

FORECLOSURE OFFENSE AND DEFENSE SEPARATION OF MORTGAGE NOTE

It might seem like a strange idea but it has been in the Uniform Commercial Code for Years and its predecessor. The usual rule is that the mortgage follows the note and the note follows the mortgage. But the UCC provides an exception for the operation of the parties intent, and by operation of law by inference.

Start with this Statute from Florida which has its counterpart in most of the country:

701.02 Assignment not effectual against creditors unless recorded and indicated in title of document.–

(1) No assignment of a mortgage upon real property or of any interest therein, shall be good or effectual in law or equity, against creditors or subsequent purchasers, for a valuable consideration, and without notice, unless the assignment is contained in a document which, in its title, indicates an assignment of mortgage and is recorded according to law.

So what you say? Well in most cases the note was assigned and the mortgage wasn't. At least it wasn't recorded. And in most cases as the loan moves up the securitization chain several things happens. Instead of there being a specific assignment of a specific loan, note or mortgage, there is a general description of the pool and possibly some identification of the loan date or parties but not assignment, endorsement, allonge or actual transfer.

So the first thing that happens in securitization of the loan is that the named payee on the note gets (a) paid in full and (b) paid a fee for the “rental” of its charter or license in order to facilitate an unchartered, unregistered entity or person to enter into a transaction that LOOKS like a residential loan transaction but is actually a scheme to issue unregulated securities to unsuspecting (or suspecting) investors under false pretenses. So if the loan is for \$100,000, the payee on the note gets the full \$100,000. Plus he usually gets \$2500 “under the table” (TILA violation).

The point here is that the note is paid and without a RECORDED assignment, the mortgage does NOT travel with the note even if an assignment was intended. And the reason is the same as the reason for recording a deed. Without that requirement a person could issue warranty deeds to 100 people on the same property. In fact, as was done in many cases with the movement of these loans, it would be the equivalent of selling the deed to the same property 100 times by a grantor who has no title.

The reason this is so important, is that if the mortgage has been severed from the note, then the obligation, if it exists at all has been converted from a secured obligation to an unsecured obligation, thus making foreclosure impossible. No mortgage can be foreclosed without the mortgagee producing the note and stating that it is in default and showing (proving) that this is so. **In securitization, this is NEVER possible.**

Foreclosure Defense and Chain of Title

Here is where foreclosure defense can begin to chip away at a bank’s claim on your property. In order for a mortgage, deed of trust or promissory note to be

valid, it must have what is known as “perfection” of the chain of title. In other words, there must be a clear, unambiguous record of ownership from the time you signed your papers at closing, to the present moment. Any lapse in the chain of title causes a “defect” in the instrument, making it invalid.

In reality, lapses occur frequently. As mortgages and deeds began to routinely be bought and sold, the sheer magnitude of those transfers made it difficult, costly and time-consuming for institutions to record every transaction in a county records office. But in order to have some method of record-keeping, the banks created the

[Mortgage Electronic Registration System](#) (MERS), a privately held company that tracks the servicing rights and ownership of the nation’s mortgages. The MERS holds more than 66 million American mortgages in its database.

When a foreclosure is imminent, MERS appoints a party to foreclose, based on its records of who owns the mortgage or deed of trust. But some courts have rejected the notion that MERS has the legal authority to assign title to a particular party in the first place. A court can decide MERS has no “standing,” meaning that the court does not recognize its right to initiate foreclosure since MERS does not have any financial interest in either the property or the promissory note.

And since MERS has essentially bypassed the county record-keeping system, the perfection of chain of title cannot be independently verified. This is where a foreclosure defense can gain traction, by questioning the perfection of the chain of title and challenging MERS’ legal authority to assign title.

Some courts may also challenge MERS' ability to transfer the promissory note, since it likely has been sold to a different entity, or in most cases, securitized (pooled with other loans) and sold to an unknown number of entities. In the U.S. Supreme Court case *Carpenter v. Longan*, it was ruled that where a promissory note goes, a deed of trust must follow. In other words, the deed and the note cannot be separated.

If your note has been securitized, it now belongs to someone other than the holder of your mortgage. This is known as bifurcation — the deed of trust points to one party, while the promissory note points to another. Thus, a foreclosure defense claims that since the relationship between the deed and the note has become defective, it renders the deed of trust unenforceable.

Your promissory note must also have a clear chain of title, according to the nation's [Uniform Commercial Code](#) (UCC), the body of regulations that governs these types of financial instruments. But over and over again, borrowers have been able to demonstrate that subsequent assignments of promissory notes have gone unendorsed. In fact, it has been standard practice for banks to leave the assignment blank when loans are sold and/or securitized and, customarily, the courts have allowed blank assignment to be an acceptable form of proof of ownership. However, when the Massachusetts Supreme Court in *U.S. Bank v. Ibenes* ruled that blank assignment is not sufficient to claim perfection, it provided another way in which a foreclosure can be challenged.

This is my first diary entry and I'm not going to hide the fact that this information comes from personal experience and need. When I made mortgage payments to Chase Home Finance, LLC, it claimed ownership of my mortgage note, also known

as a deed of trust note, or 'loan' note (hereafter "Note"). During the same time period that Chase claimed ownership of my Note, so did Fannie Mae. However, I soon discovered that *neither* Chase nor Fannie Mae owned my Note. It was, and still is, owned by a mortgage backed security trust (MBST) which purchased my Note from neither Chase nor Fannie Mae but from yet another purported owner of my Note. In my extended diary I give the UCC statute common to *all* states and also recent case citations (one is less than two weeks old) that you, your attorney or your friend's attorney will need for a successful "show me the note" defense. Yes! It works!

You need to know this; that the term, "show me the note" is a misnomer. Under the Uniform Commercial Code (UCC), Section 309 of Article 3 (UCC 3:309) <http://www.law.cornell.edu/...> the Note owner does not need to show a Note, whether original or a copy, in order to enforce it "if" it once had possession of the Note and now claims to have lost it or that it was accidentally destroyed. That, however, is not the problem that banks face. The problem banks are having with the "show me the note" defense is proving that they have a right to enforce the Note, even if they can produce a copy. The UCC, at 3:309(2), says that the bank must 'prove' its right to enforce the Note. You ask the bank, "Where did you get that Note? Show me the endorsements". The bank must show the 'chain of title' from the original Lender bank to itself, and that it *cannot* do. Almost always, the Lender sold your Note to Fannie Mae the day it was signed which then, within days, sold it to another entity and so on until it ended up in a "mortgage backed security trust", or MBST. Fannie Mae no longer owns your Note, nor does MERS. The United States Bankruptcy Court for the Eastern District of California issued a ruling dated May 20, 2010, in the matter of *In re: Walker*, Case No. 10-21656-E-

11, [http://www.ultimatebk.com/...](http://www.ultimatebk.com/) stating that “Any attempt to transfer the beneficial interest of a trust deed without ownership of the underlying note is void under California law.” Though this conclusion was based upon California law it is the same UCC and real estate law as most other states have adopted. The *In re: Walker* court states that the Note and the mortgage are inseparable, and that an assignment of the Note carries the mortgage with it, “while an assignment of the latter [the mortgage] alone is a nullity” (most foreclosing companies claim ownership of the mortgage only, not the note making the mortgage a *nullity*). Meaning; if a bank claims to own the mortgage but doesn’t also own your Note, it *cannot* foreclose. This concept is from ancient English Common Law codified by most states as the UCC, for Notes (a Note is personal property), and also from real estate law and practice for the mortgage (a mortgage is not personal property, it is real property).

A more recent California case, *Gomes v Countrywide Home Loans, et al.*, D057005, Ct. Appeals CA, 4th Dist., Div One, February 18, 2011, [http://www.leagle.com/...](http://www.leagle.com/) did not address the “show me the note” defense though it was widely expected to do so. However, in *Gomes* the CA court cited two cases approvingly where the “show me the note” defense was accepted by federal courts; *Castro v Executive Trustee Services, LLC*, (D Ariz, 2009 February 23, 2009, CV-08-2156-PHX-LOA) 2009 US Dist Lexus 14134, [http://www.leagle.com/...](http://www.leagle.com/) and *Weingartner v Chase Home Finance, LLC*, (D Nev 2010) 702 F Supp2nd 1276, 1282-1283, [http://mattweidnerlaw.com/...](http://mattweidnerlaw.com/) .

The CA court noted that the issue in those two cases cited in the preceding paragraph (the “show me the note” issue) was not the same issue that it had to decide in *Gomes*. In the *Gomes* case the plaintiff, Jose Gomes, did not raise the

“show me the note” defense. Instead, his case was a lawsuit for *discovery* in order to find out *if* he could raise the “show me the note” defense. The *Gomes* court held that such a lawsuit, making *no* specific allegations, did not state a cause of action as a matter of law. Gomes alleged only that ‘upon information and belief’ MERS did not own his Note or did not have authority from the Note owner to foreclose and Jose Gomes wanted to know if his “information and belief” was true, because he didn't really *know* if it was true. The *Gomes* court, finding that Gomes made no allegation upon which it could rule, agreed with the lower court that his case should be dismissed. The *Gomes* court never addressed the “show me the note” defense in its published opinion.

The most recent case that expounds upon the “show me the note” defense, as does *Weingartner*, continues with the reasoning made in previous court rulings made in Kansas, Ohio and Michigan and other states making ownership of your Note a requirement in order to commence a foreclosure, whether in a judicial or non-judicial state. See, Eastern District Bankruptcy Court for New York, *In Re: Ferrell L. Agard*, Case No. 810-77338, February 10, 2011 issued less than two weeks ago, <http://www.ritholtz.com/...> . In this case Ferrell Agard, the home owner, lost for reasons having nothing to do with ownership of the mortgage Note, but the Hon. Robert E. Grossman, Bankruptcy Judge, stated, **“However, in all future cases which involve MERS, the moving party must show that it validly holds both the mortgage and the underlying note in order to prove standing before this Court”**. In other words, Mr. Banker, if you want to foreclose, or file a Proof of Claim and set aside the ‘stay’ order that stops you from foreclosing, you must

“Prove” that you own “both” the **Mortgage Note and the Promissory Note** (meaning: prove a valid “chain of title”).