



1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **Opinion Number:** _____

3 **Filing Date:** March 3, 2016

4 **NO. S-1-SC-34726**

5 **DEUTSCHE BANK NATIONAL TRUST**
6 **COMPANY, AS TRUSTEE FOR MORGAN**
7 **STANLEY ABS CAPITAL 1 INC. TRUST 2006-NC4,**

8 Plaintiff-Petitioner,

9 **v.**

10 **JOHNNY LANCE JOHNSTON,**

11 Defendant-Respondent.

12 **ORIGINAL PROCEEDING ON CERTIORARI**

13 **Manuel I. Arrieta, District Judge**

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19 New Mexico Foreclosure Defense Group

1 **OPINION**

2 **CHÁVEZ, Justice.**

3 {1} This case requires us once again to examine traditional rules of jurisdiction and
4 standing in the context of modern mortgage foreclosure actions. In *Bank of New York*
5 *v. Romero*, 2014-NMSC-007, ¶¶ 19-38, 320 P.3d 1, we concluded that the plaintiff
6 did not establish standing to foreclose on the defendant’s home when it could not
7 prove that it had the right to enforce the promissory note on the mortgage at the time
8 it filed suit. *See* NMSA 1978, § 55-3-301 (1992) (defining “ ‘[p]erson entitled to
9 enforce’ [a negotiable] instrument”). In the present case, Petitioner Deutsche Bank
10 National Trust Company, acting as trustee for Morgan Stanley ABS Capital 1 Inc.
11 Trust 2006-NC4 (Deutsche Bank), filed a complaint seeking foreclosure on the home
12 of Respondent Johnny Lance Johnston (Homeowner) and attached to its complaint
13 an unindorsed note, mortgage, and land recording, both naming a third party as the
14 mortgagee. Deutsche Bank later provided documentation and testimony showing that
15 (1) a document assigning the mortgage to Deutsche Bank was dated *prior* to the filing
16 of the complaint but recorded *after* the complaint was filed; (2) Deutsche Bank
17 possessed a version of the note indorsed in blank at the time of trial; and (3) a
18 servicing company began servicing the loan to Homeowner on behalf of Deutsche
19 Bank prior to the filing of the complaint. After receiving this evidence, the district

1 court found that Deutsche Bank had standing to foreclose on Homeowner’s property.
2 The Court of Appeals disagreed, opining that “standing is a jurisdictional prerequisite
3 for a cause of action,” and concluded that the evidence provided by Deutsche Bank
4 did not establish its standing as of the time it filed its complaint. *Deutsche Bank Nat’l*
5 *Tr. Co. v. Beneficial N.M. Inc.*, 2014-NMCA-090, ¶¶ 8, 13-15, 335 P.3d 217, *cert.*
6 *granted*, 2014-NMCERT-008. Although we hold that standing is not a jurisdictional
7 prerequisite in this case, we nonetheless affirm the Court of Appeals’s ultimate
8 conclusion that the evidence provided by Deutsche Bank did not establish standing.

9 **I. BACKGROUND**

10 {2} On January 31, 2006, Homeowner refinanced his home by executing a
11 promissory note made payable to New Century Mortgage Corporation (New
12 Century). The note was secured by a mortgage on Homeowner’s property in Las
13 Cruces. Homeowner defaulted on his loan payments beginning in August 2008, and
14 received a letter notifying him of his default dated October 12, 2008 from American
15 Servicing Company (ASC), a loan servicing company.

16 {3} On February 24, 2009, Deutsche Bank filed a complaint for foreclosure.
17 Deutsche Bank attached two exhibits to its complaint: (1) a January 31, 2006
18 promissory note made payable to New Century which did not contain an indorsement;

1 and (2) a January 31, 2006 mortgage on Homeowner’s property recorded in the Doña
2 Ana County Office of the County Clerk on February 7, 2006 by New Century, which
3 the County Clerk also names as the mortgagee. In its complaint, Deutsche Bank
4 alleged that it owned the mortgage through assignment and was a holder in due
5 course of the note. Homeowner “acknowledge[d]” this allegation in his pro se answer
6 to Deutsche Bank’s complaint.

7 {4} On August 11, 2010, Homeowner filed an amended motion to dismiss for lack
8 of standing, contending that Deutsche Bank “did not show ownership of the note, nor
9 a security interest,” and that it provided no other evidence that it was the holder of the
10 note as of the date that it filed its complaint. Deutsche Bank’s response to
11 Homeowner’s motion to dismiss attached an assignment of mortgage document dated
12 February 7, 2006 and recorded in Doña Ana County on December 9, 2009 as proof
13 that Deutsche Bank held the note at the time it filed the complaint.¹

14 {5} The district court set the hearing on Homeowner’s motion to dismiss for the
15 same day as trial. After concluding that Homeowner’s arguments on the motion to

16 ¹Deutsche Bank’s response to Homeowner’s motion to dismiss claimed that the
17 assignment of mortgage was recorded on January 9, 2009, which would have been
18 prior to its February 24, 2009 complaint. However, Deutsche Bank did not provide
19 any evidence establishing that the assignment was recorded on that date.

1 dismiss would be similar to his arguments on the merits, the district court took
2 Homeowner's motion under advisement and agreed to consider it during the bench
3 trial on the merits.

4 {6} At trial, Deutsche Bank offered further evidence to prove that it owned the
5 note. First, Deutsche Bank proffered a version of the January 31, 2006 note that was
6 indorsed in blank by New Century. This new note was identical to the original note
7 attached to Deutsche Bank's complaint except that the note attached to the complaint
8 did not contain any indorsement. Second, Deutsche Bank offered the testimony of
9 Erin Hirzel Roesch, a litigation specialist for the loan servicing company. Ms.
10 Roesch was employed by Wells Fargo Bank, NA, which she testified is effectively
11 the same company as ASC. Ms. Roesch testified based on her review of the file on
12 Homeowner's mortgage. She testified that because the proffered note was indorsed
13 in blank, Deutsche Bank, as holder of the note, could act as the lender of the note;
14 that Deutsche Bank was assigned the mortgage on February 7, 2006; and that her
15 company began servicing the loan in July 2006.

16 {7} The district court concluded that Deutsche Bank was "the current holder of the
17 Note and Mortgage." The court also concluded that Homeowner was "in default in
18 payment of the principal and interest on the Note and Mortgage described in

1 [Deutsche Bank’s] Complaint.” Based on these findings, the district court then held
2 that Deutsche Bank was entitled to a foreclosure judgment on Homeowner’s property.
3 {8} The Court of Appeals reversed and remanded to the district court “with
4 instructions to vacate its judgment of foreclosure” because Deutsche Bank lacked
5 standing to foreclose. *Deutsche Bank Nat’l Tr. Co.*, 2014-NMCA-090, ¶¶ 15, 18. The
6 Court of Appeals reasoned that under *Bank of New York*, 2014-NMSC-007, ¶ 17,
7 “standing is a jurisdictional prerequisite for a cause of action and must be established
8 at the time the complaint is filed.” *Deutsche Bank Nat’l Tr. Co.*, 2014-NMCA-090,
9 ¶ 8. Accordingly, “to establish standing to foreclose, a lender must show that, *at the*
10 *time it filed its complaint for foreclosure*, it had: (1) a right to enforce the note, which
11 represents the debt, and (2) ownership of the mortgage lien upon the debtor’s
12 property.” *Id.* (emphasis added). In practical terms, the Court of Appeals’s decision
13 requires a party seeking to establish its right to enforce a note to either produce an
14 original or properly indorsed note with its complaint for foreclosure or to later
15 introduce a dated indorsed note executed prior to the initiation of the foreclosure suit.
16 *See id.* ¶ 12. The Court concluded that in this case, “neither the unindorsed copy of
17 the note produced with the foreclosure complaint nor the indorsed note produced at
18 trial were sufficient to show that [Deutsche Bank] held the note when it filed the

1 complaint” and that the assignment of mortgage proffered by Deutsche Bank had “no
2 bearing on the validity or the timing of the note’s indorsement.” *Id.* ¶¶ 13-14.

3 {9} We granted Deutsche Bank’s petition for certiorari to review (1) whether
4 standing is jurisdictional in mortgage foreclosure cases; (2) whether the Court of
5 Appeals erred in interpreting *Bank of New York* to require a plaintiff who presents an
6 original, indorsed-in-blank promissory note at trial to establish that it is the holder of
7 the note by presenting an indorsement dated prior to the filing of the complaint or by
8 attaching an indorsed copy of the note to the complaint; and (3) whether the Court of
9 Appeals erred by concluding that an assignment of mortgage dated prior to the filing
10 of the complaint cannot by itself establish standing. While we take this opportunity
11 to clarify that standing is not a jurisdictional prerequisite in mortgage foreclosure
12 cases in New Mexico, we otherwise affirm the result reached by the Court of Appeals
13 based on principles of prudential standing.

14 **II. DISCUSSION**

15 **A. The Doctrine of Standing in New Mexico**

16 {10} Deutsche Bank challenges the Court of Appeals’s statement that “standing is
17 a jurisdictional prerequisite for a cause of action.” *Deutsche Bank Nat’l Tr. Co.*,
18 2014-NMCA-090, ¶ 8 (citing *Bank of N.Y.*, 2014-NMSC-007, ¶ 17). Deutsche Bank

1 accurately observes that our jurisprudence has previously recognized that standing
2 is jurisdictional in the context of statutory causes of action rather than all causes of
3 action. *Bank of N.Y.*, 2014-NMSC-007, ¶ 17. With that distinction in mind, Deutsche
4 Bank then argues that the cause of action to enforce a promissory note existed at
5 common law and was not created by statute. Deutsche Bank concludes that standing
6 in this case therefore cannot be jurisdictional. We agree with Deutsche Bank that
7 standing is not jurisdictional in this case because the cause of action to enforce a
8 promissory note was not created by statute. Therefore, only prudential rules of
9 standing apply to the claims in this case.

10 {11} As a general rule, “standing in our courts is not derived from the state
11 constitution, and is not jurisdictional.” *ACLU of N.M. v. City of Albuquerque*,
12 2008-NMSC-045, ¶ 9, 144 N.M. 471, 188 P.3d 1222. However, “ “[w]hen a statute
13 creates a cause of action and designates who may sue, the issue of standing becomes
14 interwoven with that of subject matter jurisdiction. Standing then becomes a
15 jurisdictional prerequisite to an action.’ ” *Id.* ¶ 9 n.1 (quoting *In re Adoption of*
16 *W.C.K.*, 2000 PA Super 68, ¶ 6, 748 A.2d 223 (Pa. Super. Ct. 2000), *abrogated by In*
17 *re Nomination Petition of deYoung*, 903 A.2d 1164, 1168, 1168 n.5 (Pa. 2006)). In
18 light of the conclusions reached by the Court of Appeals in this case, *Deutsche Bank*

1 *National Trust Co.*, 2014-NMCA-090, ¶ 8, we take this opportunity to clarify our
2 statements in *Bank of New York*, 2014-NMSC-007, ¶ 17, and hold that mortgage
3 foreclosure actions are not created by statute. Therefore, the issue of standing in
4 those cases cannot be jurisdictional.

5 {12} The cause of action to enforce a promissory note originated at common law and
6 already existed when New Mexico adopted the Uniform Commercial Code (UCC) in
7 1961. *See Kepler v. Slade*, 1995-NMSC-035, ¶ 14, 119 N.M. 802, 896 P.2d 482
8 (“Under the common law rule, an action to foreclose on real property is separate and
9 distinct from an action to recover on an underlying promissory note.”); *Edwards v.*
10 *Mesch*, 1988-NMSC-085, ¶ 4, 107 N.M. 704, 763 P.2d 1169 (“The rights of a holder
11 of a promissory note were discussed by this court as early as [1853].”). New
12 Mexico’s adoption of the UCC did not create the rights and remedies associated with
13 actions to enforce promissory notes, but instead merely codified those rights and
14 clarified their scope in the interest of attaining uniformity with other states that had
15 adopted the UCC. *See Males v. W.E. Gates & Assocs.*, 504 N.E.2d 494, 495 (Ohio
16 Misc. 2d 1985) (“[A]ctions on promissory notes are rooted in the common law of
17 contracts. The Uniform Commercial Code represents the fifty states’ effort toward
18 achieving uniformity and certainty in commercial transactions. Thus, this action is

1 not a representative of a right created by statute, such as a wrongful death action.”).
2 *See also* 1A C.J.S. Actions § 37 (2015) (noting that the UCC “has been held to
3 displace common-law remedies even though *it does not create new causes of action,*
4 where it provides a comprehensive remedy” (emphasis added) (footnotes omitted)).
5 Indeed, the UCC recognizes the continuing vitality of common law “principles of law
6 and equity” which supplement its provisions. Section 55-1-103(b). *See also*
7 *Venaglia v. Kropinak*, 1998-NMCA-043, ¶¶ 11-12, 125 N.M. 25, 956 P.2d 824
8 (“There are two principal sources of law governing the rights and duties of the parties
9 with respect to a guarantee of a promissory note. One is Article 3 of the Uniform
10 Commercial Code. . . . The other is the common law.”). Thus, an action to enforce
11 a promissory note fell within the district court’s general subject matter jurisdiction in
12 this case because it was not created by statute.

13 {13} When standing does not act as a jurisdictional threshold, as in this case,
14 prudential considerations govern our analysis. *See ACLU of N.M.*, 2008-NMSC-045,
15 ¶ 9. While New Mexico courts are not subject to the jurisdictional limitations
16 imposed by Article III, Section 2 of the United States Constitution, the standing
17 jurisprudence in our courts has “long been guided by the traditional federal standing
18 analysis.” *ACLU of N.M.*, 2008-NMSC-045, ¶ 10. “Thus, at least as a matter of

1 judicial policy if not of jurisdictional necessity, our courts have generally required
2 that a litigant demonstrate injury in fact, causation, and redressability to invoke the
3 court’s authority to decide the merits of a case.” *Id.*; see also *Davis v. Fed. Election*
4 *Comm’n*, 554 U.S. 724, 733 (2008) (“To qualify for standing, a claimant must present
5 an injury that is concrete, particularized, and actual or imminent; fairly traceable to
6 the defendant’s challenged behavior; and likely to be redressed by a favorable
7 ruling.”). However, it is well settled that New Mexico courts are also not bound by
8 the limitations on standing that are constitutionally imposed on federal courts and we
9 have occasionally granted standing when it would not otherwise exist under the
10 federal analysis, most notably in instances where a case presents a “question of
11 fundamental importance to the people of New Mexico.” See, e.g., *Baca v. N.M. Dep’t*
12 *of Pub. Safety*, 2002-NMSC-017, ¶ 4, 132 N.M. 282, 47 P.3d 441 (holding that
13 validity of the Concealed Handgun Carry Act raised important constitutional question
14 sufficient to ignore normal limitations on standing (internal quotation marks and
15 citation omitted)); *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶¶ 1-2, 15, 120
16 N.M. 562, 904 P.2d 11 (claim that the Governor lacked authority to enter into various
17 compacts pursuant to the Indian Gaming Regulatory Act was of sufficient public
18 importance to confer standing without examining the standing of individual litigants);

1 *State ex rel. Segó v. Kirkpatrick*, 1974-NMSC-059, ¶ 7, 86 N.M. 359, 524 P.2d 975
2 (conferring standing under this Court’s discretionary power due to great public
3 importance of constitutional challenge to partial vetoes); *State ex rel. Gomez v.*
4 *Campbell*, 1965-NMSC-025, ¶¶ 15, 18, 75 N.M. 86, 400 P.2d 956 (concluding that
5 the plaintiffs did not establish standing but proceeding to the merits of the
6 constitutional question in that case due to its “great public interest”).

7 {14} In *ACLU of New Mexico*, we reaffirmed our adherence to the federal three-
8 pronged approach in cases that do not present issues of fundamental public
9 importance; we also recognized that the injury in fact requirement in particular is
10 “deeply ingrained in New Mexico jurisprudence.” 2008-NMSC-045, ¶¶ 10-22. Even
11 a slight injury establishes an injury in fact sufficient to confer standing. *N.M. Right*
12 *to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 12, 126 N.M. 788, 975 P.2d 841.
13 However, we have repeatedly emphasized that the injury in fact prong of our standing
14 analysis “[r]equir[es] that the party bringing suit show that he [or she] is injured or
15 threatened with injury in a direct and concrete way” as a matter of “sound judicial
16 policy.” *ACLU of N.M.*, 2008-NMSC-045, ¶ 19 (internal quotation marks and citation
17 omitted); *see also N.M. Right to Choose/NARAL*, 1999-NMSC-005, ¶ 12 (litigant
18 generally must show direct injury to establish standing). Although the UCC’s

1 definition of who may enforce a note does not create a jurisdictional prerequisite in
2 this case, it nonetheless guides our determination of whether the plaintiff can
3 articulate a direct injury that the cause of action is intended to address. *See Bank of*
4 *N.Y.*, 2014-NMSC-007, ¶¶ 19-38 (analyzing whether foreclosure plaintiff had
5 standing under provisions of Section 55-3-301 defining who is legally entitled to
6 enforce a promissory note); *see also Key v. Chrysler Motors Corp.*, 1996-NMSC-038,
7 ¶¶ 10-11, 121 N.M. 764, 918 P.2d 350 (determining that the question of whether a
8 party has standing to sue is not distinct from whether that party can assert a cause of
9 action under a particular statute). The UCC provides that there are three scenarios in
10 which a person is entitled to enforce a negotiable instrument such as a promissory
11 note: (1) when that person is the holder of the instrument; (2) when that person is a
12 nonholder in possession of the instrument who has the rights of a holder; and (3)
13 when that person does not possess the instrument but is still entitled to enforce it
14 subject to the lost-instrument provisions of UCC Article 3. Section 55-3-301. To
15 show a “direct and concrete” injury, Deutsche Bank needed to establish that it fell
16 into one of these three statutory categories that would establish both its right to
17 enforce Homeowner’s promissory note and its basis for claiming that it suffered a
18 direct injury from Homeowner’s alleged default on the note. *ACLU of N.M.*, 2008-

1 NMSC-045, ¶ 19; *see also Bank of N.Y.*, 2014-NMSC-007, ¶ 19.

2 **B. Homeowner Did Not Waive the Issue of Standing**

3 {15} Deutsche Bank contends that because standing was not a jurisdictional
4 prerequisite in this case, the issue “may be and was admitted and waived” because
5 Homeowner “ ‘acknowledge[d]’ ” Deutsche Bank’s allegation within its complaint
6 that Deutsche Bank owned both the note and the mortgage. We agree that our
7 determination that standing is not jurisdictional in this case opens up the possibility
8 that Homeowner could have waived the issue, but disagree that Homeowner waived
9 it here.

10 {16} Arguments based on a lack of prudential standing are analogous to asserting
11 that a litigant has failed to state a legal cause of action. As we have previously
12 discussed, we generally require “injury in fact, causation, and redressability” to
13 establish standing. *ACLU of N.M.*, 2008-NMSC-045, ¶ 10. If these elements are not
14 met, as a logical matter, a plaintiff generally cannot show that he or she has stated a
15 cause of action entitling him or her to a remedy. *See Key*, 1996-NMSC-038, ¶¶ 10-
16 11. Thus, while a plaintiff’s failure to state a cognizable claim for relief and a
17 plaintiff’s lack of prudential standing are not strictly jurisdictional, both implicate the
18 “properly limited . . . role of courts in a democratic society” and are relevant concerns

1 throughout a litigation. *New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶
2 16, 149 N.M. 42, 243 P.3d 746 (internal quotation marks and citation omitted).
3 Under Rule 1-012(H)(2) NMRA, “[a] defense of failure to state a claim upon which
4 relief can be granted . . . may be made in any pleading permitted or ordered . . . or by
5 motion for judgment on the pleadings, or at the trial on the merits.” We hold that
6 Rule 1-012(H)(2) applies to issues of prudential standing and precludes any waiver
7 of standing prior to the completion of a trial on the merits. *Sundance Mech. & Util.*
8 *Corp. v. Atlas*, 1990-NMSC-031, ¶ 25, 109 N.M. 683, 789 P.2d 1250.

9 {17} In this case, Homeowner did not waive standing because he raised the issue in
10 a motion filed on August 11, 2010, over a month before the September 16, 2010 trial.
11 In addition, the district court considered Homeowner’s challenge to Deutsche Bank’s
12 standing during the trial on the merits. Homeowner therefore raised the issue of
13 standing both by motion and at the trial on the merits, either of which would
14 independently constitute a timely assertion of this defense. Rule 1-012(H)(2).

15 {18} Further, we are not convinced by Deutsche Bank’s argument that Homeowner
16 waived his right to challenge its standing because in his answer to Deutsche Bank’s
17 complaint, he “acknowledge[d]” Deutsche Bank’s allegation that it owned
18 Homeowner’s note and mortgage through assignment. Even under the generous

1 assumption that Homeowner’s “acknowledge[ment]” that Deutsche Bank was entitled
2 to enforce the note was an admission of that fact, we disagree with Deutsche Bank’s
3 premise that Homeowner could have waived this defense through his initial
4 responsive pleading. When standing is a prudential consideration, it can be raised for
5 the first time at any point in an active litigation, just like a defense of failure to state
6 a claim, and unlike defenses relating to personal jurisdiction, venue, and insufficient
7 service of process, all of which must be raised in an initial or amended responsive
8 pleading. *Compare* Rule 1-012(H)(2) *with* Rule 1-012(H)(1).

9 {19} Moreover, it would be nonsensical to place any burden on a foreclosure
10 defendant to know whether the party seeking foreclosure is actually entitled to do so.
11 For example, in the present case, Homeowner signed his financing agreement with
12 New Century; received correspondence regarding his defaults on his mortgage
13 payments from ASC, the loan servicing company, which was apparently also the same
14 company as Wells Fargo Bank, N.A.; and he was ultimately sued by Deutsche Bank.
15 Under these circumstances, there is no indication that either Homeowner or any
16 defendant being sued over a securitized mortgage, for that matter, would be in a
17 position to have personal knowledge of who had the right to enforce his or her
18 mortgage. In addition, as we will explain, allowing a foreclosure defendant to waive

1 the issue of standing would not only vitiate that homeowner’s rights, but could in fact
2 cloud the title of the underlying property and lead to other problems to the detriment
3 of New Mexico’s property system as a whole. Adam J. Levitin, *The Paper Chase:
4 Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 Duke L.J. 637,
5 662 (2013). The important societal interests in maintaining the integrity of the
6 property system, protecting subsequent purchasers of the property, and the minimal
7 probative value of the alternative, convince us that a foreclosure defendant cannot
8 voluntarily waive a challenge to the plaintiff’s standing during the course of the
9 litigation.²

10 **C. Standing Must Be Established as of the Date of Filing Suit in Mortgage**
11 **Foreclosure Cases**

12 {20} Before turning to a specific analysis of Deutsche Bank’s standing in this case,
13 we will clarify why standing must be established as of the time of filing suit in
14 mortgage foreclosure cases, despite our determination that standing is not a
15 jurisdictional issue in such cases. *Bank of New York*, relying on *Lujan v. Defenders*
16 *of Wildlife*, 504 U.S. 555, 570-71, 570 n.5 (1992), states that “standing to bring a

17 ²As we will explain in Section II, Part E, a foreclosure defendant effectively
18 waives his right to challenge the plaintiff’s standing once a final judgment has been
19 entered.

1 foreclosure action” must exist “at the time [a plaintiff] file[s] suit.” 2014-NMSC-007,
2 ¶ 17. Deutsche Bank asks this Court to revisit this requirement, contending that (1)
3 unlike in federal courts, standing in New Mexico courts is not a jurisdictional issue
4 such that standing does not necessarily have to exist at the time of filing; and (2) as
5 a prudential matter, requiring foreclosure plaintiffs to establish that they had standing
6 at the time of filing contravenes our interest in judicial economy. Neither argument
7 advanced by Deutsche Bank convinces us to deviate from well-established principles
8 of standing, which are solidly supported by several prudential and policy
9 considerations that arise in the particular context of mortgage foreclosure actions.

10 {21} There are sound policy reasons for requiring strict compliance with the
11 traditional procedural requirement that standing be established at the time of filing
12 in mortgage foreclosure actions. This procedural safeguard is vital because the
13 securitization of mortgages has given rise to a pervasive failure among mortgage
14 holders to comply with the technical requirements underlying the transfer of
15 promissory notes, and more generally the recording of interests in property. *See*
16 Elizabeth Renuart, *Uneasy Intersections: The Right to Foreclose and the U.C.C.*, 48
17 Wake Forest L. Rev. 1205, 1209-10 (2013) (“[T]he failure to deliver the original
18 notes with proper indorsements [to assignees], the routine creation of unnecessary lost

1 note affidavits, the destruction of the original notes, and the falsification of necessary
2 indorsements . . . is widespread.”). Under these circumstances, not even the plaintiffs
3 may be sure if they actually own the notes they seek to enforce. As Professor Levitin
4 notes, Article 3 of the UCC and the land records recording system are each based
5 upon the notion of strict “compliance with demonstrative legal formalities to achieve
6 property rights,” which admittedly carries “up-front costs,” but also ensures “a high
7 degree of security in the property rights, both vis-à-vis other competing claimants to
8 the property rights and as to the ability to enforce the mortgage property rights.”
9 Levitin, *supra*, at 648. This regime is also desirable for its simplicity—“possession
10 clarifies title because there can be only one possessor at a time,” while “[i]ndorsement
11 creates a chain of title that travels with the instrument and provides an easy, objective
12 manner for establishing who has rights to the instrument.” Levitin, *supra*, at 662.
13 These formalities are strengthened by strict standing requirements. Otherwise,
14 institutions could potentially cloud title by foreclosing on a property upon which they
15 do not possess the right to foreclose.³

16 ³Professor Levitin illustrates this idea with the following example:

17 If the seller is not the person entitled to foreclose, the foreclosure sale
18 is no different from a sale of the Brooklyn Bridge. Accordingly, the
19 foreclosure-sale purchaser has no ability to transfer title to the property,

1 {22} Indeed, standing in foreclosure actions “is not a mere procedural detail”; it
2 protects homeowners against double liability such as “when the wrong party sells the
3 home and the note holder later appears seeking full payment on the note,” or when
4 a homeowner faces multiple lawsuits in different jurisdictions. Renuart, *supra*, at
5 1212. Reducing the potential for double liability is also beneficial to the property
6 system at large because “[i]f a debtor fears multiple satisfaction of the same debt, the
7 debtor will not borrow, thereby chilling economic activity,” whereas strict
8 compliance with UCC requirements “enables verification of the terms of the
9 obligation[,] and hence greater ability to enforce[, and] provid[es] a mechanism for
10 verifying the discharge of the obligation.” Levitin, *supra*, at 664. In our view, the
11 minor up-front compliance costs that foreclosure plaintiffs will incur by confirming
12 that they have the proper documentation *before* filing suit are a small price to pay for
13 protecting the rights of New Mexico homeowners and the integrity of the State’s title
14 system by requiring strict and timely compliance with long-standing property law
15 requirements. To be clear, perhaps despite recent industry practices, this is *not* an

16 no matter [his or] her equities, because [he or] she lacks title, just like
17 the hapless buyer of the Brooklyn Bridge.

18 Levitin, *supra*, at 646.

1 additional requirement that we impose punitively; it is simply a symptom of
2 compliance with long-standing rules. *See* Levitin, *supra*, at 650-51 (“A mortgage
3 loan involves a bundle of rights, including procedural rights. These procedural rights
4 are not merely notional; they are explicitly priced by the market. Mortgage finance
5 availability and pricing is statistically correlated with variations in procedural
6 protections for borrowers. Retroactively liberalizing the rules for mortgage
7 enforcement creates an unearned windfall for mortgagees.” (footnote omitted)). In
8 other words, requiring that standing be established as of the time of filing provides
9 strong and necessary incentives to help ensure that a note holder will not proceed
10 with a foreclosure action before confirming that it has a right to do so.

11 {23} Further, although we are sympathetic to the additional burdens this may impose
12 on an entity seeking to foreclose on a home, New Mexico is hardly alone among the
13 states in requiring a foreclosure plaintiff to prove that it was entitled to enforce the
14 note when it filed suit. *See* Levitin, *supra*, at 642-44 (“[T]here is broad agreement
15 among courts that some sort of standing or similar status is necessary for both judicial
16 and nonjudicial foreclosure There is also broad agreement that the party bringing
17 the foreclosure action or sale *must have standing at the time the litigation . . . is*
18 *commenced.*” (emphasis added) (footnote omitted)). For example, in *Federal Home*

1 *Loan Mortgage Corp. v. Schwartzwald*, 2012-Ohio-5017, ¶¶ 24-25, 979 N.E.2d 1214,
2 *overruling on other grounds recognized by Bank of New York Mellon v. Grund*, 2015-
3 Ohio-466, ¶¶ 23-24, 27 N.E.3d 555, the Supreme Court of Ohio clarified that, under
4 Ohio law, standing must be analyzed as of the commencement of an action in
5 mortgage foreclosure cases. *See also U.S. Bank Nat’l Ass’n v. McConnell*, 305 P.3d
6 1, 8 (Kan. Ct. App. 2013) (concluding that the foreclosure plaintiff had standing
7 because it was undisputed that the plaintiff held the note *prior* to the date that suit
8 was filed). Therefore, “[p]ost-filing events that supply standing that did not exist on
9 filing may be disregarded . . . despite a showing of sufficient present injury caused
10 by the challenged acts and capable of judicial redress.” *Fed. Home Loan Mortg.*
11 *Corp.*, 2012-Ohio-5017, ¶ 26 (first alteration in original) (internal quotation marks
12 and citation omitted). The Supreme Court of Oklahoma has similarly explained that
13 if a foreclosure plaintiff “became a person entitled to enforce the note . . . after the
14 foreclosure action was filed,” the plaintiff’s initial lack of standing could not be cured
15 and the proper remedy was to dismiss the case without prejudice. *Deutsche Bank*
16 *Nat’l Tr. v. Brumbaugh*, 2012 OK 3, ¶ 11, 270 P.3d 151; *see also McLean v. JP*
17 *Morgan Chase Bank Nat’l Ass’n*, 79 So. 3d 170, 173 (Fla. Dist. Ct. App. 2012)
18 (“While it is true that standing to foreclose can be demonstrated by the filing of the

1 original note with a special endorsement in favor of the plaintiff, this does not alter
2 the rule that a party's standing is determined at the time the lawsuit was filed. Stated
3 another way, the plaintiff's lack of standing at the inception of the case is not a defect
4 that may be cured by the acquisition of standing after the case is filed." (internal
5 quotation marks and citation omitted)); *Deutsche Bank Nat'l Tr. Co. v. Mitchell*, 27
6 A.3d 1229, 1234-36 (N.J. Super. Ct. App. Div. 2011) (stating that a plaintiff must
7 have standing at the time the foreclosure complaint is filed, and a lack of standing
8 cannot be cured by showing that a plaintiff acquired standing after the complaint was
9 filed); *Wells Fargo Bank, N.A. v. Marchione*, 887 N.Y.S.2d 615, 616-17 (N.Y. App.
10 Div. 2009) (noting that a plaintiff-assignee lacked standing where the note and
11 mortgage were assigned to the plaintiff after commencement of the foreclosure
12 action); *U.S. Bank Nat'l Ass'n v. Kimball*, 2011 VT 81, ¶¶ 12-20, 27 A.3d 1087
13 (stating that standing must be established at the time of filing suit, and it did not
14 contravene the interest of judicial efficiency to dismiss the complaint of a foreclosure
15 plaintiff who acquired standing after the complaint had been filed). As a result, we
16 conclude that it is not presumptuous to require, as do a substantial number of other
17 states, that a company claiming to be a mortgage holder must produce proof that it
18 was entitled to enforce the underlying promissory note prior to the commencement

1 of the foreclosure action by, for example, attaching a note containing an undated
2 indorsement to the initial complaint or producing a note dated before the filing of the
3 complaint at some appropriate time in the litigation. We agree with the Vermont
4 Supreme Court, which opined that “[i]t is neither irrational nor wasteful to expect a
5 foreclosing party to actually be in possession of its claimed interest in the note, and
6 have the proper supporting documentation in hand when filing suit.” *Kimball*, 2011
7 VT 81, ¶ 20.

8 {24} Deutsche Bank also argues that our insistence that it demonstrate that a note
9 indorsed in blank was indorsed prior to the time of filing improperly adds a new
10 requirement that indorsements be dated, in contravention of the UCC. *See Deutsche*
11 *Bank Nat’l Tr. Co.*, 2014-NMCA-090, ¶ 12 (holding that “if [a] lender produces the
12 indorsed note after filing the complaint, the indorsement must be dated to show that
13 the indorsement was executed prior to the initiation of the foreclosure suit”). We
14 agree with Deutsche Bank that the UCC does not require that instruments be dated.
15 *See* NMSA 1978, § 55-3-113(b) (1992) (“If an instrument is undated, its date is the
16 date of its issue or, in the case of an unissued instrument, the date it first comes into
17 possession of a holder.”). However, Deutsche Bank conflates the need to date a
18 negotiable instrument, so as to create an enforceable promissory note, with the

1 requirement that Deutsche Bank establish that it was entitled to enforce the
2 instrument at the time of filing. Because the time of filing requirement does not affect
3 the validity of an underlying negotiable instrument, *see Deutsche Bank Nat'l Tr. Co.*,
4 2014-NMCA-090, ¶ 12, this rule does not add a new requirement under the UCC.

5 {25} Deutsche Bank additionally contends that “when a plaintiff presents the
6 original note to the court with a blank indorsement, the plaintiff establishes it is then
7 the holder of the note, and is entitled to enforce the note and foreclose the mortgage.”

8 Deutsche Bank is correct that the holder of a note indorsed in blank may, as a general
9 matter, enforce the note. *See* § 55-3-301; NMSA 1978, § 55-3-205(b) (1992).

10 However, Deutsche Bank again conflates two distinct concepts: whether it may, as
11 the holder of a note indorsed in blank, enforce the note and whether it can establish
12 that it owned the note at the time of filing. If Deutsche Bank had presented a note
13 indorsed in blank with its initial complaint, it would be entitled to a presumption that
14 it could enforce the note at the time of filing and thereby establish standing.

15 However, Deutsche Bank did not produce a note indorsed in blank when it filed suit
16 in this case, and the subsequent production of a blank note does not prove that
17 Deutsche Bank possessed the blank note *when it filed suit*.

18 {26} We further disagree with Deutsche Bank’s argument that the Court of

1 Appeals’s opinion in this case, *Deutsche Bank Nat’l Tr. Co.*, 2014-NMCA-090, ¶¶
2 11-13, requires that a “plaintiff conclusively establish its standing upon first filing
3 the complaint.” Deutsche Bank contends that this requirement would contravene
4 well-established notice pleading standards in New Mexico, which require a complaint
5 to contain only “a short and plain statement of the claim showing that the pleader is
6 entitled to relief.” Rule 1-008(A)(2) NMRA. According to Deutsche Bank, it should
7 satisfy minimum pleading requirements for a foreclosure plaintiff to merely allege
8 that it is the holder of the note, and then later prove this fact through more detailed
9 documentation, either at trial or in connection with a dispositive motion. We agree
10 with Deutsche Bank that “it is only at trial or in a dispositive motion that plaintiffs
11 are required to *prove* the necessary elements of their claims,” including standing, and
12 that a bare statement that the plaintiff holds the note may satisfy pleading standards.
13 *See N.M. Pub. Sch. Ins. Auth. v. Arthur J. Gallagher & Co.*, 2008-NMSC-067, ¶ 11,
14 145 N.M. 316, 198 P.3d 342 (“In reviewing the district court’s decision to dismiss for
15 failure to state a claim, we accept as true all well-pleaded factual allegations in the
16 complaint and resolve all doubts in favor of the complaint’s sufficiency.”).

17 {27} However, this is an issue of proof rather than pleading standards. The elements
18 of standing

1 are not mere pleading requirements but rather an indispensable part of
2 the plaintiff's case, [and therefore] each element must be supported in
3 the same way as any other matter on which the plaintiff bears the burden
4 of proof, *i.e.*, with the manner and degree of evidence required at the
5 successive stages of the litigation.

6 *Lujan*, 504 U.S. at 561. For example, a foreclosure plaintiff may satisfy pleading
7 requirements by simply alleging that it is the holder of the note without attaching any
8 additional documentary evidence, but when a defendant subsequently raises the
9 defense that the plaintiff lacks standing to foreclose, the plaintiff must then prove that
10 it held the note *at the time of filing*. Attaching the note to the complaint is not the
11 only means of proving that the plaintiff held the note at the time of filing because
12 standing can also be proven through a dated indorsement establishing when the note
13 was indorsed to the plaintiff. Therefore, neither *Bank of New York* nor the Court of
14 Appeals's opinion in this case establish an additional pleading requirement, as
15 Deutsche Bank argues, but rather set forth requirements that must be met to prove
16 standing, should that issue be raised by the defendant or *sua sponte* by the Court.⁴

17 **D. Deutsche Bank Did Not Establish Standing**

18 ⁴In instances where a foreclosure plaintiff seeks a default judgment, courts
19 should raise the standing issue *sua sponte* and carefully scrutinize the plaintiff's
20 standing to safeguard the integrity of New Mexico's property system and protect
21 subsequent bona fide purchasers.

1 {28} Deutsche Bank argues that substantial evidence supports the district court’s
2 determination that Deutsche Bank had standing to pursue its foreclosure complaint
3 against Homeowner. We review the district court’s determination that Deutsche Bank
4 had standing under a substantial evidence standard of review. *Bank of N.Y.*, 2014-
5 NMSC-007, ¶ 18. “ ‘Substantial evidence’ means relevant evidence that a reasonable
6 mind could accept as adequate to support a conclusion. This Court will resolve all
7 disputed facts and indulge all reasonable inferences in favor of the trial court’s
8 findings.” *Id.* (internal quotation marks and citations omitted). However, “[w]hen
9 the resolution of the issue depends upon the interpretation of documentary evidence,
10 this Court is in as good a position as the trial court to interpret the evidence.” *Id.*
11 (alteration in original) (internal quotation marks and citation omitted).

12 {29} Deutsche Bank contends that there was sufficient evidence to establish
13 standing for two reasons. First, Deutsche Bank argues that “the Assignment of
14 Mortgage in this case . . . evidence[d] the timing of the transfer of the note.” Second,
15 Deutsche Bank avers that other corroborating evidence presented at trial, in
16 conjunction with the assignment of mortgage, established that it owned the note at the
17 time of filing. Deutsche Bank’s arguments do not persuade us that there is substantial
18 evidence to support the district court’s determination that Deutsche Bank had

1 standing.

2 {30} In response to Homeowner’s motion to dismiss for lack of standing, Deutsche
3 Bank produced an assignment of mortgage dated February 7, 2006. Deutsche Bank’s
4 proffer of the February 7, 2006 assignment of mortgage in this case was insufficient
5 to establish standing because (1) the assignment of mortgage does not establish that
6 Deutsche Bank was injured for the purposes of standing; and (2) it does not prove if
7 or when the note was transferred. As we have previously stated, to establish standing
8 we require that a plaintiff show that he or she has actually suffered a direct and
9 concrete injury. *ACLU of N.M.*, 2008-NMSC-045, ¶ 19 (citation omitted). “A party
10 who only has the mortgage but no note has not suffered any injury given that bare
11 possession of the mortgage does not endow its possessor with any enforceable right
12 absent possession of the note.” *BAC Home Loans Servicing, LP v. McFerren*, 2013-
13 Ohio-3228, ¶ 12, 6 N.E.3d 51 (citing Restatement (Third) of Prop.: Mortgages §
14 5.4(e), at 385 (1996) (“[I]n general a mortgage is unenforceable if it is held by one
15 who has no right to enforce the secured obligation.”)). Consequently, “possession of
16 the mortgage is of no import unless there is possession of the note.” *BAC Home*
17 *Loans Servicing, LP*, 2013-Ohio-3228, ¶ 12. Moreover, because an assignment of
18 mortgage does not “effect an assignment of a note,” an assignment of mortgage does

1 not prove “transfer of [a] note.” *Bank of Am., NA v. Kabba*, 2012 OK 23, ¶ 9, 276
2 P.3d 1006. As a result, the date that Homeowner’s *mortgage* was assigned to
3 Deutsche Bank does not establish a corresponding date indicating when the *note* was
4 transferred to Deutsche Bank, or even *if* the note was transferred.

5 {31} Deutsche Bank’s proffer of additional evidence to establish standing similarly
6 fails to meet the threshold for substantial evidence. First, Deutsche Bank contends
7 that because Ms. Roesch, an employee of a loan servicing company, “testified that the
8 Assignment of Mortgage was dated February 7, 2006,” Deutsche Bank established
9 ownership of the note at the time of filing. Once again, this assertion fails because
10 the date on the assignment of mortgage does not establish either when or whether
11 Deutsche Bank obtained the right to enforce the note. *See id.* Second, Deutsche
12 Bank argues that Ms. Roesch’s testimony that her company began servicing the note
13 in 2006 proves that Deutsche Bank owned the note prior to its February 2009
14 complaint. This testimony does not establish that Deutsche Bank had standing.
15 Again, the assertion that an entity allegedly started servicing the loan on behalf of
16 Deutsche Bank prior to the time of filing suit does not prove anything regarding the
17 actual ownership of the note, and further, because “falsification of necessary
18 indorsements” appears to be a “widespread” phenomenon, Renuart, *supra*, at 1210,

1 there is reason to believe that creditors could potentially seek to enforce notes that
2 they do not hold under the law. Thus, the additional evidence supplied by Deutsche
3 Bank does not bear on whether Deutsche Bank actually owned the note at the time of
4 filing, nor does it establish when the necessary indorsements were made, so that
5 whether Deutsche Bank had the right to enforce the note as of February 24, 2009
6 remains unclear.

7 {32} Finally, the unindorsed note attached to Deutsche Bank’s original complaint
8 did not establish standing. “Possession of an unindorsed note made payable to a third
9 party does not establish the right of enforcement, just as finding a lost check made
10 payable to a particular party does not allow the finder to cash it.” *Bank of N.Y.*,
11 2014-NMSC-007, ¶ 23. In addition, as we have discussed, the undated indorsed note
12 that Deutsche Bank presented at trial did not prove that Deutsche Bank had standing
13 when it filed its complaint. Because Deutsche Bank failed to provide evidence
14 establishing its right to enforce the note on Homeowner’s home, we hold that the
15 district court’s determination that Deutsche Bank established standing to foreclose
16 was not supported by substantial evidence, and we accordingly reverse the district
17 court’s decision and affirm the result reached by the Court of Appeals.

18 **E. Completed Foreclosure Judgments Should Not Be Voided for Lack of**
19 **Standing**

1 {33} We also take this opportunity to address Deutsche Bank’s assertion that
2 “several lower courts . . . have vacated long-completed foreclosure judgments under
3 Rule 1-060(B) NMRA[,] holding they are ‘void’ for lack of subject matter
4 jurisdiction.” To avoid this issue in the future, we will clarify the practical
5 implications of our holding that standing is not jurisdictional in mortgage foreclosure
6 cases.

7 {34} “Jurisdiction of the subject matter and of the parties is the right to hear and
8 determine the suit or proceeding in favor of or against the respective parties to it.”
9 *Sundance Mech. & Util. Corp.*, 1990-NMSC-031, ¶ 22 (internal quotation marks and
10 citations omitted). Further, a party can raise subject matter jurisdiction at any time,
11 even through a collateral attack alleging that a final judgment is void for lack of
12 subject matter jurisdiction. *Chavez v. Cty. of Valencia*, 1974-NMSC-035, ¶ 15, 86
13 N.M. 205, 521 P.2d 1154; *see also* Rule 1-012(H)(3) (“*Whenever* it appears . . . that
14 the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”
15 (emphasis added)). However, as we have previously discussed, a challenge to
16 standing is in many ways analogous to a defense for failure to state a claim because
17 it does not deprive the court of subject matter jurisdiction over the case, but instead
18 bears on whether the plaintiff has stated a cognizable claim for relief. A failure to

1 state a claim may only be raised “during the pendency of the action,” including on
2 appeal, *Sundance Mech. & Util. Corp.*, 1990-NMSC-031, ¶ 25, but it cannot be the
3 basis for a collateral attack on a final judgment. *See Palmer v. Palmer*, 2006-NMCA-
4 112, ¶¶ 13-22, 140 N.M. 383, 142 P.3d 971 (considering whether a court which
5 entered a settlement agreement between the parties had subject matter jurisdiction,
6 but refusing to consider after the entry of the judgment whether one party had failed
7 to state a claim). Therefore, a final judgment from a cause of action that may have
8 lacked standing as a jurisdictional matter may be subject to a collateral attack, while
9 a final judgment on any other cause of action, including an action to enforce a
10 promissory note such as this case, is not voidable under Rule 1-060(B) due to a lack
11 of prudential standing.

12 **III. CONCLUSION**

13 {35} For the foregoing reasons, we affirm the judgment of the Court of Appeals and
14 remand this matter to the district court with instructions to vacate its judgment of
15 foreclosure against Homeowner.

16 {36} **IT IS SO ORDERED.**

17

18

EDWARD L. CHÁVEZ, Justice

1 **WE CONCUR:**

2

3 **BARBARA J. VIGIL, Chief Justice**

4

5 **PETRA JIMENEZ MAES, Justice**

6

7 **CHARLES W. DANIELS, Justice**

8

9 **JUDITH K. NAKAMURA, Justice**