University of Richmond Law Review

Volume 51 | Issue 1 Article 9

11-1-2016

Foreclosure of a Deed of Trust in Virginia

Doug Rendleman
Washington and Lee Law School

ESSAYS

FORECLOSURE OF A DEED OF TRUST IN VIRGINIA

Doug Rendleman *

This article deals with foreclosure of a deed of trust in Virginia. The Introduction discusses the deed of trust or mortgage as a social and political institution and the foreclosure crisis that seems to be ending. Part I is a brief history of mortgage law. It provides a short history of the modern mortgage system in the United States. Part II follows with a description of the approach that Virginia takes to mortgages. It localizes the mortgage institution to Virginia and introduces Virginia's vocabulary and technical details, the deed of trust, and the parties' rights and obligations. Part III provides the procedures required to foreclose in Virginia and sell the property used to secure the debt in the event of mortgage default. It develops the debtor's default, the creditor's foreclosure, and the sale. Part IV outlines the potential responses and defenses that a borrower may use when facing foreclosure after default. It includes the borrower's defenses, redemption, techniques to assert a defense, the "show-me-the-note" response, the Servicemembers Civil Relief Act, federal bankruptcy, and self-help and civil disobedience. The ideas for change in Part V offer

---

* Huntley Professor, Washington and Lee Law School. This has been a group project. Thanks to two indispensable Washington and Lee law student research assistants—Katie Dickinson at the beginning and Trista Bishop-Watt at the end. Thanks also to Christina Rossi for helping with the footnotes and citations. Thanks to two Virginia lawyers, Henry Woodward and Henry McLaughlin, for sage advice at an early stage. Thanks for John Eller's early assistance. Finally, thanks to the Frances Lewis Law Center for support.

suggestions for reforming the Virginia mortgage system to better protect borrowers, while maintaining the efficiency of the foreclosure process.

INTRODUCTION

Home ownership is a cornerstone of success in America. People seek a stable job, a great marriage, 2.5 kids, and a brick house with a white picket fence. Those who don't have that life, dream of it. That is why it is called "The American Dream."

Home ownership is a sign of stability and community. An owner has the opportunity to accumulate wealth in the form of equity. The mortgage market is inseparably commingled with the overall well-being of the national economy.[1] The state of the housing market is simultaneously an indicator of and a contributor to the health of the economy.[2] When foreclosures rise to unhealthy levels, it hinders the recovery of the economy as a whole.[3]

The housing market is important to the American economy, so public policy subsidizes home ownership. Tax benefits include deducting mortgage interest and sheltering capital gains.[4] A homeowner has an exemption that may save all or a portion of her home from her creditors, except the one that loaned her purchase money.[5]

But home ownership, once achieved, is not always as picturesque as expected. This article deals with what happens when the owner's dream becomes a nightmare. In the early 2000s, the American economy experienced a housing boom that led to an inevitable crash.[6] An emotional commitment to the dream of owning their own homes coupled with unscrupulous creditors and investors led many borrowers into improvident decisions to undertake unsuitable mortgage debts. The market "bubble" burst between 2006 and 2007. The bonds that were based on these improvident

1. Aleatra P. Williams, *Foreclosing Foreclosure: Escaping the Yawning Abyss of the Deep Mortgage and Housing Crisis*, 7 NW. J.L. & SOC. POL'Y 455, 463–65 (2012).

2. *Id.* at 463.

3. *Id.* at 465.

4. *See* 26 U.S.C. § 163(h)(3) (2012).

5. *See* VA. CODE ANN. § 43-4 (Repl. Vol. 2013).

6. Jed Kolko, *What to Expect From the Housing Market in 2015*, TIME (Dec. 29, 2014), http://time.com/money/3629800/housing-outlook-2015/; *see also* Williams, *supra* note 1, at 463.

mortgages depreciated rapidly and brought the economy almost to its knees.

A foreclosure crisis began, which led to millions of foreclosures. There were an estimated 2.5 million foreclosures between 2007 and 2009.[7] Between 2008 and 2014, about 4.9 million foreclosures were completed.[8] However in 2014, there were 48,000 foreclosures in January 2014 alone and 1.9 million homeowners' mortgages were in serious delinquency.[9] Although projections predict that the housing market will continue to improve, the American economy hasn't fully recovered. Unless measures are taken to correct the underlying issues, a future crash is possible.[10] According to Realthtrac.com, in 2015, foreclosure filings on 1,083,572 properties dropped to a nine-year low. Foreclosures were down nationally in the first quarter of 2016, although Virginia foreclosures were up. With nearly a million properties in some stage of foreclosure, default, auction or bank owned, cleanup from the crisis continues.

A number of factors contributed to the housing market crash. Abuses included naïve and unsophisticated buyer-borrowers;[11] brokers whose profits were decoupled from any responsibility for the future of the loans;[12] lax underwriting standards;[13] subprime mortgages;[14] relaxed and inadequate documentation and background checks; reduction or elimination of down payments; extended terms; lender-placed second mortgages; adjustable-rate mortgages that adjusted up; balloon payments; loan servicers able to profit more from foreclosure than from modifying the loans; and refinancing that reduced borrowers' equity. Exacerbating the moral hazard, the originators bundled the mortgages into securities that were sold to investors.[15] The mortgages were based

7. Williams, *supra* note 1, at 456.

8. CORELOGIC, NATIONAL FORECLOSURE REPORT 2 (Jan. 2014), http://www.corelogic.com/research/foreclosure-report/national-foreclosure-report-january-2014.pdf.

9. *Id.*

10. *See* Kolko, *supra* note 6.

11. *See* Williams, *supra* note 1, at 459.

12. *See id.*

13. CONSUMER FIN. PROT. BUREAU, ABILITY-TO-REPAY AND QUALIFIED MORTGAGE RULE 9 (Nov. 3, 2014), http://files.consumerfinance.gov/f/201411_cfpb_atr-qm_small-entity-compliance-guide.pdf; *see also* Williams, *supra* note 1, at 459.

14. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 13, at 9; Williams, *supra* note 1, at 463.

15. John V. Duca, *Subprime Mortgage Crisis*, FED. RESERVE HISTORY (Nov. 22, 2013), http://www.federalreservehistory.org/Events/DetailView/55.

on assumptions of continuing price appreciation.[16] When appreciation turned into depreciation, many of the new home owners' dreams became nightmares. They found themselves with negative equity, or "under water," owing more on their loans than their houses were worth.[17] For many buyer-borrowers, home ownership was short and, in retrospect, unwise because foreclosure followed default. Credit ratings were shattered.

Complaints poured in from consumers. The Consumer Financial Protection Bureau ("CFPB") opened a consumer complaint website in a public database to document the problems that consumers had with lenders.[18] Since opening the complaint hotline, the CFPB has received over 627,000 complaints, 28 percent of which relate to mortgages, representing the largest percentage of the complaints received.[19] Among the many complaints, consumers have focused on the difficulty in contacting lenders, citing ignored calls, call redirection, and unsympathetic staff.[20] Consumers seeking loan modification were met with delay, obfuscation, difficulty, and the threat of foreclosure.[21]

Increased disclosure, verification, and consumer education might have preventive future effects. Subprime lenders and the errant segments of the mortgage industry are being brought to book. In 2012, for example, the United States government and states' attorneys general entered a $26 billion settlement with five large banks over problems in mortgage servicing.[22] In April

---

16. *Id.*

17. *See id.*

18. Kenneth R. Harney, *Complaints Pour in to Consumer Financial Protection Bureau*, WASH. POST (July 8, 2015), https://www.washingtonpost.com/realestate/complaints-pour-in-to-consumer-financial-protection-bureau/2015/07/07/4b1e00d0-2406-11e5-aae2-6c4f59b050aa_story.html.

19. *Id.*

20. *Id.*; *see also* Williams, *supra* note 1, at 457.

21. Harney, *supra* note 18.

22. Christopher K. Odinet, *Banks, Break-ins, and Bad Actors in Mortgage Foreclosure*, 83 U. CIN. L. REV. 1155, 1173–74 (2015). Under the terms of the settlement, mortgage servicers provided $5 billion to states for housing counseling and relief to those who lost their homes and $20 billion in direct relief to borrowers. Danielle Douglas, *Big Banks Finish Paying $20 Billion in Mortgage Settlement, Report Says*, WASH. POST (Mar. 18, 2014), [hereinafter Douglas, *Big Banks*] https://www.washingtonpost.com/business/economy/big-banks-finish-paying-20-billion-in-mortgage-settlement-report-says/2014/03/18/32062d92-aded-11e3-96dc-d6ea14c099f9_story.html. Servicers reduced principal balances on primary mortgages to the tune of $7.5 billion and refinanced the mortgages of struggling homeowners to provide $3.5 billion of relief. *Id.* The settlement also bars dual-tracking and requires banks to provide borrowers with a single point of contact so they are not routed to different employees for each interaction. *Id.*

2016, Goldman Sachs agreed to pay $5.06 billion to settle the government's allegations that it had sold shoddy mortgages before the financial crisis, which brought the total of related settlements to a nearly $40 billion.[23] The problems included robo-signing, sewer service, inadequate and unresponsive staffing, dual-tracking (foreclosing simultaneously with negotiation), inadequate mortgage and note documentation, and violation of the Servicemembers Civil Relief Act.[24] Under the settlement, more than half a million homeowners, including 5790 Virginians, received loan modifications, short sales, refinancing, and forbearance.[25] Extrapolating from JPMorgan Chase's $13 billion settlement, financial institutions expect their payouts to be around another $50 billion. Consumers could take $15 billion in the form of reduced payments and cash from these payouts.[26]

In early 2014, six years after foreclosure spun out of control, new rules promulgated by the CFPB went into effect.[27] The Bureau's goal was to preserve most borrowers' access to mortgage credit while ending unsustainable lending. For a qualified mortgage, these rules require all lenders to take steps that responsible

---

23. Renae Merle, *Goldman Sachs Pays $5 Billion to Settle Allegations It Sold Shoddy Mortgages*, WASH. POST (Apr. 11, 2016), http://www.washingtonpost.com/news/business/wp2016/04/11/goldman-sachs-pays-5-billion-to-settle-allegations-it-sold-shoddy-mortgages-prior-to-financial-crisis/; Matthew Goldstein, *Goldman to Pay Up to $5 Billion to Settle Claims of Faulty Mortgages*, N.Y. TIMES (Jan. 14, 2016), http://www.nytimes.com/2016/01/15/business/dealbook/goldman-to-pay-5-billion-to-settle-claims-of-faulty-mortgages.html?_r=0.

24. *See* Douglas, *Big Banks, supra* note 22; Reed Karaim, *Mortgage Servicers Are Still Wrecking Lives*, INTEREST.COM (Oct. 1, 2014), http://www.interest.com/mortgage/news/mortgage-servicers-still-wrecking-lives/; Press Release, Consumer Fin. Prot. Bureau, CFPB Supervision Report Highlights Mortgage Servicing Problems in 2013 (Jan. 30, 2014), http://www.consumerfinance.gov/about-us/newsroom/cfpb-supervision-report-highlights-mortgage-servicing-problems-in-2013/; Press Release, Dep't of Justice, Service Members to Receive Over $123 Million for Unlawful Foreclosures Under the Servicemembers Civil Relief Act (Feb. 9, 2015), https://www.justice.gov/opa/pr/service-members-receive-over-123-million-unlawful-foreclosures-under-servicemembers-civil.

25. JOHN RAO ET AL., FORECLOSURES: MORTGAGE SERVICING, MORTGAGE MODIFICATIONS, AND FORECLOSURE DEFENSE § 2.9 (4th ed. 2012); Danielle Douglas, *Banks Make Progress on $25 Billion Mortgage Settlement*, WASH. POST (Feb. 21, 2013) [hereinafter Douglas, *Mortgage Settlement*], http://www.washingtonpost.com/business/economy/banks-make-progress-on-25-billion-mortgage-settlement/2013/02/21/e06eeed6-7c35-11e2-a044-676856536b40_story.html.

26. Jessica Silver-Greenberg & Peter Eavis, *Wall Street Predicts $50 Billion Bill to Settle U.S. Mortgage Suits*, N.Y. TIMES, Jan. 10, 2014, at A1.

27. 12 C.F.R. § 1002.1 (2016); Danielle Douglas, *New Mortgage Rules Aim to Protect Home Buyers*, WASH. POST (Jan. 10, 2014) [hereinafter Douglas, *New Mortgage Rules*], https://www.washingtonpost.com/business/economy/new-mortgage-rules-aim-to-protect-home-owners/2014/01/09/f928ebaa-793e-11e3-b1c5-739e63e9c9a7_story.html.

lenders should have taken all along—verify applicants' income, assets, and debt.[28] The CFPB provides eight specific factors that represent the minimum standards that must be met to determine if consumers have the ability to repay the amount lent to them.[29] These eight underwriting factors include reasonably expected income or assets, employment status, monthly mortgage payment, other loan payments on the same property, payments for property taxes, other debts, debt-to-income ratio, and consumer credit history.[30] In August 2016, the CFPB issued updated servicing rules to protect mortgage borrowers, which will become effective in twelve months.[31]

Under the new rules, a mortgage servicer must be more transparent with borrowers. Again, these are steps that responsible businesses have taken all along—maintaining accurate records; allowing a borrower access to staff; answering the phone; providing accurate information; and negotiating meaningfully to develop options like reduced interest and lower payments for a borrower in default to avoid foreclosure.[32] Additionally, the CFPB requires that lenders provide disclosures to borrowers and to make attempts to work with borrowers to discuss loss mitigation options.[33]

Lenders have imposed tighter lending restrictions and require higher down payments. The twilight of the foreclosure crisis is a propitious time take stock on what we have learned and to suggest changes to ameliorate the hardships and reduce the risk of another crisis.

---

28. 12 C.F.R. § 1026.43(c) (2016); Douglas, *New Mortgage Rules*, *supra* note 27, at A12.

29. CONSUMER FIN. PROT. BUREAU, *supra* note 13, at 9–10.

30. *Id.* at 17–18.

31. Press Release, Consumer Fin. Prot. Bureau, Consumer Financial Protection Bureau Expands Foreclosure Protections (Aug. 4, 2016), http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-expands-foreclosure-protections/.

32. *See* 12 C.F.R. §§ 1024.30–.32 (2015).

33. CONSUMER FIN. PROT. BUREAU, TILA-RESPA INTEGRATED DISCLOSURE RULE 12–13 (July 2015), http://files.consumerfinance.gov/f/201506_cfpb_tila-respa-integrated-disclosure-rule.pdf; CONSUMER FIN. PROT. BUREAU, 2013 REAL ESTATE SETTLEMENT PROCEDURES ACT (REGULATION X) AND TRUTH IN LENDING ACT (REGULATION Z) MORTGAGE SERVICING FINAL RULES 12 (Nov. 3, 2014), http://files.consumerfinance.gov/f/201411_cfpb_small-entity-compliance-guide_tila-respa.pdf.

I. A BRIEF HISTORY OF MORTGAGES

The mortgage is an ancient institution. Its history winds back to ancient Roman law. The modern American mortgage finds its roots in the English common law.[34] In early English law, mortgages took the form of a fee simple conveyance with a condition subsequent.[35] In essence, the borrower would convey the property used to secure the loan to the lender with a condition that the borrower could reenter when the loan amount was paid in full, thus terminating the lender's estate.[36] The right of reentry later gave way to a covenant that the lender would reconvey legal title in the land when the mortgage was paid off.[37] In this early scheme, the lender could not charge interest on the loan, but instead looked to the income from the land for profit.[38] The borrower had until the "law day," the day that payment was due, to pay off the mortgage before the borrower's right to reentry terminated.[39]

This early mortgage heavily favored the lender. Chancery stepped in to right the balance.[40] The Medieval Court of Chancery developed the equity of redemption, a buyer's right to redeem his property even after the law day had passed.[41] Originally, a borrower could defend his property even after default on the grounds of "fraud, accident, misrepresentation, or duress."[42] Soon this equitable right became available to all borrowers after default, even in the absence of a defense.[43] If a borrower was able to pay off the remaining balance of the mortgage within a reasonable time after default, the property securing the mortgage would be redeemed.[44] Chancery recognized the potential for the borrower's equity of re-

34. *See also* GRANT S. NELSON ET AL., REAL ESTATE FINANCE LAW 6 (6th ed. 2015); 1 GARRARD GLENN, MORTGAGES: DEEDS OF TRUST, AND OTHER SECURITY DEVICES AS TO LAND 2 (1943). Garrard Glenn was a beloved professor of law at the UVA law school from 1929–49 and somewhat of a character: readers may be interested in Professor Hamilton Bryson's capsule biography, W. HAMILTON BRYSON, LEGAL EDUCATION IN VIRGINIA 1779–1979: A BIOGRAPHICAL APPROACH 241 (1982).

35. GLENN, *supra* note 34, at 6; NELSON ET AL., *supra* note 34, at 7.

36. *Id.*

37. NELSON ET AL., *supra* note 34, at 6.

38. GLENN, *supra* note 34, at 5; NELSON ET AL., *supra* note 34, at 6.

39. GLENN, *supra* note 34, at 7; NELSON ET AL., *supra* note 34, at 6.

40. GLENN, *supra* note 34, at 11; NELSON ET AL., *supra* note 34, at 6.

41. GLENN, *supra* note 34, at 11; NELSON ET AL., *supra* note 34, at 6–7.

42. NELSON ET AL., *supra* note 34, at 6.

43. *Id.* at 6–7.

44. *Id.*

demption to be used at the expense of the lender, who could be left indefinitely waiting for the borrower to redeem his land.[45] Thus, the equity of redemption came hand-in-hand with the lender's right to foreclose, to terminate the borrower's equity of redemption and unite the legal and equitable interest in the lender.[46]

The United States built its own mortgage practices on the English-law foundation. Under American law, a mortgage transaction has two distinct instruments: the note and the mortgage. The note represents the borrower's contractual obligation to repay her debt to the lender. The mortgage instrument provides a property as collateral to secure the loan obligation. Modern mortgages are outlined in statutes and supported by judicial decisions. Enforcement of a lien is equitable, providing the judge with equitable discretion.[47]

Building from English law, the 1930s led to the end of the law day and the modern mortgage. Before this time, the structure of mortgages was short-term, with borrowers paying interest while saving up to pay off the principal balance by the loan's due date.[48] The Federal Housing Administration led the charge to amortize mortgages, leading to borrowers paying off both interest and principal over a longer period.[49]

The vast majority of mortgage law fell to the states, leading to mortgage variations among American jurisdictions.[50] The prevailing theories of mortgages in the states are the title and lien theories.[51] The title theory of mortgages is closely related to the English common law mortgage.[52] Under this theory, the legal title of the property belongs to the lender, giving it the right to posses-

---

45. GLENN, *supra* note 34, at 17; NELSON ET AL., *supra* note 34, at 7.

46. *Id.*

47. *See generally* David A. Super, *A New New Property*, 113 COLUM. L. REV. 1773, 1844–68 (2013) (advocating broadened equitable defenses and discretion in mortgage foreclosure); *see, e.g.*, Trs. of the Wash.-Idaho-Mont. Carpenters-Emp'rs Ret. Tr. Fund v. Galleria P'ship, 780 P.2d 608, 617 (Mont. 1989); Wells Fargo Bank, N.A. v. Meyers, 913 N.Y.S.2d 500, 503 (2010), *rev'd on other grounds*, 966 N.Y.S.2d 108, 112 (2013) ("[F]oreclosure . . . is equitable in nature and triggers" broad equitable powers.).

48. NELSON ET AL., *supra* note 34, at 2.

49. *Id.*

50. *Id.* at 8.

51. *Id.* at 9.

52. *Id.*

sion.[53] Fewer than ten American jurisdictions continue to follow this theory of mortgages.[54] The majority of states follow the lien theory, which does not vest the lender with title, but rather a security interest that leaves the right to possession with the buyer until the land is foreclosed upon.[55]

In addition to mortgage theories, states differ on the treatment of foreclosure.[56] Foreclosure in the United States is predominately based on a public sale of the property, although some states adhere to strict foreclosure, where the land is forfeited without sale to the lender.[57] A majority of American jurisdictions allow for a public sale following a judicial determination.[58] A judicial foreclosure allows all interested parties to be notified and appear in court.[59] Other states allow for foreclosure by power of sale without judicial intervention.[60] Interested parties are notified following the statutory procedure provided by the individual state.[61]

Another relevant state variation is the deed of trust. The deed of trust is a mortgage instrument, in which the property used to secure a loan is transferred to a third-party trustee to be held as security for the lender.[62] Upon default, the trustee is able to bring foreclosure via power of sale on behalf of the lender.[63]

Although real property is local in nature, the modern mortgage in the United States has transcended state boundaries. A detailed contemporary source is the National Consumer Law Center's Foreclosures: Mortgage Servicing, Mortgage Modifications, and Foreclosure Defense, which has a comprehensive companion website.[64] Loans are traded across state lines and bundled into securities. Lenders retain out-of-state companies to service their loans.

---

53. *Id.*
54. *Id.* at 128.
55. *Id.* at 9.
56. *Id.* at 8.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 10.
63. *Id.*
64. *See generally* RAO ET AL., *supra* note 25.

On a practical level, if sued in a Virginia circuit court, out-of-state creditors frequently remove the lawsuits to federal court.[65]

Although mortgage law typically falls to the states, the federal government has stepped up its efforts to better protect debtors, especially in the wake of the 2008 crash.[66] Since the Great Recession, federal agencies and federal law regulate the loan transaction. In addition to the CFPB, mentioned above, the Federal Housing Administration ("FHA"), Department of Housing and Urban Development ("HUD"), Federal National Mortgage Association or Fannie Mae, and Freddy Mac appear in Virginia foreclosures. Federal law includes the Truth in Lending Act, Home Affordable Modification Program ("HAMP"), the Equal Credit Opportunity Act, the Real Estate Settlement Procedures Act, and the Fair Debt Collection Practices Act.[67] Virginia courts apply federal law, for example the FHA's prerequisite of a face-to-face meeting before acceleration.[68]

With this background in mind, the article turns to the present state of mortgages in the Commonwealth of Virginia.

II. THE VIRGINIA APPROACH TO MORTGAGE LAW

Virginia has followed the majority of American jurisdictions in adopting the lien theory of mortgages.[69] In Virginia, the borrower retains both the title to the property and right to possession until

---

65. *E.g.*, Tapia v. U.S. Bank, N.A., 718 F. Supp. 2d 689, 694 (E.D. Va. 2010).

66. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 13, at 9.

67. Class actions contesting creditors' mass foreclosures are pending in early 2014 where the plaintiffs have survived defendants' motions to dismiss. First, allegations under the HAMP of breach of the federal Equal Credit Opportunity Act, the Virginia Equal Credit Opportunity Act, defamation, breach of the covenant of good faith and fair dealing, and the Real Estate Settlement Procedures Act. Bourdelais v. J.P. Morgan Chase Bank, N.A., No. 3:10cv670, 2012 U.S. Dist. LEXIS 158508, at *29 (E.D. Va. Nov. 5, 2012); Bourdelais v. J.P. Morgan Chase Bank, N.A., No. 3:10cv670, 2011 U.S. Dist. LEXIS 35507, at *29 (E.D. Va. Apr. 1, 2011). Second, breach of a fiduciary duty of impartiality and the Fair Debt Collection Practices Act. Goodrow v. Friedman & MacFadyen, P.A., No. 3:11cv20, 2013 U.S. Dist. LEXIS 105395, at *3–4 (E.D. Va. July 26, 2013).

68. Squire v. Va. Hous. Dev. Auth., 287 Va. 507, 516–17, 758 S.E.2d 55, 60 (2014) (ruling on a HUD face-to-face meeting); Mathews v. PHH Mortg. Corp., 283 Va. 723, 736, 724 S.E.2d 196, 202 (2012); Parris v. PNC Mortg., 2014 WL 3735531, at *5 (E.D. Va. 2014) (explaining that extensive dealings are not an exception to prerequisite of face-to-face meeting).

69. High Knob Assocs. v. Douglas, 249 Va. 478, 484 n.4, 457 S.E.2d 349, 352 n.4 (1995); GLENN, *supra* note 34, at 198.

foreclosure.[70] Additionally, Virginia has adopted the power-of-sale foreclosure model. Because the property can be sold without judicial intervention, the foreclosure process is more expeditious and less costly than in judicial-foreclosure jurisdictions.[71] Under a power-of-sale foreclosure, the necessary procedures are notice, advertisement, and sale, which will be discussed in detail below.

A. *The Deed of Trust*

When a borrower pledges real property to a lender to secure a debt in Virginia, the borrower signs a note to personally guarantee the loan, and a property conveyance to secure the debt. In many states, the conveyance is called a mortgage; but Virginia utilizes the deed of trust as the instrument used to secure a debt with real property as collateral.[72] Under this mortgage variation, the borrower is called the trustor and conveys a security interest in the property to the trustee, a disinterested third party, through a lien.[73] The trustor maintains both legal and equitable title in the property, while the trustee acts as an agent-fiduciary of both the trustor and the lender, who is the beneficiary of the trust.[74] The deed of trust secures the lender-beneficiary's interest and protects the borrower from acceleration and foreclosure before the lender satisfies the conditions precedent it imposes.[75] If the borrower pays her debt to the lender, the lien on the property is released and the property is no longer encumbered.[76] If, instead, the borrower fails to pay, the trustee is able to foreclose upon and sell the property at the request of the lender.[77] The sale terminates the borrower's interest in the property; title then vests in the buyer at the public sale.[78]

---

70. Matson v. Grease Monkey Int'l, Inc. (*In re* Beverage of Va., Inc.), 237 B.R. 311, 314 (Bankr. E.D. Va. 1998).

71. NELSON ET AL., *supra* note 34, at 8, 634 n.459.

72. GLENN, *supra* note 34, at 122.

73. *Id.* at 122, 128, 137.

74. Franklin Plant Farm, Inc. v. Nash, 118 Va. 98, 111, 86 S.E. 836, 840 (1915); Mayo v. Wells Fargo Bank, NA, 30 F. Supp. 3d 485, 496 (E.D. Va. 2014) (citing Whitlow v. Mountain Trust Bank, 215 Va. 149, 152, 207 S.E.2d 837, 840 (1974) (holding trustee is a fiduciary for both borrower and lender with common-law duty of impartiality)); GLENN, *supra* note 34, at 128–29.

75. Mathews v. PHH Mortg. Corp., 283 Va. 723, 732, 724 S.E.2d 196, 200 (2012).

76. VA. CODE ANN. § 55-66.3 (Repl. Vol. 2012 & Cum. Supp. 2016).

77. GLENN, *supra* note 34, at 124–25.

78. *Id.* at 127.

Virginia law treats a deed of trust like a contract.[79] This enables the parties to a deed of trust to contract to implement their intent.[80] A court construes the deed of trust as it would any other contract, "within the four corners of the instrument itself."[81] The deed of trust is outlined in the Virginia Code, which also provides default rules that govern unless the deed contains provisions to the contrary.[82] In other words, the contract's duties, if more detailed, outrank the statute's.[83] For example, the means used to advertise a foreclosure sale is set out in the Virginia Code; however, parties are free to provide their own means of advertisement in the deed of trust.[84]

As property may be encumbered by multiple liens, it is important to note how recording of a deed of trust affects priority of creditors. Virginia's recording act is a race-notice statute.[85] A deed of trust need not be recorded to be effective among the parties. However, an unrecorded deed will not establish a lien effective against other creditors and subsequent purchasers from the borrower without notice.[86] The lender should record the deed of trust in the clerk's office in the county or city where the property is located to protect itself against future creditors and purchasers.[87] In the same vein, notes and deeds of trust are negotiable instruments that are freely transferrable unless their terms provide otherwise.[88] A note and/or deed of trust assignment may be recorded in the clerk's office, but failure to record an assignment

79. *Mathews*, 283 Va. at 733, 724 S.E.2d at 200; *see also* Squire v. Va. Hous. Dev., 287 Va. 507, 515, 758 S.E.2d 55, 60 (2014).

80. VA. CODE ANN. § 55-59 (Repl. Vol. 2012 & Cum. Supp. 2016).

81. *Mathews*, 283 Va. at 733, 724 S.E.2d at 201; *see also* VA. CODE. ANN. § 55-59 (Repl. Vol. 2012 & Cum. Supp. 2016).

82. VA. CODE ANN. §§ 55-58–59 (Repl. Vol. 2012 & Cum. Supp. 2016).

83. *See* Bayview Loan Servicing, LLC v. Simmons, 275 Va. 114, 121, 654 S.E.2d 898, 901 (2008).

84. VA. CODE ANN. § 55-59.2 (Repl. Vol. 2012).

85. *Id.* § 55-96 (Cum. Supp. 2016).

86. Hunton v. Wood, 101 Va. 54, 61, 43 S.E. 186, 188 (1903).

87. VA. CODE ANN. § 55-96(A)(1) (Cum. Supp. 2016); *see also* Tyler v. Owhit Mortg. Loan Tr., Series 2006-3, 460 B.R. 458, 462 (E.D. Va. 2011), *aff'd* 474 F. App'x 893 (4th Cir. 2012).

88. VA. CODE ANN. §§ 8.1A-302(a), 8.3A-104 (Repl. Vol. 2015).

does not affect its enforceability.[89] Courts have found that the borrower is a nonparty to the assignment, and therefore lacks standing to challenge an assignment of the note.[90]

A specific type of deed of trust called a credit-line deed of trust secures the lender's future advances to the borrower.[91] To be enforceable, it must be clearly marked as a credit-line deed of trust.[92] Once recorded, a credit-line deed of trust establishes the lender's priority against a subsequent creditor for any advances given on or after the date of execution.[93] However, a subsequent judgment creditor may give notice to the holder of a credit-line deed of trust to obtain priority for its judgment over future advances.[94]

B. *Rights and Obligations of the Parties*

Under the Virginia Code, the parties to a deed of trust (the trustor, trustee, and beneficiary) have separate rights and obligations that will be detailed in turn below.

The trustor, or the borrower, retains the rights to possession and ownership of the property used to secure the loan.[95] However, retaining possession of the property comes with obligations that are outlined in Virginia Code. Unless the terms of the deed of trust indicate otherwise, the Code imposes statutory duties upon the trustor, which include duties to pay taxes, not to commit waste, and to maintain improvements in habitable condition.[96] Additionally, the statute provides that interest will accrue from the date of sale, and that the deed of trust secures the interest as

---

89. *Id.* § 55-66.01 (Repl. Vol. 2015 & Cum. Supp. 2016).

90. Wolf v. Fed. Nat'l Mortg. Ass'n, 512 F. App'x 336, 342 (4th Cir. 2013); Buzbee v. U.S. Bank, N.A., 84 Va. Cir. 485, 489 (Va. Cir. Ct. 2012) (Fairfax County).

91. VA. CODE ANN. § 55-58.2(A) (Cum. Supp. 2016).

92. *Id.* § 55-58.2(B) (Cum. Supp. 2016). "The words 'this is a credit line deed of trust,' or words of like purport, if in capital letters or underscored and on the first page of the deed of trust and containing the name and address of the noteholder, shall have the meaning set forth in § 55-58.2." *Id.* § 55-60(11) (Repl. Vol. 2012).

93. *Id.* § 55-58.2(C) (Cum. Supp. 2016).

94. *Id.* §§ 55-58.2(D), -96(B) (Cum. Supp. 2016).

95. Matson v. Grease Monkey Int'l, Inc. (*In re* Beverage of Va., Inc.), 237 B.R. 311, 314 (Bankr. E.D. Va. 1998); GLENN, *supra* note 34, at 128–29.

96. VA. CODE ANN. § 55-59 (Repl. Vol. 2012).

well as the principal.[97] In the event of default and foreclosure, the borrower is entitled to any surplus from the sale of the land.[98]

The trustee is a fiduciary who owes duties to the other parties to the deed of trust.[99] The trustee has duties to remain impartial and to act in the best interest of the parties.[100] The trustee, who is an agent-fiduciary of both the trustor and the beneficiary of the trust, can be liable for breach of his fiduciary duty.[101] Absent breach, however, the trustee is only liable to the beneficiary for the profit realized from his duties under the trust; he is not liable for failing to realize a profit at the sale.[102]

The Virginia Code also outlines the requirements for becoming a trustee. First, only a resident of Virginia or a corporation with its principal office in Virginia may serve as trustee under a deed of trust.[103] If the trustee does not meet this requirement, the court may appoint another to conduct the sale.[104] If the secured lender is a corporation, the trustee may be a stockholder, member, employee, officer, director, or attorney for the corporation.[105] A trustee named in a deed of trust "where the deed or other writing requires that the trustee qualify" must take an oath before the circuit court or clerk that he will perform the duties of his office.[106] If the trustee is a corporation or other entity, its president or other officer may take the oath.[107]

After meeting the statutory requirements, the trustee holds the security interest in trust until the underlying debt is paid or the

97. *Id.* § 55-59(8) (Repl. Vol. 2012).

98. GLENN, *supra* note 34, at 125.

99. VA. CODE ANN. § 64.2-100 (Repl. Vol. 2012); GLENN, *supra* note 34, at 125.

100. *See* Mayo v. Wells Fargo Bank, NA, 30 F. Supp. 3d 485, 496 (E.D. Va. 2014); Whitlow v. Mountain Tr. Bank, 215 Va. 149, 152, 207 S.E.2d 837, 840 (1974). Trustee is a fiduciary for both borrower and lender with common-law duty of impartiality. GLENN, *supra* note 34, at 126.

101. *See, e.g.*, Bremer v. Bitner, 44 Va. Cir. 505, 512–13 (1996) (Fairfax County).

102. VA. CODE ANN. § 64.2-794 (Repl. Vol. 2012).

103. *Id.* § 55-58.1(2) (Repl. Vol. 2012). The Attorney General has issued opinions stating that Virginia limited liability corporations and limited liability partnerships may serve as trustees in deed of trust on real property. 2001 Op. Va. Att'y Gen. 171, 172; Op. to Hon. Gregory D. Habeeb (Mar. 23, 2012). It has also opined that the definition of principal office in Title 13.1 applies to § 55-58.1. Op. to Hon. J. Chapman Petersen (Sep. 14, 2012).

104. Somers v. Virginia-Carolina Joint Stock Land Bank, 177 Va. 431, 441, 14 S.E.2d 327, 331 (1941) (finding the trustee was a foreign corporation not domesticated in Virginia and had no agent or representative in Virginia).

105. VA. CODE ANN. § 64.2-1423(A) (Repl. Vol. 2012).

106. *Id.* § 64.2-1403(B) (Repl. Vol. 2012).

107. *Id.*

borrower defaults.[108] In the event of default, the trustee has a duty to foreclose upon the secured property.[109] This must be done at public auction, and the trustee must follow the statutory requirements for advertising and notice, unless the deed of trust provides for alternate measures.[110] Finally, after the sale is complete, the trustee has the duty to account for the profits in the manner outlined in the Virginia Code.[111] The procedures for foreclosure and sale will be discussed in greater detail in the next section.

In exchange for his services, a trustee is entitled to compensation.[112] A trustee's compensation, if not specified in the deed of trust, should be limited to what is "reasonable under the circumstances."[113] Even if the compensation is set in the deed of trust, the court may alter the amount if the compensation contemplated in the deed of trust is unreasonably high or low. The trustee is also entitled to reimbursement of expenses.[114] A trustee may forfeit his right to compensation if he breaches his fiduciary duties owed to the parties.[115]

The lender, as the beneficiary of the trust, has the right by statute to appoint a substitute trustee for any reason, even if the instrument does not expressly state as such, by executing an "instrument of appointment."[116] Borrowers' attempts to attack appointments of substitute trustees before foreclosure have not succeeded. A borrower, courts have held, is not a party to the appointment and lacks standing to contest it.[117]

---

108. *Id.* §§ 55-66.0–66.5 (Repl. Vol. 2012); GLENN, *supra* note 34, at 124–25.

109. VA. CODE ANN. § 55-59(7) (Repl. Vol. 2012); GLENN, *supra* note 34, at 125.

110. VA. CODE ANN. §§ 55-59.1–59.2 (Repl. Vol. 2012); GLENN, *supra* note 34, at 125.

111. VA. CODE ANN. § 55-59 (Repl. Vol. 2012); GLENN, *supra* note 34, at 125.

112. GLENN, *supra* note 34, at 136.

113. VA. CODE ANN. § 64.2-761(A) (Repl. Vol. 2012).

114. *Id.* §§ 64.2-61–62 (Repl. Vol. 2012).

115. GLENN, *supra* note 34, at 136.

116. VA. CODE ANN. § 55-59(9) (Repl. Vol. 2012). When the instrument is executed, the power immediately vests with the substitute trustee named therein. The substitution instrument should be recorded in the clerk's office where the original deed of trust was recorded.

117. Lewis v. Nationstar Mortg., LLC, No. 3:13cv00026, 2014 U.S. Dist. LEXIS 11113, at *2, *7–9 (W.D. Va. Jan. 29, 2014); Greene v. LNV Corp., No. 3:12cv780, 2013 U.S. Dist. LEXIS 57182, at *1, *9–10 (E.D. Va. Apr. 16, 2013), *aff'd* No. 13-1660, 2014 U.S. App. LEXIS 2630 (4th Cir. Feb. 12, 2014); Wolf v. Fed. Nat'l Mortg. Ass'n, 512 F. App'x 336, 342 (4th Cir. 2013); Bennett v. Bank of Am. N.A., No. 3:12cv34-HEH, 2012 U.S. Dist. LEXIS

III. DEFAULT, FORECLOSURE, AND SALE

A. *Default*

The trustee's power to foreclose and sell the real estate arises when the borrower defaults on her obligations under the deed of trust. The Virginia Code provides that the borrower's failure to pay under the deed of trust or breach of any other promise constitutes default.[118] Unless the deed of trust provides to the contrary, the borrower's failure to pay taxes, commission of waste, and failure to maintain habitability are also considered defaults.[119]

Unless the deed of trust expressly states otherwise, every deed of trust is presumed to contain an acceleration provision: the lender's ability to call the entire loan due at once if the borrower defaults.[120] Upon default, the trustee is able to accelerate the debt the borrower owes on the mortgage, making the full payment due at once. Unless the deed of trust states otherwise, a borrower's single missed payment is a default and is sufficient cause to accelerate.[121] However, new CFPB rules require clear monthly statements to borrowers and prohibit a mortgage servicer from starting foreclosure until the borrower completes a loss-mitigation statement and 120 days have passed since the borrower's last payment.[122]

The borrower should receive a pre-acceleration notice or notice of default giving her a thirty-day right to cure.[123] The borrower's default does not excuse the lender's duty to satisfy conditions precedent to foreclosure.[124] The borrower's default in payments doesn't discharge the lender's post-default obligations. The borrower's nonpayment isn't a material breach.[125] Even if the borrower is in arrears, the lender must comply with all the condi-

---

54725, at *20 (E.D. Va. Apr. 18, 2012).

118. Squire v. Va. Hous. Dev. Auth., 287 Va. 507, 521, 758 S.E.2d 55, 63 (2014) (deciding whether a borrower in arrears breached the contract); VA. CODE ANN. § 55-59(7) (Repl. Vol. 2012).

119. VA. CODE ANN. § 55-59 (Repl. Vol. 2012); NELSON, *supra* note 34, at 540.

120. Lipps v. First Am. Serv. Corp., 223 Va. 131, 138, 286 S.E.2d 215, 219 (1982).

121. *E.g.*, *In re* Stokes, 39 B.R. 336, 339–40 (Bankr. E.D. Va. 1984).

122. 12 C.F.R. §§ 1026.41, 1024.41 (2016).

123. Harrison v. U.S. Bank Nat'l Ass'n, No. 3:12-cv-00224, 2012 U.S. Dist. LEXIS 85735, at *2, *4–5 (E.D. Va. June 20, 2012).

124. Mathews v. PHH Mortg. Corp., 283 Va. 723, 733, 724 S.E.2d 196, 200 (2012).

125. *Id.* at 730, 724 S.E.2d at 199.

tions before foreclosing.[126] Borrowers have contested lenders' failure to provide proper pre-acceleration notice, for example, overstating the arrears.[127]

The Supreme Court of Virginia held that the HUD face-to-face meeting is a condition precedent to acceleration and foreclosure.[128] This meeting could allow a borrower in default to negotiate to resolve the issues.[129] The absence of an ability to accelerate means that the lender may either sue or foreclose for installments as they become due, or wait until the amortization period ends to collect the full obligation.

The typical acceleration clause gives the lender the right, upon the borrower's default, to declare the entire obligation due and payable immediately. The acceleration letter informs the borrower of the right to cure. Acceleration is effective when, after default, the lender notifies the borrower. If the borrower defaults, and if the lender requests, the trustee may call the entire balance of the loan due and may take possession of the property and proceed to foreclosure sale.[130]

The deed of trust and its terms grant the trustee the power to sell the mortgaged property in the event of a borrower's default.[131]

---

126. Bagley v. Wells Fargo Bank, N.A., No. 3:12-cv-617, 2013 U.S. Dist. LEXIS 11880, at *12 (E.D. Va. Jan. 29, 2013).

127. *E.g.*, Bayview Loan Servicing, LLC v. Simmons, 275 Va. 114, 118, 654 S.E.2d 898, 899 (Va. 2008); *see also* Blaney v. Beneficial Fin. I, Inc., No. 7:13cv00333, 2014 U.S. Dist. LEXIS 29224, at *3–4 (W.D. Va. Mar. 6, 2014); Vazzana v. Citimortgage, Inc., No. 7:12cv00497, 2013 U.S. Dist. LEXIS 78541, at *4–5 (W.D. Va. June 4, 2013).

128. Squire v. Va. Hous. Dev. Auth., 287 Va. 507, 516, 758 S.E.2d 55, 60 (2014); *Mathews*, 283 Va. at 736, 724 S.E.2d at 202. Parris v. PNC Mortg., 2014 WL 3735531, at *5 (E.D. Va. 2014) (holding that extensive dealings are not an exception to prerequisite of face-to-face meeting).

129. *Squire*, 287 Va. at 529, 758 S.E.2d at 67 (Mims, J., concurring); *Bagley*, 2013 U.S. Dist. LEXIS 11880, at *13.

130. Lipps v. First Am. Serv. Corp., 223 Va. 137, 138, 286 S.E.2d 215, 219 (1982). The statute states that request must be made by the beneficiary of the deed of trust before the trustee has authority to foreclose. Where the deed of trust repeats this requirement, Virginia courts have held that the request is a condition precedent to the trustee's right to sell, and a sale made without such a request may be set aside. Wills v. Chesapeake W. Ry. Co., 178 Va. 314, 321–22, 16 S.E.2d 649, 653 (1941). If there is a dispute as to the amount owed and/or whether a default exists, the trustee must petition the court to settle that question before proceeding to foreclose. Bremer v. Bitner, 44 Va. Cir. 505, 512 (1996) (Fairfax County) (citing Morriss v. Va. State Ins. Co., 90 Va. 370, 373, 18 S.E.2d 843, 844 (1893)).

131. VA. CODE ANN. § 55-61 (Repl. Vol. 2012).

Therefore, if the terms do not provide for a date of maturity, foreclosure or sale, the secured creditor must petition the court for a decree of sale.[132]

B. *Foreclosure*

The lender's remedies on the borrower's default are foreclosure and sale. If the proceeds from the sale are not enough to satisfy the debt, the lender may seek a money judgment for the deficiency, a personal judgment on the borrower's obligation or note.[133]

The lender must fulfill its requirements in the deed of trust provisions and the relevant statutes before the property may be sold at foreclosure. The procedures for notice and advertisement are precise. Although inadvertent failure to follow them properly does not automatically render the sale void or subject the trustee or the secured lender to liability, it may nevertheless defeat the foreclosure or cause additional delay and expense.[134]

The Virginia Code provides a form for notice of sale.[135] Notice should also conform to the requirements of the federal Fair Debt Collection Practices Act.[136] In Virginia, the notice must include the date, time, and place of the proposed sale, as well as either the instrument number of the trustee's appointment or a copy of the substitution of trustee.[137] The Virginia Code provides that such notice is also sufficient to exercise the trustee's acceleration right contained in the deed of trust.[138] However, in 2008, the Supreme Court of Virginia held that section 55-59 does not supersede the terms of the deed of trust.[139] Therefore, if the deed of

132. *Id.*

133. *See, e.g.*, Nizan v. Wells Fargo, 274 Va. 481, 486, 650 S.E.2d 497, 499 (2007); Resolution Tr. Corp. v. Maplewood Invs., 31 F.3d 1276, 1280 (4th Cir. 1994).

134. VA. CODE ANN. §§ 55-59.1(A), -59.1(C), -59.2(E) (Repl. Vol. 2012).

135. *Id.* § 55-62.

136. 15 U.S.C. § 1692 et seq. (2012).

137. VA. CODE ANN. § 55-59.1(A) (Repl. Vol. 2012).

138. *Id.*

139. Bayview Loan Servicing, LLC v. Simmons, 275 Va. 114, 120–21, 654 S.E.2d 898, 901 (2008). If the deed of trust contains in its terms specific directions concerning notice of sale, they are material and the trustee is required to comply with them. Tabet v. Goodman, 136 Va. 526, 534, 118 S.E. 230, 232 (1923).

trust provides that the trustee does not have the right to accelerate until the pre-acceleration notice has been provided, failure to provide such notice is not excused by section 55-59.[140]

The trustee must send written notice of the foreclosure sale to the current owner of the property at her last known address according to the lender's records. The notice must either be sent by certified or registered mail or personally delivered at least fourteen days before the sale.[141] If there are junior lien-holders and/or assignees who hold notes secured by deeds of trust recorded at least thirty days before the sale is scheduled to take place, written notice must be sent to the addresses recorded on the deeds of trust.[142] Finally, if a condominium association, homeowner's association, or proprietary lessee's association has filed a lien that was recorded at least thirty days prior to the date of sale, that association must be notified.[143]

Notice to junior lien-holders, assignees, and associations may be sent by regular mail at least fourteen days before the sale. Because of these requirements and the IRS notice requirements below, it is imperative for the lender to perform a title examination within thirty days before the date of sale in order to discover all other lien-holders before the sale is carried out.

Under the Internal Revenue Code, the IRS should be notified of a sale of property on which it holds a subordinate lien recorded more than thirty days before the sale.[144] The statute provides that notice of the sale must be given "in writing, by registered or certified mail or by personal service, not less than 25 days prior to such sale."[145] If properly notified, the federal tax lien becomes a

---

140. Mathews v. PHH Mortg. Corp., 283 Va. 723, 731, 724 S.E.2d 196, 199 (2012); *Simmons*, 275 Va. at 121–22, 654 S.E.2d at 901.

141. VA. CODE ANN. § 55-59.1(A) (Repl. Vol. 2012). Mailing the notice at least 14 days before the sale satisfies the requirement, not actual, completed notice to the mortgagor. Gallant v. Deutsche Bank Nat'l Tr. Co., 766 F. Supp. 2d 714, 719 (W.D. Va. 2011); Sun Tr. Bank v. Wright, 63 Va. Cir. 396, 397 (2003) (Roanoke City) (holding that notice sent to the owner's address after her death and not to the executor nevertheless satisfied notice requirements under § 55-59.1).

142. VA. CODE ANN. § 55-59.1(A) (Repl. Vol. 2012).

143. *Id.*

144. 26 U.S.C. § 7425(b) (2012).

145. *Id.* § 7425(c). The notice should be sent to the IRS district office for the district where the property is located. *Id.*

right of redemption for the IRS that expires 120 days after the foreclosure sale.[146]

If proper notice is not given, that creditor's lien transfers, undisturbed, with the property to the successful bidder.[147] The successful bidder is under no obligation to verify whether proper notice was given to the former owner.[148] However, the trustee can petition the IRS for its consent to the sale in order to accomplish the same result as notice.[149]

Notice is not required to be sent to a guarantor.[150] Nor is there a requirement that notice be sent to the borrower's tenants on the property. However, because both guarantors and tenants are potentially interested parties, it is good practice for the trustee or the lender to notify them.

Once the notice has been sent as provided by statute, there is a rebuttable presumption that the creditor-lien-holder has provided notice of default in compliance with the terms of the deed of trust.[151] If the trustee postpones the sale, the parties need not be sent additional notice.

Before a foreclosure sale can take place, the trustee must also advertise it in a newspaper that is circulated in the city or county where the property is located.[152] The advertisement should contain a description of the property sufficient to identify it, but the description need not be as detailed as the description in the deed of trust.[153] The advertisement should also state the date, time, and location of the sale; the sale terms, including any required deposit, and whether the sale is subject to a prior deed of trust; and the name of the trustee or substitute trustee.[154] Finally, it should contain contact information to reach someone who can an-

---

146. *Id.* § 7425(d). If the IRS wishes to redeem the property, the amount to be paid is governed by 28 U.S.C. § 2410(c) (2012).

147. 26 U.S.C. § 7425(b) (2012).

148. *See* VA. CODE ANN. § 55-59.1 (Repl. Vol. 2012).

149. 26 U.S.C. § 7425(c)(2) (2012).

150. Warner v. Clementson, 254 Va. 356, 361, 492 S.E.2d 655, 657 (1997).

151. VA. CODE ANN. § 55-59.1(C) (Repl. Vol. 2012).

152. *Id.* § 55-59.2(A) (Repl. Vol. 2012).

153. *Id.* § 55-59.3(A) (Repl. Vol. 2012). The property's street address may be used or, if there is none, a general description of its location using landmarks and street names. The tax map identification number may be provided, but is not required.

154. *Id.*

swer questions about the property or sale.[155] The trustee does not need to advertise the amount due on the note.[156]

If required information is missing or incorrect in the first advertisement, but corrected in subsequent advertisements, case law suggests that a resulting sale remains valid.[157] Likewise, substantial compliance with advertising requirements may be sufficient as long as the deficiencies at issue do not materially affect the parties' rights.[158]

Where the deed of trust directs the trustee, in case of default, to sell the realty in accordance with specified statutes, the method of advertisement should follow the statute in effect at the time the deed of trust was executed. The Supreme Court of Virginia held that the advertisement terms in the deed of trust should "be measured and determined by the language of the statute which was in effect at the date of the execution and delivery of the deed, and not by that which was in effect at the time of the sale."[159]

Where the statute relating to advertisement of a trustee's sale is referred to and incorporated in the deed of trust, its provisions become material and determine the method of advertising.[160]

If the deed of trust sets out requirements for advertisement publication, then those requirements are all that is necessary as long as they meet the minimum statutory standards.[161] They may state that the foreclosure advertisement must be published at least once a week for two weeks or, if published daily, for three days which may be consecutive.[162] If the deed of trust does not provide for advertisement by publication, then the trustee must advertise once a week for four consecutive weeks or, if the property is located in a city or in a county immediately contiguous to a city, daily for five days which may be consecutive.[163]

---

155. *Id.* The statute specifies that the contact person's name, address, and phone number should be listed.

156. Ashworth v. Cole, 180 Va. 108, 114–15, 21 S.E.2d 778, 781 (1942).

157. Bailey v. Pioneer Fed. Sav. & Loan Ass'n, 210 Va. 558, 563, 172 S.E.2d 730, 734 (1970).

158. *Id.* at 562, 172 S.E.2d at 734.

159. Cromer v. De Jarnette, 188 Va. 680, 684, 51 S.E.2d 201, 202 (1949).

160. Gloucester Realty Corp. v. Guthrie, 182 Va. 869, 871, 30 S.E.2d 686, 687 (1944).

161. VA. CODE ANN. § 55-59.2(A)(1) (Repl. Vol. 2012).

162. *Id.*

163. *Id.* § 55-59.2(A)(2) (Repl. Vol. 2012).

If the sale is postponed, the advertisement requirements above must be completed anew, unlike the notice requirements.[164] In addition, the current statute states that failure to comply with advertising requirements renders the sale voidable by the court.[165]

C. *Sale*

Once the advertisement requirements have been met, the sale must be conducted between eight and thirty days after the last publication.[166]

Unless otherwise stated in the deed of trust, the foreclosure sale should be conducted at the property being sold, at the courthouse steps, the front of the circuit court building of the city or county where the property, "or the greater part" of the property is located, or at another place within that city or county.[167] The statute also states that the sale may take place "in the corporate limits of any city surrounded by or contiguous to such county, or in the case of annexed land, in the county of which the land was formerly a part, as the trustee may select."[168] If the trustee is foreclosing upon a deed of trust that is junior to another deed of trust, the trustee may sell the property "subject to" the prior deed of trust or apply the proceeds of the sale to the payment of that obligation.[169]

The trustee's duty is to conduct the sale with a good faith effort to obtain the best price.[170] The trustee should conduct the sale in an impartial manner, because he is an agent-fiduciary of both the borrower-grantor and the lender-beneficiary of the deed of trust.[171] He has no obligation or duty to bidders at the sale, "ex-

---

164. *Id.* § 55-59.2(D) (Repl. Vol. 2012).

165. *Id.* § 55-59.2(E) (Repl. Vol. 2012). In 1988, the Supreme Court of Virginia ruled that foreclosure sales were void, not voidable, if advertisements did not meet the requirement. Deep v. Rose, 234 Va. 631, 637, 364 S.E.2d 228, 232 (1988). However, this was subsequently superseded by statute in 1992. Substantial compliance with the statute will satisfy the court and the sale will stand. Wood v. MorEquity, Inc., 331 F. App'x 243, 244–45 (4th Cir. 2009); Riley v. Robey, 25 F. App'x 149, 154 (4th Cir. 2002). For an example of an advertisement which the court found sufficiently flawed to void the sale. *See* Lindsey v. Olsen, 30 Va. Cir. 406, 407 (1993) (Fairfax County) (advertising the wrong address).

166. VA. CODE ANN. § 55-59.2(A)(1)–(2) (Repl. Vol. 2012).

167. *Id.* § 55-59.7 (Repl. Vol. 2012).

168. *Id.*

169. Kaplin v. Ruffin, 213 Va. 551, 554–55, 193 S.E.2d 689, 692–93 (1973).

170. Rohrer v. Strickland, 116 Va. 755, 759, 82 S.E. 711, 712 (1914); Hudson v. Barham, 101 Va. 63, 67, 43 S.E. 189, 190 (1903).

171. Linney v. Normoyle, 145 Va. 589, 593, 134 S.E. 554, 555 (1926). The trustee sold

cept to refrain actively from doing anything to hamper them in their search for information or to prevent the discovery of defects by inspection."[172] Therefore, if he has reason to believe that postponing the sale to a later date will obviate a significantly lower price than expected, he has the discretion, and possibly an obligation, to do so.[173] If the property will bring a better price by selling it in separate lots or parcels and if the owner-borrower requests this, and if the trustee refuses, then at the request of the owner, the court may decree such a sale.[174]

Any person other than the trustee may bid on the property at the sale.[175] The prohibition against trustee bidding is absolute: a co-trustee who does not participate in conducting the sale may not bid on or purchase the property.[176] An improper purchase is voidable, regardless of good faith, fair price, or whether the trustee purchases the property for himself or on another party's behalf.[177]

In addition to oral bids in person, the trustee may accept written one-price bids, which he should announce at the sale. If a written bid is the winning bid, a copy should be filed with the post-sale account.[178] The trustee may conduct the sale on cash or credit terms.[179] Before receiving a bid, the trustee can require a cash deposit from any bidder of up to 10 percent of the purchase

---

the property to the only bidder, a representative of the creditor, for a grossly inadequate price and the court held that the sale was prejudicial. *Id.* at 591, 134 S.E.2d at 554. Mayo v. Wells Fargo Bank, NA, 30 F. Supp. 3d 485, 496 (E.D. Va. 2014); Whitlow v. Mountain Tr. Bank, 215 Va. 149, 152, 207 S.E.2d 837, 840 (1974) (holding trustee is a fiduciary for both borrower and lender with common-law duty of impartiality).

172. Feldman v. Rucker, 201 Va. 11, 20, 109 S.E.2d 379, 386 (1959).

173. Morriss v. Scruggs, 147 Va. 166, 174, 136 S.E. 655, 657 (1927); *Linney*, 145 Va. at 593, 134 S.E. at 555.

174. Terry v. Fitzgerald, 73 Va. (32 Gratt.) 843, 852 (1879).

175. VA. CODE ANN. § 55-59.4(A)(1) (Repl. Vol. 2012).

176. *See* Jackson v. Smith, 254 U.S. 586, 588 (1921); Smith v. Credico Indus. Loan Co., 234 Va. 514, 516–18, 362 S.E.2d 735, 736–37 (1987); Whitlow v. Mountain Tr. Bank, 215 Va. 149, 152, 207 S.E.2d 837, 840 (1974); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43, illus. 20 & reporter's note d (AM. LAW INST. 2011).

177. Harrison v. Manson, 95 Va. 593, 599, 29 S.E. 420, 422 (1898).

178. VA. CODE ANN. § 55-59.4(A)(1) (Repl. Vol. 2012).

179. *Id.* § 64.2-778(A)(2) (Repl. Vol. 2012). Even if the sale is advertised on cash terms, it is within the trustees' discretion to actually sell on credit terms. Rogers v. Runyon, 201 Va. 814, 820–21, 113 S.E.2d 679, 683 (1960).

price.[180] Whether to require a deposit is in the trustee's sole discretion, as long as the deed of trust does not require one.[181] The deposit will be refunded unless the bid is successful, in which case it is credited against the sale price.[182] If the winning bidder fails to complete the purchase, its deposit can be used to pay the costs and expenses of the sale.[183] Any remaining balance after the expenses are paid may be kept by the trustee as compensation.[184] The trustee may then resell the property.[185]

The creditor may bid on and purchase the property. Virginia courts have held that the creditor is not obligated to bid the full amount of its debt, particularly if the creditor believes the debtor has sufficient assets to meet any remaining deficit.[186] The Virginia Code says that the trustee must not participate in fixing the lender's bidding price unless the lender "bids the amount secured, including interest through the date of sale and costs of foreclosure."[187]

Since the sale of real property comes under the Statute of Frauds, a foreclosure sale must be formalized by a memorandum of sale signed by the purchaser.[188]

When the trustee receives the sale proceeds, he must account for them to the commissioner of accounts and apply the proceeds to pay the expenses and his commission, discharge any taxes that have priority over the deed of trust, and discharge remaining debts secured by the property in order of their priority.[189] If money remains after these obligations are satisfied, the trustee should

---

180. VA. CODE ANN. § 55-59.4(A)(2) (Repl. Vol. 2012).

181. Yaffe v. Heritage Sav. & Loan Ass'n, 235 Va. 577, 581–83, 369 S.E.2d 404, 406–07 (1988).

182. VA. CODE ANN. § 55-59.4(A)(2) (Repl. Vol. 2012).

183. *Id.*

184. *Id.*

185. Definite Contract Bldg. & Loan Ass'n v. Tumin, 158 Va. 771, 790, 164 S.E. 562, 568 (1932); *In re* Cooper, 273 B.R. 297, 303 (Bankr. D.C. 2002).

186. Va. Hous. Dev. Auth. v. Fox Run Ltd. P'ship, 255 Va. 356, 364, 497 S.E.2d 747, 752 (1998).

187. VA. CODE ANN. § 64.2-1423(A)–(B) (Repl. Vol. 2012). But other kinds of sale to the lender may not pass title, particularly dubious ones. Heermans v. Montague, 20 S.E. 899, 904 (Va. 1890).

188. *Id.* § 11-2(6)–(7) (Repl. Vol. 2011).

189. *Id.* § 55-59.4(A)(3) (Repl. Vol. 2012). The funds must be disbursed in the correct order as set out in the statute.

pay that surplus to the borrower-grantor.[190] The trustee should also execute a deed of release for the borrower-grantor if the sale proceeds satisfied the underlying note.[191]

The trustee is required to make an accounting of the foreclosure sale within six months after the date of sale to the commissioner of accounts for the circuit court where the deed of trust was first recorded.[192] The form for this report is prescribed by the Office of the Executive Secretary of the Supreme Court of Virginia and provided to each circuit court clerk, who in turn provides it to "every fiduciary who qualifies in the clerk's office."[193] The commissioner will review the expenses and commission taken by the trustee. The commissioner should reduce the amounts taken if there is evidence that the trustee was incompetent at the time or that the commission is "excessive in light of the compensation institutional fiduciaries generally receive in similar situations."[194]

The commissioner of accounts reviews the trustee's report and sends it to the clerk and the court. The judge confirms or rejects the account after fifteen days. It is recorded with fiduciary reports.[195]

If the trustee fails to file the accounting with the commissioner, the commissioner will either proceed against the trustee himself by having the trustee served with a summons to file the report or file with the court a list of fiduciaries that did not complete reports within the required time.[196] If the trustee fails to respond within thirty days, the court may assess a fine of up to $500.[197] In addition, if the trustee is a practicing attorney licensed in Virginia and fails to provide an accounting within thirty days of service of summons, the commissioner will send a copy of his report to

190. *Id.*; RAO ET AL., *supra* note 25, at § 16.4.

191. VA. CODE ANN. § 55-59.4(B) (Repl. Vol. 2012). If the grantor has died and there is money that should have been distributed to her, the trustee should instead deliver it to the deceased grantor's personal representative. *Id.* § 55-64 (Repl. Vol. 2012).

192. *Id.* § 64.2-1309(A) (Repl. Vol. 2012). "The date of sale is the date specified in the notice of sale, or any postponement thereof." *Id.*

193. *Id.* § 64.2-1308 (Repl. Vol. 2012).

194. *Id.* § 64.2-1208(A)–(B) (Repl. Vol. 2012).

195. *Id.* § 64.2-1309 (Repl. Vol. 2012).

196. *Id.* §§ 64.2-1215–1216(A) (Repl. Vol. 2012).

197. *Id.* § 64.2-1215(A) (Repl. Vol. 2012).

the Virginia State Bar.[198] Finally, a trustee who fails to report must forfeit his commissions on the sale.[199]

The trustee conveys the property to the buyer by a special warranty deed. If the trustee acts as settlement agent at closing, the trustee must record the deed and other documents within two business days of settlement.[200] The trustee may then disburse the sale proceeds.[201]

In Virginia, if the proceeds from the sale don't satisfy the unpaid balance of the obligation, the lender may recover a personal judgment against the borrower for the deficiency.[202] There are two ways to calculate the amount of the deficiency judgment.[203] First, subtract from the total obligation the larger of the foreclosure sale price or the property's fair market value. Use of fair market value prevents windfalls to a lender that purchases at a foreclosure sale by bidding the amount of the debt or another low figure. Second, subtract the foreclosure price from the borrower's debt. The Montana Supreme Court used its inherent equitable powers to require the first measure, that the fair market value of the foreclosed real estate be the measure in a deficiency judgment proceeding.[204] The borrower should scrutinize the lender's calculation of the deficiency.

Bids at forced foreclosure sales are usually low.[205] Courts do not impose a market-value or fair-market-value standard. They hold that the foreclosure sale price at a regularly conducted sale is defective only if it is grossly inadequate. The Restatement suggests

198. *Id.* § 64.2-1216(C) (Repl. Vol. 2012).

199. *Id.* § 64.2-1217 (Repl. Vol. 2012).

200. *Id.* § 55-525.11 (Repl. Vol. 2012).

201. *Id.* § 55-59.4 (Repl. Vol. 2012).

202. *See, e.g.*, Resolution Tr. Corp. v. Maplewood Invs., 31 F.3d 1276, 1278 (4th Cir. 1994); Nizan v. Wells Fargo Bank Minn. N.A., 274 Va. 481, 485, 650 S.E.2d 497, 499 (2007). *See generally* RAO ET AL., *supra* note 25, at §§ 16.3.1–2. A minority of states forbid deficiency judgments. *See, e.g.*, CAL. CIV. PROC. CODE § 580(d) (West) (Westlaw current with urgency legislation through Ch. 1 of 2016 Reg. Sess. and Ch. 1 of 2015-2016 2d Ex. Sess.).

203. Alan M. Weinberger, *Tools of Ignorance: An Appraisal of Deficiency Judgments*, 72 WASH. & LEE L. REV. 829, 885 (2015) (proposing a statutory solution to calculate a deficiency judgment).

204. Trs. of the Wash.-Idaho-Mont.-Carpenters-Employers Ret. Trust Fund v. Galleria P'ship, 780 P.2d 608, 617 (Mont. 1989).

205. *See* BFP v. Resolution Tr. Corp., 511 U.S. 531, 539 (1994).

a price below 20 percent of fair market value as grossly inadequate.[206]

The Virginia rule is that price inadequacy will only suffice to set aside the sale if the price is so grossly inadequate as to "shock the conscience"[207] or constitute a sacrifice of the property.[208] The Supreme Court of Virginia has also held that the determination of the foreclosed property's value is not based on fair market value, but rather on forced sale value.[209]

If proven, fraud will result in a judgment being set aside, including a foreclosure. But the sale of property at foreclosure for less than market value to the lender, even if the lender is the only bidder does not, without more, constitute fraud.[210]

Since power-of-sale non-judicial foreclosure doesn't require judicial confirmation, a debtor assailing the price as inadequate must, as discussed below, file an independent lawsuit, typically to set the sale aside.[211] If the borrower doesn't vacate the property after the sale, the buyer may employ unlawful detainer to evict the holdover.[212] Whether the borrower may argue that the sale was invalid as a defense to eviction is unknown.[213]

---

206. RESTATEMENT (THIRD) PROP.: MORTGS. § 8.3 cmt. b (1997); *see also* RAO ET AL., *supra* note 25, at § 16.2.3.3. In BFP v. Resolution Tr. Co., the U.S. Supreme Court held that a foreclosure sale is not a Bankruptcy Code fraudulent conveyance. 511 U.S. at 545. A public sale with competitive bidding and an appropriate sale price is conclusive of the property's value. JEFF I. FERRIELL & EDWARD J. JANGER, UNDERSTANDING BANKRUPTCY § 16.03(B)(1) (3d ed. 2013).

207. Squire v. Va. Hous. Dev. Auth., 287 Va. 507, 519, 758 S.E.2d 55, 61 (2014); Musgrove v. Glasgow, 212 Va. 852, 854, 188 S.E.2d 94, 96 (1972) (finding the sale was free from attack for inadequacy of price where winning bid represented entire amount of debt, sale was conducted pursuant to trust deed provisions, and fraud was neither alleged nor proved); Rohrer v. Strickland, 116 Va. 755, 756, 82 S.E. 711, 712 (1914).

208. Linney v. Normoyle, 145 Va. 589, 594, 134 S.E. 554, 555 (1926).

209. Cromer v. De Jarnette, 188 Va. 680, 687, 51 S.E.2d 201, 204 (1949).

210. 11 U.S.C. § 548(a)(1) (2012).

211. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 627 (7th ed. 2010).

212. VA. CODE ANN. § 8.01-124 (Repl. Vol. 2015); *see, e.g.*, Lewis v. Nationstar Mortg., LLC, No. 3:13cv00026, 2014 U.S. Dist. LEXIS 11113, at *3 (W.D. Va. Jan. 29, 2014); Wolf v. Fannie Mae, 2013 U.S. App. LEXIS 4300, at *4 (4th Cir. Feb. 28, 2013); Vazzana v. Citimortgage, Inc., No. 7:12cv00497, 2013 U.S. Dist. LEXIS 78541, at *2–3 (W.D. Va. June 4, 2013); Marion Inv. Co. v. Va. Lincoln Furniture Corp., 171 Va. 170, 181, 198 S.E. 508, 513 (1938); RAO ET AL., *supra* note 25, at § 16.8; DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 5.10(2) (2d ed. 1993).

213. RAO ET AL., *supra* note 25, at § 5.1.4.6.

IV. THE BORROWER'S RESPONSES AND DEFENSES

A. *Redemption*

Generally the borrower may redeem or cure before the sale by paying the amount due in full. The Virginia Code does not provide the borrower an automatic right to cure under the statute.[214] However, some deeds of trust provide the borrower a period in which to reinstate the loan by curing the default, paying the deficiency or "bring[ing] the loan current."[215] The Federal National Mortgage Association-Federal Home Loan Mortgage Corporation deed-of-trust form, widely used in residential transactions, allows the borrower to cure default until five days before the foreclosure sale in a power-of-sale foreclosure.[216] The borrower may pay or tender arrearages before the effective date to cure the default and save her equity in the property. Arrearages include overdue installments of principal and interest plus other costs. If the deed of trust contains such a provision, then the trustee may not initiate foreclosure proceedings until after the cure period has passed.

B. *Asserting a Defense*

Because Virginia is a non-judicial-foreclosure jurisdiction, the borrower must take the initiative to bring the matter before the court. The borrower may sue the lender seeking to foreclose, alleging breach of the statute or the deed of trust.[217] The borrower's defenses include: whether the mortgage is valid; whether she has defaulted; whether proper procedure has been accorded, including notice and advertisement; and breach of the trustee's fiduciary duty.[218]

---

214. VA. CODE ANN. § 55-59 (Repl. Vol. 2012).

215. *E.g.*, *Deed of Trust*, FANNIE MAE/FREDDIE MAC, http://www.freddiemac.com/uniform/pdf/3047.pdf (last visited Oct. 3, 2016).

216. Mayo v. Wells Fargo Bank, NA, 30 F. Supp. 3d 485, 496 (E.D. Va. 2014) (plaintiff's claim for breach of contract because of Inadequate notice of borrower's right to cure survived defendant's motion to dismiss for failure to state a claim); RAO ET AL., *supra* note 25, at § 4.2.5.

217. *E.g.*, Harrison v. U.S. Bank Nat'l Ass'n, No. 3:12-cv-00224, 2012 U.S. Dist. LEXIS 85735, at *4–5 (E.D. Va. June 20, 2012).

218. RAO ET AL., *supra* note 25, at § 4.3.1–2.

If appropriate, the borrower may sue the lender either in tort or contract for wrongful foreclosure and recover damages.[219]

In 2014, in *Squire v. Virginia Housing Development Authority*, the Supreme Court of Virginia held that the borrower had breached by failure to pay arrearages and the lender had breached a condition precedent to foreclosure, the HUD face-to-face meeting.[220] However, the court declined to rescind the foreclosure sale to a buyer it held to be a bona fide purchaser.[221] The borrower's allegations of breach of contract, fiduciary duty, and prayer for damages survived the lender's demurrer and were remanded.[222] There was a dissent on whether the lender's breach of HUD's face-to-face meeting is sufficient in the borrower's post-foreclosure lawsuit, arguing that the borrower hadn't shown that the lender's breach caused her damages.[223] Justice Mims' concurring opinion is persuasive in support of the majority.[224]

A federal judge ruled that a borrower's allegation of her lender's fraud and constructive fraud survived the defendant's motion to dismiss for failure to state a claim upon which relief can be granted.[225] Borrowers have also argued that their lender's tactics breached the implied covenant of good faith and fair dealing. Their arguments, with but one exception, have not been successful. The federal courts have reasoned that the implied covenant is a contract doctrine that does not establish an independent tort; that a contract party does not breach the implied covenant when it exercises an express right under the contract; and that the covenant which is located in Article 2 of the Uniform Commercial Code does not apply to land.[226] The last point is a narrow view of

---

219. Bayview Loan Servicing, LLC v. Simmons, 275 Va. 114, 118, 122; 654 S.E.2d 898, 899, 902 (2008); Mayo v. Wells Fargo Bank, NA, 30 F. Supp. 3d 485, 498–99 (E.D. Va. 2014) (holding abuse of process not plausibly alleged); RAO ET AL., *supra* note 25, at § 16.5.

220. 287 Va. 507, 521, 758 S.E.2d 55, 63 (2014); Parris v. PNC Mortg., 2014 WL 3735531, at *5 (E.D. Va. 2014) (holding that extensive dealings are not an exception to prerequisite of face-to-face meeting).

221. *Id.* at 520, 758 S.E.2d at 62.

222. *Id.* at 521, 758 S.E.2d at 63.

223. *Id.*

224. *Id.* at 528, 758 S.E.2d at 67.

225. Matanic v. Wells Fargo Bank N.A., No. 3:12cv472, 2012 LEXIS 134154, at *17–21 (E.D. Va. Sept. 19, 2012).

226. Jones v. Fulton Bank, N.A., No. 3:13-cv-126, 2013 LEXIS 100779, at *22 (E.D. Va. July 18, 2013); Bagley v. Wells Fargo Bank, N.A., No. 3:12-cv-617, 2013 U.S. Dist. LEXIS 11880, at *19–20 (E.D. Va. Jan. 29, 2013); *Matanic*, 2012 U.S. Dist. LEXIS 134154, at *20–21; Harrison v. US Bank Nat'l Ass'n, No. 3:12-cv-00224, 2012 U.S. Dist. LEXIS 85735

the covenant, for the Restatement of Contracts section on the implied duty of good faith and fair dealing applies to "[e]very contract."[227]

The exception is *Parris v. PNC Mortgage* where a federal district court held that the borrower-plaintiff's complaint for breach of contract alleged sufficient facts to state a claim for the creditor's breach of the implied covenant of good faith and fair dealing.[228] But, lacking an allegation of an independent tort, the borrower's complaint did not state one for punitive damages.[229] The *Parris* decision left Virginia with a division of authority on the issue of whether the borrower may utilize breach of the implied covenant of good faith and fair dealing.

Non-judicial foreclosure takes place between two private parties. By definition, in a non-judicial foreclosure, there is no judicial forum for the mortgage borrower to interpose defenses. Even though the borrower may be deprived of her property interest in her home or farm without a judicial hearing, courts have held that the state-action prerequisite to due process is absent.[230]

Several techniques are available to the borrower. A declaratory judgment is the borrower's most common technique. The borrower may couple it with a quiet title claim.[231] Borrowers' quiet title actions have not succeeded when the plaintiff had not paid the debt and satisfied all her obligations to the lender and therefore did not have a superior right to the property.[232]

(E.D. Va. June 20, 2012); Bennett v. Bank of America, N.A., No. 3:12cv34-HEH, 2012 U.S. Dist. LEXIS 54725, at *29–30 (E.D. Va. Apr. 18, 2012).

227. Metcalf Constr. Co. v. United States, 742 F.3d 984, 990 (Fed. Cir. 2014) (examining a federal government contract); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

228. *See* Parris v. PNC Mortg., No. 2:14cv142, 2014 U.S. Dist. LEXIS 104278, at *28–29 (E.D. Va. July 7, 2014).

229. *Id.*

230. Parks v. Bank of N.Y., 614 S.E.2d 63, 65 (Ga. 2005); *see generally* William E. Eye, Comment, *Are Fannie Mae and Freddie Mac State Actors? State Action, Due Process, and Nonjudicial Foreclosure*, 65 EMORY L.J. 107 (2015) (examining state action in nonjudicial foreclosure and concluding that Fannie and Freddie, under FHFA conservatorship, are state actors).

231. *See, e.g.*, Vazzana v. Citimortgage, Inc., No. 7:12cv0047, 2013 LEXIS 78541, at *14–15 (W.D. Va. June 4, 2013); Squire v. Va. Hous. Dev. Auth., 287 Va. 507, 520, 758 S.E.2d 55, 62 (2014). The borrower may file a *lis pendens* notice with her lawsuit to alert potential buyers.

232. Lewis v. Nationstar Mortg., LLC, No. 3:13cv00026, 2014 U.S. Dist. LEXIS 11113, at *16 (W.D. Va. Jan. 29, 2014); *Bagley*, 2013 LEXIS 11880, at *24–25; Matanic v. Wells Fargo Bank N.A., No. 3:12cv472, 2012 LEXIS 134154, at *21–22; *Squire*, 287 Va. at 520, 758 S.E.2d at 62.

The debtor may also seek equitable relief, an injunction, before the sale.[233] The borrower may file a lawsuit seeking an interlocutory injunction to bar an allegedly improper foreclosure sale.[234] Although posting a bond is a prerequisite for an interlocutory injunction, an indigent may move to waive the bond or set a reduced amount.[235]

After the sale, the borrower may sue in equity to set a defective sale aside[236] or to recover as damages her equity lost because of the lender's improper procedure.[237]

C. *Subsequent Owners and "Show Me the Note"*

Disputes may arise about whether a subsequent owner of an instrument is a holder in due course. If not, the subsequent owner acquires the note or deed of trust subject to the borrower's existing defenses. This issue came before the Fourth Circuit Court of Appeals in *Horvath v. Bank of New York.*[238] The case arose when the borrower defaulted on a note secured by a deed of trust on his home. The note, originally between Horvath and America's Wholesale Lender, had been transferred to the Bank of New York.[239] The Bank foreclosed after Horvath failed to make payments.[240] Horvath argued that the foreclosure was inappropriate because only the original lender had the authority to foreclose.[241] The court observed that "parties may contract around the baseline rules applicable to negotiable instruments."[242] But the note

---

233. Rossett v. Fisher, 52 Va. 492, 499, 501 (1854).

234. HomeSide Lending, Inc. v. Unit Owners Ass'n of Antietam Square Condo., 261 Va. 161, 165, 168, 540 S.E.2d 894, 895, 897 (2001) (deciding a motion for TRO to bar sale); DOUGLAS LAYCOCK, DEATH OF THE IRREPARABLE INJURY RULE 38 (1991).

235. At least one practitioner finds that circuit court judges may be reluctant to waive bond because they think that the bond requirement, "shall," is mandatory under VA. CODE ANN. § 8.01-631(A) (Repl. Vol. 2015). The judge has discretion to set the amount that the court "considers proper" and to set "conditions." Judges often limit the required security to the property itself.

236. *See Squire*, 287 Va. at 507, 758 S.E.2d at 55; Mayo v. Wells Fargo Bank, NA, 30 F. Supp. 3d 485, 498 (E.D. Va. 2014) (recognizing borrower's equitable claim to set aside foreclosure but not deciding it on lender's motion to dismiss); DUKEMINIER & KRIER, *supra* note 211, at 627.

237. *Squire*, 287 Va. at 515, 758 S.E.2d at 59–60; Bayview Loan Servicing, LLC v. Simmons, 275 Va. 114, 119, 654 S.E.2d 898, 900 (2008).

238. 641 F.3d 617 (4th Cir. 2011).

239. *Id.* at 619.

240. *Id.*

241. *Id.*

242. *Id.* at 622.

and deed of trust at issue had not done so.[243] The court also pointed out that, contrary to Horvath's assertion, transfer of the underlying debt (the note) carries with it the transfer of the accompanying securitization by the deed of trust.[244] Thus, the mortgage follows the note.[245]

In an assignment, the borrower's defenses on the note can be available if the assignee is not a holder in due course of the note. The Fourth Circuit addressed one such situation in *Resolution Trust Corp. v. Maplewood Investments*.[246] Maplewood executed a note in favor of Commonwealth Savings Bank of Virginia, F.S.B. ("Commonwealth Bank"), which foreclosed on the property.[247] Commonwealth Bank itself purchased the property at 70 percent of the total indebtedness and filed suit for a deficiency judgment against Maplewood and its individual guarantors.[248] Commonwealth Bank was subsequently closed and Resolution Trust Corp. ("RTC") was appointed receiver; RTC replaced Commonwealth Bank as plaintiff in the deficiency suit.[249] Maplewood alleged that the trustee had conflicts of interest during the foreclosure sale.[250] The district court rejected Maplewood's conflict of interests argument and granted summary judgment to RTC.[251] Maplewood appealed to the Fourth Circuit Court of Appeals.

The Fourth Circuit disagreed with the lower court and found that a conflict of interest had existed.[252] The court held that because a conflict of interest constitutes bad faith, whether the defense would succeed against RTC depended on its status as a holder or non-holder in due course.[253] After a thorough analysis of negotiable instrument law, the court concluded that RTC was not a holder in due course of the note.[254] Thus, Maplewood's defense against RTC survived the transfer.[255]

243. *See id.*
244. *See id.* at 623.
245. *See id.*
246. 31 F.3d 1276 (4th Cir. 1994).
247. *Id.* at 1279.
248. *Id.* at 1279–80.
249. *Id.* at 1280.
250. *Id.* at 1278.
251. *Id.*
252. *Id.* at 1278–79.
253. *See id.* at 1278, 1284, 1294.
254. *Id.* at 1294.
255. *Id.*

Following the mortgage crisis in 2008 and the subsequent wave of foreclosures, debtors across the country invoked a defense nicknamed "show me the note," with varying degrees of success.[256] Simply put, as a defense to foreclosure, the borrower challenges the secured party to produce documentation or other proof that it owns the indebtedness, arguing that without proof, the party cannot properly foreclose.[257] This often proves difficult or impossible for lenders who were not original to the transaction and might even be the third or fourth owners. Plaintiffs successfully interposed lost-note affidavits.[258]

MERS, a subsidiary of MERSCORP, Inc., is a membership-based private database company that tracks mortgage transfer information by assigning a unique eighteen-digit mortgage identification number ("MIN") to each mortgage loan. MERS is the lender's nominee without an interest in the note. The deed of trust may authorize MERS to foreclose.[259] In some states, courts have held that the difficulty in establishing ownership of secured debt rendered foreclosures or transfers invalid.[260] However, in Virginia, courts have rejected MERS-based attacks on foreclosure proceedings.

In *Ramirez-Alvarez v. Aurora Loan Services, LLC*, MERS filed the substitute appointment trustee as nominee.[261] The plaintiff challenged MERS's appointment authority.[262] The court held the plaintiff's request for relief was untimely, but also that it failed

256. *See generally* Bradley T. Borden et al., *Show Me the Note!*, 19 WESTLAW J. BANK & LENDER LIABILITY 3 (2013) (providing a succinct discussion of different states' treatment of the defense); AM. LAW INST., REPORT OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, APPLICATION OF THE UNIFORM COMMERCIAL CODE TO SELECTED ISSUES RELATING TO MORTGAGE NOTES (2011) (providing an analysis of UCC rules for transferring a note).

257. *See* Borden et al., *supra* note 256, at 3.

258. *See, e.g.*, Buzbee v. U.S. Bank, N.A., 84 Va. Cir. 485, 489–90 (2012) (Fairfax County).

259. Tapia v. U.S. Bank, N.A., 718 F. Supp. 2d 689, 693 (E.D. Va. 2010).

260. *See* Eaton v. Fed. Nat'l Mortg. Ass'n, 969 N.E.2d 1118, 1121 (Mass. 2012) (giving prospective affirmation of "show me the note" defense in a non-judicial foreclosure jurisdiction); Gee v. U.S. Bank Nat'l Ass'n, 72 So.3d 211, 213 (Fla. Dist. Ct. App. 2011) (explaining that a court in a judicial foreclosure jurisdiction held that "party seeking foreclosure must present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action") (citation omitted).

261. *See* Ramirez-Alvarez v. Aurora Loan Servs., LLC, No. 01:09cv1306, 2010 U.S. Dist. LEXIS 132536, at *3 (E.D. Va. July 21, 2010).

262. *See id.*

"in light of the security instruments themselves."[263] It went on to explain that "[p]laintiff's legal theory contradicts Virginia's well-established status as a non-judicial foreclosure state, as well as the authority vested in a trustee under Virginia law to foreclose and sell property that is provided as security for a loan."[264] Likewise, in *Ruiz v. Samuel I. White, P.C.*, the plaintiff argued that MERS did not have the power to appoint a substitute trustee.[265] But the court dismissed the suit, holding that MERS, as nominee "may act on behalf of the [l]ender as authorized by the deed of trust."[266] As the Fourth Circuit wrote, "For several centuries, Virginia has attempted to enhance commerce within the state by ensuring that negotiable instruments—broadly defined under Virginia law as 'unconditional promise[s] or order[s] to pay a fixed amount of money' are freely transferable."[267]

The Virginia Code states that if the note or other indebtedness secured by the deed of trust is lost or otherwise unavailable, the trustee can still foreclose, as long as the secured party provides an affidavit stating as much to the trustee and the trustee provides the borrower with notice to that effect.[268] Since the mortgage crisis, Virginia courts have had ample opportunity to address "Show Me the Note," and have decided that it is not a valid defense.[269]

---

263. *Id.*

264. *Id.*

265. *See* Ruiz v. Samuel I. White, P.C., et al., No. 1:09cv688, 2009 U.S. Dist. LEXIS 115455, at *3 (E.D. Va. Dec. 11, 2009).

266. *Id.* at *3–4.

267. Horvath v. Bank of New York, N.A., 641 F.3d 617, 621 (4th Cir. 2011) (citation omitted).

268. VA. CODE ANN. § 55-59.1(B) (Repl. Vol. 2012). Notice must be sent via certified mail, return receipt requested, and must advise the borrower of additional rights as provided in the statute. Mayo v. Wells Fargo Bank, NA, 30 F. Supp. 3d 485, 497 (E.D. Va. 2014) (finding borrower with notice of lost note not injured by lack of lost note affidavit from beneficiary to trustee).

269. *See, e.g.*, Fedewa v. J.P. Morgan Chase Bank, Nat'l Ass'n, 921 F. Supp. 2d 504, 508 (E.D. Va. 2013); Jesse v. Wells Fargo Home Mortg., 882 F. Supp. 2d 877, 879 (E.D. Va. 2012); Gallant v. Deutsche Bank Nat'l Trust Co., 766 F. Supp. 2d 714, 720 (W.D. Va. 2011); *see also* Buzbee v. U.S. Bank, N.A., 84 Va. Cir. 485, 489–90 (2012) (Fairfax County). Massachusetts, a title-theory jurisdiction, also follows non-judicial foreclosure through power of sale. However, the Supreme Judicial Court's decision in U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 45, 55 (Mass. 2011), is much stricter in requiring technical foreclosure procedures including production of assignments that show authority to foreclose. The court invalidated foreclosure sales because the foreclosing banks could not prove that they held the mortgages at the time of the foreclosure notices and sales. The mortgage holder, the court held, must either hold the note or prove that it has authority to act on behalf of

D. *Servicemembers Civil Relief Act*

Originally enacted in 1940 as the Soldiers' and Sailors' Civil Relief Act, the Servicemembers Civil Relief Act of 2003 ("SCRA") prohibits a lender from foreclosing on the property of a borrower-mortgagor serving on active military duty.[270] The SCRA protects active duty members of the Army, Navy, Air Force, Marine Corps, and Coast Guard, and members of the National Guard called to service for longer than thirty consecutive days.[271] The protection extends to any servicemember who executed a note and deed of trust prior to his or her active duty term.[272] It also extends to "a surety, guarantor, endorser, accommodation maker, comaker, or other person who is or may be primarily or secondarily subject to the obligation or liability."[273] The lender may not foreclose until the expiration of a prescribed period after the mortgagor-servicemember's active duty ends.[274]

If a creditor takes action upon a servicemember's obligation during the prohibited period, the court may stay the action of its own volition. It must stay the action if the servicemember requests a stay.[275] In addition, any foreclosure or sale during the period is invalid without a waiver signed by the servicemember or a

---

the note holder, citing *Ibanez*, in Eaton v. Fed. Nat'l Mortg. Ass'n, 969 N.E.2d 1118, 1123 (Mass. 2012). The federal district court in Montgomery Cty. v. MERSCORP, Inc., 904 F. Supp. 2d 436, 441 (E.D. Pa. 2012), found that MERS does not comply with the state recording statute. These decisions hinge on each state's statutes and common law. Under the UCC, the mortgage follows the note. *See generally* AM. LAW INST., REPORT OF THE EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE, APPLICATION OF THE UNIFORM COMMERCIAL CODE TO SELECTED ISSUES RELATING TO MORTGAGE NOTES (2011) (providing an analysis of UCC rules for transferring a note).

270. RAO ET AL., *supra* note 25, at § 4.11.

271. 50 U.S.C.S. § 3911 (Supp. 2016). The SCRA also applies to United States citizens serving with the forces of an ally. 50 U.S.C.S. § 3914 (Supp. 2016).

272. 50 U.S.C.S. § 3953(a)(1)–(2) (Supp. 2016).

273. 50 U.S.C.S. § 3913(a)(4) (Supp. 2016).

274. 50 U.S.C.S. § 3953(c)(1)–(2) (Supp. 2016). The original protection period ended 90 days after the service member returned from active duty. Soldiers' and Sailors' Civil Relief Act—Amendment, Pub. L. No. 108-189, 117 Stat. 2835 (2003). However, in 2008 the Housing and Economic Recovery Act temporarily extended the protection to nine months. Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (July 30, 2008). In 2012 the protection was further extended to one year. Honoring America's Veterans and Caring for Camp Lejune Families Act of 2012, Pub. L. No. 112-154, 126 Stat. 1165, 1209 (2012). That provision is set to expire December 31, 2014 unless Congress chooses to prolong its effectiveness, at which time the protection period would revert to the original 90 days. *Id.*

275. 50 U.S.C.S. § 3953(b)(1) (Supp. 2016).

court order.[276] Interest on existing obligations is also capped at 6 percent while the servicemember is on active duty and for one year afterward.[277]

A servicemember may waive his or her SCRA rights by executing a written agreement, separate from the note and deed of trust, during or after his or her term of service.[278]

E. *Bankruptcy*

Filing bankruptcy is a common borrower's response to foreclosure. The federal bankruptcy court offers a belabored borrower a respite, if not always relief, from a foreclosure.

When a debtor threatened with foreclosure or a foreclosure sale files for relief under the Bankruptcy Code, the Bankruptcy Court's automatic stay prevents the creditor's collection or foreclosure from going forward unless the creditor obtains relief from the stay.[279] The creditor may not file a lien, foreclose, or conduct a foreclosure sale.[280] A creditor's action that violates the automatic stay is void.[281] A creditor's willful violation of the automatic stay may lead to the borrower's recovery of actual damages in compensatory contempt including, if the violation follows notice, punitive damages.[282]

A mortgage lien is the creditor's property interest that is not discharged in bankruptcy. Filing a Chapter 7 liquidation bankruptcy will usually result in the borrower losing the property.[283]

---

276. 50 U.S.C.S. § 3953(c)(1)–(2) (Supp. 2016).

277. 50 U.S.C.S. § 3937(a)(1) (Supp. 2016). The servicemember "shall provide to the creditor written notice and a copy of the military orders calling the servicemember to military service and any orders further extending military service, not later than 180 days after the date of the servicemember's termination or release from military service." 50 U.S.C.S. § 3937(b)(1) (Supp. 2016). Interest above 6 percent is then "forgiven." 50 U.S.C.S. § 3937(a)(2) (Supp. 2016).

278. 50 U.S.C.S. § 3918 (Supp. 2016).

279. 11 U.S.C. § 362 (2012). Bankruptcy Rule 4001 addresses the procedure for motions for relief from stay, and local rules for the Eastern or Western District should also be examined.

280. FERRIELL & JANGER, *supra* note 206, at § 8.02.

281. *Id.* § 8.07.

282. 11 U.S.C. § 362(k) (2012).

283. FERRIELL & JANGER, *supra* note 206, at § 17.01.

The borrower may file a Chapter 13 bankruptcy and propose a plan to pay or reduce the mortgage arrearage.[284] Her filing may lead to modification, a workout of some kind, or a private sale. Under some circumstances, the bankruptcy court can avoid a lien on the debtor's exempt property.[285] The borrower's Chapter 13 plan may cure her default over a reasonable period, but it may not modify her residential mortgage.[286]

The creditor may move for relief from the automatic stay to proceed with its foreclosure. The bankruptcy court "shall" grant relief from the stay "if (A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization" in Chapter 13.[287] It is the creditor's burden to show that no equity exists.[288] A borrower has no equity when the total amount of liens on the property exceeds its value.[289] In *Associates Commercial Corp. v. Rash*, the Supreme Court found that valuation of collateral in bankruptcy should be based on "replacement value."[290] An amendment to the Bankruptcy Code codified the *Rash* decision.[291] Once the creditor has established that the borrower lacks equity, the burden shifts back to the borrower to show that the property is necessary to Chapter 13 reorganization and that there is a reasonable possibility of a successful reorganization in a reasonable time.[292]

The bankruptcy court "shall" grant relief from the stay "for cause, including the lack of adequate protection of an interest in property of such party in interest."[293]Adequate protection exists

284. *Id.*

285. *Id.* § 12.07.

286. *Id.* § 18.07.

287. 11 U.S.C. § 362(d)(2) (2012); FERRIELL & JANGER, *supra* note 206, at § 8.06(B).

288. 11 U.S.C. § 362(g)(1) (2012). All other issues are the burden of the debtor. *Id.* § 362(g)(2) (2012).

289. Nationsbank of Va. v. DCI Publ'g of Alexandria, 160 B.R. 538, 540 (Bankr. E.D. Va. 1993). Liens against other property or other potential collateral are irrelevant to the inquiry. *Id.* at 540–41.

290. Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 960 (1997). The court defined replacement value as "the price a willing buyer in the debtor's trade, business, or situation would pay to obtain like property from a willing seller." *Id.*

291. 11 U.S.C. § 506(a)(2) (2012); *In re* Henry, 457 B.R. 402, 407 (Bankr. E.D. Pa. 2011) ("Bankruptcy courts appear to be unanimous in the view that the first sentence of § 506(a)(2) codifies *Rash* in individual chapter 7 and chapter 13 cases by mandating the use of replacement value as the valuation methodology.").

292. 11 U.S.C. § 362(g) (2012); *see In re* Cho, 164 B.R. 730, 734 (Bankr. E.D. Va. 1994).

293. 11 U.S.C. § 362(d)(1) (2012).

when the property's value exceeds the secured debt.[294] The Bankruptcy Code lists three methods for the debtor to obtain adequate protection: the debtor's periodic cash payments to offset a decrease in the value of the creditor's interest caused by the stay; additional or replacement liens; and "granting such other relief . . . as will result in the . . . indubitable equivalent of such entity's interest in the property."[295] If the debtor has sufficient equity in the secured property and insurance, the creditor will also be adequately protected.[296]

The bankruptcy court will also grant the creditor relief from the stay with respect to secured property if it finds "that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors."[297]

Whether a creditor's mortgage foreclosure is an avoidable preference has led to significant disagreement. Some courts, recognizing that the mortgage creditor stands to receive more from a foreclosure sale than from the bankruptcy proceedings, have held that foreclosures taking place within the ninety-day period preceding the bankruptcy filing can be avoided so long as the creditor fails to overcome the presumption of insolvency.[298] Other decisions have expressed concern about the encroachment of federal bankruptcy law on state sovereignty and refused to allow debtors to use preference recapture to avoid mortgage foreclosures.[299]

The borrower's bankruptcy discharge takes the form of a discharge injunction.[300] Bankruptcy will discharge the mortgage bor-

294. *See* FERRIELL & JANGER, *supra* note 206, at § 8.06(B)(1).

295. 11 U.S.C. § 361 (2012).

296. *E.g.*, *In re* Ebersole, 440 B.R. 690, 698 (Bankr. W.D. Va. 2010); *In re* Franklin Equip. Co., 416 B.R. 483, 528 (Bankr. E.D. Va. 2009). How much equity constitutes adequate protection is left to the court to determine on the facts. *But see In re* James River Assoc., 148 B.R. 790, 796 (Bankr. E.D. Va. 1992) ("Case law has almost uniformly held that an equity cushion of 20% or more constitutes adequate protection . . . and that an equity cushion under 11% is insufficient to constitute adequate protection") (citations omitted).

297. 11 U.S.C. § 362(d)(4) (2012).

298. Glaser v. Chelec, Inc. (*In re* Glaser), No. 01-10220-SSM, 2002 Bankr. LEXIS 1816, at *29 (Bankr. E.D. Va. Oct. 25, 2002); Villarreal v. Showalter (*In re* Villarreal), 413 B.R. 633, 636–37 (Bankr. S.D. Tex. 2009).

299. Newman v. FIBSA Forwarding, Inc. (*In re* FIBSA Forwarding, Inc.), 230 B.R. 334, 341 (Bankr. S.D. Tex. 1999).

300. 11 U.S.C. § 524(a)(2) (2012); Doug R. Rendleman, *The Bankruptcy Discharge: Toward a Fresher Start*, 58 N.C. L. REV. 723, 765 (1980); FERRIELL & JANGER, *supra* note 206, at § 13.09.

rower's unsecured personal obligation on the note.[301] The mortgage creditor's in rem security interest in the collateral is a property interest that isn't discharged. Even though her personal obligation is discharged, the mortgage creditor may foreclose on the borrower's home.[302] Although the lender may foreclose the mortgage, the borrower's liability for a deficiency judgment has been discharged. "This is because the bankruptcy discharge does not extinguish a secured creditor's in rem rights as to the debtor's property; the discharge only prohibits an in personam claim against the debtor."[303]

Instead of foreclosing, a mortgage creditor may communicate with the discharged debtor about continuing her payments on the mortgage.[304] Under section 521 in the Bankruptcy Code, the borrower may reaffirm her debt on the mortgage.[305]

F. *Self-Help and Civil Disobedience*

Borrowers' responses to foreclosures to protect their property have taken the form of self-help and civil disobedience. Shay's Rebellion in 1787 was in part a response to creditors' foreclosures of borrowers' mortgages.[306] The reaction to the rebellion led to replacing the Articles of Confederation with the Constitution.[307]

In the Great Depression of the 1930s, farmers blocked foreclosure sales and suppressed potential bids. "[F]riends of the debtor, using unspoken intimidation to cut off other bids, bought back the property for a few cents and restored it to its owner."[308]

---

301. RAO ET AL., *supra* note 25, at § 16.3.5.

302. FERRIELL & JANGER, *supra* note 206, at § 13.09(B).

303. Lovegrove v. Ocwen Loan Servicing, LLC, No. 7:14cv00329, 2015 U.S. Dist. LEXIS 112768, at *6 (W.D. Va. Aug. 25, 2015).

304. 11 U.S.C. § 524(j) (2012).

305. *Id.* § 521(a)(2)(A).

306. RON CHERNOW, ALEXANDER HAMILTON 224–25 (2004). GEORGE BROWN TINDAL, AMERICA: A NARRATIVE HISTORY 261 (W.W. Norton & Co., Inc. ed., 1st ed. 1984).

307. *Id.* at 262–63, 265, 276.

308. ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE CRISIS OF THE OLD ORDER 1919–1933, 460 (1957); *see also* DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945, 195–96 (1999).

In the recent mortgage crisis, the Philadelphia sheriff refused to conduct foreclosure auctions, a tactic that led to a settlement and some relief for mortgage debtors.[309]

These debtors were defending their property, which was threatened by deflation in its value and their income without deflation in their debts.[310] Political efforts for relief followed in their wake and governments responded.[311]

V. PROPOSALS FOR REFORM

After five million foreclosures between 2007 and 2014 in 2016, although cleanup continues, the foreclosure crisis is winding down or ending. The foreclosure crisis tested all states' systems. In 2013, 607,370 foreclosures were completed.[312] Many of those still out of work are discouraged and not seeking employment and fewer available low-skilled jobs means that unemployment will clear slowly. In Virginia alone, between January 2013 and January 2014, 11,858 foreclosures were completed.[313] The foreclosure system still has a lot of work to do. Suggestions follow for changes in Virginia's system that may ameliorate the borrower's plight without protracting the process.

Judicial Foreclosure. Some observers praise non-judicial foreclosure states for moving property through the system expeditiously. But others criticize them for lack of protection for borrowers.[314] Although a critic of non-judicial foreclosures maintains that judicial foreclosures are superior,[315] Virginia, which waited until 2006 to merge law and equity,[316] seems unlikely to abandon non-judicial foreclosure.

Legal Assistance. Taking a family's home or farm is an extreme exercise of government power. A foreclosure is a complex legal

309. A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always a Good Thing*, 84 IND. L.J. 189, 232 (2009).

310. *Id.*

311. *Id.*

312. CORELOGIC, *supra* note 8, at 7.

313. *Id.* at 8.

314. NELSON ET AL., *supra* note 34, at 948.

315. Judith Fox, *The Future of Foreclosure Law in the Wake of the Great Housing Crisis of 2007–2014*, 54 WASHBURN L.J. 489, 499–506, 520–21 (2015).

316. W. Hamilton Bryson, *The Merger of Common-Law and Equity Pleading in Virginia*, 41 U. RICH. L. REV. 77, 77 (2006).

event that most borrowers should not encounter alone without legal assistance. There is a strong case for civil-*Gideon* lawyers working for non-represented borrowers through appointment or on a pro bono basis.

Conciliation-mediation. Lenders should avoid many foreclosures.[317] At the height of the mortgage crisis, many impersonal mass-production foreclosures were based on questionable and false affidavits.[318] In bureaucratic lending institutions where one hand may not have known what the other hand was doing, one branch began foreclosure proceedings while another branch was negotiating with the borrower. Also, lending institutions, which are often far away from their collateral, are not good at managing foreclosed property.[319] A mandatory pre-foreclosure settlement conference or conciliation-mediation process under state law to supplement the HUD face-to-face meeting before a residential or family-farm foreclosure. This would bring the borrower face-to-face with the lender.[320] This meeting would allow the parties to clear up errors and misunderstandings and work out alternatives to many foreclosures like reinstatement, a modification, a short sale, or a deed in lieu of foreclosure. Notice to the borrower should include notice that mediation is available. The state statute should require the lender to negotiate in good faith about options.[321] The lender's representative should have the power to make a binding deal. Failing a mediated solution, the mediator would issue a certificate that the lender's proposed foreclosure could proceed.[322]

---

317. *See* Fox, *supra* note 315, at 506–11.

318. *See, e.g., id.* at 505 (describing a law office in Florida that handled the bulk of government-sponsored entities' state foreclosures by fraudulently reproducing documents and "robo-signing" affidavits).

319. *See* Cary Spivak, *Lenders Abandoning Foreclosed Properties*, MILWAUKEE-WISCONSIN J. SENTINEL (July 11, 2009), http://www.jsonline.com/watchdog/watch dogreports/50548282.html (describing incident where California-based lender left home condemned in Milwaukee neighborhood after deciding it did not want to take title and gut the foreclosed property).

320. *See, e.g., Information for Homeowners—Foreclosure Mediation Program (FMP)*, DC.GOV, http://disb.dc.gov/service/information-homeowners-foreclosure-mediation-program-fmp (last visited Oct. 3, 2016) (noting that the District of Columbia's Foreclosure Mediation Program provides homeowners and lenders an opportunity to meet face-to-face).

321. RAO, *supra* note 25, at § 4.10.3.

322. Schaefer v. Putnam, 841 N.W.2d 68, 83 (Iowa 2013) (explaining the statutory mandatory pre-foreclosure mediation requirement was a jurisdictional prerequisite for a farm lender suing a borrower to foreclose; but, in the judicial-foreclosure state, the statute did not apply to a lender's compulsory counterclaim).

Conciliation-mediation should be scheduled within four weeks after the lender files. The District of Columbia, which is a non-judicial foreclosure jurisdiction, has a mediation prerequisite for foreclosure, so the problem of coordinating mediation and non-judicial foreclosure should not be insurmountable.[323]

Virginia could retain non-judicial foreclosure and require the lender to file a mediation certificate in circuit court before noticing and advertising the foreclosure.[324] The burden would then be on the borrower to file a motion or a lawsuit to stop or enjoin the foreclosure. The law could give the lender's filing prima facie momentum so that the foreclosure could move forward. But the legislation could give the borrower an opportunity to file a motion to raise defenses and objections instead of filing a separate lawsuit. There would be no judicial review of foreclosure unless the borrower initiated it. But the judge would be a potential buffer between the borrower and the lender.

Restructuring. The recent mortgage crisis stemmed from both irresponsible lending and irresponsible borrowing. One response that was not taken would have allowed a bankruptcy judge to modify or write a negative-equity mortgage down to the value of the property.[325] Although Congress did not give bankruptcy judges power to restructure mortgage debt by reducing it to the value of the collateral,[326] state legislation could give that power to the circuit judge on motion by the borrower if the lender refuses.

Notice. Virginia is a non-judicial foreclosure jurisdiction. A Virginia borrower does not receive a hearing in court and a judicial decision before facing the foreclosure sale.[327] The fourteen-day deadline between the notice and the sale is too short a time for many borrowers to contest by filing a lawsuit to interpose defenses and correct errors. Borrowers who should not have lost their

323. *Information for Homeowners—Foreclosure Mediation Program (FMP)*, *supra* note 320.

324. *See* Fox, *supra* note 315, at 513 (describing the success of foreclosure mediation programs).

325. Abbye Atkinson, *Modifying Mortgage Discrimination in Consumer Bankruptcy*, 57 ARIZ. L. REV. 1041, 1052–53 (2015) (favoring modifications in Chapter 13 bankruptcy); Dickerson, *supra* note 309, at 223–24 n.189.

326. *See* Atkinson, *supra* note 325, at 1055–56 (discussing concerns with giving bankruptcy judges the ability to change the terms of signed mortgage contracts).

327. *Virginia Foreclosure Laws*, FORECLOSURE.COM, https://www.foreclosure.com/state law_VA.html (last visited Oct. 3, 2016).

homes ended up losing them.[328] Either thirty or sixty days would be a reasonable amount of time to mount a defense.

Deficiency judgment. Other states forbid a lender from obtaining a post-foreclosure in personam deficiency judgment to recover the difference between the debt and the value of the collateral.[329] A statutory solution to use "fair value" or a variation based on Louisiana and South Carolina to calculate the deficiency would ameliorate borrowers' plight and reduce possible creditors' windfalls.[330]

Until the beginning of 2014, a short sale that forgave some of the borrower's debt was not income for the borrower.[331] When that provision expired, the IRS became able to tax the borrower on the foregone debt.[332] If there is no deficiency, there is no cancellation of debt, and there is no obligation to pay tax.

If the deficiency judgment is retained, consideration should be given to the statute of limitations. The statute of limitations on a Virginia deficiency judgment is five years.[333] This is too long for the borrower to wait for the other shoe to drop while the debt draws interest at the contract rate. The lender can decide within six months.[334]

Redemption. Virginia has no post-sale redemption by the borrower to preserve her equity of redemption, if any. Some states allow a mortgage borrower to redeem the property by paying the purchaser what it paid at the sale within a set period of time—

---

328. David S. Hitzenrath, *Virginia Puts Homeowners on Fast Track to Foreclosure*, WASH. POST (Dec. 24, 2010, 12:00 AM), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/23/AR2010122305457_pf.html (quoting Jay Speer, Virginia Poverty Law Center).

329. CAL. CIV. PROC. CODE § 580(b) (West) (Westlaw through urgency legislation through Chapters 1–41 and 43–59 of 2016 Reg. Sess., ch. 8 of 2015-2016 2nd Ex. Sess.).

330. Weinberger, *supra* note 203, at 829, 887 (proposing a statutory solution to calculate a deficiency judgment).

331. Kenneth R. Harney, *Senate Action Gives Tax Relief to Short-Sellers This Year; Not Next*, L.A. TIMES (Dec. 28, 2014, 5:00 AM), http://www.latimes.com/business/realestate/la-fi-harney-20141228-story.html.

332. *Id.*

333. VA. CODE ANN. § 8.01-246(2) (Repl. Vol. 2015).

334. Kimbriell Kelly, *Lenders Seek Court Actions Against Homeowners Years After Foreclosure*, WASH. POST (June 15, 2013), https://www.washingtonpost.com/investigations/lenders-seek-court-actions-against-homeowners-years-after-foreclosure/2013/06/15/3c6a04ce-96fc-11e2-b68f-dc5c4b47e519_story.html (noting that the states' statutes of limitations on allowing lenders to pursue deficiency judgments range from thirty days to twenty years). In Maryland, the statute of limitations is twelve years. *Id.*

twenty-eight days, six months, or a year.[335] Maryland grants its judges discretion to allow the former owner to rent the property back for a short period.[336] Allowing a borrower a reasonable time to cure the default by paying the amount in arrears would help borrowers in temporary financial trouble, who are later able to continue making mortgage payments. Virginia should consider post-sale redemption within a reasonable time.

Comparing foreclosure of a deed of trust to a tax sale lends some context to the proposed changes. The tax sale notice period is thirty days.[337] The taxpayer has a right to redeem. A tax sale follows a judicial proceeding and a court order.[338] The taxpayer is entitled to any surplus.[339]

Another contrast to speedy non-judicial foreclosure of a deed of trust is the creditor's bill to collect a judgment lien. A creditor's bill is not used to enforce a deed of trust.[340] Before a judgment debtor's real property may be sold to satisfy a judgment lien, the court must find that renting the property for five years will not pay the debt.[341] A commissioner in chancery conducts a formal judicial sale, which is confirmed by the court before the sale proceeds are distributed.[342]

Allowing protections as well as adding time and possible judicial review to prevent error and to protect the borrower should improve the foreclosure process for the borrower without undue prejudice to the lender and return foreclosed property to the market untainted by unfairness.

CONCLUSION

Mortgage credit is one of the keystones in the economy. This article dealt with the issue of what happens when a mortgage borrower fails to pay. Taking a borrower's home or farm is a serious exercise of state power that, in Virginia, occurs off the judicial

---

335. *See, e.g.*, IOWA CODE ANN. § 628.3 (West) (Westlaw through 2016 Reg. Sess.); *see also* NELSON ET AL., *supra* note 34, at 92.

336. MD. CODE ANN., REAL PROP. § 7-105.6 (West 2016).

337. VA. CODE ANN. § 58.1-3965 (Cum. Supp. 2016).

338. *Id.* §§ 58.1-3960, -3965, -3967 (Cum. Supp. 2016).

339. *Id.* § 55-59.4(3).

340. Kyger v. Sipe, 89 Va. 507, 511–12, 16 S.E. 627, 628 (1892).

341. *Id.* at 511, 16 S.E. at 628; *see also* VA. CODE ANN. § 8.01-462 (Repl. Vol. 2015).

342. VA. CODE ANN. § 8.01-462 (Repl. Vol. 2015).

stage. The tradeoffs between allowing a responsible lender to salvage something from a default and protecting the honest borrower's equity, if any, and due process rights are intricate and controversial. This article has summarized Virginia's technical land financing system from the deed of trust to breach and foreclosure. It includes the lender's procedure as well as the borrower's protections. It closes with the author's suggestions that, if adopted, will ameliorate the borrower's plight, without unduly undermining the lender's ability to collect a just debt.

***