

# On the Civil Side

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### All About Bass and Indorsements in a Power of Sale Foreclosure

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The majority of foreclosures in North Carolina are filed before the clerk of superior court as non-judicial power of sale foreclosures under Chapter 45. The clerk of court at a power of sale foreclosure hearing is limited to hearing arguments related to six legal factors. G.S. 45-21.16. Recently, I wrote a bulletin, which is now posted on the clerk of superior court Hot Topic page, about some of the legal defenses to a power of sale foreclosure that may be considered by the clerk at the foreclosure hearing. One such defense, that a mere stamp is insufficient to transfer a promissory note, was addressed by the North Carolina Supreme Court. In re Bass, 366 N.C. 464, 465 (2013). The court held that, yes, a mere stamp is enough to transfer a note.

In Bass, the following stamp, without a handwritten signature or initials or the name or title of the individual with the authority to act on behalf of the company, was enough to transfer the note:

**Pay to the order of:**

**Emax Financial Group, LLC**

**without recourse**

**By: Mortgage Lenders Network USA, Inc.**

**Why Are We Talking About Stamps?** As most of us have all learned over the course of the years since the recession, mortgage lending today has changed. Lenders, particularly residential mortgage lenders, typically make loans with an eye for selling them shortly after a closing. The loan may go through a number of similar sales with several loan buyers before landing in a securitized trust, pooled together with hundreds of other loans. Each time a loan is sold, the transfer is most often evidenced by an **indorsement** to the note.

An indorsement is a signature that itself or along with other words is made on a promissory note for the purpose of transferring the note. G.S. 25-3-204(a). There are two types of indorsements: (1) a **special indorsement**, which is an indorsement made payable to an identified party, and (2) a **blank indorsement**, which is an indorsement where the payable to line is left blank (similar to a blank check). G.S. 25-3-205(a).

Due to the frequency and volume of loans sold, many times the owner of the note uses a **stamp** to indorse the note. A stamp for a special indorsement typically includes (i) the name of the loan seller, (ii) the name and title of the person at the loan seller who will sign the indorsement, and (iii) language indicating that the stamp is being made to transfer the note, such as “pay to the order of” and “without recourse.” After imprinting the stamp on the note, the officer of the loan seller referenced on the stamp then types or writes the name of the loan buyer and signs the indorsement.

In Bass, the stamp contained only the names of the loan purchaser and buyer and the “pay to the order of” and “without recourse” language. The borrower challenged the stamp at the power of sale foreclosure hearing arguing that the stamp was ineffective to transfer the note because it did not contain a valid signature of the loan seller, and it did not identify the individual at the loan seller who had the authority to authorize the transfer of the note. The borrower asserted that as a result (1) there was a break in the chain of the indorsements to the current holder, (2) the note was not payable to the party in possession of the note, and (3) the party was not a valid holder of the note entitled to foreclose.

**When is a Stamp a Signature and a Signature an Indorsement?** Under the UCC, signature is defined as “any symbol executed with the present intention to adopt or accept a writing.” G.S. 25-1-201(b)(37). Looking at the official comments to the UCC, the court in Bass noted that signature is defined broadly and is not limited to a long-form writing of an individual person’s name. A signature may be a symbol that is printed, stamped, or written.

The court noted that the determinative factor for the stamp at issue in Bass and for indorsement signatures generally is whether the stamp indicates an intention to transfer the debt. If the stamp indicates intent to transfer the debt, then the stamp constitutes a signature. The court determined that the stamp in question indicated the requisite intent. The court highlighted the fact that (a) the intent to transfer the note from Mortgage Lenders Network USA, Inc. to Emax Financial Group, LLC was clear on the face of the stamp, (b) the stamp also appeared on the page where the other uncontested indorsements were placed, and (c) the original note was actually transferred in accordance with the stamp’s intent. Therefore, the court concluded that the stamp was enough to be a valid signature.

The court then held that the signature constituted a valid indorsement. The holding was based on the strong presumption under the UCC that a signature and its accompanying words on a note are an indorsement and an indorsement is valid unless the circumstances unambiguously

indicate that the signature was made for some other purpose than indorsement. G.S. 25-3-204(a). This holds true regardless of the actual intent of the signer. *Id.* As noted in Bass, the purpose of this presumption is to protect the transfer of promissory notes by giving force to the information presented on the face of the instrument.

**What Does Bass Tell Us Going Forward?** A stamp alone is enough to indorse a note where the stamp indicates intent to transfer the note. In addition and most importantly, Bass tells us that there is a presumption that an indorsement is valid and authorized.

At the foreclosure hearing, the party seeking to foreclose must show that they are a holder of the debt to obtain the order authorizing sale. This is done by showing:

- the party is in possession of the note, and
- the note is either indorsed to them specifically or in blank by virtue of a chain of valid indorsements.

The party seeking to foreclose does not have an affirmative obligation to show that the indorsements are valid and authorized because they are presumed to be so. If the borrower raises a defense that an indorsement to the note is not valid or unauthorized, the borrower must make more than mere statements to that effect. The presumption favoring the validity of the indorsement requires the borrower to provide evidence of the grounds for the assertion before a purported holder is required to introduce evidence as to whether the indorsement is authentic and authorized.

Unfortunately, Bass does not tell us what type of evidence the clerk should expect from a borrower raising this type of defense. It may include evidence showing the borrower received demands for payments from another party purporting to be the holder or that the note was not actually transferred in accordance with the chain of purported indorsements. However, the clerk as the trier of fact in a power of sale foreclosure is obligated to presume that the indorsement is valid and authorized unless and until evidence is introduced by the borrower that supports a finding that this is not the case. Bass at 470 (citing G.S. 25-3-308 cmt. 1).

This entry was tagged with the following terms: indorsement, stamp.

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