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Court of Appeals
Division II
IN THE STATE OF WASHINGTON
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DIVISION II

NO. 51742-6-II

FLOYD and MARGARET SCOTT, husband and wife,
Plaintiffs/Appellants,

vs.

**ALLY BANK CORP.; FEDERAL HOME LOAN MORTGAGE
CORPORATION; OCWEN HOME LOAN SERVICING, INC.; AND
QUALITY LOAN SERVICES CORP. OF WASHINGTON;
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.;**
AND JOHN DOES 1-10,

Defendants/Respondents.

**ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON IN AND FOR CLARK COUNTY**

APPELLANT SCOTTS' OPENING BRIEF

FLOYD AND MARGARET SCOTT, Plaintiffs, pro se
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TABLE OF CONTENTS

I	INTRODUCTION	1
	A. Agreements Between the Parties	1
	B. Case of First Impression in Washington	1
	C. Mortgage Note Arrearages No Longer Exist.	
	D. Dismissal Should Be Reversed	2
	E. Ocwen Unlawfully Appointed Quality the Successor Trustee	4
	F. RCW 61.24.030(7)(a) Unconstitutionally Impairs DOT Contract	5
II	ASSIGNMENTS OF ERROR	6
	A. Issues Pertaining to Assignments of Error	7
III	STATEMENT OF THE CASE	8
	A. Historical Facts	8
	B. Procedural Facts	10
IV	ARGUMENT	19
	A. Nature of Borrower/Lender Agreement	19
	1. The Loan Transaction	21
	2. The Mortgage Loan Agreement	22
	B. <i>Brown</i> is not Controlling Authority in This Case	24
	1. Brown does not address Issues Upon Which Plaintiffs' CPA Claim Rests	24
	2. DOT does not follow transfer of Noteholder Status Absent transfer of Note Ownership	25

a.	Plaintiffs' DOT is a contract, and Ocwen is not a party to, or intended third-party beneficiary of, the contract	26
1.	“Successor Lender” Defined	27
2.	“Assignee Lender” Defined	27
3.	Transfer of Noteholder status, without transfer of Note Ownership, leaves Terms of DOT Unaffected	29
4.	DOT is a Three-Party Agreement, and Ocwen is not One of Those Parties	37
a.	Ocwen Lacks Standing to enforce Terms of DOT	38
5.	Article 9A applies to <i>Sales</i> of Promissory Notes Only	39
6.	Brown Court applied RCW62A.9A-203(g) to Facts, though Freddie Mac did not Sell Note to MTB	39
7.	Article 9A does not apply to Assignment of Note for Purpose of Collection	40
8.	RCW 62A.9A-203 supports Plaintiffs’ Position	40
a.	Right to Payment	40
b.	Security Interest	40
c.	Attachment	41
9.	PEB’s Analysis supports Plaintiffs’ Position	43
10.	Freddie Mac, the Lender, is the Beneficiary of the DOT	45

a.	Trust Purpose	45
b.	Property placed in Trust to Fulfill Trust Purpose	46
c.	Process by which trust property will be distributed to fulfill trust's purpose	46
d.	Recipient of Distribution of Trust Property	46
11.	Trial Court failed to apply RCW 61.24.030(1) and (3)	47
C.	Trial Court Erred by Ruling Ocwen Lawfully Appointed Quality the Successor Trustee	48
D.	RCW 61.24.030(7)(a) is Unconstitutional Impairment of DOT Contract	48
V	CONCLUSION	50

TABLE OF AUTHORITIES

STATE STATUTES

RCW CHAPTER 4.28

(1)	RCW 4.28.080	2
-----	--------------	---

RCW CHAPTER 61.24

(1)	RCW 61.24.010(2)	4, 48
(2)	RCW 61.24.030	10
(3)	RCW 61.24.030(1)	7, 25
(4)	RCW 61.24.030(3)	7, 10, 11, 12, 25, 47, 49
(5)	RCW 61.24.030(7)(a)	5, 6, 7, 8, 13, 20, 48, 49, 50

(6) RCW 61.24.080(2) 7, 24, 33, 35, 39

RCW CHAPTER 62A.1

(1) RCW 62A.1-201(b)(21)(A) 22, 31
(2) RCW 62A.1-201(b)(35) 41, 42

RCW CHAPTER 62A.3

(1) RCW 62A.3-301 5, 22, 23, 29
(2) RCW 62A.3-310 49
(3) RCW 62A.3-310(b)(1) 21, 22
(4) RCW 62A.3-310(b)(2) 21, 22, 26
(5) RCW 62A.3-412 5, 22, 23, 29, 30

RCW CHAPTER 62A.9A

(1) RCW 62A.9A-102(a)(12)(B) 41, 42
(2) RCW 62A.9A-102(a)(28)(B) 42
(3) RCW 62A.9A-102(a)(73)(D) 43
(4) RCW 62A.9A-102(a)(74) 43
(5) RCW 62A.9A-109(a)(3) 39, 41
(6) RCW 62A.9A-109(d)(5) 40, 44
(7) RCW 62A.9A-203 39
(8) RCW 62A.9A-203(a) 19, 25, 41, 42, 44, 49
(9) RCW 62A.9A-203(b) 19, 25, 28, 41, 42, 43, 44, 49
(10) RCW 62A.9A-203(g) 19, 25, 39, 40, 41, 42, 44, 49
(11) RCW 62A.9A-313 43

CASE LAW

1.	<i>Armour Fertilizer Works v. Zills</i> , 177 So. 136, 138 (Ala. 1937)	44
2.	<i>Bain v. Metropolitan Mortg. Grp., Inc.</i> , 175 Wn.2d83 (2012)	8, 17, 28, 37
3.	<i>Blair v. NWTS</i> , 193 Wn. App. 18 (2016)	29
4.	<i>Bremer County Bank v. Eastman</i> , 34 Iowa 392, 1872 WL 254, at *1 (Iowa 1872)	44
4.	<i>Brown v. Department of Commerce</i> , 184 Wn.2d 509 (2015)	4, 7, 11, 18, 20, 22, 25, 33 34, 35, 37, 39, 43
5.	<i>Carpenter v. Longan</i> , 83 U.S. 271, 275 (1873)	44
6.	<i>Cartwright v. Jackson Capital Partners, Limited Partnership</i> , 478 S.W. 3rd 596, 2015 Tenn. App. LEXIS 361	45
7.	<i>Columbia St. Bank v. Canzoni</i> , 2014 Wash. App LEXIS 1614 * 15	29
8.	<i>In re Davies</i> , 565 F. App'x 630, 633 (9 th Cir. 2014)	38
9.	<i>Deutsche Bank National Trust Co. v. Slotke</i> , 192 Wn. App 166, 177 (2016)	38
10.	<i>Dixie Grocery Co. v. Hoyle</i> , 204 N.C. 109, 167 S.E. 469 (1931)	44
11.	<i>Fed'n of Employees v. State</i> , 127 Wn.2d 544 (1995)	50
12.	<i>Fidelity Mutual Savings Bank v. Mark</i> , 112 Wn.2d 47, 52, 767 P.2d 1382 (1989)	27
13.	<i>Flake v. Flake (In re Estate of Flake)</i> , 2003 UT 17, 71 P.3d 589	45
14.	<i>Floyd v. Floyd</i> , 365 S.C. 56, 615 S.E. 2d 465	45
15.	<i>Ford v. Nokomis State Bank</i> , 135 Wash. 37, 46-47, 237 P. 314 (1925)	27

16.	<i>Fowler v. Lanpher</i> , 193 Wash. 308, 75 P.2d 132 (1938)	45
17.	<i>Green v. Community Club</i> , 137 Wn. App. 665, 682-683, 151 P.3d 1038, 1046-1047 (2007)	27
18.	<i>Gruen v. Tax Com.</i> , 35 Wn.2d 1, 55 (1949)	23
19.	<i>Hemphill v. Aukamp</i> , 164 W. Va. 368, 264 S.E. 2nd 163 (1980)	45
20.	<i>Holmes v. McGinty</i> , 44 Miss. 94, 1870 WL 4406, at *4	44
21.	<i>Housing Auth. of Sunnyside v. Sunnyside Valley Irrigation Dist.</i> , 112 Wn.2d 262, 772 P.2d 473 (1989)	50
22.	<i>In re Kennedy Mort. Co.</i> , 17 B.R. 957, 966 (Bankr. D. N.J. 1982)	44
23.	<i>Ketcham v. King County Medical Serv. Corp.</i> , 81 Wn.2d 565 (1972)	50
24.	<i>Klem v. Washington Mutual Bank</i> , 176 Wn.2d 771 (2013)	37
25.	<i>Estate of K.O. Jordan v. Hartford Accident & Indemnity Co.</i> , 120 Wn.2d 490, 844 P.2d 403 (1998)	27
26.	<i>Lagow v. Badollet</i> , 1 Blackf. 416, 1826 WL 1087, at *3 (Ind. 1826)	44
27.	<i>Matson v. Kennecott Mines Co.</i> , 103 Wash. 499 (1918)	3
28.	<i>McConnell v. Kaufman</i> , 5 Wash. 686, 32 P 782 (1893)	27
29.	<i>In re Miller</i> , No. 99-25616JAd, 2007 WL 81052, at *6 & n.7 (Bankr. W.D. Pa. Jan. 9, 2007)	44
30.	<i>Mutual of Enumclaw Ins. Co. v. USF Ins. Co.</i> , 164 Wn.2d 411, 424, 191 P.3d 866 (2009)	28
31.	<i>Navlet v. Port of Seattle</i> , 164 Wn.2d 818 (2008)	45

32.	<i>Estate of Parsons</i> , 122 Wis. 2d 186, 361 N.W. 2nd 687 (1985)	45
33.	<i>Postlewait Constr. v. Great Am. Ins. Cos.</i> , 106 Wn.2d 96, 99, 720 P.2d 805 (1986)	38
34.	<i>Proctor v. Woodhouse</i> , 127 Vt. 148, 241 A.2nd 781 (1968)	45
35.	<i>Puget Sound Machine Depot v. Clapp</i> , 191 Wash. 410, 71 P.2d 174, 176 (1937)	27
36.	<i>Puget Sound Nat'l Bank v. Dept. of Revenue</i> , 123 Wn.2d 284, 292, 868 P.2d 127 (1994)	28
37.	<i>Rafalko v. Georgiadis</i> , 290 Va. 394, 777 S.E. 870 (2015)	45
38.	<i>Ramos v. SimplexGrinnell LP</i> , 796 F.Supp. 2d 346 (2011)	23
39.	<i>Rock Springs Land & Timber, Inc. v. Lore</i> , 2003 Wyo. 152, 75 P.3d 614 (2003)	45
40.	<i>Sayers v. Baker</i> , 171 S.W. 2nd 547, 1943 Tex. App. LEXIS 363	45
41.	<i>Seattle First Nat'l Bank v. Crosby</i> , 42 Wn.2d 234, 254 P. 2nd 732 (1953)	45
42.	<i>SimplexGrinnell LP</i> , 796 F. Supp. 2d 346 (2011)	23
43.	<i>Southcenter Joint Venture v. Nat'l Democratic Policy Comm.</i> , 113 Wn.2d 413,432, 780 P.2d 1282 (1989)	27
44.	<i>Southerin v. Mendum</i> , 5 N.H. 420, 1831 WI 1104, at *7 (N.H. 1831)	44
45.	<i>U.S. Bank, NA v. LaMothe</i> , 16 Wn. App LEXIS 394	38
46.	<i>Von Hoffman v. Quincy</i> , 71 U.S. 535, 550, 18 L. Ed. 403 (1866)	35
47.	<i>Zorn v. Van Buskirk</i> , 111 Okla. 211, 239 p. 151 (1925)	44

MISCELLANEOUS AUTHORITY

1.	<i>Black's Law Dictionary</i> (5 th ed. 1979)	8, 27, 46
2.	U. S. Constitution, Article 1, Section 10	5, 6, 7, 25, 50
3.	Washington State Constitution, Article 1, Section 23	5, 6, 7, 25, 50
4.	Official Comment 3 to RCW 62A.3-310	48
5.	Report of the Permanent Editorial Board Of the Uniform Commercial Code (November 14, 2011)	25
6.	Civil Rule 12(b)(2)	2
7.	Civil Rule 12(b)(5)	2
8.	Civil Rule 12(b)(6)	2

I INTRODUCTION

A. Agreements Between the Parties

The parties to this appeal agree that the Federal Home Loan Mortgage Corporation (“Freddie Mac”) has owned Plaintiffs’ promissory note (“Note”) and deed of trust (“DOT”) at all times relevant to the issues in this litigation. Additionally, the parties agree that Ocwen has serviced the loan at all times relevant to the issues in this litigation.

B. Case of First Impression in Washington

Because this appeal is based on provisions of the DOT and sections of the U.S. and Washington State Constitutions, this is a case of first impression in Washington. For reasons provided throughout this brief, the importance of the issues Plaintiffs ask this Court to decide cannot be overstated.

C. Mortgage Note Arrearages No Longer Exist.

Plaintiffs’ promissory note (“Note”) arrearages, which served as Ocwen Loan Servicing, LLC (“Ocwen”), Quality Loan Services Corp. of Washington (“Quality”), Mortgage Electronic Registration Systems, Inc. (“MERS”), and Federal Home Loan Mortgage Corporation’s (“Freddie Mac’s”) basis for the non-judicial foreclosure proceeding, no longer exist. While making it clear that we reserved our right to continue to contest the unlawful foreclosure, Plaintiffs reinstated the Note and deed of trust (“DOT”) months ago by paying the arrearages.

D. Dismissal Should Be Reversed.

Defendants Freddie Mac, Ocwen, and MERS (collectively, “Defendants”) sought dismissal of the Complaint *with prejudice* pursuant to CR 12(b)(2) (lack of jurisdiction over the person of each of the Defendants), CR 12(b)(5) (insufficiency of service of process on each of the Defendants), and CR 12(b)(6) (failure to state a claim upon which relief can be granted). They claimed the Summons and Complaint had not been properly served on Defendants “resulting in this Court being unable to exercise personal jurisdiction on the parties.” Defendants’ Motion to Dismiss (“Motion”), at 1: 23-25. Defendants Freddie Mac and Ocwen have been served in accordance with RCW 4.28.080.

Defendants did not move to dismiss until March 2018. They had participated in the litigation generally for more than nine months before filing the motion to dismiss. For example, Plaintiffs filed the Complaint and a Motion for Preliminary Injunction on June 28, 2017. The trial court heard the motion on July 24, 2017. Defendants appeared at the hearing and opposed the Motion on the following grounds:

Defendants Federal Home Loan Mortgage Corporation (“FHLMC”) and Ocwen Loan Servicing, LLC (“Ocwen”) respectfully request this Court deny the plaintiffs’ Motion for Preliminary Injunction. Defendants make this Opposition on the grounds that plaintiffs are not likely to succeed on the merits of their underlying claims because (1) Ocwen is the holder of the Note and successor beneficiary of the Deed of Trust, (2) FHLMC’s ownership interest in the loan does not negate Ocwen’s holder of the Note status, and (3) Quality is authorized to initiate foreclosure proceedings pursuant to a properly executed

Appointment. There are simply no claims that would support stopping the trustee's sale in light of the substantial default on the plaintiffs' loan, and this Court should deny the plaintiffs' Motion.

CP at 127.

Defendants made no mention of the court's lack of jurisdiction.

Defendants did not appear specially. They made no motion to quash the summons or assert an evident lack of jurisdiction. Defendants sought a dismissal with prejudice *on the merits*. *Id.* "A party desiring to successfully challenge jurisdiction over his person should not call into action the powers of the court over the subject matter of the controversy."

Matson v. Kennecott Mines Co., 103 Wash. 499, 504 (1918). The court could not dismiss the case with prejudice on the merits unless it had jurisdiction over the all of parties. And even if they had not waived the jurisdictional claims, Defendants Freddie Mac and Ocwen were served. true and correct copies of the respective declarations of service are included in the Appendix to this Opening Brief as Exhibits A and B.

MERS was not served because the registered agent for MERS listed in the Secretary of State's registry of agents abandoned the office listed in the registry, leaving no forwarding address. A true and correct copy of the Affidavit of Attempted Service of Process is included in the Appendix as Exhibit C.

Finally, the Complaint not only states a claim for relief; it states a claim that supports summary judgment.

As Plaintiffs informed the trial court, the holding in *Brown v. Department of Commerce*, 184 Wn.2d 509 (2015) does not dictate the outcome of this case because Plaintiffs have primarily founded their defense on controlling sections of the DOT. The Brown Court reached its opinion without considering any sections of the DOT. See *Brown*, 184 Wn.2d at 529, fn. 9. In addition, as we will demonstrate throughout the remainder of this brief, the *Brown* decision is fatally flawed.

Each basis for Defendants Freddie Mac, Ocwen Loan Servicing, LLC (“Ocwen”), and Mortgage Electronic Registration Systems, Inc.’s Motion for Dismissal (“MERS”) should have been rejected, and the trial court should have permitted the case to proceed to trial. This Court should reverse the trial court decision and order the trial court to allow the case to proceed to trial.

E. Ocwen Unlawfully Appointed Quality the Successor Trustee.

RCW 61.24.010(2) authorizes the *Beneficiary* to appoint a successor trustee. As we shall prove in numerous ways, Ocwen is not the Beneficiary of the DOT; Freddie Mac is. Accordingly, Ocwen unlawfully appointed Quality the successor trustee. Quality’s actions in the foreclosure proceeding, which were directed by Freddie Mac and Ocwen, were unlawful.

F. RCW 61.24.030(7)(a) Unconstitutionally Impairs DOT Contract.

Paragraph 22 of the DOT requires the *Lender*, the *Successor Lender*, or the *Assignee Lender* to be the owner of the note and underlying mortgage debt and the holder of the note at the commencement of a non-judicial foreclosure action to be entitled to conduct the proceeding. *CP* at 72. Ocwen holds the note but does not own it. Freddie Mac owns the note and the underlying mortgage debt but does not hold the Note. Therefore, neither Freddie Mac nor Ocwen is entitled to foreclose non-judicially.

RCW 61.24.030(7)(a) defines the beneficiary as the noteholder. The provision irreconcilably conflicts with the sections of the DOT that determine who is the beneficiary of the DOT¹; who has the power to declare the note in default; who may appoint a successor trustee; and, most importantly, who has the authority to *invoke the power to sell* the property and under what circumstances the power may be utilized.

RCW 61.24.030(7)(a) destroys the meaning of the DOT agreement and thereby violates Article 1, Section 10 of the United States Constitution and Article 1, Section 23 of the Washington State Constitution.

Alternatively, if RCW 61.24.030(7)(a) does not violate the cited

¹ The DOT is a "Security Instrument." *Id.* at 62. It exists solely for the purpose of securing *to the Lender* (Freddie Mac) repayment of the mortgage debt the Borrower (Mrs. Scott) owes Freddie Mac. Mrs. Scott is obligated to repay the mortgage debt she owes to Freddie Mac by making monthly note payments to the person entitled to enforce the Note (the "PETE") (Ocwen). *RCW 62A.3-412 and 62A.3-301*. The fact that Mrs. Scott must make the monthly Note payment to Ocwen does not alter the much more important fact that the *economic benefit* of each Note payment belongs to Freddie Mac, the Note owner. And since Mrs. Scott and Freddie Mac mutually agreed the *economic benefit* of the Note payments would pay off the debt, the *economic benefit* of each Note payment must be applied against the mortgage debt Mrs. Scott owes Freddie Mac, regardless of who the law obliges Mrs. Scott to make the Note payment to.

constitutional provisions, the “power of sale” clause in the DOT is unenforceable because it irreconcilably conflicts with RCW 61.24.030(7)(a) and *Brown*.

II ASSIGNMENTS OF ERROR

1. The trial court erred by finding that *Ocwen* was entitled to foreclose even though it does not own the Note.
2. The trial court erred by finding it lacked personal jurisdiction over the Defendants Freddie Mac and Ocwen and probably erred by finding that it lacked personal jurisdiction over MERS.
3. The trial judge erred by granting Defendants’ dismissal motion based on the failure of the Complaint to state a claim upon which relief could be granted.
4. The trial court erred by ruling Ocwen lawfully appointed Quality the successor trustee.
5. The trial court erred by failing to find that RCW 61.24.030(7)(a), violates Article 1, Section 10 of the U.S. Constitution and Article 1, Section 23 of the Washington State Constitution and therefore is void.
6. Alternatively, the trial court erred by failing to find that RCW 61.24.030(7)(a) renders unenforceable the “power of sale” clause in the DOT.

7. The trial court erred by implicitly finding Quality was authorized by the DOT to conduct the non-judicial foreclosure proceeding.
8. The trial court erred by violating the RCW 61.24.030(3) requirement that the court determine whether a default had occurred, which, by the terms of the DOT, made operative the power to sell the Property.

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Given that *Brown* did not identify or analyze (1) any provisions in the DOT; (2) RCW 61.24.080(2); (3) RCW 61.24.030(1); (4) RCW 61.24.030(3); (5) Article 1, Section 10 of the U.S. Constitution; or (6) Article 1, Section 23 of the Washington State Constitution, is the *Brown* holding that the noteholder, regardless of note ownership, is entitled to foreclose controlling authority in this case?
2. Does the DOT follow a transfer of noteholder status absent a simultaneous transfer of note ownership?
 - a. Does transfer of noteholder status, while transferor retains ownership of note, change DOT agreement in any way?
 - b. May person who is neither a party to DOT agreement nor intended third-party beneficiary of DOT agreement enforce terms of DOT agreement?
 - c. Is a noteholder who does not own note he holds a Secured Party” under the terms of the DOT?
 - d. Does the “*security follows the note doctrine*” apply to a transfer of noteholder status absent a simultaneous transfer of note ownership?
 - e. Who is secured by DOT, Freddie Mac or Ocwen?
3. Is RCW 61.24.030(7)(a), as amended on June 7, 2018, an unconstitutional impairment of Plaintiffs’ DOT contract?

4. Did Ocwen lawfully appoint Quality the successor trustee?
5. Does DOT require secured party to be owner and holder of Note?
6. Did the failure to determine whether a default had occurred, which, by the terms of the DOT, operationalized the power of sale clause in the DOT prevent Quality – even if it had been lawfully appointed the successor trustee – from gaining the authority to utilize the “power of sale” clause in the DOT?
7. Does RCW 61.24.030(7)(a), as amended June 7, 2018, render the “power of sale” clause in the DOT permanently unenforceable?

III STATEMENT OF THE CASE

A. Historical Facts.

Mrs. Scott executed the Note and DOT on or about May 18, 2012. *CP* at 137 and 152. The Note lists Ally Bank Corporation (“ABC”) as the payee. *Id.* at 135. After Mrs. Scott executed Note (“Note”) and, ABC loaned Mrs. Scott \$122,600.00 to purchase the home located at 1210 W. 25th St., Vancouver, WA 98660 (“Property”).

The DOT identifies ABC as the Lender (i.e., the person from whom Plaintiffs borrowed the mortgage money (*Black’s Law Dictionary* (Fifth ed. 1979), at 812)) (*Id.* at 139); and the Secured Party (*Id.* at 141); MERS, as nominee for ABC, as the Beneficiary of the DOT² (*Id.*); and Margaret Scott as the borrower (*Id.* at 139) and trustor (*Id.*).

² In *Bain v. Metropolitan Mortgage Group*, 175 Wn.2d 83, 285 P.3rd 34 (2012), the Washington Supreme Court held MERS could never be a beneficiary because it never holds a borrower’s note. *Bain*, 175 Wn.2d at 90. Therefore, ABC’s attempt to appoint MERS the nominee-beneficiary failed; and, consequently, ABC remained the Secured Party and Beneficiary of the DOT until it sold Plaintiffs’ loan to Freddie Mac. This

The last sentence of the second paragraph of Section 13 of the DOT extends the security provided by the DOT to any person who becomes a Successor Lender or an Assignee Lender. *Id.* at 148.

Before selling the Note to Freddie Mac, ABC endorsed the Note in blank. *Id.* at 256. Allegedly, Freddie Mac delivered the blank-endorsed Note to Ocwen prior to commencing the non-judicial foreclosure proceeding that is the subject of this appeal. *CP* at 164.

On January 1, 2015, Plaintiffs allegedly stopped making payments on the Note. *Id.* at 87. On or about July 13, 2015, MERS, acting as nominee for Ally, attempted to assign the Note and DOT to Ocwen. *Id.* at 91. On information and belief, Ally sold Plaintiffs' Note and DOT to Freddie Mac more than 2 years prior to July 13, 2015.

On or about November 10, 2015, Quality, acting on behalf of Ocwen, issued a Notice of Default ("NOD"). *Id.* at 84-89. The NOD lists Freddie Mac as the owner of the Note and Ocwen as the loan servicer. *Id.* at 84-85.

On November 22, 2016, Ocwen, acting in its individual capacity as the purported Beneficiary of the DOT, executed an Appointment of Successor Trustee ("AST"). *Id.* at 162-163. The AST removed First American Title as Trustee and appointed Quality as the Successor Trustee. *Id.* at 162. Ocwen then had the AST e-recorded in the Clark County

means MERS' attempt to assign the beneficial interest in the DOT to Ocwen failed. MERS had no assignable interest in the DOT to assign.

Recorder's Office on November 30, 2016. *Id.* That same day, Ocwen executed the "Declaration of Holder of Note" (*Id.* at 164) and delivered it to Quality.

Ocwen recorded a Notice of Trustee's Sale ("NOTS") on February 2, 2017. *CP* at 167. The NOTS indicated the Property would be sold at public auction on June 9, 2017. *Id.* at 165. The sale did not occur on that date.

B. Procedural Facts.

Plaintiffs filed the Complaint and a Motion for Preliminary Injunction on May 26, 2017. *Id.* at 3. The court heard the Preliminary Injunction Motion on July 24, 2017. *RP* at 1. At the hearing Plaintiffs argued that RCW 61.24.030 provides a list of 8 requirements that must be met for a non-judicial foreclosure sale to be lawful. *Id.* at 6. Further, Plaintiffs maintained, one of the eight requirements – RCW 61.24.030(3) – had not been met in this case. *Id.* at 7. That statutory provision required the trustee and the trial court to analyze the terms of the DOT itself, not the terms of the DTA, to determine whether the foreclosing entity is entitled to foreclose. *Id.*

Only if the trustee determined that a default has occurred, which, by the terms of the DOT, made operative the power to sell the Property did the trustee obtain the power to sell the Property. *Id.* In the absence of

such a determination by the trustee, RCW 61.24.030(3) blocked the trustee from activating the power to sell the Property. *Id.* at 7-8.

Plaintiffs went further. We informed the court that it had a RCW 61.24.030(3)-mandated duty to review the relevant foreclosure language in the DOT and apply the language to the facts of the case. *Id.* A review of the relevant language in the DOT, we argued, would give the court the ability to determine whether the trustee had followed RCW 61.24.030(3)'s requirements. *Id.* at 7-8. If the trustee had followed the requirements, the sale would be deemed lawful. If not, it would be deemed unlawful. *Id.* at 8.

We stated that the *Brown* Court, in deciding the case, had reviewed sections of the DTA, the UCC, the Freddie Mac Seller/Servicer Guide (an internal document of a private company), and the November 14, 2011 Report of the Permanent Editorial Board of the UCC. *Id.* at 8. In other words, it had considered everything except the language RCW 61.24.030(3) required it to consider – the language in Section 22 of the DOT. *Id.* at 8-9.

The first sentence of Section 22 of the DOT establishes that Ocwen had no right to foreclose: “*Lender* shall give notice to Borrower prior to acceleration following Borrower’s breach of any covenant or agreement in this Security Instrument” *Id.* at 9. The Language is clear; the *Lender* must give notice of the breach. If the breach was failure to make monthly

Note payments – It was. – Freddie Mac was required by Section 22 to give notice of the default; the action required to cure the default; the date, not less than 30 days from the date the notice was given to Mrs. Scott, by which the default had to be cured; and that failure to cure the default(s) on or before the date specified in the notice might result in acceleration of the debt and sale of the Property at public auction on a date not less than 120 days in the future. *CP* at 151.

Section 22 also required Freddie Mac, not Ocwen, to inform Mrs. Scott of her rights: the right to reinstate the Note and DOT after acceleration; the right to bring a court action to assert any defense she might have to acceleration and sale of the Property; and any other matters required by applicable law to be included in the notice. *Id.* If, *and only if*, after Freddie Mac did all these things, Mrs. Scott failed to cure the default(s) on or before the date specified in the notice, Freddie Mac would have had the option of requiring the full payment of all sums secured by the DOT and of invoking the power of sale. *Id.*

In other words, under Section 22, the dormant power of sale could not be operationalized until Freddie Mac (the Lender), not Ocwen, did all the things required by the Section 22 of the DOT. *CP* at 72.

RCW 61.24.030(3) mandates that there must be a default, which, *by the terms of Section 22 of the DOT*, activates the DOT's "power of sale" clause. In the absence of such a default (i.e., a default of which the

borrower is notified by the Lender, not the servicer), the DOT's power of sale clause *remains dormant*. *Id.*

Moreover, when the default is failure to make monthly note payments, Section 22 of the DOT implicitly requires the Lender to be the noteholder. Why? Because Section 22 requires the Lender to specify the default and the action required to cure the default. *Id.* Under RCW 62A.3-301, only the person entitled to enforce the note (the "PETE") has the right to declare a note in default and to determine the action required to cure the default. And under RCW 61.24.030(7)(a), as amended June 7, 2018, the noteholder is the only PETE entitled to foreclose. Thus, the Lender – the *owner* of the note -- would also have to be the holder of the note to fulfill the Section 22 requirements. Under the terms of the DOT, you must hold and own the note to foreclose. *Id.*

Because Ocwen could not meet the "*Lender*" requirement in Section 22, it could not meet any of the other Section 22 requirements. *Id.* at 11. Accordingly, the power to sell the Property was not activated by Ocwen's announcement of a default in the obligation to make monthly Note payments, and therefore the court should have granted the Plaintiffs' Preliminary Injunction Motion. *Id.* at 10.

In rebuttal, Defendants' struggled. Defendants opened by making the following barely intelligible statement:

In quickly looking through the deed of trust, I have not found the language, but I venture the opinion – I may be

mistaken – that there could be language in there that talks about successors to any of the other parties – I don’t state that to the Court – even if that – as officially, but I think that that’s a plausible consideration. Even if that is not – the definition or reference to a successor is not in the deed of trust – and at this moment, again, I don’t address that – the fact is that under our legal system, any contractual right is assignable unless prohibited and, therefore, the status of a lender is also assignable under our legal system. And to rely on a narrow reading of the word lender as it appears in one document and there seems to me to be – as it seems to my client, I would add, it seems to be totally misplaced.

Id. at 13.

This opening makes no sense for several reasons.

First, Plaintiffs did not rely on a narrow reading of the word “Lender.” Plaintiffs followed the long-standing rule in Washington for defining the meaning of a material contractual terms that is undefined in the contract.

Second, Section 13 of the DOT extends the DOT’s security to *Successor Lenders* and *Assignee Lenders*. Section 13 is the section Defendants are groping for in the statement quoted immediately above. The fact that there can be Successor Lenders and Assignee Lenders has no impact on Plaintiffs’ argument. Why? Because the DOT does not differentiate between types of Lenders. The word “Lender” is mentioned more than 200 times in the DOT. It is not modified in even one of those more than two-hundred mentions. In other words, under the DOT, it doesn’t matter how you *became* the Lender. All that matters is that you *are* the Lender, whether by succession, assignment, or origination.

Third, and finally, the DOT is not simply “one document.” It is *the* document that defines and details the security agreement between the Borrower and the Lender. It is the only document one needs to consult to determine the parameters of the security relationship between the borrower and the Lender. It is a document the courts of this state have regularly avoided discussing in foreclosure litigation. And it is the document that should be the center of attention in every foreclosure case.

Next, Defendants appealed to what they hoped would be Judge Veljacic’s personal prejudice:

Going beyond that, I would ask this court to consider this case from a substantive, from a procedural and from a philosophical viewpoint. Substantively, the fact is that it is undisputed in this matter that the Scotts have not made payments for about 2½ years. There has been no payment made. There has been no lack of notice given to them.

Id.

Please Notice, Defendants asked the court to consider every viewpoint except the legal viewpoint, the one viewpoint the court is required to consider. The reference to 2½ years of missed payments is a blatant appeal to the judge’s personal prejudice.

The Borrower protections written into the DTA were placed in the DTA precisely for the purpose of protecting people who have missed note payments, sometime much more than 2½ years of missed payments. Consequently, the fact Plaintiffs had missed 2½ years of note payments should not have made Defendants’ legal arguments any stronger than they

would have been if Plaintiffs had missed a single note payment or if Plaintiffs had missed 10 years of note payments.

Defendants acknowledged that we had raised the issue that the wrong party had given notice to us of the default and of the intent to sell the Property. *Id.* at 13: 25 -14: 5. Then, without denying that the wrong party had given us notice of the default and notice of the intent to sell the Property, Defendants claimed that at least we had been given notice by someone.

Now, they [Plaintiffs] have raised the arguments certainly for this court's consideration as to whether or not the proper party gave notice to them of the default and of the intent to sell, but they certainly have received notice, which is perhaps the most fundamental underpinning in our legal system in any proceeding.

Id.

Defendants never claimed, let alone made a legal argument that tended to prove, that the right party had given us notice of the default and notice of the intent to sell the Property. Instead, Defendants argued simply that we had had adequate time to cure the 2½ years of missed payments or to prove that there had been no missed payments. *Id.* at 14: 6-8. Since we had not cured the missed payments or proven that the payments had not been missed, there was no substantive reason to expect that we could prevail at trial. *Id.* at 14: 6-17.

Basically, Defendants' argued that the statutory and DOT requisites (i.e., requirements) for conducting a lawful trustee's sale, which are in place largely for the purpose of protecting people who have missed

mortgage note payments, are not *requirements* if the person has missed mortgage note payments. *Id.* The irrationality of the argument eliminates the need for further comment.

Finally, Defendants argued that the *Brown* line of cases applied; that we were asking the court to overturn the *Brown* line of cases; and that we were asking the court to overrule the MERS system of mortgage lending.

Defendants proclaimed, wrongly, that the MERS system of lending is the system on which mortgage lending in Washington is based; that the MERS system has been validated and approved by numerous court decision in this state; and that it was beyond the pale to overrule those prior decisions by granting a restraining order. *Id.* at 14: 22 through 15: 25. For the record, the Washington Supreme Court specifically rejected the MERS system of lending in *Bain v. Metropolitan Mortgage Group, Inc.*, 175 Wn.2d 83 (2012).

Defendants concluded their argument by claiming the security followed the note doctrine applied and gave Ocwen the right to foreclose. *Id.* at 16: 1-10.

The court then weighed in. First, it found MERS was the beneficiary under the DOT. *Id.* at 18: 1-5. This finding flies in the face of the Supreme Court's holding in *Bain*. In that case, the Supreme Court held MERS cannot be a beneficiary because it never holds the borrower's note.

Next, once again agreeing with Defendants, the court found that language in the Transfer of Rights in the Property Section of the DOT does appear to anticipate that there will be successors and assigns. *Id.* at 18: 6-15. This finding by the court demonstrated its lack of familiarity with the terms of the DOT and its lack of familiarity with the content of Plaintiffs' Motion.

Plaintiffs revealed the existence of Section 13 of the DOT in our Preliminary Injunction Motion and provided a detailed, 4-page explanation of how Section 13 applies to this case. *CP* at 33-36. The explanation was far more precise, thorough, and accurate than the explanations provided by Defendants and the court. Nevertheless, the court spoke as though our definition of *Lender* somehow did not include the concepts of *Successor Lender's* and *Assignee Lender's*. *CP* at 17: 23 through 18: 17. It was very frustrating and very disappointing. Plaintiffs had always believed our courts were manned and woman-ed, uniformly, by people of extraordinary intellect.

Next the court created a legal term – “agency successors – and claimed the *Brown* court had ruled that “agency successors” are entitled to foreclose. *CP* at 19: 15-21. The *Brown* Court could not have made such a ruling because the concepts of *agency* and *successor* are opposed to one another. An agent works for a principal; a successor succeeds to all of the rights of a principal, essentially thereby becoming the principal.

The court then ruled that the security and enforcement rights do follow the note, regardless of note ownership (*Id.* at 19: 21 through 20: 3) and denied the motion for preliminary injunction. *Id.* 20: 4-19.

On March 5, 2018, Defendants moved the court to dismiss the case. *Id.* at 242. The court granted the motion on March 16, 2018. After a few procedural bumps in the road, this appeal followed.

IV ARGUMENT

A. Nature of Borrower/Lender Agreement.

The *security follows the note doctrine* means the security follows a sale of the secured note. This version of the security follows the note doctrine, the only version that has ever existed at common law, is codified at RCW 62A.9A-203(a), (b), and (g). This means the security follows *the sale of a note* doctrine is the law in Washington today. But you would never know it because Washington courts don't apply this statutory provision.

It pains Plaintiffs greatly to say it, but it must be said, or Washington homeowners will continue to be removed from their homes unlawfully: Most lawyers and judges in this state do not understand how to analyze RCW 62A.9A-203(a), (b), and (g). That is not Plaintiffs' opinion; that is a fact. Properly read, the meaning of RCW 62A.9A203(a),

(b), and (g) is susceptible of only one rational interpretation: The security follows a *sale* of the note it secures.

As we shall demonstrate in numerous ways in the remaining pages of this brief, the idea that the doctrine means the security follows a transfer of *the right to enforce the note* is utterly absurd. Nevertheless, in Washington, as in practically every other non-judicial foreclosure state, the myth that the *security follows the note doctrine* means the security follows a transfer of *the right to enforce the note*, regardless of note ownership, currently prevails. *RCW 61.24.030(7)(a); Brown v. Department of Commerce*, 184 Wn.2d 509 (2015). Destroying this destructive myth is one of the primary goals of this brief.

Historically, there is only one security follows the note doctrine. To understand that the currently prevailing formulation of the doctrine is nonsense, it is necessary to have a thorough understanding of the general nature of a mortgage loan transaction. Plaintiffs provide that understanding in this Section A of the Argument by analyzing the loan transaction that is the subject of this litigation. The following analysis applies to all mortgage loan transactions consummated in the State of Washington.

For those readers for whom subsections 1 and 2 below are remedial reading, we beg your indulgence. Before you finish reviewing

the arguments in this brief, the depths of your knowledge will be challenged.

1. The Loan Transaction.

To close Plaintiffs' mortgage loan, ABC, the loan originator, required Mrs. Scott to execute the Note and the DOT. The Note reads that it is given in return for a loan Mrs. Scott received from ABC. *CP* at 55. The money lent by ABC, plus interest, equaled Mrs. Scott's debt to ABC. As the Lender, ABC automatically became the *owner* of the Note and of the debt.

Please notice that the mortgage debt and the mortgage Note are not the same thing. The Note the Lender and Mrs. Scott's mutually agreed upon method of repaying the mortgage debt to the Lender. In the same way a grocery store, by accepting a shopper's personal check, makes the check the mutually agreed upon method of paying for the groceries until the check is either paid or dishonored (*RCW 62A.3-310(b)(1)*); ABC, by accepting Mrs. Scott's Note, made the Note the mutually agreed upon method of paying for the money borrowed (i.e., the mutually agreed upon method of repaying the mortgage debt) until Mrs. Scott paid-off the Note or dishonored it. *RCW 62A.3-310(b)(2)*. Also, pursuant to *RCW 62A.3-310(b)(2)*, ABC's acceptance of the Note as the mutually-agreed-upon method of repaying the mortgage debt *suspended* Mrs. Scott's obligation to repay the mortgage debt until she paid-off or dishonored the Note.

The UCC treats a personal check transaction and a promissory note transaction the same. *Compare RCW 62A.3-310(b)(2) to RCW 62A.3-310(b)(1).*

2. The Mortgage Loan Agreement.

At the close of the mortgage loan transaction, ABC became the Noteholder.³ RCW 62A.3-412 requires the issuer of a note to make note payments to the *person entitled to enforce the note* (the “PETE”). The noteholder is the PETE. *RCW 62A.3-301*. Therefore, at the close of the mortgage loan transaction, Mrs. Scott was required to make Note payments *directly* to ABC, the owner of the Note. But she was required to make Note payments *directly* to ABC because RCW 62A.3-301 entitled ABC to enforce the Note, *not because ABC loaned her the money.*

Under RCW 62A.3-412 the issuer of a note must make note payments to the noteholder, *regardless of whether the noteholder owns the note.* *See RCW 62A.3-301*. However, if the noteholder is not the note owner, the note owner continues to own the *economic benefit* of the note payments RCW 62A.3-412 requires the note issuer to make to the noteholder. *Brown*, 184 Wn.2d at 529. Understanding the simple fact related in the preceding sentence is one of the critical keys to understanding why the security *does not follow* a transfer of the right to enforce the note absent a simultaneous transfer of note ownership.

³ ABC possessed the Note, and the Note named ABC the payee. *RCW 62A.1-201(b)(21)(A)*.

Plaintiffs will repeat this fact several times in the remaining pages of this brief. Please keep it firmly in mind as you read.

Laws that relate to any material aspect of a contractual agreement become part of the agreement as though those laws had been written into the agreement. *Von Hoffman v. Quincy*, 71 U.S. 535, 550, 18 L. Ed. 403 (1866); *Gruen v. Tax Com.*, 35 Wn.2d 1, 55 (1949); *Ramos v. SimplexGrinnell LP*, 796 F. Supp. 2d 346 (2011). Accordingly, the requirements of RCW 62A.3-301 and RCW 62A.3-412 were part of the loan agreement between Mrs. Scott (the Borrower) and ABC (the Lender) from the day the loan closed. Those requirements remained part of the agreement after ABC sold the loan to Freddie Mac. *CP* at 26.

Armed with the information in this Section A, we can now fully identify and articulate the agreement Mrs. Scott and ABC enter into at the close of the mortgage loan transaction: By law, as long as ABC remained the owner of the Note and of the debt, *ABC and Mrs. Scott mutually agreed that Mrs. Scott would repay the mortgage debt owed to ABC by paying the \$621.20 monthly Note payment to the Noteholder, as required by RCW 62A.3-412 and RCW 62A.3-301. See CP at 55.* This is the precise agreement Mrs. Scott and ABC entered upon closing the mortgage loan transaction on May 18, 2012.

Understanding how to read the English language precisely is a second critical key to understanding why the *security follows the note*

doctrine does not mean the security follows the transfer of noteholder status absent a simultaneous transfer of note ownership.

Mrs. Scott's obligation – and the obligation of every mortgage loan borrower – is not simply to pay the Note, as so many of the cases, including *Brown*, misguidedly assert. That assertion is the product of a misunderstanding of the Borrower's obligation caused by inattentiveness to the details of the mortgage loan transaction. Neither is the Borrower's obligation simply to repay the debt. Again, the *precise* agreement every Lender and Borrower enters at the close of a mortgage loan transaction is *the Borrower's agreement to repay the mortgage debt owed to the Lender by paying the monthly note payments to the Noteholder, whether the Noteholder is the Lender or not.* The italicized language in the preceding sentence is the precise mortgage loan agreement that the DOT secures.

Armed with this understanding of the nature of the mortgage loan agreement, the Court can now properly review the arguments contained in the remainder of this brief.

B. *Brown* is not Controlling Authority in This Case.

1. *Brown* does not address Issues Upon Which Plaintiffs' CPA Claim Rests.

As we will prove repeatedly in the remaining pages of this brief, the *security follows the note doctrine* means the DOT follows a transfer of the debt and of the "*beneficial interest in the note.*"

Plaintiffs know the prevailing opinion in this state opposes Plaintiffs' position on the meaning of the *security follows the note doctrine*. But Plaintiffs are unmoved by this knowledge because Plaintiffs also know that the DOT itself (the *Transfer of Rights in the Property Section; Section 13; Section 22; and Section 24*); *Sub-Sections (1) and (3) of RCW 61.24.030; Sub-Section (2) of RCW 61.24.080; Sub-Sections (a), (b), and (g) of RCW 62A.9A-203; Article 1, § 10 of the United States Constitution; Article 1, § 23 of the Washington State Constitution; and the November 14, 2011 Report of the Permanent Editorial Board ("PEB") for the Uniform Commercial Code ("UCC")* all support Plaintiffs' position on the true meaning of the *doctrine*. A true and correct copy of the Report is Exhibit D to the Appendix.

The *Brown* Court did not address any of the above-recited statutory and constitutional provisions. Thus, this Court's consideration of the arguments raised in this brief is not constrained by the holding in *Brown*. This is a case of first impression.

Plaintiffs ask only that each member of the Court approaches the decision of this case with a mind that is open to the *possibility*, however infinitesimal the possibility is in the Court member's mind, that *Brown* was wrongly decided. Honestly do that, and our analysis will convince you.

**2. DOT does not follow transfer of Noteholder Status
Absent transfer of Note Ownership.**

The DOT did not follow Freddie Mac's transfer of the Note to Ocwen. We begin with the simplest methods of proving the point and progress, steadily and methodically, to the recitation of more complex proofs.

a. Plaintiffs' DOT is a contract, and Ocwen is not a party to, or intended third-party beneficiary of, the contract.

ABC originated Plaintiffs' loan⁴ ("Loan") and therefore was the Original Lender. Shortly after originating the Loan, ABC sold it to Freddie Mac. Plaintiffs and Defendants agree on these two points.

Pursuant to Section 13 of the DOT, ABC relinquished the Lender role, and Freddie Mac assumed the *Assignee Lender* role, on the day ABC *sold* the Loan to Freddie Mac:

The covenants and agreements of this Security Instrument shall *bind* (except as provided in Section 20) and *benefit* the *successors* and *assigns* of Lender.
CP at 69.

⁴ The DOT defines the word "Loan" as the *debt evidenced by* the Note. *CP* at 61. This definition proves that the *mortgage debt* and the *Note* are separate pieces of property. *See RCW 62A.3-310(b)(2)* ("if a note . . . is taken for an [mortgage debt] obligation, the [mortgage debt] obligation is suspended to the same extent the [mortgage debt] obligation would be discharged if an amount of money equal to the amount of the instrument [the note] were taken[.]") (bracketed terms added).

The language quoted in the preceding paragraph of this footnote makes sense *only if* the *note* and the *mortgage debt obligation* are *separate pieces of property*. Substitute "note" for "obligation" in the quote. The ridiculous result proves the point: "if a *note* is taken for the *note*, the *note* is suspended to the same extent the *note* would be discharged if an amount of money equal to the amount of the *note* were taken." Gibberish!

Property cannot evidence itself. Understanding this simple fact is the third critical key to understanding why the transfer of noteholder status alone does not carry the DOT with the transfer. Transferring the right to enforce a promissory note does not transfer the debt for which that note has been offered as payment unless a transfer of ownership of the note is part of the transaction.

Hence, after the date on which it sold the Loan to Freddie Mac, ABC's role as Lender permanently ended, unless ABC subsequently became a Successor Lender or an Assignee Lender. *Id.*

1. "Successor Lender" defined.

Washington courts have long held that a *successor in interest* is a person who succeeds to all a predecessor's interests in property. *Puget Sound Machine Depot v. Clapp*, 191 Wash. 410, 412, 71 P.2d 174, 176 (1937); *Green v. Community Club*, 137 Wn. App. 665, 682-683, 151 P.3d 1038, 1046-1047 (2007); *Fidelity Mutual Saving Bank v. Mark*, 112 Wn.2d 47, 52, 767 P.2d 1382 (1989); *Ford v. Nokomis State Bank*, 135 Wash. 37, 46-47, 237 P. 314 (1925); *Southcenter Joint Venture v. Nat'l Democratic Policy Comm.*, 113 Wn.2d 413, 432, 780 P.2d 1282 (1989); *McConnell v. Kaufman*, 5 Wash. 686, 688, 32 P. 782 (1893). Black's Law Dictionary (5th ed. 1979) supports this definition. *Black's*, at 1283-84.

It is undisputed that Freddie Mac retained ownership of the Note and of the underlying mortgage debt when it transferred the Note to Ocwen. Because Ocwen took the Note by transfer and did not become the owner of the mortgage debt or of the Note as a result of the transfer, Freddie Mac remained the Lender under the terms of the DOT after transferring the Note to Ocwen.

2. "Assignee Lender" defined.

An assignee *steps into the shoes of the assignor* and acquires the assignor's entire interest in the subject property. *Estate of K.O. Jordan v.*

Hartford Accident & Indemnity Co., 120 Wn.2d 490, 495, 844 P.2d 403, 407 (1993); *Puget Sound National Bank v. Dept. of Revenue*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994); *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 424, 191 P.3d 866 (2009).

In this case, after transferring the blank-endorsed Note to Ocwen, Freddie Mac retained ownership of the Note, the primary interest in the Note, and ownership of the underlying mortgage debt for which Freddie Mac accepted the Note as payment. Remember the precise security agreement: The DOT secures to the Lender (currently Freddie Mac) repayment of the debt by Mrs. Scott's payment -- to the Noteholder (currently Ocwen) -- of the Note according to its terms.

In other words, while transferring Noteholder status to Ocwen, Freddie Mac never --not for one nanosecond! -- stepped out of its Lender shoes. And if Freddie Mac never stepped out of those shoes, Ocwen could not have stepped into them. Freddie Mac remains the owner of the most important interest in the Note – the *beneficial interest* in the Note payments.

A transfer of *ownership of the debt* and of the *economic benefit of the Note payments for value* concurrently transfers “Secured Party” status (i.e., Beneficiary status) under the DOT (i.e. the *Security Instrument*). *RCW 62A.9A-203(b)(1)*. In simpler terms, the DOT follows a sale of the Note and of the mortgage debt.⁵

⁵ By far the most common way of transferring a debt, the payment for which is represented by a note, is by selling the note. *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d

3. Transfer of Noteholder status, without transfer of Note Ownership, leaves Terms of DOT Unaffected.

The Agreement between Mrs. Scott and ABC (i.e., the Original Lender) – and any subsequent Successor or Assignee Lender -- did not specify the person to whom Mrs. Scott had to make Note payments. Nor could it have.

From the date on which the mortgage loan closed until today, uninterrupted, RCW 62A.3-412 has always dictated the person to whom Mrs. Scott *must* make the Note payments. Moreover, had the DOT mandated that Mrs. Scott make monthly Note payments directly to the Lender (ABC), in addition to giving ABC the power to force Mrs. Scott to violate RCW 62A.3-412 at will, the DOT would have forced Mrs. Scott into an impossible position: Each month she would have been forced to violate either RCW 62A.3-412 or the DOT.

RCW 62A.3-412 mandates that the note issuer (Mrs. Scott in this case) *must* make the note payments to the person entitled to enforce the note. The noteholder is a person entitled to enforce the note. *RCW 62A.3-301*. Therefore, simply by blank-endorsing the Note and delivering it to a

83, 88, 285 P.3d 34 (2012); *Columbia St. Bank v. Canzoni*, 2014 Wash. App LEXIS 1614 * 15; *Blair v. NWTs*, 193 Wn. App 18, 31, 372 P.3d 127 (2016). The DOT secures repayment of the debt by the *economic benefit of the payments required by the note* (i.e., the agreed upon method of repaying the debt).

In this litigation, the right to repayment of the debt and the right to the economic benefit of the payments required by the Note belonged to Freddie Mac *before* and *after* it transferred the right to enforce the Note to Ocwen. These facts are undisputed. Nothing of significance to the Security Agreement (i.e., the DOT) changed when Freddie Mac transferred the blank-endorsed Note to Ocwen. Therefore, Freddie Mac was the Secured Party (i.e., the Beneficiary of the *Security* Instrument (the DOT)) *before* the transfer, and Freddie Mac remained the Secured Party *after* the transfer.

third person, ABC (and all subsequent Successor Lenders and Assignee Lenders) would have been able to force Mrs. Scott either to default on the DOT-mandated requirement to make note payments directly to the Lender or to violate the RCW 62A.3-412 to make note payments to the PETE, a draconian choice.

RCW 62A.3-412 dictates the person to whom Mrs. Scott must make Note payments to pay off the mortgage debt. That person is not determined by any covenant or agreement in the DOT. Thus, a change in the person to whom Note payments must be made *changes nothing* about the DOT agreement. Charts 1 and 2 below graphically illustrate the point.

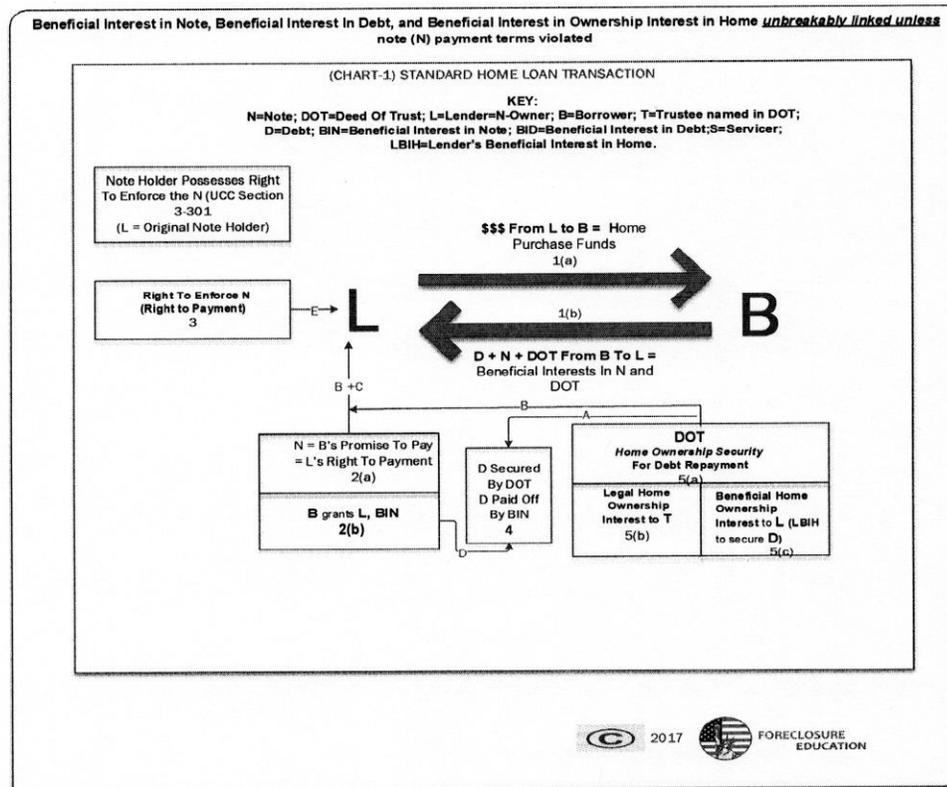


Chart 1 depicts a standard mortgage loan transaction. Line E, which emanates from Box 3, indicates the right to enforce the right to payment belongs to the Lender. At the close of a mortgage loan transaction, the Lender almost always *holds* the note.⁶ The arrow beneath 1(a) shows the Home-purchase funds moving from the Lender (ABC) to the Borrower (Mrs. Scott). The arrow beneath (1)(b) illustrates the mortgage debt, the Note, and the DOT simultaneously moving from Mrs. Scott to ABC.

Box 2(a) points out an obvious fact that is almost always overlooked: From Mrs. Scott's perspective (the Borrower's perspective), the Note represents her promise to pay \$621.20 per month for 360 consecutive months. But from ABC's perspective (the Lender's perspective), that same Note represents the right to the payment of \$621.20 per month for 360 consecutive months. Thus, in more general terms, the *Borrower's promise to pay* (i.e., the Note) equals the *Lender's right to payment* (the same Note).

The \$621.20 Freddie Mac receives from Mrs. Scott each month is the *economic benefit* Freddie Mac derives from its *ownership* of Mrs. Scott's *performance* of her promise to pay \$621.20 each month.⁷ Box 2(b)

⁶ At the close of the mortgage loan transaction, the Lender is almost always in possession of a note made payable to a specific person, and the Lender is that person. Therefore, the Lender is almost always the noteholder at the close of the mortgage loan transaction. RCW 62A.1-201(b)(21)(A).

⁷ The DOT does not secure Mrs. Scott's *promise to pay* \$621.20 each month. It secures Mrs. Scott's *performance* of the promise to pay \$621.20 per month. See *TRANSFER OF RIGHTS IN THE PROPERTY Section of the DOT (CP at 62)*. The *performance* of a promise to pay \$621.20 is the \$621.20 payment. The DOT secures to the Lender the

represents Freddie Mac's (and any subsequent Successor Lender's or Assignee Lender's) *beneficial interest* in the \$621.20 monthly payments required by the Note ("BIN").

Box 4 in Chart 1 shows two things: The DOT secures to the Lender (currently Freddie Mac) repayment of the mortgage debt ("D") by the Borrower (Mrs. Scott) making the payments required by the Note to the Noteholder.

Boxes 5(a), (b), and (c) illustrate a critical point that is never considered in the case law. These boxes show that Mrs. Scott conveyed the ownership interest in the home to the trustee in trust (Box 5(b)) *for the benefit of Freddie Mac*, the current owner of the Note and of the Debt. (Box 5(c)). Therefore, the DOT conveyed the *beneficial interest* in Mrs. Scott's ownership of the home to Freddie Mac as security for Mrs. Scott's obligation to repay the mortgage debt to Freddie Mac by paying the monthly \$621.20 payments to Ocwen (i.e., the *person entitled to enforce the note*).

This point is critical to understanding why the DOT does not follow the transfer of the right to enforce the Note. The security for repayment of the debt is the beneficial interest in the homeowner's ownership interest in the home. *CP* at 62. The DOT transfers the beneficial interest to the Lender at the close of the mortgage loan

payment itself, not the promise to pay (i.e., not the Note). In other words, the DOT secures to the Lender the *economic benefit of the payments*. The *economic benefit of the payments*, not the promise to make the payments, repays the mortgage debt.

transaction. *Id.* That beneficial interest is always tied to the debt because it is the mutually agreed upon method of repaying the debt in the event the homeowner fails to pay the note according to its terms.

Freddie Mac retained the beneficial interest in the homeowner's ownership interest in the home (i.e., Freddie Mac retained the security for repayment of the debt) and ownership of the debt after it transferred the blank-endorsed Note to Ocwen. How do we know Freddie Mac retained these two interests after it transferred the Note to Ocwen?

In *Brown*, the High Court told us that Freddie Mac retained these interests after it transfers the blank-endorsed note to M & T Bank.

The homeowner's ownership interest in the home (i.e., the security for repayment of the debt) is what the trustee sells at a trustee's sale. Let me say that again. The homeowner's ownership interest in the home is what the trustee sells at a trustee's sale. If that interest is sold to a third party, the cash proceeds of the sale, by law (RCW 61.24.080(2)), must be applied "[t]o the obligation secured by the deed of trust[.]"

Since the trustee obviously would not be able to hand the funds to the obligation itself, it must hand the funds to the owner of the obligation that is secured by the DOT. In *Brown*, the Court ruled the proceeds of the trustee's sale (i.e., the monetization of the security for repayment of the mortgage debt) would have been Freddie Mac's property. *Brown*, 184 Wn.2d at 524. Therefore, Freddie Mac retained the beneficial interest in

the homeowner's ownership interest in the home after it transferred the blank-endorsed Note to Ocwen, turning Ocwen into the Noteholder and the PETE.

Clearly, in *Brown*, the security did not follow the transfer of the right to enforce the note (i.e., the transfer of noteholder status). We have just proven, unimpeachably, that the security remained with Freddie Mac after Freddie Mac transferred noteholder status to M & T Bank. More than that, the *Brown* Court stated the observation that Freddie Mac was entitled to sale proceeds as a universal principal; meaning, Freddie Mac would always be entitled to the sale proceeds under the circumstances presented in *Brown*. In essence, in the same case, on the same facts, the *Brown* Court ruled that the security for a note always automatically transfers with the transfer of noteholder status alone (*Brown*, 184 Wn.2d at 536), and the security for a note never transfers, automatically or otherwise, with the transfer of noteholder status alone. *See Brown*, 184 Wn.2d at 524. Both things cannot be true. The truth is the idea that the security follows a transfer of the right to enforce the note is preposterous.

If Ocwen had been the Lender, then Mrs. Scott would have made the monthly payments to pay off the debt that she owed Ocwen directly to the Ocwen. If, on the other hand, Freddie Mac had been the Lender – which is the case before this Court -- then Mrs. Scott would have made the payments to pay off the debt indirectly to Freddie Mac by making the payments to the Noteholder, Ocwen. Either way, Mrs. Scott's Note

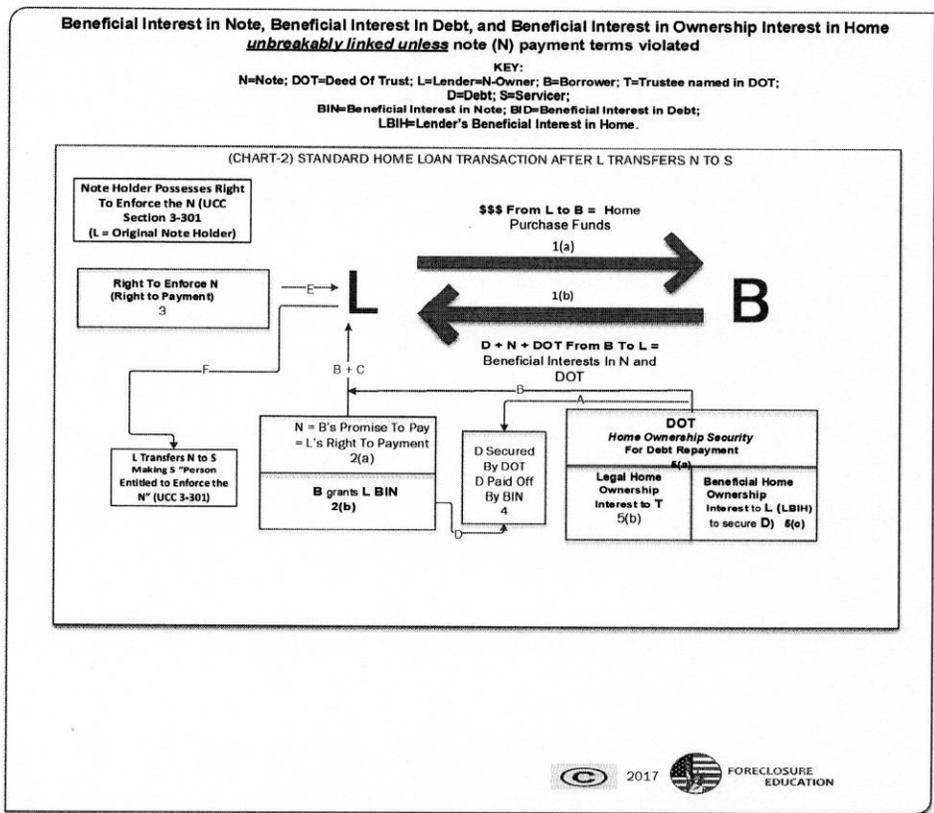
payments would have repaid Freddie Mac, not Ocwen. *See Brown*, 184 Wn.2d at 523; *RCW 61.24.080(2)*.

Box 3 represents the right to enforce Freddie Mac's right to a \$621.20 payment from Mrs. Scott each month.

The right to enforce the right to payment and the right to payment are two different things. As the Court is aware, the right to enforce the right to payment automatically attaches to the right to payment without negotiation between the contracting parties. *Von Hoffman*, 71 U.S. at 552. Additionally, RCW 62A.3-412 also grants the right to enforce the right to payment. Therefore, the right to enforce the right to payment is part of the DOT agreement. *Von Hoffman*, 71 U.S. at 550.

Nothing in the DOT agreement requires Freddie Mac to continue to hold the Note to continue to be the Secured Party. If Freddie Mac continues *to own* the Note -- and, consequently, continues *to own* the *beneficial interest in the Note payments* -- and the mortgage debt (the two interests the DOT secures), then Freddie Mac continues to be the Secured Party (i.e., the *Beneficiary* of the Security Instrument). Thus, transfer of the right to enforce the payment right, without a simultaneous transfer of ownership of the payment right, has no effect on the DOT agreement.

Chart 2 illustrates the point.



In Chart 2, line F, which emanates from L, represents Freddie Mac's transfer to Ocwen of the right to enforce the right to payment (i.e., Freddie Mac's transfer of the blank-endorsed note to Ocwen). Notice, in Ocwen's hands, there is no connection between the interests secured by the DOT (the mortgage debt and the beneficial interest in the payments required by the Note) and the right to enforce the Note. Also, there is no connection between the security provided by the DOT (the beneficial interest in Mrs. Scott's ownership interest in the home) (Box 5(c)) and the right to enforce the Note.

Even though it does not hold the Note, Freddie Mac owns the mortgage debt; the Note, and therefore the beneficial interest in the Note;

and the beneficial interest in Mrs. Scott's ownership interest in the home. The DOT secures *to the Lender* (i.e., the owner of the mortgage debt, the Note, and the beneficial interest in the Note) repayment of the mortgage debt by the beneficial interest in the Note payments. The DOT provides that security by placing the beneficial interest in Mrs. Scott's ownership of the home in the trust *for the benefit of the Lender*. See *TRANSFER OF RIGHTS IN THE PROPERTY Section of the DOT* (CP at 62). Ocwen, in addition to not being a party to the DOT agreement, possesses none of the interests secured by the DOT. How then can Ocwen possibly be the Beneficiary of the DOT?

4. DOT Is a Three-Party Agreement, and Ocwen Is Not One of Those Parties.

Under Washington law, a DOT is a *three-party agreement* – the Borrower (Mrs. Scott), the Lender (or Successor Lender (Freddie Mac) or Assignee Lender), and the Trustee (Quality). *Bain v. Metropolitan Mortgage Grp., Inc.*, 175 Wn.2d 83, 92-93 (2012); *Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 791 (2013); *Brown v. Dept. of Commerce*, 184 Wn.2d 509, 515 (2015). It is undisputed that Ocwen is not Mrs. Scott; Ocwen is not Freddie Mac; and Ocwen is not Quality. Therefore, Ocwen is not a party to the agreement.

In addition, Ocwen is not an intended third-party beneficiary of the DOT agreement. The creation of a third-party beneficiary contract requires the parties to the contract to intend that the promisor assume a direct obligation to the intended third-party beneficiary *at the time they enter*

into the contract. *Postlewait Constr. v. Great Am. Ins. Cos.*, 106 Wn.2d 96, 99, 720 P.2d 805 (1986).

Plaintiffs do not know what ABC or Freddie Mac were thinking when they entered the loan agreement. But when Mrs. Scott entered the agreement, she had no intention of making Ocwen a third-party beneficiary of the DOT. ABC became the original Lender, the Secured Party, and the beneficiary of the DOT at the close of the mortgage loan transaction. These are the only titles Mrs. Scott ever intended to bestow on ABC when she entered into the loan agreement.

a. Ocwen Lacks Standing to enforce Terms of DOT.

Washington courts have consistently held that homeowners lack standing to challenge years-late assignments of DOTs into securitized trusts because homeowners are not parties to, or intended third-party beneficiaries of, the pooling and servicing agreements (“PSAs”) violated by these late assignments. *Deutsche Bank National Trust Co. v. Slotke*, 192 Wn. App. 166, 177 (2016); *U.S. Bank, NA v. LaMothe*, 16 Wash. App. LEXIS 394, *9 (“And to the extent La Mothe is attempting to challenge Liberty's compliance with the pooling and servicing agreement, he lacks standing to do so because he is not a party to the agreement.” (citing *In re Davies*, 565 F. App'x 630, 633 (9th Cir. 2014) as support for the proposition)).

If homeowners lack standing to challenge late assignments of deeds of trust because they are not parties to the PSA agreements that

prohibit such assignments, then, by the same principle, Ocwen lacks standing to foreclose. Ocwen is not a party to the DOT.

5. Article 9A applies to Sales of Promissory Notes Only.

Article 9A (Uniform Commercial Code – Secured Transactions) contains the rules that govern secured transactions. A mortgage loan transaction is a secured transaction that is governed by Article 9A.

RCW 62A.9A-109(a)(3) specifies the type of promissory note transactions Article 9A governs: “(a) **General scope of Article.** Except as otherwise provided in subsections (c) and (d) of this section, this Article applies to: . . . (3) A sale of . . . promissory notes.” (emphasis added). RCW 62A.9A-203 is part of Article 9A. It was not placed in Article 9A by accident. It is in Article 9A because the security follows the Note doctrine means the security follows a sale of the Note.

6. Brown Court applied RCW 62A.9A-203(g) to Facts, though Freddie Mac did not Sell Note to MTB.

In *Brown*, Freddie Mac did not sell the promissory note to M & T Bank (“MTB”). Yet the *Brown* Court applied RCW 62A.9A-203(g) to the facts in *Brown*. *Brown*, 184 Wn.2d at 528-529. This is yet another sign of the *Brown* Court’s confusion about the meaning of the security follows the note doctrine.

The *Brown* Court erroneously applied RCW 62A.9A-203(g). And, the trial court, following the *Brown* Court’s lead, erroneously applied the doctrine in this case.

7. Article 9A Does Not Apply to Assignment of Note for Purpose of Collection.

Freddie Mac did not transfer Plaintiffs' Note to Ocwen *for value*. It temporarily transferred the Note to Ocwen for the purpose of enabling Ocwen to collect the outstanding mortgage debt. Pursuant to RCW 62A.9A-109(d)(5), Article 9A does not apply to the assignment of a promissory note for the purpose of collection.

8. RCW 62A.9A-203 supports Plaintiffs' position.

RCW 62A.9A-203(g) reads as follows:

(g) **Lien securing right to payment.**⁸ 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.

The provision contains three terms of art: *attachment*, *security interest*, and *right to payment*. You cannot uncover the true meaning of RCW 62A.9A-203(g) without first learning the meaning of these three terms of art and then substituting their respective meanings for the terms in RCW 62A.9A-203(g).

a. Right to Payment.

We already know the term “right to payment” references the promissory note viewed from the perspective of the *note owner*. That leaves the terms “security interest” and “attachment.”

b. Security Interest.

⁸ The term “right to payment” refers to the promissory note *viewed from the note owner's perspective*. Hence, just from the terms that the UCC's creators use to explain the *security follows the Note doctrine*, every truly knowledgeable reader of the provision instantly knows the doctrine relates to the interests of the *owner* of a promissory note.

In relevant part, “Security Interest” is defined in RCW 62A.1-201(b)(35) as any interest of a *buyer* of a promissory note in a transaction that is *subject to Article 9A*. Instantly, before we go any further in the analysis, we know Freddie Mac’s transfer of the Note to Ocwen does not fall within the boundaries of RCW 62A.9A-203(g), the codification of the common-law *security follows the note doctrine*.

How do we know? The transfer was not subject to Article 9A because it did not involve the *sale* of a promissory note. See RCW 62A.9A-109(a)(3). And Ocwen did not *buy* the Note in a transaction that was *subject to Article 9A*. See RCW 62A.1-201(b)(35). Ocwen did not buy the Note. So, it never acquired a “security interest” in the Note. Therefore, in Ocwen’s hands, the Note is “unsecured.”

c. Attachment.

Finally, the term “attachment” is defined in RCW 62A.9A-203(a). The definition contains five terms of art: *security interest*, *attaches*, *collateral*, *enforceable*, and *debtor*. It is impossible to figure out what the word “attachment” means in 9A-203(a) *and (g)* without figuring out the meaning of these five terms of art. We have already defined the term “security interest.” That leaves *collateral*, *attaches*, *enforceable*, and *debtor*.

“Collateral” is defined in RCW 62A.9A-102(a)(12)(B) as a *promissory note that has been sold*. The term “enforceable” is defined in RCW 62A.9A-203(b) as “a security interest (i.e., any interest of a *buyer* of

a promissory note in a transaction subject to Article 9A is “enforceable” against the *debtor* (the seller of a promissory note (RCW 62A.9A-102(a)(28)(B)) and third parties with respect to the collateral if, and only if, value has been given for the security interest.

How many times must one see the words “seller,” “buyer,” “sold,” “sale,” and “for value” associated with the analysis of RCW 62A.9A-203(g) before it inescapably clear that RCW 62A.9A-203(g) applies only to the sale of secured promissory notes?

Here is an unfiltered, correct analysis of RCW 62A.9A-203(g).

RCW 62A.9A-203(a) states a *security interest* (ownership interest (See RCW 62A.1-201(b)(35)) attaches to *collateral* (a promissory note that has been sold (RCW 62A.9A-102(a)(12)(B))) when the *ownership interest* in the note becomes enforceable against the *debtor* (the seller of the note (RCW 62A.9A-102(a)(28)(B))).

RCW 62A.9A-203(b) indicates that a *security interest* (ownership interest (RCW 62A.1-201(b)(35)) in *collateral* (a promissory note that has been sold (RCW 62A.9A-102(a)(12)(B))) becomes enforceable against the the debtor (the seller of a note (RCW 62A.9A-102(a)(28)(B)) the instant three conditions have been met: (1) value has been given for the note (RCW 62A.9A-203(b)(1)); (2) the seller has rights in the note or the power to transfer rights in the note to a purchaser (RCW 62A.9A-203(b)(2)); and (3) either (a) the *debtor* (the seller of the note (RCW 62A.9A-102(a)(28)(B)) has signed a *security agreement* (a *security*

agreement is an agreement that creates or provides for a security interest (RCW 62A.9A-102(a)(74)) that provides a description of the note (RCW 62A.9A-203(b)(3)(A)), or (b) pursuant to the terms of the *debtor's security agreement*, is possessed by someone other than the *secured party* (the purchaser of the note (RCW 62A.9A-102(a)(73)(D)) under RCW 62A.9A-313 solely for the purchaser's benefit (RCW 62A.9A-203(b)(3)(B)).

Stated in simpler terms, the security follows a sale of the Note.

9. PEB's Analysis supports Plaintiffs' Position.

The Permanent Editorial Board for the UCC ("PEB") provides the most authoritative interpretations of the meaning of UCC provisions of any organization in the country. The PEB issues *the* official commentaries regarding the meaning of UCC provisions.

On November 14, 2011, the PEB issued an official commentary concerning four questions related to mortgage loan transactions. The *Brown* Opinion references this Report numerous times and calls the Report, correctly, "authoritative." *Brown*, 184 Wn.2d at 524.

The third of four questions addressed in the Report is "What is the Effect of Transfer of an Interest in a Mortgage Note on the Mortgage Securing It?" The litigants herein have asked this Court to decide the same question. The PEB answers the question by stating that if a secured note is *sold*, the ownership interest the note purchaser acquires in the note automatically gives the note purchaser an ownership interest in the

security for the note. That is, the security follows the sale of the note. *PEB Report*, at 12. This passage from the Report is in perfect harmony with Plaintiffs' analysis of RCW 62A.9A-203(a), (b), and (g). It does not follow the Note when the note owner simply transfers the note to a transferee (Ocwen in this case) for the purpose of empowering the transferee to collect the note owner's debt. *RCW 62A.9A-109(d)(5)*.

No doubt much of the confusion is caused by the failure of many courts to recognize the difference between the mortgage debt and the note that represents repayment of the mortgage debt. They write about the two pieces of property as though they are the same piece of property.⁹ They are not the same piece of property. Debt, unlike a promissory note, can only

⁹ *Carpenter v. Longan*, 83 U.S. 271, 275 (1873) (in an appeal from the Supreme Court of Colorado Territory, the United States Supreme Court stated: "The transfer of the note carries with it the security, without any formal assignment or delivery, or even mention of the latter."); *Armour Fertilizer Works v. Zills*, 177 So. 136, 138 (Ala. 1937) ("when the note is secured by a mortgage, such mortgage follows the note"); *Holmes v. McGinty*, 44 Miss. 94, 1870 WL 4406, at *4 ("[T]he mortgage . . . follows the debt as an incident, and is a security for whomsoever may be the beneficial owner of it."); *Lagow v. Badollet*, 1 Blackf. 416, 1826 WL 1087, at *3 (ind. 1826) ("a mortgage . . . follows the debt into whose hands soever it may pass"). *Bremer County Bank v. Eastman*, 34 Iowa 392, 1872 WL 254, at *1 (Iowa 1872) ("The transfer of the note, secured by the mortgage, carried the mortgage with it as an incident to the debt, and the indorsee of the note could maintain an action in his own name, to foreclose the mortgage without any assignment thereon whatever."). *Southerin v. Mendum*, 5 N.H. 420, 1831 WL 1104, at *7 (N.H. 1831) ("When a mortgagee transfers to another person the debt which is secured by the mortgage, he ceases to have any control over the mortgage. . . . And we are of the opinion, that the interest of the mortgagee passes in all cases with the debt, and that it is not within the statute of frauds, because it is a mere incident to the debt, has no value independent of the debt, and cannot be separated from the debt."); *In re Kennedy Mort. Co.*, 17 B.R. 957, 966 (Bankr. D. N.J. 1982) ("Anyone interested in acquiring an interest in the mortgage would be obliged to obtain an interest in the debt."). *Dixie Grocery Co. v. Hoyle*, 204 N.C. 109, 167 S.E. 469 (1933) ("The mortgage follows the debt."); *Zorn v. Van Buskirk*, 111 Okla. 211, 239 p. 151 (1925) ("the mortgage follows the note"); *In re Miller*, No. 99-25616JAd, 2007 WL 81052, at *6 & n.7 (Bankr. W.D. Pa. Jan. 9, 2007) (citing and quoting with approval gray, mortgages in Pennsylvania at § 1-3 (1985) ("the mortgage follows the note")).

Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage Market (ASF White Paper Series Nov. 16, 2010). *App.* at ____.

be owned, not held. There is no “debt holder” concept that corresponds to the “noteholder” concept. And for a debt that is evidenced by a note, the most common way to transfer the debt, other than by gift, is by *selling* the note that evidences it.

Freddie Mac did not sell the Note to Ocwen. So, the Note is unsecured in Owen’s hands.

10. Freddie Mac, the Lender, Is the Beneficiary of the DOT.

Universally, the beneficiary of a trust is the person or person entitled to the property the trust distributes.¹⁰ As a result of this universal observation about trust beneficiaries, this Court can determine the Beneficiary of Plaintiffs’ DOT with 100% accuracy by answering four questions: (1) What is the purpose of the trust; (2) What property has been placed in the trust to achieve the trust purpose; (3) what is the process by which the trust property will be distributed to achieve the trust purpose; and (4) who will receive the benefit of the fulfillment of the purpose of the trust. The person who receives the *benefit* of the fulfillment of the Trust purpose is, ipso facto, the Beneficiary of Mrs. Scott’s trust.

a. Trust Purpose

¹⁰ *Rock Springs Land & Timber, Inc. v. Lore*, 2003 Wyo. 152, 75 P.3d 614 (2003); *In re Estate of Parsons*, 122 Wis. 2d 186, 361 N.W. 2nd 687 (1985); *Hemphill v. Aukamp*, 164 W. Va. 368, 264 S.E. 2nd 163 (1980); *Rafalko v. Georgiadis*, 290 Va. 394, 777 S.E. 870 (2015); *Proctor v. Woodhouse*, 127 Vt. 148, 241 A.2nd 781 (1968); *Flake v. Flake (In re Estate of Flake)*, 2003 UT 17, 71 P.3d 589; *Sayers v. Baker*, 171 S.W. 2nd 547, 1943 Tex. App. LEXIS 363; *Cartwright v. Jackson Capital Partners, Limited Partnership*, 478 S.W. 3rd 596, 2015 Tenn. App. LEXOS 361; 2005 SD 51, 696 N.W.2D 553; *Floyd v. Floyd*, 365 S.C. 56, 615 S.E. 2d 465; *Seattle First Nat’l Bank v. Crosby*, 42 Wn.2nd 234, 254 P. 2nd 732 (1953); *Fowler v. Lanpher*, 193 Wash. 308, 75 P.2d 132 (1938); *Navlet v. Port of Seattle*, 164 Wn.2d 818, 194 P.3d 221 (2008).

In relevant part, the TRANSFER OF RIGHTS IN THE PROPERTY Section of the DOT provides: “This Security Instrument *secures to Lender* (i) the *repayment of the Loan*, and all renewals, extensions and modifications of the Note; and (ii) the *performance* of Borrower’s covenants and agreements under this Security Instrument and the Note.” *TRANSFER OF RIGHT IN THE PROPERTY Section of DOT (CP at 62).*

The purpose of the trust is to secure *to the Lender* (Freddie Mac) repayment of the Loan *by Mrs. Scott making monthly Note Payments to the Noteholder.*

b. Property placed in Trust to Fulfill Trust Purpose.

Plaintiffs placed the property located at 1210 West 25th Street, Vancouver, WA 98660 in the trust to fulfill the trust purpose.

c. Process by Which Trust Property Will Be Distributed to Fulfill Trust’s Purpose

The process by which the property must be distributed to achieve the trust’s purpose is spelled out in detail in Section 22 of the DOT.

d. Recipient of Distribution of Trust Property.

The DOT names the intended recipient of the distribution of trust property with unmistakable clarity: “This Security Instrument secures *to Lender*” *CP at 254.* The word *Lender* is not defined in the DOT.

Therefore, it has its ordinary meaning, which can be determined by reference to a dictionary. *Black’s Law Dictionary* (5th ed. 1979) defines

the word “Lender” as “He from whom a thing or money is borrowed.”
Black’s at 812.

Pursuant to the last sentence of the second paragraph of Section 13 of the DOT, the DOT also provides security to *Successors* and *Assigns* of the *Lender*. *CP* at 69. Consequently, by the terms of the DOT, only three possible categories of persons qualify as potential “beneficiaries” (i.e., potential secured parties) – a *Lender*, a *Successor Lender*, and an *Assignee Lender*. Ocwen does not fit into any of these three categories; Accordingly, Ocwen is not secured and may not lawfully foreclose.

Freddie Mac is the “Secured Party” and, consequently, the Beneficiary of the DOT.

11. Trial Court Failed to Apply RCW 61.24.030(3).

Under RCW 61.24.030(3), for the trustee to conduct a lawful trustee’s sale, a default in the obligation secured by the DOT, which by the terms of the DOT makes operative the power to sell the property, must have occurred. Did such a default occur in this case? By dismissing the case, the trial Court implicitly answered that question affirmatively. But it did so without examining the relevant section of the DOT – Section 22.

The Court’s failure to compare the relevant terms of Section 22 to the material facts in this case violated RCW 61.24.030(3), the third *requirement* of a lawful trustee’s sale. This violation of a requisite to a lawful trustee’s sale, standing alone, invalidates the dismissal in this case.

C. Trial Court Erred by Ruling Ocwen Lawfully Appointed Quality the Successor Trustee.

RCW 61.24.010(2) authorizes the *beneficiary* to appoint a successor trustee. Ocwen is not the Beneficiary; Freddie Mac is. Ocwen had no lawful authority to appoint Quality the successor trustee. Consequently, Quality had no lawful authority to conduct a non-judicial foreclosure proceeding. The unlawful appointment makes unlawful and deceptive every action Defendants have taken in the foreclosure proceeding.

D. RCW 61.24.030(7)(a) is Unconstitutional Impairment of DOT Contract.

Paragraph 22 of the DOT requires the lender, the successor lender, or the Assignee lender to be the *holder and owner of the note* and *owner of the underlying mortgage debt obligation* at the commencement of a foreclosure action. *CP* at 72. Ocwen holds the note but does not own it. Freddie Mac owns the note and underlying mortgage debt but does not hold the Note.

Freddie Mac cannot sell the property because it cannot declare the note in default (*i.e.*, Freddie Mac is not the PETE), and Ocwen cannot enforce rights under the DOT because Ocwen is not the Lender, is not a Successor Lender, and is not an Assignee Lender (*i.e.*, Ocwen is not a party to the underlying DOT contract). *See Official Comment 3 to RCW 62A.3-310.*

Notice, the UCC comment doesn't contemplate the possibility that the holder of a note, who does not own the note he holds, has the right to enforce the underlying DOT contract. How could he have such a right? He is not a party to the DOT contract.

RCW 61.24.030(7)(a), as amended on June 7, 2018, substantially impairs the terms of the DOT for no reason. When a statutory provision *substantially* impairs, let alone *destroys*, a private contract, then two conditions must be met for the statutory provision to be constitutional: (1) the State must have a significant and legitimate public purpose behind the legislation, and (2) the change in the rights of the parties must be reasonable in relation to the public purpose.

Prior to June 7, 2018, the DTA's requirements were consistent with the requirements of other Washington statutory provisions and with the provisions of the DOT. The legislature has articulated no public purpose, significant and legitimate or otherwise, for the June 7th changes in the DTA. How could there be a legitimate and significant public purpose when the change in RCW 61.24.030(7)(a) has created irreconcilable conflicts between RCW 61.24.030(7)(a) and RCW 61.24.030(3), RCW 61.24.080(2), RCW 62A.3-310, RCW 62A.9A-203(a), (b), and (g), and controlling sections of the DOT.

The rights to determine to whom one's property is transferred and on what terms the property is transferred are two of the most sacred

private property rights. Washington homeowners no longer have the right to make those determinations in their private DOT contracts.

RCW 61.24.030(7)(a), as presently worded, violates Article 1, § 10 of the United States Constitution and Article 1, § 23 of the Washington Constitution. *Ketcham v. King County Medical Serv. Corp.*, 81 Wn.2d 565 (1972); *Housing Auth. of Sunnyside v. Sunnyside Valley Irrigation Dist.*, 112 Wn.2d 262, 274, 772 P.2d 473 (1989); *Fed'n of Employees v. State*, 127 Wn.2d 544 (1995).

V CONCLUSION

For all the foregoing reasons, Plaintiffs request that the Court reverse the trial court's dismissal ruling and remand the case to the trial court with instructions to reinstate Plaintiffs' CPA claim and to grant summary judgment that Ocwen is not the Secured party or Beneficiary under the terms of the DOT.

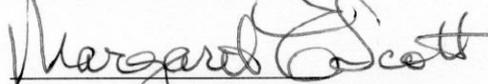
Dated this 19th day of February 2019 at Ridgefield,
Washington.

Respectfully Submitted

FLOYD SCOTT


Floyd Scott, Plaintiff, Pro se

MARGARET SCOTT


Margaret Scott, Plaintiff,
Pro se

APPENDIX

Appendix

Pages 1-21

EXHIBIT A

AFFIDAVIT OF SERVICE

State of Washington

County of Clark

Superior Court

Case Number: 17-2 01253-3

Plaintiff:

Scott, Floyd: et al.

vs.

Defendant:

Ally Bank Corp: et al.

For:

Floyd Scott
33403 NW Pekin Ferry Drive
Ridgefield, WA 98642

Received by Cavalier Courier & Process Service to be served on **Federal Home Loan Mortgage Corporation, 8200 Jones Branch Drive, McLean, VA 22102.**

I, Ben Davis, being duly sworn, depose and say that on the **30th day of May, 2017 at 1:29 pm, I:**

Served Summons; Plaintiffs' Complaint; Plaintiffs' Declaration in Support of Motion for Preliminary Injunction; Plaintiffs' Motion for Preliminary Injunction; Plaintiffs' Motion for Preliminary Injunction; Declaration of Delivery; Exhibit A-G to Jacqueline Neal-Jackson as Legal Administrator of Federal Home Loan Mortgage Corporation. Service occurred at 8200 Jones Branch Drive, McLean, VA 22102.

I certify that I am a natural person over the age of eighteen, not a party to or otherwise interested in the subject matter in controversy, and am authorized to serve process in accordance with the laws of the jurisdiction where service was made.

Subscribed and sworn to in my state and county by the affiant who is personally known to me.

TJ Cahill
NOTARY PUBLIC

Date: 5/31/2017

TIMOTHY JOHN CAHILL, JR
NOTARY PUBLIC
REGISTRATION # 7889600
COMMONWEALTH OF VIRGINIA
MY COMMISSION EXPIRES
APRIL 30, 2020

Ben Davis

Ben Davis
Process Server

Cavalier Courier & Process Service
823-C South King Street
Leesburg, VA 20175
(703) 431-7085

Our Job Serial Number: CAV-2017004178



EXHIBIT B

AFFIDAVIT OF SERVICE

STATE OF **WASHINGTON**

COUNTY OF **CLARK**

SUPERIOR

COURT

PLAINTIFF/PETITIONER: **FLOYD and MARGARET SCOTT, husband and wife,**
VS.

DEFENDANT/RESPONDENT: **ALLY BANK CORP., et al**

CAUSE NUMBER **17-2-01253-3**

ATTORNEY **PRO SE**

DATE FILED **05/26/2017**

DEPT. **CIVIL**

DOCUMENTS SERVED: **SUMMONS; COMPLAINT; NOTE FOR THE MOTION CALENDAR; MOTION FOR PRELIMINARY INJUNCTION; PLAINTIFF'S DECLARATION IN SUPPORT OF MOTION; DECLARATION OF DELIVERY**

Greg Schermerhorn

, being first duly sworn, depose and say: that I am over the age of 18 years and not a party to this action, competent to be a witness therein and that within the boundaries of the state where service was effected, I was authorized by law to perform said service.

That on **June 14th, 2017@12:18pm**, at the address of: **505 Union Ave SE, #120, Olympia, WA 98501**

, affiant duly served **Please see above**

in the above entitled action upon **OCWEN HOME LOAN SERVCING, LLC c/o CT Corporation System, Inc** by then and there personally delivering **one (1)** set(s) of true and correct copies thereof into the hands of and leaving same with **Michelle Rowe, as SOP Office Manager who stated she was authorized and designated to accept on behalf of CT Corporation System, Registered Agent**

Descriptions: Age **37** Sex **Female** Race **White** Height **5'6"** Weight **230** Hair **Brown** Beard **No** Glasses **Yes**

Additional Comments:

SIGNED and SWORN to or AFFIRMED before me this **22** day of **June**, 20**17**.



Notary Stamp Here

Damon J. Funk
Notary Signature

Damon J. Funk
Name Printed

January 27, 2019
My Appointment Expires

Process Server

Greg Schermerhorn-Thurston County Reg. #17-0224-01

STING RAY LEGAL SERVICES, INC.

17714 149TH LANE SE, UNIT A

RENTON, WA 98058

JOB INVOICE #: **17-9297-\$75.00**

REFERENCE: **SCOTT vs ALLY BANK CORP., et al**

A-2

EXHIBIT C

AFFIDAVIT OF ATTEMPTED SERVICE WITH DUE DILIGENCE

STATE OF **WASHINGTON** COUNTY OF **CLARK** SUPERIOR COURT

PLAINTIFF/PETITIONER: **FLOYD AND MARGARET SCOTT, husband and wife**
VS.

DEFENDANT/RESPONDENT: **ALLY BANK CORP., et al**

CAUSE NUMBER **17-2-01253-3**

ATTORNEY **PRO SE**

DATE FILED **5/25/2017**

DOCUMENTS ATTEMPTED TO BE SERVED Summons; Complaint; Note for Motion Calendar; Motion for Preliminary Injunction; Plaintiff's Dec. in support of Motion; Declaration of Delivery

Timofey A. Samoylenko, being first duly sworn, depose and say: that I am over the age of 18 years and not a party to this action, competent to be a witness therein and that within the boundaries of the state where service was effected, I was authorized by law to perform said service.

Received by **Greg Schermerhorn** on **05/31/2015**. I hereby affirm that I attempted to serve **Mortgage Electronic Registration Systems, Inc.** at **93 South Jackson Street, Dept 37265, Seattle, WA 98104**

Service Attempts: Service was attempted on:

- | | | |
|-----|----------------------------|---|
| (1) | 5/31/2017 at 1:17pm | Bad address, empty office space, formerly "Earth Mail" virtual office mailing depot center |
| | <small>DATE/TIME</small> | <small>NOTES</small> |
| (2) | | this entity moved over two years ago, and left no forwarding address, please see SOS report |
| | <small>DATE/TIME</small> | <small>NOTES</small> |
| (3) | | |
| | <small>DATE/TIME</small> | <small>NOTES</small> |
| (4) | | |
| | <small>DATE/TIME</small> | <small>NOTES</small> |
| (5) | | |
| | <small>DATE/TIME</small> | <small>NOTES</small> |
| (6) | | |
| | <small>DATE/TIME</small> | <small>NOTES</small> |

Non-Service: After due search, careful inquiry and diligent attempts at the address(es) listed above, I have been unable to effect service of process upon the person/entity being served because of the following reason(s):

- | | | | |
|--|--|---|---|
| <input checked="" type="checkbox"/> Unknown at Address | <input checked="" type="checkbox"/> Moved, Left no Forwarding | <input checked="" type="checkbox"/> Service Cancelled by Litigant | <input checked="" type="checkbox"/> Unable to Service in Timely Fashion |
| <input type="checkbox"/> Subject is Deceased | <input type="checkbox"/> Name not on Mailbox | <input type="checkbox"/> Electricity is Off | <input type="checkbox"/> Pegged Door - No Activity |
| <input type="checkbox"/> Address Does Not Exist | <input checked="" type="checkbox"/> Additional Comments: Entity listed no longer at this address | | |

JOB INVOICE #: 17-9297-\$75.00

REFERENCE: SCOTT vs ALLY BANK CORP., et al

I have made diligent search and inquiry to discover the current residence of MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC

The following databases were used to locate subject:

<input checked="" type="checkbox"/>	Person Search/Skip Trace	<u>IRB Person Search indicates governing person is Robert Jacobsen in Lafayette, CA</u>
<input checked="" type="checkbox"/>	Vehicle Registration	<u>IVIPS SEARCH available upon request.</u>
<input type="checkbox"/>	County Assessor Search	
<input type="checkbox"/>	Voter Registration Search	
<input checked="" type="checkbox"/>	Secretary of State Search	<u>The report reveals that the entity listed above became inactive on 9/25/2009</u>
<input checked="" type="checkbox"/>	Department of Revenue Search	<u>Subject has inactive account as of 2004 with Department of Revenue for business entity named above. Address listed is 1818 Library St, Reston, VA</u>
<input checked="" type="checkbox"/>	Department of Licensing Search	<u>Subject has not obtained any additional permits, credentials, or licenses in Washington state.</u>
<input type="checkbox"/>	Labor and Industry Search	
<input type="checkbox"/>	Death Search	
<input type="checkbox"/>	Federal Prison Record Search	
<input checked="" type="checkbox"/>	County Jail Roster Search	<u>Subject not listed in King County Jail Roster.</u>
<input type="checkbox"/>	Military Status Search	
<input type="checkbox"/>	Email Address Search	
<input type="checkbox"/>	Employment Search	
<input type="checkbox"/>	Statewide Directory Search	
<input type="checkbox"/>	Reverse 411 Search	
<input checked="" type="checkbox"/>	Postal Trace	<u>Available upon request.</u>

Additional Comments:

The defendant (MERS) cannot be located for personal service. A variety of databases were utilized in order to locate and personally serve the above named business entity without success. The subject owner is not believed living and working within the state of Washington. However, more likely, he may be concealing his true location in order to avoid service of process. All reasonable diligence to locate and personally serve this defendant in a timely manner, within the state of Washington has been exhausted. This necessitates an alternative method of service and the statute of limitations or hearing date to be tolled or extended.

SIGNED and SWORN to or AFFIRMED before me this 22 day of June, 2017.

 Notary Stamp Here

Damon J. Funk
Notary Signature

Damon J. Funk
Name Printed

Jan 27, 2019
My Appointment Expires


Process Server
Timofey A. Samoylenko-King County Reg. #1317869

STING RAY LEGAL SERVICES, INC
17714 149TH LANE SE, UNIT A
RENTON, WA 98058
JOB INVOICE #: 17-9297-\$75.00
REFERENCE: SCOTT vs ALLY BANK CORP., et al

EXHIBIT D

**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.

Certificate of Delivery

I, Margaret Scott, hereby certify that on the 19th day of February 2019 a copy of the forgoing documents were sent to the counsel of record listed below via USPS.

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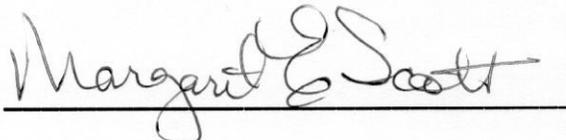
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A handwritten signature in cursive script that reads "Margaret E. Scott". The signature is written in black ink and is positioned above a solid horizontal line.

Margaret E. Scott

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