

Show Me **the Note**

By Kristen M. Jackson, Attorney At Law

What you may not know about home or property foreclosure.

My husband is disabled, and as the bread winner for my family of four, I recently lost my job and am unable to pay my mortgage and other bills. For six years, I diligently paid my mortgage until six months ago. Because I have been unable to pay my mortgage, the bank has served me with a summons to answer within 20 days how I plan to pay or they will foreclose on my home. Can I stop the bank from taking my home at least until I can find a job and turn my life around?

A potential legal defense that may delay the bank from taking your property is to request that the bank produce the original promissory or mortgage note. What is a mortgage note? It is the contract between you and your lender that establishes your promise to repay your mortgage loan amount. In a foreclosure proceeding, borrowers should require that the foreclosing party, the bank or lienholder, produce the note as evidence that it is the true owner of the note and has the right to collect the debt. In an extremely large number of cases, banks are having a difficult time producing the promissory notes since mortgages are packaged, sold, bundled and re-sold whereby the original mortgage notes are lost in the process. In many cases, the original note signed by the homeowner was lost, stored away in a distant warehouse or even destroyed.

If you are facing foreclosure, don't simply agree to allow the lender to take your property and move out. Contact an attorney who deals in matters of foreclosure, one who will ask the court to require that the bank "show me the note!"

The number of foreclosures is climbing at an alarming rate nationwide. In 2008, there were more than 2 million foreclosure proceedings filed, and that number was expected to double before the end of 2009. Because unemployment is reaching double digits and escalating, and the financial strength of our banks and nation is ailing without any immediate signs of recovery, judges have become sympathetic toward homeowners facing foreclosure. They are questioning whether default by the homeowner is entirely the homeowner's fault. Because the mortgage note is a binding contract between the homeowner and the bank, and banks expect homeowners to uphold their responsibility to repay the note, the courts are taking the position that banks should be held to an equal standard of responsibility to prove they are entitled to payment and to foreclose by producing the original note.

The banks' attorneys argue that asking a bank to produce the note is merely a stalling tactic to delay an inevitable foreclosure. They argue that the original note is almost always electronically retained and can eventually be found. Homeowners' attorneys argue that banks would not allow homeowners to use a similar argument that they "almost always" and will "eventually" pay their mortgage; banks would declare the homeowners to be in default. This is a double standard.

Banks filing foreclosure actions must show rightful ownership and custody of the note. If the bank cannot produce the original note and show it is the rightful lienholder of the property, then the court cannot ask homeowners to forfeit their property and leave their home until the note is produced. This is not to suggest that some judges are unwilling to accept electronic documentation. But while a lender is sometimes allowed to produce other paperwork to establish that it is the legitimate holder of a note, assembling such documents to a court's satisfaction often takes months. Additional time given to banks to produce the note and prove the bank is the rightful lienholder forces banks to be held to the same contractual standard as they hold homeowners to repay the note.

In a CNNMoney interview, University of Iowa law professor Katherine Porter stated, "Banks fail to attach a copy of the promissory note in 40 percent of situations." In other words, four out of 10 consumers are being asked to make payments on a mortgage, but the bank has not, or cannot, provide legal evidence to establish the debt even exists. This, combined with the fact that original notes over the past 10 years have been sold, bundled, resold, destroyed or lost, raises the question as to how large this percentage has grown. Some legal analysts believe this percentage may be as high as 60 percent or more. Additionally, it raises concerns as to who the rightful lienholder is and whether it can be proven to the court that the banks or lienholder have any legal right to foreclose.

Remember, if you are facing foreclosure, don't simply agree to abandon your property and move out. Contact an attorney who is experienced in handling foreclosure matters, one who will ask the court to demand that the bank "show me the note!" **L**



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