How Derecognition, Securitization, and the Deliberate Destruction of Original Notes Rendered Mortgage Enforcement Structurally Impossible

An Addendum to: How Your Mortgage Became a Wall Street Security Without Your Knowledge

By William Paatalo
Oregon Private Investigator OR PSID #49411

With Additional Research Contributions

July 2026

DEDICATION

To every homeowner who has faced a phantom creditor in court — this is the roadmap you were denied.

DISCLAIMER

This document is for informational, educational, and strategic purposes only. It does not constitute legal advice. Readers are strongly encouraged to seek independent legal counsel regarding any claims or defenses discussed herein.

Scope note: This analysis presumes that the mortgages, deeds of trust, and promissory notes discussed herein have been securitized. Nothing herein addresses a loan that has remained with its originating lender.

TABLE OF CONTENTS

I. INTRODUCTION: FROM THEORY TO INESCAPABLE CONCLUSION

This addendum does not propose a theory. It documents a structural condition that the securitization industry created, the courts have ignored, and the accounting mandates as a matter of federal law. The question is not whether a debt once existed. The question is whether any party can presently prove the legal authority to enforce it. The answer — under the industry's own admissions, under its own accounting rules, under the note's own language, and under the tax code that governs securitization vehicles — is no. The securitization of residential mortgage debt was not merely a transfer of assets. It was a transformation of legal relationships so complete that the original creditor-debtor framework ceased to exist. What replaced it — a distributed, atomized, and opaque structure of trusts, trustees, servicers, and investors — cannot satisfy the legal predicates for debt enforcement that the industry itself wrote into its instruments, that the Uniform Commercial Code mandates, that the Internal Revenue Code locks into place, and that every consumer protection statute presupposes. This addendum demonstrates that conclusion through eleven interlocking sections. Each section stands independently. Together, they form an irrefutable chain.

II. THE CLOSED CLASS OF ENFORCEABILITY: THE NOTE'S OWN SUICIDE CLAUSE

> "I promise to pay the Principal, plus interest, to the order of the Lender. I will make all payments under this Note in U.S. currency in the form of cash, check, money order, or other payment method accepted by Lender.
> I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder.""

(Promissory Note, § 1 — "Borrower's Promise to Pay.")

The promissory note — the instrument the industry now asks courts to enforce — defines its own enforceability in a closed class with two, and only two, categories:

Category One: The named lender.

Category Two: Anyone who takes the note by transfer.

These categories are not illustrative. They are exhaustive. The note does not say "including but not limited to." It does not provide for agents, nominees, constructive holders, or beneficiaries of trust interests. It names two categories, and two categories only, of parties entitled to enforce.

Both categories are now empty. And the proof that the second category is empty does not come from the borrowers' side of the aisle. It comes — verbatim, in a certified public record, filed for the purpose of defeating a borrower-protection rule — from the industry itself.

A. The Named Lender: Sold and Derecognized

The entity named on the note as "lender" — the originator — did not remain the creditor. It sold the note. Under FASB ASC 860, the originator derecognized the loan from its balance sheet, recording the transaction as a sale rather than a held asset. The originator no longer recognizes the loan as a receivable. It no longer accrues interest income on the loan. It no longer carries the loan as an asset against which it can enforce.

This is not an inference. It is the originator's own sworn financial reporting. Every 10-K, every call report, every audited balance sheet that reflects the securitization is the named lender's contemporaneous, regulator-filed declaration: *this loan is no longer ours.* The named lender cannot now appear in court and assert the opposite of what it told the SEC, the FDIC, and its own shareholders under penalty of the securities laws.

The named lender, under the note's own terms, no longer exists as a creditor.

The Certificates Are Absolute Evidence: A Fork With No Surviving Tine.

The mortgage-backed certificate is not merely a security. It is a representation, made under the federal securities laws, to the investors who funded the system. Every prospectus, every pooling and servicing agreement, every Regulation AB disclosure filed with the SEC represents and warrants the same thing: the loans were transferred to the trust; the trust owns the pool; the trustee holds the mortgages for the certificateholders' benefit. Investors paid billions for certificates on the strength of those representations.

The existence of the certificate therefore admits of exactly two possibilities — and the industry loses under both.

Tine One: The transfer occurred. If the loans were sold to the trusts as represented, then the originator derecognized the asset, the named lender ceased to be the creditor, and whatever enforcement right survived passed through a chain of endorsement, delivery, and assignment that the industry's own filings and sworn testimony prove was never created. (WaMu 2005-AR17 Prospectus Supplement (Form 424B5) at S-19–20 ("[t]he mortgage notes will not be endorsed to the Trust and no assignment of the mortgages to the Trust will be prepared"); *In re Kemp*, 440 B.R. 624, 628–34 (Bankr. D.N.J. 2010).) The transfer that made the certificates valid simultaneously emptied the named-lender category and made enforcement dependent on documentation that does not exist.

Tine Two: The transfer did not occur. If the loans were not transferred — not endorsed, not delivered, not assigned — then the certificates were sold to investors as "backed by" mortgages that never reached the trusts. That is securities fraud by definition: material misrepresentation in the offer and sale of a security. Securities Act of 1933 §§ 11, 12(a)(2), 15 U.S.C. §§ 77k, 77l(a)(2); Securities Exchange Act of 1934 § 10(b) and Rule 10b-5, 15 U.S.C. § 78j(b), 17 C.F.R. § 240.10b-5. Every dollar of every certificate sold against an empty trust is a dollar obtained by fraud — and the REMIC's own tax filings (Form 1066 and the Schedule Q statements reporting the pool's assets to certificateholders) become further false statements layered on top.

The fraud is indivisible — the industry cannot pick up only one end of the stick. The scheme required both ends of the transaction: the homeowner's signature on one end (the note, the asset to be monetized) and the investors' capital on the other (the certificates, the monetization). Neither works without the other: without the borrower's note there is nothing to securitize; without the certificates there is no market into which the note can be sold. The note and the certificate are two ends of the same stick. If the certificates were sold by fraud — sold as "backed by" mortgages that never reached the trusts — then the note was the instrumentality of that fraud from the moment of signing: procured from the maker for a purpose (sale, derecognition, destruction) that was never disclosed, and deployed in a scheme that misrepresented to investors where the instrument would go. Fraud does not respect the industry's compartmentalization. It does not poison the certificate and leave the note pristine. An instrument procured and used as an instrumentality of fraud is unenforceable — period. Illegality of the transaction renders the obligation a nullity, and fraud that induced the maker to sign "with neither knowledge nor reasonable opportunity to learn of its character or its essential terms" is a defense good against the world — even against a holder in due course. (UCC § 3-305(a)(1)(ii)–(iii).) And the one status that could otherwise cleanse the instrument cannot exist here: § 3-305(b) protects a holder in due course, which presupposes a holder, which presupposes negotiation of an existing instrument — and there is no instrument and never was a negotiation (UCC §§ 3-203, 3-302; §§ II.B, III). Equity likewise will not aid a claimant whose own fraud runs through the instrument it seeks to enforce. The industry cannot tell the SEC the loans were transferred, tell the investors the certificates are backed, and tell the foreclosure court the note is enforceable. If the first two statements were false, the third cannot be true.

There is no third tine. The industry cannot tell the SEC "we sold these loans; the trust owns them; buy our certificates" and then tell the foreclosure court "the chain does not matter; we can enforce anyway." Judicial estoppel exists precisely to prevent a party from prevailing on one theory in one tribunal and on an inconsistent theory in another. And the fork reassigns the burden of proof: the borrower never has to establish which tine is true. The certificates' existence is public, documented, and admitted — and each tine, standing alone, is fatal to enforcement. The plaintiff must be put to its election, and there is no election that saves it.

The fork is not a borrower's construct. It is the scenario a unanimous Congressional Oversight Panel instructed the Treasury to monitor and stress-test against: "it would mean that the improperly transferred loans are not trust assets and **MBS are in fact not backed by some or all of the mortgages that are supposed to be backing them**," with "complete recoveries" flowing back to the trusts and investors and the losses shifted to the sponsors. (Congressional Oversight Panel, *November Oversight Report: Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation* at 21 (Nov. 16, 2010) (adopted 5–0), available at cop.senate.gov/documents/cop-111610-report.pdf (archived) — cited herein as "COP Report at ____.")

The certificates also complete the accrual proof of Section VI. The sale of certificates generated proceeds; those proceeds were booked; the gain on sale was recognized; the loan was removed from the balance sheet in the same instant. The certificate is the public face of the offsetting entry. A party that issued certificates against a loan cannot thereafter produce a ledger showing that loan as still its own — its own accounting, sworn to investors and the SEC, forecloses the claim.

B. The Transferee: The Industry's Own Admission of Deliberate Destruction

The second category — "anyone who takes the note by transfer" — requires the existence of a note capable of being taken. On September 30, 2009, the Florida Bankers Association ("FBA") — a trade association of more than 300 banks and financial institutions — filed formal Comments with the Supreme Court of Florida in Case No. SC09-1460, opposing a proposed amendment to Florida Rule of Civil Procedure 1.110 that would have required verification of residential mortgage foreclosure complaints. To defeat that rule, the industry made a series of admissions that now define the structural impossibility of mortgage enforcement. Each admission is quoted exactly as it appears in the certified record.

1. Destruction was immediate and universal.

> "It is a reality of commerce that virtually all paper documents related to a note and mortgage are converted to electronic files **almost immediately after the loan is closed**. Individual loans, **as electronic data**, are compiled into portfolios which are transferred to the secondary market, frequently as mortgage-backed securities. The records of ownership and payment are maintained by a servicing agent in an electronic database."

(Comments at 3)

2. Destruction was deliberate — and it is the reason lost-note counts exist.

> "The reason 'many firms file lost note counts as a standard alternative pleading in the complaint' is because the physical document was **deliberately eliminated** to avoid confusion **immediately upon its conversion to an electronic file**."

(Comments at 4, citing State Street Bank and Trust Co. v. Lord, 851 So. 2d 790 (Fla. 4th DCA 2003))

3. Destruction was a business decision, made to save money.

> "Electronic storage is almost universally acknowledged as safer, more efficient and less expensive than maintaining the originals in hard copy, which bears the concomitant costs of physical indexing, archiving and maintaining security. **It is a standard in the industry** and becoming the benchmark of modern efficiency across the spectrum of commerce—including the court system."

(Comments at 4)

Read together, these three admissions establish the timeline that defeats every securitized enforcement action. The original note was destroyed at or immediately after closing — **before** the loan was compiled "as electronic data" into portfolios, sold, and securitized. Every subsequent "transfer" in the securitization chain was a transfer of data, not of the instrument. No downstream party ever possessed the note, because by the time the loan reached any of them, the note no longer existed. A note that has been deliberately eliminated cannot be physically transferred. A note that cannot be physically transferred cannot be "taken by transfer." The second category of enforceability under the note's own terms is a logical impossibility under the laws of physics.

4. Verification cannot cure the void — the industry said so itself.

> "The information reviewed to verify the plaintiff's authority to commence the mortgage foreclosure action will be drawn from **the same database** that includes the electronic document and the record of the event of default. The verification, made 'to the best of [the signing record custodian's] knowledge and belief' **will not resolve the need to establish the lost document**."

(Comments at 4)

This is a confession of circular proof. The servicer's database is not evidence of the instrument; it is the artifact the industry created to *replace* the instrument. A "record custodian" authenticating an image against the same database that generated the image is self-authentication. And note the FBA's own phrasing: the signer is a custodian of **records** — because there is no longer any custodian of the **instrument**. Verification "to the best of knowledge and belief" is the weakest attestation known to practice, offered by a witness who could not have personal knowledge of the one fact that matters: what happened to the original note.

5. The foreseeable result — multiple suits on the same note — was known to everyone.

The FBA's Comments quote the Task Force's own findings:

> "Plaintiff's status as owner and holder of the note at the time of filing has become a significant issue in these case[s]… **There have been situations where two different plaintiffs have filed suit on the same note at the same time.**"

(Comments at 3, quoting the Task Force proposal)

Two plaintiffs. One note. Simultaneous suits. This is not an anomaly; it is the predictable output of a system that destroyed the only document capable of proving which claimant — if any — was real.

C. What "Confusion" Actually Meant: The Industry's Own Filings and Sworn Testimony Prove the Chain Never Existed

The FBA told the Florida Supreme Court that original notes were "deliberately eliminated to avoid confusion." Confusion between what? If the electronic record faithfully mirrored the paper, the paper could only resolve disputes, never create them. Paper creates "confusion" only when it might tell a different story than the database. The industry's own SEC filings and its own sworn witnesses confirm precisely what story the paper would have told: that the endorsements, deliveries, and assignments the enforcement narrative presupposes never occurred.

1. The lawful path existed — and the industry disclosed, in its own offering documents, that it would not take it.

A note properly endorsed through each link and physically delivered to the trust's custodian eliminates any competing-holder risk while preserving the instrument. A custodian's vault of originals causes no confusion; it is the only thing that could conclusively resolve it. The industry chose otherwise — and disclosed the choice to its investors. The WaMu Mortgage Pass-Through Certificates Series 2005-AR17 Prospectus Supplement (Form 424B5), filed with the SEC on December 19, 2005, warns at S-19–20 — under the heading "Possession by a Subsequent Purchaser or Creditor of the Mortgage Notes and Mortgages Could Defeat the Interests of the Trust":

> "The trustee will not have physical possession of the mortgage notes and mortgages related to the mortgage loans owned by the Trust. In addition, the trustee will not conduct any independent review or examination of the related mortgage files. Instead, to facilitate servicing and reduce administrative costs, Washington Mutual Bank fsb, a wholly-owned subsidiary of the servicer, will retain possession of and will review the mortgage notes and mortgages as custodian for the Trust and financing statements will be filed evidencing the Trust's interest in the mortgage loans. **The mortgage notes will not be endorsed to the Trust and no assignment of the mortgages to the Trust will be prepared.** Furthermore, the mortgage notes and mortgages will not be stamped or otherwise marked to reflect the assignment to the depositor and then to the Trust. **If a subsequent purchaser or creditor were able to take physical possession of the mortgage notes and mortgages without knowledge of that assignment, the interests of the Trust in the mortgage notes and mortgages could be defeated.** In that event, distributions to certificateholders may be adversely affected."

(WaMu 2005-AR17 Prospectus Supplement (Form 424B5) at S-19–20 (emphasis added); verified against the SEC filing.)

This is the FBA's "confusion," confessed one level more honestly, in a federal securities filing. The industry knew that physical possession of the note by anyone outside its claimed chain could defeat the trust's interest. The instrument was a standing contradiction of the trust's ownership. And the passage discloses the motive in the same breath: "to facilitate servicing and reduce administrative costs." The chain of endorsement and delivery that the UCC and the trusts' own pooling and servicing agreements required was not broken by accident. It was omitted by design, disclosed in fine print to investors, and then concealed from the courts that would later be asked to enforce.

2. Sworn testimony confirmed the design: the notes were never endorsed or delivered to the trusts.

In *Kemp v. Countrywide Home Loans, Inc. (In re Kemp)*, 440 B.R. 624 (Bankr. D.N.J. 2010), Bank of New York, as trustee for CWABS Series 2006-8, claimed the right to enforce a Countrywide loan through a proof of claim filed by the servicer. The governing PSA required delivery of "the original Mortgage Note, endorsed by manual or facsimile signature in blank … with all intervening endorsements that show a complete chain of endorsement from the originator to the Person endorsing the Mortgage Note." (PSA § 2.01(g)(i).) Chief Judge Wizmur found:

> "Most significantly for purposes of this discussion, **the note in question was never indorsed in blank or delivered to the Bank of New York, as required by the Pooling and Servicing Agreement.**"

Linda DeMartini — a supervisor and operational team leader in the Litigation Management Department of BAC Home Loans Servicing L.P. — testified that "to her knowledge, the original note never left the possession of Countrywide," and that "it was customary for Countrywide to maintain possession of the original note and related loan documents." The court disallowed the claim as unenforceable under New Jersey's UCC: the owner never had possession of the note — "fatal to its enforcement" — and the note was never properly endorsed to its new owner. (440 B.R. at 628–34.) One industry witness, under oath, collapsed the entire premise of trust enforcement: the endorsements the PSA required were never made, the delivery the PSA required never happened, and retention of the originals by the originator was "customary."

3. The same case exposes the "lost note" count as a litigation device, not a fact.

In what the court called "a bizarre twist," Countrywide produced a "Lost Note Certification" dated February 1, 2007, swearing that the original had been delivered and thereafter "misplaced, lost or destroyed" after a thorough and diligent search — while its own officer's testimony established that the note had never left Countrywide's files. Confronted with the contradiction, Countrywide's counsel asked the court to disregard its own lost-note certification. Then, weeks before trial, Countrywide executed a new "Allonge to Promissory Note" — misidentifying the certificate series — which DeMartini admitted was "prepared in anticipation of this litigation" and which was never affixed to the note. This is the FBA's "standard alternative pleading" in operation: the lost-note count is not a description of what happened to the instrument but a placeholder deployed when the truth — never endorsed, never delivered, sitting in the originator's own file — would defeat the claim.

4. Destroy-after-imaging was imported from check processing — where Congress had made it legal. For notes, no one ever did.

Operationally, the industry's destroy-after-imaging practice mirrors check truncation. But checks can be destroyed after imaging because Congress authorized it: the Check Clearing for the 21st Century Act makes a "substitute check" the legal equivalent of the original instrument. 12 U.S.C. § 5003(b); see also UCC § 4-110 (electronic presentment). No equivalent statute exists for promissory notes. No "substitute note" has legal equivalence; Article 3 runs with the original, and § 3-309 is the sole, narrow exception — written for instruments that are lost, not deliberately destroyed. The industry performed check-style truncation on instruments for which truncation has never been lawful, precisely because treating them as notes would have required endorsing, delivering, and keeping them.

5. The industry then declared copies to be "originals" by contract — the script the robo-witness performs.

Having never obtained statutory equivalence for an image (§ II.C.4), the industry wrote the equivalence into its own contracts. A typical Mortgage Loan Purchase and Sale Agreement — here, the March 2015 MLPSA between LSF9 MHI LLC (a Lone Star Funds acquisition entity), as purchaser, and Bank of America, N.A./Countrywide Home Loans, Inc., as sellers, with Wells Fargo Bank, N.A. as custodian —

provides:

> "Furthermore, the Purchaser acknowledges that any of the foregoing documents **may be executed or issued electronically, as customary in the industry, and are considered to be original documents.**"

(MLPSA, LSF9 MHI LLC and BofA/CWHL (Mar. 2015), § 2.03, filed as an exhibit to Claim 6-2, *In re Lifschultz Estate Management LLC*, No. 16-23144 (RDD) (Bankr. S.D.N.Y. May 11, 2017).)

This is a contractual fiction attempting to accomplish what no statute permits: the transmutation of an electronic image into an "original" negotiable instrument. Article 3 rights attach to the original writing. Private parties cannot amend the Uniform Commercial Code by agreement, and a copy "considered to be original" by contract is not the instrument. The clause is self-refuting — parties do not need a provision deeming their documents original when the documents are original. Its existence is an admission that what the parties trade are not originals.

The clause's real function is evidentiary. It is the license for the downstream robo-witness. When a servicer's "record custodian" testifies that the image attached to the complaint is a "true and correct copy of the original note," the witness is not describing a physical artifact — the original was destroyed at imaging. The witness is reciting the contractual convention: the system contains an electronic document, and the governing agreements declare electronic documents "original." The business records say the copy is original; therefore the witness says the copy is original. The testimony is the clause, performed in court.

And the same section confesses the chain defects the fiction is designed to paper over:

> "The Purchaser acknowledges that the Sellers may deliver (i) a Mortgage Note for which **the chain of endorsements is not identical to that of the intervening assignments of Mortgage** with respect to such Mortgage Note, which shall not affect the enforceability of such Mortgage Note, and/or (ii) intervening assignments of Mortgage which are not identical to the chain of endorsements with respect to such Mortgage Note, which shall not affect the validity of such intervening assignments of Mortgage."

(§ 2.03.)

The purchaser agrees, in advance and as a matter of "customary" practice, that the endorsement chain and the assignment chain will not match — and that the mismatch "shall not affect" enforceability or validity. A private agreement cannot make an unenforceable note enforceable; it can only allocate the resulting loss between the contracting parties — the repurchase-and-indemnity machinery examined in § III.E. What the clause actually manufactures is the business-record narrative — "customary in the industry," "considered to be original," "shall not affect enforceability" — that the robo-witness later swears to as fact. And note the date: March 2015 — a decade after WaMu disclosed that notes would never be endorsed, six years after the FBA confessed the originals were destroyed, four years after five federal regulators found MERS's data unreliable. The industry was still trading the same defective paper, under the same disclaimers, with the same contractual fiction that copies are originals.

6. The substitute registry was federally examined and found unreliable — and the IRS declined to dispute what the record showed.

Two government proceedings stripped the replacement record system of any remaining credibility.

First, the tax whistleblower investigation. On March 18, 2011, whistleblowers David Stone and Thomas Carroll filed claims with the Internal Revenue Service (Form 211, 26 U.S.C. § 7623) alleging that more than 330 industry entities had separated notes from mortgages so the notes could be sold to investors without any recorded transfer of the real estate security — and that, once separated, the obligations were no longer secured, destroying the trusts' REMIC qualification under 26 U.S.C. § 860D(a)(4) and rendering hundreds of millions of dollars of income taxable to the sponsors. The IRS Whistleblower Office referred the claims to its Large Business and International Division for audit. Internal IRS review concluded the claims "could have far-reaching implications" beyond the named entities; the agency's REMIC industry practice group "reviewed the information and determined it has merit." And the IRS's own evaluation memorandum stated the quiet part plainly:

> "[A]lthough the government **does not dispute the claimants' allegations**, to examine the transfer of title for all loans in the trust, the government would expend significant resources."

Stone v. Commissioner of Internal Revenue, No. 22-13217 (11th Cir. 2022) (recounting the IRS LB&I evaluation), *cert. pet. filed*, No. 23-903 (U.S.).

Read that again. The United States did not dispute that the notes were separated from the mortgages and never properly transferred. It declined to act because verification would be expensive. The tax exemptions stood not because the transfers happened, but because proving they did not would have cost too much. The government's cost-benefit calculus is the industry's confession by proxy — and it corroborates Section V: the REMICs' qualification was never tested because everyone understood what the test would find.

Second, the federal banking regulators' examination of MERS itself. On April 13, 2011, five federal agencies — the OCC, the Board of Governors of the Federal Reserve System, the FDIC, the OTS, and the FHFA — issued a joint Consent Order against MERSCORP and MERS following an interagency examination, finding "deficiencies and unsafe or unsound practices" presenting "financial, operational, compliance, legal and reputational risks." *In re MERSCORP, Inc.*, OCC No. AA-EC-11-20 et al. (Apr. 13, 2011). The order's data-integrity provisions (Article VIII, "Quality Assurance and Data Integrity") required MERS to build, from scratch, "policies, processes and resources to ensure the accuracy and reliability of data reported to MERSCORP," including system-to-system reconciliations of every mandatory reporting field and capture of all reject/warning reports on registrations and transfers. Regulators do not order an entity to construct accuracy-and-reliability controls for data that is already accurate and reliable. The Consent Order is a formal federal determination that the industry's substitute for the land records — the registry that supplanted the destroyed notes — could not be trusted to identify who owned what. Independent research confirmed it: a survey of MERS-registered loans found only about 30 percent matched the ownership reflected in the public records.

Now place these findings beside the FBA's "confusion" rationale. The industry destroyed the authoritative document "to avoid confusion" and substituted (i) a servicing database that verifies itself against itself, and (ii) a private registry whose data federal regulators found unsafe and unsound, whose own rules disclaim any transfer function, and which — as the whistleblower record reflects — described in the whistleblower complaint's exhibits as the industry's "custodian and clearinghouse for mortgage securities" — while possessing no reliable knowledge of the creditors' identities at all. The "confusion" was not eliminated. It was institutionalized — and then federally documented.

7. The custodian knows nothing — so no successor can know anything. The chain of knowledge is as broken as the chain of title.

Follow the custody of the data. Once the notes were bifurcated from the mortgages, digitized, and eliminated, custody of the only remaining record of ownership did not pass to the individual servicers. It passed to MERS — described in the whistleblower complaint's exhibits as the industry's "custodian and clearinghouse for mortgage securities." MERS became the designated repository of the ownership record for the entire digitized system. The servicers merely keyed self-reported entries into that system; MERS's own rules disclaim any duty to verify them (MERS Rules of Membership, Rule 2, §§ 4, 6(d)), and five federal regulators formally found the resulting data practices unsafe and unsound (Consent Order, Art. VIII).

Then look at who acted in the custodian's name. MERS executed its assignments through "certifying officers" — tens of thousands of them, every one an employee of a servicer or member institution, designated by MERS to sign on its behalf. (Consent Order, Art. I(3).) The architecture splits authority from knowledge: MERS, the nominal actor and custodian of the record, admits it knows nothing of creditor identities; the servicer employees who signed in its name possessed, at most, servicing knowledge — payment ledgers, not ownership. The custodian held the authority and no knowledge. The signers held (servicing) knowledge and no authority. The law requires both in the same witness, and this system has them in no one.

Personal knowledge cannot be inherited downstream. A verification, affidavit, or business-records foundation is only as good as the source of the signer's knowledge — and every signer in this system draws from the same dry well. If the original custodian of the data knows nothing — admits it knows nothing, and is structured so that it cannot know — then no successor, no servicer, and no "record custodian" attesting "to the best of knowledge and belief" can supply the requisite personal knowledge either. *Nemo dat* applies to knowledge as surely as to title: one cannot derive from a source what the source never had. The buck stops at the custodian — and the custodian is empty.

This is the epistemic completion of the FBA's circular-verification admission (§ II.B.4). The "signing record custodian" verifies the complaint from "the same database" — and that database's authoritative upstream custodian is an entity its own rules, its own regulators, and the IRS whistleblower record all confirm knows nothing. Every verification, every affidavit, every foundation for a business record laid on that system inherits the custodian's ignorance: the sponsoring witness must have personal knowledge of the record-keeping system, and the record-keeping system's designated custodian has none. The foundation fails at the root.

Congress reached the identical finding at the individual level: "Employees or contractors of Bank of America, GMAC Mortgage, and other major loan servicers testified that they signed, and in some cases backdated, **thousands of documents claiming personal knowledge of facts about mortgages that they did not actually know to be true**." (COP Report at 1.) The custodian knew nothing; the signers knew nothing; the public record establishes both.

8. Synthesis: "confusion" was the risk that the paper would expose the multiple, inconsistent uses of the same obligation.

The instrument was the only artifact whose physical location could reveal who actually held the rights: sold to certificateholders, pledged into the credit system as collateral, retained by the originator, and still "enforceable" in court. Destruction eliminated the only evidence that could contradict the database — and, as the WaMu prospectus disclosure and the DeMartini testimony prove, the only evidence that could prove the transfers never happened. The note had to die because its existence was the refutation of the claim. And destruction is self-immunizing: once the original is gone, its absence is excused as routine, the destroyer's records become the sole account of what the instrument said and where it went, and the borrower is left to disprove the destruction from records the destroyer alone possesses. The note's absence could never be challenged — because challenging it requires the note.

D. Verification Was Never a Substitute for Proof — The Industry's Own Standard

The FBA argued the verification rule was unnecessary precisely because it changed nothing about the plaintiff's real burden:

> "Verification of the foreclosure complaint will not relieve the plaintiff seeking to foreclose a residential mortgage of the burden of **proving by competent and substantial evidence that it is the holder of the note** secured by the mortgage and **entitled to enforce** the mortgagor's obligation."

(Comments at 8)

> "Section 673.3091, Florida Statutes, establishes **stringent proof standards** when the original note is not available, and requires the court to protect the mortgagor against additional foreclosure actions."

(Comments at 2)

The industry's own position in 2009 was therefore threefold: (i) verification proves nothing about the instrument; (ii) the plaintiff's burden of proving holder status and entitlement to enforce remains, at standards the industry itself described as "stringent" and "strict"; and (iii) the only lawful pathway for a party without the original is formal re-establishment under § 673.3091. Every foreclosure prosecuted thereafter on a copy, a verification, and a robo-signed affidavit proceeded as if this concession had never been made. The industry cannot now disown the standard it articulated to the Florida Supreme Court when that standard is applied to it.

E. The Closed Class Is Empty

The note's enforceability clause — written by the industry, signed by the borrower, and now invoked by the industry in court — defines two categories of enforcement authority. The first category (named lender) is vacant because the lender sold and derecognized the asset, and its own regulatory filings prove it. The second category (transferee) is vacant because the industry destroyed the instrument required for transfer, and its own certified court filing admits it.

The note has become a self-executing discharge. Its own language, read against the industry's admissions, eliminates every party capable of enforcement.

F. The Power of Sale Is Nullified: Derecognition as Contractual Surrender — and a Beneficiary That Does Not Exist

The deed of trust's power of sale is the enforcement mechanism of the entire structure. It has no lawful holder. The nullification occurred in three stages: contractual surrender, statutory divestiture, and the recorded-beneficiary shell game — each documented by the industry's own instruments.

1. Derecognition is not bookkeeping; it is the certification of a legal surrender.

Sale accounting under ASC 860 is conditional on legal facts: the assets must be isolated from the transferor — put presumptively beyond the reach of the transferor and its creditors even in bankruptcy; the transferee must be free to pledge or exchange them; and the transferor must have surrendered control, retaining no agreement entitling and obligating it to repurchase and no unilateral right to reclaim. (FAS 140 ¶ 9; ASC 860-20-25.) The ledger therefore does not say "we chose to stop counting this asset." It says: *we are no longer legally permitted to count it, because we surrendered control.* The 10-Ks and call reports examined in Section VI are not mere accounting admissions; they are sworn, regulator-filed certifications that a legal divestiture occurred.

2. The sale contract conveyed the power of sale itself.

The purchase agreements state the conveyance in unlimited terms. Upon payment, "each Seller hereby transfers, assigns sets over and otherwise conveys to the Purchaser and the Purchaser shall own **all of Sellers' right, title and interest** in the Mortgage Loans." (MLPSA, LSF9 MHI LLC and BofA/CWHL (Mar. 2015), § 2.02.) The power of sale in a deed of trust is an interest held by the beneficiary as beneficiary — and "all right, title and interest" is what was sold. Even where the industry botched the downstream assignments, the seller's own rights died at the closing table. A party cannot retain what it has sold — and it cannot later exercise, directly or through agents, a power it conveyed for value.

3. The statute completes the divestiture: UCC § 9-318(a).

> "A debtor that has sold an account, chattel paper, payment intangible, or **promissory note** does not retain **a legal or equitable interest** in the collateral sold."

(UCC § 9-318(a).)

Not title. Not enforcement rights. Not the benefit of the power of sale. Nothing. Article 9's architecture moves the entire package by operation of law: sales of promissory notes are within Article 9 (§ 9-109(a)(3)); attachment of the buyer's interest in the note carries the mortgage with it (§ 9-203(g)); the buyer's interest is automatically perfected (§ 9-309(4)). The extinguishment of the seller's position thus rests on four independent grounds, each sufficient alone: bargained conveyance for value, statutory divestiture, accounting certification, and judicial estoppel.

4. The deed of trust's own architecture requires a beneficiary that no longer exists.

In a deed of trust, the trustee's power of sale is exercisable only at the direction of the beneficiary — the party the instrument defines by reference to the note. The MERS deed of trust then did something atypical: it named **MERS** — not the lender — as "the beneficiary under this Security Instrument," while simultaneously defining MERS as acting "solely as a nominee for Lender and Lender's successors and assigns," holding "only legal title to the interests granted by Borrower," with the right, "if necessary to comply with law or custom," "to foreclose and sell the Property" — only as such nominee. From the day of origination, the recorded beneficiary was a placeholder: an agent holding bare title for a principal whose identity was expected to change as the note moved. And a nominee's authority is wholly derivative — it extends no further than the principal's interest and the principal's instruction.

5. The principal class is empty — the nominee is a shell, and no one can lawfully direct the trustee.

Run the candidates the deed of trust contemplates. The named lender sold and derecognized the note (§ II.A; UCC § 9-318(a)) — it is no longer the beneficiary and cannot direct the trustee, substitute a successor trustee, accelerate, or instruct a sale. "Lender's successors and assigns" do not exist: the notes were never endorsed or delivered (§ II.C), the instruments were destroyed (§ II.B), and MERS's own rules state it is "not a mechanism for creating or transferring liens or interests in mortgage loans" (§ III.F). The trust appears nowhere in the land records as beneficiary. The servicer is an agent, not the beneficiary — "merely an agent" (§ IV.F). The certificateholders are owners "in industry terms … not from a legal perspective." Every candidate is disqualified by the industry's own documents. The trustee — a fiduciary holding a naked power — can receive no lawful instruction. Every substitution of trustee, every notice of default, every trustee's sale is therefore self-authorized: executed by servicer employees signing as MERS "certifying officers," in the name of a nominee whose principal class is empty, exercising a power the true principal sold years before.

The nonjudicial foreclosure statutes make the same demand — and it cannot be met. Washington's deed of trust act is representative: a trustee's sale is lawful only if every statutory requisite is satisfied, including that the notice of default contain "a statement that **the beneficiary has declared** the borrower or grantor to be in default, and a concise statement of the default alleged"; that the notice disclose "the name and address of **the holder of any promissory note** or other obligation secured by the deed of trust"; and — for residential property — that "the trustee shall have **proof that the beneficiary is the holder** of any promissory note or other obligation secured by the deed of trust," established by "a **declaration by the beneficiary made under the penalty of perjury**." (RCW 61.24.030(7)(a), (8)(c), (8)(l).) The statute thus conditions the sale on three things the MERS-securitization structure does not have: an identifiable beneficiary; a declaration of default issued by that beneficiary; and a beneficiary who is the holder of the note. Default is not a free-floating fact. It is a breach of an obligation owed to an identifiable obligee, declarable only by the party to whom performance runs. Where the beneficiary class is empty and the instrument destroyed, each requisite fails — and the industry's response has been to fabricate them: "beneficiary declarations" of holder status, signed under penalty of perjury by servicer employees as MERS "certifying officers," attesting that a shell nominee is the holder of a note that no longer exists, on behalf of a principal that sold its interest years before. That is not statutory compliance. It is the mechanism by which the empty class is concealed from the trustee, the county auditor, and the borrower — the robo-signing scandal recast as a perjury-based statutory workaround.

6. A power without a holder is null.

The power of sale follows the note; it cannot exist detached from the obligation it secures. (Restatement (Third) of Property (Mortgages) § 5.4 (1997); *Carpenter v. Longan*, 83 U.S. 271 (1872).) Derecognition extinguished the seller; elimination destroyed the instrument; conversion scattered the economics into unenforceable security entitlements. What remains in the land records is a husk: a recorded lien whose trigger mechanism has no one lawfully entitled to pull it. This is the doctrinal foundation of the remedy: where no one holds the power of sale, foreclosure is impossible as a matter of law — and the recorded instrument is a cloud on title, subject to removal by quiet title (Section X).

Nor does the belated MERS assignment rescue the structure — it memorializes the nullity. Where MERS, "as nominee for the named lender," executes and records an assignment, the instrument assigns the deed of trust alone: the security interest stripped from the debt it secures. That is precisely the transfer *Carpenter v. Longan* holds void: "an assignment of the note carries the mortgage with it, while an assignment of the latter alone **is a nullity**." (83 U.S. at 274; see § III.F.) And the note cannot be made to accompany the assignment. It was destroyed (§ II.B); it cannot be endorsed, delivered, or assigned by anyone. MERS never held it, and its own rules state that it is "not a mechanism for creating or transferring liens or interests in mortgage loans" (§ III.F). Even its derivative nominee authority could reach no further than the principal's interest — and the named lender had no interest left to confer, having sold "all of Sellers' right, title and interest" (§ II.F.2) and retained none by statute (§ II.F.3; UCC § 9-318(a)). An assignment of the incident without its principal, executed by a nominee that never held the note, on behalf of a principal with nothing left to give: three nullities stacked — and they are the industry's entire land-record case.

G. The Lien Does Not Survive the Sale: Derecognition and Conversion Extinguish the Security Interest in Every Party's Hands

The security interest cannot outlive the relationship that created it. Trace the lien, party by party, after the true sale and the conversion into securities: every candidate is divested, never invested, or definitionally incapable. No party is left holding an enforceable lien. What remains in the land records is not a lien at all.

1. The sale divests the seller of the lien itself — by statute.

UCC § 9-318(a) is categorical: the seller of a promissory note retains "no legal or equitable interest in the collateral sold." And Article 9 moves the security with the debt by operation of law: attachment of the buyer's interest in the note is simultaneously attachment of the interest in the mortgage securing it (§ 9-203(g)), automatically perfected without recording (§ 9-309(4)). That is the industry's own doctrine — the sale transfers the entire package, no assignment required. Accept it, and the recorded lien in the originator's (or its nominee MERS's) name is orphaned at the moment of sale: it secures a debt the record party no longer owns. A mortgage is a "mere incident" of the debt (*Carpenter v. Longan*, 83 U.S. at 274); an incident held by a party that has sold its principal is not an asset. It is nothing. The originator cannot thereafter foreclose it, assign it, release it, or subordinate it. From the moment of derecognition, the record lien in the seller's name is a nullity in the seller's hands.

2. The conversion abolishes lien-ownership at the investor level by definition.

What the investors purchased are not mortgages. They are certificates — securities — governed by Article 8. The certificateholder's asset is a "security entitlement": a package of rights against the securities intermediary, not an interest in any loan, any note, or any home. (UCC §§ 8-102(a)(14), 8-501.) The industry's own witnesses concede it: certificateholders are owners "as an industry term, but not as a legal term" (§ IV.F); the trustee "doesn't consider itself the owner"; "the trust has no authority there." No certificateholder holds a lien on any home; none can foreclose, demand payment, or direct the trustee. The conversion atomized the loan's economics into thousands of security entitlements — and not one of them is a lien.

3. The trust — the only candidate left — never acquired the lien and is prohibited from acquiring it.

The industry's own offering documents and sworn testimony establish that the notes were never endorsed or delivered to the trusts (§ II.C.1–2), and the originals were destroyed at imaging (§ II.B). The buyer's side of the sale was never consummated on the industry's own documents. And the door is locked against any cure: a post-startup-day transfer to the trust is a prohibited contribution carrying a 100% tax (IRC § 860G(d)(1); COP Report at 12 n.37). The trust cannot hold a lien over a note it never received — and any late-recorded assignment to it is either a nullity executed by a nominee that held nothing (§ III.F) or a tax-prohibited contribution. The trust's seat is empty twice over.

4. What remains of record is a cloud, not a lien.

Run the register. The seller is divested (§ 9-318(a)). The investors hold securities, not liens (§ 8-501). The trust never received and cannot now receive (§ II.C; IRC § 860G(d)(1)). The servicer is "merely an agent" (§ IV.F). MERS is a nominee that holds nothing and transfers nothing (MERS Rules, Rule 2, § 8). Every seat at the table is empty. The recorded instrument is a memorial of a security interest whose entire predicate — an obligation held by an identifiable creditor — has been abolished by sale, destruction, and conversion. It is not a lien on the home. It is a cloud on the title, and the remedy is its removal: quiet title (Section X).

III. THE PHYSICAL TRANSFER IMPOSSIBILITY: UCC § 3-203 AND THE DESTROYED INSTRUMENT

The Uniform Commercial Code governs negotiable instruments. It does not indulge fiction. It requires physical reality.

A. UCC § 3-203: Transfer Requires an Instrument

UCC § 3-203(a) provides: "Transfer of an instrument vests in the transferee any right of the transferor to enforce the instrument." The statute presupposes an instrument. It does not provide for transfer of a memory, a copy, a scanned image, or an affidavit of loss. It provides for transfer of 'the instrument' — the original, physical, signed document that embodies the obligation.

B. UCC § 1-201(b)(21): Holder Requires Possession

UCC § 1-201(b)(21)(A) defines 'holder' as: "The person in possession of… an instrument if the instrument is payable to bearer or… identified in an endorsement." Possession is not constructive. It is not theoretical. It is physical control of the instrument. When the original instrument has been deliberately destroyed — as the FBA admits was customary — possession is physically impossible. No party can be a holder. No party can become a holder. The category of 'holder' ceases to exist as a matter of physics.

C. UCC § 3-309: The Lost Note Statute Does Not Apply

Servicers and trustees routinely invoke UCC § 3-309, the 'lost instrument' provision, to enforce notes they cannot produce. But § 3-309 applies to instruments that were 'lost, stolen, or destroyed' — and the party seeking enforcement must prove that the loss was not the result of transfer by that party. The FBA admission destroys this defense. The industry did not 'lose' the notes. It deliberately eliminated them as standard practice. The party now seeking enforcement caused the destruction. Under the doctrine of spoliation, a party that intentionally destroys evidence bears the adverse inference. Under § 3-309(b), the court may require security to protect the obligor from double liability — and where the destruction was intentional and industry-wide, the court should deny enforcement entirely.

D. The Logical Impossibility

The servicer's litigation position requires this syllogism: Premise: We are entitled to enforce because we took the note by transfer. Fact: The note was destroyed before any transfer could occur. Conclusion: The premise is self-contradictory. The industry cannot enforce under a clause that requires physical transfer of an instrument it admits it deliberately eliminated. This is not a gap in evidence. It is ontological failure — the note's enforceability conditions were defined out of existence by the party now asserting them.

E. The Florida Bankers Association's Risk-Assumption Confession: Indemnification Is Not Proof

The FBA's Comments do more than admit the destruction of the notes. They describe — accurately, and for the purpose of comforting the court — the legal mechanism by which plaintiffs without original instruments would nonetheless be allowed to foreclose. That mechanism, on the FBA's own telling, is not proof. It is risk transfer. And risk transfer, in no way, shape, or form, establishes a claim.

1. The statute demands two independent showings: strict proof, then mandatory protection.

The FBA characterized the re-establishment process in its own words:

> "The process for re-establishment of a lost or destroyed instrument by law imposes a **strict burden of proof** and instructs the court to protect the obligor from multiple suits on the same instrument."

(Comments at 4)

Section 673.3091(1), Florida Statutes (UCC § 3-309(a)), as quoted in the Comments at 5, requires the plaintiff to prove all three elements:

> "A person not in possession of an instrument is entitled to enforce the instrument if: (a) The person seeking to enforce the instrument **was entitled to enforce the instrument when loss of possession occurred**, or has directly or indirectly acquired ownership of the instrument **from a person who was entitled to enforce the instrument when loss of possession occurred**; (b) The loss of possession was **not the result of a transfer** by the person or a lawful seizure; and (c) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process."

Section 673.3091(2) then imposes a separate, mandatory precondition to judgment:

> "The court **may not enter judgment** in favor of the person seeking enforcement **unless it finds** that the person required to pay the instrument is **adequately protected** against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means."

(Comments at 5)

The two requirements are independent and cumulative. Proof under subsection (1) does not excuse protection under subsection (2); protection under subsection (2) cannot substitute for proof under subsection (1). And the very existence of subsection (2) is the legislature's own acknowledgment that a § 673.3091 plaintiff is, by definition, a party whose entitlement could **not** be established in the ordinary way — by producing the instrument.

2. What the "protection" actually is — in the FBA's own description.

> "This protection may be effectuated by any means satisfactory to the court. It **commonly takes the form of a provision in the final judgment** stating that to the extent any obligation of the note is later deemed not to have been extinguished by merger into the final judgment, the plaintiff has by law accepted assignment of those obligations. In other words, the plaintiff who enforces a lost or destroyed instrument **assumes the risk that a third party in lawful possession of the original note or with a superior interest therein will assert that claim**. The original obligor has no liability."

(Comments at 5–6)

3. The confession inside the clause.

First, the risk-assumption mechanism presupposes that the plaintiff's claim is unproven and defeasible. A "risk that a third party … with a superior interest therein will assert that claim" can only exist if the plaintiff has **not** established that no superior interest exists. If re-establishment actually proved exclusive entitlement, there would be no residual risk to shift. The clause operates only **after** judgment, only **if** a better claimant appears. It is an indemnity — and an indemnity is what a party offers *in place of* proof, never *as* proof.

Second, the FBA's hypothetical collides with its own destruction narrative — and the collision exposes what the industry actually transferred. The stated risk is that "a third party **in lawful possession of the original note** … will assert that claim." But the same letter insists, four pages earlier, that original notes are "deliberately eliminated … immediately upon conversion to an electronic file" as universal industry practice. On that admission, there are no originals for anyone to lawfully possess; the hypothetical possessor is an impossibility — unless the "original note" the FBA imagines in third-party hands is the industry's own substitute: the digitized file, the sellable data, which is what actually moved through the chain, and which the industry's downstream contracts then declare to be "original documents." (MLPSA § 2.03; § II.C.5.) That is the only reading on which the clause has any content, and it is fatal from both directions. If "original" means the wet-ink instrument, the risk is zero and the clause is surplusage — drafted to defeat a borrower-protection rule against a hazard the industry claims it eliminated. If "original" means data deemed original by private contract, the clause concedes the scheme entire: the same sellable data can be conveyed to multiple parties, each tendering a self-authenticating "original" of a note that no longer exists — competing and superior claims are not a risk of the system; they are its product. And on either reading, the clause defeats the plaintiff. A party tendering a data file as "the original" is not re-establishing a lost instrument — § 673.3091 governs instruments, not records "considered to be original documents" by private agreement — and a party whose original was destroyed by its own chain, incident to the conversion and sale of that data, lost possession through voluntary conduct on the transfer side of the transaction, precisely the fact pattern § 673.3091(1)(b) excludes. The risk clause is thus simultaneously (i) an admission that superior claims exist, and (ii) an admission that what the industry possesses, sells, and tenders to courts is not the statutory instrument at all.

Third, the "protection" is paper. Per the FBA, it "commonly takes the form of a provision in the final judgment." Not a bond. Not insurance. Not posted security. A recital. The obligor's entire protection against paying twice is a future cause of action against the plaintiff — and the securitization plaintiff is typically a pass-through trust with no operating assets, acting through a servicer, for the benefit of dispersed certificate holders. An indemnity from an asset-less conduit is no protection at all. And the mechanism leans on merger doctrine ("to the extent any obligation of the note is later deemed not to have been extinguished by merger into the final judgment"), which presupposes a valid judgment in favor of a party entitled to enforce — the very thing in issue.

Fourth, the FBA admits the statute was bent to accommodate the destruction practice. Its own footnote states that "[t]he legislature amended Section 673.3091, Florida Statutes, in 2004 to address the issues raised by the State Street court **in recognition of the commercial reality that almost all purchase money notes are electronically stored and assigned in electronic form**." *(Comments at 5 n.1.)* A remedial statute designed for the accidental loss of instruments was re-tooled to serve an industry that destroyed them on purpose.

4. The obligation to pay the note is equally assigned to every endorser.

This is the doctrinal backdrop the FBA's risk clause cannot escape. Under UCC § 3-415, if an instrument is dishonored, an endorser is obliged to pay the amount due on the instrument according to its terms at the time of endorsement — absent a "without recourse" disclaimer, and subject only to conditions (presentment, notice of dishonor) that standard note and endorsement language routinely waives. Every endorser is a co-obligor on the instrument itself.

A securitization chain — originator to sponsor, sponsor to depositor, depositor to trust, frequently endorsed in blank — therefore does not merely purport to push enforcement rights downstream. It **accumulates payment liability upstream**. Every endorser remains liable. Every endorser's transferee took subject to transfer warranties under UCC § 3-416. And layered on top of the statutory scheme sit the industry's contractual indemnities: repurchase obligations, servicing agreements, PSA indemnification provisions.

This apparatus exists for one reason: no party in the chain could demonstrate sole, clean, exclusive entitlement to the instrument. **Parties do not purchase warranties and indemnities against a**

risk they have proven cannot materialize. The entire risk-allocation architecture of securitization is the industry's own documented knowledge that its chain of title was unprovable.

5. Indemnification is loss allocation, not proof — the analytical core.

A claim to enforce is *ex ante*: here is the instrument, here is my possession, here is the unbroken chain, here is my entitlement at the moment of loss. It is established before judgment or not at all.

An indemnity is *ex post*: if a better claimant appears after judgment, I will cover the loss. It allocates the consequences of failure. It presupposes the possibility of failure.

The FBA's formulation — the plaintiff "assumes the risk that a third party … will assert that claim" — collapses the second into the first and calls the result protection. Stripped of its comfort, the clause says this: *the plaintiff cannot prove it is the rightful claimant, so it will indemnify the defendant if a better one appears.* That is not a claim. It is a confession with an insurance policy stapled to it — and the insurance is written on an insolvent conduit.

A claim that survives only by indemnifying against a better claimant was never a claim at all.

6. On the industry's own timeline, every element of § 673.3091 fails.

- **Element (a) fails.** The FBA admits destruction occurred "almost immediately after the loan is closed" *(Comments at 3)* and "immediately upon its conversion to an electronic file" *(Comments at 4)* — before any securitization transfer. The loss therefore preceded every link in the chain. No downstream party "was entitled to enforce the instrument when loss of possession occurred," and none "directly or indirectly acquired ownership of the instrument from a person who was," because from the moment of loss forward there was no instrument to acquire — only "electronic data" *(Comments at 3)* moving through a servicing database. Nor is this inference. The industry disclosed in its own SEC filings that "[t]he mortgage notes will not be endorsed to the Trust and no assignment of the mortgages to the Trust will be prepared" (WaMu 2005-AR17 Prospectus Supplement (Form 424B5) at S-19–20), and its own litigation officer testified that original notes were "never indorsed … or delivered" to the trustee and customarily never left the originator's possession. *In re Kemp*, 440 B.R. 624, 628–34 (Bankr. D.N.J. 2010). The chain did not merely break; by the industry's own disclosed design, it never existed.
- **Element (b) fails.** The loss was not accidental. It was "deliberately eliminated to avoid confusion" *(Comments at 4)* — a voluntary, industry-wide act of the claimants' own chain, undertaken to save "the concomitant costs of physical indexing, archiving and maintaining security" *(Comments at 4)*. A party whose own side destroyed the evidence cannot invoke a remedial statute written for victims of loss. This is textbook spoliation, and the adverse inference follows.
- **The judgment precondition fails.** "The court **may not enter judgment … unless it finds**" adequate protection. *(Comments at 5, quoting § 673.3091(2).)* An express finding of adequacy is a mandatory precondition, and the FBA concedes the protection is ordinarily nothing more than "a provision in the final judgment." A boilerplate recital is not a finding of adequacy; it is the absence of one. Any judgment entered without proof of the (a)–(c) elements and a genuine, express adequate-protection determination violates the standard the industry itself told the Florida Supreme Court was "stringent" *(Comments at 2)* and "strict" *(Comments at 4)*.

7. The sanctions hook — the industry's own good-faith standard.

The FBA conceded that "[a]ny party seeking to foreclose a mortgage **without a good faith belief—based on investigation reasonable under the circumstances—in the facts giving rise to the asserted claim** may be sanctioned 'upon the court's initiative.'" *(Comments at 6, quoting § 57.105(1),* *Fla. Stat.)* A plaintiff that files a lost-note count while knowing the note was deliberately destroyed, knowing the loss preceded its entire chain, and knowing it cannot satisfy elements (a) and (b), possesses no such good-faith belief — measured by the standard its own industry proposed to the court.

The syllogism of Section III.D thus completes itself with the industry's own words:

Premise (the industry's): We are entitled to enforce because we took the note by transfer.

Fact (the industry's): The note was deliberately destroyed before any transfer could occur.

Remedy (the industry's): The plaintiff assumes the risk that a real claimant exists.

Conclusion: The premise is false, the fact is admitted, and the remedy is an indemnity among co-liable endorsers — none of which is, or ever could be, proof of a claim.

F. The MERS Nullity: Nominee for an Empty Class, Assigning an Incident Without Its Principal

The land records complete the illusion — and, read carefully, they complete the confession. In millions of recorded mortgages and deeds of trust, Mortgage Electronic Registration Systems, Inc. ("MERS") appears as "Mortgagee of Record … as nominee for Lender and Lender's successors and assigns," and from that position it executed the assignments on which countless foreclosure claims rest. The device's entire legal architecture presupposes the existence of a Note Owner. By the industry's own rules, testimony, and auditor, every element of that presupposition has failed.

1. MERS's own rules admit that it creates and transfers nothing.

The MERS System Rules of Membership (MERSCORP Holdings, Inc., effective June 30, 2025) provide, in terms that cannot be walked back:

> "The MERS Entities and the Member agree that: **(1) the MERS System is not a mechanism for creating or transferring liens or interests in mortgage loans**, and (2) MERS System membership or a Member's use of the MERS System shall not modify or supersede any agreement between or among the Members and/or any other parties having liens or interests in mortgage loans registered on the MERS System. Actual transfers of liens to or from MERS in the mortgage loans are reflected in the public land records as described in this Rule."

(MERS Rules of Membership, Rule 2, § 8 (2025 ed.).)

This is not a policy statement. It is a retroactive disclaimer — an institutional admission that the entity in whose name millions of mortgage assignments were executed was never a mechanism for transferring anything. The fallback clause is circular: if MERS holds no interest, its recorded assignment conveys nothing; recording a nullity does not validate it. The land records do not cure the defect — they memorialize it.

2. MERS assigns only the incident — never the principal.

The Rules confine MERS's role with precision. MERS serves as Mortgagee of Record "solely as Nominee for the Note Owner and the Note Owner's successors and assigns, including the Note Holder," with "no right to retain any payments," no retained properties, and "no servicing rights." (Rule 1, § 1(b).) Its assignment authority extends only to "all right, title and interest **in the Mortgage**" (Rule 2, § 6(b)(i)(2)) — the security instrument alone. Legal title to the **Note** moves, if at all, by instruction of the "Note Owner" (Rule 2, § 6(c)) — a party MERS does not identify, does not verify, and whose ownership is self-reported by its own members (Rule 2, §§ 4, 6(d)).

The common law has answered this structure for a century and a half:

> "The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an **assignment of the latter alone is a nullity**."

Carpenter v. Longan, 83 U.S. (16 Wall.) 271, 274 (1872).

Every recorded assignment from MERS purporting to transfer a mortgage or deed of trust — unaccompanied by the note — is therefore a nullity on its face, conveying the incident without the principal. The county land records of the United States are filled with documents that, by MERS's own rules and the Supreme Court's oldest mortgage rule, transferred nothing.

Congress documented the consequence. The Congressional Oversight Panel recorded that courts confronting the bifurcation have reached "the worst possible fate for secured loan buyers—that their mortgages were not effectively transferred or even that **the mortgages have been separated from the note and are no longer enforceable**," leaving the industry's own commentators to ask, if MERS "cannot even record or execute an assignment of a mortgage, what then?" (COP Report at 16 & nn.54, 56.) And by 2010, Fannie Mae had directed that "MERS must not be named as a plaintiff in any foreclosure action" on loans it owned or securitized. (*Id.* at 27 n.103.)

3. There are no successors and assigns. The class is empty.

MERS holds its recorded position as nominee for "the Note Owner and the Note Owner's successors and assigns." But Sections II and III establish what that phrase now contains. The named lender sold and derecognized the note under ASC 860. The instrument was deliberately destroyed upon imaging. The notes were never endorsed or delivered to the trusts — by the industry's own prospectus disclosures and sworn testimony. There is no Note Owner. There is no Note Holder. There are no successors and assigns in any legally cognizable sense. MERS stands in the public record as nominee for an empty class: a signatory without a principal, executing assignments on behalf of parties that do not exist, of an interest it never held, in a chain that never formed. *Nemo dat quod non habet* — no one gives what he does not have.

4. Title was never perfected — and the land records themselves are the proof.

Perfection required two things, and the record shows neither. First, negotiation of the note under UCC Article 3 — endorsement and delivery — which the WaMu prospectus disclosed would never occur and the DeMartini testimony confirmed never occurred. Second, attachment and perfection under UCC Article 9, which binds the mortgage to the note: attachment of a security interest in the note is simultaneously attachment in the mortgage (UCC § 9-203(g)), and a buyer's interest in a sold promissory note is automatically perfected (UCC § 9-309(4)) — provisions that presuppose an existing note. With the instrument destroyed and never negotiated, there was nothing to which the mortgage could attach and nothing that could be perfected. The recorded assignments — executed years after closing, by robo-signers, in the name of a nominee that admits it transfers nothing — are not evidence of perfection. They are the public record of its absence: false recordings that cloud title and supply the very grounds for the quiet title remedy this addendum prescribes. MERS's own auditor reached the same conclusion operationally: the 2024 MERS QA Findings Report (MetaSource) documented widespread member failure to reconcile MERS System data with the public land records — meaning the two record systems on which enforcement depends do not even agree with each other.

5. The two record systems contradict each other — and under the fork, both lose.

The securities records tell one story: the SEC filings say the trust owns the loans. The land records tell another: at most, a naked assignment of the lien, years after the trust's startup day, executed by a nominee that never held the note and admits it has no authority to transfer anything. Both stories cannot be true — and under Section II.A, both are fatal. If the securities records are true, the land-record assignments are nullities executed without authority. If the land records are the industry's proof of transfer, then the transfer was of the incident alone, a nullity under *Carpenter v. Longan* — and the certificates were sold against mortgages that never moved. The same documents offered to prove the chain prove its nonexistence. The federal government has examined both record systems and found both wanting: the IRS declined to dispute that the notes were never properly transferred (*Stone v. Commissioner*, No. 22-13217 (11th Cir. 2022)), and five banking regulators found MERS's data practices unsafe and unsound and ordered accuracy-and-reliability controls constructed from scratch (Consent Order, OCC No. AA-EC-11-20 (Apr. 13, 2011)). And because MERS was the custodian of the ownership record while knowing nothing, every downstream verification and affidavit drawn from that record fails for want of personal knowledge at the root. (See § II.C.6.)

IV. THE STRUCTURAL MISSING CREDITOR: FOUR CASES AND TWO DEPOSITIONS

The securitization structure does not merely obscure the creditor. It atomizes the creditor role into components distributed among multiple entities, none of which possesses the unified authority of a traditional lender.

A. Powell v. Ocwen Financial Corp. (2d Cir. 2026)

The Second Circuit held that residential mortgage-backed securities represent beneficial interests in the securitization trust, and that the underlying mortgage loans constitute the assets of that trust. The court recognized that certificate holders are beneficiaries of the trust arrangement, and that the trustee, acting through servicers, collects payments and routes them into trust distribution waterfalls. Structural implication: Once securitized, the mortgage loans are no longer in a bilateral lender-borrower relationship. They are held in a trust framework for the benefit of certificate holders. The loan relationship has been absorbed into a trust structure.

B. Cashmere Valley Bank v. Washington Department of Revenue (Wash. 2014)

The Washington Supreme Court held that investors in REMICs and CMOs merely receive defined income streams from pooled assets and do not possess legal recourse to the underlying trust assets in the event of default. The court described REMIC investors as far removed from the underlying mortgages and emphasized that the investments were not backed by any encumbrance in favor of the investors. Structural implication: Investors only receive trust-generated cash flows. They do not hold direct rights in the mortgage collateral. They cannot accept tender. They cannot enforce the note. They are not the creditor in any traditional sense.

C. Rajamin v. Deutsche Bank National Trust Co. (2d Cir. 2014)

The Second Circuit described the structure of mortgage securitization trusts and explained that trustees hold the mortgage loans in trust for the benefit of certificate holders pursuant to the governing pooling and servicing agreement. The court reinforced the trust-law distinction between the trustee, the trust corpus, and the beneficiaries. Structural implication: Trustees do not occupy the role of the original funding lender merely because they are identified as 'trustee.' Their role is derivative of the governing trust documents and exists in a fiduciary or representative capacity, not as the originating bilateral creditor.

D. Navarro Savings Association v. Lee (U.S. 1980)

The United States Supreme Court held that trustees may sue in their own names as real parties in interest only when they possess the traditional powers to hold, manage, and dispose of trust assets. Structural implication: If the trustee does not itself perform the ordinary substantive creditor functions, then merely naming the trustee does not eliminate the need to verify who can actually act with creditor authority.

E. John Richards (U.S. Bank) — Trustee Testimony

John G. Richards II, a U.S. Bank vice president within Global Corporate Trust Services, testified under oath as the person most knowledgeable for U.S. Bank in litigation involving an RMBS trust. His admissions:

1. U.S. Bank's role as trustee is established solely by the governing document.
2. The trustee's team is the primary point of contact for coordination with servicers — not for direct management of loans.
3. He would NOT describe the trustee as having a management or oversight role over the servicer.
4. He was not aware of any provision in the governing documents requiring the trustee to oversee the servicer.

Structural implication: The trustee is a document-defined fiduciary actor in a trust structure, not the kind of unified creditor that independently manages the debt relationship, the collateral relationship, and the servicing relationship.

F. A.J. Loll (Nationstar / Mr. Cooper) — Servicer Testimony

A.J. Loll, vice president of litigation support for Nationstar / Mr. Cooper, testified under oath in a Tennessee deposition. His admissions:

1. "The owner of the trust is the certificate holders."
2. "The borrower does not have a contract with U.S. Bank."
3. "Nationstar bills the borrower in its own servicing name."
4. "Nationstar had constructive and active possession of the note through unfettered access to the custodian."
5. "Nationstar would release the deed of trust."
6. "The trustee does not do modifications, does not do foreclosures, does not collect payments, does not manage escrow."
7. "The trustee does not consider itself the owner in its individual capacity."
8. "The trust — not the trustee in its individual capacity — was the owner of the mortgage and note."

On cross-examination, Loll completed the confession: "owner" is an industry fiction, not a legal status.

Pressed on who owns the note, Loll abandoned the word "owner" as a legal concept altogether:

> **Q:** Would US Bank be the owner of the debt?
> **A:** That is a legal interpretation. I am not going to give a legal interpretation. ... Industry would consider US Bank as the owner of the note, **as an industry term, but not as a legal term**.
> **A:** And in a mortgage-backed security, the trustee, their role is **to act as the owner** and represent

> investors of that trust. So, **in industry terms, the investor is the owner, but not from a legal perspective**.
> **A:** But they just **act as the owner** of this loan; but they don't handle the servicing of it … The trust has no authority there. … I said **the trustee doesn't consider itself the owner**. They give oversight in their capacity.

(Loll Dep., Nov. 20, 2018.)

Three admissions collapse the enforcement premise:

First, "owner" is not a legal status; it is an industry convention. "Industry would consider US Bank as the owner of the note, as an industry term, but not as a legal term." The industry decided — by usage, not by law — who would be called "owner." Courts enforce law, not usage. A party that is owner only "as an industry term" has no title a court can recognize.

Second, the trustee performs ownership; it does not hold it. The role is "to act as the owner." Acting is not being. U.S. Bank "doesn't consider itself the owner"; it "monitors performance" and forwards borrower correspondence to the servicer. And "the trust has no authority there." The entity named in every foreclosure caption is, by the industry's own litigation officer, playing a part.

Third, the investors are owners only "in industry terms … not from a legal perspective." Which is exactly what Sections III and IV establish doctrinally: certificateholders hold securities — Article 8 entitlements — not notes, and they cannot enforce the borrower's obligation.

Now assemble the chairs. The trustee "acts as" the owner but disclaims being it. The trust "has no authority." The investors are not owners "from a legal perspective." The servicer performs every operational function but is merely an agent. MERS is a nominee that transfers nothing. Every chair at the table is empty. The "owner of the loan" is a character in a play the industry wrote — and under the note's closed-class definition of enforceability (Section II), no such character exists.

Structural implication: The servicer performs the operational functions; the trust is described as owning the loan; the trustee disclaims individual ownership; and the borrower's payment relationship is routed through an intermediary that claims operational control without beneficial ownership. The servicer masquerades as the creditor while admitting it is merely an agent. The trustee "acts as" the owner while disclaiming legal ownership — and "owner" itself survives only as an industry term with no legal content.

G. The Combined Structural Void

The case law and testimony establish a coherent model:

```
Borrower → Originating Lender → Depositor/Sponsor → RMBS/REMIC Trust
                      ↓
           Trustee (fiduciary title only)
                      ↓
           Servicer (operational agent only)
                      ↓
        Certificate Holders (payment streams only)
```

Within this framework:

- The borrower pays the servicer.
- The servicer remits amounts through the trust structure.
- The trustee functions according to the governing documents.

- The certificate holders receive benefits from trust distributions.

The traditional unitary 'creditor' has been replaced by a distributed architecture. No single participant simultaneously occupies the full role of lender, owner, collector, verifier, and releasor. Creditor authority cannot be assumed and must be verified — and verification fails because the structure prevents it.

V. THE REMIC TAX LOCK-UP: STRUCTURAL BARRIERS TO REACQUISITION

The Real Estate Mortgage Investment Conduit (REMIC) provisions of the Internal Revenue Code create tax disabilities so severe that they functionally sterilize the note, preventing any lawful pathway to reacquisition or restoration.

A. IRC § 860G(a)(3): The Qualified Mortgage Requirement

A 'qualified mortgage' must generally be transferred to the REMIC on the startup day in exchange for regular or residual interests. Limited exception: purchased within 3 months of startup day under a fixed-price contract in effect on startup day. Consequence: Any mortgage entering the REMIC after the startup day (outside the narrow 3-month window) is not a qualified mortgage. If non-qualified mortgages exceed the 1% de minimis safe harbor, the REMIC fails to qualify entirely.

A unanimous Congressional Oversight Panel stated the same bar in the same terms: "with few exceptions, a REMIC may not receive new assets after 90 days following its creation. Thus, **if a transfer of a loan was not done correctly in the first place, proper transfer now could endanger the REMIC status of the trust**." (COP Report at 12 n.37.) And under the New York trust law that governs most PSAs, "the property must actually be delivered"; a conveyance out of time or in contravention of the trust's terms "would be void." (*Id.* at 22–23 n.83, citing N.Y. EPTL § 7-2.4.)

B. IRC § 860G(d)(1): The 100% Tax on Post-Startup Contributions

Any amount contributed to a REMIC after the startup day is taxed at 100%, with razor-thin exceptions (cleanup call, qualified liquidation, guarantee payments, 3-month period contributions, qualified reserve fund). Consequence: If a prior creditor or originator were to 'reacquire' a note from a REMIC and later attempt to transfer it back, that re-contribution triggers a 100% tax. The REMIC cannot lawfully reacquire the note without catastrophic tax consequences.

C. IRC § 860F(a)(2): The Prohibited Transaction Tax

The disposition of any qualified mortgage is a prohibited transaction (subject to 100% tax) unless the disposition is pursuant to: (i) substitution of a qualified replacement mortgage; (ii) disposition incident to foreclosure, default, or imminent default; (iii) bankruptcy or insolvency of the REMIC; or (iv) qualified liquidation. Consequence: If the originator repurchases the loan from the REMIC (e.g., due to a breach of representations and warranties), that repurchase is a disposition of a qualified mortgage — taxed at 100% unless an exception applies. The only lawful pathway for a mortgage to exit and re-enter a REMIC post-startup is the 'qualified replacement mortgage' mechanism for defective obligations within 2 years of startup. For notes securitized years ago, this window has long closed.

D. Treas. Reg. § 1.860G-2(b)(1): Significant Modification = Deemed Exchange

If an obligation held by a REMIC is 'significantly modified,' the modified obligation is treated as one that was newly issued in exchange for the unmodified obligation. If this occurs after startup day and the modified obligation is not a qualified replacement mortgage, it is no longer a qualified mortgage — and the deemed disposition is a prohibited transaction. Consequence: The REMIC cannot materially modify the note's terms post-startup without triggering 100% tax and loss of REMIC status.

E. The Legislative Intent: Static Pool, No Power to Vary

The legislative history of the REMIC provisions (S. Rep. No. 99-313, 99th Cong., 2d Sess. 791-92) states that Congress intended REMICs to hold: "a substantially fixed pool of real estate mortgages and related assets" with "no powers to vary the composition of its mortgage assets." Consequence: The REMIC was designed to be passive and static. It was not designed to manage, modify, or reacquire loans. The tax code penalizes any attempt to do so. The note, once securitized, is frozen in place — unmodifiable, unreacquirable, and ultimately unenforceable by any party within the lawful securitization framework.

VI. THE ACCRUAL MANDATE: THE HALF-LEDGER IS NOT PERMITTED

Every financial institution in the United States is required by federal law to keep its books on the accrual basis. The securitization structure makes compliance with this mandate impossible for any party asserting enforcement rights.

A. The Statutory Mandate

1. Tax Reform Act of 1986, 100 Stat. 2085, codified at 26 U.S.C. § 448: Requires accrual basis method for C corporations, partnerships with C corporation partners, and tax shelters above the threshold.
2. Federal Deposit Insurance Act, 64 Stat. 873, codified at 12 U.S.C. § 1817(a)(3): Requires accrual reporting on the FFIEC Call Report by every insured depository institution.
3. Federal Reserve Act, 38 Stat. 251, § 16: Establishes the at-par doctrine and the securities classification of promissory notes endorsed and offered as eligible paper, confirmed by Reves v. Ernst & Young, 494 U.S. 56 (1990), under the family resemblance test.
4. Financial Accounting Standards Board, Accounting Standards Codification: Codifies the accrual basis as the foundation of GAAP for every financial institution and every public company in the United States.

B. The Double-Entry Requirement

Under double-entry accrual, every asset must be balanced by a corresponding liability, equity, or income entry recorded at the same instant. There is no other lawful way for a financial institution to keep its books. The accrual method does not permit half a ledger.

C. The Securitization Half-Ledger

When the originator securitized the loan under ASC 860:

```
Asset side:        Loan receivable REMOVED
Offsetting entry:  Gain on sale / cash / securities RECEIVED
Subsequent periods: NO accrual of interest income — the asset is gone
```

The originator cannot now claim the debt is still owed without showing:

- When it was reacquired

- What was paid for it
- Where the reacquisition accrual appears on the books
- What offsetting entries were made

If none of these exist, the claim is a half-ledger — and the half-ledger is not permitted. The servicer, likewise, cannot claim the debt without producing its own accrual books showing the loan as a current asset with corresponding liability entries. The REMIC cannot produce accrual books for the loan because it accrues income on regular and residual interests, not on underlying mortgage loans. The trustee accrues nothing — it is a passive fiduciary. No party in the chain can produce the full accrual ledger required by federal law. The absence of the books is the absence of the claim.

D. The Grocery Store Analogy

The grocery store does not get to claim the customer owes for the groceries without ringing them up at the register. The credit card issuer does not get to claim the cardholder owes for the swipe without the statement entry that shows the accrual. The bank does not get to claim any obligation owed without the accrual entries that show, on its own books, that the obligation was recorded at the moment it arose, that the offsetting entries were made at the same instant, and that every period of accrual since has been booked correctly. The servicer who shows up in court with a copy of a note, a lost note affidavit, an assignment fabricated post-default, and no accrual ledger is the grocery store claiming you owe for groceries without a receipt, without a register tape, and without inventory records — while admitting they threw away the original receipt and sold the inventory to someone else.

VII. THE 1099-C VOID: TAX FRAUD AS EVIDENCE OF DISCHARGE

When the industry derecognized the debt, destroyed the note, and received payment through securitization, it triggered multiple obligations under the Internal Revenue Code that it systematically failed to fulfill.

A. IRC § 6050P: The Cancellation of Debt Reporting Requirement

Any ‘applicable entity’ that cancels a debt of $600 or more must file Form 1099-C with the IRS and furnish a copy to the debtor. Triggering events include:

- Discharge in bankruptcy
- Cancellation or extinguishment making the debt unenforceable
- Expiration of statute of limitations
- Foreclosure or abandonment of secured property
- Debt relief under settlement agreement

B. The Industry’s Systematic Failure

For the vast majority of securitized loans that were derecognized, destroyed, and sold, no 1099-C was ever issued. This failure is not administrative negligence. It is intentional concealment of debt cancellation to maintain the illusion of a live obligation for future collection. The industry wanted:

- The tax benefit of derecognition (removing the liability from its books)
- Without the corresponding tax cost to the borrower (recognizing cancellation income)
- While maintaining the illusion of a live debt for litigation and collection

This is a classic ‘zombie debt’ scheme — and the missing 1099-C is the smoking gun.

C. The Borrower's Right to File

IRS Chief Counsel Memorandum 202137010 (Sept. 17, 2021) clarifies that a person who is not the legal creditor may nonetheless file Form 1099-C if they are in possession of sufficient information that a discharge of indebtedness has occurred. The IRS prioritizes the truth and completeness of the reported information, regardless of who files. 26 CFR § 1.6041-1(c) allows individuals not engaged in a trade or business to file 1099 information returns if the payment or transaction is otherwise reportable. The borrower who files a 1099-C creates an official, unrebutted tax record that the debt was discharged. If the purported creditor fails to rebut the filing, the administrative record stands. Continued collection after the unrebutted filing is not merely wrongful — it is retaliatory conduct against a whistleblower who exposed tax fraud.

D. The Bank of America Settlement Exception Proves the Rule

The Bank of America $16.65 billion settlement (August 2014) explicitly addressed 1099-C obligations for forgiven debt under Annex 3. The settlement required BofA to anticipate and pay tax liabilities arising from discharge of indebtedness income reported on IRS Form 1099-C. This proves:

1. The 1099-C requirement was known and operative.
2. BofA expected to file 1099-Cs for forgiven debt.
3. The government required tax relief payments precisely because 1099-C income is real and reportable. For the vast majority of securitized loans where no 1099-C was issued, the industry simply ignored the requirement — hiding the cancellation from both the IRS and the borrower.

VIII. THE CONSUMER PROTECTION STATUTES: ALL REQUIRE A CREDITOR

Every major federal consumer protection statute governing mortgage lending presupposes a bilateral creditor-debtor relationship with an identifiable, verifiable creditor. The securitization structure has eliminated that entity.

A. Truth in Lending Act (TILA) — 15 U.S.C. § 1635

TILA provides borrowers with the right to rescind certain mortgage transactions within three days of consummation — or within three years if material disclosures were not properly made. The statute provides rescission rights against 'the creditor.' In a securitized transaction, 'the creditor' is unidentifiable. The originator is gone. The REMIC trust is a passive vehicle. The trustee disclaims ownership. The servicer is an agent. The investor is remote. No party satisfies the statutory definition of 'creditor' against whom rescission can be exercised. Moreover, if the bank never actually funded the loan with its own money — but instead monetized the borrower's promissory note to create credit — then consummation may never have occurred. The borrower's signature created the very credit that was then claimed to be the 'loan.' Under Jesinoski v. Countrywide Home Loans, Inc., 574 U.S. 259 (2015), rescission is effective upon mailing, and no lawsuit is necessary to initiate the process.

B. Real Estate Settlement Procedures Act (RESPA) — 12 U.S.C. § 2605

RESPA requires servicers to respond to Qualified Written Requests (QWRs) and to identify the owner of the loan. The statute assumes that an owner exists and can be identified. In securitized transactions, the 'owner' is a distributed abstraction — certificate holders own beneficial interests, the trust owns legal title, the trustee holds fiduciary title, and the servicer administers without ownership. No single entity can answer the RESPA question: 'Who is the owner?' The structure itself prevents compliance.

C. Fair Debt Collection Practices Act (FDCPA) — 15 U.S.C. § 1692

The FDCPA requires debt collectors to validate their authority to collect and to disclose the identity of the creditor. It prohibits false representation of the character, amount, or legal status of any debt. When a servicer attempts foreclosure without providing § 1641(g) notice, without verifying authority, and while knowing the debt was derecognized and the note destroyed, it is engaging in deceptive collection practices. The 'creditor' it claims to represent does not exist in any verifiable form.

D. Fair Credit Reporting Act (FCRA) — 15 U.S.C. § 1681

The FCRA requires furnishers of credit information to be identifiable and accurate. When a servicer reports a borrower as delinquent to credit bureaus, it must do so as a 'furnisher' with a verifiable relationship to the debt. If the servicer does not own the debt, if the note was destroyed, if the debt was derecognized, then the servicer's credit reporting is not merely inaccurate — it is fraudulent. The furnisher is reporting on a debt it does not own, evidenced by an instrument that no longer exists, and maintained in a structure that prevents verification.

E. The Common Structural Failure

Every consumer protection statute requires:

- An identifiable creditor
- A verifiable debt
- A party with authority to enforce, modify, or release
- Accurate disclosure of ownership and transfer

The securitization structure provides:

- No identifiable creditor (distributed among trust, trustee, servicer, investor)
- No verifiable debt (original note destroyed, copies fabricated)
- No party with unified authority (fragmented among multiple entities)
- Concealed transfers (MERS, book-entry systems, no recorded assignments)

The statutes are not inapplicable. They are unenforceable by the industry because the industry eliminated the entity they require.

IX. THE INESCAPABLE CONCLUSION

The securitization industry designed a system in which:

1. The note's own language defines enforceability into a closed class with no remaining members.
2. The UCC requires physical possession of an instrument that was deliberately destroyed.
3. The REMIC structure prohibits reacquisition or modification under penalty of 100% tax.
4. The accrual mandate requires books that no party can produce because the debt was derecognized.
5. The 1099-C requirement exposes intentional concealment of discharge.
6. Every consumer protection statute requires a creditor who no longer exists.

7. The certificates are absolute evidence: either the loans were transferred to the trusts — emptying the named lender and requiring a chain the industry admits it never created — or the certificates were sold as backed by assets that were never transferred, which is securities fraud. There is no third possibility, and both are fatal.
8. The lien itself does not survive the sale and conversion: divested from the seller by statute (UCC § 9-318(a)), never acquired by the trust, held by no investor (UCC § 8-501) — the recorded instrument is a cloud, not a lien (§ II.G).

The Congressional Record Confirms the Structure.

These conclusions do not rest on the borrower's side of the aisle. In November 2010, the Congressional Oversight Panel — adopting its report by a unanimous 5–0 vote — examined the same structure and described it in the same terms:

- **The fork:** "If transfers were not done correctly in the first place and cannot be corrected … it would mean that the improperly transferred loans are not trust assets and **MBS are in fact not backed by some or all of the mortgages that are supposed to be backing them**." (COP Report at 21.)
- **The required chain:** transfer requires "an unbroken chain of title back to the loan's originator" and "physical possession of the original note"; without a complete chain of endorsements, "it is difficult, if not impossible, to establish that the loans were in fact transferred." (*Id.* at 11, 13.)
- **The enforcement rule:** "only the owner of the mortgage and the note has the right to foreclose." (*Id.* at 20.)
- **The REMIC bar:** "if a transfer of a loan was not done correctly in the first place, proper transfer now could endanger the REMIC status of the trust." (*Id.* at 12 n.37.)
- **The bifurcation consequence:** courts have determined "that the mortgages have been separated from the note and are no longer enforceable." (*Id.* at 16 n.54.)
- **The knowledge failure:** servicer employees "signed, and in some cases backdated, thousands of documents claiming personal knowledge of facts about mortgages that they did not actually know to be true." (*Id.* at 1.)
- **The scope concession:** the only foreclosures the Panel considered unlikely to be affected are those where "a single bank originated the mortgage, serviced it, **held it as a whole loan**, and processed the foreclosure documents themselves." (*Id.* at 28 n.108.) Read inversely: by a unanimous congressional panel's own framing, every securitized loan is suspect.

The Panel warned that Treasury's "no systemic threat" posture was "premature" and urged it to "develop contingency plans to prepare for the potential worst-case scenario." (*Id.* at 68–69.) The worst case the Panel described is the structure this addendum documents — and the industry's own admissions, before and since, have proven it true.

The Judiciary Knew Before the Crash.

Long before the Congressional Oversight Panel convened, the judicial system itself had admitted the structure's central facts — on the record, in a room full of officers of the court. On November 7, 2007, the Texas Task Force on Judicial Foreclosure Rules — a rules task force reporting to the Texas Supreme Court, whose liaison, Justice Phil Johnson, sat in the room alongside district judges, trustees, servicers' counsel, and foreclosure-industry stakeholders — met in Austin to rewrite the evidentiary rules governing foreclosure. The admissions came one after another. (Texas Task Force on Judicial Foreclosure Rules, Transcript (Nov. 7, 2007) — cited herein as "TX Tr. at ____.")

The chairman of one of Texas's largest foreclosure firms — explaining that servicers acquire their status "through the purchase of an MSR most of the time," servicing rights being a traded asset comprising "40 to 50 percent of any mortgage company's assets" — conceded that the foundational document of every foreclosure, proof of who owns and holds the note and of the servicer's authority to act for that owner, does not exist:

> "There really isn't such a document… finding a document that says, 'I am the owner and holder, and I hereby grant to the servicer the right to foreclose in my name' is **an impossibility in 90 percent of the cases**."

(TX Tr. at 27 (M. Barrett, Chairman, Barrett Burke Wilson Castle Daffin & Frappier).)

A sitting district judge then described, three years before "robo-signing" had a name, how the industry fills that void — fabrication:

> "They just execute a document like Mr. Barrett says doesn't exist. **They just create one** for the most part sometimes, and **the servicer signs it themselves** saying that it's been transferred to whatever entity they name as the applicant."

(TX Tr. at 28 (Hon. Bruce Priddy).) Judge Priddy added that the applications before him papered over the void with impossible knowledge: "Nearly all of the applications I see are on personal knowledge, and **you can tell that there's no way that one person can have personal knowledge of everything that's in there**." (TX Tr. at 29.) And the industry's own description of MERS anticipated the Congressional Panel's figures by three years: "In about **60 percent of all loans** MERS is going to be the mortgagee of record, but **all MERS is is a registration system. That's all it is**." (TX Tr. at 25–26 (Bastian).)

The bench knew the ownership documents did not exist. The bench watched the fabrication that replaced them. And the proposed fix was not to require the documents or to stop the fabrication. It was to amend the rule of procedure to confer by decree the standing the law would not: "I think we can avoid a lot of problems if we **specifically allow the servicer standing** under Rule 736," the proposing judge explained — conceding in the same breath that "we don't specifically allow the servicer to proceed" under the rule as written. (TX Tr. at 28 (Priddy).) Pause there. The rule did not authorize what the courts were already doing — and rather than stop the practice, the rule would be bent to it. A second participant carried the same fix to the pleading stage: "a statement that the person, the movant, is either the owner or is the servicer with the power from the owner" — and to "swear to that as part of the application process." (TX Tr. at 29 (Temple; Baggett).) When the owner cannot be found, rewrite the rule so the owner does not matter. Standing by rule amendment — not by right, not by document, but by procedural decree — is the admission that standing never existed.

Three features make these admissions devastating.

First, the date. November 2007 — before the crash, before the robo-signing scandal, before the FBA letter, the Panel's report, and the consent order. The unidentifiability of the creditor, the fabrication of transfer documents, and the pretense of personal knowledge were not crisis-era discoveries. They were known, expected conditions of the system from the start.

Second, the forum. This was not borrower advocacy. It was a court-convened body of the very professionals who operate the foreclosure machinery — a Supreme Court liaison, district judges, trustees, and the foreclosure industry's own counsel — describing their own docket, in their own words, for their own rules.

Third, the response: accommodation, not cessation. Faced with admissions that the creditor could not be identified and that documents were being fabricated to conceal it, the task force's direction was to rewrite the pleading rules to legitimate the practice — and courts continued to allow foreclosures to proceed on declarations from parties openly acknowledged not to be the real creditors.

The abandonment of evidentiary standards in favor of expediency was adopted as policy.

The record thus shows an unbroken chain of knowledge: the bench and bar admitted it in 2007 (Texas Task Force); the industry confessed it in 2009 (FBA Comments); Congress confirmed it unanimously in 2010 (COP Report); five federal regulators sanctioned it in 2011 (Consent Order). They knew — at every step, at every level, from the beginning — and the machinery ran anyway. And when the machinery runs despite that knowledge, the due-process failure documented in the Capstone below is not negligence. It is knowing participation.

These are not independent theories. They are interlocking components of a single structural failure — a failure engineered by the industry, admitted by the industry, and now enforced by the industry against borrowers who had no role in creating it. The debt is not merely unenforceable. It is unenforceable by design — the industry's own design. The note is not merely lost. It was killed by the hand that now asks the court to resurrect it. And the court, if it enforces this phantom obligation, is not upholding contract law. It is enforcing a fraud.

The Capstone: A Remedy Without a Creditor Is Not a Remedy — It Is a Taking.

Every foreclosure remedy written into the mortgage and the deed of trust is predicated on a relationship: a creditor holding an obligation, a debtor owing it, and a security instrument securing it. The power of sale is granted to "the beneficiary." The acceleration clause is exercisable by "the lender." The judicial action must be prosecuted by "the owner of the mortgage and the note." (COP Report at 20.) Every one of those formulations presupposes that someone, somewhere, is the creditor.

This addendum has demonstrated, from the industry's own documents, that in the MERS-securitization structure no one is. The named lender sold and derecognized — and by statute retains no legal or equitable interest (UCC § 9-318(a)). No successor ever formed: the notes were never endorsed or delivered (WaMu; *Kemp*), the instruments were deliberately destroyed (FBA), and the registry meant to track ownership is a nominee that transfers nothing (MERS Rules, Rule 2, § 8), whose data five federal regulators found unsafe and unsound (Consent Order), acting as the industry's "custodian and clearinghouse" of records it cannot verify. The trust never received the notes and appears nowhere in the land records. The servicer is "merely an agent." The certificateholders are owners "in industry terms … not from a legal perspective." The debtor/creditor relationship on which every foreclosure remedy is predicated has been structurally abolished — by design, for cost and speed.

The legal consequences are direct.

First, illegality. A foreclosure remedy exercised by a stranger to the debt is no remedy at all. Nonjudicial foreclosure statutes condition the trustee's power to sell on a declaration of default and a request by the beneficiary (e.g., RCW 61.24); judicial foreclosure requires a plaintiff entitled to enforce. Where the beneficiary class is empty and no entitled plaintiff exists, every statutory condition precedent fails — and a sale conducted without statutory authority is void, not merely irregular. The foreclosure is an illegal act: the seizure of property and equity by a party with no legal relationship to the debt, executed through documents — substitutions of trustee, notices of default, robo-signed affidavits, "lost note" counts known to be false (*Kemp*) — manufactured to simulate the missing relationship.

Second, unconstitutionality — properly framed. The objection is not that foreclosure itself offends due process. It is that the state's machinery of dispossession has been conscripted into the service of parties who are not creditors. In judicial-foreclosure states, the deprivation runs through the courts: a judgment entered for a party with no enforceable interest, procured by fabricated evidence, is a void judgment — and a void judgment is a legal nullity, attackable at any time, from which no right can spring. (*Kalb v. Feuerstein*, 308 U.S. 433 (1940).) In nonjudicial states, the deprivation culminates in state execution: the sheriff's sale and the sheriff-enforced eviction are state action, and when they execute a foreclosure no creditor lawfully authorized, the state itself deprives the owner of property without due process of law. The MERS-securitization structure did not merely break the chain of title. It converted the foreclosure remedy into an instrument by which non-creditors seize homes with the state's assistance — the precise harm the Fourteenth Amendment's guarantee that no State shall deprive any person of property without due process of law exists to prevent.

And the scale is not conjecture. MERS registered 66 million loans — 60 percent of U.S. mortgages. (COP Report at 15–16.) A unanimous Congressional Oversight Panel conceded that the only foreclosures clearly unaffected are whole-loan foreclosures by a single originating bank. (*Id.* at 28 n.108.) Every foreclosure conducted within the MERS-securitization structure — tens of millions of families — proceeded under a remedy whose legal predicate had been abolished. The structure did not occasionally produce wrongful foreclosures. Wrongful foreclosure is its only output.

The remedies prescribed in Section X follow directly: the lien is a cloud (quiet title); the "creditor" is a fiction (TILA, RESPA, FDCPA, FCRA); the judgment is void (Rule 60(b)); the sale is a nullity (wrongful foreclosure).

A. The Structural Incompatibility: Why MERS Can Never Be Reconciled With Mortgage Law

One question remains, and it is the question every reform proposal avoids: can traditional mortgage lending and securitization ever be legally compatible as long as MERS is involved? The answer, on the industry's own documents, is no — and the incompatibility is not one of degree. It is one of kind. The two systems impose opposite requirements on every element of the creditor relationship:

Traditional Mortgage Law Requires	The MERS-Securitization Structure Delivers
An identifiable creditor in a verifiable debtor/creditor relationship	A nominee shell that holds no debt, is owed nothing, and admits it cannot identify the creditor (MERS Rules, Rule 2, § 8)
An original, enforceable promissory note	An instrument destroyed at imaging "to avoid confusion," its absence rendered unchallengeable by design (FBA Comments at 4)
Recorded assignments memorializing each transfer of the security interest	No recorded assignments —a private registry substituted wholesale for the public land records
A beneficiary with a beneficial interest, capable of granting the trustee the power of sale	An empty beneficiary class: the named lender sold and derecognized; no successor ever formed (Sections II.A, II.F)

Each row is not a defect to be cured. It is the system working as intended. Five considerations foreclose any reconciliation.

First, MERS's only value proposition is the avoidance of legally required acts. MERS exists to do exactly one thing: eliminate the recording of assignments and the physical transfer of notes — the "concomitant costs of physical indexing, archiving and maintaining security." (FBA Comments at 4.) But those "inefficiencies" are legal requirements: the recording acts, UCC Article 3 negotiation, and the chain of title exist precisely to preserve an identifiable creditor. A reformed MERS — one that recorded every assignment and tracked every endorsement — would be indistinguishable from the traditional system it was built to replace, and therefore pointless. MERS cannot be repaired, because its function is the flaw.

Second, MERS institutionalizes bifurcation. Traditional mortgage law treats separation of the note from the mortgage as a temporary, accidental condition that equity immediately reunites: the mortgage is a "mere incident" of the debt, and its transfer apart from the debt "is a nullity." (*Carpenter v. Longan*, 83 U.S. (16 Wall.) 271, 274 (1872); Restatement (Third) of Property (Mortgages) § 5.4 (1997).) MERS makes bifurcation permanent and deliberate — the lien sits in a nominee's name forever, while the obligation it secures circulates, derecognized, through channels the nominee cannot see. The Congressional Oversight Panel recorded the consequence: courts have determined "that the mortgages have been separated from the note and are no longer enforceable." (COP Report at 16 n.54.)

Third, the nominee-beneficiary device is void from origination. As Section II.F establishes, MERS names itself "beneficiary" in the deed of trust though it is owed nothing, holds nothing, and serves as nominee for a closed class with no remaining members. Only the beneficiary can grant the trustee the power of sale; a power granted by an empty beneficiary is no power at all. No amendment to MERS's rules can cure this, because the defect is not in MERS's paperwork — it is in the origination architecture itself. The void was built in at the closing table.

Fourth, the substitute record is federally documented as unreliable. Traditional mortgage lending depends on the integrity of the public record. MERS replaced that record with a private database that five federal regulators found to be operated in an unsafe and unsound manner, ordering accuracy-and-reliability controls constructed from scratch. (Consent Order, OCC No. AA-EC-11-20 (Apr. 13, 2011).) A registry whose own operators could not keep its data reliable cannot serve as the foundation of any lawful recording regime — and every verification, affidavit, and assignment drawn from it inherits the rot at the root. (See § II.C.6–7.)

Fifth, derecognition closes the circle. Even a hypothetically perfect MERS — every assignment recorded, every note tracked — could not make the systems compatible, because the accounting architecture independently abolishes the creditor: the named lender derecognizes under ASC 860 and retains no legal or equitable interest (UCC § 9-318(a)); the REMIC forbids reacquisition under penalty of a 100% tax (IRC § 860G(d)(1)); the trust never takes delivery of the notes (WaMu; *Kemp*). Compatibility would require securitization without true-sale derecognition — which is to say, without securitization as the industry defines and monetizes it.

MERS is not a broken component that can be repaired. It is the load-bearing wall of the substitute structure. Remove it, and the industry's entire cost-and-speed rationale collapses; keep it, and the creditor relationship that every foreclosure remedy presupposes cannot exist. Traditional mortgage lending and MERS-mediated securitization are not two versions of one system. They are mutually exclusive legal architectures — one with a creditor, one without — and no drafting, no rule change, and no registry reform can reconcile them.

The administrative demand is the test. The inability to answer is the proof. The quiet title action is the remedy. The 1099 filing is the record. And the accrual books — which no party can produce — are the final, silent confession that the debt is dead.

X. CALL TO ACTION: FOR COURTS, LEGISLATORS, AND BORROWERS

A. For Courts

- Stop enforcing notes destroyed by the industry.
- Require production of full accrual ledgers before any enforcement action.
- Treat unrebutted 1099 filings as dispositive evidence of discharge.
- Apply spoliation adverse inference where original notes were intentionally destroyed.
- Dismiss foreclosure actions where no party can verify unified creditor authority.
- Recognize that the 'missing creditor' is not a slogan — it is a structural condition created by the securitization architecture.

B. For Legislators

- Amend REMIC rules to require direct borrower notification at securitization.
- Mandate 1099-C issuance at the moment of ASC 860 derecognition.
- Criminalize phantom debt collection by entities that cannot verify creditor authority.
- Require servicers to disclose their non-owner status in all collection communications.
- Create a private right of action for borrowers against entities that enforce derecognized debts.

C. For Borrowers

- File IRS Forms 1099-A, 1099-B, and 1099-C under the authority of Chief Counsel Memorandum 202137010 and 26 CFR § 1.6041-1(c).
- Serve administrative verification demands testing creditor authority.
- Challenge every foreclosure with the structural creditor-identification framework.
- Demand production of accrual books, original notes, and chain-of-title documentation.
- Assert TILA rescission where consummation is disputed.
- File FDCPA and FCRA claims against phantom creditors.

D. For Attorneys

- Use this addendum as the foundation for discovery, motions to dismiss, and quiet title actions.
- Frame the issue not as 'no debt' but as 'no verifiable creditor.'
- Use the FBA admission, ASC 860 derecognition, and REMIC tax lock-up as admissions against interest.
- Subpoena servicer and trustee witnesses to confirm the structural fragmentation of creditor authority.
- Move for sanctions where opposing counsel cannot produce original notes or accrual ledgers.

XI. CITATIONS INDEX

Case Law

- Powell v. Ocwen Financial Corp., No. 23-999 (2d Cir. Mar. 26, 2026)
- Cashmere Valley Bank v. Washington Department of Revenue, 181 Wn.2d 622, 334 P.3d 1100 (Wash. 2014)
- Rajamin v. Deutsche Bank National Trust Co., 757 F.3d 79 (2d Cir. 2014)
- Navarro Savings Association v. Lee, 446 U.S. 458 (1980)
- Yvanova v. New Century Mortgage Corp., 62 Cal. 4th 919 (Cal. 2016)

- State Street Bank and Trust Company v. Lord, 851 So. 2d 790 (Fla. 4th DCA 2003)
- Jesinoski v. Countrywide Home Loans, Inc., 574 U.S. 259 (2015)
- Reves v. Ernst & Young, 494 U.S. 56 (1990)
- First National Bank of Montgomery v. Jerome Daly, Scott County, Minnesota, Justice Court, December 9, 1968
- In re Kemp, 440 B.R. 624 (Bankr. D.N.J. 2010)
- Carpenter v. Longan, 83 U.S. (16 Wall.) 271 (1872)
- Stone v. Commissioner of Internal Revenue, No. 22-13217 (11th Cir. 2022), cert. pet. No. 23-903 (U.S.)
- Kalb v. Feuerstein, 308 U.S. 433 (1940) (judgment rendered without jurisdiction is void and may be attacked at any time)

Congressional Reports

- Congressional Oversight Panel, November Oversight Report: Examining the Consequences of Mortgage Irregularities for Financial Stability and Foreclosure Mitigation (Nov. 16, 2010) (adopted 5–0), available at https://cop.senate.gov/documents/cop-111610-report.pdf (archived Apr. 1, 2011, UNT CyberCemetery: https://cybercemetery.unt.edu/archive/cop/20110401210305/http://cop.senate.gov/documents/cop-111610-report.pdf) — cited herein as "COP Report at ____"

Federal Statutes

- 26 U.S.C. § 448 (Tax Reform Act of 1986 — accrual method mandate)
- 26 U.S.C. §§ 860A-860G (REMIC provisions)
- 26 U.S.C. § 6050P (Cancellation of debt reporting)
- 12 U.S.C. § 1817(a)(3) (Federal Deposit Insurance Act — accrual reporting)
- 12 U.S.C. § 5003(b) (Check 21 Act — substitute check legal equivalence)
- 15 U.S.C. §§ 77k, 77l(a)(2) (Securities Act of 1933 §§ 11, 12(a)(2))
- 15 U.S.C. § 78j(b) (Securities Exchange Act of 1934 § 10(b))
- 12 U.S.C. § 2605 (RESPA)
- 15 U.S.C. § 1635 (TILA rescission)
- 15 U.S.C. § 1692 (FDCPA)
- 15 U.S.C. § 1681 (FCRA)
- 15 U.S.C. § 1641(g) (TILA transfer disclosure)

State Statutes

- Fla. Stat. § 673.3091 (Florida enactment of UCC § 3-309 — enforcement of lost, destroyed, or stolen instrument; adequate protection)
- Fla. Stat. § 57.105 (sanctions for unsupported claims)
- Fla. Stat. § 702.10 (verification of mortgage foreclosure complaint under order-to-show-cause procedure — cited in the Comments at 7)
- RCW 61.24.030(7)(a), (8)(c), (8)(l) (Washington deed of trust foreclosure — requisites to trustee's sale: proof that the beneficiary is the holder of the note, the beneficiary's declaration of holder status under penalty of perjury, and a notice of default containing the beneficiary's declaration of default and the note holder's name and address)

Federal Regulations

- 26 CFR § 1.6041-1(c) (Non-business filers)
- Treas. Reg. § 1.860D-1 (REMIC qualification)

- Treas. Reg. § 1.860F-1 (Prohibited transactions)
- Treas. Reg. § 1.860G-2 (Qualified mortgages and modifications)
- Treas. Reg. § 1.6050P-1 (Cancellation of debt events)
- 17 C.F.R. § 240.10b-5 (Rule 10b-5)
- 17 C.F.R. § 229.1111 (Regulation AB — pool asset disclosure)

IRS Guidance

- IRS Chief Counsel Memorandum 202137010 (Sept. 17, 2021)

Industry Admissions

- Comments of the Florida Bankers Association, In re: Amendments to Rules of Civil Procedure and Forms for Use with Rules of Civil Procedure, No. SC09-1460 (Fla. filed Sept. 30, 2009) (Alejandro M. Sanchez, President & CEO; Virginia B. Townes, Akerman Senterfitt); certified copy retrieved from the State Archives of Florida, Series 49, Carton 5140 (certified May 9, 2019) — cited herein as "Comments at ____" (internal pagination; Bates {01456895;1})
- Florida Bankers Association White Paper (2009)
- Texas Task Force on Judicial Foreclosure Rules, Transcript (Nov. 7, 2007) at 25–29 (statements of M. Barrett, Hon. B. Priddy, T. Bastian, L. Temple, and T. Baggett) — cited herein as "TX Tr. at ____"
- MERS System Rules of Membership (MERSCORP Holdings, Inc., eff. June 30, 2025), Rule 1 § 1(b); Rule 2 §§ 4, 6, 8
- MetaSource, 2024 MERS QA Findings Report

SEC Filings

- WaMu Mortgage Pass-Through Certificates Series 2005-AR17, Prospectus Supplement (Form 424B5) (filed Dec. 19, 2005), at S-19–20 ("Possession by a Subsequent Purchaser or Creditor … Could Defeat the Interests of the Trust": notes unendorsed to the Trust; no assignments prepared; possession risk disclosure)

Transactional Documents

- Mortgage Loan Purchase and Sale Agreement, LSF9 MHI LLC (Purchaser) and Bank of America, N.A./Countrywide Home Loans, Inc. (Sellers) (Mar. 2015; Closing Date Mar. 27, 2015), §§ 2.02, 2.03 (Wells Fargo Bank, N.A., Custodian) — filed as Ex. to Claim 6-2 (Part 2), In re Lifschultz Estate Management LLC, No. 16-23144 (RDD) (Bankr. S.D.N.Y. May 11, 2017)

Sworn Testimony

- John G. Richards II (U.S. Bank, Global Corporate Trust Services)
- A.J. Loll (Nationstar Mortgage / Mr. Cooper, Vice President of Litigation Support)
- R.K. Arnold (MERSCORP, former CEO)
- Karyn Armstrong (Chase Executive Office affidavit, Oregon, 2013)
- Linda DeMartini (BAC Home Loans Servicing L.P., supervisor and operational team leader — trial testimony, In re Kemp, 440 B.R. 624 (Bankr. D.N.J. 2010))

Accounting Standards

- FASB ASC 860 (Transfers and Servicing of Financial Assets)
- GAAP Accrual Mandate (FASB Accounting Standards Codification)

Federal Reserve Publications

- Modern Money Mechanics (Federal Reserve Bank of Chicago)

Government Enforcement Actions

- In re MERSCORP, Inc. and Mortgage Electronic Registration Systems, Inc., Consent Order, OCC No. AA-EC-11-20; Bd. of Governors Docket Nos. 11-051-B-SC-1, -2; FDIC-11-194b; OTS No. 11-040; FHFA No. EAP-11-01 (Apr. 13, 2011)
- IRS Whistleblower Claims (Form 211) of Stone & Carroll (filed Mar. 18, 2011) and IRS LB&I evaluation memoranda (Aug. 28, 2012) — as documented in Stone v. Commissioner, No. 22-13217 (11th Cir. 2022)

Sworn Affidavits

- Walker F. Todd, former Legal Counsel and Assistant General Counsel, Federal Reserve Bank of New York; Research Officer, Federal Reserve Bank of Cleveland (Oakland County Circuit Court, Michigan, Case No. 03-047448-CZ, 2004)

Investigative Publications

- W. Paatalo, "Bombshell MERS Admission Collapses 15+ Years of Foreclosure Authority," BP Investigative Agency (July 22, 2025)

Sworn Declarations

- Declaration of William J. Paatalo, Baldwin v. Select Portfolio Servicing, Inc., No. 25-3283 (9th Cir. June 12, 2025) (WaMu 2005-AR17 chain-of-title forensic investigation)

Settlement Documents

- Bank of America $16.65 Billion Settlement Agreement (August 2014), Annex 3
- National Mortgage Settlement ($25 billion, February 2012)

Restatements and Treatises

- Restatement (Third) of Property (Mortgages) § 5.4 (1997) (transfer of the note carries the mortgage; transfer of the mortgage without the debt is ineffective)

Uniform Commercial Code

- UCC § 1-201(b)(21) (Definition of 'holder')
- UCC § 3-203 (Transfer of instrument)
- UCC § 3-301 (Person entitled to enforce)
- UCC § 3-302 (Holder in due course)
- UCC § 3-305 (Defenses — illegality rendering obligation a nullity; fraud in the execution)
- UCC § 3-309 (Enforcement of lost, stolen, or destroyed instrument)
- UCC § 3-415 (Obligation of endorser)
- UCC § 3-416 (Transfer warranties)
- UCC § 8-102(a)(14) (Securities intermediary)
- UCC § 8-501 (Security entitlement)
- UCC § 9-203(g) (attachment in note carries mortgage)
- UCC § 9-309(4) (automatic perfection on sale of promissory note)
- UCC § 9-109(a)(3) (sale of promissory notes within Article 9)
- UCC § 9-318(a) (seller of promissory note retains no legal or equitable interest)

Legislative History

- S. Rep. No. 99-313, 99th Cong., 2d Sess. 791-92 (1986) (REMIC legislative intent)

APPENDIX A: VERIFIED QUOTATION TABLE

Comments of the Florida Bankers Association, No. SC09-1460 (Fla. filed Sept. 30, 2009) — every quotation below verified word-for-word against the certified copy, State Archives of Florida, Series 49, Carton 5140.

1. "It is a reality of commerce that virtually all paper documents related to a note and mortgage are converted to electronic files almost immediately after the loan is closed. Individual loans, as electronic data, are compiled into portfolios which are transferred to the secondary market, frequently as mortgage-backed securities. The records of ownership and payment are maintained by a servicing agent in an electronic database."

(Comments at 3 — used in § II.B.1)

2. "The reason 'many firms file lost note counts as a standard alternative pleading in the complaint' is because the physical document was deliberately eliminated to avoid confusion immediately upon its conversion to an electronic file."

(Comments at 4 (citing State Street Bank and Trust Co. v. Lord*, 851 So. 2d 790 (Fla. 4th DCA 2003)) — used in § II.B.2; § III.E.6)*

3. "Electronic storage is almost universally acknowledged as safer, more efficient and less expensive than maintaining the originals in hard copy, which bears the concomitant costs of physical indexing, archiving and maintaining security. It is a standard in the industry and becoming the benchmark of modern efficiency across the spectrum of commerce—including the court system."

(Comments at 4 — used in § II.B.3)

4. "The information reviewed to verify the plaintiff's authority to commence the mortgage foreclosure action will be drawn from the same database that includes the electronic document and the record of the event of default. The verification, made 'to the best of [the signing record custodian's] knowledge and belief' will not resolve the need to establish the lost document."

(Comments at 4 — used in § II.B.4)

5. "Plaintiff's status as owner and holder of the note at the time of filing has become a significant issue in these case[s]… There have been situations where two different plaintiffs have filed suit on the same note at the same time."

(Comments at 3 (quoting the Task Force proposal) — used in § II.B.5)

6. "Verification of the foreclosure complaint will not relieve the plaintiff seeking to foreclose a residential mortgage of the burden of proving by competent and substantial evidence that it is the holder of the note secured by the mortgage and entitled to enforce the mortgagor's obligation."

(Comments at 8 — used in § II.D)

7. "Section 673.3091, Florida Statutes, establishes stringent proof standards when the original note is not available, and requires the court to protect the mortgagor against additional foreclosure actions."

(Comments at 2 — used in § II.D)

8. "The process for re-establishment of a lost or destroyed instrument by law imposes a strict burden of proof and instructs the court to protect the obligor from multiple suits on the same instrument."

(Comments at 4 — used in § III.E.1

9. Text of § 673.3091(1)(a)–(c), Fla. Stat. (entitlement at time of loss; loss not the result of transfer; inability to obtain possession)

(Comments at 5 — used in § III.E.1

10. "The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means."

(Comments at 5 (quoting § 673.3091(2, Fla. Stat. — used in § III.E.1, E.6

11. "This protection may be effectuated by any means satisfactory to the court. It commonly takes the form of a provision in the final judgment stating that to the extent any obligation of the note is later deemed not to have been extinguished by merger into the final judgment, the plaintiff has by law accepted assignment of those obligations. In other words, the plaintiff who enforces a lost or destroyed instrument assumes the risk that a third party in lawful possession of the original note or with a superior interest therein will assert that claim. The original obligor has no liability."

(Comments at 5–6 — used in § III.E.2–E.5

12. "The legislature amended Section 673.3091, Florida Statutes, in 2004 to address the issues raised by the State Street court in recognition of the commercial reality that almost all purchase money notes are electronically stored and assigned in electronic form."

(Comments at 5 n.1 — used in § III.E.3

13. "Any party seeking to foreclose a mortgage without a good faith belief—based on investigation reasonable under the circumstances—in the facts giving rise to the asserted claim may be sanctioned 'upon the court's initiative.' "

(Comments at 6 (quoting § 57.105(1, Fla. Stat. — used in § III.E.7

14. "The proposed rule does not effectuate its stated goal of deterring plaintiffs that are not entitled to enforce the underlying obligation from bringing foreclosure actions."

(Comments at 2 — used in background / framing

Provenance note: The certified copy was retrieved from the State Archives of Florida on May 9, 2019 (certification of Amy L. Johnson, Division Director, Division of Library and Information Services, Florida Department of State), and was submitted as Supplemental Exhibit 19 in *Erickson v. Deutsche Bank National Trust Co.*, No. 19-2-12664-7 KNT (Wash. Super. Ct. King Cnty.), supporting judicial notice under ER 201.

ABOUT THE AUTHOR

William J. Paatalo is a licensed private investigator in the State of Oregon (PSID #49411) with more than 16 years of experience in mortgage securitization research, forensic analysis, and litigation support. He has testified as an expert in state and federal courts and has assisted homeowners, attorneys, and legislators in understanding the structural defects in modern mortgage lending.

Contact: William Paatalo —
Private Investigator OR PSID# 49411
(406) 309-1812
bill.bpia@gmail.com
www.bpinvestigativeagency.com