

# **“eFraud”**

## **eNotes – eClosing – eMortgages – eSign**

### **Perfection and Loss of Perfection (Security Instrument)**

By J. McGuire

The collection rights given in the Paper Promissory Note, if transferred, assigned, or sold to a Mortgage Backed Security, **must** be a Negotiable Instrument, **must** be “in writing” (tangible form) identifying an indebtedness which is governed by the Uniform Commercial Code Article 3: Negotiable Instruments or the states equivalence. This Paper Promissory Note by itself is an “Unsecured” indebtedness.

Where the lender requires a Security Instrument to be part of the loan package, this Security Instrument states the property is to be used as collateral for the repayment of the indebtedness noted in the Paper Promissory Note. This Security Instrument contains language that stating that if the indebtedness, the lender, as the secured party, (Holder in Due Course with rights to the Paper Promissory Note), by the authority granted in the Security Instrument, could foreclose and sale the property to satisfy the indebtedness. When the Paper Promissory Note is accompanied by a Security Instrument such indebtedness is considered to be a “Secured” indebtedness.

The “Secured” indebtedness will survive through a bankruptcy action, whereas an “Unsecured” indebtedness may or may not survive through a bankruptcy action.

One has to wonder how a large corporation can emerge from bankruptcy in a matter of months with a lot of indebtedness gone; he who has a secured loan and he who does not is the answer. Example, GM: how many debts were “Secured” and how many were “Unsecured”? The banks’ loans usually are “Secured” while all others are “Unsecured.” Banks get paid and stockholders and investors get the empty baby bottle. Consider this: the banks generally write all the contracts - as such, the banks will write the contracts to protect themselves while leaving the losses to all others.

Under the Uniform Commercial Code Article 9, there is an automatic perfection of lien rights that is created when the Security Instrument attaches to the Paper Promissory Note by the signing of all documents at closing. Of note: this automatic perfection is limited in time and to convert this temporary perfection into a permanent perfection, local laws of jurisdiction must be followed. So it is not uncommon to find the Security Instrument filed in Public Records to convert a temporary perfection of lien rights into a permanent perfection of lien rights. The Security Instrument represents the “lien.”

In the days of paper, when the Paper Promissory Note was sold/assigned/transferred/negotiated to a subsequent 3<sup>rd</sup> party purchaser,

endorsements were noted on the Paper Promissory Note, which under the UCC completed the negotiation; also, a “Notice of Assignment” was filed by the subsequent 3<sup>rd</sup> party purchaser in Public Records, which notices transfer of lien rights to the subsequent 3<sup>rd</sup> party purchaser, and, as such, continuous perfection, “Perfected Chain of Title,” was maintained of lien rights in Public Records.

Under the UCC, Perfection and Perfection for Priority have different meanings.

*§ 9-301. LAW GOVERNING PERFECTION AND PRIORITY OF SECURITY INTERESTS.<sup>1</sup>*

*Except as otherwise provided in Sections 9-303 through 9-306, the following rules determine the law governing perfection, the effect of perfection or nonperfection, and the priority of a security interest in collateral:”*

How do you create an eNote from a Paper Promissory Note? Scan it.

How do you create an eNote at an eMortgage closing? Sign it electronically.

A Negotiable Instrument is governed by the Uniform Commercial Code Article 3 and the states equivalence. The UCC allows the Negotiable Instrument to be **only** in tangible paper form.

The banks have been alleging the eSign Act allows for the existence of an eNote (Transferable Record) as being a negotiable instrument under the UCC. As this eNote Transferable Record is not in paper tangible form, it does not meet the UCC requirements to be a negotiable instrument.

In this day of electronics, it is this eNote that is transferred/assigned to a subsequent 3<sup>rd</sup> party, 4<sup>th</sup> party, or 5<sup>th</sup> party, on up to the securities market or Fannie and Freddie.

***Note: the author did not state that the note was negotiated up to any party.***

As these transfers/assignments are in electronic form there has been no negotiation of any note, “Paper or Electronic.” In fact, an eNote could never be negotiated under current laws and as such no party other than the originating lender could claim to be “Holder In Due Course.” For the subsequent 4<sup>th</sup> or 5<sup>th</sup> party to claim they have a valid Security Instrument to exercise the “Power of Sale Clause” is an absolute falsehood.

The legal counsels for the subsequent 4<sup>th</sup> or 5<sup>th</sup> parties then attempt to foreclose by filing fraudulent “Notices of Assignment” in Public Records showing “negotiation” of an eNote; eNotes lacks supporting laws. The fraudulent filings upon Public Records are the “Ball & Chain” that is misrepresented to provide the illusion that they have legal authority.

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<sup>1</sup> <http://www.law.cornell.edu/ucc/9/article9.htm#s9-301>