

## A LENDER'S VORPAL SWORD: EXPUNGENT AFFIDAVITS & THEIR POWER TO VOID SHERIFF'S SALES & REVERT MORTGAGES BACK TO THE HOMEOWNER

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*When confronted with a foreclosure, homeowners across Michigan find themselves susceptible to a unique and dire scenario. After losing their homes at a sheriff's sale, homeowners face the possibility that their lenders will execute an "expungement affidavit," a document that, for all purposes, voids the sheriff's sale, reverts the mortgage and title of the home back to the foreclosed homeowner, and leads to a second foreclosure that the homeowner is forced to endure.*

*This Note presents four arguments: 1) the authority under Michigan's statutes expressly forbids this lender practice, 2) the expungement affidavit is an irregularity in the foreclosure process under Michigan common law, 3) the laws of numerous other states lend support to the proposition that Michigan courts should stop lenders from continuing this practice, and 4) there are multiple policy reasons for disallowing this practice. In the end, this Note aims to shed light on a questionable practice that has the ability to cause further harm to homeowners in Michigan and could ultimately spread to foreclosure processes in other states.*

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## INTRODUCTION

Like many Americans across the country, Michigan residents have faced a staggering number of foreclosures in the last few years.<sup>1</sup> In 2009, Laura Buttazzoni was one of the many Michigan homeowners facing the dire reality that she was going to lose her home.<sup>2</sup> After Buttazzoni's failed attempt to sell her home, her bank initiated its own sheriff's sale in late 2009.<sup>3</sup> After the statutory redemption period expired,<sup>4</sup> Fannie Mae evicted Buttazzoni and relisted the home in 2011.<sup>5</sup> Even though Buttazzoni's home was foreclosed

<sup>1</sup> See Ben Henry, Jill Reese & Angel Torres, ALLIANCE FOR A JUST SOCIETY, *Wasted Wealth: How the Wall Street Crash Continues to Stall Economic Recovery and Deepen Racial Inequity in America*, (May 2013), available at [http://allianceforajustsociety.org/wp-content/uploads/2013/05/Wasted.Wealth\\_NATIONAL.pdf](http://allianceforajustsociety.org/wp-content/uploads/2013/05/Wasted.Wealth_NATIONAL.pdf) (stating that in 2012, Michigan endured 1 foreclosure for every 50 households).

<sup>2</sup> *Buttazzoni v. Nationstar*, No. 13-CV-14901, 2014 WL 1031278, at \*1 (E.D. Mich. March 14, 2014).

<sup>3</sup> *Id.*

<sup>4</sup> GRANT S. NELSON & DALE A. WHITMAN, *REAL ESTATE FINANCE LAW* 569-70 (5th ed. 2007) (introducing the concept of redemption rights).

<sup>5</sup> *Buttazzoni*, 2014 WL 1031278, at \*1.

upon, sold at a sale, and relisted on the market—she was not done with the property.<sup>6</sup> In June 2012, nearly three years after Buttazzoni's eviction, Fannie Mae executed an "expungement affidavit," which voided the 2009 sheriff's sale and reverted the mortgage back into Buttazzoni's name.<sup>7</sup>

Initially, this event may have seemed like a blessing to Buttazzoni, since she was once again the homeowner of her previous residence.<sup>8</sup> However, Buttazzoni quickly realized her home was no longer in the condition she had left it in, and many problems awaited this new ownership.<sup>9</sup> She was not better off financially and would soon face the foreclosure process once again.<sup>10</sup> The inevitable struck in 2013 when Buttazzoni's property was foreclosed upon a second time, which allegedly affected her credit score.<sup>11</sup> Buttazzoni filed suit against her lender for improper foreclosure, among other claims.<sup>12</sup> Buttazzoni alleged the use of an "expungement affidavit" was an irregularity in the foreclosure process.<sup>13</sup> The court, however, disregarded this claim with little explanation except that it reasoned the affidavit and first foreclosure had no bearing on the second foreclosure.<sup>14</sup> The court held that Buttazzoni's allegations lacked merit and dismissed her case.<sup>15</sup> She was left without relief.<sup>16</sup>

This scenario, involving an expungement affidavit, has played out in various forms solely across Michigan within the last five years.<sup>17</sup> An expungement affidavit is a piece of paper a lender notarizes, which usually states a foreclosure sale has been "inadvertently held" and will be treated as "void *ab initio*" without stating further reasoning in the document.<sup>18</sup> Filling out such an affidavit will effectively void a foreclosure sale and convey the

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<sup>6</sup> *See id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* (stating that Buttazzoni "was once again the homeowner of the property").

<sup>9</sup> *Id.* Buttazzoni alleged heating oil had been delivered to her home while in Fannie Mae's possession, which leaked by way of the underground reservoir. Further, the boiler had been removed and the furnace was no longer in working order, which in turn caused the pipes to freeze and burst. Buttazzoni alleged substantial damages to the property caused an environmental hazard. *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (stating that Buttazzoni's "credit was then damaged a second time through no fault of her own").

<sup>12</sup> *Id.* In addition to improper foreclosure, Buttazzoni alleged intentional infliction of emotional distress, slander of title, slander of credit, and an allegation under the Fair Credit Reporting Act. *Id.*

<sup>13</sup> *Id.* at \*3. Buttazzoni claimed that "a foreclosure following the expungement was an irregularity requiring the voiding of the second foreclosure." *Id.*

<sup>14</sup> *Id.* ("Plaintiff ha[d] not include[d] even one allegation concerning how the expungement affected the second foreclosure process.").

<sup>15</sup> *Id.* at \*4.

<sup>16</sup> *Id.*

<sup>17</sup> *See infra* Part II.

<sup>18</sup> *See, e.g.,* Connolly v. Deutsche Bank Nat'l Trust Co., 580 F. App'x 500, 502 (6th Cir. 2014) (explaining the lender filed an expungement affidavit that only reasoned the sheriff's sale was "inadvertently held").

original mortgage back to the homeowner.<sup>19</sup> Usually the homeowner is then forced through the foreclosure process a second time, which harms his or her credit, and the redemption period and price changes.<sup>20</sup> Lenders continually use the expungement affidavit as a means to revive and revert foreclosed homes back to homeowners, despite these negative effects on the homeowner.<sup>21</sup> The unilateral use of an expungement affidavit is an illegal instrument under current statutory and common law, is at odds with all other state foreclosure processes, and is an unjustified means of power with little benefit to lenders and many consequences for residential homeowners.

Part I of this Note discusses the background of residential foreclosure law.<sup>22</sup> Part II examines Michigan's recent influx of cases involving expungement affidavits and the process of voiding sheriff's sales around the United States.<sup>23</sup> Part III argues the expungement affidavit is an unlawful use of authority under Michigan statutory law, case law, and is plainly at odds with public policy and other state foreclosure practices.<sup>24</sup> In concluding, a short solution will prove the unilateral use of expungement affidavits should be deemed unlawful in all situations, except when the affidavit is used mutually amongst homeowners and lenders to avoid the costly judicial process in circumstances of loan modifications and instrument errors, which can benefit both Michigan and all other states.<sup>25</sup>

## I. MORTGAGE FORECLOSURE LAW

Foreclosure is a process lenders use to recoup property when a borrower has failed to make mortgage payments.<sup>26</sup> The actual process varies widely state to state,<sup>27</sup> but can be divided into two groups—judicial and non-judicial foreclosures.<sup>28</sup> In all instances where a lender uses an expungement affidavit,

<sup>19</sup> See discussion *infra*, Section II.A (discussing the statutory authority that allows the affidavit to convey property back to the homeowner).

<sup>20</sup> See, e.g., *Connolly*, 580 F. App'x at 502 (the redemption price went from \$108,750 to \$172,000).

<sup>21</sup> *Id.*

<sup>22</sup> See discussion *infra* Part I.

<sup>23</sup> See discussion *infra* Part II.

<sup>24</sup> See discussion *infra* Part III.

<sup>25</sup> See discussion *infra* Part III.

<sup>26</sup> See BLACK'S LAW DICTIONARY 762 (10th ed. 2014) (Foreclosure is “[a] legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property”).

<sup>27</sup> See Prentiss Cox, *Foreclosure Reform Amid Mortgage Lending Turmoil: A Public Purpose Approach* 45 HOUS. L. REV. 683, 686 (2008) (discussing some of the many differences between foreclosure processes among states).

<sup>28</sup> See BLACK'S LAW DICTIONARY, *supra* note 26 (defining judicial foreclosure as “[a] costly and time-consuming foreclosure method by which the mortgaged property is sold through a court proceeding requiring many standard legal steps such as the filing of a complaint, service of process, notice, and a hearing.”) A “[j]udicial foreclosure is available in all jurisdictions and is the exclusive

the lender also uses the non-judicial foreclosure process.<sup>29</sup> The non-judicial method is used in Michigan, as well as in the majority of other states.<sup>30</sup> Homeowners, when facing the expungement affidavit, are subject to a set of non-judicial foreclosure procedures<sup>31</sup> and may seek to set aside the foreclosure when certain defects occur.<sup>32</sup>

#### A. THE NON-JUDICIAL FORECLOSURE PROCESS

The major difference between non-judicial and judicial foreclosure is that the former process is quicker and less costly, as it is done without court oversight.<sup>33</sup> In contrast, the judicial process is often costly and time-consuming because it requires court supervision of the foreclosure.<sup>34</sup> The non-judicial process gives lenders the “power of sale,” where the actual lender oversees the foreclosure independently.<sup>35</sup> This process makes sense for lenders using expungement affidavits because the judiciary is not involved, and the lender has control over the entire proceeding, allowing the unchecked use of the affidavit.<sup>36</sup>

Once a lender using the non-judicial process sends the homeowner the proper statutory notices, the lender may initiate a sale of the property through a third party, who is often a sheriff.<sup>37</sup> States such as Michigan and Minnesota allow the mortgagee—the holder of the mortgage note—to actually purchase its own mortgaged property at a sheriff’s sale.<sup>38</sup> In many states, a mortgagee does not have this opportunity to purchase its own property.<sup>39</sup> Typically, the mortgagee purchasing the property is the lender and only bidder in attendance at the sheriff’s sale.<sup>40</sup> Reasons for this include the fact non-judicial foreclosure processes allow notice of the sale to be posted in a local newspaper with limited circulation, as well as the fact lenders already have equity in the property, allowing them to purchase the

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or most common method of foreclosure in at least 20 states.” *Id.* In contrast, a “non-judicial foreclosure” is “[a] foreclosure method that does not require court involvement.” *Id.*

<sup>29</sup> See discussion *infra* Section II.B.

<sup>30</sup> See NELSON & WHITMAN, *supra* note 4.

<sup>31</sup> See discussion *infra* Section I.A.

<sup>32</sup> See discussion *infra* Section I.B.

<sup>33</sup> See Cox, *supra* note 27, at 699.

<sup>34</sup> See *id.* (“Judicial foreclosure procedures generally are more costly for the lender and take much longer to complete.”); see also *supra* note 26 and accompanying text.

<sup>35</sup> See Cox, *supra* note 27, at 700.

<sup>36</sup> See *id.* at 699-70

<sup>37</sup> Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1403-04 (2004).

<sup>38</sup> NELSON & WHITMAN, *supra* note 4, at 651 (citing Minn. Stat. Ann. §§ 34-37; MICH. COMP. LAWS ANN. § 600.3216).

<sup>39</sup> *Id.* at 650.

<sup>40</sup> *Id.* at 760.

property without upfront costs.<sup>41</sup> These, among other reasons, are why mortgagees usually end up as the only bidder at a foreclosure sale.<sup>42</sup> Importantly, all cases involving a lender's use of an expungement affidavit take place after the lender bought its own property at a sheriff's sale.<sup>43</sup>

In twenty-two states, a homeowner has a statutory right to purchase back or "redeem" the property after it is sold at the foreclosure sale.<sup>44</sup> The amount of time allowed to redeem varies by state and ranges from six months to two years.<sup>45</sup> In Michigan, the redemption statute sets the standard that properties less than ten acres have a redemption period of six months and properties larger than ten acres have a redemption period of twelve months.<sup>46</sup> The time is very important because once the redemption period expires, the rights of the homeowner are greatly limited, if not completely eliminated.<sup>47</sup> When a homeowner redeems the property, he pays the foreclosure sale price plus any other additional costs.<sup>48</sup> At that time, the homeowner is restored to the title he had before the foreclosure sale.<sup>49</sup>

As a final step in the general non-judicial foreclosure process, a lender may seek a deficiency judgment against a homeowner if the foreclosure sale price of the property is less than the obligation owed on the mortgage.<sup>50</sup> For example, if a homeowner owes \$70,000 on his mortgage, but the property is sold at auction for \$60,000, the homeowner may have to pay a deficiency judgment in the amount of \$10,000.<sup>51</sup> There are limitations

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<sup>41</sup> *Id.*

<sup>42</sup> *Id.* ("There are several reasons for this phenomenon. First, because the mortgagee can bid up to the amount of the mortgage debt without putting up new cash, he has a distinct bidding advantage over a third party bidder, who will have out-of-pocket expense from the first dollar bid. Second, while foreclosure statutes require notice by publication to potential third party bidders, the notice, especially in urban areas, is published in legal newspapers of limited circulation. Moreover, because the publication is technical in nature, a potential third party purchaser has little idea what real estate is being sold. Third, many potential third party purchasers are reluctant to buy land at a foreclosure sale because of the difficulty of ascertaining if a purchaser will receive good and marketable title. Fourth, when a mortgagee forecloses on improved real estate, potential bidders often find it difficult to inspect the premises prior to sale.") (citations omitted).

<sup>43</sup> See discussion *infra* Part I.C.

<sup>44</sup> NELSON & WHITMAN, *supra* note 4, at 570; Helen Mason, *No One Saw It Coming—Again Systemic Risk and State Foreclosure Proceedings: Why A National Uniform Foreclosure Law is Necessary*, 67 U. MIAMI L. REV. 41, 52 (2012)

<sup>45</sup> NELSON & WHITMAN, *supra* note 4, at 745-46. A few states with a six-month redemption period include Colorado and Minnesota. *Id.* (citing COLO. REV. STAT. § 118-9-2 (1963); MINN. STAT. ANN. § 580.23 (1967)). Some states have a two-year redemption period, such as Tennessee. *Id.* (citing TENN. CODE ANN. §§ 66-8-101 to 102 (1991)).

<sup>46</sup> MICH. COMP. LAWS ANN. § 600.3140 (West 2014).

<sup>47</sup> See discussion *infra*, Section I.B.

<sup>48</sup> NELSON & WHITMAN, *supra* note 4, at 570.

<sup>49</sup> *Id.* at 754.

<sup>50</sup> *Id.* at 708 (explaining deficiency judgments occur whether or not the homeowner redeems the property and, in most states, regardless of the foreclosure method).

<sup>51</sup> RESTATEMENT (THIRD) OF PROP.: MORTGS. § 8.4 cmt. b, illus. 1 (1997) (listing an example as to how a basic deficiency judgment works).

on deficiency judgments that vary by state.<sup>52</sup> The Third Restatement of Property takes an approach that limits the amount a lender can obtain through a deficiency judgment to the fair market value of the property.<sup>53</sup> This is especially beneficial to homeowners when the obligation on the mortgage is of greater value than the actual value of the property because, no matter what they actually owe, homeowners will not have to pay a deficiency judgment.<sup>54</sup> Michigan is one of the states that follow the Restatement approach.<sup>55</sup> Once a lender sells a foreclosed property, a homeowner may attempt to use the legal process to set aside that sale, arguing the property was wrongfully foreclosed.<sup>56</sup>

### B. SETTING ASIDE A NON-JUDICIAL FORECLOSURE SALE

States differentiate between two types of wrongful foreclosure: one grounded in law and one grounded in equity.<sup>57</sup> A homeowner may seek a remedy at law if the lender forecloses on the property without there actually being a justified default on the mortgage.<sup>58</sup> Even further, a homeowner may seek a remedy at law under a tort claim for damages under the same wrongful foreclosure theory.<sup>59</sup> The homeowner's claim must support the fact that the

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<sup>52</sup> See NELSON & WHITMAN, *supra* note 4, at 708-09 (discussing how various states approach deficiency judgments).

<sup>53</sup> RESTATEMENT (THIRD) OF PROP.: MORTGS. § 8.4(b) (explaining "the deficiency judgment is for the amount by which the mortgage obligation exceeds the foreclosure sale price"). Further on, it limits the above provision by stating that:

[a]ny person against whom such a recovery is sought may request in the proceeding in which the action for a deficiency is pending a determination of the fair market value of the real estate as of the date of the foreclosure sale . . . . If it is determined that the fair market value is greater than the foreclosure sale price, the persons against whom recovery of the deficiency is sought are entitled to an offset against the deficiency in the amount by which the fair market value.

*Id.* § 8.4(c)-(d).

<sup>54</sup> See *id.* § 8.4 com. b, illus. 3.

<sup>55</sup> See MICH. COMP. LAWS ANN. § 600.3280 (West 2014) ("[I]t shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and set-off to the extent only of the amount of the plaintiff's claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and such showing shall constitute a defense to such action and shall defeat the deficiency judgment against him, either in whole or in part to such extent.").

<sup>56</sup> See discussion *infra*, Section I.B.

<sup>57</sup> See 123 AM. JUR. 3D *Proof of Wrongful Mortg. Foreclosure* § 6 (2011).

<sup>58</sup> *Id.* (citing *Dobson v. Mortg. Elec. Registration Sys., Inc./GMAC Mortg. Corp.*, 259 S.W.3d 19 (Mo. Ct. App. 2008)).

<sup>59</sup> *Id.*

initial foreclosure proceeding should not have occurred because there was no default.<sup>60</sup>

In contrast, a wrongful foreclosure claim in equity admits that there was a default, but the foreclosure sale should be set aside due to an irregularity in the foreclosure process.<sup>61</sup> While many homeowners will allege both claims, the expungement affidavit issue has to be settled through an attempt to set aside the non-judicial foreclosure grounded in equity because it is not the underlying default at issue, but a lender's later actions.<sup>62</sup> As in many states, Michigan courts have held that a wrongful foreclosure action to set aside a sale must show that the lender violated the non-judicial foreclosure statute.<sup>63</sup> Many cases in Michigan, however, require heightened scrutiny to set aside the sheriff's sale when the statutory redemption period expires.<sup>64</sup> In order for a homeowner in Michigan to prevail in an action to set aside a foreclosure after the expiration of a redemption period, he must allege: "(1) fraud or irregularity in the foreclosure procedure; (2) prejudice to the mortgagor; and (3) a causal relationship between the alleged fraud or irregularity and the alleged prejudice, i.e., that the mortgagor would have been in a better position . . . absent the fraud or irregularity."<sup>65</sup> Virtually all wrongful foreclosure actions that include a challenge to an expungement affidavit require the homeowner to prove this heightened standard.<sup>66</sup>

As a final note, the statutory redemption period in Michigan is not tolled upon the filing of an action against the lender.<sup>67</sup> This causes serious problems when an expungement affidavit severs the redemption period because it becomes difficult to determine when the redemption period expires or whether it even exists anymore.<sup>68</sup> If a homeowner cannot toll the redemption period, then it is likely that this statutory right will expire before a court reaches any type of resolution, subjecting the homeowner to heightened scrutiny.<sup>69</sup> In conclusion, the expungement affidavit is used exclusively in non-judicial foreclosure proceedings, is always challenged under a wrongful foreclosure suit in equity, and is usually subject to heightened scrutiny because the filing of a lawsuit does not toll a redemption

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *See id.*

<sup>63</sup> *See White v. Burkhardt*, 60 N.W.2d 925, 927 (Mich. 1953) ("Such statutory foreclosures should not be set aside without some good reason therefor.") (citing *Markoff v. Tournier*, 201 N.W. 888 (Mich. 1925); *Detroit Trust Co. v. Agozzinio*, 273 N.W. 747 (Mich. 1937)).

<sup>64</sup> *See Diem v. Sallie Mae Home Loans, Inc.*, No. 317499, 2014 WL 5285460, at \*3 (Mich. Ct. App. 2014) (citing *Kim v. JPMorgan Chase Bank, NA*, 825 N.W.2d 329 (Mich. 2012)).

<sup>65</sup> *Id.* (citing *Kim*, 825 N.W.2d at 337).

<sup>66</sup> *See discussion infra*, Section I.C.

<sup>67</sup> *Conlin v. Mortg. Elec. Registration Sys.*, 714 F.3d 355, 360 (6th Cir. 2013) ("[T]he filing of a lawsuit is insufficient to toll the redemption period.") (internal quotation marks omitted).

<sup>68</sup> *See Connolly v. Deutsche Bank Nat'l Trust Co.*, 581 F. App'x 500, 502-03 (6th Cir. 2014) (finding that the redemption period reset after the second sheriff's sale).

<sup>69</sup> *See Diem*, 2014 WL 5285460, at \*3.



period.<sup>70</sup> Next, it is important to understand the statutory authority and case law behind Michigan's expungement affidavit and how it contrasts with other states' procedures for voiding sheriff's sales.<sup>71</sup>

## II. THE EXPUNGEMENT AFFIDAVIT

The term "expungement affidavit" or "affidavit of expungement" is relatively new.<sup>72</sup> An "affidavit" is a document with facts written down and sworn in front of an officer authorized to administer oaths,<sup>73</sup> and to "expunge" means "[t]o erase or destroy."<sup>74</sup> Therefore, an expungement affidavit can be defined as a sworn set of facts with the purpose to erase or destroy something.<sup>75</sup> With this in mind, an expungement affidavit voids a previously held sheriff's sale when the purchaser of the property executes the affidavit, which is usually the previous mortgagee.<sup>76</sup> The expungement affidavit finds its roots in Michigan statutory law,<sup>77</sup> has been upheld in state and federal case law,<sup>78</sup> and has never been used in any other state outside of Michigan.<sup>79</sup>

### A. STATUTORY BASIS FOR THE USE OF AN EXPUNGEMENT AFFIDAVIT

Many states have statutes that allow for the use of an affidavit as a way to put homeowners on notice concerning the status of property, including title, encumbrances, or anything else that may affect the property.<sup>80</sup>

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<sup>70</sup> See discussion *supra*, Part I.

<sup>71</sup> See discussion *infra*, Part II.

<sup>72</sup> See *Freund v. Trott & Trott*, No. 299011, 2011 WL 5064248, at \*2 (Mich. Ct. App. Oct. 25, 2011). The Michigan Court of Appeals faced the expungement affidavit for the first time. *Id.* ("According to the supplemental pleadings filed after oral argument before this Court, an *Affidavit Expunging Sheriff's Deed on Mortgage Sale Filed Pursuant To MCLA 565.451a* was filed with the county Register of Deeds on May 17, 2011.") (emphasis added).

<sup>73</sup> BLACK'S LAW DICTIONARY, *supra* note 26, at 68 (defining an affidavit as "[a] voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths.")

<sup>74</sup> *Id.* at 702.

<sup>75</sup> *Id.* at 68, 702 (combining the definitions of "affidavit" and "expunge").

<sup>76</sup> See *Freund*, 2011 WL 5064248, at \*2 ("In that document [the expungement affidavit] MERS asserts that it will not rely on said foreclosure sale and will treat such sale as having not been held and void ab initio") (internal quotation marks omitted).

<sup>77</sup> See discussion *infra* Section II.A.

<sup>78</sup> See discussion *infra* Section II.B.

<sup>79</sup> See discussion *infra* Section II.C.

<sup>80</sup> See, e.g., OHIO REV. CODE ANN. § 3301.252 (West 2013-14); PA. CONS. STAT. ANN. § 3129.1 (West 2014).

In Michigan, courts<sup>81</sup> have continually used M.C.L. § 565.451a to justify the expungement affidavit as an “affidavit affecting real property.”<sup>82</sup> Particularly, the affidavit is executed as a way to express “[k]nowledge of the happening of any condition or event which may terminate an estate or interest in real property,” pursuant to the statute.<sup>83</sup> In that way, lenders argue the affidavit is giving notice to the homeowner that the property was improperly sold and must be reverted back to the homeowner.

While other states have similar statutes, Michigan courts have interpreted its property statute in a way that allows expungement affidavits to effectively void sheriff’s sales.<sup>84</sup> Statutes in Ohio and Pennsylvania use almost identical language as the Michigan statute, and yet, in those states, there has never been a single instance where an affidavit was executed as a way to expunge a sheriff’s sale.<sup>85</sup> This leads to a critical statutory interpretation of § 565.451a as it relates to expungement affidavits.<sup>86</sup> In addition to this interpretation, another provision of the Michigan statute is of great importance.<sup>87</sup>

No Michigan court has discussed M.C.L. § 565.451d.<sup>88</sup> This section gives affidavits that affect property authority to cure various errors in a

<sup>81</sup> See, e.g., *Freund*, 2011 WL 5064248, at \*2; see also *Connolly v. Deutsche Bank Nat’l Trust Co.*, 581 F. App’x 500, 505-06 (6th Cir. 2014).

<sup>82</sup> MICH. COMP. LAWS ANN. § 565.451a (West 2014) states in part:

Sec. 1a. An affidavit stating facts relating to any of the following matters which may affect the title to real property in this state made by any person having knowledge of the facts or by any person competent to testify concerning such facts in open court, may be recorded in the office of the register of deeds of the county where the real property is situated:

- (a) Birth, age, sex, marital status, death, name, residence, identity, capacity, relationship, family history, heirship, homestead status and service in the armed forces of parties named in deeds, wills, mortgages and other instruments affecting real property;
- (b) Knowledge of the happening of any condition or event which may terminate an estate or interest in real property.

<sup>83</sup> *Cordes v. Great Lakes Excavating & Equip. Rental, Inc.*, No. 304003, 2012 WL 2052789, at \*2 (Mich. Ct. App. June 7, 2012) (citing § 565.451a(b)).

<sup>84</sup> See *Connolly*, 581 F. App’x at 506 (citing *Cordes*, 2012 WL 2052789, at \*2).

<sup>85</sup> See § 5301.252(B)(3) (“The affidavits provided for under this section may relate to the following matters: The happening of any condition or event that may create or terminate an estate or interest.”); see also PA. R. CIV. P. 3129.1 (the rule does not specifically list language detailing any condition or event that may create or terminate an estate or interest in real property).

<sup>86</sup> See discussion *infra*, Section III.A.

<sup>87</sup> See MICH. COMP. LAWS ANN. § 565.451d (West 2014).

<sup>88</sup> § 565.451d states in relevant part:

Sec. 1d. (1) An affidavit to correct the following types of errors or omissions in previously recorded documents may be recorded in the office of register of deeds for the county where the real property that is the subject of the affidavit is located:

- (a) Errors and omissions relating to the proper place of recording.
- (b) Scrivener’s errors and scrivener’s omissions.

(2) All of the following apply to an affidavit under subsection (1):

previously recorded document, such as a deed.<sup>89</sup> The statute also establishes the limitations on how far an affidavit can go to cure an error.<sup>90</sup> Most importantly, the statute limits an affidavit from affecting any “substantive rights” of any party, unless those rights belong to the party executing the affidavit.<sup>91</sup> While Michigan courts have interpreted § 565.451a as a way to justify the expungement affidavit, no court has addressed § 565.451d and how it may affect this interpretation.<sup>92</sup> Armed with only § 565.451a, Michigan state and federal courts have allowed the use of expungement affidavits in almost every case.<sup>93</sup>

*B. EXPUNGEMENT AFFIDAVITS AND MICHIGAN’S DEVELOPING CASE  
LAW*

In 2012, the first case to interpret § 565.451a was *Cordes v. Great Lakes Excavating & Equipment Rental, Inc.*, and it upheld the validity of the expungement affidavit.<sup>94</sup> In *Cordes*, the parcel owner executed a mortgage in favor of the plaintiff, Cordes.<sup>95</sup> Not long after, Cordes, as the lender, mistakenly executed a discharge of the mortgage.<sup>96</sup> In order to repair the mistake, the parcel owner executed an expungement affidavit as a way to re-establish the mortgage in favor of Cordes.<sup>97</sup> A year later, however, the parcel owner executed a second mortgage that ultimately went to defendant JBN, Inc.<sup>98</sup> When Cordes sought to foreclose on the property after this transfer, the trial court held that the earlier expungement affidavit “rehabilitated the constructive notice of [Cordes’] mortgage” that had been accidentally discharged.<sup>99</sup>

On appeal, the Michigan Court of Appeals further ruled that § 565.451a(b) applied because the affidavit concerned “the happening of any

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(a) The affidavit shall be made by a person who has knowledge of the relevant facts and is competent to testify concerning those facts in open court and shall meet the requirements of section 1c.

(b) The affidavit does not alter the substantive rights of any party unless it is executed by that party.

<sup>89</sup> § 565.451d(1)(a)-(b).

<sup>90</sup> § 565.451d(2)(a)-(b).

<sup>91</sup> § 565.451d(2)(b).

<sup>92</sup> See e.g., *Connolly v. Deutsche Bank Nat’l Trust Co.*, 581 F. App’x 500, 505-06 (6th Cir. 2014) (discussing the validity of the expungement affidavit, but only mentioning § 565.451a).

<sup>93</sup> See discussion *infra*, Section II.B.

<sup>94</sup> No. 304003, 2012 WL 2052789, at \*2 (Mich. Ct. App. June 7, 2012) (“In this case, the recorded documents (and in particular the affidavit) were sufficient to put interested persons on notice that the parcel was encumbered by a mortgage and that Cordes’ discharge of the mortgage was erroneous.”).

<sup>95</sup> *Id.* at \*1.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* (the mortgage was assigned to JBN, Inc. from Independent Bank).

<sup>99</sup> *Id.*

condition or event which may terminate an estate or interest in real property.”<sup>100</sup> Because the discharge of the mortgage was an event that terminated an interest in real estate, the affidavit applied pursuant to § 565.451a(b).<sup>101</sup> In addition, the court disagreed with JBN, Inc.’s argument that an affidavit cannot resurrect a mortgage.<sup>102</sup> In denying JBN, Inc.’s argument, the court emphasized the fact recording statutes like § 565.451a put others on notice of the new encumbrance that allowed the resurrection of the mortgage.<sup>103</sup> Two years later, the ruling in *Cordes* was upheld and expanded to allow affidavits under § 565.451a to both revive mortgages and void sheriff’s sales.<sup>104</sup>

In *Connolly v. Deutsche Bank National Trust Co.*, the United States Court of Appeals for the Sixth Circuit expanded the *Cordes* ruling.<sup>105</sup> There, the Michigan homeowner endured a sheriff’s sale, which initiated a twelve-month redemption period.<sup>106</sup> Nearly seven months into the redemption period, the defendant, Deutsche Bank, executed an expungement affidavit, declaring the sheriff’s sale “inadvertently held,” which then severed the redemption period and reverted the mortgage back to the plaintiff, Connolly.<sup>107</sup> Four months later, Connolly filed suit before her original redemption period would have expired,<sup>108</sup> but because there is no way to toll the period to redeem,<sup>109</sup> it did expire, and she was left to prove her claim under a higher level of scrutiny.<sup>110</sup>

Connolly now had to prove the expungement affidavit was an irregularity in the foreclosure process, but the court disregarded her argument and did so without mentioning § 565.451d and the limitations that it places on affidavits affecting real property.<sup>111</sup> With *Connolly*, the Sixth Circuit expanded the affidavit’s effect, declaring “that such an affidavit can effectively void a sheriff’s sale” by putting interested persons on notice.<sup>112</sup> A distinguishing feature between *Cordes* and *Connolly* is that in *Cordes* the mortgage was accidentally discharged and both lender and homeowner

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<sup>100</sup> *Id.* (citing § 565.451a(b)).

<sup>101</sup> *Id.* (citing § 565.451a(b)).

<sup>102</sup> *Id.*

<sup>103</sup> *See id.* at \*3.

<sup>104</sup> *See Connolly v. Deutsche Bank Nat’l Trust Co.*, 580 Fed. App’x 500, 506 (6th Cir. 2014) (citing *Cordes*, 2012 WL 2052789, \*2).

<sup>105</sup> *Id.* (citing *Cordes*, 2012 WL 2052789, \*2) (“As the Michigan Court of Appeals has decided the validity of an expungement affidavit in the case of a mortgage discharge, we similarly hold that such an affidavit can effectively void a sheriff’s sale.”).

<sup>106</sup> *Id.* at 502; *see discussion supra* Section I.A (discussing the redemption procedure).

<sup>107</sup> *Connolly*, 581 F. App’x at 502.

<sup>108</sup> *Id.*

<sup>109</sup> *See id.* (citing *Conlin v. Mortg. Elec. Registration Sys.*, 714 F.3d 355, 360 (6th Cir. 2013)).

<sup>110</sup> *See id.* at 504.

<sup>111</sup> *See MICH. COMP. LAWS ANN.* § 565.451d(2)(a)-(b) (West 2014).

<sup>112</sup> *Connolly*, 581 F. App’x at 506.

sought its revival.<sup>113</sup> In contrast, *Connolly* involved a lender that unilaterally used the affidavit to void a sheriff's sale, not simply revive a mortgage.<sup>114</sup> While these two cases are the controlling authority supporting expungement affidavits, the most recent case to come out of Michigan denied the use of the expungement affidavit.<sup>115</sup>

In *Trademark Properties of Michigan, L.L.C. v. Federal National Mortgage Ass'n*, the Michigan Court of Appeals for the first time denied a lender's attempt to use the expungement affidavit as a way to convey property.<sup>116</sup> However, unlike *Cordes* and *Connolly*, the homeowner was not a party in *Trademark Properties*; rather, the plaintiff and defendants were lenders and lien holders of a condominium.<sup>117</sup> The defendant GMAC Mortgage, a lender for Mortgage Electronic Registration System, Inc. (MERS), filed an expungement affidavit as a way to reinstate the mortgage it held on the property.<sup>118</sup>

To begin a long string of conveyances, GMAC Mortgage foreclosed on the homeowner and held a sheriff's sale, selling the property to Fannie Mae.<sup>119</sup> The redemption period expired and Fannie Mae was left with the title to the property, subject to a lien the condominium association held.<sup>120</sup> The association initiated a foreclosure proceeding on Fannie Mae when the lien was not paid, which led to a second sheriff's sale where the property was sold to the plaintiff, Trademark Properties.<sup>121</sup> The attorney for GMAC and MERS attempted to void its sale of the property to Fannie Mae even though the property had already been sold to Trademark Properties.<sup>122</sup> Therefore, unlike *Cordes* or *Connolly*, it was not the purchaser at the second sheriff's sale that executed the expungement affidavit, it was the original mortgagee from the first sale, which no longer had a right in the property.<sup>123</sup>

The court in *Trademark Properties* distinguished itself from *Connolly*, explaining this case did not involve a void sheriff's sale like in *Connolly*.<sup>124</sup> Here, the court refused to accept GMAC's argument that the

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<sup>113</sup> *Cordes v. Great Lakes Excavating & Equip. Rental, Inc.*, No. 304003, 2012 WL 2052789, at \*1 (Mich. Ct. App. June 7, 2012) (the parcel owner "signed an affidavit which stated that the Cordes mortgage remained in effect with Cordes as the lender").

<sup>114</sup> See *Connolly*, 500 F. App'x at 502 ("Deutsche, through its attorney, executed an Affidavit Expunging the Sheriff's Deed.").

<sup>115</sup> See *Trademark Props. of Mich. L.L.C. v. Fed. Nat'l Mortg. Ass'n*, No. 313296, 2014 WL 6461712, at \*2 (Mich. Ct. App. Nov. 18, 2014).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at \*1.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (stating the original homeowner was an individual resident).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at \*3 n.3 ("[U]nlike this case where the foreclosure sale was not void despite the subsequently-filed affidavit that provided otherwise, *Connolly* involved a sheriff's sale that was

property was “void *ab initio*”<sup>125</sup> without proof, something no court had questioned before.<sup>126</sup> Requiring GMAC to prove the sale was void solved the issue in *Trademark Properties*, but the court upheld the decision in *Connolly*, because the lender there had stated on the affidavit that the property was “inadvertently held,” which seemed to be enough proof to find the sheriff’s sale void.<sup>127</sup>

After *Cordes* and *Connolly*, the Michigan courts all but carved in stone the use of expungement affidavits; however, *Trademark Properties* narrowed a lender’s ability to use the affidavit.<sup>128</sup> Despite *Trademark Properties*, it is apparent lenders may still unilaterally void a sheriff’s sale by claiming it was “inadvertently held” in the affidavit, so long as the affidavit is executed before further conveyances of the property have been made and other third-party lien-holders do not hold an interest in the property.<sup>129</sup> Essentially, any situation between an original homeowner and lender, like in *Connolly*, will allow the use of the expungement affidavit.<sup>130</sup> While these three cases ruled directly on the expungement affidavit, the Michigan courts have continually sidestepped the issue, which has allowed expungement affidavits to void sheriff’s sales in multiple contexts.<sup>131</sup>

### 1. Courts Continually Sidestep a Ruling on the Expungement Affidavit

There is a string of cases out of Michigan where the court makes a decision on a foreclosure action involving an expungement affidavit without questioning the affidavit’s use.<sup>132</sup> One of the most revealing cases on this matter is *Phh Mortgage v. O’Neal*.<sup>133</sup> In that case, the lender, Phh Mortgage, submitted the property for a sheriff’s sale, giving its counsel, Trott & Trott, extremely low bidding instructions.<sup>134</sup> Only one other bid was made at the sale, and the sheriff executed a deed in favor of Phh Mortgage for only

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inadvertently held, a mortgage that continued to encumber the property, and an affidavit that accurately provided notice of that continued encumbrance to interested persons.”).

<sup>125</sup> *Id.* at \*3 (explaining the sheriff’s sale in the case was not void).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 3 n.3.

<sup>128</sup> *Id.* (finding its case distinguishable from *Connolly*).

<sup>129</sup> *Id.* (distinguishing *Connolly* because that case involved an inadvertently held sheriff’s sale).

<sup>130</sup> Compare *Connolly v. Deutsche Bank Nat’l Trust Co.*, 580 Fed. App’x 500, 506 (6th Cir. 2014) with *Trademark Props.*, 2014 WL 6461712, \*3 (the court in *Connolly* allows an affidavit to void the property and *Trademark Props.*, through its holding, puts limitations on circumstances when such an affidavit can take effect).

<sup>131</sup> See discussion *infra* Subsection II.B.1.

<sup>132</sup> See, e.g., *Phh Mortg. v. O’Neal*, No. 311233, 2013 WL 3025566, at \*4 (E.D. Mich. June 18, 2013) (both counts were based off of clerical and scrivener’s errors).

<sup>133</sup> *Id.* at \*1. The lender attempted to void a sheriff’s sale because it underbid on the property. *Id.*

<sup>134</sup> *Id.*

\$1,000.<sup>135</sup> Thereafter, the party with the rights under the property attempted to redeem the home for \$1,000.<sup>136</sup> On the same day, an attorney with Trott & Trott executed an expungement affidavit that sought to void the sheriff's deed.<sup>137</sup> Even more interesting, instead of relying fully on the expungement affidavit, Phh Mortgage filed a complaint seeking quiet title to the property and to set aside the sheriff's deed.<sup>138</sup>

The court was able to rule against Phh Mortgage without discussing the validity of the attempted expungement affidavit because Phh Mortgage did not try to seek its validity as an effective way to void the sheriff's sale.<sup>139</sup> What separates this case from most other expungement cases is that the lender, rather than the homeowner, was the party that failed to raise the expungement affidavit issue.<sup>140</sup> Further, Phh Mortgage was also the party that sought to set aside the sheriff's sale,<sup>141</sup> which is in contrast to most cases involving expungement affidavits.<sup>142</sup>

Michigan courts have sidestepped the expungement issue for a few reasons. The ultimate reason is that the plaintiff usually fails to make any allegations that directly refute the affidavit's validity.<sup>143</sup> Another reason is that sometimes the plaintiff's ultimate relief sought is cured because of the affidavit's effect, which may be to have the foreclosure sale set aside and the mortgage reverted back to the plaintiff.<sup>144</sup> In other cases, the courts do not look to the validity of the affidavit because both parties agreed to the affidavit's use.<sup>145</sup>

In sidestepping the expungement issue for these reasons, many Michigan courts have ignored the expungement affidavit's most problematic provision—one line that states the sheriff's sale was “void *ab initio*.”<sup>146</sup>

<sup>135</sup> *Id.* (besides Trott & Trott, only one other bidder was present at the sale).

<sup>136</sup> *Id.* (the original homeowner assigned her rights in the property to a third party who was actually at the sheriff's sale).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at \*2.

<sup>139</sup> *Id.* at \*2 (Phh Mortgage only filed a two-count complaint alleging clerical and scrivener's error in the bidding instructions).

<sup>140</sup> *Compare* Buttazzoni v. Nationstart, No. 13-CV-14901, 2014 WL 1031278, at \*3 (E.D. Mich. March 14, 2014) (the court did not reach a ruling on the expungement affidavit's validity because Buttazzoni did not include an allegation that supported an argument of irregularity) *with Phh Mortgage*, 2013 WL 3025566, at \*2 (the lender filed a two-part complaint).

<sup>141</sup> *Phh Mortgage*, 2013 WL 3025566, at \*2.

<sup>142</sup> *See, e.g.,* Connolly v. Deutsche Bank Nat'l Trust Co., 580 Fed. App'x 500, 506 (6th Cir. 2014), 2014 WL 4435962, at \*2; *see also* Freund v. Trott & Trott, P.C., No. 299011, 2011 WL 5064248, at \*1 (Mich. Ct. App. Oct. 25, 2011) (Plaintiff sought to void the mortgage rather than the lender attempting to gain quiet title).

<sup>143</sup> *See, e.g.,* Buttazzoni, 2014 WL 1031278, at \*3; *Phh Mortgage*, 2013 WL 3025566, at \*2.

<sup>144</sup> *See Freund*, 2011 WL 5064248, at \*2 (“Because this is the relief ultimately sought by plaintiff, we could offer no further relief to plaintiff, and the issue regarding the validity of the foreclosure proceeding is moot.”).

<sup>145</sup> *See* discussion *infra*, Subsection II.B.2.

<sup>146</sup> *See, e.g., Freund*, 2011 WL 506428, at \*2; Verified Complaint for Equitable Relief and Jury Demand at 6, Wells Fargo Bank, N.A., No. 12-10174, 2012 WL 4450502 (E.D. Mich. Sept. 25,

Beginning with *Freund v. Trott & Trott, P.C.* in 2011, the court allowed an “affidavit expunging a sheriff’s deed,” which the lender stated it would “not rely on said foreclosure sale and will treat such sale as having not been held and void *ab initio*.”<sup>147</sup> The term “void *ab initio*,” in the foreclosure context, means a sheriff’s sale is void from the start because it seriously conflicts with law or public policy.<sup>148</sup> In addition, the defect in the foreclosure process must be “so substantial” that the lender had no right to sell the property in the first place.<sup>149</sup> The court in *Freund* did not inquire into whether the sheriff’s sale had a substantial defect that would conflict with law or public policy.<sup>150</sup> Without the court questioning why or how the first sheriff’s sale was void *ab initio*, the lender rationalized the cancelled sale and subsequent reinstatement of the mortgage by stating those three magic words—void *ab initio*.<sup>151</sup>

The court’s decision in *Freund* was only the beginning, multiple lenders used the same language in their affidavit to that of the lender in *Freund*.<sup>152</sup> In 2012, the homeowner in *Dixon v. Wells Fargo Bank, N.A.* attempted to sue his lender for wrongful foreclosure and negligence, basing one of his claims on the use of the expungement affidavit that stated the sheriff’s sale was “void *ab initio*.”<sup>153</sup> The court, however, only mentioned the affidavit while explaining the facts of the case and did not address the validity of the affidavit or how it could be void, though the plaintiff briefed the issue.<sup>154</sup>

By 2013, the court in *Mellentine v. Ameriquest Mortgage Co.* simply explained in its opinion the foreclosure was “inadvertently held” without

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2012) (No. 11-014033-CH) [hereinafter Complaint]; *but see* Trademark Props. of Mich., L.L.C. v. Fed. Nat’l Mortg. Ass’n, No. 313296, 2014 WL 6461712 (Mich. Ct. App. Nov. 18, 2014) (holding the sheriff’s sale was not void *ab initio*).

<sup>147</sup> *Freund*, 2011 WL 506428, at \*2.

<sup>148</sup> BLACK’S LAW DICTIONARY, *supra* note 26, at 1805 (defining void *ab initio* as “[n]ull from the beginning, as from the first moment when a contract is entered into. A contract is void *ab initio* if it seriously offends law or public policy, in contrast to a contract that is merely voidable at the election of one party to the contract”).

<sup>149</sup> *See* NELSON & WHITMAN, *supra* note 4, at 636-37 (an example of a void sheriff’s sale would be if the lender sold the property when there was no underlying default on the mortgage). This is in contrast to a sale that is “voidable,” meaning the sheriff’s sale could only be cancelled upon the election of one party. *See id.* at 636-40 (discussing the distinction between “void” and “voidable” foreclosure sales).

<sup>150</sup> *See Freund*, 2011 WL 506428, at \*2 (the court concludes that because the lender said, through the use of the affidavit, that the sheriff’s sale was void *ab initio*, the original mortgage would automatically “remain in full force and effect”).

<sup>151</sup> *Id.*

<sup>152</sup> *See, e.g.,* Connolly v. Deutsche Bank Nat’l Trust Co., 581 Fed. App’x 500 (6th Cir. 2014); Buttazzoni v. Nationstar, No. 13-CV-14901, 2014 WL 1031278, \*3 (E.D. Mich. March 14, 2014).

<sup>153</sup> *See Dixon v. Wells Fargo Bank, N.A.*, No. 12-10174, 2012 WL 4450502, \*1-2 (E.D. Mich. Sept. 25, 2012); *see also* Complaint, *supra* note 146.

<sup>154</sup> *See Dixon*, 2012 WL 4450502, \*1-2; *see also* Plaintiff’s Response to Defendant’s Motion to Dismiss at 3-4, *Dixon v. Wells Fargo Bank, N.A.*, No. 12-10174, 2012 WL 4450502 (2012) [hereinafter Plaintiff’s Response] (arguing that an expungement affidavit, stating a sale was “void *ab initio*” and “inadvertently held,” constituted negligence on the part of the lenders).



mentioning that it was actually an expungement affidavit that voided the foreclosure sale.<sup>155</sup> In addition, the *Mellentine* court did not question the fact the expungement affidavit was “void *ab initio*.”<sup>156</sup> Each year, courts continue to face homeowners’ challenges to a lender’s use of expungement affidavits based on simple statements as “inadvertently held” and “void *ab initio*” without any support for either claim.<sup>157</sup> While *Trademark Properties* may be the first decision to produce a sliver of light at the end of the tunnel, its ruling has left much unsettled despite being the first case to question the “void *ab initio*” rationale.<sup>158</sup> Despite many adversarial situations among lenders and homeowners and the lack of support of expungement affidavits, some uses of the affidavit have proven beneficial to both parties.<sup>159</sup>

## 2. Use of Expungement Affidavits to Cure Mutual Defects

In some instances, an expungement affidavit can be mutually executed for the beneficial use of both the lender and homeowner.<sup>160</sup> Beginning with *Cordes* in 2012, the mortgagee accidentally discharged the mortgage and had to execute an expungement affidavit with the property owner’s signature as a way for the two parties to mutually cure the error.<sup>161</sup> The expungement affidavit has revealed other beneficial uses.<sup>162</sup> A prime example is found in *Maltbie v. Bank of America*, where the affidavit was used as a way for the bank to re-establish the mortgage in the homeowner’s name because the parties subsequently agreed on a loan modification.<sup>163</sup> After the bank foreclosed on the property, the parties initiated negotiations that led to a favorable loan restructure.<sup>164</sup> Instead of having to execute a whole new mortgage or go through the court system to void the sale, the bank

<sup>155</sup> 515 F. App’x 419, 421 (6th Cir. 2013).

<sup>156</sup> Appellant’s Brief at 13, *Mellentine v. Ameriquet Mortg. Co.*, 515 F. App’x 419 (6th Cir. 2013) (stating that both parties understood the first sheriff’s sale should not have happened, but not explaining exactly why that was).

<sup>157</sup> See *Trademark Props. of Mich., L.L.C. v. Fed. Nat’l Mortg. Ass’n*, No. 313296, 2014 WL 6461712, at \*3 (Mich. Ct. App. Nov. 18, 2014).

<sup>158</sup> See *id.* at \*3 n.3 (distinguishing the *Connolly* case, which leaves intact much of the affidavit’s power).

<sup>159</sup> See *Cordes v. Great Lakes Excavating & Equip. Rental, Inc.*, No. 304003, 2012 WL 2052789, at \*2 (Mich. Ct. App. June 7, 2012); see also discussion *infra*, Subsection II.B.2.

<sup>160</sup> See *Cordes*, 2012 WL 2052789, at \*1.

<sup>161</sup> *Id.* (“O’Connor signed an affidavit which stated that the *Cordes* mortgage should not have been discharged and that the mortgage remained in effect.”).

<sup>162</sup> See, e.g., *Maltbie v. Bank of America*, 1:12-CV-1002, 2013 WL 6078945, at \*2 (W.D. Mich. Nov. 19, 2013).

<sup>163</sup> *Id.* (“After the Maltbies elected to participate in the TPP, BOA rescinded the prior foreclosure sale by filing an Affidavit of Expungement with the Kent County Register of Deeds.”). A homeowner can negotiate a loan modification to lower the monthly mortgage payment as a way to prevent foreclosure. See *Avoiding Foreclosure*, U.S. DEPT. OF HOUSING AND URBAN DEVELOP., [http://portal.hud.gov/hudportal/HUD?src=/topics/avoiding\\_foreclosure](http://portal.hud.gov/hudportal/HUD?src=/topics/avoiding_foreclosure) (last visited Feb. 20, 2015).

<sup>164</sup> *Maltbie*, 2013 WL 6078945, at \*2

was able to use the expungement affidavit as a tool to revitalize the homeowner's mortgage.<sup>165</sup>

In the right circumstances, it is clear that an expungement affidavit may work to both parties' advantage.<sup>166</sup> In the case of accidental rescission<sup>167</sup> or subsequent loan modifications after the foreclosure sale,<sup>168</sup> the mortgagee and homeowner can utilize this affidavit for each other's benefit. Furthermore, cases like *Freund*, where the affidavit's effect was in the form of the ultimate relief sought, prove that future use of the expungement affidavit in order to cure a mutual defect is available through the affidavit.<sup>169</sup> This is possible when the lender desires to void the sale and the homeowner desires to have the property back.<sup>170</sup> As long as both parties are on board, a court has little reason for invalidating the affidavit's use.<sup>171</sup>

### C. SETTING ASIDE SHERIFF'S SALES OUTSIDE OF MICHIGAN

The use of an expungement affidavit as a way to void sheriff's sales is unique to Michigan.<sup>172</sup> While other states have similar statutes regarding affidavits affecting real property,<sup>173</sup> no court outside Michigan has faced a lender's use of an expungement affidavit, whether unilaterally or mutually executed.<sup>174</sup> Even in a state like Ohio, which has a similar statute as Michigan, the courts have yet to face the affidavit's effect.<sup>175</sup> This raises the question of what other states exactly do to void sheriff's sales.<sup>176</sup> Further, how do other states view the precarious use of affidavits? Much can be gathered from looking at how other states handle challenges to sheriff's

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<sup>165</sup> *Id.*

<sup>166</sup> *See id.*

<sup>167</sup> *See Cordes*, 2012 WL 2052789, at \* 1.

<sup>168</sup> *See Maltbie*, 2013 WL 6078945, at \*2.

<sup>169</sup> *See Freund v. Trott & Trott, P.C.*, No. 299011, 2011 WL 5064248, at \*2 (Mich. Ct. App. Oct. 25, 2011).

<sup>170</sup> *See id.*

<sup>171</sup> *See, e.g., Maltbie*, 2013 WL 6078945, at \*2 (both the lender and homeowner desired to void the sheriff's sale pursuant to a loan modification).

<sup>172</sup> *See discussion infra*, Section II.B.

<sup>173</sup> *See discussion supra*, Section II.A.

<sup>174</sup> *But see, e.g., Sixty-01 Ass'n of Apartment Owners v. Parsons*, No. 89805-7, 2014 WL 4109432, at \*1 (Wash. Aug. 21, 2014) (en banc) (rather than filing an affidavit expunging the sheriff's deed, the lender used the judicial process, seeking to set aside an erroneous bid at a sheriff's sale).

<sup>175</sup> *But cf. United Cos. Lending v. Greenberg*, No. 80803, 2002 WL 31087627, at \*1 (Ohio Ct. App. Sept. 19, 2002) (the court was faced with a situation where the lender accidentally initiated a sheriff's sale, requiring a court to set the sale aside).

<sup>176</sup> *See discussion infra*, Subsection II.B.1.

sales, as well as how states have reacted to the use of other property affidavits.<sup>177</sup>

### 1. Using the Judicial Process to Set Aside Sheriff's Sales Outside of Michigan

An Ohio court in *United Companies Lending v. Greenberg* was faced with a very familiar fact pattern regarding homeowners and their lender.<sup>178</sup> Homeowners Joel and Sharon Greenberg were enduring a foreclosure before filing bankruptcy.<sup>179</sup> The court issued a stay on the Greenberg's property, but the home was still sold at a sheriff's sale.<sup>180</sup> The lender, understanding that it should not have sold the home, motioned to the court to have the sale set aside.<sup>181</sup> The court quickly granted the motion because the sheriff's sale was "inadvertently held."<sup>182</sup> Despite Ohio and Michigan's similar property statutes,<sup>183</sup> the lender in Ohio had to resort to the judicial system to void the sheriff's sale rather than attempt to void the sale through the use of an affidavit affecting property.<sup>184</sup>

In *Sixty-01 Ass'n of Apartment Owners v. Parsons*, the Washington Supreme Court, sitting en banc, made it very clear that a purchaser of property from a sheriff's sale cannot attempt to unilaterally withdraw its successful bid.<sup>185</sup> When the purchaser of two condominiums realized that one of the properties purchased had an encumbrance on the land, the purchaser sought to have the sale set aside.<sup>186</sup> While the court acknowledged that it had the ability to administer a remedy in equity with a showing of irregularity, it did not believe the situation merited such a remedy.<sup>187</sup> Had these events taken place in Michigan, it seems apparent the bidder could have filed an affidavit in order to revert the mortgage back to the homeowner and subsequently hold another sale.<sup>188</sup>

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<sup>177</sup> See discussion *infra*, Subsections II.C.1-2.

<sup>178</sup> Compare *Greenberg*, 2002 WL 31087627, at \*1 with *Connolly v. Deutsche Bank Nat'l Trust Co.*, 581 F. App'x 500, 502 (6th Cir. 2014) (both homeowners dealt with foreclosure, bankruptcy, and inadvertently held sheriff's sales).

<sup>179</sup> *Greenberg*, 2002 WL 31087627, at \*1.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* (The court explained "[a] sheriff's sale was inadvertently held during this stay").

<sup>182</sup> *Id.*

<sup>183</sup> Compare OHIO REV. CODE ANN. § 5301.252 (West 2013-14) with MICH. COMP. LAWS ANN. § 565.451a (West 2014).

<sup>184</sup> *Greenberg*, 2002 WL 31087627, at \*1.

<sup>185</sup> *Sixty-01 Ass'n of Apartment Owners v. Parsons*, No. 89805-7, 2014 WL 4109432, at \*1 (Wash. Aug. 21, 2014) (en banc).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> See discussion *supra*, Section II.B.

In Pennsylvania, the courts have made it clear that proper cause must be shown in order to set aside a sheriff's sale.<sup>189</sup> The facts in *EMC Mortgage Corp. v. Olde City Place Partnership* are rather complicated, involving multiple assignments of a mortgage and two concurrent sheriff's sales by different mortgagees, but the underlying rule in the case is that cause must be shown to set aside a sale.<sup>190</sup> Even further, the court made it clear that once property is sold at a sheriff's sale, the old mortgage is extinguished and no longer exists.<sup>191</sup> Such a statement is at odds with Michigan's expungement affidavit process because the affidavit allows the revival of a mortgage even though it was extinguished at the sheriff's sale.<sup>192</sup>

The Indiana Court of Appeals utilizes a similar rule as that of the Pennsylvania court.<sup>193</sup> In *Smith v. Federal Land Bank of Louisville*, the court, on the lender's request, set aside a sheriff's sale after the lender purchased the property.<sup>194</sup> The facts entail a lender believing it had full rights to the property that it was bidding on.<sup>195</sup> With this belief, the lender bid the full price for the property, which resulted in an overbid.<sup>196</sup> Had these actions been in Michigan, the lender's recourse would be simple—the lender could unilaterally execute an expungement affidavit, explaining that the property was “inadvertently held” like so many mortgagees in Michigan have done.<sup>197</sup> This would be enough to put other parties on notice,<sup>198</sup> and the mortgage could be reverted back to the original homeowner.<sup>199</sup> The mortgagee in *Smith*, however, did not attempt to take this course of action.<sup>200</sup> Instead, it

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<sup>189</sup> *EMC Mortg. Corp. v. Olde City Place P'ship*, No. 001827, 2002 WL 34078147 (Trial Order) (Pa. Com. Pleas July 29, 2002) (“Upon petition of any party in interest before delivery of the sheriff's deed to real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances.”).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* (“[W]hen Citizens foreclosed the mortgage to the Premises and purchased the property at sheriff's sale, the mortgage was extinguished . . . . It naturally follows, therefore, that if the mortgage was extinguished . . . there existed no mortgage . . . to foreclose upon in February 2000.”).

<sup>192</sup> See discussion *supra*, Section II.B (discussing the fact the sheriff's sale reverts an extinguished mortgage back to the homeowner).

<sup>193</sup> See *Smith v. Federal Land Bank of Louisville*, 472 N.E.2d 1298, 1300 (Ind. Ct. App. 1985).

<sup>194</sup> *Id.* (“These counsel advised the court that they were in agreement with respect to setting aside the sheriff's sale. An order to this effect was tendered to the court and was signed by the court on December 6, 1983, with copies served upon all counsel.”).

<sup>195</sup> *Id.* (In fact, a third party had rights in the Smiths' mortgage).

<sup>196</sup> *Id.*

<sup>197</sup> See, e.g., *Connolly*, 2014 WL 4435962, at \*1 (“The affidavit states that the sheriff's deed must be expunged because the sheriff's sale was ‘inadvertently held.’”); see also *Mellentine v. Ameriquest Mortg. Co.*, 515 F. App'x 419, 421 (6th Cir. 2013) (explaining the foreclosure was inadvertently held and the sheriff's deed was expunged.”).

<sup>198</sup> See discussion *supra*, Section II.A (discussing the Michigan's property statute and its purpose for giving notice).

<sup>199</sup> See discussion *supra*, Section II.B (discussing the effect of the expungement affidavits, which is to revert the mortgage back to the homeowner).

<sup>200</sup> *Smith*, 472 N.E.2d at 1300.

sought the judicial system to set aside the sheriff's sale.<sup>201</sup> The trial court, after holding a hearing, justified its reasoning for setting aside the sheriff's sale because not doing so would lead to an inequitable result.<sup>202</sup> The appellate court affirmed the trial court's ruling.<sup>203</sup>

These are just a few of the cases in which state law relies on the judicial process as the method to void a sheriff's sale.<sup>204</sup> State rules and statutes are in line with this method; for instance, in *EMC Mortg. Corp.*, the court supports its holding with state rules of procedure, which allow a court to set aside a sale so long as proper cause is shown and would be just and proper under the facts of that case.<sup>205</sup> Washington's statute similarly requires that an objection to a sheriff's sale must be made with a showing of substantial irregularity.<sup>206</sup> Whether it is pursuant to statute, procedural rules, or case law, states have been consistent on following the judicial process as a means for aggrieved purchasers or homeowners to set aside a sheriff's sale.<sup>207</sup> In addition to challenging sheriff's sales, courts around the country have faced an epidemic of another kind regarding affidavits that affect property.<sup>208</sup>

## 2. One State's Reaction to the Use of Affidavits Affecting Property

In 2011, the Maryland Court of Appeals put in place an emergency rule entitled, "Maryland Emergency Rule: Affidavits in Foreclosure Proceedings."<sup>209</sup> According to the new rule, courts would not only be permitted to heavily scrutinize any statute affecting property, but would actually encourage Maryland courts to do so.<sup>210</sup> The rule was implemented

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<sup>201</sup> *See id.* (explaining the lender filed a petition to have the sale set aside).

<sup>202</sup> *Id.* at 1301 ("The order setting aside the sale, constituted an exercise of equitable jurisdiction by this court to rectify what would otherwise have been an inequitable result.").

<sup>203</sup> *Id.* at 1304.

<sup>204</sup> *See NELSON & WHITMAN, supra* note 4, at 640 (introducing specific reasons for requiring a court to set aside a sheriff's sale).

<sup>205</sup> Pa. R. Civ. P. 3132 states:

Upon petition of any party in interest before delivery of the personal property or of the sheriff's deed to real property, the court may, upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances.

<sup>206</sup> WASH. REV. CODE ANN. § 6.21.110 (West 2014) ("If objections to confirmation are filed, the court shall nevertheless allow the order confirming the sale, unless on the hearing of the motion, it shall satisfactorily appear that there were substantial irregularities in the proceedings concerning the sale, to the probable loss or injury of the party objecting.").

<sup>207</sup> *See* discussion *supra* Subsections II.C.1.

<sup>208</sup> *See* discussion *infra* Subsection II.C.2.

<sup>209</sup> John P. Holahan, Stephen F.J. Ornstein, & Mathew S. Yoon, *Maryland Emergency Rule: Affidavits in Foreclosure Proceedings*, 65 CONSUMER FIN. L. Q. REP. 238 (2011).

<sup>210</sup> *Id.* ("[T]he Rule permits and encourages Maryland courts to scrutinize affidavits.").

in response to nationwide foreclosure fraud.<sup>211</sup> The Maryland court was looking to scrutinize instances where lenders had not personally read and signed the affidavit, though such an affidavit was signed.<sup>212</sup>

While this rule does not address the issue with expungement affidavits in Michigan,<sup>213</sup> it is revealing.<sup>214</sup> Lenders have used affidavits as a tool to obtain quick results while handling thousands of foreclosures.<sup>215</sup> As the saying goes, when one door closes, another door opens, and recent occurrences of the expungement affidavit<sup>216</sup> prove that lenders are adapting to the scrutiny they have received in the wake of their poor foreclosure procedures.<sup>217</sup> It is not surprising that lenders, after facing scrutiny dealing with fraudulent foreclosure procedures, have found a tool meant to cure “inadvertently held” sheriff’s sales.<sup>218</sup> Michigan could very well be ground zero in the spread of a new unscrupulous use of an affidavit.<sup>219</sup> The question becomes whether expungement affidavits are lawful under stator and common law theories, whether the use of these affidavits is justified, and whether their use should be stopped before it spreads into foreclosure proceedings around the country.<sup>220</sup>

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<sup>211</sup> *Id.* (explaining the rule was proposed “in response to allegations of foreclosure fraud nationwide”).

<sup>212</sup> *Id.* (stating the “affidavit may be invalid because of any of the following reasons: (1) the affiant has not read or personally signed the affidavit; (2) the affiant lacks a sufficient basis to attest to the accuracy of the facts stated in the affidavit; or (3) if applicable, because the affiant did not appear before the notary as stated, the court may order the party to show cause why the affidavit should not be stricken, and if it is stricken, why the action should not be dismissed or other relief granted”).

<sup>213</sup> See discussion *infra* Section III.D (discussing the ramifications of the Maryland affidavit on the situation with expungement affidavit).

<sup>214</sup> See Holahan, Ornstein & Yoon, *supra* note 209 (stating the rule was to be implemented because of lender fraud).

<sup>215</sup> See generally Gloria J. Liddell & Pearson Liddell, Jr., *Robo Signers: The Legal Quagmire of Invalid Residential Foreclosure Proceedings and the Resultant Potential Impact Upon Stakeholders*, 16 CHAP. L. REV. 367 (2013) (the most popular tool would seem to be the infamous robo-signatures on affidavits, which plague the foreclosure process). Lenders resorted to robo-signing to keep up with the massive amounts of foreclosures that they undertook. *Id.* at 377 (“[M]ortgage companies employ only one person to sign up to 10,000 foreclosure affidavits per month.”).

<sup>216</sup> See discussion *supra*, Section II.B (discussing the recent influx of cases involving expungement affidavits).

<sup>217</sup> See Liddell & Liddell, Jr., *supra* note 215, at 377.

<sup>218</sup> Compare *id.* with discussion *supra*, Section II.B.

<sup>219</sup> See discussion *supra*, Section II.B.

<sup>220</sup> See discussion *infra*, Part III.

### III. LENDERS' USE OF EXPUNGEMENT AFFIDAVITS AND THEIR LEGALITY

The expungement affidavit unnecessarily gives lenders the power to void a sheriff's sale and revert a mortgage back to the pervious unsuspecting homeowner by simply filing a piece of paper.<sup>221</sup> With that said, Michigan courts have almost always allowed its effect without requiring an explanation from the lender.<sup>222</sup> However, a lender's unilateral use of an expungement affidavit should be deemed unlawful for multiple reasons.<sup>223</sup> First, interpreting Michigan's statutes show that the unilateral use of the expungement affidavit is unlawful.<sup>224</sup> Second, no matter the statutory interpretation, the expungement affidavit should be held unlawful as an irregularity in the foreclosure proceeding under Michigan case law.<sup>225</sup> Third, courts should look at the harm to the homeowner and all policy reasons for rendering the affidavit unlawful in all contexts, excluding mutual execution between the lender and homeowner.<sup>226</sup>

#### A. FILING AN AFFIDAVIT PURSUANT TO M.C.L. § 565.451A SHOULD NOT EFFECTIVELY CONVEY PROPERTY

The expungement affidavit is derived from M.C.L. § 565.451a,<sup>227</sup> which Michigan courts interpret as statutory authority for lenders to use affidavits as a means to void sheriff's sales.<sup>228</sup> In relevant portion, the statute allows an affidavit to be filed based on the "knowledge of the happening of any condition or event that may terminate an estate or interest in real property."<sup>229</sup> With this language, the Michigan Court of Appeals in *Cordes v. Great Lakes Excavating & Equipment Rental, Inc.* upheld the affidavit's effect of reviving a discharged mortgage.<sup>230</sup> The true purpose of § 565.451a should be to strictly give notice of encumbrances, including previously

<sup>221</sup> See discussion *supra*, Section II.B.

<sup>222</sup> *Contra* Trademark Properties of Mich. L.L.C. v. Fed. Nat'l Mortg. Ass'n, No. 313296, 2014 WL 6461712 (Mich. Ct. App. Nov. 18, 2014) (holding the foreclosure sale was not void *ab initio* after entertaining the lender's argument to the contrary).

<sup>223</sup> See discussion *infra*, Sections III.A–D.

<sup>224</sup> See discussion *infra*, Sections III.A–B.

<sup>225</sup> See discussion *infra*, Section III.C.

<sup>226</sup> See discussion *infra*, Section III.D.

<sup>227</sup> MICH. COMP. LAW ANN. § 565.451a (West 2014).

<sup>228</sup> See discussion *supra*, Section II.B.

<sup>229</sup> § 565.451a(b).

<sup>230</sup> No. 304003, 2012 WL 2052789, at \*2 (Mich. Ct. App. June 7, 2012) ("Accordingly, the affidavit contained information within the scope of MCL 565.451a(b).").

voided sheriff's sales.<sup>231</sup> However, lenders have abused this statute so as to make the distinction between notice and conveyance nearly non-existent.<sup>232</sup> Only a handful of cases, beginning with *Cordes*, have directly discussed this statute and what its effect on property rights actually includes.<sup>233</sup>

In *Cordes*, the mortgagor and mortgagee agreed to reinstate a mortgage that was accidentally discharged.<sup>234</sup> The court explained that because the expungement affidavit at issue spoke to the discharge of the earlier mortgage, which in turn spoke to the termination of an interest in property, the court upheld the affidavit's validity under § 565.451a.<sup>235</sup> The court's interpretation correctly points out that the rescission and later resurrection of the mortgage would be considered an "event that may terminate an estate or interest in real property" under the Michigan statute.<sup>236</sup> However, the court shortchanged the most critical aspect of the interpretation: whether the statute may resurrect a mortgage or simply put others on notice of such an event.<sup>237</sup>

The statute is able to put others on notice of the "happening" of an event, but it should not have the ability to convey land and affect an interest in property, such as resurrecting mortgages.<sup>238</sup> Despite what the court in *Cordes* said, the effect of the affidavit<sup>239</sup> was not to resurrect a mortgage, but to notify a later mortgagee that the land was already encumbered because the earlier lender and the parcel owner made a mutual agreement to reinstate the discharged mortgage.<sup>240</sup> Because the parcel owner executed the affidavit and

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<sup>231</sup> See § 565.451a (an affidavit is meant to be sworn facts written down in order to put others on notice).

<sup>232</sup> See *Connolly v. Deutsche Bank Nat'l Trust Co.*, 580 F. App'x 500, 505-06 (6th Cir. 2014) (the court holds that an affidavit can void a sheriff's sale, despite the lack of any evidence that the underlying sale was actually void from the beginning, thereby making no true distinction between an affidavit giving notice and an affidavit actually conveying land back).

<sup>233</sup> See *id.*; see also *Trademark Props. of Mich. L.L.C. v. Fed. Nat'l Mortg. Ass'n*, No. 313296, 2014 WL 6461712 (Mich. Ct. App. Nov. 18, 2014); *Cordes*, 2012 WL 2052789, at \*2.

<sup>234</sup> *Cordes*, 2012 WL 2052789, at \*2

<sup>235</sup> *Id.* at \*2 ("In the O'Connor affidavit, paragraph 2 reads as follows: '2. A document granting a discharge of liens for the Bank of Alpena and Kenneth H. Cordes over the premises is recorded at Liber 446, Page 53 with the Alpena County Register of Deeds.' The Cordes discharge referenced in the affidavit plainly presented a condition that could terminate an interest in the parcel."). The plaintiff had accidentally discharged the mortgage, and the mortgagee aimed to revive the mortgage using the expungement affidavit. *Id.* at \*1.

<sup>236</sup> § 565.451a(b)

<sup>237</sup> See *Cordes*, 2012 WL 2052789, at \*1 (the court stated the affidavit allowed the discharged mortgage to "remain[] in effect with Cordes as the lender," which essentially revitalized a discharged mortgage)

<sup>238</sup> See discussion *supra*, Section II.A (an affidavit affecting property is simply a sworn set of facts that may notify others of encumbrances on the land); see also *Cordes*, 2012 WL 2052789, at \*2 (allowing the resurrection of the mortgage).

<sup>239</sup> See *Cordes*, 2012 WL 2052789, at \*2 (the effect was to reinstate a mortgage that was accidentally discharged).

<sup>240</sup> *Id.* at \*1.



reinstated the mortgage with the register of deeds, persons were put on notice of this arrangement between the parcel owner and the earlier lender.<sup>241</sup> When the expungement affidavit is used to send notice of a mutual agreement, there seems to be little reason to challenge the affidavit's purpose; however, had the parcel owner been unaware of the lender's actions in filing the affidavit, the lender could not have unilaterally filed the affidavit without first seeking permission from either the parcel owner or through the judicial process.<sup>242</sup> This case, though sound in its particular factual circumstances, set an unfortunate precedent<sup>243</sup> that justifies and expands the use of § 565.451a to not only revive a discharged mortgage, but void a sheriff's sale.<sup>244</sup>

While *Connolly v. Deutsche Bank National Trust Co.* followed the holding in *Cordes*, it expanded the application of § 565.451a by allowing expungement affidavits to void sheriff's sales.<sup>245</sup> Unlike *Cordes*, the defendant in *Connolly* unilaterally filed the expungement affidavit, stating the sheriff's sale was "inadvertently held."<sup>246</sup> This rationale was all that the court required to rule the sheriff's sale void.<sup>247</sup> The court in *Connolly* failed to discuss the crucial difference between *Cordes*, where the lender and parcel owner agreed to the effect of the affidavit,<sup>248</sup> and *Connolly*, where the lender's unilateral act disrupted the foreclosure process without the homeowner's consent or acknowledgement.<sup>249</sup> The lender gave no further reason why the first sheriff's sale was void, and allowed the affidavit to effectively revert the mortgage back to the original homeowner.<sup>250</sup>

The Michigan Court of Appeals did distinguish *Connolly* in its later decision, *Trademark Properties of Michigan L.L.C. v. Federal National Mortgage Ass'n.*<sup>251</sup> According to the court in *Trademark Properties*, the *Connolly* court dealt with an already void foreclosure sale before the affidavit was filed; therefore, the use of the affidavit was lawful under Michigan statute because its purpose was to notify all persons of the voided sale.<sup>252</sup> Such an interpretation is in line with § 595.451a and *Cordes* because the affidavit's only purpose would be to notify all interested parties of the

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<sup>241</sup> *Id.* at \*2.

<sup>242</sup> See discussion *infra*, Part III.B (due to § 565.451d, a party may not alter, through using an affidavit, the substantive rights of another party).

<sup>243</sup> See *Connolly v. Deutsche Bank Nat'l Trust Co.*, 580 Fed. App'x 500, 506 (6th Cir. 2014).

<sup>244</sup> See *id.*

<sup>245</sup> *Id.* at 505-06.

<sup>246</sup> *Id.* at 502.

<sup>247</sup> *Id.* at 505-06.

<sup>248</sup> *Cordes v. Great Lakes Excavating & Equip. Rental, Inc.*, No. 304003, 2012 WL 2052789, at \*1 (Mich. Ct. App. June 7, 2012)

<sup>249</sup> *Connolly*, 581 F. App'x at 502.

<sup>250</sup> *Id.*

<sup>251</sup> See *Trademark Props. of Mich. L.L.C. v. Fed. Nat'l Mortg. Ass'n*, No. 313296, 2014 WL 6461712, at \*3 n.3 (Mich. Ct. App. Nov. 18, 2014).

<sup>252</sup> *Id.*

“happening of any condition” with the property.<sup>253</sup> This does not, however, solve many key questions from *Connolly*, namely why or how the sheriff’s sale was “inadvertently held” and why such an inadvertently held sale is automatically rendered void without further support.<sup>254</sup> The court in *Trademark Properties* takes the court in *Connolly* at its word that the property was already void before the affidavit was filed.<sup>255</sup> Interestingly, the court in *Trademark Properties* takes the time and conducts an extensive analysis as to whether the sheriff’s sale in that case was actually void *ab initio*.<sup>256</sup>

If the true purpose of § 565.451a is to give notice of encumbrances, including previously voided sheriff’s sales, then courts, as in *Trademark Properties*, should take more time understanding why a sheriff’s sale is void to begin with.<sup>257</sup> Unfortunately, courts in Michigan rarely make such inquiries and homeowners like *Connolly*<sup>258</sup> and *Laura Buttazzoni*<sup>259</sup> are left to endure a second foreclosure process without any question as to whether the sheriff’s sale was ever really void.<sup>260</sup> While *Trademark Properties* seems to be a step in the right direction, Michigan courts will continue to interpret its property statute to allow the resurrection of mortgages and the voiding of sheriff’s sales because its decision does not disturb the numerous cases that came before it, such as *Connolly*.<sup>261</sup> Another state, however, takes an entirely different approach to voiding a sheriff’s sale, though its property statute is nearly identical to Michigan.<sup>262</sup>

In *United Companies Lending v. Greenberg*, the lender, understanding it had “inadvertently held” the sheriff’s sale, sought the judiciary’s approval to set aside that sale.<sup>263</sup> Even though Ohio has a nearly identical statute as Michigan, the lender’s recourse was channeled through the court system rather than the recording system when the lender faced

<sup>253</sup> § 565.451a(b).

<sup>254</sup> See *Connolly*, 581 F. App’x at 502, 505-06 (holding that an affidavit under § 565.451a can void a sheriff’s sale despite any discussion as to how the sheriff’s sale was inadvertently held). The property statute allows for an affidavit to cite facts that are in existence at the time of the filing; therefore, an affidavit cannot be filed as a way to create a fact, such as voiding a sale, without the sale actually being void at the outset. See § 565.451a.

<sup>255</sup> See *Trademark Properties*, 2014 WL 6461712, at \*3 n.3.

<sup>256</sup> See *id.* (the court determined the sheriff’s sale was not actually void *ab initio*).

<sup>257</sup> See discussion *supra*, Subsection II.B.1 (discussing how Michigan courts do not inquire into whether a sheriff’s sale is actually void *ab initio*).

<sup>258</sup> See *Connolly*, 581 F. App’x at 502.

<sup>259</sup> See *Buttazzoni v. Nationstar*, No. 13-CV-14901, 2014 WL 1031278, at \*1 (E.D. Mich. March 14, 2014).

<sup>260</sup> See discussion *supra*, Part II.

<sup>261</sup> See discussion *supra*, Subsection II.B.1 (discussing how Michigan courts continue to allow the expungement affidavit without any rationale).

<sup>262</sup> Compare *United Cos. Lending v. Greenberg*, No. 80803, 2002 WL 31087627, at \*1 (Ohio Ct. App. Sept. 19, 2002) and OHIO REV. CODE ANN. § 5301.252 (West 2013-14) with *Connolly*, 581 F. App’x at 505-06 and § 565.451a.

<sup>263</sup> *Greenberg*, 2002 WL 1031278, at \*1.

factual circumstances requiring a sheriff's sale to be set aside.<sup>264</sup> Even assuming that lenders in Michigan have truthfully filed the expungement affidavit because the property sold at the sale should not have been sold, as in *Greenberg*, the courts in Ohio would nonetheless require the lender to use the judicial system to set aside a sheriff's sale, despite its recording statutes.<sup>265</sup>

In the end, § 565.451a allows lenders to file affidavits to notify interested persons of the “happening of any condition or event that may terminate an estate or interest in real property,” which means there must have been some underlying event or happening, such as a mutual agreement among parties.<sup>266</sup> Michigan courts continually allow the affidavit to void a sheriff's sale on the premise that it is void *ab initio*, which can be seen as an event that meets § 565.451a.<sup>267</sup> Even if Michigan lenders could file the affidavit according to § 565.451a because the sheriff's sale was truly void, the lenders may not correct title in this manner according to a statutory provision courts fail to take into account.<sup>268</sup>

*B. MICHIGAN COURTS CONTINUALLY FAIL TO ACKNOWLEDGE M.C.L. §  
565.451D AND ITS POTENTIAL EFFECT ON THE EXPUNGEMENT  
AFFIDAVIT*

Two violations of § 565.451d may arise when lenders file the expungement affidavit.<sup>269</sup> First, the correction sought through an expungement affidavit is not one allowed under the statute.<sup>270</sup> Second, the unilateral use of the affidavit to correct title affects the “substantive rights” of the homeowner.<sup>271</sup> According to § 565.451d, affidavits filed with the register of deeds may “correct errors or omissions in previously recorded documents.”<sup>272</sup> The types of corrections allowed are limited to “errors and omissions relating to the proper place of recording” and “[s]crivener's errors and scrivener's omissions.”<sup>273</sup> Not only does the statute limit the type of corrections allowed, the statute will only permit a correction if “[t]he

<sup>264</sup> *Id.* (the inadvertently held sheriff's sale was void from the beginning because there was a stay in bankruptcy that disallowed the home to be sold).

<sup>265</sup> *Id.*

<sup>266</sup> See *Cordes v. Great Lakes Excavating & Equip. Rental, Inc.*, No. 304003, 2012 WL 2052789, at \*2 (Mich. Ct. App. June 7, 2012).

<sup>267</sup> See, e.g., *Freund v. Trott & Trott*, No. 299011, 2011 WL 5064248, at \*2 (Mich. Ct. App. Oct. 25, 2011); Complaint, *supra* note 146 (explaining the affidavit purported to expunge the sheriff's sale because it was “void *ab initio*”).

<sup>268</sup> See discussion *infra* Section III.B.

<sup>269</sup> See § 565.451d(1)(a), (2)(b).

<sup>270</sup> See § 565.451d(1)(a).

<sup>271</sup> See § 565.451d(2)(b).

<sup>272</sup> § 565.451d(1).

<sup>273</sup> § 565.451d(1)(a)-(b).

affidavit does not alter the substantive rights of any party unless it is executed by that party.”<sup>274</sup> Lenders continually file affidavits pursuant to § 565.451a in order to correct title of property that was sold during an allegedly void sheriff’s sale, but they fail to acknowledge these limitations in § 565.451d.<sup>275</sup>

First, because the statute at issue is limited to two types of corrections, errors dealing with the place of recording<sup>276</sup> and simple scrivener’s errors or omission on a document,<sup>277</sup> it follows that any kind of correction going beyond this is outside the authority granted under § 565.451d.<sup>278</sup> Expungement affidavits have the purpose of correcting legal title, which is a far more significant event than correcting the place of recording or other common scrivener’s errors.<sup>279</sup> Even if the sheriff’s sale is properly void *ab initio*<sup>280</sup> and the affidavit was meant to put all persons on notice, the ultimate effect of the affidavit is to correct the deed by conveying title back to the original homeowner.<sup>281</sup> Such a correction violates the plain meaning of the statute because such a conveyance does not constitute either one of the two corrections specified in the statute—place of recording and scrivener’s errors.<sup>282</sup>

Second, even if conveying title is a correction allowed under the statute, the lender that files the affidavit cannot affect the “substantive rights” of the non-filing party.<sup>283</sup> According to the statute, only the party who is executing the affidavit can have its rights affected; therefore, the statute limits the severity of the correction.<sup>284</sup> With this in mind, the expungement affidavit’s effect of reinstating a previously extinguished mortgage clearly alters the rights of both parties because property is conveyed from one party to the other.<sup>285</sup> Therefore, allowing an affidavit to reinstate the extinguished mortgage will alter the rights of the homeowner, whose interest in the

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<sup>274</sup> § 565.451d(2)(a).

<sup>275</sup> See discussion *supra*, Subsection II.B.1.

<sup>276</sup> § 565.451d(1)(a).

<sup>277</sup> § 565.451(1)(b).

<sup>278</sup> § 565.451d.

<sup>279</sup> See § 565.451d(1)(a)-(b) (these provisions provide the only two types of corrections allowed under the statute).

<sup>280</sup> See discussion *supra*, Part II.B.2.

<sup>281</sup> See *Dixon v. Wells Fargo Bank, N.A.*, No. 12-10174, 2012 WL 4450502, at \*1 (E.D. Mich. Sept. 25, 2012) (the affidavit was meant to “correct[] record title to show that Plaintiffs’ . . . mortgage was in full force and effect”).

<sup>282</sup> See § 565.451d(1)(a)-(b).

<sup>283</sup> See § 565.451(2)(b).

<sup>284</sup> See § 565.451(1)(a)-(b) (the errors that are allowed are not serious since the corrections are limited to the place of recording and scrivener’s errors that do not affect substantive rights of the non-filing party).

<sup>285</sup> See *Trademark Props. of Michigan, L.L.C. v. Fed. Nat’l Mortg. Ass’n*, No. 313296, 2014 WL 6461712 (Mich. Ct. App. Nov. 18, 2014) (citing *Dunitz v. Woodford Apartments Co.*, 236 Mich. 45, 49-50 (1926)).

property was wiped clean after the foreclosure.<sup>286</sup> Because an expungement affidavit alters the homeowner and lender's rights in the property, the statute should bar the use of the affidavit.<sup>287</sup>

The procedure for correcting issues with sheriff's sales outside Michigan provides further support to why lenders should not have the ability to correct title through unilaterally voiding sheriff's sales.<sup>288</sup> A prime example comes from *Sixty-01 Ass'n of Apartment Owners v. Parsons*, where the purchaser of property at a sheriff's sale in the State of Washington could not simply fix its successful overbid by filing an affidavit and reverting the property back to the homeowner.<sup>289</sup> The purchaser's only recourse was the judicial system and showing such a correction was warranted due to an irregularity in the foreclosure process.<sup>290</sup> Lenders should not have the ability to overbid on property to just, in turn, void the sale and re-foreclose on the home in order to obtain the property for a lower price.<sup>291</sup>

As another example, Pennsylvania requires a showing of cause in court to correct title and order a resale of the property.<sup>292</sup> In no case outside of Michigan has a lender had the privilege to foreclose on a homeowner, initiate a sale of the home, void the sale unilaterally as a way to correct title, resurrect and reinstate the extinguished mortgage, and then re-foreclose on the homeowner again.<sup>293</sup> Unfortunately, lenders have had this ability for the last five years, and the stark contrast with many judicial procedures required outside of Michigan.<sup>294</sup> Though adversarial situations between the lender and homeowner should require judicial oversight,<sup>295</sup> Michigan leads the way for a more cost-effective way of handling corrections in title when there is mutual agreement among the lender and homeowner.<sup>296</sup>

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<sup>286</sup> See discussion *supra*, Section I.A (Often, lenders cannot recoup their loss from the homeowner through a deficiency judgment because the fair market value of the property is worth less than the amount owed on the mortgage).

<sup>287</sup> See § 565.451d(2)(b).

<sup>288</sup> See discussion *supra*, Subsection II.C.1 (discussing the different methods of correcting title and setting aside sheriff's sales through the judicial process).

<sup>289</sup> No. 89805-7, 2014 WL 4109432, at \*1 (Wash. Aug. 21, 2014) (en banc).

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> EMC Mortg. Corp. v. Olde City Place P'ship, No. 001827, 2002 WL 34078147, at \*3 (Trial Order) (Pa. Com. Pleas July 29, 2002).

<sup>293</sup> *Contra* Buttazzoni v. Nationstar, No. 13-CV-14901, 2014 WL 1031278 (March 14, 2014) (The homeowner was foreclosed initially in 2009 and again in 2013, yet she never redeemed the property or sought to have her mortgage reinstated).

<sup>294</sup> See discussion *supra*, Subsection II.C.1.

<sup>295</sup> See, e.g., *Parsons*, 2014 WL 4109432, at \*1 (the court required a judicial finding to determine if an overbid merited the setting aside of a sheriff's sale).

<sup>296</sup> See discussion *supra*, Subsection II.B.2 (discussing the expungement affidavit's ability to cure mutual defects).

There are a handful of Michigan cases where both parties have mutually used the expungement affidavit to correct title.<sup>297</sup> Using the affidavit in this way should not violate § 565.451(d)(2)(b) because an affidavit may alter substantive rights of the party executing the affidavit.<sup>298</sup> If both parties agree to the affidavit's effect and execute the affidavit together, then the statute should not be violated.<sup>299</sup> Unfortunately, the correction both parties seek would be in violation of § 565.451d(1) even if the correction was done mutually because conveying property to fix title is clearly outside the scope of § 565.451d(1).<sup>300</sup>

This is one area of the statute that should be revised because if the parties are in agreement, it would be in both the parties' and judiciary's interest to allow the recording affidavit to make substantial corrections, which can save time and money from having to use the court system.<sup>301</sup> Reasons for allowing mutual use of the affidavit to correct title can take place in instances of loan modifications between the lender and homeowner after the sheriff's sale,<sup>302</sup> as well as when there has been an accidental rescission, as in *Cordes*.<sup>303</sup> In the end, the unilateral and mutual execution of the expungement affidavit is in violation of § 565.451d; however, the lender and homeowner's mutual use of the affidavit should be allowed for cost-saving reasons.<sup>304</sup> Despite the statutory implications of § 565.451a and § 565.451d, the unilateral use of the expungement affidavit should be considered unlawful under Michigan's case law regarding wrongful foreclosure actions.<sup>305</sup>

### C. A LENDER'S USE OF THE EXPUNGEMENT AFFIDAVIT SHOULD NOT BE UPHeld IN HOMEOWNER'S WRONGFUL FORECLOSURE ACTION

While a statutory analysis should be enough to render expungement affidavits unlawful, these affidavits should also be impermissible when

<sup>297</sup> See, e.g., *Maltbie v. Bank of America*, No. 1:12-CV-1002, 2013 WL 6078945, at \*2 (W.D. Mich. Nov. 19, 2013); *Cordes v. Great Lakes Excavating & Equipment Rental, Inc.*, No. 304003, 2012 WL 2052789, at \*1 (Mich. Ct. App. June 7, 2012).

<sup>298</sup> § 565.451d(2)(b).

<sup>299</sup> *Id.* (An affidavit cannot "alter the substantive rights of any party unless it is executed by that party").

<sup>300</sup> See *id.* § 565.451d(1) (the statute only allows corrections of errors and omissions relating to the place of recording and other scrivener's errors or omissions).

<sup>301</sup> See, e.g., *Cordes*, 2012 WL 2052789, at \*2 (the lender and parcel owner used the expungement affidavit to correct title by reviving a mortgage, which saved them from the time and hassle of going through the judicial system).

<sup>302</sup> *Maltbie v. Bank of America*, No. 1:12-CV-1002, 2013 WL 6078945, at \*2 (W.D. Mich. Nov. 19, 2013).

<sup>303</sup> *Cordes*, 2012 WL 2052789, at \*2.

<sup>304</sup> See discussion *supra*, Section III.B.

<sup>305</sup> See discussion *supra*, Section III.C.

challenged in a wrongful foreclosure action.<sup>306</sup> A wrongful foreclosure action to set aside a foreclosure sale is almost always going to require the heightened standard established in *Kim v. JPMorgan Chase Bank, N.A.*<sup>307</sup> because the filing of a wrongful foreclosure lawsuit cannot toll the redemption period.<sup>308</sup> Since almost every expungement case involved the expiration of the redemption period, it is best to analyze the affidavit against this standard.<sup>309</sup> This heightened standard consists of a three-prong test, requiring a court to set aside a sheriff's sale only on (1) the showing of fraud or irregularity in the foreclosure process; (2) prejudice to the homeowner; and (3) a causal relationship between the fraud or irregularity and the prejudice.<sup>310</sup> Even under this heightened standard, the expungement affidavit is an unlawful legal instrument that cannot pass muster.<sup>311</sup>

### 1. The Expungement Affidavit Constitutes Fraud or Irregularity in the Foreclosure Process

The standard for fraud or irregularity in a Michigan foreclosure procedure is high, and often courts fail to address the prejudice prong because plaintiffs are unable to get over this first hurdle.<sup>312</sup> In *Dixon v. Wells Fargo Bank, N.A.*, the court laid out the fraud or irregularity test.<sup>313</sup> To prove fraud or irregularity, there must be a showing of: (1) misrepresentation; (2) the misrepresentation must be false; (3) the lender must know about the false or misleading statement; (4) the lender intends for the homeowner to rely on it; (5) the homeowner must have relied on it; and (6) the homeowner must suffer injury as a result.<sup>314</sup> Even under this heightened scrutiny, the unilateral use of the expungement affidavit meets this test; therefore, it should be deemed unlawful.<sup>315</sup>

The principal issue for declaring fraud or irregularity is whether the first two prongs of the test have been met; that is, whether the affidavit is a

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<sup>306</sup> See discussion *supra*, Section I.B.

<sup>307</sup> 825 N.W.2d 329, 337 (Mich. 2012).

<sup>308</sup> See *Conlin v. Mortg. Elec. Registration Sys.*, 714 F.3d 355, 360 (6th Cir. 2013) (“[T]he filing of a lawsuit is insufficient to toll the redemption period.”) (internal quotation marks omitted).

<sup>309</sup> See discussion, *supra*, Section II.B.

<sup>310</sup> See discussion *supra*, Section I.B.

<sup>311</sup> See discussion *infra*, Subsections III.C.1–2 (analyzing expungement affidavits under the Michigan wrongful foreclosure framework).

<sup>312</sup> See *e.g.*, *Buttazzoni v. Nationstar*, No. 13-CV-14901, 2014 WL 1031278, at \*3 (E.D. Mich. March 14, 2014); *Dixon v. Wells Fargo Bank, N.A.*, No. 12-10174, 2012 WL 4450502, at \*5 (E.D. Mich. Sept. 25, 2012).

<sup>313</sup> *Dixon*, 2012 WL 4450502, at \*5.

<sup>314</sup> *Id.* (citing *Hi-Way Motor Co. v. Int'l Harvester Co.*, 247 N.W.2d 813 (Mich. 1976)).

<sup>315</sup> See discussion *supra* Part II.B.2; see also discussion *infra* Part III.D (sometimes the affidavit can be beneficial if the lender and homeowner mutually use it; therefore, disallowing such a practical use would be counter-productive).

false misrepresentation.<sup>316</sup> To begin, if a sheriff's sale is actually "void *ab initio*," the sale must have been unlawful or went against public policy.<sup>317</sup> If a lender lies on the face of the affidavit by declaring the sale void *ab initio* without the sale actually violating law or public policy, that is a false misrepresentation under the first and second prongs of the fraud test.<sup>318</sup> Beginning with *Freund v. Trott & Trott, P.C.*, the court allowed the use of an expungement affidavit based on the single proclamation that the sheriff's sale would be treated as "void *ab initio*."<sup>319</sup> The court in *Freund* gave no other rationale why the lender could automatically void the sale.<sup>320</sup> Without more, it is impossible to prove whether or not the statement is actually true.<sup>321</sup>

In most cases, this problem can be solved if courts in Michigan addressed why sheriff's sales were "inadvertently held" and whether that constituted a properly voided sale.<sup>322</sup> Fortunately, the latest case out of Michigan asked such a question.<sup>323</sup> In *Trademark Properties*, the court sought to understand why the sale could actually be void; and after doing so, the court found that the sale was not void and that the affidavit was false.<sup>324</sup> This was the first time a Michigan court actually addressed the lender's underlying rationale for voiding the sale.<sup>325</sup> By distinguishing *Connolly*,<sup>326</sup> the court in *Trademark Properties* left open the question of what effect an affidavit would have on a sale that is deemed void *ab initio* and whether an affidavit that was properly purporting to set aside a truly void sheriff's sale could still be considered a fraud or irregularity in the foreclosure proceeding.<sup>327</sup> The answer must still be yes.<sup>328</sup>

Under Michigan statute, the expungement affidavit is unlawful pursuant to § 565.451d.<sup>329</sup> Therefore, filing an unlawful affidavit will in

<sup>316</sup> See *Kim v. JPMorgan Chase Bank, NA*, 825 N.W.2d 329, 337 (Mich. 2012).

<sup>317</sup> See BLACK'S LAW DICTIONARY, *supra* note 26, at 1805.

<sup>318</sup> *Dixon*, 2012 WL 4450502, at \*5 (the second prong of the fraud or irregularity test requires the misrepresentation to actually be false).

<sup>319</sup> No. 299011, 2011 WL 5064248, at \*2 (Mich. Ct. App. Oct. 25, 2011).

<sup>320</sup> *Id.*

<sup>321</sup> See *id.*

<sup>322</sup> See, e.g., *Connolly v. Deutsche Bank Nat'l Trust Co.*, 581 Fed. App'x 500, 502 (6th Cir. 2014); *Mellentine v. Ameriquest Mortg. Co.*, 515 Fed. App'x 419, 421 (6th Cir. 2013); *Dixon*, 2012 WL 4450502, at \*1.

<sup>323</sup> See *Trademark Props. of Mich., L.L.C. v. Fed. Nat'l Mortg. Ass'n*, No. 313296, 2014 WL 6461712 (Mich. Ct. App. Nov. 18, 2014).

<sup>324</sup> *Id.*

<sup>325</sup> But see, e.g., *Connolly*, 581 Fed. App'x at 505 (the sheriff's sale was "inadvertently held," but the court did not determine why that was so); *Dixon*, 2012 WL 4450502, at \*1 (the court explains the sheriff's sale was void because it was "inadvertently held," but it did not explain why it was inadvertently held).

<sup>326</sup> *Trademark Props.*, 2014 WL 6461712, at \*3 n.3.

<sup>327</sup> *Id.* ("[W]e need not decide the effect of the filing of an affidavit where a foreclosure sale was void *ab initio* because, here, the foreclosure sale was not void.")

<sup>328</sup> *United Cos. Lending v. Greenberg*, No. 80803, 2002 WL 31087627, at \*1 (Ohio Ct. App. Sept. 19, 2002).

<sup>329</sup> See discussion *supra*, Section III.B.



essence be a misrepresentation under the fraud or irregularity test because all interested parties from that point on will rely on an unlawful affidavit purporting to explain rights in property that do not exist.<sup>330</sup> It does not matter whether the underlying sheriff's sale was truly void *ab initio*.<sup>331</sup> In addition, the misrepresentation is false because the affidavit advances facts about the property that are not true, mainly that the owner of the property is the homeowner when it should still, in fact, be the lender.<sup>332</sup> Therefore, whether the lender's false misrepresentation stems from lying on the face of the affidavit<sup>333</sup> or from the fact that the affidavit itself is unlawful,<sup>334</sup> courts should find that the use of the affidavit meets the first two prongs of the fraud or irregularity test.<sup>335</sup>

Overcoming the first two prongs of this test is crucial, but once the court does, there should be no reason the last four prongs cannot be met. The third prong requires lenders to know the statement is false and misleading.<sup>336</sup> In a case like *Freund*, the lender most certainly should know that their proclamation is false.<sup>337</sup> To highlight the point, Trott & Trott attempted to use an expungement affidavit to cure its own mistake in the subsequent case, *Phh Mortgage Corp. v. O'Neal*, despite the fact there was no unlawful conduct to render the sale void.<sup>338</sup> In addition, all lenders should understand that an affidavit voiding a sheriff's sale is unlawful under Michigan statute and, therefore, a false misrepresentation.<sup>339</sup>

The final three prongs of the fraud or irregularity test look first to the lender to determine whether it intended for the homeowner to rely on the affidavit, then to the homeowners and whether they relied on the affidavit, and finally if their reliance caused the homeowner harm.<sup>340</sup> In cases of expungement affidavits, the lender clearly relies on the homeowner to take

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<sup>330</sup> See discussion *supra*, Section III.B (explaining that correcting title for a party that did not execute the affidavit is an unlawful correction under the Michigan statute and should not be allowed to change the party's rights in the property).

<sup>331</sup> See discussion *supra*, Section III.B (explaining that even an affidavit that accurately describes a voided sale is unlawful under the Michigan statute).

<sup>332</sup> See discussion *supra*, Section III.B (discussing why a truly void sheriff's sale will still lead to an invalid expungement affidavit).

<sup>333</sup> See, e.g., *Phh Mortg. v. O'Neal*, No. 311233, 2013 WL 3025566, at \*1 (E.D. Mich. June 18, 2013) (the lender said the sheriff's sale was void *ab initio* when in reality the lender accidentally underbid at the sale and was attempting to avoid the homeowner's redemption).

<sup>334</sup> See discussion *supra*, Section III.B.

<sup>335</sup> See *Kim v. JPMorgan Chase Bank, NA*, 825 N.W.2d 329, 337 (Mich. 2012).

<sup>336</sup> *Dixon*, 2012 WL 4450502, at \*5 (the third prong of the fraud or irregularity test is for the lender to know the statement is false or misleading).

<sup>337</sup> If a lender is stating something is void *ab initio*, but understands that there is no law being violated, then that lender should know that what is being said is false and misleading.

<sup>338</sup> No. 311233, 2013 WL 3025566, at \*1 (E.D. Mich. June 18, 2013).

<sup>339</sup> See § 565.451d.

<sup>340</sup> *Dixon*, 2012 WL 4450502, at \*5.

the property back,<sup>341</sup> the homeowners rely on the affidavit, understanding it is again their home,<sup>342</sup> and the homeowners often suffer injury resulting from enduring another foreclosure and sheriff's sale, among other things.<sup>343</sup> This last point concerning injury leads into the second and third prongs of the overall wrongful foreclosure test: prejudice and a causal connection between the fraud or irregularity and the prejudice.<sup>344</sup>

2. *THE EXPUNGEMENT AFFIDAVIT PREJUDICES THE HOMEOWNER AND SUCH PREJUDICE IS DIRECTLY CONNECTED TO THE AFFIDAVIT'S IRREGULARITY IN THE FORECLOSURE PROCESS*

Once a court finds fraud or irregularity, the homeowner must prove prejudice, meaning "she would have been better positioned to preserve her interest in the property" had it not been for the fraud or irregularity.<sup>345</sup> In addition, *Kim* also requires that the fraud or irregularity be the cause of that prejudice.<sup>346</sup> Assuming, for the sake of argument, that the use of an expungement affidavit constitutes fraud or irregularity in the foreclosure process, a homeowner should be able to equally prove prejudice from the affidavit statute.<sup>347</sup>

In *Buttazzoni v. Nationstar*, the plaintiff's claim of fraud or irregularity was based partially on the expungement affidavit, but her claim for prejudice was based on a completely separate notice statute.<sup>348</sup> For this reason, the court did not address whether the expungement affidavit would constitute prejudice.<sup>349</sup> However, had the issue been posited, the plaintiff would have to succeed.<sup>350</sup> The homeowner, Buttazzoni, was foreclosed on twice, her credit score was affected twice, she endured foreclosure proceedings for nearly four years on the same property, and she was left with a home that was significantly damaged once it was reverted back to her.<sup>351</sup> All of this occurred because the expungement affidavit was allowed to

<sup>341</sup> See *Freund*, 2011 WL 5064248, at \*2 (the lender states in the affidavit that it will no longer rely on the original foreclosure sale and expects the homeowner to take the title, as if the sale never happened).

<sup>342</sup> See *Dixon*, 2012 WL 4450502, at \*2 (the plaintiffs continued to seek a loan modification after the foreclosure sale was voided).

<sup>343</sup> See Plaintiff's Response, *supra* note 154, at 3 (the plaintiff alleges the expungement affidavit harmed their ability to seek a loan modification, among other claims).

<sup>344</sup> *Kim v. JPMorgan Chase Bank, N.A.*, 825 N.W.2d 329, 337 (Mich. 2012).

<sup>345</sup> *Buttazzoni v. Nationstar*, No. 13-CV-14901, 2014 WL 1031278 (March 14, 2014).

<sup>346</sup> *Kim v. JPMorgan Chase Bank, N.A.*, 825 N.W.2d 329, 337 (Mich. 2012).

<sup>347</sup> See discussion *infra*, Section III.D (discussing many of the damaging aspects of the affidavit's effect).

<sup>348</sup> *Buttazzoni*, 2014 WL 1031278, at \*3.

<sup>349</sup> See *id.* (the prejudice claim was based on MICH. COMP. LAWS ANN. § 600.3205 (West 2014)).

<sup>350</sup> See *id.* at \*1 (the homeowner alleged the affidavit caused injury, predominantly in the form of a second foreclosure that affected her credit score).

<sup>351</sup> See *id.*

convey property back to Buttazzoni.<sup>352</sup> Therefore, Buttazzoni would have been in a much better position had the affidavit under the property statute never been used because she would have never regained title to the home, causing a second foreclosure proceeding three years later that would affect her credit score.<sup>353</sup>

As another example of prejudice, the plaintiffs' attorney in *Dixon v. Wells Fargo Bank, N.A.*<sup>354</sup> explained the homeowner's lender, due to the expungement affidavit, "caused the necessary loss mitigation efforts to languish for several months and resulted in an even more difficult problem to solve."<sup>355</sup> In that case, the homeowners faced an expungement affidavit in the middle of their process to work out a loan modification and dealings with the FHA Home Affordable Modification Program.<sup>356</sup> Had it not been for the expungement affidavit, the Dixons could very well have re-worked a loan modification and still have their home; thus, prejudice resulted.<sup>357</sup> Unfortunately, the court in *Dixon* never got to the question of prejudice and dismissed the claim.<sup>358</sup>

The final element at issue in the wrongful foreclosure analysis is whether the fraud or irregularity and prejudice have a causal connection.<sup>359</sup> There is such a connection if the affidavit at issue is an irregularity in the foreclosure process<sup>360</sup> and, because of that irregularity, the homeowner endures prejudice in the form of multiple foreclosures, sheriff's sales, and missed opportunities.<sup>361</sup> In *Buttazzoni v. Nationstar*, the homeowner would have not have received a home in disrepair three years later had it not been for the filing of the affidavit.<sup>362</sup> In *Dixon*, the plaintiff may have had the chance to successfully modify the loan if it was not for the delays caused from the affidavit.<sup>363</sup> The causal connection is clear, since the homeowners in both situations would not have been harmed had it not been for the expungement affidavit.<sup>364</sup> Because the expungement affidavit proves fraud or irregularity in the foreclosure process, the expungement affidavit

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<sup>352</sup> *See id.*

<sup>353</sup> *See id.*

<sup>354</sup> *Dixon v. Wells Fargo Bank, N.A.*, No. 12-10174, 2012 WL 4450502 (E.D. Mich. Sept. 25, 2012).

<sup>355</sup> Plaintiff's Response, *supra* note 154, at 3.

<sup>356</sup> *Id.* at 3-4.

<sup>357</sup> *See id.* at 4.

<sup>358</sup> *Dixon*, 2012 WL 4450502, at \*4.

<sup>359</sup> *Kim v. JPMorgan Chase Bank, N.A.*, 825 N.W.2d 329, 337 (Mich. 2012).

<sup>360</sup> *See discussion supra*, Subsection III.C.1 (discussing fraud and irregularity stemming from the foreclosure process).

<sup>361</sup> *See discussion supra*, Subsection III.C.2 (discussing the prejudice that results from the fraud or irregularity in the foreclosure process).

<sup>362</sup> No. 13-CV-14901, 2014 WL 1031278, at \*1 (E.D. Mich. March 14, 2014).

<sup>363</sup> *See Plaintiff's Response, supra* note 154.

<sup>364</sup> *See Buttazzoni v. Nationstar*, No. 13-CV-14901, 2014 WL 1031278, at \*3 (E.D. Mich. March 14, 2014); Plaintiff's Response, *supra* note 154.

prejudices the homeowner, and there is a connection between the two, courts should discontinue the acceptance of lender's arguments in wrongful foreclosure actions.<sup>365</sup>

As a final matter, the proper remedy for successfully proving wrongful foreclosure is problematic for aggrieved homeowners.<sup>366</sup> According to *Dixon*, the remedy for proving wrongful foreclosure is to have the foreclosure set aside and the property reverted back to the homeowner.<sup>367</sup> The problem is, of course, the fact the homeowner is suing because the foreclosure was unlawfully set aside once already, which caused the need to argue wrongful foreclosure in the first place.<sup>368</sup> In *Freund v. Trott & Trott, P.C.*, the court found the wrongful foreclosure issue moot because the effect of the affidavit was that of the ultimate relief sought—to have the title reverted back to the homeowner.<sup>369</sup> The wrongful foreclosure argument, however, should still be raised for a few reasons.<sup>370</sup> First, the court may still deem the acts of the lender unlawful under the test for purposes of declaratory relief.<sup>371</sup> Second, the court may award monetary damages if there is actual monetary harm.<sup>372</sup> If lenders face these two methods or recourse enough times, they may eventually refrain from unlawfully executing the expungement affidavit.<sup>373</sup> Therefore, the wrongful foreclosure analysis proves the unilateral use of an expungement affidavit is unlawful and that

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<sup>365</sup> See discussion *supra*, Subsection III.C.

<sup>366</sup> See *Freund v. Trott & Trott, P.C.*, No. 299011, 2011 WL 5064248, at \*2 (Mich. Ct. App. Oct. 25, 2011) (finding the issue moot because the remedy was met in the effect of the expungement affidavit).

<sup>367</sup> *Dixon v. Wells Fargo Bank, N.A.*, No. 12-10174, 2012 WL 4450502, at \*5 (E.D. Michigan Sept. 25, 2012).

<sup>368</sup> See, e.g., *Freund*, 2011 WL 5064248, at \*2 (“Because this is the relief ultimately sought by plaintiff, we could offer no further relief to plaintiff, and the issue regarding the validity of the foreclosure proceeding is moot.”).

<sup>369</sup> *Id.*

<sup>370</sup> See *County of San Diego v. State*, 79 Cal. Rptr. 3d 489, 510 (Cal. Ct. App. 2008) (explaining when declaratory relief can be sought).

<sup>371</sup> See *id.* (explaining that for declaratory relief, there must be an “actual controversy” that “encompasses a probable future controversy relating to the legal rights and duties of the parties”).

<sup>372</sup> See, e.g., *Buttazzoni v. Nationstar*, No. 13-CV-14901, 2014 WL 1031278, at \*1 (E.D. Mich. March 14, 2014) (the homeowner's credit score was affected, which amounts to such monetary harm).

<sup>373</sup> See *Holahan, Ornstein & Yoon*, *supra* note 209 (Maryland courts still instituted a rule to scrutinize fraudulent affidavits that had little real effect on the foreclosure process).

relief is still viable for a homeowner in such an action.<sup>374</sup> Even more, further policy reasons prove courts should find this use unlawful.<sup>375</sup>

*D. FOR MULTIPLE EQUITABLE AND POLICY REASONS, COURTS SHOULD  
DISALLOW THE USE OF EXPUNGEMENT AFFIDAVITS TO CORRECT  
TITLE*

Three major policy reasons should persuade future courts to find the expungement affidavit unlawful.<sup>376</sup> First, the harm and inconvenience to the homeowner should outweigh the lender's need to use the expungement affidavit.<sup>377</sup> Second, Michigan continues to receive challenges to the affidavit's use in situations where other states require judicial oversight,<sup>378</sup> and if Michigan follows in line with the rest of the country, there will be no need for homeowners to litigate the issue in the future.<sup>379</sup> Finally, lenders have continued to adapt their methods, evidenced by misconduct with other affidavits, and courts should stem this behavior before it becomes a firmly established practice in Michigan and potentially in other states.<sup>380</sup>

In multiple Michigan cases, homeowners experience monetary and emotional harm and inconvenience when lenders revert a mortgage back into the homeowner's name.<sup>381</sup> Further, expungement affidavits lead to confusion because they can disrupt the statutory redemption period if the affidavit is executed during that time.<sup>382</sup> Often, the redemption price will be for a different value than the first sale, and homeowners will not know exactly when the redemption period expires or for what price.<sup>383</sup> Even if the affidavit included such information or the lender sent notices of the new terms, the

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<sup>374</sup> See discussion *supra*, Subsections III.C.1–2.

<sup>375</sup> See discussion *supra*, Section III.D.

<sup>376</sup> See discussion *supra*, Section III.D.

<sup>377</sup> See, e.g., *Connolly v. Deutsche Bank Nat'l Trust Co.*, 581 F. App'x 500, 502-03 (6th Cir. 2014) (the homeowner's redemption period was severed, which amounted to a new redemption price that was roughly \$64,000 higher); *Buttazzoni*, 2014 WL 1031278, at \*1 (the homeowner's credit was affected twice).

<sup>378</sup> See discussion *supra*, Section II.C.

<sup>379</sup> Compare *United Cos. Lending v. Greenberg*, No. 80803, 2002 WL 31087627, at \*1 (Ohio Ct. App. Sept. 19, 2002) with *Connolly v. Deutsche Bank Nat'l Trust Co.*, 581 F. App'x 500, 505-06 (6th Cir. 2014) (the Sixth Circuit was forced to resolve the affidavit issue, whereas the underlying issue in *Greenberg* was not the inadvertently held sheriff's sale, but an entirely different issue).

<sup>380</sup> See *Holahan, Ornstein & Yoon*, *supra* note 209.

<sup>381</sup> See *Buttazzoni*, 2014 WL 1031278, at \*1 (The plaintiff had stated she believed her credit rating was damaged again when foreclosed on a second time).

<sup>382</sup> See discussion *supra*, Part I.B; see also *Connolly*, 581 Fed. App'x at 502 (explaining the plaintiff's redemption period was severed seven months in, which was before it was set to expire).

<sup>383</sup> *Id.* at 502-03 (explaining the plaintiff was foreclosed on and had to pay \$108,750 to redeem; however, after the new sheriff's sale, she was required to pay a \$172,000 redemption price).

homeowner would be left to take the lender at its word, which leaves the homeowner vulnerable to the will of the lender.<sup>384</sup>

In contrast, the lender's purpose for executing the affidavit is either unjustified<sup>385</sup> or unknown.<sup>386</sup> The lender's actions are unjustified when there is no way the sheriff's sale was actually void.<sup>387</sup> For instance, in *Maltbie v. Bank of America*, the court allowed the lender and homeowner to set aside the sheriff's sale even though there was no evidence the first sale was void.<sup>388</sup> This however, does not necessarily run up against public policy because both the homeowner and lender can quickly come to a resolution about reinstating the mortgage. However, often the lender has made a mistake, as in *Phh Mortgage Corp. v. O'Neal*.<sup>389</sup> Similarly, lenders should not be allowed to use expungement affidavits when the reason for executing the affidavit is unknown to the court.<sup>390</sup> When the affidavit simply states the sale was "inadvertently held," courts should automatically take this as a sign that more investigation is needed.<sup>391</sup> In almost every case, lenders have gotten away with this rationale whether or not the affidavit was justified.<sup>392</sup> Therefore, courts would be well advised to discontinue the unilateral use of the affidavit because in almost all cases the affidavit was either unjustified or was filed for an unknown reason.<sup>393</sup>

Secondly, Michigan should fall in line with the rest of the country because the current state of the law has led to consistent litigation.<sup>394</sup> If courts followed states like Ohio, the lender would have to seek the judiciary's approval before setting the foreclosure sale aside.<sup>395</sup> For instance, in *Greenberg*, the court quickly resolved the inadvertently held sheriff's sale after the lender's motion.<sup>396</sup> There, the court rightfully set the foreclosure

<sup>384</sup> See *Phh Mortg. Corp. v. O'Neal*, No. 311233, 2013 WL 3025566, at \*1 (Mich. Ct. App. June 18, 2013) (the lender attempted to void the sheriff's sale simply because it underbid the property and won).

<sup>385</sup> See *id.* (The lender's attorney filed an expungement affidavit to void a sheriff sale the lender gave poor bidding instructions on).

<sup>386</sup> See *e.g.*, *Connolly*, 581 Fed. App'x at 502 (the court does not explain why the sheriff's sale was inadvertently held); *Mellentine v. Ameriquet Mortg. Co.*, 515 Fed. App'x 419, 421 (6th Cir. 2014) (same).

<sup>387</sup> See *Trademark Props. of Mich., L.L.C. v. Fed. Nat'l Mortg. Ass'n*, No. 313296, 2014 WL 6461712 (Mich. Ct. App. 2014) (the court refused to accept the expungement affidavit because the original sheriff's sale was not considered void).

<sup>388</sup> No. 1:12-CV-1002, 2013 WL 6078945, at \*2 (W.D. Mich. Nov. 19, 2013).

<sup>389</sup> *O'Neal*, 2013 WL 3025566, at \*1.

<sup>390</sup> See *Connolly*, 581 Fed. App'x at 502 (the court does not explain why the sheriff's sale was inadvertently held).

<sup>391</sup> See *Trademark Props.*, 2014 WL 6461712, at \*3.

<sup>392</sup> *But see id.* at \*3.

<sup>393</sup> See discussion *supra*, Section II.B.

<sup>394</sup> See discussion *supra*, Section II.B (the case law on expungement affidavits began in 2011 and multiple cases on the subject comes out every year).

<sup>395</sup> See *United Cos. Lending v. Greenberg*, No. 80803, 2002 WL 31087627, at \*1 (Ohio Ct App. Sept. 19, 2002).

<sup>396</sup> *Id.*

sale aside.<sup>397</sup> Courts can also filter out the unmeritorious motions from lenders.<sup>398</sup> In *Parsons*, the court did not allow the lender to set the sheriff's sale aside even though the lender entered an overbid and sought to void the sale.<sup>399</sup> Michigan's courts give the lenders all the power over the sheriff's sale process, even though the lenders already have power of sale and large latitude to run the foreclosure proceedings.<sup>400</sup> The expungement affidavit becomes an extra arrow in the lender's already full quiver because it permits the unlawful conveyance of land without judicial oversight.<sup>401</sup> With this idea, the third policy reason concerns a broader look at how lenders have acted through a trying time for homeowners.<sup>402</sup>

The final policy reason concerns lender behavior beginning with the financial crisis and the subsequent fall of the housing market.<sup>403</sup> Maryland courts saw a major problem concerning lenders falsifying affidavits through robo-signatures.<sup>404</sup> For that reason, the Maryland Court of Appeals instituted an emergency rule to heighten the scrutiny under which such affidavits were reviewed.<sup>405</sup> The court specifically targeted instances where the affiant had not actually signed the affidavit or could not attest to the facts in the affidavit.<sup>406</sup> This is revealing in two ways. First, it proves that the expungement affidavit would not be the first time lenders have attempted to cut corners during the foreclosure process.<sup>407</sup> Second, it also proves lenders will take steps to ensure the process is fulfilled the way they expect it to be.<sup>408</sup> However, Michigan courts are less able to ensure a fair process for both the lender and homeowner if courts do not first review the affidavit closely, such as Maryland began doing in 2011.<sup>409</sup>

Whether the policy reason is grounded in helping the homeowner or righting the litigation process, the answer seems clear: expungement

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<sup>397</sup> *Id.*

<sup>398</sup> See *Sixty-01 Ass'n of Apartment Owners v. Parsons*, No. 89805-7, 2014 WL 4109432, at \*1 (Wash. Aug. 21, 2014) (en banc).

<sup>399</sup> *Id.*

<sup>400</sup> See discussion *supra*, Section I.B.

<sup>401</sup> See discussion *supra*, Sections III.A–C.

<sup>402</sup> See discussion *supra*, Subsection II.B.3 (affidavits affecting property became a big issue for Maryland).

<sup>403</sup> See *Henry, Reese & Torres supra* note 1.

<sup>404</sup> See *Holahan, Ornstein, & Yoon, supra* note 209 and accompanying text; see generally *Don Mayer, Anita Cava, & Catharyn Baird, Crime and Punishment (or the Lack Thereof) for Financial Fraud in the Subprime Mortgage Meltdown: Reasons and Remedies for Legal and Ethical Lapses*, 51 AM. BUS. L.J. 515 (2014) (discussing a more in-depth look at other issues in foreclosure law on a national scale); see also *Liddell & Liddell, Jr., supra* note 215 (same).

<sup>405</sup> See *Holahan, Ornstein, & Yoon, supra* note 209 and accompanying text.

<sup>406</sup> *Id.*

<sup>407</sup> *Id.*

<sup>408</sup> See, e.g., *Phh Mortg. Corp. v. O'Neal*, No. 311233, 2013 WL 3025566, at \*1 (Mich. Ct. App. June 18, 2013); *Trademark Props. of Mich., L.L.C. v. Fed. Nat'l Mortg. Ass'n*, No. 313296, 2014 WL 6461712, at \*3 (Mich. Ct. App. Nov. 18, 2014).

<sup>409</sup> *Holahan, Ornstein & Yoon, Supra* note 209.

affidavits can harm homeowners, work at odds with other state foreclosure processes, and continue a long line of unscrupulous behavior among lenders.<sup>410</sup> For such policy reasons, courts should deem the unilateral use of expungement affidavits unlawful.<sup>411</sup>

## CONCLUSION

Michigan lenders have relied on a process to void sheriff's sales and re-foreclose on homeowners that is simply counter-intuitive.<sup>412</sup> At first, this process may not seem precarious, because a homeowner is regaining possession of the mortgage.<sup>413</sup> However, repossessing a mortgage can lead to dire consequences, such as the imminent possibility of a second foreclosure that may affect the homeowner's credit.<sup>414</sup> If the mortgage does go to a second sheriff's sale, the bid may change the redemption price that the homeowner must pay in order to keep the property.<sup>415</sup> If anything, this lender practice has caused great confusion among homeowners throughout Michigan.<sup>416</sup> Unneeded litigation has ensued and many homeowners feel the judicial system has betrayed them.<sup>417</sup>

There are many ways in which this problem can be solved.<sup>418</sup> The simplest and most straightforward solution is legislative action.<sup>419</sup> The power of this lender practice has been initially fueled through statute.<sup>420</sup> It would not be difficult for the Michigan Legislature to simply enact a provision that clarifies the power of affidavits affecting real property.<sup>421</sup> Though this may be the most straightforward solution, it is not the only solution. As Michigan's statute is written, it could be construed in various ways to

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<sup>410</sup> See discussion *supra*, Section III.D.

<sup>411</sup> See discussion *supra*, Section III.D.

<sup>412</sup> Compare discussion *supra*, Section II.B. with discussion *supra*, Section II.C (proving Michigan is the only state that allows the expungement affidavit to void sheriff's sales; whereas, other states require the judicial process to void sheriff's sales).

<sup>413</sup> See, e.g., *Connolly v. Deutsche Bank Nat'l Trust Co.*, 581 F. App'x 500, 502 (6th Cir. 2014).

<sup>414</sup> See, e.g., *id.*; *Buttazzoni v. Nationstar*, No. 13-CV-14901, 2014 WL 1031278, at \*1 (E.D. Mich. March 14, 2014).

<sup>415</sup> *Connolly*, 581 F. App'x at 502 (the first sale was for \$108,750, but the second sale was for \$172,000).

<sup>416</sup> Complaint, *supra* note 146 (the plaintiff alleges that the affidavit caused her "loss mitigation efforts to languish for several months and resulted in an even more difficult problem to resolve").

<sup>417</sup> See discussion *supra*, Section II.C (discussing how homeowners in other states do not have the issue of whether the lender will unilaterally void sheriff's sales because the judicial process takes over).

<sup>418</sup> See discussion *supra*, Part III (discussing how the expungement affidavit is unlawful).

<sup>419</sup> See discussion *supra*, Section II.C (discussing how the legislature can narrow the use of the expungement affidavit according to Michigan's statute).

<sup>420</sup> See §§ 565.451a, d.

<sup>421</sup> See § 565.451a



become more aligned with the public's interest.<sup>422</sup> In addition, Michigan courts can continue on the path of *Trademark Properties* and scrutinize whether sheriff's sales are actually void.<sup>423</sup> These approaches could greatly frustrate lenders and their ability to effectively void sheriff's sales.<sup>424</sup>

This lender practice is a novel and unique process that has not gained much attention as other issues in foreclosure law.<sup>425</sup> One reason may be that the use of expungement affidavits has not yet spread out of control.<sup>426</sup> However, as banks perfect the practice in Michigan, the problem may more easily spread into other states' legal systems and infect those states' affidavit statutes regarding real property.<sup>427</sup> Rather than wait to see just how far lenders will take the practice of voiding sheriff's sales, reverting mortgages, severing redemption periods, re-foreclosing on homeowners, and extending the overall mortgage foreclosure process,<sup>428</sup> it is imperative that the courts and legislature act now to disarm this vorpal sword lenders have armed themselves with.<sup>429</sup>

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<sup>422</sup> See discussion *supra*, Sections III.A–B (discussing how the legislature should uphold the statutes' provisions while incorporating a way for lenders and homeowners to mutually correct conveyances).

<sup>423</sup> See *Trademark Props. of Mich., L.L.C. v. Fed. Nat'l Mortg. Ass'n*, No. 313296, 2014 WL 6461712, at \*3 (determining the underlying sheriff's sale was not actually void *ab initio*).

<sup>424</sup> See, e.g., Holahan, Ornstein & Yoon, *Supra* note 209 (the court's emergency rule was enacted to quell the increase in fraudulent affidavits).

<sup>425</sup> See, e.g., Mayer, Cava & Baird, *supra* note 404; Liddell & Liddell, Jr., *supra* note 215.

<sup>426</sup> See discussion *supra*, Section II.C (discussing the way in which lenders must void sheriff's sales outside of Michigan).

<sup>427</sup> See discussion *supra*, Section II.A (discussing how many property statutes are nearly identical to those in other states).

<sup>428</sup> See discussion *supra*, Part III (discussing the reasons why the expungement affidavit is unlawful).

<sup>429</sup> See discussion *supra*, Section III.D (discussing the many policy reasons for rendering the expungement affidavit unlawful).