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## **Wells Fargo v. Erobobo: Mortgage-Backed Securities of the 2000s**

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*New York Law School, 2015*

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ALEX LUXENBURG

*Wells Fargo v. Erobo*: Mortgage-Backed  
Securities of the 2000s

59 N.Y.L. SCH. L. REV. 397 (2014–2015)

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As the dust from the 2008 housing bubble begins to settle, a new breed of foreclosure litigation has emerged.<sup>1</sup> The mid-2000s witnessed a decrease in underwriting standards, coupled with a dramatic increase in the issuance of subprime mortgage loans.<sup>2</sup> Additionally, it became commonplace for the loan originators to sell these risky mortgages to various securitizers—mainly Fannie Mae, Freddie Mac, and investment banks—who then transfer the mortgage loans to a trust that issues pass-through securities entitling the trust beneficiaries to the interest and principle of the mortgage loans.<sup>3</sup> These securities and trusts are controlled by complex contractual documents and subject to various state and federal laws.<sup>4</sup>

Many complications arose in the process of pooling thousands of mortgage loans into a single instrument and issuing securities.<sup>5</sup> One such complication was the misplacement or mismanagement of individual mortgage loans, opening the door for the borrower to challenge the standing of a bank attempting to foreclose.<sup>6</sup> Consequently, courts have been forced to decipher the contractual documents controlling the instruments holding these pools of mortgages in order to determine which set of laws applies.<sup>7</sup>

In *Wells Fargo Bank, N.A. v. Erobobo*,<sup>8</sup> the New York Kings County Supreme Court held that a bank could not foreclose on a \$420,000 mortgage loan when the mortgage originator<sup>9</sup> assigned the mortgage note to a servicer,<sup>10</sup> which, in turn,

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1. See, e.g., Victoria V. Corder, *When Securitization Complicates the Issue: What Are the Homeowner's Defenses to Foreclosure?*, 16 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 299, 308–11 (2009), as adapted in *Homeowners and Bondholders as Unlikely Allies: Allocating the Costs of Securitization in Foreclosure*, 30 BANKING & FIN. SERVICES POL'Y REP. Online (CCH) No. 5, at 19, 21–22 (May 2011) (discussing the defaulting mortgagors' standing defense to foreclosure proceedings brought by banks holding securitized mortgages in a trust); see also *Wells Fargo Bank, N.A. v. Erobobo*, No. 31648/2009, 2013 WL 1831799, at \*1 (N.Y. Sup. Ct. Apr. 29, 2013).
  2. Michael Simkovic, *Competition and Crisis in Mortgage Securitization*, 88 IND. L.J. 213, 225–27 (2013).
  3. Thomas E. Plank, *Regulation and Reform of the Mortgage Market and the Nature of Mortgage Loans: Lessons from Fannie Mae and Freddie Mac*, 60 S.C. L. REV. 779, 797–98 (2009).
  4. See, e.g., Roy D. Oppenheim & Jacquelyn K. Trask-Rahn, *Deconstructing the Black Magic of Securitized Trusts: How the Mortgage-Backed Securitization Process Is Hurting the Banking Industry's Ability to Foreclose and Proving the Best Offense for a Foreclosure Defense*, 41 STETSON L. REV. 745, 756–58 (2012).
  5. *Id.*
  6. See Corder, *supra* note 1.
  7. See Oppenheim & Trask-Rahn, *supra* note 4.
  8. No. 31648/2009, 2013 WL 1831799 (N.Y. Sup. Ct. Apr. 29, 2013).
  9. Alliance Mortgage Corporation is the mortgage originator in the context of this case. "Originators make the decisions as to whether or not to loan, they negotiate loan terms, commonly prepare the loan documents, and advance loan funds on the security of land interests." CURTIS J. BERGER ET AL., *LAND TRANSFER AND FINANCE: CASES AND MATERIALS* 98 (6th ed. 2011).
  10. Option One Mortgage Corporation is the servicer in this case. A servicer collects principal and interest payments, sends the proceeds to the lender, verifies the payment of insurance and taxes on the mortgaged property, and takes corrective action when the borrower is delinquent on his payments. *Id.* at 98. Some servicers are responsible for tens of thousands of mortgages. *Id.* at 99. The servicer industry is "heavily computerized." *Id.*

assigned the mortgage note to the bank in violation<sup>11</sup> of the Pooling and Servicing Agreement (PSA).<sup>12</sup> In denying Wells Fargo Bank, N.A.'s ("Wells Fargo") motion for summary judgment, the court held—"without any analysis"<sup>13</sup>—that Estates Powers and Trusts Law (EPTL) section 7-2.4<sup>14</sup> governed Wells Fargo's Real Estate Mortgage Investment Conduit (REMIC)<sup>15</sup> and, as such, section 7-2.4 voided Wells Fargo's assignment of Rotimi Erobobo's mortgage note.<sup>16</sup> The court found that Wells Fargo did not own Erobobo's mortgage note because the assignment was void and, therefore, Wells Fargo could not meet its prima facie case to foreclose.<sup>17</sup>

On July 16, 2006, Alliance Mortgage Banking Corporation ("Alliance") secured a loan of \$420,000 to Erobobo.<sup>18</sup> On the following day, Alliance assigned Erobobo's mortgage note to the servicer, Option One Mortgage Corporation ("Option One").<sup>19</sup> On October 1, 2006, a PSA was created and signed by Option One Asset Backed

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11. One could argue that the assignment from the servicer to Wells Fargo did not violate the PSA. *See Sigaran v. U.S. Bank Nat'l Ass'n*, No. H-12-3588, 2013 WL 2368336, at \*3 (S.D. Tex. May 29, 2013) (holding that the terms of a PSA do not require a written assignment to validly transfer the mortgage to a REMIC trust), *aff'd*, No. 13-20367, 2014 WL 1688345 (5th Cir. Apr. 30, 2014). For the purpose of advancing the main arguments of this case comment, however, it is assumed that the assignment did violate the terms of the PSA.
  12. The PSA governs the resulting trust and the securitization process. The PSA details the steps necessary to effectuate the formation of the trust, to transfer the mortgages into the trust, to issue securities from the trust, and to maintain the trust once created. *See, e.g.*, Oppenheim & Trask-Rahn, *supra* note 4, at 756–57.
  13. Brief of Defendants-Appellees at 16, *Rajamin v. Deutsche Bank Nat'l Trust Co.*, No. 13-1614-cv, 2013 WL 4047441, at \*43 (2d Cir. Aug. 5, 2013). The *Erobobo* decision has garnered much scrutiny and has been criticized for "fail[ing] to conduct any analysis as to why section 7-2.4 rendered the assignment void. The opinion ignored long standing case law conflating the terms void and voidable and did not cite to the line of cases where *ultra vires* acts could be ratified." Brief for the Defendant-Appellee at 37, *Jepson v. HSBC Bank USA, Nat'l Ass'n*, No. 13-1364 (1st Cir. Sept. 18, 2013).
  14. The statutory section provides that "[i]f the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void." N.Y. EST. POWERS & TRUSTS LAW § 7-2.4 (McKinney 2014).
  15. In this case, the REMIC is the method used by Wells Fargo to pool the mortgages together and issue securities. *Wells Fargo Bank, N.A. v. Erobobo*, No. 31648/2009, 2013 WL 1831799, at \*7 (N.Y. Sup. Ct. Apr. 29, 2013). Here, the REMIC was organized as a trust, but REMICs may also be "corporation[s], partnership[s], or even a segregated pool of assets that is not an entity for state law purposes." BERGER ET AL., *supra* note 9, at 983. Also, the securities here were in the form of pass-through securities, but the securities may also be "debt, stock, or partnership interests." *Id.* "REMIC securities dominate the secondary mortgage market." *Id.* at 977. REMICs are used primarily for their favorable income tax benefits. *See id.* at 983 (explaining that the REMIC structure alleviates "tax related inefficiencies" imposed by other structures used to issue asset-backed securities). While REMIC status affects its tax consequences, it is important to note that "the securities law, state law, and GAAP consequences of the transaction remain unchanged." *Id.*
  16. *See Erobobo*, 2013 WL 1831799.
  17. *Id.* at \*6–7.
  18. *Id.* at \*2.
  19. *Id.*

Funding Corporation (“ABFC”) as the depositor,<sup>20</sup> and Wells Fargo as the trustee of the newly formed REMIC.<sup>21</sup> The PSA enumerated that ABFC shall transfer all of the interest in the mortgage notes to Wells Fargo by the closing date, November 14, 2006.<sup>22</sup> On July 15, 2008,<sup>23</sup> Option One assigned Erobobo’s mortgage note to Wells Fargo.<sup>24</sup> On December 10, 2009, Wells Fargo commenced an action to foreclose and subsequently filed a motion for summary judgment on May 11, 2010.<sup>25</sup>

Assuming the court properly determined that Wells Fargo violated the terms of the PSA, the court’s ruling is legally flawed. First, the Uniform Commercial Code (UCC)—not N.Y. State Trust Law—should govern Erobobo’s mortgage note. Second, even if N.Y. State Trust Law were applicable, the court’s application of the EPTL was incorrect because EPTL section 7-2.4 provides no basis for voiding acts by the sponsor or depositor. Even if section 7-2.4 permitted courts to void acts by the depositor, a mortgagor lacks standing to assert a violation of a trust agreement he is not a party to for the purpose of defeating an otherwise valid foreclosure action. To allow a non-beneficiary to assert a trust violation as a defense to a foreclosure action brought on behalf of the trust beneficiaries goes against the EPTL’s intended purpose and would lead to absurd results in the mortgage marketplace.

The enforcement of Erobobo’s mortgage note is not governed by N.Y. State Trust Law because: (1) a note secured by a mortgage is governed by the UCC; and (2) the term “trust” in section 7-2.4 excludes mortgage securitization trusts. Although the PSA agreement contains a choice of law provision identifying N.Y. law as governing any dispute arising under the agreement, the clause has no bearing on whether the UCC or EPTL should govern the mortgage-note assignment.<sup>26</sup>

The *Erobobo* court’s decision to apply EPTL section 7-2.4 to Erobobo’s mortgage note was incorrect because a note secured by a mortgage is governed by the UCC rather than N.Y. State Trust Law.<sup>27</sup> It is well settled that a note secured by a mortgage

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20. The depositor’s role is confined to accepting the bundled mortgages and then dispersing them to the trust. The depositor has no assets or liabilities other than this single bundle of mortgages. This is done for the purpose of ensuring bankruptcy protection for the servicer. *See* Oppenheim & Trask-Rahn, *supra* note 4, at 753.

21. *See Erobobo*, 2013 WL 1831799, at \*2, \*7.

22. *Id.* at \*2.

23. *Id.* at \*1.

24. *Id.* at \*2.

25. *Id.*

26. The UCC is not a federal law. Once a state legislature adopts the UCC, it becomes codified in the state’s code of statutes. New York has adopted the UCC, which means that the choice of law provision identifying N.Y. law as the governing law has no bearing on whether the UCC or EPTL should govern the assignment because both are N.Y. statutes. *See* William Schnader, *A Short History of the Preparation and Enactment of the Uniform Commercial Code*, 22 U. MIAMI L. REV. 1, 10 (1967); *see also* United States v. Kimbell Foods, Inc., 440 U.S. 715, 733–35 (1979) (finding federal interests not sufficiently implicated to warrant displacement of state law and applying the UCC as the state rule of decision).

27. *See* Slutsky v. Blooming Grove Inn, Inc., 542 N.Y.S.2d 721, 723 (2d Dep’t 1989); HSBC Bank USA, Nat’l Ass’n v. Miller, 889 N.Y.S.2d 430, 432 (Sup. Ct. 2009).

is a negotiable instrument, and the validity of its assignment is governed by Article 3 of the UCC.<sup>28</sup> Thus, courts evaluating claims regarding the enforceability of mortgage-note assignments apply the UCC rather than state trust law.<sup>29</sup> Additionally, there is nothing in Article 3 that would permit a court to void such an assignment simply because it violates the PSA.<sup>30</sup> Accordingly, the court erred in deeming Erobobo's assignment void because it is governed by Article 3 of the UCC, which provides no basis to challenge the assignment of a mortgage note.<sup>31</sup>

Further, the *Erobobo* court applied section 7-2.4 erroneously because the term "trust" does not include a mortgage securitization trust.<sup>32</sup> EPTL section 1-1.5 provides that "[u]nless otherwise stated therein, the provisions of this chapter apply to the estates, and to instruments making dispositions or appointments thereof, of persons living on its effective date or born subsequent thereto."<sup>33</sup> EPTL section 7-2.4 applies to estates and instruments of persons and does not cover trusts created in the name of multinational banking corporations.<sup>34</sup> Section 1-1.5 makes clear that the term "trust," as defined by the 1966 legislature, was meant to apply to instruments created in the name of natural persons who wish to transfer their assets.<sup>35</sup> Thus, because the term "trust" in section 7-2.4 refers solely to those created in the name of natural persons, the EPTL does not apply to mortgage-backed securities issued by banking corporations.

Even assuming that the EPTL controlled Erobobo's mortgage-note assignment, the EPTL should not be read to void the assignment for several reasons. First, the EPTL provides that only acts performed by the *trustee* in contravention of the trust may be deemed "void." This means that any error regarding the transfer of Erobobo's mortgage note would not justify voiding the assignment since the error would be attributable to the sponsor or depositor—not the trustee. Second, to the extent that Erobobo is neither a party nor a beneficiary to the PSA—that is, he did not purchase a financial interest in the REMIC—he lacks standing to assert a claim reserved for REMIC beneficiaries. Third, the court should have interpreted the term "void" as "voidable" pursuant to the ratification doctrine, under which the claimed PSA violation may be subsequently cured by the consent of the trust beneficiaries. The court's contrary interpretation goes against the intended purpose of the EPTL and would lead to absurd results in the mortgage marketplace.<sup>36</sup>

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28. U.C.C. § 3-102 (2002); *see also* GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW 544 (5th ed. 2007) ("[I]t is entirely clear that Article 3 of the Uniform Commercial Code governs transfers of the right to enforce negotiable promissory notes, even when they are secured by mortgages.").

29. *See Slutsky*, 542 N.Y.S.2d at 724.

30. *See* U.C.C. § 3 (2002).

31. *Id.*

32. N.Y. EST. POWERS & TRUSTS LAW § 1-1.5 (McKinney 2014).

33. *Id.*

34. *Id.* §§ 7-2.4, 1-1.5.

35. *Id.* § 1-1.5.

36. *Id.* § 7-2.4.

Taking each of these arguments in turn: First, the *Erobobo* court erred in finding that EPTL section 7-2.4 calls for voiding the assignment because the statute requires an act of the trustee to be in contravention of the trust in order for the corresponding act to be void.<sup>37</sup> The trustee (Wells Fargo) did not effectuate the mortgage-note assignment. Pursuant to the provisions of the PSA, an error regarding the transfer of Erobobo's mortgage note is an error on behalf of the sponsor (Bank of America) or the depositor (ABFC)—the designated parties whose acts effectuate the assignment. Even if deemed “in contravention of the trust” within the meaning of section 7-2.4, the assignment is not an “act of the trustee” that justifies voiding the assignment.

The PSA contains numerous provisions identifying the duties and obligations of the depositor, sponsor,<sup>38</sup> and trustee.<sup>39</sup> Among other things, the PSA provides that the “Depositor will cause the Mortgage Loans to be assigned to the Trustee for the benefit of the Certificateholders” and “[t]he Pooling and Servicing Agreement will require that the Depositor deliver or cause to be delivered to the Trustee on behalf of the Certificateholders . . . the mortgage notes endorsed in blank and the Related

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37. *Id.*; see *Deutsche Bank Nat'l Trust Co. v. Stafiej*, No. 10 C 50317, 2013 WL 1103903, at \*3–4 (N.D. Ill. Mar. 15, 2013) (holding that transfer of mortgage note in breach of the PSA was not void under section 7-2.4 because failure to comply with the terms of the PSA was the fault of the assignor, not the trustee, and thus “defendants have not pointed to an act ‘of the trustee’ in contravention of the PSA’s terms”).

38. The Mortgage Loans were selected by the Sponsor, with advice from Banc of America Securities LLC (the “Underwriter”) as to the characteristics of the Mortgage Loans in each loan group that will optimize marketability of the Certificates, from the mortgage loans purchased from the Originator under the Option One Mortgage Loan Purchase Agreement, and were chosen to meet the requirements imposed by the rating agencies to achieve the credit support . . . . These representations and warranties will be assigned by the Sponsor to the Depositor and by the Depositor to the Trustee, for the benefit of the Certificateholders. . . . Pursuant to the terms of the Mortgage Loan Purchase Agreement, the Sponsor will make to the Depositor (and the Depositor will assign to the Trustee for the benefit of Certificateholders) only certain limited representations and warranties as of the Closing Date with respect to the Mortgage Loans, generally intended to address the accuracy of the Mortgage Loan Schedule and the payment and delinquency status of each Mortgage Loan.

ABFC 2006-OPT3 Trust, Free Writing Prospectus (Form FWP), 34 (Nov. 3, 2006), *available at* <http://www.sec.gov/Archives/edgar/data/1378849/000091412106003384/as5795051-fwp.txt>.

39. Under the terms of the Pooling and Servicing Agreement, the Trustee also is responsible for securities administration, which includes pool performance calculations, distribution calculations and the preparation of monthly distribution reports. As securities administrator, the Trustee is responsible for the preparation and filing of all REMIC tax returns on behalf of the Issuing Entity and the preparation of monthly reports on Form 10-D, certain current reports on Form 8-K and annual reports on Form 10-K that are required to be filed with the Securities and Exchange Commission on behalf of the Issuing Entity and the Depositor will be required to sign any such monthly or annual reports. . . . Wells Fargo Bank is acting as custodian of the mortgage loan files pursuant to the Pooling and Servicing Agreement. In that capacity, Wells Fargo Bank is responsible to hold and safeguard the mortgage notes and other contents of the mortgage files on behalf of the Trustee and the Certificateholders.

*Id.* at 45–46.

Documents.<sup>40</sup> Moreover, with respect to the trustee—the only party whose ultra vires<sup>41</sup> acts may be deemed “void” under section 7-2.4—the PSA strictly mandates that “[t]he Trustee, on behalf of the Trust, is only permitted to take the actions specifically provided in the Pooling and Servicing Agreement prior to an Event of Default.”<sup>42</sup> Thus, the PSA makes clear that the role of transferring the mortgage notes is entirely within the control and responsibility of the sponsor and depositor, and expressly outside the control and responsibility of the trustee.<sup>43</sup> Accordingly, if there was an error regarding the transfer of Erobobo’s mortgage note, it was an error on behalf of the sponsor or depositor—the designated parties whose acts effectuate the assignment.<sup>44</sup> It follows that since section 7-2.4 does not void acts by the depositor or sponsor, the statute provides no basis for the court to void Erobobo’s mortgage-note assignment.<sup>45</sup>

Second, a mortgagor lacks standing to challenge a violation of a PSA REMIC trust agreement (to which he is not a party) for the purpose of defeating an otherwise valid foreclosure action.<sup>46</sup> Recently, several N.Y. cases involving asset-securitization trusts specifically addressed the ramifications of a trustee breaching the PSA agreement and the trust’s subsequent ability to foreclose.<sup>47</sup> In *U.S. Bank National Ass’n v. Madero*,<sup>48</sup> a case materially similar to the *Erobobo* case, the trustee of a REMIC received the defendants’ mortgage note in violation of the PSA after the trust had closed.<sup>49</sup> Notwithstanding the violation, the court held that the defendants, as neither parties nor beneficiaries to the PSA, lacked standing to challenge the validity of the assignment.<sup>50</sup> Thus, as the Second Circuit noted in *Rajamin v. Deutsche*

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40. *Id.* at 47.

41. *See infra* note 60.

42. *Id.* at 45.

43. *See id.* at 47.

44. *See id.*

45. *See* N.Y. EST. POWERS & TRUSTS LAW § 7-2.4 (McKinney 2014). Additionally, the law requires REMIC trusts to be “passive entities” and strictly forbids the trustee to effectuate any mortgage-note assignment in or out of the trust. Thus, if the REMIC trust breached section 7-2.4 by transferring a mortgage note, this same act should (in theory) be a breach of REMIC law. However, no breach of REMIC law is alleged. Tax Reform Act of 1986, Pub. L. No. 99-514, § 671(a), 100 Stat. 2085, 2309 (codified in I.R.C. §§ 860A–860G); *Wells Fargo Bank, N.A. v. Erobobo*, No. 31648/2009, 2013 WL 1831799 (N.Y. Sup. Ct. Apr. 29, 2013).

46. This naturally begs the question: What if Erobobo purchased shares of the REMIC trust that contained his mortgage note? Presumably, he would have standing. However, the purchasers of REMIC shares are typically not individuals similar to Erobobo; they are rather institutions, pension funds, and municipalities—parties that typically have portfolios containing mortgage-backed securities.

47. *See U.S. Bank Nat’l Ass’n v. Madero*, No. 102965/08, 2012 WL 5893625 (N.Y. Sup. Ct. Nov. 15, 2012); *Rajamin v. Deutsche Bank Nat’l Trust Co.*, 757 F.3d 79 (2d Cir. 2014).

48. No. 102965/08, 2012 WL 5893625 (N.Y. Sup. Ct. Nov. 15, 2012).

49. *Id.* at \*5.

50. *Id.*



*Bank National Trust Co.*,<sup>51</sup> “[t]he weight of caselaw throughout the country holds that a non-party to a PSA lacks standing to assert noncompliance with the PSA as a claim or defense.”<sup>52</sup> As neither a party nor a beneficiary to the agreement, the mortgagor is not in any way prejudiced by a violation of the agreement. Thus, for good reason, courts view it as inequitable to allow the mortgagor to benefit from the alleged violation. The *Erobobo* court therefore erred by allowing the mortgagor to assert a violation of the PSA as a defense to Wells Fargo’s foreclosure action.

Third, an act violating a trust agreement is voidable—not void.<sup>53</sup> N.Y. courts applying section 7-2.4 consistently choose not to interpret the language literally and hold that acts in contravention of a PSA are not void, but merely voidable.<sup>54</sup> This line of cases finds support in the ratification doctrine, under which a given act, although in violation of the original agreement, may subsequently be ratified by the consent of the parties.<sup>55</sup> Accordingly, section 7-2.4 should not be read literally and the term “void” should be read as “voidable.”<sup>56</sup> Had the *Erobobo* court followed this well-settled principle, the transfer of Erobobo’s mortgage note would not have been declared void, but at most voidable.<sup>57</sup>

In *Mooney v. Madden*,<sup>58</sup> the court considered whether the trustees of a trust agreement were strictly bound to vote a certain way regarding corporate stocks. If so, the votes that had already been cast in violation of that agreement would be declared null and void.<sup>59</sup> In overruling the lower court, the appellate division in *Mooney* noted

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51. 757 F.3d 79 (2d Cir. 2014).

52. *Id.* at 84; *see also* *Livonia Prop. Holdings, LLC v. 12840–12976 Farmington Road Holdings, LLC*, 717 F. Supp. 2d 724, 736–37 (E.D. Mich. 2010) (“[F]or over a century, state and federal courts around the country have . . . h[e]ld that a litigant who is not a party to an assignment lacks standing to challenge that assignment.”). The same principle holds true in the corporate context, where courts have held that “the legality of actions taken at a shareholders’ meeting is not open to collateral attack by nonshareholders on any ground of informality or irregularity in the meeting.” *Swain v. Wiley Coll.*, 74 S.W.3d 143, 148 (Tex. Ct. App. 2002).

53. *Black’s Law Dictionary* defines void as “of no legal effect; null.” Whereas voidable is defined as “valid until annulled . . . capable of being affirmed or rejected at the option of one of the parties.” *BLACK’S LAW DICTIONARY* 1709 (9th ed. 2011).

54. *See Orellana v. Deutsche Bank Nat’l Trust Co.*, No. 12-11982-NMG, 2013 WL 5348596 (D. Mass. Aug. 30, 2013); *Sigaran v. U.S. Bank Nat’l Ass’n*, No. H-12-3588, 2013 WL 2368336, at \*3 (S.D. Tex. May 29, 2013), *aff’d*, No. 13-20367, 2014 WL 1688345 (5th Cir. Apr. 30, 2014); *Calderon v. Bank of Am. N.A.*, 941 F. Supp. 2d 753, 766 (W.D. Tex. 2013); *Koufos v. U.S. Bank, N.A.*, F. Supp. 2d 40, 44 (D. Mass. 2013).

55. *See Swain*, 74 S.W.3d at 150 (discussing the ratification doctrine). “A voidable act may be subsequently ratified or confirmed.” *Id.*

56. *See Bank of Am. Nat’l Ass’n v. Bassman FBT, LLC*, 981 N.E.2d 1 (Ill. App. Ct. 2012); *Sigaran*, 2013 WL 2368336, at \*3; *Koufos*, 939 F. Supp. 2d at 49; *Deutsche Bank Nat’l Trust Co. v. Stafiej*, No. 10 C 50317, 2013 WL 1103903 (N.D. Ill. Mar. 15, 2013); *Calderon*, 941 F. Supp. 2d at 766.

57. *See Wells Fargo Bank, N.A. v. Erobobo*, No. 31648/2009, 2013 WL 1831799, at \*8 (N.Y. Sup. Ct. Apr. 29, 2013).

58. 597 N.Y.S.2d 775, 775 (3d Dep’t 1993).

59. *Id.* at 776.

that “[a] trustee may bind the trust to an otherwise invalid act or agreement which is outside the scope of the trustee’s power [if] the beneficiary or beneficiaries consent or ratify the trustee’s ultra vires<sup>60</sup> act or agreement.”<sup>61</sup> Additionally, the beneficiaries’ consent may be either express or implied<sup>62</sup> and may be given prior to, or after, the trustee’s invalid act.<sup>63</sup> Thus, it is well-settled law that an act which may be ratified is voidable and therefore cannot be void on its face.<sup>64</sup>

In *Sigarán v. U.S. Bank National Ass’n*,<sup>65</sup> the court examined—in the context of section 7-2.4—the implications of a post-closing date mortgage-note transfer into a REMIC trust. The *Sigarán* court reasoned that since “assignments made after the Trust’s closing date are voidable, rather than void, the Sigarans lack authority to challenge the assignment of their mortgage to U.S. Bank.”<sup>66</sup> Similarly, in *Calderon v. Bank of America N.A.*, the mortgagors alleged that the foreclosing bank was not in fact the holder of their mortgage notes based on alleged violations of the PSA agreement.<sup>67</sup> The *Calderon* court—relying on *Mooney*, *Hackett*, and other cases—held that “under New York law, a trustee’s unauthorized transactions may be ratified; such transactions are, accordingly, voidable—not void.”<sup>68</sup> Finally, in *Deutsche Bank National Trust Co. v. Adolfo*,<sup>69</sup> the court was presented with the same situation under an analogous Illinois statute, in which the mortgagor challenged foreclosure on the

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60. The ultra vires doctrine refers to activities outside the scope of an entity’s or individual’s power. The original purpose of the ultra vires doctrine was to protect the public from unsanctioned activities. See MELVIN A. EISENBERG & JAMES D. COX, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS: CASES AND MATERIALS 249 (10th ed. 2011). In *Erobobo*, Wells Fargo’s acceptance or execution of the assignment after the closing date of the REMIC trust fits neatly into the definition of an ultra vires act. See *Erobobo*, 2013 WL 1831799, at \*7.

61. *Mooney*, 597 N.Y.S.2d at 776 (citations omitted).

62. Here, while there is no evidence that the beneficiaries expressly consented to *Erobobo*’s untimely mortgage note transfer, failure to consent would decrease the value of each beneficiary’s share of the trust. Accordingly, acceptance should be presumed “in accordance with the general rule that individuals are presumed to act as their self-interest requires.” *Sinclair v. Fleischman*, 773 P.2d 101, 105 (Wash. 1989) (holding that in the absence of express rejection, a donee’s acceptance of a gift will be presumed).

63. *Mooney*, 597 N.Y.S.2d at 776.

64. See, e.g., *Aronoff v. Albanese*, 446 N.Y.S.2d 368, 370 (2d Dep’t 1982) (stating that a void act cannot be ratified); *Leasing Serv. Corp. v. Vita Italian Rest., Inc.*, 566 N.Y.S.2d 796, 787 (3d Dep’t 1991) (holding that a contract entered into by a trustee outside the scope of the trustee’s powers is not prima facie void); *In re Birnbaum*, 503 N.Y.S.2d 451, 456 (4th Dep’t 1986) (noting that an act that may be ratified is clearly voidable, not void); *Washburn v. Rainier*, 134 N.Y.S. 301, 304 (2d Dep’t 1912) (holding that a trustee who disposes of his property in contravention of the trust agreement allows the beneficiary the option to accept or reject the trustee’s unauthorized action).

65. H-12-3533, 2013 WL 2368336, at \*2–3 (S.D. Tex. May 29, 2013), *aff’d*, No. 13-20367, 2014 WL 1688345 (5th Cir. Apr. 30, 2014).

66. *Id.* at \*3.

67. 941 F. Supp. 2d 753, 757 (W.D. Tex. 2013).

68. *Id.*

69. No. 12 C 759, 2013 WL 4552407, (N.D. Ill. Aug. 28, 2013).

grounds that the mortgage-note assignment occurred well after the trust had closed.<sup>70</sup> Consistent with the weight of authority, the *Adolfo* court held that “a transfer that does not comply with [the] PSA is voidable, not void.”<sup>71</sup>

It is clear that the weight of case law in New York and around the country interprets the term “void” in section 7-2.4 to mean “voidable.”<sup>72</sup> Courts have thus consistently held that violations of PSA agreements—such as when a trust receives a mortgage note after its closing date—are not automatically void.<sup>73</sup> Accordingly, the *Erobobo* court erred when it held that Erobobo’s mortgage note transfer to Wells Fargo should have been deemed void.<sup>74</sup>

Using section 7-2.4 as a means to void the *Erobobo* assignment goes against the purpose of the EPTL and would lead to absurd results in the mortgage marketplace.<sup>75</sup> The purpose of section 7-2.4 is to protect beneficiaries from unintended and irreparable harm.<sup>76</sup> In *Adolfo*, the court elaborated on the statute’s purpose:

The evident purpose of [EPTL section 7-2.4] is to transfer the loans into the trust for the benefit of the certificateholders in a way that avoids later challenges along the lines that *Adolfo* has pursued in this case. But certificateholders would be harmed if they could not receive foreclosure proceeds because a transfer, otherwise effective under Article 3 [of the UCC], did not comply with [EPTL section 7-2.4]. We conclude that the transfer of the Note is voidable, at most, and therefore *Adolfo* cannot rely on noncompliance with the PSA to defeat foreclosure.<sup>77</sup>

As noted by the *Adolfo* court, allowing non-beneficiaries to void a mortgage transfer does not further the purpose of section 7-2.4. It instead directly harms the trust beneficiaries—the very parties the statute was intended to protect—by undermining their rights to the trust funds.<sup>78</sup> Because *Erobobo* is neither a party nor

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70. *Id.* at \*1.

71. *Id.* at \*3.

72. *See* Wells Fargo Bank, N.A. v. Erobobo, No. 31648/2009, 2013 WL 1831799 (N.Y. Sup. Ct. Apr. 29, 2013).

73. *See* Orellana v. Deutsche Bank Nat’l Trust Co., No. 12-11982-NMG, 2013 WL 5348596 (D. Mass. Aug. 30, 2013); Sigaran v. U.S. Bank Nat’l Ass’n, No. H-12-3588, 2013 WL 2368336, at \*3 (S.D. Tex. May 29, 2013), *aff’d*, No. 13-20367, 2014 WL 1688345 (5th Cir. Apr. 30 2014); Calderon v. Bank of Am. N.A., 941 F. Supp. 2d 753, 765–66 (W.D. Tex. Apr. 23, 2013); Koufos v. U.S. Bank, N.A., 939 F. Supp. 2d 40, 48–49 (D. Mass. Mar. 21, 2013); Feldman v. Torres, 939 N.Y.S.2d 221 (2d Dep’t 2011); *In re* Levy, 893 N.Y.S.2d 142, 144 (2d Dep’t 2010); Leasing Serv. Corp. v. Vita Italian Rest., Inc., 566 N.Y.S.2d 796, 797 (3d Dep’t 1991); Mooney v. Madden, 597 N.Y.S.2d 775, 776 (3d Dep’t 1993); Washburn v. Rainer, 134 N.Y.S. 301 (2d Dep’t 1912); Hine v. Huntington, 103 N.Y.S. 535, 540 (4th Dep’t 1907).

74. *See Erobobo*, 2013 WL 1831799, at \*9.

75. *See* Deutsche Bank Nat’l Trust Co. v. *Adolfo*, No. 12 C 759, 2013 WL 4552407, at \*3 (N.D. Ill. Aug. 28, 2013).

76. *See id.*

77. *Id.*

78. *Id.*

a beneficiary to the REMIC trust, allowing him to void his mortgage note assignment runs afoul of EPTL's intended purpose.<sup>79</sup>

Finally, the *Erobobo* court's interpretation of section 7-2.4 was incorrect because such an interpretation, if left standing, would lead to absurd<sup>80</sup> results in the mortgage marketplace.<sup>81</sup> While many people believe it "impossible to even estimate"<sup>82</sup> the number of PSA violations occurring in the mid-2000s, some suggest that the number of timely mortgage-note transfers are "few, if any."<sup>83</sup> Hence, if section 7-2.4 mandates that all untimely transfers be void—a conclusion inescapable under the *Erobobo* court's interpretation—then the home-loan sphere in the United States is in jeopardy.<sup>84</sup> Strict enforcement of section 7-2.4 leads to inequity by giving a windfall to delinquent mortgagors at the expense of trust beneficiaries, whose interests the statute seeks to protect.<sup>85</sup>

The *Erobobo* court erred in denying summary judgment to Wells Fargo's foreclosure action. The court's application of EPTL section 7-2.4 runs contrary to longstanding principles of equity, contradicts established precedent, and undermines the statute's underlying purpose. It is hardly surprising that real estate lawyers have caught wind of the *Erobobo* holding and have heavily scrutinized it for its faulty reasoning. Yet, there are some who view it as a big win against the banks that no doubt played a role in the financial crisis. If the *Erobobo* decision is upheld on appeal, the foreclosure landscape across the country could be drastically impacted, perhaps bringing another crisis upon us.

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79. See *Erobobo*, 2013 WL 1831799, at \*3.

80. The absurdity doctrine is a rule of construction which counsels against interpreting a statute in a way that "would lead to an unconscionable result, especially one that . . . the drafters could not have intended and probably never considered." BLACK'S LAW DICTIONARY 10 (9th ed. 2011).

81. See *Erobobo*, 2013 WL 1831799, at \*3.

82. Alvin Arnold, *Securitization: Assignments After REMIC Closing Date are Void*, 43 REAL EST. L. REP. 1, 2 (Sept. 2013).

83. *The REMICS Have Failed! The REMICS Have Failed!*, DEADLY CLEAR 2 (Nov. 4, 2011), <http://deadlyclear.wordpress.com/2011/11/04/the-remics-have-failed-the-remics-have-failed/>.

84. See N.Y. EST. POWERS & TRUSTS LAW § 7-2.4 (McKinney 2014).

85. See *id.*