June 3, 2013

Show Me The Note!

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Brooklyn Law School Legal Studies
Research Papers
Accepted Paper Series

Research Paper No. 343 June 2013

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News outlets and foreclosure defense blogs have focused attention on the defense commonly referred to as "show me the note." This defense seeks to forestall or prevent foreclosure by requiring the foreclosing party to produce the mortgage and the associated promissory note as proof of its right to initiate foreclosure.

The defense arose in two recent state supreme-court cases and is also being raised in lower courts throughout the country. It is not only important to individuals facing foreclosure but also for the mortgage industry and investors in mortgage-backed securities. In the aggregate, the body of law that develops as a result of the foreclosure epidemic will probably shape mortgage law for a long time to come. Courts across the country seemingly interpret the validity of the "show me the note" defense incongruously. Indeed, states appear to be divided on its application. However, an analysis of the situations in which this defense is raised provides a framework that can help consumers and the mortgage industry to better predict how individual states will rule on this issue and can help courts as they continue to grapple with this matter.

Much of the confusion and uproar surrounding the "show me the note" defense stems from the rulings that appear to vary in different states. However, the responses are not as random as they would first appear.

"Show me the note" cases may be divided into four categories:

- Non-judicial foreclosure in which the court requires proof of the note.
- Non-judicial foreclosure in which the court does not require proof of the note.
- Judicial foreclosure in which the court does not require proof of the note.
- Judicial foreclosure in which the court requires proof of the note.

The following table summarizes these categories.

Type of Foreclosure	Must Own Note to Foreclose	Need not Prove Ownership of Note to Foreclose
Non-Judicial	Category 1	Category 2
Judicial	Category 3	Category 4

'SHOW ME THE NOTE' JURISDICTIONAL CATEGORIES

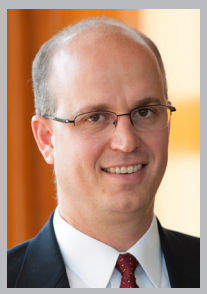
Massachusetts is a Category 1 state, as revealed in the Massachusetts Supreme Court case of *Eaton v. Federal National Mortgage Association*.[1] Category 1 places a higher burden on parties seeking non-judicial foreclosure because it requires them to produce the note.

A number of states, including Arizona, California, Idaho and Minnesota, as well as the District of Columbia, fall within Category 2. The 2012 Arizona Supreme Court case of *Hogan v. Washington Mutual Bank* is a clear example of a Category 2 jurisdiction.[2] Category 2 jurisdictions interpret state laws regarding foreclosures so as to reject the requirement of proof, thereby permitting foreclosures to proceed. Because of its heavy reliance on statutory language, *Hogan* serves as a reminder that one rule does not fit all. This is true for consumers seeking to forestall foreclosure and eviction in different jurisdictions, as well as for lenders, servicers and other secondary-market players who may assume that the economics of the deal trump the particular legal requirements of each jurisdiction.

Category 3 states include Connecticut, Florida, Maine, Missouri, New York and Oklahoma. One recent example is *Gee v. U.S. Bank*.[3] The foreclosing party need not be the actual mortgage note holder, but merely one who has been assigned an interest in the note by the note holder. This is the most common category, since parties seeking to benefit from the power of the judiciary must meet a threshold burden of standing to commence a case.

Barely any jurisdictions fall within Category 4. In these states, the court may permit judicial foreclosure without production of the note.[4] However, these jurisdictions are vanishingly rare, and our research has not revealed any contemporary examples of a Category 4 jurisdiction.[5]

It is useful to highlight that non-judicial foreclosures involve a deed of trust instead of a mortgage, whereas judicial foreclosures



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generally involve mortgages. However, in this article, the term "mortgage" will be used loosely to cover both mortgages and deeds of trust in judicial and non-judicial foreclosure situations.[6] Cases that address foreclosure issues related to note and mortgage ownership are legion and growing.[7] However, a review of that body of law in this context would be unwieldy, so we selected for discussion cases that illustrated each category. We sought to use cases from state supreme courts when they were available. For Category 3, we instead used an intermediate court case that reflected a consensus of all intermediate court rulings in that particular state.

CATEGORIES

Category 1: Eaton v. Federal National Mortgage Association

Background

The Massachusetts Supreme Judicial Court affirmed the legitimacy of the "show me the note" defense in *Eaton v. Federal National Mortgage Association*, albeit prospectively only.[8] On Sept. 12, 2007, Henrietta Eaton refinanced the mortgage on her home and executed a promissory note payable to BankUnited as the lender. She also executed a mortgage with herself as "borrower," BankUnited as "lender" and Mortgage Electronic Registration Systems Inc. as "mortgagee." The mortgage contained a clause that permitted the mortgagee MERS to invoke a "statutory power of sale" in the case of a default by Eaton.

On April 22, 2009, MERS assigned its interest in the mortgage to Green Tree. However, there was no evidence of a corresponding transfer of the mortgage note. In 2009, Eaton defaulted on the mortgage, and Green Tree (as MERS' assignee) invoked the "power of sale," foreclosed and won the foreclosure auction as the highest bidder. The identity of the mortgage note holder at the time of sale was unknown, and on Nov. 24, 2009, Green Tree assigned its interest in the mortgage to Fannie Mae.

Procedural history

On Jan. 25, 2010, Fannie Mae commenced an eviction action against Eaton in housing court. Eaton counterclaimed and raised the "show me the note" defense. She claimed that the foreclosure was invalid because Green Tree was not the mortgage note holder at the time of foreclosure. The housing court granted Eaton's request for injunction of the eviction process.

Eaton filed a complaint in the Massachusetts Superior Court for injunctive and declaratory relief. She claimed that the foreclosure sale and foreclosure deed were null and void, sought a preliminary injunction to stay the housing court eviction action, and requested a permanent injunction preventing Fannie Mae from obtaining possession of her home. The Superior Court granted Eaton's petition, and Fannie Mae appealed for relief from the injunction.

On appeal, the Massachusetts Supreme Judicial Court decided whether, under that state's statutory law, a "mortgagee" who holds the mortgage and is initiating a foreclosure action must also physically possess the mortgage note to foreclose.

> Much of the confusion and uproar surrounding the "show me the note" defense stems from the rulings that appear to vary in different states.

Massachusetts common law and statutory law

The court first considered relevant common law. Under the common law, real estate mortgages are composed of a transfer of legal title to the mortgaged property (mortgage) and the underlying debt (mortgage note). However, each may be held by a different owner. A review of applicable case law revealed that a mortgagee possessing only the mortgage has no authority to foreclose if it does not possess the mortgage note as well.

However, the court turned to statutory laws governing mortgages and noted that in Massachusetts "[t]he law of mortgage ... is a mixed system, derived partly from the common law ... but principally from various statutes" and that statutes play an important role in mortgage foreclosures with regard to a "power of sale" agreement.[9]

Appellant's contentions

The appellant, Fannie Mae, argued that Mass. Gen. Laws ch. 244 § 14 is unambiguous and expressly authorizes a foreclosure by the mortgage holder without the mortgage note if there is a "power of sale" clause in the mortgage agreement. Thus, Fannie Mae concluded that Green Tree, as the assignee of MERS, was authorized to foreclose because the "power of sale" clause authorized MERS, its successors and assigns as "mortgagees."[10]

Court's analysis

In addressing Fannie Mae's arguments, the Massachusetts court conducted its own statutory analysis. The court found that Mass. Gen. Laws ch. 183 § 21 permits a mortgagee to foreclose under a "power of sale" clause without judicial authorization, specifically in the case of default on the underlying mortgage note. Section 21 only requires that the mortgagee comply with all relevant terms and statutes listed in Mass. Gen. Laws ch. 244 §§ 11-17C. Failure to comply voids the foreclosure sale. One of those statutes is Mass. Gen. Laws ch. 244 § 14, which requires that the mortgagee provide notice to the mortgagor prior to foreclosure pursuant to a "power of sale" clause. However, the court found that this statute is ambiguous in its usage of the term "mortgagee."

The crux of the court's analysis and Fannie Mae's appeal turned on a determination of the term "mortgagee" — whether it refers to the mortgage note holder, the mortgage holder or both. In interpreting the statute, the court considered the term in the context of other applicable foreclosure statutes and their usage of the term. The court concluded that "mortgagee" under Mass. Gen. Laws ch. 244 § 14 means a mortgagee who also holds the underlying mortgage note.[11]

The court decided, however, that, on the basis of Mass. Gen. Laws ch. 244 §§ 11-17C, a party who does not hold the mortgage may foreclose if the mortgage holder authorizes that party to foreclose. The court explained that there was no statutory basis to suggest a legislative intent to limit the rules regarding agency when applying non-judicial foreclosure statutes.

The Massachusetts high court determined that, as applied to the facts of the case, the lower court's decision to grant a preliminary injunction on the foreclosure did not take into consideration issues of agency, specifically whether Green Tree/MERS had authority to act on behalf of the mortgagee, BankUnited, in initiating foreclosure proceedings against

Eaton. Although Eaton alleged that Green Tree lacked the requisite authority to foreclose, the court noted that she did so on the basis of "information and belief," which is an inadequate factual basis upon which the lower court could not have properly granted a preliminary injunction. Accordingly, the Massachusetts court vacated the preliminary injunction and remanded the case; this gave Eaton a new opportunity to provide a stronger factual basis.

Conclusion

The Massachusetts court held that in order to initiate judicial foreclosure proceedings, a "mortgagee" must either hold the mortgage note or act on behalf of the note holder. This holding raised issues of retroactive application. The court acknowledged that before its ruling, many practitioners, in good faith, had operated under the assumption that a "mortgagee" only needed to hold the mortgage and not the note. Accordingly, out of "concern for litigants and others who have relied on existing precedents," the court gave this new requirement prospective effect.[12] As a result, the ruling only applied to mortgage foreclosure sales in which the mandatory notice of sale was given after the opinion's date. Issues of agency and proving the authority to foreclose played into the court's analysis. The Massachusetts court thereby acknowledged the "show me the note" defense in a non-judicial foreclosure proceeding.

Effect of Eaton on the mortgage foreclosure market

Since *Eaton* was just decided in 2012, its effects have yet to manifest themselves in a palpable way. However, the likely result is that foreclosing parties in Massachusetts will have a more difficult time executing non-judicial foreclosures. Although the bank in *Eaton* "won" in the sense that the homeowner's motion for an injunction staying the foreclosure was vacated, it came at the cost of stricter requirements going forward for all lenders. After *Eaton*, parties seeking non-judicial foreclosure must now have possession of the note or authority from the note owner to foreclose; this makes a "show me the note" defense much stronger in Massachusetts. As a result, persons in the mortgage lending industry must now take efforts to ensure that owners of the mortgage and the mortgage note are represented in the foreclosure action.

In addition, the prospective effect of the new ruling introduces new challenges for persons conducting title searches, at least in the near term. If a foreclosure does occur, a searcher has to "determine if the foreclosure occurred after the effective date of this opinion, and if the foreclosing creditor was the record holder of the underlying note."[13]

Category 2: Hogan v. Washington Mutual Bank

Background

In *Hogan v. Washington Mutual Bank,* the Arizona Supreme Court came to a conclusion that was the opposite of that of the *Eaton* court. *Hogan* addressed the issue of "whether a trustee may foreclose on a deed of trust without the beneficiary first having to show ownership of the note that the deed secures."[14] The court held that Arizona does not require a beneficiary to prove its authority (that is, to show the note) before the trustee commences a non-judicial foreclosure.

> Category 2 jurisdictions interpret state laws regarding foreclosures so as to reject the requirement of proof, thereby permitting foreclosures to proceed.

The petitioner, John Hogan, owned two properties for which the respondents commenced a non-judicial foreclosure proceeding. The respondents, Long Beach Mortgage Co., Washington Mutual Bank, JPMorgan Chase Bank and Deutsche Bank, were the various lenders, successors and assigns under the two corresponding deeds of trust for the properties. WaMu and Deutsche Bank were the beneficiaries of the deeds of trust at the time of foreclosure. The trustee in this case, California Reconveyance Co., was also a named respondent.

Procedural history

The procedural history of *Hogan* is relatively straightforward. Hogan became delinquent on two mortgage loans that he took out with Long Beach. The trustee then initiated non-judicial foreclosures on both and named WaMu as the beneficiary for the first property and Deutsche Bank as the beneficiary for the second property. Hogan filed a lawsuit seeking to enjoin both sales unless the beneficiaries could prove that they were entitled to collect on their respective notes. The trial court granted a motion to dismiss Hogan's suits, the court of appeals affirmed and the Arizona Supreme Court granted review.

Plaintiff's contentions

Hogan's claims are worth setting forth carefully because similar arguments are being made in many jurisdictions. Hogan raises four arguments in his petition.

First, he argued that before a trustee may exercise the power of sale (a non-judicial sale), the beneficiary must show possession of, or document its right to enforce, the underlying note tied to that mortgage — "show me the note."

Second, Hogan argued that a deed of trust, similar to a mortgage, "may be enforced only by, or on behalf of, a person who is entitled to enforce the obligation the mortgage secures."[15] This is what is referred to as the "true beneficiary" argument.

Third, Hogan argued that the trustee must demonstrate its authority to collect on the underlying note pursuant to Arizona's Uniform Commercial Code. This is referred to as the "UCC" argument.

Finally, Hogan argued that the note and trust deed may not be separated. This is referred to as the "construed together" argument.

Court's analysis

In affirming the lower courts, the Arizona Supreme Court addressed each of Hogan's claims. As with *Eaton*, the court's analysis was heavily dependent on the idiosyncrasies of state law. First, with regard to the "show me the note" argument, the Arizona Supreme Court stated that no such requirement exists under Arizona law. The court stated that Arizona law instead imposes minimal requirements necessary for a trustee to proceed with a non-judicial sale. Under Ariz. Rev. Stat. § 33-809(C), after a notice of sale is recorded, the trustee must send Hogan the notice of sale signed by the beneficiary or its agent. That notice had to contain a statement that a breach or non-performance of the trust deed had occurred. Finally, the statute requires that the nature of such a breach or non-performance be disclosed.

Because Hogan did not allege that such notice was not properly given, the court found that Hogan was not entitled to relief.[16]

Second, the court's analysis of the "true beneficiary" argument is nuanced and ties back to the "show me the note" argument. The court stated that Hogan did not allege that WaMu and Deutsche Bank were not entitled to enforce the underlying notes. Rather, Hogan merely argued that the trustees had the burden of demonstrating their rights before a non-judicial foreclosure may proceed — essentially raising the "show me the note" argument again. Similarly, the court noted that Hogan neither affirmatively alleged that WaMu and Deutsche Bank were not holders of the notes, nor that they otherwise lacked the authority to enforce the notes. Nor did Hogan dispute that he was in default under the deeds of trust. The court also observed that Hogan did not dispute that he was properly noticed under Arizona non-judicial foreclosure statutes. Thus, the court concluded that Arizona law follows the "true beneficiary" rule and that Hogan had not alleged any facts supporting a cause of action under that rule.

Third, the court quickly disposed of Hogan's argument that under Arizona's UCC, the trustees are required to demonstrate their authority to collect on a note.[17] The court noted that the trustees were not seeking to enforce the underlying notes, but rather sought to enforce the terms of the trust deeds. The UCC does not govern liens on real property, and the trust deed does not require compliance with the UCC. Thus, the court ruled that the UCC was inapplicable to the trustees' non-judicial foreclosure.

Finally, the court dismissed Hogan's argument that the underlying note and the trust deed must be construed together. Although the underlying note and the trust deed generally go together, that was irrelevant to the court's analysis. Rather, the court's concern was whether the trustees had the statutory right to foreclose on the deeds of trust, not the underlying note.

Conclusion

The court in *Hogan* held that Arizona law did not require that a beneficiary prove its authority, or show the note, before a trustee commences a non-judicial foreclosure. The *Hogan* court concluded with a discussion of some policy implications. It stated that "non-judicial foreclosures sales are meant to operate quickly and efficiently, outside the judicial process."[18] The court further stated that otherwise the foreclosure process might become "time consuming and expensive."[19]

It is not clear, however, that the structure of Arizona law is sufficiently protective of homeowners in the context of non-judicial foreclosures. Post-*Hogan*, one can imagine scenarios in which homeowners are placed in situations in which they have been wronged but no remedy is available. For instance, some homeowners who are improperly foreclosed upon may face a second lawsuit from the true owner of the note. Although Arizona has an anti-deficiency statute, it does not cover all residential properties, and the homeowner would face legal fees to defend against a second lawsuit in any event.

> It is useful to highlight that non-judicial foreclosures involve a deed of trust instead of a mortgage, whereas judicial foreclosures generally involve mortgages.

Category 3: Gee v. U.S. Bank

Background

In *Gee v. U.S. Bank*, the Florida 5th District Court of Appeal reaffirmed long-standing Florida precedent that a party seeking a judicial foreclosure must "present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action."[20]

In this case, U.S. Bank alleged that Ginnifer Gee's mortgage and the accompanying note changed hands several times through a series of assignments, which ultimately ended with U.S. Bank in possession. U.S. Bank then filed a complaint against Gee to re-establish a lost note and mortgage, reform the mortgage and deed's legal description and foreclose on the new note and mortgage.

Procedural history

U.S. Bank brought its complaint in state circuit court and asserted that it was the successor in interest to the owner of Gee's mortgage and the accompanying note, and that the mortgage was in default. U.S. Bank alleged that Gee originally granted the mortgage and note to Advent Mortgage LLC, which assigned it to Option One Mortgage Corp., whose successor in interest, American Home Mortgage Servicing Inc., then assigned that interest to U.S. Bank. Gee answered *pro se*, generally denying all allegations. U.S. Bank then filed a motion for summary judgment of foreclosure. In support, U.S. Bank's servicing agent, American Home, filed an affidavit affirming U.S. Bank's claims of entitlement to the mortgage and the note, but it did not file the original note, mortgage or assignment of mortgage. The affidavit made no mention or support of U.S. Bank's claims for re-establishment and reformation. The court granted the motion for summary judgment, reestablished the lost mortgage, reformed the deed and granted foreclosure. Gee appealed.

Florida law

Florida case law requires "the party seeking foreclosure to present evidence that it owns and holds the note and mortgage in question in order to proceed with a foreclosure action."[21] A plaintiff must either provide the original promissory note, or, under Fla. Stat. § 673.3091, seek to re-establish the lost note.[22] Alternatively, if the plaintiff is not named as the payee in the mortgage note, then the note must be endorsed to the plaintiff, it must be a blank endorsement or the plaintiff must prove the note was assigned to him or her. Accordingly, in order to bring the foreclosure action, U.S. Bank was required to prove that its predecessor in interest had the authority to assign the mortgage and underlying note to the bank.

Appellant's contentions and court's analysis

On appeal, Gee argued that U.S. Bank lacked standing to foreclose. The appeals court agreed, since the original mortgage and accompanying note were never submitted. U.S. Bank instead submitted a copy of the mortgage and accompanying note and two assignments. One assignment showed a transfer from Advent Mortgage to Option One. The other assignment showed a transfer from American Home, as Option One's successor in interest, to U.S. Bank. However, the appeals court found it important that no proof was offered to show how American Home became the successor in interest.

Gee's answer, which generally denied U.S. Bank's allegations, placed ownership of the mortgage and underlying note at issue, with the burden of proof on U.S. Bank. Because no proof was offered to show how American Home became Option One's successor in interest, there was a missing link in the chain of ownership. On the basis of this deficiency, the appeals court found that U.S. Bank lacked standing to foreclose.

Conclusion

The court in *Gee* reversed the lower court and held that U.S. Bank lacked standing because it did not prove it held the mortgage and underlying note in question. Thus, in Florida judicial foreclosures such as *Gee*, the party seeking foreclosure must establish standing by providing proof that it either held the original mortgage and underlying note or that it is the holder's authorized representative.[23]

Category 4: No contemporary cases found

Our research did not reveal any contemporary examples of a jurisdiction that falls into Category 4. This makes sense, since the burden of proof is on the party seeking foreclosure to prove that it is legally entitled to foreclose. For a court to waive proof of the mortgage and the note would call into question why there would be a court proceeding at all.

ANALYZING THE FOUR CATEGORIES

The preceding cases highlight two distinguishing factors that can determine the outcome of a challenge to a foreclosure sale. The first factor is whether the foreclosure sale is executed through a judicial or non-judicial proceeding. The second factor focuses on whether the party seeking foreclosure is the mortgage note holder or an authorized representative of the holder.

First, the most notable factor is whether the foreclosure was brought through a judicial or non-judicial proceeding. Both *Eaton* and *Hogan* dealt with non-judicial foreclosure sales. In each case, the court looked to each respective state's laws governing non-judicial foreclosure in determining whether a "show me the note" argument applied. Some states permit non-judicial foreclosures, and some permit both judicial and non-judicial foreclosure.[24] Generally, the mortgage industry prefers non-judicial foreclosure because of its speed and relatively low cost.

Second, the outcome of a challenge to a mortgage foreclosure depends on whether the foreclosing party must hold title (or be an authorized representative) to the mortgage, the underlying note or both. In cases in Category 2 states, such as *Hogan*, the foreclosing party need only hold the mortgage in order to initiate a foreclosure sale. However, cases in Category 1 and 3 states, such as *Eaton* and *Gee*, require the mortgage and the note.

In contrast, Category 3 cases, such as *Gee*, in which the court requires proof in a judicial proceeding that the foreclosing party holds both the mortgage and the underlying note or is authorized by the note holder, have the toughest requirements of all four categories.

It is important to remember that with regard to non-judicial foreclosures, the idiosyncrasies of state statutes determine whether the "show me the note" defense can succeed. In judicial foreclosures, common law plays a key role in a court's determinations. Put simply, the key to making sense of seemingly conflicting applications of the "show me the note" defense is to look to each state's statutes regarding foreclosure sales.

WHY THE HYPE?

Recent cases regarding the "show me the note" defense rely largely on well-established precedent and applicable statutes. This suggests that the defense is not a currently evolving area of the law. However, the defense still receives much attention and is still unsuccessfully raised in many cases.[25]

This is not surprising, since lenders have used deceptive practices to recover debts and make loans, and homeowners are already leery of financial institutions that have played fast and loose with the legal process.[26] Accordingly, homeowners have come to believe that it is to their advantage to demand that a foreclosing party produce the note. Homeowners also reasonably believe that the production of the note helps to ensure that they are only liable once for the same underlying debt.

Still, many homeowners assert the "show me the note" defense with little chance of success. A federal district judge in Minnesota opined as to the causes of that trend and indicated that many of these lawsuits are brought by plaintiffs who represent themselves. Some of these plaintiffs seem to be desperate homeowners who have searched the Internet for a way to save their homes from foreclosure, run across websites touting unconventional legal theories and been persuaded of the merit of the "show me the note" theory. Other plaintiffs seem to be homeowners who fully understand that this theory is frivolous but are simply looking for a way to tie up their mortgagees in court, postpone the inevitable foreclosures and live rent-free in their homes for months or even years.[27]

Another reason homeowners may seek to forestall foreclosure with the "show me the note" defense is to buy just enough time to work out an alternative to foreclosure.[28] That being said, "show me the note" is successful in at least one non-judicial foreclosure jurisdiction — Massachusetts. Thus, it is a viable claim or defense for homeowners in that state.

CONCLUSION

For homeowners, defending against a foreclosure action, whether judicial or non-judicial, is stressful. In an era in which Google has made self-help the norm that sometimes replaces professional help, homeowners are susceptible to misinformation regarding the "show me the note" defense. However, the state of the law is not as confusing as it may appear, and the various scenarios stemming from this type of defense can be divided into the four simple categories outlined above. WJ

NOTES

[1] *Eaton v. Fed. Nat'l Mortgage Ass'n*, 969 N.E.2d 1118 (Mass. 2012).

[2] *Hogan v. Wash. Mut. Bank,* 277 P.3d 781 (Ariz. 2012).

[3] *Gee v. U.S. Bank,* 72 So. 3d 211 (Fla. 5th Dist. Ct. App. 2011). Although the Florida Supreme Court has not addressed this issue, all five courts of appeal in Florida acknowledge that a party must demonstrate that it holds the mortgage and the note to pursue a judicial foreclosure action. *See Mazine Frye M&I Bank*, 67 So. 3d 1129, 1132 (Fla. 1st Dist. Ct. App. 2011); *Verizzo v. Bank of N.Y.*, 28 So. 3d 976, 978 (Fla. 2d Dist. Ct. App. 2010); *Philogene Frye ABN Amro Mortgage Group*, 948 So. 2d 45, 46 (Fla. 4th Dist. Ct. App. 2006); and *Emerald Plaza West v.Salter*, 466 So. 2d 1129, 1129 (Fla. 3d Dist. Ct. App. 1985).

[4] Some have suggested, however, that under Pennsylvania law, a plaintiff may proceed with a judicial foreclosure if it possesses the mortgage and not the note. Alan M. White, *Losing the Paper: Mortgage Assignments, Note Transfers & Consumer Protection*, 24 Loy. Consumer L. Rev. 468, 476-77 (2012) (citing *In re Alcide*, 450 B.R. 526, 536 n.26 (Bankr. E.D. Pa. 2011)).

[5] *See Anderson v. Kern*, 102 A. 427, 427 (Pa. 1917); *Brownell v. Oviatt*, 64 A. 670, 670 (Pa. 1906).

[6] Connecticut, Delaware, Florida, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Pennsylvania, South Carolina and Vermont are primarily judicial foreclosure states, whereas the remaining states favor non-judicial foreclosure. Marcia Johnson & Luckett Anthony Johnson, *Defending Foreclosure Actions*, 40 Real Est. L.J. 439, 450-52 (2012).

[7] *See, e.g.*, REFinBlog.com (which presents more than 200 cases that consider the rights of lenders and borrowers in various contexts, including standing to foreclose).

[8] *Eaton*, 969 N.E.2d 1118 (which holds that a mortgagee seeking judicial foreclosure must either hold the mortgage note or be authorized by the note holder to pursue foreclosure).

[9] *Id.* at 1126-27 (citations omitted).

[10] *Id.* at 1128.

[11] *Id.* at 1128-29. The court considered Mass. Gen. Laws ch. 244 § 17B, which used the terms "holder of a mortgage note" and "mortgagee" interchangeably. *Id.* at 1128. The court also considered Mass. Gen. Laws ch. 244 §§ 19, 20 and 23, and found that a "mortgagee" is owed monies related to the underlying debt, which is due to the mortgage note holder. *Id.* at 1129.

[12] *Id.* at 1133 (citation omitted).

[13] Dan Schechter, *Foreclosure Conducted by Creditor Who Holds Mortgage but Not Underlying Promissory Note Is Invalid*, 2012 Comm. Fin. News 54 (2012).

[14] *Hogan*, 277 P.3d at 782.

[15] *Id.* at 783 (citing Restatement (Third) of Prop.: Mortgages § 5.4(c) (1997)).

[16] *Id.* at 783 n.3. In Arizona, Ariz. Rev. Stat. § 33-801 to 821 govern non-judicial foreclosure sales, or trustees' sales. *Id.* at 782. Ariz. Rev. Stat. § 807(a) permits a trustee to sell property by means of a non-judicial sale in the event of default on a deed of trust or note. *Id.* at 782-83. Under Ariz. Rev. Stat. § 33-809(C), in the event of a non-judicial sale, the trustee must provide the debtor with a notice of sale, which must include the names of the beneficiary and the trustee, as well as the basis for the trustee's qualification. *Id.* at 783. According to Ariz. Rev. Stat. § 33-803(A), this qualification is merely that the trustee either is, or is related to, one of a variety of entities that is licensed or regulated by the state or the federal government. Ariz. Rev. Stat. § 33-803(A) (2004).

[17] *Hogan*, 277 P.3d at 783.

[18] *Id.* at 784.

[19] *Id.*

[20] *Gee*, 72 So. 3d at 213 (citation omitted).

[21] *Id.* at 214.

[22] *Id.* at 213; F.S.A. § 673.3091 (2004).

[23] *Id.* at 213.

[24] *See* Foreclosure Laws and Procedures by State, RealtyTrac, *available at* http://www.realtytrac.com/foreclosure-laws/foreclosure-laws-comparison.asp (which shows a breakdown of U.S. states that permit judicial, non-judicial or both types of foreclosures).

[25] *Welk v. GMAC Mortgage,* 850 F. Supp. 2d 976, 980-81 (D. Minn. 2012).

[26] *See*, for example, the discussion of the robo-signing scandal in Bradley T. Borden and David J. Reiss, *Cleaning Up the Financial Crisis of 2008: Prosecutorial Discretion or Prosecutorial Abdication?* BNA Crim. Law Rep. (Mar. 20, 2013).

[27] *Id.* at 981.

[28] *See* Mathias W. Delort, *Motions to Stay Foreclosure Sales*, 22 CBA Rec. 34, 35 (May 2008); *see also* Rinky S. Parwani, *Advising Your Client in Foreclosure,* 41 Stetson L. Rev. 847, 863 (2012) (which advises attorneys that foreclosure defenses are important because they buy time for clients to work out alternative solutions to foreclosure).

NEWS IN BRIEF

ROMANIAN MAN ADMITS TO HACKING CREDIT CARD DATA

Adrian-Tiberiu Oprea, 29, has pleaded guilty in New Hampshire federal court to hacking into the computers of several hundred U.S. merchants and stealing customer credit card data, the Department of Justice said in a statement May 7. Prosecutors said Oprea and his Romania-based co-conspirators gained access to the computers, installed specialized hacking software and obtained data on more than 100,000 cardholders. The thefts occurred between 2009 and 2011 and the victimized merchants included 150 Subway restaurants, including one in New Hampshire.

United States v. Oprea et al., No. 11-CR-64, plea entered (D.N.H. May 7, 2013).

FDIC TAKES ACTION AFTER ARIZONA BANK FAILS

The Federal Deposit Insurance Corp. said in a May 14 statement that it has moved the assets and deposits of the failed Scottsdale, Ariz.-based Central Arizona Bank to North Dakota-based Western State Bank. The FDIC arranged the transfer in its capacity as Central's receiver after Arizona state regulators acted on liquidity concerns and closed the bank. Central had $31.6 million in assets and $30.8 million in deposits as of March 31, according to the FDIC. The bank is the 13th institution to fail this year and the second in Arizona.

FEDS TOUT SUCCESS OF MORTGAGE RELIEF PROGRAM

More than 1.1 million homeowners have obtained permanent mortgage modifications through the government's Home Affordable Modification Program as of March, the Treasury Department and the Department of Housing and Urban Development said in a joint statement May 10. The agencies said the borrowers saved an average of $546 on their monthly payments. In addition, 87 percent of mortgage borrowers who began participating in the HAMP over the last two-and-a-half years have received permanent modifications. The data is based on the Obama administration's Housing Scorecard for April. The monthly scorecard examines the housing industry and the effect of the administration's programs aimed at helping at-risk homeowners avoid foreclosure. The current scorecard is available at http://portal.hud.gov/hudportal/documents/huddoc?id=HUDAprilNat2013_SC.pdf.