Standing To Foreclose In Maine: *Bank of America, N.A. v. Greenleaf* [1]

by John J. Aromando

"There are few titles in the law of higher importance in the United States, than that of *Mortgage*." [2]

During the last several years, the Law Court has issued a string of decisions adverse to financial institutions in the area of residential mortgage foreclosure litigation. Some of these decisions have dealt with errors or even alleged fraud in documentation supporting foreclosure actions.[3] Others have taken lenders and servicers to task concerning the admissibility of evidence offered to prove foreclosure cases, in particular efforts to admit business records under Rule 803(6) of the Maine Rules of Evidence.[4] These decisions have made it more difficult for lenders and servicers to obtain judgments of foreclosure in the Superior and District Courts, even though the borrower has admittedly defaulted on the loan. Summary judgments are now hard to come by. And trials have become exercises in gamesmanship over whether the plaintiff can produce the right custodial witness to vouch for the reliability of records reflecting the current status of the loan, the substance of which often nobody seriously contests. All of this has created significant, but hopefully not insurmountable, obstacles for lenders and servicers seeking to collect on non-performing home loans.

Recently, however, the Law Court issued a decision on an issue of fundamental importance to the residential lending community that took many in that community by surprise. In *Bank of America, N.A. v. Greenleaf*,[5] the Law Court ruled that a bank which held the original promissory note, and therefore the legal authority to collect the amount due under that note, could not foreclose on the mortgage that accompanied the note, even though the mortgage existed for the sole purpose of securing the note. The Law Court held that, because

the foreclosing bank was not the original mortgagee (another lender made the original loan and then sold it, a common practice within the industry), and did not, in the Court's view, hold a sufficient assignment of the mortgage, it did not "own" the mortgage, and therefore did not have standing to foreclose.[6] In so ruling, the Court departed from established Maine law confirming that the beneficial interest in a mortgage follows, and is not separated from, the note it secures when the note is transferred. The Court imposed upon foreclosing lenders a standing requirement—"ownership" of the mortgage separate and distinct from the note it secures—that appears nowhere in the Maine statute governing residential foreclosure actions or the Court's prior precedent.

As discussed further at the conclusion of this article, the adverse consequences of this decision to separate the mortgage from the note for the purpose of analyzing standing to foreclose are far-reaching and serious, and at this point probably require a legislative solution.

Maine Law on Mortgages

As described by a leading commentator on Maine real estate law:

> The typical mortgage transaction involves the execution of two documents: (1) a *promissory note* and (2) a *mortgage deed*. The promissory note is the primary instrument; it creates the legal obligation and makes the mortgagor personally liable for payment of the debt. The mortgage deed serves as collateral security for the loan; it is the secondary instrument and creates a *security* interest in the land.[7]

Maine follows the title theory of mortgages, under which title to the mortgaged property passes from the mortgagor (borrower) to the mortgagee (lender), subject to defeasance upon satisfaction of the underlying debt, also known as the equity of redemption.[8] Other states have adopted a lien theory of mortgages.[9] "However, as a practical matter the distinction between lien-theory states and title-theory states is largely academic; the mortgagee's interest has always been considered as a security interest only."[10]

When the lender transfers the promissory note, the mortgage securing the debt follows the note. The Law Court has described this as "the principle that determines the very essence of a mortgage, namely, that the security follows the debt."[11] The Law Court has also held that a separate assignment of the mortgage is not necessary to accomplish that result.[12] Although a bare legal interest in the mortgaged premises may be held by another party, "he must hold the estate in trust for the holder of the notes to secure which the mortgage was given, whoever that holder may be," [13] and may be compelled to convey that legal interest to the legal holder of the promissory note.[14] As another leading commentator on Maine real estate law has summarized the rule: "If the note was assigned and the mortgage was not, the assignee has an interest in the mortgage which will be protected by equity."[15]

The *Saunders* Court commented in a footnote that it was not addressing the situation where "the mortgage and the note are truly held by different parties," but in that same footnote the Court cited its own authority, going back over 100 years, confirming that the beneficial interest in a mortgage follows possession of the note it secures, even without a separate assignment of the mortgage.

The sole purpose of the mortgage–the "secondary instrument"–is to secure the "primary instrument," the promissory note. It is therefore illogical to require "ownership" of the mortgage, separate and distinct from the note, as a condition of standing to foreclose. Maine law has been clear on this for many years: the mortgage follows the note.

The Uniform Commercial Code (UCC) as adopted in Maine "codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien."[16] In other words, the UCC "adopts the traditional view that the mortgage follows the note; i.e., the transferee of the note acquires the mortgage, as well."[17]

The Maine Foreclosure Statute

"In Maine, foreclosure is a creature of statute, see 14 M.R.S. §§ 6101-6325 (2013), and thus, standing to foreclose is informed by various statutory provisions."[18] Maine is a judicial foreclosure state, meaning that foreclosure must proceed by civil action.[19] Section 6321 defines who may bring a foreclosure action: "the mortgagee or any person claiming under the mortgagee may proceed for the purpose of foreclosure by a civil action."[20] The foreclosure statute itself does not define "mortgagee" but the common law definition established by the Law Court is straightforward: "[A] mortgagee is a party that is entitled to enforce the debt obligation that is secured by a mortgage."[21]

Law Court Precedent on Standing to Foreclose before *Greenleaf*

As the Law Court itself observed in *Greenleaf*, "we have not always clearly distinguished between issues of standing and issues of proof."[22] Nevertheless, between 2010 and 2013, the Court issued several decisions explicitly addressing the plaintiff's standing to bring a civil action for foreclosure.[23]

In those decisions, the Law Court articulated the general principles behind the standing requirement. "Because standing to sue in Maine is prudential, rather than of constitutional dimension, we may 'limit access to the courts to those best suited to assert a particular claim.'"[24] "Verifying that a party has standing ensures that there is 'concrete adverseness that facilitates diligent development of the legal issues presented.'"[25] "At a minimum, '[s]tanding to sue means that the party, at the commencement of the litigation, has sufficient personal stake in the controversy

to obtain judicial resolution of that controversy.'"[26]

In *Mortgage Electronic Registration Systems, Inc. v. Saunders*, the Law Court confirmed that the only party with standing to foreclose is the party with the right to enforce the note.[27] Because a promissory note is a negotiable instrument, the Court specifically tied that right to the person holding or possessing the original note under Section 3-1301 of the UCC.[28] The Court in *Saunders* expressly stated that the party entitled to foreclose—the "mortgagee" or a person claiming under it pursuant to Section 6321 of the Maine foreclosure statute—"is a party that is entitled to enforce the debt obligation that is secured by a mortgage."[29] The *Saunders* Court commented in a footnote that it was not addressing the situation where "the mortgage and the note are truly held by different parties," but in that same footnote the Court cited its own authority, going back over 100 years, confirming that the beneficial interest in a mortgage follows possession of the note it secures, even without a separate assignment of the mortgage.[30]

The Law Court reaffirmed this link between the holder of a promissory note under UCC Section 3-1301 and standing to foreclose in *JP Morgan Chase v. Harp*.[31] Referring to the definition of who can bring an action under Section 6321 of the Maine foreclosure statute—"the mortgagee or any person claiming under the mortgagee"—the Court noted that "Maine has adopted the Uniform Commercial Code's definition of 'person entitled to enforce' an instrument," quoting the language of UCC Section 3-1301.[32]

The *Harp* Court also noted that "[a]t the commencement of the litigation, JP Morgan owned the note, but not the mortgage," because a written assignment of the mortgage to JP Morgan from the original holder of the note was not executed until several weeks after JP Morgan, as the new holder of the note, had filed the foreclosure action.[33] Without further discussion of the issue of who "owns" a mortgage, including the longstanding Maine authority cited in *Saunders* establishing that the beneficial interest in the mortgage follows possession of the note it secures, the Law Court commented that "JP Morgan would have been vulnerable to a motion by Harp challenging JP Morgan's ability to foreclose at that time."[34] This comment was superfluous to the holding in the case, because the Court concluded that the assignment of the mortgage to JP Morgan before the borrower raised his objection to JP Morgan's standing to foreclose rendered the issue moot in any event.[35]

Then, in *Bank of America, N.A. v. Cloutier*,[36] the Law Court seemed to nail down once and for all the link between status as a holder of a promissory note under UCC Section 3-1301 and standing to foreclose a mortgage securing that note. In language plain and simple, citing both *Saunders* and *Harp*, the Court stated: "We have previously connected a party's right to bring an action for foreclosure to its right to enforce pursuant to 11 M.R.S. § 3-1301."[37] The *Cloutier* Court expressly held that the third paragraph of Section 6321 of the Maine foreclosure statute, requiring the mortgagee to "certify proof of ownership of the mortgage note and produce evidence of the mortgage note, mortgage and all assignments and endorsements of the mortgage note and mortgage," governed issues of proof only, and imposed no additional requirement for standing, which was governed exclusively by the first paragraph of the statute.[38] Regarding the relevant language of the first paragraph of Section 6321, stating that "the mortgagee or any person claiming under the mortgagee may proceed for the purpose of foreclosure by a civil action," the Law Court had been equally clear: "In other words, a mortgagee is a party that is entitled to enforce the debt obligation that is secured by a mortgage."[39]

Rather than relying on over a century of Maine law confirming that the beneficial interest in a mortgage follows the ownership of the promissory note it secures, the Court read into the Maine mortgage foreclosure law on standing a separation between ownership of the mortgage and the legal right to enforce the note it secures, a distinction not supported by the plain language of the statute.

All of which makes perfect sense. Going back to the general principles governing standing, the current holder of a promissory note secured by a mortgage "has sufficient personal stake in the controversy to obtain judicial resolution of that controversy"[40] in the event of a default under the note. Even without a separate assignment of the mortgage, the current holder of the note also owns the beneficial interest in that mortgage, protected by equity, which follows the note under Maine law.[41] That is the real party in interest under both the mortgage and the note,[42] and the party "best suited to assert"[43] the foreclosure claim. Indeed, the Law Court has held that only the party with the right to enforce the note may foreclose on the mortgage securing that note.[44]

A contrary view makes no sense. The sole purpose of the mortgage—the "secondary instrument"—is to secure the "primary instrument," the promissory note.[45] It is therefore illogical to require "ownership" of the mortgage, separate and distinct from the note, as a condition of standing to foreclose. Maine law has been clear on this for many years: the mortgage follows the note.[46] Evidence of conflicting claims to the mort-

gage, when and if they actually arise, can be dealt with as a matter of proof.[47] As already noted, the Maine mortgage foreclosure statute requires the plaintiff, separate from the issue of standing, to "certify proof of ownership of the mortgage note and produce evidence of the mortgage note, mortgage and all assignments and endorsements of the mortgage note and mortgage."[48] If that proof leaves sufficient doubt concerning that plaintiff's legal right to enforce the mortgage, the court can deny the claim.[49] That does not mean, however, that the plaintiff lacked standing to sue in the first instance.

That is where the law in Maine appeared to rest until the *Greenleaf* decision.

The *Greenleaf* Decision

Discussion about *Bank of America, N.A. v. Greenleaf*[50] has focused on Mortgage Electronic Registration Systems, Inc. or MERS, and the continuing viability of MERS's method of recording transfers (and also terminations) of mortgage interests in Maine. An even larger issue, foundational to Maine law on mortgages and foreclosures, is also in play, however.

The Law Court encountered MERS previously in *Saunders*, where it described the role of MERS in mortgage transactions as follows:

> MERS's purpose is to streamline the mortgage process by eliminating the need to prepare and record paper assignments of mortgage, as had been done for hundreds of years. To accomplish this goal, MERS acts as nominee and as mortgagee of record for its members nationwide and appoints itself nominee, as mortgagee, for its members' successors and assigns, thereby remaining nominal mortgagee of record no matter how many times loan servicing, or the debt itself, may be transferred.[51]

MERS itself does not hold or otherwise own the promissory note or the beneficial interest in the mortgage. As described by the *Saunders* Court, "the only rights conveyed to MERS in either the . . . mortgage or the corresponding promissory note are bare legal title to the property for the sole purpose of recording the mortgage and the corresponding right to record the mortgage with the Registry of Deeds," for the benefit of the current owner of the promissory note.[52]

The *Saunders* Court held that MERS itself does not have standing to foreclose, because it does not have "possession of or any interest in the note" secured by the mortgage.[53] The Court gave no indication, however, that it saw any problem with MERS's performance of its essential functions as the Court itself described them: "to streamline the mortgage process" by holding the nominal interest in the mortgage through multiple transfers of the note ("no matter how many times loan servicing, or the debt itself, may be transferred"), and executing and recording at the registry of deeds assignments or releases of the mortgage when required on behalf of the beneficial owner.[54] Indeed, the *Saunders* decision, which allowed substitution of the lender currently holding the promissory note for MERS as the real party in interest and proper foreclosure plaintiff in that case,[55] can be read as endorsing the MERS system for assigning and releasing mortgages.[56]

From there, the Court proceeded to analyze ownership of the note and mortgage separately, contrary to over 100 years of common law and current UCC provisions emphasizing the exact opposite.

Parties can no longer rely on the MERS system for assigning and releasing mortgage interests in Maine. Even more significantly, the right "to enforce a debt obligation that is secured by a mortgage" no longer assures standing to foreclose in Maine, even when the borrower admits the note is in default, and the lender's beneficial interest in the mortgaged property is uncontested.

That perspective, however, was placed in doubt by the Law Court's decision in *Greenleaf*. The Court adopted a narrow view of MERS's legal authority to assign the mortgage in which it held nominal title on behalf of the lender and its assigns.[57] The Court held that such assignments are legally insufficient to confer standing to sue for foreclosure on the current holder of the note.[58] Given the prevalence of mortgage assignments and discharges executed by MERS under this system, this ruling has thrown the mortgage and title industries in Maine into potential chaos.

The Law Court overlooked or ignored prior precedent that could have avoided this result. Rather than relying on over a century of Maine law confirming that the beneficial interest in a mortgage follows the ownership of the promissory note it secures,[59] the Court read into the Maine mortgage foreclosure law on standing a separation between ownership of the mortgage and the legal right to enforce the note it secures, a distinction not supported by the plain language of the statute.

The *Greenleaf* Court began its analysis of the standing issue with the premise that, because foreclosure in Maine "is a creature of statute," standing to foreclose is governed by the Maine foreclosure statute.[60] The Court then acknowledged that the relevant statutory language, the first paragraph of 14 M.R.S. § 6321, permits "the mortgagee or any person claiming under the mortgagee" to "seek foreclosure of the mortgaged property."[61] Quoting its decision in *Saunders*, the Court confirmed that "mortgagee" means "a party that is entitled to enforce the debt obligation that is secured by a mortgage."[62] Indisputably in the *Greenleaf* case, that was the plaintiff, Bank of America, N.A.,[63] which should have ended the standing inquiry in the plaintiff's favor.

It was here that the *Greenleaf* Court departed from existing Maine law in a way that unexpectedly changed the foreclosure landscape. The Court began with the following comment: "Because foreclosure regards two documents—a promissory note and a mortgage secur-

ing the note—standing to foreclose involves the plaintiff's interest in both the note and the mortgage."[64] From there, the Court proceeded to analyze ownership of the note and mortgage separately,[65] contrary to over 100 years of common law and current UCC provisions emphasizing the exact opposite.[66] The Court cited no language from the Maine foreclosure statute supporting this novel standing requirement of "ownership" of the mortgage separate and distinct from the note—because none exists. The Court followed this new path based on the assertion that, "[u]nlike a note, a mortgage is not a negotiable instrument,"[67] and therefore, "whereas a plaintiff who merely holds or possesses — but does not necessarily own — the note satisfies the note portion of the standing analysis, the mortgage portion of the standing analysis requires the plaintiff to establish ownership of the mortgage."[68]

Such concerns were merely hypothetical in *Greenleaf*, where the record confirmed that Federal National Mortgage Association (FNMA or Fannie Mae), for whom the plaintiff Bank of America serviced the loan, "is in fact the owner of the note,"[69] and "that the Bank has the priority interest in the property," and "there are no other parties that claim an interest in the property."[70] There was no actual contest over "ownership" of the mortgage in *Greenleaf*, and even if there was it should have been resolved as a matter of proof, not standing.

To have standing to foreclose, it had appeared to be enough before *Greenleaf* that the plaintiff had the legal right to enforce the note secured by the mortgage. The viability of the MERS recording system did not appear to be an obstacle to establishing standing to foreclose in Maine. After the *Greenleaf* decision, that is no longer true. Parties cannot necessarily rely on the MERS system for assigning and releasing mortgage interests in Maine. More significantly, the right "to enforce a debt obligation that is secured by a mortgage" no longer assures standing to foreclose in Maine, even when the borrower admits the note is in default, and the lender's beneficial interest in the mortgaged property is uncontested.

The Aftermath and Potential Solutions

From a policy perspective, the separation of the mortgage from the note it secures announced in *Greenleaf* creates obvious problems for lenders and a windfall for borrowers. It deprives lenders of bargained-for security that induced them to make the loan in the first place, and allows borrowers to default on their obligations without facing consequences they agreed to accept. Debating the adequacy of the MERS paperwork assigning the mortgage in this context is an academic exercise. In *Greenleaf*, nobody contended that the lender had misrepresented material facts or that the borrower had been misled.

The resulting cost and chaos will be significant. In addition to the financial losses faced by lenders holding notes secured by mortgages on which they no longer have standing to foreclose, there is also now significant turmoil in the title industry as insurers struggle with how to address the title issues created by this decision.

The intent of all parties involved could not have been clearer, yet the result—the borrower defaults, but does not forfeit the security pledged for the defaulted obligation to the current holder of the note—is the exact opposite. This exalts form over substance.

Policy arguments in favor of such an approach are difficult to divine. Certainly, big banks are not very popular these days, and the hue and cry to further punish Wall Street can be difficult to resist. Given the prevalence of the MERS system, however, smaller community banks are potentially caught in this trap as well. A string of recent lawsuits illustrates one motivation for disrupting the MERS recording system—claims by county registries of deeds that they are being deprived of fees because a new assignment of the mortgage is not recorded every time the loan is transferred.[71] Filling county coffers, however, hardly seems like a good reason to override established law governing beneficial ownership of security interests granted by mortgages. And of course, this decision is one more arrow in the quiver of borrowers' counsel as they look for ways to prevent foreclosures when there is no defense on the merits to the defaulted debt alleged.

The resulting cost and chaos will be significant. In addition to the financial losses faced by lenders holding notes secured by mortgages on which they no longer have standing to foreclose, there is also now significant turmoil in the title industry as insurers struggle with how to address the title issues created by this decision. MERS also executes and records mortgage discharges, so the potential title crisis is not limited to foreclosures.[72]

Greenleaf creates a serious problem that needs to be fixed. It appears, however, that any solution will need to come from the Legislature. The Law Court's decision leaves little if any room for judicial correction and the dominoes are already falling in foreclosure cases pending in the Superior and District Courts. Even final judgments in foreclosure actions concluded before *Greenleaf* could be subject to challenge.[73] Title insurers are scrambling to adjust, and litigation in that area may be around the corner. Opportunities for self-help are limited. One option is to return to the original lender to obtain a substitute assignment of the mortgage, but if that original lender is no longer in business—an all-too-common occurrence since the real estate bubble burst in 2008—the current holder of the note may be out of luck. The Law Court did leave open the possibility of proving "that MERS acquired [the requisite] authority [to assign] the mortgage by . . . means other than that defined in the mortgage itself,"[74] for example under the MERS membership agreement and rules, documents that were not part of the record in *Greenleaf*.

It will be interesting to see in the coming months how the lending and title communities respond to these challenges created by the Law Court's decision in *Greenleaf*, and whether the Legislature is willing to step in to help solve these problems.

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1. 2014 ME 89, 96 A.3d 700.

2. F. Hilliard, *The Law of Mortgages, of Real and Personal Property*, Preface to First Edition (1852) (emphasis in original).

3. *See, e.g., Federal Nat'l Mortgage Assoc. v. Bradbury*, 2011 ME 120, 32 A.3d 1014; HSBC Mortgage Services, Inc. v. Murphy, 2011 ME 59, 19 A.3d 815.

4. *See, e.g., Beneficial Maine Inc. v. Carter,* 2011 ME 77, 25 A.3d 96; *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶¶ 25-27, 96 A.3d 700; *but see The Bank of Maine v. Hatch*, 2012 ME 35, 38 A.3d 1260; *Bank of America, N.A. v. Barr*, 2010 ME 124, 9 A.3d 816.

5. 2014 ME 89, 96 A.3d 700.

6. *Id.* at ¶¶ 6-17.

7. P. Creteau, *Maine Real Estate Law*, Ch. 10, at 232 (1969) (emphasis in original).

8. *Johnson v. McNeil*, 2002 ME 99, ¶ 10, 800 A.2d 702.

9. P. Creteau, *Maine Real Estate Law*, Ch. 10, at 234 n. 11 (1969).

10. *Id*. (citing *Pettengill v. Turo*, 159 Me. 350, 13 A.2d 367 (1963)).

11. *Wyman v. Porter*, 108 Me. 110, 120, 79 A. 371 (1911); *see also Jordan v. Cheney*, 74 Me. 359, 361-63 (1883). Older decisions using contrary language, see, e.g., *Stanley v. Kempton*, 59 Me. 472 (1871); *Dwinel v. Perley,* 32 Me. 197 (1850); *Smith v. Kelley*, 27 Me. 472 (1847), to the extent still viable, refer only to the bare legal interest in the mortgaged property, which in and of itself is not a sufficient interest on which to foreclose under current law, *see Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 15, 2 A.3d 289.

12. *Jordan v. Cheney*, 74 Me. 359, 361 (1883) ("Nor is an assignment of the mortgage necessary.")

13. *Id.* at 361-62.

14. See *Averill v. Cone*, 128 Me. 546, 149 A. 297 (1930).

15. C. Cowan, *Maine Real Estate Law and Practice, Section* 13.2, at 519 (2d ed. 2007) (citing *Stone v. Locke*, 46 Me. 445 (1859)).

16. 11 M.R.S. § 9-1203(7) cmt. 9.

17. 11 M.R.S. § 9-1308 cmt. 6.; *see also* Report of the Permanent Editorial Board for the Uniform Commercial Code 12 (Nov. 2011), *available at* http://www.uniformlaws.org/Shared/Committees_Materials/PEBUCC/PEB_Report_111411.pdf.

18. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶8, 96 A.3d 700.

19. *See id.* at ¶ 17, n. 11; 14 M.R.S. § 6321.

20. 14 M.R.S. § 6321.

21. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶ 9, 96 A.3d 700 (quoting *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 11, 2 A.3d 289 (emphasis omitted)).

22. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶8, 96 A.3d 700.

23. *See, e.g., Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, 2 A.3d 289; *JP Morgan Chase Bank v. Harp*, 2011 ME 5, 10 A.3d 718; *Bank of America, N.A. v. Cloutier*, 2013 ME 17, 61 A.3d 1242.

24. *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 14, 2 A.3d 289 (quoting *Lindemann v. Comm'n on Govtl. Ethics & Election Practices*, 2008 ME 187, ¶ 8, 961 A.2d 538, 541-42).

25. *JP Morgan Chase Bank v. Harp*, 2011 ME 5, ¶ 8, 10 A.3d 718 (quoting *Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1380 (Me. 1996) (quotation marks omitted)).

26. *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 7, 2 A.3d 289 (quoting *Halfway House, Inc. v. City of Portland*, 670 A.2d 1377, 1379 (Me. 1996) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972))).

27. 2010 ME 79, ¶¶ 7-15, 2 A.3d 289.

28. *See id.* at ¶ 12 (citing 11 M.R.S. § 3-1301 (2009)). The Court also noted that, under Section 3-1301, a note may be enforced by a party "purporting to enforce a lost, destroyed, or stolen instrument pursuant to 11 M.R.S. § 3-1309 (2009), or . . . purporting to enforce a dishonored instrument pursuant to 11 M.R.S. § 3-1428(4) (2009)." Id.

29. *Id.* at ¶ 11 (emphasis in original).

30. *Id.* at ¶ 11 n. 3 (citing Averill v. Cone, 129 Me. 9, 11-12, 149 A. 297 (1930); *Wyman v. Porter,* 108 Me. 110, 120, 79 A. 371 (1911); *Jordan v. Cheney*, 74 Me. 359, 361-62 (1883)).

31. 2011 ME 5, 10 A.3d 718.

32. *Id.* at ¶ 9 n. 3.

33. *Id.* at ¶ 9.

34. *Id*.

35. *Id*. at ¶ 14.

36. 2013 ME 17, 61 A.3d 1242.

37. *Id*. at ¶ 16.

38. *Id*. at ¶¶ 14-17.

39. *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 11, 2 A.3d 289; *see also Bank of America, N.A. v. Cloutier,* 2013 ME 17, ¶ 17, 61 A.3d 1242 ("In contrast, paragraph one of section 6321 can be read consistently with [UCC] Article 3-A to specifically define who may enforce a promissory note.").

40. *See supra* at note 26.

41. *See supra* at notes 7-17.

42. *See* Me. R. Civ. P. 17(a) ("Every action shall be prosecuted in the name of the real party in interest.").

43. *See supra* at note 24.

44. *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶¶ 12-15, 2 A.3d 289.

45. *See supra* at note 7.

46. *See supra* at notes 7-17.

47. *See, e.g., Deutsche Bank National Trust Company v. Wilk*, 2013 ME 79, ¶¶ 11-22, 76 A.3d 363; *Wells Fargo Bank, N.A. v. Burek*, 2013 ME 87, ¶¶ 12-16, 81 A.3d 330.

48. 14 M.R.S. § 6321; *see Bank of America, N.A. v. Cloutier*, 2013 ME 17, ¶¶ 15-17, 61 A.3d 1242.

49. *See, e.g., Deutsche Bank National Trust Company v. Wilk*, 2013 ME 79, ¶¶ 11-22, 76 A.3d 363.

50. 2014 ME 89, 96 A.3d 700.

51. *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 8, 2 A.3d 289 (quoting *MERSCORP, Inc. v. Ro*I,

861 N.E.2d 81, 86 (N.Y. 2006) (Kaye, C.J., dissenting)).

52. *Id.* at ¶ 10.

53. *Id.* at ¶ 15.

54. *Id.* at ¶ 8.

55. *Id.* at ¶ 19.

56. I, 2013 ME 17, ¶¶ 1, 4-5, 16-18, 61 A.3d 1242 (indicating, in response to a reported question, that the current holder of the promissory note, with an assignment of the mortgage by MERS, had standing to foreclose).

57. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶¶ 13-16, 96 A.3d 700.

58. *Id.*

59. *See supra* at notes 7-17.

60. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶ 8, 96 A.3d 700.

61. *Id.* at ¶ 9.

62. *Id.*

63. *Id.* at ¶ 11("This is precisely what the Bank established and the court found in this matter; as the possessor of a note indorsed in blank, the Bank proved its status as the holder of the note and therefore enjoys the right to enforce the debt." (Emphasis added.))

64. *Id.* at ¶ 9.

65. *Id.* at ¶ 12 ("The interest in the note is only part of the standing analysis, however; to be able to foreclose, a plaintiff must also show the requisite interest in the mortgage.")

66. *See supra* at notes 7-17.

67. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶ 12, 96 A.3d 700 (citing 5 Emily S. Bernheim, *Tiffany Real Property*, § 1455 n. 14 (3d ed. Supp. 2000)).

68. *Id.* (emphasis in original).

69. *Id.* at ¶ 21.

70. *Id.* at ¶ 28.

71. *See, e.g., Union County, Ill. v. MERSCORP, Inc.*, 920 F.Supp.2d 923 (S.D. Ill. 2013); *Montgomery County, Pa. v. MERSCORP, Inc.*, 904 F.Supp.2d 436 (E.D. Pa. 2012). More recently, one county has asserted a similar claim against banks participating in the MERS recording system. *Montgomery County, Pa. v. The Bank of New York Mellon et al.*, Case No. 2:2014cv05500 (E.D. Pa., filed Sept. 24, 2014).

72. *See* 33 M.R.S. § 551 (requiring "a written instrument . . . signed and acknowledged by the mortgagee or by the mortgagee's duly authorized officer or agent, personal representative or assignee" to discharge a mortgage, and imposing liability for the failure of the mortgagee within 60 days after full performance of the conditions of the mortgage to "record a valid and complete release of the mortgage together with any instrument of assignment necessary to establish the mortgagee's record ownership of the mortgage.")

73. *But see Bank of Am., N.A. v. Kuchta*, Slip Opinion No. 2014-Ohio-4275 (Oct. 8, 2014) (holding that a final judgment of foreclosure is not subject to collateral attack under Rule 60(b) or for lack of subject matter jurisdiction based on the plaintiff's alleged lack of standing to commence the foreclosure action).

74. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶ 15, 96 A.3d 700.