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Henry Schein, Inc. v. Archer & White Sales, Inc., Case No. 17–1272 (2019).
A court may not override an arbitration provision when the parties' contract delegates the arbitrability question to an arbitrator, even if the court thinks that the arbitrability claim is "wholly groundless."

Mielke v. Deutsche Bank National Trust Company, Case No. 1D17-4265 (Fla. 1st DCA 2019).
Florida Statute section 673.3091 (enforcement of lost note) is tied to a foreclosure action and does not create an independent cause of action triggering a separate statute of limitations on a mortgagee's right to foreclose, regardless of whether the note holder knew the note was lost.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

HENRY SCHEIN, INC., ET AL. *v.* ARCHER & WHITE SALES, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17–1272. Argued October 29, 2018—Decided January 8, 2019

Respondent Archer & White Sales, Inc., sued petitioner Henry Schein, Inc., alleging violations of federal and state antitrust law and seeking both money damages and injunctive relief. The relevant contract between the parties provided for arbitration of any dispute arising under or related to the agreement, except for, among other things, actions seeking injunctive relief. Invoking the Federal Arbitration Act, Schein asked the District Court to refer the matter to arbitration, but Archer & White argued that the dispute was not subject to arbitration because its complaint sought injunctive relief, at least in part. Schein contended that because the rules governing the contract provide that arbitrators have the power to resolve arbitrability questions, an arbitrator—not the court—should decide whether the arbitration agreement applied. Archer & White countered that Schein's argument for arbitration was wholly groundless, so the District Court could resolve the threshold arbitrability question. The District Court agreed with Archer & White and denied Schein's motion to compel arbitration. The Fifth Circuit affirmed.

Held: The "wholly groundless" exception to arbitrability is inconsistent with the Federal Arbitration Act and this Court's precedent. Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. 63, 67. The parties to such a contract may agree to have an arbitrator decide not only the merits of a particular dispute, but also "'gateway' questions of 'arbitrability.'" *Id.*, at 68–69. Therefore, when the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract, even if the court thinks that the arbitrability claim is wholly groundless.

Syllabus

That conclusion follows also from this Court's precedent. See *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649–650.

Archer & White's counterarguments are unpersuasive. First, its argument that §§3 and 4 of the Act should be interpreted to mean that a court must always resolve questions of arbitrability has already been addressed and rejected by this Court. See, *e.g.*, *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 944. Second, its argument that §10 of the Act—which provides for back-end judicial review of an arbitrator's decision if an arbitrator has "exceeded" his or her "powers"—supports the conclusion that the court at the front end should also be able to say that the underlying issue is not arbitrable is inconsistent with the way Congress designed the Act. And it is not this Court's proper role to redesign the Act. Third, its argument that it would be a waste of the parties' time and money to send wholly groundless arbitrability questions to an arbitrator ignores the fact that the Act contains no "wholly groundless" exception. This Court may not engraft its own exceptions onto the statutory text. Nor is it likely that the exception would save time and money systemically even if it might do so in some individual cases. Fourth, its argument that the exception is necessary to deter frivolous motions to compel arbitration overstates the potential problem. Arbitrators are already capable of efficiently disposing of frivolous cases and deterring frivolous motions, and such motions do not appear to have caused a substantial problem in those Circuits that have not recognized a "wholly groundless" exception.

The Fifth Circuit may address the question whether the contract at issue in fact delegated the arbitrability question to an arbitrator, as well as other properly preserved arguments, on remand. Pp. 4–8.

878 F. 3d 488, vacated and remanded.

KAVANAUGH, J., delivered the opinion for a unanimous Court.

SUPREME COURT OF THE UNITED STATES

No. 17–1272

HENRY SCHEIN, INC., ET AL., PETITIONERS *v.* ARCHER AND WHITE SALES, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January 8, 2019]

JUSTICE KAVANAUGH delivered the opinion of the Court.

Under the Federal Arbitration Act, parties to a contract may agree that an arbitrator rather than a court will resolve disputes arising out of the contract. When a dispute arises, the parties sometimes may disagree not only about the merits of the dispute but also about the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute. Who decides that threshold arbitrability question? Under the Act and this Court's cases, the question of who decides arbitrability is itself a question of contract. The Act allows parties to agree by contract that an arbitrator, rather than a court, will resolve threshold arbitrability questions as well as underlying merits disputes. *Rent-A-Center, West, Inc.* v. *Jackson*, 561 U. S. 63, 68–70 (2010); *First Options of Chicago, Inc.* v. *Kaplan*, 514 U. S. 938, 943–944 (1995).

Even when a contract delegates the arbitrability question to an arbitrator, some federal courts nonetheless will short-circuit the process and decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is "wholly

groundless." The question presented in this case is whether the "wholly groundless" exception is consistent with the Federal Arbitration Act. We conclude that it is not. The Act does not contain a "wholly groundless" exception, and we are not at liberty to rewrite the statute passed by Congress and signed by the President. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract. We vacate the contrary judgment of the Court of Appeals.

I

Archer and White is a small business that distributes dental equipment. Archer and White entered into a contract with Pelton and Crane, a dental equipment manufacturer, to distribute Pelton and Crane's equipment. The relationship eventually soured. As relevant here, Archer and White sued Pelton and Crane's successor-in-interest and Henry Schein, Inc. (collectively, Schein) in Federal District Court in Texas. Archer and White's complaint alleged violations of federal and state antitrust law, and sought both money damages and injunctive relief.

The relevant contract between the parties provided:

> "Disputes. This Agreement shall be governed by the laws of the State of North Carolina. Any dispute arising under or related to this Agreement (except for actions seeking injunctive relief and disputes related to trademarks, trade secrets, or other intellectual property of [Schein]), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [(AAA)]. The place of arbitration shall be in Charlotte, North Carolina." App. to Pet. for Cert. 3a.

After Archer and White sued, Schein invoked the Federal Arbitration Act and asked the District Court to refer the

parties' antitrust dispute to arbitration. Archer and White objected, arguing that the dispute was not subject to arbitration because Archer and White's complaint sought injunctive relief, at least in part. According to Archer and White, the parties' contract barred arbitration of disputes when the plaintiff sought injunctive relief, even if only in part.

The question then became: Who decides whether the antitrust dispute is subject to arbitration? The rules of the American Arbitration Association provide that arbitrators have the power to resolve arbitrability questions. Schein contended that the contract's express incorporation of the American Arbitration Association's rules meant that an arbitrator—not the court—had to decide whether the arbitration agreement applied to this particular dispute. Archer and White responded that in cases where the defendant's argument for arbitration is wholly groundless—as Archer and White argued was the case here—the District Court itself may resolve the threshold question of arbitrability.

Relying on Fifth Circuit precedent, the District Court agreed with Archer and White about the existence of a "wholly groundless" exception, and ruled that Schein's argument for arbitration was wholly groundless. The District Court therefore denied Schein's motion to compel arbitration. The Fifth Circuit affirmed.

In light of disagreement in the Courts of Appeals over whether the "wholly groundless" exception is consistent with the Federal Arbitration Act, we granted certiorari, 585 U. S. ___ (2018). Compare 878 F. 3d 488 (CA5 2017) (case below); *Simply Wireless, Inc.* v. *T-Mobile US, Inc.*, 877 F. 3d 522 (CA4 2017); *Douglas* v. *Regions Bank*, 757 F. 3d 460 (CA5 2014); *Turi* v. *Main Street Adoption Servs., LLP*, 633 F. 3d 496 (CA6 2011); *Qualcomm, Inc.* v. *Nokia Corp.,* 466 F. 3d 1366 (CA Fed. 2006), with *Belnap* v. *Iasis Healthcare*, 844 F. 3d 1272 (CA10 2017); *Jones* v. *Waffle*

House, Inc., 866 F. 3d 1257 (CA11 2017); *Douglas*, 757 F. 3d, at 464 (Dennis, J., dissenting).

II

In 1925, Congress passed and President Coolidge signed the Federal Arbitration Act. As relevant here, the Act provides:

> "A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §2.

Under the Act, arbitration is a matter of contract, and courts must enforce arbitration contracts according to their terms. *Rent-A-Center,* 561 U. S., at 67. Applying the Act, we have held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also "'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Id.,* at 68–69; see also *First Options*, 514 U. S., at 943. We have explained that an "agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U. S., at 70.

Even when the parties' contract delegates the threshold arbitrability question to an arbitrator, the Fifth Circuit and some other Courts of Appeals have determined that the court rather than an arbitrator should decide the threshold arbitrability question if, under the contract, the argument for arbitration is wholly groundless. Those courts have reasoned that the "wholly groundless" excep-

tion enables courts to block frivolous attempts to transfer disputes from the court system to arbitration.

We conclude that the "wholly groundless" exception is inconsistent with the text of the Act and with our precedent.

We must interpret the Act as written, and the Act in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

That conclusion follows not only from the text of the Act but also from precedent. We have held that a court may not "rule on the potential merits of the underlying" claim that is assigned by contract to an arbitrator, "even if it appears to the court to be frivolous." *AT&T Technologies, Inc.* v. *Communications Workers*, 475 U. S. 643, 649–650 (1986). A court has "'no business weighing the merits of the grievance'" because the "'agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.'" *Id.,* at 650 (quoting *Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 568 (1960)).

That *AT&T Technologies* principle applies with equal force to the threshold issue of arbitrability. Just as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator.

In an attempt to overcome the statutory text and this Court's cases, Archer and White advances four main arguments. None is persuasive.

First, Archer and White points to §§3 and 4 of the Federal Arbitration Act. Section 3 provides that a court must

stay litigation "upon being satisfied that the issue" is "referable to arbitration" under the "agreement." Section 4 says that a court, in response to a motion by an aggrieved party, must compel arbitration "in accordance with the terms of the agreement" when the court is "satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue."

Archer and White interprets those provisions to mean, in essence, that a court must always resolve questions of arbitrability and that an arbitrator never may do so. But that ship has sailed. This Court has consistently held that parties may delegate threshold arbitrability questions to the arbitrator, so long as the parties' agreement does so by "clear and unmistakable" evidence. *First Options*, 514 U. S., at 944 (alterations omitted); see also *Rent-A-Center*, 561 U. S., at 69, n. 1. To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists. See 9 U. S. C. §2. But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.

Second, Archer and White cites §10 of the Act, which provides for back-end judicial review of an arbitrator's decision if an arbitrator has "exceeded" his or her "powers." §10(a)(4). According to Archer and White, if a court at the back end can say that the underlying issue was not arbitrable, the court at the front end should also be able to say that the underlying issue is not arbitrable. The dispositive answer to Archer and White's §10 argument is that Congress designed the Act in a specific way, and it is not our proper role to redesign the statute. Archer and White's §10 argument would mean, moreover, that courts presumably also should decide frivolous merits questions that have been delegated to an arbitrator. Yet we have already rejected that argument: When the parties' contract assigns a matter to arbitration, a court may not

resolve the merits of the dispute even if the court thinks that a party's claim on the merits is frivolous. *AT&T Technologies*, 475 U. S., at 649–650. So, too, with arbitrability.

Third, Archer and White says that, as a practical and policy matter, it would be a waste of the parties' time and money to send the arbitrability question to an arbitrator if the argument for arbitration is wholly groundless. In cases like this, as Archer and White sees it, the arbitrator will inevitably conclude that the dispute is not arbitrable and then send the case back to the district court. So why waste the time and money? The short answer is that the Act contains no "wholly groundless" exception, and we may not engraft our own exceptions onto the statutory text. See *Exxon Mobil Corp.* v. *Allapattah Services, Inc.*, 545 U. S. 546, 556–557 (2005).

In addition, contrary to Archer and White's claim, it is doubtful that the "wholly groundless" exception would save time and money systemically even if it might do so in some individual cases. Archer and White assumes that it is easy to tell when an argument for arbitration of a particular dispute is wholly groundless. We are dubious. The exception would inevitably spark collateral litigation (with briefing, argument, and opinion writing) over whether a seemingly unmeritorious argument for arbitration is *wholly* groundless, as opposed to groundless. We see no reason to create such a time-consuming sideshow.

Archer and White further assumes that an arbitrator would inevitably reject arbitration in those cases where a judge would conclude that the argument for arbitration is wholly groundless. Not always. After all, an arbitrator might hold a different view of the arbitrability issue than a court does, even if the court finds the answer obvious. It is not unheard-of for one fair-minded adjudicator to think a decision is obvious in one direction but for another fair-minded adjudicator to decide the matter the other way.

Fourth, Archer and White asserts another policy argument: that the "wholly groundless" exception is necessary to deter frivolous motions to compel arbitration. Again, we may not rewrite the statute simply to accommodate that policy concern. In any event, Archer and White overstates the potential problem. Arbitrators can efficiently dispose of frivolous cases by quickly ruling that a claim is not in fact arbitrable. And under certain circumstances, arbitrators may be able to respond to frivolous arguments for arbitration by imposing fee-shifting and cost-shifting sanctions, which in turn will help deter and remedy frivolous motions to compel arbitration. We are not aware that frivolous motions to compel arbitration have caused a substantial problem in those Circuits that have not recognized a "wholly groundless" exception.

In sum, we reject the "wholly groundless" exception. The exception is inconsistent with the statutory text and with our precedent. It confuses the question of who decides arbitrability with the separate question of who prevails on arbitrability. When the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract.

We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue. Under our cases, courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options,* 514 U. S., at 944 (alterations omitted). On remand, the Court of Appeals may address that issue in the first instance, as well as other arguments that Archer and White has properly preserved.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D17-4265

CONNIE L. MIELKE and BLAIR C. MIELKE,

Appellants,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee for GSAA Home Equity Trust 2005-MTR1, Asset-Backed Certificates, Series 2005-MTR1,

Appellee.

On appeal from the Circuit Court for Okaloosa County.
Terrance R. Ketchel, Judge.

January 10, 2019

WINOKUR, J.

Connie and Blair Mielke appeal the trial court's Final Judgment of Foreclosure in favor of Deutsche Bank National Trust Company (Deutsche Bank). The Mielkes argue that the complaint was time-barred because the statute of limitations had run on the bank's ability to enforce a lost note. Because we find that the requirements for enforcing a lost note pursuant to section 673.3091, Florida Statutes, do not create an independent cause of action triggering a separate statute of limitations on a mortgagee's right to foreclose, we affirm.

I.

In 2005, the Mielkes executed a mortgage on a condominium in Destin. In May 2008, Deutsche Bank filed a foreclosure complaint against the Mielkes alleging they defaulted on their February 2008 mortgage payment and all subsequent payments. The complaint also contained a count to reestablish the lost promissory note. In 2010, the trial court dismissed the complaint without prejudice. As a result, the trial court never determined whether Deutsche Bank was permitted to enforce the lost note.

In 2016, Deutsche Bank filed a two-count complaint against the Mielkes. The first count was entitled "Foreclosure of Mortgage" and alleged that the Mielkes defaulted on their March 2011 mortgage payment and all subsequent payments. The foreclosure count stated that Deutsche Bank was not in possession of the promissory note, but that it was entitled to enforce it. The second count was entitled "Reestablishment of Lost Promissory Note." Deutsche Bank attached an affidavit to the complaint attesting that the promissory note had been lost, but asserting that the note had not been transferred to another party or cancelled.

In their answer, the Mielkes alleged that Deutsche Bank was barred by the statute of limitations on its count to reestablish the lost note. The Mielkes later moved for summary judgment, arguing that Deutsche Bank was aware of the lost promissory note during its previous 2008 complaint. Consequently, the Mielkes claimed that the current complaint was time-barred pursuant to section 95.11(2)(b), Florida Statutes. Deutsche Bank responded that its count to reestablish the lost note was ancillary to its mortgage foreclosure count.

The trial court denied summary judgment, finding that section 673.3091, Florida Statutes, "clearly contemplates that an action to re-establish a lost note is filed in connection with an action to enforce the [n]ote." Accordingly, the trial court held that an "action under section 673.3091 is connected to an action for Mortgage Foreclosure, and not a standalone cause of action."

The Mielkes reasserted their statute of limitations defense at trial. The trial court issued a Final Judgment of Foreclosure in Deutsche Bank's favor. The Final Judgment also denied the Mielkes' Motion for Involuntary Dismissal and adopted the reasoning of its order denying the summary judgment motion.

II.

Review of statute of limitation issues relating to mortgage foreclosures is de novo. *Virginia Ins. Reciprocal v. Walker*, 765 So. 2d 229, 231 (Fla. 1st DCA 2000), *approved*, 842 So. 2d 804 (Fla. 2003).

A plaintiff has five years to bring a mortgage foreclosure action once a borrower has defaulted. § 95.11(2)(c), Fla. Stat. Florida courts have consistently held that a foreclosure action is not time-barred where the plaintiff alleges and proves the existence of a continual default. *Bartram v. U.S. Bank Nat'l Ass'n*, 211 So. 3d 1009, 1019 (Fla. 2016*); Forero v. Green Tree Servicing, LLC*, 223 So. 3d 440, 445 (Fla. 1st DCA 2017). As a result, "with each subsequent default, the statute of limitations runs from the date of each new default providing the mortgagee the right, but not the obligation, to accelerate all sums then due under the note and mortgage."[1] *Bartram*, 211 So. 3d at 1019.

In this case, the Mielkes do not dispute Deutsche Bank's ability to foreclose on their property after their subsequent default, but argue instead that the bank lacks standing because

[1] The Florida Supreme Court's reasoning in *Bartram* was predicated on the "recognition of the unique nature of the mortgage obligation and the continuing obligations of the parties in that relationship [and that] [i]f res judicata prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note." *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1007 (Fla. 2004).

its related action to reestablish the lost promissory note is time-barred. This issue has not been addressed by Florida courts.[2]

The Mielkes' argument hinges on their assertion that an action for reestablishing a lost note accrues when the party becomes aware of the note's loss or destruction. Thus, the issue for this Court is whether the ability to enforce a lost note accrues when the plaintiff discovers that the note is lost.

III.

A statute of limitations "set[s] a time limit within which an action must be filed as measured from the accrual of that cause of action, after which time obtaining relief is barred." *Hess v. Philip Morris USA, Inc.*, 175 So. 3d 687, 695 (Fla. 2015) (quoting *Merkle v. Robinson*, 737 So. 2d 540, 542, n.6 (Fla. 1991)). Accordingly, "[a] cause of action accrues when the last element constituting the cause of action occurs." § 95.031(1), Fla. Stat.

The Mielkes contend that the last element in seeking the enforcement of a lost note pursuant to section 673.3091 is the

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[2] The Second District alluded to this issue in *Peters v. Bank of New York Mellon*, 227 So. 3d 175, 177 (Fla. 2d DCA 2017). In *Peters*, one of the issues raised by the appellants was "that the Bank's claim to reestablish the lost note is barred by the applicable statute of limitations." *Id.* at 178. The Second District reversed the trial court finding that the Bank "failed to establish its ownership of the lost note." *Id.* at 180. As a result, the court did not address the statute of limitations issue, but it cited the trial court's reasoning for rejecting the argument:

> [T]he loss or discovery of the lost instrument is not a claim. It's an event. It's nothing that gives rise to a claim that would give rise to [a] cause of action. *The only time that there's going to be a claim resulting from a lost instrument is when it needs to be enforced and that is when it goes into default.*

Id. at 177 (emphasis added).

plaintiff's awareness that the note is lost. We reject this interpretation. Section 673.3091 provides as follows:

> (1) A person not in possession of an instrument *is entitled to enforce the instrument* if:
>
> (a) *The person seeking to enforce the instrument* was entitled to enforce the instrument when loss of possession occurred, or has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
>
> (b) The loss of possession was not the result of a transfer by the person or a lawful seizure; *and*
>
> (c) 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.
>
> (2) *A person seeking enforcement of an instrument* under subsection (1) must prove the terms of the instrument and the person's right to enforce the instrument.

(emphasis added).

The language of section 673.3091 demonstrates that it is not intended to create a cause of action to reestablish a lost note. Rather, it only recognizes that an entity not possessing an instrument is still entitled to enforce it if the entity meets certain conditions. The cause of action is the enforcement itself; section 673.3091 only sets forth special requirements if the plaintiff does not possess the instrument.

This interpretation is bolstered by the language of section 673.3011, Florida Statutes. The statute defines a person entitled to enforce an instrument to include "[a] person not in possession of the instrument who is entitled to enforce the instrument pursuant to s. 673.3091 . . . ." § 673.3011(3), Fla. Stat. Accordingly, sections 673.3011 and 673.3091 make clear that the right to enforce a lost note, in the foreclosure context, travels

with the breach that triggers the need to seek enforcement—default by a mortgagor. As a result, section 673.3091 does not create a standalone cause of action apart from a breach.

The Mielkes' argument conflates the requirements of section 673.3091 with the right to reestablish a lost document under section 71.011, Florida Statutes. Unlike section 673.3091, section 71.011 does create a standalone cause of action:

> A person desiring to establish any paper, record or file, except when otherwise provided, shall file a complaint in chancery setting forth that the paper, record or file has been lost or destroyed and is not in the custody or control of the petitioner, the time and manner of loss or destruction, that a copy attached is a substantial copy of that lost or destroyed, that the persons named in the complaint are the only persons known to plaintiff who are interested for or against such reestablishment.

§ 71.011(5), Fla. Stat. This statute does not merely acknowledge that a person who does not possess a document may enforce it and describe the conditions for such enforcement; it actually sets out a procedure for an entity to reestablish a lost document, starting with the filing of a complaint demonstrating an entitlement to it.

Deutsche Bank did not rely on section 71.011 in its foreclosure complaint. The complaint simply exercised Deutsche Bank's right to enforce its promissory note due to the Mielkes' default. Pursuant to section 673.3011, Deutsche Bank had to demonstrate that it was the proper holder of the note before they could foreclose on the Mielkes' condominium. Since they did not possess the original note, Deutsche Bank had to demonstrate that it complied with section 673.3091 to show that it was the holder of the note pursuant to section 673.3011(3). Therefore, the right to enforce the lost note did not accrue until the Mielkes defaulted.

IV.

Section 673.3091, Florida Statutes, does not create a cause of action separate from a mortgagee's right to foreclosure. The right to enforce a promissory note accrues when the default occurs, regardless of whether the plaintiff possesses the note. As a result, the trial court did not err in entering Final Judgment in favor of Deutsche Bank.

AFFIRMED.

MAKAR and WINSOR, JJ., concur.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

Robert J. Powell, Clark Partington, Pensacola, for Appellants.

Allison Morat and Teris A. McGovern of Pearson Bitman, LLP, Maitland, for Appellee.