

# Case Law Successes

Patton v. Diemer, 35 Ohio St. 3d 68; 518 N.E.2d 941; 1988). **A judgment rendered by a court lacking subject matter jurisdiction is void ab initio.** Consequently, the authority to vacate a void judgment is not derived from Ohio R. Civ. P. 60(B), but rather constitutes an inherent power possessed by Ohio courts. I see no evidence to the contrary that this would apply to ALL courts.

“A party lacks standing to invoke the jurisdiction of a court unless he has, in an individual or a representative capacity, **some real interest in the subject matter** of the action. Lebanon Correctional Institution v. Court of Common Pleas 35 Ohio St.2d 176 (1973).

“A party lacks standing to invoke the jurisdiction of a court unless he has, in an individual or a representative capacity, some real interest in the subject matter of an action.” Wells Fargo Bank, v. Byrd, 178 Ohio App.3d 285, 2008-Ohio-4603, 897 N.E.2d 722 (2008). It went on to hold, “If plaintiff has offered no evidence that it owned the note and mortgage when the complaint was filed, it would not be entitled to judgment as a matter of law.”

(The following court case was unpublished and hidden from the public) Wells Fargo, Litton Loan v. Farmer, 867 N.Y.S.2d 21 (2008). **“Wells Fargo does not own the mortgage loan... Therefore, the... matter is dismissed with prejudice.”**

(The following court case was unpublished and hidden from the public) Wells Fargo v. Reyes, 867 N.Y.S.2d 21 (2008). Dismissed with prejudice, Fraud on Court & Sanctions. **Wells Fargo never owned the Mortgage.**

(The following court case was unpublished and hidden from the public) Deutsche Bank v. Peabody, 866 N.Y.S.2d 91 (2008). EquiFirst, when making the loan, violated Regulation Z of the Federal Truth in Lending Act 15 USC §1601 and the Fair Debt Collections Practices Act 15 USC §1692; **“intentionally created fraud in the factum”** and withheld from plaintiff... **“vital information concerning said debt and all of the matrix involved in making the loan”.**

(The following court case was unpublished and hidden from the public) Indymac Bank v. Boyd, 880 N.Y.S.2d 224 (2009). To establish a prima facie case in an action to foreclose a mortgage, the **plaintiff must establish the existence of the mortgage and the mortgage note.** It is the law’s policy to allow only an aggrieved person to bring a lawsuit . . . **A want of “standing to sue,”** in other words, is just another way of saying that this particular plaintiff is not involved in a genuine controversy, and a simple syllogism takes us from there to a “jurisdictional” dismissal:

(The following court case was unpublished and hidden from the public) Indymac Bank v. Bethley, 880 N.Y.S.2d 873 (2009). **The Court is concerned that there may be fraud on the part of plaintiff or at least malfeasance Plaintiff INDYMAC (Deutsche) and must have “standing” to bring this action.**

(The following court case was unpublished and hidden from the public) Deutsche Bank National Trust Co v. Torres, NY Slip Op 51471U (2009). That “the dead cannot be sued” is a well established principle of the jurisprudence of this state plaintiff’s second cause of action for declaratory relief is denied. To be entitled to a default judgment, the movant must establish, among other things, the existence of facts which give rise to viable claims against the defaulting defendants. “The doctrine of ultra vires is a most powerful weapon to keep private corporations within their legitimate spheres and punish them for violations of their corporate charters, and it

probably is not invoked too often... “Zinc Carbonate Co. v. First National Bank, 103 Wis. 125, 79 NW 229 (1899). Also see: American Express Co. v. Citizens State Bank, 181 Wis. 172, 194 NW 427 (1923).

(The following court case was unpublished and hidden from the public) Wells Fargo v. Reyes, 867 N.Y.S.2d 21 (2008). Case dismissed with prejudice, fraud on the Court and Sanctions because Wells Fargo never owned the Mortgage.

(The following court case was unpublished and hidden from the public) Wells Fargo, Litton Loan v. Farmer, 867 N.Y.S.2d 21 (2008). Wells Fargo does not own the mortgage loan. “Indeed, no more than (affidavits) is necessary to make the prima facie case.” United States v. Kis, 658 F.2d, 526 (7th Cir. 1981).

(The following court case was unpublished and hidden from the public) Indymac Bank v. Bethley, 880 N.Y.S.2d 873 (2009). The Court is concerned that there may be fraud on the part of plaintiff or at least malfeasance Plaintiff INDYMAC (Deutsche) and must have “standing” to bring this action.

Lawyer responsible for false debt collection claim Fair Debt Collection Practices Act, 15 USCS §§ 1692-1692o, Heintz v. Jenkins, 514 U.S. 291; 115 S. Ct. 1489, 131 L. Ed. 2d 395 (1995). and FDCPA Title 15 U.S.C. sub section 1692.

In determining whether the plaintiffs come before this Court with clean hands, the primary factor to be considered is whether the plaintiffs sought to mislead or deceive the other party, not whether that party relied upon plaintiffs’ misrepresentations. Stachnik v. Winkel, 394 Mich. 375, 387; 230 N.W.2d 529, 534 (1975).

“Indeed, no more than (affidavits) is necessary to make the prima facie case.” United States v. Kis, 658 F.2d, 526 (7th Cir. 1981). Cert Denied, 50 U.S. L.W. 2169; S. Ct. March 22, (1982).

“Silence can only be equated with fraud where there is a legal or moral duty to speak or when an inquiry left unanswered would be intentionally misleading.” U.S. v. Tweel, 550 F.2d 297 (1977).

“If any part of the consideration for a promise be illegal, or if there are several considerations for an unseverable promise one of which is illegal, the promise, whether written or oral, is wholly void, as it is impossible to say what part or which one of the considerations induced the promise.” Menominee River Co. v. Augustus Spies L & C Co., 147 Wis. 559 at p. 572; 132 NW 1118 (1912).

Federal Rule of Civil Procedure 17(a)(1) which requires that “[a]n action must be prosecuted in the name of the real party in interest.” See also, In re Jacobson, 402 B.R. 359, 365-66 (Bankr. W.D. Wash. 2009); In re Hwang, 396 B.R. 757, 766-67 (Bankr. C.D. Cal. 2008).

Mortgage Electronic Registration Systems, Inc. v. Chong, 824 N.Y.S.2d 764 (2006). MERS did not have standing as a real party in interest under the Rules to file the motion... The declaration also failed to assert that MERS, FMC Capital LLC or Homecomings Financial, LLC held the Note.

Landmark National Bank v. Kesler, 289 Kan. 528, 216 P.3d 158 (2009). “Kan. Stat. Ann. § 60-260(b) allows relief from a judgment based on mistake, inadvertence, surprise, or excusable neglect; newly discovered evidence that could not have been timely discovered with due diligence; fraud or misrepresentation; a void judgment; a judgment that has been satisfied, released, discharged, or is no longer equitable; or any other reason justifying relief from the operation of the judgment. The relationship that the registry had to the bank was more

akin to that of a straw man than to a party possessing all the rights given a buyer.” Also In September of 2008, A California Judge ruling against MERS concluded, “There is no evidence before the court as to who is the present owner of the Note. The holder of the Note must join in the motion.”

LaSalle Bank v. Ahearn, 875 N.Y.S.2d 595 (2009). Dismissed with prejudice. Lack of standing.  
Novastar Mortgage, Inc v. Snyder 3:07CV480 (2008). Plaintiff has the burden of establishing its standing. It has failed to do so.

DLJ Capital, Inc. v. Parsons, CASE NO. 07-MA-17 (2008). A genuine issue of material fact existed as to whether or not appellee was the real party in interest as there was no evidence on the record of an assignment. Reversed for lack of standing.

Everhome Mortgage Company v. Rowland, No. 07AP-615 (Ohio 2008). Mortgagee was not the real party in interest pursuant to Rule 17(a). Lack of standing.

In Lambert v. Firststar Bank, 83 Ark. App. 259, 127 S.W. 3d 523 (2003), complying with the Statutory Foreclosure Act does not insulate a financial institution from liability and does not prevent a party from timely asserting any claims or defenses it may have concerning a mortgage foreclosure A.C.A. §18-50-116(d)(2) and violates honest services Title 18 Fraud. Notice to credit reporting agencies of overdue payments/foreclosure on a fraudulent debt is defamation of character and a whole separate fraud.

A Court of Appeals does not consider assertions of error that are unsupported by convincing legal authority or argument, unless it is apparent without further research that the argument is well taken. FRAUD is a point well taken! Lambert Supra.

No lawful consideration tendered by Original Lender and/or Subsequent Mortgage and/or Servicing Company to support the alleged debt. “A lawful consideration must exist and be tendered to support the Note” and demand under TILA full disclosure of any such consideration. Anheuser-Busch Brewing Company v. Emma Mason, 44 Minn. 318, 46 N.W. 558 (1890).

“It has been settled beyond controversy that a national bank, under Federal law, being limited in its power and capacity, cannot lend its credit by nor guarantee the debt of another. All such contracts being entered into by its officers are ultra vires and not binding upon the corporation.” It is unlawful for banks to loan their deposits. Howard & Foster Co. vs. Citizens National Bank, 133 S.C. 202, 130 S.E. 758 (1926),

“Neither, as included in its powers not incidental to them, is it a part of a bank’s business to lend its credit. If a bank could lend its credit as well as its money, it might, if it received compensation and was careful to put its name only to solid paper, make a great deal more than any lawful interest on its money would amount to. If not careful, the power would be the mother of panics . . . Indeed, lending credit is the exact opposite of lending money, which is the real business of a bank, for while the latter creates a liability in favor of the bank, the former gives rise to a liability of the bank to another. I Morse. Banks and Banking 5th Ed. Sec 65; Magee, Banks and Banking, 3rd Ed. Sec 248.” American Express Co. v. Citizens State Bank, 181 Wis. 172, 194 NW 427 (1923). I demand under TILA full disclosure and proof to the contrary.

UCC § 2-106(4) “Cancellation” occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of “termination” except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance.

“There is no doubt but what the law is that a national bank cannot lend its credit or become an accommodation endorser.” National Bank of Commerce v. Atkinson, 55 F. 465; (1893).

National Banks and/or subsidiary Mortgage companies cannot retain the note, “Among the assets of the state bank were two notes, secured by mortgage, which could not be transferred to the new bank as assets under the National Banking Laws. National Bank Act, Sect 28 & 56” *National Bank of Commerce v. Atkinson*, 8 Kan. App. 30, 54 P. 8 (1898).

“A bank can lend its money, but not its credit.” *First Nat’l Bank of Tallapoosa v. Monroe*, 135 Ga 614, 69 S.E. 1123 (1911).

It is not necessary for rescission of a contract that the party making the misrepresentation should have known that it was false, but recovery is allowed even though misrepresentation is innocently made, because it would be unjust to allow one who made false representations, even innocently, to retain the fruits of a bargain induced by such representations.” *Whipp v. Iverson*, 43 Wis. 2d 166, 168 N.W.2d 201 (1969).

“A bank is not the holder in due course upon merely crediting the depositors account.” *Bankers Trust v. Nagler*, 23 A.D.2d 645, 257 N.Y.S.2d 298 (1965).

“Any conduct capable of being turned into a statement of fact is representation. There is no distinction between misrepresentations effected by words and misrepresentations effected by other acts.” (The seller or lender) “He is liable, not upon any idea of benefit to himself, but because of his wrongful act and the consequent injury to the other party.” *Leonard v. Springer*, 197 Ill 532. 64 NE 299 (1902).

“If any part of the consideration for a promise be illegal, or if there are several considerations for an unseverable promise one of which is illegal, the promise, whether written or oral, is wholly void, as it is impossible to say what part or which one of the considerations induced the promise.” *Menominee River Co. v. Augustus Spies L & C Co.*, 147 Wis. 559 at p. 572; 132 NW 1118 (1912).

“The contract is void if it is only in part connected with the illegal transaction and the promise single or entire.” *Guardian Agency v. Guardian Mut. Savings Bank*, 227 Wis. 550, 279 NW 79 (1938).

“It is not necessary for rescission of a contract that the party making the misrepresentation should have known that it was false, but recovery is allowed even though misrepresentation is innocently made, because it would be unjust to allow one who made false representations, even innocently, to retain the fruits of a bargain induced by such representations.” *Whipp v. Iverson*, 43 Wis.2d 166, 279 N.W. 79 (1938).

In a Debtor’s RICO action against its creditor, alleging that the creditor had collected an unlawful debt, an interest rate (where all loan charges were added together) that exceeded, in the language of the RICO Statute, “twice the enforceable rate.” The Court found no reason to impose a requirement that the Plaintiff show that the Defendant had been convicted of collecting an unlawful debt, running a “loan sharking” operation. The debt included the fact that exaction of a usurious interest rate rendered the debt unlawful and that is all that is necessary to support the Civil RICO action. *Durante Bros. & Sons, Inc. v. Flushing Nat ‘l Bank*, 755 F.2d 239 (1985). Cert. denied, 473 U.S. 906 (1985).

The Supreme Court found that the Plaintiff in a civil RICO action need establish only a criminal “violation” and not a criminal conviction. Further, the Court held that the Defendant need only have caused harm to the Plaintiff by the commission of a predicate offense in such a way as to constitute a “pattern of Racketeering activity.” That is, the Plaintiff need not demonstrate that the Defendant is an organized crime figure, a mobster in the popular sense, or that the Plaintiff has suffered some type of special Racketeering injury; all that the Plaintiff must show is what the Statute specifically requires. The RICO Statute and the civil remedies for its violation are to be liberally construed to affect the congressional purpose as broadly formulated in the Statute. *Sedima, SPRL v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985).

A violation such as not responding to the TILA rescission letter, no matter how technical, it has no discretion with respect to liability. Holding that creditor failed to make material disclosures in connection with loan. Title 15 USCS §1605(c) *Wright v. Mid-Penn Consumer Discount Co.*, 133 B.R. 704 (Pa. 1991).

*Moore v. Mid-Penn Consumer Discount Co.*, Civil Action No. 90-6452 U.S. Dist. LEXIS 10324 (Pa. 1991). The court held that, under TILA's Regulation Z, 12 CFR §226.4 (a), a lender had to expressly notify a borrower that he had a choice of insurer.

*Marshall v. Security State Bank of Hamilton*, 121 B.R. 814 (Ill. 1990) violation of Federal Truth in Lending 15 USCS §1638(a)(9), and Regulation Z. The bank took a security interest in the vehicle without disclosing the security interest.

*Steinbrecher v. Mid-Penn Consumer Discount Co.*, 110 B.R. 155 (Pa. 1990). Mid-Penn violated TILA by not including in a finance charge the debtors' purchase of fire insurance on their home. The purchase of such insurance was a condition imposed by the company. The cost of the insurance was added to the amount financed and not to the finance charge.

*Nichols v. Mid-Penn Consumer Discount Co.*, 1989 WL 46682 (Pa. 1989). Mid-Penn misinformed Nichols in the Notice of Right to Cancel Mortgage.

*McElvany v. Household Finance Realty Corp.*, 98 B.R. 237 (Pa. 1989). debtor filed an application to remove the mortgage foreclosure proceedings to the United States District Court pursuant to 28 USCS §1409. It is strict liability in the sense that absolute compliance is required and even technical violations will form the basis for liability. *Lauletta v. Valley Buick Inc.*, 421 F. Supp. 1036 at 1040 (Pa. 1976).

*Johnson-Allen v. Lomas and Nettleton Co.*, 67 B.R. 968 (Pa. 1986). Violation of Truth-in-Lending Act requirements, 15 USCS §1638(a)(10), required mortgagee to provide a statement containing a description of any security interest held or to be retained or acquired. Failure to disclose.

*Cervantes v. General Electric Mortgage Co.*, 67 B.R. 816 (Pa. 1986). creditor failed to meet disclosure requirements under the Truth in Lending Act, 15 U.S.C.S. § 1601-1667c and Regulation Z of the Federal Reserve Board, 12 CFR §226.1

*McCausland v. GMAC Mortgage Co.*, 63 B.R. 665, (Pa. 1986). GMAC failed to provide information which must be disclosed as defined in the TILA and Regulation Z, 12 CFR §226.1

*Perry v. Federal National Mortgage Corp.*, 59 B.R. 947 (Pa. 1986) the disclosure statement was deficient under the Truth In Lending Act, 15 U.S.C.S. § 1638(a)(9). Defendant Mortgage Co. failed to reveal clearly what security interest was retained.

*Schultz v. Central Mortgage Co.*, 58 B.R. 945 (Pa. 1986). The court determined creditor mortgagor violated the Truth In Lending Act, 15 U.S.C.S. § 1638(a)(3), by its failure to include the cost of mortgage insurance in calculating the finance charge. The court found creditor failed to meet any of the conditions for excluding such costs and was liable for twice the amount of the true finance charge.

*Solis v. Fidelity Consumer Discount Co.*, 58 B.R. 983 (Pa. 1986). Any misgivings creditors may have about the technical nature of the requirements should be addressed to Congress or the Federal Reserve Board, not the courts. Disclosure requirements for credit sales are governed by 15 U.S.C.S. § 1638 12 CFR § 226.8(b), (c). Disclosure requirements for consumer loans are governed by 15 U.S.C.S. § 1639 12 CFR § 226.8(b), (d). A violator of the disclosure requirements is held to a standard of strict liability. Therefore, a plaintiff need not

show that the creditor in fact deceived him by making substandard disclosures. Since Transworld Systems Inc. have not cancelled the security interest and return all monies paid by Ms. Sherrie I. LaForce within the 20 days of receipt of the letter of rescission of October 7, 2009, the lenders named above are responsible for actual and statutory damages pursuant to 15 U.S.C. 1640(a).

Lewis v. Dodge, 620 F.Supp. 135, 138 (D. Conn. 1985);

Porter v. Mid-Penn Consumer Discount Co., 961 F.2d 1066 (3rd Cir. 1992). Porter filed an adversary proceeding against appellant under 15 U.S.C. §1635, for failure to honor her request to rescind a loan secured by a mortgage on her home.

Rowland v. Magna Millikin Bank of Decatur, N.A., 812 F.Supp. 875 (1992) Even technical violations will form the basis for liability. The mortgagors had a right to rescind the contract in accordance with 15 U.S.C. §1635(c).

New Maine Nat. Bank v. Gendron, 780 F.Supp. 52 (1992). The court held that defendants were entitled to rescind loan under strict liability terms of TILA because plaintiff violated TILA's provisions.

Dixon v. S & S Loan Service of Waycross, Inc., 754 F.Supp. 1567 (1990); TILA is a remedial statute, and, hence, is liberally construed in favor of borrowers. The remedial objectives of TILA are achieved by imposing a system of strict liability in favor of consumers when mandated disclosures have not been made. Thus, liability will flow from even minute deviations from the requirements of the statute and the regulations promulgated under it.

Woolfolk v. Van Ru Credit Corp., 783 F.Supp. 724 (1990) There was no dispute as to the material facts that established that the debt collector violated the FDCPA. The court granted the debtors' motion for summary judgment and held that (1) under 15 U.S.C. §1692(e), a debt collector could not use any false, deceptive, or misleading representation or means in connection with the collection of any debt; Unfair Debt Collection Practices Act.

Jenkins v. Landmark Mortg. Corp. of Virginia, 696 F.Supp. 1089 (W.D. Va. 1988). Plaintiff was also misinformed regarding the effects of a rescission. The pertinent regulation states that "when a consumer rescinds a transaction, the security interest giving rise to the right of rescission becomes void and the consumer shall not be liable for any amount, including any finance charge." 12 CFR §226.23(d) (1)..

Laubach v. Fidelity Consumer Discount Co., 686 F.Supp. 504 (E.D. Pa. 1988). monetary damages for the plaintiffs pursuant to the Racketeer Influenced and Corrupt Organization Act, 18 USC §1961. (Count I); the Truth-in-Lending Act, 15 USC §1601.

Searles v. Clarion Mortg. Co., 1987 WL 61932 (E.D. Pa. 1987); Liability will flow from even minute deviations from requirements of the statute and Regulation Z. failure to accurately disclose the property in which a security interest was taken in connection with a consumer credit transaction involving the purchase of residential real estate in violation of 15 USC §1638(a)(9). and 12 CFR §226.18(m).

Dixon v. S & S Loan Service of Waycross, Inc., 754 F.Supp. 1567, 1570 (S.D. Ga. 1990). Congress's purpose in passing the Truth in Lending Act (TILA), 15 USC §1601(a). was to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him. 15 USC §1601(a). TILA is a remedial statute, and, hence, is liberally construed in favor of borrowers.;

Shroder v. Suburban Coastal Corp., 729 F.2d 1371, 1380 (11th Cir. 1984). disclosure statement violated 12 CFR §226.6(a).,

Wright v. Mid-Penn Consumer Discount Co., 133 B.R. 704 (E.D. Pa. 1991) Holding that creditor failed to make

material disclosures in connection with one loan;

*Cervantes v. General Electric Mortgage Co.*, 67 B.R. 816 (E.D. Pa. 1986). The court found that the TILA violations were governed by a strict liability standard, and defendant's failure to reveal in the disclosure statement the exact nature of the security interest violated the TILA.

*Perry v. Federal National Mortgage*, 59 B.R. 947 (E.D. Pa. 1986). Defendant failed to accurately disclose the security interest taken to secure the loan.

*Porter v. Mid-Penn Consumer Discount Co.*, 961 F.2d 1066 (3rd Cir. 1992). Adversary proceeding against appellant under 15 U.S.C. §1635, for failure to honor her request to rescind a loan secured by a mortgage on her home. She was entitled to the equitable relief of rescission and the statutory remedies under 15 U.S.C. §1640 for appellant's failure to rescind upon request.

*Solis v. Fidelity Consumer Discount Co.*, 58 B.R. 983 (Pa. 1986). Any misgivings creditors may have about the technical nature of the requirements should be addressed to Congress or the Federal Reserve Board, not the courts. Disclosure requirements for credit sales are governed by 15 U.S.C.S. § 1638 12 CFR § 226.8(b), (c). Disclosure requirements for consumer loans are governed by 15 U.S.C.S. § 1639 12 CFR § 226.8(b), (d). A violator of the disclosure requirements is held to a standard of strict liability. Therefore, a plaintiff need not show that the creditor in fact deceived him by making substandard disclosures. *Rowland v. Magna Millikin Bank of Decatur, N.A.*, 812 F.Supp. 875 (1992),

Even technical violations will form the basis for liability. The mortgagors had a right to rescind the contract in accordance with 15 U.S.C. §1635(c). *New Maine Nat. Bank v. Gendron*, 780 F.Supp. 52 (D. Me. 1992). The court held that defendants were entitled to rescind loan under strict liability terms of TILA because plaintiff violated TILA's provisions.

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from <http://www.quatloos.com/Q-Forum/viewtopic.php?f=37&t=3827> Legitimate Issues: Where is the Note?  
by Prof on Mon Feb 16, 2009 6:02 pm

## LEGITIMATE ISSUES

The legitimate problems faced by lenders and — to a lesser extent — borrowers include the problems of missing notes and missing endorsements. Some of you may find this article interesting; it will be presented to the UCC Section of the American Bankruptcy Institute at the Annual Meeting in DC in April.

### **WHERE'S THE NOTE, WHO'S THE HOLDER: ENFORCEMENT OF PROMISSORY NOTE SECURED BY REAL ESTATE**

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AMERICAN BANKRUPTCY INSTUTUTE APRIL 3, 2009 WASHINGTON, D.C.

### **WHERE'S THE NOTE, WHO'S THE HOLDER**

#### **INTRODUCTION**

In an era where a very large portion of mortgage obligations have been securitized, by assignment to a trust indenture trustee, with the resulting pool of assets being then sold as mortgage backed securities, foreclosure becomes an interesting exercise, particularly where judicial process is involved. We are all familiar with the securitization process. The steps, if not the process, is simple. A borrower goes to a mortgage lender. The lender finances the purchase of real estate. The borrower signs a note and mortgage or deed of trust. The original lender sells the note and assigns the mortgage to an entity that securitizes the note by combining the note with hundreds or thousands of similar obligation to create a package of mortgage backed securities, which are then sold to investors.

Unfortunately, unless you represent borrowers, the vast flow of notes into the maw of the securitization industry meant that a lot of mistakes were made. When the borrower defaults, the party seeking to enforce the obligation and foreclose on the underlying collateral sometimes cannot find the note. A lawyer sophisticated in this area has speculated to one of the authors that perhaps a third of the notes “securitized” have been lost or destroyed. The cases we are going to look at reflect the stark fact that the unnamed source’s speculation may be well-founded.

### UCC SECTION 3-309

If the issue were as simple as a missing note, UCC §3-309 would provide a simple solution. A person entitled to enforce an instrument which has been lost, destroyed or stolen may enforce the instrument. If the court is concerned that some third party may show up and attempt to enforce the instrument against the payee, it may order adequate protection. But, and however, a person seeking to enforce a missing instrument must be a person entitled to enforce the instrument, and that person must prove the instrument’s terms and that person’s right to enforce the instrument. §3-309 (a)(1) & (b).

### WHO’S THE HOLDER

Enforcement of a note always requires that the person seeking to collect show that it is the holder. A holder is an entity that has acquired the note either as the original payor or transfer by endorsement of order paper or physical possession of bearer paper. These requirements are set out in Article 3 of the Uniform Commercial Code, which has been adopted in every state, including Louisiana, and in the District of Columbia. Even in bankruptcy proceedings, State substantive law controls the rights of note and lien holders, as the Supreme Court pointed out almost forty (40) years ago in *United States v. Butner*, 440 U.S. 48, 54-55 (1979).

However, as Judge Bufford has recently illustrated, in one of the cases discussed below, in the bankruptcy and other federal courts, procedure is governed by the Federal Rules of Bankruptcy and Civil Procedure. And, procedure may just have an impact on the issue of “who,” because, if the holder is unknown, pleading and standing issues arise.

### BRIEF REVIEW OF UCC PROVISIONS

Article 3 governs negotiable instruments – it defines what a negotiable instrument is and defines how ownership of those pieces of paper is transferred. For the precise definition, see § 3-104(a) (“an unconditional promise or order to pay a fixed amount of money, with or without interest . . . .”) The instrument may be either payable to order or bearer and payable on demand or at a definite time, with or without interest.

Ordinary negotiable instruments include notes and drafts (a check is a draft drawn on a bank). See § 3-104(e).

Negotiable paper is transferred from the original payor by negotiation. §3-301. “Order paper” must be endorsed; bearer paper need only be delivered. §3-305. However, in either case, for the note to be enforced, the person who asserts the status of the holder must be in possession of the instrument. See UCC § 1-201 (20) and comments.

The original and subsequent transferees are referred to as holders. Holders who take with no notice of defect or default are called “holders in due course,” and take free of many defenses. See §§ 3-305(b).

The UCC says that a payment to a party “entitled to enforce the instrument” is sufficient to extinguish the obligation of the person obligated on the instrument. Clearly, then, only a holder – a person in possession of a note endorsed to it or a holder of bearer paper – may seek satisfaction or enforce rights in collateral such as real estate.



NOTE: Those of us who went through the bank and savings and loan collapse of the 1980's are familiar with these problems. The FDIC/FSLIC/RTC sold millions of notes secured and unsecured, in bulk transactions. Some notes could not be found and enforcement sometimes became a problem. Of course, sometimes we are forced to repeat history. For a recent FDIC case, see *Liberty Savings Bank v. Redus*, 2009 WL 41857 (Ohio App. 8 Dist.), January 8, 2009.

## THE RULES

Judge Bufford addressed the rules issue this past year. See *In re Hwang*, 396 B.R. 757 (Bankr. C. D. Cal. 2008). First, there are the pleading problems that arise when the holder of the note is unknown. Typically, the issue will arise in a motion for relief from stay in a bankruptcy proceeding.

According to F.R.Civ. Pro. 17, “[a]n action must be prosecuted in the name of the real party in interest.” This rule is incorporated into the rules governing bankruptcy procedure in several ways. As Judge Bufford has pointed out, for example, in a motion for relief from stay, filed under F.R.Bankr.Pro. 4001 is a contested matter, governed by F. R. Bankr. P. 9014, which makes F.R. Bankr. Pro. 7017 applicable to such motions. F.R. Bankr. P. 7017 is, of course, a restatement of F.R. Civ. P. 17. In *re Hwang*, 396 B.R. at 766. The real party in interest in a federal action to enforce a note, whether in bankruptcy court or federal district court, is the owner of a note. (In securitization transactions, this would be the trustee for the “certificate holders.”) When the actual holder of the note is unknown, it is impossible – not difficult but impossible – to plead a cause of action in a federal court (unless the movant simply lies about the ownership of the note). Unless the name of the actual note holder can be stated, the very pleadings are defective.

## STANDING

Often, the servicing agent for the loan will appear to enforce the note. Assume that the servicing agent states that it is the authorized agent of the note holder, which is “Trust Number 99.” The servicing agent is certainly a party in interest, since a party in interest in a bankruptcy court is a very broad term or concept. See, e.g., *Greer v. O'Dell*, 305 F.3d 1297, 1302-03 (11th Cir. 2002). However, the servicing agent may not have standing: “Federal Courts have only the power authorized by Article III of the Constitutions and the statutes enacted by Congress pursuant thereto. ... [A] plaintiff must have Constitutional standing in order for a federal court to have jurisdiction.” In *re Foreclosure Cases*, 521 F.Supp. 3d 650, 653 (S.D. Ohio, 2007) (citations omitted).

But, the servicing agent does not have standing, for only a person who is the holder of the note has standing to enforce the note. See, e.g., *In re Hwang*, 2008 WL 4899273 at 8.

The servicing agent may have standing if acting as an agent for the holder, assuming that the agent can both show agency status and that the principle is the holder. See, e.g., *In re Vargas*, 396 B.R. 511 (Bankr. C.D. Cal. 2008) at 520.

## A BRIEF ASIDE: WHO IS MERS?

For those of you who are not familiar with the entity known as MERS, a frequent participant in these foreclosure proceedings:

MERS is the “Mortgage Electronic Registration System, Inc. “MERS is a mortgage banking ‘utility’ that registers mortgage loans in a book entry system so that ... real estate loans can be bought, sold and securitized, just like Wall Street’s book entry utility for stocks and bonds is the Depository Trust and Clearinghouse.” Bastian, “Foreclosure Forms”, State. Bar of Texas 17th Annual Advanced Real Estate Drafting Course, March 9-10, 2007, Dallas, Texas. MERS is enormous. It originates thousands of loans daily and is the mortgagee of record for at least 40 million mortgages and other security documents. *Id.*

MERS acts as agent for the owner of the note. Its authority to act should be shown by an agency agreement. Of course, if the owner is unknown, MERS cannot show that it is an authorized agent of the owner.

#### RULES OF EVIDENCE – A PRACTICAL PROBLEM

This structure also possesses practical evidentiary problems where the party asserting a right to foreclose must be able to show a default. Once again, Judge Bufford has addressed this issue. At *In re Vargas*, 396 B.R. at 517-19. Judge Bufford made a finding that the witness called to testify as to debt and default was incompetent. All the witness could testify was that he had looked at the MERS computerized records. The witness was unable to satisfy the requirements of the Federal Rules of Evidence, particularly Rule 803, as applied to computerized records in the Ninth Circuit. See *id.* at 517-20. The low level employee could really only testify that the MERS screen shot he reviewed reflected a default. That really is not much in the way of evidence, and not nearly enough to get around the hearsay rule.

#### FORECLOSURE OR RELIEF FROM STAY

In a foreclosure proceeding in a judicial foreclosure state, or a request for injunctive relief in a non-judicial foreclosure state, or in a motion for relief proceeding in a bankruptcy court, the courts are dealing with and writing about the problems very frequently.

In many if not almost all cases, the party seeking to exercise the rights of the creditor will be a servicing company. Servicing companies will be asserting the rights of their alleged principal, the note holder, which is, again, often going to be a trustee for a securitization package. The mortgage holder or beneficiary under the deed of trust will, again, very often be MERS.

Even before reaching the practical problem of debt and default, mentioned above, the moving party must show that it holds the note or (1) that it is an agent of the holder and that (2) the holder remains the holder. In addition, the owner of the note, if different from the holder, must join in the motion.

Some states, like Texas, have passed statutes that allow servicing companies to act in foreclosure proceedings as a statutorily recognized agent of the noteholder. See, e.g., Tex. Prop. Code §51.0001. However, that statute refers to the servicer as the last entity to whom the debtor has been instructed to make payments. This status is certainly open to challenge. The statute certainly provides nothing more than prima facie evidence of the ability of the servicer to act. If challenged, the servicing agent must show that the last entity to communicate instructions to the debtor is still the holder of the note. See, e.g., *HSBC Bank, N.A. v. Valentin*, 21 N.Y. Misc. 3d 1123(A), 2008 WL 4764816 (Table) (N.Y. Sup.), Nov. 3, 2008. In addition, such a statute does not control in federal court where Fed. R. Civ. P. 17 and 19 (and Fed. R. Bankr. P. 7017 and 7019) apply.

#### SOME RECENT CASE LAW

These cases are arranged by state, for no particular reason. Massachusetts *In re Schwartz*, 366 B.R.265 (Bankr. D. Mass. 2007)

*Schwartz* concerns a Motion for Relief to pursue an eviction. Movant asserted that the property had been foreclosed upon prior to the date of the bankruptcy petition. The pro se debtor asserted that the Movant was required to show that it had authority to conduct the sale. Movant, and “the party which appears to be the current mortgagee...” provided documents for the court to review, but did not ask for an evidentiary hearing. Judge Rosenthal sifted through the documents and found that the Movant and the current mortgagee had failed to prove that the foreclosure was properly conducted.

Specifically, Judge Rosenthal found that there was no evidence of a proper assignment of the mortgage prior to foreclosure. However, at footnote 5, *Id.* at 268, the Court also finds that there is no evidence that the note itself was assigned and no evidence as to who the current holder might be.

*Nosek v. Ameriquest Mortgage Company (In re Nosek)*, 286 Br. 374 (Bankr D Mass. 2008).

Almost a year to the day after Schwartz was signed, Judge Rosenthal issued a second opinion. This is an opinion on an order to show cause. Judge Rosenthal specifically found that, although the note and mortgage involved in the case had been transferred from the originator to another party within five days of closing, during the five years in which the chapter 13 proceeding was pending, the note and mortgage and associated claims had been prosecuted by Ameriquest which has represented itself to be the holder of the note and the mortgage. Not until September of 2007 did Ameriquest notify the Court that it was merely the servicer. In fact, only after the chapter 13 bankruptcy had been pending for about three years was there even an assignment of the servicing rights. *Id.* at 378.

Because these misrepresentations were not simple mistakes: as the Court has noted on more than one occasion, those parties who do not hold the note of mortgage do not service the mortgage do not have standing to pursue motions for leave or other actions arising from the mortgage obligation. *Id.* at 380.

As a result, the Court sanctioned the local law firm that had been prosecuting the claim \$25,000. It sanctioned a partner at that firm an additional \$25,000. Then the Court sanctioned the national law firm involved \$100,000 and ultimately sanctioned Wells Fargo \$250,000. *Id.* at 382-386.

*In re Hayes*, 393 B.R. 259 (Bankr. D. Mass. 2008).

Like Judge Rosenthal, Judge Feeney has attacked the problem of standing and authority head on. She has also held that standing must be established before either a claim can be allowed or a motion for relief be granted.

Ohio

*In re Foreclosure Cases*, 521 F.Supp. 2d (S.D. Ohio 2007).

Perhaps the District Court's orders in the foreclosure cases in Ohio have received the most press of any of these opinions. Relying almost exclusively on standing, the Judge Rose has determined that a foreclosing party must show standing. "[I]n a foreclosure action, the plaintiff must show that it is the holder of the note and the mortgage at the time that the complaint was filed." *Id.* at 653.

Judge Rose instructed the parties involved that the willful failure of the movants to comply with the general orders of the Court would in the future result in immediate dismissal of foreclosure actions.

*Deutsche Bank Nat'l Trust Co. v. Steele*, 2008 WL 111227 (S.D. Ohio) January 8, 2008.

In *Steele*, Judge Abel followed the lead of Judge Rose and found that Deutsche Bank had filed evidence in support of its motion for default judgment indicating that MERS was the mortgage holder. There was not sufficient evidence to support the claim that Deutsche Bank was the owner and holder of the note as of that date. Following *In re Foreclosure Cases*, 2007 WL 456586, the Court held that summary judgment would be denied "until such time as Deutsche Bank was able to offer evidence showing, by a preponderance of evidence, that it owned the note and mortgage when the complaint was filed." 2008 WL 111227 at 2. Deutsche Bank was given twenty-one days to comply. *Id.*

*Illinois U.S. Bank, N.A. v. Cook*, 2009 WL 35286 (N.D. Ill. January 6, 2009).

Not all federal district judges are as concerned with the issues surrounding the transfer of notes and mortgages. *Cook* is a very pro lender case and, in an order granting a motion for summary judgment, the Court found that Cook had shown no "countervailing evidence to create a genuine issue of facts." *Id.* at 3. In fact, a review of the evidence submitted by U.S. Bank showed only that it was the alleged trustee of the securitization pool. U.S. Bank relied exclusively on the "pooling and serving agreement" to show that it was the holder of the note. *Id.* Under UCC Article 3, the evidence presented in *Cook* was clearly insufficient.

## New York

HSBC Bank USA, N.A. v. Valentin, 21 Misc. 3D 1124(A), 2008 WL 4764816 (Table) (N.Y. Sup.) November 3, 2008. In Valentin, the New York court found that, even though given an opportunity to, HSBC did not show the ownership of debt and mortgage. The complaint was dismissed with prejudice and the “notice of pendency” against the property was cancelled.

Note that the Valentin case does not involve some sort of ambush. The Court gave every HSBC every opportunity to cure the defects the Court perceived in the pleadings.

## California

In re Vargas, 396 B.R. 511 (Bankr. C.D. Cal. 2008)

and

In re Hwang, 396 B.R. 757 (Bankr. C.D. Cal. 2008)

These two opinions by Judge Bufford have been discussed above. Judge Bufford carefully explores the related issues of standing and ownership under both federal and California law.

Texas In re Parsley, 384 B.R. 138 (Bankr. S.D. Tex. 2008) and In re Gilbreath, 395 B.R. 356 (Bankr. S.D. Tex. 2008)

These two recent opinions by Judge Jeff Bohm are not really on point, but illustrate another thread of cases running through the issues of motions for relief from stay in bankruptcy court and the sloppiness of loan servicing agencies. Both of these cases involve motions for relief that were not based upon fact but upon mistakes by servicing agencies. Both opinions deal with the issue of sanctions and, put simply, both cases illustrate that Judge Bohm (and perhaps other members of the bankruptcy bench in the Southern District of Texas) are going to be very strict about motions for relief in consumer cases.

## SUMMARY

The cases cited illustrate enormous problems in the loan servicing industry. These problems arise in the context of securitization and illustrate the difficulty of determining the name of the holder, the assignee of the mortgage, and the parties with both the legal right under Article 3 and the standing under the Constitution to enforce notes, whether in state court or federal court.

Interestingly, with the exception of Judge Bufford and a few other judges, there has been less than adequate focus upon the UCC title issues. The next round of cases may and should focus upon the title to debt instrument. The person seeking to enforce the note must show that:

(1) It is the holder of this note original by transfer, with all necessary rounds; (2) It had possession of the note before it was lost; (3) If it can show that title to the note runs to it, but the original is lost or destroyed, the holder must be prepared to post a bond; (4) If the person seeking to enforce is an agent, it must show its agency status and that its principal is the holder of the note (and meets the above requirements).

Then, and only then, do the issues of evidence of debt and default and assignment of mortgage rights become relevant.

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