EQUITABLE SUBROGATION IN MARYLAND MORTGAGES AND THE RESTATEMENT OF PROPERTY: A HISTORICAL ANALYSIS FOR CONTEMPORARY SOLUTIONS.

I. INTRODUCTION

Equitable subrogation has been expanded in modern mortgage refinancing so far beyond its original purpose, it is creating uncertainty in real property.[1] Consisting of substitution,[2] equitable "subrogation"[3] at first enabled a guarantor of debt, after paying, to assume the satisfied creditor's rights to pursue judgment against the defaulting party.[4] Courts, based on principles of natural justice, granted this legal right "to compel the ultimate discharge of a debt by one who in equity and good conscience ought to pay it."[5] Courts reasoned that subrogation served "natural justice."[6]

Subrogation's roots in equitable justice enabled American courts in the 19th and 20th centuries to rationally expand it.[7] Many plaintiffs, not just debt guarantors technically called sureties,[8] could seek subrogation to creditors' rights that plaintiffs had paid off.[9] For instance, a 19th century Maryland court granted subrogation to a ship's clerk who paid a crew's wages out of his own pocket, because

1. *Compare infra* Parts II, III.A–C, *with* III.D, IV.A–B. *See also infra* Part I (summarizing this comparison).
2. Logan v. Citi Mortg., Inc. (*In re* Schubert), 437 B.R. 787, 792 (Bankr. D. Md. 2010) (construing Maryland law); Jackson Co. v. Boylston Mut. Ins., 2 N.E. 103, 104 (Mass. 1885); Mason v. Sainsbury, (1782) 99 Eng. Rep. 538, (K.B.) 540 (Lord Mansfield, C.J.) ("Every day the insurer is put in the place of the insured."). *See also infra* note 5.
3. HENRY N. SHELDON, THE LAW OF SUBROGATION § 1 (1st ed. 1882) ("Subrogation is a doctrine primarily of equity jurisprudence."); BLACK'S LAW DICTIONARY 1563–64 (9th ed. 2009) (defining subrogation).
4. *See infra* note 5; *infra* Parts II, III.A.
5. Crisfield v. State *ex rel*. Handy, 55 Md. 192, 198–99 (1880).

> [W]here one is obliged as surety to pay the debt of another, an equity arises in his favor to have all the rights and remedies, securities original and collateral, which the creditor may have or hold against the principal debtor, transferred to him . . . .
>
> The right of the surety to be thus subrogated to all the rights of the creditor is not founded on contract, but upon the plainest principles of natural justice; and is adopted by Courts of equity to compel the ultimate discharge of a debt by one who in equity and good conscience ought to pay it.

Id.

6. *Id.*
7. *See infra* Part III.A–C; *see also* Burgoon v. Lavezzo, 92 F.2d 726 (D.C. Cir. 1937) (discussing various approaches).
8. BLACK'S LAW DICTIONARY, *supra* note 3, at 1579–80.
9. *See infra* note 10 and accompanying text; *infra* Part III.C.

the ship's company became insolvent and could not repay him.[10] The clerk was "substituted" to the "shoes of the crew" and their wage-claims, and so the court ordered that the clerk be repaid in the insolvency proceeding.[11]

In mortgage law today, refinancing lenders often can obtain subrogation to the earlier date of a paid-off mortgage, though state case law imposes various limitations.[12] Possessing a priority claim earlier than other creditors is crucial when a borrower becomes insolvent because multiple creditors jockey for priority position to seize whatever scraps are left.[13] Rarely are all paid in full.[14] In Maryland and other jurisdictions today, a refinancer does not need to produce an extraordinary story to request justice through subrogation because the doctrine now covers a laundry list of error and negligence.[15]

Because equitable subrogation still is an equitable doctrine granted in fact-specific inquiries,[16] the doctrine's uncertain application in mortgage law is causing concern.[17] Lenders can take steps in the

10. Abbott v. Balt. & Rappahannock Steam Packet Co., 4 Md. Ch. 310, 317 (1847), *reprinted in* William T. Brantly, Annotation, *Horace Abbott and Others v. The Baltimore and Rappahannock Steam Packet Co. and Others. March Term, 1847*, 4 REP. CASES ARGUED & ADJUDICATED HIGH CT. CHANCERY MD. 234, 239 (1886).

11. *Id.*

12. *See* ROBERT KRATOVIL & RAYMOND J. WERNER, MODERN MORTGAGE LAW AND PRACTICE §§ 31.01–02 (2d ed. 1981); John C. Murray, *Equitable Subrogation: Can a Refinancing Mortgagee Establish Priority over Intervening Liens?*, 45 REAL PROP. TR. & EST. L.J. 249, 250–52 (2010) (discussing three widely-applied stances concerning a lender's knowledge in subrogation law); Bruce H. White & William L. Medford, *Equitable Subrogation: The Saving Grace for Unperfected Lenders?*, 24 AM. BANKR. INST. J. 38, 38–39 (2005) (discussing that Ohio, Michigan, and Delaware forbid equitable subrogation for negligent plaintiffs, and also surveying equitable subrogation as applied in bankruptcy); *infra* Part III.C (discussing the volunteer rule).

13. *See* ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS 45–46 (6th ed. 2009). Priority under state law often is "[f]irst in time, first in right." *Id.* at 46. Yet types of creditors, and forums like bankruptcy, have varying rules. *See id.* at 217–27.

14. *See id.* at 45–46, 217–25; G.E. Capital Mortg. Servs., Inc. v. Levenson, 338 Md. 227, 235, 657 A.2d 1170, 1173–74 (1995) (demonstrating a circumstance where a judgment creditor got nothing and the mortgage-holder got everything at a foreclosure sale).

15. *See infra* Parts III.D–E, IV.B (discussing subrogation to repair negligence and mistake in Maryland and also subrogation irrespective of knowledge or negligence under the *Restatement (Third) of Property: Mortgages*).

16. *See infra* Parts III.E, IV.C.

17. Murray, *supra* note 12, at 252; Sang Jun Yoo, Note, *A Uniform Test for the Equitable Subrogation of Mortgages*, 32 CARDOZO L. REV. 2129, 2131–33 (2011) (calling for a

marketplace to ensure they have secure legal rights and need not resort to this equitable doctrine.[18] Further, the expanded ability of lenders in some jurisdictions to use subrogation to leapfrog back to an earlier priority date without arguing exceptional circumstances—as the *Third Restatement of Property* and, to a lesser extent, a 1995 Maryland Court of Appeals' decision advocate—creates even more uncertainty in real property rights.[19] Courts in the 21st century thus are at a crossroads.[20]

In 1995, Maryland's highest court in *General Electric Capital Mortgage Services, Inc. v. Levenson* altered Maryland's equitable subrogation case law,[21] diminishing the state's historic equitable approach.[22] The court did so partially to serve the economic objective of streamlining the foreclosure process.[23] This occurred at the expense of a judgment creditor, who was left with nothing.[24]

Levenson, as well as the *Restatement*, have adopted through obscure methods[25] a guiding principle of preventing unjust enrichment,[26] which is not central to equitable subrogation's roots[27] or evolution.[28] This permissive subrogation enables refinancers to subrogate to earlier mortgages even when negligent in adhering to state law.[29] It band-aids systematic mortgage industry problems,[30] which are causing numerous errors in lenders' legal rights.[31] Providing this band-aid forestalls market-based corrections and solutions.[32] It further contradicts equitable subrogation's purpose and

uniform approach to subrogation in New York State courts' "often confusing and uncertain application" of equitable subrogation); *cf.* Grant S. Nelson, *Confronting the Mortgage Meltdown: A Brief for the Federalization of State Mortgage Foreclosure Law*, 37 PEPP. L. REV. 583, 633 n.248 (2010) (recommending a uniform federal subrogation law to reduce title insurance costs).

18. *See infra* Part IV.A, D.
19. *See infra* Parts III.D, IV.
20. *See infra* Parts III.E (for Maryland), IV (in Maryland and nationally).
21. 338 Md. 227, 657 A.2d 1170 (1995); s*ee also infra* Part III.D.1 (for the facts), D.2 (for analysis).
22. *Compare infra* Part III.D, *with* A–C.
23. *See infra* Part III.D.1–2.a.
24. *See infra* Part III.D.1.
25. *See infra* Parts III.D, IV.B.
26. *See infra* Parts III.D.2.a, IV.B.
27. *See infra* Part II.
28. *See infra* Parts III.A–C, IV.B–C.
29. *See infra* Parts III.D.2.c, IV.B.
30. *See infra* Part IV.A–C.
31. *See infra* Part IV.A.
32. *See infra* Part IV.

development,[33] and contravenes the historic role of equity in slowing down the foreclosure process to protect the social value of land and home.[34]

When used by courts in complex insolvency situations, equitable subrogation can be a powerful tool to serve justice[35]—one fundamental purpose of the adversarial court system.[36] However, when subrogation is applied when stripped of equity and in a mechanical black-letter law fashion, the doctrine can favor one party over another, while solely paying lip service to a fact-specific inquiry about what is just.[37]

This paper traces the history of equitable subrogation in common law in Part II; with a focus on Maryland's legal history in Part III; so we can better understand, in Part IV, how subrogation should be applied in modern mortgage law. While the Supreme Court famously noted that its job is to say what the law is, not what the law should be,[38] sometimes we must rediscover what the law is, so that we can

33. *See infra* Parts II, III.A–C, IV.D.

34. *See infra* notes 207–212 and accompanying text.

35. *See supra* notes 8–11 and accompanying text, *infra* Part III.A–C, E.

36. Hickman v. Taylor, 329 U.S. 495, 510 (1947) ("Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients."); FED. R. CIV. P. 1 (citing justice as one of three guiding principles for procedure); FED. R. EVID. 102 (citing "justly determined" outcomes as a goal of federal evidence law); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 572–73 (2007) (Stevens, J., dissenting) (arguing that the Federal Rules of Civil Procedure are permissive in origin, permitting at least the airing of grievances and requiring answers from defendants). *But see* BLACK'S LAW DICTIONARY, *supra* note 3, at 62 (noting that no single agreed upon definition exists for the adversary system); *see also* Mancia v. Mayflower Textile Servs. Co., 253 F.R.D. 354, 361 (2008):

> 'The central precept of the adversary process is that out of the sharp clash of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information upon which a neutral and passive decision maker can base the resolution of a litigated dispute acceptable to both the parties and society.'

Id. (quoting STEPHAN LANDSMAN, ABA, SECTION OF LITIG., READINGS ON ADVERSARIAL JUSTICE: THE AMERICAN APPROACH TO ADJUDICATION 2 (1988)). Here, the formulation emphasizes settling and integrating disputes into a social order. *See id.*; *see also* 1 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 136–37 (2d ed. 2005) (stating that while courts provide "forums" for Davids to confront Goliaths, the poor's disadvantage is undisputable).

37. *See infra* Part III.D.2.b–c and text accompanying notes 219–228.

38. Minor v. Happersett, 88 U.S. 162, 178 (1874) ("Our province is to decide what the law is, not to declare what it should be.").

know what the law should be. This paper serves that goal. It does so by reconsidering equitable subrogation in light of its origin, purpose, and history to anchor the doctrine in a fact-specific, discretionary inquiry under equity, for furthering substantial justice, when doing so harms no one else.[39]

II. ORIGINS

To understand equitable subrogation, one must first understand its equitable context.[40] Equity began in both Roman and British law in reaction to the strict formalism of their respective law courts.[41] Equity is a "positive jurisprudence" of "important principles" founded upon "eternal verities of right and justice."[42] Equity is not meant to supplant law, but "supplement . . . defects in particular cases."[43]

Equity principles enable judges to administer justice with consistency, thus preventing arbitrary decisions; yet in early Britain, case-precedents also were mere "guideposts" to a fact-specific jurisprudence under equity principles.[44] These principles have been embodied in maxims.[45] They also have been adopted in American jurisprudence,[46] such as the maxim of clean hands: "[A] man must come into a Court of Equity with clean hands."[47]

39. *See supra* Part I, *infra* Parts III.E, IV.D, V.

40. *See supra* notes 1–11 and accompanying text.

41. JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE §§ 1–15 (3d ed. 1905) (1881); *accord* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §§ II.38–41 (Melville M. Bigelow ed., Fred B. Rothman & Co. 13th ed. 1988) (1886); *see also* HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 1–2 (2d ed. 1948) (noting that Aristotle discussed a similar concept, "Epieikea," a forerunner of Roman "Aequitas" and British "Equity").

42. POMEROY, *supra* note 41, § 59; *accord* STORY, *supra* note 41, §§ I.1–5; MCCLINTOCK, *supra* note 41, at 2 ("[Equity is] the fundamental end of attaining what the morals of the community regarded as justice in the particular case, and . . . discretion in adapting the remedy to the particular case . . . .").

43. POMEROY, *supra* note 41, §§ 45, 60. Yet Justice Story sees equity as more deferential to law. STORY, *supra* note 41, §§ I.1–7, 16.

44. POMEROY, *supra* note 41, §§ 45, 60; *accord* GEO. TUCKER BISPHAM & JOSEPH D. MCCOY, PRINCIPLES OF EQUITY §§ I.11–12 (10th ed. 1923) (1874).

45. POMEROY, *supra* note 41, § 120; *see also* STORY, *supra* note 41, §§ III.61–64g (discussing prominent equitable maxims).

46. BISPHAM & MCCOY, *supra* note 44, § I.2; *see also* POMEROY, *supra* note 41, § 13 (noting how states have adapted equity differently).

47. Dering v. Earl of Winchelsea, (1787) 29 Eng. Rep. 1184 (Exch.) 1185 ("[B]ut when this is said, it does not mean a general depravity; it must have an immediate and

In American law, subrogation arrived through British common law when a surety, guaranteeing a debt, is forced to pay upon default, and after paying, the surety appealed to equity courts to pursue repayment from the defaulting debtor.[48] American equity courts, based on principles of justice, granted this right, not at first available in legal courts but soon increasingly so,[49] "to compel the ultimate discharge of a debt by one who . . . ought to pay it."[50] The surety stands "in the shoes of the creditor" to pursue reimbursement from the defaulting debtor.[51] Courts have held this serves justice.[52]

In British law, subrogation's origins in equity have yet to be definitively traced.[53] By the 1500s, British equity had developed a justice-based contribution and repayment principle, allowing persons liable on a debt to seek repayment if they had paid for themselves plus others.[54] When one pays off a joint debt, for instance, early British courts held that the payer has a contribution right in equity against the tardy co-debtors.[55] This was before subrogation as a

necessary relation to the equity sued for."); 9 M. L. E. EQUITY § 34 (West 2011) (discussing this maxim in Maryland).

48. Lidderdale's Ex'rs v. *Ex rel*. Robinson, 25 U.S. 594, 596 (1827) (recognizing sureties' equitable rights in British precedent); Burgoon v. Lavezzo, 92 F.2d 726, 729 (D.C. Cir. 1937); Hollingsworth's v. Floyd, 2 H. & G. 87, 90–91 (Md. 1827) (describing equitable subrogation of a surety as grounded in chancery courts); *accord* Note, *Subrogation and the Volunteer Rule*, 24 VA. L. REV. 771, 771–72 (1938) [hereinafter Note, *Subrogation*, VA.]; *see also* 23 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §§ 61:50–51 (4th ed. 2002); 13 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 37:42 (4th ed. 2000). Williston notes that the term subrogation in mortgage law implies a not quite exact analogy to surety subrogation based in "a court of equity." 13 WILLISTON & LORD, *supra* § 37:42; *see also infra* Part III.A (for Maryland's example).

49. SHELDON, *supra* note 3, § 1 (stating subrogation originated in equity jurisprudence, but has expanded into courts of law); *cf.* Note, *Subrogation*, VA., *supra* note 48, at 771–73 (discussing how subrogation "has been extended").

50. Crisfield v. State *ex rel*. Handy, 55 Md. 192, 199 (1880).

51. *Id.* at 198–99; *accord* SHELDON, *supra* note 3, §§ 86–87.

52. *See* KRATOVIL & WERNER, *supra* note 12, § 31.01 (praising "the simple justice it accomplishes"); SHELDON, *supra* note 3, § 86 (quoting Lord Brougham in *Hodgson v. Shaw*, stating that equitable subrogation is "founded on the plainest principles of natural reason and justice"); Logan v. Citi Mortg., Inc. (*In re* Schubert), 437 B.R. 787, 792 (Bankr. Md. 2010) (citations omitted); *Crisfield*, 55 Md. at 198–99.

53. *See infra* notes 54–63 and accompanying text.

54. Dering v. Earl of Winchelsea, (1787) 29 Eng. Rep. 1184 (Exc.) 1185–86; Morgan v. Seymour, (1637) 21 Eng. Rep. 525 (Ch.) 525; Anonymous, (1557–1602) 21 Eng. Rep. 1 (Ch.) 1 (citing to a case listed as "9 E. 4 41 (1469)"); a*ccord* M. L. Marasinghe, *An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine I*, 10 VAL. U. L. REV. 45, 54–59 (1975).

55. *Anonymous*, 21 Eng. Rep. at 1.

concept and term had formed.[56] Because a surety can be seen as jointly liable with a debtor on a debt, this principle was extended to sureties and other insurers.[57]

By 1782 in Britain, Lord Mansfield characterized this process as substitution; the insurer metaphorically becomes the insured to seek repayment.[58] By 1834, Lord Brougham expressly used substitution theory to decide a similar case, without using "subrogation."[59] A British court first used the term in 1851.[60]

Subrogation shares roots with equitable liens and constructive trusts as remedies for those who lack legal redress.[61] Most jurists focusing on the area distinguish subrogation from those concepts because of subrogation's substitution concept born in the surety context.[62] Tracing subrogation's development, one can posit that sureties' recurring need to seek repayment from those defaulting on obligations likely carved through courts' repetitive experience of it the unique substitution process of subrogation; this then embodied and transformed a pre-existing contribution and repayment principle.[63]

56. *See* Marasinghe, *supra* note 54, at 54–59.

57. *See Morgan*, 21 Eng. Rep. at 525.

58. Mason v. Sainsbury, (1782) 99 Eng. Rep. 538 (K.B.) 540; *cf. Ex parte* Crisp, (1744) 23 Eng. Rep. 87 (Ch.) 88 (noting that a surety is "intitled [sic] to have an assignment of the security" after paying a debt, but that a petitioner who merely pays a debt cannot gain a security).

59. Hodgson v. Shaw, (1834) 40 Eng. Rep. 70 (Ch.) 73.

60. M.L. Marasinghe, *An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine II*, 10 VAL. U. L. REV. 275, 287–89 (1976) (discussing the first use of the term in *Quebec Fire Assurance Co. v. St. Louis* (1851) 13 Eng. Rep. 891 (P.C.) 895–96).

61. Comment, *Subrogation–An Equitable Device for Achieving Preferences and Priorities*, 31 MICH. L. REV. 826, 826–29, 831–32, 837 (1933) [hereinafter Comment, *Subrogation*, MICH.]; *accord* Note, *Subrogation*, VA., *supra* note 48, at 774.

62. Most authorities support the theory that subrogation is a unique substitution process providing an equitable right to pursue repayment. *See supra* notes 2, 5, 7, 48, 54, 58; *supra* Part I; *infra* Part II. Marasinghe argues Lord Hardwicke's 1744 codification of this contribution principle as a trust doctrine is most authoritative. Marasinghe, *supra* note 54, at 60–65; Marasinghe, *supra* note 60, at 281–84. However, the principle existed at least two centuries before this codification. Marasinghe, *supra* note 54, at 54–56. Lord Mansfield later codified it as substitution. *Id.* at 65. This substitution characterization, combined with sureties' experiences, carved subrogation's contour into jurisprudence. *See infra* Part II.; *cf.* OLIVER WENDELL HOLMES, THE COMMON LAW 1 (45th printing 1923) (1881) ("The life of the law has not been logic: it has been experience."). The substitution nature of subrogation is especially true when tracing its development in America. *See supra* Part I; *infra* Parts II, III.A–C.

63. *See supra* notes 54–62 and accompanying text; *cf.* HOLMES, *supra* note 62.

In the 1800s, American courts began to develop subrogation more fully than their British counterparts, including using its substitution concept to assign repayment as early as 1799 in Virginia, 1807 in Maryland, and 1815 in New York; and in 1818, the U.S. Supreme Court used the verb "subrogated" to describe this process.[64] In fact, Maryland had codified a surety's subrogation right by statute in 1763.[65] (It remains so codified.)[66] In 1827, the U.S. Supreme Court upheld a surety's statutory subrogation, noting it could have done so upon "a general principal [sic]."[67]

While American courts developed and expanded subrogation,[68] British jurisprudence temporarily retreated in 1827.[69] By the end of the 1800s in America, subrogation had expanded to apply to refinancing lenders in some jurisdictions, including Maryland.[70] By the 1920s and 1930s, American subrogation covered various just claims by plaintiffs to stand in another's shoes and seek repayment.[71]

64. Wayles v. Randolph, 6 Va. (2 Call) 125, 161–62, 188 (Va. 1799) (providing an opinion that first contains the attorney arguing then the court endorsing repayment); Tinsley v. Anderson, 7 Va. (3 Call) 329, 333 (Va. 1802) (stating sureties that pay a debt "ought to be placed in the situation of the creditors"); Norwood v. Norwood, 2 H. & J. 238, 243 (Md. 1807); Ghiselin & Worthington v. Fergusson, 4 H. & J. 522, 522, 526 (Md. 1819) ("[A surety] shall be considered to stand in the place of the creditor . . . to answer the ends of justice.") (explaining that the surety can pursue all remedies of that creditor, including a rightful refund from a trustee); Cheesebrough v. Millard, 1 N.Y. Ch. Ann. 190, 190 (N.Y. Ch. 1815) ("[T]he doctrine of *substitution* [is] founded on mere equity and benevolence."); Lenox v. Prout, 16 U.S. 520, 520, 522 (1818) (citing Maryland law and holding that a creditor can pursue the debtor or surety at any time).

65. *Prout*, 16 U.S. at 520, 522 (citing 1763 Md. Laws ch. 23, §§ 7, 8); *accord* James Morfit Mullen, *The Equitable Doctrine of Subrogation*, 3 MD. L. REV. 201, 206–07 (1939) [hereinafter Mullen, *Subrogation*, MD.].

66. MD. CODE ANN. COM. LAW § 15–401 (West 2012). The original statute was updated and amended in 1864, 1924, and thereafter. Reconstruction Fin. Corp. v. Maryland Cas. Co., 23 F. Supp. 1008, 1009 (D. Md. 1938).

67. Lidderdale's Ex'rs v. Robinson's Ex'r, 25 U.S. 594, 598 (1827).

68. *See infra* Part III.B.

69. Copis v. Middleton, (1823) 37 Eng. Rep. 1083 (Ch.) 1083–84; s*ee also* Crisfield v. State *ex rel.* Hardy, 55 Md. 192, 198–99 (1880) (discussing this British judicial retrenchment, how it was overturned by statute, and affirming an expansive view of subrogation based upon "the plainest principles of natural justice").

70. Milholland v. Tiffany, 64 Md. 455, 462–65, 2 A. 831, 835–36 (Md. 1886); *see also* Home Sav. Bank v. Bierstadt, 48 N.E. 161, 162 (Ill. 1897) ("[Equitable subrogation] has been steadily expanding and growing in importance and extent in its application to various subjects and classes of persons."); Gilbert v. Gilbert, 39 Iowa 657, 660–61 (1874); Snelling v. McIntyre, 6 Abb. N. Cas. 469, 471–72 (N.Y. Sup. 1879); Levy v. Martin, 4 N.W. 35, 38 (Wis. 1880).

71. Note, *Subrogation*, VA., *supra* note 48, at 772–74; *see also infra* Part III.C.

III. EQUITABLE SUBROGATION IN MARYLAND

In regard to mortgage refinancing, equitable subrogation first expanded from sureties, to payers of debt with justice-based claims for repayment, to lenders who make mistakes.[72] The 1995 Court of Appeals decision of *General Electric Capital Mortgage Services, Inc. v. Levenson* troubles Maryland precedent because it rewrote the doctrine's fundamental terms without expressly announcing it,[73] and because the opinion expands what Maryland courts consider to be harmless and excusable mistakes when granting subrogation.[74] Maryland courts still adhere to an equitable approach to subrogation,[75] though how the doctrine will evolve is uncertain.[76]

A. Early Case Law

The earliest Maryland cases dealing with equitable subrogation upheld a surety's right to an assignment of a judgment against the principal debtor after paying that judgment.[77] In the early 1800s, Maryland's highest court handled mostly thorny applications of this principle: In 1822, the court held that a surety who accidentally overpaid a creditor was subrogated to that creditor's right to pursue the overpaid funds in the hands of the sheriff overseeing an insolvency sale.[78] In 1827, equitable assignment was denied to a surety who made partial payment.[79] Subrogation generally requires full payment.[80]

In 1833, the Maryland Court of Appeals used the subrogation doctrine beyond surety law.[81] The court equitably enabled an estate administrator who paid off creditors of an estate before obtaining the estate's assets, which were inadequate, to obtain the paid creditors'

72. *Compare infra* Part III.A, *with* III.B, D.
73. *See infra* Part III.D.2.a.
74. *See infra* Part III.D.2.b–c.
75. *See infra* Part III.E.
76. *See infra* Parts III.E, IV.C–D.
77. *See* Norwood v. Norwood, 2 H. & J. 238, 238 (Md. 1807); Sotheren's Lessee v. Reed, 4 H. & J. 307, 309–10 (Md. 1818); Lenox v. Prout, 16 U.S. 520, 526 (1818) (deciding a case under Maryland law); Ghiselin & Worthington v. Fergusson, 4 H. & J. 522, 526 (Md. 1819).
78. *See* Merryman v. Harris, 5 H. & J. 423, 426–27 (Md. 1822).
79. *See* Hollingsworth's v. Floyd, 2 H. & G. 87, 91 (Md. 1827).
80. *See* Packam v. German Fire Ins. Co. of Balt., 91 Md. 515, 528, 46 A. 1066, 1069 (1900). Full payment usually is required by state courts. *See* 73 AM. JUR. 2D. *Subrogation* § 5 (2011).
81. *See* Collinson v. Owens, 6 G. & J. 4, 9 (Md. 1833).

legal rights in an equity court against the remaining estate at the time of the distribution.[82] The court did so based on pure equitable considerations,[83] based upon what was found just in a fact-specific inquiry.[84] The decision augured the expansion to come.[85]

B. Equitable Subrogation and Refinancing

The Court of Appeals in 1850 refused to extend subrogation to a lender who refinanced his own loan—releasing the earlier loan, and creating a new, later-dated mortgage—when land records revealed the existence of in-between creditors and so put the refinancer on constructive notice of their liens.[86] These in-between creditors are often called "intervening."[87] The court valued legal diligence over repairing error when stating that the refinancer should have checked the land records, noticed intervening creditors, and not released the prior lien.[88]

Thirty years later, Maryland expanded subrogation to a refinancing lender who provided money to extinguish a valid prior lien in a refinancing transaction voided by fraud.[89] The court held that the refinancer, named Tiffany, could be subrogated to the prior lien's rights, because not doing so would defraud Tiffany; further, the intervening creditors had notice of the prior lien when originally extending credit, so reviving it caused no harm.[90] The court did note that Tiffany should have been on inquiry notice of problems with these particular borrowers, yet still granted subrogation on "the plainest principles of justice."[91] Plus, doing so harmed none.[92]

82. *Id.* at 4, 8–10.
83. *Id.* at 12 ("He unquestionably was entitled to some relief.").
84. *See supra* Part II (on equity). In *Collinson*, the Court of Appeals discussed the case in detail and balanced competing equities and principles at play. *See* 6 G. & J. at 4–6; *see also, e.g.*, BLACK'S LAW DICTIONARY, *supra* note 3, at 617 (defining "equitable" as "[j]ust; consistent with principles of justice and right"); *id.* at 619 (defining "equity" as "[t]he recourse to principles of justice to correct or supplement the law as applied to particular circumstances").
85. *See infra* Part III.B–C, E.
86. Woollen v. Hillen, 9 Gill 185, 185–86 (Md. 1850). The court did not use the term constructive notice. *Id.*
87. *See, e.g.*, G.E. Capital Mortg. Servs., Inc. v. Levenson, 338 Md. 227, 238 n.1, 657 A.2d 1170, 1175 n.1 (1995); Bennett v. Westfall, 186 Md. 148, 153, 46 A.2d 358, 360 (1946).
88. *Woollen*, 9 Gill at 188–89.
89. Milholland v. Tiffany, 64 Md. 455, 456–57, 2 A. 831, 832 (1886).
90. *Id.* at 462, 464, 2 A. at 835–36.
91. *Id*. at 462, 2 A. at 835.

In 1946, the court expanded subrogation again by enabling a refinancer, who was negligent in not checking the land records during a commercial refinancing, to subrogate to the prior but extinguished mortgage.[93] In *Bennett v. Westfall*, for the first time in Maryland, subrogation became open to refinancers who lacked legal rights due solely to their own error, as opposed to the fraud already discussed in *Milholland v. Tiffany*.[94]

The court still used a balancing of equities approach in deciding *Bennett v. Westfall*, mixing subrogation language[95] with the negligence doctrine that one who pleads negligence must show harm.[96] Here, an intervening creditor must show harm to their interests to prevent another's subrogation.[97] The opinion contains no express reference to justice and the historical subrogation language is toned down.[98]

A fact-specific examination of *Bennett v. Westfall* notes that the refinancer, Mr. Westfall, was refinancing a $773 original loan that he previously made to a couple to extend payment for one year, to prevent the couple from defaulting.[99] It was a small transaction between individuals.[100] In this context, the mishap is local in effect.[101] However, *Bennett v. Westfall* and similar holdings have been extended to justify permitting mass commercial lenders that make mistakes to band-aid their errors through subrogation, even

92. *Id*. Subrogation can be granted "provided it does not interfere with intervening rights and incumbrances." *Id.* at 460, 2 A. at 834 (emphasis omitted).

93. *Compare* Bennett v. Westfall, 186 Md. 148, 154–55, 46 A.2d 358, 361 (1946) (expanding subrogation to a party who negligently failed to check land records), *with* Woollen v. Hillen, 9 Gill 185 (Md. 1850) (refusing to extend subrogation in light of constructive notice).

94. *Compare Bennett*, 186 Md. at 154–55, 46 A.2d at 361 (extending subrogation despite a party's negligent failure to check land records), *with Milholland*, 64 Md. at 455, 2 A. at 831 (permitting subrogation where a party was defrauded).

95. *Bennett*, 186 Md. at 155, 46 A.2d at 361 ("[I]t cannot be said that under the facts in this case appellee intended to substitute a junior lien for a senior lien and thus place the intervening judgment ahead of his mortgage.").

96. *Id*. at 154, 46 A.2d at 361 ("'[O]ne who relies on the negligence of another as a ground for recovery . . . must show . . . prejudice in reliance thereon.'" (quoting Holt v. Mitchell, 43 P.2d 388, 389 (Col. 1935)).

97. *Id.* at 154, 46 A.2d at 361.

98. *See id*. at 154–55, 46 A.2d at 361.

99. *Id*. at 150, 46 A.2d at 359.

100. *See id.*

101. *See id.*

though these lenders interact with tens of thousands of parties.[102] *Bennett v. Westfall*, which evaluated harm only to intervening creditors, was reasoned in the context of individuals engaging in a community transaction; it did not encompass and consider national, or even global, mass-market lending under 21st century realities.[103]

C. The Volunteer Debate

As equitable subrogation nationally expanded in the first decades of the 20th century, American courts and scholars debated how far subrogation should go in helping those with solely justice-based claims to repayment.[104] Some courts granted equitable subrogation to deserving plaintiffs as long as they were not "mere volunteers," like gift givers, who suddenly want repayment; other courts defined "mere volunteers" more widely, thus excluding voluntary commercial actors, like refinancers with no stake in the prior loans.[105] This divide remains.[106] Courts generally also refused subrogation if it would harm someone else.[107] By the 1930s, most courts were expanding subrogation "if justice may be served."[108] Likewise most law review articles in the 1920s and 1930s opining on equitable subrogation voiced support for the expansive view.[109] Maryland, in the 21st century, adopts the expansive position.[110]

102. *See, e.g.*, G.E. Capital Mortg. Serv., Inc. v. Levenson, 338 Md. 227, 240, 657 A.2d 1170, 1176 (1995); *see also infra* Parts III.D.2.b–c (discussing this case), IV.A (describing the modern lending market), IV.B (discussing the permissive *Restatement* position).

103. *Compare supra* Part III.B, *with infra* Part IV.A.

104. Burgoon v. Lavezzo, 92 F.2d 726 (D.C. Cir. 1937) (discussing courts' approaches nationally and reluctantly choosing an expansive approach to create uniformity in federal courts).

105. Note, *Subrogation of Purchaser to Rights of Senior Mortgage Against Junior Encumbrances*, 48 YALE L.J. 683, 686–87 (1939) [hereinafter Note, *Subrogation*, YALE].

106. *Compare In re* Lewis, 398 F.3d 735, 747–49 (6th Cir. 2005) (discussing Michigan law excluding voluntary commercial actors), *with* Hill v. Cross Country Settlements, LLC, 402 Md. 281, 302–05 & n.15, 936 A.2d 343, 355–57 & n.15 (2007) (excluding only gift-givers and intermeddlers).

107. Note, *Subrogation*, YALE, *supra* note 105, at 688 ("[A]ll courts agree that subrogation may not successfully be invoked where interested parties have, in good faith, changed their positions in reliance upon the discharge of the obligation in question."). This principle lives on. *See* 73 AM. JUR. 2D *Subrogation* § 5 (2011) ("[S]ubrogation must not work any injustice to the rights of others.").

108. Note, *Subrogation*, YALE, *supra* note 105, at 689.

109. Mullen, *Subrogation*, MD., *supra* note 65, at 201 (discussing subrogation approvingly and calling it "a doctrine of great importance"); Note, *Mortgages—Subrogation—*

D. General Electric Capital Mortgage Services, Inc. v. Levenson

The court in this case rewrote the doctrine of subrogation in Maryland, without specifically announcing this intention.[111] The court's alteration removed subrogation's well-established and historic focus from the plaintiff seeking it,[112] downplayed the harm caused to the intervening creditor in this case,[113] and expanded excusable neglect.[114] The case did not entirely change subrogation, because Maryland courts continue to cite *Levenson*'s anomalous holding alongside other Maryland precedent.[115] Nevertheless this precedent causes concern.[116]

1. Facts and Holding

In *Levenson*, G.E. Capital, as owner of a refinancing loan, moved to foreclose on a residential property without any knowledge of an intervening lienholder: a judgment creditor named Levenson.[117] A title search preceding the refinancing failed to notify the refinancing lender, because the homeowner failed to disclose it, and the judgment against the homeowner was registered under an alias.[118] However, several days before the foreclosure sale, another title search found the judgment.[119] G.E. Capital advised its foreclosure sale representative to bid up to $45,000 for the house because its interest was protected if

Merger, 9 N.Y.U. L. Q. REV. 378, 378–79 (1932) (criticizing the Georgia Supreme Court's 1931 rejection of a plaintiff's equitable argument for subrogation); Note, *Subrogation in Favor of a "Volunteer"*, 39 HARV. L. REV. 381, 381–83 (1926) [hereinafter Note, *Subrogation*, HARV.] (arguing for excluding only officious payers from subrogation); *see also* Note, *Subrogation*, VA., *supra* note 48, at 771–77 (describing the theoretical expansion of subrogation in equity, and highlighting remaining doctrinal problems); Note, *Subrogation*, YALE, *supra* note 105, at 685, 689 (discussing subrogation's expansion as a justice-based remedy); *cf.* Comment, *Subrogation*, MICH., *supra* note 61, at 836–37 (applauding subrogation's remedial uses, while calling for more "thoughtful revaluation of [its] economic purposes").

110. *Hill*, 402 Md. at 304–05, 936 A.2d at 357 (excluding officious intermeddlers).
111. *See infra* Part III.D.2.a.
112. *See infra* Part III.D.2.
113. *See infra* Part III.D.1, D.2.b.
114. *See infra* Part III.D.2.c.
115. *See infra* Part III.E.
116. *See infra* Parts III.D.2, IV.C–D.
117. G.E. Capital Mortg. Servs., Inc. v. Levenson, 338 Md. 227, 233–34, 657 A.2d 1170, 1172–73 (1995); G.E. Capital Mortg. Servs., Inc. v. Levenson, 101 Md. App. 122, 126–27, 643 A.2d 505, 507 (1994).
118. 338 Md. at 234, 657 A.2d at 1173.
119. *Id.*

it purchased the house at that price, even if Levenson's judgment had priority and thus took the $45,000.[120] G.E. Capital succeeded in buying the house for $45,000.[121]

The Maryland Court of Appeals upheld the refinancer's right to be subrogated to the priority-dated deed that its refinancing extinguished; this subrogation gave G.E. Capital a priority over Levenson.[122] Thus, G.E. Capital received rights to the foreclosure proceeds, plus the house; Levenson got zilch.[123] Second, the court held that G.E. Capital did not have to advertise its priority claim as based on equitable subrogation, nor did it have to inform Levenson at the foreclosure sale that it had an equitable subrogation claim that would trump his judgment.[124]

Lastly, the court overturned the intermediate court's holding that, because subrogation was an equity doctrine dependent on a court's grant, a foreclosing lender must go to court first to obtain subrogation before foreclosing.[125] The *Levensen* court disagreed with the Court of Special Appeals, primarily because the lower court's holding contravened "the policy of Maryland law to expedite mortgage foreclosures."[126]

2. Analysis

a. Covertly changing precedent

Levenson is notable for its divergence from Maryland precedent, though the court's reasoning does not express this intention.[127] The court does not offer an express argument to alter precedent, which is a prime characteristic of common law jurisprudence.[128] The Maryland Court of Appeals embraces the common law tradition,[129] and, for instance, has held that precedent should be overturned when, due to changes in society, precedent is no longer "sound" or

120. *Id.* at 234–35, 657 A.2d at 1173.
121. *Id.*
122. *Id.* at 246, 657 A.2d at 1179.
123. *Id.* at 246–47, 657 A.2d at 1179.
124. *Id.* at 243, 657 A.2d at 1177–78 (holding the lender's advertisement that it possessed a "first priority position," without disclosing more, sufficed to put others on notice).
125. *Id.* at 243–44, 657 A.2d at 1177–78.
126. *Id.* at 245, 657 A.2d at 1178.
127. *Id.* at 239–44, 657 A.2d at 1175–78 (citing and quoting Maryland precedent with the implication of following it).
128. *See* Mortimer N. S. Sellers, *The Doctrine of Precedent in the United States of America*, 54 AM. J. COMP. L. 67, 71–75 (2006).
129. *Id.* at 74–75.

"useful."[130] Yet an explanation and rationale for changing Maryland's subrogation tradition is missing from *Levenson*.

Levenson approvingly discusses Maryland case law,[131] yet its holding relies on a characterization of equitable subrogation's core principle as preventing unjust enrichment—a characterization alien to Maryland precedent.[132] Rather, the court finds the characterization in a mid-20th century mortgage treatise by G.E. Osborne.[133] This innovative framing also mirrors the *Third Restatement of Property*,[134] which was published in 1997, two years after *Levensen*.[135]

Levenson's citation of persuasive authority played a crucial role in its holding, especially the court's reliance on real estate treatises[136] and Texas case law.[137] In the context of well-established Maryland law,[138] the court turned to persuasive sources to rationalize that its holding served "to prevent unjust enrichment of Levenson."[139] Thus, the court interjected persuasive authority into a rich history of Maryland subrogation precedent without expressly announcing the takeover.[140]

Subrogation's equitable basis in Maryland has been reaffirmed since this 1995 case; however, subrogation's focus on doing affirmative justice, or preventing unjust enrichment, has become intertwined and mixed.[141] As the Maryland Court of Appeals stated

130. *Id.*
131. *Levenson*, 338 Md. at 239–44, 657 A.2d at 1175–78.
132. *See supra* Part III.A–C.
133. *Levenson*, 338 Md. at 231–32, 657 A.2d at 1172.
134. *Compare supra* Part III.D (discussing *Levenson* and precedent), *with infra* Part IV.B (discussing subrogation under the *Restatement*).
135. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.6 (1997).
136. 338 Md. at 231–32, 238–39, 657 A.2d at 1172, 1175.
137. *Id.* at 247–50, 657 A.2d at 1179–81.
138. *See supra* Part III.A–B.
139. 338 Md. at 242, 657 A.2d at 1177.
140. *See id.* at 239, 247–50, 657 A.2d at 1175, 1179–81 (citing and quoting persuasive authority without announcing its takeover of Maryland subrogation precedent); *see also supra* note 127 and accompanying text.
141. Hill v. Cross Country Settlements, LLC, 402 Md. 281, 313, 936 A.2d 343, 362 (2007) (distinguishing unjust enrichment and subrogation); Podgurski v. One Beacon Ins. Co., 374 Md. 133, 140–41, 821 A.2d 400, 405 (2003) (citing both unjust enrichment and justice rationales); Riemer v. Columbia Med. Plan Inc., 358 Md. 222, 231–32, 747 A.2d 677, 682 (2000) (citing both unjust enrichment and justice rationales); s*ee also* Taylor v. Furnace Assocs. (*In re* Taylor), 2008 WL 4225761, at *4 (Bankr. D. Md. Sept. 10, 2008) (adopting an unjust enrichment rationale). *But see* Rinn v. First Union Nat'l Bank of Md., 176 B.R. 401, 408, 408 n.5 (D. Md. 1995) (adopting a justice rationale); Logan v. Citi Mortg., Inc. (*In re* Shubert), 437 B.R. 787, 792–93

in a more recent 2007 subrogation case: "'The object of subrogation is the prevention of injustice. It is designed to promote and to accomplish justice.'"[142]

b. Ignoring notice and prejudice

The court's holding that subrogation could go forward despite the intervening creditor's lack of notice at the foreclosure sale also contradicts the notice requirement in prior Maryland cases before subrogation will be granted.[143] While the court found "Levenson in no worse a position than he was in when his judgments were obtained,"[144] Levenson (with judgment in hand) later relied on the land records to refrain from bidding at a foreclosure sale.[145] At the sale, Levenson relied on public records that his first priority claim would take the proceeds.[146] Because Levenson lacked notice of potential subrogation, he lacked opportunity to protect his interest at the sale, and so was prejudiced.[147]

c. Expanding excusable negligence

Lastly, the court's excuse of the lender and their agents' conduct expanded excusable neglect in Maryland subrogation.[148] In *Levenson*, the court excused the plaintiff's two faulty acts: not detecting the intervening judgment when refinancing, and not providing notice to this judgment creditor at the foreclosure sale.[149]

(Bankr. D. Md. 2010) (relying upon Maryland precedent's justice-based view of subrogation).

142. *Hill*, 402 Md. at 312, 936 A.2d at 362 (quoting *Podgurski*, 374 Md. at 141, 821 A.2d at 405 (quoting 10 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1265 (3d ed. 1957))).

143. *See supra* Part III.B.

144. *Levenson*, 338 Md. at 251, 657 A.2d at 1181.

145. *Id.* at 235, 657 A.2d at 1174.

146. *Id.*

147. *Id.* at 235, 657 A.2d at 1173–74.

148. *Compare id.* at 227, 234–36, 251, 657 A.2d at 1173–74, 1181 (granting the refinancing lender's equitable subrogation claim priority over judgment liens held by Levenson, despite the former's failure to discover existing judgment liens on the property during refinancing and provide notice to the judgment creditor of its reliance on the equitable subrogation doctrine prior to the foreclosure sale, because this left Levenson in essentially the same position as when the judgment was obtained), *with* Bennett v. Westfall, 186 Md. 148, 154–55, 46 A.2d 358, 361 (1946) (upholding Westfall's subrogation claim on appeal despite his failure to search land records for judgment liens because this omission, even if negligent, benefited Bennett, a judgment lienholder).

149. *See supra* Part III.D.1.

This went beyond the single act of failing to check the land records excused in *Bennett v. Westfall*.[150]

Further, *Levenson* obscures the harm that the plaintiff's neglect in fact caused when the plaintiff spurred a chain of events that left Levenson disarmed at a foreclosure sale.[151] This encourages further courts to discount actual prejudice to others down the road by limiting a court's analysis to whether objecting creditors would have been harmed solely at the time of obtaining their legal property interests.[152]

Excusing neglect has wider social implications.[153] First, waiving accountability lowers professional standards, because liability defines the contours of what conduct society considers reasonable conduct.[154] Second, liability is an incentive to avoid error, so permitting more error risks encouraging error.[155] Third, providing an equitable remedy in *Levenson* ignores that lenders relying on a title company's faulty product or borrower's less-than-honest disclosure do have causes of action against those parties.[156] In contrast, subrogation was created, then developed, for plaintiffs lacking substantial legal remedies.[157]

Fourth and last, a stricter approach safeguards title by providing more certainty that land records will be upheld and honored: As one attorney argued before the Virginia Supreme Court, "The deed not having been recorded within the time prescribed by law is absolutely void; or else the ways of law, like *The ways of Heaven, are dark and intricate, puzzled with mazes, and perplexed with errors*."[158]

d. Rationale has been undermined

The reason the *Levenson* court voided the intermediate appellate court's holding that a foreclosing party first must obtain equitable subrogation in court before relying on it at a foreclosure sale was to

150. 186 Md. at 154–55, 46 A.2d at 361.
151. *See supra* Part III.D.1.
152. *Levenson*, 338 Md. at 251, 657 A.2d at 1181.
153. *See infra* notes 154–159 and accompanying text.
154. *See* RESTATEMENT (SECOND) OF TORTS § 283 (1965) ("Unless the actor is a child, the standard of conduct to which he must conform to avoid being negligent is that of a reasonable man under like circumstances."). This liability standard enables society to hold people accountable. *Id.* § 283 cmt. b.
155. *See id.* § 283.
156. *See, e.g.*, Hill v. Cross Country Settlement, LLC, 402 Md. 281, 291–92, 936 A.2d 343, 349–50 (2007).
157. *See supra* Parts II (on creation), III.B–C (on development).
158. Wayles v. Randolph, 6 Va. (2 Call) 125, 157 (1799) (quoting Hay, Esq.).

support "the policy of Maryland law to expedite mortgage foreclosures."[159] However, since *Levenson*, and specifically in the wake of the 2006-2007 financial collapse and resulting national foreclosure crisis, Maryland has changed its laws to slow down foreclosures.[160] In 2008, the Maryland legislature banned residential foreclosures from commencing before a borrower was at least ninety days in arrears.[161] Maryland's executive branch in 2007 created a Homeownership Taskforce to study and recommend improved homeownership and foreclosure policy.[162] The Taskforce stated: "It is all too true that the American dream can become a nightmare unless we create a sound structure to ensure sustainable homeownership."[163]

Maryland 21st century law and policy favors "a sound structure" for home-ownership, including increased transparency and slowness in the residential foreclosure process.[164] An expedited foreclosure process is no longer the policy of Maryland.[165] The Court of Appeals should revisit *Levenson* in light of its outdated rationale. Further, *Levenson*'s expansion of excusable neglect, without a justice-based reason to excuse it, undermines the sound structure provided by accountability to rules.[166]

159. G.E. Capital Mortg. Servs., Inc. v. Levenson, 338 Md. 227, 245, 657 A.2d 1170, 1178 (1995).

160. *Compare* MD. RULES 14-204 to -212 (West 2012), *with* MD. RULE W70–W78 (Michie's 1995). The 1995 statute required little documentation to foreclose. *Compare* MD. RULE W72(a), (d) (Michie's 1995), *with* MD. RULE 14-207 (West 2012). The revamped Maryland petition process requires a foreclosing party to show not just a right to foreclose, under MD. RULE 14-207(b)(1)–(4) (West 2012), but compliance with public policies. *Id.* (b)(5)–(9). For instance, a foreclosing party must show completion of loss mitigation analysis for residential borrowers. *Id.* (b)(6)–(7). *See also* MD. GEN. ASSEMBLY DEP'T OF LEGISLATIVE SERVICES, THE 90 DAY REPORT–A REVIEW OF THE 2008 LEGISLATIVE SESSION F14–17 (2008) [hereinafter THE 90 DAY REPORT], *available at* http://mlis.state.md.us/2008rs/90-Day-report/index.htm (detailing the Maryland legislature's 2008 revamping of foreclosure law in the context of an economic recession and "foreclosure crisis").

161. S.B. 216, 2008 Leg., 425th Sess. (Md. 2008); H.B. 365, 2008 Leg., 425th Sess. (Md. 2008) (codified at MD. RULE 14-205(b) (West 2012)).

162. MD. HOMEOWNERSHIP TASKFORCE, MARYLAND HOMEOWNERSHIP TASKFORCE REPORT 1–6 (2007), *available at* http://www.gov.state.md.us/documents/HomePreservationReport.pdf.

163. *Id.* at 1.

164. See *supra* notes 159–163 and accompanying text.

165. THE 90 DAY REPORT, *supra* note 160, at F15–F16.

166. *Compare supra* Part III.D.1–2.c, *with supra* Part III.D.2.d.

E. Subrogation in 2011

Subrogation in Maryland mortgage law remains a substitution principle supporting a justice-based remedy.[167] Under a justice rationale, Maryland cases hold that a plaintiff paying off a prior mortgage-backed loan can obtain equitable subrogation to that earlier mortgage if (A) the plaintiff's transaction is legally unenforceable;[168] (B) the plaintiff did not act as a mere volunteer, but acted under some sort of compulsion (legal, moral, or economic) or upon request;[169] (C) justice is served by subrogation;[170] and (D) no creditors' reliance interests are harmed by its grant.[171] The justice inquiry in (C), *supra*, remains a fact-specific inquiry.[172]

Further, Maryland courts can raise subrogation *sua sponte* if its elements have been pled.[173] A plaintiff may have been negligent, such as mistakenly failed to check land records;[174] or relied upon a faulty title search plus made another mistake under *Levenson*.[175]

167. *See infra* notes 183–192.

168. This is the very premise of equitable subrogation. *See supra* Part III.A–D; *accord supra* Parts I–II.

169. Hill v. Cross Country Settlements, LLC, 402 Md. 281, 304–05, 936 A.2d 343, 357 (2007); *see also* Springham v. Kordek, 55 Md. App. 449, 453–54, 462 A.2d 567, 569–70 (1983):

> The meaning of "volunteer" therefore is crucial. In this regard we have noted three applicable principles:
>
> (1) One is not a volunteer when he has an interest of his own to protect.
>
> (2) A payment is not voluntary when made under a moral obligation, since such is regarded in equity as a form of compulsion.
>
> (3) One is not a volunteer where he pays the debt at the request of a person whose liability he discharges.

Id. (citations omitted).

170. *See supra* Part III.A–C. *But see supra* Part III.D, *infra* Part III.E (discussing how since 1995, Maryland courts can take two differing approaches to formulating this rationale).

171. *See, e.g.*, Rinn v. First Union Nat'l Bank of Md., 176 B.R. 401, 409 (D. Md. 1995); Bennett v. Westfall, 186 Md. 148, 155, 46 A.2d 358, 361 (1946); Milholland v. Tiffany, 64 Md. 455, 462, 2 A. 831, 835 (1886). An analysis whereby a court ensures no one is harmed by the grant is a second step in the subrogation analysis. *Rinn*, 176 B.R. at 411.

172. *See supra* Part III.B–C.

173. *Hill*, 402 Md. at 311, 936 A.2d at 361 (citing Bachmann v. Glazer & Glazer, Inc., 316 Md. 405, 412, 599 A.2d 365, 368 (1989)).

174. *Bennett*, 186 Md. at 154–55, 46 A.2d at 361.

175. G.E. Capital Mortg. Servs., Inc. v. Levenson, 338 Md. 227, 242, 657 A.2d 1170, 1177 (1995).

Some Maryland courts have held that gross negligence and inexcusable neglect bar subrogation,[176] but not yet the state's highest court. In addition, a refinancer cannot leapfrog over an intervening judgment creditor via subrogation if the refinancer actually knows about the intervening lien.[177]

Maryland courts since 1995 often interweave subrogation with the unjust enrichment principle from *Levenson*.[178] It remains to be seen if this interweaving will continue, or if one principle will win out. Subrogation is "particularly apt" as a substitution principle, noted the Maryland Court of Appeals in 2007.[179] Furthermore, subrogation can be distinguished from the contract-based unjust enrichment claim.[180] Unjust enrichment, in contrast, is an equitable claim focused on those who take a benefit from another.[181] Subrogation applies to those who pay a debt.[182]

Subrogation in Maryland remains a substitution principle based in justice.[183] Maryland courts have granted subrogation, for instance, to children who paid their mother's mortgage after the husband fled.[184] Maryland will subrogate someone to a repayment right who was asked to help pay a debt, but not if the debtor never consented to this

176. *Rinn*, 176 B.R. at 411; Logan v. Citi Mortg., Inc. (*In re* Schubert), 437 B.R. 787, 796 (Bankr. D. Md. 2010); *see also* Egeli v. Wachovia Bank, 184 Md. App. 253, 264–65, 965 A.2d 87, 94 (2009):

> Indeed, nearly three years elapsed from Wachovia's payment until it formally asserted that it had a superior lien priority to SunTrust Bank.
>
> . . . We acknowledge that the transactions at issue took place during the home equity boom, at a time when lenders were often overwhelmed and therefore may have relaxed their procedural or transactional standards. That fact, however, cannot excuse lenders, in this case Wachovia, from complying with the strictures of the law, especially when their failure to comply works to the detriment of other parties . . . .

Id.

177. *Levenson*, 338 Md. at 243, 657 A.2d at 1178; *accord* Citibank Fed. Sav. Bank v. New Plan Reality Trust, 131 Md. App. 44, 63, 748 A.2d 24, 33–34 (2000); *Egeli*, 184 Md. App. at 265, 965 A.2d at 94.

178. *See supra* note 141 and accompanying text.

179. Hill v. Cross Country Settlements, LLC, 402 Md. 281, 315, 936 A.2d 343, 363 (2007).

180. *Id.* at 315, 936 A.2d at 363.

181. *Id*. at 295–96, 936 A.2d at 351–52.

182. *See supra* Parts II, III.A–C, E.

183. *See infra* notes 184–192 and accompanying text.

184. Springham v. Kordek, 55 Md. App. 449, 450–51, 458–59, 462 A.2d 567, 568, 572 (1983).

help.[185] Maryland also rejects opportunistic uses of subrogation, denying it to a creditor who voluntarily purchases and pays off a debt to acquire rights over a debtor.[186]

The Maryland Court of Special Appeals in *Bierman v. Hunter* in 2010 exemplified the use of subrogation as a justice-based, fail-safe doctrine, after a fact-specific inquiry.[187] There, a husband fraudulently refinanced a mortgage on a home, co-owned with his wife, by forging her signature without her knowledge.[188] The husband then stole the excess funds, and by the time the lender got wind of the fraud, the husband had breezed down to Brazil.[189] The court held the defrauded refinancer subrogated to the prior mortgage-backed loan amount extinguished by the refinancing, and not to one penny more.[190] The excess could not fit in that prior mortgage's shoes.[191] The fleet husband, if caught, would be liable for the excess.[192]

IV. SUBROGATION AND MODERN MORTGAGE REFINANCING

A. The Modern Mortgage Market

The modern mortgage market has become extremely complex: mortgages pass from bank to bank due to bank failures, mergers, and consolidations.[193] Further, the lender of old has become fragmented into many parts: the issuing lender, title-company, refinancing company, debt buyer, mortgage service provider, and foreclosure processor.[194] Third, mortgages have been pooled and then sold as

185. Schilbach v. Schilbach, 171 Md. 405, 407–09, 189 A. 432, 433–34 (1937).
186. McNiece v. Eliason, 78 Md. 168, 174, 176–79, 27 A. 940, 941–42 (1893).
187. *See* Bierman v. Hunter, 190 Md. App. 250, 270–75, 988 A.2d 530, 542–45 (2010).
188. *Id*. at 253–54, 988 A.2d at 532–33.
189. *See id.*
190. *Id*. at 270, 988 A.2d at 542.
191. *See id*.; s*ee also* Crisfield v. State *ex rel*. Handy, 55 Md. 192, 198–99 (1880) ("[T]he surety is entitled to stand in the shoes of the creditor . . . .").
192. *See Bierman*, 190 Md. App. at 270–75, 988 A.2d at 542–45.
193. *See, e.g.*, Robbie Whelan, *The 25-Year `Foreclosure From Hell'*, WALL ST. J., Dec. 4, 2010, at A1 (detailing how one woman's mortgage-backed loan passed through numerous hands during the 1980s Savings and Loan crisis and collapse as well as various later bank mergers and acquisitions, and how its current holder could not prove a proper assignment of it).
194. This is apparent through reading mortgage-lending case law. *Compare* Woolen v. Hillen, 9 Gill 185, 195 (Md. 1850), *and* Bennett v. Westfall, 186 Md. 148, 150–51, 46 A.2d 358, 359 (1946) (discussed in *supra* Part III.B), *with* G.E. Capital Mortg. Servs.,

interest-paying mortgage-backed securities; further, these securities themselves sometimes are divided and re-packaged as bonds.[195]

Investor-owners and corporate-processors of mortgages are experiencing widespread technical difficulties in processing their legal claims after mortgages have passed through a proverbial mob of hands.[196] Thus, commercial-lender legal claims increasingly are deficient in the twenty-first century.[197] An April 2006 survey of 1,300 Chapter 13 cases filed in U.S. Bankruptcy Courts found that a majority of mortgage claims were "missing one or more of the required pieces of documentation."[198]

Professor Katherine Porter, the survey's author, identifies three key components of a mortgage claim in bankruptcy: itemization of fees; the mortgage that shows a right to foreclose if the borrower defaults on the loan; and the note that details the loan and its terms.[199] Sixteen percent of mortgage lenders did not produce documents to prove fees.[200] Nineteen percent failed to attach an actual mortgage.[201]

Inc. v. Levenson, 338 Md. 227, 231–34, 657 A.2d 1170, 1171–73 (1995) (discussed in *supra* Part III.D); *see also* Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 762–64 (2011) (discussing the "Fragmented Ownership" of the modern mortgage market).

195. Richard J. Rosen, *The Role of Securitization in Mortgage Lending*, CHI. FED LETTER (Fed. Res. Bank of Chi., Ill.), No. 244, Nov. 2007, *available at* http://www.chicagofed.org/digital_assets/publications/chicago_fed_letter/2007/cflnovember2007_244.pdf; *see also* Anderson v. Burson, 424 Md. 232, 237–40, 35 A.3d 452, 455–57 (2011) (discussing securitization within the context of a dispute over who owns a mortgage-backed loan).

196. *See, e.g.*, Gretchen Morgenson & Andrew Martin, *Battle Lines Forming in Clash over Foreclosures*, N.Y. TIMES, Oct. 21, 2010, at A1, *available at* http://www.nytimes.com/2010/10/21/business/21standoff.html?pagewanted=all (reporting that banks nationwide buying and selling mortgage-backed securities routinely failed to record and assign the mortgages and notes, and many have reported to courts that the documents are lost); Tami Luhby, *Robo-Signing: Just the Start of Bigger Problems*, CNNMONEY.COM, (Oct. 22, 2010), http://money.cnn.com/2010/10/22/real_estate/foreclosure_paperwork_problems/index.htm ("The problem is that many servicers don't know where that piece of paper [(i.e., the note, stating the loan and its terms)] is."); *accord* Suzanne Kapner, *U.S. Foreclosure Ruling to Reverberate*, FIN. TIMES (U.S. Ed.), Jan. 8, 2011, at 2; *see also* Dana Milbank, *Foreclosures: The Big Banks' Reign of Errors*, WASH. POST, Mar. 6, 2011, at A19 (detailing the author's problems with Citibank during a simple mortgage refinancing).

197. Katherine Porter, *Misbehavior and Mistake in Bankruptcy Mortgage Claims*, 87 TEX. L. REV. 121 (2008).

198. *Id.* at 121, 141.

199. *Id.* at 146.

200. *Id.*

201. *Id.* at 148.

A whopping forty-one percent did not attach a note to prove the existence of the loan and its agreed-to terms.[202]

Further, the mortgage-backed security investment industry, in order to enable the trading of mortgage-backed securities without having to update land records with each trade, has established the Virginia-based Mortgage Electronic Registration System (MERS) database registry, since the mid-1990s, to enable the fluid trading of these securities.[203] MERS records itself in the land records as the "nominee" on behalf of various, changing, and undisclosed investors.[204] As of December 2010, MERS had 67 million mortgages in its registry.[205] Claims to title are in a million little pieces.[206]

From a well-established policy perspective, courts of equity since the 1600s in England and subsequently in America established a homeowner's right of redemption after that owner defaulted on a mortgage-backed loan; this gives the owner additional time to pay it off, out of concern for the ownership of land and home.[207] This jurisprudential concern mirrors the view of the special function of home in a well-ordered society.[208]

One should note that the current American home ownership model, where people and families undertake large loans for large homes requiring a large portion of a lifetime to pay off, has its detractors.[209] There is a relatively new 'tiny home' movement criticizing outsized homes and debt, while implicitly still

202. *Id.* at 147.

203. *See* Ariana Eunjung Cha & Steven Mufson, *How the Mortgage Clearinghouse MERS Became a Villain in the Foreclosure Mess*, WASH. POST, Dec. 30, 2010, http://washingtonpost.com/wp-dyn/content/article/2010/12/30/AR2010123003056.html; *see also* Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. CIN. L. REV. 1359, 1363–74 (2010) (for further context and analysis).

204. *See* Cha & Mufson, *supra* note 203.

205. *Id.*

206. *See id*.

207. *See* BISPHAM & MCCOY, *supra* note 44, § II.21; KRATOVIL & WERNER, *supra* note 12, §§ I.1.1–1.4; Simard v. White, 383 Md. 257, 272–75, 859 A.2d 168, 177–79 (2004). The equity of redemption was fully established in England under Charles I. *Simard*, 383 Md. at 272, 859 A.2d at 177.

208. *See, e.g.*, Jonathan Miner, Note, *The Mortgage Crisis in Historic Perspective: Is There Hope?*, 36 J. LEGIS. 173, 174–79 (2010) (discussing Thomas Jefferson's view that social virtue depended upon an agrarian society of small landowners; and also discussing how the 1862 Homestead Act led to individual land ownership and economic independence for many, though some criticize the Act's environmentally and socially destructive stampede-like results).

209. *See* Steven Kurutz, *The Next Little Thing?*, N.Y. TIMES, Sept. 11, 2008, at F1.

acknowledging the value of a home in one's life.[210] Thus it can be said that while criticisms can be leveled at various patterns of home ownership, the belief in home's importance is generally shared.[211] Expanding the laxness of real-property title requirements through subrogation, stripped of an equitable rationale, goes against equity's historic role in slowing the mortgage process down to protect land ownership and the home, a widely supported value and goal.[212]

B. The Restatement *Position*

The *Restatement* position provides a very permissive approach to subrogation.[213] The *Restatement* states that a refinancing lender, by discharging the prior mortgage,[214] becomes "the owner" of that mortgage and its attached debt,[215] regardless of the lender's conduct.[216] Thus it is more permissive even than *Levenson*, because whether *Levenson* extends to lenders who are grossly negligent is unlikely.[217] Further, the *Restatement* extends subrogation to those who know of an intervening judgment creditor, while *Levenson* and subsequent Maryland case law do not.[218]

The *Restatement* illustrations also reinforce a use of subrogation as a mechanical application of a rule-based test, rather than as an equity doctrine applied in fact-specific inquiries.[219] The *Restatement*'s comments mention subrogation as "an equitable remedy" without elaboration,[220] despite the doctrine's enormous equitable history.[221] Because the *Restatement* has another subrogation entry under the *Restatement of Suretyship*,[222] this downplaying of subrogation's roots

210. SHAY SALOMON & NIGEL VALDEZ, LITTLE HOUSE ON A SMALL PLANET, at X–XIV (Lyons Press 2006) ("Working in construction, I have watched people's dream houses balloon into unmanageable giants. I saw the effects on homeowners, . . . and I looked for new options . . . .").
211. *See id.*
212. *Compare supra* Part III.D, *with* text accompanying *supra* notes 207–208.
213. *See* RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.6(a) (1997).
214. *Id*. ("performs the obligation of another").
215. *Id*. ("of the obligation and the mortgage").
216. *Id*. ("to the extent necessary to prevent unjust enrichment").
217. *See supra* note 176; *supra* Part III.E.
218. Egeli v. Wachovia Bank, 184 Md. App. 253, 264–67, 965 A.2d 87, 94–95 (2009) (discussing *Levenson* and criticizing the *Restatement*).
219. *See* RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.6 illus. 1–22 (1997).
220. § 7.6 cmt. a.
221. *See supra* Parts II, III.A–C.
222. RESTATEMENT (THIRD) OF SURETYSHIP & GUAR. § 27 (1996).

in surety and equity case law may be an attempt to carve out a similarly-named, but separate mortgage-based doctrine.

Equitable subrogation, according to the *Restatement*, is meant to prevent unjust enrichment of others.[223] This principle is out of line with the entire thrust of equitable subrogation as an "affirmative"[224] doctrine to do justice for those seeking its application.[225] Historically, plaintiffs seeking equitable subrogation have come to court for their own benefit.[226] This remains true today.[227]

The *Restatement* focuses on the unjust enrichment of others, as well as lack of harm to these same others.[228] Thus, the focus is off the plaintiff. An unjust enrichment basis for subrogation, combined with the *Restatement*'s permissive approach, provides subrogation without an equity analysis of a seeker's conduct.[229] In *Levenson*, the unjust enrichment principle enabled the court to downplay the lender's mistakes, while still mentioning them,[230] and then justify the holding because of a hypothetical, speculative unjust enrichment that might have occurred otherwise.[231]

This turning away from the plaintiff is a departure from subrogation's remedial purpose.[232] As a result, the *Restatement* could become a subrogation band-aid for the modern mortgage crisis[233] because lenders will be able to come to court without a focus on their own conduct.[234] This self-interest will find comfort in arguments for the *Restatement*'s adoption.[235]

223. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.6(a) cmt. a (1997).
224. Burgoon v. Lavezzo, 92 F.2d 726, 733 (D.C. Cir. 1937).
225. *See supra* Parts I, II, III.E.
226. *See supra* Parts II, III.A–C.
227. *See, e.g.*, *supra* Parts I, III.D–E.
228. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.6(a) cmt. a (1997) (stating that when subrogation is justly and correctly applied, "[t]he holders of intervening interests can hardly complain about this result, for they are no worse off than before the senior obligation was discharged"); *see also id.* § 2.2 illus. 2 (expressly illustrating this rationale in a mortgage context).
229. *See id.* § 7.6(a), cmt. a.
230. *See supra* Part III.D.1.
231. *See supra* Part III.D.2.b.
232. *See supra* Parts II, III.C.
233. *See supra* Part IV.A.
234. *See supra* text accompanying notes 223–232.
235. Grant S. Nelson & Dale A. Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, 2006 BYU L. REV. 305 (2006) (offering economic theories for adopting the *Restatement*); *see also* Kevin M. Baum, Note, *Apparently "No Good Deed Goes Unpunished": The Earmarking Doctrine, Equitable Subrogation, and Inquiry Notice Are Protections*

An unjust enrichment foundation for equitable subrogation appears to have its origin in the obscure suggestion[236] of a short, anonymous note in the *Harvard Law Review* in 1913.[237] This suggestion to ground subrogation beyond sureties in an unjust enrichment principle has only been championed by a few sources since, including the Osborne treatise relied upon in *Levenson*,[238] importantly by the *Restatement (First) of Restitution* in 1937 and the *Restatement (Third) of Property: Mortgages* in 1997,[239] by *Levenson* itself,[240] by a minority of jurisdictions since 1997 relying on the *Restatement (Third) of Property: Mortgages*,[241] and by Maryland courts since 1995 that cite *Levenson*.[242]

In contrast, the D.C. Court of Appeals in 1937 explained:

> It should be noted, however, in the interest of clarity of reasoning in respect of the right of subrogation, that absence of injury to the junior lienor can hardly be regarded as a predicate for subrogation. Rather it is but a negative factor.

When Refinancing Consumer Mortgages in an Uncertain Credit Market, 83 ST. JOHN'S L. REV. 1361, 1391–93 (2009) (criticizing Michigan's denial of subrogation to commercial lenders as "sophisticated creditors" because Michigan banks face a "Catch-22" of recordation offices taking longer than the legal deadline permits for parties to record).

236. Note, *Equitable Subrogation of Mortgages*, 26 HARV. L. REV. 261, 262 (1913) ("It is not enough to justify equitable [subrogation] that the judgment creditor would be left in no worse position, but it is submitted that the doctrine should be applied to prevent the judgment creditor from enjoying an inequitable advantage.").

237. *Id.* The note suggested this principle as a better foundation for subrogation beyond suretyships. *Id.* at 262. This suggestion was not representative of preceding or subsequent scholarship. *See* Note, *Subrogation and Volunteers*, 13 HARV. L. REV. 297, 298 (1899) ("The subject [of subrogation] would be much clearer if it were generally recognized that subrogation will be granted when justice demands it."); Note, *Subrogation*, HARV., *supra* note 109, at 382 (published in 1926); *accord* sources cited *supra* note 109. A *Virginia Law Review* commentary notes unjust enrichment as an important principle, Note, *Subrogation*, VA., *supra* note 48, at 774, then emphasizes as more primary "natural justice," "broad principals of equity," and "fairness." *Id.* at 771, 773.

238. GEORGE E. OSBORNE, THE LAW OF MORTGAGES § 277, at 781 n.12 (1st ed. 1951) (citing Note, *Equitable Subrogation of Mortgages*, 26 HARV. L. REV. 261, 262 (1913)).

239. RESTATEMENT (FIRST) OF RESTITUTION § 162 (1937), *cited in* Note, *Subrogation*, VA., *supra* note 48, at 774; RESTATEMENT (THIRD) OF PROP.: MORTGS. § 7.6(a) (1997).

240. G.E. Capital Mortg. Servs., Inc. v. Levenson, 338 Md. 227, 239–44, 657 A.2d 1170, 1175–78 (1995).

241. *See* Murray, *supra* note 12.

242. *See supra* note 141.

> That is to say, the right of subrogation in situations like that at bar, is founded on advance of money under mistake of fact and must rest on that affirmative foundation. It will not be recognized if innocent persons will be prejudiced.[243]

C. The Importance of Equity in Subrogation

Delinking equitable subrogation from an affirmative doctrine to do justice removes the focus from the seeking party.[244] Secondly, a black-letter-law approach of mechanically applying a *Restatement* test avoids the fact-specific inquiry characteristic of equitable subrogation historically[245] and in Maryland.[246] Third, substituting a black-letter test for a balancing of equities reduces a court's equitable inquiry,[247] more likely excuses egregious conduct,[248] and restricts others' equitable defenses against a party seeking subrogation.[249] It replaces a court's abiding equitable powers for temporary fixes to evolving commercial problems.[250]

The *Restatement* project purports to be a summarization of the common law.[251] While this includes ambitiously attempting to survey and clarify the common law, it also avowedly includes "seek[ing] to anticipate the direction in which the law is 'tending'."[252] However, the adoption by the *Restatement (Third) of Property: Mortgages* of an unjust enrichment rationale that also downplays an equitable analysis is a departure.[253] It takes courts in the direction of allowing subrogation to be an odd, judicial loophole. I state odd because

243. Burgoon v. Lavezzo, 92 F.2d 726, 733 (D.C. Cir. 1937).
244. *See supra* notes 228–235 and accompanying text.
245. *See supra* Parts II, III.C.
246. *See supra* Part III.A–B, E.
247. *See supra* notes 219–222 and accompanying text.
248. *See* Egeli v. Wachovia Bank, 184 Md. App. 253, 266–67, 965 A.2d 87, 95 (2009) ("[A] sophisticated party such as Wachovia must make a more comprehensive inquiry . . . . [U]njust enrichment might actually occur by implementing the Restatement approach.").
249. *See* Hill v. Cross Country Settlements, LLC, 402 Md. 281, 306, 309–10, 936 A.2d 343, 358, 360 (2007).
250. *Compare supra* Parts II, III.E, *with supra* Parts III.D, IV.A–B.
251. Sellers, *supra* note 128, at 76 (citing AM. LAW INST., CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 4 (2005)).
252. *Id.* at 77.
253. *Compare supra* Part IV.B, *with supra* Parts II–III.

without equity it loses its rationale.[254] I state loophole because it excuses non-compliance with statutory law.[255]

Like the *Restatement*, the *Levenson* decision in Maryland promotes a band-aid approach to subrogation to keep the mortgage market moving,[256] and expands excusable negligence for a plaintiff seeking subrogation.[257] *Levenson* cites an economic rationale for doing so: ensuring a speedy foreclosure process.[258]

When the Supreme Court of Washington in 2007 adopted an aspect of the more permissive *Restatement*,[259] the court justified it partially based upon the economic assumption that near-automatic subrogation reduces the cost of title insurance.[260] No economic data was cited for this assumption.[261] Instead, the court relied on a law review article.[262] Yet, whether foreclosure speed creates social and economic benefit is a questionable assumption, for mistakes can incur court costs, clogged title, and liability for damages.[263]

This discussion illustrates subrogation's crossroads: expanding subrogation to enable lending speed and convenience versus limiting subrogation to an equitable remedy.[264] In terms of an economic justification, mistakes harm others and cost money and time.[265] In terms of a jurisprudential analysis, one can argue that subrogation has never been a tool of legislating fixes to statutory real-property laws,[266] but of doing justice.[267]

254. *See supra* Part II.
255. *See supra* Part III.D.2.c.
256. *See supra* Part III.D.1.
257. *See supra* Part III.D.2.c.
258. *See supra* Part III.D.1.
259. Bank of Am. v. Prestance Corp., 160 P.3d 17, 18 (Wash. 2007).
260. *Id.* at 28–29.
261. *See id*.
262. *Id.* (citing Grant S. Nelson & Dale A. Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, 2006 BYU L. REV. 305, 365–66 (2006)).
263. *See supra* Part III.D.1 (describing a case where lender mistakes led to frozen titles, confusion of rights, and multiple litigation costs); Part IV.A (describing modern mortgage market problems).
264. *Compare supra* Part IV.B (discussing the *Restatement*'s nearly automatic subrogation approach without analyzing equities), *with supra* Part III.B–C (discussing the historical equity analysis in subrogation jurisprudence).
265. *See supra* Part III.B, D.
266. *See supra* Parts II, III.A–C.
267. *See supra* Part III.C, E. *But see* sources cited *supra* note 235 (arguing for primarily economic rationales for subrogation).

Equitable subrogation has evolved through a fact-specific jurisprudence where transactions often have been more local.[268] Creditors often have been actual individuals.[269] Subrogation's excuse of mistake thus cannot be simply imported into the modern commercial marketplace, but demands reexamination in light of the risk of mass-lender conduct to society.[270] Subrogation, stripped of an equitable basis in affirmative justice,[271] could become simply a band-aid for the self-inflicted wounds of modern mortgage succession, specialization, and securitization.[272]

D. Alternatives and Solutions

Commercial parties and governments have practical solutions to buttress commercial structures and enforce legal rights.[273] Therefore in fact-specific inquiries, courts should protect their equity powers to do justice among particular parties, rather than water down equity jurisprudence with social policy goals like speeding up the commercial mortgage market,[274] or adopting a *Restatement* position that, maybe subtly, excises equity from subrogation.[275]

The Maryland Court of Special Appeals, in a 1997 decision involving a large-dollar commercial refinancing, commented that it would be "a better practice" for refinancing lenders to simply take an assignment of the prior mortgage.[276] In the court's scenario the refinancer, rather than discharging the prior mortgage, would keep the original mortgage in place and style its refinancing as "a modification . . . of the original arrangement."[277]

States, as with sureties centuries ago,[278] can enact statutes providing for automatic subrogation when a refinancing lender's loan pays off and thus extinguishes a prior loan. Of course, such a statute

268. *See supra* Part III.A–C.
269. *See supra* Part III.B–C.
270. *Compare supra* Part III.B (discussing how subrogation historically has been used to remedy mistakes that were local in effect), *with supra* Part IV.A (discussing how the complexities of the modern mortgage market mean that the mistakes made by creditors now have broader impact on society).
271. *See supra* Parts III.D.2, IV.B.
272. *See supra* Part IV.A.
273. *See infra* notes 276–281 and accompanying text.
274. *See supra* Parts III.D.1–2.a, IV.C.
275. *See supra* Part IV.B.
276. Springhill Lake Investors Ltd. P'shp v. Prince George's Cnty., 114 Md. App. 420, 442, 690 A.2d 535, 546 (1997).
277. *See id.*
278. *See supra* notes 66–67.

would have to ensure that other creditors relying on public records of the earlier-recorded mortgage would have notice about the latest owner of the mortgage.[279]

Lastly, supporters of the *Restatement* position have argued that a more permissive subrogation promotes efficiency of markets.[280] However the liability and adjudication arising from mistakes and negligence may outweigh any benefit.[281] Further, courts are stretching their expertise when crafting holdings based upon economic theories, rather than jurisprudential justice principles and precedent premised on centuries of institutional knowledge.[282]

V. CONCLUSION

Equitable subrogation is a powerful tool for courts to serve justice and grant a payer of debt a legal right for repayment when fraud, mistake, compulsion, or other unfairness has deprived the payer of that legal right.[283] However if subrogation is shorn of its equitable foundation, it can be a mechanical tool without animating purpose, an escape-hatch for culpable conduct.[284] This escape-hatch will unsettle state recordation requirements, without society expressly reconsidering these requirements.[285] Further, a grounding of this doctrine in an unjust enrichment principle takes a court's focus away from the party actually seeking the court's equitable powers.[286] This loss of focus shifts the burden of proof to the objecting creditor and away from the plaintiff.[287] In contrast, a party-specific, equity-based approach enables courts to grant subrogation to deserving plaintiffs in order to do justice.[288] Then, once a court has ascertained a plaintiff's deserving claim, the court makes a second analysis to ensure

279. *See supra* Part III.B (describing courts' concern that other creditors have notice, and subrogation will not inflict harm).

280. *See* Nelson & Whitman, *supra* note 235, at 365–66; Robert M. Smith, Note, *What Happened to the Equity in Equitable Subrogation?*, 64 MO. L. REV. 503, 513–15 (1999) (arguing that title companies' liability for faulty title searches inflates home prices).

281. *See supra* Parts III.D, IV.A.

282. *Compare supra* Parts I–II, *with supra* Parts III.D, IV.B.

283. *See supra* Parts I, III.A–C, E.

284. *See supra* Parts III.D.2.b–c, IV.A, C.

285. *See supra* Parts III.D.2, IV.C.

286. *See supra* Part III.D.1; *supra* notes 208–218 and accompanying text.

287. *See supra* notes 221–226 and accompanying text.

288. *See supra* Part III.B, E.

subrogation is socially just—that granting subrogation harms no one's reliance on publicly-available facts.[289]

Gregg H. Mosson †

289. *See supra* Part III.B; *supra* note 232 and accompanying text.

† J.D., University of Baltimore School of Law; Associate Comment Editor, *University of Baltimore Law Review*. I thank Prof. Matthew Lindsay, Prof. Charles Shafer, and Judson Arnold, Esq., for their invaluable advice, and Patricia Bennett for her support.