Digital Transitions:
The Future of eMortgage Laws and Adoption by State

Prepared by the Legal League 100
Special Initiatives Working Group
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Dear Colleagues,

The Legal League 100 (LL100) is the nation's premier collection of financial services law firms organized to further its member's commitment to supporting the mortgage servicing industry through education, communication, and relationship development. The LL100's membership at large, council, and Special Initiatives Working Group (SIWG) works tirelessly to be a leading force for industry standards, education, and market research.

In advancement of this mission, the SIWG is providing this important guide on e-Notes and e-Mortgages to further educate attorneys, lenders, servicers, and other industry professionals as the industry rapidly moves into a more electronic document world.

Our industry has historically facilitated the origination and enforcement of mortgages and notes via paper and a wet signature. More rarely have our industry seen on the enforcement side via electronic, or paperless, mortgages and notes. However, the Congress and most states passed laws almost 20 years ago that legitimize the use of electronic loan documents in commerce.

The SIWG's goal is that the following guide will assist the industry as we swiftly move into a more electronic document world during these times.

Sincerely,

Legal League 100's Special Initiatives Working Group

History of the eMortgage

Our industry facilitates the origination and enforcement of mortgages and notes—the paper variety. Electronic, or paperless, mortgages and notes are more rarely seen on the enforcement side.

Fannie Mae defines an eMortgage as "a loan for which the promissory note and possibly other documents (such as the security instrument and loan application) are created and stored electronically rather than by traditional paper documentation that has a pen and ink signature. Because some recording jurisdictions will not yet accept electronic documents for recordation, eMortgages may consist of a paper security instrument and an electronic note (e-Note)."[1]

In 2000, the U.S. Congress passed the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §7001, et seq. (ESIGN), which allows electronic signatures on contracts and retention of electronic records as long as those records are accessible to the parties and can be accurately reproduced by electronic transmission or by printing on paper.

Introduced in 1999, the model Uniform Electronic Transactions Act (UETA) established the legal equivalence of electronic records and signatures with paper records and physical signatures in order to facilitate electronic commerce. Only two states, Illinois and New York, haven't adopted UETA in some form.[2]

ESIGN and UETA closely resemble each other: their objective is to legitimize the use of electronic records in commerce throughout the United States.

Fannie Mae and Freddie Mac, who collectively own almost half of the American residential mortgage market (or a combined $5.5 trillion), worked at the direction of their conservator, FHFA, to look at barriers to electronic mortgages and notes. The GSEs formed the Uniform Mortgage Data Program (UMDP), which published the eMortgage Foreclosure Educational Aid on March 30, 2017.[3]

[1] https://singlefamily.fanniemae.com/media/4601/display

[2] https://www.uniformlaws.org/committees/community-home?CommunityKey=2c04b76c-2b7d-4399-977e-d5876ba7e034

[3] http://www.freddiemac.com/singlefamily/sell/pdf/eMortgage_Foreclose_Educational_Aid.pdf

Key Terms Relating to eMortgages and eNotes

- *Transferrable record:* An electronic record that would be a note under Article 3 of the Uniform Commercial Code (UCC) if it were in writing. Borrower must agree it is transferable record related to a loan secured by real property. See, ESIGN 15 U.S.C. §7021; UETA §16.
- *Control or controller:* Person having control, in the MERS® e-Registry (e-Registry evidencing transfer of interests in e-Notes), controller, of a transferable record is the equivalent of a "holder," as described in UCC, with same rights and defenses as a holder; a person has control of a transferable record if the system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred. (ESIGN 15 U.S.C. §7021 (b); UETA §16b).
- *Authoritative Copy:* ESIGN and UETA requires that a single, unique, identifiable, and generally unalterable copy of the transferrable record be maintained. For example, while there can be many copies of each e-Note, there can be only one authoritative copy of the e-Note, and only the Controller of the authoritative copy can enforce it.
- *Location:* MERS® e-Registry tracks the "location" of every e-Note, using the name of the Controller or its designee, that stores the e-Note in an e-Note Vault, like a document custodian storing an original paper note.[4]

Process Flow of e-Note Delivery

- e-Note electronically signed by the borrower through use of an electronic closing system.
- e-Closing system secures electronically signed documents by applying a tamper-evident seal to the entire transferable record (e-Note).
- e-Note must be registered on MERS® e-Registry within one business day.
- Lender transmits e-Note to e-Note Vault.
- Lender submits a request to the MERS® e-Registry to transfer control of the e-Note from the lender to the GSE, if applicable.

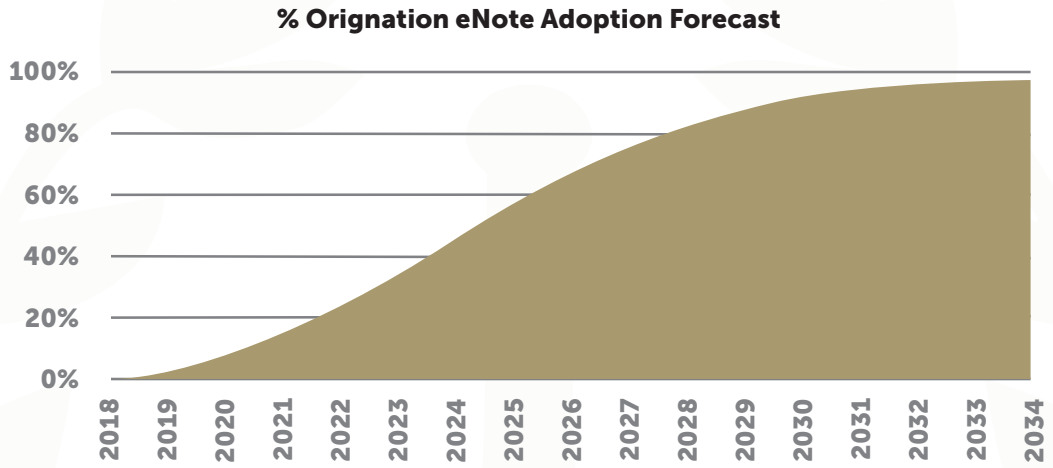
Note: e-Mortgages would be recorded in county or local records to create the lien on the real property.

History and Background of Understanding e-Notes

In February 2020, the 11 Federal Home Loan Banks, chartered by the U.S. Congress in 1932 to promote homeownership, created Electronic Promissory Notes (e-Notes) Model Collateral Acceptance Requirements and Guidelines, which established guidelines for its members (6,900 banks, credit unions, insurance companies, community development financial institutions) for accepting e-Notes as collateral.

Use of e-Notes and e-Mortgages skyrocketed in the first quarter of 2019 with the origination of 19,000 e-Notes, compared to 17,000 e-Notes in 2017. A writer for Iron Mountain used a differential equation to predict adoption of e-Notes. His model predicted a 98% adoption rate for originations in 15 years, or the year 2034.

[4] https://www.mersinc.org/products-services/mers-esuite/mers-enote-solutions



Source: Iron Mountain

Understanding e-Notes

The legal framework for e-Notes was created by the Uniform Electronic Transactions Act in 1999 and the passage of the Electronic Signature in Global and National Commerce Act in 2000. The acts ensure that e-Notes and other electronic documents are accepted and encourages the growth of electronic commerce. The Uniform Electronic Transactions Act has been adopted by all states except New York and Illinois, however both have adopted similar statues. Many servicers were initially reluctant to originate e-Notes, and Ginnie Mae did not initially authorize the purchase of e-Notes. The financial crisis likely hampered the adoption of e-Notes, as mortgage companies had to focus their attention on other matters.

Another factor in the adoption of e-Notes originations is the consumer appetite to electronically close the mortgage. For most borrowers, their home mortgage is the largest financial transaction they will ever be a party to. As a result, some may be hesitant to electronically close such a large obligation. Instead, the borrower may feel more comfortable meeting face to face with the closing agent. Younger and more technologically savvy millennials are more comfortable with the digital process and are likely to increase originations. Also, with the COVID-19 pandemic and stay-at-home orders, many states relaxed rules regarding electronic notarization and lenders and borrowers increased their use of e-closings since they were unable to attend physical closings.

Fannie Mae & Freddie's e-Note Guidelines

In 2005, Fannie Mae and Freddie Mac began purchasing e-Notes and set forth detailed guides for the purchase and servicing of e-Notes. Per the guides, an originator must obtain separate approval from Fannie Mae to originate e-Notes. The guides set forth all the technical specifications required for approval. Once approved to originate e-Notes, the seller may originate any product as an e-Note except for the following:

- Mortgages secured by mortgaged premises located in Puerto Rico
- Texas Equity Section 50(a)(6) mortgages
- New York Consolidation, Extension, and Modification Agreement (NYCEMA) mortgages (Note: An e-Mortgage may be refinanced into NYCEMA using the NYCEMA process provided in Section 1402.17.)
- Mortgages for which the borrower is a trust of any type.[5]

[5] Freddie Mac Single-Family Seller/Servicer Guide Sec. 1402.7

There are separate guidelines for to be approved as an e-Note servicer. Being approved to originate and sell e-Notes does not qualify the servicer to service an e-Note. If the servicer wishes to be authorized to service e-Notes, they should contact Fannie Mae and Freddie Mac for approval. The minimum requirements to service e-Notes for FHLMC are as follows:

- Be a member in good standing of MERSCORP Holdings, Inc.
- Be an approved member and user of the MERS® System, MERS Delivery, and MERS e-Registry
- Have an approved e-Note Vault System (Note: See Section 1402.5 for e-Note Vault System requirements. If the e-Note Vault System was not previously reviewed by Freddie Mac, the e-Note Vault System must go through a review and approval process, similar to the process described in Section 1402.3, as applicable.)

The e-Note Vault System must have the ability to:

- Maintain a copy of the Authoritative Copy of the e-Note and its Tamper Evidence Seal for the life of the e-Mortgage plus seven years
- Identify and track all e-Mortgages that the seller/servicer services for Freddie Mac
- Record all status changes and required actions that occur during the life of the e-Mortgage in the MERS® e-Registry
- Accept an offer of change of control from Freddie Mac, in the event of a foreclosure or other Freddie Mac Default Legal Matters with respect to an e-Mortgage, as applicable
- Create an offer of change of control to Freddie Mac, in the event of termination of a foreclosure or other Freddie Mac Default Legal Matters with respect to an e-Mortgage, as applicable
- Confirm that the MERS e-Registry accurately always reflects the controller and location
- Accept a transfer of the Authoritative Copy of the e-Note from Freddie Mac's e-Note Vault System using MERS e-Delivery, in the event of an e-Mortgage repurchase by the seller/servicer
- Securely store electronic copies of Mortgage File Documents (Note: A seller/servicer can store all Electronic Mortgage File Documents in its e-Note Vault System if the e-Note Vault System allows such storage. If the e-Note Vault System does not permit storage of Electronic Mortgage File Documents other than the e-Note, the seller/servicer must have a secure e-Storage System for storing such documents. (See Section 1402.8(c)(iv) for e-Storage System requirements.)
- Have written e-Mortgage Servicing policies and procedures in place
- Meet any other e-Mortgage requirements imposed by Freddie Mac[6]

In addition, if the loan is modified, the servicer should modify the loan in electronic format. Servicers should also be aware that while most state laws allow for the conversion of an e-Note to a paper Note, this should not be done without the GSE's approval.[7]

[6] *Id.* at Sec. 1402.9

[7] *Id.* at Sec. 1402.10

HUD & Ginnie Mae e-Note Guidelines

In 2018, as the impacts from the financial crisis began to subside and more servicers began to announce the creation of e-Note origination platforms, Ginnie Mae announced it would create guidelines to begin accepting digital collateral beginning in 2020.

In October of 2019, Ginnie Mae released its Digital Collateral Guide and requested input by December 2019.[8] The guide outlines a pilot program for servicers and originators to be approved to originate and service e-Notes. In addition to similar technical and process requirements to that of the GSEs, the Ginnie Mae program requires that applicants have demonstrated experience in serving e-Notes.

While Ginnie Mae does not generally issue any specific forms or language for loan documents, it does list certain elements and sample language for e-Notes. While the GSEs allow for loan modifications of e-Notes to be completed in electronic format also, Ginnie Mae requires the modification to be completed in paper format with wet-ink signatures.

Handling of e-Notes and e-Mortgages in Default

While law firms rarely see e-Notes and e-Mortgages, with their increasing popularity there are a few important items that need to be considered when foreclosing.

Starting from the beginning as a threshold question, what are an e-Mortgage and e-Note? "An e-Mortgage is a mortgage for which the promissory note and possibly other documents are created and stored electronically rather than by using traditional paper documentation that has a pen and ink signature."[9] The legal basis for proceeding under e-Mortgages stems from the Electronic Signatures in Global and National Commerce Act (E-Sign), and most states have adopted laws based on the Uniform Electronic Transactions Act (UETA).[10] While an e-Note is defined as the electronic equivalent of a promissory note, it is a transferable record.[11] This leads to the next legal questions:

- Are they legally enforceable?
- From where is the authority derived?

The legality of e-Notes and e-Mortgages was established in 2000 with the enactment of the federal Electronic Signatures in Global and National Commerce Act (ESIGN) and the Uniform Electronic Transactions Act aka eCommerce laws.[12] These eCommerce laws provide that a transferable record created in conformity with their requirements is the functional equivalent of a paper negotiable promissory note/mortgage and is just enforceable against the borrower as its written counterpart.[13]

So, what makes them "just as enforceable?" For an e-Note to qualify as a transferable record at the time of issuance, an e-Note must be electronically created, presented to the borrower, and executed entirely on information processing systems.[14]

[8] *Id.* at Sec. 1402.10

[9] Enabled by Lenders, Embraced by Borrowers, Enforced by the Courts: What you Need to Know about Enotes, by Margo H.K. Tank and R. David Whitaker, May 1, 2018

[10] FannieMae, eMortgage Delivery, Frequently Asked Questions, March 2007

[11] FannieMae, eMortgage Delivery, Frequently Asked Questions, March 2007

[12] Enabled by Lenders, Embraced by Borrowers, Enforced by the Courts: What you Need to Know about Enotes, by Margo H.K. Tank and R. David Whitaker, May 1, 2018

[13] Enabled by Lenders, Embraced by Borrowers, Enforced by the Courts: What you Need to Know about Enotes, by Margo H.K. Tank and R. David Whitaker, May 1, 2018

[14] Enabled by Lenders, Embraced by Borrowers, Enforced by the Courts: What you Need to Know about Enotes, by Margo H.K. Tank and R. David Whitaker, May 1, 2018

Further, it must otherwise qualify as a negotiable promissory note under Article 3, if it were in writing; the borrower must expressly agree that the instrument is a Transferable Record; and must be signed and must reliably establish the identity of the person entitled to "control" the e-Note (Controller).[15] To ensure the authenticity, the tamper-evident seal is a kind of "digital thumbprint" of the e-Note, which is stored on the MERS e-Registry and can be verified at any point in the loan's life by the various business partners who may hold the e-Note at different times. [16] Additionally, the eCommerce laws provide a safe harbor for satisfying the rules establishing Control (safe harbor), which lay out the following conditions to ensure same. They are:

- A single authoritative copy of the record exists that is unique identifiable, unalterable;
- The authoritative copy identifies the person asserting control as either the person to whom the Transferable Record was issued or the person to whom the Transferable Record was most recently transferred;
- The authoritative copy is communicated to and maintained by the person asserting control or his designated custodian;
- Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;
- Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
- Any revision of the authoritative copy is readily identifiable as an authorized or unauthorized revision.

Leading to the discussion of MersCorp Holdings, Inc (MERSCORP) services, MERSCORP developed the MERS e-Registry in cooperation with several mortgage industry stakeholders. The MERS e-Registry does not store the actual e-Note, but instead only stores and tracks identifying information about it, including the e-Note's digital footprint, the name of the Controller, and the location of the note. The authoritative copies of the e-notes themselves are stored in an e-Vault. It records all transactions on the MERS e-Registry record. [17]

Common Issues in Handling e-Notes and e-Mortgages

Now that we have addressed a brief of overview of what they are, the legality of same, and where to find to find them, let us get into the common issues that we see in the default industry. To start with, we understand the benefits to utilizing e-Notes and e-Mortgages, as it eliminates the need for paper, increases capital efficiencies (achieving quicker warehouse turn times, increasing liquidity for investors), eliminates lost notes, improves audit trials, increases process efficiencies and automation, reduces security needs. [18]

Now come the possible issues with proceeding on them as it relates to foreclosure:

- *Different Terminology:* Key terms when dealing with e-Mortgage and e-Notes include:

[15] Enabled by Lenders, Embraced by Borrowers, Enforced by the Courts: What you Need to Know about Enotes, by Margo H.K. Tank and R. David Whitaker, May 1, 2018

[16] eMortgage Frequently Asked Questions, MBA Technology: Where are you the Road to E-Mortgages, MBA Residential Technology Committee, eMortgage Adoption Task Force, March 9, 2007

[17] MERS, Mortgage Innovation: eNotes and the MERs eRegistry, www.mersinc.org/mers-eregistry

[18] Mortgage Innovation: eNotes and the MERS eRegistry, www.mersinc.org/mers-eregistry

- *Transferable Record:* "An electronic record that would be a Note under Article 3 of the Uniform Commercial Code (UCC) if it were in writing. To be a transferable record, the issuer (borrower) must have agreed the document is transferable record and the document must relate to a loan secured by real property."[19]
- *Control, aka as the Controller:* This means that a "person has a control of a transferable record if the system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred." (ESIGN 15 U.S.C. 7021(b); UETA 16b).
- *Authoritative Copy:* "a system satisfies the conditions of ESIGN and UETA if it maintains records in a manner such than an "authoritative copy" of the transferable record exists." It must be a single, unique, identifiable, and generally unalterable copy.[20]
- *Location:* The MERS e-Registry tracks the location of every e-Note.

- *Proving Standing:*
  - This includes getting the MERS transaction history into record and guiding the court through the chain of transfers. Also, important to note here: pursuant to MERS Rule Number 8, any member as of September 1, 2011, that initiates a foreclosure or files a legal proceeding in MERS' name could be sanctioned by MERSCORP Holdings pursuant to Rule 7.
  - Additionally, when reviewing Assignment of Mortgages from MERS, one will notice that the "language indicating that the note is being assigned to MERS is prohibited in Assignments out of MERS."
  - Confirming whether one can plead "holder" varies on jurisdiction.
- *Proving "control" of the e-Note:*
    - This is where the authoritative copy comes in and can sometimes be supplemented by the "summary information sheet" describing the bank as the "Controller" of e-Note and proving possession.
- *Proving and providing the transferable record, and to whom the e-Note/e-Mortgage has been transferred*
- *Knowing Your State Law:* Whether the applicable jurisdiction allows for same/how it differs from the ESIGN Act and UETA and knowing the requirements.

Items to consider from a bankruptcy perspective for when handling same:

- Original Documents: In bankruptcy proceedings, there is no requirement for the creditor to produce the original documents in order to evidence standing. In the event the creditor files a Motion for Relief from the Automatic Stay, the creditor must prove standing by showing is has the legal right to bring about the proceeding.
- To do this, there must be a note endorsed to the "Action in the Name of" (AITNO) or blank as well as the chain of assignment of mortgages. In addition, if state law requires perfection of the mortgage or deed of trust, a recorded copy must be attached. More importantly, compared to judicial foreclosure proceedings in most states, there is no need to produce the originals in bankruptcy court.

[19] Uniform Mortgage Data Program, eMortgage Foreclosure Educational Aid, Document Version, 1.0, 3/30/17, page

[20] Uniform Mortgage Data Program, eMortgage Foreclosure Educational Aid, Document Version, 1.0, 3/30/17

- Challenging State Court Rulings: As is sometimes the case, a borrower who lost in state court (i.e., had a foreclosure judgment entered) attempts to challenge the state court's decision to issue the judgment by arguing the creditor lacked standing and or that the borrower never signed the note and mortgage. Similarly, the borrower may also argue that the creditor failed to produce the "original" note. This may be more common with e-notes and mortgages due to the electronic signatures and lack of any "original."

    - Fortunately, the Rooker-Feldman doctrine prevents this. This doctrine bars lower courts from undertaking appellate review of state court decisions. *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 462, 103 S. Ct. 1303, 1304, 75 L. Ed. 2d 206 (1983); see also *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 414, 44 S. Ct. 149, 149, 68 L. Ed. 362 (1923).

    - The following requirements must be met for the Rooker-Feldman doctrine to apply: (1) the federal plaintiff lost in state court; (2) the plaintiff complains of injuries caused by the state-court judgments; (3) those judgments were rendered before the federal suit was filed; and (4) the plaintiff is inviting the district court to review and reject the state-court judgments. *Exxon Mobil v. Saudi Basic Industries Corporation*, 544 U.S. 280, 284, 125 S. Ct. 1517, 1521-22, 161 L.ed.2d 454 (2005). If applicable, the federal court lacks subject-matter jurisdiction over the federal plaintiff's claims and the claims must be dismissed.

    - This means that a borrower who files bankruptcy after the entry of the entry of a foreclosure judgment but prior to a sale (as is most commonly the case) will not be able to re-litigate any issues raised in the state court regarding the e-note and mortgage. In other words, the bankruptcy court does not act as an appellate court for state court decisions.

In this new world we live in, it is important to take a moment and research the applicable laws/cases in your jurisdiction on how best to handle same.

The Legal Technicalities—Admission of e-Note Records as Evidence at Trial

While the use of the e-Note has exploded in the first quarter of 2020, unfortunately, the same cannot be said for the use of e-Notes at trial, which continue to be problematic throughout the litigation process. It is important to recognize the differences between the admissibility of a "wet-ink" Note and an e-Note, as a failure to properly admit the electronic records into evidence will prove a fatal flaw to the Plaintiff's case.

Most courts throughout the nation are plodding in their adoption and reliance upon technology and electronic records. The most conventional judges are insistent upon seeing, touching, and verifying the "wet-ink" Note, to prove the existence of the financial obligation and the plaintiff's standing to commence the subject foreclosure action. Reliance upon electronic records, including the e-Note and the proof of transfer and ownership, is a clear departure from the standards imposed by the courts for countless years. However, relevant case law and state-specific statutes clearly allow for the admission of such exhibits into evidence, and the reliance upon such exhibits to prove a plaintiff's entitlement to judgment.

To prove the existence of the loan and standing in a case involving an e-Note, the plaintiff must produce and admit the e-Note and the MERS registry records at the time of trial. These documents should also be exchanged, if requested, during the discovery process to avoid the possibility of evidentiary preclusion at the time of trial. All such documents should be admitted as business records at the time of trial despite the possibility/likelihood that such "transferable records" were not created by the current plaintiff nor the current loan servicer.

Transferable records are governed by 15 U.S.C.S. 7021, which defines a transferable record as an electronic record that:

- would be a note under Article 3 of the Uniform Commercial Code if the electronic record were in writing;
- the issuer of the electronic record expressly has agreed is a transferable record; and
- relates to a loan secured by real property.

It further states that a transferable record may be executed using an electronic signature.

Subsection (b) of 15 U.S.C.S. 7021 states that "a person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred." The federal statute further states, within subsection (c), that, "if requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record."

The difficulty begins with the admission of the "related business records" to prove the control of the transferable record at the time of the commencement of the subject foreclosure action.

In New York, business records are governed by CPLR 4518(a), which defines such a record as "any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." The statute further enumerates the admissibility requirements of electronic records by stating that, "an electronic record, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained, or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record."

While the path to admissibility is clearly enumerated, there are obstacles along the way. For example, what if the loan servicer and/or the plaintiff did not create these records because they were not involved in the origination of the loan nor the transfer process through the MERS registry? If a prior entity was involved, the current servicer will not have the requisite knowledge as to how the record was created, stored, or maintained before the loan was transferred to the current plaintiff and/or servicer. This lack of knowledge is a hurdle to proving the plaintiff's standing and to the plaintiff's entitlement to judgment.

Recently, the Second Department of New York's Appellate Division held that a loan servicer could testify to the records that were created by a different entity provided that the servicer proved that the records were incorporated into its system(s) of records and relied upon in the daily servicing of the subject loan. In *Bank of N.Y. Mellon v. Gordon*, 171 A.D.3d 197 (2nd Dept. 2019), the court specifically held that "such records may be admitted into evidence if the recipient can establish personal knowledge of the maker's business practices and procedures or establish that the records provided by the maker were incorporated into the recipient's own records and routinely relied upon by the recipient in its own business." This holding is supported by New York's Court of Appeals in *People v. Cratsley,* 86 N.Y.2d 81 (1995), as well as the other Appellate Divisions in previous decisions.

While the initial benefit of these decisions was to allow new servicers to testify to the records that were created by prior servicers, they also serve as an outline as to how to properly admit e-Notes and the MERS registry without requiring a witness and/or affidavit from MERS. Upon receipt of the servicing rights, the loan servicer should upload a copy of the e-Note and the MERS registry to its own systems. These documents should be reviewed to ensure the existence of the obligation, as well as the plaintiff's standing. This review serves as the plaintiff's/servicer's reliance on the incorporated records for the daily servicing of the loan. The witness will be asked to discuss his/her knowledge and training on the servicer's systems of record to build the proper foundation to admit the records into evidence. Once the foundation is laid, the witness will have to discuss the onboarding process that is undertaken when the records are received, and the ensuing review process, including the incorporation of the records into the servicer's systems, and the servicer's reliance on the records in the subsequent servicing of the loan. It is important that the witness testify that corrections would be sought if any errors or omissions are discovered during the onboarding process. This testimony creates an indicium of reliability of the records and contributes to the admissibility of the records.

These statutes and cases apply only to New York State. If your state does not allow the incorporation/reliance testimony, the plaintiff will have to produce a witness who has personal knowledge of the MERS' registry and how entries are made and maintained within the registry. Otherwise, the records will be deemed as inadmissible hearsay.

As technology, statutes, and case law continuously change, it is incumbent upon the default servicing industry to remain vigilant as to such changes. The increased knowledge and ability to use technology to the industry's advantage will inevitably result in shorter timelines, fewer undue delays, and a greater rate of success in the litigation process.

THE LEGAL LEAGUE 100

For more information about this report or Legal League 100, please contact:

Rachel Williams, *Executive Director of Memberships*
Rachel.Williams@TheFiveStar.com

The Legal League would like to recognize the following members of the Special Initiatives Working Group for their contribution to this project.

Ryan Bourgeois

BDF LAW GROUP
ESTABLISHED 1990

Michelle Gilbert

Gilbert Garcia Group, P.A.

Brian Goldberg

Gross Polowy LLC

Marissa Yaker and Seth Greenhill

PADGETT LAW GROUP