

Why Foreclosure Fraud Is So Dangerous to Property Rights

There seems to be a misunderstanding as to why the **rampant and systemic foreclosure fraud** is so dangerous to American system of property rights and contract law. Some of this is being done by people who are naked corporatists (i.e., the [WSJ Editorial Board](#)) excusing horrific conduct by the banks. Others are excusing endemic property right destruction out of genuine ignorance.

This morning, I want to explain exactly why this RE fraud is so dangerous, and explain the significance of the rights that are currently being trampled. I also want to demonstrate that the only way the nation could have the quantity and magnitude of errors we see is by willful, systemic fraud.

Perhaps this commentary will allow for a more intelligent debate of this issue, and focus on what can be done to fix the problems, rather than the blind parroting of talking points.

~~~

The process of purchasing a home in America culminates with an event called “the **Closing**.” It is an hour plus long contract signing that ensures the buyer is **legitimately taking title, possession and legal ownership of a unique parcel of land and any structures upon it**. The process gives any buyer specific rights to that property that cannot be abrogated under the laws of the United States.

At the closing, buyers sign and initial numerous documents. The goal is to accomplish the following:

- 1) Papers are signed that will be filed with the County Clerk (or appropriate officer) along with recording fees, for the official transfer of title from the prior owner to the new owner. The enabling purchase loan (i.e., mortgage note) is also filed with the Clerk.*
- 2) The buyer receives title (ownership) of the land;*
- 3) The mortgage lender establishes a new interest in that property contingent upon their mortgage note;*
- 4) All other claims, liens, tax obligations and prior mortgages, home equity lines or second notes are satisfied and extinguished before title passes to the new owner.*
- 5) Third party claims of any interest in that property superior to the buyer are eliminated;*
- 6) Title Insurance is purchased and issued so the buyer has a recourse in case of defects in ownership occurs.*

Every step of the process is designed to protect the property rights of all parties. The result is more than a mere transaction selling property from one party to another; rather, this has created a system where ownership interests are clearly defined; where title history can be reviewed going back decades and centuries. There is a certainty to the purchasers of this property against all future claims.

Everything about this process has been created to make sure the transfer goes off perfectly. In a nation of laws, contract and property rights, there is no room for errors. Indeed, even small technical flaws can be repaired via a process called “perfecting title.”

As we noted [previously](#), esteemed economists such as [Hernando de Soto](#) have identified that the respect for title, proper documentation, contract law and private property rights are the underlying reason capitalism works in Western nations, but seems to flounder elsewhere.

We cannot have free market capitalism without this process. *So what does it mean if banks have been systemically, fraudulently and illegally undermining this process?*

~~~

The closing process described above took place with all parties participating voluntarily. The buyer wants the house, the seller wants the transaction, the financing bank wants to make the mortgage loan.

What happens during a proper foreclosure? The prior closing is essentially reversed, only its done involuntarily. The process requires another RE closing, only this time, the Note holder is exercising their right to repossess the house if the borrower has failed to uphold the terms of the mortgage note. It typically states that if a borrower fails to make the requisite payments, they become **delinquent**. After an extended period of delinquency, they go into **default**. That allows the note holder to exercise their rights to **foreclose** on the property, and take **title and possession**.

The same care and attention to detail that occurred during the initial closing must also occur in the foreclosure process. All of the steps noted in our initial closing must occur here also. But since it is an **involuntary process** for the (soon-to-be former) property owner, extra care must be taken to make sure that property rights are being maintained and respected. The entire process is, if anything, is *even more rigorous*.

The law does not tolerate any errors in this process. What does the foreclosure process legally require? It varies by state and mortgage note, but the following is a good outline:

- 1) *Notice of Delinquency* is sent to a borrower who has fallen behind his payment schedule;
- 2) *Notice of Default* is sent to a delinquent borrower who has missed the requisite number of mortgage payments;
- 3) *Notice of Foreclosure* is sent to the defaulted borrower, and the process begins;
- 4) *Affidavit* by the bank’s representative are signed attesting to: Ownership of the note, who the borrower is, the property in question, the date of last mortgage payment, amount of delinquency, tax escrow owed, other payments (such as homeowners insurance);
- 5) *Notarized documents*: A Notary Public affirms that the affidavit was actually signed by the signatory, and this allows it to be entered into the court as documentary evidence;

6A) **Notice of Pendency** (*Lis Pendens*) is filed with the County Clerk putting the world on notice as to the foreclosure action;

6B) **Summons and Complaint** are prepared by bank attorneys, who further verify the specific information attested to by the bank executives. The attorneys then file the Complaint, commencing the **Foreclosure Action**;

7) **Service of Process** is filed, either hand delivered to the home owner, or nailed to the door of the home;

8) **Referee is Appointed** to review and process the case; calculate the amount owed, and report back to the Court; The Referees report is also notarized;

9) **Judgment of Foreclosure** is moved for by Note holder;

10) Court **orders** the property auctioned. The court specifies a notice of the auction, publicizing the property auction;

11) **Bidders must Close** on the auctioned house in 30-90 days; In the event of no sale, the bank takes possession (REO);

The fraud that has come to light are primarily occurring in steps 4, 5, 6 and 7. The verification of the specific data that is mandated legally is not taking place by bank executives. Reviewing a file can take anywhere from, 20 minutes to well over an hour. Yet some bank employees are testifying that they have signed off on as many as 150 per day ([Wells Fargo](#)) or 400 per day ([Chase](#)).

It is impossible to perform that many foreclosure reviews and data verifications in a single day. The only way this could happen is via a systemic banking fraud that orders its employees to violate the law. Hence, how we end up with the wrong house being foreclosed upon, the wrong person being sued for a mortgage note, a bank without an interest in a mortgage note suing for foreclosure, and cases where more than one note holders are suing on the same property that is being foreclosed.

This is more than mere accident or error, it is willful recklessness. When that recklessness is part of a company's processes and procedures, it amounts to systemic fraud. (THIS IS CRIMINAL AND SHOULD BE PROSECUTED).

The next step in our cavalcade of illegality is the Notary. Their signature and stamp allows these fraudulent documents to be entered into court as actual evidence (no live witness required). Hence, we have not only fraud, but contempt of court on top of it (BOTH OF WHICH REQUIRE PROSECUTION).

Law firms preparing the legal documents are not doing their job of further verifying the information. And, it seems certain states such as Florida have foreclosure mills who were set up from the outset as fraudulent enterprises. (EVEN MORE PROSECUTION NEEDED).

Lastly, some service processors are not bothering to do their job. This is the last step in the foreclosure proceedings that would put a person on notice of the errors (YET MORE FRAUD).

There are multiple failsafes and checkpoints along the way to insure that this system has zero errors. Indeed, one can argue that the entire system of property rights and contract law has been established over the past two centuries to ensure that this process is error free. There are multiple checks, fail-safes, rechecks, verifications, affirmations, reviews, and attestations that make sure the process does not fail.

It is a legal impossibility for someone without a mortgage to be foreclosed upon. It is a legal impossibility for the wrong house to be foreclosed upon, It is a legal impossibility for the wrong bank to sue for foreclosure.

And yet, all of those things have occurred. The only way these errors could have occurred is if several people involved in the process committed criminal fraud. This is not a case of “Well, something slipped through the cracks.” In order for the process to fail, many people along the chain must commit fraud.

That it is being done for expediency and to save a few dollars on the process is why the full criminal prosecution must occur.

~~~

The approach of most Western nations to property is an important legacy. In the United States, it has been enshrined in the Constitution. Even the rare exercise by the State to take private property during [Eminent Domain](#) requires an extensive and proper process. The Fifth Amendment to the US Constitution guarantees that no “private property be taken for public use, without just compensation.” The Supreme Court has detailed the process required for the State to seize any citizen’s private property without the owner’s consent.

There is simply no reason we should tolerate unlawful property seizure merely when it is done by banks. They are not the State, not the King, and not above the law.

<http://timothymccandless.wordpress.com/2011/05/24/why-foreclosure-fraud-is-so-dangerous-to-property-rights/>