Maine Committee on Judicial Conduct
P.O. Box 8058, Portland, Maine 04104-8058

Complaint Form Concerning Conduct of Maine State Court Judges

This form is furnished to help facilitate the Committee's initial consideration of the complaint – determining whether it is within the Committee's jurisdiction and whether an investigation or other further action should be taken. If your complaint involves conduct that occurred in, or with reference to, a court proceeding, please give the following information:

Name of Case Finch v. U.S. Bank, N.A. **Docket No.** And-21-355

Date(s) of Proceedings Opinion is dated January 11, 2024

City or Town in which Court is located Portland

Court: District Court __ **Superior Court** __ **Supreme Court** X **Probate Court** __

Kind of Case: Civil X **Small Claims** __ **Protection/Abuse/Harassment** __

Probate __ **Divorce** __ **Traffic** __ **Criminal** __ **Other** _____

Factually describe the conduct about which you wish to complain, including all relevant dates and the judge's name. Please use as many additional separate sheets as necessary, or you may write your complaint in the form of a letter. It is important, however, to include all of the information requested on this form, to the extent that the particular items of information are relevant to your complaint.

See attached materials filed in support of complaint.

Names, addresses and phone numbers of other persons who witnessed the conduct or have information concerning your complaint

The parties and lawyers involved in the case and the other Law Court justices.

Thomas A. Cox, Maine Bar No. 1248
Your Name (printed or typed)

Thomas A. Cox
Your Signature

Address: P.O. Box 1083
Yarmouth, ME 04096

Phone: ([redacted])7[redacted]

Date: January 18, 2024

Complaint Alleging Violation of Canon 2
of the Maine Code of Judicial Conduct
by Maine Supreme Court Justice Catherine Connors

I. Introduction.

Canon 2 of the Maine Code of Judicial Conduct sets forth a standard of impartiality by which judges must conduct themselves. Rule 2.11 (A) of the canon mandates that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might be reasonably questioned. . ." Despite this command, Justice Catherine Connors not only joined the recent opinion in *Finch v. U.S. Bank, N.A.* 2024 ME 2, **Exhibit A,** in which her participation was decisive in achieving a 4-3 result in favor of the bank, but she evidently continues to participate in a companion case still pending in the Law Court, *J.P. Morgan Chase Acquisition Corp. v. Camille J. Moulton*, Oxf 21-412 (Me., argued Nov. 1, 2022). For reasons set forth below, Justice Connors' representation of Bank of America in a decision reached in 2017 that has now been overruled in *Finch*, as well as her representation of the Maine Banker's Association in another 2017 case with an outcome now likely to be reversed by *Moulton*, should have compelled her to recuse herself from participation in the Court's deliberations in both *Finch* and *Moulton*.

II. Reconsideration of the Res Judicata Holdings Reached in *Deschaine* and *Pushard*.

The appeals in *Finch* and *Moulton* both arose from mortgage foreclosure litigation. In August, 2022, issues of res judicata raised in these two cases caused the Law Court to invite amicus briefs in *Moulton*, **Exhibit B,** and instructed the parties to file new briefs in *Finch*, **Exhibit C**, on the question whether the Court should reconsider its holdings in two prior mortgage foreclosure cases decided in 2017, *Federal National*

Mortgage Association v. Deschaine, 2017 ME 190, 170 A.3d 230, **Exhibit D**, and *Pushard v. Bank of America, N.A, 2017 ME 230, 175 A.3d 103*, **Exhibit E**.

Deschaine reached two essential holdings. The Law Court held, first, that the principle of res judicata bars a bank from attempting a second foreclosure action when, in a first foreclosure action, judgment on the merits is granted to the homeowner. Second, the Court held that a trial court entering judgment for the homeowner could require the now unenforceable mortgage to be removed as a lien on the mortgaged property.

In calling for amicus briefs in *Deschaine*, the Law Court showed its keen awareness of "the effect of res judicata principles on a second foreclosure action after a mortgagee's first foreclosure action is dismissed with prejudice." **Exhibit F**. The call was issued on March 1, 2107, while a decision was still pending in *Pushard*, the second appeal from a foreclosure judgment in favor of a homeowner. In response, five amicus briefs were filed, including a brief for the Maine Bankers Association and the National Mortgage Bankers Association. [1] That brief was co-authored by then attorney Catherine Connors. **Exhibit G**.

The Law Court decided *Deschaine* by a unanimous decision on September 7, 2017, revised its decision on December 7, 2017, while *Pushard* was still pending, and followed with the unanimous decision in *Pushard* on December 12, 2017. The defense judgment reviewed in *Deschaine* was imposed as a sanction for that plaintiff's failure to follow a court order. The defense judgment reviewed in *Pushard* resulted from the failure of Bank of America to prove that it sent a default letter to the homeowner that complained with the notice of default requirements of 14 M.R.S. § 6111. This distinction is the focus

[1] The brief of the Maine Bankers Association states that the organization includes 31 retail banks operating in Mane, and the National Mortgage Association represents the real estate finance industry nationally.

of the decision reached in *Finch*, in which the Law Court has now overruled *Pushard* and held that a judgment against a mortgagee whose default letter fails to comply with 14 M.R.S. § 6111, is not a judgment on the merits that would preclude re-litigation.

Before her confirmation as a justice of the Maine Supreme Court, Justice Conners participated actively on behalf of clients with a substantial financial interest in the outcomes of *Deschaine* and *Pushard*. She filed the amicus brief for the Maine Bankers Association in *Deschaine*, and she represented and filed the appellate brief for Bank of America in *Pushard.* Since her confirmation, she not only sat on the oral the arguments in *Finch* and *Moulton*, but was the most active justice challenging the positions of the homeowner's counsel in *Finch*, and has now joined in the judgment that reverses *Pushard*. Had she not participated in the 4-3 holding, the trial court's judgment for the homeowner would have been upheld.

III. The Unique Nature of Residential Mortgage Foreclosure Actions

Most appellate decisions affect only the immediate parties. Others may affect a somewhat larger group of future litigants, such as actions based on nuisances or defective products. But a third kind of appellate decision can affect the ongoing practices of entire industries and their counter parties. Of this nature is the recent decision of the United States Supreme Court in *Tyler v. Hennepin County, Minnesota*, 143 S. Ct. 1369 (2023). *Tyler* impacts thousands of county, municipal and state property taxing authorities and perhaps millions of former property owners by holding that the collection practices of tax authorities have violated the Constitution's Taking Clause.[2]

At the state level, the Law Court's decision in *Finch*, which overrules *Pushard*, is of this third category of decisions. Its holding is certain to affect Maine's entire

[2] *See Tyler v. Hennepin County* at 137 Harv. L. Rev. 310 for a discussion of the broad impact of this decision.

mortgage industry. On average, over a thousand foreclosure cases are filed in Maine each year.[3] Each of these requires application of the same statutory provisions (14 M.R.S. Ch. 713); each involves similar forms of promissory notes and mortgages; and each involves the issuance of letters of default that must meet strict guidelines (14 M.R.S. § 6111). Moreover, every foreclosure case requires proof that seven elements are satisfied. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89 ¶ 18, 96 A.3d 700.

In 2017, when the Law Court decided *Pushard*, it affirmed that the principles of res judicata should apply to all foreclosure judgments in which homeowners prevailed because of defective notices of default. The holding had broad impact, both because it required mortgagees to exercise particular care in generating notices of default, and because few homeowners realize defense counsel may be available and need scrupulously accurate notices to apprise them of their rights and obligations. *Finch* will also now have similarly broad impact. Affected will not just be Maine homeowners, should mortgage servicers engage again in faulty notice practices, but also former mortgage owner clients of Justice Connors, with interests in the millions of dollars, including Bank of America, N.A., Federal National Mortgage Association, and some

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[3] Judicial Branch statistics show the following volumes of foreclosure filings:
FY 2018 2467
FY 2019 1746
FY 2020 1286
FY 2021 391
FY 2022 796
FY 2023 1,005
The COVID-19 Pandemic led to various foreclosure moratoria which began in early 2020 and which in turn led to the major slowdowns in Maine foreclosure filings in Fiscal Years 2020 - 2022, but volumes are increasing again.

thirty members of the Maine Bankers Association on whose behalf then Attorney Connors filed amicus briefs.

IV. The Disqualification and/or Recusal Standard of the Maine Code of Judicial Conduct.

The recusal requirement of Canon 2, Rule 2.11(A) of the Maine Code of Judicial Conduct is substantially the same as the rule set forth in 28 U.S.C. § 455(a) for federal judges and magistrates. The federal rule states that "[a]ny justice, judge or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

In the 2015 Advisory Notes to Maine Canon 2, Rule 2.11, addressing prior professional relationships of a judge or justice, the Maine Supreme Judicial Court cited *Allphin v. United States*, 758 F.3d 1336, 1343-1344 (Fed. Cir. 2014), which construed 28 U.S.C. § 455, for its holding that the standard for whether a judge's impartiality might be questioned *"is an objective standard that mandates recusal 'when a reasonable person, knowing all of the facts, would question the judge's impartiality.'"* (Emphasis supplied.) The Supreme Judicial Court went on to state that *"subjective beliefs about the judge's impartiality are irrelevant."* (Emphasis added.)

V. Facts Available to a Reasonable Person Considering Whether the Impartiality of Justice Connors May Be Reasonably Questioned.

A. Justice Catherine Connors was confirmed as a Law Court Justice in January 2020.

B. For at least thirty years before her confirmation as a Justice, Attorney Catherine Connors was a member of, and for some period of years a partner in, the law firm of Pierce Atwood.

C. During most, and perhaps all, of Attorney Catherine Connors tenure at Pierce Atwood, the firm had a continuing relationship with the Maine Bankers Association in which it was an "Affiliate Member," **Exhibit H**, entitled to various benefits, **Exhibit I**, a relationship in which Attorney Connors may have been a participant.[4]

D. During her tenure as member of the law firm of Pierce Atwood, Attorney Connors represented mortgage owners and servicers as parties in appeals before the Law Court related to residential foreclosure issues. These included at least the following cases:

(1). In *Federal National Mortgage Association v. Bradbury*, 2011 ME 120, then Attorney Connors co-authored the Law Court brief of Federal National Mortgage Association and GMAC Mortgage, LLC, arguing against the imposition of contempt sanctions against a party faulted by the Law Court for a practice of filing false summary judgment affidavits in foreclosure cases.

(2). In *English v. Bank of America*, MEM-15-33, then Attorney Connors was co-counsel for Bank of America in a declaratory judgment action seeking to quiet title in a residential mortgage matter.

(3). In *Bank of America, N.A. v. Greenleaf*, 2015 ME 127, then Attorney Connors was co-counsel for Bank of America and co-authored its brief.

(4). In *Pushard v. Bank of America*, N.A., 2017 ME 230, the case whose holding has now been reversed, the Attorney Connors represented Bank of America in its foreclosure appeal. A copy of the appellant's brief which she co-authored is attached as **Exhibit J**.

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[4] The Maine Bankers Association website (found at https://www.mainebankers.com/maine-community-banks-affiliates-2/affiliate-program-info/) provides that "Affiliate Membership provides an excellent communications network between our member institutions and related industries, offering firms and individuals invitations to meetings, access to publications and member rates on meeting fees" and which includes receipt of a "management communications package."

(5). In *Wilmington Savings Fund Society v. Needham*, 2019 ME 42, then Attorney Connors represented Wilmington Savings in the Law Court and was the co-author of its brief.

E. During her tenure as a member of the firm of Pierce Atwood, then Attorney Conners filed amicus briefs supporting the positions of a mortgage loan owner and the Maine Bankers Association in the following foreclosure related cases:

(1). In *Bank of America, N.A. v. Cloutier*, 2013 ME 17, then Attorney Catherine Conners co-authored the amicus brief of Federal Home Loan Mortgage Corporation.

(2). In *Federal National Mortgage Association v. Deschaine*, 2017 ME 190, then Attorney Catherine Connors co-authored the amicus brief of the Maine Bankers Association. A copy of that amicus brief is attached as **Exhibit G**.

(3). In *Bank of New York Mellon v. Shone*, 2020 ME 122, then Attorney Connors co-authored the amicus brief of the Maine Bankers Association.

F. Research has revealed no reported decision at the trial or appellate levels in which then Attorney Conners represented a homeowner in a Maine foreclosure case brought by a financial institution.

G. The language and analysis of the majority decision in *Finch "is identical to the one presented to [the Law Court] in Pushard by the trial court,"* (*Finch* dissent at ¶ 62, Emphasis supplied). That is, the language and analysis employed by then Attorney Connors when she wrote as counsel for Bank of America in her appellate brief. The Committee is urged to compare the brief of then Attorney Connors in *Pushard*, Exhibit K, with the majority opinion set forth in *Finch.*

VI. Canon 2, Rule 2.11(A) is to be Applied Using the Reasonable Person Standard.

In applying federal rule 28 U.S.C. § 455(a), which is substantially the same as Maine Canon 2, Rule 2.11(A), the question to be answered is "whether a judge's impartiality might be questioned from the perspective of a reasonable person."[5] A subjective determination by Justice Connors that she believed she could be impartial in deciding *Finch* and *Moulton* would not meet this standard. Instead, she was required to "apply an objective standard" and to consider whether her "perspective might be questioned from the perspective of a reasonable person."[6] Such a person is "an observer who is informed of all of the surrounding facts and circumstances.'"[7] "The reasonable observer is not the judge or even someone familiar with the judicial system, but rather an average member of the public."[8]

VII. A Reasonable Person Not Only Might, but Would, Question the Impartiality of Justice Connors in Sitting on the Appeals in *Finch* and *Moulton*.

A reasonable person, aware of all the facts, would know that, before and after she represented Bank of America in the 2017 *Pushard* case, the case that *Finch* now overturns, then Attorney Connors represented the Maine Bankers Association or mortgage owners in seven other foreclosure appeals before the Law Court. He or she would know as well that there is no record of then Attorney Connors ever representing a homeowner facing foreclosure in any court. A reasonable person would know that, before being confirmed to the Law Court in 2020, then Attorney Connors came from of a firm that for many years had been an affiliate member of the Maine Bankers

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[5] Geyh & Markarian, Judicial Disqualification: An Analysis of Federal Law Under §§ 455 and 144, (3 rd ed.), Federal Law Center, 2020, Section II. B. 1. a. This article is hereafter referred to as "Judicial Qualification."

[6] *Id.*

[7] *Cheney v. Court for Dist. of Columbia*, 541 U.S. 913, 924 (2004)

[8] *Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1310 (10th Cir. 2015)

Association, an association that had actively opposed homeowner appeals in multiple foreclosure cases. A reasonable person would know that the work of then Attorney Connors, as counsel for Bank of America in the *Pushard* appeal, was of enormous economic importance to that bank and the mortgage banking industry in Maine, because the impact of *Pushard's* holding on the question of res judicata was to bar mortgagees from bringing subsequent foreclosures when trial courts had entered judgments for homeowners. A reasonable person would also know that then Attorney Connors must have understood the economic importance of *Pushard* to the banking industry, in that she was hired by the Maine Bankers Association and the National Mortgage Bankers Association in 2017 to file an amicus brief for them further addressing the res judicata issues in the *Deschaine* appeal, while the *Pushard* decision itself was pending on appeal.

In view of the foregoing, a reasonable person could readily apprehend the impact that *Finch* and *Moulton* could have on the fortunes of lending industry if *Pushard* were reversed. He or she would know as well that Justice Connors understood how the economic consequences of *Pushard's* reversal could benefit her former clients.

When then Attorney Connors testified in her confirmation hearing on January 20, 2020, the Joint Committee on the Judiciary was aware of her prior representation of the banking industry and examined her accordingly. A reasonable person would know that then Attorney Connors professed to the Committee her recognition of the need to avoid impropriety and to "defer on the side of recusal," while assuring the Judiciary Committee that there would be "significant recusals" by her in foreclosure appeals coming before her on the Law Court.

A reasonable person also would know that, when the Law Court issued its August, 2022, call for amicus briefs on res judicata issues raised by the pending appeal in *Moulton*, then Attorney Connors had responded in 2017 to a similar call for amicus briefs on similar issues raised by *Deschaine* , and that the arguments she made in her

amicus brief for the Maine Bankers Association in *Deschaine,* as well as those in her brief for Bank of America in *Pushard,* had been discussed, analyzed, and rejected in the unanimous decisions of the Law Court.

A reasonable person would know that, when Justice Connors should have decided that Canon 2, Rule 2.11(A) required her to recuse herself in *Finch* and *Moulton,* she had already researched and analyzed the issues presented by these cases in *Pushard* and *Deschaine.* Her opinions were already formed and are mirrored now by the language set forth in *Finch.* Moreover, a reasonable person would know that Justice Connor's impartiality was questioned by the Portland Press Herald on the day before the oral argument in *Finch,* when the paper published an article questioning her participation in the case.[9] **Exhibit K**. Nonetheless, she did not recuse herself in *Moulton* or in *Finch.*

A reasonable person aware of the facts and circumstances set forth above, and who considered Justice Connors' participation in *Finch* and *Moulton*, would almost certainly question her impartiality in light of the admonition contained in Canon 2, Rule 11(a) of the Maine Code of Judicial Conduct. Indeed, her impartiality would be likely to be questioned "even if no actual bias or prejudice [were] shown."[10].

VIII. Substantial Precedent Indicates that Justice Connors Should Have Recused Herself in *Moulton* and *Finch.*

Following are interpretations of several federal courts that have construed the recusal standard set forth in 28 U.S.C. § 455(a) the federal equivalent of Canon 2, Rule 2.11(A) of the Maine Code of Judicial Conduct:

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[9] Edward D. Murphy, Maine Supreme Court may reconsider a legal protection against home foreclosure, Portland Press Herald, Oct. 31, 2022 found at https://www.pressherald.com/2022/10/31/maine-supreme-judicial-court-may-reconsider-a-legal-protection-against-home-foreclosure

[10] *Fletcher v. Conco Pipe Line Co.*, 323 F.3d. 661, 664 (8th Cir. 2003)

A. The rule "was designed to promote public confidence in the integrity of the judicial process by replacing the subjective 'in his opinion' standard with an objective test, and by avoiding even the appearance of impropriety whenever possible."[11]

B. Disqualification is required "if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown." [12]

C. Even when the disqualification question is close, the judge "whose impartiality might reasonably be questioned must recuse" from hearing the appeal.[13]

D. The Code of Conduct directs federal judges to avoid both actual impropriety and its appearance. [14]

IX. Conclusion--Justice Conners Violated Rule 2.11(A) of the Maine Code of Judicial Conduct.

"The mandate to avoid even the appearance of impropriety requires judges to engage in a thoughtful inquiry about actual or apparent conflicts arising from their conduct, relationships, financial holdings and personal views..."[15] Senior Judge Michael Posner of the United States District Court for the District of Massachusetts recently wrote an article about judicial ethics in which he said about judges: "[Y]ou don't just stay inside the lines, you stay well inside the lines. This is not a matter of politics or judicial philosophy. It is a matter of ethics in the trenches."[16]

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[11] *Liljeberg v. Health Servs. Acq. Corp*, 486 U.S. 847,848 n.7, 865 (1988).
[12] *Fletcher v. Conco Pipe Line Co.*, 323 F.3d 661, 664 (8 th Cir. 2003).
[13] *Roberts v. Bailar*, 625 F.2d 125, 129 (6 th Cir. 1980).
[14] *In re Complaint of Judicial Misconduct*, 816 F.3d 1266, 1267 (9 th Cir. 2016) (citing Cannon 2).
[15] Honorable Margaret McKoewn, *To Judge or Not to Judge: transparency and Recusal in the Federal System*, 30 Rev. Litig. 653, 654 (2011).
[16] Michael Posner, *A Federal Judge Asks: Does the Supreme Court Realize How Bad it Smells?*, NewYork Times, July 14, 2023. Found at https://www.nytimes.com/2023/07/14/opinion/supreme-court-ethics.html

An average member of the public, informed of the surrounding facts and circumstances as they relate to Justice Conners' activities as a private lawyer on behalf of mortgage lending banks would surely and reasonably question her impartiality as a Justice when she nonetheless elected to participate in deciding *Finch* and *Moulton*. The taint in *Finch* is obvious, in that *Pushard* would remain the law but for her vote. Because her "impartiality might reasonably be questioned," Justice Connors violated Rule 2.11(A) of the Maine Code of Judicial Conduct. She continues to violate the rule by failing to recuse herself in *Moulton*.

Even though a decision on this complaint cannot by itself undo the damage resulting from Justice Connors' conduct, a resolution of the issues raised may prevent further damage.[17] As the dissent in *Finch* warns, the majority opinion suggests that res judicata principles may now be insufficient to stop the majority justices from revisiting other foreclosure precedents. For the present, caution is respectfully requested should Justice Connors seek participation in any such decisions.

DATED: January 18, 2024

Thomas A. Cox, Maine Bar No. 1248
P.O. Box 1083
Yarmouth, Maine 04096
[redacted]

[17] Had Justice Connors recused, the outcome in *Finch* would have been a tie vote resulting in the trial court decision in favor of the homeowner.

2024 WL 118478

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Judicial Court of Maine.

Charles D. FINCH
v.
U.S. BANK, N.A.

Docket: And-21-355
|
Argued: June 6, 2022
|
Decided: January 11, 2024

Attorneys and Law Firms

Morgan T. Nickerson, Esq. (orally), and Emily E. Gianetta, Esq., K&L Gates LLP, Boston, Massachusetts, for appellant U.S. Bank, N.A.

John D. Clifford, IV, Esq. (orally), Clifford & Golden, PA, Lisbon Falls, for appellee Charles D. Finch

Panel: MEAD, JABAR, HORTON, CONNORS, and LAWRENCE, JJ., HJELM, A.R.J., and HUMPHREY, A.R.J.*
Majority: JABAR, HORTON, CONNORS, and LAWRENCE, JJ.
Dissent: HJELM, A.R.J., MEAD, J., and HUMPHREY, A.R.J.

Opinion

HORTON, J.

***1** [¶1] U.S. Bank, N.A., appeals from a judgment entered in the Superior Court (Androscoggin County, *Stewart, J.*) ordering the Bank to discharge its mortgage held as security on a loan to Charles D. Finch. The judgment implemented a previous order of the court (*Stanfill, J.*) in favor of Finch based on our decision in *Pushard v. Bank of America, N.A.*, 2017 ME 230, ¶ 36, 175 A.3d 103.

EXHIBIT A

[¶2] In *Pushard*, we considered the effect of a foreclosure statute that prohibits a residential mortgage lender from accelerating the balance due on the note or enforcing the mortgage unless the lender has first issued to the borrower a notice of default that complies with the statute. *Id.* ¶¶ 22-33; *see* 14 M.R.S. § 6111 (2023)[1] (providing that "[a] mortgagee *may not accelerate* maturity of the unpaid balance of the obligation or *otherwise enforce the mortgage* ... until at least 35 days after" issuing a written notice of default to the borrower in compliance with the statute (emphasis added)). However, despite the plain statutory prohibition on acceleration without compliance with the statute, we held that the lender had accelerated the maturity of the loan by filing a foreclosure action that asserted that the entire balance was then due. *Id.* ¶¶ 27, 31-33 (citing *Fed. Nat'l Mortg. Ass'n v. Deschaine*, 2017 ME 190, ¶ 26, 170 A.3d 230). As a result, by operation of res judicata, the effect of our *Pushard* decision is that a foreclosure judgment for the borrower based on a mistake in the lender's notice of default renders the note and mortgage unenforceable and requires transfer of title to the borrower, "free and clear of the [lender's] mortgage encumbrance." *Id.* ¶ 36.

[¶3] That is what happened here. The Bank's foreclosure action against Finch culminated in a 2015 judgment in Finch's favor because the Bank's notice of default failed to comply with 14 M.R.S. § 6111, the same statute at issue in *Pushard*. Relying on our ruling in *Pushard*, Finch sought—and the trial court granted—a judgment declaring that the note and mortgage were unenforceable, that the Bank was required to discharge the mortgage, and that Finch held title to the property free and clear of the mortgage. On appeal, the Bank contends that we should overrule *Pushard*, at least in part, arguing that, as a matter of law, title cannot be transferred and a mortgage is not required to be discharged even if a further foreclosure action on that mortgage would be barred by res judicata.

[¶4] Another foreclosure appeal pending before us, *J.P. Morgan Mortgage Acquisition Corp. v. Camille J. Moulton*, Oxf-21-412 (Me. argued Nov. 1, 2022), also involves a section 6111 notice of default and a judgment for the borrower declaring, as required by *Pushard*, that the borrower holds title to the mortgaged property free and clear of the note and mortgage. The appellant in *Moulton* argues that we should reexamine our precedent requiring a lender's notice of default to comply strictly with the requirements of section 6111. *Cf. JPMorgan Chase Bank, N.A. v. Lowell*, 2017 ME 32, ¶ 21, 156 A.3d 727; *Keybank Nat'l Ass'n v. Sargent*, 2000 ME 153, ¶¶ 36-37, 758 A.2d 528. Given that our foreclosure jurisprudence concerning section 6111 and claim preclusion is at issue in both appeals, we requested supplemental briefing from the parties on a series of broader questions.[2]

***2** [¶5] With the benefit of that briefing, we decide that our analysis in *Pushard* merits reconsideration and revision. The effect of *Pushard* is that a typographical error in a section 6111 notice issued before the commencement of a foreclosure action can result in a literal forfeiture of the lender's entire interest in the note and mortgage and a transfer of title to the borrower. The disproportional and draconian nature of that result, the doubtful legal premise that it rests on—that a lender can accelerate a loan balance by commencing a foreclosure action without having the statutory right to take either step, and the fact that no other jurisdiction has adopted either that result or that premise combine to call our *Pushard* analysis into question.

[¶6] Based on section 6111's clear language, we conclude that when a lender fails to comply with section 6111's requirements, the lender lacks the right to accelerate the note balance or commence a foreclosure action. We further conclude that when a lender lacks the right to accelerate the note, the note cannot be, and is not, accelerated anyhow by the commencement of a foreclosure action that the lender also lacks the right to commence. The result is to overrule our holding in *Pushard* that a lender that has not complied with section 6111 can still commence a foreclosure action and accelerate the balance due. By overruling *Pushard*, we align our interpretation of the statute with its plain language.

[¶7] In the Bank's foreclosure action against Finch, the Bank's failure to comply with section 6111 means that the Bank could not accelerate the note balance or enforce the mortgage. For claim preclusion purposes, the fact that the Bank could not accelerate the note balance or enforce the mortgage means that the Bank's claim for the full amount due on the note and for foreclosure of the mortgage was not and could not have been litigated, and a subsequent foreclosure action would therefore not be barred. That, in turn, means that the Bank's note and mortgage have not been rendered unenforceable. We therefore vacate the judgment requiring the Bank to discharge the mortgage and remand with instructions to enter a judgment in the Bank's favor on Finch's complaint.

I. BACKGROUND

[¶8] The parties stipulated to the following facts. In 2004, Finch executed a promissory note in the amount of $75,000 and a mortgage on property in Durham securing the debt. The note was properly negotiated to the Bank, and the mortgage was assigned to the Bank and recorded in the Androscoggin County Registry of Deeds. Finch defaulted on his obligations to make monthly payments under the note and mortgage. The Bank commenced an action for foreclosure of the mortgage and for the entire balance due on the note. The District Court (Lewiston, *Dow, J.*) entered a judgment in Finch's favor in April 2015 based on a finding that the Bank had not

provided Finch with a notice of default that met the requirements of section 6111. The court did not address or decide any of the other elements of the Bank's claim, such as breach of a condition of the note or mortgage.

[¶9] In January 2016, after the Bank declined Finch's request to discharge the mortgage following the 2015 judgment, Finch filed, in the Superior Court (Androscoggin County), the complaint in the action now before us. He sought a judgment declaring that the Bank is obligated to discharge the mortgage and an injunction requiring the Bank to discharge the mortgage.[3] The Bank asserted a counterclaim for unjust enrichment on the basis that Finch had not repaid principal and interest due under the note.

[¶10] In December 2018, Finch and the Bank each moved for judgment as a matter of law on the complaint and the counterclaim. *See* M.R. Civ. P. 50. In January 2021, the court (*Stanfill, J.*) heard argument on the parties' motions and then entered a partial judgment declaring that Finch was entitled to a discharge of the mortgage under the holding of our decision in *Pushard*. As to the Bank's counterclaim, the court determined that the Bank could not use the theory of unjust enrichment to recover money it had been owed under either the note or the mortgage, but that it might be entitled to restitution for property taxes and insurance costs that it had paid after losing the foreclosure action in 2015. The court set the matter for a hearing to determine the extent to which the Bank might be entitled to restitution for expenditures that were made after the 2015 judgment and that inured to Finch's benefit. In lieu of litigating that issue, however, the parties agreed to an amount that the Bank had paid and stipulated that Finch had reimbursed the Bank.

***3** [¶11] In response to the partial judgment, the Bank in March 2021 recorded a discharge of the mortgage that cited the judgment as the reason for the discharge. The court (*Stewart, J.*) entered a final judgment on October 20, 2021. The final judgment provided that it could be recorded to effectuate a discharge of the mortgage.[4]

[¶12] The Bank timely appealed. *See* 14 M.R.S. § 1851 (2023); M.R. App. P. 2B(c)(1).

II. DISCUSSION

A. Justiciability

[¶13] Finch argues that this case is moot because the Bank has already recorded a discharge of the mortgage in the Androscoggin County Registry of Deeds.

[¶14] "Generally, to hear an appeal, we must be able to resolve a justiciable controversy in which the parties have a current interest in the outcome of the litigation." *In re Christopher H.*, 2011 ME 13, ¶ 11, 12 A.3d 64. "If a case does not involve a justiciable controversy, it is moot." *Lewiston Daily Sun v. Sch. Admin. Dist. No. 43*, 1999 ME 143, ¶ 13, 738 A.2d 1239. "When mootness is an issue, we examine the record to determine whether there remain sufficient practical effects flowing from the resolution of the litigation to justify the application of limited judicial resources." *Id.* ¶ 14 (alteration and quotation marks omitted).

[¶15] We have permitted the reinstatement of a discharged mortgage when "such relief [did] not operate to the detriment of intervening rights of third persons who may have relied upon the release." *Calaska Partners L.P. v. McClintick*, 1998 ME 69, ¶ 7, 707 A.2d 1324 (quotation marks omitted); *see also* Restatement (Third) of Prop.: Mortgs. § 6.4 reporter's notes (Am. L. Inst. 1997) ("A discharge executed under fraud or mistake can be reformed or set aside unless it has been relied upon by a good-faith purchaser for value."). Sufficient practical relief thus remains available here because, on this record, no third-party rights have been affected by the Bank's discharge of the mortgage. Further, the so-called "repeat presentation" exception to mootness would apply here, where the court ordered the lender to immediately record a discharge of the mortgage in the registry of deeds. *In re Christopher H.*, 2011 ME 13, ¶ 13, 12 A.3d 64 (explaining that this exception applies where an issue might escape appellate review "because of its fleeting or determinate nature" (quotation marks omitted)).

[¶16] Because the Bank's appeal presents a justiciable controversy notwithstanding the mortgage discharge, we turn to the merits.

B. Standards and Scope of Review

[¶17] The facts relevant to this appeal are undisputed. The central issues involve questions of law, which we examine de novo. *See, e.g.*, *Toomey v. Town of Frye Island*, 2008 ME 44, ¶ 8, 943 A.2d 563.

[¶18] The issue originally presented was whether Finch is entitled to a discharge of the mortgage due to the court's conclusion that the 2015 judgment barred a subsequent foreclosure action and rendered the mortgage unenforceable. On that issue, the Bank argues that even if it lacks the ability to foreclose, Finch is not entitled to a discharge because the Bank still holds title to the property pursuant to Maine's title theory of mortgages. Given the additional questions we propounded, *see supra* n.2, our review extends also to the other aspect of the holding in

Pushard: that a judgment against a foreclosing lender based, in whole or in part, on a defective notice of default renders the mortgage unenforceable in the first place. *See Pushard*, 2017 ME 230, ¶ 36, 175 A.3d 103. Our discussion begins with a summary of our analysis in *Pushard* and then turns to our re-examination of the claim preclusion issue in *Pushard*. We then address stare decisis considerations, and we conclude by applying our conclusions to Finch's claim against the Bank.

C. Revisitation and Reconsideration of *Pushard*

1. The Underlying Foreclosure in *Pushard*

***4** [¶19] In *Pushard*, we addressed the effect of a residential foreclosure judgment rendered in favor of the borrowers based on the trial court's findings that the lender had failed to prove that it had sent a valid section 6111 notice before commencing the action, had failed to prove a breach of the mortgage, and had failed to prove the amount due. *Pushard*, 2017 ME 230, ¶¶ 2, 4, 4 n.2, 18-36, 175 A.3d 103.

[¶20] The lender, in its foreclosure complaint, had "sought the entire amount due on the note." *Id.* ¶ 6 (quotation marks omitted). The promissory note contained a provision allowing the lender to accelerate "[i]f [the borrowers are] in default." *Id.* ¶ 3 (quotation marks omitted). Similarly, the mortgage permitted acceleration if the borrowers "fail to keep any promise or agreement made in this Security Instrument." *Id.* When the foreclosure case went to trial, the trial court decided that the lender had failed to prove three elements of its claim—that it had provided the borrowers with a notice of default that complied with section 6111, that the borrowers had breached the terms of the mortgage, and the amount due. *Id.* ¶ 4 & n.2. Neither the lender nor the borrowers appealed from the foreclosure judgment. *Id.* ¶ 4. Later, after the lender failed to discharge the mortgage following the foreclosure judgment in the borrowers' favor, the borrowers brought an action against the lender seeking, inter alia, a judgment declaring that they were entitled to a discharge of the mortgage and an injunction requiring the lender to record a discharge. *Id.* ¶ 5. The trial court granted the lender's motion for summary judgment on the borrowers' claims. *Id.* ¶ 9. The borrowers' appeal resulted in our decision vacating the judgment in the lender's favor on the borrowers' declaratory judgment claim and remanding for entry of judgment in favor of the borrowers. *Id.* ¶¶ 18-36.

2. Our *Pushard* Analysis

[¶21] We concluded that the foreclosure judgment rendered the note and mortgage unenforceable under the doctrine of claim preclusion, that the borrowers had no further obligation to pay on the note, and that the borrowers held title to the mortgaged property free and clear of the mortgage encumbrance. *Id.* ¶¶ 35-36 (citing *Deschaine*, 2017 ME 190, ¶¶ 33, 35, 37, 170 A.3d 230).

[¶22] "Claim preclusion bars relitigation if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been[,] litigated in the first action."[5] *Machias Sav. Bank v. Ramsdell*, 1997 ME 20, ¶ 11, 689 A.2d 595 (quotation marks omitted). Our focus in *Pushard* was on the third element. *Pushard*, 2017 ME 230, ¶ 20 & n.9, 175 A.3d 103. In deciding whether the lender's claim for the entire balance due on the note had been or might have been litigated in the foreclosure action, we relied, as we had in *Deschaine*, on our decision in *Johnson v. Samson Constr. Corp.*, 1997 ME 220, 704 A.2d 866. *See Pushard*, 2017 ME 230, ¶¶ 22, 34-35, 175 A.3d 103. *Johnson* involved an initial nonresidential foreclosure action that, unlike the foreclosure action in *Pushard*, had been dismissed with prejudice as a pretrial sanction for failing to comply with a court order, and then a second foreclosure action in which the lender sought the same relief as it had in the first action. *Johnson*, 1997 ME 220, ¶¶ 2-4, 704 A.2d 866. The trial court concluded that the lender's second foreclosure action was precluded by the dismissal, with prejudice, of the first. *Id.* ¶ 4. On appeal, we affirmed, explaining that

> ***5** [the lender's] first cause of action ... demanded payment of the entire unpaid principal balance. This suit was an action for the accelerated debt. Once [the lender] triggered the acceleration clause of the note and the entire debt became due, the contract became indivisible. The obligations to pay each installment merged into one obligation to pay the entire balance on the note .... The court's dismissal with prejudice of the first action ... bars the complaint in this action which alleges precisely what the complaint in the first action alleged: that [the borrower] defaulted on the note and that [the lender] is entitled to a judgment for the amount due under the note. [The lender] cannot avoid the consequences of his procedural default in this second lawsuit by attempting to divide a contract which became indivisible when he accelerated the debt in the first lawsuit.

Id. ¶ 8 (footnote omitted).

[¶23] In *Pushard*, relying on *Johnson* and *Deschaine*, we said:

> [N]otwithstanding that the foreclosure court determined that the [lender] failed to prove that its notice of default complied with section 6111, we conclude that the [lender] triggered the acceleration clauses of the note and mortgage when it filed the foreclosure action demanding immediate payment of the entire remaining debt.
>
> ....
>
> ... Pursuant to *Johnson*, because the [lender] failed to prove its claim to the unitary obligation that it placed in issue in the foreclosure action, it no longer has any enforceable interest in the note or in the property set up as security for the note, and the [borrowers] have no further obligation to make payments on the note.

Pushard, 2017 ME 230, ¶¶ 33, 35, 175 A.3d 103 (citing *Johnson*, 1997 ME 220, ¶ 8, 704 A.2d 866).

[¶24] We concluded our analysis by holding as follows:

> Because the [lender] is precluded from seeking to recover on the note or enforce the mortgage, the [borrowers] are entitled, as a matter of law, to the declaratory relief they seek. We therefore must vacate the judgment in the [lender's] favor on the [borrowers'] claim for declaratory relief and remand the case to the trial court to enter a judgment declaring that the note and mortgage are unenforceable and that the [borrowers] hold title to their property free and clear of the [lender's] mortgage encumbrance.

Id. ¶ 36.

[¶25] It is the premise in our *Pushard* decision that a lender can "trigger" an acceleration clause without having the right to do so that we revisit now. Section 6111 could not be more specific in providing that a lender "may not accelerate ... or otherwise enforce the mortgage" until it has complied with the statute's notice requirements. 14 M.R.S. § 6111(1). Acceleration of a note balance either occurs or does not occur. It cannot occur for some purposes but not occur for others. It also cannot occur when the lender lacks the right to accelerate. Yet we decided in *Pushard* that although the lender could not accelerate the note balance for purposes of foreclosure, it could for purposes of res judicata. *See Pushard*, 2017 ME 230, ¶¶ 23-33, 175 A.3d 103. Moreover, that premise was essential to the outcome—it was only because we said that the lender had accelerated the balance by filing the foreclosure action that we could say that the lender's entire claim was, or might have been, litigated for res judicata purposes. *See id.* ¶¶ 21-23, 34-35.

3. *Pushard* Reconsidered

a. The Effect of Our Reliance on *Johnson* on Our Claim Preclusion Analysis in *Pushard*

***6** [¶26] The first aspect of our decision in *Pushard* that merits discussion is its reliance on our *Johnson* decision. We said in *Pushard* that the case before us was "not distinguishable from *Johnson*," *id.* ¶ 34, but there are two important distinctions, neither of which was mentioned in our *Pushard* decision. In *Johnson*, the lender's first foreclosure action was dismissed with prejudice before trial as a sanction for the lender's failure to comply with a court scheduling order.[6] *Johnson*, 1997 ME 220, ¶ 3, 704 A.2d 866. The trial court never decided whether the lender had a right to accelerate the note balance. *See id.* ¶¶ 2-4. The foreclosure action in *Pushard*, in contrast, resulted in a post-trial judgment that included a finding that the lender had not satisfied the preconditions to acceleration, *see Pushard*, 2017 ME 230, ¶ 4, 175 A.3d 103, but our analysis gave zero weight to the actual findings underlying the foreclosure judgment. Relying on *Johnson*, our claim preclusion analysis instead focused solely on the content of the lender's complaint, as if the action had not gone to trial.[7] *See id.* ¶¶ 21-33. The second important difference is that section 6111 did not apply in *Johnson* because the statute applies only "to mortgages upon residential property ... when the mortgagor is occupying all or a portion of the property as the mortgagor's primary residence and the mortgage secures a loan for personal, family or household use." 14 M.R.S. § 6111(1). The borrower in *Johnson* was a business. *Johnson*, 1997 ME 220, ¶ 2, 704 A.2d 866. Unlike the lender in *Pushard*, therefore, the lender in *Johnson* was not prohibited by section 6111 from accelerating the note balance and enforcing the mortgage. *See* 14 M.R.S. § 6111(1).

[¶27] A second aspect of our *Pushard* analysis worthy of note is our premise, drawn from *Deschaine*, that a lender prohibited from accelerating the note balance because it has not complied with section 6111 can still accelerate the note balance by filing a foreclosure action. *Pushard*, 2017 ME 230, ¶ 32, 175 A.3d 103 (citing *Deschaine*, 2017 ME 190, ¶ 26, 170 A.3d 230). That premise first appeared in our jurisprudence in *Deschaine*, 2017 ME 190, ¶ 26, 170 A.3d 230, which relied on cases from Connecticut, Georgia, Florida, and Hawaii, as well as a secondary source, none of which states that a lender that is statutorily prohibited from accelerating can do so regardless by filing a foreclosure action. Our premise that a lender's filing of a foreclosure action automatically accelerates the note balance cannot be squared, as it must be, with the plain language of section 6111. The statute unequivocally states that a lender may *not* accelerate before complying with section 6111(1-A), but if the lender has complied, that acceleration can occur *before* the foreclosure action is commenced. *See* 14 M.R.S. § 6111(1). Because foreclosure procedure is statutory, we cannot displace the Legislature's definition of

when a lender may and may not accelerate with our own definition. *See Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶ 8, 96 A.3d 700 ("In Maine, foreclosure is a creature of statute ....").

b. The Appropriate Claim Preclusion Analysis When the Lender in a Foreclosure Proceeding Fails to Comply with 14 M.R.S. § 6111

***7** [¶28] Section 6111 explicitly limits a lender's ability both to accelerate the note balance and to enforce the mortgage through foreclosure. 14 M.R.S. § 6111(1). The enforcement limitation applies to the commencement of a foreclosure action, whereas the acceleration limitation governs the exercise of a lender's contractual right.

(1) Enforcement of the Mortgage

[¶29] Regarding the enforcement limitation, a settled principle of claim preclusion that we did not acknowledge in *Deschaine* or *Pushard* holds that a judgment based on the plaintiff's failure to comply with a precondition to the commencement of the action is not given preclusive effect because a plaintiff's claim cannot be litigated if the plaintiff is not entitled to bring the suit. *See* Restatement (Second) of Judgments § 20(2) (Am. L. Inst. 1982); *Dutil v. Burns*, 1997 ME 1, ¶ 5 & n.3, 687 A.2d 639. As stated in the Restatement,

> A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, unless a second action is precluded by operation of the substantive law.

Restatement (Second) of Judgments § 20(2);[8] *see, e.g.*, *Bos. Edison Co. v. United States*, 106 Fed. Cl. 330, 342-43 (Fed. Cl. 2012) (citing section 20(2) of the Restatement); *In re Sonus Networks, Inc, S'holder Derivative Litig.*, 499 F.3d 47, 61-62 (1st Cir. 2007) (citing section 20(2) of the Restatement and concluding that failure to comply with a precondition to suit did not preclude further suit on the same claim); *Segal v. Am. Tel. & Tel. Co.*, 606 F.2d 842, 845-46 (9th Cir. 1979) (concluding that failure to fulfill a precondition to suit did not bar another action after the precondition was satisfied).

[¶30] A comment to section 20(2) explains further: "A determination by the court that the [party] has no enforceable claim because the action is premature, or because he has failed to

satisfy a precondition to suit, is not a determination that he may not have an enforceable claim thereafter, and does not normally preclude him from maintaining an action when the claim has become enforceable." Restatement (Second) of Judgments § 20 cmt. k. Moreover, the rule applies regardless of *when* the court determines that the action is premature or the plaintiff has failed to satisfy a precondition to suit—at the pleadings stage, during discovery, or even at trial. *Id.*; *S. Willow Props., LLC v. Burlington Coat Factory of N.H., LLC*, 159 N.H. 494, 986 A.2d 506, 511 (2009).

***8** [¶31] Based on section 20(2) of the Restatement and similar authority, courts around the country have concluded that a prior judgment against a foreclosing lender based on the lender's failure to comply with a notice precondition to bringing suit does not preclude a subsequent foreclosure action. *See, e.g.*, *State St. Bank & Tr. Co. v. Badra*, 765 So. 2d 251, 254-55 (Fla. Dist. Ct. App. 2000); *PNC Bank, Nat'l Ass'n v. Richards*, No. 11AP-275, 2012 WL 1245719, at *3-6 (Ohio Ct. App. Apr. 10, 2012); *Cap. Invs., Inc. v. Lofgren*, 81 Or.App. 93, 724 P.2d 862, 864-65 (1986). The court in *Richards*, for example, cited section 20(2) of the Restatement in labeling the lender's prior foreclosure action "premature" because it was filed before the bank had complied with the precondition for commencing suit. *Richards*, 2012 WL 1245719, at *3-6.

[¶32] Section 6111's requirement that a lender issue a valid notice of default and right to cure before it may enforce the mortgage is undeniably a precondition to the commencement of a foreclosure action.[9] *See* 14 M.R.S. § 6111(1) ("[A] mortgagee may not accelerate maturity of the unpaid balance of the obligation or *otherwise enforce the mortgage* ... until at least 35 days after ... [issuing] written notice [of default] to the [borrower]." (emphasis added)). Contrary to our ruling in *Pushard*, under both the Restatement and the clear preponderance of cases from other jurisdictions, a judgment in favor of the borrower based on the lender's failure to comply with section 6111 would not preclude a subsequent foreclosure action predicated on a new and valid notice of default.[10]

(2) Acceleration of the Note

***9** [¶33] With respect to the right to accelerate, we have previously endorsed the fundamental principle of law that a lender may accelerate the balance due on a note only if the lender has the right to do so. *Briggs v. Briggs*, 1998 ME 120, ¶¶ 6, 8-11, 711 A.2d 1286. In *Briggs*, after the obligors on two promissory notes had missed multiple installment payments, the note holders sued the obligors for the entire amounts due under the notes. *Id.* ¶¶ 2-3, 4 n.2. The trial court granted summary judgment to the holders, *id.* ¶¶ 2, 4, concluding that "the plaintiffs were, upon breach, entitled to accelerate the remaining payments due," *id.* ¶ 7. We concluded otherwise on

appeal. *See id.* ¶¶ 7-11. Because neither note contained an acceleration clause, we held that the note holders were "entitled to recover an amount representing each missed payment. They did not, however, have the right to accelerate the total obligation in full." *Id.* ¶¶ 9-11. Accordingly, we vacated the judgment in *Briggs* and remanded for "further proceedings consistent with [our] opinion."[11] *Id.* ¶ 11.

[¶34] As in *Briggs*, it was actually adjudicated in the *Pushard* foreclosure that the lender failed to prove that it had the right to accelerate the note balance. *See Pushard*, 2017 ME 230, ¶ 4 & n.2, 175 A.3d 103. Yet we held in *Pushard* that acceleration had nonetheless occurred based on the premise we introduced in *Deschaine*—that the mere filing of the foreclosure complaint was a "valid exercise" of the lender's right to accelerate. *Id.* ¶ 32 (quoting *Deschaine*, 2017 ME 190, ¶ 26, 170 A.3d 230). The premise that the filing of a complaint can be a "valid exercise" of a right when the court in the same case has decided after trial that there was no such right has no counterpart in our jurisprudence beyond *Pushard*. A "valid exercise" of a right cannot possibly occur without a valid right to be exercised, and, contrary to our reasoning in *Deschaine* and *Pushard*, the filing of a foreclosure action does not accelerate the mortgage note if the lender has no right to accelerate.

[¶35] The acceleration of a promissory note is a contractual remedy akin to termination, novation, rescission, and other contractual remedies that, if they are exercised validly, alter the status of the contract. *See New Bank of New England, N.A. v. Toronto-Dominion Bank*, 768 F. Supp. 1017, 1023 (S.D.N.Y. 1991) ("Acceleration is a remedy that can only be provided by—and exercised in accordance with—contract."). A party's mere allegation in its complaint that it has exercised its contractual right to a remedy—whether to terminate, rescind, renew or accelerate—does not mean that the purported exercise of the right was valid. If the party fails to prove that it is entitled to exercise the contractual right it has invoked, the purported exercise fails—regardless of the allegations in the party's complaint—and the status of the contract is unchanged. *See Fed. Nat'l Mortg. Ass'n v. Thompson*, 381 Wis.2d 609, 912 N.W.2d 364, 370-72 (2018) (holding that a loan was not accelerated when the foreclosing lender failed to prove a default by the borrower); *Baldazo v. Villa Oldsmobile, Inc.*, 695 S.W.2d 815, 817 (Tex. App. 1985) ("Because [the lender] did not, as a matter of law, accelerate the balance due under the note, it failed, as a matter of law, to prove the cause of action to collect the accelerated balance.").

[¶36] The 2018 decision of the Wisconsin Supreme Court in *Thompson* explains the point:

***10** Generally, and in the instant case, there cannot be a valid acceleration of the debt without a default by the borrower. That is, the borrower's default is a condition precedent to the lender's right to accelerate the debt.

....

... Thus, because it was never proved in the 2010 lawsuit that [the borrower] was in default, the entire balance of the note was never validly accelerated. In such circumstances, the parties are placed back into the position they held before the commencement of the lawsuit. [The borrower] was obligated to continue making installment payments after the dismissal of the 2010 lawsuit, and claim preclusion does not prevent [the lender] from suing [the borrower] for failing to make those payments.

Accordingly, we conclude that the instant lawsuit alleging a default as of September 2012 is not barred by the doctrine of claim preclusion.

Thompson, 912 N.W.2d at 371-72.

[¶37] In *Pushard*, the foreclosure court decided that the lender had failed to prove that it had provided the borrowers with a notice of default that complied with section 6111 and had failed to prove that the borrowers had breached the terms of the mortgage. *Pushard*, 2017 ME 230, ¶ 4, 175 A.3d 103. The foreclosure judgment therefore should have meant that no acceleration of the balance had occurred and the note and mortgage were still in force.[12] A subsequent foreclosure action based on a different notice of default and a different allegation of default would assert a different claim and would not be barred.[13] *See, e.g.*, *Fairbank's Cap. Corp. v. Milligan,* 234 F. App'x 21, 24 (3d Cir. 2007); *Cenlar FSB v. Malenfant*, 203 Vt. 23, 151 A.3d 778, 791-93 (2016); *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1007-08 (Fla. 2004); *Afolabi v. Atl. Mortg. & Inv. Corp.*, 849 N.E.2d 1170, 1174-75 (Ind. Ct. App. 2006).[14]

***11** [¶38] Our holding in *Pushard* that the mere filing of a complaint can result in the "valid exercise" of a nonexistent right has disquieting implications outside the foreclosure context. A party to a contract may issue a notice of termination that does not comply with the requirements of the contract or that violates a statute. If the party then files an action claiming to have terminated the contract, does the filing of the suit operate as a "valid exercise" of the party's right to terminate the contract even though the notice was defective? Our *Pushard* ruling suggests that it would. In an action for forcible entry and detainer, a landlord may issue a notice to quit purportedly terminating a tenancy at will and follow it up with a complaint for forcible entry and detainer alleging that the tenancy has been terminated. Does the landlord's filing of the complaint constitute a "valid exercise" of the landlord's right to terminate the tenancy, such that,

if the court decides that the notice to quit was defective and renders judgment for the tenant, the landlord is barred by claim preclusion from ever again seeking to terminate the tenancy? By analogy, our *Pushard* analysis seems to point that way, but such is not the law. *See S. Willow Props., LLC*, 986 A.2d at 511 (holding, in an eviction action, that a judgment against a landlord based on a defective notice to quit did not have preclusive effect).

[¶39] Contrary to our decision in *Pushard*, we conclude that when a lender fails to prove in a foreclosure action that it has issued a valid notice of acceleration or fails to prove that the borrower has breached the parties' contract, the parties are returned to the positions they occupied before the filing of the action (except as to any claim for an unaccelerated amount due that could have been litigated). *See Thompson*, 912 N.W.2d at 371-72; *Singleton*, 882 So. 2d at 1007-08; *see also supra* n.12.

D. Stare Decisis Considerations

[¶40] Although we thus conclude that there is a substantial justification for revising our *Pushard* analysis, we must weigh that against the countervailing considerations of stare decisis. The doctrine of stare decisis is a court-made policy. *See Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); *Myrick v. James*, 444 A.2d 987, 997-98 (Me. 1982), *superseded by statute on other grounds as recognized by Erlich v. Ouellette, Labonte, Roberge & Allen, P.A.*, 637 F.3d 32, 37 & n.7 (1st Cir. 2011). Its purposes are to create "stability" in the law and to "enable[ ] the public to place reasonable reliance on judicial decisions affecting important matters." *McGarvey v. Whittredge*, 2011 ME 97, ¶ 63, 28 A.3d 620 (Levy, J., concurring). On the other hand, stare decisis does not carry the same force and weight in every context, and there are well-established factors that help guide the ultimate determination of whether to revise precedent. *See, e.g.*, *Myrick*, 444 A.2d at 1000.

1. Consistency

[¶41] As we have explained, our premise in *Deschaine* and *Pushard*—that the filing of a foreclosure complaint automatically accelerates the balance due on the note regardless of whether the lender has the statutory and contractual right to accelerate—is contrary to both the express language of section 6111 and our longstanding rule that whether claim preclusion applies does not turn solely on the contents of the complaint in the initial action if the court has actually adjudicated the claim. *See supra* ¶¶ 26-39. As the Supreme Court has noted,

> *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience. Remaining true to an intrinsically sounder doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, special justification exists to depart from the recently decided case.

Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 231, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (citation and quotation marks omitted).

[¶42] The view that a residential mortgage lender can accelerate a note balance without complying with section 6111 and that a defective notice of default can automatically result in a transfer of title to the borrower was unprecedented in our jurisprudence until 2017, when we decided *Deschaine* and *Pushard*. Given that one of the basic purposes of stare decisis is stability in the law, *see McGarvey*, 2011 ME 97, ¶ 63, 28 A.3d 620 (Levy, J., concurring), the doctrine does not oppose revision of precedent that is itself a recent aberration from longstanding legal principles, *see Adarand Constructors, Inc.*, 515 U.S. at 232-34, 115 S.Ct. 2097.

2. Anomaly

***12** [¶43] A factor that contributes to reconsideration of precedent includes "a tide of critical or contrary authority from other jurisdictions." *Samara v. Matar*, 5 Cal.5th 322, 234 Cal.Rptr.3d 446, 419 P.3d 924, 933 (2018) (alteration and quotation marks omitted); *cf. MacDonald v. MacDonald*, 412 A.2d 71, 72-73, 73 n.3 (Me. 1980) (abrogating a common law rule and noting the growing support from other jurisdictions and commentators for the new rule); *Black v. Solmitz*, 409 A.2d 634, 639 (Me. 1979) (similarly looking to the growing weight of authority when abrogating a rule of common law).

[¶44] No other jurisdiction follows the rule adopted in *Pushard* that claim preclusion bars a second foreclosure attempt after a first mortgage foreclosure attempt has failed due to a defective notice of default.[15]

3. Workability

[¶45] A "relevant consideration in the *stare decisis* calculus is the workability of the precedent in question." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. ——, 138 S. Ct. 2448, 2481, 201 L.Ed.2d 924 (2018). The result of our ruling in *Pushard* is that either the lender is automatically compelled to transfer title to the borrower for zero consideration or, to the extent that the Bank's title argument in this case is valid, *see infra* n.19, title to the mortgaged property is put into limbo, with neither the borrower nor the lender able to market the property. Neither outcome is a logical result of a defective notice of default, signaling the need to revise the analysis.

4. Reliance

[¶46] Given that a fundamental concern of the stare decisis doctrine is the ability to rely on the law as enunciated by the court, another important factor in determining whether to apply the doctrine is whether revising the precedent will upset settled expectations. *See Adams v. Buffalo Forge Co.*, 443 A.2d 932, 935 (Me. 1982); *Jordan v. McKenzie*, 113 Me. 57, 59, 92 A. 995, 996 (1915). Here, not only is the decision in *Pushard* of recent vintage, but its ruling cannot have caused reasonable reliance by borrowers or lenders.[16] Under what has been referred to as the "court-as-casino" dynamic created by *Pushard*, a single typographical error in a required notice of default can have the same windfall result as a winning casino bet, but in the form of a house instead of cash. A borrower in a foreclosure action may hope the lender has made a mistake that will result in the windfall, but a hope is not reliance. In any mortgage loan transaction, the parties have, or should have, expectations regarding their rights and obligations. Overruling *Pushard* would actually restore and fulfill those expectations.

5. Policy

***13** [¶47] Another relevant factor is whether the precedent promotes sound public policy and addresses social needs. *See Myrick*, 444 A.2d at 998. Drastic foreclosure sanctions are sometimes defended, including in the dissent, *see* Dissenting Opinion ¶ 72, on the ground that foreclosing lenders and their servicers will otherwise bring repeated failed foreclosure actions. *See, e.g.*, Megan Wachspress et al., Comment, *In Defense of "Free Houses,"* 125 Yale L.J. 1115, 1115-16 (2016). However, the Legislature in 2019 enacted a statute imposing a duty on lenders and servicers to act in good faith and authorizing courts to impose sanctions for breach of the duty, including damages and dismissal of a foreclosure action. P.L. 2019, ch. 363, § 1 (effective Sept. 19, 2019) (codified as subsequently amended at 14 M.R.S. § 6113 (2023)). We should not assume the courts will not use their authority to deal with abusive foreclosure practices. Besides, under *Pushard*, just one defective notice in one foreclosure action can result

in a "free house," as this case illustrates. How many failed foreclosure actions is too many? The answer has to be more than one. A "free house" forfeiture, if it is ever decreed, should be reserved for conduct worse than issuing a single defective notice.

III. CONCLUSION

[¶48] The ultimate question before us is whether the considerations favoring a revision of our *Pushard* analysis outweigh the considerations of stare decisis.

[¶49] Overruling *Pushard* would align our application of section 6111 with the plain language of the statute. It would clarify that a foreclosing lender cannot accelerate a note balance or commence a foreclosure action without having the statutory and contractual right to do so. It would align our jurisprudence with the substantial weight of authority that a failure to meet a precondition to the commencement of a suit does not have claim-preclusive effect. It would treat consistently lenders who fail to comply with statutory preconditions to suit—proof of ownership of the note and proof of compliance with section 6111. It would avoid the draconian windfall outcome under which a typographical error in a foreclosing lender's first and only section 6111 notice voids the note and mortgage and transfers title to the borrower. It would end Maine's outlier status as the only jurisdiction that endorses that outcome. Instead of automatically imposing a total forfeiture in response to a single failure to comply with section 6111, it would allow the court to tailor the consequence, potentially including sanctions, to the circumstances of the case.

[¶50] Finally, the touchstone of the res judicata doctrine is fairness. *See Tungate v. Gardner*, 2002 ME 85, ¶ 4, 797 A.2d 738 (articulating that res judicata "is justified by concerns for ... fairness to litigants" (quotation marks omitted)). We have indicated, multiple times, that strict compliance is required with the statutory notice requirements, and nothing in our analysis today changes that. *See, e.g.*, *Greenleaf*, 2014 ME 89, ¶ 18, 96 A.3d 700. On the other hand, it does not promote fairness for a lender's mistake in a notice of default to result in the borrower not just avoiding foreclosure but avoiding any obligation on the note and mortgage and acquiring title to the mortgaged property.[17]

***14** [¶51] Having weighed all of these considerations against those of stare decisis, we now overrule *Pushard* to the extent that it holds that the acceleration of a note balance can occur without the lender having proved that it has complied with the statutory and contractual requirements to accelerate. When a court finds that a lender's notice of default, acceleration, and right to cure fails to comply with section 6111, the court should treat the lender's foreclosure

claim as prematurely commenced, without proceeding further unless the lender has asserted a justiciable claim under the note for the unaccelerated balance due.[18] The court should ordinarily also consider awarding attorney fees to the borrower pursuant to the applicable statute. *See* 14 M.R.S. § 6101 (2023). In appropriate cases, the court should also consider imposing sanctions and other relief available under the foreclosure statutes or its inherent authority, including dismissal with prejudice if it is appropriate. *See* 14 M.R.S. § 6113(3) (authorizing the imposition of sanctions during a foreclosure action for a lender's or mortgage servicer's violation of its duty of good faith).

[¶52] In the Bank's foreclosure action against Finch, the issue of whether the Bank was entitled to foreclose was decided against the Bank based only on its defective section 6111 notice. As we have explained above, the foreclosure judgment in favor of Finch does not bar a further foreclosure action or render the note and mortgage unenforceable, although it precludes the Bank from recovering in the future any unaccelerated balance due on the note as of the date of the judgment.[19] Finch accordingly is not entitled to the relief he seeks, and the Bank is entitled to a judgment as a matter of law on Finch's complaint.

The entry is:

> The judgment in favor of Charles D. Finch on his claims for declaratory and injunctive relief is vacated, and the matter is remanded for entry of a judgment in favor of U.S. Bank, N.A., on those claims. The judgment dismissing the unjust enrichment counterclaim of U.S. Bank, N.A., as moot is affirmed.

HJELM, A.R.J., with whom MEAD, J., and HUMPHREY, A.R.J., join, dissenting.

[¶53] Not even seven years ago, in two separate but analytically related cases each decided unanimously, the Court held that a judgment entered against a mortgagee in a foreclosure action barred successive lawsuits seeking the same relief. *See Pushard v. Bank of Am., N.A.*, 2017 ME 230, ¶¶ 4, 35-36, 175 A.3d 103 (where the judgment in the first proceeding was based, in part, on a deficient notice of default); *Fed. Nat'l Mortg. Ass'n v. Deschaine*, 2017 ME 190, ¶¶ 7, 37, 170 A.3d 230 (where the prior judgment was issued as a sanction for the plaintiff's failure to comply with a pretrial procedural order). This conclusion is unremarkable because it treats mortgagees like any other claimant that had already sought relief but was unsuccessful—when a party loses its case through a final judgment arising from a failure of proof or some other reason that is dispositive, that party is barred from trying again. *See U.S. Bank, N.A. v. Tannenbaum*, 2015 ME 141, ¶¶ 6, 10, 126 A.3d 734. Today, the Court retreats from that principle. It does not do so because the law emanating from those cases has become antiquated. It does not do so

because the law has changed. Rather, the Court does so simply because it now disagrees with the outcome of the cases we decided a short time ago.

***15** [¶54] In my view, *Pushard* and *Deschaine* remain good and settled law. And the effects of the Court's holding today go well beyond overruling most or all of those two 2017 cases; it calls into question other consequential areas of established foreclosure law. Even beyond that, the Court's willingness to make an abrupt change in the direction of the law in these circumstances reasonably raises questions about the extent to which this Court is willing to adhere to established precedent generally.

[¶55] For these reasons, I respectfully dissent.

A.

[¶56] The facts of this case are undisputed and straightforward.

[¶57] In 2004, Charles D. Finch executed a promissory note, with performance to be secured by a mortgage. The instruments were ultimately acquired by U.S. Bank, N.A. Five years after executing the note and mortgage, Finch defaulted by failing to make payments as required. The following year, in 2010, U.S. Bank filed a court action for foreclosure, which, after a trial, resulted in a judgment entered in favor of Finch based on the court's finding that the notice of default and right to cure issued by U.S. Bank did not specify the amount that Finch needed to pay to cure the default and therefore did not satisfy the requirements of 14 M.R.S. § 6111 (2023).

[¶58] After the court issued its judgment, U.S. Bank declined Finch's request that it discharge the mortgage, prompting Finch to file this action seeking a declaratory judgment that he was entitled to the discharge. The parties filed cross-motions for judgment as a matter of law, *see* M.R. Civ. P. 50, supported by a stipulated set of facts. The court granted Finch's motion in part, concluding that the judgment entered against U.S. Bank in the 2010 foreclosure case barred it from seeking further relief from Finch under the note and mortgage, that the note was therefore unenforceable because there was nothing left to be secured by the mortgage, and that Finch was entitled to have U.S. Bank record a discharge of the mortgage.[20] Pursuant to the order, U.S. Bank has now recorded the discharge.

***16** [¶59] In reaching its determinations, the court explicitly relied on *Pushard* and *Deschaine*. And, undeniably, the court was correct in the way it applied that precedent.[21] Consistent with our holdings in *Pushard* and *Deschaine*, U.S. Bank's commencement of the underlying foreclosure action against Finch, standing alone and without regard to any other action U.S. Bank had taken, had the effect of accelerating his total payment obligation pursuant to the promissory note. *Pushard*, 2017 ME 230, ¶¶ 30-33, 175 A.3d 103; *Deschaine*, 2017 ME 190, ¶ 26, 170 A.3d 230. The judgment adverse to U.S. Bank in its foreclosure action thereby relieved Finch of that fully accelerated obligation in its entirety. *See Pushard*, 2017 ME 230, ¶ 35, 175 A.3d 103; *Deschaine*, 2017 ME 190, ¶ 35, 170 A.3d 230. And, pursuant to our holdings in *Pushard* and *Deschaine*, because there was no performance remaining to be secured, Finch was entitled to a declaration that both the note and mortgage were unenforceable and that he owned the property free and clear of the mortgage encumbrance. *See Pushard*, 2017 ME 230, ¶ 36, 175 A.3d 103; *Deschaine*, 2017 ME 190, ¶ 37, 170 A.3d 230.

[¶60] In its brief on appeal and at oral argument, U.S. Bank sought a remedy more modest than what the Court today allows because U.S. Bank challenged only the last of the aspects of the partial judgment I describe above. U.S. Bank acknowledged that, because it had lost the foreclosure action, it was precluded from pursuing any subsequent effort to collect on the note or foreclose on the property while Finch held the equity of redemption. U.S. Bank contended, however, that the mortgage is nonetheless not subject to discharge because, despite the remedial limitations resulting from the adverse judgment in the foreclosure case, it still retained title, which it would realize when, for example, the mortgagor dies or conveys the property to a third party. But in a separate case on appeal, and after oral argument in this case, the Court invited the submission of supplemental and amici briefs on the broader question of whether we should "reconsider ... existing precedent"—meaning *Pushard* and *Deschaine*—that establishes that a mortgagee is barred from commencing a second foreclosure action after, in its first judicial effort to foreclose, it fails to prove that the notice of default complied with statutory requirements. It is this latter issue, framed by the Court, that now constitutes the centerpiece of its decision.

B.

[¶61] In concluding that *Pushard* and at least significant parts of *Deschaine* should now be overturned, the essential analytical element invoked by the Court is its view that future payments due under a promissory note secured by a mortgage on certain types of residential

property cannot be accelerated by a notice of default if the notice does not meet the requirements of 14 M.R.S. § 6111.[22] Court's Opinion ¶¶ 6, 26-27. And, the Court reasons, if the mortgagee then fails in its judicial effort to collect on the note because the notice of default was defective, no preclusive effect can be assigned to the resulting judgment. Court's Opinion ¶¶ 32-39. As the Court puts it, "the parties are returned to the positions they occupied before the filing of the action." Court's Opinion ¶ 39. In other words, it's as if the first action never happened.

***17** [¶62] The analysis the Court adopts today, however, is *identical* to the one presented to us in *Pushard* by the trial court, *see Pushard v. Bank of Am., N.A.*, No. BCD-CV-15-28, 2016 WL 3509467, at *5 (Me. B.C.D. Mar. 15, 2016) (Horton, J.)—and *the very same analysis* that we rejected on appeal. Further, the law the Court announces today adopts *the very same position* urged by the mortgagee in its brief on that appeal—an argument that, again, we rejected. As much as the current Court may disagree with what we did in *Pushard* and *Deschaine*, our determinations in those cases are—or were until today—the law in Maine.

[¶63] In *Pushard*, instead of accepting the notion that a defective notice of default is equivalent to no notice at all and therefore does not have the power to accelerate the secured debt, we reaffirmed the established principle we had relied on some three months earlier in *Deschaine*, namely, that the commencement of a foreclosure action *is* a mechanism sufficient to accelerate all payments due. *Pushard*, 2017 ME 230, ¶ 32, 175 A.3d 103; *Deschaine*, 2017 ME 190, ¶ 26, 170 A.3d 230. And we reached that conclusion in *Deschaine*, not on a whim or out of whole cloth, but based on both case law from other jurisdictions and scholarship. *See Pushard*, 2017 ME 230, ¶ 32, 175 A.3d 103; *Deschaine*, 2017 ME 190, ¶ 26, 170 A.3d 230. Although the principle is reiterated in more contemporary case law, which we also cited, a passage from the latter is worth repeating here: "The institution of a suit for the whole debt is, of course, the most solemn form in which the holder can exercise his option. This is well recognized and it is, hence, generally held that the institution of a suit on the bills or notes is notice of the most unequivocal character that the holder wishes to avail himself of his option for acceleration." C.T. Drechsler, Annotation, *What is Essential to Exercise of Option to Accelerate Maturity of Bill or Note*, 5 A.L.R.2d 968 § 5[a] (1949). *See also Pushard*, 2017 ME 230, ¶ 32, 175 A.3d 103 (citing additional authority and an updated edition of the Annotation, supporting the same principle).

[¶64] The Court criticizes the opinions in *Pushard* and *Deschaine* for not taking into account what it views as the plain language and the procedural role of section 6111. Because, the Court now asserts, there can be no acceleration of the secured debt absent a statutorily compliant notice of default, the mortgagee has not met a *precondition* to the availability of judicial relief; any judicial process in that case is a nullity; and the unsuccessful outcome of that proceeding does not bar another action by the mortgagee for the same relief. Court's Opinion ¶¶ 32, 34.

[¶65] Although the Court now recasts a notice of default as little more than the predicate to suit, in *Pushard* we rejected that very contention. 2017 ME 230, ¶ 30, 175 A.3d 103. And more substantively, the Court's new view fundamentally changes the role of a notice of default as we had established that role in our jurisprudence. That substantial body of precedent identifies a proper notice of default not merely as a ticket for admission into the courtroom but as an actual substantive element of the mortgagee's case for foreclosure. *See, e.g.*, *Wilmington Tr., N.A. v. Berry*, 2020 ME 95, ¶ 9, 237 A.3d 167 (describing a proper notice of default and right to cure as one of "the eight elements of proof necessary to support a judgment of foreclosure"); *Wilmington Sav. Fund Soc'y, FSB v. Abildgaard*, 2020 ME 48, ¶ 3, 229 A.3d 789 ("In order to prevail on a foreclosure action, a plaintiff must prove eight elements, including that it sent [the mortgagor] a proper notice of default and right to cure."); *First Fin., Inc. v. Morrison*, 2019 ME 96, ¶ 13, 210 A.3d 811; *Deutsche Bank Nat'l Tr. Co. v. Eddins*, 2018 ME 47, ¶ 14, 182 A.3d 1241 (stating that when the notice of default and right to cure is defective, the mortgagee fails "as a matter of law to prove a necessary element of its foreclosure claim," and the mortgagor is "entitled to judgment"); *U.S. Bank Tr., N.A. v. Mackenzie*, 2016 ME 149, ¶ 11, 149 A.3d 267 ("When in a foreclosure action a court determines that a notice of default and right to cure sent to the mortgagor is defective, that determination reaches the merits of the claim for foreclosure."); *Tannenbaum*, 2015 ME 141, ¶ 5, 126 A.3d 734 ("As we have held explicitly, a notice of default that comports with the requirements of section 6111 is a substantive element of proof in a foreclosure action.") (also concluding that the mortgagee's failure to prove a proper notice results in a "final judgment on the merits" for the mortgagor); *Wells Fargo Bank, N.A. v. Girouard*, 2015 ME 116, ¶ 7, 123 A.3d 216 (identifying a proper notice of default as one of "the elements that ... define a foreclosure claim and that a mortgagee therefore must prove in order to obtain a judgment of foreclosure"); *Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶ 18, 96 A.3d 700 (enumerating "the eight elements of proof to support a judgment of foreclosure," which include a proper notice of default and right to cure); *Chase Home Fin. LLC v. Higgins*, 2009 ME 136, ¶ 11, 985 A.2d 508.[23] Indeed, even today the Court acknowledges this principle by referring to a properly framed notice of default and right to cure as an "element" of proof. *See* Court's Opinion ¶ 8.

***18** [¶66] Precisely because a proper notice of default and right to cure is a substantive element of proof, if the notice does not satisfy statutory requirements, the mortgagor is entitled to judgment on the merits. *See* *Morrison*, 2019 ME 96, ¶ 13, 210 A.3d 811; *Mackenzie*, 2016 ME 149, ¶ 11 & n.6, 149 A.3d 267. In fact, as we have said, a court errs by merely dismissing a foreclosure action when the notice of default and right to cure is deficient, unless the dismissal is with prejudice. *See* *Morrison*, 2019 ME 96, ¶ 13, 210 A.3d 811; *Mackenzie*, 2016 ME 149, ¶ 11 & n.6, 149 A.3d 267; *Girouard*, 2015 ME 116, ¶ 11, 123 A.3d 216. Instead, in that situation, the

proper disposition of the case is the entry of a judgment on the merits for the mortgagor. *Mackenzie*, 2016 ME 149, ¶ 11 & n.6, 149 A.3d 267; *Girouard*, 2015 ME 116, ¶ 11, 123 A.3d 216. By issuing a notice of default and right to cure and then commencing an action for the accelerated amount, it is the mortgagee that places the entire amount in issue.[24] If the action is unsuccessful, that is the end of the matter, just as in any court proceeding.[25]

[¶67] Several of our decisions illustrate this point clearly. In *JPMorgan Chase Bank, N.A. v. Lowell*, 2017 ME 32, 156 A.3d 727, we held that the trial court's entry of judgment for the mortgagee was error because the evidence established that the notice of default and right to cure was deficient as gauged by the requirements of section 6111. *Id.* ¶¶ 19-21. On that basis, we vacated the judgment and remanded for entry of a new *judgment* for the mortgagor. *Id.* ¶ 21. Another case, *Eddins*, presented the same situation—because the notice of default did not comply with the statutory requirements, we vacated the judgment that the trial court had entered for the mortgagee and remanded for *judgment* to be entered in favor of the mortgagor. 2018 ME 47, ¶ 14, 182 A.3d 1241.

[¶68] And even more pointedly, in *Tannenbaum*, the trial court took a different approach, favorable to the mortgagee, that we rejected. After finding that the mortgagee had failed to prove that the notice of default and right to cure met the statutory requirements, the court entered judgment for the mortgagor but explicitly reserved to the mortgagee the right to relitigate its foreclosure claim in a future action. 2015 ME 141, ¶¶ 3, 6, 126 A.3d 734. The court concluded that, because the notice was defective, the mortgagee had not been entitled to pursue its foreclosure action in the first place and included the limitation in the judgment in order to obviate any preclusive effect arising from it. *Id.* ¶¶ 6, 9. On appeal, we affirmed the basic judgment but stripped it of the limitation. *Id.* ¶ 10. In doing so, we explained that a judgment entered against a mortgagee arising from a failure to prove its claim does not provide the trial court with a basis to specify that the losing claimant may bring another action for the same relief. *Id.* As we explained, a judgment based on the failure of proof—specifically, a defective notice of default and right to cure—is a judgment on the merits, and a court has no authority "to transform a final judgment on the merits into a decision tantamount to a dismissal without prejudice, simply by stating that the parties may relitigate the issues in a future proceeding."[26] *Id.* ¶¶ 9-10. But that is just what the Court does today.

***19** [¶69] All of this leads directly to the conclusion we reached in *Pushard*: that a mortgagee's failure to have issued a proper notice of default and right to cure is substantively fatal to a foreclosure claim, *on its merits*. 2017 ME 230, ¶¶ 30, 36, 175 A.3d 103.

[¶70] On the basis of these established principles, we have explicitly rejected the equivalence drawn today by the Court between a defective notice of default and a mere statutory precondition of suit that, if not perfected, would prevent the trial court from entering an order on the merits with preclusive adjudicatory effects. In *Girouard*, we rebuffed the contention that the defective notice is procedurally comparable to a claimant's failure to comply with, say, the required pre-suit process applicable to medical negligence claims. 2015 ME 116, ¶¶ 8, 11, 123 A.3d 216. As we discussed in *Girouard*, if a malpractice claimant does not follow the necessary pre-suit statutory procedure, then the court does not have the authority to reach and adjudicate the claim regardless of the claim's merit, a conclusion we had announced in *Dutil v. Burns*, 1997 ME 1, ¶ 7, 687 A.2d 639. *Girouard*, 2015 ME 116, ¶ 8, 123 A.3d 216. In *Girouard*, we explained that, in contrast, proof in a foreclosure action of a proper notice of default *is* included among the merits of the foreclosure claim. *Id.* ¶¶ 8-9. That is why the mortgagee's failure to prove that element necessarily results in a judgment against the mortgagee on the merits and not just a dismissal that—as in a *Dutil*-type case—would have no future preclusive consequence. *Id.* ¶¶ 9, 11.

[¶71] By recharacterizing a notice of default as a mere precondition of suit, the Court undermines these lines of precedent. Going forward, a court's order in these circumstances—even when it purports to be a judgment on the merits—will now be, in essence and effect, a dismissal without prejudice because the mortgagee will now be entitled to commence another action, free of any preclusive consequence that *should* arise from the outcome of the first proceeding. This is directly contrary to the law as we have stated it multiple times.[27]

***20** [¶72] There is one more way in which the Court's decision runs counter to established foreclosure law. We have stated, repeatedly and for decades, that in order to obtain foreclosure relief, a mortgagee must prove that it has strictly complied with the requirements of the law. *See Pushard*, 2017 ME 230, ¶ 4, 175 A.3d 103; *Greenleaf*, 2014 ME 89, ¶ 18, 96 A.3d 700; *Higgins*, 2009 ME 136, ¶ 11, 985 A.2d 508; *Camden Nat'l Bank v. Peterson*, 2008 ME 85, ¶ 21, 948 A.2d 1251; *Winter v. Casco Bank & Tr. Co.*, 396 A.2d 1020, 1024 (Me. 1979); *see also U.S. Bank, N.A. v. Gordon*, 2020 ME 33, ¶ 29, 227 A.3d 577 ("Due to the inherently draconian consequences of foreclosure and for other reasons, we should, and we do, require strict compliance by the plaintiff in any foreclosure action ....") (Horton, J., concurring). But by today's decision, the Court renders that criterion a hollow one. True, within the confines of a single proceeding the mortgagee could still be held to that standard. But if a mortgagee fails to prove that the notice of default satisfied the prescriptions of the law and consequently suffers an adverse outcome in a particular case, the mortgagee can simply file another complaint and try again. And again. And again. Until the mortgagee is able to get it right. Or until the mortgagor's

ability—financial and otherwise—to resist the claim is expended and exhausted. And all at the expense of limited and precious judicial resources.

[¶73] In this case, we should—as we have done many times before—treat the judgment previously entered against U.S. Bank as preclusive of any opportunity for it to seek the same relief again. Our decisions in *Pushard* and *Deschaine* have settled that issue. In my view, the Court errs by overruling them.[28]

C.

[¶74] As I have discussed, the Court today does more than overturn *Pushard* and at least a substantial part of *Deschaine*; the direct effects of its decision extend to and call into serious question multiple lines of cases as well as well-established principles of our foreclosure jurisprudence. These far-reaching ramifications of the Court's decision require an examination of whether its choice to depart from established law is consistent with fundamental and critical principles of stare decisis. In my view, it manifestly is not.

***21** [¶75] The law builds on itself. Judicial respect for precedential authority is essential for that linear development and for stability; to allow members of the public to reasonably rely on the content of the law so they can act properly and plan sensibly; and to promote confidence in the law and the judiciary itself by preventing it from appearing arbitrary. *See Bank of N.Y. Mellon v. Shone*, 2020 ME 122, ¶ 54, 239 A.3d 671 (Hjelm, A.R.J., dissenting); *McGarvey v. Whittredge*, 2011 ME 97, ¶ 63, 28 A.3d 620 (Levy, J., concurring) ("Even when we have a certain 'unease' with the analysis of a prior decision, we do not overrule the decision without a compelling and sound justification."). Placing weight on past judicial determinations also reflects "a basic humility that recognizes today's legal issues are often not so different from the questions of yesterday and that we are not the first ones to try to answer them." *June Med. Servs. L.L.C. v. Russo*, 591 U.S. ——, 140 S. Ct. 2103, 2134, 207 L.Ed.2d 566 (2020) (Roberts, C.J., concurring).

[¶76] Although stare decisis does not trap precedent in amber, the rationale offered today by the Court for making such a fundamental and abrupt change in the law comes nowhere close, in my view, to overcoming the restraint and circumspection we should have in order to take such a consequential step. An assessment of factors relevant to respecting and applying precedent proves this point.

[¶77] There has been no change in the surrounding law—statutory or otherwise—warranting the Court's repudiation of its prior decisions. Indeed, nearly every case and each secondary authority cited by the Court predate our decisions in *Pushard* and *Deschaine*.

[¶78] The Court's jurisprudence has not become antiquated—the two cases at issue were decided in 2017. Although the holdings in *Pushard* and *Deschaine* may constitute the minority view nationally,[29] they are supported by authority and legal analysis articulated in those opinions, and they represent the considered, contemporary, and unanimous determinations of this Court, rendered twice. In this context, I note that the Court's 2014 decision on standing in *Greenleaf*—holding that the power granted to the lender's nominee only to *record* a mortgage does not create a right in the nominee to *assign* the mortgage, 2014 ME 89, ¶¶ 15-16, 96 A.3d 700—also appears contrary to the law of many or most jurisdictions, *see Gordon*, 2020 ME 33, ¶¶ 19, 24, 26, 227 A.3d 577 (describing *Greenleaf* as contrary to the "modern majority rule") (Horton, J., concurring). As I have discussed above, *see supra* ¶¶ 65, 72, aspects of *Greenleaf* will now be called into question by the Court's decision in this case. Nonetheless, *Greenleaf*'s holding on standing, which is the core of the decision and the reason the case is important, remains entirely intact, even though it may not be in the mainstream and even though it has faced an explicit call from within the Court to abandon its standing analysis. *See Gordon*, 2020 ME 33, ¶¶ 24-30, 227 A.3d 577 (Horton, J., concurring).

[¶79] Beyond those factors, which clearly support staying the course, the most troubling aspects of the Court's discussion of stare decisis center on its claims, first, that *Pushard* and *Deschaine* are unfair to lenders and others in the mortgage industry, and second, that any reliance by homeowners on our pronouncements in those cases has been misplaced. Court's Opinion ¶¶ 46, 50.

[¶80] The view that the effects of *Pushard* and *Deschaine* are too harsh on mortgagees[30] illustrates how easily the Court is now willing to overrule precedent based in part on its own value judgment that we have already considered and rejected. *See Myrick v. James*, 444 A.2d 987, 1000 (Me. 1982) (stating that the justification for overruling precedent requires more than "the commitment of the individual justices to their mere personal policy preferences"). In *Deschaine*, we explicitly addressed the view now adopted by the Court, which was the mortgagee's assertion that as a result of our debt-acceleration and claim-preclusion jurisprudence, the mortgagor would end up with a "free" house—a result the mortgagee claimed was disproportionate to the reason it did not prevail in the foreclosure action. 2017 ME 190, ¶¶ 32-34, 170 A.3d 230. We found this contention unpersuasive, and we explained why. As we stated there, the "salutary purposes" of claim preclusion—judicial economy, conservation of

limited court resources, and the prevention of serial litigation—and intolerance of repeated unacceptable foreclosure litigation practices by mortgagees and their attorneys outweigh the equities claimed by the mortgagee. *Id.*; *see also Pushard*, 2017 ME 230, ¶ 35, 175 A.3d 103.

***22** [¶81] Now, the Court simply prefers a different balance. The Court describes the outcomes that result from our existing law as "disproportional and draconian." Court's Opinion ¶ 5; *see also id.* ¶ 49 (referring to a "draconian windfall outcome"). In *Deschaine*, however, we spoke on this very issue and rejected what is now the Court's new view.[31] 2017 ME 190, ¶¶ 32-34, 170 A.3d 230. The superior position that mortgagees enjoy in foreclosure actions is evident because they are in a uniquely controlling position to do what needs to be done—and done properly—in order to obtain relief in the courts. That is their business. They and their counsel are sophisticated and knowledgeable players in a specialized field. They, or the servicers they select to administer the secured loan accounts, create, possess, and maintain the records containing information about the history and status of the accounts. They, or their servicers, generate and issue the notices of default and right to cure. They choose when to commence the court action. And they are the ones to present their proof in court.[32] Those parties should be held responsible for marshaling and presenting a case that meets the requirements of the law, just as *any* litigant seeking relief must do.

***23** [¶82] The Court adopts the view that a foreclosure trial has become a "court-as-casino." Court's Opinion ¶ 46. If so, it is the mortgagee that holds all the cards.

[¶83] Now, by fundamentally altering the law to diminish the effects of legally consequential mistakes made by mortgagees, the Court creates a special, privileged class of litigant—one whose members will no longer suffer the preclusive consequences of a deficient case, unsuccessfully presented.[33] The Court's decision, in other words, will create a windfall *for mortgagees*—an outcome we explicitly rejected, after full consideration, in *Pushard*.[34] 2017 ME 230, ¶ 35, 175 A.3d 103; *see also Deschaine* 2017 ME 190, ¶¶ 32-33, 170 A.3d 230.

[¶84] The second of these remaining stare decisis considerations is reliance on our clear precedent and the disruption that will result from casting aside settled law. The Court today utterly discounts the effects of any reliance by mortgagors on our established law that it now overrules because, the Court asserts, that law is of "recent vintage"—a reference to it having been articulated only in 2017—and it has not been reasonable for mortgagors to rely on the "hope [of a] windfall." Court's Opinion ¶ 46. Respectfully, these assertions are specious.

[¶85] In 2017, we described—loudly and clearly—the legal effects on mortgagees *and mortgagors* of judgments in foreclosure cases adverse to the former. Aren't members of the

public entitled to rely on those pronouncements issued by Maine's highest court? And, perhaps more importantly, don't we *want* people to rely on our pronouncements? As I note above, our judicial process is built on the foundation of stare decisis so that people can act, plan, and order their affairs within the bounds of the law, which are society's rules of the road. We *should* want the public to take seriously the determinations we are called upon to make. It is extraordinary for the Court to now say that people who make decisions in reliance on clear and explicit guidance emanating from our case law do so at their peril. The Court diminishes its standing through such an assertion.

***24** [¶86] Consider the impact of today's decision. It is inconceivable to me that, since we issued our decisions in *Pushard* and *Deschaine* in 2017, there are no mortgagors who have made important and entirely reasonable decisions about their finances, their estates, and their property, carrying significant consequences, in reliance on our authoritative pronouncements. What now becomes of them? Will today's reversal of clear precedent be applied retroactively so that those mortgagors who have moved forward in their financial lives will now be exposed to further litigation they could not have planned or anticipated? Can discharged mortgages be reinstated given that the reason that led to the discharges is now nullified? And if, in order to avert this considerable uncertainty, the Court's decision applies only prospectively, don't there arise two very different sets of rules, separated only by the arbitrariness of today's decision date? These are questions of great importance to people and entities—not to mention the trial courts themselves—that will be affected by the Court's decision. But it would be inappropriate for the Court to address them today given that the breadth of the application of today's decision is not before the Court in this case, so uncertainty and anxiety are amplified.

[¶87] And, even beyond all of this, what if some future iteration of the Court concludes that our decisions in *Pushard* and *Deschaine* were correct after all? Should the members of *that* Court feel constrained to honor today's decision as precedent, given that this Court does not do so with *Pushard* and *Deschaine*?

[¶88] All of these dynamics will only augment uncertainty in people's lives and make it difficult, if not impossible, for them to act and plan in an informed way, while any adjudication of these and other related questions must await a future case on another day. And that uncertainty will not be limited to people and entities who are participants in mortgage transactions. The Court's startling warning about the risks of relying on its decisions can only carry over to other, unrelated areas of the law presented across the breadth of its jurisdiction.

D.

[¶89] I recognize that reasonable minds may differ regarding issues the Court is called upon to decide. That is the nature of the judicial process given that, by definition, cases that come to us are generated by conflicting views of the matters presented. As one Supreme Court justice has noted, "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540, 73 S.Ct. 397, 97 L.Ed. 469 (1953) (Jackson, J., concurring). But the issue presented here is not one of first impression. Rather, we made our determinations in *Pushard* and *Deschaine* as "the product of deliberate and solemn analysis." *See Shaw v. Jendzejec*, 1998 ME 208, ¶ 8, 717 A.2d 367. While one is free to disagree with what we did less than seven years ago, the Court errs by casting aside significant determinations of law rendered in analytically interlocking cases, thereby also raising significant questions about the viability of entire lines of our foreclosure decisions.

[¶90] The sweep of the jurisprudential debris field that the Court creates today—what it minimizes, astonishingly, as merely a "course correction," Court's Opinion ¶ 50 n.17—should not be underestimated. *Deschaine* and, perhaps even more so, *Pushard* comprise the direct and most visible fallout. But as I have discussed, other cases and lines of holdings within the ecosystem of foreclosure law are now exposed to reconsideration, revision, and rejection. The uncertainty today injected into foreclosure law is augmented to an even greater extent by the Court's relaxation, several years ago, of the previously established standard for admissibility of records that are often central to a mortgagee's ability to prove its foreclosure case. *See Shone*, 2020 ME 122, ¶¶ 15, 19, 29-30, 239 A.3d 671. In my view, the Court's decision today is a retreat from principles of judicial restraint and modesty and from the protections that stare decisis provides to the public as a column of stability and predictability in the law. And now that the bar given to precedential weight has been lowered, I submit that the willingness of the Court, as currently composed, to overturn considered and entrenched legal precedent it might simply have decided differently may raise questions among the public about the extent to which it will feel restrained in departing from precedent in other areas of the law.

***25** [¶91] The judgment of the trial court, which was faithful to and indeed required by Maine's good and settled law, should be affirmed. Respectfully but insistently, I dissent.

All Citations

--- A.3d ----, 2024 WL 118478, 2024 ME 2

Footnotes

* Although not present at oral argument, Justice Hjelm and Justice Humphrey participated in this appeal. *See* M.R. App. P. 12(a)(2).

1 Title 14 M.R.S. § 6111 has been amended twice during the life of this case. *See* P.L. 2019, ch. 361, §§ 1, 2 (effective Sept. 19, 2019); P.L. 2015, ch. 36, §§ 1, 2 (effective Oct. 15, 2015). The amendments do not affect our analysis in this appeal, and we cite the current version of the statute unless otherwise noted.

2 We requested supplemental briefs from the parties in both this case and *Moulton* on the following questions:

> 1. Should the Court reconsider its existing precedent that a foreclosure judgment in favor of the mortgagor based on the mortgagee's failure to comply with 14 M.R.S. § 6111 renders the note and mortgage unenforceable because a second foreclosure action is barred by principles of res judicata?
>
> a. If so, upon what grounds, and to what extent, should principles of res judicata continue to apply? Should it make a difference if the second foreclosure action is based on a new default?
> b. If the lender is barred from pursuing a second foreclosure action under principles of res judicata, does this inability render the note and mortgage unenforceable such that the lender may pursue alternative claims including, but not limited to, an unjust enrichment claim against the borrower consistent with *Restatement (Third) of Restitution & Unjust Enrichment* § 2(2)?
>
> 2. Should the court reconsider and repudiate the language in *Fed. Nat'l Mortg. Ass'n v. Deschaine*, 2017 ME 190, ¶ 37, 170 A.3d 230, and *Pushard v. Bank of. Am., N.A.*, 2017 ME 230, ¶ 36, 175 A.3d 103, ordering that a failed foreclosure action barring a second foreclosure action on res judicata principles entitles the borrower to a discharge of the mortgage and title to the mortgaged property?

We also invited amicus briefs in *Moulton* on the same questions.

3 He also asserted a claim for damages under 33 M.R.S. § 551 (2023), but he later dismissed that claim.

4 The court stated that "upon payment of the stipulated taxes by Finch" to the Bank, the Bank's counterclaim was "moot and therefore dismissed with prejudice." We do not

disturb this aspect of the judgment, although either party may, pursuant to Maine Rule of Civil Procedure 60(b), ask the court to revisit the dismissal in light of our ruling.

5 "To determine whether the matters presented for decision in the instant action were or might have been litigated in the prior action, we examine whether the same cause of action was before the court in the prior case." *Wilmington Tr. Co. v. Sullivan-Thorne*, 2013 ME 94, ¶ 8, 81 A.3d 371 (alteration and quotation marks omitted). "We define a cause of action through a transactional test, which examines the aggregate of connected operative facts that can be handled together conveniently for purposes of trial to determine if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong." *Id.* (alteration, citation, and quotation marks omitted).

6 The first foreclosure action in *Deschaine* was likewise dismissed with prejudice before trial as a sanction. *Fed. Nat'l Mortg. Ass'n v. Deschaine*, 2017 ME 190, ¶ 7, 170 A.3d 230.

7 We explained our focus on the contents of the foreclosure complaint rather than the contents of the foreclosure judgment by saying that "[w]e cannot hold that the *reason* for a mortgagee's loss on the merits in its foreclosure action is dispositive of whether the judgment precludes a subsequent action on the same debt." *Pushard v. Bank of Am., N.A.*, 2017 ME 230, ¶ 30, 175 A.3d 103. But that is simply incorrect; the reason *can* determine whether the judgment precludes a subsequent action on the same debt. To illustrate, if the reason for the judgment against the lender is that the note and mortgage are void or invalid, no subsequent action could be brought on either. However, if the reason is only that the lender failed to prove a breach by the borrower, a subsequent action based upon a new and different breach would not be barred because it would involve a new cause of action that was not, and could not have been, litigated in the initial action. We said as much in rejecting a borrower's res judicata argument in *Sullivan-Thorne*, 2013 ME 94, ¶¶ 12-13, 81 A.3d 371 ("Although IndyMac alleged a breach of the same note and mortgage pursuant to which Wilmington now seeks relief, Wilmington alleges a breach of a different term of the mortgage based on wholly separate conduct.").

8 A comment explains the import of the phrase "unless a second action is precluded by operation of the substantive law": "As a matter of substantive law, however, the failure of the plaintiff to establish the existence of the condition precedent in the original action may fix the relationship of the parties so that it is no longer open to him to satisfy that condition." Restatement (Second) of Judgments § 20 cmt. m (Am. L. Inst. 1982). An example of when the substantive law may bar a subsequent action is when a subsequent action is precluded by the applicable statute of limitations. In *Hebron Academy, Inc. v. Town of Hebron*, we observed, "Although a decision on the merits for res judicata

purposes generally does not include a dismissal for procedural defects, the question whether an action is barred by a statute of limitations is a matter of substance." 2013 ME 15, ¶ 29, 60 A.3d 774 (alteration, citations, and quotation marks omitted).

9 The dissent implies that we mischaracterize compliance with section 6111 by calling it a precondition to enforcing a mortgage by foreclosure. Dissenting Opinion ¶¶ 65-71. But the statute plainly frames it as exactly that. 14 M.R.S. § 6111(1) (providing that a lender "may not ... enforce the mortgage ... until" it has complied). The dissent goes on to point out that our precedent treats "a proper notice of default not merely as a ticket for admission into the courtroom but as an actual substantive element of the mortgagee's case for foreclosure." Dissenting Opinion ¶ 65. In fact, a valid section 6111 notice is both a precondition to suit and an element of a foreclosure claim, there being no inconsistency between the two. In that sense, it is akin to proof of ownership of the mortgage note, which is also both a precondition to maintaining a foreclosure action and an element of a foreclosure claim. A lender that cannot prove ownership of the note lacks standing, and a foreclosure action commenced by a lender that lacks standing is dismissed without prejudice. *See Bank of Am., N.A. v. Greenleaf*, 2015 ME 127, ¶¶ 2, 4, 9, 124 A.3d 1122.

10 The dissent repeatedly emphasizes that the foreclosure judgment in *Pushard* must have had claim-preclusive effect because it was a "judgment on the merits." Dissenting Opinion ¶¶ 65-66, 68, 71, 68 n.26, 71 n.27. But a "judgment on the merits" is "one in which the merits of [a party's] claim are in fact adjudicated [for or] against the [party] after trial of the *substantive issues*." Restatement (Second) of Judgments § 19 cmt. a (emphasis added). A judgment that is based solely on a plaintiff's failure to meet a precondition to suit is not a "judgment on the merits." *See Costello v. United States*, 365 U.S. 265, 285-86, 81 S.Ct. 534, 5 L.Ed.2d 551 (1961) (explaining that dismissal of an action "based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of [the] substantive claim" is not an "adjudication on the merits"). We have recognized that principle outside the foreclosure context. *See Dutil v. Burns*, 1997 ME 1, ¶ 5, 687 A.2d 639 ("[A] dismissal for failure to comply with [a] statutory procedure is akin to a dismissal for insufficient service of process or lack of subject matter jurisdiction, and does not serve as an adjudication of the merits."); *Hebron Acad., Inc.*, 2013 ME 15, ¶ 29, 60 A.3d 774 ("[A] decision on the merits for res judicata purposes generally does not include a dismissal for procedural defects ....").

Moreover, the premise that a judgment on the merits necessarily has claim-preclusive effect is questionable. As the United States Supreme Court has observed, the "premise that all judgments denominated 'on the merits' are entitled to claim-preclusive effect ... is not necessarily valid." *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001). "[O]ver the years[,] the meaning of the term

'judgment on the merits' has gradually undergone change, and it has come to be applied to some judgments ... that do not pass upon the substantive merits of a claim and hence do *not* (in many jurisdictions) entail claim-preclusive effect. That is why the Restatement of Judgments has abandoned the use of the term—'because of its possibly misleading connotations.' " *Id.* at 502-03, 121 S.Ct. 1021 (citations and quotation marks omitted) (quoting Restatement (Second) of Judgments § 19 cmt. a).

11 Notably, in *Briggs*, we did not follow our *Johnson* decision of the previous year. In other words, we only vacated the judgment in favor of the note holders; we did not remand for entry of judgment against them even though the holders had attempted to accelerate and asserted a claim for the entire amount due in their complaint. *See Briggs v. Briggs*, 1998 ME 120, ¶¶ 3, 8-11, 711 A.2d 1286. The difference between *Johnson* and *Briggs* is that the lender's right to accelerate was never actually adjudicated in *Johnson*.

12 Section 6111 imposes preconditions on a lender's ability to "accelerate maturity of the unpaid balance of the obligation or otherwise enforce the mortgage"; it does not apply to a lender's claim for only the unaccelerated amount past due under the note. 14 M.R.S. § 6111(1). Therefore, a lender may be able to recover the past due amount without complying with section 6111 (and without accelerating the debt). Accordingly, for claim preclusion purposes, a claim for the unaccelerated amount past due under the note *could have been litigated* in conjunction with a foreclosure action even where the foreclosure claim itself *could not have been litigated* because of a section 6111 violation. In *Pushard*, for example, notwithstanding the lender's inability to accelerate or litigate the foreclosure claim that it attempted to assert, the lender could have litigated a claim for the unaccelerated amount past due on the note. Because the claim for the past-due amount could have been litigated, claim preclusion would bar recovery for that amount in any subsequent action. *See Sullivan-Thorne*, 2013 ME 94, ¶¶ 7-8, 81 A.3d 371.

13 Likewise, issue preclusion did not bar a future acceleration of the balance due because the foreclosure court made no finding essential to the judgment that the loan had been accelerated, leaving the parties free to relitigate that issue in a subsequent action. *See Macomber v. MacQuinn-Tweedie*, 2003 ME 121, ¶ 22, 834 A.2d 131 (explaining that issue preclusion "prevents the relitigation of factual issues already decided if the identical issue was determined by a prior final judgment" (quotation marks omitted)).

14 We cited favorably to the holdings in *Singleton* and *Afolabi* not long before we decided *Pushard*. *See Sullivan-Thorne*, 2013 ME 94, ¶ 12, 81 A.3d 371.

15 Indeed, no other jurisdiction has adopted the view that a failed first foreclosure attempt necessarily bars a second attempt based on a new breach. Supporters of such a rule often cite Ohio as adopting it, but there, a lender is precluded from trying to foreclose again

after *two* voluntary dismissals, and there are exceptions to this rule, such as when the mortgage has been reinstated following an earlier default. *See U.S. Bank Nat'l Ass'n v. Gullotta*, 120 Ohio St.3d 399, 899 N.E.2d 987, 991-93 (2008). For a recent decision discussing a defective notice and rejecting the reasoning in *Pushard*, *see U.S. Bank Nat'l Ass'n v. Davis*, 232 A.3d 952, 954-59 (Pa. Super. Ct. 2020) (citing authority from Florida and the United States Court of Appeals for the Third Circuit); *see also Fed. Nat'l Mortg. Ass'n v. Thompson*, 381 Wis.2d 609, 912 N.W.2d 364, 370-71 (2018) (rejecting Maine precedent as not "persuasive"). While not directly relevant, given that our analysis does not directly implicate *Johnson*, it should be noted that *Johnson* relied on a decision that was subsequently disavowed by the Florida Supreme Court. *See Johnson v. Samson Constr. Corp.*, 1997 ME 220, ¶ 8, 704 A.2d 866 (citing *Stadler v. Cherry Hill Devs., Inc.*, 150 So. 2d 468 (Fla. Dist. Ct. App. 1963)); *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1008 (Fla. 2004) (expressly abrogating *Stadler*).

16 As we have noted, good-faith reliance by third parties is protected. *See supra* ¶ 15.

17 Contrary to the dissent's assertion, our decision does not "fundamentally alter[ ] the law" to "create[ ] a special, privileged class of litigant" and "a windfall for mortgagees," Dissenting Opinion ¶ 83 (emphasis omitted). Can it be said that a lender that has lost its first and only foreclosure action is "privileged" because it has not also lost all of its rights under the note and mortgage? Or that the lender is getting a "windfall" because the borrower who has won in the foreclosure action does not also win a "free house"? In fact, it was *Deschaine* and *Pushard* that put lenders who are subject to section 6111 into a special class of litigant. Is there any other situation in which a party who is required to send a notice before initiating litigation not only loses the case if the notice contains an error but also automatically forfeits property that it already owns?

It was *Pushard*, building on *Deschaine*, that helped make Maine foreclosure law unique by introducing the idea that an incorrect notice of default can void the note and mortgage and transfer title automatically to the borrower, free and clear and free of charge. *See Pushard*, 2017 ME 230, ¶ 32, 175 A.3d 103. Neither *Deschaine* nor *Pushard* acknowledged stare decisis as they altered the law, so our decision today is a course correction that actually promotes stare decisis. It steers our jurisprudence back toward our own precedent, our Legislature's statutes, and the legal mainstream.

18 The issue of the lender's compliance with section 6111 may arise in different contexts, such as on a motion to dismiss, a motion for summary judgment, or even at trial. The result is the same regardless of the context in which the issue arises—if the court determines that the lender has not complied with section 6111's notice requirements, the note balance cannot be accelerated, the foreclosure claim cannot be litigated, and the

resulting judgment does not preclude a subsequent foreclosure action. If no claim for the unaccelerated amount due has been asserted, the effect of the judgment, under the rule against claim-splitting and the claim preclusion doctrine, is to bar any future claim for that amount because the claim could have been litigated regardless of the lender's failure to comply with section 6111. *See supra* n.12.

19 Because the Bank's note and mortgage remain enforceable, we need not and do not reach the issue originally raised in the Bank's appeal: the validity of the principle, introduced in *Deschaine* and repeated in *Pushard*, that because the lenders could not foreclose, the borrowers automatically held title to the mortgaged properties free and clear of the lenders' mortgage encumbrances. *See Deschaine*, 2017 ME 190, ¶ 37, 170 A.3d 230; *Pushard*, 2017 ME 230, ¶ 36, 175 A.3d 103.

20 The judgment on these issues was partial because the court concluded that it could not adjudicate as a matter of law U.S. Bank's counterclaim against Finch for unjust enrichment, which was based on allegations that, after the judgment was entered in the 2010 foreclosure case, the Bank took action benefiting Finch by paying certain expenses associated with the property. The parties ultimately reached an agreement under which Finch reimbursed U.S. Bank for those expenses. Also by agreement of the parties, the court then entered a final judgment, which recited that U.S. Bank's counterclaim had become "moot and therefore [was] dismissed with prejudice."

Even though the agreed judgment also recited that the parties had "properly preserved all appellate rights" associated with the earlier partial judgment, in my view the dismissal *with prejudice* of U.S. Bank's counterclaim for unjust enrichment, issued pursuant to the parties' consent, is dispositive of that claim. The Court now leaves open the prospect of that claim being resurrected on remand because it is reopening other aspects of the judgment. Court's Opinion ¶ 11 n.4. Given that U.S. Bank itself participated in posturing its counterclaim as having been finally resolved, there should not be an opportunity for that claim to be addressed any further. If the dismissal with prejudice was to be conditional and not carry the finality that the phrase "with prejudice" signifies, *see* M.R. Civ. P. 41(a)(2); *Johnson v. Samson Constr. Corp.*, 1997 ME 220, ¶ 8, 704 A.2d 866, U.S. Bank could and should have agreed to the judgment only if that reservation had been made explicit.

21 A peripheral step in the trial court's analysis was incorrect. Contrary to an assertion in the partial judgment, a mortgage deed conveys legal title to the mortgagee, although that title is conditional because it is subject to a right of defeasance retained by the mortgagor. *Keybank Nat'l Ass'n v. Keniston*, 2023 ME 38, ¶ 15, 298 A.3d 800. This error does not affect the issue presented on appeal because, for the reasons I discuss below, *see infra* ¶

73 n.28, Finch is entitled to a discharge of the mortgage, which would extinguish U.S. Bank's legal title to the property.

22 More particularly, by its own terms 14 M.R.S. § 6111 (2023) applies to efforts to foreclose on property that is the mortgagor's primary residence when the proceeds from the secured loan are used for personal, family, or household use. Therefore, the Court's construction of the statute—and the decision it issues today—will be profoundly consequential to those whose mortgages are within its reach, namely, homeowners.

23 The Court asserts that a mortgagee's failure to prove a proper notice of default and right to cure is "akin" to the failure to prove ownership of the note. Court's Opinion ¶ 32 n.9. In the Court's view, because of that claimed similarity, because the first situation results in a dismissal of the action without prejudice, so too does the second. *Id.* This, however, conflates the concept of standing, which is predicated on the ownership of the instruments, with the entitlement to relief that the proper party may pursue. As we have stated a number of times, standing is a "threshold concept" essential to identifying the party that has a justiciable claim. *Bank of Am., N.A. v. Greenleaf*, 2015 ME 127, ¶¶ 8-9, 124 A.3d 1122 (quotation marks omitted); *see also Bank of N.Y. v. Dyer*, 2016 ME 10, ¶ 11, 130 A.3d 966; *Wells Fargo Bank, N.A. v. Girouard*, 2015 ME 116, ¶ 8 n.3, 123 A.3d 216; *Homeward Residential, Inc. v. Gregor*, 2015 ME 108, ¶¶ 23-24, 122 A.3d 947. Proof by the mortgagee that it owns the note and mortgage establishes that the court has jurisdiction to adjudicate the merits of the claim—in other words, that the claim is justiciable because the court would then be authorized to grant relief to that claimant if the evidence were to support the elements of the claim. *Girouard*, 2015 ME 116, ¶ 8 n.3, 123 A.3d 216. Here, it is undisputed that U.S. Bank has standing because it owned the note and mortgage. Its 2010 foreclosure action was therefore justiciable, and, pursuant to our case law, the court properly proceeded to adjudicate the claim on its merits and ultimately entered a judgment.

24 As we stated in *Deschaine*, the allegation by a mortgagee in its foreclosure complaint—which is "subject to the requirements of M.R. Civ. P. 11(a)—that it had declared the entire unpaid principal balance to be due immediately ... establishes that it exercised its right to accelerate the underlying debt on the note, and it may not now argue otherwise." *Fed. Nat'l Mortg. Ass'n v. Deschaine*, 2017 ME 190, ¶ 27, 170 A.3d 230. Now the Court rejects that conclusion and holds that even when a mortgagee—still being held to the standard of good-faith pleading—asserts that it had accelerated that debt, it is not bound by the effects of such an assertion if made incorrectly, even within the solemn context of a judicial proceeding. This is yet another aspect of *Deschaine* that the Court overturns.

25 Despite the Court's assertion, Court's Opinion ¶ 38, landlords should harbor no fear from

our decisions in *Pushard* and, by extension, *Deschaine*. In an action for forcible entry and detainer, a landlord does not seek to accelerate future rent payments or other tenant obligations that have not yet arisen. In fact, more relevant to foreclosure actions, as we explained in *Deschaine*, 2017 ME 190, ¶ 27 n.8, 170 A.3d 230, even a mortgagee that participates in a case involving a secured debt that it had *not* accelerated is not precluded from later commencing a foreclosure action. *See Wilmington Tr. Co. v. Sullivan-Thorne*, 2013 ME 94, ¶ 12 n.4, 81 A.3d 371. The same is true in actions for breach of contract, despite the Court's concern. *See* Court's Opinion ¶ 38.

26 Although we concluded that the trial court was without authority to prospectively declare that the mortgagee could commence another action despite losing the first on the merits, we explicitly did not reach the question of whether conventional principles of res judicata would bar a second action because the preclusion issue is not justiciable unless and until the mortgagee actually commences a second action. *U.S. Bank, N.A. v. Tannenbaum*, 2015 ME 141, ¶ 6 n.3, 126 A.3d 734; *see also Girouard*, 2015 ME 116, ¶ 10, 123 A.3d 216. *Tannenbaum* nonetheless confirms and ratifies the principle—which the Court today abandons—that when a mortgagee fails to prove its case, the court is obligated to enter a substantive judgment on the merits against the mortgagee, thereby letting the tenets of res judicata determine the viability of a future duplicative action, rather than an order that is equivalent to a mere dismissal of the complaint without prejudice.

27 The Court criticizes our decisions in *Pushard* and, implicitly, *Deschaine*, for not following the provisions of the Restatement and Maine case law, which both state that a preclusive effect does not arise from a judgment based on a failure by the claimant to satisfy a precondition to suit. Court's Opinion ¶¶ 29-32 & n.10 (discussing Restatement (Second) of Judgments § 20(2) (Am. L. Inst. 1982) and *Dutil v. Burns*, 1997 ME 1, 687 A.2d 639). The Court's complaint, however, is undermined by the substantial body of Maine law, which I recount in the text, *see supra* ¶¶ 65-68, establishing that a proper notice of default and right to cure is a substantive element of proof that the mortgagee must establish at trial. It is further undercut by our analysis in *Girouard*, 2015 ME 116, ¶¶ 8-9, 11, 123 A.3d 216, which I also discuss in the text, *see supra* ¶¶ 69-71, that distinguishes *Dutil* by explicitly holding that the effect of a judgment for the mortgagor based on a defective notice of default and right to cure—because it is a judgment on the merits—should not be confused with a judgment that results from failing to meet a procedural precondition to suit, as was the case in *Dutil*. *Girouard* is consequently another casualty of today's decision.

28 Because the Court determines that the flawed notice of default and right to cure rendered the first action a nullity, it does not reach the primary question U.S. Bank presented in its

initial round of briefs, *see supra* ¶ 60, namely, whether the loss of its right to seek monetary relief based on the promissory note and the limits on its claim of title resulting from the adverse judgment in its foreclosure action also mean that Finch is now entitled to a discharge of the mortgage.

In my view, Finch is entitled to that relief, just as *Pushard* and *Deschaine* provide. In its partial judgment, the trial court correctly determined that not only is U.S. Bank barred from seeking recovery on the note (which U.S. Bank conceded in its initial briefs on this appeal) but that U.S. Bank is required to record the discharge (as it has now done). Those results were compelled by *Deschaine* and *Pushard.* In each of those cases, we held that when the secured debt becomes unenforceable after a judgment is entered against a mortgagee in a foreclosure action, the property is no longer encumbered by that security and the mortgagor owns the property free and clear of the mortgage deed. *See Pushard*, 2017 ME 230, ¶ 36, 175 A.3d 103; *Deschaine*, 2017 ME 190, ¶ 37, 170 A.3d 230. Contrary to U.S. Bank's contention, those determinations were not dicta but rather constituted holdings because they addressed substantive claims for relief that the mortgagors had asserted. *See Pushard*, 2017 ME 230, ¶ 5, 175 A.3d 103; *Deschaine*, 2017 ME 190, ¶ 9, 170 A.3d 230. Therefore, pursuant to that case law and to 14 M.R.S. § 6206 (2023), because the judgment entered against U.S. Bank in its foreclosure action extinguished Finch's liability under the secured note, nothing was left due, thereby entitling Finch—in the words found in section 6206—to "hold the land discharged of the mortgage." I recognize that nearly a century and a half ago we suggested, in conclusory terms, a contrary reading of a similar statute, *see Mason v. Mason*, 67 Me. 546, 548 (1878), but the effects of *Pushard* and *Deschaine*, combined with the plain language of section 6206, support the conclusion I draw here.

29 A minority, yes, but we are not alone. *See U.S. Bank Nat'l Ass'n v. Gullotta*, 120 Ohio St.3d 399, 899 N.E.2d 987, 990-94 (2008); *Cenlar FSB v. Malenfant*, 203 Vt. 23, 151 A.3d 778, 793-99 (2016) (Dooley, J., dissenting); *see also* Megan Wachspress et al., Comment, *In Defense of "Free Houses,"* 125 Yale L.J. 1115 (2016).

30 It bears noting, however, that even one of the amici advocating for the interests of mortgagees—the Maine Bankers Association—asserts that, if a second foreclosure action is barred by an unsuccessful first action, the mortgagor should be entitled to a discharge of the mortgage and acquire title to the property.

31 The Court makes reference to legislation, enacted after we issued our decisions in *Deschaine* and *Pushard*, that imposes on mortgage servicers a duty of good faith and authorizes the courts, in their discretion, to impose consequences when that duty is violated. Court's Opinion ¶ 47 (discussing 14 M.R.S. § 6113 (2023)). It appears that, in

the Court's view, this statutory reform diminishes the justification for barring successive foreclosure actions pursuant to principles of claim preclusion. To the contrary, I read this legislative development as an enhancement of borrower protection—a signal that the Legislature sees the need for *more* restraint on mortgagees and their agents based on the same kinds of concerns about improper practices conducted by mortgagees, their servicers, and their attorneys that led, in part, to the determination we articulated in *Pushard* that the preclusive effect resulting as a matter of law from prior unsuccessful litigation should not be relaxed. 2017 ME 230, ¶ 35, 175 A.3d 103; *see also Deschaine* 2017 ME 190, ¶¶ 32-34, 170 A.3d 230.

While amending 14 M.R.S. § 6113 to address problematic behavior by mortgage servicers, the Legislature made no changes to section 6111 itself in a way that would signal any disagreement with the way we had construed and applied that statute in *Deschaine* and *Pushard*. Although we have stated that significance should not be attached to legislative *inaction*, *Mahaney v. Miller's, Inc.*, 669 A.2d 165, 169 (Me. 1995), that approach may be subject to some nuance here. Two years after we issued our decisions in *Deschaine* and *Pushard*, the Legislature amended section 6111 to tighten the requirements for the way notices of default are provided to mortgagors. *See* P.L. 2019, ch. 361, §§ 1, 2 (effective Sept. 19, 2019). Thus, the Legislature was paying attention to that statute, which is central to the case at bar. Notwithstanding the caution we expressed in *Mahaney* about legislative silence, we presume that the Legislature bears "in mind" our decisions when it enacts statutes. *Finks v. Me. State Highway Comm'n*, 328 A.2d 791, 797 (Me. 1974); *see also Gen. Motors Acceptance Corp. v. Anacone*, 160 Me. 53, 78, 197 A.2d 506, 521 (1964) (explaining that "a statute enacted after a judicial construction is presumed to take that construction"). The 2019 amendment adding entirely new provisions to section 6111 may arguably be treated as an enactment, which means that when the Legislature did so, it was mindful of the way we had construed other elements of that same statute in *Deschaine* and *Pushard* —and did nothing to override our view. But, in my view, even if the enactment that resulted in the 2019 amendment to section 6111 does not bring the issue presented here within the ambit of *Finks*, because we have already announced the way we read section 6111 it is now the Legislature, and not the judiciary, that should be the appropriate entity to make any substantive changes to the meaning and application of its statutes. The ball, in other words, is in the Legislature's court, not ours.

32 And all of this must be seen against the backdrop of the nature of the initial transactions between the secured lenders and homeowners, which are embodied in "contracts of adhesion because their terms are selected by professional lenders for unsophisticated borrowers who have no choice but to accept the lenders' terms or forego purchasing their home." Shelley Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to*

the Subprime Mortgage Crisis, 14 Lewis & Clark L. Rev. 1035, 1040 (2010).

33 That imbalance will now be present even as between the parties to a foreclosure proceeding because mortgagors will not have the opportunity for a do-over, as mortgagees will now have. *See Harriman v. Border Tr. Co.*, 2004 ME 28, ¶¶ 4-7, 842 A.2d 1266 (affirming the dismissal of a complaint by a borrower seeking title to and possession of real property lost in a foreclosure action because the action was barred by res judicata, and imposing sanctions because the borrower had filed multiple complaints with no reasonable prospect of success); *Rohe v. Wells Fargo Bank, NA*, No. 21-10561, 2022 WL 17752372, at *1, 3 (11th Cir. 2022) (holding that a borrower was barred from litigating a claim that that the mortgagee did not own the mortgage when that claim had already been litigated and adjudicated in a state foreclosure proceeding).

34 As has been insightfully explained, when a mortgagee pursues a foreclosure action and suffers an adverse judgment,

> Well-established legal principles seem to provide a clear answer: the homeowner keeps her house, and res judicata bars any future suit to foreclose on the home. Yet state courts around the country resist this outcome.
>
> ....
>
> ... [C]ourts are afraid to bar future attempts to foreclose—that is, afraid of giving borrowers "free houses." While courts rarely explain the reasoning behind this aversion, it seems to arise from a reflexive belief that such an outcome would be unjust. Courts are therefore quick to sidestep well-established principles of res judicata in favor of ad hoc measures meant to protect banks against the specter of "free houses."

Wachspress at 1115-16 (footnote omitted).

End of Document

State of Maine Judicial Branch

COURT ALERTS IN EFFECT. See Active Alerts and COVID-19 Response

Law Court invites amicus briefs regarding preclusive effect of judgment in favor of mortgagor on future actions to enforce a promissory note and mortgage

Date: 8/23/2022

The Maine Supreme Judicial Court, sitting as the Law Court, invites briefs of amici curiae in the appeal of *J.P. Morgan Acquisition Corp. v. Camille Moulton*, Law Court docket number Oxf-21-412. J.P. Morgan Acquisition Corp. appeals from a judgment entered by the Superior Court on J.P. Morgan's foreclosure action against Moulton. The Superior Court determined that J.P. Morgan failed to comply with the provisions of 14 M.R.S. § 6111, which requires a mortgagee to provide a mortgagor with a notice of default and right to cure before bringing a foreclosure action, and entered a summary judgment in favor of Moulton. As part of the judgment, the Superior Court declared that Moulton holds title to the real property at issue, unencumbered by the mortgage and promissory note.

The Court invites amicus briefs on the following issues:

1. Should the Court reconsider its existing precedent that a foreclosure judgment in favor of the mortgagor based on the mortgagees failure to comply with 14 M.R.S. § 6111 renders the note and mortgage unenforceable because a second foreclosure action is barred by principles of res judicata?
    a. If so, upon what grounds, and to what extent, should principles of res judicata continue to apply? Should it make a difference if the second foreclosure action is based on a new default?
    b. If the lender is barred from pursuing a second foreclosure action under principles of res judicata, does this inability render the note and mortgage unenforceable such that the lender may pursue alternative claims including, but not limited to, an unjust enrichment claim against the borrower consistent with Restatement (Third) of Restitution & Unjust Enrichment § 2(2)?

2. Should the court reconsider and repudiate the language in *Fed. Natl Mortg. Assn v. Deschaine*, 2017 ME 190, ¶ 37, 170 A.3d 230, and *Pushard v. Bank of. Am., N.A.*, 2017 ME 230, ¶ 36, 175 A.3d 103, ordering that a failed foreclosure action barring a second foreclosure action on res judicata principles entitles the borrower to a discharge of the mortgage and title to the mortgaged property?

The parties briefs and the appendix are available at the links below.

An amicus brief may be filed by or on behalf of any individual, entity, or group of individuals and/or entities without separate leave of the Court. Any amicus brief must be filed on or before September 27, 2022. An amicus brief must be filed at the address listed below and must comply with M.R. App. P. 7A. In addition to filing and serving the required number of copies, any amicus must send a copy of the brief electronically, as a single "native" or text-based .pdf file, to the Clerk of the Law Court at lawcourt.clerk@courts.maine.gov.

EXHIBIT B

MAINE JUDICIAL BRANCH
SUPREME JUDICIAL COURT

Matthew Pollack
Executive Clerk
Clerk of the Law Court
205 Newbury St Rm 139, Portland ME 04330
Phone: 207-822-4146

August 23, 2022

Morgan T. Nickerson, Esq.
Emily E. Gianetta, Esq.
K&L GATES LLP
State Street Financial Center
One Lincoln Street
Boston, MA 02111

John D. Clifford, IV, Esq.
Clifford & Golden, PA
PO Box 346
Lisbon Falls, Maine 04252

Re: Charles D. Finch v. U.S. Bank, N.A.
Law Court docket number And-21-355

Dear Counsel:

The Law Court has decided to request additional briefing from the parties.

The Court requests that the parties file supplemental briefs addressing the following issues:

1. Should the Court reconsider its existing precedent that a foreclosure judgment in favor of the mortgagor based on the mortgagee's failure to comply with 14 M.R.S. § 6111 renders the note and mortgage unenforceable because a second foreclosure action is barred by principles of res judicata?
    a. If so, upon what grounds, and to what extent, should principles of res judicata continue to apply? Should it make a difference if the second foreclosure action is based on a new default?
    b. If the lender is barred from pursuing a second foreclosure action under principles of res judicata, does this inability render the note and mortgage unenforceable such that the lender may pursue alternative claims including, but not limited to, an unjust enrichment claim against the borrower consistent with *Restatement (Third) of Restitution & Unjust Enrichment* § 2(2)?

EXHIBIT C

2. Should the court reconsider and repudiate the language in *Fed. Nat'l Mortg. Ass'n v. Deschaine*, 2017 ME 190, ¶ 37, 170 A.3d 230, and *Pushard v. Bank of. Am., N.A.*, 2017 ME 230, ¶ 36, 175 A.3d 103, ordering that a failed foreclosure action barring a second foreclosure action on res judicata principles entitles the borrower to a discharge of the mortgage and title to the mortgaged property?

The parties must file supplemental briefs on these issues on or before **September 27, 2022.** The cover of your briefs should be the same color as your initial briefs (blue for U.S. Bank, red for Finch). The supplemental briefs must not exceed twenty pages and should be titled "Supplemental Brief" (followed by the identification of the party filing the brief, as usual). The Court will not permit briefs in response to the supplemental briefs.

If you have any questions, please let me know. Thank you.

Sincerely,

Matthew Pollack

170 A.3d 230
Supreme Judicial Court of Maine.

FEDERAL NATIONAL MORTGAGE ASSOCIATION
v.
Patricia W. DESCHAINE et al.

Docket: Pen–16–316
|
Argued: May 12, 2017
|
Decided: September 7, 2017
|
Revised: December 7, 2017

Synopsis

Background: Federal National Mortgage Association (Fannie Mae) brought residential foreclosure action against mortgagors. The Superior Court, Penobscot County, Anderson, J., granted mortgagors' motion for summary judgment and denied Association's cross-motion for summary judgment based on res judicata. Association appealed.

The Supreme Judicial Court, Hjelm, J., held that action was barred by res judicata.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

***231** Jeffrey J. Hardiman, Esq., and Dean J. Wagner, Esq., Shechtman Halperin Savage, LLP, Pawtucket, Rhode Island, and Marissa I. Delinks, Esq. (orally), Hinshaw and Culbertson LLP, Boston, Massachusetts, for appellant Federal National Mortgage Association

EXHIBIT D

James F. Cloutier, Esq., Cloutier, Conley & Duffett, P.A., Portland, for appellees Patricia W. Deschaine and Paul J. Deschaine

L. Scott Gould, Esq., Cape Elizabeth, for amici curiae National Consumer Law Center and National Association of Consumer Advocates

Jeffrey Gentes, Esq., Jerome Frank Legal Services Corporation, New Haven, Connecticut, for amicus curiae Jerome Frank Legal Services Corporation

***232** Thomas A. Cox, Esq. (orally), Portland, for amicus curiae Maine Attorneys Saving Homes

Catherine R. Connors, Esq., and John J. Aromando, Esq., Pierce Atwood LLP, Portland, for amici curiae Maine Bankers Association and The National Mortgage Bankers Association

Frank D'Alessandro, Esq., Pine Tree Legal Assistance, Portland, for amicus curiae Pine Tree Legal Assistance

Gerald F. Petruccelli, Esq., amicus curiae pro se

John A. Doonan, Esq., and Reneau J. Longoria, Esq., Doonan, Graves & Longoria, LLC, Beverly, Massachusetts, for amicus curiae Doonan, Graves & Longoria
Panel: ALEXANDER, MEAD, GORMAN, JABAR, HJELM, and HUMPHREY, JJ.

Opinion

HJELM, J.

[¶ 1] In 2012, a complaint for residential foreclosure filed by Federal National Mortgage Association (Fannie Mae) against Patricia W. Deschaine and Paul J. Deschaine was dismissed with prejudice because the parties failed to comply with the court's pretrial order. Fannie Mae did not seek post-judgment or appellate relief, and so the judgment became final. The following year, Fannie Mae filed a second complaint for foreclosure involving the same property, based on the same note and mortgage, and against the same mortgagors. The Superior Court (Penobscot County, *Anderson, J.*) ultimately granted the Deschaines' motion for summary judgment on Fannie Mae's complaint and on their counterclaims to quiet title and for a declaratory judgment, and denied Fannie Mae's cross-motion for summary judgment on its complaint. Applying our decision in *Johnson v. Samson Construction Co.*, the court concluded that this second foreclosure action is barred as a matter of law by the judgment dismissing with prejudice the earlier foreclosure action. 1997 ME 220, ¶ 8, 704 A.2d 866. On this appeal by Fannie Mae, we

conclude that the court correctly determined that this second foreclosure claim is precluded by principles of res judicata, and we affirm the judgment.[1]

I. BACKGROUND

[¶ 2] The summary judgment record contains the following facts, which are not in dispute. *See Harlor v. Amica Mut. Ins. Co.*, 2016 ME 161, ¶ 7, 150 A.3d 793.

[¶ 3] In October 2004, the Deschaines executed a promissory note in favor of First Horizon Home Loan Corporation in the principal amount of $127,920. As security for the note, the Deschaines also executed a mortgage on residential property located in Lincoln in favor of Mortgage Electronic Registration Systems, Inc. (MERS), as "nominee" for First Horizon.[2] Fannie Mae eventually acquired ***233** the note endorsed in its favor. MERS purported to assign the mortgage to Fannie Mae in June 2011, but because MERS possessed only the right to record the mortgage, the assignment conveyed nothing more than that right. *See Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶¶ 15–16, 96 A.3d 700; *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶¶ 9–11, 2 A.3d 289.

[¶ 4] Paragraph 7(C) of the note and Paragraph 22 of the mortgage contain acceleration clauses, which provide that if the borrower fails to satisfy an obligation under either instrument and fails to timely cure the default after being notified of it, the lender may require "immediate payment in full" of the amount then remaining unpaid under the loan documents—including the total balance of principal and interest under the note and any additional fees and charges allowed by the note and mortgage.

[¶ 5] Additionally, Paragraph 19 of the mortgage is a reinstatement provision, stating that "even if [the l]ender has required immediate payment in full, [the borrower] may have the right to have enforcement of [the mortgage] discontinued" if, among other things, the borrower "pay[s] to [the l]ender the full amount that then would be due under [the mortgage] and the [n]ote as if immediate payment in full had never been required" before the earliest of the date a foreclosure judgment is issued, five days prior to the sale of the property, or "such other period as [a]pplicable [l]aw might specify for the termination of [the] right to reinstate." Paragraph 19 further provides that if the borrower exercises her right of reinstatement, "the [n]ote and this [s]ecurity [i]nstrument will remain in full effect as if immediate payment in full had never been required."

[¶ 6] In September 2011, Fannie Mae issued to the Deschaines a notice of default and right to cure because, among other things, they had not made any monthly payments on the note since January 2011. The Deschaines failed to pay the stated amount due—$7,719.33—by the date specified in the notice. As a result, in December 2011 Fannie Mae filed a foreclosure complaint in the District Court (Lincoln). In its complaint, Fannie Mae alleged, "[I]n accordance with the terms of the [l]oan [d]ocuments, [Fannie Mae] has declared the entire outstanding principal amount, accrued interest thereon, and all other sums due under the [l]oan [d]ocuments to be presently due and payable." Specifically, Fannie Mae alleged that the amount due included a principal balance of $122,712.93, which, together with accrued interest, fees, and other charges, resulted in a total amount due of $131,944.56.

[¶ 7] In June 2012, the court (*Stitham, J.*) issued a trial management order stating that neither party had complied with an earlier order that had established a deadline for the parties to exchange witness and exhibit lists, and warning the parties that sanctions would be imposed if they did not comply with a revised deadline. *See* M.R. Civ. P. 16A(a), (d) (authorizing a court to dismiss an action with prejudice ***234** for a party's failure to comply with a pretrial order). The following month, the court issued a judgment stating that there had been "no filings by either party," and dismissed Fannie Mae's foreclosure complaint "with prejudice." Fannie Mae did not seek any type of relief from the dismissal through a post-judgment motion or an appeal, and so the judgment became final.

[¶ 8] In September 2013—more than one year after the first foreclosure action had been dismissed—Fannie Mae sent a new notice of default to the Deschaines, this time stating that, among other grounds for a default, the Deschaines had failed to make payments on the note since February 2011. The Deschaines did not take the actions specified in the notice to cure the purported default, and in December 2013 Fannie Mae filed a complaint in the Superior Court (Penobscot County), which, as later amended, requested a judgment of foreclosure and other relief based on theories of equitable mortgage and unjust enrichment.[3] In both the original and amended complaints, Fannie Mae alleged, "[I]n accordance with the terms of the [n]ote and [m]ortgage, [Fannie Mae] has declared the entire outstanding principal amount, accrued interest thereon, and all other sums due under the [n]ote and [m]ortgage to be presently due and payable."

[¶ 9] After an unsuccessful mediation session held in the summer of 2014, the Deschaines filed an answer that denied many of the allegations in the amended complaint and asserted, among others, the affirmative defenses of lack of standing and res judicata. The Deschaines' responsive pleading included counterclaims to quiet title and for a declaratory judgment that, as a result of the dismissal with prejudice of Fannie Mae's prior foreclosure complaint, Fannie Mae was no

longer entitled to enforce the mortgage and so the Deschaines held title to the property unencumbered by the mortgage in favor of Fannie Mae.

[¶ 10] In January 2015, Fannie Mae obtained an assignment of the mortgage from the successor-in-interest to First Horizon, the original lender, and thus acquired standing to pursue this second foreclosure action against the Deschaines, which had already been pending for over a year. *See Greenleaf*, 2014 ME 89, ¶ 17, 96 A.3d 700.

[¶ 11] In November 2015, the Deschaines moved for summary judgment on their counterclaims and on all counts of Fannie Mae's complaint. *See* M.R. Civ. P. 56. With the motion, the Deschaines filed a statement of material facts, *see* M.R. Civ. P. 56(h)(1), in which they asserted that the notice of default issued by Fannie Mae in September 2011 "resulted in the acceleration of the mortgage debt." In support of this assertion, the Deschaines cited to the 2011 foreclosure complaint as one of several record references. *See* M.R. Civ. P. 56(h)(4). Based on that assertion and our decision in *Johnson*, the Deschaines argued that Fannie Mae was barred from bringing a second foreclosure claim and that they were therefore entitled to a judgment as a matter of law on that claim and on their counterclaims.

[¶ 12] In its opposition to the Deschaines' motion, Fannie Mae disputed the assertion that the debt was accelerated in ***235** the 2011 action, characterizing it as a legal conclusion that did not require a response. Fannie Mae simultaneously filed its own motion for summary judgment on each count of its complaint. In its statement of material facts, Fannie Mae reiterated allegations it had made in its complaint, including the Deschaines' failure, since February 2011, to make principal and interest payments due pursuant to the note, among other grounds for default. Fannie Mae argued that it was not precluded from bringing a second foreclosure claim against the Deschaines because the 2013 action was based on new breaches of the note and mortgage that had not been at issue in the earlier proceeding and because there had not been an effective acceleration of the debt in that proceeding.

[¶ 13] In June 2016, the court (*Anderson, J.*) granted the Deschaines' motion for summary judgment on both Fannie Mae's complaint and their counterclaims, and denied Fannie Mae's cross-motion for summary judgment. The court concluded, as a matter of law, that each of Fannie Mae's claims was barred by res judicata, and alternatively that in the circumstances of this case Fannie Mae was not entitled to relief on its equitable claims. As to the counterclaims, the court concluded that the Deschaines were not subject to any remaining obligation created by the note and mortgage because Fannie Mae was "barred from enforcing the note," and the Deschaines were therefore entitled to a declaratory judgment that they held title to the Lincoln property unencumbered by the mortgage in favor of Fannie Mae. *See* 14 M.R.S. § 6206 (2016)

("If it appears that nothing is due on the mortgage, judgment shall be rendered for the defendant and for his costs, and he shall hold the land discharged of the mortgage."). Fannie Mae timely appealed. *See* 14 M.R.S. § 1851 (2016); M.R. App. P. 2(b)(3).

II. DISCUSSION

[¶ 14] Fannie Mae argues that the court erred by concluding, as a matter of law, that the present foreclosure action is barred by the doctrine of res judicata.[4] "We review a grant of a summary judgment on a res judicata issue de novo, viewing the record in the light most favorable to the party against whom judgment has been granted to decide whether the parties' statements of material facts and the referenced record material reveal a genuine issue of material fact." *Wilmington Tr. Co. v. Sullivan–Thorne*, 2013 ME 94, ¶ 6, 81 A.3d 371 (quotation marks omitted).

[¶ 15] The doctrine of res judicata prevents "a party and its privies ... from relitigating claims or issues that have already been decided." ***236** *Portland Co. v. City of Portland*, 2009 ME 98, ¶ 22, 979 A.2d 1279. The doctrine "has two components: collateral estoppel, also known as issue preclusion, and claim preclusion." *Wilmington Tr. Co.*, 2013 ME 94, ¶ 7, 81 A.3d 371 (quotation marks omitted). Claim preclusion, which is the component at issue in this case, "bars the relitigation of claims if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been, litigated in the first action."[5] *Id.* (quotation marks omitted).

[¶ 16] Fannie Mae does not dispute that the same parties were involved in both the 2011 and 2013 foreclosure actions.

[¶ 17] Additionally, as Fannie Mae acknowledged at oral argument, because the dismissal with prejudice in the 2011 action was imposed as a sanction pursuant to Rule 16A(d) based on both parties' failure to comply with a scheduling order, that dismissal has the same effect as an adjudication on the merits of Fannie Mae's foreclosure complaint regardless of whether Fannie Mae had standing at the time of the dismissal to pursue foreclosure.[6] *See Green Tree Servicing, LLC v. Cope*, 2017 ME 68, ¶¶ 17–18 & n.10, 158 A.3d 931. The dismissal is therefore a valid final judgment for purposes of res judicata. *See Penkul v. Matarazzo*, 2009 ME 113, ¶ 8, 983 A.2d 375 ("For a valid final judgment to have preclusive effect, it must be made on the merits of the case."); *Johnson*, 1997 ME 220, ¶¶ 3, 8, 704 A.2d 866 (concluding that a judgment dismissing the plaintiff's foreclosure complaint with prejudice based on its failure to timely file a

report of conference of counsel "operated as an adjudication on the merits" (quotation marks omitted)).

[¶ 18] We therefore proceed to address the remaining element of res judicata, namely, whether the matters presented for decision in this foreclosure action were, or might have been, litigated in the 2011 foreclosure action. *See Wilmington Tr. Co.*, 2013 ME 94, ¶ 7, 81 A.3d 371. To answer that question, we must determine

> whether the same cause of action was before the court in the prior case. We define a cause of action through a transactional test, which examines the aggregate of connected operative facts that can be handled together conveniently for purposes of trial to determine if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong.... ***237** Claim preclusion may apply even where a suit relies on a legal theory not advanced in the first case, seeks different relief than that sought in the first case, or involves evidence different from the evidence relevant to the first case.

Id. ¶ 8 (citations, alterations, and quotation marks omitted).

[¶ 19] Claim preclusion "is grounded on concerns for judicial economy and efficiency, the stability of final judgments, and fairness to litigants." *Id.* ¶ 6. The doctrine promotes those goals by preventing a party "from splintering his or her claim and pursuing it in a piecemeal fashion by asserting in a subsequent lawsuit other grounds of recovery for the same claim that the litigant had a reasonable opportunity to argue in the prior action." *Johnson*, 1997 ME 220, ¶ 7, 704 A.2d 866 (quotation marks omitted).

[¶ 20] We previously addressed claim preclusion in the foreclosure context in *Johnson*. In that case, the mortgagee commenced a foreclosure action in August 1990 alleging that the mortgagor had defaulted by failing to make the periodic payment due on the note in May 1990; that the mortgagor failed to timely cure the default; and that therefore, pursuant to the acceleration clause in the note, the mortgagee was entitled to a judgment for the entire unpaid principal balance. *Id.* ¶¶ 2–3. Four years later, the court dismissed the foreclosure action with prejudice after the mortgagee failed to timely file a court-ordered report of conference of counsel. *Id.* ¶ 3. The mortgagee then filed a second foreclosure complaint in August 1995, this time alleging that the mortgagor had failed to make any payments due on the note since September 1990 and again seeking a judgment for the entire unpaid principal balance. *Id.* ¶ 4. Rejecting the mortgagee's argument that the first judgment should only bar claims based on defaults that occurred *before*

the first action was filed, the trial court granted the mortgagor's motion for summary judgment based on res judicata. *Id.*

[¶ 21] We affirmed the court's decision on appeal. *Id.* ¶¶ 1, 8. We reasoned that once the mortgagor "triggered the acceleration clause of the note" by "demand[ing] payment of the entire unpaid principal balance," the installment contract, which "required 240 equal monthly payments of principal and interest[,] ... became indivisible. The obligations to pay each installment merged into one obligation to pay the entire balance on the note." *Id.* ¶ 8. Accordingly, we concluded, as a matter of law, that the judgment dismissing the first foreclosure complaint with prejudice barred the second foreclosure complaint, "which allege[d] precisely what the complaint in the first action alleged: that [the mortgagor] defaulted on the note and that [the mortgagee was] entitled to a judgment for the amount due under the note." *Id.* We stated that the mortgagee could not "avoid the consequences of his procedural default ... by attempting to divide a contract which became indivisible when he accelerated the debt in the first lawsuit." *Id.*

[¶ 22] *Johnson* fully disposes of the issue in this case. The Deschaines' promissory note requires 360 equal monthly payments of principal and interest. Paragraph 7(C) of the note states, however, that if the borrower fails to "pay the full amount of each monthly payment on the date it is due ... the [n]ote [h]older may send [the borrower] a written notice telling [the borrower] that if [she] do[es] not pay the overdue amount by a certain date, the [n]ote [h]older may require [the borrower] to pay immediately the full amount of [p]rincipal that has not been paid and all the interest that [the borrower] owe[s] on that amount." An acceleration clause at Paragraph ***238** 22 of the mortgage states that if the borrower "fail[s] to keep any promise or agreement made in this [s]ecurity [i]nstrument, including the promises to pay when due the [s]ums [s]ecured," and fails to timely cure the default after being notified of it, then the "[l]ender may require that [the borrower] pay immediately the entire amount then remaining unpaid under the [n]ote and under this [s]ecurity [i]nstrument ... without making any further demand for payment." Paragraph 22 further provides, "If [l]ender requires immediate payment in full, [l]ender may bring a lawsuit to take away all of [the borrower's] remaining rights in the [p]roperty and have the [p]roperty sold."

[¶ 23] It is undisputed that in September 2011 Fannie Mae sent the Deschaines a notice of default informing them that they had failed to make monthly payments on the note since January 2011, and stating that if the Deschaines failed to cure the default "within 35 days of receipt of this notice, the balance of the [n]ote may be deemed accelerated without further demand, and the [l]ender may proceed with foreclosure of the [m]ortgage." It is also undisputed that the Deschaines failed to timely cure the default. Accordingly, the necessary predicates for

acceleration as specified in Paragraph 7(C) of the note and Paragraph 22 of the mortgage—namely, a default, a subsequent notice of default, and a failure to cure the default—were fulfilled. Then, in December 2011, Fannie Mae filed a foreclosure complaint alleging that "in accordance with the terms of the [l]oan [d]ocuments, [Fannie Mae] *has declared* the entire outstanding principal amount, accrued interest thereon, and all other sums due under the [l]oan [d]ocuments to be presently due and payable."[7] (Emphasis added.) If Fannie Mae in fact accelerated the debt in the 2011 action—as it had alleged—then this case would be indistinguishable from *Johnson* because Fannie Mae would have placed the entire outstanding balance on the note at issue in the first case, precluding any future separate action to recover the same debt.

[¶ 24] In an attempt to avoid the effects of *Johnson*, Fannie Mae makes several arguments to support its contention that the record does not conclusively establish that acceleration occurred in the 2011 action.

[¶ 25] First, Fannie Mae contends that the acceleration provisions in the note and mortgage, which state that the lender "may" require immediate payment in full upon the borrower's failure to cure a default, merely give the lender the *option* to accelerate the debt and that Fannie Mae did not indisputably exercise that option. In contrast, the note in *Johnson* stated in mandatory terms that upon a borrower's failure to cure a default "the entire unpaid principal and accrued interest *shall* become immediately due and payable without further demand." *Johnson*, 1997 ME 220, ¶¶ 2, 8, 704 A.2d 866 (emphasis added) (quotation marks omitted).

[¶ 26] In the circumstances of this case, however, the permissive acceleration language in the Deschaines' note and mortgage does not make *Johnson* distinguishable because, as shown in the summary judgment record, Fannie Mae exercised its optional right to accelerate the entire obligation. When, as here, a note contains an optional acceleration clause, some affirmative action is required by the note holder to provide notice to the borrower ***239** that the holder has exercised that option. *See, e.g.*, *Hassler v. Account Brokers of Larimer Cty., Inc.*, 274 P.3d 547, 553–54 (Colo. 2012); *Reano v. U.S. Bank, Nat'l Ass'n*, 191 So.3d 959, 961 (Fla. Dist. Ct. App. 2016); *Bischoff v. Cook*, 118 Hawai'i 154, 185 P.3d 902, 911 n.8 (App. 2008); *First Fed. Sav. & Loan Ass'n of Gary v. Stone*, 467 N.E.2d 1226, 1232 (Ind. Ct. App. 1984). The filing of a foreclosure complaint "constitutes a valid exercise of a mortgagee's acceleration right" and is sufficient to provide notice to the mortgagor. *Hartford Fed. Sav. & Loan Ass'n v. Tucker*, 196 Conn. 172, 491 A.2d 1084, 1086 (1985); *see also FAS Capital, LLC v. Carr*, 7 F.Supp.3d 1259, 1270 (N.D. Ga. 2014); *Reano*, 191 So.3d at 961; *Bischoff*, 185 P.3d at 911 n.8; C.T. Drechsler, Annotation, *What is Essential to Exercise of Option to Accelerate Maturity of Bill or Note*, 5 A.L.R.2d 968 § 5[a] (1949) ("The institution of a suit for the whole debt is, of course, the most

solemn form in which the holder can exercise his option. This is well recognized and it is, hence, generally held that the institution of a suit on the bills or notes is notice of the most unequivocal character that the holder wishes to avail himself of his option for acceleration.").

[¶ 27] Here, in its 2011 complaint for foreclosure, Fannie Mae alleged—subject to the requirements of M.R. Civ. P. 11(a)—that it had declared the entire unpaid principal balance to be due immediately. Accordingly, Fannie Mae's own complaint in the 2011 proceeding establishes that it exercised its right to accelerate the underlying debt on the note, and it may not now argue otherwise.[8]

[¶ 28] Fannie Mae next argues that under the parties' mortgage contract an attempted acceleration is not effective unless and until the court enters a foreclosure judgment, because until that time the mortgagor has the right under Paragraph 19 to "discontinue[ ]" enforcement of the mortgage. The mortgagor may do so by paying the mortgagee "the full amount that then would be due under [the mortgage] and the [n]ote as if immediate payment in full had never been required," thereby reinstating the parties' prior contractual relationship with the same continuing obligation on the part of the mortgagor to make installment payments. In Fannie Mae's view, acceleration occurs only if the borrower *fails to take* certain actions to stop foreclosure, thereby putting the onus on *the borrower* to elect whether acceleration by the lender occurs.

[¶ 29] Fannie Mae's argument misconstrues the nature of its right to accelerate. Pursuant to Paragraph 7(C) of the note and Paragraph 22 of the mortgage, acceleration is *the lender's* unilateral right, upon stated conditions, to require "immediate payment in full" of the amount then remaining unpaid under the loan documents "without making any further demand for payment." The loan documents ***240** therefore establish that acceleration was not dependent on the Deschaines' failure exercise their rights under Paragraph 19 of the mortgage. Rather, as we have discussed, *see supra* ¶¶ 26–27, the acceleration occurred here no later than when Fannie Mae commenced the first foreclosure action and declared in its complaint that the *entire* amount the Deschaines were obligated to pay pursuant to the loan documents was then due. Further, it is undisputed that in the 2011 action the Deschaines did not take the actions required by Paragraph 19 to discontinue Fannie Mae's right to foreclose prior to entry of the dismissal with prejudice. Accordingly, even assuming a borrower's invocation of the right to reinstate renders acceleration ineffective, that did not occur in this case.

[¶ 30] Finally, relying on case law from other jurisdictions, *see, e.g.*, *Singleton v. Greymar Assocs.*, 882 So.2d 1004, 1006–08 (Fla. 2004); *Cenlar FSB v. Malenfant*, 151 A.3d 778, 785–92 (Vt. 2016), Fannie Mae urges us to abandon our holding in *Johnson*, arguing that we

misunderstood the effect of a dismissal with prejudice on subsequent foreclosure actions. Specifically, Fannie Mae argues that if the dismissal with prejudice in the 2011 action operates as an adjudication on the merits, *see supra* ¶ 17, then it was necessarily an adjudication in favor of the Deschaines, which requires us to treat the judgment of dismissal as if the court had determined that Fannie Mae failed to prove the elements of foreclosure, including default. *See Greenleaf*, 2014 ME 89, ¶ 18, 96 A.3d 700 (listing the elements of proof to obtain a foreclosure judgment). Fannie Mae goes on to argue that under the loan documents a default is a condition precedent to acceleration, and so contrary to our holding in *Johnson*, which also involved a note where acceleration arose from a default, 1997 ME 220, ¶¶ 3, 8, 704 A.2d 866, the effect of the dismissal with prejudice was to invalidate the attempted acceleration because in effect the court determined that the Deschaines were not in default. *See Cenlar FSB*, 151 A.3d at 787–88. Fannie Mae argues that absent a prior adjudication of default or an effective acceleration, it remains free to file a new claim for foreclosure based on defaults that have allegedly occurred since the dismissal was entered, because those new grounds for foreclosure could not have been litigated in the 2011 action.

[¶ 31] We are not persuaded by Fannie Mae's challenges to *Johnson*'s continuing vitality. In a statement of material fact, Fannie Mae itself asserted—and the Deschaines admitted—that the Deschaines "failed to cure the default" that was the basis for the 2011 action. To the extent that Fannie Mae now argues that the dismissal with prejudice means that the Deschaines were not, in fact, in default, thereby rendering acceleration ineffective, its argument does not carry the day. Although the dismissal with prejudice in the 2011 action *operates* as an adjudication on the merits for purposes of res judicata, *see Johnson*, 1997 ME 220, ¶¶ 3, 8, 704 A.2d 866, that dismissal was not *actually* an adjudication in favor of the Deschaines, but rather resulted from both parties' failure to comply with a scheduling order, *see Cope*, 2017 ME 68, ¶ 18, 158 A.3d 931 ("A dismissal with prejudice imposed as a sanction is not an adjudication of the merits of a plaintiff's claim. Rather, the imposition of a sanction represents the court's determination of a collateral issue: whether the party or attorney has abused the judicial process." (alteration and quotation marks omitted)). The dismissal with prejudice therefore does not undermine the undisputed facts in the summary judgment record demonstrating that, as we have concluded, *see supra* ¶ 23, the conditions ***241** precedent to acceleration—including default—were satisfied in the 2011 action. Further, because acceleration is entirely *the lender's* prerogative and occurs upon the filing of a foreclosure complaint, *see supra* ¶¶ 26–27, it does not depend on any judicial imprimatur in the form of a judgment in the lender's favor.

[¶ 32] Fannie Mae also contends that adherence to *Johnson* will result in a windfall to the Deschaines—namely a "free," or deeply discounted, house—and that this consequence is disproportionate to the bank's procedural default in the 2011 action.

[¶ 33] We disagree. To the contrary, abandoning our analysis in *Johnson* would result in a windfall to *Fannie Mae* and all other similarly situated mortgagees because those parties would become entitled to commence successive foreclosure actions indefinitely until they eventually win. In other words, mortgagees would be treated differently from all or most other litigants in other types of cases. We have held that a judgment entered for the defendant based on a procedural aspect of the case, such as the statute of limitations or some other grounds unrelated to the substance of the claim, bars another effort by the plaintiff to obtain the same relief from the same defendant. *See Hebron Acad., Inc. v. Town of Hebron*, 2013 ME 15, ¶¶ 29–30, 60 A.3d 774 (concluding that a municipal decision denying a tax abatement request based on the applicant's failure to meet a statute of limitations "was a decision on the merits for res judicata purposes" and barred a future declaratory judgment action concerning the tax status of the property); *Spickler v. Dube*, 644 A.2d 465, 467–68 (Me. 1994) (concluding that an involuntary dismissal for want of prosecution of a shareholders' derivative suit "serve[d] as a valid final judgment for the purposes of *res judicata*" and barred relitigation of the same cause of action). The salutary purposes supporting the doctrine of claim preclusion—to promote judicial economy, and to conserve the resources of the courts and litigants by protecting them from sequential, piecemeal litigation, *see Wilmington Tr. Co.*, 2013 ME 94, ¶ 6, 81 A.3d 371—are as relevant and important in foreclosure litigation as in other areas of the law. We find no persuasive justification for carving out an exception to the settled doctrine of claim preclusion that would protect mortgagees from the adverse consequences of judgments dismissing their complaints with prejudice, particularly when unsuccessful litigants in all other categories of civil litigation would continue to be barred from relitigating their claims.[9]

[¶ 34] Further, our recent decisions contain multiple examples of proceedings—not at all unlike the case at bar—where mortgagees have failed to abide by court orders and established rules of court procedure, resulting in dismissals of their complaints. *See, e.g., United States Bank v. Sawyer*, 2014 ME 81, ¶¶ 12–13, 17, 95 A.3d 608; *Bayview Loan Servicing v. Bartlett*, 2014 ME 37, ¶ 15–18, 22–23, 87 A.3d 741; ***242** *Bank of N.Y. v. Richardson*, 2011 ME 38, ¶¶ 2–6, 15 A.3d 756; *Johnson*, 1997 ME 220, ¶¶ 3, 8, 704 A.2d 866; *cf. also Homeward Residential, Inc. v. Gregor*, 2015 ME 108, ¶¶ 13–14, 21, 24, 122 A.3d 947. If we were to shield mortgagees and their attorneys from the preclusive effects of adverse judgments arising from deficient pretrial conduct, we would improperly tolerate and perhaps even foster within that limited group of parties and counsel an inappropriately casual attitude toward the processes necessary for the prompt, orderly, and fair administration of justice. *See Cenlar FSB*, 151 A.3d at 796 (Dooley, J., dissenting) (stating that the "message" that should be sent to mortgagees and counsel who engage in unacceptable litigation practices "should not be that they may file foreclosure action after foreclosure action until they finally win"); M. Wachspress, et al., Comment, *In Defense of*

"Free Houses," 125 Yale L.J. 1115, 116 (2016) (stating that application of principles of res judicata in foreclosure cases will "provide[ ] a necessary market-correcting incentive to promote greater responsibility among foreclosure litigators").

[¶ 35] For these reasons, we reaffirm our analysis in *Johnson* as good and settled law, and conclude that because Fannie Mae exercised its right to accelerate, the promissory note became "indivisible" and the Deschaines' obligation to pay each monthly installment of principal and interest over the life of the note merged into a unitary obligation to pay the entire debt. 1997 ME 220, ¶ 8, 704 A.2d 866. Contrary to Fannie Mae's contention, there could be no new breaches of the Deschaines' obligations following acceleration because, once the contract became unified as a result of that acceleration, the Deschaines did not have any continuing responsibility to make monthly installment payments.[10] Fannie Mae "cannot avoid the consequences of [its] procedural default" by alleging *grounds* for foreclosure that are different from those alleged in the 2011 action—in other words, by "attempting to divide a contract which became indivisible when [it] accelerated the debt in the first lawsuit." *Johnson*, 1997 ME 220, ¶ 8, 704 A.2d 866.

[¶ 36] Consequently, the matters presented for decision in the present foreclosure action were or might have been litigated in the 2011 action because in each case Fannie Mae sought "redress for the same basic wrong," *see Wilmington Tr. Co.*, 2013 ME 94, ¶¶ 7–8, 81 A.3d 371, and—as explicitly stated in both its 2011 and 2013 complaints—requested precisely the same form of relief: a judgment of foreclosure for "the entire outstanding principal amount, accrued interest thereon, and all other sums due under the [l]oan [d]ocuments." The third element of res judicata is therefore satisfied.

III. CONCLUSION

[¶ 37] In sum, based on the application of the principles articulated in *Johnson* to the undisputed facts of this case, Fannie Mae's 2013 foreclosure complaint is barred by the judgment dismissing with prejudice its 2011 complaint. The court therefore did not err by granting the Deschaines' motion for summary judgment on Fannie Mae's foreclosure complaint. Additionally, because Fannie Mae is precluded from seeking to recover the underlying debt on the note, the court did not err by concluding, ***243** based on 14 M.R.S. § 6206, that the Deschaines were, as a matter of law, entitled to a judgment declaring that they hold title to the Lincoln property unencumbered by the mortgage in favor of Fannie Mae.

The entry is:

Judgment affirmed.

All Citations

170 A.3d 230, 2017 ME 190

Footnotes

1 Amicus briefs have been filed by National Consumer Law Center, National Association of Consumer Advocates, Jerome Frank Legal Services Corporation, and Maine Attorneys Saving Homes; Maine Bankers Association and The National Mortgage Bankers Association; Pine Tree Legal Assistance; Gerald F. Petruccelli; and Doonan, Graves & Longoria, LLC. *See* M.R. App. P. 9(e).

2 Later, in April 2011, the United States Bankruptcy Court for the District of Maine (*Haines, J.*) granted the Deschaines' petition for a discharge in bankruptcy pursuant to 11 U.S.C.S. § 727 (LEXIS through Pub. L. No. 115–50). As a result of the discharge, the Deschaines can no longer be held personally liable for their obligations under the note and mortgage. *See* 11 U.S.C.S. § 524(a)(1) (LEXIS through Pub. L. No. 115–51) (stating that a discharge in a Chapter 7 bankruptcy "voids any judgment any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged"). Because a discharge in bankruptcy does not extinguish a valid lien on a property, however, that discharge does not preclude Fannie Mae from enforcing its security interest in an *in rem* foreclosure proceeding. *See Johnson v. Home State Bank*, 501 U.S. 78, 82–84, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991) ("[A] discharge [in a Chapter 7 liquidation] extinguishes *only* the personal liability of the debtor.... [A] creditor's right to foreclose on the mortgage survives or passes through the bankruptcy." (citations and quotation marks omitted)); *New Eng. Merchs. Nat'l Bank v. Herron*, 243 A.2d 722, 726 (Me. 1968).

3 The amended complaint named 21st Mortgage Corporation as a party-in-interest because it allegedly holds a junior interest in the mortgaged property. *See* 14 M.R.S. § 6321 (2013), *amended by* P.L. 2013, ch. 555, § 2 (effective Aug. 1, 2014); P.L. 2015, ch. 229, § 1 (effective October 15, 2015). That entity did not participate in either the trial court proceedings or this appeal.

4 In its summary of the issues on appeal, Fannie Mae also states as an issue that the court erred by concluding that its claims to enforce an equitable mortgage and for unjust

enrichment were precluded as a matter of law. Because Fannie Mae fails to develop that issue in its brief, we do not address it. *See Bayview Loan Servicing v. Bartlett, LLC*, 2014 ME 37, ¶ 15 n.5, 87 A.3d 741 (stating that a party waives any argument that it fails to adequately develop in briefing). Fannie Mae does not argue that the court erred by denying its cross-motion for summary judgment on its foreclosure claim. Rather, Fannie Mae argues that it should "be allowed to *proceed* on its foreclosure claim"—in other words, it argues the court did *not* err by denying its summary judgment motion, which, if granted, would have precluded a trial. (Emphasis added.) Our discussion is therefore limited to whether the court erred by granting the Deschaines' motion for summary judgment on Fannie Mae's foreclosure complaint and on their counterclaims. *See Thurston v. Galvin*, 2014 ME 76, ¶ 5 n.1, 94 A.3d 16 (stating that an issue not raised on appeal is deemed waived).

5 In contrast, issue preclusion "merely prevents the reopening in a second action of an issue of fact actually litigated and decided in an earlier case." *Johnson v. Samson Constr. Corp.*, 1997 ME 220, ¶ 6, 704 A.2d 866 (quotation marks omitted). Because the question here is whether the 2011 action prohibits the relitigation of *an entire cause of action*—namely, Fannie Mae's claim for residential foreclosure—and is not limited to a single issue of fact, *see id.*, we address only the claim preclusion component of res judicata.

6 Any assertion to the contrary would have been unavailing in any event. Fannie Mae may not now collaterally attack the earlier judgment of dismissal with prejudice (i.e., on the merits) based on its alleged lack of standing in the 2011 action in an attempt to render that judgment void or limit its preclusive effect, because Fannie Mae failed to raise the standing issue during those earlier trial court proceedings or through a timely appeal from the dismissal. *Cf. Wells Fargo Bank v. White*, 2015 ME 145, ¶¶ 10–13, 127 A.3d 538 (holding that the court did not err or abuse its discretion by denying a plaintiff's M.R. Civ. P. 60(b)(4) request for relief from a judgment of foreclosure based on the plaintiff's contention that the judgment was void for want of standing, because the plaintiff had the opportunity to raise the standing issue during the trial court proceedings but did not do so).

7 We note that according to its own complaint, filed in December 2011, Fannie Mae alleged that the principal balance alone that was due from the Deschaines exceeded $122,000, in contrast to the $7,719.33 required to cure the default as stated in the notice of default issued by Fannie Mae only one month earlier.

8 This case is therefore distinguishable from *Wilmington Trust Co. v. Sullivan–Thorne*, where we concluded that the summary judgment record did not establish that the mortgagee had accelerated a promissory note in previous litigation between the parties.

2013 ME 94, ¶ 12 n.4, 81 A.3d 371. In the first action, the mortgagee merely sent the mortgagor a notice stating that it would accelerate the debt if the mortgagee failed to cure the default, but did not actually commence a foreclosure proceeding carrying out that threatened action. *See id.* ¶¶ 3–4, 12 n.4. Rather, the mortgagee, which the mortgagor brought in as a third-party defendant, filed a counterclaim against the mortgagor, but the counterclaim did not clearly place the full unpaid principal balance at issue and also was not a claim for foreclosure. *See id.* ¶¶ 4, 11–12. We stated that *Johnson* did not bar the mortgagee from bringing the later foreclosure action because the underlying debt had not been accelerated. *Id.* ¶ 12 n.4.

9 We note that a mortgagee is not without an opportunity to avoid, where appropriate, the preclusive effect of the judgment that would dismiss with prejudice a foreclosure complaint as a sanction for the mortgagee's misconduct. For example, the mortgagee is entitled to notice and an opportunity to be heard before a court considers entering such a judgment, which should define the terms of the dismissal so that the scope and effect of that order will be clear to the parties, to us, and to courts addressing any subsequent attempt to relitigate a particular claim. *See Green Tree Servicing, LLC v. Cope*, 2017 ME 68, ¶¶ 20–22, 158 A.3d 931. Additionally, a mortgagee may also seek appellate relief from the terms of a judgment of dismissal with prejudice that it contends are oppressive—something Fannie Mae did not do after the court dismissed its 2011 complaint.

10 In *Wilmington*, we concluded that a second action on the same note and mortgage was not precluded, in part because the mortgagor sought to recover for breaches that were not at issue in a prior action. 2013 ME 94, ¶ 12, 81 A.3d 371. There, however, the mortgagor had not accelerated the debt in the prior action, *see supra* n.8, and so the contract had not become unified.

175 A.3d 103
Supreme Judicial Court of Maine.

Heidi M. PUSHARD et al.
v.
BANK OF AMERICA, N.A.

Docket: BCD–16–247
|
Argued: February 7, 2017
|
Decided: December 12, 2017

Synopsis

Background: Mortgagors brought declaratory judgment action against mortgagee, alleging they owed noting on the note and seeking a discharge of the mortgage, and an order enjoining the mortgagee from enforcing the note and mortgage and to compel it to record a release of mortgage, as well as asserting a claim for slander of title, and mortgagee counterclaimed for breach of contract, unjust enrichment, and declaratory judgment. The Business and Consumer Court, Cumberland County, A.M. Horton, J., 2016 WL 3509467, entered summary judgment in favor of mortgagee on mortgagors' claims for slander of title, damages, and injunctive relief. Mortgagors appealed.

Holdings: The Supreme Judicial Court, Humphrey, J., held that:

mortgagors' claims against mortgagee for declaratory and injunctive relief presented a justiciable controversy;

judgment in favor of mortgagors on mortgagee's prior foreclosure action did not mean that mortgagors fully performed under the note and mortgage, as required to hold mortgagee liable for damages based on a failure to record a release of mortgage;

EXHIBIT E

no evidence existed to demonstrate that mortgagee failed to discharge mortgage with malice or disregard of the falsity of the encumbrance, as required to support slander of title claim; but

mortgagors were entitled to a declaration that the note and mortgage were unenforceable, and that they held title to the property free and clear of the mortgagee's mortgage encumbrance.

Affirmed in part, vacated in part, and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

***106** Joshua Klein–Golden, Esq. (orally), Clifford & Golden, PA, Lisbon Falls, for appellants Heidi M. Pushard and Jeffrey A. Pushard

John J. Aromando, Esq., and Catherine R. Connors, Esq., Pierce Atwood LLP, Portland, and Elizabeth P. Papez, Esq. (orally), Winston & Strawn LLP, Washington, D.C., for appellee Bank of America, N.A.
Panel: ALEXANDER, MEAD, GORMAN, JABAR, HJELM, and HUMPHREY, JJ.

Opinion

HUMPHREY, J.

[¶ 1] Heidi M. Pushard and Jeffrey A. Pushard appeal from summary judgments entered in the Business and Consumer Docket (*Horton, J.*) in favor of Bank of America, N.A. (the Bank), on the Pushards' claims against the Bank for declaratory and injunctive relief, slander of title, and damages pursuant to 33 M.R.S. § 551 (2016). We do not disturb the judgments on the Pushards' claims for slander of title, damages pursuant to section 551, and injunctive relief. We vacate the judgment on the Pushards' claim for declaratory relief and remand the case for entry of summary judgment in the Pushards' favor on that claim.

I. BACKGROUND

[¶ 2] In October 2011, the Bank initiated a foreclosure action against the Pushards in the Superior Court (Androscoggin County, *MG Kennedy, J.*). In its amended complaint, filed in May 2013, the Bank made the following allegations:

- In December 2006, the Pushards executed a promissory note in favor of Countrywide Home Loans, Inc., *107 (Countrywide) in the amount of $145,000.

- As security for the note, the Pushards executed a mortgage on their property in Wales in favor of Mortgage Electronic Registration Systems, Inc. (MERS), "as nominee for" Countrywide.

- The Pushards failed to make the monthly mortgage payment due on April 1, 2008, and have failed to make all subsequent monthly mortgage payments.

- In 2008, MERS assigned the mortgage to Countrywide. In 2011, Countrywide assigned the mortgage to the Bank.

- The Bank became the holder of the promissory note.

- In May 2011, the Bank sent the Pushards notice of their default and of their right to cure the default "in conformity with Maine law." The Pushards received the notice in June 2011.

- The amount due "[a]s of September 6, 2011," was $191,717.91, including the "principal balance" of $142,882.25, an "escrow balance," interest, fees, and late charges.

[¶ 3] The Bank sought judicial foreclosure of the Pushards' mortgage.[1] Among other documents attached to its complaint, the Bank included copies of the note and the mortgage. Included in the note was a provision stating:

> If [the Pushards are] in default, the Note Holder may send [them] a written notice telling [them] that if [they] do not pay the overdue amount by a certain date, the Note Holder may require [them] to pay immediately the full amount of Principal which has not been paid and all the interest that [they] owe on that amount.

The mortgage contained a provision stating that the lender

> may require that [the Pushards] pay immediately the entire amount then remaining unpaid under the Note and under this Security Instrument ... if all of the following conditions are met:
>
> (a) [The Pushards] fail to keep any promise or agreement made in this Security Instrument, including the promises to pay when due the Sums Secured;
>
> (b) Lender sends to [the Pushards] ... a notice that [meets various requirements]; ... and

(c) [The Pushards] do not correct the default stated in the notice from Lender by the date stated in that notice.

[¶ 4] After a trial on the Bank's foreclosure complaint, the court entered a judgment in the Pushards' favor in October 2014. The court determined that the Bank had failed to meet its burden to prove three of the eight elements of a foreclosure action: (1) a breach of a condition of the mortgage; (2) the amount due; and (3) that the notice of default that it sent to the Pushards complied with statutory requirements.[2] *See* ***108** *Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶ 18, 96 A.3d 700 ("A plaintiff seeking a foreclosure judgment must comply strictly with all steps required by statute.") (quotation marks omitted). Neither the Bank nor the Pushards appealed from the judgment.

[¶ 5] Five months later, in March 2015, the Pushards initiated the action giving rise to this appeal.[3] In an amended complaint, based on the judgment in their favor in the Bank's foreclosure action and the Bank's failure to subsequently discharge the mortgage, the Pushards averred that they owe nothing on the note and sought a declaration that they are entitled to (1) a discharge of the mortgage and (2) an order enjoining the Bank from enforcing the note and mortgage and compelling the Bank to record a release of the mortgage. They also asserted a claim for slander of title, alleging that the Bank's failure to discharge the mortgage prevents them from transferring clean title to the property or using it as collateral, and a claim for damages pursuant to 33 M.R.S. § 551.[4] The Bank counterclaimed for breach of contract, unjust enrichment, and a declaratory judgment.

[¶ 6] The Pushards moved for summary judgment on all of their claims. *See* M.R. Civ. P. 56(a). In their statement of material facts, *see* M.R. Civ. P. 56(h)(2), they described, with reference to supporting evidence, the procedural history and outcome of the Bank's foreclosure action. Specifically, the Pushards asserted that (1) the Bank had "sought the entire amount due on the note and foreclosure of the mortgage"; (2) the court had entered a judgment in the Pushards' favor; and (3) the Bank had not thereafter discharged the mortgage.

[¶ 7] In its opposition to the Pushards' motion, the Bank effectively admitted all of the Pushards' stated facts.[5] The Bank submitted an opposing statement of material facts in which it asserted, with references to supporting evidence, that the Pushards had not made mortgage, tax, or insurance payments on the property since 2008. The Bank also filed its own motion for summary judgment on the Pushards' claims.[6]

[¶ 8] The Pushards filed an opposing statement of material facts in response to the Bank's motion for summary judgment. They did not properly controvert the Bank's statements that they

had not made mortgage, tax, or insurance payments since 2008. *See* M.R. Civ. P. 56(h)(2), (4); *Halliday v. Henry*, 2015 ME 61, ¶ 7, 116 A.3d 1270.

[¶ 9] After a hearing, by order dated March 15, 2016, the court concluded that the Bank was entitled to a judgment as a matter of law on each of the Pushards' ***109** claims. *See* M.R. Civ. P. 56(c). The court therefore denied the Pushards' motion for summary judgment and granted the Bank's motion for summary judgment. After the Bank's counterclaims were dismissed without prejudice by consent of the parties, the Pushards filed this timely appeal from the judgment in the Bank's favor. 14 M.R.S. § 1851 (2016); M.R. App. P. 2(b)(3) (Tower 2016).[7]

II. DISCUSSION

A. Justiciability

[¶ 10] As a preliminary matter, the Bank argues that the Pushards' claims are nonjusticiable because resolution of those claims involves examining the res judicata effect of the judgment in the foreclosure action and no subsequent foreclosure action has been filed.

[¶ 11] "Courts can only decide cases before them that involve justiciable controversies." *Homeward Residential, Inc. v. Gregor*, 2015 ME 108, ¶ 16, 122 A.3d 947 (quotation marks omitted). "Justiciability requires a real and substantial controversy, admitting of specific relief through a judgment of conclusive character." *Id.* (quotation marks omitted). "A justiciable controversy involves a claim of present and fixed rights based upon an existing state of facts. Accordingly, rights must be declared upon the existing state of facts and not upon a state of facts that may or may not arise in the future." *Madore v. Me. Land Use Regulation Comm'n*, 1998 ME 178, ¶ 7, 715 A.2d 157 (quotation marks omitted).

[¶ 12] The Bank relies on our decisions in recent cases in which the parties disputed whether a judgment in the mortgagor's favor would bar a future foreclosure action based on principles of res judicata, but in each case we concluded that that issue did not present a justiciable controversy because no second action had yet been filed. *See U.S. Bank, N.A. v. Tannenbaum*, 2015 ME 141, ¶ 6 n.3, 126 A.3d 734; *Wells Fargo Bank, N.A. v. Girouard*, 2015 ME 116, ¶ 10, 123 A.3d 216.[8] Our holdings in those cases do not determine the result here because this case comes to us in a different posture. Although, as in *Girouard* and *Tannenbaum*, the Bank has not filed a second foreclosure action, there does exist a second action—the Pushards' action against the Bank—that presents a live controversy. As the trial court recognized, the Pushards' claims

are "not contingent upon the occurrence of any future event," and "even if the Bank were content to do nothing to enforce the loan, the mortgage remains on record in the registry of deeds as a present encumbrance on the Pushards' property." The Pushards have claimed that they are entitled to relief based on "the existing state of facts." *Madore*, 1998 ME 178, ¶ 7, 715 A.2d 157 (quotation marks omitted). We therefore conclude that the Pushards' claims present a justiciable controversy and turn to the merits of their appeal. *See Mass. Delivery Ass'n v. Coakley*, 769 F.3d 11, 16 (1st Cir. 2014); *Annable v. Bd. of Envtl. Prot.*, 507 A.2d 592, 595 (Me. 1986); *Me. Sugar Indus. v. Me. Indus. Bldg. Auth.*, 264 A.2d 1, 4–5 (Me. 1970).

***110** B. Summary Judgments

[¶ 13] "We review a [trial court's] ruling on cross-motions for summary judgment de novo, considering the properly presented evidence and any reasonable inferences that may be drawn therefrom in the light most favorable to the nonprevailing party, in order to determine whether there is a genuine issue of material fact and whether any party is entitled to a judgment as a matter of law." *Estate of Frost*, 2016 ME 132, ¶ 15, 146 A.3d 118; *see* M.R. Civ. P. 56(c). "Cross motions for summary judgment neither alter the basic Rule 56 standard, nor warrant the grant of summary judgment per se." *Remmes v. Mark Travel Corp.*, 2015 ME 63, ¶ 19, 116 A.3d 466 (quotation marks omitted). "When the material facts are not in dispute, we review de novo the trial court's interpretation and application of the relevant statutes and legal concepts." *Id.*

[¶ 14] The Pushards argue that the court erred by granting the Bank's motion for summary judgment and that they are entitled to judgments as a matter of law on all four of their claims against the Bank. They contend that any future action by the Bank to recover on the note and the mortgage would be barred by principles of res judicata, the note and mortgage are therefore unenforceable, and as a result the mortgage must be discharged. We first address their section 551 and slander-of-title claims and conclude, without needing to address the res judicata effects of the judgment in the foreclosure action, that the court correctly entered summary judgments in the Bank's favor on those claims. We then turn to the claims for declaratory and injunctive relief.

1. Section 551

[¶ 15] Title 33 M.R.S. § 551 provides that a mortgagee is "liable to an aggrieved party for damages" if the mortgagee fails to record a release of the mortgage "[w]ithin 60 days after full performance of the conditions of the mortgage." The Pushards argue that the judgment in their

favor on the Bank's foreclosure action means that their "performance under the note and mortgage was *effectively* fully performed." (Emphasis added.) We are not persuaded.

[¶ 16] Because the Pushards did not properly controvert the Bank's statement that they have failed to make monthly mortgage payments since the spring of 2008, that fact is deemed admitted. *See* M.R. Civ. P. 56(h)(2), (4). In order for the Pushards to be entitled to relief pursuant to section 551, therefore, we would need to hold that they have "full[y] perform[ed] ... the conditions of the mortgage," 33 M.R.S. § 551, even though they have not made monthly payments as required by the mortgage. This would be an illogical result. *See MaineToday Media, Inc. v. State*, 2013 ME 100, ¶ 6, 82 A.3d 104 ("[W]e interpret [statutory] provisions according to their unambiguous meaning unless the result is illogical or absurd.") (quotation marks omitted). The judgment in the Pushards' favor in the Bank's foreclosure action established that the Bank was not entitled to a foreclosure judgment; it did not establish that the Pushards had fully performed the conditions of the mortgage. The trial court did not err by granting the Bank's motion for summary judgment on the Pushards' section 551 claim.

2. Slander of Title

[¶ 17] The Pushards' argument regarding their claim for slander of title also warrants little discussion. In order to succeed on that claim, the Pushards would need to prove that "(1) there was a publication of a slanderous statement disparaging [their] title; (2) the statement was ***111** false; (3) the statement was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages." *Harvey v. Furrow*, 2014 ME 149, ¶ 25, 107 A.3d 604 (quotation marks omitted). The Pushards argue that the "continued publication without a discharge" of the mortgage "constitutes a false publication of a slanderous statement disparaging [their] title." Even if we were to assume that the undischarged mortgage constitutes a "slanderous statement" that was "false" and that "the statement caused actual or special damages," there is nothing in the summary judgment record that could induce a fact-finder to determine that the Bank failed to discharge the mortgage with malice or a "reckless disregard" of the "falsity" of the encumbrance. *Id.* (quotation marks omitted); *see Morgan v. Kooistra*, 2008 ME 26, ¶ 34, 941 A.2d 447; *Onat v. Penobscot Bay Med. Ctr.*, 574 A.2d 872, 874–75 (Me. 1990). We therefore do not disturb the court's entry of a summary judgment in the Bank's favor on the Pushards' slander-of-title claim.

3. Declaratory and Injunctive Relief

[¶ 18] In order to resolve the question of whether either party is entitled to a judgment on the Pushards' claims for declaratory and injunctive relief, we must examine the effect of the judgment in the Pushards' favor in the foreclosure action. The Pushards argue that any further action by the Bank to recover on the note or mortgage would be barred by principles of res judicata, that the Bank therefore has no enforceable legal interest in the note or the property designated as collateral according to the mortgage, and that the Bank therefore must discharge the mortgage to remove the unenforceable encumbrance on the property.

[¶ 19] "The doctrine of res judicata ... is a court-made collection of rules designed to ensure that the same matter will not be litigated more than once." *Beegan v. Schmidt*, 451 A.2d 642, 643–44 (Me. 1982). The term "res judicata" encompasses two different legal theories: claim preclusion, or "bar"; and issue preclusion, or "collateral estoppel." *Id.* at 644; *see Wilmington Tr. Co. v. Sullivan–Thorne*, 2013 ME 94, ¶ 7, 81 A.3d 371. Claim preclusion "prohibits relitigation of an entire 'cause of action' between the same parties or their privies, once a valid final judgment has been rendered in an earlier suit on the same cause of action"; and issue preclusion "prevents the reopening in a second action of an issue of fact actually litigated and decided in an earlier case." *Beegan*, 451 A.2d at 644; *see Macomber v. MacQuinn–Tweedie*, 2003 ME 121, ¶ 22, 834 A.2d 131 ("The collateral estoppel prong of res judicata is focused on factual issues, not claims ...."). Because the Pushards' argument depends on the legal effect of the Bank's unsuccessful foreclosure cause of action, as opposed to particular factual issues litigated in connection with that claim, the question here involves claim preclusion.

[¶ 20] "Claim preclusion bars the relitigation of claims if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been, litigated in the first action." *Sullivan–Thorne*, 2013 ME 94, ¶ 7, 81 A.3d 371 (quotation marks omitted). At issue in this case is the third element—whether, given the judgment in the foreclosure action, the Bank could bring an action on the note or mortgage other than one that would present matters that were, or might have been, ***112** litigated in the foreclosure action.[9] *See id.*

[¶ 21] To analyze this third element, we "examine whether the same cause of action was before the court in the prior case." *Id.* ¶ 8 (quotation marks omitted). We define the parameters of the phrase "cause of action" by applying a "transactional test, which examines the aggregate of connected operative facts that can be handled together conveniently for purposes of trial to determine if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong." *Id.* ¶ 8 (alteration omitted) (citation omitted) (quotation marks omitted).

[¶ 22] As we discussed in *Federal National Mortgage Ass'n v. Deschaine*, 2017 ME 190, ¶¶ 19–21, 170 A.3d 230, we previously addressed this element of claim preclusion in the context of a mortgage foreclosure in *Johnson v. Samson Construction Corp.*, 1997 ME 220, 704 A.2d 866. In *Johnson*, the trial court concluded that the mortgagee's second foreclosure action was precluded by the dismissal, with prejudice, of an earlier foreclosure action. *Id.* ¶¶ 3–8. In the earlier foreclosure action, the mortgagee, Johnson, had claimed he was entitled to the entire amount of the unpaid principal pursuant to the note's acceleration clause. *Id.* ¶¶ 3, 8. We affirmed the judgment, explaining that

> Johnson's first cause of action ... demanded payment of the entire unpaid principal balance. This suit was an action for the accelerated debt. Once Johnson triggered the acceleration clause of the note and the entire debt became due, the contract became indivisible. The obligations to pay each installment merged into one obligation to pay the entire balance on the note.... [The judgment in the first action] bars the complaint in this action which alleges precisely what the complaint in the first action alleged: that Samson defaulted on the note and that Johnson is entitled to a judgment for the amount due under the note. Johnson cannot avoid the consequences of his procedural default in this second lawsuit by attempting to divide a contract which became indivisible when he accelerated the debt in the first lawsuit.

Id. ¶ 8 (footnote omitted).[10]

[¶ 23] Recognizing the ramifications of our holding in *Johnson*, the Bank argues that our reasoning in that case does not apply here because it did not "effectively" trigger the acceleration clauses of the note and mortgage in its foreclosure action against the Pushards. The Bank relies principally on the language of 14 M.R.S. § 6111 and the acceleration clauses at issue. We are not persuaded by these arguments.

[¶ 24] It is helpful to review the ways in which acceleration clauses operate before we turn to the Bank's specific arguments. An acceleration clause is a "loan-agreement provision that requires the ***113** debtor to pay off the balance sooner than the due date if some specified event occurs, such as failure to pay an installment or to maintain insurance."[11] *Acceleration Clause*, Black's Law Dictionary (10th ed. 2014). "Automatic" acceleration clauses are self-executing and render the entire indebtedness due immediately upon some specified default; by contrast, where the acceleration clause is "optional," the lender must affirmatively exercise its option to declare the entire indebtedness due. *See Mullins v. IBCS Mining, Inc.*, No. 10-93-ART, 2011 WL 4715169 at *2–3, 2011 U.S. Dist. LEXIS 116083 at *6 (E.D. Ky. Oct. 6, 2011) ("The optional acceleration clause [gave the lender] the right, but not the obligation, to accelerate payments on

the Note."); *Snow v. Wells Fargo Bank, N.A.*, 156 So.3d 538, 541 (Fla. Dist. Ct. App. 2015); *Found. Prop. Invs., LLC v. CTP, LLC*, 286 Kan. 597, 186 P.3d 766, 771–72 (2008); Note, *Acceleration Clauses in Notes and Mortgages*, 88 U. Pa. L. Rev. 94, 95–96 (1939–40).

[¶ 25] An optional acceleration clause is therefore a bargained-for contract term that gives a lender, upon specified conditions such as the borrower's uncured default, the right to demand immediate payment of any remaining debt under the note and mortgage, including installment payments that would not otherwise have come due until a later date. An acceleration clause does not, on its own, entitle the lender to the sums to which it claims it has a legal right. Instead, it allows the lender to elect to hasten the due date of sums to which it is otherwise legally entitled.

[¶ 26] It has long been understood that it is the mortgagee's choice, or "election," whether—and when—to exercise its right under an optional acceleration clause. *See, e.g.*, *Me. Sav. Bank v. Chee*, 576 A.2d 1358, 1358 (Me. 1990) (referring to "*the Bank's election to exercise* the acceleration clause of a promissory note secured by the mortgage") (emphasis added); *Mitchell v. Fed. Land Bank*, 206 Ark. 253, 174 S.W.2d 671, 676 (1943) ("The *right to accelerate* the indebtedness is exercised by the unilateral act of the creditor ....") (emphasis added); Note, *Acceleration Clauses in Notes and Mortgages* at 95–98. In *Johnson*, for example, we repeatedly referred to the fact that it was the mortgagee who had the power to accelerate the debt—*he* "demanded payment of the entire unpaid principal balance," *he* "triggered the acceleration clause of the note and the entire debt became due," and *he* therefore "accelerated the debt in the first lawsuit." 1997 ME 220, ¶ 8, 704 A.2d 866.

[¶ 27] Bearing these principles in mind, we turn to the Bank's argument that it could not have triggered the acceleration clauses of the note and mortgage in the foreclosure action in this case. Title 14 M.R.S. § 6111 provides that, with respect to residential mortgages, a mortgagee "may not accelerate maturity of the unpaid balance of the obligation or otherwise enforce the mortgage because of a default" without first giving the mortgagor adequate notice of the default as described in the statute. The Bank relies on this statutory language to contend that because, as the foreclosure court determined, it failed to give adequate notice of the default, it could not "effectively accelerate" the debt ***114** in its foreclosure action.[12] Although section 6111 contains the term "accelerate," we conclude that the Legislature could not have intended for the statute to carry the meaning that the Bank propounds. *See Farris v. Libby*, 141 Me. 362, 365, 44 A.2d 216 (1945) ("[W]e must assume that the [L]egislature did not intend an absurd result ....").

[¶ 28] Compare, for example, the case at hand to a hypothetical case with identical facts except that the mortgagee sent to the mortgagor, and the mortgagor received, a notice of the default and right to cure that complied flawlessly with section 6111. After the mortgagor failed to cure the

default, the mortgagee initiated a foreclosure action in which it demanded, pursuant to an acceleration clause, immediate payment of the entire remaining balance on the note. After hearing evidence, the foreclosure court concluded that the mortgagee had not proved its claim and entered a judgment accordingly, because even though the mortgagee met its burden to prove that it had provided adequate notice of the default pursuant to section 6111, it failed to prove the amount due, or that a breach of condition of the mortgage had occurred, or one or more other substantive elements of proof in a foreclosure action. *See, e.g.*, *Greenleaf*, 2014 ME 89, ¶ 18, 96 A.3d 700.

[¶ 29] Plainly, the mortgagee in our hypothetical case could raise no argument that section 6111 prevented it from "effectively" triggering the acceleration clause, because that argument is based entirely on its own noncompliance with the statute. According to the Bank's logic, the hypothetical mortgagee *has* triggered the acceleration clause, placing in issue all of the contractual installments as one indivisible debt obligation, and a subsequent action to recover on the note and mortgage would be precluded by the judgment in the mortgagor's favor. In other words, the Bank's interpretation would mean that a mortgagee that loses on the merits in its foreclosure action based—even in part—on an inadequate notice of default has *not* triggered the acceleration clause and a subsequent action is not precluded. But if the same mortgagee had lost on the merits due only to a failure of proof on one or more other elements of its foreclosure action, a subsequent action on the note and mortgage *is* precluded.

[¶ 30] This would be an absurd result. We cannot hold that the *reason* for a mortgagee's loss on the merits in its foreclosure action is dispositive of whether the judgment precludes a subsequent action on the same debt. The Bank has provided no reason why the Legislature would have created such a distinction. We therefore interpret section 6111 as we have since we decided *Chase Home Finance LLC v. Higgins*, 2009 ME 136, ¶ 11, 985 A.2d 508, as setting forth a required element of proof in a foreclosure action by providing that a mortgagee must give notice in accordance with section 6111 in order to *obtain a foreclosure judgment*. *See, e.g.*, *Girouard*, 2015 ME 116, ¶¶ 7–8 & n.3, 123 A.3d 216. We do not interpret section 6111 as a prohibition on a mortgagee's choice to exercise an acceleration clause.

[¶ 31] The language of the acceleration clauses at issue here does not alter our conclusion. It is true, as the Bank points out, that the acceleration provisions at issue here are optional, unlike the automatic acceleration clause in *Johnson*. The Bank does not explain why this distinction ***115** matters to the issue presented here, however, nor is any significance evident to us. An optional acceleration clause that has been exercised is no different—legally—than a self-executing acceleration clause. The essential inquiry, in examining whether claim preclusion applies, is what the mortgagee chose to litigate—or could have litigated—in the first action. *See Sullivan*

Thorne, 2013 ME 94, ¶ 7, 81 A.3d 371. That the acceleration provisions here are optional does not change the fact that the Bank could have—and indeed did—exercise its option to put the entire remaining balance in issue in its foreclosure action, instead of simply demanding payment of past due amounts. When the Bank chose to do so, "the contract became indivisible" and "[t]he obligations to pay each installment merged into one obligation to pay the entire balance on the note." *Johnson*, 1997 ME 220, ¶ 8, 704 A.2d 866.[13]

[¶ 32] As we recently explained in *Deschaine*, the "filing of a foreclosure complaint constitutes a valid exercise of a mortgagee's acceleration right and is sufficient to provide notice to the mortgagor." *Deschaine*, 2017 ME 190, ¶ 26, 170 A.3d 230 (quotation marks omitted); *see also Sullivan–Thorne*, 2013 ME 94, ¶ 12 n.4, 81 A.3d 371; *Chee*, 576 A.2d at 1358 (concluding that "the allegations of the complaint constituted a sufficient pleading that acceleration [pursuant to an optional acceleration clause] had occurred"); *Strong v. Stoneham Co-op. Bank*, 357 Mass. 662, 260 N.E.2d 646, 649 (1970) ("[T]he commencement of an action before the tender of the amount due was one way in which [the] option [to declare the whole debt due] could be exercised.") (quotation marks omitted); *see also Nationstar Mortg., LLC v. Nelson*, No. 2:14-cv-00507-JDL, 2016 WL 5720710, at *4, 2016 U.S. Dist. LEXIS 136660, at *12-18 (D. Me. Oct. 3, 2016) (addressing the issue presented here and concluding that the mortgagee triggered the acceleration clause when it filed its foreclosure claim seeking the entire remaining balance due on the note); C.T. Drechsler, Annotation, *What is Essential to Exercise of Option to Accelerate Maturity of Bill or Note*, 5 A.L.R.2d 968, § 5a (2017) ("The institution of a suit for the whole debt is, of course, the most solemn form in which the holder can exercise his option."). As one court explained,

> the filing of suit for foreclosure amounts to exercise of the option of the mortgagee to declare the whole of the principal sum and interest secured by the mortgage due and payable. And the filing of suit to foreclose operates as notice to the mortgagor of the election to accelerate, where the election to do so is declared in the complaint ... or, in the absence of such declaration, where the complaint on its face shows that foreclosure for the entire mortgage indebtedness is sought therein.

Campbell v. Werner, 232 So.2d 252, 254 n.1 (Fla. Dist. Ct. App. 1970) (citations omitted).

[¶ 33] In sum, notwithstanding that the foreclosure court determined that the Bank failed to prove that its notice of default complied with section 6111, we conclude that the Bank triggered the acceleration clauses of the note and mortgage when it filed the foreclosure action demanding ***116** immediate payment of the entire remaining debt.

[¶ 34] Because this case is not distinguishable from *Johnson*, which settles the question of the res judicata consequence of the Bank's failure to prove its foreclosure claim, we must address the Bank's argument that we should revisit our holding in that case.

[¶ 35] As we explain in more detail in *Deschaine*, 2017 ME 190, ¶ 33, 170 A.3d 230, and for the reasons expressed in that opinion, an alteration of the approach we expressed in *Johnson* is not warranted because we identify no *legal* reason to adopt different res judicata rules for foreclosure cases than those that apply in every other type of case. Pursuant to *Johnson*, because the Bank failed to prove its claim to the unitary obligation that it placed in issue in the foreclosure action, it no longer has any enforceable interest in the note or in the property set up as security for the note, and the Pushards have no further obligation to make payments on the note. 1997 ME 220, ¶ 8, 704 A.2d 866; *see Deschaine*, 2017 ME 190, ¶ 35, 170 A.3d 230 ("[T]here could be no new breaches of the [mortgagors'] obligations following acceleration because, once the contract became unified as a result of that acceleration, the [mortgagors] did not have any continuing responsibility to make monthly installment payments.").

[¶ 36] Because the Bank is precluded from seeking to recover on the note or enforce the mortgage, the Pushards are entitled, as a matter of law, to the declaratory relief they seek. We therefore must vacate the judgment in the Bank's favor on the Pushards' claim for declaratory relief and remand the case to the trial court to enter a judgment declaring that the note and mortgage are unenforceable and that the Pushards hold title to their property free and clear of the Bank's mortgage encumbrance. *See Deschaine*, 2017 ME 190, ¶ 37, 170 A.3d 230.[14] Further, because a declaratory judgment "is a particularly efficacious method for quieting title to real property," *Welch v. State*, 2004 ME 84, ¶ 6 n.3, 853 A.2d 214 (quotation marks omitted), that can be recorded on the land records, we need not address the Pushards' claim for injunctive relief.

The entry is:

> Judgment in favor of the Bank on the Pushards' claim for declaratory relief is vacated. Remanded for entry of judgment in favor of Pushards consistent with this opinion. Judgment affirmed in all other respects.

All Citations

175 A.3d 103, 2017 ME 230

Footnotes

1 With regard to the Bank's standing, the court concluded that Countrywide's (and, therefore, the Bank's) ownership interest in the mortgage was not compromised by the assignment from MERS to Countrywide. The court determined that that assignment was superfluous because "Countrywide was the lender named on the note[ ] and in the mortgage" and "was thereby the mortgagee from the outset." It therefore distinguished the case from *Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶¶ 13–16, 96 A.3d 700, which we decided after the trial but before the court issued the judgment.

2 The Bank's notice of default was defective because it did not meet the requirements found in 14 M.R.S. § 6111 (2011).

3 The Pushards filed their initial complaint in the Superior Court (Androscoggin County). The case was transferred to the Business and Consumer Docket in May 2015.

4 Title 33 M.R.S. § 551 requires a mortgagee to record a valid and complete release of the mortgage "[w]ithin 60 days after full performance of the conditions of the mortgage," and provides that a mortgagee that violates this release provision is "liable to an aggrieved party for damages ...."

5 Although the Bank denied that it had "sought the entire amount due" on the note in the foreclosure action, because it did not provide a citation to the record in support of this denial, the fact is deemed admitted. *See* M.R. Civ. P. 56(h)(2), (4); *Halliday v. Henry*, 2015 ME 61, ¶ 7, 116 A.3d 1270.

6 The Bank captioned its motion as a "motion for judgment on the pleadings or, in the alternative, for summary judgment on plaintiffs' complaint." We treat it as a motion for summary judgments on the Pushards' claims. *See* M.R. Civ. P. 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [M.R. Civ. P.] 56 ....").

7 This appeal was commenced before September 1, 2017, and therefore the restyled Maine Rules of Appellate Procedure do not apply. *See* M.R. App. P. 1 (restyled Rule).

8 These cases are distinguishable from foreclosure cases in which a "court dismisses an action as a sanction for a plaintiff's misconduct" and must make clear the future effect of the order dismissing the case, including whether the judgment bars a subsequent action.

See Green Tree Servicing, LLC v. Cope, 2017 ME 68, ¶ 22, 158 A.3d 931.

9 The parties present no argument related to the first two elements of claim preclusion. We conclude that those elements are met here because the judgment in the Bank's foreclosure action was a final judgment on the merits and the issue raised by the Pushards' claims involves the same parties as the foreclosure action.

10 In 2008, the Supreme Court of Ohio held, similarly, that res judicata barred a third foreclosure action after the mortgagee voluntarily dismissed two prior actions, concluding that after acceleration "each missed payment under the promissory note and mortgage did not give rise to a new claim ...." *U.S. Bank Nat'l Ass'n. v. Gullotta*, 120 Ohio St.3d 399, 899 N.E.2d 987, 990 (2008).

11 "Acceleration" means, in general terms, the "act or process of quickening or shortening the duration of something, such as payments or other functional activities." *Acceleration*, Black's Law Dictionary (10th ed. 2014). More specifically, as applied in the context of a secured loan, acceleration means the "advancing of a loan agreement's maturity date so that payment of the entire debt is due immediately." *Id.*

12 The Bank does not explain what, according to its theory, *would* trigger an acceleration clause.

13 We also do not see the relevance of the note's provision, highlighted by the Bank, stating that "[e]ven if, at a time when [the Pushards are] in default, the Note Holder *does not require [them] to pay immediately in full* as described above, the Note Holder will still have the right to do so if [they are] in default at a later time." (Emphasis added.) This anti-waiver provision does not inform the inquiry here because the Bank *did* require payment immediately in full in the foreclosure action.

14 Because the Bank's counterclaim for unjust enrichment was dismissed without prejudice and is not before us, we do not address any issues regarding the justiciability or merit of that claim, nor the availability of any process pursuant to M.R. Civ. P. 4A or 4B. *See, e.g.*, *Girouard*, 2015 ME 116, ¶ 10, 123 A.3d 216.

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STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

NOTICE OF INVITATION TO FILE AMICUS BRIEFS

Law Court invites amicus briefs on whether the dismissal with prejudice of a foreclosure action bars a second foreclosure action based on the same note and mortgage

The Maine Supreme Judicial Court, sitting as the Law Court, invites briefs of amici curiae in the appeal of *Federal National Mortgage Association v. Patricia W. Deschaine et al.,* Law Court docket number Pen-16-316. The issue involves the effect of res judicata principles on a second foreclosure action after a mortgagee's first foreclosure action is dismissed with prejudice. The parties' briefs, the appendix, and two motions of non-profit organizations to participate as amici are available on the Court's website at www.courts.maine.gov/quick/deschaine.

An amicus brief may be filed by or on behalf of any individual, entity, or group of individuals and/or entities without separate leave of the Court. Any amicus brief must be filed on or before **March 29, 2017.** An amicus

brief must be filed at the address listed below, and must comply with M.R. App. P. 7(c), 9(e)(1), and 9(f). In addition to filing and serving the required number of copies, any amicus must send a copy of the brief electronically, as a single "native" or text-based .pdf file, to lawcourt.clerk@courts.maine.gov.

Dated: March 1, 2017

Matthew Pollack
Clerk of the Law Court
205 Newbury Street Room 139
Portland, Maine 04101
(207) 822-4146
lawcourt.clerk@courts.maine.gov

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. PEN-16-316

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Plaintiff-Appellant

v.

PATRICIA W. DESCHAINE,
PAUL J. DESCHAINE

Defendants- Appellees

On Appeal from Maine Superior Court (Penobscot)
Docket No.: BANSC-RE-2013-00140

AMICI BRIEF OF THE MAINE BANKERS ASSOCIATION AND THE NATIONAL MORTGAGE BANKERS ASSOCIATION

Catherine R. Connors, Bar No. 3400
cconnors@pierceatwood.com
John J. Aromando, Bar No. 3099
jaromando@pierceatwood.com
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
(207) 791-1100

Attorneys for Maine Bankers Association and The National Mortgage Bankers Association

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STATEMENT OF INTEREST

The Maine Bankers Association (MBA), founded in 1893, represents Maine's banking industry and its 9000 employees statewide. Maine's 31 retail banks operate 485 offices in nearly every community throughout the state, where they assist Maine's citizens and businesses with financial decisions that improve the quality of life for everyone. With assets exceeding $29 billion, the Maine banking industry is the economic engine for our state.

The National Mortgage Bankers Association (NMBA) is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community nationwide. The NMBA works to ensure the continued strength of the Nation's residential and commercial real estate markets, and to expand homeownership and extend access to affordable housing to all Americans. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage lending field. The national home-lending market comprises a vast network of transactions involving a diverse array of services and service providers. That market facilitates homeownership for approximately 48 million American families and accounts for more than ten percent of gross domestic product, with outstanding home loans totaling more than ten trillion dollars nationwide.

Amici file this brief because its member financial institutions hold residential mortgages on many properties in Maine and stand to be directly affected by this Court's decision in this matter, as will the entire residential mortgage industry. In the interest of their members and the consumers they serve, the MBA and NMBA appreciate the opportunity to respond to the Court's request for our views on the important issue raised in this case.

As of December 31, 2016, the 27 member banks of the MBA headquartered in Maine held a combined total of $9.1 billion in mortgages and home equity loans. The issue before the Court affects each of these banks because it relates to the health of Maine's banking industry, the ability to provide mortgages at reasonable cost to residential property owners, and the alienability of property in the State.

These aspects of Maine's economy would all adversely be affected if the Appellees' position is accepted by this Court and a dismissal with prejudice of a residential foreclosure action is held to preclude further enforcement of the mortgage based on subsequent defaults, and further, to discharge the mortgage, even when there has been no full satisfaction of the mortgage. Any potential claim for unjust enrichment or similar cause of action against the defaulting mortgagor, even if legally viable, would be an inadequate substitute for the right to foreclose on the mortgage. The resulting lack of clarity as to the status of property would have the adverse effects noted above, hampering access to credit, reducing the alienability of Maine real property, and undermining a significant engine of the Maine economy. As discussed

below, neither existing statutory law nor Court-established res judicata principles require such undesirable consequences.

STATEMENT OF THE ISSUE PRESENTED

Does dismissal with prejudice of a statutory residential foreclosure action bar a subsequent foreclosure action based on the same note and mortgage?

As discussed below, with respect to residential mortgages, a subsequent foreclosure action based on defaults occurring after the unsuccessful conclusion of an earlier foreclosure action is not barred by the outcome of the earlier action.[1]

[1] This brief does not address the application of res judicata principles in the context of commercial loans, a question not presented by this appeal.

SUMMARY OF ARGUMENT

Res judicata principles are court-made, crafted by the Court in light of specific circumstances, including the statutory context in which the principles are to be applied. Under the Maine common law of contracts, each failure to make an individual payment under an installment contract generates a separate cause of action, and thus is conceptually a separate transaction for claim preclusion purposes. An exception to this general rule can arise if the contract includes an acceleration clause, but in the residential mortgage context, no such acceleration can occur automatically, whatever the language of the contract. The Legislature has enacted a series of statutory provisions that postpone acceleration and encourage "deceleration" until after a judgment is issued in favor of the mortgagee in an accelerated amount, the redemption period has passed, and the property is sold. Typically, these mortgages also include a reinstatement clause, contractually providing for "deceleration" as well. Given these circumstances, with lack of finality unless or until the lender obtains a judgment in the accelerated amount and the property is sold, in the event an initial foreclosure action fails, res judicata principles should not bar a later foreclosure action based on breaches independent and subsequent to those upon which the first action was pursued.

This result, allowing a subsequent foreclosure action based on subsequent breaches, serves all the interests of the res judicata doctrine, the ultimate touchstone of which is fairness. It avoids perverse incentives rewarding breaching borrowers over

those faithfully paying their notes. It avoids imposing disproportionate penalties upon lenders, which, in turn, would hamper access to consumer credit and impair the alienability of property. The result is consistent with the Court's decision in *Wilmington Trust Co. v. Sullivan-Thorne*, 2013 ME 94, ¶ 6, 81 A.3d 371, citing with approval *Singleton v. Greymar Assocs.*, 882 So.2d 1004 (Fla. 2004) and *Afolabi v. Atlantic Mortg. & Investment Corp.*, 849 N.E.2d 1170, 1174 (Ind. Ct. App. 2006). It is not inconsistent with *Johnson v. Samson Construction Corp.*, 1997 ME 220, 704 A.2d 866, which addressed a commercial contract, with an automatic acceleration provision that was effective prior to suit. The result is wholly fair to defaulting borrowers, who remain in possession of the property until completion of a successful foreclosure; who cannot be foreclosed upon based on the same default as asserted in the first suit; and who are protected by a statutory attorney's fee provision and the availability of other sanctions to make them whole for any harm caused by a preceding aborted foreclosure attempt.

Finally, any alternative approach, *e.g.* barring a second foreclosure action but permitting pursuit of other equitable claims against the borrower such as unjust enrichment, would be legally inconsistent, wholly inadequate and unpredictable, and thus would trigger the same adverse credit and alienability consequences of precluding the second foreclosure.

ARGUMENT

I. *Standard of review*: the Court applies res judicata principles based on the surrounding statutory context, to serve fairness, economy and stability.

As discussed below, the question presented addresses how court-made res judicata principles should be applied in the residential mortgage context, in which the Legislature has enacted statutory provisions superseding ordinary contract law.

Interpretation of statutes is undertaken de novo by the Court on appeal, with legislative intent as the touchstone. *See Scamman v. Shaw's Supermarkets, Inc.*, 2017 ME 41, ¶ 14, -- A.3d --.

In identifying and applying Court-made rules, the Court also acts *de novo*, responding to contemporary circumstances and considering the impact of statutory enactments. *See Beegan v. Schmidt,* 451 A.2d 642, 644 (Me. 1982) (the doctrine of res judicata is a court-made collection of rules); *Pendexter v. Pendexter*, 363 A.2d 743, 749-50 (Me. 1976) (altering child support law based on changing times and legislative intent reflected in more recent statutes).

The purpose of the res judicata doctrine is, applying a pragmatic perspective, to advance fairness, judicial economy and stability. *See Beegan*, 451 A.2d at 644; *id.* at 646. *See also Wilmington*, 2013 ME 94, ¶ 6, 81 A.3d 371 (res judicata doctrine is grounded on concern for judicial economy and efficiency, stability of final judgments and fairness to litigants).

II. In the residential mortgage context, res judicata principles generally do not preclude a subsequent foreclosure action based on a default occurring after an earlier foreclosure action is dismissed with prejudice.

The general rule regarding the ability to sue successively as to installment contracts was discussed in *Briggs v. Briggs*, 1998 ME 120, 711 A.2d 1286. There, the Court held that the holder of a note could not sue for the entire unpaid balance, but rather, would need to file suit separately each time a payment became due. *See id.*, ¶¶ 8-9. Each breach constitutes a different transaction for claim preclusion purposes. *See* Am.Jur.2d *Judgments* § 477 (updated Feb. 2017) ("a final determination of an action for an amount due under an installment contract does not preclude a later action based on defaults in payments of installments due after the judgment in the prior action") (footnotes omitted); *cf. Kirkham v. Hansen*, 583 A.2d 1026, 1027 (Me. 1990) (earlier forbearance in exercising optional acceleration clause did not estop lender from suing after subsequent breaches).

An exception to the general rule that each breach generates a separate claim for res judicata purposes can exist when an installment contract includes an effective, invoked acceleration clause. In *Johnson*, 1997 ME 220, 704 A.2d 866, a case involving a commercial mortgage with an automatic, pre-judicially accelerated note, the Court concluded that ordinary res judicata principles barred a second foreclosure action, finding that the pre-suit acceleration made any future breach claims indivisible. In so ruling, the Court relied on a subsequently overruled Florida decision, and did not address what would happen to the property thereafter, given an inability to foreclose,

but no discharge of the mortgage. *See id.*, ¶ 8, citing *Stadler v. Cherry Hill Developers, Inc.*, 150 So.2d 468 (Fla. Dist. Ct. App. 1963), *overruled by Singleton v. Greymar Assocs.*, 882 So.2d 1004 (Fla. 2004).

Acceleration is deemed a harsh remedy, so there is a preference against finding it, *e.g.* requiring the language in an acceleration clause to be unequivocal. *See Briggs*, 1998 ME 120, ¶ 10. This Court found that res judicata principles did not bar a second foreclosure action in *Wilmington*, citing *Singleton* with favor.[2] *Wilmington*, 2013 ME 94, ¶ 12, 81 A.3d 37 ("We can find no valid basis for barring mortgagees from challenging subsequent defaults on a mortgage and note solely because they did not prevail in a previous attempted foreclosure based upon a separate alleged default."), citing *Singleton*, 882 So.2d at 1008); *see also Wilmington,* 2013 ME 94 ¶ 12 ("subsequent and separate alleged defaults under [a] note create[ ] a new and independent right in the mortgagee to accelerate payment on a note in a subsequent foreclosure action"), citing *Afolabi v. Atl. Mortg. & Inv. Corp.*, 849 N.E.2d 1170, 1175 (Ind. Ct. App. 2006). In finding the ruling in *Johnson* inapposite, the Court noted that the record in *Wilmington* did not establish acceleration.[3]

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[2] The holding in *Singleton*, that res judicata principles do not bar a second foreclosure action after dismissal with prejudice of the first, was subsequently affirmed by the Florida Supreme Court in *Bartram v. U.S. Bank Nat. Ass'n*, -- So.3d ---, 2016 WL 6538647 (Fla. 2016).

[3] The Court stated:

> Sullivan-Thorne argues that because the mortgage contained an acceleration clause, IndyMac's prior counterclaim bars any future action to foreclose on the property pursuant to *Johnson v. Samson Construction Corporation*, 1997 ME 220, 704 A.2d 866. In that case, we held that once a mortgagee "trigger[s] the acceleration clause of [a]

(footnote continued)

Harmonizing the case law, res judicata principles do not bar a later suit when it is based on breaches subsequent to those asserted in an earlier suit and the debt was not effectively accelerated in the first suit, with a policy preference against acceleration. As discussed below, in the context of residential mortgages, this preference is reflected in statute, barring any automatic pre-suit acceleration as occurred in *Johnson*. More broadly, to ensure that maximum opportunity is provided to residential mortgagors to catch up with their payments before a foreclosure judgment and to redeem the property even thereafter, the Legislature has enacted a series of statutory restrictions, reflecting an intent not to treat a note and mortgage as irretrievably accelerated until acquisition of a foreclosure judgment in the accelerated amount, conclusion of the statutory redemption period, and sale of the property subject to foreclosure. Typically, the express language of a mortgage echoes this concept of "deceleration," giving the borrower a right to roll back acceleration even after judgment.

(continued footnote)

> note," the contract becomes "indivisible" and the mortgagee's procedural default in a foreclosure action precludes any later suit on the note. *Id.* ¶ 8. Contrary to Sullivan-Thorne's contentions, the summary judgment record, viewed in the light most favorable to Wilmington as the nonprevailing party, does not establish that Wilmington or IndyMac accelerated the debt, but rather only that IndyMac sent Sullivan-Thorne a notice of default stating that it would accelerate the debt if Sullivan-Thorne failed to cure her default. *Johnson* is therefore inapposite.

Wilmington, 2013 ME 94, ¶ 12 n.4.

Given this statutory overlay and these contractual provisions in the residential mortgage foreclosure context, res judicata principles should not be applied to preclude a later foreclosure action based upon an aborted earlier foreclosure action resulting in no foreclosure and sale, when the second action is based upon separate and independent defaults.

A. The Legislature has modified contract law in the residential mortgage context, preventing finality until the redemption period in a successful foreclosure action has passed and a sale of the foreclosed property has occurred.

Special rules apply to notes and mortgages, particularly in the residential context. Over time, and in particular after the foreclosure crisis accompanying the Great Recession of 2008, the Legislature enacted laws superseding ordinary contract law, to require a series of actions and processes before a mortgage loan foreclosure can be consummated. *See, e.g.*, 14 M.R.S. § 6111 (providing right to cure and required notice of same); § 6321 (requiring mortgagee's certification of compliance with § 6111; requiring certification of proof of ownership; requiring that the complaint make certain allegations with specificity; providing that the acceptance before the expiration of the right of redemption and after the commencement of foreclosure proceedings of anything of value constitutes a waiver of the foreclosure absent written agreement to the contrary or return of payment within ten days; and providing that the mortgagee and mortgagor may enter into an agreement to allow the mortgagor to bring payments up to date with the foreclosure process stayed as long as the

mortgagor makes payments); § 6321-A (establishing foreclosure mediation program for residential property); § 6322 (requiring after a finding of a breach of the mortgage that the judgment provide for the ability of the mortgagor to pay the sum adjudged due within a period of redemption); § 6323(1) (setting requirements for sale and providing that the mortgagee may allow the mortgagor to redeem or reinstate the loan after expiration of the period of redemption at any time prior to sale). Judicial rules echo this overlay of special requirements before enforcing the terms of the parties' agreement in the residential mortgage context. *See* Me. R. Civ. P. 93 (describing the foreclosure diversion program).

An overarching purpose of these special requirements is to maximize the opportunity of the mortgagor to forestall consummation of a foreclosure. By providing a right to cure, mediation, waiver based on payment after commencement of the foreclosure proceeding, and a right to redeem or reinstate thereafter, these statutes extend, and are designed to extend, the period before a mortgage is irretrievably foreclosed and the mortgagor's ability to stop or reverse the foreclosure concludes.

For example, section 6111 expressly provides that a residential mortgagee "may not accelerate" an obligation to pay the loan absent a properly transmitted notice of the right to cure. 14 M.R.S. § 6111(1). Such statutory language expressly prevents in the residential context any automatic contractual pre-suit acceleration as occurred with the commercial loan at issue in *Johnson*. Thus, if a first foreclosure action involving a

residential mortgage is aborted due to the lack of a proper notice to cure, there is no ground under the reasoning in *Johnson* to preclude a second foreclosure action based on subsequent breaches of the loan agreement, because no acceleration was effected in the first aborted suit. *See Pushard v. Bank of America*, No. BCD-CV-15-28 (Me. BCD March 15, 2016), *app. pending*, Law Docket No. BCD-16.247 (argued Feb. 6, 2017).

Finally, in the course of enacting these statutes, nothing in their legislative history suggests, let alone expresses, the intent that if a foreclosure action ends, for whatever reason, before a judgment is entered in favor of the mortgagee in an accelerated amount, then that first foreclosure attempt should bar the mortgagee from ever seeking to foreclose in the future based on subsequent breaches, much less result in a discharge of the mortgage.[4]

B. Residential mortgages also often include reinstatement provisions providing for deceleration.

As is often the case with residential mortgages, the mortgage in the instant appeal includes a reinstatement clause. (App. 114, § 19.) This clause provides that even if the lender has accelerated the debt ("required immediate payment in full"), the borrower has the right to have enforcement of the mortgage discontinued until the earlier of five days before sale, such other period required by law, or before a judgment enforcing the mortgage, if certain conditions are met. If those conditions

[4] Indeed, as discussed *infra*, another statutory provision, 33 M.R.S. § 551, specifies that a mortgage is only discharged "after full performance of the conditions of the mortgage," not the least of which is repayment in full of the loan secured by the mortgage.

are met, then the note and mortgage "remain in full effect as if immediate payment in full had never been required." (*Id.*)

This clause is similar to the Maine-Single Family Fannie Mae/Freddie Mac Uniform Mortgage, § 18, providing a borrower the right after acceleration to discontinue enforcement of the mortgage any time before sale or any time before a judgment entered enforcing the security instrument under similar conditions, again with the effect being the note and mortgage remain in full effect as if no acceleration occurred.

In *Bartram*, *supra*, n.2, the reinstatement clause contained similar language, providing that "*Upon reinstatement by Borrower, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred.*" 2016 WL 6538647, *3 (emphasis in original).

Thus, typically the concept of deceleration reflected in Maine statute is also provided for in the express agreement of the parties to a residential mortgage contract.

C. Application of res judicata principles should take into account this special legislative and contractual overlay modifying ordinary contract law.

While statutory provisions other than section 6111 do not expressly prohibit acceleration, as a practical matter they prevent the finality triggering claim preclusion until after completion of a successful foreclosure in an accelerated amount. This is so whether, technically, acceleration is deemed to have been achieved at the beginning of

a foreclosure proceeding commenced after transmittal of a proper notice of the right to cure, subject to "deceleration" thereafter, or the acceleration is deemed inchoate until entry of a foreclosure judgment in an accelerated amount, followed by a sale after the redemption period.

To illustrate one reason why this is so, section 6321 provides that acceptance by the lender before the expiration of the right of redemption and after the commencement of foreclosure proceeding of anything of value constitutes a waiver of the foreclosure. If acceleration is deemed to have occurred at the inception of the proceeding and the bank accepts a partial payment – which the framework of the statutes encourages – under Appellees' proposed application of res judicata principles, the lender would have no legal recourse after its acceptance of the partial payment should the borrower choose to stop paying his loan thereafter. There would have been an acceleration of the obligation to pay, so any second foreclosure proceeding would be barred.

Such a result would make no sense. *See Fairbank's Capital Corp. v Milligan*, 234 Fed. App'x 21, 24 (3d Cir. 2007) (lender and borrower settled first foreclosure with stipulated dismissal of action with prejudice and the borrower subsequently defaulted; the Court of Appeals held that the first foreclosure did not bar the subsequent action; otherwise "it would encourage a delinquent mortgagor to come to settlement with mortgagee on a default in order to later insulate the mortgagor from the consequences of a subsequent default. This is plainly nonsensical.").

In Maine, such a result would not only be nonsensical, but would undermine the statutory scheme intended to encourage workouts and the common law preference against acceleration. The various provisions noted in Maine's mortgage statutes are designed to facilitate and encourage rolling back a foreclosure, whether at the notice of cure point, during the foreclosure proceedings, or even during the redemption period and any time prior to sale.[5] If a lender knew that by filing a foreclosure proceeding, it could never thereafter settle, waive or otherwise walk back an acceleration for res judicata purposes and would never be permitted to file another action to enforce the mortgage should the borrower thereafter fail to pay, such a result would, contrary to legislative intent, discourage, and not encourage, such lender flexibility and forbearance.

Similar logic applies when the first foreclosure is aborted not due to a lack of proper notice of the right to cure, or settlement or waiver, but when the first attempt to foreclose fails for other reasons, such as lack of standing, procedural deficiencies, or failure to prove the specific breach upon which the first action is based. In the absence of an actual, successful foreclosure with a judgment entered in an accelerated amount, and sale of the property, any unsuccessful attempted acceleration should not

[5] Examining context pragmatically, all successful foreclosure proceedings involve acceleration, with a judgment in the amount of the total remaining due. In *Johnson*, the acceleration occurred pre-suit by virtue of unadorned contract common law. By statute, no residential mortgage can be accelerated until after the cure period. Also by statute, and often by contract, even after judgment in an accelerated amount, a rollback of the foreclosure is possible until actual sale of the property.

be deemed consummated or sufficiently irreversible so as to preclude a subsequent action based on new and subsequent defaults. *Cf. Cenlar FSB v. Melenfant*, 2016 VT 93, ¶ 26, 151 A.3d 778 (noting that a dismissal with prejudice of a first unsuccessful action reflects a ruling that there has been no default, a requirement of acceleration.[6])

Similarly, the parties' contractual agreement allowing for reinstatement of the mortgage until the acquisition of a judgment in favor of the lender enforcing the mortgage, and, indeed, thereafter, prior to sale, shows how this right to decelerate should forestall any application of res judicata principles to bar a second foreclosure action, whether or not the first was dismissed with prejudice. In *Bartram*, the Florida Supreme Court stated that its ruling that a dismissal with prejudice does not bar a second foreclosure suit based subsequent defaults was buttressed by the inclusion of a reinstatement clause in the parties' agreement, because to preclude a second suit would not only be unjust but render the reinstatement provision a nullity.[7]

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[6] The Vermont Supreme Court stated:

> The breach of a covenant, or default, by the borrower is a condition precedent to the acceleration. If the lender brings an action alleging default by the borrower, and the court determines that the borrower is not, in fact, in default – whether after actual adjudication on the merits or by dismissal with prejudice – then the acceleration is invalid. In other words, the adjudication against lender with prejudice, or "on the merits," requires us to treat the first judgment as essentially determining that lender did not establish a default on the note by borrowers as of the date alleged. Under these circumstances, the result of a seems to invalidate the attempted acceleration, not to preserve it as an element of a final judgment that precludes future attempts to collect on the note.

Melenfant, 2016 VT 93, ¶ 26.

[7] The Court stated:

(footnote continued)

D. The purposes of the res judicata doctrine are not served by precluding a subsequent foreclosure action.

As noted *supra*, the purposes of the res judicata doctrine are judicial economy, stability of final judgments, and fairness to litigants. *Wilmington*, 2013 ME 94, ¶ 6,

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(continued footnote)

> Under the reinstatement provision of paragraph 19, then, even after the optional acceleration provision was exercised through the filing of a foreclosure action--- as it was in this case—the mortgagor was not obligated to pay the accelerated sums due under the note until final judgment was entered and needed only to bring the loan current and meet other conditions—such as paying expenses related to the enforcement of the security interest and meeting other requirements established by the mortgagee-lender to ensure the mortgagee-lender's interest in the property would remain unchanged— to avoid foreclosure. "Stated another way, despite acceleration of the balance due and the filing of an action to foreclosure, the installment nature of a loan secured by such a mortgage continues until a final judgment of foreclosure is entered and no action is necessary to reinstate it via a notice of 'deceleration' or otherwise." [*Deutshe Bank Trust Co. Americas v.*] *Beauvais*, 188 So.3d [938] at 947 [Fla. 3d DCA 2016]. Or, as the Real Property Law Section of the Florida Bar has explained, "[t]he lender's right to accelerate is subject to the borrower's continuing right to cure." Brief for The Real Property Probate & Trust Law Section of the Florida Bar at 8, *Beauvais*, 188 So.3d 938 (Fla. 3d DCA 2016), 2015 WL 6406768, at *8. In the absence of a final judgment in favor of the mortgagee, the mortgagor still had the right under paragraph 19 of the Mortgage, the reinstatement provision, to cure the default and to continue making monthly installment payments.
>
> Accepting Bartram's argument that the installment nature of his contract terminated once the mortgagee attempted to exercise the mortgage contract's optional acceleration clause—ignoring the existence of the mortgage's reinstatement provision—would permit the mortgagee only one opportunity to enforce the mortgage despite the occurrence of any future defaults. As we cautioned in *Singleton*, "justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default." 882 So.2d at 1008. Following to its logical conclusion Bartram's argument that acceleration of the loan was effective before final judgment in favor of the mortgagee-lender in a foreclosure action would mean that the mortgagor-borrower would owe the accelerated amount after the dismissal, effectively rendering the reinstatement provision a nullity, and—in most cases—leading to an unavoidable default.

Bartram, 2016 WL 6538647, *10.

81 A.3d 371. These interests are not served by precluding a second foreclosure action after a dismissal with prejudice of a first foreclosure suit, when the later suit is based on subsequent breaches.

1. **Judicial economy and efficiency and stability of final judgments are not served by precluding a second action because the second suit involves different breaches, the relationship between borrower and lender is long term, lender forbearance is encouraged, and the interests advanced by application of res judicata principles can be better served by means other than a total bar of any future suit.**

First, residential notes and mortgages involve installment contracts, typically of long duration. As noted above, the general rule in the installment context is that there is no acceleration, and one must sue successively as each payment becomes due. Thus, the common law does not favor judicial economy and efficiency in this context, recognizing the harshness of the acceleration exception to this general rule.

In the residential mortgage context, moreover, as noted above, by statute, lenders are constrained as to when and how they can choose to accelerate a debt, however unequivocal the language of the written agreement. Aside from the general preference against acceleration, other policy interests in the residential context encourage dialogue between the parties and flexibility in allowing a lender to abort a proceeding seeking to accelerate and enforce, *i.e.* to foreclose. These interests also affect how the interests of judicial economy and stability of final judgments should be viewed in the residential mortgage context. A foreclosure judgment is not "final" in the usual sense, given waiver rules, the redemption period, and the explicit statutory

right of the lender to redeem or reinstate the loan after expiration of the period of redemption at any time prior to the sale. Stability and finality in the mortgage context is desired only after a successful foreclosure action resulting in a judgment in an accelerated amount, followed by a sale. Only at that point is the breached loan agreement treated as irretrievable and the property lost.

This lack of finality, moreover, is typically embedded in the language of the borrowing agreement itself, showing how it is also the expectation of the parties that any acceleration remain at best inchoate until at least a judgment in favor of the lender in the accelerated amount. Just as the parties' decision to enter an installment contract supersedes as a general matter any judicial economy or stability concerns in requiring multiple suits, such reinstatement language similarly reflects a conscious desire of the parties to supersede any economy or stability concern in favor of providing the flexibility to decelerate unless or until a judgment enforcing the mortgage is obtained in an accelerated amount.

It is certainly true that judicial economy is advanced by incenting lenders to be ready when they file their first foreclosure action, to have their proof in evidentiary order, and not to flood the courts with multiple aborted foreclosure actions because they have failed to prepare properly or follow statutes or judicial rules. But after a dismissal with prejudice, any subsequent foreclosure attempt is barred if based on the same specific breach as asserted in the earlier action. Defining the transaction consistently as described in *Wilmington* to allow pursuit of "subsequent and separate

alleged defaults," with each creating "a new and independent right in the mortgagee to accelerate payment on a note in a subsequent foreclosure action," results in a logical balance, fully and fairly responding to legitimate judicial economy concerns.

Second, the interest in ensuring that lenders have their ducks in a row before filing a foreclosure action is advanced more effectively through other, more targeted means, such as individualized sanctions. By statute, as of 2011, a mortgagor may recover attorney's fees if the mortgagee does not prevail, or upon evidence that the action was not brought in good faith. 14 M.R.S. § 6101. Other sanctions, depending upon the lender's specific conduct, are available, *e.g.* under Maine Rule of Civil Procedure 16, to ensure than any costs imposed upon the borrower from any misconduct is remedied.

Notably, in the instant case, if the Superior Court decision stands, the effective penalty imposed on the lender for not exchanging witness and exhibit lists by the scheduled date is approximately $125,000, the remaining balance of the loan secured by the property. (*See* App. 27, ¶ 23; 149, ¶ 3; 152, 154.) Such a sanction would by any existing measure be deemed an abuse of discretion under Rule 16. *See U.S. Bank Nat. Ass'n v. Manning*, 2014 ME 96, 97 A.3d 605 (vacating dismissal of foreclosure action with prejudice as discovery sanction as an abuse of discretion, noting that it is "the rare case that requires the ultimate sanction"); *Unifund CCR Partners v. Demers*, 2009 ME 19, 966 A.2d 400 (vacating dismissal of action against credit cardholder as sanction for failure to appear at a conference); *cf. Bank of New York v. Dyer*, 2016 ME

10, ¶ 5, 113 A.3d 966 (limiting award of first-day costs and attorney's fees as sanction in foreclosure action not an abuse of discretion); *Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶ 34, n. 17, 96 A.3d 700 (limiting sanction for bank's violation of Rule 56(h) to $625 not an abuse of discretion), citing *Baker's Table, Inc. v. City of Portland*, 2000 ME 7, ¶ 17, 743 A.2d 237 (vacating dismissal of cause of action as sanction). *See generally Cenlar*, 2016 VT 93, ¶ 27 & n. 7 ("By insulating the borrowers from any legally enforceable obligation to make future payments to lender, this approach imposes on lender a cost for its procedural default that may be wholly disproportionate to the lender's infraction" and "puts the defaulting borrower in a better position than the borrower who pays a note to its maturity.").

2. Precluding a second foreclosure action based on subsequent defaults would be unfair.

This factor is perhaps the most fundamental reason why a subsequent foreclosure should not be deemed barred. To use the instant situation as an example, one of the defendants is a loan officer who presumably understood the promises he undertook to perform when executing his note and mortgage.[8] Appellees appear to have made no payment on their home loan since January 1, 2011. (*See* App. 131-39, 142, 156-64.) The first foreclosure action was dismissed with prejudice for lack of a

[8] *See* App. 38, ¶ 8 ("Defendant Paul Deschaine has been, for many years, a mortgage banking officer.... At the time of the mortgage loan which is the subject matter of the instant foreclosure litigation, [he] was a loan origination officer for the original lender in the present transaction ... [and] had at the time a comprehensive knowledge of the business of mortgage lending conducted by [the lender].").

prompt exchange of exhibit and witness lists. Appellees are alleged to have subsequently breached multiple provisions of their loan agreement since the first unsuccessful foreclosure attempt in 2011, not only by failing to make payments as they came due, but by apparently renting the home to others, contrary to their promise to the bank. (App. 25-27, 107, 109, 124-25.) The result of the application of the res judicata doctrine as they propose it would bestow upon them an unencumbered, free house despite these many and longstanding breaches. The bank could not recover by selling the property the $125,000 that Appellees promised they would pay. It would thus be deprived of significant sums consequently made unavailable to lend to other prospective homeowners.

This result is not fair to the lender. It is not fair to the thousands of borrowers who adhere to their contractual promises and faithfully make their mortgage payments every month. It is not fair to prospective new homeowners seeking mortgages, with such a "one and out" rule drying up the credit available to them. It is not fair to defaulting borrowers who would like to try to pay something after a foreclosure proceeding begins and achieve a waiver, because lenders will have to decline any such efforts, given their inability to pursue a second foreclosure should the borrower fail to pay in the future.

Fairness – a touchstone in the crafting and application of res judicata principles – rejects such perverse and inequitable results. When an attempted acceleration of a first suit is aborted and the mortgagor thereafter commits further defaults, it is

reasonable to allow the lender to foreclose based on those further and subsequent breaches. In the words of the Florida Supreme Court, whose decision this Court cited approvingly in *Wilmington*:

> If *res judicata* prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note. The adjudication of the earlier default would essentially insulate her from future foreclosure actions on the note—merely because she prevailed in the first action. Clearly, justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.

Singleton, 882 So.2d at 1007. *See also Afolabi.*, 849 N.E.2d at 1174, citing *Singleton.*

III. Even if a second foreclosure action were precluded, the mortgage would not be discharged, which would leave property in limbo, and any alternative equitable counterclaims in lieu of foreclosure would be at best questionable and wholly inadequate.

In the instant case, the plaintiff alternatively included equitable causes of action such as unjust enrichment, and from time to time the argument has been made that the appropriate course of action in situations such as that presented here is to bar a second foreclosure action but allow such alternate equitable claims to proceed against the borrower. Such an approach, however, suffers from many flaws.

First, there is no basis in either the common law or statute to discharge the mortgage. It is black letter law in Maine, affirmed multiple times by this Court, that "nothing short of actual payment of the debt or an express release will discharge a mortgage." *St. Agatha Federal Credit Union v. Ouellette*, 1998 ME 279, ¶ 10, 722 A.2d 858, citing *Buck v. Wood*, 85 Me. 204, 27 A.103 (1892); *Bunker v. Barron*, 79 Me. 62,

8 A. 253 (1887). By statute, a mortgagee must discharge a mortgage only upon the borrower's "full performance of the conditions of the mortgage." 33 M.R.S. § 551.

Thus, the application of claim preclusion would not discharge the mortgage – there is no basis in Maine law for such a result, and Appellees cite none. In granting Appellees summary judgment on their counterclaim to quiet title, the Superior Court cited 14 M.R.S. § 6206. But this statute provides that judgment shall be rendered for the defendant to a foreclosure action and the land discharged of the mortgage only "[i]f it appears that nothing is due on the mortgage." Here, approximately $125,000 appears due on the mortgage. That an inappropriate application of res judicata principles could bar the lender from recovering that sum by foreclosing on the property securing the loan would not mean that the amount due vanished.

This result, an inability to foreclose but no discharge of the mortgage, renders the property in limbo. The bank cannot take possession, but the lien prevents any sale or use of equity in the home by the breaching borrowers. Such a result would conflict with the policy in Maine favoring the free alienability of property. *See O'Donovan v. McIntosh*, 1999 ME 71, ¶ 10, 728 A.2d 681; *id.*, citing *Restatement of Property*, § 489 cmt. A (1944) ("This policy arises from a belief that the social interest is promoted by the greater utilization of the subject matter of property resulting from the freedom of alienation of interests in it.") And again, with no ability to foreclose after an aborted attempt, access to credit shrinks and the real estate engine driving the Maine economy slows.

Second, looking to alternative causes of action against the borrower is no solution. As a threshold matter, if the result of the application of the res judicata doctrine is unfairness that supports equitable causes of action, then that unfairness is a basis for not applying that doctrine in the first place. The res judicata doctrine is court-made, to be applied and contoured consistent with fairness concerns.

It is also unclear whether, if the definition of a transaction for claim preclusion purposes is so broad as to bar any future foreclosure cause of action based on subsequent and different breaches, that it would not also bar any other type of claim, such as claim for unjust enrichment. Additionally, as the Superior Court noted, an unjust enrichment action arises when there is no contractual relationship. (App. 22, n.4.)

The instant case provides a further illustration as to the inadequacy of such an alternative, if it exists. Here, the borrowers' obligations on the note were discharged in bankruptcy. (App. 37, ¶ 2.) Such a discharge does not preclude foreclosure, because a foreclosure claim is in rem against the property securing the loan. While the personal obligation to pay may be discharged through bankruptcy, that discharge does not mean the debtor obtains a free house. *See* Am.Jur.2d Bankruptcy, § 3513 (Feb. 2017 update) (a bankruptcy discharge does not preclude in rem actions or affect in rem rights; hence "a secured creditor retains the right to foreclose on its collateral in the event of default").

Here, how would this in personam-in rem distinction affect any alternative equitable action instituted by the lender? If the debtor is discharged from personal obligations, how can the lender sue him or her personally on the debt in an unjust enrichment action? Would the action be filed in rem, so that the defendant would be the property and not the borrowers? If this could be some sort of personal action, and allowed despite a bankruptcy discharge, would the debt be deemed unsecured? Such an unsecured obligation, even if available, would be inadequate to allow responsible bankers to lend money to prospective homeowners, because creditors on debts arising after the mortgage loan but before legal action to collect it could leapfrog the mortgage lender in priority. The mortgage lender's ability to recover on its loan would be severely impaired. The fundamental underpinning of a functioning residential lending market is a senior security interest in the real property financed.

Finally, would the equities in such an alternative cause of action require an individualized analysis in each situation, as the Appellee here suggests? If so, no borrower or lender would ever know the scope of its rights until the issuance of each individual, final judgment. The banking industry cannot function effectively and supply credit in such an unpredictable environment.

CONCLUSION

For the reasons given above, consistent with the Court's reasoning in *Wilmington* and its citation, with approval, of the decisions in *Singleton* and *Afolabi*, the Court should deem the transaction for claim preclusion purposes not to be the same

as that in a later foreclosure action based on different and subsequent breaches, at least in the residential context, where there cannot be any pre-suit automatic acceleration as in *Johnson*. Debt should not be deemed accelerated for res judicata purposes unless and until after the completion of a successful foreclosure action issuing a judgment in the accelerated amount and the sale of the property. To bar a new foreclosure action based on new breaches would fail to recognize "the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship," *Singleton*, 882 So.2d at 1007, as well as the special contractual and regulatory environment in which residential foreclosures are pursued and enforced in Maine.

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Catherine R. Connors, Bar No. 3400
cconnors@pierceatwood.com
John J. Aromando, Bar No. 3099
jaromando@pierceatwood.com
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
(207) 791-1100

Attorneys for Maine Bankers Association and The National Mortgage Bankers Association

CERTIFICATE OF SERVICE

I, Catherine R. Connors, Esquire, hereby certify that two copies of this Amici Brief of the Maine Bankers Association and The National Mortgage Bankers Association was served upon counsel at the address set forth below by email and first class mail, postage-prepaid on March 29, 2017:

Jeffrey J. Hardiman, Esq. — jhardiman@shslawfirm.com
Dean J. Wagner, Esq. — dwagner@shslawfirm.com
Shechtman Halperin Savage LLP
1080 Main Street
Pawtucket, RI 02860

Paula-Lee Chambers — pchambers@hinshawlaw.com
Hinshaw & Culbertson LLP
28 State Street, 24th Floor
Boston, MA 02109

James F. Cloutier, Esq. — cloutierj@ccdpa.com
Cloutier, Conley & Duffett, P.A.
465 Congress Street
Portland, Maine 04101

Thomas A. Cox, Esq. — tac@gwi.net
P.O. Box 1314
Portland, ME 04104-1314

Frank D'Alessandro, Esq. — frank@ptla.org
Pine Tree Legal Assistance
P.O. Box 547
Portland, ME 04112

DATED: March 29, 2017

Catherine R. Connors, Bar No. 3400
cconnors@pierceatwood.com
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101
(207) 791-1100

Attorney for Maine Bankers Association and The National Mortgage Bankers Association

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STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. BCD-16-247

HEIDI PUSHARD, *et al.*,

Appellant,

v.

BANK OF AMERICA, N.A.,

Appellee.

ON APPEAL FROM JUDGMENT ENTERED BY
THE BUSINESS AND CONSUMER COURT
DOCKET NO.: BCD-CV-2015-00028

BRIEF OF APPELLEE BANK OF AMERICA, N.A.

John J. Aromando (Bar No. 3099)
jaromando@piercatwood.com
Catherine R. Connors (Bar No. 3400)
cconnors@pierceatwood.com
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
(207) 791-1100

Attorneys for Appellee
Bank of America, N.A.

EXHIBIT J

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INTRODUCTION

The question presented by this appeal is whether a mortgagee that issued a statutorily defective right-to-cure notice ("RTC notice") before pursuing an unsuccessful foreclosure action is, as a result, forever barred from foreclosing on that mortgage. Appellants seek to push that question even further, demanding that the mortgagee, following an unsuccessful foreclosure attempt, must immediately discharge the mortgage and note or be liable for slander of title and pursuant to 33 M.R.S. § 551—which requires timely discharge of a mortgage upon the borrower's "full performance of the conditions" thereof. Under the appellant mortgagors' theory, even though they took out a mortgage loan with the promise to repay it, then failed to repay that loan under the agreed terms, they nevertheless should receive a full release of their debt obligation and a property free and clear of mortgage lien—all because the mortgagee, Bank of America, N.A. ("BANA" or "the Bank"),[1] failed to issue a legally sufficient RTC notice and achieve a valid foreclosure.

No authority stands for appellants' position. If a mortgagee fails to issue a proper RTC notice and an unsuccessful foreclosure action ensues, and if future defaults accrue and the mortgagee attempts a new foreclosure action, the court may then address the impact, if any, of the first foreclosure action upon the second, based

[1] There is no dispute in this action that BANA was, at all relevant times, the mortgagee with standing to foreclose the mortgage at issue.

on all the circumstances presented. The first action does not automatically vitiate the mortgage or note, or in any event require the discharge of those instruments.

STATEMENT OF THE FACTS

In 2006, appellants Heidi and Jeffrey Pushard ("the Pushards") executed a promissory note (the "Note") in favor of Countrywide Home Loans, Inc. ("Countrywide") in the amount of $145,000.00. (Appendix or "A." 76 ¶ 1, 97 ¶ 1.) The note was secured by a mortgage (the "Mortgage") in favor of Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Countrywide, its successors and assigns. (A. 76 ¶ 2, 97 ¶ 2.) The Mortgage subsequently was assigned from Countrywide to Defendant-Appellee BANA, which also holds the Note. (A. 76 ¶¶ 3-4, 97 ¶¶ 3-4.)

The Pushards defaulted on their obligations pursuant to the Note and Mortgage in May 2008, and concede they have not made all payments due. (A. 13, 76 ¶ 5, 78-81, 84-96.)

In October 2011, BANA commenced a foreclosure proceeding against the Pushards in Androscoggin Superior Court (the "Foreclosure Action"). (A. 59.) A trial was held in February 2014, and the court (Kennedy, J.) entered judgment for the Pushards in October 2014 (the "2014 Judgment"), concluding that BANA's notice of the Pushards' right to cure their default was defective and "failed to meet the requirements of 14 M.R.S. § 6111." (A. 67, 70-71.) The court also ruled that the Bank failed to prove the amount due on the Note as of the date of trial. (A. 73.)

In the instant action, filed in March 2015 by the Pushards and transferred by BANA to the Business and Consumer Docket ("BCD"), the Pushards, based on the 2014 Judgment—not based on any new attempt by BANA to foreclose—sought a declaration that the Note and Mortgage are unenforceable, and to hold BANA liable for slander of title and violation of 33 M.R.S. § 551. In addition to damages, they asked the lower court to enjoin BANA from ever enforcing the Note and Mortgage and to compel BANA to record a discharge of the Mortgage. (A. 19-23.)

In response to the Pushards' action, BANA brought counterclaims for breach of contract, declaratory judgment, and unjust enrichment. (A. 24.) The Pushards moved for summary judgment on their claims, and BANA filed a cross-motion seeking judgment on the pleadings or, in the alternative, summary judgment against the Pushards' claims. (A. 4, 5.) BANA made no motion for judgment on its own counterclaims.

The BCD Court (Horton, J.) granted summary judgment in favor of BANA on the Pushards' claims. (A. 34.) BANA subsequently dismissed its counterclaims without prejudice (A. 6), and this appeal by the Pushards followed.

STATEMENT OF THE ISSUES

1. Did the BCD Court correctly grant summary judgment to BANA because an initial unsuccessful foreclosure action relating to residential property, suffering from a defective right-to-cure notice, does not vitiate the Mortgage and Note?

2. Did the BCD Court correctly grant summary judgment to BANA on the Pushards' claim that BANA violated 33 M.R.S. § 551 because the Pushards did not fully perform the conditions of the Mortgage?

3. Are the Pushards' claims ripe for adjudication, given that BANA has not commenced a new foreclosure action?

SUMMARY OF ARGUMENT

The BCD Court correctly granted summary judgment in this case for BANA because no applicable legal authority supports granting the Pushards the relief they demand. There is no dispute in this case that the Pushards defaulted on their mortgage loan and have not satisfied its terms. They are not, therefore, entitled to a mortgage discharge (as they assert) under 33 M.R.S. § 551 or a slander-of-title theory. The plain language of § 551 makes clear that the statute requires discharges of mortgages only "after full performance of the conditions" thereof, which has not occurred in this case.[2]

Nor are the Pushards entitled to a discharge on the basis of res judicata. The 2014 Judgment nowhere states that BANA's Mortgage must be discharged as a result of BANA's unsuccessful foreclosure attempt; nor does it state that the Pushards' obligation to repay the debt was extinguished. The same is true with respect to this

[2] *See infra*, Argument Pt. I.B.

Court's 1997 decision in *Johnson v. Samson Construction Corp.*, 1997 ME 220, 704 A.2d 866 ("*Johnson*"), on which the Pushards depend entirely for their res judicata argument. (Blue Brief "Br." at 10-12). The *Johnson* Court did not hold that an unsuccessful first foreclosure, even if determined to bar a subsequent foreclosure action—which is not the case here—necessitates a discharge of the mortgage or note.[3]

The Pushards' reliance on *Johnson* is misplaced for multiple additional reasons. As an initial matter, *Johnson* does not support application of res judicata in this case because BANA's initial Foreclosure Action never succeeded in actually accelerating the Pushards' loan. The parties do not dispute that the RTC notice on which BANA relied for its prior Foreclosure Action failed—for reasons set forth in *Bank of America, N.A. v. Greenleaf*, 2011 ME 89, 96 A.3d 700 ("*Greenleaf I*")—to satisfy the statutory notice requirements of 14 M.R.S. § 6111. As a result, according to the plain language of the statute as well as governing precedent from this Court (including *Greenleaf I*), BANA was prevented from accelerating the Note.[4] Because BANA never previously accelerated the Note, *Johnson* does not apply to prevent BANA from issuing a new (valid) notice of acceleration and pursuing a future foreclosure based on more recent defaults.

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[3] *See infra*, Argument Pt. I.A.4.

[4] *See infra*, Argument Pt. I.A.1.

Johnson would not apply, moreover, even if BANA actually ***had*** succeeded in accelerating the Pushards' Note, because—unlike in *Johnson*—the Note's provisions governing acceleration and foreclosure are optional in nature, not mandatory, and expressly reserve to BANA the right to issue new accelerations based on subsequent defaults.[5] Indeed, case law more recent than *Johnson* supports this premise of successive foreclosure actions based on new defaults, and rejects the fundamental underpinnings of the *Johnson* Court's contrary reasoning—at least in cases like this.[6] The *Johnson* decision's continued, overall viability is, at best, questionable; and in any event, it does not apply to the facts of this case.

For these and the additional reasons set forth in the Argument below, the Court should affirm summary judgment for BANA on the Pushards' claims.

STANDARD OF REVIEW

This Court reviews the BCD Court's legal analysis *de novo* for errors of law. *See Anderson v. Town of Durham*, 2006 ME 39, ¶ 19, 895 A.2d 944, 951. For the reasons set forth herein, the Court should conclude that the BCD Court was correct to enter summary judgment for BANA on the Pushards' claims, and it should affirm the BCD Court's judgment accordingly.

[5] *See infra*, Argument Pt. I.A.2.

[6] *See infra*, Argument Pt. I.A.3.

ARGUMENT

I. The BCD Court was correct to grant summary judgment to BANA on the merits.

A. The Pushards were not entitled to a discharge of the mortgage or note upon entry of the 2014 Judgment.

The Pushards argue they are entitled to a discharge of their Mortgage, an injunction requiring BANA to file the discharge with the registry of deeds, and damages for slander of title and violation of 33 M.R.S. § 551, because, they assert, such relief is mandated under this Court's *Johnson* decision. The Pushards are wrong.

Johnson involved a commercial loan that was pre-judicially accelerated according to the mandatory-acceleration provision of the parties' note. 1997 ME 220, ¶¶ 2, 8, 704 A.2d at 867-68, 869. The parties in that case agreed that the language used in the note and the lender's communications to the borrower prior to suit accelerated the note in full. *See id.*, ¶¶ 2, 4, 704 A.2d at 867-68; Brief for Appellant, *Johnson v. Samson Constr.*, Dkt. No. CUM-97-82 at 4; Brief of Defendant-Appellee, *Johnson v. Samson Constr.*, Dkt. No. CUM 97-82 at 2. The lender foreclosed on the accelerated note, and the trial court dismissed the case with prejudice as a sanction for the lender's failure to comply with procedural orders of the court. *Johnson*, 1997 ME 220, ¶ 3, 704 A.2d at 868.

The lender (Johnson) thereafter filed a second foreclosure action, and this Court concluded that he was barred from commencing a new foreclosure because "[o]nce Johnson triggered the acceleration clause of the note [in advance of the first

foreclosure action] and the entire debt became due, the contract became indivisible. The obligations to pay each installment merged into one obligation to pay the entire balance on the note." *Id.*, ¶ 8, 704 A.2d at 869. The Court cited two cases from other states for this determination: (1) *Stadler v. Cherry Hill Developers, Inc.*, 150 So. 2d 468, 472 (Fla. Dist. Ct. App. 1963) ("*Stadler*"), which held that "[w]hile it is axiomatic that a suit for one installment payment does not preclude suit for a later installment on a divisible contract, ... an election to accelerate puts all future installment payments in issue and forecloses successive suits"; and (2) *Snyder v. Exum*, 315 S.E.2d 216, 218 (Va. 1984) ("*Snyder*"), which held that a lessor could not file multiple, piecemeal actions for unpaid rent where the parties' lease required mandatory acceleration, in full, of all rent upon the lessee's default.

None of the above decisions——including *Johnson*—applies to the instant action. As explained herein, the Note in this case was not effectively accelerated by the prior Foreclosure Action, thus distinguishing this action from *Johnson*, *Stadler*, and *Snyder* (*see infra* Pt. I.A.1); the acceleration provision of the Pushards' Note employs ***optional*** acceleration language—not mandatory as in *Johnson* and *Snyder*—distinguishing the factual basis for application of res judicata in those two cases (*see infra* Pt. I.A.2); and *Stadler* has been overturned by the Florida Supreme Court on grounds that support BANA's motion in this case for summary judgment (*see infra* Pt. I.A.3). Indeed, the reversal of *Stadler* calls into question the continued viability of *Johnson* with regard to any foreclosure-related action (not just to this one). (*See id.*)

Moreover, even if *Johnson* did somehow apply to this case, that decision does not support the Pushards' demands for immediate discharge of the Mortgage. Beyond dismissing Johnson's second foreclosure action, the *Johnson* Court did not address any further consequences of the lender's inability to pursue a new foreclosure on the previously accelerated debt—including what to do with the note and mortgage. The Court simply affirmed summary judgment in favor of the borrower. *Johnson*, 1997 ME 220, ¶ 1, 704 A.2d at 867.

For these and the additional reasons set forth below, the Pushards have no valid authority for their claims, and this Court should affirm the BCD Court's entry of summary judgment.

1. Unlike in *Johnson* (and the cases on which it relied), the Pushard loan was not effectively accelerated before or by the initial Foreclosure Action.

There was no dispute in *Johnson* that the lender successfully accelerated the entirety of the disputed debt prior to filing its unsuccessful foreclosure action. The situation here is opposite. Under the express statutory requirements of 14 M.R.S. § 6111—which governs residential mortgage foreclosures (as in this case), but not foreclosures of commercial property (as in *Johnson*)—BANA never effectively accelerated the Pushards' Note in its initial Foreclosure Action. The Superior Court in the Foreclosure Action found—in keeping with this Court's decision in *Greenleaf I*—that the RTC notice underlying the Foreclosure Action failed to comply with the pre-foreclosure notice requirements of § 6111. (A. 70-71.) No one appealed

that ruling. Accordingly, and as a matter of law, BANA failed to accelerate the Pushards' debt.

Section 6111(1) states on its face, a "mortgagee ***may not accelerate*** maturity of the unpaid balance of the obligation ***or otherwise enforce the mortgage*** because of a default . until at least 35 days after the date that ***written notice pursuant to subsection 1-A*** is given by the mortgagee to the mortgagor." 14 M.R.S. § 6111(1) (emphasis added). Subsection 1-A required that the Bank's RTC notice specify:

> A. The mortgagor's right to cure the default as provided in subsection 1;
>
> B. An itemization of all past due amounts causing the loan to be in default;
>
> C. An itemization of any other charges that must be paid in order to cure the default;
>
> D. A statement that the mortgagor may have options available other than foreclosure, that the mortgagor may discuss available options with the mortgagee, the mortgage servicer or a counselor approved by the United States Department of Housing and Urban Development and that the mortgagor is encouraged to explore available options prior to the end of the right-to-cure period;
>
> E. The address, telephone number and other contact information for persons having authority to modify a mortgage loan with the mortgagor to avoid foreclosure, including, but not limited to, the mortgagee, the mortgage servicer and an agent of the mortgagee;
>
> F. The name, address, telephone number and other contact information for all counseling agencies approved by the United States Department of Housing and Urban Development operating to assist mortgagors in the State to avoid foreclosure; and
>
> G. Where mediation is available as set forth in section 6321-A, a statement that a mortgagor may request mediation to explore options for avoiding foreclosure judgment.

14 M.R.S. § 6111(1)(1-A) (2009);[7] *Greenleaf I*, 2014 ME 89, ¶ 29 n.16, 96 A.3d at 711-12 n.16.

Compliance with the above RTC notice requirements was a condition precedent for BANA's residential foreclosure action, as this Court made clear in *Greenleaf I*, 2014 ME 89, ¶ 18, 96 A.3d at 708 (explaining that the "elements of proof [necessary] to support a judgment of foreclosure" include "evidence of properly served notice of default and mortgagor's right to cure in compliance with statutory requirements") (citing *Chase Home Finance LLC v. Higgins*, 2009 ME 136, ¶ 11, 985 A.2d 508, 510-11). "A plaintiff seeking a foreclosure judgment 'must comply strictly with all steps required by statute[,]'" *id.* (quoting *Higgins, supra*), including the requirement of a statutorily valid RTC notice. *See id.* ¶ 31, 96 A.3d at 713 (this Court's "clear directive that foreclosure plaintiffs must strictly comply with all statutory foreclosure requirements" extends to RTC notices required by § 6111) (internal citations omitted); *see also* 14 M.R.S. § 6321 (as a requirement for foreclosure, there must be "evidence that all steps mandated by law to provide notice to the mortgagor pursuant to section 6111 were strictly performed"). If a mortgagee fails to satisfy the

[7] This was the language of the statute at the time of the Foreclosure Action. Section 6111(1)(1-A) subsequently was amended in 2015 to add "and the total amount due to cure the default" to the end of ¶ B, and to add a new ¶ H reading: "A statement that the total amount due does not include any amounts that become due after the date of the notice." Act of March 3, 2015, 127th Me. Leg., 1st Reg. Sess., No. 630, S.P. 223 (Mar. 3, 2015), available online at http://legislature.maine.gov/bills/getPDF.asp?paper=SP0223&item=1&snum=127.

requirements under 14 M.R.S. § 6111 for a valid RTC notice, the "mortgagee ***may not accelerate***" the debt or pursue foreclosure. 14 M.R.S. § 6111(1) (emphasis added). This tenet is clear from the statute's face, as well as this Court's precedent. *See Greenleaf I*, 2014 ME 89, ¶ 30, 96 A.3d at 713 ("the mortgagee is ***prevented*** from seeking any remedy for the default" until at least 35 days after sending a notice that strictly complies with § 6111(1)(1-A)) (emphasis added) (citing 14 M.R.S. § 6111(1)).

There is no dispute in this case that BANA's RTC notice to the Pushards failed to satisfy the requirements of 14 M.R.S. § 6111 (just as in *Greenleaf I*). The Superior Court, in its 2014 Judgment, found that BANA's notice was statutorily defective, and no one appealed that ruling. (A. 70-71.) Thus, based on a plain reading of 14 M.R.S. § 6111(1), BANA "[could] not accelerate" the Pushards' debt. The mere fact that BANA alleged acceleration in its foreclosure complaint was not enough to effect valid acceleration under the law, and the Pushards err in arguing otherwise. (Blue Br. at 7-8.) The Pushards' theory ignores the express language of the governing statute. Further, no actually applicable case law supports the Pushards' insistence that the Bank's prior (unsuccessful) acceleration attempt bars all future attempts at acceleration and foreclosure.

Citation to *Maine Sav. Bank v. Chee*, 576 A.2d 1358 (Me. 1990), does not help the Pushards' cause. (Blue Br. at 7.) In *Chee*, unlike here, there was a waiver of notice of acceleration—a point upon which the *Chee* Court relied. 576 A.2d at 1358.

Moreover, the decision in *Chee* was issued before enactment of § 6111.[8] *Chee* clearly does not apply, and Plaintiffs' citations to other cases fare no better.

Contrary to the Pushards' assertion, nothing in *Greenleaf I* or *Wells Fargo v. Girouard*, 2015 ME 116, 123 A.3d 216 ("*Girouard*"), suggests that the plain language of § 6111 means anything other than what it says. In *Greenleaf I*, the Court held that the Bank lacked standing to foreclose, thus its foreclosure action should have been dismissed. 2014 ME 89, ¶ 34, 96 A.3d at 713. In so ruling, the Court also noted that the RTC notice provided to borrowers in that case failed to meet the statutory requirements of 14 M.R.S. § 6111. *Id.*, ¶ 31, 96 A.3d at 713. In *Girouard*, the Court held that summary judgment properly was entered for the borrower in a foreclosure action because the underlying RTC notice was defective and proper notice is a required element of foreclosure. 2015 ME 116, ¶ 9, 123 A.3d at 219.[9] In neither of these two decisions did the Court suggest that a lender can accelerate a residential mortgage debt without complying with § 6111. To the contrary, as previously described, the Court in *Greenleaf I* cited the statute in explaining: "Section 6111 affords a mortgagor a period of time within which he has a right to cure any default

[8] Indeed, the Legislature enacted § 6111 shortly after the decision in *Chee*, in 1992.

[9] Notably, the Court in *Girouard* expressly left for another day the question as to the effect the summary judgment would have should the lender seek to foreclose in the future, finding the question at that stage hypothetical and speculative. *Girouard*, 2015 ME 116, ¶ 10, 123 A.3d at 219. (*See infra* Pt. II.)

on the mortgage before the mortgagee may 'accelerate maturity of the unpaid balance....'" 2014 ME 89, ¶ 30, 96 A.3d at 712-13 (quoting 14 M.R.S. § 6111(1)).

As a final matter, to the extent the Pushards argue that even a defective RTC notice may trigger a valid acceleration of the debt (*see* Blue Br. at 8), the Pushards cite no authority for this novel proposition—which would require the Court to find that § 6111 does not require a mortgagee's RTC notice to satisfy statutory requirements. Such a finding contradicts the language of the statute and makes no logical sense. Section 6111 requires a notice "pursuant to subsection 1-A." 14 M.R.S. § 6111(1). By any rational reading, this means there must be notice that meets the requirements of subsection 1-A. *See, e.g., Higgins*, 2009 ME 136, ¶ 13, 985 A.2d at 512 (lender must serve "proper notice of default and the right to cure"). The statute requires a valid RTC notice—prior to acceleration—that satisfies a laundry list of required contents. *See* 14 M.R.S. § 6111(1)(1-A). If the notice does not meet the statutory requirements, then it does not meet the language of the statute, nor its intent, which is to ensure that the borrower receives a notice that comports with the statute prior to acceleration.

In sum, the lack of a statutorily valid notice of the right to cure will result in an unsuccessful foreclosure action, and under the clear language of § 6111, precludes acceleration. 14 M.R.S. § 6111(1); *see also Greenleaf I*, 2014 ME 89, ¶ 30, 96 A.3d at 712-13 ("the mortgagee is prevented from seeking any remedy for the default" if it does not comply with the statutory notice requirement of § 6111(1)(1-A)). These are not disparate results, but complementary. Because the Pushards' Note was not

accelerated by BANA's 2011 Foreclosure Action—because BANA did not provide a § 6111-compliant pre-foreclosure RTC notice—the ruling in *Johnson* (including its citations to *Stadler* and *Snyder*)[10] does not apply.

2. The Pushards' Note expressly allows for multiple defaults and accelerations, unlike the mandatory acceleration provisions of the agreements in *Johnson* and *Snyder*.

Not only do the Pushards lack statutory or common-law authority to support their argument for mortgage discharge based on res judicata, the language of their own Note contradicts their theory that the Bank can make only one attempt at acceleration and foreclosure.

According to the Pushards' Note, the lender "may" accelerate the debt upon default, after notice, and it specifically reserves the right to seek payment based on subsequent defaults:

> **(C) Notice of Default**
> If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder ***may*** require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

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[10] There was no question in either *Stadler* or *Snyder* as to the validity of the lender's prior acceleration of the debt (though the parties disputed whether the first acceleration was in full, so as to prevent the lender from attempting to collect later defaults). *See Stadler*, 150 So. 2d at 472-73; *Snyder*, 315 S.E.2d at 217. Further, neither of these actions—from Florida and Virginia, respectively—were governed by 14 M.R.S. § 6111. Also, *Stadler* has since been overturned by *Singleton v. Greymar Assocs.*, 882 So. 2d 1004 (Fla. 2004) ("*Singleton*"). (*See infra* Pt. I.A.3.)

> **(D) No Waiver By Note Holder**
> Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default ***at a later time***.

(A. 58 (italicized emphases added).)[11] This is quite different from the mandatory acceleration provision underlying the Court's decision in *Johnson*, as well as in the *Snyder* decision (from Virginia) on which *Johnson* partially relies.[12]

In *Johnson*, the parties' commercial mortgage note stated: "If any default be made in any payment under this Note, and if such default is not made good within thirty (30) days after written notice of same, the entire unpaid principal and accrued interest ***shall*** become immediately due and payable without further demand." *Johnson*, 1997 ME 220, ¶¶ 2, 8, 704 A.2d at 867-68, 869 (emphasis added). Likewise, in *Snyder*, the lease agreement at issue provided: "upon default all the rent, whether accrued or not, '***shall*** become due and payable.'" *Snyder*, 315 S.E.2d at 218 (emphasis in original). The *Snyder* court expressly distinguished between "optional" acceleration clauses using the term "may," and "mandatory" acceleration clauses using the term "shall." *Id.* This distinction further was emphasized in the Virginia Supreme Court's *Aiglon Associates, Ltd. v. Allan* decision (distinguishing *Snyder*), which explained that *Snyder*'s

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[11] Similarly, the Pushard Mortgage states that the lender "may" require immediate payment in full after certain conditions are satisfied—including provision to the Pushards of written notice making clear, among other things, "[t]he action that [the borrowers] must take to correct the default" and the "date by which [the borrowers] must correct the default ...." (A. 53.)

[12] The other case on which *Johnson* relies—*Stadler*, out of Florida—no longer is good law, and addressed in Subpart I.A.3, below.

application of res judicata was based on there being "a lease[] which provided for a ***mandatory*** acceleration of rent upon the lessee's default, [and which] required the lessor to include a claim for future rent in its initial action for past due rent ...." 445 S.E.2d 138, 140 (Va. 1994) (emphasis in original).

Because nothing in the Pushards' Note—unlike the note in *Johnson* and the lease in *Snyder*—mandates a one-time acceleration of the Pushards' debt; but rather, provides for optional accelerations of multiple defaults, *see supra* (quoting Note ¶¶ (C), (D)), *Johnson* and *Snyder* do not apply, and the doctrine of res judicata does not prevent BANA from pursuing a new foreclosure based on a new (and legally valid) notice of acceleration. *See Goodwin v. Cabot Amusement Co.*, 129 Me. 36, 149 A. 574, 579-80 (1930) (supporting a lender's ability to sue multiple times on an installment contract).

3. Subsequent authority brings into question the continuing viability of the reasoning in *Johnson*.

Not only does *Johnson* not apply to this action for the reasons discussed in Subparts I.A.1 and I.A.2, the decision's overall viability—including as precedent in cases where there actually was a valid, prior acceleration of the debt—is doubtful given the Florida Supreme Court's subsequent rejection of *Stadler*, the only case cited in *Johnson* for application of res judicata to bar a second acceleration and foreclosure where the previously triggered acceleration provision was permissive (not mandatory) in nature. *See Johnson*, 1997 ME 220, ¶ 8, 704 A.2d at 869; *Stadler*, 150 So. 2d at 472-73 (reasoning that lender "elected" to accelerate the entire debt all at once); *compare*

Snyder, 315 S.E.2d at 217 (distinguishing mandatory acccleration provision at issue (using the term "shall") from hypothetical, optional provision (using the term "may")). *Stadler* no longer is good law, and the basis for this Court's reliance on it in *Johnson* no longer holds water.

In 2004, the Florida Supreme Court overruled *Stadler* in a case involving a second foreclosure based on a new default. *Singleton*, 882 So. 2d at 1004.[13] In *Singleton*, the Florida Supreme Court—expressly rejecting the appeals court's reasoning in *Stadler*—explained: "We agree ... that when a second and separate action for foreclosure is sought for a default that involves a separate period of default from the one alleged in the first action, the case is not necessarily barred by res judicata." *Id.* at 1006-1007 (emphasis added).

> This seeming variance from the traditional law of res judicata rests upon a recognition of the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship. For example, we can envision many instances in which the application of the Stadler decision would result in unjust enrichment or other inequitable results. If res judicata prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note. The adjudication of the earlier default would essentially insulate her from future foreclosure actions on the note-merely because she prevailed in the first action. Clearly, justice would not be served if the

[13] The lender in *Singleton* previously had filed a foreclosure action based on the borrower's failure to make payments, and that case was dismissed with prejudice. Subsequently, the lender filed a new foreclosure action alleging a different breach. *See Singleton*, 882 So. 2d at 1005. Both foreclosure actions sought to accelerate the entire indebtedness. *Id.* at 1005 n.1.

> mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.
>
> … The ends of justice require that the doctrine of res judicata not be applied so strictly so as to prevent mortgagees from being able to challenge multiple defaults on a mortgage. We can find no valid basis for barring mortgagees from challenging subsequent defaults on a mortgage and note solely because they did not prevail in a previous attempted foreclosure based upon a separate alleged default.

Id. at 1007-1008 (internal citation omitted).

In light of the above reasoning and rejection by the Florida Supreme Court of *Stadler*, this Court's reliance on *Stadler* in *Johnson* no longer appears viable. *See, e.g., Kirchberger v. HSBC Bank, USA, N.A.*, No. CV-12-164, Order at 3 (Me. Super. Ct. Jan. 9, 2014) (Fritzsche, J.) ("It is not clear that the note in this case actually was accelerated[,] and I have significant doubts as to whether the Law Court would find that *Johnson* remains good law."). The reasoning of *Singleton* and other, similar decisions—such as *Fairbank's Capital Corp. v. Milligan*, 234 F. App'x 21, 23 (3d Cir. 2007) (subsequent foreclosure action based on new default not barred); *Afolabi v. Atl. Mortg. & Inv. Corp.*, 849 N.E.2d 1170, 1174-75 (Ind. Ct. App. 2006) (same); and *In re Rogers Townsend & Thomas, PC*, 773 S.E.2d 101, 104 (N.C. Ct. App. 2015) (same)—better fits the context of residential mortgage foreclosures. This Court itself has cited *Singleton* with favor, noting in *Wilmington Trust Co. v. Sullivan-Thorne*, 2013 ME 94, 81 A.3d 371 ("*Wilmington Trust*") that "[w]e can find no valid basis for barring mortgagees from challenging subsequent defaults on a mortgage and note solely because they did not prevail in a previous attempted foreclosure based upon a

separate alleged default." *Id.*, ¶ 12, 81 A.3d at 376. The Court in *Wilmington Trust* also cited *Afolabi, supra*, with approval, stating: "[S]ubsequent and separate alleged defaults under [a] note create[ ] a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action." 2013 ME 94, ¶ 12, 81 A.3d at 376 (citing *Afolabi,* 849 N.E.2d at 1175).

Further—and of particular significance to the instant action—the Court in *Wilmington Trust* distinguished that case from *Johnson* for reasons including that the note in *Johnson* (but not in *Wilmington Trust*) had successfully been accelerated. 2013 ME 94, n.4, 81 A.3d at 376, n.4. The same distinction applies here (***see*** *supra* Pt. I.A.1); as does the distinction between (a) successive foreclosure actions based on new defaults (as in *Wilmington Trust* and the instant action) and (b) those based on the same default as underlay the first, unsuccessful foreclosure action (as in *Johnson*). In declining to apply the principle of res judicata against a second foreclosure action by the lender in *Wilmington Trust,* this Court noted that the second foreclosure involved violation of different terms, based on different conduct. 2013 ME 14, ¶ 12, 81 A.3d at 376. The same is true here. The 2011 foreclosure complaint that resulted in the 2014 Judgment for the Pushards focused wholly on the Pushards' failure to make payments then due on the Note. (A. 65, ¶ 12.) Since that time, Plaintiffs have committed multiple, additional defaults, including the failure to pay required property taxes and insurance. (A. 76-77, ¶¶ 5, 6, 7, 9.) Notwithstanding the fact that no new foreclosure action has been filed since issuance of the 2014 Judgment, should BANA

take steps to pursue a new foreclosure action in future, any or all of the Pushards' subsequent defaults could serve as the basis for a new complaint without running afoul of the res judicata doctrine.[14]

Accordingly, even had the Pushards' Note been accelerated by the prior Foreclosure Action (which was not the case), the reasoning in *Wilmington Trust*—as well as the *Singleton* and *Afolabi* cases cited therein with approval by this Court—supports the conclusion that a new foreclosure based on subsequent defaults (committed after dismissal of the first foreclosure action) is not automatically barred by the doctrine of res judicata.

4. The *Johnson* decision did not call for extinguishment of the borrower's note or mortgage.

Finally, even if *Johnson* is determined to still be good law (at least in the context of that case), it does not support the Pushards' argument that the Bank must immediately release their Note and Mortgage. The Court in *Johnson* nowhere stated or implied that the result of an inability to pursue a second foreclosure action requires a discharge of mortgage. Nor does any other authority stand for that proposition.

[14] This also aligns with the express terms of the parties' Note, which contemplates the potential for multiple accelerations based on multiple defaults. (*See supra* Pt. I.A.2.)

The Pushards' obligation to repay the Note underlying the Mortgage has not been satisfied, and was not extinguished by the 2014 Judgment. (A. 68-69.)[15] Indeed, the Pushards' debt obligation could not have been extinguished by the 2014 Judgment, because, as discussed in Part I.A.1, above, the Note never was accelerated. But even if, for argument's sake, the Pushards' obligation to repay the Note had been accelerated and extinguished as part of the 2014 Judgment, that still would not necessitate BANA's release of the Mortgage—and *Johnson* does not hold otherwise. *See generally Johnson*, 1997 ME 220, 704 A.2d 866. The law expressly recognizes situations where borrowers' obligations to repay a note may be extinguished while a corresponding mortgage remains intact. A prime example is bankruptcy—where the personal obligations under a note may be discharged, but the mortgage securing the note remains valid and enforceable. *See, e.g., In re Canning*, 442 B.R. 165, 172 (Bankr. D. Me.) (mortgagee "did not … violate the discharge injunction by failing to foreclose upon or release its mortgage on valuable real estate at the [mortgagors'] post-discharge insistence"), *aff'd*, 462 B.R. 258 (B.A.P. 1st Cir. 2011), *aff'd but criticized on other grounds*, 706 F.3d 64 (1st Cir. 2013).

It is not axiomatic that any time a borrower's note repayment obligations are extinguished, a discharge of the mortgage must follow. The BCD Court did not,

[15] The 2014 Judgment says nothing about the enforceability of the Mortgage or Note, and certainly does not order either instrument's discharge.

therefore, err in denying the Pushards' demand for discharge of the Mortgage based on the 2014 Judgment, and this Court should affirm.

B. As a matter of law, BANA has not violated 33 M.R.S. § 551.

Section 551 states in pertinent part:

> Within 60 days ***after full performance of the conditions of the mortgage***, the mortgagee shall record a valid and complete release of mortgage together with any instrument of assignment necessary to establish the mortgagee's record ownership of the mortgage. … If a release is not transmitted to the registry of deeds within 60 days, the [mortgagee] and any [] servicer are jointly and severally liable to an aggrieved party for damages equal to exemplary damages of $200 per week after expiration of the 60 days, up to an aggregate maximum of $5,000 for all aggrieved parties or the actual loss sustained by the aggrieved party, whichever is greater.

33 M.R.S. § 551 (2015) (emphasis added).

It is uncontested on the record that the Pushards have not fully performed the conditions of the Mortgage. As Justice Horton ruled: "To read this statutory language to include situations in which a mortgage is claimed to be unenforceable or void, which is essentially the Pushards' position, is not a reasonable interpretation of the statute." (A. 13.) Justice Horton was correct.

The sole authority proffered by the Pushards for their argument that when the 2014 Judgment became final, their "performance under the note and mortgage was effectively fully performed and the Pushards were entitled to a discharge of the mortgage" (A. 13), is their citation: "*See, Johnson, supra.*" (*Id.*) Nothing in *Johnson* stands for the Pushards' proposition. Section 551 did not apply and was never

mentioned in the *Johnson* decision. And the Pushards have done nothing to "effectively fully perform" their obligations.

The language of § 551 is plain, and its intent is clear: to ensure prompt releases of mortgages after mortgagors fully perform their obligations. 33 M.R.S. § 551. The predicate for triggering the intended application of the statute—complete mortgagor performance—is not present here. The Pushards do not even allege that the conditions of their Mortgage have been fulfilled. Rather, they claim that the purported res judicata impact of BANA's unsuccessful prosecution of the Foreclosure Action requires BANA to discharge the Mortgage. (A. 14-17; Blue Br. at 4-5.) Setting aside the lack of common law or statutory authority to support this proposition, as a matter of statutory right, § 551 does not provide the Pushards with a cause of action.

Indeed, the plain language of § 551 underscores why the Pushards are ***not*** entitled to the extraordinary relief they seek. The statute provides: "A mortgage only may be discharged by a written instrument acknowledging the satisfaction thereof …." 33 M.R.S. § 551. The Pushards have not satisfied the Mortgage and do not allege facts to the contrary. Independent of the res judicata question (discussed above in Part I.A), the Mortgage remains in effect for its entire term unless and until all conditions of the Mortgage are satisfied.[16] Thus, the Pushards' claim under § 551 fails

[16] This legal conclusion—that the Mortgage remains valid and in effect until the Pushards satisfy its conditions—complements BANA's argument in Part I.A.3, *supra*, that BANA should be permitted, in future, to pursue a new foreclosure based on

(footnote continued)

as a matter of law, and the BCD Court was correct to grant summary judgment on this claim to BANA.[17]

As a final matter with regard to the Pushards' claim under § 551, the Pushards argue that if they are not permitted relief under this statute, they have no ability to

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(continued footnote)

subsequent defaults. As a matter of logic and equity, it makes no sense that an unsatisfied mortgage may remain in effect under the law, but that the mortgagee no longer may enforce that mortgage. Such circumstances would yield an untenable limbo state, in which unsatisfied mortgages lived out their terms on property records (perhaps for decades), without foreclosures that could serve justice for unpaid lenders as well as clear up title. As the *Singleton* court noted in its discussion of equity:

> If res judicata prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note. … Clearly, justice would not be served if the mortgagee was barred from challenging the subsequent default payment solely because he failed to prove the earlier alleged default.

882 So. 2d at 1007-08 (emphasis added). As a matter of Maine statute, mortgagors are not entitled to discharges of mortgage until "full performance of the conditions of the mortgage." 33 M.R.S. § 551. This reading of the statute—in accordance with its plain meaning—accords with the notice of justice and equity, that mortgagors who fail to repay their mortgage loans are not entitled to the windfall of a mortgage-free property.

[17] The same holds true with respect to the Pushards' slander of title claim. As the Pushards note (Blue Br. at 14), the elements of that cause of action include publication of a false statement disparaging the plaintiffs' title, made with malice or reckless disregard, causing damages. The Pushards claim that the lack of filing a release of the Mortgage constitutes such conduct. But no court order has discharged the Mortgage. A discharge is not provided for under § 551. No precedent requires the discharge of a mortgage upon an unsuccessful attempt to foreclose stymied by a defective RTC notice. BANA has made no false statement disparaging the Pushards' title; BANA's reliance on existing law is not reckless or malicious; and no factual allegation in the Pushards' Complaint would support such a slander of title claim as a matter of law.

recoup attorney's fees incurred in the 2014 Foreclosure Action. (Blue Br. at 14, n.5.) This back-door argument does not create a valid claim for relief. The time for the Pushards to have sought such fees was in the prior Foreclosure Action, in which the Pushards could have moved for fees under 14 M.R.S. § 6101.[18] Section 551 does not provide a vehicle for belatedly seeking fees from an action made final (and not appealed) years before.

II. The Pushards' claims are not ripe for adjudication.[19]

The Pushards' claims are based on the purported res judicata effect of the 2014 Judgment. This Court has concluded, however, that determination of the res judicata impact of a foreclosure judgment is not ripe unless or until the mortgagee commences another foreclosure action. *See Girouard*, 2015 ME 116, ¶ 10, 123 A.3d at 219 ("Consideration of this issue is necessarily speculative, however, because, if the issue arises at all, it will be generated by events that have not yet happened and at present are entirely hypothetical. Therefore, we do not address this issue, leaving it to

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[18] Section 6101 was amended effective September 28, 2011 to permit a mortgagor to recover attorney's fees "[i]f the mortgagee does not prevail, or upon evidence that the [foreclosure] action was not brought in good faith." Pub. L. 2011, Ch. 269, § 1, 125th Leg., 1st Reg. Sess. (Me. 2011). The Bank's Foreclosure Action against the Pushards was filed in October 2011 (A. 59), meaning the amended statutory language of § 6101 applied to that action.

[19] The Pushards suggest that this issue cannot be addressed by the Court because BANA did not cross-appeal to assert this argument. (Blue Br. at 10-11.) The question whether a matter is ripe for adjudication may be raised at any stage of the proceedings and *sua sponte* by the Court. *See, e.g., Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807-08, 123 S. Ct. 2026, 2030 (2003).

another day if it becomes an actual controversy."); *accord U.S. Bank, N.A. v. Tannenbaum*, 2015 ME 141, ¶ 6 n.3, 126 A.3d 734, 736, n.3.

There are sound reasons why this Court has determined that it is premature to rule upon the res judicata impact, if any, of an unsuccessful foreclosure action on a second attempt to foreclose. For example, it is only when a second suit is filed that the bases of the second attempt are advanced, so they can be compared to those asserted in the earlier suit. The second foreclosure action may never happen, because the borrower catches up with his or her payments, or other circumstances cause the parties to resolve their differences. Further, res judicata is an equitable doctrine, subject to general equitable considerations. *Hackett v. Eaton*, 389 A.2d 848, 849 (Me. 1978); *see also Singleton*, 882 So. 2d at 1008. That the Court would want to view the question in light of the surrounding equities at the time of the second attempt to foreclose is understandable and prudent.

Accordingly, because BANA has not yet filed a second foreclosure action, the Pushards' claims are not ripe. While the BCD Court was correct in its reasoning as to why the Pushards' claims fail on their merits, (A. 16-18)—and this Court should affirm those determinations—the fact remains that the BCD Court need not even have considered those merits, since the Pushards' claims were (and are) not yet ripe. The fact that the Pushards included as bases for their discharge demand claims for violation of § 551 and slander of title should not have been enough to render the Pushards' claims justiciable. Contrary to Justice Horton's reading of *Girouard* and

Tannenbaum as distinguishable from the present action, both those cases involved parties seeking declarations from this Court regarding the res judicata impact of a foreclosure judgment. That is precisely what the Pushards are attempting to do here. Every claim in the Pushards' Complaint, however captioned,[20] is based on the premise that BANA is precluded from filing a second foreclosure action. (A. 16-18.) Their claims are, therefore, premature, and the BCD Court should have granted BANA's motion for judgment on the pleadings (in addition to granting BANA's alternative motion for summary judgment). (A. 8-9, 74, 76.)

CONCLUSION

For the reasons given above, the Court should affirm the BCD Court's decision granting summary judgment for BANA on the Pushards' claims. The Court also should declare that the Pushards' claims are premature and properly could have been dismissed on the basis of BANA's motion for judgment on the pleadings.

[20] *See, e.g., Lund ex rel. Wilbur v. Pratt*, 308 A.2d 554, 557 (Me. 1973) (caption of complaint constitutes no part of statement of cause of action).

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John J. Aromando (Bar No. 3099)
jaromando@piercatwood.com
Catherine R. Connors (Bar No. 3400)
cconnors@pierceatwood.com
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
(207) 791-1100

Attorneys for Appellee
Bank of America, N.A.

CERTIFICATE OF SERVICE

I, Catherine R. Connors, hereby certify that a copy of this Brief of Appellee Bank of America, N.A. was served upon counsel by email and two copies were served by U.S. Mail, postage-prepaid, at the address set forth below on September 14, 2016:

Joshua Klein-Golden
CLIFFORD & GOLDEN, PA
5 Maple Street
P.O. Box 368
Lisbon Falls, Maine 04252
jkgolden@cliffordandgolden.com

DATED: September 14, 2016

Catherine R. Connors (Bar No. 3400)
cconnors@pierceatwood.com
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
(207) 791-1100

Attorney for Appellee
Bank of America, N.A.

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https://www.pressherald.com/2022/10/31/maine-supreme-judicial-court-may-reconsider-a-legal-protection-against-home-foreclosure

Maine Supreme Judicial Court may reconsider a legal protection against home foreclosure

The court could overturn previous rulings that barred mortgage companies from refiling cases in which they failed to present proper evidence.

Posted October 31, 2022 Updated October 31, 2022

Edward D. Murphy
Staff Writer

Maine's top court will begin weighing two cases Tuesday that could rewrite the rules for how home foreclosures are handled in the state.

The cases before the Maine Supreme Judicial Court focus on whether a mortgage servicer can try to foreclose on a home a second time, after previously losing the foreclosure case because the company failed to present proper evidence of ownership and the amount owed on the loan.

Under law that dates to 1997 and was upheld in 2017, the mortgage company can't refile. In some cases where the evidence is lacking, the courts can even require that the lien on the property be removed – in other words, the rest of the mortgage debt is forgiven and the home is owned free and clear by the borrower, said Thomas A. Cox of Yarmouth.

In the current case, J.P. Morgan v. Moulton, the court is being asked to review a South Paris District Court decision last year that found the mortgage lender, Morgan, didn't provide an adequate default notice and information for the plaintiff to repay the loan.

Cox, who has provided free legal representation for hundreds of borrowers in foreclosure cases, was the lawyer who discovered the "robo-signing" scandal during the nationwide foreclosure crisis that began in 2008. Mortgage servicing company officials were signing hundreds or thousands of foreclosure documents daily without verifying, as the law required, that the information in those papers was accurate.

In some cases, the mortgage servicing companies had a hard time proving that they actually owned the mortgages, which often passed through a lot of hands in the years before the real estate market crashed in the financial meltdown of the late 2000s.

In response, Maine courts and the Legislature clamped down on lender practices to make sure that the mortgage servicing companies were pursuing foreclosures properly.

Cox said that culminated in a ruling five years ago that led to the courts limiting mortgage companies' ability to file a new foreclosure case if they failed to present proper evidence the first time around.

He said that made the system fair because those mortgage companies have another recourse and can sue their lawyer or the lawyer of the mortgage servicer if the lien on the property is released after an initial court case is thrown out.

"If a bank loses a foreclosure case, it's either due to the negligence of the servicer or the negligence of the servicer's lawyer," Cox said. He said there have only been about 20 cases in the state where a lien was removed after the lender or mortgage servicer lost a case, so the decision hasn't led to a huge wave of homeowners having the liens on their houses removed.

BENCH ISSUES

Cox said he thinks the Supreme Judicial Court decided to hear the two cases on their calendar for Tuesday because of a significant change in the makeup of the court – Gov. Janet Mills has appointed four of the seven justices since she became governor in 2019.

"Simply because there's new justices on the court, that is not a reason to change established law," he said. "What this Law Court is doing is making me realize that I am no longer practicing law in a fair or just legal system."

Cox also said that he thinks one of the justices on the case should recuse herself from participating in the decision because she represented a mortgage company in one of the 2017 cases and wrote a "friend of the court" brief for the Maine Bankers Association in the other.

So far Justice Catherine Connors has declined to recuse herself from the case. A spokeswoman for the court did not return a call Monday to find out of she still planned to hear the case.

DECISION UP TO JUDGE

Decisions on whether a judge should recuse themselves are largely up to the judge, said Dmitry Bam, vice dean of the University of Maine School of Law.

"Each judge or justice decides for themselves," he said and noted there have been only a few cases where lawyers have appealed that decision to the U.S. Supreme Court and the court told a judge that recusal was needed.

There are some "red lines" that clearly call for a recusal, Bam said, such as owning stock in a company that is before the court, a relative's involvement in a case or previous participation the case.

But even then, it's largely up to judges to decide if they can't be impartial.

"It's basically a judge deciding his own case," Bam said, and there's no process for other justices to call for a colleague to recuse themselves.

He said the system is set up this way because judges who may have been involved in similar cases aren't bound by their previous views.