FEDERAL RESERVE BANK *of* CLEVELAND

Mark B. Greenlee
Vice President and Counsel
Legal Department

PO Box 6387
Cleveland, OH 44101-1387
216.579.2163
216.579.2990 *fax*
mark.b.greenlee@clev.frb.org
www.clevelandfed.org

October 24, 2014

VIA E-MAIL

Mr. William R. Breetz, Jr.
Chairman, Uniform Law Commission, Drafting Committee
for Home Foreclosure Procedures Act
University of Connecticut School of Law
Knight Hall Room 202
35 Elizabeth Street
Hartford, CT 06105

Re: Draft of Home Foreclosure Procedures Act dated June 5, 2014 ("Act")

Dear Mr. Breetz:

This letter follows-up on several topics discussed during the second reading of the Home Foreclosure Procedures Act at the annual meeting of the Uniform Law Commission on July 11, 2014: (1) the number of residential foreclosure judicial decisions involving the holder-in-due-course rule, (2) the extent of assignee liability under current federal law and section 606 of the Act, and (3) the length of time defenses and claims against a loan originator may be asserted against an assignee.

1. Holder-in-Due-Course Litigation

During my introductory remarks at the Annual meeting, I commented on the number of foreclosure cases related to the holder-in-due-course rule:

> MR. MARK GREENLEE (Observer): … [A]re there any figures out there about the number of cases that are brought having to do with holder in due course. Tom Cox, a consumer advocate, sat up here at the table last year and said, . . . I hear lots of stories, clients tell me things, but the holder in due course rule is an obstacle and we don't bring those cases.
>
> After the meeting I did a LEXIS search of various databases to see if I could find holder in due course related cases…. Over a 30-year period I came up with 741 cases…. So even if that's very much understated, and you would multiply that by a significant multiple, you would still have less than a hundredth of a percent of the cases that would involve holder in due course….[1]

[1] 2014 Annual Meeting of Uniform Law Commission, Second Session, Home Foreclosure Procedures Act, July 14, 2014, Transcript at

After my introductory remarks, the following colloquy occurred:

> COMMISSIONER PETER F. LANGROCK (Vermont): … [I]s there any litigation out there questioning whether [banks] are generally holders in due course?.... [A]re they really genuine holders in due course? Were they buying things knowing that there were potential defenses out there? I just don't know if that has been litigated at all. That would be a place where I would start.
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> MR. MARK GREENLEE (Observer): There are very few reported cases. I can probably count them on the one hand….
>
> COMMISSIONER LANGROCK: Not the 741.
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> MR. GREENLEE: Well, cases that deal with those terms, yes, but where it actually gets down to not just being a holder, but actually being a holder in due course, there are very few cases. I think that the courts sometimes confuse the two, holder and holder in due course.[2]

After the annual meeting, I took a closer look at residential mortgage foreclosures cases in which courts mentioned the holder-in-due-course rule.[3] I found hundreds of court decisions that used the phrase "holder in due course." The overwhelming majority of them dealt with whether a person was entitled to enforce a note or mortgage. In UCC terms, the court was asked to determine whether a party was a "holder" of a negotiable instrument. In civil procedure terms, the court was asked to determine whether a party had standing or whether the party was a real party in interest. The courts sometimes referred to these kinds of challenges to foreclosure as the "show-me-the-note" defense.[4] These issues may relate to a party's status as a holder in due course. For instance, being a "holder" is a prerequisite to being a "holder in due course." However, determining whether a party meets the criteria to be a "holder in due course" involves additional analysis.

Another smaller group of residential mortgage foreclosure cases touched on the holder-in-due-course rule in a cursory way. Some appellate court cases accepted the finding of the trial court that a party was a holder in due course with little or no explanation. In other cases, the appellate court itself found that a party was a holder in due course with little or no analysis. Trial and appellate courts sometimes went a little further, setting forth the definition of a holder in due course without explicit application to the facts of the case.

The cases that substantively applied the criteria for holder-in-due-course status to the facts in a residential mortgage foreclosure were rare. I summarized 24 cases from the hundreds of cases I reviewed to illustrate the ways in which the courts have substantively discussed the holder-in-due-course rule. The cases are complicated. They address many claims, counter-claims and defenses. My summaries do not address all of the issues raised in cases, but focus on the holder-in-due-course rule. Attachment 1 provides an overview of the holdings in these

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114 (hereinafter "2014 Transcript"). See also, letter from Mark B. Greenlee to William R. Breetz, Jr. dated March 28, 2013 letter, at 8, and Statement of Thomas Cox, 2013 Annual Meeting of Uniform Law Commission, Tenth Session, Home Foreclosure Procedures Act, July 11, 2013, Transcript at 158-159.

[2] 2014 Transcript, at 127-128. See also, Statement of Commissioner Barry C. Hawkins (Connecticut), 2014 Transcript, at 156-157.

[3] I reviewed the 741 cases mentioned in my remarks at the 2014 annual meeting and additional cases responsive to the LEXIS query "mortgage & foreclos! & 'holder in due course' & 'fraud in the inducement'".

[4] Mainor v. Deutsche Bank Trust Co. Ams., 2014 U.S. Dist. LEXIS 1499 (S.D. Tex. Jan. 7, 2014); Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 489-90 (Minn. 2009), Stein v. Chase Home Fin., LLC, 662 F.3d 976, 979-80 (8th Cir. 2011).

cases and Attachment 2 provides detailed case summaries with extensive quotations from the court opinions.

These cases provide examples of common homeowner claims arising from loan originator conduct: (1) understatement of loan payment amounts, (2) understatement of interest rates (3) substitution of variable rate for fixed interest rate notes, (4) inability to refinance when promised the ability to do so, (5) forgery of signature, (6) lack of consideration, (7) concealment of a balloon payment, (8) undisclosed negative amortization of payments, and (9) exclusion of taxes and insurance from payment calculations. Homeowners made these allegations to support causes of action or defenses based on fraud, misrepresentation, and violation of law.

In these cases, assignee status as a holder in due course usually defeated homeowner claims against assignees. Homeowners didn't properly plead, present evidence, or meet the burden of proof to overcome holder-in-due-course status. Therefore, based on holder-in-due-course status, the courts usually granted assignee motions to dismiss because homeowners failed to state a claim upon which relief can be granted and motions for summary judgment because of the absence of an issue of material fact. In fourteen of the cases summarized in Attachments 1 and 2, the court affirmatively entered or affirmed judgment that an assignee was a holder in due course. In eight of these cases, the court dismissed or remanded the case for further proceedings to determine holder-in-due-course status.

The rarity of cases that substantively analyze holder-in-due-course status masks the impact of the holder-in-due-course rule on foreclosure litigation. As stated above, Thomas Cox, consumer attorney, spoke about the deterrent effect of the holder-in-due-course rule on homeowner attorneys asserting claims of wrongdoing by loan originators to defend against foreclosure actions by assignees.[5] Homeowner attorneys expect to be barred from using such claims against a holder in due course. Conversely, the securitization industry's insistence on the need for the holder-in-due-course rule indicates its effectiveness in foreclosure litigation.[6] Assignees want to preserve the insulation from claims of wrongdoing by loan originators provided by the holder-in due-course rule.

2. Assignee Liability

a. Federal Law

During his remarks at the annual meeting, Lawrence Platt, K & L Gates partner and counsel to the Securities Industries and Financial Markets Association ("SIFMA"), addressed existing assignee liability under federal law and the expansion in assignee liability that would

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[5] Footnote 1 supra.

[6] American Securitization Forum, Assignee Liability in the Secondary Market (June 2007), http://www.americansecuritization.com/uploadedFiles/Assignee%20Liability%20Final%20Version_060507.pdf (viewed Oct. 24, 2014); letter from Christopher Killian, Managing Director Securitization, SIFMA to William R. Breetz, Jr, Chairman, Uniform Law Commission Drafting Committee, dated July 7, 2013, http://www.sifma.org/comment-letters/2013/sifma-submits-comments-to-the-uniform-law-commission-on-residential-real-estate-mortgage-foreclosure-process-and-protections/ (viewed Oct. 24, 2014); Jason H.P. Kravitt and Robert E. Gordon, Securitization Financial Assets 6.03[C][1], 6.05[A], and 16.04[A][1][b][iii] (Aspen, 2015 Supplement).

follow from enactment of section 606 of the Act.[7] These remarks prompted me to look more closely at the extent of assignee liability under current federal law with a view toward how the limitation on the holder-in-due-course rule proposed in section 606 would expand the potential liability of assignees.

Currently, assignees face potential liability under federal law for the actions of loan originators in a lawsuit by a homeowner for: (1) violation of the Truth-in-Lending Act ("TILA"), (2) violation of the Home Owners Equity Protection Act ("HOEPA"), and (3) violation of the ability-to-repay requirements imposed by the Dodd-Frank Act ("ATR requirements). The general parameters of these laws are described below.

(1) TILA

TILA requires disclosure of credit terms in a standardized form. These disclosures include annual percentage rate, finance charge, amount financed, total payments, and other information to allow consumers to compare credit terms. TILA also gives consumers the right to rescind residential mortgage transactions that involve a lien on a consumer's principal dwelling. This right ends at midnight on the third business day following loan consummation, delivery of the right to rescind notice required by TILA, or delivery of all material disclosures, whichever occurs last. An assignee may be required to accept rescission of a residential mortgage transaction. This would result in a loss to the assignee – the cost of providing no-interest financing for the period between loan consummation and rescission. If there is no rescission, an assignee may be liable for actions of an original creditor if the violation is apparent on the face of the disclosure statement, except where the assignment was involuntary.[8] An assignee may be liable for such TILA violations up to the sum of:

- Actual damages,
- Statutory damages of twice the amount of the finance charge, and
- Costs and attorney fees.[9]

Statutory damages range from $400 to $4,000. There is a one-year limitation on an affirmative cause of action for TILA violations, but TILA violations may be raised any time as a defense (setoff or recoupment) in an action to collect a debt. There is a three-year limitation on the right of rescission.

(2) HOEPA

HOEPA requires additional disclosures and imposes substantive limitations on high-cost mortgage loans. Generally, a mortgage is a "High-Cost Mortgage" if: (1) the average percentage rate exceeds the average prime offer rate by 6.5%, (2) points and fees exceed 5% of the total loan amount, or (3) a prepayment penalty applies within 36 months after the loan is consummated or exceeds 2% of the amount prepaid.[10] Under HOEPA, an assignee is subject

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[7] 2014 Transcript, at 106-107.

[8] A violation apparent on the face of the disclosure statement includes: (1) a disclosure which can be determined to be incomplete or inaccurate from the face of the disclosure statement or other documents assigned or (2) a disclosure which does not include use of terms required by the TILA.

[9] 15 U.S.C. § 1640(a).

to two types of liability. Strict liability can be imposed for failure to deliver enhanced disclosures or inclusion of prohibited terms, which gives the obligor the right to rescind the transaction. Alternatively, assignees may be subject to liability for all claims and defenses that the consumer could assert against the original creditor unless the assignee demonstrates that it could not reasonably have determined the loan was a high-cost mortgage. Damages for failure to exercise reasonable due diligence are limited to the sum of:

- General liabilities described above under TILA;
- Amount of all remaining indebtedness; and
- Total amount paid by the consumer in connection with the transaction.[11]

There is a one-year limitation on affirmative claims and a three-year limitation on the right of rescission. HOEPA violations may be raised any time as a defense (setoff or recoupment) in an action to collect a debt.

(3) ATR Requirements

The Dodd-Frank Act and implementing regulations prohibit creditors from making a closed-end residential mortgage loan without a good faith evaluation that the consumer will have a reasonable ability to repay the loan.[12] Qualified Mortgages[13] that are Not Higher-Priced Mortgage Loans[14] are conclusively presumed to comply with the ATR requirements. Qualified Mortgages that are Higher-Priced Mortgage Loans benefit from a rebuttable presumption of

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[10] More specifically, a mortgage is a "High-Cost Mortgage" if it satisfies any of the following tests:
Average Prime Offer Rate ("APOR") Test
Annual Percentage Rate ("APR") percentage points in excess of APOR:
- > 6.5 % points for first-lien loans,
- > 8.5 % points for subordinate-lien loans, or
- > 8.5 % points for first-lien loans if dwelling is personal property and less than $50,000.

Points and Fees Test
Points and fees exceed the greater of
- 5 % of the total loan amount if loan amount is $20,000 or more or
- The lesser of 8% or $1,000 for loan amounts less than $20,000 (adjusted annually).

Prepayment Penalty Test
- Prepayment penalty more than 36 months after consummation or account opening or
- Prepayment penalties that can exceed, in total, more than 2% of the amount prepaid.

12 C.F.R. § 1026.32.
[11] 15 U.S.C. §1641(d).
[12] Sections 1411, 1412, and 1414 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 124 Stat. 2142, 2145, 2149, and 2152 (July 21, 2010), codified at 15 U.S.C. § 139c; 78 Fed. Reg. 6408 (Jan. 30, 2013) 78 Fed. Reg. 35420 (Jun. 12, 2013).
[13] A mortgage is a "Qualified Mortgage" satisfies all the following tests:
Product Features Test
- Regular periodic payments.
- No negative amortization.
- Loan term of 30 years or less.

Underwriting Requirements Test
- Consider & verify borrower's income, assets & debt obligations.
- Debt-to-income ratio ≤ 43%.
- Monthly payments calculated based on maximum interest rate that may apply during first 5 years of the loan and periodic principal and interest based on such interest rate.

Points & Fees Test
- Not > 3% if the total loan amount if ≥ $100,000 with greater limits for smaller loans.

12 C.F.R. § 1026.43(e)(2). There are three other types of "Qualified Mortgage" – Temporary, Small Creditor, and Balloon Payment.
[14] Loan secured by consumer's principal dwelling will be considered a "Not Higher-Priced Mortgage Loans" if the difference between APR and APOR is:

compliance with ATR requirements.[15] Non-qualified mortgages must satisfy ATR requirements. A non-qualified mortgage may be a High-Cost Mortgage or a Higher-Priced Mortgage Loan. A creditor, which includes an assignee, may be liable for ATR violations of an original creditor for non-qualified mortgages, whether they are High-Cost Mortgage or Higher-Priced Mortgage Loan and for Qualified Mortgages that are Higher-Priced Mortgage Loans in an amount equal to the sum of:

- All finance charges and fees paid by the consumer unless creditor demonstrates that failure to comply is not material.[16]

Borrowers do not have an affirmative right of action against an assignee for ATR violations, but ATR violations may be raised at any time as a defense (set off or recoupment) in an action to collect a debt.

b. Section 606

Section 606 of the Act would expand the potential liability of assignees[17] holding mortgages on residential property under state law by barring use of holder-in-due-course status or a waiver of claims or defenses clause to insulate assignees from liability for fraud, material misrepresentation, or fundamental breach of promise by the original creditor. Section 606 would allow a homeowner to assert the same claims against an assignee that the homeowner could assert against the initial holder of the obligation. Homeowner relief would be limited to reformation of the obligation and recoupment. Any recoupment would be limited to the economic loss caused by fraud, misrepresentation, or fundamental breach of promise up to the amount owed on the obligation at the time of judgment. These remedies would be available to homeowners for three years after the execution of the obligation, unless the claim or defense relates to an adjustment of the interest rate on the obligation or a prepayment fee, in which case, these remedies would be available for one year after the creditor sends notice of an adjustment or prepayment fee.

As currently drafted, the homeowner claims and defenses related to a transaction with the original creditor that would become effective against an assignee with holder-in-due-course status would be fraud, material misrepresentation, or fundamental breach of promise. Section 606 would not allow a homeowner to defend against foreclosure by an assignee of an obligation

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- $<1.5\%$ points on first-lien loan that does not exceed Freddie Mac limit on maximum principal obligation eligible for purchase,
- $< 2.5\%$ points on first-lien loan that exceeds Freddie Mac limit on maximum principal obligation eligible for purchase, or
- $< 3\%$ points on subordinate-lien loan.

These criteria are inferred from the criteria for a Higher-Priced Mortgage Loan. 12 C.F.R. § 1026.43(e)(2).

[15] Loan secured by consumer's principal dwelling will be considered a "Higher-Priced Mortgage Loan" if APR exceeds APOR by:

- $\geq 1.5\%$ points on first-lien loan that does not exceed Freddie Mac limit on maximum principal obligation eligible for purchase,
- $\geq 2.5\%$ points on first-lien loan that exceeds Freddie Mac limit on maximum principal obligation eligible for purchase, or
- $\geq 3\%$ points on subordinate-lien loan.

12 C.F.R. § 1026.43(e)(2).

[16] 15 U.S.C. §1640(a)(4).

[17] Section 102(3) of the Act defines "creditor" as "a person that commences a foreclosure or has the right to foreclose a mortgage under Section 401(b)." Generally, assignees will fit within this definition of creditor.

based on lack of consideration, violations of law, or unconscionability or other conduct. For the claims and defenses listed in section 606, homeowner relief would be limited to reformation of the obligation and recoupment with any recoupment limited to the economic loss not exceeding the amount owed on the obligation at the time of judgment.

3. Time Limits for Claims and Defenses under Section 606

a. Remove Statute of Limitations Exception

Sections 606(b) and (c) of the Act include language that limits the time within which claims and defenses may be asserted by a homeowner. Subsection (b) allows a homeowner to assert a claim or defense against a holder in due course based on fraud, material misrepresentation, or fundamental breach of promise in connection with the original loan transaction if it is "not otherwise subject to a statute of limitations."[18] I am concerned that inclusion of the "statute of limitations" exception may routinely negate the time limits set forth in subsection (c). Subsection (c) allows assertion of a claim or defense listed in subsection (b) for up to three years after the execution of the obligation being enforced or for up to one year after the creditor sends notice of adjustment of the interest rate on the obligation or a prepayment fee. However, with the statute of limitations exception, a claim of fraud, misrepresentation or fraud, or breach of promise may be subject to a shorter statute of limitations (e.g., one- or two-year statute of limitation). Therefore, I do not support inclusion of the statute of limitations exception in section 606.

b. Do Not Shorten Time Period

I am also concerned that subsection (c) could be used to shorten the time period during which a homeowner may assert claims and defenses. Subsection (c) states that "no such claim or defense may be made or asserted after the later of three years after the execution of the obligation being enforced or, if the claim or defense relates to an adjustment of the interest rate on the obligation or a prepayment fee, one year after the creditor sends notice of an adjustment or fee." If, for example, a creditor sends notice of an adjustment in the interest rate or prepayment fee the day after the execution of the obligation, the one-year time period to assert claims and defenses would expire three years and one day after the execution of the obligation. It is clear from the Drafter's Note about subsection (c), Alternative A that the one-year period is to be in addition to the three-year period: "[T]his right is . . . longer in the case of an interest rate adjustment or prepayment fee, an additional one year after the date of the adjustment" (emphasis added). Therefore, I suggest that subsection (c) be revised to reflect the drafter's intention, namely, that the one-year period be subsequent to, not concurrent with, the three-year period.

I am also concerned that small adjustments in the interest rate might be used to shorten the time period during which a homeowner may assert claims and defenses. For instance, an adjustment of one-tenth of a percent on the day after the expiration of the three-year period would trigger the start of the one-year period. Such a change would hardly be noticeable to a

[18] Section 606(b) also includes the words "other preclusion." This may have been included to bar claims based on collateral estoppel and res judicata. The application of these common law principles to homeowner claims and defenses would apply without mention in section 606.

homeowner, but it would cut off a homeowner's right to assert a claim or defense after four years and one day. Thereafter, a homeowner would not have the right to assert the defenses listed in subsection (b). Therefore, I suggest that "adjustment" be defined to mean an aggregate increase of one percent or more in the interest rate on an obligation or a prepayment fee of one percent or more of the amount of the obligation.

c. Consider Six-Year Time Period

While I think that the three-year-plus-one-year period set forth in subsection (c) is a move in the right direction, I would prefer a longer period without a one-year variable. Here's how I addressed this at the annual meeting:

> MR. MARK GREENLEE (Observer): … [Section 606] would also limit, and this is very important from my perspective, the time during which these claims and defenses could be asserted. In Alternative A, it is three years, or in the event of an interest rate adjustment, you have an additional year with which to assert these claims or defenses. I think it's a good proposal.
>
> I think it could be a little bit better. My chief concern, as I said, is with the time limit. I have supported the three-year plus one year proposal in an effort to reach a compromise. But I do favor a longer time limit.
>
> In the past, I have advocated a six-year time limit which is approximately the life of a mortgage loan. I think at a minimum we need a particular or certain time frame.… [T]he one year variable . . . introduces uncertainty into the equations. I think it would be better to have a fixed period of time.[19]

During the comments from the floor, one commissioner expressed support for a longer time limit, something approximating the normal life of a mortgage, which is six to seven years.

d. Do Not Extend Time Period to Term of Loan

Despite my preference for a longer time period, I do not think that homeowners should be allowed to assert claims and defenses against a holder-in-due-course for as long as the obligation remains outstanding. I am concerned that the current draft of subsection (c) might extend the length of time during which a homeowner could assert claims and defenses on a variable rate mortgage loan for as long as the full term of the obligation (e.g., 30 years). The current language seems to renew the one-year period each time the creditor sends notice of an adjustment or fee. Subsection (c) states in pertinent part as follows: "if the claim or defense relates to an adjustment of the interest rate on the obligation or a prepayment fee, one year after the creditor sends notice of an adjustment or fee." A creditor could send notice of an adjustment in interest rate annually throughout the life of a variable rate mortgage loan. I do not think that the drafters intended to extend the time period for a homeowner to assert a claim to the time of any adjustment. If subsection (c) continues to include the one-year period, I support extension of the time period for one year after an <u>initial</u> and <u>significant</u> adjustment in interest rate or prepayment fee that occurs later than the expiration of the three-year period.

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[19] 2014 Transcript, at 111.

4. Requests

Based upon the comments made above, I have several requests. First, I ask the drafting committee to consider the following revisions to section 606:

1. Delete "not otherwise subject to a statute of limitations or other preclusion" from subsection (b);
2. Substitute the following text after "sends" at the end of subsection (c)(2) "its first notice of an adjustment in interest rate or fee more than three years after execution of the obligation" and
3. Define "adjustment" as "an aggregate increase of one percent or more in the per annum interest rate on an obligation or a prepayment fee of one percent or more of the amount of the obligation."

A redlined version of section 606 including these revisions is provided as Attachment 3.

Second, I ask the drafting committee to reconsider whether the list of claims and defenses in section 606(b) is sufficient. I do not think that there is interest in allowing all claims and defenses, as is the case under HOEPA, but perhaps other claims or defenses should be preserved.

Third, I ask the drafting committee to reconsider the length of time homeowners should be able to assert claims and defenses against a holder in due course.

Finally, I ask the drafting committee to add a springing provision for section 606, as I mentioned in my remarks at the annual meeting and in my letter to you dated July 2, 2014.[20]

Thank you for the opportunity to speak at the annual meeting in July. I am looking forward to further discussion of the holder-in-due-course rule at the drafting committee meetings on November 14th and 15th.

Sincerely,

Mark B Greenlee

Mark B. Greenlee
Vice President and Counsel

cc: Lucy Grelle
enc.

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[20] 2014 Transcript, at 112-13 and letter from Mark B. Greenlee to William R. Breetz, Jr. dated July 2, 2014 letter, at 2-3.

Case Summary Overview

This table provides an overview of the cases summarized in Attachment 2. "Declaratory Judgment" is abbreviated as DJ, "Motion to Dismiss" as MD, "Motion to Strike" as MS, "Statute of Limitation" as SL, "Summary Judgment" as SJ, "Trial Court" as TC, and "Holder in Due Course" as HDC.

Case Name	State	Stage in Case/Decision	Year	Page
BAC Home Loans Servicing v. Duran	NM	SJ because assignee HDC affirmed	2013	1
Bank of America v. Quintana	NM	SJ because assignee HDC reversed	2014	2
Bank of America v. Vaught	OH	SJ for assignee affirmed, assignee had standing, HDC irrelevant	2014	3
Bank of New York v. Ukpe	NJ	SJ because assignee HDC affirmed	2014	4
Citibank, N.A. v. Dalessio	FL	TC determined assignee HDC at trial	2010	8
CitiMortgage, Inc. v. Hoge	OH	SJ because assignee HDC affirmed	2011	9
Countrywide v. Heck	OH	SJ because assignee HDC affirmed	2011	10
Deutsche Bank v. Bethea	NJ	SJ because assignee HDC reversed because assignee did not establish a holder or standing	2011	12
Deutsche Bank v. Carmichael	PA	SJ because assignee HDC	2011	12
Deutsche Bank v. Medina	CT	MS fraud defense denied because assignee did not properly plead HDC elements	2011	14
Deutsche Bank v. Samora	CO	TC grant of judgment at trial affirmed on appeal because assignee a HDC	2013	16
Dixon-Ford v. U.S. Bank, N.A.	NJ	TC granted SJ because assignee HDC	2011	18
Erkins v. Alaska Trustee, LLC	AK	SJ because assignee HDC reversed, remand for HDC determination	2011	19
Gonzales v. American Title Co.	TX	SJ because assignee HDC affirmed	2003	20
Hays v. Bankers Trust	WV	TC declined to grant SJ because HDC status unclear	1999	21
HSBC Bank USA N.A. v. Gouda	NJ	SJ because assignee HDC affirmed	2010	22
In re Reagoso	PA	TC granted MD because assignee HDC	2007	24
Mainor v. Deutsche Bank	TX	TC granted MD in DJ because of assignee standing, fraud claims barred by SL not HDC status	2014	25
McLehan v. Chase Home Finance	MI	SJ granted and case dismissed because no evidence assignee not a HDC	2010	26
Ocwen Fed. Bank v. Russell	HI	SJ reversed because material issue of fact concerning assignee's HDC status	2002	27
Singo v. Deutsche Bank	IN	TC granted SJ because assignee HDC	2013	28
U.S. Bank v. Ballard	CT	TC allowed foreclosure to proceed because assignee a HDC	2012	29
Wells Fargo Minn., NA v. Finley	OH	SJ affirmed because no material issue of fact on Homeowner's fraud defense[1]	2008	30
Wells Fargo v. Ford	NJ	SJ reversed because assignee did not establish standing to foreclose or HDC status	2011	31

[1] HDC status of assignee assumed by appellate court.

Residential Mortgage Foreclosure Cases Addressing Holder in Due Course Status

The cases summarized below illustrate the ways in which the holder in due course rule has arisen in judicial decisions, such as residential mortgage foreclosure, declaratory judgment, quiet title, and bankruptcy cases. These cases are complicated. They deal with many claims, counter-claims, and defenses. The summaries do not address all of the issues raised, but focus on discussions of the holder-in-due-course rule. The cases were not selected to represent the law generally or in a particular state but only to illustrate how the courts have addressed the holder-in-due-course rule in the context of foreclosures on mortgaged residential property. Section 102(23) of the Home Foreclosure Procedures defines "residential property" as "real property improved with not more than four dwelling units." It includes owner-occupied principal residences, second or vacation homes, and investment property, so long as they contain not more than four dwelling units.[1]

1. BAC Home Loans Servicing, L.P. v. Duran.[2] In 2003, Karen Duran and Fred Montano (Defendants) executed a promissory note payable to First State Bank ("First State") in the amount of $322,700 at a fixed rate of 6.625% per annum, which was secured by a mortgage on the Defendants' home. First State assigned its mortgage to Countrywide Home Loans Servicing L.P., subsequently known as BAC Home Loans Servicing, L.P. ("BAC"). In 2009, BAC filed a foreclosure complaint against the Defendants. In 2011, the district court granted summary judgment in favor of BAC. On appeal, the Defendants made several arguments that a genuine issue of material fact existed, including that BAC is not a holder in due course. In support of its motion for summary judgment, BAC attached the affidavit of a person responsible for maintaining BAC's loan files, averring, based upon a review of the loan file, that: (i) BAC is the legal holder of the note executed by the Defendants, (ii) the note is secured by the mortgage, the note and mortgage were assigned to BAC, and (iii) BAC is the owner and holder in due course of the note and mortgage. In 2011, the trial court entered summary judgment in favor of BAC. On appeal, the appellate court concluded that the statements in the affidavit were admissible, BAC made a *prima facie* showing that it was entitled to summary judgment, and the Defendants presented no genuine issue of fact to defeat that showing.

> We understand Defendants' argument to be that the note is not a negotiable instrument and that BAC is not the holder in due course of the note. We begin with whether the note is a negotiable instrument. Defendants correctly cite to *NMSA 1978, Section 55-3-104* (1992), for the definition of a negotiable instrument but appear to argue that the note here does not meet the definition because it was transferred to another party and is therefore "further evidence of false deceptive claims of [BAC]." We are not persuaded.

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[1] While the holder-in-due-course rule has been an issue in cases questioning the negotiability of variable rate instruments because of the lack of a sum certain, cases alleging fraud related to the purchase of residential property in real estate developments, cases involving the priority of creditors, cases investment in property used for business purposes, and cases involving the FDIC as receiver of a failed bank, no case summaries have been provide for such cases.

[2] 2013 NM App Unpub LEXIS 204 (July 9, 2013).

In our view, there can be no dispute that the note signed by Duran is a negotiable instrument pursuant to *Section 55-3-104*. Here, the note as drafted was payable to the order of First State and stated that Duran understood that First State could transfer the note. Moreover, the note contained two endorsements: one to the order of First State and one from First State without a specific payee identified. This second endorsement meant that the note was payable to the note's bearer. Because BAC properly had possession of the note, it was the holder of the note. Accordingly, BAC was entitled to enforce the note.

We conclude that BAC's status as the note's holder meant that BAC could, in the event of any default, pursue Duran for any amounts owing on the note. To the extent that Defendants argue that the assignment of the mortgage was flawed, the assignment had no effect on BAC's ability to enforce the note because the note is separate from the mortgage. The mortgage serves only as security for payment of the note and, therefore, even absent the mortgage, BAC could still pursue Duran for payment of the note. Accordingly, the note is a negotiable instrument that BAC had the right to enforce.

Defendants also argue that BAC is not the holder in due course. In order to establish that it is a holder in due course, BAC must show that it took the note "(i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored," and without notice of other circumstances that are not applicable here. Defendants do not dispute any of the above elements but premise their argument solely on the basis that the note is not a negotiable instrument and, therefore, BAC is not the holder in due course. However, we have already concluded that the note at issue in this case is a negotiable instrument, and that the note and mortgage were successfully transferred to BAC through both assignment and a blank endorsement on the note. Therefore, there are no disputed issues of fact concerning BAC's status as a holder in due course, and summary judgment was properly granted....[3]

2. Bank of America v. Quintana.[4] In 2007, Erasmo and Grace Quintana obtained a $152,000 loan secured by a mortgage on their home from First Franklin Financial Corp. The adjustable rate loan The promissory note that set an initial interest rate of 6.9%, which could increase to as much as 12.9% on a schedule of prescribed "change dates" starting in 2009. Mr. Quintana died shortly after signing the loan contract. In December 2008, the loan servicer notified Mrs. Quintana that her loan was past due. In January 2009, LaSalle Bank filed a foreclosure complaint. In March 2009, Bank of America ("Bank") filed an amended complaint, identifying itself as successor by merger to LaSalle Bank. Mrs. Quintana's answer included allegation that the bank lack standing to foreclose because it had not demonstrated a proper chain of title of the note and that the terms of the loan violated New Mexico's Home Protection Loan Act ("HPLA") because the rate cap of 12.9% made it a high-cost loan.

The trial court granted Bank's motion for summary judgment on all issues, finding that the note was assigned and transferred to Bank, giving it standing to foreclose and making the bank a holder in due course. The appellate court affirmed, holding that that the Bank had standing to enforce the note, and that the Bank as a holder in due course had an affirmative defense to the application of the HLPA, and that Mrs. Quintana failed to present evidence creating an issue

[3] Id. at 10-13 (citations omitted).
[4] 2014 N.M. LEXIS 60 (Feb. 27, 2014).

of material fact warranting trial on any of her defenses. The Supreme Court of New Mexico reversed the holding of the appellate court and grant of summary judgment by the trial court on the issues of Bank's standing and status as a holder in due course. The opinion provides in pertinent part as follows:

> New Mexico's UCC provides that a holder in due course is not subject to defenses of an obligor on an instrument based on claims that "arose from the transaction that gave rise to the instrument." The UCC defines a holder in due course as a "holder" who "took the instrument (i) for value, (ii) in good faith, and (iii) without notice that the instrument is overdue or has been dishonored."
>
> Key to being a holder in due course is the term "holder." *See NMSA 1978, § 55-1-201(b)(21)(A)* (2005) (defining "holder" as "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"). For the same reasons that the Bank could not demonstrate that it was a holder of the Quintanas' note for purposes of standing, it cannot be a holder in due course for purposes of affirmative defenses. . . . Because the Bank failed to demonstrate how it became a holder of the Quintanas' note, it cannot be treated as a holder in due course....
>
> Because neither the district court nor the Court of Appeals addressed the merits of Mrs. Quintana's HLPA claims as a result of their determinations that the Bank was a holder in due course, those substantive claims are not before us at this time....[5]

The court reversed the holding of the appellate court and the grant of summary judgment by the district court on the issues of the Bank's standing, status as a holder in due course, and HLPA defenses....

3. Bank of America v. Vaught.[6] In 2005, Sabrina and Bruce Vaught executed a promissory note in favor of ComUnity Lending Incorporated in the amount of $212,000 for the purchase of a residence, which was secured by a mortgage on that residence. In January 2012, they stopped making payments on the loan. In September 2012, Bank of America N.A. ("BANA") field a foreclosure compliant. In October 2013, the trial court entered summary judgment in favor of BANA. On appeal, the Vaughts asserted that the trail court erred by granting summary judgment because there were material issues of fact, including whether BANA was a holder in due course of the note.

> [W]e will consider whether BANA is a holder in due course of the Note, because this issue bears some relation to BANA's standing to foreclose. As a jurisdictional requirement, standing may be raised by a party to the action at any time.
>
> "It is an elementary concept of law that a party lacks standing to invoke the jurisdiction of the court unless he has, in an individual or representative capacity, some real interest in the subject matter of the action." Put another way, in order to establish standing, the plaintiff must show it has suffered injury "caused by the defendant that has some remedy in

[5] Id. at 18-22 (citations omitted).
[6] 2014 Ohio App. LEXIS 3320 (Aug. 4. 2014).

law or equity." This requirement is satisfied in a foreclosure action if the plaintiff can demonstrate he has an interest in the note or mortgage at the time the complaint is filed.

The Vaughts assert that BANA failed to demonstrate an interest in the Note. They claim that because BANA has not satisfied *R.C. 1303.32(A)(2)(c)*, it is not a holder in due course of the Note, and therefore has no right to foreclose. The Vaughts also claim that because BANA failed to produce originals of the Note or Mortgage for their inspection, BANA's ownership of the debt remains a genuine issue of material fact.

BANA need not be a holder in due course in order to demonstrate an interest in the Note sufficient to foreclose. As this court has previously observed, the "holder" of an instrument such as the Note here in question is a "person entitled to enforce" the instrument. Although the concept of "holder" is distinct from that of a "holder in due course," both concepts refer to persons entitled to enforce the instrument. A "holder" includes a person who is in possession of an instrument payable to bearer. "When an instrument is indorsed in blank, the instrument becomes payable to bearer * * *." A "holder in due course," on the other hand, is a holder who took for value, in good faith, and without notice of one of three specific problems with the instrument, including that the instrument is overdue.

In the present case, BANA, with a copy of the Note and the affidavit of Ms. Snipe, demonstrated to the trial court both that it is in possession of the Note, and that the Note is endorsed in blank. In other words, BANA has established it is a holder. As a holder, BANA is a person entitled to enforce the Note. Therefore, the argument by the Vaughts that BANA has failed to prove it is a holder in due course is irrelevant.[7]

The appellate court affirmed the grant of summary judgment.

4. Bank of New York v. Ukpe.[8] In July 2005, Victor and Enoabasi Ukpe obtained a mortgage loan to buy a residential property from Countrywide Home Loans, Inc. (CHL). The Ukpes alleged that they told the mortgage broker that they could not afford a monthly payment of more than $1,000. The broker allegedly assured them that the payment would not exceed that amount. During the closing the Ukpes learned that the monthly payment would be $1,488.67. The broker told them that they could refinance in a few months to decrease the payment to $1,000. They proceeded with the closing, signing a note and mortgage. In August 2005, the mortgage was recorded. It was held by Mortgage Electric Recording Systems (MERS) as nominee for American Wholesale Lender, which was another name for CHL. In the fall of 2005, the Ukpes' mortgage became part of a pool of mortgages that were securitized, enabling investors to purchase interests in securities backed by the mortgages. The Bank of New York (BONY) was the trustee. Countrywide Home Loans Servicing, LP (CHLS) collected mortgage payments, and forwarded net proceeds to the trustee for payments to the investors. These activities took place in accord with a Pooling Service Agreement (PSA) entered into by CHL, CHLS, BONY, and other entities. The Ukpes unsuccessfully tried to refinance on several occasions. They stopped making payments in August 2007. The Bank of New York filed a foreclosure compliant in March 2008. BONY moved for summary judgment. The Ukpe's

[7] Id. at 10-14 (citations omitted).

[8] 2014 N.J. Super. Unpub LEXIS 2059 (Aug. 20, 2014).

challenged: (i) BONY's standing to pursue the foreclosure action, (ii) the negotiability of the note, and (iii) BONY's status as a holder in due course. In November 2011, the trial court rejected these arguments, and granted summary judgment in favor of BONY, supporting its decision with a thorough review BONY's status as a holder in due course.[9] The opinion of the trial court provides in part as follows:

> [I]s the plaintiff's right to enforce the note through the foreclosure of the mortgage subject to the debtor's right to raise defenses that would be available in an action brought by the original lender? The answer to that question depends on whether the plaintiff is a "holder in due course" under the UCC. This question requires me to address another group of discrete issues. I will discuss the holder in due course concept generally, the endorsement issue, and the "close connectedness" issue.
>
> N.J.S.A. 12A:3-305 deals with the defenses which are available to one resisting an action to enforce an obligation to pay an instrument, including negotiable notes. N.J.S.A. 12A:3-305(b) provides that the right of a holder in due course to enforcement is not subject to the defenses of the obligator referenced in N.J.S.A. 12A:3-305(a)(2), dealing with defenses "stated in another section of this chapter" and defenses which would be available "if the person is entitled to enforce the instrument were enforcing a right to payment under simple contract." Another group of defenses, referenced in N.J.S.A. 12A:3-305(a), are specifically available against a holder in due course, pursuant to N.J.S.A. 12A:3-305(b). The defenses and claims the Upke defendants are asserting against CHL are not with the group of defenses referenced in N.J.S.A. 12A:305(a)(1) which might be available against a holder in due course. (There is no claim of infancy, duress, lack of capacity, a particular species of fraud, or insolvency.) Under the UCC, the defenses and claims being asserted against CHL may not be asserted against plaintiff if it is, in fact, a holder in due course. How does one become a holder in due course?....
>
> One cannot be a holder in due course without first being a holder. To take free of the types of defenses at issue, plaintiff must establish that it is a holder, and that it is a holder in due course....
>
> The instrument at issue is a negotiable note. To establish its right to enforce the note as a holder, plaintiff must establish that it received the note, through negotiation, at the appropriate point in time. Negotiation of an instrument payable to an identified person requires transfer and an endorsement by the holder. A negotiable note which is endorsed in blank, however, becomes a bearer instrument, which can be transferred and negotiated by delivery, without more. The Upke note was payable to the order of CHL. To become a holder, plaintiff must show it received the note through negotiation. That, in turn, requires showing that the note was endorsed when it was transferred to plaintiff. Either endorsement in favor of plaintiff or an endorsement in blank would be sufficient.
>
> More is required, however, to become a holder in due course, a term defined in N.J.S.A. 12A:3-302. The instrument, when negotiated, must not appear irregular or incomplete. The holder must have taken the instrument for value, in good faith, and without notice that the instrument was overdue, had been dishonored or was in default. There is no indication this note was irregular or incomplete. On the record presented, it is

[9] Bank of New York v. Ukpe, N.J. Super. Ct. Ch. Div., Docket No. F-10209-08 (Oct. 24. 2011).

clear plaintiff obtained the note for value. A distinct issue is presented, however, as to whether plaintiff would have had notice of the Ukpes' default, as of the time the note was negotiated. That issue turns on the date the note was endorsed in blank.

Plaintiff's proofs indicate that the note was transferred to the BKNY Trust, as Co-Trustee under the PSA, with the blank endorsement in the fall of 2005. At that point, the Upkes had not defaulted on their obligations under the loan. There would have been no indication to plaintiff or its representatives of any default or other irregularity involving the Upke loan. On those facts, it would be appropriate to treat plaintiff as a holder in due course. An entirely different scenario would be present, however, if the note was not in fact endorsed in the fall of 2005. If plaintiff received the note, without the endorsement, it would not have been a holder, and would not have been a holder in due course.

The endorsement of the note around the time the foreclosure was instituted would not remedy the problem. The Ukpes defaulted on their loan in August 2007. The Notice of Intention was served in September 2007. The foreclosure complaint was filed in March 2008. If the endorsement was placed on the note during those time periods, it would not be sufficient to make plaintiff a holder in due course. Plaintiff would not be able to take the position that it had taken the instrument without notice it was overdue or had been dishonored, as required by N.J.S.A. 12A:3-302. Plaintiff would be subject to the defenses and claims asserted against CHL.

It is that context that the Upke defendants challenge plaintiff's proofs as to the endorsement of the note. The question presented is whether there is a genuine issue of facts as to the time at which the endorsement was placed on the note.

It is clear that the original note has been endorsed in blank, in the name of a representative of CHL. Notably, it is apparently undisputed that the individual whose name appears on the endorsement – David A. Spector – has not worked for CHL since some time in 2006. The question presented is whether the endorsement was placed on the note when the loan was securitized in the fall of 2005, as indicated by the plaintiff, or whether the endorsement was only placed on the note when the plaintiff or its representatives elected to proceed for the foreclosure.... [10]

On the endorsement issue, the trial court concluded:

Plaintiff has presented appropriate proofs indicating that the note was endorsed in the fall of 2005, around the time the various mortgage loans were securitized. The PSA required the endorsement and transfer of the various mortgage notes at issue and the endorsement and transfer process was the subject of specific review. The various exception reports appear to confirm the Ukpe note was in the collateral file, in the appropriate form, and plaintiff has accounted for the handling of the collateral file from the fall of 2005 to the present time. The endorsement at issue is in the name of a CHL employee who left CHL's employment sometime in 2006. The Ukpe defendants offer no direct proofs to the contrary. In the absence of any direct proofs, I see no legitimate basis for inferring that the note was not endorsed in 2009, as

[10] Id. at 18-19 (citations omitted).

> defendants have suggested. At this point, I am not convinced there is a genuine issue of fact as to the timing of the endorsement....
>
> I would conclude that the note was endorsed in the fall of 2005 and that it was appropriately negotiated prior to any default by the Ukpes. Assuming that to be the case, it would appear appropriate to treat plaintiff as a holder in due course, taking the note free of the defenses and claims the Ukpe defendants may be able to assert against CHL. . . .[11]

The trial court went on to address the Ukpes' argument that plaintiff cannot be a holder in due course based on the close connectedness doctrine.

> [T]he Ukpe defendant[s] argue that plaintiff is so "closely connected" to CHL that it should not be able to avail itself of the protections that flow from being a holder in due course. I do not believe that doctrine should be applied to bar plaintiff from attaining the status of a holder in due course in this matter, assuming it would otherwise attain that status under the UCC.
>
> . . . . I am satisfied that the doctrine is generally applicable only when the parties are involved in such an unusually close relationship that the transferee should have known that the underlying transaction was somehow suspect. that may occur when the transferee was created by the transferor to handle the transactions in question. It may also occur when the transferee somehow controls the actions of the transferor or is intimately involved in the structuring or processing of the underlying transactions. Those circumstances are simply not presented here. There is no apparent reason to suggest that plaintiff was created by or for CHL, or that it was involved in the structuring of the Ukpe mortgage.[12]

The appellate court affirmed the grant of summary judgment by the trail court, adding the following:

> As a general rule, one who takes an instrument does so subject to the claims and defenses that the maker may have against the originator. The holder in due course doctrine is an exception to this general rule, protecting from liability an innocent bona fide purchaser of an instrument. A holder in due course is one who takes the instrument in good faith and for value. The doctrine is meant to remove anxieties of one who takes the paper as an innocent purchaser. However, holder in due course status is "neither necessary nor desirable when the transferee knew a great deal about, or controlled, or participated in, the underlying transaction."
>
> In *Unico*, a consumer and a merchant had agreed that in exchange for the payment of a monthly fee, the merchant would deliver goods. The consumer signed a note that the merchant assigned. Thereafter, the merchant became insolvent and stopped delivering the goods, but the assignee attempted to collect on the note anyway.

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[11] Id. at 22 (citations omitted).
[12] Id. at 22-23 (citations omitted).

The Court found that the assignee was a partnership that had been formed exclusively to finance the merchant's sales. The assignee had played a major role in structuring the merchant's financing contracts and in setting financing terms. Therefore, according to the Court, the "close connectedness" between the merchant and the assignee prohibited the assignee from being considered an HIDC. The holding was expressly limited to consumer goods transactions.

Here, it is clear beyond dispute that plaintiff bank was not created by CHL for the purpose of this transaction. Moreover, there was nothing in the documents executed at closing that would have indicated to plaintiff that a mortgage broker made false representations to defendants, or that defendants made any false representations in their application for a mortgage loan. Also, nothing in the record supports that plaintiff played any role whatsoever in structuring defendants' mortgage obligations. Accordingly, Judge Todd appropriately determined that plaintiff was entitled to the protections of a holder in due course.[13]

5. Citibank, N.A. v. Dalessio.[14] In 2006, Christopher Dalessio received a loan solicitation in the mail from The Loan Corporation. Dalessio contacted The Loan Corporation about refinancing his home. He spoke with Ryan Duncan. Based on this conversation, Dalessio believed that he could obtain a loan for five years at a rate of 2.5%. A few weeks later, Delessio closed on a loan from American Brokers Conduit. He signed an adjustable rate note in the amount of $253,000 secured by a mortgage on his home. The disclosures stated that the initial interest rate of 2.5% would only last for one month. They also listed different interest rates from 9.055% to 8.972%. As Dalessio made payments on the loan, he noticed that his principal balance was increasing each month. He sought an explanation and learned that he had a negative amortization loan with an interest rate that changed each month. He stopped making payments in 2008. Citibank field a foreclosure complaint. At trial, Citibank presented evidence that it holds the note endorsed in blank, and is therefore, entitled to enforce the note and foreclose on the mortgage. Dalessio asserted a variety of affirmative defenses, including an assertion that Citibank was a not a holder in due course. The court responded to this defense as follows:

> The term "holder in due course" means the holder of an instrument if: (a) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and (b) the holder took the instrument: (1) for value; (2) in good faith; (3) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series; (4) without notice that the instrument contains an unauthorized signature or has been altered; (5) without notice of any claim to the instrument described in *section 673.3061*; and (6) without notice that any party has a defense or claim in [*1367] recoupment described in *section 673.3051(1)*.

[13] 2014 N.J. Super. Unpub. LEXIS 2059, at 8-10 (citations omitted).
[14] 756 F. Supp. 2d 1361 (M.D. Fla. Dec. 10, 2010).

As previously stated, Citibank demonstrated that it has standing to pursue this foreclosure action against Dalessio because it is the proper holder of the note. Citibank is a holder in due course pursuant to *Fla. Stat. § 673.3021(1)*. It took the note and mortgage free and clear of any claims or affirmative defenses that Dalessio has asserted in connection with the origination of the mortgage loan. The Court finds that Citibank is the holder in due course of the note.[15]

The court concluded that Dalessio did not present sufficient evidence to establish his affirmative defenses, including Citibank's non-holder in due course status.

6. CitiMortgage, Inc. v. Hoge.[16] In 2005, Cynthia Hoge refinanced her home mortgage in the amount of $85,500. She executed a note and mortgage to American Equity Mortgage ("AEM") . The note and mortgage were assigned to CitiMortgage, Inc. ("CitiMortgage"). In 2007, CitiMortgage filed a foreclosure compliant because Hoge had become delinquent on her payments. The trial subsequently granted CitiMortgage's motion for summary judgment. Hoge appealed. The court considered Hoge's allegations that AEM committed fraud by representing that her monthly payment would be $680 per month, but failed to inform her that this did not include real estate taxes and insurance, which brought the monthly payment to $872.

As a defense, appellant alleged that AEM had committed fraud during the origination of the note and mortgage. CitiMortgage claims it was not the loan originator nor did it participate in the original transaction. However, "the assignee of a contract takes that contract with all rights of the assignor and subject to all defenses that the obligor may have had against the assignor."

"The default rule for consumer and commercial mortgages alike is that a mortgage lender's assignee takes subject to the claims and defenses that the borrower might assert against the original lender." This is subject to two limitations embodied in the ability to draft waiver of defense clauses in contracts and the "holder in due course" rule. A holder in due course takes free of certain claims and defenses a party may assert against the originator of the mortgage.

R.C. 1303.35(A)(1)(c) provides that fraud is still a valid defense even against a holder in due course.[3] In asserting her fraud defense, appellant alleged that AEM did not include the payment of taxes and insurance in the stated monthly payment and that CitiMortgage was liable for this fraud and misrepresentation. . . . After CitiMortgage demonstrated that it was entitled to judgment, appellant had a burden to produce evidence that a genuine issue of material fact existed to preclude summary judgment and, based on the documents and pleadings before the court, appellant failed to do this. CitiMortgage was entitled to summary judgment as a matter of law on its foreclosure claim based on the record before the court.[17]

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[15] Id. at 1366-67 (citations omitted).
[16] 196 Ohio App. 3d 40 (2011).
[17] Id. at 47-48 (citations omitted).

A holder in due course is defined as one who takes an "instrument when issued or negotiated to the holder [that] does not bear evidence of forgery or alteration that is so apparent, or is not otherwise so irregular or incomplete as to call into question its authenticity; [and:] (a) For value; (b) In good faith; (c) Without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series; (d) Without notice that the instrument contains an unauthorized signature or has been altered...."

Appellant only asserted that CitiMortgage was liable for the actions of the loan originator as assignee....

7. Countrywide v. Heck.[18] In 2007, Charles and Patricia Heck executed a note in the amount of $290,250, secured by a mortgage on their real property. The lender was America's Wholesale Lender. The mortgage was subsequently assigned to Countrywide Home Loan Servicing, L.P. ("Countrywide"). In 2009, Countrywide instituted a foreclosure proceeding. The Hecks answered the compliant with various affirmative defenses, including fraud in the inducement. Countrywide moved for summary judgment. In response, the Hecks provided an affidavit stating that their monthly income was $1,600 at the time of the loan application. Furthermore, it was averred the loan broker, without their knowledge, entered a monthly income of $5,500 on the loan application. In 2010, the trial court granted Countrywide's motion for summary judgment. On appeal, the court considered the allegations of fraud in the inducement and Countrywide's status as a holder in due course.

Accepting as true the facts alleged in Patricia Heck's affidavit, the question becomes whether such facts are material so as to defeat or impair appellee's claim. Appellee insists that it is a holder in due course and, therefore, not affected by claims of impropriety that appellants may have against third parties.

One who takes an instrument as a holder in due course, with certain exceptions, is immune to defenses and free of claims of recoupment or title that prior parties might assert. *R.C. 1303.32(A)* (*UCC 3-302*) provides that one is a holder in due course if:

"(1) The instrument when issued or negotiated to the holder does not bear evidence of forgery or alteration that is so apparent, or is not otherwise so irregular or incomplete as to call into question its authenticity [and]

"(2) The holder took the instrument under all of the following circumstances:

"(a) For value;

"(b) In good faith;

"(c) Without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series;

"(d) Without notice that the instrument [**6] contains an unauthorized signature or has been altered;

"(e) Without notice of any claim to the instrument as described in [*R.C.1303.36*];

(f) Without notice that any party has a defense or claim in recoupment...."

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[18] 2011 Ohio App. LEXIS 117 (Jan. 14, 2011).

There is no claim that appellee obtained the note other than for value and in good faith. *R.C. 1303.36* (*UCC 3-308*) concerns the validity of signatures and is not at issue here. Appellants do suggest that appellee's compliance with *R.C. 1303.32(A)(1)(c)* is lacking because the date of assignment of the note was only a few weeks before suit on the default was instituted. Appellants insist that it is reasonable to believe that appellee must have known that the note was overdue when it was obtained.

Appellee insists that it acquired the note and mortgage in the ordinary course of business and there is nothing of record to the contrary. Moreover, appellee insists, the date an assignment is executed is not indicative of when the loan was acquired.

We are somewhat skeptical of appellee's proposition of law concerning the significance of the date of execution of an assignment, but that point is not dispositive here. While the proximity of the date of the assignment and the institution of suit on the note may be cause for further inquiry, absent more it is not sufficient evidence that the assignee had notice of default at the time of assignment.

What remains is the question of whether the facts appellants assert are within that range of defenses that remain viable against a holder in due course. These defenses are articulated in *R.C. 1303.35(A)* (*UCC 3-305*):

> "[T]he right to enforce the obligation of a party to pay an instrument is subject to all of the following:
>
> "(1) A defense of the obligor based on any of the following:
>
> "(a) Infancy of the obligor to the extent it is a defense to a simple contract;
>
> "(b) Duress, lack of legal capacity, or illegality of the transaction that, under other law, nullifies the obligation of the obligor;
>
> "(c) Fraud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or its essential terms;
>
> "(d) Discharge of the obligor in insolvency proceedings. * * *"

R.C. 1303.35(A)(1)(a) and *(d)* are clearly inapplicable here. With respect to *R.C. 1303.35(A)(1)(b)*, in argument, appellants suggest that the mortgage broker violated the Ohio Mortgage Broker Act and the Ohio Consumer Sales Practices Act, but fails to articulate in what manner these violations occurred or provide authority that such violations nullify their obligation.

Appellants repeatedly suggest their application was the result of fraud in the inducement, but fail to inform in what manner they were denied a reasonable opportunity to determine the true character of the document they were signing. The loan application which appears in the record is unsigned. The note, which appellants undisputedly did sign, carries a monthly payment of $ 1,980.02. Patricia Heck's affidavit, which states appellants' monthly income was $ 1,600.00, suggest that appellants were aware that their income was inadequate to qualify for the loan at issue. It would seem from the contents of that affidavit that it is equally probable that appellants were at least acquiescent in the mortgage broker's fraudulent inducement of the lender to approve the loan. None of these circumstances suggest events which, pursuant to *R.C. 1303.35(A)(1)(c)*, would absolve appellants from their obligation to repay the debt they incurred.[19]

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[19] Id. at 2, 5-8 (citations omitted).

The appellate court concluded that Countrywide was entitled to summary judgment.

8. Deutsche Bank Nat'l Trust Co. v. Bethea.[20] In 2002, Jacqueline Bethea and her mother obtained a mortgage on the house in which they lived from Home American Credit Inc. d/b/a Upland Mortgage in the amount of $150,000. Bethea's mother died in 2003, and Bethea, who suffers from long-standing medical conditions, failed to keep up the mortgage payments. In 2008, Deutsche Bank filed a foreclosure complaint. The trial court granted Deutsche Bank's motion for summary judgment. Bethea appealed. With regard to Deutsche Bank's assertion of holder in due course status, the appellate court said:

> In this mortgage foreclosure action, defendant Jacqueline Bethea, a victim of a buy-lease-back "mortgage rescue scam," appeals the trial court's order entering summary judgment in favor of Deutsche Bank....
>
> Defendant argues that Deutsche Bank did not have standing to file the foreclosure complaint and, if it did have standing, it was not a holder in due course of the mortgage. Without evidence that Deutsche Bank possessed the note at the time of filing, and knowing that the complaint was filed prior to the assignment of the mortgage, the trial court nevertheless found that Deutsche Bank had standing. The court found that plaintiff cured the defect of filing the complaint a day before receiving the assignment by filing an amended complaint. The trial court also found that Deutsche Bank was a holder in due course of the mortgage and thus was not subject to any defenses asserted by Bethea because nothing in the transaction would have alerted the original lender or Deutsche Bank to any fraud in the underlying transaction.
>
> Given that Deutsche Bank has not demonstrated standing, we cannot decide at this time whether it was a holder in due course of the mortgage.[21]

Therefore, the court reversed the grant of summary judgment and final judgment and vacated the sheriff's sale.

9. Deutsche Bank v. Carmichael.[22] In April 2005, Damion and Kiya Carmichael obtained a loan from Ameriquest Mortgage Company ("AMC"). Later in 2005, the loan was assigned to Ameriquest Mortgage Services ("AMS"), and then to Deutsche Bank National Trust Company (Deutsche). In 2008, Deutsche filed a foreclosure compliant. The debtors subsequently filed for bankruptcy. In the bankruptcy proceedings, the court granted Deutsche's motion for summary judgment:

> Defendants contend that at the loan's inception, AMC induced them to sign the mortgage note with fraudulent representations. . . . Deutsche does not dispute the Defendants' claim of fraud with regard to certain representations that the original lender, Ameriquest, may have made. Deutsche's position is that it was not aware of such claims

[20] 27 A.3d 1229 (Sup. Ct. App. Div. N.J. Aug. 9, 2011).
[21] Id. at 1230-1231 (citations omitted).
[22] 644 BR 699 (Bankr. E.D. Pa., Feb. 1, 2011).

when it purchased the loan from Ameriquest. As a result, Deutsche maintains that it is a holder in due course immune from the Debtors' fraud claims....

Pennsylvania law does recognize that a holder of commercial paper may raise a defense of good faith. Deutsche asserts innocence as to any claims of fraud which the Debtor would have against the original lender, here, AMC. As a holder in due course, Deutsche declares, it is not vicariously liable for its predecessor's torts. A determination of whether Deutsche has established such status follows....

[T]he Court turns to whether the record demonstrates that Deutsche acquired the note in good faith (i.e., in due course). The circumstances which indicate innocence are as follows:

[a](1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) the holder took the instrument:

(i) for value; (ii) in good faith;

(iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series;

(iv) without notice that the instrument contains an unauthorized signature or has been altered;

(v) without notice of any claim to the instrument described in section 3306 (relating to claims to an instrument); and

(vi) without notice that any party has a defense or claim in recoupment described in section 3305(a) (relating to defenses and claims in recoupment).

There is no allegation of forgery or alteration (*subsection (a)(1)*). Likewise, the [Pooling and Services Agreement (PSA)] demonstrates that Deutsche took the loan for value and in good faith (*subsection (a)(2)(i), (ii)*). Defendants contend that Deutsche's innocence is in question when considering ¶ 2(iii) above. By the time of the assignment, they explain, the loan was already nine months in default. Deutsche contests that premise arguing that the assignment occurred at least two years earlier. What does the record show? . . . .

[T]he PSA had already conveyed the Debtors' mortgage loan from AMC to AMS and then on to Deutsche *2 1/2 years earlier*. For that reason, the Court finds that Deutsche took the loan well before it ever went into default. Accordingly, the Court finds Deutsche to have been a holder in due course.[23]

The court went on to review the defenses good against a holder in due course pursuant to Pennsylvania's version of section 3-305(b) of the Uniform Commercial Code, finding that the fraud defense was a barred against Deutsche as a holder in due course:

This provision *does not* include fraud in all its forms: it draws a distinction between certain types of fraud-based defenses. *Subsection (a)(1)(iii)* thus preserves as against the HDC on the [claim of fraud that is alleged to have occurred in the execution of the instrument, i.e,

[23] Id . at 704-705 (citations omitted).

fraud in factum. Therefore, it precludes other frauds such as a fraudulent inducement to enter into the transaction....

As it turns out, the fraud claim which the Defendants would impute to Deutsche consists of a claim of fraudulent inducement. They maintain that they were fraudulently persuaded to refinance their mortgage loan based on representations that if it would be beneficial for them to refinance, then they would later be permitted to refinance notwithstanding the existence of a prepayment penalty in the note. Simply put, these claims may not be raised as to Deutsche, but they are in no way barred as to AMC, the original lender....[24]

10. Deutsche Bank v. Medina.[25] In 2005, Frank and Carmen Medina executed a note in the amount of $692,500 in favor of Novastar Mortgage, Inc. ("Novastar"), secured by a mortgage, to buy a residence. The mortgage was assigned to Deutsche Bank. The Medinas defaulted on the note. In 2009, Deutsche Bank filed a foreclosure complaint. The defandants' answer alleged many special defenses, including the allegation that the Novastar fraudulently induced the defendants to enter into the loan transaction. The defendants made specific factual allegations that Novastar made changes to the loan transaction were made on the closing day at a point where it would be very difficult for the borrowers not to accept the changes proposed by the original lender without potentially losing the opportunity to purchase the property and the money they had already invested. The allegations asserted that Novastar offered the defendants a conventional 80/20 mortgage product with conventional fixed interest rate and then switched to a subprime, adjustable rate, 6-month mortgage a point where the defendants' bargaining position was significantly eroded. Deutsche Bank filed a motion to strike the special defenses.

The plaintiff argues that the court should grant the motion to strike the defendants' special defenses because the defenses are inapplicable against the plaintiff as an assignee and holder in due course of the note and mortgage. The plaintiff argues that all of the actions in the special defenses allege that its predecessor, the original lender, [3] engaged in the conduct relevant to the special defenses, but that none of those allegations apply to the plaintiff due to its status as an assignee and holder in due course....

The defendants counter that the plaintiff's motion to strike the special defenses should be denied because the pleadings make factual allegations that, if provable, are legally sufficient to sustain the special defenses....

General Statute §42a-3-302(a)(2) states in pertinent part that the holder of an instrument is a "holder in due course" if "[t]he holder took the instrument (I) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in *section 42a-3-306,* and (vi) without notice that any party has a defense or claim in recoupment described in *section 42a-3-305(a).*"

[24] Id. at 706 (citations omitted).

[25] 2011 Conn. Super. LEXIS 25 (Sup. Ct. Conn. Jan., 10, 2011).

The plaintiff argues that the special defenses are not applicable to it as a holder in due course. The plaintiff argues that it made the factual allegation in its complaint that it is a holder in due course of the subject loan and mortgage, but that the defendants' special defenses rely upon denying that the plaintiff is a holder in due course, and that the defendants are, therefore, improperly contesting a well-plead fact from the complaint in the special defenses. The plaintiff argues that, for the purposes of a special defense, the defendants are obligated to accept the plaintiff's holder in due course status as a well-plead fact. The defendant counters that the plaintiff merely stating it is a holder in due course is not sufficient to establish this statement as a well-plead fact. The court must determine whether the complaint makes sufficient factual allegations to establish that it is a well-plead fact that the plaintiff is a holder in due course.

Paragraph three of the complaint states that Frank Medina executed and delivered a note for a loan in the amount of $692,500.00 to Novastar. Paragraph four of the complaint states that Frank Medina executed and delivered a mortgage on the property to Mortgage Electronic Registration Systems, Inc. as Nominee for Novastar. Paragraph four then goes on to state that "[s]aid mortgage was assigned to [the plaintiff] by virtue of an Assignment of Mortgage . . . The Plaintiff . . . is the holder of said Note and Mortgage." This is the only statement in the complaint that explains how the plaintiff came to be the holder of the mortgage. Nowhere in the complaint does the plaintiff actually use the term "holder in due course." No factual statements are made in the complaint regarding whether the plaintiff took the instrument in compliance with the requirements of *General Statute §42a-3-302(a)(2)*. There are no factual statements addressing whether the plaintiff took the mortgage: "for value"; "without notice that the instrument is overdue or has been dishonored"; or "without notice that any party has a defense or claim in recoupment described in *section 42a-3-305(a)*." The plaintiff fails to allege sufficient facts in its complaint to support the argument that it is a well-plead fact that the plaintiff is a holder in due course. The complaint simply does not contain sufficient facts to establish that the plaintiff is a holder in due course because the complaint contains no factual allegations regarding the elements required under *General Statute §42a-3-302(a)(2)*....

In the present case, however, the complaint does not provide any information regarding a payment, or any other value, provided in exchange for the note and mortgage. The plaintiff's argument in its memorandum of law in support of the motion to strike suggests that the situation in the present case is [that]...the defendants' special defenses should be stricken because the plaintiff is a holder in due course, but this argument glosses over the fact that the plaintiff's complaint has failed to allege the factual elements necessary to prove holder in due course status under *General Statute §42a-3-302(a)(2)*. The complaint fails to allege sufficient facts to support the plaintiff's argument that it is a well-plead fact that the plaintiff is a holder in due course. The court rules that the plaintiff's motion to strike the special defenses on the ground that the plaintiff is a holder in due course is denied.[26]

[26] Id. at 9-10, 17-22 (citations omitted).

11. Deutsche Bank v. Samora.[27] In 2003, Veronica Samora fell behind in payments on a note and deed trust related to the refinancing of the purchase of real property for use as her home. She approached Randy Gonzales, a mortgage broker for Denver Metro Mortgage, Inc. ("Denver Metro"), owned by his uncle, Kenneth Medina. With Gonzales' assistance, Samora executed a note and deed of trust in favor of BNC Mortgage, Inc. Shortly thereafter, the note and deed of trust were assigned to Chase Bank. Shortly thereafter, Gonzales forged Samora's signature on a quitclaim deed, transferring the property to Gonzales and Medina. Medina obtained a loan for $32,000, secured by a note and deed of trust on the property. Samora was unaware of these transactions.

In May 2004, Samora sought a second refinancing from Chase Bank. The bank informed her that the property belonged to Gonzales. When Samora confronted Gonzales he acted surprised to learn the property was in his name. He assured her it was a mistake and transferred the property back into her name. Despite these events, Samora agreed to use Medina for her second refinance. Medina learned that Samora did not qualify for a refinance. He decided to sell the property to his girlfriend, Amanda Wasia, who would then lease the property to Samora. Samora was, again, unaware of this plan.

In September 2004, Gonzales completed a loan application for Wasia from Saxon Mortgage, Inc. ("Saxon"). He included a false statement of Wasia's income and intention to use the property as her primary residence. Despite the false statements Wasia did not qualify for a loan. Matthew Libby, a Saxon loan officer, suggested that Gonzales submit a false letter stating that Wasia was Samora's granddaughter and that she was gifting her equity in her home to Wasia. Saxon then made a loan to Wasia secured by a note and deed of trust for $172,000. Saxon endorsed the note in blank and deposited the note and deed of trust with Saxon Asset Securities Trust 2004-3 ("Trust") for which Duetsche Bank Trust Company Americas ("Deutsche Bank") served as trustee.

Meanwhile, Medina told Samora that her loan had been approved. At the "closing," Medina placed a document in front her, covering the top portion. However, Samora noticed the document was titled "Warranty Deed" and that Wasia's name was on the deed. When she questioned this, he falsely stated that Wasia was a co-signor and that Wasia was on the deed for Samora's protection. Samora signed the deed. It was recorded.

The scheme unraveled in 2005. Gonzales, Medina, Wasia, and Libby were indicted on fraud charges and plead guilty. In 2006, Deutsche Bank unsuccessfully tried to foreclose on the property. In 2007, Deutsche Bank filed an action to quiet title. The trial court found that valid title had passed from Samora to Wasia, the deed was not void for fraud in factum, and that Deutsche Bank was a holder in due course entitled to foreclosure on the property.

On appeal, the court determined that Samora failed to establish that she was fraudulently deceived about the nature of the deed she signed. Rather, she believed fraudulent misrepresentations about use of the deed. In other words, she was the victim of fraud in the inducement rather than fact in factum. The court addressed the holder-in-due-course issue as follows:

[27] 321 P.3d 590 (Colo. App., 2013).

[I]n order for Samora to defeat Deutsche Bank's claim to quiet title in the Trust, she must show that Deutsche Bank as trustee is not advancing a claim by the Trust as a holder in due course of the Note and Deed of Trust.[3]

"[H]older in due course" means the holder of an instrument if:

(1) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice that any claim to the instrument described in *section 4-3-306*, and (vi) without notice that any party has a defense or claim in recoupment described in *section 4-3-305(a)*....

[T]he trustee is acting for the Trust and advancing a claim on behalf of the Trust. Accordingly, the Trust must satisfy holder in due course status. The parties stipulated that the Trust took the Note and Deed of Trust without actual knowledge of any wrongdoing or fraud. The record indicates that the Trust gave value for the Note and Deed of Trust.

Samora argued to the trial court that the interrelated Saxon companies and the Trust represented by Deutsche Bank shared such a "close connectedness" that the Trust's status as a holder in due course should be defeated. The trial court did not address Samora's argument, but rather concluded Deutsche Bank was a holder in due course.... In certain circumstances, an assignee's status as a holder in due course may be defeated when the original payee of the instrument is so closely related to the assignee that, as a matter of law, the assignee is subject to all defenses against the original payee....

The close relationship doctrine targets the good faith of a holder in due course.... Here, the following facts were stipulated to at the trial:

o "Saxon Funding Management, Inc., Saxon Mortgage Services, Inc., and Saxon Mortgage, Inc. are consolidated fully owned subsidiaries of Saxon Capital, Inc."

o "The Trust took the Note without actual knowledge of any wrongdoing or fraud on the part of Saxon [Mortgage]."....

Samora introduced no evidence at trial or by stipulation that Saxon Mortgage and the other Saxon entities shared employees, officers, directors, or other members, or that any one entity controlled the actions of another. Thus, for Samora to prevail, we would have to decide that corporate status is, in and of itself, enough to establish a close relationship causing the conduct of Saxon Mortgage to be imputable to the Trust....

We conclude that corporate status alone is insufficient to prove a close relationship. Samora provided no authority, and our independent research found none, which concludes that related corporate entities are, as a matter of law, too closely connected to take an instrument as a holder in due course from one another. There must be some other indicia that the related corporations knew or should have known that the instrument was infirm. Accordingly, we hold that the fact that an assignor and an assignee of a negotiable instrument are corporate siblings or have a corporate parent-subsidiary relationship is not enough to establish as a matter of law a close connection barring holder in due course status.

Thus, based upon the facts presented at trial and found by the trial court, we conclude that there was no error in determining that Deutsche Bank as trustee for the Trust and, by necessity the Trust, is a holder in due course. The record before us shows that the Trust took the Note and Deed of Trust for value and without actual knowledge of any wrongdoing or fraud. Nothing in the record shows that it did not take that paper in good faith. Because the Trust enjoys the status of a holder in due course, Deutsche Bank, as trustee, was not barred by the close relationship doctrine....[28]

Therefore, the appellate court affirmed the trial court's dismissal of claims against Deutsche Bank.

12. Dixon-Ford v. U.S. Bank N.A.[29] In 2006, Mary Dixon-Ford ("Debtor") engaged Weichert Co., d/b/a Weichet Realtors as her real estate representative. In February 2007, she executed a sales contract to purchase a residence. The purchase was financed with a mortgage loan from Mortgage Access Corp., d/b/a Weichert Financial Services ("WFS"). Together, Weichart Realtors and WFS are referred to below as "Weichert."Debtor occupied the property with several family members who contributed to household expenses. Debtor defaulted when one of the contributing family members moved out. In October 2007, Debtor's mortgage was pooled with other residential mortgages loans in securitization trust for which U.S. Bank N.A. ("US Bank") served as trustee. In 2010, Debtor filed compliant, which included allegations of common law fraud against US Bank. In its defense, US Bank asserted that it was a holder in due course. Debtor contested that assertion, arguing that US Bank was not a holder in due course because it knew or should have known of alleged misrepresentations made in connection with the origination of the Debtor's mortgage. Specifically, WFS misrepresented her income to cause her to qualify for a mortgage she could not afford. On motion for summary judgment, the bankruptcy court reviewed US Bank's assertion of holder-in-due-course status:

Where a defense exists against the payee, the party "claiming the rights of a holder in due course has the burden of establishing that he is . . . such a holder." The Uniform Commercial Code, as adopted in New Jersey, provides that a holder of an instrument becomes a holder in due course when he takes the instrument "for value, in good faith, and without notice of any defense or claim against it." Additionally, it is required that "the instrument when . . . negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity." A holder in due course takes an instrument free of any personal defenses the maker may assert against the payee.

That US Bank took the mortgage instrument for value is undisputed. Instead, the Debtor alleges that US Bank "knew or should have known of the misrepresentations made by [WFS] and [Weichert Realtors] . . . ." Such allegations implicate the holder's good faith. Good faith is defined by statute in *N.J.S.A. 12A:3-103(a)(4)* as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Good faith then, concerns both the subjective actions of the holder and the objective elements of the transaction....

[28] Id. at 599-601 (citations omitted).

[29] 2011 Bankr. LEXIS 5130 (U.S. Bankr. Ct. N.J., Dec 21, 2011).

In the present matter, the note has been supplied to the Court for evaluation. The note is facially free from any irregularity that could have alerted US Bank to the existence of a potential fraud. While US Bank does possess the mortgage file containing the allegedly altered [Verification of Employment], it was under "no duty to inquire" under the circumstances. Failure to investigate inconsistencies in the mortgage file regarding the Debtor's income, without more, does not evidence bad faith sufficient to prevent US Bank from a holder in due course status. Certainly, fraud is one explanation in the array of possibilities, however, constructive notice requires "circumstances [] so strong that if ignored they will be deemed to establish bad faith on the part of the transferee." ...

Moreover, the undisputed facts show that US Bank did not participate in the origination of the mortgage, nor is there evidence of collusion or communication between Weichert and US Bank regarding the Debtor's mortgage. On the record, there are simply no facts which tend to apprise US Bank of potential defenses at the time of taking and impair good faith. Thus, US Bank holds the Debtor's mortgage in due course and is entitled to the benefits of its status.

The instant case involves alleged fraudulent inducement in connection with the origination of the Debtor's mortgage, that is, "the [Debtor] was led by deception to execute what [s]he knew to be a negotiable instrument . . . ." Under New Jersey law, fraud in the inducement is a personal defense against "transferees who have been parties to any fraud or illegality affecting the instrument or transferees who were prior holders with notice of the defenses or claims and not against holders in due course." Thus, US Bank is immune to the Debtor's claims and the Court will grant US Bank's motion for summary judgment against the Debtor.

13. Erkins v. Alaska Trustee, LLC.[30] In 2005, Gregory Erkins obtained a loan from Ameriquest Mortgage Company ("Ameriquest") secured by his house, which was largely used to pay off a prior home loan. In 2007, Erkins ceased making payments on the loan. Wilshire Credit Corporation, the loan servicer, commenced a foreclosure proceeding, and the house was listed for foreclosure sale. At some point between 2005 and 2007, Ameriquest assigned the loan to Bank of New York Trust Company, N.A. Erkins filed a lawsuit in 2008 against Alaska Trustee, LLC and Bank of New York alleging fraud. Several months later, Wilshire presented Erkins with a forbearance agreement, postponing the foreclosure sale in exchange for $2,000 payments for several months. Erkins signed the agreement. Unbeknownst to Erkins, the forbearance agreement included a wavier of claims clause. In 2009, the defendants moved for summary judgment, arguing that Erkins has waived his claims. The trial ourt granted the motion. On appeal, Erkins argued that the trial court erred by granting summary judgment because a material issue of fact existed as to whether including the waiver provision in the forbearance agreement constituted constructive fraud. The Alaska Supreme Court held that a genuine issue of material fact precluded the award of summary judgment. It reversed the trial court's decision, and remanded, instructing the trial court to examine the forbearance agreement in light of a theory of constructive fraud, as well as in light of the doctrine of unconscionability. The Supreme Court went on to suggest other issues to be examined:

[30] 2011 Alas. LEXIS 109 (Oct. 21, 2011).

Other genuine issues of material fact may preclude summary judgment. Erkins argues contractual incapacity with respect to the two loans, claiming that he was bedridden and under the influence of potent pain medication at both signings. The entities that originated the loans -- Ameriquest and Mortgage Information Services -- are not parties to this proceeding. But even without resorting to vicarious liability, Erkins can assert an incapacity defense against enforcement of the note. The superior court on remand will need to consider whether there is merit to Erkins's incapacity defense.

Erkins also asserts that the note was past due at the time of its assignment to Bank of New York, and therefore that the bank is not a holder in due course. Under the Uniform Commercial Code doctrine of holder in due course, the bona fide purchaser of a note is shielded from most liability by taking the instrument free of all claims and personal defenses. A holder in due course is insulated from disputes arising between the original parties to the note, except some that concern fraud, capacity, infancy, or duress. *See AS 45.03.305(b)* (providing that although a holder in due course is insulated from many defenses, its right to "enforce the obligation of a party to pay the instrument is subject to defenses of the obligor stated in [*AS 45.03.305(a)(1)*]," which lists infancy, lack of capacity, duress, fraud, illegality, and discharge in insolvency). *AS 45.03.302(a)(2)(F)* provides that one cannot be a holder in due course if one takes with "notice that any party has a defense or claim in recoupment described in *AS 45.03.305(a)*," a section that lists "lack of legal capacity" and "fraud." An owner also is a holder in due course only if he takes "without notice that the instrument is overdue or has been dishonored." *AS 45.03.302(a)(2)(C)*. Thus, to qualify as a holder in due course, appellee Bank of New York must have taken Erkins's note without knowledge of his incapacity or fraud defenses, and before the note was overdue or in default.

The superior court did not address these issues. The record is unclear as to precisely when the assignment took place, and whether the loan was current at the time of assignment. The loan was apparently in default by August 2007 at the latest, and the assignment was not recorded until November 29, 2007 -- although appellees state that the loan may have been transferred well before that time.[31]

14. Gonzales v. American Title Company of Houston.[32] In May 2007, Carlos Gonzales and Janet Jones sought a $200,000 loan to build a house on land they owned from Woodforest Bancshares, Inc. ("Woodforest"). They told Woodforest that they could not afford more than $1,500 in monthly payments. In June 1997, Woodforest made a construction loan to Gonzales and Jones. In December 1997, they converted the construction loan into a permanent loan, which was funded by Woodforest. In February 1998, Gonzales and Jones received notice that Woodforest had transferred its interest the borrowers note and deed of trust to Resource Bancshares Mortgage Group (RBMG). Thereafter, they received notice that their monthly payment would be $1,608. They refused to pay this amount, and sought an injunction to prevent foreclosure. They asserted a number of claims against RBMB, including misrepresentation, fraud in the inducement, conspiracy, and violation of law. They also contested RBMG's defense to these claims – assertion that it was a holder in due course.

[31] Id. at 23-24, fn. 32 (citations omitted).
[32] 104 S.W.3d 588 (Tex. App. 2003).

The borrowers contend that they raised a fact issue regarding whether RBMG was a holder in due course. In moving for summary judgment, RBMG asserted that it was a holder in due course as a matter of law and, therefore, entitled to prevail against all of the borrowers' claims. The borrowers' claim that RBMG was not a holder in due course of the borrowers' loan contract appears to be based on assertions that Woodforest was the agent of RBMG and that RBMG had knowledge of misrepresentations made by Woodforest to the borrowers.

A "holder in due course" takes an instrument for value in good faith and without notice, either that the instrument is overdue or has been dishonored or that any person has a defense against or claim to the instrument.

As addressed above, Woodforest was not the agent of RBMG, and there is no summary judgment evidence that RBMG was a party to the negotiations between Woodforest and the borrowers. In addition, there is no summary judgment evidence that RBMG had notice of any alleged misrepresentations Woodforest made to the borrowers or that the borrowers had any claim or defense against the legality of the note. We hold that RBMG conclusively established it was a holder in due course when it purchased the borrowers' note and was, therefore, entitled to summary judgment on that basis.

We overrule the borrowers' third issue, which challenges whether RBMG established its right to summary judgment as a holder in due course....[33]

15. Hays v. Bankers Trust Co. of Calif.[34] In 1995, Vanguard Mortgage Group ("Vanguard") contacted Abbe Hays offering to refinance her loan at a low interest rate. She completed a loan application in which she agreed to pay Vanguard a "finders fee" in the amount of 7.5% of the future loan amount. Vanguard sent Hays an "Initial Financing Agreement" for an estimated loan amount of $ 57,600 at 9.7% on a conventional 30-year mortgage. Vanguard notified Hays her loan had been approved. At the closing, the loan terms presented to her were quite different. The term was 180 months, and the payment schedule included 179 payments of $ 533.36 and a balloon payment of $ 48,380.51. Furthermore, the actual lender was not Vanguard but Finance America Corporation ("Finance America"). Hays asked the closing attorney what the title 'Balloon Note' meant. He told her 'don't worry they all have that now.'" Hays signed the note borrowing $ 57,600 from Finance America on January 3, 1996. On the same date, Hays' note was assigned to City Federal Funding and Mortgage ("City Federal"), and then to Defendant Bankers Trust.

Hays fell behind on her payments. She received letters Advanta Mortgage Corporation ("Advanta") instructing her to call its representative to verify amounts necessary to reinstate the loan. In January 1998, Hays was contacted by Banker's Trust's counsel stating that her house had been sold, there was a default judgment against her, and she had to move out of her home in eight days. Banker's Trust obtained a default eviction, but it was subsequently dismissed. In March 1998, Hays filed a civil action against Bankers Trust and Advanta. Hays' complaint alleged violations of federal law, breach of contract, breach of the covenant of good

[33] Id. at 594-595 (citations omitted).
[34] 46 F. Supp. 2d 490 (1999).

faith and fair dealing, civil conspiracy, and breach of fiduciary duty. At the time of this filing, Vanguard and Finance America were not in business.

Bankers Trust and Advanta moved for summary judgment arguing (i) their status as a holder in due course insulated them from Hays' claims, (ii) their lack of participation in a civil conspiracy, and (iii) the loan documents on their face revealed no violations of federal law. The court addressed their claims of status as a holder in due course as follows:

> "A 'holder' is a person who is in possession of a financial instrument made to his order, or in blank." If a holder takes that note for value, in good faith, without notice that it is overdue or has been dishonored or of any defense against it or claim to it on the part of any person, then the holder is a holder in due course ("HDC"). If one is an HDC, then implicitly one has no knowledge of any claims arising from the instrument or defenses against the collection under that instrument. Once a holder is, in fact, an HDC, the only valid defenses against the HDC are: infancy, incapacity, duress, illegality of the transaction, fraud in the factum, or a bankruptcy discharge on the part of the maker.
>
> Movants assert they are HDCs, who therefore took Hays' note free from all claims asserted in this civil action. The initial inquiry must be whether Movants are holders. Bankers Trust was assigned Plaintiff's mortgage note on January 3, 1996. As assignee, Bankers Trust is a holder....[35]

The court determined that Bankers Trust was a holder of Hays' note. Advanta's status was not clear. Although Advanta was involved with securitizing and servicing a pool of loans, and although it may have had relationships with the "fly-by-night" originators, Vanguard and Finance America, the court determined that it never became a holder of Hays' note.

> As concluded above, Bankers Trust is a holder, but to claim HDC status, Bankers Trust must show it took the note in good faith with no knowledge of any claims arising from the instrument or defenses against the collection under that instrument. TILA and HOEPA violations apparent on the face of the documents evidencing Hays' 1996 loan transaction are sufficient to put Bankers Trust on notice of the note's infirmities.
>
> ...The record is simply too tangled for the Court to conclude, without more, that Bankers Trust had no knowledge of, or complicity in, the wrongs Hays asserts were perpetrated by the rest of the Defendants in this civil action prior to its acquisition of the note.[36]

Therefore, the court denied Bankers Trusts' motion for summary judgment based on holder in due course status.

16. <u>HSBC Bank USA N.A. ex rel. Ace Secs. Corp. Home Equity v. Gouda</u> (#248).[37] In 2003, Lamiaa Gouda and Mohammed Shaikh, husband and wife, purchased a one-family home for $165,000 as an investment. They renovated and converted the property into a two-unit home. In 2005, they refinanced the property through a mortgage broker, Empire Equity Group, Inc.

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[35] Id. at 496 (citations omitted).
[36] Id. at 497 (citations omitted).
[37] 2010 N.J. Super. Unpub. LEXIS 3029 (Sup. Ct. App.Div. N.J. Dec. 17, 2010).

("Empire"). In 2006, they contacted Empire to borrow additional money by way of a second mortgage. Empire persuaded them to refinance the entire loan, offering a 30-year conventional loan for $333,200 with an 8% interest rate through New Century Mortgage Company ("New Century"). Two days before the closing, Emprie informed Gouda and Shaikh that it could no longer provide a loan on those terms, but instead were offered a 40-year adjustable rate loan of $352,800 with an initial rate of 9.9%. They allege that Empire represented that they could refinance within three months with a 30-year conventional loan at an interest rate of 8% or less. They agreed to the new terms and Lamiaa Gouda executed a note in the amount of $352,800, secured by a mortgage on the property. Three days later, New Century assigned its interest in the note and mortgage to HBSC Bank USA ("HSBC"). In 2007, the borrowers defaulted, and HBSC filed a foreclosure compliant. The defendants answered, contesting the foreclosure action and asserting a variety of claims, including fraud, deceit, inducement, and misrepresentation. HBSC moved for summary judgment. The defendants opposed the motion, arguing that Empire defrauded them by changing the terms two days before the loan closing and misrepresenting that they would be able to refinance. The trial court granted the motion for summary judgment. On appeal, the defendants argued that HBSC was not a holder in due course because it knew or should have known that the mortgage broker misrepresented the terms of the loan and misled defendants into signing closing statements that did not accurately reflect the term of the loan. The court rejected the defendants' argument that HSBC was not a holder in due course.

> The Uniform Commercial Code defines a holder in due course as "one who takes a negotiable instrument for value, in good faith and without notice of any defense or claim against it." Good faith is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing." Thus, "a holder in due course must satisfy both a subjective and an objective test of good faith, requiring a consideration of the holder's honesty in fact and observance of reasonable commercial standards." Under this standard, "[a] party who fail[ed] to make an inquiry, reasonably required by the circumstances of the transaction, so as to remain ignorant of facts that might disclose a defect[,] cannot claim to be a holder in due course." Most importantly, "once it appears that a defense exists against the payee, the person claiming the rights of a holder in due course has the burden of establishing that he is in all respects such a holder."
>
> Here, defendants challenge HSBC's good faith simply because a few days before closing, the terms of the note changed from a thirty-year conventional loan of $ 333,200 with an 8% interest rate to a forty-year adjustable rate loan of $ 352,800 with an initial interest rate of 9.9%. Merely suspicious circumstances without more, however, do not implicate a note holder's good faith.
>
> [P]roof of circumstances calculated merely to arouse suspicion will not defeat recovery on a negotiable note taken for value before maturity. Bad faith, *i.e.*, fraud, not merely suspicious circumstances, must be brought home to a holder for value whose rights accrued before maturity, in order to defeat his recovery on a negotiable note upon the ground of fraud in its inception or between the parties to it.
>
> Moreover, defendants do not dispute that they were fully aware of the changes in the note's terms days before closing and nevertheless voluntarily decided to proceed with the loan. Nothing in the record therefore supports a valid defense to plaintiff's

foreclosure action. Rather, the undisputed proofs demonstrate that HSBC is a holder in due course, having purchased the note and mortgage from New Century for value, in good faith and in the regular course of business, and without notice that the mortgage was overdue or that any party had a claim or defense against the instrument. Thus, since defendants' default is not attributable to any conduct by HSBC, plaintiff has an absolute right to foreclose against the defaulting mortgagors.[38]

The appellate court affirmed the trial court's entry of summary judgment for HSBC.

17. In re Reagoso.[39] In 2003, Michael and Carol Reagoso refinanced their home loan through Homeowners Loan Corp. ("Homeowners"). The loan was assigned to Litton Loan Servicing, Inc. ("Litton"), and then to JP Morgan Chase, who became the beneficial and equitable owner of the loan. Mortgage Electronic Registry Systems ("MERS") became the record holder of the mortgage. In 2006, JP Morgan Chase obtained a foreclosure judgment on the property. The Reagosos filed for bankruptcy later that year. The bankruptcy trustee filed a lawsuit against Homeowners and Litton, which included allegations of unfair and deceptive trade practices and fraud arising from the "bait and switch" tactics of Homeowners. The Reagosos alleged that they were made a loan offer by Homeowners and then were presented with different terms at settlement of the loan.

The Complaint's state law claims -- Count III alleging a cause of action under the [Pennsylvania Unfair Trade Practices and Consumer Protection Act] and Count IV, asserting fraud -- will be dismissed with prejudice. Defendants correctly assert that they are not liable with regard to these causes of action pursuant to the holder in due course doctrine, which states that an innocent assignee takes an instrument free and clear of all claims and defenses. The Trustee points only to an inapposite case in his response to the Motion, which discusses the consequences of an agent's fraud, not an assignee's liability. That case has no bearing on this adversary proceeding....

The Court has considered other cases which do bear more closely on this issue. Recently, in *Green Tree Consumer Discount Co. v. Newton,* the Superior Court held that an assignee of a mortgage refinancing loan involving the purchase of new siding was subject to claims and defenses of a fraud claim. The Court discussed "Pennsylvania's recognition of the broad application of the holder notice" or the provision in the C.F.R. which mandates the following notice to be placed in all consumer credit contracts: "[a]ny holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof." However, that portion of the C.F.R. is inapplicable here because a "consumer credit contract" does not include mortgage loans. Therefore, *Green Tree's* discussion of the exception to the holder in due course rule does not determine the outcome of the issue presented here.

[38] Id. at 9-13 (citations omitted).
[39] 2007 Bankr. LEXIS 2004 (June 6, 2007).

The state law claims of unfair and deceptive trade practices and fraud are dismissed with prejudice with regard to the Defendants, who are mere holders in due course of the Reagosos' mortgage loan.[40]

The bankruptcy court dismissed Counts III and IV of the Complaint with respect to Litton and MERS because they did not state a claim for which relief can be granted.

18. Mainor v. Deutsche Bank.[41] In 2003, Jo Ann Mainor and Edmond Osuji obtained a home equity loan from America's Moneyline, Inc. ("America's Moneyline") in the amount of $96,801.06. They contacted a mortgage broker to obtain that loan, to whom they paid an origination fee of $3,000. In October 2013, Plaintiffs filed an action for declaratory judgment, asserting that Deutsche Bank did not have standing to foreclose on the note and deed of trust executed with the loan. Plaintiffs also asked the federal court to dismiss the foreclosure proceedings pending in state court. Plaintiffs asserted many other claims, including fraud and misrepresentation.

Plaintiffs first allege that Deutsche Bank is not the holder of the Note and thus does not have standing to foreclose. Complaint, More specifically, Plaintiffs allege that they signed the Note payable to America's Moneyline, not Deutsche Bank, and that "[w]ithout proper indorsement, the transferee is not a holder and is not aided by any presumption that he is entitled to enforce the instrument." Plaintiffs assert that Deutsche Bank has not provided "proof of ownership of the Note and/or Deed of Trust" and seek a declaratory judgment that Deutsche Bank cannot foreclose.

Plaintiffs, in effect, argue that Deutsche Bank cannot foreclose because it has not properly presented evidence that it holds the Note. The Fifth Circuit has recently held that the "show-me-the-note" theory--the theory that, in order to foreclose, a party "must produce the original note bearing a wet ink signature"--is inapplicable under Texas law. Indeed, the Fifth Circuit stated explicitly that "[t]he original, signed note need not be produced in order to foreclose."

Furthermore, under Texas law, notes may either be transferred or negotiated. Transfer is the delivery of an instrument "by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument." After transfer, the transferee has the right "to enforce the instrument, including any right as a holder in due course." Negotiation is the "transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes the holder." When an instrument is "payable to bearer," it is "negotiated by transfer of possession alone."

Here, Deutsche Bank has produced a copy of the Note that Plaintiffs signed, which was indorsed by America's Moneyline to Saxon Mortgage, Inc., and thereafter indorsed in blank by Saxon Mortgage, Inc. Deutsche Bank has also produced a "Transfer of Lien," dated June

[40] Id. at 16-20 (citations omitted).
[41] 2014 U.S. Dist. LEXIS 1499 (S.D. Tex. Jan. 7, 2014).

21, 2010, in which America's Moneyline assigned all of its interests in the Property, including "all notes and obligations," to Deutsche Bank. Deutsche Bank has shown that it properly possesses the Note with the right to enforce it. Accordingly, Plaintiffs' requests for a declaratory judgment or injunctive relief preventing foreclosure on the basis of Deutsche Bank's lack of legal interest in the Note are dismissed.

> Plaintiffs also assert claims of fraud, common law fraud, statutory fraud, fraud by misrepresentation, and negligent misrepresentation against Defendants. Plaintiffs claim that "[t]he original lender worked in concert with the broker and loan officer . . . [to] defraud Plaintiffs." Furthermore, Plaintiffs allege that the broker and lender made "material false representations" and "concealed or failed to disclose material facts" to Plaintiffs. Specifically, Plaintiffs allege that the broker with whom they worked promised that he would "shop around for the best rate" but that, in reality and without Plaintiffs' knowledge, the broker did not secure them the " Plaintiffs state that Deutsche Bank, a later assignee of the Note, is liable for this fraud and misrepresentation because it cannot prove that it has "holder in due course" status.

> Even if the putative fraud and misrepresentation claims were properly pleaded, which they are not, these claims are barred by the applicable statutes of limitations. Under Texas law, a four-year statute of limitations applies to fraud claims. Negligent misrepresentation claims under Texas law are governed by a two-year limitations period. All of Plaintiffs' claims accrued in 2003, when the alleged statements underlying their loan were made. Thus, the longest applicable limitations period expired in 2007....

Therefore, the court dismissed the case.[42]

19. <u>McLehan v. Chase Home Finance, LLC</u>.[43] In 2005, Darren and Noreen McLehan executed a mortgage in favor of Chase Home Finance, LLC ("Chase"). It was assigned to the Federal Home Loan Corporation ("Freddie Mac"). In 2009, the McLehan's fied suit against Chase and Freddie Mac, alleging improprieties surrounding the foreclosure on their home in 2008. They alleged that Chase failed to provide them with documents required by the Truth in Lending Act and that Chase reneged on a promise to give them a fixed rate mortgage at the time the mortgage was executed. They alleged that they were unaware that additional charges would be tacked on to the "regular monthly payment;" that they would be obliged to pay a balloon note at the end of term; or that they would be subject to prepayment penalties. Chase moved for summary judgment and dismissal. The court said that following with regard to allegations that Freddie Mac was not a holder in due course:

> Plaintiffs' argument that Freddie Mac is not a "holder in due course" reflects a misapplication of *M.C.L. § 440.3302(1)*.... Pursuant to *M.C.L. § 440.3302(1)* "'holder in due course'" requires that
>
> "(a) The instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity"
>
> and

---

[42] The Court also noted that it was without authority to grant Plaintiffs' request to abate and dismiss a pending case in Texas state court in which Deutsche Bank applied for foreclosure.

[43] 2010 U.S. Dist. LEXIS 74576 (E.D. Mich. July 2, 2010).

"(b) The holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an incurred default with respect to payment of another instrument issued as part of [*15] the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v) without notice of any claim to the instrument described in section 3306, and (vi) without notice that any party has a defense or claim in recoupment described in section 3305(1)."

Defendants contend that *§ 440.3302* and the "holder in due course doctrine" is inapplicable to Freddie Mac's deed to the property. From a substantive perspective, Plaintiffs' allegation, construed to state that Freddie Mac's interest in the property is invalidated by foreclosure irregularities, is unavailing. Freddie Mac's purchase was "for value." Plaintiffs, waiting until January, 2009 to file suit, cannot show that Freddie Mac had reason to question the validity of the note at the time of the May 21, 2008 sale or that the purchase was not made in good faith.[44]

The court granted summary judgment and dismissed the compliant with prejudice.

20. Ocwen Fed. Bank v. Russell.[45] In 1996, Alexa Russell borrowed $224,750 form Quality Funding, Inc. The loan was secured by a mortgage on Russell's residence. In 1998, Quality Funding filed a complaint seeking to foreclose on Russell's mortgage. In 1999, Quality Funding, Inc. assigned Russell's mortgage to Ocwen Federal Bank ("Ocwen"). Shortly thereafter, Ocwen filed a motion for summary judgment, which the circuit court granted. Russell appealed. On appeal, the court considered whether Russell produced the necessary material in support of her affirmative defenses to counter Ocwen's *prima facie* case, thereby obligating Ocwen to disprove Russell's affirmative defenses:

Our review of the record in this case reveals that Russell similarly adduced substantial evidence to support her counterclaim and many of her affirmative defenses to Ocwen's foreclosure complaint, clearly sufficient to raise genuine issues of material fact as to the merits of Russell's defenses. Russell's many pleadings and declarations under penalty of perjury raised issues of material fact as to the validity of the note and mortgage that Russell had entered into in favor of Quality Funding; whether Ocwen had the right to sue upon the note and mortgage; and whether Quality Funding, in compliance with TILA, had properly disclosed to Russell the terms of her refinancing loan and the finance charges and interest she was being assessed....

During proceedings before the circuit court, Ocwen argued that because it was an HDC of the note originally held by Quality Funding, it was entitled to foreclose on the note, free and clear of any TILA or other defenses asserted by Russell. That is, Ocwen argued that even if Russell's defenses were true, Ocwen could not be held liable for any wrongdoing by its assignor....

Our review of the record reveals that genuine issues of material fact exist as to whether Ocwen was an HDC. First, the only evidence in the record as to whether Ocwen took

[44] Id. at 14-15 (citations omitted).

[45] 53 P.3d 312 (Ct. App. Haw. July 31, 2002).

Russell's note "for value" is a copy of the recorded assignment of Russell's promissory note from Quality Funding to Ocwen that indicates on its face that the consideration for the assignment was "the sum of ONE DOLLAR ($ 1.00) and other valuable consideration[.]" Given that Russell's note was assigned to Ocwen after Russell had raised her defenses in the bankruptcy court and filed her answer raising her defenses in the court below, serious questions exist as to whether Ocwen took the note "in good faith" and "without notice that the [note was] overdue" or that Russell had "a defense or claim in recoupment[.]" Ocwen's status as an HDC, therefore, depends on the establishment of facts at trial, a situation clearly not appropriate for resolution by summary judgment....[46]

Therefore, the court concluded that the circuit court erred in granting Ocwen's motion for summary judgment, vacated the order granting summary judgment, and remanded the case for further proceedings.

21. Singo v. Deutsche Bank Nat'l Trust Co. Ams.[47] In 2004, Norma Singo signed a promissory note agreeing to pay Encore Credit Corporation $180,000. The note was secured by her home. The note was assigned to Deutsche Bank in 2008. In 2011, Deutsche Bank filed a foreclosure complaint against Singo, and subsequently filed a motion for summary judgment, which the trial court granted.

Singo argues that Deutsche Bank is not a holder in due course because it was aware that the loan was fraudulent, delinquent, and in foreclosure when it acquired the loan. Looking to the designated evidence, however, Singo's claim fails and the entry of summary judgment by the trial court was proper.

Indiana Code section 26-1-3.1-302 provides in pertinent part that a holder of an instrument is a holder in due course if the following is true:

1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and

(2) the holder took the instrument:

(A) for value;

(B) in good faith;

(C) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series. . . .

Among the evidence designated by Deutsche Bank is an affidavit by Kevin Kerestes, Assistant Vice-President of Bank of America, N.A. ("BANA"). BANA is the servicing agent for loans and the loan at issue in this appeal. The affidavit states that Deutsche Bank took the instrument, i.e., the mortgage, for value in good faith, and without notice of any defenses, including fraud. This affidavit is uncontroverted by any evidence designated by Singo.

Singo claims that Deutsche Bank knew that the loan was fraudulent, delinquent, and in foreclosure. The evidence designated by Singo to support that argument is her statement

[46] Id. at 324-26 (citations omitted).

[47] 2013 Ind. App. Unpub. LEXIS 22 (Ct. App. Ind. Jan. 15, 2013).

that the mortgage was signed without a notary and "later forged with a notary seal." Nevertheless, the promissory note and mortgage at issue do not show any apparent evidence of the fraudulent action required to defeat a finding that Deutsche Bank is a holder in due course. Furthermore, there is no designated evidence in the record to establish that Deutsche Bank had notice of the alleged fraud before it took possession of the instruments. The fact that Singo admittedly was previously delinquent in her payments, but that payments were made to bring the loan current, does not establish that the loan was overdue when Deutsche Bank became the holder, or that Deutsche Bank had notice of the fact it was overdue in the event that it was. Summary judgment was properly entered in Deutsche Bank's favor.[48]

22. U.S. Bank v. Ballard.[49] In 2008, the Ballards obtained a mortgage loan from Freemont Investment & Loan ("Freemont") in the amount of $255,000 in order to purchase a home. The loan was assigned to U.S. Bank. The defendants failed to make their monthly payments as required by the loan documents and as a result the loan was declared in default. U.S. Bank filed a foreclosure complaint. The defendants asserted nine special defenses in their answer, including misrepresentation, fraudulent inducement, and unconscionability. Considering post-trial briefs, the court discussed the application of the holder-in-due-course rule to the case:

> At the commencement of the trial, the plaintiff sought and was granted leave to amend its reply to the special defenses by asserting its status as a holder in due course pursuant to G.S. §42a-3-305.
>
> The plaintiff has proven the allegations of its complaint as well as its status as a holder in due course. While the defendants may be deemed to have abandoned the special defenses by failure to offer any briefing thereon, ... the court will nevertheless consider both the special defenses, the evidence and argument of counsel presented during the trial to support them.
>
> Initially, the court observes that the allegations of misconduct contained in the special defenses are directed not at the plaintiff as holder of the mortgage but rather at an entity referred to as Eagle Mortgage acting through one Jeff Bell. Both are described as a "mortgage originator" who found the mortgage lender for the defendants. Jose's testimony revealed that his real estate broker referred him to Jeff Bell. The evidence further revealed that Mr. Bell, acting on behalf of the lender, committed numerous unconventional acts, including but not limited to failure to take a loan application until the closing, falsifying income figures, failing to make certain mandated disclosures and insisting that defendants engage an attorney other than their own to represent them at the closing. Because of the view which the court adopts herein it is unnecessary to consider these acts separately and in detail. The special defenses contain no allegations that Jeff Bell, as representative for Eagle Mortgage, at any time acted as agent for the plaintiff....
>
> The evidence showed clearly that the mortgage was one of a pool of mortgages which had been assigned to the plaintiff. The mortgage was not in default at the time and there was nothing in the mortgage file to indicate that there were any pending disputes

[48] Id. at 18-20 (citations omitted).
[49] 2012 Conn. Super. LEXIS 1749 (July 10, 2012).

with the defendants. Moreover, the defendants made 22 monthly payments subsequent to the assignment. Thus, there was nothing to suggest that the plaintiff had or should have had knowledge of any of the acts which are described in the special defenses....

The special defenses also implicate HOEPA . . .and TILA. Each of these federal statutes were enacted by Congress to protect the consumer/home owner....

HOEPA applies only to a mortgage that fails a total points and fees test or an interest rate test. While evidence was offered concerning points, fees and interest rates, there was no evidence that these components arguably made the mortgage a HOEPA mortgage. Therefore, the plaintiff had no burden to prove that it could not determine that the loan was a HOEPA loan at the time of the assignment. Assuming that the allocation of the burden of proof rests on the plaintiff, the defendants, by asserting violations in their special defenses have waived the benefit of that burden of proof and themselves have assumed that burden." . . . The defendants have failed to meet their burden.

Until the time of trial the plaintiff referred to itself as an assignee. At trial, the court allowed the plaintiff to refer to itself as a holder in due course by amending its reply. The court granted the amendment over the defendants' objection because the pleadings contained clear indications from the beginning that the plaintiff's status could have qualified as a holder in due course and therefore the plaintiffs could not have been misled....

While the defendants offered no evidence that the plaintiff had such notice, the plaintiff proved that it had no notice of any non disclosure or impropriety at the time it took the assignment. The plaintiff is therefore a holder in due course within the meaning of G.S. §42a-3-302 and 305 and acquired the mortgage free of all claims arising out of TILA. Indeed, the defendants have made no allegation that the plaintiff took the assignment subject to all claims and defenses that they could have asserted against the original mortgagee, Freemont....

The trial court allowed foreclosure by U.S. Bank to proceed.

23. Wells Fargo Minn., NA v. Finley.[50] In 2001, Sue Finley refinanced the mortgage on her house. She signed a note and mortgage in favor of Option One Mortgage Corporation ("Option One") for $105,950. Gwin Mortgage, Inc. acted as the broker for the transaction. Option One assigned the mortgage to Wells Fargo Minnesota N.A. ("Wells Fargo"). Finley failed to make payments on the loan. In 2003, Wells Fargo commenced foreclosure. In 2006, the trial court granted Well Fargo's motion for summary judgment. On appeal, Finley argued that Wells Fargo failed to meets its burden to prove that no genuine issue material fact existed in relation to Finley's affirmative defenses – that Finley had no evidence to support her affirmative defenses. The appellate court declined to alter summary judgment procedure to require the moving party to bear the initial burden of negating the non-moving party's affirmative defenses. Therefore, the court found that Wells Fargo was entitled to summary judgment unless Finley satisfied her burden to show that there was a genuine material issue of fact. The appellate court addressed the holder in due issue in the following way:

[50] 2008 Ohio App. LEXIS 853 (March 7, (2008).

Finley submitted an affidavit in opposition to Wells Fargo's motion for summary judgment. In her affidavit, Finley stated that she discovered numerous errors in the closing documents and tried to contact representatives of Wells Fargo about the errors. Further, she stated that she never received a check in the amount of $1,789.93 at the closing because an agent of Gwin Mortgage forced her to sign the check over to him. She also stated that she was never given a Notice of Right to Cancel at the closing and that her original second mortgage with AVCO has not been released.

The facts and circumstances on which Finley relies occurred when her note and mortgage were executed. Wells Fargo argues that defenses arising from those matters are not available to Finley against Wells Fargo because it is a holder in due course.

Finley does not dispute that Wells Fargo enjoys the status of a holder in due course. However, she contends that her particular claims are for fraud, for which a holder in due course may be liable. *R.C. 1303.35(A)(1)(c)* permits a defense to the claims of a holder in due course for "[f]raud that induced the obligor to sign the instrument with neither knowledge nor reasonable opportunity to learn of its character or essential terms."

Fraud in the inducement involves misrepresentation of facts which induce another party to enter into an agreement or assume an obligation. In that event, there is no failure of understanding of the party to be bound as to the nature or character of his act. Rather, the actor claims that he was induced to commit the act by the wrongful conduct or misrepresentation of the person so benefitted. The defense is unavailable to a mortgagor who was negligent in failing to read the instruments she signed.

The facts and circumstances Finley alleges pertain to the proper performance of their contract obligations by Wells Fargo's predecessors. They do not demonstrate that Finley was induced to sign by misrepresentations of fact. Therefore, the fraud defense in *R.C. 1303.35(A)(1)(c)* has no application.

Finley conceded that she was not current in her financial obligations pursuant to the terms of the mortgage and note. Although she believes that there were errors in the loan documents, she does not identify any specific evidence that would create a genuine issue of material fact as to the amount owed to Wells Fargo. Further, she fails to identify any specific evidence that would create a genuine issue of material fact regarding the affirmative defenses she raised in her answer. Therefore, the trial court did not err in granting summary judgment in favor of Wells Fargo.....[51]

24. Wells Fargo v. Ford.[52] In March 2005, Sandra Ford executed a negotiable note to secure repayment of $403,750 she borrowed from Argent Mortgage Company ("Argent") and a mortgage on her residence. Within a few days, Argent assigned the mortgage to Wells Fargo Bank, N.A. ("Wells Fargo"). In the spring of 2006, Ford stopped making payments on the note. In July 2006, Wells Fargo filed a foreclosure action. Subsequently, Wells Fargo filed a motion for summary judgment. Ford filed a cross-motion for summary judgment. Wells Fargo alleged that it is the holder and owner of Ford's note and mortgage. Ford alleged that documents relating to her loan application were forgeries, including a handwritten note purportedly by her stating that she was employed at a monthly salary of $9,500, even though

[51] Id. 8 - 10 (citations omitted).
[52] 15 A.3d 327 (Jan 29, 2011).

her actual income was only approximately $10,000 per year. Ford also alleged that the estimate of closing costs was for $13,673.90 but on the closing statement they were $36,259.06. In January 2007, the court granted summary judgment in favor of Wells Fargo.

> On appeal, defendant argues that (1) Wells Fargo failed to establish that it is the holder of the negotiable note she gave to Argent and therefore lacks standing to pursue this foreclosure action; (2) even if Wells Fargo is the holder of the note, it failed to establish that it is a holder in due course and therefore, the trial court erred in concluding that Wells Fargo is not subject to the defenses asserted by defendant based on Argent's alleged predatory and fraudulent acts in connection with execution of the mortgage and note; and (3) even if Wells Fargo is a holder in due course, it still would be subject to certain defenses and statutory claims defendant asserted in her answer and counterclaim.
>
> We conclude that Wells Fargo failed to establish its standing to pursue this foreclosure action. Therefore, the summary judgment in Wells Fargo's favor must be reversed and the case remanded to the trial court. This conclusion makes it unnecessary to address defendant's other arguments.... However, for the guidance of the trial court in the event Wells Fargo is able to establish its standing on remand, we note that even though Wells Fargo could become a "holder" of the note under *N.J.S.A. 12A:3-201(b)* if Argent indorsed the note to Wells Fargo even at this late date, Wells Fargo would not thereby become a "holder in due course" that could avoid whatever defenses defendant would have to a claim by Argent because Wells Fargo is now aware of those defenses. Consequently, if Wells Fargo produces an indorsed copy of the note on the remand, the date of that indorsement would be a critical factual issue in determining whether Wells Fargo is a holder in due course.
>
> Accordingly, the summary judgment in favor of Wells Fargo is reversed and the case is remanded to the trial court for further proceedings in conformity with this opinion.[53]

[53] Id. at 329, 331-32 (citations omitted).

SECTION 606. EFFECT OF THE HOLDER IN DUE COURSE RULE.

(a) Notwithstanding [insert reference to State UCC 3-305] and any agreement waiving claims or defenses by an obligor or homeowner, a creditor who is a holder in due course or who seeks to enforce a waiver of claims or defenses is subject to the claims and defenses described in subsection (b) that the obligor or homeowner could assert against the initial holder of the obligation.

(b) An obligor or homeowner may assert against a holder in due course a claim or defense ~~not otherwise subject to a statute of limitations or other preclusion~~ that is based on fraud, material misrepresentation, or fundamental breach of promise in connection with the original loan transaction.

(c) If the creditor holder in due course under [insert reference to State UCC 3-305] or seeks to enforce a waiver of claims and defenses, an obligor or homeowner may:

(1) assert, in addition to the defenses otherwise available under [insert reference to State UCC 3-305], any defense against the holder in due course described in subsection (b); or

(2) bring a declaratory judgment action to establish any claim against the holder in due course described in subsection (b); provided, that no such claim or defense may be made or asserted after the later of three years after the execution of the obligation being enforced or, if the claim or defense relates to an adjustment of the interest rate on the obligation or a prepayment fee, one year after the creditor sends its first notice of an adjustment in interest rate or fee more than three years after execution of the obligation.

(d) If an obligor or homeowner establishes a claim or defense under this section, relief shall be limited to reformation of the obligation and recoupment. Any recoupment shall be in the amount of the economic loss caused by the fraud, misrepresentation, or fundamental breach of promise and may not exceed the amount owed on the obligation at the time of judgment. The court may determine whether the effect of recoupment is to cure the default or reinstate the obligation pursuant to Section 201. Any recoupment shall reduce both what the creditor is entitled to collect in foreclosure and what the creditor is entitled to collect by other processes, including a separate action to collect the obligation.