

CHAPTER 11

RULE 3: MAKE THE MACHINE PROVE ITS RIGHT TO FORECLOSE

*"Laws are not masters but servants,
and he rules them who obeys them."*

Henry Ward Beecher
(1813-1887)

We do not have to make payments that we do not legally owe. Every month, however, borrowers targeted for foreclosure make payments and even give up their homes to people to whom they owe nothing. This has happened too frequently over the past several years, and it will continue for borrowers who do not use the law to their advantage.

A law with which the mortgage finance industry is all too familiar, and which you need to learn about, is the Uniform Commercial Code, or UCC. This chapter explains the importance of what the foreclosure machine already knows, and what it hopes you will not learn.

Bear with me in this chapter. The discussion covers complex points of law, and, by necessity, it contains a certain amount of legalese. But what you'll learn goes to the heart of your case against the foreclosure machine. I think you'll have a lot more success if you learn and apply these concepts and rules of law.

Let's begin with the Boss concept.

THE IMPORTANCE OF THE BOSS

Only one person or company has the legal right to enforce the Note when mortgage payments are late or not made. That "one" has the sole and legal right to receive payments due under the Note, to make demands for delinquent payments, to sell or give the Note away, to modify the terms of the Note with the borrower's consent, and to fully discharge or settle the borrower's obligation under the Note. That "one" exerts full

dominion over the Note, including the right to tear it up or destroy it if desired. Laws and documents often differ as to the word or phrase they use to refer to the "one," and these variations in terminology are often and intentionally abused by the industry's machine. To avoid confusion, you and I will refer to this one person or company with genuine control over your Note as the Boss.

When you bought your house, or perhaps later when you refinanced it, you signed a Note promising to repay your loan and to make the mortgage payments for the benefit of the lender with which you dealt. That lender became the Boss of the Note, per the UCC, when you signed and delivered the Note. The Note contained language authorizing the Boss to sell the Note to someone else if it chose to do that, or it did not prohibit such dealings. The identity of the Boss of your Note, therefore, could have changed after you signed the Note.⁷⁴

Most residential real estate loans created from the late 1990s through 2008 were sold and resold in the secondary mortgage market, as this period was the heyday of mortgage-backed securities. If the first sale of the Note was made in full compliance with the UCC, the buyer would have become the new Boss of the Note. If that first buyer subsequently sold the Note in full compliance with the UCC, the second buyer would then have become the Boss. If a third buyer later purchased the Note in full compliance with the UCC, the third Buyer would have become the new Boss, and so on, and so on.

If, however, a sale in that chain did not follow the strict UCC requirements, the Note ultimately could have been left without any Boss at all. That's correct: failure to comply with the UCC could have terminated an earlier Boss's rights under the Note and left the Note without a Boss. A transaction, for example a sale, could also have created a new owner of some or all of the value of your mortgage loan, but with no change in who was the Boss. In that event the buyer may have mistakenly thought itself the new Boss when in fact it obtained no Boss rights at all because of the UCC law of negotiable instruments.

Because you were not involved in the sale or exchange of your Note by your lender or its successors, you would not have received complete, if any, information about a change in its ownership or control. You would not have received information sufficient to let you or any attorney know whether each or any of the transactions had been done in full compliance with the UCC. You have never been in a position to know the true identity of the Boss of your Note except on that one day when you signed and delivered your Note and mortgage to your lender. Do not delude yourself into thinking otherwise. You received instructions, which may have changed from time to time, telling you where to send mortgage payments. You assumed that those instructions came from the Boss or the Boss's servant or agent.⁷⁵ (See "The Boss's Representative or Agent" later in this chapter.) You assumed that each payment you made actually

reached the Boss and that the Boss gave you credit for the payment, thus lowering the remaining loan balance still due.

The first time you received a notice about a missed mortgage payment, you assumed the notice was an authorized communication from the Boss of the Note, or maybe the Boss's servant. When things really got bad and the notice turned into a demand for money combined with a threatened foreclosure, you still assumed the Boss was involved.

You never received a notice that said, "Oh, by the way, I do not represent the Boss of the Note, and by law I have no right to collect any payment from you. But, hey, send your money to me anyway, because if you don't I'll foreclose and take your house, whether or not that is actually a violation of your rights regarding the Note and the mortgage." But if the foreclosure machine were totally honest, that is the kind of notice it should have sent out to millions of borrowers. If the notice carried a disclosure like that, you would have begun to rethink the assumptions you had been making all along.

Let me again emphasize the basics. Only the Boss of the Note has a right to the payments you made. Only the Boss has the legal right to make demands under the Note if the payments have not been received in a timely manner. The Boss is the only one with the right to declare a default that can lead to a foreclosure of your house. If the Boss has not declared a default under the Note within the meaning of default as discussed in Chapters 4 and 8, foreclosure of the pledged collateral—that is, the mortgage against your house—is not proper. This is true whether you are dealing with a judicial or nonjudicial foreclosure.

When the foreclosure machine tries to take your house, it certainly implies that it is the Boss or that it can legally assert the rights of the Boss. But what if the machine is wrong? What does it mean if the machine can't prove it is the Boss or the Boss's servant? That means it has no right to your money and no right to foreclose. At least, that is my understanding based on my research and analysis.

If your opponent can't prove it has a right to Boss status, that also means that you may have been sending mortgage payments to the wrong company in the past, that any new payments you make in answer to the machine's threat may go to the wrong company, and, that if your home is foreclosed, the sales money may not get to the Boss, either. If there is still a Boss of your Note, and it did not receive your payments, you may still owe that money. Making payments to the wrong company or companies does not relieve you of the obligations to the actual Boss. You would hate to have your home foreclosed, or to settle with the machine for a sum of money or debt restructuring, only to be sued later by the real Boss, who has not been paid, did not receive the foreclosure monies, or did not agree to whatever debt restructuring you thought had occurred. These are all possibilities and problems for you if you assume that the

foreclosure machine at your door actually represents the one and only entity with the right to call itself the Boss of your Note at that time.

Confusion about the identity of the Boss of the Note happens. This is apparently a result of sloppy business practices within the mortgage finance industry since the late 1990s. Should your judge doubt that, you can point to cases in which more than one company claims rights to the same Note⁷⁶ and cases, like those cited in this chapter, in which the party claiming rights, as if a Boss of the Note, could not, when pressed for proof, support its claims.

Sometimes a foreclosure suit is decided without the court's requiring and obtaining admissible evidence about the machine's alleged right to claim Boss status, and the relationship, if any, between the party claiming the right to foreclose and that of the alleged Boss. Whenever this happens, it places at risk the interests of the borrower, the true Boss, and others who may acquire interests in the Note when thinking they are dealing with the real Boss. UCC analysis is a must if adjudication is to be accurate, meaningful, and of value as precedent for others engaging in foreclosure litigation. You need to do your part to keep these important issues before your judge.

The mortgage finance industry created the economic mess we now endure. It doesn't own up to its responsibility, and yet it aggressively beats up on borrowers who have been made delinquent by the industry's incompetence, greed, and indifference. The industry has effectively created a double moral standard. It says that borrowers who don't pay their bills are bad, while it approves, or at least doesn't disparage, its own members who treat obligations as things to be ignored when doing so helps their business.⁷⁷ The industry hasn't demonstrated concern for the borrowers it created who are now victims.

So it is up to you to correct your own situation. Use your opponent's information, and lack of information, to show that it is not, and does not represent, the Boss of your Note. That is how you "get in their face." That is how you avoid paying your money to, or having your home taken by, a company with no legal rights to either.

THE UNIFORM COMMERCIAL CODE PROTECTS BORROWERS

An Introduction to the UCC

Our legal system upholds common-sense principles of fairness. For example, it supports and has put legal teeth behind the concept that a borrower is required to pay only bona fide legal debts and that the Boss of that legal debt, not someone else, is the only one entitled to enforce the obligations of the Note.

The Uniform Commercial Code, or UCC, now law in every state, is designed to implement these fairness principles. It contains protections for the borrower that simultaneously protect the Boss, and vice versa. The UCC rules are designed to help ensure that payments of the Note (including foreclosure proceeds if a home is foreclosed to help satisfy the obligation of the Note) go to the Boss, and also to protect the borrower from someone not entitled to enforce the Note.

The UCC applies to mortgage loans because the Note is, with only rare exceptions, a negotiable instrument under the Uniform Commercial Code and, therefore, subject to that old and well established body of law.⁷⁸ If your lender had the right to sell your Note or put it into the stream of commerce so it could be sold and traded by others, it is a negotiable instrument. Yes, when your Note is sold, traded, or exchanged by people you do not know, it is, at least legally, a lot like the check you write on your bank account.

The Uniform Commercial Code is your friend. It is the enemy of the foreclosure machine when the machine falsely or mistakenly claims rights derived through ownership or control of your Note. Evaluating your attacker's claims in terms of the strict requirements of the UCC is the way to learn whether your opponent actually has any rights regarding your Note.⁷⁹ The UCC establishes the ground rules that can shield you from bogus threats coming from those who lack legal right to make those demands under the UCC.⁸⁰

During a state's adoption of the Uniform Commercial Code, the renumbering system of its parts and other superficial differences may have occurred as the state incorporated the UCC into the state's already existing body of laws. For example, the UCC's Article 3, § 3-301, *Person Entitled To Enforce Instrument*, is § 55-3-301 of the New Mexico Statutes; § 28-3-301 of the Idaho Statutes; § 3301 of the California Commercial Code; § 73.0301 of Oregon's Commercial Transaction Statutes; and 12A:3-301 of the New Jersey Statutes. (The symbol §

stands for the word *section*. The number that follows it identifies the relevant section of the statute in question.)

My UCC references are to the version of this code that was approved by the Uniform Law Commissioners, in collaboration with The American Law Institute, and then recommended for adoption by the states. A copy of this form of the Uniform Commercial Code can be viewed online at www.law.cornell.edu/ucc. Article 3—*Negotiable Instruments* is the part of the UCC you will use most. A copy of that portion of the UCC can be viewed at www.law.cornell.edu/ucc/3.

Compilations of the UCC by state, including variances or proposed revisions, can be located online or in the legal or business sections of public libraries or libraries in law schools or courts.⁸¹ You can also compare the text of the UCC as available online or in this book with the text of your state's form of the UCC for the same section. The organization and content of the UCC among the states is highly standardized, however, especially with regard to the portions of the UCC most applicable to residential foreclosure matters.

The substance of the UCC also is highly uniform and constant among the states, and intentionally so, because it is law designed to nurture, protect, and standardize commerce across state lines and within state boundaries. Protecting the borrower and the Boss is important to the viability of trades and exchanges of negotiable instruments in the United States. The laws protecting their rights are also barriers to fraud and mistakes that could hurt buyers of negotiable instruments. For example, the UCC provides the means by which a prudent buyer can usually tell if the seller has the legal right to sell a negotiable instrument such as your Note.

The Uniform Commercial Code, when people take time to use it, is a type of insurance for those making, buying, and selling Notes, somewhat akin to real estate title insurance that gives additional protections and comforts to people who buy and sell real estate. The UCC is law designed to foster commerce by protecting your interests, the interests of the Boss (that is, the only one entitled to sell the Note), and the rights of prospective purchasers of the Note.

Some Provisions of the UCC and Related Case Law

The content of the UCC and related case law reflect concerns for the protections afforded to a borrower who issues a Note or other negotiable instrument. Here are some examples:

“[T]he payor of a [N]ote exposes himself or herself to double liability if he or she makes payment to someone other than the [Boss] of the instrument, *unless the other person to whom*

payment is made is an agent of the owner of the [N]ote." (Emphasis added.) *In the Matter of Foreclosure of a Deed of Trust Executed by Woodard*, 185 N.C.App. 159 (NC Ct.App. 2007).

"The purpose of the possession requirement in Article 3 [of the UCC] is to protect the Debtor from multiple enforcement claims to the same [N]ote." *Marks v. Branstein*, No. 09-11402-NMG (USD Ct D. MA 2010) and, also, *In re Kemp*, No. 08-18700-JHW (Bankr. D. NJ 2010). Here, "possession" refers to physical possession of the Note with all of the markings and attachments to it, as contrasted with what someone says is a copy of the physical Note.

Part (c) of UCC § 3-203, *Transfer of instrument; rights acquired by transfer*, provides that even a person in possession of the Note cannot enforce it if the Note was not properly indorsed and delivered to that person. (The UCC spells indorse with an "i" rather than an "e" as in most dictionaries.)

Part (d) of UCC § 3-203, *Transfer of instrument; rights acquired by transfer*, attempts to eliminate risks of multiple claimants under the same Note by providing that a possessor of the Note who did not acquire 100% of all rights and entitlements under the Note is a transferee who "obtains no rights." For example, someone who can prove only a partial interest in the Note, or who might only be holding onto the Note for someone else, does not have a right to enforce the Note.⁸² That is, only the one Boss of the Note can direct enforcement of the Note, and there can only be one true Boss.

Part (b) of UCC § 3-309, *Enforcement of lost, destroyed, or stolen instrument*, provides in relevant part that "The court may not enter judgment in favor of the person seeking enforcement [of a lost, destroyed or stolen Note] unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument."⁸³

UCC § 3-501(a) states that only the one entitled to enforce the Note or its servant may make demands for payment.⁸⁴ § 3-501(b)(2) states that, upon your request, whoever is making the demand must exhibit the Note, identify itself, and, if alleging to represent the Boss, then prove its authority to be the servant. The

borrower “is given the right to make these demands for his [or her] own protection.”⁸⁵

Right to enforce a Note requires strict compliance with the UCC in order to achieve the protective policies under the UCC. See, for example:

- *Adams v. Madison Realty & Development, Inc.*, 853 F.2d 163 (3rd Cir. 1988): This decision notes that strict compliance with the UCC protects each intended owner of the Note as it gets passed about.
- *Cogswell v. Citifinancial Mortgage*, 624 F.3d 395 (US Cir.7th 2010): Ruling against the foreclosure machine, the court raised the concern that the machine’s failure to prove compliance with the UCC requirements created a reasonable concern about whether the “[N]ote was actually held by another who would be entitled to enforce it against the property owners.”
- *Norwood v. Chase Home Finance*, No. A-09-CA-940-JRN (USD Ct. W.D. TX 2011): “The rationale for the strict requirement of possession [of the physical Note] is to protect the obligor from being subject to multiple demands for payment on a single [N]ote. ... Without procedural safeguards, multiple parties could force the debtor to pay the [N]ote. If the original [N]ote is a prerequisite for enforcement, however, then a later party faces a significant hurdle before it may enforce the [N]ote.”
- *Bank of America v. Miller*, 2011-Ohio-1403 (OH Ct.App.2nd 2011): “[I]t becomes essential to establish that the person who demands payment of a negotiable [N]ote, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument. These risks provide makers with a recognizable interest in demanding proof of the chain of title.”

Some Judicial Concepts You Should Know

Sometimes the fairness principles that protect you from claims of those who are not the Boss surface when a court addresses common judicial policies, such as:

- *Judicial standing*—whether the plaintiff (that is, the party who starts the lawsuit) has sufficient connection to the Note to justify invoking the court's jurisdiction, or control of the case, when making claims against you⁸⁶
- *Real party in interest*—whether your opponent is actually the one to whom you legally owe money under the Note⁸⁷
- *Joinder*—whether the essential persons are actually parties to that particular lawsuit so full adjudication of all closely related legal issues can be raised, thereby affording the borrower and the Boss the opportunity to raise all of their claims and defenses with a view of obtaining the most meaningful and complete adjudication possible⁸⁸
- *Finality, or judicial economy or efficiency*—whether the borrower and the Boss should be in the same lawsuit so the dispute about what if anything is owed can be fully resolved once and for all times without risk of burdening the borrower, the Boss, or the judicial system with unnecessarily extended or additional litigation⁸⁹

When courts address these judicial policies in relationship to a real estate foreclosure, UCC law is necessarily invoked, even if not specifically mentioned. This is because correct decisions about those policy issues typically revolve about the question of who has rights to enforce the Note. In other words, is your opponent actually the Boss?⁹⁰ The only way to know whether your opponent has the right to enforce the Note (or the mortgage, which has no validity independent of the Note)⁹¹ is to force it to prove its relationship to the Note, and in minute detail going back to the lender who was the first Boss of your Note. That relationship, whether or not it exists, can only be defined with analysis pursuant to the UCC.

Each time the court deals with an issue that involves one of these judicial policies, the UCC's strict definition of the Boss should be placed before the judge. Strengthen your case by making certain that you raise the fairness principles of the UCC and that the judge looks at them as he or she makes decisions involving judicial standing, real party in interest, joinder, finality and judicial economy.

The UCC Also Protects the Boss

I think your judge should be reminded that his or her decision involves more than just your dispute with your opponent. An incorrect decision can hurt both you and the true Boss of your Note. An incorrect

decision can also send the wrong message to those who deal in negotiable instruments like mortgage loans and are looking for excuses to ignore the plain language of the law.

In addition to protecting you, the UCC simultaneously protects the Boss. As noted earlier in this chapter, your obligation under the Note is not reduced or discharged if you pay the wrong person, or if the wrong person gets the foreclosure proceeds from selling your house. The UCC intends that the Boss should be solely in charge of your Note. Its incorporated fairness principles for the Boss keep you on the hot seat to be certain your payments get to the right person, including proceeds from a foreclosure.⁹²

Even if a court mistakenly rules that your opponent has the right to payments or foreclosure, you could nevertheless be liable to the real Boss of the Note. For example, UCC § 3-602 subjects the borrower to continuing liability and the risk of extended litigation with the Boss should the borrower make Note payments to or permit its home value to be taken by someone other than the Boss.⁹³ Your obligation under the Note is clearly discharged to the extent your payments go to "a person entitled to enforce the [Note]," as stated by § 3-602(a)(ii), but you may still owe that money to the Boss if the wrong person gets your payments. Making sure your payments go to the right person is important. This is a legally recognized concern when the issue of who has the right to enforce a Note is raised.⁹⁴ A court order in favor of a person who is not the Boss of your Note does not necessarily protect you if the disgruntled and real Boss later decides to make you pay your obligation under the Note.

The documents you submit to the court should help the judge remember the underlying fairness principles that are incorporated in the Uniform Commercial Code. If you don't remind the judge that the UCC is designed to protect you and the Boss from claims by people lacking the right to enforce the Note, your judge may get too involved with details and lose sight of the broad purposes of the UCC and its strict requirements when defining who has the sole legal right to enforce and make claims related to your Note.

You have no choice but to push your opponent to prove its alleged Boss-type rights. You're at risk of more headaches and debts if you don't.⁹⁵ This pressure on you is the UCC's attempt to help take care of the Boss.

I think it is common for the wrong company to allege Boss status in a foreclosure-related lawsuit. How often such mistakes or fraud have occurred can't be accurately computed. Only a tiny portion of the millions of foreclosures in the past few years resulted in contested litigation. The mass of judicial foreclosures placed no burden on the machine to actually prove its right to take the targeted homes. Most foreclosures were the nonjudicial type, in which no judge was ever involved and no facts were preserved in public records regarding the

propriety or legality of those foreclosures. Typically, a company showed up, demanded payment under threat of foreclosure, and the homeowners walked away without ever demanding proof that the attacker had the rights it claimed.

Published court decisions in which the foreclosure machine prevailed have rarely involved genuine UCC analysis. Often, the reason is that the borrower in those cases didn't know about the UCC or failed to put the foreclosure fundamentals clearly at issue.⁹⁶

Successes by borrowers, on the other hand, have frequently involved some level of analysis of Boss rights according to the UCC. Those questions may have been raised either by the borrower or the judge, and either directly as a UCC question of law or indirectly as a determination involving a judicial policy such as judicial standing or real party in interest.⁹⁷ As a result of my research, I am convinced that borrowers will realize substantial gains if they challenge the machine to actually prove a right to make demands regarding the Notes.

You are not required to pay the wrong claimant under the Note, and that is one of the UCC protections for you. However, if your payments or home go to any person other than the one true Boss, you face the risk of another lawsuit and more collection headaches. That is an intended pressure for the benefit and protection of the Boss of your Note. These are serious matters for both you and the Boss. The judge needs to understand that letting the wrong person take your money or home can hurt the Boss and also can expose you to more problems. However, the risk of an incorrect decision can be minimized by adherence to the strict UCC requirements. Both judicial precedence and UCC authority are available to help you explain this to your judge.

THE UCC AND THE BURDEN OF PROOF

As noted above, the UCC, which has been adopted by all fifty states, defines the Note as a negotiable instrument.⁹⁸ Because this well-established body of law controls negotiable instruments, it therefore defines who has the right to enforce your Note. The UCC makes it clear that you owe your opponent nothing unless and until it produces real proof that it has the right to enforce your Note—that is, proof that satisfies the strict tests of the UCC. This is how the law helps protect you from someone who has no right to your money or home.

Your court's rules place the burden of proof on the party claiming the right to enforce your Note, but the UCC is even tougher. Your opponent must prove that it is the Boss or the Boss's servant or else lose its case against you.⁹⁹

The UCC authorizes you to demand information from your opponent and simultaneously places a heavy burden on it to comply with your request. If your opponent doesn't cooperate, it has no right to demand payment from you, and no right to your money also means no right to take your house.

Here are examples of what the UCC requires from a person claiming the right to enforce your Note:

➤ UCC § 3-203(b) vests in the transferee (the person to whom the Note is transferred) the rights of the transferor (the person who held the Note and is transferring it to a new holder) to enforce the payment obligations of the Note. This would permit, for example, a person in possession of the Note to claim Boss status when it couldn't otherwise qualify as a Boss. Qualifying as Boss under this part of the UCC is difficult. The required proof would consist of showing that the prior company was the Boss at the time of the transfer and that it intended to deliver all of its Boss powers when it gave up possession of the Note. Thus, the proof would have to establish the transferor's right to Boss status by analysis of those rights all the way back to your lender, and clear evidence would have to be provided as to the reasons and intents of that transferor when giving up possession.¹⁰⁰ If applicable, this section creates a possible Boss status as a "non-holder in possession" under UCC § 3-301(ii) discussed later in this chapter.

➤ UCC § 3-308(b) provides that a person who actually produces the Note is entitled to payment, but only if that person "proves entitlement to enforce the instrument under Section 3-301."¹⁰¹ In this section and many other UCC sections, references to "enforce" mean the strict Boss status requirements of UCC § 3-301, discussed more fully later in this chapter.

➤ UCC § 3-309(b) involves enforcement of a lost, destroyed or stolen Note. It states that the person seeking to enforce the Note "must prove the terms of the instrument and the person's right to enforce the instrument." Recall that under the UCC the word *instrument* means the Note. Observe that this section also requires proof of the "right to enforce," that being the difficult Boss status requirements of UCC § 3-301.

➤ UCC § 3-501, *Presentment*, states that only a person with the right to enforce the Note has a right to make demands under

it.¹⁰² Are you beginning to appreciate the importance of the “right to enforce”?

➤ UCC § 3-501(b)(2) states that, upon your demand, “the person making presentment”—that is, the person demanding payment of the Note—must exhibit or present the Note. Pursuant to this part of the UCC, your opponent has no right to demand payment from you until it has produced the physical Note. A copy is not enough. The only exception occurs when your opponent asserts a right to enforce the Note pursuant to § 3-309 (related to an alleged lost, destroyed, or stolen Note) and provides all of the proof that § 3-309 requires.

➤ UCC § 3-501(b)(2) further states that the person making presentment also must, upon your demand, give reasonable identification, and, if presentment is made on behalf of another person, provide reasonable evidence of authority to do so. In other words, your opponent has to identify itself, meaning prove its right to enforce your Note or else its authority to act on behalf of someone else who has that right. If your opponent claims to be the servant of the Boss, you are entitled to see proof that the company your opponent identifies as the Boss really has that status under the UCC. Your opponent must also prove that it is doing that Boss’ bidding regarding your Note as a result of a clear instruction about your Note from that alleged Boss.

Until you’ve received all of this information from your opponent, you have not dishonored or breached the Note by not paying the demanded money to the company that has not proven its right to make that demand. The law does not require you to pay money to a company that makes demands but refuses to, or cannot, prove it is owed your money.

Furthermore, until all of that information and proof is provided, you haven’t been told by the Boss or its representative that anything is due under the Note—that is, “presentment is not effective until the presenter has reasonably satisfied all proper counter-demands of the person to whom presentment has been made.”¹⁰³ Unless you get complete proof that your opponent has a right to enforce the Note, therefore, the notice of delinquency or default you received is meritless—only the one true Boss of your Note has the right by law to say when and how much, if anything, you owe related to your Note. The real Boss could be mistaken or a crook, so you don’t want to take its word about

such matters, either. No person other than that Boss, however, has any business or right to say what the Boss thinks or wants to do regarding your Note.

► UCC 3-602(b) states that the borrower's obligation to pay anything on the Note, including letting his or her home be taken as payment, is subject first to the duty of the attacker to give proof of its rights. This section states, "Upon request, a transferee shall seasonably furnish reasonable proof that the Note has been transferred." In essence, this is a requirement that the person claiming the right to enforce the Note must prove it has that right when requested to do so. If the person can't provide that proof, or refuses to respond to the request, the borrower doesn't owe anything to that person. Observe, that this provision requires your opponent to provide real proof—not opinions, guesses, or self-serving conclusions. You can make your request before a lawsuit begins via an informal letter, as discussed in Chapter 10, and by a letter or formal discovery during the course of your lawsuit.

Numerous court decisions and other legal authorities address the UCC's fundamental fairness principles. These legal sources support the idea that the burden of proof is placed on the person who is demanding payment from you or threatening to foreclose. A few examples are provided below:

"... [T]o protect the Debtor from multiple enforcement claims to the same [N]ote ... the maker of the [N]ote must have certainty regarding the party who is entitled to enforce the [N]ote. From the maker's standpoint, therefore, it becomes essential to establish that the person who demands payment of a negotiable [N]ote, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument. These risks provide makers [i.e., borrowers] with a recognizable interest in demanding proof of the chain of title. Consequently, plaintiffs here, as makers of the [N]otes, may properly press defendant to establish its holder status."¹⁰⁴

Discussing requirements of UCC § 3-301(ii), the federal bankruptcy court concludes that a person claiming status as a "non-holder in possession of the instrument who has the rights of a holder" must "prove the transaction" by which it claims to have obtained such rights, must prove the transferor had the right

to enforce the Note at that time, and must produce the physical Note. Further, the court noted that mere ownership of the Note did not establish the right to enforce the payment obligations under the Note and that even if possession of the Note was demonstrated, the court was not allowed to assume without proof that the other requirements had been satisfied. *In re Wilhelm*, 407 B.R. 392 (Bankr. D. ID 2009). Notice that neither possession nor ownership is sufficient to establish the "right to enforce" your Note.

"In addition to authenticating the [N]ote, MERS must show that it is entitled to enforce the [N]ote. Only the holder of a negotiable promissory [N]ote (with minor exceptions not relevant in this case) is entitled to enforce the [N]ote. *See* CAL.COM. CODE § 3301. The holder enforces the [N]ote by making a demand for payment. *See id* § 3501(a). The person making a demand shows its right to enforcement by showing the original of the promissory [N]ote. *See id*, § 3501(b)(2)." *In re Vargas*, 396 B.R. 511, 517 (Bankr. C.D. Cal. 2008). As discussed later in this chapter, the physical Note, not just a copy, must be produced if your opponent claims to have the right to enforce it and does not claim that the Note was lost, destroyed or stolen.

"The rationale for the strict requirement of possession is to protect the obligor from being subject to multiple demands for payment on a single [N]ote. *See Camp*, 965 F.2d at 29 (explaining that mere possession is insufficient because a later party may demand payment). Without procedural safeguards, multiple parties could force the debtor to pay the [N]ote. If the original [N]ote is a prerequisite for enforcement, however, then a later party faces a significant hurdle before it may enforce the [N]ote." *Norwood v. Chase Home Finance*, No. A-09-CA-940-JRN (USD Ct. W.D. TX 2011).

"[W]here the negotiable instrument sued upon is in the possession of the plaintiff, the original of the document, normally, must be produced since it is the best evidence of the obligation." *Nadjarian v. Rose*, No. PC/05-5213 (RI Superior Ct. 2009). That is, if your opponent claims to have the physical Note, the only way to fully protect your rights is for you to demand to see and then examine all of that document, which will likely be different than when you gave it to the lender.

“In a foreclosure proceeding under a power of sale [i.e., non-judicial sale], the lender bears the burden of proving four elements that must be established in order for the clerk of court to authorize the mortgagee or trustee to proceed with the foreclosure: (i) valid debt of which the party seeking to foreclose is the holder, (ii) default, (iii) right to foreclose under the instrument, (iv) notice to those entitled to such ...” *In the Matter of the Foreclosure of a Deed of Trust Executed by Adams*, No. COA09-1455 (NC Ct.App. 2010). For more information about the importance of the UCC in nonjudicial foreclosure situations, see the discussions later in this chapter and in the section called *Avoid “Show Me the Note” Difficulties* in Chapter 12.

“[I]t becomes essential to establish that the person who demands payment of a negotiable [N]ote, or to whom payment is made, is the duly qualified holder. Otherwise, the obligor is exposed to the risk of double payment, or at least to the expense of litigation incurred to prevent duplicative satisfaction of the instrument. These risks provide makers with a recognizable interest in demanding proof of the chain of [ownership and control].” *Bank of America v. Miller*, 2011-Ohio-1403 (OH Ct.App.2nd 2011).

“The official commentary to this section explains that while the transferee of an instrument may enforce the instrument without being its holder, the transferee, unlike a holder, is not entitled to the presumption of the right of enforcement, and must prove the transaction through which the instrument was acquired. UCC § 3-203, § 2, cmt. 1 (1999).” *In re Thomas*, No. 10-40549-MSH (Adv. Pro. No. 10-04086) (Bankr. D. MA 2011). This case is discussing the state of Massachusetts’s equivalent of UCC § 3-203(b). Keep in mind also that, in this context, *holder* refers to the person who qualifies as a Boss pursuant to the UCC, not simply a person with the Note in hand. A person in possession of the Note may have no right to enforce it pursuant to the UCC.

“Person seeking to enforce ... *must* identify the person entitled to enforce the [N]ote and establish that that person has not been paid,” and “Determining to whom a [N]ote is payable requires examination not only of the face of the [N]ote but also of any indorsements. This is because the party to whom a [N]ote is payable may be changed by indorsement.”¹⁰⁵ Also, regarding application of § 3-203(a): “[T]he person in possession of the [N]ote *must* also demonstrate the purpose of the delivery of the note to it in order to qualify as the person entitled to enforce.”¹⁰⁶

(Emphasis added.) *Report on Application of the UCC to Selected Issues Relating to Mortgage Notes*, Permanent Editorial Board for the Uniform Commercial Code.

“BOSS” PER THE UCC

What Is a Boss?

I selected the term *Boss* for the purpose of introducing the Uniform Commercial Code’s importance to your court fight against the industry’s foreclosure machine. The authority, control, and trump rights associated with the word *Boss* are helpful concepts when thinking about your Note and determining whether your attacker has the legal right to be making demands related to the Note or mortgage (a document that has no importance apart from the Note).

The UCC, however, does not mention *Boss* at all. Nor does it provide a single defined word that encompasses all the rights and entitlements of the *Boss*, even though the *Boss* concept is a good way to relate to the many words and parts of the UCC.

Your opponents will not likely mention *Boss* either. The foreclosure machine, when trying to imply or intimate that it is the *Boss* of the Note, or that it represents the *Boss*, will toss around terms like *beneficiary*, *lender*, *owner*, *creditor*, *trustee*, or *holder*. Sometimes it will even claim to be in *possession* of the original Note, as if the use of any of these words or claims magically gives your opponent the right to enforce the Note. Even ownership of the Note is not a prerequisite to having the right to enforce the Note.¹⁰⁷ There is no open-sesame magic, and no words that automatically mean your opponent has the right to make demands related to the Note.

Ignore, therefore, whatever label your opponent uses to refer to its alleged rights. Instead, concentrate on the tests of the UCC. Substance, not labeling, is the only thing truly important when applying the UCC. Your opponent must either prove that it is the *Boss* or the legitimate representative of the *Boss*, or else it has no right to make demands for payments or to allege that you are in default.

Even the words of the contracts you executed, those being the Note and the mortgage, do not trump the UCC when it comes to deciding who by law holds the status of *Boss* of your Note.¹⁰⁸ For example, suppose the terms of your Note attempt to define the *Boss* differently from the UCC, or the Note or mortgage refers to the successor lender as then having all the rights of the original lender—this makes no difference.

The UCC, not the text of the Note or the mortgage, defines the Boss of your Note. Being a negotiable instrument triggers the rules of the UCC, which include defining the rights of the lender and its successors regarding the enforcement of the obligations of your Note.

A good judge will look beyond labels and will apply law as indicated by the facts and the meaning reasonably assigned to those facts in the context of the law and policies underlying it.¹⁰⁹ Your discovery demands and your evaluations of the information that your opponent produces will show what it can and cannot prove. Facts, not your opponent's calculated words, determine whether it has a right to enforce the Note. Keep your eye on the requirements of the UCC and you'll be able to see past the machine's subterfuge.

I will continue to use the term *Boss* for two reasons. First, because it reflects a correct concept, and second, because it is easier to use *Boss* as an instructive tool than to talk about the various ways a person can become the Boss pursuant to the interactive pieces of the Uniform Commercial Code. I will also use references to the basic UCC document, the one that has been assimilated into each state's body of law. As I've said, the numbering and labeling used in this book may vary from how your state numbers and labels the same UCC text, but you will not have difficulty identifying your state's complement to the sections I discuss once you get into that activity. In your litigation, you and your opponent will, of course, refer to the UCC in the way specifically set out by your state's statutes.

Let me emphasize that only one person has the right to enforce your Note. The UCC is a body of law designed to give the right of enforcement to the one person who most fairly, in the eyes of those who created that law, is entitled to that stature. To underscore that there can be only one Boss for each Note, UCC § 3-203(d) provides that "If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The *transferee obtains no rights under this Article* and has only the rights of a partial assignee." [Emphasis added.] A person who doesn't receive complete ownership of and full rights to the Note when it obtains possession of the Note can't be the Boss. A Boss has everything or nothing, under the UCC, and there are no exceptions.

The one-Boss concept is there to protect you from possibly paying the wrong person. It simultaneously protects the Boss from some interloper trying to take what is owed to the Boss. The identity of the Boss can change with each sale or exchange of the Note, as was so common within the industry during the late 1990s through 2008. At each point in time, however, there can be only one Boss—or possibly even no Boss at all, depending on how botched a sale or exchange within the chain of ownership and control might have been.

Understand that the Boss can make whatever arrangements it wishes with others regarding sharing the proceeds or benefits of the Note, including sharing in possible foreclosure proceeds. But the Boss is the only person entitled to make those arrangements. Likewise, the Boss, and no one else, is the only person or company with the right to engage a servant to help it manage its interests in the Note and related mortgage. A Boss's creditor may have legitimate claims against the Boss for money it gets from enforcing your Note. That creditor, however, is not the Boss as defined by the UCC and has no right to pretend otherwise, no right to enforce the payment obligation of your Note, and no right to foreclose your home.

A Definition of the Boss—the UCC's Starting Point

Now we need to look at the UCC to learn how it defines the person with Boss-type authority over the Note. In other words, the person who is:

- The one with legal authority to enforce the Note—that is, to collect the amounts owed under it
- The one legally entitled to payments under the Note
- The one entitled to foreclosure sale proceeds should your home be foreclosed to satisfy your obligation under the Note
- The one with the authority to declare a default under the Note as a necessary precursor to initiation of a foreclosure, whether in court or by non-judicial process¹¹⁰

Obtaining a technical understanding of Boss under the Uniform Commercial Code begins with UCC § 3-301, which states the following:

UCC § 3-301. Person Entitled To Enforce Instrument

“Person entitled to enforce” an instrument means (i) the holder of the instrument, (ii) a non-holder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 or 3-418(d). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.”¹¹¹

A brief comment about the last sentence of § 3-301 is warranted. It won't likely have any importance to your case, but I thought you might

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A brief comment about the last sentence of § 3-301 is warranted. It isn't likely have any importance to your case, but I thought you might

like to know what the UCC is getting at by having added it. Don't worry about the possibility that your opponent will be permitted to enforce the Note if, for example, it was stolen from a rightful owner or was acquired in some illegal or immoral way.

Inside a court of law, your opponent will be required to prove its relationship to the Note. In other words, it will have to answer such questions as: Is it the Boss or a duly appointed agent of the Boss? How and when did the alleged Boss obtain possession of the Note, and under what circumstances? From whom did the alleged Boss obtain possession, and what relationship to the Note did that person have per the UCC? If your opponent admits having wrongfully obtained possession of the Note or it says a thief is in the chain of title, rest assured the judge will not let your opponent enforce that Note.

The last sentence is in § 3-301 to help clarify the commercial aspect of a negotiable instrument, and it places a higher responsibility on the owner of the Note to protect its property. For example, consider a situation where there is a purchaser of the Note who is totally unaware that it was stolen. The UCC says the innocent buyer has the right to enforce the Note rather than the Boss who failed to protect the Note against theft.

You won't be facing an opponent who seeks to enforce the Note while admitting to having acquired it illegally or wrongfully. Nor will you face an opponent who asserts Boss status under a claim of having innocently acquired possession of a Note that was stolen or wrongfully taken from a previous rightful owner. Any company that would try to claim Boss status for a stolen or improperly obtained Note has a terribly difficult burden of proof about too many things to go there. That last sentence clarifies that ownership is not a requirement of Boss status, but the rest of that last sentence will not likely have any importance in your lawsuit.

Typical of statutory law, many of the words used in the UCC are defined by other statutes and by case law that has developed over time. A few explanations may help you more comfortably absorb the UCC's legalese. For example, think *Note* when you see *instrument*.¹¹² The word *enforce* can be understood to mean the legal right to all of those Boss-type powers and entitlements I itemized above. The word *person* is used broadly to address an individual or a legal entity, which might be, for example, a corporation, a partnership, a trust, a government agency, or a limited liability company.¹¹³ When I write the word *person*, I use it in that broad sense as well, unless the context clearly indicates otherwise.

THE THREE TESTS THAT DETERMINE BOSS STATUS

UCC § 3-301 sets forth three tests to determine if a person is entitled to enforce an instrument or Note. A person who satisfies any of these three tests is the Boss at that time. If a Boss sells or transfers the Note, a successor Boss may arise, but only if that next person in the chain of rights then satisfies part (i), (ii), or (iii) of § 3-301.

The three tests are mutually exclusive, so a person who can satisfy part (i) cannot also satisfy (ii) or (iii). Likewise, a person who cannot satisfy part (i) may be able to qualify as a Boss pursuant to part (ii) or (iii). Anyone who cannot prove status pursuant to one of these three tests is not the Boss.

Furthermore, a person is no longer the Boss if that person transfers its rights as Boss to another. A person who is the Boss can also waive or abandon that position by agreement with others. A person who claims Boss status due to special relationship with an alleged Boss must first prove that alleged Boss satisfied these UCC tests, and then must prove the legal relationship that lets that claimant act like the Boss regarding your Note. These simple truths are stated here to help you evaluate the meaning of what your opponent cannot prove with the documents and information it produces in response to your fact-finding.

Remember, your objective is to demonstrate that your opponent can't prove it is the Boss or the Boss's servant. You may never learn who the Boss really is, but you don't need to know that in order to defeat your opponent in court.

Compliance with parts (i) and (ii) of § 3-301 requires current physical possession of the original Note, but part (iii) does not. If your opponent actually has physical possession of the Note, it must satisfy the tests of parts (i) or (ii) to enjoy Boss status. If the opponent does not have possession of the Note, then analysis under part (iii) will control whether or not it has Boss status for itself or for whomever it might claim to be representing. Part (iii) is, however, also tied to possession, because the person claiming rights under part (iii) has to prove that it or its successor properly held physical possession in the past. Physical possession is, therefore, a key element that must be proven by anyone asserting the right to enforce a Note, whether or not the person claiming Boss status currently has possession of the Note.

As mentioned earlier, reason exists to be hopeful that the machine won't be able to prove physical possession of the Note or strict compliance with the UCC, because of the mortgage finance industry's sloppy business practices in those years when its emphasis was so heavily on selling mortgage-backed securities.¹¹⁴ Likewise, evidence exists that the managers of investment pools that purchased the millions

and millions of mortgage-backed securities often did not take possession of the Notes or personally inspect those Notes to check for even rudimentary compliance with the UCC requirements.¹¹⁵ Whether the foreclosure machine represents itself, a bank, or an investment fund, its difficulties will be the same. The machine must prove a proper chain of possession of the Note and authority per the UCC, or else it has no right to enforce your Note.

What the UCC means by the three ways a person can qualify to enforce the Note are discussed below. In addition, Exhibits D, *Checklist—Investigation of Boss Status*; E, *Example—Informal Discovery*; and F, *Examples—Formal Discovery*, which you will find in the back of this book, are provided to demonstrate how the UCC rules get incorporated into the effort to make the machine prove whether it has the right to enforce your Note or to foreclose your home.

UCC § 3-301(i)—Holder of the Instrument

UCC § 3-301(i) recognizes a person's right to enforce a Note if that person is "the holder of the instrument." Unfortunately, no single definition or section of the UCC supplies the complete meaning of this little phrase. Understanding what the UCC means by it requires the aid of other parts of the UCC.

UCC § 1-201(21) defines what a holder is after the person achieves that status. But to learn how a person becomes a holder, and to find out the limitations of enforcement rights that apply to the types of persons who could become a holder, one must study UCC §§ 3-109, 3-201, 3-203, 3-204, and 3-205. Not every holder has the same enforcement rights. For example, a thief or a person who found a lost Note could be a holder, but he or she would have no rights to enforce the Note. Also, some holders are subject to claims and defenses that the borrower could raise against the original lender or its agents, while a holder in due course is freed from liability for most of those types of claims and defenses. You'll get a better feel for the differences as we look more at the concept of "holder of the instrument," just one of the three classes of persons who can enforce a Note.

Because piecing together what *holder* means can be a little daunting, you may find it helpful to think of holder in the way I define it in order to help me keep the interactive elements in focus:

A "holder of the instrument" is a person in physical possession of the Note, having received it from a previous holder who, at that time, had the sole right to enforce the Note and who voluntarily delivered the Note with the intention of transferring all of the transferor's interests in the Note, including the right to

enforce it, to the transferee, said Note having been indorsed by the person who was the Boss at the time of the indorsement to be payable specifically to the recipient, or else payable to whomever has possession of it.

This definition is of my making. It helps me remember to check the many UCC requirements for Boss status. It describes a holder who would have the right to enforce your Note if you came across that person in a foreclosure lawsuit, and is not about holders who might not be a threat. You may think it too wordy, but the more you look at all of the legalese used to define the little six-letter word *holder*, the more tolerant you may be of my mnemonic device.

Keep in mind that your opponent may say it is a holder. Use of that label, however, does not a holder make. You are not up against a holder if your opponent can't prove all of the crucial factors that define that status under the UCC. So learning the correct definition is, therefore, important to your ability to ferret out those who mistakenly or intentionally claim this type of Boss status when in fact a true holder is not involved.

UCC § 1-201(21) provides this definition: "Holder...means: (A) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession ..." The UCC emphasizes possession, which means actual physical possession of the Note, not a copy and not someone's word that they have possession. A person can't be a holder under the UCC without actually having the original Note in their possession.¹¹⁶ If your opponent claims to be the holder, or it claims to represent the holder, but for any reason it cannot or refuses to produce the physical Note, you should conclude that it is not the holder of your Note and you should ask your judge to make the same conclusion.

The language about "payable either to bearer or to an identified person that is the person in possession" requires a look at how the Note is indorsed. In other words, was it made payable to just whomever had possession or to a specific person? Did a prior Boss of the Note properly designate who should take over the Boss rights when the ownership changed? The original lender to whom you gave the Note was the first owner and the first to qualify as a Boss under the UCC because it was a holder per 3-301(i). Most likely, there have been several subsequent owners as a result of routine sales and exchanges of your Note. As previously discussed, the UCC test does not require ownership or define Boss in terms of whoever claims to be an owner of your Note. Just having some interest in the Note and mortgage is not enough. Each sale or transfer of your Note requires looking to the UCC for guidance about two key points: (1) whether each next person claiming rights in your Note is actually a Boss, and (2) whether your opponent is actually

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recognized under the UCC as being or representing the current Boss in what could be a line of many Bosses over time.

UCC §§ 3-204¹¹⁷ and 3-205¹¹⁸ contain the basic indorsement rules that arise in a typical foreclosure setting. Like the check you might make out to Mrs. Smith, how she signs the back of that check has a lot to do with who ultimately has the right to cash the check at your bank. Lack of indorsement, or indorsement by the wrong person, can defeat your opponent's claim that it has Boss status or represents the Boss. If, for example, your lender indorses the back of your Note as "payable to Company X" and your opponent is not Company X or the servant of Company X, your opponent does not have the right to enforce your Note.

UCC § 3-204 states that an indorsement is a signature or other words signed onto the Note or a paper affixed—that is, attached—to the Note.¹¹⁹ An indorsement is something that some person in the possession of your Note, not you, puts on or attaches to the Note.

This rule shows why your opponent must produce the actual Note and not be permitted to simply show a copy of what you signed or copies of papers it claims are the indorsement(s). A Note may consist of one or many pages. The UCC does not specify which side of the paper or where in the Note an indorsement can be made, so an indorsement could be attached or affixed to the front or back of any page. You need to see the original Note so you can thoroughly inspect each page. Without the actual Note, you have no way to verify what, if any, indorsement papers have been affixed or attached to the Note and whether they are in compliance with § 3-204.

If your opponent objects to being required to produce the Note, you will want to help your judge understand the necessity of seeing the actual Note in order to determine what, if any, indorsements are on or affixed to it. Explaining the risks to you and to the real Boss if your opponent claims to have the physical Note but can't actually produce it can be a helpful part of your explanations to the judge.¹²⁰ Your explanation supported by UCC §§ 3-301(i) and (ii), 3-308(b), 3-501 and 3-501(b)(2) should help persuade your judge to make your opponent display the Note for your inspection. Anything less than letting you actually inspect the physical Note should be viewed as evidence your opponent doesn't actually have it.

What impact, if any, an indorsement has is set out by UCC § 3-205. An indorsement by a person who is not already a holder or payee is a nullity—that is, it is legally invalid—and therefore has no effect on who may enforce the Note.¹²¹ This is called an *anomalous indorsement*. If an indorsement was made by a person not in the chain of ownership and control of the Note, that indorsement is merely scribble on the Note or wasted paper attached to it. Likewise, if a person who was previously a holder but is not a holder at the time of indorsement—for example, because it had previously transferred all of its interests in the Note to

someone else—that person's indorsement is also a nullity.¹²² When asking whether an indorsement was made by a holder, the inquiry must be joined with, "Was that indorser¹²³ a holder with the right to enforce the Note at the time it made the indorsement?"¹²⁴

An indorsement that identifies the person to whom the Note is payable is a *special indorsement*,¹²⁵ also referred to as a Note that is *payable to order*.¹²⁶ You can think of this as an abbreviated way of saying "payable to the order or demand of the person specified by the indorsement." If the indorsement does not specify a particular payee, it is called a *blank indorsement*. A signature of the specified payee, with nothing more, can be a blank indorsement. That would make the Note *payable to bearer*.¹²⁷

A Note payable to bearer can be converted into one that is payable to order, and vice versa.¹²⁸ This possibility is yet another reason to insist on seeing the physical Note. Otherwise, your opponent could show, for example, a copy of a blank indorsement even though the Note was later indorsed on a different page to be payable to the order of a specific person. Seeing the physical Note is a must, regardless of whether your opponent claims to be the Boss or the legal representative of the Boss. Making your opponent show the physical Note is the best way to protect you as a borrower and also to protect the interests of the true Boss of the Note. (See Chapter 12.)

UCC § 3-205 also provides that neither a special indorsement nor a blank indorsement is valid unless it was made by the then holder of the Note. Each indorsement on the Note should make you question whether the indorser was in fact the Boss or holder at the time the indorsement was made. If the person indorsing the Note didn't independently qualify as a holder of the instrument at that time, that person's indorsement is invalid.¹²⁹ Taking possession of a Note without a proper indorsement means no Boss rights have transferred at that point. There are exceptions, as indicated in UCC §§ 3-301(ii), 3-203(b) and 3-203(c), but unless all of those requirements are alleged and proven, the person in possession of that Note is not the Boss. The chain of ownership and control of the Note is important to a determination under the UCC as to whether your opponent can, in fact, prove it has genuine Boss status.

The foreclosure machine frequently produces self-serving affidavits and declarations that say it has the Note. Do not give in: be diligent and demand to see the physical Note. The UCC gives you the right to make that demand and places your opponent at a substantial disadvantage if it does not comply. (See *Avoid "Show Me the Note" Difficulties* in Chapter 12.)

UCC § 3-201, *Negotiation*, § 3-203, *Transfer of Instrument*; *Rights Acquired by Transfer*, and § 1-201(15), *Delivery*, also bear on what § 3-301 means by *holder of the instrument*. UCC § 3-201 tells us that a person other than the borrower (that is, the issuer or maker) becomes a

holder through negotiation,¹³⁰ which means transfer of possession if the Note is payable to bearer. When the Note is payable to a specific person, the transfer of the Note to someone else must include indorsement by that specified person.

Transfer is the new word introduced by § 3-201. It is explained by § 3-203,¹³¹ which tells us that the Note is transferred by delivery “for the purpose of giving to the person receiving delivery the right to enforce the instrument.”¹³² UCC § 1-201(15) defines delivery as a “voluntary transfer of possession.”¹³³ UCC § 3-203(d) also provides that the transferor must intend to relinquish 100% of its rights in the Note to the transferee, or else the transferee obtains no rights to enforce the Note.

I find § 3-203(d) particularly interesting. A person who gets less than 100% of the interests in the Note gets no enforcement rights at all. That person may have some right to share in collection proceeds with others, for example, but the rule is clear—all rights or else no right to enforce the Note as its Boss. The details involving the how and why a person gets possession of the Note are, therefore, extremely important.

A person, even if in possession of the physical Note, may not have any right to enforce it because that person did not obtain all of the Boss rights, rights involving its value and control. Examples of when the person might buy or get possession of the Note but not acquire all of the Boss's rights would be as follows:

- An agreement with the previous person in possession of the Note limited the enforcement rights of the successor by dictating the details about how, when, or by whom enforcement is authorized.
- An agreement with the previous person in possession of the Note limited how much money the successor can pocket if any money is collected by enforcing the Note.
- An agreement with the previous person in possession of the Note established that the recipient only had the right to hold onto the Note for the benefit of someone else.
- The Note was received under an agreement that dictated who had the right to service that mortgage loan, whether the services involve, for example, accounting, collections, borrower communications, or foreclosure services.

Therefore, when your opponent can produce the physical Note, you must investigate all agreements it has with any others regarding your Note. Even if your lender reserved the right to service the Note when it was first sold to some other person, that fact may be enough to negate your opponent's ability to prove it has 100% of all legal and financial

rights in the Note, and, accordingly, enough to negate its right to enforce your Note.

These parts of the UCC show that, for a person to become a holder, negotiation must occur, meaning voluntary delivery of possession with an intention that the recipient will thus receive all of the rights to and ownership of the Note. If the prior holder of the Note did not intend that someone else might get it, as in the case of theft or the finding of a lost Note, no delivery or transfer would have occurred per the UCC. Thus the new possessor of the Note—in this example, the thief or the finder—could not be a holder, regardless of what indorsements were on the Note when the new person took possession.¹³⁴

Likewise, if the holder's signature is forged or if the holder's agent exceeds his authority in signing the indorsement, this constitutes a failed negotiation.¹³⁵ Even though § 3-201(a) suggests that holder status can occur when the prior holder has "involuntarily" transferred possession, other provisions of the UCC deprive enforcement rights for those taking possession without the consent and knowledge of the prior holder of the Note. Remember, therefore, that some holders have a right to enforce a Note and others do not.

If the chain of possessors of a Note includes a person who was not a holder as defined by the UCC, anyone in possession thereafter may also be denied the status of holder, and not permitted to enforce the Note. Through your formal and informal discovery, you should maintain pressure on your opponent to prove not only how it obtained possession of the Note, but also the circumstances by which each alleged prior holder obtained and gave up possession of the Note and all arrangements your opponent has with others regarding anything to do with your Note. Remember that mere possession of the Note does not prove Boss status under the UCC.¹³⁶

UCC § 3-203(b) provides that transfer of the Note vests in the transferee any right to enforce the Note that had been held by the transferor. If a prior possessor of the Note does not have the right to enforce the Note pursuant to § 3-301(i) or (ii), which are the current-possession-related mechanisms for enforcement rights, then the transferee obtains no right to enforce the Note. If the transferor has enforcement rights and the change of possession was a voluntary act for the purpose of transferring all interests in the Note to the transferee, then the transferee has the enforcement rights of the transferor. Your opponent has an extremely difficult burden of proof when it claims rights of the prior transferor. (See Chapter 12.) Special rules regarding application of § 3-203 to questions about rights of a holder in due course will be discussed later.

A brief comment about UCC § 3-203(c) may be helpful for some borrowers who face the situation in which the opponent has the Note but was not properly indorsed by a prior holder. UCC § 3-203(c) states that

the new person in possession does not have the right to enforce the Note until it is properly indorsed by that prior holder. This keeps alive the possibility that the person currently in possession will eventually have the right to enforce the Note, but it won't have that right until the correct indorsement is obtained. This section of the UCC does not relieve the burden of proof from the person trying to enforce the Note. That person must prove, first, that the lack of the indorsement was unintended or inadvertent, and second, that the person from whom the late indorsement is obtained was actually the holder at the time the indorsement should have been placed on the Note. This is a special law for special circumstances and most of you will never run into this situation.

As you can see from what I have outlined above, the term *holder* can only be understood by interactive use of several sections of the Uniform Commercial Code. The simple definition of 1-201(21) does not tell the entire story. Yes, it states the basic profile of a holder, but the other sections describe how, and if, a person can obtain that technical profile.

Now that you have seen a bit of the details that lead to the UCC's definition of holder, my coined definition may seem more friendly and useful. Remember that my version is about the holder who may have a right to enforce the Note, not the other holders. It is worth repeating with the addition of references to the UCC parts upon which it is based:

A "holder of the instrument" is a person in physical possession of the Note, having received it from a previous holder who, at that time, had the sole right to enforce the Note and who voluntarily delivered it with the intention of transferring (§§1-201(21), 3-201, 1-201(15) and 3-203) all of the transferor's interests in the Note (§ 3-203(d)), including the right to enforce it, to the transferee, said Note having been indorsed by the person who was the Boss at the time of the indorsement to be payable specifically to the recipient, or else payable to whomever has possession of it (§§ 1-201(21), 3-204 & 3-205).

Your fact-finding work will focus on using the discovery process to gather the documents and information available to your opponent and then assessing whether its facts actually prove that it is the Boss of your Note or the Boss's servant. For your opponent to be a holder of the instrument, its evidence must detail the ownership of the Note, including:

- Each sale and transfer must be documented regarding when, by whom, and all of the related agreements, all the way back to your original lender.
- Indorsements must be on or affixed to the Note.

- Indorsements must have been made at the time the indorser was actually the holder of the Note, unless the exception of § 3-203(c) applies (which also requires strict proof).
- The indorsement must be either payable to bearer or to order. In the latter situation, it must be specifically payable to your opponent or the Boss it claims to represent.
- Each transfer in the chain of ownership and control must have entailed the entire relinquishment of all rights in the Note by the transferor.

On this last point, the foreclosure machine sometimes plays games with borrowers and the courts by having possession that was never intended to vest all of the rights of the Note in that foreclosure shop.¹³⁷ The machine sort of borrows possession under an undisclosed agreement with whomever had the physical possession (which could be a person without a right to enforce the Note), and then it asserts in court that it is the holder and can produce the physical Note. The machine may admit its ploy on direct examination, but it often keeps silent about the ruse it has contrived unless it gets caught. This deceptive tactic is part of an attempt either to hide the identity of the Boss so it does not get entangled in the litigation, or to avoid having the enforcement rights of that accommodating transferor investigated. None of the companies that participate in this type of cover-up may have the right to enforce the Note.

Because the machine uses tactics like this, in every instance in which your opponent claims to have physical possession of Note, you should respond with questions and demands for the production of facts. Insist on proof about how, and under what agreement or circumstances, the possession was obtained and held by each name appearing in the alleged chain of ownership, possession, and control of the Note.

Getting past your opponent's claims and self-serving conclusions can require diligent work. Carefully trace the details in the documents you obtain in response to formal discovery, for as some published court decisions show,¹³⁸ the details can be very important in persuading the judge that your opponent has not proven its burden with clear and convincing evidence.

Review documents and try to reconstruct the chain of ownership and rights. Make note of missing dates, unexplained time gaps, lack of proof about what happened with each new alleged transfer or exchange of your note, lack of agreements about each of those transfers, and any circumstances that make you suspect that a complete and UCC-compliant chain of ownership and control doesn't exist. Creating diagrams of names, dates, and circumstances, much as you would have

done for classroom exercises in school, can be very helpful when going through the papers, admissions, and explanations your opponent will provide through your formal fact-finding process. If your opponent's facts fall short of proving that it or the Boss it alleges to serve is the holder of the instrument, the machine should lose.

"The devil is in the details" is a common phrase that alerts us to look beyond surface appearance. Pushing your opponent to prove its statements and claims with genuine and relevant fact is the only way to get to the truth. Let the details be your angel and your opponent's devil.

UCC § 3-301(ii)—Nonholder, in Possession, with Rights of a Holder

The wording of § 3-301(ii), "a nonholder in possession of the instrument who has the rights of a holder," basically refers to a person who is not a holder pursuant to the requirements of § 3-301(i), but who has physical possession of the Note and the right to enforce the Note as if it were a holder. If your opponent can't prove it is a holder of the instrument pursuant to § 3-301(i) but it has physical possession of the Note, then the question may arise about its rights under § 3-301(ii).

Generally, the status of nonholder in possession is derived from having legally succeeded to the enforcement rights that were previously held by another person. For example, the person possessing the Note might have obtained it as a result of a legal seizure of the previous holder's assets, a corporate merger, or the termination of a corporation's or partnership's existence. Or the person could have paid the obligation the holder thought due under the Note, thereby being subrogated (meaning put in the place of the holder) respecting the holder's right to enforce the Note.

This section of the UCC has also been interpreted broadly to permit an enforcement right under other situations recognized by law where the successor has the rights of its predecessor.¹³⁹ The key concept is "recognized by law"—not what might be assumed by a borrower. In some cases, a court decided the foreclosure machine had the right to enforce the Note pursuant to § 3-301(ii) based on little more than the admission of a borrower who assumed the opponent was a successor to a prior holder and told the judge this, even though the borrower didn't have facts to support such a statement. You should learn two lessons from this. First, never make assumptions for which you don't have factual support. Second, always require your opponent to prove with genuine facts that it has enforcement rights per the UCC.

Neither possession in and of itself nor ownership of the Note are sufficient to establish the right to enforce the Note under § 3-301(ii). Your opponent must prove the transactions by which it came into

possession of the Note.¹⁴⁰ If your attacker is not a holder pursuant to § 3-301(i) and it alleges a right to enforce the Note pursuant to part (ii), it must prove four things:

1. That it has physical possession of the Note, which is available for inspection by you and the judge;
2. How, when, and based upon what facts it succeeded to the rights of the prior Boss of the Note (for example, as a legally recognized successor in interest, or via a legal seizure of the Note from its holder, or by whatever theory your opponent asserts);
3. That the person alleged to have been the prior Boss actually was a Boss pursuant to the UCC at the time your opponent was deemed the successor; and
4. That it obtained 100% of all economic and legal rights and interests in the Note, and not just some or even most of them.

Your opponent has to prove each of these requirements or else it has no right to enforce the Note under § 3-301(ii) of the UCC. In fact, with respect to this and all parts of the UCC that deal with who has the right to enforce the Note, a person has either complied fully and exactly with the UCC requirements or else that person does not have the right to enforce the Note.¹⁴¹ UCC compliance, unlike a game of horseshoes, is not a game that can be won by simply being "close enough."¹⁴²

§ 3-301(iii) - Not in Possession but Entitled to Enforce

UCC § 3-301(iii), "a person not in possession of the instrument who is entitled to enforce the instrument pursuant to §§ 3-309 or 3-418(d)," involves the right to enforce the Note by someone who does not have actual possession of it but who is entitled to enforce it if the person's circumstances clearly satisfy one of the two referenced UCC sections. Of the three ways a person can qualify to have the right to enforce the Note pursuant to § 3-301, part (iii) is the only way possible for someone who does not have physical possession. This part (iii) test, however, requires proof of a prior holder status, which in fact does require proof of prior physical possession.

UCC § 3-309, *Enforcement of Lost, Destroyed, or Stolen Instrument*,¹⁴³ is available to a person who was a holder of the Note per the UCC but who no longer has the original Note because it was lost, destroyed, or stolen. If your opponent claims the right to enforce the

Note pursuant to § 3-309, you must require your opponent to put forward facts that prove three things:

1. That it had the right to enforce the Note pursuant to 3-301 at the time the Note was lost, destroyed, or stolen; or that it acquired rights to the Note from the person entitled to enforce the Note pursuant to § 3-301 at the time the Note was lost, destroyed, or stolen;¹⁴⁴
2. That the loss of possession was not caused by voluntary transfer or legal seizure; and
3. That possession cannot be reasonably regained.

These requirements, just like those for §§ 3-301(i) and (ii), demand a lot of proof from your opponent. UCC validation is, by its very nature, a fact-intensive inquiry.

The foreclosure machine, when claiming rights to enforce under this part of § 3-301(iii), has often alleged that it looked for the original but could not locate it. I could honestly say I didn't find a Rolls Royce at my house today even though I looked for it. My search, of course, doesn't mean that I ever owned one. Likewise, compliance with the UCC requires more.¹⁴⁵ Your opponent must prove that it actually had possession of the Note and what happened to it or that it obtained Boss rights from a person with verifiable Boss authority who previously qualified per § 3-309.

Also, if your opponent was previously the holder, it may not enforce the Note under § 3-309 if it lost possession either voluntarily by a transfer to another or involuntarily via a lawful seizure.¹⁴⁶ For example, did your opponent sell the Note, or deliver it to one of its creditors to satisfy a debt?

If your opponent introduces an affidavit or certificate attesting to unsuccessful efforts to locate the Note, be extremely careful. Make certain the information clearly and believably supports each and every requirement of § 3-309. Also, push for the opportunity to question, either at trial or via deposition, the person who provides that written testimony so all relevant facts can be investigated thoroughly. In other words, don't accept as legally significant or truthful any written testimony introduced by the industry's foreclosure shop.

If your funds are too low to permit you to conduct a deposition of the person whose affidavit the machine wants to use, do not despair. Affidavits are not usually admissible at trial. If your opponent wants to get that information before the Court, it will need to have the person testify in person. At that point, you can question the person about the circumstances involving the Note that is alleged to have been lost, destroyed, or stolen. If, under questioning, that person shows he or she

doesn't actually know what happened and doesn't know if the Note was actually ever in your opponent's physical possession, the testimony will hurt your opponent's case and help yours.

The second possibility under 3-301(iii) involves § 3-418, *Payment or Acceptance by Mistake*. This section points to portions of Article 4, *Bank Deposits and Collection*, of the UCC. I have not seen § 3-418 applied in any foreclosure lawsuit to date. Its application appears to be limited to negotiable instruments that are routinely created and processed through the banking system rather than Notes created in mortgage loan transactions.

UCC § 3-301—A Concluding Remark

UCC § 3-301, as outlined above, sets forth the three ways, and the only ways, a person can become the Boss of the Note. To win in court against the foreclosure machine, you must consistently require it to show what it has and knows about the Note and any alleged Boss the machine claims to represent. Your opponent must answer your pesky questions about how, when, where, how much, and why with reasonable explanations and documentary proof, or else it should lose.

When the case is over, if your opponent fails to carry its evidentiary burden, you may be no closer to knowing the identity of the Boss of the Note. That does not matter. Beat the company attacking you and you will have done well. One step at a time is the path to success.

THE BOSS'S SERVANT OR AGENT

It is noteworthy that none of the three enforcement tests of UCC § 3-301 grants Boss status to an agent or servant. These enforcement rights must first be proven to exist for the Boss. If a Boss exists, then your opponent and the Boss are required to provide strict proof that shows the exact nature, authority, and scope of the alleged agency relationship respecting your specific Note.

What Is an Agent ?

An agent is someone who has been authorized by another party—the principal or master—to perform certain actions on its behalf. The agent could be designated by any of several names, such as agent, servant, representative, or loan servicer.

The Boss has a right to designate another person or company to do its bidding regarding your Note. It can appoint a servant to help manage the

Boss's interests in the Note, send out notices, discuss possible solutions should a dispute arise with you, commence foreclosure in the event of a default, and so forth. The servant has no legal rights regarding the Note except as expressly directed by the Boss, and this is so no matter what the servant is called. Labels like loan servicer, agent, or servant mean the company has no authority unless the Boss says otherwise. A servant can't create its own authority.

If your opponent can't prove its master is the Boss of your Note, questions involving the claimed master-servant or principal-agent relationship become moot and unimportant. No Boss means no right to make demands under the Note, and no right to foreclose, because the Note is not in default and you owe nothing to your opponent or the company for which it works.

As a practical matter, you have limited time to gather your facts during the lawsuit, so you'll want to demand that your opponent prove its master has Boss powers and, at the same time, also prove the opponent's relationship with that alleged Boss. You have a right to receive all agreements, communications, and documents that have gone back and forth between your opponent and the alleged Boss. Look at them and see if they actually prove Boss status consistent with the requirements of the UCC. Those documents must also show that the alleged Boss actually instructed your opponent to start collection efforts regarding your Note or the foreclosure process.

Sometimes there is an intermediary servant layer involved. A master servicer for a company will assign various tasks and duties to other companies rather than perform all of the work itself. If your opponent claims its master servicer gave it instructions, then you need to see at least three sets of agreements and communications. You want the ones between your opponent and the master servicer, those between the master servicer and the alleged Boss, and those between the alleged Boss and your opponent.

When looking at a servicing or servant agreement, keep in mind that the servant often has no right to delegate its duties to other sub-servants unless the Boss expressly authorized such delegation. If the Boss appointed, for example, Wells Fargo as a master servicer but did not expressly authorize Wells Fargo to designate a change of trustee in a deed of trust, Wells Fargo probably has no right to designate a new trustee.¹⁴⁷ When dealing with an opponent that claims to be servant for some other company, look at the agreement that is supposed to define the servant's authority. Don't assume it has more rights or powers than what the agreement clearly says. That is not how master-servant arrangements work in the mortgage finance industry.

Anyone can claim to be the agent of someone else. The foreclosure machine regularly implies or says it is the agent of the Boss. The only way for the machine to prove that, however, is for the alleged Boss to

show up and confirm the existence of a master-servant arrangement regarding your Note, and to define, with contractual proof, the nature and scope of the arrangement.¹⁴⁸ The company claiming servant status can't prove such a relationship using only its own self-serving statements or papers. Your opponent can have its staff say what it wants them to say, or it can produce affidavits allegedly from the Boss, but neither is enough.

Stick to your guns and push to get whatever written agreements exist. Otherwise you can't be certain what the real relationship is, when it was formed, and whether it actually applies to your Note and mortgage. If you have any doubt that you're getting all of the documents, communications, and agreements that have passed between your opponent and its alleged master, ask the judge to make the alleged master join the lawsuit. That is the only way to be sure you can use the full force of discovery, and the only way to be sure that you get more than simply what your opponent wants to give you after filtering what it lets you see. (See *Joinder of Real Parties in Interest*, below.)

If your opponent asserts that there is only a verbal arrangement or attempts to get by with no more than summaries of the alleged agreement, that is evidence of something being hidden. Businesses like banks and Wall Street finance companies are distinguished, in part at least, by using lots of paper to document arrangements, not verbal agreements. Remind your judge of this reality when seeking his or her help to obtain full compliance with your discovery demands.

A Note and mortgage represent a large dollar asset. Common sense tells us that a real Boss is going to have more than a verbal deal with some lackey when the asset involved represents so much money. Expect and demand to see the written agreement that pertains to your Note and mortgage. Your opponent's failure to produce such evidence should be viewed as suspicious and evidence that it doesn't actually represent the other company regarding your Note and mortgage.

If your opponent claims the right to enforce the Note on its own behalf and not as a servant of some other company, then you don't need to investigate agency matters. If, however, it is unclear whether your opponent is claiming Boss or servant status, then your discovery should require your opponent to state whether it is acting as servant for some other company and, if it is a servant, to provide copies of all documents and communications sent or received from the alleged master that involve your Note or mortgage in any way.

If your opponent begins by claiming Boss status but later changes its story to being a servant of an alleged Boss, your discovery work won't change, but you will have received added evidence that may be of help when you are in front of the judge. Your opponent will have, by its changed position, admitted dishonesty or incompetence, both of which demand that whatever it says can't be trusted by you or your judge. The

changed story should also be sufficient grounds for requesting more time for discovery if you need more fact-finding time.

You should make note of any change in position about an important matter and share it with the judge whenever the machine objects to your requested discovery and whenever the machine asks the judge to take its word for anything. Your opponent typically will want discovery to be abbreviated, and to have the right to say and imply that it has evidence without showing it. Flip-flops and waffling about its position are good indicators that your opponent's judgment is, at best, flawed about what is or is not important. Challenge its credibility each time you have an opportunity to address your judge. Help your judge keep track of your opponent's indiscretions. And use your opponent's tarnished reputation to keep pressure on it to comply fully with all of your discovery demands.

Trustee Under a Deed of Trust

A trustee under a deed of trust has no authority to decide on its own that a default exists under a Note or to initiate a foreclosure. At least, that kind of authority is extremely rare. Only the Boss of the Note has those rights. Read your deed of trust document and you will see what I mean.

Your state's nonjudicial foreclosure statutes will also require that whatever the trustee does must be consistent with the agreement between the borrower and the Boss, who will likely be referred to as creditor, lender, or beneficiary in the deed of trust document. The referenced agreement, of course, means the arrangement made by the lender and you in your Note and mortgage, and the UCC then defines who has the right to enforce the Note and thus control the mortgage.

The trustee is a type of agent or servant. Whoever gives the trustee instructions to start a foreclosure must be the Boss or a duly appointed servant of the Boss. The trustee's authority is typically set out by the deed of trust or trust deed, or whatever title is used in that state for the document that creates the lien against the borrower's home and can be used in a nonjudicial foreclosure. That document usually requires the lender or its successor to do certain things that then trigger the trustee's right to commence the nonjudicial foreclosure process. As you now know, the identity of that lender or successor is controlled by the UCC because the Note is a negotiable instrument.

Frequently, state law defines the trustee as having duties to both the Boss and the borrower in order to help ensure that only a proper foreclosure might take place. The trustees, however, get their money from the machine, so you can imagine to whom they listen the most. Do not, therefore, trust any summary or affidavit issued by the trustee's office. What you'll want from the trustee is a copy of every document,

email, fax, agreement, and anything else in the trustee's file regarding your Note and mortgage. You should have no difficulty obtaining the trustee's records.

Send a letter requesting copies of its entire file regarding your Note and mortgage. The trustee may give them to you upon request, or it may refuse in order to better accommodate the company paying its bills. You may have to enter the lawsuit without copies of the trustee's files but you can gain access to that information and documents through formal discovery. If the trustee wants to play games, your court's rules will help you force it to comply with your fact-finding. Look for those rules and use them.

If the trustee refuses to cooperate, you can also use that fact to help persuade your judge that your opponent and/or the trustee know they have violated your rights and are trying to hide information, thereby necessitating court assistance with getting to the truth. Why else would the trustee refuse to show its records when it is helping others take your home?

When reviewing the trustee's records, you are looking for information that indicates it commenced the foreclosure process without having been instructed to do so by the Boss. You also want to find any violations of the procedural rules of the nonjudicial process. Who instructed the trustee to commence the foreclosure process? What evidence does the trustee have that the person giving it the "start" instruction was the one true Boss or a servant of that Boss? Did the trustee even make any investigation as to Boss status? Did the trustee send out all of the notices required by your state's nonjudicial statutes, and to the correct addresses or publications?

You'll be conducting a negative content audit of the trustee's information and documents, much like the work you'll do when you get documents and information from your opponent. The trustee's information will frequently disclose that it has no meaningful basis for following the instructions that led to its commencement of the foreclosure. Less often, but it happens, the trustee will have failed to send out the required nonjudicial notices at the right time, to the right address, to the right people, or with the correct text. Look for what the trustee did not do right and use that to challenge the validity of the foreclosure you face.

Don't get concerned or intimidated if the trustee points to documents that have been formally filed in the public land records as the trustee's alleged authority to do what it has or plans to do. Papers can get filed by mistake and in furtherance of illegal actions. Any documents involving your Note or mortgage that a trustee or any company filed in public records are suspect and subject to being declared invalid by your judge if the Boss was not properly involved. For example, the records might include assignments of your mortgage, or changes in the designated

trustee, or notices about an upcoming foreclosure. These are not legal and binding if your opponent fails to prove that they were properly created or directed by the Boss of your Note. Public records are just more papers that need to be evaluated in light of the foreclosure fundamentals.

When ShellGame-MERS Is Involved

The question of agency is particularly important when ShellGame-MERS (Mortgage Electronic Registration Systems, Inc.) appears in the chain of title of your mortgage or deed of trust. As discussed in Chapter 4, ShellGame-MERS has no ownership or beneficial interest in any Note or mortgage. That means that the law and facts are well established that ShellGame-MERS never has independent authority to sell, assign, transfer, exchange, enforce, or otherwise do anything with a Note or mortgage. ShellGame-MERS, therefore, can't be properly involved unless in the role of servant for the Boss. Challenging ShellGame-MERS to prove its involvement has been duly appointed and directed by the Boss of your Note is the legal field upon which you can anticipate success when fighting back.

The mortgage finance industry and its foreclosure machine use the name of ShellGame-MERS in ways that impact the validity of a foreclosure. This is true whether the borrower has a mortgage or deed of trust. If ShellGame-MERS is mentioned in your mortgage, your opponent will either be ShellGame-MERS or a company that has to prove that its alleged Boss rights depend on something done in the name of ShellGame-MERS.

ShellGame-MERS doesn't pretend much anymore to be the party conducting a foreclosure. I think that's because it has suffered too many embarrassments when challenged in past lawsuits, and also because, as an actual party in a lawsuit, it exposed the industry's folly to heightened discovery. If the true nature of its existence and operations were too often exposed to the public, the presence of its name in mortgages would lead to increasing foreclosure challenges and losses for the machine. ShellGame-MERS will not likely be a party in your lawsuit.

The industry and its machine continue, however, to press a claim that ShellGame-MERS is in fact an agent for the original lender and for every successor to the lender who is also a member of the MERS System. The argument is that membership in the MERS System creates an ongoing agency relationship between ShellGame-MERS and each successor of the lender's interests in the Note and mortgage. That story has been accepted by most courts when it has gone unchallenged by borrowers, who typically didn't demand proof that ShellGame-MERS was authorized to represent companies alleged to have been Bosses at different times in the life of the Note.

One federal court, however, actually took time to read the *MERS Rules of Membership* and found that no such agency appointment existed, and that ShellGame-MERS obtained no independent authority to act as an agent of successors, even those who adopted the MERS rules.¹⁴⁹ There is no genuine evidence that ShellGame-MERS receives carte blanche authority to do what it wants with the Notes and mortgages owned by companies because of those so-called MERS Rules of Membership.

At other times the question of whether ShellGame-MERS had authority to foreclose or to act on behalf of some alleged master were resolved upon a mistaken assumption that the borrower, upon executing the mortgage document, had appointed ShellGame-MERS as agent of the original lender and also every successor to that lender. The borrowers in those cases didn't know how to raise an effective challenge to the foreclosure, and they were no match for the polished legal beagles of the machine. Those assumptions were wrong because only a principal—that is, the Boss—has the power to appoint its servant. Your state law will corroborate that statement if you do a little research.

The mortgage document is executed by the borrower, not by the lender and not by any unknown person who might succeed to the lender's interests in the future. Obviously, the borrower is not a representative of the original lender or any successor. The borrower has no authority to create an agency relationship between those persons and ShellGame-MERS. A borrower never has the authority to appoint ShellGame-MERS as servant for any company.

At most, the borrower who signs a mortgage document that mentions ShellGame-MERS can be viewed as having acknowledged that the lender or some successors might appoint ShellGame-MERS to be a servant. However, that simple acknowledgement cannot possibly create an agency relationship between persons whom the borrower does not represent. The U.S. Supreme Court has ruled that a borrower cannot appoint, through a loan transaction, a servant to act on behalf of future unidentified persons.¹⁵⁰ Nothing you signed at your loan closing gave you the power or authority to appoint ShellGame-MERS as servant for anyone. It is a ridiculous concept that should be easily rebutted if your opponent tries to use it.

If the machine argues that ShellGame-MERS was a servant of a prior Boss of your Note, you must make it prove two things. First, it must show that the company ShellGame-MERS was allegedly serving was in fact the Boss of the Note and mortgage at the time ShellGame-MERS alleged to have sold, transferred, or assigned the Note and/or mortgage to some other company. Next, it must produce evidence proving that ShellGame-MERS was acting as that prior Boss's servant when the subject documents were being signed in ShellGame-MERS's name.¹⁵¹ And because ShellGame-MERS is involved, your opponent must also

prove that it was actually ShellGame-MERS that used its name, not some clerk or employee of another company that was acting on its own and without any direction from ShellGame-MERS regarding your Note and mortgage.

As I've said, your opponent has the burden of proving that its claimed Boss status can be traced all the way back to the lender's rights, through as many intermediary companies as are involved in the chain of ownership and control of your Note. If your opponent relies on a piece of paper showing that ShellGame-MERS assigned or transferred your Note and mortgage to some other company, you should be making a mental list of questions for your opponent to answer and document with genuine proof.

For example, what evidence does your opponent have that the company for which ShellGame-MERS was supposedly working actually had Boss status at that time? Is there any evidence that the company actually communicated with ShellGame-MERS about your Note and mortgage? What evidence does your opponent have that ShellGame-MERS, not some other company using its name, actually responded to that earlier Boss's instruction regarding your Note and mortgage? Look for the information that your opponent should, but doesn't, have about these matters. Those gaps and missing bits of proof are the straws that can break the machine's back.

Joinder of Real Parties in Interest

If the machine alleges that some other company is the Boss, look to your court's rules regarding what is called "real party in interest" or "standing." These are two of the judicial principles I mentioned earlier in this chapter. (See Chapter 12 to learn more about these concepts.)

If the suit was filed against you, the servant lacked standing and the suit should be dismissed upon your request, or else the servant should exit and its alleged master (that is, the alleged Boss) should become the plaintiff attacking you. Of course, there is no need for an admitted servant to be in the lawsuit when you can deal directly with the company claiming to be the Boss, unless you want the servant there so you can sue it for wrongs it committed.

If you start the lawsuit and later learn about an alleged Boss, you should ask the judge to make it a party in your case. A person standing in for someone else as a servant is not considered to be a real party in interest.¹⁵²

Do you want the servant in the case you start? The answer will probably hinge on the importance of the legal claims you have against the servant regarding its conduct towards you. If your case is mainly an effort to stop a wrongful foreclosure, but not an effort to get back money

from the servant, you will probably be better off with only the alleged master in the fight against you. The court will probably dismiss the servant on your request and make it leave the lawsuit, whether based on a standing or a real party in interest reasoning. Unless you have a really good reason, why have two opponents picking on you during the lawsuit if your fight is actually only with the alleged master? If, however, you believe the servant owes you something and the law will make it pay, holding it in as a party would make sense.

If a company admits to being a mere servant for an alleged master, you want the master in your lawsuit so you can make it prove all of the complicated and difficult matters of proof regarding the UCC requirements. You don't want to be limited to the middleman servant's information about its master, because that information may be incomplete and filtered to protect the master. You want everything to come directly from the master, and you want full access to everything the alleged master has about your Note and mortgage.

Beat that alleged master in court and you will have dispensed with it and with any possible claims its servant company might try to assert later. The servant, even though ousted from your suit, had its day in court when you argued to the judge that it had no business remaining in your lawsuit. That is, the servant will most likely be prohibited from later concocting a new story about why it should be permitted to take your money or house.

When facing a lawsuit with you, the alleged master company may say the servant company is wrong and there is no master-servant relationship. The alleged master may even state that it has no legal interest in your Note and mortgage. In that event, you will have successfully eliminated that alleged Boss's right to pick on you, and at the same time you will have demonstrated that your opponent must lose. Your opponent's claim to being a servant means it has no direct interest in your lawsuit. Your opponent's inability to point to an alleged Boss for which the opponent claims to work would mean it also has no indirect interest in your Note and mortgage. Thus, this type of scenario would mean that your case should be concluded in your favor and against both the servant and its alleged master.

WHAT IF THE BOSS IS IDENTIFIED?

If the genuine Boss actually appears in your case, do not assume your case is lost. You may still get results you can classify as a win. Additional questions of fact and law rise in importance if the alleged Boss is actually a party in your lawsuit. The next two topics can only be

addressed with the true Boss of your Note, not with a servant and not with a company that erroneously claims Boss status.

Accounting Issues—How Much Is Owed and to Whom

How much money, if any, you owe to the Boss cannot be known until the Boss is identified. This is because any accounting information provided or asserted by the machine is meaningless until and unless it can be demonstrated to be the actual account information on the books of the one and only Boss of your Note. If your opponent is not the Boss, it can talk all day about how much you owe, but those words mean nothing because your remaining obligation under the Note is solely a matter between you and the Boss. Your opponent's comments under those circumstances must be understood as the statements of a stranger to your Note and mortgage—statements by a company that has no stake in either.

As soon as the alleged Boss is identified, you will want to exercise your formal discovery against it. Your objective will be to force it to produce its records and information regarding its rights in the Note, if any, and its accounting of payments received respecting its ownership of the Note. The extra information may show that your obligation under the Note has already been paid off.

Several things could have happened that only the Boss knows about but which could have reduced your obligation under your Note. For example, an insurance policy protecting the Boss against loss regarding your Note could have been paid off. An indorsement warranty claim may have resulted in payment to the Boss by a person who previously indorsed the Note and became liable to subsequent holders pursuant to UCC § 3-415; that provision of the law makes an indorser liable along with the borrower for the obligation under the Note under some circumstances.¹⁵³ Another possibility might be that your Boss sued or threatened to sue whoever sold it your Note and mortgage, based on a claim that the value or details of your Note were misstated or falsified. If that legal threat or lawsuit ends in a settlement payment to the Boss, that, too, should reduce or eliminate the amount you owe under the Note.

The details of payments to the Boss may show that it actually lost its Boss status when it got paid. For example, if an indorser has made good on its obligation to the Boss, then pursuant to § 3-412 the obligation under the Note is payable to that indorser, not to the Boss.¹⁵⁴ Likewise, if an insurer has paid all or some of the obligation, then it, not the Boss, may be the one who is legally entitled to enforce the Note pursuant to subrogation rights.¹⁵⁵

A full accounting is how you learn whether the company you think is the Boss is still entitled to enforce your Note or if that right has moved to someone else because of dealings about which you are unaware. If you

have to make mortgage payments to anyone, or if anyone gets to foreclose on your house, you want to make sure the right person gets those benefits. If the accounting information indicates that some other person may have the right to enforce your Note, that may be all you need to defeat your opponent or opponents in the current lawsuit.

Your opponents will probably lose all interest in continuing to fight with you once they learn they can't get anything. That lawsuit should be over. Whether or not you have another fight with the newly identified and possible Boss will be a matter to address in the future, but it's not a fight you have to start. The newly identified company that seems more likely to be the Boss might have also done something to terminate its Boss status. Therefore, take care of the immediate threat represented by your opponent or opponents and deal with the future as it develops.

Holder in Due Course

If a Boss is identified in your lawsuit, the type of status it has as a holder might be important, depending on the specific facts of your case. Here's why.

When you took out your loan, you dealt with the lender and its agent. One or both may have violated your rights by misrepresenting important facts, falsifying your loan papers, promising to refinance the loan in the future, or doing something else that violated state or federal laws designed to protect you. The lender and the agent may no longer be in existence or may be judgment proof—that is, so poor that suing them would likely cost you more than you could realistically expect to recover from them. However, you may be able to reduce or eliminate the amount of your obligation under the Note because of wrongs committed against you during the loan process. If you think you have a good legal defense or claim relating back to the creation of your Note, you can assert them against the person with the right to enforce the Note, but not if that person is classified as a holder in due course under the UCC.

The Uniform Commercial Code defines a holder in due course as one who takes an instrument for value in good faith, absent any notice that it is overdue, has been dishonored, or is subject to any defense against it or claim to it by any other person. Arguments about the status of holder in due course frequently center around two points: (1) when the Boss learned, or should have learned, that you had legal claims that could have been asserted against your lender or its agent, and (2) how much that Boss knew about delinquencies or possible defaults of your obligations under the Note and mortgage before the Boss acquired its interests in them. If your lender or its agents violated laws, or did things that created legal defenses or claims you could have used against them had they tried to enforce your Note, you will want to remember that you may be able to

assert those legal issues against the Boss, should it appear. Then the concept of holder in due course might be important for you.

Your discovery can lead to information that is important in determining whether a person can actually be viewed as a holder in due course, should that person prove it is the Boss. You can simultaneously investigate your opponent's alleged Boss status and whether it might possibly be a holder in due course. The level of detail required for either your opponent or an alleged master to prove it has Boss status is often enough to determine whether a Boss is a holder in due course. The way that I suggest you use discovery pretty much requires your opponent to disclose the information you might also need should "holder in due course" later become an issue in your case.

Of course, if your opponent is not the Boss or the servant of the Boss, your opponent will lose and you will not need to argue about questions regarding the account balance or whether someone is a holder in due course. That's why *Fighting the Foreclosure Machine* focuses primarily on helping you and others defend against mistaken and fraudulent claims by persons alleging Boss status. I don't attempt to provide a comprehensive discussion about the topic of holder in due course in this book. It is not essential material for all borrowers fighting the foreclosure machine. It is also a large topic which is better saved for another day and another book or paper. If, however, this topic becomes important to you, the additional information below can help guide your studies and legal analysis.

UCC § 3-302, *Holder in Due Course*, sets out the basics that must exist for someone to qualify as a holder in due course—namely, the person has to have acquired your Note for value; the person has to have acquired it in good faith; and, at the time it acquired an interest in your Note, the transferee had no information suggesting there were any disputes, delinquencies, or other enforcement issues involving your Note. UCC § 3-302 is modified, enlarged, and defined by several other parts of the UCC, so your study will also take you to them. For example, you would want to look at the following:

- § 1-201(20)—defines "good faith"
- § 3-202—defines "notice" and "knowledge"
- § 3-106(d)— applies if your Note or an indorsement on it includes verbiage alerting others that you have a right to assert claims against the lender and its successors
- § 3-203(b)—vests enforcement rights of a transferor upon the transferee, but with limitations if an otherwise "holder in due course" perpetrated wrongs respecting the Note

- § 3-203(b)—also does not transfer holder in due course status to a subsequent holder¹⁵⁶
- § 3-303—addresses what is meant by taking the Note for “value”
- § 3-305—describes defenses and claims the payor or borrower cannot assert against a Boss who is a holder in due course
- § 3-306—describes claims to the Note which defeat holder in due course status if known about prior to transfer
- § 3-308—requires the Boss to prove its status, including that of a holder in due course, if it tries to avoid defenses and claims available to the borrower (if an opponent claims status as a holder in due course, it has this added evidentiary burden of proving with facts all elements of that status)¹⁵⁷

If, therefore, the real Boss is present in your lawsuit, it may be subject to your right to reduce or eliminate your obligation under the Note because of wrongs you may have suffered during the loan creation process. If that Boss knows too much about problems regarding your Note before it acquires your Note, the Boss is probably not a holder in due course.

I suggest that you not worry about a Boss appearing in your case until one actually shows up,¹⁵⁸ and then don't be too hasty to concede defeat. That's the time to demonstrate what, if any, amount is still owed under your Note, based on what you have learned through discovery, and that's also the time to question the Boss's alleged status as a holder in due course for the purpose of holding it liable for damages owed you by your lender

The accounting and holder-in-due-course matters are important only if your judge concludes that your opponent is the Boss of your Note. Court rules, however, often require you to raise these issues early in the lawsuit, before you know if your opponent can prove Boss rights. Pleading in the alternative is often how people do that. You would first state that your opponent lacks authority to enforce your Note. You would next state that if the court thinks otherwise, then you maintain that you owe your opponent nothing and that it is liable for the predatory wrongs you suffered when you took out your loan. Your wording would, of course, be more eloquent and specific as to your circumstances. Pleading in the alternative is a common technique when asserting matters that cannot both be true at the same time.