Statement of Hon. Arthur M. Schack,

New York State Supreme Court

"Failure to Recover: The State of Housing Markets,

Mortgage Servicing Practices and Foreclosures" Hearing

March 19, 2012

The United States House of Representatives

Committee on Oversight and Government Reform

Good morning. I thank Chairman Issa, Ranking Minority Member Cummings, Member Edolphus Towns, whose District we are physically located in, and all the other Members of the Committee for the invitation and opportunity to speak about foreclosure issues from my perspective as a judge, dealing with foreclosures on a house by house basis. At the present time, here in the Borough of Brooklyn, which is also Kings County, there are pending across the park in the Supreme Court, Kings County about 14,000 foreclosure cases. About 400 to 500 of these cases are assigned to me.

In 2007, before the recession, I observed the bursting of the housing bubble and the growth in foreclosure filings. In Supreme Court, Kings County, we went from about 3,000 to 3,500 foreclosure filings per year to more 7,000 foreclosure filings per year.

New York is a judicial foreclosure state and the power to order a judgement of

foreclosure is vested in the New York State Supreme Court, which, despite its lofty title, is the Court of general jurisdiction in this state and equivalent to Superior Court or Circuit Court in other states. The Court of Appeals is the highest court in New York. There are more than 300 Supreme Court Justices in New York State, allocated by population to each county. Since Kings County has about 15% of the New York State's population, it has about 15% of the Supreme Court Justices.

My experience dealing with residential foreclosures has given me a unique perspective on what is happening with the housing market. While I will not discuss any specific cases, lenders or homeowners, I have observed many foreclosure problems, including, but not limited to: shoddy paperwork by lenders and/or mortgage servicers; determining the actual owners of mortgages and notes; and, the disproportionate impact of foreclosures upon minorities and neighborhoods that have a predominant minority population.

As a judge I am neutral. My role is to apply the law equally to all parties, on a level playing field. For a lender to receive a judgment of foreclosure, like any other type of judgment, due process of law must be followed. When taking office, I took an oath to uphold the Constitution, which, as we know, states in the XIVth Amendment "nor any State shall deprive any person of . . . property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws." The Honorable John Leventhal of the New York Appellate Division, Second Department, last June, in his

decision for a unanimous court, in *Bank of New York v Silverberg*, 86 AD3d 274, 283, holding that an assignee of a lender who was never the actual holder or assignee of the underlying note lacked standing to commence a foreclosure action, stated that "the law must not must not yield to expediency and the convenience of lending institutions. Proper procedures must be followed to ensure the reliability of the chain of ownership, to secure the dependable transfer of property, and the assure the enforcement of the rules that govern real property."

For a plaintiff to receive a judgment of foreclosure it must demonstrate three things to the Court: (1) the existence of a mortgage and note; (2) plaintiff's ownership of the mortgage and note; and (3) defendant's default. This might sound relatively simple, but in this age of mortgage securitization and numerous assignments of mortgages and notes, it is not easy in many cases to demonstrate plaintiff's ownership of the mortgage and note. Further, the plaintiff must demonstrate standing, that it or a predecessor in interest owned the mortgage and note when the foreclosure case commenced.

Judges, with the proliferation of mortgage securitization and assignments of mortgages and notes, are confronted in many instances to examine a lengthy chain of title to determine how the purported plaintiffs secured ownership of the mortgages and notes that they sue upon. I have seen a plethora of cases with: defective assignments of mortgages and notes by "robosigners." Robosigners are individuals who sign thousands of mortgage documents and wear numerous corporate hats. Further, I continue to see

conflicts of interests, in which a robosigner might assign a mortgage and note as an officer of assignor entity A and then days, weeks or months later sign affidavits on behalf of assignee entity B. Additionally, I have observed: defective notarials of assignments and affidavits; missing powers of attorney or defective powers of attorney to mortgage servicers who submit affidavits on behalf of alleged plaintiffs; retroactive assignments of mortgages and notes to attempt to legitimatize foreclosures that are commenced prior to the plaintiff owning a mortgage and note; and, the failure to produce pooling and servicing agreements that detail the powers allegedly given to mortgage servicers.

I have had foreclosure cases in which in I have held conferences with bank lawyers and defendants attempting to achieve a modification and settlement. When a change in interest rates or mortgage length was proposed, bank lawyers informed me that they had to check on the modification terms with "the investor," the actual owner of the mortgage and note, which is part of a securitization. This piqued my curiosity and I inquired who is "the investor?" Too many times I would receive the bank lawyer's puzzled response, "I don't know."

Too many times this lack of knowledge of the actual ownership is caused by Mortgage Electronic Registrations Systems, Inc. (MERS). Probably, more than half of the mortgages in the country are recorded by MERS, as the nominee of the lender. MERS in many cases assigned the mortgage and note many times within the MERS system, but did not record the assignments with the local recording authority. Thus, it cannot be

determined who owns the mortgage and note. Therefore, the MERS system lends itself to cases of fraud with respect to home ownership, because, in New York State, for mortgages and assignments to be enforceable they do not have to be recorded. Plaintiffs in New York only have to prove that they possessed the mortgage and note when the foreclosure action commenced.

MERS, created in the early 1990's, has cost localities, usually counties, several billion dollars in unpaid recording fees. To paraphrase the late Senator Everett Dirksen of Illinois, who allegedly said something to the effect of "a billion here, a billion there, and pretty soon you're talking about real money," "fifty dollars in recording fees here, fifty dollars in recording fees there, and pretty soon you're talking about real money for counties and localities."

To alleviate problems in determining who owns mortgages and notes, reduce mortgage fraud and to improve the finances of counties or other recording localities, I propose that legislation is enacted requiring that all mortgages and assignments, to be enforceable in a foreclosure, must be recorded with the appropriate local recording authority. Mandatory recording of mortgages and assignments will go a long way to determine the actual ownership of mortgages and notes, reduce fraud and improve local treasuries with the payment of recording fees.

Also, we have in New York State a logjam in moving forward foreclosures. In October 2010, to address the abuses of robosigning, the New York court system, by

administrative order, required an affirmation in foreclosures by plaintiff's counsel that counsel communicated with a named representative of the plaintiff, who informed counsel that he or she personally reviewed plaintiff's documents and records for factual accuracy and confirmed the factual accuracy of the allegations set forth in the complaint, and any supporting affidavits or affirmations, as well as the accuracy of the notarizations contained in the supporting documents. Then, plaintiff's counsel, based upon counsel's communication with plaintiff's representative, must inspect the documents and affirm under the penalty of perjury that all the papers filed with the Court contain no false statements of fact or law.

In announcing this affirmation requirement, New York's Chief Judge Jonathan Lippman, in his October 20, 2010 press release, stated, "We cannot allow the courts in New York State to stand by idly and be party to what we now know is a deeply flawed process, especially when that process involves basic human needs – such as a family home – during this period of economic crisis. This new filing requirement will play a vital role in ensuring that the documents judges rely on will be thoroughly examined, accurate, and error-free before any judge is asked to take the drastic step of foreclosure." However, this laudatory requirement, as a practical matter, slowed up the foreclosure process. Many bank lawyers are reluctant to file the required affirmations under the penalty of perjury. Bank lawyers are afraid of being sanctioned by the courts for filing false statements. This logjam is something else that our courts have to must deal with,

despite our limited resources.

In conclusion, I thank the Committee for the opportunity to share these observations and thoughts with you. I will be glad to answer any questions.

HON. ARTHUR M. SCHACK

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of the
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BIOGRAPHY OF JUSTICE ARTHUR M. SCHACK

Justice Arthur M. Schack is a New York State Supreme Court Justice sitting in Civil Term, Kings County. He has a B.A. (Brooklyn College); M.A. (Indiana University); and, a J.D. *cum laude* (New York Law School). Justice Schack has been a high school social studies teacher and served for 16 years as Counsel for the Major League Baseball Players Association. He was elected in 1998 to the Civil Court of the City of New York, and served three years in Criminal Court. Justice Schack was elected to the Supreme Court, 2d District in 2003, in which he has conducted hundreds of jury trials. More than 240 of his decisions have been published by the New York State Official Reporter and *The New York Law Journal*. In the past several years, more than 70 of his published decisions have been about mortgage foreclosures.