

A LENDER'S VORPAL SWORD:

EXPUNGEMENT AFFIDAVITS & THEIR POWER to Void Sheriff's Sales & Revert Mortgages

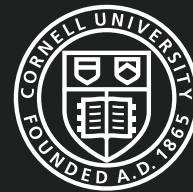
Back to the Homeowner



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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.² In 2009, Laura Buttazzoni was one of the many Michigan homeowners facing the dire reality that she was going to lose her home.³ After Buttazzoni's failed attempt to sell her home, her bank initiated a sheriff's sale in late 2009.⁴ After the statutory redemption period expired,⁵ Fannie Mae evicted Buttazzoni and relisted the home in 2011.⁶ Even though Buttazzoni's home was foreclosed, sold at a sale, and relisted on the market—she was not done with the property. 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 to Buttazzoni's name.

Initially, this event may have seemed like a blessing to Buttazzoni, since she was once again the owner of her previous residence; however she quickly realized that her home was no longer in the condition she had left it in, and many problems awaited her new period of ownership.⁷ She was not better off financially, and would soon face the foreclosure process once again. The inevitable struck in 2013, when Buttazzoni's property was foreclosed a second time, allegedly affecting her credit score.⁸ Buttazzoni filed suit against her lender for improper foreclosure, among other claims. She alleged the use of an "expungement affidavit" was an irregularity in the foreclosure process.⁹ 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.¹⁰ The court held that Buttazzoni's allegations lacked merit and dismissed her case, leaving her without relief.

This scenario has played out in various forms solely across Michigan within the last five years. An expungement affidavit like that used in *Buttazzoni* is a piece of paper that a lender notarizes, usually stating a foreclosure sale has been "inadvertently held" and will be treated as "void *ab initio*" without stating further reasoning in the document.¹¹ Filling out such an affidavit will effectively void a foreclosure sale and convey the original mortgage back to the homeowner. Usually the homeowner is then forced through the foreclosure process a second time, which harms his or her credit, alters the redemption period, and usually changes the sale price.¹² Despite the negative effects on the homeowner, lenders continually use the expungement affidavit as a means to revive and revert foreclosed homes. The unilateral use of an expungement affidavit is an illegal instrument under

Michigan statute 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 defines the expungement affidavit and examines Michigan's recent influx of cases involving such affidavits. Part II argues that the expungement affidavit is an unlawful use of authority under Michigan statutory law and case law, how it is odds with public policy and other state foreclosure practices, and it discusses the other advantages lenders obtain through this process. When 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.

I. THE EXPUNGEMENT AFFIDAVIT

The term "expungement affidavit" or "affidavit of expungement" is relatively new.¹³ An "affidavit" is a document with facts written down and sworn in front of an officer authorized to administer oaths,¹⁴ while to "expunge" means "[t]o erase or destroy." Therefore, an expungement affidavit can be defined as a sworn set of facts with the purpose to erase or destroy something. 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.¹⁵ The expungement affidavit finds its roots in Michigan statutory law, has been upheld in state and federal case law, and has never been used in any other state outside of Michigan.

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.¹⁶ In Michigan, courts have continually used M.C.L. § 565.451a¹⁷ to justify the expungement affidavit as an “affidavit affecting real property.”¹⁸ 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. 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.¹⁹ 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.²⁰ This leads to a critical statutory interpretation of § 565.451a as it relates to expungement affidavits. In addition to this interpretation, M.C.L. § 565.451d of the Michigan statute is also of great importance.

No Michigan court has discussed § 565.451d.²¹ This section gives affidavits that affect property authority to cure various errors in a previously recorded document, such as a deed. The statute also establishes the limitations on how far an affidavit can go to cure an error. 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. 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 influence this interpretation.²² Armed with only § 565.451a, Michigan state and federal courts have allowed the use of expungement affidavits in almost every case.

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.²³ In *Cordes*, the parcel owner executed a mortgage in favor of the plaintiff, Cordes. Not long after, Cordes, as the lender, mistakenly

executed a discharge of the mortgage. 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. A year later, however, the parcel owner executed a second mortgage that ultimately went to defendant JBN, Inc. 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.

On appeal, the Michigan Court of Appeals further ruled that § 565.451a(b) applied because the affidavit concerned “the happening of any condition or event which may terminate an estate or interest in real property.” Because the discharge of the mortgage was an event that terminated an interest in real estate, the affidavit applied pursuant to § 565.451a(b). In addition, the court disagreed with JBN, Inc.’s argument that an affidavit cannot resurrect a mortgage. In denying JBN, Inc.’s argument, the court emphasized the fact that recording statutes like § 565.451a put others on notice of the new encumbrance that allowed the resurrection of the mortgage. 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.²⁴

In *Connolly v. Deutsche Bank National Trust Co.*, the United States Court of Appeals for the Sixth Circuit expanded the *Cordes* ruling.²⁵ There, the Michigan homeowner endured a sheriff’s sale, which initiated a twelve-month redemption period. 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. Four months later, Connolly filed suit before her original redemption period would have expired, but because there is no way to toll the period to redeem, it expired and she was left to prove her claim under a higher level of scrutiny.

Connolly now had to prove that 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. 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. A distinguishing feature between *Cordes* and *Connolly* is that in *Cordes* the mortgage was accidentally discharged and both lender and homeowner sought its revival.²⁶ In contrast, *Connolly* involved a lender that unilaterally used the affidavit to void

a sheriff's sale, not simply to revive a mortgage.²⁷ While these two cases are the most direct authority supporting expungement affidavits, the most recent case to come out of Michigan denied the use of the expungement affidavit.²⁸

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. However, unlike the previous cases involving expungement affidavits, the homeowner was not a party or at all involved in *Trademark Properties*; rather, the plaintiff and defendants were lenders and lien holders of a condominium. The defendant GMAC Mortgage, a lender, filed an expungement affidavit as a way to reinstate the mortgage it held on the property.

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. The redemption period expired and Fannie Mae was left with the title to the property, subject to a lien the condominium association held. 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. 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. Therefore, unlike *Cordes* or *Connolly*, it was not the purchaser at the second sheriff's sale that executed the expungement affidavit, but rather the original mortgagee from the first sale, now twice removed from the proceeding, which attempted to execute the affidavit.

The court in *Trademark Properties* distinguished itself from *Connolly*, explaining that this case did not involve a void sheriff's sale like in *Connolly*.²⁹ Here, the court refused to accept GMAC's argument that the property was "void *ab initio*" without proof, something no court had questioned before. 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.

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. Despite *Trademark Properties*, it is apparent that 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. Essentially, in many situations between an original homeowner and lender, like in *Connolly*, courts will allow the use of the expungement affidavit. 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.³⁰

II. 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 previous unsuspecting homeowner by simply filing a piece of paper. With that said, Michigan courts have almost always allowed its effect without requiring an explanation from the lender.³¹ A lender's unilateral use of an expungement affidavit should be deemed unlawful, however, for multiple reasons. First, simple interpretation of Michigan's statutes reveals that the unilateral use of the expungement affidavit is unlawful. Second, no matter the statutory interpretation, the expungement affidavit should be held unlawful as an irregularity in the foreclosure proceeding under Michigan case law.³² Third, courts should focus on the harm caused to the homeowner and all policy reasons for rendering the affidavit unlawful in all contexts, excluding mutual execution between the lender and homeowner.

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, which Michigan courts interpret as statutory authority for lenders to use affidavits as a means to void sheriff's sales. 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." 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. The true purpose of § 565.451a should be to strictly give notice of encumbrances, including previously voided sheriff's sales.³³ Lenders have abused this statute so as to make the distinction between notice and conveyance nearly non-existent. Only a handful of cases, as discussed above beginning with *Cordes*, have directly discussed this statute and what its effect on property rights actually includes.

In *Cordes*, the mortgagor and mortgagee agreed to reinstate a mortgage that was accidentally discharged. 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.³⁴ 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, 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.

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. Despite what the court in *Cordes* said, the effect of the affidavit 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. Because the parcel owner executed the affidavit and reinstated the mortgage with the register of deeds, persons were put on notice of this arrangement between the parcel owner and the earlier lender. 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 should not have the ability to unilaterally file an affidavit without first seeking permission from either the parcel owner or the judiciary. This case, though sound in its particular factual circumstances, set an unfortunate precedent that justifies and expands the use of § 565.451a to not only revive a discharged mortgage, but void a sheriff's sale.³⁵

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. Unlike *Cordes*, the defendant in *Connolly* unilaterally filed the expungement affidavit, stating the sheriff's sale was "inadvertently held." This rationale was all that the court required to rule the sheriff's sale void. 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, and *Connolly*, where the lender's unilateral act disrupted the foreclosure process without the homeowner's consent or acknowledgement. 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.

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.³⁶ 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.³⁷ 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.

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. First, the correction sought through an expungement affidavit is not one allowed under the statute. Second, the unilateral use of the affidavit to correct title affects the "substantive rights" of the homeowner. According to § 565.451d, affidavits filed with the register of deeds may "correct errors or omissions in previously recorded documents." 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." Not only does the statute limit the type of corrections allowed, the statute will only permit a correction if "[t]he affidavit does not alter the substantive rights of any party unless it is executed by that party." 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.

First, because the statute at issue is limited to two types of corrections, errors dealing with the place of recording and simple scrivener's errors or omission on a document, it follows that any kind of correction going beyond this is outside the authority granted under § 565.451d. 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. Even if the sheriff's sale is properly void *ab initio* 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.³⁸ 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.

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. 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. 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.³⁹ Therefore, allowing an affidavit to reinstate the extinguished mortgage will alter the rights of the homeowner, whose interest in the property was wiped clean after the foreclosure.⁴⁰ Because an expungement affidavit alters the homeowner and lender’s rights in the property, the statute should bar the use of the affidavit.

The procedure for correcting issues with sheriff’s sales outside Michigan provides further support for why lenders should not have the ability to correct title through unilaterally voiding sheriff’s sales. 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.⁴¹ The purchaser’s only recourse was the judicial system and showing such a correction was warranted due to an irregularity in the foreclosure process.⁴² 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.⁴³

As another example, Pennsylvania requires a showing of cause in court to correct title and order a resale of the property.⁴⁴ 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.⁴⁵ Unfortunately, lenders have had this ability for the last five years, in stark contrast to many judicial procedures required outside of Michigan. Though adversarial situations between the lender and homeowner should require judicial oversight,⁴⁶ Michigan could lead the way for a more cost-effective way of handling corrections in title when there is mutual agreement among the lender and homeowner.

There are a handful of Michigan cases where both parties have mutually used the expungement affidavit

to correct title.⁴⁷ 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. If both parties agree to the affidavit’s effect and execute the affidavit together, then the statute should not be violated. 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).

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. 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,⁴⁸ as well as when there has been an accidental rescission, as in *Cordes*. 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. 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.⁴⁹

C. 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. First, the harm and inconvenience to the homeowner should outweigh the lender’s need to use the expungement affidavit. Second, Michigan continues to receive challenges to the affidavit’s use in situations where other states require judicial oversight,⁵⁰ 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.⁵¹ 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.

In multiple Michigan cases, homeowners experience monetary and emotional harm, and inconvenience when lenders revert a mortgage back into the homeowner’s name.⁵² Further, expungement affidavits lead to confusion because they can disrupt the statutory redemption period

if the affidavit is executed during that time. 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. Even if the affidavit included such information or the lender sent notices of the new terms, the homeowner would be left to take the lender at its word, which leaves the homeowner vulnerable to the will of the lender.⁵³

In contrast, the lender's purpose for executing the affidavit is either unjustified or unknown. The lender's actions are unjustified when there is no way the sheriff's sale was actually void.⁵⁴ 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. 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. Often the lender has made a mistake, as in *Phh Mortgage Corp. v. O'Neal*. Similarly, lenders should not be allowed to use expungement affidavits when the reason for executing the affidavit is unknown to the court. When the affidavit simply states the sale was "inadvertently held," courts should automatically take this as a sign that more investigation is needed. In almost every case, lenders have gotten away with this rationale whether or not the affidavit was justified. 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.

Secondly, Michigan should fall in line with the rest of the country because the current state of the law has led to consistent litigation.⁵⁵ If courts followed states like Ohio, the lender would have to seek the judiciary's approval before setting the foreclosure sale aside.⁵⁶ For instance, in *United Companies Lending v. Greenberg*, the court quickly resolved the inadvertently held sheriff's sale after the lender's motion. There, the court rightfully set the foreclosure sale aside. Courts can also filter out the unmeritorious motions from lenders.⁵⁷ In *Sixty-01 Ass'h of Apartment Owners v. 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. Michigan's courts give lenders all the power over the sheriff's sale process, even though lenders already have power of sale and large latitude to run the foreclosure proceedings. The expungement affidavit becomes an extra arrow in lenders' already full quiver because it permits the unlawful conveyance of land without judicial oversight. With this idea, the third policy reason concerns a broader

look at how lenders have acted through a trying time for homeowners.

The final policy reason concerns lender behavior beginning with the financial crisis and the subsequent fall of the housing market.⁵⁸ Maryland courts saw a major problem concerning lenders falsifying affidavits through robo-signatures.⁵⁹ For that reason, the Maryland Court of Appeals instituted an emergency rule to heighten the scrutiny under which such affidavits were reviewed. The court specifically targeted instances where the affiant had not actually signed the affidavit or could not attest to the facts in the affidavit. 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. Second, it also proves lenders will take steps to ensure the process is fulfilled in the way they expect it to be.⁶⁰ Michigan courts are less able to ensure a fair process for both the lender and homeowner, however, if courts do not first review the affidavit closely, such as Maryland began doing in 2011.

Whether the policy reason is grounded in helping the homeowner or righting the litigation process, the answer seems clear: expungement affidavits can harm homeowners, are at odds with other state foreclosure processes, and continue a long line of unscrupulous behavior among lenders. For such policy reasons, courts should deem the unilateral use of expungement affidavits unlawful.

D. Fuel from Mortgage-Backed Securities

What incentive does a lender really have to use the expungement affidavit? Yes, lenders likely want to ensure they follow the proper process, but there is more to the story. Multiple events trigger when a homeowner is again obligated under a mortgage that was at one time extinguished. First, the lender can report the property as not being in foreclosure. In *Buttazzoni*, the property was effectively out of foreclosure for a year. Second, the lender has the ability to foreclose on the property and purchase it back through the sheriff's sale, usually at a different price.

These two processes may be crucial to a lender when one realizes just where these mortgages derive. In every case involving the expungement affidavit, the mortgage at issue was one backed through securitization, meaning the mortgage was part of a larger pool of mortgage-backed securities. To draw investors, banks hope to achieve the highest ratings, by companies such as Standard & Poor's Corp., Moody's Investors Service, Inc., and Fitch Ratings, for these securities. The ability to keep a home out of foreclosure or to keep it out of the hands of the lender

as empty property is highly valuable for the rating of such securities. The expungement affidavit proves to be the tool that can do this. There is no doubt that the foreclosure of a home can have further consequences for the lender:

When foreclosures cannot be avoided, borrowers lose their homes. The losses also extend beyond borrowers. The foreclosure process typically costs lenders added legal fees, taxes due until the property is sold and lost equity in a house that must be priced to sell in a falling market. The added inventory of unsold homes further weakens local housing markets, depressing the value of other nearby homes.⁶¹

Based on this short overview, the benefits for a lender become clearer. Not only can lenders report the mortgages in many of these cases as healthy, or at least not in foreclosure, they can postpone paying the property taxes and prevent the further devaluation of properties in the area. In turn, this may improve ratings of mortgage-back securities overall. While this is not fully substantiated, the potential for such benefits is real, and if the use of expungement affidavits catches on nationwide, lenders will easily find uses for them, as mortgage-backed securities would inevitably work to fuel the practice.

III. CONCLUSION

Michigan lenders have relied on a process to void sheriff's sales and re-foreclose on homeowners that is simply counter-intuitive. At first, this process may not seem precarious, because a homeowner is regaining possession of the mortgage. Repossessing a mortgage can lead to dire consequences, however, such as the imminent possibility of a second foreclosure that may affect the homeowner's credit. 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. If anything, this lender practice has caused great confusion among homeowners throughout Michigan and may soon find its way into other states' practices. Unneeded litigation has ensued and many homeowners feel the judicial system has betrayed them.

There are many ways in which this problem can be solved, the simplest solution being legislative action. The power of this lender practice has been initially fueled through statute. It would not be difficult for the Michigan Legislature to simply enact a provision that clarifies the power of

affidavits affecting real property. Though this may be the most straightforward solution, it is not the only solution. As Michigan's statute is written, courts can construe it in various ways to become more aligned with the public's interest. In addition, Michigan courts can continue on the path of *Trademark Properties* and scrutinize whether sheriff's sales are actually void. These approaches could greatly frustrate lenders and their ability to effectively void sheriff's sales.

This lender practice is a novel and unique process that has not gained as much attention as other issues in foreclosure law. One reason may be that the use of expungement affidavits has not yet spread out of control. 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. 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, it is imperative that the courts and legislature act now to disarm this vorpal sword with which lenders have armed themselves.

IV. (ENDNOTES)

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2 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 (stating that in 2012, Michigan endured 1 foreclosure for every 50 households).

3 Buttazzoni v. Nationstar, No. 13-CV-14901, 2014 WL 1031278, at *1 (E.D. Mich. March 14, 2014).

4 Id.

5 Grant S. Nelson & Dale A. Whitman, Real Estate Finance Law 569-70 (5th ed. 2007) (introducing the concept of redemption rights).

6 Buttazzoni, 2014 WL 1031278, at *1.

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

8 Id. (stating that Buttazzoni's "credit was then damaged a second time through no fault of her own").

9 Id. at *3. Buttazzoni claimed that "a foreclosure following the expungement was an irregularity requiring the voiding of the second foreclosure." Id.

10 Id. ("Plaintiff ha[d] not include[d] even one allegation concerning how the expungement affected the second foreclosure process.").

11 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").

12 The redemption price for the same property went from \$108,750 to \$172,000.

13 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).

14 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."

15 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).

16 See, e.g., Ohio Rev. Code Ann. § 5301.252 (West 2013-14); Pa. Cons. Stat. Ann. § 3129.1 (West 2014).

17 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.

18 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).

19 See Connolly, 581 F. App'x at 506.

20 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).

21 Mich. Comp. Laws Ann. § 565.451d (West 2014) 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):

(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.

22 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).

23 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.").

24 See Connolly v. Deutsche Bank Nat'l Trust Co., 580 Fed. App'x 500, 506 (6th Cir. 2014) (citing Cordes, 2012 WL 2052789, *2).

25 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.").

26 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").

27 See Connolly, 500 F. App'x at 502 ("Deutsche, through its attorney, executed an Affidavit Expunging the Sheriff's Deed.").

28 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).

29 The court said, "[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 inadvertently held, a mortgage that continued to encumber the property, and an affidavit that accurately provided notice of that continued encumbrance to interested persons."

30 For further discussion regarding Michigan case law, see the full-length article published with Dartmouth Law Journal.

31 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).

32 See the full article to be published in the Dartmouth Law Journal for this legal analysis.

33 According to the statute, an affidavit is meant to be sworn facts written down in order to put others on notice, and it does not affect substantive rights in the land.

34 The court in Cordes explained, "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.

35 See Connolly v. Deutsche Bank Nat'l Trust Co., 580 Fed. App'x 500, 506 (6th Cir. 2014).

36 This was the underlying circumstance in Cordes.

37 See, e.g., Freund v. Trott & Trott, No. 299011, 2011 WL 5064248, at *2 (Mich. Ct. App. Oct. 25, 2011); 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, 2012) (No. 11-014033-CH) [hereinafter Complaint] (explaining the affidavit purported to expunge the sheriff's sale because it was "void ab initio").

38 See, e.g., 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").

39 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)).

40 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.

41 No. 89805-7, 2014 WL 4109432, at *1 (Wash. Aug. 21, 2014) (en banc).

42 Id.

43 Id.

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

45 Contra Buttazoni 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).

46 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).

47 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).

48 Maltbie v. Bank of America, No. 1:12-CV-1002, 2013 WL 6078945, at *2 (W.D. Mich Nov. 19, 2013).

49 See the full article published in the Dartmouth Law Journal for a complete legal analysis.

50 See the full article published in the Dartmouth Law Journal for a more complete study of Michigan case law.

51 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).

52 See Buttazoni, 2014 WL 1031278, at *1 (The plaintiff had stated she believed her credit rating was damaged again when foreclosed on a second time).

53 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).

54 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).

55 See discussion supra, Section I.B (the case law on expungement affidavits began in 2011 and multiple cases on the subject comes out every year).

56 See United Cos. Lending v. Greenberg, No. 80803, 2002 WL 31087627, at *1 (Ohio Ct App. Sept. 19, 2002).

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

58 See Henry, Reese & Torres *supra* note 1.

59 See 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); 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).

60 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).

61 Katalina M. Bianco, *The Subprime Lending Crisis: Causes and Effects of the Mortgage Meltdown*, CCH Mortgage Compliance Guide and Bank Digest (2008).