# Property
# Professor Grimmelmann
# New York Law School
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## Supplement


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**Janet Sue Lanham Stevens**
**v.**
**Paul Douglas Casdorph, as Executor of the Last Will and Testament of Home Haskell Miller**
203 W. Va. 450 (1988)

Per Curiam:

. . . On May 28, 1996, [Patricia Eileen Casdorph and Paul Douglas Casdorph] took Mr. Homer Haskell Miller to Shawnee Bank in Dunbar, West Virginia, so that he could execute his will. [1] Once at the bank, Mr. Miller asked Debra Pauley, a bank employee and public notary, to witness the execution of his will. After Mr. Miller signed the will, Ms. Pauley took the will to two other bank employees, Judith Waldron and Reba McGinn, for the purpose of having each of them sign the will as witnesses. Both Ms. Waldron and Ms. McGinn signed the will. However, Ms. Waldron and Ms. McGinn testified during their depositions that they did not actually see Mr. Miller place his signature on the will. Further, it is undisputed that Mr. Miller did not accompany Ms. Pauley to the separate work areas of Ms. Waldron and Ms. McGinn.

1 Mr. Miller was elderly and confined to a wheelchair.

Mr. Miller died on July 28, 1996. The last will and testament of Mr. Miller, which named Mr. Paul Casdorph as executor, left the bulk of his estate to the Casdorphs. The Stevenses, nieces of Mr. Miller, filed the instant action to set aside the will. . . .[4]

4 As heirs, the Stevenses would be entitled to recover from Mr. Miller's estate under the intestate laws if his will is set aside as invalidly executed. . . .

The Stevenses' contention is simple. They argue that all evidence indicates that Mr. Miller's will was not properly executed. Therefore, the will should be voided. The procedural requirements at issue are contained in *W.Va. Code § 41-1-3* (1997). The statute reads:

> No will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly in the handwriting of the testator, *the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, and of each other*, but no form of attestation shall be necessary. (Emphasis added.)

The relevant requirements of the above statute calls for a testator to sign his/her will or acknowledge such will in the presence of at least two witnesses at the same time, and such witnesses must sign the will in the presence of the testator and each other. In the instant proceeding the Stevenses assert, and the evidence supports, that Ms. McGinn and Ms. Waldron did not actually witness Mr. Miller signing his will. Mr. Miller made no acknowledgment of his signature on the will to either Ms. McGinn or Ms. Waldron. Likewise, Mr. Miller did not observe Ms. McGinn and Ms. Waldron sign his will as witnesses. Additionally, neither Ms. McGinn nor Ms. Waldron acknowledged to Mr. Miller that their signatures were on the will. It is also undisputed that Ms. McGinn and Ms. Waldron did not actually witness each other sign the will, nor did they acknowledge to each other that they had signed Mr. Miller's will. . . .

Our analysis begins by noting that "the law favors testacy over intestacy." However, we clearly held in syllabus point 1 of *Black v. Maxwell, 131 W. Va. 247, 46 S.E.2d 804 (1948)*, that "testamentary intent and a written instrument, executed in the manner provided by [*W.Va. Code § 41-1-3*], existing concurrently, are essential to the creation of a valid will." *Black* establishes that mere intent by a testator to execute a written will is insufficient. The actual execution of a written will must also comply with the dictates of *W.Va. Code § 41-1-3*. The Casdorphs seek to have this Court establish an exception to the technical requirements of the statute. In *Wade v. Wade, 119 W. Va. 596, 195 S.E. 339 (1938)*, this Court permitted a narrow exception to the stringent requirements of the *W.Va. Code § 41-1-3*. This narrow exception is embodied in syllabus point 1 of *Wade*:

> Where a testator acknowledges a will and his signature thereto in the presence of two competent witnesses, one of whom then subscribes his name, the other or first witness, having already subscribed the will in the presence of the testator but out of the presence of the second witness, may acknowledge his signature in the presence of the testator and the second witness, and such acknowledgment, if there be no indicia of fraud or misunderstanding in the proceeding, will be deemed a signing by the first witness within the requirement of Code, 41-1-3, that the witnesses must subscribe their names in the presence of the testator and of each other. . . .

*Wade* stands for the proposition that if a witness acknowledges his/her signature on a will in the physical presence of the other subscribing witness *and the testator*, then the will is properly witnessed within the terms of *W.Va. Code § 41-1-3*. In this case, none of the parties signed or acknowledged their signatures in the presence of each other. This case meets neither the narrow exception of *Wade* nor the specific provisions of *W.Va. Code § 41-1-3*.

Workman, J., dissenting:

The majority once more takes a very technocratic approach to the law, slavishly worshiping form over substance. In so doing, they not only create a harsh and inequitable result wholly contrary to the indisputable intent of Mr. Homer Haskell Miller, but also a rule of law that is against the spirit and intent of our whole body of law relating to the making of wills.

There is absolutely no claim of incapacity or fraud or undue influence, nor any allegation by any party that Mr. Miller did not consciously, intentionally, and with full legal capacity convey his property as specified in his will. The challenge to the will is based solely upon the allegation that Mr. Miller did not comply with the requirement of *West Virginia Code 41-1-3* that the signature shall be made or the will acknowledged by the testator in the presence of at least two competent witnesses, present at the same time. The lower court, in its very thorough findings of fact, indicated that Mr. Miller had been transported to the bank by his nephew Mr. Casdorph and the nephew's wife. Mr. Miller, disabled and confined to a wheelchair, was a shareholder in the Shawnee Bank in Dunbar, West Virginia, with whom all those present were personally familiar. When Mr. Miller executed his will in the bank lobby, the typed will was placed on Ms. Pauley's desk, and Mr. Miller instructed Ms. Pauley that he wished to have his will signed, witnessed, and acknowledged. After Mr. Miller's signature had been placed upon the will with Ms. Pauley watching, Ms. Pauley walked the will over to the tellers' area in the same small lobby of the bank. Ms. Pauley explained that Mr. Miller wanted Ms. Waldron to sign the will as a witness. The same process was used to obtain the signature of Ms. McGinn. Sitting in his wheelchair, Mr. Miller did not move from Ms. Pauley's desk during the process of obtaining the witness signatures. The lower court concluded that the will was valid and that Ms. Waldron and Ms. McGinn signed and acknowledged the will "in the presence" of Mr. Miller. . . .

The majority embraces the line of least resistance. The easy, most convenient answer is to say that the formal, technical requirements have not been met and that the will is therefore invalid. End of inquiry. Yet that result is patently absurd. That manner of statutory application is inconsistent with the underlying purposes of the statute. Where a statute is enacted to protect and sanctify the execution of a will to prevent substitution or fraud, this Court's application of that statute should further such underlying policy, not impede it. When, in our efforts to strictly apply legislative language, we abandon common sense and reason in favor of technicalities, we are the ones committing the injustice.

**Coleman F. Madden**
**v.**
**Queens County Jockey Club, Inc.**
296 N.Y. 249 (1947)

FULD, J. "Owney" Madden was named by one Frank Costello in 1943 as a bookmaker with whom he placed bets. "Coley" Madden, plaintiff herein, a self-styled "patron of the races", was barred by defendant from its Aqueduct Race Track in 1945, under the mistaken belief that he was Costello's bookmaker. Plaintiff thereupon sought a declaratory judgment declaring that he has a right, as citizen and taxpayer - upon paying the required admission price - to enter the race course and patronize the pari-mutuel betting there conducted. Defendant, on the other hand, asserted an unlimited power of exclusion. . . .

The question posed . . . is whether the operator of a race track can, without reason or sufficient excuse, exclude a person from attending its races. In our opinion he can; he has the power to admit as spectators only those whom he may select, and to exclude others solely of his own volition, as long as the exclusion is not founded on race, creed, color or national origin.

At common law, a person engaged in a public calling, such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. (See e.g., *People v. King, 110 N.Y. 418, 427*; see, also, Wyman, Public Callings and The Trust Problem, 17 Harv. L. Rev. 156, 217.) On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. A race track, of course, falls within that classification.

The common-law power of exclusion, noted above, continues until changed by legislative enactment. In this State, a statute - explicitly covering "race courses" - limits the power by prohibiting discrimination on account of race, creed, color, or national origin. (*Civil Rights Law, § 40*; see, also, Penal Law, §§ 514, 700.) That, then, is the measure of the restriction.

Plaintiff, however, asserts a right founded upon the constitutional guaranty of equal protection of the laws. The argument is based on [the assumption that] the license to conduct horse racing is a franchise to perform a public purpose. . . .

There is little need to cite authority for the proposition that a race track is normally considered a place of amusement and that - with the possible exception of ancient Rome - amusement of the populace has never been regarded as a function or purpose of government. Horse racing does not become a function of government merely because, in sanctioning it, the Legislature anticipated a consequent, though incidental, advantage to the public in "improving the breed of horses". (L. 1926, ch. 440, § 1.) There is, then, nothing inherent in the nature of horse racing which makes operation of a race track the performance of a public function. If plaintiff's assumption were valid, it would follow that the mere fact of licensing makes the purpose a public one and the license in effect a franchise. Such, however, is not the law.

## Cheney Bros.
## v.
## Doris Silk Corporation

35 F.2d 279 (2d Cir. 1929)

L. HAND, Circuit Judge. The plaintiff, a corporation is a manufacturer of silks, which puts out each season many new patterns, designed to attract purchasers by their novelty and beauty. Most of these fail in that purpose, so that not much more than a fifth catch the public fancy. Moreover, they have only a short life, for the most part no more than a single season of eight or nine months. It is in practice impossible, and it would be very onerous if it were not, to secure design patents upon all of these; it would also be impossible to know in advance which would sell well, and patent only those. Besides, it is probable that for the most part they have no such originality as would support a design patent. Again, it is impossible to copyright them under the Copyright Act (*17 USCA § 1 et seq.*), or at least so the authorities of the Copyright Office hold. So it is easy for any one to copy such as prove successful, and the plaintiff, which is put to much ingenuity and expense in fabricating them, finds itself without protection of any sort for its pains.

Taking advantage of this situation, the defendant copied one of the popular designs in the season beginning in October, 1928, and undercut the plaintiff's price. This is the injury of which it complains. The defendant, though it duplicated the design in question, denies that it knew it to be the plaintiff's, and there thus arises an issue which might be an answer to the motion. However, the parties wish a decision upon the equity of the bill, and, since it is within our power to dismiss it, we shall accept its allegation, and charge the defendant with knowledge.

The plaintiff asks for protection only during the season, and needs no more, for the designs are all ephemeral. It seeks in this way to disguise the extent of the proposed innovation, and to persuade us that, if we interfere only a little, the solecism, if there be one, may be pardonable. But the reasoning which would justify any interposition at all demands that it cover the whole extent of the injury. A man whose designs come to harvest in two years, or in five, has prima facie as good right to protection as one who deals only in annuals. Nor could we consistently stop at designs; processess, machines, and secrets have an equal claim. The upshot must be that, whenever any one has contrived any of these, others may be forbidden to copy it. That is not the law. In the absence of some recognized right at common law, or under the statutes -- and the plaintiff claims neither -- a man's property is limited to the chattels which embody his invention. Others may imitate these at their pleasure. , , ,

True, it would seem as though the plaintiff had suffered a grievance for which there should be a remedy, perhaps by an amendment of the Copyright Law, assuming that this does not already cover the case, which is not urged here. It seems a lame answer in such a case to turn the injured party out of court, but there are larger issues at stake than his redress. Judges have only a limited power to amend the law; when the subject has been confided to a Legislature, they must stand aside, even though there be an hiatus in completed justice. An omission in such cases must be taken to have been as deliberate as though it were express, certainly after long-standing action on the subject-matter. Indeed, were are not in any position to pass upon the questions involved, as Brandeis, J., observed in International News Service v. Associated Press. We must judge upon records prepared by litigants, which do not contain all that may be relevant to the issues, for they cannot disclose the conditions of this industry, or of the others which may be involved. Congress might see its way to create some sort of temporary right, or it might not. Its decision would certainly be preceded by some examination of the result upon the other interests affected. Whether these would prove paramount we have no means of saying; it is not for us to decide. Our vision is inevitably contracted, and the whole horizon may contain much which will compose a very different picture.

**Gary Kremen et al.**
**v.**
**Stephen Michael Cohen, Networks Solutions, Inc., et al.**
337 F.3d 1024 (9th Cir. 2003)

KOZINSKI, Circuit Judge:

We decide whether Network Solutions may be liable for giving away a registrant's domain name on the basis of a forged letter.

### Background

"Sex on the Internet?," they all said. "*That'll* never make any money." But computer-geek-turned-entrepreneur Gary Kremen knew an opportunity when he saw it. The year was 1994; domain names were free for the asking, and it would be several years yet before Henry Blodget and hordes of eager NASDAQ day traders would turn the Internet into the Dutch tulip craze of our times. With a quick e-mail to the domain name registrar Network Solutions, Kremen became the proud owner of sex.com. He registered the name to his business, Online Classifieds, and listed himself as the contact.

Con man Stephen Cohen, meanwhile, was doing time for impersonating a bankruptcy lawyer. He, too, saw the potential of the domain name. Kremen had gotten it first, but that was only a minor impediment for a man of Cohen's boundless resource and bounded integrity. Once out of prison, he sent Network Solutions what purported to be a letter he had received from Online Classifieds. It claimed the company had been "forced to dismiss Mr. Kremen," but "never got around to changing our administrative contact with the internet registration [sic] and now our Board of directors has decided to *abandon* the domain name sex.com." Why was this unusual letter being sent via Cohen rather than to Network Solutions directly? It explained:

> Because we do not have a direct connection to the internet, we request that you notify the internet registration on our behalf, to delete our domain name sex.com. Further, we have no objections to your use of the domain name sex.com and this letter shall serve as our authorization to the internet registration to transfer sex.com to your corporation. [2]

Despite the letter's transparent claim that a company called "*Online* Classifieds" had no Internet connection, Network Solutions made no effort to contact Kremen. Instead, it accepted the letter at face value and transferred the domain name to Cohen. When Kremen contacted Network Solutions some time later, he was told it was too late to undo the transfer. Cohen went on to turn sex.com into a lucrative online porn empire.

> 2 The letter was signed "Sharon Dimmick," purported president of Online Classifieds. Dimmick was actually Kremen's housemate at the time; Cohen later claimed she sold him the domain name for $ 1000. This story might have worked a little better if Cohen hadn't misspelled her signature.

And so began Kremen's quest to recover the domain name that was rightfully his. He sued Cohen and several affiliated companies in federal court, seeking return of the domain name and disgorgement of Cohen's profits. The district court found that the letter was indeed a forgery and ordered the domain name returned to Kremen. . . . It awarded $ 40 million in compensatory damages and another $ 25 million in punitive damages.

Kremen, unfortunately, has not had much luck collecting his judgment. The district court froze Cohen's assets, but Cohen ignored the order and wired large sums of money to offshore accounts. His real estate property, under the protection of a federal receiver, was stripped of all its fixtures-- even cabinet doors and toilets -- in violation of another order. The court commanded Cohen to appear and show cause why he shouldn't be held in contempt, but he ignored that order, too. . . . Cohen, so far as the record shows, remains at large.

[I]t should come as no surprise that Kremen seeks to hold someone else responsible for his losses. That someone is Network Solutions, the exclusive domain name registrar at the time of Cohen's antics. Kremen sued it for mishandling his domain name. . . . The district court granted summary judgment in favor of Network Solutions on all claims. . . .

**Conversion**

Kremen's conversion claim is another matter. To establish that tort, a plaintiff must show "ownership or right to possession of property, wrongful disposition of the property right and damages." *G.S. Rasmussen & Assoc., Inc. v. Kalitta Flying Service, Inc., 958 F.2d 896, 906 (9th Cir. 1992).* The preliminary question, then, is whether registrants have property rights in their domain names. Network Solutions all but concedes that they do. . . .

Property is a broad concept that includes "every intangible benefit and prerogative susceptible of possession or disposition." We apply a three-part test to determine whether a property right exists: "First, there must be an interest capable of precise definition; second, it must be capable of exclusive possession or control; and third, the putative owner must have established a legitimate claim to exclusivity." Domain names satisfy each criterion. Like a share of corporate stock or a plot of land, a domain name is a well-defined interest. Someone who registers a domain name decides where on the Internet those who invoke that particular name -- whether by typing it into their web browsers, by following a hyperlink, or by other means -- are sent. Ownership is exclusive in that the registrant alone makes that decision. Moreover, like other forms of property, domain names are valued, bought and sold, often for millions of dollars . . . .

Finally, registrants have a legitimate claim to exclusivity. Registering a domain name is like staking a claim to a plot of land at the title office. It informs others that the domain name is the registrant's and no one else's. Many registrants also invest substantial time and money to develop and promote websites that depend on their domain names. Ensuring that they reap the benefits of their investments reduces uncertainty and thus encourages investment in the first place, promoting the growth of the Internet overall. *See G.S. Rasmussen, 958 F.2d at 900.*

Kremen therefore had an intangible property right in his domain name, and a jury could find that Network Solutions "wrongfully disposed of" that right to his detriment by handing the domain name over to Cohen. *Id. at 906.* The district court nevertheless rejected Kremen's conversion claim. It held that domain names, although a form of property, are intangibles not subject to conversion. This rationale derives from a distinction tort law once drew between tangible and intangible property: Conversion was originally a remedy for the wrongful taking of another's lost goods, so it applied only to tangible property. Virtually every jurisdiction, however, has discarded this rigid limitation to some degree. Many courts ignore or expressly reject it. . . .

Indeed, the leading California Supreme Court case rejects the tangibility requirement altogether. In *Payne v. Elliot, 54 Cal. 339 (1880)*, the Court considered whether shares in a corporation (as opposed to the share certificates themselves) could be converted. It held that they could, reasoning: "The action no longer exists as it did at common law, but has been developed into a remedy for the conversion of *every species of personal property*." *Id. at 341* (emphasis added). While *Payne*'s outcome might be reconcilable with the *Restatement*, its rationale certainly is not: It recognized conversion of shares, not because they are customarily represented by share certificates, but because they are a species of personal property and, perforce, protected. *Id. at 342.* [7]

7 Intangible interests in *real* property, on the other hand, remain unprotected by conversion, presumably because trespass is an adequate remedy. . . .

Kremen's domain name is protected by California conversion law, even on the grudging reading we have given it. Exposing Network Solutions to liability when it gives away a registrant's domain name on the basis of a forged letter is no different from holding a corporation liable when it gives away someone's shares under the same circumstances. We have not "created new tort duties" in reaching this result. We have only applied settled principles of conversion law to what the parties and the district court all agree is a species of property.

The district court supported its contrary holding with several policy rationales, but none is sufficient grounds to depart from the common law rule. The court was reluctant to apply the tort of conversion because of its strict liability nature. This concern rings somewhat hollow in this case because the district court effectively exempted Network Solutions from liability to Kremen altogether, whether or not it was negligent. Network Solutions made no effort to contact Kremen before giving away his domain name, despite receiving a facially suspect letter from a third party. A jury would be justified in finding it was unreasonably careless.

We must, of course, take the broader view, but there is nothing unfair about holding a company responsible for giving away someone else's property even if it was not at fault. Cohen is obviously the guilty party here, and the one who should in all fairness pay for his theft. But he's skipped the country, and his money is stashed in some offshore bank account. . . .The question becomes whether Network Solutions should be open to liability for its decision to hand over Kremen's domain name. Negligent or not, it was Network Solutions that gave away Kremen's property. Kremen never did anything. It would not be unfair to hold Network Solutions responsible and force *it* to try to recoup its losses by chasing down Cohen. This, at any rate, is the logic of the common law, and we do not lightly discard it. . . .

The evidence supported a claim for conversion, and the district court should not have rejected it.

### United States Constitution Amendment XIII (1865)

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Alex Kotlowitz, **All Boarded Up**, New York Times Magazine (Mar. 4, 2009)

TONY BRANCATELLI, A CLEVELAND CITY COUNCILMAN, yearns for signs that something like normal life still exists in his ward. Early one morning last fall, he called me from his cellphone. He sounded unusually excited. He had just visited two forlorn-looking vacant houses that had been foreclosed more than a year ago. They sat on the same lot, one in front of the other. Both had been frequented by squatters, and Brancatelli had passed by to see if they had been finally boarded up. They hadn't. But while there he noticed with alarm what looked like a prone body in the yard next door. As he moved closer, he realized he was looking at an elderly woman who had just one leg, lying on the ground. She was leaning on one arm and, with the other, was whacking at weeds with a hatchet and stuffing the clippings into a cardboard box for garbage pickup. "Talk about fortitude," he told me. In a place like Cleveland, hope comes in small morsels.

The next day, I went with Brancatelli to visit Ada Flores, the woman who was whacking at the weeds. She is 81, and mostly gets around in a wheelchair. Flores is a native Spanish speaker, and her English was difficult to understand, especially above the incessant barking of her caged dog, Tuffy. But the story she told Brancatelli was familiar to him. Teenagers had been in and out of the two vacant houses next door, she said, and her son, who visits her regularly, at one point boarded up the windows himself. "Are they going to tear them down?" she asked. Brancatelli crossed himself. "I hope so," he mumbled.

Prayer and sheer persistence are pretty much all Brancatelli has to go on these days. Cleveland is reeling from the foreclosure crisis. There have been roughly 10,000 foreclosures in two years. For all of 2007, before it was overtaken by sky-high foreclosure rates in parts of California, Nevada and Florida, Cleveland's rate was among the highest in the country. (It's now 24th among metropolitan areas.) Vacant houses are not a new phenomenon to the city. Ravaged by the closing of American steel mills, Cleveland has long been in decline. With fewer manufacturing jobs to attract workers, it has lost half its population since 1960. Its poverty rate is one of the highest in the nation. But in all those years, nothing has approached the current scale of ruin.

And in December, just when local officials thought things couldn't get worse, Cuyahoga County, which includes Cleveland, posted a record number of foreclosure filings. The number of empty houses is so staggeringly high that no one has an accurate count. The city estimates that 10,000 houses, or 1 in 13, are vacant. The county treasurer says it's more likely 15,000. Most of the vacant houses are owned by lenders who foreclosed on the properties and by the wholesalers who are now sweeping in to pick up houses in bulk, as if they were trading in baseball cards.

Brancatelli and others — judges, the police, city officials, residents — are grappling with the wreckage left behind, although to call this the aftermath would be premature. Even with President Barack Obama's plan to help prevent foreclosures, the city is bracing for more, especially as more people lose their jobs. The city's unemployment rate is now 8.8 percent. Moreover, on some streets so many houses are already vacant that those residents left behind are not necessarily inclined to stay. "It just happens so fast, the sad part is you really have little control," Brancatelli told me. "It snowballs on the street, and you try to prevent that avalanche." Walking away from a house even makes a kind of economic sense when the mortgage far exceeds the home's value; Obama's foreclosure-prevention plan does little to address that situation. Now outside investors have descended on Cleveland; they pick up properties for the price of a large flat-screen TV and then try to sell them for a profit.

So much here defies reasonableness. It's what Brancatelli keeps telling me. A few months ago, he met with Luis Jimenez, a train conductor from Long Beach, Calif. Jimenez had purchased a house in Brancatelli's ward on eBay and had come to Cleveland to resolve some issues with the property. The two-story house has a long rap sheet of bad deals. Since 2001, it has been foreclosed twice and sold four times, for prices ranging from $87,000 to $1,500. Jimenez bought it for $4,000. When Jimenez arrived in Cleveland, he learned that the house had been vacant for two years; scavengers had torn apart the walls to get the copper piping, ripped the sinks from the walls and removed the boiler from the basement. He also learned that the city had condemned the house and would now charge him to demolish it. Brancatelli asked Jimenez, What were you thinking, buying a house unseen, from 2,000 miles away? "It was cheap," Jimenez shrugged. He didn't want to walk away from the house, but he didn't have the money to renovate. The property remains an eyesore. "Generally, I'm an optimist, but none of this makes sense," Brancatelli told me. "Trying to give order to all this chaos is the big challenge."

Like others who have stayed in Cleveland, Brancatelli, who has lived in his two-story American Foursquare for 15 years, is trying to hold the wall against the flood. Of his ward, known as Slavic Village, he says: "It's one of the most resilient communities in the country. People are rolling up their sleeves and working. We can't wait for others to step in." This was a tone — the swagger of the underdog — that I heard from other Cleveland stalwarts during the weeks I spent in the city this winter. "Cleveland's a blue-collar community," Mayor Frank Jackson told me. "They're surviving-cultures. And we will fight back."

The task is achingly slow; each house its own battle. On one street I visited, in a ward near Brancatelli's, a third of the houses were abandoned. One resident, Anita Gardner, told me about the young family who moved in down the street a few years before. They spruced up the house with new windows, a fireplace, wood kitchen cabinets, track lighting and a Jacuzzi. When they lost the house to foreclosure, they left nothing for the scavengers. They stripped their own dwelling, piling toilets, metal screen doors, kitchen cabinets, the furnace and copper pipes into a moving van. "They said, 'Why should someone else get it?' " Gardner told me. "So they took it themselves." In December, Gardner's neighbor watched a man strain to push a cart filled with thin slabs of concrete down the street. It explained why so many of the abandoned homes in the city are without front steps, as if their legs had been knocked out from under them. Perhaps such pillage is part of the natural momentum of a city being torn apart. If you can't hold onto something of real value, at least get your hands on something.

Foreclosures are a problem all over the country now, but Cleveland got to this place a while ago. Cities, old and new, are looking at what's occurring in Cleveland with some trepidation — and also looking for guidance. Already places as diverse as Atlanta, Chicago, Denver, Las Vegas and Minneapolis have neighborhoods where at least one of every five homes stands vacant. In states like California, Florida and Nevada, where many of the foreclosures have been newer housing, there is fear that with mounting unemployment and more people walking away from their property, houses will remain empty longer, with a greater likelihood that they will deteriorate or be vandalized. “There are neighborhoods around the country as bad as anything in Cleveland,” says Dan Immergluck, a visiting scholar at the Federal Reserve Bank of Atlanta and an associate professor in the city and regional planning program at Georgia Tech. Local officials from other industrial cities have visited Cleveland to learn how it’s dealing with the devastation. “Cleveland is a bellwether,” Immergluck says. “It’s where other cities are heading because of the economic downturn.”

TONY BRANCATELLI, WHO IS 51, is a man of a birdlike build and intensity, but he also possesses a Midwestern folksiness, closing most conversations with a cheerful “alrighty.” Over the past couple of years, he has become a minor media star. Journalists from Sweden, Japan, China, Germany, Britain and France have visited him, drawn to his ward because of the high rate of foreclosures, at present two a day. Brancatelli’s world is defined by the borders of Slavic Village. It’s where he grew up and where he has lived for all but three years of his life. His license plate reads Slavic 1. (He tried to convince his wife to get plates that read Slavic 2, but she declined.) The neighborhood took root roughly a hundred years ago: diminutive, narrow homes — some no more than 900 square feet — built within walking distance of the steel mills now shuttered. The demographics have been changing over the past decade: African-Americans moving in, whites moving out. A common story. Unintentionally, it’s one of the few racially mixed communities in Cleveland.

Brancatelli’s mother worked as a waitress at a local diner, then as a clerk at a neighborhood Army-Navy store. His father was an auto mechanic. They divorced when Brancatelli was 12, yet Brancatelli describes his childhood in Slavic Village in nostalgic hues. “You always knew somebody,” he says. “You didn’t need formal day care. There was always somewhere to stay.”

He began working for the Slavic Village Development Corporation, a local nonprofit group, in 1988 and a year later became its director. The organization built and renovated storefronts and homes, bringing new people to the area. In fact, he met his wife when she bought a rehabbed house in the neighborhood. He stayed at the development group for 17 years until moving on to the City Council.

Cleveland has long been known for its unusually large number of nonprofit housing groups, and in the 1990s their impact on the city was noticeable. Under Brancatelli’s watch, Slavic Village Development constructed more than 500 new homes and rehabbed more than 1,000. Brancatelli measured success by the number of homes the group sold for more than $50,000. “We started to see this incredible transformation,” he recalls. A local thrift, Third Federal Savings and Loan, built its new corporate headquarters in Slavic Village. Marc A. Stefanski, chairman and chief executive of Third Federal, told me, “There was a good feeling that, hey, this neighborhood’s coming back.” Throughout the city, there was a renaissance of sorts: new housing construction in the neighborhoods and, downtown, three sports stadiums and the Rock and Roll Hall of Fame. Cleveland adopted the moniker “The Comeback City.”

But then Cleveland was hit hard — and early — by the foreclosure crisis. In 1999, Brancatelli noticed something peculiar: homes, many of which were in squalid condition, were selling for inflated prices. One entrepreneur in particular caught Brancatelli’s attention: 27-year-old Raymond Delacruz. He would buy a distressed property and, at best, make nominal repairs before quickly selling it for three or four times what he paid for it. The flips needed the cooperation of appraisers and the gullibility of home buyers. But the proliferation of mortgage companies — mostly based out of state and willing to provide loans with little documentation — also facilitated flippers. And the flippers justified the high prices to both home buyers and mortgage companies by pointing to the high prices nonprofit housing groups, like Brancatelli's, were getting for their new construction.

There was something else going on in the city that was even more destructive. Unlike fast-growing communities in Florida and California, Cleveland didn't see housing prices rise through the stratosphere. But even moderately rising property values created the conditions for subprime lenders to exploit strapped homeowners. Cold-calling mortgage brokers offered refinancing deals that would let homeowners use the equity in their houses to pay off other debts. A neighbor of Brancatelli's had medical problems and fell behind in her bills. She refinanced, then did it two more times, draining the equity in her house. "She used her house as an A.T.M.," Brancatelli says. "In the end, they just walked away. The debt exceeded the value of the house." In other instances, mortgage brokers would cruise neighborhoods, looking for houses with old windows or a leaning porch, something that needed fixing. They would then offer to arrange financing to pay for repairs. Many of those deals were too good to be true, and interest rates ballooned after a short period of low payments. Suddenly burdened with debt, people began to lose homes they had owned free and clear.

As early as 2000, a handful of public officials led by the county treasurer, Jim Rokakis, went to the Federal Reserve Bank of Cleveland and pleaded with it to take some action. In 2002, the city passed an ordinance meant to discourage predatory lending by, among other things, requiring prospective borrowers to get premortgage counseling. In response, the banking industry threatened to stop making loans in the city and then lobbied state legislators to prohibit cities in Ohio from imposing local antipredatory lending laws.

In the ensuing years, the city's real estate was transformed into an Alice-in-Wonderland-like landscape. Local officials began keeping track of foreclosed homes by placing red dots on large wall maps. Some corners of the map, like Slavic Village, are now so packed with red dots they look like puddles of blood. The first question outsiders now ask is, Where has everyone gone? The homeless numbers have not increased much over the past couple of years, and it appears that most of the people who lost their homes have moved in with relatives, found a rental or moved out of the city altogether. The county has lost nearly 100,000 people over the past seven years, the largest exodus in recent memory outside of New Orleans.

Banks are now selling properties at such low prices — many below what they sold for in the 1920s — you have to wonder why they bother to foreclose at all. (The F.D.I.C. estimates that each foreclosure costs a bank on average $50,000, more than if they were to do a loan modification.) All of this leaves Brancatelli in a constant state of exasperation. When asked how he's doing, he often takes a breath and replies, "Another day in paradise."

O.V.V. IS A TERM OF ART that stands for Open, Vacant and Vandalized. Houses fitting this description have popped up like prairie dogs. They are boarded, unboarded, then boarded again, and the city can't keep up with the savvy squatters. They will prop the plywood over the front entrance to make it look as if it's nailed shut. One woman told me that she called the police last summer when she saw smoke coming out of a vacant home across the street; it turned out that some young men were cooking on a grill inside.

On a dreary wintry day, Brancatelli took me to Hosmer Street, on which a fourth of the homes were foreclosed. As we strolled down the block, Brancatelli noticed something odd. Through a side window of one slender house, we could make out a waist-high pile of tree limbs and branches. The front door was off the hinges and propped against the entrance. We entered through the rear, where the door was gone altogether. “Hello,” Brancatelli hollered, “City!” — an effort to both warn squatters and frighten animals. Earlier that day we entered another O.V.V. and heard footsteps upstairs. “They don’t have a gun,” he had assured me. He explained that scavengers know enough not to carry weapons because it would mean more prison time should they be caught. Even in O.V.V.’s, there are rules.

Inside, we found firewood and brush piled in the kitchen and front room. “The crap we deal with,” Brancatelli muttered to himself. He snapped a photo with his cellphone and sent an e-mail message to the city’s Building and Housing Department, urging the department to send someone to secure the house. He often does this two or three times a day. But finding a collection of timber like this is of particular concern; over the past year there have been more than 60 fires in his ward, all in vacant houses. The fire department tried stakeouts but has not caught anyone. The general belief is that the fires are set either by squatters trying to stay warm or by mischievous kids. Brancatelli, though, wonders aloud if it might be vigilantes who don’t like the blight on their block. “Maybe I’m overthinking it,” he says. More likely, he’s projecting. He would like to see many of these houses just disappear.

This is Brancatelli’s conundrum: many of the abandoned homes should be razed. They’re either so old or so impractically tiny that they have little resale value, or they have been stripped of their innards and are in utter disrepair. There are an estimated one million lender-owned properties nationwide, and on average each house sits empty for eight months, a length of time that is only growing. Demolition, though, is costly: roughly $8,000 a house. Two years ago, Litton Loan Servicing, a mortgage servicer, discussed giving the city a number of foreclosed homes. Free. The city told them that would be fine, but only if the company came up with money to pay for the necessary demolitions. The transaction never occurred.

Last summer, Congress appropriated $3.9 billion in emergency funds for cities to acquire and rehab foreclosed properties. (An additional $2 billion will be available under the recently enacted economic-stimulus package.) The legislation was labeled the Neighborhood Stabilization Program, but Cleveland and a handful of other cities had to lobby hard to convince Congress that “stabilization” in their cities meant tearing down houses — not renovating them. Last month, Cleveland said it planned to use more than half of its $25.5 million allotment to raze 1,700 houses. This presents an opportunity to reimagine the city, to erase the obsolete and provide a space for the new. (There’s little money now to build, so imagine is the operative word.) Cuyahoga County is also establishing a land bank, a public entity that can acquire distressed properties and hold on to the land until improved economic times allow for redevelopment. The county hopes to persuade banks to unload their distressed properties, which the land bank would then raze, as well as give up some foreclosed properties in the suburbs, which the county could eventually renovate and sell.

Other cities — including Minneapolis, Youngstown, Detroit and Cincinnati — have put aside at least a third of their neighborhood-stabilization funds for demolition. "As properties stay vacant for longer periods of time," says Joe Schilling, a founder of the National Vacant Properties Campaign, "it's inevitable that even in some of the fast-growing communities, they'll have to look at demolition." Phoenix, for instance, has set aside a quarter of its grant money to tear down abandoned homes.

Cleveland may use some of those demolition dollars on houses now owned by the federal government. Between the Department of Housing and Urban Development and entities like Fannie Mae and Freddie Mac, the federal government has control of roughly a thousand abandoned properties in Cleveland. Across the street from the house with the timber inside sits a one-and-a-half story vacant property owned by HUD, which had guaranteed the last mortgage. On the front porch, a large picture window was wide open, but Brancatelli chose to enter through the front door. Going on a hunch, he punched the numbers in the address into the lockbox. The toilet was gone, as was the copper piping. HUD recently sold this house — for $1,500 — but didn't inform the new owner that the house had been condemned. "They dumped the house," Brancatelli grumbled. "It's this kind of stuff that drives me nuts."

A few weeks ago Brancatelli persuaded HUD to let the owner out of his purchase. Then HUD offered to sell the city its distressed properties, including this one, for $100 each. You might think this was something to celebrate. Brancatelli, though, is irked. As he sees it, the city will now have to use some of its emergency HUD financing to demolish houses that HUD was responsible for.

THE LIFE OF A CLEVELAND CITY COUNCILMAN has become one of answering complaints derived in one way or another from the foreclosure crisis. In November, Zachary Reed, who represents the ward near Slavic Village, received a pleading phone call from Cecilia Cooper-Hardy, a constituent and school-bus driver who lives next to a vacant house. Cooper-Hardy told Reed that as she was leaving for work at 5 one morning, she peered out her living-room window and noticed a pair of eyes staring back at her from behind a slit cut in a window shade next door. Reed had the house secured, but within days the boards were pulled off. Cooper-Hardy then purchased a pistol that she now keeps under her pillow. The local police commander calls her regularly, just to make sure everything's O.K., a routine he has adopted with others as well. Last summer, while Cooper-Hardy was doing yardwork, someone slipped in her back door. She hollered to a neighbor across the street who was drinking in the yard with friends. They rushed to her aid as the burglar fled. That neighbor is gone now. Another foreclosure. So every morning she offers up a prayer, and then she peeks out her living room blinds to see if there's anyone peeking back at her from the house next door. Reed, the councilman, told me, "If we don't get some help we're going to turn into a third-world nation."

Brancatelli doesn't necessarily disagree with the sentiment, but he continues to search for reasons to be sanguine. He insisted on driving me past a small store called Johnny's Beverage because, he told me, it was a key to his community's future. Johnny's Beverage sits in the middle of a residential block. Its facade is worn. Dark plastic sheeting covers the front windows so you can't see in. A hodgepodge of posters and handwritten signs advertise cold beer and wine, cigarettes and lottery tickets. A tattered American flag flaps in the breeze. When Jerome Jackson purchased the store three years ago, Brancatelli told him in no uncertain terms that he wasn't too happy about it and that he was going to oppose the transfer of the liquor license. It did not, after all, have the aspect of a family-friendly enterprise you would want in a residential neighborhood.

Jackson, who is 52 and barrel-chested, has a retiring demeanor. His perch is a narrow space separated from the rest of the store by counter-to-ceiling plexiglass. He had managed a store in another neighborhood and saved up to buy his own business. He renovated the upstairs and moved in (and hung the American flag from a second-floor deck he built).

He then purchased a foreclosed house down the street, where his brother could live. The house next door to the store went into foreclosure, and Brancatelli heard that Jackson kept watch over it, chasing scavengers away and erecting a fence in the rear. He also heard that Jackson had alerted the city that there was a foot of water in the basement of the vacant, the result of pipes having been ripped out. (This is common; Brancatelli has seen back water bills for vacant houses as high as $6,000.)

Brancatelli began to reconsider his opinion of Jackson. He was keeping an eye on the neighborhood — and he was committed to staying. Brancatelli decided to support the liquor-license transfer and then told Jackson that he would help get him the property next door, if he agreed to tear it down.

U.S. Bank, which owned the house, appealed a city condemnation order. "It's the running joke," Brancatelli told me. "The banks appeal the condemnations because they say they want more time to make repairs to put it on the market to sell. And I go to the hearings on a regular basis to say you shouldn't get more time. Here, they owned it for more than six months and hadn't made any repairs. They just want time to try to unload the property." Jackson offered U.S. Bank $2,000. He heard nothing. He upped his offer to $3,000. Again, no response. When Brancatelli intervened and made it clear that U.S. Bank would be stuck with the $8,000 demolition bill, the bank agreed to sell it for a dollar to the Slavic Development Corporation. The nonprofit group then turned it over to Jackson, who agreed to pay for the razing. "Imbeciles," Brancatelli said more than once, referring to the banks. "They're imbeciles."

I spent an evening with Jackson in his store and watched as a young disheveled man came in and purchased a pack of cigarettes. He hovered around the plexiglass. "Do you want to buy some tools?" the man asked.

"No," Jackson curtly replied.

Customers frequently offer Jackson sinks, cabinets and other scavenged items. He says that in the few years he has owned the store, the community has become more transient. "I don't know nobody no more," he said. "I don't know who to trust." Everyone calls him Johnny. They assume the store was named after him, even though it has been there for decades. The week before Christmas, two men rammed a van into the front of the store, intending to rob it. The van got stuck, and the robbers fled. But Jackson isn't deterred. He says he hopes one day to knock down his store and build a row of small enterprises, including a restaurant and a barbershop. He is trying to buy another vacant house on the block. Brancatelli now fears he'll lose Jackson. "I want to convince him we have a strategy for the neighborhood," he told me. "The worst thing you can have happen is to have this store close up."

BY MID-2007, IT BECAME CLEAR to Brancatelli that his was a city at the mercy of lenders and real estate wholesalers, who now owned thousands of abandoned properties in the city. Somehow, the city needed to hold these new land barons accountable for their vacant houses, so many of which were in utter disrepair.

Brancatelli and others looked to Raymond Pianka, the judge in the city's lone housing court. In 1996, Pianka gave up his seat on the City Council to accept this judgeship. His judicial colleagues derisively refer to it as "rat court," because its main function is to make sure that owners mow their lawns, trim their hedges, clean up their garbage, repair leaning porches or hanging gutters — in short, that they make their homes inhospitable for rats. No one foresaw that this lowliest of courts would become one of the most powerful instruments in the city's fight for survival. "The court's the only tool we have," Brancatelli said. "When we get them into court, we can't let them go."

In 2001, when it became clear how Raymond Delacruz was wreaking havoc on city neighborhoods by flipping houses, it was Pianka who ran him out of town. The city's building and housing department cited Delacruz for code violations on a house he hadn't flipped fast enough. When he didn't show up in court, Pianka had his chief bailiff stake out Delacruz at a doughnut shop. Pianka placed him on house arrest, ordering him to spend 30 days in the dilapidated structure he owned but had not maintained. Shortly after his sentence was up, Delacruz moved to Columbus, where he continued his flipping, and was eventually convicted for fraud that included swindling a bank vice president.

Housing codes, which were established in the mid-19th century, set minimum standards for housing quality. They traditionally help maintain both a city's aesthetics and safety. In Cleveland today, they seem to be all that keeps the city from crumbling. In 2007, Pianka realized that the banks weren't showing up in court after being cited for code violations. "They were thumbing their noses at the city," he told me. "They were probably thinking, It's Municipal Court. What can they do? And we thought, How loud can this mouse roar?" Pianka set up what he called his Clean Hands Docket. If a bank didn't respond to a warrant, Pianka refused to order any evictions it requested.

Pianka's staff also dug up a little-used 1953 statute that allowed for trials in absentia, and every other Monday afternoon for the last year and a half Pianka has held trials with a judge and a prosecutor but no defendant. The first case involved Destiny Ventures, a firm based in Oklahoma that buys foreclosed properties in bulk and then sells them. It was cited in 2007 for violations on one of its houses, but didn't show up in court. The idea of a trial without a defendant was so unusual that when the prosecutor said he had no opening statement, Pianka prodded him. "You're going to waive opening statement?" he asked. "Don't you want to give the court a little road map about the strategy?" A housing inspector testified that Destiny Ventures had done nothing to correct the code violations on the vacant two-story clapboard house in question. The windows were punched out, the front door was wide open and roof shingles were missing. Pianka fined Destiny Ventures $40,000, and then had a collection agency sweep the company's bank accounts for the money. Brancatelli celebrated by taping a copy of the check to his office wall. In a recent phone interview, an owner of Destiny Ventures, Steve Nodine, said, "It's unconstitutional the way they fine people." His firm now refuses to do business in Cleveland.

One morning this fall, I visited Pianka before his Monday court session. His office, on the 13th floor of the Justice Center, overlooks Lake Erie and the new Cleveland Browns Stadium. It might be one of the nicer views in the city, but he would just as soon overlook the city's residential neighborhoods. When I entered his chambers, he was on his computer scanning Web sites to tap into the real estate chatter. He found a Cleveland house on eBay selling for $500. In the photos, Pianka could make out mold on the walls and noticed a large portable heater, which he said was illegal. He shook his head. He has no power to haul people into court. Building and housing inspectors issue citations for code violations, and then the city's law department decides whether to prosecute. Pianka hears only misdemeanor offenses, but he can both fine and jail defendants.

Pianka, who has a bushy mustache, often seems amused, so it's easy to underestimate his resoluteness. The chief magistrate told me she has heard Pianka curse only once. It was in late 2007. He had fined Wells Fargo $20,000 for code violations but told the bank he would rescind the fine if it spent that amount rehabilitating the structure. Wells Fargo fixed up the house, and it was, for Pianka, a success story. When he drove the chief magistrate to the address to show off the house, there was nothing there, just a vacant lot. The city, he discovered, had razed it, unaware of the repairs.

Pianka lives on a beautiful block in Cleveland's Detroit-Shoreway neighborhood, where there is a stunning variety of architecture. But even on his street, there have been three foreclosures. For months, Pianka helped keep watch on a majestic 19th-century Victorian down the street. One neighbor paid for the electricity so the vacant house would be protected against vandals by an alarm system. Pianka shoveled the snow in winter and often parked his car in the driveway so it would appear as if someone were living there.

Pianka is an amateur historian, and his office shelves are filled with books on Poland, his grandfather's native country. During my visit, he retrieved a book about wartime Warsaw and opened it to a photograph of a lone man with a wheelbarrow collecting bricks from the rubble of a building's ruins. "He's putting the city back together," Pianka told me. "We just have to make the best of things. We have to do it because nobody else will."

One of his assistants poked her head in the doorway. "It looks like we're going to have another packed house," she announced, and Pianka headed for the courtroom. A line of people snaked into the hallway. When the bailiff called their names, they approached the lectern, usually without an attorney. Pianka asked one man how he wanted to plead. "I plead whatever it takes," he replied. Most of the defendants are simply asking for guidance, or at least some understanding, and the word is that you can trust Pianka. "He's the most loved judge in Cleveland," Brancatelli told me. A good number of the defendants are facing foreclosure themselves and don't have the means to keep up their property. Until recently, many might have refinanced, but that is no longer an option.

One of the first cases I observed involved Sally Hardy, who is 52 and works as a housekeeper at a nursing home. She asked Pianka if she could confer briefly with the prosecutor, which she did, and then began to cry softly. "What'd you say to her?" Pianka asked the prosecutor in an attempt to lighten the mood. Hardy jogged out of the courtroom in tears. When she returned, Pianka apologized. "I'm sorry," he said. "These are emotional times, and sometimes it feels like the weight of the world is on your shoulders." Her house was in foreclosure, she told Pianka, but she had rescued it. Pianka brightened. "That's a great accomplishment," he told her. He ordered her into a program that assists struggling homeowners; a housing specialist will work with Hardy to find money to repair her roof and porch.

Mayra Caraballo, a 39-year-old mother of two, appeared in court in response to code violations on her home. She explained to Pianka that she no longer owned the house. She had lost her job at a processing plant, and an adjustable rate had kicked in on her mortgage, boosting her monthly payments to $1,100, from $800. She had left after receiving a foreclosure notice. The house was quickly stripped of everything but the furnace. Pianka asked a clerk to check into the house's ownership; he suspected that the lender had withdrawn the foreclosure at the last minute, as is becoming more common. The clerk tracked down the trustee on the mortgage, Deutsche Bank, and confirmed that the foreclosure had indeed been withdrawn. Pianka calls these situations "toxic titles." "You're in limbo," Pianka told a shocked Caraballo. "There's no hope in your getting out of this property as a result of foreclosure. We're seeing this more and more."

Pianka sees these toxic titles as an effort by lenders to dodge responsibility for vacant houses. Later, I called Deutsche Bank to ask about Caraballo's house. "We don't own the property," a spokesman told me. "We're the owner of record, but the investors who bought the mortgage-backed securities own it." Pianka chuckled when I told him of the bank's response. "That's their mantra: we don't own it," he said. "It's handy for them to say, 'Oh, it's not us.' It's part of this big shell game they're playing." I checked in with Caraballo, too. She's now renting and working part time at a day care center. She told me that she would like to move back into the house, but she's not sure she has the money to replace all the hardware that has been stripped by scavengers or to make the necessary repairs.

Over the last year and a half, the housing court has collected $1.6 million in fines from defendants who didn't show up for their trials. Last April, Pianka fined Washington Mutual $100,000 for a vacant property on the city's west side. Washington Mutual, now owned by JPMorgan Chase, appealed, and in December, the Eighth District Court of Appeals in Ohio ruled that trials in absentia were not permitted in misdemeanor cases, essentially putting an end to Pianka's efforts. JPMorgan Chase disputes the code violations, but a spokeswoman said the bank was not planning to send a representative to court to respond to the city's charges.

"We just have to figure out some other ways," Pianka told me. He has suggested that the city could name corporate officers when prosecuting code violations. He told me that a Cleveland police officer was so angered by all the abandoned properties that he volunteered last month to serve warrants to bank officers should they ever be issued. In the meantime, early last year, Cleveland sued 21 lenders, arguing that their vacant houses created a public nuisance, virtually destroying some neighborhoods. Ten of those lenders have since gone under, been acquired or gone into bankruptcy. The case is slowly winding its way through federal court.

"This crisis changes weekly," Pianka told me. "It's a torrent of water coming at us. We can divert it one way or another. But we can't stop it."

ON FEB. 29 LAST YEAR, Derek Owens, a 36-year-old police officer on patrol, spotted a group of young men drinking beer in the open garage of an abandoned house. Neighbors previously complained of teenagers both selling and using drugs in the row of vacant houses on the street.

When Owens and his partner got out of their squad car, the men fled. As Owens chased them, one of the men stopped in the driveway of yet another abandoned house, turned around and opened fire. One shot hit Owens in the abdomen, and he died several hours later.

When Brancatelli heard of Owens's murder, he wondered who owned the abandoned house and garage where the young men were drinking. He made some phone calls and discovered that he knew the owners, Eric and Sheila Tomasi, a couple from Templeton, Calif., who had been buying up foreclosed houses in Cleveland as an investment. Eric Tomasi soon called. He had heard about the shooting. Brancatelli liked the Tomasis, and suggested that it might be a good idea to begin repairs on the house. The neighbors, he told Tomasi, were up in arms over the vacant houses in their community. The Tomasis soon sought permits to do work and began to fix up the house.

Brancatelli had met the Tomasis a few weeks earlier at a suburban hotel where a private company was auctioning off foreclosed homes. Brancatelli was there to scare off speculators. He passed out a flyer, which read in part: "Dealing with the increasing problem of abandoned and vacant homes is at the forefront of our efforts to continue improving our community. . . . You should be aware that some of these homes were the source of incredible community concern and some resulted in criminal prosecution of mortgage brokers."

This is what Brancatelli calls "the next tsunami" — companies and individuals who are buying foreclosed houses in bulk and then quickly selling them for a profit, often without making any repairs. The companies have appellations like Whatever Inc., Under Par Properties and Tin Cup Investments. Brancatelli thought all the equity had been wrung out of these properties, but clearly he was mistaken.

At this auction, Brancatelli was introduced to the Tomasis. They are both in their 40s. Before investing in real estate, Sheila Tomasi owned a small chain of clothing stores and Eric Tomasi was a mortgage broker and before that managed a chain of sporting-goods stores. Brancatelli found them surprisingly open, unlike some of the other wholesalers — or "bottom feeders" as some derisively refer to them — who wouldn't return his phone calls or e-mail queries. He invited the couple to a gathering of local housing activists, and they laid out their business plan. Brancatelli was curious to find out how anyone was making money in a market where houses were selling for a few thousand dollars on eBay.

The Tomasis said that they owned about 200 houses in Cleveland. (They purchased 2,000 homes last year, in 22 states.) They explained that they, unlike most other wholesalers, provide each buyer with the mechanicals — pipes, a boiler, a furnace, all the basic materials that had been stripped — that the purchaser would then be responsible for installing. Brancatelli derived some comfort from this description. From his background with a nonprofit housing group, he knew the theory that people who put sweat equity into a house will be more committed to its upkeep and to making the mortgage payments. The financing the Tomasis laid out, though, made Brancatelli squirm. The purchaser would pay $500 down and then make monthly payments of no more than $450, which was below local rental prices. But the interest rate was 10 or 11 percent. What most concerned Brancatelli was that the Tomasis eventually hope to package the mortgages and sell them to investors.

“It’s Groundhog Day all over again,” Brancatelli remembers thinking to himself. “Intuitively, it doesn’t make any sense that a person from California would be buying hundreds of distressed properties in a place that’s in a downward spiral. It has nothing but the makings of someone coming to pillage our neighborhood.” But did that mean he shouldn’t work with the Tomasis? If he considered them the enemy, he wondered, where would that get him? Eric Tomasi assured Brancatelli and the others that they had a shared interest. “I want to put people in homes,” he said. “And you want to get homes occupied.”

Pianka says Brancatelli faces a difficult choice: work with the Tomasis to make sure their properties are maintained and then sold to people who make the payments, or contest the Tomasis’ efforts and lose any oversight. In December, while I was driving through Slavic Village with Brancatelli, we passed a Tomasi-owned house that wasn’t secured. He left a message for Tomasi: “Eric, calling about 6921 Gertrude. The door’s open in the back. Give me a call. Hope things are well.” Tomasi sent someone out to board it up. “Even if I didn’t like this guy, I don’t have the ammo to fight him,” Brancatelli later told me. “Let’s see if this is a model we can work with.”

THERE ARE REASONS to be wary. During my time in Cleveland, I came across two properties owned by an investment company that goes by the name Thor Real Estate. The first I stumbled across while driving through the city’s west side with Jay Westbrook, a city councilman. We passed a compact two-story house that had been vacant just a few weeks earlier. Westbrook peeked through the windows and, much to his surprise, saw some activity. A young, stocky man was inside installing new floors. He introduced himself as Oswan Jackson and told us he had just bought the house. He planned to move in with his wife, who was pregnant with their first child. He seemed disoriented, like many new homeowners, overwhelmed by the amount of work he needed to do. “I didn’t know there were code violations,” he told Westbrook. The foundation was failing and the roof needed replacing. He said the purchase price was $24,580 for the house: $500 down and $290 a month. “We’ll make it work for you,” Westbrook cheerfully told him. “Welcome to the neighborhood.” A few days later, after a colleague researched the property, Westbrook learned that the house had been in such poor condition that it was condemned three weeks after Jackson signed the contract — and that Jackson owed the back taxes on the property, which amounted to $4,000. The last I spoke with Jackson, he planned to walk away from his new home.

The second house was on East 113th Street. The front steps were missing; piles of brush and rubbish clogged the driveway. One side was tagged by a local gang, an indication that it had been used as a gathering place. Posted to the front porch was a sign that read: 500 Down, 295 a month. In January on Craigslist, the owner advertised it this way: “I have a beautiful home at 3637 East 113th Street, Cleveland, OH 44105 Move in now! No credit check!” One neighbor I spoke to wondered why anyone would want to buy it. “It looks like there’s nothing left for that house to give,” the neighbor said.

The dispiriting part of the story behind these houses, certainly from Brancatelli’s point of view, is that Thor Real Estate had been in partnership with the Tomasis. The Tomasis say they are now separate entities, but in court, the Tomasis have admitted that properties have been transferred between the two companies, and on occasion Eric Tomasi has offered to speak for Thor on code-violation cases. Once again, it's hard to know who owns what.

In January, Sheila Tomasi appeared in housing court. Sheila Tomasi is a personable, cheerful woman with high cheekbones and honey-streaked hair. The Tomasis purchased a house for their own use near Cleveland, and she was back for a couple of weeks to appear in court and to check on their properties. It wasn't the Tomasis' first time in Pianka's court, and on that day, five of the Tomasis' properties were cited for code violations. During her appearance, she told the court about a new owner, a single mother of seven, who had hired a contractor to install new pipes provided by the Tomasis. But it was a shoddy job. So, the Tomasis hired a plumber themselves and paid him $1,300 to redo the work. They added that charge to the woman's monthly mortgage payments. "I can't go to sleep at night if we can't give someone a good start," Tomasi told me on an earlier occasion. "You want to groom them and get all the hiccups out of owning a home: that they're getting all their improvements done, that they're paying their taxes. We want to make sure that everything's going O.K."

Tomasi also confirmed to the judge that they were considering the purchase of another 1,000 homes in the city. "That's the nature of what's happening here," Pianka sighed. "We feel in many ways helpless.

"You've moved to Cleveland at least temporarily," he said. "That's important, and taking care of your inventory properties, making sure you come into compliance with the law. There aren't enough inspectors to follow you around." Tomasi nodded. Pianka continued, "If we find out you have a property and it's flying below the radar, there are going to be severe consequences."

"Yes, your honor," Tomasi replied.

Then, as if thinking aloud, Pianka said, "It is really tough being a city municipality because we're subject to international banks, national banks, acts of Congress, buyouts of mortgages. . . . We have no control over those entities, so I guess we're going to have to try to work with you."

He fined the Tomasis $50,000 but gave them time to either raze the properties or repair them. "I'd like you to appreciate what we're dealing with in Cleveland," he told Tomasi. "Now if you don't have some good reason, I expect a good check made out to the clerk."

Pianka left the bench shaking his head and later told me he better understood why Brancatelli was willing to work with the Tomasis. "What are you to do?" he said.

When I told Brancatelli about the court proceedings and about the Tomasis' mention of purchasing another 1,000 homes, Brancatelli said, "It's just really strange times."

*Alex Kotlowitz teaches writing at Northwestern University and is a regular contributor to the magazine. His last cover article was about urban violence.*

This article has been revised to reflect the following correction:

Correction: March 8, 2009
The cover article on Page 28 this weekend about efforts by Cleveland and other cities to deal with the growing number of foreclosures misstates the name of an area in Louisiana with a recent exodus of people comparable to that of Cleveland. It is Orleans Parish, or New Orleans — not New Orleans Parish.

Susan Saulny, **Banks Starting to Walk Away on Foreclosures**, New York Times (Mar. 29, 2009)

SOUTH BEND, Ind. — Mercy James thought she had lost her rental property here to foreclosure. A date for a sheriff's sale had been set, and notices about the foreclosure process were piling up in her mailbox.

Ms. James had the tenants move out, and soon her white house at the corner of Thomas and Maple Streets fell into the hands of looters and vandals, and then, into disrepair. Dejected and broke, Ms. James said she salvaged but a lesson from her loss.

So imagine her surprise when the City of South Bend contacted her recently, demanding that she resume maintenance on the property. The sheriff's sale had been canceled at the last minute, leaving the property title — and a world of trouble — in her name.

"I thought, 'What kind of game is this?' " Ms. James, 41, said while picking at trash at the house, now so worthless the city plans to demolish it — another bill for which she will be liable.

City officials and housing advocates here and in cities as varied as Buffalo, Kansas City, Mo., and Jacksonville, Fla., say they are seeing an unsettling development: Banks are quietly declining to take possession of properties at the end of the foreclosure process, most often because the cost of the ordeal — from legal fees to maintenance — exceeds the diminishing value of the real estate.

The so-called bank walkaways rarely mean relief for the property owners, caught unaware months after the fact, and often mean additional financial burdens and bureaucratic headaches. Technically, they still owe on the mortgage, but as a practicality, rarely would a mortgage holder receive any more payments on the loan. The way mortgages are bundled and resold, it can be enormously time-consuming just trying to determine what company holds the loan on a property thought to be in foreclosure.

In Ms. James's case, the company that was most recently servicing her loan is now defunct. Its parent company filed for bankruptcy and dissolved. And the original bank that sold her the loan said it could not find a record of it.

"It is what some of us think is the next wave of the crisis," said Kermit Lind, a clinical professor at the Cleveland-Marshall College of Law and an expert on foreclosure law.

For older industrial cities like South Bend, hard times in the mortgage market began before the recent national downturn, as did the problem of bank walkaways. In the case of Ms. James, a home health care administrator, the foreclosure proceedings began in the summer of 2007, when she could not keep up with the adjustable rate on her mortgage.

In Buffalo, where officials said the problem had reached “epidemic” proportions in recent months, the city sued 37 banks last year, claiming they were responsible for the deterioration of at least 57 abandoned homes; the city chose a sampling of houses to include in the lawsuit, even though the banks had walked away from many more foreclosures. So far, five banks have settled.

In Kansas City, Rachel Foley, a lawyer who handles housing cases, said bank walkaways were “a rare occurrence two to three years ago.”

“We’re seeing them dumped more and more at the moment,” she said.

Experts suggest the bank walkaways are most visible in states where foreclosures are processed through the courts and therefore tend to be more transparent. Other states, like Indiana and New York, have court-mandated foreclosures, but roughly half of the states allow foreclosures to proceed without court intervention, making it difficult to accurately count the number of bank walkaways in recent months.

The soft housing market and the vandalism that often occurs when a house sits empty are the two main factors influencing the mortgage holders’ decisions to walk away, said Larry Rothenberg, a lawyer for Weltman, Weinberg & Reis, one of the larger creditors’ rights firms in the country.

“Oftentimes when the foreclosure starts out, it’s a viable property,” Mr. Rothenberg said, “but by the time it gets to a sheriff’s sale, it might not have enough value to justify further expense. We’ve always had cases where property was vandalized or lost value, but they were rare compared to these times.”

The problem seems most acute at the bottom of the market — houses that were inexpensive to begin with — and with investment properties, where investors and banks want speedy closure by writing off bad loans as losses. Banks and investors typically lose 40 percent to 50 percent of their investment on every foreclosure.

Guy Cecala, publisher of Inside Mortgage Finance, an industry newsletter, said some properties had become such liabilities for investors that it was not even worth holding on to them to strip valuable fixtures, like kitchen appliances, toilets and hardware.

“The whole purpose of foreclosure is to take title of the property, sell it and recoup what money you can,” Mr. Cecala said. “It’s just a sign of the times that things are so bad no one wants to take possession of the property.”

In South Bend, boarded-up houses for whom no one has stepped forward are dotting the landscape, adding a fresh layer of blight to communities that were already scarred from the area’s industrial decline.

The city is hoping to create a new type of legal mediation process that would bring together the homeowners and the mortgage holders to settle their disputes while allowing the owners to remain in the home — considered crucial to any stabilization effort.

"I'd say in the last three or four months, we've seen dozens of these cases," said Chuck Leone, the South Bend city attorney. "We see it one of two ways. One is that the bank will simply dismiss the foreclosure complaint. The other is that the mortgage holder will follow through and take a judgment of foreclosure, but then not schedule the property for sheriff's sale."

In Ms. James's case, it has been impossible to determine who canceled the sheriff's sale, since her last mortgage holder went out of business. Even the city clerk's records did not provide an answer.

"Nobody has any idea who owns what or who's responsible," said Judy Fox, Ms. James's lawyer at the Notre Dame Legal Aid Clinic. "It's a very common story."

Mayor Stephen J. Luecke of South Bend added: "It's just a crime the way it puts people in limbo. They first off have gone through the grief of losing their house, then they move out and find out that they still own it and have responsibility for it."

In Jacksonville, Fla., Sylvester Kimbrough Jr. found himself caught in the limbo between foreclosure and ownership last year, 10 years into his 30-year mortgage on a $42,000 two-bedroom house.

Mr. Kimbrough, 56, a former driver for a car dealership who is now unemployed, had already moved out when he learned that the foreclosure had been stopped.

"That move really almost destroyed us," Mr. Kimbrough said. "It was all for nothing."

## Marrone
## v.
## Washington Jockey Club

227 U.S. 633 (1913)

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action of trespass for forcibly preventing the plaintiff from entering the Bennings Race Track in this District after he had bought a ticket of admission, and for doing the same thing, or turning him out, on the following day just after he had dropped his ticket into the box. There was also a count charging that the defendants conspired to destroy the plaintiff's reputation and that they excluded him on the charge of having 'doped' or drugged a horse entered by him for a race a few days before, in pursuance of such conspiracy. But as no evidence of a conspiracy was introduced and as no more force was used than was necessary to prevent the plaintiff from entering upon the race track, the argument hardly went beyond an attempt to overthrow the rule commonly accepted in this country from the English cases, and adopted below, that such tickets do not create a right in rem.

We see no reason for declining to follow the commonly accepted rule. The fact that the purchase of the ticket made a contract is not enough. A contract binds the person of the maker but does not create an interest in the property that it may concern, unless it also operates as a conveyance. The ticket was not a conveyance of an interest in the race track, not only because it was not under seal but because by common understanding it did not purport to have that effect. There would be obvious inconveniences if it were construed otherwise. But if it did not create such an interest, that is to say, a right in rem valid against the landowner and third persons, the holder had no right to enforce specific performance by self-help. His only right was to sue upon the contract for the breach. It is true that if the contract were incidental to a right of property either in the land or in goods upon the land, there might be an irrevocable right of entry, but when the contract stands by itself it must be either a conveyance or a license subject to be revoked.

Jane Jacobs, **The Death and Life of Great American Cities**, (1961)

Consider, for example, the orthodox planning reaction to a district called the North End in Boston. This is an old, low-rent area merging into the heavy industry of the waterfront, and it is officially considered Boston's worst slum and civic shame. It embodies attributes which all enlightened people know are evil because so many wise men have said they are evil. Not only is the North End bumped right up against industry, but worse still it has all kinds of working places and commerce mingled in the greatest complexity with its residences. It has the highest concentration of dwelling units, on the land that is used for dwelling units, of any part of Boston, and indeed one of the highest concentrations to be found in any American city. It has little parkland. Children play in the streets. Instead of super-blocks, or even decently large blocks, it has very small blocks; in planning parlance it is "badly cut up with wasteful streets." Its buildings are old. Everything conceivable is presumably wrong with the North End. In orthodox planning terms, it is a three-dimensional textbook of "megalopolis" in the last stages of depravity. The North End is thus a recurring assignment for M.I.T. and Harvard planning and architectural students, who now and again pursue, under the guidance of their teachers, the paper exercise of converting it into super-blocks and park promenades, wiping away its nonconforming uses, transforming it to an idea of order and gentility so simple it could be engraved on the head of a pin.

Twenty years ago, when I first happened to see the North End, its buildings—town houses of different kinds and sizes converted to flats, and four- or five-story tenements built to house the flood of immigrants first from Ireland, then from Eastern Europe and finally from Siciliy—were badly overcrowded, and the general effect was of a district taking a terrible physical beating and certainly desperately poor.

When I saw the North End again in 1959, I was amazed at the change. Dozens and dozens of buildings had been rehabilitated. Instead of mattresses against the windows there were Venetian blinds and glimpses of fresh paint. Many of the small, converted houses now had only one or two families in them instead of the old crowded three of four. Some of the families in the tenements (as I learned later, visiting inside) had uncrowded themselves by throwing two older apartments together, and had equipped these with bathrooms, new kitchens, and the like. I looked down a narrow alley, thinking to find at least here the old, squalid North End, but no: more neatly repainted brickwork, new blinds, and a burst of music as a door opened. Indeed, this was the only city district I had ever seen—or have seen to this day—in which the sides of buildings around parking lots had not been left raw and unpainted, but repaired and painted as neatly as if they were intended to be seen. Mingled all among the buildings for living were an incredible number of splendid food stores, as well as such enterprises as upholstery making, metal working, carpentry, food processing. The streets were alive with children playing, people shopping, people strolling, people talking. Had it not been a cold January day, there surely would have been people sitting.