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## Attachment Issues: Staple the Allonge to the Note or Else!

In attempting to fend off lenders' mortgage foreclosure actions, borrowers will often assert defenses challenging the lenders' right to foreclose. Two recent Connecticut Superior Court decisions provide cautionary tales on the basic tasks that must be performed when loans are assigned to ensure that the assignee will be able to foreclose. In these cases, the foreclosing plaintiffs were tripped up by something as simple as a staple attaching the allonge to the underlying note.

Because mortgage notes are usually negotiable instruments, they are often governed by Connecticut's adoption of Article 3 of the Uniform Commercial Code ("UCC"). To establish the right to foreclose a mortgage securing a note governed by Article 3, the plaintiff must prove that, among other things, it is the holder of the note or a nonholder with the rights of a holder. This requirement is often met by the plaintiff establishing it is the holder of the note by presenting the court with the note, and if the loan has been transferred to the plaintiff, evidence of the endorsement of the note under Article 3 of the UCC.

In two recent decisions, the Connecticut Superior Court held that the lender failed to show that it was the holder of the underlying mortgage note because the allonges by which the note was allegedly ultimately endorsed to the plaintiff was not attached to the note. In *LB-RPR REO Holdings, LLC v. Nimage Enterprises, LLC*, No. CV116003546S, 2015 WL 5975594 (Conn. Super. Ct. Sept. 14, 2015) ("*REO Holdings*"), the plaintiff alleged that it was the ultimate assignee of a \$1.7 million mortgage note under which the defendant borrower was in default. The plaintiff moved for summary judgment to foreclose the mortgage; that is, that there were no factual issues in dispute and the law requires that judgment enter allowing plaintiff to foreclose the mortgage. The borrower opposed summary judgment, arguing that the allonges were not attached to the note, and, therefore, the plaintiff was not the holder of the note since the note had not been properly endorsed to it. In response, the plaintiff argued that it is not necessary for the allonges to be attached to the note for it to be a holder.

The Court denied plaintiff's motion for summary judgment. To be a "holder" of a note under Article 3 of the UCC, a person must be in possession of the note that is either payable to the bearer or to that person.<sup>1</sup> Holder status of a note (that is not payable to the bearer) can be transferred to an assignee by a "negotiation," which requires that the note be endorsed to the assignee.<sup>2</sup> The Court in *REO Holdings* held that there were factual issues as to the endorsement of the note that precluded summary judgment. Section 3-204(a) of the UCC defines endorsement as follows:

"Endorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for

<sup>1</sup> Conn. Gen. Stat. § 42a-1-201(21).

<sup>2</sup> Conn. Gen. Stat. §§ 42a-3-201 and 42a-3-203(c).

the purpose of (i) negotiating the instrument . . . . For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.

Because § 3- 204(a) provides that the signature negotiating the note be made on the note itself or on “a paper to be affixed to the” note, the Court held that the allonges needed to be attached to the note for it to have been negotiated. Although the Court acknowledged no appellate authority on this issue in Connecticut, it observed that Connecticut appellate courts have defined “allonge” as “[a] piece of paper annexed to a negotiable instrument or promissory note, on which to write endorsements for which there is no room on the instrument itself. Such must be so firmly affixed thereto as to become a part thereof.”

The Court also distinguished *Kohler v. United States Bank National Ass’n*, No. 11–C–0893, 2013 U.S. Dist. LEXIS 87565 (E.D.Wis. June 21, 2013), which was relied on by the plaintiff, wherein the evidence showed that (i) the allonge was at some point affixed to the note because staple holes were apparent in both the note and the allonge, making it more likely that the note and allonge were once stapled together; and (ii) stickers bearing the loan number on each allonge matched loan number on the note evidencing that the allonges were intended to be affixed. By contrast, in the *REO Holdings* case, the only identifying information on the allonges was the parties’ names and the date the note was issued. There were no staple holes indicating that the allonges had ever been attached to the note and the allonges bore no stickers or identification numbers to evince an intent to affix the allonge to the note. Because there was an issue of material fact as to whether the allonges were “attached” to the note, the Court denied the plaintiff’s motion for summary judgment.<sup>3</sup>

A few months later in *RBS Citizens, N.A. v. Sabatelli*, No. CV14-6016519S, 2016 WL 1099090 (Conn. Super. Ct. Feb. 19, 2016), the Superior Court similarly denied a lender’s summary judgment motion in a foreclosure action for a number of reasons, including that there was no evidence that the allonge endorsing the note to the plaintiff had ever been attached to the underlying note.

The holdings in *REO Holdings* and *RBS Citizens* are examples of how the failure to properly document the assignment of a mortgage loan may make it more difficult, or possibly even imperil, the assignee’s ability to foreclose the mortgage securing the loan. To avoid such pitfalls, parties being assigned a note using an allonge should immediately attach the allonge to the note with a staple and include identifying information on the allonge, such as the loan number.

## Questions or Assistance:

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<sup>3</sup> If the foreclosing plaintiff is not a “holder” under Article 3 due to, among other things, a faulty endorsement, it can still foreclose under the so-called “shelter rule,” if it can show it was “transferred” the note under Article 3. Section 3-203(a) of the UCC requires that a transfer be established through proof that (1) the transferor intended to vest in the transferee the right to enforce the note, and (2) the transferor must deliver the note to the transferee so that the transferee has either actual or constructive possession. In *REO Holdings*, the Court concluded that the lack of evidence showing that the allonge had been attached to the note raised factual issues as to the intent of the transferor, and, thus, whether the shelter rule applied.

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