REAL PROPERTY

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I. INTRODUCTION

Real property law often seems deceptively static when compared to more outwardly evolving areas of law. Appearances aside, real property law still manages to adapt to changing social climates and economic times. This *Survey* Article examines developments in Michigan real property law between June 2011 and July 2012—a time when the economy played a dominant role in the cases brought before both state and federal courts.

II. MICHIGAN REAL PROPERTY LAW DURING THE SURVEY PERIOD—A SYNOPSIS

A. Mortgages and Foreclosure

During the *Survey* period, issues concerning mortgages and foreclosures pre-dominated the dockets for Michigan's circuit courts, its court of appeals, and its supreme court,[1] a testament to Michigan's

1. *E.g.*, Greenville Lafayette, LLC v. Elgin State Bank, 296 Mich. App. 284, 285; 818 N.W.2d 460 (2012); Kim v. JP Morgan Chase Bank, NA, 493 Mich. 98; 825 N.W.2d 329 (2012); Residential Funding Co. v. Saurman, 292 Mich. App. 321; 807 N.W.2d 412 (2011), *rev'd*, 490 Mich. 909; 805 N.W.2d 183 (2011); Wells Fargo Bank v. Cherryland Mall Ltd. P'ship, 295 Mich. App. 99; 812 N.W.2d 799 (2011); Young v. Indep. Bank, 294 Mich. App. 141; 818 N.W.2d 406 (2011).

economic state.[2] Legal disputes concerning mortgage and foreclosure actions not only played out in state courts, but also played out in federal and bankruptcy court cases decided under Michigan law.[3]

Shortly before the start of the *Survey* period, the firm foundation many lenders, mortgagees, and servicers believed they had beneath their feet when foreclosing Mortgage Electronic Registration Systems (MERS)-assigned mortgages was pulled out from beneath them by the Michigan Court of Appeals' in *Residential Funding Co. v. Saurman.*[4] However, the Michigan Supreme Court quickly reversed the court of appeals and issued its own *Saurman* decision, and held MERS had authority to foreclose by advertisement even if MERS did not hold the underlying note because MERS held an interest in the indebtedness by owning a security lien on the mortgage property.[5]

The effect of *Saurman* was immediate: the United States District Court for the Eastern District of Michigan used *Saurman* as the basis for part of its decision in *McCann v. U.S. Bank, N.A.* where the role of the servicer and the holder of the underlying note were used as a defense to avoid foreclosure after an alleged refinancing agreement fell apart.[6] However, this defense failed, and the *McCann* foreclosure was considered valid.[7]

Yet, things did not remain quiet for long, as the court of appeals subsequently decided *Kim v. J.P. Morgan Chase Bank N.A.*,[8] sending many lenders, mortgagees, and servicers back to the drawing board to make sure they had crossed the appropriate "Ts" and dotted the proper "Is" before proceeding with sheriff foreclosure sales. In *Greenville Lafayette, LLC v. Elgin State Bank* similarly put lenders, mortgagees, and

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2. *See* DEPT. OF ENERGY, LABOR, & ECON. GROWTH, BUREAU OF LABOR MKT. INFO. & STRATEGIC INITIATIVES, ADMINISTRATION ESTIMATES, MICHIGAN ECONOMIC AND WORKFORCE INDICATORS, (2011), *available at* http://www.doleta.gov/performance/results/AnnualReports/2010_economic_reports/mi_economic_report_py2011-Winter.pdf . *See also* MICH. DEPT. OF TREASURY, OFFICE OF REVENUE & TAX ANALYSIS, MICHIGAN ECONOMIC AND REVENUE OUTLOOK, (2012), *available at* http://www.michigan.gov/documents/treasury/AdminTreasHandout_05162012_404046_7.pdf.

3. *See, e.g.*, McCann v. U.S. Bank, N.A., 873 F. Supp. 2d 823, 827 (E.D. Mich. 2012).

4. 292 Mich. App. 321, 324; 807 N.W.2d 412 (2011), *rev'd*, 490 Mich. at 909-10. (*Saurman I*).

5. Residential Funding Co v. Saurman (*Saurman II*), 490 Mich. 909, 909-10; 805 N.W.2d 183 (2011).

6. McCann v. U.S. Bank NA, 873 F. Supp. 2d 823, 829-32 (E.D. Mich. 2012).

7. *Id.*

8. 295 Mich. App. 200; 813 N.W.2d 778, *aff'd in part, rev'd in part*, 493 Mich. 98; 825 N.W.2d 329 (2012).

servicers on watch.[9] In that decision, the Michigan Court of Appeals acted to limit the avenues of recovery for the foreclosing party by strictly applying Michigan's "one action" rule.[10]

Wells Fargo, N.A. v. Cherryland Mall, Limited Partership was another case that sought to clarify the remedies available for foreclosing parties decided during the *Survey* period—this time defining when a deficiency can be recovered on a traditional non-recourse commercial mortgage-backed security loan.[11] Then, in *Young v. Independent Bank*, the importance of timing and complete disclosure was illustrated when foreclosure and bankruptcy crossed paths.[12] In *CitiMortgage, Inc. v. Mortgage Electronic Registration Systems, Inc.*, the Michigan Court of Appeals addressed the legal doctrine known as equitable subrogation, and recognized the applicability of this doctrine in mortgage refinancing transactions.[13]

B. Easement and Other Property-Related Disputes

For people who have decided to forego the opportunity to become a legal professional, the phrase "timing is everything" has a much different meaning than it does for seasoned lawyers. In the litigation context, the timing of a suit has tremendous implications. In *Beach v. Township of Lima*,[14] the Michigan Supreme Court made it very clear relief for claims based in real property law proceed sequentially: first in the sequence are actions to determine substantive property interests. Only then can a litigant proceed to the second step in the sequence: an action to ensure previously determined substantive property interests are properly reflected in the necessary recorded instruments.[15] Then, in *Redmond v. Van Buren County*, a homeowner's association and homeowners denied membership in the homeowner's association faced-off in a dispute over an ingress-egress easement, bringing the differences between public and private dedications to light.[16]

9. 296 Mich. App. 284; 818 N.W.2d 460 (2012).
10. *Id.* at 291-92.
11. 295 Mich. App. 99; 812 N.W.2d 799 (2011).
12. Young v. Indep. Bank, 294 Mich. App. 141; 818 N.W.2d 406 (2011).
13. CitiMortgage v. MERS, 295 Mich. App. 72; 813 N.W.2d 332 (2011).
14. 489 Mich. 99; 802 N.W. 2d 1 (2011).
15. *Id.* at 102.
16. Redmond v. Van Buren Cnty., 293 Mich. App. 344; 819 N.W.2d 912 (2011), *appeal denied,* 491 Mich. 913; 811 N.W.2d 495 (2012).

C. Contracts, Securities, and Property Interests

Methods of securing debt also came into play in the Michigan Court of Appeals decision in *Eastbrook Homes, Inc. v. Department of Treasury*, where quitclaim deeds and attempts to contractually secure debt crossed paths resulting in what the Michigan Department of Treasury characterized as a tax avoidance mechanism.[17]

D. Accusations of Discrimination

Woodbury v. Res-Care Premier, Inc. was another case where a homeowner's association and a disenfranchised homeowner were in direct conflict, this time over whether or not a for-profit adult fostercare chain could purchase the homeowner's home over the homeowners association's objections.[18] However, in *Woodbury*, the de facto corporation doctrine and accusations of discrimination[19] demonstrated how real property can become intertwined with the outwardly impersonal nature of real property law. Accusations of discrimination emerged again, this time intertwined with real estate development and option contracts in *HDC, LLC v. City of Ann Arbor* before the Sixth Circuit Court of Appeals.[20]

E. Damages

The Plaintiff in *Price v High Pointe Oil Co.* suffered the complete destruction of her home at the hands of a negligent crude oil company.[21] Awarded the fair market value of her house, the Plaintiff was also awarded non-economic damages for the emotional distress she suffered.[22] But, under Michigan law, non-economic damages are not a recognized remedy for the loss of real property due to negligence.[23] While the award was initially upheld by the Michigan Court of Appeals during the *Survey* period, the Michigan Supreme Court reversed, holding

17. Eastbrook Homes v. Dept. of Treasury, 296 Mich. App. 336; 820 N.W.2d 242 (2012); *appeal denied,* 493 Mich. 882; 812 N.W.2d 890 (2012).

18. Woodbury v. Res-Care Premier, Inc., 295 Mich. App. 232; 814 N.W.2d 308 (2012), *appeal granted,* 493 Mich. 881; 821 N.W.2d 888 (2012).

19. *Id.*

20. HDC, LLC v. City of Ann Arbor, 675 F.3d 608 (6th Cir. 2012).

21. Price v. High Pointe Oil Co., 294 Mich. App. 42, 45; 817 N.W.2d 583 (2011), *rev'd*, 493 Mich. 238; --N.W.2d-- (2013).

22. *Id.*

23. Price v. High Point Oil Co., 493 Mich. 238; --N.W.2d-- (2013).

non-economic damages are not an available remedy for the negligent destruction of real property.[24]

III. SIGNIFICANT STATE AND FEDERAL CASES INVOLVING MICHIGAN REAL PROPERTY LAW

A. Michigan State Court Cases

1. Residential Funding Co., L.L.C. v. Saurman

One of the most important cases decided by the Michigan Supreme Court in recent years, *Residential Funding Company, L.L.C. v. Saurman*[25] held the record-holder of a mortgage could foreclose by advertisement without owning the rights to the promissory note underlying the mortgage.[26] This holding was based on the Michigan Supreme Court's determination that owning legal title to a security lien contingent on the satisfaction of a debt authorizes an individual or entity to foreclose by advertisement under MCLA section 600.3204(1)(d).[27]

MERS was formed in 1995 to allow mortgage servicing rights and mortgage ownership to be electronically tracked to simplify the common practice of bundling mortgages into portfolios and selling these mortgage portfolios in the mortgage-backed securities market.[28] MERS is owned

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24. *Id.*

25. Residential Funding Co. v. Saurman (*Saurman II*) 490 Mich. 909, 909-910; 805 N.W.2d 183 (2011).

26. *Id.*

27. *Id.*; MICH. COMP. LAWS ANN. § 600.3204(1)(d) (West 2012). MCLA section 600.3204(1) provides:

> (1) Subject to subsection (4), a party may foreclose a mortgage by advertisement if all of the following circumstances exist:
> (a) A default in the condition of the mortgage has occurred, by which the power to sell became operative.
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.
> (c) The mortgage containing the power of sale has been properly recorded.
> (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.

28. John T. Gregg & Patrick E. Mears, *Sixth Circuit Issues "Final Chapter" on Electronic Registration System's Role as Foreclosing Mortgagee in Michigan*, THE NAT'L LAW REVIEW, July 8, 2012, *available at* http://www.natlawreview.com/article/sixth-circuit-issues-final-chapter-electronic-registration-system-s-role-foreclosing.

by twenty-four of the top lenders in the United States, among them Citigroup, JPMorgan Chare, and Wells Fargo.[29] It has been estimated that MERS owns or controls between one half to two-thirds of all residential mortgages in the United States.[30] Lenders and MERS work together in the following manner: when a borrower and a lender enter into a loan agreement secured with a mortgage, MERS is identified in the mortgage documents as the lender's nominee and/or the mortgagee under mortgage's terms.[31] While the lender is the note holder, MERS either owns the mortgage lien created by the mortgage loan or, by virtue of its role as the lender's nominee and the mortgagee, the mortgage will authorize MERS to foreclose on the mortgage if the mortgagor defaults.[32] Additionally, MERS can transfer the interest in the note underlying the mortgage amongst MERS lenders as the lender's identified nominee and the mortgagee of record.[33]

In *Saurman*,[34] MERS[35] held multiple mortgages as nominee and mortgagee for a single lender.[36] When the borrower-Plaintiffs defaulted on their payments under the lender's notes, MERS—not the lender—initiated foreclosure by advertisement proceedings pursuant to MCL 600.3201.[37] MERS purchased the properties at foreclosure sale, and

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29. Mike McIntire, *Tracking Loans Through A Firm That Holds Millions*, N.Y. TIMES, Apr. 23, 2009, http://www.nytimes.com/2009/04/24/business/24mers.html?ref=business&_r=0. *See also About Us*, MERS, http://www.mersinc.org/about-us/about-us (last visited Apr. 14, 2013).

30. *Id. See also* Christopher Ketcham, *Stop Payment! A Homeowner's Revolt Against the Banks.* HARPER'S MAGAZINE, Jan. 2012, *available at* http://harpers.org/archive/2012/01/stop-payment-a-homeowners-revolt-against-the-banks/.

31. *See FAQs,* MERS, http://www.mersinc.org/about-us/faq#aremersloansrecorded (last visited Jan. 29, 2013).

32. *See* Gregg & Mears, *supra* note 28.

33. *See FAQs,* MERS, http://www.mersinc.org/about-us/faq#whatdoesmersdoforlenders (last visited Jan. 29, 2013).

34. These facts form the basis for both *Saurman I* and *Saurman II.*

35. Lenders in the mortgage industry created MERS to track their ownership interests in securitized residential mortgages. *See About Us,* MERS, http://www.mersinc.org/about-us/about-us (last visited Jan. 29, 2013); *See also About Us,* MERS, http://www.mersinc.org/about-us/our-business (last visited Jan. 29, 2013). MERS mortgage is initially recorded in the county clerk's office with "Mortgage Electronic Registration Systems, Inc." named as nominee for the underlying lender/note-holder. *See FAQs,* MERS, http://www.mersinc.org/about-us/faq#aremersloansrecorded (last visited Jan. 29, 2013). The interest in the underlying note can then be transferred among MERS members without the necessity of recording an assignment of mortgage with the county clerk. *See FAQs,* MERS, http://www.mersinc.org/about-us/faq#whatdoesmersdoforlenders (last visited Jan. 29, 2013).

36. *Saurman I*, 292 Mich. App. at 325-26.

37. *Id.* at 326-27.

subsequently conveyed them by quit-claim to the original lender's successors in interest.[38] When the successor lenders later initiated eviction actions, the borrower-Plaintiffs challenged the MERS foreclosures, asserting MERS did not have authority to foreclose by advertisement.[39] The borrower-Plaintiffs argued that as the mortgagee, MERS did not have an interest in the underlying note that acted to secure the mortgage, and consequently MERS lacked standing to foreclose under Michigan law, rendering any MERS non-judicial foreclosure void or voidable.[40]

While this argument initially found favor before the Michigan Court of Appeals in *Saurman I*, the Michigan Supreme Court overturned the court of appeals decision in *Saurman* because it found the decision "inconsistent with established legal principles governing Michigan's real property law . . . ."[41] One of those established legal principles cited by the Michigan Supreme Court was that it is not necessary for the mortgagee and the note-holder to be the same person or entity.[42]

In the underlying court of appeals case, the majority determined MERS could not foreclose by advertisement on homes because, as nominee and mortgagee under the mortgage agreement, "MERS did not own the indebtedness, own an interest in the indebtedness secured by the mortgage, or service the mortgage."[43]

The court of appeals majority stated:

> The separation of the note from the mortgage in order to speed the sale of mortgage debt without having to deal with all the 'paper work' of mortgage transfers appears to be the sole reason for MERS's existence. The flip side of separating the note from the mortgage is that it can slow down the mechanism of foreclosure by requiring judicial action rather than allowing foreclosure by advertisement.[44]

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38. *Id.* at 327.
39. *Id.*
40. *Id.*
41. *Saurman II*, 490 Mich. at 909.
42. *Id.* at 910 (citing Adams v Niemann, 46 Mich. 135, 137; 8 N.W. 719 (1881); Canvasser v. Bankers Trust Co., 284 Mich. 634, 639; 280 N.W. 71 (1938)).
43. *Saurman I*, 292 Mich. App. at 342.
44. *Id.* at 342.

However, the Michigan Supreme Court completely rejected the position taken by the court of appeals' majority, and instead adopted the reasoning of the *Saurman I* dissent in its entirety.[45]

The *Saurman I* dissent reasoned three parties may foreclose by advertisement under MCLA section 600.3204(1)(d): first, the owner of the indebtedness the mortgage secures; second, the mortgage servicer; and third, an "owner of *an interest* in the indebtedness secured by the mortgage."[46] Because the legislature laid out three different categories of parties that could foreclose by advertisement under MCLA section 600.3204(1)(d), it would follow that an owner of an interest in the debt the mortgage secured could be a separate person or entity apart from the holder of the note or the mortgage servicer, yet still maintain the ability to foreclose by advertisement.[47]

The supreme court, adopting the *Saurman I* dissent, stated:

> We discern no indication that when the Legislature amended MCL 600.3204(1) . . . it meant to establish a new legal framework in which an undisputed record holder of a mortgage, such as MERS, no longer possesses the statutory authority to foreclose. Rather . . . the Legislature's use of the phrase "interest in the indebtedness" to denote a category of parties entitled to foreclose by advertisement indicates the intent to include mortgagees of record among the parties entitled to foreclose by advertisement, along with parties who 'own [] the indebtedness' and parties who act 'as the servicing agent of the mortgage.' We therefore reverse the Court of Appeals' decision because it erroneously construed MCL 600.3204(1)(d).[48]

It did not take long for the effects of *Saurman II* to be noticed. The Michigan Court of Appeals, now bound by the precedent set in *Saurman II*, held in *Fawaz v. Aurora Loan Services, LLC* that a servicer who received an assignment from MERS could foreclose by advertisement because the servicer "stood in MERS shoes and had the same authority to foreclose under MCLA section 600.3204(1)(d)."[49] Similarly, the United States District Court for the Eastern District of Michigan determined in

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45. *Saurman II*, 490 Mich. at 909; *Saurman I*, 292 Mich. App. at 343 (Wilder, J., dissenting).

46. *Saurman I*, 292 Mich. App. at 346.

47. *Id.*

48. *Saurman II*, 490 Mich. at 910.

49. Fawaz v. Aurora Loan Servs., LLC, No. 302840, 2012 WL 1521589, at *2 (Mich. Ct. App., May 1, 2012).

Wright v. Mortgage Electronic Registration Systems, Inc., that "the recorded assignment of the mortgage from MERS to [the bank-assignee] establishes a record chain of title from the original mortgage holder, MERS, to the current mortgage holder, [the bank-assignee]. [The bank-assignee] owns an interest in the indebtedness securing the mortgage . . . and is therefore permitted to foreclose by advertisement . . . ."[50] Additionally, the Sixth Circuit Court of Appeals upheld and applied *Saurman II* in *Hargrow v. Wells Fargo Bank, NA*, an unpublished decision holding that a nominee and mortgagee could assign a mortgage and subsequently foreclose by advertisement.[51]

However, *Saurman II*'s logic has not been universally accepted, with some states, such as New York and Washington, rejecting the concept that MERS has the ability to foreclose by advertisement without holding the underlying note.[52]

2. Greenville Lafayette, LLC v. Elgin State Bank

In this case, the mortgagor-Plaintiff sought an injunction against the Defendant-mortgagee's pending foreclosure by advertisement.[53] When the mortgagee's motion for summary disposition was granted by the county circuit court, the mortgagor appealed to the Michigan Court of Appeals.[54] The court of appeals reversed the county circuit court's

50. Wright v. Mortg. Elec. Registration Sys., Inc., No. 11-12756, 2012 WL 1060069, at *5 (E.D. Mich. Mar 29, 2012).

51. Hargrow v. Wells Fargo Bank, NA, 491 Fed. App'x. 534 (6th Cir. 2012).

52. *See* U.S. Bank Nat'l Ass'n. v. Dellarmo, 942 N.Y.S.2d 122 (N.Y. App. Div. 2012); Bain v. Metro. Mortg. Grp., 285 P.3d 34 (Wash. 2012). In the wake of the *Saurman II*, the "produce the note" strategy gained prominence. *See* Anne Batte, *"Produce the Note" Strategy for Judicial and Non-Judicial States (Technique Used to Stall Foreclosures)*, OPERATION RESTORATION, http://www.operationrest.org/ProducetheNote (last visited Apr. 14, 2013); *see* Sallie v. Fifth Third Bank, 297 Mich. App. 115; 824 N.W.2d 238 (2012).

> [T]he foreclosure statute 'does not require that the mortgagee produce the underlying note in order to foreclosure a mortgage by advertisement. In the case at bar, the Defendant met all the requirements to foreclose by advertisement . . . [d]efendant provided unrefuted testimony that the lost note was never transferred, assigned or sold. By establishing its continuing ownership of Plaintiff's debt, Defendant eliminated the risk that Plaintiff would face multiple collections on the same debt . . . [m]oreover, Defendant did not institute an action to recover the debt secured by the note as described in MCL 600.3204(1)(b). Accordingly, Defendant is entitled to foreclose on the mortgage notwithstanding the loss of the note . . . .

Id. (citing George v. Ludlow, 66 Mich 176, 179; 33 N.W. 169 (1887)).

53. Greenville Lafayette, LLC v. Elgin State Bank, 296 Mich. App. 284, 285; 818 N.W.2d 460 (2012).

54. *Id.* at 286.

decision, holding that when guarantees were part of the underlying indebtedness the mortgage was intended to secure, a separate existing action seeking to enforce the guaranties invalidated the mortgagee's foreclosure by advertising proceedings.[55]

Generally, mortgagees may simultaneously bring separate actions to collect from a mortgage guarantor and foreclose on the mortgage because guaranties are not typically included in the debt the mortgage secures.[56] However, the mortgage in *Greenville* provided the guaranties for that mortgage were included in the indebtedness that the mortgage served to secure.[57] The applicable Michigan statute, MCL section 600.3204,[58] does not define what constitutes "the debt secured by the mortgage."[59] Therefore, the mortgage security instrument itself must define the nature of the debt the mortgage secures.[60]

As such, the specific language used in the mortgage security instrument at issue in *Greenville* controls—and that language states the guaranties were not separate and independent obligations from the debt the mortgage served to secure.[61] Accordingly, since the mortgage security instrument at issue defined the debt the mortgage secured as including the guaranties, the prior action brought against the guarantors was deemed by the court of appeals to be an action to recover the debt secured by the mortgage.[62] Consequently, the later foreclosure by advertisement was invalid because foreclosure by advertisement is only permitted if no other action has been "instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage."[63] The previous action to enforce the guaranties effectively nullified the subsequent foreclosure action because the wording of the mortgage

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55. *Id.* at 291-92.

56. *Id.* at 288 (citing United States v. Leslie, 421 F.2d 763, 766 (6th Cir. 1970); Mazur v. Young, 507 F.3d 1013, 1019 (6th Cir. 2007) (applying Michigan law)).

57. *Greenville Lafayette, LLC*, 296 Mich. App. at 285-286.

58. The applicable portion of MICH. COMP. LAWS ANN. § 600.3204 provides:

> (1) Subject to subsection (4), a party may foreclose a mortgage by advertisement if all of the following circumstances exist:
>
> (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage; or, if an action or proceeding has been instituted, the action or proceeding has been discontinued; or an execution on a judgment rendered in an action or proceeding has been returned unsatisfied, in whole or in part.

59. *See, supra* note 27. *See also Greenville Lafayette, LLC*, 296 Mich. App. at 291.

60. *Greenville Lafayette, LLC*, 296 Mich. App. at 291.

61. *Id.* at 292.

62. *Id.*

63. *Id.*

agreement linked the guaranties with the underlying debt securing the mortgage.

3. Wells Fargo Bank, N.A. v. Cherryland Mall, Limited Partership

Like the mortgage agreement in *Greenville Lafayette*, the underlying promissory note in *Wells Fargo Bank, N.A. v. Cherryland Mall, LP* had a similar dispositive effect. In this case involving a specific type of loan—a commercial mortgage-backed securities loan (CMBS loan)[64]—the Michigan Court of Appeals determined the Defendant's failure to remain solvent caused it to lose its status as a single purpose entity,[65] and in turn violating the loan's single purpose entity requirements, which then resulted in the loan becoming fully recourse.[66]

In *Cherryland Mall*, when the Plaintiff moved to foreclose by advertisement, the subsequent sheriff's sale left a $2.1 million deficiency.[67] When the case reached the Michigan Court of Appeals, the court of appeals ruled that the Plaintiff was permitted to recover the deficiency from the Defendant because the Defendant failed to maintain its single purpose entity status as required by the mortgage due to its insolvency.[68]

The Defendant argued the mortgage had been extinguished once the foreclosure by advertisement procedure had been completed, and thus the Plaintiff's suit seeking to recover the deficiency was barred because the mortgage no longer existed and thus its terms could no longer be enforced.[69] The court of appeals rejected this argument because suits to recover deficiencies under Michigan law are not based on the terms of the mortgage; rather such suits are based on the terms of the note underlying the mortgage.[70] Unfortunately for the Defendants, the note underlying the Plaintiff's mortgage provided that the debt would become fully recourse if the Defendant failed to "maintain its status as a single purpose entity as required by, and in accordance with the terms and

64. Wells Fargo Bank, N.A. v. Cherryland Mall Ltd. P'ship, 295 Mich. App. 99; 812 N.W.2d 799, 802 (2011).

65. A single purpose entity (SPE), according to STANDARD & POORS, U.S. CMBS LEGAL AND STRUCTURED FINANCE CRITERIA, 89 (2003), "is an entity, formed concurrently with or immediately prior to the subject transaction, that is unlikely to become insolvent as a result of its own activities and that is adequately insulated from the consequences of any related party's insolvency."

66. *Wells Fargo Bank*, 295 Mich. App. at 128.

67. *Id.* at 105.

68. *Id.* at 128.

69. *Id.* at 108.

70. *Id.* at 109.

provisions of the Mortgage . . . ."[71] Therefore, the note provided the Plaintiffs with the legal basis to pursue a post-foreclosure sale action for the loan deficiency against the Defendant.[72]

The Defendant's next argument was that the mortgage's single purpose entity requirements had not been violated by virtue of the Defendant's insolvency.[73] However, this argument was also rejected by the court of appeals based on the language of the mortgage agreement clause that laid out the requirements Defendant had to meet in order to maintain its single purpose entity status.[74] Solvency was listed as one of the mortgage's fourteen requirements for single purpose entity status;[75] therefore, the Defendant's failure to remain solvent constituted a violation of the single purpose entity requirements and rendered the note fully recourse. [76] As such, the Plaintiffs had the right to recover the deficiency from the Defendants based on the mortgage agreement's terms.[77]

4. CitiMortgage, Inc. v. Mortgage Electronic Registration Systems, Inc.

CitiMortgage, Inc. v. Mortgage Electronic Registration Systems, Inc. focused on the application of what is known as the doctrine of equitable subrogation.[78] Under Michigan's race-notice statute, a first recorded mortgage has priority over a mortgage recorded later unless equity permits the application of equitable subrogation.[79] In *CitiMortgage*, the Michigan Court of Appeals held that equitable subrogation can be applied in cases where "the senior mortgagee discharges its mortgage of record and contemporaneously takes a replacement mortgage, as often occurs in the context of refinancing . . . ."[80] The court of appeals was very careful to state that "the lending mortgagee seeking subrogation . . . *must be the same lender* that held the original mortgage before the intervening interest arose . . . [f]urthermore, any application of equitable

71. *Id.* at 110.
72. *Wells Fargo Bank*, 295 Mich. App. at 110.
73. *Id.*
74. *Id.*
75. *Id.* at 120-21.
76. *Id.* at 128.
77. *Id.*
78. CitiMortgage, Inc. v. Mortg. Elect. Registration Sys., 295 Mich. App. 72; 813 N.W.2d 332 (2011).
79. MICH. COMP. LAWS ANN. § 565.25(1),(4) (West 2006); *See also* Ameriquest Mtg. Co. v. Alton, 273 Mich. App. 84, 99-100; 731 N.W.2d 99 (2006).
80. *CitiMortgage*, 295 Mich. App. at 77.

subrogation is subject to a careful examination of the equities . . . and potential prejudice to the intervening lienholder."[81] Additionally, the doctrine of equitable subrogation cannot be applied when the party seeking subrogation is a mere volunteer.[82]

5. Kim v. JPMorgan Chase Bank, NA

In this case, the Plaintiffs appealed the Macomb County Circuit Court's order granting the Defendant bank's motion for summary disposition.[83] The Plaintiffs had refinanced their home with a $615,000 loan from Washington Mutual Bank (WaMu) and, as security for the loan, the Plaintiffs granted a mortgage on the home.[84] WaMu did not fare well in the years after being granted a mortgage on the Plaintiffs home, and eventually the Defendant acquired WaMu's loans and loan commitments from the Federal Deposit Insurance Corporation (FDIC).[85]

Unfortunately, the Plaintiffs defaulted on their loan payments, which resulted in the Defendant initiating a foreclosure by advertisement on the home used to secure Plaintiff's loan from WaMu's.[86] As the Michigan statute requires, the Defendant published a notice of foreclosure in the proper county weekly newspaper for four weeks and held a sheriff's sale.[87] At the sheriff's sale, the Defendant purchased the property for $218,000.[88]

Five months after the sheriff's sale, the Plaintiffs filed suit against the Defendant seeking to set aside the sheriff's sale.[89] When the Defendant brought a motion for summary disposition under MCR 2.116(c)(8), (10),[90] the Plaintiffs responded by arguing the Defendant did not have the authority to conduct a foreclosure by advertisement proceeding because the Defendant had failed to properly record its interest in the Plaintiff's mortgage before conducting the sheriff's sale.[91] The circuit court was not persuaded by the Plaintiffs' argument—rather, the circuit court followed the reasoning of a Michigan Attorney General

81. *Id.*
82. *Id.* at 80-81.
83. Kim v. JPMorgan Chase Bank, NA., 295 Mich. App. 200; 813 N.W.2d 778 (2012), *aff'd in part, rev'd in part*, 493 Mich. 98; 825 N.W. 2d 329 (2012).
84. *Id.* at 202.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Kim*, 295 Mich. App. at 202.
90. *Id.*
91. *Id.*

opinion,[92] which determined that the Defendant was not required to record its interest in the mortgage before commencing the sheriff's sale because the Defendant had acquired an interest in the mortgage by operation of law.[93]

The court of appeals did not find the circuit court or the Attorney General's, reasoning very sound, and instead held that the Defendant was indeed required to record its interest in the Plaintiffs' mortgage[94] because the Defendant had not acquired by merger, but by assignment.[95] The FDIC had acquired an interest in WaMu's assets by operation of law, *not* the Defendant.[96] As a receiver, the FDIC was, by operation of law, the successor to WaMu and the "rights, titles, powers, and privileges . . . ."[97] WaMu's assets included the Plaintiff's mortgage.[98] Accordingly, the FDIC had the ability to dispose of WaMu's assets, and exercised this ability when it sold the assets to the Defendant pursuant to a purchase and assumption agreement.[99] Unlike the transfer of assets to the FDIC,[100] a contract dictated the transfer of WaMu's assets to the Defendant.[101]

Therefore, the court of appeals held the Defendant did not have the authority to foreclose by advertisement because the Defendant had not recorded its interest in the mortgage before the sheriff's sale commenced.[102] The court of appeals reversed the lower court's grant of summary disposition in the Defendant's favor and remanded the case back to the lower court without retaining jurisdiction.[103]

6. Young v. Independent Bank

In *Young v. Independent Bank*[104] foreclosure proceedings had been initiated by the Defendant bank prior to the Plaintiff filing for Chapter 7 bankruptcy.[105] Subsequent to the Plaintiff's bankruptcy filing, the Defendant bank filed the appropriate motions to conduct the foreclosure

92. *Id.* at 202-03 (referencing Necessity of Recording Mortgage Before Initiating Foreclosure by Advertisement, Op. Mich. Att'y Gen. No 7147 (Jan. 8, 2004)).
93. *Id.* at 203.
94. *Id.* at 208
95. *Kim*, 295 Mich. App. at 205.
96. *Id.* at 207.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Kim*, 295 Mich. App. at 207.
102. *Id.* at 208.
103. *Id.*
104. Young v. Indep. Bank, 294 Mich. App. 141; 818 N.W.2d 406 (2011).
105. *Id.* at 142.

outside of the bankruptcy court's jurisdiction.[106] Before and during the Plaintiff's bankruptcy proceedings, the Plaintiff disputed the Defendant bank's foreclosure action, but did not file a lawsuit formally challenging the foreclosure at that time.[107] While the bankruptcy trustee and the Plaintiff's bankruptcy attorney were aware of the Plaintiff's conflicts with the Defendant bank, the Plaintiff did not list a potential lawsuit against the Defendant bank for actions taken in connection with its foreclosure action.[108]

Less than a month after the bankruptcy court entered a discharge in the Plaintiff's bankruptcy proceeding, the Plaintiff filed suit against the Defendant bank in state circuit court.[109] In response, the Defendant bank brought a motion to dismiss the Plaintiff's claim for lack of standing, arguing that any interest in Plaintiff's cause of action belonged not to the Plaintiff but rather to the bankruptcy estate, which the state circuit court granted.[110] The Plaintiff appealed, arguing that her interest in a cause of action against the Defendant bank was an abandoned asset that had reverted back to her because the bankruptcy trustee knew the Defendant bank had instituted a foreclosure action and that the Plaintiff had disputes with the Defendant bank regarding that foreclosure action—albeit not in the form of a filed lawsuit.[111]

The Michigan Court of Appeals disagreed with the Plaintiff's argument, and affirmed the holding of the state circuit court.[112] Under *Kuriakuz v. Community National Bank of Pontiac*,[113] a bankruptcy debtor has no standing to pursue causes of action known at the time of the bankruptcy filing unless the trustee has abandoned that vested interest or the bankruptcy court permits the debtor to proceed with the cause of action.[114] The Plaintiff argued that the trustee had abandoned the Plaintiff's cause of action against the Defendant bank when the bankruptcy trustee did not list the Plaintiff's potential cause of action against the Defendant bank in his report, despite having knowledge of the Defendant bank's foreclosure action filed prior to bankruptcy and the Plaintiff's informal disputes with the Defendant bank regarding its pre-bankruptcy foreclosure action.[115] The court of appeals rejected the

106. *Id.*
107. *Id.*
108. *Id.* at 141-42.
109. *Id.* at 143.
110. *Young*, 294 Mich. App. at 143.
111. *Id.*
112. *Id.* at 143.
113. 107 Mich. App. 72, 75; 308 N.W.2d 658 (1981).
114. *Id.*
115. *Young*, 294 Mich. App. at 147.

Plaintiff's argument, asserting that under *Kuriakuz*,[116] "an unscheduled asset cannot be abandoned."[117] While a bankruptcy trustee must know about an asset to abandon it, the trustee's knowledge becomes irrelevant because the burden to list an asset belongs solely to the debtor.[118] While Michigan courts had not considered the exact issue of whether potential causes of action had to be listed on a bankruptcy schedule, the court of appeals determined that potential causes of action must be listed on a bankruptcy schedule, citing other jurisdictions which had held similarly in support.[119]

Therefore, since the Plaintiff had not listed the potential claim against the Defendant bank among her scheduled assets, and an unscheduled asset cannot be abandoned, the Plaintiff lacked standing to bring a suit against the Defendant bank.[120]

7. Sallie v. Fifth Third Bank

In 2000, the Plaintiff and his wife obtained a loan from a bank secured by a mortgage on their home.[121] In 2009, the Plaintiff defaulted on the loan, but the Defendant, who had merged with the bank that had taken the Plaintiff's mortgage as security for its loan, could not locate the promissory note when the Defendant initiated foreclosure proceedings.[122] The Plaintiff subsequently challenged the validity of the foreclosure based on the Defendant's failure to produce the promissory note.[123] The trial court was not persuaded by the *Plaintiff's* argument, and granted summary disposition in favor of the Defendant.[124]

When the case came before the Michigan Court of Appeals, the court of appeals determined that "[a] mortgagee may foreclose on a mortgage without producing the note secured by the mortgage. In order to do so however, the mortgage must produce a valid mortgage and power of sale."[125] The *Sallie* court also took care to note that Michigan's

116. *Kuriakuz*, 107 Mich. App. at 75-77.

117. *Young*, 294 Mich. App. at 147.

118. *Id.* at 147 (citing Jeffrey v. Desmond, 70 F.3d 183, 186 (1st Cir. 1995)).

119. *Id.* at 144-45. The sixth circuit had previously determined in *White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 484 (2010) that when a bankruptcy debtor "clearly knew the factual basis" for a cause of action but did not disclose the potential cause of action to the bankruptcy court, the potential cause of action was an asset that "properly belong[ed] to the bankruptcy estate."

120. *Id.* at 147-48.

121. Sallie v. Fifth Third Bank, 297 Mich. App. 115, 117; 824 N.W.2d 238 (2012).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 118 (citing Snyder v. Hemingway, 47 Mich. 549, 553; 11 N.W. 381 (1882)).

foreclosure statute "does not require that the mortgagee produce the underlying note in order to foreclose a mortgage by advertisement."[126] Accordingly, the Michigan Court of Appeals held that the Defendant met all the requirements to foreclose by advertisement and was entitled to foreclose on the mortgage "notwithstanding the loss of the note."[127] In addition to meeting the statutory requirements to foreclose by advertisement, the Defendant also "provided unrefuted testimony that the lost note was never transferred, assigned, or sold. By establishing its continuing ownership of the Plaintiff's debt, Defendant eliminated the risk Plaintiff would face multiple collections on the same debt."[128] Thus, summary judgment in favor of the Defendant was affirmed, and the foreclosure remained valid.[129]

8. Eastbrook Homes, Inc. v. Department of Treasury

The Plaintiff was a residential building company that constructed and sold custom built homes.[130] During a purchase transaction with a buyer, the Plaintiff's development company issued a warranty deed to the buyer, and would pay the transfer tax on the value of the undeveloped property at the time of the developer's conveyance to the buyer.[131] At the same time, the buyer would contract with the Plaintiff-builder to construct a home custom built to the buyer's specifications.[132] The purchase agreement for the property would only include "the value of the real property without the value of the later construction."[133]

The building contract between the buyer and the Plaintiff-builder would only include the cost of construction and not the value of the underlying real property.[134] To secure the contract price, the Plaintiff-builder would require the buyer to quitclaim the property back to the Plaintiff-builder.[135] Upon the home's completion, the Plaintiff-builder would quitclaim the property back to the buyer.[136]

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126. *Id.* at 119.
127. *Sallie*, 297 Mich. App. at 119-20.
128. *Id.* at 119 (citing George v. Ludlow, 66 Mich 176, 179; 33 N.W. 169 (1887)).
129. *Id.* at 119-20.
130. Eastbrook Homes, Inc. v. Dep't of Treasury, 296 Mich. App. 336, 338; 820 N.W.2d 242, 246, *leave to appeal denied*, 493 Mich. 882; 821 N.W. 2d 890 (2012).
131. *Id.* at 339.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Eastbrook*, 296 Mich. App. at 339.

The Plaintiff argued that because the quitclaim deeds were made to create a security interest in the property or to discharge a security interest in the same property, the quitclaim deeds were subsequently exempt from the State Real Estate Transfer Tax Act (SRETTA) transfer tax.[137] The Michigan Department of Treasury (Treasury Department) thought otherwise.[138] According to the Treasury Department, the transfer from the developer to the buyer was illusory, and in all actuality, nothing more than a tax avoidance mechanism to prevent the Plaintiff from having to pay tax on the improved value of the property.[139] The Tax Tribunal found that the doctrine of equitable mortgages exempted the conveyances from transfer taxes because the deeds were given as a security or assignment or discharge of a security interest and thus exempt under sections 3 and 6 of SRETTA.[140]

On appeal, the Michigan Court of Appeals overturned the Tax Tribunal's determination, finding there was no basis in equity to reform the parties' quitclaim deeds to become mere security instruments.[141] Although the quitclaim deeds to the Plaintiff stated that "[t]his transfer is made for security purposes" and that the transfer was exempt from transfer tax, there was no language in the quitclaim deeds that reserved any property rights in the buyers.[142] Although Michigan recognizes equitable mortgages,[143] "[e]quity will create a lien only in those cases where the party entitled thereto has been prevented by fraud, accident or mistake from securing that to which he was equitably entitled."[144] Further, "A party that has an adequate remedy at law is not entitled to an equitable lien."[145] Therefore, "merely advancing money to improve real property with an understanding a lien would be given[,] will not create an equitable lien."[146]

Because there was no fraud, accident, or mistake that prevented the Builder and buyer from creating instruments that only created or discharged security instruments—instruments that would fall under the

137. *Id.*
138. *Id.* at 339-40.
139. *Id.*
140. *Id.* at 342-43; MICH. COMP. LAWS ANN. §§ 207.521-537 (West 2010).
141. *Id.* at 353.
142. *Eastbrook*, 296 Mich. App. at 349.
143. *Id.* at 352.
144. *Id.* at 352-53 (quoting Cheff v. Haan, 269 Mich. 593, 598; 257 N.W. 894 (1934)).
145. *Id.* at 353 (quoting Ypsilanti Charter Twp. v. Kircher, 281 Mich. App. 251, 284; 761 N.W. 2d 761 (2008)).
146. *Id.* (citing *Cheff*, 269 Mich. at 598).

SRETTA exception — there was no basis in equity to reform the parties' quitclaim deeds.[147]

9. Beach v. Township of Lima

In *Beach v. Township of Lima*,[148] the Michigan Supreme Court ruled that legal proceedings seeking to establish substantive property rights are independent from claims seeking to vacate, correct, or revise a recorded plat pursuant to the Land Division Act[149] (LDA). Therefore, until a property right is legally recognized, the LDA does not apply, which in turn makes a claim under the LDA only "appropriate when a party's interest arises from or is traceable to the plat or the platting process."[150]

Beach involved a dispute between the Plaintiffs and the Defendant township over property rights described in an unaltered plat dating from 1835.[151] The Plaintiffs' family had acquired land through different conveyances dating back to 1854.[152] The Defendant township purchased several lots between the years of 1954 and 2004, and intended to develop part of the purchased lots into ingress-egress roads to what would eventually be a fire department substation before litigation ensued.[153] The Plaintiffs were not pleased with the townships plans to develop part of its purchased lots located near their property into ingress-egress roads, and filed a quiet title action against the Defendant township.[154]

The Plaintiffs' claim was based on the contention that the Plaintiffs had adversely possessed the portions of the Defendant township's lots the Defendant township intended to develop into ingress-egress roads.[155] The Defendant township responded by filing a quiet title counterclaim against the Plaintiffs, asserting it had a right to develop ingress-egress roads because the portions of the lots where these roads were to be developed had been originally platted as streets.[156] The Plaintiffs and the Defendant township then proceeded to file cross-motions for summary disposition.[157]

147. *Id.* at 553-54.
148. 489 Mich. 99; 802 N.W. 2d 1 (2011).
149. MICH. COMP. LAWS ANN. §§ 560.101-.293 (West 2006).
150. *Beach*, 489 Mich. at 99.
151. *Id.* at 103.
152. *Id.*
153. *Id.*
154. *Id.* at 104.
155. *Id.*
156. *Beach*, 489 Mich. at 104.
157. *Id.*

The Defendant township argued that the Plaintiffs' "action should be dismissed because [the Plaintiffs] were required to file an action under the LDA to vacate portions of the plat."[158] The crux of the Plaintiffs' cross-motion for summary disposition was that the Plaintiffs had acquired title to the portions of the plat the township sought to develop into ingress-egress roads through adverse possession.[159] As such, the Defendant township could not develop what had originally been platted as streets into ingress-egress roads.[160]

While the trial court denied the Defendant township's motion, it ordered an evidentiary hearing to determine the appropriateness of the Plaintiff's summary disposition motion based on the adverse possession theory.[161] After the evidentiary hearing's conclusion, the trial court determined that because there were large trees that were 100 or more years old growing in the portions of the plat originally designated as streets, the Plaintiffs had adversely possessed those portions of the plat by farming as well as "maintaining private trails and fences on the disputed property."[162] The trial court proceeded to enter an order for the plat to be corrected, removing the portions originally designated as streets that the trial court determined the Plaintiffs had adversely possessed, even though it held the Plaintiffs were not required to bring their claim under the LDA.[163]

The Defendant township appealed, and the Michigan Court of Appeals affirmed the trial court's decision because the Plaintiff "did not expressly seek in this action to vacate, correct, or revise a dedication in a recorded plat," and therefore the Plaintiffs were not required to bring a claim under the LDA.[164]

When the case came before the Michigan Supreme Court, the majority stated: "[T]he township's challenge to Plaintiffs' claim required the [trial court] to resolve the merits of Plaintiffs' adverse possession claim *before* considering any claims regarding the plat's accuracy."[165] This was because if the Plaintiffs could not prove that they had adversely

158. *Id.*
159. *Id.*
160. *Id.*
161. *Id.*
162. *Beach*, 489 Mich. at 104.
163. *Id.*
164. *Id.* at 104-05 (quoting Beach v. Lima Twp., 283 Mich. App. 504, 509; 770 N.W. 2d 386, 391 (2009) *aff'd and remanded,* Beach v. Twp. of Lima, 489 Mich. 99; 802 N.W.2d 1 (2011)).
165. *Id.* at 110.

possessed the disputed land, the Defendant township would have superior title to the disputed land, leaving the plat accurate.[166]

The reason for the revision of a plat is to ensure that it "accurately reflects *existing* substantive property rights."[167] Thus, until the Plaintiffs established a substantive property right in the portions of the plat originally designated as streets through adverse possession, there was no reason to revise the plat because it would still "accurately reflect[] existing substantive property rights."[168] Therefore, Plaintiffs could not bring a claim under the LDA until they established they had a substantive property right through a quiet title proceeding.[169] Once the quiet title proceeding concluded, the LDA was implicated.[170] Accordingly, the Michigan Supreme Court affirmed the trial court's determination regarding the Plaintiff's adverse possession of the disputed land, but vacated the trial court's order to revise the plat.[171]

10. Redmond v. Van Buren County

In 1995, Plaintiffs purchased real property (the Property) within a subdivision.[172] The only vehicular access the Plaintiffs had to the Property was through an easement on adjacent property, secured by a gate (the Easement).[173] The Easement was conveyed to the homeowner's association in 1956.[174] According to adjacent lot-owners, all members of the association could use the Easement, and membership in the association transferred automatically when a member of the association transferred title to property in the subdivision.[175] Despite their purchase of the Property within the subdivision, the Plaintiffs were not offered membership to the association.[176] In 2006, the Plaintiffs were denied access through the gate to the Easement.[177] The Plaintiffs sued the association and its members for access to the Property, and claimed they had a right to use of the Easement based on prescription, implication and

166. *Id.*
167. *Id.* (emphasis added).
168. *Beach*, 489 Mich. at 110.
169. *Id.* at 110-11.
170. *Id.* at 111.
171. *Id.* at 121.
172. Redmond v. Van Buren Cnty., 293 Mich. App. 344, 348; 819 N.W.2d 912, 914 (2011), *appeal denied*, 491 Mich. 913; 811 N.W.2d 495 (2012).
173. *Id.* at 347.
174. *Id.*
175. *Id.* at 348.
176. *Id.* at 350.
177. *Id.* at 349.

necessity.[178] The trial court found there was no public dedication of the Easement, but a private dedication of the Easement to the association's members by prior conveyance, and/or by prescription and/or acquiescence.[179]

A valid common-law dedication of land to the public requires: (1) an intent of the owners of property to offer the property to the public for use; (2) acceptance of the owners' offer by public officials and maintenance of the property by public officials; and (3) use of the property by the public generally.[180]

In *Badeaux v Ryerson*, the Michigan Supreme Court determined that a common-law public dedication arose out of a deed—which the court determined to be void—that attempted to convey property to a nonlegal entity.[181] In *Badeaux*, a landowner conveyed to the Ottawa Tribe of Indians, land which was to be used as a burial site.[182] When the landowner later transferred the same property to another party, the other party challenged as void the deed to the Ottawa Tribe of Indians.[183] The court found that, although the transfer to the Ottawa Tribe of Indians was void by virtue of common-law dedication, the land was nonetheless subject to an easement held by the public for the purposes of using the land as a cemetery.[184] The court emphasized that the public had used the land as a cemetery before and after the attempted conveyance.[185] It further found that common law dedication need not be in writing and that "dedications have been established in every conceivable way by which the intention of the dedicator could be evinced."[186]

Finding there was no legal authority in Michigan addressing common-law private dedications—in an issue of first impression—the *Redmond* court applied the requirements for a public common-law dedication.[187] As evidenced by the failed conveyance of the easement to the association, and the previous access to the easement that was granted to the Plaintiffs and their predecessors, the court found that the facts and circumstances illustrated "that the Porters intended to dedicate [the Easement] to all the lot owners [in the subdivision] whose only means of

178. *Redmond*, 293 Mich. App. at 350.
179. *Id.* at 351-52.
180. *Id.* at 353 (citing Bain v. Fry, 352 Mich. 299, 305; 89 N.W.2d 485 (1958)).
181. Badeaux v. Ryerson, 213 Mich. 642, 646-47; 182 N.W. 22 (1921).
182. *Id.* at 644.
183. *Id.* at 645.
184. *Id.* at 649-50.
185. *Id.* at 649-50.
186. *Id.* at 647.
187. *Redmond*, 293 Mich. App at 353 (citing Bain v. Frye, 352 Mich. 299, 305; 89 N.W.2d 485 (1958)).

accessing their property by land" was through the easement.[188] Accordingly, the Plaintiffs maintained access to the Easement by private dedication.[189]

11. Price v. High Pointe Oil Company

In *Price v. High Pointe Oil Company*, the Plaintiff owned a home that had once been heated by an oil furnace.[190] To fill the furnace with the necessary fuel oil, an oil fill pipe was installed on the outside of the Plaintiff's home and was directly connected to the furnace's oil tank.[191] Eventually, the Plaintiff decided to change the method by which she heated her home from fuel oil to propane.[192] Her neighbor purchased her old fuel oil furnace and removed the tank and the furnace from the Plaintiff's basement before she had her new propane furnace installed.[193] The Plaintiff called the Defendant, her fuel oil servicer, and cancelled its services.[194] However, the Defendant inadvertently forgot to take the Plaintiff off of its "keep full" list.[195]

While the Plaintiff was at work one afternoon, one of the Defendant's employees attempted to fill what he believed to be her fuel oil furnace tank.[196] The Plaintiff had not altered the oil fill pipe located outside of her home since having her fuel oil furnace and tank removed a little over a year earlier.[197] So, the Defendant's employee hooked his truck's oil hose up to the Plaintiff's oil fill pipe, and began to pump fuel oil into the Plaintiff's basement.[198] When there were no signs of the tank being full after four or five minutes, the Defendant's employee suspected there was a problem.[199] When he looked into the basement, he saw fuel oil on the basement floor and immediately called 911.[200] A total of 396 gallons of fuel oil had been pumped into Plaintiff's basement, which seeped into the soil beneath the home causing the ground to become so

188. *Id.* at 357.
189. *Id.* at 359.
190. Price v. High Pointe Oil Co., 294 Mich. App. 42, 45; 817 N.W.2d 583 (2011), *rev'd*, 493 Mich. 238; 828 N.W.2d 660 (2013).
191. *Id.* at 46.
192. *Id.* at 45.
193. *Id.*
194. *Id.*
195. *Id.* at 45-46.
196. *Price*, 294 Mich. App. at 46.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.*

contaminated the Plaintiff's home had to be demolished.[201] It took six months before the Department of Environmental Quality informed the Plaintiff that "the excavation and cleanup of the soil had been completed and that no further action was required."[202]

Before the Plaintiff had a new home built on another portion of her property, she lived with her parents, in a duplex, and suffered from sleeplessness, inability to concentrate, and was prescribed an antidepressant to treat the symptoms she began to experience after her home had to be demolished as a result of the Defendant filling her basement with hundreds of gallons of fuel oil.[203] In addition to seeking economic damages from the Defendant for negligence, negligent infliction of emotional distress, trespass, nuisance, and a private citizen's suit under the Natural Resources and Environmental Protection Act,[204] the Plaintiff requested noneconomic damages for "annoyance, inconvenience, pain, suffering, mental anguish, emotional distress, and psychological injuries caused by the destruction of her house."[205]

The case went to trial on the Plaintiff's claims for trespass, nuisance, the private citizen's claim, and damages associated with the Plaintiff's negligence claim.[206] In regard to the damages for the Defendant's negligence, at the close of the trial the judge instructed the jury it could award the Plaintiff "non-economic damages, for things such as mental anguish and fright and shock, and denial of social pleasures and enjoyment in the use of the former home and embarrassment or humiliation."[207] The jury awarded the Plaintiff $100,000; the Defendant filed a motion for judgment notwithstanding the verdict and remittitur, which was denied by the trial judge.[208] The Defendants subsequently appealed the trial judge's denial of their motion.[209]

Price presented the Michigan Court of Appeals with a case of first impression—whether a Plaintiff can recover noneconomic damages for the destruction of real property.[210] The Defendant argued the Plaintiff was not entitled under Michigan law to recover non-economic damages that were a result of her home's destruction.[211] The trial court's

201. *Id.*
202. *Price*, 294 Mich. App. at 46.
203. *Id.* at 46-49.
204. *Id.* at 47 (citing MICH. COMP. LAWS § 324.1701 (2010)).
205. *Id.*
206. *Id.* at 48-49.
207. *Id.* at 49.
208. *Price*, 294 Mich. App. at 49.
209. *Id.*
210. *Id.* at 51.
211. *Id.*

instruction was upheld by the court of appeals, reasoning that "[n]oneconomic damages are generally recoverable in tort claims, and we are not convinced that noneconomic damages stemming from damage to or destruction of real property must or should be excepted from the general rule."[212]

However, in March of 2013, the court of appeals' decision in *Price* was reversed.[213] The Michigan Supreme Court determined it was inappropriate to award non-economic damages for the negligent destruction of real property because Michigan common law has long held that damages for the negligent destruction of real property are limited to the cost of the replacement or the repair of the destroyed property.[214] Accordingly, the Michigan Supreme Court determined non-economic damages for the negligent destruction of real property can only be available in the event the Michigan Legislature were to act and modify Michigan's common law.[215]

12. Woodbury v. Res-Care Premier, Inc.

In *Woodbury v. Res-Care Premier, Inc.*,[216] the dispute centered around the homeowner's sale of her in 2009 to a for-profit corporation that operated a chain of adult fostercare facilities around the country.[217] The Plaintiffs owned the property next door to the property the homeowner purchased in 1991 and subsequently sold to the chain of adult fostercare facilities.[218]

The properties involved in this case were part of a residential subdivision.[219] The subdivision had formed an incorporated homeowners association in 1941 (homeowner's association).[220] In 1993, the incorporated homeowner's association was automatically dissolved by the state of Michigan for failing to pay its annual filing fee for two consecutive years.[221] The homeowner's association filed renewal of

212. *Id.* at 60.
213. Price v. High Pointe Oil Co., 493 Mich. 238; 828 N.W.2d 660 (2013).
214. *Id.* at 245-50.
215. *Id.* at 263-64.
216. 295 Mich. App. 232, 234; 814 N.W.2d 308 (2012), *appeal granted* 493 Mich. 881; 821 N.W.2d 888 (2012).
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*

existence papers on October 13, 2009, the same day the complaint initiating this lawsuit was filed.[222]

The homeowner's association's articles of agreement dictated the covenants made in the agreement ran with the land, and that the subdivision was to remain residential, and no properties within it could be "used for any trade, commercial, industrial, or any other use whether or not herein specified, except for single family dwellings."[223] Additionally, the articles provided "no property in [the subdivision] shall be sold without first giving [the homeowner's association], thirty (30) days' notice thereof and first opportunity to purchase said property at a price equal to a bona fide offer."[224]

On July 20, 2009, the homeowner sent a short memorandum to the head of the homeowners' association informing him that she had sold her home and it was scheduled to go to closing in twenty-five days.[225] The homeowner also stated that because she did not receive notification of the three prior sales of property within the subdivision, she believed she was no longer required to provide notification of the pending sale of her property.[226] She stated she was unaware of the identity of the purchaser of her property, but provided the head of the homeowner's association with the name of her realtor and the name of the purchaser's realtor.[227]

Neither the homeowner, nor her realtor, were contacted about the pending sale of her property.[228] When the original purchaser, one of the investors in the chain of adult fostercare facilities, was unable to obtain the requisite financing, the chain itself proceeded to purchase the property under the same terms the original purchaser had negotiated.[229] The closing date for the property was moved to on or before September 30, 2009 and took place on September 25, 2009.[230] On October 7, 2009, the homeowner sent another memorandum to the head of the homeowner's association, as well as the named Plaintiffs in this case.[231] That memorandum stated that the new owner was the chain of adult fostercare facilities, and after the homeowner learned the identity of the new purchaser, she had contacted two individuals regarding the zoning

222. *Woodbury*, 295 Mich. App. at 234.
223. *Id.* at 235.
224. *Id.*
225. *Id.* at 236.
226. *Id.*
227. *Id.*
228. *Woodbury*, 295 Mich. App. at 236.
229. *Id.*
230. *Id.*
231. *Id.*

regulations who informed her "'group homes' are exempt from the law and cannot be refused or discriminated from a neighborhood."[232]

The homeowner's association was not pleased, and the Plaintiffs were concerned the homeowner's home was going to "be occupied by 'troubled youth/sex offenders,'" and called an emergency meeting of the homeowner's association to which the homeowner was not invited.[233] On October 12, 2009, legal counsel for the homeowners' association sent the homeowner a letter claiming she had violated the articles of agreement and that the homeowners' association was considering exercising its right to purchase the property.[234] The next day, this lawsuit was filed against the homeowner and the chain of adult fostercare facilities, seeking a permanent injunction to prevent the chain of adult fostercare facilities from occupying the property.[235] A preliminary injunction was granted, along with an expedited trial.[236]

The homeowner and the chain of adult fostercare facilities filed motions for summary disposition seeking judgment as a matter of law pursuant to the Marketable Record Title Act (MRTA),[237] as well as arguing the homeowner had not violated the articles of agreement as a group home is not considered a commercial use and that the only basis for the enforcement of the articles of agreement was discriminatory and unlawful.[238] In their corresponding motion for summary disposition, the Plaintiffs and the homeowners' association argued both the homeowner and the chain of adult fostercare facilities had both constructive and actual knowledge of the subdivision use restrictions and that the homeowners' association had acted within thirty days of when it had received notice of the sale.[239] Further, the Plaintiffs and the homeowners' association argued the discrimination claim could be severed from the action on the articles of agreement and that the homeowners' association existed at the time of the sale by virtue of statute and was still entitled to notice as provided under the articles of agreement.[240]

The trial court determined that the MRTA did not extinguish the use restriction in the articles of agreement because references to the articles of agreement had been re-recorded in deeds found in the homeowner's

232. *Id.* at 237.
233. *Id.*
234. *Woodbury*, 295 Mich. App. at 237.
235. *Id.* at 238.
236. *Id.* at 239.
237. MICH. COMP. LAWS ANN. §§ 565.101-.109 (West 2012).
238. *Woodbury*, 295 Mich. App. at 240.
239. *Id.*
240. *Id.*

chain of title.[241] The trial court also determined the homeowner's notice was insufficient because it was given for the sale to the investor, not the sale to chain of adult fostercare facilities.[242] Additionally, the homeowners' association had not waived its right to notice by not enforcing the notice provision regarding sales of property in the subdivision, but rather, elected not to exercise its right to enforce the notice provision.[243] The trial court set aside the sale between the homeowner and the chain of adult fostercare facilities and directed the Defendants that if they intended to renew their agreement they were to provide thirty days' notice to the homeowners' association, who would in turn have thirty days to exercise their right of first refusal.[244] The discrimination claims were determined to be moot at that time since the homeowners' association had not exercised its right of first refusal yet.[245] The chain of adult fostercare facilities appealed the finding that the discrimination claims were moot because the homeowners' association had not yet exercised its right of first refusal.[246]

The only issue the Michigan Court of Appeals address in this case was whether the homeowner was required to give notice to the homeowners' association when it had been dissolved in 1993 for not paying annual filing fees for two consecutive years.[247] The issue became whether or not the homeowners' association had de facto status after it had been dissolved because it had continued to collect money and fulfill its obligations to members.[248] The Michigan Court of Appeals found that the homeowners' association had not maintained de facto status, reasoning:

> This de facto legal existence, however, is just a legal creation. It provides retroactive *legal* existence to a corporation even though, at that moment in the past, *factually*, the corporation had no such existence. Thus, notwithstanding the fact [the homeowners' association's] reinstatement in October 2009 created some type of legal existence for those prior 16 years, the actuality is that [the homeowners' association] did not exist when the sale between Averill and Res-Care took place. Accordingly, we conclude that Averill had no obligation to

241. *Id.* at 241.
242. *Id.* at 242.
243. *Id.* at 241-42.
244. *Woodbury*, 295 Mich. App. at 242.
245. *Id.*
246. *Id.* at 242-43.
247. *Id.* at 243-44.
248. *Id.* at 249-50

> provide notice of the pending sale . . . because, although [the homeowners' association] obtained a retroactive legal existence, it was, at the time of the pending sale, a nonexistent corporation.[249]

Therefore, the Michigan Court of Appeals determined the trial court erred in holding the homeowners' association was entitled to notice of the sale from the homeowner and the chain of adult fostercare facilities and reversed the trial court's decision, remanding the case to the trial court to enter an order granting the Defendants' summary disposition motion.[250]

B. Michigan Federal Court Cases

1. HDC, LLC v. City of Ann Arbor

The Plaintiffs in *HDC, LLC v. City of Ann Arbor* brought a suit against the city alleging violations of the Fair Housing Act, as well as violations of state law.[251] The Plaintiffs were property developers who had entered into an option contract that provided they could purchase a piece of city owned property if certain conditions were met.[252] Among those conditions was the requirement that the Plaintiffs "obtain a demolition permit" by a certain date.[253] When the demolition permit was not obtained in a timely manner, the city terminated the option contract.[254]

In their complaint, the Plaintiffs alleged obtaining the demolition permit by the date specified in the option contract was impossible, and the city knew, or at least should have known, this fact.[255] Additionally, the Plaintiffs claimed the real reason for the option contract's termination was the city did not want the developers to complete their project because when it was completed, the project would accommodate disabled tenants.[256]

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249. *Id.* at 250-51.

250. *Woodbury*, 295 Mich. App. at 251.

251. HDC, LLC v. City of Ann Arbor, 675 F.3d 608, 610 (6th Cir. 2012). Additionally, the Fifth Circuit had determined that debtor's had a duty to disclose "contingent and unliquidated claims" among their assets. *In re* Coastal Plains, Inc., 179 F.3d 197, 208 (5th Cir. 1999).

252. HDC, 675 F.3d at 610.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

The Sixth Circuit rejected the Plaintiffs arguments for several reasons.[257] First, because the city voluntarily engaged the developer in contract negotiations, knowing the occupants the development would house (which included not only handicapped individuals, but also the chronically homeless and low-income individuals), the Plaintiffs' pleading failed to provide the necessary facts[258] to meet the plausibility standards the Plaintiffs' complaint of disparate treatment was required to satisfy to be considered well pled.[259] Additionally, the Sixth Circuit reasoned that because the Plaintiffs were a "sophisticated land development firm" and it was unlikely that the city could have designed an option agreement to which such a "sophisticated land development firm" would consent if the terms were ones that the developer could not feasibly meet under any circumstances.[260] Therefore, the Sixth Circuit affirmed the lower court's decision to dismiss the Plaintiffs' claims for failing to properly state a claim upon which relief could be granted.[261]

2. McCann v. U.S. Bank, N.A.

The Plaintiffs granted a mortgage on their home to a lender to secure a $120,000.00 loan.[262] The lender identified Mortgage Electronic Registration System, Inc. (MERS) as nominee and mortgagee, and America's Servicing Company (ASC) as the servicer, under the terms of the mortgage security agreement.[263] Approximately a year after the Plaintiffs granted the mortgage, MERS assigned the Plaintiff's mortgage to the Defendant.[264] After the Plaintiff's mortgage was assigned to the Defendant, the lender went out of business and ceased to exist.[265]

Five years after granting the mortgage, Plaintiffs fell behind on their monthly payments.[266] The Plaintiffs contacted their mortgage servicer and asked if the terms of the mortgage's repayment could be modified to a more reasonable rate.[267] A representative for the servicer informed the Plaintiffs to modify their mortgage repayments all they would have to do

257. *Id.*
258. *HDC*, 675 F.3d at 612-15 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Lindsay v. Yates, 498 F.3d 434, 440, n.7 (6th Cir. 2007)).
259. *Id.* at 612-13 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009)).
260. *Id.* at 612.
261. *Id.* at 615.
262. McCann v. U.S. Bank, N.A., 873 F. Supp. 2d 823, 827 (E.D. Mich. 2012).
263. *Id.* at 827-28.
264. *Id.* at 828.
265. *Id.*
266. *Id.*
267. *Id.*

was make a series of six payments.[268] The servicer representative initially referred to this series of modified payments as a "trial period," and then began to refer to it as a "forbearance plan."[269] Then, a year after the Plaintiffs contacted the servicer, the Defendant—who was the mortgagee by virtue of the assignment it received from MERS—moved to foreclose on the Plaintiff's home by advertisement.[270]

The Plaintiffs, upon receiving notice of the foreclosure auction, filed a complaint in the county circuit court requesting a temporary restraining order to halt the Defendant's foreclosure on their home as well as money damages and attorney fees.[271] The Plaintiffs claimed the Defendant did not have standing to foreclose their home by advertisement because MERS did not properly assign their mortgage to the Defendant.[272]

The Defendant successfully removed the suit to federal court, and then in lieu of answering the Plaintiffs' complaint, filed a motion to dismiss.[273] The magistrate judge recommended the United States District Court dismiss the Plaintiffs' complaint, and the United States District Court followed the magistrate judge's recommendation, completely rejecting the Plaintiffs' arguments.[274]

First, the Plaintiffs argued that the assignment of the mortgage to the Defendant bank by the MERS did not give the Defendant bank the authority to foreclose by advertisement because MERS was merely the nominee and did not have any interest in the promissory note underlying the mortgage at issue.[275] Both the magistrate judge and the district court judge rejected this argument based on the recent Michigan Supreme Court decision in *Residential Funding Company, LLC v. Saurman*[276] and based on the fact that the Defendant bank was indeed in possession of the promissory note at the time of the disputed foreclosure proceedings.[277] Additionally, the court determined Plaintiffs could not challenge the assignment based on numerous different Michigan holdings pertaining to

268. *McCann*, 873 F. Supp. 2d at 828.
269. *Id.*
270. *Id.*
271. *Id.* at 829.
272. *Id.*
273. *Id.*
274. *McCann*, 873 F. Supp. 2d at 827.
275. *Id.* at 829.
276. 490 Mich. at 909 (citing Livonia Props. Holdings, LLC v. 12840-12976 Farmington Rd. Holdings, L.L.C., 399 Fed. App'x 97, 102-03 (6th Cir. 2010); Bakri v Mortg. Elec. Reg. Sys., No. 297962, 2011 WL 3476818, at *4 (Mich. Ct. App. Aug. 9, 2011)).
277. *McCann*, 873 F. Supp. 2d at 829-30.

the ability of a debtor to challenge the assignability of a debt and the related promissory note.[278]

The Plaintiffs also argued that the Michigan Supreme Court decision in *Saurman* was inapplicable to the present case because *Saurman* addressed MERS's ability to foreclose by advertisement—not MERS's ability to assign the note to a bank that subsequently forecloses by advertisement.[279] However, a previous Eastern District of Michigan decision authored by Chief Judge Gerald Rosen determined that MERS's authority to enforce a mortgage as nominee for the lender also provided MERS with the authority to assign the mortgage on behalf of the lender.[280] Further, *Fortson v. Fed. Home Loan Mortgage*,[281] while persuasive and not binding, directly addressed the issue of whether a party assigned a mortgage by MERS could foreclose, answering that question affirmatively. Because MERS could indeed assign the mortgage, the Plaintiffs Fair Debt Collection Practices Act claims failed because those claims were based on the contention that the Defendant was not collecting on its own debt because MERS could not assign the mortgage to another entity.[282]

The Plaintiffs' claims based on breach of the alleged contract for the Defendant's alleged failure to send the Plaintiffs a permanent loan modification package with a decreased interest rate were also rejected.[283] The basis for rejecting the breach of contract claims was that any alleged promises made to Plaintiffs by Defendants employees, agents, or representatives regarding any alleged modification of the mortgage terms were unenforceable absent a written agreement with a signature from an agent of the Defendant with the proper authority.[284] The Plaintiffs' claims relating to fraud and promissory estoppel based on the rejected premise that there had been an enforceable loan modification between the Defendant and the Plaintiffs were rejected because the Eastern District of Michigan had routinely found that "misrepresentation claims based on alleged promises to modify home mortgages are barred by the Michigan Statute of Frauds."[285] Additionally, the Michigan Court of

278. *Id.* at 829-31 (citing *Livonia*, 399 F. App'x at 102; Bowles v. Oakman, 246 Mich. 674, 677; 225 N.W.2d 613, 614 (1929)).

279. *Id.* at 831.

280. *See* Luster v. Mortg. Elec. Registration Sys., No. 11-CV-14166, 2012 WL 124967, at *3 (E.D. Mich. Jan. 17, 2012).

281. No. 12-CV-10043, 2012 WL 1183692, at *3-6 (E.D. Mich. Apr. 9, 2012).

282. *McCann*, 873 F. Supp. 2d at 836.

283. *Id.* at 832-34.

284. *Id.*

285. *Id.* at 835-36 (citing Jarbo v. BAC Home Loans Servicing, No. 10-12632, 2010 WL 5173825 at *11); *see also* Bingham v. Bank of Am., No. 10-11917, 2010 WL

Appeals determined in *Crown Technology Park v. D & N Bank, FSB*,[286] that a party cannot bring any claim against a bank or other financial entity to "enforce the terms of an oral promise to waive a loan provision."

3. Osprey-Troy Officentre, L.L.C. v. World Alliance Financial Corporation

In *Osprey-Troy Officentre, L.L.C. v. World Alliance Financial Corporation*,[287] the Plaintiff was assigned the rights to a lease from the original landlord of a commercial office building in Troy, Michigan. The Defendant was the subtenant in a sublease agreement with an original lessee of office space within the commercial office building.[288] After executing the sublease agreement, the original lessee left Michigan and subsequently filed for bankruptcy in New York.[289] The original lessee's request to have its financial obligations under the lease was discharged, and the New York bankruptcy court granted this request despite the Plaintiff's objections.[290] After the original lessee was released from its financial obligations to Plaintiff, the Plaintiff brought this action against the Defendant.[291]

The district court determined that the relevant provisions of both the original lease and the subsequent sublease provided support for the contention that the Plaintiff was a third-party beneficiary of the sublease.[292] Specifically, the Plaintiff was identified as the "Landlord" in the sublease, and the sublease contained provisions stating it was to be governed "in accordance with the financial and other requirements that were imposed . . . under the terms of the original lease."[293] Additionally, the Defendant had promised to "not do or permit anything to be done in the Subpremises . . . which would violate any Lease covenants, terms or agreements."[294] Perhaps even more indicative of the Plaintiff's third-party beneficiary status were several instances within the sublease where

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3633925, at *2-3 (E.D. Mich. Sept. 14, 2010); Ajami v. IndyMac Mortg. Servs., No. 09-13488, 2009 WL 3874680, at *2 (E.D. Mich. Nov. 13, 2009)).

286. 242 Mich. App. 538, 550; 610 N.W.2d 66 (2000).

287. 822 F. Supp. 2d 700, 702 (E.D. Mich 2011) *aff'd*, Osprey-Troy Officentre, LLC v. World Alliance Fin. Corp., No. 11-2366, 2012 WL 4857030 (6th Cir. Oct. 12, 2012).

288. *Id.* at 702.

289. *Id.*

290. *Id.*

291. *Id.* at 702-03.

292. *Id.* at 706.

293. *Osprey-Troy*, 822 F. Supp. 2d at 706.

294. *Id.*

original lease provisions were incorporated to the Plaintiff's advantage.[295]

Further supporting the Plaintiff's third party beneficiary status was the sublease's consent agreement, in which the Defendant "promised to conduct itself in accordance with the desires of [the Plaintiff], as expressed in the default provisions of the original lease which [the Plaintiff] had negotiated to protect its own interests."[296] Based on this and the above reasoning, the district court determined the Plaintiff was indeed a third-party beneficiary with the right to assert claims based on the lease and sublease contracts.[297] Even though the sublease contained a provision which stated that "nothing in the Sublease shall be construed to create privity of estate or contract between Subtenant and Landlord," this provision could not be viewed separate from the other provisions when those other provisions objectively demonstrated the Defendant and the original leasee's agreement encompassed the Plaintiff as a third-party beneficiary.[298]

The Defendant also argued that, even should the court determine the sublease to be valid, the sublease was extinguished by the Defendant's bankruptcy proceedings because in cases where a lease had been breached and subsequently terminated, the subtenant no longer maintains an "interest that can be pursued in a bankruptcy court . . . ."[299] The Plaintiff argued the Defendant's position failed because the bankruptcy court rejected the original lease for breach, but did not reject the original lease for both breach and termination.[300]

Termination permitted by contract is an independent question apart from the bankruptcy court's rejection or assumption of the contract for purposes of the bankruptcy proceeding.[301] The district court viewed the Defendant's argument as a conflation of the concepts of rejection and termination, by incorrectly assuming that "a rejection of the lease in bankruptcy yields termination."[302] Therefore, this argument was also rejected and the Defendant next argued that the termination agreement between the Defendant and the original lessee effectively terminated the sublease prior to the bankruptcy court's rejection of the original lease.[303] The Plaintiff argued that because the sublease had been negotiated and

295. *Id.*
296. *Id.* at 707.
297. *Id.*
298. *Id.*
299. *Osprey-Troy*, 822 F. Supp. 2d at 707-08.
300. *Id.* at 708.
301. *Id.* (citing *In re* N. Am. Royalties, Inc., 276 B.R. 860, 865 (E.D. Tenn. 2002)).
302. *Id.*
303. *Id.* at 708-09.

executed without the Plaintiff's knowledge, the Plaintiff as a third party beneficiary could not rescind the sublease once the Plaintiff accepted the sublease.[304] The court found little support for the Plaintiff's argument under Michigan case law, and determined the Defendant had properly terminated the sublease via its termination agreement with the original lessee, however this did not affect the Plaintiff's third-party beneficiary status.[305]

However, the district court denied the Plaintiff's claims relating to fraud and the Plaintiff's request for a declaratory judgment for two reasons: first, because the Plaintiff had failed or neglected to present sufficient evidence that the Defendant was obligated to inform the Plaintiff of the termination agreement with the original lease; second, because the court determined summary judgment was appropriate for the Defendant as to its breach of contract claims, the Defendant's request for a dismissal of the Plaintiff's request for a declaratory judgment was also granted.[306]

4. Saline River Properties, LLC v. Johnson Controls, Inc.

In 1993, the Defendant, Johnson Controls, Inc., consented to an Environmental Protection Agency (EPA) Administrative Order and Consent (AOC).[307] The AOC required the Defendant to do environmental clean-up on a twenty-two acre parcel of property on which it owned and operated a manufacturing facility.[308] The Defendant did not comply with the AOC, and proceeded to sell the twenty-two acre parcel of property to the Plaintiff, Saline River Properties, LLC.[309]

The Plaintiff subsequently brought a breach of contract action against the Defendant arguing that "as a subsequent purchaser of the Property, Plaintiff . . . was and is an intended third party beneficiary of the *agreement* between [Defendant] and EPA as embodied in the AOC."[310]

The Defendant argued that the AOC was not a contract and therefore the Plaintiff had failed to state a claim against the Defendant.[311] The district court found merit in the Defendant's argument because the AOC

304. *Id.* at 709.
305. *Osprey-Troy*, 822 F. Supp. 2d at 709.
306. *Id.*
307. Saline River Prop., LLC v. Johnson Controls, Inc., 823 F. Supp. 2d 670 (E.D. Mich. 2011).
308. *Id.* at 672.
309. *Id.*
310. *Id.* at 674.
311. *Id.* at 675.

was an administrative order, not a consent decree, the latter of which "has attributes of both a contract and of a judicial act."[312] Because the Plaintiff did not provide authority supporting its contention that the AOC was indeed a contract, the district court dismissed the Plaintiff's breach of contract claim against the Defendant.[313]

The district court also went on to dismiss the Plaintiff's claim for nuisance based on the applicable statute of limitations, which in the present case was three years.[314] The Plaintiff's claims for negligence were also rejected for failure to demonstrate any legal duty on behalf of the Defendant to properly clean the property of toxic and other potentially hazardous materials because the Defendant had not undertaken the duties imposed by the AOC for the Plaintiff's benefit, nor did the Defendant enter into the AOC for the Plaintiff's benefit.[315]

5. Victory Lane Quick Oil Change, Inc. v. Darwich

This case arose from a dispute between the Plaintiff, the franchisor Victory Lane Quick Oil Change, and the Defendants, the franchisees, Balal and Magid Darwich.[316] In 2008, the Defendants entered into an agreement to operate an oil change franchise that one of the brothers signed as a guarantor.[317] Apparently, there was a mistake in the formation of the limited liability companies the Defendants formed to enter into the franchise agreement with the Plaintiff—the guarantor Defendant did not have an interest in them.[318] To correct this mistake, the Defendants terminated the original assumed names for the limited liability companies and formed a new limited liability company to operate the franchises.[319] This was not to the Plaintiff's satisfaction, and the Plaintiff filed a demand for arbitration claiming the Defendants had violated the franchise agreement's non-compete clause, and terminated the franchise agreement.[320]

Shortly after the Plaintiff filed a demand for arbitration, one Defendant sold the assets of one of the franchise locations to the other Defendant, who formed another limited liability company and began

312. *Id.* (quoting Williams v. Vukovich, 720 F.2d 909, 920 (6th Cir. 1983)).
313. *Saline*, 823 F. Supp. 2d at 675.
314. *Id.* at 675-76 (citing MICH. COMP. LAWS § 600.5805(10) (2006)).
315. *Id.* at 676-77.
316. Victory Lane Quick Oil Change, Inc. v. Darwich, 799 F. Supp. 2d 730, 732-33 (E.D. Mich. 2011).
317. *Id.*
318. *Id.* at 733.
319. *Id.*
320. *Id.*

operating another oil change business at that location.[321] The Defendants intended to transfer the lease for the location to the new limited liability company, but the landlord refused to permit the transfer and eventually started eviction proceedings, leaving the former limited liability company as the location's tenant.[322]

When the Plaintiff discovered the Defendants were operating a new oil change business at the same location as the franchise, the Plaintiff requested the United States District Court enter a preliminary injunction enforcing the terms of the non-compete agreement.[323] The Plaintiffs claimed the Defendants had violated the franchise agreement's post-term non-compete clause which provided:

> The Franchisee, the Owners and Personal Guarantors will not, for a period of two (2) years after the termination or expiration of this Agreement . . . on their own account or as an employee, principal, agent, independent contractor, consultant, affiliate, licensee, partner, officer, director or Owner of any other person, firm, Entity, partnership or corporation, own, operate, lease, franchise, conduct, engage in, *be connected with, have any interest in or assist any person or Entity engaged in any Competitive Business* which is located within 25 miles of the Franchised Location.[324]

The Defendants claimed that because the new oil change business was owned and operated by the new limited liability company and the brother who had not been identified as having an interest in the old limited liability company, the non-compete clause had not been violated.[325] The court rejected the Defendant's argument, reasoning that the former limited liability company that had entered into the franchise agreement with the Plaintiffs was still the tenant of the former franchise location where the new limited liability company was now operating the new oil change business.[326] The court further reasoned that the former limited liability company was connected with, had an interest in, and was assisting another person or entity engaging in business that competed with the Plaintiff's franchise.[327] Thus, the court determined the non-

321. *Id.*
322. *Victory Lane*, 799 F. Supp. 2d at 733.
323. *Id.*
324. *Id.* at 734.
325. *Id.*
326. *Id.*
327. *Id.*

compete agreement between the Plaintiffs and Defendants' former limited liability company prohibited the Defendants from permitting the new limited liability company from using the former franchise location which was still leased by the former limited liability company.[328]

C. Michigan Bankruptcy Court Cases

1. In re Iwanski

The Debtor/Appellant and his wife (together, the Debtors), owned an investment property (the Property), which they rented out to Tenant/Appellees (collectively, the Tenants).[329] The Debtors gave a mortgage on the Property to Federal Home Loan Mortgage Corporation (FHLMC).[330] When the Debtors fell behind on their payments under the mortgage, FHLMC foreclosed on the Property.[331] One month later, the Debtors filed for bankruptcy protection.[332] The Tenants continued to occupy the Property as holdover tenants after the foreclosure and bankruptcy; their leases expired five months after the foreclosure.[333] During the six month redemption period following the FHLMC foreclosure, the Debtors initiated state court eviction actions against the Tenants, demanding payment of alleged past due rent.[334] On appeal was the bankruptcy court's order that the Debtors remit the Tenants' security deposits back to Tenants, despite the pending state court action for non-payment of rent.[335]

In Michigan, during the redemption period following a foreclosure, mortgagors are entitled to possession and all benefits of possession of a mortgaged property:

> [T]he bank ha[s] no legal right of possession during the [ ] redemption period . . . It has been the definite and continuous policy of this State to save to mortgagors the possession and

328. *Victory Lane*, 799 F. Supp. 2d at 734.
329. Iwanski v. Fed. Home Loan Mortg. Corp. (*In re* Iwanski), 477 B.R. 67, 68 (E.D. Mich. 2012).
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.* at 69.
335. *Iwanski*, 477 B.R. at 68.

> benefits of the mortgaged premises, as against the mortgagees, until expiration of the period of redemption.[336]

The right to collect rent from tenants is considered a benefit of possession.[337] Pursuant to the Michigan Landlord and Tenant Relationships Act, a landlord is allowed to retain a security deposit for "all rent in arrearage."[338]

In *Iwanski*, the bankruptcy court did not make a determination whether the Tenants owed past-due rent.[339] If the Tenants owed past-due rent at the time of the state court eviction actions, the Landlord and Tenant Relationship Act[340] would allow the landlord (Debtors) to retain the portion of the security deposit necessary to satisfy any money judgment for past-due rent.[341] Once recovered, the landlord (Debtors) would be entitled, as a benefit of possession, to all rent up the expiration of the redemption period.[342] Because the bankruptcy court made no factual determination whether the Tenants owed rent during the redemption period, on appeal, the Eastern District Court remanded the case back to the bankruptcy court for a factual determination of whether the Tenants owed rent during the redemption period.[343]

D. Michigan Sixth Circuit Court of Appeals Cases

1. Sutter v. U.S. National Bank

Daniel and Sheryl Sutter (Mortgagors) purchased a residence in 1994.[344] In April 2004, the Mortgagors refinanced their mortgage with a refinance lender.[345] The mortgage was subsequently assigned to the Defendant.[346] At closing, the Mortgagors did not sign the mortgage document, but did sign the underlying note.[347] A few months later, when the Mortgagors fell behind on mortgage payments, the Mortgagee

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336. *Id.* at 70 (quoting Kubzcazk v. Chemical Bank & Trust Co., 456 Mich. 653, 660; 575 N.W.2d 745, 747-48 (1998)).
337. *Id.* (citing Bennos v. Waderlow, 291 Mich. 595, 599; 289 N.W. 267, 269 (1939)).
338. *Id.* (quoting MICH. COMP. LAWS § 554.607 (2006)).
339. *Id.*
340. MICH. COMP. LAWS ANN. § 554.613 (West 2006).
341. *Iwanski*, 477 B.R. at 70-71.
342. *Id.*
343. *Id.*
344. Sutter v. U.S. Nat'l Bank (*In re* Sutter), 665 F.3d 722, 724 (6th Cir. 2012).
345. *Id.* at 725.
346. *Id.*
347. *Id.*

initiated foreclosure proceedings.[348] In response to the foreclosure proceedings, in November 2005, the Mortgagors filed a Chapter 13 bankruptcy petition.[349] The Mortgagee filed a proof of secured claim, to which it attached an executed mortgage, with the Mortgagors' signatures forged on the document.[350] The Mortgagors objected to the Mortgagee's proof of claim, and the bankruptcy court disallowed the claim on grounds that "those who acquire an interest under a forged instrument are in no better position as to title than if they had purchased with notice."[351] Nonetheless, the bankruptcy court ultimately imposed an equitable mortgage on the residence.[352] The equitable mortgage was subsequently overturned by the district court, and the Mortgagee appealed to the Sixth Circuit.[353]

In Michigan, a forged mortgage is void ab initio. [354] For instance, "'[t]here can be no such thing as a bona fide holder under a forgery, whose good faith gives him any rights against the party whose name has been forged or his heirs.'"[355] Further, "[E]quitable mortgages are appropriate in circumstances where the underlying mortgage is void, particularly when one party received the benefits of the mortgage."[356] However, a party seeking equity "must come with clean hands[;] . . . [t]he unclean hands doctrine is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, *however improper may have been the behavior of the Appellant.*"[357] This doctrine is limited to actions specifically on resolving real property claims.[358]

The Sixth Circuit determined that the Mortgagee's attempt to offer a forged mortgage as substantiation of its proof of secured claim constituted bad faith, and therefore, the Mortgagee was not entitled to

348. *Id.* at 724-25.
349. *Id.* at 725.
350. *Sutter*, 665 F.3d at 725.
351. *Id.*
352. *Id.* at 726.
353. *Id.*
354. *Id.* at 728.
355. *Id.* (quoting Horvath v. Nat'l Mortg. Co., 238 Mich. 354, 360; 213 N.W. 202(1928) (quoting Austin v. Dean, 40 Mich. 386, 388 (1879))).
356. *Sutter,* 665 F.3d at 728 (citing Fair v. Moody, No. 278906, 2008 WL 5382648 (Mich. Ct. App. Dec. 23, 2008)).
357. *Id.* at 729 (citing Rose v. Nat'l Auction Grp., Inc., 466 Mich. 453, 461; 646 N.W.2d 455, (2002) (quoting Stachinik v. Winkel, 394 Mich. 375, 382; 230 N.W.2d 529 (1975))).
358. *Id.* (citing McFerren v. B & B Inv. Grp., 253 Mich. App. 517, 523; 655 N.W.2d 779, (2002)).

equitable relief in the form of an equitable mortgage.[359] Whether the Mortgagors were harmed by the forgery is irrelevant.[360]

2. Veneklase v. Bridgewater Condominiums, LC

On April 18, 2006, the Plaintiffs entered into an agreement to purchase a condominium from the Defendant and put down a deposit for purchase of the condominium.[361] On February 24, 2009, the Defendant notified the Plaintiffs that the closing on the condominium was scheduled for March 19, 2009. [362] On March 17, 2009, the Plaintiffs requested rescission of the purchase agreement and promissory note, and return of the Plaintiffs' deposit.[363] When the Defendant declined to return the Plaintiffs' security deposit, the Plaintiffs filed a complaint alleging the Defendant violated the Interstate Land Sales Full Disclosure Act (ILSFDA)[364] by failing to provide the Plaintiffs with a printed property report, and by failing to include, within the purchase agreement, a provision notifying them that in the event the Defendant failed to furnish a property report in advance of the execution of the purchase agreement, the Plaintiffs "had the right to revoke the purchase agreement within two years of the date of its signing."[365] In addition, the Plaintiffs sought relief under the Michigan Condominium Act (MCA).[366] The district court found the Plaintiffs could not bring the ILSFDA claim because it was untimely and outside of the statute of limitations, and dismissed the MCA claim because it could no longer maintain supplemental jurisdiction after dismissing the state law actions.[367]

Pursuant to the ILSFDA, it is unlawful

> [F]or any developer or agent . . . to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails . . . to sell . . . any lot unless a printed property report . . . has been furnished to the purchaser . . . in

359. *Id.*
360. *Id.* at 731.
361. Veneklase v. Bridgewater Condos, L.C., 670 F.3d 705, 707 (6th Cir. 2012).
362. *Id.*
363. *Id.*
364. 15 U.S.C.A. §§ 1701-20 (West 2012).
365. *Veneklase*, 670 F.3d at 707.
366. *Id.* at 708; MICH. COMP. LAWS ANN. § 559.184 (West 2011).
367. *Veneklase*, 670 F.3d at 708-09.

advance of the signing of any contract or agreement by such purchaser.[368]

If the developer or agent does not provide a property report in advance of the purchase agreement, the "contract or agreement may be revoked at the option of the purchaser . . . within *two years* from the date of such signing, and such contract of agreement shall clearly provide this right."[369] The ILSFDA also includes a three year statute of limitations period.[370] On appeal, the Sixth Circuit found that the apparently conflicting provisions of the ILSFDA, are not conflicting, but instead require that for a buyer to maintain a claim under the ILFSDA, they must exercise their right to rescind within two years, but have a third year within which to enforce the right in court if the seller refuses to honor the timely rescission.[371] If the buyer does not exercise the right of rescission with two years, a court may still allow equitable rescission of a purchase agreement if the buyer shows that the remedy is justified by the facts of the case.[372]

Although the Plaintiffs did not exercise their right to rescind the purchase agreement with the two year rescission period, the district court was required to determine whether equitable rescission is appropriate under the circumstances.[373] Furthermore, because the court did have equitable jurisdiction over the ILSFDA claim, it maintained supplemental jurisdiction over the MCA claim.[374]

3. Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC

In 1992, the debtor "purchased a condominium to use as his primary residence."[375] Pursuant to the deed to the condominium, upon purchase, the debtor became obligated to pay condominium assessments to the condominium association (the Association).[376] The debtor resided in the condominium until 2005, after which he maintained the condominium as

368. *Id.* at 709-10 (quoting 15 U.S.C. § 1703(a)(1)(B)).

369. *Id.* at 710 (quoting 15 U.S.C. § 1703(c)) (emphasis added).

370. 15 U.S.C.A. § 1711 (West 2012).

371. *Veneklase*, 670 F.3d at 711-12 (adopting Taylor v. Holiday Isle, LLC, 561 F. Supp. 2d 1269, 1273-75 (S.D. Ala. 2008)).

372. *Id.* at 713-14 (adopting Gentry v. Harborage Cottages-Stuart, LLLP, 654 F.3d 1247, 1261-63 (11th Cir. 2011)).

373. *Id.* at 714.

374. *Id.* at 716-17.

375. Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC, 698 F.3d 290, 292 (6th Cir. 2012).

376. *Id.*

an investment property.[377] After moving from the property the debtor ceased paying assessments.[378] In December 2008, a law firm (the Firm), sent two notices on behalf of the Association, informing the debtor he defaulted on his obligation to pay assessments and owed the Association $898.00.[379] The debtor timely responded to both letters, requesting verification of the debt owed.[380] The Firm never verified the debt, but did record a notice of lien in May 2009.[381] The Association later corrected its records and discharged the lien in February 2010.[382]

The debtor brought an action against the Firm alleging violations of the Fair Debt Collection Practices Act (FDCPA)[383] and the Michigan Consumer Protection Act (MCPA),[384] for "using any false, deceptive, or misleading representation or means in the collection of any debt,"[385] and continuing "collection of a disputed debt . . . until the debt collector obtains verification of the debt."[386] The United States District Court for the Eastern District of Michigan held that because the debtor did not reside in the condominium, the assessments cannot be considered "primarily for personal, family, or household purposes", and therefore could not be considered a "debt" covered by the FDCPA.[387]

The Sixth Circuit adopted the reasoning of the Seventh Circuit,[388] finding that the assessment does constitute a debt under the FDCPA:[389] "the relevant point in time for determining the character of the obligation is when the loan is made, rather than when collection efforts begin."[390] Therefore, by purchasing a condominium, purchasers become "bound by the Declaration of Covenants, Conditions, and Restrictions of their homeowners association, which required payment of regular and special assessments imposed by the association."[391] In addition, "the assessments themselves qualify as 'personal, family, or household' purposes, to the extent that they are used for household and common-area improvements and maintenance, and 'thereby directly benefit each household in the

377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.*
381. *Haddad*, 698 F.3d at 292.
382. *Id.*
383. 15 U.S.C.A. §§ 1692e, g (West 2012).
384. MICH. COMP. LAWS ANN. § 445.251 (West 2012).
385. 15 U.S.C.A. §1692e.
386. 15 U.S.C.A. §1692g.
387. *Haddad*, 698 F.3d at 292.
388. *See* Newman v. Boehm, Pearlstein, & Bright, Ltd., 119 F.3d 477 (7th Cir. 1997).
389. *Haddad*, 698 F.3d at 293.
390. *Id.*
391. *Id.* (quoting *Newman*, 119 F.3d at 481).

development.'"[392] Accordingly, the court in *Haddad* found that because the debtor agreed to pay the assessments at the time he purchased the condominium, he became obligated to pay the assessments at the time of purchase.[393] Because the debtor purchased the condominium for personal usage and lived there for fifteen years, the assessments qualified as "debt" pursuant to the FDCPA.[394]

IV. CONCLUSION

Mortgages, MERS, and foreclosure by advertisement undoubtedly stole much of the spotlight during the *Survey* period. It became evident MERS not only could foreclose by advertisement based on its status as mortgagee and nominee, but MERS could also successfully assign a mortgage to a third party, allowing the third party to proceed to foreclose by advertisement.[395]

As practitioners, it is important to keep in mind securitized mortgages can be successfully foreclosed by advertisement by the lender, the mortgagee, or the servicer.[396] Additionally, it is relevant, when preparing to litigate a mortgage case, to determine if the mortgage has been assigned and that assignment properly recorded, especially in cases where the mortgagee obtained the mortgage through a contract and not by a merger.[397] While this does not render any subsequent foreclosure by advertisement void ab initio, it does render a subsequent foreclosure by advertisement voidable.[398]

Also important to bear in mind is that MERS, as nominee, not only can foreclose by advertisement, but also can assign rights under the mortgage to a third party, who in turn can successfully foreclose on the mortgaged property.[399] Again, the assignee should ensure the assignment is recorded in the appropriate county register of deeds. The ability to produce the original promissory note securing the mortgage effectively clears the path for potential assignees, and is important considering the proliferation of the "produce the note" strategy employed by mortgagors

392. *Id.* (quoting *Newman*, 119 F.3d at 481-82).
393. *Id.* at 294.
394. *Id.* at 294-95.
395. Residential Funding Co. v. Saurman, 490 Mich. 909; 805 N.W.2d 183 (2011).
396. *Id.*
397. Kim v. JPMorgan Chase Bank, NA., 295 Mich. App. 200; 813 N.W.2d 778 (2012), *aff'd in part, rev'd in part*, 493 Mich. 98; 825 N.W. 2d 329 (2012).
398. Kim v. JPMorgan Chase Bank, 493 Mich. 98; 825 N.W.2d 329 (2012).
399. McCann v. U.S. Bank, N.A., 873 F. Supp. 2d 823, 836 (E.D. Mich. 2012).

in default.[400] However, failure to produce the note is not necessarily fatal.[401]

Playing supporting roles were issues related to bankruptcy, which set the stage for different actions ranging from suits challenging foreclosure proceedings to lease-based contract claims. Additionally, land division, easements, the availability of non-economic damages for destruction of property, and adverse possession made cameo appearances. When viewed as a whole, the cases discussed demonstrate how issues relating to property law, especially in times of economic hardship, can shape a state's overall legal landscape.

400. *See Fight Foreclosure-Demand Bank "Produce The Original Note,"* THE "KICK THEM ALL OUT" PROJECT, http://www.kickthemallout.com/article.php/Video-Fight_Forclosure_Produce_The_Note (last visited Apr. 16, 2013); Anne Batte, *"Produce the Note" Strategy for Judicial and Non-Judicial States (Technique Used to Stall Foreclosures)*, OPERATION RESTORATION, http://www.operationrest.org/ProducetheNote (last visited Mar. 14, 2013); Kurt O'Keefe, *Produce the Note*, MICHIGAN MORTGAGE ATTORNEY (April 7, 2009), http://www.michiganmortgageattorney.com/produce-note/; Ryan Grim & Shahien Nasiripour, *Who Owns Your Mortgage? "Produce the Note" Movement Helps Stall Foreclsoures*, HUFFINGTON POST (June 18, 2010), http://www.huffingtonpost.com/2009/09/22/whos-got-the-mortgage-pro_n_294169.html; *Some Homeowners Facing Foreclosures Saying to Banks 'Show Me the Note,* CBS LOCAL SAN FRANCISCO (Nov. 15, 2010, 11:53 P.M.), http://sanfrancisco.cbslocal.com/2010/11/15/homeowners-facing-foreclosure-saying-to-banks-show-me-the-note/.

401. *See* Sallie v. Fifth Third Bank, 297 Mich. App. 115, 119; 824 N.W.2d 238 (2012) (holding that Michigan's foreclosure statute "does not require that the mortgagee produce the underlying notice in order to foreclosure a mortgage by advertisement.").