in future interest, despite the increased principal balance. For capitalization-only modifications where the interest rate remains the same, a second owner or second lienholder could be materially prejudiced as this permits the holder of the second lien to compound interest by collecting interest on the past-due amounts.

70. Davis, *supra* note 66, at 1097 (citing *Duke v. Duke*, 101 Cal. App. 3d 152 (1980)); see also Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 991 (1982) (describing a home as "a moral nexus between liberty, privacy, and freedom of association"). But cf. Stephanie M. Stern, *Residential Protectionism and the Legal Mythology of Home*, 107 MICH. L. REV. 1093, 1098 (2009).

71. Melissa B. Jacoby, *The Value(s) of Foreclosure Law Reform*, 37 PEPP. L. REV. 511, 520 (2010) (identifying shelter as an important goal of foreclosure law reform and noting a curious absence of such an obvious issue from previous scholarship).

72. Jed Kolko, *Buying Cheaper Than Renting Til Mortgage Rates Hit 10.5%*, TRULIA TRENDS (June 12, 2013), <http://trends.truliablog.com/2013/06/mortgage-rates-rent-vs-buy/>.

73. Jacoby, *supra* note 71, at 522.

74. Davidson, *supra* note 32, at 425.

75. Melissa B. Jacoby, *Home Ownership Risk Beyond a Subprime Crisis: The Role of Delinquency Management*, 76 FORDHAM L. REV. 2261, 2277 n.79 (2008).

76. Richard R. Daugherty, *Will North Carolina's Predatory Home Lending Act Protect Borrowers from the Vulnerability Caused by the Inadequacy of Federal Law?*, 4 N.C. BANKING INST. 569, 569 n.3 (2000).

prevent foreclosure should consider the entirety of the cost of a lost home.

Concerns about shelter and safety become more complicated when a history of domestic violence makes the property an unsafe place.⁷⁷ Hazardous or unsafe conditions in a home might also mean that preserving ownership and occupancy may not be in the best interests of a client.

3. Credit Scores

A foreclosure has a very negative impact on credit scores and remains on a credit report for seven years.⁷⁸ Short sales or deeds-in-lieu are comparably devastating to credit histories.⁷⁹ While a loan modification will still affect credit history, HAMP guidelines include special credit reporting requirements to reduce the impact and duration of a loan modification.⁸⁰ If an account was seriously delinquent for a prolonged period, it is unlikely to recover quickly. As a practical matter, many borrowers nearing foreclosure have numerous delinquent obligations. Many have also filed bankruptcy. Where substantial credit damage has already been done, the marginal difference in potential credit impact between various workout options may have a negligible effect on a homeowner's overall creditworthiness.

Of course, a failed attempt to modify a loan can prolong a delinquency and delay the ability of borrower's credit scores to recover. If borrowers are seeking to move on and rebuild, they may have an interest in resolving the matter with the house quickly in hopes of having a clean credit report more quickly. If one borrower seeks to modify the loan and keep the house, this must be weighed against the other borrower's interest in a complete break. On the other hand, if one borrower has an opportunity and a desire to mitigate credit damage through modification, the other borrower may not have a right to force a more complete, serious default and foreclosure. A lender may decline to foreclose and continue reporting an account as seriously delinquent over and beyond the life of a thirty-year mortgage.

77. See generally *Foreclosures and Domestic Violence Survivors*, *supra* note 56, at 15.

78. See, e.g., *Credit Report Q&A: How Long Will a Foreclosure Affect My FICO Score?*, MYFICO <http://www.myfico.com/crediteducation/questions/foreclosure-fico-score-affect.aspx> (Listing foreclosure as "a very negative event") (last visited May 7, 2014).

79. Joan Gaskin, *Research Looks at How Mortgage Delinquencies Affect Scores*, BANKING ANALYTICS BLOG (Mar. 24, 2011) <http://bankinganalyticsblog.fico.com/2011/03/research-looks-at-how-mortgage-delinquencies-affect-scores.html>.

80. U.S. DEP'T OF TREASURY, *supra* note 22, at § 12.2.

4. Finality

A joint-borrower may legitimately hope for the finality that a foreclosure would bring. Some borrowers might be more comfortable with the certainty of a quick foreclosure followed by an effort to rebuild than with the uncertainty of a prolonged loss-mitigation process over which they have little control.

In cases of domestic violence, a final separation of the legal interests of the parties may be particularly pressing. Maintaining the connection with the house might increase a chance of further abuse.⁸¹

5. Privacy

Foreclosure prevention frequently requires homeowners to submit extensive financial information. The same information, of course, would need to be disclosed in a divorce or bankruptcy. Owners of a house have an interest in knowing the status of a mortgage securing the property. They also have an interest against broad or unnecessary disclosure of their personal information. This is particularly critical in cases involving domestic violence where the safety of one owner could be compromised by an unauthorized release of information or where inadequate privacy protections could lead to identity theft.⁸² This concern may be greater in cases where parties are not already required to disclose financial information to each other as part of a divorce proceeding.

C. *Motivations That Do Not Require Special Legal Protection*

1. Abuse and Control

Too often, domestic violence survivors also face foreclosure.⁸³ The stress of the foreclosure process can trigger—or at least exacerbate—domestic violence.⁸⁴ Alternatively, if an abuser is removed from the home, the corresponding loss of income could render the survivor unable to continue paying the mortgage without a loan modification.⁸⁵ Even if the survivor has sufficient income to make the mortgage payment, a pattern of financial abuse could cause a borrower to not know how far

81. *Foreclosures and Domestic Violence Survivors*, *supra* note 56, at 15.

82. *See, e.g.*, Littwin, *supra* note 59, at 978.

83. *Foreclosures and Domestic Violence Survivors*, *supra* note 56, at 15; Camille Carey, *Correcting Myopia in Domestic Violence Advocacy: Moving Forward in Lawyering and Law School Clinics*, 21 COLUM. J. GENDER & L. 220, 265-66 (2011).

84. *See* Stephanie Armour, *Foreclosures Take an Emotional Toll on Many Homeowners*, USA TODAY (May 14, 2008, 10:38 PM), http://www.usatoday.com/money/economy/housing/2008-05-14-mortgage-foreclosures-mental-health_N.htm.

85. Carey, *supra* note 83, at 265-66.

behind the mortgage is, that the mortgage is delinquent, or in some circumstances, that the debt exists at all.⁸⁶ Some survivors may not know whether or not they even own a home.⁸⁷ Others have been defrauded or coerced into signing a mortgage or signing over an interest in the home.⁸⁸

A lender's loan modification requirements may be used by abusers to control their survivors.⁸⁹ Abusers may attempt to use their required signature as leverage in other disputes or attempt to force the home into foreclosure in the belief that this will result in the survivor being homeless. As reprehensible as this motive is, the peculiarities of the modification process make this an achievable goal for the abuser. A survivor may be told, for example, that the loan could be modified to create an affordable payment if, and only if, the survivor reaches out to an abusive co-borrower to secure a signature.⁹⁰ This can give an abuser a de facto veto over a survivor's continued shelter.⁹¹

2. Spite

The same types of behavior may also arise in cases of animosity between parties undergoing divorce or other separation where no violence is present. Individuals attempting to force a home into foreclosure act against their own apparent interests and may be motivated by a desire to extend a system of coercive control—or may simply be motivated by run-of-the-mill spite. The disjunct in the parties'

86. Littwin, *supra* note 59, at 994.

87. Littwin, *supra* note 59, at 986.

88. Littwin, *supra* note 59, at 993. Advocates representing borrowers who may have signed a mortgage under duress or under fraudulent pretenses should remember that both fraud and coercion are defenses to an action to enforce a deed. *See, e.g.,* Brown v. Pierce, 74 U.S. 205, 210 (1868) (fraud pled as a defense to a contract or deed is not limited by a statute of limitations in the same manner that fraud pled as a tort would be).

89. *See* Littwin, *supra* note 59, at 953. Littwin discusses the problem of coerced debt in a general consumer context. The problem is particularly acute where the debt is mortgage debt and a failure to pay the debt could result in homelessness.

90. U.S. DEP'T OF TREASURY, *supra* note 22, at § 5.7 (Requiring the signature of all borrowers except in narrow cases such as incapacity or contested divorce. There is no listed exception for never-married co-borrowers where it is unsafe for one borrower to contact the other).

91. This Article, to the extent possible, avoids gendered pronouns when discussing the perpetrators and victims of domestic violence. Despite this effort, research has shown that the type of controlling violence at issue in such cases is, at least in heterosexual relationships, almost always perpetrated by men against women. Michael P. Johnson, *Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 1003, 1003 (2006). A failure to acknowledge this gross asymmetry would render any article on the subject incomplete. Whether policies of mortgage servicers that disparately impact victims of domestic violence violate fair lending or fair housing laws is beyond the scope of this article.

goals may be a result of violence, could be a result of a mutual desire to hurt the other through whatever mechanism is available, or may be somewhere on a spectrum in between. While borrowers acting out a mutual desire to harm each other may be a less compelling social concern than the systems of violent abuse and control discussed above, it is owed no deference by policymakers. Spite is not a legally protected interest.

III. COMMON PROBLEMS AND PARTIAL SOLUTIONS

Conflicts between parties with shared interests are hardly unique to the world of homeowners facing foreclosure. There are, however, certain aspects of the lending and foreclosure process that make them particularly challenging to resolve.

A. *Lack of Resources and Representation*

Borrowers facing financial hardship frequently will not have an attorney to assist in a probate or family law matter. If a parent dies with no assets other than an over-secured home, the children may not probate the estate promptly. A divorcing couple representing themselves may not have an attorney assist with the drafting of a final agreement. Even where a legal services attorney may help with a divorce or a home preservation case, there will often not be full representation in both matters. Some legal services programs, for example, have much lower income caps for divorce cases than for home preservation cases. Even where income permits representation in multiple cases, legal aid programs are unlikely to be able to help all eligible applicants. Many areas do not have legal assistance attorneys who are adequately trained in foreclosure law.⁹²

For the borrowers in non-judicial foreclosure states this problem is complicated further. In a judicial foreclosure, a homeowner receives a summons and complaint directing them to take specific action in court.⁹³ In a non-judicial foreclosure, the borrower may receive different types of notice, but does not appear in a judicial proceeding unless they can

92. Frank S. Alexander, Dan Immergluck, Katie Balthrop, Philip Schaeffing & Jesse Clark, *Legislative Responses to the Foreclosure Crisis in Nonjudicial Foreclosure States*, 31 REV. BANKING & FIN. L. 341, 360 (2011) (discussing uneven distribution of legal assistance attorneys trained in foreclosure law and a resistance to providing funding to alleviate the shortfall). *But cf. Attorney General's HomeCorps: Borrower Representation Initiative*, OFFICIAL WEBSITE OF THE ATT'Y GEN. OF MASS., <http://www.mass.gov/ago/about-the-attorney-generals-office/community-programs/ago-grants/homecorps-borrower-representation-initiative.html> (last visited May 13, 2014).

93. Alexander, Immergluck, Balthrop, Schaeffing & Clark, *supra* note 92, at 343.

manage to bring the suit themselves.⁹⁴ This can be particularly difficult for unrepresented borrowers. Even though most mortgages require an entity seeking to foreclose to notify the borrower of the right to bring a court action to challenge an alleged default “or any other defense of Borrower to acceleration and sale,”⁹⁵ it is not always clear what that cause of action is.

A subset of problems with the availability of representation arises where there is a conflict of interest between co-owners.⁹⁶ If a legal aid attorney is representing the homeowners and their interests diverge, there may be no attorney available to help either party.

B. *Three Timelines, Three Decision-Makers*

One problem that has plagued foreclosure prevention efforts is the practice of dual tracking where servicers will proceed with foreclosure while loss-mitigation efforts are pending.⁹⁷ This leads to two problems. First, costs related to the foreclosure process accumulate while the loss-mitigation process is pending. Second, if the foreclosure process ends first, the loss-mitigation efforts cannot be completed. Due to shorter time frames in non-judicial foreclosure states,⁹⁸ this is a bigger problem. Under the National Mortgage Settlement, dual tracking should no longer occur.⁹⁹ This resolves some of the timeline problems. However, the problem remains that the decision on whether a contested foreclosure can legally proceed and whether a loan can be modified happens in an entirely separate forum. Additionally, a home defense case may have judicially-established timelines. A bankruptcy court, for example, might wish to close a case before a final decision can be made by the lender regarding loss-mitigation.

This problem becomes even more complicated if there are legal proceedings adjudicating the interests of the borrowers. In a contested divorce, a judge may not be willing to wait six months while the parties explore a loan modification with the lender. Dividing property

94. Alexander, Immergluck, Balthrop, Schaeffing & Clark, *supra* note 92, at 343.

95. See FREDDIE MAC, *supra* note 9, at ¶ 22

96. *Foreclosures and Domestic Violence Survivors*, *supra* note 56 (discussing particular concerns where a firm that assisted in a foreclosure prevention case could later be prevented from assisting in a domestic violence case).

97. See, e.g., United States v. Bank of America Corp., Settlement Term Sheet, Case 1:12-cv-00361-RMC, A-17 (D.C. Dist., 2012), available at <https://www.mortgageoversight.com/wp-content/uploads/2012/03/Servicing-Standards.pdf> (last visited May 13, 2014).

98. Alexander et al., *supra* note 92, at 344.

99. United States v. Bank of America Corp., Settlement Term Sheet, Case 1:12-cv-00361-RMC, A-17 (D.C. Dist., 2012), available at <https://www.mortgageoversight.com/wp-content/uploads/2012/03/Servicing-Standards.pdf> (last visited May 13, 2014).

encumbered by a mortgage requires knowledge of the terms of the mortgage and whether and under what terms they are likely to be modified. At the same time, a lender may not be willing to allow a loan modification until the divorce is complete or to stay foreclosure proceedings while a divorce or probate matter is resolved.

C. *Notice and Privacy Problems*

A joint mortgagee, with or without the cooperation of the other mortgagee, has a right to keep the mortgage current by paying the monthly mortgage payments or to redeem the property by paying the entire amount due. Most mortgages also provide a right to cure or reinstate a mortgage by tendering any past due payments, even after acceleration.¹⁰⁰ Exercising this right requires that the borrower know how much is owed. Various practices of lenders can interfere with this.

First, most mortgages have a clause stating that all notices must be sent to only a single designated address.¹⁰¹ If two borrowers are living separately, there is no provision that would allow them to each receive notices. In domestic abuse cases, this has resulted in an abuser having notices forwarded to a postal office box to conceal the fact that the mortgage was not paid. This could be done both by making the request of the servicer or by filing a change of address with the post office.

In an age where electronic notice can be sent at virtually no cost, such clauses are an anachronism. Nor would providing a second notice to a joint account holder be out of line with existing law. Federal privacy law, for example, permits institutions to provide joint account holders with a single copy of a privacy notice *unless* one or more borrowers requests separate notices.¹⁰² Adding similar language to an amendment to the Mortgage Servicing Rules under the Real Estate Settlement Procedures Act (Regulation X)¹⁰³ could effectively resolve this issue.

Lenders have also cited privacy laws when prohibiting disclosures of any information regarding the account—even to those with a legitimate interest in paying the mortgage. The broad reading of privacy

100. See Freddie Mac, *supra* note 9, at ¶ 15.

101. See Freddie Mac, *supra* note 9, at ¶ 15 (“There may be only one designated notice address under this Security Instrument at any one time.”); see also Nelson, *supra* note 13, at 601 (discussing efforts to standardize mortgage law through the use of uniform instruments. Presently, the vast majority of home mortgages either use a Fannie/Freddie Uniform instrument or a substantially similar document).

102. 16 C.F.R. § 313.19(g).

103. Bureau of Consumer Financial Protection Docket No. CFPB-2012-0033, REGULATIONS.GOV, available at <http://www.regulations.gov/#!documentDetail;D=CFPB-2012-0033-0019>.

laws may be part of an effort to set one policy that complies with the financial privacy laws of all fifty states.¹⁰⁴ This has caused particular problems where the borrower who had been primarily responsible for paying the mortgage dies. If a spouse or child inherits the property, the lender may refuse to communicate with the child or require a lengthy assumption process before communicating. If the loan account is already delinquent, this delay could turn a solvable problem into an impossible one.

Finally, the insistence on treating borrowers as a unified entity interferes when one borrower does not wish to be contacted pursuant to the Federal Debt Collection Practices Act¹⁰⁵ and the other borrower seeks to communicate regarding the status of an account. While the Ninth Circuit has held that borrowers may waive the rights created by a cease communication directive sent pursuant to section 1692c(c) of the Federal Debt Collection Practices Act,¹⁰⁶ little or nothing has been written on how a debt collector should proceed when one co-debtor asks the collector to cease communication and the other co-debtor seeks communication for the purpose of resolving a delinquency.

These problems could be easily resolved with only minor changes in lender procedures. First, permitting multiple notice addresses is a simple action that could prevent many communication problems. With the consent of a borrower, having notices sent to multiple addresses could also be helpful for homeowners who for reasons related to capacity or infirmity periodically have trouble promptly responding to bills in a timely fashion but have friends or family members who are able to assist them. Similarly, servicers should have clear policies stating that all mortgagors are entitled to an accounting of the mortgage, whether or not they are personally liable on the loan. Where servicers are unable or unwilling to voluntarily adopt policies that both protect borrower privacy and allow homeowners to know the status of their account,¹⁰⁷ regulators should consider amending servicing regulations.

104. See Andrea Lee Negroni & John P. Kromer, *Gramm-Leach-Bliley: Tip of the Privacy Iceberg*, 118 *BANKING L. J.* 958, 967 (2001) (encouraging financial institutions to incorporate a periodic review and update of state privacy laws in their compliance program).

105. 15 U.S.C. § 1692c(c) (2006).

106. *Id.*; *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1170 (9th Cir. 2006).

107. *Cf. Littwin, supra* note 59, at 978 (citing concerns that current, impersonal systems have permitted identity theft by intimate associates while preventing borrowers from finding the correct person to speak to about the loan).

D. *There Are Rarely Concerns About Recourse*

A foreclosure alternative that allows one borrower to avoid future liability on the loan could, in theory, limit a bank's ability to collect a judgment for any deficiency if the home was ultimately foreclosed. In practice, deficiency judgments are rarely pursued. Many states, by law, protect or limit deficiency judgments following foreclosure.¹⁰⁸ Even where pursuit of a deficiency is legal, it is rarely pursued. The flagship HAMP program explicitly permits modification where one or more borrowers has effectively transformed a mortgage loan into a non-recourse loan through a Chapter 7 filing.¹⁰⁹ So long as any owner being removed from the loan is not contributing income to the household, concerns about removing one borrower from the obligation are unlikely to substantially affect a lender's bottom line.¹¹⁰ For a prudently underwritten loan, a lender's security in the event of default is the property—not the other assets of a questionably-solvent co-obligor.

IV. POSSIBLE WAYS TO RESOLVE CONFLICTS

The problems discussed above are all species of the same, more general problem. Two mortgagors and one mortgagee are three parties with three sets of interests—not two. While the mortgagors often have aligning interests, this is not always the case. This problem becomes more difficult to resolve when the primary interests of the parties are fundamentally divergent in nature. The lender's interest is primarily financial. One owner might be primarily interested in retaining the home as shelter. A co-owner's interests could be financial or could be something else entirely—such as ensuring that the first owner doesn't get to keep the house. The matter cannot be fruitfully negotiated unless one party is somehow removed or the three parties are brought together at a common table with a referee. Pretending that co-owners with divergent interests can or should act with one voice does not solve the problem.

108. Ron Harris & Asher Meir, *Non-Recourse Mortgages—a Fresh Start*, 21 AM. BANKR. INST. L. REV. 119, 124 (2013).

109. U.S. DEP'T OF TREASURY, *supra* note 22, at § 8.5.

110. *Cf.* U.S. DEP'T OF TREASURY, *supra* note 22, at § 5.7 (requiring the signature of all original borrowers on documents, except in cases where a borrower is deceased or divorced, including the Request for Modification Affidavit that includes documentation of income). Because the HAMP guidelines provide this protection for formerly married borrowers following divorce, they may also be required to provide similar protections for never-married borrowers following a similar life change. *See Foreclosures and Domestic Violence Survivors*, *supra* note 56.

A. *Can One Homeowner Be Removed?*

1. Legal Options

An order in a domestic relations case can transfer ownership of the property and responsibility for making payments on the loan.¹¹¹ In some circumstances, a suit for partition might allow one owner to remove a joint owner—provided the interests of the other owner can adequately be protected.¹¹² A mortgage may not be accelerated based solely on a transfer from one spouse to another.¹¹³ If borrowers are unmarried, the Equal Credit Opportunity Act, in conjunction with the Garn St. Germain Act, may prohibit acceleration where a transfer would have been protected had the borrowers been married.¹¹⁴ If a non-occupying co-borrower has relinquished the property through a quitclaim, HAMP and similar programs permit modification of the loan.¹¹⁵

Absent an order transferring ownership, one borrower may be able to obtain a power of attorney from the other borrower—either voluntarily or by order of the court—authorizing the first borrower to execute any documents related to the home. In cases in which one borrower is deliberately trying to sabotage loss-mitigation efforts, this could prevent the borrower seeking a workout from having to return to court for a contempt order each time the servicer sought additional documents.

2. Refinance, Redemption, and Repurchase

A property owner may redeem a mortgaged property by paying the entire amount due on the mortgage prior to foreclosure.¹¹⁶ In the rare case where an owner, or somebody willing to help the owner, has adequate cash reserves to redeem the mortgage, the owner could simply do so. In cases where the current owner was not personally obligated on the original loan, reports of delinquent payments would not cause damage to the owner's credit score. A refinance may also be a viable option. In some cases, lenders have been willing to accept a “short payoff” where the owner tenders less than the amount the lender believes

111. *Foreclosures and Domestic Violence Survivors*, *supra* note 56, at 16.

112. *Foreclosures and Domestic Violence Survivors*, *supra* note 56, at 16.

113. 12 U.S.C. § 1701j-3 (2006).

114. *Foreclosures and Domestic Violence Survivors*, *supra* note 56, at 16.

115. U.S. DEP'T OF TREASURY, *supra* note 22, at § 1.2.

116. James B. Hughes, Jr., *Taking Personal Responsibility: A Different View of Mortgage Antideficiency and Redemption Statutes*, 39 ARIZ. L. REV. 117, 137 (1997).

is due and the lender releases the lien.¹¹⁷

A refinance for less than the amount originally due is, in rare circumstances, an option. Although a lender may be understandably reluctant to underwrite a new loan to a borrower already at risk of foreclosure, lenders may be willing to do so as a loss-mitigation measure on an existing portfolio loan.¹¹⁸ This could be structured as a principal write-down on the original loan followed by a refinance or as a full refinance coupled with an immediate principal write-down.

Depending on state law, borrowers may have a right to purchase a property at a foreclosure sale. In practice, this would need to be a cash purchase because lenders typically will not underwrite loans without a title insurance policy¹¹⁹ and no title insurer is likely to insure a loan to purchase a property at a foreclosure auction.¹²⁰ In practice this means that the only bidders at foreclosure auctions tend to be lenders or investors.¹²¹ There is, however, no reason that a lender could not, prior to the auction, agree to guarantee to finance a bid up to a certain amount for a borrower.¹²² For example, a foreclosing lender could offer to extend a new loan to a homeowner in an amount comparable to the present value of the home. While there is some risk that a third party (or even the other owner) would show up and enter a higher bid, this could effectively lead to title vested in one owner, securing a loan with an affordable payment. Because any other owner, claimant, or lienholder would have notice and an opportunity to show up at sale and enter a higher bid, concerns about collusion between the purchasing homeowner and the foreclosing party are minimized.

117. See, e.g., *Mortgagee Letter 09-52*, U.S. DEP'T OF HOUSING AND URBAN DEV. (April 2, 2014, 8:57 PM), <http://portal.hud.gov/hudportal/documents/huddoc?id=09-52ml.pdf>.

118. A portfolio loan is a loan in which the debt is owned by the current servicer. Portfolio loans may have more workout options because the servicer is not bound by contracts with a third party investor. Brian S. Weinhart & Todd M. Moore, *Understanding Modification Options Under Portfolio and CMBS Loan Structures*, 8 ANDREWS SEC. LITIG. & REG. REP. 1, 1 (2009) (discussing workouts in the context of commercial loans).

119. Ron Lieber, *After Foreclosure, a Focus on Title Insurance*, N.Y. TIMES, Oct. 8, 2010, <http://www.nytimes.com/2010/10/09/your-money/mortgages/09money.html> (last visited May 13, 2014).

120. Mike Giusti, *Fantasizing About Foreclosure? Novice Investors Beware*, MSN REAL ESTATE, <http://realestate.msn.com/article.aspx?cp-documentid=13107739> (last visited May 13, 2014).

121. Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1420 (2004). Nelson and Whitman cite the requirement to provide a substantial down payment in good funds as a primary barrier.

122. *Id.* at 1419.

B. *Coordination of Timelines*

Unnecessary foreclosure can also be avoided by ensuring that timelines for resolving title to the house are coordinated with foreclosure timelines. If resolving ownership of a house requires a probate process or divorce process to run its course, courts, advocates, and lenders can push to ensure that the respective processes proceed in a manner that preserves as many options as possible. For lenders, this could simply mean delaying foreclosure while another legal proceeding occurs. Alternatively, lenders could grant a provisional modification contingent upon a homeowner providing, for example, a copy of a divorce decree awarding title to the home. This could allow a lender to transform a delinquent account into a performing account while other proceedings are pending.

It might be objected that efforts to synchronize timelines of the various decision makers result in a de facto adoption of the slowest timeline. If delay in a probate or divorce proceeding prevents foreclosure, a homeowner could have an incentive to draw out the proceedings for as long as possible. This may be a particularly compelling objection in light of existing concerns by some commentators that foreclosure timelines already take too long.¹²³ More recent scholarship, however, has raised concerns that a rush to foreclosure has stood in the way of finding alternatives to foreclosure.¹²⁴ Ultimately the foreclosure process, like every other legal process, takes as long as it takes. A mortgage lender need not be entitled to a faster recovery than any other litigant at the expense of the homeowner. Delays related to long dockets and understaffed courthouses affect all litigants. In practice, many of the delays are caused by a lender's inability to review documents¹²⁵ or respond to discovery requests in the allotted time frames.

Many of these problems regarding timelines are resolved in judicial foreclosure states, where foreclosure requires an action to be brought against a homeowner or the representative of an estate.¹²⁶ Courts

123. Nelson, *supra* note 13, at 586.

124. Dewar, *supra* note 36, at 187.

125. Kulp & Shack, *supra* note 6, at 219 (citing lender's failure to request, expectation of documents in unconventional and counter-intuitive forms, and provision of inaccurate or contradictory directions to borrowers as a primary cause for delays or denials of loan modifications). This article addressed cases where a third party was assisting in the workout process and providing some level of supervision to the lender. Presumably the normal absence of any oversight would result in similar or worse problems.

126. See, e.g., ABN AMRO Mortg. Group, Inc. v. McGahan, 931 N.E.2d 1190, 1197 (Ill. 2010) (requiring that a foreclosure suit be brought against the estate of a deceased borrower rather than against the home itself); see also Michael W. Zientz, *Why Deceased*

overseeing foreclosure cases have the power to stay the case to permit other courts or other proceedings a reasonable time to reach a conclusion.

V. JUDICIAL FORECLOSURE CAN BRING COMPETING INTERESTS INTO THE SAME COURT

While all of the proposals above might resolve specific cases, they are all imperfect in that they do not accomplish the goal of getting all the parties with all their diverse interests into the same room with a neutral adjudicator with the power to determine ownership of the property. The way to do this is judicial foreclosure.¹²⁷ This process is necessary to protect the substantive and procedural rights of homeowners.¹²⁸ Courts have long been equipped to deal with litigation involving numerous parties with divergent interests, including parties that may not be present in the action at issue.¹²⁹

Traditionally, all owners and obligors would be named parties in a foreclosure proceeding.¹³⁰ With all interested parties in court,¹³¹ the entirety of any title suit may be resolved. Parties in disagreement can further avail themselves of existing alternative dispute resolution options courts may have established.

It is particularly important that courts have the ability to hear the entirety of a dispute or the authority to stay the matter while the

Borrowers Cause Title Problems in Texas, USFN (2006), available at http://www.usfn.org/AM/Template.cfm?Section=USFN_E_Update&Template=/CM/HTMLDisplay.cfm&ContentID=2746 (describing a similar process in Texas from an industry perspective).

127. Judicial foreclosure is far and away the most effective approach to the problems outlined in this Article and the most challenging to implement. See, e.g., Elizabeth Renuart, *Toward a More Equitable Balance: Homeowner and Purchaser Tensions in Non-Judicial Foreclosure States*, 24 LOY. CONSUMER L. REV. 562, 585 (2012); see also Alexander et. al, *supra* note 91, at 349 (stating that while pushing for judicial foreclosure would seem desirable from a borrower's perspective, it might be more politically viable to push for incremental change).

128. *But cf.* Nelson, *supra* note 13, at 587 (lambasting the irregular patterns of state laws designed to protect and preserve the due process rights of homeowners faced with the loss of the property that is likely both their largest asset and their sole source of shelter as "quaint").

129. Andrew J. Kazakes, *Protecting Absent Stakeholders in Foreclosure Litigation: The Foreclosure Crisis, Mortgage Modification, and State Court Responses*, 43 LOY. L.A. L. REV. 1383, 1415 (2010) (discussing state courts' ability to represent the interests of both absent investors and absent community members).

130. See, e.g., Charles E. Clark & Herbert Brownell, Jr., *Joinder of Parties*, 37 YALE L.J. 28, 41 (1927).

131. Nelson & Whitman, *supra* note 121, at 1403 (noting that a typical judicial foreclosure process requires service of all parties whose interests may ultimately be prejudiced by the foreclosure).

remainder of the dispute is litigated in another forum.¹³² Determinations limited to default or non-default are insufficient to fully protect the rights of borrowers.¹³³ Unrestricted jurisdiction is necessary to avoid a multiplicity of suits.¹³⁴ Similar efficiencies occur in Chapter 13 adversary proceedings.

A judicial foreclosure also has a finality that a non-judicial foreclosure does not have.¹³⁵ A judicial foreclosure bars a subsequent unraveling of the sale through the doctrine of *res judicata*.¹³⁶ This is particularly important in cases where joint owners have a disagreement regarding the status of the property. Where one homeowner does not want to own a distressed home, few things would be more frustrating than having a co-borrower successfully challenge and unravel the sale. A judgment in a judicial foreclosure, including a default judgment, could permit one owner to effectively and permanently relinquish any right to the property.

Opponents of judicial foreclosure often cite costs and efficiency concerns. These concerns may be overstated. Because a non-judicial foreclosure state does not require a judicial determination prior to foreclosure,¹³⁷ foreclosures in those states do not have the finality a judicial determination could bring. Massachusetts, for example, is a non-judicial foreclosure state, which permits foreclosure pursuant to a statutory power of sale.¹³⁸ However, Massachusetts practice usually includes a limited suit to determine whether a party is entitled to the protections of the Sailor and Service Members Civil Relief Act (SCRA).¹³⁹ Although this is generally an abbreviated suit¹⁴⁰ where defendants who are not entitled to SCRA protections lack any standing, it requires filing, service, and delays connected with both court dockets and the answer period. This is particularly confusing to *pro se*

132. Advocates may consider counterclaim to try title or a cross-claim for partition in cases where it may be necessary for a court to reach a determination on title other than an order permitting foreclosure.

133. Timothy J. Peterkin, *Getting to the Arguments: How Legitimate Defenses to Foreclosure Are Raised*, 3 CHARLOTTE L. REV. 253, 264 (2012) (discussing circumstances where a mortgage was entered by a party with a clear inability to contract who could not assert fraud or incapacity in a North Carolina hearing before a clerk).

134. *See, e.g., id.* at 274 (discussing cases where homeowners would simultaneously defend a legal action to stop a foreclosure sale and prosecute an equitable suit to enjoin the sale with no possibility of joining the two cases).

135. Renuart, *supra* note 125, at 563.

136. Renuart, *supra* note 125, at 565.

137. Alexander et al., *supra* note 91, at 345.

138. MASS. GEN. LAWS ch. 183, § 21 (2004 & supp. 2013); MASS. GEN. LAWS ch. 244, § 14 (2004 & supp. 2013).

139. HSBC Bank USA, N.A. v. Matt, 981 N.E.2d 710, 713-14 (Mass. 2013).

140. *Id.*

homeowners who attempt to answer the suit, are told they lack standing, and do not know where to turn. Following this abbreviated process, non-judicial foreclosure is permitted. However, *evicting* a former homeowner after foreclosure requires a second judicial proceeding.¹⁴¹ Homeowners or former homeowners have the opportunity to challenge the validity of the sale in this action.¹⁴² In practice this means that the same matters are litigated—but a homeowner prevails only on the matter of possession.¹⁴³ Quieting title requires a third suit in a different court.¹⁴⁴ If the foreclosing party is different than the plaintiff in an eviction suit,¹⁴⁵ settlement can be inhibited.

A Chapter 13 Bankruptcy may be an option for homeowners who can afford a Chapter 13 plan. Because this stays collection proceedings, it could effectively bring all parties into the same suit.¹⁴⁶

CONCLUSION

The world of lending, securitization, servicing, and foreclosure involve a vast array of entities, frequent internal conflicts, and a level of opacity most consumers cannot penetrate. A house is a real-world physical asset with a value that extends far beyond its mere appraised value. In part because of this, individuals who own or claim to own the same home may have varying and conflicting interests. In short, a foreclosure is a variety of title dispute between entities that are far more complicated than a unified mortgagee and a unified mortgagor.

Because the stakes are so high for the owners, it is imperative that these conflicts be resolved through a process that respects the rights of all involved. This requires paying careful attention to both communications and timelines to avoid conflict or avoidable loss. Ultimately, the stakes and complexity of the interests involved should be handled judicially, by an institution that has long been equipped to handle high stakes, complicated conflicts.

141. MASS. GEN. LAWS ch. 239 (2004 & supp. 2013).

142. *Bank of New York v. Bailey*, 951 N.E.2d 331, 332 (Mass. 2011).

143. MASS. GEN. LAWS ch. 239, § 7 (2004 & supp. 2013) (stating, “[t]he judgment in an action under this chapter shall not be a bar to any action thereafter brought by either party to recover the land or tenements in question . . .”).

144. *Id.*

145. See, e.g., FANNIE MAE SINGLE FAMILY 2012 SERVICING GUIDE 801-34 (2012), available at <https://www.fanniemae.com/content/guide/svc031412.pdf> (directing servicers to retain attorneys to conduct proceedings in the servicer’s name but vest title in Fannie Mae’s name through an assignment of the bid) (last visited Feb. 16, 2014).

146. *Foreclosures and Domestic Violence Survivors*, *supra* note 56, at 15-16.