

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable R. Mikell Scarborough  
Charleston County Master in Equity

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Unpublished Opinion No. 2017-UP-344  
Submitted April 3, 2017 – Filed August 9, 2017  
Petition for Rehearing Denied November 17, 2017

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Brent E. Bentrin ..... Petitioner

v.

Wells Fargo Bank, N.A. .... Respondent

Appellate Case Nos. 2014-002590 & 2015-000396

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**REPLY PETITION TO WRIT OF *CERTIORARI***

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## ARGUMENT

Respondent Wells Fargo Bank, N.A. (“Wells Fargo” or “Respondent”) basically argues that certiorari is unwarranted because Bentrin “refuses to be candid” and fails to cite any South Carolina cases to warrant certiorari review. Wells Fargo’s arguments only serve to strengthen the need for review.

**I. Wells Fargo counterstatement of the case is grossly inaccurate and simply a personal attack on the Plaintiff.**

The Record neither supports any attempt to invalidate his loan or his refusal to pay.

In 2008, prior to Wachovia accelerating his loan, Bentrin asserted his rights against Wachovia. He did this again in his answer of the 2009 foreclosure complaint. In 2008, Bentrin disputed the accuracy of Wachovia’s demand he pay \$4920.09 “as one final attempt to avoid acceleration or foreclosure.” (R. pp. 504-5). Ignoring his concerns, Wachovia accelerated and refused further payments.

It is this failure to cure by which Wells Fargo asserts a condition precedent to its counterclaim (R. pp. 41-54; Amended Answer and Counterclaim, ¶ 76-7). Nothing should be simpler than the notion because Wachovia admitted the basis for its acceleration was incorrect (R. pp 502-03), Bentrin should have not been required to pay late charges, fees and foreclosure costs to reinstate his loan. Bentrin asserted this as a defense in his answer. Bentrin states this in his deposition, (R. pp. 781-82) yet Wells Fargo continues to argue he is refusing to pay installment payments it would not accept.

Neither Wachovia nor Wells Fargo has ever denied its refusal of tender or even the sufficiency of his attempts to reinstate. Nor can it deny, by virtue of the Court’s dismissal order of the 2009 foreclosure case, it failed to, as a matter of law, to satisfy the essential element to

foreclose – a demand for payment in full. (R. pp. 26). The dismissal was granted *by the Court* over the objection of Wachovia’s attorney present in the Court room. (*Id.*)

Thereafter, Bentrin once again attempted to determine what was owed on the Note as well as verify Wells Fargo was the party entitled to enforce his Note, as it was once again demanding he pay amounts refused to include fees and other indeterminate costs. Wells Fargo responded by providing a loan history that was materially different from previously provided and admitted it could not determine the amount owed on the Note. It then raised the “holder” issue – as to whether it possessed the Note, by claiming a copy of the note certified by his attorney’s paralegal and given Bentrin at closing to be the original in its vault. (R. pp.1127-30).

Given the fact Wells Fargo had not ceased collection efforts and reported his loan as actually being foreclosed he sued, asserting Wells Fargo and Wachovia had violated numerous consumer protection laws and therefore engaged in unfair and deceptive practices.

Wells Fargo raised the “holder” issue by its lack of possession admission

“The purpose of requiring production of the instrument is to show that the instrument has not been transferred or assigned to another; in other words, that the plaintiff is *the then holder*. (emphasis added).” *Blair v. Halliburton Company*, 456 S.W.2d 414 (TX Ct. App. 1970).

There can be no dispute that Wells Fargo amended its answer and initiated its counterclaim stating it “*is the present owner and holder of the Note, even though it is lost.*” [App. pp. 1190-1191]. Bentrin therefore rightly denied Wells Fargo was the holder because “[a] holder is defined as one in possession of an instrument drawn, issued or indorsed to the party or to its order and *one cannot be a holder without possession* (emphasis added).” *Rex Smith Propane, Inc. v. National Bank of Commerce*, 372 F. Supp. 499 (N.D. Tx. 1974).

Bentrim does not “refuse to accept the basic point that when bank merge, their assets automatically transfer” as Wells Fargo claims; rather, he simply asserts that Wells Fargo has admitted it cannot establish Wachovia had possession, and therefore the National Bank Act is ineffective to transfer a note not held “at the time of the merger.” In fact, other than the merger, Wells Fargo has no other records to assert such.

Its Lost Note affiant, Tracy Thomas, stated clearly: “The bank did not know where it was. I did a reasonable search and could not locate it.” (R. pp. 854; Lost Note Affiant Deposition, 11:13). The lack of any “vault records which pre-date the merger” (R. pp. 1351) resulted in her only being able to assert “the time and manner of loss is some unknown time from the date of receipt.” (R. pp. 1190-93; Lost Note Affidavit).

The Court of Appeals never found that Wachovia or Wells Fargo had possession of the Note

The Court of Appeals never established Wachovia’s status as holder under the UCC, it instead clearly articulates: “*We find Wells Fargo is the holder and holder in due course of Bentrim's Note because, by operation of 12 U.S.C. § 215a(e) (2014), Wells Fargo succeeded to First Union's status as holder and holder in due course.*” (R. p. 1571).

By virtue of this logic the Court of Appeals denied a reversal on fraud for Wachovia, asserting it was the Note holder in 2007 and 2009.

According to the Court of Appeals, First Union’s status as holder (for eight days in 2002) is maintained in perpetuity by operation of law, rather than possession: “*Wachovia, as the surviving bank in the Wachovia-First Union merger, succeeded by operation of law to First Union's status as holder and holder in due course of Bentrim's Note. Similarly, Wells Fargo, as the surviving bank in the subsequent Wells Fargo-Wachovia merger, succeeded by operation of law to Wachovia's status as holder and holder in due course of Bentrim's Note.*” (*Id.*)

Bentrim argues 12 U.S.C. § 215a(e) “is intended solely to preserve to a receiving association any previously existing rights of an individual merging bank (emphasis added).” *Rickey v. Boden*, 421 A. 2d 539 (R.I. 1980). Examining the specific wording, as it has not materially been altered since 1933 when 12 USC 215a(e) was added to the National Bank Act, we see that it rejects any notion “that the 1933 amendment was intended to do anything other than to preserve to the consolidated corporation previously existing rights of the state bank constituents, including those rights it exercised under fiduciary appointments of state courts (emphasis added).” *Fidelity-Baltimore National Bank v. United States*, 328 F. 2d 953 (4th Cir. 1964).

12 U.S.C. § 215a(e) clearly states that “the receiving institution shall hold ... all rights of property ... in the same manner and to the same extent ... were held ... by anyone of the merging banks ... at the time of the merger (emphasis added).”

Therefore, holding “the surviving corporation after the merger, succeeded by operation of law to [the predecessor bank's] status as owner and holder of the [l]oan [d]ocuments" without first establishing possession at the time of the merger would result in the NBA pre-empting the UCC.

The provisions of the UCC deny “holder” status to one not currently in possession of the Note. “The purpose of requiring production of the instrument is to show that the instrument has not been transferred or assigned to another; in other words, *that the plaintiff is the then holder*. (emphasis added).” *Blair v. Halliburton Company*, 456 S.W.2d 414 (TX Ct. App. 1970). “It might be added that a person claiming to be the owner of a lost instrument is not a "holder" since he is not in possession of the paper. He has no rights as a holder.” *Haupt v. Coldwell*, 500 S.W. 2d. 563 (TX. Ct. App. 1973).

Because Wells Fargo admitted in its Lost Note Affidavit it lacked possession, the UCC as well as “several cases from other jurisdictions provide guidance on alternative methods for proving

the authority to enforce a promissory note when the note has been misplaced or lost.” *Steinberger v. McVey*, 318 P.3d 419 (Ariz: Ct. App., 1st Div. 2014).

Bentrim asserts that by the fact First Union is the named payee, absent possession, Wells Fargo – by virtue of 12 USC § 215a(e) only, as it pertains to the Note – succeeded First Union’s status as a “prior holder.” Therefore, whether Wells Fargo is the Note holder via possession some *three years after a merger*, is comprehensively covered by Article 3. “Section 3-208 contemplates the factual situation where a prior holder reacquires an order instrument.” South Carolina Reporter’s Comment to S.C. Code Ann. § 36-3-208 (2002). “The reacquisition contemplated by Section 3-208 is the result of a voluntary act of the person who is then the holder or in possession of the instrument. There is nothing in the section to suggest the reacquiring party should be able to divest a rightful owner of title to the instrument.” William H. Lawrence, *Commercial Paper and Check Collection* (Butterworth Legal Pub. July 1990).

The Appellate Court did however, rule Wachovia **did not** lose the Note.

Wells Fargo argues its lack of possession was because it lost the Note. However, absent possession, the person "does not have the holder's prima facie right to recover under the section on the burden of establishing signatures." Instead "[h]e must prove his case" by "establish[ing] the terms of the instrument and his ownership, and must account for its absence.” *Genger v. Sharon*, 910 F. Supp. 2d 656 (S.D.N.Y. 2012).

Like Section 3-208, Section 3-804 is designed to avoid allowing a prior holder the ability to divest a current holder or owner of its title by asserting some relation to the original payee. Wells Fargo cannot meet the burden requiring “[t]he owner of an instrument which is lost, whether by destruction, theft or otherwise, may maintain an action in his own name and recover from any

party liable thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms.” S.C. Code § 36-3-804 (2002).

Simply put “Wells Fargo failed to prove who lost the note, when it was lost, and who had the right to enforce the note when it was lost. Wells Fargo also failed to produce any evidence of ownership at the time of the loss” *Wells Fargo Bank, NA v. Robinson*, 168 So. 3d 1279 (Fla: Dist. Court of Appeals, 5<sup>th</sup> Dist. 2015).

Citing the exact same issue in other jurisdictions provide when the UCC is followed: “[p]roof of the mergers, without more, cannot establish PNC Mortgage's status as holder at the time of the filing of the complaint.” *PNC Mortgage v. Romero*, 377 P. 3d 461 (N.M Ct. App. 2016). “competent, substantial evidence... that the bank acquired ownership of the note and mortgage” through the merger. *Am. Home Mortg. Servicing, Inc. v. Bednarek*, 132 So.3d 1222, 1223 (Fla. 2d DCA 2014). The “surviving entity prove that it acquired all of [the absorbed entity's] assets, including [the] note and mortgage, by virtue of the merger.” *Fiorito v. JP Morgan Chase Bank, Nat'l Ass'n*, 174 So.3d 519, 521 (Fla. 4th DCA 2015).

## **II. This case absolutely merits review based on the bad acts of Wells Fargo and public policy.**

Wells Fargo’s argument against certiorari stands in direct opposition of South Carolina Code Ann. § 36-1-103, which states: “Unless displaced by the particular provisions of [the U.C.C.], the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy or other validating or invalidating cause shall supplement its provisions.”

Establishing precedence, in *Hitachi Elec. Devices (USA), Inc. v. Platinum Techns., Inc.*, 366 S.C. 163, 170, 621 S.E.2d 38, 41 (2005), this Court articulates “[o]nly where the U.C.C. is incomplete does the common law provide applicable rules.” Therefore, 12 USC 215a(e) transfers

rights held *at the time of the merger* and Article 3 comprehensively sets forth the method to identify such rights.

Wells Fargo next abandons the argument “possession” is required because Bentrin cannot deny First Union was not the holder<sup>1</sup>. As outline above, Wells Fargo’s position would allow any prior holder to divest a current holder of its status – which is not allowed. Section 3-804 is clear, as it only pertains to a note which is *lost, destroyed or stolen*. Even stronger evidence is the South Carolina Reporter’s use of “prior holder” in its Official Comments regarding reacquisition. See Reporter’s comments to S.C. Code Ann. § 36-3-804. Such a term would be wholly unnecessary if a holder could never lose such status.

Wells Fargo has the audacity to question that because Bentrin borrowed money from First Union, and First Union is the Note’s payee, and that it or its successor has always (through mergers) serviced his loan, “what third party could railroad him out of his house?” Bentrin asserts Wells Fargo is the dubious party.

Characterizing Bentrin’s concern as “hypothetical” and without merit is repugnant because the Defendant and its counsel have knowledge of Ms. Emily Harlin, a 70 year old widow working part time in a cafeteria in Richland County. In 2006, Ms. Harlin was convinced by Wells Fargo to refinance her reverse mortgage (where the bank pays the borrower) to a traditional mortgage. Wells Fargo took a negotiable note from Ms. Harlin and its payment was secured by mortgage on her home.

In April 2007, after Ms. Harlin defaulted, Wells Fargo filed a foreclosure action asserting by virtue of the fact Ms. Harlin *received funds from Wells Fargo* and it was the *named payee on the Note*, it was entitled to foreclose her home. *See Wells Fargo Bank, NA v. Emily M. Harlin*,

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<sup>1</sup> Any assertion that Bentrin has not and cannot deny First Union was not a Holder in Due Course has been briefed and is an absurd argument.

2007-CP-40-01300 (S.C. Ct. of Comm. Pleas). There is no dispute that Wells Fargo lent her the money or it was servicing the loan.

Ms. Harlin counterclaimed asserting the loan was inappropriate. December 20, 2010 Wells Fargo entered into a settlement agreement allowing Ms. Harlin to remain in her home without making any payments to Wells Fargo. As a part of the settlement, Wells Fargo “retained its rights under the note and mortgage.” (R. pp. 644-655).

The problem is that Wells Fargo had no rights under the note or mortgage to retain because weeks after closing the loan, Wells Fargo sold and transferred the note to a depositor who then sold and transferred it to a REMIC trust.

On January 25, 2011 the true holder of the note, HSBC Bank NA as trustee for WFHET 2006-2 filed a foreclosure action against Ms. Harlin. (R. pp. 644-55; *F*). By virtue of the exact same language contained in the Participant Agreement and Servicing Agreement (“PSA”) between Wachovia and TMS, the PSA between Wells Fargo and HSBC Bank, NA proves a transfer Harlin’s note. As a custodian, Wells Fargo was merely the agent through which HSBC had constructive possession.

Certiorari is critical as Wells Fargo has just argued it should be allowed to continue its unfettered enforcement of notes which have resulted in it *railroading* widowed grandmothers and other South Carolinians and get free houses. Yes plural.

Like with Ms. Harlin (R. pp. 644-55), Wells Fargo here argues that Bentrim is attempting to enforce consent order violations. This is a red herring to distract away from the fact Wells Fargo has admitted to the tune of nearly \$3.4 billion its liability to compensate homeowners it unlawfully but successfully foreclosed upon. (R. pp. 1211-84; National Mortgage Settlement; ¶ 5).

Wells Fargo seeks to avoid acknowledging having admitted its mortgage servicing and foreclosure processes were deficient and such acts as Bentrin truly alleges as the basis of his case, are in violation of SCUPTA, SC Consumer Code and FDCPA. (R. pp. 1176-1210; O.C.C. Announcement and Consent Order, R. pp. 1211-84; National Mortgage Settlement).

Acknowledging the orders and liability therein, Wells Fargo cannot be a holder in due course, even if it was a holder. It also omits the fact that the Amended OCC Consent Order (R. pp. 1220), expressly required Wells Fargo compensate all homeowners it brought a foreclosure action against. Wells Fargo paid Bentrin \$600.00 in April 2013 “in connection with an enforcement action related to deficient mortgage servicing and foreclosure practices.” (R. pp. 1302-1303). The letter further provides “by cashing or depositing this check, you do not waive any legal claims against your servicer and pursue additional actions related to your foreclosure.” (R. pp. 1302-1303).

Wells Fargo and Mr. Carroll are well aware as participants in Ms. Harlin’s case, the National Mortgage Settlement consent judgment states “claims and defenses asserted by third parties, including individual borrowers” are “specifically reserved.” (R. pp. 653-654).

Unsolicited by the Court, our Attorney General stated in *Harlin* that Wells Fargo’s admission to foreclosure actions against Bentrin as “shall be prima facie evidence under Section 39-5-140 that [Wells Fargo] used or deployed a method, act or practice declared unlawful by Section 39-5-140.” (R. pp. 653-654; Attorney General Amicus, ¶4).

Thus, Wells Fargo is wrong stating it can foreclose as a holder because Bentrin has sufficiently raised defenses to any enforcement to include it was not entitled to enforce the Note when bringing its counterclaim.

## CONCLUSION

Since the pendency of this appeal began, the highest Courts across the nation have as a matter of public policy granted certiorari on “noting nothing that the general requirement that a holder be in possession of the instrument is meant “to protect the maker or drawer from multiple liability on the same instrument.” *Bank of America, NA v. Reyes-Toledo*, 390 P.3d 1248 (Haw. 2017).

The Supreme Court of New Mexico recently observed that “[t]his procedural safeguard is vital because the securitization of mortgages has given rise to a pervasive failure among mortgage holders to comply with the technical requirements underlying the transfer of promissory notes and, more generally the recording of interests in property.” *Deutsche Bank Nat. Trust Co. v. Johnston*, 369 P.3d 1046, 1052 (N.M. 2016). The Court further states “[u]nder these circumstances, not even the plaintiffs may be sure if they actually own the notes they seek to enforce.” *Id.* at 1052

What is clear here is Wells Fargo did not in fact possess the Note when it asserted such prior to 2013 and it has in the past used its position as the note’s payee and servicer to hide the fact it has no enforcement rights in the Note. The highest courts across the nation have uniformly agreed that summary judgment, like here, is not warranted when the foreclosing party cannot establish its right to enforce a note at the commencement of its action.

The New Mexico Supreme Court has gone so far as to state “[i]n instances where a foreclosure plaintiff seeks a default judgment, courts should raise the standing issue sua sponte and carefully scrutinize the plaintiff’s standing to safeguard the integrity of New Mexico’s property system and protect subsequent bona fide purchasers.” *Deutsche Bank Nat. Trust Co. v. Johnston*, 369 P.3d at 1052.

No such scrutiny exists in South Carolina as it remains the sole state to adopt “[t]he general rule is that a mortgage servicer has standing by virtue of its pecuniary interest in collecting payments under the terms of the note and mortgage.” *Bank of America, N.A. v. Draper*, 405 S.C 215, 746 S.E.2d 478 (Ct. App. 2013). Nearly every jurisdiction agrees that the requirement that a foreclosing plaintiff prove its entitlement to enforce the note at the commencement of the proceedings “provides strong and necessary incentives to help ensure that a note holder will not proceed with a foreclosure action before confirming that it has a right to do so.” *Deutsche Bank Nat. Trust Co. v. Johnston*, 369 P.3d at 1052. The principle that a foreclosing plaintiff must establish entitlement to enforce the note at the time the action was commenced has been recognized in several other jurisdictions. *See, e.g., U.S. Bank, N.A. v. Ugrin*, 91 A.3d 924, 930 (2014) (“Generally, in order to have standing to bring a foreclosure action the plaintiff must, at the time the action is commenced, be entitled to enforce the promissory note that is secured by the property.”); *McLean v. JP Morgan Chase Bank Nat. Ass’n*, 79 So.3d 170, 173 (Fla. D.C.A. 2012) (“A crucial element in any mortgage foreclosure proceeding is that the party seeking foreclosure must demonstrate that it has standing to foreclose.”); *Deutsche Bank Nat. Trust Co. v. Johnston*, 369 P.3d 1046, 1052 (N.M. 2016) (holding that “standing must be established as of the time of filing suit in mortgage foreclosure cases”); *U.S. Bank, N.A. v. Collymore*, 68 A.D.3d 752, 890 N.Y.S.2d 578, 580 (2009) (noting that “the plaintiff must prove its standing in order to be entitled to relief” and that, “[i]n a mortgage foreclosure action, a plaintiff has standing where it is both the holder or assignee of the subject mortgage and the holder or assignee of the underlying note at the time the action is commenced”); *Bank of N.Y. Mellon v. Grund*, 27 N.E.3d 555, 559 (Ohio Ct. App. 2015) (noting that, in a mortgage foreclosure action, the mortgage lender must establish an interest in the promissory note or the mortgage “as of the filing of the complaint”); *Deutsche Bank*

*Nat. Trust v. Brumbaugh*, 270 P.3d 151, 154 (Okla.2012) (“Being a person entitled to enforce the note is an essential requirement to initiate a foreclosure lawsuit. In the present case, there is a question of fact as to when Appellee became a holder, and thus, a person entitled to enforce the note. Therefore, summary judgment is not appropriate.”); *U.S. Bank Nat. Ass'n v. Kimball*, 190 Vt. 210, 27 A.3d 1087, 1092 (Vt. 2011) (affirming the circuit court's granting of summary judgment for the homeowner where the bank could not prove it was the holder of the note).

Absent a reversal, South Carolina homeowners must accept that after issuing a negotiable note they sign any and all rights and defenses provided by other jurisdictions and Federal laws. Although the Court’s error is obvious, it is troubling to find any servicer could plausibly assert a holder in due course defense.

Respectfully submitted,

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Mount Pleasant, South Carolina

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Appellate Case Nos. 2014-002590 & 2015-000396

**CERTIFICATE OF SERVICE**

The undersigned attorney for Appellant hereby certifies that a true copy of the *Reply Petition for Writ of Certiorari* in the above-referenced matter has been served on all counsel of record by sending a copy via U.S. Mail on this the 29<sup>th</sup> day of January, 2018, to the following:

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