SERVICING LITIGATION TRACK: The State of States

Tuesday, February 17, 2026

Moderator

Robert Maddox, CMB, AMP, Partner, Bradley

Speakers

Brian S. McGrath, Partner, Co-Chair of CFS, Hinshaw & Culbertson LLP

Michelle A. Mierzwa, Partner, Wright, Finlay & Zak, LLP

Adam Swanson, Partner, McCarter & English, LLP

Nanci Weissgold, Esq., MBA's 2025-2026 MORPAC Chair; Co-Chair, Financial Services Group, Partner, Alston & Bird, LLP

How do you effectively run a servicing operation when policy is dictated X and EOs?

California AB 130 Litigation: Resisting State Legislative Overreach and Threats to Constitutional Protections

Michelle A. Mierzwa
Partner
Wright, Finlay & Zak, LLP

Background on California Assembly Bill 130

Effective July 1, 2025, as urgency legislation, AB 130 included one section of 200-page budget trailer bill purportedly to limit enforcement of “zombie mortgages”

Codified as Civil Code 2924.13 with poorly-drafted, overbroad language

Scope of loans actually impacted?

- **Subordinate mortgages**, defined **at the time of Deed of Trust recording**
- Secured by **residential real property**, regardless of size/number of units
- **No limitation on loan type**; applies to consumer and business purpose
- **No limitation on date of loan origination**/recording
- **No limitation on lender/beneficiary type**; applies to security interests securing seller carryback loans, family and personal loans, litigation settlements, etc.

Background on California AB 130

Created new “unlawful practices”, including:

- The servicer (including all prior servicers) did not provide the borrower with any written communication for at least 3 years;
- The servicer failed to provide a servicing transfer notice that was required by law;
- The servicer failed to provide an ownership transfer notice that was required by law;
- The servicer conducted or threatened to conduct a foreclosure sale after providing a “form” to the borrower indicating that the debt had been written off or discharged, including, but not limited to, an IRS 1099;
- The servicer conducted or threatened to conduct a foreclosure sale after the applicable statute of limitations expired; and
- The servicer failed to provide a periodic statement that was required by law, investor, or guarantor requirements.

Background on California AB 130

Prohibits the servicer from “threatening” to non-judicially foreclose or conducting a non-judicial foreclosure sale before the servicer records a newly required Certification.

- Must be recorded “simultaneously” with the Notice of Default.
- Must be signed under penalty of perjury, attesting that either:
  - The servicer (defined to include prior servicers) did not engage in an unlawful practice described above; or
  - The servicer lists all instances when it committed an unlawful practice.
- Certification must be mailed to the borrower by certified mail with return receipt requested, at the time of recording the NOD, along with a notice indicating that - If the borrower believes the servicer (again, including the prior servicers) engaged in an unlawful practice or misrepresented its compliance history, the borrower may petition the court for relief before the foreclosure sale.

Background on California AB 130

If the servicer (including prior servicers) failed to record the Certification, engaged in an unlawful practice or misrepresented the compliance history, the Borrower can sue to enjoin the foreclosure sale, set aside the foreclosure sale, or obtain equitable relief regarding the loan terms:

- "**Upon a borrower's petition** to the court for relief before the foreclosure sale, **the court shall enjoin** a proposed foreclosure sale pursuant to a power of sale in a subordinate mortgage until a final determination on the petition has been made."

- "The court may provide equitable remedies that the court deems appropriate, depending on the extent and severity of the mortgage servicer's violations. The **equitable remedies may include**, but are not limited to, **striking all or a portion of the arrears claim, barring foreclosure, or permitting foreclosure subject to future compliance and corrected arrearage claim**."

- "A borrower may also petition the court to set a **nonjudicial foreclosure sale aside** when a **certification required by subdivision (c) was never recorded** or when a certification recorded pursuant to subdivision (c) indicates that the mortgage servicer engaged in an unlawful practice described in subdivision (b) or misrepresented its compliance history."

Background on California AB 130

In direct conflict with the foregoing provisions, the statute also provides:

- "Any failure to comply with the provisions of this section **shall not affect the validity of a trustee's sale** OR **a sale in favor of a bona fide purchaser.**" [Emphasis added.]

To cover all potential options for enforcement of a security interest, the statute also provides:

- "It shall be an **affirmative defense** in a judicial foreclosure proceeding if the court finds the mortgage servicer engaged in **any of the unlawful practices** specified in subdivision (b)**..**" [Emphasis added.]

Recent Trial Court Decisions on California AB 130

- ***Cline v. Real Time Resolutions*** (Sept. 12, 2025) 2025 WL 2635687. Eastern District court **denied a preliminary injunction request** where the Notice of Default was recorded before the effective date of AB 130.
- ***Martinez v Specialized Loan Servicing*** (Oct. 30, 2025) 2025 WL 3030982 Eastern District case dismissed a third amended complaint that added AB 130-related claims to an existing lawsuit, **citing lack of retroactive effect of Civil Code section 2924.13**, where Notice of Default and all alleged "unlawful practices" occurred before effective date of statute.
- ***Montoya v. FCI Lender Servs***. (Sept. 22, 2025) 2025 U.S. Dist. LEXIS 187209. Central District court ruled on lender's Motion to Dismiss borrower's First Amended Complaint, dismissing three causes of action for fraud, violation of TILA (servicing transfer notice) and Violation of RESPA (periodic statements) because the claims were barred by applicable statutes of limitation. However, the fourth cause of action for violation of Business & Professions Code 17200, et seq. (unfair business practices) was not time barred under the longer 4-year SOL, **allowing the borrower to allege time-barred violations of RESPA & TILA as predicate unfair business practices under B & P Code 17200. The court cited AB 130's Civil Code section 2924.13** in footnote 9 and indicated: "Although that law did not become effective until June 30, 2025, it at least provides some further support that the alleged conduct violates public policy in California concerning fair loan servicing practices." Montoya at *22.
- ***Warren v. Specialized Loan Servicing*** (Jan 6, 2026) 2026 WL 92303 Central District court granted MSJ in favor of lender, holding for **UCL claims the borrower still has to show evidence of intended statutory retroactivity and/or has to show wrongful conduct occurring after the enactment of 2924.13**.

Industry-sponsored Lawsuit Against the State of CA

Wright Finlay & Zak LLP in partnership with the Buchalter firm filed suit on behalf of various industry representatives and lenders including California Mortgage Association, United Trustees Association and the Credit Union League to have Section 2924.13 deemed unconstitutional.

- Complaint filed September 2025, amended complaint filed November 2025
- U.S. District Court, Eastern District Case No. 2:25-cv-02614-DAD-CKD
- Motion for preliminary injunction prohibiting the enforcement of the new law filed 12/15/25, set for hearing February 19, 2025. 18 Declarations from industry stakeholders filed in support of motion.

Industry-sponsored Lawsuit Against the State of CA

Causes of action include:

(1) VIOLATION OF THE CONTRACT CLAUSE UNDER 42 U.S.C. § 1983;

(2) VIOLATION OF DUE PROCESS UNDER 42 U.S.C. § 1983;

(3) VIOLATION OF EQUAL PROTECTION UNDER 42 U.S.C. § 1983;

(4) VIOLATION OF THE SUPREMACY CLAUSE UNDER 42 U.S.C. § 1983;

(5) INJUNCTIVE RELIEF;

(6) DECLARATORY RELIEF AND OTHER EQUITABLE RELIEF;

(7) ATTORNEYS' FEES AND COSTS UNDER 42 U.S.C. § 1988 AND ALL OTHER APPLICABLE STATUTES

Industry-sponsored Lawsuit Against the State of CA

Summary of Arguments:

- Civil Code section 2924.13 does not merely create procedural changes for "zombie mortgages" but constitutes retroactive and substantial impairment of vested property rights/remedies of all subordinate lenders and destruction of the lender's bargained-for security interest, violating the Contract Clause.
- Section 2924.13 violates the Due Process Clause by creating retroactive unlawful practices that unreasonably preclude lenders from exercising their lien rights, judicially or nonjudicially
- Section 2924.13 Violates the Equal Protection Clause by imposing burdens and foreclosure restrictions that do not apply to otherwise identical residential loans and is irrationally drawn to burden/eliminate the subordinate loan market while creating windfalls for borrowers with junior debt.
- Section 2924.13 is preempted by federal law as it intrudes into areas of law (mortgage servicing and national banks) with a history of significant federal presence and conflicts with federal law because it places state-law conditions on the exercise of rights that federal law protects, thereby obstructing the enforcement of subordinate mortgage liens.

New York's Foreclosure Abuse Prevention Act: The Final Act? (Hopefully, No Encore)

Brian S. McGrath
Partner, Co-Chair of CFS
Hinshaw & Culbertson LLP

Background on FAPA

FAPA Enactment and Purpose:

- Enacted December 30, 2022 (L 2022, ch 821).
- Designed to overrule Court of Appeals decision in Freedom Mtge. Corp. v. Engel, 85 Misc. 3d 939.

Key Statutory Amendments:

- CPLR 203, 205, 213, 3217; RPAPL § 130; GOL § 17-105.

Retroactive Application:

- Applies to all actions where final judgment of foreclosure has not been enforced.
- Courts consistently finding retroactive effect intended by Legislature.

Background on FAPA

Statute of Limitations Framework:

- Six-year limitation period for mortgage foreclosure actions under CPLR 213(4).
- Limitations period begins when mortgage debt is accelerated.
- Acceleration occurs upon commencement of foreclosure action seeking entire sum due.

Voluntary Discontinuance Impact:

- FAPA amended CPLR 3217 to add subsection (e).
- Voluntary discontinuance cannot "waive, postpone, cancel, toll, extend, revive or reset" limitations period.
- Applies whether discontinuance by motion, order, stipulation, or notice.

Background on FAPA

Years of Litigation ensued over whether the retroactive application of FAPA was constitutional

Reminder of Brian's Prediction…

New York Court of Appeals Mostly Settles FAPA

- In *Article 13 LLC v. Ponce De Leon Federal Bank* and *Van Dyke v. U.S. Bank*, the Court **rejected** the constitutional challenges and held that FAPA's key provisions apply to any case where a foreclosure sale has not been held.

- **Bottom line**, when faced with the densest parts of FAPA, the Court of Appeals entered a decision that was **even worse** than the intermediate appellate decisions that had come through to date.

New York Court of Appeals Mostly Settles FAPA

The Certified Question from the Article 13 Case

1. Whether or to what extent does Section 7 of the Foreclosure Abuse Prevention Act, codified at CPLR § 213(4)(b), apply to foreclosure actions commenced before the statute's enactment?
2. Whether FAPA's retroactive application violates the right to substantive and procedural due process under the New York Constitution, N.Y. Const., art. I, § 6?

The Court's Holdings

- **Retroactivity and Scope**. FAPA applies to all matters where a foreclosure was started but no final foreclosure sale had been enforced prior to its effective date.
- **Estoppel.** A lender is estopped from claiming a prior acceleration was invalid unless the prior case was expressly dismissed on that ground based on a timely defense. Denials of summary judgment and so-ordered discontinuances—even if they mention standing—do not count. The Court's view is that standing defects could have been fixed and a new case filed within six years.
- **Voluntary Discontinuances.** A voluntary discontinuance will not restart, toll, or extend the statute of limitations.

New York Court of Appeals Mostly Settles FAPA

Constitutional Issues

- **Substantive Due Process**. The Court treated FAPA as "clarifying" rules rather than shortening the six-year statute. The Court said FAPA does not shorten the six-year period; it simply defines when the clock starts and stops. It found that FAPA had a rational basis in curbing "serial filings" and there is no "vested right" in pre-FAPA strategies.
- **Procedural Due Process**. No grace period is required because the six-year limitations period itself was not shortened.
- **Contract Clause.** The Court held that FAPA serves a legitimate public purpose. Even if FAPA impairs the contractual relationship between the borrower and the lender, the Court believes it did so via a reasonable means in a heavily regulated field, warranting deference to the Legislature.
- **Reliance on *Engel*.** The Court treated *Engel* as a rule the Legislature was free to change. The Court stated that there was no long-standing line rule that a voluntary discontinuance reset the SOL, so the lenders' reliance arguments did not carry weight against FAPA's text and purpose.

New York Court of Appeals Mostly Settles FAPA

Practical Consequences

These rulings tighten the limitations rules in New York and raise the risk that older loans are time-barred:

- **Standing Arguments are Limited.** We cannot argue the prior acceleration was invalid for lack of standing unless the earlier case was expressly dismissed on that basis and the defense was timely raised. Stipulations, summary judgment denials, and ambiguous orders do not qualify.
- **Modifications and Reinstatement Still Reset the SOL.** These cases do not change the rule that a reinstatement or a modification combined with a payment resets the statute of limitations.
- **When a Judgment is "Enforced" is Unclear.** Under FAPA, the statute applies to all actions "in which a final judgment of foreclosure and sale has not been enforced." However, the Court states that FAPA applies to "all foreclosure actions as to which a ***final foreclosure sale*** had not been enforced prior to its effective date..." (emphasis added). This difference in language raises new questions as to when a judgment is deemed "enforced" under FAPA.

New York Court of Appeals Mostly Settles FAPA

Conclusion

- While the Court of Appeals ruling is disappointing for the mortgage lending and servicing industry, it brings final resolution to the outstanding questions regarding retroactive application of FAPA under New York law and New York's Constitution.

- Procedurally, the *Van Dyke* case is concluded, but the *Article 13* case went back to the Second Circuit Court of Appeals. The Second Circuit *could* still—but likely will not—find that retroactive application of FAPA violates the United States Constitution. As in the state court, the primary argument to be considered is whether retroactive application of FAPA violates the Due Process Clause, Contracts Clause, and/or Takings Clause of the federal constitution.
  - This argument would highlight the fact that the New York Court of Appeals was only tasked with interpreting these issues under the New York Constitution, while the federal courts retain the authority to interpret these issues under the United States Constitution.
  - **However, as most of the rights granted by both constitutions are substantially similar and case law interpreting both constitutions were also considered, there is a low likelihood that the federal courts will enter a contradictory decision.**

New York Court of Appeals Mostly Settles FAPA

Conclusion – Silver Lining Thoughts from Adam Swanson

- The Court left open the possibility of a different outcome in factually distinguishable cases involving FAPA Sections 4, 7, and 8, such as where the noteholder did not know about an earlier foreclosure, or where a discontinuance or de-acceleration was timely under "well-established" pre-FAPA law.
- Further, and critically, the Court's decisions do not address the constitutionality of the retroactive application of other FAPA provisions, including Section 6, which created the new foreclosure savings statute.

Speaking of Adam Swanson…

Hot Topics and Evolving Law: eNotes, standing (again) and reverse mortgages

Adam Swanson
Partner
McCarter & English, LLP

E SIGN Act and UETA

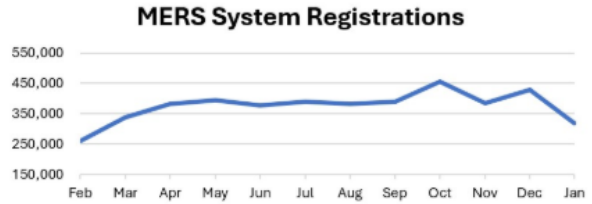
Increasing eNote originations and demand for eNotes

MERS® eNote Statistics

Year	Month	eNote Registrations	MERS System Registrations	% eNotes
2026	Jan	48,277	317,806	15.19%
2025	Dec	53,966	428,103	12.61%
2025	Nov	48,693	385,713	12.62%
2025	Oct	58,659	456,011	12.86%
2025	Sep	49,691	388,977	12.77%
2025	Aug	42,701	381,374	11.20%
2025	Jul	41,362	391,026	10.58%
2025	Jun	36,295	377,017	9.63%
2025	May	38,542	395,137	9.75%
2025	Apr	37,632	382,083	9.85%
2025	Mar	33,452	337,266	9.92%
2025	Feb	24,799	260,585	9.52%
2025	Jan	23,871	252,217	9.46%

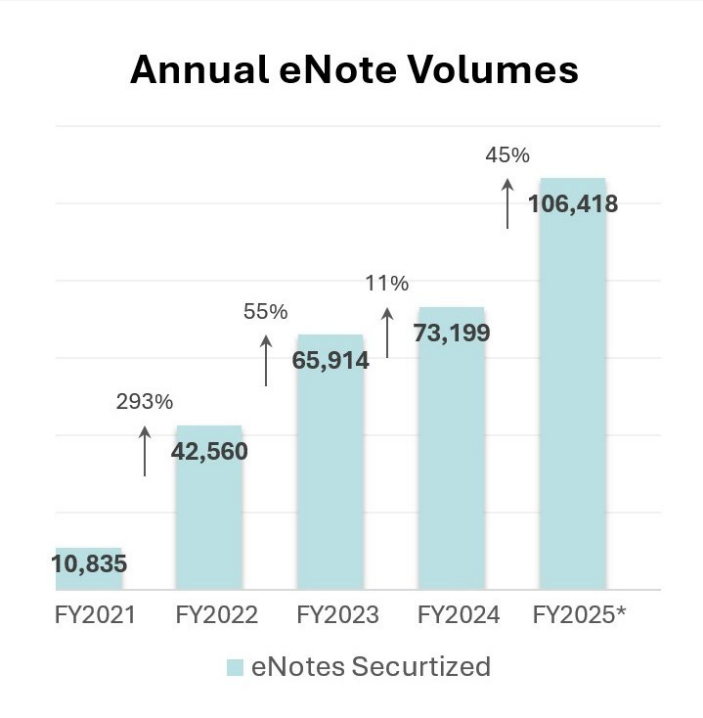
Data Source: MERS® Systems

- MERSCORP Holdings, Inc. (MERSCORP) will continue to disclose total eNote registration volume via the MERSCORP website (mersinc.org) and monthly eNote registration volume via MISMO eMortgage Community of Practice.
- Anyone seeking to re-distribute this content must contact the MHI Marketing Department (sales-mers-support@ice.com) for permission prior to circulation.



Increasing eNote originations and demand for eNotes

Ginnie Mae eNote Statistics



Data provided by MISMO: https://www.mismo.org/standards-resources/digital-mortgage-resource-center/digital-mortgage-education/emortgage-statistics (last visited 2/10/2026)

Increasing eNote originations and demand for eNotes

Fannie Mae Statistics:

- 12.2% total eNote volume: 22.4% refinance // 9.2% purchase
- 22% of lenders have adopted eNotes and 62% plan to use eNotes in 2 years
- As of April 1, 2025, there are 2,513,863 unique eNotes registered on the MERS® eRegistry
- Number one cited benefit of eNotes is: *•Improved operational efficiency [49%]*
- Number one cited business priority is: *•Business Process Streamlining [37%]*
- Number two cited business priority is: *•Cost cutting [29%]*

Do we see Alignment!

Fannie Mae Mortgage Lender Sentiment Survey (August 2025): https://www.fanniemae.com/media/56061/display (last visited 2/10/2026)

Two Primary Sources of Law

Electronic Signatures in Global and National Commerce Act ("ESIGN")

- Federal Statute providing that in "any transaction in or affecting interstate or foreign commerce" a "signature, contract, or other record" **may not be "denied legal effect, validity, or enforceability solely because"**
  - it is in "electronic form" (15 USC § 7001(a)(1)) or
  - "an electronic signature or electronic record was used in its formation" (15 USC § 7001(a)(2)).
- 15 USC § 7001, *et seq*.

Uniform Electronic Transactions Act ("UETA")

- A record, signature or contract may not be denied legal effect or enforceability solely because the record or signature is in electronic form or electronic record used in formation.
- If a law requires a record to be in writing, an electronic record satisfies the law.
- If a law requires a signature, an electronic signature satisfies the law
- Model act adopted on a state-by-state basis. All states but IL, **NY** and WA have adopted.
  - **CT:** Conn. Gen. Stat. § 1-266 , *et seq.*
  - **NJ:** N.J. Stat. § 12A:12-1, *et seq*
- **New York** has not adopted UETA but has a similar statute that suffices. It is the "Electronic Signatures and Records Act"
  - NY State Tech Law § 301, *et seq.*

Comparison of Terminology to Old Regime

Old Regime	New Regime
Original Note	Authoritative Copy
Negotiable Instrument	Transferable Record (eNote)
Possession	Control
Owner / Holder	Controller
Endorsement	Transfer of Control
Custodian	Location of Authoritative Copy
Chain of Indorsements	Audit trail from controller to controller

Key Definition of New Regime

Term	Definition
Authoritative Copy	A single, unique, identifiable and generally unalterable copy of the eNote. 15 U.S.C. § 7021(c)(1)
Consumer	"an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes, and also means the legal representative of such an individual." 15 U.S.C. § 7006(1)
Control	"A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred." 15 U.S.C.A. § 7021(b)
Electronic Record	"a contract or other record created, generated, sent, communicated, received, or stored by electronic means." 15 U.S.C. § 7006(4)
Electronic Signature	"an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record." 15 U.S.C. § 7006(5)
Authoritative Copy	A single, unique, identifiable and generally unalterable copy of the eNote. 15 U.S.C. § 7021(c)(1)
Consumer	"an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes, and also means the legal representative of such an individual." 15 U.S.C. § 7006(1)

Key Definition of New Regime

Term	Definition
Proof of Control	"If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record." 15 U.S.C. § 7021(f)
Record	"information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form." 15 U.S.C. § 7006(9)
Transaction	"an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons, including any of the following types of conduct-- (A) the sale, lease, exchange, licensing, or other disposition of (i) personal property, including goods and intangibles, (ii) services, and (iii) any combination thereof; and (B) the sale, lease, exchange, or other disposition of any interest in real property, or any combination thereof." 15 U.S.C. § 7006(13)

Key Definition of New Regime

Term	Definition
Transferrable Record	“an electronic record that-- (A) would be a note under Article 3 of the Uniform Commercial Code if the electronic record were in writing; (B) the issuer of the electronic record expressly has agreed is a transferable record; and (C) relates to a loan secured by real property. A transferable record may be executed using an electronic signature.” 15 U.S.C. § 7021(a)(1)

Proving Control

Proof of control

If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide **reasonable proof** that the person is in control of the transferable record. **Proof may include access to the authoritative copy** of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record.

15 U.S.C. § 7021 (f)

Reported Decisions

Concerning Electronic Signatures:

Barwick v. Gov't Emple. Ins. Co., 2011 Ark. 128 (Ark. 2011): "In our view, the meaning of [the UETA] could not be more straightforward when it states that '[i]f a law requires a record to be in writing, an electronic record satisfies the law.'"

Meyer v. Jacobsen, 2022 MT 93 (Mont. 2022): "[C]annot assume, therefore, that the Legislature intended a "signature" to encompass the definition of an "electronic signature" for purposes of ballot petitions." The case recognizes that the UETA states the legal consequences of an electric signature are determined by both the UETA *and other applicable law*.

De Moura Castro by Hilario v. Loanpal, LLC, 715 F. Supp. 3d 373 (D. Conn. 2024): "[E]lectronic signature attributed to a person … is determined from the context and surrounding circumstances at the time of its creation, execution or adoption, including the parties' agreement, if any." Highlights the importance of

Reported Decisions

Concerning a "Transferrable Record":

N.Y. Cmty. Bank v. McClendon, 138 A.D.3d 805 (2nd Dept. 2016), finding that: "[d]elivery, possession, and endorsement are not required to obtain or exercise any of the rights" of a holder of a "transferrable record". (quoting 15 U.S.C. § 7021(d)).

Rivera v. Wells Fargo Bank, N.A., 189 So. 3d 323 (Fla. Dist. Ct. App. 2016): Physical delivery, possession, and endorsement not necessary for enforcement. Business records showing transfer history plus access to authoritative copy of the note itself sufficient to establish assignee's standing.

Wells Fargo Bank, NA v Benitez, 2017 NY Slip Op 32747(U) (Whelan, J.S.C.): "These affidavits establish plaintiff's standing as the controller of the eNote, since Wells Fargo maintains the single authoritative copy of the eNote and is entitled to enforce same … The MERS eRegistry is explained and documents are attached showing the Transfer of control. The terms of the eNote further establish plaintiff's standing." *Id*.

Reported Decisions

NEGATIVE:

Good v. Wells Fargo Bank, N.A., 18 N.E.3d 618 (Ind. Ct. App. 2014): "Wells Fargo did not provide any evidence documenting the transfer or assignment of the Note[.] Thus, Wells Fargo did not demonstrate it controlled the Note by showing that a system employed for evidencing the transfer of interests in the Note reliably established that the Note had been transferred to Wells Fargo." This decision highlights the consequences of not appreciating the difference between possession and control.

- Cited to in *S. Nelson Enterprises, LLC v. Affordable Housing of Indy, LLC,* 272 N.E.3d 990 (2025)("without an assignment of the Note, [plaintiff] would not be able to enforce it through a foreclosure action on the Mortgage").

Standing (Again)

Negotiable Instruments

"Holder" status is controlled by the NY UCC § 1-201(20), "a person who is in possession of a document of title or an instrument or an investment certificated security drawn, issued or indorsed to him or to his order or to bearer or in blank."

"Indorsement" is controlled by NY UCC §§ 3-202 and 3-204.

Note the "i" spelling under the NY statute.

- NY UCC § 3-202: (1) Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary indorsement; if payable to bearer it is negotiated by delivery. (2) An indorsement must be written by or on behalf of the holder and on the instrument or on a paper **so firmly affixed thereto as to become a part thereof ...**
- NY UCC § 3-204: (1) A special indorsement specifies the person to whom or to whose order it makes the instrument payable. Any instrument specially indorsed becomes payable to the order of the special indorsee and may be further negotiated only by his indorsement. (2) An indorsement in blank specifies no particular indorsee and may consist of a mere signature. An instrument payable to order and indorsed in blank becomes **payable to bearer and may be negotiated by delivery alone** until specially indorsed.
- "Holder" has the right to enforce the instrument. NY UCC § 3-301.
- Holder is not necessarily the owner or assignee.

Negotiable Instruments

Under pre-code NY law, an assignment of an instrument can happen by giving physical possession of the instrument to another **with the intent to transfer without a written assignment or indorsement on the instrument**.

- "[T]he owner of negotiable paper, who obtains title without indorsement by the payee, holds it subject to all the equities and defenses which exist between the original parties. Where such an instrument is so transferred, it is treated as a chose in action assigned to the holder, and the assignee acquires all the title of the assignor and may maintain an action thereon in his own name."

- *Wagner v. Grimm*, 169 N.Y. 421, 428, 62 N.E. 569 (1902) (emphasis added).

- Difference: Breach of contract claim instead of claim on note.

Isn't standing settled now?

Aurora Loan Services v, Taylor, 25 N.Y.3d 357(N.Y. 2015).

"Contrary to the Taylors' assertions, to have standing, it is not necessary to have possession of the mortgage at the time the action is commenced. This conclusion follows from the fact that the note, and not the mortgage, is the dispositive instrument that conveys standing to foreclose under New York law. In the current case, the note was transferred to Aurora before the commencement of the foreclosure action-that is what matters."

No, sir! Affixing the Allonge has become the standing issue du jour.

Differing Authorities

First Department:

U.S. Bank v. Askew, 27 N.Y.S.3d 856 (1st Dept. 2016).

- "Here, plaintiff attempted to show assignment of the mortgage note through a series of allonges. However, the allonges do not all bear the same loan number as the original mortgage note. This creates a fact issue as to whether the allonges are proper.
- Nevertheless, plaintiff sufficiently demonstrated physical delivery of the note prior to commencement of the action. Therefore, plaintiff was entitled to summary judgment."

But See One Westbank FSB v. Rodriguez, 161 A.D.3d 715 (1st Dept. 2018), citing *Roumiantseva* (below) and holding:

- The indorsement which plaintiff purports effected a transfer of the note to it was not written on the note itself; rather, it was written on a separate sheet of paper, was written in blank, was undated, and does not reference the note. Further, there is no indication in the record that the blank indorsement was ever attached to the note, much less "so firmly affixed thereto as to become a part thereof," as required under N.Y. UCC § 3–202(2). Accordingly, there is a triable issue [of fact precluding summary judgment].

Differing Authorities

Second Department:

HSBC Bank USA Nat. Ass'n v. Roumiantseva, 130 A.D.3d 983 (2015).

- "[T]he plaintiff submitted, among other things, a copy of an endorsement in blank dated December 7, 2006. Thereafter, the Supreme Court directed the plaintiff to produce the original note and the endorsement. **The endorsement was attached to the original note by only a paperclip**. UCC 3-202 provides that 'an indorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof.' Here, the purported endorsement, attached by a paperclip, was not so firmly affixed to the note as to become a part thereof. As such, the purported endorsement did not constitute a valid transfer of the underlying note to the plaintiff."

- Case dismissed!

A Whole New Direction?

U.S. Bank N.A. v. Nelson, ___ N.Y.3d ___ (2021) (Wilson, J. concurring).

- In his concurring opinion, Judge Wilson explained that standing does not turn on UCC holder status and identifies a conflation of the doctrine of standing that has developed incorrectly in New York jurisprudence for the last decade. Standing is a requirement that must be satisfied before a court can even hear certain cases, while the failure to state a claim for relief goes to the merits of the case. Judge Wilson says that being a holder under the UCC goes to the merits of the case.

- So, being a holder is sufficient, but not necessary for standing.

Negotiable No Longer!
Reverse Mortgage Notes

Reverse Mortgages

***Bank of New York Mellon Trust Co. v. Hendrickson,* 79 Misc.3d 540 (S. Ct. Rockland Co. 2023) (Zugibe, J.S.C.)**

While simple possession of a standard forward-looking note and mortgage for a sum certain debt obligation confers standing, when the instrument is a reverse mortgage, only a security interest governed by UCCArticle 9is created since the instrument does not constitute a negotiable instrument as defined under UCC Article 3. A negotiable instrument must “contain an unconditional promise or order to pay a sum certain in money.”UCC § 3-104(1)(b). The obligation to pay contained in the Reverse Mortgage instead establishes that the instrument creates a line of credit available for discretionary withdrawal by the Borrower. While this loan document establishes a maximum principal available for withdrawal, a sum certain loan is plainly not articulated therein.

Reverse Mortgages

***OneWest Bank, N.A. v FMCDH Realty, Inc.*,165 A.D.3d 128 (2d Dept. 2018)**

Finding that an open-end line of credit agreement is not a negotiable instrument and stating, therefore, that “plaintiff cannot establish its standing merely by demonstrating that it was in possession of the original Cash Account Agreement, indorsed in blank, at the time the instant action was commenced[.]”

Federal Preemption: Push and Pull Between Federal Uniformity and Diminished State Protections

Nanci L. Weissgold, Esq.
MBA's 2025-2026 MORPAC Chair
Co-Chair, Financial Services Group
Partner
Alston & Bird, LLP

Doctrine of Federal Preemption

The doctrine of federal preemption arises under the Supremacy Clause of Article VI of the Constitution, which provides that:

- "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The Supreme Court has further provided "under the Supremacy Clause . . . any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."

Federal law can generally preempt state law in two ways: Either a federal statute or regulation can contain express language stating that it preempts certain provisions of state law or federal law can implicitly preempt state law.

- The Supreme Court has held that there are two types of implied preemption: field preemption and conflict preemption.

  - Field preemption is implicated where federal law is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."

  - Conflict preemption occurs where "compliance with both federal and state regulations is a physical impossibility" or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

National Bank Act Preemption

Section 1044 of the Dodd-Frank Act, codified at 12 U.S.C. §25b, clarified the relevant NBA preemption standard as follows:

State consumer financial laws are preempted, only if—

- application of a State consumer financial law would have a discriminatory effect on national banks, in comparison with the effect of the law on a bank chartered by that State;
- in accordance with the legal standard for preemption in the decision of the Supreme Court of the United States in *Barnett Bank of Marion County, N.A. v. Nelson, Florida Insurance Commissioner, et al.,* 517 U.S. 25 (1996), the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers; and any preemption determination under this subparagraph may be made by a court, or by regulation or order of the [OCC] on a case-by-case basis, in accordance with applicable law; or
- the State consumer financial law is preempted by a provision of Federal law other than [the NBA].

Cantero v. Bank of America, N.A.

- U.S. Supreme Court addressed a circuit split between Second Circuit (holding that New York's interest on escrow law is preempted) and the Ninth Circuit (holding that a similar California interest on escrow statute was not preempted).

- Supreme Court vacated the Second Circuit decision and held that a state law is preempted only if it "prevents or significantly interferes with" a national bank's exercise of its powers. Courts must undertake "a practical assessment of the nature and degree of the interference caused by a state law," based on a case-by-case "nuanced comparative analysis" of the Court's prior preemption cases.

- The Supreme Court's rejection of categorical preemption and declination to provide a "bright-line rule" creates uncertainty and increases the risk of additional litigation.

OCC's Two-Part Proposal: Escrow Accounts

Escrow Account Rule - Proposed

- Codifies longstanding lending powers under the National Bank Act for national banks and federal savings associations to establish and manage real estate escrow accounts—including decisions on:
  - Whether to pay interest or other compensation.
  - Whether to charge fees related to escrow accounts.
- Requires banks to exercise business judgment in setting account terms and conditions.

Preemption Determination - Proposed

- Declares federal law preempts state statutes that:
  - Require payment of interest (or other compensation) on escrowed funds.
  - Restrict banks' ability to assess fees.
- Specifically identifies New York's interest-on-escrow law and 11 other states with similar statutes as subject to preemption.

- Comment period ended Jan. 29, 2026. Industry groups support OCC's proposal while CSBS/AARMR and consumer advocates strongly argue that it undermines state consumer protections, shifts costs to consumers, and creates imbalance with nonbank lenders.

Identifying the Correct Preemption Standard in Servicing

- When a loan is originated by a national bank, for example, for which the National Bank Act preempts a number of state laws, but serviced by a non-depository state-licensed servicer, must the servicer follow state laws that are preempted for the originator in connection with the loan?
- Conversely, does a national bank that is servicing a loan need to comply with state laws that are preempted for the servicer if those laws were not preempted for the originator?
- OCC's proposal does not address if mortgage subservicing activity on behalf of a bank should be explicitly included in the preemption.
- What is the analytical framework for determining the appropriate preemption standard?

Open Panel Discussion

Robert Maddox
Michelle Mierzwa
Brian McGrath
Adam Swanson
Nanci Weissgold

Questions