

Complexity

Simplified

Many lay people have asked for supporting case law. Currently there is little or no case law, but that is changing on a daily basis. Supporting case law in some jurisdictions may be non-existent and will remain that way until someone paves the road.

It appears from comments in various blogs and chat rooms that many people are ready to pave that road. One such website is <http://www.foreclosurehamlet.org/>, founded by Lisa Epstein, and I praise her actions to protect the people of her state of Florida.

On with the Seriousness

Depending upon the state, the Security Instrument may be titled “Deed of Trust,” “Mortgage,” “Mortgage Deed” or “Security Deed.” Fannie Mae and Freddie Mac list 25 states where the Security Instrument is called the “Mortgage,” so we shall call the two (2) major components of the “Mortgage Loan” the “Mortgage Note” and the “Security Instrument.”

The Mortgage Note is the indebtedness, and commonly executed with the signing of the Mortgage Note is the Security Instrument. The house is the collateral to the Security Instrument. The purpose of the collateral is to allow the collateral to be foreclosed upon under the Security Instrument by using the “Power of Sale Clause” securing the Mortgage Note if there is a default in payment of the Mortgage Note. The Mortgage Note in tandem with a valid Security Instrument is a “Secured Indebtedness.”

The Mortgage Note without a valid Security Instrument is an “Unsecured Indebtedness.”

The Uniform Commercial Code, Article 3 and the states equivalence provide the laws regarding negotiability of the Mortgage Note.

First, we will comment on the Security Instrument

The Security Instrument usually contains some form of the two (2) following notices:

(“Applicable Law” means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, nonappealable judicial opinions.”)

(“Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law. Applicable Law might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the Note conflicts with Applicable Law, such conflict shall not affect other provisions of this Security Instrument or the Note which can be given effect without the conflicting provision.”)

We need a closer look at the paragraph titled, *“Governing Law; Severability; Rules of Construction”* where it states, *“This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the Property is located.”*

When the Security Instrument is signed at the same time the Mortgage Note is signed, several things happen unknown to the average homeowner. The Security Instrument attaches to the Mortgage Note and is temporarily perfected. In simple English, this means the Security Instrument has identified the house as collateral to the Mortgage Note and the Security Instrument at this point establishes a temporarily perfected lien. The Security Instrument is then filed of legal record in the jurisdiction in which the property is located to permanently perfect the lien.

Okiee Dokiee, the homeowner has a financed house and owes lender payments until all monies borrowed are paid back, and if there is a default under the terms of the Mortgage

Note or Security Instrument the “Power of Sale Clause” comes into play and allows the lender to foreclose on the house and sell the house.

What has been described: a scenario where a local bank made a loan to the homeowner and executed a Mortgage Note as proof of the loan. To better protect the local bank’s interest a lien was placed on the house in the form of a Security Instrument and filed of record in public records to permanently perfect the lien, which is a guarantee. If there were a default on the Mortgage Note the local bank could foreclose upon the house in lieu of payments on the Mortgage Note. Other terms may exist within the Security Instrument, such as Payment Mortgage Insurance, Hazard Insurance, etc., that requires the homeowner’s compliance, and if not complied with could also lead to default under the Security Instrument allowing for foreclosure to happen under the Security Instrument.

It’s time to Securitize the Mortgage Loan (MERS)
Actions affecting the Mortgage Note and the Security Instrument
“must be executed in tandem”

There are a number of possible scenarios but the one described below appears to be the most common procedure.

- Given 1. The Originating Lender indorses the Mortgage Note “In Blank” and this one indorsement is the only indorsement appearing on the face of the Mortgage Note.

- Given 2. MERS is filed of record in public records to be the lien holder of the Security Instrument as nominee for the Lender and Lender’s successors and assigns.

- Given 3. The Mortgage Loan (consisting of the Mortgage Note, Security Instrument and all additional required paperwork) is registered on the MERS system by the Originating Lender.

Pre First Negotiation (Post Closing)

After closing the Security Instrument naming MERS is filed in public records to allege a permanently perfected lien (Security Instrument) in MERS's name as "Nominee for Lender."

Here, a question arises: Can MERS as "Nominee for Lender" be a proper Mortgagee (Owner of the Security Instrument as agent) to be in compliance with the laws of local jurisdiction?

The Originating Lender prepares the Mortgage Note for negotiation by placing an "Indorsement in Blank" on the face of the Mortgage Note. The Mortgage Loan is being purchased by a subsequent purchaser and the Originating Lender transfers possession and ownership of the Mortgage Note to the subsequent purchaser by indorsing the Mortgage Note "In Blank." (Lawful Action)

First Purchase Has Been Executed

1. The first subsequent purchaser takes possession of the Mortgage Note as "Unidentified Indorsee In Blank #1." As the Mortgage Note contains this indorsement "In Blank" from the Originating Lender, the actual owner/holder with rights has not been identified. Until such "Person" is identified by filling in the "Blank" there is no subsequent "Holder."

UCC § 3-201. NEGOTIATION

(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.

UCC § 3-204. INDORSEMENT

(a) "Indorsement" means a signature, other than that of a signer as maker, drawer, or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of (i) negotiating the instrument, (ii) restricting payment of the instrument, or (iii) incurring indorser's liability on the instrument, but regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words,

terms of the instrument, place of the signature, or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.

(b) "Indorser" means a person who makes an indorsement.

(c) For the purpose of determining whether the transferee of an instrument is a holder, an indorsement that transfers a security interest in the instrument is effective as an unqualified indorsement of the instrument.

2. The MERS registry is updated to reflect transfer of possession of the Mortgage Note from the Originating Lender to "Unidentified Indorsee In Blank #1."
3. The transfer of possession of the Mortgage Note from the Originating Lender to a subsequent purchaser only indentified as "Unidentified Indorsee In Blank #1," with MERS acting as "Nominee for Lender's successors and assigns," raises a serious question.

Can MERS be an agent or nominee to any Lender successor and assign who is Unidentified?

4. The "Unidentified Indorsee In Blank #1" further sells the Mortgage Loan to a subsequent purchaser by transferring possession of the Mortgage Note utilizing the Originating Lender's original indorsement "In Blank." This procedure will transfer possession and ownership of the Mortgage Note to the subsequent purchaser but will not transfer holder rights to enforce the Mortgage Note to the subsequent purchaser.
5. Transferring holder rights requires an indorsement by the current holder (Person) who has rights as the holder; holder rights remain with "Unidentified Indorsee in Blank #1" with only possession and ownership transferring with any further negotiation.
6. The "Unidentified Indorsee in Blank #1" would only need to identify oneself by filling in the blank which would identify himself as a "Person" who then could further negotiate the Mortgage Note by executing an indorsement, and if the "Person" cares too, "In Blank."

7. A side car action that needs to occur with the negotiation of the Mortgage Note, is filing in public records to notice lien rights (Security Instrument) have been transferred from the Originating Lender to an identified holder.

Second Purchase Has Been Executed

1. The second subsequent purchaser has taken possession of the Mortgage Note as “Unidentified Indorsee In Blank #2.” The Mortgage Note contains only an indorsement “In Blank” from the Originating Lender; the actual owner/holder with rights has not been identified until such “Unidentified Indorsee In Blank #2” has been identified as a “Person” by filling in the “Blank.” Until such “Person” has been identified there is no subsequent “Holder.”

(a) For the “Unidentified Indorsee In Blank #2” to achieve rights to the Mortgage Note, the previous owner/holder with rights (Person) is required to indorse the Mortgage Note. The previous indorser in this instant is only identified as “Unidentified Indorsee In Blank #1,” which fails to comply with the requirements of Uniformed Commercial Code: § 3-201, “Person.”

2. The MERS registry is again updated to reflect a transfer of possession of the Mortgage Note from the “Unidentified Indorsee In Blank #1” to “Unidentified Indorsee In Blank #2.”

3. Now we ask:

Can MERS be an agent or nominee to any “successor and assign” who is Unidentified?

4. The “Unidentified Indorsee In Blank #2” further sells the Mortgage Loan to a subsequent purchaser by transferring possession of the Mortgage Note utilizing the Originating Lender’s original indorsement “In Blank.”

Here we have all the same concerns as listed in “First Purchase Has Been Executed”

Third Purchase Has Been Executed

1. The third subsequent purchaser has taken possession of the Mortgage Note as “Unidentified Indorsee In Blank #3.” The Mortgage Note contains only an indorsement “In Blank” from the Originating Lender; the actual owner/holder with rights has not been identified until such “Unidentified Indorsee In Blank #3” has been identified as a “Person” by filling in the “Blank.” Until such “Person” has been identified there is no subsequent “Holder.”

(a) For the “Unidentified Indorsee In Blank #3” to achieve rights to the Mortgage Note, the previous owner/holder with rights was required to indorse the Mortgage Note. The previous indorser in this instance is identified only as “Unidentified Indorsee In Blank #2,” which fails to comply with the requirements of Uniformed Commercial Code: § 3-204, “Person.”

2. The MERS registry is again updated to reflect a transfer of possession of the Mortgage Note from the “Unidentified Indorsee In Blank #2” to “Unidentified Indorsee In Blank #3.”

3. Again, we ask:

Can MERS be an agent or nominee to any successor and assign who is Unidentified?

Here we have all the same concerns as listed in “First Purchase Has Been Executed”

Reach Back in Time

1. As the “Pooling and Servicing Agreement” is in compliance with the SEC Act of 1933 and is that of a 3rd party contract identifies the “Seller/Securitizer” as the “Unidentified Indorsee In Blank #1” for the Trust; the “Depositor” as the “Unidentified Indorsee In Blank

#2” for the Trust; and the “Trustee” as the “Unidentified Indorsee In Blank #3” for the Trust.

2. As the “Pooling and Servicing Agreement” reaches back in time to identify the Unidentified parties, would this reach-back give MERS the authority to act as either Nominee or Agent for those Unidentified parties?

3. If by chance MERS is allowed to be named in public record as Mortgagee of record for a Lender, would such agent/contract relationship extend back to “Unidentified Parties” that can only be identified in the “Pooling and Servicing Agreement?”

A Blank Cannot Indorse a Negotiable Instrument

Correct Way (UCC Compliant)

Person Indorses in Blank (Possession/Holder) Originator
Negotiation in Blank #1 (Filed of Record)
In Blank to Person (Possession/Holder) Seller/Securitizer
Person Indorses in Blank
Negotiation in Blank #2 (Filed of Record)
In Blank to Person (Possession/Holder) Depositor
Person Indorses in Blank
Negotiation in Blank #3 (Filed of Record)
In Blank to Person (Possession/Holder) Trustee

Banks' Way (UCC Non-Complaint)

Person Indorses in Blank (Possession/Holder)
Negotiation in Blank #1 (MERS)
In Blank (Possession) Seller/Securitizer
Negotiation #2 by Originator's Indorsement (MERS)
In Blank (Possession) Depositor
Negotiation #3 by Originator's Indorsement (MERS)
In Blank (Possession) Trustee