

ANews

President's Message

With almost 200 College members, together with spouses/partners, gathering for the College's terrific program to be presented at our Mid-Year Meeting in sunny and warm Naples, I want to share with you the report that the College is in excellent condition. Our financial house is in good order and the governance of the College has adopted significant changes to improve transparency and to conduct the business of the College in accordance with "best practices".

This year to date, we have implemented two significant new by-laws creating our Audit and Compensation Committees. The highly qualified Audit Committee, chaired by Treasurer Kathy Murphy, will present the committee's proposed Audit Committee charter in Naples. Portia Morrison is chairing our 2013 Compensation Committee. Additionally, Ken Jacobson and Tom Kaufman, working with Jill Pace, our Executive Director, led the successful search for our new auditor. With the help of George Constantine, our special counsel at Venable, the College reviewed the substantial revisions to the D.C. Not for Profit Corporation Law and the College has taken appropriate actions to assure our compliance with governing law. Similar compliance reviews under Texas law have been completed for the ACREL Foundation.

The Substantive Committees of the College have never been more active. "Newish" Fellows are

engaged as members and officers of these committees and the College is abuzz with renewed energy. Our co-sponsored audio webcast with ALI-CLE is continuing, providing our Fellows with broad exposure to the legal profession beyond the College. Steve Waters has undertaken the creation of a new working group of Fellows who practice "in-house".

The SharePoint initiative under Gordon Tanner's and Dan Smith's energetic leadership is being utilized by several committees as the "beta" model. With the invaluable assistance of ACREL Fellow Tim Osborn, Microsoft Corporation has selected the College for significant in kind assistance under Microsoft's non-profit user SharePoint support program. SharePoint, as we adapt it for our use, will make committee and College work faster, easier and more efficient for our committee and College activities.

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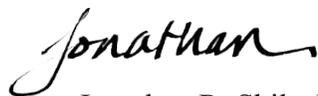
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67% of our members are over 60. Under Toni Wise's leadership, the Membership Development Committee will undertake this year's most important initiative – the identification and mentoring to nomination of a one to three year rolling “pipeline” of potential nominees for election as Fellows. This initiative is underway, will continue in Naples and throughout this year and into 2014, 2015 and beyond. Rather than waiting until October when we usually start thinking about nominations, please feel free to suggest potential nominees even if an otherwise qualified candidate does not yet have the required “give backs”. Please read the criteria in our Directory. I ask each of you to forward names of distinguished practitioners you may think of as future Fellows to Toni Wise. The Membership Development Committee can help potential nominees with suggestions for appropriate “give back” activities.

Enjoy Naples thanks to the fine programming of Peggy Rolando, Ann Waeger and Jane Smith and the extra-curricular activities arranged by Jill Pace and Henri Keller, who serve the College so well.

Circle your calendars for Vancouver in October and Kauai in March, 2014. It is not too early to plan.



Jonathan R. Shils, President

STAFF BOX

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Meetings Calendar

2013 Mid-Year Meeting

March 14-17, 2013

Waldorf=Astoria
Naples, FL

2013 Annual Meeting

October 24-27, 2013

Four Seasons Hotel
Vancouver, BC, Canada

2014 Mid-Year Meeting

March 27-30, 2014

Grand Hyatt Kauai Resort and Spa
Kauai, HI

2014 Annual Meeting

October 16-19, 2014

InterContinental Hotel
Boston, MA

2015 Annual Meeting

October 22-25, 2015

Four Seasons Hotel
Baltimore, MD



ACREL Friends Gather in Palm Desert 2/2013

Back: Anne Hetlage, Larry Preble, Alan Wayte

Middle: Dick Volpert, Don Siskind, Barbara Botein,

Debby Preble, Sharon Glazer, Beth Siskind,

Howard Kane, Nancy Wayte

Front: Marcia Volpert, Mark Levick

Using the Judicial System to Abate the Foreclosure Crisis¹

by Adam Leitman Bailey and Rachel Sigmund²

Many stagnant foreclosures in the United States have been stuck in the judicial process for more than two years. This article describes how several states have addressed one of the primary legal impediments clogging the pipelines of pending or future foreclosures: lenders' inability to locate the original mortgage documents. To borrow a phrase from *All the President's Men* (Warner Bros. Pictures 1976), the answer to expediting foreclosures with lost documents is to "just . . . follow the money."

Many of today's foreclosure actions are commenced not by the original lenders but instead by parties that received a mortgage after a number of transfers during the last housing boom. Because of sloppy recordkeeping, millions of mortgage notes were lost as the mortgage interests were bundled into mortgage-backed securities and, in many cases, tracked only through the Mortgage Electronic Registry System. As a result, borrowers have successfully used the "show me the note" defense to defeat many foreclosures.

Recent case law across the nation, however, demonstrates that the "show me the note" defense to foreclosure actions will not shield defaulting borrowers from liability in all cases. This article looks at some of the states reporting the highest number of foreclosures—Florida, New Jersey, Illinois, California, and New York—to examine the approaches that courts have used to permit lenders to bring foreclosure actions without the original mortgage note.

One of the primary tools that lenders have used to overcome the problem of missing mortgage documents is section 3-309 of the Uniform Commercial Code (UCC), which governs the enforcement of lost,

destroyed, or stolen instruments. UCC section 3-309 provides that a person who is not in possession of the instrument may still enforce the instrument if the person can prove both the terms of the instrument and the person's right to enforce it.

Although virtually every state, except for New York, has enacted UCC section 3-309, there is substantial divergence among them over one of the three requirements a person must meet to prove the right to enforcement. Under the 1990 version of UCC section 3-309, the party must prove that it "was in possession of the instrument and entitled to enforce it when loss of possession occurred." UCC § 3-309(a)(i) (1990). A federal district court interpreted this provision to require the party to show that it was in possession of the note *at the time it was lost*. *Dennis Joslin Co. v. Robinson Broad. Corp.*, 977 F. Supp. 491 (D.D.C. 1997) (holding that under District of Columbia's version of UCC section 3-309, the assignee of a mortgage could not bring a foreclosure action because it did not possess the original note at the time it was lost and thus was not entitled to enforce the note). UCC section 3-309 was amended in 2002, however, to reject this interpretation. See UCC § 3-309, cmt. 2. The current provision permits enforcement if the person *either* "(A) was entitled to enforce the instrument when loss of possession occurred; or (B) has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred."

The two other requirements for enforcement are the same in both the 1990 and 2002 versions of UCC section 3-309. The party must prove (1) that it did not lose the note as a result of a transfer or a lawful

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seizure, and (2) that it “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.” UCC § 3-309.

The following discussion illustrates how states have used UCC section 3-309, as well as other statutes, to permit foreclosure in cases in which the original mortgage documents are missing.

Florida

Florida and fifteen other states (Alabama, Arkansas, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, Oklahoma, South Carolina, Tennessee, and Texas) have enacted the 2002 amendment to UCC section 3-309. With the exception of New York, which is discussed in greater detail below, the remaining states have retained the 1990 version of UCC section 3-309. It is unclear, however, whether those states would interpret the 1990 language to permit enforcement only if the document had been in the possession of the party at the time it was lost.

A Florida case that predated the 2002 amendments to UCC section 3-309 illustrates this point. In *National Loan Investors, L.P. v. Joymar Associates*, 767 So. 2d 549, 550 (Fla. Dist. Ct. App. 2000), the plaintiff attempted to foreclose on defendant’s property after receiving the note and mortgage after two previous assignments. The circuit court agreed with the defendant and dismissed the complaint with prejudice because the plaintiff “did not possess the loan documents because [its] assignor . . . never possessed the loan documents. Therefore, [the assignor] had no ability to assign non-possessed documents to [the plaintiff].” A Florida District Court of Appeal reversed, however, concluding that plaintiff should have been permitted to amend its complaint to allege “a cause of action . . . through proof of an assignable right of enforcement[.]” The court said:

In a mortgage foreclosure action, a lender is

required to either present the original promissory note or give a satisfactory explanation for the lender’s failure to present it prior to it being enforced. . . . We see no reason why this right of enforcement cannot be assigned when recognizing such a right would prevent defendants in foreclosure actions from receiving a windfall.

Id. at 551 (citations omitted); *see also Lawyers Title Ins. Co., Inc. v. Novastar Mortg., Inc.*, 862 So. 2d 793, 798 (Fla. Dist. Ct. App. 2003).

Illinois

In Illinois, a foreclosure action must comply with the Illinois Mortgage Foreclosure Law, 735 Ill. Comp. Stat. section 5/15-1504. (Illinois foreclosures generally look to this law rather than to UCC section 3-309, but still acknowledge the latter. *See Cogswell v. CitiFinancial Mortg. Co., Inc.*, 624 F.3d 395 (7th Cir. 2010)). This statute permits any “legal holder of the indebtedness, a pledgee, an agent or a trustee” to foreclose on a defaulting borrower. The term “mortgagee” “goes beyond just note holders to also encompass ‘any person designated or authorized to act on behalf of such holder.’” *MERS v. Barnes*, 940 N.E.2d 118, 124 (Ill. App. Ct. 2010) (citing 735 Ill. Comp. Stat. 5/15-1208); *see also Eaton v. Fed. Nat’l Mortg. Ass’n*, 969 N.E.2d 1118, 1121 (Mass. 2012) (“mortgagee” refers to “the person or entity then holding the mortgage *and also* either holding the mortgage note or acting on behalf of the note holder.”) (emphasis added). Thus, “[a] plaintiff can maintain a lawsuit although the beneficial ownership of the note is in another person. . . . Illinois does not require that a foreclosure be filed by the owner of the note and mortgage.” *Barnes*, 940 N.E.2d at 124.

In the absence of a copy of the note, a party in Illinois may submit a lost-note affidavit to explain the *terms* of the note. *Cogswell*, 624 F.3d at 402-03; *Deutsche Bank Nat’l Trust Co. v. Giallombardo*, No. 07-CH-34558, 2009 WL 1935918, at *3 (Ill. Cir. Ct. June 16, 2009) (noting that plaintiff’s lost-note affidavit did not provide all of the note’s terms, but found

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that there was “sufficient demonstration of the terms of the note” to survive a motion to dismiss because the mortgage and adjustable-rate rider that plaintiff attached to its complaint explained the note in “sufficient detail”).

A lost note affidavit alone, however, is unlikely to be sufficient to prove the party’s rights to the note under UCC section 3-309, as the *Cogswell* court explained:

Because neither The Patrick Group [the plaintiff] nor CitiFinancial [its predecessor in interest] could produce an original or even a copy of the note, there remained the possibility that the note was actually held by another who was entitled to enforce it against the property owners. This concern was reasonable in light of the questions raised by the ambiguous state of the title record.

Cogswell, 624 F.3d at 403-04.

In dictum, the court suggested that it was “theoretically possible to establish ownership of the underlying debt by tracing it through a title search back to the original mortgagee.” *Id.* at 403 (citing *Fin. Freedom v. Kirgis*, 877 N.E.2d 24, 45 (Ill. App. Ct. 2007) (allowing a foreclosure action to proceed when the plaintiff produced testimonial evidence, a copy of the mortgage, and evidence that the mortgage was recorded)). That avenue was not available to the plaintiff in *Cogswell*, however, because there was a gap in the recorded ownership of the mortgage.

California

California is a non-judicial foreclosure state that does not require a foreclosing party to produce the original note. *Gens v. Wachovia Mortgage Corp.*, No. CV10-01073 JF (HRL), 2010 WL 1924777, at *4 (N.D. Cal. May 12, 2010). California Civil Code section 2924 governs mortgage foreclosures, and “California courts have held that the civil code provisions ‘cover every aspect’ of the foreclosure process and are ‘intended to be exhaustive[.]’” *Chilton v. Fed. Nat’l*

Mortg. Ass’n, No. 1:09-CV-02187 OWW SMS, 2009 WL 5197869, at *1 (E.D. Cal. Dec. 23, 2009). Specifically, the California Civil Code provides that a “trustee, mortgagee or beneficiary or any of their authorized agents” can conduct the foreclosure process. Cal. Civ. Code § 2924(a)(1). Thus, in *Gomes v. Countrywide Home Loans, Inc.*, 121 Cal. Rptr. 3d 819, 827 (Cal. Ct. App. 2011), the court found that the language in the deed of trust stating that the mortgage registry company had the authority to initiate a foreclosure was valid even if the registry company did not hold a beneficial interest in the deed of trust because the company was designated as nominee for the original lender and its successors and assigns.

New York

In New York, a party may bring a foreclosure action without the note under UCC section 3-804, which requires the party to establish “due proof of his ownership [of the note], the facts which prevent his production [of the note] and its terms.” *See Marazzo v. Piccolo*, 558 N.Y.S.2d 103 (N.Y. App. Div. 1990); *Clovine Assocs. Ltd. P’ship v. Kindlund*, 621 N.Y.S.2d 606 (N.Y. App. Div. 1995). Further, a “written assignment of the underlying note or a physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation” and thus adequately establishes standing. *U.S. Bank, N.A. v. Collymore*, 890 N.Y.S.2d 578, 580 (N.Y. App. Div. 2009).

U.S. Bank, N.A. v. Collymore suggests that a party can submit an affidavit together with its complaint detailing when the note was physically delivered to it before its loss of possession to establish its right to sue on the note. In the case, however, U.S. Bank ultimately dug its own grave by submitting conflicting evidence of its right to enforce the note, and the court affirmed the lower court’s denial of summary judgment in favor of the bank.

Similarly, in *Deutsche Bank National Trust v. Barnett*, 931 N.Y.S.2d 630, 632 (N.Y. App. Div. 2011), the New York Supreme Court found that the foreclosing party failed to show its right to enforce the

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note where the affidavits submitted by the bank's vice president "did not state any factual details concerning when the plaintiff received physical possession of the note and, thus, failed to establish that the plaintiff had physical possession of the note prior to commencing [its] action." *Id.*

Moreover, in *Aurora Loan Services LLC v. Weisblum*, 923 N.Y.S.2d 609, 611 (N.Y. App. Div. 2011), the New York Supreme Court found that the foreclosing party failed to establish standing to foreclose where it "produced no documents indicating an assignment to it of the second note and mortgage" and where its vice president's affidavit merely alleged that it became holder of the mortgage by delivery without a written assignment. The court noted that the plaintiff also had to provide factual details "of a physical delivery of both the consolidated note [and modification agreement] . . . prior to the commencement of the action." *Id.* at 619; *see also In re Agard*, 444 B.R. 231, 246 (Bankr. E.D. N.Y. 2011), *vacated in part sub nom. Agard v. Select Portfolio Servicing Inc.*, No. BR 8-10-77338 (REG), 2012 WL 1043690 (E.D.N.Y. Mar. 28, 2012); *CITIBANK, N.A. v. Lin*, No. 0101699/2007, 2007 WL 2176294, at *1 (N.Y. Sup. Ct. May 24, 2007).

Lastly, *Bank of New York v. Silverberg*, 926 N.Y.S.2d 532, 539 (N.Y. App. Div. 2011) ruled that because plaintiff's assignor was never the owner of the note and never had physical possession of it, it had no assignable interest in the mortgage in its favor as "nominee." Therefore, its assignment to plaintiff was void, depriving plaintiff of standing to bring a foreclosure action.

New Jersey

New Jersey did not adopt the 2002 amendment to UCC section 3-309. Thus, unlike in California and Florida, a New Jersey party may bring its foreclosure claim without the note only if it can prove that it possessed the note prior to the commencement of the action under UCC section 3-309. To accomplish this, a party can submit evidence of the mortgage's

assignment, provided that the assignment is dated and recorded before the complaint is filed and is authenticated in some manner. In *Wells Fargo Bank, N.A. v. Ford*, 15 A.3d 327, 331 (N.J. Super. Ct. App. Div. 2011), the court ruled that the lower court improperly considered a mortgage assignment because it was not "authenticated by an affidavit or certification based on [the bank attorney's] personal knowledge."

A New Jersey trial court decision, *Bank of America v. Alvarado*, No. BER-F-47941-08, 2011 WL 145639 (N.J. Super. Ct. Ch. Div. Jan. 7, 2011), used UCC section 3-309, together with the common law principle of unjust enrichment, to allow the creditor to foreclose on the defaulting defendant. The bank conceded that at the time it commenced its foreclosure action, it did not possess the mortgage note because the original note was lost when sold as part of a group of mortgages and subsequently transferred to plaintiff's predecessor. The bank asserted that it was entitled to enforce the note obligation as successor trustee. It submitted a lost-note affidavit, alleging that the affidavit "was properly executed by the entity that was in possession and entitled to enforce [the note] when the loss occurred, and that it has the same right to enforce the original [n]ote that [its predecessor] had when the [a] ffdavit was executed." 2011 WL 145639, at *3. UCC section 3-309 in New Jersey requires a party seeking to enforce a note to show that it was in possession of the note at the time it was lost. The court noted, however, that simply applying UCC section 3-309 "would lead to the result that no entity now exists that can enforce defendant's defaulted [n]ote obligation[.]" Recognizing that such a result would produce "a wind-fall to defendant[.]" the court ultimately ruled that the plaintiff was entitled to enforce the note under the equitable common law remedy of unjust enrichment. 2011 WL 145639, at *5, *8.

Any version of the UCC

Regardless of which version of UCC section 3-309(a) a state has enacted, a foreclosing party must also comply with UCC section 3-309(b), under which a court will not enter judgment in favor of a foreclos-

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ing party “unless it finds that the person required to pay the [note] is adequately protected against loss that might occur by reason of a claim by another person to enforce the [note].” Indeed, a court will likely find that a party who successfully establishes its right to enforce a note under UCC section 3-309(a) also satisfies UCC section 3-309(b).

This finding, however, would not preclude another party from attempting to enforce the note. Thus, a court may require a prevailing foreclosing party to “intervene and participate” in the defense of a subsequent action brought against the same borrower. *Bank of America v. Alvarado*, *supra*, notes, “In the unlikely event any . . . action is filed in the future, Bank of America shall be required to intervene and participate in the defense so that defendant will not be liable twice for the same obligation.” 2011 WL 145639, at *7-8; UCC § 3-309(b) (“[a]dequate protection may be provided by any reasonable means.”).

It appears that *Bank of America v. Alvarado* evidences the true intent of UCC section 3-309: A transferee of a mortgage note should be permitted to foreclose if it can establish a valid chain of title without having to prove that it possessed the lost note prior to bringing its foreclosure action. *See* UCC § 3-309, cmt. 2.

Conclusion

For our economy to fully rebound from the housing crisis, homes need to be put into the hands of people who can afford them. Alternative proofs of lost documentation can unlog foreclosure proceedings and free up burdened housing. The statutes and case law discussed in this article demonstrate several approaches that courts could employ to permit the use of those alternative proofs. ■

ACRELades

Greg Stein’s new book, *Modern Chinese Real Estate Law: Property Development in an Evolving Legal System*, was published recently by Ashgate. The book, based on dozens of interviews with real estate professionals working in China, discusses how China’s evolving law of real estate actually operates in practice. It also examines how China has been able to develop a modern and thriving real estate market when its legal system is still so unsettled. Learn more about the book here: <http://www.ashgate.com/isbn/9780754678687> and read Chapter 1 here: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2042708

Got Programs?

If you’d like to volunteer, or communicate ideas for Plenary Sessions, Roundtables, or Internal Webinars, contact Margaret Rolando (mrolando@shutts.com)

National Construction Dispute Resolution Committee Meeting

Summary of Minutes for the American College of Real Estate Lawyers, December 6, 2012

It was noted that the average contract aging time frame for construction disputes from the signing of the contract to the initiation of the dispute is 18-24 months. There has been a significant increase in case-loads in cases where the claims were \$500,000 and up (Large Complex Cases). There has also been an upward trend in International cases over the past 3 years.

The current roster of AAA Construction Neutrals is composed of 68% attorneys and 32% industry professionals. AAA has recognized that there is also a need for customers to have more information about how arbitrators manage an arbitration and how they would view issues such as postponements and discovery.

To assist industry professionals with additional training in the arbitration process a mandatory training webinar for industry professionals has been presented.

India Johnson, incoming CEO and President of the AAA announced the appointment of Senior Vice Presidents, Robert Matlin in the East and Dwight James in the West. She also announced AAA's new mediation initiative Mediation.org (www.mediation.org)

which will permit a more robust search feature to allow the parties to select a mediator.

There was a discussion of the new AAA Clause Builder which will allow parties to build a custom ADR clause. Clause Builder can be found at: <http://www.clausebuilder.org>.

AAA is in the process of preparing a new set of procedures to control time and cost in construction arbitrations but may be just as easily utilized for commercial disputes, including real estate disputes. The procedures were designed to provide an arbitration process that will be predictable in terms of total time and cost.

The next meeting is scheduled for June 6, 2013 in Washington D.C. If any Fellows of ACREL have issues of concern which may be addressed please inform either of the undersigned to permit those issues to be placed on the agenda.

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ACREL Vancouver Meeting

October 24-27, 2013

The Programs Committee is hard at work on the 2013 Annual Meeting, to be held in Vancouver, British Columbia. The Meeting Leader, Larry Bensignor, and Session Coordinators, Neil Kessler, Dean Pappas and Gordy Scannell, with the support of the Vice Chair of Fall Meetings, Beth Mitchell, and the Chair of the Programs Committee, Peggy Rolando, are compiling the panels for the plenary sessions and roundtables for Vancouver. We expect the meeting to cover a wide range of topics, including issues affecting the capital markets, real estate development and investment, leasing and insurance. The Programs Committee is excited to include a session this year with speakers from business and academic circles, discussing how demographic factors influence investment decisions in commercial real estate. This session, as well as others, will provide insights into our clients' business practices, allowing Fellows of the College to become better informed counselors.

The Programs Committee is always looking for new topics of interest to the Fellows to include in future meetings. The Committee also encourages Fellows who have not recently participated in a session to consider speaking at an upcoming meeting. If you have suggestions for topics or speakers, please contact any member of the Programs Committee.

Beth Mitchell, Vice Chair, Fall Meetings