NOTES

OLD DOGS WON'T ADOPT NEW TRICKS, BUT CONTINUE TO BEFUDDLE THEIR OWN: NEW YORK'S ANTIQUATED UCC ARTICLE 3 AND THE AMBIGUITY OF ASSIGNMENT REQUIREMENTS IN MORTGAGE FORECLOSURE ACTIONS

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INTRODUCTION

In the mid to late 2000s, the rise of bundling mortgage loans and reselling those loans created a sense of promise for American homeowners, leading them to believe there was a new avenue for homeownership.[1] In 2006, "the system began to unravel."[2] As a result, "[m]illions of Americans borrowed money against their homes and [could not] afford to repay" the loans, leading to defaults on mortgage payments.[3] Financiers claimed that the subprime mortgage process would create new opportunities for Americans to afford homes; in reality, Americans bought homes they would never be able to afford.[4] By 2008, the bundling of mortgages and the subprime market took a toll on the average American, plunging the American economy into a recession, the "magnitude [of which had] not [been] seen since the Great Depression."[5]

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[1] *See* CHRISTOPHER L. PETERSON, KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, SUBPRIME LENDING, FORECLOSURE AND RACE: AN INTRODUCTION TO THE ROLE OF SECURITIZATION IN RESIDENTIAL MORTGAGE FINANCE 1 (2008), http://www.kirwaninstitute.osu.edu/reports/2008/10_2008_SecuritizationRace_Primer_Peterson.pdf.

[2] RONALD D. UTT, THE HERITAGE FOUND., THE SUBPRIME MORTGAGE MARKET COLLAPSE: A PRIMER ON THE CAUSES AND POSSIBLE SOLUTIONS 1 (2008), https://www.heritage.org/report/the-subprime-mortgage-market-collapse-primer-the-causes-and-possible-solutions.

[3] PETERSON, *supra* note 1, at 1.

[4] *See id.*; Yaron Brook, *The Government Did It*, FORBES (Jul. 18, 2008), https://www.forbes.com/2008/07/18/fannie-freddie-regulation-oped-cx_yb_0718brook.html#c19e62b364b4.

[5] PETERSON, *supra* note 1, at 1.

The recession created financial problems for Americans, and the issues of enforcement of bundled mortgages were lurking in the background.[6] Lending standards with bundled mortgages were loose, and the risk was high.[7] The loose standards of the bundling process in the 2000s set the table for original promissory notes (associated with the individual mortgages) to get lost in the mix.[8] Lost promissory notes, as well as the failure to transfer promissory notes with their corresponding mortgages, gives rise to problems of enforceability for mortgagees and creates defenses by borrowers/ owners.[9] The enormous mortgage bundling transactions, which led to recession and mortgage defaults, have required courts to address the issue of standing in several different procedural contexts.[10] Given the sheer number of mortgage loans extended during the bundling era, the prevalence of mortgage foreclosures arising from these bundled mortgage loans continues today, carrying with it the standing issues arising from sloppy document keeping, as well as sloppy transfers of promissory notes.[11] Of course, it is not only bundled mortgages that can give rise to standing issues in a foreclosure action. To successfully foreclose, the mortgagee needs to legally hold both the note and mortgage.[12]

A mortgage is a lien against real property, through which the lender that granted the mortgage loan secures the obligations, so as to receive payment of those obligations out of a foreclosure sale of the real property in the event of a borrower's default.[13] This seems

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[6] *See* Cam Merritt, *What is Bundling a Mortgage?*, THE NEST, https://budgeting.thenest.com/bundling-mortgage-31426.html (last visited Sept. 23, 2018).

[7] *See id.*

[8] *See, e.g.*, PETERSON, *supra* note 1, at 17 (describing loose standards in bundling; quantity not quality).

[9] *See id.*; Mark C. Dillon, *Unsettled Times Make Well-Settled Law: Recent Developments in New York State's Residential Mortgage Foreclosure Statutes and Case Law*, 76 ALB. L. REV. 1085, 1094, 1097 (2013).

[10] *See* Dillon, *supra* note 9, at 1096–97.

[11] *See* Bruce J. Bergman, *Standing is a Waivable Defense—But for How Long?*, LEXISNEXIS LEGAL NEWSROOM: REAL ESTATE LAW BLOG (May 3, 2011), https://www.lexisnexis.com/legalnewsroom/real-estate/b/real-estate-law-blog/archive/2011/05/03/standing-is-a-waivable-defense-but-for-how-long.aspx?Redirected=true (explaining the possibility of breaking the "chain of assignments" with multiple assignments).

[12] *See* FTBK Inv. II LLC v. Genesis Holding LLC, 7 N.Y.S.3d 825, 834 (Sup. Ct. 2014) (citing Citimortgage, Inc. v. Stosel, 934 N.Y.S.2d 182, 183 (App. Div. 2d Dep't 2011); Bank of N.Y. v. Silverberg, 926 N.Y.S.2d 532, 537 (App. Div. 2d Dep't 2011); Aurora Loan Servs., LLC v. Weisblum, 923 N.Y.S.2d 609, 618 (App. Div. 2d Dep't 2011); MLCFC 2007-9 Mixed Astoria, LLC v. 36-02 35th Ave. Dev., LLC, 983 N.Y.S.2d 604, 606 (App. Div. 2d Dep't 2011); U.S. Bank, N.A. v. Collymore, 890 N.Y.S.2d 578, 580 (App. Div. 2d Dep't 2009)).

[13] *Financial Encumbrances—Liens*, N.Y.C. BAR, http://www.nycbar.org/get-legal-help/article/real-property-law/financial-encumbrances-liens/ (last visited Sept. 23, 2018).

simple enough: a person takes out a mortgage loan from a lender and, if the borrower defaults, the lender produces the original promissory note as evidence of the loan and proceeds with foreclosure of its mortgage.[14] Issues arise where the holder of a mortgage assigns it to a third party, and then there is a subsequent default.[15] A mortgage assignment is the transfer of a mortgage from the original lender to a third party.[16] In the instance of an assignment, the questions become (1) whether there was a valid assignment of the mortgage, and (2) whether there was a valid transfer of the underlying note, such that the assignee has standing to foreclose.[17]

Assignments of mortgages are commonplace.[18] Bundled mortgages, by their very nature, are assigned from the original lender into a securitized form.[19] Mortgages are sold or assigned for a number of reasons, including freeing up money to lend to other borrowers, both as a realization of profit or disposing of troubled loans at a discount.[20] In New York, there is a tax associated with recording a mortgage related to property.[21] An assignment of the mortgage waives "a portion of tax imposed for recording such mortgage," making mortgage assignments a popular avenue even if a borrower is simply refinancing an existing mortgage.[22] However, in the event of default, transfer or assignment of a mortgage is pointless for the assignee unless the transfer includes the promissory note.[23]

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[14] *See Understanding New York State's Mortgage Foreclosure Process*, N.Y.S. HOMES & CMTY. RENEWAL 1 (SEPT. 2012), http://www.nyshcr.org/Topics/Home/Owners/ForeclosurePrevention/FactSheets/Understanding-Foreclosure-Process-in-NYS-Fact-Sheet.pdf.

[15] *See FTBK*, 7 N.Y.S.3d at 831; *Collymore*, 890 N.Y.S.2d at 579.

[16] *Assignment of Mortgage*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[17] *See FTBK*, 7 N.Y.S.3d at 831 (citing 71 Clinton St. Apts. LLC v. 71 Clinton Inc., 982 N.Y.S.2d 6, 8 (App. Div. 1st Dep't 2014); OneWest Bank FSB v. Carey, 960 N.Y.S.2d 306, 306 (App. Div. 1st Dep't 2013); Bank of N.Y. Mellon Trust Co. NA v. Sachar, 943 N.Y.S.2d 893, 893 (App. Div. 1st Dep't 2012)).

[18] Allan L. Hill & Nickolas Karavolas, *A Note on Mortgage Assignments in New York*, LAW360 (Jan. 25, 2017), https://www.law360.com/articles/880759/a-note-on-mortgage-assignments-in-new-york.

[19] *See* PETERSON, *supra* note 1, at 14.

[20] *What You Should Worry About if Your Lender Sold Your Mortgage to Another Bank*, HUFFINGTON POST: THE BLOG (Aug. 1, 2014, 5:22 PM), https://www.huffingtonpost.com/mybanktracker/what-you-should-worry-abo_b_5642913.html; Matthew Goldstein, *As Banks Retreat, Private Equity Rushes to Buy Troubled Home Mortgages*, N.Y. TIMES (Sept. 28, 2015), https://www.nytimes.com/2015/09/29/business/dealbook/as-banks-retreat-private-equity-rushes-to-buy-troubled-home-mortgages.html.

[21] *Mortgage Recording Tax*, N.Y.S. DEP'T OF TAXATION & FIN. (July 18, 2018), https://www.tax.ny.gov/pit/mortgage/mtgidx.htm.

[22] Hill & Karavolas, *supra* note 18.

[23] *See* FTBK Inv. II LLC v. Genesis Holding LLC, 7 N.Y.S.3d 825, 834 (Sup. Ct. 2014) (citing MLCFC 2007-9 Mixed Astoria, LLC v. 36-02 35th Ave. Dev., LLC, 983 N.Y.S.2d 604, 606 (App.

Promissory notes are negotiable instruments under the Uniform Commercial Code (UCC)—a negotiable instrument is termed an "unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it . . . is payable to [the] bearer or to order at the time it is issued or first comes into possession of a holder . . . ."[24] "An instrument is a 'note' if it is a promise . . . ."[25] It is the promissory note that secures the mortgage loan, giving the lender the power to foreclose.[26]

During the formation of the New York Uniform Commercial Code (N.Y. UCC),[27] and its enactment in 1964, three goals were sought to be achieved: "(a) to simplify, clarify and modernize the law governing commercial transactions; (b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties; [and] (c) to make uniform the law among the various jurisdictions."[28] At this point in time, the provisions New York adopted were similar to those in the UCC.[29] In following the ideology above, it is puzzling that New York did not adopt some of the amendments to the UCC, proposed in the 1990s and early 2000s—particularly those in Article 3.[30]

Article 3 of the N.Y. UCC, entitled "Commercial Paper," deals with negotiable instruments (such as promissory notes) and the provisions associated with their use and transfer.[31] In the 1990s, some of the articles in the UCC were amended; but the *only* state that did not adopt the 1990s revisions to Article 3 was New York.[32] Additional

Div. 2d Dep't 2014); Citimortgage, Inc. v. Stosel, 934 N.Y.S.2d 182, 183 (App. Div. 2d Dep't 2011); Bank of N.Y. v. Silverberg, 926 N.Y.S.2d 532, 537 (App. Div. 2d Dep't 2011); Aurora Loan Servs., LLC v. Weisblum, 923 N.Y.S.2d 609, 618–19 (App. Div. 2d Dep't 2011); U.S. Bank, N.A. Collymore, 890 N.Y.S.2d 578, 580 (App. Div. 2d Dep't 2009)).

[24] U.C.C. § 3-104(a)(1) (AM. LAW INST. & UNIF. LAW COMM'N 2018).

[25] U.C.C. § 3-104(e). A promissory note, generally defined, is "[a]n unconditional written promise, signed by the maker, to pay absolutely and in any event a certain sum of money either to, or to the order of, the bearer or a designated person." *Promissory Note*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[26] *See FTBK*, 7 N.Y.S.3d at 834 (citing *Mixed Astoria*, 983 N.Y.S.2d at 606; *Stosel*, 934 N.Y.S.2d at 183; *Silverberg*, 926 N.Y.S.2d at 537; *Weisblum*, 923 N.Y.S.2d at 618–19; *Collymore*, 890 N.Y.S.2d at 580).

[27] Hereinafter "N.Y. UCC" shall refer to New York's version of the Uniform Commercial Code; "UCC" shall refer to the model Uniform Commercial Code.

[28] N.Y. U.C.C. § 1-102 (a)–(c) (McKinney 2018); Kyle C. Bisceglie et al., *New York's Proposed UCC Amendments: Will New York Pass Legislative Amendments to Bring its Uniform Commercial Code in Line with the Rest of the Country?*, EMERGING ISSUES ANALYSIS, Oct. 25, 2013.

[29] Bisceglie et al., *supra* note 28.

[30] *See* Barbara M. Goodstein, *The N.Y. Uniform Commercial Code Comes of Age*, N.Y.L.J., Apr. 3, 2014, at 5, col. 2; Bisceglie et al., *supra* note 28.

[31] *See* Goodstein, *supra* note 30.

[32] *See id.*

amendments were proposed in 2002 as a means of keeping up with "developments of legal rules in other areas" of law—however, only 11 states have adopted the 2002 changes to Article 3.[33] New York's Article 3 has been left intact and unchanged since it was first enacted in 1964.[34] This, in essence, poses problems for uniformity of the UCC across the states.[35] The amendments to the UCC's version of Article 3 "eliminate[d] outmoded requirements, including that allonges (indorsements) to notes be physically attached to the related instrument."[36] It is the archaic, ambiguous language in New York's unrevised Article 3 that creates issues when it comes to mortgage assignments—specifically the question of whether it is necessary to hold physical possession of the promissory note in order to be able to foreclose on the underlying mortgage.[37]

The amended UCC provides that "[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument."[38] It is clear that delivery is a requirement. The N.Y. UCC provides "any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor."[39] Here, there is no mention of delivery, which causes analytical problems down the line.

One of the issues with mortgage assignments is whether the assignee can show that they are the actual holder of the note.[40] Both prior to and after the 2008 recession, many large transactions occurred with the assigning of mortgages from bank to bank.[41] The bundling of mortgages led to enormous transactions, each involving a multitude of bundled mortgages, resulting in sloppy recordkeeping and mortgage assignments without physical transfer of the note.[42] With the promissory note lost in the mix, how can one be sure that the person to whom the mortgage was assigned is the actual holder

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[33] Bisceglie et al., *supra* note 28.

[34] *See* Goodstein, *supra* note 30.

[35] *See id.*

[36] *Id.*

[37] *See* David Dunn & Allison J. Schoenthal, *The Note is All a Lender Needs to Foreclose*, AM. BANKER (May 2, 2012), https://www.americanbanker.com/opinion/the-note-is-all-a-lender-needs-to-foreclose; Goodstein, *supra* note 30.

[38] U.C.C. § 3-203(a) (AM. LAW INST. & UNIF. LAW COMM'N 2018).

[39] N.Y. U.C.C. § 3-201(3) (McKinney 2018).

[40] *See* Dunn & Schoenthal, *supra* note 37.

[41] *See* Barbara M. Goodstein, *The Dilemma of Transferability of Mortgage Loans*, N.Y.L.J., Apr. 2, 2015, at 5, col. 2.

[42] *See id.*

of the note? The mortgage is not enforceable unless the assignee is the holder, or received a legally valid transfer, of the note.[43] It is the note that provides the basis for enforcement of the mortgage.[44] Without the rights arising from the note, the mortgage, although held by the assignee, is worthless.[45] Branching from this is the overarching question whether the assignee has standing to foreclose.

There has been much debate over the requirements for a valid mortgage assignment, especially when it comes to the issue of mortgage foreclosure: can a person's home be foreclosed upon if the holder of the mortgage does not have physical possession of the original promissory note, but does have a document that purports to assign a note that cannot be produced.[46] It is clear that "whoever has rights to the note also has rights to the mortgage method of enforcing the note (i.e., foreclosure)."[47] Under the amended version of UCC Article 3, there is no question that indorsement of the promissory note requires physical delivery of the note to the new owner of the mortgage.[48] But in New York it is not as clear.

This issue arises when a homeowner defaults on his or her mortgage payments (or other obligations associated with the loan), the original mortgage has been assigned, and the assignee commences a foreclosure action.[49] In cases where there has not been a default by the homeowner, it is commonplace for the non-defaulting homeowner to receive notice of the assignment and simply pay the assignee thereafter (i.e., continuing to make mortgage payments but to a different person).[50] Here, the non-defaulting homeowner would have no reason to know if there has been a valid assignment—and likely would not inquire.[51] The non-defaulting homeowner, after receiving such a notice, would simply direct their mortgage payments to the assignee, even though that person may not be the valid holder of the note.[52] It is unlikely an assignee would even respond to a

[43] *See id.*

[44] *See id.*

[45] *See* U.S. Bank N.A. v. Collymore, 890 N.Y.S.2d 578, 580 (App. Div. 2d Dep't 2009) (citing Merritt v. Bartholick, 36 N.Y. 44, 45 (1867); Kluge v. Fugazy, 536 N.Y.S.2d 92, 93 (App. Div. 2d Dep't 1988)).

[46] *See* Goodstein, *supra* note 41.

[47] Joseph William Singer, *Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How to Fix Them*, 46 CONN. L. REV. 497, 513 (2013).

[48] Bisceglie et al., *supra* note 28.

[49] *See, e.g.*, U.S. Bank Trust, N.A. v. Varian, 68 N.Y.S.3d 556, 557 (App. Div. 3d Dep't 2017).

[50] *See What You Should Worry About if Your Lender Sold Your Mortgage to Another Bank*, *supra* note 20.

[51] *See id.*

[52] *See id.*

request to produce proof of proper transfer of the note outside of the context of a foreclosure proceeding.[53]

If a mortgage holder forecloses, the borrower/homeowner becomes entitled to place standing at issue and compel the mortgage holder to prove its standing.[54] However, most people who have defaulted also do not realize that they may have the defense and remedy of challenging standing in a mortgage foreclosure action.[55] The defense of standing requires that the foreclosing mortgage holder prove they are entitled to enforce the mortgage by having both the note and the corresponding mortgage.[56] Standing can, and should, always be raised as a defense, even if the person being foreclosed upon does not know if the person foreclosing has the note.[57] Few people realize they have this defense, and those who ultimately do typically raise it when it is too late.[58] A standing defense that is raised and preserved requires the court to address and resolve the ambiguities in N.Y. UCC Article 3.

The underlying question addressed here is whether under New York law, an assignee of a mortgage loan obligation has standing to foreclose on a defaulting borrower when the assignee has not received both indorsement and physical possession of the promissory note. Part I addresses the requirements of becoming a holder of the promissory note, examining the tension between N.Y. UCC sections 3-201 and 3-202. Part II examines the procedural issues of standing, and its implications in affecting certain mortgage foreclosure actions. Part III touches upon policy considerations, namely the way in which New York courts should handle the archaic, ambiguous provisions in N.Y. UCC Article 3.

PART I

As a general matter, in the mortgage foreclosure context, a note is the "agreement that the lender is lending you money and your personal promise to pay it back;"[59] a mortgage is a "separate contract

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[53] *See* Ronald D. Weiss, *You Can't Take My House! Requirements for an Assigned Mortgage Lender to Have Standing in a NY Foreclosure Case*, RONALD D. WEISS, P.C., ATTORNEY AT LAW (Sept. 15, 2016), https://www.ny-bankruptcy.com/you-cant-take-my-house-requirements-for-an-assigned-mortgage-lender-to-have-standing-in-a-ny-foreclosure-case/.

[54] *See Common Defenses in a Foreclosure Case*, N.Y. STATE UNIFIED COURT SYS. (July 30, 2018), https://www.nycourts.gov/courthelp/Homes/foreclosureDefenses.shtml.

[55] *See* Bergman, *supra* note 11.

[56] *See* Goodstein, *supra* note 41.

[57] *Cf.* Bergman, *supra* note 11 (noting that lack of standing is a waiveable defense).

[58] *See id.*

[59] N.Y.S. HOMES & CMTY. RENEWAL, *supra* note 14.

that gives the lender a security interest in the property—your pledge of the home as collateral for the loan."[60] In order to foreclose on a person's real property, the plaintiff must be both the holder of the note and the mortgage.[61] Without the note, the mortgage is unenforceable.[62]

Sections 3-201 and 3-202 are two provisions in Article 3 of the N.Y. UCC that address the requirements for an assignee to become the holder of a note.[63] There is a tension that arises from the language when reading these provisions together: whether the note is required to be negotiated by indorsement[64] *and* that the assignee must have physical possession of the note, or whether an assignment of the note (without negotiations or possession) is sufficient.[65] N.Y. UCC section 3-201 indicates that "[n]egotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner."[66] Under N.Y. UCC section 3-202, negotiation is termed "the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery."[67] Section 3-202 goes on to say: "[a]n indorsement must be written by or on behalf of the holder *and* on the instrument or on a paper so firmly affixed thereto as to become a part thereof."[68]

It is clear from the statute that negotiation is necessary for a transferee to become the holder of the note. The language in section 3-202(2) implies that it is the original note that must have the indorsement (either directly on the note, or on a paper "so firmly affixed" to the original note).[69]

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[60] *Id.*

[61] *See* U.S. Bank, N.A. v. Collymore, 890 N.Y.S.2d 578, 580 (App. Div. 2d Dep't 2009) (citing Mortg. Elec. Registration Sys., Inc v. Coakley, 838 N.Y.S.2d 622, 623 (App. Div. 2d Dep't 2007); Fannie Mae v. Youkelsone, 755 N.Y.S.2d 730, 731 (App. Div. 2d Dep't 2003); First Tr. Nat'l Ass'n v. Meisels, 651 N.Y.S.2d 121, 122 (App. Div. 2d Dep't 1996)).

[62] *See Collymore*, 890 N.Y.S.2d at 580 (citing Merritt v. Bartholick, 36 N.Y. 44, 45 (1867); Kluge v. Fugazy, 536 N.Y.S.2d 92, 93 (App. Div. 2d Dep't 1988)).

[63] *See* N.Y. U.C.C. §§ 3-201, 3-202 (McKinney 2018).

[64] Indorsement is defined as "[t]he placing of a signature, sometimes with an additional notation, on the back of a negotiable instrument to transfer or guarantee the instrument or to acknowledge payment." *Indorsement*, BLACK'S LAW DICTIONARY (10th ed. 2014). "Indorsement" will be used interchangeably with "written assignment."

[65] *See* N.Y. U.C.C. § 3-201; N.Y. U.C.C. § 3-202.

[66] N.Y. U.C.C. § 3-201(3).

[67] N.Y. U.C.C. § 3-202(1).

[68] N.Y. U.C.C. § 3-202(2) (emphasis added).

[69] *See id.*

N.Y. UCC Article 3 has not been updated since 1964.[70] On the one hand, the provisions in Article 3 were enacted at a time when electronic filing and other modern tools of the court were not in existence; these technological advancements should be taken into account in determining the valid transfer of a note.[71] On the other hand, New York had (and still has) the ability to amend Article 3, not only conforming to the provisions in the other states, but also incorporating revisions that are pertinent to society today.[72] Reading the New York statute as is, it would seem clear that the actual note is needed to satisfy a valid transfer.[73] However, various New York court decisions rule otherwise.[74]

As early as 1867, the Court of Appeals of New York has held that "a transfer of the mortgage without the debt is a nullity, and no interest is acquired by it. The security cannot be separated from the debt and exist independently of it."[75] The same holds true into the present. In 2009, the New York Appellate Division held in *U.S. Bank, N.A. v. Collymore* that "the mere assignment of the mortgage without an effective assignment of the underlying note is a nullity."[76]

In *Collymore*, defendant-borrower executed a note to borrow money from a mortgage corporation, securing the note with a mortgage on defendant-borrower's property.[77] The mortgage corporation assigned the mortgage to Mortgage Electronic Registration Systems (MERS);[78] MERS later assigned the mortgage to the plaintiff-lender (bank).[79] The bank commenced an action, claiming defendant defaulted on his mortgage, and that since the bank was the holder of the note and mortgage, it could foreclose on defendant.[80] Defendant asserted a standing defense, claiming the bank did not hold the note and

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[70] *See* Goodstein, *supra* note 30.

[71] *See* Bisceglie et al., *supra* note 28.

[72] *See* Goodstein, *supra* note 30.

[73] *See* N.Y. U.C.C. § 3-202(1)–(2).

[74] *See* Merritt v. Bartholick, 36 N.Y. 44, 45–46 (1867); U.S. Bank, N.A. v. Collymore, 890 N.Y.S.2d 578, 580 (App. Div. 2d Dep't 2009).

[75] *Merritt*, 36 N.Y. at 45. A "nullity" is "[s]omething that is legally void." *Nullity*, BLACK'S LAW DICTIONARY (10th ed. 2014). In the mortgage foreclosure context, a nullity means that an attempt to foreclose would be ineffective (i.e., legally void). *Merritt*, 36 N.Y. at 45.

[76] U.S. Bank, N.A. v. Collymore, 890 N.Y.S.2d 578, 580 (App. Div. 2d Dep't 2009) (citing *Merritt*, 36 N.Y. at 45; Kluge v. Fugazy, 536 N.Y.S.2d 92, 93 (App. Div. 2d Dep't 1988)).

[77] *Collymore*, 890 N.Y.S.2d at 579.

[78] The Mortgage Electronic Registration Systems (MERS) is an online, national database that has information about registered home mortgages. *About MERSCORP Holdings, Inc.*, MERS, https://www.mersinc.org/about (last visited Sept. 23, 2018). A product of the mortgage banking industry, MERS was created to "streamline the mortgage process by using electronic commerce." *Id.*

[79] *Collymore*, 890 N.Y.S.2d at 579.

[80] *See id.*

mortgage, and therefore could not foreclose.[81] The bank has the burden of proving it has standing, for which it needs to show the valid assignment of the note and mortgage.[82] Significantly, the court noted that "[e]ither a written assignment of the underlying note or the physical delivery of the note prior to the commencement of the foreclosure action is sufficient to transfer the obligation, and the mortgage passes with the debt as an inseparable incident."[83]

The decision in *Collymore* centers around the timing of the assignment—whether the note and mortgage were assigned prior to the commencement of the action.[84] Nevertheless, it appears that either written assignment *or* physical delivery of the note is a sufficient assignment in the mortgage foreclosure context.[85] This decision is considered foundational in various New York cases that grapple with the issue of physical delivery and appropriate assignment of the promissory note, as it is frequently cited.[86] Though it may seem clear-cut that written assignment or physical delivery of the note is sufficient, this either/or language is so broad and malleable that anything could arguably pass as an assignment. The benefit of requiring physical delivery of the original note is a failsafe, of sorts, indicating that the lender has actual possession, and literally holds the note and mortgage.

A prominent decision in New York that further broadens the standard is *Aurora Loan Services, LLC v. Taylor*, where the court held that an affidavit was sufficient to show a valid transfer of the note.[87] *Taylor* represents a shift in the ability for lenders to establish standing—this decision loosens the requirement, under precedent, that there be "'factual details of a physical delivery' of the promissory

[81] *See id.*

[82] *See id.* at 580 (citing Wells Fargo Bank Minn. v. Mastropaolo, N.Y.S.2d 247, 249–50 (App. Div. 2d Dep't 2007); TPZ Corp. v. Dabbs, 808 N.Y.S.2d 746, 749 (App. Div. 2d Dep't 2006)).

[83] *Collymore*, 890 N.Y.S.2d at 580 (citing Weaver Hardware Co. v. Solomovitz, 139 N.E. 353, 356 (N.Y. 1923); Payne v. Wilson, 74 N.Y. 348, 354–55 (1878); Lasalle Bank Nat'l Ass'n v. Ahearn, 875 N.Y.S.2d 595, 597 (App. Div. 3d Dep't 2009); Mortg Elec. Registration Sys., Inc. v. Coakley, 838 N.Y.S.2d 622, 623 (App. Div. 2d Dep't 2007); Flyer v. Sullivan, 134 N.Y.S.2d 521, 523 (App. Div. 1st Dep't 1954)).

[84] *See Collymore*, 890 N.Y.S.2d at 580.

[85] *See id.* (citing *Weaver Hardware*, 139 N.E. 353; *Payne*, 74 N.Y. at 354–55; *Ahearn*, 875 N.Y.S.2d at 597; *Coakley*, 838 N.Y.S.2d at 623; *Flyer*, 134 N.Y.S.2d at 523).

[86] *See* Deutsche Bank Nat'l Tr. Co. v. Horowitz, 163 A.D.3d 764, 765 (N.Y. App. Div. 2d Dep't 2018); Bank of N.Y. Mellon Tr. Co., N.A. v. Sukhu, No. 2016-09785, 2018 WL 3451604, at *4–5 (N.Y. App. Div. 2d Dep't 2018); Bac Home Loans Servicing, LP v. Uvino, 64 N.Y.S.3d 377, 381 (App. Div. 3d Dep't 2017); U.S. Bank N.A. v. Brjimohan, 62 N.Y.S.3d 43, 45 (App. Div. 1st Dep't 2017).

[87] Aurora Loan Servs. LLC v. Taylor, 34 N.E.3d 363, 366 (N.Y. 2015).

note."[88]

About four months prior to the *Taylor* decision, the Appellate Division had held in *Bank of America, N.A. v. Paulsen*[89] that physical delivery of the note *was* necessary prior to the foreclosure action, and that factual details of the delivery were necessary to establish standing.[90] The *Paulsen* court indicated that plaintiff's reliance on an affidavit that contained what were considered "conclusory statements," as opposed to "factual details of a physical delivery," did not establish plaintiff's standing.[91]

In *Taylor*, the plaintiff-lender claimed defendant-borrower defaulted on a mortgage payment (after defendant-borrower had executed a note and mortgage with the bank).[92] The plaintiff-lenders, however, were not the original party to the note/mortgage creation; there had been a number of assignments from the creation of the note and mortgage up until the time of defendant-borrower's default.[93] The question was whether plaintiff-lender had exclusive possession of the note before commencing the foreclosure action.[94] The plaintiff-lenders submitted an affidavit from its "legal liaison, who stated that based on her 'personal knowledge' of the facts as well as her 'review of the note, mortgage and other loan documents'" that plaintiff-lenders had the original note at the time they foreclosed.[95] The affidavit went on to say that plaintiff-lenders were in "exclusive possession of the original note and allonge[96] affixed thereto, indorsed to [the predecessor holder bank], and has not transferred same to any other person or entity."[97]

The decision in *Taylor* alters the ways in which lenders can show standing. Prior to the *Taylor* decision, there were stringent provisions (physical delivery and factual details of delivery) to

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[88] Christopher A. Gorman, *NY High Court Standing Ruling Looks Like a Win for Lenders*, LAW360 (July 6, 2015), https://www.law360.com/articles/673128/ny-high-court-standing-ruling-looks-like-a-win-for-lenders.

[89] Bank of Am., N.A. v. Paulsen, 6 N.Y.S.3d 68 (App. Div. 2d Dep't 2015).

[90] *See id.* at 70 (citing Bank of N.Y. Mellon v. Gales, 982 N.Y.S.2d 911, 912 (App. Div. 2d Dep't 2014); U.S. Bank Nat'l Ass'n v. Faruque, 991 N.Y.S.2d 630, 633 (App. Div. 2d Dep't 2014); Deutsche Bank Nat'l Tr. Co. v. Haller, 954 N.Y.S.2d 551, 553 (App. Div. 2d Dep't 2012)).

[91] *Paulsen*, 6 N.Y.S.3d at 70 (citing *Faruque*, 991 N.Y.2d at 633; *Haller*, 954 N.Y.S.2d at 553).

[92] *See Taylor*, 34 N.E.3d at 364.

[93] *See id.*

[94] *See id.* at 366.

[95] *Id.* at 365.

[96] Allonge is defined as "[a] slip of paper sometimes attached to a negotiable instrument for the purpose of receiving further indorsements when the original paper is filled with indorsements." *Allonge*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[97] *Taylor*, 34 N.E.3d at 365.

support the valid assignment of a note.[98] The main concern arising from *Taylor* is the weakening of the factual requirement standard; the ability to use an affidavit to prove standing opens the door to potential falsifications.[99] Borrowers will now find themselves in a position where it is harder to challenge a lender's standing in a mortgage foreclosure action. There may be situations where the lender did not actually have standing to foreclose but was able to obtain an affidavit saying it did. In this situation, a defaulting homeowner may lose their home when in reality the lender did not have standing to foreclose in the first place.

The application of the dated language in N.Y. UCC Article 3 to the decisions by the New York courts, that appear to make it progressively easier for assignees to establish standing, create further tensions in deciphering what really is, or should be, necessary to prove a valid assignment of the note. The requirements that were implemented in the 1964 version of New York's Article 3 become harder to apply as courts broaden the standards of what is considered acceptable to show a lender has standing to foreclose. The ability for lenders to use affidavits to show they had possession/valid assignment of the note at the time they commenced the foreclosure action, is something that was not allowed at the time N.Y. UCC Article 3 was drafted.[100] Moving forward, the requirements for holding the note and mortgage become blurred in the sense that comparing the provisions in N.Y. UCC Article 3 to recent court decisions presents a discord: the application is not directly on point, making it harder to know whether a lender has a valid assignment and actual standing to foreclose.

PART II

A. Standing

1. Is Standing a Defense or a Jurisdictional Requirement in Mortgage Foreclosure Cases?

Once the holder of the note and mortgage decides to foreclose on

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[98] *See* Bank of Am., N.A. v. Paulsen, 6 N.Y.S.3d 68, 70 (App. Div. 2d Dep't 2015) (citing U.S. Bank Nat'l Ass'n v. Faruque, 991 N.Y.S.2d 630, 633 (App. Div. 2d Dep't 2014); Deutsche Bank Nat'l Tr. Co. v. Haller, 954 N.Y.S.2d 551, 553 (App. Div. 2d Dep't 2012)).

[99] *See* Gorman, *supra* note 88.

[100] *Cf. Taylor*, 34 N.E.3d at 365 (allowing the use of affidavits to prove assignment of the note).

the mortgagor because of a default, the mortgagor has the option to raise the issue of standing.[101] The law is clear that standing is a defense, not "jurisdictional."[102] In raising a defense of standing, the person being foreclosed upon (borrower) is alleging that the person foreclosing (lender) does not have a valid assignment of the note and/or mortgage—as specified in the statute—and does not have the power to foreclose.[103]

In *Wells Fargo Bank Minnesota v. Mastropaolo*, the court addresses the question of standing as a defense (waivable) or as a lack of subject matter jurisdiction (non-waivable).[104] The court noted that "where there is no aggrieved party, there is no genuine controversy, and where there is no genuine controversy, there is no subject matter jurisdiction."[105] Unless the jurisdiction "has been specifically proscribed," the court is able to hear cases pertaining to (in this action) mortgage foreclosures.[106] Since standing is considered a defense, it can be waived.[107] In *Mastropaolo*, "[s]ince the defendant did not raise the standing issue in his answer or in a pre-answer motion to dismiss the complaint, Wells Fargo [plaintiff-lender] correctly argued that the defendant, did, in fact, waive any defense based on a lack of standing, pursuant to CPLR 3211(e)."[108]

CPLR 3211(e)—titled "Number, time and waiver of objections; motion to plead over"—indicates that "[a]t any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted."[109] The relevant portions of CPLR 3211(a), which have a direct relation to the issue presented in *Mastropaolo* and other mortgage foreclosure actions which implement standing as a waived defense, state:

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[101] *Common Defenses in a Foreclosure Case*, *supra* note 54.

[102] *See* Wells Fargo Bank Minn., N.A. v. Mastropaolo, 837 N.Y.S.2d 247, 250–51 (App. Div. 2d Dep't 2007).

[103] *See Common Defenses in a Foreclosure Case*, *supra* note 54.

[104] *See Mastropaolo*, 837 N.Y.S.2d at 250 (citing Stark v. Goldberg, 746 N.Y.S.2d 280, 281 (App. Div. 1st Dep't 2002); Axelrod v. N.Y. State Teachers' Ret. Sys., 546 N.Y.S.2d 489, 490 (App. Div. 3d Dep't 1989); Eaton Assocs. v. Egan, 535 N.Y.S.2d 998, 1000–01 (App. Div. 3d Dep't 1988)).

[105] *Mastropaolo*, 837 N.Y.S.2d at 250 (citing Sec. Pac. Nat'l Bank v. Evans, 820 N.Y.S.2d 2, 7 (App. Div. 1st Dep't 2006) (Catterson, J., dissenting)).

[106] *Mastropaolo*, 837 N.Y.S.2d at 251 (quoting Thrasher v. U.S. Liab. Ins. Co., 225 N.E.2d 503, 506 (N.Y. 1967)).

[107] *See Mastropaolo*, 837 N.Y.S.2d at 251.

[108] *Id.* at 251.

[109] N.Y. C.P.L.R. 3211(e) (McKinney 2018).

> [a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . (2) the court has not jurisdiction of the subject matter of the cause of action; or (3) the party asserting the cause of action has not legal capacity to sue . . . .[110]

Though standing is not expressly mentioned in any portion of CPLR 3211(e) or the provisions in CPLR 3211(a), New York courts have been consistent in ruling that in mortgage foreclosure actions, standing is a defense, rather than jurisdictional.[111]

2. Can Standing in a Mortgage Foreclosure Case Be Waived?

As a general concept, standing, as a defense, must be placed into issue in defendant's answer to the complaint.[112] However, specific denials in defendant's answer about the note and mortgage would appear to impugn a mortgagee's standing to foreclose.[113] Whether general denials in an answer are sufficient to raise the issue of standing is examined in *U.S. Bank National Association. v. Faruque*, where the defendant-borrower's specific denials in her answer to plaintiff-lender's complaint were held sufficient.[114] Under the circumstances of this mortgage foreclosure, they do not require a pleading of lack of standing.[115] Defendant-borrower's answer consisted of claims that directly addressed issues pertaining to the note and mortgage (e.g., denying delivery of the note to plaintiff-lender; assignment of the note to plaintiff-lender had not been recorded).[116] Though standing was not explicitly asserted in the answer, the specific denials attack the underlying elements that address a plaintiff-lender's standing to foreclose.[117] Once defendant-borrower brings standing as an affirmative defense, or makes specific denials in their answer supporting a claim for standing, plaintiff-

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[110] C.P.L.R. 3211(a).

[111] *See* Christopher A. Gorman, *Stage is Set for NY High Court Review of Standing Waiver*, LAW360 (July 24, 2015), https://www.law360.com/articles/680772/stage-is-set-for-ny-high-court-review-of-standing-waiver.

[112] *See* U.S. Bank Nat'l Ass'n v. Faruque, 991 N.Y.S.2d 630, 632 (App. Div. 2d Dep't 2014) (citing Bank of N.Y. Mellon v. Gales, 982 N.Y.S.2d 911, 911–12 (App. Div. 2d Dep't 2014); Deutsche Bank Nat'l Tr. Co. v. Whalen, 969 N.Y.S.2d 82, 83–84 (App. Div. 2d Dep't 2013); Bank of N.Y. v. Silverberg, 926 N.Y.S.2d 532, 536 (App. Div. 2d Dep't 2011); U.S. Bank, N.A. v. Collymore, 890 N.Y.S.2d 578, 580 (App. Div. 2d Dep't 2009)).

[113] *See Faruque*, 991 N.Y.S.2d at 632.

[114] *See id.* at 632.

[115] *See id.*

[116] *See id.*

[117] *See id.*

lender is tasked with proving they had standing—being "both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced."[118]

What is also mentioned by the court in *Faruque* is that written assignment or physical delivery of the note is sufficient to establish possession of the note—citing to *Collymore*.[119] As noted in Part I, the court in *Collymore* indicated that written assignment of a note (without physical delivery) is sufficient to establish standing.[120] The plaintiff-lender in *Faruque* could not show physical delivery of the note prior to commencement of the action; further, the affidavit supplied did not contain any factual details of physical delivery.[121]

3. Should Standing Be a Waivable Defense in a Mortgage Foreclosure Case?

Various New York cases have held that if a defendant-borrower does not raise the issue of standing in its answer or if a defendant defaults, then standing is waived—the court in *Deutsche Bank National Trust Co. v. McRae*[122] held to the contrary.[123] The court distinguished cases where the defendant-borrowers "filed answers containing either counterclaims or affirmative defenses, without asserting a standing defense," and cases where the answers identified plaintiff-lender as the proper party to the foreclosure action.[124] The *McRae* court held that since defendant-borrower neither appeared nor filed an answer, standing had *not* been

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[118] *Id.* at 632 (citing Kondaur Capital Corp. v. McCary, 981 N.Y.S.2d 547, 547 (App. Div. 2d Dep't 2014); HSBC Bank U.S.A. v. Hernandez, 939 N.Y.S.2d 120, 122 (App. Div. 2d Dep't 2012); Bank of N.Y. v. Silverberg, 926 N.Y.S.2d 532, 537 (App. Div. 2d Dep't 2011)).

[119] *See Faruque,* 991 N.Y.S.2d at 633 (citing Aurora Loan Servs., LLC v. Taylor, 980 N.Y.S.2d 475, 477 (App. Div. 2d Dep't 2014); *Hernandez*, 939 N.Y.S.2d at 122, 121; U.S. Bank N.A. v. Collymore, 890 N.Y.S.2d 578, 580 (App. Div. 2d Dep't 2009)).

[120] *See Collymore*, 890 N.Y.S.2d at 580 (citing Weaver Hardware Co. v. Solomovitz, 139 N.E. 353 (N.Y. 1923); Payne v. Wilson, 74 N.Y. 348, 354–55 (1878); Lasalle Bank Nat'l Ass'n v. Ahearn, 875 N.Y.S.2d 595, 597 (App. Div. 3d Dep't 2009); Mortg. Elec. Registration Sys., Inc. v. Coakley, 838 N.Y.S.2d 622, 623 (App. Div. 2d Dep't 2007); Flyer v. Sullivan, 134 N.Y.S.2d 521, 523 (App. Div. 1st Dep't 1954)).

[121] *See Faruque*, 991 N.Y.S.2d at 633 (citing Bank of N.Y. Mellon v. Gales, 982 N.Y.S.2d 911 (App. Div. 2d Dep't 2014); Deutsche Bank Nat'l Tr. Co. v. Haller, 954 N.Y.S.2d 551, 553 (App. Div. 2d Dep't 2012)).

[122] Deutsche Bank Nat'l Tr. Co. v. McRae, 894 N.Y.S.2d 720 (Sup. Ct. 2010).

[123] *See id.* at 723 (distinguishing Countrywide Home Loans, Inc. v. Delphonse, 883 N.Y.S.2d 135, 136 (App. Div. 2d Dep't 2009); HSBC Bank, USA. v. Dammond, 875 N.Y.S.2d 490, 491 (App. Div. 2d Dep't 2009); Wells Fargo Bank Minn. v. Mastropaolo, 837 N.Y.S.2d 247, 251 (App. Div. 2d Dep't 2007)).

[124] *McRae*, 894 N.Y.S.2d at 723 (citing *Delphonse*, 883 N.Y.S.2d at 136; *Mastropaolo*, 837 N.Y.S.2d at 248).

waived.[125] Justice Walker eloquently expanded upon this decision:

> Today, with multiple and (and often unrecorded) assignments of mortgage obligations and multiple securitizations often related to the same debt, the courts should carefully scrutinize the status of parties who claim the right to enforce these mortgage obligations. For the unrepresented homeowner, the issues of standing and real party in interest status of the foreclosing party are never considered. Without such scrutiny, there is a risk that the courts will give the judicial "seal of approval" to foreclosures against unrepresented homeowners who have little, if any, understanding of these issues, much less the legal significance thereof. To quote my colleague in Kings County, "[a]llowing this case to proceed on behalf of a plaintiff without standing at the commencement of the action would [also] open the door to potential fraud and place in jeopardy the integrity of title to the property to be foreclosed."[126]

There is a slight humanitarian approach in this portion of Walker's opinion. He considers the people whose homes are being foreclosed upon, and the ways in which lenders can take advantage of those people, even though the lenders may not have standing to foreclose.[127] Though *McRae* was decided before *Taylor*,[128] the notion that lenders could take advantage of borrowers—even when the lenders did not actually have standing to foreclose—is evident through Walker's opinion. Most homeowners are unaware that they can raise an issue of standing, and only learn of that option when it is too late.[129] In these situations, the lender may not have had standing to foreclose, leaving a defenseless person homeless.[130] The holding in *McRae* is catered toward the defendant-borrower, in that standing is not

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[125] *See McRae*, 894 N.Y.S.2d at 723.

[126] *Id.* at 724 (alterations in original) (quoting Citigroup Glob. Mkts. Realty Corp. v. Bowling, 906 N.Y.S.2d 778 (table), 2009 Slip. Op. 525267, at 3 (Sup. Ct. 2009)).

[127] *See id.*

[128] *Taylor* created a more lenient standard for lenders in proving standing; the court in *Taylor* held that an affidavit was enough to show the lender had been assigned the note and had possession of the note. The *Taylor* decision broadened the scope of proving a plaintiff-lender's standing, making it easier to prove they had valid assignment of the note. *See* Aurora Loan Servs., LLC v. Taylor, 34 N.E.3d 363, 365 (N.Y. 2015); Gorman, *supra* note 88.

[129] *See, e.g.*, Bergman, *supra* note 11.

[130] *See id.*; Peter S. Goodman, *Foreclosures Force Ex-Homeowners to Turn to Shelters*, N.Y. TIMES (Oct. 18, 2009), https://www.nytimes.com/2009/10/19/business/economy/19foreclosed.html.

waived even if the defendant does not appear or file an answer to the complaint.[131] However, the defendant would still need to make a sufficient showing to vacate the default and receive leave to serve an answer.[132]

B. Standing and Summary Judgment

The issue of standing and summary judgment revolves around the conflicting reality that standing is a matter of law, whereas summary judgment pertains to issues of fact.[133] With this, we must ask what proof must be raised to prove standing, in a summary judgment context, when the entire issue of standing revolves around matters of law.

Defendant-borrowers can move for summary judgment when they believe there is no basis establishing standing in a foreclosure action.[134] However, a significant amount of New York caselaw shows that plaintiff-lenders tend to prevail when they move for summary judgment.[135] For a plaintiff-lender to prevail on a summary judgment motion, they must produce the mortgage, the note, and evidence of defendant-borrower's defaults in payment.[136] As in most cases, when a defendant-borrower pleads lack of standing as a defense, plaintiff-lenders must also prove their standing to succeed in their summary judgment motion.[137] Once plaintiff-lender fulfills these requirements, the burden shifts to defendant-borrower to "demonstrate, by competent and admissible proof, that a defense exists so to raise a question of fact as to his or her default."[138]

Courts have reasoned that a defendant-borrower's answer to a complaint consisting only of a lack of standing defense, not indicating

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[131] *See McRae*, 894 N.Y.S.2d at 723.

[132] *See Vacating a Default Judgment*, N.Y. STATE UNIFIED CT. SYS., http://www.nycourts.gov/courthelp/AfterCourt/vacatingDefault.shtml (last visited Sept. 28, 2018).

[133] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citing Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)); FED. R. CIV. P. 56(a).

[134] BRUCE J. BERGMAN, BERGMAN ON NEW YORK MORTGAGE FORECLOSURES, Ch. 21, § 21.07a (2017).

[135] *See* HSBC Bank USA, N.A. v. Szoffer, 52 N.Y.S.3d 721, 723, 724 (App. Div. 3d Dep't 2017); Citibank, N.A. v. Abrams, 40 N.Y.S.3d 653, 658 (App. Div. 3d Dep't 2016); Wells Fargo Bank Minn. v. Mastropaolo, 837 N.Y.S.2d 247, 251–52 (App. Div. 2d Dep't 2007).

[136] *Abrams*, 40 N.Y.S.2d at 656 (citing PHH Mortg. Corp. v. Davis, 975 N.Y.S.2d 480, 482 (App. Div. 3d Dep't 2013); Charter One Bank, FSB v. Leone, 845 N.Y.S.2d 513, 515 (App. Div. 3d Dep't 2007); HSBC Bank USA v. Merrill, 830 N.Y.S.2d 598, 599 (App. Div. 3d Dep't 2007)).

[137] *Abrams*, 40 N.Y.S.2d at 656 (citing Wells Fargo Bank, N.A. v. Ostiguy, 8 N.Y.S.3d 669, 670 (App. Div. 3d Dep't 2015)).

[138] *Abrams*, 40 N.Y.S.2d at 657 (citing *Davis*, 975 N.Y.S.2d at 482; *Leone*, 845 N.Y.S.2d at 515; *Merrill*, 830 N.Y.S.2d at 599).

any triable issue of fact, does not thwart a plaintiff-lender's summary judgment motion.[139] In *Mastropaolo*, the Appellate Division reversed the Supreme Court's denial of plaintiff-lender's motion for summary judgment, indicating that defendant-borrower failed to raise a triable issue of fact pertaining to plaintiff-lender's standing to foreclose.[140] In plaintiff-lender's motion for summary judgment, they had all of the necessary documents (note, mortgage, copy of defendant-borrower's answer, etc.).[141]

In *Citibank, N.A. v. Abrams*, plaintiff-lender foreclosed on defendant-borrower after defendant-borrower defaulted on making payments.[142] In addition to the mortgage foreclosure action, plaintiff-lender moved for summary judgment, for which defendant-borrower claimed plaintiff-lender did not have standing and cross-moved for an order dismissing the complaint.[143] Plaintiff-lenders fulfilled the requirements to succeed on their summary judgment motion: they had possession of the mortgage, "the note that, by allonge, contained an indorsement specifically payable to it," and an affidavit that was sufficient to show plaintiff-lender had "physical possession as holder of the note" at the time the action was commenced.[144] The affidavit and other evidence indicated that plaintiff-lender had standing.[145]

The defendant-borrower in *Abrams* argued that the affidavit was not factually substantial to show that plaintiff-lender had standing to foreclose.[146] The court disagreed, holding that "[m]otions for summary judgment may not be defeated merely by surmise, conjecture or suspicion."[147] Defendant-borrower's argument about the affidavit rested upon allegations that plaintiff-lender did not have knowledge of the note and, since the affidavit was a "fill-in-the-blank document," there was the question whether plaintiff-lender actually had knowledge of the contents of the affidavit.[148] The court held that, "[s]elf-serving and conclusory allegations do not raise issues of fact and do not require plaintiff to respond to such

[139] *See Mastropaolo*, 837 N.Y.S.2d at 251.

[140] *See id.* at 251–52.

[141] *See id.* at 248–49.

[142] *See Abrams*, 40 N.Y.S.2d at 655.

[143] *See id.*

[144] *Id.* at 657 (citing Deutsche Bank Nat'l Tr. Co. v. Monica, 15 N.Y.S.3d 863, 866 (App. Div. 3d Dep't 2015); Wells Fargo Bank, N.A. v. Ostiguy, 8 N.Y.S.3d 669, 671 (App. Div. 3d Dep't 2015)).

[145] *See Abrams*, 40 N.Y.S.2d at 657.

[146] *See id.*

[147] *Id.* at 658 (citing Shaw v. Time-Life Records, 341 N.E.2d 817, 821 (N.Y. 1975); Naylor v. Ceag Elec. Corp., 551 N.Y.S.2d 349, 351 (App. Div. 3d Dep't 1990)).

[148] *See* Abrams, 40 N.Y.S.2d at 657, 658.

allegations."[149] It was further indicated that the notarization of plaintiff-lender's affidavit by a notary public was an additional fact showing that defendant-borrower's argument was without merit.[150]

The Appellate Division again favored plaintiff-lenders in their summary judgment motion in *HSBC Bank USA, N.A. v. Szoffer*.[151] Here, plaintiff-lender produced "the mortgage, the note ([i]ndorsed in blank),[152] the assignment agreement . . . and proof of defendants' default . . . ."[153] Defendant-borrowers attempted to raise standing as a defense, but they failed to raise it in their answer, therefore waiving the defense altogether.[154] It is important to notice that in this case, defendant-borrowers did not attempt to raise a lack of standing defense until plaintiff-lenders brought the summary judgment motion—"some 5 1/2 years after this action was commenced."[155] Defendant-borrowers could have sought leave to amend their answer to include the standing defense, but in waiting so long, they inadvertently waived the defense.[156]

In these summary judgment motions brought by plaintiff-lenders, the bar is set fairly high for defendant-borrowers to overcome the motion.[157] In essence, the holdings in these cases probe the question of what the defendant-borrower would have to prove is actually a triable issue of fact. For a plaintiff-lender to prevail, they have to show they have standing to foreclose, which encompasses the viable assignment of the note and mortgage.[158] The standing issue is a matter of law—either the plaintiff-lender has possession of the note

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[149] *Id.* at 658 (citing Charter One Bank, FSB v. Leone, 845 N.Y.S.2d 513, 515 (App. Div. 3d Dep't 2007)).

[150] *See Abrams*, 40 N.Y.S.2d at 658.

[151] *See* HSBC Bank USA, N.A. v. Szoffer, 52 N.Y.S.3d 721, 724 (App. Div. 3d Dep't 2017).

[152] New York's UCC § 3-204 pertains to blank indorsements, which "specif[y] no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes payable to bearer and may be negotiated by delivery alone until specially indorsed." N.Y. U.C.C. § 3-204(2) (McKinney 2018). "A special indorsement specifies the person to whom or to whose order it makes the instrument payable." § 3-204(1). "The holder may convert a blank indorsement into a special indorsement by writing over the signature of the indorser in blank any contract consistent with the character of the indorsement." § 3-204(3).

[153] *Szoffer*, 52 N.Y.S.3d at 723.

[154] *See id.* (citing HSBC Mortg. Corp. v. Johnston, 43 N.Y.S.3d 575, 576 (App. Div. 3d Dep't 2016); Nationstar Mortg., LLC v. Alling, 35 N.Y.S.3d 541, 542 (App. Div. 3d Dep't 2016)).

[155] *Szoffer*, 52 N.Y.S.3d at 723–24.

[156] *See id.* at 724.

[157] *See* Citibank, NA v. Abrams, 40 N.Y.S.2d 653, 657, 658 (App. Div. 3d Dep't 2016) (holding plaintiff-lenders' motion for summary judgment was granted because of the supply of necessary documentation to prove standing and defendants' failure to raise a triable issue of fact).

[158] *See id.* at 656 (citing Bank of Am., N.A. v. Kyle, 13 N.Y.S.3d 253, 254 (App. Div. 3d Dep't 2015); Chase Home Fin., LLC v. Miciotta, 956 N.Y.S.2d 271, 272 (App. Div. 3d Dep't 2012)).

and mortgage or they do not.[159] In each of the opinions, the court only indicates what plaintiff-lender has to show in order to prevail on a motion for summary judgment.[160] What is absent is a specific indication of what defendant-borrower must prove is the triable issue of fact. The *Mastropaolo* court alludes to this through defendant-borrower's claim that the question of fact is whether at the time the action was commenced, plaintiff-lender was the true owner of the note and mortgage, giving them the standing to foreclose.[161] Though the claim revolves around whether plaintiff-lender is the true and lawful owner,[162] the overbearing notion becomes whether this legal defense doubles as a question of fact.

C. Potential Waiver in Failure to Answer the Complaint

In mortgage foreclosure actions, a question that frequently arises is "whether the defense of lack of standing may be waived by a borrower upon the borrower's pleading default."[163] The issue revolves around defendant-borrower's failure to answer or file a pre-answer motion to plaintiff-lender's complaint.[164] As indicated above, some courts have held that if standing has not been specifically raised in a defendant-borrower's answer, it is not waived.[165] The question presented in this section pushes that theory one step further. Is a standing defense waived when a defendant-borrower completely fails to answer plaintiff-lender's complaint? The New York Court of Appeals has yet to take a solid stance on this issue.[166]

Appellate Division decisions tend to provide "conflicting guidance" in determining whether the defendant-borrower's default automatically waives an argument that the plaintiff-lender lacked

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[159] *See* Aurora Loan Servs., LLC v. Taylor, 34 N.E.3d 363, 365 (N.Y. 2015).

[160] *See Szoffer*, 52 N.Y.S.3d at 723 (citing *Abrams*, 40 N.Y.S.2d at 656); Nationstar Mortg., LLC v. Alling, 35 N.Y.S.3d 541, 543 (App. Div. 3d Dep't 2016); HSBC Bank USA., N.A. v. Sage, 977 N.Y.S.2d 446, 447 (App. Div. 3d Dep't 2013)); *see Abrams*, 40 N.Y.S.2d at 656 (citing PHH Mortg. Corp. v. Davis, 975 N.Y.S.2d 480, 482 (App. Div. 3d Dep't 2013)); Charter One Bank, FSB v. Leone, 845 N.Y.S.2d 513, 515 (App. Div. 3d Dep't 2007); HSBC Bank USA. v. Merrill, 830 N.Y.S.2d 598, 599 (App. Div. 3d Dep't 2007); Wells Fargo Bank Minn. v. Mastropaolo, 837 N.Y.S.2d 247, 251 (App. Div. 2d Dep't 2007) (citing Marculescu v. Ovanez, 815 N.Y.S.2d 598 (App. Div. 2d Dep't 2006); Fleet Nat'l Bank v. Olasov, 793 N.Y.S.2d 52 (App. Div. 2d Dep't 2005)).

[161] *See Mastropaolo*, 837 N.Y.S.2d at 249.

[162] *See id.*

[163] Gorman, *supra* note 111.

[164] *See Mastropaolo*, 837 N.Y.S.2d at 249.

[165] *See, e.g.*, Deutsche Bank Nat'l Tr. Co. v. McRae, 894 N.Y.S.2d 720, 723 (Sup. Ct. 2010).

[166] Gorman, *supra* note 111.

standing to foreclose.[167] This creates a dichotomy, of sorts, because the plaintiff-lender may not actually have had standing to foreclose but would prevail solely because the defendant-borrower failed to answer the complaint. Both the defendant-borrower and the plaintiff-lender are at odds, but what makes the most sense to allow?

The distinction between the Westchester County Supreme Court's decision and the Appellate Division's decision in *HSBC Bank, USA v. Dammond* exemplifies the lack of uniformity when it comes to defendant-borrower's potential waiver of standing by not timely answering the plaintiff-lender's complaint. In *Dammond*, defendant-borrower moved to vacate the judgment of foreclosure and dismiss plaintiff-lender's complaint.[168] The Westchester County Supreme Court granted defendant-borrower's motion; on appeal, the Appellate Division reversed, denying vacation of the judgment and dismissal of plaintiff-lender's complaint.[169]

Defendant-borrower owned property in White Plains, New York, for which he had a mortgage.[170] The original mortgage, via assignment, was executed and dated September 7, 2006, and "the mortgage and underlying note were assigned by [MERS]" to plaintiff-lender.[171] "The assignment stated, inter alia, that it is 'effective on or before June 16, 2006.'"[172] Defendant-borrower's failure to make monthly mortgage payments led plaintiff-lender to commence a foreclosure action, through which it filed a summons and complaint, dated July 27, 2006.[173] Defendant-borrower neither answered the complaint nor filed a timely motion to dismiss the complaint.[174] By default, plaintiff-lender "obtained a judgment of foreclosure . . . and the property was scheduled for sale."[175]

Defendant-borrower "obtained a temporary restraining order in an order to show cause staying the sale," seeking an order vacating the foreclosure judgment and dismissing the complaint.[176] His argument was founded upon the notion that "at the time the action was commenced, [plaintiff-lender] did not have standing since the assignment of the mortgage to [plaintiff-lender] post-dated the

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[167] *Id.*
[168] *See* HSBC Bank, USA v. Dammond, 875 N.Y.S.2d 490, 491 (App. Div. 2d Dep't 2009).
[169] *See id.*
[170] *See id.*
[171] *Id.*
[172] *Id.*
[173] *See id.*
[174] *See id.*
[175] *Id.*
[176] *Id.*

commencement of its foreclosure action."[177] Though defendant-borrower failed to timely answer plaintiff-lenders complaint, the Supreme Court granted defendant-borrower's motion to vacate the foreclosure judgment and dismiss the complaint.[178] The Appellate Division took a contrary stance.[179]

On appeal, the Appellate Division reversed the Supreme Court's holding, indicating that defendant-borrower's failure to answer or file a timely pre-answer motion, claiming standing as a defense, waived his ability to use that defense.[180] The Appellate Division relied upon the provisions in CPLR 3211(e) in making their determination.[181] In *Dammond*, defendant-borrower's failure to answer the complaint automatically waived his standing defense.[182] The Appellate Division did not give any weight to the fact that the assignment of the note and mortgage to plaintiff-lender was executed *after* the commencement of the foreclosure action.[183] In actuality, plaintiff-lender did not have standing to foreclose, and defendant-borrower most likely would have prevailed in the action if they had answered the complaint.[184]

The procedural issues surrounding the proof of a lender's standing are also befuddled by the caselaw attempting to interpret the ambiguous language of N.Y. UCC Article 3.[185] The use of standing as a defense, the arguments for summary judgment (which defendant-borrowers continually lose), and the waiver of a standing defense in failing to answer the complaint are all procedural issues the courts

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[177] *Id.*

[178] *See id.*

[179] *See id.*

[180] *See id.* (citing Wells Fargo Bank Minn. v. Mastropaolo, 837 N.Y.S.2d 247, 250 (App. Div. 2d Dep't 2007)).

[181] *Dammond*, 875 N.Y.S.2d at 491. The relevant portion of CPLR 3211(e) indicates that:

> "[a]t any time before service of the responsive pleading is required, a party may move on one or more of the grounds set forth in subdivision (a). . . Any objection or defense based upon [the] ground set forth in paragraph[] . . . three . . . of subdivision (a) is waived unless raised either by such motion or in the responsive pleading."

N.Y. C.P.L.R. 3211(e) (McKinney 2018). CPLR 3211(a)(3) is the defense that "the party asserting the cause of action has not legal capacity to sue." C.P.L.R. 3211(a)(3).

[182] *See Dammond*, 875 N.Y.S.2d at 491 (App. Div. 2009) (citing *Mastropaolo*, 837 N.Y.S.2d at 250).

[183] *See Dammond*, 875 N.Y.S.2d at 491.

[184] *See id.*; *see*, *e.g.*, Bergman, *supra* note 11 (explaining that in cases where the borrower does not raise standing and where the lender did not actually have standing to foreclose, the borrower is at a loss because without standing, the *lender* may not prevail).

[185] *See* Gorman, *supra* note 111 ("[P]ractitioners need to closely monitor how the Appellate Division, Second Department, and other Appellate Division departments attempt to reconcile Taylor with existing Appellate Division precedent.").

have been presented with in the mortgage foreclosure context.[186] In examining the caselaw, there are few occasions where the defendant-borrower succeeds on the latter two issues.[187] The more pro-lender stance the courts are taking with these holdings speaks to potential problems that arise from the lack of direction of the provisions in N.Y. UCC Article 3.

PART III

Aside from the baseline procedural issues pertaining to standing in mortgage foreclosure actions, there are policy considerations that arise as a byproduct of the antiquated N.Y. UCC Article 3. A recent federal case exemplifies a side-stepping of the issues presented in N.Y. UCC Article 3.[188] There are three issues that will be analyzed, arising from New York's continued use of the 1964 provisions in Article 3: (1) the old version does not recognize modern practices; (2) New York cases have broadened the scope of what is acceptable in being the holder of the promissory note; and (3) New York courts have failed to directly address the issues arising from its version of UCC Article 3, and have yet to analyze and interpret its provisions.

A. New York's UCC Article 3 Is Not So Uniform

Even though states have authority to adopt their own UCC provisions, New York's non-uniformity with some of its codes create problems, since the whole concept of uniform laws is that they are indeed uniform across the country.[189] Not only do the reforms keep the UCC provisions current with the modern times,[190] New York is a prominent player in commercial transactions, and is in some cases

[186] *See supra* Part II.

[187] *See*, *e.g.*, JP Morgan Chase Bank, N.A. v. Hill, 21 N.Y.S.3d 363, 366 (App. Div. 3d Dep't 2015) (holding plaintiff did not have the necessary proof to show standing prior to the summary judgment motion); Deutsche Bank Nat'l Tr. Co. v. McRae, 894 N.Y.S.2d 720, 723 (Sup. Ct. 2010) (holding the borrower's defense of standing was not waived when it was not raised in the answer).

[188] *See* Arnold v. First Citizens Nat'l Bank, 693 F. App'x 62, 64–65 (2d Cir. 2017) ("[W]e need not address the issue ourselves here, however, as doing so is ultimately unnecessary to our resolution of this case.").

[189] *See generally* Bisceglie et al., *supra* note 28 (demonstrating the ways in which the antiquated N.Y. UCC fails to address contemporary concerns of the legal community and is the *only* state in the United States yet to adopt the proposed 1990s amendments to Articles 3 and 4).

[190] *See id.*

considered the governing law.[191] G. Ray Warner[192] has indicated some of the problems associated with New York's failure to adopt the revisions:

> Unfortunately, New York chose not to modernize its entire UCC, as the New York City Bar Association had recommended and as the original version of the bill had proposed. The failure to adopt the most current version of the UCC creates a great risk of confusion because New York is the nation's preeminent commercial law jurisdiction and its law is chosen as the governing law for many sophisticated commercial transactions. While the recent amendments bring most of New York's UCC up to date, New York remains the only state with archaic versions of UCC Article 3 (commercial paper) . . . . Those provisions were drafted in the 1950s and do not reflect modern practices.[193]

One of the main problems arises from practitioners of law who are unaware of the discrepancies in Article 3 because of New York's failure to adopt the 1990s revisions.[194] Additionally, the lack of uniformity becomes significant when there is a choice of law issue.[195] This creates the challenge for lawyers to decide which state's provision would be more beneficial for their client to follow, because there is the chance that a lawyer may be unaware of the unrevised provisions.[196]

B. Broadening the Scope of the Old Code

It is clear that New York's failure to adopt the 1990s revisions to Article 3 are problematic. However, that is not the only element that creates the disunity in courts' decisions. Another aspect that plays a role are the rulings in mortgage foreclosure actions by courts that place a strong focus on a looser concept of proving standing—one that does not appear to have clear underlying statutory or precedential

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[191] G. Ray Warner, *Rejoice in New York's Revised UCC, But Beware Traps*, LAW360 (Feb. 18, 2015), https://www.law360.com/articles/621303/rejoice-in-new-york-s-revised-ucc-but-beware-traps.

[192] Warner is a Professor of Law and Associate Dean of Bankruptcy Studies at St. John's University School of Law. *Id.*

[193] *Id.*

[194] Bisceglie et al., *supra* note 28.

[195] *See id.*

[196] *See id.*

support—meaning assignment of the note is acceptable.[197] Over the years, the courts' decisions are leaning towards less stringent standards, as is evident from the decision in *Taylor*.[198] However, there has not been a New York Court of Appeals decision *squarely* addressing the issue.[199]

The *Taylor* decision is influential in New York mortgage foreclosure issues because the court expanded the ways in which plaintiff-lenders could prove standing—even aside from having the assignment of the note.[200] The use of affidavits in this context gives plaintiff-lenders another avenue in which they can succeed on proving their standing and foreclosing on the defaulting homeowner.[201] The fact that N.Y. UCC is so ambiguous about the requirements for the assignment and transfer of the original note to prove standing, the relative ease of proving a valid assignment can be attributed to the holding in *Taylor*.[202] Though plaintiff-lenders should have the ability to prove their standing, proof of standing must be supported by principles of law.[203] It is apparent that New York courts have not given more than lip service to the provisions of N.Y. UCC Article 3 in determining what is acceptable to prove standing. Rather, New York courts appear to be lowering the threshold of establishing standing without sufficient underlying statutory grounds or legal precedent.[204]

The easy fix to this is if New York were to adopt the revisions to Article 3, which clearly require indorsement and possession of the actual note.[205] This would provide certainty. Relying on the antiquated language and concluding that an assignment of a note is sufficient creates issues of proof with respect to establishing the

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[197] *See, e.g.*, Aurora Loan Servs., LLC v. Taylor, 34 N.E.3d 363, 366–67 (N.Y. 2015) ("Although the better practice would have been for Aurora to state how it came into possession of the note in its affidavit in order to clarify the situation completely, we conclude that, under the circumstances of this case, the court did not err in granting summary judgment to Aurora.").

[198] *See id.* at 365, 366 (holding that an affidavit was sufficient to show possession of the note, verifying plaintiff-lender's standing).

[199] Though *Taylor* is a New York Court of Appeals case, the court allows the use of affidavits to prove the lender had the note at the time of commencing the foreclosure action, but it does not *analyze* what constitutes a valid assignment of the note under New York law. *See id.* at 366–367.

[200] *See* Gorman, *supra* note 88.

[201] *See id.*

[202] *See id.* (warning about future interpretations by appellate divisions, and the implications of the ruling in *Taylor*).

[203] *See* Bergman, *supra* note 11.

[204] *See* Gorman, *supra* note 88 (indicating the Court of Appeals strayed from the Appellate Division, Second Department precedent about proof of "'factual details of a physical delivery' of the promissory note").

[205] *See* U.C.C. § 3-203; U.C.C. § 3-204 (AM. LAW INST. & UNIF. LAW COMM'N 2018).

assignment. If the scope of N.Y. UCC Article 3's provisions for proving a valid assignment are further broadened, defaulting homeowners are placed in a precarious situation. The broadening of the scope of requirements creates a leniency, of sorts, placing a greater burden on the borrower to show that the lender did not have standing to foreclose.[206] Plaintiff-lenders may successfully move to foreclose against a defaulting homeowner while not having a valid assignment of the promissory note if there is greater leniency.[207] It is not unduly burdensome to require plaintiff-lenders to hold the note by indorsement, transfer and possession. Loosening standards could allow plaintiff-lenders to foreclose when standing is questionable or even absent.[208] At this end of the spectrum is the untenable risk that an assignor transfers the note to a person, other than the mortgage assignee, and a borrower/homeowner could face not only a foreclosure action, but a separate and subsequent attempt by a different party to enforce the note.[209] This prospect is eliminated with the modern UCC Article 3.

C. Side-Stepping the Issues

A prime example of the discord between lower courts and the seeming unwillingness of higher courts to touch the issues presented in N.Y. UCC Article 3 can be seen in the various court holdings in *Arnold v. First Citizen's National Bank*.[210] This federal case was initially brought in the U.S. Bankruptcy Court for the Western District of New York, under the case heading *In re Cornerstone Homes, Inc*.[211] The primary issues in that case pertained to whether "an assignee under a written assignment of mortgage . . . has standing to enforce the mortgage, despite the absence of indorsement or physical delivery of the underlying note to the assignee."[212] The court held in the affirmative, that the assignee (plaintiff-lender) did have standing to enforce the mortgage.[213]

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[206] *See* Gorman, *supra* note 88.

[207] *See* Bergman, *supra* note 11.

[208] *See id.* ("The legislature in New York, however, fears that borrowers are being victimized by foreclosing lenders who do not own the loans they are foreclosing upon.").

[209] *See id.* ("But when the mortgage is assigned, particularly multiple times, there is always the possibility of a break in that chain of assignments.").

[210] *See* Arnold v. First Citizens Nat'l Bank (*In re* Cornerstone Homes, Inc.), 544 B.R. 492 (Bankr. W.D.N.Y. 2015), *aff'd sub nom.* Arnold v. First Citizens Nat'l Bank, 217 F. Supp. 3d 696 (W.D.N.Y. 2016), *aff'd* 693 Fed. App'x 62 (2d Cir. 2017).

[211] *In re* Cornerstone Homes, Inc., 544 B.R. 492 (Bankr. W.D.N.Y. 2015).

[212] *Id.* at 495.

[213] *See id.* at 494–95.

The focus here was whether both indorsement and physical delivery were required to give rise to standing by plaintiff-lender to foreclose, citing to provisions in N.Y. UCC section 3-202(1).[214] The argument here (by the Trustee) is that N.Y. UCC indicates a need for indorsement *and* physical delivery, not one or the other.[215] The court, however, recognizes New York decisions stating that either a written assignment of the note *or* physical delivery of the note is sufficient to confer standing to the assignee.[216] The New York appellate division decisions apply a loose standard without any apparent sufficient basis—leaving the federal court, which was required to determine and apply New York law, in somewhat of a quandary if the federal court did not agree with the underlying basis of New York's decisions.[217]

The court elaborates on the intricacies of assignment: "in order to assign the right to enforce both the mortgage and the note, the written assignment must specifically reference the mortgage and the underlying debt or obligation. 'Assignment of the mortgage without the note it secures is insufficient to provide the assignee with standing to foreclose.'"[218] This fundamental concept of establishing standing is what is at issue here in determining whether the physical delivery of the note is necessary. The court cites to *Collymore* and *Taylor* throughout the decision, establishing that this precedent does not support the defendant's argument that both written assignment *and* physical delivery are necessary to establish standing.[219] The bankruptcy court held that there were valid assignments, establishing the standing necessary to successfully commence a foreclosure action.[220]

On appeal, the U.S. District Court affirmed the bankruptcy court's decision.[221] The opinion makes an important note about the 1990s revision that New York did not adopt, which plays a prominent role

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[214] *See id.* at 500. New York's UCC § 3-202(1) reads: "[n]egotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery." N.Y. U.C.C. § 3-202(1) (McKinney 2018).

[215] *See Arnold*, 544 B.R. at 500.

[216] *See id.* at 504–05 (citing *In re* Idicula, 484 B.R. 284, 288 (Bankr. S.D.N.Y. 2013)).

[217] *See id.* at 505.

[218] *Id.* (quoting 1077 Madison St., LLC v. Smith, 2015 U.S. Dist. LEXIS 135025, at *15 (E.D.N.Y. Aug. 27, 2015)) (citing Knox v. Countrywide Bank, 4 F. Supp. 3d 499, 508 (E.D.N.Y. 2014); Bank of N.Y. v. Silverberg, 926 N.Y.S.2d 532, 537 (App. Div. 2d Dep't 2011).

[219] *See Arnold*, 544 B.R. at 500, 505.

[220] *See id.* at 507.

[221] *See* Arnold v. First Citizens Nat'l Bank, 217 F. Supp. 3d 696, 697 (W.D.N.Y. 2016).

in the holding.[222] The revised version of Article 3 clearly requires delivery of the note, whereas the New York version is not as clear about the necessity of physical delivery.[223] "Had the New York legislature intended to limit 'transfer' of a negotiable instrument to situations in which the transferee received physical delivery of the instrument, it would have adopted section 3-203 of the revised UCC."[224] The revised version of the UCC makes it clear that there is a delivery requirement, but compared to the N.Y. UCC section dealing with transfer of rights, there is no mention of delivery, creating the ambiguity.[225] In interpreting N.Y. UCC Article 3, the district court concludes that the best reading of it includes written assignment of the note, not requiring the additional step of physical delivery.[226]

On further appeal to the U.S. Court of Appeals for the Second Circuit, the issue is mentioned again, however in this instance the court appears to completely avoid any examination or elaboration of the issue of written assignment connected to physical delivery of the note.[227]

> New York's version of the UCC does not clearly define the mechanism for a valid "transfer," and the parties join issue on whether a written assignment without physical delivery of the instrument can effect a valid transfer of the instrument under Article 3. Though there are numerous New York decisions

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[222] *See id.* at 703.

[223] *See id.*

[224] *Id.* UCC § 3-203, titled "Transfer of Instrument; Rights Acquired by Transfer," reads "[a]n instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving the delivery the right to enforce the instrument." U.C.C. § 3-203(a) (AM. LAW INST. & UNIF. LAW COMM'N 2018). The section of New York's UCC that pertains to transfer and right of indorsement is § 3-201. N.Y. U.C.C. § 3-201 (McKinney 2018). There is no clear indication in this section that speaks to physical delivery of the note; section 3-201(3) is the only portion that alludes to what is required with delivery, but also ties in section 3-202, which deals with negotiation. *See* N.Y. U.C.C. § 3-201; § 3-202.

> Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified indorsement of the transferor. Negotiation takes effect only when the indorsement is made and until that time there is no presumption that the transferee is the owner.

N.Y. U.C.C. § 3-201(3). Comparing the provisions in New York's UCC to the revised section dealing with transfer of rights exemplifies the challenges that New York courts face in establishing actual standing based upon delivery of the note.

[225] *See* U.C.C. § 3-203; N.Y. U.C.C. Law § 3-201.

[226] *See Arnold*, 217 F. Supp. 3d at 705.

[227] *See* Arnold v. First Citizens Nat'l Bank, 693 Fed. App'x 62, 64–65 (2d Cir. 2017).

> that suggest, in passing, that the recipient of a written assignment who has not taken physical delivery has, at the very least, standing to foreclose . . . the parties have not pointed us to New York case law articulating a clear basis for this view or otherwise generally considering the interaction between negotiable instruments law and the law governing the prerequisite for standing to foreclose. *We need not address the issue ourselves here,* however, as doing so is ultimately unnecessary to our resolution of this case.[228]

It is clear that the court does not take a definitive stance about the rulings of the lower federal courts or the New York courts on the issue of written assignment versus physical delivery.[229] The court ultimately affirmed the district court's decision, but for reasons that did not require the court to address or attempt to determine the standing issues with which the District Court and Bankruptcy Court struggled.[230] The court completely avoided that issue. There is no New York Court of Appeals authority that *directly* addresses this issue, and the New York appellate division courts do not present any in-depth analysis of N.Y. UCC Article 3 as it applies to transfers of promissory notes for purposes of standing.[231] The analysis by the federal court examines the issue, but the federal courts ultimately do not take a position at variance with New York appellate division decisions.[232]

Since N.Y. UCC Article 3 is so elusive about the requirements of transfer and delivery,[233] we fall back on caselaw to flesh out the provisions and necessary steps in obtaining valid standing to foreclose. Though a federal Second Circuit decision does not act as binding precedent on New York law,[234] a decision from this court would have been very persuasive for New York courts, especially if it had provided a thorough analysis. The Second Circuit's avoidance of the issue of written assignment and delivery of the note in New York simply furthers the ambiguities that lenders and borrowers face in

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[228] *Id.* at 64–65 (emphasis added).

[229] *See id.*

[230] *See id.*

[231] *See id.* at 64; *see, e.g.*, U.S. Bank, N.A. v. Collymore, 890 N.Y.S.2d 578 (App. Div. 2d Dep't 2009); Citibank, NA v. Abrams, 40 N.Y.S.3d 653 (App. Div. 3d Dep't 2016).

[232] *See Arnold*, 693 Fed. App'x at 64-65.

[233] *See* N.Y. U.C.C. § 3-201 (McKinney 2018).

[234] M. Jason Hale, *Federal Questions, State Courts, and the Lockstep Doctrine*, 57 CASE W. RES. L. REV. 927, 933 (2016) ("[D]ecisions of a lower federal court are no more binding on a state court than they are on a federal court not beneath it in the judicial hierarchy.").

trying to determine standing, and arguably leave in place a loose concept of standing that does not have sufficient statutory or precedential support.[235] The New York State Legislature should clarify and resolve the issue by amending the N.Y. UCC. Alternatively, the New York Court of Appeals should grant leave to hear an appeal on the issue and deliver a thorough analysis and holding that provides certainty.

CONCLUSION

The ambiguities of N.Y. UCC Article 3 have not been squarely addressed by the New York courts relative to what constitutes a sufficient transfer of a promissory note for mortgage foreclosure purposes. The New York appellate division cases, concluding that an assignment of a note is sufficient, notwithstanding the absence of any critical legal analysis, end up avoiding a definitive analysis of what is truly necessary to prove a valid assignment of the promissory note.[236] There does not appear to be any New York caselaw that addresses the interpretation that physical delivery of the note is required to complete the transfer. In examining the caselaw pertaining to the issue of standing in mortgage foreclosure actions, it is clear that New York should adopt the 1990s revisions to the UCC and amend its Article 3 to reflect the UCC's Article 3 (and, quite literally, every other state's Article 3).[237]

If New York courts continue to rule in a manner that creates less stringent requirements to prove a valid assignment and transfer of the note, then the defendant-borrower loses his ability to effectively challenge whether an assignee is the proper party to sue.[238] The risks of this revert to the defendant-borrower, who not only may have a viable defense that the plaintiff-lender did not have standing when the foreclosure action was commenced, but exposes the defendant-borrower to a subsequent action on the note brought by some other party.[239] The distinct provisions in the UCC that clearly indicate

[235] *See Arnold*, 693 Fed. App'x at 64–65.

[236] *See, e.g.*, *Collymore*, 890 N.Y.S.2d at 580 ("Either a written assignment . . . or the physical delivery of the note . . . is sufficient to transfer the obligation") (citing Weaver Hardware Co. v. Solomovitz, 139 N.E. 353 (N.Y. 1923); Payne v. Wilson, 74 N.Y. 348, 354–55 (1878); Lasalle Bank Nat'l Ass'n v. Ahearn, 875 N.Y.S.2d 595, 597 (App. Div. 3d Dep't 2009); Mortg. Elec. Registration Sys., Inc. v. Coakley, 838 N.Y.S.2d 622, 623 (App. Div. 2d Dep't 2007); Flyer v. Sullivan, 134 N.Y.S.2d 521, 523 (App. Div. 1st Dep't 1954)).

[237] *See* Bisceglie et al., *supra* note 28.

[238] *See* Gorman, *supra* note 88.

[239] *See* Bergman, *supra* note 11.

delivery of the note is required for a valid assignment and transfer would provide certainty that a plaintiff-lender is the true holder of the note.[240] A requirement that the original note be maintained and physically transferred upon an assignment is not an unreasonable burden. New York caselaw does reflect a somewhat consistent line of analysis, but fails to closely examine and analyze N.Y. UCC Article 3.[241] A decision from the New York Court of Appeals that provides a definitive conclusion, standard and holding would be welcome in order to clarify and provide certainty.

If the current N.Y. UCC Article 3 (1964 version) was clearer about the physical delivery/transfer aspect of assigning the promissory note, then the issues the courts face with determining a valid assignment would be moot. However, that is not the case. The fact that the UCC directly addresses the issue about delivery of the note begs one to wonder why New York is still the only state that has not amended its Article 3.[242] Reliance on the existing caselaw and the antiquated N.Y. UCC creates unpredictable avenues for holdings in future cases. In most of the cases discussed above, the lender tends to reign supreme, possibly because of the ability for New York's Article 3 to be interpreted so broadly.[243] In the long run, it only makes sense for New York to embrace the true purpose of the UCC: uniformity.

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[240] *See* U.C.C. § 3-203 (AM. LAW INST. & UNIF. LAW COMM'N 2018).

[241] *See, e.g.*, Citibank, N.A. v. Abrams, 40 N.Y.S.3d 653, 656 (App. Div. 3d Dep't 2016) (citing Bank of Am., N.A. v. Kyle, 13 N.Y.S.3d 253, 254 (App. Div. 3d Dep't 2015) (either written assignment or physical delivery before the foreclosure action was commenced is valid, does not say how or why)); Onewest Bank, F.S.B. v. Mazzone, 15 N.Y.S.3d 505, 506 (App. Div. 3d Dep't 2015)); *Collymore*, 890 N.Y.S.2d at 580 (stating what constitutes a valid transfer, but not explaining how or why it is a valid transfer) (citing *Weaver*, 139 N.E. at 356; *Payne*, 74 N.Y. at 354–55; *Ahearn*, 875 N.Y.S.2d at 597; *Coakley*, 838 N.Y.S.2d at 623; *Flyer*, 134 N.Y.S.2d at 523).

[242] *See* Bisceglie et al., *supra* note 28; U.C.C. § 3-203.

[243] *See, e.g.*, Gorman, *supra* note 111 (cautioning against future courts' interpretations of N.Y. UCC Article 3 because of caselaw that lessens the stringent requirements on lenders to prove valid assignment and transfer of the promissory note).