

NOT A HOLDER IN DUE COURSE?
NOT NECESSARILY A STANDING PROBLEM

By now, all lenders have likely been faced with at least one situation where a borrower alleges that the lender lacked standing to sue on a note because the lender was not the holder of the note. While New Jersey courts have largely eliminated this defense, at least in the post-judgment context (see [here](#)), a recent decision from the Appellate Division reminds us that a lender can have standing to sue even when it is not a holder in due course.

In [Lynx Asset Services, LLC v. Simon Zarour](#), National City Bank loaned defendant \$190,000, and defendant executed a mortgage as security for the note. Thereafter, National City merged with PNC Bank. Sometime later, PNC Bank delivered the original note to Lynx Asset Services, LLC and issued an assignment of the note and mortgage, but did not indorse the assignment. Defendant eventually defaulted on the note and Lynx sued. Defendant admitted that he signed the note and mortgage and that he had stopped paying on the note. He nonetheless argued that Lynx lacked standing to sue because **it did not have a signed assignment. The trial court rejected this claim, and the Appellate Division affirmed**, holding that, although Lynx was not a holder in due course, it nonetheless had standing to sue on the note because it was a non-holder with the rights of a holder.

The Official Comment to the UCC explains what it means to be a nonholder with holder status:

The definition [of a person entitled to enforce an instrument] recognizes that enforcement is not limited to holders. . . It also includes a person in possession of an instrument who is not a holder. *A nonholder in possession of an instrument includes a person that acquired rights of a holder . . . under Section 3-203(a).*

N.J.S.A. 12A:3-301 (emphasis added). In turn, Section 3-203(a) states that a person acquires the rights of a holder upon “transfer” of the instrument, which occurs when the instrument is “delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.” Therefore, like the lender in *Lynx Asset Services*, **a party that receives the original note for the purpose of enforcing that note, has standing to sue under the note.**

In *Bank of New York v. Raftogianis*, 418 N.J. Super. 323, 331-32 (Ch. Div. 2010), the court provided a detailed explanation of what it means to be a nonholder with the rights of a holder under Section 3-203, and how it provides an alternate route to standing:

[Section 301] also provides that an instrument may be enforced by “a nonholder in possession of the instrument who has the rights of a holder.” How does one obtain that status? There are a variety of circumstances where a party may obtain that status. That may occur, by example, where a creditor of a holder acquires an instrument through execution. *More frequently, that status will be created by the “transfer” of the instrument, without negotiation. As already noted, transfer occurs when the instrument is delivered for the purpose of giving the person receiving the instrument the right to enforce it.* The statute also provides that the transfer of the instrument, without negotiation, vests in the transferee the transferor’s right to enforce the instrument. That circumstance can be illustrated by reference to the dispute presented here. The note at issue, as originally drafted, was payable “to the order of” the original lender. The negotiation of the note, in that form, would require endorsement, either to a designated recipient of the note or in blank. The note, however, could be transferred without an endorsement. Assuming the transfer was for the purpose of giving the recipient the ability to enforce the note, the recipient would become a “nonholder in possession with the rights of a holder.” That would require, however, the physical delivery of the note.

Under either of the provisions of N.J.S.A. 12A:3–301 which are at issue here, the person seeking to enforce the note must have possession. That is required to be a holder, and to be a nonholder in possession with the rights of a holder.

Id. at 331-32 (emphasis added).

It is important to keep in mind that being a nonholder with holder status necessarily assumes that the underlying note was not “negotiated” through a properly executed indorsement or allonge. Therefore, establishing that the lender is a nonholder with holder status affords the lender an alternate route to establish standing in situations where there is an issue with the indorsement or allonge of a note.