2013

Update on Mortgage Foreclosure Litigation: MERS, Standing to Sue and "Show Me the Note" as Defenses

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I. Introduction—Separation of the Note and Mortgage

In the early 1990s, the increasing practice of securitizing home mortgage loans led to efforts to constrain the costs

and delays inherent in sequential recordings of mortgage assignments, leading ultimately to the development of MERS (Mortgage Electronic Registration Systems), which acts as the mortgagee of record for parties who may then transfer the mortgage or partial interests in the mortgage by registering the transfers with MERS.[1] A purpose of MERS is to simplify the securitization process by serving as mortgagee of record in the county land records, while quickly and efficiently registering changes in ownership of the mortgage in a system agreed to by the parties.[2] However, when the recent wave of mortgage foreclosures began in roughly 2006–2008,[3] MERS became a popular target for those seeking to slow or impede the foreclosure process.[4]

Plaintiffs in this wave of cases generally have been unsuccessful in their attempts to use the involvement of MERS as a defense to foreclosure.[5] Courts generally uphold the enforcement of mortgages recorded in the name of MERS, although the analysis may differ depending on the jurisdiction.[6] For example, *Horvath v. Bank of New York*[7] illustrates the vast majority view that a transfer of the debt (*e.g.*, by negotiation or other transfer of the mortgage note) carries with it ownership of the deed of trust (or mortgage).[8] But there are a few aberrational cases to the contrary, such as *Eaton v. Fed. Nat'l Mortgage Ass'n*,[9] holding that, although the mortgage does not automatically follow the note under Massachusetts law, a mortgagee acting as agent for the note-holder may comply with the statutory foreclosure requirements.[10] The *Eaton* court emphasized that its holding applied only prospectively, *i.e.*, where the notice of foreclosure sale is given after June 22, 2012, so as to not interfere with prior transactions.[11]

II. The *Cervantes* and *Hogan* Cases

As noted above, most foreclosure defenses based on a "separation" of the note and mortgage have been rejected by the courts.[12] A well-known example is *Cervantes v. Countrywide Home Loans*,[13] where the plaintiffs alleged conspiracy to commit fraud and wrongful foreclosure based on the designation of MERS as beneficiary in the deed of trust.[14] The United States Court of Appeals for the Ninth Circuit rejected the borrowers' argument that the "splitting" of the note and deed of trust rendered the latter unenforceable, explaining that a trustee (in the deed of trust) has the power to foreclose as long as it is the designated agent of both the holder of the note and the named beneficiary under the deed of trust.[15] Similarly, the plaintiffs in *In re Mortgage Electronic Registration Systems (MERS) Litigation MDL*[16] sought to invalidate MERS mortgages on a "splitting" theory.[17] The *MERS MDL* court rejected the argument that the separation of the note and deed of trust rendered the note unsecured, citing *Cervantes* and *Hogan v. Washington Mutual Bank*.[18] In *Hogan*, the Supreme Court of Arizona upheld the nonjudicial foreclosure of a deed of trust by the mortgagee, who was not the holder of the note, on grounds that a lien enforcement is different from enforcement of the note (there was no dispute that the debt was in default).[19]

The plaintiff in the *MERS MDL* litigation attempted to distinguish its case from *Cervantes* by alleging that in the former MERS was not an agent of the note-holder. The *MERS MDL* court dismissed this claim for lack of supporting evidence, pointing out that the deed of trust signed by the borrower stated that MERS was acting "solely as a nominee for Lender and Lender's successors and assigns."[20] The *MERS MDL* court further rejected the wrongful foreclosure claim, explaining that, even if Arizona recognized such a cause of action, it would not apply here because the plaintiff admitted that she was past due on her loan payments and that the loan was in default.[21]

1. For background on mortgage loan securitization and the role of MERS, *see, e.g.*: Sharon McGann Horstkamp, *MERS Case Law Overview,* 64 Consumer Fin. L.Q. Rep. 458 (2010); Beau Phillips, *MERS: The Mortgage Electronic Registration System*, 63 Consumer Fin. L.Q. Rep. 262 (2009); Derrick M. Land, *Residential Mortgage Securitization and Consumer Welfare*, 61 Consumer Fin. L.Q. Rep. 208 (2007).

2. *See, e.g., supra* note 1. It should be emphasized, however, that the promissory note secured by the mortgage (the mortgage note, or note) can be transferred separately (*e.g.*, by negotiation if the note is a negotiable instrument--*see infra* Part III.), and in that event the holder of the note generally has a right to enforce the mortgage, regardless of any mortgage assignment. *See, e.g.*, Uniform Commercial Code (UCC) § 9-607; *infra* this text and note 8; Harrell, *infra* note 25; Epperson, *infra* note 8 (*i.e.*, "the mortgage follows the note").

3. *See, e.g.*, Alvin C. Harrell, Commentary: *The Subprime Lending Crisis—The Perfect Credit Storm?*, 61 Consumer Fin. L.Q. Rep. 626 (2007).

4. *See, e.g.*, Donald W. MacPherson & Nathaniel K. MacPherson, *"From a Syntactical Fog into an Impossible Swamp"—Fed Up Mortgage Foreclosure Judges Find "No Life on MERS,"* 65 Consumer Fin. L.Q. Rep. 339 (2011).

5. *Id. See also infra* note 6, and discussion below.

6. Often based on variations in state law. *See, e.g.*, Brett J. Natarelli & James M. Golden, *The End of the Beginning in the Battle Over MERS*, 65 Consumer Fin. L.Q. Rep. 400 (2011) (discussing the "impossible split" theory and "irrelevant split" theories), and discussion below.

7. 641 F.3d 617 (4th Cir. 2011).

8. *Id. See also*: Bernardo v. Nat'l City Real Estate Servs., 435 Fed. Appx. 240 (4th Cir. 2011); *In re* Allen, 472 B.R. 559 (B.A.P. 9th Cir. 2012); Kraettli Q. Epperson, *BAC Home Loans—The Mortgage Follows the Note*, 65 Consumer Fin. L.Q. Rep. 415 (2011); *supra* note 2; and other sources cited throughout this article.

9. 462 Mass. 569, 969 N.E.2d 1118 (2012). *See generally* Scott D. Samlin, Stephen F.J. Ornstein & Rinaldo Martinez, *Massachusetts Superior Court Decision*, Eaton v. FNMA, 66 Consumer Fin. L.Q. Rep. 70 (2012).

10. *Eaton,* 969 N.E.2d 1118. This may effectively achieve the same result as under the more conventional, majority view. *See also* discussion of subsequent cases in this article, *e.g.*, *infra* at Parts V.–VII.

11. *Eaton,* 969 N.E.2d 1118. *See also, e.g.*: McKenna v. Wells Fargo, 2012 WL 3553475 (1st Cir. 2012) (prospective holding in *Eaton* did not apply where mandatory notice of sale was issued on January 14, 2010); Samlin, Ornstein & Martinez, *supra* note 9. *See generally* Claire Alxis Ward, *Throw the Book at Them: Testing Mortgagor Remedies in Foreclosure Preoeedings After* U.S. Bank v. Ibanez, 66 Consumer Fin. L.Q. Rep. 269 (2012).

12. *See, e.g., supra* notes 1 & 6 - 8.

13. 656 F.3d 1034 (9th Cir. 2011).

14. *Id. See also, e.g.*, Natarelli & Golden, *supra* note 6.

15. *Cervantes*, 656 F.3d 1034.

16. 2012 WL 1931365 (D. Ariz. 2012).

17. *Id. See also* Natarelli & Golden, *supra* note 6, at 404 - 05.

18. *See Cervantes*, 656 F.3d 1034; *and see* the analysis in Hogan v. Washington Mutual Bank, 227 Ariz. 561 (Ariz. Ct. App. 2011), vacated, 277 P.3d 781 (S.Ct. Ariz. 2012) (vacating the appellate court's opinion, but affirming dismissal of the borrowers' "show me the note" claims based on the state nonjudicial foreclosure statute).

19. *Id.*

20. 2012 WL 1931365.

21. *Id.*

III. PEB Report

Because of the renewed interest in these issues resulting from the foreclosure crisis, the Permanent Editorial Board for the Uniform Commercial Code (the PEB) released a Report on November 14, 2011 entitled "Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes" (the PEB Report).[22]

The PEB Report reiterates the basic principles governing the enforcement of negotiable mortgage notes under Uniform Commercial Code (UCC) Article 3 (and related issues for promissory notes under UCC Article 9).[23] It discusses in some detail the evidentiary requirements for a non-holder seeking to enforce a negotiable promissory note, as well as the requirements for a security interest in a note, and the law governing transfers of notes and mortgages.[24] A basic problem, as reflected in some cases, is noted in the PEB Report: "Although the UCC provisions are settled law, it has become apparent that not all courts and attorneys are familiar with them."[25] However, the PEB Report also recognizes that, while many of the issues related to enforcement of the promissory note are governed by the UCC, some issues (*e.g.*, relating to foreclosures of liens including real estate mortgages) are governed by real property law.[26]

IV. Standing

A recurring issue in recent foreclosure litigation is the issue of standing; that is, when borrowers wish to assert a defense to foreclosure, they may attack the authority (or "standing") of the foreclosing party to initiate the foreclosure.[27] As noted above at Part II., some of these cases have focused on whether MERS, the industry system used to track mortgage assignments, has "split" the promissory note and the mortgage or trust deed, resulting in the foreclosure being initiated by a party that does not have a right to foreclose.[28] The overwhelming national trend has been for courts to reject this line of attack.[29] Moreover, lack of standing is an affirmative defense and at least some courts have recognized that it must be raised in timely fashion or it is waived.[30] However, as noted below at Part V., the issue sometimes depends on a state-specific analysis and also may depend in part on whether it is a judicial or nonjudicial foreclosure.

V. Nonjudicial Foreclosure

A. *Saurman*

A subset of the litigation on standing over the past few years has involved the argument that the MERS model prevents a party from being able to meet the state statutory prerequisites for nonjudicial foreclosure.[31] In November 2011, in *Residential Funding Co. v. Saurman and Bank of NY Trust Co. v. Messner*,[32] the Michigan Supreme Court handed a significant victory to MERS and its members by reversing the Michigan Court of Appeals' decision denying MERS the right to foreclose nonjudicially and voiding the foreclosures at issue. In order to foreclose nonjudicially in Michigan, by statute the foreclosing party must be "either the owner of the indebtedness secured by the mortgage or the servicing agent of the mortgage."[33] The Michigan Court of Appeals had reasoned that, although MERS had an interest in the subject properties as mortgagee, it did not own an interest in the indebtedness because it did not own the notes or have an interest, legal share or right in the notes.[34] In reversing the court of appeals' holding, the Michigan Supreme Court clarified that, as record owner of the mortgage, MERS "owned a security lien on the properties, the continued existence of which was contingent

22. The PEB Report is available at http://www.uniformlaws.org/NewsDetail.aspx?title =PEB/UCC%20Report%20Now%20Available [PEB Report]. *See also* Fred H. Miller, *Promissory Notes, Mortgages, Assignments, Foreclosure, and Related UCC Issues*, 65 Consumer Fin. L.Q. Rep. 406 (2011).

23. PEB Report, *supra* note 22. A promissory note is governed by UCC Article 3 if it is a negotiable instrument as defined at UCC §§ 3-103 and 3-104. *Id*. The definition of promissory note is somewhat broader for purposes of Article 9. *See* UCC § 9-102(a)(65). A promissory note is also an "instrument" under Article 9, as defined at section 9-102(a)(47), if it meets certain other requirements as specified at section 9-102(a)(47) (*e.g.*, "is of a type that in ordinary course of business is transferred by delivery with any necessary indorsement or assignment"). Transfer of an instrument is imbued with certain aspects of negotiability under Article 9 (*see* section 9-330(d)), and Article 9 applies to sales of promissory notes (*see* section 9-109(a)(3)). For non-negotiable notes not covered by Article 3, these Article 9 rules provide an alternative structure to resolve many issues, *e.g.*, priority disputes. However, these Article 9 rules generally do not address the issues discussed in this article. *Cf.* sources cited *infra* at note 24; *see also supra* note 2, and Harrell, *infra* note 25. The UCC Article 3 rules provide excellent reasons for using a negotiable instrument in mortgage lending transactions.

24. PEB Report, *supra* note 22. *See also, e.g.*: UCC § 3-103(a)(13) (definition of "Prove"); *id*. § 3-308(b) (elements of proof required); *id*. § 3-301 (persons entitled to enforce an instrument).

25. PEB Report, *supra* note 22. *See generally* Alvin C. Harrell, *Impact of Revised UCC Article 9 on Sales and Security Interests Involving Promissory Notes and Payment Intangibles*, 55 Consumer Fin. L.Q. Rep. 144 (2001).

26. PEB Report, *supra* note 22. *See also, e.g.*, *Hogan*, 277 P.3d 781 (distinguishing between collection of a debt and foreclosure of a lien); *infra* this text at note 83.

27. *See, e.g.*: JP Morgan Chase Bank v. Porzio, FSTCV095010388S, 2011 WL 3672077 (Conn. Super. Aug. 1, 2011); U.S. Bank v. Sharif, 89 A.D.3d 723 (N.Y. App. 2011); Peirce v. Assurity Financial Services, LLC, 3:10-cv-01269-MO, 2011 WL 7740690 (D. Or. Dec. 15, 2011); Stein v. Chase Home Finance, LLC, *et al.*, 662 F.3d 976 (8th Cir. 2011); Deutsche Bank National Trust Company v. Byrams, 275 P.3d 129 (Okla. 2012). *See also infra* Part X.

28. *See supra* Parts I. and II. For example, *In Re* Mortgage Electronic Registration System Litigation, MDL Docket No. 09-2119-JAT., 2011 WL 4550189 (D. Ariz. Oct. 3, 2011), consolidated 72 actions from several states that asserted claims centered on the premise that a split of the note and the deed of trust renders the note unsecured and unenforceable. *But see supra* Part II. for the resolution of these cases.

29. *See MERS MDL*, 2011 WL 4550189 (*supra* note 28), at *3 (stating that even if the note is split from the deed, the "plaintiffs' alleged conclusion that, 'as a necessary consequence, no party has the power to foreclose' does not hold" (quoting Cervantes v. Countrywide Home Loans, No. 09-17364, slip. op. at 16 (9th Cir. Sep. 7, 2011)). *See* discussion of these cases, including resolution of the *MERS MDL*, *supra* this text at Part II. *See also*: *Horvath*, 641 F.3d 617 (*supra* note 7); *Hogan*, 277 P.3d 781 (*supra* note 18); Bhatti v. Guild Mortgage Company et al., C11-0480JLR, 2011 WL 6300229 (W.D. Wash. Dec. 16, 2011); Kirby v. Bank of America, N.A. *et al.*, 2:09-cv-182-DCB-JMR, 2012 WL 1067944 (S.D. Miss. March 29, 2012); and Welk *et al.* v. GMAC Mortgage, LLC *et al.*, 850 F.Supp.2d 976, 11-CV-2676, 2012 WL 1035433 (D. Minn. Mar. 29, 2012). Note that, as regards negotiable promissory notes, UCC § 3-301 recognizes that a party may be a person entitled to enforce the instrument without being the holder or otherwise having possession, *e.g.*, by reason of agency law or a contractual arrangement or assignment. *See, e.g.*, PEB Report, *supra* note 22.

30. *See, e.g.*: Deutsche Bank National Trust Company v. Kari B. Snick, No. 100436 (Ill. Ct. App. Oct. 21, 2011); Scott D. Samlin & Rinaldo Martinez, *Casenote: Deutsche Bank National Trust Co. v. Kari B. Snick*, 65 Consumer Fin. L.Q. Rep. 351 (2011).

31. *See, e.g.*, MacPhearson & MacPhearson, *supra* note 4.

32. 490 Mich. 909, 805 N.W.2d 183 (Mich. Nov. 16, 2011) [*Saurman II*] (*reversing* Residential Funding Co., LLC v. Saurman and Bank of NY Trust Co. v. Messner, 292 Mich. App. 321, 807 N.W.2d 412 (Mich. App. 2011) [*Saurman I*]). *See generally* Stephen F.J. Ornstein, Scott D. Samlin & William W. Carpenter, Case Note: *Michigan Supreme Court Decision in* Residential Lending Co. v. Saurman, 65 Consumer Fin. L.Q. Rep. 338 (2011).

33. Mich. Comp. Law § 600.3204(1)(d).

34. *Saurman I*, 292 Mich. App. at 331, 332.

upon the satisfaction of the indebtedness."[35] Accordingly, MERS had an interest in the indebtedness sufficient to allow it to foreclose by advertisement.[36]

B. *Niday*

The *Saurman* cases[37] did not call into question the validity of MERS' status as mortgagee,[38] but in July 2012 the Oregon Court of Appeals opined on essentially this issue (with respect to a deed of trust), concluding that a nonjudicial foreclosure could not occur under Oregon law unless all assignments from the lender had been recorded.[39] In *Niday*, the court analyzed whether foreclosure by advertisement under the Oregon Trust Deed Act (OTDA) could be effectuated where MERS was the nominal beneficiary of the deed of trust.[40] As is standard practice, in *Niday* the deed of trust securing the borrower's loan identified the lender as the party making the loan and the party to whom the debt was repayable under the promissory note, and named MERS as the beneficiary under the deed of trust "(solely as nominee for Lender and Lender's successors and assigns)."[41]

Under the OTDA, foreclosure by advertisement is permitted if certain conditions are met, including a requirement that "any assignments of the trust deed by the trustee or the beneficiary" must be recorded in the mortgage records of the county where the property is located.[42] The court of appeals agreed with the borrower's argument that, although the deed of trust named MERS as beneficiary, Oregon's statutory definition of "beneficiary" requires the beneficiary to be the party to whom the underlying debt is owed.[43] In other words, the party identified as the lender in the deed of trust was the true beneficiary under the deed of trust, and therefore would have to record an assignment to MERS as beneficiary, even though MERS was already named directly as the original beneficiary in the recorded deed of trust.[44] Despite the defendants' observation that, because MERS was the beneficiary of record at both origination and foreclosure, there was no assignment to record, the court deemed the lender to be the true beneficiary of the deed of trust.[45] Therefore, an assignment from the lender would have to be recorded in order for the beneficiary named in the deed of trust to avail itself of the nonjudicial foreclosure option.[46]

The *Niday* court observed that a deed of trust may be assigned by either a separate writing or by transfer of the underlying promissory note.[47] Because the lender (*i.e.*, the "true" beneficiary of the deed of trust) had transferred the promissory note to a third party prior to initiation of the foreclosure but failed to record an assignment of the deed of trust to that party, the transferee had not met the nonjudicial foreclosure prerequisite of recording an assignment reflecting its status as beneficiary of the deed of trust.[48] This was required even though MERS was the beneficiary of record and served as nominee of the transferee (the foreclosing party). In reversing the trial court's summary judgment order in favor of the defendants, the Oregon Court of Appeals concluded that "the import of our holding is this: A beneficiary that uses MERS to avoid publicly recording assignments of a trust deed cannot avail itself of a nonjudicial foreclosure process that requires that very thing—publicly recorded assignments."[49]

C. Authors' Observations

It can be observed that the *Niday* court's analysis is anomalous as compared to traditional norms and basic legal principles, and seems to stretch the statutory language as needed to support the court's conclusion. At a basic level, the analysis fails to recognize the role of agency law, which permits a nominee (such as MERS) to represent the owner of a promissory note as mortgagee of record (or for any other legitimate purpose).[50] As nominee of the note-holder and the only mortgagee of record, MERS could not be expected to record an assignment to itself; to suggest otherwise is to ignore the law of agency.

To be sure, the analysis in *Niday* is clouded by language in the OTDA apparently intended to avoid lien foreclosures by parties who do not have a recorded lien. However, clearly that was not the case in *Niday*, and it takes a major stretch of the imagination to use statutory language directed at that purpose to essentially require an assignment by the mortgagee of record to itself, or to reject the law of agency in this context. It is up to the legislature and courts of a state to deal with this kind of problem, but the *Niday* analysis seems to be outside the scope of accepted legal precedent.

VI. Securitization

Another avenue of attack on foreclosure proceedings has been to challenge standing where the debt has been securitized.[51] Generally these attacks also have been unsuccessful. For example, in *Commonwealth Property Advocates, LLC v. Mortgage Electronic Registration Systems, Inc. et al.*,[52] the United States Court

35. *Saurman II*, 490 Mich. at 909.

36. *Id. See also* text and sources cited *supra* at Part II., and *supra* Part IV.

37. *See supra* Part V.A.

38. MERS clearly was the mortgagee of record in those cases. *Id.*

39. *See* Niday v. GMAC Mortgage, LLC, 251 Ore. App. 278, 284 P.3d 1157, (Ore. App. 2012).

40. *Id.*, 251 Ore. App. 278.

41. *Id.* at 288.

42. *Id.* at 283.

43. *Id.* at 294 - 295.

44. *Id.* at 298.

45. *Id.*

46. *Id.* at 299.

47. *Id. See also, e.g.*, sources cited *supra* at notes 2 & 8 (the mortgage follows the note).

48. *Niday*, 251 Ore. App. at 300.

49. *Id.* at 301.

50. *See, e.g., supra* Part II.

51. For background on securitization, *see* sources cited *supra* at note 1.

52. 680 F.3d 1194 (10th Cir. 2011).

of Appeals for the Tenth Circuit rejected the plaintiff's assertion that, once a note has been sold and securitized, the beneficiary named in the recorded deed of trust no longer has authority to foreclose absent authorization from the "new owners" of the debt (*i.e.*, the investors who have purchased the securitized debt).[53] The *Commonwealth* court recognized that the securitization did not revoke the language in the deed of trust providing the named beneficiary with authority to foreclose on behalf of the lender and its assigns.[54]

VII. *Bevilacqua*—No Retroactive Effect

The fallout from a foreclosure conducted by a party that lacks standing can be significant. In a follow-up to its decision in *U.S. Bank National Association v. Ibanez*,[55] the Supreme Judicial Court of Massachusetts decided *Bevilacqua v. Rodriguez*,[56] holding that the purchaser at an improperly-conducted foreclosure sale does not have ownership of the property and, thus, does not have standing to bring a "try title" action.[57] In *Bevilacqua*, the plaintiff (Bevilacqua) brought an action to "try title" to property he purchased from U.S. Bank, which had acquired the property in a foreclosure it conducted and completed one month prior to being assigned the mortgage.[58]

Because U.S. Bank was not the assignee of the mortgage at the time of the foreclosure, the court held that the foreclosure was invalid and U.S. Bank did not own the property it had purported to transfer by quitclaim deed to Bevilacqua.[59] Accordingly, Bevilacqua did not own the property for which he sought to clear the title, and did not have standing to bring the try title action.[60] The *Bevilacqua* court upheld the dismissal of the try title action for lack of standing but did so without prejudice, leaving open the option that the chain of title could be reestablished and a new foreclosure sale could be held to give the plaintiff clear title.[61] The court emphasized that, as to other cases, its holding would be given only prospective effect, thereby avoiding potentially devastating economic effects as regards a large number of previous Massachusetts foreclosures.[62]

XIII. Lost Notes

Another range of cases deals with the situation where the promissory note cannot be located. UCC section 3-309 provides a mechanism for proving and enforcing a negotiable instrument that has been lost, destroyed or stolen, codifying basic common law principles, and in most cases it is sufficient to follow this approach. In *In re Allen*,[63] for example, the court found that possession of a lost note affidavit and a copy of the promissory note was sufficient to establish the person entitled to enforce the instrument.[64]

In *Allen*, the note had been indorsed in blank by the original payee, who lost the note and executed a lost note affidavit. The loan was then assigned to DLJ, who entered into a pooling and servicing agreement that transferred the note to U.S. Bank as trustee. U.S. Bank filed a secured proof of claim in the debtor's bankruptcy, presenting the lost note affidavit and a copy of the original note as evidence that it was the party in interest in the bankruptcy case.

The *Allen* court held that U.S. Bank's possession of the affidavit and copy of the note indorsed in blank alone were sufficient to replace the lost note, giving U.S. Bank status as the person entitled to enforce the instrument.[65] However, it can be observed that, although an assignee in these circumstances is the party entitled to enforce the instrument under UCC section 3-301,[66] when it comes to that enforcement the assignee may need to provide adequate protection under UCC section 3-309 to protect the maker against subsequent liability should the note be found, negotiated to and presented by a holder in due course.[67]

In *Stein v. Chase Home Fin., LLC*,[68] the mortgagor argued that the mortgagee did not have the authority to begin foreclosure because it could not prove possession of the note.[69] The *Stein* court rejected the argument that possession of the note is necessary at the time the action is commenced.[70] The court concluded that it is sufficient that a right to enforce the note is established at the time that issue is presented to the court for resolution.[71]

53. *Id.* at 1203 - 1205.

54. *Id.* at 1204, 1205. *See also supra* Part II. (noting similar analyses).

55. 941 N.E.2d 40 (Mass. 2011) (holding that the securitization trustees did not have standing to foreclose where the assignments were not recorded until after the foreclosure sale). *See also* Ward, *supra* note 11.

56. 955 N.E.2d 884 (Mass. 2011).

57. *Id.* Under Massachusetts law, a person in possession of and claiming a freehold interest in land with record title that is subject to an adverse claim, or the possibility of such a claim, can file an action in the land courts to "try title," in order to clear the clouded title. *See* Mass. Gen. Laws ch. 240, § 1. *See generally* Scott D. Samlin & Rinaldo Martinez, Case Note: *Massachusetts Supreme Judicial Court Decision in* Bevilacqua v. Rodriguez, 65 Consumer Fin. L.Q. Rep. 349 (2011). *See also* Ward, *supra* note 11.

58. *Bevilacqua*, 955 N.E.2d at 888.

59. *Id.* at 893.

60. *Id.*

61. *Id.* at 898.

62. *Id. See also, e.g.*, Samlin & Martinez, *supra* note 57.

63. 472 B.R. 559 (B.A.P. 9th Cir. 2012).

64. *Id. See also* UCC §§ 3-301 & 3-309.

65. *See supra* note 64.

66. *See generally*: Harvey v. Deutsche Bank Nat. Trust Co., 69 So.3d 300 (Fla. Dist. Ct. App. 2011) (assignee of the note had standing to foreclose the mortgage); Kennington Partners, LLC v. Beal Bank Nev., 715 S.E.2d 491 (Ga. App. 2011) (assignment from the FDIC entitled the assignee to enforce the note); Stein v. Chase Home Fin., LLC, 662 F.3d 976 (8th Cir. 2011) (possession of the note is not necessary to begin foreclosure); *but see* Gee v. U.S. Bank Nat'l Ass'n, 72 So.3d 211 (Fla. Dist. Ct. App. 2011) (lack of possession of the note or other required evidence precluded standing to foreclose the mortgage). *Compare Hogan*, 277 P.3d 781 (discussed *supra* at Part II.) (enforcement of lien did not require that the lienor be holder of the note where the debt and default were admitted or in evidence).

67. *See* UCC § 3-309.

68. 662 F.3d 976 (8th Cir. 2011).

69. *Id. See also* discussion *supra* at Part VII.

70. *See Stein*, 662 F.3d 976. *Cf.* Deutsche Bank Nat'l Trust Co. v. Byrams, 275 P.3d 129 (Okla. S.Ct. 2012) (contra) (discussed in this text below at notes 72 - 74. *See also*: El Diaby v. Bierman, 795 F.Supp.2d 108 (D. D.C. 2011) (allegation that the mortgagee was not the holder and therefore lacked standing was rejected); Gee v. U.S. Bank Nat'l Ass'n, 72 So.3d 211 (Fla. Dist. Ct. App. 2011) (mortgagee did not produce the note or other required evidence that it owned the debt, and an assertion of equitable reformation was insufficient to establish standing); Feltus v. U.S. Bank Nat'l Ass'n, 80 So.3d 375 (Fla. Ct. App. 2012) (a copy of an unindorsed note was not sufficient); *supra* this text Part VII; *infra* Part X.

71. *See Stein*, 662 F.3d 976. *See also supra* note 70; and discussion below at Part X. *But see* discussion immediately below.

In *Deutsche Bank Nat'l Trust Co. v. Byrams*,[72] the Oklahoma Supreme Court held that the plaintiff may have lacked standing to sue because, *e.g.*, the indorsement of the note did not precisely match the payee's name and therefore was not sufficient to transfer the note and make the bank a holder.[73] Therefore, the plaintiff may have lacked standing to sue.[74] The Court's analysis seems to require greater precision as to holder status and an indorsement than is required by law including the UCC.[75]

IX. Evidentiary Requirements

A. Overview of Recent Cases

If the promissory note is a non-negotiable instrument (*i.e.*, an ordinary contract), it is not governed by UCC Article 3 and proof of the terms of an assignment (and the terms of the obligation assigned) may require elements of evidence beyond the relatively simple requirements for the holder of a note under UCC section 3-308.[76] For example, in *Arrow Fin. Servs., LLC v. Guiliana*,[77] summary judgment for an assignee seeking to collect a credit card debt (based on an ordinary contract) was reversed on grounds that the evidence submitted (a bill of sale and electronic payment records) was insufficient proof of the original contract and payment schedule, and the account balance.[78] Similar allegations as regards the plaintiff's evidentiary burden may confront the assignee of a non-negotiable mortgage note that has been lost, or the assignee of a negotiable instrument or mortgage loan who is not the holder of the note.[79] These problems and, in contrast, the relatively user-friendly provisions of UCC section 3-308 may suggest reasons to use a negotiable instrument and maintain holder status under UCC Article 3.[80]

Nonetheless, holder status is not always needed. Consider, for example, *Hogan v. Washington Mutual Bank*,[81] which rejected the "show me the note" defense in a nonjudicial foreclosure where only the lien (and not the debt secured by the lien) was being enforced (due to an anti-deficiency statute).[82] In *Hogan*, the Arizona Supreme Court noted that proving ownership of the note is superfluous where the debtor's default is established or conceded and the only remedy sought is foreclosure of the lien, because foreclosure of a lien is the transfer of a property interest and is not the same as collecting a debt evidenced by the note.[83]

B. The *Heath* Case

In 2012 the Oklahoma Supreme Court decided more than a dozen cases addressing the issue of standing when a foreclosure is commenced by the assignee of a mortgage loan.[84] *Deutsche Bank Nat. Trust Co. v. Byrams*[85] already has been noted above.[86] Another important

72. 275 P.3d 129 (*see supra* note 70).

73. *Id.* at 132.

74. *Id.* The case was remanded for further consideration of the relevant facts. *Id.*

75. *See, e.g.*, UCC §§ 3-110(a), 3-203 & 3-204. *See also*: Manley v. Wachovia Small Business Capital, 349 S.W.3d 233 (Tx. Ct. App. 2011) (the owner of the note was the party entitled to enforce it even though the loan servicer had erroneously stamped it paid and returned it to the debtor); Gee v. U.S. Bank Nat'l Ass'n, 72 So.3d 211 (Fla. Dist. Ct. App. 2011) (mortgagee could commence foreclosure despite lack of possession of the note); *but see*: *In re* Banks, 457 B.R. 9 (8th Cir. BAP 2011) (physical possession of the bearer note was a prerequisite to foreclosure); Feltus v. U.S. Bank Nat'l Ass'n, 80 So.2d 375 (Fla. Ct. App. 2012) (bank's initial foreclosure complaint was inadequate because it provided only a copy of the note, without indorsements; an amended complaint attached the original note indorsed in blank but was inadequate because it was filed without permission to amend). *See also*: *In re* Escobar, 457 B.R. 229 (Bankr. E.D. N.Y. 2011) (servicing agent with possession of the notes had standing to commence foreclosure); Deutsche Bank Nat'l Trust Co. v. Barnett, 931 N.Y.S.2d 630, 2011 N.Y. App. Div. LEXIS 6938 (N.Y. App. Div. 2011) (the bank lacked standing to foreclose because it failed to establish that it held both the note and mortgage when foreclosure was commenced).

76. Unless, *e.g.*, by the terms of the note the parties have "opted in" to Article 3. *See* § 3-104, cmt. 2. Otherwise, a non-negotiable instrument may be a promissory note and instrument under UCC Article 9, but will be outside the scope of Article 3 sections 3-308 and 3-309.

77. 32 A.3d 1055 (Me. 2011).

78. *Id.* Note that the Uniform Electronic Transactions Act (UETA) makes clear that an electronic record cannot be denied legal effect on grounds that its format is electronic. *See, e.g.*, UETA § 7.

79. *See*, *e.g. In re* Lippold, 457 B.R. 293 (Bankr. S.D. N.Y. 2011) (assignment of mortgage was not sufficient to grant rights in the note); *Deutsche Bank*, 275 P.3d 129 (*see supra* notes 72 - 75) (same); Aurora Loan Servs., LLC v. Louis, 2012 WL 361988, 2012 Ohio App. LEXIS 334 (Ohio Ct. App. Feb. 3, 2012) (affidavit in support of lost assignment and note was insufficient evidence for standing to foreclose). *See generally supra* Part V., and sources cited *supra* at notes 2 & 8 (the mortgage follows the note, but not necessarily vice versa). Regarding electronic records, *see* the UETA, *supra* note 78, and *compare* UETA section 16 (electronic transferrable records).

80. *See, e.g.*, UCC Article 3 pt. 3 (governing the enforcement of negotiable instruments, and illustrating some benefits of holder status). *See also supra* this text and notes 23 - 25.

81. 277 P.3d 781, 2012 WL 1835540 (S.Ct. Ariz. May 18, 2012).

82. *Id. See also supra* Part II.

83. *Hogan*, 277 P.3d 781. *See also*: *In re* MERS (MDL), 2012 WL 1931365 (D. Ariz. May 25, 2012) (same) (following *Hogan*) (noted *supra* at Part II); Kan. v. OneWest Bank, FSB, 823 F. Supp.2d 464 (W.D. Tex. 2011) (same) (also rejecting ad-

(Continued in next column)

83. *(Continued from previous column)*

ditional spurious borrower defenses and awarding attorney fees to the mortgage servicer on grounds that the defenses were asserted in bad faith); Parker v. Greenpoint Mortg. Funding, Inc., 2011 WL 5248171, 2011 U.S. Dist. LEXIS 127206 (D. Nev. Nov. 1, 2011) (a nonjudicial foreclosure can be conducted by an agent of the holder even though the agent is not the holder); Culhane v. Aurora Loan Services of Nebraska, 826 F. Supp.2d 352 (D. Mass. 2011) (servicing agent had standing to foreclose, as assignee of the note and mortgage). *But cf.*: *Deutsche Bank*, 275 P.3d 129 (discussed *supra* at notes 72 - 75) (ownership of the note was essential to a judicial foreclosure); Wells Fargo Bank, N.A. v. Heath, 280 P.3d 328 (Okla. S.Ct. 2012) (proof of holder status is required at the time a foreclosure petition is filed, in order to prevail on a motion for summary judgment) (discussed below at Part X.B.); *Lippold*, 457 B.R. 293 (*supra* note 79) (same); *Aurora,* 2012 WL 361988, 2012 Ohio App. LEXIS 334 (*supra* note 79) (affidavit supporting allegations of a lost assignment and note was not sufficient to establish a right to enforce the note).

84. *See, e.g.*: U.S. Bank Nat. Ass'n v. Baber, 280 P.3d 956 (Okla. S.Ct. 2012) (foreclosing party must be the holder or otherwise entitled to enforce the note); U.S. Bank, N.A. *ex rel* Credit Suisse First Boston Heat 2005-4 v. Alexander, 280 P.3d 936 (S.Ct. Okla. 2012) (factual questions as to whether the note was properly assigned to the foreclosing party); Wells Fargo Bank, N.A. v. Heath, 280 P.3d 328 (Okla. St. Ct. 2012) (assignment of mortgage does not automatically include the note; fact issue remained as to whether the assignee was the holder of the note at the time suit was commenced, as required for standing); Residential Funding Real Estate Holding, LLC v. Adams, 279 P.3d 788 (Okla. S.Ct. 2012) (question as to whether the assignor was the proper party to assign the note); HSBC Bank USA, National Association v. Lyon, 276 P.3d 1002 (Okla. S.Ct. 2012) (lack of standing was cured by refilling an amended petition with the note attached); U.S. Bank, National Association v. Moore, 278 P.3d 596 (Okla. S.Ct. 2012) (the assignee lacked standing to sue absent evidence that it was the holder of the note); CPT Asset Backed Certificates, Series 2004-EC1 v. Cin Kham, 278 P.3d 586 (2012) (same); Bank of America, NA v. Kabba, 276 P.3d 1006 (Okla. S.Ct. 2012) (assignment of the mortgage did not automatically assign the note; material issues remained as to whether the assignee was entitled to enforce the note); Deutsche Bank Nat. Trust Co. v. Matthews, 273 P.3d 43 (Okla. S.Ct. 2012) (same); Deutsche Bank Nat. Trust Co. v. Richardson, 273 P.3d 50 (Okla. S.Ct. 2012) (same); Deutsche Bank Nat. Trust Co. v. Byrams, 275 P.3d 129 (Okla. S.Ct. 2012) (same); NTEX Realty, LP v. Tacker, 275 F.3d 147 (Okla. S.Ct. 2012) (fact issue remained as to when the foreclosing party became the holder of the note, as required for standing); Mill Creek Lumbere & Supply Co. v. First United Bank and Trust Co., 278 P.3d 12 (Okla. Ct. Civ. App. 2012) (mortgagee that released its prior construction mortgage when it refinanced the loan with a subsequent mortgage loan lost priority as against intervening liens and could not use equitable subrogation to assert its earlier priority statutes); J.P. Morgan Chase Bank Nat. Ass'n v. Eldridge, 273 P.3d 62 (Okla. S.Ct. 2012) (fact issues remained as to whether the foreclosing party was a nonholder with rights of a holder who had standing to sue). *See also* BAC Home Loans Servicing, L.P. v. White, 256 P.3d 1014 (Okla. Ct. App. 2011) (the mortgage follows the note, but the note doesn't necessarily follow the mortgage); the *BAC* case is analyzed in Kraettli Q. Epperson, Case Note: BAC Home Loans—*The Mortgage Follows the Note*, 65 Consumer Fin. L.Q. Rep. 415 (2011).

85. 275 P.3d 129.

86. *See supra* notes 72 - 75 and accompanying text.

and illustrative example is *Wells Fargo Bank, N.A. v. Heath*,[87] where Wells Fargo as trustee for the owner of the loan filed a foreclosure action and attached to the petition a copy of the note, mortgage and assignment of the mortgage. However, as is common with respect to an assignment of mortgage, the assignment did not "purport to transfer the note."[88] The property was sold at a sheriff's sale on July 28, 2009 and the hearing on a motion to confirm the sale was set for two weeks later but this hearing was delayed when the debtors' filed bankruptcy; after several more delays the hearing was rescheduled for February 16, 2010 but on February 12, 2010 the debtors' new counsel filed a motion to vacate the foreclosure judgment, apparently on several grounds including an allegation that Wells Fargo was not the holder of the mortgage note.[89] At the hearing on this motion, Wells Fargo produced the promissory note with an undated allonge attached,[90] containing a blank indorsement; the trial court denied the debtors' motions,[91] and this appeal followed.

On appeal the Oklahoma Supreme Court cited three basic points: (1) the foreclosing party must be the holder of the note;[92] (2) this status must be achieved at the time the action is commenced, in order to have standing to sue; and (3) the mortgage follows the note, but not the converse (assignment of the mortgage does not carry with it the note).[93] Each of these points is analyzed briefly below.

The Court stated that the mortgage note was a negotiable instrument, and therefore governed by UCC Article 3.[94] Although at points the Court's opinion uses unnecessarily restrictive language,[95] the *Heath* Court quoted the applicable statutory provision (UCC section 3-301)[96] and the Court's opinion properly states the basic issue: "The Appellee [Wells Fargo] has the burden of showing it is entitled to enforce the instrument."[97]

Unfortunately, the Court proceeded in its opinion to focus almost entirely on only one of the alternative means of having authority to enforce the note, namely holder status, thereby failing to adequately consider the alternatives that may have been applicable on the facts of the *Heath* case.[98] For example, the Court concluded that:

> both possession of the note and an indorsement or attached allonge[] are required in order for one to be a "holder" of the note. The record in this case reflects [that] the note attached to the petition had not been indorsed. Therefore, there [was] no evidence, at the time the petition was filed[,] that the Appellee [Wells Fargo] was the holder of the note.[99]

All of this is true, no doubt; but it is also not necessarily dispositive of the issues in the case. As noted, there are other ways to become the person entitled to enforce the instrument, aside from being the holder.[100] It is quite possible (and even seems likely) that, on the facts of *Heath,* Wells Fargo was such a person.[101]

The second issue addressed in *Heath* was the effect of the assignment of the mortgage to Wells Fargo. The *Heath* Court clearly was correct in concluding that an assignment of mortgage does not automatically carry with it holder status as to the note.[102] However, it is equally clear that such an assignment evidences a consensual relationship with the assignor that may corroborate or even indicate the assignee's authority to enforce the note.[103] However, on this issue the *Heath* Court did not venture beyond the established rule that a note does not automatically follow the mortgage.[104]

The *Heath* Court additionally considered the impact of Wells Fargo's presentation of the indorsed note at the hearing on the petition and motion to vacate.[105] While this was sufficient to establish holder status, the Court concluded that it came too late: "Standing must occur prior to the petition being filed."[106] The court noted that a negotiable instrument is a contract,[107] and privity of contract is required in order to enforce the

87. 280 P.3d 328.

88. *Id.* at 330.

89. *Id.* at 330 - 331.

90. Regarding the allonge, *see, e.g.*: UCC § 3-204(a) ("For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument."); *id.* cmt. 1 (indorsement on an allonge is sufficient); *Heath*, 280 P.3d at 333, n. 11 (quoting BLACK'S LAW DICTIONARY (9th ed. 2009) for the definition of an "allonge").

91. *Heath*, 280 P.3d at 331.

92. *Id.* at 328. This is not quite correct, even aside from the issue of standing; all that is required is that the foreclosing party be the person entitled to enforce the instrument. *See* UCC § 3-301. This may be achieved by various means, including holder status but also including an assignment or other transfer of the instrument, agency, subrogation, etc. *See, e.g., id.*, cmt.; discussion in this text below at notes 94 - 101.

93. These points are identified (though numbered differently) in *Heath*, 280 P.3d at 328 (along with an additional procedural point not discussed here), and then discussed *id.* at 332 - 34.

94. *Id.* at 333. *See* UCC §§ 3-103, 3-104 (requirements for a negotiable instrument).

95. *See, e.g. Heath*, 280 P.3d at 332 ("From the record, there was no proof [that Wells Fargo] was the *holder* of the note….") (emphasis added); *id.* at 333 ("…absent a showing of *ownership*, the plaintiff lacks standing.") (emphasis added). Under the UCC, neither holder status nor ownership is required to enforce the instrument. *See, e.g., supra* note 92, UCC § 3-301, and discussion below.

96. *Heath*, 280 P.3d at 333.

97. *Id.* As indicated above at notes 92 and 95, it detracts somewhat from the Court's analysis that the *Heath* opinion periodically seems to equate the right to enforce the note with holder status; as clearly provided in UCC section 3-301, holder status is merely one of the ways to do so.

98. *See* discussion of holder status in *Heath*, 280 P.3d at 333; *see also supra* note 97.

99. *Heath*, 280 P.3d at 333 (citation omitted). *Cf. supra* this text notes 92, 95 & 97.

100. *See supra* notes 92 - 97.

101. Since the Court stated that Wells Fargo attached a copy of the note and mortgage, and an assignment of mortgage, to the foreclosure petition (*see* 280 P.3d at 330), there was apparently a contractual or agency relationship between the owner and/or holder of the note and Wells Fargo. Under contract and agency law it is likely this was sufficient to authorize Wells Fargo to enforce the note.

102. *Heath,* 280 P/3d at 333. *See also* Epperson, *supra* note 84.

103. Obviously there is little reason to assign a mortgage except as part of a transaction to transfer the loan secured by the mortgage; therefore, minimal additional evidence of such a transfer should be sufficient. The *Heath* opinion discusses such a case, Everhome Mortg. Co. v. Robey, 136 P.3d 1066 (Okla. Ct. App. 2006); *see Heath*, 280 P.3d at 333. Although *Everhome* is not factually identical to *Heath,* it is close enough to illustrate this principle.

104. *Heath*, 280 P.3d at 333 - 34.

105. *Id.* at 334.

106. *Id.*

107. *Id.*, citing UCC § 3-104 and FRED H. MILLER & ALVIN C. HARRELL, THE LAW OF MODERN PAYMENT SYSTEMS AND NOTES § 1.03 (practitioners ed. 2002).

contract.[108] Thus, the Court concluded, the foreclosing plaintiff must be the person entitled to enforce the instrument at the time the petition is filed.[109]

C. Analysis of and Dissent in *Heath*

The majority opinion in *Heath* summarizes its holding on the UCC issues as follows:

> If there is no indorsement on a note, and a plaintiff is claiming it is a nonholder in possession who has the rights of a holder, then the plaintiff should have documentation establishing that the purpose of the transfer of the note was to give the plaintiff the right to enforce the note.[110]

While this is mostly true as a general statement,[111] and reflects good business practices, it may go too far as a statement of the legal requirements for standing. The UCC provides greater flexibility than the *Heath* opinion suggests, as regards the authority to enforce a note, and does not require any specific documentation to establish that authority. Arguably the evidence in *Heath* was sufficient to establish that authority; indeed, it does not appear that there was any serious allegation to the contrary, *e.g.*, to indicate that Wells Fargo was not the person entitled to enforce the note. The Court's analysis seems almost a gratuitous effort to intercede and create another roadblock to delay judicial foreclosures.

The dissenting opinion of Justices Gurich and Winchester makes essentially these points,[112] concluding (in reference to the majority opinion in *Heath* and other 2012 foreclosure cases[113]) that:

> The majority continues to fashion new requirements in mortgage foreclosure cases, this time, by requiring [the] Plaintiff to have separate documentation at the time of filing that establishes that the transfer of the note included the Plaintiff's right to enforce the note.[114]

The dissenting opinion rejected the holding of the majority that the assignment of a mortgage is insufficient as evidence of an intent to transfer the note, noting that the majority's holding is contrary to both the *Restatement* and the UCC.[115] The dissent also points out that all of the evidence and averments of Wells Fargo indicated its authority to enforce the note, and "[t]here is no indication in the assignment of mortgage that the parties intended anything other than to transfer both the mortgage and the note."[116]

The result, in the dissenting view, is to:

> create [] procedural requirements that are not applied in any other civil actions and are inconsistent with requirements found in established statutory and case law. Similarly, the majority reinterpreted the Oklahoma version of the U.C.C. to require more stringent requirements for enforcement of a negotiable instrument than were previously required. The majority continues to use these new substantive and procedural requirements to vacate judgments entered by trial judges who applied the existing law to the facts presented and were correct in most, if not all, of the cases.[117]

X. Mortgage Lending Settlements

Although not directly related to the mortgage foreclosure litigation discussed in this article, brief mention can be made of the 2012 mortgage lending settlements asserted or imposed on major mortgage lenders.[118] These settlements illustrate a new range of risks for those engaging in mortgage lending transactions.[119]

The $25 billion settlement reached in early 2012, involving the federal government and forty-nine state attorneys general,[120] already has been reported in the pages of this journal,[121] and that discussion will not be repeated here. In addition, there has been a separate set of cases filed by the U.S. government under the federal False Claims Act,[122] *e.g.*, seeking to recover losses suffered by the Federal Housing Administration as the result of loan defaults and mortgage foreclosures.[123]

According to published reports, the resulting settlements have included Bank of America, for $1 billion in February 2012, and $490 million more in cases against other lenders (not including Wells Fargo).[124] In October 2012 the government sued Wells Fargo & Co., alleging misconduct relating to more than half of the 100,000-plus mortgage loans originated by Wells Fargo since May 2001.[125] This adds to the $9.34 billion in mortgage-related costs and

108. *Heath*, 280 P.3d at 334 (citing various authorities).

109. *Id.*

110. *Id.* at 336.

111. As observed above at notes 92, 95 and 97, it is not necessary to have the rights of a holder in order to enforce the instrument.

112. *Heath,* 280 P.3d at 336-37 (dissenting op. of J. Winchester and J. Gurich).

113. *See supra* note 84.

114. *Heath*, 280 P.3d at 336 (dissenting op.).

115. *Id.* (citing: Restatement (Third) of Property on Mortgages § 5.4 cmt. c.; and UCC § 3-203 cmt. 2 (the latter indicating generally that any proof of a transfer is sufficient)).

116. *Id.* Nor, one might add, is there any such indication provided by other evidence in the case.

117. *Id.*

118. *See generally* Robert E. Bostrom, Stephen F.J. Ornstein, Scott D. Samlin & Jennifer Maree, *Final Agreement Filed in Attorney General $25 Billion Settlement with Servicers*, 66 Consumer Fin. L.Q. Rep. 130 (2012).

119. *See, e.g., id.*

120. Oklahoma settled separately, for $18.6 million in relief for Oklahoma homeowners. *See, e.g.*, Cary Aspinwall, *Checks coming from state in mortgage settlement*, Oklahoman, Oct. 9, 2012, at 12A.

121. *See* Bostrom, Ornstein, Samlin & Maree, *supra* note 118.

122. Federal False Claims Act, 31 U.S.C. §§ 3729-3733; *see, e.g.*, Joe Palazzolo, *Fannie, Freddie and the False Claims Act*, Wall Str. J., Oct. 29, 2012, *available at* http://blogs.wsj.com/law/2012/10/29/fannie-freddie-and-the-false-claims-act/; Shayndi Raice & Nick Timiraos, *U.S. Sues BofA Over Mortgage Sales*, Wall Str. J., Oct. 25, 2012, at C3.

123. *See, e.g.*, Shayndi Raice & Nick Timiraos, *U.S. Sues Wells Fargo for Faulty Mortgages*, Wall Str. J., Oct. 10, 2012, at A1.

124. *Id.*

125. *Id.*

litigation expenses suffered by Wells Fargo since 2008 (compared to, *e.g.*, $39.14 billion for Bank of America and $21.55 billion for J.P. Morgan Chase).[126]

XI. Conclusion

Clearly mortgage lending and foreclosures are not the relatively routine and low-cost transactions they used to be. While much of the private litigation has focused on state-law issues (which traditionally have governed these transactions), and therefore the economic damage (*e.g.*, as regards credit availability) has been uneven among the states,[127] the increased movement of federal law and regulation into these transactions and procedures[128] likely means that the future impact will spread to all states.[129] In addition, state foreclosure "prevention" measures have tended to increase the time and cost of mortgage foreclosures.[130] In this legal environment, the prospects for a return to private, risk-based mortgage lending cannot be considered favorable, and it appears likely that mortgage lending transactions will continue to depend on federal life-support for the foreseeable future, meaning that economic, credit, and financial markets will remain closely tied to federal fiscal and monetary policies.[131]

126. *Id.* Citigroup, which perhaps was fortunate in having more of its assets invested overseas, has suffered such losses "only" to the extent of $3.09 billion. *Id. See also, e.g.*, Ben Protess, *U.S. Accuses Bank of America of a 'Brazen' Mortgage Fraud*, N.Y. Times, Oct. 24, 2012, *available at* http://dealbook.nytimes.com/2012/10/24/federal-prosecutors-sue-bank-of-america-over-mortgage-program/. These figures do not include the increased compliance costs that have resulted. *See, e.g.*, Monica Langley & Dan Fitzpatrick, *Embattled J.P. Morgan Bulks Up Oversight*, Wall Str. J., Sept. 13, 2013, at A1 ("J.P. Morgan Chase & Co.…plans to spend an additional $4 billion and commit 5,000 extra employees to clean up its risk and compliance problems….").

127. *See, e.g.*, Dan Fitzpatrick, *Need a Loan? Where Do You Live?*, Wall Str. J., Sept. 27, 2012, at C1 ("The long-awaited recovery in bank lending is well under way in some smaller U.S. cities but remains depressed in large metropolitan areas on the East and West coasts…."). It surely cannot escape notice that the states and cities where lending remains depressed have been among the most aggressive in regulating and penalizing credit transactions. *See generally* Martin C. Bryce, Jr., *Foreclosure Developments, Mortgage Fraud, Counterclaims and Defenses*, 64 Consumer Fin. L.Q. Rep. 4 (2010). In contrast, vehicle security interests remain largely subject to the traditional, uniform, state-based legal rules in the UCC, and remain readily available nationwide. *See, e.g.*, Neil Shah, *A Green Light for Car Loans,* Wall Str. J., Aug. 14, 2012, at C1.

128. *E.g.*, due to the proactive role and comprehensive authority of the CFPB. *See, e.g.*, Alan S. Kaplinsky, *CFPB Announces 2013 Regulatory Agenda*, 66 Consumer Fin. L.Q. Rep. 418 (2012).

129. The more traditional approach of achieving state law uniformity through the uniform law process has not been widely embraced by the states in this context. *Cf., e.g.*, Aaron Byrkit, *Reforming Foreclosure Disposition: A Tool for Tempering the Financial Meltdown*, 63 Consumer Fin. L.Q. Rep. 275 (2009).

130. *See, e.g.*, Melanie R. Finkelstein, *State Law Foreclosure Trends*, 65 Consumer Fin. L.Q. Rep. 352 (2011).

131. *See, e.g.*, Romain Hatchuel, Opinion, *So Long Price-Earnings, Hello Price-Expectations*, Wall Str. J., Oct. 11, 2012, at A17. This further increases the importance of efforts to reform the federal housing finance programs. *See, e.g.*, Nick Timiraos, *A Plan to Alter Fannie, Freddie,* Wall Str. J., Oct. 22, 2012, at A2; Opinion, Review & Outlook, *The FHA's November Surprise*, Wall Str. J., Nov. 6, 2012, at A16 (noting a possible need for a financial rescue of the Federal Housing Administration); Nick Timiraos, *FHA Nears Need for Taxpayer Funds*, Wall Str. J., Nov. 15, 2012, at A1 (same).