WELLS FARGO BANK, N.A. V. HEATH: HEIGHTENED PLEADING STANDARDS DRESSED IN STANDING GARB

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I. INTRODUCTION

When the mortgage bubble collapsed in 2006, the resultant crisis shocked this country's confidence and pocketbooks. Across the United States, the number of initiated foreclosures skyrocketed and home prices decreased, which further destabilized the economy. Banks strained to regain some of their lost investments by pushing as many foreclosures through the judicial process as possible. However, this furious bevy of proceedings brought dubious documentation, and courts took notice. Oklahoma and numerous other state courts now strictly require parties to show that they have standing to foreclose on a mortgage. In *Wells Fargo Bank, N.A. v. Heath*, the Oklahoma Supreme Court held that a foreclosing party must show it has standing as holder of the note by offering evidence of that status with the initial complaint to prevail on a motion for summary judgment. At the same time, there is a chance that *Heath* made it impossible to prevail on a motion for summary judgment as a "nonholder in possession of the instrument who has the rights of a holder."[1]

This Comment briefly discusses requirements of Oklahoma's Uniform Commercial Code (UCC) as it applies to negotiable instruments.[2] It also covers the facts and holdings of *Deutsche Bank*

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1. For ease of reading, "nonholder in possession of the instrument who has the rights of a holder" hereinafter will be "nonholder."

2. For the rest of this Article, "UCC" means the Oklahoma Uniform Commercial

National Trust Co. v. Byrams and *HSBC Bank USA, National Association v. Lyon*, both of which preceded and paved the way for the *Heath* decision. Thereafter, it analyzes the facts and holding of *Heath* and concludes by discussing the implications *Heath* could have on future negotiable instrument cases in Oklahoma, specifically, those that deal with notes secured by real property mortgages.

II. BACKGROUND

A. The Mortgage Crisis

Today, the subprime mortgage crisis is, simultaneously, a fresh wound and an indelible moment in history. While the crisis was not caused by one particular moment or decision, many agree one of the main causes was the "bursting of the residential real estate bubble . . . fueled in large part by the reckless expansion of subprime mortgage lending."[3] The mortgage crisis's impact on Oklahoma, as well as across the United States, is a product of decisions and occurrences that slowly accumulated and finally crumbled in 2006.[4] Arguably, it all started in 1980 when Congress began to pass a series of laws that would make home ownership easier for the middle-class American.[5] In an effort to achieve the proverbial American dream, homeowners were approved for home loans with adjustable interest rates and balloon payments that they could not afford when compared to their debt-to-income ratios.[6] In

Code as promulgated by Oklahoma and as it appears in the Oklahoma Statutes. If the Author means the Uniform Commercial Code that was prepared by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, then "ALI UCC" will be used in the text and citation will be to the UCC rather than the Oklahoma Statutes.

3. Jerry W. Markham, *The Subprime Crisis—A Test Match for the Bankers: Glass Steagall vs. Gramm-Leach-Bliley*, 12 U. PA. J. BUS. L. 1081, 1104 (2010); *see also* Roy D. Oppenheim & Jacquelyn K. Trask–Rahn, *Deconstructing the Black Magic of Securitized Trusts: How the Mortgage-Backed Securitization Process Is Hurting the Banking Industry's Ability to Foreclose and Proving the Best Offense for a Foreclosure Defense*, 41 STETSON L. REV. 745, 748–50 (2012) (discussing the various legislative enactments and economic changes within the mortgage industry that helped to create the subprime lending practices that eventually led to the mortgage crisis).

4. *See* Oppenheim & Trask–Rahn, *supra* note 3, at 748–50.

5. *Id.*

6. *See* GLOBAL INSIGHT, INC., THE MORTGAGE CRISIS: ECONOMIC AND FISCAL IMPLICATIONS FOR METRO AREAS 1 (Nov. 26, 2007), *available at* http://www.usmayors.org/metroeconomies/1107/report.pdf; *see also* Oppenheim & Trask–Rahn, *supra* note 3, at 748–49 (noting that, while banks may have approved these questionable loans, these

addition, Congress repealed the Glass-Steagall Act in 1999,[7] which allowed banks "to enter other areas of finance, including . . . engaging freely in commercial paper dealings."[8] With these changes came a growth in the mortgage industry and a sudden push for mortgage brokers to obtain as many loans as possible.[9] Securitization of mortgage-backed loans became a trend as it became easier to bundle and sell the loans, spreading the risk that inevitably came with them, especially as screening became perfunctory.[10]

The only problem was that this "whole scheme [only] worked as long as borrowers made their monthly mortgage payments."[11] With fluctuating and often skyrocketing interest rates, borrowers could not keep up, and the whole process crashed between 2006 and 2007.[12] According to RealtyTrac, there were roughly 2.7 million foreclosure filings in 2011;[13] this was down 34% from 2009 and 19% from 2008.[14] In

approvals would not have been possible without the preceding legislative decisions of Congress).

7. Gramm-Leach-Bliley Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in §§ 12 and 15 of the United States Code) (repealing the Glass-Steagall Act in an effort to allow United States banks to be more competitive in the "financial service industry").

8. Markham, *supra* note 3, at 1104.

9. *See* Oppenheim & Trask–Rahn, *supra* note 3, at 750 ("At a lightning-fast rate, mortgage loans went from being illiquid to liquid assets, and for the first time mortgage brokers began making a premium for selling or disposing of the loans upon origination instead of only earning the up-front fees they charged to borrowers."); GLOBAL INSIGHT, *supra* note 6, at 1 (noting the rapid increase in subprime mortgages across the U.S.).

10. *See* Oppenheim & Trask–Rahn, *supra* note 3, at 752 ("'Mortgage brokers . . . would find borrowers and get paid a premium for creating subprime loans, 'seduc[ing] millions of people into signing on the dotted line.' Then, instead of holding onto the loans as traditional lending practices had called for before, subprime lenders sold the loans, and the very high risk of default that goes with them, to investors who were looking to buy these types of loans—investors such as pension funds and 401k plans." (alteration in original) (quoting John Atlas, *The Conservative Origins of the Sub-Prime Mortgage Crisis*, AM. PROSPECT (Dec. 17, 2007), http://prospect.org/cs/articles?article=the_conservative_origins_of_the_subprime_mortgage_crisis)).

11. *Id.* at 752 (quoting Atlas, *supra* note 10) (internal quotation marks omitted).

12. GLOBAL INSIGHT, *supra* note 6, at 1.

> It was the sharp increase in this lending in 2004 and 2005, with rate resets in 2006 and 2007, which has led to the mortgage mess in 2007. Suddenly, buyers who would not have qualified for mortgages at the reset rates have found themselves with a home they are unable to pay for or to sell.

Id.

13. *2011 Year-End Foreclosure Report: Foreclosures on the Retreat*, REALTYTRAC (Jan. 9, 2012), http://www.realtytrac.com/content/foreclosure-market-report/2011-year-end-foreclosure-market-report-6984.

2010, Congress addressed questionable "documentation irregularities" that had been used by foreclosing parties seeking to "cut corners," and Congress noted that "sloppy and cursory" procedures had been used "to move delinquent borrowers out of their homes as quickly as possible."[15]

As a result of this widespread crisis, courts saw a stream of foreclosure claims[16] supported by dubious documents, signatures, and affidavits.[17] Courts began to address the predatory practices of the foreclosing parties in various ways.[18] *Heath*, one of the cases caught up in this movement, is the case in which the Oklahoma Supreme Court directed its opinion at Wells Fargo and at the questionable tactics of foreclosing parties.

B. Securitization

When someone buys a home, the loan used to buy the home consists of a note (evidence of the debt) and a mortgage (lien on the real property to secure the debt).[19] Once the original loan is made, the note and mortgage can change hands numerous times and in a variety of ways because the original lender does not necessarily keep possession of, or interest in, the note and mortgage.[20] If the original lender sells the note—thus transferring ownership rights—but keeps the hardcopy, the original

14. *Id.*

15. CONG. OVERSIGHT PANEL, 111TH CONG., NOV. OVERSIGHT REPORT: EXAMINING THE CONSEQUENCES OF MORTGAGE IRREGULARITIES FOR FINANCIAL STABILITY AND FORECLOSURE MITIGATION 7 (Nov. 16, 2010), http://www.gpo.gov/fdsys/pkg/CPRT-111JPRT61835/pdf/CPRT-111JPRT61835.pdf [hereinafter OVERSIGHT REPORT].

16. *See id.* ("[T]he boom in the housing market mutated into a boom in foreclosures . . . .").

17. *See id.* at 4 (reporting, in part, on the various fraud claims made in connection to loan "document irregularities" and potential issues that they could cause).

18. *See, e.g.*, U.S. Bank, N.A. v. Collymore, 68 A.D.3d 752, 754 (N.Y. App. Div. 2009) (holding that the foreclosing party failed to prove standing because it could not show that it was both holder of the note and holder of the collateral mortgage nor did the note "indicate when . . . [it had been] physically delivered to the Bank . . . [since] the version of the note attached to the . . . affidavit contained an undated indorsement in blank by the original lender"); U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 55 (Mass. 2011) (holding that the plaintiff did not have standing because it did not show that it was holder of the mortgage at the "time of foreclosure").

19. *See* Nolan Robinson, *The Case Against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) to Initiate Foreclosure Proceedings*, 32 CARDOZO L. REV. 1621, 1625–26 (2010) ("In its most basic form, a home mortgage loan consists of a borrower (or mortgagor), a lender (or mortgagee), a promissory note, and a mortgage.").

20. *See* OVERSIGHT REPORT, *supra* note 15, at 2 ("[A] single mortgage loan may be sold dozens of time between various banks across the country.").

lender will keep the servicing rights in the note (i.e., the right to initiate foreclosure and remain the entity to which the homeowner makes payments).[21] However, the original lender can also sell the servicing right to one party and sell the ownership right to another, thereby splitting who owns the note from who has the right to enforce it.[22]

The securitization process is prevalent and complex because it adds additional parties and steps to a run-of-the-mill home loan. To summarize, the process requires multiple transfers of the note and mortgage before both settle into the hands of the final owner and holder.[23] Once a loan is made between an originating party and debtor, the originating party can transfer the mortgage and note to an investment bank, which will then securitize a bundle of notes and mortgages.[24] The securitzed notes and mortgages are then generally sold to a trust.[25] When someone invests in these securities, the money they make derives not from the mortgaged real estate, but rather from the liquid cash stream that comes from the monthly payments made by the debtors.[26] In the end, the process could be quite confusing for everyone involved because no one knows who physically possesses each of the original notes and thus who has the right to enforce them.[27]

C. Negotiable Instruments and Article 3

The UCC requires that one is either "(i) the holder[28] of the

21. *See* Robinson, *supra* note 19, at 1626 (explaining the securitization process and the various transfers a note and mortgage may go through as a result).

22. *Id.*

23. *See id.*; *see also* OVERSIGHT REPORT, *supra* note 15, at 2 ("The securitization process is complicated and requires several properly executed transfers.").

24. *See* Robinson, *supra* note 19, at 1626; *see also* OVERSIGHT REPORT, *supra* note 15, at 52 ("There are at least three points at which the mortgage and the note must be transferred during the securitization process in order for the trust to have proper ownership of the mortgage and the note and thereby the authority to foreclose . . . .").

25. *See* OVERSIGHT REPORT, *supra* note 15, at 14.

26. *See* i*d.*

27. *See id.* at 10 ("Effective transfers of real estate depend on parties' [ability] to answer seemingly straightforward questions: who owns the property? [H]ow did they come to own it? [C]an anyone make a competing claim to it? The irregularities have the potential to make these seemingly simple questions complex." (footnotes omitted)).

28. A "holder" is

> (A) 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;

instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 12A 3-309 or subsection (d) of Section 12A 3-418 of [the negotiable instruments] title" when seeking to enforce an instrument.[29] According to the UCC, a party will obtain any right to enforce the instrument equal to that of the previous holder if the holder delivered the note in such a way as to constitute a "transfer" under the UCC.[30] "An instrument is transferred when it is delivered by a person . . . for the purpose of giving to the person receiving delivery the right to enforce the instrument."[31] This is true even if the transfer is not a negotiation.[32] "Thus, the failure to obtain the indorsement of the payee does not prevent a person in possession of the note from being the person entitled to enforce it, but demonstrating that status is more difficult."[33] In order to prove nonholder status, the UCC requires that one prove the transaction from which that party obtained the unindorsed instrument and show that the transaction was intended to give that party the rights of the transferring holder.[34]

(B) the person in possession of a document of title if the goods are deliverable either to bearer or to the order of the person in possession; or

(C) the person in control of a negotiable electronic document of title.

OKLA. STAT. tit. 12A, § 1-201(b)(21) (OSCN through 2013 Leg. Sess.).

29. *See* Wells Fargo Bank, N.A. v. Heath, 2012 OK 54, ¶ 9, 280 P.3d 328, 333 (quoting OKLA. STAT. tit. 12A, § 3-301).

30. OKLA. STAT. tit. 12A, § 3-203(b).

31. *Id.* § 3-203(a).

32. *Id.* at § 3-203(a)–(b)The UCC defines *negotiation* as "a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder." *Id.* § 3-201(a).

33. PERMANENT EDITORIAL BD. FOR THE UNIF. COMMERCIAL CODE, APPLICATION OF THE UNIFORM COMMERCIAL CODE TO SELECTED ISSUES RELATING TO MORTGAGE NOTES 6 (Nov. 14, 2011), http://www.uniformlaws.org/Shared/Committees_Materials/PEBUCC/PEB_Report_111411.pdf [hereinafter UCC REPORT].

34. OKLA. STAT. tit. 12A, § 3-203 cmt. 3 (noting that the ALI UCC's "[o]fficial Comment 2 indicates that subsection 3-203(b) continues what has been Oklahoma law for many years as to a transferee's burden when bringing suit. . . . [I]n Code terms, the burden is as to the right to enforce the instrument"); U.C.C. § 3-301 cmt. 2 (2012) (discussing that the transferee, while not a holder, possesses "the rights of the holder," but the transferee must show why he or she is in possession of an unindorsed note, and prove "the transaction through which the transferee acquired it." Once the transferee has proven that transaction, transferee is "entitled" to the presumption of a holder in due course).

III. BEFORE *WELLS FARGO BANK, N.A. V. HEATH*

Heath was not the first case of its kind decided by the Oklahoma Supreme Court.[35] On the contrary, beginning in January 2012, the Court seemed to take up a vendetta against the cursory procedural habits used by some banks seeking to foreclose in Oklahoma, and all of those cases, save one,[36] were decided against the banks seeking foreclosure. In doing so, the Court responded to the national mortgage crisis by dressing its heightened-pleading holdings in standing garb.

A. Deutsche Bank National Trust Co. v. Byrams

When the Oklahoma Supreme Court decided *Byrams* on January 17, 2012, it held that Deutsche Bank lacked standing to foreclose because the bank had not provided sufficient evidence that it was holder or nonholder of the note at the time the suit had commenced.[37] When Deutsche Bank initiated foreclosure on December 8, 2009, it filed a complaint in which it alleged it was the present holder of the note and mortgage "having received due assignment through mesne assignments of record or conveyance."[38] When Deutsche Bank moved for summary judgment, it attached an assignment of mortgage to the motion; the assignment had been acknowledged on January 12, 2010, and recorded two weeks later—but over a month after Deutsche Bank initiated foreclosure.[39] The verbiage of the assignment stated that it secured payment of the subject note.[40] The court granted summary judgment in favor of Deutsche Bank

35. *See, e.g.*, U.S. Bank Nat'l Ass'n v. Baber, 2012 OK 55, 280 P.3d 956 (reversing the trial court's decision and holding that there was a question of fact as to when U.S. Bank had become the party with the right to enforce the note); Deutsche Bank Nat'l Trust v. Brumbaugh, 2012 OK 3, 270 P.3d 151 (reversing the trial court's decision and holding that there was a question of fact as to when Deutsche Bank had become the party with the right to enforce the note); Deutsche Bank Nat'l Trust Co. v. Byrams, 2012 OK 4, 275 P.3d 129 (reversing the trial court's decision and holding that there was a question of fact as to whether Deutsche Bank acquired the right to enforce the note prior to filing the foreclosure proceedings).

36. *See* HSBC Bank USA, Nat'l Ass'n v. Lyon, 2012 OK 10, ¶¶ 9–10, 276 P.3d 1002, 1006.

37. *Byrams*, 2012 OK 4, ¶¶ 8–10, 276 P.3d at 132.

38. *Id.* ¶ 1, 276 P.3d at 130.

39. *Id.*

40. *Id.* ¶ 9, 276 P.3d at 132. Specifically, the assignment stated that it transferred

> the following described mortgage, securing the payment of a certain promissory note(s) for the sum listed below, together with all rights therein and

and held it had shown it was holder of the note.[41] Upon appeal, the Oklahoma Supreme Court ruled against Deutsche Bank and stated that it had not established that it had the right to enforce the note before foreclosure proceedings commenced.[42]

The Court reasoned, for one, that Deutsche Bank could not establish itself as holder of the note because it had not produced the original note with the required signatures—there was just a mortgage assignment.[43] Moreover, Deutsche Bank could not establish status of nonholder because it did not show that it had received the instrument through transfer and, as a result, acquired the right to enforce the instrument *before* filing the complaint.[44] "[W]ithout holder status and therefore the presumption of a right to enforce, the possessor of the note must demonstrate both the fact of the delivery and the purpose of the delivery of the note to the transferee in order to qualify as the person entitled to enforce."[45]

Additionally, while the Court acknowledged that the presentation of the assignment of the mortgage was an attempt to establish "purpose of delivery," the Court noted that the assignment's language had been held by "other jurisdictions to not effect an assignment of a note."[46] In other words, it only identified and assigned the mortgage.[47] Finally, the assignment did not occur until after Deutsche Bank had commenced the suit, thereby creating a question of fact as to whether Deutsche Bank had become a person entitled to enforce the note prior to commencement of the suit.[48] In the end, the Court determined that summary judgment for Deutsche Bank was not appropriate.[49]

> thereto, all liens created or secured thereby, all obligations therein described, the money due and to become due thereon with interest, and all rights accrued or to accrue under such mortgage.

Id. (internal quotation marks omitted).

41. *Id.* ¶ 1, 276 P.3d at 130.
42. *Id.* ¶ 10, 276 P.3d at 132.
43. *Id.* ¶ 8, 276 P.3d at 132.
44. *See id.* ¶¶ 9–10, 276 P.3d at 132.
45. *Id.* ¶ 7 n.3, 276 P.3d at 132 n.3.
46. *Id.* ¶ 9, 276 P.3d at 132 (citing Veal v. Am. Home Mortg. Servicing, Inc. *(In re* Veal), 450 B.R. 897, 905 (B.A.P. 9th Cir. 2011)).
47. *Id.*
48. *Id.* ¶ 10, 276 P.3d at 132.
49. *Id.* ¶ 11, 276 P.3d at 133.

B. HSBC Bank USA, National Association v. Lyon

The Oklahoma Supreme Court decided *Lyon* on February 14, 2012, and it was the only decision on this subject matter in which the Court ruled in favor of the foreclosing party.[50] In *Lyon*, HSBC filed its complaint on November 25, 2008, in which it attached an unindorsed note and claimed to be the holder.[51] HSBC moved for summary judgment claiming it had proven its status as holder through a mortgage assignment, which was dated August 31, 2009, and recorded two weeks later with the county clerk.[52] The trial court held that HSBC did not have standing and dismissed the case without prejudice to refile.[53] It found that the unindorsed note, paired with the mortgage assignment—that had not occurred until almost a year after HSBC had filed the complaint—did not show HSBC obtained the right to enforce the note at the time it initiated foreclosure proceedings.[54]

HSBC filed a second amended complaint in which it claimed to be the holder; this time, however, it filed the note complete with a blank indorsement from the original lender.[55] The trial court granted the renewed motion for summary judgment in favor of HSBC,[56] and the Oklahoma Supreme Court affirmed.[57] The Oklahoma Supreme Court held that, because HSBC had filed its second petition with its note properly indorsed and the mortgage properly attached, it had shown that it was, in fact, the party "entitled to enforce the instrument as the holder of the note."[58]

50. *Compare, e.g.*, U.S. Bank Nat'l Ass'n v. Baber, 2012 OK 55, ¶ 5, 280 P.3d 956, 958 (reversing and remanding the trial court's decision in favor of the foreclosing bank), *and* Deutsche Bank Nat'l Trust v. Brumbaugh, 2012 OK 3, ¶ 11, 270 P.3d 151, 154 (reversing and remanding the trial court's decision in favor of the foreclosing bank), *and* Wells Fargo Bank, N.A. v. Heath, 2012 OK 54, ¶ 16, 280 P.3d 328, 335 (reversing and remanding the trial court's decision in favor of the foreclosing bank), *and Byrams*, 2012 OK 4, ¶ 10, 275 P.3d at 132 (reversing and remanding the trial court's decision in favor of the foreclosing bank), *with* HSBC Bank USA, Nat'l Ass'n v. Lyon, 2012 OK 10, ¶ 10, 276 P.3d 1002, 1006 (affirming the trial court's summary judgment in favor of the foreclosing bank).

51. *Lyon*, 2012 OK 10, ¶ 1, 276 P.3d at 1003.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* ¶ 10, 276 P.3d at 1006.

58. *Id.* ¶ 7, 276 P.3d at 1005. The properly indorsed note was "an indorsed-in-blank note." *Id.*

IV. *WELLS FARGO BANK, N.A. V. HEATH*

A. Facts

On August 11, 2005, Mr. and Mrs. Heath executed a note that was secured by a mortgage in favor of Option One Mortgage Corporation.[59] After the Heaths defaulted on their obligation under the note, Wells Fargo, "as Trustee for Option One Mortgage Loan Trust . . . , filed its petition to foreclose" on the mortgage.[60] Upon filing its complaint on December 22, 2008, Wells Fargo attached an unindorsed note accompanied by an assignment of the mortgage dated February 28, 2008.[61] The Heaths generally denied all allegations within the complaint.[62]

B. Trial Court Proceedings

Wells Fargo filed a motion for summary judgment, and the trial court granted a default judgment in favor of Wells Fargo after the Heaths failed to answer.[63] On July 28, 2009, Wells Fargo filed a "motion to confirm the sale" of the mortgaged property, and a hearing was scheduled for August 18, 2009.[64] On February 12, 2010, the Heaths filed a petition and motion to vacate the default judgment as well as a motion to suspend the sale of the real property.[65] Further, the Heaths' attorney moved "for leave to file an application to assume original jurisdiction and petition for writ of prohibition."[66] Wells Fargo answered by asserting "it was the holder of the note and mortgage pursuant to an assignment filed of record with the county clerk."[67]

At the motion hearing, Wells Fargo produced the original note with an indorsed-in-blank allonge, executed by Option One, the previous holder and loan originator.[68] The court denied the Heaths' motion to

59. Wells Fargo Bank, N.A. v. Heath, 2012 OK 54, ¶ 1, 280 P.3d 328, 330.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* ¶ 2, 280 P.3d at 330.
64. *Id.*
65. *Id.* ¶ 3, 280 P.3d at 330.
66. *Id.*
67. *Id.*
68. *Id.* ¶ 4, 280 P.3d at 331.

vacate and held that Wells Fargo was holder of the note.[69] While the court denied the motion to suspend execution of proceedings, it did grant the "request for leave of court to file a writ of prohibition" with the Oklahoma Supreme Court.[70]

C. Opinion

In an opinion written by Justice Combs, the Oklahoma Supreme Court held that Wells Fargo had not established itself as a party with the right to enforce the note and therefore did not have standing.[71] Wells Fargo had the burden to establish its standing "as of the commencement of the suit," and without such a showing, the trial court did not have subject-matter jurisdiction to hear the case.[72] Accordingly, a party that attempts to foreclose on a mortgage proves standing by demonstrating the "right to enforce the note;"[73] without *ownership*, the court held, a party has no standing.[74] "[T]o establish it was a person entitled to enforce the note at the commencement of the action," Wells Fargo had to "demonstrate it became a person entitled to enforce ***prior*** to the filing of the foreclosure proceeding."[75]

The Court began its analysis by stating how one can establish the status of holder, and concluded that Wells Fargo had failed to show that it had the right to enforce the note.[76] The Court dismissed Wells Fargo's argument that it had become holder of the note through assignment of the mortgage because "[i]n Oklahoma, 'proof of ownership of the note carrie[s] with it ownership of the mortgage security'. . . . The opposite is

69. *Id.* ¶¶ 4–5, 280 P.3d at 331.

70. *Id.* ¶ 5, 280 P.3d at 331.

71. *Id.* ¶ 8, 280 P.3d at 332.

72. *Id.* (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 570 n.5 (1992)). "Standing, as a jurisdictional question, may be correctly raised at any level of the judicial process or by the Court on its own motion." *Id.* ¶ 8, 280 P.3d at 332 (citing Young Men's Christian Ass'n v. First Nat'l Bank & Trust Co. (*In re* Estate of Doan), 1986 OK 15, ¶ 7, 727 P.2d 574, 576).

73. *Id.* ¶ 9, 280 P.3d at 333.

74. *Id.* The Court's statement that one must have *ownership* to have standing is suspect. As noted previously, Article 3 allows for one who is not, in fact, the owner of a negotiable instrument to enforce it. Further still, securitization necessitates that an owner not be the only party entitled to enforce a note since usually it is an inanimate trust that owns the note. Whether this was careless wording or the Court actually holding that only an owner of a negotiable instrument may enforce it is questionable.

75. *Id.* ¶ 16, 280 P.3d at 335 (internal quotation marks omitted).

76. *Id.* ¶ 10, 280 P.3d at 333 (citing OKLA. STAT tit. 12A, §§ 1-201(b)(21), 3-204, 3-205).

not true."[77] The Court continued its analysis with contract law and stated that "[c]ontracts are binding only upon those who are parties thereto, and are enforceable only by the parties to a contract or those in privity with it."[78] "The rights and obligations of the parties are established within the four corners of the contract, which is the promissory note."[79] Therefore, Wells Fargo had to show it had the right to enforce the note as established "in the original promissory note."[80] In this case,

> there was no proof [Wells Fargo] was the holder of the note at the time of commencement of the suit. Standing was not established by the materials attached to [Wells Fargo's] petition or motion for summary judgment because there was no attached indorsed note nor was there an assignment of the note.[81]

Therefore, there was a "substantial issue of material fact" with regard to Wells Fargo's status as a party with the right to enforce the note.[82]

D. Justice Gurich's Dissent

In her dissent, Justice Gurich stated that "[t]he majority continues to fashion new requirements in mortgage foreclosure cases, this time, by requiring [Wells Fargo] to have separate documentation at the time of filing that establishes that the transfer of the note included [Wells Fargo's] right to enforce the note."[83] Justice Gurich pointed out that ownership of the mortgage through assignment was "proof of the purpose for the alleged transfer" through which Wells Fargo acquired the rights of holder.[84] Also, while there is no presumption that the party who owns the mortgage will then own the note, the mortgage still follows the note in the sense that it effectively proves "the transaction through which the [Wells Fargo] acquired the rights of holder."[85] Wells Fargo actually bolstered its position when it produced the "indorsed-in-blank allonge at

77. *Id.* ¶ 11, 280 P.3d at 333 (quoting Engle v. Fed. Nat'l Mortg. Ass'n, 1956 OK 176, ¶ 7, 300 P.2d 997, 999).
78. *Id.* ¶ 12, 280 P.3d at 334 (citations omitted) (internal quotation marks omitted).
79. *Id.*
80. *Id.*
81. *Id.* ¶ 8, 280 P.3d at 332.
82. *Id.*
83. *Id.* ¶ 2, 280 P.3d at 336 (Gurich, J., dissenting).
84. *Id.*
85. *Id.* ¶ 4, 280 P.3d at 337.

the hearing on the [Heaths'] motion to vacate."[86] In the end, Justice Gurich rejected the majority's continued practice of creating "procedural requirements that are not applied in any other civil actions and are inconsistent with requirements found in established statutory and case law."[87]

V. ANALYSIS

Throughout the Court's opinions in 2012, there seemed to be a common theme: one must establish a right to enforce the note by establishing holder or nonholder status, and one must prove that the enforcement right existed prior to commencing foreclosure.[88] However, *Heath* proves this understanding fruitless. After the Court stated how one may establish itself as holder, it curiously applied contract law in its discussion regarding enforcement of the note, which it had already deemed to be a negotiable instrument and not just an ordinary contract.[89] The Court stated the note, as a contract, was only enforceable "by the parties to [the] contract or those in privity with it."[90] Consequently, Wells Fargo had to establish that it had a right to enforce the note by showing that the right had been established in the "original promissory note" and, without such a showing, Wells Fargo had no standing.[91]

A. Negotiable Instrument or Solely a Contract?

In *Heath*, the Court held that the note was a negotiable instrument thus subject to the rules of the UCC.[92] However, by applying contract law to determine who may *enforce* the note, it would seem as if the Court second guessed this determination. In the absence of a negotiable label,

86. *Id.* ¶ 5, 280 P.3d at 337.

87. *Id.* ¶ 6, 280 P.3d at 337.

88. *See, e.g.*, U.S. Bank Nat'l Ass'n v. Baber, 2012 OK 55, ¶ 6, 280 P.3d 956, 958–59; Deutsche Bank Nat'l Trust v. Brumbaugh, 2012 OK 3, ¶ 11, 270 P.3d 151, 154; Deutsche Bank Nat'l Trust Co. v. Byrams, 2012 OK 4, ¶ 11, 275 P.3d 129, 132; HSBC Bank USA, Nat'l Ass'n v. Lyon, 2012 OK 10, ¶ 10, 276 P.3d 1002, 1006.

89. *Heath*, 2012 OK 54, ¶ 12, 280 P.3d at 334.

90. *Id.* (internal quotation marks omitted) (footnotes omitted).

91. *Id.*

92. *Id.* ¶ 9, 280 P.3d at 333. For an in-depth analysis of the requirements that a form must meet to qualify as a negotiable instrument, the questionably lenient labeling of notes as such, and the lack of understanding as to what a negotiable instrument entails, see FRED H. MILLER & ALVIN C. HARRELL, THE LAW OF MODERN PAYMENT SYSTEMS 39–42, 47–79 (West Group ed. 2003).

contract law could be applicable to determine who has the right of enforcement.[93]

> If an instrument is not a negotiable instrument, it is not governed by the rules in Article 3. What law then governs? A negotiable instrument is a contract. The contractual nature of a negotiable instrument is evident in the case of a promissory note, where there is an express promise to pay.[94]

Modernization of notes has meant the "erosion of negotiable status" in many instruments that would have otherwise been negotiable.[95] In order for a note to be deemed negotiable, it must essentially be a "courier without luggage"[96]—a requirement that assists in the note's transferability.[97] While there are exceptions to this rule, many modern real estate loans that are secured by mortgages are no longer negotiable because "the promise of the note is thereby made conditional" on the possibility that the debtor will default and the mortgage will need to be foreclosed.[98] However, as long as a court concludes that a note is a negotiable instrument, the "rights and responsibilities" of the parties are, in fact, transferable.[99]

> [A] negotiable instrument obtains value from the fact that, even

93. *See id.* at 13–14 (discussing the "applicability of general contract law" when a note does not meet negotiability requirements).

94. *Id.*

95. *See id.* at 41–42.

> Nonetheless, the form requirements for negotiable instruments have not evolved and commercial practice and changes in the legal environment by-passed some of the requirements. . . . As a result, consumer notes often are now merged into combination forms containing a promise to pay, a security agreement, and a disclosure statement . . . and, of course, these combined documents do not qualify as negotiable instruments. . . . It also is true that sales of promissory notes are included under Article 9 because such transactions have become common in securitizations, and in this context a distinction is not made between Article 3 and non-Article 3 instruments.

Id. at 41 (footnotes omitted).

96. *Id.* at 51 (internal quotation marks omitted).

97. *See id.* at 98 ("Much of the purpose behind the special rules for negotiable instruments codified in Article 3 is to promote the free transferability of such paper.").

98. *Id.* at 42.

99. *Id.* at 31 (explaining that the UCC serves the limited function of determining what will qualify as a negotiable instrument and, in such case, what the "rights and responsibilities" are of the parties involved).

> though it is a contract, it is governed by a special body of rules that confer particular benefits not available in an ordinary contract. . . . Thus some method must exist for distinguishing the contracts that are negotiable instruments from the contracts that are not. The method chosen by the common law . . . was a set of requirements as to the form of the instrument. If the instrument met the requirements, it was governed by the special rules.[100]

If the note in *Heath* was a negotiable instrument, as the Court held, then it was simply incorrect to require Wells Fargo to establish itself as a party with the right of enforcement within the four corners of the document or in privity thereto. One of the driving purposes behind the negotiable instrument law is to make instruments subject to it easily transferable. By simply indorsing and taking possession, one gains the right to enforce the note as holder.[101] In the case of a nonholder, by changing hands and proving purpose of delivery, one gains the same right to enforce as the prior holder.[102] While other law supplements the UCC in areas it does not address, the UCC is not silent on the subject of who has the right to enforce an instrument.[103] As long as an instrument is negotiable, the UCC determines who has the right to enforce the instrument.

Yet, after this holding, it is unclear whether the Court is moving away from generally labeling notes as negotiable instruments. If this is the case, absent a finding that the instrument is a negotiable instrument and, therefore, governed by the rules of the UCC, contract law could be the sole, applicable law. Applying contract law to notes would mean that parties who seek to foreclose on delinquent mortgages would find the

100. *Id.* at 39. These rules are now found in Article 3 of the UCC.

101. *See* OKLA. STAT. tit. 12A, §§ 3-301, 1-201(b)(21) (OSCN through 2013 Leg. Sess.).

102. *See id.* § 3-301 cmt. ("Of particular importance is that a nonholder in possession of an instrument who has the rights of a holder may enforce the instrument."). The Official Comment to the ALI UCC § 3-301 states that "enforcement is not limited to holders. . . . It also includes a person in possession of an instrument who is not a holder. A nonholder . . . includes a person that acquired rights of a holder by subrogation or under Section 3-203(a)." U.C.C.§ 3-301 cmt. (2012).

103. *See* MILLER & HARRELL, *supra* note 92, at 31 ("[I]t is apparent that Article 3 is by no means the only law that is likely to apply to an instrument."); *see also* OKLA. STAT. tit. 12A, § 1-103(b) ("Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, . . . or other validating or invalidating cause shall supplement its provisions.").

process much more difficult for secured mortgages.[104] Because of the complicated process that securitization requires, most foreclosing parties will not be a party, or in privity to the original note. Further, classifying notes as ordinary contracts would frustrate the mortgage-foreclosure process immensely because the mortgage industry created those loans with the customary understanding that they would be ruled negotiable instruments and therefore subject to the UCC.

B. Heightened Pleading Requirements

In 1984, Oklahoma joined the federal courts by adopting the requirements of notice pleading.[105] In fact, Oklahoma wrote its civil procedure rules "based on Federal Rules 1 through 25,"[106] and the Oklahoma Supreme Court has held that when a state pleading rule is "the same as a federal rule [it] must be interpreted in the same manner as the federal courts have interpreted the federal rule."[107]

Since Congress promulgated the Federal Rules of Civil Procedure pursuant to the Rules Enabling Act, there has been a constant battle to make pleadings more than what they were initially designed to be.[108] Charles E. Clark, the reporter for the original Advisory Committee and one of the most influential drafters of the Federal Rules, stated that the "'intent and effect of the rules is to permit the claim to be stated in general terms; the rules are designed to discourage battles over mere form of statement.'"[109] The drafters of the rules intended pleadings to generally inform both the litigants and the court of each party's assertion, ensure there is a plausible claim, and set the basic parameters as to what will eventually be explored during discovery; while the initial pleadings certainly begin the lawsuit's process, they do "not assume to decide the

104. *See* OVERSIGHT REPORT, *supra* note 15, at 2 ("Nowadays, a single mortgage loan may be sold dozens of times between various banks across the country. . . . [T]he sheer speed of the modern mortgage market has rendered obsolete the traditional ink-and-paper recordation process . . . . Further, the financial industry now commonly bundles the rights to thousands of individual loans into a mortgage-backed security (MBS).").

105. *See* George B. Fraser, *The Petition Under the New Pleading Code*, 38 OKLA. L. REV. 245, 245 (1985).

106. *Id.*

107. *Id.*

108. *See* Charles E. Clark, *Special Pleading in the "Big Case,"* 21 F.R.D. 45, 49 (1957) (discussing the "revolt" against enforcing the pleadings as the drafters intended).

109. *Id.* at 47 (quoting ADVISORY COMM., REPORT OF PROPOSED AMENDMENTS 18–19 (Oct. 1955)).

case."[110]

Coupled with the opinions that preceded it, *Heath* makes it clear that the Court has imposed heightened pleading requirements on mortgage foreclosure suits. This is evident by the immoderate amount of proof imposed on one claiming holder or nonholder status when filing a complaint.

1. Holder

In order to prove standing based on holder status, the Oklahoma Supreme Court held in *Heath* that one has to attach a note to the complaint that is either indorsed to the foreclosing party (special indorsement) or indorsed in blank (which would make it bearer paper).[111] However, this heightened showing when one files the initial complaint is not required under the Oklahoma statutes[112] nor is it required under the UCC.[113] The opposing party may choose not to challenge the foreclosing party's status, thus indicating to the court that the particular fact is not in controversy.[114] Alternatively, the opposing party may initially challenge the foreclosing party's holder status based upon the information given in the complaint, but the foreclosing party may sufficiently meet its burden during discovery to prove he or she is entitled to enforce the note.[115] If

110. *Id.* ("[T]he mutual statement of claims of the parties. . . . sets the lawsuit in action and informs the parties and the court of the general nature of the contentions of the litigants.").

111. *See* Wells Fargo Bank, N.A. v. Heath, 2012 OK 54, ¶ 10, 280 P.3d 328, 333.

112. *See* OKLA. STAT. tit. 12, § 2008 (A)(1) (OSCN through 2013 Leg. Sess.) ("A pleading which sets forth a claim for relief, . . . shall contain: a short and plain statement of the claim showing that the pleader is entitled to relief . . . .").

113. The Court based its standing requirements off of the UCC when it held that a party who had not established holder or nonholder status as defined in the UCC did not have standing. *Id.* ¶ 8, 280 P.3d at 332. There are two issues with this reasoning: The UCC defines holder and nonholder, but never states these statuses must be proven the moment one files a complaint; more importantly, the Court's reasoning is completely contrary to negotiable instrument law, which seeks to encourage easy transfer of negotiable instruments. Even for one who may be a nonholder, the ALI UCC explains that the party, without the presumption of holder, must prove those rights by proving the transaction from which he or she acquired the note. U.C.C. § 3-203 cmt. 2 (2012). However, the ALI UCC does not say that this must be proven in the initial complaint to be valid.

114. *See* OKLA. STAT. tit. 12, app. § 13(a)–(b) (stating that the movant for summary judgment shall list any material facts not in controversy, while the party opposing summary judgment shall define which material facts are in controversy).

115. Weeks v. Wedgewood Vill., Inc., 1976 OK 72, ¶ 14, 554 P.2d 780, 784 ("Motions for summary judgment do not admit all the well-pleaded facts in a petition.

the opposing party moves for summary judgment and challenges the party's status as holder, the challenged foreclosing party must then prove his or her status as alleged in the complaint.[116] At that time, the challenged foreclosing party may produce the signed and dated note to the court as proof of standing.[117] As long as the date on the note is before the suit's commencement and the previous holder of the note signed it, the foreclosing party can be said to have met its burden. If the trial judge determines that the challenged party has not met the burden with the facts presented, the trial judge can dismiss the complaint.[118] By requiring parties to file all necessary documentation with an initial complaint in order to prove they held the note at that time, the Court is effectively requiring a foreclosing party to prove much of its case up front, which is the opposite aim of the Federal and Oklahoma Rules of Civil Procedure.[119]

2. Nonholder

To prove nonholder status, the Oklahoma Supreme Court's prior holdings seem to impose a strict list of requirements to establish standing. First, a foreclosing party would need to file an unindorsed note with the complaint.[120] That party would also need to attach a copy of the mortgage as well as an assignment of the mortgage dated before commencement of the suit in order establish purpose of delivery.[121]

Although the allegations of the pleadings standing alone may raise an issue of material fact, summary judgment is not to be denied if other documentation pertinent to the motions palpably show the absence of such an issue.").

116. *See* OKLA. STAT. tit. 12, app. §13(b).

117. *See id.* ("All material facts set forth in the statement of the movant which are supported by acceptable evidentiary material shall be deemed admitted for the purpose of summary judgment.").

118. *See id.* § 13(e).

119. *See* J.P. Morgan Chase Bank, N.A. v. Eldridge, 2012 OK 24, ¶ 6, 273 P.3d 62, 69 (Gurich, J., dissenting) ("[Section] 2011 (B)(3) provides that an attorney filing anything with the court certifies that to 'the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances . . . the allegations and other factual contentions . . . *are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery*." (citations omitted) (internal quotation marks omitted)).

120. Deutsche Bank Nat'l Trust Co. v. Byrams, 2012 OK 4, ¶ 7, 275 P.3d 129, 132 ("To be a 'nonholder in possession who has the rights of a holder' you must be in possession of a note that has not been indorsed either by special indorsement or blank indorsement.").

121. *See supra* Part II.A–B.

Further, the wording of the assignment would need to expressly purport to transfer the note with the mortgage.[122] Finally, the Court held in *Byrams* that the foreclosing party must also "establish delivery of the note," but it did not specify how this is specifically accomplished.[123]

In *Heath*, while Wells Fargo did not establish it was a holder since it had only attached an unindorsed note[124] the Court's consideration of Wells Fargo's status as nonholder is curiously absent. According to the Court's prior holdings in *Byrams* and *Lyon*, Wells Fargo would have arguably established its status as a nonholder upon filing its complaint.[125] Option One Mortgage had assigned the mortgage to Wells Fargo ten months prior to when Wells Fargo filed its initial complaint, thus evidencing a transaction in which Wells Fargo retained the right to enforce the note.[126] "[O]rdinarily what the parties desire and expect when a mortgage is assigned" is that the mortgage will follow the obligation.[127] As Justice Gurich indicated, while the Oklahoma Supreme Court rejected the presumption that the note follows the mortgage,[128] this did not negate the industry's common practice that a mortgage is intended to follow the note; through common understanding, the *intent* within the transaction was evidenced by the ensuing assignment, which provided proof of Wells Fargo's standing.[129]

The Court stated in *Byrams* that an assignment of a mortgage could be offered to prove purpose as long as the assignment was effectuated prior to the filing of the foreclosure suit.[130] However, the Court also stated the assignment of the mortgage's language was ineffective to

122. *See Byrams*, 2012 OK 4, ¶ 9, 275 P.3d at 132 ("[T]his language is neither proof of transfer of the note nor proof of the purpose of any alleged transfer.").

123. *Id.*

124. Wells Fargo Bank, N.A. v. Heath, 2012 OK 54, ¶ 10, 280 P.3d 328, 333.

125. *See supra* Part III.A–B.

126. *See Heath*, ¶ 1, 280 P.3d at 329; HSBC Bank USA, Nat'l Ass'n v. Lyon, 2012 OK 10, ¶¶ 1, 3, 10, 276 P.3d 1002, 1003–04, 1006 (affirming that the trial court's initial summary judgment denial had been proper because HSBC had not initially proven it had the right to enforce the note prior to filing its initial petition, in part, because the date on the mortgage assignment was after the filing date).

127. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4 cmt. c (1997).

128. *See Heath*, 2012 OK 54, ¶ 11, 280 P.3d at 333.

129. *Id.* ¶ 4, 280 P.3d at 337 (Gurich, J., dissenting) ("The assignment of the mortgage was proof of the purpose of the transfer of the note. There is no indication in the assignment of the mortgage that the parties intended anything other than to transfer both the mortgage and the note. As such, the note followed the mortgage even if the assignment of the note was not expressly mentioned in the assignment of the mortgage.").

130. Deutsche Bank Nat'l Trust Co. v. Byrams, 2012 OK 4, ¶¶ 9–10, 275 P.3d 129, 132.

assign the subject note because it did not specifically purport to assign the note.[131] It is arguable whether this reasoning is sound.

When dealing with mortgage transferability, it is necessary to look to the laws of property because mortgages are forms of property and not negotiable instruments.[132] While it is true that ownership of the mortgage does not presumptively carry with it ownership of the note,[133] the issue in *Heath* was not determining ownership—it was determining the purpose of the transfer in order to prove that one is entitled to enforce the instrument. According to the Restatement of Property,

> it is nearly always sensible to keep the mortgage and the right of enforcement of the obligation it secures in the hands of the same person . . . . It is conceivable that on rare occasions a mortgagee will wish to disassociate the obligation and the mortgage, but that result should follow only upon evidence that the parties to the transfer so agreed.[134]

While property law does not directly apply to negotiable instruments, it would apply to determine what parties intended when transferring a subject mortgage.[135] Because the Restatement's purpose is to adhere to the intent of the parties,[136] the parties' common understanding is critical when transferring a mortgage without specifically assigning the accompanying note.[137] "When the right of enforcement of the note and the mortgage are split, the note becomes [practically] unsecured. This result is economically wasteful and confers an unwarranted windfall on the mortgagor."[138] Therefore, the Court, when determining the purpose of transfer, should not require specific language if the note is secured by that particular mortgage.

Finally, in its conclusion, the Court stated the trial court's "erroneous conclusion of law" regarding Wells Fargo's standing, was due to "no evidence" proving Wells Fargo had the right to enforce the note at the

131. *Id.* ¶ 9, 275 P.3d at 132.
132. *See* RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4 cmt. a ("This section applies whenever the transfer [of the mortgage] is outright or is given as collateral or security for some other obligation.").
133. *Heath*, 2012 OK 54, ¶ 11, 280 P.3d at 333–34.
134. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4 cmt. a.
135. *See Heath*, 2012 OK 54, ¶ 4, 280 P.3d at 336–37 (Gurich, J., dissenting).
136. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4 cmt. a.
137. *See Heath*, 2012 OK 54, ¶ 4, 280 P.3d at 337.
138. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4 cmt. a.

time the suit was commenced.[139] In fact, the Court explained that

> [i]f there is no indorsement on a note, and a plaintiff is claiming it is a nonholder in possession who has the rights of a holder, then the plaintiff should have documentation establishing that the purpose of the transfer . . . was to give the plaintiff the right to enforce the note. An assignment of the mortgage without an assignment of the note is not proof of the purpose for the alleged transfer of the note.[140]

Yet, nonholder status could be seen as the epitome of free transferability. While not adopted in the UCC, the ALI UCC's Title 12A, § 3-203's comment states that the right to enforce an instrument and to receive payment therein is "reified" by the instrument itself.[141] "The right to payment is transferred by delivery of possession of the instrument . . . ."[142] Further, the proof of intent required by the Court upon transferring should not be restricted to assignment of the note because that intent can be proven by the assignment of the attached mortgage.[143]

When Wells Fargo filed its complaint, the supporting note was unsigned, but there was an *attached* assignment of the mortgage effectuated *before* commencement of the suit.[144] Even though these items should not have been required upon filing the initial complaint, the Court still found the documents unpersuasive.[145] The Oklahoma Supreme Court, in finding the documents filed with the complaint were insufficient to establish standing,[146] almost eliminated the possibility of succeeding upon motion for summary judgment when the status of nonholder is the status in question. This conclusion will lead to far more trials and require much more time, money, and judicial resources than necessary to prove what could have been proven at a summary judgment hearing.[147] Essentially, if a party wants to succeed upon summary

139. *Heath*, 2012 OK 54, ¶ 16, 280 P.3d at 335 (majority opinion).
140. *Id.* at ¶ 17, 280 P.3d at 336.
141. U.C.C. § 3-203 cmt. 1 (2010).
142. *Id.*
143. *See Heath*, 2012 OK 54, ¶ 4, 280 P.3d at 336–37 (Gurich, J., dissenting).
144. *Id.* ¶ 1, 280 P.3d at 330 (majority opinon).
145. *Id.* ¶ 16, 280 P.3d at 335.
146. *Id.*
147. *See* Deutsche Bank Nat'l Trust Co. v. Matthews, 2012 OK 14, ¶ 7, 273 P.3d 43, 49 (Gurich, J., dissenting) ("I cannot agree with the majority's holding that the plaintiff

judgment, that party will have to do so upon the status of holder because *Heath*'s precedent suggests there is virtually no other evidence that can be proffered upon filing the petition to prove the status of nonholder.

VI. CONCLUSION

Clark stated in his paper, *Special Pleading in the "Big Case,"* "I wish to reiterate this as forcefully and sincerely as I can. I have spent a lifetime studying, teaching, and working in this field and I assert dogmatically that strict special pleading has never been found workable or even useful in English and American law."[148] In the early 1900s, when judges attempted to heighten pleading standards for antitrust cases, they were not successful.[149] If the writers of the Federal Rules and the Supreme Court of the United States rejected stricter pleading standards for specific types of claims, then this desire to impose heightened pleading standards to prove standing in foreclosure cases should surely be reconsidered, regardless of the justification.[150] If the statuses of holder and nonholder are too malleable and open to manipulation during the current mortgage crisis, then courts should more closely scrutinize the notes prior to determining that they are negotiable. Oklahoma is in the midst of a lesson that Clark stated every age must learn: "[S]pecial pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings . . . ."[151]

must have the proper supporting documentation in hand when filing suit" because no authority states such and the Oklahoma pleading code requires otherwise. The procedure imposed by the majority in this case, will result in delay, will not affect the inevitable outcome of foreclosure, and will increase the homeowner's debt. (internal quotation marks omitted)).

148. Clark, *supra* note 108, at 47.

149. *See id.* at 48 (noting the push for heightened pleading standards for certain types of cases and the subsequent decision by the committee against this).

150. *See id.* ("It is urged by defendants that stricter requirement as to a plaintiff's pleading in treble damage actions is necessary because of the expense often involved in such litigation. But in that respect such actions are not unique, for huge expense is involved, too, in many . . . suit[s] where jurisdiction rests on diversity of citizenship. To impose peculiarly stiff requirements in treble damage suits will be to frustrate the Congressional intent. We see no reason whatever to believe that the Supreme Court intended its liberal rules governing pleadings to be inapplicable to a suit for treble damages.").

151. *See id.* at 46.