

NO. 43712-1-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JANICE GEARY f/k/a JANICE VALLI,

Appellant,

v.

ING BANK, FSB; AURORA LOAN SERVICES LLC; QUALITY
LOAN SERVICE CORPORATION OF WASHINGTON, INC.

Respondents.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY

RESPONDENT
AURORA LOAN SERVICES LLC's BRIEF

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
The Honorable Garold E. Johnson

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I. INTRODUCTION

Appellant Janice Geary f/k/a Janice Valli's home was nonjudicially foreclosed and sold more than three years ago. Mrs. Geary testified she could not afford her mortgage, defaulted on payments, received the Notices of Default, Trustee's Sale, and postponements, and did not move to restrain the Trustee's sale. Mrs. Geary's family has lived in the home payment-free for over four and one-half years, and remains there today.

Despite these facts, Mrs. Geary asserts the trial court erred by denying her summary judgment motion to quiet title to the property. She argues the "separation" of her Note from the Deed of Trust securing it and her loan's subsequent registration with Mortgage Electronic Registration Systems, Inc. ("MERS") flawed the foreclosure, voiding the sale.

Mrs. Geary also assigns error to the dismissal of her claims against the loan owner, ING Bank, FSB ("ING"), and the loan servicer, Aurora Loan Services LLC ("Aurora"), on their summary judgment motion.¹ Those claims were for fraud in the inducement, violations of the Deed of Trust Act, injunctive relief, declaratory relief, violation of the Consumer Protection Act, and fraudulent avoidance of real estate excise taxes.

After Aurora carried its summary judgment burden proving Mrs. Geary could not prevail, she submitted no evidence raising a triable

¹ At the time of that motion, Aurora and ING were represented by the same counsel. ING substituted counsel shortly before Respondents' briefs were due.

material fact issue. Because the trial court did not err in awarding summary judgment, this Court should affirm the orders denying Mrs. Geary's Motion for Partial Summary Judgment Quieting Title and granting Aurora's Cross-Motion for Summary Judgment.

II. RESTATEMENT OF ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Respondent Aurora makes no assignments of error, inasmuch as the summary judgment below was correct. Aurora restates the issues pertaining to Appellant's assignments of error as follows:

1. As a matter of law under the Waiver Doctrine, when a borrower: (a) defaults on a Note and Deed of Trust, (b) receives Notices of Default and Trustee's Sale advising of her right to enjoin the foreclosure sale, (c) believes she has foreclosure defenses before the sale occurs, but (d) does not obtain an order enjoining it, (e) the sale is conducted, and (f) the Trustee issues a deed, may the borrower thereafter quiet title in herself to the property sold, without first paying off her mortgage?

2. As a matter of law under RCW 61.24.127, when a defaulting borrower fails to prove a trial material fact issue exists regarding whether: (a) a factual misrepresentation, (b) was made to her by her loan servicer who knew it was false, (c) she reasonably and justifiably relied on the misrepresentation, and (d) her reliance proximately caused her damages, may the borrower prevail on an alleged post-foreclosure

fraud claim to void the sale or for damages?

3. As a matter of law under RCW 61.24.127, when a defaulting borrower fails to prove a triable material fact issue exists regarding whether: (a) her loan servicer engaged in an unfair or deceptive act or practice, (b) such act or practice affected the public interest, and (c) such act or practice proximately caused her damages, may the borrower prevail on an alleged post-foreclosure Consumer Protection Act, RCW 19.86, *et seq.* (“CPA”), violation claim to void the sale or for damages?

4. As a matter of law under RCW 61.24.127, when a defaulting borrower fails to prove a triable material fact issue exists regarding whether the loan servicer so controls the trustee so as to make the trustee a mere agent of the beneficiary, may the borrower prevail on a post-foreclosure Deed of Trust Act, RCW 61.24, *et seq.* (“DOTA”), violation claim against her loan servicer to void the sale or for damages due to the Trustee’s alleged material non-compliance with DOTA?

5. As a matter of law under RCW 61.24.127, may a defaulting borrower prevail on an alleged post-foreclosure action against her loan servicer to void the sale or for damages due to the loan servicer’s non-payment of excise taxes for the Trustee’s deed?

III. STATEMENT OF THE CASE

A. Appellant's Title to Property, Marriage, and Loan Entry.

Before their marriage Appellant's husband, James Geary, purchased a home in Buckley, Washington in October 2003. [CP 465, 468-70.] That property is commonly known as 8005 224th Avenue East, Buckley, Washington 98321 (the "Property"). [CP 465, 468-70.] On February 24, 2005, Mr. Geary conveyed the Property to his fiancée, Appellant Janice Geary, then known as Janice Valli.² [CP 465, 472-74.] Mrs. Geary was a practicing realtor for over 20 years. [CP 487-88, 499.]

To complete the purchase, Mrs. Geary took out two loans from Pierce Commercial Bank secured by the Property.³ [CP 490, 496, 531.] The first loan's principal balance was \$620,000.00 (the "Loan"), evidenced by an Adjustable Rate Note dated February 24, 2005, payable to Pierce Commercial Bank (the "Note"). [CP 118-28, 498, 546-56.] It provided Mrs. Geary would pay only interest for the first 10 years of the 30 year term. [CP 125-26, 553-54.] The interest rate was fixed for five years, first set to adjust on March 1, 2010. [CP 119, ¶4(A), 547, ¶4(A).]

The Note was secured by a Deed of Trust on the Property, also dated February 24, 2005 (the "Deed of Trust"). [CP 80-106, 502, 558-84.]

² Three months later, on May 20, 2005, Mrs. Geary married Mr. Geary but continued to use the name "Janice Valli." [CP 480, 485-86, 539-40, 641.]

³ The second loan was paid off and is not at issue in this litigation. [CP 441, n. 4, 531.]

The Deed of Trust conveyed title to the Trustee, Transnation Title Insurance Company, to secure Mrs. Geary's obligations to pay her lender, Pierce Commercial Bank. [CP 80-81, 558-59.]

B. Negotiation of Note and Transfer of Loan Interest.

When she borrowed the money, Mrs. Geary knew her lender would likely sell the Loan and transfer servicing. [CP 500-01, 503-04.] Mrs. Geary received correspondence from both Pierce Commercial Bank and Aurora advising that Aurora would start servicing her Loan, effective May 1, 2005. [CP 108, 670-72, 687, 689.] Thereafter, Mrs. Geary made her Loan payments to Aurora. [CP 504-06.] On March 19, 2005, the loan was registered on the MERS[®] System. [CP 109-10, 115-16.]

After origination, Pierce Commercial Bank endorsed the Note to "Lehman Brothers Bank, FSB." Lehman Brothers Bank, FSB endorsed the Note to "Lehman Brothers Holdings Inc." Lehman Brothers Holdings Inc. endorsed the Note in blank. [CP 550.]

ING purchased the Note in May of 2005 [CP 478, ¶11], over four years before the Trustee's sale [CP 171]. Throughout ING's Note ownership, Aurora was ING's servicing agent. [CP 477-78, ¶¶7-11.] ING and/or its agents maintained custody of the original Note with its blank

endorsement from 2005 until December 2009.⁴ [CP 478, ¶13.]

The beneficial interest in the Deed of Trust tracked the Note ownership. Pierce Commercial Bank assigned the beneficial interest in to Lehman Brothers Bank, FSB, to which it also endorsed the Note, recording that Assignment on April 25, 2005. [CP 113.] Lehman Brothers Bank, FSB then assigned it to MERS, as its agent, with recording on December 1, 2005. [CP 130.] Three years later, MERS, at ING's direction, assigned its agency interest in the Deed of Trust to Aurora, ING's loan servicer, recording it on April 24, 2009.⁵ [CP 153.]

C. Appellant's Default, Modification Denial, and Foreclosure.

As the Note's interest adjustment date approached, Mrs. Geary grew concerned about paying her mortgage. [CP 510-11, 542-43, 645-48.] In December of 2008, she asked Aurora about a loan modification. [CP 506-07, 646-47.] Mrs. Geary asserts Aurora told her she could not modify her loan unless her payments were 60 to 90 days' past due. [CP 508.]

Ostensibly relying on this information, Mrs. Geary stopped paying her mortgage. [CP 511.] Her last payment was made over four and one-

⁴ Mrs. Geary's bare assertion, "ING to this date has produced no evidence of holding the note" [Appellant's Brief, p. 8], is inaccurate. The uncontroverted evidence is that "ING and/or its authorized agents were in possession of the original Note indorsed in blank from 2005 until Aurora took possession of it on December 18, 2009." [CP 478, ¶13.]

⁵ After the foreclosure sale, to assist in rectifying the first incorrect Trustee's Deed, Aurora executed an assignment to ING which was recorded on May 24, 2010. [CP 180.]

half years ago in December of 2008. [CP 511-12.] Mrs. Geary's family has lived in the home, payment-free, since that time. [CP 513-14, 660.]

In December 2008, Mrs. Geary applied to Aurora for a loan modification, providing several supporting financial documents. [CP 477, ¶9, 673, 675-84, 691-703, 710-16, 1046-61, 1066-84, 1088-1108, 1114, 1118-26, 1138-47.] Aurora reviewed the documents, determined Mrs. Geary did not qualify to modify her loan, and wrote her three times regarding the decision that same month. [CP 477, ¶9, 515, 649-51, 678-82, 717-25.] Despite that information, Mrs. Geary never sought a loan elsewhere, or tried to sell the Property. [CP 543, 648, 653-54.]

Initiating foreclosure proceedings for the Loan owner ING, Aurora directed MERS as ING's agent to sign an Appointment of Successor Trustee for the Deed of Trust. [CP 477-78, ¶10.] Quality Loan Service Corporation of Washington ("QLS") was appointed to replace the original Trustee, with the Appointment recorded on March 17, 2009. [CP 146-47.]

Before QLS's Appointment was recorded, Aurora directed QLS, as ING's agent, to send Mrs. Geary a Notice of Default and QLS did so, on March 13, 2009. [CP 142-44, 477-78, ¶¶7-10, 515, 522.] Mrs. Geary also received a Notice of Trustee's Sale dated April 16, 2009, and several continuance notices for that sale. [CP 165-68, 527-28, 600-02, 662-63.]

The Trustee's Sale was held November 20, 2009. [CP 170-71, 478, ¶12.] In preparing the Trustee's Deed Upon Sale, QLS mistakenly granted title to the loan servicer Aurora, rather than the loan owner, Note holder, and beneficiary, ING. [CP 170-71, 478, ¶12.] A Real Estate Excise Tax Affidavit claiming full exemption was filed. [CP 172.]

Later, QLS recorded a Corrective Trustee's Deed Upon Sale, conveying title to ING as originally intended, rather than Aurora. [CP 185-86, 478, ¶12.] Another full exemption was claimed. [CP 187.]

D. Appellant's Knowledge, Failure to Restrain, and Complaint.

Between March and November of 2009, Mrs. Geary received from QLS the Notice of Default, Notice of Trustee's Sale, and several Notices of Continuance of Trustee's Sale, and from Aurora several letters concerning her loan default and failure to qualify for loan modification. [CP 165-68, 477, ¶9, 515, 521-22, 527-28, 536-38, 595-96, 598-602, 605-06, 613, 649-51, 678-82, 717-25.] Mrs. Geary was aware she had the option to enjoin the Trustee's sale, but did not attempt to. [CP 528-29, 536-38, 601, 662-63.] Mr. Geary attended and tried to stop the sale on November 20, 2009, but was unsuccessful. [CP 535, 663, 665-66.]

The Gearys knew their alleged claims before the foreclosure sale. They communicated with QLS several times regarding their assertions that the Loan was not in default, the default claim was fraudulent, the

foreclosure notices were fraudulent, QLS was not an authorized agent for the lender, ING was not the Note holder, and related issues. [CP 529, 534-35, 587-591, 603-606, 663, 665-66.] The couple did not file suit or obtain an order restraining the sale before it occurred. [CP 528-29, 537-38, 663.]

Well after the foreclosure sale, on May 11, 2011, Mrs. Geary filed her Complaint. [CP 3.] She pleaded claims against Aurora for: (1) fraudulent inducement and CPA violation for its purported misstatement that the loan must be in default to be considered for modification [CP 7-8, 10]; (2) DOTA violation for Aurora's alleged "document manipulations, the manufacturing of defaults; and the demand for monies to which [it was] not legally entitled" [CP 8]; (3) injunctive and declaratory relief due to ING's supposedly fraudulent acquisition of title [CP 8-10]; and (4) "Fraudulent Attempt to Avoid Payment of Excise Taxes" for recording the Trustee's Deeds without paying excise tax [CP 10-11].

E. Parties' Cross-Motions for Summary Judgment.

1. Appellant's Partial Summary Judgment to Quiet Title.

Mrs. Geary filed a Motion for Partial Summary Judgment requesting the Property title be quieted in her. [CP 62-75.] The motion was supported by several of Aurora's, ING's and QLS's documents. [CP 76-197.] Mrs. Geary asserted ING had no Property interest because, (a) "there was a separation of the note from the beneficiary interest in the

DOT” [CP 63]; (b) “the unity of the note and security [was] destroy[ed]” by assigning the Note without the Deed of Trust [CP 65]; (c) “the Assignment to MERS as beneficiary of the Deed of Trust further alienate[d] ... the unity of the note and security” [CP 65]; (d) “[ING] should have known that the ‘Corrective Deed of Trust’ was a shame (*sic*)” [CP 65]; and (e) “a violation of the rule of equal dignities” [CP 66].

2. Respondents’ Cross-Motions for Summary Judgment.

ING and Aurora together, and QLS separately, filed Cross-Motions for Summary Judgment. [CP 198-214, 439-63.] Both cross-motions were supported by Requests for Judicial Notice. [CP 371-438, 464-74.] ING’s and Aurora’s motion was supported by Aurora’s Affidavit [CP 475-78], Mrs. Geary’s deposition transcript, and exhibits [CP 479-728]. QLS relied on its employees’ and counsel’s Declarations. [CP 215-370.]

All Respondents argued by not enjoining the foreclosure sale, Mrs. Geary waived all but three possible claims under RCW 61.24.127 for fraud, CPA violation, or the Trustee’s DOTA violation. [CP 204-05, 449-51.] Aurora urged Mrs. Geary could not establish the requisite fraud elements of a false statement, made with knowledge of its falsity, intending her to act on it, and that her ostensible reliance was not reasonable after rejection of her modification application. [CP 451-54.] Aurora argued a CPA violation did not occur because Aurora’s alleged

misstatement to Mrs. Geary that she must be in default to apply for a loan modification did not impact the public nor proximately cause the loss of the home. [CP 460-62.]

Aurora urged a DOTA violation claim premised on MERS's involvement could not survive because, (a) the blank-endorsed Note was a bearer instrument enforceable by its holder; (b) the "unity" of the Note and Deed of Trust were never "violated" because the security always follows the obligation; (c) the Notice of Default contained no defects; (d) the "Rule of Equal Dignities" does not require a Successor Trustee Appointment be "validated" by a recorded Power of Attorney; (e) the Trustee's Deed contained no defects; and (f) MERS's involvement did not void the sale. [CP 454-60.]

3. Appellant's Summary Judgment Opposition.

Mrs. Geary asserted the only disputed factual issues were whether Aurora's statement regarding her loan modification eligibility induced her to default, whether QLS conspired with Aurora to "change the nature and character of ownership of the Note and beneficiary under the Deed of Trust," and whether there were CPA violations. [CP 743-44, 902.] She filed a supporting Declaration and exhibits. [CP 908-1208.]

4. Aurora and ING's Reply to Appellant's Opposition.

Aurora and ING moved that Mrs. Geary's supplemental evidence be stricken because it was irrelevant, unfounded, and unauthenticated [CP 1223-24], and asserted she could not prove any claims against them as a matter of law [CP 1224-32]. At oral argument the trial court did not expressly rule on the strike motion, but requested supplemental briefing clarifying the issues of Note ownership and Assignments, which was provided. [CP 1237-40, CP 1255-1315.]

F. Summary Judgment Awards and Appeal.

On July 2, 2012, the trial court entered two Orders granting Aurora, ING, and QLS summary judgment, denying Mrs. Geary partial summary judgment, and dismissing the litigation. [CP 1241-52.] On Aurora and ING's motion, the trial court clarified its summary judgment dismissal order on August 3, 2012. [CP 1330-31.] Mrs. Geary timely appealed all summary judgment orders on July 17, 2012. [CP 1316-29.] The notice was not amended to include the subsequent clarification ruling.

IV. ARGUMENT

A. Summary Judgment Standard of Review is *De Novo*.

The appellate standard of review of summary judgment is *de novo*, with the reviewing court performing the same inquiry as the trial court. *Del Guzzi Constr. Co. v. Global Northwest Ltd.*, 105 Wn.2d 878, 882, 719

P.2d 120 (1986); *Hartley v. State*, 103 Wn.2d 768, 774, 698 P.2d 77 (1985). The burden is on the moving party to demonstrate the absence of a material fact issue and, as a matter of law, that summary judgment is proper. *Id.* Once that burden is satisfied, the nonmoving party must present evidence demonstrating material facts are in dispute. *Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989). If the nonmoving party fails to sufficiently establish the existence of an element essential to her case, then the trial court correctly granted the motion. *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 148, 787 P.2d 8 (1990); *Atherton Condo. Apt.-Owners Ass'n. Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

It is the appellate court's task to review a summary judgment award based solely on the trial court record. *Wash. Fed'n. of St. Employees, Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 163, 849 P.2d 1201 (1993); *Gaupholm v. Aurora Office Bldgs., Inc.*, 2 Wn. App. 256, 257, 467 P.2d 628 (1970). Generally, an appellate court may affirm a grant of summary judgment on an issue not decided by the trial court. *Plein v. Lackey*, 149 Wn.2d 214, 222, 67 P.3d 1061 (2003); *Int'l. Bhd. of Elec. Workers v. Trig Elec. Constr. Co.*, 142 Wn.2d 431, 435, 13 P.3d 622 (2000); *Ertman v. City of Olympia*, 95 Wn.2d 105, 108, 621 P.2d 724 (1980) (a superior court decision will not be reversed where the reason

given is erroneous if the judgment or order is correct).

B. Mrs. Geary's Failure to Enjoin the Trustee's Sale Waived All but Three Claims.

1. Due to Mrs. Geary's Lack of Asserted Error, Aurora's Summary Judgment on Waiver Must be Affirmed.

Mrs. Geary assigns error only to the portion of ING's – but not Aurora's – summary judgment based on her failure to enjoin the Trustee's sale. [Appellant's Brief, p. 1, ¶A.4.] RAP 10.3(a)(4) requires an appellant provide, “[a] separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.” Mrs. Geary assigned no error to Aurora's summary judgment award premised on the Waiver Doctrine.

“It is well settled that a party's failure to assign error ... , as required under RAP 10.3, precludes appellate consideration of an alleged error.” *Emmerson v. Weilep*, 126 Wn. App. 930, 939-40, 110 P.3d 214 (2005) (citing *Escude ex rel. Escude v. King Co. Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190, 69 P.3d 895 (2003)). Further, when no error is assigned to the trial court's findings of fact, they become the established facts of the case. *Fain v. Nelson*, 57 Wn.2d 217, 219, 356 P.2d 302 (1960). In such circumstances the appellate court's “review is, therefore, limited to whether or not the facts as found support the trial court's conclusions of law and judgment.” *Hoke v. Stevens-Norton, Inc.*, 60

Wn.2d 775, 776, 375 P.2d 743 (1962) (citing *J. D. English Steel Co. v. Tacoma Sch. Dist. No. 10*, 57 Wn.2d 502, 504, 358 P.2d 319 (1961)).

The trial court requested the prevailing parties propose detailed factual findings for its consideration, and it selected (and rejected) the facts concerning which no triable issue was shown. [CP 1243-46, 1249-51.] To the extent Mrs. Geary's brief may be read as assigning error to any fact findings, those assignments assert claimed error in ING's summary judgment, not Aurora's. [Appellant's Brief, p. 1 ¶¶A.4.]

Because Mrs. Geary assigns no error to Aurora's summary judgment award premised on the Waiver Doctrine and to the factual findings supporting it, and the trial court correctly applied the law to those facts, Aurora's summary judgment must be affirmed. Should the court choose to consider the issue, Appellant's Brief barely mentions the Waiver Doctrine [*id.*, p. 11], and neither quotes nor cites the doctrine and its three exceptions in RCW 61.24.127. Both control most issues here.

2. Not Enjoining the Sale Waives a Borrower's Claims.

The DOTA specifies procedures to stop a Trustee's sale so a nonjudicial foreclosure contest may proceed. RCW 61.24.130. The sale may be restrained "on any proper legal or equitable ground." RCW 61.24.130(1). The Waiver Doctrine holds that if the borrower does not enjoin the Trustee's sale, he waives all claims associated with the

underlying obligation and the foreclosure. *Brown v. Household Realty Corp.*, 146 Wn. App. 157, 163-64, 189 P.3d 233 (2008), *rev. den'd.* 165 Wn.2d 1023, 202 P.3d 308 (2009); *Steward v. Good*, 51 Wn. App. 509, 515, 754 P.2d 150, *rev. den'd.*, 111 Wn.2d 1004 (1988). Waiver of any post-sale contest occurs when the borrower: (1) receives notice of his right to enjoin; (2) has actual or constructive knowledge before the sale of a foreclosure defense; but (3) fails to enjoin the sale. *Plein v. Lackey*, 149 Wn.2d 214, 227-229, 693 P.2d 683 (2003) (*citing, Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985)); *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 137, 157 P.3d 415 (2007).

The Waiver Doctrine fulfills DOTA's three goals of (1) an efficient and inexpensive nonjudicial foreclosure process; (2) an adequate opportunity to prevent wrongful foreclosure; and (3) securing stability of land titles. *Brown, supra*, 146 Wn. App. at 169; *McCrorey v. Fed. Nat'l. Mtg. Assoc.*, 2013 WL 681208, *2 (W.D.Wash. Feb. 25, 2013).⁶ A Notice of Default and Notice of Trustee's Sale specifically advise the borrower of their right to enjoin the sale. If the borrower fails to invoke this pre-sale remedy, his claims for declaratory and injunctive relief, quiet title, rescission, setting aside default, and accounting are waived, as a matter of

⁶ GR 14.1(b) and Fed. R. App. P. 32.1 allow citation to unpublished federal opinions filed after January 1, 2007. *See, Wash. St. Comm. Access Project v. Regal Cinemas, Inc.*, 173 Wn. App. 174, 190, n. 31 (2013); *Brown, supra*, 146 Wn. App. at 165, n. 16; *Fulton v. St., Dept. of Soc. & Health Svcs.*, 169 Wn. App. 137, 160, n. 34, 279 P.3d 500 (2012).

law. RCW 61.24.040; *Plein, supra*, 149 Wn.2d at 227-229; *Gossen v. JPMorgan Chase Bank*, 819 F.Supp.2d 1162, 1169 (W.D.Wash. 2011).

Before the sale Mrs. Geary received notice of her right to enjoin it:

Anyone having any objections to this sale *on any grounds whatsoever* will be afforded an opportunity to be heard as to those objections if they bring a lawsuit to restrain the sale pursuant to RCW 61.24.130. *Failure to bring such a lawsuit may result in a waiver of any proper grounds for invalidating the Trustee's sale.*

[CP 601, ¶IX (emphasis supplied); 527-28.] She believed she had foreclosure defenses and her husband tried to stop the sale. [CP 528-29, 662-63.] Specifically, before the sale the Gearys believed: (1) the Loan was not in default, (2) the default claim was fraudulent, (3) the foreclosure notices were fraudulent, (4) QLS was not an authorized agent for the lender, (5) ING was not the Note holder, and (6) they had other defenses. [CP 529, 534-35, 587-591, 603-606, 663, 665-66.] Despite those beliefs, and Mrs. Geary's receipt of the waiver notice, the couple did not file suit or obtain an order restraining the sale. [CP 528-29, 537-38, 663.]

On these facts, no Washington court has ever held the Waiver Doctrine does *not* bar the borrower's claims. *See, Brown, supra*, 146 Wn. App. at 164; *Steward, supra*, 51 Wn. App. at 515; *Plein, supra*, 149 Wn.2d at 227-229; *McCrorey, supra*, 2013 WL 681208 at *2; *Gossen, supra*, 819 F.Supp.2d at 1169; *Peoples Nat'l. Bank of Wash. v. Ostrander*,

6 Wn. App. 28, 32, 491 P.2d 1058 (1971). Recent case law emphasizing the Waiver Doctrine's equitable nature does not change this outcome.

In *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013), the Washington Supreme Court held, "the right to enjoin a foreclosure sale is an *equitable* remedy and the failure to enjoin a sale does *not* operate to waive claims based on the foreclosure process where it would be *inequitable* to do so." *Id.*, at 796 (emphasis supplied). Unlike the foreclosed party did in *Klem*, Mrs. Geary here did *not* prove that: (1) any documents were falsely notarized (*id.*, at 777); (2) there was a confidential agreement between the beneficiary and QLS that was "in tension with [QLS's] fiduciary duty to [her] and its duty to act impartially" (*id.*, at 777-78); (3) neither the servicer nor QLS would respond to her reasonable requests, such as a postponement of the sale (*id.*, at 778-79); (4) it was "impossible for [her] to obtain a presale injunction due to the time frame" (*id.*, at 780); nor did she (5) present expert testimony (*id.*).

In dictum, the *Klem* court noted, "there are ample reasons why a presale injunction was not an available remedy and thus application of the equitable doctrine of waiver would be inappropriate." *Id.*, at 783, n. 7. Mrs. Geary has neither raised, argued, nor proven any equitable issues should prevent application of the Waiver Doctrine to her.

Similarly, in *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 297 P.3d 677 (2013), the court held waiver inapplicable to agricultural property being foreclosed nonjudicially in violation of DOTA. *Id.*, at 111-12. The opinion analyzes and quotes *Plein* at length, reaffirming that:

“Simply bringing an action to obtain a permanent injunction will not forestall a trustee’s sale that occurs before the end of the action is reached.” ... For whatever reason, Plein did not seek to temporarily restrain the trustee’s sale and the sale proceeded as scheduled. ... *We found that failure to restrain the sale waived his challenge.* ... (“Plein received notice of his right to enjoin the sale, had knowledge of his asserted defense before the sale ..., and failed to obtain a preliminary injunction or other order restraining the sale.”).

Id., at 111 (citations omitted, original parenthetical, emphasis supplied).

The Waiver Doctrine was again reaffirmed in *Albice v. Premier Mtg. Svcs. of Wash., Inc.*, 174 Wn.2d 560, 276 P.3d 1277 (2012). The court chose not to apply the doctrine, finding inequitable the foreclosing lender’s failure to advise the borrower that it was ceasing its past practice of accepting late payments. *Id.*, at 571-72. Noting that “waiver is an equitable principle,” the Washington Supreme Court distinguished and reaffirmed application of the Waiver Doctrine under *Plein’s* circumstances where the borrower delays asserting a defense until post-sale, despite knowledge and opportunity to utilize pre-sale remedies. *Id.*, at 569-70; accord, *Frizzell v. Murray*, 170 Wn. App. 420, 283 P.3d 1139 (2012).

The Washington Supreme Court has had several opportunities to reverse or criticize the holdings in *Brown, supra*; *Steward, supra*; and *Plein, supra*, applying the Waiver Doctrine under these facts. It has never done so, and the Waiver Doctrine remains good law in Washington applicable to this case. Having failed to restrain the foreclosure sale despite prior knowledge of her defenses, Mrs. Geary's claims are barred as a matter of law. The trial court correctly awarded Aurora summary judgment on all claims, and correctly refused to quiet title in Mrs. Geary.

3. Non-Waived Post-Sale Claims Cannot Effect Title.

RCW 61.24.127 excepts three claims from the Waiver Doctrine:

(1) The failure of the borrower or grantor to bring a civil action to enjoin a foreclosure sale under this chapter may not be deemed a waiver of a claim for damages asserting:

(a) Common law fraud or misrepresentation;

(b) A violation of Title 19 RCW; or

(c) Failure of the trustee to materially comply with the provisions of this chapter.

(2) The nonwaived claims listed under subsection (1) of this section are subject to the following limitations:

(a) ...;

(b) The claim may not seek any remedy at law or in equity other than monetary damages;

(c) The claim may not affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property;

(d) ...;

(e) The claim may not operate in any way to encumber or cloud the title to the property that was subject to the foreclosure sale, ...; and

(f) The relief that may be granted for judgment upon the claim is limited to actual damages. ...

Damages claims for fraud, CPA violations, and the Trustee's non-compliance with DOTA are Waiver Doctrine exceptions, but cannot affect the Trustee's sale's finality or property title. *See, McCrorey, supra*, 2013 WL 681208, at *2; *Beadles v. Recontrust Co., N.A.*, 2012 WL 4904461, *2 (W.D.Wash. Oct. 15, 2012); Appendix Two. Claims to set aside the Trustee's sale and return the property – like Mrs. Geary's – are waived. *Beadles, supra*, 2012 WL 4904461, at *2; *Moore v. Fed. Nat'l. Mtg. Assoc.*, 2012 WL 424583, *2 (W.D.Wash, Feb. 9, 2012). So are slander of title, quiet title, and declaratory relief claims. *Harmon v. Fed. Home Loan Mtg. Corp.*, 2012 WL 3879241, *2 (W.D.Wash. Sept. 6, 2012); *Bhatti v. Guild Mtg. Co.*, 2011 WL 6300229, *4 (W.D.Wash. Dec. 16, 2011).

As a matter of law, Mrs. Geary's claims for fraud, CPA violations, and the Trustee's non-compliance are limited to damages. RCW 61.24.127(2). The trial court correctly ruled her claims for quiet title, negligence, injunction, declaratory relief, and excise taxes were waived.

C. Mrs. Geary's Waiver Doctrine Defenses Misstate the Law.

Mrs. Geary argues the Waiver Doctrine is inapplicable, asserting the sale was void *ab initio* due to procedural irregularities, Respondents' lack of authority to direct foreclosure, MERS's involvement, "separation" of the Note and Deed of Trust, and the Corrective Trustee's Deed issuance. Neither the law nor evidence supports such defenses.

1. Procedural Irregularities Which Void a Trustee's Sale.

Although the cases she cites are not on point, Mrs. Geary correctly asserts that the Waiver Doctrine does not apply to a Trustee's sale void *ab initio* due to procedural irregularities. [Appellant's Brief, p. 11.] *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992), held that the IRS's violation of an automatic bankruptcy stay imposed by 11 U.S.C. §362(a)(4)-(6) was void, rather than voidable. *Wheaton v. Dept. of L&I*, 40 Wn.2d 56, 58, 240 P.2d 567 (1952), held that a worker's compensation claim not filed within the limitations period was void *ab initio*. Neither is pertinent here.

DOTA procedural defects which void a sale include conducting the sale 161 days after the notice date, "well beyond [RCW 61.24.040(6)'s] statutorily mandated 120-day limit." *Albice, supra*, 157 Wn. App. at 928; *accord, Walcker v. Benson & McLaughlin PS*, 79 Wn. App. 739, 746, 904 P.2d 1176 (1995) (foreclose cannot occur after note limitations period expires). A trustee's lack of statutory power to nonjudicially foreclose

agricultural realty also voids a sale. *Schroeder, supra*, 177 Wn.2d at 112.

In *Cox v. Helenius*, the sale was voided because, “along with the grossly inadequate purchase price,” the Trustee, who under then-applicable law had an “exceedingly high” fiduciary duty, knew of the borrower’s pre-sale injunction suit but held the sale, breaching that duty.⁷ *Cox, supra*, 103 Wn.2d at 385. Another duty breach and extraordinary inequitable circumstances serving to void the sale were described in *Klem v. Wash. Mut. Bank*. There, “many foreclosure documents ... were falsely notarized by [the Trustee]” (176 Wn.2d at 792-93), the Trustee and beneficiary had a private written agreement barring sale continuances that was “in tension with [the Trustee’s] fiduciary duty to both sides and its duty to act impartially” (*id.*, at 777-78), the then-applicable Trustee’s duty was a fiduciary one (*id.*, at 805-06 (J. Madsen, concurring opinion)), and the property’s control by a court-appointed guardian who required court permission for action delayed and complicated resolution of the default (*id.*, at 779-80). On these unusual facts the court held, “the failure to enjoin a sale does not operate to waive claims based on the foreclosure

⁷ In 2008 and 2009, RCW 61.24.010 was amended to read as follows: “(3) The trustee or successor trustee shall have no fiduciary duty or fiduciary obligation to the grantor or other persons having an interest in the property subject to the deed of trust. (4) The trustee or successor trustee has a duty of good faith to the borrower, beneficiary, and grantor.” See, *Klem, supra*, 176 Wn.2d at 805-06 (J. Madsen, concurring opinion).

process where it would be inequitable to do so” (*Id.*, at 796.)

Other procedural irregularities that would void a Trustee’s sale are the borrower’s pre-sale bankruptcy filing (*Udall v. T.D. Escrow Svcs., Inc.*, 159 Wn.2d 903, 911, 154 P.3d 882 (2007) (dictum) (citing *In re Schwartz, supra*)), or the beneficiary’s pending action against the borrower on the obligation secured by the trust deed (RCW 61.24.030(4)).

Further, “prejudice [must] be established in order to void a sale where ... the trustee’s error was a technical, formal error, nonprejudicial, and correctable.” *Koegel v. Prud. Mut. Svgs. Bank*, 51 Wn. App. 108, 113, 752 P.2d 385 (1988) (holding default notice’s incorrect property description did not void sale); *Amresco Indep. Funding, Inc. v. SPS Prop., LLC*, 129 Wn. App. 532, 537, 119 P.3d 884 (2005) (holding default notice’s incorrect service on attorney did not void sale because, “[d]espite the strict compliance requirement, a plaintiff must show prejudice before a court will set aside a trustee sale”). When debtors fail to show any resulting harm from DOTA violations, the court correctly applies waiver to award summary judgment. *Steward, supra*, 51 Wn. App. at 153-544.

Finally, RCW 61.24.127(2)(b)-(f) reflects the legislature’s intent *not* to set aside a Trustee’s Sale, even when a Trustee fails to materially comply with DOTA. These provisions are strong indicators that the legislature favors damages over voiding a sale or clouding title.

In summary, the types of procedural irregularities which void a Trustee's sale are prejudicial violations of DOTA's fundamental requirements, or egregious inequitable circumstances. Neither exists here.

2. MERS's Successor Trustee Appointment Execution is Not a Procedural Irregularity that Voids the Sale.

Mrs. Geary claims MERS's execution of the Successor Trustee Appointment voids the Trustee's sale, citing only *Bain v. Met. Mtg. Group, Inc.*, 175 Wn.2d 83, 285 P.3d 34 (2012). [Appellant's Brief, pp. 10-11.] *Bain* does not so hold.

First, Mrs. Geary waived this issue by not briefing it, other than the sole *Bain* citation. RAP 10.3(a)(6) requires Appellant present supporting arguments, authoritative legal citations, and references to the record. Mrs. Geary having failed to do so, this court should not consider the assigned error. *Smith v. King*, 106 Wn.2d 443, 451-52, 722 P.2d 796 (1986); *Griffin v. Dept. of Soc. & Health Svcs.*, 91 Wn.2d 616, 630, 590 P.2d 816 (1979) ("We have been ... unwilling to consider issues which are not supported by argument or citation of authority ...").

Second, in *Bain* it was asserted that naming MERS, an ineligible beneficiary, would render the Deed of Trust void and result in quieting title in the borrower. *Bain, supra*, 175 Wn.2d at 112. The court refused, stating that any DOTA violation "should not result in a void deed of trust, both legally and from a public policy standpoint." *Id.*, at 114. Contrary to

Mrs. Geary's briefing, the *Bain* court *declined* to determine the legal effect of MERS acting as an unlawful beneficiary (*i.e.*, as if it were the Note holder itself, rather than acting as an agent for a principal directing its actions). *Id.*, at 114, 120. Since *Bain's* issuance, several other courts have emphasized that a foreclosure is not automatically improper because MERS is identified as a beneficiary. *See*, Appendix One.

Indeed, the *Bain* court expressly recognized that it was "likely true" MERS could act as an agent for the Note holder principal, so long as the principal controlled MERS's actions. *Id.*, at 106. The court held that "[i]f, for example, MERS is in fact an agent for the holder of the note, likely no split would have happened" between the Note and Deed of Trust and that MERS can act as an agent. *Id.* at 112.

That an agent may act for a Note holder principal is consistent with more than 100 years of Washington law, holding that Note holders may designate agents as beneficiaries to pursue foreclosure. *See, e.g.*, *Carr v. Cohn*, 44 Wn. 586, 588 (1906) (nominee can bring quiet title action on deed); *Andrews v. Kelleher*, 124 Wn. 517, 534–36 (1923) (bond holders' agent authorized to prosecute foreclosure); *Fid. Trust Co. v. Wash. & Or. Corp.*, 217 F. 588, 596 (W.D.Wash. 1914) (same). By contrast, *Bain* holds that MERS may not represent it is the Note holder and take actions as such, but it does not hold that MERS cannot act as an agent for the Note

holder (indeed, the opposite). If *Bain* were to overrule a century of Washington law, the court would have stated as much: “The doctrine of *stare decisis* ‘requires a clear showing that an established rule is incorrect and harmful before it is abandoned.’” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970)). “[O]verruling prior precedent should not be taken lightly,” or done in a vacuum without analysis of the cases subject to being overturned. *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009).

Third, RCW 61.24.031(1)(a) allows a default notice to be issued by the “trustee, beneficiary, or authorized agent ...” QLS issued the default notice in its capacity “as Agent for ... the Beneficiary.” [CP 144.] Aurora, as ING’s servicing agent, directed ING’s agent MERS to appoint QLS as Successor Trustee. [CP 477-78, ¶¶7-11.] Accordingly, QLS’s appointment as Successor Trustee and its Notice of Default are authorized as both the beneficiary’s and servicer’s agent. *See, Gossen v. JPMorgan Chase Bank*, 819 F.Supp.2d 1162, 1169-70 (W.D.Wash. 2011) (“By statute, then, an agent of the beneficiary may issue the Notice of Default. The Notice of Default makes clear that [the issuer] was not acting as trustee, but rather as the ‘duly authorized agent’ for [the beneficiary].”)

Finally, Mrs. Geary has neither asserted nor proven any resulting prejudice from MERS's execution of the Successor Trustee Appointment, as directed by Aurora acting as ING's agent, nor has she argued it is inequitable. Thus, the Appointment is not an inequitable procedural irregularity, and any defects were waived by her failure to enjoin the sale.

3. "Separation" of the Note and Deed of Trust is Not a Procedural Irregularity that Voids the Sale.

Mrs. Geary asserts that the beneficial interest assignments of the Deed of Trust do not track Note ownership, such that the Note and its security were "separated" and the "chain of unity" broken. [Appellant's Brief, pp. 12-15.] There is no authority for this proposition in Washington law, and it ignores both the uncontroverted facts and the *Bain* holding.

a. The holder is authorized to enforce a note.

For over 50 years Washington's negotiable instrument law has been the Uniform Commercial Code's ("UCC") Article 3. Under that law, a promissory note is a negotiable instrument. RCW 62A.3-104(a), (b), and (e). A note may be enforced by, "the holder of the instrument...." RCW 62A.3-101. In turn, "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." RCW 62A.1-201(b)(21)(A). Thus, the holder possesses a note payable or indorsed to itself or in blank.

In addition, “[a] person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument[.]” RCW 62A.3-101. The Washington Supreme Court recognized more than forty years ago that – for enforcement – what matters is who holds the Note, not who owns the rights to payments on the Note: “The holder of a negotiable instrument may sue thereon in his own name, and payment to him in due course discharges the instrument. It is not necessary for the holder to first establish that he has some beneficial interest in the proceeds.” *John Davis & Co. v. Cedar Glen No. Four, Inc.*, 75 Wn.2d 214, 222–23, 450 P.2d 166 (1969) (citation omitted).

The UCC’s Permanent Editorial Board recently reaffirmed application of these laws to notes secured by Deeds of Trust.⁸ It sought to “identify[] and explain[] several key rules in the UCC that govern the ... enforcement of notes secured by a mortgage [or Deed of Trust],” stating:

The first way that a person may qualify as the person entitled to enforce a note is to be its ‘holder.’ This familiar concept, ... requires that the person be in possession of the note and either (i) the note is payable to that person or (ii) the note is payable to bearer. Determining to whom a note is payable requires examination not only of the face of the note but also of any indorsements. This is because the party to whom a note is payable may be changed by indorsement so that, for example, a note payable to the order of a named payee that is indorsed in blank

⁸ The report, dated November 14, 2011, is attached as Appendix Three (the “PEB Report”).

by that payee becomes payable to bearer.

PEB Report, p. 5 (fns. omitted). The UCC's indorsement provisions are also Washington law. RCW 62A.3-204(a), RCW 62A.3-205(b).

The Washington Supreme Court found as controlling the above UCC provisions defining "holder" and "person entitled to enforce" in nonjudicial foreclosure cases. *Bain, supra*, 175 Wn.2d at 103-104. It stated that to enforce a Note, "a beneficiary must either actually possess the promissory note or be the payee," and a non-owner may enforce. *Id.*

b. ING held the note and its agent, Aurora, was entitled to enforce.

ING became the owner of Mrs. Geary's Note in May 2005. [CP 478, ¶11.] ING and/or its agents maintained custody of the original Note, endorsed in blank. [CP 478, ¶13.] Being in possession of the properly indorsed Note, ING was the Note holder as a matter of law, under RCW 62A.1-201(5) and RCW 62A.3-205(b).

Accordingly, ING's standing to foreclose did not derive from any MERS assignment, but rather from its status as Note holder, and thus a statutorily-defined and *Bain*-defined beneficiary. ING, as beneficiary acting through agents, had authority to direct institution of nonjudicial foreclosure proceedings under DOTA. RCW 61.24.030(7)(a); *Bain, supra*, 175 Wn.2d at 120; *McDonald v. OneWest Bank, FSB*, 2013 WL 858178, *4 (W.D.Wash. Mar. 7, 2013) ("[The lender's] authority to issue

the statutory notice of default and/or to appoint a successor trustee hinges on its actual physical possession of the original signed promissory note. ... The note is, after all, bearer paper.”).

Throughout ING’s Note ownership, Aurora was ING’s loan servicing agent. [CP 477-78, ¶¶7-11.] *Bain* emphasized “nothing in this opinion should be construed to suggest an agent cannot represent the holder of a note. Washington law, and the deed of trust act itself, approves of the use of agents.” *Id.*, at 106. It is entirely permissible under *Bain* for ING to exercise its authority to foreclose through its agent, Aurora. [CP 477-78, ¶¶7, 10-13.] It is a lender’s holder status that is the pertinent inquiry. As a practical matter, Deed of Trust assignments are not material to ING’s and its agents’ entitlement to foreclose. *See, e.g., Lynott v. Mtg. Elec. Reg. Sys., Inc.*, 2012 WL 5995053, *2 (W.D.Wash. Nov. 30, 2012) (“[P]ossession of the note makes U.S. Bank the beneficiary; the assignment merely publicly records that fact. Because U.S. Bank is the proper beneficiary, it is empowered to initiate foreclosure”).

c. Because the security follows the note, Aurora as ING’s agent was authorized to enforce.

Under long-standing Washington law, a security instrument follows the obligation: “[T]ransfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter.” *In re Jacobson*, 402 B.R. 359, 367 (W.D.Wash. 2009) (quoting *Carpenter*

v. *Longan*, 16 Wall. 271, 83 U.S. 271, 275, 21 L.Ed. 313 (1872)). This law was codified in Washington’s UCC: “[T]he assignment of the interest of the seller ... of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee[.]” PEB Report, p. 12; RCW 62A.9A-203(g) (“The attachment of a security interest in a right to payment ... secured by a security interest ... on ... real property is also attachment of a security interest in the ... mortgage”)⁹

This statement of Washington law was reaffirmed in *Bain*: “Washington’s deed of trust act contemplates that the security instrument will follow the note, not the other way around.” *Id.*, at 104. Even courts criticizing DOTA compliance recognize the note holder’s entitlement to enforce the Deed of Trust. *See, McDonald v. OneWest Bank, FSB*, 2013 WL 858178, *4 (W.D.Wash. March 7, 2013); *accord, Florez v. OneWest Bank, FSB*, 2012 WL 1118179, *1 (W.D.Wash. April 3, 2012).

As the Note holder, ING was entitled to issue Plaintiff a default notice through its agents, Aurora and QLS, because a beneficiary may act through agents. RCW 61.24.030(8); *Bain, supra*, 175 Wn. 2d at 106. ING, acting through its agents Aurora and MERS, was also entitled to appoint QLS as Successor Trustee to enforce the Deed of Trust because

⁹ RCW 62A.9A-203’s Comment 9 confirms: “Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest ... also transfers the security interest or lien.”

the Note holder, as beneficiary, may replace the trustee with a successor under RCW 61.24.010(2). *McDonald, supra*, at *4; *Mickelson v. Chase Home Fin., LLC*, 2012 WL 3240241, *3 (W.D.Wash. Aug. 7, 2012).

d. “Separation” of the Note and Deed of Trust states no claims.

Mrs. Geary’s assertion that her Note was split from the Deed of Trust is not supported by the record or Washington law. Even were the Court to consider this issue, there is no requirement that the Deed of Trust be “unified” with or not “split” from the Note. *Buchna v. Bank of Am., N.A., et al*, 478 F.App’x. 425, 425 (9th Cir. 2012) (“The [plaintiffs] argue that the note and deed of trust were split, rendering the non-judicial foreclosure provisions in the deed of trust unenforceable. That argument fails to state a claim because it is based on nothing more than conclusory speculation that the parties exercising power under the deed of trust are not the note holder or agents of the note holder.”); *Zamzow v. Homestead Residential, Inc.*, 2012 WL 6615931, *1 (W.D.Wash. Dec. 19, 2012) (“[I]t is not a violation in Washington to split the note from the deed [of trust].”)

An asserted “break” or “separation” of the Deed of Trust from Note ownership is not a procedural irregularity which voids the sale.

4. An Unrecorded Power of Attorney is Not a Procedural Irregularity that Voids the Sale.

Citing statutes requiring real estate conveyances be recorded, Mrs. Geary asserts the lack of any recorded powers of attorney violates the “Rule of Equal Dignities,” and is a foreclosure defect. [Appellant’s Brief, pp. 15-17.] But the very statute Mrs. Geary quotes contradicts her argument. RCW 65.08.060(3) defines conveyance as:

[E]very written instrument by which any estate or interest in real property is created, transferred, mortgaged or assigned or by which the title to any real property may be affected, including an instrument in execution of a power, although the power be one of revocation only, and an instrument releasing in whole or in part, postponing or subordinating a mortgage or other lien; except ... an instrument granting a power to convey real property as the agent or attorney for the owner of the property. “To convey” is to execute a “conveyance” as defined in this subdivision.

RCW 65.08.060(3) (emphasis supplied).

As the Washington Supreme Court held, it is only *if* a power of attorney is recorded, that its revocation must also be recorded. RCW 65.08.130; *Lazov v. Black*, 88 Wn.2d 883, 885, 567 P.2d 233 (1977). None of the case authorities cited by Mrs. Geary even involve powers of attorney or the use of agents.¹⁰ Further, in the innumerable Washington reported cases arising from nonjudicial foreclosures, not a single one mentions the “Rule of Equal Dignities,” let alone applies it to invalidate a

¹⁰ *Berg v. Ting*, 125 Wn.2d 544, 555, n. 1, 886 P.2d 564 (1995), cited by Appellant, specifically found agency cases to be, “not relevant in this case, ... where there was no authorization for an agent”

Trustee's sale. *See, e.g., Knecht v. Fidelity Nat'l. Title Ins. Co.*, No. 2:12-CV-01575-RAJ, Dkt. 20, p. 12, ll. 8-13 (W.D.Wash. Mar. 11, 2013) (“An AHSMI representative signed the document in which [the beneficiary] DB purports to appoint ... a successor trustee, stating that AHMSI was DB’s ‘attorney-in-fact.’ ... [Plaintiff] complains that there is no recorded power-of-attorney document establishing AHMSI’s right to act on DB’s behalf, but he points to no authority requiring AHMSI to record such a document. He also fails to establish his own standing to object to AHMSI’s acting on DB’s behalf.”)

There is no requirement that a recorded Power of Attorney exist to validate a Successor Trustee Appointment.

5. Issuance of a Corrective Trustee’s Deed is Not a Procedural Irregularity that Voids the Sale.

Mrs. Geary asserts the Trustee had no power to issue the Corrective Trustee’s Deed, because its duties were “extinguished” immediately on the Property’s sale or after recording its initial deed. [Appellant’s Brief, p. 12.] That statement of law is incorrect.

First, Mrs. Geary acknowledges the Property was sold to the beneficiary for a credit bid. [Appellant’s Brief, pp. 5, 8, 18.] The undisputed evidence is that the original deed was mistakenly issued to Aurora as the beneficiary, rather than ING. [CP 170-71, 478, ¶12.] Mrs. Geary asserts no basis on which she, as a third party to the transaction, has

any standing to challenge the correction. “[A] stranger to a contract may not challenge the contract’s validity ...” *Newport Yacht Basin Ass’n. of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 80, 277 P.3d 18 (2012). “[T]he fact that a third party would be better off if a contract were unenforceable does not give him standing to sue to void the contract.” *Spanish Oaks, Inc. v. Hy-Vee, Inc.*, 265 Neb. 133, 138, 655 N.W.2d 390 (2003) (quoted with approval in *Newport Yacht, supra*, at 80).

Second, Mrs. Geary’s contention that the Trustee has no authority once the sale occurs or deed is recorded is belied by DOTA’s requirements concerning the Trustee’s post-sale duties. *See, e.g.*, RCW 61.24.080 (requiring post-sale deposit of surplus funds and documents with court clerk, and mailing of certain notices). Thus, the Trustee has continuing duties that are not automatically discharged on issuing the deed.

Third, the Trustee here did not discharge its duties *until* it issued the Corrective Trustee’s Deed. “[T]he trustee ... *shall sell* the property at public auction *to the highest bidder.*” RCW 61.24.040(4) (emphasis supplied). After the purchaser pays the bid price, “the trustee *shall execute to the purchaser*” the Trustee’s Deed. RCW 61.24.040(7) (emphasis supplied); *accord, Udall, supra*, 159 Wn.2d at 910-11 (“this statutory language imposes on the trustee, ... an *obligation* to ... execute the deed *to the highest bidder*”) (emphasis supplied). QLS did not fulfill

DOTA's requirements until the Corrective Deed was issued to the *actual* credit purchaser, ING, rather than the purchaser's servicing agent, Aurora.

Fourth, Mrs. Geary wrongly claims that the Corrective Deed must be recorded within 15 days of sale. "Whether ... [the Trustee] record[s] the deed within 15 days of the purported sale date is irrelevant to the conveyance of property rights." *Udall, supra*, 132 Wn. App. at 299-300. The purpose of recording "is to place subsequent purchasers on notice of property's transfer from one owner to another, not to convey rights in land to the purchaser." *Id.; In re Bell*, 386 B.R. 282, 292 (W.D.Wash. 2008).

Under DOTA, QLS was required to issue its Trustee's Deed to ING, as it eventually did. That issuance cannot serve to void the sale.

6. No Other Defect Constitutes a Procedural Irregularity that Voids the Sale.

Citing no substantive authorities, Mrs. Geary further nit-picks the foreclosure process. [Appellant's Brief, pp. 16-17.] None of the alleged flaws constitute procedural defects which void the Trustee's sale. There is no requirement that the default notice have a wet-ink signature. RCW 61.24.030(8). There is no requirement that the Appointment of Successor Trustee be recorded before the default notice is issued, since the Notice of Default may be issued by the beneficiary acting through agents. RCW 61.24.030(8); *Vawter v. Quality Loan Svc. Corp. of Wash.*, 707 F.Supp.2d 1115, 1127 (W.D.Wash. 2010) ("[Plaintiffs] have not alleged that this

[default notice issuance before Trustee appointment recording] caused them prejudice or harm and have not explained how this error would affect any future nonjudicial foreclosure proceedings.”); *accord, Salmon v Bank of Am. Corp.*, 2011 WL 2174554, *8 (E.D.Wash. May 25, 2011).

There is no requirement that each sale date postponement be recited in the Trustee’s Deed. At the time this sale was conducted, once written notice of the first sale date was sent, DOTA authorized continuances by “public proclamation.”¹¹ RCW 61.24.040(6); *In re Bell, supra*, 386 B.R. at 289. It would be incongruous to require the Trustee’s Deed recite continuances, when no written notice of the continuances themselves is required. Further, the deed’s failure to include continuance dates could not possibly have prejudiced Mrs. Geary, as she was aware of the sale date and her husband attended the sale. [CP 535, 665-66.]

In short, none of the asserted flaws is so irregular, prejudicial or inequitable as to prevent the Waiver Doctrine’s application.

D. Mrs. Geary Did Not Rebut Aurora’s Evidence Showing No Triable Material Fact Issues Existed Concerning Essential Elements of her Three Non-Waived Claims.

¹¹ RCW 61.24.040(6) now requires written notice along with public proclamation. Under the law applicable to this case, postponement by public proclamation was upheld even when the borrowers and lender entered an agreement implying written postponement notices would be provided. *See, Wells Fargo Bank Minnesota v. Vincent*, 124 Wn. App. 1, 4, 93 P.3d 173 (2004).

Mrs. Geary pleaded the three RCW 61.24.127 Waiver Doctrine-excepted claims. [CP 7-11.] In opposing summary judgment, she did not rebut Aurora's evidence that no material triable facts existed for each claim's essential elements. Accordingly, the trial court correctly awarded summary judgment dismissing all claims against Aurora.

1. Mrs. Geary Did Not Rebut Aurora's Evidence Proving the Lack of Essential Elements of Fraud.

Mrs. Geary claimed Aurora fraudulently induced her default by telling her she could not apply for a loan modification until she was 60 to 90 days' delinquent. [CP 5, ¶3.2; CP 7-8.] To prevail on her fraud claim, Mrs. Geary must show: (1) Aurora represented the truth of an existing material fact; (2) the fact represented was false; (3) Aurora was aware the representation was false when made; (4) Aurora intended Mrs. Geary to act on the falsehood; (5) she had a right to and did rely on Aurora's representation; and (6) her reliance proximately caused consequential damages. *Sigman v. Stevens-Norton, Inc.* 70 Wn.2d 915, 920, 425 P.2d 891 (1967); *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996).

Mrs. Geary did not controvert Aurora's proof that she could not establish all fraud claim elements. First, assuming Aurora made a false representation, Mrs. Geary had no right to rely on it. "The general rule in Washington is that a lender ... and its successors, assigns, or designated loan servicer ... are not fiduciaries of its borrowers." *Schanne v.*

Nationstar Mtg., LLC, 2011 WL 5119262, *3 (W.D.Wash. Oct. 27, 2011) (citing, *Miller v. U.S. Bank of Wash., N.A.*, 72 Wn. App. 416, 426-27, 865 P.2d 536 (1994)). “Rather, a special relationship must develop between the parties before a fiduciary duty exists. *Where the parties deal with each other at arm’s length, such as a borrower-lender relationship, no fiduciary duty arises.*” *Id.* (internal citation omitted) (emphasis supplied).

Particularly due to the loan document terms, Mrs. Geary had no right to rely on Aurora’s alleged misrepresentation. The Deed of Trust provides in bold-face all capitals, directly above the signature line:

**ORAL AGREEMENTS OR ORAL
COMMITMENTS TO ... FORBEAR
FROM ENFORCING REPAYMENT
OF A DEBT ARE NOT ENFORCEABLE
UNDER WASHINGTON LAW.**

[CP 94 (original emphasis).] In addition, the Note provides:

If I do not pay the full amount of each monthly payment on the date it is due, I will be in default.

...

Even if, at a time when I am in default, the Note Holder does not require me to pay immediately in full as described above, the Note Holder will still have the right to do so if I am in default at a later time.

[CP 120, ¶7(B) and (D).] Accordingly, the parties’ written agreements specifically reject Mrs. Geary’s claimed entitlement to rely on any verbal statements by Aurora, or any promised collection forbearance.

Further, Mrs. Geary did not show that her reliance on Aurora's modification eligibility statement was justifiable. Mrs. Geary was informed three times in writing that she did not qualify for a loan modification. [CP 477, ¶9, 515, 649-51, 678-82, 717-25.] All three notices were provided the same month she applied for modification, in December of 2008. [CP 506-07, 646-47, 717-25.] Despite that, she continued failing to pay her mortgage for over four years after the denial and to the present, ostensibly because Aurora told her she needed to default before applying for a modification. [CP 513-14, 660.]

Whether reliance is justifiable may be determined by the court as a matter of law. *Havens v. C & D Plastics, Inc.*, 124 Wn.2d 158, 181, 876 P.2d 435 (1994); *Schaaf v. Highfield*, 127 Wn.2d 17, 30, 896 P.2d 665 (1995) ("Ordinarily, whether reliance was justifiable is a question of fact, but when reasonable minds could reach but one conclusion, summary judgment is appropriate.") It is "patently unreasonable" for a borrower to rely on his lender's "oral representations where they directly contradicted the written terms of the loan. To allow avoidance of the debt ... would affront the law of contracts and destabilize business transactions." *Cornerstone Equip. Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 906, 247 P.3d 790 (2011). After her requested loan modification was rejected and in view of the written loan terms, as a matter of law Mrs. Geary could

not reasonably rely on Aurora's statement to excuse her continued default.

Neither were Mrs. Geary's damages proximately caused by her reliance on Aurora's statement. The foreclosure was caused by her failure to pay her mortgage, not anything Aurora said. "[When a p]laintiff does not contest that he was in default, he failed to cure the default, and he received notice of the foreclosure sale [i]t may be difficult for [the p]laintiff to establish [fraud] damages as he will have to establish that he had other viable options to avoid foreclosure." *Beadles, supra*, 2012 WL 4904461, at *2; *accord, Ladunskiy v. First Horizon Corp.*, 2012 WL 4467652, *3 (W.D.Wash. Sept. 26, 2012) (dismissing claim where unclear how misrepresentation caused foreclosure). Mrs. Geary never purported to have "other viable options to avoid foreclosure" or that she would have cured her default and avoided foreclosure but for Aurora's statement.

Failing to establish justifiable reliance and proximate cause as a matter of law, Mrs. Geary's fraud claim was appropriately dismissed.

2. Mrs. Geary Did Not Rebut Aurora's Evidence Proving the Lack of Essential Elements of a CPA Violation.

To establish a violation of the CPA, a plaintiff must prove: (1) defendants engaged in an unfair or deceptive act or practice; (2) which occurred in trade or commerce; (3) affecting the public interest; (4) the plaintiff was injured in either his business or property; and (5) the act or practice proximately caused the injury. *Hangman Ridge Training Stable,*

Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

The purpose of the CPA is to protect consumers from harmful practices, which is why the plaintiff must allege an actual or potential impact on the general public, not merely a private wrong. *Lightfoot v. Macdonald*, 86 Wn.2d 331, 333, 544 P.2d 88 (1976). A deceptive act must have the capacity to deceive a substantial portion of the population. *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 30, 948 P.2d 816 (1997).

Mrs. Geary failed to rebut Aurora's proof that she could not establish the public impact and causation elements of her CPA claim.¹² To satisfy the public impact requirement in a private dispute, the plaintiff must prove "it is likely that additional plaintiffs have been or will be injured in *exactly the same fashion*." *Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 702-03, 754 P.2d 1262 (1988) (emphasis supplied). Mrs. Geary's loan terms, payment amount, interest rate, Note term, ability to pay, default, requested modification, ability to modify, foreclosure circumstances, and communications with her loan servicer are all unique to her. The allegedly unfair and deceptive act of informing Mrs. Geary that she must be in default to apply for a loan modification was specific to her. There was no evidence that the statement – if indeed it was false, as lenders generally do not gratuitously modify performing loans – was ever

¹² In addition, Mrs. Geary offered no evidence that Aurora's alleged statement was incorrect or otherwise deceptive.

made to anyone else. Accordingly, Mrs. Geary did not show a fact issue exists concerning the public interest requirement of her CPA claim.

For a deception-based CPA claim, the plaintiff must establish she was actually deceived and would not have been damaged “but for” the alleged deceptive act:

We hold that the proximate cause standard embodied in WPI 15.01 is required to establish the causation element in a CPA claim. *A plaintiff must establish that, but for the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.*

Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc., 162 Wn.2d 59, 83-84, 170 P.3d 10 (2007) (emphasis supplied). In turn, WPI 15.01, as quoted in *Schnall v. AT&T Wireless Services, Inc.*, 171 Wn.2d 260, 278, 259 P.3d 129 (2011), provides:

“The term ‘proximate cause’ means a cause which in a direct sequence [*unbroken by any superseding cause,*] produces the [injury] [event] complained of and without which such [injury] [event] would not have happened. [There may be more than one proximate cause of an [injury] [event].]” WPI 15.01 at 181. Similarly, under WPI 310.07, the plaintiff has the burden of showing “a cause which in direct sequence [*unbroken by any new independent cause*] produces the injury complained of without which such injury would not have happened. [There may be more than one proximate cause of an injury.]” 6A Washington Practice: Washington Pattern Jury Instructions: Civil 310.07, at 274 (5th ed. 2005). The plaintiff must merely show that the “injury complained of ... would not have happened” if not for defendant’s violative acts.

Id. (emphasis supplied).

Similar to the fraud claim analysis, Mrs. Geary did not establish a triable issue concerning CPA but-for causation. Her Property was foreclosed because she never paid her mortgage after her modification application was denied. Despite being a realtor, Mrs. Geary did not seek another loan or try to sell the Property. [CP 543, 648, 653-54.]

Viewing the evidence most favorably to her, Mrs. Geary proved she *originally* defaulted due to Aurora's alleged misrepresentation. But she did not establish the Trustee's sale would not have occurred but for Aurora's purported suggestion that she default. Instead, the foreclosure occurred due to her continued refusal to pay and failure to cure her default, even after the loan modification denial. These intervening and superseding causes broke the proximate causation sequence. *See, McCrorey, supra*, 2013 WL 681208, at *4 (dismissing borrower's CPA claim based on deceptive representations because, "it was the failure [of plaintiffs] to meet their debt obligations that led to a default, the destruction of credit, and the foreclosure," not misrepresentations).

Mrs. Geary having failed to establish the public impact of Aurora's statement made only to her and that but for the statement without any superseding cause her Property would not have been foreclosed, the trial court did not err in dismissing her CPA claim, as a matter of law.

3. Mrs. Geary Cannot Claim DOTA Violations Against Aurora, as a Matter of Law.

The third RCW 61.24.127 Waiver Doctrine-exempted claim may only be brought against the Trustee, not the loan servicer. *See*, RCW 61.24.127(1)(c) (stating exception for “[f]ailure of the trustee to materially comply with the provisions of this chapter”) (emphasis supplied); *McCrorey, supra*, 2013 WL 681208, at *3 (“The only type of DTA claim that may be asserted post-foreclosure is a claim *against the trustee* for failing to materially comply with the provisions of the DTA. ... Any wrongdoing alleged on behalf of ... the original trustee under the deed of trust, *relates to its conduct as servicer of plaintiffs’ mortgage* rather than its role as trustee under the DTA. Plaintiffs have not, therefore, alleged facts giving rise to a plausible claim for relief under the one type of DTA claim preserved by RCW 61.24.127(1)(c).”) (emphasis supplied).

In the past month, Division I refused to decide whether the *trustee failure exception* of RCW 61.24.127(1)(c) is grounds for allowing a borrower’s claims against the *beneficiary* to proceed. *Walker v. Quality Loan Svc. Corp. of Wash., et al.* -- Wn. App. 2d --, -- P.3d --, Slip. Opn. at 16 (August 5, 2013).¹³ Instead the court held, “where a beneficiary, lawful or otherwise, *so controls* the trustee so as to make the trustee a *mere agent*

¹³ Available at: <http://www.courts.wa.gov/opinions/?fa=opinions.disp&filename=659758MAJ>.

of the beneficiary, then, as principal, it may have vicarious liability [for the trustee's material DOTA violations]." *Id.*, at *17 (emphasis supplied).

There is no evidence here that Aurora exerted such control over QLS as to make Aurora vicariously liable for *all* of QLS's actions as its principal. Instead, the sole evidence in the record is that Aurora's servicing functions included directing appointment of QLS as Successor Trustee, and then directing QLS "to commence a nonjudicial foreclosure action after [Mrs. Geary's] account became delinquent." [CP 477-78, ¶¶7-10.] There is no authority for the proposition and no Washington court has held that a loan servicer's request and direction to an independent Trustee to conduct a nonjudicial foreclosure, especially without proof of control, establishes the servicer's vicarious liability for the Trustee's acts.

Even could Mrs. Geary state a DOTA violation claim against Aurora, she cannot prevail for the reasons above. Aurora not being the Trustee, and absent proof that Aurora exerted such control of QLS to impose vicarious liability, as a matter of law Mrs. Geary cannot prevail against Aurora under RCW 61.24.127(1)(c) for DOTA violations.

E. Mrs. Geary has No Valid Excise Tax Violation Claim.

As a matter of law, Mrs. Geary's claim for "Fraudulent Attempt to Avoid Payment of Excise Tax" [CP 10-11] is not viable for three reasons. First, it is barred by the Waiver Doctrine. Second, Mrs. Geary neither

cites nor argues the existence of any private action allowing her to enforce real estate excise tax laws. [CP 72-73; Appellant's Brief, pp. 24-25.] Third, she admits she suffered no harm by any wrongfully withheld tax payments and would not be entitled to receive them. [CP 207-08.]

Accordingly, Mrs. Geary cannot state a claim for excise tax violations as a matter of law and, even if she could, she suffered no damages. The trial court correctly dismissed this claim against Aurora.

V. REQUEST FOR ATTORNEYS' FEES

Mrs. Geary's Deed of Trust provides for appellate attorneys' fees and costs award in any action to construe or enforce the instrument. [CP 87, ¶9; CP 94, ¶26.] Aurora hereby requests an award of reasonable attorneys' fees and costs on appeal pursuant to RAP 18.1.

VI. CONCLUSION

After the moving party shows the absence of material facts, the summary judgment inquiry shifts to the party with the burden of proof at trial. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the non-moving party then fails to establish the existence of an element essential to that party's case, the moving party is entitled to summary judgment as a matter of law. *Id.*, at 225; *Sun Mountain Productions, Inc. v. Pierre*, 84 Wn. App. 608, 616, 929 P.2d 494 (1997).

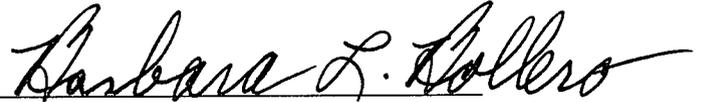
Here, Aurora proved its summary judgment motion by uncontroverted, competent, admissible evidence. Both in the trial court and on appeal [CP 4-5, ¶¶3.1-3.3, Appellant's Brief, p. 9], Mrs. Geary does not dispute the existence or terms of the Note, Deed of Trust, and her default. The circumstances surrounding Mrs. Geary's default do not entitle her to quiet title in herself, nor release her from her contracts.

This Court should:

1. Affirm entry of the trial court's Order Granting Defendants ING Bank, FSB's and Aurora Loan Services LLC's Cross-Motion for Summary Judgment, dated July 2, 2012;
2. Affirm entry of the trial court's Order Denying Plaintiff's Motion for Partial Summary Judgment, dated July 2, 2012;
3. Affirm entry of the trial court's Order Granting Defendants ING Bank, FSB's and Aurora Loan Services LLC's Motion, and Clarifying Order Granting ING Bank, FSB's and Aurora Loan Services LLC's Cross-Motion for Summary Judgment, and Denying Plaintiff's Motion for Partial Summary Judgment, dated August 3, 2012;
4. Dismiss this appeal; and
5. Award Respondent Aurora Loan Services LLC its reasonable attorneys' fees and costs incurred on appeal pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 21st day of August, 2013.

BISHOP, WHITE, MARSHALL
& WEIBEL, P.S.

A handwritten signature in black ink, reading "Barbara L. Bollero". The signature is written in a cursive style with a horizontal line underneath the name.

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1 APPENDIX ONE

2 Post-Bain Washington Nonjudicial Foreclosure Opinions Addressing MERS's

3 Authority to Act as Note Holder and Deed of Trust Beneficiary

4 1. *Moseid v. Selene Finance LP*, 2013 WL 766277, *2, 13-CV-363-MJP (Feb.
5 28, 2013) (“*Bain* is clear that there is no automatic cause of action under the CPA simply
6 because MERS acted as an unlawful beneficiary under the Deed of Trust Act. ... *Bain* did
7 not hold a foreclosure was automatically improper because MERS is listed as the
8 beneficiary. ... Plaintiffs have not argued or offered any evidence that [the beneficiary] is
9 not the holder of the note and cannot foreclose.”)

10 2. *McCrorey v. Fed. Nat'l. Mtg. Assoc.*, 2013 WL 681208, *4, 12-CV-1630-
11 RSL (W.D.Wash., Feb. 25, 2013) (“Even if the Court assumes plaintiff is asserting the
12 default, the related impact on their credit, and the foreclosure as their injuries, these harms
13 cannot be laid at MERS' door. MERS' identification as the beneficiary on the deed of
14 trust and its subsequent assignment of whatever interest it may or may not have had did not
15 cause the loss of plaintiffs' home or the impairment of their credit. Plaintiffs began having
16 trouble making their mortgage payments in late 2008: it was the failure to meet their debt
17 obligations that led to a default, the destruction of credit, and the foreclosure. Although
18 the misidentification of a party as the beneficiary may give rise to compensable damages
19 ..., the misidentification itself does not cause the type of injuries alleged in the
20 complaint.”)

21 3. *Zalac v. CTX Mtg. Corp.*, 2013 WL 562892, *3, 12-CV-01474-MJP (Feb.
22 14, 2013) (“The Court in *Bain* only held that characterizing MERS as the beneficiary on a
23 deed of trust has the capacity to deceive homeowners, but held that MERS involvement
24 does not by itself constitute a per se violation of the CPA.”)

1 4. *Zamzow v. Homestead Residential, Inc.*, 2012 WL 6615931, *1, 12-CV-
2 5755-BHS (W.D.Wash. Dec. 19, 2012) (Court dismissed at least 11 causes of action
3 relating to the plaintiffs' mortgage loan, citing *Bain*, and noting that "it is not a violation in
4 Washington to split the note from the deed [of trust].")

5 5. *Moore v. Fed. Nat'l. Mtg. Assoc.*, 11-CV-1342-RSL, *2, 2012 WL 6059192
6 (W.D.Wash. Dec. 6, 2012) ("Plaintiff objects to the fact that MERS is identified as the
7 'beneficiary' of the deed of trust when it never had possession of the underlying debt
8 instrument. The fact that the parties to the contract called MERS the 'beneficiary' is
9 simply a label: it does not, in and of itself, constitute a promise, give rise to a breach, or
10 cause damage.")

11 6. *Mickelson v. Chase Home Finance LLC*, 11-CV-1445-MJP, *2, 2012 WL
12 6012791 (W.D.Wash. Dec. 3, 2012) ("[T]he DTA approves the use of agents, and
13 Plaintiffs provide no proof or law that shows [the signing employee] could not act as an
14 agent of MERS and separately as an employee for [the Successor Trustee]. [The
15 employee's] actions do not convert [the Successor Trustee] into both beneficiary and
16 trustee.")

17 7. *Buchna v. Bank of Am., N.A., et al*, 478 F.App'x. 425, 425 (9th Cir. 2012)
18 ("The [plaintiffs] argue that the note and deed of trust were split, rendering the non-judicial
19 foreclosure provisions in the deed of trust unenforceable. That argument fails to state a
20 claim because it is based on nothing more than conclusory speculation that the parties
21 exercising power under the deed of trust are not the note holder or agents of the note
22 holder.").

23 8. *Lynott v. Mortgage Elec. Registration Sys., Inc.*, 12-CV-5572-RBL, 2012
24 WL 5995053, *2 (W.D. Wash. Nov. 30, 2012) ("In sum, possession of the note makes U.S.

1 Bank the beneficiary; the assignment merely publicly records that fact. Because U.S. Bank
2 is the proper beneficiary, it is empowered to initiate foreclosure following Plaintiff's
3 default. Plaintiff relies heavily on *Bain* in arguing that MERS's assignment renders U.S.
4 Bank incapable of foreclosing. In *Bain*, the court held that MERS could not act as a
5 beneficiary unless it actually held a borrower's note. ... *Bain* did not, however, create a
6 *per se* cause-of-action based solely on MERS's involvement.")

7 9. *Kullman v. Northwest Trustee Svcs., Inc.*, 12-CV-5852-RBL, 2012 WL
8 5922166, *2 (W.D. Wash. Nov. 26, 2012) ("Plaintiffs' claims fail as a matter of law.
9 Although the Washington State Supreme Court has ruled that MERS cannot serve as
10 beneficiary (unless, of course, it actually holds a promissory note), the court did not rule
11 that MERS's involvement renders a foreclosure *per se* invalid. See *Bain v. Metropolitan*
12 *Mortg. Group, Inc.*, 175 Wash.2d 83, 285 P.3d 34 (2012). Further, Plaintiffs have failed
13 to allege any prejudice arising from MERS's role in the foreclosure. Plaintiffs admit
14 default and seek to generate controversy where none exists.")

15 10. *Mickelson v. Chase Home Finance LLC*, 2012 WL 5377905, *2
16 (W.D.Wash. Oct. 31, 2012) ("*Bain* does not hold that the presence of MERS in a mortgage
17 creates a presumptive CPA claim. In fact, the Supreme Court clearly states that
18 '[d]epending on the facts of a particular case, a borrower may or may not have been
19 injured by the disposition of the note, the servicing contract, or many other things, and
20 MERS may or may not have a causal role.'")

21 11. *Beadles v. Recontrust Co., N.A.*, 2012 WL 4904461, *, 12-CV-00378-JLQ
22 (E.D.Wash, Oct. 15, 2012) ("Contrary to Plaintiff's argument, the Washington Supreme
23 Court did *not* hold that MERS claiming to be the beneficiary was *per se* deceptive. ")
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1 APPENDIX TWO

2 Washington Nonjudicial Foreclosure Opinions Addressing RCW 61.24.127

3 1. *McDonald v. Onewest Bank, FSB*, 2013 WL 858178, *5 (W.D.Wash., Mar.
4 7, 2013) (“RCW 61.24.127 allows the recovery of actual monetary damages in certain
5 circumstances[. T]hat provision applies where the borrower has failed to enjoin the
6 trustee’s sale and seeks damages arising from the trustee’s failure to comply with the
7 requirements of the DTA.”)

8 2. *McCrorey v. Fed. Nat’l. Mortgage Assoc.*, 2013 WL 681208, *2
9 (W.D.Wash., Feb. 25, 2013) (“[T]he legislature modified the waiver doctrine to exempt
10 claims for common law fraud or misrepresentation, violations of Washington’s Consumer
11 Protection Act ..., failure by a trustee to comply with the DTA, and violations of RCW
12 61.24.026. Thus, these types of claims may be brought even when the borrower or grantor
13 failed to enjoin the foreclosure sale. ... Although these claims can be filed post-
14 foreclosure, they will not affect the validity or finality of the foreclosure sale or operate to
15 encumber or cloud the title to the property.”)

16 3. *Tran v. Bank of America, N.A.*, 2013 WL 64770, *4 (W.D.Wash., Jan. 4,
17 2013) (“The waiver doctrine applies to claims ‘arising out of any underlying obligation
18 secured by the foreclosed deed of trust.’ ... The waiver doctrine does not apply to claims
19 for negligent misrepresentation, fraud, and violations of the CPA because RCW 61.24.127
20 specifically states that these claims cannot be waived.”)

21 4. *Beadles v. Recontrust Co., N.A.*, 2012 WL 4904461, *2 (W.D.Wash., Oct.
22 15, 2012) (“RCW 61.24.127(1)(a) provides that a failure to seek to enjoin a foreclosure
23 sale does not waive a claim for damages based on fraud or misrepresentation. Although a
24 misrepresentation claim is not waived, a plaintiff may only seek monetary damages.

1 Under RCW 61.24.127(2), a claim may not affect the validity or finality of the foreclosure
2 sale and ‘may not seek any remedy at law or in equity other than monetary damages.’
3 Plaintiff’s claim for wrongful foreclosure seeks to have the sale set aside and the property
4 returned to him. ... This claim has been waived.”)

5 5. *Harmon v. Fed. Home Loan Mortgage Corp.*, 2012 WL 3879241, *2
6 (W.D.Wash., Sept. 6, 2012) (“Plaintiff’s slander-of-title and quiet title claims are waived
7 under Wash. Rev. Code §61.24.127 Here, there appears to be no dispute that Plaintiff
8 received notice and failed to enjoin the sale.”)

9 6. *U.S. Bank Nat’l. Assoc. v. Woods*, 2012 WL 2031122, *4 (W.D.Wash., Jun
10 6, 2012) (“[U]nder RCW §61.24.127(1)(a)-(c), claims for fraud, violations of the
11 Consumer Protection Act, and failure by the trustee to materially comply with the DTA are
12 preserved even after the foreclosure sale has occurred. However, the statute specifically
13 states that a borrower bringing post-sale claims, ‘may not seek any remedy at law or in
14 equity other than monetary damages;’ and ‘may not operate in any way to encumber or
15 cloud the title to the property that was subject to the foreclosure sale....’”)

16 7. *Albice v. Premier Mortgage Svc. of Wash., Inc.*, 174 Wn.2d 560, 580, n. 2
17 (May 24, 2012) (“Amendments to the [Deeds of Trust A]ct postdating this case
18 additionally authorize a claim for monetary damages against a trustee for, among other
19 things, failure to materially comply with the act. ... While the [plaintiffs] argue these
20 legislative changes support granting relief, significantly none of the relief they authorize
21 includes invalidating a foreclosure sale. Nor do the amendments alter the strong statutory
22 policy of requiring a motion to enjoin a sale before it occurs. Indeed, the amendments to
23 RCW 61.24.127 suggest that money damages against the trustee are warranted in part
24 because the grantor cannot recover property sold to a bona fide purchaser.”)

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8. *Mickelson v. Chase Home Finance LLC*, 2012 WL 1301251, *3 (W.D.Wash., April 16, 2012) (“Amendments to the Deed of Trust Act ... have attempted to carve out certain post-sale claims that would otherwise by *(sic)* waived Relevant to this case, the DTA preserves claims of violations of RCW Title 19 and claims the trustee failed to materially comply with the DTA. ... These non-waived claims do not allow the Plaintiff to ‘seek any remedy at law or in equity other than monetary damages’ or ‘affect in any way the validity or finality of the foreclosure sale or a subsequent transfer of the property.’”)

9. *Gurtler v. Northwest Trustee Services Inc.*, 2012 WL 934206, *3 (W.D.Wash., Mar. 20, 2012) (“[A]fter foreclosure, a borrower may bring suit only for damages, and may do so only for fraud or misrepresentation, violations of the Washington Consumer Protection Act, or a failure of the trustee to ‘materially comply’ with the Deed of Trust Act.”)

10. *Beaton v. JPMorgan Chase Bank N.A.*, 2012 WL 909768, *2 (W.D.Wash, Mar. 15, 2012) (“In July 2011, the legislature modified the waiver doctrine to exempt claims for common law fraud or misrepresentation, violation of Washington’s Consumer Protection Act ..., failure by a trustee to comply with the DTA and violation of RCW 61.24.026. ... Although these types of claims are allowed post-foreclosure, they will not operate to encumber or cloud the title to the property auctioned at the trustee’s sale.”)

11. *Myers v. Mtg. Elec. Reg. Sys., Inc.*, 2012 WL 678148, *3 (W.D.Wash., Feb. 25, 2012) (“After foreclosure, a borrower may bring suit only for damages, and may do so only for fraud or misrepresentation, violations of the Washington Consumer Protection Act, or a failure of the trustee to ‘materially comply’ with the Deed of Trust Act.”)

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12. *Moore v. Fed. Nat'l. Mortgage Assoc.*, 2012 WL 424583, *2 (W.D.Wash., Feb. 9, 2012) (“The legislature ... recently modified the waiver doctrine to exempt claims for common law fraud or misrepresentation, violations of Washington’s Consumer Protection Act ..., failure by a trustee to comply with the DTA, and violation of RCW 61.24.026, thereby permitting these types of claims to be brought ... even when the borrower or grantor failed to enjoin the foreclosure sale. ... These types of claims, although allowed post-foreclosure, will not operate to encumber or cloud the title to the property auctioned at the trustee’s sale. ... Thus, plaintiff may not, as a matter of law, seek the remedy of rescission or expungement of the trustee’s deed of sale.”)

13. *Bhatti v. Guild Mortgage Co.*, 2011 WL 6300229, *4 (W.D.Wash., Dec. 16, 2011) (“Plaintiffs did not invoke any pre-sale remedy afforded to them with respect to their causes of action seeking to set aside sale of the foreclosed property. Accordingly, the quiet title and declaratory judgment claims may be deemed waived.”)

14. *Fed. Nat'l. Mortgage Assoc. v. Wages*, 2011 WL 5138724, *2 (W.D.Wash., Oct. 28, 2011) (“[Plaintiff’s] claim that he did not waive all claims, pursuant to RCW 61.24.127(1)(a)-(c), is of no avail. ... The sorts of claims which are preserved in RCW 61.24.127(1)(a)-(c) are not at issue here.”)

15. *Gossen v. JPMorgan Chase Bank*, 819 F.Supp.2d 1162, 1169 (W.D.Wash., Oct. 18, 2011) (“The Deed of Trust Act was amended in 2009 to permit claims for money damages after a foreclosure sale based upon (1) fraud or misrepresentation, (2) claims under RCW 19, and (3) the failure of the trustee to “materially comply” with the provisions of the Act.”)

1 16. *Campbell v. Indymac Mortgage Services*, 2011 WL 3897826, *2
2 (W.D.Wash., Sept. 6, 2011) (“As this Court has previously held, objections to the trustee’s
3 sale are waived where pre-sale remedies are not pursued. ... Failure to enjoin the sale will
4 not waive claims for damages asserting common law fraud or misrepresentation, violation
5 of Title 19 of the RCW, or failure of the trustee to materially comply with provisions of the
6 Deed of Trust Act”).

7 17. *Kim v. Bank of America, N.S.*, 2011 WL 3563325, *2 (W.D.Wash., Aug. 11,
8 2011) (“While the Washington Court of Appeals determined all claims were barred post-
9 sale under the DTA ..., the Washington legislature later enacted RCW 61.24.127, which
10 preserved certain claims post-sale as long as they did not seek a remedy at law or in equity
11 and they do not challenge the validity or finality of the sale. ... Specifically, the
12 Washington legislature preserved claims involving common law fraud or
13 misrepresentation, violation of Title 19 of the RCW, or failure of the trustee to materially
14 comply with the DTA, as valid even after a foreclosure sale occurs.”)

15 18. *Vechirko v. Recontrust Co., N.A.*, 2011 WL 3501724, *2 (W.D. Wash.,
16 Aug. 10, 2011) (“[T]o the extent that Plaintiffs assert a claim under the DTA for fraud,
17 violations of the consumer protection act, and failure by the trustee to materially comply
18 with the DTA, the claim is not waived for their failure to bring an action to enjoin the sale.
19 ... Further, as to these ‘non-waived claims’ under the DTA, ‘the claim may not seek any
20 remedy at law or in equity other than monetary damages.’”)

21 19. *Pavino v. Bank of America, N.A.*, 2011 WL 834146, *3 (W.D.Wash., Mar.
22 4, 2011) (“Objections to the trustee’s sale are waived where pre-sale remedies are not
23 pursued. ... However, failure to enjoin a foreclosure will not waive a claim for damages
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1 asserting common law fraud or misrepresentation, violation of Title 19 of the RCW, or
2 failure of the trustee to materially comply with the provisions of the DTA.”)

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APPENDIX THREE

**REPORT OF THE PERMANENT EDITORIAL BOARD
FOR THE
UNIFORM COMMERCIAL CODE**

**APPLICATION OF THE UNIFORM COMMERCIAL CODE TO
SELECTED ISSUES RELATING TO MORTGAGE NOTES**

NOVEMBER 14, 2011

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PREFACE

In 1961, the American Law Institute and the Uniform Law Commission, the organizations that jointly sponsor the Uniform Commercial Code, established the Permanent Editorial Board for the Uniform Commercial Code (PEB). One of the charges of the PEB is to issue commentaries “and other articulations as appropriate to reflect the correct interpretation of the [Uniform Commercial] Code and issuing the same in a manner and at times best calculated to advance the uniformity and orderly development of commercial law.” Such commentaries and other articulations are issued directly by the PEB rather than by action of the American Law Institute and the Uniform Law Commission.

This Report of the Permanent Editorial Board is such an articulation, addressing the application of the Uniform Commercial Code to issues of legal, economic, and social importance arising from the issuance and transfer of mortgage notes. A draft of this Report was made available to the public for comment on March 29, 2011, and the comments that were received have been taken into account in preparing the final Report.

**REPORT OF THE PERMANENT EDITORIAL BOARD
FOR THE
UNIFORM COMMERCIAL CODE**

**APPLICATION OF THE UNIFORM COMMERCIAL CODE TO SELECTED ISSUES
RELATING TO MORTGAGE NOTES**

Introduction

Recent economic developments have brought to the forefront complex legal issues about the enforcement and collection of mortgage debt. Many of these issues are governed by local real property law and local rules of foreclosure procedure, but others are addressed in a uniform way throughout the United States by provisions of the Uniform Commercial Code (UCC).¹ Although the UCC provisions are settled law, it has become apparent that not all courts and attorneys are familiar with them. In addition, the complexity of some of the rules has proved daunting.

The Permanent Editorial Board for the Uniform Commercial Code² has prepared this Report in order to further the understanding of this statutory background by identifying and explaining several key rules in the UCC that govern the transfer and enforcement of notes secured by a mortgage³ on real property. The UCC, of course, does not resolve all issues in this field. Most particularly, as to both substance and procedure, the enforcement of real estate mortgages by foreclosure is primarily the province of a state's real property law (although determinations made

¹ The UCC is a uniform law sponsored by the American Law Institute and the Uniform Law Commission. It has been enacted in every state (as well as the District of Columbia, Puerto Rico, and the United States Virgin Islands) in whole or significant part. This Report is based on the current Official Text of the UCC. Some states have enacted some non-uniform provisions that are generally not relevant to the issues discussed in this Report. Of course, the enacted text of the UCC in the state whose law is applicable governs. See note 6, *infra*, regarding the various different versions of Article 3 of the UCC in effect in the states.

²In 1961, the American Law Institute and the Uniform Law Commission, the organizations that jointly sponsor the UCC, established the Permanent Editorial Board for the Uniform Commercial Code (PEB). One of the charges of the PEB is to issue commentaries "and other articulations as appropriate to reflect the correct interpretation of the [Uniform Commercial] Code and issuing the same in a manner and at times best calculated to advance the uniformity and orderly development of commercial law."

³ This Report, like Article 9 of the UCC, uses the term "mortgage" to include a consensual interest in real property to secure an obligation whether created by mortgage, trust deed, or the like. See UCC § 9-102(a)(55) and Official Comment 17 thereto and former UCC § 9-105(1)(j). This Report uses the term "mortgage note" to refer to a note secured by a mortgage, whether or not the note is a negotiable instrument under UCC Article 3.

pursuant to the UCC are typically relevant under that law). Accordingly, this Report should be understood as providing guidance only as to the issues the Report addresses.⁴

Background

Issues relating to the transfer, ownership, and enforcement of mortgage notes are primarily governed by two Articles of the UCC:

- In cases in which the mortgage note is a negotiable instrument,⁵ Article 3 of the UCC⁶ provides rules governing the obligations of parties on the note⁷ and the enforcement of those obligations.
- In cases involving either negotiable or non-negotiable notes, Article 9 of the UCC⁸ contains important rules governing how ownership of those notes may be transferred, the effect of the transfer of ownership of the notes on the ownership of the mortgages securing those notes, and the right of the transferee, under certain circumstances, to record its interest in the mortgage in the applicable real estate recording office.

This Report explains the application of the rules in both of those UCC Articles to provide guidance in:

- Identifying the person who is entitled to enforce the payment obligation of the maker⁹ of a mortgage note, and to whom the maker owes that obligation; and

⁴ Of course, the application of the UCC rules to particular factual circumstances depends on the nature of those circumstances. Facts raising legal issues other than those addressed in this Report can result in different rights and obligations than would be the case in the absence of those facts. Accordingly, this Report should not be read as a statement of the total legal implications of any factual scenario. Rather, the Report sets out the UCC rules that are common to the transactions discussed so as to provide a common basis for understanding the application of those rules. The impact of non-UCC law that applies to other aspects of such transactions is beyond the scope of this Report.

⁵ The requirements that must be satisfied in order for a note to be a negotiable instrument are set out in UCC § 3-104.

⁶ Except for New York, every state (as well as the District of Columbia, Puerto Rico, and the United States Virgin Islands) has enacted either the 1990 Official Text of Article 3 or the newer 2002 Official Text (the latter having been adopted in ten states as of the date of this Report). Unless indicated to the contrary all discussions of provisions in Article 3 apply equally to both versions. Much of the analysis of UCC Article 3 in this Report also applies under the older version of Article 3 in effect in New York, although many section numbers differ. The Report does not address those aspects of New York's Article 3 that are different from the 1990 or 2002 texts.

⁷ In this Report, such notes are sometimes referred to as "negotiable notes."

⁸ Unlike Article 3 (which has not been enacted in its modern form in New York), the current version of Article 9 has been enacted in all 50 states, the District of Columbia, and the United States Virgin Islands. Some states have enacted non-uniform provisions that are generally not relevant to the issues discussed in this Report (but see note 31 with respect to one relevant non-uniformity). A limited set of amendments to Article 9 was approved by the American Law Institute and the Uniform Law Commission in 2010. Except as noted in this Report, those amendments (which provide for a uniform effective date of July 1, 2013) are not germane to the matters addressed in this Report.

⁹ A note can have more than one obligor. In some cases, this is because there is more than one maker (in which case they are jointly and severally liable; see UCC § 3-116(a)). In other cases, there may be an indorser. The obligation

- Determining who owns the rights represented by the note and mortgage.

Together, the provisions in Articles 3 and 9 of the UCC (along with general principles that appear in Article 1 and that apply to all transactions governed by the UCC) provide legal rules that apply to these questions.¹⁰ Moreover, these rules displace any inconsistent common law rules that might have otherwise previously governed the same questions.¹¹

This Report does not, however, address all of the rules in the UCC relating to enforcement, transfer, and ownership of mortgage notes. Rather, it reviews the rules relating to four specific questions:

- Who is the person entitled to enforce a mortgage note and, correspondingly, to whom is the obligation to pay the note owed?
- How can the owner of a mortgage note effectively transfer ownership of that note to another person or effectively use that note as collateral for an obligation?
- What is the effect of transfer of an interest in a mortgage note on the mortgage securing it?
- May a person to whom an interest in a mortgage note has been transferred, but who has not taken a recordable assignment of the mortgage, take steps to become the assignee of record in the real estate recording system of the mortgage securing the note?¹²

of an indorser is different from that of a maker in that the indorser's obligation is triggered by dishonor of the note (see UCC § 3-415) and, unless waived, indorsers have additional procedural protections (such as notice of dishonor; see UCC § 3-503)). These differences do not affect the issues addressed in this Report. For simplicity, this Report uses the term "maker" to refer to both makers and indorsers.

¹⁰ Subject to limitations on the ability to affect the rights of third parties, the effect of these provisions may be varied by agreement. UCC § 1-302. Variation by agreement is not permitted when the variation would disclaim obligations of good faith, diligence, reasonableness, or care prescribed by the UCC or when the UCC otherwise so indicates (see, e.g., UCC § 9-602). But the meaning of the statute itself cannot be varied by agreement. Thus, for example, private parties cannot make a note negotiable unless it complies with UCC § 3-104. See Official Comment 1 to UCC § 1-302. Similarly, parties may not avoid the application of UCC Article 9 to a transaction that falls within its scope. See *id.* and Official Comment 2 to UCC § 9-109.

¹¹UCC § 1-103(b). As noted in Official Comment 2 to UCC § 1-103:

The Uniform Commercial Code was drafted against the backdrop of existing bodies of law, including the common law and equity, and relies on those bodies of law to supplement its provisions in many important ways. At the same time, the Uniform Commercial Code is the primary source of commercial law rules in areas that it governs, and its rules represent choices made by its drafters and the enacting legislatures about the appropriate policies to be furthered in the transactions it covers. Therefore, while principles of common law and equity may *supplement* provisions of the Uniform Commercial Code, they may not be used to *supplant* its provisions, or the purposes and policies those provisions reflect, unless a specific provision of the Uniform Commercial Code provides otherwise. In the absence of such a provision, the Uniform Commercial Code preempts principles of common law and equity that are *inconsistent* with either its provisions or its purposes and policies.

¹² The Report does not discuss the application of common law principles, such as the law of agency, that supplement the provisions of the UCC other than to note some situations in which the text or comments of the UCC identify such principles as being relevant. See UCC § 1-103(b).

Question One – To Whom is the Obligation to Pay a Mortgage Note Owed?

If the mortgage note is a negotiable instrument,¹³ Article 3 of the UCC provides a largely complete set of rules governing the obligations of parties on the note, including how to determine who may enforce those obligations and, thus, to whom those obligations are owed. The following discussion analyzes the application of these rules to that determination in the context of mortgage notes that are negotiable instruments.¹⁴

In the context of mortgage notes that have been sold or used as collateral to secure an obligation, the central concept for making that determination is identification of the “person entitled to enforce” the note.¹⁵ Several issues are resolved by that determination. Most particularly:

- (i) the maker’s obligation on the note is to pay the amount of the note to *the person entitled to enforce the note*,¹⁶
- (ii) the maker’s payment to *the person entitled to enforce the note* results in discharge of the maker’s obligation,¹⁷ and
- (iii) the maker’s failure to pay, when due, the amount of the note to *the person entitled to enforce the note* constitutes dishonor of the note.¹⁸

Thus, a person seeking to enforce rights based on the failure of the maker to pay a mortgage note must identify the person entitled to enforce the note and establish that that person has not been paid. This portion of this Report sets out the criteria for qualifying as a “person entitled to enforce” a mortgage note. The discussion of Question Two addresses how ownership of a mortgage note may be effectively transferred from an owner to another person.

¹³ See UCC § 3-104 for the requirements that must be fulfilled in order for a payment obligation to qualify as a negotiable instrument. It should not be assumed that all mortgage notes are negotiable instruments. The issue of the negotiability of a particular mortgage note, which requires application of the standards in UCC § 3-104 to the words of the particular note, is beyond the scope of this Report.

¹⁴ Law other than Article 3, including contract law, governs this determination for non-negotiable mortgage notes. That law is beyond the scope of this Report.

¹⁵ The concept of “person entitled to enforce” a note is not synonymous with “owner” of the note. See Official Comment 1 to UCC § 3-203. A person need not be the owner of a note to be the person entitled to enforce it, and not all owners will qualify as persons entitled to enforce. Rules that address transfer of ownership of a note are addressed in the discussion of Question 2 below.

¹⁶ UCC § 3-412. (If the note has been dishonored, and an indorser has paid the note to the person entitled to enforce it, the maker’s obligation runs to the indorser.)

¹⁷ UCC § 3-602. The law of agency is applicable in determining whether a payment has been made to a person entitled to enforce. See *id.*, Official Comment 3. Note that, in states that have enacted the 2002 Official Text of UCC Article 3, UCC § 3-602(b) provides that a maker is also discharged by paying a person formerly entitled to enforce the note if the maker has not received adequate notification that the note has been transferred and that payment is to be made to the transferee. This amendment aligns the protection afforded to makers of notes that have been assigned with comparable protection afforded to obligors on other payment rights that have been assigned. See, e.g., UCC § 9-406(a); Restatement (Second), Contracts § 338(1).

¹⁸ See UCC § 3-502. See also UCC § 3-602.

UCC Section 3-301 provides only three ways in which a person may qualify as the person entitled to enforce a note, two of which require the person to be in possession of the note (which may include possession by a third party that possesses it for the person)¹⁹:

- The first way that a person may qualify as the person entitled to enforce a note is to be its “holder.” This familiar concept, set out in detail in UCC Section 1-201(b)(21)(A), requires that the person be in possession of the note and either (i) the note is payable to that person or (ii) the note is payable to bearer. Determining to whom a note is payable requires examination not only of the face of the note but also of any indorsements. This is because the party to whom a note is payable may be changed by indorsement²⁰ so that, for example, a note payable to the order of a named payee that is indorsed in blank by that payee becomes payable to bearer.²¹
- The second way that a person may be the person entitled to enforce a note is to be a “nonholder in possession of the [note] who has the rights of a holder.”
 - How can a person who is not the holder of a note have the rights of a holder? This can occur by operation of law outside the UCC, such as the law of subrogation or estate administration, by which one person is the successor to or acquires another person’s rights.²² It can also occur if the delivery of the note to that person constitutes a “transfer” (as that term is defined in UCC Section 3-203, see below) because transfer of a note “vests in the transferee any right of the transferor to enforce the instrument.”²³ Thus, if a holder (who, as seen above, is a person entitled to enforce a note) transfers the note to another person, that other person (the transferee) obtains from the holder the right to enforce the note even if the transferee does not become the holder (as in the example below). Similarly, a

¹⁹ See UCC § 1-103(b) (unless displaced by particular provisions of the UCC, the law of, *inter alia*, principal and agent supplements the provisions of the UCC). See also UCC § 3-420, Comment 1 (“Delivery to an agent [of a payee] is delivery to the payee.”). Note that “delivery” of a negotiable instrument is defined in UCC § 1-201(b)(15) as voluntary transfer of possession. This Report does not address the determination of whether a particular person is an agent of another person under the law of agency and the agency law implications of such a determination.

²⁰ “Indorsement,” as defined in UCC § 3-204(a), requires the signature of the indorser. The law of agency determines whether a signature made by a person purporting to act as a representative binds the represented person. UCC § 3-402(a); see note 12, *supra*. An indorsement may appear either on the instrument or on a separate piece of paper (usually referred to as an *allonge*) affixed to the instrument. See UCC § 3-204(a) and Comment 1, par. 4.

²¹ UCC Section 3-205 contains the rules concerning the effect of various types of indorsement on the party to whom a note is payable. Either a “special indorsement” (see UCC § 3-205(a)) or a “blank indorsement” (see UCC § 3-205(b)) can change the identity of the person to whom the note is payable. A special indorsement is an indorsement that identifies the person to whom it makes the note payable, while a blank indorsement is an indorsement that does not identify such a person and results in the instrument becoming payable to bearer. When an instrument is indorsed in blank (and, thus, is payable to bearer), it may be negotiated by transfer of possession alone until specially indorsed. UCC § 3-205(b).

²² See Official Comment to UCC § 3-301.

²³ UCC § 3-203(b).

subsequent transfer will result in the subsequent transferee being a person entitled to enforce the note.

- Under what circumstances does delivery of a note qualify as a transfer? As stated in UCC Section 3-203(a), a note is transferred “when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.” For example, assume that the payee of a note sells it to an assignee, intending to transfer all of the payee’s rights to the note, but delivers the note to the assignee without indorsing it. The assignee will not qualify as a holder (because the note is still payable to the payee) but, because the transaction between the payee and the assignee qualifies as a transfer, the assignee now has all of the payee’s rights to enforce the note and thereby qualifies as the person entitled to enforce it. Thus, the failure to obtain the indorsement of the payee does not prevent a person in possession of the note from being the person entitled to enforce it, but demonstrating that status is more difficult. This is because the person in possession of the note must also demonstrate the purpose of the delivery of the note to it in order to qualify as the person entitled to enforce.²⁴
- There is a third method of qualifying as a person entitled to enforce a note that, unlike the previous two methods, does not require possession of the note. This method is quite limited – it applies only in cases in which “the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.”²⁵ In such a case, a person qualifies as a person entitled to enforce the note if the person demonstrates not only that one of those circumstances is present but also demonstrates that the person was formerly in possession of the note and entitled to enforce it when the loss of possession occurred and that the loss of possession was not as a result of transfer (as defined above) or lawful seizure. If the person proves those facts, as well as the terms of the note, the person is a person entitled to enforce the note and may seek to enforce it even though it is not in possession of the note,²⁶ but the court may not enter judgment in favor of the

²⁴ If the note was transferred for value and the transferee does not qualify as a holder because of the lack of indorsement by the transferor, “the transferee has a specifically enforceable right to the unqualified indorsement of the transferor.” See UCC § 3-203(c).

²⁵ UCC § 3-309(a)(iii) (1990 text), 3-309(a)(3) (2002 text). The 2002 text goes on to provide that a transferee from the person who lost possession of a note may also qualify as a person entitled to enforce it. See UCC § 3-309(a)(1)(B) (2002). This point was thought to be implicit in the 1990 text, but was rejected in some cases in which the issue was raised. The reasoning of those cases was rejected in Official Comment 5 to UCC § 9-109 and the point was made explicit in the 2002 text of Article 3.

²⁶ To prevail the person must establish not only that the person is a person entitled to enforce the note but also the other elements of the maker’s obligation to pay such a person. See generally UCC §§ 3-309(b), 3-412. Moreover, as is the case with respect to the enforcement of all rights under the UCC, the person enforcing the note must act in good faith in enforcing the note. UCC § 1-304.

person unless the court finds that the maker is adequately protected against loss that might occur if the note subsequently reappears.²⁷

Illustrations:

1. Maker issued a negotiable mortgage note payable to the order of Payee. Payee is in possession of the note, which has not been indorsed. Payee is the holder of the note and, therefore, is the person entitled to enforce it. UCC §§ 1-201(b)(21)(A), 3-301(i).
2. Maker issued a negotiable mortgage note payable to the order of Payee. Payee indorsed the note in blank and gave possession of it to Transferee. Transferee is the holder of the note and, therefore, is the person entitled to enforce it. UCC §§ 1-201(b)(21)(A), 3-301(i).
3. Maker issued a negotiable mortgage note payable to the order of Payee. Payee sold the note to Transferee and gave possession of it to Transferee for the purpose of giving Transferee the right to enforce the note. Payee did not, however, indorse the note. Transferee is not the holder of the note because, while Transferee is in possession of the note, it is payable neither to bearer nor to Transferee. UCC § 1-201(b)(21)(A). Nonetheless, Transferee is a person entitled to enforce the note. This is because the note was transferred to Transferee and the transfer vested in Transferee Payee's right to enforce the note. UCC § 3-203(a)-(b). As a result, Transferee is a nonholder in possession of the note with the rights of a holder and, accordingly, a person entitled to enforce the note. UCC § 3-301(ii).
4. Same facts as Illustrations 2 and 3, except that (i) under the law of agency, Agent is the agent of Transferee for purposes of possessing the note and (ii) it is Agent, rather than Transferee, to whom actual physical possession of the note is given by Payee. In the facts of Illustration 2, Transferee is a holder of the note and a person entitled to enforce it. In the context of Illustration 3, Transferee is a person entitled to enforce the note. Whether Agent may enforce the note or mortgage on behalf of Transferee depends in part on the law of agency and, in the case of the mortgage, real property law.
5. Same facts as Illustration 2, except that after obtaining possession of the note, Transferee lost the note and its whereabouts cannot be determined. Transferee is a person entitled to enforce the note even though Transferee does not have possession of it. UCC § 3-309(a). If Transferee brings an action on the note against Maker, Transferee must establish the terms of the note and the elements of Maker's obligation on it. The court may not enter judgment in favor of Transferee, however, unless the court finds that Maker is adequately protected against loss that might occur by reason of a claim of another person (such as the finder of the note) to enforce the note. UCC § 3-309(b).

²⁷ See *id.* UCC § 3-309(b) goes on to state that "Adequate protection may be provided by any reasonable means."

Question Two – What Steps Must be Taken for the Owner of a Mortgage Note to Transfer Ownership of the Note to Another Person or Use the Note as Collateral for an Obligation?

In the discussion of Question One, this Report addresses identification of the person who is entitled to enforce a note. That discussion does not address who “owns” the note. While, in many cases, the person entitled to enforce a note is also its owner, this need not be the case. 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,²⁸ 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. This is because the rules that determine who is entitled to enforce a note and the rules that determine whether the note, or an interest in it, have been effectively transferred serve different functions:

- The rules that determine who is entitled to enforce a note are concerned primarily with the maker of the note, providing the maker with a relatively simple way of determining to whom his or her obligation is owed and, thus, whom to pay in order to be discharged.
- The rules concerning transfer of ownership and other interests in a note, on the other hand, primarily relate to who, among competing claimants, is entitled to the economic value of the note.

In a typical transaction, when a note is issued to a payee, the note is initially owned by that payee. If that payee seeks either to use the note as collateral or sell the note outright, Article 9 of the UCC governs that transaction and determines whether the creditor or buyer has obtained a property right in the note. As is generally known, Article 9 governs transactions in which property is used as collateral for an obligation.²⁹ In addition, however, Article 9 governs the sale of most payment rights, including the sale of both negotiable and non-negotiable notes.³⁰ With very few exceptions, the same Article 9 rules that apply to transactions in which a payment right is collateral for an obligation also apply to transactions in which a payment right is sold. Rather than contain two parallel sets of rules – one for transactions in which payment rights are collateral and the other for sales of payment rights – Article 9 uses nomenclature conventions to apply one set of rules to both types of transactions. This is accomplished primarily by defining the term “security interest” to include not only an interest in property that secures an obligation

²⁸ See UCC § 3-301, which provides, in relevant part, that “A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument”

²⁹ UCC § 9-109(a)(1).

³⁰ With certain limited exceptions not germane to this Report, Article 9 governs the sale of accounts, chattel paper, payment intangibles, and promissory notes. UCC § 9-109(a)(3). The term “promissory note” includes not only notes that fulfill the requirements of a negotiable instrument under UCC § 3-104 but also notes that do not fulfill those requirements but nonetheless are of a “type that in ordinary business is transferred by delivery with any necessary indorsement or assignment.” See UCC §§ 9-102(a)(65) (definition of “promissory note”) and 9-102(a)(47) (definition of “instrument” as the term is used in Article 9).

but also the right of a buyer of a payment right in a transaction governed by Article 9.³¹ Similarly, definitional conventions denominate the seller of such a payment right as the “debtor,” the buyer as the “secured party,” and the sold payment right as the “collateral.”³² As a result, for purposes of Article 9, the buyer of a promissory note is a “secured party” that has acquired a “security interest” in the note from the “debtor,” and the rules that apply to security interests that secure an obligation generally also apply to transactions in which a promissory note is sold.

Section 9-203(b) of the Uniform Commercial Code provides that three criteria must be fulfilled in order for the owner of a mortgage note effectively to create a “security interest” (either an interest in the note securing an obligation or the outright sale of the note to a buyer) in it.

- The first two criteria are straightforward – “value” must be given³³ and the debtor/seller must have rights in the note or the power to transfer rights in the note to a third party.³⁴
- The third criterion may be fulfilled in either one of two ways. Either the debtor/seller must “authenticate”³⁵ a “security agreement”³⁶ that describes the note³⁷ or the secured party must take possession³⁸ of the note pursuant to the debtor’s security agreement.³⁹

³¹ See UCC § 1-201(b)(35) [UCC § 1-201(37) in states that have not yet enacted the 2001 revised text of UCC Article 1]. (For reasons that are not apparent, when South Carolina enacted the 1998 revised text of UCC Article 9, which included an amendment to UCC § 1-201 to expand the definition of “security interest” to include the right of a buyer of a promissory note, it did not enact the amendment to § 1-201. This Report does not address the effect of that omission.) The limitation to transactions governed by Article 9 refers to the exclusion, in cases not germane to this Report, of certain assignments of payment rights from the reach of Article 9.

³² UCC §§ 9-102(a)(28)(B); 9-102(a)(72)(D); 9-102(a)(12)(B).

³³ UCC § 9-203(b)(1). UCC § 1-204 provides that giving “value” for rights includes not only acquiring them for consideration but also acquiring them in return for a binding commitment to extend credit, as security for or in complete or partial satisfaction of a preexisting claim, or by accepting delivery of them under a preexisting contract for their purchase.

³⁴ UCC § 9-203(b)(2). Limited rights that are short of full ownership are sufficient for this purpose. See Official Comment 6 to UCC § 9-203.

³⁵ This term is defined to include signing and its electronic equivalent. See UCC § 9-102(a)(7).

³⁶ A “security agreement” is an agreement that creates or provides for a security interest (including the rights of a buyer arising upon the outright sale of a payment right). See UCC § 9-102(a)(73).

³⁷ Article 9’s criteria for descriptions of property in a security agreement are quite flexible. Generally speaking, any description suffices, whether or not specific, if it reasonably identifies the property. See UCC § 9-108(a)-(b). A “supergeneric” description consisting solely of words such as “all of the debtor’s assets” or “all of the debtor’s personal property” is not sufficient, however. UCC § 9-108(c). A narrower description, limiting the property to a particular category or type, such as “all notes,” is sufficient. For example, a description that refers to “all of the debtor’s notes” is sufficient.

³⁸ See UCC § 9-313. As noted in Official Comment 3 to UCC § 9-313, “in determining whether a particular person has possession, the principles of agency apply.” In addition, UCC § 9-313 also contains two special rules under which possession by a non-agent may constitute possession by the secured party. First, if a person who is not an agent is in possession of the collateral and the person authenticates a record acknowledging that the person holds the collateral for the secured party’s benefit, possession by that person constitutes possession by the secured party. UCC § 9-313(c). Second, a secured party that has possession of collateral does not relinquish possession by delivering the collateral to another person (other than the debtor or a lessee of the collateral from the debtor in the ordinary course of the debtor’s business) if the delivery is accompanied by instructions to that person to hold possession of the collateral for the benefit of the secured party or redeliver it to the secured party. UCC § 9-313(h).

- Thus, if the secured party (including a buyer) takes possession of the mortgage note pursuant to the security agreement of the debtor (including a seller), this criterion is satisfied even if that agreement is oral or otherwise not evidenced by an authenticated record.
- Alternatively, if the debtor authenticates a security agreement describing the note, this criterion is satisfied even if the secured party does *not* take possession of the note. (Note that in this situation, in which the seller of a note may retain possession of it, the owner of a note may be a different person than the person entitled to enforce the note.)⁴⁰

Satisfaction of these three criteria of Section 9-203(b) results in the secured party (including a buyer of the note) obtaining a property right (whether outright ownership or a security interest to secure an obligation) in the note from the debtor (including a seller of the note).⁴¹

Illustrations:

6. Maker issued a mortgage note payable to the order of Payee.⁴² Payee borrowed money from Funder and, to secure Payee's repayment obligation, Payee and Funder agreed that Funder would have a security interest in the note. Simultaneously with the funding of the loan, Payee gave possession of the note to Funder. Funder has an attached and

See also Official Comment 9 to UCC § 9-313 ("New subsections (h) and (i) address the practice of mortgage warehouse lenders.") Possession as contemplated by UCC § 9-313 is also possession for purposes of UCC § 9-203. See UCC § 9-203, Comment 4.

³⁹ UCC §§ 9-203(b)(3)(A)-(B).

⁴⁰ As noted in the discussion of Question One, payment by the maker of a negotiable note to the person entitled to enforce it discharges the maker's obligations on the note. UCC § 3-602. This is the case even if the person entitled to enforce the note is not its owner. As between the person entitled to enforce the note and the owner of the note, the right to the money paid by the maker is determined by the UCC and other applicable law, such as the law of contract and the law of restitution, as well as agency law. See, e.g., UCC §§ 3-306 and 9-315(a)(2). As noted in comment 3 to UCC § 3-602, "if the original payee of the note transfers ownership of the note to a third party but continues to service the obligation, the law of agency might treat payments made to the original payee as payments made to the third party."

⁴¹ For cases in which another person claims an interest in the note (whether as a result of another voluntary transfer by the debtor or otherwise), reference to Article 9's rules governing perfection and priority of security interests may be required in order to rank order those claims (and, in some cases, determine whether a party has taken the note free of competing claims to the note). In the case of notes that are negotiable instruments, the Article 3 concept of "holder in due course" (see UCC § 3-302) should be considered as well, because a holder in due course takes its rights in an instrument free of competing property claims to it (as well as free of most defenses to obligations on it). See UCC §§ 3-305 and 3-306. With respect to determining whether the owner of a note has effectively transferred a property interest to a transferee, however, the perfection and priority rules are largely irrelevant. (The application of the perfection and priority rules can result in the rights of the transferee either being subordinate to the rights of a competing claimant or being extinguished by the rights of the competing claimant. See, e.g., UCC §§ 9-317(b), 9-322(a), 9-330(d), and 9-331(a).)

⁴² For this Illustration, as well as Illustrations 7-11, the analysis under UCC Article 9 is the same whether the mortgage note is negotiable or non-negotiable. This is because, in either case, the mortgage note will qualify as a "promissory note" and, therefore, an "instrument" under UCC Article 9. See UCC §§ 9-102(a)(47), (65).

enforceable security interest in the note. UCC § 9-203(b). This is the case even if Payee's agreement is oral or otherwise not evidenced by an authenticated record. Payee is no longer a person entitled to enforce the note (because Payee is no longer in possession of it and it has not been lost, stolen, or destroyed). UCC § 3-301. Funder is a person entitled to enforce the note if either (i) Payee indorsed the note by blank indorsement or by a special indorsement identifying Funder as the person to whom the indorsement makes the note payable (because, in such cases, Funder would be the holder of the note), or (ii) the delivery of the note from Payee to Funder constitutes a transfer of the note under UCC § 3-203 (because, in such case, Funder would be a nonholder in possession of the note with the rights of a holder). See also UCC §§ 1-201(b)(21)(A), 3-205(a)-(b), and 3-301(i)-(ii).

7. Maker issued a mortgage note payable to the order of Payee. Payee borrowed money from Funder and, in a signed writing that reasonably identified the note (whether specifically or as part of a category or a type of property defined in the UCC), granted Funder a security interest in the note to secure Payee's repayment obligation. Payee, however, retained possession of the note. Funder has an attached and enforceable security interest in the note. UCC § 9-203(b). If the note is negotiable, Payee remains the holder and the person entitled to enforce the note because Payee is in possession of it and it is payable to the order of Payee. UCC §§ 1-201(b)(21)(A), 3-301(i).
8. Maker issued a mortgage note payable to the order of Payee. Payee sold the note to Funder, giving possession of the note to Funder in exchange for the purchase price. The sale of the note is governed by Article 9 and the rights of Funder as buyer constitute a "security interest." UCC §§ 9-109(a)(3), 1-201(b)(35). The security interest is attached and is enforceable. UCC § 9-203(b). This is the case even if the sales agreement was oral or otherwise not evidenced by an authenticated record. If the note is negotiable, Funder is also a person entitled to enforce the note, whether or not Payee indorsed it, because either (i) Funder is a holder of the note (if Payee indorsed it by blank indorsement or by a special indorsement identifying Funder as the person to whom the indorsement makes the note payable) or (ii) Funder is a nonholder in possession of the note (if there is no such indorsement) who has obtained the rights of Payee by transfer of the note pursuant to UCC § 3-203. See also UCC §§ 1-201(b)(21)(A), 3-205(a)-(b), and 3-301(i)-(ii).
9. Maker issued a mortgage note payable to the order of Payee. Pursuant to a signed writing that reasonably identified the note (whether specifically or as part of a category or a type of property defined in the UCC), Payee sold the note to Funder. Payee, however, retained possession of the note. The sale of the note is governed by Article 9 and the rights of Funder as buyer constitute a "security interest." UCC § 1-201(b)(35). The security interest is attached and is enforceable. UCC § 9-203(b). If the note is negotiable, Payee remains the holder and the person entitled to enforce the note (even though, as between Payee and Funder, Funder owns the note) because Payee is in

possession of it and it is payable to the order of Payee. UCC §§ 1-201(b)(21)(A), 3-301(i).

Question Three – What is the Effect of Transfer of an Interest in a Mortgage Note on the Mortgage Securing It?

What if a note secured by a mortgage is sold (or the note is used as collateral to secure an obligation), but the parties do not take any additional actions to assign the mortgage that secures payment of the note, such as execution of a recordable assignment of the mortgage? UCC Section 9-203(g) explicitly provides that, in such cases, the assignment of the interest of the seller or other grantor of a security interest in the note automatically transfers a corresponding interest in the mortgage to the assignee: “The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.” (As noted previously, a “security interest” in a note includes the right of a buyer of the note.)

While this question has provoked some uncertainty and has given rise to some judicial analysis that disregards the impact of Article 9,⁴³ the UCC is unambiguous: the sale of a mortgage note (or other grant of a security interest in the note) not accompanied by a separate conveyance of the mortgage securing the note does not result in the mortgage being severed from the note.⁴⁴

It is important to note in this regard, however, that UCC Section 9-203(g) addresses only whether, as between the seller of a mortgage note (or a debtor who uses it as collateral) and the buyer or other secured party, the interest of the seller (or debtor) in the mortgage has been correspondingly transferred to the secured party. UCC Section 9-308(e) goes on to state that, if the secured party’s security interest in the note is perfected, the secured party’s security interest

⁴³See, e.g., the discussion of this issue in *U.S. Bank v. Ibanez*, 458 Mass. 637 at 652-53, 941 N.E.2d 40 at 53-54 (2011). In that discussion, the court cited Massachusetts common law precedents pre-dating the enactment of the current text of Article 9 to the effect that a mortgage does not follow a note in the absence of a separate assignment of the mortgage, but did not address the effect of Massachusetts’s subsequent enactment of UCC § 9-203(g) on those precedents. Under the rule in UCC § 9-203(g), if the holder of the note in question demonstrated that it had an attached security interest (including the interest of a buyer) in the note, the holder of the note in question would also have a security interest in the mortgage securing the note even in the absence of a separate assignment of the mortgage. (This Report does not address whether, under the facts of the *Ibanez* case, the holder of the note had an attached security interest in the note and, thus, qualified for the application of UCC § 9-203(g). Moreover, even if the holder had an attached security interest in the note and, thus, had a security interest in the mortgage, this would not, of itself, mean that the holder could enforce the mortgage without a recordable assignment of the mortgage to the holder. Whatever steps are required in order to enforce a mortgage in the absence of a recordable assignment are the province of real property law. The matter is addressed, in part, in the discussion of Question 4 below.)

⁴⁴Official Comment 9 to UCC § 9-203 confirms this point: “Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien.” Pursuant to UCC § 1-302(a), the parties to the transaction may agree that an interest in the mortgage securing the note does not accompany the note, but such an agreement is unlikely. See, e.g., Restatement (3d), Property (Mortgages) § 5.4, comment a (“It is conceivable that on rare occasions a mortgagee will wish to disassociate the obligation and the mortgage, but that result should follow only upon evidence that the parties to the transfer so agreed.”).

in the mortgage securing the note is also perfected,⁴⁵ with result that the right of the secured party is senior to the rights of a person who then or later becomes a lien creditor of the seller of (or other grantor of a security interest in) the note. Neither of these rules, however, determines the ranking of rights in the underlying real property itself, or the effect of recordation or non-recordation in the real property recording system on enforcement of the mortgage.⁴⁶

Illustration:

10. Same facts as Illustration 9. The signed writing was silent with respect to the mortgage securing the note and the parties made no other agreement with respect to the mortgage. The attachment of Funder's interest in the rights of Payee in the note also constitutes attachment of an interest in the rights of Payee in the mortgage. UCC § 9-203(g).

Question Four – What Actions May a Person to Whom an Interest in a Mortgage Note Has Been Transferred, but Who Has not Taken a Recordable Assignment of the Mortgage, Take in Order to Become the Assignee of Record of the Mortgage Securing the Note?

In some states, a party without a recorded interest in a mortgage may not enforce the mortgage non-judicially. In such states, even though the buyer of a mortgage note (or a creditor to whom a security interest in the note has been granted to secure an obligation) automatically obtains corresponding rights in the mortgage,⁴⁷ this may be insufficient as a matter of applicable real estate law to enable that buyer or secured creditor to enforce the mortgage upon default of the maker if the buyer or secured creditor does not have a recordable assignment. The buyer or other secured party may attempt to obtain such a recordable assignment from the seller or debtor at the time it seeks to enforce the mortgage, but such an attempt may be unsuccessful.⁴⁸

Article 9 of the UCC provides such a buyer or secured creditor a mechanism by which it can record its interest in the realty records in order to conduct a non-judicial foreclosure. UCC Section 9-607(b) provides that “if necessary to enable a secured party [including the buyer of a mortgage note] to exercise ... the right of [its transferor] to enforce a mortgage nonjudicially,” the secured party may record in the office in which the mortgage is recorded (i) a copy of the security agreement transferring an interest in the note to the secured party and (ii) the secured

⁴⁵ See Official Comment 6 to UCC § 9-308, which also observes that “this result helps prevent the separation of the mortgage (or other lien) from the note.” Note also that, as explained in Official Comment 7 to UCC § 9-109, “It also follows from [UCC § 9-109(b)] that an attempt to obtain or perfect a security interest in a secured obligation by complying with non-Article 9 law, as by an assignment of record of a real-property mortgage, would be ineffective.”

⁴⁶ Similarly, Official Comment 6 to UCC § 9-308 states that “this Article does not determine who has the power to release a mortgage of record. That issue is determined by real-property law.”

⁴⁷ See discussion of Question Three, *supra*.

⁴⁸ In some cases, the seller or debtor may no longer be in business. In other cases, it may simply be unresponsive to requests for execution of documents with respect to a transaction in which it no longer has an economic interest. Moreover, in cases in which mortgage note was collateral for an obligation owed to the secured party, the defaulting debtor may simply be unwilling to assist its secured party. See Official Comment 8 to UCC § 9-607.

party's sworn affidavit in recordable form stating that default has occurred⁴⁹ and that the secured party is entitled to enforce the mortgage non-judicially.⁵⁰

Illustration:

11. Same facts as Illustration 10. Maker has defaulted on the note and mortgage and Funder would like to enforce the mortgage non-judicially. In the relevant state, however, only a party with a recorded interest in a mortgage may enforce it non-judicially. Funder may record in the relevant mortgage recording office a copy of the signed writing pursuant to which the note was sold to Funder and a sworn affidavit stating that Maker has defaulted and that Funder is entitled to enforce the mortgage non-judicially. UCC § 9-607(b).

Summary

The Uniform Commercial Code provides four sets of rules that determine matters that are important in the context of enforcement of mortgage notes and the mortgages that secure them:

- 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.

As noted previously, these UCC rules do not resolve all issues in this field. The enforcement of real estate mortgages by foreclosure is primarily the province of a state's real property law, but legal determinations made pursuant to the four sets of UCC rules described in this Report will, in many cases, be central to administration of that law. In such cases, proper application of real property law requires proper application of the UCC rules discussed in this Report.

⁴⁹ The 2010 amendments to Article 9 (see fn. 8, *supra*) add language to this provision to clarify that "default," in this context, means default with respect to the note or other obligation secured by the mortgage.

⁵⁰ UCC § 9-607(b) does not address other conditions that must be satisfied for judicial or non-judicial enforcement of a mortgage.

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JANICE GEARY f/k/a JANICE
VALLI,

Appellant,

v.

ING BANK; AURORA LOAN
SERVICES, LLC; QUALITY LOAN
SERVICE CORPORATION OF
WASHINGTON, INC.,

Respondents.

Case No. 43712-1-II

AFFIDAVIT OF
SERVICE

FILED
COURT OF APPEALS
DIVISION II
2013 AUG 21 PM 1:07
STATE OF WASHINGTON
BY DEPUTY

COUNTY OF KING)
STATE OF WASHINGTON) ss

The undersigned being first duly sworn upon oath, deposes and
says:

That on the 20th day of August, 2013, she caused to be delivered
copies of the following document: RESPONDENT AURORA LOAN
SERVICES LLC'S BRIEF, to the following parties in the manner
indicated below:

Via U. S. Mail
Roy G. Brewer
Attorney at Law
27215 Pacific Hwy S. #B
Federal Way, WA 98003

Via U.S. Mail

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Via U. S. Mail

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Seattle, WA 98121

Dated this 10th day of August, 2013.

Barbara L. Bollero

Barbara L. Bollero, WSBA# 28906
Attorneys for Respondent
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SIGNED AND SWORN TO (or affirmed) before me on the 20th
day of August, 2013, by Barbara L. Bollero.



Ana I. Todakonzie

ANA I. TODAKONZIE
Notary Public in and for the
State of Washington.
Residing in Seattle, Washington.
My appointment expires: 2/28/2015.