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Senator David R. Hastings, III, Esq., Chair
Committee on Judiciary
c/o Legislative Information
100 State House Station
Augusta, ME 04333

Representative Joan M. Nass, Chair
Committee on Judiciary
c/o Legislative Information
100 State House Station
Augusta, ME 04333

RE: HP 128, LD 145 - An Act to Protect Homeowners Subject to Foreclosure by Requiring the Foreclosing Entity to Provide the Court with Original Documents

Dear Senator Hastings and Representative Nass:

I am writing to express my support for LD 145 and in the hope that it may be helpful to the Committee to focus particularly on the distinctive characteristics of a promissory note, as distinguished from documents generally. Many years ago, I taught commercial law at the University of Maine School of Law School. In the course of that work, I came to know something about promissory notes and I am writing to offer some observations that I think might be helpful in thinking about these problems.

I do not currently represent any banks. One of my Partners has been involved in one or two of the foreclosure disputes that have generated some of this discussion, but I am not writing on behalf of any client.

This is not simply a question of evidence law. The question is not whether the copy, or the photograph, or the digital image, should suffice as proof that a loan was made, notwithstanding the best evidence rule. It is not a question of modern technology concerning recordkeeping in the computer age. The note is not a record. The promissory note, unlike other documents, is itself valuable property. A photograph of the promissory

note is no more valid or sufficient than a photograph of the mortgaged house. If it is sufficient for the bank to produce a photocopy of the note, it ought to be sufficient for the homeowner to satisfy the foreclosure judgment by producing a photograph of the property. This is the fundamental point.

There is a practical functional reality to all of this as a matter of negotiable instruments law. The promissory note is negotiable and the holder in due course of a negotiable promissory note has preferred status in litigation on the note. If the person seeking to enforce the note does not actually have it as a matter of physical possessory fact, it is likely that somebody else does. It is only the holder of that original note who has any rights at all on the note. Anyone may have a copy of it. But without the note itself, all that any plaintiff can actually accomplish is to try to persuade the court that at one time somebody photographed it, not that at the current time the plaintiff owns it, and possesses it, and has enforceable legal rights on the note. There is really no good reason that a plaintiff claiming to be the holder of a note should be entitled to enforce it without bringing it to court.

Because of this fundamental characteristic of the promissory note as property, carrying both substantive and procedural rights for the holder in due course, every defendant in every case is at some risk of having to pay twice, or at least defend twice, if the original note is not brought forward in every action. It may be statistically unlikely that there will be a large number of these cases, but there ought not to be any of them. It is an important protection for the makers of promissory notes that they not be subjected to this risk, simply because the bankers now find it inconvenient to produce this essential item in the very process of enforcing rights that are bound up in and rest upon this very item.

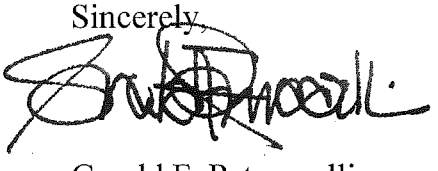
Another significant point follows from that. Because a promissory note is negotiable, the circumstances of its negotiation are vitally important with respect to any determination of the rights of any plaintiff purporting to be the holder by virtue of negotiation. The endorsements must be examined to determine not only their authenticity but their legal sufficiency. As you know, there are various forms or kinds of endorsements and it is only by examining the document itself that the court can determine whether any sequence of endorsements is regular and in good order so as to confer the rights of a holder upon the plaintiff. A photograph of a note that does not include both sides cannot possibly permit a court to determine whether or not all of the necessary endorsements are provided. But even a photograph showing all of the purported endorsements does not address the fundamental initial problem which is that the actual

note may be in the possession of still another person, carrying still another endorsement, a fact which cannot be determined by the court without examination of the original.

To return to the beginning, I do not mean to be flippant when I say that if the bank can foreclose by producing a photograph of the note, the foreclosure judgment ought to be able to be satisfied by the homeowner delivering a photograph of the house. In both instances, photographs of the property are not the property. In a negotiable instruments setting, all of the issues relating to the sufficiency of photocopies of records or files, or contracts, or documents are fundamentally irrelevant to the real point. Only the holder of the original note with all proper endorsements in place is entitled to claim and enjoy the benefits of holder in due course status in enforcing the obligations of the maker on the promissory note.

I respect and appreciate all of the hard work that is being done by all of the members of the Legislature on all of these difficult problems. I hope this is of some assistance, and I thank you for the opportunity to comment.

Sincerely,



Gerald F. Petruccelli

GFP/ap