2012 WL 12109914 (N.M.) (Appellate Brief)
Supreme Court of New Mexico.

THE BANK OF NEW YORK, as Trustee for Popular Financial Service Mortage Pass-Through Certificate Series #2006-D, Plaintiff-Respondent,

v.

Joseph A. and Mary Romero, et al., Defendants-Petitioners.

No. 33,224.
April 10, 2012.

From an Opinion of the Court of Appeals (No. 29,945), affirming a Judgment of the District Court of Rio Arriba County (No. D117 CV 2008-0139)
Honorable James A. Hall, Judge

Consolidated Answer Brief on the Merits and Response to Amici

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***1 I**

INTRODUCTION

The Court should affirm the judgments of the lower courts in this case. It may and should do so simply by invoking well settled principles of substantial evi-dence review. To decide this case, the Court need not and should not resolve any of the legal issues that Joseph and Mary Romero (the "Romeros") and their amici so urgently press it to determine.

Substantial evidence supports the district court's finding that the Romeros' loan did not violate the Home Loan Protection Act's "anti-flipping" provision, NMSA 1978, § 58-21 A-4(B) (2003). This is true even if the borrower's ability to repay the new loan is a "circumstance" that a lender or court should consider in deciding if the new loan confers a "reasonable, tangible net benefit" on the borrower.

The anti-flipping provision bans only "knowing and intentional" violations. The Romeros, whose burden it was, produced no evidence to show the originating lender, Equity One, knew they could not repay the new loan. To the contrary, Joseph Romero told Equity One he earned $5,600 per month on average from his store - more than enough to allow him to repay the new loan.

Likewise, Bank of New York's ("BoNY's") "standing" to sue is properly resolved by routine application of substantial evidence principles. The Court of Appeals held that the Romeros had waived any standing argument by failing to set ***2** forth all the evidence on the issue, including the evidence supporting the district court's finding. *Bank of New York v. Romero,* 2011-NMCA-110, ¶ 20, 150 N.M. 769, 266 P.3d 638, 644-45. This Court should affirm that determination as it did in *Chavez v. S.E.D. Labs.,* 2000-NMSC-034, 129 N.M. 794, 799, 14 P.3d 532, 537.

Furthermore, BoNY introduced sufficient evidence from which the district court could reasonably infer that, before this action was filed, Equity One physically transferred the Romeros' promissory note to BoNY, intending that BoNY have the right to enforce the note. That is all BoNY had to prove to establish that it was the party entitled to enforce the Romeros' note and mortgage. NMSA 1978, §§ 55-3-301(ii), 55-9-203(g) (2008).

Determining that substantial evidence supports the district court's findings on these two issues fully resolves this appeal and requires affirmance of the judgment in BoNY's favor. The Court need not and should not reach the broader legal issues that the Romeros and their amici urge it to resolve. It should, instead, await a case in which resolution of those issues is critical to the outcome on appeal.

If the Court, nevertheless, ventures beyond the substantial evidence rule, it will find that the Romeros' and their amici are wrong on the law as well as the facts.

Read in context, the HLPA's anti-flipping provision's references to all "circumstances" and "borrower's circumstances" do not include the borrower's re ***3** payment ability, a separate concept that a different subsection of the same statute addresses specifically - using the term "repayment ability." Had the Legislature intended to require consideration of that same factor in the anti-flipping provision, it would have used that same term to express its intent clearly. Instead, it chose the different term, "circumstances," which must be given a different meaning.

Secondary aids to statutory interpretation confirm this plain language construction of the anti-flipping provision. The Financial Institution Division's ("FID's") implementing regulation, like the HLPA itself, does not mention repayment ability as a factor to be considered in deciding whether a refinance loan confers a reasonable, tangible net benefit. The same pattern appears in the AARP Model Home Loan Protection Act, on which New Mexico's HLPA was based, as well as in the similar statutes and regulations adopted by about a dozen other states. Contemporaneous legal commentary shows why all these statutes and regulations were drafted as they were. Flipping was viewed as an **abusive** practice distinct from and in some ways antithetical to "asset-based lending," also known as "equity-stripping" - lending without regard to ability to repay. Based on this perception, the statutes and regulations adopted distinct measures to deal with these different **abusive** practices. The Romeros and their amicus wrongly try to meld the two together retroactively.

***4** There is no dispute between the parties or their amici regarding the legal rules that determine whether BoNY is entitled to enforce the Romeros' note and mortgage - and thus whether it has standing to bring this foreclosure suit. The Uniform Commercial Code sets out those rules clearly. To establish its "standing," BoNY had to prove only that before it filed suit (a) it acquired physical possession of the Romeros' note, endorsed to it or in blank, or (b) it received the note, without such an endorsement, from a holder who transferred the note to BoNY intending that BoNY thereby acquire the right to enforce the note. NMSA 1978, §§ 55-1-201(b)(21)(A), 55-3-203(b), 55-3-301(b) (2008). As already stated, BoNY satisfied that burden, as the district court correctly found.

The rest of the arguments offered by the Romeros' Civic Amici are not supported by the record in this case, not within the issues presented for this Court's review, and not appropriate for this Court's consideration, as they require legislative, not judicial, action.

The Court need not reach the Romeros' final issue - federal preemption. But if it does, it will find that, after consulting with the Attorney General, the FID issued regulations which recognize that national banks are exempt from the HLPA and, in particular, its anti-flipping provision. The FID's position is fully borne out in the official positions taken by federal agencies regulating national banks and ***5** savings institutions, which are entitled to judicial deference. None of the Romeros' or their amicus' efforts to avoid federal preemption succeed.

For all of these reasons, this Court should affirm the judgment in BoNY's favor.

II

STATEMENT OF THE CASE

A. Proceedings Below

In April 2008, BoNY filed this suit for foreclosure of the Romeros' mortgage. R.P. 1. The Romeros answered, admitting they entered into the promissory and mortgage and were in default under those instruments. R.P. 51, 52 ¶¶ 2, 4.

The Romeros also counterclaimed against BoNY, alleging, inter alia, that the loan originator, Equity One, had "flipped" the Romeros' loan in violation of NMSA 1978, § 58-21A-4(B). R.P. 53-54. The Romeros' third party complaint reiterated this claim against Equity One. R.P. 55-56.

BoNY answered the counterclaim and Equity One answered the third party complaint. Both denied the Romeros' allegations. R.P. 70, 98.

The case was tried to the district court, sitting without jury, on February 17 and 18, 2009. R.P. 298 ¶ 11; Tr. (2/17/09, 2/18/09). Thereafter, the district court adopted BoNY's proposed findings 1-65 to which it added court-drafted findings 66-69. R.P. 322-323.

***6** On September 1, 2009, the district court entered judgment, incorporating its findings and conclusions and ordering sale of the Romeros' house. R.P. 339, 350-351. The Romeros filed their notice of appeal on September 29, 2009. R.P. 360.

The Court of Appeals affirmed the judgment, rejecting the Romeros' claims of error. *Bank of New York,* 2011-NMCA-110, 150 N.M. 769, 266 P.3d 638. This Court granted the Romeros' petition for certiorari.

B. Factual Summary

The Romeros owned a residential property on County Road 87 in Chimayo. R.P. 340, 341, ¶¶ 4, 10, 13. [1] In June 2006, the Romeros signed a promissory note evidencing a loan from Equity One. R.P. 341 ¶9, 346 ¶ 45; Tr. Ex. A. They also signed a mortgage, pledging their property as security for repayment of the loan. R.P. 341¶ 10, 346 ¶ 45; Tr. Ex. B.

The Romeros defaulted under the note and mortgage. They have not made a payment since September 2007, nearly five years ago. R.P. 342 ¶ 14, 343 ¶¶ 22-24; Tr. Ex. PP, pp. 2-5; Tr. (2/17/09) 10:56:59, 4:07:53; Tr. (2/18/09) 8:56:56. The Romeros were sent (and received) a notice of default letter in December 2007. R.P. 342 ¶ 18, 346 ¶ 46; Tr. (2/17/08) 4:08:19; Tr. Ex. RR. The Romeros were ***7** given a reasonable time to reinstate their mortgage, but failed to do so. R.P. 342 ¶ 18, 346 ¶ 47.

BoNY accelerated the outstanding balance of the Romeros' loan, as the note permits. Electing to foreclose the mortgage, BoNY filed this suit. R.P. 343 ¶ 19. The district court found that BoNY is entitled to a judgment ordering sale of the Romeros' property to repay their debt. R.P. 344-345 ¶¶ 34-37, 40.

III

THE SUBSTANTIAL EVIDENCE RULE REQUIRES AFFIRMANCE OF THE JUDGMENT

The Court can and should decide this case based solely on the substantial evidence rule and the allied principle embodied in Rule 12-213(A)(3) NMRA. The Romeros' Brief in Chief ("BiC") sets forth none of the evidence supporting the district court's crucial findings. Nor did their briefs in Court of Appeals. So the Romeros have waived their attacks on the findings.

A. The Romeros Waived Their Attacks On The Findings By Failing To Comply With Rule 12-213(A)(3)

"A contention that a... finding of fact is not supported by substantial evi-dence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing upon the proposition." Rule 12-213(A)(3) NMRA.

***8** The Romeros' first two arguments challenge the sufficiency of the evidence supporting the district court's findings that the Romero's loan provided a reasonable, tangible net benefit, R.P., 346 ¶ 51, 347 ¶ 64, 348 ¶ 67(b), and that the Ro-meros' note and mortgage were properly transferred to BoNY, giving it standing to sue when the complaint was filed, R.P. 341, ¶¶ 11, 12. [2] *See Bank of New York*, 2011-NMCA-l10, ¶¶ 13, 20, 266 P.3d at 642-43, 644; R.P., 367-368.

The Romeros' BiC does not recite "the substance of the evidence" bearing on those propositions. Instead, the BiC offers only a short, slanted recitation of some evidence that the Romeros believe supports their arguments on these issues, See BiC, 1-5, 19, 22-23, 25-26, 30-31. That one-sided presentation is improper.

> ... Defendant's brief does not present us with a recitation of the evidence that would support the [finding]. Rather, Defendants focus on the evidence that would support the opposite result. Such briefing is not acceptable. Appellate courts should be given the fact-finder's view of the facts; that is, the evidence that supports the [district court's finding] in favor of Plaintiff.

***9** *Hourigan v. Cassidy,* 2001-NMCA-085, ¶ 18, 131 N.M. 141, 148, 33 P.3d 891, 898 (citation omitted).

"The party challenging the sufficiency of the evidence supporting a proposition must set forth the substance of *all* the evidence bearing upon the proposition. [Rule] 12-213 requires this." *Martinez v. Southwest Landfills, Inc.,* 115 N.M. 181, 184, 848 P.2d 1108, 1111 (Ct. App. 1993). To comply with the rule, the appellant "must present all supporting evidence in the light most favorable to" the challenged finding, including "stating all reasonable inferences that can be drawn from the facts." *Id.,* 115 N.M. at 185, 848 P.2d at 1112.

Rule 12-213 serves important purposes. *Chavez,* 129 N.M. at 799, 14 P.3d at 537; *Martinez,* 115 N.M. at 185-86, 848 P.2d at 1112-13. Hence, a Brief in Chief that fails to satisfy the rule's requirements waives any challenge to the sufficiency of the evidence supporting the trial court's findings. Chavez, 129 N.M. at 799, 14 P.3d at 537; *Wachocki v. Bernalillo County Sheriff's Dept.,* 2010-NMCA-021, ¶ 15, 147 N.M. 720, 726, 228 P.3d 504, 510.

The Romeros' BiC does *not* recite *all* the evidence on the tangible net worth and "standing" issues. *See* BiC, 1-5, 17, 19. It does *not* present any of the evidence supporting the district court findings, let alone do so in the light most favorable to those findings. It also mentions none of the reasonable inferences that can be drawn from the supporting evidence.

***10** The Romeros' failure to comply with rule 12-213(A)(3) is all the more unforgivable because BoNY's answer brief in the Court of Appeals pointed out the same failing in their BiC in that court. *See* BoNY Ans. Brief, 7-10. The Court of Appeals also faulted the Romeros' brief for that defect as well as others that "make it almost impossible to address many of their assertions...." *Bank of New York,* 2011-NMCA-110, ¶¶ 8, 20, 266 P.3d at 642, 644-45.

The Romeros have not complied with Rule 12-213 in this Court. They did not do so in the Court of Appeals, which held they had thus waived their challenge to the district court's finding that BoNY had standing to sue. *Bank of New York,* 2011-NMCA-110, ¶ 20, 266 P.3d at 644-45. As a result, the Court should deem that the Romeros waived their attack on the findings, and review only whether the findings support the district court's conclusions and the ensuing judgment. *See Chavez,* 129 N.M. at 799, 14 P.3d at 537.

B. Substantial Evidence Supports The District Court's Findings That The Romeros' Loan Conferred A Tangible Net Benefit

Substantial evidence supports the district court's finding that Equity One did not violate the HLPA's anti-flipping provision. R.P., 347 ¶ 64, 348 ¶ 67(b); Tr. (2/18/09) 12:01:20-02:02. The evidence showed that the loan it made the Romeros conferred substantial benefits. Even if ability to repay is a circumstance to be considered, the Romeros did not show that Equity One "knowingly and intentionally" made them a loan they could not afford.

***11** That the Equity One loan conferred benefits on the Romeros is undeniable. The district court so found. Its findings were supported by substantial evidence. The Court of Appeals reviewed the record and reached the same conclusion. *Bank of New*

York, 2011-NMCA-110, ¶ 15, 266 P.3d at 643. Neither the Romeros nor their amicus claim or attempt to show these findings are unsupported. The new loan's benefits included:

• Extending a low interest rate for another year before the first interest rate adjustment. [3]

• Capping the adjustable interest rate at a lower level. [4]

• Repaying $8,089 in prior debt that bore a higher interest rate. [5]

• Paying the Romeros $31,164 in cash, about half of which the Romeros used to buy inventory for their store, and the remainder to pay other debts. [6]

• Repaying the Romeros' existing home loan from New Century which was then in default. [7]

These benefits were important to the Romeros. Mr. Romero told his wife that he wanted the refinance loan for his business, to get cash for the business and to pay bills. Tr. (2/18/09) 9:03:04-40. Mr. Romero admitted as much on the stand. ***12** He said he had been "called all the time" by other loan companies. He turned them down. But he was interested in the loan Equity One offered. Equity One, he said, had the lowest mortgage rates in town. Tr. (2/17/09) 3:36:45-37:16.

At the closing, the Romeros also signed a certificate acknowledging that the loan "achieves the financial and personal goals I/we seek" and "has resulted or will result in a reasonable, tangible net benefit to me/us" considering all the circumstances, including "My/our personal financial circumstances." Tr. Ex. W; *see* NMAC, § 12.15.5.9(G) (while not determinative, a borrower certification of tangible net benefit may be helpful in determining the lender's compliance with statutory requirements).

In the district court's words:

> [I]f the $30,000 had been received, they [the Romeros] had started up the business, and it had taken off, and basically that influx of cash would have saved the business and enabled them to go forward, that would be a considerable benefit. So I think when a court looks at this and someone such as the Romeros come in and say we need some additional cash to put into our business and they get the cash, that's a benefit - a tangible benefit that they received.

Tr. (2/18/09) 12:02:03-59.

Neither the Romeros nor their amicus challenge the above-cited evidence that amply supports the district court's finding of tangible net benefit. *See Bank of New York,* 2011-NMCA-110, ¶¶ 15, 19, 266 P.3d at 643, 644. Rather, they claim ***13** those benefits were negated because the Romeros' "documented" income was insufficient to repay the loan. BiC, 8. In their words, a loan that was bound to fail could not, as a matter of law, confer a reasonable, tangible net benefit. *Id.*, 8-9, 14-15 *see* AG Amicus, 20-21; *see also Bank of New York,* 2011-NMCA-110, ¶¶ 14, 16, 266 P.3d at 643-644.

This theory is legally flawed, see pp. 25-37 below. More importantly, it is unsupported by the evidence. The Romeros, who bore the burden of proof on this issue, introduced no evidence to show that Equity One knew the Romeros could not afford to repay the loan. Hence, they did not establish that Equity One had "knowingly and intentionally" engaged in flipping. [8]

The evidence proved the exact opposite: the information the Romeros gave Equity One showed they *could* afford to repay the new loan. In response to Equity One's question that Mr. Romero interpreted as asking for his average monthly income from his store, he said $5,600. Tr. (2/17/09) 3:12:40-13:04, 3:13:07-30, 3:37:20-36, 3:58:33-54; Tr. Ex. C, p. 2.

***14** Mr. Romero knew his income was substantially less than $5,600 per month. [9] But he did not tell Equity One that fact. Mr. Romero did not send Equity One his tax returns which showed a much lower income. [10] And Equity One did not ask for them. [11] Tr. (2/17/09) 3:39:06-19, 3:40:58-46:04, 3:59:23-4:01:45; Tr. Ex. 3-6.

***15** Equity One was entitled to rely on Mr. Romero's statement that his average monthly income was $5,600. [12] Equity One was not shown to know anything else about the Romeros' income.

An average monthly income of $5,600 was adequate to repay the loan Equity One made. Monthly payments were only $1,683, just 30% of the Romeros' stated monthly income - below the 31% of income target for HAMP loan modifications. [13] In fact, the Romeros managed to pay the Equity One loan for 15 months until 2007 when Mrs. Romero had costly health problems. Tr. (2/17/09), 4:07:53-08:00; Tr. (2/18/09), 8:56:30-57:25.

In short, the information available to Equity One showed the Romeros had the ability to repay the loan it made them. It did not "intentionally" make the Ro- ***16** meros a loan "knowing" that they could not repay it or that it conferred no tangible net benefit on them. Thus, even if the Romeros were right about the anti-flipping provision's meaning, they are wrong on the evidence which amply supported the district court's findings, making them impervious to attack on appeal.

C. Substantial Evidence Supports The District Court's Findings That BoNY Has Standing To Bring This Suit

1. The Romeros Waived This Issue By Non-Compliance With Rule 12-213

As already mentioned, p. 10 above, the Court of Appeals held that the Romeros waived their challenge to the sufficiency of the evidence supporting the district court's findings that BoNY "is entitled to enforce the Note and Mortgage" and that it had standing to enforce those instruments when it filed this suit. R.P. 341 ¶¶ 11,12.

> [W]e have said that in order to challenge the district court's findings of fact as not supported by substantial evidence, a party must provide this Court with a summary of all the evidence bearing on the finding being challenged, including the evidence that supports the trial court's determination, regardless of interpretation. The Romeros have failed to do this.

Bank of New York, 2011-NMCA-110, ¶ 20, 266 P.3d at 644-45.

In *Chavez*, 129 N.M. at 799, 14 P.3d at 537, this Court affirmed the Court of Appeals' finding of waiver under similar circumstances, reasoning:

Chavez's failure to cite this evidence [favorable to the finding] to the Court of Appeals provides an adequate ***17** ground for the decision by that Court to deem Chavez to have waived his challenge to the sufficiency of the evidence under Rule 12-213(A)(3). Rule 12-213(A)(3) is designed to promote judicial economy by requiring appellants challenging the sufficiency of the evidence to provide an appellate court with a summary of all relevant evidence instead of relying upon the court to review the record independently and prepare its own summary. Chavez has failed to comply with his obligation to present "the substance of the evidence bearing upon the proposition." *Id.* Accordingly, we affirm the Court of Appeals' decision to waive Chavez's challenge to the sufficiency of the evidence supporting the [finding against Chavez].

Here, the Romeros failed to mention any of the evidence discussed in the next section in their Court of Appeals BiC. Their BiC in this Court does not do so either. If Chavez's failure to state one bit of evidence was enough to torpedo his appeal, the

Romeros' repeated failure to discuss any of the host of evidence supporting the district court's findings on standing should surely merit the same treatment.

2. The Evidence Supports The District Court's Findings

To establish it had the right to enforce the Romeros' note and mortgage, and thus bring this foreclosure suit, BoNY had to prove only that before it filed suit (a) it acquired physical possession of the Romeros' note, endorsed to it or in blank, or (b) it received the note, without proper endorsement, from a holder who transferred the note to BoNY intending that BoNY thereby acquire the right to enforce the note. NMSA 1978, §§ 55-1-201(b)(21)(A), 55-3-203(b), 55-3-301(b); *see* ***18** pp. 42-46 below. The evidence and inferences supporting the district court's findings that BoNY met this burden are summarized below:

1. BoNY produced the original note at trial. Tr. (2/17/09) 9:16:33-43, 10:16:44-55. There was no evidence that physical possession of the original note had changed at any time after suit was filed. From this, the district court could reasonably infer that BoNY physically possessed the note [14] and had acquired possession before suit was filed. [15]

***19** 2. Kevin Flannigan, the loan servicer's custodian of records, [16] authenticated the loan records as business records kept in the ordinary course of business in a secure environment and relied upon by the servicer in conducting its business. Tr. (2/17/09) 10:03:50-07:06, 10:07:55-08:50, 10:11:06-12:59. Flannigan testified that he had reviewed all of the servicer's records regarding the Romeros' loan. Tr. (2/17/09) 10:07:06-18. The records, he said, showed that BoNY had physical possession of the note and mortgage when the foreclosure suit was filed and still owned the loan on the date of trial. Tr. (2/17/09) 10:17:00-36, [17] 10:17:44-18:10, 10:48:17-48:50, 10:49:28-56, 11:17:52-18:10, 11:20:53-21:25.

3. The original note bore two endorsements by Equity One, one in blank, the other to JPMorgan Chase on behalf of the same certificate holders on whose behalf BoNY holds the note and filed this suit. Tr. Ex. A, p. 4. As the two endorsements conflicted, the district court could reasonably infer that one was added by mistake and should be disregarded. Based on the additional facts stated below, ***20** it was also reasonable to infer that the special endorsement to JP Morgan was the mistaken one.

4. Equity One, the note's original payee and holder, was named and appeared as a third party defendant in this suit. R.P., 98-100. If Equity One still claimed to be the holder of the Romeros' note, it was required to raise that claim in this suit. Rules 1-013(A), (G), 1-014(A) NMRA; *see* *Heffern v. First Interstate Bank,* 99 N.M. 531, 534, 660 P.2d 621, 624 (Ct. App. 1983). Equity One did not do so. Hence, it was reasonable to infer that Equity One no longer claimed any interest in the note but had, instead, endorsed the note in blank and transferred it to BoNY intending to give BoNY the right to enforce the note. [18] Tr. (2/18/09) 11:52:42-58.

5. An assignment to BoNY of the mortgage, "[t]ogether with the Note therein described or referred to," was recorded. Tr. (2/17/09) 10:47:37-48:10, 11:33:23-34:07; Tr. (2/18/09) 11:52:35-40; Tr. Ex. OO. The assignment was prepared by Equity One and signed by its employee, acting as a vice-president of MERS, as nominee for Equity One. Tr. (2/17/09) 11:34:16-58; Tr. Ex. OO, p. 2. Though prepared and recorded after the suit was filed, the assignment confirmed ***21** that Equity One had transferred the note to BoNY with the intent that BoNY acquire the right to enforce it.

This evidence and the reasonable inferences from it are substantial evidence - a firm basis upon which a reasonable mind might - and the highly experienced trial judge in this case did - base a finding [19] that BoNY had owned the Romeros' loan, had physical possession of their note, and was entitled to enforce it and their mortgage at the time it filed this action.

That the supporting evidence was less forceful than the Romeros might wish provides no ground for reversal. In this Court's words:

> [E]ven if the evidence as to certain elements of proof leaves something to be desired, and inconsistencies are to be found in the evidence and testimony of party in whose favor the findings are made, nevertheless, unless they are of such a nature as to render the facts relied on inherently improbable, it is for the fact finder to reconcile such in-consistencies and finally say where the truth lies.

Addison v. Tessier, 65 N.M. 222, 226, 335 P.2d 554, 556 (N.M. 1959). [20]

***22** Moreover, as the district court pointed out, despite a full opportunity to conduct discovery, the Romeros came up with absolutely no evidence to disprove BoNY's standing. They complained about BoNY's evidence but offered none of their own. Here, the district court determined the facts in BoNY's favor. Its findings were supported by substantial evidence. They should be affirmed.

3. The Romeros' Attacks On The Evidence Are Without Merit

Seeking to overturn these findings, the Romeros first argue that BoNY could not have had standing to sue because (a) the copy of the note attached to the complaint contained no endorsement, and (b) the endorsements on the original note produced at trial were either to bearer or JP Morgan Chase, not BoNY. BiC, 22.

The Romeros are wrong. As explained below, pp. 43-44, an endorsement to BoNY was not legally required to give it the right to enforce the note. *See* NMSA 1978, §§ 55-3-203(b), 55-3-301(ii). Also, as already explained, p. 20 above, the district court could properly disregard the mistaken special endorsement and treat the note as endorsed in blank, making it bearer paper. To be sure, the finding that BoNY possessed the note and had the right to enforce it had to be based on other evidence in addition to the note itself - and it was. *See* pp. 17-20 above.

Next, the Romeros argue that the post-suit recorded assignment of the mortgage and the note cannot "cure BoNY's standing defect," and MERS could not transfer the note as it acted solely as nominee under the mortgage. BiC, 22-25. ***23** While some courts have held that MERS cannot transfer rights in the secured note, others have reached the opposite conclusion. [21] The Court need not decide that legal issue because there was no "standing defect" in the first place. So there was nothing the recorded assignment had to "cure." [22]

The Romeros finish with a diatribe about an affidavit that BoNY filed in support of its *unsuccessful* motion for summary judgment. BiC, 25-32. This whole argument is irrelevant. Whether true or false, [23] the affidavit was not admitted into evidence at trial. So it could neither serve as support for the district court's findings nor as a basis for challenging those findings.

***24** Also, contrary to the Romeros' contention, BiC, 25-26, 31, no "documentary proof" of the note's transfer was required. Facts may be proved by testimony, inference or other means; documentary proof is not necessary.

Likewise, the Romeros' complaint that BoNY's witnesses lacked "personal knowledge" is misplaced. As the district court held, Flannigan could properly testify as the custodian of the loan records even though he was not present the day the note and mortgage were physically transferred. Tr. (2/17/09) 10:17:37-20:10; see pp. 49-51 below.

Decisions or even complaints about BoNY's or other banks' alleged difficulties in proving in other cases that they received timely assignment of the borrower's notes and deeds of trust prove nothing about this case. *See* BiC, 28-29. As evidence of bad character or other wrongs is inadmissible to prove liability, Rule 11-404 NMRA, the Romeros' other cases or complaints cannot show that BoNY mishandled or did not timely acquire the Romeros' note and mortgage. [24]

In sum, substantial evidence supported the district court's key findings that BoNY was entitled to enforce the Romeros' note and mortgage and that the loan they evidenced did not violate the HLPA's anti-flipping provision. As those find ***25** ings fully support the judgment in BoNY's favor, this Court should affirm based on the substantial evidence rule. The Court should not decide the broader legal issues the Romeros and their amicus raise as their resolution cannot affect the outcome of this case.

IV

ABILITY TO REPAY IS NOT A CIRCUMSTANCE TO BE CONSIDERED UNDER THE HLPA'S ANTI-FLIPPING PROVISION

A. Read In Context The Statute's Words Do Not Support The Romeros' Argument

Statutory interpretation begins with the statute's words. NMSA 1978, § 12-2A-19. In interpreting a statute, a Court must not isolate a particular word, phrase, sentence, or section, but must consider each provision in light of the statute as a whole.[25] The Romeros and their amicus rely on the first of these rules. They ignore the second, and thus incorrectly interpret the HLPA's anti-flipping provision.

***26** The critical portion of the anti-flipping provision defines flipping as "knowingly and intentionally" refinancing a home loan "when the new loan does not have reasonable, tangible net benefit to the borrower considering **all of the circumstances,** including the terms of both the new and refinanced loans, the cost of the new loan and **the borrower's circumstances.**" NMSA 1978, § 58-21A-4(B) (2003) (emphasis added).

Considered in isolation "all of the circumstances" and "the borrower's circumstances" might be all encompassing so as to require consideration of the borrower's ability to repay the refinance loan. That is the gist of the Romeros' and their amicus' statutory construction arguments. BiC, 12, 14-16; AG Amicus, 14-15.

Context, however, shows the Romeros' interpretation is incorrect. First, the meaning of the twice-used word "circumstances" is limited by the series of words or phrases of which it is a part. NMSA 1978, § 12-2A-20(A)(1). That series includes "the terms of both the new and refinanced loans" and "the cost of the new loan." Those terms show that the anti-flipping provision is focused on the refinance loan." benefits and costs, not all conceivable "circumstances." In directing consideration of the "borrower's circumstances," the provision is likewise limited ***27** to those circumstances relevant to the refinance loan's benefits and costs - such as any specific needs the borrower may have that the loan satisfies.[26]

Second, the anti-flipping provision must be viewed in the context of the HLPA's other provisions, the most pertinent of which stated: "No creditor shall make a high-cost home loan without due regard to repayment ability." NMSA 1978, § 58-21A-5(H) (2003). Section 5(H) shows that the Legislature knew how to require consideration of a borrower's ability to repay. It used clear, precise terms to do so in section 5(H).

Had the Legislature intended to require consideration of repayment ability in determining whether a refinance loan conferred a reasonable, tangible net benefit, it would have said so, using the same clear terminology it employed in section 5(H); it would not have hidden its intent in a completely different and vague generality - "borrower's circumstances." *See Crawford v. Burke,* 195 U.S. 176, 190 (1904) ("[A] change in phraseology creates a presumption of a change in intent[.] Congress would not have used such different language in § 17 from that ***28** used in § 33 of the act of 1867, without thereby intending a change of meaning."); *Bank of New York,* 2011-NMCA-110, ¶ 17, 266 P.3d at 644.

Moreover, interpreting "borrower's circumstances" in the anti-flipping provision to encompass the borrower's ability to repay would render section 5(H) largely superfluous and its limitation to high cost loans inexplicable. That interpretation makes even less sense under the HLPA now. In 2009, the Legislature moved the substance of Section 5(H) to Section 4(C) and (D), which now require a lender to consider and document the borrower's ability to repay in connection with making any home loan. NMSA

1978, § 58-21A-4(C), (D) (2009), as added by L. 2009, ch. 122, § 56. The 2009 amendment left the anti-flipping provision untouched. So, the Romeros' interpretation of that provision's language now makes it overlap Sections 4(C) and (D), rendering those provisions superfluous, at least for refinance loans. *See Bank of New York,* 2011-NMCA-110, ¶ 18, 266 P.3d at 644

In short, proper interpretation of the anti-flipping provision's words in the context of the entire HLPA shows that "all circumstances" and "borrower's circumstances," as used in that provision do not encompass or require a consideration of the borrower's ability to repay the refinance loan.

***29 B. Other Aids To Statutory Construction Yield The Same Result**

1. Administrative Regulations Do Not Support The Romeros

If the anti-flipping provision were ambiguous, the Court might properly look to the FID's regulation for guidance in interpreting the statute. [27]

The regulation, NMAC, § 12.15.5.9, confirms the interpretation of the anti-flipping provision stated above. It acknowledges that "the majority of loans may be evaluated using an appropriate economic analysis of the old and new loan." NMAC, § 12.15.5.9(B). As examples of facts potentially relevant to the tangible net benefit analysis, the regulation highlights "[t]erms of the new and old loan" and "[c]osts of the new loan." NMAC, § 12.15.5.9(D)(1), (2).

The regulation does *not* list the borrower's ability to repay the loan as a factor to be considered. The closest it comes is mentioning "debt-to-income ratio of the borrower before and after the transaction" as a sub-factor as part of the "[c]osts of the new loan." NMAC, § 12.15.5.9(D)(2)(b); *see* BiC, 13; AG Amicus, 17-19.

By contrast, another part of the same regulations, fittingly titled "Home Loan Protection Act - High-Cost Loans: Repayment Ability, Financial Ratios and Guidelines" implemented section 5(H). NMAC, § 12.15.4.7-.9 (2004). As its title ***30** suggests, the regulation expressly addressed "repayment ability," using that phrase repeatedly. Like section 5(H), the regulation applied only to high-cost loans. [28]

As with the HLPA itself, the use of the specific term "repayment ability" in one part of the regulations and its complete absence from the part implementing the anti-flipping provision shows that the latter provision's references to "circumstances" and "borrower's circumstances" were not understood to require consideration of the borrower's ability to repay the loan.

2. Other States' Statutes And Regulations Confirm The Anti-Flipping Provision's Meaning

As originally enacted in 2004, New Mexico's HLPA closely followed the AARP Model Home Loan Protection Act, promulgated in 2001. [29] Like the HLPA, the AARP Model Act contained an anti-flipping provision (§ 3(b)) applicable to all refinance loans as well as a provision (§ 4(i)) prohibiting the making of a high-cost home loan without due regard to repayment ability.

***31** The AARP Model Act's commentary explains that the anti-flipping provision was intended to prohibit repeated refinancings that generate up-front fee income for the lender without providing anything of value to the borrower. [30] By contrast, the Model Act's ban on high-cost loans made without due regard for the borrower's ability to repay was aimed at a different problem, so-called "asset-based lending" or "equity stripping." [31]

Other states adopted the AARP Model Act or statutes closely patterned on it. Those statutes and their implementing regulations likewise show that repayment ability was not a circumstance taken into account in determining whether a refi-nance loan was "flipped." [32] None of the cited statutes or regulations mention re ***32** payment ability in defining "tangible net benefit" or listing factors to be considered in deciding whether such a benefit has been conferred. Instead, they, like New Mexico's anti-flipping provision and regulation, focus on the characteristics of the new and old loans and whether the changed features meet any special needs of the borrowers.

***33** The exception to this pattern proves the rule. New York's regulation of "high cost" home loans expressly requires consideration of repayment ability as part of the tangible net benefit/anti-flipping determination.[33] New York's regulation shows how New Mexico's Legislature or the FID could and would have written this state's anti-flipping statute or regulation to explicitly require consideration of repayment ability had that been their intent.

Unlike New York's regulation, the HLPA's anti-flipping provision and its implementing regulation say nothing about repayment ability. Instead, like the laws and regulations cited in footnote 32 above, this state's law and regulation focus on other factors, indicating that the New Mexico Legislature and FID chose to follow the same path as those states, not New York's divergent route. *See* NMSA 1978, §§ 12-2A-18(B), 12-2A-20(C).

3. Flipping And Equity Stripping Are Separate Evils Separately Regulated Under The HLPA And Similar Statutes

Like the AARP Model Act and the other states' laws cited in footnote 32 above, New Mexico's HLPA regulates "flipping" separately from "asset-based lending" or "equity-stripping" for a reason. While legislatures, regulators, and ***34** commentators condemned both practices as predatory lending, they saw them as separate evils perpetrated for different reasons, inflicting different kinds of harm, and thus appropriately subject to separate regulation.

Predatory lenders "flip" loans allegedly to generate more income from upfront loan fees charged at loan origination.[34] Borrowers are hurt by "flipping" because their loan balance is increased by the fees, but they receive no compensating benefit for that additional debt. "Flipping" occurs only with a refinance loan, not with a purchase money loan.

***35** "Asset-based lending" or "equity stripping," on the other hand, is purportedly driven by a predatory lender's desire to acquire the borrower's home by lending more than the borrower can repay but less than his or her home is worth. When the borrower defaults, the lender forecloses, benefitting by the amount the property's value exceeds the loan balance.[35] "Equity stripping" can occur on a purchase money loan if the borrower made a large down payment. But "equity-stripping" was said to occur more frequently with refinance loans offered to **elderly** borrowers who had lived in the same house long enough to build up substantial equity in their property.[36]

***36** While it is possible to both "flip" and "strip" the same loan, there is little incentive to do so. "Flipping" increases the loan balance by at least the amount of loan fees and costs charged. A higher loan balance makes "equity-stripping" less profitable by decreasing the difference between property value and loan balance. Likewise, "equity-stripping" diminishes the profitability of "flipping." If the borrower cannot repay the loan, up-front fees rolled into the loan balance will be paid, if at all, only through foreclosure and resale at a profit.

Likely for this reason, legislators, regulators and commentators saw little, if any, overlap between the two sorts of predatory lending. Hence, as enacted in 2003, the HLPA banned "flipping" in section 4(B), applicable to all refinance loans; whereas, it forbade "equity-stripping" in section 5(H), applicable only to "high-cost home loans."[37] NMSA 1978, §§ 58-21A -4(B), 58-21A-5(H) (2003).

In short, text, context, implementing regulation, similar legislation and regulation in other states, and pertinent commentary all confirm that the Romeros and their amicus misconstrue the HLPA's anti-flipping provision. The borrower's ***37** ability to repay the loan is ***not*** a "circumstance" which that provision requires a lender to consider in determining whether a refinance loan confers a reasonable, tangible net benefit on the borrower.

C. The Romeros' Contrary Arguments Are Without Merit

The Romeros' and their amicus' arguments regarding tangible net benefit, not already addressed in the preceding discussion, are without merit for the reasons set forth below.

1. The 2009 HLPA Amendments Do Not Apply In This Case

Contrary to the Romeros' argument, BiC, 13-14, the 2009 amendments to the HLPA do not apply retroactively to the Romeros' loan made in 2006 for several reasons. Apart from constitutional constraints, whether a statute applies retroactively is a question of legislative intent. "If the statute expressly declared that it was to be applied prospectively only, we would of course give it that effect." *Swink v. Fingado,* 115 N.M. 275, 283, 850 P.2d 978, 986 (N.M. 1993). New Mexico's Legislature did just that in the 2009 amendments to the HLPA. It said that those amendments would become effective on July 31, 2009. [38]

***38** Even absent that express indication of legislative intent, the same result would follow for two additional reasons. First, the 2009 amendments were not mere "clarifications" of existing law. The 2009 amendment radically changed the Act, moving many of its proscriptions-including the ability to repay requirement-from section 5, applicable only to "high-cost" home loans to section 4, applicable to all home loans. It also added a completely new requirement of documenting the borrower's income. NMSA 1978, § 58-21A-4(C) (2009).

Second, unlike the marital property rights at stake in *Swink,* vested creditor's rights under existing contracts are constitutionally protected against substantial impairment by later enacted state law. *See Swink,* 115 N.M. at 290, 850 P.2d at 993; U.S. Const., art. I, § 10; *General Motors Corp. v. Romein,* 503 U.S 181, 186 (1992). The Romeros seek to use the 2009 amendment to invalidate a 2006 loan agreement, undeniably a substantial impairment of existing contractual rights by a subsequent statute that the Contracts Clause squarely forbids. "[I]f a valid constitutional objection exists to applying the 1984 Act retroactively, our inquiry is at an end; obviously we cannot construe the Act as applying retroactively if that construction would run afoul of the Constitution." *Swink,* 115 N.M. at 290, 850 P.2d at 993.

Apparently in an effort to fend off Contracts Clause attack, the Romeros claim that BoNY cannot complain about retroactive application of the 2009 ***39** amendment because it supposedly "knew all along of the HLPA' thrust and had no vested right to engage in **abusive** lending practices." BiC, 14. The Romeros are wrong. Whatever the HLPA's "thrust," it did not prohibit making loans - other than "high-cost" home loans - without first assuring the borrower's repayment ability. Nor is it an **abusive** lending practice for a lender to allow the borrower to decide if he or she can repay the loan, unless a statute requires otherwise. [39] The decisions the Romeros cite also fail to support their argument. [40]

2. There Is No Unconscionability Issue In This Case

The Romeros' discussion of the Unfair Practices Act ("UPA") as well as decisions banning unconscionable contracts and requiring clear drafting of releases of ***40** liability is completely irrelevant. See BiC, 16-17. The Romeros alleged no unconscionability or clarity-of-drafting counterclaim or defense. See R.P., 51-57. No such issue was stated in their docketing statement, nor was it mentioned in their certiorari petition. See R.P. 367-370; Cert. Pet., 1. It is far too late to raise the issue now.

Equally irrelevant are the Romeros' and their amicus' allusions to "the toxic effect of **abusive** home loan practices on Hispanic communities" and to Bank of America's settlement of racial and ethnic discrimination claims. See BiC, 18-19, AG Amicus, 9-13. On this appeal, the Court's task is to interpret the HLPA as the Legislature enacted it in 2003, not to proclaim the Court's own social policy. Least of all should the Court be swayed by a settlement of unadjudicated claims against a completely unrelated entity.

3. The Romeros Bore The Burden Of Proving Flipping

As the Attorney General notes, FID's regulation lists as potentially relevant to proving a "flipping" violation the lender's policies and procedures for evaluating loans, its managerial review of loans, its collection of information about the borrower's alternatives to reach their financial objectives without the refinance loan, and the lender's documentation of its anti-flipping evaluation. *See* AG Amicus, 21; NMAC, § 12.15.5.9(C), (E), (H).

***41** Contrary to the Attorney General's assertion, AG Amicus, 21, there was evidence on some of these factors. BoNY introduced documentation of Equity One's anti-flipping evaluation as well as the Romeros' certification of tangible net benefit. Tr. Exs. W, NN. Also, the evidence showed the Romeros' refinance loan was reviewed by Equity One's management. Tr. Ex. NN, p. 1.

Even if the evidence fell short in this regard, as the Attorney General claims, the shortfall redounds to BoNY's benefit and affirmance, not the Romeros' and reversal. On their counterclaim alleging that their loan had been "flipped" in violation of the HLPA, R.P., 53-54, the Romeros bore the burden of proof. *Frost v. Markham,* 86 N.M. 261, 264, 522 P.2d 808, 811 (N.M. 1974). If the Romeros introduced insufficient evidence on the issue, judgment was properly entered against them.

D. Conclusion Re HLPA Interpretation

As shown above, pp. 7-15, the Court need not construe the HLPA at all to resolve this suit. Substantial evidence supports the district court's finding of no HLPA violation even if repayment ability is a circumstance to be considered in determining whether a refinance loan confers a reasonable, tangible net benefit.

If the Court, nevertheless, interprets the HLPA's anti-flipping provision, it will find that the statutory text, context, implementing regulation, similar legislation and regulation in other states, and pertinent commentary all show that the bor ***42** rower's ability to repay the loan is ***not*** a "circumstance" to be considered in deciding that a refinance loan confers a reasonable, tangible net benefit.

v

TO ESTABLISH ITS "STANDING," BONY ONLY HAD TO PROVE IT WAS A PARTY ENTITLED TO ENFORCE THE ROMEROS' NOTE

A. A Note And Mortgage May Be Transferred By Physical Delivery Of The Note

Though the Romeros and their amici frame the issue as one of standing to sue, BiC, 20-22, Civic Amici, 2-4,[41] the Romeros' second issue for review really turns on whether, at the time it filed this foreclosure action, BoNY was the party entitled to enforce the Romeros' note and mortgage.

Articles 3 and 9 of the Uniform Commercial Code state the legal rules dictating the answer to that question. As recently explicated by the Code's Permanent ***43** Editorial Board's special report on mortgage notes,[42] those rules are quickly summarized below.

A note's maker must pay the note, as agreed, to "the person entitled to enforce the note."[43] Report, p. 4; NMSA 1978, § 55-3-412 (2008). Section 3-301 provides that either a "holder" of the note or a "non-holder in possession of the instrument who has the rights of the holder" is the "person entitled to enforce the note. Report, p. 5; NMSA 1978, § 55-3-301(i), (ii) (2008).[44]

To be a "holder" of a note, a person must physically possess the note and the note must be payable to that person or bearer. [45] Report, p. 5; NMSA 1978 § 55-1-201(b)(21)(A) (2008).

***44** To be a "non-holder in possession of the instrument who has the rights of the holder," a holder must have transferred physical possession of the note to the non-holder for the purpose of giving the non-holder the right to enforce the instrument. [46] Report, pp. 5-6; NMSA 1978 § 55-3-203(a), (b) (2008).

For example, assume that the payee of a note sells it to an assignee, intending to transfer all of the payee's rights to the note, but delivers the note to the assignee without indorsing it. The assignee will not qualify as a holder (because the note is still payable to the payee) but, because the transaction between the payee and the assignee qualifies as a transfer, the assignee now has all of the payee's rights to enforce the note and thereby qualifies as the person entitled to enforce it. 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....

Report, 6.

At common law, a mortgage was a mere incident of the note it secured; hence, assignment of the note automatically transferred the mortgage as well. "The transfer of the note carries with it the security, without any formal assignment ***45** or delivery, or even mention of the latter." *Carpenter v. Longan,* 83 U.S. 271, 274-75 (1872); *accord* Rest.3d Property (Mortgages), § 5.4 (1997).

UCC section 9-203(g) codifies this "common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien." NMSA 1978, § 55-9-203(g) (2006), UCC cmt. ¶ 9. As the Report explains:
What if a note secured by a mortgage is sold ..., but the parties do not take any additional actions to assign the mortgage that secures payment of the note, such as execution of a recordable assignment of the mortgage? UCC Section 9-203(g) explicitly provides that, in such cases, the assignment of the interest of the seller... in the note automatically transfers a corresponding interest in the mortgage to the assignee...

While this question has provoked some uncertainty and has given rise to some judicial analysis that disregards the impact of Article 9, the UCC is unambiguous: the sale of a mortgage note... not accompanied by a separate conveyance of the mortgage securing the note does not result in the mortgage being severed from the note.

Report, p. 12 (fns. omitted). [47]

***46** Thus, both under the prior common-law rule and under the UCC, transfer of the promissory note automatically transfers the mortgage that secures it, giving the transferee of the note - if entitled to enforce the note - the right to enforce the mortgage as well.

Non-UCC law determines whether a formal assignment of the mortgage must be recorded before the transferee of the note may bring a foreclosure action. Report, pp. 13-14. In New Mexico, the transferee need not record the assignment.

> The bona fide holder of negotiable paper, transferred to him by indorsement thereon before maturity, and secured by a real estate mortgage, *need not record the assignment of the mortgage,* or bring home to the mortgagor actual notice of such assignment..."

Hayden v. Speakman, 20 N.M. 513, 521, 150 P. 292, 295 (N.M. 1915) (emphasis added).

The upshot of these legal rules is that to prove it was entitled to bring this suit, BoNY was required to prove only that before it filed suit (a) it acquired physical possession of the Romeros' note, endorsed to it or in blank, or (b) it received the note, not so endorsed, from a holder who transferred the note to BoNY intending that BoNY thereby acquire the right to enforce the note. BoNY did not need to prove that the mortgage had been separately assigned to it or that it had recorded any assignment of the mortgage.

***47 B. The Civic Amici's Arguments Are Misplaced**

1. The District Court's Finding That BoNY Had Standing Was Supported By Substantial Evidence

In attacking the district court's finding that BoNY was entitled to enforce the Romeros' note when it filed this suit, Civic Amici, 12-13, 17, 22-24, the Civic Amici fall victim to the same error as the Romeros themselves. Like the Romeros, they recite only the evidence they find helpful, ignoring the contrary evidence and inferences on which the district court could and did base its findings.

That evidence and the inferences from it are discussed in detail at pages 18-21 above. It suffices here to briefly summarize the support for the district court's findings in terms of the just-discussed UCC rules governing persons entitled to sue on a note.

There was substantial evidence that BoNY was a "holder" of the Romeros' note. It had physical possession of their promissory note both at trial and when it filed suit. Tr. (2/17/09) 9:16:33-43, 10:16:44-55, 10:17:00-36, 10:17:44-18:10, 10:48:17-48:50, 10:49:28-56, 11:17:52-18:10, 11:20:53-21:25; see also pp. 18-20 & nn. 14, 15, 17 above. The note's payee had endorsed the note in blank, thereby making it bearer paper and its possessor a holder. [48] Tr. Ex. A, p. 4.

***48** There was also substantial evidence showing that BoNY was at least a non-holder with the rights of a holder. As just mentioned, the evidence showed that BoNY had physical possession of their promissory note both at trial and when it filed suit. Also, there was evidence that Equity One, the original payee - hence a holder of the note [49] - had transferred the note to BoNY intending that BoNY thereby acquire the right to enforce it. [50] Tr. (2/17/09) 9:16:33-43, 10:16:44-55, ***49** 10:17:00-36, 10:17:44-18:10, 10:48:17-48:50, 10:49:28-56, 11:17:52-18:10, 11:20:53-21:25, 11:34:16-58; Tr. Ex. 00, p. 2; see also pp. 18-21 above.

2. Personal Knowledge Of The Transfer Is Not Required And The Romeros Waived Any Objection On That Ground

The Civic Amici also object that "testimony of employees of servicers with no personal knowledge of the circumstances" is insufficient to prove a lender is entitled to enforce a promissory note. Civic Amici, 17, 22, 23. That objection is meritless for two reasons.

First, as the district court correctly ruled, Tr. (2/17/09), 10:19:39-20:10, Flannigan showed he had personal knowledge of the loan servicing records of which he was a custodian. Based on his personal knowledge of those records, he could testify about the transactions they recorded even if he had no personal knowledge of those transactions apart from the records.

Rule 11-602 NMRA was borrowed verbatim from F.R. Evid. 602. Both state that a witness may not testify about a matter unless it is shown that he or she has personal knowledge of it. However, as the Advisory Committee Comment to the federal rule points out:

> This rule does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement. Rules 801 and 805 would be applicable.

***50** A custodian of business records is just such a person. The custodian testifies as to the hearsay statements found in the business records, which are made admissible by Rule 11-803(F) NMRA. The custodian must have personal knowledge of the records and the manner of their creation and maintenance, but may testify regarding their contents even though he or she did not create the record(s) in question or witness the transactions or events that they reflect. [51]

Second, the Romeros have waived any evidentiary objection to Flannigan's testimony. The Romeros objected only three times during Flannigan's testimony. Tr. (2/17/09), 10:02:11-38, 10:02:53-03:02, 10:17:35-18:34, 10:48:59-49:00. The district court sustained one objection to a leading question; it overruled the other two objections. Tr. (2/17/09), 10:02:40-53, 10:03:04-18; 10:19:39-20:10, 10:49:01-03.

The Romeros have not challenged any of these rulings on appeal. Their docketing statement raises no issue about the propriety of the district court's evidentiary rulings. See R.P., 367-370. Their Briefs in Chief in the Court of Appeals and this Court do not assert error in admission of evidence. The petition for certiorari proffered no such issue for this Court's review.

***51** An amicus "must accept the case before the reviewing court as it stands on appeal, with the issues as framed by the parties...." *Crutchfield v. N.M. Dept. of Taxation & Revenue,* 2005-NMSC-022, 1 15, 137 N.M. 26, 31, 106 P.3d 1273, 1278. As framed by the Romeros, the issue before this Court is whether the evidence actually admitted at trial supports the findings, not whether the evidence was properly admitted.

"[O]nce the testimony was received into evidence generally, without objection or limitation, the [trier of fact] was entitled to draw all reasonable inferences from it." *United States v. Castro-Lara,* 970 F.2d 976, 981 (1st Cir. 1992). Objections to admissibility cannot be raised for the first time on appeal dressed as attacks on the substantiality of the evidence supporting the findings. *See* *United States v. Endicott,* 803 F.2d 506, 512 (9th Cir. 1986).

3. The Civic Amici's Other Arguments Are Unsupported By The Record And Address Issues Not Before This Court

The Civic Amici begin their brief, calling for "strict proof of standing" because, they say, otherwise borrowers "risk being pursued by several parties on the same note." Civic Amici, 3. Along the same lines, they say that allowing BoNY to foreclose "on the basis of lax evidentiary standards compromises the integrity of the process, leaves a potential cloud on title, and would be unfair to the Romeros." Civic Amici, 24.

***52** Not so. As the Romeros admitted they had not paid on the loan since September 2007, the judgment of foreclosure was both justified and fair to the Romeros. No "lax evidentiary standards" were employed at this trial. The Romeros have not asserted, much less shown, any error in any evidentiary ruling by the district court. The personal knowledge objection that the Civic Amici raise for the first time in this Court comes too late and lacks merit in any event for the reasons already discussed. *See* pp. 49-51 above.

There is no risk that the Romeros will be "pursued" by another party on the same note. No other putative holder of their note has appeared in the more than four years since they last made a payment under the note. No other claimant is likely to appear now, after a four-year silence. Moreover, as already discussed, the original payee of the note, Equity One, was a party to this case. It is bound by the judgment. So it can no longer claim any ownership interest in the Romeros' note or the foreclosed property, thus eliminating any potential cloud on title.

The Civic Amici also claim that "it is common for lenders to sue for foreclosure in this state before they have an actual stake in the outcome of the case." Civic Amici, 4, 25. Based on that assertion, the Civic Amici urge the Court to adopt new, restrictive pleading requirements as well as a mandatory mediation program just for mortgage foreclosure cases. *Id.*, 26-31. The Court should not do so for several reasons.

***53** First, the argument suffers from a complete lack of evidence. The Civic Amici cite nothing - and certainly nothing in this record - to substantiate their claim of widespread problems with mortgage foreclosures in New Mexico. Instead, they rely on what they claim to be "common knowledge" of **abuses** found in other states, such as New Jersey and New York. Civic Amici, 27-28. This is a court of law. It decides based on evidence properly admitted at trial, not some airy notion of "common knowledge." Also, this is New Mexico, not New Jersey or New York. That those urban states 2,000 miles distant have experienced problems does not mean that New Mexico has or will experience those same difficulties.

Similarly, nothing in this record supports the Civic Amici's call for mandatory mediation of foreclosure cases. The Romeros never sought to invoke settlement and mediation procedures that were available to them. [52] Reform should await a showing that the existing procedures are inadequate. That showing cannot be made in this case.

Second, the Romeros have not raised any of these issues or sought any relief of this nature in any court, including this one. An appellate court will not decide issues raised only by an amicus, and not by the appellant or appellee. *K.R. Swerd* ***54** *feger Constr.,* 2006-NMCA-117, ¶¶ 25-29, 140 N.M. 374, 382-83, 142 P.3d 962, 970-71.

Third, the Civic Amici's request is directed to the wrong branch of government. The Legislature, not the Court, sets this state's social and economic policy. The Legislature has repeatedly considered measures to address home mortgage loans and foreclosure. It enacted the HLPA and its 2009 Amendment. In its 2011 and 2012 regular sessions, the Legislature considered at least five other foreclosure-related bills. [53] One would have mandated the very type of foreclosure mediation program that the Civic Amici ask this Court to impose. Sen. Bill No. 75 (2012 Reg. Sess.). None was enacted. The Court is not a forum for reviving failed legislation. As this Court said half a century ago, "courts cannot legislate." [54] *Feldhake v. City of Santa Fe,* 61 N.M. 348, 356, 300 P.2d 934, 939 (N.M. 1956).

***55 VI**

THE NATIONAL BANK ACT PREEMPTS THE HOME LOAN PROTECTION ACT

The Court need not and should not reach the Romeros' final issue of federal preemption. It is unnecessary to address preemption (a) if the Court decides in BoNY's favor on the substantial evidence grounds addressed in Part III above, (b) if the Court interprets the HLPA against the Romeros as urged in Part IV above, or (c) if the Court rules in the Romeros' favor on the "standing" issue discussed in Part V above. [55] In other words, only if the Court concludes that BoNY owns the Romeros' loan but violated the HLPA will it be necessary or appropriate to decide the federal preemption issue.

Should the Court reach the issue, however, it will find, once again, that the district court ruled correctly. [56]

***56** Federal preemption of state law with respect to national banks has a long history. *See Watters v. Wachovia Bank, N.A.,* 550 U.S. 1, 10 (2007) (citing *McCulloch v. Maryland,* 4 Wheat. 316 (1819)). National banks are subject to state laws "of general application" only to the extent that those state laws do not conflict with the letter or general purposes of the National Bank Act. *Watters,* 550 U.S. at 11.

Because of the long history of federal regulation of national banks, and because the United States Supreme Court has traditionally "interpret[ed] grants of both enumerated and incidental 'powers' to national banks as grants of authority not normally limited by, but rather ordinarily pre-empting, contrary state law," *Watters,* 550 U.S. at 12 (*quoting Barnett Bank v. Nelson,* 517 U.S. 25, 32 (1996)), "the usual presumption against federal preemption of state law is inapplicable to federal banking regulation." *Wells Fargo Bank, N.A. v. Boutris,* 419 F.3d 949, 956 (9th Cir. 2005). [57]

Furthermore, "[u]nder the familiar Chevron framework, we defer to an agency's reasonable interpretation of a statute it is charged with administering." ***57** *Cuomo v. Clearing House Ass'n, L.L.C.,* 557 U.S. 519, 129 S.Ct. 2710, 2715 (2009) *(citing*

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)). *Chevron* deference "extends to the judgments of the Comptroller of the Currency with regard to the meaning of the banking laws." *Smiley v. Citibank South Dakota,* N.A., 517 U.S. 735, 739 (1996). The Comptroller's construction of the National Bank Act may be disregarded only when it is contrary to clear statutory language or prior Supreme Court interpretation of that act. *Cuomo,* 129 S.Ct. at 2715.

In this case, there can be little doubt that federal banking laws preempt the HLPA. The FID's regulations implementing the HLPA, adopted after consultation with the Attorney General, see AG Amicus, 16; AG Motion to File Amicus Brief, 2; NMSA 1978, § 58-21A-13, expressly recognize that, in accordance with federal regulatory agencies' determinations, federal law regulating national banks, savings associations and credit unions preempts various HLPA provisions, including section 4(B). See NMAC, §12.16.76.8(E)-(H) (citing OTS Opn. Chief Counsel, No. P-2003-6 (Sept. 9, 2003)). [58]

The Romeros and their amicus wrongly rely on the rule that the National Bank Act does not preempt state laws of general application. See BiC, 34, 35, AG ***58** Amicus, 26-27 & n. 9. Under the OCC's regulations, even state laws of general application are preempted if they more than "incidentally affect" a national bank's congressionally granted powers. See 12 C.F.R. §§ 7.4008(e), 7.4009(c)(2), 34.4(b). The OTS opinion letter cited in FID' regulation establishes that the HLPA, and in particular section 4(B) of that act, more than incidentally affect federally regulated financial institutions' congressionally granted powers.

In a final effort to avoid preemption, the Romeros and their amicus argue that BoNY cannot invoke federal preemption because it brought this action in its capacity as trustee of a securitized trust. See BiC, 33; AG Amicus, 28-29. The Attorney General cites no authority for this argument. The Romeros cite only one, OCC Interpretative Letter No. 1016, 2005 WL 475400 (Jan. 14, 2005).

The letter does not support the Romeros' or the Attorney General's assertion that a national bank, acting as trustee of a securitized trust, may never invoke National Bank Act preemption of state law. Instead, the letter says only that since, as trustee, the bank does not buy or sell loans for its own account, but rather does so on behalf of non-bank investors, the bank may not claim that state law interferes with the bank's federally granted power to "make, arrange, purchase or sell" loans. Id., 2005 WL 475400, at *2 (citing 12 U.S.C. § 371).

The letter goes on to say, however, that national banks are also granted the power to act as trustees. *Id.,* 2005 WL 475400, at *2 (*citing* 12 U.S.C. § 92a).

> ***59** [I]f the application of [state law] to the loans held by the Banks as trustee were to obstruct, impair, condition, or otherwise interfere with the Banks' exercise of fiduciary powers granted to them under federal law, the state statute would be preempted.

Id., 2005 WL 475400, at *3.

Whether application of the HLPA to the Romeros' loan will interfere with BoNY's congressionally granted powers to act as trustee is, in part, a factual matter. The Romeros never raised BoNY's trustee status in opposition to its federal preemption claim in either the district court or the Court of Appeals. Tr. (2/17/09), 3:04:30-05:51; Tr. (2/18/09), 11:32:46-42:16; Ct. App. BiC, 11-12. Instead, the Romeros argued below that federal preemption was precluded simply because a non-bank, Equity One, originated their loan. [59] *See* Ct. App. BiC, 11-12. The Romeros should not be allowed to raise their new bank-as-trustee argument in this Court for the first time since it is fact-dependent and BoNY was not given a fair opportunity to meet the objection when it could have presented evidence concern ***60** ing it at trial. *See Garcia v. La Farge,* 119 N.M. 532, 540, 893 P.2d 428, 436 (1995); *Fullen v. Fullen,* 21 N.M. 212, 226, 153 P. 294, 298 (N.M. 1915).

Moreover, there is some evidence in this record showing that the HLPA, at least as the Romeros seek to apply it, does interfere with BoNY's congressionally granted power to act as trustee. The Romeros assert the HLPA as a defense to foreclosure of their defaulted loan. Foreclosing such loans is one of BoNY's prime functions as trustee. Also, the Romeros sought damages from BoNY, individually and not as trustee, based on the alleged HLPA violation. *See* R.P. 53-54. Subjecting a bank to personal liability for its functions as trustee interferes with its trustee powers.

Accordingly, the district court correctly ruled that the National Bank Act preempts the HLPA in this case.

VII

CONCLUSION

For the reasons stated above, the Court should reject defendants' arguments and affirm the judgment.

Footnotes

1 Evidence supporting the findings that the Romeros challenge is set forth at pages 11-21 below.

2 The Romeros wrongly chide the Court of Appeals for applying standard substantial evidence analysis in determining whether these findings were adequately supported by the evidence. *See* BiC, 6. The findings concerned typical "adjudicative facts" about the parties to this case - the who did what, when, where, and how. The findings were not used to determine the content of law and policy, so they were not "legislative facts." Accordingly, the Court of Appeals properly reviewed the findings under the substantial evidence rule and did not subject them to de novo review. *See Quynh Truong v. Allstate Ins. Co.,* 2010-NMSC-009, ¶¶ 25-27, 147 N.M. 583, 590-91, 227 P.3d 73, 80-81.

3 Tr. (2/17/09), 2:24:33-47; Tr. (2/18/09), 12:00:51-01:08; Tr. Ex. A, ¶ 4(A).

4 Tr. (2/17/09), 2:24:23-33; Tr. (2/18/09), 12:00:51-01:08; Tr. Ex. A, ¶ 4(D).

5 R.P., 347 ¶ 64; Tr. (2/17/09), 11:56:53-57:06, 2:24:53-25:05; Tr. Exs. D, lines 1306-1309, NN, p. 6.

6 R.P., 347 ¶ 64; Tr. (2/17/09), 11:56:53-57:06, 2:24:53-25:05 3:46:50-47:36, 4:04:05-59, 4:05:04-16, 4:18:09-40, 4:19:42-20:12; Tr. Exs. D, line 303, NN, p. 6.

7 Tr. (2/18/09), 9:33:16-40, 10:32:36-33:00; Tr. Ex. D, line 1304.

8 A creditor violates the anti-flipping provision only when it makes a "new loan with the intent and knowledge that the new loan did not provide a reasonable, tangible net benefit to the borrower." NMAC, § 12.15.5.8.

9 On the stand, Mr. Romero conceded that $5,600 was the *highest* amount his store had earned in a month, not his average monthly income from the store. Tr. (2/17/09) 3:58:57-59:20.

10 Exhibits 3 and 4 are the Romeros' 2005 federal and state income tax returns which appear to have been prepared a month before their loan closed. *See* Tr. Ex. 3, p. 2 5/11/2006 beside tax preparer's signature line. Exhibits 5 and 6 are the Romeros' federal and state income tax returns for 2006 which were not prepared until nearly two years *after* the loan was made. *See* Tr. Ex. 5, p. 2 3/05/2008 beside tax preparer's signature line.

11 Stated income loans like Equity One's loan to the Romeros required no verification of the borrower's income and were often made to self-employed borrowers, like Mr. Romero. Tr. (2/17/09) 1:54:20-56:15. Stated income loans later came to be known as "liar's loans" due to the perception that borrowers had mis-reported their income.

> "Stated income loans began as a product designed to facilitate lending to individuals with difficult to document incomes: those working on commission, the self-employed, individuals with incomes that fluctuate from year-to-year, and other non-traditional borrowers. As these products were offered to more borrowers, they earned the name 'liar's loans' in industry circles as the perception existed that some borrowers were inflating their stated income to qualify for a loan."

Zachary B. Marquand, Ability to Repay: Mortgage Lending Standards after Dodd-Frank, 15 N.C. Banking Inst. 291, 292 (2011) (fns. omitted.)

State and federal statutes now require lenders to document the borrower's income, thus prohibiting stated income loans. 15 U.S.C.A. § 1639c(a)(1), (3), (4); added by Pub.L. 111-203, tit. XIV, § 1411(a)(2) (July 21, 2010); NMSA 1978, § 58-21A-4(C), (D), added by L. 2009, ch. 122, § 56. But in 2006, stated income loans were completely legal and commonplace. Marquand, *supra,* at 293.

12 "Borrowers are responsible for the disclosure of information provided on the application for a home loan. Truthful disclosure of all relevant facts and financial information concerning the borrower's circumstances is required in order for lenders to evaluate and determine that the refinance loan transaction provides a reasonable, tangible net benefit to the borrower." NMAC, § 12.15.5.9(G).

13 *See* U.S. Dept. of Treasury, *Making Home Affordable Program: Handbook for Servicers of Non-GSE Mortgages*, 60, 74, 75 (ver. 3.3 Sept. 1, 2011). With taxes and insurance added in, total monthly house-related payments were $1,799.38, just 32% of the Romeros' reported $5,600 monthly income. *See* Tr. Ex. C, p. 2; *see also* NMAC, § 12.15.4.8 (2004) (Under former NMSA 1978, § 58-21A-5(H), applicable to high-cost loans only, a rebuttable presumption of ability to repay arose if the borrower's total debt payments do not exceed 50% of his or her income).

14 Kevin Flannigan testified that that BoNY's trial counsel, Little & Dranttel had physical possession of the note at the time of trial. Tr. (2/17/09) 10:16:45-51. BoNY's attorneys' possession is possession by BoNY. "[T]he possession required by the Code to constitute a person a 'holder' may be a constructive possession by delivery to one on his behalf. Thus a person is a 'holder' of commercial paper when it is in the physical possession of his agent." *Midfirst Bank, SSB v. C.W. Haynes & Co., Inc.,* 893 F.Supp. 1304, 1314 (D. S.C. 1994); 1 A Lary Lawrence, *Lawrence's Anderson on the Uniform Commercial Code*, § 1-201:265 (3d ed. 2011).

15 " '[T]he subsequent existence of a condition is some evidence of its prior existence, at least when the time span is not too great and there is no suggestion of an intervening circumstance that might call its previous existence into question.' *United States v. Sliker,* 751 F.2d 477, 484 (2d Cir. 1985) (citing 2 Wigmore, *Evidence*, § 437(1) at 513-19 (Chadbourn rev. 1979)) (testimony at time of trial that bank is insured is sufficient to support an inference of prior coverage); see also *United States v. Knop,* 701 F.2d 670, 673 n. 2 (7th Cir. 1983) (noting this evidentiary principle and sustaining conviction of crime committed two and a half years before trial on basis of testimony that bank "is" insured by FDIC)...." *United States v. Ayewoh,* 587 F.Supp.2d 378, 382 (D.Puerto Rico 2008); *accord United States v. Hall,* 613 F.3d 249, 253 (D.C. Cir. 2010).

16 Tr. (2/17/09) 10:00:00-05, 10:00:23-32. Though Flannigan had been employed by Litton for only six months, he had worked in the mortgage industry for 16-1/2 years. Tr. (2/17/09) 10:00:06-20. As Litton's employee, Flannigan said he had authority to testify for both BoNY and Equity One regarding the Romeros' loan. Tr. (2/17/09) 10:01:59-02:07, 10:03:38-46.

17 The district court overruled the Romeros' objection to this testimony. Tr. (2/17/09) 10:17:37-20:10. Neither in the Court of Appeals nor in this Court have the Romeros challenged that ruling. So they have waived any claim of error in the admission of this testimony.

18 *See Fuller v. Crocker,* 44 N.M. 499, 507, 105 P.2d 472, 477 (N.M. 1940) ("Where facts and circumstances are proved from which an inference may be and is drawn by the trial court, the finding of such an inference will not be disturbed on appeal.").

19 "Substantial evidence is evidence upon which a reasonable mind might base a conclusion." *Jones v. General Motors Corp.,* 1998-NMCA-020, ¶ 18, 124 N.M. 606, 610, 953 P.2d 1104, 1108 (citing *Ortega v. Montoya,* 97 N.M. 159, 161, 637 P.2d 841, 843 (N.M. 1981)).

20 The substantial evidence rule "relate[s] importantly to the allocation of function between a trial court and an appellate court in resolving a dispute such as this one. The trial court determines the facts; the appellate court decides questions of law." *Segal v. Goodman,* 115 N.M. 349, 353, 851 P.2d 471, 475 (N.M. 1993).

21 *See, e.g., Fontenot v. Wells Fargo Bank, N.A.,* 198 Cal.App.4th 256, 270-71, 129 Cal.Rptr.3d 467, 479-80 (2011).

22 Also, contrary to the Romeros' argument, BiC, 26, 30, the fact that the assignment was recorded after the suit was filed does not prove the note was not transferred to BoNY earlier. A physical transfer of the note could easily precede recordation of the assignment, as Flannigan correctly explained at trial. Tr. (2/17/09) 10:48:17-50. The Romeros also wrongly complain that the pooling and service agreement was not produced in discovery or at trial. BiC, 27. However, they do not challenge any discovery rulings, and as already shown the evidence that was introduced was sufficient to support the district court's findings.

23 In fact, the affidavit was true, not false, as the Romeros claim. It said the Romeros' note had been transferred and assigned to BoNY before it filed this action, giving BoNY the right to enforce those instruments. R.P. 179. The evidence discussed above showed that the statement was true, and the district court so found. R.P. 341¶¶ 11, 12; Tr. (2/18/09) 11:52:09-53:01.

24 Likewise, the Romero's claims that BoNY's foreclosure of the Romeros' mortgage offends the Unfair Practices Act and "resonates" with decisions regarding fraud on the court are irrelevant. BiC, 31-32. The Romeros did not plead or prove any claims or defenses of that nature in the district court and have not raised those issues either in the Court of Appeals or this Court.

25 *Oldham v. Oldham,* 2011-NMSC-007, ¶ 11, 149 N.M. 215, 218. 247 P.3d 736, 739 ("[A] statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter."); *Cox v. City of Albuquerque,* 53 N.M. 334, 339, 207 P.2d 1017, 1021 (N.M. 1949) ("In arriving at true legislative intent we are not permitted to choose given language, isolate it from other portions of the Act, and make its otherwise emphatic tone controlling. Each and every part of the statute, where possible, must be given some effect in an effort to reconcile it in meaning with every other part.").

26 Here, for example, one "borrower circumstance" that rendered this refinance loan more beneficial to the Romeros was their need for cash to buy inventory for their store. That is why Mr. Romero wanted the loan. Tr. (2/18/09) 9:03:04-40. As the district court observed, had the store prospered as a result of increased inventory, the loan would have conferred a considerable benefit on the Romeros. Tr. (2/18/09) 12:02:03-59.

27 The Court may give an agency's interpretation "some deference," though the Court "may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law." *Morning Star Water Users Ass'n v. N.M. Pub. Util. Comm'n,* 120 N.M. 579, 583, 904 P.2d 28, 32 (1995); see AG Amicus, 16.

28 The regulation was largely rewritten in 2009 to conform to the 2009 amendment to the HLPA.

29 The Model Act is publicly available at <http:// assets.aarp.org/rgcenter/ con-sume/d17346_loan.pdf> This Court has recognized that interpretation of another state's law is persuasive as guidance in construing a New Mexico statute modeled on the other law. *Vulcraft v. Midtown Bus. Park, Ltd.,* 110 N.M. 761, 765, 800 P.2d 195, 199 (N.M. 1990); *see also State ex rel. Dept. of Public Safety v. One 1990 Chevrolet Pickup,* 115 N.M. 644, 649, 857 P.2d 44, 49 (Ct. App. 1993) ("This Court has often looked to uniform acts and the commentaries explaining those acts for guidance in interpreting New Mexico law."); NMSA 1978, § 12-2A-20(B)(3).

30 "Flipping occurs when a loan is refinanced repeatedly with new up-front fees imposed on each refinancing, providing little tangible benefit to the borrower. Flipping strips the homeowner's equity by substantially increasing the amount borrowed each time the loan is refinanced. At the same time, ***the borrower receives little in the way of additional credit or cash.***" AARP Model Act, p. 18 (emphasis added).

31 "The practice of lending to borrowers who have no reasonable prospect of being able to repay a loan, but who have substantial equity in their homes, is **abusive**. ... The Model Act prohibits asset-based lending for high-cost loans." AARP Model Act, p. 23.

32 Colorado's statutes require refinance loans to provide a reasonable, tangible net benefit "considering all the circumstances." Colo. Rev. Stat. §§ 12-61-904.5(1)(a), 38-40-105(1.7)(a)(II). An implementing regulation requires consideration, if applicable, of the following: lower payments, condensed amortization schedule, debt consolidation, cash out, avoiding foreclosure, negative amortization, balloon payments, variable rates, interest only options, prepayment penalties, and hybrid mortgage products. 4 Colo. Code Regs. § 725-3:3-1-1-5.3-1-1(3). Maine's statute prohibits refinances of high-cost loans that fail to provide a reasonable, tangible net benefit "considering all the circumstances." Me. Rev. Stat., tit. 9-A, § 8-506(5). The implementing regulation lists as factors to be considered in determining whether the loan meets that standard: (a) new monthly payments compared with total prior monthly payments, (b) change in amortization period, (c) borrower's receipt of cash in excess of refinance costs and fees, (d) interest rate reduction, (e) change from adjustable to fixed interest rate, and (f) a bona fide personal need or court order requiring the refinancing. 02-029-144 Me. Code R. § 5(2).

Massachusetts' anti-flipping statute, Mass. Gen. L., ch. 183, § 28C, and its implementing regulation, 209 Code Mass. Reg. § 53.04, ban refinance loans not "in the borrower's interest" and look to the same factors as Maine's regulation.

Ohio Revised Code section 1345.031(B)(12) bans flipping, which it defines in the same way as New Mexico law does. The Ohio Attorney General's implementing regulation requires consideration of most of the same factors as Maine's regulation. Ohio Admin. Code 109:4-3-26(B)-(D).

Rhode Island's Home Loan Protection Act prohibits flipping in the same words as New Mexico's law does. R.I. Gen. Laws § 34-25.2-5(b). The statute also defines "tangible net benefit" in the same manner as Maine's regulation. R.I. Gen. Laws § 34-25.2-4(q); *see also* 11-2-3 R.I. Code R., § 5(B)(ii).

Virginia law forbids refinancing not in the borrower's best interest and lists the same factors as Maine's regulation as a non-exclusive list of factors to be considered in determining the borrower's best interest. Va. Code Ann. § 6.2-1614(7).

33 The regulation defines tangible net benefit to mean that "the borrower receives a monetary benefit... taking into consideration the totality of the circumstances, including, but not limited to,... the borrower's repayment ability, current and expected income and current obligations ...." N.Y. Comp. Codes R. & Regs. tit. 3, § 41.5(b)(4), implementing N.Y. Banking Law, §6-1(2)(i).

34 *See, e.g.,* Julie L. Williams, Michael S. Bylsma, *Federal Preemption and Federal Banking Agency Responses to Predatory Lending,* 59 Bus. Law. 1193, 1197 (May 2004) ("Loan flipping is generally understood to mean the refinancing of a loan, often repeatedly or after a relatively short time period, which results in little or no economic benefit to the borrower and is undertaken for the primary or sole objective of generating additional fees, prepayment penalties, and fees from the financing of credit related products."); Note, *A Suitability Standard for Mortgage Brokers: Developing a Common Law Theory,* 17 Geo. J. on Poverty L. * Pol'y 377, 383 n. 39 (Spring 2010) ("'Flipping' is a term that refers to a lender who helps a recent homeowner quickly refinance their mortgage and often results in lucrative fees for the lender."); AARP Model Act, p. 18 ("Flipping occurs when a loan is refinanced repeatedly with new up-front fees imposed on each refinancing...."); Cathy Lesser Mansfield, *The Road to Subprime "HEL" Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market,* 51 S.C. L. Rev. 473, 548 (2000); HUD-Treasury Joint Task Force, *Curbing Predatory Home Mortgage Lending,* p. 73 (2000) ("Lenders who flip loans tend to charge high origination fees with each successive refinancing.... In addition, each refinancing may trigger prepayment penalties ...."); N.M. Stat. Ann., § 58-21A-2(C) (2003) ("the financing of points and fees in these loans provides immediate income to the originator and encourages creditors to repeatedly refinance home loans").

35 "Equity-stripping" is "lending based on the value of the asset securing the loan rather than a borrower's ability to repay ...in other words issuing a loan 'designed to fail' and profiting by acquiring the property through default, rather than by receiving loan payments ...."

Hargraves v. Capital City Mortg. Corp., 140 F.Supp.2d 7, 20-21 (D. D.C. 2000); HUD-Treasury Joint Task Force, *supra,* p. 76 ("For unscrupulous lender, the attraction may be the equity the borrower has in his/her home."); *see also* N.M. Stat. Ann., § 58-21A-2(B) (2003) ("one of the most common forms of **abusive** lending is the making of loans that are equity-based, rather than income-based").

36 "[T]he HUD-Treasure taskforce ... found that many borrowers believed that they had been lured into accepting loans that clearly failed to factor in their ability to repay. Many of these borrowers were **elderly**, and lived on fixed incomes. When these **elderly** borrowers obtained new loans, they often found that their monthly payments equaled or exceeded their monthly fixed income. Accordingly, many of these borrowers failed to meet their monthly payment, and therefore lost their homes to foreclosure, along with the equity that they had spent lifetimes securing." Note, *Preying on the American Dream: The Argument for HOEPA Reform Amidst Predatory Lending's Dire Effects on the* ***Elderly*** *Poor,* 17 Geo. J. on Poverty L. & Pol'y 335, 353 (2010) (fns. omitted); *see* HUD-Treasury Joint Task Force, supra, p. 76.

37 Doubtless, "equity-stripping" was seen as the less prevalent of the two practices. To work, "equity-stripping" requires a borrower who has built up substantial equity in his or her home but is unable to assess his or her own ability to make loan payments. Most borrowers do not fall in either of these categories. Also, to quote the Attorney General, most loan originators' "main incentive is to profit from the origination of the loan which gives them fees, points and commissions...." AG Amicus, 11. Only the investor who owned the loan when it was foreclosed could profit from "equity stripping." Few loan originators kept loans that long, and so few had any incentive to engage in "equity stripping." See AG Amicus, 10-11.

38 The 2009 HLPA amendments were contained in L. 2009, ch. 21, §§ 54-58. Section 61(B) of the same act provided that the effective date of "sections 17 through 60 of this act is July 31, 2009." Thus, the practices prohibited by the added sections 58-21A-4(C) and (D) became illegal only if performed after July 31, 2009.

39 "A lender is under no duty 'to determine the borrower's ability to repay the loan.... The lender's efforts to determine the creditworthiness and ability to repay by a borrower are for the lender's protection, not the borrower's.' *(Renteria v. U.S.* (D.Ariz.2006) 452 F.Supp.2d 910, 922-923 [borrowers rely on their own judgment and risk assessment in deciding whether to accept the loan]...)." *Perlas v. GMAC Mortg., LLC,* 187 Cal.App.4th 429, 436, 113 Cal.Rptr.3d 790, 796 (2010).

40 *Atkins v. Steelworkers Union,* 2009-NMCA-051, ¶¶ 15-18, 146 N.M. 237, 243, 208 P.3d 457, 463 and *Padilla v. Wall Colmony Corp.,* 2006-NMCA-137, ¶¶ 9-15, 140 N.M. 630, 633-34, 145 P.3d 110, 113-14 dealt with the retroactive effect of court decisions, to which quite different rules apply. Compare *Reynoldsville Casket Co. v. Hyde,* 514 U.S. 749, 752 (1995) with Landgraf v. USI Film Prods., 511 U.S. 244, 265-67 (1994). The Romeros' last case, *Grygorwitz v. Trujillo,* 2006-NMCA-089, ¶¶ 13-20, 140 N.M. 129, 133-34, 140 P.3d 550, 554-55, dealt with a statute extending the statute of limitations which was enacted before plaintiff's claim had become time-barred under prior law. As Grygorwitz, itself, points out, statutes of limitation like other laws governing litigation procedure are governed by different rules than laws affecting substantive rights. *Id.*

41 In New Mexico, standing is not a jurisdictional matter, *ACLU v. City of Albuquerque,* 2008-NMSC-045, ¶¶ 3-10, 144 N.M. 471, 474-76, 188 P.3d 1222, 1225-27, but a prudential concern designed to "insure that only those with a genuine and legitimate interest can participate in a proceeding," *De Vargas Sav. & Loan Ass'n v. Campbell,* 87 N.M. 469, 471, 535 P.2d 1320, 1322 (N.M. 1975). To acquire standing, an individual must demonstrate the existence of (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision. *Forest Guardians v. Powell,* 2001-NMCA-028, ¶ 16, 130 N.M. 368, 375, 24 P.3d 803, 810. As shown in the text, the focus in this case is properly on quite different considerations.

42 *See* UCC Permanent Editorial Bd., *Report: Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes* (Nov. 14, 2011) ("Report"), publicly available at http://www.uniformlaws.org/Shared/Committees_ Materials/PEBUCC/PEB_Report_111411.pdf.

43 "The right to enforce an instrument and ownership of the instrument are two different concepts." NMSA 1978 § 55-3-203 (2008), UCC cmt. 1. "A person need not be the owner of a note to be the person entitled to enforce it, and not all owners will qualify as persons entitled to enforce." Report, p. 4 n. 15.

44 The section also lists a third type of person entitled to enforce the note; namely, "a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 55-3-309 or 55-3-418(d) NMSA 1978." As BoNY does not claim to fall within this description, it is not further discussed. *See* Report, pp. 6-7.

45 "Determining to whom a note is payable requires examination not only of the face of the note but also of any indorsements. This is because the party to whom a note is payable may be changed by indorsement so that, for example, a note payable to the order of a named payee that is indorsed in blank by that payee becomes payable to bearer." Report, p. 5 (fns. omitted); NMSA 1978 §§ 55-3-204, 55-3-205 (2008).

46 The Civic Amici's brief largely agrees with this analysis of the UCC's legal rules for determining who is entitled to enforce a promissory note. Though the title of that brief's first section states that "BoNY must have had a properly indorsed note...to have

standing," Civic Amici, 5, five pages into that section, the brief concedes that a non-holder may be entitled to enforce the note if it has acquired the rights of a holder by the means described in the text, Civic Amici, 10-11.

47 As the Report explains, Article 9 governs the sale of a secured note by the potentially confusing means of defining a "security interest" to "include not only an interest in property that secures an obligation but also the right of a buyer of a payment right...." Report, pp. 8-9 (citing UCC § 1-201(b)(35)). New Mexico has not yet adopted that revised definition, but NMSA 1978, § 55-1-201(b)(37) (2006) provides that "security interest" includes "any interest of ... a buyer ... of a promissory note ...."

48 The Romeros' note also bore a special endorsement to JPMorgan Chase by the same payee. As pointed out before, pp. 19-20, the district court could reasonably infer that that conflicting special endorsement had been added by mistake - as there was no other evidence of JPMorgan Chase's involvement or interest in the Romeros' loan or note. In boldly claiming that the "note in this case appears to be enforceable only by J.P. Morgan Chase," Civic Amici, 12, the Civic Amici wrongly rely on an opposing inference - that the blank endorsement was unintended - which the district court might have, but did not, draw from the conflicting evidence.

49 The Civic Amici wrongly contend that BoNY did not prove it obtained the note from a holder. Civic Amici, 12-13. Flannigan testified that Equity One transferred the note to BoNY. Tr. (2/17/09) 11:21:00-50. Equity One was the note's original payee. Tr. Ex. A. The original payee is a holder of the note. *See In re McMullen Oil Co.,* 251 B.R. 558, 567 (Bankr. C.D. Cal. 2000); 1A Lary Lawrence, Lawrence's *Anderson on the Uniform Commercial Code,* § 1-201:275 (3d ed. 2011).

50 The Civic Amici also wrongly complain that BoNY "has not proven the transaction by which it obtained the note" or how it came into possession of the note. Civic Amici, 12, 23. In fact, Flannigan testified that the Romeros' note was transferred pursuant to a pooling and service agreement. Tr. (2/17/09) 11:21:00-50. The UCC does not require proof in any greater detail of the transaction which results in transfer of a promissory note to the person currently entitled to enforce it. Likewise, Civic Amici's assertions that BoNY "must prove the history of the note" and "the chain of title" are mistaken, at least in this case. Civic Amici, 14, 16. In this case, there was only a single transfer from Equity One to BoNY. As to that transfer, sufficient evidence was introduced.

51 *Kirk Co. v. Ashcraft,* 101 N.M. 462, 468, 684 P.2d 1127, 1133 (N.M. 1984); *Roark v. Farmers Group, Inc.,* 2007-NMCA-074, ¶¶ 20-26, 142 N.M. 59, 65-66, 162 P.3d 896, 902-03; *see also Resolution Trust Corp. v. Eason,* 17 F.3d 1126, 1132 (8th Cir. 1994); *United States v. Reese,* 568 F.2d 1246, 1252 (6th Cir. 1977).

52 First District Local Rule LR1-405 provides for judicially supervised settlement conferences. The First District's Administrative Order 2009-00001 established a Foreclosure Mediation Option as part of the district's ADR Pilot Project. The Romeros did not invoke either of these procedures, choosing to litigate their claims rather than resolve them amicably. *See* R.P. (Case History).

53 Sen. Bill No. 1 (2012 Reg. Sess.); Sen. Bill No. 70 (2012 Reg. Sess.); Sen. Bill No. 75 (2012 Reg. Sess.); House Bill No. 171 (2011 Reg. Sess.); House Bill No. 174 (2011 Reg. Sess.); Sen. Bill No. 406 (2011 Reg. Sess.).

54 To the extent the Civic Amici's proposed reforms might be carried out by amending the rules of civil procedure or other court rules, the appropriate process for proposing and adopting those rules is set out in Rule 23-106 NMRA, which calls for public comment before any change in the rules--a process that the Civic Amici wrongly try to side-step by urging the Court adopt reforms in ruling on an individual case without any public notice or opportunity for public input.

55 If the district court's findings that BoNY had "standing" to sue and there was no violation of the HLPA are supported by substantial evidence, the judgment must be affirmed whether or not the National Bank Act preempts the HLPA. The same is true if the Court determines that there was no HLPA violation because the HLPA does not require consideration of the borrower's ability to repay in deciding whether a refinance loan conferred a tangible net benefit. Also, if the Court concludes there was insufficient evidence that BoNY owns the Romeros' loan, there will be no factual predicate for federal preemption.

56 Federal preemption is a question of law which this Court reviews de novo. *Humphries v. Pay & Save, Inc.,* 2011-NMCA-035, at ¶ 6, 150 N.M. 444, 261 P.3d 592, 594.

57 For this reason, the Romeros' and their amicus' references to *Altria Group, Inc. v. Good,* 555 U.S. 70, 77 (2008) and *Humphries,* 2011-NMCA-039, at ¶ 7 are misplaced. *See* BiC, 33, AG Amicus, 27. Neither *Altria Group* nor *Humphries* involved National Bank Act preemption; they applied the usual presumption against federal preemption which does not apply in the national bank arena.

58 The cited letter interprets the federal Home Owners Loan Act, not the National Bank Act, but as the FID regulation recognizes the scope of preemption under the two federal banking laws is the same. See 12 C.F.R. §§ 7.4008, 7.4009, 34.4.

59 The very OCC Interpretative Letter on which the Romeros now rely shows the fallacy of that argument and the error the Eighth Circuit committed in *Thomas v. U.S. Bank, Nat'l Ass'n,* 575 F.3d 794 (8th Cir. 2009), a decision the Romeros continue to cite. *See* BiC, 34. As the letter points out, a national bank is granted power not only to make or arrange mortgage loans, but to purchase and sell them as well. OCC Interpretative Letter No. 1016, 2005 WL 475400, at *2 (*citing* 12 U.S.C. § 371 and 12 C.F.R. § 34.4(a)(10)). By invalidating mortgage loans or subjecting them to crippling defenses, the HLPA significantly interferes with a national bank's power to buy or sell such loans, and so is preempted in a case where the bank acts on its own account in the purchase or sale transaction - even if a non-bank made or arranged the loan.

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