Litigation
Symposium

Foreclosure Resistance

Panelists

Edward S. Cheng
Sherin and Lodgen LLP; Boston

Julia Frost-Davies
Bingham McCutchen LLP; Boston

Patrick P. Dinardo
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Frederic D. Grant, Jr.
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Patrick J. O'Toole, Jr.
Weil, Gotshal & Manges LLP; Boston

Judge Participants

Hon. Henry J. Boroff, Chief Judge
U.S. Bankruptcy Court; Springfield, Mass.

Hon. J. Michael Deasy
U.S. Bankruptcy Court; Manchester, N.H.

Vignettes/Mock Presentation

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Witnesses

Hon. Joan N. Feeney
U.S. Bankruptcy Court; Boston

Anne J. White
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Parker & Associates, P.C.; Winchester, Mass.

Educational Materials

2011

Wendy Livefree Debtor filed a Chapter 13 petition on June 9, 2010 with the United States Bankruptcy Court for the Southern District of Massachusetts. Her principal asset is her home, which she seeks to retain. The Debtor acquired the home on October 23, 2006, and admits that at that time she signed an Adjustable Rate Note (the "Note") and Mortgage (the "Mortgage") in favor of Frontrunner Bank (the "Bank"). The Mortgage, which refers to the Note, was recorded on October 26, 2006 with the Southern District Registry of Deeds.

On July 28, 2010, Acme Loan Servicing, Inc. ("Acme"), acting on behalf of Successor Bank, N.A. ("Successor Bank") as Trustee for the holders of Asset-backed Certificates, Series 2006-OOPS-007, filed a two page proof of secured claim (the "Proof of Claim") in Debtor's case. Debtor objected, stating that the arrearage calculation was wrong and that none of the documents on which the claim was founded were attached. One day before the preliminary hearing on Debtor's objection, Acme filed an Amended Proof of Claim (the "Amended Claim") attaching copies of various documents. At the December 17, 2010 preliminary hearing, Debtor renewed her objection, raising the three issues listed below. Judge Stephen Shamban determined that this dispute is a contested matter to which the adversary proceeding rules apply, and directed the parties to confer in accordance with Rule 26(f) and to file their certification and proposed discovery plan by January 17, 2011. The Court issued its Pretrial Order the following day.

Issue No. 1. Was the Note properly indorsed to its transferee or placed in the transferee's possession? Debtor argues not, noting that no endorsement appears on the Note attached to the Amended Claim, and that Acme's counsel was unable to state whether his client did or did not have the original Note when so asked at the hearing. Creditor states that shortly after the Note and Mortgage were signed, Frontrunner Bank pooled them with other similar instruments and sold them as a "securitized" package to Successor Bank as trustee. Attached to the Amended Claim is a copy of the November 7, 2006 Pooling and Servicing Agreement ("PSA") under which a trust fund including the Note was validly and effectively transferred to Successor Bank as Trustee, which issued in return the Asset-backed Certificates.

Issue No. 2. Was the Mortgage properly assigned to Successor Bank, N.A. as Trustee? Debtor argues not, noting that no assignment of the Mortgage to Successor Bank can be found at the Southern District Registry of Deeds, and that none was attached to the Amended Claim. Creditor states that under and pursuant to the PSA a trust fund including the Mortgage was validly and effectively transferred to Successor Bank as Trustee.

Issue No. 3. Is the Confirmatory Assignment of Mortgage, which creditor attached to its Amended Claim, effective? Debtor argues not, based on its recent date and the limited scope of the subject power of attorney. Creditor states that both documents are valid and effective. Attached to its Amended Claim are copies of: (1) a

"Confirmatory Assignment of Mortgage" pursuant to which Frontrunner Bank by its attorney in fact Acme Loan Servicing, Inc. assigned to Successor Bank, N.A. as trustee for the holders of Asset-backed Certificates, Series 2006-OOPS-007 all beneficial interest under the Note and Mortgage; and (2) a "Limited Power of Attorney" given by Frontrunner Bank to Acme. The Confirmatory Assignment is notarized as having been signed on December 12, 2010 but states that "[T]he effective date of this assignment is October 23, 2006." The Limited Power of Attorney was signed on November 10, 2010.

This hypothetical is drawn loosely from the following cases: Kemp v. Countrywide Home Loans, Inc. (In re Kemp), 2010 WL 4777625, 2010 Bankr. LEXIS 4085 (Bankr. D.N.J. Nov. 16, 2010); In re Hayes, 393 B.R. 259 (Bankr. D. Mass. 2008); In re Samuels, 415 B.R. 8 (Bankr. D. Mass. 2009).

EVIDENCE?

IT'S ATTACHED TO MY MOTION (ISN'T IT?)

Hon. J. Michael Deasy
Jennifer A. Hayes, Esq.

U.S. Bankruptcy Court
District of New Hampshire

American Bankruptcy Institute
2011 Northeast Winter Consumer Forum
Boston, Massachusetts
January 17, 2011

I. PRELIMINARY MATTERS (or Evidence 101).[1]

A. "In a routinized area, such as bankruptcy motion practice, one easily loses sight of some of such basics as the need to make out a prima facie case by competent evidence. Bankruptcy litigation is no different than any other federal litigation practice in this respect. Although such evidentiary questions as the use of appraisals arise more frequently in bankruptcy courts than elsewhere because the issue of value of property is pervasive in bankruptcy, that does not excuse compliance with the Federal Rules of Evidence." In re Roberts, 210 B.R. 325, 329 (Bankr. N.D. Iowa 1997).

1. The Federal Rules of Evidence apply in bankruptcy proceedings. Rule 101[2] of the Federal Rules of Evidence provides, with emphasis added:

> These rules govern proceedings in the courts of the United States and before United States bankruptcy judges and United States magistrate judges, to the extent and with the exceptions stated in rule 1101.

2. The most common evidentiary problem in bankruptcy proceedings is the absence of admissible and/or admitted evidence. The application of three basic principles will solve the most common evidence problems in bankruptcy court.

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[1] These materials include portions of "Evidence? It's Attached To My Motion (isn't it?)"originally prepared by Judge Deasy and Jennifer A. Hayes, Esq. and David H. Kimelberg,Esq., current and former law clerks respectively, for the ABI 2000 Northeast Bankruptcy Conference, "Trial Practice: How to Win Cases and Influence Judges (It's Evidentiary, My DearWatson), updated by Judge Deasy, for the ABI 2005 Northeast Bankruptcy Conference, and " Evidence? It's Attached To My Motion (Isn't It?), by Hon. J. Michael Deasy and Jennifer A. Hayes, Esq. U.S. Bankruptcy Court, District of New Hampshire prepared for the American Bankruptcy Institute, 2007 Northeast Consumer Forum, Newport, Rhode Island July 12-15, 2007.

[2] All rule references hereinafter are to the Federal Rules of Evidence, unless noted otherwise. Such rules shall also be referenced as Rule.

B. **Argument is not evidence**. Many matters come before the bankruptcy court on short notice or by motion. The lawyers and the judge may talk about the matter in dispute. Such talk is not evidence.

1. Attorneys are not under oath when they present argument. Rule 43 of the Federal Rules of Civil Procedure,[3] made applicable in bankruptcy cases by Rule 9017 of the Federal Rules of Bankruptcy Procedure,[4] requires the testimony of witnesses to be taken under oath in open court.

2. Attorneys may present arguments or statements of fact outside of their personal knowledge. Rule 602 requires that the testimony of a witness rest upon a foundation of "personal knowledge of the matter."

3. Parties frequently object to statements of counsel on the basis of an evidentiary rule. However, parties can't object to argument. They can only object to evidence, and talk or argument is not evidence.

4. On appeal there will be no evidence in the record. The transcript will contain the arguments of counsel, but no admitted, or admissible, evidence.

C. **Schedules and exhibits attached to pleadings and motions are not evidence**. Documents attached to pleadings or offered in court without testimony are simply a written form of argument. (Refer to paragraph B above.)

1. Documents are not admitted as evidence simply by filing them with a pleading. In re Holly's, Inc. 190 B.R. 297, 301 (Bankr. W.D. Mich. 1995) (documents attached to a brief were not properly admitted into evidence and could not be considered by the court).

2. FRCP 43, made applicable in bankruptcy proceedings by FRBP 9017, allows the court to accept testimony by affidavit. See 28 U.S.C. § 1746 (permitting unsworn declarations made in writing, under penalty of perjury and dated, to be admissible in place of a sworn statement).

a. A document may be admitted as evidence if accompanied by an affidavit from a competent witness (Rule 602) that authenticates the document (Rule 901) and the document is otherwise admissible.

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[3] The Federal Rules of Civil Procedure shall hereinafter be referred to as FRCP.

[4] The Federal Rules of Bankruptcy Procedure shall hereinafter be referred to as FRBP.

b. However, absent an agreement with the other parties, or a pretrial order, presentation of an affidavit by a witness without the presence of the witness for cross examination may not overcome an objection based upon hearsay. See In re Roberts, 210 B.R. 325, 329 (Bankr. N.D. Iowa 1997) (affidavits on the value of an automobile excluded as hearsay where witnesses were not present to authenticate the documents or for cross examination).

D. **Stipulations are evidence**. Parties may stipulate that statements by counsel, affidavits or documents attached to pleadings may be treated as evidence.

1. Where a party stipulated that the debtor was the purchaser of a cashier's check, it was bound by that stipulation and the bankruptcy court's inference that the debtor was in possession and control of the funds used to purchase the check. See Hall-Mark Electronics Corp. v. Sims (In re Lee), 179 B.R. 149, 157 (B.A.P. 9th Cir. 1995).

2. The State was bound by the terms of a previous court-approved stipulation and order that compelled the conclusion at the confirmation hearing that it had waived any tax lien against the debtor's property. See In re Holly's, Inc., 190 B.R. 297, 302 (Bankr. W.D. Mich. 1995).

3. A Stipulation and Confession of Judgment in a pre-petition state court proceeding that established a claim was admissible as evidence of intent in an action to except the claim from discharge under 11 U.S.C. § 523(a)(6). See In re Burress, 245 B.R. 871, 881 (Bankr. D. Colo. 2000).

II. LAYING A FOUNDATION.

A. **Competency**. Before a witness may testify, it must be shown that he or she is competent. Rule 601 provides that any person is competent to testify except as provided otherwise in the Federal Rules of Evidence.

B. **Personal Knowledge**. A witness is not competent to testify regarding a matter unless it can be shown through evidence that he or she has personal knowledge of the matter. Rule 602. Whether a witness has the requisite personal knowledge to testify is a matter for determination by the trial judge under Rule 104.

1. "Evidence is inadmissable under [Rule 602] only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testified to." Hallquist v. Local 276, 843 F.2d 18, 24 (1st Cir. 1988); M.B.A.F.B. Fed. Credit Union v. Cumis Ins. Society, Inc., 681 F.2d 930, 932 (4th Cir. 1982), but see

dissent citing United States v. Borelli, 336 F.2d 376, 392 (2d Cir. 1964), cert. denied sub. nom. 379 U.S. 960 (1965).

2. However, beyond such a minimal requirement, "[t]he extent of a witness' knowledge of matters about which he offers to testify goes to the weight rather than the admissibility of the testimony." Hallquist, 843 F.2d at 24.

3. Where a witness was competent to testify about procedures in a Paris office, the plaintiff had failed to establish that the witness knew enough about procedures in the Tokyo office to knowledgeably testify about communications from that office. Trigano v. Bain & Co., Inc., 380 F.3d 22, 33 (1st Cir. 2004).

4. Evidence that a long term employee had experience operating chemical plants and had reviewed and provided input into the design of a new chemical plant, provided a sufficient foundation for him to identify a design defect and to infer that the defendant was responsible. Sheek v. Asia Badger, Inc., 235 F.3d 687, 695 (1st Cir. 2000).

5. Testimony by a custodian of records who had been on the job only two weeks before trial and did not claim direct personal knowledge of the prior demise of a bank and the appointment of the FDIC as receiver could testify to authenticate business records, but could not testify about the receivership and the transfer of notes held by the failed bank to the FDIC. FDIC v. Houde, 90 F.3d 600, 606 (1st Cir. 1996).

6. "A witness may testify to the contents of business records kept in the regular course of business without having personal knowledge of the facts reported therein," so long as the entries in the records were made by persons with personal knowledge of the facts and a business duty to report them. The witness's lack of personal knowledge merely affected the weight of the testimony, not its admissibility. Cities Serv. Oil Co. v. Coleman Oil Co., Inc., 470 F.2d 925, 932 (1st Cir. 1972).

III. **ADMISSIBILITY OF DOCUMENTS**.

A. **Necessity For Authentication**. Rule 901(a) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."

1. Something is found to have been authenticated when a "court discerns enough support in the record to warrant a reasonable person in determining that the evidence is what it purports to be . . . ." United States

v. Mulinelli-Navas, 111 F.3d 983, 990 (1st Cir. 1997). See also United States v. Perez-Gonzalez, 445 F.3d 39, 47 (1st Cir. 2006); United States v. Collado, 957 F.2d 38, 39 (1st Cir. 1992); United States v. Nolan, 818 F.2d 1015, 1017 (1st Cir. 1987).

2. A document's authenticity may be confirmed by appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances. See Rule 901(b)(4); United States v. Gonzalez-Maldonado, 115 F.3d 9, 20 (1st Cir. 1997). There is no single way to authenticate evidence. United States v. Garcia, 452 F.3d 36, 40 (1st Cir. 2006).

B. **Authentication of Documents With a Foundation Witness**.

1. A document may be authenticated by the testimony of a person with personal knowledge. See Rule 901(b)(1); Mulinelli-Navas, 111 F.3d at 990 ("Authentication can be provided by, among other things, testimony of a custodian or percipient witness . . . .").

2. Before a witness may testify for the purpose of authenticating a piece of evidence, it must be shown that he or she is competent. See section II above.

3. Who may authenticate business records? To authenticate business records, a witness need not be the actual person who prepared the records: "a qualified witness is . . . one who can explain and be cross-examined concerning the manner in which the records are made and kept." Moulder v. City Investing Co. Liquidating Trust (In re The Nat'l Trust Group, Inc.), 98 B.R. 90, 92 (Bankr. M.D. Fla. 1989) (quoting Wallace Motor Sales, Inc. v. Am. Motor Sales Corp., 780 F.2d 1049, 1060-61 (1st Cir. 1985)). See also Capital Marine Supply, Inc. v. M/V Roland Thomas, II, 719 F.2d 104 (5th Cir. 1983) (account manager who had direct control over a business account could authenticate business records prepared under his direction or supervision, even though he did not actually prepare the records).

C. **Authentication of Records Without a Foundation Witness.**

1. Rules 902(11) and 902(12) permit parties to authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness.

2. The procedures for self authentication apply to records of regularly conducted activity that are admissible under Rule 803(6). The intent is to establish a procedure in civil actions similar to the procedure provided

under 18 U.S.C. § 3505 for certifying foreign records in criminal cases. See section IV.C below regarding business records under Rule 803(6).

D. **Self Authentication of Documents**.

1. Rule 902 contains several exceptions to the general rule that extrinsic evidence of authenticity is required before evidence is deemed admissible. Rule 902 provides in relevant part:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

> (1) Domestic Public Documents Under Seal. A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, . . . or of a political subdivision, department, officer, or agency thereof, and signature purporting to be an attestation or execution.
>
> (2) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.
>
> (4) Certified Copies of Public Records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this rule or complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority.
>
> (5) Official Publications. Books, pamphlets, or other publications purporting to be issued by public authority.
>
> (6) Newspapers and Periodicals. Printed materials purporting to be newspapers or periodicals.
>
> (8) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in a manner provided by

law by a notary public or other officer authorized by law to take acknowledgments.

Rules 902(1), (2), (4), (5), (6), and (8).

2. Public Records. Rules 902(1), (2), (4), and (5).

   a. Acosta-Mestre v. Hilton Int'l of Puerto Rico, Inc., 156 F.3d 49, 57 (1st Cir. 1998) (stating that a notarized document does not constitute a copy of an official record or report or a document authorized by law to be recorded or filed and actually recorded or filed in a public office as required by Rule 902(4) and further stating that self-authenticating documents are not necessarily admissible).

   b. United States v. Robinson-Munoz, 961 F.2d 300, 305 (1st Cir. 1992) ("[T]he certification, bearing a Department of State seal and the signature of a Department of State official authorized to authenticate such documents, was a self-authenticating document pursuant to Fed. R. Evid. 902(1).").

   c. Crossley v. Lieberman, 868 F.2d 566, 568 (3d Cir. 1989) (a certified record of the state court was self-authenticating as it contained a raised seal and the signature of the prothonotary).

   d. McLellan Highway Corp. v. United States, No. Civ. A 98-12142-DPW, 2000 WL 461004, at *6 (D. Mass. Mar. 28, 2000) (certified copies of letters from the National Archives and Records Administration satisfied the authentication requirement).

   e. Poirier v. Educ. Credit Mgmt. Corp. (In re Poirier), 346 B.R. 585 (Bankr. D. Mass. 2006) (acknowledging that courts take judicial notice of federal agencies' websites and the information on them, treating these websites as public records, but refusing to take judicial notice of all the information published on the Department of Education's website as the information was not constant and consisted of information on a wide range of topics, much of which could not reasonably be described as a public record or an official publication).

3. Newspapers and Periodicals. Rule 902(6).

a. Price v. Rochford, 947 F.2d 829, 833 (7th Cir. 1991) (noting that newspaper articles are generally self-authenticating).

b. Wyandotte Indus. v. E.Y. Neill & Co. (In re First Hartford Corp.), 63 B.R. 479, 483 n.2 (Bankr. S.D.N.Y. 1986) (explaining that articles from periodicals may be admitted into evidence because they are self-authenticating under Rule 902(6)).

c. Goguen v. Textron, Inc., 234 F.R.D. 13, 19 (D. Mass. 2006) (concluding that a company's annual reports were not self-authenticating "periodicals" because however broad the definition of a "periodical" may be, it cannot be stretched to include every single document that is published on regular basis).

4. Acknowledged Documents. Rule 902(8).

a. Trinity Nat'l Bank v. Bobby Boggs, Inc. (In re Bobby Boggs, Inc.), 819 F.2d 574, 581 (5th Cir. 1987) (stating that notarized performance and payment bonds may be self-authenticating under Rule 902(8)).

b. First Security Bank of Utah, N.A. v. Styler, 147 B.R. 248, n.2 (D. Utah 1992) ("Acknowledging an instrument provides benefits beyond the right to record the document. For example, the Federal and Utah Rules of Evidence provide that acknowledged documents may be admitted into evidence without any other confirmation of their authenticity.").

E. **Best Evidence Rule**. Rules 1001 through 1007.

1. Original Document. Rules 1002 and 1004.

a. With respect to original documents, the Rule 1002 provides:

> To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

Rule 1004 further provides:

> The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if —
>
> > (1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or
> >
> > (2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or
> >
> > (3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or
> >
> > (4) Collateral Matters. The writing, recording or photograph is not closely related to a controlling issue.

b. The Tenth Circuit Court of Appeals has held that divorce counsel could testify as to his recollection of a deposition even though no written transcript or divorce counsel's notes were produced because an event may be proved by non-documentary evidence even though a written report of it was made. Lang v. Lang (In re Lang), 106 F.3d 413, 1997 WL 26585, at *3 (10th Cir. 1997) (unpublished opinion).

c. Courts have emphasized that testimony as to a witness's independent knowledge of facts is not barred by the "best evidence rule" where the testimony is not regarding the contents of any document but rather of the events that the witness has observed. In other words, the rule is not applicable when a witness testifies from personal knowledge even though the same information is contained in a writing. Miner v. Sharp Ford-Mercury, Inc. (In re United Tractors, Inc.), 13 B.R. 239, 244 and n.11 (Bankr. W.D. Mo. 1981).

d. The optimal proof of the contents of a document is the original document. However, the original is not required, and other evidence of the contents of a writing is admissible if all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. "Unless someone testifies that he or she personally destroyed or witnessed the destruction of a document, such proof will ordinarily be circumstantial . . . . Rule 1004 does not contain an independent requirement that a search be conducted; rather the concept of a diligent search is an avenue by which the larger issue of the document's destruction may be proved." United States v. McGaughey, 977 F.2d 1067, 1071 (7th Cir. 1993).

e. The First Circuit Court of Appeals has held that the transcript of a conversation is inadmissible where a tape of the conversation is available as evidence. United States v. Bizanowicz, 745 F.3d 120, 123 (1st Cir. 1984).

f. "The mere negligent destruction of original evidence is insufficient to establish bad faith on the part of the proponent [within the meaning of Rule 1004(1)]." Sicherman v. Diamoncut, Inc. (In re Sol Bergman Estate Jewelers, Inc.), 225 B.R. 896, 902 (B.A.P. 6th Cir. 1998).

g. The summation of financial transactions drafted by the debtors was inadmissible "as the document was a summation of other documents and not the original." Barrows v. Internal Revenue Serv., 231 B.R. 446, 450 (D.N.H. 1998).

h. A copy of a letter written by a chapter 7 debtor in his capacity as settlor of a trust, in which the debtor purports to extend irrevocability of the trust for an additional ten years, was not admissible to show that the irrevocability period had been extended, and that the chapter 7 trustee, as successor in interest to the debtor's rights under the trust instrument, was unable to revoke the trust for the benefit of the estate, where the debtor failed to produce an original or to satisfactorily explain how a copy of the letter suddenly appeared during litigation over the trustee's right to terminate the trust. Osherow v. Porras (In re Porras), 224 B.R. 367, 371 (Bankr. W.D. Tex. 1998).

i. In In re Mullins, 125 B.R. 808, 811 (Bankr. E.D. Cal. 1990), the court held that a photocopy of a faxed loan agreement which bore

the original signature of the debtor was a duplicate, and not the original document, and was inadmissible to prove the debtor's lack of equity, even though there existed no "original" document signed by the debtor.

j. "[A] computerized record may be admitted into evidence as an 'original' only after the court has made a fact-specific determination as to the intent of the drafters and the accuracy of the documents. . . . [W]here a written record, prepared prior to the computer record, contains a more detailed and complete description of the transaction than that contained in the computer record, the proponent of the evidence should be required to produce the more detailed record, or account for its nonproduction under F.R.E. 1004." In re Gulph Woods Corp., 82 B.R. 373, 377-78 (Bankr. E.D. Pa. 1988) (holding that the computerized business records of the debtor's loan account were not admissible, over the debtor's best evidence objection, absent a showing that the computerized records were prepared within a reasonable time of the prior written reports and accurately reflected the loan transactions at issue).

2. Admissibility of Duplicates. Rule 1003 provides that a duplicate is admissible unless: (1) a genuine question is raised regarding the authenticity of the original; or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

a. Rule 1001(4) defines a "duplicate" as "a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original."

b. United States v. Carroll, 860 F.2d 500 (1st Cir. 1988) (finding that a microfilm copy of a check is a "duplicate" for purposes of Rules 1001(4) and 1003).

3. Summaries. Rule 1006 provides in part: "The contents of voluminous writings, records, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation."

a. "Evidence admitted under Rule 1006 must be otherwise admissible and remains subject to the usual objections under the rules of

evidence and the Constitution." United States v. Milkiewicz, 470 F.3d 390, 396 (1st Cir. 2006).

b. "Rule 1006 does not contemplate that summaries must be prepared by someone independent of the party offering the summary." Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505 (9th Cir. 1985).

c. Rule 1006 provides that the originals or duplicates underlying summaries are to be made available to other parties for examination and/or copying. United States v. Milkiewicz, 470 F.3d 390, 396 (1st Cir. 2006).

d. Evidence underlying Rule 1006 summaries need not be admitted into evidence unless so ordered by the court. Air Safety, Inc. v. Roman Catholic Archbishop of Boston, 94 F.3d 1, 7 (1st Cir. 1996). However, the First Circuit has clarified that the summary may be admitted in addition to the underlying documents to provide the jury or fact finder with easier access to the relevant information. United States v. Milkiewicz, 470 F.3d 390, 397 (1st Cir. 2006).

e. A trial court may also allow the use of a chart or other summary tool under Rule 611(a), but such summaries most typically are used as "pedagogical devices" to clarify and simplify complex testimony, other information and evidence, or to assist counsel in the presentation of argument to the court or jury. A summary chart used as a pedagogical device must be linked to previously admitted evidence and usually is not admitted itself into evidence. United States v. Milkiewicz, 470 F.3d 390, 397 (1st Cir. 2006).

f. In a case where voluminous underlying records are involved, the key difference between the various approaches regarding the use of summaries appears to be the purpose for which the summaries are offered. Those which fairly represent the underlying documents accurately and non-prejudicially are admitted under Rule 1006. Those which serve as an aid to illustrate or clarify a party's position or to assist expert testimony may be admissible under Rule 611 and Rule 703, respectively. United States v. Milkiewicz, 470 F.3d 390, 398 (1st Cir. 2006).

g. To be admissible: (1) a summary must be of the contents of the documents and not the testimony; and (2) "while projections of

> future lost profits are not legitimately admissible as summaries under [Rule 1006] since they are interpretations of past data and projections of future events, not simply a compilation of voluminous records they nevertheless may be admissible as opinion evidence under [Rules 701 and 702]." In re Snider Farms, Inc., 83 B.R. 977 (Bankr. N.D. Ind. 1988).

4. Demonstrative Evidence (i.e., tables, charts).

   a. "Demonstrative evidence, including such items as a model, map, chart, photograph, or demonstration is distinguished from real evidence in that it has no probative value itself, but serves merely as a visual aid in comprehending the oral testimony of a witness or other evidence; demonstrative evidence illustrates and clarifies." Hon. Barry Russell, Bankruptcy Evidence Manual § 401.2 (2000).

   b. "Use by a witness of visual illustrations to explain testimony is a common occurrence in bankruptcy proceedings." Id. § 401.5.

IV. ADMISSION OF BUSINESS AND FINANCIAL RECORDS.

A. Hearsay.

1. Definition of Hearsay. Rule 801(c) provides:

   > "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

2. Rule 802 provides that hearsay is generally inadmissible:

   > Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

3. Hearsay evidence is not admissible at trial or for summary judgment purposes unless it falls within an exception to the rule. Ramirez Rodriguez v. Boehringer Ingelheim Pharmaceuticals, Inc., 425 F.3d 67, 76 (1st Cir. 2005).

B. Hearsay Exceptions.

1. **Business and Computer Records**. Certain business and financial records are excepted from the general rule that hearsay is inadmissible. Rule 803(6) provides:

> The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:
> . . .
> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

a. United States v. Kayne, 90 F.3d 7, 12 (1st Cir. 1996) ("The foundation for admission of a business record under Fed. R. Evid. 803(6) requires both the testimony of a qualified custodial witness and a showing that the declarant was a person with knowledge acting in the course of regularly conducted business activity.").

b. United States v. Lizotte, 856 F.2d 341, 344 (1st Cir. 1988) (a drug dealer's recording of weekly drug sales on calendar is a business record admissible under Rule 803(6)).

c. United States v. Grossman, 614 F.2d 295, 297 (1st Cir. 1980) (holding that the trial judge properly admitted a catalog of cigarette lighters since it qualified as a business record pursuant to Rule 803(6)).

d. Remington Inv., Inc. v. Quintero & Martinez Co., Inc., 961 F. Supp. 344 (D.P.R. 1997) (indicating that the bank records used by the FDIC in preparing its report were kept by the bank in the regular course of its business operations and as such were admissible under Rule 803(6) as an exception to the hearsay rule).

2. **Absence of Entry in Records**. Rule 803(7) provides:

> The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:
> . . .
> Evidence that a matter is not included in the memoranda reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

a. Resolution Trust Corp. v. Gladstone, 895 F. Supp. 356, 373 (D. Mass. 1995) (finding that the absence of documents in the loan files created a material issue of fact sufficient to defeat a motion for summary judgment).

b. Humboldt Express, Inc. v. The Wise Co., Inc. (In re Apex Express Corp.), 190 F.3d 624, 635 (4th Cir. 1999) ("The absence of business records can be used as evidence to prove the non-existence of such a record.")

c. Armstead v. United States, 815 F.2d 278, 282 n.3 (3d Cir. 1987) ("The dissent notes that under Fed. R. Evid. 803(7), absence of an entry in relevant business records may be used to prove the non-existence or non-occurrence of a matter. The Rule allows such evidence as an exception to the hearsay rule. The admission of such evidence, however, depends upon presentation of a proper foundation, and exclusion may result where circumstances 'indicate lack of trustworthiness.'").

d. United States v. Lee, 589 F.2d 980, 987 (9th Cir. 1979) ("The exceptions to the hearsay rule which provide for the admissibility of negative records in the Federal Rules (Fed. R. Evid. 803(7) and 803(1)) were designed to resolve any doubts about such evidence in favor of admissibility.") (quoted in Resolution Trust Corp. v. Gladstone, 895 F. Supp. 356, 373 (D. Mass. 1995)).

3. **Market Reports**. Rule 803(17) provides:

> The following [is] not excluded by the hearsay rule, even though the declarant is available as a witness:
> . . .

Market quotations, tabulations, lists, directories, or other published compilations generally used and relied upon by the public or by person in particular occupations.

a. United States v. Cassiere, 4 F.3d 1006, 1019 (1st Cir. 1993) (upholding the lower court's admission of County Comps reports because they were published compilations of property sales data which were generally used and relied upon by appraisers).

b. United States v. Mount, 896 F.2d 612, 625 (1st Cir. 1990) (holding books admissible under Rule 803(17) where witness testified that manuscript dealers rely on the books to locate original documents).

c. United States v. Grossman, 614 F.2d 295, 297 (1st Cir. 1980) (holding that the trial judge properly admitted a catalog of cigarette lighters since it qualified as a commercial publication pursuant to Rule 803(17)).

d. United States v. Meo, 15 F.3d 1093, 1994 WL 12340, at *6-7 (9th Cir. 1994) (unpublished opinion) (upholding lower court's admission of Kelly Blue Book valuations under Rule 803(17) as witnesses testified that the Blue Book is a standard reference within the used car industry).

e. In re McCutchen, 224 B.R. 373, 375 n.1 (Bankr. E.D. Mich. 1998) (noting in footnote that N.A.D.A. guides and similar publications are admissible as evidence pursuant to Rule 803(17)).

f. In re Roberts, 210 B.R. 325, 330 (Bankr. N.D. Iowa 1997) (explaining that while N.A.D.A. values constitute admissible evidence for purposes of valuation, these values are not necessarily conclusive).

g. In re Huffman, 204 B.R. 562 (Bankr. W.D. Mo. 1997) (taking judicial notice of the United State Government's Directory of Zip Codes and a United States Atlas pursuant to Rules 201 and 803(17)).

h. In re Byington, 197 B.R. 130 (Bankr. D. Kan. 1996) (noting that market guides, such as the N.A.D.A., are admissible under Rule 803(17) but they should not be exclusively relied upon by the court as it contradicts the court's duty to determine value under 11 U.S.C. § 506(a)).

C. **Authentication of Business Records Without a Foundation Witness**.

1. Under Rule 803(6) records kept in the regular course of a regularly conducted business activity may be admitted by a certification complying with Rule 902(11) or 902(12) or a statute permitting certification.

2. Under Rules 902(11) and 902(12), the certificate must state that the business record:

   a. was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of those matters;

   b. was kept in the course of regularly conducted activity; and

   c. was made by the regularly conducted activity as a regular practice.

3. A party intending to offer a record into evidence under Rule 902(11) or 902(12) must provide written notice to all adverse parties, and must make the record and the declaration available for inspection sufficiently in advance of the party's offer into evidence to provide an adverse party with a fair opportunity to challenge them.

4. The certification should also provide a foundation for the personal knowledge of the person making the certification.

V. **LAY WITNESS OPINION TESTIMONY. RULE 701.**

A. Rule 701 provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

B. The primary distinction between an expert witness and a lay witness is that the expert witness may offer an opinion based upon information and data from a number of sources (e.g., trial testimony or information conveyed to him prior to trial), while a lay witness is confined to testifying from personal knowledge. United States v. Williams, 81 F.3d 1434, 1442 (7th Cir. 1996). See also Pelletier v. Main Street Textiles, LP, 470 F.3d 48, 55 (1st Cir. 2006).

1. Unlike an ordinary witness, an expert is permitted wide latitude to offer opinions, including those that are not based upon firsthand knowledge or observation. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 592, 113 S. Ct. 2786, 2796, 125 L. Ed. 2d 469 (1993).

2. A real estate finance expert would be able to testify as to the projected rentals for a particular property. However, a lay witness is limited to testimony based upon personal knowledge, such as the owner of a house who testifies regarding value based upon the purchase price. Malloy v. Monahan, 73 F.3d 1012, 1016 (10th Cir. 1996).

C. Rule 701(c) prohibits lay witnesses from offering opinion testimony based on scientific, technical or other specialized knowledge within the scope of Rule 702. This provision was added to the Rule on December 1, 2000, to eliminate the risk that the reliability requirements of Rule 702 would be evaded through the simple expedient of proffering an expert in lay witness clothing. Rule 701(c) does not distinguish between expert and lay witnesses, but rather between expert and lay testimony.

D. The trial court has broad discretion in ruling on the admissibility of lay opinion evidence and such rulings are reviewed only for "manifest abuse of discretion." Alexis v. McDonald's Restaurants of Massachusetts, Inc., 67 F.3d 341, 347 (1st Cir. 1995).

E. **Owner's Testimony as to Value of Property**.

1. Generally, an owner of property is competent to give an opinion of value based upon substantial familiarity with the property. Shane v. Shane, 891 F.2d 976, 982 (1st Cir. 1989). "In testifying as to the value of his property, an owner is entitled to the privileges of an expert." Id.

2. However, the cases prior to 2000 should be reviewed carefully.

   a. On December 1, 2000, Rule 701 was amended by adding subsection (c) which excludes opinion testimony by lay witnesses which is "based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

   b. According to the advisory committee notes "Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing."

c. Notwithstanding the advisory committee's note on the addition of subsection (c) to Rule 701, the advisory committee's notes to Rule 702 regarding testimony by expert witnesses under Rule 702 states, with emphasis added:

> Thus within the scope of [Rule 702] are not only experts in the strictest sense of the word, e.g. physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

3. The 2000 amendment to Rule 701 clearly intended to limit opinion testimony from persons not qualified as experts under Rule 702. Therefore, in spite of the advisory committee notes to Rule 702, it appears that Rule 701 now restricts valuation opinion testimony by lay witness property owners.

a. Rule 701(c), by its terms, restricts an owner of property from giving an opinion of value based on more than personal knowledge.

b. In addition, if an owner of property is expected to give an opinion of value under Rule 702 that may rely on hearsay (i.e., market data, compilations, registry reports), then the property owner would presumptively need to qualify as an expert under Rule 702 and be subject to pretrial disclosures under FRCP 26(a)(2)(B) with respect to an expert report, list of qualifications, etc., as well as discovery depositions by an opposing party.

F. **Lay Witness Opinion Testimony Admissible**.

1. Lay witnesses may testify about their subjective interpretation of conversations in which they have participated as long as their opinions are rationally based on their perception and are helpful either to an understanding of their testimony or to the determination of a fact in issue. United States v. Lizardo, 445 F.3d 73, 83 (1st Cir. 2006).

2. A witness in a commodity business who occupied a desk near one of his partners, a cattle buyer, was not involved in cattle buying, had not traveled to the feedlots with his partner on buying trips and did not know specific details of the cattle buying business was permitted to testify. At trial, the agency status of his partner with the defendant was at issue. The trial

court allowed him to testify that on the basis of frequent daily telephone conversations with his partner and an employee of the defendant, he "understood" that his partner was buying cattle for the defendant. On appeal, the Fifth Circuit found that the witness's inference, although "tenuous," was predicated upon conduct he personally observed, was an inference that a normal person might draw from those observations, and is an inference that the trial court could, in its discretion, consider helpful in the determination of a disputed fact. Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc., 630 F.2d 250, 263-64 (5th Cir. 1980).

3. A self-employed real estate appraiser with four years of experience performing appraisals for lending institutions and over one thousand tax appeals at the local and state level was proffered as an expert for the debtor in an adversary proceeding under 11 U.S.C. § 505 against the state department of revenue over the real estate tax assessment of the debtor's motel. The trial court found that the witness's educational background consisted of a graduate degree in theology, no scholarly training in the fields of taxes, statistics or real estate and that the majority of his appraisal work had been in the area of residential property. The court held he did not qualify as an expert under Rule 702. However, the court allowed him to testify as a lay witness under Rule 701 based upon his investigation of assessments made by the DOR upon the debtor's property as well as eighteen parcels of commercial real estate sold in the debtor's county during the relevant time frame. Lipetzky v. Dept. of Revenue of the State of Montana (In re Lipetzky), 66 B.R. 648, 650-51 (Bankr. D. Mont. 1986).

4. In a dispute over the validity of a deed, the trial court allowed the son of the decedent to give lay opinion testimony that the signature on the deed did not appear to be that of his father and that he doubted that his father was able to see well enough at the time of the execution of the purported deed to place his name on the signature line. Although the testimony was admitted, the fact that the witness was an interested party with no special expertise in the area of handwriting analysis went to the weight to which the testimony was entitled. Pogge v. Neiderer (In re Neiderer), 196 B.R. 417, 419 (Bankr. C.D. Ill. 1996).

5. Based upon foundation evidence establishing that a DEA agent was regularly exposed to marijuana as part of his job, the First Circuit affirmed the admission of lay witness testimony by the DEA agent that he smelled marijuana during a search of the defendant's home because the testimony was based upon his perception and he was not required to qualify as an expert under Rule 702. United States v. Santana, 342 F.3d 60, 69 (1st Cir. 2003).

G. **Lay Witness Opinion Testimony Excluded**.

1. A debtor was competent to testify as to her opinion of value on her interest in certain items of personal property, but was unable to provide any detailed explanation of how she arrived at lump sum value for all items of property and had not prepared any valuation for individual items of property. Therefore the testimony had no credibility and was insufficient to establish a value for the property. In re Brown, 244 B.R. 603, 611-12 (Bankr. W.D. Va. 2000).

2. The former president of the debtor and an employee of the defendant submitted an affidavit in support of the chapter 7 trustee's defense of a motion for summary judgment by the defendant in an action against a former sole supplier of computer motherboards alleging grossly inflated pricing, preference, fraudulent transfer and seeking equitable subordination. The affidavit attested to the former president's various positions with the debtor and the defendant in upper-level management, including finance and that he had "personal knowledge of the facts contained herein." The affidavit recited that the defendant had grossly overcharged the debtor for computer motherboards. The court found that the affidavit did not establish that the former president was ever involved in procurement or inventory maintenance while employed by either company, or that he ever supervised those operations in a way to gain either knowledge or expertise in them. The affidavit was devoid of any evidence to establish the former president as an expert under Rule 702. The portion of the affidavit on inflated pricing was excluded since the affidavit did not establish a foundation for personal knowledge and, therefore, there was no foundation for a lay opinion under Rule 701. Leonard v. Mylex Corp. (In re Northgate Computer Sys., Inc.), 240 B.R. 328, 342-43 (Bankr. D. Minn. 1999).

3. A witness who did not qualify as an expert on real estate investment or real estate management could not testify as to the rent forecast, monthly budget and projected income that he prepared regarding the debtor's property. The witness's testimony was not admissible under Rule 701 because it was not based upon personal knowledge, but upon information from a variety of sources and his own opinions. In re Syed, 238 B.R. 133, 144 (Bankr. N.D. Ill. 1999).

VI. EXPERT WITNESS TESTIMONY. RULE 702.

A. **Gatekeeper role of court**.

1. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

"The test is whether, under the totality of the circumstances, the witness can be said to be qualified as an expert in a particular field through any one or more of the five bases enumerated in Rule 702–knowledge, skill, experience, training, or education." Santos v. Posada de Puerto Rico Assocs., Inc., 452 F.3d 59, 64 (1st Cir. 2006).

2. The trial judge must determine that the expert scientific testimony is both reliable and relevant. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 589, 113 S. Ct. 2786, 2795, 125 L. Ed. 2d 469 (1993); Beaudette v. Louisville Ladder, Inc., 462 F.3d 22, 25 (1st Cir. 2006); Marcano Rivera v. Med. Ctr. P'ship, 415 F.3d 162, 170 (1st Cir. 2005).

   a. The reliability of scientific testimony is determined by many factors including, but not limited to, the so-called Daubert factors: (a) can the theory or technique be (and has it been) tested, (b) has the theory or technique been subject to peer review and publication, (c) does the technique have a known or potential error rate and do standards exist for its use, and (d) is the theory or technique generally accepted by the relevant scientific community. Daubert, 509 U.S. at 592-94.

   b. In order to meet the requirement under Rule 702 that expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue," the testimony must be relevant. Relevant testimony must be tied to the facts of the case and must have a credible link to assisting the trier of fact to resolve a factual dispute in issue. Id. at 590.

3. The general holding in Daubert applies not only to testimony based upon "scientific" knowledge, but also to testimony based on "technical" and

"other specialized" knowledge. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 141, 119 S. Ct. 1167, 1170, 143 L. Ed. 2d 238 (1999).

a. The test of reliability is "flexible," and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Id. at 141.

b. Rule 702 and the principles in Daubert establish a standard of evidentiary reliability by requiring a "a valid connection to the pertinent inquiry as a precondition to admissibility." Daubert, 509 U.S. at 592.

c. The burden of demonstrating that expert testimony is competent, relevant and reliable rests with the proponent of the testimony. Kumho, 526 U.S. at 147-52.

d. A trial court has wide discretion in determining the admissibility of expert testimony. There is no particular procedure it is required to follow. In reviewing a trial court's decision about how to determine reliability and admissibility of expert testimony, a court of appeals is to apply an abuse of discretion standard. Kumho, 526 U.S. at 152; United States v. Vargas, 471 F.3d 255, 261 (1st Cir. 2006); Palmacci v. Umpierrez, 121 F.3d 781, 792 (1st Cir. 1997); Bogosian v. Mercedes-Benz of North America, Inc., 104 F.3d 472, 476 (1st Cir. 1997).

4. In response to Daubert and Kumho, Rule 702 was amended on December 1, 2000, by adding the following language at the end of the rule:

> if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case.

5. A trial court has broad discretion to exclude expert opinion evidence about the law that would impinge on the roles of the judge and the jury. Pelletier v. Main Street Textiles, LP, 470 F.3d 48, 54 (1st Cir. 2006).

6. Once a trial court finds that an expert's methodology is reliable, the expert is allowed to testify as to the inferences and conclusions he draws from it. United States v. Vargas, 471 F.3d 255, 261 (1st Cir. 2006). "It is not required that experts be blue-ribbon practitioners with optional certifications." United States v. Mahone, 453 F.3d 68, 71 (1st Cir. 2006). It is beyond debate, however, that a testifying expert should have achieved a meaningful threshold of expertise. Levin v. Dalva Bros., Inc., 459 F.3d 68, 78 (1st Cir. 2006); Prado Alvarez v. R.J. Reynolds Tobacco Co., Inc., 405 F.3d 36, 40 (1st Cir. 2005).

B. **Expert Testimony Admissible**.

1. In general, the customs and practices of an industry are proper subjects for expert testimony. Pelletier v. Main Street Textiles, LP, 470 F.3d 48, 55 (1st Cir. 2006).

2. The First Circuit reversed the trial court's exclusion of certain pharmacological and toxicology evidence and ordered a new trial. The evidence was relevant, but was excluded as unreliable. The appellate court found that the expert's methodology was supported in standard medical textbooks and a prestigious peer-reviewed medical journal, as well as several secondary sources, although some disagreement existed within the medical community on the meaning of the results of the methodology. The First Circuit held that Daubert neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance. It demands only that the expert's conclusion has been arrived at in a scientifically sound and methodologically reliable fashion. Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co., 161 F.3d 77 (1st Cir. 1998).

3. Where chapter 13 debtor's counsel failed to raise the Kumho issues by questioning the expertise of the City's witnesses on rehabilitation costs for the debtor's property at trial, the qualifications issue was waived. Kumho does not require a court to hold a full Daubert hearing each time a party offers expert witness testimony. The testimony of the debtor's expert, an experienced contractor, who was not a licensed plumber or electrician, and did not consult with a structural engineer, was found to have little credibility. Bankruptcy court denied reconsideration of stay relief order. In re Syed, 238 B.R. 133 (Bankr. N.D. Ill. 1999).

4. Creditors committee objected to the appropriateness of solvency opinions as a field of inquiry. The expert testified that he had obtained undergraduate and graduate degrees from prestigious universities, had

subsequently been employed with various financial firms, at the time of trial was a partner and national director of a valuation services group with a leading financial firm, and at a previous firm had developed solvency opinions as a financial product. The bankruptcy court overruled the committee's objection and found that the opinion would assist the court in determining the facts at issue in the proceeding. The Sixth Circuit BAP upheld the bankruptcy court's determination based upon the witness's experience in determining solvency of companies in complex financial circumstances and the nature of the issues in the proceeding. In re Valley-Vulcan Mold. Co., 237 B.R. 322, 335-36 (BAP 6th Cir. 1999).

5. An investment banker's prior representation of a shareholder and creditor of the debtor and his entitlement to a "success fee" on account of prior services to the debtor, if the transactions contemplated by the plan of reorganization were approved, did not taint or disqualify the firm from testifying as an expert witness at the confirmation hearing. A committee's objection to the qualifications of the same expert were overruled where the expert used the same methodologies and sources of data as the committee's expert. In re Zenith Elec. Corp., 241 B.R. 92, 102-03 (Bankr. D. Del. 1999).

6. Bankruptcy court found admissible under Daubert an expert's testimony on lost profits based upon the expert's use of generally accepted statistical methods, even though the court rejected some of the expert's conclusions based upon his selection of data. Elder-Beerman Stores Corp. v. Thomasville Furniture Indus. Inc. (In re Elder-Beerman Stores Corp.), 206 B.R. 142, 151-52 (Bankr. S.D. Ohio 1997).

7. At a hearing on confirmation of a chapter 11 plan of reorganization, a statistician and expert on estimating damages in mass tort cases testified that he had studied every breast implant verdict in the past 3 ½ years and found that no punitive damages had been awarded to plaintiffs. Based upon that foundation, the expert's opinion on the adequacy of a fund created under a plan of reorganization to pay future claims was admissible. The bankruptcy court made a factual finding that punitive damages would not be paid by a trustee in a chapter 7 case and that a plan that did not provide for payment of punitive damages did not violate the rights of individual tort claimants rejecting the plan and satisfied § 1129(a)(7) of the Bankruptcy Code. In re Dow Corning Corp., 244 B.R. 721, 728-29 (Bankr. E.D. Mich 1999).

8. In a criminal proceeding for bank fraud, the government proffered the testimony of a special agent of the FBI to testify as an expert on the

meaning and definition of check kiting and the common characteristics of check kiting. The district court found the testimony to be reliable and an aid to the trier of fact and allowed the testimony. The Eighth Circuit held that the trial judge did not abuse his discretion in allowing the expert testimony. United States v. Whitehead, 176 F.3d 1030, 1035 (8th Cir. 1999).

9. The issue of insolvency is a factual issue. Although the methodologies employed by the experts for each party in this case were not identical, both utilized valuation theories which were consistent with the flexible range of theories that experts use to analyze solvency. The court concluded that each side's objections to the other's expert went to the weight of the testimony, not its admissibility. Union Bank of Switzerland v. Deutsche Financial Services Corp., No. 98 Civ. 3251(HB), 2000 WL 178278, at *8 (S.D.N.Y. Feb. 16, 2000).

10. A witness, who possessed advanced degrees in art history, wrote a dissertation on a painter, had experience as an appraiser, and had published works on appraisal methodology for art and antiques, was qualified to offer expert opinions that an antique clock was unusual, because of its painted panels, and that substantial renovations to the clock would not alter its period of origin, which he assumed was authentic, in an action brought by buyers against an antiques dealer for fraud, negligent misrepresentation, breach of express warranties, unjust enrichment, and a violation of Massachusetts consumer protection statutes. Levin v. Dalva Bros., Inc., 459 F.3d 68, 79 (1st Cir. 2006).

C. **Expert Testimony Excluded**.

1. The First Circuit upheld the trial court's exclusion of the testimony of an expert CPA under Rule 702 because his opinion on the value of collateral was based upon insufficient data and internally inconsistent and unreliable methods. Ed Peters Jewelry Co., Inc. v. C&J Jewelry Co., Inc., 124 F.3d 252, 260-61 (1st Cir. 1997).

2. Plaintiff appealed the trial court's exclusion of expert testimony in a products case. The trial court ruled the testimony of the proffered expert inadmissible because his testimony was not within his area of expertise (qualified master mechanic, not an automotive design engineer), his methodology was unreliable (no evidence that expert's test method was generally accepted) and the factual foundation was inadequate (no evidence that transmission was in substantially the same condition as it was at the time of the accident). The First Circuit upheld the trial court's

exclusion of the expert testimony. Bogosian v. Mercedes-Benz of North America, Inc., 104 F.3d 472, 476-80 (1st Cir. 1997).

3. At trial the district court allowed expert testimony by an accountant on lost profits based upon representations from the plaintiff's management on the mix of sales. On appeal, the First Circuit found that other evidence in the record contradicted the expert's assumption and that the expert's testimony was dependent upon a product mix which the record as a whole did not support and which he had not independently verified. Admission of the expert's testimony was an abuse of discretion. The judgment was vacated and a new trial ordered. Irvine v. Murad Skin Research Labs., Inc., 194 F.3d 313 (1st Cir. 1999).

4. A bankruptcy judge did not abuse his discretion in excluding the testimony of the chief title attorney for a national title insurance company and an Indiana title attorney on the effect of a recorded document in the chain of title on the state of the title. The bankruptcy judge excluded the testimony because the ultimate question before the court was a legal conclusion and, in the court's view, the expert testimony would not assist the court in understanding the evidence. Sagamore Park Centre Assocs. Ltd. Partnership v. Sagamore Park Properties, 200 B.R. 332, 341 (N.D. Ind. 1996).

5. Creditors objecting to confirmation of a chapter 11 plan of reorganization offered expert testimony by a qualified CPA regarding the sufficiency of a fund to be established under the plan to satisfy anticipated tort claims against it. The bankruptcy judge found that the creditors failed to establish that the proposed expert's opinions were based upon reliable data and methodology (i.e., reliance on limited anecdotal data) and excluded the evidence. The bankruptcy judge did allow testimony of the plan proponent's expert on the same issue because he had collected data from what he thought was a comparable mass tort settlement rather than relied on anecdotal information. In re Dow Corning Corp., 237 B.R. 364, 374 (Bankr. E.D. Mich 1999).

6. Bankruptcy court refused to admit any expert testimony on the reasonableness of a trustee's fees in a chapter 7 proceeding where the trustee had disbursed $101,492,332 and was seeking the maximum fee allowed under § 326 of the Bankruptcy Code. The trustee offered the testimony of three panel trustees from the jurisdiction and a nationally known panel trustee from another jurisdiction. A secured creditor offered the testimony of a respected local attorney who had never served as a trustee or represented a trustee. The bankruptcy court excluded all expert

testimony and held that evidence of the type proffered by the parties lacked the sort of reliability predicated on a reliable foundation in a relevant discipline. The court stated that the proffered evidence was more in the nature of anecdotal hearsay evidence or pure legal conclusions that could just as well be, and were, presented by counsel in their arguments. In re Miniscribe Corp., 241 B.R. 729, 744-43 (Bankr. D. Colo. 1999).

7. In a trademark infringement case, the plaintiff sought to introduce evidence of lost profits due to the defendant's infringing activity. It proffered as an expert an individual with 15 years experience in the industry but no formal training in accounting. The expert also did not conduct an independent examination of the defendant's sales figures, but instead relied upon figures provided by the plaintiff's lawyers. On appeal, the Fifth Circuit held that the trial judge's exclusion of the evidence based upon the witness's lack of training and failure to conduct an independent analysis of the defendant's sales figures was not an abuse of discretion. Seatrax, Inc. v. Sonbeck Int'l, Inc., 200 F.3d 358, 371-72 (5th Cir. 2000).

8. An adversary proceeding commenced by a debtor was withdrawn to federal district court when the defendant requested a jury trial. The debtor proffered the testimony of a management consultant who had prepared a report on the disputed contract, its terms and an analysis of lost profits as an expert witness. The trial judge excluded expert testimony which would purport to interpret the parties' intentions, contract language, and whether there was a breach of contract because the testimony would do nothing more than "mirror" testimony offered by fact witnesses or argument offered by counsel and pertained to matters which a jury was capable of understanding and deciding without an expert's help. The court did permit expert testimony on damages. Tasch, Inc. v. Sabine Offshore Serv., Inc. (In re Tasch, Inc.), Nos. 97-15901 JAB and 98-3746 G, 1999 WL 596261 (E.D. La. Aug. 5, 1999).

9. The First Circuit upheld the exclusion of testimony by a contractor's employee's safety expert as to industry customs and practices in a negligence action against the premises owner, arising from the employee's injury while operating a forklift, since the expert failed to inspect the premises and had no personal knowledge about the premises conditions, his testimony on customs and practices could only have gone toward establishing a standard of care, and other evidence in the form of applicable regulations and premises owner's safety policies was sufficient to establish the standard of care. There was no showing that the expert's testimony would have demonstrated a higher standard of care. Pelletier v. Main Street Textiles, LP, 470 F.3d 48, 55-56 (1st Cir. 2006).

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In re:	)	Chapter
	)	Case No. JNF
	)	
	)	
Debtors	)	
	)	
	)	
	)	
Movant(s)	)	Contested Matter
v.	)	
	)	
Respondent(s)	)	
	)	

PRETRIAL ORDER

1. The parties are ordered to confer pursuant to Fed. R. Civ. P. 26, made applicable to this proceeding by Fed. R. Bankr. P. 7026, within 45 days of the date of this order and to file no later than_____, a certification that the rule 26(f) conference has taken place, as well as a written report outlining a proposed discovery plan.

2. Discovery shall be completed on or before _____, unless the court, upon appropriate motion and consideration of the discovery plan, alters the time and manner of discovery.

3. The Parties are ordered to file by_____, a Joint Pretrial Memorandum approved by all counsel and unrepresented parties, which shall set forth the following:

(A) The name and, if not previously provided, the address and telephone number of

each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises.

(B) A list of witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony.

(C) A list of witnesses intended to be called as experts, together with a statement as to an objection to their qualification.

(D) An appropriate identification of each document or other exhibit, other than those to be used for impeachment, in the sequence in which they will be offered, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

(E) A statement of any objections, together with the grounds therefor, reserved as to the admissibility of a deposition designated by another party and to the admissibility of documents or exhibits. Objections not so disclosed, other than an objection under Rule 402 and 403 of the Federal Rules of Evidence, shall be deemed waived unless excused by the court for good cause shown.

(F) A statement confirming that the parties have exchanged copies of the exhibits.

(G) Facts which are admitted and which require no proof.

(H) The issues of fact which remain to be litigated (evidence as the trial shall be limited to these issues).

(I) The issues of law to be determined.

(J) A statement summarizing the Plaintiff's case.

(K) A statement summarizing the Defendant's case.

(L) The estimated length of the trial.

4. Any dispositive motions must be filed no less than seven business days prior to the date fixed for the filing of the Joint Pretrial Memorandum or the relief sought in such motion shall be

deemed to have been waived.

5. Failure to strictly comply with all of the provisions of this order may result in the automatic entry of a dismissal or a default as the circumstances warrant in accordance with Fed. R. Civ. P. 16, made applicable to this proceeding by Fed. R. Bankr. P. 7016.

6. A pretrial conference or trial shall be scheduled after the filing of the Joint Pretrial Memorandum.

By the Court,

_____
Joan N. Feeney
United States Bankruptcy Judge

Date:

cc:

DRAFT FOR DISCUSSION

DISCOVERY IN A CONTESTED MATTER IN BANKRUPTCY COURT

(Presented by Patrick P. Dinardo, Frederick D. Grant, Jr. and Robert J. Kerwin)

Once a motion is opposed or an objection to a claim is lodged, the dispute becomes a "contested matter," to which the Bankruptcy Rules (applicable in adversary proceedings*) apply. These Rules allow for all the discovery otherwise available in civil litigation. See Fed. R. Bankr. P. 9014(c). Subpoenas under Rule 9016 may also be issued (incorporating Fed. R. Civ. P. 45 in its entirety).

The utility of discovery being allowed in a contested matter cannot be doubted. The tools available to probe and investigate your adversary's case include requests for production of documents (and the analog for third parties, a subpoena duces tecum), written interrogatories, and, one of the most powerful tools, requests for admissions. Examples of these discovery devices, adapted to the hypothetical involving Wendy Livefree's objection to the claim by Acme Loan Servicing, Inc., are attached hereto as follows:

1. Debtor's Request for Production of Documents to Claimant Acme Loan Servicing, Inc. (**Exhibit 1**).
2. Debtor's Interrogatories to Claimant Acme Loan Servicing, Inc. (**Exhibit 2**).
3. Debtor's Request for Admissions to Claimant Acme Loan Servicing, Inc. (**Exhibit 3**).
4. Debtor's 30(B)(6) Subpoena Duces Tecum to Third Party Roderick England (**Exhibit 4**).

* For a list of what constitutes an "adversary proceeding", see Fed. R. Bankr. P. 7001. Sometimes what starts out as a contested matter may actually be considered an adversary proceeding. See, eg. In re Miramar Resources, Inc., 176 B.R. 45 (Bankr. N. Colo. 1994) (where a claim objection joined with a request for other relief, of the kind specified in Rule 7001, was considered an adversary proceeding).

Often the Court may issue a procedural order which may govern the parties' pre-trial activity. An example of such an order is annexed hereto as **Exhibit 5**.

Please note that there are some exceptions to the discovery rules otherwise applicable in contested matters, and these include various mandatory disclosure requirements contained in Fed. R. Bankr. P. 7026(a) and (f). See Fed. R. Bankr. P. 9014(c). Particularly with the recent changes to the Rule 26 of the Federal Rules, effective December 1, 2010 (relating to expert witness disclosures), these exceptions can be very significant. Essentially, the changes to Rule 26 extend work product protection to draft reports and lawyer/expert communications, but open up the way for discovery into certain aspects of the expert's analysis. A blackline of these changes in Rule 26(a) and (b) is **Exhibit 6** hereto.

To the extent you think your case may be advanced by a determination from the Court as to the type of proceeding you are in, you should feel free to ask for it. Most judges will generally articulate that the matter will (or will not) be considered an adversary proceeding or contested matter, so that the parties can have a clear understanding of which rules will apply.

EXHIBIT 4

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
SOUTHERN DIVISION

In Re: **WENDY LIVEFREE DEBTOR,** **Debtor.**	**Chapter 13** **Case No. 10-98332-SES**

DEPOSITION SUBPOENA DUCES TECUM

TO: Keeper of Records
Acme Loan Servicing, Inc.
[address]

GREETINGS:

YOU ARE HEREBY REQUIRED, pursuant to applicable provisions of Federal Rule of Civil Procedure 30(b)(6) and Federal Rules of Bankruptcy Procedure 7030 and 9014, to appear for a deposition upon oral examination by Debtor Wendy Livefree Debtor ("Debtor") through her attorneys, at the offices of _____, Boston, Massachusetts 02109 at **10:00 a.m.** on **_____, 2011**, to give evidence of what you know relating to the above-captioned contested matter between Debtor in the above-captioned Chapter 13 bankruptcy case and Successor Bank, N.A. as Trustee for the holders of Asset-backed Certificates, Series 2006-OOPS-007 (the "Bank"). The deposition will be conducted by stenographic means before a Notary Public or some other person authorized by law to administer oaths. The oral examination will continue from day to day until completed. You are also required to bring to the deposition all documents listed on **Exhibit A** attached hereto.

In lieu of appearing, you may produce to _____ at the aforementioned address, date and time, certified copies of all documents requested in **Exhibit A**

attached hereto. An examination may or may not thereafter be rescheduled after review of those documents. If you object to the production of any such documents or cannot produce a true and accurate copy of all such documents at the aforementioned address, date and time, an oral examination is required.

Hereof fail not, as you will answer your default under the pains and penalties in the law in that behalf made and provided.

Dated as of the ____ day of _____, 2011.

By: _____

Attorney for Debtors

EXHIBIT 4

EXHIBIT A

DEFINITIONS AND INSTRUCTIONS

1. The uniform definitions set out in Local Rule 26.5(c) of the United States District Court for the District of Massachusetts govern these requests and are incorporated by reference herein.

2. Unless otherwise indicated, the relevant time period for each Request is the period from January 1, 1970 to the present date.

3. You are required to produce and permit inspection and copying of every requested document which is in your possession, custody or control or which is in the possession, custody or control of your agents, employees, attorneys, representatives, or any other persons or entities acting or purporting to act on your behalf, without regard to whether or not their relationship with you currently exists or has been terminated.

4. You are required to produce pursuant to this request the original of every requested document and any copies that have been altered in any way or which contain on their face additional markings, comments or information. If the original of any document is not available, you shall produce the most legible copy.

5. If any documents sought by these Requests has been destroyed, and no copy exists within your possession, custody or control, you shall identify the document and state the date of its destruction, and the reason for the destruction.

6. You are required to supplement seasonably all of their responses to these requests to include documents acquired after such response.

7. A copy of Fed. R. Civ. P. 45(c) and (d) is attached for your review.

EXHIBIT 4

Documents to be Produced

1. Please produce an original copy of the Adjustable Rate Note said to have been signed by Debtor on or about October 23, 2006.

2. Please produce an original copy of the Mortgage said to have been signed by Debtor on or about October 23, 2006.

3. Please produce all documents (including all computer or digital media-stored data) relating to Debtor, her residential property, and the subject transaction and/or account, or which are indexed, filed or retrievable under her name or any number, symbol, designation or code (such as a transaction number or Social Security number) assigned to her or to the subject transaction(s), including but not limited to all documents relating to the origination, approval, disbursement, assignment and administration of the loan(s), all agreements between Forerunner Bank and Successor Bank, and all correspondence related to the subject transaction.

4. Please produce all documents concerning the "Limited Power of Attorney" given by Frontrunner Bank to Acme Loan Servicing, Inc. and any documents which Acme has signed under, pursuant to or in accordance with such "Limited Power of Attorney."

In re: LILIA SHAPOVAL, Debtor
Case No. 10-30175-HJB
UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
WESTERN DIVISION
DATED: November 19, 2010
MEMORANDUM OF DECISION

Before the Court is a Motion filed by Creditor Wells Fargo Bank, N.A., as Trustee for Merrill Lynch Mortgage Investors Trust Mortgage Loan Asset-Backed Certificates, Series 2004-OPT1 and/or its successors and assigns for Relief from the Automatic Stay ("Wells Fargo," the "Motion for Relief ") relative to property owned by Lilia Shapoval (the "Debtor") at 71-73 Beaumont Street, Springfield, Massachusetts (the "Property"). Among the issues remaining for resolution, one predominates: whether the alleged assignee of a note secured by property located in the Commonwealth of Massachusetts has standing to file a motion for relief from the automatic stay where its rights as assignee are claimed through an allonge not affixed to the note.

I. FACTS AND POSITIONS OF THE PARTIES

On February 2, 2010, the Debtor filed a Chapter 13 case in this Court. In her

Page 2

Schedule A-Real Property, she listed her ownership interest in 73 Beaumont Street, Springfield, Massachusetts and valued the Property at $164,000. In her Schedule D-Creditors Holding Secured Claims, the Debtor identified four encumbrances on the Property; respectively, a first mortgage held by Wells Fargo and three nonconsensual liens held by the City of Springfield, the Springfield Water and Sewer Commission, and a former attorney, all totaling the sum of $143,033.68. The Debtor's Chapter 13 plan (the "Plan") proposed payments to the lienholders but none to Wells Fargo.

Wells Fargo filed a proof of claim on February 16th, listing, *inter alia,* a prepetition arrearage of $34,680.62. And on February 18th, Wells Fargo objected to the Plan on the grounds that it failed to address the claim of Wells Fargo. The Debtor failed to respond to Wells Fargo's objection to the Plan, and on March 9th, this Court sustained Wells Fargo's objection to the Plan and ordered the Debtor to file an amended plan within 30 days. The Debtor never filed the an amended plan or sought reconsideration of the March 9th order.

On April 23rd, the Debtor filed an objection to the Wells Fargo proof of claim, maintaining that the note attached to the proof of claim failed to show any indorsement to Wells Fargo. Wells Fargo responded on June 16th, by attaching to its response a copy of an allonge to the mortgage note. The allonge was indorsed in blank. On June 18th, Wells Fargo filed the instant Motion for Relief under 11 U.S.C. § 362 (d)(1) and (2), arguing that its claim was not adequately protected because the Debtor failed to make postpetition payments, there was no equity in the Property, and the Property was not necessary for an effective reorganization.[1]

Page 3

The Debtor timely objected to the Motion for Relief, and a hearing was scheduled. At the hearing, the only issue of substance argued was the Debtor's contention that Wells Fargo had no standing to prosecute the Motion for Relief because the indorsement of the mortgage note to Wells Fargo was invalid-the allonge not having been affixed to the note-the same issue presented by the Debtor in her objection to Wells Fargo's proof of claim. Well Fargo's counsel responded that the two were affixed (at least now), but that, in any event, attachment of a mortgage note and allonge is not a requirement under

Massachusetts law. This Court took the latter contention under advisement.[2]

II. DISCUSSION

In 1998, the Massachusetts legislature amended Article 3 of its adopted version of the Uniform Commercial Code. See Mass. Gen. Laws ch. 106, § 3-101, et seq. Under the pre-1990 version of Article 3, § 3-202 provided that the indorsement of an instrument must be written on the instrument itself if space was available or on a paper "so firmly affixed thereto as to become a part thereof." Mass. Gen. Laws ch. 106, § 3-202(2) (1998)

Page 4

(repealed 1998).

The 1998 amendment redrafted the section on indorsement to read, in relevant part:

> (a) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made *on an instrument* for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. *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.*

Mass. Gen. Laws ch. 106, § 3-204(a) (1999) (emphasis added). Official Comment 1 to § 3-204 further clarifies that "[t]he last sentence of subsection (a) is based on subsection (2) of former Section 3-202. An indorsement on an allonge is valid even though there is sufficient space on the instrument for an indorsement." Accordingly, the amendment was intended to liberalize the utilization of an allonge by permitting the use of a separate sheet regardless of whether the original document has space remaining for further indorsements.

Nevertheless, it is well-settled that the 1998 amendment maintained the requirement that an allonge be affixed to the original instrument. See Dyck-O'Neal v. Pungitore, No. 01-P-1775, 2003 WL 22998879, at *2, n.6 (Mass. App. Ct. Dec. 22, 2003) (applying the pre-1998 statute but suggesting, under those facts, the result would be identical under the amendments); In re Weisband, 427 B.R. 13, 19 (Bankr. D. Ariz. 2010) (finding under an identical Arizona provision that an unattached allonge that was not included with a proof of claim and later submitted did not sufficiently prove a creditor's holder in due course status required to obtain relief from the automatic stay); Big Builders, Inc. v. Israel, 709 A.2d 74, 76 (D.C. 1998) (finding under an identical District of Columbia provision that the

Page 5

language change from "firmly affix" to "affix" still requires physical attachment).

Since the Debtor's mortgage was executed on March 24, 2004, well after the adoption of the 1998 amendments, the Court simply rules today that Wells Fargo's standing to prosecute the instant Motion for Relief is dependent on whether the purported allonge which contains the indorsement on which Wells Fargo relies was affixed to the mortgage note. An evidentiary hearing is now required to make findings on that question.

III. CONCLUSION

The Court holds that, pursuant to Mass. Gen. Laws ch. 106 §3-204, the indorsement of a

note set forth in an allonge is not valid if the allonge is not affixed to the note. An evidentiary hearing is required to determine whether the allonge was ever affixed to the note and if so, when and what occurred thereafter. Because the Debtor's objection to Wells Fargo's proof of claim raises identical issues of fact, an evidentiary hearing on that objection will be consolidated for the sake of judicial economy.

A separate order consistent with this Memorandum will issue accordingly.

DATED: November 19, 2010

By the Court,

Henry J. Boroff

United States Bankruptcy Judge

Notes:

[1.] Wells Fargo claimed that the total postpetition arrears at the time of the filing of the motion were $2,902.42, plus attorneys' fees. It also maintained that, while a January 2010 Broker's Price Opinion valued the Property at $105,000, giving it a liquidation value of $97,721.20, encumbrances on the Property totaled $155,033.68, including approximately $150,000 owed to Wells Fargo.

[2.] The Court feels compelled here to raise an additional point. Debtor's counsel failed to respond to Well Fargo's objection to confirmation of the Plan. That is particularly troubling since the lender argued therein that the Plan was unconfirmable precisely because it failed to provide for payments to Wells Fargo. The Court sustained the objection and ordered the Debtor to file an amended plan. Debtor's counsel failed to seek reconsideration of that order and failed to comply with its terms. Wells Fargo could well have argued here (with a disposition that the Court will not predict) that the establishment of a claim in some amount by Wells Fargo is now the law of the case. That argument not having been timely made, the Court considers it waived. But counsel for debtors are cautioned not to rely on similar waivers or accommodations by lenders nor should they assume that they will prevail on exceptions to the "law of the case" doctrine, particularly when they have not ensured that their clients are complying with court orders. Such risks are unwarranted and expose attorneys to court sanctions and/or professional liability.

EXHIBIT 6

SULLIVAN & WORCESTER

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E-Discovery Updates > Posts > Amendment to FRCP Rule 26 (Disclosure of Expert Testimony)

12/1/2010

Amendment to FRCP Rule 26 (Disclosure of Expert Testimony)

As reported in Digital Discovery and e-Evidence, effective today, the new Federal Rule 26 is now in effect. This new rule change is intended to impact how lawyers use expert witnesses and allow for more effective, open collaboration that is also cost efficient.

The purpose of the rule change is to remove some of the discovery risks associated with the use of expert testimony that may have prevented open and collaborative discussions between counsel and expert witnesses.

According to the article, it is because of the interpretation of the of old rule, that lawyers would take additional steps to avoid creating discoverable information. For example, lawyers would hire two experts – one for consultation and one to provide testimony. Or, alternatively, this led attorneys to discourage experts from preparing any draft report or communicating with counsel in writing.

The new Rule 26 ***extends*** the work-product protection to draft reports, disclosures, and, with some exceptions, communications between an attorney and their expert.

Open to discovery are:

(1) Compensation of the expert's study or testimony
(2) Facts or data provided to the expert that he/she used to form their opinion; and
(3) Assumptions provided to the expert that are relied upon in forming an opinion.

Posted at 9:41 AM by Isotti, Michael A. | Permalink | Email this Post | Comments (0)

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Title

Body *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

****

(2) Disclosure of Expert Testimony.

(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) *Witnesses Who Must Provide a Written Report.* Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report - prepared and signed by the witness - if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(i) a complete statement of all opinions the witness will express and the basis and reasons for them;

(ii) the facts or data ~~or other information~~ considered by the witness in forming them;

(iii) any exhibits that will be used to summarize or support them;

(iv) the witness's qualifications, including a list of all publications authored in the previous ten years;

(v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(vi) a statement of the compensation to be paid for the study and testimony in the case.

*New material is underlined; matter to be omitted is lined through.

(C) *Witnesses Who Do Not Provide a Written Report.* Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, the Rule 26(a)(2)(A) disclosure must state:

(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(ii) a summary of the facts and opinions to which the witness is expected to testify.

(D~~C~~) *Time to Disclose Expert Testimony.* A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(i) at least 90 days before the date set for trial or for the case to be ready for trial; or

(ii) if evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E~~D~~) *Supplementing the Disclosure.* The parties must supplement these disclosures when required under Rule 26(e).

****

(b) Discovery Scope and Limits.

****

(4) Trial Preparation: Experts.

(A) *Deposition of an Expert Who May Testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) *Trial Preparation Protection for Draft Reports or Disclosures.* Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form of the draft.

(C) *Trial Preparation Protection for Communications Between Party's Attorney and Expert Witnesses.* Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) Relate to compensation for the expert's study or testimony;

(ii) Identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed, or

(iii) Identify assumptions that the party's attorney provided and that the expert relied upon in forming the opinions to be expressed.

(DB) *Expert Employed Only for Trial Preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(EC) *Payment.* Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (DB); and

(ii) for discovery under (DB), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
SOUTHERN DIVISION

In Re: **WENDY LIVEFREE DEBTOR,** **Debtor.**	**Chapter 13** **Case No. 10-98332-SES**

DEBTOR'S FIRST REQUEST FOR ANSWERS TO WRITTEN INTERROGATORIES

Pursuant to Fed. R. Bankr. P. 7033 and Fed. R. Civ. P. 33 as incorporated therein, Wendy Livefree Debtor, Debtor (the "Debtor") hereby requests that Acme Loan Servicing, Inc, as representative of Successor Bank, N.A. as Trustee for the holders of Asset-backed Certificates, Series 2006-OOPS-007 (the "Bank") answer the following interrogatories in writing, under oath, in accordance with the instructions and definitions which follow, within not less than thirty days after the date of service of these interrogatories.

INSTRUCTIONS AND DEFINITIONS

1. With respect to each answer to each interrogatory, please state whether the answer is within your personal knowledge and, if not, the names and positions of the person or persons to whom the answer is a matter of personal knowledge.

2. Each interrogatory is to be deemed a continuing one. If, after serving an answer, you obtain or become aware of any further information pertaining to any of these interrogatories, you are requested to serve a supplemental answer setting forth such information.

3. The uniform definitions set out in Local Rule 26.5(c) of the United States District Court for the District of Massachusetts govern these interrogatories and are incorporated by reference herein.

INTERROGATORIES

1. Please identify each person responding to these interrogatories and the request for production of documents and the request for admissions, as served by Debtor together with these interrogatories.

2. Please identify each person who was contacted, or who assisted in any way, in the formulation of your responses to these interrogatories and the request for production of documents and the request for admissions, as served by Debtor together with these interrogatories.

3. Please state the basis for your contention that the Note was properly transferred to the Bank.

4. Please state the basis for your contention that the Mortgage was properly assigned to the Bank.

5. Please state the basis for your contention that the Confirmatory Assignment of Mortgage, as attached to the Amended Proof of Claim filed by the Bank on December 16, 2010, is effective.

6. Please state the basis for your contention that the Confirmatory Assignment of Mortgage, as attached to the Amended Proof of Claim filed by the Bank on December 16, 2010, was validly signed by Acme Loan Servicing, Inc. under or pursuant to the "Limited Power of Attorney," also attached to the Amended Proof of Claim.

7. Please identify each expert witness whom you intend to call at the trial of this action and, with respect to each, state: the subject matter upon which each expert is expected to testify; the substance of the facts and opinions to which the expert is expected to testify; a summary of the grounds for each opinion; and a summary of the qualifications of the expert.

8. With reference to each and every document, exhibit, or other tangible item which you expect to introduce into evidence at trial, please state the following: (a) identify each such document, exhibit, or other tangible item; and (b) identify the present location and person having custody of each such document, exhibits, or other tangible item.

EXHIBIT 2

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
SOUTHERN DIVISION

In Re: **WENDY LIVEFREE DEBTOR,** **Debtor.**	**Chapter 13** **Case No. 10-98332-SES**

DEBTOR'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to Fed. R. Bankr. P. 7034 and Fed. R. Civ. P. 34 as incorporated therein, Wendy Livefree Debtor, Debtor (the "Debtor") hereby requests that Acme Loan Servicing, Inc, as representative of Successor Bank, N.A. as Trustee for the holders of Asset-backed Certificates, Series 2006-OOPS-007 (the "Bank") produce the documents listed below for inspection and copying within thirty days after the date of service of this request, in accordance with the instructions and definitions set out below.

INSTRUCTIONS AND DEFINITIONS

1. If any document responsive to this request is withheld by reason of any assertion of privilege, please identify in writing each document withheld. If any portion of a document is claimed to be subject to privilege, redact and identify each portion, and produce the document. As to each document or portion thereof that is withheld, please produce a Privilege Log in conformity with the requirements of Fed. R. Civ. P. 26(b)(5).

2. This request shall be deemed continuing so as to require prompt supplemental production if you locate or obtain possession, custody or control of additional responsive documents at any time through the completion of trial.

3. The uniform definitions set out in Local Rule 26.5(c) of the United States District Court for the District of Massachusetts govern these requests and are incorporated by reference herein.

DOCUMENT REQUESTS

1. Please produce an original copy of the Adjustable Rate Note said to have been signed by Debtor on or about October 23, 2006.

2. Please produce an original copy of the Mortgage said to have been signed by Debtor on or about October 23, 2006.

3. Please produce all documents (including all computer or digital media-stored data) relating to Debtor, her residential property, and the subject transaction and/or account, or which are indexed, filed or retrievable under her name or any number, symbol, designation or code (such as a transaction number or Social Security number) assigned to her or to the subject transaction(s), including but not limited to all documents relating to the origination, approval, disbursement, assignment and administration of the loan(s), all agreements between Forerunner Bank and Successor Bank, and all correspondence related to the subject transaction.

4. Please produce all documents identified in your answer to Interrogatory No. 3.

5. Please produce all documents identified in your answer to Interrogatory No. 4.

6. Please produce all documents identified in your answer to Interrogatory No. 5.

7. Please produce all documents identified in your answer to Interrogatory No. 6.

8. Please produce all documents concerning the “Limited Power of Attorney” given by Frontrunner Bank to Acme Loan Servicing, Inc. and any documents which Acme has signed under, pursuant to or in accordance with such "Limited Power of Attorney."

9. Please produce all documents you intend to offer as exhibits at the time of trial.

EXHIBIT 3

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
SOUTHERN DIVISION

In Re: **WENDY LIVEFREE DEBTOR,** **Debtor.**	**Chapter 13** **Case No. 10-98332-SES**

DEBTOR'S FIRST REQUEST FOR ADMISSIONS

Pursuant to Fed. R. Bankr. P. 7036 and Fed. R. Civ. P. 36 as incorporated therein, Wendy Livefree Debtor, Debtor (the "Debtor") hereby requests that Acme Loan Servicing, Inc, as representative of Successor Bank, N.A. as Trustee for the holders of Asset-backed Certificates, Series 2006-OOPS-007 (the "Bank") shall admit or deny, under oath, the truth of each of the statements contained herein in a writing served on plaintiff's counsel within thirty days after the date of service of this request, in accordance with the instructions and definitions set out below.

INSTRUCTIONS AND DEFINITIONS

1. In accordance with Rule 7036, each matter of which an admission is requested is admitted unless, within thirty (30) days after service of this request, the Bank serves upon Debtor either (1) a written statement signed under the penalties of perjury specifically (a) denying the matter or (b) setting forth in detail why the Bank cannot truthfully admit or deny the matter; or (2) a written objection addressed to the matter, signed by the Bank. If an objection is made, the reasons therefore shall be stated. A denial shall fairly meet the substance of the requested admission, and when good faith requires that the Bank qualify

its answer to deny only a part of the matter of which an admission is requested, it shall specify so much of it as is true and qualify or deny the remainder. The Bank may not give lack of information or knowledge as a reason for failure to admit or deny unless it states that it has made reasonable inquiry and that the information known or readily obtainable by the Bank is insufficient to enable the Bank to admit or deny.

2. Each request is to be deemed a continuing one. If, after serving an answer, you obtain or become aware of any further information pertaining to any of these requests, you are requested to serve a supplemental answer setting forth such information.

3. The uniform definitions set out in Local Rule 26.5(c) of the United States District Court for the District of Massachusetts govern these requests and are incorporated by reference herein.

REQUESTS FOR ADMISSION

Admit or deny the following:

1. No endorsement appears on the copy of the Adjustable Rate Note which is attached to the Amended Proof of Claim filed by the Bank on December 16, 2010.

2. The Bank does not have an original of the Adjustable Rate Note it says was signed by Debtor on or about October 23, 2006.

3. The Bank does not know the location of the original copy of the Adjustable Rate Note it says was signed by Debtor on or about October 23, 2006.

4. The Bank does not know who now holds the original copy of the Adjustable Rate Note it says was signed by Debtor on or about October 23, 2006.

5. No Assignment of the Mortgage signed by the Debtor in favor of Frontrunner Bank was ever recorded at the Southern District Registry of Deeds.

6. The Confirmatory Assignment was notarized and signed on or after December 12, 2010.

DISCOVERY IN A CONTESTED MATTER IN BANKRUPTCY COURT

(Presented by Patrick P. Dinardo, Frederic D. Grant, Jr. and Robert J. Kerwin)

Once a motion is opposed or an objection to a claim is lodged, the dispute becomes a "contested matter," to which the Bankruptcy Rules (applicable in adversary proceedings[*]) apply. These Rules allow for all the discovery otherwise available in civil litigation. See Fed. R. Bankr. P. 9014(c). Subpoenas under Rule 9016 may also be issued (incorporating Fed. R. Civ. P. 45 in its entirety).

The utility of discovery being allowed in a contested matter cannot be doubted. The tools available to probe and investigate your adversary's case include requests for production of documents (and the analog for third parties, a subpoena duces tecum), written interrogatories, and, one of the most powerful tools, requests for admissions. Examples of these discovery devices, adapted to the hypothetical involving Wendy Livefree's objection to the claim by Acme Loan Servicing, Inc., are attached hereto as follows:

1. Debtor's First Request for Answers to Written Interrogatories (**Exhibit 1**).
2. Debtor's First Request for Production of Documents (**Exhibit 2**).
3. Debtor's First Request for Admissions (**Exhibit 3**).
4. Debtor's 30(B)(6) Subpoena Duces Tecum to Acme Loan Servicing, Inc. (**Exhibit 4**).

Often the Court may issue a procedural order which may govern the parties' pre-trial activity. An example of such an order is annexed hereto as **Exhibit 5**.

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[*] For a list of what constitutes an "adversary proceeding", see Fed. R. Bankr. P. 7001. Sometimes what starts out as a contested matter may actually be considered an adversary proceeding. See, eg. In re Miramar Resources, Inc., 176 B.R. 45 (Bankr. N. Colo. 1994) (where a claim objection joined with a request for other relief, of the kind specified in Rule 7001, was considered an adversary proceeding).

Please note that there are some exceptions to the discovery rules otherwise applicable in contested matters, and these include various mandatory disclosure requirements contained in Fed. R. Bankr. P. 7026(a) and (f). See Fed. R. Bankr. P. 9014(c). Particularly with the recent changes to the Rule 26 of the Federal Rules, effective December 1, 2010 (relating to expert witness disclosures), these exceptions can be very significant. Essentially, the changes to Rule 26 extend work product protection to draft reports and lawyer/expert communications, but open up the way for discovery into certain aspects of the expert's analysis. A blackline of these changes in Rule 26(a) and (b) is **Exhibit 6** hereto.

To the extent you think your case may be advanced by a determination from the Court as to the type of proceeding you are in, you should feel free to ask for it. Most judges will generally articulate that the matter will (or will not) be considered an adversary proceeding or contested matter, so that the parties can have a clear understanding of which rules will apply.

ABI WINTER LEADERSHIP CONFERENCE
Camelback Inn
Scottsdale, AZ
December 9-11, 2010

RESOLVED:
A MORTGAGE SERVICER LACKS STANDING AS A REAL PARTY IN INTEREST

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These materials[1] summarize several prominent decisions by bankruptcy courts faced with deciding whether to grant relief to purported lenders, servicers and/or their agents in bankruptcy cases. These cases address the constitutional standing and real party in interest status of parties where they cannot show they hold the past due note or that they are entitled to enforce it.

INTRODUCTION

In the past decade, electronic information and data transmission have increased the speed at which we do business. These seemingly efficient tools have made it easier for banks to transfer funds and buy and sell notes without leaving a paper trail. However, now that the real estate bubble has burst, courts are demanding to see the paper trail for promissory notes before allowing lenders to foreclose on real property. As required by the Constitution, courts must confirm that a lender actually has standing and will benefit from the court granting relief from an automatic stay before the court can do so. Below is a brief description of the concepts related to standing and real parties in interest, followed by a summary of several different cases addressing these issues.

DISCUSSION

In the cases below, the courts discuss whether the party seeking relief from the automatic stay has standing to bring the motion and/or is the real party in interest. Many courts use the terms of standing and real party in interest interchangeably because the two concepts are closely related, but they do have distinct requirements. Standing has both constitutional and prudential (*i.e.* self-imposed) requirements. The real party in interest question is really the prudential component of the overall standing analysis, while injury-in-

[1] These materials were prepared by Ford Elsaesser and Rudy J. Cerone.

fact is a constitutional requirement. Both requirements must be met before a court can grant relief from the automatic stay. In addition, a party also has standing to seek relief if it has the authority to act on behalf of an entity that has standing. Therefore, a nominee or agent will have to prove both (1) that it is an agent with the authority to act on behalf of the principal and (2) that the principal has both constitutional standing and prudential standing. However, even if a party has standing, the agent must prosecute the action in the name of the real party in interest and not in its own name.

The standing requirement is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 US 555, 560 (1992). This constitutional doctrine requires that a claimant must present an actual or imminent injury that is fairly traceable to the defendant's conduct and redressable by a favorable ruling. *Davis v. Fed. Election Comm'n*, 128 S.Ct. 2759 (2008). The standing question is a threshold issue, required before a court may entertain a suit. *Warth v. Seldin*, 422 U.S. 490, 495 (1975). Thus, if a lender cannot prove standing, the court has no authority to hear its motion for relief from stay and it must dismiss the motion.

Prudential requirements also require that a party bringing a motion be the real party in interest. Rule 17 of the Federal Rules of Civil Procedure ("FRCP") requires "[a]n action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17. The purpose is to ensure the party bringing forth the action is the party who "possesses the substantive right being asserted under the applicable law." 6A Wright, Miller & Kane, *Federal Practice and Procedure* § 1541 (Westlaw current through 2009 update). This reflects the fact that the federal judiciary also adheres to certain prudential principles concerning standing. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). The real party in interest inquiry is one of the prudential

considerations the judiciary self-imposes to limit the role of courts in democratic society. *See, e.g., In re Village Rathskeller*, 147 B.R. 665, 668 (Bankr. S.D.N.Y. 1992). Because it applies in bankruptcy proceedings, parties must adhere to Rule 17 in order to seek relief from automatic stay. Rules 9014 and 7017, Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"); *In re Hwang*, 396 B.R. 757, 766 (Bankr. C.D. Cal. 2008).

The cases in this discussion illustrate potential standing and real party in interest issues arising in bankruptcy proceedings. While the Mortgage Electronic Registration Systems ("MERS") promised to streamline mortgage transactions and cut costs, this service often results in a series of unrecorded transfers or transfers to parties outside the servicer's system that can complicate knowing how a note traveled through the system and whether a party really has standing to seek foreclosure. The cases below demonstrate how some creditors and servicers failed to show they had standing or were, or were acting on behalf of, the real party in interest.

IN RE HWANG

The Bankruptcy Court for the Central District of California reconsidered its denial of IndyMac Federal Bank's ("IndyMac Bank") motion for relief from automatic stay. *Hwang*, 396 B.R. at 760. In this case, IndyMac transferred ownership of the note to an unknown party, but never transferred possession of the note. *Id.* The court found that, despite IndyMac Bank being entitled to enforce the note against the debtors, it was not the real party in interest because it was not ultimately entitled to the payments made on the note, so the court affirmed its denial of IndyMac Bank's motion for relief from automatic stay. *Id.* at 766-67.

The original payee and beneficiary of the deed was Mortgageit, Inc. ("Mortgageit"). *Id.* However, Mortgageit later transferred it to IndyMac Bank. *Id.* at 761. Mortgageit was a

MERS member, but MERS lost its rights when the deed passed to IndyMac Bank. *Id.* IndyMac Bank later sold the note to "unidentified 'investors' through Freddie Mac" while retaining physical possession of the note. *Id.* IndyMac Bank argued it was the authorized servicing agent for the new owner. *Id.* at 761-62. However, the court rejected this argument since IndyMac Bank admitted it did not know who the owner was and submitted no evidence of any such agreement. *Id.* However, the court found that IndyMac Bank was entitled to enforce the promissory note since it is a negotiable instrument, and under California law, the holder of a negotiable instrument has the right to enforce it. *Id.* at 762-63. For any instrument payable to a particular person, the holder is required to prove both (1) that it is in possession of the instrument and (2) that the instrument is payable to that person. *Id.* Here, IndyMac Bank can enforce the note because it has possession of the note which is payable to IndyMac Bank. *Id.* Since IndyMac Bank never delivered the note to the new owner, the right to enforce the note never passed and IndyMac Bank remains the holder of the note, retaining the right to enforce it. *Id.* at 763-65.

However, to prosecute the action in its own name, IndyMac Bank also must be the real party in interest. *Id.* at 766. The court found that a party may have constitutional standing, but still not be the real party in interest (*i.e.,* have prudential standing) if the substantive right belongs to someone else. *Id.* at 767-68. In this case, even though IndyMac Bank was entitled to demand and receive payment from debtors, the payments actually belonged to the new owner, not IndyMac Bank. *Id.* at 764-65.

Even if IndyMac Bank proved it was the servicing agent for the owner of the note, it must bring the action in the real party in interest's name rather than its own name, or join that party to the action to satisfy FRCP 19. *Id.* at 770-71. The purpose of FRCP 19 is to join "all

persons whose joinder would be desirable for a just adjudication of the matter." *Id.* In this case, joinder is required because "as a practical matter [failure to join will] impair . . . the person's ability to protect the interest." *Id.* at 771. Here, adjudicating the motion without joining the owner jeopardizes the owner's ability to protect its interest. *Id.* Since the court gave IndyMac Bank more than two months to join the new owner, but IndyMac failed to do so, the court denied the motion for relief from automatic stay. *Id.* at 772.

IN RE HAYES

In *Hayes,* the court noted that "mortgage servicers are parties in interest with standing by virtue of their pecuniary interest in collecting payments under the terms of the notes and mortgages they service." *In re Hayes,* 393 B.R. 259, 267 (Bankr. D. Mass. 2008) (*citing In re Woodberry,* 383 B.R. 373, 379 (Bankr. D.S.C. 2008); and *In re Conde-Dedonato,* 391 B.R. 247 (Bankr. E.D.N.Y. 2008)). However, Deutsche Bank National Trust Company, in its capacity as Trustee under a securitization Pooling and Servicing Agreement (a "PSA"), the moving party under the stay relief motion, did not prove that the mortgage at issue ever was assigned to the Depositor under the PSA. *Id.* at 268. The court noted that both it and the debtor "are entitled to insist that the moving party establish its standing in a motion from a relief from stay through the submission of an accurate history of the claim of ownership of the mortgage. Absent such proof, relief from the stay is unwarranted and a proof of claim filed by the moving party, to which an objection is filed, must be disallowed." *Id.* at 269.

Consequently, the court denied Deutsche Bank's stay relief motion and sustained the debtor's claim objection without prejudice to reconsideration upon the filing of an amended proof of claim by the proper party. *Id.* at 270 (*citing* Bankruptcy Code § 502(j) and Bankruptcy Rule 3008); *see also In re Wells,* 407 B.R. 873, 881-83 (Bankr. N.D. Ohio 2009)

(disallowing proof of claim in a chapter 13 case because the Trustee under a PSA and its servicer failed to prove that the Trustee had standing to file the proof of claim). Ominously for counsel for the mover, the court noted that inaccurate representations about the moving party's status as a holder may constitute a violation of Bankruptcy Rule 9011 and may warrant sanctions under 28 U.S.C. § 1927. *Hayes,* 393 B.R. at 269; s*ee also In re Fitch,* 2009 WL 1514501 (Bankr. N.D. Ohio, May 28, 2009) (the court ordered an audit of any cases in its district in which MERS filed affidavit of default and, if any incorrect affidavits were filed, ordered counsel to appear at an adjoined hearing).

IN RE JACOBSON

In this case, the Bankruptcy Court for the Western District of Washington denied the motion for relief from automatic stay because the moving party, UBS AG, could not show it had standing, nor that it had authority to act for anyone that did have standing. *In re Jacobson*, 402 B.R. 359, 369 (Bankr. W.D. Wash. 2009). UBS AG purported to represent ACT as servicer of the note. *Id.* The court cited Hwang, noting that even if the moving party is the noteholder's agent, it does not make the agent a real party in interest. *Id.* at 366. To have standing to prosecute the motion in the name of the real party in interest, the court required UBS AG to show it had authority to act on the noteholder's behalf. *Id.* at 367. Since UBS AG made no such showing, and it was not the real party in interest, the court denied the motion. *Id.* at 770.

Execution of the original note was on behalf of Castle Point Mortgage ("Castle Point") and listed MERS as a beneficiary "solely as nominee for lender and lender's successors and assigns." *Id.* at 362. Castle Point later sold the note to ACT Properties, LLC ("ACT") in an unrecorded transaction. *Id.* However, UBS AG admitted that Wells Fargo held the note. *Id.* at

363. The court questioned, as did the court in *Hwang*, whether ACT itself would even qualify as the holder given that someone endorsed it in blank and another had possession of the note. *Id.* at 369.

As both an admonition and suggestion to MERS, the court instructed that it is possible to prove the identity of the various holders and servicers by putting forth evidence and stated that some courts require such evidence to be admissible before considering it. *Id.* at 367. The evidence put forth by UBS AG did not meet any standards of admissibility, and the court further commented on its ineffectiveness. *Id.* UBS AG submitted a conclusory declaration by a "bankruptcy specialist" stating he was a custodian of the records, knew them to be a true copy of the originals made at the time of the events in the ordinary course of business. *Id.* at 368. Although no business records were submitted, the court opined that the "bare assertion that one works for the company and is familiar with its recordkeeping procedures is not sufficient . . . to establish the person is sufficiently knowledgeable about the subject of the testimony." *Id.* The testimony needs to express information warranting the conclusion that the records presented are what they purport to be. *Id.*

Unlike *Hwang*, the movant here asserted that it was the servicer of the note and acting on behalf of the holder. In addition, neither UBS AG nor ACT had actual possession of the note and thus neither appeared to have any right to enforce it. *Id.* at 370. While establishing that UBS AG is the agent rather than the noteholder seems like it might be an easier standard to meet, it must still show it is the agent of ACT. *Id.* Even if it could, it must also show ACT is the real party in interest and join ACT as a party or litigate in its name instead of its own name. *Id.* Because UBS AG was not the real party in interest nor could it show it was acting on behalf of the real party in interest, the court denied the motion for relief from stay. *Id.*

IN RE SHERIDAN

In this case, the Bankruptcy Court for the District of Idaho considered a stay relief motion brought by MERS as nominee for HSBC Bank USA ("HSBC"). *In re Sheridan*, 2009 WL 631355 (Bankr. D. Idaho, Mar. 12, 2009). MERS not only asserted it was nominee, but also characterized itself as a "secured creditor and Claimant." *Id.* at *1. MERS was designated a beneficiary on the Deed of Trust and as nominee for the noteholder at the time of execution. *Id.* at *6 The court still found this insufficient, as there was no showing made as to who the current noteholder was. The court also held MERS was not an actual beneficiary, despite the Deed naming it one, since no actual economic benefit accrued to it. *Id.* at * 4.

The Promissory Note and Deed of Trust identified the lender as Fieldstone Mortgage Company ("Fieldstone"), and the Deed also identified MERS as nominee and beneficiary for the noteholder and all its successors and assigns. *Id.* at * 4. The Promissory Note also stated that "anyone who takes this Note by transfer and who is entitled to receive payments . . . is called the Note Holder." *Id.* at *1. MERS argued that it had authority to act for the current noteholder, whoever that was, since it was named as a beneficiary and nominee for all successors and assigns. *Id.* at *4. Even if the court agreed, there is still the issue of the Note not indicating any transfer to other parties. *Id.* at *5. Therefore, Fieldstone appeared to be the current noteholder, and MERS did not purport to represent Fieldstone at any time. *Id.* at *4. The court denied the motion for relief from stay for two reasons: (1) It found the "titular designation" of MERS as "beneficiary" on the Deed insufficient to establish it as such; and (2) there was no evidence or explanation presented showing whether HSBC had any current interest in the note. *Id.*

Merely naming a party as a beneficiary of an instrument is not sufficient to make it one. *Id.* The court looked to Idaho Code § 45-1502(1) which defines a beneficiary for purposes of the trust deed statute as "the person for whose benefit a trust deed is given." *Id.* Therefore, MERS was not a beneficiary under Idaho Code because the trust deed benefits the noteholder, which appeared to be Fieldstone in this case. *Id.* In addition, the language used in the Deed of Trust was confusing as it also stated that MERS will act "solely as nominee for Lender and Lender's successors and assigns." *Id.* Because MERS was not a beneficiary under Idaho Code and the language of the Deed was ambiguous, the court held that MERS was not a real party in interest and could not bring the motion in its own name. *Id.*

Even if MERS was properly acting as the agent of the real party in interest there was no showing that HSBC, or even Fieldstone, had any current interest in the note. *Id.* If there had been, the action must still be brought in the real party in interest's own name, not its agent's. *Id.* Later MERS submitted a "supplemental affidavit" stating that it had obtained an original copy of the Note, which now indicated an endorsement. *Id.* at *5. The court found the affidavit improper for several reasons. But, even had the court been able to consider it, the affidavit would not have assisted MERS since there was neither a date nor any indication of who the transferor or the transferee was. *Id.* at *6. Even if Fieldstone had endorsed the note in blank it would not have established HSBC or Fieldstone as the noteholder since Idaho Code provides it "may be negotiated by transfer of possession alone until specially indorsed." *Id.* The court held, "the only entity that MERS could conceivably represent as agent/nominee would be [Fieldstone]. But MERS does not represent [Fieldstone] . . . and, in fact, . . . conten[ds] that [Fieldstone] is no longer a party in interest." *Id.* at *6.

Because MERS was unable to establish that it was a real party in interest with standing, or even that it represented such, the court denied the motion for relief from stay. *Id.; accord, In re Vargas,* 396 B.R. 511 (Bankr. C.D.Cal. 2008) (because MERS was not the holder of the note, and because only the holder of a negotiable promissory note is entitled to enforce same, the stay relief was denied).

IN RE MITCHELL

Mitchell is the lead case for a number of motions to lift stay filed in MERS' own name or filed in the name of MERS as nominee for another. *In re Mitchell*, 2009 WL 1044368 (Bankr. D. Nev., Mar. 31, 2009). The Bankruptcy Court for the District of Nevada handled the motions in a joint hearing because each of the cases had substantially similar issues regarding MERS' standing. *Id.* at *1. MERS withdrew the motions to lift stay in all but four of the cases and, in this opinion, the court issued orders in two of the cases. *Id.* Like *Sheridan*, this court denied the motions in both cases because MERS was not the noteholder nor did it show the authority to act on behalf of one who was the noteholder. *Id.* at *4.

Similar to *Sheridan*, MERS argued it had standing because the deeds of trust either named it as a beneficiary or as the nominee of the beneficiary. *Id.* The court noted that merely naming MERS a beneficiary does not give it any rights to enforce the note. *Id.* at 3. The court found that, since MERS had no rights to any payments, servicing rights or any rights to secured properties, it was not a beneficiary. *Id.* The court also found similar ambiguities in the language of the deeds of trust and in MERS' brief regarding whether MERS argued it had standing in its own right, or as the nominee, or both. *Id.* Even if MERS was a beneficiary of the note, that alone would be insufficient to confer standing. *Id.* For MERS to foreclose, it must show that it had possession of the note and the deed of trust or it had authority to act as

agent for the entity that did. *Id.* at *4. Because MERS was not the beneficiary or the holder of the deed of trust, nor was there evidence that the principal it purported to act on behalf of were either of these, the court denied the motions for relief from stay. *Id.* at *6.

IN RE WILHELM

In a recent decision, the Bankruptcy Court for the District of Idaho further expounded on the requirements for lenders to show standing when seeking relief from the automatic stay. *In re Wilhelm,* 407 B.R. 392 (Bankr. D.Idaho 2009). In his decision, Judge Myers held that the movants in five different actions for relief from stay lacked standing to bring such motions because: (1) they were not named on the notes at issue; (2) the notes were not indorsed in blank or to any specific person or entity (such as the movants); (3) the movants failed to prove that they held the notes; and (4) the movants were not proper assignees of the notes even though they argued that MERS assigned the notes to them because the notes named MERS as beneficiary acting solely as nominee with no right to assign the notes.

The court found that "there are two threshold questions in each of these motions: (1) Have Movants established an interest in the notes? (2) Are Movants entitled to enforce the notes?" *Id.* at 398. The court held that the Movants failed to provide any admissible proof to answer either question in their favor and, in fact, the notes attached to several declarations contradicted the information contained in the declarations. In reaching its decision, the court did add one important admonition to counsel: "In general, counsel should gather the appropriate documents and factual data *before* filing the motions (as required by Rule 9011 in any event), rather than attempting to cure patently defective motions with serial supplemental filings." *Id.* at 403 (emphasis in original).

IN RE FORECLOSURE CASES

Standing and real party in interest problems occur outside of bankruptcy courts in foreclosure actions themselves. In *In re Foreclosure Cases,* 2007 WL 3232430, *2 (N.D. Ohio, Oct. 31, 2007), the United States District Court for the Northern District of Ohio dismissed fourteen (14) foreclosure actions filed by Deutsche Bank National Trust Company ("DB"), as Trustee under a PSA for certain asset-backed pooled mortgage facilities because the DB failed to establish diversity jurisdiction and standing. In the foreclosure actions, Judge Christopher Boykin issued an Order requiring DB to prove that it was the holder and owner of the underlying notes and mortgages that were the basis for each of the foreclosure actions. DB was required to file a copy of the executed Assignment demonstrating that DB was the holder and owner of the Note and Mortgage as of the date the Complaint was filed. The original lender was reflected as the mortgagee and no assignment to DB was reflected in the chain of title. Under Ohio law, assignments of mortgages are subject to recording requirements. Therefore, in addition to execution of a mortgage assignment, recording may also be required to establish standing.

DB produced Mortgage Assignments dated after the date of the original foreclosure complaint. These Mortgage Assignments were attached to pleadings in support of DB's position that the Mortgage Assignments were sufficient to establish standing to prosecute the foreclosure actions, even though such Mortgage Assignments were entered into after the commencement of the foreclosure actions. The Court disagreed. It found that DB was not the holder of the notes when the complains were filed and dismissed all 14 foreclosure actions. The dismissals were without prejudice to re-file at a later date.

Other recent, notable cases dealing with standing issues in state law foreclosure proceedings are: *Mortgage Electronic Registration System, Inc. v. Southwest Homes of Ark.,* 302 S.W. 3d 1 (Ark. 2009) (MERS is not a necessary party in a deed of trust foreclosure because it is neither the trustee nor the beneficiary under the deed of trust); *Landmark Nat'l Bank v. Kesler,* 216 P.3d 158 (because MERS is not a lender, it is not a necessary party in a mortgage foreclosure action and has no due process right to intervene; the court describes MERS, variously, as a "straw man" and a "front man" for its financial institution members); *Goodyke v. BNC Mortgage, Inc.,* 2009 WL 2971086 (D.Ariz., Sept. 11, 2009) (because a nonjudicial foreclosure in Arizona does not require presentation of the original note before commencing the foreclosure proceedings, debtors' "show me the note" argument in support of an action to enjoin the foreclosure lacks merit).

CONCLUSION

The cases discussed above highlight the failure of several lenders to keep adequate records of transfers of underlying notes. Without a proper paper trail, lenders cannot show that they have standing or are the real parties in interest entitled to bring a motion for relief from the automatic stay or a subsequent foreclosure action. In addition, attorneys should take note of how courts will regard conclusory affidavits in support of these motions as well as the potential for Rule 11 land mines when taking a client's averments regarding the ownership of a note or deed at face value without making a reasonable and independent inquiry before submitting such statements to a court.

DISCLAIMER

This presentation summarizes certain cases, arguments and developments, and is for educational purposes only. It should not be attributed as the views either of the authors, of their firm or of their clients.

TABLE OF RECENT AUTHORITIES REGARDING STANDING ISSUES

1. Stay Relief Cases

In re Lopez, 2010 WL 1636040 (Bankr. D. Ariz., Apr. 19, 2010)

In re Sheridan, 2009 WL 631355 (Bankr. D. Id., Mar. 12, 2009)

In re Weisband, 427 B.R. 13 (Bankr. D. Ariz. 2010)

In re Emrich, 2009 WL 3816174 (Bankr. N.D. Cal., Nov. 12, 2009)

In re Jacobson, 402 B.R. 359 (Bankr. W.D. Wash. 2009)

In re Gramajo, 2009 WL 2824786 (Bankr. N.D. Cal., Apr. 24, 2008)

In re Hayes, 393 B.R. 259 (Bankr. D. Mass. 2008)

2. Claims Objections Cases

In re Brown, 2010 WL 1571160 (Bankr. D. Mass. Apr. 19, 2010)

In re Minbatiwalla, 424 B.R. 104 (Bankr. S.D. N.Y. 2010)

In re Curry, 2009 WL 2424534 (Bankr. N.D. Tex., Aug. 3, 2009)

In re Samuels, 415 B.R. 8 (Bankr. D. Mass. 2009)

In re Williams, 395 B.R. 33 (Bankr. S.D. Ohio 2008)

In re Hayes, 393 B.R. 259 (Bankr. D. Mass. 2008)

3. Adversary Proceedings/Foreclosure Cases

In re Brown, 2010 WL 1571160 (Bankr. D. Mass. Apr. 19, 2010)

Dumesnil v. Bank of America, N.A., 2010 WL 1408889 (D. Ariz., Apr. 7, 2010)

Rhoads v. Washington Mutual Bank, F.A., 2010 WL 1408888 (D. Ariz., Apr. 7, 2010)

Newbeck v. Washington Mutual Bank, 2010 WL 291821 (N.D. Cal., Jan. 19, 2010)

In re Williams, 395 B.R. 33 (Bankr. S.D. Ohio 2008)

4. Sanctions Cases

In re Lee, 408 B.R. 893 (Bankr. C.D. Calif. 2009)

SJC-10694

U.S. BANK NATIONAL ASSOCIATION, trustee[1] vs. ANTONIO IBANEZ (and a consolidated case[2,3]).

Suffolk. October 7, 2010. - January 7, 2011.

Present: Marshall, C.J., Ireland, Spina, Cordy, Botsford, & Gants, JJ.[4]

Real Property, Mortgage, Ownership, Record title. Mortgage, Real estate, Foreclosure, Assignment. Notice, Foreclosure of mortgage.

Civil actions commenced in the Land Court Department on September 16 and October 30, 2008.

Motions for entry of default judgment and to vacate judgment were heard by Keith C. Long, J.

The Supreme Judicial Court granted an application for direct appellate review.

R. Bruce Allensworth (Phoebe S. Winder & Robert W. Sparkes, III, with him) for U.S. Bank National Association & another.
Paul R. Collier, III (Max W. Weinstein with him) for Antonio Ibanez.
Glenn F. Russell, Jr., for Mark A. LaRace & another.
The following submitted briefs for amici curiae:
Martha Coakley, Attorney General, & John M. Stephan, Assistant Attorney General, for the Commonwealth.

[1] For the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z.

[2] Wells Fargo Bank, N.A., trustee, vs. Mark A. LaRace & another.

[3] The Appeals Court granted the plaintiffs' motion to consolidate these cases.

[4] Chief Justice Marshall participated in the deliberation on this case prior to her retirement.

Kevin Costello, Gary Klein, Shennan Kavanagh & Stuart Rossman for National Consumer Law Center & others.
Ward P. Graham & Robert J. Moriarty, Jr., for Real Estate Bar Association for Massachusetts, Inc.
Marie McDonnell, pro se.

GANTS, J. After foreclosing on two properties and purchasing the properties back at the foreclosure sales, U.S. Bank National Association (U.S. Bank), as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z; and Wells Fargo Bank, N.A. (Wells Fargo), as trustee for ABFC 2005-OPT 1 Trust, ABFC Asset Backed Certificates, Series 2005-OPT 1 (plaintiffs) filed separate complaints in the Land Court asking a judge to declare that they held clear title to the properties in fee simple. We agree with the judge that the plaintiffs, who were not the original mortgagees, failed to make the required showing that they were the holders of the mortgages at the time of foreclosure. As a result, they did not demonstrate that the foreclosure sales were valid to convey title to the subject properties, and their requests for a declaration of clear title were properly denied.

Procedural history. On July 5, 2007, U.S. Bank, as trustee, foreclosed on the mortgage of Antonio Ibanez, and purchased the Ibanez property at the foreclosure sale. On the same day, Wells Fargo, as trustee, foreclosed on the mortgage of Mark and Tammy LaRace, and purchased the LaRace property at that foreclosure sale.

[5] We acknowledge the amicus briefs filed by the Attorney General; the Real Estate Bar Association for Massachusetts, Inc.; Marie McDonnell; and the National Consumer Law Center, together with Darlene Manson, Germano DePina, Robert Lane, Ann Coiley, Roberto Szumik, and Geraldo Dosanjos.

In September and October of 2008, U.S. Bank and Wells Fargo brought separate actions in the Land Court under G. L. c. 240, § 6, which authorizes actions "to quiet or establish the title to land situated in the commonwealth or to remove a cloud from the title thereto." The two complaints sought identical relief: (1) a judgment that the right, title, and interest of the mortgagor (Ibanez or the LaRaces) in the property was extinguished by the foreclosure; (2) a declaration that there was no cloud on title arising from publication of the notice of sale in the Boston Globe; and (3) a declaration that title was vested in the plaintiff trustee in fee simple. U.S. Bank and Wells Fargo each asserted in its complaint that it had become the holder of the respective mortgage through an assignment made after the foreclosure sale.

In both cases, the mortgagors -- Ibanez and the LaRaces -- did not initially answer the complaints, and the plaintiffs moved for entry of default judgment. In their motions for entry of default judgment, the plaintiffs addressed two issues: (1) whether the Boston Globe, in which the required notices of the foreclosure sales were published, is a newspaper of "general circulation" in Springfield, the town where the foreclosed properties lay. See G. L. c. 244, § 14 (requiring publication every week for three weeks in newspaper published in town where foreclosed property lies, or of general circulation in that town); and (2) whether the plaintiffs were legally entitled to foreclose on the properties where the assignments of the mortgages to the plaintiffs were neither executed nor recorded in

the registry of deeds until after the foreclosure sales. The two cases were heard together by the Land Court, along with a third case that raised the same issues.

On March 26, 2009, judgment was entered against the plaintiffs. The judge ruled that the foreclosure sales were invalid because, in violation of G. L. c. 244, § 14, the notices of the foreclosure sales named U.S. Bank (in the Ibanez foreclosure) and Wells Fargo (in the LaRace foreclosure) as the mortgage holders where they had not yet been assigned the mortgages. The judge found, based on each plaintiff's assertions in its complaint, that the plaintiffs acquired the mortgages by assignment only after the foreclosure sales and thus had no interest in the mortgages being foreclosed at the time of the publication of the notices of sale or at the time of the foreclosure sales.

The plaintiffs then moved to vacate the judgments. At a

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[6] The uncertainty surrounding the first issue was the reason the plaintiffs sought a declaration of clear title in order to obtain title insurance for these properties. The second issue was raised by the judge in the LaRace case at a January 5, 2009, case management conference.

[7] The judge also concluded that the Boston Globe was a newspaper of general circulation in Springfield, so the foreclosures were not rendered invalid on that ground because notice was published in that newspaper.

[8] In the third case, LaSalle Bank National Association, trustee for the certificate holders of Bear Stearns Asset Backed Securities I, LLC Asset-Backed Certificates, Series 2007-HE2 vs. Freddy Rosario, the judge concluded that the mortgage foreclosure "was not rendered invalid by its failure to record the assignment reflecting its status as holder of the mortgage prior to the foreclosure since it was, in fact, the holder by assignment at the time of the foreclosure, it truthfully claimed that status in the notice, and it could have produced proof of that status (the unrecorded assignment) if asked."

hearing on the motions on April 17, 2009, the plaintiffs conceded that each complaint alleged a postnotice, postforeclosure sale assignment of the mortgage at issue, but they now represented to the judge that documents might exist that could show a prenotice, preforeclosure sale assignment of the mortgages. The judge granted the plaintiffs leave to produce such documents, provided they were produced in the form they existed in at the time the foreclosure sale was noticed and conducted. In response, the plaintiffs submitted hundreds of pages of documents to the judge, which they claimed established that the mortgages had been assigned to them before the foreclosures. Many of these documents related to the creation of the securitized mortgage pools in which the Ibanez and LaRace mortgages were purportedly included.

The judge denied the plaintiffs' motions to vacate judgment on October 14, 2009, concluding that the newly submitted documents did not alter the conclusion that the plaintiffs were not the holders of the respective mortgages at the time of foreclosure. We granted the parties' applications for direct appellate review.

Factual background. We discuss each mortgage separately, describing when appropriate what the plaintiffs allege to have happened and what the documents in the record demonstrate.

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[9] On June 1, 2009, attorneys for the defendant mortgagors filed their appearance in the cases for the first time.

[10] The LaRace defendants allege that the documents submitted the judge following the plaintiffs' motions to vacate judgment are not properly in the record before us. They also allege that several of these documents are not properly authenticated. Because we affirm the judgment on other grounds, we do not address these concerns, and assume that these documents are

The Ibanez mortgage. On December 1, 2005, Antonio Ibanez took out a $103,500 loan for the purchase of property at 20 Crosby Street in Springfield, secured by a mortgage to the lender, Rose Mortgage, Inc. (Rose Mortgage). The mortgage was recorded the following day. Several days later, Rose Mortgage executed an assignment of this mortgage in blank, that is, an assignment that did not specify the name of the assignee. The blank space in the assignment was at some point stamped with the name of Option One Mortgage Corporation (Option One) as the assignee, and that assignment was recorded on June 7, 2006. Before the recording, on January 23, 2006, Option One executed an assignment of the Ibanez mortgage in blank.

According to U.S. Bank, Option One assigned the Ibanez mortgage to Lehman Brothers Bank, FSB, which assigned it to Lehman Brothers Holdings Inc., which then assigned it to the Structured Asset Securities Corporation, which then assigned the mortgage, pooled with approximately 1,220 other mortgage loans, to U.S. Bank, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z. With this last assignment, the Ibanez and other loans were pooled into a trust and converted into mortgage-backed securities that

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properly before us and were adequately authenticated.

[11] This signed and notarized document states: "FOR VALUE RECEIVED, the undersigned hereby grants, assigns and transfers to _____ all beneficial interest under that certain Mortgage dated December 1, 2005 executed by Antonio Ibanez . . . ."

[12] The Structured Asset Securities Corporation is a wholly owned direct subsidiary of Lehman Commercial Paper Inc., which is in turn a wholly owned, direct subsidiary of Lehman Brothers Holdings Inc.

can be bought and sold by investors -- a process known as securitization.

For ease of reference, the chain of entities through which the Ibanez mortgage allegedly passed before the foreclosure sale is:

Rose Mortgage, Inc. (originator)
⇩
Option One Mortgage Corporation (record holder)
⇩
Lehman Brothers Bank, FSB
⇩
Lehman Brothers Holdings Inc. (seller)
⇩
Structured Asset Securities Corporation (depositor)
⇩
U.S. Bank National Association, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z

According to U.S. Bank, the assignment of the Ibanez mortgage to U.S. Bank occurred pursuant to a December 1, 2006, trust agreement, which is not in the record. What is in the record is the private placement memorandum (PPM), dated December 26, 2006, a 273-page, unsigned offer of mortgage-backed securities to potential investors. The PPM describes the mortgage pools and the entities involved, and summarizes the provisions of the trust agreement, including the representation that mortgages "will be" assigned into the trust. According to the PPM, "[e]ach transfer of a Mortgage Loan from the Seller [Lehman Brothers Holdings Inc.] to the Depositor [Structured Asset Securities Corporation] and from the Depositor to the Trustee [U.S. Bank] will be intended to be a sale of that Mortgage Loan and will be reflected as such in the Sale and Assignment Agreement and the Trust Agreement, respectively." The PPM also specifies that "[e]ach Mortgage Loan will be identified

in a schedule appearing as an exhibit to the Trust Agreement." However, U.S. Bank did not provide the judge with any mortgage schedule identifying the Ibanez loan as among the mortgages that were assigned in the trust agreement.

On April 17, 2007, U.S. Bank filed a complaint to foreclose on the Ibanez mortgage in the Land Court under the Servicemembers Civil Relief Act (Servicemembers Act), which restricts foreclosures against active duty members of the uniformed services. See 50 U.S.C. Appendix §§ 501, 511, 533 (2006 & Supp. II 2008). In the complaint, U.S. Bank represented that it was the "owner (or assignee) and holder" of the mortgage given by Ibanez for the property. A judgment issued on behalf of U.S. Bank on June 26, 2007, declaring that the mortgagor was not entitled to protection from foreclosure under the Servicemembers Act. In June, 2007, U.S. Bank also caused to be published in the Boston Globe the notice of the foreclosure sale required by G. L. c. 244, § 14. The notice identified U.S. Bank as the "present holder" of the mortgage.

At the foreclosure sale on July 5, 2007, the Ibanez property was purchased by U.S. Bank, as trustee for the securitization trust, for $94,350, a value significantly less than the outstanding debt and the estimated market value of the property. The foreclosure deed (from U.S. Bank, trustee, as the purported holder of the mortgage, to U.S. Bank, trustee, as the purchaser)

[13] As implemented in Massachusetts, a mortgage holder is required to go to court to obtain a judgment declaring that the mortgagor is not a beneficiary of the Servicemembers Act before proceeding to foreclosure. St. 1943, c. 57, as amended through St. 1998, c. 142.

and the statutory foreclosure affidavit were recorded on May 23, 2008. On September 2, 2008, more than one year after the sale, and more than five months after recording of the sale, American Home Mortgage Servicing, Inc., "as successor-in-interest" to Option One, which was until then the record holder of the Ibanez mortgage, executed a written assignment of that mortgage to U.S. Bank, as trustee for the securitization trust. This assignment was recorded on September 11, 2008.

The LaRace mortgage. On May 19, 2005, Mark and Tammy LaRace gave a mortgage for the property at 6 Brookburn Street in Springfield to Option One as security for a $103,200 loan; the mortgage was recorded that same day. On May 26, 2005, Option One executed an assignment of this mortgage in blank.

According to Wells Fargo, Option One later assigned the LaRace mortgage to Bank of America in a July 28, 2005, flow sale and servicing agreement. Bank of America then assigned it to Asset Backed Funding Corporation (ABFC) in an October 1, 2005, mortgage loan purchase agreement. Finally, ABFC pooled the mortgage with others and assigned it to Wells Fargo, as trustee for the ABFC 2005-OPT 1 Trust, ABFC Asset-Backed Certificates, Series 2005-OPT 1, pursuant to a pooling and servicing agreement (PSA).

For ease of reference, the chain of entities through which the LaRace mortgage allegedly passed before the foreclosure sale is:

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[14] The Land Court judge questioned whether American Home Mortgage Servicing, Inc., was in fact a successor in interest to Option One. Given our affirmance of the judgment on other grounds, we need not address this question.

Option One Mortgage Corporation (originator and record holder)
⇓
Bank of America
⇓
Asset Backed Funding Corporation (depositor)
⇓
Wells Fargo, as trustee for the ABFC 2005-OPT 1, ABFC Asset-Backed Certificates, Series 2005-OPT 1

Wells Fargo did not provide the judge with a copy of the flow sale and servicing agreement, so there is no document in the record reflecting an assignment of the LaRace mortgage by Option One to Bank of America. The plaintiff did produce an unexecuted copy of the mortgage loan purchase agreement, which was an exhibit to the PSA. The mortgage loan purchase agreement provides that Bank of America, as seller, "does hereby agree to and does hereby sell, assign, set over, and otherwise convey to the Purchaser [ABFC], without recourse, on the Closing Date . . . all of its right, title and interest in and to each Mortgage Loan." The agreement makes reference to a schedule listing the assigned mortgage loans, but this schedule is not in the record, so there was no document before the judge showing that the LaRace mortgage was among the mortgage loans assigned to the ABFC.

Wells Fargo did provide the judge with a copy of the PSA, which is an agreement between the ABFC (as depositor), Option One (as servicer), and Wells Fargo (as trustee), but this copy was downloaded from the Securities and Exchange Commission website and was not signed. The PSA provides that the depositor "does hereby transfer, assign, set over and otherwise convey to the Trustee, on behalf of the Trust . . . all the right, title and interest of the Depositor . . . in and to . . . each Mortgage Loan identified on the Mortgage Loan Schedules," and "does hereby

deliver" to the trustee the original mortgage note, an original mortgage assignment "in form and substance acceptable for recording," and other documents pertaining to each mortgage.

The copy of the PSA provided to the judge did not contain the loan schedules referenced in the agreement. Instead, Wells Fargo submitted a schedule that it represented identified the loans assigned in the PSA, which did not include property addresses, names of mortgagors, or any number that corresponds to the loan number or servicing number on the LaRace mortgage. Wells Fargo contends that a loan with the LaRace property's zip code and city is the LaRace mortgage loan because the payment history and loan amount matches the LaRace loan.

On April 27, 2007, Wells Fargo filed a complaint under the Servicemembers Act in the Land Court to foreclose on the LaRace mortgage. The complaint represented Wells Fargo as the "owner (or assignee) and holder" of the mortgage given by the LaRaces for the property. A judgment issued on behalf of Wells Fargo on July 3, 2007, indicating that the LaRaces were not beneficiaries of the Servicemembers Act and that foreclosure could proceed in accordance with the terms of the power of sale. In June, 2007, Wells Fargo caused to be published in the Boston Globe the statutory notice of sale, identifying itself as the "present holder" of the mortgage.

At the foreclosure sale on July 5, 2007, Wells Fargo, as trustee, purchased the LaRace property for $120,397.03, a value significantly below its estimated market value. Wells Fargo did not execute a statutory foreclosure affidavit or foreclosure deed until May 7, 2008. That same day, Option One, which was still

the record holder of the LaRace mortgage, executed an assignment of the mortgage to Wells Fargo as trustee; the assignment was recorded on May 12, 2008. Although executed ten months after the foreclosure sale, the assignment declared an effective date of April 18, 2007, a date that preceded the publication of the notice of sale and the foreclosure sale.

Discussion. The plaintiffs brought actions under G. L. c. 240, § 6, seeking declarations that the defendant mortgagors' titles had been extinguished and that the plaintiffs were the fee simple owners of the foreclosed properties. As such, the plaintiffs bore the burden of establishing their entitlement to the relief sought. Sheriff's Meadow Found., Inc. v. Bay-Courte Edgartown, Inc., 401 Mass. 267, 269 (1987). To meet this burden, they were required "not merely to demonstrate better title . . . than the defendants possess, but . . . to prove sufficient title to succeed in [the] action." Id. See NationsBanc Mtge. Corp. v. Eisenhauer, 49 Mass. App. Ct. 727, 730 (2000). There is no question that the relief the plaintiffs sought required them to establish the validity of the foreclosure sales on which their claim to clear title rested.

Massachusetts does not require a mortgage holder to obtain judicial authorization to foreclose on a mortgaged property. See G. L. c. 183, § 21; G. L. c. 244, § 14. With the exception of the limited judicial procedure aimed at certifying that the mortgagor is not a beneficiary of the Servicemembers Act, a mortgage holder can foreclose on a property, as the plaintiffs did here, by exercise of the statutory power of sale, if such a power is granted by the mortgage itself. See Beaton v. Land

Court, 367 Mass. 385, 390-391, 393, appeal dismissed, 423 U.S. 806 (1975).

Where a mortgage grants a mortgage holder the power of sale, as did both the Ibanez and LaRace mortgages, it includes by reference the power of sale set out in G. L. c. 183, § 21, and further regulated by G. L. c. 244, §§ 11-17C. Under G. L. c. 183, § 21, after a mortgagor defaults in the performance of the underlying note, the mortgage holder may sell the property at a public auction and convey the property to the purchaser in fee simple, "and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity." Even where there is a dispute as to whether the mortgagor was in default or whether the party claiming to be the mortgage holder is the true mortgage holder, the foreclosure goes forward unless the mortgagor files an action and obtains a court order enjoining the foreclosure. See Beaton v. Land Court, supra at 393.

Recognizing the substantial power that the statutory scheme affords to a mortgage holder to foreclose without immediate judicial oversight, we adhere to the familiar rule that "one who sells under a power [of sale] must follow strictly its terms. If

[15] An alternative to foreclosure through the right of statutory sale is foreclosure by entry, by which a mortgage holder who peaceably enters a property and remains for three years after recording a certificate or memorandum of entry forecloses the mortgagor's right of redemption. See G. L. c. 244, §§ 1, 2; Joyner v. Lenox Sav. Bank, 322 Mass. 46, 52-53 (1947). A foreclosure by entry may provide a separate ground for a claim of clear title apart from the foreclosure by execution of the power of sale. See, e.g., Grabiel v. Michelson, 297 Mass. 227, 228-229 (1937). Because the plaintiffs do not claim clear title based on foreclosure by entry, we do not discuss it further.

he fails to do so there is no valid execution of the power, and the sale is wholly void." Moore v. Dick, 187 Mass. 207, 211 (1905). See Roche v. Farnsworth, 106 Mass. 509, 513 (1871) (power of sale contained in mortgage "must be executed in strict compliance with its terms"). See also McGreevey v. Charlestown Five Cents Sav. Bank, 294 Mass. 480, 484 (1936).

One of the terms of the power of sale that must be strictly adhered to is the restriction on who is entitled to foreclose. The "statutory power of sale" can be exercised by "the mortgagee or his executors, administrators, successors or assigns." G. L. c. 183, § 21. Under G. L. c. 244, § 14, "[t]he mortgagee or person having his estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person" is empowered to exercise the statutory power of sale. Any effort to foreclose by a party lacking "jurisdiction and authority" to carry out a foreclosure under these statutes is void. Chace v. Morse, 189 Mass. 559, 561 (1905), citing Moore v. Dick, supra. See Davenport v. HSBC Bank USA, 275 Mich. App. 344, 347-348 (2007) (attempt to foreclose by party that had not yet been assigned mortgage results in "structural defect that goes to

[16] We recognize that a mortgage holder must not only act in strict compliance with its power of sale but must also "act in good faith and . . . use reasonable diligence to protect the interests of the mortgagor," and this responsibility is "more exacting" where the mortgage holder becomes the buyer at the foreclosure sale, as occurred here. See Williams v. Resolution GGF Oy, 417 Mass. 377, 382-383 (1994), quoting Seppala & Aho Constr. Co. v. Petersen, 373 Mass. 316, 320 (1977). Because the issue was not raised by the defendant mortgagors or the judge, we do not consider whether the plaintiffs breached this obligation.

the very heart of defendant's ability to foreclose by advertisement," and renders foreclosure sale void).

A related statutory requirement that must be strictly adhered to in a foreclosure by power of sale is the notice requirement articulated in G. L. c. 244, § 14. That statute provides that "no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale," advance notice of the foreclosure sale has been provided to the mortgagee, to other interested parties, and by publication in a newspaper published in the town where the mortgaged land lies or of general circulation in that town. Id. "The manner in which the notice of the proposed sale shall be given is one of the important terms of the power, and a strict compliance with it is essential to the valid exercise of the power." Moore v. Dick, supra at 212. See Chace v. Morse, supra ("where a certain notice is prescribed, a sale without any notice, or upon a notice lacking the essential requirements of the written power, would be void as a proceeding for foreclosure"). See also McGreevey v. Charlestown Five Cents Sav. Bank, supra. Because only a present holder of the mortgage is authorized to foreclose on the mortgaged property, and because the mortgagor is entitled to know who is foreclosing and selling the property, the failure to identify the holder of the mortgage in the notice of sale may render the notice defective and the foreclosure sale void. See

[17] The form of foreclosure notice provided in G. L. c. 244, § 14, calls for the present holder of the mortgage to identify itself and sign the notice. While the statute permits other forms to be used and allows the statutory form to be "altered as circumstances require," G. L. c. 244, § 14, we do not interpret this flexibility to suggest that the present holder of the mortgage need not identify itself in the notice.

Roche v. Farnsworth, supra (mortgage sale void where notice of sale identified original mortgagee but not mortgage holder at time of notice and sale). See also Bottomly v. Kabachnick, 13 Mass. App. Ct. 480, 483-484 (1982) (foreclosure void where holder of mortgage not identified in notice of sale).

For the plaintiffs to obtain the judicial declaration of clear title that they seek, they had to prove their authority to foreclose under the power of sale and show their compliance with the requirements on which this authority rests. Here, the plaintiffs were not the original mortgagees to whom the power of sale was granted; rather, they claimed the authority to foreclose as the eventual assignees of the original mortgagees. Under the plain language of G. L. c. 183, § 21, and G. L. c. 244, § 14, the plaintiffs had the authority to exercise the power of sale contained in the Ibanez and LaRace mortgages only if they were the assignees of the mortgages at the time of the notice of sale and the subsequent foreclosure sale. See In re Schwartz, 366 B.R. 265, 269 (Bankr. D. Mass. 2007) ("Acquiring the mortgage after the entry and foreclosure sale does not satisfy the Massachusetts statute"). See also Jeff-Ray Corp. v. Jacobson, 566 So. 2d 885, 886 (Fla. Dist. Ct. App. 1990) (per curiam) (foreclosure action could not be based on assignment of mortgage dated four months after commencement of foreclosure proceeding).

The plaintiffs claim that the securitization documents they

[18] The plaintiffs were not authorized to foreclose by virtue of any of the other provisions of G. L. c. 244, § 14: they were not the guardian or conservator, or acting in the name of, a person so authorized; nor were they the attorney duly authorized by a writing under seal.

submitted establish valid assignments that made them the holders of the Ibanez and LaRace mortgages before the notice of sale and the foreclosure sale. We turn, then, to the documentation submitted by the plaintiffs to determine whether it met the requirements of a valid assignment.

Like a sale of land itself, the assignment of a mortgage is a conveyance of an interest in land that requires a writing signed by the grantor. See G. L. c. 183, § 3; Saint Patrick's Religious, Educ. & Charitable Ass'n v. Hale, 227 Mass. 175, 177 (1917). In a "title theory state" like Massachusetts, a mortgage is a transfer of legal title in a property to secure a debt. See Faneuil Investors Group, Ltd. Partnership v. Selectmen of Dennis, 458 Mass. 1, 6 (2010). Therefore, when a person borrows money to purchase a home and gives the lender a mortgage, the homeowner-mortgagor retains only equitable title in the home; the legal title is held by the mortgagee. See Vee Jay Realty Trust Co. v. DiCroce, 360 Mass. 751, 753 (1972), quoting Dolliver v. St. Joseph Fire & Marine Ins. Co., 128 Mass. 315, 316 (1880) (although "as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands," mortgagee has legal title to property); Maglione v. BancBoston Mtge. Corp., 29 Mass. App. Ct. 88, 90 (1990). Where, as here, mortgage loans are pooled together in a trust and converted into mortgage-backed securities, the underlying promissory notes serve as financial instruments generating a potential income stream for investors, but the mortgages securing these notes are still legal title to someone's home or farm and must be treated as such.

Focusing first on the Ibanez mortgage, U.S. Bank argues that

it was assigned the mortgage under the trust agreement described in the PPM, but it did not submit a copy of this trust agreement to the judge. The PPM, however, described the trust agreement as an agreement to be executed in the future, so it only furnished evidence of an intent to assign mortgages to U.S. Bank, not proof of their actual assignment. Even if there were an executed trust agreement with language of present assignment, U.S. Bank did not produce the schedule of loans and mortgages that was an exhibit to that agreement, so it failed to show that the Ibanez mortgage was among the mortgages to be assigned by that agreement. Finally, even if there were an executed trust agreement with the required schedule, U.S. Bank failed to furnish any evidence that the entity assigning the mortgage -- Structured Asset Securities Corporation -- ever held the mortgage to be assigned. The last assignment of the mortgage on record was from Rose Mortgage to Option One; nothing was submitted to the judge indicating that Option One ever assigned the mortgage to anyone before the foreclosure sale. Thus, based on the documents submitted to the judge, Option One, not U.S. Bank, was the mortgage holder at the time of the foreclosure, and U.S. Bank did not have the authority to foreclose the mortgage.

Turning to the LaRace mortgage, Wells Fargo claims that, before it issued the foreclosure notice, it was assigned the LaRace mortgage under the PSA. The PSA, in contrast with U.S.

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[19] Ibanez challenges the validity of this assignment to Option One. Because of the failure of U.S. Bank to document any preforeclosure sale assignment or chain of assignments by which it obtained the Ibanez mortgage from Option One, it is unnecessary to address the validity of the assignment from Rose Mortgage to Option One.

Bank's PPM, uses the language of a present assignment ("does hereby . . . assign" and "does hereby deliver") rather than an intent to assign in the future. But the mortgage loan schedule Wells Fargo submitted failed to identify with adequate specificity the LaRace mortgage as one of the mortgages assigned in the PSA. Moreover, Wells Fargo provided the judge with no document that reflected that the ABFC (depositor) held the LaRace mortgage that it was purportedly assigning in the PSA. As with the Ibanez loan, the record holder of the LaRace loan was Option One, and nothing was submitted to the judge which demonstrated that the LaRace loan was ever assigned by Option One to another entity before the publication of the notice and the sale.

Where a plaintiff files a complaint asking for a declaration of clear title after a mortgage foreclosure, a judge is entitled to ask for proof that the foreclosing entity was the mortgage holder at the time of the notice of sale and foreclosure, or was one of the parties authorized to foreclose under G. L. c. 183, § 21, and G. L. c. 244, § 14. A plaintiff that cannot make this modest showing cannot justly proclaim that it was unfairly denied a declaration of clear title. See In re Schwartz, supra at 266 ("When HomEq [Servicing Corporation] was required to prove its authority to conduct the sale, and despite having been given ample opportunity to do so, what it produced instead was a jumble of documents and conclusory statements, some of which are not supported by the documents and indeed even contradicted by them"). See also Bayview Loan Servicing, LLC v. Nelson, 382 Ill. App. 3d 1184, 1188 (2008) (reversing grant of summary judgment in favor of financial entity in foreclosure action, where there was

"no evidence that [the entity] ever obtained any legal interest in the subject property").

We do not suggest that an assignment must be in recordable form at the time of the notice of sale or the subsequent foreclosure sale, although recording is likely the better practice. Where a pool of mortgages is assigned to a securitized trust, the executed agreement that assigns the pool of mortgages, with a schedule of the pooled mortgage loans that clearly and specifically identifies the mortgage at issue as among those assigned, may suffice to establish the trustee as the mortgage holder. However, there must be proof that the assignment was made by a party that itself held the mortgage. See In re Samuels, 415 B.R. 8, 20 (Bankr. D. Mass. 2009). A foreclosing entity may provide a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage. See In re Parrish, 326 B.R. 708, 720 (Bankr. N.D. Ohio 2005) ("If the claimant acquired the note and mortgage from the original lender or from another party who acquired it from the original lender, the claimant can meet its burden through evidence that traces the loan from the original lender to the claimant"). The key in either case is that the foreclosing entity must hold the mortgage at the time of the notice and sale in order accurately to identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale (or the foreclosing entity must be one of the parties authorized to foreclose under G. L. c. 183, § 21, and G. L. c. 244, § 14).

The judge did not err in concluding that the securitization

documents submitted by the plaintiffs failed to demonstrate that they were the holders of the Ibanez and LaRace mortgages, respectively, at the time of the publication of the notices and the sales. The judge, therefore, did not err in rendering judgments against the plaintiffs and in denying the plaintiffs' motions to vacate the judgments.

We now turn briefly to three other arguments raised by the plaintiffs on appeal. First, the plaintiffs initially contended that the assignments in blank executed by Option One, identifying the assignor but not the assignee, not only "evidence[] and confirm[] the assignments that occurred by virtue of the securitization agreements," but "are effective assignments in their own right." But in their reply briefs they conceded that the assignments in blank did not constitute a lawful assignment of the mortgages. Their concession is appropriate. We have long held that a conveyance of real property, such as a mortgage, that does not name the assignee conveys nothing and is void; we do not regard an assignment of land in blank as giving legal title in land to the bearer of the assignment. See Flavin v. Morrissey, 327 Mass. 217, 219 (1951); Macurda v. Fuller, 225 Mass. 341, 344 (1916). See also G. L. c. 183, § 3.

Second, the plaintiffs contend that, because they held the mortgage note, they had a sufficient financial interest in the mortgage to allow them to foreclose. In Massachusetts, where a note has been assigned but there is no written assignment of the

[20] The plaintiffs have not pressed the procedural question whether the judge exceeded his authority in rendering judgment against them on their motions for default judgment, and we do not address it here.

mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage. Barnes v. Boardman, 149 Mass. 106, 114 (1889). Rather, the holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment. Id. ("In some jurisdictions it is held that the mere transfer of the debt, without any assignment or even mention of the mortgage, carries the mortgage with it, so as to enable the assignee to assert his title in an action at law. . . . This doctrine has not prevailed in Massachusetts, and the tendency of the decisions here has been, that in such cases the mortgagee would hold the legal title in trust for the purchaser of the debt, and that the latter might obtain a conveyance by a bill in equity"). See Young v. Miller, 6 Gray 152, 154 (1856). In the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged. This common-law principle was later incorporated in the statute enacted in 1912 establishing the statutory power of sale, which grants such a power to "the mortgagee or his executors, administrators, successors or assigns," but not to a party that is the equitable beneficiary of a mortgage held by another. G. L. c. 183, § 21, inserted by St. 1912, c. 502, § 6.

Third, the plaintiffs initially argued that postsale assignments were sufficient to establish their authority to foreclose, and now argue that these assignments are sufficient when taken in conjunction with the evidence of a presale

assignment. They argue that the use of postsale assignments was customary in the industry, and point to Title Standard No. 58 (3) issued by the Real Estate Bar Association for Massachusetts, which declares: "A title is not defective by reason of . . . [t]he recording of an Assignment of Mortgage executed either prior, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record, by the Assignee." To the extent that the plaintiffs rely on this title standard for the proposition that an entity that does not hold a mortgage may foreclose on a property, and then cure the cloud on title by a later assignment of a mortgage, their reliance is misplaced because this proposition is contrary to G. L. c. 183, § 21, and G. L. c. 244, § 14. If the plaintiffs did not have their assignments to the Ibanez and LaRace mortgages at the time of the publication of the notices and the sales, they lacked authority to foreclose under G. L. c. 183, § 21, and G. L. c. 244, § 14, and their published claims to be the present holders of the mortgages were false. Nor may a postforeclosure assignment be treated as a pre-foreclosure assignment simply by declaring an "effective date" that precedes the notice of sale and foreclosure, as did Option One's assignment of the LaRace mortgage to Wells Fargo. Because an assignment of a mortgage is a transfer of legal title, it becomes effective with respect to the power of sale only on the

[21] Title Standard No. 58 (3) issued by the Real Estate Bar Association for Massachusetts continues: "However, if the Assignment is not dated prior, or stated to be effective prior, to the commencement of a foreclosure, then a foreclosure sale after April 19, 2007 may be subject to challenge in the Bankruptcy Court," citing In re Schwartz, 366 B.R. 265 (Bankr. D. Mass. 2007).

transfer; it cannot become effective before the transfer. See In re Schwartz, supra at 269.

However, we do not disagree with Title Standard No. 58 (3) that, where an assignment is confirmatory of an earlier, valid assignment made prior to the publication of notice and execution of the sale, that confirmatory assignment may be executed and recorded after the foreclosure, and doing so will not make the title defective. A valid assignment of a mortgage gives the holder of that mortgage the statutory power to sell after a default regardless whether the assignment has been recorded. See G. L. c. 183, § 21; MacFarlane v. Thompson, 241 Mass. 486, 489 (1922). Where the earlier assignment is not in recordable form or bears some defect, a written assignment executed after foreclosure that confirms the earlier assignment may be properly recorded. See Bon v. Graves, 216 Mass. 440, 444-445 (1914). A confirmatory assignment, however, cannot confirm an assignment that was not validly made earlier or backdate an assignment being made for the first time. See Scaplen v. Blanchard, 187 Mass. 73, 76 (1904) (confirmatory deed "creates no title" but "takes the place of the original deed, and is evidence of the making of the former conveyance as of the time when it was made"). Where there is no prior valid assignment, a subsequent assignment by the mortgage holder to the note holder is not a confirmatory assignment because there is no earlier written assignment to confirm. In this case, based on the record before the judge, the plaintiffs failed to prove that they obtained valid written assignments of the Ibanez and LaRace mortgages before their foreclosures, so the postforeclosure assignments were not

confirmatory of earlier valid assignments.

Finally, we reject the plaintiffs' request that our ruling be prospective in its application. A prospective ruling is only appropriate, in limited circumstances, when we make a significant change in the common law. See Papadopoulos v. Target Corp., 457 Mass. 368, 384 (2010) (noting "normal rule of retroactivity"); Payton v. Abbott Labs, 386 Mass. 540, 565 (1982). We have not done so here. The legal principles and requirements we set forth are well established in our case law and our statutes. All that has changed is the plaintiffs' apparent failure to abide by those principles and requirements in the rush to sell mortgage-backed securities.

Conclusion. For the reasons stated, we agree with the judge that the plaintiffs did not demonstrate that they were the holders of the Ibanez and LaRace mortgages at the time that they foreclosed these properties, and therefore failed to demonstrate that they acquired fee simple title to these properties by purchasing them at the foreclosure sale.

Judgments affirmed.

CORDY, J. (concurring, with whom Botsford, J., joins). I concur fully in the opinion of the court, and write separately only to underscore that what is surprising about these cases is not the statement of principles articulated by the court regarding title law and the law of foreclosure in Massachusetts, but rather the utter carelessness with which the plaintiff banks documented the titles to their assets. There is no dispute that the mortgagors of the properties in question had defaulted on their obligations, and that the mortgaged properties were subject to foreclosure. Before commencing such an action, however, the holder of an assigned mortgage needs to take care to ensure that his legal paperwork is in order. Although there was no apparent actual unfairness here to the mortgagors, that is not the point. Foreclosure is a powerful act with significant consequences, and Massachusetts law has always required that it proceed strictly in accord with the statutes that govern it. As the opinion of the court notes, such strict compliance is necessary because Massachusetts is both a title theory State and allows for extrajudicial foreclosure.

The type of sophisticated transactions leading up to the accumulation of the notes and mortgages in question in these cases and their securitization, and, ultimately the sale of mortgaged-backed securities, are not barred nor even burdened by the requirements of Massachusetts law. The plaintiff banks, who brought these cases to clear the titles that they acquired at their own foreclosure sales, have simply failed to prove that the underlying assignments of the mortgages that they allege (and would have) entitled them to foreclose ever existed in any

legally cognizable form before they exercised the power of sale that accompanies those assignments. The court's opinion clearly states that such assignments do not need to be in recordable form or recorded before the foreclosure, but they do have to have been effectuated.

What is more complicated, and not addressed in this opinion, because the issue was not before us, is the effect of the conduct of banks such as the plaintiffs here, on a bona fide third-party purchaser who may have relied on the foreclosure title of the bank and the confirmative assignment and affidavit of foreclosure recorded by the bank subsequent to that foreclosure but prior to the purchase by the third party, especially where the party whose property was foreclosed was in fact in violation of the mortgage covenants, had notice of the foreclosure, and took no action to contest it.