

Indiana, like Pennsylvania, is what's called a "lien theory" state. What that means is a mortgage lender in Indiana obtains a lien against the real estate, but not title to the real estate. A lien is a charge against the real estate that gets discharged, when paid.

If the mortgage is defective, or not properly assigned on the record, as you said, then it affects the enforceability of the lien, not the quality of title to your property.

However, if you received written notice from Bank of America that they are the holders of your mortgage and you were able to verify that with MERS, you won't be able to argue you don't have pay Bank of America simply because the assignment is not recorded. You see the purpose for recording the assignment is to notify third parties. You're a party to the transaction, not a third party, and if you have actual knowledge of the assignment, you must pay Bank of America. I should also add that in my experience, should Bank of America initiate a mortgage foreclosure action against, they will record the assignment right before they file the complaint.

A Securitization Audit I had performed concludes that the Chain of Title has been broken. The original Lender was Countrywide. I could be facing foreclosure soon. I would like to file a Quiet Title Action as I am confident that Bank of America and/or MERS shall not be able to provide an original copy of the Promissory Note with all of the indorsements required under California law.

No, you would not be able to prevail under current California law.

Nonjudicial foreclosure under deeds of trust is governed by California Civil Code section 2924 et seq., not the Commercial Code, which governs negotiable instruments. California law does not require that the original note be in possession of the party initiating non-judicial foreclosure. See Civil Code § 2924. Only copies are required within 21 days of an adequate request. Civil Code § 2943(b)(1). Nothing in the comprehensive scheme set forth in Civil Code section 2924, et seq., allows a judicial action to determine whether the person initiating the foreclosure process is indeed authorized. See *Gomes v. Countrywide Home Loans, Inc., et al.* (2011) 192 Cal. App.4th 1149 (review denied). The Fourth District Court of Appeal confirmed that the statutory scheme does not provide for a preemptive suit challenging standing. *Robinson v. Countrywide Home Loans, Inc.* (Sept. 12, 2011) Slip Opinion at 7.

Further, a plaintiff cannot challenge a foreclosure on the basis that MERS is involved, if that borrower expressly agreed in the deed of trust that MERS was a party. (Gomes, supra, 192 Cal. App. 4th at 1157.)

In short, the "produce the note" or "show me the note" theory has been uniformly rejected. Production of the original note is not required to proceed with a nonjudicial foreclosure. (*Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1155; *Gamboa v. Trustee Corps.* (ND Cal. 2009) 2009 WL 656285, at *4; *Putkkuri v. ReconTrust Co.* (SD Cal. 2009) 2009 WL 32567, at *2.)