

UNEASY INTERSECTIONS: THE RIGHT TO FORECLOSE AND THE U.C.C.

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INTRODUCTION

Historically, the practice of real property and foreclosure law was routine and noncontroversial.¹ Bank lawyers had little difficulty complying with the relatively simple and clear rules established in Article 3 of the Uniform Commercial Code (“U.C.C.”) and state foreclosure law when proving their clients’ rights to foreclose upon mortgages securing promissory notes.² This legal

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1. Email from Thomas A. Cox, Esquire, to Elizabeth Renuart, Assoc. Professor of Law, Albany Law Sch. (July 31, 2013, 01:34 PM) (on file with author) (confirming that it was the expectation of attorneys representing banks, as he did, that the foreclosing party have possession of the original note and be able to present it and all indorsements to the court at the time judgment was sought); see *Fed. Deposit Ins. Corp. v. Bandon Assocs.*, 780 F. Supp. 60, 63 (D. Me. 1991) (noting the rule that possession and production of a validly executed note in a foreclosure action is necessary).

2. Deborah L. Thorne & Ethel Hong Badawi, *Does “the Mortgage Follow the Note”?: Lessons Learned, Best Practices for Assignment of a Note and Mortgage*, AM. BANKR. INST. J., May 2011, at 54, 54 (observing that the foreclosure requirements seemed “so simple, so black and white”); Dale A. Whitman & Drew Milner, *Foreclosing on Nothing: The Curious Problem of the Deed of Trust Foreclosure Without Entitlement to Enforce the Note*, 66 ARK. L. REV. 21, 22 (2013) (noting the absence of appellate decisions during that time and stating that “most lawyers familiar with the process of mortgage foreclosure in the United States would probably have regarded it as a satisfactory, if not somewhat dull, area of the law. Foreclosure did not generate

landscape significantly altered during the spectacular growth of securitization deals involving trillions of dollars of mortgage loans, a noteworthy percentage of which later tanked and triggered the foreclosure crisis.³

The National Conference of Commissioners on Uniform State Laws (“NCCUSL”) was a driving force behind one of these changes. It adopted amendments to Article 9 of the Uniform Commercial Code in 1998, at least in part, to facilitate securitization.⁴ These modifications include extending coverage to the sale of (not merely to a security interest in) promissory notes, declaring that the sale of the note also constitutes a sale of the mortgage without the need for a written assignment of the mortgage, and providing for automatic perfection of interests in both the note and the accompanying mortgage without the need to file.

The behavior of the residential mortgage lending and securitization industries generated additional legal complications in several ways. First, they often mishandled the loan notes and mortgages, triggering serious concerns about who possesses the right to foreclose, an issue under scrutiny in courts throughout the nation. Second, in order to fix document problems, some foreclosing parties (usually the trustee identified in the securitization contract) or their agents resorted to forging indorsements or submitting fraudulent affidavits to courts. Third, in nonjudicial foreclosure states, where forced sales proceed without judicial oversight, trustees pressed on without the necessary documentation until faced with homeowner objections. When called upon to account for the note and mortgage, the refrain presented to the courts was: “Judge, you just don’t understand how things work,” equating industry practices with legal compliance.⁵ Finally, written arguments filed

much appellate litigation, and those few lawyers who specialized in the field, mostly representing lenders, had little difficulty in getting the results they needed from the mechanisms of foreclosure”).

3. Securitization is the process of utilizing mortgage loans to back investment instruments.

4. Julian B. McDonnell & John Franklin Hitchcock, Jr., *The Sale of Promissory Notes Under Revised Article 9: Cooking Securitization Stew*, 117 BANKING L.J. 99, 99–100, 124 n.8 (2000) (crediting Donald J. Rapson, formerly Vice President and Special Counsel of the CIT Group, Inc. and a member of the U.C.C.’s Permanent Editorial Board, as the driving force behind the decision to apply Article 9 to the sale of promissory notes); Memorandum from Donald J. Rapson on the Inclusion of Sales of Instruments (Negotiable and Non-negotiable) in Article 9 to the Article 9 Drafting Committee (Feb. 2 1998) (promoting the inclusion of the sale of instruments into Article 9 and identifying securitization as the primary reason to take this action) (on file with author).

5. *In re Foreclosure Cases*, No. 1:07CV2282, 2007 WL 3232430, at *3 n.3 (N.D. Ohio Oct. 31, 2007).

by some foreclosing parties obfuscated the rules found in the U.C.C. and foreclosure law.⁶

Confusion about the roles of and intersections between Articles 3 and 9 of the U.C.C. and the right to foreclose under state real property law followed in the wake of these changes. These misunderstandings spawned volumes of judicial rulings, many of which appear to be at odds with each other. Absent a careful assessment of these cases, the path through the thicket of rulings is unclear. The possibility of unnecessarily inconsistent outcomes is real and harmful to the homeowners, litigants, and the integrity of the legal system.

In an effort to reduce the ensuing legal confusion about the intersections between the right to foreclose and the U.C.C., this Article provides a roadmap of the relevant rules in Articles 3 and 9 and the right to foreclose in state real property law. Further, it

6. *E.g.*, Brief for Appellee at 10, *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2 A.3d 289 (Me. 2010) (No. CUM-09-640), 2010 WL 5096854, at *10 (trying to fit the Mortgage Electronic Registration System (“MERS”) into the definition of a person entitled to enforce in U.C.C. § 3-301 by arguing that section 3-301 includes, in effect, an additional subsection covering a person who is not the owner of the instrument or is in wrongful possession of the instrument, such as a person who obtained enforcement authority by contract or through agency principles); Reply Brief for Appellant at 7, *Mortg. Elec. Registration Sys., Inc.*, 2 A.3d 289 (No. CUM-09-640) (noting that the appellee created a fictitious subsection and, in doing so, misread Maine’s U.C.C.; discussing why MERS does not meet any of the criteria that would enable it to enforce the note). The court agreed with the appellant, ruling that MERS did not qualify under any of the three subsections in U.C.C. § 3-301 because MERS produced no evidence that it held the note, possessed the note, or that the note was lost, stolen, or destroyed. *Mortg. Elec. Registration Sys., Inc.*, 2 A.3d at 296. MERS is a controversial player utilized in many securitizations. The Mortgage Banker Association member companies created MERS in 1995 to operate a computer database on behalf of its members to track servicing and ownership rights in mortgages originated anywhere in the United States. A full discussion of MERS is beyond the scope of this Article. Suffice it to say that the mere presence of MERS in a mortgage loan transaction increases the likelihood of legal challenges to the authority to foreclose and, potentially, to title to real property throughout the United States. *Culhane v. Aurora Loan Servs. of Neb.*, 826 F. Supp. 2d 352, 360 (D. Mass. 2011) (“Nationwide, courts are grappling with challenges to MERS’s power to assign mortgages as well as its practice of deputizing employees of other companies to make assignments on its behalf.”), *aff’d*, 708 F.3d 282 (1st Cir. 2013). For a few of the many articles identifying the issues raised by the use of MERS in mortgages, see generally Donald J. Kochan, *Certainty of Title: Perspectives After the Mortgage Foreclosure Crisis on the Essential Role of Effective Recording Systems*, 66 ARK. L. REV. 267, 284–96 (2013). See also generally Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System’s Land Title Theory*, 53 WM. & MARY L. REV. 111 (2011) (discussing whether naming MERS as a mortgagee satisfies traditional conveyance requirements); David E. Woolley & Lisa D. Herzog, *MERS: The Unreported Effects of Lost Chain of Title on Real Property Owners*, 8 HASTINGS BUS. L.J. 365 (2012) (analyzing the effects of MERS’s electronic recording system on traditional recorded property rights in the United States).

explores the tension developing over the last decade among Articles 3, 9, and the right-to-foreclose concept in state real property law. For the first time, this Article surveys all fifty states to identify the recent state appellate court decisions addressing the right to foreclose and groups the cases together into three categories by the type of analysis applied by those courts.⁷ The Article then highlights the decisions that fall into one category, those from Arizona, California, and Georgia, because these rulings dismiss the role of the U.C.C. outright. In addition, these states have experienced some of the worst foreclosure rates in the nation and permit foreclosures to proceed nonjudicially.⁸ Hence, the consequences of these opinions affect a broad swath of homeowners in danger of losing their homes. The Article then applies statutory construction principles to determine whether those courts ruled out the U.C.C. unnecessarily, concluding that foreclosure laws in those states could be harmonized with the U.C.C.

The Article begins by summarizing the evidence of document mishandling followed by a discussion of why the right-to-foreclose rules matter in Parts I and II. Part III details the enforcement rules governing negotiable and nonnegotiable loan notes, the respective roles of Articles 3 and 9 of the U.C.C. in this context, the distinctions between the concepts of the right to enforce and ownership, and enforcement obstacles reflected in judicial decisions. Part IV outlines the contours of the common law right to foreclose, as amended in some state statutes, and describes the differences between the foreclosure regimes in judicial and in nonjudicial foreclosure states. Next, this Part identifies the connections between the U.C.C. and the right to foreclose. Finally, it places state appellate court decisions that define the right to foreclose into analytical groupings. Part V presents a guide to applicable statutory construction principles and applies them to the decisions released by the Arizona, California, and Georgia appellate courts.

Finally, the Article concludes that where inconsistencies arise between the U.C.C. and state real property law, applying statutory construction principles will likely result in a more uniform legal landscape throughout the nation, which would protect homeowners from unjustified foreclosures and reduce litigation costs and judicial resources in a distraught foreclosure system.

I. SHODDY DOCUMENT HANDLING

The crisis that severely weakened the economic security of the United States and millions of its residents over the last six years began when large numbers of homeowners defaulted on poorly

7. See *infra* Parts IV, V.

8. Elizabeth Renuart, *Property Title Trouble in Non-Judicial Foreclosure States: The Ibanez Time Bomb?*, 4 WM. & MARY BUS. L. REV. 111, 116 (2013).

underwritten subprime mortgage loans.⁹ The ensuing flood of foreclosures displaced millions of homeowners, promoted neighborhood blight, drove down housing prices, and sparked a severe recession.¹⁰ A less publicized result is the failure to comply with the legal rules governing the transfer of mortgage loans.

Securitization contributed to this problem for two reasons: first, investors drove loan originations due to their demand for mortgage-backed securities, thus ramping up the origination (and paperwork) frenzy,¹¹ and, second, complex securitization deals required the physical transfer of the notes and mortgages among several different players, thus increasing the likelihood of transfer glitches.¹²

A detailed catalog of instances of negligent and intentional mishandling of these documents is beyond the scope of this Article. The following summary is derived from numerous sources. The evidence reveals the failure to deliver the original notes with proper indorsements to the trustee or its document custodian, the routine

9. FIN. CRISIS INQUIRY COMM'N, *THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES* xv–xvi (2011), available at <http://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>.

10. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-433, *MORTGAGE FORECLOSURES: DOCUMENTATION PROBLEMS REVEAL NEED FOR ONGOING REGULATORY OVERSIGHT* 42 (2011), available at <http://www.gao.gov/new.items/d11433.pdf> (describing the effect of foreclosures on communities, local governments, and the national economy); MORTG. BANKERS ASS'N, *NATIONAL DELINQUENCY SURVEY Q2* (2011) (reporting that almost 3.5 million loans were seriously delinquent).

11. *Subprime Lending and Securitization and Government-Sponsored Enterprises (GSEs): Hearing Before the Fin. Crisis Inquiry Comm'n*, 111th Cong. 118, 126 (2010) (statement of Richard Bitner, Former President, Kellner Mortgage Investments) (describing the “originate-to-distribute” model of lending and how securitization created a “renewable source of capital”); Douglas J. Whaley, *Mortgage Foreclosures, Promissory Notes, and the Uniform Commercial Code*, 39 W. ST. U. L. REV. 313, 315 (2012) (describing the careless handling and sometimes intentional mistreatment of the promissory notes and opining that the collapse of the housing market was a direct consequence of “greedy and unwise business practices”).

12. Securitization deals usually require the transfer and sale of the notes and mortgages from the lender to a sponsor, seller, or arranger that in turn passes the documents to a depositor. The depositor transfers the documents to a special purpose vehicle (“SPV”), usually a trust that holds the loans for the benefit of the investors. Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 13–14 (2011). Additional moves occur when, for example, the lender obtains the mortgage loans from affiliates. *Id.* at 14. In the context of a securitization deal, this contract often is embodied in either a mortgage loan purchase and sale agreement or a pooling and servicing agreement, depending on which parties to the securitization are transferring and receiving the mortgage loans. *Id.* at 13 nn.32–33. See also *Citimortgage, Inc. v. Barabas*, 975 N.E.2d 805, 808 (Ind. 2012) (describing a mortgage loan as a “mass delusion” due to the panoply of players involved in the negotiation of mortgages on the secondary market).

creation of unnecessary lost note affidavits, the destruction of the original notes, and the falsification of necessary indorsements.¹³ This behavior is widespread and reported in judicial decisions, the findings of a state's attorney general and a city recorder office's investigation, studies by law professors, news reports, congressional testimony, and shareholder lawsuits.¹⁴ As Kathleen Cully, a former in-house counsel and securitization lawyer, and her coauthors put it: "Unfortunately, over the years procedural standards in mortgage securitizations appear to have deteriorated along with loan-underwriting standards. As a result, in some, if not many or most, cases, notes were neither indorsed nor delivered to the SPV [trust] or its agent in accordance with the delivery instructions."¹⁵

The consequences can be significant and include the failure of the foreclosing party to possess the right to foreclose, the wrongful removal of some homeowners from their homes, fraud upon the court in the case of forgery and false affidavits, and property title uncertainty.¹⁶

II. WHY FORECLOSURE RULES MATTER

The foreclosure crisis and resulting deep recession were not provoked by greedy or fraudulent homeowners searching for easy credit who intentionally defaulted and walked away from the mess. Rather, the Financial Crisis Inquiry Commission, established in 2009 by Congress to examine the causes of the financial and

13. Alan M. White, *Losing the Paper—Mortgage Assignments, Note Transfers and Consumer Protection*, 24 LOY. CONSUMER L. REV. 468, 475 (2012) (describing these behaviors).

14. Renuart, *supra* note 8, at 119–28 (compiling evidence from these sources); White, *supra* note 13, at 473–76, 486 (reviewing some evidence and concluding that there was “a significant breakdown in the system of endorsement and delivery of mortgage notes in the pre-2007 period”; surveying 396 foreclosure cases in six judicial foreclosure states and finding mismatches between the plaintiff identified in the foreclosure complaint and the proper party listed in MERS about twenty percent of the time).

15. Shaun Barnes et al., *In-House Counsel's Role in the Structuring of Mortgage-Backed Securities*, 2012 WIS. L. REV. 521, 528; see also *U.S. Bank Nat'l Ass'n v. Ibanez*, 941 N.E.2d 40, 55 (Mass. 2011) (Cordy, J., concurring) (“[W]hat is surprising about these cases . . . [is] the utter carelessness with which the plaintiff banks documented the titles to their assets.”); Renuart, *supra* note 8, at 179 (“The sloppiness and hubris of parties to the securitization deals created and, in some cases, covered up the documentation problems chronicled in this Article.”).

16. Renuart, *supra* note 8, at 124–25, 127–28, 171–77 (discussing each of these consequences); see also *Pino v. Bank of N.Y.*, 121 So. 3d 23, 25 (Fla. 2013) (noting that the issue of fraud on the court “arises out of a widespread problem associated with fraudulent documentation filed by various financial institutions seeking to foreclose on real property throughout the state,” in the context of affirming the voluntary dismissal of the plaintiff's foreclosure complaint allegedly based upon fraudulent information when the defendant suffered no harm before the dismissal).

economic crisis, pinned responsibility on a number of parties and practices. The commission found widespread failures in financial regulation and supervision by key federal agencies, failures of corporate governance and heightened risk taking, excessively leveraged financial institutions and high consumer debt loads, deterioration of mortgage-lending standards, loosening of due diligence standards applied in the securitization process, the repackaging and sale of questionable mortgage-backed securities into collateralized debt obligations and the sale of credit default swaps to hedge against the collapse of these securities, failures of the credit rating agencies, and an unprepared government that responded inconsistently to the crisis.¹⁷

Certainly, not all homeowners were blameless for their overextended borrowing. Many other homeowners, however, faced foreclosure due to unemployment, not surprising since more than twenty-six million Americans had no job, could not find full-time work, or had given up search for work as of the beginning of 2011.¹⁸ Most disturbing, a subset of homeowners lost their homes even though they had not defaulted on their payments.¹⁹

The prerequisites to foreclosure found in state laws are important, to the extent they are designed to prevent the illegal or unnecessary loss of the family home. The stakes are particularly high in nonjudicial foreclosure states where the borrower who mortgages her property can lose it without easy access to the courts.²⁰ There, the burden and expense of litigating is shifted from

17. FIN. CRISIS INQUIRY COMM'N, *supra* note 9, at xvii–xxviii; *see also* FDIC Oversight: Examining and Evaluating the Role of the Regulator During the Financial Crisis and Today: Hearing Before the Subcomm. on Fin. Insts. and Consumer Credit of the H. Fin. Servs. Comm., 112th Cong. 7–39 (2011) (statement of Sheila C. Bair, Chairman, Federal Deposit Insurance Corporation) (identifying the roots of the financial crisis—excessive reliance on debt and financial leverage, misaligned incentives in financial markets, failures and gaps in financial regulation, and erosion of market discipline due to “too big to fail”).

18. FIN. CRISIS INQUIRY COMM'N, *supra* note 9, at xv.

19. The Office of the Comptroller of the Currency created a procedure whereby homeowners who lost their homes could file a claim for damages after conducting examinations of the largest mortgage servicers and uncovering significant paperwork problems related to foreclosures. The fact that the agency established this remedy is significant because it recognizes that not all foreclosed homeowners were in default and not all foreclosures were lawful. OFFICE OF THE COMPTROLLER OF THE CURRENCY, INTERIM STATUS REPORT: FORECLOSURE-RELATED CONSENT ORDERS 7–10 (2011), *available at* <http://www.occ.treas.gov/news-issuances/news-releases/2011/nr-occ-2011139a.pdf>.

20. See the description of the nonjudicial foreclosure procedure in the text accompanying notes 153–65. Indeed, “foreclosure under a power of sale is not favored in the law, and its exercise will be watched with jealousy.” Tenney v. Birdsall (*In re* Foreclosure of Deed of Trust by Goforth Props., Inc.), 432 S.E.2d 855, 859 (N.C. 1993) (internal quotation marks omitted). Notably, one court

the foreclosing party to the homeowner, who must file an affirmative lawsuit to stop the process prior to the forced sale. State law also may require that the homeowner post a bond, limit the right to contest the sale to a narrow period of time before or after the sale, permit only narrow grounds to challenge the legality of the procedure, or apply a presumption of legality once the sale occurs.²¹

Taking care to ensure that foreclosures are carried out only by the parties that possess the legal right to do so is not a mere procedural detail. The rule requiring possession of the note in Article 3 of the U.C.C. ensures that the homeowner does not face double liability, which occurs when the wrong party sells the home and the note holder later appears seeking full payment on the note.²² Moreover, a homeowner needs the certainty provided by Articles 3 and 9 of the U.C.C. that any loan modification agreement or other negotiated alternative to foreclosure is entered into with the legally correct person.²³

Professor Levitin provided a fresh insight into the role of the mortgage contract in this context:

The mortgage contract is not simply an agreement that the home may be sold upon a default on the loan. Instead, it is an agreement that . . . if the homeowner defaults on the loan, the mortgagee may sell the property *pursuant to the requisite legal procedure*. A mortgage loan involves a bundle of rights, including procedural rights. These procedural rights are not merely notional; they are explicitly priced by the market. Mortgage finance availability and pricing is statistically correlated with variations in procedural protections for borrowers. Retroactively liberalizing the rules for mortgage

described the Arizona foreclosure procedure as “draconian.” Schrock v. Fed. Nat’l Mortg. Ass’n, No. CV 11-0567-PHX-JAT, 2011 WL 3348227, at *6–8 & n.7 (D. Ariz. Aug. 3, 2011) (discussing in detail the draconian results of the legislative foreclosure regime in the context of recognizing the tort of wrongful foreclosure); see also Molly F. Jacobson-Greany, *Setting Aside Nonjudicial Foreclosure Sales: Extending the Rule to Cover Both Intrinsic and Extrinsic Fraud or Unfairness*, 23 EMORY BANKR. DEV. J. 139, 150–51 (2006) (describing the nonjudicial foreclosure process as “harsh”).

21. Renuart, *supra* note 8, at 152–53, 164, 167–68 (noting restrictions to homeowner challenges and presumptions upon sale in Arizona law; bond or payment requirements in Georgia law; and, short timeframes to challenging a completed sale and a showing that the homeowner did not breach any condition in the deed of trust in Nevada law).

22. Whitman & Milner, *supra* note 2, at 62.

23. *Id.*; see also David A. Dana, *Why Mortgage “Formalities” Matter*, 24 LOY. CONSUMER L. REV. 505, 507–08 (2012) (identifying additional reasons why “formalities” matter: in some cases, the homeowner can stay in the home over the long haul; procedural rights represent the societal value that a home is central to the lives of its residents and to the vitality of the larger community; and, insistence on following these rules may help to prevent another foreclosure crisis in the future).

enforcement creates an unearned windfall for mortgagees. Moreover, the ability to credibly push back against a foreclosure through a challenge to standing provides the homeowner leverage for a negotiated solution such [as] a loan modification or simply buys the homeowner time to relocate, enabling a softer landing with fewer social dislocations and externalities.²⁴

Finally, the important interests of purchasers and the property title systems existing in all states deserve some attention. If state law or the courts interpreting state law fail to ensure that the proper entity forecloses, defective title resulting from wrongful foreclosures can infect the title system.²⁵ Purchasers of foreclosed properties expect that title to the premises is clear and that the foreclosure sale is valid and final.²⁶ The policy justifications behind property title recording systems include the paramount need for an authoritative source of ownership information “to protect property rights, encourage commerce, expose fraud, and avoid disputes.”²⁷

III. ENFORCEMENT OF LOAN NOTES

A “loan,” as used in common parlance, is represented in a piece of paper called a “note.”²⁸ A note or “instrument” is any writing that

24. Adam J. Levitin, *The Paper Chase: Securitization, Foreclosure, and the Uncertainty of Mortgage Title*, 63 DUKE L.J. 637, 650–51 (2013) (citations omitted).

25. Renuart, *supra* note 8, at 173–75 (discussing title headaches).

26. Elizabeth Renuart, *Toward a More Equitable Balance: Homeowner and Purchaser Tensions in Non-Judicial Foreclosure States*, 24 LOY. CONSUMER L. REV. 562, 570–74 (2012).

27. Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System’s Land Title Theory*, 53 WM. & MARY L. REV. 111, 125 (2011). “A \$13 trillion residential mortgage market depends directly on clarity of mortgage title . . .” Levitin, *supra* note 24, at 645.

28. The U.C.C. discussion throughout this Article relies upon the 2001 version of Article 1, unless otherwise indicated, which all but five states have enacted. See *UCC Article 1, General Provisions (2001)*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=UCC%20Article%201,%20General%20Provisions%20%282001%29> (last visited Nov. 17, 2013):

All references to Article 3 of the U.C.C. in this Article rely upon the 1990 version of that Article, unless otherwise indicated. The 1990 Article 3 is effective in all states except New York (which essentially uses the original version it adopted in 1961) and those eleven states that have adopted the 2002 version of Article 3. See *UCC Article 3, Negotiable Instruments (1990)*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/Act.aspx?title=UCC%20Article%203,%20Negotiable%20Instruments%20\(1990\)](http://www.uniformlaws.org/Act.aspx?title=UCC%20Article%203,%20Negotiable%20Instruments%20(1990)) (last visited Nov. 17, 2013); *UCC Article 3, Negotiable Instruments and Article 4, Bank Deposits (2002)*, UNIFORM L. COMMISSION, [http://www.uniformlaws.org/Act.aspx?title=UCC%20Article%203,%20Negotiable%20Instruments%20and%20Article%204,%20Bank%20Deposits%20\(2002\)](http://www.uniformlaws.org/Act.aspx?title=UCC%20Article%203,%20Negotiable%20Instruments%20and%20Article%204,%20Bank%20Deposits%20(2002)) (last visited Nov. 17, 2013).

Finally, the discussions regarding Article 9 refer to the 2010 version, unless otherwise indicated. All but five states have enacted the 2010 amendments to the 1998 version. See *UCC Article 9 Amendments (2010)*,

evidences a right to payment of a monetary obligation.²⁹ An example of an instrument is a promissory note, the type of note typically used in transactions in which the loan is secured by residential real property.³⁰ Thus, a “mortgage loan” consists of two distinct documents, a promissory note and a security agreement.³¹ In many states, the agreement granting a security interest in real property takes one of two forms, a mortgage or deed of trust.³²

If the note is negotiable, Article 3 of the U.C.C. governs the identity of the party who possesses the right to enforce it.³³ This is not a controversial principle. But if the negotiable note is transferred to a buyer or assignee, as opposed to “negotiated,” or the note is nonnegotiable, Article 9 of the U.C.C. and contract law apply to determine ownership. The intersections between Articles 3 and 9 and the distinction between the right to enforce a note and ownership are not well understood. The next Subparts describe the conditions that a party must meet in order to enforce a negotiable note and provide examples of situations where foreclosing parties

UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=UCC%20Article%209%20Amendments%20%282010%29> (last visited Nov. 17, 2013); *UCC Article 9, Secured Transactions (1998)*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=UCC%20Article%209,%20Secured%20Transactions%20%281998%29> (last visited Nov. 17, 2013). In any event, the 2010 revisions generally are not germane to the discussion in this Article.

29. BLACK'S LAW DICTIONARY 1162 (9th ed. 2009) (defining “note” to include an “instrument”); see U.C.C. § 9-102(a)(47) (2010) (defining “instrument” to include both negotiable and nonnegotiable writings that evidence a promise to pay a monetary obligation); cf. U.C.C. § 3-104(b) (1990) (stating that an instrument is a negotiable instrument); *id.* § 3-102(a) (applying Article 3 only to negotiable instruments).

30. U.C.C. § 9-102(a)(65) (defining a promissory note as an “instrument that evidences a promise to pay a monetary obligation”). If the note includes both a promise to pay a monetary obligation and a security interest, the note is chattel paper. *Id.* § 9-102(a)(11).

31. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 5.27 (5th ed. 2007)

32. 4 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 37.03 (Michael Allan Wolfe ed., LexisNexis Matthew Bender & Co. 2013). A mortgage is a two-party contract that, most commonly, creates a lien on real property. In contrast, a deed of trust is three-party contract in which the trustor (borrower) conditionally conveys title to a third-party trustee who holds it as security for the debt owed to the beneficiary (lender). See, e.g., ARIZ. REV. STAT. ANN. § 33-801 (2012) (defining the parties to a deed of trust). When the mortgage or deed of trust creates a security interest under state law, that state is considered a “lien theory” state. In a minority of states, the mortgage or deed of trust vests legal title in the mortgagee or beneficiary and, hence, are “title theory” states. NELSON & WHITMAN, *supra* note 31, § 4.1 and text accompanying n.11, § 4.2 and text accompanying n.1. When a transaction involves a “security deed,” as is used in Georgia, that instrument also transfers title to the real estate. FRANK S. ALEXANDER, GEORGIA REAL ESTATE FINANCE AND FORECLOSURE LAW § 8:1 (2013). Georgia's security deed is the subject of a larger discussion in Subpart V.C.3 below.

33. U.C.C. §§ 3-102, -301.

have failed to meet these standards. A similar discussion follows addressing nonnegotiable note.

A. *The Development and Role of Negotiable Instruments*

The English bill of exchange was the earliest form of a negotiable instrument developed to transport capital in the form of a document, rather than carrying tangible valuables from place to place or to another country as payment for goods or services.³⁴ Originally, these bills had four parties: the maker (or payor), the one desiring or obligated to make payment; the payee for whose benefit the payor made payment; the drawer (a third party to be paid by the payor); and the drawee (a bank or other entity instructed to pay the payee).³⁵ Bills of exchange provided a means of credit and became central to trade among merchants in the 1500s.³⁶ Later, both merchants and nonmerchants used bills of exchange because an adequate supply of money did not exist in England and because they were easily transferred.³⁷ The promissory note, a two-party instrument, developed later and remains common today.³⁸

The real value of negotiable instruments lies in their liquidity. They are easily transferable because the buyer need not search beyond the instrument itself to verify the power of the seller to transfer it.³⁹ Because they are easily transferable, the payee readily can obtain cash in exchange for the instrument. "By providing a ready source of cash, an active market for payment obligations aids the financial position of operating businesses that generate payment obligations when they sell things to their customers."⁴⁰ For this reason, loan notes themselves become commodities to buy, sell, and securitize. The Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") are the largest secondary mortgage purchasers of mortgage loans in the United States.⁴¹ The uniform notes that they require

34. Kurt Eggert, *Held Up in Due Course: Codification and the Victory of Form over Intent in Negotiable Instrument Law*, 35 CREIGHTON L. REV. 363, 377 (2002).

35. *Id.* at 378.

36. *Id.* at 379, 381–82.

37. *Id.* at 382–83.

38. *Id.* at 385–89.

39. LYNN M. LOPUCKI ET AL., *COMMERCIAL TRANSACTIONS: A SYSTEMS APPROACH*, 725–26 (5th ed. 2012). Indeed, the instrument is a "reified right to payment," meaning that this right is represented by the instrument itself. U.C.C. § 3-203 cmt. 1 (1990). One professor characterizes the current Code covering negotiable instruments, Article 3 of the U.C.C., as a "note title system." Levitin, *supra* note 24, at 659–64.

40. LOPUCKI ET AL., *supra* note 39, at 725.

41. Levitin, *supra* note 24, at 656.

lenders to use in residential mortgage transactions purport to be negotiable.⁴²

The history of negotiable instrument law in the United States is beyond the scope of this Article. The more recent part of the story began with the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) and the American Law Institute (“ALI”). These organizations commenced the process of drafting the U.C.C. in 1942.⁴³ Professor Karl Llewellyn served as the Chief Reporter along with Professor Sonia Metschikoff, the Associate Chief Reporter.⁴⁴ Committees of each organization reviewed various drafts of each article.⁴⁵ The full membership of both organizations voted to adopt a version in 1951.⁴⁶ That draft encountered opposition leading to its revision and final adoption by NCCUSL and ALI in 1957.⁴⁷ States began to enact the Code thereafter.⁴⁸ For example, Massachusetts adopted the U.C.C. in 1957 and Kentucky in 1958.⁴⁹ All other states followed in these footsteps over the next few years.⁵⁰ Negotiable instrument law now appears in Article 3 of that Code.

B. Negotiable Instruments and the Concept of the Person Entitled to Enforce

In Article 3 nomenclature, the person who signs or is identified in a note as the person agreeing to pay is known as the “maker.”⁵¹ The one named on the instrument as the person to whom the money is paid or payable is the “payee.”⁵²

The right to enforce “negotiable” notes is governed by several provisions of Article 3. Pursuant to section 3-104, a “negotiable instrument”: (1) contains an unconditional promise to pay a fixed amount of money; (2) is payable to bearer or to order at the time it is issued or first comes into possession of a holder; (3) is payable on

42. FANNIEMAE, SELLING GUIDE: FANNIE MAE SINGLE FAMILY § A2-2.1-03, at 22–23 (2013).

43. Bruce W. Frier, *Interpreting Codes*, 89 MICH. L. REV. 2201, 2201 (1991).

44. *Id.*

45. *General Comment of the National Conference of Commissioners on Uniform State Laws and the American Law Institute*, in PERSPECTIVES ON THE UNIFORM COMMERCIAL CODE 7 (Douglas E. Litowitz ed., 2d ed. 2007).

46. Robert Braucher, *Legislative History of the Uniform Commercial Code*, in PERSPECTIVES ON THE UNIFORM COMMERCIAL CODE, *supra* note 45, at 22.

47. GENERAL COMMENT OF NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND THE AMERICAN LAW INSTITUTE, *reprinted in* 1 UNIFORM LAWS ANNOTATED XIII (2012).

48. Braucher, *supra* note 46, at 23–25.

49. *Id.*

50. *Id.* at 25.

51. U.C.C. § 3-103(a)(7) (1990).

52. BLACK’S LAW DICTIONARY 1243 (9th ed. 2009). Interestingly, “payee” is not defined in Article 3. Most of us know the “maker” as the “borrower.” Most of us know the “payee” as the “lender.”

demand or at a definite time; and (4) does not state any other undertaking or instruction by the promisor to do any action in addition to the payment of money. If any one of these conditions is not met, the loan note is not “negotiable.”⁵³ Negotiability is important because Article 3 creates rights to enforce the note only if it is negotiable.⁵⁴

Article 3 creates three discrete paths to acquiring the right to enforce the loan note and, hence, to become a “person entitled to enforce” (“PETE”). The first method is to become the “holder” of the note.⁵⁵ A holder is “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.”⁵⁶ When a negotiable note is “negotiated” to another party, the transfer must include delivery of the note containing the indorsement of the current holder (if the note is payable to an identified person).⁵⁷ If the instrument is payable to bearer, transfer by possession alone suffices.⁵⁸

Alternatively, a “nonholder” may enforce a negotiable note if that person possesses both the note itself and the rights of a holder.⁵⁹ This situation occurs when the note “transferred,” that is “delivered by a person . . . for the purpose of giving to the person receiving delivery the right to enforce the [note].”⁶⁰ Delivery requires that a voluntary transfer of possession to the transferee occurs.⁶¹ The rights of the transferor must be proven because the

53. Many of these elements are discussed more fully in subsequent sections. See U.C.C. §§ 3-106, -108, -109, -112.

54. *Id.* § 3-102(a) (stating that Article 3 applies only to negotiable instruments). However, the note maker (borrower) and the note payee (lender) could contract to apply Article 3 to nonnegotiable instruments. *Id.* § 3-104 cmt. 2.

55. *Id.* § 3-301(i).

56. U.C.C. § 1-201(b)(21)(A) (2001). Article 3 does not define “possession.” According to Black’s Law Dictionary, “possession” means “[t]he fact of having or holding property in one’s power; the exercise of dominion over property.” BLACK’S LAW DICTIONARY 1281 (9th ed. 2009).

57. U.C.C. § 3-201(b); see also *id.* § 3-204(a) (defining indorsement as the signature that is made for the purpose of negotiating the instrument). The U.C.C. uses the word “indorsement,” not “endorsement.”

58. U.C.C. § 3-201(b); see also *Horvath v. Bank of N.Y.*, 641 F.3d 617, 621 (4th Cir. 2011) (describing this rule as “possession permits enforcement”). A note originally payable to bearer or to an identified payee may be indorsed in blank, rendering the note bearer paper, or indorsed payable to an identified person, called a special indorsement, rendering it payable only to that person. U.C.C. § 3-205.

59. U.C.C. § 3-301(ii).

60. *Id.* § 3-203(a). A person also can become a nonholder if the person acquired the rights of a holder by subrogation and is in possession of the note or any other person who is a successor to the holder under applicable law. *Id.* § 3-302 cmt. 2.

61. *Id.* § 1-201(b)(15). Article 3 requires delivery because it is a simple method that identifies the proper party to receive payment from the borrower. See U.C.C. § 3-602(a) (the note is paid to the extent payment is made to the

transferee's rights are derivative of the transferor's rights.⁶² Moreover, the person transferring the note or a person earlier in the chain of transfers must be a holder.⁶³ The crucial element common to both negotiation to a "holder" and a transfer to a "nonholder" is possession of the instrument.

The third path is distinctly different from the two described above. It arises when a person no longer possesses the note because it was lost, destroyed, or stolen.⁶⁴ Under the 1990 version of Article 3, the person seeking to enforce the note must have been entitled to enforce it when the loss of possession occurred for one of these three reasons.⁶⁵ In addition, that person must prove the terms of the note and the court must ensure that the maker is adequately protected against loss in the event that a holder later asserts its right to payment.⁶⁶

1. *Enforcement Obstacles*

Part I summarizes evidence of the nature and scope of the mishandling of notes and mortgages preceding and during the recent foreclosure crisis. This Part compiles judicial rulings that illustrate the potholes in the path to enforcing a mortgage loan note.

a. The Foreclosing Party Does Not Possess the Note

The foreclosing party may not have obtained physical possession of the negotiable note at the relevant time and, therefore, had no authority to enforce it by foreclosure or otherwise. Examples of this situation abound in court decisions.⁶⁷

PETE); Levitin, *supra* note 24, at 659 (characterizing Article 3 as a note title system, not merely a transfer and enforcement regime).

62. U.C.C. § 3-203 cmt. 2 (1990); *see also* FDIC v. Houde, 90 F.3d 600, 605 (1st Cir. 1996).

63. U.C.C. § 3-301; *see also* Houde, 90 F.3d at 605; U.C.C. § 3-203(b) (noting that the recipient of the note upon a qualified transfer receives the same right of the transferor to enforce the note).

64. U.C.C. § 3-301(iii) (explaining that section 3-301 also permits enforcement by a person not in possession of the note where the payment on the instrument was made or accepted by mistake, referencing section 3-418(d), a situation not relevant to the issues discussed in this article).

65. *Id.* § 3-309(a). Some courts hold that the assignee of a promissory note that was lost while in the possession of the assignor also can enforce the note under section 3-309(a). *E.g.*, Atl. Nat'l Trust, LLC v. McNamee, 984 So. 2d 375, 377-78 (Ala. 2007). The 2002 version permits enforcement of a lost, stolen, or destroyed instrument by a person who "directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred." U.C.C. § 3-309(a)(1)(B) (2002).

66. U.C.C. § 3-309(b) cmt. (1990).

67. *E.g.*, Country Place Cmty. Ass'n v. J.P. Morgan Mortg. Acquisition Corp., 51 So. 3d 1176, 1179 (Fla. Dist. Ct. App. 2010) (finding no evidence that the plaintiff possessed the note when it filed its lawsuit and lacked standing); Deutsche Bank Nat'l Trust Co. v. Mitchell, 27 A.3d 1229, 1235-37 (N.J. Super. Ct. App. Div. 2011) (vacating the sheriff's sale and remanding due to lack of

Possession by an agent on behalf of the owner of the note arguably can suffice. An Official Comment on Article 3 suggests that possession of the note can occur “directly or through an agent.”⁶⁸ Some courts describe possession through an agent as “constructive

evidence that the plaintiff possessed the loan note at the time of filing the foreclosure action); *Bank of N.Y. v. Raftogianis*, 13 A.3d 435, 459 (N.J. Super. Ct. Ch. Div. 2010) (dismissing foreclosure complaint without prejudice because plaintiff could not prove it had possession of the note on the date it filed the complaint); *Bank of N.Y. v. Silverberg*, 926 N.Y.S.2d 532, 538–40 (App. Div. 2011) (reversing the lower court’s refusal to dismiss the foreclosure complaint where the assignee only obtained the mortgage from MERS and not the note); *HSBC Bank USA, Nat’l Ass’n v. Miller*, 889 N.Y.S.2d 430, 432–33 (Sup. Ct. 2009) (dismissing the foreclosure because the plaintiff failed to show that the note was transferred to it before filing the foreclosure action); *In re Adams*, 693 S.E.2d 705, 710 (N.C. Ct. App. 2010) (ruling that the evidence of transfer of the note to the trustee bank was insufficient); *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 979 N.E.2d 1214, 1216–17, 1220 (Ohio 2012) (holding that the plaintiff did not have possession of the note and a valid assignment of it before filing the foreclosure complaint); *U.S. Bank, Nat’l Ass’n v. Moore*, 278 P.3d 596, 599–600 (Okla. 2012) (finding that the plaintiff could not prove it had possession of the note at the time the complaint was filed); *U.S. Bank Nat’l Ass’n v. Kimball*, 27 A.3d 1087, 1091–92 (Vt. 2011) (affirming summary judgment to the mortgagor when the bank failed to prove that it was the holder of the note); see also *Anderson v. Burson*, 35 A.3d 452, 454 (Md. 2011) (noting that mortgage transferors often lose or misplace mortgage documents and fail to properly transfer loan notes but affirming the ruling that the substituted trustee may enforce the note because the homeowner conceded the proffered version of the transfer history). Standing challenges to the filing of a motion to lift the automatic stay or of a proof of claim in bankruptcy proceedings where the alleged creditor did not possess the note arise with some frequency. *E.g.*, *Miller v. Deutsche Bank Nat’l Trust Co. (In re Miller)*, 666 F.3d 1255, 1264–65 (10th Cir. 2012) (reversing and remanding judgment of Bankruptcy Appellate Panel because the current evidence did not prove that alleged holder or transferee had obtained possession of the note); *Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal)*, 450 B.R. 897, 917–18 (B.A.P. 9th Cir. 2011) (holding that the party seeking to lift the automatic stay failed to show that it or its agent had actual possession of the note and, therefore, could not be a person entitled to enforce the note).

68. U.C.C. § 3-201 cmt. 1. The Permanent Editorial Board of the Uniform Commercial Code issued a report addressing selected issues relating to mortgage notes in 2011. There, the Board opined that a person in possession of the note can include possession by a third party that possesses it for the person. AM. LAW INST., REPORT OF THE PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE: APPLICATION OF THE UNIFORM COMMERCIAL CODE TO SELECTED ISSUES RELATING TO MORTGAGE NOTES 5 n.19 (2011). This board is composed of members from the American Law Institute and the Uniform Law Commission. It monitors current drafting activities of the Uniform Commercial Code and prepares commentaries and advises its member organizations on further changes needed in the Uniform Commercial Code. *Committees: Permanent Editorial Board for Uniform Commercial Code*, UNIFORM L. COMMISSION (2013), <http://www.uniformlaws.org/Committee.aspx?title=Permanent%20Editorial%20Board%20for%20Uniform%20Commercial%20Code>.

possession.”⁶⁹ In the context of a mortgage loan, a “servicer,” acting for the lender or its transferee, collects the payments, maintains the payment records, selects foreclosure attorneys in the event of defaults, and sometimes forecloses.⁷⁰ When a servicer seeks to enforce the note in its own name by, for example, filing a proof of claim in the borrower’s bankruptcy or initiating a foreclosure, the servicer must show that it is the PETE, or, at a minimum, has an agency relationship with the PETE that authorizes it to foreclose on behalf of the PETE.⁷¹ Servicers may be unable to prove PETE status when seeking to enforce notes on behalf of the trust in a securitization deal because they “did not always bother to take physical possession of the notes in accordance with state law.”⁷²

b. Broken Chain of Indorsements or No Indorsement to Transferee

If the negotiable instrument requires an indorsement and does not bear the necessary indorsement to the party attempting to foreclose, the note is not payable to the transferee.⁷³ In that situation, the transferee is not a “holder” but, nevertheless, must possess the note and account for its possession of the instrument “by proving the transaction through which the transferee acquired it.”⁷⁴ Moreover, the transferee must show that it possesses the rights of a

69. *E.g.*, *In re Miller*, 666 F.3d at 1263 n.9; *In re McFadden*, 471 B.R. 136, 175 (Bankr. D.S.C. 2012).

70. Diane E. Thompson, *Foreclosing Modifications: How Servicer Incentives Discourage Loan Modifications*, 86 WASH. L. REV. 755, 765 (2011).

71. JOHN RAO ET AL., NAT’L CONSUMER LAW CTR., FORECLOSURES: MORTGAGE SERVICING, MORTGAGE MODIFICATIONS, AND FORECLOSURE DEFENSE § 5.6 (4th ed. 2012) (relying on cases cited therein); *see also* *Equity One, Inc. v. Shivers*, 74 A.3d 1225, 1234 (Conn. 2013) (ruling that the servicer had standing to foreclose because it was the holder of the note); *J.E. Robert Co. v. Signature Props. LLC*, 71 A.3d 492, 500–01, 504 (Conn. 2013) (ruling that the servicer may foreclose in its name when it established that it was a nonholder entitled to enforce the note even though it was not the owner or the holder of the note and mortgage).

72. Barnes et al., *supra* note 15.

73. The necessary indorsements may appear on an allonge. U.C.C. § 3-204(a). In that situation, the allonge must be affixed, that is, “actually attached to the instrument, meaning some form of physical connection securing the paper to the instrument.” *Wells Fargo Bank, N.A. v. Settoon*, 120 So. 3d 757, 761–62 (La. Ct. App. 2013) (ruling, however, that the homeowner admitted that the allonge was affixed in his verified petition); *Whaley*, *supra* note 11 at 318–19 (noting the renewed attention to this issue in court decisions); *see also* *Vidal v. Liquidation Props., Inc.*, 104 So. 3d 1274, 1277–78 (Fla. Dist. Ct. App. 2013) (reversing summary judgment to foreclosing party where it relied on an undated allonge to show that the note was indorsed in blank and failed to attach any proof that the note was transferred prior to the filing of the complaint); *U.S. Bank Nat’l Ass’n v. Kimball*, 27 A.3d 1087, 1092 (Vt. 2011) (finding that the allonge containing undated indorsements was not adequate to confer holder status at the time of filing the foreclosure complaint).

74. *Anderson v. Burson*, 35 A.3d 452, 462 (Md. 2011) (relying on U.C.C. § 3-203 cmt. 2).

“holder.”⁷⁵ If this evidence is not available, the party may not foreclose.⁷⁶

c. Inability to Prove Lost Note Requirements

The foreclosing party may not rely upon a lost note affidavit if it cannot show that it had the right to enforce the note at the time it lost possession.⁷⁷

C. *Right to Enforce Versus Ownership*

Ordinarily, the person entitled to enforce a negotiable note is also its owner.⁷⁸ The clearest example of this dual status arises when the payee listed in a loan note is the holder demanding payment. However, when mortgage loans are sold and resold on the secondary market, the buyers may not qualify as PETEs due to the

75. *Id.* at 462 (“If there are multiple prior transfers, the transferee must prove each prior transfer. . . . Once the transferee establishes a successful transfer from a holder, he or she acquires the enforcement rights of that holder.”); U.C.C. § 3-301(ii).

76. *McLean v. JP Morgan Chase Bank Nat’l Ass’n*, 79 So. 3d 170, 174–75 (Fla. Dist. Ct. App. 2012) (reversing summary judgment as there was insufficient evidence to show that original note contained a special indorsement at the time of filing the lawsuit); *Wells Fargo Bank, N.A. v. Heath*, 280 P.3d 328, 333–34 (Okla. 2012) (reversing summary judgment to the plaintiff because it did not show that the indorsement on the note occurred before the complaint was filed); *U.S. Bank, N.A. ex rel. Credit Suisse First Bos. Heat 2005-4 v. Alexander*, 280 P.3d 936, 941–42 (Okla. 2012) (reversing summary judgment for the plaintiff where it produced an indorsement on an allonge over a year after it filed the complaint; MERS had no authority to indorse the note); *J.P. Morgan Chase Bank, Nat’l Ass’n v. Eldridge*, 273 P.3d 62, 66–67 (Okla. 2012) (dismissing foreclosure case without prejudice because the plaintiff could not demonstrate that the note was indorsed to it; finding that an assignment of the mortgage does not constitute an assignment of the note and, hence, does not establish the purpose of delivery of the note to the transferee).

77. *Fifth Third Mortg. Co. v. Fillmore*, No. 12 CAE 04 0030, 2013 WL 425116, at *6 (Ohio Ct. App. Jan. 28, 2013) (ruling, in a priority dispute over which mortgage lienholder was in first position to foreclose, that the lost note affidavit filed by one party failed to establish that he was in possession of the note and entitled to enforce it when the loss of possession occurred; consequently, evidence of a debt to support the mortgage was lacking); U.C.C. § 3-309; *see also Maddox v. Cohn*, 36 A.3d 426, 433 n.10 (Md. 2012) (describing the “widespread” practice of filing a lost note affidavit when the note was not lost but, rather, inconveniently stored somewhere in the MERS system); *supra* text accompanying notes 64–66.

78. *Veal v. Am. Home Mortg. Servicing, Inc. (In re Veal)*, 450 B.R. 897, 912 (B.A.P. 9th Cir. 2011) (“While in many cases the owner of a note and the person entitled to enforce it are one and the same, this is not always the case”); U.C.C. § 3-203 cmt. 1 (“[T]ransfer of an instrument might mean in a particular case that title to the instrument passes to the transferee”); AM. LAW INST., *supra* note 68, at 8 (“While, in many cases, the person entitled to enforce the note is also its owner, this need not be the case.”).

transfer problems noted previously.⁷⁹ These buyers may be owners but are not PETEs.⁸⁰

In the context of Articles 3 and 9, ownership means the ultimate right to the economic value of the note.⁸¹ PETE status entitles that person to exercise certain rights vis-à-vis the borrower, such as, accepting payments or a payoff for the purpose of discharging the debt, modifying the loan, and approving a short sale.⁸² Ownership rights in negotiable notes are determined by principles of property law, independent of Article 3 of the U.C.C.⁸³ “The [legal] distinction between ownership and PETE status has been widely misunderstood in the past and has been responsible for considerable confusion in judicial decisions and statutes.”⁸⁴ Part of the difficulty in understanding the scope and meaning of Article 9 resides in its language. Article 9 covers the sale of a variety of payment

79. I use the words “sale” and “assign” interchangeably, relying on BLACK’S LAW DICTIONARY 136, 1454 (9th ed. 2009) (defining “assignment” as the “transfer of rights or property”; defining “sale” as the “transfer of property or title for a price”). See NELSON & WHITMAN, *supra* note 31 (“When a lender, having originated a mortgage loan, *sells* it to another investor, a secondary market transaction is said to occur, and the transfer by the original mortgagee is loosely termed an ‘assignment.’ Three federally-sponsored agencies, Fannie Mae, Freddie Mac, and the Government National Mortgage Association (GNMA or ‘Ginnie Mae’), are actively involved in purchasing assignments of mortgages, primarily on residential properties, from local lenders throughout the nation.” (emphasis added)).

80. See U.C.C. § 3-309 cmt. 1 (“The rights stated are those of a ‘person entitled to enforce the instrument’ at the time of loss rather than those of an ‘owner’ as in former Section 3-804.”).

81. *In re Veal*, 450 B.R. at 912 (defining economic value as the value of the maker’s promise to pay); Whitman & Milner, *supra* note 2, at 25 (defining ownership as the right to the economic benefits of the note, including the monthly payment, proceeds in the event of a voluntary payoff, short sale, or foreclosure sale); see also *Bank of Am., N.A. v. Cloutier*, 61 A.3d 1242, 1246 (Me. 2013) (noting that the “owner” of a mortgage note under the state’s foreclosure law is the economic beneficiary of the note).

82. Whitman & Milner, *supra* note 2, at 25.

83. U.C.C. § 3-203 cmt. 1. When a negotiable instrument is sold, however, Article 9 determines the identity of the owner. See also discussion *infra* Subpart III.D.

84. Whitman & Milner, *supra* note 2, at 26 (citations omitted); see also *In re Veal*, 450 B.R. at 912 (“[O]ne can be an owner of a note without being a ‘person entitled to enforce.’ This distinction may not be an easy one to draw, but is one the UCC clearly embraces.” (citations omitted)); *Kemp v. Countrywide Home Loans, Inc. (In re Kemp)*, 440 B.R. 624, 633 (Bankr. D. N.J. 2010) (“The attempted assignment of the note in the assignment of the mortgage document, together with the terms of the Pooling and Servicing Agreement, created an ownership issue, but did not transfer the right to enforce the note.”); Alvin C. Harrell, *Impact of Revised UCC Article 9 on Sales and Security Interests Involving Promissory Notes and Payment Intangibles*, 55 CONSUMER FIN. L. Q. REP. 144, 148 (2001) (“There is, however, some inevitable interplay (and potential for conflict) between the claims of the holder of a negotiable instrument under UCC Articles 3 and 9 . . .”).

obligations (accounts, chattel paper, payment intangibles, and promissory notes), in addition to traditional security interests in personal property.⁸⁵ Nonetheless, the text refers to the buyer as the “secured party” and the seller as the “debtor” throughout.⁸⁶

Articles 3 and 9 overlap and diverge in their coverage of negotiable notes. Both provide distinct parts of the law affecting negotiable notes that fit together. Broadly speaking, Article 3 governs negotiability, transfer of PETE status, payment, right to collect and enforcement, and satisfaction of negotiable notes.⁸⁷ Article 9 addresses the transfer of ownership of both negotiable and nonnegotiable notes.⁸⁸ As for nonnegotiable notes, once Article 9 creates ownership rights in the buyer, contract law and other common law, in combination, generate enforcement rights by the owner, as detailed in Subparts D and G.⁸⁹

D. Article 9, Ownership, and Nonnegotiable Notes

A note is nonnegotiable when it fails to meet the requisites contained in Article 3.⁹⁰ Nevertheless, ordinarily, it is a writing that contains a promise or order to pay money and that may “resemble[] a negotiable instrument in form and which, by its nature, is such that the original parties could reasonably contemplate its transfer.”⁹¹ Professor Willier’s research into the common law revealed that, at least as of 1960, the courts often applied the same

85. U.C.C. § 1-201(b)(35) (2001) (defining security interest); *see also* U.C.C. §§ 9-109(a)(1), (3) (2010) (applying Article 9 to security interests in personal property and to the sale of accounts, chattel paper, payment intangibles, and promissory notes). Professor Levitin notes that the applicability of Article 9 is not obvious, even to an “intrepid researcher.” Levitin, *supra* note 24, at 691.

86. U.C.C. §§ 9-102(a)(28), (73) (defining debtor and secured party, respectively).

87. *In re Veal*, 450 B.R. at 909. Regarding these distinctions, the court noted: “Article 3 does not necessarily equate the proper person to be paid with the person who owns the negotiable instrument. Nor does it purport to govern completely the manner in which those ownership interests are transferred. For the rules governing those types of property rights, Article 9 provides the substantive law.” *Id.*

88. *Id.*

89. The terms of the sale contract governing enforcement apply because Article 1 recognizes that principles of contract law apply to the U.C.C. unless displaced by particular Code provisions. U.C.C. § 1-103. It is important to note that Article 3 defers to Article 9 in the event of a conflict between the two. U.C.C. § 3-102(b) (1990). However, there are no conflicts between the two on the issues relevant to this Article. Levitin, *supra* note 24, at 695 (arguing that Article 9 itself does not contain any provisions for enforcement of notes); *see also infra* text accompanying notes 96–100.

90. *See In re Veal*, 450 B.R. at 909 & n.15 (stating that Article 3 applies only to negotiable instruments).

91. William F. Willier, *Nonnegotiable Instruments*, 11 SYRACUSE L. REV. 13, 13 (1960) (discussing the similarities and differences between negotiable and nonnegotiable instruments).

or similar transfer rules to nonnegotiable notes as they did to negotiable notes when the instruments were drafted in a similar fashion. For example, where the nonnegotiable instrument was payable to a named person, indorsement and delivery were required.⁹² Possession of an indorsed nonnegotiable note was “presumptive of ownership and delivery,” although some courts required that words of assignment be present.⁹³ Moreover, “[a] proper transfer of a nonnegotiable instrument vest[ed] legal ownership . . . in the transferee.”⁹⁴ Events since the publication of Professor Willier’s article in 1960 resulted in trumping the common law addressing the transfer of ownership of nonnegotiable notes as he knew it. This story takes us to Article 9.

At its inception, Article 9 governed conventional security interests in personal property.⁹⁵ Revisions in 1972 extended Article 9 rules to the sale of accounts and chattel paper in order to recognize “historical forms of financing that had long been practiced in many industries called ‘factoring.’”⁹⁶ The residential mortgage-backed securitization market flourished in the ensuing decades.⁹⁷ In order

92. *Id.* at 14–15.

93. *Id.*; see also *Chi. Trust & Sav. Bank v. Chi. Title & Trust Co.*, 60 N.E. 586, 588 (Ill. 1901) (holding that an indorsement and delivery of a nonnegotiable instrument, absent an actual assignment, does not pass title).

94. Willier, *supra* note 91, at 19. The owner of a nonnegotiable instrument ordinarily is subject to the defenses existing among the prior parties to the instrument at the time of transfer and before notice of the transfer is provided to the maker. *Id.* at 21–22. This latter principle approximates the common law rule that an assignee of a contract acquires all rights and is subject to all liabilities of the assignor upon the transfer. RESTATEMENT (SECOND) OF CONTRACTS § 336 (1981). By contrast, if the note is negotiable and the holder is a “holder in due course,” the holder is not subject to most defenses to payment on the note. U.C.C. § 3-305.

95. The original version of Article 9 dates to 1962, although its drafting began in the 1940s. JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 1149 (6th ed. 2010); see also U.C.C. § 9-101 (2010); Braucher, *supra* note 46.

96. WHITE & SUMMERS, *supra* note 95, at 1170. Factoring was the practice of buying accounts and paying less than 100% of the account value. The factor’s profit was the difference between 100% of the account’s value and the purchase price. *Id.*

97. *Id.* (recounting that following the 1972 Code, a more complex form of factoring burst forth—securitization); 2 INSIDE MORTGAGE FINANCE PUBLICATIONS, INC., THE 2009 MORTGAGE MARKET STATISTICAL ANNUAL 174–77 (2009) (showing Freddie Mac outstanding mortgage-backed securitizations in dollar volume rising from \$515 billion in 1995 to \$646.5 billion in 1998 and showing Fannie Mae outstanding securitizations in dollar volume rising from \$583 billion in 1995 to \$834.5 billion in 1998); Robert M. Lloyd, *Article 9 and Real Estate Law: Practical Solutions for Some Bothersome Problems*, 29 IDAHO L. REV. 583, 587–88 (1992) (describing the development of an enormous market in mortgage-backed securities due to the activities of Fannie Mae, Freddie Mac, and Ginnie Mae). By 2008, when the foreclosure crisis was in full swing, Freddie Mac’s outstanding volume had risen to \$1.8 trillion while Fannie Mae’s outstanding volume had risen to \$3.1 trillion. INSIDE MORTGAGE FINANCE

to facilitate this type of financing and investment vehicle, NCCUSL and the ALI amended Article 9 in 1998.⁹⁸ As a result, Article 9 now governs the sale of promissory notes.⁹⁹ Next, the 2001 amendments to Article 1 inserted the sale of promissory notes into the definition of “security interest.”¹⁰⁰ Arguably, Article 9 and the sale contract now provide the exclusive method for determining ownership of nonnegotiable promissory notes when common law conflicts with Article 9.¹⁰¹

In order to sell promissory notes under Article 9, the seller and buyer must enter into a signed agreement that includes a

PUBLICATIONS, INC., *supra*, at 164. In addition, private securitizations that funded the subprime mortgage loan market rose from \$65 billion in 1995 to its peak of \$430 billion in 2006. *Id.* at 3–5.

98. Steven L. Harris & Charles W. Mooney, Jr., *How Successful Was the Revision of UCC Article 9?: Reflections of the Reporters*, 74 CHI.-KENT L. REV. 1357, 1373–74 (1999) (confirming that the Drafting Committee gave little thought to the sale of instruments until the very end of the process and “did not spend much time considering the ramifications of its decision. Whether otherwise avoidable problems will arise as a consequence remains to be seen.”); McDonnell & Hitchcock, *supra* note 4 (noting that the decision to apply Article 9 to the sale of promissory notes was made late in the drafting process and attributing the driving force to Donald J. Rapson, formerly Vice President and Special Counsel of the CIT Group, Inc. and a member of the U.C.C.’s Permanent Editorial Board). Indeed, Mr. Rapson wrote a Memorandum to the Article Drafting Committee on February 2, 1998 promoting the inclusion of the sale of instruments in Article 9 and identifying securitization as the primary reason to take this action. Memorandum from Donald J. Rapson on the Inclusion of Sales of Instruments (Negotiable and Non-negotiable) in Article 9 to the Article 9 Drafting Committee (Feb. 2 1998) (on file with author). Prior to Mr. Rapson’s suggestion, the Article 9 Drafting Committee, headed by its two reporters, Steven L. Harris and Charles W. Mooney, Jr., had proposed including only the sale of general intangibles and credit card securities into Article 9. Steven L. Harris & Charles W. Mooney, Jr., *The Article 9 Study Committee Report: Strong Signals and Hard Choices*, 29 IDAHO L. REV. 561, 569–70 (1992).

99. The U.C.C. drafters accomplished this by adding the buyer of promissory notes into the definition of “secured party,” defining “promissory note,” and adding the sale of promissory notes into the scope section. U.C.C. §§ 9-102(a)(65), -102(a)(72), -109(a)(3).

100. U.C.C. § 1-201(b)(35) (2001). In forty-nine states, Article 9 covers the sale of promissory notes by relying upon this broader definition of a “security interest.” South Carolina has not adopted this expanded definition upon which Article 9 relies. AM. LAW INST., *supra* note 68, at 9 n.31.

101. U.C.C. § 1-103(b) cmt. 2 (“In the absence of [a specific provision that provides otherwise], the Uniform Commercial Code preempts principles of common law and equity that are inconsistent with either its provisions or its purposes and policies.”); Barnes et al., *supra* note 15, at 527 (stating that Article 9 governs the sale of all promissory notes, whether or not they are negotiable). As previously discussed in this Subpart, Article 9 provides the sole method for determining ownership of negotiable promissory notes when they are “transferred” under section 3-203, rather than “negotiated” under section 3-201. Article 3 alone determines when a party qualifies as a PETE. See U.C.C. § 9-109 cmt. 5 (stating that a person entitled to enforce a negotiable promissory note may sell its ownership rights in the instrument).

description of the promissory notes, the buyer must give value, and the seller must have rights in the property being transferred.¹⁰² Alternatively, the seller can deliver the notes to the buyer pursuant to an oral agreement, so long as the buyer gives value and the seller has rights in the property being transferred.¹⁰³ Consequently, the buyer owns the notes and the right to enforce the sale agreement, both against the seller and against any third parties claiming an ownership right in the notes.¹⁰⁴

E. Article 9 and Negotiable Notes

The major innovation of an Article 9 sale is that promissory notes can be sold without transfer of possession and “independently of the principles of Article 3.”¹⁰⁵ If the note qualifies as a negotiable instrument, Article 3 recognizes two types of transfers, those that qualify as “negotiations” and those that do not meet the

102. U.C.C. § 9-203(b).

103. *Id.* cmt. 4. The effect of provisions in section 9-203 can be varied by agreement with certain exceptions, including the definitions of negotiable instrument, negotiation, and holder in due course. U.C.C. § 1-302(a) cmt. 1. Comment 1 to this section implies that the “effect of its provisions” means changing the legal consequences that would otherwise flow from any given UCC provision. *Id.* § 1-302 cmt. 1 (internal citations omitted). Moreover, Comment 2 to section 3-104 permits the parties to a nonnegotiable note to agree that one or more provisions of Article 3 apply to that note. U.C.C. § 3-104 cmt. 2 (1990). Arguably, the parties to a sale can agree to transfer by way of negotiation as defined in section 3-201 (indorsement plus possession or mere possession in the case of bearer paper). The securitization industry attempted to cover its bases by providing for both the negotiation of mortgage notes under Article 3 and the outright sale and assignment of the notes and mortgages under Article 9 in the PSAs used in each deal. AM. SECURITIZATION FORUM, TRANSFER AND ASSIGNMENT OF RESIDENTIAL MORTGAGE LOANS IN THE SECONDARY MORTGAGE MARKET 3 (2010), available at http://www.americansecuritization.com/di/uploadedfiles/asf_white_paper_11_16_0.pdf (“Thus, whether the mortgage notes in a given securitization pool are deemed ‘negotiable’ . . . or ‘non-negotiable’ will have little or no substantive effect under the UCC on the validity of the transfer of the notes.”). Arguably, if the note transfers do not comply with both Articles 3 and 9, the transfers are not defensible. Levitin, *supra* note 24, at 698–701 (discussing the reasons why both negotiation of notes under Article 3 and sale of notes under Article 9 are desirable from the securitization industry’s perspective; suggesting that Article 9 requires proof of the chain of title from the original note payee to the final buyer because each seller in the securitization process must have rights in the note to transfer). *But see* Barnes et al., *supra* note 15, at 523–26, 529–30 (arguing that the note and mortgage delivery instructions contained in PSAs are not conditions to the sale).

104. U.C.C. § 9-203(b) (“[A] security interest is enforceable against the debtor and third parties” if certain requirements are met.). Section 9-308(e) goes further and, in conjunction with section 9-203(g), provides that the buyer acquires the rights to any mortgage related to the note that is senior to the rights of a lien creditor. *Id.* § 9-308 cmt. 6.

105. McDonnell & Hitchcock, *supra* note 4, at 99.

requirements of “negotiations.”¹⁰⁶ In the latter case, Article 9 determines whether the transfer constitutes a sale and, if so, the identity of the owner.¹⁰⁷ The Article 9 buyer can only enforce a negotiable note against the maker (the homeowner), however, if the buyer is a PETE under Article 3.¹⁰⁸ Significantly, under Article 3, the PETE, either a holder or nonholder, must have possession, even though, under Article 9, possession is not necessary to create ownership.¹⁰⁹

Ms. Cully, a former securitization industry in-house counsel, contends that Article 9 trumps Article 3 when an Article 9 buyer enforces the note, negotiable or nonnegotiable, and the mortgage via foreclosure. She contends this is so because the sale agreement covers both notes (personal property) and their accompanying mortgages (creating a security interest in real property).¹¹⁰ This argument conflates the sale agreement with the loan note. Rather,

106. U.C.C. §§ 3-201, -203.

107. U.C.C. § 9-203(a)–(b).

108. *Id.* § 9-308 cmt. 6 (“For example, if the obligation is evidenced by a negotiable note, then Article 3 dictates the person whom the maker must pay to discharge the note and any lien securing it. See Section 3-602.”); U.C.C. § 3-203 cmt. 1 (“[A] person who has an ownership right in an instrument might not be a person entitled to enforce the instrument.”); *id.* § 3-602(a) (“[A negotiable] instrument is paid to the extent payment is made by or on behalf of a party obliged to pay the instrument, and to a person entitled to enforce the instrument.”); *id.* § 3-301 (defining under what circumstances a person is entitled to enforce an instrument); *see also* U.C.C. § 9-607 cmt. 8 (“Of course, the secured party’s rights derive from those of its debtor. Subsection (b) would not entitle the secured party to proceed with a foreclosure unless the mortgagor also were in default or the debtor (mortgagee) otherwise enjoyed the right to foreclose.”). For additional support, see AM. LAW INST., *supra* note 68, at 4 n.15, (“The concept of ‘person entitled to enforce’ a note is not synonymous with ‘owner’ of the note.”); *id.* at 8 (“The rules that determine whether a person is a person entitled to enforce a note do not require that person to be the owner of the note, and a change in ownership of a note does not necessarily bring about a concomitant change in the identity of the person entitled to enforce the note.”); *id.* at 10 nn.40–41, 10–11 illus. 6–8. The Board illustrated these points through fact patterns and concluded that the identity of the person entitled to enforce a negotiable instrument is determined by Article 3, not Article 9. *See* NELSON & WHITMAN, *supra* note 31, § 5.28 (“The methods of transferring an obligation and the mortgage that secures it depend on the nature of the obligation.”).

109. *Tarantola v. Deutsche Bank Nat’l Trust Co.* (*In re Tarantola*), 491 B.R. 111, 119–21 (Bankr. D. Ariz. 2013) (dismissing homeowner’s argument that only Article 9 and the pooling and servicing agreement apply on the issue of the transfer of the note because the note is not negotiable; implicitly finding the promissory note subject to Article 3 and applying that Article to determine that the creditor is either a holder or a nonholder with the rights of a holder for purposes of standing). As discussed in the text accompanying notes 64–66, possession is not required where the note is lost, destroyed, or stolen.

110. Kathleen G. Cully, Presentation at the NCLC Mortgage Training Conference: Transfer of Mortgage Loan to Securitization Trusts, slides 5, 9, 25–26 (July 18, 2012) (on file with author).

these are two separate and distinct contracts involving different parties.

Ms. Cully relies, in part, upon U.C.C. section 9-604(a). In a mixed personal and real property situation, section 9-604 permits a secured party to utilize Article 9 remedies as against only the personal property without prejudicing any rights related to the real property.¹¹¹ Alternatively, the secured party may proceed against both the real and personal property in accordance with real property law.¹¹²

Reliance upon this provision is misplaced when applying this language in the context of a sale agreement. Article 9 permits enforcement of the sale agreement by the secured party (buyer) against the debtor (seller) in the event of a default or breach of that agreement.¹¹³ It does not address (and does not affect) the right of the buyer to enforce the notes and mortgages against the borrowers/mortgagors, who are not parties to the sale agreement.¹¹⁴ As described previously, if the notes are negotiable, the right to enforce the note inures only to the PETE.¹¹⁵ The right to enforce nonnegotiable notes and Article 9's limited role in this context are described in Subpart G.

F. *Negotiable or Not?*

1. *Home Equity Lines of Credit*

Courts often assume that the standard promissory note is negotiable without engaging in any analysis.¹¹⁶ The discussion of

111. U.C.C. § 9-604(a)(1).

112. *Id.* § 9-604(a)(2) cmt. 2.

113. *See generally id.* § 9-601 (enumerating the rights of a secured party (buyer) upon default by the debtor (seller)).

114. *See id.*

115. *See supra* note 108 and accompanying text; *see also* discussion *infra* Part IV (regarding the relationship between the right to enforce the note and the right to foreclose).

116. *E.g.*, Chase Home Fin., LLC v. Fequiere, 989 A.2d 606, 610–11 (Conn. App. Ct. 2010); Deutsche Bank Nat'l Trust Co. v. Clarke, 87 So. 3d 58, 60–61 (Fla. Dist. Ct. App. 2012); Leyva v. Nat'l Default Servicing Corp., 255 P.3d 1275, 1280 (Nev. 2011) (mentioning the elements of negotiability but concluding that "a mortgage note is a negotiable instrument" without analysis of the specific note at issue); Deutsche Bank Nat'l Trust Co. v. Matthews, 273 P.3d 43, 46 (Okla. 2012); Arnold v. Palmer, 686 S.E.2d 725, 732 (W. Va. 2009); Dale A. Whitman, *How Negotiability Has Fouled Up the Secondary Mortgage Market, and What to Do About It*, 37 PEPP. L. REV. 737, 754–55 (2010) (reviewing forty-two court decisions rendered during the twenty years prior to 2009 in which negotiability of mortgage notes was in issue and finding that in thirty-three cases, "the court either expressly assumed without analysis that the note or notes in question were negotiable, or implicitly assumed the same result by moving directly to an issue that depended on negotiability without any mention of negotiability itself?"); *see also* Fred H. Miller, *Promissory Notes, Mortgages, Assignments, Foreclosure, and Related UCC Issues*, 65 CONSUMER FIN. L. Q. REP.

nonnegotiable notes secured by mortgages is not merely academic. For example, homeowners may borrow against their homes to pay for home repairs, medical bills, a child's education, to retire a credit card account, or for other reasons.¹¹⁷ Rather than refinance a current fixed-term mortgage loan, the lender may offer the homeowner a home equity line of credit ("HELOC"). Between 2005 and 2009, the dollar volume of balances owed on HELOCs in the United States rose from approximately \$350 billion to over \$500 billion.¹¹⁸

A HELOC is similar to other mortgage loans in that both are secured by the homeowner's home, although the HELOC mortgage usually is subordinate to an existing mortgage.¹¹⁹ A HELOC differs from a traditional mortgage loan in several ways. A traditional second mortgage loan provides the borrower with a fixed amount of money that is repayable over a fixed term, regardless of whether the interest rate is fixed or variable.¹²⁰ In contrast, a HELOC sets a credit limit, permits the homeowner to draw up to that cap in multiple advances, and may set a time limit to the draw period.¹²¹ In essence, a HELOC is a revolving line of credit. Consequently, the note is not negotiable because it does not contain a provision requiring payment of a fixed amount of money.¹²²

406, 409 (2011) ("Generally, the courts that have been addressing foreclosure issues have not engaged in an analysis of whether the promissory note at issue in the case is negotiable or nonnegotiable.")

117. LINDA CAVANAUGH, U.S. CENSUS BUREAU, HOME EQUITY LINES OF CREDIT—WHO USES THIS SOURCE OF CREDIT? 1 (2007), available at <http://www.census.gov/prod/2007pubs/c2kbr-37.pdf>.

118. FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 7 (2010), available at http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q22010.pdf; see also 1 INSIDE MORTGAGE FINANCE PUBLICATIONS, INC., *supra* note 97, at 4 (showing home equity loans rising in volume on an annual basis from \$53 billion in 2000 to \$349 billion in 2007, before the foreclosure crisis fully hit); *Improving Housing Market Helps Revive HELOC Originations*, MORTGAGE DAILY (Mar. 25, 2013), <http://www.mortgagedaily.com/MctHelocs032513LP.asp> (reporting almost \$700 billion in outstanding HELOCs in 2008).

119. 1 INSIDE MORTGAGE FINANCE PUBLICATIONS, INC., *supra* note 97, at v (defining a home equity loan as a loan secured by a mortgage that is in second position which includes home equity lines of credit).

120. FED. RESERVE BD., WHAT YOU SHOULD KNOW ABOUT HOME EQUITY LINES OF CREDIT 8 (2012), http://files.consumerfinance.gov/f/201204_CFPB_HELOC-brochure.pdf.

121. *Id.* at 3.

122. U.C.C. §§ 3-104(a), -112 cmt. 1 (1990) (clarifying that the requirement of a fixed amount of money applies to the principal); see also *Heritage Bank v. Bruha*, 812 N.W.2d 260, 268 (Neb. 2012) (ruling that a nonmortgage loan note permitting advances up to a set amount is not for a fixed amount of money because one cannot see how much the borrower had been advanced at any given time and is not negotiable); *Diversified Fin. Sys., Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C.*, 99 S.W.3d 349, 357 (Tex. App. 2003) (holding that a

2. *Payment Option ARMs*

The lending industry began offering payment option or “pick-a-payment” adjustable rate mortgages in the early part of the last decade and they steadily gained market share.¹²³ Option ARM originations rose from \$145 billion in 2004 to the peak of \$255 billion in 2007.¹²⁴

The complaint in one case succinctly describes the mechanics of a typical payment option ARM:

Ralston’s loan was offered at a low “teaser” interest rate of 1%. That rate lasted only thirty days, after which the rate was calculated by combining an index and a margin of 3.075%. Even if the index went down to zero, the combined total of the index and the margin always would be significantly higher than the teaser rate. However, the monthly payment schedule was calculated at the 1% rate. Under the applicable payment cap, the monthly payment could be increased only by 7.5% each year. Thus Ralston’s loan was certain to cause—indeed, it was *designed* to cause—negative amortization. Ralston was “locked in” to the loan by “a draconian prepayment penalty consisting of a prepayment charge equal to six months of interest.” Once the principal reaches 115% of the original loan amount, the monthly payment cap is eliminated and the monthly payments immediately are recast to fully amortizing payments of principal and interest. “To the extent that this built-in ‘payment shock’ is more than many Class Members can afford, they need to refinance 115% of the amount they initially borrowed (despite having made all of the required payments) or risk losing their homes to foreclosure.”¹²⁵

nonmortgage secured note was not negotiable when it permitted multiple advances over time up to \$50,000).

123. *E.g.*, ANDREW G. PIZOR ET AL., MORTGAGE LENDING § 2.6.2.1 (1st ed. 2012) (noting that payment option ARMs were common before 2008).

124. 1 INSIDE MORTGAGE FINANCE PUBLICATIONS, INC., *supra* note 97, at 6. The top five producers of option ARMs in 2007, the peak year, were Countrywide Financial, Wells Fargo & Company, Washington Mutual Bank, Wachovia Corporation, and IndyMac Bank. 1 INSIDE MORTGAGE FINANCE PUBLICATIONS, INC., THE 2008 MORTGAGE MARKET STATISTICAL ANNUAL 137 (2008). Only Wells Fargo survived the foreclosure crisis intact; it purchased Wachovia Bank in the process. SHEILA BAIR, BULL BY THE HORNS 96–105 (2012). Bank of America bought Countrywide and its related companies in 2008. *Bank of America to Acquire Countrywide*, NBCNEWS.COM (Jan. 11, 2008, 2:55 PM), http://www.msnbc.msn.com/id/22606833/ns/business-real_estate/t/bank-america-acquire-countrywide. Meanwhile, IndyMac Bank and Washington Mutual Bank failed on July 11, 2008 and September 25, 2008, respectively. *Failed Bank List*, FDIC, <http://www.fdic.gov/bank/individual/failed/banklist.html> (last visited Nov. 19, 2013).

125. *Ralston v. Mortg. Investors Grp., Inc.*, No. C 08–536 JF (PVT), 2010 WL 3211931, at *2 (N.D. Cal. Aug. 12, 2010) (citations omitted) (quoting complaint) (refusing to dismiss the class member’s fraudulent omission cause of action).

Negative amortization occurs when the monthly payments are insufficient to cover the interest earned for that payment period.¹²⁶ In that event, the loan note often provides that the earned and unpaid interest is added to the principal, a concept known as capitalizing the interest.¹²⁷ If the note makes clear that negative amortization and capitalization inevitably will occur, as alleged in the *Ralston v. Mortgage Investors Group, Inc.* case, the note does not contain a fixed principal amount because the stated initial principal constitutes only a floor while the principal cap operates like the credit limit in a HELOC, that is, the maximum possible principal.¹²⁸ The actual principal is never certain, rendering the note nonnegotiable.¹²⁹

3. Prepayment Penalty and Written Notice of Prepayment

Professors Ronald Mann and Dale Whitman question whether the standard Fannie Mae and Freddie Mac notes widely used in mortgage loans transactions across the nation are negotiable.¹³⁰

126. *What Is Negative Amortization?*, CFPB, <http://www.consumerfinance.gov/askcfpb/103/what-is-negative-amortization.html> (last updated June 12, 2013).

127. NAT'L CONSUMER LAW CTR., GUIDE TO SURVIVING DEBT 479, 484 (2013) (defining capitalization and negative amortization); PIZOR ET AL., *supra* note 123, §§ 2.6.2.2, 2.6.2.3, 2.6.2.4 (providing the mathematical calculations to prove how negative amortization occurs based upon a loan of \$425,000 with terms similar to those described in the *Ralston* case); *see also* Letter from Countywide Bank, a Division of Treasury Bank, N.A., on Amortization Schedule for Adjustable Rate Note-Payment Caps Note and Pay Option Rider (April 8, 2005) (on file with author).

128. *Ralston*, 2010 WL 3211931, at *2.

129. There appears to be only one case directly addressing the negotiability of a payment option ARM. In *Bank of New York v. Baldwin*, the Connecticut Superior Court failed to describe the terms of the particular loan at issue and misunderstood the concepts of amortization, negative amortization, and capitalization by stating that no note could be negotiable unless the principal remained constant throughout the loan term. No. CV085019044, 2009 WL 2962445, at *4 (Conn. Super. Ct. Aug. 13, 2009). Amortization of simple interest loans, such as promissory notes, occurs when each monthly payment is applied first to earned interest and next to principal resulting in a predictably *declining* balance. In this scenario, negative amortization can occur only by the act of the borrower in failing to make payments. In that event, unpaid interest may be added to the principal, that is, capitalized, and the principal increases, if capitalization is authorized in the note. In the case of option ARMs described in *Ralston* negative amortization is guaranteed by the note and occurs regardless of whether the borrower makes all payments on time. CAROLYN L. CARTER ET AL., CONSUMER CREDIT REGULATION § 5.3.1.1 (1st ed. 2012) (explaining simple interest); PIZOR ET AL., *supra* note 123, § 2.3.3.4 (defining negative amortization); *id.* §§ 2.6.2.1–4 (describing the effect of negative amortization in an option ARM).

130. Ronald J. Mann, *Searching for Negotiability in Payment and Credit Systems*, 44 UCLA L. REV. 951, 971–72 (1997); Whitman & Milner, *supra* note 2, at 28–29 (observing that, at best, the negotiability of the notes used by the secondary market giants, Fannie Mae and Freddie Mac, is “uncertain”).

Professor Mann focused on the prepayment provision and related writing requirement in these instruments, arguing that requiring the maker (borrower) to send a notice before a prepayment constitutes a requirement in addition to the payment of money which renders the note nonnegotiable pursuant to U.C.C. section 3-104(a)(3).¹³¹ Some homeowners recently have litigated this issue—so far, unsuccessfully.¹³²

G. *The Enforcement of Nonnegotiable Notes*

Under Article 9, the right to enforce a nonnegotiable note provided for in the note can be transferred either by a written sale agreement or by delivery of the note accompanied by an oral agreement to transfer ownership.¹³³ Thus, section 9-203(b) permits the buyer to acquire ownership rights without indorsement or delivery of the notes, so long as its other requirements are met. Moreover, a comment in the *Restatement (Third) of Property: Mortgages* explains that transfer of a contractual right obligation, such as that embodied in a nonnegotiable note, can occur by assignment.¹³⁴

131. Mann, *supra* note 130 (quoting from the standard note that “[w]hen I make a prepayment, I will tell the Note Holder in writing that I am doing so”). *But see* Whaley, *supra* note 11, at 324–25 (disagreeing with Professor Mann on this point).

132. HSBC Bank USA, Nat’l Ass’n v. Gouda, No. F-20201-07, 2010 WL 5128666, at *3 (N.J. Super. Ct. App. Div. Dec. 17, 2010) (holding that the right to prepayment is a voluntary option and the fact that the borrower must notify when opting to prepay is not a condition placed on the borrower’s promise to pay). Several courts expressly adopt the Gouda court’s view. *See, e.g.*, Steinberg v. Bank of Am., N.A. (*In re Steinberg*), No. WY-12-082, 2013 WL 2351797, at *4 & n.34 (B.A.P. 10th Cir. May 30, 2013); Picatinny Fed. Credit Union v. Fed. Nat’l Mortg. Ass’n, No. 09-1295 (GEB), 2011 WL 1337507, at *7 (D.N.J. Apr. 7, 2011); *In re Walker*, 466 B.R. 271, 283 (Bankr. E.D. Pa. 2012); Edwards v. Deutsche Bank Nat’l Trust Co. (*In re Edwards*), No. 11-23195, 2011 WL 6754073, at *5 (Bankr. E.D. Wis. Dec. 23, 2011). Professor Whitman noted these decisions in a recent article and remarked that the courts’ reasoning in these cases “is hardly overwhelming” and contends that the negotiability of Fannie Mae and Freddie Mac notes “remains uncertain.” Whitman & Milner, *supra* note 2, at 28–29 & n.30.

133. U.C.C. §§ 9-203(b)(3)(A)–(B) cmt. 4 (2010). Article 9 supports this view because it defines a promissory note as an “instrument” which is “of a type that in [the] ordinary course of business is transferred by delivery with any necessary indorsement or assignment.” *Id.* § 9-102(a)(47). Professor Whitman and Mr. Milner opine that transfer of the enforcement rights in a nonnegotiable instrument can occur by written assignment in a separate document or by delivery. “[A]nd beyond these general principles, not much can be said.” Whitman & Milner, *supra* note 2, at 31. They do not reference section 9-203(b) in this context, which, as noted in the text accompanying notes 91–93 above, requires more than mere transfer of possession.

134. RESTATEMENT (THIRD) OF PROP.: MORTGGS. § 5.4 cmt. b (1997) (contrasting a negotiable note which must be delivered).

As a result of the intervention of Article 9 into the common law addressing the transfer of nonnegotiable promissory notes, its relevant provisions and the purchase and sale contract now determine ownership.¹³⁵ It is important to remember that the note itself is a separate contract between the maker and the original payee. When the payee sells the note, the immediate buyer and any subsequent buyers stand in the shoes of the seller who, in turn, stands in the shoes of its seller, extending back to the shoes of the original payee.¹³⁶ The rights of the buyer to enforce the note are coextensive with those afforded the original payee as set forth in the note and that arise under relevant law. Moreover, ownership and the right to enforce the note ordinarily reside in the same party unless the owner grants enforcement rights in a contract to a third party, such as a servicer.

Article 9 intervenes into the actual enforcement of the underlying note in only two limited ways: first, if so agreed or in the event of default by the seller, the buyer may direct the note maker to make payment to it or perform other obligations; and second, the buyer may record a copy of the sale agreement and an affidavit indicating its right to foreclose if necessary to permit a buyer to foreclose nonjudicially.¹³⁷ Otherwise, Article 9 does not address the scope of the right to enforce the note itself or the right to foreclose on its accompanying mortgage. Those rights arise under contract, property, or other common law and include filing a lawsuit on the note or foreclosing or both.¹³⁸

1. *Enforcement Obstacles*

Although the Article 9 sale procedure appears straightforward, carelessness occurred in the securitization context. For example,

135. Unless provided elsewhere in the U.C.C., the effect of the provisions of the Code may be varied by agreement. U.C.C. § 1-302(a) (2001). An official comment to this section states that “freedom of contract is a principle of the Uniform Commercial Code.” *Id.* § 1-302 cmt. 1. However, this right is not limitless. U.C.C. § 9-602 (containing explicit limitation on freedom of contract). As discussed in Part V, states can amend the application of Article 9 rules through the subsequent passage of conflicting statutes.

136. See *supra* text accompanying notes 62–63, 80.

137. U.C.C. §§ 9-607(a)(1), (a)(3), (b).

138. See *id.* cmt. 6 (noting that section 9-607 only establishes the baseline rights of the secured party (buyer) vis-à-vis the debtor (buyer). The right to foreclose, as one enforcement mechanism, and Article 9’s role are discussed in Subpart IV.D, below. In effect, the right to enforce the note and the rights that accompany ownership of the note collapse into one party, the buyer, in the context of a sale of nonnegotiable notes. Nonetheless, arguably, the buyer can assign its right to enforce nonnegotiable notes to a third party. See U.C.C. § 1-302(a) (permitting the parties to a contract to vary the effect of the provisions of the U.C.C.); accord U.C.C. § 9-602(3) (stating that the parties may not waive or vary the Article 9 rules itemized therein and listing section 9-607(c) but not section 9-607(a)); see also *supra* text accompanying notes 73–76.

the pooling and servicing agreement (“PSA”) may fail to meet the section 9-203(b) prerequisites to enforceability. The Massachusetts Supreme Judicial Court in *U.S. Bank National Ass’n v. Ibanez* reviewed two PSAs to determine whether they contained effective assignments of the mortgages to the trustee banks.¹³⁹ In one of the consolidated cases, the sale agreement did not constitute an actual sale of the notes or assignment of the mortgages. Rather, it represented only a desire to sell.¹⁴⁰ In both cases, the PSAs presented to the court failed to include an itemized list of the specific mortgage loans contained in the deal. Accordingly, the mortgages were not assigned legally and the foreclosure sales by the trustee banks were void.¹⁴¹

The *Ibanez* court did not address the specific question of whether the PSA sale failed to meet the elements of an Article 9 sale. Its analysis, however, parallels two of the elements listed in section 9-203(b): first, that the seller sign a written agreement to sell the mortgage loans; and second, that the agreement contain a description of the collateral (the notes being sold).¹⁴²

Section 9-108 governs the sufficiency of the description of collateral in a sale agreement. Generally, the description is adequate if it reasonably identifies what is described.¹⁴³ This section includes examples of reasonable identification, for example, by a specific listing, category, type of collateral as defined in the U.C.C., quantity, or any other method “if the identity of the collateral is objectively determinable.”¹⁴⁴ “Supergeneric” descriptions of the collateral, such as “all the [seller’s] assets” or “all

139. *U.S. Bank Nat’l Ass’n v. Ibanez*, 941 N.E.2d 40, 52 (Mass. 2011) (construing the contract and addressing whether the mortgages were assigned properly).

140. *Id.*

141. The outcome in the *Ibanez* case prompted two attorneys practicing with the Barnes & Thornburg firm in its Finance, Insolvency, and Restructuring Department to publish a list of best practices to ensure proper documentation prior to initiating any foreclosure action. Thorne & Badawi, *supra* note 2, at 84. They recommend that foreclosing parties and their counsel ensure that: (1) the purchase agreement for the note and mortgage include a specific intent to sell and a itemized listing of each mortgage loan being sold, accompanied by granting language conveying the mortgage loans; (2) the note is properly transferred and endorsed; (3) the foreclosing party has possession of the note or a proper lost note affidavit is prepared; and, (4) they verify that all required assignments of the mortgage have been recorded in the local land records office. *Id.*

142. U.C.C. § 9-203(b) must be read together with U.C.C. § 9-102(a)(74) (defining “security agreement” as an agreement that creates or provides for a security interest) and U.C.C. § 1-201(b)(35) (defining “security interest” to include the sale of promissory notes).

143. U.C.C. § 9-108(a).

144. *Id.* § 9-108(b)(6).

the [seller's] personal property" or words of similar import are prohibited.¹⁴⁵

The PSA purportedly governing the Larace loan in *Ibanez* contains the following description of the mortgage loans being sold:

The Depositor, concurrently with the execution and delivery hereof, does hereby transfer, assign, set over and otherwise convey to the Trustee, on behalf of the Trust, without recourse for the benefit of the Certificateholders all the right, title and interest of the Depositor, including any security interest therein for the benefit of the Depositor, in and to (i) each Mortgage Loan identified on the Mortgage Loan Schedules¹⁴⁶

The parties to this transaction agreed to specifically list each mortgage loan, a legitimate form of collateral description permitted by section 9-108(b).¹⁴⁷ However, the parties failed to actually include the itemization in the PSA.¹⁴⁸ Moreover, the use of the broad phrase "mortgage loans" does not reasonably identify the mortgage loans subject to this particular securitization or provide a method for objectively determining the relevant loans.¹⁴⁹ For these reasons, the sale agreement is not enforceable under Article 9 where the seller and buyer rely upon a written sale agreement and the outcome is the same as in *Ibanez*.¹⁵⁰

145. *Id.* § 9-108(c).

146. Asset Backed Funding Corp., Pooling and Servicing Agreement § 2.01 (Form 8-k, Ex. 4) (Oct. 1 2005), available at <http://www.sec.gov/Archives/edgar/data/1343316/0000091412105002222/as871211-ex4.txt>.

147. *Id.*

148. *Id.* at exs. D-1, D-2.

149. The parties to a PSA usually do not know at the time they sign it exactly which mortgage loans being originated by the lender or its affiliates will make it into that particular deal. Each deal contains a closing date which may postdate the contract.

150. U.C.C. § 9-203(b) (stating that a sale agreement is not enforceable against the buyer and seller and third parties if the written agreement does not contain a description of the collateral). Courts are split on the question of whether the mortgagor may challenge the validity of the assignment of the mortgage. Compare *Correia v. Deutsche Bank Nat'l Trust Co.* (*In re Correia*), 452 B.R. 319, 324-25 (1st Cir. BAP 2011) (agreeing with other courts that the mortgagor is not a third party beneficiary of the PSA and lacks standing to object to any breaches of the terms of that document); *In re McFadden*, 471 B.R. 136, 161-62 (Bankr. D.S.C. 2012) (identifying and following other decisions in which courts have ruled that the borrowers lack standing to challenge an assignment because they are not parties to the assignment), with *Culhane v. Aurora Loan Servs. of Neb.*, 708 F.3d 282, 291 (1st Cir. 2013) ("[A] mortgagor has standing to challenge the assignment of a mortgage on her home to the extent that such a challenge is necessary to contest a foreclosing entity's status qua mortgagee."); *Miller v. Homecomings Fin., LLC*, 881 F. Supp. 2d 825, 831 & n.9 (S.D. Tex. 2012) (citing *Tri-Cities Constr., Inc. v. Am. Nat'l Ins. Co.*, 523 S.W.2d 426, 430 (Tex. Civ. App. 1975); *Glass v. Carpenter*, 330 S.W.2d 530, 537 (Tex. Civ. App. 1959)) ("Texas has long followed the common law rule which

Having set the stage with a discussion of the enforcement of notes, we now turn to the relationship between the enforcement of notes and state foreclosure law.

IV. THE RIGHT TO FORECLOSE UNDER REAL ESTATE LAW

A. *Common Law Rules*

“It is axiomatic that a mortgage is security for the performance of an act; that is the very nature of a mortgage.”¹⁵¹ The required act that most commonly is the source of a default under mortgages is repayment of the borrowed amount.¹⁵² Historically, the loan note and mortgage traveled together. “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.”¹⁵³ Many state courts and legislatures have adopted this rule.¹⁵⁴ Moreover, if an Article 9

permits a debtor to assert against an assignee any ground that renders the assignment void or invalid.”); *Glaski v. Bank of Am., Nat’l Ass’n*, 160 Cal. Rptr. 3d 449, 461 (Ct. App. 2013) (approving the rule that “a borrower can challenge an assignment of his or her note and deed of trust if the defect asserted would void the assignment”); *Dernier Mortg. Network, Inc.*, No. 2012-226, 2013 WL 5663279, ¶ 29 (Vt. Oct. 18, 2013) (adopting the rule that a mortgagor can assert violations of a PSA “only if those violations render[] the assignment to defendant absolutely invalid for breach of the PSA provisions”).

151. NELSON & WHITMAN, *supra* note 31, § 2.1 (citing RESTATEMENT (THIRD) OF PROP.: MORTGS. § 1.1 (1997)). The word “mortgage” refers to all types of residential real estate security agreements unless the text specifically states “deed of trust” or “security deed.”

152. Before the housing market meltdown, the percentage of all outstanding residential mortgage loans in the nation ninety days or more delinquent on loan payments or in foreclosure (“seriously delinquent”) stood at 2.23% (or almost 980,000 loans). MORTG. BANKERS ASS’N, NATIONAL DELINQUENCY SURVEY Q1 (2007). This percentage rose dramatically to its peak of 9.67% (or almost 4.3 million loans) by the end of 2009. MORTG. BANKERS ASS’N, NATIONAL DELINQUENCY SURVEY Q4 (2009). A default of an obligation in the mortgage other than nonpayment of the amounts due under the note can trigger the right to foreclose, depending on the terms of the mortgage contract. This Article limits its analysis to loan payment defaults.

153. *Carpenter v. Longan*, 83 U.S. 271, 274 (1872); RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4(a) (1997) (applying this rule to the transfer of both negotiable and nonnegotiable notes in Illustrations 1 and 2, but recognizing that the methods of transfer differ depending on the type of note). When only the note is transferred, at minimum, an equity interest in the mortgage automatically follows. POWELL, *supra* note 32, § 37.27[2]. The transfer of the mortgage typically is completed upon the execution of a formal written assignment. *Id.* § 37.27[3].

154. Examples of state statutes include: ALA. CODE § 8-5-24 (2002); ARIZ. REV. STAT. ANN. § 33-817 (2007); CONN. GEN. STAT. ANN. § 49-17 (West 2006) (as interpreted by *RMS Residential Props., LLC v. Miller*, 32 A.3d 307, 313 (Conn. 2011)); N.D. CENT. CODE § 35-03-01.2(7) (2013); UTAH CODE ANN. § 57-1-35 (LexisNexis 2010). *But see* GA. CODE ANN. § 44-14-64(b) (2002) (when the security deed is assigned, the note follows the deed); KAN. STAT. ANN. §58-2323

sale of promissory notes secured by related mortgage loans occurs, the sale automatically includes the mortgages.¹⁵⁵

The *Restatement (Third) of Property: Mortgages* addresses the right to foreclose and states “[a] mortgage may be enforced only by, or [o]n behalf of, a person who is entitled to enforce the obligation the mortgage secures.”¹⁵⁶ If the note and mortgage are split between different parties, the assignee of only the mortgage ordinarily holds a worthless piece of paper.¹⁵⁷

B. Statutory Wrinkles

State statutes enacted over the years have diverged from these common law principles. For example, statutes of frauds may mandate that transfers of interests in real property, including mortgages and their assignments, be in writing.¹⁵⁸ States also may insist upon the recordation of a mortgage assignment before a party

(2005) (codifying the opposite, that the note follows the mortgage); U.S. Bank Nat'l Ass'n v. McConnell, 305 P.3d 1, 6–7 (Kan. Ct. App. 2013) (stating that the state statute that codifies the opposite, that the note follows the mortgage; but holding that the mortgage follows the note; relying on the RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4(a) (1996)). Examples of court decisions include: Thomas v. Wells Fargo Bank, N.A., 116 So. 3d 226, 229 (Ala. Civ. App. 2012); Coon v. Shry, 289 P. 815, 816 (Cal. 1930); Lindsey v. Wells Fargo Bank, N.A., No. 1D12-2406, 2013 WL 692825, at *3 (Fla. Dist. Ct. App. Feb. 27, 2013); Prime Fin. Servs., LLC v. Vinton, 761 N.W.2d 694, 703–04 (Mich. Ct. App. 2008); Edelman v. Bank of N.Y. Mellon, 286 P.3d 249, 257–58 (Nev. 2012); U.S. Bank, N.A. v. Collymore, 890 N.Y.S.2d 578, 580 (App. Div. 2009); Wells Fargo Bank, N.A. v. Heath, 280 P.3d 328, 333 (Okla. 2012); Brandrup v. ReconTrust Co., N.A., 303 P.3d 301, 306–07 (Or. 2013); Stimpson v. Bishop, 82 Va. 190, 200–201 (1886) (relied upon in Horvath v. Bank of N.Y., N.A., 641 F.3d 617, 623 (4th Cir. 2011)); Bain v. Metro. Mortg. Grp., Inc., 285 P.3d 34, 38 (Wash. 2012); Tobin v. Tobin (*In re Tobin's Estate*), 121 N.W. 144, 146 (Wis. 1909) (assignment of the mortgage alone does not transfer the note); *see also* Harrell, *supra* note 84 (stating that most courts recognize this common law rule); *cf.* Eaton v. Fed. Nat'l Mortg. Ass'n, 969 N.E.2d 1118, 1125 (Mass. 2012) (confirming that the transfer of only the note vests in the note holder the right to obtain a conveyance of the mortgage in this title theory state; note holder only possesses a beneficial interest in the mortgage until a written assignment occurs); Jackson v. Mortg. Elec. Registration Sys., Inc., 770 N.W.2d 487, 497 (Minn. 2009) (noting rule in Minnesota that an assignment of the note operates as an equitable assignment of the related security agreement; however, foreclosing party must possess both record and legal title).

155. U.C.C. § 9-203(g) cmt. 9 (codifying the common law rule). In addition, the ownership interest of the buyer is perfected upon the sale in both the note and the accompanying mortgage. *Id.* §§ 9-308(e), -309(4).

156. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4(c) (1997).

157. *Id.* § 5.4 cmt. e; POWELL, *supra* note 32, § 32.27[2]. *But see* You v. JP Morgan Chase Bank, N.A., 743 S.E.2d 428, 433 (Ga. 2013) (reading GA. CODE ANN. § 44-14-64(b) to mean that the note follows the security deed where the security deed alone is transferred).

158. POWELL, *supra* note 32, at § 37.27[1].

can foreclose.¹⁵⁹ Moreover, some states require that the foreclosing party allege and prove “ownership” of the mortgage note and produce the note, mortgage, and all assignments of these instruments.¹⁶⁰

C. *The Two Prevailing Foreclosure Procedures Used in the United States*

In the United States, most residential mortgages or deeds of trust are foreclosed by judicial or nonjudicial process.¹⁶¹ The dominant form of foreclosure in the majority of states is the

159. *Id.* § 37.27[3]; GA. CODE ANN. § 44-14-162(b) (Supp. 2013); IDAHO CODE ANN § 45-1505(1) (2009); MICH. COMP. LAWS SERV. § 600.3204(3) (Supp. 2013); MINN. STAT. ANN. § 580.02 (2013); NEV. REV. STAT. ANN. § 106.210(1) (LexisNexis 2013); S.D. CODIFIED LAWS § 21-48-2 (2013); TEX. LOCAL GOV'T CODE ANN. § 192.007(a) (West 2008); VT. R. CIV. P. 80.1(b)(1) (Supp. 2012) (requiring the complaint to state the record date of the instrument upon which the foreclosing party relies and attaching copies of all original assignments of the mortgage); WYO. STAT. ANN. § 34-4-103(a)(iii) (2006); NELSON & WHITMAN, *supra* note 31, § 5.28; *supra* text accompanying note 80 (noting that a party cannot foreclose on a mortgage in many jurisdictions unless it has a recorded chain of title leading from the original mortgagee to it); *see also* Kim v. JPMorgan Chase Bank, N.A., 825 N.W.2d 329, 336 (Mich. 2012) (applying section 600.3204(3) and holding that failure to record all assignments of the mortgage render the sale voidable); Miller v. Homecomings Fin., LLC, 881 F. Supp. 2d 825, 830 (S.D. Tex. 2012) (stating that there are no reported cases interpreting TEX. LOCAL GOV'T CODE ANN. § 192.007(a) and the legal consequences of noncompliance are “unclear”); *cf.* Calvo v. HSBC Bank USA, N.A., 130 Cal. Rptr. 3d 815, 819 (2011) (interpreting CAL. CIV. CODE § 2932.5 (Deering Supp. 2012) that mandates recordation of an assignment of the mortgage or other encumbrance prior to exercising the power of sale to apply to mortgages and not to deeds of trust); Brandrup v. ReconTrust Co., N.A., 303 P.3d 301, 318 (Or. 2013) (interpreting OR. REV. STAT. § 86.735(1) to require recordation of all assignments of the deed of trust that are in recordable form before proceeding to foreclosure; excluding from the statute transfers of the deed of trust that occur by operation of law, such as when the note is transferred).

160. *E.g.*, ME. REV. STAT. ANN. tit. 14, § 6321 (Supp. 2012) (requiring the mortgagee to certify proof of ownership of the mortgage note and to produce evidence of the mortgage note, mortgage, and all assignments and endorsements of the mortgage note and mortgage); MICH. COMP. LAWS SERV. § 600.3204(1)(d) (Supp. 2013) (permitting either the owner of the indebtedness or of an interest in the indebtedness to foreclose); *see also* POWELL, *supra* note 32, § 37.38[2] (reprinting a complaint form used in Illinois pursuant to 735 ILL. COMP. STAT. 5/15-1504 which includes factual allegations that support the plaintiff's capacity to bring the action and requires the plaintiff to attach a copy of the note and the mortgage). Maine's highest court interpreted this Maine statute to mean that to certify proof of ownership of the mortgage note, the foreclosing party must own or be the economic beneficiary of the note or, if not the owner, be entitled to enforce the note under U.C.C. § 3-301. Bank of Am., N.A. v. Cloutier, 61 A.3d 1242, 1245–46 (Me. 2013).

161. RAO ET AL., *supra* note 71, § 4.2.1. A form of judicial process called “[s]trict foreclosure is allowed in only two states, Connecticut and Vermont” and will not be discussed in this Article. *Id.* § 4.2.4.1. For a description of this type of foreclosure, *see id.* § 4.2.4.

nonjudicial method.¹⁶² In these states, judicial foreclosure may be required only in certain special circumstances.¹⁶³

In judicial foreclosure states, the mortgage holder files a complaint in court in order to obtain a court decree authorizing a foreclosure sale.¹⁶⁴ Generally, the party seeking a foreclosure must establish its standing to foreclose and that it is the real party in interest.¹⁶⁵ To prove these threshold matters, there must be a valid mortgage between the parties and the plaintiff must be the holder of the note and mortgage or, otherwise, is a proper party with authority to foreclose.¹⁶⁶ The homeowner may file an answer, raise defenses to the foreclosure, or respond to the lawsuit on another basis in a fashion similar to other civil cases.¹⁶⁷ The court may enter a judgment of foreclosure and order the sale to proceed if the homeowner defaults or the plaintiff prevails.¹⁶⁸

In nonjudicial foreclosure states, foreclosures proceed with little or no judicial oversight.¹⁶⁹ Lenders foreclose by exercising the power of sale contained in the mortgage contract.¹⁷⁰ In some of these states, the statutory scheme is detailed and extensive whereas, in others, it is minimal.¹⁷¹ Generally, following a default by the homeowner, the holder of the mortgage or the trustee named in a deed of trust must give notice according to the terms of the mortgage or deed of trust and applicable statutes before a sale can occur.¹⁷² Typically, these notices include notification of default, of acceleration, and of the sale.¹⁷³ In addition, nearly all states require some form of public advertisement of the sale through a newspaper or posting.¹⁷⁴

Once the foreclosing entity complies with these procedural mandates, it schedules the sale usually with an auctioneer that it

162. Jacobson-Greany, *supra* note 20, at 144.

163. NELSON & WHITMAN, *supra* note 31, § 7.11 (highlighting the following examples of when a judicial foreclosure may be necessary: (1) the mortgage or deed of trust fails to include a power of sale provision; (2) there is a serious lien priority dispute; and (3) a deficiency judgment is prohibited when the party proceeds nonjudicially).

164. RAO ET AL., *supra* note 71, § 4.2.2.

165. *Id.* §§ 5.1.2.2–3.

166. *Id.* § 5.1.2.2.

167. POWELL, *supra* note 32, § 37.38[2].

168. *Id.* § 37.40.

169. JOHN RAO & GEOFF WALSH, NAT'L CONSUMER LAW CTR. INC., FORECLOSING A DREAM: STATE LAWS DEPRIVE HOMEOWNERS OF BASIC PROTECTIONS 11 (2009), available at http://www.nclc.org/images/pdf/foreclosure_mortgage/state_laws/foreclosing-dream-report.pdf.

170. *Id.*

171. Jacobson-Greany, *supra* note 20, at 144–45.

172. POWELL, *supra* note 32, § 37.42[4].

173. *Id.*

174. *Id.*

hires.¹⁷⁵ The burden is on the homeowner to initiate a judicial proceeding, seek an injunction, and raise legal claims and defenses in order to stop this type of foreclosure.¹⁷⁶

The power of sale process benefits lenders because it provides a less expensive and swift remedy against allegedly defaulting homeowners.¹⁷⁷ The sale process can be completed in 20 to 120 days, depending upon state law.¹⁷⁸ The nonjudicial foreclosure process, however, is harsh in its treatment of homeowners because the homeowners lose their homes without guaranteed prior judicial oversight.¹⁷⁹

D. Intersections Between the Right to Foreclose and the U.C.C.

The discussion in Part III outlines the law defining the right to enforce negotiable and nonnegotiable notes. If the note is unsecured, "enforcement" involves suing on the note and obtaining a money judgment.¹⁸⁰ When the note is secured by a mortgage, the mortgagee may sue on the note, foreclose on the mortgage, or both. If a deficiency is permitted under state law, a mortgagee may obtain a judgment for the deficiency.¹⁸¹

The connection between the right to foreclose and the U.C.C. is one of the most common issues faced by courts over the last five years due primarily to the mishandling of the notes and mortgages

175. Jacobson-Greany, *supra* note 20, at 148–49. The sale may occur at the real estate or some other location permitted by law. *Id.*

176. RAO ET AL., *supra* note 71, § 5.1.4.4. In this instance, court rules or state statutes may require the homeowner to post a bond or tender the arrearage or total amount due, a significant hurdle that may discourage or prevent some plaintiffs from pursuing an injunction. *Id.* § 5.1.4.5. Alternatively, a qualified homeowner may file a petition for bankruptcy and obtain a stay of the foreclosure sale. *See id.* §§ 10.3.1–2 (detailing the steps the debtor must take to file and the possible benefits afforded by the bankruptcy forum); *see also* 1 HENRY J. SOMMER, CONSUMER BANKRUPTCY LAW AND PRACTICE §§ 6.1–6.2.1.6 (John Rao ed., 9th ed. 2009) (discussing when and how bankruptcy provides the best solution for consumer debtors).

177. *See* Jacobson-Greany, *supra* note 20, at 150–51 (explaining that nonjudicial foreclosures allow lenders to foreclose more efficiently and at less cost).

178. *Id.*

179. *Id.* at 151.

180. *See* U.C.C. § 3-412 (1990) (stating that the issuer of a note owes the obligation to pay to the person entitled to enforce the instrument and declining to distinguish between secured and unsecured notes); *id.* § 3-502 cmt. 3 (stating that failure to pay the note when due constitutes a dishonor, permitting the holder to collect in ways that make commercial sense).

181. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 8.2 (1997). Over thirty states have enacted statutes which prohibit or limit deficiency claims against the mortgagor. RAO ET AL., *supra* note 71, §16.3.2. Some states limit the mortgagee's remedy to foreclosure, compelling that party to exhaust the security before attempting to sue on the debt. This is called the "one action rule." NELSON & WHITMAN, *supra* note 31, § 8.2.

and the foreclosing party's response to the lack of proper documentation. The Permanent Editorial Board ("PEB") of the U.C.C. recently confirmed that "[t]he enforcement of real estate mortgages by foreclosure is primarily the province of a state's real property."¹⁸² The PEB identified four sets of rules from the U.C.C. (and only these rules) that "are important in the context of enforcement of mortgage notes and the mortgages that secure them."¹⁸³

First, in the case of a mortgage note that is a negotiable instrument, Article 3 of the UCC determines the identity of the person who is entitled to enforce the note and to whom the maker owes its payment obligation; payment to the person entitled to enforce the note discharges the maker's obligation, but failure to pay that party when the note is due constitutes dishonor.

Second, for both negotiable and non-negotiable mortgage notes, Article 9 of the UCC determines whether a transferee of the note from its owner has obtained an attached property right in the note.

Third, Article 9 of the UCC provides that a transferee of a mortgage note whose property right in the note has attached also automatically has an attached property right in the mortgage that secures the note.

Finally, Article 9 of the UCC provides a mechanism by which the owner of a note and the mortgage securing it may, upon default of the maker of the note, record its interest in the mortgage in the realty records in order to conduct a non-judicial foreclosure.¹⁸⁴

The PEB then articulated its view of the relationship between foreclosure law and the U.C.C. when it concluded: "[P]roper application of real property law requires proper application of the UCC rules discussed in this Report."¹⁸⁵ However, the PEB avoided addressing the thorny issues that arise when foreclosure laws appear to conflict with the relevant Article 3 and 9 rules.¹⁸⁶

When the issue of the right to foreclose arises in litigation, some courts have inconsistently utilized Articles 3 and 9 when identifying the proper party to foreclose. I surveyed the foreclosure statutes and reported state appellate court decisions issued since 2007 of all fifty states and the District of Columbia. I then placed the states

182. AM. LAW INST., *supra* note 68, at 14; *see also* Harrell, *supra* note 84 ("[T]he deference to real property law continues largely as before.").

183. AM. LAW INST., *supra* note 68, at 14.

184. *Id.*

185. *Id.*

186. This Article provides this type of statutory reconciliation analysis in Part V.

into three categories based upon the type of analysis employed by the courts to address the contours of the right to foreclose on a mortgage loan. I refer to these case sets as: the U.C.C. States; the Foreclosure-Statute-Definition States; and, the U.C.C.-Does-Not-Apply States. I relied upon decisions from state courts, rather than federal courts sitting in those states, because the state courts are the best arbiters of that state's law.¹⁸⁷

Two recent articles cataloged smaller collections of judicial right-to-foreclose decisions along other lines. In the first, Whitman and Milner spotlighted opinions by state and federal courts in nonjudicial foreclosure states utilizing deeds of trusts in the western states.¹⁸⁸ They summarized the emerging law on the issue of whether a party that does not have the right to enforce the note might, nonetheless, foreclose on the deed of trust.¹⁸⁹ Next, they discussed rulings from a few nonwestern states in which deeds of trust are the predominant security instrument in residential real property secured transactions.¹⁹⁰ Whitman and Milner concluded that "in a number of nonjudicial-foreclosure states, the requirements of UCC Article 3 and the corresponding statutory framework procedures seem to exist in different universes."¹⁹¹

The second article selected a subset of foreclosure decisions—those dealing with the "show me the note" defense.¹⁹² The authors divided the state and federal court decisions into four categories using the following factors: whether or not the foreclosing party must prove ownership of the note and whether or not judicial or

187. Indeed, the federal courts may get it wrong. *E.g.*, *Miller v. Homecomings Fin., LLC*, 881 F. Supp. 2d 825, 831 & n.9 (S.D. Tex. 2012) (noting that the federal courts in Texas incorrectly hold that homeowners have no standing under state law to challenge an assignment of the security agreement; providing state court decisions to the contrary); *see also* *Martins v. BAC Home Loans Servicing, L.P.*, 722 F.3d 249, 254–55 (5th Cir. 2013) (recognizing the Texas appellate decisions holding that the foreclosing party must be the holder or owner of the note and relying on U.C.C. §§ 3-301, 3-203 (1990), but disregarding these judicial decisions in favor of a statute that permits a mortgage servicer to act on behalf of the mortgagee in the context of deciding that the MERS can assign the deed of trust and that MERS's assignee can foreclose without certifying these issues to the Texas Supreme Court); *see also* *Citimortgage, Inc. v. Barabas*, 975 N.E.2d 805, 814–15 n.8 (Ind. 2012) (noting that federal court decisions are not binding on the court).

188. Whitman & Milner, *supra* note 2, at 35–50. They discussed decisions from courts in seven states: Arizona, California, Idaho, Nevada, Oregon, Utah, and Washington.

189. *Id.* at 36.

190. *Id.* at 50–58 (noting decisions from courts in nine states: Georgia, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, North Carolina, Texas, and Virginia).

191. *Id.* at 60.

192. Bradley T. Borden et al., *Show Me the Note!*, 19 WESTLAW J. BANK & LENDER LIABILITY 1, 1–2 (2013) (focusing on decisions from Arizona, Florida, Massachusetts, Minnesota, and Pennsylvania).

nonjudicial foreclosure procedures were employed in that state.¹⁹³ The authors concluded that this defense is largely unsuccessful in nonjudicial foreclosure states; on the other hand, courts routinely concern themselves with standing in judicial foreclosure states.¹⁹⁴

The following Subparts explain the analysis applied by the courts in each category, list the relevant rulings by state, and identify the type of foreclosure procedure employed in each jurisdiction.

1. *Category One: The U.C.C. States*

The courts in these seventeen states explicitly join the right to foreclose on a mortgage that secures the negotiable note with the concept of a PETE and U.C.C. section 3-301. They hold that only the PETE may foreclose.¹⁹⁵ These states usually, though not

193. *Id.* The authors do not define “ownership” or refer to the U.C.C.

194. *Id.* at 8. These findings appear to simply represent the difference between the presence or absence of a judicial proceeding.

195. **Alabama** (nonjudicial foreclosure state): *Perry v. Fed. Nat’l Mortg. Ass’n*, 100 So. 3d 1090, 1094–95 (Ala. Civ. App. 2012) (ruling that a party’s right to foreclose arises when it accelerates the indebtedness and invokes the power of sale in the mortgage; the right to enforce a negotiable note is governed by U.C.C. § 3-301 (1990)); **Florida** (judicial foreclosure state): *U.S. Bank Nat’l Ass’n v. Knight*, 90 So. 3d 824, 825–26 (Fla. Dist. Ct. App. 2012) (applying U.C.C. § 3-301 to determine that the foreclosure plaintiff had standing to file the case because it was the holder of the note indorsed in blank and the mortgage necessarily followed); **Indiana** (judicial foreclosure state): *Buchanan v. HSBC Mortg. Servs., Inc.*, 993 N.E.2d 275, 278–80 & n.6 (Ind. Ct. App. 2013) (applying Article 3 of the U.C.C. to determine the identity of the person entitled to enforce the note and to foreclose); *Blocker v. U.S. Bank Nat’l Ass’n*, 993 N.E.2d 1154, 1158 (Ind. Ct. App. 2013) (tying Article 3 of the U.C.C. to standing to foreclose); *see also* MORTG. FORECLOSURE TASK FORCE, MORTGAGE FORECLOSURE BEST PRACTICES (2011), available at <http://www.in.gov/judiciary/admin/files/mortgage-mortgage-foreclosure-best-practices.pdf> (providing that the defendant or the court may require the plaintiff to prove possession of the original note and that the plaintiff qualifies as a PETE under U.C.C. § 3-301), approved by, *In re Mortg. Foreclosure Best Practices*, No. 94S00-1101-MS-3 (Ind. Oct. 7, 2011); **Kansas** (judicial foreclosure state): *U.S. Bank Nat’l Ass’n v. McConnell*, 305 P.3d 1, 6–7 (Kan. Ct. App. 2013) (stating that the state statute that codifies the opposite, that the note follows the mortgage, but holding that the mortgage follows the note, relying on the RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4(a) (1996)); *Bank of Am., N.A. v. Inda*, 303 P.3d 696, 702–03 (Kan. Ct. App. 2013) (applying Article 3 of the U.C.C. to determine who has the right to enforce the note and to foreclose); **Kentucky** (judicial foreclosure state): *Stevenson v. Bank of Am.*, 359 S.W.3d 466, 469–70 (Ky. Ct. App. 2011) (ruling that the real party in interest in a foreclosure action is the entity that is the holder of the note; relying on the U.C.C.); **Louisiana** (judicial foreclosure state): LA. CODE CIV. PROC. ANN. art. 2635 cmt. d (Supp. 2013) (requiring the plaintiff to submit authentic evidence of the note and the mortgage with the petition; stating that when the plaintiff is not identified on the note, it must show the transfer and indorsement to it); *Deutsche Bank Trust Co. Am. v. Ochoa*, 120 So. 3d 735, 740–41 (La. Ct. App. 2013) (confirming that a creditor seeking foreclosure by executory process must

be entitled to enforce the note under U.C.C. § 3-301); **Maryland** (quasi-judicial foreclosure state): *Anderson v. Burson*, 35 A.3d 452, 461–63 (Md. 2011) (applying a court rule that requires that the party docketing the foreclosure attach a copy of the note and ruling that the U.C.C. determines the right of the foreclosing party to enforce the note; citing to §§ 3-203, 3-301); **Nevada** (nonjudicial foreclosure state): *Edelstein v. Bank of N.Y. Mellon*, 286 P.3d 249, 255 n.7, 261–62 (Nev. 2012) (stating that to have standing in a foreclosure, the current holder of the promissory note and the current beneficiary of the deed of trust must be the same person; applying U.C.C. Article 3 to determine the identity of the person entitled to enforce the note; discussing the legislative history surrounding the enactment of preforeclosure mediation program that equates the beneficiary of the deed of trust with the note holder); **New Jersey** (judicial foreclosure state): *Wells Fargo Bank, N.A. v. Ford*, 15 A.3d 327, 329–30 (N.J. Super. Ct. App. Div. 2011) (ruling that the party foreclosing must own or control the underlying debt, and applying U.C.C. Article 3 to determine whether the foreclosing party was a PETE, and, if so, that party owns or controls the note); **New York** (judicial foreclosure state): *GRP Loan, LLC v. Taylor*, 945 N.Y.S.2d 336, 338 (App. Div. 2012) (ruling that the plaintiff in a foreclosure action must be both the holder or assignee of the mortgage and the holder or assignee of the note; more specifically, stating that the plaintiff must show either a written assignment of the note or the physical delivery of the note prior to filing the complaint); *Bank of N.Y. v. Silverberg*, 926 N.Y.S.2d 532, 537 (App. Div. 2011) (same; stating, in addition, that the mortgage automatically follows the note); *Mortg. Elec. Registration Sys., Inc. v. Coakley*, 838 N.Y.S.2d 622, 623 (App. Div. 2007) (applying Article 3 of the U.C.C. to determine if MERS was a holder). Author's note: This standard, a written assignment or physical delivery, appears consistent with New York's 1962 version of Article 3. That version does not contain the definition of "transfer" that appears in the 1990 version. Compare N.Y. U.C.C. LAW § 3-201 (McKinney 2013), with U.C.C. § 3-203(a). "Transfer" means delivery and "delivery" is defined in Article 1 as the "voluntary transfer of possession." U.C.C. § 1-201(b)(15) (2001); U.C.C. § 3-203(a). Also missing from New York's U.C.C. is the current version of section 3-301, which requires the PETE to possess the instrument, unless it was lost, stolen, or destroyed. U.C.C. § 3-301. As a result, it appears that a negotiable note can be transferred by a written assignment without physical delivery of the note itself in New York. See the discussion of the differences between these versions of Article 3 in *Bank of New York Mellon v. Deane*, 970 N.Y.S.2d 427, 431–37 (Sup. Ct. 2013); **Ohio** (judicial foreclosure state): *Cent. Mortg. Co. v. Webster*, 978 N.E.2d 962, 967–68 (Ohio Ct. App. 2012) (requiring the real party in interest in a foreclosure action to be the current holder of the note and mortgage under the U.C.C.; explaining that transfer of the note operates as a transfer of the mortgage under U.C.C. § 9-203(g)); **Oklahoma** (judicial foreclosure state): *Wells Fargo Bank, N.A. v. Heath*, 280 P.3d 328, 333 (Okla. 2012) (finding that the foreclosing party must be a person entitled to enforce the note under U.C.C. § 3-301 at the time it filed the foreclosure suit); **Pennsylvania** (judicial foreclosure state): *JP Morgan Chase Bank, N.A. v. Murray*, 63 A.3d 1258, 1267–68 (Pa. Super. Ct. 2013) (ruling that the plaintiff failed to establish possession of the original note, indorsed in blank, and therefore failed to show that it had the right to foreclose upon default by the defendant; relying on Article 3 of the U.C.C.); **South Carolina** (judicial foreclosure state): *Bank of Am., N.A. v. Draper*, 746 S.E.2d 478, 481–83 (S.C. Ct. App. 2013) (finding that the plaintiff had standing to foreclose because it held the note and serviced it; relying in part on Article 3 of the U.C.C.); **Texas** (nonjudicial foreclosure state): *Martin v. New Century Mortg. Co.*, 377 S.W.3d 79, 84–85 (Tex. App. 2012) (applying the rule that the

exclusively, are judicial foreclosure states.¹⁹⁶ This procedural distinction should not make any difference to the substantive analysis. The common thread appears to be that these courts implicitly, and sometimes explicitly, align themselves with the *Restatement (Third) of Property: Mortgages* concept that a mortgage may be enforced only by or on behalf of a person entitled to enforce the obligation that the mortgage secures.¹⁹⁷ Addressing entitlement

foreclosing party must be the holder or owner of the note and relying on U.C.C. sections 3-301 and 3-203); *see also* *Leavings v. Mills*, 175 S.W.3d 301, 309–10 (Tex. App. 2004) (applying the rule that the foreclosing party must be the holder or owner of the note, but holding that the note is not negotiable and to prove ownership, the foreclosing party must provide the note and show an unbroken chain of assignments from the original lender to it); *Shepard v. Boone*, 99 S.W.3d 263, 265 (Tex. App. 2003) (applying the rule that the foreclosing party must be the holder or owner of the note); **Vermont** (strict foreclosure state): *U.S. Bank Nat'l Ass'n v. Kimball*, 27 A.3d 1087, 1092 (Vt. 2011) (requiring the foreclosing party to show that it was a person entitled to enforce the note under the U.C.C. at the time it filed the complaint as assignment of the mortgage alone is not sufficient); **Wisconsin** (judicial foreclosure state): *Dow Family, LLC v. PHH Mortg. Corp.*, 838 N.W.2d 119, 124–25, 128–30 (Wis. Ct. App. 2013) (citing *Mitchell Bank v. Schanke*, 676 N.W.2d 849 (Wis. 2004)) (agreeing that to foreclose a mortgage, the plaintiff must show it has the right to enforce both the note and the mortgage; defining right to enforce a negotiable note by relying upon Article 3 of the U.C.C.; relying upon Article 9 of the U.C.C. and the RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4(a) when finding that the mortgage follows the note without the need for a written assignment); *PNC Bank, N.A. v. Bierbrauer*, 827 N.W.2d 124, 126–27 (Wis. Ct. App. 2012) (noting that it was undisputed that the plaintiff had to prove it had the right to enforce the note in a foreclosure proceeding; applying Article 3 of the U.C.C. to determine if the plaintiff was the current holder of the note); *see also* *Mitchell Bank v. Schanke*, 676 N.W.2d 849, 859–60 (Wis. 2004) (holding that, in order to foreclose, the plaintiff must prove the existence of the underlying debt secured by the mortgage; providing no discussion of U.C.C.).

196. The mere fact of a mandated judicial proceeding as a condition precedent to a sale necessarily results in a larger number of reported standing contest in those jurisdictions.

197. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4(c). The uniform Fannie Mae and Freddie Mac mortgage in a judicial foreclosure state, such as Pennsylvania, embodies the Restatement's position in the contract by defining "lender" as the "mortgagee," and "note" as the "promissory note" stating the amount owed to the lender, and the "loan" as the debt evidenced by the note. "Lender," rather than "mortgagee" is used throughout. Form 3039: Pennsylvania—Single Family—Fannie Mae/Freddie Mac Uniform Instrument 1–2 (Jan. 2001), available at <http://www.freddiemac.com/uniform/unifsecurity.html#highlights>. Further, the mortgage permits acceleration of the full amount of the indebtedness if a default is not cured followed by foreclosure by judicial proceeding. *Id.* ¶ 22, at 14–15. Interestingly, in a nonjudicial foreclosure state such as Alabama, the mortgage instrument contains identical definitions. Form 3001: Alabama—Single Family—Fannie Mae/Freddie Mac Uniform Instrument 1–2 (Jan. 2001), available at <http://www.freddiemac.com/uniform/unifsecurity.html#highlights>. The relevant acceleration provision is identical to that used in Pennsylvania with the exception that it permits the lender to invoke the power of sale and proceed to foreclose nonjudicially in accordance with applicable law. *Id.* ¶ 22, at 14–15.

to enforce the note then takes the courts in these states directly into Article 3 of the U.C.C.

The appellate courts in four states have not issued any reported opinions in which they linked standing or the right to foreclose with rules in the U.C.C. defining the right to enforce loan notes; nonetheless, these states' laws and judicial opinions contain the ingredients to make this link and qualify as potential Category One states.¹⁹⁸

California's uniform deed of trust is similar to Alabama's mortgage with the exception that the trust deed includes three parties, the borrower (a/k/a the trustor), the lender (a/k/a the beneficiary), and the trustee, to whom the borrower irrevocably granted in trust with power of sale. Form 3005: California—Single Family—Fannie Mae/Freddie Mac Uniform Instrument 1–3, 14–15 (Jan. 2001), available at <http://www.freddiemac.com/uniform/unifsecurity.html#highlights>.

198. **Arkansas** (nonjudicial foreclosure state): ARK. CODE ANN. § 18-50-103 (2013) (codifying that the beneficiary under a deed of trust cannot exercise the power of sale nonjudicially until the beneficiary has provided to the obligor on the note the name of the holder and the physical location of the original note, a true and correct copy of the note with all required indorsements, a true and correct copy of the deed of trust and each assignment of the deed of trust); *McKay v. Capital Res. Co.*, 940 S.W.2d 869, 870–71 (Ark. 1997) (applying Article 3 in the context of reversing an order of foreclosure in a judicial foreclosure proceeding where the foreclosing party failed to show that it possessed the original note at the time the note was lost and ruling that a copy of the note was inadequate); *Crofford v. Green Tree Servicing, LLC*, No. CA 06-363, 2006 WL 3734929, at *5 (Ark. Ct. App. Dec. 20, 2006) (extending the *McKay* analysis to a judicial foreclosure seeking only an *in rem* judgment; holding there is no basis to enforce the mortgage lien without proof of the debt); **Colorado** (quasijudicial foreclosure state): *Citywide Banks v. Armijo*, 313 P.3d 647, No. 10CA1458, 2011 WL 4837501, at *2–3, 6 (Colo. App. Oct. 13, 2011) (applying Article 3 of the U.C.C. to determine whether the payoff of the remaining balance due under the note to an agent of the note holder constitutes satisfaction of the debt, under the facts of the case; finding that payment to the holder's servicer satisfied the note and prevented the holder from foreclosing); *Lakeside Ventures, LLC v. Lakeside Dev. Co.*, 68 P.3d 516, 519 (Colo. App. 2002) (stating that a debt is evidenced by a note and the holder of the note can foreclose a deed of trust used to secure the note; noting that the holder of the note secured by a deed of trust can pursue two remedies concurrently or consecutively—sue on the debt evidenced by a promissory note and foreclose on the property; relying in part upon language of COLO. REV. STAT. § 38-38-101 (2013), which provides that the “holder” of an evidence of debt can proceed to foreclose if a covenant in the deed of trust is violated); **Missouri** (nonjudicial foreclosure state): *U.S. Bank Nat'l Ass'n v. Burns*, 406 S.W.3d 495, 497–99 (Mo. Ct. App. 2013) (applying U.C.C. Article 3 in the context of a judicial action seeking to reform the deed of trust to determine whether the plaintiff possessed the right to enforce the note because the note is critical to who has the right to enforce the deed of trust; relying upon *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619 (Mo. Ct. App. 2009); *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 621, 623–24 (Mo. Ct. App. 2009) (applying the RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4 in a quiet title action to hold that a mortgage loan, consisting of the note and the security instrument, gives the lender the right to foreclose; noting that the note is critical because an assignment of only the deed of trust has no force; noting that the record shows the original lender

2. *Category Two: The Foreclosure-Statute-Definition States*

In six states, the courts focus on relevant words in the state's foreclosure statute, such as "mortgagee" where mortgages are used, "beneficiary" where deeds of trust are used, "holder", or "owner." Next, they determine if that state's legislature intended that these designations refer to the note holder or the one with the right to act on behalf of the note holder. These courts may or may not reference the U.C.C. in their decisions, but the result is generally consistent with Articles 3 and 9 enforcement principles, that is, the foreclosing party must possess the right to enforce the negotiable note or own the nonnegotiable note.¹⁹⁹ This type of inquiry occurs more often in nonjudicial foreclosure states.

held the note and that MERS had no legal right to assign the note when it assigned the deed of trust); **New Mexico** (judicial foreclosure state for most residential mortgage loans): N.M. STAT. ANN. §§ 58-21A-6(A), (B), (E) (2010) (requiring the creditor or creditor's assignee to provide notice to cure and permitting creditor or assignee to accelerate; mandating judicial foreclosure for "home loans"); *Bank of N.Y. v. Romero*, 266 P.3d 638, 644-45 (N.M. Ct. App. 2011), *cert. granted*, 289 P.3d 1254 (N.M. 2011) (finding that the plaintiff was the legal owner of the note and mortgage based upon an assignment of both and possessed standing to foreclose in the context of; evidencing the defendants failing to provide support for their argument or evidence to the contrary; providing no discussion of the U.C.C.).

199. **Connecticut** (judicial/strict foreclosure state): *RMS Residential Props., LLC v. Miller*, 32 A.3d 307, 313-14 (Conn. 2011) (interpreting "person entitled to receive the money secured" in the state foreclosure statute to be the "holder" of a negotiable note under U.C.C. Article 3; rejecting the homeowner's contention that the foreclosing party must be the note owner); **Maine** (judicial foreclosure state): *Bank of Am., N.A. v. Cloutier*, 61 A.3d 1242, 1245-46 (Me. 2013) (interpreting a 2009 statutory amendment that requires the mortgagee to "certify proof of ownership of the mortgage note" to mean that the foreclosing party must own or be the "economic beneficiary of the note" or, if not the owner, then be entitled to enforce the note under U.C.C. § 3-301); *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2 A.3d 289, 295-96 (Me. 2010) (citing 11 M.R.S. § 3-1301 (2009)) (holding that the "mortgagee" or the entity that may foreclose refers to the mortgage creditor or lender, that is, the person entitled to enforce the debt; defining a person entitled to enforce if the note is negotiable); **Massachusetts** (nonjudicial foreclosure state): *Eaton v. Fed. Nat'l Mortg. Ass'n*, 969 N.E.2d 1118, 1129-31 & n.26 (Mass. 2012) (defining "mortgagee" in light of the state foreclosure provisions and common law to include the party who also holds the note or the one who is acting on behalf of the note holder; not relying on the U.C.C. but noting that "nothing in the UCC [is] inconsistent with our view that in order to effect a valid foreclosure, a mortgagee must either hold the note or act on behalf of the note holder"); **North Carolina** (quasijudicial foreclosure state): *In re David A. Simpson, P.C.*, 711 S.E.2d 165, 171 (N.C. Ct. App. 2011) (applying the U.C.C. definition of "holder" in Article 3 to the foreclosure statute's requirement that the foreclosing party must show it is the note holder; relying upon *Connolly v. Potts*, 306 S.E.2d 123 (N.C. Ct. App. 1983)); **Oregon** (nonjudicial foreclosure state): *Brandrup v. ReconTrust Co., N.A.*, 303 P.3d 301, 310, 312 (Or. 2013) (en banc) (defining the beneficiary of a deed of trust as the lender, that is, the person "who is entitled to repayment of the note and, thus, functionally is 'the person for whose benefit the trust deed is

The appellate courts in six states and the District of Columbia have not directly applied Category Two analysis in defining the right to foreclose; nonetheless, these states' laws and judicial opinions contain the ingredients to make this link and qualify as potential Category Two states.²⁰⁰

given;” relying on OR. REV. STAT. § 86.705 (2011) and *United States Nat’l Bank v. Holton*, 195 P. 823, 826 (Or. 1921); recognizing that the promissory note is the typical instrument that evidences the obligation secured by the deed of trust); *Niday v. GMAC Mortg., LLC*, 302 P.3d 444, 454 n.8 (Or. 2013) (en banc) (discussing the distinction between the person to enforce a negotiable note under U.C.C. § 3-301 and the owner of the note; stating that most courts to date conclude that “PETE status, not ownership, confers the right to foreclose”); **Washington** (nonjudicial foreclosure states): *Bain v. Metro. Mortg. Grp., Inc.*, 285 P.3d 34, 36, 44 (Wash. 2012) (en banc) (citing WASH. REV. CODE § 61.24.005 (2004)) (deciding, in the context of whether MERS can qualify as a beneficiary under Washington’s deed of trust statutes, that a beneficiary is “the holder of the instrument or document evidencing the obligations secured by the deed of trust”; only the beneficiary has the right to appoint the trustee to proceed with a nonjudicial foreclosure; relying on U.C.C Article 3 to define a “holder” of the note).

200. **Alaska** (nonjudicial foreclosure state): *Moening v. Alaska Mut. Bank*, 751 P.2d 5, 7–8 & n.6 (Alaska 1988) (using “secured creditor” and “debtor” when interpreting and applying the nonjudicial foreclosure statute, ALASKA STAT. § 34.20.070 (2012), though the statute uses “beneficiary” and “trustor”; ruling that the creditor may elect to foreclose or sue on the debt in the event of a default and is only prevented from obtaining a deficiency judgment if it proceeds to foreclose nonjudicially rather than first sue on the debt and foreclose on the basis of an outstanding balance later; providing no mention of the U.C.C.); **District of Columbia** (nonjudicial foreclosure jurisdiction): D.C. CODE § 42-815(b) (2001); D.C. MUN. REGS. tit. 9, § 3100.2(f) (2013) (permitting only the holder of the note secured by a deed of trust or its agent to initiate a foreclosure by sending notice of default that includes the name, address, and telephone number of the note holder); *Rose v. Wells Fargo Bank, N.A.*, 73 A.3d 1047, 1049–50 (D.C. 2013) (discussing this statute and regulation in the context of deciding whether the notice of default can contain the name, address, and telephone number of the note holder’s agent, as long as it includes the name of the note holder; whether Wells Fargo actually was the note holder not at issue); **Illinois** (judicial foreclosure state): 735 ILL. COMP. STAT. 5/15-1208 (2013) (defining mortgagee for purposes of foreclosure to include the holder of the indebtedness secured by a mortgage or a person authorized to act on behalf of the holder); 735 ILL. COMP. STAT. 5/15-1504 (a)(3)(N) (2013) (requiring the plaintiff in a foreclosure action to plead whether it is the “legal holder of the indebtedness, a pledgee, an agent, the trustee under a trust deed or otherwise, as appropriate”); *Deutsche Bank Nat’l Trust Co. v. Gilbert*, 982 N.E.2d 815, 819 (Ill. App. Ct. 2012) (affirming that a mortgagee must initiate a foreclosure action (i.e., the holder of the note secured by the mortgage or an agent or successor; no mention of the role of the U.C.C. in defining “holder” of the note)). *But cf.* *Mortg. Elec. Registration Sys., Inc. v. Barnes*, 940 N.E.2d 118, 124 (Ill. App. Ct. 2010) (stating that a party can file a foreclosure action although the beneficial ownership of the note is held by another person in the context of deciding whether MERS has standing; holding that MERS, in any event, was authorized to act on behalf of the note holder); **Michigan** (nonjudicial foreclosure state): MICH. COMP. LAWS SERV. § 600.3204(1)(d) (LexisNexis 2004) (requiring the foreclosing party to be the owner of the indebtedness or of an

3. *Category Three: The U.C.C.-Does-Not-Apply States*

The courts in three states reason that the state's foreclosure scheme is comprehensive, inclusive of the prerequisites to foreclose, or does not define the secured party as the one entitled to repayment on the secured monetary obligation. As a result, the U.C.C. does not apply in any way to identify the party who possesses the right to foreclose.²⁰¹ Two additional states have not explicitly rejected the

interest in the indebtedness or to be the servicing agent of the mortgage); *Davenport v. HSBC Bank USA*, 739 N.W.2d 383, 384 (Mich. Ct. App. 2007) (ruling that the foreclosing party admitted that it did not own the indebtedness at the time it initiated the foreclosure and had no right to foreclose), *rev'd on other grounds*, *Kim v. JPMorgan Chase Bank, N.A.*, 825 N.W.2d 329, 336–37 (Mich. 2012) (reversing on grounds that noncompliance renders the sale voidable, not void); *see also* *Residential Funding Co., L.L.C. v. Saurman*, 805 N.W.2d 183, 183–84 (Mich. 2011) (interpreting MICH. COMP. LAWS § 600.3204(1)(d) (2013 Supp.) to permit MERS to foreclose since it possessed an interest in the indebtedness as the mortgagee of record); **Rhode Island** (nonjudicial foreclosure state): *Bucci v. Lehman Bros. Bank, FSB*, 68 A.3d 1069, 1076–77, 1086–89 (R.I. 2013) (defining “mortgagee” as the the owner of the note or the mortgage holder, provided that an agency relationship exists between the two; applying the RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4(c); agreeing with the holding in *Eaton v. Federal National Mortgage Ass'n*, 969 N.E.2d 1118 (Mass. 2012); noting, but not addressing, the trial court's reliance on Article 3 of the U.C.C. to define the effect of a blank indorsement); **Utah** (nonjudicial foreclosure state): *DiMeo v. Nupetco Assocs. LLC*, 309 P.3d 251, 253 (Utah Ct. App. 2013) (defining a deed of trust as securing the obligations due under a note by transferring a security interest in real property to a trustee to be held until the debt is repaid; interpreting UTAH CODE ANN. § 57-1-19 (2010)); *Commonwealth Prop. Advocates, LLC v. Mortg. Elect. Registration Sys., Inc.*, 263 P.3d 397, 403–04 (Utah Ct. App. 2011) (recognizing the primacy of the note in the context of foreclosure; interpreting UTAH CODE ANN. § 57-1-35, codifying that the deed of trust follows the note, as not prohibiting the parties to the deed of trust from agreeing that a third party could act on behalf of the beneficial owner of the note), *cert. denied*, 268 P.3d 192 (Utah 2011); **West Virginia** (nonjudicial foreclosure state): *W. VA. CODE* § 38-1-3 (2011) (the trustee may proceed to sell the property secured by a deed of trust when required by the secured creditor or its assignee upon default by the grantor owing the debt); *Arnold v. Palmer*, 686 S.E.2d 725, 732–33 (W. Va. 2009) (ruling that a deed of trust conveys title as security until the grantor repays the loan and that the real property may be sold in the event that the grantor defaults on the debt; deciding that the lending bank could foreclose against the surviving spouse even though she had signed the deed of trust but not the note).

201. **Arizona** (nonjudicial foreclosure state): *Hogan v. Wash. Mut. Bank, N.A.*, 277 P.3d 781, 783 (Ariz. 2012) (en banc) (deciding that the foreclosing beneficiary need not prove its authority or show the note before the trustee may commence a nonjudicial foreclosure under a deed of trust; stating, however, that the trust deed statute does not require compliance with the U.C.C. before commencing a foreclosure; noting that Hogan did not allege that the foreclosing party had no right to enforce the note, rather that Hogan argued that the foreclosing party must demonstrate its rights before proceeding); **California** (nonjudicial foreclosure state): *Debrunner v. Deutsche Bank Nat'l Trust Co.*, 138 Cal. Rptr. 3d 830, 835–36 (Ct. App. 2012) (ruling that California's nonjudicial foreclosure regime is exhaustive and, in effect, trumps the

relevance of Article 3; nonetheless, these states' laws and judicial opinions arguably lean in that direction and qualify as potential Category Three states.²⁰² To date, these decisions have arisen exclusively in nonjudicial foreclosure states.

Finally, neither the foreclosure statutes nor state appellate decision in twelve states appear to tilt one way or the other regarding the contours of the right to foreclose and the role of the U.C.C. This research is summarized in Appendix A.

The methodology utilized in Category One and Two states properly harmonizes the relevant U.C.C. rules with state foreclosure law. Category Three states dismiss the U.C.C.'s role outright. It is these decisions that muddy the law and create inconsistent outcomes from state to state. These cases raise the question of whether there is a principled method to evaluate and apply both the relevant U.C.C. provisions (essentially uniform from state to state) and state foreclosure laws (variable from state to state). The next Part highlights how the U.C.C. itself and general statutory construction principles point the way.

provisions of Article 3 of the U.C.C.; finding that the trust deed beneficiary need not possess any right to loan note before commencing a foreclosure); **Georgia** (nonjudicial foreclosure state): *You v. JP Morgan Chase Bank, N.A.*, 743 S.E.2d 428, 431–33 (Ga. 2013) (finding that Georgia's nonjudicial foreclosure statutes do not define "secured creditor," the person required to give the "debtor" certain presale notices; relying upon the legislative history of amendments to conclude that the legislature made no substantive changes in this regard over the years, which reinforces the ability of the security deed holder to exercise its rights under the security deed, independent of the note; recognizing that a transfer for the security deed transfers the secured indebtedness pursuant to GA. CODE ANN. § 44-14-64(b) (2002) and, therefore, rejecting the applicability of U.C.C. Article 3 and the RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4(c)).

202. **Idaho** (nonjudicial foreclosure state): *Edwards v. Mortg. Elec. Registration Sys., Inc.*, 300 P.3d 43, 48–49 (Idaho 2013) (relying on *Trotter v. Bank of N.Y. Mellon*, 275 P.3d 857, 861–62 (Idaho 2012), to hold that homeowner is not entitled to enjoin a nonjudicial foreclosure on the ground that MERS has no standing, but homeowner can contest whether MERS had authority to initiate a foreclosure; finding that MERS is not a "beneficiary" unless it has an interest in the secured note but is an agent for the beneficiary under the terms of the deed of trust and may act for the beneficiary and appoint a substitute trustee); *Trotter*, 275 P.3d at 861–62 (ruling that the trustee need not first prove standing before initiating a nonjudicial foreclosure; providing no mention of the U.C.C. and its relationship to the state's foreclosure scheme, but suggesting that the foreclosure act contains all of the requirements to foreclose); **Minnesota** (nonjudicial foreclosure state): *Jackson v. Mortg. Elec. Registration Sys., Inc.*, 770 N.W.2d 487, 494 & n.4, 497–98 (Minn. 2009) (deciding that MINN. STAT. § 580.02 (2006) does not require recordation of assignments of notes that also equitably assign the mortgage prior to foreclosure and permitting MERS to foreclose; noting that Minnesota's nonjudicial foreclosure regime was enacted in 1848); *JPMorgan Chase Bank, N.A. v. Erlandson*, 821 N.W.2d 600, 604 n.3, 606, 608 (Minn. Ct. App. 2012) (relying on *Jackson* to hold that the validity of a foreclosure depends on possession of legal title to the mortgage and not on ownership or possession of the note; providing no discussion of the U.C.C.; characterizing the homeowner's argument as "show-me-the-note").

V. A STATUTORY RECONCILIATION ROADMAP

Enactment and amendment dates can be important considerations when construing two statutory schemes together. NCCUSL and ALI modified their initial 1952 edition of the U.C.C. in 1957 and 1958.²⁰³ All of the states except Louisiana enacted it by 1968.²⁰⁴

Meanwhile, state judicial foreclosure procedures date from at least 1818.²⁰⁵ Later, the majority of states adopted nonjudicial foreclosure statutes over an extended period of time. For example, California enacted its statute in 1872, whereas Arizona passed its deed of trust act in 1971.²⁰⁶

The following Subparts discuss relevant statutory construction principles and apply them to assess the relationship between foreclosure law and the U.C.C. in the Category Three states of Arizona, California, and Georgia.

A. *The Statutory Construction Rule in Article 1*

Article 1 of the U.C.C. is not a stand-alone, comprehensive set of provisions addressing a discrete area of the law, such as Article 2, which covers the sales of goods. Rather, Article 1 “applies to a transaction to the extent that it is governed by another article of [the Uniform Commercial Code].”²⁰⁷ It contains rules that apply to each of the other Articles, including instructions regarding construction of the code to promote its purposes and policies and the role of other law.²⁰⁸ Article 1 also includes definitions, principles of interpretation, and territorial application rules.²⁰⁹

Article 1 articulates three purposes that the Code was designed to achieve, one of which is to make the law governing commercial transactions uniform among the various jurisdictions.²¹⁰ To foster this goal, Article 1 provides that provisions appearing elsewhere in

203. See Gregory E. Maggs, *Karl Llewellyn’s Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U. COLO. L. REV. 541, 547 (2000) (discussing the creation and revision of the U.C.C.).

204. *Id.*

205. NELSON & WHITMAN, *supra* note 31, § 7.11 n.2.

206. CAL. CIV. CODE § 2924 (Deering Supp. 2012). The formal notes following the statute reveal that this power of sale and foreclosure provision was enacted in 1872 and amended numerous times since then. See generally A. M. Kidd, *Trust Deeds and Mortgages in California*, 3 CALIF. L. REV. 381 (1915) (discussing the early law regarding the differences and similarities between these two instruments). As for Arizona, see Gary E. Lawyer, *The Deed of Trust: Arizona’s Alternative to the Real Property Mortgage*, 15 ARIZ. L. REV. 194, 194 (1973) (noting that the adoption of the deed of trust and the creditor’s right to elect a nonjudicial foreclosure occurred in 1971).

207. U.C.C. § 1-102 (2001) (alteration in original).

208. *Id.* §§ 1-103, -104, -105, -106.

209. *Id.* §§ 1-201, -206, -301, -302.

210. *Id.* § 1-103(a)(3).

the Code displace “principles of common law and equity that are inconsistent with either its provisions or its purposes and policies.”²¹¹ On the other hand, principles of law and equity can supplement the U.C.C. because the Code “was drafted against the backdrop of existing bodies of law.”²¹²

The analysis changes, however, when construing and applying the U.C.C. in relation to other state statutes. When that situation arises,

other interpretive principles addressing the interrelationship between statutes may lead the court to conclude that the other statute is controlling, even though it conflicts with the Uniform Commercial Code. This, for example would be the result in a situation where the other statute was specifically intended to provide additional protection to a class of individuals engaging in transactions covered by the Uniform Commercial Code.²¹³

Professors White and Summers suggest that this comment addresses consumer concerns “to some extent” because most of consumer law is statutory.²¹⁴ However, the comment is neutral on the type of statutes to which it refers. Nonjudicial foreclosure statutes, for example, are not typically considered to be consumer protection statutes.²¹⁵ Rather, state legislatures usually enacted the nonjudicial regimes as exceptions to existing judicial procedures.²¹⁶ Nonetheless, courts may attribute a consumer protection purpose to this process, such as the protection of the homeowner from wrongful loss of property.²¹⁷

211. *Id.* § 1-103(b) cmt. 2. Section 1-103(b) provides a nonexhaustive list of common law principles, including, the law related to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, and bankruptcy. *Id.* § 1-103 cmt. 4. The preemptive power of the U.C.C. also applies to common law principles that have been codified. *Id.* § 1-103 cmt. 3.

212. *Id.* § 1-103(b) cmt. 2.

213. *Id.* § 1-103 cmt. 3.

214. WHITE & SUMMERS, *supra* note 95, at 4 (noting that if the consumer protection statutes provide additional protections to consumers as a class, “they will not be preempted even if they do not have a provision that specifically grants them superiority over the UCC”).

215. Schrock v. Fed. Nat’l Mortg. Ass’n, No. CV 11-0567-PHX-JAT, 2011 WL 3348227, at *6 n.7 (D. Ariz. Aug. 3, 2011) (discussing the “draconian” Arizona nonjudicial procedure); Jacobson-Greany, *supra* note 20, at 151 (concluding that nonjudicial foreclosures are “harsh remedies because debtors lose their property in a proceeding devoid of judicial oversight”).

216. RAO ET AL., *supra* note 71, § 4.5 (“[T]he deed of trust was developed as an alternative to the mortgage, which traditionally had to be foreclosed judicially.”).

217. Moeller v. Lien, 30 Cal. Rptr. 2d 777, 784 (Ct. App. 1994). *But cf.* Bain v. Metro. Mortg. Grp., Inc., 285 P.3d 34, 39 (Wash. 2012) (en banc) (quoting Udall v. T.D. Escrow Servs., Inc., 154 P.3d 882, 890 (Wash. 2007)) (construing

In the wake of the foreclosure crisis, many states incorporated new protections for homeowners into their foreclosure laws. Examples include required settlement conferences and optional mediation to encourage loan modifications and other resolutions that avoid foreclosure,²¹⁸ additional time before a notice of default can be sent or recorded,²¹⁹ heightened disclosures regarding the foreclosure process,²²⁰ and information regarding the identity of the mortgage holder and its interest in the property.²²¹

When a court must determine whether a provision of the U.C.C. or another statute controls, Article 1 directs us to general principles of statutory construction. The following Subpart discusses those principles.

B. *Relevant General Statutory Construction Principles*

When statutes dealing with the same subject apparently conflict, courts will construe the provisions harmoniously in order to give effect to both.²²² Statutes are *in pari materia* when they have the same purpose or object, relate to the same activity, transaction, person or thing, or related to the same class of persons, things, or transactions.²²³ Mere overlap, without more, does not constitute a conflict.²²⁴ If the attempt to harmonize fails because the statutes irreconcilably conflict, three general statutory construction rules provide guidance: first, the more specific statute controls over the more general; second, the newer statute controls; or, third, one

Washington's Deed of Trust Act in favor of the homeowner "because of the relative ease with which lenders can forfeit borrowers' interests and the lack of judicial oversight in conducting nonjudicial foreclosure sales").

218. See GEOFFRY WALSH, NAT'L CONSUMER LAW CTR., STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS: CAN THEY SAVE HOMES? (2009), available at http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs.pdf (analyzing the strengths and weakness of twenty-five of these programs); GEOFF WALSH, NAT'L CONSUMER LAW CTR. INC., FORECLOSURES: STATE AND LOCAL FORECLOSURE MEDIATION PROGRAMS (2010), available at http://www.nclc.org/images/pdf/foreclosure_mortgage/mediation/report-state-mediation-programs-update.pdf (discussing several additional mediation programs created in 2009).

219. *E.g.*, CAL. CIV. CODE § 2923.5(a) (Deering Supp. 2012) (prohibiting the trustee, beneficiary, or mortgage servicer from recording the notice of default until at least thirty days from contact with the borrower in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure).

220. *E.g.*, *id.* § 2923.3(a) (requiring that the notice of default attach an extensive "summary of key information" in English and in other specified languages regarding the foreclosure process).

221. RAO ET AL., *supra* note 71, § 5.10 (outlining these new protections).

222. 1A NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 23:10, at 477–78 (7th ed. 2009).

223. 2B NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51:3, at 222 (7th ed. 2012).

224. See SINGER & SINGER, *supra* note 222, § 23:9, at 454–55.

statute is determined to be an exception to the general rule stated in the other statute.²²⁵

The doctrine of implied repeal arises when the court cannot harmonize the provisions at issue. In this case, the later act ordinarily controls to the extent of the inconsistency between the provisions relevant to the substance of the dispute, even in the absence of a specific repealing clause.²²⁶ Legislative intent is critical in making this determination and courts will examine the legislative history to determine whether repeal was intended.²²⁷ In addition, the later act will displace the former when the legislature clearly intended it to occupy the entire field addressed in the prior act.²²⁸ Finally, courts apply a presumption against repeal by implication because the legislature is assumed to be cognizant of the existing statutory law at the time of new enactments. The presumption is overcome only by a showing of clear repugnance between the two provisions.²²⁹ In the context of the U.C.C., courts must consider any part of the Code “resistant to implied repeal” if “such construction can reasonably be avoided.”²³⁰

C. Application of These Principles to the Decisions from the Category Three States

1. Harmonizing Foreclosure Law and the U.C.C.

The starting point in the analysis is whether the foreclosing party (the mortgagee, assignee, or agent in mortgage states) or the party with the power to direct the trustee to foreclose (the beneficiary in a deed of trust state) must possess the right to enforce the note. One of three scenarios arises, depending upon a given state’s law: (1) the U.C.C. is relied upon to provide the result (represented by the Category One states); (2) other state law and the U.C.C. are applied together explicitly or implicitly (represented by the Category Two states); and (3) other state law appears to answer this question and potentially conflicts with the U.C.C. (represented by the Category Three states).

Category One states embrace the U.C.C. principles explicitly while Category Two jurisdictions explicitly or implicitly utilize

225. SINGER & SINGER, *supra* note 223, § 51:2, at 215–21.

226. SINGER & SINGER, *supra* note 222, § 23:9, at 450.

227. *Id.* § 23:9, at 462–63, § 23:10, at 478.

228. *Id.* § 23:9, at 454.

229. *Id.* § 23:10, at 481.

230. U.C.C. § 1-104 cmt. (2001); see *J.E. Robert Co. v. Signature Props. LLC*, 71 A.3d 492, 502 (Conn. 2013) (harmonizing CONN. GEN. STAT. § 49-17 (2013) that permits the party to whom the secured debt is owed to foreclose even though it is not the mortgagee with U.C.C. section 3-301 by finding that section 49-17 “simply requires a party to prove that they are ‘the person entitled to receive the money secured [by the mortgage],’ and such a party may be someone other than the owner of the note”).

U.C.C. rules in the context of defining “mortgagee”, “beneficiary”, “holder”, “owner”, or other critical terms in the state foreclosure statutes. Since there is no incompatibility between the definition of authority to foreclose and the right to enforce the note in these states, the analysis stops at that stage.

When the non-U.C.C. law supplies the answer and that resolution does not conflict with the U.C.C., as in Category Two states, the examination ends there. Where a conflict arises between the non-U.C.C. law resolution and the U.C.C. resolution, statutory construction principles must be applied to determine the result.

The rub arises in the three and potentially growing number of jurisdictions in which the courts have refused to apply the U.C.C. in this context: Arizona, California, and Georgia.²³¹ These states experienced some of the highest rates of delinquency and foreclosure among the jurisdictions utilizing nonjudicial foreclosure in the country during the height of the foreclosure crisis.²³² Consequently, the judicial rulings in these states affect the ability of an enormous number of homeowners to contest foreclosures. The following discussion reveals that the courts in Arizona and California could have harmonized their foreclosure laws with the U.C.C. Even if harmonization is not possible in Georgia, that state’s commercial code expressly supersedes the real property provision key to the highest court’s ruling.

a. Arizona

In *Hogan v. Washington Mutual Bank, N.A.*, the homeowner argued that the trustee of the deed of trust must demonstrate possession of the note or its right to enforce the note before exercising the power of sale (the “show-me-the-note” argument).²³³ Unfortunately, the court did not limit its ruling to this narrow issue which would have yielded an unremarkable ruling because, generally, neither the beneficiary nor mortgagee must prove this fact in advance or at the time of initiating a nonjudicial foreclosure.²³⁴

231. See *supra* discussion in Subpart IV.D.2.

232. Renuart, *supra* note 8, at 150, 155, 160 (stating that in Arizona, 89,262 mortgage loans were seriously delinquent as of the second quarter of 2011; in California, 462,714 mortgage loans were seriously delinquent as of the second quarter of 2011; and that, in Georgia, 124,125 mortgage loans were seriously delinquent as of the second quarter of 2011); see Arielle Kass & Greg Bluestein, *Foreclosure Ruling*, ATLANTA J. & CONST., May 21, 2013 (“Georgia was battered by the foreclosure crisis that followed the housing bust, with tens of thousands of repossessed homes on the market at the peak of the crisis driving down values for all homeowners.”).

233. *Hogan v. Wash. Mut. Bank, N.A.*, 277 P.3d 781, 783 (Ariz. 2012) (en banc).

234. *Id.* (emphasizing that nothing in the nonjudicial foreclosure regime imposes an obligation to demonstrate their rights to enforce the note before

Perhaps because Hogan failed to allege that the beneficiary was not entitled to enforce the note, the court never tackled the threshold issue of the definition of “beneficiary” and that person’s role in the foreclosure process. Instead, the court unnecessarily observed that the U.C.C. does not govern liens on real property and the Deeds of Trust Act does not require compliance with the U.C.C. before commencing the nonjudicial process.²³⁵ Although noting that the note and deed of trust are distinct documents that serve different purposes,²³⁶ the opinion never delved into the Deeds of Trust Act or the contracts themselves to enunciate the powers and roles of each. If it had, the outcome in the case likely would have remained unchanged due to the pleading problem, but the analysis would have been more nuanced on the issue of the U.C.C.’s role.

For example, “beneficiary” is defined by statute to mean “the person named . . . in a trust deed as the person for whose benefit a trust deed is given, or the person’s successor in interest.”²³⁷ The trustor is the “person conveying trust property by a trust deed as security for the performance of a contract . . . or the successor in interest of such person.”²³⁸ The trustee’s duties to the trustor and beneficiary are those specified by statute and listed in the deed of trust.²³⁹ The trustee can begin the foreclosure process pursuant to the power of sale provisions in the trust deed only after a breach or default in the contracts for which the trust property is conveyed as security and, in that event, only at the option of the beneficiary.²⁴⁰

proceeding with a foreclosure and noting that Hogan failed to allege that the foreclosing party was not entitled to enforce the note); see generally RAO ET AL., *supra* note 71, § 4.2.3 (discussing various requirements across states for non-judicial foreclosures). In a quasi-nonjudicial state, such as Maryland, the statute and rules of court require the docketing of an order to foreclose no sooner than forty-five days after the notice of intent to foreclose is sent to the homeowner. MD. CODE ANN., REAL PROP. § 7-105.1(c)(1) (LexisNexis Supp. 2012). Among other things, the order to docket must include the deed of trust and any assignments and a copy of the note accompanied by an affidavit certifying ownership of the note. *Id.* § 7-105.1(e)(2). The matter subsequently proceeds nonjudicially until the point where the court ratifies the sale upon review of an audit. MD. CODE ANN., MD. RULES § 14-215 (LexisNexis 2013).

235. *Hogan*, 277 P.3d at 783. Interestingly, the court agreed that the RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4(c) (1997) applies, which states that the deed of trust can be enforced only by or on behalf of the person entitled to enforce the note. *Id.* However, the court did not connect the dots between the Restatement and Article 3 of the U.C.C., which addresses the definition of PETE.

236. *Id.* at 784.

237. ARIZ. REV. STAT. ANN. § 33-801(1) (2013).

238. *Id.* § 33-801(11).

239. *Id.* § 33-801(10).

240. *Id.* § 33-807(A).

Arizona codified the common law rule that the deed of trust follows the note.²⁴¹ Since the Deeds of Trust Act incorporates the duties of the trustor into the statute, the contract itself is highly relevant. The uniform deed of trust used by the secondary mortgage giants, Fannie Mae and Freddie Mac, defines the “beneficiary” as the “lender,” the “trustor” as the “borrower,” the “note” as the “promissory note” between the borrower and lender which states the principal amount owed, and “loan” as the debt evidenced by the note.²⁴² Arizona’s uniform deed of trust “secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower’s covenants and agreements under this Security Instrument and the Note.”²⁴³

Both Arizona’s Deeds of Trust Act and the uniform deed of trust define the beneficiary in a way that supports a ruling that the beneficiary must possess the right to enforce the note. Reading the statute and deed of trust together, the beneficiary is the “person for whose benefit a trust is given” and the trust is given to the lender.²⁴⁴ Because the lender is the entity to whom the payment obligation on the note is due, the U.C.C. is triggered. This analysis harmonizes the U.C.C. with the nonjudicial foreclosure statute.

b. California

In the seminal case to date, the Sixth District Court of Appeals in *Debrunner v. Deutsche Bank National Trust Co.* held that the statutory scheme “broadly allows a trustee, mortgagee, beneficiary, or any of their agents to initiate non-judicial foreclosure.”²⁴⁵ The court found nothing in the statutes mandating possession of a beneficial interest in both the note and the deed of trust by the beneficiary.²⁴⁶ Because in California nonjudicial foreclosure is

241. *Id.* § 33-817. See also *Hill v. Favour*, 84 P.2d 575, 578–79 (Ariz. 1938) (holding that an assignment of the deed of trust without the debt transfers no right upon the assignee).

242. Form 3003: Arizona—Single Family—Fannie Mae/Freddie Mac Uniform Instrument 1 (June 2002), available at <http://www.freddiemac.com/uniform/unifsecurity.html#highlights>.

243. *Id.* at 2–3.

244. Compare ARIZ. REV. STAT. § 33-801(1), with Form 3003: Arizona—Single Family—Fannie Mae/Freddie Mac Uniform Instrument, *supra* note 242, at 1.

245. *Debrunner v. Deutsche Bank Nat’l Trust Co.*, 138 Cal. Rptr. 3d 830, 836 (Ct. App. 2012).

246. *Id.* at 835–36 (apparently considering it significant that the trustee is listed in the statute). *But cf.* *Glaski v. Bank of Am.*, Nat’l Ass’n, 160 Cal. Rptr. 3d 449, 456, 465 (Ct. App. 2013) (characterizing the plaintiff’s claim as one challenging whether the nonholder of the deed of trust conducted the foreclosure sale and whether the beneficiary was the true owner of the note; reversing dismissal of the case; providing no mention of the U.C.C. or *Debrunner*).

specific and comprehensive, according to the court, the U.C.C. does not displace its provisions.²⁴⁷

In reaching this result, the court failed to discuss other precedent in California law. Although the “beneficiary” is not defined by statute, court decisions fill the gap and hold that the beneficiary is the party to the deed of trust that is owed the debt and whose economic interests are at risk when the existence or priority of the deed of trust is challenged.²⁴⁸ The trustee’s authority to exercise the power of sale is subject to the beneficiary’s express declaration of default and instructions to the trustee to sell the property.²⁴⁹ Moreover, because a deed of trust is a contract, the courts will construe it, together with the note and any agreement of sale, using rules of contract interpretation.²⁵⁰ In addition, decades ago, the Fourth District Court of Appeals noted that the deed of trust must be foreclosed by the owner of the note.²⁵¹ In an

247. *Debrunner*, 138 Cal. Rptr. 3d at 836.

248. *Monterey S.P. P’ship v. W.L. Bangham, Inc.*, 777 P.2d 623, 627 (Cal. 1989) (en banc).

249. CAL. CIV. CODE §§ 2924(a)(1)(B)–(C) (Deering Supp. 2012) (permitting the notice of default to be recorded by the trustee, mortgagee, beneficiary, or an authorized agent but stating that it is the beneficiary who elects to sell the property and who provides the information in the default notice that a breach of an obligation for which the deed of trust is security has occurred and the nature of each breach); *Glaski*, 160 Cal. Rptr. 3d at 453 (observing that the “lender-beneficiary” decides whether to pursue nonjudicial foreclosure under the deed of trust used by the parties in this case); see also 4 HARRY D. MILLER & MARVIN B. STARR, *MILLER & STARR CALIFORNIA REAL ESTATE* § 10:4 (3d ed. 2000). The California Single Family-Fannie Mae/Freddie Mac Uniform Deed of Trust tracks section 2924:

If *Lender* invokes the power of sale, *Lender* shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of *Lender’s* election to cause the Property to be sold. Trustee shall cause this notice to be recorded in each county in which any part of the Property is located. *Lender* or Trustee shall mail copies of the notice as prescribed by Applicable Law to Borrower and to the other persons prescribed by Applicable Law. Trustee shall give public notice of sale to the persons and in the manner prescribed by Applicable Law. After the time required by Applicable Law, Trustee, without demand on Borrower, shall sell the Property at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the Property by public announcement at the time and place of any previously scheduled sale. *Lender* or its designee may purchase the Property at any sale.

Form 3005: California—Single Family—Fannie Mae/Freddie Mac Uniform Instrument Form ¶ 22, at 15 (January 2001) (emphasis added), available at <http://www.freddiemac.com/uniform/unifsecurity.html#highlights>.

250. MILLER & STARR, *supra* note 249, § 10:5.

251. *Santens v. L.A. Fin. Co.*, 204 P.2d 619, 621–22 (Cal. Dist. Ct. App. 1949) (resolving, in an action to quiet title, who had a superior interest in the property at issue—a judgment creditor who executed or the owner of the note

unpublished opinion, however, that court recently adopted the *Debrunner* holding without mentioning its previous decision in *Santens v. Los Angeles Finance Co.*²⁵²

It is difficult to reconcile the *Debrunner* court's ruling with the existing judicial definition of "beneficiary" and with the central role that the beneficiary plays under the deed of trust. The fact that a trustee is listed along with the beneficiary as one of the parties who can record the notice of default, thereby commencing the process leading to a sale, should not be dispositive. The trustee is powerless to sell the real property without instructions from the beneficiary.²⁵³ Moreover, a deed of trust is considered incident to the note and follows the note when the latter is transferred.²⁵⁴

The distinct roles of the parties to a deed of trust are defined by contract. The uniform deed of trust used by the secondary mortgage giants, Fannie Mae and Freddie Mac, defines the "beneficiary" as the lender; the "trustor" as the "borrower," the "note" as the promissory note between the borrower and lender which states the principal amount owed, and the "loan" as the debt evidenced by the note.²⁵⁵ The deed of trust explicitly secures "(i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note."²⁵⁶ Thus, where the California statutes fail to provide pivotal definitions, the deed of trust fills those gaps. The *Debrunner* court could have defined the beneficiary as the party possessing the right to enforce the note and harmonized the U.C.C. with the nonjudicial foreclosure statute.²⁵⁷

and deed of trust—and deciding in favor of the owner of the note and deed of trust because he acquired his rights before the judgment creditor); see also *Cockerell v. Title Ins. & Trust Co.*, 267 P.2d 16, 20 (Cal. 1954) (en banc) (approving the holding in *Santens* that the deed of trust can only be foreclosed by the owner of the note).

252. *St. James v. JPMorgan Chase Bank, N.A.*, No. D059674, 2012 WL 3089275, at *3 (Cal. Ct. App. July 31, 2012). The First, Second, and Fifth District Courts of Appeal also approved the *Debrunner* ruling in unpublished decisions with little or no independent analysis. *Solis v. EMC Mortg.*, No. B234772, 2012 WL 2949787, at *4 (Cal. Ct. App. July 20, 2012) (failing to mention *Santens*); *Taasan v. Family Lending Servs., Inc.*, No. A132339, 2012 WL 2774967, at *6–7 (Cal. Ct. App. July 10, 2012) (explaining the same); *Demison v. U.S. Bank Nat'l Ass'n*, No. F062022, 2012 WL 1690204, at *3 (Cal. Ct. App. May 15, 2012).

253. CAL. CIV. CODE §§ 2924(a)(1)(B)–(C); Form 3005: California—Single Family—Fannie Mae/Freddie Mac Uniform Instrument, *supra* note 249, ¶ 22, at 15.

254. *Coon v. Shry*, 289 P. 815, 816 (Cal. 1930).

255. Form 2005: California—Single Family—Fannie Mae/Freddie Mac Uniform Instrument, *supra* note 249, at 1.

256. *Id.* at 3.

257. Significantly, the amended complaint admitted to a chain of title of the note by way of assignment to the foreclosing beneficiary. *Debrunner v.*

In light of the general principles of statutory construction enunciated earlier in this Article, the *Debrunner* court should have analyzed whether there exists a clear and irreconcilable conflict between the U.C.C. and the nonjudicial foreclosure statutes. If the court finds a conflict, then the other statutory construction principles enunciated above become relevant. The failure to tie the right to foreclose to the right to enforce the note (to which the deed of trust is incident) will result in unwarranted foreclosures. “The trustee is thus represented by the *Debrunner* reasoning as a sort of legal Don Quixote, foreclosing on his or her own initiative when a default is discovered. The result is potential legal chaos!”²⁵⁸

c. Georgia

Before discussing the decision in *You v. JP Morgan Chase Bank, N.A.*, it is important to describe the function of the “security deed” employed by the lender in this case.²⁵⁹ The security deed is a two-party instrument that conveys title of, not merely a security interest in, real property to secure a debt and requires the creditor to reconvey the property upon payment of the debt.²⁶⁰ The uniform security deed used in Georgia by Fannie Mae and Freddie Mac labels the homeowner-grantor as the “borrower.” The grantee is

Deutsche Bank Nat'l Trust Co., 138 Cal. Rptr. 3d 830, 833 (Ct. App. 2012). The court could have used these facts to support the outcome it reached, affirmance of the dismissal of the complaint, and, at the same time, acknowledge the U.C.C.'s rightful role.

258. Whitman & Milner, *supra* note 2, at 38. Professor Whitman opines that the real explanation for the court's position in *Debrunner* is that deficiency judgments on deeds of trust foreclosed nonjudicially are barred in California. As a result, the likelihood that another party holding the note would attempt to enforce it against the borrower on some future date is “extremely unlikely.” *Id.* at 40–41. He responds, however, that different lenders and their servicers offer a varying set of forbearance, modification, mediation, short sale, or other mitigation options to avoid foreclosure.

As a matter of orderly process and fundamental fairness, should not borrowers be eligible to know that the party depriving them of their real estate is legally entitled to do so and to have the opportunity to claim whatever foreclosure mitigation procedures that particular lender has adopted? We think they should.

Id. at 41.

259. The most commonly used instrument to secure a real estate related loan in Georgia is the security deed. ALEXANDER, *supra* note 32, §§ 1:5, 1:8.

260. GA. CODE ANN. § 44-14-60 (2013) (permitting the use of “security deeds” and stating that “[s]uch conveyance shall be held by the courts to be an absolute conveyance, with the right reserved by the grantor to have the property reconveyed to him upon the payment of the debt or debts intended to be secured agreeably to the terms of the contract, and shall not be held to be a mortgage”). Consequently, Georgia is a title theory state where the parties to a transaction employ a security deed. Georgia does not prohibit the use of a mortgage which is deemed to be a lien, but the more common instrument appearing in residential real estate loans is the security deed. ALEXANDER, *supra* note 32, § 1:5.

referred to as the “lender.”²⁶¹ Despite conveying title, the security deed refers to itself as the “Security Instrument” and “secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower’s covenants and agreements under this Security Instrument and the Note.”²⁶²

Georgia’s Supreme Court decided two of the questions addressing “unsettled” questions of Georgia law certified to it by a federal district court in the *You* case.²⁶³ The first question is relevant here: “Can the holder of a security deed be considered a secured creditor, such that the deed holder can initiate foreclosure proceedings on residential property even if it does not also hold the note or otherwise have any beneficial interest in the debt obligation underlying the deed?”²⁶⁴ In response, the court observed that Georgia’s nonjudicial power of sale foreclosure dates to the 1800s, that contract law primarily governs this process, and that the statutory law is “scant.”²⁶⁵

In answering the certified question in the negative, the court examined the words “debtor” and “secured creditor” in the foreclosure provisions, noting that “secured creditor” is not defined.²⁶⁶ The legislature added this term into the statute in 1981, at a time when the common law “appear[ed]” to allow nonjudicial foreclosure by one who held title to the property but not the note.²⁶⁷ The court rejected the argument that Article 3 of the U.C.C. is

261. Form 3011: Georgia—Single Family—Fannie Mae/Freddie Mac Uniform Instrument 1 (Jan. 2001), available at <http://www.freddiemac.com/uniform/unifsecurity.html#highlights>.

262. *Id.* at 1, 3. This language is similar to that included in the Arizona and California deeds of trust.

263. *You v. JP Morgan Chase Bank, N.A.*, 743 S.E.2d 428, 429–30 (Ga. 2013). The plaintiff (homeowner) filed the suit based upon allegations of wrongful foreclosure in state court and the defendants removed it to federal court.

264. *Id.* at 430.

265. *Id.* at 430–31 (noting that the existing statutes primarily address the manner and content of notices to the debtor).

266. *Id.* at 431.

267. *Id.* The court distinguished its previous ruling that the party seeking to foreclose must be the holder of the note secured by the mortgage on the ground that the proceeding involved a judicial action. Compare *id.* at 432 & n.5 with *Weems v. Coker*, 70 Ga. 746, 749 (1883). This may be a distinction without a difference particularly in states, such as Georgia, that allow the foreclosing party to obtain a deficiency judgment following a sale. GA. CODE ANN. § 44-14-161 (2009). This possibility exposes the homeowner to the real and serious risk of double liability—to the deficiency judgment holder and to the real note holder who later sues on the note—after losing the home. *Whitman & Milner, supra* note 2, at 62–63. The *You* court referred to the homeowner’s concern that he or she could face double liability but refused to resolve the concern. *You*, 743 S.E.2d at 433 (“Because this issue is not directly presented here, however, we need not resolve it.”).

relevant to identify the party possessing the right to enforce the note for two reasons.²⁶⁸ First, the court commented that the foreclosing party is not seeking to enforce the note.²⁶⁹ Rather, that entity is enforcing the security deed which is not a negotiable instrument and, hence, not subject to the U.C.C.²⁷⁰ Second, the court interpreted a Georgia statute to mean that when the security deed is assigned, the note automatically follows the deed.²⁷¹ The court implied that this provision trumps (and is in conflict with) the negotiation and transfer rules in the U.C.C. when it concluded: "This Code section further supports the conclusion that the deed holder possesses full authority to exercise the power of sale upon the debtor's default, regardless of its status with respect to the note."²⁷²

Despite these unique characteristics of Georgia law, the court could have harmonized the U.C.C. and the nonjudicial foreclosure statutes. Alternatively, the court should have ruled that the Georgia U.C.C. trumps the note-follows-the-security-deed provision to the extent of any conflict for the reasons that follow.

Although the foreclosure statute does not specifically define "secured creditor," the function of the security deed provides important guidance. A security deed secures a debt to any person loaning or advancing the grantor any money.²⁷³ Moreover, title to the property is held by the grantee until the grantor pays the debt under the terms of the contract.²⁷⁴ The uniform security deed embodies these concepts. Thus, the term "secured creditor" is equivalent to the lender listed in the security deed (i.e., the person loaning money and holding title until repayment of the loan).

If the note alone is transferred, Georgia law states that the transferee holds an equitable interest in the security itself.²⁷⁵ The transferee of the note may enforce this equitable interest by obtaining a declaration from a court sitting in equity that a lien in

268. *You*, 743 S.E.2d at 432-33.

269. *Id.* at 433.

270. *Id.*

271. *Id.* (relying on GA. CODE ANN. § 44-14-64(b) and rejecting the common law articulated in RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4(c) (1997)). Immediately following its rejection of the Restatement, the court acknowledged GA. CODE ANN. § 10-3-1 (2009), which codifies the common law rule that the transfer of the note conveys to the transferee the "benefit of the security." The court does not interpret these two statutes together. *But see* *Cumming v. McDade*, 45 S.E. 479, 480 (Ga. 1903) (suggesting that the security deed follows the note but decided before the Legislature enacted section 44-14-64(b)).

272. *You*, 743 S.E.2d at 433.

273. GA. CODE ANN. § 44-14-60 (2002). The court also could have looked to Black's Law Dictionary for guidance. BLACK'S LAW DICTIONARY 425 (9th ed. 2009) (defining a secured creditor as a "creditor who has the right, on the debtor's default, to proceed against collateral and apply it to the payment of the debt.").

274. GA. CODE ANN. § 44-14-60.

275. GA. CODE ANN. § 10-3-1.

favor of the transferee exists on the property.²⁷⁶ Applying this provision to the situation where a negotiable note is transferred or sold without a written assignment of the deed of trust should result in the application of Article 3 to identify the person entitled to enforce the note. Where the note is nonnegotiable and is transferred without a written assignment of the security deed, Article 9 should determine ownership. Moreover, under Georgia's Article 9, the security deed follows the note.²⁷⁷

The *You* court focused upon a transfer of the security deed without a separate transfer of the note.²⁷⁸ As a result, the opinion leaves open the possibility of the U.C.C.'s relevance when the note alone is transferred or where written transfers of the note and security deed occurred. Moreover, the court unnecessarily dismissed the U.C.C.'s applicability when the security deed alone is transferred. As suggested in one of the amicus briefs filed in the case, the court could have ruled that a written assignment of a security deed that is silent regarding the note is sufficient to transfer the note so long as the Article 3 transfer rules are followed.²⁷⁹ This resolution avoids the specter of dual liability when the note can travel along two different paths, one provided by section 44-14-64(b) and the other governed by Article 3.²⁸⁰

Alternatively, the Georgia Supreme Court failed to discuss the role of a nonuniform provision of Georgia's U.C.C. that appears in its unique Article 10, an article not contained in the uniform version of the U.C.C. Georgia's Article 10 includes section 11-10-103: "The provisions of the following chapters of the Official Code of Georgia Annotated, as amended, shall yield to and be superseded by any provisions of this title which conflict therewith . . . Article 3 of Chapter 14 of Title 44, relating to conveyances to secure debt."²⁸¹

276. *Alley v. First Nat'l Bank of Gainesville*, 168 S.E. 317, 317 (Ga. Ct. App. 1933).

277. GA. CODE ANN. § 11-9-203(g) (2010).

278. In fact, the assignment of the security deed included an assignment of the note. *You v. JP Morgan Chase Bank*, 743 S.E.2d 428, 429 (Ga. 2013). In those circumstances, GA. CODE ANN. § 44-14-64(b) arguably is inoperable and the court could have applied Article 3 to determine the PETE status of the foreclosing party. See U.C.C. §§ 3-301, -203 (1990).

279. Supplemental Brief of Amicus Curiae Atlanta Legal Aid Society, Inc. at 7, *You v. J.P. Morgan Chase Bank, N.A.*, 743 S.E.2d 438 (Ga. 2013) (No. S13Q0040) (on file with author).

280. *Id.* at 6.

281. GA. CODE ANN. § 11-10-103 (2013). The only brief available on Westlaw that referenced section 11-10-103 was that filed by Atlanta Legal Aid. Amicus Curiae Brief of Atlanta Legal Aid Society, Inc. at 10, *You v. J.P. Morgan Chase Bank, N.A.*, 743 S.E.2d 428 (Ga. 2013) (No. S13Q0040), 2012 WL 6780481 at *10 (stating that the Georgia's version of the U.C.C. expressly repealed any conflicting provisions regarding conveyances to secure debt). Atlanta Legal Aid later filed a supplemental brief that discussed section 11-10-103 more fully, but it does not appear on Westlaw. Supplemental Brief of Amicus Curiae Atlanta

The Georgia Legislature added Article 10 and this section to the other nine articles of the U.C.C. when it enacted the original edition of the U.C.C. in 1962.²⁸²

Article 3 of Chapter 14 of Title 44 includes section 44-14-64(b), the provision that is pivotal to the holding in *You*. The Legislature added this provision in 1967, five years after it adopted the U.C.C. and the nonuniform Article 10.²⁸³ Nonetheless, section 44-14-64(b) does not trump the application of Article 3 rules governing the transfer and enforcement of negotiable notes. This is so because the Legislature unequivocally stated that Article 3 of Chapter 14 of Title 44, as it appeared in 1962 and *as amended* from time to time, is superseded by the provisions of the U.C.C. to the extent that they conflict. For the same reasons, Article 9's sale rules that determine ownership of negotiable and nonnegotiable notes and state that the mortgage follows the sale of the note trump section 44-14-64(b).

Inexplicably, the *You* court never addressed section 11-10-103 and the critical role it should have played in this case. The court missed the opportunity to resolve the thorny issues raised when the security deed alone is transferred and to minimize lingering confusion in Georgia law.

2. Applying Statutory Construction Principles when Foreclosure Laws and the U.C.C. Irreconcilably Conflict

As just shown, harmonization between a state's foreclosure law and the U.C.C. is highly likely in the Category Three States and those states appearing in Appendix A where these issues have not yet been addressed head-on. If a court decides that two statutes irreconcilably conflict on the same issue, it must proceed to the next level of inquiry: whether the more general statute defers to the more specific statute, the newer statute controls, or one statute is determined to be an exception to the general rule stated in the other statute.²⁸⁴ The courts in Arizona and California never tackled the threshold issue of whether a conflict existed. Not surprisingly,

Legal Aid Society, Inc. at 5-9, *You v. J.P. Morgan Chase Bank, N.A.*, 743 S.E.2d 428 (Ga. 2013) (No. S13Q0040) (on file with author).

282. 1962 Ga. Laws 156, § 1. Article 10 originally included six sections titled as follows: Effective Date, Provision for Transition, Specific Repealer, General Repealer, Laws Not Repealed, and Severability. In the Specific Repealer section, the Georgia Legislature painstakingly listed approximately forty-three laws that it intended to repeal in whole or in part or modify by the enactment of the U.C.C. in 1962. 1962 Ga. Laws 427-32.

283. 1967 Ga. Laws 737, § 1. This provision initially was codified at GA. CODE ANN. § 67-1305.1. The original version of current section 11-10-103 appeared in section 109A-10-103 titled "Specific Repealer" and referenced Chapter 67-13 "Conveyances to Secure Debt." 1962 Ga. Laws 427, 432. When section 67-1305.1 was codified in 1967, the legislature placed it in Chapter 67-13 "Conveyances to Secure Debt."

284. SINGER & SINGER, *supra* note 223, § 51:2, at 215.

therefore, these courts never considered these ancillary principles. The Georgia court at least implied the existence of an irreconcilable conflict, however, it failed to take the next analytical step.²⁸⁵ Of course, if the court had applied the statutory provision that its U.C.C. supersedes the note-follows-the-security-deed statute, any conflict should quickly have been resolved.

Utilizing these statutory construction principles does not necessarily ensure more uniform outcomes from state to state. For example, the original enactment of Articles 3 and 9 (starting in the late 1950s and ending in the early 1960s) postdated California's and Georgia's nonjudicial foreclosure statutes but predated Arizona's Deeds of Trust Act.²⁸⁶ A deeper dive into the legislative history of the statutory regimes contained in the U.C.C. and the foreclosure statutes raises more issues because both sets of laws have been amended over the years in these states (and likely all states), usually not in tandem.

On the question of which statute is "general" and which is "specific," the answer is not clear. Arguably, both are specific, at least in relation to the topics covered. Article 3 is the comprehensive set of provisions addressing the enforcement of negotiable instruments. In the vast majority of states where the deed of trust or mortgage automatically follows the transfer of the note, Article 3 should control on the question of identifying the PETE for negotiable notes and Article 9, and the contract, should control on the issue of ownership and enforcement for nonnegotiable notes. This conclusion is even stronger in states that apply the *Restatement (Third) of Property: Mortgages*, which states: "[a] mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures."²⁸⁷ Nonetheless, the *Debrunner* court characterized the California nonjudicial foreclosure regime as "comprehensive" and dismissed the U.C.C. as not relevant.²⁸⁸

An Official Comment to Article 1 of the U.C.C. suggests that a court may conclude that the other statute is controlling, even though it conflicts with the U.C.C., in the situation "where the other statute was specifically intended to provide additional protection to a class of individuals engaging in transactions covered by the Uniform

285. The Georgia Supreme Court applied at least one of the ancillary principles in a previous decision. *Patrick v. Head*, 424 S.E.2d 615, 616 (Ga. 1993) (adopting the principle that more contemporary statute prevails).

286. Regarding Arizona and California, see *supra* text accompanying note 201. Regarding Georgia, see ALEXANDER, *supra* note 32, § 1:5 (noting that the dominant statutory framework in Georgia for almost 150 years has been a title theory state through the use of the security deed).

287. RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4(c) (1997).

288. *Debrunner v. Deutsche Bank Nat'l Trust Co.*, 138 Cal. Rptr. 3d 830, 835-36 (Ct. App. 2012).

Commercial Code.”²⁸⁹ As discussed in Subpart V.B., nonjudicial foreclosure statutes generally are not considered to provide additional protections to the homeowner. This assessment can vary from state to state, however. Many of the homeowner protections enacted by state legislatures since the foreclosure crisis began are intended to protect homeowners. These provisions may trump the U.C.C. if they relate to the same subject matter as the U.C.C. and conflict with a U.C.C. rule.²⁹⁰

The authors of a recent article examined these questions in the context of how Article 9 interacts with relevant real estate recording laws.²⁹¹ They concluded that the resolution of potential and real conflicts between the two likely will vary from state to state due to differences among the statutory schemes which will be construed in light of “each state’s policies and [the] legislative history of the relevant enactments.”²⁹²

The application of statutory construction principles will not guarantee uniformity in outcomes from state to state. It should ensure, however, that state courts harmonize the two legal regimes whenever possible. When irreconcilable conflicts do arise, the application of these statutory construction principles ensures a more consistent methodology to evaluate the relationship of various statutes in relation to each other.

CONCLUSION

This Article highlights the complexities introduced into the legal standards governing foreclosure law due to the 1998 amendments to Article 9 and the mishandling of notes and mortgages by parties to securitization deals. In an attempt to bring order to a growing group of judicial decisions, this Article groups state appellate opinions into three categories based on the analysis applied by the courts. Doing so clarifies that the courts in Category One and Two states will likely reach similar results when called upon to identify which party possesses the right to foreclose in cases involving the same facts.

289. U.C.C. § 1-103 cmt. 3 (2001); *accord id.* § 1-104 cmt. (“This section embodies the policy that an act that bears evidence of carefully considered permanent regulative intention should not lightly be regarded as impliedly repealed by subsequent legislation.”).

290. The following newly codified homeowner protections do not conflict with Articles 3 and 9 because those Articles do not address these issues or the mechanics of the foreclosure process: required settlement conferences and optional mediation to encourage loan modifications and to avoid foreclosure; additional time before a notice of default can be sent or recorded; heightened disclosures regarding the foreclosure process; and, information regarding the identity of the mortgage holder and its interest in the property.

291. John Patrick Hunt et al., *Rebalancing Public and Private in the Law of Mortgage Transfer*, 62 Am. U. L. Rev. 1529, 1553–55 (2013).

292. *Id.* at 1555.

The Category Three states—Arizona, California, and Georgia—represent the greatest challenge to the systematic application of the law addressing the right to foreclose. First, these opinions were all released very recently and may represent a trend.²⁹³ These states account for a significant number of foreclosures in relation to the total in the United States. By dismissing the relevance of the U.C.C., these rulings threaten to unnecessarily relegate the U.C.C. to the closet and heighten the potential for unjustified foreclosures. When properly applied and harmonized with foreclosure law, the U.C.C. provides the best chance to increase the uniformity of outcomes in these cases from state to state.²⁹⁴

293. Indeed, two additional states, Idaho and Minnesota, appear to lean in the same direction and twelve states have yet to tackle the contours of the right to foreclose as noted in Appendix A.

294. In the absence of a more consistent application of legal principles, the call for legislative reform at the state and federal level will intensify. Perhaps that horse has already left the gate. The NCCUSL formed a drafting committee in 2012 to undertake draft a uniform foreclosure law. The committee presented a draft of the Home Foreclosures Procedure Act at the NCCUSL annual meeting in July 2013. For information about this draft and its status, see *Home Foreclosures Procedures Act*, UNIFORM L. COMMISSION, <http://www.uniformlaws.org/Committee.aspx?title=Home%20Foreclosure%20Procedures%20Act> (last visited Nov. 20, 2013). The 2013 Annual Meeting Draft makes clear that the party possessing the right to foreclose must be an Article 3 PETE if the note is negotiable and must be the owner if the note is nonnegotiable. NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAW, DRAFT FOR DISCUSSION ONLY: HOME FORECLOSURE PROCEDURES ACT § 401, at 20–21 (2013), available at http://www.uniformlaws.org/shared/docs/Residential%20Real%20Estate%20Mortgage%20Foreclosure%20Process%20and%20Protections/2013AM_HFPA_Draft.pdf. At the federal level, see Protecting American Taxpayers and Homeowners Act of 2013, H.R. 2767, 113th Cong. §§ 331, 332 (2013) (proposing to create a federal system for recording mortgage-related documents, including assignments and transfers; providing that “by proper demonstration of registration with the Repository, any holder of an interest in any mortgage-related note shall satisfy any requirement for demonstration of a right to act regarding such note or other registered data that exists in State or Federal law, including any obligation to produce or possess an original note”). A critique of these proposals is beyond the scope of this Article.

APPENDIX A

In the twelve states listed below, the foreclosure statutes provided little or no guidance regarding the contours of the right to foreclose and the role of the U.C.C. In some of these states, I could not find any relevant reported state appellate court decisions. In others, the court cases either predated the adoption of the U.C.C. or were not on point.²⁹⁵

Delaware (judicial foreclosure state): DEL. CODE ANN. § 5061 (1999) (permitting a party to sue for foreclosure if it is the mortgagee or its heirs, executors, administrators, successors or assigns); no relevant published appellate decisions.

Hawaii (nonjudicial foreclosure state): HAW. REV. STAT. § 667-1 (2012) (defining “mortgagor” in the judicial foreclosure context to include the borrower and defining “mortgagee” to include the holder of record of the mortgage or the holder of the lender’s interest under the mortgage); HAW. REV. STAT. § 667-22(c) (1993) (requiring the mortgagee to include a copy of the mortgage and all assignments and the note and all indorsements and allonges to the notice of default); *Miller v. Bank of N.Y. Mellon*, No. 30698, 2013 WL 4522975, at *5 (Haw. Ct. App. Aug. 23, 2013) (finding challenge of MERS’ authority to invoke the power of sale moot on the grounds that the note was indorsed to Bank of New York and the mortgage was assigned to Bank of New York as of the date the bank sent the notice of default); *Wells Fargo Bank, N.A. v. Himalaya-Fidele*, 301 P.3d 1266 (Haw. Ct. App. 2013) (ruling that MERS was acting on behalf of the mortgagee in nonjudicial foreclosure that resulted in this ejectment action; using “mortgagee” per the nonjudicial foreclosure statute, HAW. REV. STAT. § 667-22, without referencing the definition in section 667-1); *cf. Citicorp Mortg., Inc. v. Bartolome*, 16 P.3d 827, 839 (Haw. Ct. App. 2000) (recognizing that CMI was the real party in interest in this judicial foreclosure action because it held the note and mortgage).

Iowa (judicial foreclosure state): IOWA CODE ANN. § 654.2B (West 1995) (requiring that the notice of right to cure sent to the “borrower” which must state, *inter alia*, the name, address, and telephone number of the “creditor” and a date by which the “borrower” must cure and if cure does not occur, the “creditor” may initiate a foreclosure proceeding); IOWA CODE ANN. § 654.4B (West 1995) (requiring the “creditor” to give the “borrower” a specific

295. I reviewed each state’s foreclosure statutes and performed searches in each state’s database using combinations of terms and phrases such as “mortgagee,” “beneficiary,” “note,” “mortgage,” “deed of trust,” “right to foreclose,” “standing,” “foreclosure,” “UCC,” “Uniform Commercial Code,” “Commercial Code,” and citations to relevant foreclosure statutes. Researching the right to foreclose is difficult because of the variation in the terminology used from state to state and the lack of uniformity among the foreclosure laws.

amount of time following the cure period to pay the “creditor” the accelerated balance); 10 Ia. Prac., Civil Practice Forms § 53:1 (2013) (providing a sample petition to foreclose that includes allegations regarding the signatories to the loan note and that the plaintiff owns the note and mortgage pursuant to indorsements and written assignment of the mortgage; requiring that the relevant documents be attached as exhibits); *see also* Pope & Slocum v. Jacobus, 10 Iowa 262, 263–64 (1859) (granting demurrer to foreclosure action on grounds that an assignment of only the mortgage to the foreclosing party does not carry the note with it).

Mississippi (nonjudicial foreclosure state): MISS. CODE ANN. § 89-1-55 (2011) (permitting foreclosure after posted and advertised notice); MISS. CODE ANN. § 89-1-63 (2011) (specifying that the beneficiary or holder of a deed of trust may appoint the trustee or substitute trustee in order to carry out the trustee duties listed in the deed of trust); *McKinley v. Lamar Bank*, 919 So. 2d 918, 928–29 (Miss. 2005) (ruling that upon the unqualified assignment of the deed of trust and note, that party had no further rights in the instruments and could not act upon them); *Weyburn v. Watkins*, 44 So. 145, 146 (Miss. 1907) (holding that note holder had right upon default of the indebtedness to “have the lands sold for the payment of her notes.”).

Montana (nonjudicial foreclosure state): MONT. CODE ANN. §§ 71-1-304(1), (6), (7) (2013) (permitting trustee of trust indenture to foreclose with or without express provision in the indenture); MONT. CODE ANN. § 71-1-303 (2013) (defining beneficiary in a trust indenture as the person for whose benefit the instrument is given; defining trust indenture as conveying legal title in real property to a trustee to secure performance of an obligation of the grantor).

Nebraska (nonjudicial foreclosure state): NEB. REV. STAT. § 76-1005 (2009) (permitting trustee to exercise the power of sale); *Deutsche Bank Nat’l Trust Co. v. Siegel*, 777 N.W.2d 259, 261–63 (Neb. 2010) (ruling that the servicer of the trustee bank was the real party in interest in this judicial foreclosure proceeding where the trustee bank obtained the note indorsed in blank via an assignment and the servicer was the agent of the trustee bank with specific authority to foreclose); *West Town Homeowners Ass’n v. Schneider*, 435 N.W.2d 645, 648 (Neb. 1989) (recognizing that the mortgagee must prove the existence of the mortgage lien, amount and priority, default, and right to a decree in a judicial foreclosure).

New Hampshire (nonjudicial foreclosure state): N.H. REV. STAT. ANN. § 479:25 (2012) (permitting mortgagee or its assignee to foreclose under a power of sale clause upon breach of a condition).

North Dakota (judicial foreclosure state): *Clark v. Henderson*, 244 N.W. 314, 316–17 (N.D. 1932) (ruling that the plaintiff had the right to foreclose because he had possession of the notes, properly indorsed; providing that no formal assignments of the mortgages were necessary; making no mention of the U.C.C.).

South Dakota (nonjudicial foreclosure): S.D. CODIFIED LAWS § 21-48-1 (2004) (permitting mortgages containing a power of sale to be foreclosed upon by advertisement); S.D. CODIFIED LAWS § 21-48-6.1 (2004) (requiring the “foreclosing creditor” to serve a copy of the notice of sale on the mortgagor).

Tennessee (nonjudicial foreclosure state): TENN. CODE ANN. § 35-5-101 (Supp. 2013) (instructing the trustee under a deed of trust to send the sale advertisement to the “debtor”); *Lively v. Drake*, 629 S.W.2d 900, 904 (Tenn. 1982) (suggesting that the holder of the indebtedness is entitled to foreclose in the context of deciding whether the holder of the indebtedness waived the right to accelerate due to receipt of partial payments).

Virginia (nonjudicial foreclosure state): VA. CODE ANN. § 55-58.1(1) (2013) (stating that a deed of trust is given to secure the payment of the primary obligation and the performance of the grantor’s other covenants); VA. CODE ANN. §§ 55-59(7), (9) (2013) (providing that at the request of the beneficiary, the trustee may accelerate the debt and sell in the event of default of the payment of the secured debt; the secured party or holders of more than fifty percent of the monetary obligation may substitute the trustee); VA. CODE ANN. § 55-59.1B. (2013) (adopting a lost note provision into the deed of trust statute); *Stimpson v. Bishop*, 82 Va. 190, 198, 200 (1886) (holding that the mortgage follows the note; stating, however, that a promissory note is a personal contract which is not governed by the principles applicable to a mortgage).

Wyoming (nonjudicial foreclosure state): WYO. STAT. ANN. § 34-4-103 (2013) (containing the requisites to foreclose nonjudicially, including that no suit to recover the secured debt has been instituted, is pending, or was concluded but the judgment has been returned unsatisfied in whole or in part); WYO. STAT. ANN. § 34-4-105 (2013) (mandating that the notice of sale include the amount claimed to be due); *Bitker v. First Nat’l Bank in Evanston*, 98 P.3d 853, 856–57 (Wyo. 2004) (ruling that notice of assignment of the note satisfied WYO. STAT. ANN. § 34-4-103(a)(iii) that requires recordation of assignments of the mortgage prior to foreclosing).