THE IMPLICATIONS, RAMIFICATIONS, AND DESTROYED FOUNDATIONS OF OWNERSHIP AND CIVIL PROCEDURE THROUGH *SCHWARTZWALD*'S "UNFORECLOSURE"

Sam G. Brinker[1]

[1] The author is a student at the University of Dayton School of Law with an undergraduate degree (B.A. English, 2012) from Wright State University and is a life-long resident of the Dayton area. Sam would like to thank Jeffrey Gammell for his willingness to participate in an interview, for without the information provided therein, neither this Comment nor Sam's understanding of title insurance would have been nearly as clear. Sam also owes a tremendous thank you to his "trio of property professors." Sam thanks Professor Tracy Reilly, his Real Property I professor, for her continuous encouragement and mentorship throughout the author's law school career and for laying a most brilliant foundation in real property law. Sam thanks Professor Blake Watson, his Real Property II professor, for asking the hard questions and playing the devil's advocate in the writing process, ever pushing Sam to raise and dismiss counterarguments. And finally, Sam thanks Professor James Durham, his Comment advisor, for his tireless effort to keep Sam on point throughout this Comment-writing process, and for his sage advice. Sam would like to thank his mom and dad and his sister for their endless support both in listening to Sam ramble about a topic they have no interest in or understanding of, appreciably so, and for never failing to believe in him.

I. INTRODUCTION

Within the housing market of the United States is a "$13 trillion residential mortgage market," which "depends directly on clarity of mortgage title[.]"[2] On October 31, 2012, the Supreme Court of Ohio decided *Federal Home Loan Mortgage Corporation v. Schwartzwald* and jeopardized the integrity of that market, and titles to hundreds, perhaps thousands, of properties in Ohio.[3]

Schwartzwald, like all cases, has a story. In 2006, the

[2] Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637, 645 (2013).

[3] *See generally* Fed. Home Loan Mortg. Corp. v. Schwartzwald, 979 N.E.2d 1214 (Ohio 2012).

Schwartzwalds purchased property in Xenia, Ohio.[4] At that time, the Schwartzwalds also executed a promissory note secured by a mortgage with Legacy Mortgage.[5] Eventually, they defaulted on the promissory note, which had been assigned to Wells Fargo, the loan servicer.[6] And in April of 2009, Freddie Mac filed a complaint for foreclosure, without receiving assignment of the note until May of 2009.[7] The Ohio Second District Court of Appeals ruled in favor of Freddie Mac on summary judgment.[8] The Supreme Court, however, reversed the Second District Court's decision, and dismissed Freddie Mac's complaint for lack of standing, since Freddie Mac did not receive the assignment until after it filed the complaint.[9] The foreclosure judgment was, therefore, void.[10]

Because the foreclosure judgment was voided, rather than the Court upholding the foreclosure judgment and applying the decision prospectively, the decision has retroactive effect, potentially rendering null and void all foreclosure judgments, which lacked assignment of the note prior to the complaint.[11] Therefore, in Ohio, all foreclosures, where the note has been assigned,[12] can be questioned as to their validity, which has a huge impact on people who have purchased foreclosed upon property. This will result in a parade of horribles.

In addition to creating adverse economic impacts, which are beyond the scope of this Comment, the *Schwartzwald* decision may cause mortgage lenders to further urban blight by walking away from properties, title insurance companies to create gaps in coverage on foreclosed properties, and bona fide purchasers to face a list of hurdles. Bona fide purchasers could possibly (1) incur the costs of litigation in fighting for good title to their property, likely through quiet title actions; (2) be forced to lose a loan after otherwise completing the closing process; and (3) lose value in their property by being stuck with unsellable property. Furthermore, foreclosed upon parties may be given a second bite at the apple, creating judicial inefficiencies. There are also severe economic impacts of the decision, which are beyond the scope of this Comment. Identity of ownership through clarity of title belongs to both sellers and buyers of property, and

---

[4] Fed. Home Loan Mortg. Corp. v. Schwartzwald, 957 N.E.2d 790, 793–97 (Ohio Ct. App. 2011), *rev'd* 979 N.E.2d 1214 (Ohio 2012).

[5] *Id.* at 793.

[6] *Id.*

[7] *Id.* at 793–94.

[8] *Id.* at 805; *see also Schwartzwald*, 979 N.E.2d at 1216.

[9] *Schwartzwald*, 979 N.E.2d at 1216.

[10] *Id.*

[11] *See id.*

[12] Title agents will have to look for a foreclosure in the chain of title, and then check to see if there was an assignment of the note. If there was an assignment of the note then the title agent will have to see if that assignment was dated prior to the filing of the foreclosure complaint. If it was, a *Schwartzwald* issue does not exist. If it was not, validity is called into question, and the foreclosure judgment is likely void.

the Court takes that away from both.

The implications of *Schwartzwald* will, thus, change the landscape of both past and future foreclosures in Ohio. The Ohio Supreme Court failed to see the impacts of its decision, especially as its holding pertains to bona fide purchasers. Consequently, the Court should readdress the issue and reverse itself.

The Ohio Supreme Court should overrule or reverse its decision in *Schwartzwald* because the holding goes against the well-established precedent concerning the long recognized rights of bona fide purchasers as well as the commonly held practices in the mortgage lending industry and the title insurance industry. The decision jeopardizes property owners' rights and threatens industries that are part of a major sector of the economy in Ohio and the United States as a whole – the residential mortgage industry.

In addition, the Court's holding is fundamentally flawed in two ways. First, it equates a lack of standing issue with a subject matter jurisdiction issue, which is disputed by other Ohio decisions.[13] Second, even if the Court wants to equate lack of standing to lack of subject matter jurisdiction, the Court did not go far enough in its decision, instead putting bona fide purchasers in a position where they are no longer treated as bona fide purchasers.

This Comment will first discuss important terminology in Part II. Also in Part II is a discussion of the background of the foreclosure landscape prior to *Schwartzwald*, specifically the split in the district courts in Ohio on how to address the issue of standing in a foreclosure action. To better frame the discussion in Part III, Part II will also give a more in depth analysis of the facts of *Schwartzwald*. Finally, Part II will also address the Ohio Supreme Court's inconsistent application of real party in interest precedent and standing precedent in *Schwartzwald*, *State ex rel. Jones v. Suster*, and in *Groveport Madison Local Schools Board of Education v. Franklin City Board of Revision*.

Part III of this Comment will discuss the effects of the *Schwartzwald* decision on the foreclosure process. This part of the Comment will explicate which parties are affected by the decision, those

---

[13] *Compare* Self Help Ventures Fund v. Jones, No. 2012–A–0014, 2013 Ohio App. LEXIS 767, at *4–9 (Ohio Ct. App. Mar. 11, 2013), Lasalle Bank Nat'l. Ass'n. v. Street, No. 08 CA 60, 2009 Ohio App. LEXIS 1560, at *10–11 (Ohio Ct. App. Apr. 17, 2009), Wachovia Bank v. Cipriano, No. 09CA007, 2009 Ohio App. LEXIS 4605, at *9–14 (Ohio Ct. App. Oct. 13 2009), *and* Bank of N.Y. v. Stuart, No. 06CA008953, 2007 Ohio App. LEXIS 1387, at *5–8 (Ohio Ct. App. Mar. 30, 2007), *with* Wells Fargo Bank, N.A. v. Jordan, No. 91675, 2009 Ohio App. LEXIS 881, at *12 (Ohio Ct. App. Mar. 12, 2009), *and* Wells Fargo Bank, N.A. v. Byrd, 897 N.E.2d 722, 724–25 (Ohio Ct. App. 2008). *See also* Groveport Madison Local Schs. Bd. of Educ. v. Franklin Cnty. Bd. of Revision, 998 N.E.2d 1132, 1139 (Ohio 2013); State *ex rel.* Jones v. Suster, 701 N.E.2d 1002, 1008 (Ohio 1998); John B. Leach, *Taking a Stand on Standing: The Real Party in Interest Conflict in Ohio Foreclosure Actions*, 40 CAP. U.L. REV. 1099, 1119–24 (2012).

specifically being: (1) the mortgage lending industry; (2) the title insurance industry; (3) the third party purchasers (typically, bona fide purchasers) of foreclosed upon homes; (4) the courts; and (5) the foreclosed upon parties.

Further, Part III of this Comment will provide alternative holdings that should have come from *Schwartzwald*. If the Court had not held a lack of standing to be a lack of subject matter jurisdiction, the holding would have been proper, pursuant to and supported by Ohio law. In the alternative, the Court should have required prospective application of the decision so as to provide time for the mortgage lending industry and title insurance industry to react, and should have limited the decision to avoid inequitable outcomes for innocent bona fide purchasers.

II. BACKGROUND

Prior to the *Schwartzwald* decision, there was a split in Ohio as to whether (1) a party could cure standing in a foreclosure action by assignment of the mortgage and promissory note prior to final judgment; and (2) whether the lack of standing should be equated to a lack of subject matter jurisdiction.[14] Consequently, this prior case law is important to discuss and understand in light of the *Schwartzwald* decision.

It is also important to discuss the relevant terminology as it relates to the split in the district courts in Ohio and as it relates to the subsequent decision from the Ohio Supreme Court in *Schwartzwald*. As such, the background section of this Comment will begin by discussing the interplay between the definition of standing and real party in interest and the interplay between subject matter jurisdiction and void versus voidable judgments because it is paramount to the discussion of *Schwartzwald* and its effects. It is also important to briefly discuss bona fide purchasers to provide a framework for who exactly is affected by the *Schwartzwald* decision.

This section will also review the facts of *Schwartzwald* more in depth. Finally, it is important to address the Ohio Supreme Court's inconsistent application of real party in interest and standing precedent in *Schwartzwald*, *Suster*, and *Groveport*. This will help to frame the issues to be analyzed in Part III of this Comment.

A. The Interplay Between Standing and Real Party in Interest

In order for a controversy to be justiciable, a party must have

---

[14] *Compare Jones*, 2013 Ohio App. LEXIS 767, at *4–9, *Street*, 2009 Ohio App. LEXIS 1560, at *10–11, *Cipriano*, 2009 Ohio App. LEXIS 4605, at *9–14, *and Stuart*, 2007 Ohio App. LEXIS 1387, at *5–8, *with Jordan*, 2009 Ohio App. LEXIS 881, at *12, *and Byrd*, 897 N.E.2d at 724–5. *See also* Leach, *supra* note 13, at 1119–24.

standing to sue.[15] The Ohio Supreme Court stated that, "standing depends on whether the party has alleged a 'personal stake in the outcome of the controversy.'"[16] This requirement and definition of standing has been cited all the way up to the United States Supreme Court.[17]

In Ohio, "[c]ommon-law standing is similar to Civ.R. 17(A)'s real-party-in-interest requirement."[18] A real party in interest is "'one who has a real interest in the subject matter of the litigation, and not merely an interest in the action itself, *i.e.*, one who is *directly* benefitted or injured by the outcome of the case.'"[19] If a party has standing as a real party in interest and there is an otherwise justiciable controversy, "[t]he courts of common pleas and divisions thereof shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law."[20]

Although it has been held in other states, and even by the United States Supreme Court, that standing should be determined "as of the commencement of the suit,"[21] it is held that in Ohio, "the issue of standing, inasmuch as it is jurisdictional in nature, may be raised at any time during the pendency of the proceedings."[22] Further, according to Ohio Civil Procedure Rule 17, standing may not be jurisdictional insomuch as it states that:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the

---

[15] Cleveland v. Shaker Heights, 507 N.E.2d 323, 325 (Ohio 1987); *see also* OHIO CONST. art. IV, § 4(B); ROBERT M. CURRY & JAMES GEOFFREY DURHAM, OHIO REAL PROPERTY LAW AND PRACTICE § 19.05[1] (6th ed. 2013).

[16] *Cleveland*, 507 N.E.2d at 325 (quoting Middletown v. Ferguson, 495 N.E.2d 380, 384 (Ohio 1986)); *see also* BLACK'S LAW DICTIONARY 1536 (Bryan A. Garner ed., 9th ed. 2009) (defining standing as "[a] party's right to make a legal claim or seek judicial enforcement of a duty or right").

[17] Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998) ("Standing to sue is part of the common understanding of what it takes to make a justiciable case." (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990))).

[18] Fed. Home Loan Mortg. Corp. v. Schwartzwald, 957 N.E.2d 790, 802 (Ohio Ct. App. 2011), *rev'd* 979 N.E.2d 1214 (2012).

[19] Countrywide Home Loans, Inc. v. Swayne, No. 2009 CA 65, 2010 WL 3292363, at *4 (Ohio Ct. App. Aug. 20, 2010) (quoting Shealy v. Campbell, 485 N.E.2d 701, 702 (Ohio 1985); *see also* BLACK'S LAW DICTIONARY, *supra* note 16, at 1232 (defining a real party in interest as "[a] person entitled under the substantive law to enforce the right sued upon and who generally, but not necessarily, benefits from the action's final outcome").

[20] OHIO CONST. art. IV, § 4(B); *see also* Levitin, *supra* note 2, at 643–44 ("[T]here is broad agreement among courts that some sort of standing or similar status is necessary for both judicial and nonjudicial foreclosure . . . . There is far less agreement, however, about what determines who has standing to bring the foreclosure.").

[21] Lujan v. Defenders of Wildlife, 504 U.S. 555, 571 n.5 (1992).

[22] New Boston Coke Corp. v. Tyler, 513 N.E.2d 302, 305 (Ohio 1987).

> action had been commenced in the name of the real party in interest.[23]

Furthermore, Section 1303.31(A) of the Ohio Revised Code "identifies three classes of persons who are 'entitled to enforce' an instrument, such as a note"; those are: "(1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a holder; and (3) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to R.C. 1303.38 or R.C. 1303.58(D)."[24]

The Fifth District Court of Appeals for Ohio has also held that, where there is a transfer of a note, a transfer of the mortgage will be implied as long as there is intent to transfer both, suggesting that an assignment of the note post-commencement of the suit will suffice to cure any lack of standing due to the intent in assigning the mortgage.[25] However, a discussion about intent to transfer in the context of *Schwartzwald* and how exactly Freddie Mac came into possession of the note is outside the scope of this Comment.

B. The Interplay Between Subject Matter Jurisdiction and Void Versus Voidable Judgments

The definition of subject matter jurisdiction, particularly the distinction between lack of jurisdiction and improper exercise of jurisdiction, controls whether a foreclosure judgment would be considered void or voidable.[26] There is a specific difference between lack of subject matter jurisdiction and improper exercise of jurisdiction over a claim.[27] A court has subject matter jurisdiction when it has jurisdiction over the issue or nature of the case and relief sought, such that it can rule on the conduct of the parties or the state of things in the case.[28] The Second District Court of Appeals for Ohio noted that, "[j]urisdiction over a particular case is an elusive concept, defined best by example."[29] It went on to give such an example:

> A common pleas court is a court of general jurisdiction and has subject matter jurisdiction over crimes committed by an adult. Nevertheless, where the common pleas court fails to strictly comply with procedures in a capital case, such as the

---

[23] OHIO R. CIV. P. 17(A).

[24] Fed. Home Loan Mortg. Corp. v. Schwartzwald, 957 N.E.2d 790, 799 (Ohio Ct. App. 2011) (referencing Ohio Revised Code Section 1303.31(A)), *rev'd* 979 N.E.2d 1214 (2012).

[25] Bank of New York v. Dobbs, No. 2009–CA–000002, 2009 U.S. App. LEXIS 4019, at *28–29 (Ohio Ct. App. Sept. 8, 2009) (discussing Section 5.4 of the Restatement (Third) of Property: Mortgages).

[26] *Schwartzwald*, 957 N.E.2d at 803.

[27] *Id.*

[28] *Id.*; *see also* BLACK'S LAW DICTIONARY, *supra* note 16, at 931.

[29] *Schwartzwald*, 957 N.E.2d at 803 (citation omitted).

> failure to utilize a statutorily mandated three judge panel, it is an improper exercise of jurisdiction over the case.[30]

Lack of subject matter jurisdiction cannot be waived, unlike other affirmative defenses, and lack of subject matter jurisdiction renders a judgment void.[31] Other authority in Ohio, from the Ohio Supreme Court, has held that a lack of standing issue does not challenge the court's subject matter jurisdiction but, rather, challenges the ability of the complaining party to bring the action at all.[32]

Furthermore, depending on the jurisdictional question, the foreclosure actions become either void or voidable.[33] The Ohio Supreme Court explicated the distinction, generally, between void and voidable actions in *Miller v. Nelson-Miller*:

> The distinction is between the lack of power or want of jurisdiction in the Court, and a wrongful or defective execution of power. In the first instance all acts of the Court not having jurisdiction or power are void, in the latter voidable only. A Court then, may act, first, without power or jurisdiction; second, having power or jurisdiction, may exercise it wrongfully; or third, irregularly. In the first instance, the act or judgment of the Court is wholly void, and is as though it had not been done. The second is wrong and must be reversed upon error. The third is irregular, and must be corrected by motion. Thus, a judgment is generally void only when the court rendering the judgment lacks subject-matter jurisdiction or jurisdiction over the parties; however, a voidable judgment is one rendered by a court that lacks jurisdiction over the particular case due to error or irregularity.[34]

In *Pratts v. Hurley*, the Ohio Supreme Court stated that subject matter jurisdiction "is a 'condition precedent to the court's ability to hear the case. If a court acts without jurisdiction, then any proclamation by that court is void.'"[35]

Further, as explicated in the Second District Court of Appeals

---

[30] *Id.*

[31] *Id.*; *see also* State *ex rel.* Jones v. Suster, 701 N.E.2d 1002, 1008 (Ohio 1998) (citation omitted).

[32] *Suster*, 701 N.E.2d at 1008 (citation omitted) ("Lack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court.").

[33] Miller v. Nelson-Miller, 972 N.E.2d 568, 571 (Ohio 2012) (citing Cochran's Heirs v. Loring, 17 Ohio 409, 423 (1848)).

[34] *Id.* at 571 (citations omitted); *see also* GRANT S. NELSON & DALE A. WHITMAN, LAND TRANSACTIONS AND FINANCE 165 (4th ed. 2004) (stating that, in the context of deeds, "[i]f the grantee has reconveyed the land to a BFP, a void deed will be set aside even as against the BFP, while a merely voidable deed will not").

[35] Pratts v. Hurley, 806 N.E.2d 992, 996 (Ohio 2004) (quoting *Suster*, 701 N.E.2d at 1007).

decision in *Schwartzwald*, there is a parade of horribles to consider if lack of standing is equated to lack of subject matter jurisdiction:

> If there is no jurisdiction in the court, then the judgment is void and can be challenged at any time. One could speculate on the effect of a holding that any judgment and decree of foreclosure ever granted wherein it can be shown that a mortgagee did not, at the time of the initial complaint, have standing and thus was not a real party in interest, results in the court's not having jurisdiction.[36]

Therefore, as a result of *Schwartzwald*'s interpretation of jurisdiction, foreclosure judgments made without jurisdiction – because the foreclosing party did not receive assignment of the note prior to filing a complaint – are void.

C. Bona Fide Purchaser Terminology

The third parties that purchase foreclosures after judgment of the court can be considered bona fide purchasers, as long as they meet the requirements of such. Ohio courts have defined a bona fide purchaser "as one who takes in good faith, for value, and without actual or constructive notice."[37] According to the Ohio Supreme Court, "[p]ursuant to [Ohio Revised Code Section 5301.25(A)], a bona fide purchaser for value is bound by an encumbrance upon land only if he has constructive or actual knowledge of the encumbrance."[38]

If a bona fide purchaser has no knowledge, either actual or constructive, of an instrument recorded against the bona fide purchaser's title, the bona fide purchaser's title is not affected by that instrument, which demonstrates the legal protection afforded to a bona fide purchaser for value

---

[36] *Schwartzwald*, 957 N.E.2d at 803.

[37] Biviano v. Edward C. Mahan Trust, No. 2002–T–0089, 2003 WL 22931350, at *3 (Ohio Ct. App. Dec. 12, 2003) (citing Wayne Bldg. & Loan Co. of Wooster v. Yarborough, 228 N.E.2d 841, 846 (1967); *see also* BLACK'S LAW DICTIONARY, *supra* note 16, at 1355 (defining a bona fide purchaser as "[o]ne who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims"); *Bona Fide Purchaser Definition*, THE LAW DICTIONARY, http://thelawdictionary.org/bona-fide-purchaser/ (last visited Feb. 18, 2015) (defining a bona fide purchaser as, "[a] purchaser for a valuable consideration paid or parted with in the belief that the vendor had a right to sell, and without any suspicious circumstances to put him on inquiry") (citation omitted).

[38] Emrick v. Multicon Builders, Inc., 566 N.E.2d 1189, 1193 (Ohio 1991); *see also* OHIO REV. CODE ANN. § 5301.25(A) (West 2014); GRANT S. NELSON ET AL., REAL ESTATE TRANSFER, FINANCE, AND DEVELOPMENT 213 (8th ed. 2009) ("BFP status encompasses two elements: paying value and lacking notice of the prior conveyance."); *Bona Fide Purchaser for Value Without Notice Definition*, THE LAW DICTIONARY, http://thelawdictionary.org/bona-fide-purchaser-for-value-without-notice/ (last visited Mar. 24, 2015) (defining a bona fide purchaser for value without notice as, "party that buys property without any idea of prior claims on it. They are not liable for prior claims unless it was registered before the purchase").

without notice.[39] Further, a mortgage that is unrecorded is unenforceable against a bona fide purchaser who has no knowledge of it.[40] This suggests that if a foreclosure judgment is voided, the mortgage is still in effect, or it becomes effective again. The question is whether that mortgage is considered unrecorded as against the bona fide purchaser who purchased the property after the mortgage had already been released as a result of the foreclosure judgment.[41] The effects of the answer to that question are beyond the scope of this Comment.

D. The District Split in Curing Standing Issues

Although outside the scope of this Comment, it is interesting to note as a perspective point that there have been nearly three thousand reported opinions concerning this type of standing issue within the last five years.[42] For the purposes of this Comment it is important to discuss that, prior to the decision by the Ohio Supreme Court in *Schwartzwald*, there was a split in the district courts as to how the issue of standing could or could not be cured in a foreclosure action.[43] Specifically, the First and Eighth Districts had "held that a lack of standing cannot be cured by substituting the real party in interest for an original party pursuant to Civ.R. 17(A)."[44] Essentially, these districts required that the assignment be made prior to the complaint ever being filed, otherwise there would be a lack of subject matter jurisdiction.[45]

Other district courts were holding the opposite prior to *Schwartzwald*, that "[i]n a mortgage foreclosure action, the lack of standing or a real party in interest defect can be cured by the assignment of the mortgage prior to judgment."[46] *Schwartzwald*'s holding mimicked the First

---

[39] Four Howards, Ltd. v. J & F Wenz Rd. Inv., LLC, 902 N.E.2d 63, 72 (Ohio Ct. App. 2008).

[40] Vickroy v. Vickroy, 542 N.E.2d 700, 701 (Ohio Ct. App. 1988).

[41] The chain of title would show a release of the mortgage, thus, giving a "false" impression of clear title. The impression is false because the mortgage would be effectively reinstated due to the void judgment.

[42] Levitin, *supra* note 2, at 642. Furthermore, the *Schwartzwald* decision has been cited over 192 times as of the last update of this Comment. However, for purposes of avoiding redundancy and with respect to the Law Review Staff Writers who will work tirelessly on my Comment, this author will not cite the 192 cases. This author would suggest that the reason for the prevalence of this issue is the 2008 mortgage lending crisis and the market crash discussed *infra* at Part II (E).

[43] Fed. Home Loan Mortg. Corp. v. Schwartzwald, 979 N.E.2d 1214, 1217–18 (Ohio 2012); *see also* CURRY & DURHAM, *supra* note 15, at § 19.05[1]. *But see* Levitin, *supra* note 2, at 641 (explaining that the reason for the confusion of the law arose out of the too-big-to-fail housing finance industry changing and disregarding prior law because it was inconvenient, "banking on its too-big-to-fail status to guarantee favorable legal outcomes").

[44] *Schwartzwald*, 979 N.E.2d at 1217. *See also* Wells Fargo Bank, N.A. v. Jordan, No. 91675, 2009 WL 625560, at *4–5 (Ohio Ct. App. Mar. 12, 2009); Wells Fargo Bank, N.A. v. Byrd, 897 N.E.2d 722, 726 (Ohio Ct. App. Sept. 12, 2008); *see also* Levitin, *supra* note 2, at 642 ("There have been nearly three thousand reported opinions dealing with this issue [of standing] in some way over the past five years [nationwide].").

[45] *Jordan*, 2009 WL 625560, at *4; *Byrd*, 897 N.E.2d at 726.

[46] *Schwartzwald*, 979 N.E.2d at 1216; Lasalle Bank Nat'l. Ass'n. v. Street, No. 08 CA 60, 2009 Ohio App. LEXIS 1560, at *10–11 (Ohio Ct. App. Apr. 17, 2009); Wachovia Bank v. Cipriano, No. 09CA007, 2009 Ohio App. LEXIS 4605, at *11–14 (Ohio Ct. App. Oct. 13 2009); Bank of N.Y. v. Stuart, No. 06CA008953, 2007 Ohio App. LEXIS 1387, at *5–7 (Ohio Ct. App. Mar. 30, 2007). The

and Eighth Districts' decisions – a minority of the split in districts – reasoning that, "standing is required to invoke the jurisdiction . . . and therefore it is determined as of the filing of the complaint."[47]

E. Residential Housing Market Crash Background

In 2008, the residential housing market faced arguably its most troubling time.[48] Ultimately, "the residential mortgage market . . . collapsed . . . ."[49] The crash was "accompanied by drastically reduced liquidity, the de-privatization of Fannie Mae and Freddie Mac . . . and the failure of a number of other large investment bankers and institutional lenders."[50]

The crash was caused primarily by two factors.51 First, in 2001, interest rates were the lowest they had been throughout the entire Twentieth Century.[52] The second factor was the "fundamental structural realignment in the mortgage lending industry."[53] Beginning in the 1970's, the mortgage lenders sold their loans on the secondary mortgage market to investors such as Fannie Mae and Freddie Mac who required high standards to ensure borrowers were in positions to pay back their loans.[54] By the beginning of the Twenty-First Century, more independent brokers emerged on the scene and sold many of the loans on the market.[55] These independent brokers were encouraging borrowers to get "creative" with their answers on their loan applications to show ability to repay.[56] As a result, borrowers became "stuck" in loans they could not afford and houses they could not sell because the market did not support the sales.[57] In other words, borrowers could not sell their homes to cover their indebtedness, but yet, they could not afford their loans and thus, many of them fell into foreclosure.

The low interest rates and downed home values were directly to blame. Also directly to blame were "mortgage brokers, wholesale lenders/securities issuers, and securities investors."[58] The parties affected were very widespread from pension fund investors, to commercial banks and insurance companies, to the individuals who purchased the mortgages.[59]

---

author of this Comment would submit this holding is the proper one because it does not alter the results of the judgment to allow curing by assignment during the adjudication process. Further, this holding creates more judicial efficiency.

47 *Schwartzwald*, 979 N.E.2d at 1216.
48 *See* NELSON ET AL., *supra* note 38, at 486.
49 *Id.*
50 *Id.*
51 *Id.*
52 *Id.*
53 *Id.* at 487.
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.* at 488.
58 *See id.*
59 *Id.* at 489–90.

This market crash led right up and into *Schwartzwald* and its facts.

F. Schwartzwald *Background*

In *Schwartzwald*, the Ohio Supreme Court cured the district split, but created something worse.[60] The complete background of *Schwartzwald* lays the foundation for the rest of this Comment. In 2006, Duane and Julie Schwartzwald purchased property in Xenia, Ohio, and executed a note for $251,250.00 secured by a mortgage on the property.[61] Legacy Mortgage held both the original mortgage and the original promissory note.[62] By 2009, the Schwartzwalds were unable to make their loan payments and began a short sale process[63] with Wells Fargo; Wells Fargo had acquired the promissory note and mortgage from Legacy Mortgage in November of 2006.[64] Wells Fargo assigned the promissory note and mortgage to Freddie Mac in May of 2009.[65] Freddie Mac filed a foreclosure action in April of 2009, prior to the date the short sale was set to close.[66] This was also one month prior to receiving the assignment from Wells Fargo in May of 2009.[67] Freddie Mac, however, alleged that it owned the promissory note, but did not attach a copy of the promissory note to its complaint.[68]

After the complaint had been filed, however, Wells Fargo assigned the note to Freddie Mac.[69] After Freddie Mac filed the complaint for the foreclosure action, Wells Fargo declined to move forward with the short sale process.[70] It was not until December of 2009, nine months after it brought suit, that Freddie Mac filed copies of the November 2006 assignment from Legacy Mortgage to Wells Fargo and the May 2009 assignment from Wells Fargo to Freddie Mac.[71]

Freddie Mac's motion for summary judgment was granted, while

---

[60] *See generally* Fed. Home Loan Mortg. Corp. v. Schwartzwald, 979 N.E.2d 1214 (Ohio 2012)

[61] *Schwartzwald*, 957 N.E.2d 790, 793 (Ohio Ct. App. 2011), *rev'd* 979 N.E.2d 1214 (Ohio 2012).

[62] *Id.*

[63] A short sale is a "reasonable alternative to foreclosure." Zachary T. Brumfield, *The "Short Cut" to the Stabilization of the Underwater Housing Market: How the New FHFA Short Sale Guidelines Promote Economic Efficiency*, 41 REAL EST. L.J. 456, 457 (2013). In a short sale, the "senior and junior lien holders release their liens on the property in order to obtain a contracted amount of proceeds from the sale." *Id.* When compared to a foreclosure, "a short sale provides, on average, a larger recovery for lien holders and a smaller deficiency for borrowers." *Id.* "Short sales typically sell the property at only a 10% discount where a foreclosure sale generally s[ell] at a 30% discount of the actual fair market value." *Id.* Consequently, a short sale is an attractive alternative to foreclosure, as "a short sale is an efficient alternative to the foreclosure process as long as the parties are able to come to an agreement on the details and price during a short sale negotiation." *Id.*

[64] *Schwartzwald*, 957 N.E.2d at 793–95.

[65] *Id.* at 794.

[66] *Id.* at 793.

[67] *Id.* at 794.

[68] *Id.* at 794.

[69] *Id.*

[70] *Id.* at 793–95.

[71] *Id.* at 793, 795.

the Schwartzwalds' motion for summary judgment was denied.[72] The Schwartzwalds appealed, and the Second District Court of Appeals "held that Federal Home Loan had established its right to enforce the promissory note as a nonholder in possession, because assignment of the mortgage effected a transfer of the note it secured."[73] The Ohio Supreme Court reversed the decision of the Second District Court of Appeals, and held that, since Freddie Mac did not hold the promissory note prior to filing the complaint, it lacked standing, and therefore, the court lacked subject matter jurisdiction, rendering the foreclosure judgment void.[74] The Court dismissed Freddie Mac's complaint without prejudice, voiding the foreclosure judgment.[75] As a side note, had an assignment never occurred, the judgment would definitely be void; but here, the assignment was made prior to the Court's judgment on the foreclosure.[76]

G. The Ohio Supreme Court's Inconsistent Application of Real Party in Interest and Standing

The proper precedent for standing and the substitution of real parties in interest is *Suster*, which the *Schwartzwald* Court should have followed.[77] In *Suster*, the Ohio Supreme Court held that a substitution for a real party in interest could be made to cure a lack of standing or subject matter jurisdiction.[78] This case did not pertain to real estate or foreclosures[79] and therefore, does not affect the issue of curing standing that caused the aforementioned split in the district court decisions.[80] However, the decision

---

[72] *Id.* at 796.

[73] Fed. Home Loan Mortg. Corp. v. Schwartzwald, 979 N.E.2d 1214, 1217 (Ohio 2012).

[74] *Id.* at 1216; *see also* 3 COUSE'S OHIO FORM BOOK § 39.10 (6th ed. 2014) ("A future assignee of a promissory note and mortgage that does not have an interest in the note or mortgage at the time it files a foreclosure action has no standing to invoke the jurisdiction of the common pleas court, and the lack of standing is not cured by an assignment to plaintiff of the note and mortgage prior to entry of summary judgment in its favor. A litigant cannot cure a lack of standing after commencement of the action by obtaining an interest in the subject of the litigation and substituting itself as the real party in interest." (citing *Schwartzwald*, 979 N.E.2d at 1220)).

[75] *Schwartzwald*, 979 N.E.2d at 1223. Since the complaint was dismissed without prejudice, the whole process could start all over leading to judicial inefficiency discussed *infra* at Part III (C)(1).

[76] *See Schwartzwald*, 957 N.E.2d at 793–97.

[77] State *ex rel.* Jones v. Suster, 701 N.E.2d 1002, 1008 (Ohio 1998).

[78] *Id.* ("The lack of standing may be cured by substituting the proper party so that a court otherwise having subject matter jurisdiction may proceed to adjudicate the matter." (citing OHIO R. CIV. P. 17)). To be clear, there is no question that the *Schwartzwald* courts otherwise had subject matter jurisdiction.

[79] *Id.* The petition in this case was filed by the prosecuting attorney from Cuyahoga County after the infamous conviction, and subsequent acquittal, of Dr. Samuel Sheppard in the murder of his pregnant wife, Marilyn Sheppard. *Id.* at 1004. In the original case, Dr. Sheppard was convicted and sentenced to life in prison, but after ten years in prison, he was granted a new trial by the Federal District Court for the Southern District of Ohio on the basis that he did not receive a fair trial in the first instance. Sheppard v. Maxwell, 231 F.Supp. 37, 40, 72 (S.D. Ohio 1964). That decision was reversed on appeal by the Sixth Circuit, but then the Sixth Circuit's decision was reversed by the Supreme Court of the United States. Sheppard v. Maxwell, 384 U.S. 333, 335 (1966). "Upon retrial, [Dr.] Sheppard was found not guilty. He was discharged from prison in 1966." *Suster*, 701 N.E.2d at 1004. The special administrator for Sheppard's estate, after Sheppard died in 1970, filed a "Petition for Declaration of Innocence as a Wrongfully Imprisoned Individual" ultimately leading to *Suster*. *Id.*

[80] Ultimately, *Suster* could be distinguished as to subject matter, but *not* as to *procedure*.

was very clear that the substitution of real parties in interest, when there is a lack of standing, was perfectly acceptable even after the complaint was filed.[81] The Court in *Suster* further noted that a lack of standing is not the same as a lack of subject matter jurisdiction.[82] Finally, in *Suster*, the Court stated that the decision whether a party has standing in an action is within the province of the trial court.[83] In other words, the discretion to determine the presence of standing lies with the trial court, thus, unless the discretion is abused, that decision should control.[84]

The Ohio Supreme Court refuses to follow its own precedent in *Suster* in its holding in *Schwartzwald* in three ways: (1) by not allowing a party to cure standing by substituting a real party in interest; (2) by improperly equating a lack of standing to a lack of subject matter jurisdiction; and, (3) by ignoring the trial court's discretion in determining a party's standing.[85]

To further show the Ohio Supreme Court's abuse of the *stare decisis* rule, a subsequent decision hailing from the Ohio Supreme Court actually held the opposite of *Schwartzwald* and applied *Suster*, *not* equating a lack subject matter jurisdiction to a lack of standing.[86] In *Groveport*, the Ohio Supreme Court cited *Suster* to make the point that a lack of standing does *not* create a lack of subject matter jurisdiction, but rather, whether the party can bring the action; the Court even cited to *Schwartzwald* in the next paragraph![87] It is worth noting that the holding in *Groveport* could mean that *Schwartzwald* has been overruled and the *Suster* precedent has been restored as binding with *Groveport*'s adoption of it. However, the district courts have not been applying it as such.[88]

---

[81] *Suster*, 701 N.E.2d at 1008.

[82] *Id.* (citation omitted). To reiterate, the Court specifically stated that "[l]ack of standing challenges the capacity of a party to bring an action, not the subject matter jurisdiction of the court." *Id.*

[83] *Id.*

[84] *Id.* (noting too, that jurisdiction can be raised for the first time on appeal, but this author submits that even if raised on appeal the trial court's decision as to standing should be strongly considered by the appellate court).

[85] Fed. Home Loan Mortg. Corp. v. Schwartzwald, 979 N.E.2d 1214, 1220–21 (Ohio 2012) (arguing that because four justices did not join the *Suster* opinion and it was a mere plurality, *Suster* did not constitute precedent to which they were bound to follow under the Ohio Constitution); *see also Suster*, 701 N.E.2d at 1008; CitiMortgage, Inc. v. Patterson, 984 N.E.2d 392, 397 (Ohio Ct. App. 2012) (rationalizing *Schwartzwald*'s refusal to follow *Suster* because the opinion was a plurality opinion rather than a majority opinion and "'[a] majority of the [S]upreme [C]ourt shall be necessary to constitute a quorum or to render a judgment'" (quoting OHIO CONST. art. IV, § 2(A))). *But see* BLACK'S LAW DICTIONARY, *supra* note 16, at 1537 (defining *stare decisis* as "[t]he doctrine of precedent, under which a court must follow *earlier judicial decisions* when the *same points arise again* in litigation") (emphasis added).

[86] Groveport Madison Local Sch. Bd. of Educ. v. Franklin Cnty. Bd. of Revision, 998 N.E.2d 1132, 1139 (Ohio 2013).

[87] *Id.* ("Lack of standing, on the other hand, challenges a party's capacity to bring an action, not the subject-matter jurisdiction of the tribunal.") (citing *Suster*, 701 N.E.2d at 1008).

[88] The *Schwartzwald* decision has been cited by over 192 cases as of the completion of this Comment, and continues to be cited as authority. *See supra* note 42 and accompanying text. There is, on

This demonstration of cherry-picking precedent, when it is convenient, certainly bolsters the argument that the Ohio Supreme Court was misguided in its decision in *Schwartzwald*. Had the Court not cherry-picked, but rather continued to follow precedent properly, the forthcoming analysis of the implications, ramifications, and destroyed foundations of ownership and civil procedure would be entirely unnecessary. Alas, the Court did cherry-pick and create inconsistencies, thus the analysis is necessary, and it is set forth below in Part III.

III. ANALYSIS

The effects of the *Schwartzwald* decision are sweeping – spanning from the mortgage lending industry as a whole, to individual lending institutions, and from title insurance companies to individual bona fide purchasers of previously foreclosed upon houses in Ohio. The decision also has created application challenges for Ohio courts in its aftermath, but that is beyond the scope of this Comment.[89]

Two major players in real estate, lending institutions and title

---

the other hand, an argument that *Schwartzwald* is still binding in a very limited context, and that *Groveport* is binding for a broader context, but that is outside the scope of this Comment.

[89] CURRY & DURHAM, *supra* note 15, at § 19.05[1] (discussing the way in which courts have subsequently dealt with the *Schwartzwald* decision: "Other courts grappling with the aftermath of *Schwartzwald* have addressed its effect in varying circumstances. In *Bank of N.Y. Mellon Trust Co., N.A. v. Shaffer*, where the mortgagor did not produce the note with the complaint (but alleged ownership of the note) and filed an assignment of the mortgage after the complaint was filed, a default judgment in favor of the lender was overturned. In essence the court found that the plaintiff had not provided proof of standing and its conclusory allegation that it owned the note was not sufficient, even though the judgment rendered was by default. In *IndyMac Bank F.S.B. v. Borosh*, standing to bring a foreclosure action was challenged on the basis that Indymac was not assigned the mortgage until after it filed suit. However, the court found that *Schwartzwald* did not apply, and held that, even if *IndyMac* lacked standing when it filed the original complaint, such defect was cured by filing an amended complaint and attaching the assignment of the mortgage prior to the borrowers filing a responsive pleading. In *CitiMortgage, Inc. v. Patterson*, the Eighth District Court of Appeals reversed the vacation of a foreclosure judgment where the plaintiff alleged ownership of the note, and attached a copy of a note endorsed in blank, even though the mortgage was not assigned until after the complaint was filed. The court pointed to language in *Schwartzwald* to the effect that the plaintiff in that case had failed to establish an interest in the note or the mortgage, therefore implying that an ownership interest in either document would be jurisdictionally sufficient. Because in *Patterson* the plaintiff held the note, the *Schwartzwald* requirement was met. This view was disputed by the Ninth District Court of Appeals in *BAC Home Loans Servicing, LP v. McFerren*. In that case, the plaintiff also produced a note endorsed in blank, but provided no evidence that it was the holder of that note at the time the complaint was filed. It did, however, produce evidence that it was the mortgagee at the time of filing the complaint. The Ninth District took the position that jurisdiction requires ownership of both the note and the mortgage at the time the complaint was filed. The authors suggest that the better view may be as follows: an enforceable interest in the note is the key. Under Ohio law, the collateral follows the note and the assignment of the mortgage is a formality. However, as the Court pointed out in *BAC Home Loans*, ownership of the mortgage without the note is, effectively, a nullity.") (footnotes omitted) (citing Bank of N.Y. Mellon Trust Co., N.A. v. Shaffer, 981 N.E.2d 898 (Ohio 2013); Citi Mortgage, Inc. v. Patterson, 986 N.E.2d 30 (Ohio 2013); Kernohan v. Manss, 41 N.E. 258 (Ohio 1895); BAC Home Loans Servicing, LP v. McFerren, No. 26384, 2013 Ohio App. LEXIS 3374 (Ohio Ct. App. July 24, 2013); Indymac Bank F.S.B. v. Borosh, No. 98520, 2013 Ohio App. LEXIS 1068 (Ohio Ct. App. Mar. 28, 2013); Kuck v. Sommers, 100 N.E.2d 68 (Ohio Ct. App. 1950); RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 5.4 (1997)).

insurance companies, will be affected by the decision in several ways.[90] Lending institutions, as a result of the decision, will have to restructure certain mortgage lending practices. Title insurance companies will begin to provide coverage with gaps, which may not be accepted by lenders and will, therefore, devastate the industry of title insurance to the extent that those gaps reduce the ability for title insurance companies to effectuate closings.[91]

Bona fide purchasers for value will also experience a whole host of issues, essentially to the extent of no longer being treated like bona fide purchasers, with regard to property purchased both prior and subsequent to *Schwartzwald*. These parties are particularly innocent because they were not parties to the initial foreclosure action in any way. They neither defaulted on their loans and failed to pay, as the foreclosed upon parties did, nor did they fail to show assignment of the mortgage prior to filing an action, as the lending institutions did.

From a social policy standpoint the effects are considerable as well. The effects reach the courts to the extent that courts will have to deal with more judicial inefficiencies as a result of redundant foreclosure actions, which have previously been decided on the merits. Although to a lesser extent, it affects the foreclosed upon parties themselves by providing them a second bite at the apple, even though their actions have not changed, as a result of the plaintiff being a nonholder prior to filing the action against them.

Finally, the Court's decision in *Schwartzwald* should be changed by reversing it entirely for noncompliance with Ohio law as it relates to

---

[90] Levitin, *supra* note 2, at 645 (stating that what is at stake as a result of Schwartzwald-like standing decisions is "potentially ruinous liability for the nation's largest financial institutions" and "clarity of title to a large part of the real property in the United States").

[91] *See* Russell Kutell, *Will the Real Owner of This Mortgage Loan Please "Stand": The Necessary Standing for Ohio Foreclosure Action After Schwartzwald*, FROST BROWN TODD: FIN. SERVS. BLOG (Dec. 28, 2012), http://fbtbankingresource.com/The-Necessary-Standing-for-Ohio-Foreclosure-Actions-After-Schwartzwald ("The *Schwartzwald* decision will have a monumental impact on both the banking and title insurance industry. As to the banking industry, it is a fairly common practice for lenders to obtain assignments of notes and mortgages during the pendency of a foreclosure suit. At least in the situation where the lender commencing the lawsuit does not yet have the assignment of the note and mortgage, the lender should not commence an Ohio foreclosure action or should have the prior lender commence the action and the new lender should substitute itself in for the prior lender as soon as the assignment occurs. Otherwise, the foreclosure action will likely be dismissed and the new lender will need to commence the action again. For the title industry, the ramifications of the *Schwartzwald* decision are huge as well. Given that a lack of jurisdiction for lack of standing can make a judgment of foreclosure and sale void, a title agent will need to ensure that the lender selling a property at a foreclosure sale was actually the owner of the note and mortgage when the foreclosure action was commenced. If the lender was not the actual owner of the note and mortgage at the commencement of the foreclosure sale, a title agent will likely take exception to that issue in any subsequent title insurance policy. Similarly, if there was a foreclosure action involving a property in the chain of title, a title agent will need to ensure that the prior lender who foreclosed on a mortgage and subsequently sold the property in the chain of title was the holder of the note and mortgage when the lender commenced the foreclosure action. If this is not the case, the title agent will likely take exception in any subsequently issued title policy for that issue as well.").

equating lack of standing with lack of subject matter jurisdiction. Alternatively, the decision should be distinguished as retroactive in application to protect bona fide purchasers, as they are innocent parties deserving of clarity of title.

A. The Schwartzwald *decision affects the major industries involved in and party to foreclosure actions.*

The decision affects two major players in home buying and ownership – the mortgage lending industry and the title insurance industry. The effects on the lending industry are primarily of the restructuring type. Put another way, lenders will have to revise their approach to foreclosure actions. Title insurance companies will be affected in primarily two ways, both of which will extend to the bona fide purchasers. The ramifications for these two industries will, in turn, create major issues that will detrimentally impact bona fide purchasers of previously foreclosed upon homes, all because the *Schwartzwald* Court got it wrong.

1. The *Schwartzwald* decision will require the mortgage lending industry[92] to restructure its practices and will lead to an increase in problems, such as bank walkaways.

More than 70,000 foreclosures were filed in Ohio in 2012 and nearly the same number in 2011.[93] After the housing market crash of 2008,[94] in 2009, there was a peak in foreclosures with 89,000 foreclosure actions filed.[95] Since 1995, the number of foreclosures has tripled in the whole state of Ohio and quadrupled in fifty-one of Ohio's eighty-eight counties.[96]

Just to put all of that into perspective, in 2012, "[t]here was one foreclosure filing for every 73 housing units."[97] In fact, Ohio ranks as one of the most troubled states in the country with regard to foreclosures.[98] These statistics may well be one of the reasons lenders have had trouble filing their foreclosure complaints *after* assignment of mortgages and promissory notes. With the sheer number of foreclosures in Ohio, it is a wonder the lenders could keep up at all, if in fact they have. According to

---

[92] NELSON ET AL., *supra* note 34, at 105 (noting that "[m]ost home sales are financed with new mortgage loans from institutional lenders such as banks, savings associations, and mortgage companies," which is primarily what this Comment refers to as the "lending industry" or "lending institutions," however there are other sources of lending to which this Comment may apply).

[93] *Home Insecurity 2013: Foreclosures and Housing in Ohio*, POLICY MATTERS OHIO (May 9, 2013), http://www.policymattersohio.org/foreclosures-may2013. There were actually slightly more foreclosures in 2011, specifically 71,556 foreclosures. *Id.*

[94] *See* discussion *supra* Part II (E).

[95] *Home Insecurity 2013*, *supra* note 93.

[96] *Id.*

[97] *Id.*

[98] *Id.* (citation omitted).

Robert M. Curry and Professor James Geoffrey Durham, "in recent years mortgage loans have been packaged and commoditized, assigned and reassigned, as never before. The volume of transfers has led to incomplete paperwork, unrecorded transfers, and other errors."[99] As a result, "[f]oreclosing lenders in many instances cleared up their records on the fly, sometimes, as in *Schwartzwald*, *after* filing a foreclosure action."[100] This issue of clearing records on the fly is not an acceptable one, but it shows how flummoxed the state lenders were, and still are, concerning foreclosure actions. The lenders were already in a scramble and the *Schwartzwald* holding compounds, and even complicates that scramble.

Prior to *Schwartzwald* there was also an issue of lender walkaways (commonly, bank walkaways) when dealing with foreclosures.[101] As described by Policy Matters Ohio:

> The term "bank walkaway" is commonly used to describe situations where the plaintiff gets a judgment from the court but fails to execute on the judgment, leaving the property unmarketable and with no owner. The former homeowner is often under the assumption that the home title has transferred to the lender or sold at auction, only to find later that they are still listed as the legal owner of record. This situation, often called a "toxic title" or "zombie loan," frustrates local communities because the properties sit vacant and abandoned, largely unable to be sold or rehabilitated.[102]

These bank walkaways are likely to increase in frequency under *Schwartzwald* because banks and other lenders are going to be required to go back and refile their foreclosure actions in order to get proper standing as a real party in interest and an enforceable foreclosure judgment.[103] This will leave houses empty during the time it takes to refile and reforeclose the same house with the same defaulting parties as defendants, which could lead to vandalism, blight, drops in value, and so forth.

Further, it used to be a common lender practice to assign mortgages or notes during the pendency of the foreclosure action and, as long as the assignment was made prior to the judgment, courts accepted it.[104] Therefore, Freddie Mac had no reason to believe receiving assignment after

---

[99] CURRY & DURHAM, *supra* note 15, at §19.05[1].
[100] *Id.* (emphasis added).
[101] *Home Insecurity 2013*, *supra* note 93.
[102] *Id.*
[103] *See* Fed. Home Loan Mortg. Corp. v. Schwartzwald, 979 N.E.2d 1214, 1216 (Ohio 2012).
[104] Lasalle Bank Nat'l. Ass'n. v. Street, No. 08 CA 60, 2009 Ohio App. LEXIS 1560, at *10-11 (Ohio Ct. App. Apr. 17, 2009); Wachovia Bank v. Cipriano, No. 09CA007, 2009 Ohio App. LEXIS 1387, at *2 (Ohio Ct. App. Oct. 13, 2009); Bank of N.Y. v. Stuart, No. 06CA008953, 2007 Ohio App. LEXIS 4605, at *3 (Ohio Ct. App. Mar. 30, 2007).

filing its complaint would be an issue that would cause their complaint to be dismissed, based on the courts previous willingness to accept that. With *Schwartzwald* now in play, the lenders will have to restructure this practice so as to get the assignment *prior* to the filing of the complaint, which can take time, leading to more potential lender walkaways in the end, providing more expense for the lenders, and creating a potential increase in the already massive urban blight problem in Ohio.

Consequently, *Schwartzwald* places a burden on the mortgage lending industry to both relitigate past foreclosures and restructure their practices for post-*Schwartzwald* foreclosures because it is not as though mortgagors will miraculously produce the funds to pay the mortgage and it is not as if mortgagors had not defaulted in the first place.

2. Title insurance companies used to have more inclusive insurance for homebuyers, but in light of *Schwartzwald*, there will be gaps in coverage.

The number of title insurance policies issued in Ohio each year is staggering to say the least. In 2013 alone, over $366 million dollars worth of title insurance policies were issued, which is actually up from 2012's numbers – over $323 million.[105] According to Jeffrey Gammell, an attorney and title insurance agency owner, who has been asked to testify as an expert witness in *Schwartzwald*-type cases, the decision in *Schwartzwald* is a tough one for the title insurance industry.[106]

There are two types of title insurance – lender policies and owner policies.[107] Title insurance is not required at every property sale, particularly when it is a cash sale, and usually only lender policies are required, as the lenders have great interest in protecting their risk.[108] Owners are not protected by lender policies, however, and it is advisable that owners get their own policy, yet not all owners do so, especially when they are not informed that they should have the policy.[109] Title insurance

---

[105] OHIO DEP'T. OF INS., 2014 ANNUAL REPORT 58 (2014), *available at* http://www.insurance.ohio.gov/aboutodi/AR/Documents/2014AnnualReport.pdf; OHIO DEP'T. OF INS., 2013 ANNUAL REPORT 68 (2013), *available at* http://www.insurance.ohio.gov/aboutodi/AR/Documents/2013AnnualReport.pdf.

[106] Interview with Jeffrey Gammell, Attorney-at-Law, Owner, M&M Title Co., in Dayton, Ohio (Oct. 17, 2013) [hereinafter Gammell Interview]; *see also* CURRY & DURHAM, *supra* note 15, at § 19.05[1] ("Ohio title companies are concerned about titles involving foreclosed properties, and are creating coverage exceptions.").

[107] Gammell Interview, *supra* note 106; *see also* CURRY & DURHAM, *supra* note 15, at § 19.05[1]; *All About Title Insurance: How to protect your real property against hidden risks,* OHIO DEP'T. OF INS., 1, 1–2 (last visited Mar. 24, 2015), *available at* http://www.insurance.ohio.gov/consumer/publications/TitleIns.pdf. "A *title insurance policy* is an indemnity contract in which the title insurance company insures the owner of an interest in the described real estate against damage as set forth in the policy. The principal forms are: an owner's policy insuring the owner of the fee simple title; a mortgagee's policy insuring the holder of a mortgage on the premises; and a lessee's policy insuring the owner of a leasehold interest in the premises." CURRY & DURHAM, *supra* note 15, at § 6.03[1].

[108] Gammell Interview, *supra* note 106.

[109] *Id.*

coverage is what is known as non-affirmative coverage, which means it only covers unknown problems that are not found in a title search.[110] This means, if a *Schwartzwald* issue is known to a purchaser or lender when the property is purchased, title insurance will not cover it and the title insurance company will now (and has already begun to) write it in as an exception.[111] The result of the exception is that any subsequent purchaser of a previously foreclosed upon property – where the foreclosure was procured by a complainant without standing or by an improperly substituted real party in interest – the subsequent purchaser will be on the hook for any litigation resulting from that defect in title. That exception will read as follows:

> The Company will not insure against loss or damage and the Company will not pay costs, attorneys fees or expenses that arise by reason of the setting aside or attempt to set aside any interest in the Land acquired under or subsequent to the judicially ordered sale in (case caption and number) _____ County Common Pleas Court, due to any claim of a lack of standing or a lack of subject matter jurisdiction in said proceeding.[112]

The first issue regarding the effects on title insurance companies emerges from the fact that title insurance companies, post-*Schwartzwald*, are trending toward not insuring over *Schwartzwald* standing issues either in owner or lender polices, which creates a gap in insurance coverage.[113] Lenders are trending toward not accepting insurance policies with this type of gap, perpetuating the issue and creating a vicious cycle of unresolved problems.[114] This creates a problem for title insurance companies in that they cannot sell policies for foreclosed upon homes where there is an issue of standing in the chain of title.[115] Further, this creates issues for bona fide purchasers who go through the process of getting a contract on a property and pay for the due diligence required, only to find that they cannot get a loan because the lenders will not accept insurance with *Schwartzwald* gaps

---

[110] NELSON ET AL., *supra* note 34, at 74 ("The title report does not necessarily claim to be a complete statement of the findings of the company's search; technically, it merely states that the company is willing to issue a policy insuring that the land's title is as stated in the report, and thus to be liable to indemnify the insured if she or he suffers a loss due to any title defect not disclosed in the report."); *see also* Gammell Interview, *supra* note 106.

[111] Gammell Interview, *supra* note 106. "A policy of title insurance obligates the title insurance company to pay any loss, up to a fixed amount and as provided in the policy, that is suffered by the insured because of defects in title or encumbrances existing at the date of the policy and not listed as exceptions in the policy." CURRY & DURHAM, *supra* note 15, at § 6.03[1]. In other words, exceptions are items that the policy does not cover.

[112] Gammell Interview, *supra* note 106.

[113] NELSON ET AL., *supra* note 38, at 78 (explaining that insuring over means the title insurance company will "refrain from showing the defect as an exception to the policy's coverage"); *see also* Gammell Interview, *supra* note 106.

[114] Gammell Interview, *supra* note 106.

[115] *Id.*

from the title insurance companies.[116]

The other issue that arises for title insurance companies is the problem with the pre-*Schwartzwald* polices, since the decision is retroactive.[117] Although title insurance companies insured over the *Schwartzwald* issues that may arise in pre-*Schwartzwald* polices, and the bona fide purchasers with pre-*Schwartzwald* policies are largely protected, the title insurance companies could and likely will come to bear the brunt of any loss.[118] Underwriters for title insurance companies could end up with costs falling back on them in the event that there is a *Schwartzwald* standing issue that is challenged under a pre-*Schwartzwald* policy either on a lender's policy or on an owner's policy.[119]

With these two issues arising out of the decision in *Schwartzwald*, and the sheer number of policies that are issued per year in Ohio, title insurance companies will feel the impact from two directions – the pre-*Schwartzwald* polices and future polices that emerge post-*Schwartzwald* with built-in exceptions that lenders are unlikely to accept.

B. The Schwartzwald *decision will affect the chain of title for potentially anyone who has purchased a foreclosure in Ohio or anyone who has purchased a home that has been previously foreclosed.*

The biggest issue with the *Schwartzwald* decision is the way in which it affects bona fide purchasers. For this reason, the decision did not go far enough because it failed to distinguish between bona fide purchasers that would be affected or protected by its holding and those that would not. As a result, the *Schwartzwald* decision is devastating to bona fide purchasers in three major ways: (1) even though a bona fide purchaser should have the right to possession, they could be subjected to the cost of litigation in fighting for good title, most likely through quiet title actions; (2) bona fide

---

[116] *See* discussion *infra* Part II (B). As an example: "BFP" is the bona fide purchaser; "Lender" is the lender that foreclosed on the property (the author will call it "Blackacre") without standing under *Schwartzwald*; and "Title Agency" is the title agency insuring the property for both the BFP's bank and the BFP. BFP begins negotiations to buy Blackacre from Lender. BFP gets preapproved from their bank and waits the thirty days or more that it takes to get a contract ready on a property. BFP gets ready to close and gets a phone call from Title Agent, or the BFP's bank more likely, saying that the Lender's title insurance policy cannot be accepted because there is a gap in coverage due to *Schwartzwald*. BFP has wasted time and probably some transactional costs in trying to secure Blackacre as their own. Admittedly, they may not want the property anyway because it would leave them with a property that has questionable title, but nonetheless their time is wasted. Furthermore, Blackacre now sits vacant – that is until it is purchased by an all cash buyer or until it becomes an eyesore and the city tears it down. With the number of properties *Schwartzwald* affects, this could be a massive problem economically, particularly when factoring in current urban sprawl and blight issues.

[117] *See* discussion *supra* Part I.

[118] Gammell Interview, *supra* note 106; *see also* CURRY & DURHAM, *supra* note 15, at § 6.01[4][b] ("Differences may emerge . . . if a title insurer elects to assume the risk that a particular title defect will not be asserted, and agrees to 'insure over' that defect, or if the insurer takes a more conservative view and refuses to insure against a defect that a title examiner deems not to impair marketability.").

[119] Gammell Interview, *supra* note 106.

purchasers could go through the process of getting a contract on a property and spend time and money for the due diligence required and then be forced to walk away because title agencies are not insuring the *Schwartzwald* standing issues, which most lenders probably would not accept, resulting in a denial of the loan; and, (3) bona fide purchasers could become stuck with a property – that was purchased pre-*Schwartzwald* – that is now unsellable.

1. Bona fide purchasers could be subjected to the cost of litigation in fighting for good title.[120]

Bona fide purchasers could be caused to litigate, at their expense, in fighting for good title to a property that they purchased in good faith, or third party acquirers could be caused to do the same after receiving property in good faith. (For purposes of this discussion, the focus is on bona fide purchasers.) The best way to illustrate the issue of forcing a bona fide purchaser or third party acquirer to litigate for good title is by looking to a trilogy of cases from the Massachusetts Supreme Judicial Court in which *Schwartzwald*-like decisions did just that to third party purchasers in Massachusetts.[121]

The Massachusetts equivalent to *Schwartzwald* is *United States Bank National Association v. Ibanez*.[122] The Massachusetts Supreme Judicial Court held in *Ibanez*, much like the Supreme Court of Ohio held in *Schwartzwald*, that United States Bank (hereinafter U.S. Bank) and Wells Fargo were not proper parties in their respective actions because they were only future assignees of the mortgage (and the note) at the time the foreclosure complaints were filed.[123]

Subsequently, in *Bevilacqua v. Rodriguez*, another Massachusetts case, Rodriguez's property was foreclosed upon by U.S. Bank prior to U.S. Bank receiving an assignment of the mortgage from MERS.[124] Bevilacqua came into possession of the property via a quitclaim deed from U.S. Bank subsequent to the foreclosure judgment, and then filed an action to quiet title against Rodriguez because MERS had not assigned the mortgage to U.S. Bank prior to the foreclosure complaint *and* Bevilacqua believed this

---

[120] It is true that the BFP's could go after the lenders (who sold the BFP's property they did not own), but only if the deed the BFP's received was more than a quitclaim deed, that is either a limited warranty deed that included coverage, or a general warranty deed. NELSON ET AL., *supra* note 38, at 191–92 (explaining the difference between the types of deeds and the remedies that go with them).

[121] *See generally* Eaton v. Fannie Mae, 969 N.E.2d 1118, 1131 (Mass. 2012); Bevilacqua v. Rodriguez, 955 N.E.2d 884, 898 (Mass. 2011); United States Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 54 (Mass. 2011). *See also* Levitin, *supra* note 2, at 640 (noting that the Court in *Ibanez* ruled "that a pair of foreclosure sales was invalid because the foreclosing banks were not the mortgagees of record at the time of the foreclosure sale").

[122] *Ibanez*, 941 N.E.2d at 53 ("[T]he foreclosing entity must hold the mortgage at the time of the notice and sale in order accurately to identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale . . . .").

[123] *Id.* at 50–51, 55. *Ibanez* combined multiple cases into one decision. *See id.* at 44.

[124] *Bevilacqua*, 955 N.E.2d at 888. MERS is the Mortgage Electronic Registration System. *Id.*

constituted "a cloud on his title in the form of 'the possibility of an adverse claim by Rodriguez against Bevilacqua's title to the [p]roperty.'"[125]

The Court in *Bevilacqua* relied on the Massachusetts version of *Schwartzwald – United States Bank National Association v. Ibanez* – finding that Bevilacqua could not be the true owner because of the assignment issue prior to the filing of the foreclosure complaint against Rodriguez.[126] The complaint against Rodriguez vis-á-vis Bevilacqua was dismissed without prejudice, however, but this would not cure the issue of the cost to litigate for good title, in fact it would double the expense in making a third–party purchaser litigate twice.[127] There is no discussion as to whether Bevilacqua had actual or even constructive knowledge of the unassigned mortgage problem prior to the quitclaim deed, but even if he did, this case is illustrative of what can happen to a subsequent owner when there is a standing issue in a foreclosure action within the chain of title.

Similarly, in *Eaton v. Federal National Mortgage Association*, the Massachusetts Supreme Judicial Court held "that a foreclosure sale was invalid because the foreclosing bank did not hold the promissory note at the time of the sale."[128] Since the "Massachusetts trilogy[,]"[129] there has been broad disagreement and confusion amongst the state and federal courts across the United States over how to determine who has standing.[130]

In light of the similarities between *Schwartzwald* and *Ibanez* (even though they are from different states) and the subsequent decisions in *Bevilacqua* and *Eaton*, the outlook is grim for bona fide purchasers or third party acquirers in terms of getting good title, or title at all, through litigation, even after the expense. The chain of title argument did not work for Bevilacqua, and would not likely work for a bona fide purchaser in Ohio.[131] Furthermore, the cost of litigation will be borne by the bona fide purchaser because of the exception that title insurance companies are writing and will continue to write into their policies.[132]

2. Bona fide purchasers could go through nearly the entire purchase process only to have their loan denied for the reason that there are gaps in the title insurance.

A second issue with the *Schwartzwald* decision as it relates to bona fide purchasers is the issue it presents for homebuyers in the situation where

---

[125] *Id.* (alteration in original) (internal quotation marks omitted).
[126] *Id.* at 892–93.
[127] *Id.* at 898.
[128] Levitin, *supra* note 2, at 640 (citing Eaton v. Fannie Mae, 969 N.E.2d 1118, 1134 (Mass. 2012).
[129] Levitin, *supra* note 2, at 642.
[130] *Id.* at 644–45 (asking questions concerning the confusion such as: "Can mortgages be transferred separately from promissory notes? What is the effect of unrecorded mortgage transfers?").
[131] *Bevilacqua*, 955 N.E.2d at 893.
[132] *See* discussion *supra* Part III (A)(2).

the homebuyers go through nearly the entire purchase process, which requires a level of time and expense commitment, and then have their loan denied because there are gaps in the lender's title insurance policy due to title insurance companies' refusal to insure over *Schwartzwald* standing issues.

When a loan is involved, the residential purchase and closing process requires several steps.[133] There is first a pre-qualification in which lenders gather information on potential borrowers to generate an idea about whether they would be a good risk to lend to.[134] Borrowers then compare loan options by looking at rates and programs offered by various lenders.[135] Once a home has been chosen and the borrowers pre-qualify for a loan on that property, the application process begins, following a processing of the application, which requires the borrower to provide the lender with several documents to prove ability and willingness to repay.[136] Once the loan makes it through the underwriting and appraisal process, closing on the property can begin.[137]

This is the point in the process where the problem arises for bona fide purchasers (the borrowers in this scenario). At this point, the lender will become aware of any gaps in title insurance coverage, such as a *Schwartzwald* exception.[138] The lender then will either refuse to fund the loan or it will not be approved. Either way, the result is that the bona fide purchaser has wasted at least a month's worth of time in attempting to purchase the property; that is only if the loan is a conventional mortgage for a typical home as opposed to a foreclosure, short-sale, or FHA loans, and so forth.[139] This hassle, the time and money wasted in getting nearly all the way through the purchase process only to be turned away, is yet another downside for bona fide purchasers who encounter a *Schwartzwald* issue.

3. Bona fide purchasers could be stuck with unsellable property that was purchased pre-*Schwartzwald*.

Many homebuyers, especially those who do not purchase their property through a lender, did not, in the past, traditionally purchase an owner's policy from a title insurance company and as a result, they could now have unsellable or difficult-to-sell property purchased pre-

---

[133] *The Loan Process (Residential)*, MARIN MORTGAGE BANKERS, http://www.marinloans.com/loanprocess.html (last visited Feb. 21, 2015).

[134] *Id.* (noting that there are two key factors lenders look to: "[f]irst, the borrower's ability to repay the loan and, second, the borrower's willingness to repay the loan").

[135] *Id.*

[136] *Id.*

[137] *Id.*

[138] Gammell Interview, *supra* note 106.

[139] *The Loan Process*, *supra* note 133; *see also* Gammell Interview, *supra* note 106.

Schwartzwald.[140] The difficulty that the *Schwartzwald* decision creates for bona fide purchasers who have a *Schwartzwald* standing issue in the chain of title of a property purchased prior to the *Schwartzwald* decision, is one of real importance.

Many homebuyers who buy their homes with cash have no title insurance at all and even some of those who do use lenders to fund the purchase of their homes do not have owner's policies.[141] As a result of *Schwartzwald*, their properties will become unsellable because the chain of title is defective and sellers are charged with delivering marketable title to the buyers.[142] Ohio has even made the requirement of marketable title a statutory requirement through the enactment of the Marketable Title Act.[143] Further, the Supreme Court of Ohio defined marketable title in *McCarty v. Lingham* as:

> [O]ne which imports such ownership as insures to the owner the peaceable enjoyment and control of the land, as against all others. It has also been defined as one which is sufficient to support or defend an action of ejectment. It should show a full and perfect right of possession in the vendor. It should appear reasonably certain that the title will not be called in question in the future, so as to subject the purchaser to the hazard of litigation with reference thereto.[144]

Under the Ohio Supreme Court's own definition, a bona fide purchaser pre-*Schwartzwald* with a defect in the chain of title as a result of the decision in *Schwartzwald*, cannot sell their property and still provide marketable title to the buyer because there would not be a reasonable certainty that the title would not be called into question in the future.[145] In fact, pre-*Schwartzwald* purchasers may not be able to present title at all, let alone marketable title.

Since these pre-*Schwartzwald* bona fide purchasers cannot present a buyer with marketable title under Ohio's Marketable Title Act and *McCarty v. Lingham*'s definition from the Ohio Supreme Court, they will be left with unsellable property until the Court fixes the decision in *Schwartzwald*. By making the decision in *Schwartzwald* prospective in application only, the

---

[140] *See* discussion *supra* Part III (A)(2); *see also* Gammell Interview, *supra* note 106 (discussing that traditionally purchasers in Cleveland and Columbus did buy owner's policies, but not in the Dayton or Cincinnati areas; now, across Ohio, purchasers are increasingly purchasing owner's policies).

[141] Gammell Interview, *supra* note 106.

[142] *See* CURRY & DURHAM, *supra* note 15, at § 6.01[1].

[143] THE MARKETABLE TITLE ACT, OHIO REV. CODE ANN. § 5301.47 *et. seq.* (2014).

[144] McCarty v. Lingham, 146 N.E. 64, 66 (Ohio 1924); *see also* CURRY & DURHAM, *supra* note 15, at § 6.01[1] ("The purpose of a title examination is to determine the marketability of a title and the presence of any liens or encumbrances against the title to the property.").

[145] *Id.*

solution would be achieved.[146]

C. The effects of the Schwartzwald *decision extend to the courts and the foreclosed upon parties in a way that has some considerable social policy impacts.*

There are two significant social policy impacts as a result of *Schwartzwald*, unrelated to the bona fide purchaser and the big industry effects. First, through the decision, the Court created serious inefficiencies for the courts themselves. The result is that courts will now have to rehear the same foreclosure case that resulted in a foreclosure, subsequently voided by *Schwartzwald*, in order to get a valid judgment. The evidence will not change, and judicial resources and time are thus wasted. Second, the foreclosed upon parties potentially get a second bite at the apple with a new foreclosure action by filing quiet title actions themselves. The foreclosed upon parties still defaulted, but they get a second chance, potentially many years later.

1. The holding creates inefficiencies for the courts.

Courts, especially recently, have a strong policy against creating judicial inefficiencies. Case law is wrought with rationales, which purport that an alternate holding would create judicial inefficiency.[147] Two recent and prime examples of the desire to reduce judicial inefficiency are *Bell Atlantic Corporation v. Twombly* and *Ashcroft v. Iqbal*, and through these decisions, courts now have heightened pleading standards to avoid meritless claims and clear dockets of those claims, speaking, of course, to the desire to reduce judicial inefficiency.[148]

The *Schwartzwald* decision, although it is not a federal decision like *Twombly* and *Iqbal*, goes counter to, in general, the judicial system's strong policy against construing outcomes that create judicial inefficiencies.[149] Since the complaint in *Schwartzwald* was dismissed without prejudice, it causes lenders, typically banks, to refile the same foreclosure action a second time only to get the same result at potentially double the cost.[150]

The first foreclosure action with a *Schwartzwald* issue will have already been adjudicated on the merits as required by *Twombly* and *Iqbal*, which the pleading standards in Ohio reflect, and the change in assigning the mortgage and promissory note prior to filing the complaint does nothing to

---

[146] *See* discussion *infra* Part III (D)(2).

[147] Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007).

[148] Linda S. Mullenix, *Dropping the Spear: The Case For Enhanced Summary Judgment Prior to Class Certification*, 43 AKRON L. REV. 1197, 1223 (2010).

[149] *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 557.

[150] Fed. Home Loan Mortg. Corp. v. Schwartzwald, 979 N.E.2d 1214, 1223 (Ohio 2012).

advance either side's position or change it in any way.[151] The same result will then emerge in the second instance (or re-adjudication of the first foreclosure action) because the defendants in the foreclosure actions already had notice and opportunity to cure and also had the requisite hearings.

Consequently, courts will become muddled with duplicate complaints taking up space on already brimming dockets.[152] In addition to the duplicitous nature of this problem, the judicial inefficiency it creates goes against the policy of the courts to adjudicate complaints on their merits.

2. The holding also disregards the fact that foreclosed upon parties are now granted a "gift" for their failure to pay on a mortgage due to a lack of standing, which does not change the default committed by the foreclosed upon party.

Another problem with the *Schwartzwald* decision is the second bite at the apple that it gives to the party in default in the initial action – the foreclosed upon party. A case has already been decided in Ohio subsequent to *Schwartzwald* where the foreclosed upon party, represented by the same attorney as the Schwartzwalds, prevailed in her action against the bank that originally foreclosed without standing, according to *Schwartzwald*.[153] In *Washington Mutual Bank F.A. v. Wallace*, the plaintiff (Washington Mutual Bank, an assignee of the note post-complaint) successfully obtained a default judgment against Betty Wallace (the original borrower and foreclosed upon party) and nine months later Wallace filed "a 60(B) motion to overturn the judgment."[154] On appeal, the Ohio Supreme Court reversed the Twelfth District's decision overruling her motion, which "perhaps impl[ies] that a tardy 60(B) motion [is] a permissible method for challenging standing."[155]

Ultimately, because the foreclosure actions that lacked subject matter jurisdiction under *Schwartzwald*'s interpretation are void, the process Betty Wallace went through might not even be necessary to achieve the second bite at the apple. The second bite at the apple could be as easy as the foreclosed upon party sticking a for sale sign in their yard and reaping the benefits of sale as a result of the void foreclosure judgment, thereby allowing the defaulting party to avoid the repercussions of default.

There are many counter-arguments concerning why many of the

---

[151] *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 557.

[152] Leach, *supra* note 13, at 1128 (concluding that "as courts hand down rulings that run contrary to well-established legal principles, while simultaneously increasing litigation costs for all parties involved, including the courts themselves").

[153] Wash. Mut. Bank, F.A. v. Wallace, 982 N.E.2d 691, 691 (Ohio 2012); *see also* Wash. Mut. Bank, F.A. v. Wallace, 957 N.E.2d 92, 93 (Ohio Ct. App. 2011), *rev'd*, 982 N.E.2d 691 (Ohio 2012).

[154] CURRY & DURHAM, *supra* note 15, at § 19.05[1] (citing *Wallace*, 957 N.E.2d at 94).

[155] *Id.*; *see also Wallace*, 982 N.E.2d at 691.

defaulting parties were victims in this whole scheme, but most of those exceed the scope of this Comment. However, the counter-argument to allowing the foreclosed upon party a second bite at the apple is a relevant one with respect to some of the market crash and subprime mortgage crisis issues discussed *supra* in Part II (E).

With regard to the issues of the recent housing market crash, some of the parties that were eventually foreclosed upon had been maliciously targeted by the lending industry.[156] Ultimately, there were problems with subprime lending, over-lending to unqualified buyers, and the banking industry taking advantage of naïve buyers by under-informing them and relaxing standards used for qualification.[157] As a result, some would argue that the banking industry should go through all of the proper steps for filing a complaint in a foreclosure action because they already had the upper hand with many of these parties in the practices they utilized in lending to them in the first place.[158]

This argument, however, is both underinclusive and overinclusive. Not all parties that are foreclosed upon were victims, in any sense of the word, and not all lenders were taking advantage of the homebuyers that they were lending to.[159] As such, the defaulting parties are still granted a second bite at the apple despite their default in the first instance, which presents a policy issue that courts do not like to get into.

D. There are at least two alternative holdings that would have made more legal sense and had more limited and less drastic effects as it relates to innocent third parties.

The *Schwartzwald* decision is wrong for the reasons stated *supra*.[160] As a result, the Court should alter its decision by reversing itself because the issue of lack of standing should not be equated to subject matter jurisdiction under Ohio law. Alternatively, if the decision is legally sound, it should be distinguished because it did not go far enough in its holding, especially as it relates to bona fide purchasers. Further, the Court failed to see the extent to which bona fide purchasers are not going to be treated as bona fide purchasers when there are foreclosures with *Schwartzwald* standing issues in the chain of title.

---

[156] *See generally* Jonathan Swift, *Lest We Forget: Why We Had a Financial Crisis*, FORBES (November 22, 2011, 11:28AM), http://www.forbes.com/sites/stevedenning/2011/11/22/5086/.

[157] *Id.*

[158] This author would submit that the Ohio Supreme Court in *Schwartzwald* ruled the way it did largely based on this underlying policy – lenders should be required to go through all of the proper steps because they were maliciously lending in the first place – but the Court did not include that in their rationale for the holding, so this is merely speculation.

[159] Swift, *supra* note 156.

[160] *See* discussion *supra* Part III (A)-(C).

1. The decision to consider a lack of standing issue equal to a subject matter jurisdiction issue is disputed by other Ohio decisions.

It is well established in Ohio that a lack of standing is not the same or equal to a lack of subject matter jurisdiction, making the *Schwartzwald* decision legally incorrect, and largely under supported. The dissent by Judge Diane V. Grendell in *Bank of N.Y. Mellon Trust Co., N.A. v. Shaffer* suggests that *Schwartzwald* is being misinterpreted as equating a lack subject matter jurisdiction with a lack of standing.[161] If this is the case, then the foreclosure judgments are not void, but voidable, as a lack of subject matter jurisdiction creates a void judgment, but a lack of jurisdiction over the case for reasons of standing creates a voidable judgment.[162] This would clear up some of the issues discussed *supra*[163] for bona fide purchasers, but not those in which a foreclosed upon party filed a motion to vacate the judgment as Betty Wallace did in *Washington Mutual Bank, F.A. v. Wallace*.[164]

The entire issue of curing standing is where the real problem lies with *Schwartzwald*, however, Ohio Civil Procedure Rule 17 suggests that standing is not jurisdictional in nature, at least in as much as it allows for substitution or joinder in order to bring in a real party in interest.165 Furthermore, the *Schwartzwald* Court failed to follow the doctrine of *stare decisis* by failing to follow the precedent set forth in *Suster* and by cherry-picking when to apply that precedent.[166] Consequently, the decision is incorrect under Ohio law and should be reversed.

2. Alternatively, if there is sufficient support in Ohio law for the decision as it relates to standing and subject matter jurisdiction, the Court did not go far enough in its decision, leaving bona fide purchasers in a position where they are no longer treated as bona fide purchasers as it relates to foreclosure purchases and the details relating to them.

In the alternative, there is some support for the *Schwartzwald* decision in Ohio law discussed *supra*,[167] and as a result the Ohio Supreme Court could maintain the holding as to lack of standing being equal to lack

---

[161] Bank of N.Y. Mellon Trust Co., N.A. v. Shaffer, No. 2011–G–3051, 2013 Ohio App. LEXIS 3267, at *22 (Ohio Ct. App. July 22, 2013) (Grendell, J., dissenting), *overruled by* BAC Home Loans Servicing, L.P. v. Meister, 2013-Ohio-873, 2013 Ohio App. LEXIS 765 (Ohio Ct. App., 11th Dist. 2013), *and overruled in part by* Waterfall Vict. Master Fund v. Yeager, 2013-Ohio-3206, 2013 Ohio App. LEXIS 3266 (Ohio Ct. App. 11th Dist. 2013).

[162] *Id.*

[163] *See* discussion *supra* Part III (B)(1)-(3).

[164] *See* Wash. Mut. Bank, F.A. v. Wallace, 982 N.E.2d 691, 691 (Ohio 2012); *see also* Wash. Mut. Bank, F.A. v. Wallace, 957 N.E.2d 92, 97 (Ohio Ct. App. 2011), *rev'd*, 982 N.E.2d 691 (Ohio 2012).

[165] OHIO R. CIV. P. 17(A).

[166] *See* discussion *supra* Part II (B); *see also* State *ex rel.* Jones v. Suster, 701 N.E.2d 1002, 1008 (Ohio 1998).

[167] *See* discussion *supra* Part III (A)(1).

of subject matter jurisdiction, but should distinguish the holding to the extent that it harms bona fide purchasers and should amend its decision to the extent that it is retroactive, making it prospective only in application. This would alleviate the issues title insurance companies face and would allow time for the lending industry to amend its procedures for filing foreclosure actions and assigning mortgages and promissory notes.

Furthermore, at the time Freddie Mac filed its complaint against the Schwartzwalds, the practice of receiving assignment after filing the complaint was commonplace as discussed *supra*.[168] Freddie Mac had no reason to believe the late assignment, one month later, would defeat, without prejudice, their claim. In other words, Freddie Mac did not have notice (at least not in the Second District or in Greene County, even if the First and Eighth Districts held otherwise), which is another reason the decision should be prospective.

E. On the Horizon: Cases Coming Down the Pike from the Ohio Supreme Court that Could Fix the Schwartzwald "Unforeclosure" Issue

The Ohio Supreme Court will have some opportunity to correct the *Schwartzwald* problems in a few upcoming cases. The first case hails from the Ninth District Court of Appeals for Ohio, *Wells Fargo Bank, N.A. v Horn*.[169] The Ohio Supreme Court granted a discretionary appeal in terms of what depth of proof of standing needs to be shown at the time the complaint is filed.[170] Specifically, the Ohio Supreme Court will be resolving a split between the Eighth and Tenth District Court of Appeals and the Ninth District Court of Appeals. The Ninth District, in *Horn*, held that a bank did not have standing at the time of the complaint because documentation of proof was not attached to the complaint.[171] The Eighth and Tenth Districts found the opposite, holding that documentation did not need to be attached to the complaint, however, standing does *need to exist* at the time the complaint is filed, just as *Schwartzwald* professes.[172] Although this case could give the Ohio Supreme Court room to correct the *Schwartzwald* problems, the *Finney* case discussed below will have the most power for that.

---

[168] *See* discussion supra Part III (A)(1).

[169] *See* Wells Fargo Bank, N.A. v. Horn, No. 12CA010230, 2013 Ohio App. LEXIS 2322, at *2–7 (Ohio Ct. App. June 10, 2013); *see also* Matthew Moberg, *Ohio Supreme Court to Address Issues Arising in Schwartzwald's Wake*, BANKING AND FINANCE LAW REPORT (April 25, 2014), http://www.bankingandfinancelawreport.com/2014/04/articles/collection-and-foreclosure/ohio-supreme-court-to-address-issues-arising-in-schwartzwalds-wake/.

[170] Wells Fargo Bank, N.A. v. Horn, 5 N.E.3d 668, 668 (Ohio 2014).

[171] *Horn*, 2013 Ohio App. LEXIS 2322, at *6–7.

[172] *See* Moberg, *supra* note 169 (citing U.S. Bank Nat'l Ass'n v. Gray, No. 12AP–953, 2013 WL 3963471, at *4 (Ohio Ct. App. July 30, 2013); Deutsche Bank Nat'l Trust Co. v. Najar, No. 985202, 2013 WL 1791372, at *13 (Ohio Ct. App. Apr. 25, 2013)).

In *Deutsche Bank Nat'l Trust Co. v. Finney*, the Ohio Supreme Court will answer whether a lack of standing deprives the court of subject matter jurisdiction and whether a judgment where a plaintiff lacked standing is void or voidable.[173] Ultimately, this decision will determine what happens when a post-judgment challenge arises.[174] "[T]he question becomes whether the court had any jurisdiction to render a valid judgment when the plaintiff's standing has not been affirmatively established."[175] With this question the Ohio Supreme Court can correct *Schwartzwald* in a major way – in terms of the effects that *Schwartzwald* has on bona fide purchasers. If the Ohio Supreme Court determines that those judgments are voidable rather than void then many of the issues with *Schwartzwald* will cease to exist. However, there would still be issues with the *Schwartzwald* decision's retroactive versus prospective application, which the Court most likely would not address in either of these cases that are coming down the pike, thus, there is still work to be done even if these cases start to correct and undo *Schwartzwald*'s unforeclosure.

IV. CONCLUSION

Because the effects of the *Schwartzwald* decision are so sweeping – spanning from two of the most major industries in residential real estate to the individual bona fide purchasers of previously foreclosed upon residential property in Ohio – the Ohio Supreme Court must act. The Court needs to reverse itself or distinguish this opinion in order to prevent the sweeping effects on innocent parties. If the Court does not act, the decision stands as inconsistent with the well-established law and precedent, and equity considerations, which means the real estate industry in Ohio will have to reorganize itself with regard to the newly created "unforeclosure" and the implications, ramifications, and destroyed foundations it creates for ownership and civil procedure.

---

[173] Deutsche Bank Nat'l Trust Co. v. Finney, 5 N.E.3d 666, 666 (Ohio 2014); *see also* Deutsche Bank Nat'l Trust Co. v. Finney, Nos. 13AP–198, 13AP–373, 2013 WL 5963079, at *6 (Ohio Ct. App. Nov. 5, 2013); Moberg, *supra* note 169. This case conflicts with a Tenth District Court case. *See* Quantum Servicing Corp. v. Haugabrook, No. 26542, 2013 Ohio App. LEXIS 3618, at *3 (Ohio Ct. App. Aug. 14, 2013).

[174] Moberg, *supra* note 169.

[175] *Id.*