

# Hamilton County LAW LIBRARY NEWS

Professional legal information, services, and education

July 2015

## The Case of the Missing Promissory Note: How can a Mortgage Lender Enforce a Lost Note in Ohio? By Benjamin N. Hoen, Esq. of Weltman, Weinberg & Reis LPA. Reprinted with permission.

Standing has recently become a foreclosure buzzword. The Ohio Supreme Court weighed in extensively on the topic and determined that a lender must establish an interest in the note or mortgage at the time it filed suit.<sup>1</sup> To prove standing in a foreclosure action, a plaintiff generally must show that it held the note and the mortgage prior to filing the complaint. Failure to establish standing is also fatal to the lender's foreclosure action.<sup>2</sup>

Ohio Law permits a mortgage and assignment of mortgage to be recorded in the office of the County Recorder.<sup>3</sup> Certified copies of the recorded mortgage or assignment of mortgage can be easily obtained from the office of the County Recorder, and are sufficient to show that the lender is the holder of the mortgage.<sup>4</sup> But, showing an interest in the mortgage may not be sufficient to establishing standing in Ohio when the note is lost.

How is the lender meant to show

that it is the holder of the note when the note is lost?

A promissory note is a negotiable instrument governed by the Uniform Commercial Code ("UCC"). Ohio's version of the UCC specifies that only three people are entitled to enforce a promissory note: 1) The holder of the note; 2) A non-holder in possession of the instrument who has the rights of a holder; and 3) A person not in possession of the instrument who is entitled to enforce the instrument.<sup>5</sup>

Under the Ohio version of the UCC, a person not in possession of the note is entitled to enforce a lost note, but only if all of the following are true: 1) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred and

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### Hamilton County Law Library

Hamilton County  
Courthouse  
1000 Main Street  
Room 601  
Cincinnati, OH 45202  
T:513.946.5300  
F:513.946.5264

Open Monday-Friday 8 - 4

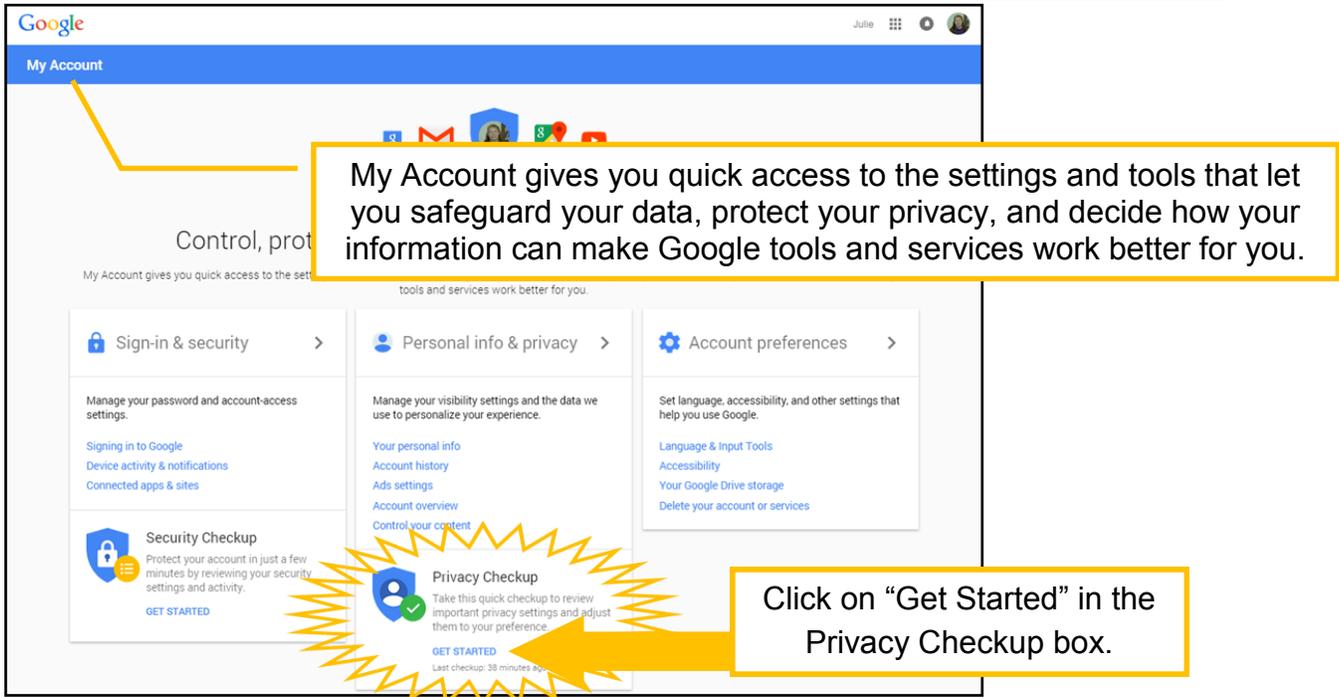
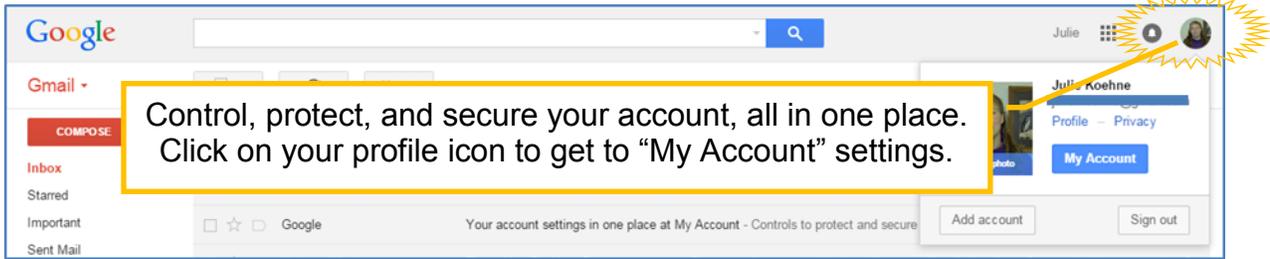
<http://lawlibrary.hamilton-co.org>

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# Tech Tip: Tips from Google on Controlling, Protecting, and Securing your Account

By Julie Koehne, Assistant Law Librarian, Systems

Take charge of what others can view about you in Google.



## Upcoming CLE

Free to subscribers; \$50 for non-subscribers  
To register, call 513.946.5300, email [reference@cms.hamilton-co.org](mailto:reference@cms.hamilton-co.org), or register via the website <http://lawlibrary.hamiltoncountyohio.gov/classes/cle/>

## Ohio Legislative History: Research Tips and Tricks

Presenter: Laura Dixon-Caldwell  
Thursday, July 30  
Noon-1pm  
Approved for 1.0 hour of general CLE credit in Ohio. Kentucky credit is pending  
\*Note: this is not the same course that was offered In 2014. This will focus on searching online resources and when to use print vs. online.

## Breaking Down Barriers to Effective Representation: Tips on Working with Pro Se Litigants, Language Barriers and Parties from Diverse Backgrounds

Thursday, August 27  
Noon-1pm  
Presenter: Lauren Morrison  
1.0 general hour of CLE credit is pending in Ohio and Kentucky.

## Library Board Meeting

The Hamilton County Law Library Resources Board will hold its next meeting on Thursday, July 16, 2015 at 12:00 noon in the Robert S. Kraft Board Room, in conjunction with a meeting of the Directors of the Cincinnati Law Library Association. HCLLRB meetings are open to the public.

## Bloomberg BNA Tax Resource Training: Search Basics

Wednesday, August 5  
11:00am-12:00pm  
Law Library subscribers have access to a variety of databases for state and federal tax research here in the law library. Join us for a training session to learn the basics of searching and navigating BNA.

**\*Note: this seminar is approved for CPE credit, but not CLE.**

To register, call 946.5300 or reserve your spot online at <http://lawlibrary.hamiltoncountyohio.gov/classes/calendar/>

## Speakers

Law library users are welcome to propose speakers and topics for our CLEs and training events. Perhaps you would like to share your experience via a CLE here. Our [reference librarian](#) will prepare the application materials and generally make it a pleasant experience for you. Also, consider the librarians here as potential speakers for your organization if you're seeking expertise on research or technology topics. If your suggestion fits our knowledge base and availability, we can help, or we may be able to connect you with another resource.



*(Continued from page 1)*

2) The loss of possession was not the result of a transfer by the person or a lawful seizure; and 3) the person cannot reasonably obtain possession of the instrument because it was destroyed, or its whereabouts cannot be determined.<sup>6</sup> To establish these facts, the owner must be able to execute a valid lost note affidavit.

In Ohio, mortgage lenders may find it quite difficult to show its status as holder with the right of enforcement when the note is lost. The general version of the UCC was amended in 2002 to include a provision also permitting enforcement of a lost note if the person has directly or indirectly acquired ownership from a person who was entitled to enforce the note when loss of possession occurred.<sup>7</sup> Unfortunately, Ohio has not adopted this amendment and therefore, a party in Ohio is not entitled to enforce a lost note unless it was entitled to enforce the instrument when the loss occurred.<sup>8</sup> However, in most instances a note is lost in transit between mortgage servicers, and the current owner may never have received the note before it was lost. When the note is lost in transit, or by the prior owner, the current owner cannot execute a valid lost note affidavit in Ohio, and therefore the lender is no longer considered a person not in possession entitled to enforce the note.

In the recent case of *Fannie Mae v. Hicks*, the Court of Appeals reviewed a case in which the lender could not execute a valid lost note affidavit because the note had been lost by the prior owner prior to the transfer, and this deficiency was found to be fatal to the lender's foreclosure. In *Hicks*,

the foreclosure complaint contained a copy of the Promissory Note, along with the note and the mortgage. The Plaintiff later discovered that the original note was lost and filed an amended complaint which incorporated a lost note affidavit from the prior owner of the note. The lender argued that although it was not entitled to enforce the lost note under Ohio law, it was still entitled to judgment foreclosing the property as holder of the mortgage. The court of Appeals disagreed, and held that although the lender showed that it had an interest in the mortgage, it was not entitled to enforce the mortgage because it was not able to show that it was entitled to enforce the note under the lost note exception. Without establishing its right to enforce the underlying debt obligation, the court stated that, "the owner of the note cannot satisfy the prerequisite to obtaining a judgment under the mortgage."<sup>9</sup>

What then can a lender do to establish standing and a right to foreclose when the note is lost and it is not able to execute a valid lost note affidavit because it was not in possession of the note when the loss of possession occurred? The Court in *Hicks* also suggests that the only viable remedy is to pass assignments back to the entity from which the obligation was purchased, and so on, until it reaches the party who is entitled to enforce it.<sup>10</sup> Although this solution is not optimal because the owner will incur the expenses relative to assigning the mortgage back to the prior owner, it would allow the case to proceed. As long as the entity that can establish standing commences the foreclosure action, it can later assign its judgment to the current owner of the loan. Moreover, clear title to the property can then pass through the foreclosure sale to the current

owner of the loan or to a third party purchaser at the sheriff's sale.

<sup>1</sup> *Federal Home Loan Mortgage Corp. v. Schwartwald*, 134 Ohio St.3d 13

<sup>2</sup> *BAC Home Loan Serv. v. McFerren*, 2013-Ohio-3228

<sup>3</sup> *Ohio Revised Code 5301.23*

<sup>4</sup> *Ohio Rules of Evidence Rule 902*

<sup>5</sup> *Ohio Revised Code 1303.31*

<sup>6</sup> *Ohio Revised Code Section 1303.38*

<sup>7</sup> *UCC 3-309*

<sup>8</sup> *Fannie Mae v. Hicks*, 2015-Ohio-1955

<sup>9</sup> *Id* at 16

<sup>10</sup> *Id*

For more information, contact

[Benjamin N. Hoen, Esq.](#)

## Lexis Advance

The Law Library will have access to Lexis Advance in the computer room starting this July. Lexis Advance is the relatively new search interface for Lexis, in place in law schools and law firms for quite some time and introduced more recently in government law libraries. In September, Lexis.com will not be accessible here anymore; we will only offer Lexis Advance. Watch for announcements of another Lexis Advance CLE or try out some of the Lexis Advance [Show Me How Tips videos](#). Our Lexis content is unchanged. Please [ask a librarian](#) if you have any questions about Lexis Advance.



## New Books

We don't routinely list our new books here because you can see them on display or in our catalog, but we have done a lot of collection management lately to discard out-of-date material and purchase new items. Here is a partial listing of recent acquisitions. If you would like to borrow one, we'd be happy to hold it for you at the reference desk. And keep in mind that we offer our discards for sale through the County's [auction site](#).

Agency, partnership, and the LLC : the law of unincorporated business enterprises  
Call Number: KF1365 .H96 2015

Agency, partnerships & LLCs  
Call Number: KF1345.Z9 B24 2014

Bankruptcy evidence manual  
Call Number: KF1530.E87 B36

Bloomberg BNA federal tax guide.  
Call Number: KF6369.A1 C61

Discipline and discharge in arbitration  
Call Number: KF3424 .D57 2015

The employer's legal handbook  
Call Number: KF3455.Z9 S74 2015

The Essential formbook : comprehensive management tools for lawyers  
Call Number: KF318.A65 M86

Legislative process  
Call Number: KF4945 .M55 2015

## Subscriber Benefits

All subscribers have access to the following valuable resources and services:

Circulation privileges to borrow from over 40,000 print volumes for up to six weeks at a time

Access to extensive electronic databases from the Law Library, including LexisNexis, Shepards', Westlaw, IntelliConnect, Hein Online Law Journals and Federal Register, and over 70 Aspen /LOISLaw treatises in 16 substantive areas

Wireless network throughout the Law Library

Polycom videoconferencing

Five meeting rooms with speaker phones

Professional reference service by our law librarians, available via e-mail, telephone, and in person

Free document delivery by fax or e-mail of print and electronic materials

Inexpensive CLE seminars throughout the year, on legal research and substantive topics

Bi-weekly news updates in various practice areas

In addition, solos and attorneys whose firm has a subscription have 24 hour remote access to Fastcase.com case law, Aspen/ LOISLaw treatises, HeinOnline and IntelliConnect.

## You and the Legal System: Landlord Tenant Law

Attorney Tom Hodges is our next speaker in the *You and the Legal System* series for the public. Mr. Hodges will discuss Landlord Tenant Issues on Friday, July 17 at noon in the Law Library.

The program is free to the public. To register, call 513.946.5300 or register via our website at <http://lawlibrary.hamiltoncountyohio.gov/classes/you-and-the-legal-system/>

Please note that this is not a CLE event; it is intended for the general public. However, attorneys are welcome to attend and may want to pass along the program announcement to clients, staff and community organizations. If you would like more information, please contact *You and the Legal System* is brought to you as a public service by the Hamilton County Law Library, in conjunction with the Cincinnati Bar Association's Lawyer Referral Service. Save the date for the next event in the *You and the Legal System* series. Attorney Joe Luken will discuss estate and probate law on August 21.



## Landlord Tenant Law

Law Library subscribers have access to a variety of resources on Landlord Tenant Law. If you have questions about accessing these resources, contact the reference staff at [reference@cms.hamilton-co.org](mailto:reference@cms.hamilton-co.org) or 513.946.5300

American law of landlord and tenant  
KF589 .S34 2013

Anderson's Ohio real estate law handbook  
KFO112.Z9 O45

Baldwin's Ohio landlord tenant law  
KFO117 .W45 2014

Baldwin's Ohio real estate law  
KFO112 .H38 2013

Baldwin's Ohio real estate laws annotated  
KFO112 .H38

Commercial leases  
KFO117.3 .C65 2011

Every landlord's legal guide  
KF590.Z9 S74 2010

Every tenant's legal guide  
KF590.Z9 P67 2009

First-time landlord : your guide to renting out a single-family home  
HD1394.5.U6 P67 2009

Friedman on leases  
KF590 .F74 2014

Landlord-tenant law from A to Z [in Ohio]

KFO117 .L35 2010

Landlord and tenant law in a nutshell  
KF590.Z9 H45 2011

Leases & rental agreements  
KF590.Z9 S744 2009

Ohio eviction and landlord tenant law  
KFO117 .I85 2012

Ohio real property law and practice  
KFO112 .M35 2006-

Renters' rights : the basics  
KF590.Z9 P673 2009

### Online Resources-Remote Access\*

#### Aspen/LoisLaw

Real Estate Law Library:

Commercial Real Estate Law Handbook

Commercial Real Estate Leases

State-by-State Guide to Commercial Real Estate Leases

#### EBSCO

Every Landlord's Guide to Finding Great Tenants

Every Landlord's Property Protection Guide

Every Landlord's Tax Deduction Guide

Leases & Rental Agreements

Secrets to a Successful Eviction for Landlords & Rental Property Managers

Research Guides

[http://libguides.hamilton-co.org/landlord\\_tenant](http://libguides.hamilton-co.org/landlord_tenant)

\*Remote access is available to subscribers who are solos or firm attorneys whose entire firm has a subscription to the Law Library.

## Upcoming Events:

July 17: You and the Legal System: Landlord Tenant Law

July 30: Legislative History CLE

August 5: BNA Training

August 21: You and the Legal System: Estate and Probate Law

August 27: Breaking Down Barriers to Effective Representation CLE

## Law Library Holidays

The Law Library will be closed on Friday, July 3 in observance of Independence Day.



# July 2015 Law Library Newsletter

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ADDRESS CORRECTION REQUESTED

Hamilton County Law Library  
1000 Main Street, Room 601  
Cincinnati, OH 45202