Vulnerable Populations and Transformative Law Teaching

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Teaching to Address the Foreclosure Crisis

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It is important to teach about mortgage financing and foreclosure not only so that students can do this work after graduation but so they may do it well while they are in law school, in law school clinics, or as volunteers. In fact, some very important cases have been handled or involved significant work by law school clinics. It can be especially fruitful for students and lawyers to work with community organizations and related groups that are educating the public and encouraging direct action. A wonderful model is the collaboration in Boston among City Life/Vida Urbana, the Harvard Legal Aid Bureau, Harvard’s WilmerHale Legal Services Center, and students from eight other schools (not all law schools) in the Boston area. Students should be trained not only for litigation but also for other activities, including legislative advocacy (particularly with state legislatures and city councils) and mediation work (particularly taking as a model the foreclosure mediation work in Philadelphia).

Teaching about these topics also will enrich thinking and scholarship about whether the nature of homeownership and our national policy focus on homeownership should be changed. The United States became “a nation of homeowners” as the result of deliberate government policy, rooted principally in New Deal programs. Today, “taxpayer subsidies for homeowners are about three times the size of all rental subsidies and tax incentives combined.” The drive for homeownership strongly favored white households over households of color, and has contributed substantially to the large and growing racial wealth gap. Several experts have urged reconsideration of the national focus on homeownership or redefining the attributes of “the default homeownership package [to provide] ... broad and meaningful access to homeownership’s most valuable attribute — the option to remain in possession.”

All of us ought to teach the students two things: the basic principles and to push the envelope — to protect, enlarge, and expand the rights of borrowers.
homeowners, and renters. Even with the reduction of Property courses to four credits, it is as feasible as it is important to teach about foreclosures. What follows is a discussion of three points that are important to teach and cases and other material that enable one to teach these principles in two to four class hours.

Teach the Basic Principles of Mortgage Financing

If one were going to teach only one case, I suggest that be U.S. Bank National Ass'n v. Ibañez, which provides a platform from which to discuss many basic issues. Also, it is a case that benefited from work of law students, a point well worth making to encourage and inspire your own students.

If one begins by asking what are the facts in this case, responding to a student recital will enable one to illuminate several basic points about the financing of residential real estate.

First, although each of the foreclosures began with a complaint under the Servicemembers Civil Relief Act, once the court had determined that the mortgagors were not entitled to protection under that act, the foreclosing parties then were free to "sell the property at a public auction without judicial authorization or supervision." This invites attention to

- the Servicemembers Civil Relief Act, though the relief available under that act is limited;
- the differences among judicial, non-judicial (power of sale), and strict foreclosure states, focusing on the fact that Massachusetts allows power-of-sale foreclosure; and
- the differences between mortgages and deeds of trust.

Second, since the foreclosing parties had foreclosed and had purchased the properties at the foreclosure sales, one may ask why these cases are in court at all, in this non-judicial foreclosure state. The Supreme Judicial Court tells us that the foreclosing parties filed suit "to quiet or establish the title . . . or to remove a cloud from the title . . ." because they had difficulty securing title insurance. This offers a good opportunity to discuss title insurance and the recordation system.

The discussion of the facts will invite attention to the axiom that mortgage financing involves two fundamental documents: the mortgage and the note. If we consider the note first, we distinguish between negotiable and non-negotiable notes and may observe, without getting deeply into the issue, that the rules
for assignment of notes differ depending upon whether the notes are negotiable or non-negotiable.\(^{23}\) (In this case, the negotiable notes had been validly assigned, so there is no need to pursue this issue.\(^{24}\)

If one then asks what is the central dispute in the case, one focuses on the conditions under which a statutory power of sale may be exercised. (It is worth noting that the power of sale must be authorized both by a statute and "by the mortgage itself."\(^{25}\)) The Supreme Judicial Court emphasizes that because of "the substantial power that the statutory scheme affords to a mortgage holder to foreclose without immediate judicial oversight, ... one who sells under a power [of sale] must follow strictly its terms....\(^{26}\) The statute restricts the categories of people who may exercise a power of sale. The foreclosing entities here were not the original mortgagees.\(^{27}\) Under "the plain language" of the Massachusetts statute, "plaintiffs had the authority to exercise the power of sale ... only if they were the assignees of the mortgages at the time of the notice of sale and the subsequent foreclosure sale."\(^{28}\)

In the trial court, the foreclosing parties initially asserted that each was entitled to foreclose because "it had become the holder of the respective mortgage through an assignment made after the foreclosure sale."\(^ {29}\) The Land Court held that since the assignments had not been either executed or recorded before the foreclosures were initiated, U.S. Bank and Wells Fargo had not been authorized to foreclose.

U.S. Bank and Wells Fargo then moved to vacate the judgments; they "conceded that each complaint alleged a postnotice, postforeclosure sale assignment of the mortgage at issue, but they now represented to the judge that documents might exist that could show a prenotice, preforeclosure sale assignment of the mortgages."\(^ {30}\) The Land Court judge denied those motions to vacate, and the Supreme Judicial Court allowed this direct appellate review.\(^ {31}\)

In the Land Court, U.S. Bank and Wells Fargo had argued that they were the assignees of the mortgages at the time of the notice of sale and the subsequent foreclosure sale "because they possessed the note (endorsed in blank), an assignment of the mortgage in blank (i.e., without an identified assignee), and, as assignees of the notes, a contractual right to obtain the mortgage at those times."\(^ {32}\) The trial court rejected this argument, and rejected also the alternative argument that the sales "were authorized by the last record holder of the mortgage and the plaintiffs acted as the 'agent' of that holder."\(^ {33}\)

In the Supreme Judicial Court, the foreclosing parties "conceded that assignment in blank did not constitute a lawful assignment of the mortgages."\(^ {34}\) Their principal argument on appeal was that they had shown pre-foreclosure assignment of the mortgages to them. They relied on "hundreds of pages of documents" they had submitted at trial, which they claimed established these pre-
foreclosure assignments. "Many of these documents related to the creation of the securitized mortgage pools in which the Ibañez and LaRace mortgages were purportedly included."35

The Supreme Judicial Court details the steps in the transfers of the mortgages. The Ibañez mortgage was originated by Rose Mortgage, Inc., which recorded its mortgage.36 Rose then executed an assignment of the mortgage in blank, i.e., without specifying the name of the assignee.37 At some point, the blank was "stamped with the name of Option One Mortgage Corporation ... and that assignment was recorded on June 7, 2006."38 Prior to the recordation, Option One had executed an assignment of the mortgage in blank.39 According to U.S. Bank, this assignment was to Lehman Brothers Bank, which assigned the mortgage to Lehman Brothers Holdings, Inc., which then assigned it to the Structured Asset Securities Corp., which then assigned the mortgage, pooled with approximately 1,220 other mortgage loans, to U.S. Bank, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certification, Series 2006-Z.40 "With this last assignment, the Ibañez and other loans were pooled into a trust and converted into mortgage-backed securities that can be bought and sold by investors—a process known as securitization."41

"According to U.S. Bank, the pre-foreclosure assignment to it occurred pursuant to a December 1, 2006, trust agreement, which is not in the record."42 U.S. Bank did put in the record a December 26, 2006 Private Placement Memorandum (PPM), "a 273-page, unsigned offer of mortgage-backed securities to potential investors."43 This PPM states "that mortgages 'will be' assigned into the trust," but "U.S. Bank did not provide the judge with any mortgage schedule identifying the Ibañez loan as among the mortgages that were assigned in the trust agreement."44

Thus, Option One appeared as the record holder of the Ibañez mortgage until September 11, 2008, when U.S. Bank recorded a September 2, 2008 assignment of the Ibañez mortgage to it by "American Home Mortgage Servicing, Inc., as 'successor in-interest' to Option One."45 U.S Bank had initiated and consummated the foreclosure on July 5, 2007, when Option One was the record holder of the Ibañez mortgage.

Similarly, the Supreme Judicial Court reviews the history of the mortgage that Mark and Tammy LaRace gave to Option One on May 19, 2005.46 "On May 26, 2005, Option One executed an assignment of this mortgage in blank."47 According to Wells Fargo, Option One then assigned the mortgage to Bank of America, which assigned it to Asset Backed Funding Corporation (ABFC), and "ABFC pooled the mortgage with others and assigned it to Wells Fargo, as trustee for the ABFC 2005-OPT I Trust."48 It would be instructive to engage students in a detailed review of the bases for Wells Fargo's claims that it emerged
from this process as the assignee of the mortgage authorized to initiate foreclosure on July 5, 2007. The crucial facts are:

- "Wells Fargo did not provide the judge with a copy of the flow sale and servicing agreement" that allegedly effected the assignment from Option One to Bank of America, "so there is no document in the record reflecting an assignment of the LaRace mortgage by Option One to Bank of America."59;
- While Wells Fargo did produce a copy of a mortgage loan purchase agreement which recited that Bank of America assigned to ABFC certain mortgages listed in an attached schedule, the copy of the agreement is unexecuted and the schedule allegedly listing mortgages assigned was not put into the record. Thus, "there was no document before the judge showing that the LaRace mortgage was among the mortgage loans assigned to the ABFC."51;
- "Wells Fargo did provide the judge with a copy of the PSA, which is an agreement between the ABFC (as deposito), Option One (as servicer), and Wells Fargo (as trustee), but this copy was downloaded from the Securities and Exchange Commission website and was not signed." The PSA recites an assignment to the trustee of mortgages identified on certain Mortgage Loan Schedules, but "[t]he copy of the PSA provided to the judge did not contain the loan schedules referenced in the agreement."53 Wells Fargo did submit to the judge "a schedule that it represented identified the loans assigned in the PSA, which did not include property addresses, names of mortgagors, or any number that corresponds to the loan number or servicing number on the LaRace mortgage. Wells Fargo contends that a loan with the LaRace property's zip code and city is the LaRace mortgage loan because the payment history and loan amount match the LaRace loan."54
- Wells Fargo conducted the foreclosure sale and purchased the property on July 5, 2007. It "did not execute a statutory foreclosure affidavit or foreclosure deed until May 7, 2008. That same day, Option One, which was still the record holder of the LaRace mortgage, executed an assignment of the mortgage to Wells Fargo as trustee; the assignment was recorded on May 12, 2008."55

The court notes that since Massachusetts is a title theory state, "when a person borrows money to purchase a home and gives the lender a mortgage, the homeowner-mortgagor retains only equitable title in the home; the legal title is held by the mortgagee."56 The "assignment of a mortgage is a conveyance of an interest in land that requires a writing signed by the grantor."57

The court holds that U.S. Bank and Wells Fargo have not borne their burden of establishing that they were the assignees of the mortgages at the time of foreclosure.58 With respect to the Ibanez mortgage, "based on the docu-
ments submitted to the judge, Option One, not U.S. Bank, was the mortgage holder at the time of the foreclosure, and U.S. Bank did not have the authority to foreclose the mortgage.”99 With respect to the LaRace mortgage, Wells Fargo relies on the PSA, which,

in contrast with U.S. Bank's PPM, uses the language of a present assignment (“does hereby ... assign” and “does hereby deliver”) rather than an intent to assign in the future. But the mortgage loan schedule Wells Fargo submitted failed to identify with adequate specificity the LaRace mortgage as one of the mortgages assigned in the PSA. Moreover, Wells Fargo provided the judge with no document that reflected that the ABFC (depositor) held the LaRace mortgage that it was purportedly assigning in the PSA. As with the Ibañez loan, the record holder of the LaRace loan was Option One, and nothing was submitted to the judge which demonstrated that the LaRace loan was ever assigned by Option One to another entity before the publication of the notice and the sale.60

On the basis of the documents submitted to the trial court, the Supreme Judicial Court held that the trial judge “did not err in concluding that the securitization documents ... failed to demonstrate that [plaintiffs] were the holders of the Ibañez and LaRace mortgages ... at the time of the” foreclosures.61

The Supreme Judicial Court also addressed an alternative argument made by U.S. Bank and Wells Fargo. Against the background of the general principle that "the mortgage follows the note," they used their status as the assignees of the notes to argue that "they had a sufficient financial interest in the mortgage to allow them to foreclose."62 The Supreme Judicial Court rejected this argument (as had the trial court), noting that in Massachusetts "the tendency of the decisions" has been that, where the note has been validly assigned but the mortgage has not, "the mortgagee would hold the legal title in trust for the purchaser of the debt, and ... the latter might obtain a conveyance by a bill in equity."63

Teach About the Targeting of Predatory Loans to Low-Income, Minority Homeowners

After the fundamentals of mortgage finance, the next major issue to address is the current foreclosure crisis and how it was created, with a focus on the proposition that low-income, minority, and elderly homeowners were deliberately targeted by unscrupulous lenders who believed that these categories of people would be most vulnerable to predatory lending.64 The goal of these lenders was to take immediate profit and transfer the notes and mortgages to
entities that would have holder-in-due-course status and therefore be immune to defenses offered by the homeowners when the interest rates rose and the homeowners predictably were unable to make the increased payments demanded. Much of the discussion of the foreclosure crisis involves moral judgments about the extent to which it was caused by individuals who irresponsibly purchased "more house than they could afford" rather than by lenders who lied, cheated, and stole, deliberately targeting the people who were most assailable economically and psychologically. As Boston's Citywide/La Vida/Harvard Legal Aid Bureau advocates the importance of education about "the nature of the crisis": "Don't let them individualize the struggle and blame the victim."65

There is a wealth of material available on these topics, but I think one could summarize these points with some lecture and consideration of one case (Associates Home Equity Group, Inc. v. Troup) and one article from the New York Times ("Decades of Gains Vanish for Blacks in Memphis").66  

Ibanez involves "adjustable-rate, subprime loans," the latter being defined as those that "do not meet the customary credit standards of Fannie Mae and Freddie Mac" and are made to borrowers "that typically have limited access to traditional mortgage financing for a variety of reasons, including impaired or limited past credit history, lower credit scores, high loan-to-value ratios or high debt-to-income ratios."67 This ties into a discussion of the distinctions between subprime and predatory loans and the fact that some people are offered only subprime or predatory loans even though they are financially eligible for prime loans.68 It is important that students understand that much of the foreclosure crisis is rooted in illegal discrimination on the basis of race, ethnicity, gender, disability, or age—or a combination of these.69

There is no doubt that subprime loans have been concentrated in low-income, minority neighborhoods.70 Former employees of lenders and others allege that lenders deliberately targeted minority communities for high-cost loans; Thomas E. Perez, the Assistant Attorney General for Civil Rights, testified to Congress that, "[t]he more segregated a community of color is, the more likely it is that homeowners will face foreclosure because the lenders who peddled the most toxic loans targeted those communities."71

Certainly, "[d]elinquencies have been especially high in low-income minority neighborhoods;"72 the allegation in Memphis is that Wells Fargo's foreclosures are seven times more common in black neighborhoods than in white.73 And minority homeowners have less capacity than do whites to cure delinquencies and avoid foreclosure: they suffer higher unemployment rates, lower incomes, lower wealth, and lower "equity cushions."74

These general principles are illustrated in Troup. Beatrice Troup, a 74-year-old African American, had owned her home in Newark, New Jersey, for ap-
proximately forty years. Gary Wishnia solicited her to contract for $49,990 worth of home repairs and undertook to secure financing. He did so by having East Coast Mortgage Co. (ECM) prepare a loan application for $46,500 at 11.65 percent interest, adjustable after six months, with a balloon payment of $41,603.58 after fifteen years. ECM then assigned the mortgage and note to Associates Home Equity Services, Inc. ( Associates). When Troup later defaulted, Associates filed a foreclosure action. Troup counterclaimed and filed a third-party complaint against Wishnia, ECM, and Associates, making claims under federal and state civil rights laws, holder-in-due-course principles, state consumer protection laws, and the Truth in Lending Act (TILA).

The trial court dismissed all of Troup's claims. The Appellate Division reversed with respect to all but the TILA claim, holding, with respect to the civil rights laws, that Ms. Troup was entitled to discovery regarding the allegations that Associates engaged in predatory and racially discriminatory lending and that Associates may also be held accountable for ECM's discriminatory practices because it "controlled" ECM's conduct. 76

The court decided the case against the background of a certification that a "dual housing finance market exists in New Jersey for the refinance and home repair loans" market, and that in "the home improvement market, African-Americans are almost four times as likely to be slotted into subprime lenders as whites, even after accounting for income, loan amount, and differences between deposit-taking banks and nondepository independent mortgage companies." 77 Testimony by Calvin Bradford, a noted expert in discriminatory lending practices, maintained that predatory lenders generally target, "among others, the elderly, minorities, and residents of neighborhoods that do not have ready access to mainstream credit." 78 The court reviewed evidence that supports the claim "that Associates participated in the targeting of inner-city borrowers who lack access to traditional lending institutions, charged them a discriminatory interest rate, and imposed unreasonable terms." 79

Teach About the Problems of Renters in Foreclosure

A substantial number of people affected by foreclosure are renters; the National Low Income Housing Coalition estimates that renters make up approximately 40% of the families facing eviction due to foreclosure. 80 "Renters" comprise tenants in single-family (one to four household) as well as multi-family structures; moreover, after foreclosure, former homeowners often are
characterized as “tenants.” Renters disproportionately are members of low-income and minority populations. Studies of multifamily foreclosures in Chicago have shown much higher rates of foreclosure and numbers of units and households affected by foreclosure in African American neighborhoods than elsewhere.

Renters have at least five kinds of problems with respect to foreclosure: (1) how to acquire notice of and an opportunity to participate in foreclosure proceedings; (2) how to assure that the building is well maintained during the period between default and foreclosure sale—and often even before default, for the period of time when the mortgagor is technically responsible for the condition of the building but is not spending money for maintenance of the building; (3) how to determine to whom to pay rent during foreclosure; (4) how to protect their ability to continue in occupancy during and after foreclosure; and (5) how to secure relocation assistance and replacement housing if they are displaced from the foreclosed home.

While a course in real estate finance would do well to consider each of these issues, I think that a property course realistically could address one or two. I suggest either the second issue, the fourth, or both.

**Maintenance of the Property During Foreclosure**

Before property owners stop paying their mortgages, they end building reserves for capital improvements, defer required maintenance, and cease making repairs and paying utility bills. Thus, before and during the process of foreclosure, the buildings deteriorate and the tenants live in unsafe conditions. If the buildings are vacated, vandalism and property deterioration increase, often causing a permanent loss of housing that disproportionately served low-income minorities.

“Normally a lender, as mortgagee, is not responsible to third parties, private or governmental, for the physical condition of the mortgaged real estate or injuries that occur on it.” There are circumstances that will make a lender/mortgagee so responsible, and when a mortgagor is not maintaining the property—whether or not the mortgagor has defaulted in mortgage payments; whether or not the lender has begun foreclosure proceedings—tenants and others often will want to establish that the lender/mortgagee is responsible for the condition of the premises. This issue is presented neatly in Coleman v. Hoffman. In general, the rule is that “[o]nly by becoming a mortgagee in possession or by acquiring title through foreclosure or a deed in lieu does a mortgagee assume the normal responsibilities of an owner or possessor of real estate.”
In Coleman, the court says that "the determinative issue is not whether each respondent is properly titled a 'mortgagee in possession,' but whether each respondent actually possessed the premises." Moreover, the court emphasizes, "[a]ctual possession, not a right to possession, is the critical inquiry in premises liability cases." Thus, even if the mortgagee's possession were wrongful, the mortgagee could be liable.

The court notes that while a mortgagee does not become a mortgagee-in-possession (MIP) simply by receiving rents, MIP status may be shown by such factors as leasing, making repairs, paying bills, making management decisions, and receiving and responding to tenant complaints. Finding evidence of such conduct in this case, the court reverses summary judgments awarded to two of the parties sued.

Protecting the Tenant's Right to Remain After Foreclosure

Much of the attention that has been paid to renters threatened by foreclosure has been focused on the federal Protecting Tenants at Foreclosure Act (PTFA), which addresses only the fourth problem: it generally provides that tenants with leases may stay until the end of their leases and that other tenants are entitled to 90 days' notice before they have to leave. PTFA specifically does not preempt state and local laws that provide more protection, and some of those laws both enlarge the tenant's ability to remain in place and address other of the potential problems.

There has been a great deal of litigation under PTFA, involving a variety of issues, and it is likely that by the time this chapter appears in print there may be some compelling appellate opinions that would be excellent cases to teach. Pending production of better teaching vehicles, I now would recommend two short cases. I do think it worthwhile to teach at least one PTFA case to give students a view of how rapidly the law in this area is developing.

The first case I recommend is JP Morgan Chase, Nat'l Ass'n v. Gilmore. The right to continued occupancy under PTFA is accorded only to bona fide tenants (which would not include former mortgagors). To be bona fide, a tenant must, among other things, have entered into the tenancy prior to the foreclosure notice. This important (though unreported) decision in San Diego held that a tenant who entered into her lease after the notice of default but before the initiation of the foreclosure process is a bona fide tenant entitled to the protection of PTFA. One reason to teach this case is that it was brought by the clinic at the University of San Diego; teaching the case may inspire your students to do what the USD students did.
The second case I recommend is \textit{GMAC Mtge., LLC v. Taylor}. The decision discusses the interaction of federal and state law, whether PTFA applies only to federally related mortgage loans, and what constitutes the notice of foreclosure under the statute.

These and many other issues already have been raised with respect to PTFA. The judge in \textit{Taylor} relied on his earlier holding that PTFA applies only to federally related mortgage loans. A Georgia federal district court opinion threatens the utility of PTFA in that state, where leases often are framed as five year leases (so that they create "estates" not subject to landlord-tenant laws with respect to repairs) but also are made terminable at will. One district court held there is no private right of action to enforce PTFA.

Other issues include whether PTFA applies to a deed in lieu of foreclosure and whether the tenant's rent satisfies PTFA's requirement that the rent be "not substantially less than fair market rent for the property..." Each Property professor may choose different PTFA issues to address and different cases or other materials to present them.

The foreclosure crisis has invited a thorough reconsideration of the structures for financing housing and enabling its acquisition, retention, and decent maintenance. By introducing our students to these issues, we enable them to make major contributions to the alleviation of suffering and injustice now, and the development of more humane standards for the future.

\textbf{Notes}

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This chapter is dedicated to the memory of Professor Mary Harter Mitchell, an inspired and inspiring teacher and advocate for peace and justice.

1. Many—probably most—homeowners and renters threatened by foreclosure are not represented at all, with respect to the foreclosure or the subsequent eviction. See, Brennan Center for Justice, \textit{Foreclosures: A Crisis in Representation} 2 (2009) (reporting that in various jurisdictions 60\% to 86\% of defendants in foreclosure proceedings were without counsel); Jane Pribek, \textit{Foreclosure Attorneys in Wisconsin Deal with Surge in Work}, 2/22/10 Wis. L.J. (No Page) (stating that "[a] February 2009 report from the Milwaukee Foreclosure Part-
nership Initiative concluded that some 90 percent of borrowers in foreclosure are pro se”); Lawyers’ Comm. for Better Housing 2009 Report, Chicago Apartment Building Foreclosures: Impact on Tenants [hereinafter CBHF 2009 Report] (April 2010) at 1 (stating that “the vast majority of tenants in foreclosure do not have access to legal representation”).

The unavailability of lawyers for those threatened with foreclosure is not surprising, since most law schools have substantially decreased the amount of attention they give to these topics. A recent study of the first-year Property curriculum reported that “[t]he most notable decreases in frequency of coverage ... involve ... real estate conveying, real estate financing, and real estate recording,” Joanne Martin, The Nature of the Property Curriculum in ABA Approved Schools and Its Place in Real Estate Practice, 44 Real Property, Trust and Estate L. 385, 393 (2009). The American Bar Association’s Section of Real Property, Probate, and Trust Law’s Task Force on Real Property Law School Curricula, which conducted the study, urged that more attention be paid to real estate transactions in the first-year Property course. Roger Bernhardt & Joanne Martin, Teaching the Basic Property Course in U.S. Law Schools, 36 Probate & Property 36, 42 (2007).


10. See, Melvin Oliver & Thomas M. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality 6, 8 (1995); see also, Press Release, Institute on Assets and Social Policy, New Study Finds Racial Wealth Gap Quadrupled Since Mid-1980s (May 17, 2010) ("The wealth gap between white and African-American families increased more than four times between 1984–2007 ... from $20,000 to $95,000"). While these figures exclude home equity, the wealth gap is fueled by housing policies, including "persistent discrimination in housing, credit and labor markets." Id. See also, Michael Powell, Blacks in Memphis Lose Decades of Economic Gains, N.Y. TIMES, May 31, 2010, at A1 (stating that studies by the Federal Reserve and the Economic Policy Institute show a similar racial wealth gap for all assets).

See also, Joint Ct. for Hous. Studies, 7403-7403 State of the Nation’s Housing 2010, at Table A-4, p. 37, available at http://www.jchs.harvard.edu/publications/markets/snn2010/snn2010.pdf (the racial gap in homeownership increased in 2009, with whites at 74.8%, blacks at 46.6%, Hispanics at 48.4%, and Asians/Others at 59%). "Delinquencies have been especially high in low-income minority neighborhoods, where high-cost lending was concentrated during the housing boom." Id. at 19. See also, Nancy A. Denton, The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property, 34 Ind. L. Rev. 1199, 1207 (2001) ("even among homeowners, ... African Americans consistently own homes of lower value, regardless of their socioeconomic status and household structure").


13. Teaching about mortgage financing and foreclosure is important for teachers of many courses in addition to the obvious—Property, Real Estate Finance, and Secured Transactions. For Contracts, for example, one might teach about the class action suits the National Consumer Law Center filed against four major lenders regarding their misadministration of the Home Affordable Modification Program (HAMP). The complaints are on the NCLC Webpage—www.nclc.org. Other contract issues may be raised in connection with new mortgage relief programs. See, HUD to Roll Out Emergency Homeowners Loan Program by End of Year, 40 Hous. L. Bull. 237 (2010); States Implement Programs to Provide Hardest Hit Funds to Struggling Homeowners, 40 Hous. L. Bull. 240 (2010).


18. The Supreme Judicial Court references an alternative procedure available in Massachusetts, foreclosure by entry. Ibanez, 2011 WL 38071 at *6n.15.

To get information about the foreclosure laws in your jurisdiction, consult www.realtytrac.com/foreclosure. An invaluable resource on these and related questions is Nelson, Whitman, Section 7.19–.39 discuss power of sale foreclosure. Excellent resources for information about foreclosure are the National Consumer Law Center (www.ncl.org) and the Center for Responsible Lending (www.responsiblelending.org). Excellent resources for information about the rights of tenants in foreclosure are the National Housing Law Project (www.nhlp.org) and the National Low Income Housing Coalition (www.nlihc.org).

19. If one also teaches Coleman v. Hoffman, 115 Wash. App. 853, 64 P.3d 65 (2003), one can point to it as a situation involving a deed of trust. Coleman is discussed in this chapter at text at notes 88–92. See also, Nelson & Whitman, supra note 18, at §1.6 (discussing deeds of trust).


21. Id. at *1n.6.

22. There is a reference to recordation also at Ibanez, 2011 WL 38071 at *2n.8.

23. Non-negotiable notes may be assigned in various ways, including endorsement or separate documents. See, Nelson & Whitman, supra note 18, at 390. For negotiable notes, “the mode of transfer is much more narrowly constrained. The note must be physically transferred into the hands of the person who is gaining the right to enforce it.” Id. at 391, emphasis in original. “If the delivery is accompanied by an endorsement of the note, the transferee is known as a ‘negotiation,’ and the transferee may become a holder-in-due-course.” Id. “[D]elivery is absolutely essential to a transfer of the right to enforce a negotiable note.” Id. at 392. “Unfortunately, many of the cases do not distinguish between negotiable and nonnegotiable notes, and they often make statements about assignment which clearly could not be correct as representing attempts to enforce a negotiable note.” Id. at 392–3, footnotes omitted.

24. Similarly, we may note that holder-in-due-course (HDC) status was very important to the lenders involved in this transaction, and that HDC status is available only for

25. Similarly, we may note that holder-in-due-course (HDC) status was very important to the lenders involved in this transaction, and that HDC status is available only for
obligable notes. See NELSON & WHITMAN, supra note 18, at §§ 5.29–5.32 (with respect to HDC status).
26.  Id. at *6.
27.  Id. at *1.
28.  Id. at *7. The court notes also that the statute requires that the foreclosing party must give advance notice which includes, among other things, the name of the foreclosing party: "the failure to identify the holder of the mortgage in the notice of sale may render the notice defective and the foreclosure sale void." Id.
29.  Id. at *1.
30.  Id. at *2.
31.  Id.
33.  Id.
34.  *Ibáñez*, 2011 WL 38071 at *10. The Supreme Judicial Court says that this "concession is appropriate" because "[w]e have long held that a conveyance of real property, such as a mortgage, that does not name the assignee conveys nothing and is void; we do not regard an assignment of land in blank as giving legal title in land to the bearer of the assignment." Id.
35.  Id. at *2.
36.  Id.
37.  Id.
38.  Id.
39.  Id.
40.  Id.
42.  *Ibáñez*, 2011 WL 38071 at *3.
43.  Id.
44.  Id.
45.  Id. at *4. For ease of reference, the chain of entities through which the Ibáñez mortgage allegedly passed before the foreclosure sale is:
   Rose Mortgage, Inc. (originator)
   ↓
   Option One Mortgage Corporation (record holder)
   ↓
   Lehman Brothers Bank, FSB
   ↓
   Lehman Brothers Holdings Inc. (seller)
   ↓
   Structured Asset Securities Corporation (depositor)
   ↓
U.S. Bank National Association, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z.” Id. at 3.
46.  Id. at 4.
47.  Id.
48. *Id.* "For ease of reference, the chain of entities through which the LaRace mortgage allegedly passed before the foreclosure sale is:
   
   Option One Mortgage Corporation (originator and record holder)
   ↓
   Bank of America
   ↓
   Asset Backed Funding Corporation (depositor)
   ↓

Wells Fargo, as trustee for the ABFC 2005-OPT 1, ABFC Asset-Backed Certificates, Series 2005-OPT 1." *Id.*

49. This review should produce some moments of (somewhat black) humor in the classroom. One might season the discussion with information about the salaries paid to lawyers who represent Wells Fargo. At the very least, this is an object lesson in how not to practice law.


51. *Id.*

52. *Id.*

53. *Id.* at *5.

54. *Id.*

55. *Id.* "[T]he assignment declared an effective date of April 18, 2007, a date that preceded the publication of the notice of sale and the foreclosure sale." *Id.*

56. *Id.* at *8; see, *Nelson & Whitman,* supra note 18, at §1.5 (discussing title, lien, and intermediate theories of mortgage law).

57. *Ibanez,* 2011 WL 38071 at *8. This would be an opportunity to discuss the statute of frauds.

58. *Id.* The Supreme Judicial Court notes also that the notice of the foreclosure sale may be defective and the foreclosure sale void when the notice does not accurately identify the present holder of the mortgage. *Id. See,* note 28.

59. *Id.* at *8 (summarizing the defects in the documents).

60. *Id.*

61. *Id.* at *9.

62. *Id.* at *10.


The opinion’s analysis is in four parts. Part I, addressing discriminatory lending claims under the civil rights laws, is the most relevant part of the decision. One might omit parts
II (holder-in-due-course status) and IV (Truth in Lending Act). Part III, addressing consumer fraud claims, is so relevant to Part I that it is worth including.

The article is Powell, supra note 10.

70. See, e.g., State of the Nation’s Housing 2010, supra note 10, at 3; Daniel McCue, The Painful Impact of the Housing Downturn on Low Income and Minority Families, SHELTERFORCE, Fall 2009, at 26, 27 (stating that, according to HUD estimates of all loans issued between 2004 and 2006, "the median share of high-cost loans in the low-income minority neighborhoods was 50 percent, while the median share for low-income white neighborhoods was approximately 30 percent").

73. Powell, supra note 10.
74. Id.; McCue, supra note 70, at 27 (stating that “[e]ven before the recession began, the share of minority homeowners with equity cushions of less than 5 percent of the home’s value was twice as high as that of whites (6.9 percent versus 3.4 percent)
75. These facts are based on the “the evidentiary material in a light most favorable to the Trouts...” Associates Home Equity Group, Inc. v. Troup, 343 N.J. Super. 254, 778 A.2d 529, 534 (2001). This abbreviated review of the facts refers only to Ms. Troup, although the case also involved her son, and—as the court did—uses “Wishnia” to designate not only Gary Wishnia himself but also the corporate entities with which he was associated.
76. The court did not set out the specific statutory provisions pertinent to the decision on the civil rights claims. Most Property casebooks probably have the federal statutes: 42 U.S.C. §§ 1982 and 3604(a) and (b). Section 1982 was at issue in Jones v. Mayer, 392 U.S. 409 (1968) and was referenced in Shelley v. Kraemer, 334 U.S. 1 (1948). Most Property casebooks probably also contain some reference to the 1968 Fair Housing Act and its central substantive provision, Section 3604. These cases and statutes appear in PHR, supra note 2.
77. Troup, 778 A.2d. 529 at 536n.2.
78. Id., at 537. For Calvin Bradford’s credentials, see, e.g., Testimony before the House Financial Services Subcommittee on Financial Institutions and Consumer Credit, April 15, 2010, available at http://www.house.gov/apps/list/hearing/financialsvcs_dem/bradford_testimony_4.15.10.pdf, and Statement before the National Commission on Fair Housing

79. Troup, 778 A.2d. 529 at 538.

80. Danilo Pelletiere, Renters in Foreclosure: Defining the Problem, Identifying Solutions [hereinafter Renters in Foreclosure] National Low Income Housing Coalition (Jan. 2009), at 3 and Executive Summary. See also, LCBH 2009 Report, supra note 1, at 9 (stating that in 2009, "significantly more rental units were impacted by foreclosure than were owner-occupied units in the City of Chicago").


82. Renters in Foreclosure, supra note 80, at 4.


84. See, e.g., id., at 1 (stating that "[m]any ... tenants were unaware that their buildings were in foreclosure until their essential services were shut-off..."); id. at 11 ("there is a significant period of time during the foreclosure process where owners may have effectively abandoned the property but lenders refuse to take responsibility for maintaining the rental units").

85. Id., supra note 1, at 13–14; Executive Summary at 2.

86. Nelson & Whitman, supra note 18, ¶4.47 at 256.

87. Tenants also may be protected by state or local laws or by countervailing common law principles. The National Law Center on Homelessness and Poverty reports that New York has enacted statutes that require that "the successor in interest to the foreclosed mortgagor maintain the property after and/or during foreclosure" and that Maine and Wisconsin have enacted statutes to give tenants the "right to deduct or withhold rent under certain circumstances, such as to cover repairs to the property in foreclosure or to compensate for the potential loss of a security deposit." Staying Home, supra note 4, at 3 (stating that as of March 2010, at least 21 states were considering protective legislation). Also, state statutes or local ordinances, including housing codes and receivership laws, that impose duties of maintenance and repair may apply to mortgagees or to successors in interest as well as to original mortgagees.


89. Nelson & Whitman, supra note 18, ¶4.47 at 256.

90. Coleman, 64 P.3d 65 at 68.

91. Id. This might explain why mortgagees are not liable even in title theory states, where the mortgagees hold title, though under the Coleman court’s definition of possession, a mortgagee in a title theory state would seem to be a possessor. The definition of possessor in Coleman is "(a) a person who is in occupation of the land with intent to control it or (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b)." Id. See generally, Nelson & Whitman, supra note 18, §§4.24 through 4.29.

92. Coleman, 64 P.3d 65 at 70.


The statute makes special provision for section 8 tenants, and the protections of PTHA
do not apply if the new owner plans to use the property as her primary residence.

94. Statutory requirements of notice of a foreclosure action or a foreclosure sale (in advance or after the fact) have been enacted by several states. See, State and Local Measures, supra note 4. See also, Staying Home, supra note 4, at 6, 7 (stating that several states have enacted legislation enlarging the time within which the tenant must vacate the property after foreclosure); up-to-date information on these developments should be available at www.nhlp.org.

One of the most important forms of state legislative protection is a requirement that tenants not be evicted except for good cause, with the specification that foreclosure of a mortgage does not constitute good cause for eviction. Both New Jersey and the District of Columbia require just cause for eviction for all tenants, as do several cities; other jurisdictions require just cause for eviction for certain categories of tenants. See, Florence Wagman Roisman, The Right to Remain: Common Law Protections for Security of Tenure: An Essay in Honor of John Otis Calmore, 86 N.C. L. Rev. 817, 831–835 (2008); see also, Chase Manhattan Bank v. Josephson, 638 A.2d 1301, 135 N.J. 209 (1994) (holding that under the N.J. Anti-Eviction Act, a foreclosing mortgagee may not evict a tenant without satisfying the good cause requirements of the statute; the fact of foreclosure itself does not establish good cause for eviction).

95. Materials about PTFA, including notices of new cases, are posted at www.nhlp.org. Such developments also are discussed in the Housing Law Bulletin, published by the National Housing Law Project. The author’s webpage, supra note 2, may have additional relevant material.


97. A tenant is bona fide if (1) she is not the mortgagor or the child, spouse, or parent of the mortgagor; (2) the lease or tenancy is the result of an arms’ length transaction; and (3) the rent is not substantially less than the fair market rent for the property. Protecting Tenants at Foreclosure Act § 702(2)(B)(b)(1)(3).

98. Id. The supervising attorney in the case is Professor Allen M. Gruber of the University of San Diego Legal Clinics, amgruber@gruber-donnet.com. For other cases involving the bona fide tenant issue, see, www.nhlp.org; one case is JP Morgan Chase, Nat’l Ass’n. v. Weathers, No. 70176/09 (N.Y. Queens Cty. Ct. May 6, 2010), distinguishing U.S. Bank Nat’l Ass’n v. Hurtado, 27 Misc.3d 933, 899 N.Y.S.2d 806 (Nassau Dist. Ct. 2010).

In Gilmore, No. 00-2009-00048525-CL-UD-CTL, the court entered only a minute order. To teach the case, one would use the tenant’s trial brief, which is posted at author’s Webpage, supra note 2.

99. GMAC Mtge., LLC v. Taylor, 27 Misc.3d 550, 899 N.Y.S.2d 802 (Suffolk County, 3d Dist. 2010).

100. This last issue is clarified by 2010 legislation, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1484, 124 Stat. 1376, 1386 (2010), 12 U.S.C. § 5301, which amends Protecting Tenants at Foreclosure Act section 702 (c) to provide that the date of a notice of foreclosure shall be deemed to be “the date on which complete title to a property is transferred to a successor entity or person as a result of an order of a court or pursuant to provisions in a mortgage, deed of trust or security deed.”


102. Tiffany Joel v. HSBC Bank USA, No. 1:10-cv-00732-TWT (N.D. GA March 16, 2010) (dismissing a tenant’s suit seeking protection for the five year term of the lease, the
court held that "The Plaintiff is not entitled to remain in the property because her lease is terminable at will".


105. Another possibility is U.S. Bank, N.A. v. Davis, No. 10-H84-SP-/0/0/3/3/5/1/ (MA, City of Boston Div., Housing Court Dept., Oct. 27, 2010) (Order Granting Motion to Dismiss or, in the Alternative, for Summary Judgment). This decision holds that PTFA does not apply, but the tenant is protected by the technical requirements of state law that specify the date on which a notice to quit must expire. An edited version of this decision also is on author’s webpage, supra note 2.