



WELCOME TO THE VAP PRO BONO COLLABORATIVE ECHO CLE

SESSION JUNE 6, 2024 Navigating Foreclosure and Learning its Alternatives

Agenda





Introductions - Nedia Isabella (Bella) Zayani, Statewide Pro Bono Coordinator, New Mexico Legal Aid, Inc.



Announcements for Session: Marissa Gonzalez, VAP Paralegal, New Mexico Legal Aid, Inc.



Topic Presentation: Navigating Foreclosure and Learning its Alternatives



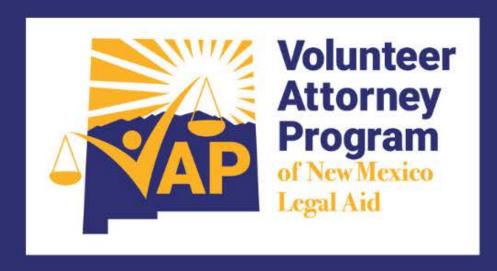
Topic Presenter: Penelope M. Quintero Esq., O'Brien & Padilla, P.C.



Case Analysis and Q&A: Jennifer Isom, Esq., IDEA Law Group, LLC



Overview & Closing Remarks: Volunteer Attorney Program of New Mexico Legal Aid





NAVIGATING FORECLOSURE AND LEARNING ITS ALTERNATIVES



The Basics

Promissory Note v. Mortgage

New Mexico as an "Original Note State"

How does a home become collateral?

• Bonus: Replevin

Under the UCC (NMSA 55-3-104),

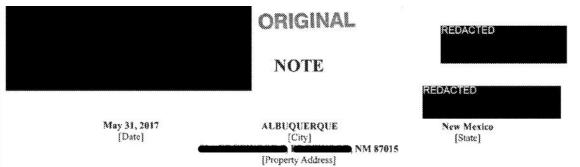
a promissory note is a *negotiable instrument* which can be enforced by a third party who is a *holder* of the instrument.

55-3-104 (a) Except as provided in Subsections (c) and (d), "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

- (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
- (2) is payable on demand or at a definite time; and
- (3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) a waiver of the benefit of any law intended for the advantage or protection of an obligor.







1. BORROWER'S PROMISE TO PAY

In return for a loan that I have received, I promise to pay U.S. \$175,757.00 (this amount is called "Principal"), plus interest, to the order of the Lender. The Lender is CORPORATION. I will make all payments under this Note in the form of cash, check or money order.

I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

INTEREST

Interest will be charged on unpaid principal until the full amount of Principal has been paid. I will pay interest at a early rate of 4.250%.

The interest rate required by this Section 2 is the rate I will pay both before and after any default described in Section 6(B) of this Note.

3. PAYMENTS

(A) Time and Place of Payments

I will pay Principal and interest by making a payment every month.

I will make my monthly payment on the 1st day of each month beginning on July 1, 2017. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on June 1, 2047, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

I will make my monthly payments at the state of the state

(B) Amount of Monthly Payments

My monthly payment will be in the amount of U.S. \$864.62.

BORROWER'S RIGHT TO PREPAY

I have the right to make payments of Principal at any time before they are due. A payment of Principal only is known as a "Prepayment." When I make a Prepayment, I will tell the Note Holder in writing that I am doing so. I may not designate a payment as a Prepayment if I have not made all the monthly payments due under the Note.



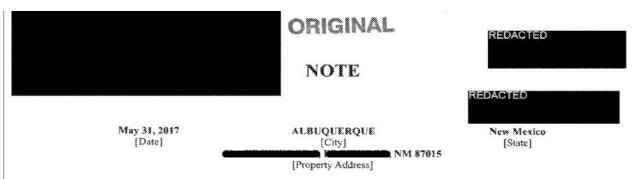


Layman Terms

Debtor's promise to pay back loan.

Note can be transferred to a new **holder** who can then enforce the Note.

The **holder** is important for standing. This may be different from the **servicer**.



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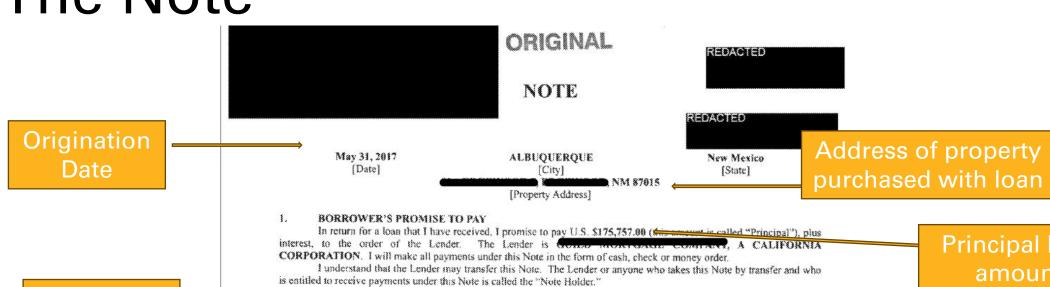
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Interest rate and type

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I will make my monthly payments at or at a different place if required by the Note Holder.

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Principal Ioan amount

Day monthly payments are due

Maturity date

Amount of monthly payment





- Provides terms for grace period and late charge
- Establishes failure to pay monthly payment as default
- Terms for Notices of Default will typically require 30 days after sending notice and before filing suit
- Establishes recovery of attorneys' fees and costs

6. BORROWER'S FAILURE TO PAY AS REQUIRED

(A) Late Charge for Overdue Payments

If the Note Holder has not received the full amount of any monthly payment by the end of 15 calendar days after the date it is due, I will pay a late charge to the Note Holder. The amount of the charge will be 4.000% of my overdue payment of principal and interest. I will pay this late charge promptly but only once on each late payment.

(B) Default

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

(C) Notice of Default

If I am in default, the Note Holder may send me a written notice telling me that if I do not pay the overdue amount by a certain date, the Note Holder may require me to pay immediately the full amount of Principal which has not been paid and all the interest that I owe on that amount. That date must be at least 30 days after the date on which the notice is mailed to me or delivered by other means.

(D) No Waiver By Note Holder

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

(E) Payment of Note Holder's Costs and Expenses

If the Note Holder has required me to pay immediately in full as described above, the Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law. Those expenses include, for example, reasonable attorneys' fees.



Person entitled to enforce a Note 55-3-301 NMSA

A person is entitled to enforce a note in any of the following scenarios:

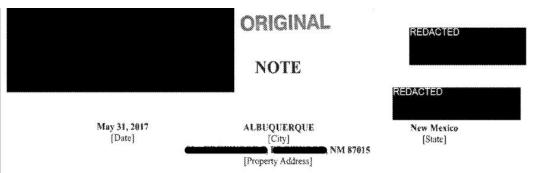
- 1) when that person is the holder of the instrument; or
- 2) when that person is a non-holder in possession of the instrument who has the rights of a holder; or
- 3) when that person does not possess the instrument but is still entitled to enforce it subject to the lostinstrument provisions of the UCC.

Standing

- Establishes who is entitled to enforce the note (standing).
- Must prove standing at the time of the Complaint. Deutsche Bank Nat'l Trust Co. v. Johnston, 2016-NMSC-013, aff'g 2014-NMCA-090, 335 P.3d 217.
- The holder of the instrument is the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession. A third party who is not the payee of the instrument must prove both physical possession and the right to enforcement through either a proper indorsement or a transfer by negotiation. Flagstar Bank v. Licha, 2015-NMCA-086.







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I understand that the Lender may transfer this Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the "Note Holder."

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PAYMENTS

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I will pay Principal and interest by making a payment every month.

I will make my monthly payment on the Ist day of each month beginning on July 1, 2017. I will make these payments every month until I have paid all of the principal and interest and any other charges described below that I may owe under this Note. Each monthly payment will be applied as of its scheduled due date and will be applied to interest before Principal. If, on June 1, 2047, I still owe amounts under this Note, I will pay those amounts in full on that date, which is called the "Maturity Date."

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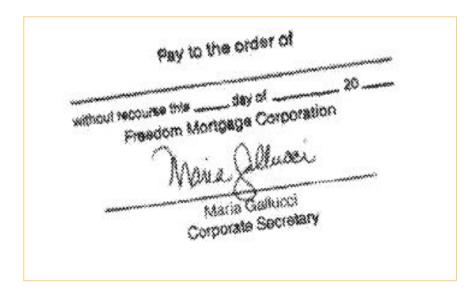
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payable either to bearer:







or to an identified person:

(Seal) -Borrower	(Scal) -Bortower
(Seal) -Borrower	(Scal) -Borrower
ray to the order of Freedom Mortgage Corpora	Sign Original Only
vithout recourse SUILD MORTGAGE COMPANY, A CALIFORNIA CORPORATION by	



When Possession is not Enough

Bank of New York v. Romero, 2014-NMSC-007, rev'g 2011-NMCA-110, 150 N.M. 769, 266 P.3d 638.

- Plaintiff sought to foreclose a mortgage that secured a promissory note in plaintiff's physical possession.
- However, the note was made payable to the order of the original lender. At trial, the original note was admitted but contained 2 indorsements.
 - The 1st contained a blank indorsement by the original lender, and
 - 2nd was a special indorsement made payable to a third person.
 - Neither included plaintiff
- None of the indorsements included plaintiff. Even though plaintiff had physical
 possession of the original note the Court held that it did <u>not</u> establish plaintiff as
 a holder with the right of enforcement.



Defending Standing

- Buy time
- Certificate/Affidavit of Possession of Original Note filed with the Complaint
- Ask to inspect the original note
- Standing is curable Deutsche Bank Nat'l Trust Co. v. Johnston





The Mortgage

- Consumer Financial Protection Bureau (CFPB): A mortgage is an agreement between you and a lender that gives the lender the right to take your property if you fail to repay the money you've borrowed plus interest.
- Layman Terms: Establishes the house you purchase as collateral for your promise to pay (the Note).



DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

MORTGAGI

- (A) "Security Instrument" means this document, which is dated May 31, 2017, together with all Riders to this document,
- (B) "Borrower" is AN UNMARRIED MAN. Borrower is the mortgagor under this Security Instrument. The mailing address of the Borrower is
- (C) "MERS" is Mortgage Electronic Registration Systems, Inc. MERS is a separate corporation that is acting solely as a nominee for Lender and Lender's successors and assigns. MERS is the mortgagee under this Security Instrument. MERS is organized and existing under the laws of Delaware, and has an address and telephone number of P.O. Box 2026, Flint, MI 48501-2026, tel. (888) 679-MERS.
- (D) "Lender" is GUILD MORTGAGE COMPANY, A CALIFORNIA CORPORATION. Lender is a corporation organized and existing under the laws of CALIFORNIA. The mailing address of the Lender is 5898 COPLEY DRIVE, SAN DIEGO, CA 92111.
- (E) "Note" means the promissory note signed by Borrower and dated May 31, 2017. The Note states that Borrower owes Lender One Hundred Seventy Five Thousand Seven Hundred Fifty Seven and 60/100ths Dollars (U.S. \$175,757.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than June 1, 2047. This Security Instrument secures a maximum principal amount of up to 150% of the original amount of the Note.
- (F) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

Characteristics of a Typical Mortgage

- May name Mortgage Electronic Registration Systems, Inc. (MERS) as "nominee" or lender.
- References Note.
- Includes legal description.
- Allows assignments.
 - Assignment of Mortgage NOT required for standing.
 - Mortgage follows note.
- Reduces statutory right of redemption from 9 months to 1.
- Establishes the right of "acceleration" of the loan.
- Describes other events giving rise to "default."
- Foreclosure sale rights.
- MUST BE RECORDED.
- Notice of Lis Pendens after suit is filed.





EDININ OF NATATE OF NEW MICHAEL 1 See PAGES: 46

I Hereby Certify That this Instrument Was a Resented for Record for The Yan Date of James, A. D., 2017 at 13-26-19 AM
And Was Date of James, A. D., 2017 at 13-26-19 AM
And Was Date of James, A. D., 2017 at 13-26-19 AM
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ST. A. A. S. CHILD MODICAGE COMPANY A CALLEGRAL CORROLATION I. TRANSFER OF RIGHTS IN THE PROPERTY COPLE This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to MERS (solely as to pay th nominee for Lender and Lender's successors and assigns) and to the successors and assigns of MERS, the following described property located in the SANTA FE Property [Type of Recording Jurisdiction] [Name of Recording Jurisdiction] ARTER ARKOT HER TRACKER AND ARKANDER FRANCHER FREI BERAKEN ARTANDER BERAKER BERAKER BERAKTE BOOM ALTECKYOTERIN KARIOTEKKA KUERKA KAWAKA HALOOTEKTA KARIOTEKO (KARIOTEK KARIOTEK KARIO RKAMAHRIKKY PILANYKOLOHYYKENNORKAMENAS INYGUMENTYYOO 1601,983. (420 x 2987-099 102 which currently has the address of \$1A EDGEWOOD 7 * SEE EXHIBIT "A" FOR COMPLETE LEGAL [Street] ("Property Address"): DESCRIPTION EDGEWOOD New Mexico 87015 [City]



Mobile/Manufactured Home Replevin

- Similar to a foreclosure but loan documents allow the homeowner to voluntarily surrender the home.
- If there is no surrender of the home, the creditor will file a replevin action similar to a foreclosure.
- If the loan documents include real property (land) the process will be identical to a foreclosure.



WHAT YOU REALLY CAME HERE FOR

Alternatives to Foreclosure



Can you save a client's home?

- Manage expectations instead.
- Buy time for your client to sell the property and payoff the loan, or to save up enough money to reinstate the loan.
- Take advantage of Foreclosure Settlement Programs (FSP) across the state.
- Find out all loss mitigation options.



Reinstatement (Retention)

- Requires payment of all arrears at once.
- Will likely include any attorneys' fees and costs spent up until that point, as well as next month's normal monthly payment.
- Request up to date reinstatement quote.



Payoff (Retention & Non-Retention)

- A complete payoff of the loan.
- Sale of the property will result in a payoff.
- Will likely include attorneys' fees and costs.
- Request up to date payoff quote.



Loan Modification (Retention)

- Re-negotiate the terms of the original loan.
 - monthly payment or interest rate may be lower (i.e. HAMP)
 - arrears are put towards the back of the loan and your loan term extended (i.e. Covid forbearance modifications)
- Some servicers, especially non-government backed loans, may not offer any loan modifications.
- Even the ones that do have specific application processes, as well as internal and sometimes strict federal guidelines, to adhere to.
- Some servicers require the homeowner to possess an actual hardship (i.e. loss of job) to pre-qualify.
- Request a lost mitigation application. Sometimes called a hardship packet/application, or HAMP application. Talk to the servicer.



Deed-in-Lieu of Foreclosure (Non-Retention)

- Borrower executes a deed and related agreement documents, agreeing to transfer title back to the creditor in lieu of foreclosure.
- Establish a move out date.
- Cash for keys possibility.
- The general rule of thumb for servicers is to only accept a DIL if title is clear, meaning that no other mortgages or liens appear on title.
- Should seek advise from a qualified tax expert as some of these agreements may implicate cancelled debt for tax purposes.



Forbearance or Repayment Plan Agreement (Retention)

- A servicer may reduce or suspend payments for a set amount of time through a forbearance agreement. If at the end of the forbearance period they do not then apply those arrears to the back of your loan (through a loan modification), may be able to agree on a repayment plan.
- Keep in mind that through a repayment plan a lender temporarily increases the monthly payment amount by adding part of the overdue amount to the current payments until borrower gets caught up (reinstate your loan).
- Some servicers limit this option to a loan that has been in default for one year or less.
- Typically more readily available with Replevins.



Agreed Judgment; Stipulated Judgment; In rem Judgment; Waiver of Deficiency (Non-Retention)

- Judgment orders are ALWAYS negotiable.
- Agreed judgments can encompass a repayment agreement. (Replevins)
- In rem judgment is only against the property and the servicer cannot then sue the debtors personally for the money - waiving all deficiency (difference between the judgment amount and proceeds from the sale of property).
- Tax implications.



Foreclosure Settlement Program (FSP) (Retention & Non-Retention)

- A number of courts in New Mexico (specifically, 2nd, 13th, and 1st Districts) order all or some of their foreclosure cases to a foreclosure settlement program ("FSP"). The program provides settlement assistance in residential mortgage cases.
- "The program brings homeowners and lenders together with a settlement facilitator to seek alternatives to residential foreclosures which are agreeable to both."
- When a Judge orders a case to FSP, the foreclosure itself and any and all deadlines are stayed until the parties are ordered out of FSP.



Redemption & Assignment of Redemption Rights (Retention & Non-Retention)

- The NM statutory redemption period of 9 months may be contractually modified. *See* NMSA 39-5-18.
- Most mortgages reduce this period to 1 month (subject to an extended federal right of redemption that is typically waived by the government counsel).
- Property may be redeemed at any time during the redemption period, by any of the named defendants (with the debtors having first right of redemption) or their assignees, by providing funds equal to the foreclosure purchase price plus interest in the amount of 10% per year.



Redemption Continued.

- As the redemption period is a statutory right, no one, not even Courts, have the legal power to extend the redemption period.
 - You may be able to get the foreclosure purchaser (normally the Plaintiff) to agree to allow you to redeem after the period is over.
 - Certified funds in the total amount usually required.
- May assign redemption rights to a 3rd party.
 - Certain entities may purchase redemptions rights.
 - Make sure to read over any assignment of redemption agreements carefully, and that you receive a fair and just compensation for that assignment.
 - \$1,000-\$10,000.



In Conclusion:

- Ask the servicer what alternatives they offer.
- Ask opposing counsel to find out all loss mitigation options.
- Participate in discovery.
- Other arguments:
 - Improper notice (i.e. demand letter; notice of sale; no new default notice after reinstatement and default)
 - Wrong legal description
 - Home Loan Protection Act (HLPA) violations (58-21A-1 to -14 (2009) re: high cost loans).
 - Statute of Limitations 6 years
 - Unfair Trade Practices Act violation
 - Origination disclosure violations
 - SCRA protections
 - Bankruptcy (automatic stay; in rem)

Case Presentation







LEGAL ISSUE: Foreclosure of interest of someone not on Note or Mortgage

Factual Summary

- Client is the daughter of deceased mortgagor
- Is not in title to the property
- Is not on the loan itself
- Wants to try to keep the property
- Foreclosure filed and client wants to work out settlement





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Question of Practice

What would you consider advising client

- Mortgage company will not discuss loan with non-authorized party
- Need to consider loan type

How would you proceed?









Tuesday, July 16, 2024

Next Session

3:30-5:00 PM

Topic: Wills & Probate

Presenter: Judge Carbon-Gaul, Bernalillo County Probate Court





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Upcoming Pro Bono Opportunities

For additional information or to volunteer at one of these events, please contact our Statewide Pro Bono Coordinator, Nedia Isabella (Bella) Zayani at nediaz@nmlegalaid.org

Legal Fairs

Volunteer attorneys have the opportunity to provide one-time consultations by providing legal advice and/or information, in-person.

Malpractice insurance is provided by the Access to Justice Commission for consultations made during the hours of the event.

- Saturday, June 22, 2024
 Law-La-Palooza in Albuquerque (9:00 AM-4:00 PM)
 9:00 AM-12:00 PM Family Law Consultations
 1:00-4:00 PM Civil Law Consultations
- Friday, June 28, 2024 in Las Vegas 9:00 AM-3:00 PM
- Friday, July 19, 2024 in Taos 9:00 AM-4:00 PM
- Friday, July 20, 2024 in Doña Ana Village 10:00 AM-5:00 PM
- Friday, July 26, 2024 in Santa Fe (TBD)



THANK YOU FOR JOINING TODAY'S VAP PRO BONO COLLABORATIVE ECHO SESSION!

JUNE 6, 2024

<u>Topic Presenter</u>:

Penelope M. Quintero Esq., O'Brien & Padilla, P.C.

Case Presenter:

Jennifer (Jeannie) Isom, Esq., IDEA Law Group, LLC

Facilitated By:

Nedia Isabella (Bella) Zayani, Statewide Pro Bono Coordinator, NMLA

Marissa Gonzalez, VAP Paralegal, NMLA vapecho@nmlegalaid.org