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MONDAY, FEBRUARY 11, 2013

Mortgage Foreclosures, Missing Promissory Notes, and the Uniform Commercial Code: A New Article

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For the last few years I have been crossing the country giving lectures on what I now call the "Golden Rule of Mortgage Foreclosures," which is that such foreclosures cannot proceed without production of the *original promissory note* signed at the closing. A symposium at Western State University Law School last year at which I gave the keynote address turned into a law review article on point, and that law review article is reprinted below in full. The correct citation for the printed version is 39 W. St. U. L. Rev. 313 (2012). As subsequent developments occur I will add them in red to the original article below. Any corrections or suggestions may be sent to me at dglswhaley@aol.com.

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Mortgage Foreclosures, Promissory Notes, and the Uniform Commercial Code

By Douglas J. Whaley *

Introduction

As is true of many things in life the Uniform Commercial Code's statutes concerning the role of promissory notes in a mortgage foreclosure are both simple and at the same time complicated. The purpose of this article is to draw out the matter in detail, but let's begin with the simple (and basic) rule first. Indeed let's call it the Golden Rule of Mortgage Foreclosure: the Uniform Commercial Code forbids foreclosure of the mortgage unless the creditor possesses the properly-negotiated original promissory note. If this can't be done the foreclosure must stop.

Of course there are exceptions and situations in which problems with the note can be addressed and cleared up, and those will be explored as we progress. The difficulty is that all too often the Golden Rule of Mortgage Foreclosure is simply ignored and the foreclosure goes ahead as if the rule were not the statutory law of every jurisdiction in the United States.[2]

Why is that? The answer is almost too sad to explain. The problem is that the Uniform Commercial Code is generally unpopular in general, and particularly when it comes to the law of negotiable instruments (checks and promissory notes) contained in Article Three of the Code. Most lawyers were not trained in this law when in law school (The course on the subject, whether called "Commercial Paper" or "Payment Law," is frequently dubbed a "real snoozer" and skipped in favor or more exotic subjects), and so the only exposure to the topic attorneys have occurs, if at all, in bar prep studies (where coverage is spotty at best). Thus many foreclosures occur without it occurring to anyone that the UCC has any bearing on the issue.

Judges are frequently similarly unlearned when the matter arises, and loath to hear more. If the defendant's attorney announces that the Uniform Commercial Code requires the production of the original promissory note, the judge may react by saying something like, "You mean to tell me that some technicality of negotiable instruments law lets someone who's failed to pay the mortgage get away with it if the promissory note can't be found, and that I have to slow down my overly crowded docket in the hundreds of foreclosure cases I've got pending to hear about this nonsense?" It's a wonder the judge doesn't add, "If you say one more word about Article Three of the UCC you'll be in contempt of court!"

But the law is the law. If the judge doesn't like what the state statute says that is no excuse for ignoring it. If the statute reaches a bad result then the legislature should repeal the statute, and until that occurs the courts must follow it. As it happens there are good and sufficient rules for Article Three's mandates, as we shall see below.

The Landscape of the Mortgage Mess

Let's begin with what a mortgage actually is. Properly defined it is a consensual lien placed by the home owner (called the "mortgagor") on the real estate being financed in order secure the debt incurred by the loan in favor of the lender/mortgagee. The debt is created by the signing of a promissory note (which is governed by Article Three of the Uniform Commercial Code); the home owner will be the maker/issuer of the promissory note and the lending institution will be payee on the note. There is a common law maxim that "security follows the debt." This means that it is presumed that whoever is the current holder of the promissory note (the "debt") is entitled to enforce the mortgage lien (the "security"). The mortgage is reified as a mortgage deed which the lender should file in the local real property records so that the mortgage properly binds the property not only against the mortgagor but also the rest of the world (this process is called "perfection" of the lien).[3]

What happens to the promissory note? In the good old days, the twentieth century, it was kept down at the bank so that when the time for payment arrived the bank could present it to the mortgagor when due, and, if it wasn't paid, the mortgagee could then use legal process (or in some states self-help) to foreclose on the mortgage lien. But during the feeding frenzy that the real estate mortgage community indulged in for the last decade, more bizarre things happened. The mortgages themselves were no longer kept at the originating bank, nor were the notes. Instead they were bundled together with many others and sold as a package to an investment banking firm, which put them in a trust and sold stock in the trust to investors (a process called "securitization"). The bankers all knew the importance of the mortgage, and supposedly kept records as to the identity of the entities to whom the mortgage was assigned. But they were damn careless about the promissory notes, some of which were properly transferred whenever the mortgage was, some of which were kept at the originating bank, some of which were deliberately destroyed (a really stupid thing to do), and some of which disappeared into the black hole of the financial collapse, never to be seen again. [See http://deadlyclear.wordpress.com/2012/03/15/securitized-distrust/]

In recent years the combination of subprime lending, securitization of mortgage loans, a housing market that first boomed then busted, rapacious predators who worked hard to take for themselves the equity people had built up in their homes, and foreclosure mills that operated with neither proper paperwork, nor attention to the rules of law, much less common decency, led to an explosion of laws and legal actions designed to deal with these matters.

The collapse of the housing market in 2008 was a direct consequence of these greedy and unwise business practices. Gullible consumers were encouraged to take out mortgages they could not afford on property that turned out to be worth far less than the mortgage indebtedness. Minority communities were particularly hard hit, often targeted by shady lenders because people of color are more likely to store their wealth in home equity in many USA communities. Things went fine until real property stopped appreciating in value and its worth dropped to alarmingly low levels, with a recession that engulfed the country and, indeed, the world. Not just subprime borrowers were affected; the

recession reduced the value of almost all property, and perfectly responsible mortgagors (many of whom were also laid off from their jobs) began to struggle to make payments and avoid foreclosure. According to one monitoring agency, a record number of homes received foreclosure filings in 2010 (over 2.9 million).[4]

Ten years or so ago the bank that made the mortgage loan filed the mortgage deed in the local real property records so as to perfect its interest in the realty. But when the mortgages themselves began to be assigned, changing the real property records at the time of each transfer would be both expensive and awkward. Filing fees in real property record offices average $35 every time a new document is filed. The solution was the creation of a straw-man holding company called Mortgage Electronic Registration Systems [MERS]. MERS makes no loans, collects no payments, though it does sometimes foreclose on properties (through local counsel). Instead it is simply a record-keeper that allows its name to be used as the assignee of the mortgage deed from the original lender, so that MERS holds the lien interest on the real property. While MERS has legal title to the property, it does not pretend to have an equitable interest. At its headquarters in Reston, Va., MERS (where it has only 50 full time employees, but deputizes thousands of temporary local agents whenever needed) supposedly keeps track of who is the true current assignee of the mortgage as the securitization process moves the ownership from one entity to another.[5] Meanwhile the homeowner, who has never heard of MERS, is making payments to the mortgage servicer (who forwards them to whomever MERS says is the current assignee of the mortgage). If the payments stop, the servicer will so inform the current assignee who will then either order MERS to foreclose or will take an assignment of the mortgage interest from MERS so that it can foreclose in its own name. Amazingly, MERS Corporation holds title to roughly half of the home mortgages in the country, some 60 million of them![6]

The Uniform Commercial Code

Article 3 of the Uniform Commercial Code could not be clearer when it comes to the issue of mortgage note foreclosure. When someone signs a promissory note as its maker ("issuer"), he/she automatically incurs the obligation in UCC §3-412 that the instrument will be paid to a "person entitled to enforce" the note.[7] "Person entitled to enforce"—hereinafter abbreviated to "PETE"—is in turn defined in §3-301:

"Person entitled to enforce" an instrument means (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3-309 or 3-418(d) . . . .

Three primary entities are involved in this definition that have to do with missing promissory notes: (1) a "holder" of the note, (3) a "non-holder in possession who has the rights of a holder, and (3) someone who recreates a lost note under §3-309.[8] Let's take them one by one.

"Holder"

Essentially a "holder" is someone who possesses a negotiable instrument payable to his/her order or properly negotiated to the later taker by a proper chain of indorsements. This result is reached by the definition of "holder" in §1-201(b)(21):

(21) “Holder” means:

(A) the person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession . . . .

and by §3-203:

(a) “Negotiation” means a transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person who thereby becomes its holder.

(b) Except for negotiation by a remitter, if an instrument is payable to an identified person, negotiation requires transfer of possession of the instrument and its endorsement by the holder. If an instrument is payable to bearer, it may be negotiated by transfer of possession alone.

The rules of negotiation follow next.

“Negotiation”

A proper negotiation of the note creates “holder” status in the transferee, and makes the transferee a PETE. The two terms complement each other: a “holder” takes through a valid “negotiation,” and a valid “negotiation” leads to “holder” status. How is this done? There are two ways: a *blank* endorsement or a *special* endorsement by the original payee of the note.

With a blank endorsement (one that doesn’t name a new payee) the payee simply signs its name on the back of the instrument. If an instrument has been thus indorsed by the payee, anyone (and I mean anyone) acquiring the note thereafter is a PETE, and all the arguments explored below will not carry the day. Once a blank endorsement has been placed on the note by the payee, all later parties in possession of the note qualify as “holders,” and therefore are PETEs.[9]

If the payee’s endorsement on the back of the note names a new payee (“pay to X Company”), that's called a “special endorsement.” Now only the newly nominated payee can be a “holder” (a status postponed until the new payee acquires the note—you have to hold to be a holder). The special endorsee, wishing to negotiate the note to a new owner, may now sign in blank, creating a bearer instrument, or may make another special endorsement over to the new owner. Only if there is a valid chain of such endorsements has a negotiation taken place, thus creating “holder” status in the current possessor of the note and making that person a PETE. With the exception mentioned next, the endorsements have to be written on the instrument itself (traditionally on the back).

The Allonge

Sometimes the endorsement is not made on the promissory note, but on a separate piece of paper, called an "allonge," which is formally defined as a piece of paper attached to the original note for purposes of endorsement.[10] An allonge has an interesting history, traceable to the days in which instruments circulated for long periods before being presented for payment. Consider, for example, the early period in United States history before it was even a country. People living in the Americas frequently had their banks back in Great Britain. If they drew up drafts ("check") on these banks and gave them to another American, that person was unlikely to immediately send it across the Atlantic to the mother country. Instead, the payee would simply indorse it over to one of the payee's creditors, who would do the same. In those days drafts would circulate, more or less like money, for extended periods of time. But the drafts quickly ran out of room on which to place endorsements, so a separate piece of paper, called an "allonge" was glued to the original draft and the new endorsements were placed on the allonge. There are cases from Great Britain where the allonge had over a hundred endorsements before finally being presented to the drawee for payment.[11]

The Uniform Commercial Code still allows the use of an allonge, and given the large number of transfers that some mortgage promissory notes have had in the last few years, there are many new cases dealing with the allonge. These cases frequently reveal problems with negotiation that give the current holder of the instrument difficulties in trying to establish "holder" status. For example, the allonge must be "affixed to the instrument" per §3-204(a)'s last sentence. It is not enough that there is a separate piece of paper which documents the transfer unless that piece of paper is "affixed" to the note.[12] What does "affixed" mean? The common law required gluing. Would a paper clip do the trick? A staple?
[13]

Thus a contractual agreement by which the payee on the note transfers an interest in the note, but never signs it, cannot qualify as an allonge (it is not affixed to the note), and no proper negotiation of the note has occurred. If the endorsement by the original mortgagee/payee on the note is not written on the note itself, there must be an allonge or the note has not been properly negotiated, and the current holder of that note is not a PETE (since there is no proper negotiation chain).

Another difficulty with allonges that has bothered a number of courts occurs in the following fact pattern. The promissory note apparently has a valid endorsement of the payee's name either on the back of the note or on the accompanying allonge, but the evidence shows that when the note was transferred to the current possessor that signature was not then on the note. Instead it is clear that the current possessor, realizing the problem, went back to the payee and had it indorse the note over to the current possessor, thus clearing up the negotiation issue. But some courts have disallowed such a late negotiation by the original payee on the theory that by the time the payee's signature was added to the note, the payee no longer had an "ownership" interest in the note and thus no title to convey, which supposedly invalidates the late endorsement.[14] This is simply wrong, and is a misunderstanding of the difference between ownership and the rules of negotiation. The Code never requires the person making an endorsement to have an ownership interest in the note[15] (though of

course the payee normally does have such an interest), but simply that he/she is the named payee, and the Code clearly allows for correction of a missing endorsement. Section 3-203(c) provides for it specifically:

(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

And Official Comment 3 explains: "The question may arise if the transferee has paid in advance and the indorsement is omitted fraudulently or through oversight. . . . Subsection (c) provides that there is no negotiation of the instrument until the indorsement by the transferor is made. Until that time the transferee does not become a holder . . . ."

If the allonge is not in order, or there are other problems with the negotiation of the note (the original payee's name is missing, for example), the person suing on the instrument will have to rely on the "shelter rule" to become a PETE, and so let's turn to that rule.

The Shelter Rule

It has always been a basic rule in commercial law that the sale of anything vests in the buyer whatever rights the seller had in the object sold. Phrased another way, the buyer takes "shelter" in the rights of the seller. Even legal rights can pass in this way, including "holder" status. Say, for example, that the payee fails to indorse the note (so no "negotiation" takes place) but instead sells the note to a new owner. The new owner is not a "holder" (since there has not been an indorsement by the payee), but the new owner takes shelter in the holder status of its buyer, and thus is a PETE according to both §§3-301 (defining PETE) and 3-203(b) (the shelter rule itself). In this case, the burden of proving proper possession is on the person in holding the instrument, and until that is done no liability on the note arises (since the maker of the note's obligation to pay it under §3-412, see above, only runs to a PETE). The shelter rule even acts to pass on the original holder's rights completely down the chain as long as the current possessor of the note can prove the validity of all previous transfers in between.

The shelter rule can be hugely useful to the foreclosing entity. Say that the original payee on the note was First Bank, which never indorsed the note at all. The note was then transferred into the hands of Second Bank, which is the plaintiff in the current foreclosure action. Second Bank, using the shelter rule, is a PETE as long as it proves the chain of transfers of the note, obtaining the "holder" status of First Bank even without proper indorsements on the note or an allonge. The courts have had no problem reaching this result.[16]

Lost Notes

If the note has been lost, §3-309 of the UCC allows for the re-creation of lost or destroyed notes. It states:

(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.[17]

Note that (b) places the burden of proving a right to payment on the person claiming the right to enforce the lost instrument. Nothing is presumed. The plaintiff must show the validity of each transfer of the instrument from the original payee to the current plaintiff, and explain how and why the note cannot be produced.[18] The last sentence in §3-309 (see above) does allow the court to rule in favor of the entity claiming under a lost note if there is a bond or other security posted to protect the payor from the risk of double payment to a later party producing the note.

The Golden Rule of Mortgage Foreclosure Under the UCC

As stated in the first paragraph of this article, the Golden Rule of Mortgage Foreclosure: the Uniform Commercial Code forbids foreclosure of the mortgage unless the creditor possesses the properly-negotiated original promissory note. If this can't be done the foreclosure must stop. The maker who signs a promissory note is only liable per §3-412 to a "person entitled to enforce" (PETE) the note, a term described in §3-301 so that only someone in possession of a validly negotiated note qualifies. As we saw above, defects in negotiation frequently defeat the ability to be a PETE, and therefore stop the foreclosure from being successful.[19] Let's now turn to the *possession* requirement, which is emphasized over and over in §3-301's definition of PETE and its accompanying Official Comment.

An assignee of the mortgage who does not have the promissory note is not allowed to foreclose on the mortgage[20] Without the note, the foreclosing entity does not have "standing" to sue (and/or—a civil procedure distinction that is not my forte—is not the "real party in interest").[21] As United States District Judge Christopher Boyko explained throwing out a number of mortgage foreclosure cases, attempts to slide past the jurisdictional issue that arises from filing without the necessary paperwork is unacceptable:

> Plaintiff's, "Judge, you just don't understand how things work," argument reveals a condescending mindset and quasi-

> monopolistic system where financial institutions have traditionally controlled, and still control, the foreclosure process. Typically, the homeowner who finds himself/herself in financial straits, fails to make the required mortgage payments and faces a foreclosure suit, is not interested in testing state or federal jurisdictional requirements, either *pro se* or through counsel. Their focus is either, “how do I save my home,” or “if I have to give it up, I'll simply leave and find somewhere else to live.”
>
> In the meantime, the financial institutions or successors/assignees rush to foreclose, obtain a default judgment and then sit on the deed, avoiding responsibility for maintaining the property while reaping the financial benefits of interest running on a judgment. The financial institutions know the law charges the one with title (still the homeowner) with maintaining the property.
>
> There is no doubt every decision made by a financial institution in the foreclosure process is driven by money. And the legal work which flows from winning the financial institution's favor is highly lucrative. There is nothing improper or wrong with financial institutions or law firms making a profit-to the contrary, they should be rewarded for sound business and legal practices. However, unchallenged by underfinanced opponents, the institutions worry less about jurisdictional requirements and more about maximizing returns. Unlike the focus of financial institutions, the federal courts must act as gatekeepers, assuring that only those who meet diversity and standing requirements are allowed to pass through. Counsel for the institutions are not without legal argument to support their position, but their arguments fall woefully short of justifying their premature filings, and utterly fail to satisfy their standing and jurisdictional burdens. The institutions seem to adopt the attitude that since they have been doing this for so long, unchallenged, this practice equates with legal compliance. Finally put to the test, their weak legal arguments compel the Court to stop them at the gate.
>
> The Court will illustrate in simple terms its decision: “Fluidity of the market”---“X” dollars, “contractual arrangements between institutions and counsel”---“X” dollars, “purchasing mortgages in bulk and securitizing”---“X” dollars, “rush to file, slow to record after judgment”---“X” dollars, “the jurisdictional integrity of United States District Court”---“Priceless.”[22]

Nor will a mere *copy* of the note suffice.[23] There could be 100 copies of the original note, but that would not create a right of foreclosure in 100 plaintiffs. To the bank's argument that a copy of the promissory note should be enough, ask any banker if he/she would be willing to accept a copy of *check*.

There are good practical reasons for the possession requirement. If the maker of the note pays a "person not entitled to enforce," he/she is not discharged from liability on the note, and faces the prospect of having to pay the true owner when that person surfaces with proof of ownership of the note (see §§3-601 and 3-602 above).[24] Courts must take special care not to expose the maker to such double liability.

Is the Promissory Note Negotiable?

This is a thorny issue. First of all, as the debtor's attorney, *don't raise the issue yourself*. Why not? Because if the note is not technically "negotiable" under the rigid rules of UCC §3-104 then arguably the Uniform Commercial Code does not apply, and all of the statutory provisions examined above are not the law. Thus the attorney for the foreclosing entity may think of this and want to argue it (on the other hand, most attorneys would rather slaughter hogs than contemplate the elements of negotiability), so what happens if it does comes up?

There have been serious scholarly arguments that most mortgage notes are not technically negotiable.[25] The typical issue concerns what is called the "courier without luggage" requirement: the note must not contain promises or obligations (with certain exceptions) other than a bald promise to pay the debt to the order of a named person or bearer.[26] Pennsylvania's Chief Justice John Gibson once said that a negotiable instrument must be a "courier without luggage."[27] This oft-repeated description means that the instrument must not be burdened with anything other than the simple and clean unconditional promise or order; it cannot be made to truck around other legal obligations. If the maker of a note adds any additional promises to it, the note becomes non-negotiable because the prospective holder is then given notice that the note is or may be conditioned on the performance of the other promise. Section 3-104(a)(3) specifies the few additional items that may be mentioned in an instrument without destroying its negotiable character.[28] Since most mortgage notes are cluttered with extraneous promises by the maker, the contention is at these notes are not "negotiable instruments" as that term is defined in the UCC.

In the article mentioned in footnote 23, Professor Ronald Mann argues that a promise in the typical mortgage note provides that on electing to make a prepayment, the maker of the note must give a written notice to that effect to the holder of the note. Is this an extraneous promise forbidden in a "negotiable" note? He argues it is, but that seems wrong to me. UCC §3-106(b) allows a references to another document for rights as to prepayment, and while that is not exactly what is happening here, it is an indication that the Code drafters were unconcerned with prepayment issues when it came to negotiability (the reason being that prepayment *aids* the maker, so the rules should be construed to protect that bias). So far the courts have not agreed that such promises destroy negotiability.[29]

Further, what is the harm by so minor a promise, that it should strip away the protection of the only uniform treatment of the law from what all parties intended to be a promissory note? Official Comment 2 to §3-104 states that a major test on whether the parties *intended* to create a negotiable instrument is the inclusion vel non of "order or bearer" language in the note. Since the typical note is payable to the "order" of a named payee, that should settle it that the parties did intend for the UCC to apply to their transaction. The same Official Comment goes on to provide that where the parties intended to create a negotiable instrument but made some minor misstep, Article 3 could be applied by *analogy* (since it is the current best thinking of how instruments should be legally governed—amended most recently in 2002). Courts have been receptive to

this analogy argument.[30

Destroying the negotiability of the promissory note is not always a good thing for the foreclosing entity. If the note is not negotiable, then there can no holder in due course of that note who will take free of defenses to the note. Such a status is reserved only for negotiable instruments. A non-negotiable instrument is merely a contract, and like all contracts it travels with its defenses whenever assigned from one entity to another.[31] There is no such thing as a holder in due course of a non-negotiable instrument. This is important to foreclosing entities where the homeowner has defenses to payment that can be asserted in contract actions, but which are not assertable against a holder in due course.[32] Say, for example, that the homeowner was tricked by fraud into signing the mortgage due to extravagant lies told by the lender (which often happened, particularly in the sub-prime market).[33] Such a defense would not be good against a holder in due course, who could foreclose and take the home free of the fraud allegation. This is happening over and over.[34]

Finally, if all else fails and the note is deemed nonnegotiable, then the common law would apply, and the common law routinely required possession of a promissory note before foreclosure could proceed, though that's going to take some library research to prove up state by state.[35]

The Difference Between the Note and the Mortgage

Faced with these daunting UCC provisions, but not possessing the original promissory note, some entities foreclosing have turned to the mortgage contract itself, and tried to use the failure of the home owner to make the payments required by that contract as a ground for the foreclosure. "We can prove that the mortgage was assigned to us, so we'll use it as the grounds for foreclosure," is their mantra. Let's explore why that possibility won't work.

When the purchaser of real property attends the closing and signs paper after paper the three primary legal documents that are involved in a later foreclosure are (1) the promissory note by which the new homeowner, called the maker of the note, promises to pay the lender (the payee) the amount being borrowed to finance the mortgage, (2) the mortgage contract which promises the same thing and has a large number of additional contractual obligations and duties, and (3) the mortgage deed which transfers title to the real estate involved from the homeowner ("mortgagor") to the lending institution ('mortgagee"). The lender keeps the note and the mortgage contract, and files the mortgage deed in the real property records so as to create a lien on the property which must be satisfied before the property could later be transferred to someone else.

"Security Follows the Debt"

The common law was clear that the mortgage contract and the mortgage deed are mere "security" for the payment of the promissory note (the "debt"). It is a common law maxim that "security follows the debt."[36] This means the mortgage travels along with the promissory note, and that the note is the important item, not the mortgage itself. Thus

whoever has the promissory note is the only entity that can enforce the mortgage. The courts are more or less unanimous on this.[37] The United States Supreme Court established the basic rule early in the 1873 case of Carpenter v. Longan:[38] "The note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity. . . . The mortgage can have no separate existence. When the note is paid the mortgage expires. It cannot survive for a moment the debt which the note represents. This dependent and incidental relation is the controlling consideration . . . ." A purported assignment of a mortgage to a bank is not proof of a transfer of a promissory note secured by the mortgage, since the mortgage follows the note but not vice versa.[39]

Indeed, Article 9 of the Uniform Commercial Code codifies this idea. Section 9-203(g) provides that whoever has a perfected interest in the note automatically has a perfected interest in the underlying mortgage ("security follows the debt"). But Article 9 says nothing about who is entitled to enforce the note when it comes due, which is left to Article 3; thus the plaintiff in the foreclosure must still prove it is a PETE, as that term is defined in Article 3. Moreover, even if §9-203(g) works its magic to transfer the mortgage interest to the possessor of the note, that does not mean that foreclosure can be had without satisfying the court (in judicial foreclosures) that the state foreclosure laws requiring a clear chain of mortgage assignments have been met. In non-judicial foreclosure state, UCC §9-607(b) provides that "if necessary to enable a secured party [including the buyer of a mortgage note] to exercise the right of [its transferor] to enforce a mortgage non-judicially," the secured party may record in the office in which the mortgage is recorded (i) a copy of the security agreement transferring an interest in the note to the secured party and (ii) the secured party's sworn affidavit in recordable form stating that default has occurred and that the secured party is entitled to enforce the mortgage non-judicially.[40] For a complete discussion of these issues, see the UCC's Permanent Editorial Board's official explanation: http://www.ali.org/00021333/PEB%20Report%20-%20November%202011.pdf

There has been an attack on this concept recently in a way that might aid homeowners. In U.S. Bank v. Ibanez,[41] handed down on January 7, 2011, the Massachusetts Supreme Judicial Court ruled that a mortgage cannot be assigned in blank (a common practice in the securitization of mortgages), so that the holder of a blank mortgage assignment was not the proper entity to foreclose. "We have long held that a conveyance of real property, such as a mortgage, that does not name the assignee conveys nothing and is void," the court said. When the assignee argued that it held the promissory note, which automatically gave it the appropriate ownership interest in the mortgage ("security follows the debt"), the court disagreed, saying that a more formal assignment of the mortgage was necessary for a clear real estate title. "In Massachusetts, where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage." The court then added that a holder of the note could file a lawsuit to obtain the mortgage. Without a properly assigned mortgage the mortgage holder remains unchanged, which is why the banks lacked the power to foreclose. The court refused to apply its decision only to future cases, thus creating a legal mess in Massachusetts that could undo foreclosures held years ago. Bank stocks

fell instantly. The Massachusetts Supreme Judicial Court did not consider the effect of UCC §9-203(g), which clearly states that possession of the promissory note automatically creates a security interest in the mortgage even without a formal assignment of same. Why didn't the court discuss this very relevant statute? My guess is that no one (not the parties, not the law clerks, not the judges) came across it in preparing the case or the decision (so here the UCC law professor emits a sad sigh). The obligation giving rise to the mortgage is reified in the promissory note, and only the current possessor of the promissory note can bring suit thereon (regardless of who is the assignee of the mortgage).
[In *Eaton v. Fed. Nat'l Mort. Ass'n*, 462 Mass. 569, 969 N.E.2d 1118 (2012), the Massachusetts Supreme Judicial Court backed away from *Ibanez*, clearly holding that the mortgage follows the note (and not vice versa), and that only the holder of the promissory note (or the agent thereof) is the proper entity to foreclose. The court managed to do this with only a curt nod to the rules of the Uniform Commercial Code. Massachusetts has now enacted a statute dealing with foreclosures that gives various redemption rights. In particular M.G.L.A. 244 § 35C requires the creditor foreclosing to be the holder of the mortgage note and further that all statements made to either state or federal courts in foreclosure proceedings shall be true. The statute also requires that all mortgage assignments be recorded. For a detailed comment on the current Massachusetts situation see Christopher Cifrino, Comment, Now UCC Me, Now You Don't: The Massachusetts Supreme Judicial Court Ignores the UCC in Requiring Unity of Note and Mortgage for Foreclosure in Eaton v. Fannie Mae, 54 B.C. L. Rev. E. Supp. 99 (2013), http://lawdigitalcommons.bc.edu/bclr/vol54/iss6/9.]

Interestingly, in Utah some homeowners have been successful in bringing quiet title actions to strip off the mortgage where no entity can prove a valid chain of assignments of the mortgage. Doing that would rid the property of the mortgage lien and permit subsequent sale, though it would not excuse the mortgagor's liability on the promissory note should it finally surface in the hands of a PETE.

The Merger Rule

It has always been a basic rule of negotiable instruments law that once a promissory note is given for an underlying obligation (like the mortgage contract), the underlying obligation is merged into the note and is suspended while the note is still outstanding. Discharge on the note would (due to the rule that the two are merged) result in discharge of the underlying obligation. This makes sense: paying the note would also pay the obligation. Because of the merger rule, the underlying obligation is not available as a separate cause of action until the note is dishonored.

This merger rules, with its suspension of the underlying obligation until dishonor of the note, is codified in §3-310(b) of the UCC:

(b) Unless otherwise agreed and except as provided in subsection (a), if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken, and the following rules apply:

* * *

(2) In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment.

Thus until the note is dishonored there can be no default on the underlying obligation (the mortgage contract). All foreclosure statutes, whether permitting self-help or requiring the involvement of a court, forbid foreclosure unless the underlying debt is in "default." That means that the maker of the promissory note must have failed to make the payments required by the note itself, and thus the note has been dishonored. Under UCC §3-502(a)(3) a promissory note is dishonored when the maker does not pay it when the note first becomes payable.[42]

However, as discussed above, the promissory note itself is owed to a PETE, and only that person can show that the debt was not paid when due, thus creating a "dishonor" and severing the note from the underlying mortgage obligation, so as to permit foreclosure under the latter theory. Both the Official Comments to §§3-502 and to 3-310 make it clear that a dishonor can only occur if the person who wishes to sue is a "holder," i.e., someone in possession of the instrument. Official Comment 3 to §3-502 states "This [section] allows holders to collect notes in ways that make commercial sense without having to be concerned about a formal presentment on a given day," and Official Comment 3 to §3-310 explains: "If the check or note is dishonored, the [other party] may sue on either the dishonored instrument or [the underlying contract] if [that person is in] *possession* of the dishonored instrument and is the *person entitled to enforce* it" (emphasis added).

Putting this altogether, were I a mortgagor's attorney, on getting notice of the intent to foreclose, I would demand that my client be presented with the original promissory note and that the note was is the hands of a PETE when failure to pay the note occurred.[43] Failing that the mortgagor is not in default since he/she has not dishonored the note. Until that happens, §3-310 *suspends the entire mortgage obligation*. The contractual obligation to pay has merged into the note, and until the note is dishonored it's unavailable as a separate cause of action. Thus if the entity trying to foreclose cannot produce the promissory note, it cannot prove that payment was not made to the PETE, meaning that no "dishonor" of the note has occurred under 3-502, and thus the underlying mortgage obligation is still merged into the note.

There are some federal cases supposedly applying California law which state that production of the original promissory note is not required in California since it is not mentioned in the comprehensive California statute detailing foreclosure procedure in this non-judicial foreclosure state[44] (there are federal California decisions to the contrary[45]). I looked up the California foreclosure statute. Cal.Civ.Code §2924(a) clearly states that the power of foreclosure is "to be exercised after a breach of the obligation for which that mortgage or transfer is a security." If no dishonor of the note has occurred then there has not yet been such a breach, and the California statute would not permit foreclosure. The obligation in the statute is either the obligation of the maker of the promissory note (UCC

§3-412), which obligation only runs to a PETE, or the mortgage obligation which is suspended as a cause of action per §3-310 until dishonor of the note in the hands of the PETE. Either way there is no "breach of the obligation for which the mortgage or transfer is a security" without the original promissory note being involved.[46]

Arizona has a similar dismal history with this issue, where once again some federal courts have misconstrued Arizona's foreclosure statute so as to permit foreclosure without production of the promissory note.[47] The Arizona Supreme Court has recently adopted this line of reasoning. In the *Hogan v. Washington Mutual Bank*, 277 P.3d. 781 (Ariz. 2012), the Arizona Supreme Court held that the Arizona statute allowing non-judicial foreclosure of a deed of trust does not require the foreclosing entity to "show the note." The decision contains one mistake after another in the court's reading of the Uniform Commercial Code. The court separates the note from the mortgage, in violation of the "security follows the debt" rules carefully codified in Article 9, and then casually states that the Uniform Commercial Code does not apply to real property liens. The latter statement is just plain wrong. Article 3 of the Code on Negotiable Instruments applies to all notes, including those generated by the creation of a mortgage lien,[48] and Article 9 then applies the "security follows the debt" rules to such notes.[49] The Arizona Supreme Court pays no attention at all to the merger rule of §3-310, which would prevent any foreclosure on the mortgage debt until the note itself has been dishonored. The court offered a policy reason for its decision: "Requiring the beneficiary to prove ownership of a note to defaulting trustors before instituting non-judicial foreclosure proceedings might again make the "mortgage foreclosure process ... time-consuming and expensive," . . . and re-inject litigation, with its attendant cost and delay, into the process." That may be true, but it does not justify ignoring statutes enacted by the Arizona legislature that clearly call for a different result. Arizona Revised Statutes §33-807 permits a foreclosure sale "after a breach or default in performance of the contract or contracts, for which the trust property is conveyed as security, or a breach or default of the trust deed." As above, no such breach or default can exist until there is a failure to pay the promissory note in the hands of a PETE.[50]

How To Resolve These Matters

There are substantial equities in favor of the foreclosing party, and judges should work hard to preserve these equities. The debtor did take out the mortgage and sign the promissory note promising to pay off the mortgage amount, and, on failing to do so, must surrender the real property that is the security for this debt. Further, the foreclosing entity has paid good money for the right to foreclose, and this investment must be protected. The bank that is foreclosing may protest that if some technicality (i.e., the rules that are explained in this article) forbids foreclosure the homeowner might escape from having to pay anyone the mortgage debt, but still retain possession of the mortgaged property.

Of course these equities presume that the foreclosing entity really is the owner of the debt and can prove it according the standard rules of law,

and that the debt truly is in default. At the symposium presentations that resulted in this issue of the law review, one of the attorneys in the audience came to the microphone with a horror story about a client who had missed some payments but then, faced with foreclosure, worked out a repayment agreement with the current holder of the mortgage, never missed a payment, but was considerably surprised one day to have the doorbell ring and be faced with the "new owner" of his property which had been purchased at a California non-judicial sale of which the current owner was unaware. Many homeowners are caught in a trap whereby one part of the foreclosing bank is engaged in working out an agreement to save the property, while the other is sending out a foreclosure notice. Basic rules of contract and estoppel can lead a court of equity to refuse foreclosure in these situations.[51]

If a court rules that the bank can't foreclose, does that mean that the home owner gets away without paying the mortgage? Not quite. The mortgage deed is still filed in the real property records, and unless it's removed the property can *never* be sold, not even if the home owner dies and the heirs want to dump it. The home remains collateral for the debt, and that won't go away until the mortgagee agrees to remove it from the records. Thus the homeowner has an interest in working things out with the entity threatening to foreclose.

If the foreclosing bank cannot prove valid ownership and hence is forbidden the possibility of foreclosure, the only remedy left for the bank is to pass liability back to the entity from which the obligation was purchased, and so on until we find a person who really is entitled to enforce. The common law creates a warranty from the assignor to the assignee that the obligation assigned exists and is subject to no defenses, [52] and this is the remedy the disappointed assignee should seek if it is not a PETE. If the chain of transactions cannot be undone (the records are lost, a major player has ceased to exist, or whatever), well, life is hard and sometimes you purchase a worthless asset. You certainly shouldn't buy something unless your seller can prove good title.

If the foreclosing bank wins the lawsuit but doesn't have proper documentation, any *subsequent* sale of the property foreclosed upon is going to be problematic and risky for the new purchaser (and this should be pointed out to judges before they rule). Issues like this present new difficulties. Consider title insurance companies. At all real estate closings the buyer has to pay for such insurance, but it's not common for title insurance companies to actually have to pay off; the title normally is flawless. But if judges start invalidating foreclosures and ruling that the house belongs to the original owner, buyers of foreclosure homes are going to be filing claims. Title insurance companies might have to pay out millions, leading them to raise rates, cut down policies, layoff employees, or declare bankruptcy. Certainly no respectable title insurance company is going to issue a policy for the resale of a foreclosed-upon home where there are legal issues about missing notes or improper documentation in the foreclosure proceeding, and, without title insurance available, what will the foreclosing bank do with an unsalable property?[53]

If the client wants to pay the mortgage debt, but is leery of paying the wrong entity, he/she should pay the debt into an escrow account and advise the putative assignee of the mortgage that the amount deposited

will be available on production of the promissory note or the signing of an indemnity agreement. Such a deposit would be the equivalent of tender of the amount due, so as to avoid late charges. The amount could also be paid into court in an interpleader action in appropriate circumstances.

The true solution to the mortgage mess that results from missing notes, inadequate documentation of mortgage assignment, confusion at the bank, and robo-signing of required affidavits, is for the foreclosing entity to make sure it has the proper documentation *before* it files the foreclosure, and to have contacted the debtor before foreclosing to see if (a) the debt is really in default, (b) there are no defenses to foreclosure (such as an existing workout arrangement), (c) the debtor can pay the debt without the necessity of foreclosure), or (d) some option to foreclosing exists. The banks are overwhelmed by the ownership of worthless homes on which they have foreclosed. In truth it would be smarter for the foreclosing banks to put their money into creating a negotiation program that takes troubled transactions and works them out by mutual agreement with the home owner, so that the title can be cleared and the property resold. These negotiations might include a voluntary waiver of the home owner's rights in return for forgiveness of the mortgage debt, or renegotiated payments on the mortgage, or whatever the parties can construct as a compromise. With all of the above defenses on the table, the home owner has some leverage to make the bank listen to his/her concerns and not just steamroller over them in the rush to foreclose. Judges faced with foreclosing entities that do not have the original promissory note should at least use the mechanism for lost notes described above and require the foreclosing entity to post bond protecting the homeowner form later claimants to the property who do possess the original note.

There are tons of unintended consequences from the current procedures. If you are a respectable bank official caught up in all this, how many new mortgages would you be willing to make to people who are not already well off? Then, without readily available mortgage loans, what will happen to the whole idea of home ownership? Or the ability to move to take a job in another town? Or the economy? Or the American Dream of a better life than one’s parents? If you are a consumer considering buying a new home, think again. Doing so can be asking for trouble even if you can afford to pay cash—will the neighborhood self-destruct? Could you sell it if you want to? How good is the title on this new property?

For troublesome transactions (the paperwork is a mess, the note is missing, the home owner alleges he/she has defenses) it’s time to sit everybody around a table and work out a satisfactory solution through negotiation. Judges might well order this. All involved need a resolution that will end in a resumption of the payments, or an agreed-upon foreclosure with indemnities to the home owner against future troubles (say from the real owner of the original promissory note), or some contractual arrangement that ends up with a salable property in the local community.

Conclusion

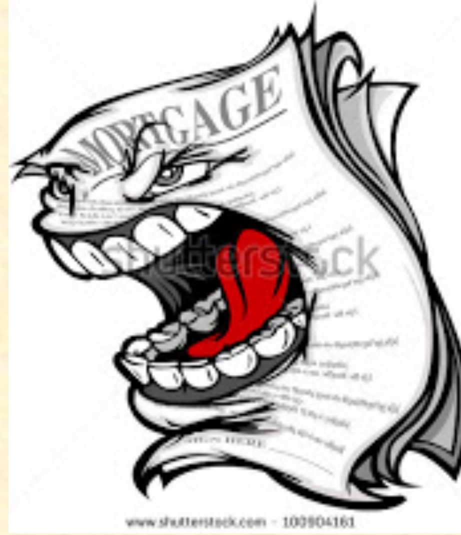
This article has not gotten into a host of other issues affecting mortgage foreclosures, and those matters must be dealt with elsewhere. Here is a brief list of some legal difficulties: proof the assignment of the

mortgage,[54] robo-signing and foreclosure mills,[55] proof of business records establishing the right to foreclose,[56] and fraud.[57] The footnotes give some guidance to these difficulties, which have little or nothing to do with the Uniform Commercial Code.

The truth is that the current lending mess was sloppily run for years, with greed as the fuel, and no one paid any attention to details, and increasingly complex transactions led to the loss of a paper trail. But now the orgy has ended with major hangovers for the participants who paid no attention to the basic rules. The borrowers (who also have had to battle this problem at their end, when they can't figure out who is the proper party to negotiate with over repayment issues or settlement discussions), have done nothing wrong. They do owe the debt and the house is still the collateral, so they are not off the hook at all. But the courts won't let someone foreclose just because that someone thinks they are the right entity to do it, or *really, really, really* wants to foreclose. They have to prove they are a PETE by clear evidence. Wishing that they had that evidence is not enough. Indeed, as discussed above, if the buyer pays the wrong person, he/she still owes the debt.[58]

The UCC rules are not just fusty technicalities. They reflect common sense: you can't sue or foreclose unless you can prove you are entitled to sue or foreclose. What could be more basic in our law than that idea? I tell the Legal Aid lawyers who call me that if the trial judge hates the UCC and wants to duck all of this, remind him/her that it is the statutory law of this jurisdiction (indeed, all jurisdictions in the USA have identical UCC provisions to those quoted above). And, as explained above, the common law is no different from the UCC, so dodging the UCC does not help the plaintiff trying to foreclose without having possession of the note.

When the consumer agrees to buys a new home and goes to the closing, the lending bank overwhelms the new homeowner with legal paper, after legal paper, after legal paper which the borrower must sign or the loan will not go through. At this end of the transaction the bank is very careful to make sure everything is in apple pie order and that every "i" is dotted and every "t" is crossed. Call me a madcap fool if you will, but I think that at the other end of the transaction when banks are attempting to take someone's home, they ought to be required to follow the law then too. As the Third Circuit has commented in a case where the foreclosing bank could not produce the necessary proof, "Financial institutions, noted for insisting on their customers' compliance with numerous ritualistic formalities, are not sympathetic petitioners in urging relaxation of an elementary business practice."[59]



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[1] Article 3 of the Uniform Commercial Code has been adopted in all jurisdictions in the United States. New York has adopted only the original version of Article 3, but in that state, the relevant citations and the law remain the same with only minor variations in language.

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[3] The "mort" portion of the word mortgage comes from Latin for "death" (as in "mortician," "morgue," "mortal," etc.) because on the payment of the promissory note debt, the mortgage deed dies.

[4] RealtyTrac Staff, *Record 2.9 Million U.S. Properties Receive Foreclosure Filings in 2010 Despite 30-Month Low in December*, http://www.realtytrac.com/content/press-releases/record-29-million-us-properties-receive-foreclosure-filings-in-2010-despite-30-month-low-in-december-6309 (last updated Jan. 12, 2011). This immediately followed late 2009, where the third quarter saw 937,840 homes receive some sort of foreclosure letter, which at that point was "'the worst three months of all time.'" Les Christie, *Foreclosures: 'Worst three months of all time'*, http://money.cnn.com/2009/10/15/real_estate/foreclosure_crisis_deepens/ (last updated Oct. 15, 2009).

[5] *See HSBC Bank USA, N.A. v. Charlevagne*, 872 N.Y.S.2d 691 (table), 2008 WL 2954767 (N.Y. Sup. Ct. 2008) and *HSBC Bank USA, Nat. Assn. v. Antrobus*, 872 N.Y.S.2d 691 (table), 2008 WL 2928553 (N.Y. Sup. Ct. 2008) (Describing "possible incestuous relationship" between HSBC Bank, Ocwen Loan Servicing, Delta Funding Corporation, and Mortgage Electronic Registration Systems, Inc., due to the fact that the entities all share the same office space at 1661 Worthington Road, Suite 100, West Palm Beach, Florida. HSBC also supplied affidavits in support of foreclosure from individuals who claimed simultaneously to be officers of more than one of these corporations.).

[6] Things would have gone better for MERS if it had done its job more thoroughly, but in the speed and volume that was necessitated by the boom/bust economy, it became sloppy, its records often confused, and eventually courts started blowing the whistle. There are decisions reaching all possible results, but recently many courts (and particularly bankruptcy ones) are questioning whether MERS has standing to foreclose on any of the mortgages it holds. The Supreme Court of Arkansas has even ruled that since it makes no loans MERS cannot be the mortgagee on a deed filed in the Arkansas property records; *see Mortg. Elec. Registration Sys., Inc. v. S.W. Homes of Ark.*, 2009 Ark. 152 (2009). In one Utah trial court decision, reported in news articles, a judge ruled that MERS couldn't prove up its records and granted the home owner's petition to quiet title and remove the MERS deed from the records. No one could find the promissory note (on which further liability depends), so that particular home owner is a major beneficiary of the MERS mess. MERS has been under much greater attacks lately. News articles have reported that in early February, 2012, the New York Attorney General filed suit against the major banks charging that their use of MERS was an "end run" around the property recording system, which was designed so that the identity of the true mortgagee would be a public record. In 2012, Merscorp, Inc., which operates MERS, was sued by the Delaware Attorney General who alleged it initiated foreclosures for which "the authority has not been fully determined and may not be legitimate."

[7] Uniform Commercial Code §3-412. Obligation of Issuer of Note or Cashier's Check. ("The issuer of a note . . . is obliged to pay the instrument (i) according to its terms at the time it was issued . . . . The obligation is owed to a *person entitled to enforce* the instrument . . . . ") (emphasis added).

[8] Uniform Commercial Code §3-418(d) is also referenced in the PETE definition but it has to do with recreating the rights of indorsers in instrument paid by mistake, which is not something that arises in mortgage foreclosure cases.

[9] *See e.g. Riggs v. Aurora Loan Services*, 36 So. 3d 932 (Fla. 4th Dist. App. 2010).

[10] *See* Uniform Commercial Code § 3-204, Official Comment 1.

[11] L.S. Presnell, *Country Banking In The Industrial Revolution* 172-73 (Oxford 1956) (discussed in J. Rogers, *The End Of Negotiable Instruments: Bringing Payment Systems Law Out of the Past* 32 (Oxford 2011)).

[12] *See Adams v. Madison Realty & Dev., Inc.*, 853 F.2d 163, 167 (3d Cir. 1988) (Mere folding of the alleged allonge around the note insufficient—$19.5 million lost because of this legal error!); *HSBC Bank USA v. Thompson*, 940 N.E.2d 986 (Ohio App. 2nd Dist. 2011) (unattached pages cannot be an allonge); *In re Weisband*, 427 B.R. 13, 20 (Bankr. D. Ariz. 2010) (same).

[13] I know of no paper clip cases, but it does seem unlikely a court would hold that such a clip would "firmly affix" one piece of paper to another. As for staples, *see Lamson v. Commercial Credit Corp.*, 187 Colo. 382 (1975) ("Stapling is the modern equivalent of gluing or pasting. Certainly as a physical matter it is just as easy to cut by scissors a document pasted or glued to another as it is to detach the two by un-stapling."); *accord S.W. Res. Corp. v. Watson*, 964 S.W.2d 262, 263 (Tex. 1997). I tell my law students that they'll know they've hit the big time if

they're in the Colorado Supreme Court arguing about whether a staple firmly affixes an allonge to the original instrument. One court has also blessed the use of an Acco fastener; *see Fed. Home Loan Mortg. Corp. v. Madison*, 2011 WL 2690617 (D. Ariz. July 12, 2011).

[14] The leading (misleading?) case is *Anderson v. Burson*, 424 Md. 232 (2011).

[15] Uniform Commercial Code § 3-201 (Thieves can qualify as a "holder" of a negotiable instrument and thereafter validly negotiate same to another); *See also* Uniform Commercial Code § 3-201, Official Comment 1 (giving an example involving a thief).

[16] *See In re Veal*, 450 B.R. 897 (9th Cir. BAP 2011); *Anderson v. Burson*, 424 Md. 232 (2011); *Leyva v. National Default Servicing Corp.*, 255 P.3d 1275 (Nev. 2011); *In re Kang Jin Hwang*, 396 B.R. 757 (Bankr. C.D. Cal. 2008).

[17] Uniform Commercial Code §3-309. The 2002 version has slightly different wording of (a):

(a) A person not in possession of an instrument is entitled to enforce the instrument if:

(1) the person seeking to enforce the instrument:

(A) was entitled to enforce the instrument when loss of possession occurred; or

(B) has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;

(2) the loss of possession was not the result of a transfer by the person or a lawful seizure; and

(3) 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.

The 2002 rewrite of (a) was done to allow an *assignee* of the entity which lost the note to enforce it, a result that most courts reached even without this clarification. *See Atlantic Nat. Trust, LLC v. McNamee*, 984 So.2d 375 (Ala. 2007).

[18] *See In re Carter*, 681 S.E.2d 864 (N.C. App. 2009) (In one major misstep, a bank in Florida, in a "paper reduction effort" is reputed to have deliberately put the notes through a paper shredder after making photocopies of them! Any attorney who approved such a practice should be disbarred.).

[19] *See* Bank of New York v. Romero, 302 P.3d 1 (N.M. 2014); 255 P.3d at 1275; *In re David A. Simpson, P.C.*, 711 S.E.2d 165 (N.C.App. 2011); *Schwartzwald*, 194 Ohio App. 3d at 644; *U.S. Bank Nat. Ass'n v. Kimball*, 27 A.3d 1087 (Vt. 2011).

[20] *In re Miller*, 666 F.3d 1255 (10th Cir. 2012); Bank of America v. Kabba, 276 P.3d 1006 (Okla. 2012); 450 B.R. at 914; *In re Foreclosure Cases*, 2007 WL 3232430 (N.D.Ohio Oct. 31, 2007); *In re Vargus*, 396 B.R. 511 (Bankr. C. D. Cal.

2008); *Norwood v. Chase Home Finance LLC*, 2011 WL 197874 (W.D.Tex. Jan. 19, 2011); 194 Ohio App.3d at 644; *Manufacturers and Traders Trust Co. v. Figueroa*, 2003 WL 21007266 (Conn. Super. April 22, 2003); 711 S.E.2d at 165; 27 A.3d at 1087 ("It is neither irrational nor wasteful to expect a foreclosing party to actually be in possession of its claimed interest in the note, and to have the proper supporting documentation in hand when filing suit.").

[21] 666 F.3d at 1255; 450 B.R. at 914; 2007 WL 3232430; *In re Sheridan*, 2009 WL 631355 (Bankr. D. Idaho Mar. 12, 2009) (a moving party which has the burden of proof must make a showing that it is actually a party in interest to the proceedings); *In re Wilhelm*, 407 B.R. 392 (Bankr. D. Idaho 2009); *In re Weisband*, 427 B.R. 13 (Bankr. D.Ariz. 2010); *In re Jacobson,* 402 B.R. 354 (Bankr. W.D.Wash. 2009) (where movants attempted to show that they were a party in interest with a deed rather than a note, but the court held that "[h]aving an assignment of the deed is not sufficient, because the security follows the obligation secured, rather than the other way around." *Id.* at 367 (citations omitted)). *accord* I.C. § 45–911
("The assignment of a debt secured by mortgage carries with it the security.")
In 2012, the Ohio Supreme Court held that a party who does not possess a properly indorsed promissory note at the time the foreclosure proceeding is begun lacks standing, and is not the real party in interest, and that these defects cannot be cured by transfers and indorsements made *after* the complaint has been filed; see Federal Home Loan Mortg. Corp. v. Schwartzwald,
134 Ohio St.3d 13, 979 N.E.2d 1214 (2012). Although some courts have been in confusion as to this, both the Official Comment to §3-301 and the cases make it clear that the holder of the note need not also be the owner of the underlying obligation (i.e., the mortgagee or the mortgagee's assignee); see Bank of America, N.A. v. Inda, 48 Kan.App.2d 658, 303 P.3d 696 (2013). Thus, a servicer in possession of the note, acting as an agent of the owner of the note, can qualify as a PETE and therefore prosecute the foreclosure action; see J.E. Robert Co., Inc. v. Signature Properties, LLC, 309 Conn. 307, 71 A.3d 492 (2013). See also Bank of New York v. Romero, 320 P.3d 1 (N.M. 2014); and Bank of America v. Kabba, 276 P.3d 1006 (Okla. 2012).

[22] 2007 WL 3232430 at *n. 3, 3.

[23] *See In re Veal*, 450 B.R. 897 (9th Cir. BAP 2011) (dueling creditors attempting to foreclose each held only a copy of the note, but not the original); McKay v. Capital Resources Co., 327 Ark. 737, 940 S.W.2d 869 (1997); but see *In re Adams*, 204 N.C. App. 318 (2010) (copy of note sufficient as long as possession of the original note is alleged, but if possession challenged it must be proven, along with a valid chain of indorsements to demonstrate proper negotiation). A copy of the note is also allowed if accompanied by an affidavit attesting to possession of the original note; see F.D.I.C. v. Cashion, 720 F.3d 169 (4th Cir. 2013).

[24] *See* 255 P.3d at 1275; 204 N.C. App. at 318; *HSBC Bank USA v. Thompson*, 2010 WL 3451130 (Ohio App. Sept. 3, 2012).

[25] *See* Neil Cohen, *The Calamitous Law of Notes*, 68 Ohio St. L.J. 161 (2007); Ronald J. Mann, *Searching for Negotiability in Payment and Credit Systems*, 44 UCLA L. Rev. 951, 962-985 (1997).

[26] Uniform Commercial Code §§3-104(a)(3) and §3-106.

[27] *Overton v. Tyler*, 3 Pa. 346, 347 (1846).

[28] *See also* Uniform Commercial Code §3-106.

[29] *See HSBC Bank USA, Nat. Ass'n v. Gouda*, 2010 WL 5128666 (N.J.Super. App. Div. Dec. 17, 2010); *In re Edwards*, 2011 WL 6754073 (Bankr.. E.D.Wis. Dec. 23, 2011).

[30] 450 B.R. at 897; *see also* Fred H. Miller & Alvin C. Harrell, *The Law of Modern Payment Systems* § 1.03(1)(b) (2003).

[31] *See* Restatement (Second) of Contracts §336 (1981) (Defenses Against an Assignee).

[32] Per Uniform Commerical Code §3-305, a holder in due course is free of "person" defenses, and only subject to the short list of "real" ones, which do not include common law fraud.

[33] Michael W. Hudson, The Monster: *How a Gang of Predatory Lenders and Wall Street Bankers Fleeced America and Spawned a Global Crisis* (Times Books 2012). (This work details how these mortgages came to be).

[34] The most egregious case is *Brown v. Carlson*, 26 Mass.L.Rptr. 61 (2009), in which the mortgage fraud was perpetrated on "a retired crossing guard, widowed and in her sixties, with an eighth grade education," who lost her home to a holder in due course. See also *In re Carmichael*, 443 B.R. 698 (Bankr. E.D.Pa. 2011); *In re Dixon-Ford*, 76 UCC Rep.Serv.2d 247 (Wis. Lab. Ind. Rev. Com. Dec. 21, 2011).

[35] *See* Restatement (Third) of Property: Mortgages §5.4. For a historical discussion of the reification of the underlying obligation in the physical form of a bill or note, *see* James Steven Rogers, *The End of Negotiable Instruments: Bringing Payment Systems Law Out of the Past* 24 – 39 (Oxford University Press 2011).

[36] *In re Williams*, 395 B.R. 33, 47 (Bankr. S.D. Ohio 2008); *Manufacturers and Traders Trust Co. v. Figueroa*, 2003 WL 21007266 at *2 (Conn. Super. Apr. 22, 2003).

[37] "For nearly a century, Ohio courts have held that whenever a promissory note is secured by a mortgage, the note constitutes the evidence of the debt and the mortgage is a mere incident to the obligation." *U.S. Bank Natl. Assn. v. Marcino*, 181 Ohio App. 3d 328, 337 (7th Dist. 2009) (citing *Edgar v. Haines,* 109 Ohio St. 159, 164 (1923).) "Therefore, the negotiation of a note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered." *Marcino,*181 Ohio App. 3d at 337. See also Bank of New York v. Romero, 302 P.3d 1 (N.M. 2014).

[38] 83 U.S. 271, 274 (1872).

[39] *Deutsche Bank Nat. Trust. Co. v. Byrams*, 275 P.3d 129 (Okla.

2012); Bank of America v. Kabba, 276 P.3d 1006 (Okla. 2012).

[40] Various provisions in Article 9, see §§9-203(b), 9-309(3), provide that the creation of a security interest (that is, ownership rights) in a promissory note that is being sold (as opposed to being used as collateral) does not require the buyer of the note to take possession of the note if the sale is made pursuant to an agreement reflected in a writing or other record. Some lawyers seem to think that this gets rid of the need to possess the note for foreclosure purposes. It doesn't, and confuses apples with oranges. The Article 9 rules have nothing to do with the homeowner who is the maker of the promissory note, but apply only to regulate rights between later parties claiming ownership in the note as it passes from one hand to another. The Article 9 rules were written so that the note can be sold by contracts without being physically moved around (thus allowing the note to be warehoused somewhere). That has nothing to do with the Article 3 rules discussed in the body of this law review article. For a complete discussion of these issues, see the UCC's Permanent Editorial Board's official explanation: http://www.ali.org/00021333/PEB%20Report%20-%20November%202011.pdf.

[41] *U.S. Bank Nat. Assn. v. Ibanez*, 458 Mass. 637 (2011); *see also* http://www.businessweek.com/news/2011-01-08/massachusetts-top-court-hands-foreclosure-loss-to-u-s-bancorp.html. (last accessed Jan. 8, 2011)

[42] The Code's dishonor rules do not create a right of physical "presentment" of the note, but §3-501 does create such a right if the maker so demands. Section 3-501(a) defines "presentment" as a demand to pay the instrument made by a "person entitled to enforce an instrument" [the PETE], and under subsection (b)(2) adds that "Upon demand of the person to whom presentment is made, the person making presentment must (1) exhibit the instrument" [emphasis added]. Most promissory note have a standard clause *waiving* the right of presentment, and that would be effective to obviate the effect of a demand under §3-501—which is why this discussion of "presentment" is relegated to a mere footnote.

[43] If the foreclosing bank says that the original promissory note had a clause waiving the right of presentment, I would demand to see the note as proof of that assertion. If the foreclosing entity cannot produce the original promissory note, how do we know what it says? Even if the court is convinced that the right of presentment was waived, that does not have anything to do with the other requirement of *dishonor* of the note in the hands of a *PETE.* Until such a dishonor occurs per §3-502, the underlying obligation is still suspended as an independent cause of action.

[44] *See Tina v. Countrywide Home Loans, Inc.*, 2008 WL 4790906 (S.D. Cal. Oct. 30, 2008); *Castaneda v. Saxon Mortg. Serv., Inc.*, 687 F.Supp.2d 1191 (E.D. Cal. 2009). Interestingly, I can find no state cases from California agreeing with this federal analysis of the California foreclosure statute.

[45] *See e.g., In re Doble*, 2011 WL 1465559 (Bankr. S.D. Cal. Apr. 14, 2011).

[46] In any event, the California statutes do not allow the wrong party to foreclose, so someone attempting to do so must establish PETE status (thus having standing to sue), and that, as we've seen from the discussion of the merger rule, requires dishonor of the note. There are California bankruptcy decisions so saying; *See Id.*

[47] *See, e.g., Diessner v. Mortg. Elec. Registration Sys.*, 618 F.Supp.2d 1184 (D. Ariz. 2009); *Mansour v. Cal-Western Reconveyance Corp.*, 618 F.Supp.2d 1178 (D. Ariz. 2009). Happily the more recent decision by the 9th Circuit Bankruptcy Appellate Panel gets it right in *In re Veal*, 450 B.R. 897 (Bankr. App. 9th Cir. 2011) (Arizona law does not allow foreclosure without production of the original promissory note).

[48] See, for example, Official Comment 7 to §3-605 noting that that section applies "whether the collateral is personalty or realty, whenever the obligation is in the form of a negotiable instrument."

[49] See §9-203(g).

[50] *Compare Ernestberg v. Mortg Investors Group*, 2009 WL 160241 (D. Nev. Jan. 22, 2009), *with* the relevant Nevada foreclosure statute, which only allows foreclosure "after a breach of the obligation for which the transfer is security" [N.R.S. 107.080].

[51] *See PHH Mortg. Corp. v. Barker*, 190 Ohio App.3d 71 (2010).

[52] *See* Restatement (Second) of Contracts §333(b) (1981).

[53] Sometimes, faced with such ownership, the foreclosing entity will conduct the sale, but never record its deed, thus leaving the now-homeless former owner with continued liability for taxes and other major expenses. Since he/she can't afford these, the properties just deteriorate further. Urban blight is already a major problem in many communities, even upscale ones, as house after house sits abandoned, leading to dropping real estate value of others, and a vicious cycle of neighborly collapse. What do municipalities do about the resulting crime, fire hazards, disease, etc.? They can't raise taxes in today's economy. Chapter Nine of the United States Bankruptcy Code provides for municipal bankruptcies, but we never teach those rules in law school because actual cases were rare in the past.

[54] The assignment itself may have difficulties with a chain of title, and that should be investigated with vigor. The leading case requiring a clear chain of title in assignments is *U.S. Bank Nat. Assn. v. Ibanez*, 458 Mass. 637 (2011).

[55] Affidavits of those filing foreclosure actions that the debts have been reviewed and verified must, of course, be true. In the foreclosure mills these swearings are often pro forma and, due to the volume involved, frankly impossible, being done by humans acting like robots. Where this can be proven, the lawsuit should be dismissed, and, indeed, massive publicity over this practice led to the suspension of many foreclosures nationwide in 2010. Notary stamps are required on assignments in many states or the assignment is invalid, and if the evidence demonstrates the stamp was added much later, that is fraud [see http://4closurefraud.org/2010/08/04/mother-jones-andy-kroll-exclusive-fannie-and-freddies-foreclosure-barons/]. Indeed there is out and out fraud in many foreclosures as phony documents are created, signatures forged, false affidavits of lost instruments sworn to, and newly "discovered" allonges solve negotiation difficulties. If the lawsuit was filed by someone who didn't have standing and the attorney who filed it should have known that, he/she should be reported to the bar association, and the misfiling should also be called to the judge's attention as a reason to dismiss. This is also criminal conduct, of course, and should be prosecuted,

including as a defendant any attorney participating in deception of the court. Recently the Florida courts have become disgusted by improper documentation and have insisted upon it, causing major foreclosures to be abandoned and the courts to strip the properties from their mortgages (!): *See* http://www.squattable.com/news/040311/foreclosure-crisis-fed-judges-dismissing-cases-giving-homes-back-homeowners-and-boldly-a. On April 6, 2011, the Ohio Supreme Court dismissed a complaint filed by lawyers against three trial court judges who recently began requiring lawyers to personally verify the authenticity of all documents used in foreclosures. The judges have refused to grant summary or default judgments without such certification, though a trial can still go forward. The attorneys are not happy.

[56] Assignees are required to prove up the business records that are the basis of the assignment, and such evidence is an exception to the hearsay rule only where the person proffering the business records can testify to their authenticity. Assignees to whom such records are transferred in the ordinary course of business do not have the requisite personal knowledge of the records creation and preservation, and hence cannot so testify to their validity. This rule of evidence can be a major stumbling block to foreclosure actions and other collection efforts. *See* CACH, L.L.C. v. Askew, 2012 WL 135395 (Mo. 2012); *Asset Acceptance v. Lodge*, 325 S.W.3d 525 (Mo. App. E. Dist. 2010); *Chase Bank USA, N.A. v. Herskovits*, 28 Misc. 3d 1202(A) (table), 2010 WL 2598198 (N.Y. Civ. Ct. 2010); *DNS Eq. Group, Inc. v. Lavallee*, 907 N.Y.S.2d 436 (table), 2010 WL 682466 (N.Y. Dist. Ct. 2010); *Palisades Collection LLC v. Kalal*, 781 N.W.2d 503 (Wis. App. 2010); *Riddle v. Unifund CCR Partners*, 298 S.W.3d 780 (Tex.App.—El Paso 2009); *Unifund CCR Partners v. Bonfigil*, 2010 Vt. Super. LEXIS 24 (Vt. Super. Ct. May 5, 2010); *but see Simien v. Unifund CCR Partners*, 321 S.W.3d 235 (Tex. App. –Hous. [1st Dist.] 2010).

[57] Outside of the UCC, attorneys should consider filing a lawsuit charging fraud (misrepresentation of a material fact made with knowledge of its falsity or a reckless disregard of its truth, on which there was justifiable reliance causing damages) if it's indeed present and you can be proven. Fraud is the civil action for lying, an ugly thing to charge someone with, creating great headlines for the media. If fraud has been at work, well, that's good news for the plaintiff in a lawsuit. The common law maxim is that "fraud vitiates all transactions," so that nothing can hide fraud. Those guilty of fraud cannot sue on the contract, which is now void for "illegality"(as that word is used in the law of contracts: void as a matter of public policy), and punitive damages, including attorney's fees are also a possibility. Nor is unjust enrichment in favor of the evil-doer a possibility since guilty parties to an illegal contract lose all rights to sue on any theory —they are truly "outlaws" in the literal meaning of that term.

[58] Uniform Commercial Code § 3-602.

[59] 853 F.2d at 169.

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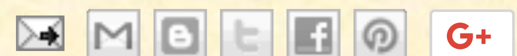
Posted by Douglas Whaley at 9:46 PM 

175 comments:

Anonymous February 15, 2013 at 3:53 AM

I appreciate they way you have outlined the way the UCC's should be read. But I feel you don't understand why the lenders must foreclose on these loans. I don't know if you ever saw the movie, "The Producers", but it illustrated quite clearly why the bank chose foreclosure over any loan mod's. The lenders securitized these loans, most likely more than once, into multiple CDOs. They do not know who the PETE is/are. When you sell more than 100% of something, and you can't pay everyone what you promise them, you tell them that the loan went bad and the holders will hopefully not ask questions, take their tax loss, and go about there business. This is way original lender or assignees can't give loan mods. They

don't own the loans and don't know who does to get permission. My foreclosure was done in the name of IndyMac Federal Bank, months after they were sold to One West Bank. All docs were robo-signed in the name of an entity that no loner existed. One West Bank, in Federal Court, said they had no claim and did not foreclosure on the property. I am still trying to figure out how there could have been a non-judicial foreclosure under these conditions.

Reply

Replies

Anonymous January 5, 2014 at 3:34 PM

Hi-I am also a holder of an Indy Mac/One West mortgage taken out in 2007 in NY. I would very much appreciate if you could give me more details about your case in particular with regard to, "One West Bank, in Federal Court, said they had no claim and did not foreclosure on the property".

bank fighter March 17, 2014 at 12:45 PM

Fighting the Foreclosure Machine is an excellent book. Chapter 11 is very specific.
Mortgage Compliance Investigators MCI is able to provide a change of title.
We are all going through all of this. I thought I had a buy down when in reality it was a subprime pick a pay. My truth in Lending was good for 52 days then all hell broke loose. No one can find my owner. Check out those helps. 9th circuit court of appeals is producing some positive homeowner outcomes. Judge pappas idaho bankruptcy and judge meyers are making banks prove ownership. Bev Beach

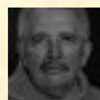
Reply

Anonymous February 19, 2013 at 9:07 AM

Can I get this article in printable format?

Reply

Replies



Douglas Whaley March 9, 2013 at 5:05 PM

Yes. It can be found at http://wsulawreview.org/DWhaley.pdf

Reply

Pennsylvania Mortgage May 22, 2013 at 6:56 AM

Nice article, thanks! I learn something new on blogs everyday and yours is stimulating and provides new ideas. Thanks and keep up the good work!

Reply

Bertha June 13, 2013 at 10:39 AM

Cool ! I like it.

Reply

Anonymous June 26, 2013 at 1:32 PM

Thank you for the article, just sent to my Lawyer to see what he think..

Reply

Rusty Payton July 15, 2013 at 7:41 PM

Prof. Whaley, so nice to stumble across your blog. You taught my commercial paper and consumer law courses at OSU Law in 1987-88. I still believe that those two courses were the most practical instruction that I had in three years at law school. I also still remember your "gall is all" speech to graduating students. I selfishly use that phrase without attribution all the time with young attorneys here in Chicago. I am sure this mortgage mess is great fodder for the likes of your analysis and sharp intellect. Never have secured transactions been such a topic of discussion. Hope all is well. Keep blogging. Rusty Payton

Reply

Mary Ella Hutchinson July 26, 2013 at 12:00 AM

Great article for a lay person to get a better understanding. It was written without all the legalese, so thank you for that. I will be reprinting it to give a copy of our Clerk of Court and others who insist that an indorsement in blank needs no proof and is much like a blank check to take someone's home. I just don't see it that way.

Reply

Anonymous July 29, 2013 at 4:35 AM

Thank you for addressing this ongoing disaster with such a wonderful article. I am working with a local Legal Aid group to help me through a foreclosure without proper "note." I will give a copy of your article to my attorney who is preparing me for the hearing. Thank you again for your work.

Reply

Joel Garcia August 5, 2013 at 6:16 PM

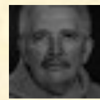
Great article.

Reply

Anonymous August 22, 2013 at 6:22 PM

Which is the greater evil? 1) mortgagors using law to force a lender to the table or for leverage in court against a lender with no standing, or 2) lenders who flaunt the law, make the law by lobbying Congress, or use fraudulent practices to force foreclosures on hapless home owners? Perhaps it is just accepted practice for banks to be sleazy, lying, and corrupt. There is a reason why bankers are hated almost as much as lawyers. I think this sums it up: the other day my credit union displayed two monitors: one boasted a whopping 1% return on IRA CDs; the other, a credit card charging between 12% and 22%.

Reply



Douglas Whaley August 22, 2013 at 11:11 PM

"Almost as much as lawyers?" That hurts!

Reply

Anonymous September 10, 2013 at 12:37 PM

Great article, very helpful. I have a question regarding the foreclosure by servicers vs. the owner of the note. You wrote: "Thus if the entity trying to foreclose cannot produce the promissory note, it cannot prove that payment was not made to the PETE, meaning that no "dishonor" of the note has occurred under 3-502, and thus the underlying mortgage obligation is still merged into the note." So for example, Wells Fargo as servicer is attempting to foreclose on a loan owned by Freddie Mac. Based on what you stated, WF can not foreclose because it was not WF that was "dishonored" via no payment, it was Freddie Mac. Wells Fargo as servicer only processes the payments as the middleman, it is Freddie Mac as the owner/investor of the loan that has the beneficial interest in the Note and thereby is the one PETE. Is this correct? Only the "injured party", the party that was to receive the payments can foreclose. A servicer cannot foreclosure because the servicer is not the PETE even if the servicer has possession of the original Note. Correct??

Reply

Replies

Anonymous October 23, 2013 at 2:05 AM

A PETE may contract with a "servicer" to collect payments and, among other things,to conduct a foreclosure in the event of default. If, as the professor posits, the PETE delivers a properly endorsed note to the servicer, the servicer becomes a PETE. Obviously, the contract between the original PETE and the servicer will require the servicer to remit the proceeds to the entity that hired it.

Reply

Anonymous September 10, 2013 at 3:56 PM

Doesn’t the language in most notes nullify the note as being a negotiable instrument? “I understand that the Lender may transfer the Note. The Lender or anyone who takes this Note by transfer and who is entitled to receive payments under this Note is called the “NoteHolder”. The note itself has qualifiers in order to be the Note Holder, there must be possession of the Note and the PETE must be entitled to receive payments. Under the language of the Note, one cannot be the Note Holder or PETE if one does not have possession of the Note. And someone with just possession of the Note but is not entitled to receive payments under the Note cannot be the Note Holder or PETE. Is this correct?

Reply

Douglas Whaley September 10, 2013 at 5:29 PM

As to negotiability of the note, maybe or maybe not. There is no way to contact that someone holding the note is not a note holder---that's like saying a man is not a man. You might contract that the note holder has not right to receive the payment of the note, but that causes all sorts of other problems, both legal and practical.

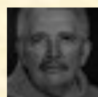
Reply

Replies

King Simon January 23, 2017 at 6:58 PM

Lets speak plain english, Did i loan you the money or did you loan i the money? Follow the money folks!

Reply



Douglas Whaley September 11, 2013 at 10:08 AM

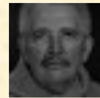
Answering the servicer question two Comments up: there is no reason why the PETE cannot employ an agent to act on its behalf and file suit. Corporations, after all, are not real people and must always act through agents. So if the owner of the promissory note (the PETE) employs a servicer as an agent to collect the debt, failure to pay the servicer is failure to pay the PETE. The servicer could file the foreclosure action only if it has possession of the note, but it could then foreclose as an agent of the real owner of the note. Whoever files the foreclosure, however, is going to have to produce the original note since the very definition of PETE is "person entitled to enforce." Further the real owner of the note must take through a valid negotiation from the original payee in order to be a PETE.

Reply

Anonymous October 9, 2013 at 10:12 PM

#14 Anderson v. Burson what did you mean by :Leading Misleading"?

Reply



Douglas Whaley October 10, 2013 at 12:21 PM

I meant that the Maryland Court of Appeals is wrong in concluding that a late indorsement is not allowed. It's a leading case making this mistake, hence misleading other courts.

Reply

jose hoyos October 27, 2013 at 9:32 PM

Great article thanks in Floria. Maybe Judges will learn something.

Reply

Richard Davet April 29, 2014 at 2:16 PM

What's going on here?

Bank of America was sued by prosecutors in 2012 for what they had called brazen mortgage fraud. A case which they lost. This past month, BofA reached a settlement with the Federal Housing Finance Agency (FHFA) for a total of $9.5 billion to Fannie Mae and Freddie Mac, See more at: http://www.loansafe.org/bank-of-america-13-billion#sthash.r6d2nw4y.dpuf

US prosecutors seek more than $13 billion from Bank of America Corp (NYSE:BAC) to resolve federal and state investigations of the lender's sale of mortgage-backed securities. – See more at: http://www.loansafe.org/bank-of-america-13-billion#sthash.b5q5QePH.dpuf

All this taking place after:

Big banks request intervention in FHFA lawsuits
More than a dozen banking giants filed a joint petition, urging a U.S. Appeals Court to step in and reverse several rulings by U.S. District Court Judge Denise Cote, who is accused of depriving the companies of evidence to defend their cases.
In 2011, the Federal Housing Finance Agency sued fifteen major banks including Bank of America (BAC), Citigroup(coffee) and JPMorgan Chase (JPM), on claims that Fannie Maeand Freddie Mac purchased $200 billion in residential mortgage-backed securities sold in 500 securitizations, representing the largest collection of litigation ever filed in the U.S., the petition noted.
The lawsuits filed accuse the banks of violating securities laws by "misleading" the government-sponsored enterprises about the quality of the home loans packaged into RMBS deals worth billions of dollars.
The companies argued that "the District Court has deprived petitioners of their rights to obtain evidence that the GSEs either knew the extent to which those mortgage originators had abandoned their guidelines or, more likely, had concluded that

originators did not materially deviate from the guidelines disclosed in petitioner's offering documents."

The banks added, "The District Court has also barred discovery on other important issues – including statute of limitations, loss causation, the materiality of any alleged defects, the adequacy of petitioners' due diligence, and justifiable reliance – on the grounds that any discovery beyond the business units that purchased the securitizations at issue is irrelevant and burdensome."

The petition explained that of the 18 lawsuits the FHFA filed, 16 were given to Cote in 2011 and since then, the banks believe they must proceed under a series of "gravely prejudicial rulings, some aimed at pressuring petitioners to settle."

Cote denied the motion to dismiss the cases and also limited depositions and document discovery as well as set an immediate trial schedule, the petition stated.

The first trial is set for Jan. 2014 against UBS AG (UBS). Trials for the other cases are scheduled for later on next year and even Jan. 2015. Additionally, most banks will be tried before different federal district court judges.

The banks also complained that Cote limited the companies to 20 depositions of the GSEs and FHFA for all lawsuits, but granted the FHFA to take more than 400 depositions.

"These one-sided rulings operate to excise from litigation what the GSEs knew about the mortgage underwriting and origination practices at the heart of FHFA's claims – and when they knew it – as well as GSE admissions about the existence and materiality of the alleged misrepresentations, the adequacy of Petitioners' due diligence, and loss causation," the banks said in court filings.

The banks added, "The rulings prejudge facts a jury should decide based on a full evidentiary record. Neither a fair and reasonable compromise of FHFA's claims nor a fair determination of them at trial can come from placing the parties on such uneven footing."

The big banks are claiming the GSEs and the FHFA knew all about their malfeasance and did nothing about it.

Could the "GSE Business Model" be nothing more than an elaborate scheme bilking the Taxpayers with the culprit players all pointing their fingers at one another?

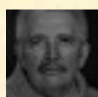
Reply

Anonymous May 7, 2014 at 2:20 PM

When one financial institution is taken over by another bank by merger, does the note need to be signed over by an endorsement or does the note just automatically transfer by the corporate merger where the prior bank as originator no longer exists and its corporation becomes inactive as a result of the merger?

Reply

▾ Replies



Douglas Whaley May 7, 2014 at 3:54 PM

It would depend on state law concerning corporate transfers, which is not my field. Sorry.

DickKohn December 13, 2016 at 12:38 AM

How would anyone know if any particular loan was part of the assets at the time of the merger?

Douglas Whaley December 13, 2016 at 10:35 AM

There is no obvious way to know that I'm aware of.

Reply

Anonymous May 7, 2014 at 2:41 PM

What about a case where the attorney suing to foreclose of behalf of the bank submits a copy of the note (which original note actually has the original loan account number on it) which in the original complaint has no allonge and no transfer endorsements exist on the note.

Then during the case the bank foreclosing transfers the note and mortgage to a new bank, then files a motion to substitute plaintiff at the last minute prior to judgment, and in that motion they provide a copy of the note again, only this time the account number on the note is erased and a copy of an allonge is submitted which the allonge shows another account number different from the original account number on the actual note?

And the allonged is signed by someone signing as VP of the original lender that became an inactive corp. over 10 years ago and the allonge is pay to the order of the new bank as trustee for a trust fund holding mortgage back securities which wasn't created until 2012 when everything was transferred to this new bank as trustee?

Does a loan have to be current and in good standing in order to be transferred and placed into a mortgage back security? Can this be done a year after the loan was alleged to have defaulted and while there is a current foreclosure action pending in the court?

It is also discovered the person signing the allonge as VP of the original lender who has not existed for over 10 years now is a "robo signer" who has signed numerous mortgage assignments signing as VP of various banks and corporations, including MERS.

I have four different mortgage assignments signed by this same person with same signature on everyone, naming them self as VP of various companies who also signed the allonge mentioned above, and found this person is employed at some other company as merely a document specialist which that company they work for is also the company showing on those mortgage assignments as the company preparing the assignments and the company the assignments were to be mailed to after the recorder recorder them.

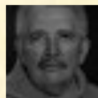
There was also a number of pages submitted as an account history which the spot showing for the account number was all blank having been erased and concealed with the exception of one page

that was missed. This is yet another account number where the documents all submitted show 3 different account numbers pertaining to the same note.

The new servicer for the new bank as trustee also fabricated mortgage assignments showing this company as being servicer for two prior banks that never filed any mortgage assignments where this new servicer represents themselves as the servicer for those banks as attorney in fact when this company was never the servicer for those two prior banks and is just the servicer for the new bank as trustee that was assigned everything 6 months after the foreclose case was filed.

Reply

Replies



Douglas Whaley May 7, 2014 at 3:53 PM

Banks that engage in fraud or shoddy practices should be called to the attention of the judge, and it should be pointed out to this judge that the banks are planning on using his/her court to aid in their outrageous conduct as they attempt to take your home.

Anonymous May 7, 2014 at 6:48 PM

A full blown notice of felony outlining all the illegal acts with all the documents submitted by plaintiff as the evidence of the fraud was handed to the judge and the judge said there is nothing he can do about that. That that is something you would need to take to the state attorney. The states attorney office said you cannot submit and report a fraud directly to them. They said you have to go to the police to report it and they have to fill out a police report and submit it to the states attorney and then they would decide whether to do anything or not. It's a complete joke!

The judge was reminded under federal law anyone having knowledge of a commission of a felony committed is required to report it to a judge. He still ignored it.

Anonymous May 7, 2014 at 6:52 PM

Would this type of language make a note negotiable to where it can just be endorsed over without actual assignment?

Note has lender name and also has actual account number on it.

It says:

"I", "me", and "my" refer to the Borrower(s) and Co-borrower(s) named above. "You" and "your" refer to the lender named above.

Then it says:

REPAYMENT

I promise to pay you at your office, the principal balance together with interest figured at the Agreed Rate of Interest checked below until fully paid.

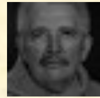
You meaning name of that lender to be paid at its office.

Can this type of note just be transferred by any endorsement or would this require an actual assignment in order to transfer it?

Anonymous September 24, 2014 at 2:01 PM

zadrozny v BONY/Mellon ninth appeals court puts your argument on its head. Az Supreme Court has stated no duty to "Show the Note" on a non-judicial foreclosure.

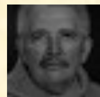
Reply



Douglas Whaley May 7, 2014 at 3:49 PM

This comment has been removed by the author.

Reply



Douglas Whaley May 7, 2014 at 8:22 PM

Replying to the last two Comments.

First: if the judge knows that fraud has been committed in creating the document presented to the court, he/she should not allow those documents to control the outcome of the case. Doing so is grounds for appeal. Have your attorney point that out to the judge.

Second: The valid negotiation of a note is an assignment of the mortgage. The mortgage follows the note, so that any transfer of the note automatically transfers (assigns) the mortgage along with it.

Reply

Anonymous May 10, 2014 at 3:24 AM

On the part pertaining to the "security follows the debt" I see a problem with that logic in cases where a Trust Deed is used instead of the typical mortgage.

Here is what a federal judge ruled regarding the note and the trust deed:

"The Loan Agreement is merely the note secured by the Trust Deed. Because this action is one seeking foreclosure on the mortgage represented by the Trust Deed, and not merely one suing upon the note, the fact that Associates Finance, Inc. is the lender under the Loan Agreement is not dispositive. Rather, this Court must look to the terms of the Trust Deed to determine who is the real party in interest."

If the lender is name on the note and named as beneficiary in the Trust Deed, then how can a lender just sign over the note with a Pay to the Order of XYZ Bank, without also assigning over the beneficial interest in the Trust Deed?

If only the note is signed over and the original Trustee and Beneficiary remain with the Trust Deed, how can the new holder have any right to the trust in which they are not a beneficiary of?

It would seem by separating the two in this manner would cause the note itself to become unsecured leaving the new holder of only the note with just the note itself to sue on.

The judge in that case also ruled the Trustee is a indispensable party and the Trustee ALONE is the only one that can be named as plaintiff suing to foreclose (unless the Trustee is not able to perform to protect the beneficiary, which then the beneficiary could sue)

From the judges ruling:

II. The Trustee Is an Indispensable Party

Illinois law is clear that a trustee is an indispensable party to an action to foreclose a trust deed. See 27 III. Law & Prac. Mortgages § 365 (2002) ("As a general rule, the trustee is a necessary and proper party to an action to foreclose a trust deed."); 27 III. Law & Prac. Mortgages § 366 ("Since trustee and cestui que trust really represent but one interest and trustee is holder of legal interest, trustee alone should be made party to foreclosure action .... "); Hickey v. Union Nat'l Bank & Trust Co., 547 N.E.2d 4, 6 (III. App. Ct. 1989) ("The beneficiary of a land trust is not a necessary party in a foreclosure proceeding, unless the trustee cannot fully protect his interests.").

Federal courts have recognized the general rule that a trustee is an indispensable party to litigation involving the validity of the trust. Hanson v. Denckla. 357 U.S. 235. 245 (1958); see 59A C.J .S. Mortgages § 718 (2002). Whether plaintiff or defendant. the trustee alone is the real party in interest. because she represents the interests of the beneficiary. See Bergkamp v. The New York Guardian Mortgagee Corp., 667 F. Supp. 719. 724 (D. Mont. 1987) (citing 3A J. Moore. Moore's Federal Practice ~ 19.08 at 19-175). Therefore. it is this Court's determination that the Trustee is a necessary and indispensable party to this action under Federal Rule of Civil Procedure 19.

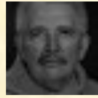
As discussed under subheading II above, the fact that Associates Finance, Inc. is the beneficiary of the trust proves nothing, for it is the trustee and not the beneficiary who holds the legal interest in the real estate. 27 III. Law & Prac. Mortgages § 366.

According to this federal judge, the court must look to the terms of the Trust Deed to determine who the real party in interest is. This would eliminate the holder of the note who under a Trust Deed would be the beneficiary.

It would appear to me that the note in this type of case could not be merely transferred just by endorsement, but would have to actually be assigned along with having been assigned the Trust Deed to have the beneficial interest in the security securing the loan agreement.

Reply

Replies



Douglas Whaley May 10, 2014 at 1:58 PM

I am not an expert on Illinois law, but the judge and the courts cited appear to be ignoring the Uniform Commercial Code, a statute in effect in all states. Section 3-301 and its Official Comment make it clear that the PETE need not be the owner of the note in order to sue to enforce it. It would be interesting to see an Illinois court that actually discusses this issue.

Reply

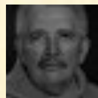
Anonymous May 10, 2014 at 3:37 AM

"Sometimes, faced with such ownership, the foreclosing entity will conduct the sale, but never record its deed, thus leaving the now-homeless former owner with continued liability for taxes and other major expenses. Since he/she can't afford these, the properties just deteriorate further."

If this is the case then why couldn't the foreclosed homeowner just record a quit claim deed to the foreclosing lender? Wouldn't that put the liability on the lender to maintain the property?

Reply

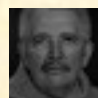
Replies



Douglas Whaley May 10, 2014 at 1:56 PM

I have no idea what would be the legal effect of a quit claim deed filed in the real prorperty records. That would likely vary from state to state, but it's an interesting tactic. Ask a local lawyer about it.

Reply



Douglas Whaley May 10, 2014 at 1:54 PM

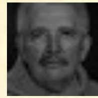
This comment has been removed by the author.

Reply

Anonymous May 12, 2014 at 12:08 PM

So does UCC supersede State statute if a statute provides a specified requirement that may contradict a certain part in the UCC?

Reply



Douglas Whaley May 12, 2014 at 3:11 PM

The UCC itself is a state statute. If a state legislature enacts two statutes that contradict each other (this does happen) the general rule of interpretation is "the more specific controls the general." This means if one statute specifically addresses a particular situation and the other only has general application to it, the first statute will prevail.

Reply

legalwhizzard May 29, 2014 at 10:36 AM

Well done article Professor. Let me know if you run across a debtor in Maryland or DC who has not already signed a bunch of new documents as part of attempts to modify his/her mortgage. I'd love to find the right client with a lost note, and no post-hoc written "reaffirmations" of any sort as to the terms and conditions of the original note to take up on appeal here.

Lawrence Holzman
The Holzman Law Firm, LLC
www.theholzmanlawfirm.com
lholzman@theholzmanlawfirm.com

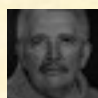
Reply

Smileygirlnow May 29, 2014 at 9:46 PM

I am not aware that you have read this article and would appreciate your comments on this article written by the Boston College Law Review (p.s. I love your blog)....
http://bclawreview.org/files/2013/03/08_Cifrino.pdf

NOW UCC ME, NOW YOU DON'T:
THE MASSACHUSETTS SUPREME JUDICIAL
COURT IGNORES THE UCC IN REQUIRING
UNITY OF NOTE AND MORTGAGE FOR
FORECLOSURE IN
EATON v. FANNIE MAE

Reply



Douglas Whaley May 30, 2014 at 12:23 PM

I had not seen the article before, but think it is splendid. Here is the full citation to the article: Christopher Cifrino, Comment, Now

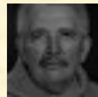
UCC Me, Now You Don't: The Massachusetts Supreme Judicial Court Ignores the UCC in Requiring Unity of Note and Mortgage for Foreclosure in Eaton v. Fannie Mae, 54 B.C. L. Rev. E. Supp. 99 (2013), http://lawdigitalcommons.bc.edu/bclr/vol54/iss6/9.

Reply

Smileygirlnow June 2, 2014 at 10:08 AM

Splendid how so? Can it help homeowners such as myself in which Eaton was not helpful because my foreclosure was pre Easton? Thank you.

Reply



Douglas Whaley June 2, 2014 at 11:22 AM

You can still argue the Uniform Commercial Code provisions which reach the same result as Eaton: foreclosure is forbidden unless the entity foreclosing has the original promissory note, properly indorsed.

Reply

Anonymous October 24, 2014 at 5:14 AM

There is a remedy for judicial misconduct. Why corrupt judges are not pursued as a matter of law by these so called "bar approved" legal experts is beyond me . The presumption of immunity from all acts are ignorant in law.

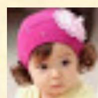
A Judges claim of mistake in depriving homeowners due process protection under the very basics of law itself, is either ignoring law or ignorant of it. Only 1 has no excuse.

Reply

Anonymous October 24, 2014 at 5:15 AM

Neither is excusable.

Reply



Ellen October 31, 2014 at 7:44 AM

Hi, nice post. Well what can I say is that these is an interesting and very informative topic. Thanks for sharing your ideas.New Jersey Lawyer

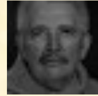
Reply

Anonymous November 8, 2014 at 11:45 PM

On the mortgage document the address is correct.
The description is incorrect such as lot 356 but it should be lot 365.
The HELC is open and the bank went bankrupt.

So now what?

Reply



Douglas Whaley November 9, 2014 at 10:51 AM

I don't understand the question, but in any event I cannot give specific legal advice. Talk to your lawyer.

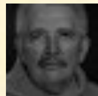
Reply

Anonymous November 30, 2014 at 10:10 AM

Hello Professor Whaley - A highly adversarial party went to my longtime bank and bought my three mortgage notes. A corporation other than the buyer paid the bank. The new "assignee" of the notes then foreclosed against my home but the court stopped the sheriff's sale because that same party owed me three times the combined amount of the notes that was due to be paid 3 months later. They then dummied up a second corporation, assigned the notes and foreclosed again to defraud the court and myself. The new "corp" was owned by a sibling of the owner of the first corp. I had to file bankruptcy to stop the sale. The sibling corp did not pay for the notes. The original notes disappeared in the 4th quarter of 2008 and they proceeded (in Tennessee) w/o the originals. I think they sold the originals through the TARP act and double dipped by taking money by force from what they owed me. Plus they charged me $115 "attorney's fees". Thoughts would be greatly appreciated! Please reply to Show me the notes.

Reply

Replies



Douglas Whaley November 30, 2014 at 10:55 AM

You need an attorney. And the state's Attorney General's office should be asked to investigate.

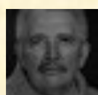
Reply

Anonymous November 30, 2014 at 10:12 AM

p.s. The presiding court has "authenticated" the poor note copies they used to foreclose AND the notes lack ink endorsement or endorsement by affixed allonges!

Reply

Replies



Douglas Whaley November 30, 2014 at 10:56 AM

If courts won't follow the law, all you can do is appeal.

Reply

Anonymous November 30, 2014 at 11:48 AM

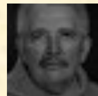
Thanks for the quick reply. If I could ask, what are the obvious defenses against enforcement from what I have described? The matter is set for trial in February. The court took up the note copies of which are not endorsed. Also after notes are assigned through fraud, do the parties engaging in the fraud lose rights of enforcement? Any thoughts as to how the three original notes made their way to the Feds in late 2008 and how I could discover that pathway? Thanks again!

Reply

Anonymous November 30, 2014 at 12:44 PM

p.s. The $115" referenced above for attorney's fees was $115,000!

Reply



Douglas Whaley November 30, 2014 at 10:15 PM

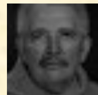
Sorry, but I'm forbidden by law from giving specific legal advice. Good luck with this.

Reply

Anonymous December 8, 2014 at 2:17 PM

How is a man forbidden from saying anything? I know you can say anything you want, as long as you have not caused physical harm or damage. What law forbids you from giving lawful advice to a man or a woman?

Reply



Douglas Whaley December 8, 2014 at 3:57 PM

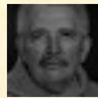
Lawyers can only give legal advice about specific cases in the jurisdiction in which they are members of the bar. If they give legal advise in other jurisdictions they violate state law and can be punished. On this blog I, as a law professor and expert in commercial law, can explain the general rules, but I cannot advise people in specific situations without getting myself into trouble.

Reply

Anonymous February 12, 2015 at 6:59 PM

Is it possible to find out if the current pete has the original note. And if the pete does not have the original and it was lost prior to or during a transaction can a claim be made or do you have to come into foreclosure?

Reply



Douglas Whaley February 12, 2015 at 10:50 PM

I know of no procedure for tracking the note. If someone demands payment on the mortgage debt the person who signed the note can demand production of the note as a condition of payment (lest the wrong person be paid). Only the PETE is entitled to payment on the mortgage debt represented by the promissory note. Certainly, as my article explains, only the PETE can foreclose.

Reply

Replies

Anonymous February 28, 2015 at 9:37 AM

I posted a comment earlier to you before I read this last post which partly answers it, but for the lack of mention of the implication of a waiver of presentment clause. I am very interested in any support you may have that the basic waiver of presentment clause in the conventional note we see is simply a waiver of the PETE's duty to to demand payment rather than also serving as a waiver of the maker's right to inspect.

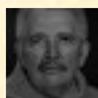
Reply

Anonymous February 26, 2015 at 6:56 PM

I have a dispute over the interpretation of 3.501 with another attorney who claims that the typical waiver of presentment clause in the uniform promissory mortgage note (see your footnote 43) waives the maker's right to inspect the note before dishonor can be declared. He posits that since the inspection rights clause begins with "Upon demand of the person to whom presentment is made . . . ." and since presentment has been waived that therefore we never reach the rights of inspection - the predicate to it having been "waived". It is, in his opinion, like "stop here don't go pass go". To me I see it differently in that presentment means "demand" which needs not be made every installment payment - that is, demand is automatic every month, but every month after such "auto-demand" you now have the right to inspect the note before you pay it to make sure the claimant is a PETE. This being very relevant when the claimant is someone different from the payee you have been making payments to in the past. What do you think? We have no precedent on this specific issue here in Florida where I practice. Greg Clark-gclark560@aol.com

Reply

Replies



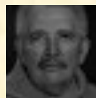
Douglas Whaley March 3, 2015 at 6:24 PM

The UCC was written in a day when there was almost never an issue about whether the entity foreclosing was the holder of the note, so Official Comment 2 to section 3-502 clearly says that waiver of the right of presentment would waive the necessity of a formal

demand and that all the "holder" need prove is that payment was not made on time. But that word "holder" means the drafters were of the opinion that no one else but the "holder" could get payment, and hence could not declare that payment had not been made. This is also in accordance both with common sense and the definition of PETE as the only entity that can enforce the instrument. No court would hold that waiver of a right of presentment meant that any Tom, Dick, or Harry could foreclose. Only a PETE can do that, and then only after failure to make payment is proven.

Anonymous March 4, 2015 at 1:21 PM

Thanks for the response but it does not entirely answer my question. To be clear I am concerned for the maker who makes his payments but is concerned about sending them to a new purported holder (or even the original one who may have quietly sold the note) to avoid double liability on the note. While he is current with his payments he demands to see the original note to check it for proper indorsements. As I understand it under 3-501 he is not in dishonor for non-payment pending his inspection of the note. If he is not in dishonor then he is not in default. This is the issue: has the maker lost his right to inspect the note (which his only way of making sure he is not exposing himself to double liability before he actually defaults) because of the waiver of presentment? This is important because most lenders will not comply with the maker's request to see the note after the maker has demanded inspection and will file foreclosure suit, eventhough - in my opinion - the maker is not in dishonor at the time suit is filed. Florida law is clear that a maker of an NI is at risk to paying the obligation twice or more if he does not make certain he is paying the right PETE, but if waiver of presentment means waiver of inspection rights it would seem an unfair, unbalanced interpretation making the whole obligation lacking in mutuality. Let me have your thoughts. Greg

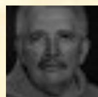


Douglas Whaley March 4, 2015 at 2:57 PM

I understand your question, but the UCC, as I said, doesn't answer it. There have been few cases about what the waiver of presentment accomplishes. Your practical concern is a valid one, but the law as it's written doesn't address the problem. When you go to the servicer and demand to know if it is representing the right person (i.e., a PETE) the servicer won't know what you're talking about and will have no way of helping you. Only if you stop making payments after a threat to do so because no proof of PETE status will there be a foreclosure action that will resolve the problem. As I say in the blog, some people in this position start making payments into a bank account to be paid to the PETE on proof of that status, and so notify the servicer. Section 3-603 clearly states that tender of payment need only be made to a PETE.

Anonymous March 5, 2015 at 7:35 AM

Further to my last post on this question of a maker's right to inspect the note before he pays it I wanted to share a Florida Supreme Court case under the old negotiable instruments law that brightlined this right to inspect and how a maker assumes great risk by not exercising it: please look up Scott v. Taylor, it is a 1919 case.



Douglas Whaley March 5, 2015 at 11:22 AM

Interesting case, which I'd not seen before. It does say the maker of a note has a duty to pay the possessor of the note and that paying the wrong person will not discharge the debt. The court cites no statute in making its decision, so this is a common law decision. The UCC reaches the same result: the duty to pay is owed only to a PETE. But the court does not say there is a duty of the person being paid to produce the note (merely assuming that he/she would do so if asked in that much simpler day). For lawyers wanting to look up the case the citation is Scott v. Taylor, 63 Fla. 612, 58 So. 30 (1912).

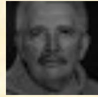
Anonymous March 6, 2015 at 8:31 AM

The Scott case supports the right to inspect before payment by making it clear that a maker must inspect in order to achieve the benefit of discharge. This important principal, set forth in Scott, was codified into 3-501 when the UCC was adopted, and your earlier cite to the discharge subsection (very instructive, thank you) ties it in. This might be the solution path to the problem, the "Unanswered question" as you put it. It requires employing rules of statutory construction and interpretation (and common sense) which have been employed before in order to avoid an absurd result from a strict literal reading of a particular subsection of a law. That is, we must read and interpret the whole of these provisions of Article 3 in order to give proper effect to any one of them - so that we reach and attain the intent and purposes of the entire Act, as a collective whole. Greg. gclark560@aol.com

Greg Clark March 7, 2015 at 10:48 AM

Taking this concept - of the right to inspection before payment - further, I submit that to be effective to keep the maker out of dishonor, the demand for inspection must occur before the maker is in payment default. For instance before his next payment is due the maker must make the demand to inspect. If you do not do this, thinking you can ask later rather than earlier, I posit that your right to inspect has been effectively waived for that payment and puts you in default and the case

against you ripe for filing by the holder. On the other hand if your demand to inspect occurs before the next payment due date and the holder declines to offer the note for inspection you are not in dishonor and therefore not in default. If the holder goes ahead anyhow to sue for foreclosure you should win the suit upon contest of their allegation that you are in default. What to you think of this legal analysis?



Douglas Whaley March 7, 2015 at 2:09 PM

I think it's a good argument as a matter of policy, but there is no legal precedent for it that I know of. I've never heard a court say there is a right to inspect, just that a non-PETE cannot foreclose. The courts have not addressed the question of how the maker determines whether a claimant is a PETE if the claimant refuses to produce the note when it demands payment.

Greg Clark March 8, 2015 at 2:37 PM

I think it was your reference - to a maker's right to discharge - that ties in and supports this concept of a right to inspect under 3.501, regardless of whether or not "presentment" is waived.

By the way I think the use of the term "presentment" is really unfortunate since it is not defined in its ordinary vernacular as "exhibition" but is specifically defined as "demand" for payment. This diction diversion causes the understandable confusion of thinking that the holder doesn't ever have to "show" the note. The holder is only relieved from having to make a demand for payment every month. Any argument to promote this legal theory of right to inspect should start with this point as a predicate.

Anonymous March 12, 2015 at 8:39 PM

Today I found a Florida case that supplements nicely the Scott v. Taylor cite I gave you a few posts ago: Bank of Miami 367 S2d 683. Much more recent and, being post UCC adoption, directly cites the maker's right to inspect before payment on a note by specific reference to 3.501. Again, Like Scott, the makers had to pay the note twice!! Greg.
gclark560@aol.com

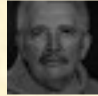
Reply

Anonymous March 3, 2015 at 11:29 AM

I cannot find a currect version of the UCC which supports your footnote #10 (Uniform Commercial Code § 3-204, Official Comment 1.) Where can I find this officially? Excellent article!!

Thanks!

Reply



Douglas Whaley March 3, 2015 at 6:16 PM

The last sentence of section 3-204(a) states that "a paper affixed to the instrument is a part of the instrument" and the end of the first Official Comment refers to this sentence and uses the term "allonge" (the historical word for a paper used for indorsements) to add the thought that "an indorsement on an allonge is valid even though there is sufficient space on the instrument for an indorsement," thus overruling common law decisions which forbade the use of an allonge unless the original instrument ran out of space for indorsements on it.

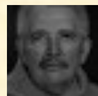
I tried to find a free copy of the UCC with Official Comments online, but failed in a brief search. You can certainly buy the UCC online, including on Amazon. Lawyers sign up for legal research services which, of course, contain the UCC and the comments in full.

Reply

Anonymous April 1, 2015 at 12:58 AM

Can a deed of trust be amended to rescind / retract the language of the "waiver of presentment" clause?
Thank you Douglas,
Peace ~ Jacque

Reply



Douglas Whaley April 1, 2015 at 11:03 AM

An amendment to any contractual agreement requires the consent of both parties.

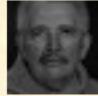
Reply

Anonymous April 10, 2015 at 10:03 AM

What if Plaintiff Nationstar (who purchased servicing rights from Aurora in 2012) attached to the complaint in f/c, it filed in Jan. 2014, copy of the original note with Lehman Bros Bank as payee. The Note has two undated endorsements appearing on the last page-- one specialty from Lehman Bros Bank to Lehman Bros Holding, Inc; the other in blank from Lehman Bros Holdings. First question, are undated endorsements acceptable under the UCC? I can't find any such requirement in my research. Here, since plaintiff attached a copy of the Note, it is presumably showing that it is a holder, etc. and has standing to sue as of the date it filed the complaint. But, these are undated endorsements and we can't know whether when they were made, and whether the signatories to the endorsements had authority to endorse. (my argument). Second question, when I request to inspect the original note, should the original note have Nationstar's signature on the back of the note as your article mentions? We cannot see this on

the copy attached to the complaint. Thanks, and great article!

Reply



Douglas Whaley April 10, 2015 at 10:46 AM

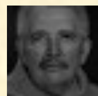
I can't give specific legal advice, but I can say that the UCC does not require that indorsements be dated, nor specify where they must be, though traditionally they are on the back of the note (or on an allonge). Signatures are presumed to be valid (i.e., not forged and authorized) unless some proof is introduced that they are not valid, at which point the burden of proof switches to the entity presenting the note.

Reply

Anonymous April 10, 2015 at 10:50 AM

Thanks. This raises another question I have regarding chain of title of the endorsements (for want of a better phrase). Are endorsements permitted to skip a subsidiary and be endorsed by the parent holding company? E.g. Lehman Holdings is parent, but Lehman Bancorp wholly owned Lehman Bros. Bank FSB. The endorsements were not made by the bankcorp entity, just the parent. Is that kosher?

Reply



Douglas Whaley April 10, 2015 at 2:59 PM

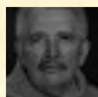
If a note is payable to one entity, then that entity must indorse it. The indorsement of that entity's name may be made by an agent, but the indorsement must use the name of the entity to whom the note is payable.

Reply

Replies

Anonymous May 7, 2015 at 8:00 AM

Interesting concept - an agent indorsing the name of the actual payee or prior indorsee. It would seem that such an indorsement would not enjoy the presumption of validity or authenticity given under 3-308, and if the maker raises or asserts this defense the purported PETE would have to bear the burden of proof to show that it was legit. Correct?



Douglas Whaley May 7, 2015 at 10:32 AM

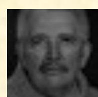
No. Both sections 3-401 and 3-402 authorize agents to sign for principals. Section 3-308's presumption of validity still stands until, as the Comment puts it, "some evidence is introduced" that would support a finding to the contrary.

Reply

Anonymous April 12, 2015 at 11:22 AM

First, I seek a clarification of your Golden Rule that forbids foreclosure unless the creditor possesses a properly negotiated note, in that a note that is missing an indorsement in the chain to the present possessor (a non holder") is OK as long as he shows any proof, in writing or by affidavit) that the last holder transferred all rights to the note, regardless of whether value was paid for those rights. That is, a simple transfer of rights document (like by a simple assignment) does not need proof that consideration was paid for them. Or is proof of purchase or that value was paid to acquire those rights, such as by contract to purchase the note with consideration paid necessary?

Reply



Douglas Whaley April 12, 2015 at 11:13 PM

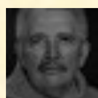
There is no consideration necessary as long as the person in possession took through a voluntary transfer of the transfers rights (even if there is no proper indorsement).

Reply

Replies

Anonymous April 28, 2015 at 7:45 PM

This is true with a PETE under an Art 3 . But the comments under 301 "that a thief can be a holder" suggest otherwise - with regard to the need for the transfer being voluntary, No?

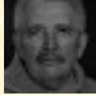


Douglas Whaley April 29, 2015 at 9:35 AM

Yes a thief can be a holder because a holder need not be the owner of the note. But a thief could not enforce it because the theft would be a defense to the lawsuit. Holders are subject to all legitimate defenses, such as the fact that they stole the note or are not the agent of the true owner, for example.

Anonymous May 1, 2015 at 8:45 AM

OK, so your logic is that a thief can be a holder because the definition of a holder does not require a 'voluntary' negotiation to him, only that the previous holder (or payee) of the instrument voluntarily indorsed the instrument. This means that voluntary 'delivery' is not required to complete the event as a negotiation? I always thought to the contrary - that delivery by the old holder to the new holder had to be voluntary. Please explain.

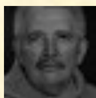


Douglas Whaley May 1, 2015 at 9:46 AM

Nothing to explain. You explained it yourself. No voluntary delivery is required. However, as I said, when the thief tries to enforce the instrument the defense of theft would prevent such enforcement.

Anonymous May 2, 2015 at 9:22 PM

But the maker need not assert the defense of theft if he wants to obtain a discharge. Even if he knows the note was stolen. Not his problem, right? That is, if the thief is a holder, he is a PETE for purposes of allowing the maker to access his right to discharge. The conversion/theft action is a matter between the thief and the dumb prior holder that did not secure his property. Correct? That is, the maker is still entitled to discharge regardless of his state of knowledge of the conversion?

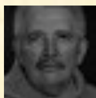


Douglas Whaley May 2, 2015 at 11:18 PM

No. The maker is discharged if he doesn't know the note is stolen and pays the PETE but section 3-602(e) provides that the maker is not discharged if he pays someone he knows to be "in wrongful possession of the instrument." So if the maker knows of the theft he should raise that as a defense to the action brought by the thief/holder.

Anonymous May 3, 2015 at 9:39 AM

So a thief can be a PETE and a maker is safe to make payment to the thief and achieve an effective discharge as long as he does not know the note has been stolen. Is this why 3-301 says: "A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument"? The use of the cryptic word "May" has always confounded me as is seems to imply that a thief has the right to enforce. Please explain the limits of this closing sentence to 3-301.

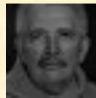


Douglas Whaley May 3, 2015 at 10:45 AM

The drafters wanted to protect an innocent maker who pays a PETE without knowing the PETE stole the note. Say it's a bearer note and the thief steals it. The real owner is not aware it's missing. The thief is a PETE and presents it to the maker, and the maker then pays it. As long as the maker does not know of the theft the maker's liability is discharged to all parties. It's a bad thing to lose a bearer note, which is why it's best to keep notes specially indorsed to the proper owner, who then indorses it only when transferring the note deliberately.

Anonymous May 3, 2015 at 3:17 PM

This makes sense under Art 3 but I would think the "thief" reasoning stops there. To take the next step beyond Art 3, to a secured interest in real estate or other collateral Art 9 and supplementing common law would seem to be in play - it being understood that a mortgage is not a negotiable instrument. I understand that Art 9 rules over Art 3 and that Art. 9 requires that value be paid in order for a party to have an enforceable secured interest in the note/mortgage.

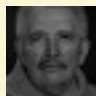


Douglas Whaley May 3, 2015 at 11:39 PM

Article 9 does not rule over Article 3. The two are written about different topics and by the same drafters, so they compliment each other. Yes, Article 9 requires value to create a security interest, but that has nothing to do with Article 3's rules on who can enforce a negotiable instrument.

Anonymous May 6, 2015 at 11:45 PM

I respectfully dissent from your position and ask that you reconsider and correct your last statement. Please look at the conflicts sections of the Code. Article 9 plainly and specifically governs over Article 3 and the "thief" reasoning stops there. Furthermore, once sold Art 9 governs over promissory mortgage notes even if they are negotiable. Greg Clark



Douglas Whaley May 7, 2015 at 10:25 AM

Nowhere does the Code say that Article 9 changes the rules of Article 3; they are not in conflict at any point. They are dealing with different issues.

Anonymous May 7, 2015 at 9:28 PM

Plainly, the UCC has a conflicts provision for the very reason that the drafters saw the need to provide for it and in doing so gave Art 9 precedence over Art 3. Please read the conflicts section of the UCC. A downstream holder (not the original payee) of a mortgage note does not have an enforceable security interest unless value has been paid. Thus a holder of an indorsed mortgage note cannot enforce it by way of foreclosure upon the collateral by meeting only Art 3 standards as those do not require that value be paid for the transfer/negotiation of the note. This is why Article 9 was made superior over Art 3 when dealing with secured interests. Also it goes without saying that the drafters of the original code were not in fact the same people who drafted the changes to Art 9 in 2000 which brought in mortgage notes (and the mortgages that secured them). 30+ some years separated the two

groups and their work.

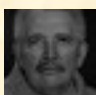
Maybe it would be more acceptable for you to look at the two in progressive, linear fashion rather than in conflict: In order for a claimant under Art 3 to enforce the note by way of foreclosure, the claimant must not only prove he is a PETE under Art 3 but he must also prove he has met the requirements of Art 9 to be entitled to realize (foreclose) upon the collateral (property). Greg Clark, Esq.

Douglas Whaley May 7, 2015 at 11:13 PM

Article 9 is talking about taking a security interest in notes when the notes are being used as collateral (not a security interest in the land), and Article 9 provides that the secured party must give value in order for the security interest in the notes to attach and be valid. Say, for example, the payee on the mortgage note is a Bank that borrows money from a Lender and uses as collateral all of the promissory mortgage notes the bank has in its vault. The Lender makes the loan (gives value) and files a financing statement covering the notes as collateral. The Bank continues to collect payments on the mortgage and forecloses if the maker of the note doesn't pay. Article 3 applies to the note as between the payee and the Bank, and Article 9 between the Bank and the Lender. If the bank forecloses the Lender's interest transfers to the judgment in the foreclosure suit. The Article 9 creditor doesn't foreclose in this situation as long as the bank doesn't default on its loan and the bank keeps possession of the notes. There is no Article 9 priority rule saying otherwise. The two Articles are dealing with different issues.

Anonymous May 8, 2015 at 9:56 AM

Your example "situation" falls outside and is thus irrelevant to the vast the alternative - Sold loans - which make up by far the bulk of mortgage loans and the reason Article 9 was amended in 2000: to allow for securitization, which requires REMIC standards of chained SALES of the note, not pledges of them. Respectfully, I submit that your cited "situation" is simply not responsive to my posit and the reality of the majority of loans in trouble today. These loans are being sold, not pledged. Also, you have not acknowledged the fact that Art 9 was specifically made to govern over Art 3 in the interplay of enforcement of the underlying notes and their mortgages in the instance of sold/transferred notes and their enforcement through foreclosure. Respectfully, I again ask: Do you know the specific code section that directs that Art 9 governs over Art 3? Greg Clark, ESQ Florida.

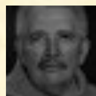


Douglas Whaley May 8, 2015 at 11:16 AM

We're not understanding each other. Please cite me to specific sections of Article 9 that you say change Article 3.

Anonymous May 8, 2015 at 9:55 PM

Actually I was curious if you are even aware of the conflicts section of the UCC. These are the provisions, common in many statutory schemes, that reconcile provisions when they may come into conflict. "Conflicts" was a separate course we had at Stetson devoted to this area of law. Now, to be clear, I did not say Art 9 "changes" Art 3, it simply governs over it; in our instance, on the issue of the requirement that 'value be paid' By a "transferee" PETE (not the original payee) in order to enforce the mortgage note in the context of foreclosure. I know specifically the code conflicts provision in question. What I don't know is you, but for your blog here, and what you promote of yourself as an expert of some degree on the UCC. But frankly, if you cannot demonstrate right here right now that you even know the conflicts code provision in question then I know you are working and opining from a limited intellectual foundation in this particular area. I mean no insult here but if you can't cite us the conflicts provision of the code because you don't know of it then we will know that your reasoning and conclusions might be likewise limited and incomplete. Again, I intend no disrespect, but you should, for the benefit of your readers, make a fair account of this state of your knowledge. Cite the conflicts subsection. Greg Clark, Esq. Florida



Douglas Whaley May 8, 2015 at 11:31 PM

Mr. Clark: I do claim to be one of the leading experts on the Uniform Commercial Code in the country, having written seven casebooks on it and related subjects and authored the three Gilberts on the UCC. Any Google search of my name will confirm this. I too had a course in "Conflicts" in law school, but it dealt with conflicts of law between jurisdictions, and had nothing to do with the Uniform Commercial Code. I do confess that I know of no section in Article 9 that states it has a rule that prevails over Article 3 as to the qualifications of a PETE (even a transferee from the payee on the note) so as to keep such a transferee from foreclosing on the note, which is what I understand your contention to be. If I somehow missed this in my almost 50 years of studying the Code, that would be very embarrassing. So, here's your chance. Cite that section to me, and I'll apologize to you and to all my readers. Douglas Whaley

Anonymous May 9, 2015 at 1:17 PM

Mr. Whaley:

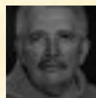
I am not interested in apologies.

I am interested in education, understanding and fair and logical application of the law - with integrity - especially in the reality of the courtroom. My knowledge stands upon the shoulders of others many of whom I've had the honor of leading as founder of JEDTI (Jurists Engaged in Defending Title Integrity). This Order is a litigation think and action tank composed of some of the top trial and appeal lawyers in the field of foreclosure defense in Florida (google: greg clark JEDTI)--(also google: G. David Clark Smashwords to see a short non fiction work - "Christmas Eva" that I believe links us in the matter of our pulmonary pumps). My 34 years of legal experience includes, simultaneously, 34 years as a title examiner, underwriter and title insurance agent. Blah, Blah, Blah, I digress. I don't really like talking about myself because this is not about me, or you. It is about all those whom we can perhaps give the benefit found in the predicate to this paragraph.

So let's do this the same way my professors in law school and the Jurists in the court and appellate rooms I've faced have and will continue to do. They never gave me answers, they made me find them on my own. For all I know we are speaking to each other in an echo chamber with no one really paying attention to this thread. If that is the case we might as well contact each other offline. I really don't have any idea of the eyeballs interested in or following this thread but if any of them are I invite them to jump in and comment but more importantly assist in finding the UCC code provision regarding conflict between Art 9 and Art 3 - if you don't beat them to it. I know it. But learning by active intellectual search and engagement of that portion of our minds that ingrain and imprint through process and the mental muscles that require effort to obtaining the fruit we seek is no different from the maxim regarding giving a man a fish as opposed to teaching him how to fish.

Fair enough?

Greg Clark, Esq. Florida



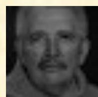
Douglas Whaley May 9, 2015 at 2:09 PM

No, not fair enough. I confess that I don't know of such a conflict and don't believe (a) that it exists or that (b) you or anyone can cite me to UCC provisions so providing. It you do have this knowledge and share it with us all in your next Comment, as I said in my last reply, I will bow to your superior expertise and eat humble pie. But telling me to guess what sections you are supposedly referring to is no escape from the necessity of producing them. I can't read your mind. Unless you next provide those citations, I won't print any more of your Comments. I'm done with this futile discussion. If you do send them, I assure our mutual readers that I will print them in their entirety.

Anonymous May 11, 2015 at 9:15 AM

Still waiting for you to publish my comment as you promised. I've shown you the (a) conflicts provision (3-102), and (b) where value must be paid 9-203 to enforce an instrument by means of a secured interest. In short an Art 3 holder, when he travels into Art 9 must show he is a PETE and that he has paid value before he is admitted to have an enforceable security interest.

Greg Clark, Esq. Florida.



Douglas Whaley May 11, 2015 at 12:31 PM

No. It is simply wrong to say that Article 9 overrules the provisions of Article 3 when it comes to enforcement of the promissory note. Article 9 only requires value for attachment of a security interest in notes, not their subsequent transfer or enforcement, which Article 3 governs. As I've said repeatedly throughout these Comments Article 3 and Article 9 are never in conflict on this or any other issue. Official Comment 6 to §9-308 specifically says: "Under this Article, attachment and perfection of a security interest in a secured right to payment do not of themselves affect the obligation to pay. For example, if the obligation is evidenced by a negotiable note, then Article 3 dictates the person to whom the maker must pay to discharge the note and any lien securing it. See Section 3-602." That section in turn provides that the maker should pay the PETE unless, per subsection (e), the PETE holds through a chain of title that includes theft and this can be proven. Consider the following example. The note is a bearer instrument that the current owner, Bank A, puts into a securitization trust. An employee of the trust decides to steal bearer notes in the trust and wrongly puts them into a separate account, supposedly belonging to a mythical Bank B, and then sells these notes to Bank C. Bank C is a PETE even though its transferor is a thief and paid no value for the notes. When Bank C forecloses it will prevail against the maker of the note unless Bank A intervenes in the lawsuit and raises its rights under §3-602(e). This is the result mandated by both Articles 3 and 9 of the UCC, which harmonize nicely on the law of promissory notes.

Anonymous May 11, 2015 at 7:59 PM

I believe you confuse concepts. Comment 6 to §9-308 as you quote "For example, if the obligation is evidenced by a negotiable note, then Article 3 dictates the person to whom the maker must pay to discharge the note and any lien securing it". This is correct and consistent as it is directed from the position of the maker's right and entitlement to DISCHARGE. It is not from the position of the PETE who wishes to foreclose

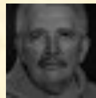
but does not have an enforceable security interest because he failed to pay value as is required by 9-203. That is, I fear you confuse the concepts of a maker's right to discharge - which have not been affected by Art 9 - with the requirements upon an Art 3 PETE to PAY VALUE to have an enforceable security interest which were added in 2000 by way of Art 9.

Again, to summarize, one should not confuse the rules regarding discharge with the rules regarding enforceable secured interests. Apples and Oranges.

As to your analysis of 3-602(e) I would only edify that a maker can gain a discharge from a thief holder or a subsequent holder taking after the thief as long as he does not know of the theft.

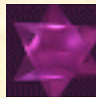
Also, I believe your hypo is incorrect. Bank "C" cannot show a chain of transfers back to bank "A" where value was paid at each link in the transfer chain. True, it has tentative PETE status for a personal money judgment - depending on what it knew about the theft, or possibly face a divestiture of that right in court if and when the victim Bank A shows up and intervenes, but it has no enforceable security interest as these rights are derivative and there is a break in the chain under Art 9 requirements.

It is clear, as a general rule that Article 9 now governs in foreclosure actions where the note has been sold or transferred from the original lender. Indeed, case law now supports this concept. Now mind you, compliance with Art 3 is still important, it's just that Art 9 adds the requirement that value be paid to have an ENFORCEABLE security interest.
Greg Clark Esq. Florida.



Douglas Whaley May 12, 2015 at 10:28 AM

Enough of this. Let's just agree to disagree and let it go.



djoh652864 March 6, 2017 at 11:54 AM

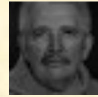
I just want to say thank you to both of you. You both have good valid points.It was like learning from two heavy weights who are equal in power and both helping us beginners. My hats off to both of you and much respect to both.

Reply

Brqwerty April 19, 2015 at 2:16 PM

Governor Scott, Florida, passed a law in 2013 stating it the note is not present, all the bank has to do is have an affidavit stating that someone saw the note or touch the note and it exist. With all of the robo signing that went on how do we know that this is true? Wells Fargo has broken the law so many times. Do we have a leg to stand on? Thank you geop110@yahoo.com

Reply



Douglas Whaley April 19, 2015 at 7:05 PM

This comment has been removed by the author.

Reply

Douglas Whaley April 19, 2015 at 7:07 PM

I'm not aware of this Florida statute. Do you have a copy of it or the citation to the Florida statute so I can look it up?

Reply

Douglas Whaley April 20, 2015 at 10:27 PM

I have now read the Florida statute and can say that this statute really doesn't change the existing law. The Uniform Commercial Code is referred to it twice in the new statute, and this statute just elaborates on the existing UCC requirements. Section 3-309 of the UCC already requires for lost notes that there be an affidavit that states that the person who wants to foreclose is entitled to enforce the note (hence that this person would be a PETE if the original note were available) and explain why it cannot be produced---the Florida citation for this UCC section 3-309 is s. 673.3091, mentioned in the new statute as an existing requirement that must still be met. So this new statute just makes it clear that the UCC requirements must be satisfied when the foreclosing entity cannot produce the lost note. Payment twice (to the foreclosing entity and to an entity that shows up with the original note) can be avoided by a court order for "adequate protection" (such as a bond or deposit into court) sufficient to protect the defendant from double liability (which UCC section 3-309 already requires).

Douglas Whaley

Reply

Replies

Anonymous April 22, 2015 at 10:38 PM

I winced a little when you reported that Florida's UCC lost note statute, 673.3091, requires an affidavit. Not true. An affidavit might work for the court for an uncontested case but never at trial. In fact the word "affidavit" never appears in 673.3091. Also, Proof of ownership of the note, not just being a PETE, is required under this statute. This is significant in that being a holder (or former holder) is not enough.

Anonymous February 2, 2016 at 5:27 PM

I am student of the UCC, and not a scholar. I've found a contrast between a prior version which is still used in New York, and the more recent revised version used in almost every other state.

In the NY code Article 3, § 804, is the section relating to enforcement of lost, destroyed or stolen instruments. It includes this language:

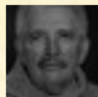
"The court shall require security, in an amount fixed by the court not less than twice the amount allegedly unpaid on the instrument, indemnifying the defendant, his heirs, personal representatives, successors and assigns against loss, including costs and expenses, by reason of further claims on the instrument ..."

In the revised UCC, adopted by 48 states, Article 3, § 309, deals with lost, destroyed or stolen instruments, and, includes this language:

"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."

I am not comfortable with "adequate protection" being determined at the discretion of the courts. In the past several years I've simply seen too many courts cling steadfastly to their power to abuse their discretion.

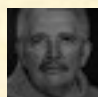
"Not less than twice the amount" provided ... something much less likely to be discretionarily abused.



Douglas Whaley February 2, 2016 at 5:50 PM

I too liked the older version, still the law in New York, and for the reason you mention.

Reply



Douglas Whaley April 22, 2015 at 11:09 PM

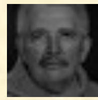
You're right. Section 3-309 does not use the word affidavit, but merely states that the allegations therein must be proven. In the few cases I've seen where this has come up the plaintiff did offer an affidavit on point signed by the person who was in possession of the note when it was lost.

Reply

Anonymous May 9, 2015 at 8:26 PM

I am a Florida law student ready to graduate on Saturday. In florida at least, Florida Statute 673.1021 (2) seems to suggest that chapter 679 (secured transactions) governs over chapter 673 (negotiable instruments) in the case of a conflict between the chapters.

Reply



Douglas Whaley May 10, 2015 at 11:02 AM

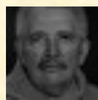
You're right it does. In the fact pattern under discussion in a prior Comment thread the question was whether Article Nine conflicts with Article Three on the issue of whether a holder must give value (i.e., whether a thief can be a holder of a bearer note), and there is no such conflict. For other readers that Florida citation is to UCC section 3-102(b).

Reply

Replies

Anonymous May 11, 2015 at 8:07 PM

Interesting threads. But I did find a conflict between Article 3 and Article 9: each define "Instrument" differently. Article 9 includes negotiable instrusments (article 3) and non-negotiable ones in it's subject matter definitions. That would seem to bring all of these under article 9 jurisdiction.



Douglas Whaley May 12, 2015 at 10:24 AM

All that means is that Article 9 covers more things than Article 3 does. It also covers, for example, stocks and bonds. But the fact that it covers both negotiable and non-negotiable instruments does not affect the Code drafters' decision to make Article 3 the sole law for foreclosures of negotiable promissory notes, and the Article that defines what a negotiable promissory note means.

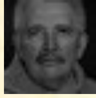
Anonymous May 12, 2015 at 11:58 AM

What doesn't make sense is that you say there is no conflict between Article 3 and Article - yet you agree that there is a conflicts clause making 9 govern over 3. Obviously the drafters saw the need. I mean why put in such a conflicts clause If the two Articles are in perfect harmony?

Anonymous May 12, 2015 at 5:42 PM

I think you might be wrong about Art 3 being the sole law for foreclosures. Art 9 extends to both negotiable and non-negot mortgage notes. See the new appeal courts case says Art 9 governs. Just came out of the 4th DCA last week. HSBC v. Perez. it comes right out and

quotes the 9-203 that value must be paid.

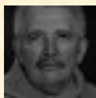


Douglas Whaley May 12, 2015 at 5:49 PM

I don't know the case. The Fourth Circuit Court of Appeals, HSBC v. Perez? It's not on Westlaw under that name.

Anonymous May 12, 2015 at 7:07 PM

No, it is the 4th District Court of Appeal in Florida. Here is a quote: "An assignment of a promissory note “attaches”—in other words, becomes enforceable against the assignor and debtor with respect to the collateral—when (a) value has been given, (b) the assignor has rights in the collateral or the power to transfer rights in the collateral to a secured party, and (c) the assignor has either “authenticated a security agreement that provides a description of the collateral” or the assignee has taken possession of the note under section 679.3131"

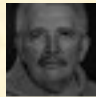


Douglas Whaley May 13, 2015 at 11:21 AM

What a fascinating case! Here there were two original promissory notes (part of a fraudulent scheme), each transferred to innocent banks, both of whom were equally, under Article 3, entitled to foreclose. The court looked to Article 9’s rules, but it quotes White and Summers’ treatise on the UCC as saying that looking to Article 9 when there are two original notes “makes the case's footing in Article 9 slippery.” Indeed it does, because the Code drafters never thought of a situation in which there would be two original notes floating around. But the court must do something, so it looks to the Article 9 perfection rules, which require “possession” of the note as the test of priority. Since between these two competing banks, one bank had possession of its note before the other had possession of the other, that bank prevails. Of course, had the conflict been between the second’s bank’s assignor and the other bank, the second bank’s assignor would have won (having had possession first), so the outcome has nothing to do with rewarding good business practices or punishing sloppy business behavior (which is what Article 9 usually attempts). So it’s an arbitrary result, based on happenstance. But, as I said, the court must chose of winner, and this result is as fair as flipping a coin. However, in this case, once again, Articles 3 and 9 are not in conflict. Neither answers the question, so the court looks to “possession,” a key element in both Articles for promissory notes, though here is a chimera since both parties had possession, both therefore were Article 3 “holders,” both perfected their interests in the note, and justice requires that one of the innocent banks is punished when it does nothing wrong.

Anonymous May 13, 2015 at 2:34 PM

Right, but one cannot ignore the court's recite of the three legs necessary to an enforceable interest in collateral, Particularly the requirement that value be paid and that the transferor/assignee have rights in the collateral. This is what defeats a PETE who is a thief of the note. He has neither paid value for the note or the collateral (he stole the note) nor did he receive title to the other property, the collateral, from (your earlier hypo) 'Bank A' - who signed no assignment or document of transfer to the thief PETE (a thief acquires no ownership in property). That is, such a PETE may have power over the stolen bearer note/paper itself (to give a discharge for example), but he has no enforceable interest in the collateral for want of value paid and no title to the collateral. I'm thinking This concept would fortify your golden rule of foreclosure.



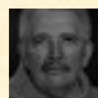
Douglas Whaley May 13, 2015 at 3:15 PM

Those three legs are necessary to create a security interest, and no one disputes that. But it has nothing to do with PETE in Article 3. A thief in possession of a bearer note could enforce it if no one raised the defense of theft because they didn't know about it. But the thief doesn't usually try this, so there are no cases. What the thief does is what was done in the Florida case, which is sell it to someone else. The Official Comment to 3-301 says a thief can be a holder, and nothing in Article 9 has any relevance to that issue except to say that the thief could not have a valid security interest in a note without giving value for it. Look, I'm not going to change my mind about this, and you're not either. It is foolish to keep discussing it. No more of this.

Anonymous May 13, 2015 at 3:58 PM

Agreed. It was a good discussion and I appreciate you publishing most of my posts regarding it. And in truth I think some common ground was attained in your last post. It is refreshing to debate with someone with a good grasp of the UCC. We don't really see that level of understanding at the bench.
The JEDTI attorneys in Florida are gaining victories and better settlements because of Art 9. Together with Art 3 Pete requirements, Art 9's three legs become very difficult for the opposition in discovery to produce. Thank you. Greg Clark Esq. Florida

Reply



Douglas Whaley May 12, 2015 at 12:03 PM

I say there is no current conflict between Articles 3 and 9, and so far the drafters have been careful to harmonize them. But the

conflicts clause in Article 3 provides that if such a conflict arises Article 9 will prevail because future developments might create the need for such a conflict. Article 3 was last rewritten in 2002 and Article 9 in 2010. So far the drafters have worked things out between the two, but that may not always be the case (either deliberately or accidentally), and so the provision is in place to rectify any overlap and provide guidance for the courts.

Reply

Anonymous June 28, 2015 at 3:30 PM

Hello Professor Whaley,
I've read your article thoroughly and several times due to its relevance in a situation occurring for myself and family in Louisiana. In short, it involves a failed/bankrupt bank, lost promissory note, fdic assignment in which the note changed hands two or three times and a subsequent foreclosure attempt. Prior to my father's passing he obtained a lawyer, filed an answer that they prove they had the right to foreclosure...specifically asking for the promissory note. We are now three years into that case and it has become clear that there is no original note. I am told an Ex Parte motion to file (with or without prejudice) can be filed to dismiss the case since enough time has passed without them producing an answer to what was requested by my father's attorney. The house has been unoccupied for over a year now since his death and it is falling apart slowly...I want to get it fixed and rented but at the time didn't know if they would foreclose so I just emptied it of its contents to be safe...however, if this motion to dismiss is won I would assume, with or without prejudice, that any future claims for foreclosure may meet the same end (a request for the original promissory note and a failure to produce). So the house can never be sold because the title is not clear, correct? Yet they cannot foreclose or take possession and they are left paying the property taxes and insurance to protect their investment...I believe they have acquired the note through some secondary market as an investment company who purchases large packages of debt to turn profits...some work out others may not. Their records show a lot of inconsistency in what they believe is owed...as much information hasn't transferred through all of the changing of hands..the amount owed is grossly inflated. The story goes on and on but in the end I've read so much that some of these cases may end in a discharge of a mortgage. As far as I can see, the house is at a stalemate. Do you or anyone on the forum happen to know of a good real estate attorney the New Orleans area that could assist? I am seeking to discharge the mortgage, or at least bring them to the table to renegotiate the mortgage terms if that is even possible.

Reply

▾ Replies

Anonymous July 31, 2015 at 6:56 AM

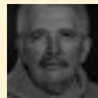
Tell the court there is too much fraud involved with this situation and you need the original docs, period! You object to any copies as they do not mean anything. These documents have changed way too many hands and each of one those people could have made a copy. The courts know exactly what is going since they are on

the front lines. Do not let them forget that. Millions of people around the country could not have just made the same things up about the same people. It's an impossibility and the law does not allow for impossibilities. The original note is the only real evidence of legal chain of assignments. Without it , they have nothing. Period. Is the trust foreclosing a REMIC? If yes then game over! That is an admission your note was was converted into a stock.

Anonymous July 31, 2015 at 6:57 AM

Someone needs to Quiet Title.

Reply



Douglas Whaley June 28, 2015 at 10:57 PM

Louisiana law is very different from the other states (though the Uniform Commercial Code provisions I cite in the article are in effect there), so their mortgage procedures are foreign to me. You need a real estate lawyer. Try the bar association, which in most states will refer you to experts in various fields. Good luck with this.

Reply

Replies

Anonymous June 30, 2015 at 10:04 PM

Thank you so much. I will reach out to the bar association that sounds like a great place to start. It's been difficult to run this by attorney's simply by word of mouth or the phone book, this requires someone with some experience and a bit of an open mind as to how and why this has come about as well as what the options are. Thank you for your good wishes.

Reply

Anonymous July 31, 2015 at 6:31 AM

Consider these few concepts. The documents being used to foreclose are allegedly copies of your original deed of trust, correct? Take a minute and get your original deed of trust. NOT A COPY! THE ORIGINAL! How many people have the Original document in Blank? Those are in fact the Original, Period! What are they claiming to foreclose with? A true and correct COPY of the Original!

"Your honor I object. How can that be when I have the only actual ORIGINAL right here your honor, and those are clearly NOT a COPY of this ORIGINAL document. It would seem your honor what they have is an altered, changed, fabricated, forged, edited

version of this original document" Don't let Legal Word Wizardry throw you off. Stick the Basics.

Reply

Anonymous July 31, 2015 at 6:46 AM

Here's another... Basic Contract Law 101. What are the requirements for a valid contract? This is self explanatory. If the the Contract is not valid, it can't be enforced. 2 signatures are required.

Another... Fraud vitiates everything. Is that not a maxim of law? Wrong doers may not benefit from their own wrong. a maxim? The law leaves wrongdoers where it finds them. If your bank has been caught or found guilty of fraud upon the court, or any wrong doing related to this mess, then the court cannot proceed as if the circumstances were normal. The laws were made for normal situation, not one were fraud is well-known and rampant. It's a legal absurdity. Especially when they are habitual offenders like Chase.

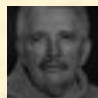
another... did your deed of trust create the trust trying to foreclose? Was this disclosed to you? Did you intend to obtain a loan or sell a security on the secondary market? Did you agree to have you agree to have your note converted into a check and then a stock? Did you agree to have your signature securitized (identity theft)? How can that be legal? If it was then why don't they reveal it to you or put in the documents? Simple. Cause no one would agree if they knew the actual transaction taking place behind their back. AND THAT MATTERS!

Reply

Anonymous September 20, 2015 at 7:41 AM

I recently took a closer look at my alleged original copies of the note and rider only to realize the signatures were behind the baseline. Proof of "copy & paste". The law states that a note can't be enforced against a party who does/did not sign. Obviously I didn't sign behind the baseline. That's just impossible. My question is, why was it even done? What happened to the original? What the hell is going on?

Reply



Douglas Whaley September 20, 2015 at 7:50 PM

I don't know what you mean? That you didn't sign? Or that you did sign but not in the spot where maker's sign, which is at the end of the note on the front side? I don't know what you mean by "baseline." It's not a legal term. If the note that the foreclosing entity has is not the one you signed, that triggers the arguments in my article above.

Reply

Replies

Anonymous December 8, 2016 at 4:03 AM

When "Cut and Paste" signatures are photoshopped badly they won't align correctly and the signature line appears to be placed on top of the signature.

It's only noticeable if you zoom in extremely close. Sometimes a separation of the signature can be seen at the baseline like a break or space that runs evenly across which can only be seen at high levels of zoom which is also a clear sign of bad photoshopping.

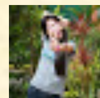
I can send you some examples if you like. It's helpful to know what to look for and useful in many types of situations whether fraud is suspected or not.

The most amazing thing to me is how normal cut and paste can look to the naked eye.

Douglas Whaley December 12, 2016 at 2:55 PM

Well, it sounds like interesting evidence if you're trying to prove a fraudulent signature. Good luck with this.

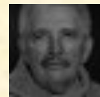
Reply



akilabai benito February 4, 2016 at 11:45 PM

Hi Sir. An innocent man lost his prommisory note due to fortuitousness event,and presents a photocopy of the promissory note . is it valid negotiable instrument?

Reply



Douglas Whaley February 5, 2016 at 11:53 AM

As the blog post says, a photocopy is not a valid note, but section 3-309 of the statute allows the court to recreate a lost note on proof how how it was lost, and that frequently helps when a note has been lost.

Reply

Replies

Anonymous February 15, 2016 at 5:16 AM

The federal rules of evidence offer some assistance here as well.

https://www.law.cornell.edu/rules/fre

FRE 1001 defines terms, including "original," and "duplicate."

FRE 1002 requires the original of a writing to prove its

contents.

FRE 1003 provides "A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate."

In the case of a specially indorsed note [UCC 3-205(a)] use of a duplicate, or copy, properly authenticated as a true copy pursuant to FRE 803(6), and/or FRE 902(11), may not be so unfair as to make admission of the duplicate unwarranted. The instrument is only enforceable by the special indorsee so multiparty liability by the payor is largely eliminated.

Though a question is always begged - how does the qualified witness, or custodian, know the copy to be a true copy of the original? The only way to know is to actually compare it to the original. If the original is available then why not just use the original?

If the answer to "how do they know" is any variation of "Someone told me" then it becomes hearsay, and is inadmissible.

Original notes, as commercial paper, are self-authenticating under FRE 902(9). That would seem to cut through most of the evidentiary issues.

In the case of a blank indorsed note [UCC 3-205(b)] the use of a duplicate absolutely creates circumstances which are unfair. If a copy of "bearer paper" were enforceable against the maker then multiple copies could be enforced by anyone with a copy.

Recent case law supports actual possession of bearer paper being essential to enforcement, "In the case of bearer paper such as the note, physical possession is essential because it constitutes proof of ownership and a consequent right to payment." In re Miller, 666 F.3d 1255 (10th Cir. 2012).

Reply

Anonymous February 9, 2016 at 6:15 AM

Perhaps this very common scenario (fact pattern) is a potential conflict between Art. 3 and 9. Please let me know you're thoughts. Or perhaps others will have an opinion...

-Judicial f/c scenario - or similar situation where note transfer history is available for discussion.
-Lender to Trust endorsement on the note (skipping Sponsor and Depositor - aka an A to D endorsement, or allonge). -No later endorsements, in blank or otherwise.
-Party A retains the note after selling and purports to hold for parties B and C.

-Party A allegedly becomes servicer after sale. No proof presented that agent can "hold" though.
-Party A then endorses to party D, the trust, and physically transfers note to party D's agent, the Custodian for the trust.
-Party D sells trust business to party E by authenticated agreement. No endorsement reflecting this. Nonholder status claimed by party E due to lack of endorsement. Specific endorsement still in Party D's name. Note remains with common agent/Custodian.
-No authenticated agreements provided showing A to B, B to C, C to D. Perhaps one or two unauthenticated agreements provided for these parties but gaps or unsigned agreements in the chain.
-No loan schedule identifying subject loan on any unauthenticated agreement except for D to E.
-No authenticated agreement showing party A is servicer for trust (may be however shown through servicer records)
-No personal knowledge of note transfer history by servicer. Servicer records may discuss though.
-Shelter rule test in Anderson v. Burson not helpful for party E being PETE due to insufficient proof provided under UCC 3 (transfers not conceded as in Anderson v. Burson).
-Party E may have (Perhaps not "holding") physical note through agent/custodian but cannot rely upon shelter rule due to incomplete proof.
-UCC 9-313 cmt. 3 states Party A can't sell and later "hold" for buying (party B - secured party).

-Endorsement ineffectual?
-Lack of negotiation between A and B means Art. 9 transfer must be proven by agreement or other means?
-Would party A retain PETE status under Art. 3 or would party D be able to claim HIDC status since no notice of impropriety, by upstream parties, and subsequently transfer to Party E by agreement as nonholder? All previous transfers must be proven though (per case law).

What article rules?

Perhaps neither because they both fail (shelter rule to know avail and 9-313 cmt. 3 doesn't pass holder status to B)?

Unless it (PETE status) fails under shelter rule (constructive possession argument) there would be a conflict and then it would seem UCC 9 would prevail. If constructive possession (for PETE status) is allowed it would seem to conflict with UCC 9. This seems to give credence to rulings which state actual possession (and not merely constructive possession) is required by the UCC.

Thoughts? It appears there is a conflict between Art 3 and 9.

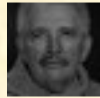
Reply

Anonymous February 9, 2016 at 11:56 PM

I have a question regarding a Reverse Mortgage on a house I inherited. The Original Contract (Hecm) states specifically that contract has 2 mortgages and 2 notes. In trying to foreclose, the mortgage company has provided copies only of 1st and 2nd mortgage and only 1st note with questionable allonges. Must the

provide 2nd note also, or would just 1st note work?

Reply



Douglas Whaley February 10, 2016 at 9:34 PM

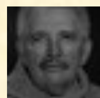
I can't give specific legal advice since not admitted to the bar in your state. Generally, as the blog post above indicates, foreclosing entity must have original copy of the note in order to foreclose. For more specific advice, please consult an attorney. If you can't afford one, called Legal Aid or the Bar Association.

Reply

DickKohn February 16, 2016 at 12:52 AM

You said: "Original notes, as commercial paper, are self-authenticating under FRE 902(9). That would seem to cut through most of the evidentiary issues." How did you conclude a mortgage note is "commercial paper"?

Reply



Douglas Whaley February 16, 2016 at 3:35 PM

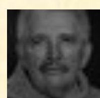
Almost all mortgage notes are promissory notes under the definition of that term in the Uniform Commercial Code.

Reply

DickKohn February 17, 2016 at 12:01 AM

NO MORTGAGE NOTE IS "COMMERCIAL PAPER". See the definition at http://www.investopedia.com/terms/c/commercialpaper.asp, which reads:
"http://www.investopedia.com/terms/c/commercialpaper.asp
"DEFINITION of 'Commercial Paper'
An unsecured, short-term debt instrument issued by a corporation, typically for the financing of accounts receivable, inventories and meeting short-term liabilities. Maturities on commercial paper rarely range any longer than 270 days. The debt is usually issued at a discount, reflecting prevailing market interest rates."

Reply



Douglas Whaley February 17, 2016 at 2:26 PM

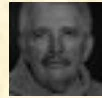
You're right, it isn't "commercial paper" as defined in that blurb. But the statute, which is the Uniform Commercial Code, defines promissory notes as negotiable instruments, and those issued as part of a mortgage loan so qualify. A course in law school entitled "Commercial Paper" will cover promissory notes whether they meet the common definition in corporate borrowing or not.

Reply

jersey joe April 27, 2016 at 3:23 PM

Hi Prof Whaley. Question. Further up this string you talk of a 'thief' who claims as holder or possession of a note. Would that 'thief' be equally unable to file a proof of claim in BK court as he/she would be to enforce it in the context of a foreclosure? Does the UCC act differently or is considered differently in BK cases? - Thank you!

Reply



Douglas Whaley April 27, 2016 at 4:06 PM

A thief has no title and hence cannot enforce a note in any court, not even in bankruptcy proceedings.

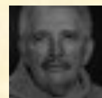
Reply

chandu June 1, 2016 at 8:50 AM

Excellent attempt!! Please look at the conflicts sections of the Code. Article 9 plainly and specifically governs over Article 3 and the "thief" reasoning stops there. Furthermore, once sold Art 9 governs over promissory mortgage notes even if they are negotiable.

work injury compensation

Reply



Douglas Whaley June 1, 2016 at 2:31 PM

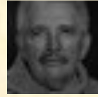
It is simply wrong to say that Article 9 overrules the provisions of Article 3 when it comes to enforcement of the promissory note. Article 9 only requires value for attachment of a security interest in notes, not their subsequent transfer or enforcement, which Article 3 governs. As I've said repeatedly throughout these Comments Article 3 and Article 9 are never in conflict on this or any other issue. Official Comment 6 to §9-308 specifically says: “Under this Article, attachment and perfection of a security interest in a secured right to payment do not of themselves affect the obligation to pay. For example, if the obligation is evidenced by a negotiable note, then Article 3 dictates the person to whom the maker must pay to discharge the note and any lien securing it. See Section 3-602.” In turn that section requires payment to a PETE.

Reply

Fran June 2, 2016 at 6:27 PM

Professor Whaley. Great blog! Do you have a view of Note enforceability (in Pennsylvania) where a loose allonge (undated, indorsed in blank) is produced at the eleventh hour of discovery and the plaintiff's attorney attaches such to the purported original Note prior to an evidentiary hearing, saying it had been previously attached (but unable to prove it through screen scans or copies)? Seems like these suddenly appearing allonges are a license for fraud.

Reply



Douglas Whaley June 2, 2016 at 11:37 PM

I have no cases, but no court is going to allow fraud. Allonges have to be firmly attached at the time of negotiation. Doing it later and misrepresenting it to the court would be, well: (fill in blank with ugly words).

Reply

Fran June 3, 2016 at 10:55 AM

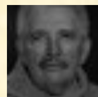
Believe it or not, that is happening in JP Morgan Chase Bank, NA v. Murray, 63 A. 3d 1258 - Pa: Superior Court 2013 (precedential), followed up in JP Morgan Chase Bank, NA v. Murray, Pa: Superior Court 2016. Will see if Supreme Court takes it up. Both Opinions are good reads if you have time.

Reply

Anonymous June 11, 2016 at 2:27 PM

Doug, can a lender raise new allegation 1 year after motion for summary judgment denied new allegation no note is needed to foreclose

Reply



Douglas Whaley June 13, 2016 at 5:04 PM

This is a civil procedure question and would depend on local and state law that I do not know. Sorry.

Reply

Craig E. Mathers October 5, 2016 at 6:39 AM

This is a very informative article. I agree with Douglas Whaley's point that all information here are general and it may not suit a specific case or situation.

Reply

Anonymous December 8, 2016 at 3:08 AM

I have a few questions that have bugged me for sometime.

1. Is it true that the borrowers promissory note is the source of the Banks alleged loan, and if so, shouldn't convertible notes show or disclose whether they are convertible or not, or that it will be converted?

2. How can securitization take place without a borrowers permission or knowledge and without compensation of any kind. It seems to me like it violates the very basics of contract law 101.

3. How can homeowners not have rights to argue trust issues in court as 3rd parties their contracts and yet that same 3rd party have rights to foreclose?

None of it seems to be fair or legal.

Reply

Replies

Douglas Whaley December 12, 2016 at 2:58 PM

1. The answer is that there's no law that I know of that requires a statement about convertability.

2. The courts haven't had any contract law problems with this that I know of. How does it hurt the maker of the note?

3. If a third party is to get rights in a contract the law requires that such rights have been intended. When you send a promissory note you signed out into the world you understand it may be negotiated to strangers, so these third parties can enforce the note and rights in the collateral (the property).

Reply

Anonymous December 8, 2016 at 3:19 AM

Also it seems to me that people should have legitimate claims against all the entities who had a duty to act and protect and yet failed to do so habitually for over 10 years.

Some, like the CFPB, were even helping the Banks by accepting complaints, forwarding them to Banks, and doing nothing to protect or help the homeowners at all.

And then to add insult to injury, used those complaints to extort money from the Banks which they pocketed for themselves, just like many other regulatory agencies did.

At any other time in history it would be considered a good case for damages via negligence.

Reply

Unknown January 7, 2017 at 1:28 PM

Question on issues with America's wholesale lender! My note states AWL as lender. Not AWL dba Countrywide. Judicial foreclosure was commenced in Oregon. At times if the complaint filed by BONY they attached an unindorsed note. AT SJ they provided an indorsed note AWL dba Countrywide. The note remember stated AWL the lender not AWL dba Countrywide. Since AWL was not a lender as itself how can the indorsed the

note using DBA countrywide.
With all that wouldn't UCC 3-310 come to play in, that the obligation was suspended when Bony produced a note at SJ not at time of complaint. So BONY had not incurred injury at the time they filed suit. When the filed suite they claimed they were a non holder and PETE. Judge ruled BONY was A PETE and holder; when there was no pleading or amended complaint stating Bony was Holder of the note during the entire court proceeding. If appealed, should the court look to UCC 3-310 and state that BONY had no right to foreclose without prior having an indorsed note? Granted Bony had a variety of assignments before the complaint, but as you mentioned in on the website, assignments mean nothing and do not follow the note. The note is required for assignments to follow.
In addition wouldn't there FL be fraud at the time the note was signed since I solely thought AWL was the lender? Not AWL DBA countrywide? Nor did AWL have any banking or mortgage license in 2007 in oregon when the lender commenced the Note?
Thank you in advance for any clarification on this in regards to UCC and fraud of the note

Reply

Douglas Whaley January 7, 2017 at 3:13 PM

I can't give specific legal advice, and don't completely understand the issues from this brief note. You need to raise these things with your attorney. Good luck.

Reply

Anonymous February 10, 2017 at 10:34 AM

Hello Mr. Whaley. Thank you for answering my 3 questions. But answer 3. you stated " If a third party is to get rights in a contract the law requires that such rights have been intended. When you send a promissory note you signed out into the world you understand it may be negotiated to strangers, so these third parties can enforce the note and rights in the collateral (the property)."

Negotiated is one thing, but once a note is converted into stock and securitized it can never be converted back. It is no longer a Promissory Note. Borrowers are of the impression that the note is a promise to pay (like an IOU). But if the bank is converting them to or cashing them like checks to fund loans then the borrower is the one giving something of value. Furthermore, securitization is unfair because it's not disclosed and adds unknown 3rd parties (violation of basic contract law).

A borrower believes they are obtaining a loan, not selling a security in (which is sold using their name). If the lenders are using notes to be paid then the borrower should at least get lower payments or something. These mortgage trusts are bottom feeding of people's mortgage payments. I believe borrowers monthly payments shouldn't be picked at by investor vultures and 3rd party middle men unknown to the borrower.

They are the backbone of these trusts and this scheme wouldn't

exist without them. The whole thing defeats the purpose of contract laws. If nothing was wrong with it then why don't they reveal it to the borrowers? Because they know it's unfair and the borrower would never agree. And that's what the law is meant for. To protect both parties, not just one. There's no mutuality, no consideration, no disclosure. That's 3 of 4 requirements not being met. How can that not matter in contract law?

Reply

Replies

Douglas Whaley February 11, 2017 at 3:41 PM

Putting the notes into a bundle is a trust does not destroy them as notes. They can (and are) subsequently removed from the trust and enforced against the maker.

You make a policy argument that such trust should not exist or that there be payments to the note makers, but that would take legislation to accomplish and is simply not the law at present.

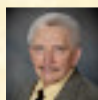
Reply

Anonymous February 10, 2017 at 10:42 AM

And besides that, the law doesn't say who has to pay the loan off. If Banks are making more than the amount of the loan using the borrowers notes, then the debt should be considered satisfied. That's the other reason securitization is never disclosed. That's just disgusting greed.

Reply

Replies



Douglas Whaley February 11, 2017 at 3:43 PM

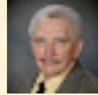
Same reply. Bankers would say that the debt of the mortgage still has to be paid to the current possessor of the note, who has nothing to do with the trust in which the note was placed and (in theory) is not harmed by it.

Reply

Unknown June 20, 2017 at 7:47 PM

Colorado passed a statute in 2002 that forbids negative amortization loans. If a negative amortization loan was written in 2005 is the loan an illegal loan. It is my understanding that anything against public policy or statute is void.

Reply



Douglas Whaley August 8, 2017 at 12:21 PM

I can't give specific legal advice, but your State Attorney General's office might be willing to advise you, or a local lawyer.

Reply

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