

Legal analysis to guide the mortgage industry and protect its interests.

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## Courts Rule that the Holder of a Note May Foreclose

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In rulings favorable for the mortgage industry, three courts recently found that the holder of a note can proceed with foreclosure. The article below examines cases in California, Connecticut and Ohio.

### ***Wood v. Aegis Wholesale Corporation* 2009 WL 1948844 (E.D. Cal. July 6, 2009).**

On March 12, 2007, Gregory Wood obtained a mortgage from Aegis Wholesale Corporation secured by a deed of trust which names MERS as the beneficiary and Aegis as the lender. The loan was later assigned to IndyMac Federal Bank, FSB. On or around November 17, 2008, Wood defaulted on the loan and MTC Financial Inc., dba Trustee Corps, filed a Notice of Default that initiated foreclosure proceedings. On February 20, 2009, IndyMac substituted MTC as trustee under the Deed of Trust and recorded the Substitution of Trustee.

Wood filed suit alleging, amongst other allegations, that the foreclosure sale was invalid since IndyMac and MTC filed the Substitution of Trustee three months after foreclosure proceedings began and because the defendants failed to provide the original note. California law does not require that the trustee file the Notice of Default; rather, *any* of the beneficiary's authorized agents may do so. In this matter, MTC was an authorized agent for the beneficiary under the deed of trust, IndyMac, and thus, "it is immaterial to the validity of the foreclosure process that MTC filed the Notice of Default before MTC was officially substituted as trustee." Accordingly, Wood failed to show any error with respect to the non-judicial foreclosure proceedings.

The court further held that the holder of a note was not required to have physical possession of the original note in order to conduct a non-judicial foreclosure sale. In reaching its conclusion, the court relied on case law that held that the holder of a note, which is a distinct concept from one who physically possesses a note, is the party entitled to enforce it.

### ***Bank of New York v. Gagnon*, 2009 WL 1607599 (Conn. Super. May 19, 2009).**

On August 19, 2004, Dorothy E. Gagnon executed and delivered a promissory note to Mortgage Lenders Network USA, Inc. which was secured by a mortgage to MERS as Nominee for Mortgage Lenders on that same date. On September 2, 2008, The Bank of New York Trust Company, N.A. as successor to JP Morgan Chase Bank, N.A. as Trustee, commenced foreclosure proceedings against Gagnon claiming that the mortgage had been assigned to it and that Gagnon had defaulted on the note.

Gagnon argues that the plaintiff has no standing to bring the foreclosure action because the plaintiff had not recorded the assignment of the mortgage. The plaintiff argues that it has standing to foreclose because it is the holder of the note secured by the mortgage. The Court analyzed this issue under General Statutes § 49-17 which provides:

*When any mortgage is foreclosed by the person entitled to receive the money secured thereby but to whom the legal title to the mortgaged premises has never been conveyed, the title to such premises shall . . . vest in him in the same manner and to the same extent as such title would have vested in the mortgagee if he had foreclosed, provided the person so foreclosing shall forthwith cause the decree of foreclosure to be recorded in the land records in the town in which the land lies.*

In support of its position, the plaintiff submitted the note which was endorsed to JP Morgan and an affidavit claiming the plaintiff had acquired all rights to the note. The court agreed with the plaintiffs in holding that it "has proven that it is entitled to enforce the note because as transferee of the corporate trust business of JP Morgan, it acquired the rights of a holder of the note."

### ***Liberty Savings Bank v. Redus*, 2009 WL 41857 (Ohio App. 8 Dist Jan. 8, 2009).**

In 1996, Liberty Savings Bank acquired the note and mortgage at issue from the FDIC. In May 2002, Liberty filed a foreclosure action against the defendant Garnette Redus. EMC Mortgage Corporation was substituted as plaintiff because Liberty sold the note and assigned the mortgage to EMC. Redus claimed that there was no proof that Liberty and EMC had any legal or equitable interest in the note and mortgage, and thus had no authority to commence foreclosure proceedings. Despite mortgagor's contention that the assignee was not the owner of the mortgage she executed, the court granted Liberty and EMC's motion for summary judgment holding that an assignee of a note and mortgage was entitled to foreclose on the note and mortgage where the evidence conclusively proved that the assignee was the current owner of the note.