

I have written extensively on foreclosures and ways to deal with them. Just as there were companies popping up doing loan modifications 2-3 years ago, the nouveau business is companies charging borrowers a fee to navigate the “show me the note” process. Potential clients consistently ask me about forcing the lender to, “show us the note”.

Unbeknownst to most, the basis for this action is the Uniform Commercial Code (“UCC”), which governs sales contracts in many states. Section 3-309 of the UCC provides the criteria for allowing a person to enforce a promissory note without having the original paper. These criteria are as follows:

- Person must no longer have the original note,
- was entitled to enforce the instrument when loss of possession occurred, or
- has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
- the loss of possession was not the result of a transfer by the person or a lawful seizure; and
- the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

*A person seeking enforcement of an [instrument](#) under subsection (a) must [prove](#) the terms of the instrument and the person's right to enforce the instrument. If that proof is made, [Section 3-308](#) applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means. UCC § 3-309 b.*

This can be very lengthy, complex and expensive to litigation, and in most cases, it does not prevent a foreclosure, however it may slow down the process. Most homeowners would have to retain an attorney to understand what exactly they are looking for and how to pursue such. In the end the cost effectiveness of such measure should be addressed.

**Please Note: This blog is not legal advice. Do not treat it as such or rely on it without consulting your own attorney or advising your clients to do so. This material is presented for educational purposes only, to apprise homeowners of the current general state of foreclosure litigation and possible defenses available to a defaulting borrower. Each borrower’s facts and circumstances are unique and the foregoing defenses and law may not apply to each situation.**