

# Tools and Techniques for Researching Ownership of Notes and Mortgages

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## Why Ask “Who Owns the Note”?

- In litigation, the answer can determine whether the plaintiff has the right to sue
  - Not just who owns, but when
- In non-litigation advocacy, the answer can determine modification options
  - Whether loan can be modified
  - How loan can be modified
  - Who can contract for modification

## Legal Principles of Ownership in Foreclosure Litigation

- Plaintiff must own note and mortgage at commencement of case
- Assignment of mortgage without assignment (transfer, delivery) of note is a nullity
- Assignment of mortgage from MERS is likely ineffective to assign underlying note

## Standing: What to Look For

- Evidence of purported assignment of mortgage after foreclosure filing date
- Evidence of purported retroactive assignment
- Evidence of defective assignment
- Evidence of assignment that is a nullity because of evidence that the note was not transferred
- Suspicious allonges or different versions of note

## Foreclosure Documents

- Look for relevant names (originating lender, assignee plaintiff, name of trust if plaintiff is trustee, interim assignees)
- Look for explanations of assignments
- Look for dates (foreclosure filing, assignments executed and recorded)

## Foreclosure Docs: Red Flags

- Corrected or amended assignment
- Multiple assignments
- Retroactive assignment (e.g., “effective as of June 6, 2009” but signed in 2010)
- Assignment signed by unauthorized person (e.g., lawyer for assignee signs on behalf of assignor; “attorney-in-fact” w/o POA)
- Recent assignment to a trust with a bygone year in its name
- A note that’s not indorsed, even in blank

## ACRIS

- <http://www.nyc.gov/html/dof/html/jump/acris.shtml> (Bronx, Kings, New York, Queens Counties)
- Search “Borough, Block & Lot”
- Identify all assignments of subject mortgage
- Note both execution date and recordation date

## ACRIS: Red Flags

- Same as foreclosure doc red flags, PLUS
  - Differences between recorded assignments and assignments attached to complaint
  - Assignments from MERS

## Court Docket

- New York County:  
<http://iapps.courts.state.ny.us/iscroll/index.jsp>
- Kings County: <http://iapps.courts.state.ny.us/kcco/>
- Bronx County:  
<http://bronxcountyclerkinfo.com/law/UI/Admin/login.aspx>
- Queens, Staten Island not online
- eCourts:[http://iapps.courts.state.ny.us/webcivil/FCA\\_SMain](http://iapps.courts.state.ny.us/webcivil/FCA_SMain) (does not include filing dates)
- E-filing:  
<https://iapps.courts.state.ny.us/nyscef/HomePage>

## Court Docket: Red Flags

- Date of filing (does it precede or follow assignment date?)
- Multiple actions filed against same defendant (by the same or different entity, but same mortgage)
- Search by name and by index number

## PSA Search - EDGAR

- <http://www.sec.gov/edgar/searchedgar/companysearch.html>
- Search: “contains” a portion of trust name (most reliable is the end portion)
- Look for pooling & servicing agreement (may be in an 8-K or 10-K)

## PSA Search (cont'd)

- If your EDGAR search for the trust comes up empty, Google trust name.
- If neither search works, it's likely a private deal and you won't be able to get the PSA

## PSA Red Flags

- Check closing date of trust in PSA – was purported assignment dated more than 2 years later? If so, assignment arguably violates the PSA itself, because...

## EDGAR Red Flags

SECTION 2.03. Repurchase or Substitution of Mortgage Loans by the Originator or Responsible Party

[ . . . ]

(d) Any substitution of Qualified Substitute Mortgage Loans for Deleted Mortgage Loans made pursuant to Section 2.03(a) **must be effected prior to the last Business Day that is within two years after the Closing Date. . . .**

## Collateral Reports

- Financial institutions maintain websites for investors to get information about the status of their investments (including residential mortgage-backed securities)
- Info about loans actually held in pool contained in monthly statements

Deutsche Bank  
Bank of NY  
Wells Fargo  
Bank of America  
Citi  
US Bank

[tss.sfs.db.com/investpublic](http://tss.sfs.db.com/investpublic)  
[gctinvestorreporting.bnymellon.com](http://gctinvestorreporting.bnymellon.com)  
[www.ctslink.com](http://www.ctslink.com)  
[etrustee.net](http://etrustee.net)  
[sf.citidirect.com](http://sf.citidirect.com)  
<https://usbtrustgateway.usbank.com>

## Collateral Reports (cont'd)

- Consult if you have reason to believe that the mortgage assignment misrepresents the current owner/holder of the note
- Trust reports generally provide loan-level info (updated monthly) on loans in foreclosure, bankruptcy, REO, prepayment, or with prepayment assessed
- Use original principal balance, original interest rate, state, LTV, loan # if available



## The Take-Home on Standing: Follow the Hinky

- If it looks suspicious from the start, there's probably a defect or impropriety someplace
- If you find a minor defect, it's worth probing for deeper problems
- If you can't show how the defect is more grave than a scrivener's error, the court is unlikely to care

## Capacity to Sue

- Plaintiff must show either that it is authorized to do business in this State or that it qualifies as a "duly organized foreign banking corporation"
- Facially sufficient allegations may conceal a capacity problem

## Probing Capacity Allegations

- Is plaintiff authorized in this State?  
<http://www.dfs.ny.gov/about/whowesupervise.htm>
- Is plaintiff a bank?
  - <http://www.ffiec.gov/consumercenter/default.aspx>
- Is plaintiff a corporation?
  - Check website for Secretary of State where plaintiff is allegedly incorporated
  - If search comes up empty, search web to learn if may be incorporated in another state

## Ownership Issues in Non-Litigation Advocacy

- Modification Denials for Investor Restrictions
- HAMP Denials for Investor Restrictions
- Fannie/Freddie Issues

## Who Owns a Performing Loan?

- No caption
- Likely no assignment of mortgage
- No basis to challenge

## Researching Ownership in Modification Context

- Fannie Mae  
lookup:<https://knowyouroptions.com/loanlookup>
- Freddie Mac lookup:  
<https://ww3.freddiemac.com/corporate/>
- “Request for Information” under 12 CFR § 1024.36

## 12 CFR § 1024.36

- Per CFPB official commentary, "A servicer complies with § 1024.36(d) by responding to an information request for the owner or assignee of a mortgage loan by identifying the person on whose behalf the servicer receives payments from the borrower."
- Servicer must respond to borrower's request for identity of, contact info for owner within ten days

## If Fannie or Freddie...

- Must review for HAMP
- If homeowner has already defaulted on a HAMP mod, must review for GSE Standard Mod
- GSEs no longer permitted to deny mod because loan value is lower than 80% "mark-to-market loan to value"
- BUT no Standard Mod if modified payment will not be lower than existing payment.

## If Private-Label Securitization...

- Back to the PSA
  - Most PSAs permit modifications
  - Some restrict the type of modification (and servicers may offer HAMP as modified)
  - Some restrict the proportion of loans that may be modified
  - REMIC rules may limit the extent of modification a mortgage pool may experience without the pool losing its tax advantage

## If PSA Says “Yes” but the Servicer or Attorney Says “No”...

- HAMP Solution Center could help
- If not, go back to the collateral report
  - Proof that other loans in the pool were modified shows either that your interpretation of the PSA is right, or that investors have waived restrictions
  - Proof that other loans in the pool have been modified since your client was denied undermines 5-percent cap claim

## Negotiating Modification with Putative Owner

- If your research creates question as to whether foreclosure plaintiff is true owner...
- And plaintiff offers to settle via a modification that your client wants to accept...
- You can propose to include an indemnification provision in the settlement agreement, protecting your client in case the true owner turns up to disavow the modification