

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.¹ In 2009, Laura Buttazzoni was one of the many Michigan homeowners facing the dire reality that she was going to lose her home.² After Buttazzoni’s failed attempt to sell her home, her bank initiated its own sheriff’s sale in late 2009.³ After the statutory redemption period expired,⁴ Fannie Mae evicted Buttazzoni and relisted the home in 2011.⁵ Even though Buttazzoni’s home was foreclosed upon, sold at a sale, and relisted on the market—she was not done with the property.⁶ 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.⁷

¹ 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).

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

³ *Id.*

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

⁵ *Buttazzoni*, 2014 WL 1031278, at *1.

⁶ *See id.*

⁷ *Id.*

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

This scenario, involving an expungement affidavit, has played out in various forms solely across Michigan within the last five years.¹⁷ 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.¹⁸ Filling out such an affidavit will effectively void a foreclosure sale and convey the original mortgage back to the homeowner.¹⁹ Usually the homeowner is then forced through the foreclosure process a second time, which harms his or

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

⁹ *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.*

¹⁰ *Id.*

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

¹² *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.*

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

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

¹⁵ *Id.* at *4.

¹⁶ *Id.*

¹⁷ *See infra* Part II.

¹⁸ *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").

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

her credit, and the redemption period and price changes.²⁰ 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.²¹ 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.²² Part II examines Michigan's recent influx of cases involving expungement affidavits and the process of voiding sheriff's sales around the United States.²³ 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.²⁴ 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.²⁵

I. MORTGAGE FORECLOSURE LAW

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

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

²¹ *Id.*

²² See discussion *infra* Part I.

²³ See discussion *infra* Part II.

²⁴ See discussion *infra* Part III.

²⁵ See discussion *infra* Part III.

²⁶ 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”).

²⁷ 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).

²⁸ 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

expungement affidavit, the lender also uses the non-judicial foreclosure process.²⁹ The non-judicial method is used in Michigan, as well as in the majority of other states.³⁰ Homeowners, when facing the expungement affidavit, are subject to a set of non-judicial foreclosure procedures³¹ and may seek to set aside the foreclosure when certain defects occur.³²

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.³³ In contrast, the judicial process is often costly and time-consuming because it requires court supervision of the foreclosure.³⁴ The non-judicial process gives lenders the “power of sale,” where the actual lender oversees the foreclosure independently.³⁵ 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.³⁶

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.³⁷ 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.³⁸ In many states, a mortgagee does not have this opportunity to purchase its own property.³⁹ Typically, the mortgagee purchasing the property is the lender and only bidder in attendance at the sheriff’s sale.⁴⁰ 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

exclusive 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.*

²⁹ See discussion *infra* Section II.B.

³⁰ See NELSON & WHITMAN, *supra* note 4.

³¹ See discussion *infra* Section I.A.

³² See discussion *infra* Section I.B.

³³ See Cox, *supra* note 27, at 699.

³⁴ 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.

³⁵ See Cox, *supra* note 27, at 700.

³⁶ See *id.* at 699-70

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

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

³⁹ *Id.* at 650.

⁴⁰ *Id.* at 760.

the property without upfront costs.⁴¹ These, among other reasons, are why mortgages usually end up as the only bidder at a foreclosure sale.⁴² 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.⁴³

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.⁴⁴ The amount of time allowed to redeem varies by state and ranges from six months to two years.⁴⁵ 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.⁴⁶ The time is very important because once the redemption period expires, the rights of the homeowner are greatly limited, if not completely eliminated.⁴⁷ When a homeowner redeems the property, he pays the foreclosure sale price plus any other additional costs.⁴⁸ At that time, the homeowner is restored to the title he had before the foreclosure sale.⁴⁹

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.⁵⁰ 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

⁴¹ *Id.*

⁴² *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).

⁴³ See discussion *infra* Part I.C.

⁴⁴ 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)

⁴⁵ 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)).

⁴⁶ MICH. COMP. LAWS ANN. § 600.3140 (West 2014).

⁴⁷ See discussion *infra*, Section I.B.

⁴⁸ NELSON & WHITMAN, *supra* note 4, at 570.

⁴⁹ *Id.* at 754.

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

pay a deficiency judgment in the amount of \$10,000.⁵¹ There are limitations on deficiency judgments that vary by state.⁵² 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.⁵³ 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.⁵⁴ Michigan is one of the states that follow the Restatement approach.⁵⁵ 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.⁵⁶

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.⁵⁷ 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.⁵⁸ Even further, a homeowner may seek a remedy at law under a tort claim for damages under

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

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

⁵³ 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).

⁵⁴ See *id.* § 8.4 com. b, illus. 3.

⁵⁵ 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.”).

⁵⁶ See discussion *infra*, Section I.B.

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

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

the same wrongful foreclosure theory.⁵⁹ The homeowner's claim must support the fact that the initial foreclosure proceeding should not have occurred because there was no default.⁶⁰

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.⁶¹ 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.⁶² 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.⁶³ Many cases in Michigan, however, require heightened scrutiny to set aside the sheriff's sale when the statutory redemption period expires.⁶⁴ 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."⁶⁵ Virtually all wrongful foreclosure actions that include a challenge to an expungement affidavit require the homeowner to prove this heightened standard.⁶⁶

As a final note, the statutory redemption period in Michigan is not tolled upon the filing of an action against the lender.⁶⁷ 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.⁶⁸ 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

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See id.*

⁶³ *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)).

⁶⁴ *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)).

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

⁶⁶ *See discussion infra*, Section I.C.

⁶⁷ *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).

⁶⁸ *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).

heightened scrutiny.⁶⁹ 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 period.⁷⁰ 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.⁷¹

II. THE EXPUNGEMENT AFFIDAVIT

The term "expungement affidavit" or "affidavit of expungement" is relatively new.⁷² An "affidavit" is a document with facts written down and sworn in front of an officer authorized to administer oaths,⁷³ and to "expunge" means "[t]o erase or destroy."⁷⁴ Therefore, an expungement affidavit can be defined as a sworn set of facts with the purpose to erase or destroy something.⁷⁵ 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.⁷⁶ The expungement affidavit finds its roots in Michigan statutory law,⁷⁷ has been upheld in state and federal case law,⁷⁸ and has never been used in any other state outside of Michigan.⁷⁹

⁶⁹ See *Diem*, 2014 WL 5285460, at *3.

⁷⁰ See discussion *supra*, Part I.

⁷¹ See discussion *infra*, Part II.

⁷² 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).

⁷³ 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.")

⁷⁴ *Id.* at 702.

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

⁷⁶ 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).

⁷⁷ See discussion *infra* Section II.A.

⁷⁸ See discussion *infra* Section II.B.

⁷⁹ See discussion *infra* Section II.C.

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.⁸⁰ In Michigan, courts⁸¹ have continually used M.C.L. § 565.451a to justify the expungement affidavit as an “affidavit affecting real property.”⁸² 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.⁸³ 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.⁸⁴ 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.⁸⁵ This leads to a critical statutory interpretation of § 565.451a as it relates to expungement affidavits.⁸⁶ In addition to this interpretation, another provision of the Michigan statute is of great importance.⁸⁷

⁸⁰ See, e.g., OHIO REV. CODE ANN. § 5301.252 (West 2013-14); PA. CONS. STAT. ANN. § 3129.1 (West 2014).

⁸¹ 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).

⁸² 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.

⁸³ *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)).

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

⁸⁵ 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).

⁸⁶ See discussion *infra*, Section III.A.

⁸⁷ See MICH. COMP. LAWS ANN. § 565.451d (West 2014).

No Michigan court has discussed M.C.L. § 565.451d.⁸⁸ This section gives affidavits that affect property authority to cure various errors in a previously recorded document, such as a deed.⁸⁹ The statute also establishes the limitations on how far an affidavit can go to cure an error.⁹⁰ 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.⁹¹ 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.⁹² Armed with only § 565.451a, Michigan state and federal courts have allowed the use of expungement affidavits in almost every case.⁹³

*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.⁹⁴ In *Cordes*, the parcel owner executed a mortgage in favor of the plaintiff, Cordes.⁹⁵ Not long after, Cordes, as the lender, mistakenly executed a discharge of the mortgage.⁹⁶ In order to repair the mistake, the parcel owner executed an expungement affidavit as

⁸⁸ § 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):

- (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.

⁸⁹ § 565.451d(1)(a)-(b).

⁹⁰ § 565.451d(2)(a)-(b).

⁹¹ § 565.451d(2)(b).

⁹² 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).

⁹³ See discussion *infra*, Section II.B.

⁹⁴ 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.”).

⁹⁵ *Id.* at *1.

⁹⁶ *Id.*

a way to re-establish the mortgage in favor of Cordes.⁹⁷ A year later, however, the parcel owner executed a second mortgage that ultimately went to defendant JBN, Inc.⁹⁸ 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.⁹⁹

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.”¹⁰⁰ Because the discharge of the mortgage was an event that terminated an interest in real estate, the affidavit applied pursuant to § 565.451a(b).¹⁰¹ In addition, the court disagreed with JBN, Inc.’s argument that an affidavit cannot resurrect a mortgage.¹⁰² 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.¹⁰³ 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.¹⁰⁴

In *Connolly v. Deutsche Bank National Trust Co.*, the United States Court of Appeals for the Sixth Circuit expanded the *Cordes* ruling.¹⁰⁵ There, the Michigan homeowner endured a sheriff’s sale, which initiated a twelve-month redemption period.¹⁰⁶ 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.¹⁰⁷ Four months later, Connolly filed suit before her original redemption period would have expired,¹⁰⁸ but because there is

⁹⁷ *Id.*

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

⁹⁹ *Id.*

¹⁰⁰ *Id.* (citing § 565.451a(b)).

¹⁰¹ *Id.* (citing § 565.451a(b)).

¹⁰² *Id.*

¹⁰³ *See id.* at *3.

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

¹⁰⁵ *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.”).

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

¹⁰⁷ *Connolly*, 581 F. App’x at 502.

¹⁰⁸ *Id.*

no way to toll the period to redeem,¹⁰⁹ it did expire, and she was left to prove her claim under a higher level of scrutiny.¹¹⁰

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.¹¹¹ 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.¹¹² A distinguishing feature between *Cordes* and *Connolly* is that in *Cordes* the mortgage was accidentally discharged and both lender and homeowner sought its revival.¹¹³ In contrast, *Connolly* involved a lender that unilaterally used the affidavit to void a sheriff's sale, not simply revive a mortgage.¹¹⁴ 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.¹¹⁵

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.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸

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.¹¹⁹ The redemption period expired and Fannie Mae was left with the title to the property, subject to a lien the condominium association held.¹²⁰ The association initiated a foreclosure proceeding on Fannie Mae

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

¹¹⁰ See *id.* at 504.

¹¹¹ See MICH. COMP. LAWS ANN. § 565.451d(2)(a)-(b) (West 2014).

¹¹² *Connolly*, 581 F. App'x at 506.

¹¹³ *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").

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

¹¹⁵ 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).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at *1.

¹¹⁸ *Id.*

¹¹⁹ *Id.* (stating the original homeowner was an individual resident).

¹²⁰ *Id.*

when the lien was not paid, which led to a second sheriff's sale where the property was sold to the plaintiff, Trademark Properties.¹²¹ 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.¹²² 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.¹²³

The court in *Trademark Properties* distinguished itself from *Connolly*, explaining this case did not involve a void sheriff's sale like in *Connolly*.¹²⁴ Here, the court refused to accept GMAC's argument that the property was "void *ab initio*"¹²⁵ without proof, something no court had questioned before.¹²⁶ 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.¹²⁷

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.¹²⁸ 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.¹²⁹ Essentially, any situation between an original homeowner and lender, like in *Connolly*, will allow the use of the expungement affidavit.¹³⁰ While these three cases ruled directly on the expungement affidavit, the

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *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 inadvertently held, a mortgage that continued to encumber the property, and an affidavit that accurately provided notice of that continued encumbrance to interested persons.").

¹²⁵ *Id.* at *3 (explaining the sheriff's sale in the case was not void).

¹²⁶ *Id.*

¹²⁷ *Id.* at 3 n.3.

¹²⁸ *Id.* (finding its case distinguishable from *Connolly*).

¹²⁹ *Id.* (distinguishing *Connolly* because that case involved an inadvertently held sheriff's sale).

¹³⁰ 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).

Michigan courts have continually sidestepped the issue, which has allowed expungement affidavits to void sheriff's sales in multiple contexts.¹³¹

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.¹³² One of the most revealing cases on this matter is *Phh Mortgage v. O'Neal*.¹³³ In that case, the lender, Phh Mortgage, submitted the property for a sheriff's sale, giving its counsel, Trott & Trott, extremely low bidding instructions.¹³⁴ Only one other bid was made at the sale, and the sheriff executed a deed in favor of Phh Mortgage for only \$1,000.¹³⁵ Thereafter, the party with the rights under the property attempted to redeem the home for \$1,000.¹³⁶ On the same day, an attorney with Trott & Trott executed an expungement affidavit that sought to void the sheriff's deed.¹³⁷ 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.¹³⁸

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.¹³⁹ 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.¹⁴⁰ Further, Phh Mortgage was also

¹³¹ See discussion *infra* Subsection II.B.1.

¹³² 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).

¹³³ *Id.* at *1. The lender attempted to void a sheriff's sale because it underbid on the property. *Id.*

¹³⁴ *Id.*

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

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

¹³⁷ *Id.*

¹³⁸ *Id.* at *2.

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

¹⁴⁰ 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).

the party that sought to set aside the sheriff's sale,¹⁴¹ which is in contrast to most cases involving expungement affidavits.¹⁴²

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.¹⁴³ 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.¹⁴⁴ In other cases, the courts do not look to the validity of the affidavit because both parties agreed to the affidavit's use.¹⁴⁵

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*.”¹⁴⁶ 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*.”¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹ The court in *Freund* did not inquire into whether the sheriff's sale had a substantial defect that would conflict

¹⁴¹ *Phh Mortgage*, 2013 WL 3025566, at *2.

¹⁴² *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).

¹⁴³ *See, e.g., Buttazoni*, 2014 WL 1031278, at *3; *Phh Mortgage*, 2013 WL 3025566, at *2.

¹⁴⁴ *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.”).

¹⁴⁵ *See discussion infra*, Subsection II.B.2.

¹⁴⁶ *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, 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*).

¹⁴⁷ *Freund*, 2011 WL 506428, at *2.

¹⁴⁸ 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”).

¹⁴⁹ *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).

with law or public policy.¹⁵⁰ 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*.¹⁵¹

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*.¹⁵² 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*."¹⁵³ 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.¹⁵⁴

By 2013, the court in *Mellentine v. Ameriquest Mortgage Co.* simply explained in its opinion the foreclosure was "inadvertently held" without mentioning that it was actually an expungement affidavit that voided the foreclosure sale.¹⁵⁵ In addition, the *Mellentine* court did not question the fact the expungement affidavit was "void *ab initio*."¹⁵⁶ 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.¹⁵⁷ 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.¹⁵⁸ Despite many adversarial situations among lenders and homeowners and the lack of

¹⁵⁰ 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").

¹⁵¹ *Id.*

¹⁵² 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).

¹⁵³ 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.

¹⁵⁴ 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).

¹⁵⁵ 515 F. App'x 419, 421 (6th Cir. 2013).

¹⁵⁶ Appellant's Brief at 13, *Mellentine v. Ameriquest 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).

¹⁵⁷ 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).

¹⁵⁸ See *id.* at *3 n.3 (distinguishing the *Connolly* case, which leaves intact much of the affidavit's power).

support of expungement affidavits, some uses of the affidavit have proven beneficial to both parties.¹⁵⁹

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.¹⁶⁰ 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.¹⁶¹ The expungement affidavit has revealed other beneficial uses.¹⁶² 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.¹⁶³ After the bank foreclosed on the property, the parties initiated negotiations that led to a favorable loan restructure.¹⁶⁴ Instead of having to execute a whole new mortgage or go through the court system to void the sale, the bank was able to use the expungement affidavit as a tool to revitalize the homeowner's mortgage.¹⁶⁵

In the right circumstances, it is clear that an expungement affidavit may work to both parties' advantage.¹⁶⁶ In the case of accidental rescission¹⁶⁷ or subsequent loan modifications after the foreclosure sale,¹⁶⁸ 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

¹⁵⁹ 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.

¹⁶⁰ See *Cordes*, 2012 WL 2052789, at *1.

¹⁶¹ *Id.* ("O'Connor signed an affidavit which stated that the Cordes mortgage should not have been discharged and that the mortgage remained in effect.")

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

¹⁶³ *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 (last visited Feb. 20, 2015).

¹⁶⁴ *Maltbie*, 2013 WL 6078945, at *2

¹⁶⁵ *Id.*

¹⁶⁶ See *id.*

¹⁶⁷ See *Cordes*, 2012 WL 2052789, at *1.

¹⁶⁸ See *Maltbie*, 2013 WL 6078945, at *2.

the affidavit.¹⁶⁹ This is possible when the lender desires to void the sale and the homeowner desires to have the property back.¹⁷⁰ As long as both parties are on board, a court has little reason for invalidating the affidavit's use.¹⁷¹

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.¹⁷² While other states have similar statutes regarding affidavits affecting real property,¹⁷³ no court outside Michigan has faced a lender's use of an expungement affidavit, whether unilaterally or mutually executed.¹⁷⁴ Even in a state like Ohio, which has a similar statute as Michigan, the courts have yet to face the affidavit's effect.¹⁷⁵ This raises the question of what other states exactly do to void sheriff's sales.¹⁷⁶ 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 sales, as well as how states have reacted to the use of other property affidavits.¹⁷⁷

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.¹⁷⁸ Homeowners Joel and Sharon Greenberg were enduring a foreclosure before filing bankruptcy.¹⁷⁹ The court issued a stay on the

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

¹⁷⁰ See *id.*

¹⁷¹ 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).

¹⁷² See discussion *infra*, Section II.B.

¹⁷³ See discussion *supra*, Section II.A.

¹⁷⁴ 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).

¹⁷⁵ 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).

¹⁷⁶ See discussion *infra*, Subsection II.B.1.

¹⁷⁷ See discussion *infra*, Subsections II.C.1-2.

¹⁷⁸ 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).

¹⁷⁹ *Greenberg*, 2002 WL 31087627, at *1.

Greenberg's property, but the home was still sold at a sheriff's sale.¹⁸⁰ The lender, understanding that it should not have sold the home, motioned to the court to have the sale set aside.¹⁸¹ The court quickly granted the motion because the sheriff's sale was "inadvertently held."¹⁸² Despite Ohio and Michigan's similar property statutes,¹⁸³ 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.¹⁸⁴

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.¹⁸⁵ 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.¹⁸⁶ 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.¹⁸⁷ 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.¹⁸⁸

In Pennsylvania, the courts have made it clear that proper cause must be shown in order to set aside a sheriff's sale.¹⁸⁹ 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.¹⁹⁰ 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.¹⁹¹ Such a statement is at odds with

¹⁸⁰ *Id.*

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

¹⁸² *Id.*

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

¹⁸⁴ *Greenberg*, 2002 WL 31087627, at *1.

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

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See discussion *supra*, Section II.B.

¹⁸⁹ *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.").

¹⁹⁰ *Id.*

¹⁹¹ *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.").

Michigan's expungement affidavit process because the affidavit allows the revival of a mortgage even though it was extinguished at the sheriff's sale.¹⁹²

The Indiana Court of Appeals utilizes a similar rule as that of the Pennsylvania court.¹⁹³ 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.¹⁹⁴ The facts entail a lender believing it had full rights to the property that it was bidding on.¹⁹⁵ With this belief, the lender bid the full price for the property, which resulted in an overbid.¹⁹⁶ 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.¹⁹⁷ This would be enough to put other parties on notice,¹⁹⁸ and the mortgage could be reverted back to the original homeowner.¹⁹⁹ The mortgagee in *Smith*, however, did not attempt to take this course of action.²⁰⁰ Instead, it sought the judicial system to set aside the sheriff's sale.²⁰¹ 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.²⁰² The appellate court affirmed the trial court's ruling.²⁰³

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.²⁰⁴ State rules and statutes are in line with this method; for instance, in *EMC Mortg. Corp.*, the

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

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

¹⁹⁴ *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.”).

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

¹⁹⁶ *Id.*

¹⁹⁷ 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. Ameriquist Mortg. Co.*, 515 F. App'x 419, 421 (6th Cir. 2013) (explaining the foreclosure was inadvertently held and the sheriff's deed was expunged.”).

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

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

²⁰⁰ *Smith*, 472 N.E.2d at 1300.

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

²⁰² *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.”).

²⁰³ *Id.* at 1304.

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

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.²⁰⁵ Washington's statute similarly requires that an objection to a sheriff's sale must be made with a showing of substantial irregularity.²⁰⁶ 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.²⁰⁷ In addition to challenging sheriff's sales, courts around the country have faced an epidemic of another kind regarding affidavits that affect property.²⁰⁸

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."²⁰⁹ 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.²¹⁰ The rule was implemented in response to nationwide foreclosure fraud.²¹¹ The Maryland court was looking to scrutinize instances where lenders had not personally read and signed the affidavit, though such an affidavit was signed.²¹²

²⁰⁵ 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.

²⁰⁶ 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.").

²⁰⁷ See discussion *supra* Subsections II.C.1.

²⁰⁸ See discussion *infra* Subsection II.C.2.

²⁰⁹ 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).

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

²¹¹ *Id.* (explaining the rule was proposed "in response to allegations of foreclosure fraud nationwide").

²¹² *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").

While this rule does not address the issue with expungement affidavits in Michigan,²¹³ it is revealing.²¹⁴ Lenders have used affidavits as a tool to obtain quick results while handling thousands of foreclosures.²¹⁵ As the saying goes, when one door closes, another door opens, and recent occurrences of the expungement affidavit²¹⁶ prove that lenders are adapting to the scrutiny they have received in the wake of their poor foreclosure procedures.²¹⁷ 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.²¹⁸ Michigan could very well be ground zero in the spread of a new unscrupulous use of an affidavit.²¹⁹ 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.²²⁰

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.²²¹ With that said, Michigan courts have almost always allowed its effect without requiring an explanation from the lender.²²² However, a lender’s unilateral

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

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

²¹⁵ 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.”).

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

²¹⁷ See Liddell & Liddell, Jr., *supra* note 215, at 377.

²¹⁸ Compare *id.* with discussion *supra*, Section II.B.

²¹⁹ See discussion *supra*, Section II.B.

²²⁰ See discussion *infra*, Part III.

²²¹ See discussion *supra*, Section II.B.

²²² *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).

use of an expungement affidavit should be deemed unlawful for multiple reasons.²²³ First, interpreting Michigan's statutes show that the unilateral use of the expungement affidavit is unlawful.²²⁴ Second, no matter the statutory interpretation, the expungement affidavit should be held unlawful as an irregularity in the foreclosure proceeding under Michigan case law.²²⁵ 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.²²⁶

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,²²⁷ which Michigan courts interpret as statutory authority for lenders to use affidavits as a means to void sheriff's sales.²²⁸ 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."²²⁹ 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.²³⁰ The true purpose of § 565.451a should be to strictly give notice of encumbrances, including previously voided sheriff's sales.²³¹ However, lenders have abused this statute so as to make the distinction between notice and conveyance nearly non-existent.²³² Only a handful of cases, beginning with *Cordes*, have directly discussed this statute and what its effect on property rights actually includes.²³³

²²³ See discussion *infra*, Sections III.A–D.

²²⁴ See discussion *infra*, Sections III.A–B.

²²⁵ See discussion *infra*, Section III.C.

²²⁶ See discussion *infra*, Section III.D.

²²⁷ MICH. COMP. LAW ANN. § 565.451a (West 2014).

²²⁸ See discussion *supra*, Section II.B.

²²⁹ § 565.451a(b).

²³⁰ 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).").

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

²³² 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).

²³³ 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.

In *Cordes*, the mortgagor and mortgagee agreed to reinstate a mortgage that was accidentally discharged.²³⁴ 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.²³⁵ 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.²³⁶ 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.²³⁷

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.²³⁸ Despite what the court in *Cordes* said, the effect of the affidavit²³⁹ 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.²⁴⁰ 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.²⁴¹ 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.²⁴² This case, though sound in its

²³⁴ *Cordes*, 2012 WL 2052789, at *2

²³⁵ *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.

²³⁶ § 565.451a(b)

²³⁷ 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)

²³⁸ 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).

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

²⁴⁰ *Id.* at *1.

²⁴¹ *Id.* at *2.

²⁴² 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).

particular factual circumstances, set an unfortunate precedent²⁴³ that justifies and expands the use of § 565.451a to not only revive a discharged mortgage, but void a sheriff's sale.²⁴⁴

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.²⁴⁵ Unlike *Cordes*, the defendant in *Connolly* unilaterally filed the expungement affidavit, stating the sheriff's sale was "inadvertently held."²⁴⁶ This rationale was all that the court required to rule the sheriff's sale void.²⁴⁷ 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,²⁴⁸ and *Connolly*, where the lender's unilateral act disrupted the foreclosure process without the homeowner's consent or acknowledgement.²⁴⁹ 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.²⁵⁰

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.*²⁵¹ 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.²⁵² 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 "happening of any condition" with the property.²⁵³ 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.²⁵⁴ The court in *Trademark Properties* takes the court in *Connolly*

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

²⁴⁴ See *id.*

²⁴⁵ *Id.* at 505-06.

²⁴⁶ *Id.* at 502.

²⁴⁷ *Id.* at 505-06.

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

²⁴⁹ *Connolly*, 581 F. App'x at 502.

²⁵⁰ *Id.*

²⁵¹ 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).

²⁵² *Id.*

²⁵³ § 565.451a(b).

²⁵⁴ 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

at its word that the property was already void before the affidavit was filed.²⁵⁵ 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*.²⁵⁶

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.²⁵⁷ Unfortunately, courts in Michigan rarely make such inquiries and homeowners like Connolly²⁵⁸ and Laura Buttazzoni²⁵⁹ are left to endure a second foreclosure process without any question as to whether the sheriff's sale was ever really void.²⁶⁰ 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*.²⁶¹ Another state, however, takes an entirely different approach to voiding a sheriff's sale, though its property statute is nearly identical to Michigan.²⁶²

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.²⁶³ 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 factual circumstances requiring a sheriff's sale to be set aside.²⁶⁴ 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

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.

²⁵⁵ See *Trademark Properties*, 2014 WL 6461712, at *3 n.3.

²⁵⁶ See *id.* (the court determined the sheriff's sale was not actually void *ab initio*).

²⁵⁷ 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*).

²⁵⁸ See *Connolly*, 581 F. App'x at 502.

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

²⁶⁰ See discussion *supra*, Part II.

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

²⁶² 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.

²⁶³ *Greenberg*, 2002 WL 1031278, at *1.

²⁶⁴ *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).

use the judicial system to set aside a sheriff's sale, despite its recording statutes.²⁶⁵

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.²⁶⁶ 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.²⁶⁷ 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.²⁶⁸

*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.²⁶⁹ First, the correction sought through an expungement affidavit is not one allowed under the statute.²⁷⁰ Second, the unilateral use of the affidavit to correct title affects the "substantive rights" of the homeowner.²⁷¹ According to § 565.451d, affidavits filed with the register of deeds may "correct errors or omissions in previously recorded documents."²⁷² 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."²⁷³ 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."²⁷⁴ Lenders continually file affidavits pursuant to § 565.451a in order to correct title of property that was sold during an

²⁶⁵ *Id.*

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

²⁶⁷ 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*").

²⁶⁸ See discussion *infra* Section III.B.

²⁶⁹ See § 565.451d(1)(a), (2)(b).

²⁷⁰ See § 565.451d(1)(a).

²⁷¹ See § 565.451d(2)(b).

²⁷² § 565.451d(1).

²⁷³ § 565.451d(1)(a)-(b).

²⁷⁴ § 565.451d(2)(a).

allegedly void sheriff's sale, but they fail to acknowledge these limitations in § 565.451d.²⁷⁵

First, because the statute at issue is limited to two types of corrections, errors dealing with the place of recording²⁷⁶ and simple scrivener's errors or omission on a document,²⁷⁷ it follows that any kind of correction going beyond this is outside the authority granted under § 565.451d.²⁷⁸ 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.²⁷⁹ Even if the sheriff's sale is properly void *ab initio*²⁸⁰ 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.²⁸¹ 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.²⁸²

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.²⁸³ 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.²⁸⁴ 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.²⁸⁵ 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.²⁸⁶

²⁷⁵ See discussion *supra*, Subsection II.B.1.

²⁷⁶ § 565.451d(1)(a).

²⁷⁷ § 565.451(1)(b)

²⁷⁸ § 565.451d.

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

²⁸⁰ See discussion *supra*, Part II.B.2.

²⁸¹ 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”).

²⁸² See § 565.451d(1)(a)-(b).

²⁸³ See § 565.451(2)(b).

²⁸⁴ 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).

²⁸⁵ 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)).

²⁸⁶ 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).

Because an expungement affidavit alters the homeowner and lender's rights in the property, the statute should bar the use of the affidavit.²⁸⁷

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.²⁸⁸ 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.²⁸⁹ The purchaser's only recourse was the judicial system and showing such a correction was warranted due to an irregularity in the foreclosure process.²⁹⁰ 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.²⁹¹

As another example, Pennsylvania requires a showing of cause in court to correct title and order a resale of the property.²⁹² 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.²⁹³ Unfortunately, lenders have had this ability for the last five years, and the stark contrast with many judicial procedures required outside of Michigan.²⁹⁴ Though adversarial situations between the lender and homeowner should require judicial oversight,²⁹⁵ 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.²⁹⁶

²⁸⁷ See § 565.451d(2)(b).

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

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

²⁹⁰ *Id.*

²⁹¹ *Id.*

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

²⁹³ *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).

²⁹⁴ See discussion *supra*, Subsection II.C.1.

²⁹⁵ 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).

²⁹⁶ 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.²⁹⁷ 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.²⁹⁸ If both parties agree to the affidavit's effect and execute the affidavit together, then the statute should not be violated.²⁹⁹ 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).³⁰⁰

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.³⁰¹ 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,³⁰² as well as when there has been an accidental rescission, as in *Cordes*.³⁰³ 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.³⁰⁴ 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.³⁰⁵

²⁹⁷ 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).

²⁹⁸ § 565.451d(2)(b).

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

³⁰⁰ 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).

³⁰¹ 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).

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

³⁰³ *Cordes*, 2012 WL 2052789, at *2.

³⁰⁴ See discussion *supra*, Section III.B.

³⁰⁵ See discussion *supra*, Section III.C.

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 challenged in a wrongful foreclosure action.³⁰⁶ 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.*³⁰⁷ because the filing of a wrongful foreclosure lawsuit cannot toll the redemption period.³⁰⁸ Since almost every expungement case involved the expiration of the redemption period, it is best to analyze the affidavit against this standard.³⁰⁹ 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.³¹⁰ Even under this heightened standard, the expungement affidavit is an unlawful legal instrument that cannot pass muster.³¹¹

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.³¹² In *Dixon v. Wells Fargo Bank, N.A.*, the court laid out the fraud or irregularity test.³¹³ 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;

³⁰⁶ See discussion *supra*, Section I.B.

³⁰⁷ 825 N.W.2d 329, 337 (Mich. 2012).

³⁰⁸ 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).

³⁰⁹ See discussion, *supra*, Section II.B.

³¹⁰ See discussion *supra*, Section I.B.

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

³¹² 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).

³¹³ *Dixon*, 2012 WL 4450502, at *5.

and (6) the homeowner must suffer injury as a result.³¹⁴ Even under this heightened scrutiny, the unilateral use of the expungement affidavit meets this test; therefore, it should be deemed unlawful.³¹⁵

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 false misrepresentation.³¹⁶ To begin, if a sheriff's sale is actually "void *ab initio*," the sale must have been unlawful or went against public policy.³¹⁷ 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.³¹⁸ 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*."³¹⁹ The court in *Freund* gave no other rationale why the lender could automatically void the sale.³²⁰ Without more, it is impossible to prove whether or not the statement is actually true.³²¹

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.³²² Fortunately, the latest case out of Michigan asked such a question.³²³ 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.³²⁴ This was the first time a Michigan court actually addressed the lender's underlying rationale for voiding the sale.³²⁵ By distinguishing

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

³¹⁵ 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).

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

³¹⁷ See BLACK'S LAW DICTIONARY, *supra* note 26, at 1805.

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

³¹⁹ No. 299011, 2011 WL 5064248, at *2 (Mich. Ct. App. Oct. 25, 2011).

³²⁰ *Id.*

³²¹ See *id.*

³²² 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.

³²³ 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).

³²⁴ *Id.*

³²⁵ 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).

Connolly,³²⁶ 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.³²⁷ The answer must still be yes.³²⁸

Under Michigan statute, the expungement affidavit is unlawful pursuant to § 565.451d.³²⁹ Therefore, filing an unlawful affidavit will in 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.³³⁰ It does not matter whether the underlying sheriff's sale was truly void *ab initio*.³³¹ 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.³³² Therefore, whether the lender's false misrepresentation stems from lying on the face of the affidavit³³³ or from the fact that the affidavit itself is unlawful,³³⁴ courts should find that the use of the affidavit meets the first two prongs of the fraud or irregularity test.³³⁵

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.³³⁶ In a case like *Freund*, the lender most certainly should know that their proclamation is false.³³⁷ To highlight the point, Trott & Trott attempted to use an expungement affidavit to cure its own mistake in the

³²⁶ *Trademark Props.*, 2014 WL 6461712, at *3 n.3.

³²⁷ *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.”).

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

³²⁹ See discussion *supra*, Section III.B.

³³⁰ 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).

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

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

³³³ 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).

³³⁴ See discussion *supra*, Section III.B.

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

³³⁶ *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).

³³⁷ 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.

subsequent case, *Phh Mortgage Corp. v. O'Neal*, despite the fact there was no unlawful conduct to render the sale void.³³⁸ In addition, all lenders should understand that an affidavit voiding a sheriff's sale is unlawful under Michigan statute and, therefore, a false misrepresentation.³³⁹

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.³⁴⁰ In cases of expungement affidavits, the lender clearly relies on the homeowner to take the property back;³⁴¹ the homeowners rely on the affidavit, understanding it is again their home;³⁴² and the homeowners often suffer injury resulting from enduring another foreclosure and sheriff's sale, among other things.³⁴³ 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.³⁴⁴

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.³⁴⁵ In addition, *Kim* also requires that the fraud or irregularity be the cause of that prejudice.³⁴⁶ 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.³⁴⁷

³³⁸ No. 311233, 2013 WL 3025566, at *1 (E.D. Mich. June 18, 2013).

³³⁹ See § 565.451d.

³⁴⁰ *Dixon*, 2012 WL 4450502, at *5.

³⁴¹ 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).

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

³⁴³ 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).

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

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

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

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

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.³⁴⁸ For this reason, the court did not address whether the expungement affidavit would constitute prejudice.³⁴⁹ However, had the issue been posited, the plaintiff would have to succeed.³⁵⁰ 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.³⁵¹ All of this occurred because the expungement affidavit was allowed to convey property back to Buttazzoni.³⁵² 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.³⁵³

As another example of prejudice, the plaintiffs' attorney in *Dixon v. Wells Fargo Bank, N.A.*³⁵⁴ 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."³⁵⁵ 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.³⁵⁶ 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.³⁵⁷ Unfortunately, the court in *Dixon* never got to the question of prejudice and dismissed the claim.³⁵⁸

The final element at issue in the wrongful foreclosure analysis is whether the fraud or irregularity and prejudice have a causal connection.³⁵⁹ There is such a connection if the affidavit at issue is an irregularity in the

³⁴⁸ *Buttazzoni*, 2014 WL 1031278, at *3.

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

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

³⁵¹ *See id.*

³⁵² *See id.*

³⁵³ *See id.*

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

³⁵⁵ Plaintiff's Response, *supra* note 154, at 3.

³⁵⁶ *Id.* at 3-4.

³⁵⁷ *See id.* at 4.

³⁵⁸ *Dixon*, 2012 WL 4450502, at *4.

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

foreclosure process³⁶⁰ and, because of that irregularity, the homeowner endures prejudice in the form of multiple foreclosures, sheriff's sales, and missed opportunities.³⁶¹ 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.³⁶² 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.³⁶³ The causal connection is clear, since the homeowners in both situations would not have been harmed had it not been for the expungement affidavit.³⁶⁴ Because the expungement affidavit proves fraud or irregularity in the foreclosure process, the expungement affidavit prejudices the homeowner, and there is a connection between the two, courts should discontinue the acceptance of lender's arguments in wrongful foreclosure actions.³⁶⁵

As a final matter, the proper remedy for successfully proving wrongful foreclosure is problematic for aggrieved homeowners.³⁶⁶ According to *Dixon*, the remedy for proving wrongful foreclosure is to have the foreclosure set aside and the property reverted back to the homeowner.³⁶⁷ 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.³⁶⁸ 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.³⁶⁹ The wrongful foreclosure argument, however, should still be raised for a few reasons.³⁷⁰ First, the court may still deem the acts of the lender unlawful under the test

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

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

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

³⁶³ See Plaintiff's Response, *supra* note 154.

³⁶⁴ 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.

³⁶⁵ See discussion *supra*, Subsection III.C.

³⁶⁶ 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).

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

³⁶⁸ 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.").

³⁶⁹ *Id.*

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

for purposes of declaratory relief.³⁷¹ Second, the court may award monetary damages if there is actual monetary harm.³⁷² If lenders face these two methods or recourse enough times, they may eventually refrain from unlawfully executing the expungement affidavit.³⁷³ Therefore, the wrongful foreclosure analysis proves the unilateral use of an expungement affidavit is unlawful and that relief is still viable for a homeowner in such an action.³⁷⁴ Even more, further policy reasons prove courts should find this use unlawful.³⁷⁵

*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.³⁷⁶ First, the harm and inconvenience to the homeowner should outweigh the lender's need to use the expungement affidavit.³⁷⁷ Second, Michigan continues to receive challenges to the affidavit's use in situations where other states require judicial oversight,³⁷⁸ 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.³⁷⁹ 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.³⁸⁰

In multiple Michigan cases, homeowners experience monetary and emotional harm and inconvenience when lenders revert a mortgage back

³⁷¹ 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").

³⁷² 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).

³⁷³ 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).

³⁷⁴ See discussion *supra*, Subsections III.C.1-2.

³⁷⁵ See discussion *supra*, Section III.D.

³⁷⁶ See discussion *supra*, Section III.D.

³⁷⁷ 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).

³⁷⁸ See discussion *supra*, Section II.C.

³⁷⁹ 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).

³⁸⁰ See *Holahan, Ornstein & Yoon*, *supra* note 209.

into the homeowner's name.³⁸¹ Further, expungement affidavits lead to confusion because they can disrupt the statutory redemption period if the affidavit is executed during that time.³⁸² 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.³⁸³ 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.³⁸⁴

In contrast, the lender's purpose for executing the affidavit is either unjustified³⁸⁵ or unknown.³⁸⁶ The lender's actions are unjustified when there is no way the sheriff's sale was actually void.³⁸⁷ 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.³⁸⁸ 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*.³⁸⁹ Similarly, lenders should not be allowed to use expungement affidavits when the reason for executing the affidavit is unknown to the court.³⁹⁰ When the affidavit simply states the sale was "inadvertently held," courts should automatically take this as a sign that more investigation is needed.³⁹¹ In almost every case, lenders have gotten away with this rationale whether or not the affidavit was justified.³⁹² Therefore, courts would be well advised to discontinue the

³⁸¹ 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).

³⁸² 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).

³⁸³ *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).

³⁸⁴ 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).

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

³⁸⁶ 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. Ameriquest Mortg. Co.*, 515 Fed. App'x 419, 421 (6th Cir. 2014) (same).

³⁸⁷ 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).

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

³⁸⁹ *O'Neal*, 2013 WL 3025566, at *1.

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

³⁹¹ See *Trademark Props.*, 2014 WL 6461712, at *3.

³⁹² *But see id.* at *3.

unilateral use of the affidavit because in almost all cases the affidavit was either unjustified or was filed for an unknown reason.³⁹³

Secondly, Michigan should fall in line with the rest of the country because the current state of the law has led to consistent litigation.³⁹⁴ If courts followed states like Ohio, the lender would have to seek the judiciary's approval before setting the foreclosure sale aside.³⁹⁵ For instance, in *Greenberg*, the court quickly resolved the inadvertently held sheriff's sale after the lender's motion.³⁹⁶ There, the court rightfully set the foreclosure sale aside.³⁹⁷ Courts can also filter out the unmeritorious motions from lenders.³⁹⁸ 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.³⁹⁹ 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.⁴⁰⁰ 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.⁴⁰¹ With this idea, the third policy reason concerns a broader look at how lenders have acted through a trying time for homeowners.⁴⁰²

The final policy reason concerns lender behavior beginning with the financial crisis and the subsequent fall of the housing market.⁴⁰³ Maryland courts saw a major problem concerning lenders falsifying affidavits through robo-signatures.⁴⁰⁴ For that reason, the Maryland Court of Appeals instituted an emergency rule to heighten the scrutiny under which such affidavits were reviewed.⁴⁰⁵ The court specifically targeted instances where the affiant had not actually signed the affidavit or could

³⁹³ See discussion *supra*, Section II.B.

³⁹⁴ 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).

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

³⁹⁶ *Id.*

³⁹⁷ *Id.*

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

³⁹⁹ *Id.*

⁴⁰⁰ See discussion *supra*, Section I.B.

⁴⁰¹ See discussion *supra*, Sections III.A–C.

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

⁴⁰³ See Henry, Reese & Torres *supra* note 1.

⁴⁰⁴ 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).

⁴⁰⁵ See Holahan, Ornstein, & Yoon, *supra* note 209 and accompanying text.

not attest to the facts in the affidavit.⁴⁰⁶ 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.⁴⁰⁷ Second, it also proves lenders will take steps to ensure the process is fulfilled the way they expect it to be.⁴⁰⁸ 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 2011.⁴⁰⁹

Whether the policy reason is grounded in helping the homeowner or righting the litigation process, the answer seems clear: expungement affidavits can harm homeowners, work at odds with other state foreclosure processes, and continue a long line of unscrupulous behavior among lenders.⁴¹⁰ For such policy reasons, courts should deem the unilateral use of expungement affidavits unlawful.⁴¹¹

CONCLUSION

Michigan lenders have relied on a process to void sheriff's sales and re-foreclose on homeowners that is simply counter-intuitive.⁴¹² At first, this process may not seem precarious, because a homeowner is regaining possession of the mortgage.⁴¹³ 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.⁴¹⁴ 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.⁴¹⁵ If anything, this lender practice has caused great confusion among homeowners throughout

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *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).

⁴⁰⁹ Holahan, Ornstein & Yoon, *Supra* note 209.

⁴¹⁰ *See* discussion *supra*, Section III.D.

⁴¹¹ *See* discussion *supra*, Section III.D.

⁴¹² *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).

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

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

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

Michigan.⁴¹⁶ Unneeded litigation has ensued and many homeowners feel the judicial system has betrayed them.⁴¹⁷

There are many ways in which this problem can be solved.⁴¹⁸ The simplest and most straightforward solution is legislative action.⁴¹⁹ The power of this lender practice has been initially fueled through statute.⁴²⁰ It would not be difficult for the Michigan Legislature to simply enact a provision that clarifies the power of affidavits affecting real property.⁴²¹ 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 become more aligned with the public's interest.⁴²² In addition, Michigan courts can continue on the path of *Trademark Properties* and scrutinize whether sheriff's sales are actually void.⁴²³ These approaches could greatly frustrate lenders and their ability to effectively void sheriff's sales.⁴²⁴

This lender practice is a novel and unique process that has not gained much attention as other issues in foreclosure law.⁴²⁵ One reason may be that the use of expungement affidavits has not yet spread out of control.⁴²⁶ 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.⁴²⁷ 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,⁴²⁸ it

⁴¹⁶ 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").

⁴¹⁷ 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).

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

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

⁴²⁰ See §§ 565.451a, d.

⁴²¹ See § 565.451a

⁴²² 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).

⁴²³ 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*).

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

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

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

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

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

is imperative that the courts and legislature act now to disarm this vorpal sword lenders have armed themselves with.⁴²⁹

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