A UNIFORM TEST FOR THE EQUITABLE SUBROGATION OF MORTGAGES

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INTRODUCTION

The period from the late 1990s to early 2000s saw a dramatic increase in real estate prices\(^1\) and the number of mortgages\(^2\) issued.\(^3\) Millions of homeowners took advantage of historically low interest rates to refinance their existing mortgages.\(^4\) In everyone’s haste to make money, many of these mortgage refinancing transactions were “sloppily” conducted.\(^5\) The mistakes from these transactions have returned to haunt both refinancing institutions and homeowners alike, giving rise to large amounts of litigation\(^6\) and record numbers of foreclosures.\(^7\)

One mistake in particular that has generated many problems involves mortgage refinancings in which preexisting mortgages are

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\(^2\) For the purposes of this Note, a mortgage is a lien against real property that is granted by the owner of the real property (the mortgagor) to another party (the mortgagee) to secure an obligation that is owed by the mortgagor. BLACK’S LAW DICTIONARY 1101 (9th ed. 2009).


\(^5\) Michael Powell, A “Little Judge” Who Rejects Foreclosures, Brooklyn Style, N.Y. TIMES, Aug. 31, 2009, at A1. See generally Moran, supra note 4, at 7-8 (explaining how imprudent lending practices along with other factors made, “a housing correction—the bursting of the bubble . . . both inevitable and necessary”).


\(^7\) Delinquencies and Foreclosures Continue to Climb in Latest MBA National Delinquency Survey, MORTGAGE BANKERS ASSOC. (May 28, 2009), http://www.mortgagebankers.org/NewsandMedia/PressCenter/69031.htm (reporting record delinquency and foreclosure rates).
inadvertently left unsatisfied.\textsuperscript{8} During a mortgage refinancing, homeowners apply for a mortgage refinancing loan in order to pay off existing mortgages on their property.\textsuperscript{9} Refinancing mortgagees provide these loans on the condition that all preexisting mortgages on the property be satisfied.\textsuperscript{10} This condition is necessary to ensure that the refinancing mortgagee will obtain the protection of being first in priority in case the homeowner defaults on the refinancing mortgage loan.\textsuperscript{11} If, however, a refinancing mortgagee fails to identify a preexisting mortgage and satisfy it, a serious problem occurs. Upon the closing of the mortgage refinancing transaction, the unidentified preexisting mortgage, rather than the refinancing mortgage, becomes the oldest interest on the property and obtains the first in priority protection paid for by the refinancing mortgagee.\textsuperscript{12} As home prices plummeted and homeowners began to default on mortgages in record

\textsuperscript{8} The satisfaction of a mortgage is the complete payment according to stipulated terms. BLACK’S LAW DICTIONARY 1460 (9th ed. 2009).

\textsuperscript{9} See discussion infra Part I.C.

\textsuperscript{10} A refinancing mortgagee will knowingly waive this requirement only when the property is worth more than the total amount of any existing mortgages. When the property is worth more than the total amount of all mortgages against it, mortgage priority is not practically important as all of the mortgages can be satisfied with the proceeds of a sale of the property. See 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 37.28 (Michael Allan Wolf ed., 2010).

\textsuperscript{11} Default means the “omission or failure to perform a legal or contractual duty.” BLACK’S LAW DICTIONARY 480 (9th ed. 2009). With mortgages this primarily means the homeowner’s failure to pay the mortgage loan when due. When a homeowner defaults on a mortgage, the mortgagee maintains the right to enforce its security interest by having the mortgaged property sold in a foreclosure proceeding. If more than one mortgage or lien exists on the property, all interests are ranked in order of priority. Proceeds from the foreclosure sale are then applied to the full satisfaction of each interest in descending order of priority until the proceeds are exhausted. If the proceeds from a foreclosure sale are less than the total outstanding amounts of all interests, interests that are lower in priority may recover nothing at all. Therefore, being first in priority ensures that the refinancing mortgagee will be paid first from the proceeds of a foreclosure sale if the homeowner defaults on the refinancing mortgage. See discussion infra Parts I.C & I.E.

\textsuperscript{12} For example, suppose that a property has three mortgages:
1. Mortgage A, which was recorded on January 1, 2001, secures a debt of $100,000;
2. Mortgage B, which was issued on May 1, 2001, but never recorded, secures a debt of $50,000; and
3. Mortgage C, which was recorded on September 1, 2001, secures a debt of $100,000.

The property owner wishes to obtain a mortgage refinancing loan. The refinancing mortgagee conducts a title search and discovers only the recorded mortgages, Mortgage A and Mortgage C. The refinancing mortgagee prepares and issues a refinancing mortgage, Mortgage D, in the amount of $200,000 on December 1, 2001. Mortgage D is used to satisfy Mortgages A and C. The refinancing mortgagee believes that upon satisfying Mortgages A and C, Mortgage D will be the only existing mortgage on the property and, therefore, will have first in priority rights. See discussion infra Part I.C. However, once the refinancing mortgage satisfies Mortgages A and C, Mortgage B, not Mortgage D, will become the oldest, or most senior, mortgage on the property and will obtain the protection of being first in priority thanks to the refinancing mortgage. Mortgage D still could obtain first in priority rights if it is recorded prior to Mortgage B. See discussion infra Parts I.C & I.E.
numbers, many refinancing mortgagees found themselves lower in priority to an unknown, preexisting mortgage and unable to recover any money from their investments.

In order to avoid this unjust outcome, courts have resorted to a judicial remedy known as the doctrine of equitable subrogation. Equitable subrogation essentially assigns the priority rights the original creditor of the satisfied debt would have held if the debt had not been satisfied to a party who involuntarily satisfied another person’s debt. In the mortgage refinance context, equitable subrogation works to resolve the problem of the unknown, intervening mortgage by providing the refinancing mortgage with the priority rights of the mortgages or liens it satisfied.

Use of the doctrine of equitable subrogation, however, has been tainted by inconsistent and conflicting judgments because courts in New York and across the country have had trouble clearly defining the scope of equitable subrogation and justifying its application. For example, in Surace v. Stewart, the Appellate Division of the Supreme Court of New York, Second Department, applied the doctrine of equitable subrogation in direct contravention of the New York State recording statute to defeat the first in priority right of a good faith mortgagee, Rudolph Kats, who had no notice of a subsequent, unrecorded mortgage. The only rationale provided by the court was that Mr. 

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14 See discussion infra Part I.E.
15 E.g., Shinn v. Budd, 14 N.J. Eq. 234 (N.J. Ch. 1862); Arnold v. Green, 23 N.E. 1 (N.Y. 1889); GEORGE E. HARRIS, A TREATISE ON THE LAW OF SUBROGATION (1889).
16 For example, equitable subrogation would remed the hypothetical problem in note 12 by “assigning” the priority rights of Mortgages A to Mortgage D. After equitable subrogation, Mortgage D would become the senior most mortgage on the property ahead of Mortgage B. See discussion infra Part I.F.
17 See, e.g., Catto v. United Cal. Bank, 576 P.2d 466, 471 (Cal. 1978) (“[T]he doctrine of equitable subrogation is broad enough to include every instance in which one person, not acting as a mere volunteer or intruder, pays a debt for which another is primarily liable, and which in equity and good conscience should have been discharged by the latter.” (citation omitted)); Am. Surety Co. v. State Trust & Sav. Bank, 254 N.W. 338, 339 (Iowa 1934) (“Subrogation is said to be ‘the creature of equity, and is so administered as to secure real and essential justice without regard to form . . . .’” (citation omitted)); Deerfield Ltd. P’ship v. Henry Bldg., Inc., 41 S.W.3d 259, 268 (Tex. Ct. App. 2001) (“The doctrine of equitable subrogation is given a liberal application . . . .”); Douglass v. Fagg, 35 Va. (8 Leigh) 588, 598 (1837) (“The doctrine of subrogation, it must be remembered, is the offspring of natural justice, and . . . is so administered as to attain real essential justice, without regard to form.”).
19 The New York recording act statute states:
A conveyance of real property, within the state, on being duly acknowledged by the person executing the same, or proved as required by this chapter, and such acknowledgment or proof duly certified when required by this chapter, may be recorded in the office of the clerk of the county where such real property is situated, and such county clerk shall, upon the request of any party, on tender of the lawful fees therefor, record the same in his said office. Every such conveyance not so recorded is
Kats’s mortgage did not exist at the time the original mortgage was satisfied.20

In Surace, Mr. Kats issued a mortgage loan to a homeowner, Andrew Stewart, after conducting a thorough title search of Mr. Stewart’s property.21 Mr. Kats believed he had obtained a mortgage with first priority rights because the title search revealed no existing mortgages or liens on the property,22 and promptly recorded his mortgage.23 However, unbeknownst to Mr. Kats, another mortgage on the property existed—the Surace mortgage.24 Mr. Kats had not discovered the Surace mortgage because it had not been recorded at the time of Mr. Kats’s title search.25

Under New York’s race-notice recording statute,26 even though Mr. Kats’s mortgage was issued three months after the Surace mortgage, Mr. Kats’s mortgage still should have had priority because Mr. Kats had no notice of the Surace mortgage and had recorded first.27

20 Surace, 875 N.Y.S.2d at 84.
21 Mr. Kats also conducted an Automated City Register Information System (ACRIS) search of the New York City Register’s records and reviewed Mr. Stewart’s credit report. Brief for Appellant at 3, Surace, 875 N.Y.S.2d 82 (No. 2008-01461).
22 The title search had revealed one satisfied mortgage on the property that had been paid off three months prior to Mr. Kats’s mortgage. The homeowner, Mr. Stewart, represented to Mr. Kats that the prior mortgage had been satisfied with the sale proceeds of another property. As proof of the satisfaction Mr. Stewart provided Mr. Kats with a copy of an attorney’s escrow account check. The check listed the address of another property in its notes section. Id. at 2.
23 See supra Part I.E. for a discussion on priority rights. Mr. Kats recorded his mortgage eighteen days after issuance. Brief for Appellant at 5 n.2, Surace, 875 N.Y.S.2d 82 (No. 2008-01461).
24 The Surace mortgage was issued three months prior to Mr. Kats’s mortgage. Contrary to the homeowner’s representation to Mr. Kats, it was the Surace mortgage, not the sale proceeds from another property, that provided the funds to satisfy the mortgage identified in Mr. Kats’s title search. Brief for Appellant at 2, Surace, 875 N.Y.S.2d 82 (No. 2008-01461).
25 The plaintiff’s mortgage remained unrecorded for over nine months before finally being recorded several months after Mr. Kats’s mortgage. Brief for Plaintiff-Respondents at 7, Surace, 875 N.Y.S.2d 82 (No. 2008-01461).
26 N.Y. REAL PROP. LAW § 291 (McKinney 2010).
27 Brief for Appellant at 5, Surace, 875 N.Y.S.2d 82 (No. 2008-01461).
However, despite the fact that Mr. Kats was a party protected by the recording statute, the trial court held, and the Second Department affirmed, that the unrecorded Surace mortgage should be equitably subrogated over Mr. Kats’s mortgage.

Surace is just one example of the often confusing and unclear application of equitable subrogation in the mortgage refinancing context. This Note argues for New York courts to apply a uniform, multifactor analysis in order to resolve this confusion and conflict. This multifactor test will provide increased transparency and uniformity to the application of equitable subrogation, while maintaining flexibility for the courts to reach equitable outcomes in different factual contexts.

Part I of this Note defines equitable subrogation as it operates within the context of mortgage refinancings. Part II outlines the development of equitable subrogation in order to determine the historical purpose and scope of equitable subrogation. Part III proposes a comprehensive reading of key New York cases to identify factors implicitly considered by New York courts in deciding when to apply equitable subrogation. Finally, Part IV formulates a uniform, multifactor test to be used by New York courts in determining when to apply equitable subrogation in the mortgage refinancing context.

I. EQUITABLE SUBROGATION IN CONTEXT

In order to understand the doctrine of equitable subrogation as it applies in the context of mortgage refinancing, this Part will briefly explain the basic mechanics of mortgages, mortgage recordation, mortgage refinancing, title searches, foreclosures, and priority. This Part then will define equitable subrogation as it operates within this context.

A. Mortgages

A mortgage is the transfer of an interest in real property from the owner of the real property, the mortgagor, to another party, the mortgagee, as security for the repayment of an underlying loan.
Multiple mortgages can be placed on the same property\(^3\) because a mortgage only transfers an interest in property and not the property itself.\(^2\)

A mortgage exists solely to provide security for an underlying loan obligation. Therefore, a mortgage cannot be transferred or survive without the underlying loan.\(^3\) A mortgage and all of its priority rights will be automatically extinguished once the mortgagor has paid off the underlying mortgage loan.\(^4\) Notwithstanding this automatic extinguishment, the mortgagor is entitled to receive a formal written release that should be recorded.\(^5\) Recordation of the release is necessary even though the mortgage is automatically extinguished in order for the mortgagor to clear the public record, which continues to show the satisfied mortgage until the release is recorded. Recordation is also necessary to prevent any parties from potentially claiming any rights under the satisfied mortgage.\(^6\)

51,164,197 housing units out of a total of 75,072,666 or 68.15% of homes are subject to a mortgage.\(^3\) Approximately 12.5 million homes have two or more mortgages. U.S. CENSUS BUREAU, HOUSING AND HOUSEHOLD ECONOMIC STATISTICS DIVISION, AMERICAN HOUSING SURVEY FOR THE UNITED STATES 2007 (2008), available at http://www.census.gov/hhes/www/housing/ahs/ahs07/tab3-15.pdf.

\(^3\) See Burnett v. Wright, 135 N.Y. 543, 547 (1892) ("[A mortgage] is ‘any conveyance of land intended by the parties at the time of making it to be a security for the payment of money or the doing of some prescribed act.’" (citations omitted) (emphasis added)).

\(^2\) See, e.g., Tomatore v. Bruno, 785 N.Y.S.2d 820, 822 (App. Div. 2004) ("[A] mortgage is not valid and enforceable unless there is an underlying valid debt or obligation for which the mortgage is intended as security. . . . If the underlying indebtedness is found at a later time to be unenforceable for want of consideration, the mortgage, even if supported by its own consideration, will be of no effect." (citations omitted)); Coronet Capital Co. v. Spodek, 696 N.Y.S.2d 191 (App. Div. 1999) (holding that a mortgage is invalid and unenforceable unless there is an underlying valid debt or obligation for which the mortgage is intended as security).

\(^4\) See, e.g., Tiffany v. St. John, 65 N.Y. 314, 318 (1875) ("It is a general rule of law that where a person holds a lien upon property, a tender by the owner of the property of the amount of the lien will discharge it. . . . The instantaneous effect is to discharge any collateral lien, as a pledge of goods or a right of distress."); State Bank of Albany v. Amak Enters., Inc., 353 N.Y.S.2d 857, 861 (Sup. Ct. 1974) ("When the debt was extinguished, the lien of the mortgage given to collaterally secure that debt necessarily expired.").

\(^5\) Bacon v. Van Schoonhoven, 87 N.Y. 446, 450 (1882) (holding that a satisfaction of mortgage was a conveyance within the meaning of the recording statute).

\(^6\) For example, in Gibson v. Thomas, 73 N.E. 484, 485 (N.Y. 1905), it was held that the failure of a company to record a mortgage satisfaction was an omission that permitted the subsequent assignee of the mortgage to gain priority over the company by recording the assignment.
B. Recordation

Recording statutes provide statutory protection to interests in real property that are not chronologically first-in-time, provided that those interests meet certain requirements. All recording statutes require that these interests be filed or recorded with a designated agency in order to obtain these protections. Recording statutes may also require that lienholders be without notice of a prior interest, record before a prior interest, or be without notice of a prior interest and record first. New York’s recording statute creates a race-notice system that gives priority to mortgagees who record first without actual or constructive notice of another’s interests. Interests that meet the applicable recording statute requirements are deemed to have priority over, or be senior to, a chronologically prior interest that did not comply with the statutory requirements.

Recording statutes are a key part of our legal system because they protect property rights. Protection of property rights creates incentives

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37 ROBERT H. BOWMAR, LIEN PRIORITIES IN NEW YORK § 1:1 (2009).
38 Id.
40 N.Y. REAL PROP. LAW § 291 (McKinney 2010). A subsequent mortgagee is deemed to have constructive notice of a prior interest in the property if the interest is properly recorded, even if the subsequent mortgagee had no actual knowledge of the interest. E.g., Doyle v. Lazarro, 306 N.Y.S.2d, 270 (App. Div. 1970) (“The recording acts reflect a legislative presumption that a recorded deed constitutes notice to a subsequent purchaser. It matters not whether he checks the records but does not find the deed or neglects to check the records—he is unprotected in either case.”). The system was designed by the legislature with a twofold purpose. First, the recording statute was designed to keep track of different interests in a property by establishing a public record. Witter v. Taggart, 577 N.E.2d 338, 340 (N.Y. 1991) (observing that the purpose of the recording statute is to “furnish potential purchasers with actual or at least constructive notice of previous conveyances and encumbrances that might affect their interests and uses”). Second, the recording statute was designed to protect subsequent purchasers against fraud. See, e.g., Fox v. Sizeland, 9 N.Y.S.2d 350, 360 (Sup. Ct. 1938) (“The basic purpose which led to the enactment of the Recording Acts was to prevent persons owning lands from selling them more than once.”); Stuyvesant v. Hone, 1 Sand. Ch. 419 (N.Y. Ch. 1844) (“The effect of recording a conveyance is not retrospective, nor was it designed to change rights already vested and secured by a recorded deed or mortgage. It simply protects a purchaser who takes the precaution to search the records, and record his own conveyance, against prior unrecorded conveyances of which he had no notice.”). In rendering decisions regarding priority, courts seek to apply the recording statute in order to best accomplish these purposes. See, e.g., Andy Assocs., Inc. v. Bankers Trust Co., 399 N.E.2d 1160 (N.Y. 1979) ("[W]ell-established policy in favor of applying the recording act in such a way as to effect its underlying purpose . . . ."); State Ins. Fund v. Parrilla, 225 N.Y.S.2d 236, 237 (Mun. Ct. 1961) ("After a lien has attached, a liberal construction should be put upon the (lien) statute for the purpose of fulfilling its objects.").
41 Szypszak, supra note 39.
to use property efficiently.\footnote{Without the protection of property rights, people would be unwilling to make investments necessary to maximize the value of their property. \textit{See} Richard A. Posner, \textit{Economic Analysis of Law} 32-35, 75-79 (4th ed. 1992).} Therefore, a strong policy rationale exists for maintaining an effective recording statute that protects and enforces property rights at a low cost in comparison to the value of the property protected.\footnote{All systems for creating and protecting property rights necessarily involve enforcement costs. These costs reduce the benefits people receive from such systems. Therefore, from an efficiency standpoint, systems with lower costs are preferable to high cost systems, and it only makes sense to have a system for creating and enforcing property rights when the costs of enforcing such system are less than the benefits received. Judge Posner provides, as an example, a scenario involving a primitive society in which the principal use of land is for grazing, the cost of materials for erecting fences is high, and the society is illiterate. If the population of the society and the flocks of grazing animals are small in relation to the amount of land, the benefits from creating and enforcing property rights in such land may be zero. In contrast, the cost of creating and enforcing property rights through fencing is very high. Therefore, it would not make sense for this particular society to create or enforce a property protection system based on fences. \textit{Id} at 35-38.}

C. \textit{Mortgage Refinancing}

Mortgage refinancing is the term used to describe transactions where existing mortgages are discharged and replaced with new mortgages.\footnote{Michael T. Madison \textit{et al.}, \textit{The Law of Real Estate Financing} § 8:3 (2009).} Homeowners typically seek to refinance when interest rates on new mortgages are lower than interest rates on existing mortgage loans, or when they are in need of additional capital.\footnote{Leonard P. Vidger, \textit{Borrowing and Lending on Residential Property} 160-63 (1981).} Refinancing mortgagees agree to issue a refinancing mortgage loan on the condition that all prior interests on a property are satisfied by the refinancing mortgage loan in order to secure the protection of being first in priority in case of default.\footnote{When interest rates on new mortgage loans are lower than the interest rate on a property owner’s existing mortgages, the homeowner can save the difference between the rates by refinancing. Additionally, when the value of a property exceeds the total amount of mortgages on the property, the homeowner can obtain that difference in cash by applying for a refinancing mortgage that covers the entire increased value of the property. Part of the refinancing mortgage will pay off the existing loans and the remainder will go to the homeowner. \textit{Id.}}

D. \textit{Title Searches and Risks}

A crucial part of the mortgage and mortgage refinancing process is the title search. A title search is an examination of public records for any prior encumbrance on a specified property.\footnote{See discussion \textit{supra} note 10.} Title searches are
performed by a mortgagee’s attorney, an abstracter, or by a title insurance company.\textsuperscript{48} In the mortgage refinancing context, mortgagees obtain title searches for the purpose of identifying all prior interests on a property that need to be satisfied.\textsuperscript{49} However, conducting a title search does not necessarily eliminate the risk that a prior interest will go undiscovered.\textsuperscript{50}

E. Foreclosure & Priority

In cases where the mortgagor fails to pay the mortgage loan, mortgagees maintain the right to enforce their security interest by having the mortgaged property sold in a foreclosure proceeding.\textsuperscript{51} During this foreclosure proceeding, the law does not satisfy all mortgages, liens, or other interests on the property equally. Rather, all

\textsuperscript{48} 14 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 82.03[2] (Michael Allan Wolf ed., 2010). The search process is essentially the same for any of the three. Searchers must examine documents in the recorder’s office and other places, such as the local clerk of court’s office, and offices holding records of U.C.C. financing statements, to identify prior recorded interests on the property. Searchers who regularly perform large numbers of title searches, such as title insurance companies, often also create and search their own “plant” in which they maintain their own set of records for efficiency purposes. However, in New York, title plants are rare, and title agents generally utilize abstractors and independent examiners who go to various offices to manually conduct searches. U.S. GEN. ACCOUNTING OFFICE, GAO-07-401, TITLE INSURANCE: ACTIONS NEEDED TO IMPROVE OVERSIGHT OF THE TITLE INDUSTRY AND BETTER PROTECT CONSUMERS 17 (2007), available at http://www.gao.gov/new.items/d07401.pdf.

\textsuperscript{49} Refinancing mortgagees want to satisfy all existing prior interests in order to obtain a mortgage that can be foreclosed without having to contend with superior interests. See supra note 10 and accompanying text.

\textsuperscript{50} See Szypszak, supra note 39, at 668-70 (discussing the nature of the American real estate conveyance system). The risk that a prior interest will not be discovered during a title search and not be satisfied may be categorized into one of four types of groups. First, the party performing the title search may simply overlook a recorded interest, or fail to perform the search at all. Id. at 668. Second, a party performing a title search may conduct the search according to ordinary standards but still fail to discover a recorded interest. Id. at 669. For example, a deed may include an easement right that is not mentioned in any other document. Third, parties that have conducted a title search may misunderstand the legal significance of identified prior recorded interests. Id. at 668. The example provided by Professor Szypszak involved a title search that revealed an existing mortgage granted by a prior owner. The party conducting the title search incorrectly concluded that the mortgage was unenforceable because the prior owner obtained a bankruptcy discharge after the mortgage was recorded. Under the Bankruptcy Code, however, only the prior owner’s personal liability is discharged, not the mortgage lien. Id. Finally, title searches do not protect against unrecorded interests such as mechanic’s liens, or interests arising by operation of law such as rights acquired by adverse possession. Id. at 669-70.

\textsuperscript{51} The term foreclosure, as used in this Note, refers to the process of selling the mortgaged property to satisfy the unpaid mortgage debt. Generally, a mortgagee may initiate a foreclosure proceeding any time after the mortgagor defaults on their obligations. Foreclosure cuts off the mortgagor’s right to redeem the mortgage, as well as the rights of any interests in the land acquired after the execution of the mortgage. Interests acquired prior to the mortgage, however, survive foreclosure. 9 WILLIAM XENOPHON WEED, WARREN’S WEED NEW YORK REAL PROPERTY § 95.37 (2010).
interests in the property are ranked in order of priority. Proceeds from the foreclosure sale are applied to the full satisfaction of each interest in descending order of priority until the proceeds are exhausted. If the proceeds from a foreclosure sale are less than the total outstanding amounts of all interests, interests that are lower in priority may recover nothing at all.

At common law, an interest is given priority based on the chronological sequence of when the interest arose. Earlier interests hold priority over subsequent interests. This rule is commonly stated as first in time, first in right. Although priority ranking based on chronological sequence remains the default rule, it may be modified through the application of state recording statutes and by the doctrine of equitable subrogation.

F. Operation of Equitable Subrogation in Mortgage Refinancing

Equitable subrogation operates in the mortgage refinancing context to effectively assign a refinancing mortgage the priority rights of mortgages that the refinancing mortgage satisfied. Although there can be no legal assignment of a satisfied mortgage’s priority rights because all of the rights of a mortgage are extinguished upon satisfaction,

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52 Bowmar, supra note 37, § 1:1.
53 Sautter v. Frick, 242 N.Y.S. 369, 371-72 (App. Div. 1930) (“Distribution follows in satisfaction of the liens in their order as far as the purchase money will satisfy them. If it will not satisfy the mortgage debt on which the foreclosure is based, a deficiency judgment as to the unsatisfied balance, if asked for, results.”).
54 In addition, although the foreclosure of a first priority mortgage will extinguish the claims of all subsequent junior interests, the foreclosure of a secondary mortgage will not extinguish the claim of more senior interests. Interests acquired prior to the foreclosing mortgage will survive the foreclosure. Rathbone v. Hooney, 58 N.Y. 463, 467 (1874) (“It is the proper purpose and scope of a foreclosure suit to bar interests in the equity of redemption, and the decree does not affect rights paramount to those of the mortgagor and mortgagee . . . .”); Bankers Trust Co. v. Bd. of Managers, 584 N.Y.S.2d 576, 576 (App. Div. 1992) (“[A] first mortgage lien has priority superior to the liens of the board of managers, and may not be cut off by the board’s foreclosure actions”).
55 14 Powell, supra note 48, § 82.01[1][a].
56 Id.
57 City & Cnty. Sav. Bank v. Oakwood Holding Corp., 387 N.Y.S.2d 512, 514 (Sup. Ct. 1976) (“[C]ommon law rule of first in time, first in right may of course be altered by statute, but in the absence of any legislative changes it is well established that the common law rule still controls.”).
59 See discussion supra Part I.A.
courts will treat the rights of satisfied mortgages as still in existence for the purpose of equitable subrogation.\textsuperscript{60}

II. THE DEVELOPMENT OF EQUITABLE SUBROGATION

A. Doctrinal Development

Initially,\textsuperscript{61} courts in New York attempted to limit the scope of equitable subrogation to apply only to persons standing directly in the place of a surety.\textsuperscript{62} Courts interpreted this requirement to exclude refinancing mortgagees. In \textit{Banta v. Garmon},\textsuperscript{63} the Chancery Court of New York refused to subrogate a refinancing mortgagee on the grounds that the refinancing mortgagee was a voluntary creditor.\textsuperscript{64} The court disregarded the fact that the refinancing mortgagee had conducted a title search and satisfied a senior mortgage with the intent of becoming first in priority.\textsuperscript{65} Although the court acknowledged the hardship of the refinancing mortgagee, the court declined to subrogate the refinancing mortgagee, holding that equitable subrogation was available only to persons standing in the position of a surety.\textsuperscript{66} The court noted that it had found no case where a third person was permitted to take the rights of a first mortgage lien that the third person had voluntarily satisfied. In its reasoning, the court stated that award of equitable subrogation to

\textsuperscript{60} King v. Pelkofski, 266 N.Y.S.2d 61, 61-62 (App. Div. 1965) (“Equity will preserve for the benefit of the plaintiff the senior incumbrance which she caused to be discharged.”); \textit{see also} \textsc{Restatement (Third) of Prop.: Mortgages} § 7.6(a) (1997) (“One who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment. Even though the performance would otherwise discharge the obligation and the mortgage, they are preserved and the mortgage retains its priority in the hands of the subrogee.”).

\textsuperscript{61} The doctrine of subrogation first arose under Roman civil law and was later adopted into the equitable jurisprudence of England before making its way to American courts. \textit{E.g.}, Shinn v. Budd, 14 N.J. Eq. 234 (N.J. Ch. 1862); \textsc{George E. Harris, A Treatise on the Law of Subrogation} (1889); \textsc{2 Joseph Story, Commentaries on Equity Jurisprudence} § 714 (14th ed. 1918).

\textsuperscript{62} Sandford v. McLean, 3 Paige Ch. 116 (N.Y. Ch. 1832). A surety is a party that is bound by the original security and is compelled to pay the debts of a third party in order to protect its rights. \textsc{Black’s Law Dictionary} 1579 (9th ed. 2009).

\textsuperscript{63} 1 Sand. Ch. 384 (N.Y. Ch. 1844).

\textsuperscript{64} \textit{Id.} at 385-86.

\textsuperscript{65} The search results revealed an outstanding first mortgage and a judgment that had been satisfied, but failed to reveal that the judgment had been satisfied by a sale of the land to the awardees. The solicitor assumed that, aside from the first mortgage, the title was unencumbered and advised the mortgagee as such. The refinancing mortgagee provided a refinancing mortgage loan to the property owner based upon the solicitor’s advice. After the refinancing mortgage loan was made and the first mortgage satisfied, the sheriff conveyed the lands sold on execution to the judgment awardees. The refinancing mortgagee then sought to be subrogated to the rights of the first mortgage in order to protect his rights. \textit{Id.}

\textsuperscript{66} \textit{Id.}
parties other than sureties would create “evils” that would far outweigh any hardships suffered by parties not entitled to equitable subrogation.\textsuperscript{67}

Courts in other states, however, most notably Virginia, expanded the scope of equitable subrogation by emphasizing the doctrine’s equitable nature and purpose over its form.\textsuperscript{68} Four years after \textit{Banta}, the New York State Court of Appeals in \textit{Mathews v. Aikin}\textsuperscript{69} followed this trend and expanded equitable subrogation to cover third party guarantors. The \textit{Aikin} court held that a third party guarantor had acquired the character of a surety so as to be entitled to equitable subrogation, even though the guarantor had become a guarantor voluntarily and against the advice of the mortgagor.\textsuperscript{70} Emphasizing its role as a court of equity, the \textit{Aikin} court justified the expansion of equitable subrogation by appealing to the rationale and principles underlying the doctrine.\textsuperscript{71} The court held that equitable subrogation rested not on principles of contract, but rather “upon the broader and deeper foundations of natural justice and moral obligation.”\textsuperscript{72}

Several years later, the Court of Appeals further expanded the scope of equitable subrogation in \textit{Barnes v. Mott}.\textsuperscript{73} In \textit{Mott}, the court held that owners of a property who paid off a mortgage were entitled to equitable subrogation to the priority position of the paid off mortgage over an unknown, subsequent judicial lien.\textsuperscript{74} The court reasoned that, because the property owners had reasonable intent to become first in priority when the mortgage was paid off, equitable subrogation should be applied in order to prevent injustice and hardship.\textsuperscript{75} The court

\textsuperscript{67} Id. at 387 (“[I]f the question were open, I should at once say that the evils which would flow from the adoption of such a principle, would far overbalance the hardship of particular cases under the rule of law as now settled.”).

\textsuperscript{68} See, e.g., Hart v. Western R. R. Corp., 54 Mass. 99, 108 (Supp. Ct. 1847) (“[A]fter a payment by the insurer, by compulsion of legal process or voluntarily, the assured becomes trustee for the insurer, and by necessary implication makes an equitable assignment to him of the right so to recover.”); Furnold v. Bank of Missouri, 44 Mo. 336, 338 (1869) (“The practice of subrogation or substitution, or the cession of remedies, is borrowed from the civil law, and, under the guidance of Chancellor Kent, has gone further in this country than in England. It is the creature of equity, and is administered so as to secure real, essential justice, without regard to form.”); Douglass v. Fagg, 35 Va. (8 Leigh) 588, 598 (1837) (“The doctrine of subrogation, it must be remembered, is the offspring of natural justice, and is not founded in contract. It is the creature of equity, and is so administered as to attain real essential justice, without regard to form. ‘He who, in administering it, would stick in the letter, forgets the end of its creation, and perverts the spirit which gave it birth.’” (citing Enders & c. v. Brune, 25 Va. (4 Rand.) 447 (1826))).

\textsuperscript{69} 1 N.Y. 595 (1848).

\textsuperscript{70} Id. at 601-02, 605.

\textsuperscript{71} Id. at 600 (“The objection seems somewhat narrow and technical when addressed to a court of equity whose peculiar province is to mete out substantial justice where the more restricted powers of the common law fail in its administration.”).

\textsuperscript{72} Id.

\textsuperscript{73} 64 N.Y. 397 (1876).

\textsuperscript{74} Id.

\textsuperscript{75} Id. at 401; see also Arnold v. Green, 23 N.E. 1, 2 (1889) (“The remedy of subrogation is no longer limited to sureties and quasi sureties, but includes so wide a range of subjects that it has
explained that when parties satisfy a mortgage under circumstances authorizing an inference of a mistake of fact, courts in equity will presume such a mistake.\(^{76}\)

The Court of Appeals later expressly held refinancing mortgagees eligible for equitable subrogation in *The Thrift v. Michaelis.*\(^{77}\) In *Thrift,* the plaintiff, a refinancing mortgagee, provided a refinancing mortgage loan to a homeowner in order to satisfy three existing mortgages on the homeowner’s property. Prior to issuing its refinancing mortgage loan, the plaintiff conducted a title search on the property that identified the three mortgages to be satisfied.\(^{78}\) The plaintiff also received an affidavit from the homeowner confirming the results of the plaintiff’s title search.\(^{79}\) The homeowner, however, did not disclose to the plaintiff the existence of a fourth mortgage, which was recorded in the period between the issuance and recordation of the refinancing mortgage loan.\(^{80}\) Upon the satisfaction of the three identified mortgages on the homeowner’s property by the plaintiff’s refinancing mortgage loan, the unidentified fourth mortgage became the oldest interest upon the property and first in priority. Furthermore, the priority position of the fourth mortgage was fully protected under the New York recording statute because it had been recorded first.\(^{81}\)

The *Thrift* court held that strict adherence to the recording statute would clearly result in the “unjust enrichment”\(^{82}\) of the fourth mortgagee at the expense of the refinancing mortgagee.\(^{83}\) In order to avoid assisting this inequitable outcome, the court equitably subrogated the refinancing mortgage into the priority positions of the mortgages that the refinance mortgage had satisfied.\(^{84}\) The court justified the award of equitable subrogation by finding no difference between the mortgagee in *Thrift* and the property owners in *Barnes,* and holding that

\(^{76}\) Mott, 64 N.Y. at 401. In *Mott,* the mistake of fact was the lack of knowledge of a judgment lien on the property. The parties seeking equitable subrogation had paid off a mortgage lien on the property not knowing that a subsequent judgment lien had been placed on it. *Id.*

\(^{77}\) 181 N.E. 580, 580-81 (N.Y. 1932).

\(^{78}\) *Id.* at 580.

\(^{79}\) *Id.*

\(^{80}\) *Id.*

\(^{81}\) *Id.*

\(^{82}\) This unjust enrichment formulation would later form the core of the New York Court of Appeals’ equitable subrogation test. King v. Pelkofski, 229 N.E.2d 435 439 (N.Y. 1967) (“[W]here the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance.”).

\(^{83}\) *Thrift,* 181 N.E. at 580.

\(^{84}\) *Id.* at 581.
the satisfaction of prior mortgages by the refinancing mortgage was not a voluntary payment, but had been made with the intention that the refinancing mortgagee obtain first in priority rights.85

B. Current Standard

The current standard utilized for cases involving mortgagees seeking equitable subrogation in New York was set forth by the New York State Court of Appeals in King v. Pelkofski.86 In King, Joseph Pelkofski, the owner of a mortgaged bowling alley, conveyed a beneficial interest in the bowling alley to his wife via a trust agreement.87 Approximately two and a half months after the trust agreement was recorded, Mr. Pelkofski, acting without his wife, obtained an additional $75,000 mortgage on the bowling alley from the plaintiff, Rose King, which was promptly recorded.88 Mr. Pelkofski used the proceeds from the plaintiff’s mortgage to satisfy the first mortgage on the bowling alley before ultimately defaulting on the plaintiff’s loan.89

The plaintiff’s action to foreclose her mortgage was dismissed at trial based on the fact that her mortgage was invalid90 and that Mrs. Pelkofski held a senior interest.91 The Appellate Division reversed the trial court’s dismissal and equitably subrogated the mortgage into the priority position of the senior interests the mortgage had discharged, despite the fact that the plaintiff’s mortgage was invalid.92 The Court of Appeals affirmed.93 The Court of Appeals, quoting section 162 of the

85 Id.
87 Mr. Pelkofski continued to operate the property as trustee. Id. at 437-38. The trust agreement was not recorded until a year and a half after its execution. Id. at 438.
88 Id.
89 Id.
90 Mr. Pelkofski had obtained the mortgage loan without the authority to do so. Given that a valid trust was created in the Pelkofski’s agreement with one another, it was clear that regardless of whether the trust was active or passive, Mr. Pelkofski could not bind Mrs. Pelkofski’s interest. Although the trust agreement empowered Mr. Pelkofski as trustee to sell the property it was silent as to mortgaging. If the trust was passive, then although the mortgage would be valid as to Mr. Pelkofski’s half of the property, Mr. Pelkofski still could not burden Mrs. Pelkofski’s half. If the trust was active, then the mortgage would invalidly cover the entire property and burden Mrs. Pelkofski’s interest. Ms. King’s mortgage, therefore, was invalid. Id. at 439.
92 The appellate court reversed the trial court’s judgment in favor of the defendants and equitably subrogated the plaintiff mortgagee. The appellate court reasoned that although the plaintiff’s mortgage was ineffective for use as a security, the plaintiff was entitled to be equitably subrogated because her loan had been used to discharge prior encumbrances, and the defendants had no superior intervening equity that would adversely affected. Id. at 63-64.
93 King, 229 N.E.2d at 439-40.
Restatement of Restitution,°⁴ reasoned that failing to apply equitable subrogation would benefit the Pelkofskis at the expense of the plaintiff mortgagee.°⁵ The Court of Appeals held that where an unknown lien obtains priority at the expense of a refinancing mortgagee, a refinancing mortgagee should be equitably subrogated in order to avoid any unjust enrichment of the unknown lien.°⁶

C. Summary

The holding by the Court of Appeals in King was the culmination of the development of equitable subrogation in New York from a narrow remedy available only to sureties to a broad doctrine available to any party regardless of the validity of the party’s legal interest. However, in tandem with this expansion of scope, confusion has also grown regarding when equitable subrogation should be applied. This confusion stems in part from the fact that courts have historically developed few limitations on equitable subrogation, of which only two are commonly cited.°⁷

First, courts have stated that equitable subrogation may not be applied against a party that has equal or superior equities to those of the party seeking equitable subrogation.°⁸ Although this suggests that courts should apply a balancing test of the equities of the respective parties, New York courts have failed to enumerate factors that such a test would include.

Second, courts have stated that someone who voluntarily chooses to pay the debt of another may not be awarded equitable subrogation.°⁹

°⁴ Restatement (First) of Restitution § 162 (1937) (“Where property of one person is used in discharging an obligation owed by another or a lien upon the property of another, under such circumstances that the other would be unjustly enriched by the retention of the benefit thus conferred, the former is entitled to be subrogated to the position of the obligee or lien-holder.”).
°⁵ King, 229 N.E.2d at 439.
°⁶ Id. (“This principal has been applied to situations, such as the one at bar, where the funds of a mortgagee are used to satisfy the lien of an existing, known incumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance.”).
°⁷ An additional limitation is the requirement that, as an equitable remedy, no other remedy at law be available. See Douglass v. Fagg, 35 Va. (8 Leigh) 588, 598 (1837).
°⁹ Berm. Trust Co. v. Ameropian Oil Corp., 698 N.Y.S.2d 691 (App. Div. 1999) (holding that equitable subrogation is not available to a party that voluntarily satisfied another’s debts); see also Koehler v. Hughes, 42 N.E. 1051 (N.Y. 1896); Acer v. Hotchkiss, 97 N.Y. 395 (1884).
Therefore, payment of a third party’s debt must have been made either under legal compulsion or for the purpose of protecting an interest.\textsuperscript{100}

Even with these limitations, equitable subrogation remains an extremely vague and amorphous doctrine.\textsuperscript{101} In \textit{King}, the Court of Appeals attempted to clarify a standard to use in equitable subrogation analyses by holding that equitable subrogation should apply in the mortgage refinancing context only when an intervening lien holder has been unjustly enriched.\textsuperscript{102} This unjust enrichment standard, however, failed to bring any additional clarity or uniformity to equitable subrogation analyses. The problem in determining when to apply equitable subrogation continued because \textit{King} failed to clarify the exact factors and weights that should be used in determining whether a party has been unjustly enriched. Part III examines several New York equitable subrogation cases decided after \textit{King} in order to identify the most common factors courts consider.

\section*{III. Factors Considered}

\subsection*{A. Intent of the Refinancing Mortgagee}

One factor that courts in New York have considered when deciding whether there is unjust enrichment requiring the application of equitable subrogation is the intent of the party seeking equitable subrogation.\textsuperscript{103} This factor arose out of the historic limitation on equitable subrogation against use for the benefit of parties that voluntarily satisfy the debt of a third party.\textsuperscript{104} Parties seeking equitable subrogation must demonstrate that they paid off the debt of a third party either under legal obligation or out of a need to protect an interest.\textsuperscript{105} In the mortgage refinancing

\textsuperscript{100} \textit{Cohn}, 547 N.Y.S.2d at 882 (“The doctrine of subrogation encompasses every instance where one party pays a debt of another under compulsion or for the protection of some interest.”).

\textsuperscript{101} 12 \textsc{William Xenophon Weed, Warren's Weed New York Real Property} § 128.02 (2010) (“The remedy of subrogation includes so wide a range of subjects that it has been called the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it.”).

\textsuperscript{102} \textit{King} v. Pelkofski, 229 N.E.2d 435, 439 (N.Y. 1967) (“[W]here the funds of a mortgagee are used to satisfy the lien of an existing, known encumbrance when, unbeknown to the mortgagee, another lien on the property exists which is senior to his but junior to the one satisfied with his funds. In order to avoid the unjust enrichment of the intervening, unknown lienor, the mortgagee is entitled to be subrogated to the rights of the senior incumbrance.”).


\textsuperscript{104} See cases cited supra note 99.

\textsuperscript{105} \textit{Sandford} v. \textit{McLean}, 3 Paige Ch. 117, 122 (N.Y. Ch. 1832) (“It is only in those cases where the person advancing money to pay the debt of a third party, stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity, as a matter of course and without any agreement to that effect, substitutes him in the place of the creditor. In other cases the debt of a creditor, which is paid with the money of a third person, without any
2011] EQUITABLE SUBROGATION OF MORTGAGES 2145

case context, this means that courts will not apply equitable subrogation
unlesss the mortgagee seeking equitable subrogation issued a mortgage
loan with the intent of obtaining first in priority rights.106 If a
mortgagee issues a mortgage loan without this required intent, the
mortgagee’s satisfaction of any prior mortgages will be deemed to be a
voluntary repayment and is thus ineligible for equitable subrogation.107

Courts in New York, however, have not been clear as to how much
weight they should afford to intent. For example, although the Third
Department in Elwood v. Hoffman made intent a primary factor in
deciding whether to grant equitable subrogation,108 other courts, such as
the Second Department in Roth v. Porush, have ignored intent in favor
of other factors, such as notice.109

In Elwood, the plaintiff brought an action to impose a constructive
trust on property, which the plaintiff had jointly purchased with the
defendant, after the plaintiff and defendant ended their relationship.110
The plaintiff recorded a notice of pendency111 against the property in
connection with the plaintiff’s suit.112 Sometime after the notice of
pendency was filed, the defendant independently applied for a
refinancing mortgage loan from an entity called Delta Funding.113
Delta Funding gave the defendant a refinancing mortgage loan
notwithstanding the notice of pendency because its title agent

agreement that the security shall be assigned or kept on foot for the benefit of such third person,
is absolutely extinguished.”).

106 See cases cited supra note 99.
107 See cases cited supra note 99. However, establishing intent in most equitable subrogation
cases is relatively easy as courts will presume there has been a mistake of fact rather than a lack
of intent in circumstances that indicate a mortgagee failed to satisfy all prior mortgages and
interests due to a mistake of fact. Barnes v. Mott, 64 N.Y. 397, 401 (1876).
108 876 N.Y.S.2d 538.
110 876 N.Y.S.2d at 539. Plaintiff and defendant lived together and jointly purchased the
property in dispute. However, because the plaintiff was still legally married to another person at
the time of purchase, the legal title to the property was held by the defendant alone. Id. at 539-40.
The plaintiff had also jointly obtained a mortgage loan with the defendant in order to finance the
construction of a home upon the property. Id. “A constructive trust arises where a person
holding title to property is subject to an equitable duty to convey it to another on the ground that
he would be unjustly enriched if he were permitted to retain it.” Equity Corp. v. Groves, 60
N.E.2d 19, 21 (N.Y. 1945) (internal quotation marks omitted). Because legal title to the property
was held solely by the defendant, the plaintiff had to seek a constructive trust in order to obtain a
legal recognition of his interest in the property.

111 A plaintiff pursuing a lawsuit that may affect the title or the possession of real property is
entitled to file a notice of pendency with respect to that property. If the notice is properly filed,
the outcome of the plaintiff’s lawsuit will bind any person whose interest is recorded after the
375, 378 (App. Div. 1984) (“By merely filing a notice of pendency, the ‘world [is put] on notice
of the plaintiff’s potential rights in the action and . . . warning all comers that if they then buy the
realty . . . or otherwise rely on defendant’s right, they do so subject to whatever the action may
establish as the plaintiff’s right.’” (citation omitted)).
112 Elwood, 863 N.Y.S.2d at 539.
113 Id. at 539.
overlooked the notice of pendency in its title search.\textsuperscript{114} The Delta Funding mortgage was used in part to satisfy the original mortgage on the property.\textsuperscript{115} Thereafter, the Delta Funding mortgage was acquired by HSBC USA, N.A. (HSBC), which also failed to discover the recorded notice of pendency.\textsuperscript{116} When HSBC finally discovered the plaintiff’s suit, HSBC moved to intervene and sought equitable subrogation.\textsuperscript{117}

The Third Department held in favor of HSBC, stating that equitable subrogation was necessary to prevent the plaintiff from receiving a windfall at the expense of HSBC.\textsuperscript{118} The court awarded equitable subrogation even though the plaintiff’s notice of pendency had been on file months prior to the second mortgage, and both Delta and HSBC had inexplicably overlooked this record.\textsuperscript{119} The court held that Delta and HSBC’s failure to properly conduct a good faith title search did not bar equitable subrogation since, based on \textit{King}, constructive notice does not render equitable subrogation inapplicable.\textsuperscript{120} The Third Department, therefore, interpreted \textit{King}’s unjust enrichment test to focus primarily on protecting a refinancing mortgagee’s intent to obtain a first in priority mortgage without any regard for the reasonableness of the refinancing mortgagee’s actions in carrying out this intent.\textsuperscript{121} Under \textit{Elwood}, so long as a refinancing mortgagee intended to obtain first in priority protection, it should be awarded that protection by equitable subrogation over any party that did not pay for first in priority protection, regardless of whether the refinancing mortgagee could have avoided the situation by conducting a proper title search.

\section*{B. Notice}

Other courts, however, have appeared to grant more or additional weight to other factors, such as notice.\textsuperscript{122} A mortgagee charged with

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{114} \textit{Id.} at 540.
  \item \textsuperscript{115} \textit{Id.} at 539.
  \item \textsuperscript{116} \textit{Id.}
  \item \textsuperscript{117} HSBC USA, N.A., or its title agent, apparently “overlooked” the recorded notice of pendency at the time of its acquisition of the Delta Funding mortgage. \textit{Id.} at 540.
  \item \textsuperscript{118} \textit{Id.} (“Denying HSBC equitable subrogation would provide a windfall to plaintiff by allowing him to have his original mortgage debt extinguished while at the same time maintain a right to the subject property that is superior to the mortgagee that furnished the funds that extinguished the first mortgage.”).
  \item \textsuperscript{119} \textit{Id.}
  \item \textsuperscript{120} \textit{Id.}
  \item \textsuperscript{121} See also \textit{Surace v. Stewart}, 875 N.Y.S.2d 82 (App. Div. 2009) (holding that a mortgagee was entitled to subrogation of the rights of the senior encumbrances satisfied from the proceeds of its mortgage, even though that mortgagee had recorded late, and a subsequent mortgagee had conducted a diligent title search, and promptly recorded its interest.).
\end{itemize}
\end{footnotesize}
notice is presumed to either know about a prior mortgage or interest, or to be so negligent as to waive any claim for protection under the recording statute. Actual notice is when a mortgagee has knowledge of a prior mortgage or interest, for example by discovering a properly recorded mortgage in a title search. Courts may not award equitable subrogation to refinancing mortgagees who have actual notice of an intervening interest because actual notice indicates a lack of intent to obtain first in priority protection. When a mortgagee has actual notice of an intervening interest but nonetheless fails to satisfy the intervening interest, courts deem the satisfaction of other liens a voluntary payment, and the mortgagee, therefore, ineligible for equitable subrogation.

Inquiry notice arises when there exists facts or circumstances sufficient to put a person on inquiry that there may be another outstanding right on the property. For example, open and visible possession of real property by a third person places a purchaser on inquiry notice of the possible existence of prior rights. A number of courts have refused to award equitable subrogation to mortgagees who were found to have inquiry notice.

Constructive notice is when a mortgagee is presumed to know all matters that are in the title record. Unlike actual notice, courts have held that constructive notice does not automatically preclude equitable subrogation.

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123 Williamson v. Brown, 15 N.Y. 354, 362 (1857) (“[W]here a purchaser has knowledge of any fact, sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim, to be considered as a bona fide purchaser.”).

124 McPherson v. Rollins, 14 N.E. 411, 412 (N.Y. 1887) (“The important inquiry before the referee was, whether the defendants had any notice, actual or constructive, of the plaintiff’s rights.”).

125 See Chelsea Exch. Bank v. Weinstein, 236 N.Y.S. 185 (App. Div. 1929) (holding that a subsequent mortgagee had actual notice of an intervening interest from the fact that the interest appeared in the title company’s report).

126 NYP Holdings, Inc. v. McCler Corp., 881 N.Y.S.2d 407, 409 (App. Div. 2009) (“The voluntary payment doctrine ‘bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law.’” (citation omitted)).

127 Id.

128 Phelan v. Brady, 23 N.E. 1109, 1110 (N.Y. 1890) (“Actual possession of real estate is sufficient notice to a person proposing to take a mortgage on the property, and to all the world of the existence of any right which the person in possession is able to establish.”).

129 See, e.g., Roth v. Porush, 722 N.Y.S.2d 566 (App. Div. 2001) (holding that the presence of facts which should have lead the subsequent purchasers to conduct further inquiry into their title, barred application of equitable subrogation); see also Zeidel v. Dunne, 626 N.Y.S.2d 509 (App. Div. 1995) (rejecting an argument against equitable subrogation in part because of the lack of any facts which would have put the party seeking equitable subrogation on notice of an intervening interest).

subrogation.\textsuperscript{131} The rationale is that the fact that the refinancing mortgagee could have discovered an intervening interest does not necessarily mean it intended to issue a junior mortgage.\textsuperscript{132} Courts, however, have been split as to whether constructive notice should factor into an equitable subrogation analysis, and to what extent. Although some courts, such as the court in \textit{Elwood}, have virtually ignored constructive notice, other courts have considered the presence of constructive notice a significant factor in determining the applicability of equitable subrogation.

For example, in \textit{Bank One v. Mui},\textsuperscript{133} the Second Department held that a refinancing mortgage could be equitably subrogated into the priority rights of a senior encumbrance it had satisfied only over an unrecorded intervening interest.\textsuperscript{134} In \textit{Mui}, a homeowner obtained and defaulted on three separate home mortgages.\textsuperscript{135} The homeowner used mortgage proceeds from two of the mortgages obtained in order to satisfy senior pre-existing mortgages on the property.\textsuperscript{136} The homeowner satisfied the senior-most existing mortgage on the property with the proceeds of the third mortgage obtained.\textsuperscript{137} This satisfaction was made prior to the recordation of the second mortgage obtained but after the recordation of the first mortgage obtained.\textsuperscript{138} The Second Department held that the third mortgage obtained was entitled to be equitably subrogated into the first in priority position of the senior-most mortgage it satisfied.\textsuperscript{139} However, the court also held that because the first mortgage obtained was recorded prior to the time the third mortgage obtained satisfied the senior-most mortgage, the third mortgagee obtained had notice of the first mortgage obtained and so could recover only after the first mortgagee obtained.\textsuperscript{140} Therefore, under \textit{Mui}, an equitably subrogated mortgage can never take priority over an intervening interest if that interest is recorded, even if the intervening recorded interest is junior to the encumbrance satisfied by the refinancing mortgage.\textsuperscript{141}

\textsuperscript{131} King v. Pelkofski, 229 N.E.2d 435, 439 (N.Y. 1967).
\textsuperscript{132} See, e.g., \textit{Zeidel}, 626 N.Y.S.2d 509 (awarding equitable subrogation even though the refinancing mortgagee could have discovered the existence of the intervening mortgage).
\textsuperscript{133} 835 N.Y.S.2d 585 (App. Div. 2007).
\textsuperscript{134} \textit{Id.} at 587.
\textsuperscript{135} \textit{Id.} at 586.
\textsuperscript{136} \textit{Id.}
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.} at 587.
\textsuperscript{140} \textit{Id.}
\textsuperscript{141} \textit{Id.} Additionally, in \textit{Roth v. Porush}, 722 N.Y.S.2d 566 (App. Div. 2001), the Second Department rejected an argument for equitable subrogation, in part, based upon the presence of constructive notice from a recorded interest. \textit{Id.} at 568. The court held that the presence of a recorded notice of pendency combined with other facts, such as the fact that the seller’s deed showed no consideration and no real estate transfer had been paid, should have led the party
C. Negligence

In deciding whether to grant equitable subrogation, New York courts also appear to consider the negligence of the parties seeking equitable subrogation. Although equitable subrogation is a remedy available to parties regardless of the validity of their interest, some courts consider any negligence on the part of the party seeking equitable subrogation as a potential bar to application of equitable subrogation. For example, in *Perla v. Real Property Solutions Corp.*, equitable subrogation was denied to Wells Fargo Bank, an acquirer of a refinancing mortgage, in part because Wells Fargo failed to perform a basic title search prior to acquiring the refinancing mortgage.

The defendant in *Perla*, Real Property Solutions Corporation (RPSC), purchased a piece of property with the proceeds from an initial mortgage loan from Linda Funding, LLC. This initial mortgage was not recorded until several months after RPSC purchased the property. Shortly after the purchase, but prior to the recordation of the Linda Funding mortgage, RPSC conveyed the property to its president, Joseph Derima. Mr. Derima obtained a mortgage loan from American Brokers Conduit to help pay for the property. The majority of the America Brokers Conduit loan was used to satisfy the initial Linda Funding mortgage loan. The transfer of the property from RPSC to Mr. Derima, the mortgage loan from American Brokers Conduit, and the satisfaction of the Linda Funding mortgage were not recorded until more than a year after the transactions.

After conveying the property to Mr. Derima, but prior to recording that conveyance, RPSC obtained a second mortgage loan from the plaintiff. The plaintiff’s mortgage loan was recorded before the American Brokers Conduit mortgage. Thereafter, Wells Fargo seeking equitable subrogation to conduct further inquiry, and therefore barred the application of equitable subrogation. *Id.*
acquired the American Brokers Conduit mortgage. Wells Fargo believed that the American Brokers Conduit mortgage was the senior-most mortgage on the property, but did not perform a title search check prior to its purchase and therefore did not know of the plaintiff’s mortgage. The court, in a scathing opinion, rejected Wells Fargo’s arguments for equitable subrogation and held the plaintiff’s mortgage to be senior.

Other courts, however, have afforded less weight to negligence. For example, in the case of Surace, it appeared that the Second Department did not give much weight to the failure of the refinancing mortgagee to record its mortgage. The Surace court briefly noted the fact that the refinancing mortgagee took over nine months to record in a single sentence. The court did not mention the fact that the refinancing mortgagee had no excuse as to why recordation was delayed for so long.

D. Mitigating or Aggravating Factors

Some courts in New York have considered miscellaneous mitigating or aggravating factors when deciding whether or not to award equitable subrogation. For example, in Zeidel v. Dunne, the Second Department rejected a senior mortgagee’s arguments against equitable subrogation in part because it appeared that the senior mortgagee knew about a refinancing mortgagee’s efforts to refinance all of the mortgages on the property.

In Zeidel, the refinancing mortgagee, Green Point Savings Bank, conducted a title search in connection with the issuance of its

153 Wells Fargo Bank, N.A., was acting as the indenture trustee under an indenture relating to IMH Assets Corp., Collateralized Asset-Backed Bonds, Series 2005-6(WF), which was the legal owner of the American Brokers Conduit mortgage. Id. at *1.
154 Id. at *3.
155 Id. at *7. In addition to narrating all of the numerous errors and omissions committed by the various parties in the case, Judge Schack quoted Cassius’s advice to Brutus in William Shakespeare’s Julius Caesar (“The fault, dear Brutus, is not in our stars, but in ourselves”) in rejecting Wells Fargo’s arguments for equitable subrogation. Id. at *1. Judge Schack was the subject of a New York Times article regarding mortgage foreclosure proceedings. Powell, supra note 5.
157 Id.
158 Brief for Plaintiff-Respondents at 6, Surace, 875 N.Y.S.2d 82 (No. 2008-01461) (“For reasons unknown to respondents, however, the Mortgage was not then promptly recorded with the City Register . . . .”).
159 Surace, 875 N.Y.S.2d at 83.
161 Id. at 511.
refinancing mortgage loan.\textsuperscript{162} Green Point’s title search identified four existing mortgages on the property, one of which belonged to the plaintiff mortgagee.\textsuperscript{163} Green Point contacted and received a pay-off letter from the plaintiff mortgagee indicating that a payment of $5000 would satisfy the plaintiff’s $16,000 mortgage.\textsuperscript{164} Green Point issued its refinancing mortgage and paid off all four mortgages on the property, including the plaintiff’s mortgage.\textsuperscript{165}

The plaintiff mortgagee, however, had failed to disclose the existence of new, fifth mortgage on the property it had issued shortly prior to sending its pay-off letter to Green Point. The plaintiff mortgagee recorded this new mortgage after Green Point issued its refinancing mortgage, but just prior to the recordation of the Green Point refinancing mortgage.\textsuperscript{166} Therefore, the plaintiff’s new mortgage, and not the Green Point refinancing mortgage, became first in priority.\textsuperscript{167}

The plaintiff argued that equitable subrogation should not apply in favor of Green Point because Green Point could have discovered the existence of the plaintiff’s new mortgage prior to the issuance of the Green Point mortgage.\textsuperscript{168} The court rejected this argument and awarded Green Point Savings Bank equitable subrogation.\textsuperscript{169} The court noted that it was undisputed that plaintiff’s new mortgage had not been recorded until after Green Point issued its refinancing mortgage, and also noted the lack of any facts that would have put Green Point on notice of the plaintiff’s new mortgage.\textsuperscript{170} The court further emphasized the fact that the plaintiff mortgagee had issued a pay-off letter to Green Point acknowledging the satisfaction of the plaintiff mortgagee’s first mortgage and, therefore, questioned the timing of the plaintiff mortgagee’s new mortgage.\textsuperscript{171} The facts indicating that the plaintiff mortgagee knew and took advantage of Green Point’s intent to refinance all mortgages on the property colored the court’s finding in favor of equitable subrogation.

\textsuperscript{162} Id. at 509.
\textsuperscript{163} Id. at 509-10.
\textsuperscript{164} Id. at 510.
\textsuperscript{165} Id. at 509-10.
\textsuperscript{166} Id. at 510.
\textsuperscript{167} Id. at 510-11.
\textsuperscript{168} Id.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
IV. PROPOSAL: UNIFORM MULTI-FACTOR TEST

The conflicting and contradictory holdings reached by New York courts in Part III are the result of confusion regarding what exactly the King unjust enrichment standard requires in order to award equitable subrogation. Although the unjust enrichment standard calls for a balancing test of the parties’ equities, courts have reached a number of conflicting results due to the lack of certainty and uniformity regarding what factors should be used and how they should be weighed.

Despite the use of a variety of different tests emphasizing different factors, the majority of court rulings on equitable subrogation have tended to follow one of two broad standards: (1) a relatively lax standard that primarily seeks to protect refinancing mortgagees’ intent to issue a refinancing mortgage loan, or (2) a stricter standard that primarily seeks to avoid conflict with the recording statute and award equitable subrogation only in situations that come close to fraud.

Adherence to the lax standard has emphasized the need for flexibility to reach outcomes in accordance with the courts’ sense of justice and good conscience. The primary objective under a lax standard is to determine whether it would be just or fair to shift the cost of a failed refinancing transaction from the refinancing mortgagee who paid for but failed to obtain the first in priority rights, to the mortgagee who actually obtained the first in priority rights. Generally, courts that apply a lax standard tend to find that equitable subrogation is justified when a refinancing mortgagee intended to obtain and paid for first in priority rights because it would seem unjust to allow a party to benefit freely from another’s mistake. However, although the lax standard

172 King v. Pelkofski, 266 N.Y.S.2d 61, 61-62 (App. Div. 1965) (“In this case, the interest of the defendant Genevieve Pelkofski in the trust property was subject and subordinate to the mortgage lien of the National Bank of Kings Park. The defendant has no superior intervening equity in the property which would be adversely affected by subrogating plaintiff to the prior mortgagee’s rights.”), affirmed King v. Pelkofski, 229 N.E..2d 435 (N.Y. 1967).

173 Compare, for example, the result of Elwood v. Hoffman, 876 N.Y.S.2d 538 (App. Div. 2009) (awarding equitable subrogation to a refinancing mortgagee notwithstanding the refinancing mortgagee’s unexplained failure to identify a properly recorded intervening interest), with Bank One v. Mui, 835 N.Y.S.2d 585 (App. Div. 2007) (allowing no equitable subrogation over recorded interests).


176 Matthews v. Aikin, 1 N.Y. 595, 600 (1848) (holding that equitable subrogation rests not on principles of contract but rather upon the foundations of natural justice and moral obligation).

177 See, e.g., Elwood, 876 N.Y.S.2d at 540 (“Notably, plaintiff would be unjustly enriched if the doctrine of equitable subrogation were not applied in the case at hand. Plaintiff was
may result in an equitable outcome as between the present parties, a lax test awarding equitable subrogation based primarily on the intent of a refinancing mortgagee creates a moral hazard in the sense that little incentive is provided for future parties to conduct careful title searches or timely record their interest.\textsuperscript{178} Awards of equitable subrogation under this standard do nothing to prevent future situations requiring equitable subrogation; situations that could have been prevented at a low cost by parties conducting careful title searches and timely recording their interests. For example, in \textit{Elwood},\textsuperscript{179} the fact that two institutional mortgage companies inexplicably failed to identify a properly recorded interest did not prevent the court from awarding equitable subrogation.\textsuperscript{180} Similarly, in \textit{Surace},\textsuperscript{181} the court awarded equitable subrogation to a mortgagee who failed to record his interest for more than nine months, with no excuse, over a mortgagee who had promptly recorded.\textsuperscript{182}

In comparison, a strict test emphasizing the recording statute provides strong incentives for future parties to carefully search the title records and record their interest.\textsuperscript{183} However, strict adherence to the rigid recording statute requirements provides little flexibility for courts and may help perpetuate unjust outcomes for parties.\textsuperscript{184} Therefore, strict adherence to the recording statute in an equitable subrogation analysis may sacrifice equitable outcomes in cases for the sake of reducing future accidents.

In order to avoid the problems of both these approaches, courts should apply equitable subrogation in a manner that preserves both the ability to reach just outcomes, and the ability to provide incentives to future parties to conduct careful title searches and promptly record.\textsuperscript{185} This Note argues for courts to apply a uniform, multifactor test that will

\begin{quote}
personally obligated on the first mortgage loan to KeyBank which was completely satisfied by the subsequent mortgage loan provided by Delta and assigned to HSBC. Denying HSBC equitable subrogation would provide a windfall to plaintiff by allowing him to have his original mortgage debt extinguished while at the same time maintain a right to the subject property that is superior to the mortgagee that furnished the funds that extinguished the first mortgage."
\end{quote}

\textsuperscript{178} The term moral hazard is used in this Note to mean only the lack of incentives to guard against risk where one is protected from its consequences. \textit{The New Oxford American Dictionary} 1101 (2d ed. 2005)
\textsuperscript{179} 876 N.Y.S.2d 538.
\textsuperscript{180} See supra note 120 and accompanying text.
\textsuperscript{181} 875 N.Y.S.2d 82.
\textsuperscript{182} See discussion supra note 25.
\textsuperscript{184} See, e.g., Banta v. Garmo, 1 Sand Ch. 384 (N.Y. Ch. 1844).
\textsuperscript{185} This may be accomplished by expanding the frame of reference of the \textit{King} unjust enrichment standard from beyond just the immediate parties, to considerations of what is unjust as to the entire class of mortgage refinancing activities, thereby incorporating considerations of future impact.
capture both present and future concerns by including all of the factors described in Part III with the following weights:

A.  *Intent (Willingness to Pay)*

It is clear that intent to obtain first in priority protection is a requirement for a party to receive equitable subrogation. This is supported by the fact that courts refuse to award equitable subrogation to mortgagees that have actual notice of prior interests for the reason that actual notice indicates a lack of intent to obtain first in priority rights.\(^\text{186}\) However, it is unclear how much weight courts should afford to intent.

Courts that follow a lax standard for equitable subrogation have tended to place greater weight on intent than courts that follow a strict standard.\(^\text{187}\) One possible explanation for this is that a determination of intent primarily affects whether the application of equitable subrogation is viewed as just or fair. Parties seeking equitable subrogation must demonstrate that they paid off the debt of a third party either under legal obligation or out of a need to protect an interest.\(^\text{188}\) It would seem unfair or unjust not to protect a party that was forced to pay off a third party’s debt out of a legal obligation or need. On the other hand, it would not seem unfair or unjust not to similarly protect a party that voluntarily satisfied a third party’s debt. Furthermore, mortgagees who intend to obtain first in priority rights pay more for those rights, by satisfying prior mortgages, than mortgagees who have no such intent. It would seem unfair to allow a mortgagee who paid less for first in priority rights to maintain those rights over a mortgagee paid more for the same rights. Therefore, whether equitable subrogation is required for a just or fair outcome turns primarily on the determination of intent. In comparison, the issue of whether equitable subrogation will create moral hazards on the issue of title searches and recordation does not depend as greatly on a determination of intent.

In line with the desire to protect both present and future concerns, courts should then analyze intent in two steps. First, intent should be viewed as a necessary yet insufficient prerequisite for the party seeking

\(^{186}\) *See supra* note 106 and accompanying text.

\(^{187}\) *See* discussion *supra* Part III.A.

\(^{188}\) Sandford v. McLean, 3 Paige Ch. 117, 122 (N.Y. Ch. 1832) (“It is only in those cases where the person advancing money to pay the debt of a third party, stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity, as a matter of course and without any agreement to that effect, substitutes him in the place of the creditor. In other cases the debt of a creditor which is paid with the money of a third person, without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished.”).
equitable subrogation. Second, once intent is established for the party seeking equitable subrogation, courts should determine each party’s willingness to pay for the right of first priority as measured by the value of the mortgage loan the parties provided. The factor of intent should then be weighed in favor of the party that values first priority rights the most. This will encourage efficient outcomes where the right of first priority will go to the party that values it the most, so long as the total benefits to that party exceed any harm to the other party.\footnote{The outcome would be efficient in the sense that the party who is made better off could, in theory, compensate those made worse off. See \textit{Posner}, supra note 42, at 13-14.}

\section*{B. Notice}

Courts in New York have been clear with regard to two issues regarding notice. First, New York courts will not award equitable subrogation to refinancing mortgagees that have actual notice of an intervening lien.\footnote{See supra note 126 and accompanying text.} Second, constructive notice, by itself, will not bar the application of equitable subrogation.\footnote{See supra note 131 and accompanying text.} The area of confusion with regard to notice is how much of a factor the presence of constructive notice should play in determining whether to apply equitable subrogation.

Ignoring the presence of constructive notice reduces incentives for parties to promptly record their interests and perform diligent title searches. However, the use of constructive notice as an automatic bar to equitable subrogation would result in inequitable outcomes in cases in which, for example, the prior intervening interest is recorded after a refinancing mortgagee’s title search.\footnote{See example cited supra note 132.}

In order to avoid either of these extremes, courts should give weight to constructive notice in accordance with the degree of negligence and amount of inquiry notice the party seeking equitable subrogation may have had.\footnote{See, e.g., \textit{Universal Title Ins. Co. v. United States}, 942 F.2d 1311, 1317 (8th Cir. 1991) (granting no equitable subrogation to a title insurance company, in part because of the title insurance company’s failure as a sophisticated entity to discover an intervening Internal Revenue Service tax lien); \textit{Roth v. Porush}, 722 N.Y.S.2d 566 (App. Div. 2001) (holding equitable subrogation inapplicable where the prior interest was recorded and there existed facts which should have led the defendants to conduct further inquiry).} If the court finds the party seeking equitable subrogation non-negligent and there is no inquiry notice, then the mere presence of a recorded intervening interest should be given little weight and not bar equitable subrogation by itself. If, however, the court finds that the party seeking equitable subrogation has been

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negligent, and/or there were facts giving rise to inquiry notice, then the presence of a recorded intervening interest should be given greater weight.

For example, in cases such as *Thrift* and *Zeidel*, in which the refinancing mortgagees conducted thorough title searches and there was no information that would have given rise to inquiry notice, the mere fact that the intervening interest was recorded prior to the refinancing mortgage should be given little weight. On the other hand, in cases such as *Perla*, in which the mortgagee seeking equitable subrogation had not even conducted a title search, the presence of a recorded intervening interest should be given greater weight.

C. Negligence

The negligence of the party seeking equitable subrogation can be divided into two time periods: (1) negligence occurring during the period before the issuance of a refinancing mortgage, typically in conducting a title search; and (2) negligence occurring during the period after the issuance of a refinancing mortgage, typically in failing to timely record the mortgage. The focus of courts in an equitable subrogation analysis should primarily be on negligence that occurs during the period before the issuance of a refinancing mortgage. Although affording little weight to negligence occurring after the issuance of a refinancing mortgage may reduce incentives for future mortgagees to timely record their interests, placing too much weight on the failure of refinancing mortgagees to win the race to the recording office may lead to inequitable outcomes in many cases. Conversely, a finding of negligence in the period before the issuance of a refinancing mortgage both creates incentives for future mortgagees to conduct careful title searches and avoids present inequitable outcomes by creating a strong presumption against the negligent refinancing mortgagee, who was in the best position to have prevented the current situation, being awarded equitable subrogation.

The determination of how much weight should be afforded to any negligence occurring in the period prior to mortgage issuance should be determined in line with the actions of the refinancing mortgagee.

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Courts should not deny equitable subrogation based merely on the fact that a refinancing mortgagee missed an intervening lien in a title search. Courts have provided that when a refinancing mortgagee fails to satisfy an intervening interest under circumstances authorizing an inference of a mistake of fact, equity will presume such mistake. This implies that the failure to conduct a perfect title search or to identify a prior recorded interest should not serve to bar equitable subrogation. Therefore, a mistake in the title search process should not by itself be afforded enough weight to bar equitable subrogation. However, when facts indicate that a refinancing mortgagee failed to perform a title search at all or ignored facts that would have induced a reasonable person to conduct further inquiry, courts should weigh such negligence heavily against an award of equitable subrogation.

D. Interest of Justice

The final factor is the overriding importance of fairness. This typically covers facts that indicate fraud or deceit. If either the party seeking equitable subrogation or the party arguing against it is found to have engaged in deceptive or fraudulent conduct, then the other party should be awarded higher priority, as its equities are clearly superior. A clear example of such facts is provided in the case of Thrift, where the homeowner made a false affidavit to the refinancing mortgagee that there were only three mortgages on the property, when in fact the homeowner recently obtained a fourth unrecorded mortgage.
situations where the party opposing equitable subrogation had knowledge of the refinancing mortgagee’s actions or intent to refinance all mortgages on the property.\textsuperscript{205}

CONCLUSION

The lack of a clear test in determining when equitable subrogation should apply in the mortgage refinancing setting has led to conflicting decisions by the New York courts. Discordant application of equitable subrogation has weakened the protection of the recording statute without any clear justification, creating uncertainty for both parties who have recorded their interests and parties seeking equitable subrogation. The four-factor test outlined in this Note offers a potential solution to this problem by providing a uniform structure for courts to follow in conducting equitable subrogation analyses that balances the need to provide a fair judgment to the parties before the court with the need to provide adequate incentives to reduce future injustices.