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I. INTRODUCTION

Full payment of a mortgage loan – whether at the loan's originally scheduled maturity or (more commonly) by prepayment upon a sale or refinancing – legally extinguishes the mortgage lien. But while such a mortgage lien is no longer legally effective, its extinguished status does not appear automatically on the public records. Until the mortgage is "cleared" from the record – typically by means of a recorded document called a *satisfaction, release, discharge,* or *cancellation*, depending on local practice – a searcher could reasonably conclude that the mortgage may affect title to the land.

This may create a practical problem for the landowner in a subsequent sale or refinancing. For example, suppose that Alice has contracted to sell her home to the Smiths, who expect to finance the purchase with a mortgage loan from Second Bank. Alice has already paid off her mortgage to First Bank at its scheduled maturity, but no satisfaction of the First Bank mortgage yet appears of record. There are numerous potential reasons – some understandable, some not – why this may be so. These reasons could include:

- First Bank prepared a document and submitted it to the recorder, but the recorder rejected it for noncompliance with substantive content requirements or technical recording rules.

- First Bank prepared a satisfaction and submitted it to the recorder, but the recorder has not yet processed the recording.[1]

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As with all participants in this Symposium, I am forever grateful to Dale Whitman, both for his many contributions to the law of real estate finance and for his gracious and wise counsel to me during my career in law teaching. Special thanks to those persons whose conversations on these issues – either recently or during the drafting of the URMSA – helped to influence my thoughts, including Jordan Dorchuck, Carol Dubie, Kathy Egan, Nancy Ferguson, Bill Henning, Carl Lisman, Ed Lowry, Fred Miller, Pat Randolph, Tom Rosiello, and Walt Wileman.

1. According to Walt Wileman, an observer to the URMSA Drafting Committee, a few county recorders are (or at times, have been) more than six months in arrears in processing recorded instruments. Walt established a Southlake, TX com-

- First Bank prepared a satisfaction and submitted it to Alice, but she misplaced it or failed to appreciate the need to record it.

- First Bank made a clerical error and prepared and recorded a satisfaction of a different mortgage due to a transposition of loan numbers.

- First Bank did not yet prepare a satisfaction because it has insufficient administrative staff to handle the volume of satisfaction documents (a problem experienced by some lenders during times of high refinancing volume).

- First Bank did not yet prepare a satisfaction because it mistakenly believes that there remains an outstanding balance on Alice's loan.

- First Bank no longer exists; e.g., following Alice's payoff of the mortgage, First Bank has ceased doing business, or has been acquired by another bank.

- First Bank may simply not wish to bother with the expense of preparing a satisfaction now that Alice has paid off her loan and is no longer a customer.

The existing record presents Alice with a practical problem. To perform the sale contract, Alice most likely must demonstrate marketable record title,[2] which she cannot do without recorded evidence of the satisfaction of the First Bank mortgage. Likewise, Second Bank would require a recorded satisfaction of the First Bank mortgage to be certain that its mortgage will have the expected first priority. Thus, without a recorded satisfaction of the First Bank mortgage, Alice may be unable to close the sale or may incur additional transaction costs to close the sale. These costs might include indemnifying the Smiths against any loss caused by subsequent efforts to enforce the First Bank mortgage, or (more likely) the cost of affirmative title insurance coverage against any loss caused to the Smiths or Second Bank due to subsequent attempts by First Bank to enforce its mortgage.

To address this problem, each state has one or more statutes that obligate mortgagees to deliver and/or record a satisfaction in a timely fashion after receiving full payment. Unfortunately, most of these statutes – many of

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pany, Orion Financial Group, Inc., that handles the recording of mortgage satisfactions and other land-related instruments for mortgage lenders that outsource these services, and Walt's insights proved invaluable to the URMSA Drafting Committee.

2. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 10.12 (3d ed. 2000).

which date from the late nineteenth or early twentieth centuries – vary significantly in their particulars and have not evolved to reflect the transformation of the residential mortgage market. Thus, as is the case in other areas of real estate law, state mortgage satisfaction law provides a nineteenth century solution to a twenty-first century problem.

Reforming mortgage satisfaction law is an appropriate topic for an article in a symposium honoring Dale Whitman, whose career is defined in significant part by his contributions to the modernization of mortgage law.[3] Dale's law reform contributions have come in many different roles. Most notable, of course, was his service with Grant Nelson as a co-Reporter for the American Law Institute's Restatement (Third) of Property: Mortgages, but Dale's contributions go far beyond the influence of the Restatement. Dale also served as Reporter for the Uniform Nonjudicial Foreclosure Act,[4] and as an adviser to the Uniform Real Property Electronic Recording Act.[5] He currently serves as an adviser to the drafting committee preparing a uniform act regarding beneficiary deeds (transfers on death for real estate).[6] He has also served the American College of Real Estate Lawyers (ACREL) as its representative to the Joint Editorial Board for Uniform Real Property Acts (JEBURPA). In this position, Dale played an important role in encouraging the National Conference of Commissioners on Uniform State Law

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3. *See, e.g.*, Grant S. Nelson, *The Foreclosure Purchase by the Equity of Redemption Holder or Other Junior Interests: When Should Principles of Fairness and Morality Trump Normal Priority Rules?*, 72 MO. L. REV. 1259 (2007); John A. Lovett, *Doctrines of Waste in a Landscape of Waste*, 72 MO. L. REV. 1209 (2007).

4. Approximately one-half of American states do not permit private (nonjudicial) foreclosure of mortgages. The National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Nonjudicial Foreclosure Act (UNFA) in 2002, in an attempt to both bring greater state-to-state consistency in foreclosure procedure in states that already authorized private foreclosures and encourage adoption of private foreclosure in states that currently authorize only judicial foreclosure. The provisions of the UNFA can be found on NCCUSL's website via the URL http://www.law.upenn.edu/bll/archives/ulc/UFBPOSA/2002final.htm.

5. NCCUSL promulgated the Uniform Real Property Electronic Recording Act (URPERA) in 2004 in an attempt to help modernize real property recording systems by providing statutory authorization and a basic legal framework for the development and implementation of electronic recording systems. The provisions of URPERA can be found on NCCUSL's website via the URL http://www.law.upenn.edu/bll/archives/ulc/urpera/URPERA_Final_Apr05-1.htm.

6. Currently, only about 20% of American states permit the use of "beneficiary deeds," or deeds having testamentary effect (i.e., deeds executed during the grantor's life, but not effecting any transfer until the grantor's death). NCCUSL is currently in the process of drafting a uniform law authorizing the use of transfer on death deeds, which will receive its first reading at NCCUSL's 2007 Annual Meeting. The most recent draft of the proposed Act can be found on NCCUSL's website via the URL http://www.nccusl.org/Update/CommitteeSearchResults.aspx?committee=278.

(NCCUSL) to draft a uniform law governing mortgage satisfaction.[7] This article explores the end product of that process – the Uniform Residential Mortgage Satisfaction Act (URMSA) – which addresses certain key aspects of the mortgage satisfaction problem, but which might have achieved more significance as a law reform measure if it had successfully incorporated the more fundamental reform proposals recommended by JEBURPA.

This article addresses current law governing mortgage satisfaction, the need for effective reform, and the extent to which URMSA provides (or fails to provide) that reform. Part II briefly describes the transformation of the modern mortgage transaction – from its traditional "local" character to the modern development of the "national" mortgage market – and the implications of this transformation for the way in which satisfaction of mortgages occurs. Part III discusses the current patchwork of state law mortgage satisfaction provisions, emphasizing how these provisions have not kept pace with the transformation of the mortgage market, how the lack of uniformity has accentuated problems in obtaining mortgage satisfactions, and how URMSA addresses (or fails to address) these problems. Part IV briefly describes the Mortgage Electronic Recording System (MERS) and explains why the MERS system (as it currently functions) does not provide a satisfactory potential solution for mortgage satisfaction problems. Part V introduces a promising model for law reform – the "one-touch" model – under which a responsible closing agent might deliver a closing-table satisfaction document on the mortgagee's behalf once the agent has disbursed full payment to the mortgagee pursuant to the mortgagee's payoff statement. Part V reviews the mechanics of one-touch, and then discusses the political problems and systemic barriers that have as yet prevented one-touch from achieving widespread influence as a law reform measure. Part VI finishes with some concluding thoughts.

II. THE TRANSFORMATION OF THE RESIDENTIAL MORTGAGE TRANSACTION

Once upon a time, a mortgagor anticipating a sale or refinancing of the mortgaged land plausibly could have expected to obtain title clearance at (or

7. JEBURPA is comprised of representatives from NCCUSL, ACREL, and the American Bar Association Real Property, Probate and Trust Section, with liaisons from the American College of Mortgage Attorneys (ACMA) and the Community Associations Institute (CAI). Among JEBURPA's primary purposes is to make recommendations to NCCUSL regarding potential uniform law revision or drafting projects involving real estate. In recent years, JEBURPA's recommendations led NCCUSL to promulgate a number of real-estate related acts, including the Uniform Nonjudicial Foreclosure Act (2002), the Uniform Environmental Covenants Act (2003), the Uniform Real Property Electronic Recording Act (2004), the Uniform Residential Mortgage Satisfaction Act (2004), and the Uniform Assignment of Rents Act (2005).

contemporaneously with) the closing of that sale or refinancing. This expectation arose in significant part from the bureaucratic and geographic proximity of the mortgagor and the mortgagee. Most residential mortgage loans were made by local banking and thrift institutions, which typically held the loans in their portfolios until maturity or prepayment. Frequently, the mortgagee held the loan documents in the office where the loan was originated or in a nearby depository, and the mortgagee serviced the loan (i.e., collected monthly payments) itself rather than outsourcing this function to a remote servicer. The mortgage transaction was a quintessentially "local" transaction; the mortgagor and the mortgagee were a part of the same community (and often known to and familiar with each other).

This proximity and familiarity helped to facilitate prompt title clearance at or following the sale or refinancing of mortgaged land. Where the closing occurred in close proximity to the county recorder's office, the mortgagee that received full payment at closing could simply proceed to the recorder's office and have the recorder make the necessary marginal notation of satisfaction.[8] More frequently, in anticipation of the closing, the closing agent[9] could go to the mortgagee's local office and, with a few hours or days of notice, obtain the original loan documents and/or a recordable satisfaction document to be available at the closing. In states where an attorney handled closings (attorney states), the attorney could have the mortgagee prepare and deliver a satisfaction document to the attorney in advance, with instructions that the attorney was to deliver or record it only after the mortgagee received full payment of the mortgage debt. These practices fit the local character of the traditional residential mortgage transaction. Local mortgage lenders, who were typically familiar with the identity and reputations of the local real estate attorneys, were comfortable providing such documentation to closing attorneys to facilitate prompt closing and title clearance.

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8. Historically, the mortgagee appeared before the recorder, either personally or by document, and certified that it had received payment of the mortgage debt. The recorder would then go to the appropriate volume of the records, turn to the page where the mortgage appeared of record, and physically enter a notation in the margin (by handwriting or stamp) indicating the satisfaction of the mortgage. Alternatively, the mortgagee might return the original loan documents (the note and mortgage/deed of trust) to the mortgagor marked "paid" or "satisfied." In turn, the mortgagor could present these documents to the recorder, who would then make the appropriate marginal notation in the records.

Over time, it became more common for satisfactions to occur by the execution and recording of a separate satisfaction document, rather than by marginal notation. Subsequent searchers would not see any evidence of satisfaction upon reviewing the recorded mortgage itself, but would find the recorded satisfaction later in the chain of record title (assuming proper indexing). While recording of a separate satisfaction document has become the norm, statutes in some states still authorize satisfaction by marginal notation. *See infra* note 43.

9. Closing agent is used here to describe the person handling the documents/arrangements for the closing.

Today, however, widespread changes in the financial services industry have complicated the payoff, discharge, and release of mortgage instruments.[10] The most significant change is the development of the secondary market and the widespread securitization of residential mortgages. Most originating mortgage lenders no longer retain loans in their portfolios, but promptly assign them on the secondary market (facilitating the eventual securitization of those loans and the issuance of mortgage-backed securities to remote investors). Today, mortgagees also commonly outsource servicing of their loans to remote servicers. As a result, loan servicing often occurs (and the loan documents may physically reside) hundreds or thousands of miles from the mortgagor and the mortgaged land. Large-scale mortgage loan transfers have also occurred with increasing frequency as originating lenders merge with or are acquired by other financial institutions. Finally, the title insurance industry has experienced significant consolidation with the emergence of large national title insurance companies that rely upon local independent agents or other intermediaries to perform a wide variety of functions related to the closing of real estate transactions.

These changes have had a dramatic impact on the residential mortgage market, which has become essentially national in its character. In many respects, these impacts have been quite positive. Residential mortgage securitization has encouraged the investment of substantial capital into the residential mortgage market. This investment has dramatically increased the supply (and reduced the cost) of residential mortgage money in a fashion that has encouraged more widespread homeownership in the United States. The secondary mortgage market has also benefited residential homeowners through the development and widespread use of standardized residential mortgage documentation whose terms are in many respects quite consumer-favorable.[11] Nevertheless, this transformation has created a substantial bureaucratic and geographic gap between the mortgagor, the mortgagee, and the servicer. This gap has complicated the timely satisfaction of mortgages in several ways.

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10. A slightly more detailed summary of these changes appears in URMSA's prefatory note, accessible on NCCUSL's website via the URL http://www.law.upenn.edu/bll/archives/ulc/umsa/2004finalact.htm.

11. For example, Fannie Mae and Freddie Mac standard residential mortgage forms permit prepayment without fee or penalty. *See, e.g.*, Julie P. Forrester, *Fannie Mae/Freddie Mac Uniform Mortgage Instruments: The Forgotten Benefit to Homeowners*, 72 MO. L. REV. 1077 (2007). While the secondary market for residential mortgages has had some unquestionably beneficial effects, however, scholars have noted that the trend toward securitization in the residential mortgage industry, and the resulting flood of capital into the residential mortgage market, has spawned widespread predatory lending. *See, e.g.*, Kurt Eggert, *Held Up in Due Course: Predatory Lending, Securitization, and the Holder in Due Course Doctrine*, 35 CREIGHTON L. REV. 503 (2002); Julia Patterson Forrester, *Still Mortgaging the American Dream: Predatory Lending, Preemption, and Federally-Supported Lenders*, 74 U. CIN. L. REV. 1303 (2006).

First, the geographic separation of the parties often creates a temporal or "transit" gap between the mortgagee and the recorder – i.e., the time needed for the mortgagee to transmit the necessary documents to the recorder – given that real estate transfer (and most real estate recording systems) still operates largely in paper rather than electronic form. Second, the bureaucratic separation of lending and servicing functions creates another temporal gap – as more people become involved in paying off the loan, confirming the loan's full payment, and issuing the necessary paperwork, more time is needed for bureaucratic coordination. Finally, this bureaucratic and geographic disconnection increases the likelihood that the mortgagor, mortgagee, and closing agent will be essentially strangers at the time a closing occurs.

In this new world, mortgage lenders have ceased to deliver the original loan documents or a recordable satisfaction document in anticipation of an upcoming closing. Instead, the holder of the mortgage now starts to perform its obligation to satisfy the mortgage satisfaction function only after it has confirmed the receipt of good funds in full satisfaction of the mortgage debt.[12] The result is a temporal gap between the closing and the clearance of record title – even when all parties are acting in good faith and there is no question about the identity of the mortgagee or the location of the loan documents.[13]

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12. Even if the payoff is made in certified funds, the mortgagee may be reluctant to provide contemporaneous confirmation that the loan has been fully satisfied. For example, the mortgagee may have incurred liability for certain fees (e.g., attorney fees) or costs to protect its security, but these amounts may not yet have been liquidated or, if liquidated, may not have been posted to the mortgagee's system as of the time of the mortgagee's original payoff. Alternatively, the mortgagee may have previously credited the mortgagor's account for a previous mortgage payment, only to find out after closing that the mortgagor's check was returned. These types of concerns are further explored in Part V's discussion of the "one-touch" mortgage satisfaction model. *See infra* notes 169-171 and accompanying text.

13. Further, a mortgagor's ability to obtain the return of original loan documents and the necessary satisfaction documentation may be complicated by the mortgagor's uncertainty about the identity of the mortgagee or the location of the documents themselves. Over the past two decades, financial institutions have routinely merged or consolidated operations. By virtue of merger or consolidation, a residential mortgage previously held by a local bank in one state may now be held by a regional or national bank based in another state; however, if the loan is serviced by a third party, the mortgagor may be unaware of the identity or location of the current holder of the mortgage. Moreover, transfer of mortgage servicing sometimes occurs, and if the respective holders of a mortgage loan have transferred servicing responsibilities one or more times during a loan's term, this may increase the risk that the original loan documentation is mislocated. Finally, there is some concern that mortgage lenders, after having already collected full payment from a borrower, may feel less compunction to act quickly to provide prompt service (i.e., preparing and recording a satisfaction) for a now-"former" customer. These problems create additional "bureaucratic" delay for the mortgagor seeking to obtain the needed evidence of satisfaction to clear its title.

At present, this gap problem forces the parties to incur additional transaction costs. Most frequently, title insurance provides a workable solution. Suppose that Seller owns a home (subject to a mortgage held by First Bank) and has contracted to sell that home to Buyer, with the closing to occur on June 1. Buyer plans to complete the purchase using the proceeds of a mortgage loan from Second Bank, and Seller expects to use the sale proceeds to satisfy the mortgage loan to First Bank. Once the First Bank mortgage is paid off, Second Bank would have its expected first priority for its mortgage lien. But until the First Bank mortgage is satisfied, Second Bank bears a risk that full payment of the First Bank mortgage will not occur – perhaps because someone handling the transaction misappropriates the closing funds, or because of an unresolved dispute about the outstanding balance of the First Bank mortgage. Thus, as a condition of its obligation to make a mortgage loan to Buyer, Second Bank will insist upon a lender's title insurance policy that insures both the validity and first priority of its mortgage against the home. In this way, Second Bank shifts to the title insurer the potential priority risk that it faces because First Bank has not yet released its mortgage of record.

Likewise, Buyer faces a similar risk. If First Bank does not receive full payment, First Bank will refuse to release its mortgage, and Buyer's title will thus be subject to the mortgage liens of both banks. Thus, Buyer should obtain an owner's policy of title insurance that provides affirmative coverage against the risk that the First Bank mortgage is not legally satisfied by the closing payoff, or the benefit of a closing protection letter issued by a title insurance company.[14] Unfortunately, some buyers may fail to obtain an owner's policy of title insurance – mistakenly believing the mortgagee's loan policy and the mortgagee's willingness to make them the loan provides a sufficient protection. Even buyers who do obtain an owner's policy may not appreciate the risks sufficiently to ensure that the policy affirmatively covers them against nonrelease of the seller's mortgage.

III. THE CURRENT PATCHWORK OF MORTGAGE SATISFACTION LAW

Article 9 of the Uniform Commercial Code provides a simple, coherent, uniform, and efficient process for the clearance of title to personal property collateral following the payoff of a secured loan. Once the obligor pays off the secured debt and the secured party becomes legally obligated to terminate the effectiveness of its financing statement,[15] the secured party prepares a

14. *See, e.g.*, Title Resources Guaranty Company, *Closing Protection Letters: What Are They and Why Do Lenders Request Them?*, 1996, *available at* http://www.trgctx.com/center/closingltr.htm.

15. An Article 9 secured party becomes obligated to file a termination statement if the debtor did not authorize the filing of the original financing statement, or if the secured obligation has been satisfied and the secured party has no commitment to extend further credit to the debtor. U.C.C. § 9-513(a) (consumer goods); *id.* § 9-

standard form termination statement (essentially identical in all 50 states)[16] and files it in the filing office in which the initial financing statement appears. This filing immediately terminates the effectiveness of the initial financing statement to perfect any security interest that the secured party might claim against the debtor's property as it was described in the financing statement.[17] The secured party must file the termination statement within a limited grace period, which is uniform from state to state.[18] If the secured party fails to do so, Article 9 authorizes the debtor to file an effective termination statement.[19] Finally, the Article 9 filing system is inherently "self-clearing," as filed financing statements typically remain effective only for a five-year period.[20]

513(c)(1), (4) (collateral other than consumer goods). If the collateral is consumer goods, the secured party must file the termination statement on its own initiative within one month after the obligation has been satisfied (reduced to 20 days if the debtor makes demand), *id.* § 9-513(b), or face potential liability for actual damages and a $500 penalty for its failure to do so. *Id.* § 9-625(b), (e)(4). By contrast, for other types of collateral, the secured party need not file a termination statement until it receives a sufficient demand from the debtor. *Id.* § 9-513(c) (secured party must file termination statement within 20 days after demand).

16. Article 9 provides a "safe harbor" form termination statement. *Id.* § 9-521(b). The comments make clear that a filing office that accepts written filings may not reject a filing using the safe harbor form on grounds of form or format. *Id.* § 9-521 cmt. 2.

17. *Id.* § 9-513(d) ("[U]pon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective.").

18. *See supra* note 15.

19. U.C.C. § 9-509(d)(2). If the debtor files a termination statement at a time when the secured party has not failed to meet its obligation to file a termination statement – e.g., if the secured obligation has not been satisfied, or if the obligation has been satisfied but the grace period has not yet expired – then the debtor's filed termination statement is not authorized and thus is not legally effective. *Id.* § 9-510(a) ("A filed record is effective only to the extent that it was filed by a person that may file it under Section 9-509."). In that case, the secured party's original financing statement would remain effective (at least for the remaining period of its ordinary effectiveness) to perfect the secured party's interest in the collateral.

A debtor-filed termination statement must explicitly indicate that the debtor authorized the filing of the termination statement. *Id.* § 9-509(d)(2). Thus, a third party searching the filing records and discovering a debtor-filed termination statement might well choose not to rely upon the effectiveness of the termination statement without first checking with the secured party to confirm that the secured obligation has been satisfied and that the secured party was in fact legally obligated to file a termination statement.

20. *Id.* § 9-515(a). A secured party may file a continuation statement that extends the effectiveness of the original financing statement by an additional five years. *Id.* § 9-515(e). If no continuation statement is filed in a timely manner, the effectiveness of the original financing statement lapses after five years and the original statement cannot be revived. *Id.* § 9-515(c).

In summary, Article 9's uniform procedures allow a personal property secured lender to establish systems that allow it to prepare termination statements in a standardized fashion, without regard to variations in state law (other than the amount of any filing fee).[21]

By contrast, clearance of title to mortgaged land is a morass. Each state has at least some pertinent legislation regarding a mortgagee's duty to prepare and/or record a satisfaction, but there are wide state-to-state variations in these statutes, particularly with respect to the time periods for compliance and the penalties for noncompliance.[22] Each state has legislation regarding the content of satisfaction documents and the technical requirements for their effective recording, but these statutes likewise vary from state to state. Even within each state, significant variations exist between filing jurisdictions (county, parish, district or otherwise) both as to recording fees and recorder-imposed technical requirements for land-related documents. Thus, in establishing systems to handle mortgage satisfactions, lenders holding a national portfolio of mortgage loans must take account of not only 50 different state mortgage satisfaction laws but also the technical recording regulations of approximately 3,650 recording offices.[23]

This nonuniformity has several undesirable effects. Most obviously, it increases the costs of providing mortgage satisfaction services, and there is little doubt (at least in most states) that consumers ultimately pay these increased costs.[24] Moreover, this nonuniformity encourages lenders to implement systems that discriminate in providing services between otherwise similarly-situated borrowers, based solely upon the relative strictness or laxity of the statute in the state where the mortgaged land is located. As the residential mortgage transaction has become increasingly standardized and less "local" in nature, this discrimination in customer service likely frustrates the reasonable expectations of the residential borrower. The remainder of Part III discusses these and other negative effects, while highlighting some of the key

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21. Filing fees can vary from state to state, but are at least consistent within each state. *Id.* § 9-525(a) & cmt. 1 (authorizing the imposition of filing fees and establishing a generally uniform fee structure, but not dictating specific fee amounts). Under pre-revision Article 9, there was substantial nonuniformity in the size of filing fees from state to state, and the drafters of the Article 9 revisions reasonably concluded that an attempt to impose a uniform fee structure would have threatened the enactability of revised Article 9.

22. *See infra* notes 68-114 and accompanying text.

23. The number "approximately 3,650" comes from Walt Wileman, retired CEO of Orion Financial Group, Inc., which handles filing of mortgage satisfactions and other land-related recordings for mortgage lenders that outsource these services.

24. In a few states, statutes obligate the mortgagee to provide a mortgage satisfaction without charge. *See, e.g.*, TENN. CODE ANN. § 66-25-115; W. VA. CODE § 38-12-1(a). In most states, however, mortgagees impose fees for providing mortgage satisfactions, at least where such fees are not prohibited by the mortgage loan documents. *See infra* notes 63-67 and accompanying text.

variations in current state mortgage satisfaction laws and the extent to which URMSA attempts to address these effects.

A. Payoff Statements

It is increasingly rare for residential mortgagors to pay off a mortgage debt at its originally scheduled maturity. With the housing boom and the increased mobility of today's society, the typical homeowner does not remain in the same home for the full mortgage amortization period. Further, during periods of declining mortgage interest rates, large numbers of homeowners refinance their existing mortgages prior to maturity. As a result, most mortgage payoffs occur in conjunction with a sale of the mortgaged property or a refinancing of the mortgage debt. In this situation, the mortgagor (or the mortgagor's closing agent) typically requests that the mortgagee provide a "payoff statement" specifying the balance of the mortgage debt as of the expected closing date.[25]

For personal property collateral, U.C.C. section 9-210 establishes a uniform rule that obligates a secured party to provide a payoff statement within 14 days after receipt of a sufficient request from the debtor.[26] If the secured party fails to provide a payoff statement in a timely fashion, it is liable for any actual damages suffered as a result of its failure,[27] plus a statutory penalty of $500 if its failure is without reasonable cause.[28]

By contrast, state law governing a mortgagee's obligation to provide a payoff statement is less clear. The Restatement of Mortgages provides that a mortgagee must provide a payoff statement within a "reasonable time" after a written request,[29] but less than one-third of the states have adopted statutes expressly regulating the timing and content of payoff statements, and almost no two states have identical statutes.[30] Arizona has adopted requirements

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25. Typically, the payoff statement reflects the principal and accrued interest balance as of a certain date, along an additional "per diem" amount to reflect the further daily accrual of interest thereafter, as well as any other costs or fees incurred by the mortgagee for which the mortgagor is responsible under the terms of the loan documents.

26. U.C.C. § 9-210(b)(1). Article 9 defines this statement as an "accounting" rather than a "payoff statement," but the difference is only terminological. *See id.* § 9-102(a)(4) ("accounting" is a record authenticated by secured party, indicating aggregate unpaid balance of the secured obligations, and identifying the components of the balance in reasonable detail).

27. *Id.* § 9-625(b).

28. *Id.* § 9-625(f).

29. RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 1.6(a) (1997).

30. The co-Reporters defended Section 1.6 on the authority of a number of existing analogous state statutes, *see id.* § 1.6 Reporters' Note, but Section 1.6 would be entirely defensible even if there were no such provisions. As with any contract, a mortgage would implicitly place a duty of good faith and fair dealing upon the mort-

roughly comparable to those found in Article 9,[31] and California and Nevada have adopted similar provisions slightly more favorable to mortgagees.[32] Statutes in Florida, Iowa, Maryland, Michigan, Tennessee, and West Virginia require that a payoff statement be provided to the borrower within varying periods (ranging from three to twenty-five days to a "reasonable time" following request), but do not address sanctions for noncompliance with this obligation.[33] Connecticut obligates the mortgagee to provide a payoff statement by a specific date identified in a written request received at least 10 days earlier, with the mortgagee unable to recover any interest that accrues during the period of its noncompliance.[34] New York statutes require a mortgagee of an owner-occupied, one-to-six family residential structure or condominium unit to provide a payoff statement within 30 days of a written demand; the mortgagee is liable for actual damages caused by its failure to comply (but not for a penalty).[35] North Dakota requires a servicer to provide a payoff statement within 7 business days after receipt of a written request and subjects the servicer to liability for any damages caused by its noncompliance.[36] Vermont's statute requires a mortgagee to provide a payoff statement within five business days of receiving a written request, and imposes statutory damages of $25 per day (up to a maximum total of $5,000) for noncompliance.[37] The remaining states – other than North Carolina and Virginia, which have enacted URMSA – have no statutory provisions governing the timing and/or content of payoff statements by mortgagees.

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gagee in the performance and enforcement of the mortgage. Further, the general practice of lenders to provide payoff statements would undoubtedly constitute part of the mortgage "agreement," even if that mortgage did not so expressly provide. The mortgagee's obligation to perform and enforce the mortgage in good faith would thus effectively obligate the mortgagee to provide a payoff statement (leaving aside what costs or fees the mortgagee might impose) unless the mortgage agreement expressly negated any such obligation.

31. ARIZ. REV. STAT. ANN. § 33-715 (mortgagee shall provide payoff statement within 14 days of request; liability for actual damages and $500 penalty for willful noncompliance).

32. CAL. CIV. CODE § 2943(c), (e)(4) (mortgagee shall provide payoff statement within 21 days of request; liability for actual damages and $300 penalty for willful noncompliance); NEV. REV. STAT. §§ 107.200, 107.300(1) (same).

33. *See, e.g.*, FLA. STAT. ANN. § 701.04(1) (14 days after receipt of written request); IOWA CODE § 535B.11(4) (10 days after written request); MD. CODE ANN., COM. LAW § 12-1025(a), (c) (within a "reasonable time" following request); MICH. COMP. LAWS ANN. § 445.1674(1) (25 days after written request); TENN. CODE ANN. § 45-13-114 (14 days after written request); W. VA. CODE § 31-17-9(d) (3 business days).

34. CONN. GEN. STAT. ANN. § 49-10a.

35. N.Y. REAL PROP. LAW § 274-a(2)(a), (b)(iv).

36. N.D. CENT. CODE § 35-03-18.

37. VT. STAT. ANN. tit. 27, § 464(a).

Although state law governing payoff statements varies significantly, no available empirical evidence indicates that lack of uniform payoff statement regulations has produced systematic negative effects for mortgagors. While few statutes expressly impose an obligation upon the mortgagee to provide a payoff statement, it seems likely that courts would conclude that the mortgagee's duty of good faith does obligate a lender to respond to a request for a payoff statement within a reasonable time.[38] Further, while existing statutory grace periods vary dramatically, anecdotal evidence suggests that most mortgagees (or their servicers) respond to payoff statement requests almost immediately. Most lenders have now implemented systems that make loan information available to customers via telephone or the internet in nearly instantaneous fashion. Nevertheless, during the drafting of URMSA, observers from the closing services industry anecdotally suggested that some mortgagees would "drag their feet" in providing payoff statements during peak refinancing periods and use the period of delay to solicit (often aggressively) retention of the customer's business (e.g., "refinance with us rather than a different lender"). Accordingly, the URMSA Drafting Committee agreed to adopt a provision similar in nature to U.C.C. section 9-210. As promulgated, URMSA requires the mortgagee to provide a payoff statement within 10 days following proper request,[39] and permits the borrower to recover any actual damages caused by the mortgagee's noncompliance along with a civil penalty of $500 (but not punitive damages in excess of the statutory penalty).[40]

B. The Mechanics of Compliance with the Duty to Satisfy a Mortgage

Article 9 provides a procedure for personal property title clearance that is identical in all 50 states. The secured party prepares a standard form termination statement, which only requires the secured party to insert the file number of the initial financing statement and check the appropriate box marked "TERMINATION."[41] A secured party can thus have its staff prepare termination statements in a standardized fashion without concern about widespread variations in state law (other than the amount of any filing fee, which can vary from state to state but is at least consistent within each state). By contrast, as discussed below, the mechanical procedures for satisfying mortgages vary much more dramatically from state to state, and even from recorder to recorder within a state.

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38. *See supra* note 30.

39. URMSA § 201(c).

40. *Id.* § 201(i).

41. U.C.C. § 9-521(b). The safe-harbor form states, in full: "TERMINATION: Effectiveness of the Financing Statement identified above is terminated with respect to security interest(s) of the Secured Party authorizing this Termination Statement."

1. What Must a Satisfaction Document Contain?

As discussed earlier,[42] while a few states appear to retain the requirement for a marginal notation,[43] today satisfaction typically occurs by means of a recorded certificate of satisfaction or release. While satisfaction by recorded certification has become the norm, there is substantial state-to-state variation in the form and content of the certification. Some states impose no specific requirements or merely state that a certification must appear in recordable form (i.e., properly executed and acknowledged in compliance with any technical requirements for recordation) and recite that the mortgage debt has been satisfied.[44] Some states provide specific satisfaction forms, either for mandatory use or as "safe harbor" forms.[45] Some states require that a satisfaction must indicate who prepared it and/or be signed by that person.[46] Several statutes require that the satisfaction recite information like the legal description of the property[47] or any intermediate recorded assignments of the

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42. *See supra* note 8.

43. *See, e.g.*, ALA. CODE § 35-10-27; MISS. CODE ANN. § 89-5-21(1). Arkansas and Rhode Island nominally require marginal notation, but an executed and recorded certificate appears equivalent to a marginal notation. ARK. CODE ANN. §§ 18-40-104(a), -107(b); R.I. GEN. LAWS §§ 34-26-2(a), -3, -6. Statutes in Georgia, Idaho, New Jersey, South Dakota and Wyoming appear to require both a recorded certification and a marginal notation. GA. CODE ANN. § 44-14-4; IDAHO CODE ANN. § 45-914; N.J. STAT. ANN. § 46:18-12; S.D. CODIFIED LAWS § 44-8-14; WYO. STAT. ANN. § 34-1-130. Ohio law requires a marginal notation unless the county recorder elects to require satisfactions by recorded certificate. OHIO REV. CODE ANN. § 5301.36(A). Tennessee permits satisfaction by marginal notation in certain counties. TENN. CODE ANN. § 66-25-101(b).

44. *See, e.g.*, ALASKA STAT. § 34.20.030; ARIZ. REV. STAT. ANN. § 33-707(A); ARK. CODE ANN. § 18-40-107(b); FLA. STAT. ANN. § 701.04; GA. CODE ANN. § 44-14-4; HAW. REV. STAT. § 506-8; IDAHO CODE ANN. § 45-913; 765 ILL. COMP. STAT. ANN. 905/2; IND. CODE ANN. § 32-29-1-7; IOWA CODE § 655.1; LA. REV. STAT. ANN. § 9:5385(A); ME. REV. STAT. ANN. tit. 33, § 551; MICH. COMP. LAWS ANN. § 565.42; MINN. STAT. ANN. § 507.40; MONT. CODE ANN. § 71-1-211; NEB. REV. STAT. § 76-253; NEV. REV. STAT. §§ 106.270, 106.280 (mortgages); NEV. REV. STAT. § 107.073(3) (deeds of trust); N.J. STAT. ANN. §§ 46:18-1, -5.1; N.M. STAT. ANN. § 48-7-4; N.Y. REAL PROP. ACTS. LAW § 1921(1); OKLA. STAT. ANN. tit. 46, § 16; OR. REV. STAT. § 86.100; TENN. CODE ANN. § 66-25-101(a); VA. CODE ANN. § 55-66.3(A)-(C); WASH. REV. CODE ANN. § 61.16.020; W. VA. CODE § 38-12-1(b); WIS. STAT. ANN. § 706.05(8).

45. *See, e.g.*, CONN. GEN. STAT. ANN. § 49-9(a); DEL. CODE ANN. tit. 25, § 2111(b); N.H. REV. STAT. ANN. § 479:7(I); N.C. GEN. STAT. §§ 47-46.1 to -46.2; N.D. CENT. CODE § 35-03-16; 21 PA. CONS. STAT. ANN. § 721-5; S.D. CODIFIED LAWS § 44-8-5; VT. STAT. ANN. tit. 27, § 463(a); W. VA. CODE § 38-12-4(a); WYO. STAT. ANN. § 34-2-113.

46. *See, e.g.*, KY. REV. STAT. ANN. § 382.335(1).

47. *See, e.g.*, KAN. STAT. ANN. § 58-2306(a); OHIO REV. CODE ANN. § 5301.46(B); S.D. CODIFIED LAWS § 44-8-14. The Massachusetts statute requires the

mortgage.[48] Further, in states that use deeds of trust rather than mortgages, there is an additional complication. Statutes in some deed of trust states (predominantly in the east and midwest) permit the beneficiary to execute an effective satisfaction document, without any need for the trustee's signature.[49] In other states, however (predominantly western states), statutes expressly obligate the trustee to execute the necessary satisfaction documentation.[50]

This nonuniformity produces deadweight costs by requiring lenders to implement unduly complicated systems for providing satisfactions. The costs of these systems might be justified if state or local variations served *any* meaningful function protective of either borrowers or the recording system – but nearly all existing variations serve no such function. For example, there is no useful purpose served to require that a satisfaction document include a legal description of the mortgaged land (except in the rare situation where that description is actually necessary for proper indexing).[51] Likewise, there is no useful purpose served by requiring the recording data for intermediate recorded assignments (which should appear in the recorded chain of title anyway) or the identity of the document's preparer. This information is not needed for a satisfaction to fulfill its intended function – to communicate to searchers that the mortgage is no longer effective. Likewise, there is no reason to require both the beneficiary and the trustee of a deed of trust to execute a satisfaction document. The trustee's unique role in the lending transaction – to facilitate a foreclosure sale after default – bears no relation to voluntary satisfaction of the mortgage debt.[52] As there is no protective function served by requiring the trustee's signature, there is no reason to require the

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inclusion of the street address of the mortgaged property, but does make clear that failure to include the address does not affect the validity of the release. MASS. GEN. LAWS ANN. ch. 183, § 54(b). The North Dakota and Pennsylvania statutes do not expressly require the inclusion of a description of the mortgaged property, but have "safe harbor" forms that include a place for such a description. N.D. CENT. CODE § 35-03-16; 21 PA. CONS. STAT. ANN. § 721-5.

48. *See, e.g.*, DEL. CODE ANN. tit. 25, § 2111(b).

49. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-707(A); MO. REV. STAT. § 443.060(1); VA. CODE ANN. § 55-66.3(B)-(C); W. VA. CODE §§ 38-12-1(a), -4(a).

50. *See, e.g.*, NEV. REV. STAT. § 107.073(1); N.M. STAT. ANN. § 48-7-4(A); OR. REV. STAT. § 86.720(1); UTAH CODE ANN. § 57-1-33.1(1)(a); WASH. REV. CODE ANN. § 61.24.110.

51. Obviously, in a jurisdiction with tract indexing, the satisfaction would need to include a legal description of the property because indexing occurs based on that description rather than upon the names of the mortgagor and the mortgagee. The vast majority of recording offices, however, still use name indexes rather than tract indexes. *See, e.g.*, STOEBUCK & WHITMAN, *supra* note 2 § 11.11, at 892-93 & n.1.

52. See 1 GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 7.21, at 683-86 (4th ed. 2002), for a discussion of the limited nature of trustee's role and duties owed to mortgagor under a deed of trust.

mortgagee to incur the cost involved in obtaining it (a significant cost, if the original trustee has died or cannot be located).

For this reason, URMSA provides for standardized content for mortgage satisfaction documents,[53] eliminates any need for the trustee under a deed of trust to sign the satisfaction document,[54] and limits the permissible reasons for which a recorder may refuse a satisfaction document (thereby addressing significant anecdotal concerns about the propensity of recorders to "flyspeck" and reject satisfactions).[55]

2. Must the Mortgagee Deliver the Satisfaction, or Actually Record It?

Statutes in most states expressly obligate the mortgagee to both execute and record the satisfaction.[56] In a significant minority of states, however, the

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53. URMSA provides that a document is a "satisfaction" if it

> (1) identifies the security instrument, the original parties to the security instrument, the recording data for the security instrument, and the office in which the security instrument is recorded; (2) states that the person signing the satisfaction is the secured creditor; (3) contains a legal description of the real property identified in the security instrument, but only if a legal description is necessary for a satisfaction to be properly indexed; (4) contains language terminating the effectiveness of the security instrument; and (5) is signed by the secured creditor and acknowledged as required by law for a conveyance of an interest in real property.

URMSA § 204(a).

54. While URMSA section 204(a)(5) requires that a satisfaction document be signed by the secured creditor, URMSA section 102(14) makes clear that "[t]he term [secured creditor] does not include a trustee under a security instrument." *See also id.* § 102 cmt. 13.

55. Under URMSA, the recorder may not reject a document that contains the information in section 204(a) unless

> (1) an amount equal to or greater than the applicable recording fees and taxes is not tendered; (2) the document is submitted by a method or in a medium not authorized by the [appropriate governmental office under the recording act of this state]; or (3) the document is not signed by the secured creditor and acknowledged as required by law for a conveyance of an interest in real property.

Id. § 204(b).

56. GA. CODE ANN. § 44-14-3(b)(1); KAN. STAT. ANN. § 58-2309a(a); KY. REV. STAT. ANN. § 382.365(1); ME. REV. STAT. ANN. tit. 33, § 551; MICH. COMP. LAWS ANN. § 565.41; MINN. STAT. ANN. § 507.41; MISS. CODE ANN. § 89-5-21(1); NEV. REV. STAT. § 106.290(1) (mortgages); NEV. REV. STAT. § 107.077(2) (deeds of trust); N.H. REV. STAT. ANN. § 479:7(II); N.J. STAT. ANN. § 46:18-11.2(a)-(b); N.M. STAT. ANN. § 48-7-4(A); N.D. CENT. CODE § 35-01-27; OHIO REV. CODE ANN. § 5301.36(B); OKLA. STAT. ANN. tit. 46, § 15(A); 21 PA. CONS. STAT. ANN. § 721-6(d); R.I. GEN. LAWS § 34-26-2(a); S.C. CODE ANN. §§ 29-3-310 to -320; TENN. CODE ANN. § 66-25-102(a); WIS. STAT. ANN. § 706.05(10). Missouri law traditionally allowed the mortgagee to deliver a recordable satisfaction to the mortgagor, but Mis-

mortgagee need only execute the document in recordable form and deliver it to the landowner.[57] Thus, a satisfaction document sent to the mortgagor will go unrecorded if the mortgagor fails to present the document for recording. Perhaps not surprisingly, some title-clearance problems occur because an unsophisticated mortgagor received a satisfaction but placed it among the mortgagor's personal effects rather than recording it.[58]

Most existing state statutes obligate the mortgagee to record the satisfaction directly, and Article 9 uniformly obligates secured parties to file termination statements in cases involving consumer borrowers.[59] Thus, URMSA requires the mortgagee to record the satisfaction rather than just prepare it and transmit it to the landowner.[60] This position is sound, as residential mortgagees are systematically better situated than residential mortgagors to carry out this responsibility. Residential mortgagees are as well or better positioned than residential mortgagors to appreciate the practical consequences if title clearance does not occur.[61] Further, as "repeat players," residential

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souri amended its statute in 2004 to require the mortgagee to submit the satisfaction for recording. MO. REV. STAT. § 443.060(1). New York, North Carolina, and Virginia require the mortgagee to present the satisfaction for recording unless the mortgagor directs that it be delivered to the mortgagor. N.Y. REAL PROP. ACTS. LAW § 1921(1); N.C. GEN. STAT. § 45-36.3(a); VA. CODE ANN. § 55-66.3(A)(1).

57. 765 ILL. COMP. STAT. ANN. 905/2; LA. REV. STAT. ANN. § 9:5385(A); MASS. GEN. LAWS ANN. ch. 183, § 55; MONT. CODE ANN. § 71-1-212; NEB. REV. STAT. § 76-252; OR. REV. STAT. § 86.140 (mortgages);, OR. REV. STAT. § 86.720(1) (deeds of trust); S.D. CODIFIED LAWS § 44-3-8; VT. STAT. ANN. tit. 27, § 464(b); W. VA. CODE § 38-12-1(a); WYO. STAT. ANN. § 34-1-132(a). In a few of these states, if the mortgagee delivers the satisfaction to the mortgagor rather than recording it, the satisfaction must bear a conspicuous legend indicating that the mortgagor needs to record the document with the recorder. *See, e.g.*, 765 ILL. COMP. STAT. ANN. 905/2; WASH. REV. CODE ANN. §§ 61.16.020-.030.

58. Or worse. In popular culture, some mortgagors have been known to ceremonially burn their mortgage once the mortgage has been paid off – a tradition reflected in a famous *All in the Family* episode in which Archie and Edith Bunker staged a mortgage-burning party. There are, of course, apocryphal stories of mortgagors setting fire to their paid-off mortgages and inadvertently burning down the mortgaged property. *See, e.g.*, Free at Last: Should You Burn Your Mortgage When You're Done Paying It Off?, http://consumerist.com/consumer/free-at-last/should-you-burn-your-mortgage-when-youre-done-paying-it-off-265840.php (last visited Oct. 30, 2007). Perhaps not surprisingly, some lenders tell stories of having delivered recordable satisfactions to mortgagors and later being asked to execute another satisfaction because the unsophisticated mortgagor had burned the satisfaction along with the mortgage.

59. U.C.C. § 9-513(a).

60. URMSA § 203(a).

61. Lending industry observers to the URMSA suggested anecdotally that lenders in "delivery" states (i.e., states where the lender need only deliver a recordable satisfaction document to the mortgagor) often comply with their statutory obligations

mortgagees are better able to carry out the burden of recording satisfactions at a lower cost.[62]

3. Payment of Costs and Fees for Preparing and/or Recording Satisfactions

Can the mortgagee charge the mortgagor a fee for preparing and/or recording a satisfaction document? This question generates substantial disagreement, driven by the differing assumptions of the parties. A residential mortgagor commonly expects that the mortgagee has priced the cost of preparing and/or recording a satisfaction into the interest rate – or at least that the mortgagee should have done so. Thus, mortgagors often express the view that the mortgagee should prepare and record the satisfaction at no additional charge to the mortgagor. By contrast, mortgagees argue that they cannot accurately price the cost of this service into the interest rate at origination because of (a) the potential for changes in the law over the term of the mortgage and (b) the inability to predict accurately how the cost of providing satisfaction services will increase over time (compounded by the uncertainty about the time period during which the mortgage will remain outstanding). Thus, mortgagees argue that they should be able to charge a reasonable additional fee for preparing and/or recording a satisfaction.

Roughly one-half of the states have statutory provisions addressing this issue, but again significant nonuniformity abounds. Two states (West Virginia and Tennessee) require the mortgagee to provide a satisfaction at no charge.[63] Some states permit the mortgagee to impose a "reasonable" fee for this service, with a few establishing a particular dollar amount as reasonable.[64] Others provide that the mortgagee may recover the "cost" or the "rea-

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but nevertheless receive complaints from mortgagors that never recorded the satisfaction document.

62. Recorders typically charge a standard fee for recording mortgages and do not provide a "volume discount" to institutional mortgagees filing large numbers of satisfactions. Nevertheless, it is still more costly for mortgagors to record satisfactions if one considers that the cost of doing so includes the cost of identifying the location of the recorder and the cost of transmitting satisfaction documents for recording. As repeat players who would execute and record satisfactions in higher volume, mortgagees would presumably have lower search, preparation, and transmittal costs than mortgagors.

63. TENN. CODE ANN. § 66-25-115; W. VA. CODE § 38-12-1(a).

64. *See, e.g.*, ALASKA STAT. § 34.20.050; CAL. CIV. CODE § 2941(e)(1)-(2) (fee up to $45 conclusively presumed reasonable); IDAHO CODE ANN. § 45-1502(6) (trustee under deed of trust entitled to reasonable charge for reconveyance service); MICH. COMP. LAWS ANN. § 565.44 (mortgagor must pay reasonable charge before it can recover in civil action); MINN. STAT. ANN. § 507.41 (mortgagor must tender mortgagee's reasonable charge for satisfaction); NEV. REV. STAT. § 107.077(7) (trustee may charge a reasonable fee for preparation, execution or recordation of satisfaction, not to exceed $100); N.H. REV. STAT. ANN. § 479:10 (mortgagee may collect "rea-

sonable cost" of providing this service, but these formulations leave it ambiguous whether the lender must base its fee on fixed or variable costs and whether "reasonable" cost may include a profit margin.[65] The remaining states are silent, and mortgagees in these states typically do charge fees for preparing and/or recording mortgage satisfactions, at least where such fees are either expressly authorized or not specifically prohibited by the mortgage loan documents.[66]

Under the existing nonuniform regime, mortgagors in different states thus receive substantially similar satisfaction services from the same mortgagee, but pay different prices for these services – a result that has become increasingly troublesome, as a normative matter, as the mortgage transaction

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sonable" charge for preparing satisfaction); N.H. REV. STAT. ANN. § 479:7(II) (mortgagee may collect fee for recording if mortgagor received written disclosure fee would be charged); N.J. STAT. ANN. § 46:18-11.2(b)(2) (mortgagor must pay release recording fee and service fee up to $25, provided mortgagor received notice of these fees); OR. REV. STAT. § 86.140 (mortgagor must tender "reasonable charges" to obtain satisfaction); OR. REV. STAT. § 86.720(1), (7) (trustee under deed of trust may charge a reasonable fee for preparation, execution and recordation of reconveyance); 21 PA. CONS. STAT. ANN. § 682 (mortgagor must tender "reasonable charges" to obtain satisfaction); R.I. GEN. LAWS § 34-26-5(a) (mortgagor must tender "reasonable charges" to obtain satisfaction); S.C. CODE ANN. § 29-3-320 (mortgagee may charge statutory recording fee and additional fee up to $25 to process satisfaction); TEX. FIN. CODE ANN. § 342.307(1) (contract governing secondary mortgage loan may provide borrower's payment of fees to trustee relating to trust deed, including fees relating to release); VT. STAT. ANN. tit. 9, § 42(a)(5) (mortgagee may collect filing and recording fees); VA. CODE ANN. § 55-66.6 (mortgagor must pay recording fee).

65. *See, e.g.*, ALASKA STAT. § 34.20.050 ("reasonable"); COLO. REV. STAT. ANN. § 38-35-124 (reasonable costs of procuring and recording the release documents); DEL. CODE ANN. tit. 25, § 2111(a) (must pay cost of recording satisfaction); DEL. CODE ANN. tit. 25, § 2116 (must pay cost of execution and acknowledgment of reconveyance); GA. CODE ANN. § 44-14-3(b)(3) (cost of recording cancellation or satisfaction, if added to payoff statement); MO. REV. STAT. § 443.060(1) (party requesting satisfaction must pay cost of satisfaction); N.D. CENT. CODE § 35-03-16 (mortgagee may add amount of recording fee to balance of debt); OHIO REV. CODE ANN. § 5301.36(B) (mortgagee may recover cost of recording fee by contract with mortgagor); WIS. STAT. ANN. § 706.05(10)(d) (mortgagee may charge mortgagor for cost of recording fees).

66. For example, the Fannie Mae/Freddie Mac Connecticut Uniform Mortgage Deed contains the following language:

> In regard to any [fees other than ones associated with the Borrower's default], the absence of express authority in this Security Instrument to charge a specific fee to Borrower shall not be construed as a prohibition on the charging of such fee. Lender may not charge fees that are expressly prohibited by this Security Instrument or by Applicable Law.

Connecticut – Single Family – Fannie Mae/Freddie Mac Uniform Instrument (Form 3007), ¶ 14, Jan. 2001, *available at* https://www.efanniemae.com/sf/formsdocs/documents/secinstruments/doc/3007w.doc.

has become more national in character. A reasonable uniform satisfaction preparation fee would prevent the differential treatment of otherwise-similarly-situated residential mortgagors. Unfortunately, URMSA did not address this issue, as the drafting committee ultimately concluded that a uniform satisfaction fee was politically unrealistic.[67]

C. Grace Periods for Mortgagee Compliance

As discussed in Part II, the geographical and bureaucratic separation of mortgagor, mortgagee, and servicer means that even the most conscientious of mortgagees needs some period of time post-closing to execute and record a satisfaction. While nearly all state laws permit some grace period, there is widespread variation in the length of that period.[68] Some states have ex-

67. URMSA § 203 cmt. 6. While a uniform recording fee might also be a good idea in theory, URMSA likewise rejected this as impracticable given the revenue implications for local government entities currently charging a higher fee.

68. ALA. CODE § 35-10-30(a) (30 days); ALASKA STAT. § 34.20.050 (10 days); ARIZ. REV. STAT. ANN. § 33-712(A), (B) (30 days); ARK. CODE ANN. § 18-40-104(d) (60 days); CAL. CIV. CODE § 2941(a), (b) (30 days); CONN. GEN. STAT. ANN. § 49-8(c) (60 days); DEL. CODE ANN. tit. 25, § 2111(a) (60 days); FLA. STAT. ANN. § 701.03 (60 days); GA. CODE ANN. § 44-14-3(b)(1) (60 days); HAW. REV. STAT. § 506-8 (60 days); 765 ILL. COMP. STAT. ANN. 905/4 (1 month); IND. CODE ANN. § 32-28-1-2(a) (15 days); IOWA CODE § 655.3 (30 days; applicable to mortgagees), IOWA CODE § 535B.11(5) (45 days, applicable to servicers; then notice and 15 additional days); KAN. STAT. ANN. § 58-2309a(a) (20 days); KY. REV. STAT. ANN. § 382.365 (30 days; then notice and additional 15 days); LA. REV. STAT. ANN. § 9:5385(A) (30 days, extended to 60 days for certain federally-related or out-of-state lenders); ME. REV. STAT. ANN. tit. 33, § 551 (60 days); MD. CODE ANN., REAL PROP. § 7-106(e) (30 days); MASS. GEN. LAWS ANN. ch. 183, § 55 (45 days); MICH. COMP. LAWS ANN. § 565.44 (75 days if before Dec. 27, 2006; 60 days if on or after Dec. 27, 2006); MINN. STAT. ANN. § 507.41 (10 days; 60 days if mortgagee is not Minnesota resident); MISS. CODE ANN. § 89-5-21(2) (1 month); MO. REV. STAT. § 443.130(1) (45 days); MONT. CODE ANN. § 71-1-212 (90 days); NEB. REV. STAT. § 76-252 (60 days; applicable to mortgages); NEB. REV. STAT. § 76-1014.01 (60 days; applicable to deeds of trust); NEV. REV. STAT. § 106.290(1) (21 days; applicable to mortgages); NEV. REV. STAT. § 107.077(1) (21 days; applicable to deeds of trust); N.H. REV. STAT. ANN. § 479:7(II) (60 days); N.J. STAT. ANN. §§ 46:18-11.2(b), -11.3(a) (30 days, then notice and additional 15 days); N.Y. REAL PROP. ACTS. LAW § 1921(1) (45 days); N.Y. REAL PROP. ACTS. LAW § 1921(4) (90 days where premises are one-to-six family owner-occupied residential unit); N.C. GEN. STAT. § 45-36.3 (60 days, then notice and additional 30 days); N.D. CENT. CODE § 35-01-27 (shorter of 60 days from full payment or 30 days from full payment and written demand); OHIO REV. CODE ANN. § 5301.36 (90 days for residential mortgages); OKLA. STAT. ANN. tit. 46, § 15(A) (50 days, then notice and additional 10 days); OR. REV. STAT. § 86.140 (30 days; applicable to mortgages); OR. REV. STAT. § 86.720(1) (30 days; applicable to deeds of trust); 21 PA. CONS. STAT. ANN. § 682 (45 days); R.I. GEN. LAWS § 34-26-5(a) (10 days); S.C. CODE ANN. § 29-3-320 (3 months); S.D. CODIFIED LAWS § 44-3-8 (10 days); TENN. CODE ANN. §

tremely short grace periods – seven days in Michigan,[69] and ten days in Alaska,[70] Minnesota,[71] Rhode Island,[72] and South Dakota.[73] By contrast, Montana,[74] New York,[75] Ohio,[76] South Carolina,[77] and Utah[78] permit the mortgagee a grace period of ninety days. The median statutory grace period is currently forty-five days in duration.[79]

Furthermore, not all states agree as to exactly what event triggers the relevant grace period. Statutes in thirteen states require no formal demand by

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66-25-102(a) (45 days); UTAH CODE ANN. § 57-1-38(3) (90 days); VT. STAT. ANN. tit. 27, § 464(b) (30 days); VA. CODE ANN. § 55-66.3(A)(1) (90 days); WASH. REV. CODE ANN. § 61.16.030 (60 days); W. VA. CODE § 38-12-1(a) (30 days); WIS. STAT. ANN. § 706.05(10)(a)-(b) (shorter of 30 days from full payment or 7 days from full payment and written request); WYO. STAT. ANN. § 34-1-132(a) (30 days).

Idaho, and New Mexico do not provide a specific grace period. The Idaho statute requires the mortgagee to act "immediately." IDAHO CODE ANN. § 45-915. The New Mexico statute obligates the mortgage to cause a satisfaction to be entered, but states no time period during which this must occur. N.M. STAT. ANN. § 48-7-4(A).

69. MICH. COMP. LAWS ANN. § 565.44.

70. ALASKA STAT. § 34.20.050.

71. MINN. STAT. ANN. § 507.41. The Minnesota statute does extend the grace period to 60 days, however, if the mortgagee does not reside in Minnesota.

72. R.I. GEN. LAWS § 34-26-5(a).

73. S.D. CODIFIED LAWS § 44-3-8.

74. MONT. CODE ANN. § 71-1-212.

75. N.Y. REAL PROP. ACTS. LAW § 1921(4) (where mortgaged premises consist of one-to-six family owner-occupied residential unit).

76. OHIO REV. CODE ANN. § 5301.36 (residential mortgages).

77. S.C. CODE ANN. § 29-3-320 (grace period stated as three months rather than ninety days).

78. UTAH CODE ANN. § 57-1-38(3).

79. To identify a true "median" grace period is somewhat inexact. Several states have statutes that contain essentially two grace periods. For example, Oklahoma provides the mortgagee with a fifty-day grace period after receiving full payment, but further provides that an aggrieved party cannot recover damages or penalties without also making written demand and providing the mortgagee with an additional ten days in which to record the satisfaction. OKLA. STAT. ANN. tit. 46, § 15(A). For purposes of calculating a median, I combined these two periods and treated the Oklahoma statute (and other similar statutes) as if it had one sixty-day grace period. Likewise, in a few states, the mortgagor can effectively shorten the otherwise applicable grace period by making demand that the mortgagee record a satisfaction in a shorter period of time. For example, the Wisconsin statute typically accords the mortgagee with a thirty-day grace period following receipt of full payment, but also requires that the mortgagee must provide the satisfaction within seven days after it receives both full payment and a written request for the satisfaction. WIS. STAT. ANN. § 706.05(10). *See also* N.D. CENT. CODE § 35-01-27 (grace period is shorter of sixty days from full payment or thirty days from full payment and written demand). The overall median grace period remained forty-five days, regardless of whether I calculated it using the shorter or longer grace period for these states.

the mortgagor; the grace period is triggered upon full payment of the mortgage debt.[80] In the majority of states, however, the grace period does not begin to run – and thus the mortgagee has no liability for noncompliance – until the mortgagee first receives a sufficient demand or request.[81] Most states require a written demand;[82] but statutes in several states contain no such express requirement,[83] leaving open the possibility that an oral request

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80. CAL. CIV. CODE § 2941(a) (applicable to mortgages); DEL. CODE ANN. tit. 25, § 2111(a); FLA. STAT. ANN. § 701.03; ME. REV. STAT. ANN. tit. 33, § 551; MASS. GEN. LAWS ANN. ch. 183, § 55; MINN. STAT. ANN. § 507.41 (no demand necessary to trigger 60-day grace period applicable to mortgagee that is not Minnesota resident); N.H. REV. STAT. ANN. § 479:7(II); N.Y. REAL PROP. ACTS. LAW § 1921(1), (4); OHIO REV. CODE ANN. § 5301.36; OR. REV. STAT. § 86.720(1) (applicable to deeds of trust); UTAH CODE ANN. § 57-1-38(3); VT. STAT. ANN. tit. 27, § 464(b); WIS. STAT. ANN. § 706.05(10).

81. ALA. CODE § 35-10-27, -30; ALASKA STAT. § 34.20.050; ARK. CODE ANN. § 18-40-104(c), (d) (60 days); CAL. CIV. CODE § 2941(b)(1)-(2) (applicable to deeds of trust); CONN. GEN. STAT. ANN. § 49-8(c); GA. CODE ANN. § 44-14-3(c); HAW. REV. STAT. § 506-8; 765 ILL. COMP. STAT. ANN. 905/2, 4; IND. CODE ANN. § 32-28-1-2(a); IOWA CODE § 655.3 (notice requirement not applicable to nonresident mortgagees); IOWA CODE § 535B.11(4); KAN. STAT. ANN. § 58-2309a(a); KY. REV. STAT. ANN. § 382.365; LA. REV. STAT. ANN. § 9:5385(A); MD. CODE ANN., REAL PROP. § 7-106(e); MICH. COMP. LAWS ANN. § 565.44; MINN. STAT. ANN. § 507.41 (applies only to mortgagees residing in Minnesota and thereby subject to 10-day grace period); MISS. CODE ANN. § 89-5-21(2); MO. REV. STAT. § 443.130(1); MONT. CODE ANN. § 71-1-212; NEB. REV. STAT. §§ 76-252, 76-1014.01; NEV. REV. STAT. §§ 106.290(1), 107.077(1); N.J. STAT. ANN. §§ 46:18-11.2(b), -11.3(a); N.C. GEN. STAT. § 45-36.3; N.D. CENT. CODE § 35-01-27; OKLA. STAT. ANN. tit. 46, § 15(A); OR. REV. STAT. § 86.140 (applicable to mortgages); 21 PA. CONS. STAT. ANN. § 682; R.I. GEN. LAWS § 34-26-5(a); S.C. CODE ANN. § 29-3-320; S.D. CODIFIED LAWS § 44-3-8; TENN. CODE ANN. § 66-25-102(a); VA. CODE ANN. § 55-66.3(A)(1); WASH. REV. CODE ANN. § 61.16.030; W. VA. CODE § 38-12-10; WYO. STAT. ANN. § 34-1-132(a).

82. ALA. CODE § 35-10-27; ALASKA STAT. § 34.20.050; ARIZ. REV. STAT. ANN. § 33-712(B); CONN. GEN. STAT. ANN. § 49-8(c); GA. CODE ANN. § 44-14-3(b)(1); HAW. REV. STAT. § 506-8; IND. CODE ANN. § 32-28-1-2(a); IOWA CODE § 535B.11(4) (written notice required before fine imposed upon servicer); KAN. STAT. ANN. § 58-2309a(a); KY. REV. STAT. ANN. § 382.365(3)-(4); LA. REV. STAT. ANN. § 9:5385(A); MD. CODE ANN., REAL PROP. § 7-106(d); MISS. CODE ANN. § 89-5-21(2); MO. REV. STAT. § 443.130(1)-(2); NEB. REV. STAT. §§ 76-252, 76-1014.01; NEV. REV. STAT. §§ 106.290(1), 107.077(1); N.J. STAT. ANN. § 46:18-11.3(a); N.C. GEN. STAT. § 45-36.3(b); N.D. CENT. CODE § 35-01-27; OKLA. STAT. ANN. tit. 46, § 15(A); S.C. CODE ANN. § 29-3-320 (language "certified mail, or other form of delivery" strongly suggestive of writing requirement); S.D. CODIFIED LAWS § 44-3-8; TENN. CODE ANN. § 66-25-102(a); WIS. STAT. ANN. § 706.05(10); WYO. STAT. ANN. § 34-1-132(a).

83. IDAHO CODE ANN. § 45-915; 765 ILL. COMP. STAT. ANN. 905/4; IND. CODE ANN. § 32-28-1-2(a) (15 days); IOWA CODE § 655.3 (applicable to mortgagees); MICH. COMP. LAWS ANN. § 565.44; MINN. STAT. ANN. § 507.41; MONT. CODE ANN. § 71-1-212; OR. REV. STAT. § 86.140 (applicable to mortgages); 21 PA. CONS. STAT.

(such as a verbal request at a face-to-face closing or a telephone request) could trigger the grace period and the mortgagee's potential liability for noncompliance. Furthermore, because most satisfaction statutes predate modern electronic communications technology (such as electronic mail), most of those statutes do not explicitly address the extent to which a "demand" or "request" could be sufficient if provided in electronic form.[84]

Disparity in state law grace periods seems increasingly hard to justify as a normative matter. The shorter grace periods may have been reasonable as applied to the classic "local" mortgage transaction, but a seven-day or ten-day period pushes the bounds of practicability as applied to today's residential mortgage loan. By contrast, a grace period of ninety days far exceeds the time needed for even an incompetent lender to satisfy its duty. Variation in state grace periods encourages lenders to discriminate between otherwise-similarly-situated mortgagors; one would predict that national mortgage lenders would structure their systems to provide satisfactions for customers in short-grace-period states before those in longer-grace-period states. While perfectly predictable, this behavior is likely inconsistent with the expectations of residential mortgagors.

Likewise, before penalizing a mortgagee for failure to fulfill its satisfaction obligation, state law should provide a uniform triggering event. Because of the high volume of residential mortgage lending/refinancing and the bureaucratic separation of the mortgagor and mortgagee, even good faith mortgagees will make occasional errors. If the consequences of failure are to include liability for civil penalties and/or attorney's fees, state law should uniformly require that the mortgagee receive notice of its noncompliance and an opportunity to cure before suffering punitive sanctions.

Based upon these concerns, URMSA adopted the "hybrid" approach reflected in Arizona's mortgage satisfaction statute.[85] Under this approach, full

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ANN. § 682; R.I. GEN. LAWS § 34-26-5(a); VA. CODE ANN. § 55-66.3(A)(1); WASH. REV. CODE ANN. § 61.16.030; W. VA. CODE § 38-12-10.

84. The federal Electronic Signatures in Global and National Commerce Act (E-Sign) provides that a "signature, contract, or other record" relating to a transaction in or affecting interstate commerce "may not be denied legal effect, validity, or enforceability solely because it is in electronic form." 15 U.S.C. § 7001(a)(1) (2006). However, E-Sign does not "require any person to agree to use or accept electronic records or electronic signatures." *Id.* § 7001(b). URMSA permits a mortgagor or mortgagee to send a required notice "by facsimile transmission, electronic mail, or other electronic transmission . . ., but only if the recipient agreed to receive notification in that manner." URMSA § 103(a)(2).

85. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-712(A). Under the Arizona statute, the mortgagee must record a satisfaction within 30 days of receiving full payment, and is liable for any actual damages caused by the mortgagee's failure to do so. The Arizona statute also authorizes the imposition of a civil penalty of $1,000, but only after the mortgagee has received a written request for a satisfaction and an additional 30-day grace period after the expiration of the initial 30-day grace period. *Id.* § 33-712(B).

payment triggers the mortgagee's obligation to record a satisfaction within thirty days, without additional demand – and the mortgagee is liable for any actual damages resulting from noncompliance.[86] However, a mortgagee is not liable for URMSA's civil penalty for its noncompliance unless it has been given notice and does not cure its noncompliance within the ensuing thirty days.[87]

D. Sanctions for Mortgagee's Noncompliance

Each state's law permits a landowner to bring an action to quiet title against the holder of an apparent but invalid interest of record (such as the lien of a paid-off but unsatisfied mortgage). In such a case, a mortgagor could recover damages equal to any economic loss suffered due to the mortgagee's noncompliance with the mortgage satisfaction statute (e.g., additional interest costs due to inability to close a refinancing, or expectation damages suffered due to a lost sale). In many cases, however, mortgagors may not suffer economic loss, and thus may be reluctant to absorb the cost of a quiet title action.

State tort law also addresses invalid and no-longer-valid claims of title through the cause of action for slander of title, which introduces the potential for recovering punitive damages.[88] In theory, the specter of punitive damages would provide additional incentive for mortgagee compliance with satisfaction obligations. The slander of title action, however, is a less-than-perfect remedy to the problem of the undelivered mortgage satisfaction. First, slander of title requires the mortgagor to establish that the mortgagee's false statement (in this case, the implicit suggestion that the mortgage is still valid) was malicious – i.e., that it was the product of deliberate conduct without probable cause, or was intended to vex, injure, or annoy the mortgagor.[89] Certainly, if a mortgagee has refused to record a satisfaction after unquestionably receiving full payment and a written demand for a satisfaction, a court would likely infer that the mortgagee's conduct was malicious. In many circumstances, the mortgagee's conduct may not be malicious – it may be a product of an honest disagreement over the balance of the debt, or it may

86. URMSA § 203(a), (b).

87. *Id.* § 203(c).

88. To establish a cause of action for slander of title at common law, a plaintiff must typically show that the defendant (1) uttered/published slanderous words regarding ownership of property; (2) that those words were false; (3) that the defendant acted with malice; (4) that the plaintiff suffered special damages as a result of diminished value of the property in the eyes of third parties; and (5) that the plaintiff holds an estate or interest in the property. *See, e.g.*, Latson v. Boaz, 598 S.E.2d 485, 487 (Ga. 2004); Davitt v. Smart, 449 N.W.2d 378, 379 (Iowa 1989); Huff v. Jennings, 459 S.E.2d 886, 889 (S.C. Ct. App. 1995); TXO Prod. Corp. v. Alliance Res. Corp., 419 S.E.2d 870, 879, 887 (W. Va. 1992).

89. *See, e.g.*, *Davitt*, 449 N.W.2d at 380.

be due to a recorder's rejection of a tendered satisfaction based upon technical recording requirements. Second, slander of title would require the mortgagor to establish "special damages" attributable to the continued record presence of the mortgage – and not all states have treated the cost of a quiet title action (or the attorney fees needed to prosecute that action) as "special damages" sufficient to support a cause of action.[90]

To provide the appropriate incentives for lenders to comply with satisfaction requirements, most states impose statutory damages or a civil penalty upon a noncompliant mortgagee, and typically allow the mortgagor to recover this penalty even in the absence of actual economic loss.[91] Further, to encourage borrowers to bring judicial actions to compel compliance when needed, statutes in most states authorize fee-shifting to permit the mortgagor (or a purchaser, in the case of a sale of the mortgaged premises) to recover attorney fees and costs in addition to any actual damages caused by the mortgagee's noncompliance.[92]

Nevertheless, there is wide state-to-state variation in the civil penalties imposed upon noncompliant mortgagees. In some states, the penalty is the equivalent of the proverbial "slap on the wrist" – e.g., New Mexico's "fine" of $10 to $25,[93] and $100 penalties in Idaho,[94] Michigan,[95] North Dakota,[96] and South Dakota.[97] In other states, the penalty is potentially draconian.

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90. The majority rule permits recovery of costs of litigation involved in clearing title. *See, e.g.*, GKC Mich. Theaters, Inc. v. Grand Mall, 564 N.W.2d 117, 120 (Mich. Ct. App. 1997); *TXO Prod. Corp.*, 419 S.E.2d at 881. Nevertheless, courts in some states have refused to treat such costs as special damages capable of supporting a slander of title action. *See, e.g.*, *Latson*, 598 S.E.2d at 487.

91. In function, these penalty provisions are analogous to the uniform $500 penalty authorized by Article 9 for a secured party's failure to file a timely termination statement. U.C.C. § 9-625(e)(4).

92. CONN. GEN. STAT. ANN. § 49-8(c); FLA. STAT. ANN. § 701.04(1); GA. CODE ANN. § 44-14-3(c); HAW. REV. STAT. § 506-8(2); 765 ILL. COMP. STAT. ANN. 905/4; IND. CODE ANN. § 32-28-1-2(b); IOWA CODE § 655.3; KAN. STAT. ANN. § 58-2309a(d); KY. REV. STAT. ANN. § 382.365(3), (4); LA. REV. STAT. ANN. § 9:5385(B); ME. REV. STAT. ANN. tit. 33, § 551; MD. CODE ANN., REAL PROP. § 7-106(e); NEB. REV. STAT. §§ 76-252, 76-1014.01; NEV. REV. STAT. §§ 106.290(2), 107.077(3); N.J. STAT. ANN. § 46:18-11.3(c); N.M. STAT. ANN. § 48-7-5; N.Y. REAL PROP. ACTS. LAW § 1921(7); N.C. GEN. STAT. § 45-36.3(b); OR. REV. STAT. § 86.720(9); R.I. GEN. LAWS § 34-26-5(a); S.C. CODE ANN. § 29-3-320; S.D. CODIFIED LAWS § 44-3-8; TENN. CODE ANN. § 66-25-102(c); UTAH CODE ANN. § 57-1-38(3); VT. STAT. ANN. tit. 27, § 464(d); VA. CODE ANN. § 55-66.3(A)(1); WASH. REV. CODE ANN. § 61.16.030; W. VA. CODE § 38-12-10.

93. N.M. STAT. ANN. § 48-7-5.

94. IDAHO CODE ANN. § 45-915.

95. MICH. COMP. LAWS ANN. § 565.44.

96. N.D. CENT. CODE § 35-01-27.

97. S.D. CODIFIED LAWS § 44-3-8.

Statutes in Arkansas,[98] Mississippi,[99] and Pennsylvania[100] give judges the discretion to impose a penalty *equal to the amount of the mortgage debt.* South Carolina authorizes the imposition of a penalty of up to the lesser of one-half of the mortgage debt or $25,000.[101] Until amended several years ago, Missouri's statute authorized a penalty of 10% of the mortgage amount – a sum that often exceeded five figures.[102]

Most of the penalties range from $200 to $5,000, with a median penalty of $500.[103] Some statutes authorize a flat penalty amount,[104] while others impose a flat per-day or per-week penalty that accumulates as the mortgagee's noncompliance continues (up to a stated cap).[105] Most of these pen-

98. ARK. CODE ANN. § 18-40-104(c).

99. MISS CODE ANN. § 89-5-21(2). The Mississippi statute does set a minimum penalty amount of $200.

100. 21 PA. CONS. STAT. ANN. § 682.

101. S.C. CODE ANN. § 29-3-320. It is worth observing, perhaps, that South Carolina also provides mortgagees with the longest grace period (3 months) in which to record a satisfaction and thus avoid liability. Nevertheless, the size of the South Carolina penalty would far, far exceed the actual damages typically suffered by a landowner as a result of the mortgagees failure to record a timely satisfaction.

102. MO. REV. STAT. § 443.130(1) (2000) (amended 2004). The statute was amended on June 14, 2004, to extend the applicable grace period from 15 days to 45 days. The amendment would also produce a lower penalty in some cases, as it now establishes a penalty of the lesser of $300/day or 10% of the mortgage debt.

103. It is difficult to calculate a true "median" penalty, because the penalty amount is indeterminate in a number of states. In some cases, the penalty accumulates on a daily or weekly basis while the mortgagee's noncompliance continues. *See infra* note 105 and accompanying text. In other cases, state statutes permit judicial discretion to set the penalty amount on a case-by-case basis. *See infra* note 107 and accompanying text.

104. From smallest to largest: IDAHO CODE ANN. § 45-915 ($100); N.D. CENT. CODE § 35-01-27 ($100); S.D. CODIFIED LAWS § 44-3-8 ($100); TENN. CODE ANN. § 66-25-102(a)-(b) ($100, raised to $1,000 if mortgagee fails to record within 30 days following second request); ALA. CODE § 35-10-30(a) ($200); 765 ILL. COMP. STAT. ANN. 905/4 ($200); OHIO REV. CODE ANN. § 5301.36(C) ($250); ALASKA STAT. § 34.20.050 ($300); CAL. CIV. CODE § 2941(d) ($500); GA. CODE ANN. § 44-14-3(c) ($500); KAN. STAT. ANN. § 58-2309a(d) ($500); MONT. CODE ANN. § 71-1-212 ($500); NEV. REV. STAT. §§ 106.290(2), 107.077(3) ($500); N.Y. REAL PROP. ACTS. LAW § 1921(4) ($500); VA. CODE ANN. § 55-66.3(A)(1) ($500); N.C. GEN. STAT. § 45-36.3(b) ($500 for mortgagor, and $500 for purchaser from mortgagor; maximum penalty = $1,000); OR. REV. STAT. §§ 86.140, 86.720(1) ($500); ARIZ. REV. STAT. ANN. § 33-712 ($1,000); MICH. COMP. LAWS ANN. § 565.44 ($1,000); N.J. STAT. ANN. § 46:18-11.3(c) ($1,000); UTAH CODE ANN. § 57-1-38(3)(a) ($1,000); MASS. GEN. LAWS ANN. ch. 183, § 55(c)(1)(i) ($2,500); NEB. REV. STAT. §§ 76-252, 76-1014.01 ($5,000).

105. CONN. GEN. STAT. ANN. § 49-8(c) ($200/week, up to $5,000 maximum); IOWA CODE § 535B.11(5) ($50/day; applicable to servicers only); KY. REV. STAT. ANN. § 382.365(3), (4) ($100/day for first 30 days of noncompliance, $500/day there-

alties are recoverable in addition to any actual damages resulting from the mortgagee's noncompliance, although a few states limit the aggrieved party to the greater of the penalty amount or actual damages.[106] Others provide the court with case-by-case discretion to establish a penalty, up to a designated cap.[107] Hawaii's statute does not provide a specific penalty, but does treble the aggrieved party's actual damages.[108]

There seems to be no defensible justification for the disparity in the remedies available to otherwise-similarly-situated borrowers. The legitimacy of a civil penalty provision is well-established in commercial law, as reflected by the analogous noncompliance penalty in Article 9.[109] The penalty should be sufficiently large to incentivize sound mortgagee satisfaction practices; a too-small penalty provides an aggrieved landowner with little economic incentive to pursue legal action when she has suffered no other compensable damages, even if the state's statute also authorizes attorney-fee shifting to the prevailing party. At the same time, extreme penalties that far exceed a mortgagor's actual harm create the opposite risk of abuse.[110]

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after); ME. REV. STAT. ANN. tit. 33, § 551 ($200/week, up to $5,000 maximum); MO. REV. STAT. § 443.130(1) (lesser of $300/day or 10% of mortgage amount); OKLA. STAT. ANN. tit. 46, § 15(A) (lesser of 1% of principal or $100, per day, up to maximum of 100% of principal); R.I. GEN. LAWS § 34-26-5(b)-(c) ($50 for first day of noncompliance, and $5/day thereafter); VT. STAT. ANN. tit. 27, § 464(b) ($25/day, up to $5,000 maximum); WIS. STAT. ANN. § 706.05(10)(c) ($100/day, up to $2,000 maximum); WYO. STAT. ANN. § 34-1-132(a) (lesser of 0.1% of original principal amount or $100 per day).

106. CONN. GEN. STAT. ANN. § 49-8(c); MASS. GEN. LAWS ANN. ch. 183, § 55(c)(1); ME. REV. STAT. ANN. tit. 33, § 551; NEB. REV. STAT. §§ 76-252, 76-1014.01; N.J. STAT. ANN. § 46:18-11.3(c); N.Y. REAL PROP. ACTS. LAW § 1921(4); UTAH CODE ANN. § 57-1-38(3) (greater of $1,000 penalty or treble actual damages).

107. ARK. CODE ANN. § 18-40-104(c) (any sum not exceeding mortgage amount); DEL. CODE ANN. tit. 25, § 2114 (no less than $10 or more than $500, "except when special damage to a larger amount is alleged in the complaint and proved"); IND. CODE ANN. § 32-28-1-2(b)(1) (up to $500); MISS. CODE ANN. § 89-5-21(2) ($200 plus any sum not exceeding mortgage amount); 21 PA. CONS. STAT. ANN. § 682 (any sum not exceeding mortgage amount); S.C. CODE ANN. § 29-3-320 (up to the greater of one-half the mortgage amount or $25,000).

108. HAW. REV. STAT. § 506-8(2)(D).

109. U.C.C. § 9-625(e)(4) ($500 minimum statutory damages where secured party fails to file or send termination statement as required by U.C.C. § 9-513).

110. One Missouri lawyer, Charles Pullium, described the experience under the Missouri statute in a 2003 posting on DIRT (a real estate e-mail discussion list moderated by Professor Pat Randolph):

> Our statute requires that the bank send the release to the recorder's office, the recorder to duly record the same, and the person making satisfaction to receive the recorded release all within 15 business days. Lawsuits based upon this statute are being filed with ever increasing frequency. I'll just note a few aspects of these lawsuits. First, some title companies are having the borrowers sign general assignments of their claims at the closing

Further, as with variation in grace periods, variation in penalty amounts produces unwarranted discrimination in the provision of mortgage satisfaction services. Under the current regime, one would expect national mortgage lenders and/or their servicers to establish systems that respond most promptly in states where the grace period is shortest and/or the sanctions for noncompliance are highest.[111] While this sort of service differentiation is predictable, it is likely inconsistent with the presumed expectations of residential landowners. In turn, this service differentiation by mortgagees predictably encourages state legislatures to ratchet up their civil penalties to ensure preferential treatment of their own citizens – risking a "race to the bottom" in which penalty levels exceed those necessary to create the proper incentives for prompt title-clearing services. Since 1989, at least twelve states have increased their civil penalty;[112] no state had reduced it during that period until Missouri amended its statute in June 2004.[113]

> and then filing suit on the claim at a later date and retaining all of the proceeds of the successful suits without the borrower who signed the mortgage ever having knowledge of the suit or receiving any of the penalty. Second, the courts are ruling that sending the release to the recorder's office is not sufficient and that it must be provided to the person making satisfaction. So, if a servicer sends the release to the recorder's office within the statutory period but does not send it to the borrower, then that servicer will still be liable for 10% of the face value of the note. Third, the demands for release are being sent with the payoff checks. This is important because the clock has now started before the funds are even negotiated so that by the time the payoff is processed and the deed of release prepared, the time within which to mail the release to the recorder's office and then to the borrower has been reduced to the point of absurdity for statutory compliance.
>
> I can't speak for all recorder's offices, but I know from experience that recorder's offices here frequently take a week or more to record documents and during the holidays sometimes develop five week back logs. I think a fair reading of the above will suggest that the statute is difficult if not impossible to comply with. The off shoot of this is that some attorneys are developing these cases as somewhat of a cottage industry . . . "shooting fish in a barrel" is how I've heard it described. I might also point out that a large number of the cases filed are by attorneys on their own behalf to cash in on the opportunity.

111. There is no readily available empirical data to test this hypothesis, but mortgage lending industry representatives that participated as Observers to the Drafting Committee for the Uniform Residential Mortgage Satisfaction Act anecdotally confirmed that some national mortgage lenders in fact did prioritize satisfaction services in certain states.

112. CAL. CIV. CODE § 2941(d) (2001; from $300 to $500); CONN. GEN. STAT. ANN. § 49-8 (1989; from $100/week to $200/week); MASS. GEN. LAWS ANN. ch. 183, § 55(c)(1) (2006; from no penalty to $2,500); ME. REV. STAT. ANN. tit. 33, § 551 (1999; from fine of up to $50 to $200/week, with $5,000 maximum); MISS. CODE ANN. § 89-5-21(2) (1995; from $50 to $200); MONT. CODE ANN. § 71-1-212 (2001;

Consistent with the analogous penalty authorized by Article 9 for failure to file a termination statement, URMSA adopts a civil penalty of $500 for any mortgagee that failed to record a satisfaction within 30 days following demand.[114]

E. "Self-Help" Satisfaction: Satisfaction by Affidavit

As discussed above, a mortgagor's quiet-title remedy is a cumbersome way to address the apparent lien of a paid-off mortgage that remains unsatisfied of record. By contrast, Article 9 provides a reasonably effective nonjudicial remedy: if a secured party fails to file a termination statement within the appropriate grace period, the debtor can file a termination statement on its own.[115] If the secured party was in fact obligated to file a termination statement and has failed to do so, the debtor-filed termination statement is effective.[116] By contrast, if the debtor files a termination statement when the secured party is not obligated to do so and has not authorized such a filing, then the debtor-filed termination statement is not legally effective.[117]

Consistent with this approach, roughly one-half the states have enacted statutes authorizing a nonjudicial or "self-help" mortgage satisfaction procedure. These statutes do not permit the mortgagor to record a satisfaction, but they do permit certain presumptively responsible persons to assist the mortgagor to clear the title in the face of the mortgagee's noncompliance. In general terms, these statutes authorize a "closing agent" (i.e., someone who facilitated the payoff of the mortgage in question or has evidence of its payment) to give the mortgagee written notice of the agent's intention to execute

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from $100 to $500); NEB. REV. STAT. §§ 76-252, 76-1014.01 (2003; from $1,000 to $5,000); NEV. REV. STAT. §§ 106.290(2), 107.077(3) (1999; from $100 to $500); S.C. CODE ANN. § 29-3-320 (1999; from $100 to greater of one-half of mortgage debt or $25,000); UTAH CODE ANN. § 57-1-38(3) (1995; from no minimum penalty to $1,000); VT. STAT. ANN. tit. 27, § 464(b) (1999; from no minimum penalty to $25/day, up to $5,000 maximum); VA. CODE ANN. § 55-66.3(A)(1) (1996; from $300 to $500).

113. *See supra* note 102 and accompanying text.

114. URMSA § 203(c).

115. U.C.C. § 9-509(d)(2).

116. *Id.* § 9-510(a) ("A filed record is effective only to the extent that it was filed by a person that may file it under Section 9-509.").

117. *Id.* In that case, the secured party's initial financing statement would remain effective to perfect the secured party's interest in the collateral. At first blush, this seems problematic, because subsequent searchers would appear likely to be misled by the presence of the debtor-filed termination statement. However, a debtor-filed termination statement must indicate on its face that it was filed by the debtor. *Id.* § 9-509(d)(2). A searcher that discovers a debtor-filed termination statement thus may choose not to assume the effectiveness of that statement, and instead may seek to confirm from the secured party that the secured obligation has been satisfied (and that the debtor-filed termination statement is thus effective).

and record an affidavit evidencing satisfaction of the mortgage if, after an additional grace period, the mortgagee has neither complied with its obligation nor objected that the debt remains unsatisfied. If this grace period passes without further action or objection, the closing agent may execute and record the affidavit, which constitutes the statutory equivalent of a satisfaction of the mortgage.

While roughly half of the states have adopted a "self-help" procedure, these statutes vary in both scope and specifics. Some limit the availability of "self-help" satisfaction based upon the mortgage amount or the type of mortgage,[118] while others contain no such limitation. The statutes vary significantly as to when the closing agent can first provide notification (e.g., at the time of payment, or only at the end of the mortgagee's grace period for compliance?) and how much additional time must pass before the agent can record an affidavit of satisfaction.[119] Each statute dictates the form and content for the affidavit, but there are numerous variations in the required content.[120]

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118. *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-707(E) (any mortgage up to $500,000); CONN. GEN. STAT. ANN. § 49-8a(a)(1) (one-to-four family residential property); IND. CODE ANN. § 32-29-6-10 (any mortgage up to $1,000,000); ME. REV. STAT. ANN. tit. 33, § 553-A (one-to-four family owner-occupied dwellings); N.Y. REAL PROP. ACTS. LAW § 1921(5) (one-to-six family owner-occupied dwellings); N.D. CENT. CODE § 35-03-19(1)(a) (any mortgage up to $500,000); VT. STAT. ANN. tit. 27, § 464a (two or fewer residential units occupied as owner's principal residence, or farmland).

119. ARIZ. REV. STAT. ANN. § 33-707(E) (notification may be sent no less than 60 days after full payment; mortgagee has 30 days to cure/respond); CAL. CIV. CODE § 2941(b)(3) (affidavit may be filed no less than 75 days after full payment; mortgagee must have 10 days after notification to cure/respond); CONN. GEN. STAT. ANN. § 49-8a (affidavit may be filed no less than 60 days after full payment; mortgagee must have 15 days after notification to cure/respond); DEL. CODE ANN. tit. 25, § 2120 (affidavit may be filed no less than 4 months after full payment; mortgagee must have 15 days after notification to cure/respond); GA. CODE ANN. § 44-14-3(c.1) (notification may be sent at any time after full payment; mortgagee has 60 days to cure/respond); HAW. REV. STAT. § 506-8 (notification may be sent at any time after full payment; mortgagee has 45 days to cure/respond); IND. CODE ANN. § 32-29-6-9 (affidavit may be filed no less than 60 days after full payment; mortgagee must have 30 days after notification to cure/respond); KAN. STAT. ANN. § 58-2309a(a) (notification may be sent at any time after full payment; mortgagee has 20 days to respond); ME. REV. STAT. ANN. tit. 33, § 553-A (affidavit may be filed no less than 30 days after full payment; mortgagee must have 15 days after notification to cure/respond); MASS. GEN. LAWS ANN. ch. 183, § 55 (affidavit may be filed no less than 30 days after full payment; mortgagee must have 15 days after notification to cure/respond); NEV. REV. STAT. § 106.290(3) (affidavit may be filed no less than 75 days after full payment; mortgagee must have 30 days after notification to cure/respond); N.H. REV. STAT. ANN. § 479:7-a (affidavit may be filed no less than 60 days after full payment; mortgagee must have 15 days after notification to cure/respond); N.J. STAT. ANN. § 46:18-11.7 (first notification may be sent no less than 30 days after full payment; second notification may be sent no less than 30 days after first notification; mortgagee must

To alleviate mortgagee concerns about the risk of mortgages being fraudulently or erroneously released by self-help, self-help statutes typically impose liability upon a closing agent that improperly records an affidavit of satisfaction. These liability provisions vary, however, both in the applicable liability standard and in severity. Some self-help statutes impose liability only if the closing agent has executed the affidavit knowing that it contains false statements.[121] Others provide that the closing agent is liable if it acts "wrongfully or erroneously,"[122] but do not make clear when the closing agent's conduct would be "wrongful" or "erroneous." Utah's statute expressly adopts a "gross negligence" or "bad faith" standard.[123]

Likewise, mortgagees have legitimate concerns about the creditworthiness of the person recording an affidavit if that affidavit wrongfully extinguishes the mortgagee's lien. As a result, these statutes generally limit the class of persons authorized to record an affidavit of satisfaction. Some states permit only a licensed title insurer to perform this function;[124] other states permit only a licensed attorney to do so;[125] others allow either a licensed title

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have 15 days after second notification to cure/respond); N.M. STAT. ANN. § 48-7-4.1(A) (affidavit may be filed no less than 90 days after full payment; mortgagee must have 10 days after notification to cure/respond); N.Y. REAL PROP. ACTS. LAW § 1921(5) (notification may be sent no less than 30 days after full payment; mortgagee has 15 days to cure/respond); OR. REV. STAT. § 86.720 (affidavit may be filed no less than 60 days after full payment; mortgagee must have 30 days after notification to cure/respond); R.I. GEN. LAWS § 34-26-8 (affidavit may be filed no less than 60 days after full payment; mortgagee must have 30 days after notification to cure/respond); TEX. PROP. CODE ANN. § 12.017 (affidavit may be filed no less than 60 days after full payment; mortgagee must have 15 days to cure/respond); UTAH CODE ANN. § 57-1-40 (notification may be sent at any time after full payment; mortgagee has 60 days to respond); VT. STAT. ANN. tit. 27, § 464a (affidavit may be filed no less than 30 days after full payment; mortgagee must have 15 days after notification to cure/respond); VA. CODE ANN. § 55-66.3(E) (notification may be sent at any time after full payment; mortgagee must have 90 days after notification to cure/respond); WYO. STAT. ANN. § 34-1-146 (notification may be sent no less than 30 days after full payment; mortgagee must have 30 days after notification to cure/respond).

120. For example, some states require that the affidavit include a legal description of the real property or recording data for intermediate mortgage assignments, while others do not require these items.

121. *See, e.g.*, R.I. GEN. LAWS § 34-26-8(h).

122. *See, e.g.*, VA. CODE ANN. § 55-66.3(E)(4)(b).

123. UTAH CODE ANN. § 57-1-42.

124. ARIZ. REV. STAT. ANN. § 33-707(E); CAL. CIV. CODE § 2941(b)(3); HAW. REV. STAT. § 506-8; IDAHO CODE ANN. § 45-1203; IND. CODE ANN. § 32-29-6-9; NEV. REV. STAT. § 106.290(3); N.D. CENT. CODE § 35-03-19; OR. REV. STAT. § 86.720; S.D. CODIFIED LAWS § 44-8-30; TEX. PROP. CODE ANN. § 12.017; UTAH CODE ANN. § 57-1-40; WYO. STAT. ANN. § 34-1-146.

125. DEL. CODE ANN. tit. 25, § 2120; ME. REV. STAT. ANN. tit. 33, § 553-A; MASS. GEN. LAWS ANN. ch. 183, § 55; N.H. REV. STAT. ANN. § 479:7-a; N.Y. REAL

insurer or a licensed attorney to file the necessary affidavit.[126] A few states authorize such an affidavit to be filed by a refinancing lender or the lender for a buyer where that lender certifies that it has paid off the mortgage in question.[127]

While a number of states have adopted self-help procedures, anecdotal evidence suggests that they are not frequently used. First, the notification and grace-period provisions of most self-help statutes are relatively long. Under most of the statutes, an affidavit of satisfaction cannot be recorded until sixty or more days following payment.[128] Even during periods of high refinancing volume, most initial mortgagee noncompliance is cured within that period. Second, closing agents in some states appear reluctant to record a self-help satisfaction because the statutory liability standard is ambiguous. Third, if the closing agent is a title company that has already insured the gap risk by issuing title insurance, the closing agent may not have a significant incentive to spend additional time and money preparing and recording the affidavit. Finally, some mortgagors cannot effectively use the procedure established by many of the existing self-help statutes. For example, some statutes apply only where the closing agent actually facilitated the payoff of the mortgage,[129] or where the mortgagee provided a payoff statement with respect to the mortgage debt.[130] Under this approach, a landowner that paid off its mortgage at maturity effectively could not use the self-help satisfaction procedure. In addition, where the mortgagee that received payment is now defunct, some existing self-help statutes are of little use because they require the

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PROP. ACTS. LAW § 1921(5); S.C. CODE ANN. § 29-3-330(e); VT. STAT. ANN. tit. 27, § 464a.

126. CONN. GEN. STAT. ANN. § 49-8a; N.J. STAT. ANN. § 46:18-11.7; R.I. GEN. LAWS § 34-26-8. Virginia authorizes a "settlement agent" to prepare and record an affidavit of satisfaction. VA. CODE ANN. § 55-66.3(E). Under Virginia's statutes, a "settlement agent" would include a person who had provided "escrow, closing or settlement services" in conjunction with a transaction and thus could include both title insurers and attorneys. VA. CODE ANN. § 6.1-2.20.

127. GA. CODE ANN. § 44-14-3(c.1); KAN. STAT. ANN. § 58-2309a(a).

128. *See supra* note 119.

129. *See, e.g.*, DEL. CODE ANN. tit. 25, § 2120(a) (attorney may prepare and record affidavit of satisfaction where attorney "paid in full or caused to be paid in full a debt owed by any debtor to any creditor holding a mortgage securing such debt").

130. Some jurisdictions require that the closing agent state, under penalty of perjury, that the mortgagee provided a payoff statement with respect to the mortgage debt and that the mortgagee has received payment of the debt in accordance with the payoff statement. In a few states, the closing agent must even attach a copy of the payoff statement and evidence of payment to the affidavit. *See, e.g.*, VT. STAT. ANN. tit. 27, § 464a(a). This requirement renders self-help unavailable if the landowner cannot locate a copy of the payoff statement – even if the landowner has other reliable evidence of full payment of the mortgage debt (such as a cancelled check, a HUD-1 form with a settlement amount matching that check, and subsequent months without further communication or collection efforts by the mortgagee).

closing agent to state, under penalty of perjury, that the mortgagee has received written notification of the closing agent's intention to prepare and record an affidavit of satisfaction.[131] This may be an impossible certification to give with respect to a now-defunct mortgagee, particularly without accessible public records to enable a borrower to determine what entity succeeded to the mortgage portfolio of the defunct mortgagee.

IV. MERS AND MORTGAGE SATISFACTION: AN INCOMPLETE SOLUTION

With the development of the secondary market and widespread securitization of residential mortgage loans, the Mortgage Electronic Registration System ("MERS") has begun to play a substantial role in mortgage transactions. Historically, when a mortgage loan was assigned, the assignee often recorded the assignment of the mortgage on the real property records. While recording is not necessary for an assignment to be effective,[132] a prudent assignee would record the assignment to protect against the risk that the assignor – who would otherwise remain the mortgagee of record – might record an effective satisfaction of the mortgage, either through negligence or collusion with the mortgagor.[133]

Because a mortgage loan may be assigned multiple times over the course of a securitization, however, the cost of preparing and recording multiple mortgage assignments is nontrivial, particularly in localities where recording costs are high. MERS provides an innovative solution to this transaction cost problem. MERS is a private mortgage tracking system, created by members of the mortgage banking industry, that eliminates the need to prepare and record assignments when trading mortgage loans.[134] When a member of MERS originates a mortgage loan, it typically completes the mortgage document with MERS listed as the original mortgagee, as nominee for the beneficial owner. When the originator of the loan thereafter assigns it, the assignee does not have to record any assignment document in the public land records. MERS remains the mortgagee of record – but now as nominee for

131. *See, e.g.*, ME. REV. STAT. ANN. tit. 33, § 553-A(1); N.J. STAT. ANN. § 46:18-11.7(a); VT. STAT. ANN. tit. 27, § 464a(a). Most of the state self-help statutes merely require the agent preparing the affidavit to certify that the necessary notification was sent, not that it was received. *See, e.g.*, IND. CODE ANN. § 32-29-6-10; MASS. GEN. LAWS ANN. ch. 183, § 55(g)(1); N.H. REV. STAT. ANN. § 479:7-a(I).

132. STOEBUCK & WHITMAN, *supra* note 2 § 11.9, at 872 ("In general, no one is obliged to record anything . . . . As between its original parties, an instrument is fully binding whether it is recorded or not.").

133. *Id.* (noting that a grantee who fails to record "is taking this risk that his or her grantor will make a subsequent conveyance that will diminish or destroy the efficacy of the prior transfer").

134. Basic information about MERS and MERS transactions is available on the MERS website, which can be found at the URL http://mersinc.com/.

the assignee. Behind the scenes, the MERS electronic system tracks all assignments and changes in servicing and beneficial ownership rights. By eliminating the need for recording of intermediate mortgage assignments, MERS enables substantial transaction costs savings – up to $25 per loan, according to MERS estimates.[135]

Ultimately, if MERS is the mortgagee of record, then when the mortgage is satisfied MERS is the party that must enter a satisfaction (unless MERS was going to assign the mortgage back to its beneficial owner and record that assignment – additional transaction costs that would in part defeat the cost-saving function of MERS). Thus, one might naturally look to see whether MERS might play a substantial role in addressing the mortgage satisfaction problem.

MERS does make one significant contribution by reducing the problems caused by unrecorded assignments. One of the thorniest of mortgage satisfaction problems arises when a now-fully paid mortgage has been assigned one or more times by virtue of unrecorded assignments, but the mortgagee of record no longer exists due to failure, merger or consolidation. At present, the mortgagor in such circumstances may be able to clear its title only through a quiet title action or perhaps through a self-help procedure such as described in Part III.E (if the jurisdiction has an effective self-help procedure). To the extent that a mortgage is a MERS mortgage, however, this problem disappears – MERS is always the nominal record holder of the mortgage and can always identify the current beneficial owner.

Unfortunately, however, MERS (at least as it is currently structured) does not provide a complete solution to the mortgage satisfaction problem. First, while MERS continues to grow substantially,[136] MERS is by no means universal. Registration by MERS is not required, and thus MERS is unlikely to achieve universal use. Even though MERS has achieved impressive enrollment numbers for new home mortgage loans, there remain substantial

135. The MERS website touts savings of $22 per loan due to avoiding the cost of recording mortgage assignments. *See* Why MERS? Overview, http://www.mersinc.org/why_mers/index.aspx (last visited Oct. 30, 2007). A recent MERS press release, however, represents this savings as $25 per loan. *See* Press Release, MERS, 50 Millionth Loan Registered on the MERS System (May 24, 2007), *available at* http://www.mersinc.org/newsroom/press_details.aspx?id=194.

136. In the first seven years of the MERS system, MERS registered 30 million loans. *See 30 Millionth Loan Registered on MERS*, INSIDE MERS (MERS, Vienna, Va.), May/June 2005, at 1, *available at* http://www.mersinc.org/newsroom/pastnewsletters.aspx (follow "May/June 2005" download hyperlink). By April 2006, this number had increased to 40 million, with 29 of the 30 top mortgage lenders in the industry using MERS to register their mortgages. *See 40 Millionth Loan Registered on MERS*, INSIDE MERS (MERS, Vienna, Va.), May/June 2006, at 1, *available at* http://www.mersinc.org/newsroom/pastnewsletters.aspx (follow "May/June Issue of 'Inside MERS'" download hyperlink). A May 2007 press release by MERS announced that MERS registrations had passed the 50 million mark. *See* Press Release, *supra* note 135.

numbers of outstanding residential mortgage loans that were originated prior to the development of MERS. While these mortgages could be registered into the MERS system if they are assigned to a MERS member, many non-MERS mortgages remain outside of the MERS system. Further, MERS is much less frequently used for commercial loans.[137] To the extent MERS is not universal, it cannot provide a complete solution to any mortgage satisfaction problem.

Second, MERS operates as a tracking service, not as a mortgage servicer. Thus, while MERS could identify the current servicer and beneficial owner of a mortgage note at any point in time, MERS cannot issue a payoff statement or confirm whether a particular payoff was sufficient to satisfy the mortgage debt. Instead, MERS would merely direct the mortgagor to the beneficial holder/servicer for payoff information.[138] As a tracker and not a servicer, MERS is dependent upon the beneficial holder/servicer for confirmation that a MERS mortgagee has been fully paid, and no satisfaction would go of record until that confirmation was obtained.

As a result, MERS maintains no staff tasked with handling mortgage satisfactions. Once a MERS mortgage is paid off, the beneficial owner of the mortgage in question merely executes and records a satisfaction in the name of MERS (as MERS's authorized agent). Thus, any problems that exist with the timely satisfaction of mortgages will continue to exist with the timely satisfaction of MERS mortgages – at least given the current structure of MERS.

V. A POSSIBLE REFORM: THE "ONE TOUCH" SATISFACTION

A. The "One-Touch" Concept

As discussed in Part II, the local nature of the traditional residential mortgage transaction made it plausible for a mortgagee to obtain a satisfaction document at or immediately after closing.[139] Today, this is no longer the norm; given the geographic and bureaucratic separation of the mortgagor,

137. In 2003, MERS introduced MERS Commercial for registration of commercial mortgages that were expected to be securitized. During its first two years, MERS registered $20 billion worth of commercial mortgages. *See $20 B Registered on MERS Commercial*, INSIDE MERS (MERS Vienna, Va.), July/Aug. 2005, at 1, *available at* http://www.mersinc.org/newsroom/pastnewsletters.aspx (follow "July/August 2005" download hyperlink).

138. Recently, MERS has introduced a new web-based servicer identification system (Servicer ID) that will permit searchers to identify and obtain contact information for the company servicing any MERS mortgage loan. *See Free Web-Based Tool for Servicer ID Unveiled*, INSIDE MERS (MERS Vienna, Va.), Nov,/Dec. 2006, at 1, *available at* http://www.mersinc.org/newsroom/currentnews.aspx (follow "November/December 2006 Issue of 'Inside MERS'" download hyperlink).

139. *See supra* note 8 and accompanying text.

mortgagee, and servicer, a mortgagor cannot realistically expect to obtain a satisfaction at the closing table unless the closing agent is authorized to execute and deliver a recordable satisfaction document on the mortgagee's behalf.

No state has absolute structural legal barriers that prevent a mortgagee from authorizing a particular closing agent to execute and deliver a closing-table satisfaction. Nevertheless, the conveyancing and recording statutes of most states make this option relatively unpalatable. Under most current state laws, only the mortgagee or its attorney-in-fact is authorized to execute a mortgage satisfaction.[140] As a result, a mortgagee that wanted to permit a closing agent to deliver closing-table satisfactions would have to execute and record a power of attorney evidencing a particular closing agent's authority to execute and deliver satisfactions on the mortgagee's behalf.[141] For a national lender, this would pose substantial burdens. The lender would have to identify closing agents in each of the more than 3,650 recording jurisdictions, engage in due diligence investigation regarding each potential agent's trustworthiness and creditworthiness, and then execute and record a power of attorney in the appropriate offices for each closing agent. The administrative costs associated with this approach are significant, if not prohibitive.

State law could instead create a default rule authorizing closing agents to execute and record a binding satisfaction, without the necessity for a recorded power of attorney, upon appropriate conditions. Under this "one-touch" model, for example, state law could authorize a title insurance company or a licensed attorney to execute and record a binding satisfaction of a mortgage immediately upon tender to the mortgagee of good funds in the amount specified in the mortgagee's payoff statement. This approach is called the one-touch model because it would permit the closing agent to clear title while "touching" the closing documentation only once (i.e., at the closing table). By contrast, under the "self-help" statutes described in Part III.E, the closing agent would have to "touch" the file multiple times: at closing, again when sending a later demand for satisfaction, and then again when preparing and recording an affidavit of satisfaction.[142] The one-touch model thus offers the potential for substantial transaction cost savings.

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140. *Cf.* Hildebrandt v. Hildebrandt, 683 P.2d 1288, 1290 (Kan. Ct. App. 1984) (agent with power of attorney may sign grantor's name and bind grantor, even without grantor's presence and without stating that the agent is acting as an agent); Catawba County Horsemen's Ass'n v. Deal, 419 S.E.2d 185, 188 (N.C. Ct. App. 1992) (signature of a purported agent who lacks authority from grantor is ineffective).

141. Execution and recording of the power of attorney would be needed both (a) to demonstrate to the mortgagor the attorney-in-fact's express authority to execute the satisfaction document on the mortgagee's behalf and (b) to permit the attorney-in-fact's authority to appear within the chain of title so as to address potential marketability of title concerns that might be raised based upon the lack of record evidence of the attorney-in-fact's authority.

142. *See supra* notes 115-31 and accompanying text.

B. "One-Touch" in Practice

At the inception of the URMSA drafting process, JEBURPA recommended that the Drafting Committee incorporate the one-touch model into URMSA.[143] This model holds substantial theoretical appeal. It would eliminate the current gap in clearance of the mortgagor's title, and it could permit lenders to streamline operations by reducing the staff needed to handle satisfaction services.[144] Further, as discussed below, the one-touch model has some political viability, as reflected by the fact that it has gained adoption in a few states.

1. The South Carolina model

South Carolina, an attorney-closing state, authorizes a licensed attorney to record an affidavit of satisfaction which states that "full payment of the balance or pay-off amount of the mortgage . . . has been made and that evidence of payment from the mortgagee, assignee, or servicer exists."[145] If the attorney completes the affidavit in the statutorily-mandated form,[146] the at-

143. Letter from William R. Breetz, Member, Joint Editorial Board on Uniform Real Property Acts, to Carl H. Lisman, Co-Chair, Joint Editorial Board on Uniform Real Property Acts (May 1, 2003) (on file with author).

144. Even under a one-touch approach, a lender would have to retain the staff capacity needed to issue satisfaction documents in those circumstances where a payoff occurred without the assistance of a closing agent qualified to deliver closing table satisfactions. On occasion, for example, a mortgagor might pay off its mortgage loan at its originally scheduled maturity by making the final scheduled monthly payment, but such a transaction typically would not necessarily involve the participation of a title insurance company or attorney that could deliver a contemporaneous satisfaction on the mortgagee's behalf. Thus, the mortgagee would retain the legal responsibility for delivering a satisfaction (and the potential liability for its failure to do so). Mortgagees would thus have to retain sufficient staff to execute such satisfactions, or retain the services of third-party vendors that could handle this lower volume of satisfaction services for an appropriate fee.

145. S.C. CODE ANN. § 29-3-330(e).

146. The form of the affidavit appears in S.C. CODE ANN. § 29-3-330(e). The affidavit requires the attorney to make the following statements under penalty of perjury:

> 1. The undersigned is a licensed attorney admitted to practice in the State of South Carolina.
> 2. That with respect to the mortgage given by _____ to _____ dated _____ and recorded in the offices of the Register of Deeds in book _____ at page _____:
> a. [ ] That the undersigned was given written payoff information and made such payoff and is in possession of a canceled check to the mortgagee, holder of record, or representative servicer;

torney can record the affidavit and its recording discharges the lien of the mortgage. Because the language of the statute and the affidavit only require the attorney to have evidence of full payment of the mortgage debt, the statute would clearly permit the attorney to deliver a closing-table satisfaction (at least where the attorney can produce proof of payment of good funds sufficient to satisfy the mortgage debt).

This procedure is relatively straightforward, but anecdotal evidence suggests that South Carolina attorneys rarely use it. There may be several reasons why this is so. First, the procedure is expressly optional in nature. The statute makes clear that attorneys have no obligation to record an affidavit and bear no liability for refusal to do so.[147] Second, the statute contains no provisions addressing the extent to which an attorney using the statute can rely upon the accuracy of the mortgagee's payoff statement. Thus, even an attorney that facilitated a closing payoff may be reluctant to deliver a closing-table satisfaction if the lender has expressly reserved the right to correct its payoff amount after closing.[148] Third, it is possible that the punitive nature of the state's noncompliance penalty (up to the lesser of one-half the mortgage debt or $25,000) already provides a sufficient incentive to good mortgage satisfaction practices. Finally (and most cynically), one might question whether lawyers – substantial beneficiaries of lawsuits to enforce the potential $25,000 penalty against noncompliant lenders – would willingly relieve mortgagees of this potential liability by customarily providing closing-table satisfactions.

2. The Minnesota model

Minnesota's statute provides that

> [a]n officer or duly appointed agent of a title insurance company may . . . execute a certificate of release . . . and record the certificate of release in the real property records of each county in which the mortgage is recorded if a satisfaction or release of the mortgage has not been executed and recorded after the date payment in full

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b. [ ] That the undersigned was given written payoff information and made such pay off by wire transfer or other electronic means to the mortgagee, holder of record, or representative servicer and has confirmation from the undersigned's bank of the transfer to the account provided by the mortgagee, holder of record, or representative servicer.

147. *Id.* This exculpation is significant, to the extent that an attorney that agreed to provide such a satisfaction and failed to do so in a timely manner could be subjected to South Carolina's penalty statute, which provides for a penalty of up to the lesser of one-half of the mortgage debt or $25,000.

148. This may be accentuated by the potential sanctions for a false affidavit, which include both liability for actual damages and attorney's fees, as well as possible perjury charges. *Id.*

> of the loan secured by the mortgage was sent in accordance with a payoff statement furnished by the mortgagee or the mortgage servicer.[149]

The "certificate of release" contains the following information: (1) the name of the mortgagor, mortgagee, and servicer (if applicable); (2) the date of the mortgage and its recording, the recording data, and the recording data for the last recorded assignment of the mortgage; (3) a statement that the mortgage was in the original principal amount of $1.5 million or less; (4) a statement that the person executing the certificate is an officer or duly appointed agent of a title insurance company; (5) a statement that the person executing the certificate does so on behalf of the owner of the mortgaged land, and (6) a statement that the mortgagee or its servicer provided a payoff statement specifying the unpaid balance of the mortgage loan, and that payment of the specified balance was made in accordance with the payoff statement.[150] Upon recording, a certificate of release containing the necessary information constitutes prima facie evidence of the facts stated in that certificate and operates as a release of the mortgage in favor of subsequent purchasers of the land.[151]

On its face, the Minnesota statute does not unambiguously create a one-touch model, but only authorizes a closing agent to act if the lender has not recorded a satisfaction "after the date payment in full of the loan secured by the mortgage was sent in accordance with a payoff statement."[152] This language seems to assume that a mortgagee would have some reasonable period in which to fulfill its duty before the closing agent could record a certificate of release.[153] Nevertheless, the statutory form certificate of release does not

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149. MINN. STAT. ANN. § 507.401(2).

150. *Id.* § 507.401(3).

151. *Id.* § 507.401(5) ("For purposes of releasing the mortgage, a certificate of release containing the information and statements provided for in [§ 507.401(3)] and executed as provided in this section is prima facie evidence of the facts contained in it, is entitled to be recorded with the county recorder or registrar of titles, and operates as a release of the mortgage described in the certificate of release.").

The recording of a wrongful or erroneous certificate – e.g., where the closing agent recorded the certificate even though the mortgagee never received the payoff amount either because of inadvertence, negligence, or misappropriation – renders the title insurer liable to the mortgagee for any actual damages sustained due to the recording, and does not relieve the obligor from personal liability upon the mortgage debt. *Id.*

152. *Id.* § 507.401(2).

153. Indeed, where the payoff occurs by payment of funds other than immediately available funds, the statute would appear to prevent the delivery of a closing-table certificate of release, as there would necessarily be a gap in time between the closing and the payoff – which legally would not occur until the payoff funds actually cleared.

require the closing agent to recite that any particular period of time has passed following payoff, nor does it require a recital that the mortgagee has failed to record a satisfaction document on its own initiative. Based upon this omission, many title companies in Minnesota (to the extent authorized by their underwriters) routinely issue closing-table certificates of release under the authority of this statute.[154] The Minnesota statute has served as a model for enactment of similar statutes in North Dakota[155] and South Dakota,[156] although those two states limit use of the one-touch procedure to mortgages of $500,000 or less.[157] Likewise, the Minnesota statute served as the inspiration for Illinois' adoption of the one-touch model, as discussed below.

3. The Illinois model

In 2003, the Illinois legislature amended its statute – which originally provided a "self-help" procedure similar to those described in Part III.E – to provide a one-touch satisfaction procedure for most residential mortgages of $500,000 or less.[158] The statute provides that the "[r]eceipt of payment pursuant to the lender's written payoff statement shall constitute authority to record a certificate of release . . . by the title insurance company or its duly appointed agent."[159] The certificate must state (1) the name of the mortgagor,

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Note also that Minnesota does not permit recovery of damages against a mortgagee for failure to record a satisfaction until after the passage of a designated grace period. *Id.* § 507.41 (10 day grace period for Minnesota mortgagees; 60 days for nonresident mortgagees). One could read this grace period provision *in pari materia* with § 507.401 and argue that the latter statute would only authorize the recording of a certificate by the title company if the mortgagee has failed to record a satisfaction within the appropriate grace period. Such an interpretation would negate § 507.401's use as authorization for the closing table satisfaction.

154. A title insurance company need only record one appointment of agent in each county for each closing agent authorized by the company to deliver certificates of release. *Id.* § 507.401(4)(a), (c). This obviates the need for the mortgagee to execute and record a power of attorney or separate appointments for each actual certificate of release.

155. *See* N.D. CENT. CODE § 35-03-19.

156. *See* S.D. CODIFIED LAWS §§ 44-8-30 to -35.

157. N.D. CENT. CODE § 35-03-19(1)(a), (3)(b); S.D. CODIFIED LAWS §§ 44-8-31(2), -35.

158. 765 ILL. COMP. STAT. ANN. 935/5.

159. *Id.* at 935/10. *See also id.* at 935/15 (certificate may be recorded by an officer or duly appointed agent of a title insurance company on behalf of the mortgagor/landowner, so long as "payment of the loan secured by the mortgage was made in accordance with a written payoff statement furnished by the mortgagee or the mortgage servicer"). Curiously, the statute makes clear that the title company "shall not be required to search the public record for a possible recorded satisfaction or release." *Id.* at 935/15. One might argue that this language comprehends some gap period during which the lender might first record a satisfaction, but the Illinois Land Title

original mortgagee, and (if applicable) the mortgage servicer; (2) the date of recording and the recording data for the mortgage; (3) that the mortgagee or mortgage servicer provided a written payoff statement; (4) that the mortgage was paid in accordance with that payoff statement; (5) that there is *no objection from the mortgagee or mortgage servicer* or its successor; (6) that the person executing the certificate of release is an officer or a duly appointed agent of an authorized and licensed title insurance company; and (7) that the certificate of release is made on behalf of the mortgagor or landowner.[160] A properly executed certificate containing this information is prima facie evidence of the facts recited and, upon recording, constitutes a release of the mortgage lien.[161] Similar to the Minnesota statute, the recording of a wrongful or erroneous certificate renders the title insurer liable to the mortgagee for any actual damages sustained due to the recording, and does not relieve the obligor from personal liability upon the mortgage debt.[162]

C. Law Reform and the Politics of One-Touch: URMSA and the Illinois Experience

The Illinois statute provides clear authority for a one-touch procedure, but it requires the closing agent to certify that it has received no objection to the recording of the certificate from the mortgagee or mortgage servicer. This requirement thus allows mortgagees to "opt-out" of the one-touch procedure merely by issuing a payoff statement containing language to the effect that "Lender hereby objects to having its mortgage released by a title insurance company under the Illinois Mortgage Certificate of Release Act." Many mortgage lenders in Illinois appear to do precisely that.[163]

At first blush, it seems odd to adopt a one-touch model yet allow mortgage lenders to circumvent it entirely by opting-out. Not surprisingly, the

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Association has taken the position that the statute authorizes the delivery of closing table satisfactions by the title insurer as long as the mortgagee has received full payment of the debt in accordance with the payoff statement.

160. *Id.* at 935/20.

161. *Id.* at 935/35. This section also provides that the title insurer "may use the recording fee it may have collected for the recording of a release or satisfaction of the mortgage to effect the recording of the certificate of release." *Id.*

162. *Id.* at 935/40. This section also provides that "[t]he prevailing party in any action or proceeding seeking actual damages due to the recording of a certificate of release shall be entitled to the recovery of reasonable attorneys fees and costs incurred in that action or proceeding." *Id.*

163. Earlier in 2007, the Illinois Bankers Association conducted a nonscientific poll of its member institutions through its website, posing the question: "Does your bank 'opt out' of the Illinois Mortgage Certificate of Release Act by issuing blanket objections in payoff statements?" Forty-three percent of the respondents answered "Yes." *See* Illinois Bankers Association: Mortgage Certificate of Release Act, http://ilbanker.com/poll_archive_detail.asp?p=44 (last visited Nov. 27, 2007).

explanation lies in the politics of conflicting interests. The political barriers to widespread implementation of the one-touch model are illustrated both by how the Illinois statute took shape and how disagreement between title and mortgage industry advocates derailed incorporation of the one-touch model into URMSA.

As the Illinois statute took shape, representatives of the title services industry advocated strongly for the adoption of a one-touch procedure modeled upon the Minnesota statute. Under that model, a closing agent can use the one-touch procedure *if it chooses to do so*, but has no express legal obligation to use it.[164] Mortgage lenders argued, however, that having this option rest with the closing agent created a systems problem and a potential liability trap for mortgagees. For example, suppose that a closing agent signals an intention to deliver a closing-table satisfaction, or customarily does so, but then does not do so in a particular transaction. Existing law places a nondelegable legal responsibility on the mortgagee to record a satisfaction, discharged only by compliance.[165] If the closing agent has a choice whether to deliver a closing-table satisfaction, the lender cannot assume the closing agent will in fact do so. Thus, the lender would have to modify its systems to create its own "multiple-touch" system – i.e., the lender would have to continue to monitor the file after closing to confirm whether the closing agent recorded a certificate, and would have to take steps to record a timely satisfaction if the closing agent did not do so.

This is a non-trivial systems problem, and the systems and personnel costs of continued monitoring might easily exceed the original cost of compliance. Thus, a lender might reasonably choose to opt-out of such a one-touch model altogether and simply prepare and record a satisfaction on each loan, without regard to the closing agent's conduct.[166] Under this system, closing agents and lenders might in fact produce and record redundant satisfaction documents – more than negating any efficiency gains that a one-touch process could provide. Accordingly, both in the Illinois legislative process and in the URMSA drafting process, mortgage lenders advocated for a one-touch model that was obligatory in nature. If the closing agent was going to have the authority to issue a closing-table satisfaction, then the closing agent should also have the legal responsibility to do so (as well as the liability for failure to fulfill that responsibility). Only in this way could the lender manage its potential liability and simultaneously avoid the cost of redundant releases.

Based upon these concerns, an early draft of the URMSA would have permitted the mortgagee to make a choice at the time it issued its payoff

164. *See* MINN. STAT. ANN. § 507.401(2) (officer or duly appointed agent of title insurance company "may" execute certificate of satisfaction on behalf of mortgagee).

165. *See supra* notes 68-114 and accompanying text.

166. As discussed above, this appears to be precisely what many Illinois lenders are doing – opting out of the one-touch process in order to manage their potential liability effectively. *See supra* note 163 and accompanying text.

statement. The mortgagee could have chosen to issue a regular payoff statement, thereby choosing to retain the statutory duty to record a timely satisfaction (and the potential liability for noncompliance). Alternatively, the mortgagee could have issued a "satisfaction statement," or a payoff statement that also delegated to the closing agent both the authority and the responsibility to record a satisfaction on the mortgagee's behalf, upon payment of the balance set forth in the statement.[167]

While this procedure adequately addressed the systems problem from the perspective of mortgage lenders, it created other systems problems for title companies providing closing services. Obviously, a one-touch model requires a procedure that protects the lender against the risk of a wrongful release, either due to clerical error or defalcation on the part of closing agent. Typically, this assurance would come from a title insurance underwriter that indemnifies the mortgagee against this risk. Understandably, title insurance underwriters are not prepared to accept this risk without knowledge of the identity, credentials, and trustworthiness of the closing agent who will actually handle the closing funds and issue the satisfaction. Instead, an underwriter would typically only accept this risk where the closing agent in question was pre-approved by the underwriter.

As a result, title services industry representatives objected to the proposed URMSA procedure because it placed the "who bears compliance responsibility?" option with the mortgagee rather than the title insurance underwriter. For example, consider a hypothetical transaction in which Buyer is purchasing from Seller a home that is subject to a mortgage in favor of First Bank. The closing is to be handled by an agent for Local Title Company, but the agent in question is not approved to issue certificates of satisfaction by the underwriter, Chicago Title. The closing agent requests a payoff statement from First Bank, and First Bank issues a payoff statement indicating that the closing agent is to prepare and record a certificate of satisfaction. The closing occurs and the payoff is made, but no satisfaction ends up being recorded. First Bank does not record because it believes the responsibility has shifted to the closing agent, and the closing agent does not record because it does not have authorization to do so from its underwriter, Chicago Title.

In the URMSA drafting process, then, debate over the one-touch model largely devolved into a struggle between lending advocates and title industry advocates, each hostage to their existing bureaucratic systems. Each insisted upon the need to control the decision whether to use the one-touch model – title insurers based upon their existing underwriting practices, and lenders based upon the specter of noncompliance liability. When these discussions reached an impasse, members of the URMSA Drafting Committee – concerned that including one-touch would diminish URMSA's prospects for state adoptions – chose not to incorporate the one-touch procedure.

167. Proposed URMSA § 402(a) (Dec. 19, 2003 draft) (on file with author).

A similar dynamic appears to have been at work in the Illinois legislature during its consideration and enactment of its one-touch statute. Preliminary negotiations on the shape of the Illinois statute were premised on the assumption that the act would be mandatory (i.e., lenders could not "opt out") but would contain a provision shifting responsibility (and liability) for recording from the mortgagee to the closing agent. As the bill progressed, it did not place any affirmative obligation on the closing agent to use the one-touch procedure. Thus, based upon lender objections, the Illinois statute as enacted included the provision permitting mortgage lenders to "opt out" of the one-touch procedure.[168] If mortgage lenders routinely choose to opt out of the one-touch procedure by issuing blanket objections in payoff statements, the potential efficiency gains that could be achieved through the one-touch process would go unrealized.

D. Can the One-Touch Model Be Saved?

One-touch presents a significant reform opportunity, so can the law reform process get past the barriers that derailed its incorporation into URMSA and limited its effectiveness in Illinois? As the preceding section hints, resolution of this question requires parsing the concerns raised about the one-touch model. This section addresses concerns commonly raised or possessed by mortgage lending industry advocates.

1. "One-touch would create too great a risk due to fraud or mistake by closing agents"

Lenders typically express the view that they should not be subject to the risk of losing their lien due to fraud or mistake by a closing agent. Certainly, a closing agent could misappropriate payoff funds and nevertheless record a closing-table satisfaction. Likewise, a closing agent could mistakenly pay an incorrect payoff amount (e.g., mistakenly wiring $15,150.98 rather than the required $115,150.98) and yet still record a closing-table satisfaction because it failed to realize the error.

Neither risk, however, justifies rejection of the one-touch model. As is often the case, Article 9 provides an instructive comparison. Under Article 9, if the debtor or the debtor's agent files a termination statement when it lacks the secured party's express authorization or when the debt remains unsatisfied, the termination statement is unauthorized and has no effect. In other words, even though the termination statement appears in the filing records, it does not operate to terminate the effectiveness of the secured party's financ-

168. *See, e.g.*, H.R. 4759, 93d Gen. Assem., Reg. Sess. (Ill. 2003) (enacted); S. 2994, 93d Gen. Assem., Reg. Sess. (Ill. 2003) (enacted); S. 3020, 93d Gen. Assem., Reg. Sess. (Ill. 2003) (enacted).

ing statement – the secured party's interest in the collateral remains continuously perfected.[169]

By analogy to Article 9, a one-touch statute could (and presumably should) preserve the effectiveness of a mortgage in these situations. If a closing agent failed to pay good funds to the mortgagee sufficient to satisfy the debt, then the closing agent lacked authority to record the satisfaction, and the satisfaction should be of no greater effect than a forged document.[170] Wrongly-filed termination statements by debtors have not substantially impaired the functioning of the Article 9 filing system or personal property secured lending. Under a comparable system, wrongly-recorded one-touch satisfactions should not impair real estate mortgage lending.

Admittedly, a wrongly-recorded one-touch satisfaction carries with it the risk of potential harm to a subsequent good faith buyer – who might assume the unauthorized one-touch satisfaction is valid and thus conclude that title is clear of the actually-unsatisfied mortgage. But buyers face comparable or identical risk under the current system. The mere fact a document is recorded is not conclusive evidence of its validity. Any mortgage satisfaction document purportedly signed by the mortgagee and appearing on the record could be valid, or it could be forged or unauthorized and thus invalid. This risk is one of the primary reasons why prudent buyers of land purchase title insurance. In summary, the fraud or mistake concern cannot justify rejection of the one-touch model.

2. "One-touch does not accommodate the mortgage lender's need to correct its original payoff amount, after closing, to account for legitimate information that does not come to the lender's attention until after closing"

To illustrate this concern, suppose that Buyer has a contract to buy Seller's home, with closing to occur on November 3. On November 2, Seller's mortgagee, First Bank issues a $125,550.76 payoff amount to Seller, based upon the scheduled November 3 closing date. Closing does occur on November 3, and the Closing Agent tenders exactly that payoff amount by wire transfer to First Bank. Closing Agent then issues and records a one-touch satisfaction on First Bank's behalf. On November 4, however, First Bank receives notice that Seller's October 31 check for its monthly mortgage payment – which First Bank had credited against Seller's balance prior to calculating the original payoff amount – was returned for insufficient funds. As a result, First Bank informs Seller and Buyer that the correct payoff amount was really $126,750.35, that the remaining balance due is $1,199.59,

169. *See supra* note 117 and accompanying text.

170. A forged deed is void, even as against the claim of a bona fide purchaser. STOEBUCK & WHITMAN, *supra* note 2 § 11.1, at 817.

and that First Bank will institute foreclosure proceedings if neither Seller nor Buyer tenders the remaining balance immediately.

Mortgage lenders insist that the current post-closing "gap" is necessary to provide them with the time needed to ensure that the debt really has been fully paid before issuing a satisfaction.[171] Unlike the "fraud or mistake" objection, this objection is more nuanced. In the above hypothetical, First Bank's position appears sympathetic at first blush: Seller bounced a check, and as a result failed to satisfy the debt in full. Yet the problem results in part because First Bank issued an inaccurate payoff statement. First Bank could have chosen not to credit the Seller's October 31 check until the check cleared, and thus could have issued a payoff statement demanding the larger amount – with First Bank thereafter either (a) adjusting the payoff amount downward if the October 31 check later clears prior to closing or (b) returning the funds reflected by the October 31 check if that check only clears after closing. Instead, First Bank chose to issue a payoff amount based upon the assumption that the check would clear in the ordinary course.

Because the very purpose of the payoff statement is to facilitate payoff in the context of the proposed sale, First Bank can readily foresee that the buyer (and the buyer's mortgage lender, if the buyer is obtaining financing) will rely upon the accuracy of this payoff statement. Under already existing law, if a third party like Buyer or Buyer's mortgage lender has reasonably relied upon the accuracy of First Bank's original payoff statement and proceeded to close, that reliance should work an estoppel against First Bank's ability to enforce the mortgage.[172] The mistake was First Bank's, and Seller still retains personal liability on the mortgage debt (assuming a recourse debt) for the remaining unpaid debt balance. To the extent this scenario results because the mortgagee issued what turns out to be an inaccurate payoff statement, the concern appears illegitimate and does not justify rejection of the one-touch model.

The question is whether First Bank can (or should) be able to address this risk by "qualifying" or "conditioning" its payoff statement so as to defeat its reliability (and, in turn, the application of equitable estoppel doctrine). For example, First Bank might attempt to qualify its payoff statement as follows:

> The payoff amount reflected on this statement may be subject to change for __XX__ days following the closing to address matters that might have changed the balance of the debt but do not come to

171. Other kinds of "post-closing" adjustments that might arise would be liability for attorney's fees or for funds advanced to pay real estate taxes, insurance costs, or other sums advanced to protect the mortgagee's security.

172. *See, e.g.*, Rissman v. Kilbourne, 643 So. 2d 1136 (Fla. Dist. Ct. App. 1994); Mut. Life Ins. Co. v. Grissett, 500 F. Supp. 159 (M.D. Ala. 1980). *See also* URMSA § 202(b) ("A secured creditor that sends a payoff statement containing an understated payoff amount may not deny the accuracy of the payoff amount as against any person that reasonably and detrimentally relies upon the understated payoff amount.").

> the mortgagee's attention until after receipt of the stated payoff amount, including, without limitation, the dishonor of a check for previous payments, expenditure of funds by the mortgagee to protect the security of the debt, or the incurring of attorney's fees and other costs of collection for which the borrower is liable.

Should such an extensive qualification be permissible?[173] Ultimately, the answer to this question is important if there is any hope for a universal one-touch model. If mortgagees can and do legally qualify payoff statements in this fashion, then title insurers will not willingly accept broad responsibility to issue one-touch satisfactions. Instead, title insurers will simply maintain the status quo – i.e., they will leave the responsibility for recording a satisfaction (and the liability for noncompliance) with the mortgagee, and will instead make individualized judgments regarding whether to issue affirmative coverage to a buyer and/or its mortgagee in any particular transaction. By contrast, if mortgagees cannot legally qualify payoff statements in this fashion, mortgagees may be more reluctant to give up control over the recording of the satisfaction.

3. "One-touch is not workable unless it clearly assigns responsibility for satisfactions in a way that permits mortgage lenders to manage their noncompliance liability"

As suggested earlier, this concern is clearly both legitimate and significant, particularly to the extent that a state imposes a substantial penalty for mortgagee noncompliance.[174] Even under a one-touch model, a mortgagee could not simply eliminate its mortgage satisfaction department. Mortgagees will still have to retain the administrative capacity needed to issue satisfactions in cases where payoff occurred without the assistance of a closing agent authorized to deliver a one-touch satisfaction. This would occur either when a mortgagor pays off her loan at its originally scheduled maturity, or when the closing agent is not eligible to record a one-touch satisfaction. Mortgagees would have to maintain sufficient staff to execute such satisfactions or outsource this duty to third-party vendors.

Further, for a mortgage lender to manage its potential liability effectively, the mortgage lender must receive a fail-proof signal that the closing agent in a particular transaction is *both willing* to file a closing-table satisfac-

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173. URMSA (which did not incorporate one-touch) does provide that a secured creditor cannot qualify the accuracy of a payoff amount unless the payoff statement provides information sufficient to permit the person seeking the payoff to obtain an updated payoff amount at no charge during the creditor's normal business hours on the payoff date or the immediately preceding business day. URMSA § 201(f).

174. Penalties for noncompliance are discussed above. *See supra* notes 88-114 and accompanying text.

tion *and authorized* by a title insurer to do so. This is feasible, but it is a non-trivial information systems challenge. To work effectively, it would require some common information system, accessible both to title insurers and mortgage lenders and continuously updated, that would permit a mortgage lender to ascertain whether a particular closing agent is authorized by a title insurance underwriter to deliver a one-touch satisfaction.

On this point, it is worth noting that the only state in which one-touch appears to be functioning as intended is Minnesota – *which does not impose any civil penalty upon a mortgage lender that fails to record a timely satisfaction.*[175] While civil penalties may incentivize good satisfaction practices, they may have the perverse effect of discouraging a potentially effective law reform effort. Given a mortgagee's legitimate need to manage potential liability, it is predictable that the higher a state sets its civil penalty, the more difficult it will become for mortgage lenders and title industry advocates to reach consensus on how to allocate that potential liability appropriately.

4. "One-touch is not workable because mortgage lenders do not want to give up control over the fee revenue obtained by providing mortgage satisfactions"

For obvious reasons, mortgage lending industry advocates do not articulate this concern publicly. Nevertheless, widespread use of a one-touch model would result in lost fee revenue for mortgage lenders in those states (nearly all of them) in which state law does not prohibit a lender from charging a satisfaction preparation fee. To the extent mortgage lenders treat the provision of satisfaction services as a source of fee revenues, one can expect mortgage lending advocates will not embrace the one-touch model (but will couch their objections in the more "neutral" fashion reflected in the previous three arguments).

An earlier draft of URMSA that did incorporate the one-touch model tried to address this concern by permitting the mortgage lender to impose a $20 fee for the issuance of a satisfaction statement (i.e., a payoff statement that authorized the closing agent to record a one-touch satisfaction on the mortgagee's behalf).[176] Even if the other concerns expressed above can be addressed satisfactorily, authorization of such fees may be necessary to obtain the consent of mortgage lending advocates.

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175. The Minnesota statute does permit the mortgagor to recover actual damages caused by the mortgagee's noncompliance, but – unlike nearly every other state – does not authorize a statutory penalty. MINN. STAT. ANN. § 507.401.

176. UNIF. MORTGAGE SATISFACTION ACT § 401(c) (Proposed Annual Meeting Draft 2003), *available at* http://www.ernstpublishing.com/public/Draft%207-03.pdf.

VI. CONCLUDING THOUGHTS

Ultimately, progress in electronic contracting, payments, and recording is likely to reach a point where technology solves the mortgage satisfaction problem. But we are not there yet. Despite recent progress in electronic recording and the early success of the Uniform Real Property Electronic Recording Act,[177] we are still years (perhaps decades) away from universally leaving behind paper-based transfer and recording. In the interim, the law must continue to struggle with how our system can best provide satisfaction services to mortgagors.

Given the obstacles that derailed the incorporation of one-touch into URMSA and limited its effectiveness in Illinois, it remains doubtful whether the law reform process can generate sufficient consensus between mortgage lenders and title industry advocates to accomplish one-touch reform. Consensus will be particularly difficult to obtain through a uniform law promulgated by NCCUSL, given the substantial differences in existing state and local mortgage satisfaction laws and practices identified in Part III. State and local banking associations, bars, and land title associations often have substantial interests in the preservation of their existing laws and practices. This produces inertia that can be difficult for the uniform law process to overcome – especially in the real estate area, where the most ambitious uniform law projects (like the Uniform Land Transactions Act and the Uniform Land Security Interests Act) achieved no adoptions.

Perhaps the best hope for successful law reform lies with congressional action. Given the substantial role that mortgage lending plays in the American economy – and the transformation of mortgage practices occasioned by the secondary market and widespread securitization of residential mortgage loans – the current patchwork of state mortgage satisfaction laws and practices is more than a little quaint. Congress can provide the most effective and immediate push toward uniformity by authorizing a one-touch satisfaction model for mortgages held by federal agencies and government-sponsored secondary market entities like Fannie Mae and Freddie Mac – if not all mortgage transactions. Congress surely has the power to do so pursuant to its authority to regulate activities affecting interstate commerce.[178] Furthermore, if real uniformity is to be achieved, congressional legislation is likely neces-

177. Since 2003, URPERA has been enacted in 14 states (Arizona, Arkansas, Delaware, Florida, Idaho, Illinois, Kansas, Nevada, New Mexico, North Carolina, Tennessee, Texas, Virginia, and Wisconsin) and the District of Columbia. Uniform Law Commissioners, A Few Facts About the Uniform Real Property Electronic Recording Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-urpera.asp (last visited Oct. 30, 2007).

178. Grant S. Nelson & Robert J. Pushaw, *Rethinking the Commerce Clause: Applying First Principles to Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 164 (1999) (suggesting federal real estate security code).

sary to overcome the parochial interests of state and local actors within the real estate transfer and recording systems.

Federalization of key aspects of mortgage law is, of course, not a novel suggestion. Like an awful lot of the good ideas in the field of mortgage law, it comes from the minds of Dale Whitman and Grant Nelson. They have previously and persuasively argued that Congress should enact the Uniform Nonjudicial Foreclosure Act as an exercise of its commerce power,[179] and that NCCUSL should work to have its uniform acts dealing with commercial transactions adopted by Congress.[180] While it seems doubtful that NCCUSL would embrace that approach, truly meaningful reform of mortgage satisfaction law may be unlikely without it.

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179. Grant S. Nelson & Dale A. Whitman, *Reforming Foreclosure: The Uniform Nonjudicial Foreclosure Act*, 53 DUKE L.J. 1399, 1511-12 (2004).

180. In their article on the Uniform Nonjudicial Foreclosure Act, Professors Nelson and Whitman offered a pragmatic defense of this proposal:

> Perhaps it is time for the Conference to adopt a new perspective. There is a strong case that uniform acts dealing with commercial transactions ought to be enacted by Congress under its Commerce Clause power. Under this paradigm, future versions of the UCC would be enacted by Congress. So too would UNFA. The Conference would continue to produce only acts dealing primarily with local social and cultural concerns, such as the Uniform Marriage and Divorce Act and the Uniform Probate Code.
>
> This "bifurcated function" approach for the Conference is hardly a radical suggestion. Uniform acts involve a time-consuming, deliberate, multidraft process that generally takes at least three or four years, and the result is almost always a high-quality product – at least equal in quality to typical acts of Congress. State influence on uniform acts is substantial. They are drafted and considered by a body of commissioners that draws its financial support largely from state governments. Perhaps more importantly, the membership of the Conference is comprised of leading lawyers, judges, and academics who are appointed by a political process in each of the states. Indeed, uniform acts probably receive much more local and state input than the usual legislation enacted by Congress. Consequently, if uniformity in commercial matters is desirable, why not let it come in the form of a congressionally enacted uniform act produced by the Conference's careful deliberative process that substantially reflects state concerns? If the Conference and Congress adopted this cooperative approach, the Conference could achieve an impact in the new millennium that would far exceed its influence on the development of the law in the twentieth century.

Id. at 1512-13 (footnotes omitted). *See also* Grant S. Nelson & Dale A. Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, 2006 B.Y.U. L. REV. 305, 364-65 (2006) (urging congressional adoption of mortgage subrogation principles reflected in Sections 7.3 and 7.6 of the Restatement of Mortgages).