Defective Foreclosure Documents – Who Has the Note and Why Does It Matter

Pennsylvania Legal Aid Network/Pennsylvania Housing Finance Agency
Statewide Mortgage Foreclosure Training
December 7, 2010

Defective Foreclosure Documents/Who Has the Note & Why Does It Matter?

Case Summaries

Case Summaries

In re Weisband (Bankr. D.AZ, 4/1/10)

Court found that GMAC lacked standing to bring motion for relief from stay.
Very detailed discussion of parties involved in securitization.
Very detailed discussion of UCC issues.
GMAC was not "holder", allonge was not properly affixed to Note, etc.

U.S. Bank v. Emmanuael (NY, Kings Co. 5/11/10)

Court denied Plaintiff's motion for alternate service & dismissed complaint
Assignment was executed by employee of Plaintiff's attorney
MERS assignment of mortgage null bec Note not also assigned

U.S. Bank v. Gonzalez (NY, Kings Co. 6/8/10)

Court ordered $10,000 sanctions against Plaintiff
Plaintiff named in complaint was a different trust than id'd in most recent assignment of mortgage; Plaintiff proceeded with litigation anyway

Bank of New York v. Raftogianis (NJ, Atlantic Co., 6/29/10)

Court denied summary judgment for forecl Plaintiff and scheduled hearing on ownership of note

Duetsche Bank v. Smith (Pa., Delaware Co., 7/22/10)

Court granted summary judgment for forecl Plaintiff.
Court found irrelevant break in assignment chain w/in the securitization

HSBC Bank v. Thompson (OH Appeals, 9/3/10)

Lower court granted defendant's sum judg motion, dismissed forecl case w/o pre.
Appeals court upheld
Plaintiff did not prove it owned the Note & Mortgage, its affidavit was stricken
* Affidavit by Plaintiff was by a person in Fla but notarized in NJ
Discussed whether P needed assignment before filing, but didn't decide
Discussed validity of allonges to Note, incl lack of dates, attachment to Note

Kemp v. Countrywide (Bankr. D.N.J., 11/16/10)

Bankr filed 5/9/08
Proof of claim filed by Countrywide Home Loans, Inc. as servicer for Bank of New York
Court found that Bank of New York could not enforce the claim because (1) Bank of New York never had possession of the Note and therefore under New Jersey UCC, could not enforce it; (2) The Note was never properly indorsed to the new owner upon sale of the loan to Bank of New York.

"Even if the newly executed allonge is recognized as a valid indorsement of the note... the Bank of New York does not qualify as a holder, because it never came into possession of the note." pg. 15.

Where Is the Note & Why Does It Matter?
Dec. 7, 2010
Pennsylvania Legal Aid Network/Pennsylvania Housing Finance Agency
Statewide Mortgage Foreclosure Training

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Introduction: Falsely-executed documents in the media

See for more information:
Congressional Oversight Panel Report Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation
http://cop.senate.gov/documents/cop-111610-report.pdf

I. Securitization & transfers of ownership of loans

A. The parties
- Sponsor
- Originator(s)
- Seller
- Depositor
- Trust ("SPV" – Special Purpose Vehicle)

B. The contracts

- Prospectus Supplement (Form 424B5)
  - Representations to potential investors
- Pooling & Servicing Agreement
- Trust Agreement
  - Contracts among Depositor, Seller, Servicer, Trustee

C. How to find the contracts via the SEC

D. What the contracts say about transfers
(See examples in materials)

E. What the relevant law says about transfers

- UCC – Pa., 13 Pa. 3103 et seq.
- New York trust law
- Pa. law re assignments of mortgage

F. Sample assignments

G. Cases

Kemp v. Countrywide

II. Foreclosure in PA

A. Rules of Civil Procedure

1. Set out requirements for pleading, but not the full requirements for a cause of action

2. Rules that apply to foreclosure

Rule 1019: Contents of Pleadings
Rule 1024: Verification
Rule 1147: The Complaint
Rule 2002: Real Party in Interest

3. Note is not specifically required by 1147, but is incorporated indirectly by requirement to aver the default & amount owed

4. Preliminary objections based on failure to attach the Note

5. Answer & New Matter denying standing based on flaws in assignments and demanding proof of possession of Note

6. Response to Summary Judgment Motion

7. Discovery

Where Is The Note & Why Does It Matter?

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Where Is the Note & Why Does It Matter?

I. **Securitization & transfers of ownership of loans**

A. **The parties**

See Testimony of Prof. Adam Levitin

- **Sponsor**
- **Originator(s)**
- **Seller**
- **Depositor**
- **Trust ("SPV" – Special Purpose Vehicle)**

Where Is the Note & Why Does It Matter?

I. Securitization & transfers of ownership of loans

A single loan goes through at least 3 transfers on its way to the trust:

Originator – Seller
(More steps if the sponsor is not also the originator)

Seller – Depositor

Depositor – Trust

I. Securitization & transfers of ownership of loans (continues)

B. The contracts

- Prospectus Supplement (Form 424B5)
  Representations to potential investors
- Pooling & Servicing Agreement
- Trust Agreement
  Contracts among Depositor, Seller, Servicer, Trustee

I. Securitization & transfers of ownership of loans (continues)

C. Finding securitization documents (continues)

- Go to SEC website
- http://www.sec.gov/
- Select Filings & Forms
- Select Search Company Filings
- Select Boolean & Advanced Searches
- Enter name of Trust/Depositor, NOT the Trustee

I. Securitization & transfers of ownership of loans (continues)

C. Finding securitization documents (continues)

- Name of trust from assignment(s) or foreclosure complaint
- For "U.S. Bank National Association as Trustee for Structured Asset Securities Corp. Mortgage Pass-Through Certificates, 2005-SC1"

~ Sufficient:

Structured Asset Securities Corp. 2005-SC1

Structured Asset Securities Corp.

~ Not sufficient:

U.S. Bank as Trustee of 2005 SC1

I. Securitization & transfers of ownership of loans (continues)

D. What the contracts say about transfers

- Documents use several words when referring to the transfer in ownership of the loans and mortgages:
  - ~ assign
  - ~ convey
  - ~ transfer
  - ~ deposit
  - ~ deliver

I. Securitization & transfers of ownership of loans (continues)

E. What the relevant law says about transfers

- UCC – PA., 13 PA. 3103 et seq.
- New York trust law
- Pa. law re assignments of mortgage

What is an assignment of mortgage?

Transfer of interest in real estate?

Transfer of security interest?

Who has authority to execute an assignment of mortgage?

F. Sample assignments
(see hand outs)

I. Securitization & transfers of ownership of loans (continues)

G. Cases

- Kemp v. Countrywide
  - Proof of claim filed by Countrywide Home Loans, Inc. as servicer for Bank of New York
  - Court found that Bank of New York could not enforce the claim because
    1. Bank of New York never had possession of the Note and therefore under New Jersey UCC, could not enforce it;
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3. Note is not specifically required by 1147, but is incorporated indirectly by requirement to aver the default & amount owed
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GEORGETOWN UNIVERSITY LAW CENTER

Adam J. Levitin
Associate Professor of Law

Written Testimony of

Adam J. Levitin
Associate Professor of Law
Georgetown University Law Center

Before the
Senate Committee on Banking, Housing, and Urban Affairs

"Problems in Mortgage Servicing from Modification to Foreclosure"

November 16, 2010
2:30 pm

Witness Background Statement

Adam J. Levitin in an Associate Professor of Law at the Georgetown University Law Center, in Washington, D.C., and Robert Zinman Scholar in Residence at the American Bankruptcy Institute. He also serves as Special Counsel to the Congressional Oversight Panel, and has been the Robert Zinman Scholar in Residence at the American Bankruptcy Institute.

Before joining the Georgetown faculty, Professor Levitin practiced in the Business Finance & Restructuring Department of Weil, Gotshal & Manges, LLP in New York, and served as law clerk to the Honorable Jane R. Roth on the United States Court of Appeals for the Third Circuit.

Professor Levitin holds a J.D. from Harvard Law School, an M.Phil and an A.M. from Columbia University, and an A.B. from Harvard College.

Professor Levitin has not received any Federal grants nor has he received any compensation in connection with his testimony. The views expressed in Professor Levitin's testimony are his own and do not represent the positions of the Congressional Oversight Panel.

Executive Summary

The mortgage foreclosure process is beset by a variety of problems. These range from procedural defects (including, but not limited to robosigning) to outright counterfeiting of documents to questions about the validity of private-label mortgage securitizations that could mean that these mortgage-backed securities are not actually backed by any mortgages whatsoever. While the extent of these problems is unknown at present, the evidence is mounting that it is not limited to one-off cases, but that there may be pervasive defects throughout the foreclosure and securitization processes.

The problems in the mortgage market are highly technical, but they are extremely serious. At best they present problems of fraud on the court, clouded title to property, and delay in foreclosures that will increase the shadow housing inventory and drive down home prices. At worst, they represent a systemic risk of liabilities in the trillions of dollars, greatly exceeding the capital of the US's major financial institutions.

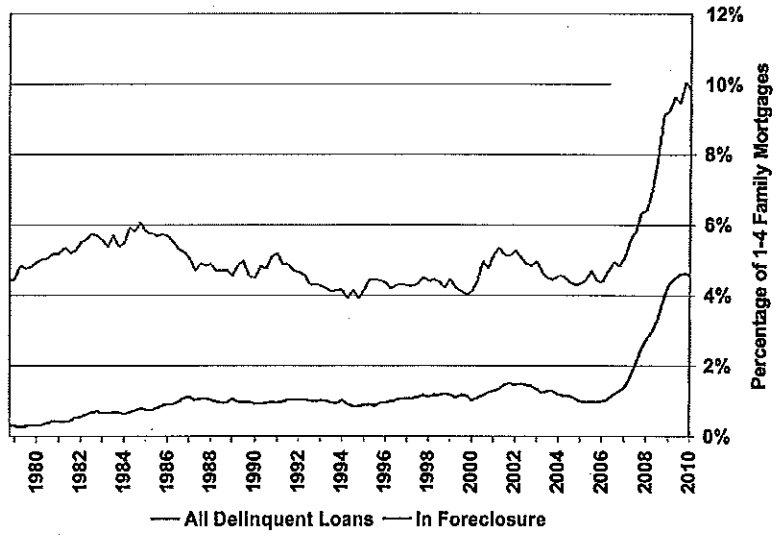
Congress would do well to ensure that federal regulators are undertaking a thorough investigation of foreclosure problems and to consider the possibilities for a global settlement of foreclosure problems, loan modifications, and the housing debt overhang that stagnate the economy and pose potential systemic risk.

Mr. Chairman, Members of the Committee:

Good morning. My name is Adam Levitin. I am an Associate Professor of Law at the Georgetown University Law Center in Washington, D.C., where I teach courses in bankruptcy, commercial law, contracts, and structured finance. I also serve as Special Counsel to the Congressional Oversight Panel for the Troubled Asset Relief Program. The views I express today are my own, however.

We are now well into the fourth year of the foreclosure crisis, and there is no end in sight. Since mid-2007 around eight million homes entered foreclosure,[1] and over three million borrowers lost their homes in foreclosure.[2] As of June 30, 2010, the Mortgage Bankers Association reported that 4.57% of 1-4 family residential mortgage loans (roughly 2.5 million loans) were currently in the foreclosure, process a rate more than quadruple historical averages. (See Figure 1.) Additionally, 9.85% of mortgages (roughly 5 million loans) were at least a month delinquent.[3]

Chart 1: Percentage of 1-4 Family Residential Mortgages in Foreclosure[4]



Private lenders, industry associations, and two successive administrations have made a variety of efforts to mitigate the crisis and encourage loan modifications and refinancings. A series of much hyped initiatives, such as the FHASecure refinancing program and the Hope4Homeowners have all met what can charitably be described as limited success. FHASecure, predicted to help 240,000 homeowners,[5] assisted only a few thousand borrowers before it wound down,[6] while Hope4 Homeowners, originally predicted to help 400,000

[1] HOPE Now Data Reports.
[2] *Id.*
[3] Mortgage Bankers Association, National Delinquency Survey.
[4] Mortgage Bankers Association, National Delinquency Surveys.
[5] *See, e.g.*, Press Release, US Dep't of Housing and Urban Development, Bush Administration to Help Nearly One-Quarter of a Million Homeowners Refinance, Keep Their Homes; FHA to implement new "FHASecure" refinancing product (Aug. 31, 2007), *available at* http://www.hud.gov/news/release.cfm?content=pr07-123.cfm; Press Release, US Dep't of Housing and Urban Development, FHA Helps 400,000 Families Find Mortgage Relief; Refinancing on pace to help half-million homeowners by year's end (Oct. 24, 2008), *available at* http://www.hud.gov/news/release.cfm?content=pr08- 167.cfm.
[6] Michael Corkery, *Mortgage 'Cram-Downs' Loom as Foreclosures Mount*, WALL ST. J:,, Dec. 31, 2008.

homeowners,[7] had closed only 130 refinancings as of September 30, 2010.[8] The Home Affordable Modification (HAMP) has also failed, producing 495,898 permanent modifications through September 2010. This number is likely to be a high water mark for HAMP, as new permanent modifications are decreasing rapidly while defaults on permanent modifications rise; if current trends continue, by year's end the number of active permanent HAMP modifications will actually decline.

A number of events over the past several months have roiled the mortgage world, raising questions about:

(1) Whether there is widespread fraud in the foreclosure process;

(2) Securitization chain of title, namely whether the transfer of mortgages in the securitization process was defective, rendering mortgage-backed securities into *non*-mortgage-backed securities;

(3) Whether the use of the Mortgage Electronic Registration System (MERS) creates legal defects in either the secured status of a mortgage loan or in mortgage assignments;

(4) Whether mortgage servicers' have defaulted on their servicing contracts by charging predatory fees to borrowers that are ultimately paid by investors;

(5) Whether investors will be able to "putback" to banks securitized mortgages on the basis of breaches of representations and warranties about the quality of the mortgages.

These issues are seemingly disparate and unconnected, other than that they all involve mortgages. They are, however, connected by two common threads: the necessity of proving standing in order to maintain a foreclosure action and the severe conflicts of interests between mortgage servicers and MBS investors.

It is axiomatic that in order to bring a suit, like a foreclosure action, the plaintiff must have legal standing, meaning it must have a direct interest in the outcome of the legislation. In the case of a mortgage foreclosure, only the mortgagee has such an interest and thus standing. Many of the issues relating to foreclosure fraud by mortgage servicers, ranging from more minor procedural defects up to outright counterfeiting relate to the need to show standing. Thus problems like false affidavits of indebtedness, false lost note affidavits, and false lost summons affidavits, as well as backdated mortgage assignments, and wholly counterfeited notes, mortgages, and assignments all relate to the evidentiary need to show that the entity bringing the foreclosure action has standing to foreclose.

Concerns about securitization chain of title also go to the standing question; if the mortgages were not properly transferred in the securitization process (including through the use of MERS to record the mortgages), then the party bringing the foreclosure does not in fact own the mortgage and therefore lacks standing to foreclose. If the mortgage was not properly transferred, there are profound implications too for investors, as the mortgage-backed securities they believed they had purchased would, in fact be non-mortgage-backed securities, which would almost assuredly lead investors to demand that their investment contracts be rescinded, thereby exacerbating the scale of mortgage putback claims.

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[7] Dina ElBoghdady, *HUD Chief Calls Aid on Mortgages a Failure*, WASH. POST. Dec. 17, 2008, at A1.

[8] *See* FHA Single Family Outlook, Sept. 2010, *at* http://www.hud.gov/offices/hsg/rmra/oe/rpts/ooe/olcurr.xls - 2010-11-02, Row 263 (note that FHA fiscal years begin in October, so that Fiscal Year 2009 began in October 2008).

Putback claims underscore the myriad conflicts of interest between mortgage servicers and investors. Mortgage servicers are responsible for prosecuting on behalf of MBS investors, violations of representations and warranties in securitization deals. Mortgage servicers are loathe to bring such actions, however, not least because they would often be bringing them against their own affiliates. Servicers' failure to honor their contractual duty to protect investors' interest is but one of numerous problems with servicer conflicts of interest, including the levying of junk fees in foreclosures that are ultimately paid by investors and servicing first lien loans while directly owning junior liens.

Many of the problems in the mortgage securitization market (and thus this testimony) are highly technical, but they are extremely serious.[9] At best they present problems of fraud on the court and questionable title to property. At worst, they represent a systemic risk of liabilities in the trillions of dollars, greatly exceeding the capital of the US's major financial institutions. While understanding the securitization market's problems involves following a good deal of technical issues, it is critical to understand from the get-go that securitization is all about technicalities.

Securitization is the legal apotheosis of form over substance, and if securitization is to work it must adhere to its proper, prescribed form punctiliously. The rules of the game with securitization, as with real property law and secured credit are, and always have been, that dotting "i's" and crossing "t's" matter, in part to ensure the fairness of the system and avoid confusions about conflicting claims to property. Close enough doesn't do it in securitization; if you don't do it right, you cannot ensure that securitized assets are bankruptcy remote and thus you cannot get the ratings and opinion letters necessary for securitization to work. Thus, it is important not to dismiss securitization problems as merely "technical;" these issues are no more technicalities than the borrower's signature on a mortgage. Cutting corners may improve securitization's economic efficiency, but it undermines its legal viability.

Finally, as an initial matter, let me also emphasize that the problems in the securitization world do not affect the whether homeowners owe valid debts or have defaulted on those debts. Those are separate issues about which there is no general controversy, even if debts are disputed in individual cases.[10]

This written testimony proceeds as follows: Part I presents an overview of the structure of the mortgage market, the role of mortgage servicers, the mortgage contract and foreclosure process. Part II presents the procedural problems and fraud issues that have emerged in the mortgage market relating to foreclosures. Part III addresses chain of title concerns. Part IV considers the argument that the problems in foreclosures are mere technicalities being used by deadbeats to delay foreclosure. Part V concludes.

[9] I emphasize, however, that this testimony does not purport to be a complete and exhaustive treatment of the issues involved and that many of the legal issues discussed are not settled law, which is itself part of the problem; trillions of dollars of mortgage securitization transactions have been done without a certain legal basis.

[10] A notable exception, however, is for cases where the default is caused by a servicer improperly force-placing insurance or misapplying a payment, resulting in an inflated loan balance that triggers a homeowner default.

I. BACKGROUND ON SECURITIZATION, SERVICING, AND THE FORECLOSURE PROCESS

A. MORTGAGE SECURITIZATION

Most residential mortgages in the United States are financed through securitization. . Securitization is a financing method involving the issuance of securities against a dedicated cashflow stream, such as mortgage payments, that are isolated from other creditors' claims. Securitization links consumer borrowers with capital market financing, potentially lowering the cost of mortgage capital. It also allows financing institutions to avoid the credit risk, interest rate risk, and liquidity risk associated with holding the mortgages on their own books.

Currently, about 60% of all outstanding residential mortgages by dollar amount are securitized.[11] The share of securitized mortgages by number of mortgages outstanding is much higher because the securitization rate is lower for larger "jumbo" mortgages.[12] Credit Suisse estimates that 75% of outstanding first-lien residential mortgages are securitized.[13] In recent years, over 90% of mortgages originated have been securitized.[14] Most second-lien loans, however, are not securitized.[15]

Although mortgage securitization transactions are extremely complex and vary somewhat depending on the type of entity undertaking the securitization, the core of the transaction is relatively simple.[16]

First, a financial institution (the "sponsor" or "seller") assembles a pool of mortgage loans. The loans were either made ("originated") by an affiliate of the financial institution or purchased from unaffiliated third-party originators. Second, the pool of loans is sold by the sponsor to a special-purpose subsidiary (the "depositor") that has no other assets or liabilities. This is done to segregate the loans from the sponsor's assets and liabilities.[17] Third, the depositor sells the loans to a passive, specially created, single-purpose vehicle (SPV), typically a trust in the case of residential mortgages.[18] The SPV issues certificated securities to raise the funds to pay the depositor for the loans. Most of the securities are debt securities—bonds—but there will also be a security representing the rights to the residual value of the trust or the "equity."

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[11] Inside Mortgage Finance, 2010 Mortgage Market Statistical Annual.

[12] *Id.*

[13] Ivy L. Zelman et al., *Mortgage Liquidity du Jour: Underestimated No More* 28 exhibit 21 (Credit Suisse, Equity Research Report, Mar. 12, 2007).

[14] Inside Mortgage Finance, 2010 Mortgage Market Statistical Annual.

[15] Inside Mortgage Finance, 2010 Mortgage Market Statistical Annual. From 2001-2007, only 14% of second lien mortgages originated were securitized. *Id.* Second lien mortgages create a conflict of interest beyond the scope of this paper. In many cases, second lien loans are owned by financial institutions that are servicing (but do not own) the first lien loan. *See* Hearing Before the House Financial Services Committee, Apr. 13, 2009 "Second Liens and Other Barriers to Principal Reduction as an Effective Foreclosure Mitigation Program" (testimony of Barbara DeSoer, President, Bank of America Home Loans) at 6 (noting that Bank of America owns the second lien mortgage on 15% of the first lien mortgages it services); Hearing Before the House Financial Services Committee, Apr. 13, 2009 "Second Liens and Other Barriers to Principal Reduction as an Effective Foreclosure Mitigation Program" (testimony of David Lowman, CEO for Home Lending, JPMorgan Chase) at 5 (noting that Chase owns the second lien mortgage on around 10% of the first lien mortgages it services). The ownership of the second while servicing the first creates a direct financial conflict between the servicer qua servicer and the servicer qua owner of the second lien mortgage, as the servicer has an incentive to modify the first lien mortgage in order to free up borrower cashflow for payments on the second lien mortgage.

[16] The structure illustrated is for private-label mortgage-backed securities. Ginnie Mae and GSE securitizations are structured somewhat differently. The private-label structure can, of course, be used to securitize any asset, from oil tankers to credit card debt to song catalogues, not just mortgages.

[17] This intermediate entity is not essential to securitization, but since 2002, Statement of Financial Accountings Standards 140 has required this additional step for off-balance-sheet treatment because of the remote possibility that if the originator went bankrupt or into receivership, the securitization would be treated as a secured loan, rather than a sale, and the originator would exercise its equitable right of redemption and reclaim the securitized assets. Deloitte & Touche, *Learning the Norwalk Two-Step*, HEADS UP, Apr. 25, 2001, at 1.

[18] The trustee will then typically convey the mortgage notes and security instruments to a "master document custodian," who manages the loan documentation, while the servicer handles the collection of the loans.

The securities can be sold directly to investors by the SPV or, as is more common, they are issued directly to the depositor as payment for the loans. The depositor then resells the securities, usually through an underwriting affiliate that then places them on the market. (See Figure 2, below.) The depositor uses the proceeds of the securities sale (to the underwriter or the market) to pay the sponsor for the loans. Because the certificated securities are collateralized by the residential mortgage loans owned by the trust, they are called residential mortgage-backed securities (RMBS).

A variety of reasons—credit risk (bankruptcy remoteness), off-balance sheet accounting treatment, and pass-through tax status (typically as a REMIC[19] or grantor trust)—mandate that the SPV be passive; it is little more than a shell to hold the loans and put them beyond the reach of the creditors of the financial institution.[20] Loans, however, need to be managed. Bills must be sent out and payments collected. Thus, a third-party must be brought in to manage the loans.[21] This third party is the servicer. The servicer is supposed to manage the loans for the benefit of the RMBS holders.

Every loan, irrespective of whether it is securitized, has a servicer. Sometimes that servicer is a first-party servicer, such as when a portfolio lender services its own loans. Other times it is a third-party servicer that services loans it does not own. All securitizations involve third-party servicers, but many portfolio loans also have third-party servicers, particularly if they go into default. Third-party servicing contracts for portfolio loans are not publicly available, making it hard to say much about them, including the precise nature of servicing compensation arrangements in these cases or the degree of oversight portfolio lenders exercise over their third-party servicers. Thus, it cannot always be assumed that if a loan is not securitized it is being serviced by the financial institution that owns the loan, but if the loan is securitized, it has third-party servicing.

Securitization divides the beneficial ownership of the mortgage loan from legal title to the loan and from the management of the loans. The SPV (or more precisely its trustee) holds legal title to the loans, and the trust is the nominal beneficial owner of the loans. The RMBS investors are formally creditors of the trust, not owners of the loans held by the trust.

The economic reality, however, is that the investors are the true beneficial owners. The trust is just a pass-through holding entity, rather than an operating company. Moreover, while the trustee has nominal title to the loans for the trust, it is the third-party servicer that typically exercises legal title in the name of the trustee. The economic realities of securitization do not track with its legal formalities; securitization is the apotheosis of legal form over substance, but punctilious respect for formalities is critical for securitization to work.

Mortgage servicers provide the critical link between mortgage borrowers and the SPV and RMBS investors, and servicing arrangements are an indispensable part of securitization.[22] Mortgage servicing has become particularly important with the growth of the securitization market.

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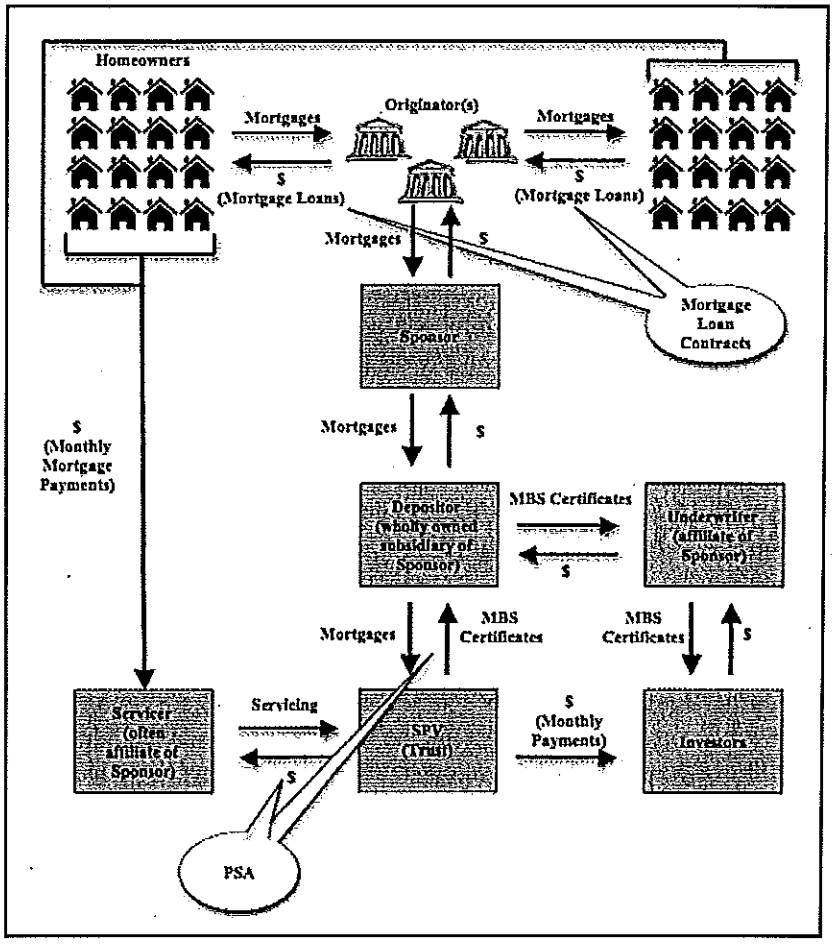
[19] A REMIC is a real estate mortgage investment conduit, as defined under I.R.C. §§ 860A-860G.

[20] *See* Anna Gelpern & Adam J. Levitin, *Rewriting Frankenstein Contracts: Workout Prohibitions in Residential Mortgage Backed Securities*, 82 S. CAL. L. REV. 1075, 1093-98. (2009).

[21] *See* Kurt Eggert, *Limiting Abuse and Opportunism by Mortgage Servicers*, 15 HOUSING POL'Y DEBATE 753, 754 (2004).

[22] The servicing of nonsecuritized loans may also be outsourced. There is little information about this market because it does not involve publicly available contracts and does not show up in standard data.

Figure 2. Private-Label Mortgage Securitization Structure[23]



B. THE MORTGAGE SERVICING BUSINESS[24]

The nature of the servicing business in general militates toward economies of scale and automation. Servicing combines three distinct lines of business: transaction processing, default management, and loss mitigation. Transaction processing is a highly automatable business, characterized by large economies of scale. Default management involves collections and activities related to taking defaulted loans through foreclosure. Like transaction processing, default management can be automated,[25] as it does not require any negotiation with the homeowner, insurers, or junior lienholders.[26]

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[23] *See* ACE Sec. Corp. Home Equity Loan Trust, Series 2006-NC3, Prospectus Supplement (Form 424B5) S-11 (Nov. 21, 2006), *available at* http://www.sec.gov/Archives/edgar/data/1380884/000114420406049985/v058926_424b5.htm.

[24] This section of my testimony comes from Adam J. Levitin & Larry Cordell, *What RMBS Servicing Can Learn from CMBS Servicing*, working paper, November 2010.

[25] *See In re Taylor*, 407 B.R. 618 (Bankr. E.D. Pa. 2009), *rev'd* 2010 WL 624909 (E.D. Pa. 2010).

[26] Arguably servicers have a fourth line of business—the management of real estate owned (REO). REO are foreclosed properties that were not purchased by third-parties at the foreclosure sale. REO management involves caring for and marketing the REO. It does not require negotiations with the homeowner (who is evicted) or junior lienholders (whose liens are generally extinguished by the foreclosure).

Loss mitigation is considered an *alternative to foreclosure*, and includes activities such as repayment plans, loan modifications, short sales and deeds in lieu of foreclosure. Loss mitigation is always a negotiated process and is therefore labor-intensive and expensive. Not only must the homeowner be agreeable to any loss mitigation solution, but so too must mortgage insurers and junior lienholders if they are parties on the loan. Because each negotiation is separate and requires a trained employee, there are very few opportunities for automation or economies of scale. Labor expenses are also considered overhead, which are all non-reimbursable expenses to servicers. And, to the extent that loss mitigation is in the form of a loan modification, redefault and self-cure risk always lurk in the background. Moreover, loss mitigation must generally be conducted in addition to default management; the servicer must proceed with foreclosure even if attempting to find an alternative, so the cost of loss mitigation is additive. Yet, while taking a loan through foreclosure is likely to involve lower costs than pursuing loss mitigation, it may not ultimately maximize value for RMBS investors because loss severities in foreclosure can easily surpass those on a re-performing restructured loan.

The balance between these different parts of a servicer's business changes over the course of the housing cycle. When the housing market is strong, the transaction processing dominates the servicing business, but when the housing market is weak, default management and loss mitigation become more important.

The very short weighted average life (WAL) of RMBS trusts combined with very low defaults in most economic environments encouraged servicers to place disproportionate weight on performing loan servicing, which historically has been characterized by small servicing fees and enormous economies of scale. Thus, on a typical loan balance of $200,000 today, a servicer might earn between $500 and $1,000 per year.[27] Given the low-level of annual income per loan, the short WAL of each loan, and low default rates in most economic environments before 2006, servicers had few incentives to devote resources to loss mitigation, but large incentives to invest in performing loan automation to capture the large economies of scale. This left servicers wholly unprepared for the elevated level of defaults that began in 2007.

C. RMBS Servicer Compensation

RMBS servicers' duties and compensation are set forth in a document called a "Pooling and Servicing" agreement (PSA) also governs the rights of the RMBS certificate holders. RMBS servicers are compensated in four ways. First, they receive a "servicing fee," which is a flat fee of 25—50 basis points (bps) and is a first priority payment in the RMBS trust.[28] This is by far the greatest portion of servicer income. This fee is paid out proportionately across all loans regardless of servicer costs through the economic cycle.

Second, servicers earn "float" income. Servicers generally collect mortgage payments at the beginning of the month, but are not required to remit the payments to the trust until the 25th of the month. In the interim, servicers invest the funds they have collected from the mortgagors, and they retain all investment income. Servicers can also obtain float income from escrow

[27] Servicing fees are generally 25—50 bps, which translates into $500--$1000 per year in servicing fees.

[28] Generally the servicing fee is 25 bps for conventional fixed rate mortgages, 37.5 bps for conventional ARM loans, 44 bps for government loans and 50 bps for subprime.

balances collected monthly from borrowers to pay taxes and insurance during the course of the year.

Third, servicers are generally permitted to retain all ancillary fees they can collect from mortgagors. This includes things like late fees and fees for balance checks or telephone payments. It also includes fees for expenses involved in handling defaulted mortgages, such as inspecting the property. Finally, servicers can hold securities themselves directly as investors, and often hold the junior-most, residual tranche in the securitization.

Servicers face several costs. In addition to the operational expenses of sending out billing statements, processing payments, maintaining account balances and histories, and restructuring or liquidating defaulted loans, private label RMBS servicers face the expense of "servicing advances."[29] When a loan defaults, the servicer is responsible for advancing the missed payments of principal and interest to the trust as well as paying taxes and insurance on the property. They continue to pay clear through liquidation of the property, unless these advances are not deemed recoverable.

The servicer is able to recover advances it has made either from liquidation proceeds or from collections on other loans in the pool, but the RMBS servicer does not receive interest on its advances. Therefore, advances can be quite costly to servicers in terms of the time value of money and can also place major strains on servicers' liquidity, as the obligation to make advances continues until the loan is liquidated or the servicer believes that it is unlikely to be able to recover the advances. In some cases, servicers have to advance years' worth of mortgage payments to the trust.

While RMBS servicers do not receive interest on servicing advances, they are compensated for their "out-of-pocket" expenses. This includes any expenses spent on preserving the collateral property, including force-placed insurance, legal fees, and other foreclosure-related expenses. Large servicers frequently "in-source" default management expenses to their affiliates.

D. Monitoring of RMBS Servicers

RMBS servicing arrangements present a classic principal-agent problem wherein the agent's incentives are not aligned with the principal and the principal has limited ability to monitor or discipline the agent.

1. Investors

Investors are poorly situated to monitor servicer behavior because they do not have direct dealings with the servicer. RMBS investors lack information about servicer loss mitigation activity. Investors do not have access to detailed servicer expense reports or the ability to examine loss mitigation decisions. Investors are able to see only the ultimate outcome. This means that investors are limited in their ability to evaluate servicers' performance on an ongoing

[29] In Agency securities, servicers generally stop advancing after borrowers owe their fifth payment, at 120 days past due. For GSE loans, they are then removed from the securities and taken on balance sheet. Servicer advances for the four payments are typically not reimbursed until termination.

basis. And even if investors were able to detect unfaithful agents, they have little ability to discipline them short of litigation.[30]

2. Trustees

RMBS feature a trustee, but the name is deceptive. The trustee is not a common law trustee with general fiduciary duties. Instead, it is a limited purpose corporate trustee whose duties depend on whether there has been a default as defined UN the PSA. A failure to pay all tranches their regularly scheduled principal and interest payments is *not* an event of default. Instead, default relates to the financial condition of the servicer, whether the servicer has made required advances to the trust, whether the servicer has submitted its monthly report, and whether the servicer has failed to meet any of its covenants under the PSA.

Generally, before there is an event of default, the trustee has a few specifically assigned ministerial duties and no others.[31] These duties are typically transmitting funds from the trust to the RMBS investors and providing investors performance statements based on figures provided by the servicer. The trustee's pre-default duties do *not* include active monitoring of the servicer.

Trustees are generally entitled to rely on servicers' data reporting, and have little obligation to analyze it.[32] Indeed, as Moody's has noted, trustees lack the ability to verify most data reported by servicers; at best they can ensure that the reported data complies with any applicable covenant ratios:

> The trustee is not in a position to verify certain of the numbers reported by the servicer. For example, the amount of delinquent receivables and the amount of receivables charged off in a given month are figures that are taken from the servicer's own computer systems. While these numbers could be verified by an auditor, they are not verifiable by the trustee.[33]

Likewise, as attorney Susan Macaulay has observed, "In most cases, even if the servicer reports are incorrect, or even fraudulent, absent manifest error, the trustee simply has no way of knowing that there is a problem, and must allocate the funds into the appropriate accounts, and make the mandated distributions, in accordance with the servicer reports."[34]

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[30] Investors also arguably lack a strong incentive to care about servicer performance. *See* Levitin & Twomey, *supra* note **Error! Bookmark not defined.** (noting that resecuritization and investor optimism bias means that investors are likely to either be invested only derivatively in subordinated tranches or believe that they have selected a tranche that will be "in-the-money" and therefore unaffected by marginal changes in servicer behavior).

[31] *See, e.g.*, Wells Fargo Mortgage Backed Securities 2006-AR10 Trust § 8.01 ("Prior to the occurrence of an Event of Default of which a Responsible Officer of the Trustee shall have actual knowledge and after the curing of all such Events of Default which may have occurred, the duties and obligations of the Trustee shall be determined solely by the express provisions of this Agreement, the Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth in this Agreement, no implied covenants or obligations shall be read into this Agreement against the Trustee and, in the absence of bad faith on the part of the Trustee, the Trustee may conclusively rely, as to the truth of the statements and the correctness of the opinions expressed therein, upon any certificates or opinions furnished to the Trustee, and conforming to the requirements of this Agreement."). *See also* Moody's Investor Service, Structured Finance Ratings Methodology: Moody's Re-examines Trustees' Role in ABS and RMBS, Feb. 4, 2003, at 4. (noting "Some trustees have argued that their responsibilities are limited to strictly administrative functions as detailed in the transaction documents and that they have no "fiduciary" duty prior to an event of default.").

[32] MBIA Ins. Corp. v. Royal Indem. Co., 519 F. Supp. 2d 455 (2007), *aff'd* 321 Fed. Appx. 146 (3d Cir. 2009) ("Royal argues that Wells Fargo [the trustee] had the contractual obligation to analyze data using certain financial accounting principles and to detect any anomalies that analysis might have uncovered. As Royal suggests, this analysis may not have been very labor-intensive. Yet, the contract did not call for any analysis at all. It simply required Wells Fargo to perform rote comparisons between that data and data contained in various other sources, and to report any numerical inconsistencies. Wells Fargo did just that.").

[33] Moody's Investor Service, *supra* note 31, at 4.

[34] Susan J. Macaulay, *US: The Role of the Securitisation Trustee,* GLOBAL SECURITISATION AND STRUCTURED FINANCE 2004. Macaulay further notes that:

Similarly, trustees usually wait for servicers to notify them of defaults,[35] and Moody's has noted that trustees are often unresponsive to information from third parties indicating that an unreported default might have occurred.[36] Thus, trustees enforce servicer representations and warranties largely on the honor system of servicer self-reporting.

For private-label securities, trustees also lack the incentive to engage in more vigorous monitoring of servicer loss mitigation decisions. The trustee does not get paid more for more vigorous monitoring. The trustee generally has little ability to discipline the servicer except for litigation. Private-label RMBS trustees have almost no ability to fire or discipline a servicer. Servicers can only be dismissed for specified acts, and these acts are typically limited to the servicer's insolvency or failure to remit funds to the trust. Occasionally servicers may be dismissed if default levels exceed particular thresholds.

Trustees also have no interest in seeing a servicer dismissed because they often are required to step in as back-up servicer.[37] In the event of a servicer default, the trustee takes over as servicer (which includes the option of subcontracting the duties), and assumes the duty of making servicing advances to the trust. The back-up servicer role is essentially an insurance policy for investors, and activation of that role is equivalent to payment on a claim; a trustee that has to act as a back-up servicer is likely to lose money in the process, especially when some of the trustees do not themselves own servicing operations.

Trustees also often have close relationships with particular servicers. For example, Professor Tara Twomey and I have shown that Bank of America/Countrywide accounts for nearly two-thirds of Deutsche Bank's RMBS trustee business.[38] In such circumstances, trustees are unlikely to engage in meaningful monitoring and disciplining of servicers.[39] Amherst Securities points out that early payment default provisions are not effectively enforced by trustees, to the point where in cases where borrowers did not make a single payment on the mortgage, only 37 percent were purchased out of the trust, much smaller amounts for loans making only one to six payments.[40] Thus, for private-label RMBS, there is virtually no supervision of servicers.[41]

GSE and Ginnie Mae securitization have greater oversight of servicers. The GSEs serve as master servicers on most of their RMBS; they therefore have a greater ability to monitor servicer compliance. The GSEs require servicers to foreclose according to detailed timelines, and

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It is almost always an event of default under the indenture if the trustee does not receive a servicer report within a specified period of time, and the trustee must typically report such a failure to the investors, any credit enhancement provider, the rating agencies and others. However, the trustee generally has no duties beyond that with respect to the contents of the report, although under the TIA, the trustee must review any reports furnished to it to determine whether there is any violation of the terms of the indenture. Presumably this would include verifying that any ratios represented in any reports conform to financial covenants contained in the indenture, etc. It would not however, require the trustee to go beyond the face of the report, i.e. to conduct further investigation to determine whether the data underlying the information on the reports presented to it were, in fact, true. Virtually all indentures, whether or not governed by the TIA, explicitly permit the trustee to rely on statements made to the trustee in officers' certificates, opinions of counsel and documents delivered to the trustee in the manner specified within the indenture.

Id.

[35] Moody's Investor Service, *supra* note 31, at 4.

[36] *Id.*

[37] Eric Gross, *Portfolio Management: The Evolution of Backup Servicing*, Portfolio Financial Servicing Company (PFSC) (July 11, 2002) *at* http://www.securitization.net/knowledge/article.asp?id=147&aid=2047.

[38] Levitin & Twomey, *supra* note **Error! Bookmark not defined.**.

[39] *See* Ellington Credit Fund, Ltd. v. Select Portfolio, Inc., No. 1:07-cv-00421-LY, W.D. Tex., Plaintiffs' First Amended Complaint, July 10, 2007 (RMBS residual tranche holder alleging that trustee was aware that servicer was in violation of PSA and failed to act).

[40] *See* Amherst Mortgage Insight, *supra* note **Error! Bookmark not defined.**, at 15.

[41] For MBS with separate master and primary servicers, the master servicer may monitor the primary servicer(s), but often the master and primary servicers are the same entity.

servicers that fail to comply face monetary penalties. Recognizing the benefits inherent in effective loss mitigation, Fannie Mae places staff directly in all of the largest servicer shops to work alongside loss mitigation staff at their servicers.[42] Freddie Mac constructed servicer performance profiles to directly monitor servicers, sharing results directly with servicers and rating agencies. Since each GSE insures against credit losses on the loans, their ongoing monitoring provides consistent rules and a single point of contact to approve workout packages and grant exceptions, something absent in private label RMBS.

3. Ratings and Reputation

Like any repeat transaction business, servicers are concerned about their reputations. But reputational sanctions have only very weak discipline on servicer behavior.

While Regulation AB requires servicers to disclose information about their experience and practices,[43] they are not required to disclose information about performance of past pools they have serviced. In any event, reputational sanctions are ineffective because loss severities are more likely to be attributed to underwriting quality than to servicing decisions.

Rating agencies also produce servicer ratings, but these ratings are a compilation of the evaluation of servicers on a multitude of characteristics. Rating agencies have been known to incorporate features of Freddie Mac's servicer performance profiles in their servicer assessments and to incorporate loss mitigation performance into their ratings. But details of their methodology used to measure these assessments are not disclosed. They give no indication of whether a servicer is likely to make loss mitigation decisions based solely on the interests of the securitization trust. Ratings are also combined with other criteria, such as the servicer's own financial strength and operational capacity. In other words, servicer ratings go to the question of whether a servicer will have to be replaced because it is insolvent or lacks the ability to service the loans, with much less weight given to whether the servicer acts in the investors' interests.

C. THE MORTGAGE CONTRACT AND FORECLOSURE PROCESS

The mortgage contract consists of two documents, a promissory note (the "note" or the "mortgage loan") and a security instrument (the "mortgage" or the "deed of trust").[44] The note is the IOU that contains the borrower's promise to repay the money loaned. If the note is a negotiable instrument, meaning that it complies with the requirements for negotiability in Article 3 of the Uniform Commercial Code,[45] then the *original physical note* is itself the right to payment.[46]

The mortgage is the document that connects the IOU with the house. The mortgage gives the lender a contingent right to the house; it provides that *if* the borrower does not pay according to the terms of the note, then the lender can foreclose and have the property sold *according to the*

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[42] PMI insurers have recently started to embed staff in servicer shops to monitor loss mitigation efforts. Harry Terris & Kate Berry, *In the Trenches*, AM. BANKER, Aug. 27, 2009.

[43] 17 C.F.R. § 229.1108.

[44] The note and the mortgage can be combined in a single document, but that is not common practice, both because the mortgage can be granted subsequent to the creation of the debt and because of borrower privacy concerns about the terms of the note, which would become public if the note and mortgage were combined and recorded in local property records.

[45] *See* UCC 3-104.

[46] UCC 3-203, Cmt. 1 ("An instrument is a reified right to payment. The right is represented by the instrument itself.").

terms of the mortgage and applicable state and federal law. The applicable law governing foreclosures is state law.[47]

State real estate law, including foreclosure law, is non-uniform, making it difficult to state what the law is as a generic matter; there is always the possibility that some jurisdictions may deviate from the majority rule. That said, no state requires a borrower's note to be recorded in local land records for the note to be valid, and, as a general matter, state law does not require the mortgage to be recorded either in order for the mortgage to be enforceable against the borrower. Recording of the mortgage is necessary, however, to establish the mortgage's priority relative to the claims of other parties, including other mortgagees, judgment lien creditors and tax and workmen's' liens against the property. The basic rule of priority is first in time, first in right; the first mortgage to be recorded has senior priority. An unrecorded mortgage will thus, generally have junior priority to a subsequently issued, but recorded mortgage. The difference between enforceability and priority is an important one, discussed in more detail below, in the section of this testimony dealing with MERS.

State law on foreclosures is also non-uniform. Roughly, however, states can be divided into two groups: those where foreclosure actions are conducted through the courts ("judicial foreclosure") and those where foreclosure actions are conducted by private sales ("nonjudicial foreclosure"). This division maps, imperfectly, with whether the preferred security instrument is a mortgage or a deed of trust.[48]

Mortgage loans cost more in states that have judicial foreclosure; what this means is that borrowers in judicial foreclosure states are paying more for additional procedural rights and legal protections; those procedural rights are part of the mortgage contract; failure to honor them is a breach of the mortgage contract. Note, that a default on the mortgage note is not a breach of the contract per se; instead it merely triggers the lender's right to foreclose per the applicable procedure.

In a typical judicial foreclosure proceeding, the homeowner receives a notice of default and if that default is not cured within the required period, the mortgagee then files a foreclosure action in court. The action is commenced by the filing of a written complaint that sets forth the mortgagee's allegations that the homeowner owes a debt that is secured by a mortgage and that the homeowner has defaulted on the debt. Rules of civil procedure generally require that legal actions based upon a writing include a copy of the writing as an attachment to the complaint, although there is sometimes an exception for writings that are available in the public records. While the mortgage is generally filed in the public records, assignments of the mortgage are often not (an issue complicated by MERS, discussed below), and the note is almost never a matter of public record.

It is important to understand that most judicial foreclosures do not function like the sort of judicial proceeding that is dramatized on television, in which all parties to the case appear in court, represented by attorneys and judgment only follows a lengthy trial. Instead, the norm in foreclosure cases is a default judgment. Most borrowers do not appear in court or contest their foreclosures, and not all of those who do are represented by competent counsel, not least because

[47] There is a federal foreclosure statute that can be utilized by FHA...

[48] Mortgages sometimes also include a power of sale, permitting nonjudicial foreclosure. In a deed of trust, the deed to the property is transferred in trust for the noteholder to a deed of trust trustee, often a local attorney. The note remains the property of the lender (the deed of trust beneficiary). When there is a default on the note, the lender notifies the deed of trust trustee and the lender or its agent is typically appointed as substitute deed of trust trustee to run the foreclosure sale.

of the difficulties in paying for counsel. Most borrowers that the borrower does not contest the foreclosure or appear in court. In most cases, only the lender's attorney appears, and judges routinely dispatch dozens or hundreds of foreclosure cases in a sitting. Homeowners in foreclosure actions are among the most vulnerable of defendants, the least able to insist up on and vindicate their rights, and accordingly the ones most susceptible to abuse of legal process.

II. PROCEDURAL PROBLEMS AND FRAUD

The first type of problems in the mortgage market are what might generously be termed "procedural defects" or "procedural irregularities." There are numerous such problems that have come to light in foreclosure cases. The extent and distribution of these irregularities is not yet known. No one has compiled a complete typology of procedural defects in foreclosures; there are, to use Donald Rumsfeld's phrase, certainly "known unknowns" and well as "unknown unknowns."

A. AFFIDAVITS FILED WITHOUT PERSONAL KNOWLEDGE (ROBOSIGNING)

Affidavits need to be based on personal knowledge to have any evidentiary effect; absent personal knowledge an affidavit is hearsay and therefore generally inadmissible as evidence. Accordingly, affidavits attest to personal knowledge of the facts alleged therein.

The most common type of affidavit is an attestation about the existence and status of the loan, namely that the homeowner owes a debt, how much is currently owed, and that the homeowner has defaulted on the loan. (Other types of affidavits are discussed in sections II.B. and II.C., *infra*). Such an affidavit is typically sworn out by an employee of a servicer (or sometimes by a law firm working for a servicer). Personal knowledge for such an affidavit would involve, at the very least, examining the payment history for a loan in the servicer's computer system and checking it against the facts alleged in a complaint.

The problem with affidavits filed in many foreclosure cases is that the affiant lacks any personal knowledge of the facts alleged whatsoever. Many servicers, including Bank of America, Citibank, JPMorgan Chase, Wells Fargo, and GMAC, employ professional affiants, some of whom appear to have no other duties than to sign affidavits. These employees cannot possibly have personal knowledge of the facts in their affidavits. One GMAC employee, Jeffrey Stephan, stated in a deposition that he signed perhaps 10,000 affidavits in a month, or approximately 1 a minute for a 40-hour work week.[49] For a servicer's employee to ascertain payment histories in a high volume of individual cases is simply impossible.

When a servicer files an affidavit that claims to be based on personal knowledge, but is not in fact based on personal knowledge, the servicer is committing a fraud on the court, and quite possibly perjury. The existence of foreclosures based on fraudulent pleadings raises the question of the validity of foreclosure judgments and therefore title on properties, particularly if they are still in real estate owned (REO).

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[49] *See* Deposition of Jeffrey Stephan, GMAC Mortgage LLC v. Ann M. Neu a/k/a Ann Michelle Perez, No. 50 2008 CA 040805XXXX MB, (15th Judicial Circuit, Florida, Dec. 10, 2009) at 7, *available at* http://api.ning.com/files/s4SMwlZXvPu4A7kq7XQUsGW9xEcYtqNMPCm0a2hISJu88PoY6ZNqanX7XK41Fyf9gV8JIHDme7KcFO2cvHqSBMcplJ8vwnDT/091210gmacmortgagevsannmneu1.pdf (stating that Jeffrey Stephan, a GMAC employee, signed approximately 10,000 affidavits a month for foreclosure cases).

B. Lost Note Affidavits for Notes that Are Not Lost

The plaintiff in a foreclosure action is generally required to produce the note as evidence that it has standing to foreclose. Moreover, under the Uniform Commercial Code, if the note is a negotiable instrument, only a holder of the note (or a subrogee)—that is a party in possession of the note— may enforce the note, as the note is the reified right to payment.[50]

There is an exception, however, for lost, destroyed, or stolen notes, which permits a party that has lost possession of a note to enforce it.[51] If a plaintiff seeks to enforce a lost note, it is necessary "to prove the terms of the instrument" as well as the "right to enforce the instrument."[52] This proof is typically offered in the form of a lost note affidavit that attests to the prior existence of the note, the terms of the note, and that the note has been lost.

It appears that a surprisingly large number of lost note affidavits are filed in foreclosure cases. In Broward County, Florida alone, over 2000 such affidavits were filed in 2008-2009.[53] Relative to the national population, that translates to roughly 116,000 lost note affidavits nationally over the same period.[54]

There are two problems with the filing of many lost note affidavits. First, is a lack of personal knowledge. Mortgage servicers are rarely in possession of the original note. Instead, the original note is maintained in the fireproof vault of the securitization trustee's document custodian. This means that the servicer lacks personal knowledge about whether a note has or has not been lost.[55] Merely reporting a communication from the document custodian would be hearsay and likely inadmissible as evidence.

The second problem is that the original note is frequently not in fact lost. Instead, it is in the document custodian's vault. Servicers do not want to pay the document custodian a fee (of perhaps $30) to release the original mortgage, and servicers are also wary of entrusting the original note to the law firms they hire. Substitution of counsel is not infrequent on defaulted mortgages, and servicers are worried that the original note will get lost in the paperwork shuffle if there is a change in counsel. When pressed, however, servicers will often produce the original note, months after filing lost note affidavits. The Uniform Commercial Code (UCC) requires that a party seeking to enforce a note be a holder (or subrogee to a holder) or produce evidence that a note has been lost, destroyed, or stolen; the UCC never contemplates an "inconvenience affidavit" that states that it is too much trouble for a servicer to bother obtaining the original note. But that is precisely what many lost note affidavits are effectively claiming.

Thus, many lost note affidavits are doubly defective: they are sworn out by a party that does not and cannot have personal knowledge of the alleged facts and the facts being alleged are often false as the note is not in fact lost, but the servicer simply does not want to bother obtaining it.

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[50] UCC 3-301; 1-201(b)(21) (defining "holder").

[51] UCC 3-309. Note that UCC 3-309 was amended in the 2001 revision of Article 3. The revision made it easier to enforce a lost note. Not every state has adopted the 2001 revisions. Therefore, UCC 3-309 is non-uniform law.

[52] UCC 3-309(b).

[53] Cite NY Times.

[54] According to the US Census Bureau, Broward County's population is approximately 1.76 million, making it .57% of the total US population of 307 million. Broward does have a significantly higher than average foreclosure rate, roughly 12% over the past two years, according to Core Logic Loan Performance data, making it approximately 3 times the national average.

[55] The 2001 version of UCC 3-309 permits not only a party that has lost a note but a buyer from such a party to enforce a lost note.

C. *JUNK FEES*

The costs of foreclosure actions are initially incurred by servicers, but servicers recover these fees off the top from foreclosure sale proceeds before MBS investors are paid. This reimbursement structure limits servicers' incentive to rein in costs and actually incentives them to pad the costs of foreclosure. This is done in two ways. First, servicers charge so-called "junk fees" either for unnecessary work or for work that was simply never done. Thus, Professor Kurt Eggert has noted a variety of abusive servicing practices, including "improper foreclosures or attempted foreclosures; imposition of improper fees, especially late fees; forced-placed insurance that is not required or called for; and misuse of escrow funds."[56] Servicers' ability to retain foreclosure-related fees has even led them to attempt to foreclose on properties when the homeowners are current on the mortgage or without attempting any sort of repayment plan.[57] Consistently, Professor Katherine Porter has documented that when mortgage creditors file claims in bankruptcy, they generally list amounts owed that are much higher than those scheduled by debtors.[58]

There is also growing evidence of servicers requesting payment for services not performed or for which there was no contractual right to payment. For example, in one particularly egregious case from 2008, Wells Fargo filed a claim in the borrower's bankruptcy case that included the costs of two brokers' price opinions allegedly obtained in September 2005, on a property in Jefferson Parish, Louisiana when the entire Parish was under an evacuation order due to Hurricane Katrina.[59]

Similarly, there is a frequent problem of so-called "sewer summons" issued (or actually not issued) to homeowners in foreclosures. Among the costs of foreclosure actions is serving notice of the foreclosure (a court summons) on the homeowner. There is disturbing evidence that homeowners are being charged for summons that were never issued. These non-delivered summons are known as "sewer summons" after their actual delivery destination.

One way in which these non-existent summons are documented is through the filing of "affidavits of lost summons" by process servers working for the foreclosure attorneys hired by mortgage servicers. A recent article reports that in Duval County, Florida (Jacksonville) the number of affidavits of lost summons has ballooned from 1,031 from 2000-2006 to over 4,000 in the last two years, a suspiciously large increase that corresponds with a sharp uptick in foreclosures.[60]

Because of concerns about illegal fees, the United States Trustee's Office has undertaken several investigations of servicers' false claims in bankruptcy[61] and brought suit against

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56 Kurt Eggert, *Comment on Michael A. Stegman et al.'s "Preventive Servicing Is Good for Business and Affordable Homeownership Policy": What Prevents Loan Modifications?*, 18 HOUSING POL'Y DEBATE 279 (2007).

57 Eggert, *Limiting Abuse*, *supra* note 21, at 757.

58 Katherine M. Porter, *Mortgage Misbehavior*, 87 TEX. L. REV. 121, 162 (2008).

59 *In re* Stewart, 391 B.R. 327, 355 (Bankr. E.D. La. 2008).

60 Matt Taibi, *Courts Helping Banks Screw Over Homeowners,* ROLLING STONE, Nov. 25, 2010, *at* http://www.rollingstone.com/politics/news/17390/232611?RS_show_page=7.

61 Ashby Jones, *U.S. Trustee Program Playing Tough With Countrywide, Others*, LAW BLOG (Dec. 3, 2007, 10:01 AM), http://blogs.wsj.com/law/2007/12/03/us-trustee-program-playing-tough-with-countrywide-others.

Countrywide,[62] while the Texas Attorney General has sued American Home Mortgage Servicing for illegal debt collection practices.[63]

The other way in which servicers pad the costs of foreclosure is by in-sourcing their expenses to affiliates at above-market rates. For example, Countrywide, the largest RMBS servicer, force places insurance on defaulted properties with its captive insurance affiliate Balboa.[64] Countrywide has been accused of deliberately extending the time to foreclosure in order to increase the insurance premiums paid to its affiliate, all of which are reimbursable by the trust, before the RMBS investors' claims are paid.[65] Similarly, Countrywide in-sources trustee services in deed of trust foreclosures to its subsidiary Recon Trust.[66]

Thus, in Countrywide's' 2007 third quarter earnings call, Countrywide's President David Sambol emphasized that increased revenue from in-sourced default management functions could offset losses from mortgage defaults.

> Now, we are frequently asked what the impact on our servicing costs and earnings will be from increased delinquencies and loss mitigation efforts, and what happens to costs. And what we point out is, as I will now, is that *increased operating expenses in times like this tend to be fully offset by increases in ancillary income in our servicing operation, greater fee income from items like late charges, and importantly from in-sourced vendor functions* that represent part of our diversification strategy, a counter-cyclical diversification strategy such as our businesses involved in foreclosure trustee and default title services and property inspection services.[67]

In June, 2010, Countrywide settled with the FTC for $108 million on charges that it overcharged delinquent homeowners for default management services. According to the FTC,

> Countrywide ordered property inspections, lawn mowing, and other services meant to protect the lender's interest in the property... But rather than simply hire third-party vendors to perform the services, Countrywide created subsidiaries to hire the vendors. The subsidiaries marked up the price of the services charged by the vendors – often by 100% or more – and Countrywide then charged the homeowners the marked-up fees.[68]

Among the accusations brought against Countrywide in a recent investor notice of default filed by the Federal Reserve Bank of New York along with BlackRock and PIMCO, is that Countrywide has been padding expenses via in-sourcing on the 115 trusts covered by the letter.[69]

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62 Complaint, Walton v. Countrywide Home Loans, Inc. (*In re* Atchely), No. 05-79232 (Bankr. N.D. Ga. filed Feb. 28, 2008).

63 Complaint, State v. Am. Home Mtg. Servicing, Inc., No. 2010-3307 (Tex. Dist. Ct. 448th Jud. Dist. filed Aug. 30, 2010).

[64] Amherst Mortgage Securities, *supra* note **Error! Bookmark not defined.**, at 23.

[65] *Id.*

[66] Center for Responsible Lending, *Unfair and Unsafe: How Countrywide's irresponsible practices have harmed borrowers and shareholders*, CRL Issue Paper, Feb. 7, 2008, at 6-7.

[67] Transcript, "Countrywide Financial Corporation Q3 2007 Earnings Call," Oct. 26, 2007 (emphasis added) (also mentioning "Our vertical diversification businesses, some of which I mentioned, are counter-cyclical to credit cycles, like the lender-placed property business in Balboa and like the in-source vendor businesses in our loan administration unit.").

[68] FTC, Press Release, June 7, 2010, *Countrywide Will Pay $108 Million for Overcharging Struggling Homeowners; Loan Servicer Inflated Fees, Mishandled Loans of Borrowers in Bankruptcy.*

[69] Kathy D. Patrick, Letter to Countrywide Home Loan Servicing LP and the Bank of New York, dated Oct. 18, 2010, *available at* http://www.scribd.com/Bondholders-Letter-to-BofA-Over-Countrywide-Loans-inc-NY-Fed/d/39686107.

Countrywide is hardly the only servicer accused of acting in its interests at the expense of investors. Carrington, another major servicer, also owns the residual tranche on many of the deals it services. Amherst Mortgage Securities has shown that Carrington has been much slower than other servicers to liquidate defaulted loans.[70] Delay benefits Carrington both as a servicer and as the residual tranche investor. As a servicer, delay helps Carrington by increasing the number of monthly late fees that it can levy on the loans. These late fees are paid from liquidation proceeds before any of the MBS investors.

As an investor in the residual tranche, Carrington has also been accused of engaging in excessive modifications to both capture late fees and to keep up the excess spread in the deals, as it is paid directly to the residual holders.[71] When loans were mass modified, Carrington benefited as the servicer by capitalizing late fees and advances into the principal balance of the modified loans, which increased the balance on which the servicing fee was calculated. Carrington also benefited as the residual holder by keeping up excess spread in the deals and delaying delinquency deal triggers that restrict payments to residual holders when delinquencies exceed specified levels. Assuming that the residual tranche would be out of the money upon a timely foreclosure, delay means that Carrington, as the residual holder, receives many more months of additional payments on the MBS it holds than it otherwise would.[72]

It is important to emphasize that junk fees on homeowners ultimately come out of the pocket of MBS investors. If the homeowner lacks sufficient equity in the property to cover the amount owed on the loan, including junk fees, then there is a deficiency from the foreclosure sale. As many mortgages are legally or functionally non-recourse, this means that the deficiency cannot be collected from the homeowner's other assets. Mortgage servicers recover their expenses off the top in foreclosure sales, before MBS investors are paid. Therefore, when a servicer lards on illegal fees in a foreclosure, it is stealing from investors such as pension plans and the US government.

D. COMPLAINTS THAT FAIL TO INCLUDE THE NOTE

Rule of civil procedure generally require that a compliant based on a writing include, as an attachment, a copy of a writing. In a foreclosure action, this means that both the note and the mortgage and any assignments of either must be attached. Beyond the rules of civil procedure requirement, these documents are also necessary as an evidentiary matter to establish that the plaintiff has standing to bring the foreclosure. Some states have exceptions for public records, which may be incorporated by reference, but it is not always clear whether this exception applies in foreclosure actions. If it does, then only the note, which is not a public record, would need to be attached.

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[70] Amherst Mortgage Insight, 2010, "The Elephant in the Room—Conflicts of Interest in Residential Mortgage Securitizations", pp. 22-24, May 20, 2010.

[71] See Amherst Mortgage Insight, "Why Investors Should Oppose Servicer Safe Harbors", April 28, 2009. Excess spread is the difference between the income of the SPV in a given period and its payment obligations on the MBS in that period, essentially the SPV's periodic profit. Excess spread is accumulated to supplement future shortfalls in the SPV's cashflow, but is either periodically released to the residual tranche holder. Generally, as a further protection for senior MBS holders, excess spread cannot be released if certain triggers occur, like a decline in the amount of excess spread trapped in a period beneath a particular threshold.

[72] Carrington would still have to make servicing advances on any delinquent loans if it stretched out the time before foreclosure, but these advances would be reimbursable, and the reimbursement would come from senior MBS holders, rather than from Carrington, if it were out of the money in the residual.

Many foreclosure complaints are facially defective and should be dismissed because they fail to attach the note. I have recently examined a small sample of foreclosure cases filed in Allegheny County, Pennsylvania (Pittsburgh and environs) in May 2010. In over 60% of those foreclosure filings, the complaint failed to include a copy of the note. Failure to attach the note appears to be routine practice for some of the foreclosure mill law firms, including two that handle all of Bank of America's foreclosures.

I would urge the Committee to ask Bank of America whether this was an issue it examined in its internal review of its foreclosure practices.

E. Counterfeit and Altered Documents and Notary Fraud

Perhaps the most disturbing problem that has appeared in foreclosure cases is evidence of counterfeit or altered documents and false notarizations. To give some examples, there are cases in which multiple copies of the "true original note" are filed in the same case, with variations in the "true original note;"[73] signatures on note allonges that have clearly been affixed to documents via Photoshop;[74] "blue ink" notarizations that appear in blank ink; counterfeit notary seals;[75] backdated notarizations of documents issued before the notary had his or her commission;[76] and assignments that include the words "bogus assignee for intervening asmts, whose address is XXXXXXXXXXXXXXXXX."[77]

Most worrisome is evidence that these frauds might not be one-off problems, but an integral part of the foreclosure business. A price sheet from a company called DocEx that was affiliated with LPS, one of the largest servicer support firms, lists prices for various services including the "creation" of notes and mortgages. While I cannot confirm the authenticity of this price sheet or date it, it suggests that document counterfeiting is hardly exceptional in foreclosure cases.

While the fraud in these cases is not always by servicers themselves, but sometimes by servicer support firms or attorneys, its existence should raise serious concerns about the integrity of the foreclosure process. I would urge the Committee to ask the servicer witnesses what steps they have taken to ascertain that they do not have such problems with loans in their servicing portfolios.

G. The Extent of the Problem

The critical question for gauging the risk presented by procedural defects is the extent of the defects. While Federal Reserve Chairman Bernanke has announced that federal bank regulators are looking into the issue and will issue a report this month, I do not believe that it is

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Brief of Antonio Ibanez, Defendant-Appellee, US Bank Nat'l Assn, as Trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z v. Ibanez; Wells Fargo Bank, N.A. as Trustee for ABFC 2005-Opt 1 Trust, ABFC Asset Backed Certificates Series 2005-OPT 1, No 10694, (Mass. Sept. 20, 2010), at 10 (detailing 3 different "certified true copies" of a note allonge and of an assignment of a mortgage); http://4closurefraud.org/2010/04/27/foreclosure-fraud-of-the-week-two-original-wet-ink-notes-submitted-in-the-same-case-by-the-florida-default-law-group-and-jpmorgan-chase/ (detailing a foreclosure file with two different "original" wet ink notes for the same loan).

[74] http://4closurefraud.org/2010/04/08/foreclosure-fraud-of-the-week-poor-photoshop-skills/.

[75] *See* WSTB.com, *at* http://www.wsbtv.com/video/25764145/index.html.

[76] Deposition of Cheryl Samons, Deutsche Bank Nat'l Trust Co., as Trustee for Morgan Stanley ABS Capital I Inc. Trust 2006-HE4 v. Pierre, No. 50-2008-CA-028558-XXXX-MB (15th Judicial Circuit, Florida, May 20, 2009, *available at* http://mattweidnerlaw.com/blog/wp-content/uploads/2010/03/depositionsammons.pdf.

[77] http://www.nassauclerk.com/clerk/publicrecords/oncoreweb/showdetails.aspx?id=809395&rn=0&pi=0&ref=search.

within the ability of federal bank regulators to gauge the extent of procedural defects in foreclosure cases. To do so would require, at the very least, an extensive sampling of actual foreclosure filings and their examination by appropriately trained personnel. I am unaware of federal bank regulators undertaking an examination of actual foreclosure filings, much less having a sufficient cadre of appropriately trained personnel. Bank examiners lack the experience or training to evaluate legal documents like foreclosure filings. Therefore, any statement put forth by federal regulators on the scope of procedural defects is at best a guess and at worse a parroting of the "nothing to see here folks" line that has come from mortgage servicers.

I would urge the Committee to inquire with federal regulators as to exactly what steps they are taking to examine foreclosure irregularities and how they can be sure that those steps will uncover the extent of the problem. Similarly, I would urge the Committee to ask the servicer witnesses what specific irregularities they examined during their self-imposed moratoria and by what process. It defies credulity that a thorough investigation of all the potential problems in foreclosure paperwork could be completed in a month or two, much less by servicers that have taken so long to do a small number of loan modifications.

III. Chain of Title Problems

A second problem and potentially more serious problem relating to standing to foreclose is the issue of chain of title in mortgage securitizations.[78] As explained above, securitization involves a series of transfers of both the note and the mortgage from originator to sponsor to depositor to trust. This particular chain of transfers is necessary to ensure that the loans are "bankruptcy remote" once they have been placed in the trust, meaning that if any of the upstream transferors were to file for bankruptcy, the bankruptcy estate could not lay claim to the loans in the trust by arguing that the transaction was not a true sale, but actually a secured loan.[79] Bankruptcy remoteness is an essential component of private-label mortgage securitization deals, as investors want to assume the credit risk solely of the mortgages, not of the mortgages' originators or securitization sponsors. Absent bankruptcy remoteness, the economics of mortgage securitization do not work in most cases.

Recently, arguments have been raised in foreclosure litigation about whether the notes and mortgages were in fact properly transferred to the securitization trusts. This is a critical issue because the trust has standing to foreclose if, and only if it is the mortgagee. If the notes and mortgages were not transferred to the trust, then the trust lacks standing to foreclose. There are several different theories about the defects in the transfer process; I do not attempt to do justice to any of them in this testimony.

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[78] Chain of title problems appear to be primarily a problem for private-label securitization, not for agency securitization because even if title were not properly transferred for Agency securities, it would have little consequence. Investors would not have incurred a loss as the result of an ineffective transfer, as their MBS are guaranteed by the GSEs or Ginnie Mae, and when a loan in an Agency pool defaults, it is removed from the pool and the owned by the GSE or Ginnie Mae, which is then has standing to foreclose.

[79] Bankruptcy remote has a second meaning, namely that the trust cannot or will not file of bankruptcy. This testimony uses bankruptcy remote solely in the sense of whether the trust's assets could be clawed back into a bankruptcy estate via an equity of redemption. The Uniform Commercial Code permits a debtor to redeem collateral at face value of the debt owed. If a pool of loans bore a now-above-market interest rate, the pool's value could be above the face value of the debt owed, making redemption economically attractive.

It can be very difficult to distinguish true sales from secured loans. For example, a sale and repurchase agreement (a repo) is economically identical to a secured loan from the repo buyer to the repo seller, secured by the assets being sold.

While the chain of title issue has arisen first in foreclosure defense cases, it also has profound implications for MBS investors. If the notes and mortgages were not properly transferred to the trusts, then the mortgage-backed securities that the investors' purchased were in fact *non-mortgage-backed securities*. In such a case, investors would have a claim for the rescission of the MBS,[80] meaning that the securitization would be unwound, with investors receiving back their original payments at par (possibly with interest at the judgment rate). Rescission would mean that the securitization sponsor would have the notes and mortgages on its books, meaning that the losses on the loans would be the securitization sponsor's, not the MBS investors, and that the securitization sponsor would have to have risk-weighted capital for the mortgages. If this problem exists on a wide-scale, there is not the capital in the financial system to pay for the rescission claims; the rescission claims would be in the trillions of dollars, making the major banking institutions in the United States would be insolvent.

The key questions for evaluating chain of title are what method of transferring notes and mortgages is actually supposed to be used in securitization and whether that method is legally sufficient both as a generic matter and as applied. There is a surprising degree of legal uncertainty over these issues, even among banks' attorneys; different arguments appear in different litigation. The following section outlines the potential methods of transfer and some of the issues that arise regarding specific methods. It is critical to emphasize that the law is not settled on most of the issues regarding securitization transfers; instead, these issues are just starting to be litigated.

A. Transfers of Notes and Mortgages

As a generic matter, a note can be transferred in one of four methods:

(1) the note can be sold via a contract of sale, which would be governed by the common law of contracts.

(2) if the note is a negotiable instrument, it could be negotiated, meaning that it would be transferred via endorsement and delivery, with the process governed by Article 3 of the Uniform Commercial Code (UCC). The endorsement

(3) the note could be converted into an electronic note and transferred according to the provisions of the federal E-SIGN Act.[81]

(4) The note could be sold pursuant to UCC Article 9. In 49 states (South Carolina being the exception), Article 9 provides a method for selling a promissory note, which requires that there be an authenticated (signed) agreement, value given, and that the seller have rights in the property being transferred.[82] This process is very similar to a common law sale.

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[80] This claim would not be a putback claim necessarily, but could be brought as a general contract claim. It could not be brought as a securities law claim under section 11 of the Securities Act of 1933 because the statute of limitations for rescission has expired on all PLS.

[81] 15 U.S.C. § 7021.

[82] UCC 9-203. The language of Article 9 is abstruse, but UCC Revised Article 1 defines "security interest" to include the interest of a buyer of a promissory note. UCC 1-201(b)(35). Article 9's definition of "debtor" includes a seller of a promissory note, UCC 9-102(a)(28)(B), and "secured party" includes a buyer of a promissory note, UCC 9-102(a)(72)(D). Therefore UCC 9-203, which would initially appear to address the attachment (enforceability) of a security interest also covers the sale of a promissory note. South Carolina has not adopted the revised Article 1 definition of security interest necessary to make Article 9 apply to sales of promissory notes.

There is general agreement that as a generic method, any of these methods of transfer would work to effectuate a transfer of the note. No method is mandatory. Whether or not the chosen process was observed in practice, is another matter, however.[83]

There are also several conceivable ways to transfer mortgages, but there are serious doubts about the validity of some of the methods:

(1) the mortgage could be assigned through the traditional common law process, which would require a document of assignment.

   a. There is general consensus that this process works.

(2) the mortgage could be negotiated.

   a. This method of transfer is of questionable effectiveness. A mortgage is not a negotiable instrument, and concepts of negotiability do not fit well with mortgages. For example, if a mortgage were negotiated in blank, it should become a "bearer mortgage," but this concept is utterly foreign to the law, not least as the thief of a bearer mortgage would have the ability to enforce the mortgage (absent equitable considerations). Similarly, with a bearer mortgage, a homeowner could never figure out who would be required to grant a release of the mortgage upon payoff. And, in many states (so-called title theory states), a mortgage is considered actual ownership of real property, and real property must have a definite owner (not least for taxation purposes).

(3) the mortgage could "follow the note" per common law.

   a. Common law is not settled on this point. There are several instances where the mortgage clearly does not follow the note. For example, the basic concept of a deed of trust is that the security instrument and the note are separated; the deed of trust trustee holds the security, while the beneficiary holds the note. Likewise, the mortgage follows the note concept would imply that the theft of a note also constitutes theft of a mortgage, thereby giving to a thief more than the thief was able to actually steal. Another situation would be where a mortgage is given to a guarantor of a debt. The mortgage would not follow the debt, but would (at best) follow the guarantee. And finally, the use of MERS, a recording utility, as original mortgage (a/k/a MOM) splits the note and the mortgage. MERS has no claim to the note, but MERS is the mortgagee. If taken seriously, MOM means that the mortgage does not follow the note. While MERS might claim that MOM just means that the beneficial interest in the mortgage follows the note, a transfer of the legal title would violate a bankruptcy stay and would constitute a voidable preference if done before bankruptcy.

(4) the mortgage could "follow the note" if it is an Article 9 transfer.[84]

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[83] Note that common law sales and Article 9 sales do not affect the enforceability of the note against the obligor on the note. UCC 9-308, Cmt.6, Ex. 3 ("Under this Article, attachment and perfection of a security interest in a secured right to payment do not of themselves affect the obligation to pay. For example, if the obligation is evidenced by a negotiable note, then Article 3 dictates the person to whom the maker must pay to discharge the note and any lien security it."). UCC Article 3 negotiation and E-SIGN do affect enforceability as they enable a buyer for value in good faith to be a holder in due course and thereby cut off some of the obligor's defenses that could be raised against the seller. UCC 3-305, 3-306; 15 U.S.C. § 7021(d).

[84] UCC 9-203(g). If the transfer is not an Article 9 transfer, then the Article 9 provision providing that the mortgage follows the note would not apply.

a. There is consensus that this process would work *if* Article 9 governs the transfer of the note.

Ultimately, there is lack of consensus as to the method of transfer that is actually employed in securitization transactions. In theory, the proper method should be UCC Article 9 transfer process was adopted as part of the 2001 revision of Article 9 with the apparent goal of facilitating securitization transactions. Parties are free, however, to contract around the UCC.[85] That is precisely what pooling and servicing agreements (PSAs) appear to do. PSAs provide a recital of a transfer of the notes and loans to the trust and then they further require that the as they set forth specific requirements regarding the transfer of the notes and mortgages, namely that there be a complete chain of endorsements followed by either a specific endorsement to the trustee or an endorsement in blank.[86] The reason for this additional requirement is to provide a clear evidentiary basis for all of the transfers in the chain of title in order to remove any doubts about the bankruptcy remoteness of the assets transferred to the trust. Absent a complete chain of endorsements, it could be argued that the trust assets were transferred directly from the originator to the trust, raising the concern that if the originator filed for bankruptcy, the trust assets could be pulled back into the originator's bankruptcy estate.

As PSAs are trust documents, they must be followed punctiliously. Moreover, most RMBS are issued by New York common law trusts, and well-established New York law provides that a transaction that does not accord with the trust documents is void.[87] Therefore, the key question is whether transfers to the trusts complied with PSAs. It appears that in recent years mortgage securitizers started to cut corners in order to deal with the increased deal volume they faced during the housing bubble, and they ceased to comply with the PSA requirements in many cases. Thus, in many cases, the notes contain either a single endorsement in blank or no endorsement whatsoever, rather than the chain of endorsements required by the PSA and critical for ensuring the trust's assets' bankruptcy remoteness.

It bears emphasis that the validity of transfers to the trusts is an unsettled legal issue. But if the transfers were invalid, they cannot likely be corrected because of various timeliness requirements in the PSAs.

IV. YES, BUT WHO CARES? THESE ARE ALL DEADBEATS

A common response from banks about the problems in the securitization and foreclosure process is that it doesn't matter as the borrower still owes on the loan and has defaulted. This "No Harm, No Foul" argument is that homeowners being foreclosed on are all a bunch of deadbeats, so who really cares about due process? As JPMorganChase's CEO Jamie Dimon put it "for the most part by the time you get to the end of the process we're not evicting people who deserve to stay in their house."[88]

Mr. Dimon's logic condones vigilante foreclosures: so long as the debtor is delinquent, it does not matter who evicts him or how. But that is not how the legal system works. A

[85] UCC 1-203.
[86] This provision is general found in section 2.01 of PSAs.
[87] NY E.P.T.L. § 7-2.4.
[88] Tamara Keith & Renee Montaigne, *Sorting Out the Banks' Foreclosure Mess*, NPR, Oct. 15, 2010.

homeowner who defaults on a mortgage doesn't have a right to stay in the home if the proper mortgagee forecloses, but any old stranger cannot take the law into his own hands and kick a family out of its home. That right is reserved solely for the proven mortgagee.

Irrespective of whether a debt is owed, there are rules about who can collect that debt and how. The rules of real estate transfers and foreclosures have some of the oldest pedigrees of any laws. They are the product of centuries of common law wisdom, balancing equities between borrowers and lenders, ensuring procedural fairness and protecting against fraud.

The most basic rule of real estate law is that only the mortgagee may foreclosure. Evidence and process in foreclosures are not mere technicalities nor are they just symbols of rule of law. They are a paid-for part of the bargain between banks and homeowners. Mortgages in states with judicial foreclosures cost more than mortgages in states without judicial oversight of the foreclosure process.[89] This means that homeowners in judicial foreclosure states are buying procedural protection along with their homes, and the banks are being compensated for it with higher interest rates. Banks and homeowners bargained for legal process, and rule of law, which is the bedrock upon which markets are built function, demands that the deal be honored.

Ultimately the "No Harm, No Foul," argument is a claim that rule of law should yield to banks' convenience. To argue that problems in the foreclosure process are irrelevant because the homeowner owes *someone* a debt is to declare that the banks are above the law.

V. CONCLUSION

The foreclosure process is beset with problems ranging from procedural defects that can be readily cured to outright fraud to the potential failure of the entire private label mortgage securitization system.

In the best case scenario, the problems in the mortgage market are procedural defects and they will be remedied within reasonably quickly (perhaps taking around a year). Remedying them will extend the time that properties are in foreclosure and increase the shadow housing inventory, thereby driving down home prices. The costs of remedying these procedural defects will also likely be passed along to future mortgage borrowers, thereby frustrating attempts to revive the housing market and the economy through easy monetary policy.

In the worst case scenario, there is systemic risk, as there could be a complete failure of loan transfers in private-label securitization deals in recent years, resulting in trillions of dollars of rescission claims against major financial institutions. This would trigger a wholesale financial crisis.

Perhaps the most important lesson from 2008 is the need to be ahead of the ball of systemic risk. This means (1) ensuring that federal regulators do a serious investigation as discussed in this testimony above and (2) considering the possible legislative response to a crisis. The sensible course of action here is to avoid gambling on unsettled legal issues that could have systemic consequences. Instead, we should recognize that stabilizing the housing market is the

[89] *See* Karen Pence, *Foreclosing on Opportunity: State Laws and Mortgage Credit*, 88 REV. ECON. & STAT. 177 (2006) (noting that the availability—and hence the cost—of mortgages in states with judicial foreclosure proceedings is greater than in states with non-judicial foreclosures).

key toward economic recovery, and that it is impossible to fix the housing market unless the number of foreclosures is drastically reduced, thereby reducing the excess inventory that drives down housing prices and begets more foreclosures. Unless we fix the housing market, consumer spending will remain depressed, and as long as consumer spending remains depressed, high unemployment will remain and the US economy will continue in a doldrums that it can ill-afford given the impending demographics of retirement.

This suggests that the best course of action is a global settlement on mortgage issues, the key elements of which must be (1) a triage between homeowners who can and cannot pay with principal reduction and meaningful modifications for homeowners with an ability to pay and speedier foreclosures for those who cannot, (2) a quieting of title on securitized properties, and (3) a restructuring of bank balance sheets in accordance with loss recognition.

I recognize that for many, the preferred course of action is not to deal with a problem until it materializes. But if we pursue that route, we may be confronted with an unmanageable crisis. We cannot rebuild the US housing finance system until we deal with the legacy problems from our old system, and these are problems that are best addressed sooner, before an acute crisis, then when it is too late.

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As filed Pursuant to Rule 424B5
Registration No. [Client-to-Supply]

PROSPECTUS SUPPLEMENT
(To Prospectus Dated May 23, 2000)

$740,121,000 (Approximate)

AMORTIZING RESIDENTIAL COLLATERAL TRUST
Mortgage Pass-Through Certificates, Series 2000-BC3

Structured Asset Securities Corporation
Depositor

Wells Fargo Bank Minnesota, National Association
Master Servicer

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Consider carefully the risk factors beginning on page S-12 of this prospectus supplement.

For a list of capitalized terms used in this prospectus supplement and the prospectus, see the Index of Defined Terms beginning on page S-93 of this prospectus supplement and on page 123 in the prospectus.

The certificates will represent interests in the trust fund only and will not represent interests in or obligations of any other entity.

This prospectus supplement may be used to offer and sell the certificates only if accompanied by the prospectus.

<C>

The trust fund will issue certificates including the following:

Class	Class Principal Amount	Interest Rate	CUSIP Number
A2	$ 550,202,000	(2)	863572U43
M1	87,655,000	(2)	863572U50
M2	80,350,000	(2)	863572U68
B	21,914,000	(2)	863572U76

(1) These balances are approximate, as described in this prospectus supplement.
(2) Interest will accrue on the Class A2, M1, M2 and B Certificates based upon one-month LIBOR plus a specified margin, subject to limitation, as described in this prospectus supplement under "Description of the Certificates -- Distributions of Interest."

This prospectus supplement and the accompanying prospectus relate only to the offering of the certificates listed in the table above and not to the other classes of certificates that will be issued by the trust fund as described in this prospectus supplement.

The assets of the trust fund will primarily consist of two pools of conventional, first and second lien, fixed and adjustable rate, fully amortizing and balloon, residential mortgage loans that were originated in accordance with underwriting guidelines that are not as strict as Fannie Mae and Freddie Mac guidelines. As a result, these mortgage loans may experience higher rates of delinquency, foreclosure and bankruptcy than if they had been underwritten in accordance with higher standards.

Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved the certificates or determined that this prospectus supplement or the accompanying prospectus is accurate or complete. Any representation to the contrary is a criminal offense.

The certificates listed in the table above will be purchased by Lehman Brothers Inc. from Structured Asset Securities Corporation, and are being offered by Lehman Brothers Inc. from time to time for sale to the public in negotiated transactions or otherwise at varying prices to be determined at the time of sale. Proceeds to Structured Asset Securities Corporation from the sale of these certificates will be approximately 100.00% of their initial total principal amount, plus accrued interest, before deducting expenses.

On or about September 8, 2000, delivery of the certificates offered by this prospectus supplement will be made through the book-entry facilities of The Depository Trust Company, Clearstream Banking, societe anonyme (formerly Cedelbank) and the Euroclear System.
</TABLE>

Underwriter:

LEHMAN BROTHERS

August 31, 2000.

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Important notice about information presented in this prospectus supplement and the accompanying prospectus:

We provide information to you about the certificates offered by this prospectus supplement in two separate documents that progressively provide more detail: (1) the accompanying prospectus, which provides general information, some of which may not apply to your certificates, and (2) this prospectus supplement, which describes the specific terms of your certificates.

If information varies between this prospectus supplement and the accompanying prospectus, you should rely on the information in this prospectus supplement.

You should rely only on the information contained or incorporated by reference in this prospectus supplement and the accompanying prospectus. We have not authorized anyone to provide you with different information.

in the trust fund with original principal balances which do not exceed the applicable Freddie Mac maximum original loan limitations for one- to four-family mortgaged properties. Pool 2 will consist of mortgage loans with original principal balances which may be less than, equal to, or in excess of, those loan amount limitations.

Distributions of principal and interest on the Class A1 Certificates will be based primarily on collections from the pool 1 mortgage loans. Distributions of principal and interest on the Class A2 Certificates will be based primarily on collections from the pool 2 mortgage loans. Distributions of principal and interest on the Class M1, Class M2 and Class B Certificates will be based on collections from both mortgage pools. None of the Class A2, Class M1, Class M2 or Class B Certificates will have the benefit of the Freddie Mac guarantee.

The rights of holders of the Class M1, M2 and B Certificates to payments will be subordinate to the rights of the holders of certificates having a senior priority of payment, as described in this Summary of Terms under "-- Credit Enhancement -- Subordination of Payments" below. In describing this subordination feature, we sometimes refer to the Class M1, M2 and B Certificates as "subordinate" certificates, and to the Class A1 and A2 Certificates as "senior" certificates.

The Class X and Class R Certificates are generally not entitled to monthly distributions of

principal and interest, but rather solely to any residual cash flows remaining after all payments on the other classes of the certificates and certain fees and expenses of the trust fund have been made on the related distribution date.

The certificates (other than the Class X Certificate) will have an approximate total initial principal amount of $2,921,817,000. Any difference between the total principal amount of the certificates on the date they are issued and the approximate total principal amount of the certificates on the date of this prospectus supplement will not exceed 5%.

The Parties

The Originators

The originators of the mortgage loans are various mortgage lending institutions, including Ameriquest Mortgage Company, Aurora Loan Services Inc., BNC Mortgage, Inc., Fieldstone Mortgage Company, Finance America, LLC, First Chicago NBD Mortgage Company, Fremont Investment & Loan Association, Life Bank, Long Beach Mortgage Company, Option One Mortgage Corporation, Union Planters Bank, N.A. and Wells Fargo Home Mortgage, Inc. (formerly known as Norwest Mortgage, Inc.) or their correspondents which have previously sold the mortgage loans under separate sale agreements to either Lehman Brothers Holdings Inc., or Lehman Brothers Bank, FSB.

See "The Trust Agreement -- Assignment of the Mortgage Loans" in this prospectus supplement.

The Seller

Prior to the closing date, Lehman Brothers Bank, FSB will have assigned all of its interest in the mortgage loans to Lehman Brothers Holdings Inc. On the closing date, Lehman Brothers Holdings Inc., as seller, will convey all of its interest in the mortgage loans to the depositor.

See "The Trust Agreement -- Assignment of the Mortgage Loans" in this prospectus supplement.

The Depositor

Structured Asset Securities Corporation, a limited purpose Delaware corporation and an indirect wholly-owned subsidiary of Lehman Brothers Holdings Inc., will convey the mortgage loans to the trust fund.

See "The Trust Agreement -- Assignment of the Mortgage Loans" in this prospectus supplement.

The Trustee

First Union National Bank, a national banking association, will act as the trustee of the trust fund titled the "Amortizing Residential Collateral Trust."

See "Description of the Certificates -- The Trustee" in this prospectus supplement.

The Master Servicer

Wells Fargo Bank Minnesota, National Association (formerly known as Norwest Bank Minnesota, National Association), as master servicer, will oversee, but have no primary responsibility for, the servicing of the mortgage loans by the primary servicers.

See "The Master Servicer" in this prospectus supplement

The Primary Servicers

Ameriquest Mortgage Company, Aurora Loan Services Inc., Homeside Lending, Inc., Life Bank, Long Beach Mortgage Company, Ocwen Federal Bank FSB, Option One Mortgage Corporation and Wells Fargo Home Mortgage, Inc. will each act as a primary servicer of certain of the mortgage loans in the trust fund pursuant to separate servicing agreements. As described herein, all of such primary servicers, other than Homeside Lending, Inc., Life Bank and Wells Fargo Home Mortgage, Inc. (each of which will only service loans in pool 2) will service

loans in both mortgage pools.

See "The Primary Servicers" and "Servicing of the Mortgage Loans" in this prospectus supplement.

The PMI Insurer

The seller has acquired for the benefit of the trust fund certain loan-level primary mortgage insurance policies to be issued by Mortgage Guaranty Insurance Corporation with respect to approximately 95.06% of those mortgage loans with original loan-to-value ratios in excess of 60% and not covered by an existing primary mortgage insurance policy.

See "Description of the Certificates -- Credit Enhancement -- Primary Mortgage Insurance" in this prospectus supplement.

The Loss Mitigation Advisor

The Murrayhill Company, as loss mitigation advisor for the trust fund, will monitor the performance of, and make recommendations to the primary servicers regarding, certain delinquent and defaulted mortgage loans.

See "Servicing of the Mortgage Loans -- The Loss Mitigation Advisor" in this prospectus supplement.

The Guarantor

Freddie Mac is guaranteeing the timely payment of interest and principal solely with respect to the Class A1 Certificates (which are not offered hereby).

Cut-off Date

August 1, 2000.

Closing Date

On or about September 8, 2000.

Payments on the Certificates

Distribution Dates. Principal and interest on the certificates will be payable on the 25th day of each month, beginning in September 2000. However, if the 25th day is not a business day, distributions will be made on the next business day after the 25th day of the month.

Interest Payments. Interest will accrue on each class of offered certificates, other than the Class P, Class X and R Certificates, at the applicable annual rate described in this prospectus supplement.

See "Description of the Certificates -- Distributions of Interest" in this prospectus supplement.

Principal Payments. The amount of principal payable on the offered certificates will be determined by (1) formulas that allocate portions of principal payments received on the mortgage loans among the different mortgage pools and the different certificate classes, (2) funds actually received or advanced on the mortgage loans that are available to make principal payments on the certificates and (3) the application of excess interest to pay principal on the certificates as described below. Funds actually received on the mortgage loans may consist of expected monthly scheduled payments, and unexpected payments resulting from prepayments or defaults by borrowers.

The manner of allocating payments of principal will differ, as described in this prospectus supplement, depending upon whether a distribution date occurs before the distribution date in September 2003 or on or after that date, and depending upon whether the delinquency and loss performance of the mortgage loans is worse than certain levels determined by the rating agencies.

See "Description of the Certificates -- Distributions of Principal" in this prospectus supplement.

Prepayment Premiums on the Mortgage Loans

The Class P Certificate will solely be entitled to the cash flow from both mortgage pools arising from prepayment premiums paid by the borrowers on certain voluntary full and partial prepayments of the mortgage loans. Accordingly, such amounts will not be available for distribution to the other classes of certificates.

See "Description of the Certificates" and "Description of the Mortgage Pools -- General" in this prospectus supplement.

Limited Recourse

The only source of cash available to make interest and principal payments on the offered certificates will be the assets of the trust fund. The trust fund will have no other source of cash other than collections and recoveries of the mortgage loans through insurance or otherwise and no other entity will be required or expected to make any payments on the offered certificates.

Credit Enhancement

The payment structure includes overcollateralization, subordination, loss allocation, limited cross-collateralization and limited insurance features to enhance the likelihood that certificateholders of more senior classes will receive regular distributions of interest and ultimate payment of principal. The Class B Certificates are more likely to experience losses than the M2, M1

Excerpts from Trust Agreement

Section 2.01. Creation and Declaration of Trust Fund; Conveyance of Mortgage Loans. (a) Concurrently with the execution and delivery of this Agreement, the Depositor does hereby transfer, assign, set over, deposit with and otherwise convey to the Trustee (or its designee, in the case of any MERS Mortgage Loans), without recourse, subject to Sections 2.02, 2.04, 2.05 and 2.06, in trust, all the right, title and interest of the Depositor in and to the Mortgage Loans.

(b) In connection with such transfer and assignment, the Depositor has delivered to, and deposited with the applicable Custodian the following documents or instruments with respect to each Mortgage Loan (each a "Mortgage File") so transferred and assigned:

(i) with respect to each Mortgage Loan, *the original Mortgage Note endorsed without recourse in proper form* to the order of the Trustee, or in blank (in each case, with all necessary intervening endorsements as applicable), or with respect to any lost Mortgage Note, an original lost note affidavit in the form annexed as Exhibit B-5 to each Custodial Agreement stating that the original Mortgage Note was lost, misplaced or destroyed, together with a copy of the related Mortgage Note;

(iii) with respect to any Mortgage Loan, the original recorded Mortgage with evidence of recording indicated thereon . . .

(v) with respect to each Non-MERS Mortgage Loan, the original Assignment of Mortgage for each Mortgage Loan assumed either (a) in blank, without recourse, or (B) to "First Union National Bank, as Trustee of the Amortizing Residential Collateral Trust, Series 2000-BC3, without recourse;"

(vi) if applicable, such original intervening assignments of the Mortgage, notice of transfer or equivalent instrument (each, an "Intervening Assignment"), as may be necessary to show a complete chain of assignment from the originator, or, in the case of an Intervening Assignment that has been lost, a written Opinion of Counsel acceptable to the Trustee and the Guarantor (in the case of any Pool 1 Mortgage Loan) that such original Intervening Assignment is not required to enforce the Trustee's interest in the Mortgage Loans;

Uniform Commercial Code

see Kemp v. Countrywide, Bankr. D.N.J. 11/16/10
Adams v. Madison Realty & Development Inc., 853 F.2d 163, 166 (3rd Cir. 1988)

UCC – Pa., 13 Pa. 1101 et seq.

1201 Definition of Holder (1) With respect to a negotiable instrument, the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession.

3104 Definition of Negotiable Instrument

3201 Definition of Negotiation
(b) ... if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its indorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

3204 Definition of Indorsement
A signature on the instrument or on a paper affixed to the instrument (an allonge)

3301 Person entitled to enforce instrument
(1) Holder
(2) Nonholder in possession who has rights of holder
(3) Person not in possession entitled to enforce per 3309 or 3418(d)

3302 Holder in due course

Kemp v. Countrywide

Court found that Bank of New York was not entitled to enforce the note because
(1) it was not a holder of the note
(a) it was not in possession of the note and
(b) the note had not been indorsed to it upon the sale

(2) it was not a non-holder in possession of the note
because it was not in possession

(3) It did not qualify under the 3rd provision, which only applies to lost, destroyed or stolen instruments

I. THE PLAINTIFF IS REQUIRED TO HAVE STANDING TO FORECLOSE UPON THE MORTGAGE OF ABIGAIL LA CROIX

A mortgage is defined as 'any conveyance of land intended by the parties at the time of making it to be a security for the payment of money or the doing of some prescribed act'.[1] The typical mortgage transaction is accomplished by the mortgagor executing to the mortgagee a mortgage note (or bond) and a mortgage.[2] The person or entity to whom the obligation or debt is owed is the mortgagee.[3] A mortgage is a lien on real property given as security for the payment of a debt and is merely collateral security for the payment of that debt.[4]

In a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced.[5] Where, as here, standing is put into issue by the defendant, the plaintiff must prove its standing in order to be entitled to relief.[6] Foreclosure of a mortgage may not be brought by one who has no title to it.[7]

II. THE PLAINTIFF IS A TRUST ACTING THROUGH ITS TRUSTEE AND BOTH ARE GOVERNED AT ALL TIMES MATERIAL TO THIS ACTION BY NEW YORK LAW

The Plaintiff in this action is identified as Wells Fargo Bank, N.A. as Trustee for the Carrington Mortgage Loan Trust Series 2006-NC5. The document which created this Trust is referred to as a Pooling and Servicing Agreement. The Pooling and Servicing agreement is the

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[1] See Burnett v Wright, 135 NY 543, 547 [citation omitted]; see, 2 Rasch, New York Real Property § 33:1, at 476 [2d ed]) as cited in D & L Holdings, LLC v. RCG Goldman Co. LLC, 287 A.D.2d 65, 71 (N.Y. App. Div. 1st Dep't 2001)

[2] 1-1 Bergman on New York Mortgage Foreclosures § 1.20

[3] 1-2 Bergman on New York Mortgage Foreclosures § 2.02

[4] 1-1 Bergman on New York Mortgage Foreclosures § 1.20

[5] See Mortgage Elec. Registration Sys., Inc. v Coakley, 41 AD3d 674, 838 N.Y.S.2d 622

[6] See Wells Fargo Bank Minn., N.A. v Mastropaolo, 42 AD3d 239, 242, 837 N.Y.S.2d 247

[7] Kluge v Fugazy, 145 AD2d 537, 538, 536 N.Y.S.2d 92 [1988]

Trust instrument which creates the Trust and defines its rights, duties and obligations.[8] The plaintiff trust, suing through its trustee, is a New York Corporate Trust formed to act as a "REMIC" trust pursuant to the IRS Tax Code. The plaintiff trust is formed and governed by New York law regarding its rights, duties, powers and obligations. The Trust was formed by the execution of a trust agreement referred to in the finance and securitization industry as a "Pooling and Servicing Agreement" or "PSA". The trust agreement is filed under oath with the Securities and Exchange Commission and is attached to the defendant's motion for summary judgment as Exhibit 9 to the deposition of Robert Petruska. The operative securitization documents consist of the Pooling and Servicing Agreement (hereinafter "PSA") and the Mortgage Loan Purchase Agreement ("MLPA"). The acquisition of the assets of the subject Trust and these documents are governed under the law of the State of New York (see, § 13.04 of PSA at Page 155).

The Plaintiff trust was created on or about December 1, 2006. The Trust by its terms set a "closing date" of December 19, 2006. Pursuant to the terms of the Trust and the applicable IRS Regulations this date was also the "Start up date" for the trust under the IRS tax code. The Start up date is significant because the IRS tax code ties the limitations upon which a REMIC trust may be funded with its assets to this date. The relevant portion of the IRS tax code addressing the definition of a REMIC is:

26 USCS § 860D

§ 860D. REMIC defined.

(a) General rule. For purposes of this title, the terms 'real estate mortgage

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[8] It is settled that the duties and powers of a trustee are defined by the terms of the trust agreement and are tempered only by the fiduciary obligation of loyalty to the beneficiaries (see, United States Trust Co. v First Natl. City Bank, 57 AD2d 285, 295-296, affd 45 NY2d 869; Restatement [Second] of Trusts § 186, comments a, d). See In re IBJ Schroder Bank & Trust Co., 271 A.D.2d 322 (N.Y. App. Div. 1st Dep't 2000)

investment conduit' and 'REMIC' mean any entity--

(1) to which an election to be treated as a REMIC applies for the taxable year and all prior taxable years,

(2) all of the interests in which are regular interests or residual interests,

(3) which has 1 (and only 1) class of residual interests (and all distributions, if any, with respect to such interests are pro rata),

(4) ***as of the close of the 3rd month beginning after the startup day*** (emphasis supplied) and at all times thereafter, substantially all of the assets of which consist of qualified mortgages and permitted investments,

The IRS Code also provides definitions of prohibited transactions and prohibited contributions. In the context of this case, the relevant statute is the definition of prohibited contributions which is as follows:

> 26 U.S.C. 860G(d)(1) states that, except as provided in section 860G(d)(2), "if any amount is contributed to a REMIC after the startup day, there is hereby imposed a tax for the taxable year of the REMIC in which the contribution is received equal to 100 percent of the amount of such contribution."
>
> 26 U.S.C. 860G(d)(2) states:
>
> (2) Exceptions. Paragraph (1) shall not apply to any contribution which is made in cash and is described in any of the following subparagraphs:

(A) Any contribution to facilitate a clean-up call (as defined in regulations) or a qualified liquidation.

(B) Any payment in the nature of a guarantee.

(C) Any contribution during the 3-month period beginning on the startup day.

(D) Any contribution to a qualified reserve fund by any holder of a residual interest in the REMIC.

(E) Any other contribution permitted in regulations.

These sections are addressed in the Trust agreement dealing with the parties to the trust agreement and their obligations to avoid any action which might jeopardize the tax status of any REMIC and / or impose any tax upon the Trust for prohibited contributions or prohibited transactions. Specifically, Article X of the PSA deals with REMIC Provisions of the Trust and states in pertinent part:

> SECTION 10.01 REMIC Administration. (a) The Trustee shall elect to treat each Trust REMIC as a REMIC under the Code and, if necessary, under applicable state law.
>
> (b) The Closing Date is hereby designated as the *"Startup Day"* of each Trust REMIC within the meaning of Section 860G(a)(9) of the Code.
> (j) Following the Startup Day, neither the Servicer nor the Trustee shall accept any contributions of assets to any Trust REMIC other than in connection with any Qualified Substitute Mortgage Loan delivered in accordance with Section 2.03 unless it shall have received an Opinion of Counsel to the effect that the inclusion of such assets in the Trust Fund will not cause any Trust REMIC to fail to qualify as a REMIC at any time that any Certificates are outstanding or subject any Trust REMIC to any tax under the REMIC Provisions or other applicable provisions of federal, state and local law or ordinances.
> SECTION 10.02 Prohibited Transactions and Activities. None of the Depositor, the Servicer or the Trustee shall sell, dispose of or substitute for any of the Mortgage Loans.... ***nor acquire any assets for any Trust REMIC*** (other than REO Property acquired in respect of a defaulted Mortgage Loan), nor sell or dispose of any investments in the Custodial Account or the Certificate Account for gain, ~~***nor accept any contributions to any Trust REMIC after the Closing***~~

> ***Date*** (other than a Qualified Substitute Mortgage Loan delivered in accordance with Section 2.03), unless it has received an Opinion of Counsel, addressed to the Trustee (at the expense of the party seeking to cause such sale, disposition, substitution, acquisition or contribution but in no event at the expense of the Trustee) that such sale, disposition, substitution, acquisition or contribution will not (a) affect adversely the status of any Trust REMIC as a REMIC or (b) cause any Trust REMIC to be subject to a tax on *"prohibited transactions"* or *"contributions"* pursuant to the REMIC Provisions. (emphasis supplied)

These sections of the trust agreement are important to the Court's analysis of the facts in this case because of the interplay between the Trust agreement under New York Law and the adoption and ratification of the IRS tax code regarding REMICs and the limits upon these trusts placed by the agreement itself, New York Trust law and the IRS tax code.

Under New York law, A typical investment trust exists where the trustees invest and reinvest the fund paid in to them in payment for shares and pay the income to the certificate holders and at the termination of the trust divide the fund among them, thus giving them a status like that of shareholders in a corporation.[9] "[T]he trust becomes a quasi corporation, separate and distinct from its members," and that the certificate holders have "a status like that of shareholders in a corporation." (263 N. Y. 177, at p. 187.) Implicit in the entire opinion, however, is the recognition that a so-called business trust is distinctive in character, and that while it possesses many of the attributes of a corporation it is not a corporation either in fact or in law.[10] Several New York courts have held that commercial trusts are "common law trusts." As early as 1935, the New York Supreme Court recognized that business trusts, also known as "Massachusetts trusts," are deemed to be common law trusts.[11] *See also In re Estate of Plotkin*, 290 N.Y.S.2d 46, 49 (N.Y. Sur. 1968) (characterizing common stock trust funds as "common law trust[s]"). Other jurisdictions are in accord. *See, e.g., Mayfield v. First Nat'l Bank of*

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[9] Brown v. Bedell, 263 N.Y. 177, 187 (N.Y. 1934)

[10] Burgoyne v. James, 156 Misc. 859, 862 (N.Y. Sup. Ct. 1935)

[11] Burgoyne v. James, 156 Misc. 859, 862 (N.Y. Sup. Ct. 1935)

Chattanooga, 137 F.2d 1013 (6th Cir. 1943) (applying common law trust principles to a pool of mortgage participation certificate holders).

Under New York law, a common law trust is established whenever the following four elements are present: (i) a designated beneficiary; (ii) a designated trustee; (iii) property sufficiently identified to enable title thereto to pass to the trustee; and (iv) actual delivery or assignment of that property to the trustee, with the intention of passing legal title to such trustee.[12] However, New York Courts have drawn critical distinctions between the common law Trustee and the indenture or corporate Trustee. While "It is a fundamental principle of trust law that the instrument under which the trustee acts is the charter of his rights"[13] It may be said that "An indenture trustee is unlike the ordinary trustee"[14] and that some cases have confined the duties of the indenture trustee to those set forth in the indenture.[15] It is undisputed however, that a trustee has only the authority granted by the instrument under which he holds, either deed or will. This fundamental rule has existed from the beginning and is still law.[16] Further, It is settled that the duties and powers of a trustee are defined by the terms of the trust agreement and are tempered only by the fiduciary obligation of loyalty to the beneficiaries (see, United States Trust Co. v First Natl. City Bank, 57 AD2d 285, 295-296, affd 45 NY2d 869; Restatement [Second] of

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[12] Brown v. Spohr, 180 N.Y. 201, 209-210 (N.Y. 1904) see also In re Estate of Fontanella, 304 N.Y.S.2d 829, 831 (N.Y. App. Div. 1969); In re Estate of Mannara, 785 N.Y.S.2d 274, 275 (N.Y. Sur. 2004).

[13] 14-140 Warren's Weed New York Real Property § 140.58

[14] Ambac Indem. Corp. v. Bankers Trust Co., 151 Misc. 2d 334, 336 (N.Y. Sup. Ct. 1991)

[15] Green v. Title Guarantee & Trust Co., 223 A.D. 12, 227 N.Y.S. 252 (1st Dept.), affd., 248 N.Y. 627 (1928); Hazzard v. Chase National Bank, 159 Misc. 57, 287 N.Y.S. 541 (Sup. Ct. 1936), affd., 257 A.D. 950, 14 N.Y.S.2d 147 (1st Dept.), affd., 282 N.Y. 652, cert. denied, 311 U.S. 708 (1940).

[16] Allison & Ver Valen Co. v. McNee, 170 Misc. 144, 146 (N.Y. Sup. Ct. 1939)

Trusts § 186, comments a, d).[17] Most importantly for purposes of this analysis is the well settled law of New York codified at NY CLS EPTL § 7-2.4 which reads:

> § 7-2.4. Act of trustee in contravention of trust
>
> If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void.

This statute is the reenactment of RPL § 105 and this exact language was cited as early as 1939 to void the actions of a Trustee in contravention of his Trust in the seminal case of Allison & Ver Valen Co. v. McNee, 170 Misc. 144, 148 (N.Y. Sup. Ct. 1939).

In this case, The Pooling and servicing agreement was offered as exhibit 9 to the deposition of Robert Petruska, the 30b6 representative of the Trust who was deposed on February 12, 2010. Section 13.04 of the Pooling and Servicing Agreement (hereinafter "PSA") is an election by the parties to the pooling and servicing agreement that the Trust will be governed by New York law.[18] The PSA and its exhibits, including the Mortgage Loan Purchase Agreement (which was also part of exhibit 9 to the Petruska deposition) set out the mechanism by which the mortgage loans are sold from the originator to the Trust. The Defendant prepared an exhibit to the deposition of Robert Petruska which is a chart setting forth the parties who purchased and sold the loans which were allegedly purchased by the Plaintiff Trust. This

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[17] In re IBJ Schroder Bank & Trust Co., 271 A.D.2d 322 (N.Y. App. Div. 1st Dep't 2000)

[18] SECTION 13.04 Governing Law. THIS AGREEMENT SHALL BE CONSTRUED IN ACCORDANCE WITH AND GOVERNED BY THE SUBSTANTIVE LAWS OF THE STATE OF NEW YORK APPLICABLE TO AGREEMENTS MADE AND TO BE PERFORMED IN THE STATE OF NEW YORK AND THE OBLIGATIONS, RIGHTS AND REMEDIES OF THE PARTIES HERETO AND THE CERTIFICATEHOLDERS SHALL BE DETERMINED IN ACCORDANCE WITH SUCH LAWS WITHOUT REGARD TO THE CONFLICT OF LAWS PRINCIPLES THEREOF (OTHER THAN SECTION 5-1401 OF THE GENERAL OBLIGATIONS LAWS).

document was marked as exhibit 10 to the Deposition of Robert Petruska and a copy of that exhibit is included as an exhibit to this brief for the Court's reference.[19]

According to the Mortgage Loan Purchase Agreement (hereinafter MLPA) and the PSA the following transfers were required to transfer a given promissory note from origination to the Plaintiff trust as follows:

> **transaction number one:**
>
> New Century Mortgage Corporation was to sell the loans to New Century Capital Corporation prior to December 19, 2006.
> This recital is found in the MLPA section 1 on page 2 of the document
>
> **Transaction number two:**
>
> New Century Capital Corporation was to sell the loans to Carrington Securities Corporation, L.P. on or before December 19, 2006.
> This recital is found in the MLPA at section 1 on page 2 of the document.
>
> **Transaction number three:**
>
> Carrington Securities Corporation, L.P. was to sell the loans to Stanwich Asset Acceptance Corporation on December 19, 2006 according to section 8 of the MLPA.
> This sale is found in the MLPA section 1 on page 2 of the document.
> Furthermore, Section 13 of the MLPA acknowledged that each loan was unique and identifiable and required delivery by December 19, 2006.
>
> **Transaction number four:**
>
> Stanwich Asset Acceptance Corporation was then to sell the loans to Carrington Mortgage Loan Trust 2006 – NC5 pursuant to section 2.01 under article II of the PSA found at page 59 of 369 of the PSA (exhibit 9 to deposition of Robert Petruska), according to the terms of the PSA on December 19, 2006.

Each of these transactions were to have been completed in compliance with the terms of the MLPA and the PSA on or before December 19, 2006. The demonstrative exhibit designed as

[19] A copy of this Deposition exhibit is attached to this brief numbered "exhibit 10". The document is titled "How it was supposed to work".

2009–2010 Supplement

LADNER PENNSYLVANIA REAL ESTATE LAW

Fifth Edition

By
RONALD M. FRIEDMAN
Member of the Pennsylvania Bar

VOLUME 2

GEORGE T. BISEL COMPANY, INC.
710 S. WASHINGTON SQUARE
PHILADELPHIA PENNSYLVANIA
www.bisel.com

§ 26.01. ASSIGNMENTS OF MORTGAGE

(a) Introduction to Assignments

An assignment of mortgage is the transfer of the mortgagee's rights under the promissory note and accompanying security instrument from one party to another. After the assignment, the mortgagor is bound to the new mortgagee, the assignee of the mortgage. As a general rule, mortgages are freely transferable by the mortgagee under the covenants, terms and conditions set forth in the mortgage document as are mortgage notes, bonds, or any other underlying obligation for which the mortgage is given as collateral. Traditionally, mortgages were not assigned as a matter of course. When a mortgage was assigned, a particular procedure was employed in order to verify that the rights of parties to the assignment and the mortgagor were protected. This traditional procedure is set forth below.

In modern practice, a great number of mortgages are assigned from the original mortgagee to an investor or servicing agent. The evolution of the secondary mortgage market has made it possible to have mortgage loans, especially residential mortgage loans, considered to be an investment commodity. The quality of the investment may depend upon factors such as the interest rate of the underlying obligation, the credit rating of the obligor, and the loan-to-value ratio of the mortgaged premises. Often mortgages may be assigned more than one time during the term of a mortgage with the mortgagor remitting payments to a succession of mortgage holder-assignees.

An entirely new industry has emerged since the publication of the last edition of this text. Residential mortgages were formerly the bailiwick of banks and savings and loan associations. Today, mortgage origination companies match borrowers with investors. Banks, savings banks, and credit unions also originate mortgages. Still other lenders specialize in loans where there is a higher risk of default. Typically, these lenders charge a much higher interest rate, higher loan charges, and some of these mortgages have prepayment penalties. Other service companies handle tax and insurance escrows and provide private mortgage insurance so that investors in mortgages can better manage risk.

There is a growing movement to eliminate the paperwork of assigning mortgages, cutting the attorneys, title agents and even the recorders of deeds out of the mortgage assignment process. MERS®, the Mortgage Electronic Registration System, Inc. has been in operation since just before the turn of the 21st century and countless mortgages are assigned electronically rather than following the traditional method of execution, delivery, acceptance and recording of paper assignments. And, even when MERS® is not used, as a matter of practice, rarely if ever, do parties to residential mortgage assignments follow the procedures outlined in the Historical Perspective, below. Assignees may believe that it is not cost effective to follow the traditional procedures and the parties, usually corporate entities, are willing to assume the risks of not following these time-honored procedures.

Encumbered Property: XXX XXXXXX Street
City of XXXXXX,
County, PA

This Assignment of Mortgage dated this ___ day of XXXX, 20XX.

_____(SEAL)
XXXXXXXX, Assignor

STATE OF XXXXXXX)
)
COUNTY OF)

On this, the _____ day of XXXXXX, 20XX, before me, a notary public personally appeared XXXXXXXXXXXXX, known to me, and that he/she executed the foregoing instrument for the purpose therein contained.

IN WITNESS WHEREOF, I have hereunto set my hand and notarial seal.

_____
Notary Public

It is hereby certified that the address of the Assignee is as follows:

_____
Agent of Assignee

This Assignment of Mortgage entered for record on this _____ day of _____, 20XX in XXXXXXXXX County Record Book _____ at page_____.

Please return to:

END OF FORM

Traditional Form of Assignment. The following (Form 9) is the older, more traditional form of mortgage assignment:

ASSIGNMENT OF BOND AND MORTGAGE

KNOW ALL MEN BY THESE PRESENTS, That I, XXXX, of the City and County of Philadelphia, State of Pennsylvania, assignee from xxxxx by assignment of mortgage dated February 3, 1999 and recorded in the Department of Records of the City of Philadelphia in Assignment of Mortgage Book No. xxxxx, page XX &c., said

(b) Statutory Provisions for Assignments

The following are statutory provisions for assignments of mortgages:

21 P.S. § 623-1. Assignments to be in writing
21 P.S. § 623-2. Residence of assignee
21 P.S. § 623-3. Duty of recorder
21 P.S. § 623-4. Fee
21 P.S. § 625. Certificate of residence of mortgagee or assignee
21 P.S. §§ 731-738 Compulsory Assignment of Mortgages:
§ 731. Holders of mortgages may be required to assign the same in certain cases
§ 732. Assignment may be enforced by court
§ 733. Assignment on tender of money due
§ 734. Failure or refusal to assign; court to enforce
§ 735. Compulsory assignment to mortgagor tendering payment after sale of land
§ 736. Petition if mortgagee refuses to assign; mortgagor discharged from liability on bond
§ 737. Copy of decree recorded; mortgagee's lien confined to mortgaged premises
§ 738. Prothonotary to note decree on judgment index; record and notation on margin of mortgage

Note: 21 P.S. 623 dealing with letters of attorney to satisfy mortgages was repealed. 1998, Jan. 29, P.L. 45, No. 12, § 1.

(c) Assignment of Mortgage Forms

Short Form of Assignment. The following (Form 8) is a simplified assignment of mortgage form by an individual:

ASSIGNMENT OF MORTGAGE

FOR CONSIDERATION, XXXXXXXXXXXXX hereby assigns, transfers and conveys to XXXXXXXXXXXXXXXXXXXX the following mortgage:

Mortgagor: XXXXXXXXXXXXX
Mortgagee: XXXXXXXXXXXXXXXX
Amount of Mortgage Debt: $ 000,000.00
Dated: XXXXXXX XXX, 20XX
Recorded: XXXXXXXXX, 20XX
in XXXXXX County Record Book XXXXX, Page XXX

Tax ID 40N5-47

LOST ASSIGNMENT AFFIDAVIT

I, Jeffrey Stephan, do hereby certify and affirm under penalty of perjury, that I, or another employee of GMAC MORTGAGE, LLC, have reviewed the file in the matter **GMAC MORTGAGE, LLC**, and have determined that the original Assignment has been lost and was not delivered to our office by the previous holder of the Mortgage, **FIRST UNION NATIONAL BANK AS INDENTURE TRUSTEE** but the Mortgage and Note have otherwise been duly assigned and sold to the undersigned.
Original Mortgage to Mellon Bank in the amount of $22,800.00 dated 7/13/93, recorded 7/16/93 in Book: VCS 666, Page: 565. Assignment to First Union National Bank recorded 5/13/02, document #50456986.
Mortgagee: [redacted]
Property Address: [redacted], Philadelphia, PA 19140
Parcel # 40N5-14

Submitted this 9 day of May, 2008

GMAC MORTGAGE, LLC

BY: _____
Jeffrey Stephan
Limited Signing Officer

SWORN TO and SUBSCRIBED:

before me this 9 day:

of May, 2008:

_____
Notary Public

COMMONWEALTH OF PENNSYLVANIA
Notarial Seal
Susan Turner, Notary Public
Horsham Twp., Montgomery County
My Commission Expires Nov. 9, 2011
Member, Pennsylvania Association of Notaries

State of PA
Montgomery County

CERTIFIED

eRecorded in Philadelphia, PA
07/02/2008 03:36P
Page: 1 of 2
Commissioner of Records

Doc Id: 51931219
Receipt #: 721545
Rec Fee: $124.50
Doc Code: A

LOST ASSIGNMEN

I, , do hereby certify and affirm under penalty of perjury, that I, or another employee of GMAC MORTGAGE LLC, have reviewed the file in the matter **GMAC MORTGAGE, LLC**, and have determined that the original Assignment has been lost and was not delivered to our office by the previous holder of the Mortgage, **MELLON BANK, N.A.** but the Mortgage and Note have otherwise been duly assigned and sold to the undersigned.

Executed [redacted], Mortgagor(s); to **MELLON BANK, N.A.**. Bearing date of: **July 13, 1993**; Amount Secured: **$22,800.00**; Recorded on **July 16, 1993**; in **Book VCS 666, Page 565**; in the Recorder of Deeds Office of **Philadelphia** County, Commonwealth of Pennsylvania ("Mortgage")
Tax ID:40N5-47
Property: [redacted], **Philadelphia,PA 19140**

Submitted this 12 day of June, 2008

FIRST UNION NATIONAL BANK AS INDENTURE TRUSTEE

Name:
Title: Jeffrey Stephan
Limited Signing Officer

PA
STATE OF
COUNTY OF

On this 12 day of June, 2008, before me, a Notary Public,
Jeffrey Stephan Aixa M Torres the undersigned officer, personally appeared
Limited Signing Officer *, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within instrument and acknowledged that Jeffrey Stephan, executed the same for the purposes therein contained..

* Jeffrey Stephan, Limited Signing officer of First Union National Bank as Indenture Trustee.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal.

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Aixa M. Torres, Notary Public
Horsham Twp., Montgomery County
My Commission Expires Aug. 3, 2010
Member, Pennsylvania Association of Notaries

Notary Public

My Commission Expires: 8/3/10

I hereby certify the address of the Assignee is:
3451 Hammond Avenue, Suite 150, Waterloo,IA 50702

Joseph A Goldbeck Jr

ASSIGNMENT OF MORTGAGE

KNOW ALL MEN BY THESE PRESENTS that "Wells Fargo Bank N.A." hereinafter "Assignor" the holder of the Mortgage hereinafter mentioned, for and in consideration of the sum of ONE DOLLAR ($1.00) lawful money unto it in hand paid by DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR HASCO 2007-WF1, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2007-WF1 "Assignee *the receipt whereof is hereby acknowledged, has hereby granted, bargained, sold, assigned, transferred and set over unto the said Assignee, its successors and assigns,* ALL THAT CERTAIN Indenture of Mortgage given and executed by Angela L Brown to Wells Fargo Bank N.A., bearing the date 01/29/07, in the amount of $110,700.00, together with the Note and indebtedness therein mentioned, said Mortgage being recorded on 03/19/07 in the County of Philadelphia, Commonwealth of Pennsylvania, in Mortgage Book Doc#51651958
Being Known as Premises: [redacted], Philadelphia PA 19124
Parcel No: 137N20-0135

The transfer of the mortgage and accompanying rights was effective at the time the loan was sold and consideration passed to the Assignee. This assignment is solely intended to describe the instrument sold in a manner sufficient to put third parties on public notice of what has been sold.

Also the Bond or Obligation in the said Indenture of Mortgage recited, and all Moneys, Principal and Interest, due and to grow due thereon, with the Warrant of Attorney to the said Obligation annexed. Together with all Rights, Remedies and incidents thereunto belonging. And all its Right, Title, Interest, Property, Claim and Demand, in and to the same:
TO HAVE, HOLD, RECEIVE AND TAKE, all and singular the hereditaments and premises hereby granted and assigned, or mentioned and intended so to be, with the appurtenances unto Assignee, its successors and assigns, to and for its only proper use, benefit and behoof forever; subject, nevertheless, to the equity of redemption of said Mortgagor in the said Indenture of Mortgage named, and his/her/their heirs and assigns therein.
IN WITNESS WHEREOF, the said "Assignor" has caused its Corporate Seal to be herein affixed and these presents to be duly executed by its proper officers this 24th day of April, 2008.

Wells Fargo Bank N.A.

By: _____
Michele M Bradford Vice President of Loan Documentation

Sealed and Delivered
in the presence of us;

Attest: _____

State of PA :
ss.
County of Phila :

51903786
Page 1 of 2
05/13/2008 09:37AM

On this 24th day of April, 2008, before me, the subscriber, personally appeared Michele M Bradford, who acknowledged him/herself to be the Vice President of Loan Documentation of Wells Fargo Bank N.A., and that he/she, as such Vice President of Loan Documentation, being authorized to do so, executed the foregoing instrument for the purposes therein contained.
IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Thomas P. Strain
Notary Public

Stamp/Seal:

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
THOMAS P. STRAIN, Notary Public
City of Philadelphia, Phila. County
My Commission Expires February 4, 2010

The precise address of the within named Assignee is:
3476 Stateview Blvd
Ft Mill SC 29715
By: _____
(for Assignee)

After recording return to:
Phelan, Hallinan and Schmieg LLP
One Penn Center
1617 J.F.K. Blvd., Ste.1400
Philadelphia, PA 19103-1814

4/17/08-JHC
Doc Request
0158142687

This Document Recorded
05/13/2008
09:37AM
Doc Code: A

Doc Id: 51903786
Receipt #: 708707
Rec Fee: 124.50
Commissioner of Records, City of Philadelphia

epared By and Return To: Beth Gradel
LOBECK McCAFFERTY & McKEEVER
Mellon Independence Center - Suite 5000
701 Market Street
Philadelphia, PA 19106-1532
215-825-6344

eRecorded in Philadelphia, PA
12/30/2008 10:48A
Page: 1 of 3
Commissioner of Records

Doc Id: 52008097
Receipt #: 765488
Rec Fee: $124.50
Doc Code: A

0359510609

GMM File Number: 75156FC

Parcel ID#: 145N19-123

ASSIGNMENT OF MORTGAGE

GMAC MORTGAGE, LLC (Assignor),
for and in consideration of the sum of Ten Dollars ($10.00) and other good and valuable consideration, the receipt of which is acknowledged, does grant, bargain, sell, assign and transfer to U.S. BANK, N.A. AS TRUSTEE OF 2007-TC1.

U.S. BANK, N.A. AS TRUSTEE OF 2007-TC1 (Assignee),
all of its right, title and interest, as holder of, in, and to the following described mortgage, the property described and the indebtedness secured by the mortgage:

Executed CELESTE G. LEWIS and JOSEPH O. LEWIS , Mortgagor(s); to AMERIQUEST MORTGAGE COMPANY. Bearing date of: 09/25/98; Amount Secured: $48,800.00; Recorded on 10/09/98; in Book JTD 1545 Page 123; in the Recorder of Deeds Office of Philadelphia County, Commonwealth of Pennsylvania ("Mortgage")

Property: 1961 Ashley Street, Philadelphia,PA 19138

AS FURTHER DESCRIBED IN EXHIBIT "A", ATTACHED AND INCORPORATED INTO THIS ASSIGNMENT.

Together with the note or obligation described in the Mortgage endorsed to the Assignee,("Note") and all moneys due and to become due on the Note and Mortgage, with interest. Assignee its successors, legal representatives and assigns shall hold all rights under the Note and Mortgage forever, subject however, to the right and equity of redemption, if any, of the maker(s) of the Mortgage, their heirs and assigns forever.

Assignor, by its appropriate corporate officers, has executed and sealed with its corporate seal this Assignment of Mortgage on this 11 day of Dec., 2008.

GMAC MORTGAGE, LLC

(Affix Corporate Seal)

(SEAL)
Name: Jeffrey Stephan
Title: Limited Signing Officer

(SEAL)
Name:
Title: John Kerr, Limited Signing Officer

ss:
STATE OF PA) COUNTY OF Montgomery County

BE IT REMEMBERED, that on this 11 day of Dec, 2008, before me, the subscriber, a Notary Public personally appeared Jeffrey Stephan and John Kerr, Limited Signing Officer Limited Signing Officer GMAC Mortgage, LLC officers of Assignor, who I am satisfied are the persons who signed the within instrument and they acknowledged that they signed, sealed with the corporate seal and delivered the same as such officers aforesaid, and that the within instrument is the voluntary act and deed of such corporation made by virtue of a Resolution of its Board of Directors.

Notary Public
My commission expires:

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Mary Lynch, Notary Public
Upper Dublin Twp., Montgomery County
My Commission Expires Nov. 3, 2010
Member, Pennsylvania Association of Notaries

I hereby certify the address of the Assignee is:
3451 Hammond Avenue, Waterloo,IA 50702
Michael McKeever

0359510609

Case #: 75156FC

GOLDBECK McCAFFERTY & McKEEVER
BY: Thomas I. Puleo, Esquire
Attorney I.D.# 27615
Suite 5000 Mellon Independence Center
701 Market Street
Philadelphia, PA 19106
215-627-1322
Attorney for Plaintiff

U.S. BANK, N.A. AS TRUSTEE OF 2007-TC1
3451 Hammond Avenue
Waterloo, IA 50702

vs.

[redacted], JR.
Mortgagor and Record Owner
[redacted]
Philadelphia, PA 19138

IN THE COURT OF COMMON PLEAS

OF Philadelphia COUNTY

Term
No. 090100759

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Jeffrey Stephan
Limited Signing Officer
_____, being duly sworn according to law, deposes and says:

1. I am the LSO for and representative of Plaintiff. I am authorized to make and do make this affidavit on behalf of Plaintiff; and that the facts set forth in the foregoing Motion for Summary Judgment are true and correct to the best of my knowledge, information and belief.

2. I have reviewed the business records that relate to the mortgage loan account that forms the basis of this action and, based on those business records, I have personal knowledge of the matters referred to in Plaintiff's Motion and as set forth below, I make this affidavit in support of Plaintiff's Motion for Summary Judgment, and aver that the facts set forth below are admissible in evidence and I am competent to testify to the matters stated herein.

3. The Defendant, [redacted], Philadelphia, PA 19138, made, executed and delivered a Mortgage upon the premises, [redacted] Philadelphia, PA 19138, on September 25, 1998 to AMERIQUEST MORTGAGE COMPANY.

4. The mortgage is held by Plaintiff. The mortgage was assigned to U.S. BANK, N.A. AS TRUSTEE OF 2007-TC1 by Assignment of Mortgage.

5. The Mortgage is in default because monthly payments of principal and interest due August 01, 2008 and each month thereafter are due and unpaid. At no time from August 01, 2008 to the present has the Defendant tendered the amount of payments required to bring the Mortgage current and I have at all times been willing to accept same.

6. Notice of Intention to Foreclose and a Notice of Homeowners Emergency Mortgage Assistance has been sent to Defendant by Certified and regular mail, as required by Act 160 of 1998 of the Commonwealth of Pennsylvania, on the date set forth in the true and correct copy of such notice attached hereto as Exhibit B to Plaintiff s Complaint. The Defendant has not had the required face-to-face meeting within the required time and Plaintiff has no knowledge of any such meeting being requested by the Defendant through the Plaintiff, the Pennsylvania Housing Finance Agency, or any appropriate Consumer Credit Counseling Agency.

7. The amounts due and owing on the mortgage in question as of the filing of the Complaint are as follows:

Principal Balance	$44,425.98
Interest from 07/01/2008 through 12/31/2008 at 10.8750% Per Diem interest rate at $13.23	$2,024.19
Reasonable Attorney s Fee at 5% Principal Balance	$2,221.30
Late Charges from 08/01/2008 to 12/31/2008 Monthly late charge amount at $22.66	$90.64
Costs of Suit and Title Search	$900.00
Property Inspection	$22.50
Escrow Advance	$273.46
Unapplied Funds Monthly Escrow amount $171.42	($3.79)
	$49,954.28

I hereby verify that any and all exhibits attached to the Motion for Summary Judgment are true and correct copies of the originals and I declare all of the foregoing to be true and correct.

SWORN TO AND SUBSCRIBED:
before me this 19 day:
of AUG, 2009:

Nikole Shelton
Notary Public

Jeffrey Stephan
Limited Signing Officer

COMMONWEALTH OF PENNSYLVANIA
NOTARIAL SEAL
Nikole Shelton, Notary Public
Upper Dublin Twp., Montgomery County
My Commission Expires Aug. 11, 2010
Member, Pennsylvania Association of Notaries

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In the Matter of	:	Case No. 08-18700-JHW
John T. Kemp	:	
Debtor	:	
John T. Kemp	:	Adversary No. 08-2448
Plaintiff	:	
v.	:	
Countrywide Home Loans, Inc.	:	**OPINION**
Defendant	:	

APPEARANCES: Bruce H. Levitt, Esq.
Levitt & Slafkes, PC
76 South Orange Avenue, Suite 305
South Orange, New Jersey 07079
Counsel for the Debtor

Harold Kaplan, Esq.
Dori L. Scovish, Esq.
Frenkel, Lambert, Weiss, Weisman & Gordon, LLP
80 Main Street, Suite 460
West Orange, New Jersey 07052
Counsel for the Defendant

Before the court for resolution is the debtor's adversary complaint seeking to expunge the proof of claim filed on behalf of the Bank of New York by Countrywide Home Loans, Inc. as servicer. The debtor challenges the creditor's opportunity to enforce the obligation alleged to be due, based

primarily on the fact that the underlying note executed by the debtor was not properly indorsed to the transferee, and was never placed in the transferee's possession. Under the New Jersey Uniform Commercial Code, the note, as a negotiable instrument, is not enforceable by the Bank of New York under these circumstances. The plaintiff/debtor's challenge to the proof of claim is sustained on this record.

PROCEDURAL HISTORY

On May 9, 2008, the debtor, John T. Kemp, filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. The debtor scheduled an ownership interest in several properties, including one located at 1316 Kings Highway, Haddon Heights, New Jersey, the property at issue in this proceeding. Schedule D of the debtor's petition, listing creditors holding secured claims, listed Countrywide Home Loans as both the first and second mortgagee, with claims of $167,000 and $42,000, respectively, against the 1316 Kings Highway property. The debtor's Chapter 13 plan proposed to make payments over 60 months to satisfy priority claims and to cure arrearages on three separate mortgages, including the two Countrywide mortgages.[1]

[1] The debtor filed an amended plan on October 3, 2008 which was confirmed on December 11, 2008 at $2,081 for 54 months. The modified plan increased the arrearage to be paid to Countrywide from $18,000 to $34,000,

On June 11, 2008, the defendant herein, Countrywide Home Loans, Inc. (hereinafter "Countrywide"), identifying itself as the servicer for the Bank of New York, filed a secured proof of claim in the amount of $211,202.41, including $40,569.69 in arrears, noting the property at 1316 Kings Highway as the collateral for the claim.[2] The debtor filed this adversary complaint on October 16, 2008 against Countrywide, seeking to expunge its proof of claim.[3] The debtor asserts that the Bank of New York cannot enforce the underlying obligation.

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and maintained the second Countrywide mortgage arrears at $6,000. A second modified plan was filed on April 15, 2010 and is currently scheduled for confirmation on December 8, 2010. The latest modified plan does not list Countrywide as a creditor to be treated under the plan.

[2] Although the debtor listed two mortgages held by Countrywide against 1316 Kings Highway in his schedules, Countrywide only filed one proof of claim regarding one mortgage and note.

[3] In 2008, Countrywide Financial Corporation, the umbrella organization for Countrywide Home Loans, Inc., was purchased by the Bank of America Corporation. Effective April 27, 2009, Countrywide Home Loans, Inc. changed its name to BAC Home Loan Servicing, L.P. ("BAC Servicing"). Motion to Dismiss, Van Beveren Certif. at 1. On July 1, 2010, a "Transfer of Claim for Security" was filed on the debtor's claim register, transferring the claim from "Countrywide Home Loans, Inc., servicer for Bank of New York" to "BAC Home Loan Servicing, LP". In this opinion, I will continue to refer to the defendant as Countrywide.

FACTS

In his complaint, the debtor does not dispute that he signed the original mortgage documents in question. The note and mortgage were executed by the debtor on May 31, 2006. The note, designated as an "Interest Only Adjustable Rate Note", listed the lender as "Countrywide Home Loans, Inc." No indorsement appeared on the note. Accompanying the note was an unsigned "Allonge to Note" dated the same day, May 31, 2006, in favor of "America's Wholesale Lender", directing that the debtor "Pay to the Order of Countrywide Home Loans, Inc., d/b/a America's Wholesale Lender."[4]

The mortgage, in the amount of $167,000, listed the lender as "America's Wholesale Lender". Mortgage Electronic Registration Systems, Inc., or "MERS", is named as "the mortgagee", and is authorized to act "solely as the nominee" for the lender and the lender's successors and assigns. The mortgage references the promissory note signed by the borrower on the same date. The mortgage was recorded in the Camden County Clerk's Office on July 13, 2006.

Shortly after the execution by the debtor of the note and mortgage, the

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[4] The record does not reflect whether the unsigned allonge was physically affixed to the note.

instruments executed by the debtor were apparently pooled with other similar instruments and sold as a package to the Bank of New York as Trustee. On June 28, 2006, a Pooling and Servicing Agreement ("PSA" or "the Agreement") was executed by CWABS, Inc. as the depositor, with Countrywide Home Loans, Inc., Park Monaco, Inc. and Park Sienna, LLC as the sellers, Countrywide Home Loans Servicing LP ("Countrywide Servicing") as the master servicer, and the Bank of New York as the Trustee. Pursuant to the Agreement, the depositor was directed to transfer the Trust Fund, consisting of specified mortgage loans and their proceeds, including the debtor's loan, to the Bank of New York as Trustee, in return for certificates referred to as Asset-backed Certificates, Series 2006-8. The sellers sold, transferred or assigned to the depositor "all the right, title and interest of such Seller in and to the applicable Initial Mortgage Loans, including all interest and principal received and receivable by such Seller." PSA § 2.01(a) at 52. In turn, the depositor immediately transferred "all right title and interest in the Initial Mortgage Loans," including the debtor's loan, to the Trustee, for the benefit of the certificate holders. Id.

The Agreement expressly provided that in connection with the transfer of each loan, the depositor was to deliver "the original Mortgage Note, endorsed by manual or facsimile signature in blank in the following form: 'Pay to the order

of _____ without recourse', with all intervening endorsements that show a complete chain of endorsement from the originator to the Person endorsing the Mortgage Note." PSA § 2.01(g)(i) at 56. Most significantly for purposes of this discussion, the note in question was never indorsed in blank or delivered to the Bank of New York, as required by the Pooling and Servicing Agreement.

On March 14, 2007, MERS, as the nominee for America's Wholesale Lender, assigned the debtor's mortgage to the Bank of New York as Trustee for the Certificateholders CWABs, Inc. Asset-backed Certificates, Series 2006-8. The assignment purported to assign "a certain mortgage dated May 31, 2006 . . . [t]ogether with the Bond, Note or other obligation described in the Mortgage, and the money due and to become due thereon, with the interest." The assignment provided further that the "Assignor covenants that there is now due and owing upon the Mortgage and the Bond, Note or other obligation secured thereby, the sum of $167,199.92 Dollars principal with interest thereon to be computed at the rate of 9.530 percent per year." The assignment was recorded with the County Clerk on March 24, 2008.

At the trial of this matter, Countrywide produced a new undated "Allonge to Promissory Note", which directed the debtor to "Pay to the Order of Bank of New York, as Trustee for the Certificateholders CWABS, Inc., Asset-backed

Certificates, Series 6006-8."[5] The new allonge was signed by Sharon Mason, Vice President of Countrywide Home Loans, Inc., in the Bankruptcy Risk Litigation Management Department. Linda DeMartini, a supervisor and operational team leader for the Litigation Management Department for BAC Home Loans Servicing L.P. ("BAC Servicing"),[6] testified that the new allonge was prepared in anticipation of this litigation, and that it was signed several weeks before the trial by Sharon Mason.

As to the location of the note, Ms. DeMartini testified that to her knowledge, the original note never left the possession of Countrywide, and that the original note appears to have been transferred to Countrywide's foreclosure unit, as evidenced by internal FedEx tracking numbers. She also confirmed that the new allonge had not been attached or otherwise affixed to the note. She testified further that it was customary for Countrywide to maintain

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[5] The allonge misidentifies the Asset-backed Certificates as "Series 6006-8" rather than "Series 2006-8."

[6] Ms. DeMartini testified that Countrywide Home Loans, Inc., the originator of the note and mortgage at issue here, and Countrywide Home Loans Servicing LP, the servicer of the loan both before and after the sale of the loan, were and are two different legal entities under one corporate umbrella. Her understanding that the entity known as Countrywide Home Loans Servicing LP became BAP Home Loans Servicing LP when Bank of America took over the Countrywide entities differs from the representation made in papers submitted by the defendant herein that the entity known as Countrywide Home Loans, Inc. became BAP Home Loan Servicing LP. See n. 3.

possession of the original note and related loan documents.

In a supplemental submission dated September 9, 2009, the defendant asserted that "the Defendant/Secured Creditor located the original Note. The original Note with allonge and Pooling and Servicing Agreement are available for inspection."[7] When the matter returned to the court on September 24, 2009, counsel for the defendant represented to the court that he had the original note, with the new allonge now attached, in his possession. No additional information was presented regarding the chain of possession of the note from its origination until counsel acquired possession.

In sum, we have established on this record that at the time of the filing of the proof of claim, the debtor's mortgage had been assigned to the Bank of New

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[7] In a bizarre twist, in the same September 9, 2009 submission, Countrywide produced a copy of a "Lost Note Certification," dated February 1, 2007, which indicated that the original note had been delivered to the lender on the origination date and thereafter "misplaced, lost or destroyed, and after a thorough and diligent search, no one has been able to locate the original Note." The defendant asserted for the first time that the "whereabouts of the Note could not be determined" at the time that the proof of claim was filed. Def. Suppl. Subm. at 6. As a result, Countrywide claimed that it was unable to affix the allonge to the note until after the original note had been rediscovered. At the next hearing on September 24, 2009, counsel was not able to explain the inconsistencies between the lost note certification, Ms. DeMartini's testimony, and the "rediscovery" of the note, and asked that the lost note certification be disregarded. T13-15 to 16 (9/24/2009).

York, but that Countrywide did not transfer possession of the associated note to the Bank. Shortly before trial in this matter, the defendant executed an allonge to transfer the note to the Bank of New York; however, the allonge was not initially affixed to the original note, and possession of the note never actually changed. The Pooling and Servicing Agreement required an indorsement and transfer of the note to the Trustee, but this was not accomplished prior to the filing of the proof of claim. The defendant has now produced the original note and has apparently affixed the new allonge to it, but the original note and allonge still have not been transferred to the possession of the Bank of New York. Countrywide, the originator of the loan, filed the proof of claim on behalf of the Bank of New York as Trustee, claiming that it was the servicer for the loan. Pursuant to the PSA, Countrywide Servicing, and not Countrywide, Inc., was the master servicer for the transferred loans.[8] At all relevant times, the original note appears to have been either in the possession

[8] According to a Prospectus Supplement dated June 30, 2006, filed by Countrywide, Inc. with the Securities and Exchange Commission, see www.sec.gov, Countrywide Servicing was created to service the loans originated by Countrywide, Inc. The Prospectus notes that "Countrywide Home Loans expects to continue to directly service a portion of its loan portfolio," while transferring new mortgage loans to Countrywide Servicing. Prospectus Supplement at 40. In addition, because "certain employees of Countrywide Home Loans became employees of Countrywide Servicing, Countrywide Servicing has engaged Countrywide Home Loans as a subservicer to perform certain loan servicing activities on its behalf." Id. Because Countrywide Home Loans, Inc. designated itself as the servicer for the Bank of New York on the proof of claim at issue here, I assume for these purposes that it is acting in that capacity on this loan.

of Countrywide or Countrywide Servicing.[9]

DISCUSSION

With this factual backdrop, we turn to the issue of whether the challenge to the proof of claim filed on behalf of the Bank of New York, by its servicer Countrywide, can be sustained. Under the Bankruptcy Code, a claim is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a). If an objection to a claim is made, the claim is disallowed "to the extent that . . . such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured." 11 U.S.C. § 502(b)(1).

Countrywide's claim here must be disallowed, because it is unenforceable under New Jersey law on two grounds. First, under New Jersey's Uniform Commercial Code ("UCC") provisions, the fact that the owner

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[9] The record is unclear about whether the original note has been in the possession of Countrywide Home Loans, Inc. or Countrywide Home Loans Servicing LP. Ms. DeMartini testified both that the original note was always located in the Countrywide origination file (presumably at Countrywide Home Loans, Inc.) and that the servicer actually retained possession of the original note (presumably Countrywide Home Loans Servicing LP). She also testified that the "Documents Department" was charged with imaging and storing the original documents, but the record is not clear about which of the two entities housed the Documents Department.

of the note, the Bank of New York, never had possession of the note, is fatal to its enforcement. Second, upon the sale of the note and mortgage to the Bank of New York, the fact that the note was not properly indorsed to the new owner also defeats the enforceability of the note.

Under New Jersey law, the enforcement of a promissory note that is secured by a mortgage is governed by the UCC. The note, at issue here, made payable to Countrywide, providing for interest and an unconditional promise to pay the lender, is a "negotiable instrument" under the New Jersey UCC, which defines a negotiable instrument as "an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it: (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder; (2) is payable on demand or at a definite time." N.J.S.A. 12A:3-104. A party is entitled to enforce a negotiable instrument if it is "the holder of the instrument, a nonholder in possession of the instrument who has the rights of a holder, or a person not in possession of the instrument who is entitled to enforce the instrument pursuant to 12A:3-309 or subsection d. of 12A:3-418." N.J.S.A. 12A:3-301. In this case, the creditor may not enforce the instrument under any of the three statutory qualifiers.

1. Holder.

A "holder" is defined as "the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession." N.J.S.A. 12A:1-201(20). "Mere ownership or possession of a note is insufficient to qualify an individual as a 'holder'." Adams v. Madison Realty & Dev. Inc., 853 F.2d 163, 166 (3d Cir. 1988). Where, as here, the ownership of an instrument is transferred, the transferee's attainment of the status of "holder" depends on the negotiation of the instrument to the transferee. N.J.S.A. 12A:3-201(a). The two elements required for negotiation, both of which are missing here, are the transfer of possession of the instrument to the transferee, and its indorsement by the holder. N.J.S.A. 12A:3-201(b).

As to the issue of possession, we are not certain on this record whether the party in possession of the note is Countrywide or Countrywide Servicing.[10] What we do know is that the note was purchased by the Bank of New York as Trustee, but never came into the physical possession of the Bank. Because the Bank of New York never had possession of the note, it can not qualify as a "holder" under the New Jersey UCC. See Dolin v. Darnall, 115 N.J.L. 508, 181

[10] See n. 9.

A. 201 (E&A 1935) ("Since the plaintiff was not 'in possession of' the notes in question, he was neither the 'holder' nor the 'bearer' thereof.").[11]

The second element required to negotiate an instrument to the transferee, i.e., indorsement of the instrument by the holder, is also missing here. An indorsement means "a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of negotiating the instrument, restricting payment of the instrument, or incurring indorser's liability on the instrument." N.J.S.A. 12A:3-204. The indorsement may be on the instrument itself, or it may be on "a paper affixed to the instrument." Id. Such a paper is called an "allonge", defined as "[a] slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." See Black's Law Dictionary at 88 (9th Ed. 2009).

The significance of indorsement and affixation requirements to achieve

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[11] If Countrywide was in possession of the note, then it would have had "holder" status as of the date of the petition filing date, because the note was payable to Countrywide, no indorsement or allonge had been executed, and Countrywide was in possession of the original note. However, Countrywide did not file the claim on its own behalf. Rather, it filed the claim as "servicer for Bank of New York." The qualification of the Bank of New York, rather than Countrywide, to enforce the note is at issue.

holder status, and thereby qualify to enforce a note against the maker, was explained by the Third Circuit in Adams v. Madison Realty & Dev. Inc., supra. The court explained that the maker of the note must have certainty regarding the party who is entitled to enforce the note.

> From the maker's standpoint, therefore, it becomes essential to establish that the person who demands payment of a negotiable note, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument. These risks provide makers with a recognizable interest in demanding proof of the chain of title. Consequently, plaintiffs here, as makers of the notes, may properly press defendant to establish its holder status.

853 F.2d at 168.

At the time of the Adams' decision, the New Jersey UCC provided in relevant part that "[a]n indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof." N.J.S.A. 12A:3-202(2) (1961).[12] The UCC Commentary explained that this language was in conformance with those

> decisions holding that a purported indorsement on a mortgage or other separate paper pinned or clipped to an instrument is not

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[12] The New Jersey Study Comment noted that the "wording in reference to indorsements [was] changed from 'or upon a paper attached thereto', to 'so firmly affixed thereto as to become a part thereof'. This change merely implement[ed] the ancient doctrine of allonge."

> sufficient for negotiation. The indorsement must on the instrument itself or on a paper intended for the purpose is so firmly affixed to the instrument as to become an extension or part of it. Such a paper is called an allonge.

In 1995, Chapter 3 of Title 12A was amended and subsection 2 of 12A:3-202 was revised, renumbered, and included as the last sentence in N.J.S.A. 12A:3-204(a). As revised, the provision now states that "[f]or the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument." N.J.S.A. 12A:3-204(a).

In this case, we had neither a proper indorsement on the note itself, nor an allonge that was executed at the time the proof of claim was filed. An allonge purporting to negotiate the note to the Bank of New York was not executed until shortly before the original trial date, and was not affixed to the original note until the second trial date. Even if the newly executed allonge is recognized as a valid indorsement of the note, under these circumstances, the Bank of New York does not qualify as a holder, because it never came into possession of the note.[13]

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[13] As an additional argument in support of the proposition that the Bank of New York qualifies as a holder who may enforce the note, the claimant cites to Mulert v. National Bank of Tarentum, 210 F. 857, 860 (3d Cir. 1913) for the proposition that it had constructive possession of the note because Countrywide intended to transfer possession, and that constructive possession is sufficient to permit the transferee to enforce the note. This proposition is not sustainable in light of the actual possession required under the New Jersey

2. Nonholder in Possession.

Nor does the claimant qualify as a non-holder in possession who has the rights of a holder. "A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument." N.J.S.A. 12A:3-301. The Official Comment to section 3-301 adds that this definition:

> 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 by subrogation or under Section 3-203(a). It also includes both a remitter that has received an instrument from the issuer but has not yet transferred or negotiated the instrument to another person and also any other person who under applicable law is a successor to the holder or otherwise acquires the holder's rights.

Id. at UCC Comment to § 3-301. Countrywide, the originator of the loan and the original "holder" of the note, sold the note to the Bank of New York as Trustee. In this way, the Bank of New York is a successor to the holder. As a successor to the holder of the note, the Bank of New York would qualify as a non-holder in possession who could enforce the note by its servicer if it had possession of the note. Because the Bank of New York does not have possession of the note, and never did, it may not enforce the note as a

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UCC. See N.J.S.A. 12A:1-201(20).

nonholder in possession.

3. Non-holder Not in Possession.

The third category that would enable a claimant to enforce the note would be a person not in possession of the note who is entitled to enforce the note pursuant to N.J.S.A. 12A:3-309 or subsection d. of N.J.S.A. 12A:3-418. Section 12A:3-309 concerns the enforcement of lost, destroyed or stolen instruments.[14] The defendant presented a lost note certification to this court,

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[14] N.J.S.A. 12A:3-309 provides:

> a. A person not in possession of an instrument is entitled to enforce the instrument if the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, the loss of possession was not the result of a transfer by the person or a lawful seizure, and the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.
>
> b. A person seeking enforcement of an instrument under subsection a. of this section must prove the terms of the instrument and the person's right to enforce the instrument. If that proof is made, 12A:3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.

but the factual predicate of the certificate conflicted with other facts presented on this record, and we have determined to disregard the certificate.[15] Section 12A:3-418, concerning payment or acceptance by mistake, does not apply here.

In a recent District Court decision from the District of Massachusetts, the court rejected the enforcement of a note where the assignee of the note and accompanying mortgage did not have possession of the note. Marks v. Braunstein, No. 09-11402-NMG, 2010 WL 3622111 (D.Mass. Sept. 14, 2010). In Marks, the assignee of the note and mortgage purchased the collateral for the note, a commercial building, from the Chapter 7 trustee, filed a secured proof of claim, and sought to enforce the note and mortgage against the proceeds from the sale. When the matter first came on to be heard, the claimant confirmed that he was not in possession of the note and was unaware of who was in possession of it.[16] Because the claimant acknowledged that he was never in possession of the note, he was precluded from reliance on Section 3-309A of the Massachusetts UCC, which permits enforcement of a lost, destroyed or stolen instrument, but requires possession of the instrument at

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[15] See n. 7.

[16] Following the disallowance of the proof of claim by the court, the claimant discovered the location of the note. However, the bankruptcy court denied his motion for reconsideration of the disallowance. The denial was affirmed by the District Court. Marks v. Braunstein, 2010 WL 3622111 at *5.

some point. Citing to Premier Capital, LLC v. Gavin, 319 B.R. 27, 33 (1st Cir. BAP 2004), the Marks court reflected that "[t]he purpose of the possession requirement in Article 3 is to protect the Debtor from multiple enforcement claims to the same note." Id. at *3. Acknowledging that conflicting enforcement claims were not a concern in the case before it, the court nevertheless applied the statutory requirements to hold that the note could not be enforced by the claimant to collect proceeds otherwise due to the claimant from the sale of the collateral on account of his secured claim.

Similarly, in this case, the purchaser of the note and mortgage, the Bank of New York, never had possession of the note. Therefore, under the Uniform Commercial Code as adopted in New Jersey, the Bank of New York as Trustee may not enforce the instrument.

On behalf of the Bank of New York, Countrywide contends that the written mortgage assignment in this case, which purports to assign both the note and mortgage in this case, and which was properly executed and recorded with the appropriate county clerk's office, serves to properly transfer the note to the new owner, enabling the new owner to enforce both the note and the mortgage. The recorded assignment of mortgage does include provision for the assignment of the note as well. However, the recorded assignment of the

mortgage does not establish the enforceability of the note. As discussed above, the UCC governs the transfer of a promissory note. See 29 Myron C. Weinstin, New Jersey Practice, Law of Mortgages, § 11.2 at 749. The attempted assignment of the note in the assignment of mortgage document, together with the terms of the Pooling and Servicing Agreement, created an ownership issue, but did not transfer the right to enforce the note.

> The right to enforce an instrument and ownership of the instrument are two different concepts. . . . Moreover, a person who has an ownership right in an instrument might not be a person entitled to enforce the instrument. For example, suppose X is the owner and holder of an instrument payable to X. X sells the instrument to Y but is unable to deliver immediate possession to Y. Instead, X signs a document conveying all of X's right, title, and interest in the instrument to Y. Although the document may be effective to give Y a claim to ownership of the instrument, Y is not a person entitled to enforce the instrument until Y obtains possession of the instrument. No transfer of the instrument occurs under Section 3-203(a) until it is delivered to Y.

N.J.S.A. 12A:3-203 (UCC Cmt. 1). Accordingly, the Bank of New York has a valid claim of ownership, but may not enforce the note on the basis of the reference to the note in the recorded assignment of the mortgage.

The fact that the proof of claim in question was filed by "Countrywide Home Loans, Inc., as servicer for Bank of New York, Trustee" does not alter the enforceability of the note. Bankruptcy Rule 3001(b) provides that a proof of claim may be filed by either the creditor "or the creditor's agent."

FED.R.BANKR.P. 3001(b). Here, Countrywide, Inc. was the originator of the note and mortgage, but sold both the note and mortgage to the Bank of New York as Trustee, and filed the proof of claim as the "servicer" for the Bank of New York. A servicer has standing to file a proof of claim on behalf of a creditor. See, e.g., Greer v. O'Dell, 305 F.3d 1297, 1302 (11th Cir. 2002) ("A servicer is a party in interest in proceedings involving loans which it services."); In re Viencek, 273 B.R. 354, 358 (N.D.N.Y. 2002); In re Gulley, No. 07-33271-SGJ-13, 2010 WL 3342193, *9 (Bankr. N.D.Tex. Aug. 23, 2010) ("many courts have held that a mortgage servicer has standing to participate in a debtor's bankruptcy case by virtue of its pecuniary interest in collecting payments under the terms of a note"); In re Minbatiwalla, 424 B.R. 104, 109 (Bankr. S.D.N.Y. 2010); In re Conde- Dedonato, 391 B.R. 247, 250 (Bankr. E.D.N.Y. 2008) ("A servicer of a mortgage is clearly a creditor and has standing to file a proof of claim against a debtor pursuant to its duties as a servicer."). But Countrywide, as the servicer, acts only as the agent of the owner of the instrument, and has no greater right to enforce the instrument than its principal. See, e.g., Greer v. O'Dell, 305 F.3d at 1303. Because the Bank of New York has no right to enforce the note, Countrywide as its agent and servicer cannot enforce the note.[17]

[17] As noted, Countrywide Home Loans, Inc. is listed as the servicer on the debtor's loan. However, there is serious question raised about the authority of that entity to file a proof of claim on behalf of the Bank of New

CONCLUSION

Because the claim filed by "Countrywide Home Loans, Inc., servicer for Bank of New York" cannot be enforced under applicable state law, the claim must be disallowed under 11 U.S.C. § 502(b)(1).

Dated: November 16, 2010

JUDITH H. WIZMUR
CHIEF JUDGE
U.S. BANKRUPTCY COURT

York. A Power of Attorney dated November 15, 2005 was submitted, affording Countrywide Home Loans Servicing LP, not Countrywide Home Loans, Inc., the limited opportunity to perform all necessary acts to foreclose mortgage loans, dispose of properties and modify or release mortgages, presumably including the authority to file a proof of claim in a bankruptcy case.

Pennsylvania Foreclosure Rules & Rules/Statutes re False Swearing

Rule 2002: Real Party in Interest

Requires that all actions must be prosecuted by and in the name of the real party in interest

Rule 1019: Contents of Pleadings

(i) When any claim or defense is based upon a writing, the pleader shall attach a copy of the writing, or the material part, but if the writing or copy is not accessible to the pleader, it is sufficient to state, together with the reason, and to set forth the substance of the writing.

Rules 1141-1150 Mortgage Foreclosure

Rule 1147: The Complaint

The plaintiff shall set forth in the complaint:

(1) the parties to and the date of the mortgage, and of any assignments, and a statement of the place of record of the mortgage and assignments.

(2) a description of the land

(3) the names, addresses and interest of the defendants in the action and that the present real owner is unknown if the real owner is not made a party

(4) a specific averment of default

(5) an itemized statement of the amount due;

(6) a demand for judgment for the amount due.

18 Pa. C.S.A § 4902. Perjury
18 Pa. C.S.A. § 4903. False swearing
18 Pa. C.S.A. § 4904. Unsworn falsification to authorities

Rule 1024: Verification

Every pleading containing an averment of fact must be verified by the party or, if not verified by the party, must be made by a person w/ sufficient knowledge or information and belief and must state the reason not verified by a party.

Rule 1023.1. Scope. Signing of Documents. Representations to the Court.

(a) Rules 1023.1 through 1023.4 do not apply to disclosures and discovery requests, responses, objections and discovery motions that are subject to the provisions of general rules.

(b) Every pleading, written motion, and other paper directed to the court shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. This rule shall not be construed to suspend or modify the provisions of Rule 1024 or Rule 1029(e).

(c) The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, motion, or other paper. By signing, filing, submitting, or later advocating such a document, the attorney or pro se party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law,

(3) the factual allegations have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual allegations are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(d) If, after notice and a reasonable opportunity to respond, the court determines that subdivision (c) has been violated, the court may, subject to the conditions stated in Rules 1023.2 through 1023.4, impose an appropriate sanction upon any attorneys, law firms and parties that have violated subdivision (c) or are responsible for the violation.

§ 4902. Perjury

(a) Offense defined.--A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.

(b) Materiality.--Falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.

(c) Irregularities no defense.--It is not a defense to prosecution under this section that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at any time when the actor presents it as being so verified shall be deemed to have been duly sworn or affirmed.

(d) Retraction.--No person shall be guilty of an offense under this section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

~~**(e) Inconsistent statements.**--Where the defendant made inconsistent statements under~~

oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

(f) Corroboration.--In any prosecution under this section, except under subsection (e) of this section, falsity of a statement may not be established by the uncorroborated testimony of a single witness.

18 Pa. C.S.A. § 4903. False swearing

(a) False swearing in official matters.--A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he does not believe the statement to be true is guilty of a misdemeanor of the second degree if:

(1) the falsification occurs in an official proceeding; or

(2) the falsification is intended to mislead a public servant in performing his official function.

(b) Other false swearing.--A person who makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made, when he does not believe the statement to be true, is guilty of a misdemeanor of the third degree, if the statement is one which is required by law to be sworn or affirmed before a notary or other person authorized to administer oaths.

(c) Perjury provisions applicable.--Section 4902(c) through (f) of this title (relating to perjury) applies to this section.

§ 4904. Unsworn falsification to authorities

(a) In general.--A person commits a misdemeanor of the second degree if, with intent to mislead a public servant in performing his official function, he:

(1) makes any written false statement which he does not believe to be true;

(2) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or

(3) submits or invites reliance on any sample, specimen, map, boundary mark, or other object which he knows to be false.

(b) Statements "under penalty."--A person commits a misdemeanor of the third degree if he makes a written false statement which he does not believe to be true, on or pursuant to a form bearing notice, authorized by law, to the effect that false statements made therein are punishable.

(c) Perjury provisions applicable.--Section 4902(c) through (f) of this title (relating to perjury) applies to this section.

(d) Penalty.--In addition to any other penalty that may be imposed, a person convicted under this section shall be sentenced to pay a fine of at least $1,000.

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Attorney for Defendants [redacted]
and [redacted]

BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP, Plaintiff v. [redacted]olely in Her Capacity as Heir of [redacted]eceased, and Unknown Heirs of [redacted] Deceased, Defendants	COURT OF COMMON PLEAS PHILADELPHIA COUNTY CIVIL DIVISION [redacted]erm, 2009 No. [redacted]

Defendants' First Set of Interrogatories and Requests for Production Directed to Plaintiff

Pursuant to Rules 4005 and 4009.11, Pa. Rules of Civil Procedure, Defendants [redacted] and [redacted] hereby direct Plaintiff to answer the following interrogatories and produce the following documents, in accordance with the instructions and definitions set forth below.

DEFINITIONS and INSTRUCTIONS

1. In addition to any specific instructions set forth within an interrogatory, "identification," "identify," or "identity," when used in reference to: (a) an individual, requires you to state his or her full name, employer, position, address and telephone number; (b) a business entity, requires you to state its full name,

including its corporate form (e.g., Inc., LLP, LLC), any name under which it does business and the address of its principal place of business; (c) a document, requires you to state the number of pages and the nature of the document (letter, memorandum, e-mail, etc.), its title, its date, the name or names of its authors and recipients, and its present location and custodian; (d) an event or meeting requires you to state the date of the event or meeting, briefly describe the event or meeting, and identify any individual or entity involved in the event or meeting; and/or (f) location or facility requires you to state the owner of the location or facility, the street address, and the persons occupying such location or facility.

2. Without in any way limiting the definition of "document" contained in Rule 4009.1, Pa. Rules of Civil Procedure, you are specifically instructed to search all centralized and decentralized document management systems, computer and electronic/e-mail archives, disks and other media, and/or backup tapes or disks for documents responsive to the following items for which production is compelled, and production of such documents should be made regardless of whether such documents currently exist in tangible or "hard" copy form. Production is also compelled regardless of whether the user purported to "delete" the document, if such document is capable of being retrieved or restored.

3. If the requested documents are maintained in a paper file, please produce the file folder or container and all labels and notations thereon along with the documents.

4. The term "document" is an all-inclusive term with the broadest possible meaning accorded to it under the Pa. Rules of Civil Procedure, and means

12. "The original lender" means Countrywide Home Loans, Inc.

13. "The Law Firm" or "Plaintiff's counsel" means Goldbeck McCafferty & McKeever.

14. For each response provided, identify all persons who supplied information contained in the answer, and, if more than one person is listed, identify the relevant contribution of each. If such person(s) is not an employee of Plaintiff U.S. Bank, then explain the basis of such person(s)'s authority to respond on behalf of Plaintiff and identify all documents relating to such authority.

INTERROGATORIES

1. Does the named Plaintiff, "BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing LP," currently own the beneficial interest in the debt underlying this foreclosure action? If so, explain the basis for its claim of ownership, and in this description: (a) identify each separate transfer of the debt, starting with transfer from the original lender and ending with the transfer to the Plaintiff, including the date of the transfer, the individuals effectuating the transfer and any value exchanged in return for such transfer; (b) identify any and all documents that evidence or that constitute each transfer; and (c) identify any and all documents that request, describe, or otherwise relate to such transfers. If not, identify who does and describe the details of the transfer to that entity.

Persons supplying information:

Answer:

2. Identify each custodian who has held the note and mortgage from the loan since the inception of the loan and the location where the note and mortgage have been held, and for each, (a) identify the location where the custodian has held the note and mortgage; (b) the time period during which the note and mortgage were held at that location and (c) any agreement or other document that describes the duties of such custodian.

Persons supplying information:

Answer:

3. Identify the particular trust entity on whose behalf Plaintiff is acting and identify all documents that establish or pertain to that trust entity and/or that define the responsibilities and authority of Plaintiff applicable to this action.

Persons supplying information:

Answer:

4. State whether or not the loan obligation underlying this mortgage has been or is part of a pool of obligations that has been securitized If so, identify the name or other designation of the securitization trust and the trustee.

Persons supplying information:

Answer:

5. Regarding the address stated in the caption as being the address of the Plaintiff—7105 Corporate Drive, PTX C-35, Plano, TX 75024—what business is located at that address?

Persons supplying information:

Answer:

6. If the answer to the previous Interrogatory is a business entity other than BAC Home Loans Servicing, LP., describe the connection that business has

to this action and identify all documents that establish or pertain to that relationship.

Persons supplying information:

Answer:

7. Identify any and all servicing agents and default management companies that are currently involved in servicing the underlying mortgage account and/or in managing the underlying default and identify all documents that evidence or relate to any such servicing or default managing agreements.

Persons supplying information:

Answer:

8. If the initial servicer of the loan was a different entity than the one currently functioning as the servicer of the loan, identify all the previous servicers

of the loan and, for each, state the month and year each particular entity acquired servicing rights in the loan.

Persons supplying information:

Answer:

9. Identify the entity that retained the Law Firm to institute this action and identify all documents that relate to any standing agreement between that entity and the Law Firm.

Persons supplying information:

Answer:

10. Is the Law Firm a party to any Network Agreement that covers its billing in this action? If so, identify such agreement.

Persons supplying information:

Answer:

11. State the date that the Law Firm was directed to commence this action and, if that direction was communicated electronically, identify any loan management computer platform, system or software through which that communication was made and identify any documents relating to such communications.

Persons supplying information:

Answer:

12. Regarding the December 18, 2009 Assignment of Mortgage on the property from "Mortgage Electronic Registrations Systems, Inc. acting solely as a nominee for Countrywide Home Loans, Inc," to the Plaintiff, (a) identify all

documents pertaining to any request or order for such assignment, and all documents pertaining to its preparation, execution and/or filing; (b) identify all documents that relate to the authority of Gary E. McCafferty, Esquire and/or the Law Firm to execute the assignment; (c) identify the employer of the notary Martin S. Bair; and (d) state the date and amount of any charges imposed on Defendant's mortgage account that relate to the preparation, notarization or recording of the assignment.

Persons supplying information:

Answer:

13. Have any of the following entities (including their divisions) been involved in any way in the managing of this foreclosure suit and, if so, (a) describe the entity and its connection to this suit; (b) identify all actions taken by such entity with regard to this suit and (c) identify any agreements that pertain to such entity's involvement in this suit: Lender Processing Services, Inc., Fidelity National Information Services, Inc, Fidelity National Title Co., or Fidelity National Foreclosure Solutions, Inc.

Persons supplying information:

Answer:

14. Identify all persons, other than members of the Law Firm, who were involved in the decision to have a member of the Law Firm execute the Assignment of Mortgage underlying this foreclosure action and identify any communications, agreements or other documents that relate to that decision or to the authority granted to the Law Firm to make that decision.

Persons supplying information:

Answer:

15. Regarding the $2,752.92 attorney's fee alleged to be due in paragraph 6 of the Complaint, is this (a) a fixed standard amount, (b) an estimate based on anticipated hours times an hourly rate, or (c) some other amount? If (a), identify all agreements, schedules or other documents that relate to this fee. If (b), state

June 1, 2009, and continuing until the date this action was commenced. If any of the offices identified were not maintained throughout the entire time period in question, then as to each such office state the dates during which such office was maintained.

Persons supplying information:

Answer:

27. Identify all witnesses you intend to call at trial and, as to each, describe the subject matter of his or her testimony.

Persons supplying information:

Answer:

28. Identify all persons with knowledge of the claims or defenses in this matter and, as to each, describe the subject matter of his or her knowledge.

Persons supplying information:

Answer:

REQUESTS FOR PRODUCTION

1. The original promissory note and the "Bond or Obligation" referenced in the Assignment of Mortgage, together with any and all endorsements and allonges from which Plaintiff claims to be a holder of that note. **(Plaintiff is requested to produce the original of these documents for inspection, not copies.).**

2. Any agreement, correspondence or other document, including any pooling and servicing agreement (PSA) or schedule to a PSA, that, in addition to the note and mortgage, relates to the named Plaintiff's interest in the loan or to the interest of the Trust, if any, on whose behalf Plaintiff is acting in this action..

3. Any report, evaluation, correspondence, computer entry, email or other document relating to (a) the delinquency and default underlying this action, (b) the estimated value or condition of the collateral or (c) the ownership of the underlying debt.

4. All invoices and other documents related to any fee or charge included in any amount that Defendant would have to pay in order to reinstate the mortgage.

5. All title reports related to this action.

6. All documents referred to in the above Interrogatories and in the responses thereto.

7. Any and all agreements between the Law Firm and either the servicer of the loan or a default-manager-contractor of the servicer applicable to this action.

8. Any and all account activity statements for the loan, including any separate accounts that pertain to corporate advances or fees attributable to the loan.

9. All documents relating to this loan, including the documents relating to the origination, the underwriting, the closing, the transfer and/or the servicing of the loan.

10. A Key Loan Transaction or similar detailed payment history for the Borrower's loan account, including the date and amount of each payment due, the date and amount of each payment received from Borrower, the month to which each payment was applied and the date, amount and nature of each disbursement or payment taken out of the account such as for insurance and tax payments, together with all instructions or explanations of the format, terms, abbreviations and language used in the payment history.

11. If this obligation has been or is part of a pool of obligations that has been securitized, all prospectuses, pooling and servicing agreements including master servicing agreements or subservicing agreements, or reports concerning that loan pool,

including documents that describe the investment and those that describe the performance of the loans in such pool, and all documents relating or referring to same.

12. All documents reflecting the fact, date and time of delivery of the HUD publication PA 426-H, *How to Avoid Foreclosure*, to the prior to commencing foreclosure.

13. All documents recording or showing any written or oral contact with the Defendant by Plaintiff relating to Plaintiff's efforts to contact the defendant regarding the default during the first 90 days after the loan payments were past due, including but not limited to, all records contained in any claim review file maintained by the Plaintiff..

14. All documents recording or reflecting a pre-foreclosure review conducted by Plaintiff prior to commencing foreclosure, including but not limited to, all contents or documents contained in any claim review file maintained by the Plaintiff.

15. All documents recording or showing any written or spoken contact by mail, phone or any other means with the Defendant by Plaintiff which document Plaintiff's efforts to arrange a face-to-face meeting with the Defendant prior to commencing foreclosure; or any documents establishing that a face-to-face meeting occurred between Plaintiff and Defendant prior to Plaintiff's commencing foreclosure.