

The Lost UCC §3-309 Gizmo

ENFORCEMENT OF LOST, DESTROYED, OR STOLEN INSTRUMENT

- (a) A person not in possession of an instrument is entitled to enforce the instrument if
 - (i) *the person was in possession of the instrument and entitled to enforce it when loss of possession occurred,*
 - (ii) *the loss of possession was not the result of a transfer by the person or a lawful seizure, and*
 - (iii) *the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.*
- (b) ***A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument.*** *If that proof is made, Section 3-308 applies to the case as if the person seeking enforcement had produced the instrument. The court may not enter judgment in favor of the person seeking enforcement unless it finds that the person required to pay the instrument is adequately protected against loss that might occur by reason of a claim by another person to enforce the instrument. Adequate protection may be provided by any reasonable means.*

Uniform Commercial Code Article 3 specifically defines a negotiable instrument and a Lost Note Affidavit does not meet the Uniform Commercial Codes Article 3 definition of a negotiable instrument.

Sub-Subsection (i) of Subsection (a) of UCC §3-309 requires that a party making a claim to re-establish a negotiable instrument, was the party in possession of the negotiable instrument and had rights to enforce the negotiable instrument at the

time the party lost possession of the negotiable instrument. So long as destruction was not a willful destruction as define by Uniform Commercial Code §3-604,

“(a) A person entitled to enforce an instrument, with or without consideration, may discharge the obligation of a party to pay the instrument (i) by an intentional voluntary act, such as surrender of the instrument to the party, destruction,...”

Then, according to Uniform Commercial Code §3-309, a negotiable instrument maybe resurrected up as a Lost note Affidavit, but this Lost Note Affidavit is not an instrument that can be negotiated.

Now we deal with Sub-Section (b) of §3-309,

“A person seeking enforcement of an instrument under subsection (a) must prove the terms of the instrument and the person's right to enforce the instrument.”

Mortgage industry practice would be to offer up a printed graphic image of a negotiable instrument obtained from the electronic files a computer system along with the Lost Note Affidavit, and like other affidavits being defined by some courts as “Hearsay”, so would a graphic image be also “Hearsay.”

“Murray, 804 S.W2d at 284 (computer printout is often simply “the feeding back of data placed into a computer by a person; although the data may be in a different form than it was when it was fed into the computer, it retains its status as the statement or statements made by a person” and thus fits the definition of hearsay).”