NEGATIVE IMPLICATIONS OF STATE LAW ENTRENCHMENT IN FEDERAL COURTS

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This Note considers the effects of state law entrenchment in federal courts. Entrenchment occurs when defendants, incentivized by higher pleading standards in federal court, continuously remove claims involving unsettled state law, effectively preventing a state high court from correcting erroneous federal interpretations. The entrenchment of unsettled state law in federal courts is a recent phenomenon and an underappreciated consequence of the divergence between federal and state pleading standards, which increases the likelihood of erroneous federal court predictions of unsettled state law. This Note exhibits the entrenchment phenomenon using a case study comprised of recent Arizona federal and state court cases. Finally, this Note suggests a three-pronged inquiry for federal courts to use when deciding whether to certify an entrenched and unsettled state claim. This inquiry weighs the costs of frequent certification against the negative effects of prolonged entrenchment.

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INTRODUCTION

Diversity jurisdiction, a form of subject matter jurisdiction allowing an individual to bring a state law claim before a federal court,[1] has drawn numerous critiques as to its purpose and continuing relevance.[2] While the rationale behind diversity jurisdiction is to avoid local bias by providing attorneys with an alternative forum to file a lawsuit,[3] attorneys have continuously used diversity jurisdiction as a vehicle to forum shop.[4] The Supreme Court has specifically targeted forum shopping when created by diversity jurisdiction.[5]

In *Erie*, the Supreme Court held that, except in matters governed by the U.S. Constitution or acts of Congress, federal courts must apply the law of the

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1. 28 U.S.C. § 1332(a) (2012) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs and is between . . . citizens of different States . . . .").

2. *See* 13E CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3601, at 20–22 (3d ed. 2009) ("[T]he question of what purpose is served by diversity jurisdiction has retained its controversial character over the years. Time only has exacerbated the disagreements stirred at the time of the ratification debates."); *see, e.g.*, John P. Frank, *For Maintaining Diversity Jurisdiction*, 73 YALE L.J. 7, 13 (1963) (supporting diversity jurisdiction); Robert C. Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. PA. L. REV. 179, 193 (1929) (supporting diversity jurisdiction); Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 CORNELL L.Q. 499, 521 (1928) (arguing that justifications for diversity jurisdiction no longer exist); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: The Silver Lining*, 66 A.B.A. J. 177, 180 (1980) (arguing against continuing diversity jurisdiction).

3. *See* Henry J. Friendly, FEDERAL JURISDICTION: A GENERAL VIEW 146–48 (1973) (noting that local prejudice is a justification for diversity jurisdiction).

4. *See* J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967) ("[F]orum-shopping, among both federal and state courts, [has become] a national legal pastime."). Forum shopping is "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard." *Forum Shopping*, BLACK'S LAW DICTIONARY (10th ed. 2014).

5. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 76–78 (1938); *see also* Hanna v. Plumer, 380 U.S. 460, 468 (1965) (Harlan, J., concurring) ("[T]he twin aims of the *Erie* rule [are the]: discouragement of forum shopping and avoidance of inequitable administration of the laws.").

state in which the court sits.[6] When there is no applicable state statute or law by the state high court, a federal court must act as "another court of the State,"[7] taking into consideration lower court rulings[8] and high court dicta.[9] If there is still little guidance on state substantive law, the federal court must make an "informed prophecy."[10] As a result, while *Erie* eliminated an incentive for forum shopping, it also created a risk that federal courts incorrectly predict a state's law.[11] Such incorrect predictions, until corrected by a state high court, "skew the decisions of persons and businesses who rely on them,"[12] inequitably affect the losing federal litigant,[13] and frustrate state policy.[14] While some scholars have debated the

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6. *Erie*, 304 U.S. at 78.

7. Guaranty Tr. Co. v. York, 326 U.S. 99, 108 (1945).

8. Judith S. Kaye & Kenneth I. Weissman, *Interactive Judicial Federalism: Certified Questions in New York*, 69 FORDHAM L. REV. 373, 376 n.22 (2000) ("Federal courts must follow intermediate state court cases, unless there is reason to believe that the state's highest court would not follow them.") (citing Hicks v. Feiock, 485 U.S. 624, 630 n.3 (1988); Pentech Int'l, Inc. v. Wall St. Clearing Co., 983 F.2d 441, 445–46 (2d Cir. 1993)).

9. *See* Rocky Mountain Fire & Cas. Co. v. Dairyland Ins., 452 F.2d 603, 603–04 (9th Cir. 1971) ("A federal court exercising diversity jurisdiction is bound to follow the considered dicta as well as the holdings of state court decisions.").

10. Rodriguez-Suris v. Montesinos, 123 F.3d 10, 13 (1st Cir. 1997) ("Where a jurisdiction's highest court has not spoken on a precise issue of law, we look to 'analogous state court decisions, persuasive adjudications by courts of sister states, learned treatises, and public policy considerations identified in state decisional law' in order to make an 'informed prophecy' of how the state court would rule on the precise issue.") (quoting Blinzler v. Marriott Int'l, Inc., 81 F.3d 1148, 1151 (1st Cir. 1996)). While some federal courts choose to avoid ruling on unclear state law through abstention, or refrain from exercising jurisdiction over an action, the Supreme Court has emphasized that such delay must be used only in "exceptional circumstances" and where there is "a concurrent state proceeding." Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 813, 818 (1976). Furthermore, Third Circuit Court of Appeals Judge Dolores K. Sloviter noted "the law is clear that we are not permitted to abstain from predicting state law in diversity cases merely because of the difficulty of ascertaining it." Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671, 1683–84 (1992) (citing Meredith v. City of Winter Haven, 320 U.S. 228, 234–35 (1943)).

11. *See, e.g.*, Stella L. Smetanka, *To Predict or to Certify Unresolved Questions of State Law: A Proposal for Federal Court Certification to the Pennsylvania Supreme Court*, 68 TEMP. L. REV. 725, 729–35 (1995) (cataloging whether multiple Third Circuit Court of Appeals predictions of state law were correct); *see also* Sloviter, *supra* note 10, at 1679–80 ("[T]he state courts have found fault with a not insignificant number of past '*Erie* guesses' made by the Third Circuit and our district courts.").

12. Sloviter, *supra* note 10, at 1681.

13. Daniel J. Meador, *Transformation of the American Judiciary*, 46 ALA. L. REV. 763, 768 (1995) ("A federal court's erroneous application of state law cannot be corrected, because a state supreme court—the authoritative voice of state law—has no power to review federal judgments.").

14. *See, e.g.*, Scott v. Bank One Tr. Co., 577 N.E.2d 1077, 1080 (Ohio 1991) ("The state's sovereignty is unquestionably implicated when federal courts construe state law. If the federal court errs, it applies law other than Ohio law . . . 'and frustrates the state's policy that would have allocated the rights and duties differently.'") (quoting Wade H. McCree, *Foreword* to 1976 ANN. SURV. OF MICH. L., 23 WAYNE L. REV. 255, 257 n.10 (1977)).

magnitude of the effects from erroneous federal predictions, they have premised their criticisms on the assumption that a state high court is able to "correct" the erroneous federal interpretation.[15] However, scholars have failed to identify the effects of erroneous federal decisions when unsettled state law is *entrenched*[16] within federal courts and out of the reach of state high courts.

The entrenchment of unsettled state law in federal courts is a recent phenomenon and an underappreciated consequence of the divergence between federal and state pleading standards. The heightened federal pleading standard, ushered in by *Bell Atlantic Corporation v. Twombly*[17] and *Ashcroft v. Iqbal*,[18] retired the notice pleading standard in favor of a plausibility standard that tasks district court judges as "vigorous gatekeepers" at the pleading stage.[19] Meanwhile, many states have retained a notice pleading standard.[20] When deciding unsettled law involving inherently speculative facts, federal judges' ability to make an *informed prophecy* has been confounded by the heightened pleading standard. Consequently, federal judges have taken a more restrictive view of state law, while state judges are more willing to explore the nuances of unsettled state law.[21] Defendants have recognized these divergent treatments of unsettled state law as an opportunity to forum shop and have utilized diversity jurisdiction to remove their cases to federal court. The result is that unsettled state law becomes *entrenched* within federal courts, prolonging delay and magnifying the negative effects associated with potentially erroneous federal decisions on state law.

This Note suggests that federal courts should certify unsettled questions of state law to a state high court under a more lenient standard to combat against entrenchment. Federal courts should shift from a novelty standard, which has been difficult for courts to apply,[22] to an entrenchment standard. Under this standard, a federal court would certify if a state issue: (1) arises with some frequency in federal court; (2) remains predominantly in federal court; and (3) has an assembled body of federal case law without many state sources. The entrenchment standard balances the drawbacks of certification, such as delay and overburdening state high courts, with the necessity for federal courts to correctly interpret state law.

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15. *See* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1674 n.3 (2003) (providing examples of state court correction of incorrect federal court interpretations regarding state law); Justin R. Long, *Against Certification*, 78 GEO. WASH. L. REV. 114, 123 (2009) ("[T]he opportunity for inconsistency exists only until the state high court decides the relevant question."); *see also* Benjamin C. Glassman, *Making State Law in Federal Court*, 41 GONZ. L. REV. 237, 289 (2005/2006) ("Neither parties nor states are harmed by 'wrong' Erie guesses.").

16. Entrenchment occurs when defendants, incentivized by higher pleading standards in federal court, continuously remove claims involving unsettled state law, effectively preventing a state high court from correcting erroneous federal interpretations. *See infra* Part II.

17. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

18. Ashcroft v. Iqbal , 556 U.S. 662 (2009).

19. Douglas G. Smith, *The Twombly Revolution?*, 36 PEPP. L. REV. 1063, 1098 (2009).

20. *See infra* note 48 (listing states that follow a notice pleading standard).

21. *See infra* Part II.

22. *See infra* Section III.B.

Part I of this Note provides a brief overview on the history and recent changes to pleading standards in state and federal courts. Part II presents a case study illustrating the entrenchment phenomenon in Arizona. Finally, Part III proposes that federal courts should certify unsettled state law when the law is *entrenched* in the federal courts.

I. PLEADING DISPARITY BETWEEN FEDERAL COURTS AND STATE COURTS

Federal Rule of Civil Procedure ("Rule") 8 sets forth a simple pleading standard that a complaint filed in federal court must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[23] If a plaintiff fails to satisfy this requirement, a court will likely dismiss the complaint after a defendant files a Rule 12(b)(6) motion for "failure to state a claim upon which relief can be granted."[24] For over 60 years, the United States Supreme Court has debated how strictly federal courts should interpret Rule 8. While the Supreme Court initially instructed federal courts to liberally construe Rule 8,[25] two decisions in the past decade have heightened pleading standards for plaintiffs filing in federal courts.

A. Notice Pleading Standard

For 50 years, *Conley* instructed that, for the purposes of Rule 8, a plaintiff need not "set out in detail the facts upon which he bases his claim."[26] The Supreme Court instructed the federal courts that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief."[27] This *no set of facts* language represented the foundation of notice pleading. Notice pleading does not require significant detail but, rather, "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."[28] The Court rationalized notice pleading because a claimant is able to both "disclose more precisely the basis of [the] claim and defense" as well as "define more narrowly the disputed facts and issues" later in the litigation process due to "the liberal opportunity for discovery and the other pretrial procedures established by the Rules."[29] An example of a satisfactory pleading under *Conley* would be a complaint, brought under Title VII of the Civil Rights Act of 1964, alleging "that (1) [plaintiff] is a woman, (2) she was fired from her job, (3) for which she was qualified, (4)

23. Fed. R. Civ. P. 8(a)(2).
24. Fed. R. Civ. P. 12(b)(6).
25. Conley v. Gibson, 355 U.S. 41, 47 (1957).
26. *Id.*
27. *Id.* at 45–46 (emphasis added).
28. *Id.* at 47 (quoting Fed. R. Civ. P. 8(a)(2)).
29. *Id.* at 47–48.

because of her gender."[30] In 2007, despite reiterating the notice pleading standard a few years earlier,[31] the Court "retired" *Conley*'s notice pleading standard.[32]

B. Plausibility Pleading Standard

Twombly replaced Rule 8's "liberal notice pleading regime" with a "heightened 'plausibility' paradigm."[33] In *Twombly*, the claimants alleged that the defendants violated § 1 of the Sherman Act, which required the claimants to establish that the defendants' anti-competitive behavior was a result of a "contract, combination . . . , or conspiracy."[34] While the claimants alleged parallel conduct by the defendants, they did not allege facts suggesting that the defendants had entered into an unlawful agreement.[35]

The Supreme Court found that the claimants' allegations failed to satisfy Rule 8 because "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice."[36] The Court went on to proclaim that the "no set of facts" language from *Conley* had "earned its retirement,"[37] and scholars observed that the Court "imposed an entirely new test on the pleading stage, instituting a judicial inquiry into the pleading's convincingness."[38] The Court held that "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[39] In other words, while detailed factual allegations are unnecessary to satisfy Rule 8, the plaintiff must include some factual allegations to provide plausible *grounds* for relief.

Two years later, the Supreme Court attempted to clarify the new plausibility pleading standard in *Ashcroft v. Iqbal*.[40] In *Iqbal*, a detainee alleged the defendants approved a "policy of holding post-September-11th detainees until they were 'cleared' by the FBI."[41] The defendants argued that the Court should dismiss

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30. Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After Bell Atlantic Corp. v. Twombly*, 41 SUFFOLK U. L. REV. 851, 854 (2008).

31. *See* Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 510, 514 (2002) ("The liberal notice pleading of [Federal] Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.").

32. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 562–63 (2007).

33. Benjamin P. Cooper, *Iqbal's Retro Revolution*, 46 WAKE FOREST L. REV. 937, 937–38 (2011).

34. *Twombly*, 550 U.S. at 548–50 (alteration in original).

35. *Id.* at 588 (noting allegations of parallel conduct but no allegations of actual agreement).

36. *Id.* at 556.

37. *Id.* at 563.

38. Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821, 827 (2010).

39. *Twombly*, 550 U.S. at 555 (quoting Fed. R. Civ. P. 8).

40. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

41. *Id.* at 669.

the complaint because the claimant failed to sufficiently allege that they were involved in the unconstitutional conduct of low-level subordinates.[42]

The district court, using the *Conley* pleading standard, denied the defendants' motion to dismiss because "it cannot be said there are no set of facts on which the plaintiffs would be entitled to relief as against [the defendants]."[43] The Second Circuit Court of Appeals, now applying the *Twombly* pleading standard, affirmed the district court's denial of the motion to dismiss because the plausibility pleading standard "obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."[44] The Supreme Court, using two "working principles," disagreed with both courts and dismissed plaintiffs' complaint as implausible because the allegations were merely conclusory and there were more likely explanations for the alleged conduct.[45] First, the Court recognized that while courts must accept a claimant's allegations as true at the motion to dismiss stage, conclusory allegations are not entitled to a presumption of truth.[46] Second, the Court reaffirmed the plausibility standard by stating, "only a complaint that states a plausible claim for relief survives a motion to dismiss."[47]

C. State Court Response to the Plausibility Pleading Standard

While many states have adopted the federal plausibility pleading standard,[48] a significant number of states have refused to stray from the more liberal notice pleading standard.[49] Many legal scholars have analyzed the disparity

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42. *Id.* at 666.

43. Elmaghraby v. Ashcroft, No. 04-CV-01809 JG SMG, 2005 WL 2375202, at *29 (E.D.N.Y. Sept. 27, 2005).

44. Iqbal v. Hasty, 490 F.3d 143, 157–58 (2d Cir. 2007) (emphasis in original).

45. *Iqbal*, 556 U.S. at 681 ("Taken as true, these allegations are consistent with petitioners' purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish the purpose.").

46. *Id.* at 678.

47. *Id.* at 678–79.

48. *See, e.g.*, Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008) ("[W]e take the opportunity to adopt the refinement of [the pleading] standard that was recently articulated by the United States Supreme Court in [*Twombly*] . . . . We agree with the Supreme Court's analysis of the *Conley* language . . . and we follow the Court's lead in retiring its use."); Sisney v. Best Inc., 754 N.W.2d 804, 809 (S.D. 2008) ("[W]e adopt the Supreme Court's new [*Twombly* pleading] standard[]."); *see also* A. Benjamin Spencer, *Pleading in State Courts After Twombly and Iqbal*, POUND CIVIL JUSTICE INST., 16 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038349 (listing states that have adopted the heightened pleading standard).

49. *See, e.g.*, Cullen v. Auto-Owners Ins., 189 P.3d 344, 348 (Ariz. 2008) (en banc) (rejecting a lower court's adoption of *Twombly*); Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 430 (Tenn. 2011) ("We decline to adopt the new plausibility standard and adhere . . . to the notice pleading standard . . . ."); Colby v. Umbrella, Inc., 955 A.2d 1082, 1086 n.1 (Vt. 2008) ("[W]e have relied on the *Conley* standard for over twenty years . . . and are unpersuaded by the dissent's argument that we should now abandon it for a heightened standard."); McCurry v. Chevy Chase Bank, FSB, 233 P.3d 861, 864 (Wash. 2010) (holding that there is "no similar basis to fundamentally

among state and federal pleading standards and pinpointed, in the case of a federal court hearing a state-based claim, "the attendant risk that 'similarly situated litigants may be treated differently and, as a result, unfairly.'"[50] Scholars also predicted that "[p]laintiffs are . . . likely to shift litigation to state courts" that have notice-pleading while defendants would prefer the "diversity jurisdiction of the federal courts."[51] Empirical studies have had mixed results in determining the broad impact of plausibility pleading standard on where plaintiffs file their claims and whether defendants remove claims to federal courts.[52] However, at least one empirical study has found no correlation between sparse pleading and the merits of the case.[53] Based on this research, a defendant would prefer a heightened pleading standard jurisdiction because there is a better chance that courts will dismiss claims based on a plaintiff's sparse pleading, regardless of its merit. Importantly, claims that require state of mind allegations inherently involve informational disadvantages for the claimant and are more likely to be dismissed for failing to state a claim under a heightened pleading standard.[54] Other claims in which a

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alter our interpretation of CR 12(b)(6) that has been in effect for nearly 50 years and decline to do so here") (citations omitted); *see also* A. Benjamin Spencer, *Pleading in State Courts After Twombly and Iqbal*, POUND CIVIL JUSTICE INST., 14 (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038349 (listing states that have retained the notice pleading standard).

50. Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 120 (2010) (quoting Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1191 (2005)); *see also* Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1829, 1837 (2008) (revealing that motions to dismiss were granted in 41.7% of pre-*Twombly* (notice-pleading) civil rights cases while motions to dismiss were granted 52.9% of the time in post-*Twombly* (plausibility-pleading) civil rights cases).

51. Michalski, *supra* note 50, at 120.

52. *See* Jill Curry & Matthew Ward, *Are Twombly & Iqbal Affecting Where Plaintiffs File? A Study Comparing Removal Rates by State*, 45 TEX. TECH L. REV. 827, 872 (2013) (concluding that "this study does not find support for an effect of *Twombly* and *Iqbal* on the rate of removal in notice-pleading states compared to fact-pleading states"); *but cf.* Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) ("Under *Iqbal*, the odds that a 12(b)(6) motion would be granted with leave to amend, rather than denied, were over four times greater than under *Conley*, holding all other variables constant.").

53. *See* Alexander A. Reinert, *The Costs of Heightened Pleading*, 86 IND. L.J. 119, 169 (2011) ("[A] heightened pleading standard may function in the same way that randomized dismissal would, amounting to a radical departure from pleading standards that few would find satisfactory."); *see also* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 460–86 (2008) (predicting that *Twombly* would lead to significant dismissal of meritorious claims).

54. Reinert, *supra* note 53, at 159 (noting that civil rights, constitutional, and employment discrimination cases "are more likely to be vulnerable to accusations of thin pleading" due to "large information asymmetries").

plaintiff has informational disadvantages, like wrongful foreclosure claims,[55] are also more difficult to plead under a heightened pleading standard.[56]

II. ENTRENCHMENT

Entrenchment occurs when defendants, incentivized by higher pleading standards in federal court, continuously remove claims involving unsettled state law, effectively preventing a state high court from correcting erroneous federal interpretations. The defendants' incentive to remove is greatest in states that abide by a notice pleading standard. Entrenchment magnifies the negative effects of erroneous federal interpretations of state law, including: unnecessary confusion regarding the law for both litigants and other courts;[57] an increased number of litigants whose cases are determined according to the "law adopted by federal courts" rather than true state law;[58] and greater impediments to the "lawmaking function of [a] state court."[59] While each of these negative implications may not be significant in the case of a lone erroneous federal court prediction of state law, when the same erroneous prediction is repeated numerous times, the effects grow exponentially.

An example of entrenchment occurred in Arizona following the 2007 foreclosure crisis. As lenders initiated foreclosure proceedings, federal courts in non-judicial foreclosure[60] states, like Arizona and Nevada, experienced an "ever-

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55. Dale A. Whitman & Drew Milner, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note*, 66 ARK. L. REV. 21, 41, 43 (2013) (recognizing the pleading difficulty in wrongful foreclosure cases for borrowers, who must allege "evidence as to possession of the note" but are "the party least likely to have any information or knowledge on the subject").

56. Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 909 (2009) ("To be sure, stricter pleading treats plaintiffs who do not have access to information less favorably than plaintiffs who do have access."); *see also* Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65, 123 (2010) (proposing, in light of heightened pleading standards, that courts should order plausibility discovery if the party has an informational inequity).

57. *See* Amberboy v. Societe de Banque Privee, 831 S.W.2d 793, 798 n.9 (Tex. 1992) (noting that when federal courts "venture into 'the always-dangerous undertaking of predicting what Texas courts would hold if the issue were squarely presented to them,'" the federal courts "contribut[e] to, rather than ameliorat[e] confusion about the state of Texas law") (quoting Stephens v. State Farm Mut. Auto. Ins., 508 F.2d 1363, 1366 (5th Cir. 1975)).

58. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. PA. L. REV. 1459, 1507 (1997).

59. Sloviter, *supra* note 10, at 1687 ("When federal judges make state law—and we do, by whatever euphemism one chooses to call it—judges who are not selected under the state's system and who are not answerable to its constituency are undertaking an inherent state court function."); *but cf.* Glassman, *supra* note 15, at 289 (arguing that "[n]either parties nor states are harmed by 'wrong' Erie guesses").

60. Non-judicial foreclosure requirements are established solely by state statute. Generally, borrowers who default are sent a default letter, which includes a required notice period when borrowers can cure their debt. Following the expiration of the notice period, there is a trustee's sale in which the highest bidder for the property becomes the owner. *See*

growing pile of novel, unmeritorious, cookie-cutter, and sometimes downright bizarre foreclosure-related complaints" that began to "clog" federal court dockets.[61] Among the barrage of wrongful foreclosure claims was the *show me the note* argument, in which the plaintiff-borrower would assert that a foreclosing party must show the original promissory note before a trustee could begin foreclosure proceedings on the plaintiff's property.[62] While the Arizona District Court "routinely" dismissed the novel *show me the note* claims by borrowers,[63] legal scholars found the law to be anything *but* routine, observing that "Arizona is . . . ambiguous in describing the nature of the proof of authority the trustee must show"[64] and questioning whether a note is discoverable to demonstrate that a foreclosing party is not a "real party in interest."[65] Even after Arizona state courts provided nuanced interpretations of the state foreclosure law, the federal courts continued its *routine* understanding through broad rejection of borrowers' *show me the note* claims.

A. Federal Court's Initial Predictions of Arizona's Show Me The Note Claims

In 2009, following a significant rise in foreclosure proceedings, the Arizona District Court first predicted whether Arizona law recognized the validity of *show me the note* claims. In *Mansour v. Cal-Western Reconveyance Corp.*, after the plaintiff defaulted on a loan secured by property, the foreclosure trustee initiated a trustee's sale.[66] The plaintiff sued the foreclosure trustee and nominee beneficiary and sought an injunction on the trustee's sale, alleging that, under A.R.S. § 47-3301,[67] "because [d]efendants have not produced the original note securing the mortgage, they have no valid ownership interest and therefore may not foreclose on the property."[68] In its attempt to predict whether Arizona law

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generally Mortg. Bankers Assoc. of Am., *Judicial Versus Non-Judicial Foreclosure*, MBAA, http://mysmartblog.com/wp-content/uploads/2013/05/JudicialVersusNon-JudicialForeclosure.pdf.

61. Gomez v. Countrywide Bank, FSB, No. 2:09-cv-01489-RCJ-LRL, 2009 WL 3617650, at *11 (D. Nev. Oct. 26, 2009); *see also* Whitman & Milner, *supra* note 55, at 40 (noting that borrowers' "demand[s] for production of the note . . . clog the courts").

62. *See* Bradley T. Borden et al., *Show Me the Note!*, 19 WESTLAW J. BANK & LENDER LIABILITY 1, 1–2 (2013) (discussing cases involving a *show me the note* argument in Arizona, Florida, Massachusetts, Minnesota, and Pennsylvania).

63. Ruiz v. Deutsche Bank Nat'l Tr. Co., No. CV-13-00419-PHX-GMS, 2013 WL 4478931, at *3 (D. Ariz. Aug. 21, 2013) (quoting Diessner v. Mortg. Elec. Reg. Sys., 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009)).

64. Dale A. Whitman, *Proposal for a National Mortgage Registry: MERS Done Right*, 78 MO. L. REV. 1, 17 n.48 (2013).

65. Mark W. Hofgard, *Arizona Foreclosure Defense – Hogan v. Washington Mutual*, MARKHOFGARDLAW (Aug. 25, 2012), http://markhofgardlaw.wordpress.com/2012/08/25/arizona-foreclosure-defense-hogan-v-washington-mutual/ ("The question remains as to whether the note is still discoverable or subject to subpoena during the course of litigation in order to demonstrate that the foreclosing party is not the real party in interest.").

66. 618 F. Supp. 2d 1178, 1180 (D. Ariz. 2009).

67. ARIZ. REV. STAT. ANN. § 47-3301 (2014).

68. *Mansour*, 618 F. Supp. 2d at 1181. The plaintiff also alleged that the defendants violated "the Federal Fair Debt Collection Practices Act ("FDCPA") and Real

recognized the *show me the note* claim, the district court followed a Nevada federal court interpretation of Nevada state law and rejected the plaintiff's *show me the note* claim, holding that the "complaint fail[ed] to state a claim upon which relief may be granted."[69] While the district court premised its prediction of Arizona law on supposed similarities between the Arizona and Nevada statutes, legal scholars have disagreed, calling Arizona's foreclosure statute "nonsensical" because it contains no "reference to the UCC or any requirement that the foreclosing party show entitlement to enforce the promissory note."[70] In contrast, scholars have noted that the Nevada statute "reconcil[es] the demands of UCC Article 3 and the procedure for foreclosure of deeds of trust . . . nicely."[71] As a result, commentators have characterized *Mansour* as "misconstru[ing] Arizona's foreclosure statute."[72]

The validity of the *show me the note* claim in Arizona law arose again in the district court just a month after *Mansour* in *Diessner v. Mortgage Electronic Registration Systems.*[73] In *Diessner*, as in *Mansour*, the borrower sued his lenders after he defaulted on a mortgage loan and the trustee began to conduct a trustee's sale on the property.[74] The plaintiff filed a complaint in Arizona state court, but the defendants removed the action to the Arizona District Court.[75] Recognizing the plaintiff's *show me the note* claim, the district court dismissed the claim by quoting *Mansour*: "[D]istrict courts 'have routinely held that Plaintiff's 'show me the note' argument lacks merit.'"[76] The district court further noted that no language in A.R.S. § 33-807,[77] Arizona's non-judicial foreclosure statute, requires "presentation of the original note before commencing foreclosure proceedings."[78] Without any detailed analysis into the Arizona Supreme Court's interpretation of A.R.S. § 33-807, the district court dismissed the plaintiff's claim "because the acts complained of cannot constitute a claim for relief."[79] The district court repeatedly

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Estate Settlement Procedures Act ("RESPA"); and alleg[ed] predatory lending practices in violation of the Home Ownership and Equity Protection Act ("HOEPA"), the Truth in Lending Act ("TILA"), and the Federal Trade Commission Act ("FTC Act")." *Id.* at 1180–81.

69. *Id.* at 1181 (citing Ernestberg v. Mortg. Inv'rs Grp., No. 2:08-cv-01304-RCJ-RJJ, 2009 WL 160241, at *5 (D. Nev. Jan. 22, 2009); Wayne v. Homeq Servicing, Inc., No. 2:08-cv-00781-RCJ-LRL, 2008 WL 4642595, at *3 (D. Nev. Oct. 16, 2008)).

70. Whitman & Milner, *supra* note 55, at 41, 43, 46–47.

71. *Id.*

72. Douglas J. Whaley, *Mortgage Foreclosures, Promissory Notes, and the Uniform Commercial Code*, 39 W. ST. U. L. REV. 313, 330 (2012).

73. 618 F. Supp. 2d 1184 (D. Ariz. 2009).

74. *Id.* at 1186.

75. *Id.*

76. *Id.* at 1187 (quoting Mansour v. Cal-Western Reconveyance Corp., 618 F. Supp. 2d 1178, 1181 (D. Ariz. 2009)).

77. ARIZ. REV. STAT. ANN. § 33-807 (2014).

78. *Diessner*, 618 F. Supp. 2d at 1187.

79. *Id.* at 1187–88 (quoting Bloom v. Martin, 77 F.3d 318, 321 (9th Cir. 1996)).

applied its analysis of unsettled Arizona law to cases presenting facts similar to *Mansour* and *Diessner*.[80]

B. Entrenchment of Federal Court Predictions

As the Arizona District Court encountered significantly more claims relating to wrongful foreclosure, borrowers varied their *show me the note* claims by affirmatively alleging that the lenders had no authority to foreclose, oftentimes because of a broken chain of title; as a result, borrowers argued that lenders must produce the original promissory note to *prove* their foreclosure authority.[81] The district court dismissed these frequent challenges to lender authority as being too speculative to satisfy the plausibility pleading standard and couched them as typical *show me the note* arguments as dealt with in *Mansour* and *Diessner*.[82] For example, in *Warren v. Sierra Pacific Mortgage Services Inc.*, unlike in *Mansour* or *Diessner*, the borrower affirmatively alleged that the lender had no authority to foreclose due to improper assignment.[83] Specifically, the borrower alleged that the nominee beneficiary "did not sign the notice of substitution of trustee," and, thus, the lender's agent "did not have authority to record the notice of trustee's sale."[84] The borrower argued that, as a result of the improper assignment, the lender must present evidence of the chain of title for both the promissory note and deed of trust to prove its authority.[85] The district court classified the borrower's lack-of-authority argument as a "speculative assertion" and dismissed the borrower's

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80. *See, e.g.*, Charov v. Bank of Am., No. CV-10-00512-PHX-FJM, 2010 WL 2629419, at *1 (D. Ariz. June 30, 2010); Earl v. Wachovia Mortg. FSB, No. CV 09-2198-PHX-MHM, 2010 WL 2336191, at *2 (D. Ariz. June 10, 2010); Ciardi v. Lending Co., No. CV 10-0275-PHX-JAT, 2010 WL 2079735, at *2–3 (D. Ariz. May 24, 2010); Grey v. First Am. Title Ins., No. CV09-1807-PHX-JAT, 2010 WL 1962323, at *2 (D. Ariz. May 14, 2010); Italiano v. Concord Mortg. Co., No. CV-10-685-PHX-MHM, 2010 WL 1531054, at *1 (D. Ariz. Apr. 8, 2010); Dumesnil v. Bank of Am., N.A., No. CV10-0243-PHX-NVW, 2010 WL 1408889, at *3 (D. Ariz. Apr. 7, 2010); Rhoads v. Wash. Mut. Bank, F.A., No. CV10-0197-PHX-NVW, 2010 WL 1408888, at *3 (D. Ariz. Apr. 7, 2010); Contreras v. U.S. Bank as Tr. for CSMC Mortg. Backed Pass-Through Certificates, Series 2006-5, No. CV09-0137-PHX-NVW, 2009 WL 4827016, at *4 (D. Ariz. Dec. 15, 2009); Calugay v. GMAC Mortg., No. CV-09-1947-PHX-LOA, 2009 WL 3872356, at *2 (D. Ariz. Nov. 18, 2009); Martin v. Family Lending Servs., Inc., No. CV 09-2133-PHX-ROS, 2009 WL 3340460, at *1 (D. Ariz. Oct. 15, 2009); Goodyke v. BNC Mortg., Inc., No. CV-09-0074-PHX-MHM, 2009 WL 2971086, at *2 (D. Ariz. Sept. 11, 2009); Garcia v. GMAC Mortg., LLC, No. CV-09-0891-PHX-GMS, 2009 WL 2782791, at *3 (D. Ariz. Aug. 31, 2009).

81. *See, e.g.*, Pitre v. BANA CWB CIG HIF 1st Liens, No. CV 11-00821-PHX-JAT, 2011 WL 6153651, at *3–5 (D. Ariz. Dec. 12, 2011); Owens v. ReconTrust Co., No. CV 10-2696-PHX-JAT, 2011 WL 3684473, at *2–5 (D. Ariz. Aug. 23, 2011); Yares v. Bear Stearns Residential Mortg. Corp., No. CV 10-2575-PHX-JAT, 2011 WL 2531090, at *3–5 (D. Ariz. June 24, 2011); Nichols v. Bosco, No. CV-10-01872-PHX-FJM, 2011 WL 814916, at *3–4 (D. Ariz. Mar. 4, 2011); Kane v. Bosco, No. 10-CV-01787-PHX-JAT, 2010 WL 4879177, at *10–12 (D. Ariz. Nov. 23, 2010).

82. *See supra* note 80 (listing cases).

83. No. CV-10-02095-PHX-NVW, 2011 WL 1526957, at *5 (D. Ariz. Apr. 22, 2011).

84. *Id.*

85. *Id.*

demand that the lender prove its authority as the type of *show me the note* theory dealt with in *Diessner* and *Mansour*.[86]

As *Warren* exhibits, federal courts were unable to parse out the nuances of Arizona's unsettled state law[87] because of the inherently-speculative facts required to successfully plead that a defendant lacked authority to foreclose on the borrower's property; such speculation required the borrower to analyze the procedure that the lender and lender's successors used when assigning and reassigning a promissory note or deed of trust. While Arizona state courts, with a notice pleading standard,[88] could look past the factual allegations and into the actual law underlying the unsettled cause of action, federal courts could not move past the plaintiffs' inherently speculative factual allegations.[89] Lenders, eager to continue the broad rejection of actions involving *show me the note* claims, continued to remove the actions from state to federal court.[90] Additionally, because most cases met the requirements for removal on diversity grounds, many lenders were able to take advantage of the incentive to litigate in federal court.[91]

The Arizona District Court's restrictive interpretation of whether Arizona law recognized a *show me the note* cause of action reoccurred frequently until 2012, when a case with facts resembling *Mansour* and *Diessner*, rather than those of *Warren*, finally came before the Arizona Supreme Court.[92] In *Hogan v. Washington Mutual Bank, N.A.*, the borrower triggered foreclosure proceedings after becoming delinquent on two loans.[93] The borrower sought enjoinment from the trustees' sales unless the beneficiaries proved they were entitled to collect on the respective notes.[94] Agreeing with *Mansour*, the Arizona Supreme Court dismissed the borrower's claim, noting that "[n]othing in the non-judicial

86. *Id.*

87. *See infra* Section II.C (explaining why *Warren*'s interpretation of Arizona law was likely erroneous).

88. Arizona is a notice-pleading state. *See* Cullen v. Auto-Owners Ins., 189 P.3d 344, 348 (Ariz. 2008) (en banc).

89. *Compare* Frame v. Cal-Western Reconveyance Corp., No. CV-11-0201-PHX-JAT, 2011 WL 3876012, at *11 (D. Ariz. Sept. 2, 2011) (dismissing a borrower's claims that the lender lacked authority to foreclose because the lender "intentionally destroyed" the promissory note, among other allegations as "speculative and unsupported") *with* Steinberger v. McVey, 318 P.3d 419, 427 (Ariz. Ct. App. 2014), *review denied*, CV-14-0063-PR, 2014 Ariz. LEXIS 155 (Ariz. Sept. 23, 2014) (allowing borrower's claim that the lender had no authority to foreclose because the notary on the deed of trust assignment "did not personally witness" the assignment, among other allegations).

90. *See* Manuel John Dominguez, William B. Lewis & Anne F. O'Berry, *The Plausibility Standard as a Double-Edged Sword: The Application of Twombly and Iqbal to Affirmative Defenses*, 84 FLA. BAR J. 77, 77 (2010) ("Unlike the modest factual requirements of the notice pleading standard, the plausibility standard requires that a pleading include specific factual allegations that are more than merely consistent with an entitlement to relief.").

91. Each situation typically involved an out-of-state defendant (lender) and an in-state plaintiff (borrower) with an amount of controversy greater than $75,000 (the property in dispute). *See* 28 U.S.C. § 1332(a) (2012).

92. Hogan v. Wash. Mut. Bank, N.A., 277 P.3d 781 (Ariz. 2012) (en banc).

93. *Id.* at 782.

94. *Id.*

foreclosure statutes" imposes a "burden of demonstrating [a lender's right to foreclose] before a non-judicial foreclosure may proceed."[95] However, the court was careful to note that, unlike the borrower in *Warren* or cases with similar fact patterns,[96] the borrower here did not "affirmatively allege that [the defendants] . . . lack authority to enforce the note."[97] As a result, the court did not address a foreclosing party's burden of proof prior to a non-judicial foreclosure in cases like *Warren*, where the borrower factually alleged that the foreclosing party was unauthorized to foreclose. However, by addressing the borrower's failure to affirmatively allege that the defendants lacked authority to enforce the notes,[98] the Arizona Supreme Court suggested that its interpretation of A.R.S. § 33-807 could be different when a borrower *does* make an authorization argument with factual support.

Despite the Arizona Supreme Court's nuanced interpretation of Arizona's foreclosure statute, the Arizona District Court continued to broadly reject *show me the note* claims, even where the borrower factually alleged that the lender had no authority to foreclose. In *Bergdale v. Countrywide Bank FSB*, the borrower contended that the foreclosing defendants did not have "authority to make the assignment, substitution, or notice."[99] The borrower asserted that an assigning officer lacked authority, and, thus, the foreclosing party must prove its authority before foreclosing on the property.[100] Despite the borrower's factual challenge to the foreclosing party's authority, the district court labeled the claim as "a tidy repackaging of a 'show me the note' argument" and, citing to *Hogan*, rejected the claim as "meritless."[101] The district court's citation to *Hogan*, however, overlooked the Arizona Supreme Court's statement that a deed of trust "may be enforced only by, or [on] behalf of, a person who is entitled to enforce the obligation the mortgage secures."[102] If true, the borrower's factual allegations, which claimed that the officer's lack of signing authority broke the chain of title, would withdraw the lender's enforcement authority. The district court, instead, disposed of the borrower's lack-of-authority argument because the factual allegations were too speculative for the plausibility pleading standard.[103]

While *Hogan* had settled Arizona law for claims involving *Mansour* and *Diessner* fact patterns, cases with fact patterns resembling *Warren* and *Bergdale*, in which the borrower affirmatively alleged that the lender lacked foreclosing authority, remained unsettled. Instead, the district court resisted *Hogan*'s nuanced

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95. *Id.* at 783.

96. *See supra* note 80 (listing cases).

97. *Hogan*, 277 P.3d at 783.

98. *Id.*

99. No. CV-12-8057-PCT-GMS, 2012 WL 4120482, at *3 (D. Ariz. Sept. 18, 2012).

100. *Id.* at *3–4. Specifically, the plaintiff alleged that the officer failed to "state any basis for [his] authority to assign for [defendants]" in violation of A.R.S. §§ 33-505, 506. Special Action Complaint ¶ 86, Bergdale v. Countrywide Bank FSB, No. CV-12-8057-PCT-GMS, 2012 WL 4120482 (D. Ariz. Sept. 18, 2012).

101. *Bergdale*, 2012 WL 4120482, at *3.

102. *Hogan*, 277 P.3d at 783.

103. *Bergdale*, 2012 WL 4120482, at *4.

interpretation of state law, relying on its *routine* dismissal of all cases involving *show me the note* claims. Additionally, because of the incentives for lenders to remove to federal court, the appellate state courts were limited in receiving cases with varied fact patterns, making correction of the erroneous federal interpretation nearly impossible for state courts.

C. Entrenchment-Caused Resistance in the Arizona District Court

Five years after *Mansour*, in *Steinberger v. McVey*, the Arizona Court of Appeals parted with the decisions of Arizona federal courts by recognizing a duty of foreclosing entities to prove their authority to conduct a trustee's sale if a borrower "possesses a good faith basis to dispute" such authority.[104] The court held that "borrowers/trustors who obtain a [Temporary Restraining Order] or injunction prior to the trustee's sale" may challenge the authority of their lenders to foreclose if they have a good faith basis that "the trustee or beneficiary is not, in fact, the 'true' trustee/beneficiary."[105] Through this holding, the court recognized a state cause of action to avoid a trustee's sale where the borrower alleges a lender "lack[s] the authority to foreclose on [the borrower's] home."[106]

Here, Steinberger sought a loan modification on her residential mortgage with her lender.[107] After the lender's representative told Steinberger that "a loan modification was not available unless she was in default on the loan," she defaulted on her loan payments.[108] Two years later, after the deed of trust was transferred among different entities, the new holder of her deed of trust sent notice of a trustee's sale.[109] Steinberger filed suit in state court against the holder and other financial entities seeking an injunction to bar the trustee's sale, affirmatively alleging that the defendants lacked "the authority to foreclose on her home."[110]

The Arizona Court of Appeals found Steinberger's allegations, if true, would "seriously undermine the validity of the title transfers."[111] Notably, Steinberger's factual allegations were the same allegations that federal courts had routinely dismissed for failing to state a claim, including: (1) the executor of the assignment from nominee beneficiary to the assignee had no authority because he "was employed by [the assignee], not [the nominee beneficiary]";[112] and (2) the

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104. 318 P.3d 419, 430 (Ariz. Ct. App. 2014), *review denied*, CV-14-0063-PR, 2014 Ariz. LEXIS 155 (Ariz. Sept. 23, 2014).

105. *Id.*

106. *Id.* at 424, 439.

107. *Id.* at 423.

108. *Id.*

109. *Id.* at 424.

110. *Id.*

111. *Id.* at 429.

112. *Id.* at 427; *see* Steers v. CitiMortgage, No. CV-11-1144-PHX-GMS, 2011 WL 6258219, at *3 (D. Ariz. Dec. 15, 2011) ("Plaintiff's allegation, however, rests on the faulty assumption that [the executor] could not be an officer of *both* [the assignee] and [the nominee beneficiary]."); *see also* Cervantes v. Countrywide Home Loans, Inc., 656 F.3d 1034, 1040 (9th Cir. 2011); Bergdale v. Countrywide Bank FSB, No. CV-12-8057-PCT-GMS, 2012 WL 4120482, at *4 (D. Ariz. Sept. 18, 2012); Kentera v. Fremont Inv. & Loan, No. CV-10-8259-PHX-GMS, 2012 WL 1132760, at *6 (D. Ariz. Apr. 4, 2012).

notary notarized the document six weeks after it was signed and, therefore, "did not personally witness" the signing.[113] In reaching its decision, the court cited *Eardley v. Greenberg*, where the Arizona Supreme Court held that, where an unauthorized individual may have signed a substitution notice, "a triable issue existed."[114] The court also reiterated that "deed of trust procedures 'strip borrowers of many protections available' in judicial foreclosure actions, and as a result 'lenders must strictly comply with the Deed of Trust statutes, and the statutes and Deed of Trust must be strictly construed in favor of the borrower.'"[115]

The Arizona Court of Appeals went on to note that "Steinberger bears the burden of proving her claim," and the defendants may "rebut this claim with evidence showing they are in fact the 'true' beneficiary or trustee of the deed of trust."[116] While such evidence could "consist of documents in the chain of title tracing [the lender's] beneficial interest from the original beneficiary, such as assignments, substitutions or a power of attorney," the court, citing *Hogan*,[117] fell short of requiring a lender to show the original promissory note whenever a borrower/trustor disputed the lender's authority to foreclose.[118] Instead of imposing an affirmative duty on lenders to produce the original promissory note, the court explained that "affidavits or deposition testimony from persons involved in the transfers may suffice as evidence of the chain of title."[119] In other words, the court imposed a duty on lenders to show they are the true beneficiaries or trustees of a deed of trust by producing the original promissory note or other evidence showing a chain of title. This duty arises whenever a borrower presents evidence that the lender did not have authority to conduct a foreclosure.

Since *Steinberger*, federal courts in Arizona have been mixed in responding to the case's nuanced interpretation. In one case, where a court denied a defendant's motion to dismiss because there was insufficient information from which the plaintiff could determine the holder of a note, the federal court noted

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113. *Steinberger*, 318 P.3d at 427; *see* Nichols v. Bosco, No. CV-10-01872-PHX-FJM, 2011 WL 814916, at *4 (D. Ariz. Mar. 4, 2011) ("Arizona law does not require a notary to actually witness a signature."); *see also* Das v. JPMorgan Chase Bank, N.A., No. CV-12-00486-PHX-FJM, 2012 WL 1658718, at *2 (D. Ariz. May 11, 2012); Owens v. ReconTrust Co., No. CV 10-2696-PHX-JAT, 2011 WL 3684473, at *2–3 (D. Ariz. Aug. 23, 2011).

114. *Steinberger*, 318 P.3d at 429 (citing Eardley v. Greenberg, 792 P.2d 724, 728 (Ariz. 1990)). "Our conclusion is also supported by A.R.S. § 33-807(A) which provides, in relevant part, that '[B]y virtue of his *position*, a power of sale is conferred upon the trustee of a trust deed . . . .' (emphasis added). This language, on its face, suggests that only the 'true,' legally authorized trustee may, by virtue of his 'position,' exercise the power of sale." *Id.* at 429 n.13 (citing New Sun Bus. Park, LLC v. Yuma Cty., 209 P.3d 179, 182 (Ariz. Ct. App. 2009)).

115. *Id.* at 429–30 (quoting Patton v. First Fed. Sav. & Loan Ass'n of Phx., 578 P.2d 152, 156 (Ariz. 1978)).

116. *Id.* at 430.

117. *Id.* at 429 ("Unlike the borrower/trustor in *Hogan*, Steinberger has affirmatively alleged that Respondents do not have the authority to conduct a trustee's sale on her property.").

118. *Id.* at 430.

119. *Id.*

that the decision was consistent with *Steinberger*.[120] In contrast, however, the court has also relied on entrenched case law, like *Diessner*, in an outright denial of a plaintiff's *show me the note* arguments, ignoring the *Steinberger* call to first examine a plaintiff's factual allegations.[121] Ordinary appellate review has also not remedied the entrenchment because of a failure to take notice of the validity of some *show me the note* claims.[122]

It took five years for an Arizona state court to clarify unsettled law that federal courts had erroneously decided countless times. The entrenchment of the erroneous federal interpretation resulted in significant confusion and alterations to state public policy. Four years after *Mansour*, legal scholars were still confused regarding the condition of Arizona foreclosure law;[123] nevertheless, the Arizona District Court operated as if state law was certain on the subject.[124] Additionally, the myriad federal decisions applying the state law likely influenced the later interpretations by state courts, eager not to dramatically change the state of the law.[125]

D. Pattern for Entrenchment

While the above example provides just one detailed account of entrenchment, the factors that produced its occurrence are not limited to its particular facts.[126] These factors included unique procedural and substantive

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120. Quintana v. Bank of Am., No. CV 11-2301-PHX-JAT, 2014 WL 690906, at *5 n.3 (D. Ariz. Feb. 24, 2014) (noting that the "result is bolstered by the Arizona Court of Appeals recent holding in [*Steinberger*], in which the Court recognized a 'cause of action to avoid a trustee's sale' and held that a borrower could bring this cause of action if the borrower was in default and possessed a good faith basis to dispute the authority of an entity to conduct a trustee's sale").

121. Kramer v. Ocwen Loan Servicing LLC, No. CV-13-01415-PHX-DGC, 2014 WL 1827158, at *6 n.1 (D. Ariz. May 8, 2014) ("To the extent Kramer advances a 'show me the note' argument, courts have routinely held that such argument lacks merit.") (citing Dumont v. HSBC Mortg. Corp., USA, No. CV-10-1106-PHX-MHM, 2010 WL 3023885, at *3 (D. Ariz. Aug. 2, 2010); Diessner v. Mortg. Elec. Registration Sys., 618 F. Supp. 2d 1184, 1187–88 (D. Ariz. 2009)).

122. *See, e.g.*, Przybylski v. Fed. Nat'l Mortg. Ass'n, 586 F. App'x 377, 378 (9th Cir. 2014) (affirming the Arizona District Court's decision to dismiss plaintiff's action because plaintiff "failed to allege facts sufficient to state a cognizable claim for relief"); Skinner v. Deutsche Bank Nat'l Tr. Co., 582 F. App'x 715, 715 (9th Cir. 2014) (affirming the Arizona District Court's dismissal of plaintiff's claim for "erroneous representation as to standing to foreclose" because the allegations did not "plausibly suggest an entitlement to relief"); Margaritis v. U.S. Bank, N.A., 579 F. App'x 590, 591 (9th Cir. 2014) (affirming the Arizona District Court's dismissal of plaintiff's claim because plaintiff's "show me the note argument [was] unpersuasive").

123. *See supra* notes 64–65.

124. *See supra* Section II.B.

125. *See* Whaley, *supra* note 72, at 330–31 (noting that the Arizona Supreme Court's decision in *Hogan* appears to ignore "statutes enacted by the Arizona legislature" in favor of following the Arizona District Court's "line of reasoning"); *see also* Sloviter, *supra* note 10, at 1682–83 (discussing the influence of federal court interpretations of state law on later state court interpretations).

126. *See infra* Section III.C.

forces, which heightened the effects and scope of the entrenchment. Procedural factors included the more liberal discovery rules in Arizona versus in federal court.[127] Entrenchment is much more likely to occur in states that have more liberal discovery rules than those in federal court. Additionally, substantive factors, like the sudden onslaught of the *show me the note* claims, likely led federal courts to be less concerned with quickly disposing these types of claims.[128] As a result, scholars are likely to find similar situations to those that appeared in Arizona where there is significant procedural disparity between state and federal courts, as well as unique substantive factors like a sudden increase in novel causes of action.

III. CERTIFICATION AS THE SOLUTION TO ENTRENCHMENT

Certifying unsettled questions of the law to the state high court is the best approach to combatting entrenchment. Specifically, federal courts should abide by a standard that balances both the practical drawbacks of certification and the negative effects of entrenched state law.

A. Certification: Background

Federal courts utilize the certification process to ask a state high court to resolve the state law dispute. A state high court has discretion to decide the ambiguous question of state law and may then send the case back to the federal court to decide any other issues before issuing a final order.[129] If a state high court chooses to decide an unsettled question of state law, the court does not have jurisdiction over the case, but its answers are binding on the federal court and on future litigants.[130]

As an advocate for certification, the Supreme Court has noted that the process "reduc[es] the delay, cut[s] the cost, and increas[es] the assurance of gaining an authoritative response" from a state high court.[131] Importantly, however, the Court has deferred to federal courts' "sound discretion" when deciding whether to utilize the certification process.[132] Today, with the exception

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127. *See* Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1212 (2005) ("The Zlaket [Arizona discovery] Rules implemented the concept of mandatory disclosure in its most drastic form virtually replacing routine formal discovery.").

128. Gomez v. Countrywide Bank, FSB, No. 2:09-cv-01489-RCJ-LRL, 2009 WL 3617650, at *11 (D. Nev. 2009); *see also* Whitman & Milner, *supra* note 55, at 40 (noting that borrowers' "demand[s] for production of the note . . . clog the courts").

129. 17A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 3d § 4248, at 515–16 (2007).

130. *Id.* at 514.

131. Arizonans for Official English v. Arizona, 520 U.S. 43, 76 (1997).

132. Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974) (vacating and remanding the case to the United States Court of Appeals for the Second Circuit while urging the Second Circuit to consider certifying the case to the Florida Supreme Court); *but cf.* Bruce M. Selya, *Certified Madness: Ask a Silly Question . . .*, 29 SUFFOLK U. L. REV. 677, 691 (1995) (arguing that certification "frequently adds time and expense to litigation that is already overlong and overly expensive"); *see also* Glassman, *supra* note 15, at 249–55

of North Carolina and Missouri's high courts, every state high court has a functional certification process;[133] however, some states only permit certified questions from federal appellate courts, not federal district courts.[134]

General criticism against certification is that "state high courts are not generally in the business of error correction," and a federal court mistaken about state law "is precedential only over federal courts."[135] While this criticism may be relevant when certification involves unsettled state law that is likely to make its way to the state's high court without significant delay, the delay caused by entrenchment trumps these criticisms. When an unsettled state issue is entrenched within federal courts, cases with varied fact patterns are prevented from making their way to the state high court. As a result, certification is oftentimes the only means through which a state high court can correct a federal court's error. Additionally, while the federal court interpretation does not have precedential value in state courts, it is the only interpretation that has determined the state law and, therefore, influences later state court decisions.[136] These considerations make certification the only viable method of preventing years of confusion and incorrect interpretation of unsettled state law.

B. Entrenchment Standard for Certification

Judge Guido Calabresi has argued that federal courts should certify to a state's high court "whenever there is a question of state law that is even possibly in doubt."[137] Unfortunately, if federal courts certified on such a lenient standard, a state's high court would be overburdened,[138] and federal judges would experience significant delays in their dockets.[139] As a result, federal courts have tended to use

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(arguing that delay and impracticalities due to settlement, greater burdens on state courts, and a state high court's reluctance to answer highly-political questions makes the certification process impracticable).

133. *See* Eric Eisenberg, Note, *A Divine Comity: Certification (At Last) in North Carolina*, 58 DUKE L.J. 69, 71 n.13 (2008).

134. *See, e.g.*, State Farm Mut. Auto Ins. v. Schepp, 616 F. Supp. 2d 340, 346 n.11 (E.D.N.Y. 2008) ("While New York does not permit certification from a district court, 'most states also permit questions to be certified from federal district courts.'") (citing 17A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 4248 (3d 2007)).

135. Long, *supra* note 15, at 121.

136. Sloviter, *supra* note 10, at 1682–83 (discussing the influence of federal court interpretations of state law on later state court interpretations); *see also* Whaley, *supra* note 72, at 330–31 (recognizing that the Arizona Supreme Court may have been influenced by Arizona federal court decisions interpreting Arizona's foreclosure statute).

137. Guido Calabresi, Lecture, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1301 (2003).

138. Geri J. Yonover, *A Kinder, Gentler Erie: Reining in the Use of Certification*, 47 ARK. L. REV. 305, 351–52 (1994) (recognizing that many state high courts refuse to answer questions certified to them by federal courts due to considerations which outweigh "the potential for decisional inconsistency"); *see also* Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 769 (1989) ("In 1988 there were about 240,000 civil cases filed in federal courts and about 7,000,000 civil cases filed in state courts.").

139. Calabresi, *supra* note 137, at 1302 (noting that delay "is one reason why many federal judges don't like to certify").

a more conservative approach to certification. While some federal courts have created standalone standards for certification,[140] other federal courts have used the state statute or rule authorizing certification as the only standard.[141] The two central elements of these various standards are that the question of state law must be determinative to the case at hand, and the question must be sufficiently novel. While courts are fairly consistent in interpreting whether a question is determinative to a case, assessing the novelty of a question has encountered wide discrepancy.[142]

This Note proposes that when state claims are *entrenched* within federal court, the federal court should minimize or eliminate the novelty requirement for certification, if the applicable state certification statute or rule allows. A court would know if a state claim is entrenched within federal court if the issue: (1) arises with some frequency in federal court; (2) remains predominantly in federal court; and (3) has been interpreted by federal courts using a body of case law without many state sources. This alternative standard is necessary because there is hesitation and great discrepancy with which courts interpret and apply the novelty standard. A more identifiable standard will encourage federal courts to certify when necessary. Additionally, as the Tenth Circuit Court of Appeals has noted, the primary purpose for the novelty standard is to determine whether a court feels "uncomfortable attempting to [resolve a state law question] without further guidance."[143] When a state claim is entrenched within federal courts, such discomfort should be naturally apparent to federal courts deciding unsettled state

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140. *See* Pino v. United States, 507 F.3d 1233, 1236 (10th Cir. 2007) (certifying a question to the Oklahoma Supreme Court regarding Oklahoma law because the question was: (1) determinative of the case at hand; (2) sufficiently novel, such that the court was uncomfortable in attempting to decide it without further guidance; and (3) not yet addressed authoritatively by the Oklahoma Supreme Court).

141. *See, e.g.*, Kilby v. CVS Pharmacy, Inc., 739 F.3d 1192, 1195 (9th Cir. 2013) (certifying to the California Supreme Court a question of California law based on requirements of California Rule 8.548(a)); Quihuis v. State Farm Mut. Auto. Ins., 748 F.3d 911, 917–18 (9th Cir. 2014) (certifying to the Arizona Supreme Court a question of Arizona law based on requirements set forth by ARIZ. REV. STAT. § 12-1861 (1993)); Doyle v. City of Medford, 565 F.3d 536, 543 (9th Cir. 2009) (certifying to the Oregon Supreme Court a question of Oregon law using discretionary factors set forth by the Oregon Supreme Court) (citing W. Helicopter Servs., Inc. v. Rogerson Aircraft Corp., 811 P.2d 627, 630 (Or. 1991)).

142. *Compare* Hobbs v. Rui Zhao, No. 13-CV-0637-CVE-FHM, 2014 WL 3898408, at *2 (N.D. Okla. Aug. 11, 2014) (declining to certify to the Oklahoma Supreme Court a question of Oklahoma law for lack of novelty because "multiple federal courts and the Oklahoma Court of Civil Appeals [had] considered th[e] issue" and, thus, the court had no reason to believe "the Oklahoma Supreme Court would rule any differently than those courts"); *with* Caronia v. Philip Morris U.S., Inc., 715 F.3d 417, 434–38 (2d Cir. 2013) (certifying to the New York Court of Appeals a question of New York law despite congruous rulings recognizing the existence of an independent state cause of action for medical monitoring from both federal district courts sitting in New York and New York intermediate appellate courts).

143. *Pino*, 507 F.3d at 1236 (citing Delaney v. Cade, 986 F.2d 387, 391 (10th Cir. 1993)).

law because it has a low probability of a state's high court reevaluating it within a reasonable time.

In determining if an unsettled state issue is entrenched in federal court, the first factor, whether a state issue arises with some frequency in federal court, should carry a low threshold, and the court can determine this by looking into cases pending in various district courts. The second factor, whether the state issue predominantly remains in federal court, can be determined by a survey of the appropriate state's appellate court cases. Finally, the third factor, whether federal courts have assembled a body of case law on the state issue without state sources, should carry the most weight in determining entrenchment.

C. Certification Utilized by Washington Federal Courts to Thwart Entrenchment

A recent example of a federal court appreciating the threat of entrenchment and certifying an unsettled issue of state law to a state high court under a standard similar to the entrenchment standard occurred in Washington. In 2010, a Washington state law was unsettled regarding remedies for borrowers who may have been wrongfully foreclosed. The law was unsettled as to whether a borrower whose loan was secured by a deed of trust on owner-occupied residential property could recover monetary damages against a trustee who acted without authority in violation of Washington's Deed of Trust Act ("DTA"),[144] even if the trustee's sale was only *initiated* but *did not occur*. The federal court adopted a restrictive view on state law, recognizing that Washington law "does not authorize a cause of action for damages for the wrongful institution of non[-]judicial foreclosure proceedings where no trustee's sale occurs."[145] Citing to an interpretation of the DTA from the Eastern District Court of Washington, the Western District Court of Washington held that, even if the trustee lacked authority to initiate non-judicial foreclosure proceedings, there was no cause of action for such a claim because it would interfere with "the efficient and inexpensive nature of the non[-]judicial foreclosure process."[146] Washington federal courts repeatedly applied this reasoning in denying the existence of the cause of action, despite the issue being unsettled in Washington state courts.[147]

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144. WASH. REV. CODE § 61.24.

145. Vawter v. Quality Loan Serv. Corp. of Wash., 707 F. Supp. 2d 1115, 1123 (W.D. Wash. 2010).

146. *Id.* at 1124 (citing Pfau v. Wash. Mut., Inc., No. CV-08-00142-JLQ, 2009 WL 484448, at *12 (E.D. Wash. Feb. 24, 2009); Krienke v. Chase Home Fin., LLC, 140 Wash. App. 1032, 2007 WL 2713737, at *5 (Ct. App. Sept. 18, 2007)).

147. Townsend v. Quality Loan Serv. Corp. of Wash., No. 3:12-cv-05778-RBL, 2012 WL 5330972, at *2 (W.D. Wash. Oct. 26, 2012) ("In Washington, there is no cause of action for 'wrongful foreclosure' when no foreclosure has in fact occurred.") (citing *Vawter*, 707 F. Supp. 2d at 1123–24); *see also* Krusee v. Bank of Am., N.A., No. C13-824 RSM, 2013 WL 3973966, at *2–3 (W.D. Wash. July 30, 2013); Rose v. ReconTrust Co., No. CV-10-394-LRS, 2013 WL 1703335, at *3 (E.D. Wash. Apr. 18, 2013); Mickelson v. Chase Home Fin., LLC, No. C11-1445 MJP, 2012 WL 3240241, at *3 (W.D. Wash. Aug. 7, 2012); Frase v. U.S. Bank, N.A., No. C11-1293JLR, 2012 WL 1658400, at *7 (W.D. Wash. May 11, 2012);.

Three years later, the Washington appellate court finally received a case in which it had to decide the existence of a cause of action for wrongful foreclosure if the trustee only *initiated* foreclosure proceedings.[148] The Washington Court of Appeals explicitly and lengthily rejected the federal court analysis.[149] The state court noted that, in the case before it, the borrower's allegations "strongly support recognizing a presale cause of action for damages under the DTA because he pleads facts showing he has suffered prejudice from [the lenders'] unlawful conduct."[150] As a result, the court held, "a borrower has an actionable claim against a trustee who, by acting without authority or in material violation of the DTA, injures the borrower, even if no foreclosure sale occurred."[151]

The Western District Court of Washington recognized the discrepancy between the federal and state court interpretation of the DTA.[152] Abiding by the principle that "when sitting in diversity and considering issues of state law, federal courts are bound only by the decisions of the state's highest court,"[153] the district court stayed the action before it and certified the question to the Washington Supreme Court to clarify the DTA uncertainties.[154] The Washington Supreme Court agreed with the initial reasoning of the district court by noting that the language in the DTA "strongly implies that a cause of action . . . for a trustee's material statutory violations is not available until after a completed foreclosure sale."[155]

Here, the unsettled state law started to become entrenched within the federal court, which applied a restrictive interpretation on the existence of the cause of action. However, after the state appellate court applied a different interpretation, the district court recognized the dangers of two separate interpretations of state law. Borrowers attempting to state a presale cause of action for damages under the DTA would receive disparate treatment depending on if they were in federal or state court. The lender-favorable federal interpretation threatened to propel entrenchment of unsettled state law in federal court. To thwart this entrenchment, the federal court relied on the certification process. The court's decision was consistent with the entrenchment standard because the state law claims: (1) arose with frequency in federal court;[156] (2) would become entrenched in federal court if the federal interpretation remained lender-favorable over the

148. Walker v. Quality Loan Serv. Corp. of Wash., 308 P.3d 716 (Wash. Ct. App. 2013).

149. *Id.* at 722–24.

150. *Id.* at 724.

151. *Id.* at 723.

152. Frias v. Asset Foreclosures Servs., Inc., No. C13-760-MJP, 2013 WL 6440205, at *1 (W.D. Wash. Sept. 25, 2013).

153. *Id.* (citing *In re* Kirkland, 915 F.2d 1236, 1238–39 (9th Cir. 1990)).

154. *Id.* at *1–2.

155. Frias v. Asset Foreclosure Servs., Inc., 334 P.3d 529, 536 (Wash. 2014).

156. *Frias*, 2013 WL 6440205, at *1 (listing federal court cases interpreting with the unsettled state law).

state interpretation; and (3) were primarily interpreted by federal courts using a body of federal case law.[157]

D. Applying the Entrenched Standard to the Arizona Show Me The Note Claim

To better explain the entrenched standard, this Note will use the example explained in Part II: whether Arizona law allows a cause of action to avoid a trustee's sale when the borrower affirmatively alleges that a lender lacks authority to foreclose on the borrower's home.[158] In *Hogan,* the Arizona Supreme Court denied the existence of a cause of action to avoid a trustee's sale where the borrower *does not* allege that a lender lacks authority to foreclose on the borrower's home.[159] *Hogan*, decided in 2012, partitions two periods in which the Arizona District Court should have certified the unsettled state law question: first, before the Arizona Supreme Court's decision in *Hogan*; second, after *Hogan*, when the federal court received cases that were not fully-answerable by *Hogan.*

1. Certification of Unsettled State Claims Pre-Hogan

In *Mansour*, when the Arizona District Court first decided the unsettled question of state law, the court noted that, "[a]lthough no reported cases address the applicability of A.R.S. § 47-3301 in a factually analogous situation, courts have routinely held that Plaintiff's 'show me the note' argument lacks merit."[160] Instead of predicting how the Arizona Supreme Court would decide the issue, however, the court simply analyzed federal court interpretations of other states' laws.[161] Following *Mansour*, the district court frequently cited this "routinely held" language but eventually began to qualify it as "courts *within the District of Arizona* 'have routinely held . . . ,'"[162] which gave the appearance that the law was settled and routine. Instead of continuing to cite the *routine* language of its entrenched cases, the court should have certified the question to the Arizona Supreme Court.

Using either the novelty standard or the entrenched standard discussed above, the Arizona District Court would have found grounds to certify. Initially, as both standards require, recognition of this cause of action is outcome determinative because it would have prevented trustees from conducting a trustee's sale. Under the novelty standard, no reported Arizona Court of Appeals case dealt with a *show me the note* claim until *Hogan*, which was appealed to the Arizona Supreme

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157. *Id.* at *1–2 (recognizing that the Washington Court of Appeals has "reached a contrary interpretation" from federal courts on the DTA).

158. *See supra* Part II.

159. *See supra* Section II.B.

160. 618 F. Supp. 2d 1178, 1181 (D. Ariz. 2009).

161. *Id.*

162. Blau v. Am.'s Servicing Co., No. CV-08-773-PHX-MHM, 2009 WL 3174823, at *6 (D. Ariz. Sept. 29, 2009) (quoting Diessner v. Mortg. Elec. Registration Sys., 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009)) (emphasis added); *see also* Earl v. Wachovia Mortg. FSB, No. CV 09-2198-PHX-MHM, 2010 WL 2336191, at *2 (D. Ariz. June 10, 2010); Garcia v. Recontrust Co., No. CV-08-8113-PHX-MHM, 2010 WL 1268136, at *2 (D. Ariz. Mar. 30, 2010).

Court.[163] As a result, the novelty standard would have been met. Similarly, under the entrenched standard, there also would have been grounds to certify: (1) plaintiffs made this claim "routinely" in the district court;[164] (2) no Arizona Court of Appeals had dealt with the claim; and (3) the district court continued to cite case law that had decided unsettled state law without any analysis on Arizona jurisprudence. Under either standard, the Arizona District Court should have certified the ambiguous question of state law to avoid perpetuating confusion.

2. Certification of Unsettled State Claim Post-Hogan

In *Hogan*, the Arizona Supreme Court agreed with the Arizona District Court's initial *Erie* guess and denied the existence of a cause of action to avoid a trustee's sale when the borrower *does not* affirmatively allege that a lender lacks authority to foreclose on the borrower's home.[165] However, the Arizona Supreme Court was careful to note that a case where the borrower *affirmatively alleges* that a lender lacks authority to foreclose on a borrower's home could elicit a different result.[166] Despite *Hogan*, the Arizona District Court continued to ignore the difference between cases where a borrower *did* and *did not* affirmatively allege a lender's lack of authority.[167]

While the Arizona District Court may still decline to certify the unsettled state law question under the novelty standard, the *entrenched* standard would require the court to certify. Using a broad novelty standard, the district court may decline certification since the Arizona Supreme Court had ruled on a similar issue. However, using the *entrenched* standard, the court must certify this question to the Arizona Supreme Court. This case meets both the frequency and 'predominantly federal court' elements because claims of this type have continued to flood the federal court.[168] Additionally, besides *Hogan*, which applies only where a plaintiff *does not* affirmatively allege a lender's lack of authority to foreclose, the district court has continued to rely on its nonbinding and entrenched case law to make its *routine* determination.[169] Utilizing this *entrenched* standard, the Arizona District Court would certify and avoid prolonged misinterpretation of state law.

CONCLUSION

Pleading standards can affect every aspect of how parties litigate a case. As a result of the recent shifts and incongruence of pleading standards between

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163. Hogan v. Wash. Mut. Bank, N.A., 261 P.3d 445 (Ariz. Ct. App. 2011), *vacated*, 277 P.3d 781 (Ariz. 2012) (en banc).

164. *See Blau*, 2009 WL 3174823, at *6 (quoting *Diessner*, 618 F. Supp. 2d at 1187).

165. Hogan v. Wash. Mut. Bank, N.A., 277 P.3d 781, 783 (Ariz. 2012) (en banc).

166. *Id.*

167. *See* Bergdale v. Countrywide Bank FSB, No. CV-12-8057-PCT-GMS, 2012 WL 4120482, at *3 (D. Ariz. Sept. 18, 2012); *see also supra* Section II.B.

168. *See supra* Section II.B.

169. *See, e.g.*, Standish v. Encore Credit Corp., No. CV-13-01819-PHX-DGC, 2014 WL 232021, at *2–3 (D. Ariz. Jan. 22, 2014) (dismissing a plaintiff's wrongful foreclosure claim despite the plaintiff's affirmative argument that defendants lacked authority to foreclose due to improper assignment).

federal and state courts, litigation inequities are bound to arise with which courts have not yet dealt. This Note encourages federal courts to be vigilant in combatting the problems that incongruent pleading standards have caused in predicting unsettled state law. Using the *entrenched* standard, federal courts should certify a question regarding unsettled state law to a state's high court when the issue: (1) arises with some frequency in federal court; (2) remains predominantly in federal court; and (3) has an assembled body of federal case law without many state sources. Adhering to this standard will prevent widespread confusion, injustice, and encroachment when federal courts venture to predict unsettled state law.