

Another Court Refuses Lost Note Status to a Successor Lender

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Last year, we [reported](#) on a Massachusetts Land Court decision, which interpreted Uniform Commercial Code section 3-309 to conclude that a mortgagee cannot foreclose in reliance upon a lost note affidavit, because the 1990 version of UCC 3-309 requires the party seeking to enforce the note demonstrate possession prior to its loss. 32 states remain under the 1990 version, and recently the Rhode Island Supreme Court joined decisions that prohibit enforcement of a lost note under this outdated version of the UCC. In *SMS Fin. v. Corsetti*, SMS Financial sued to enforce default on a note that was lost by a prior transferee. Sovereign Bank had loaned the defendants \$1 million in exchange for a promissory note and a mortgage on property located at 385 South Main Street in Providence, Rhode Island. Following default and foreclosure, the defendants issued to Sovereign a new promissory note to repay the \$200,000 deficiency on the original loan. Sovereign subsequently assigned its interest in the loan to SMS Financial; but, Sovereign had lost the original note so it delivered to SMS a lost note affidavit and an allonge. SMS filed suit against the defendants to collect on breach of the note, but the Superior Court entered summary judgment in favor of the defendants because SMS could not enforce the lost note.

The Rhode Island Supreme Court affirmed summary judgment in favor of the defendants. Rhode Island is one of the 32 states that remain under the 1990 version of [UCC 3-309](#), which means that a person not in possession of the note is only entitled to enforce that note if that person was in possession of the note and entitled to enforce it when loss of possession occurred. Chief Justice Suttell, writing for the Court, concluded that the plain language of section 3-309 demonstrated that SMS was not entitled to enforce the note because Sovereign Bank, and not SMS, possessed the note when it was lost. Justice Suttell noted that an amended version of UCC 3-309 enabled the transferee of a lost to enforce the instrument. He wrote that “[w]hile some states have followed suit and amended their codes to comport with the amended Section 3-309 of the UCC, Rhode Island has not done so. The remedy for situations such as the instant matter, where a party to an instrument can ‘escape liability,’ falls squarely within the purview of the Legislature.”

As a reminder, the 32 states that have yet to adopt the 2002 amendment to UCC 3-309 are: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oregon,

Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming.

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