LEGAL ISSUES ON ENFORCEMENT OF PROMISSORY NOTES

By: masaccio Wednesday October 20, 2010 8:06 am

The foreclosure fraud debacle raises a number of legal issues, ranging from perjury to consumer fraud. All of the issues revolve around one central legal issue. Who has the right to foreclose? I address the basic law, and then offer an example to explain why it matters.

Introduction

Let’s assume a couple buys a house with a down payment a loan from Argent Mortgage Co. The borrowing is evidenced by a promissory note, and the promissory note is secured by a mortgage on the home. State law governs promissory notes. Article 3 of the Uniform Commercial Code is the basic law. Every state has adopted Article 3, some with minor variations. The citations vary from state to state, but generally track the UCC sections. References are to model UCC provisions. This link gives you Article 3.

Basic Negotiable Instrument Law

§ 3-301 says that the person entitled to enforce a note is (a)(1) the holder, (a)(2) a nonholder in possession of the note who has the rights of a holder, or (a)(3) a person not in possession but who has the right to enforce because the note is missing (§3-309) or another section which isn’t likely to apply.

§ 3-201 defines negotiation as transfer of possession to a person other than the issuer of the note. The transferee is a holder. If a note is payable to a specific person, negotiation requires both transfer of possession and indorsement by the named person. If the instrument is payable to bearer, transfer of possession is enough.

A note is payable to bearer if it is made out to bearer, or if it is indorsed in blank. In our example, the couple signed the note, making it payable to Argent Mortgage Co. When Argent Mortgage Co. transfers the note, it might endorse it as follows:

Pay to Bank of America, N.A.
Argent Mortgage Co.
By: ___________________
Its: [title of authorized person]

In this example, Bank of America is an identified payee, so to transfer the note, Bank of America has to indorse the note as well as transfer possession.

The note could have been endorsed:

Pay to: ___________________
Argent Mortgage Co.

By: ___________________
Its: [title of authorized person]

That is an indorsement in blank, and the note can be negotiated by transfer of possession.

With this background, we can see who is entitled to enforce the note. In the first case, only Bank of America can enforce the note. In the second case, any person in possession of the note can enforce it.

That covers the provisions of § 3-301(a)(1).

Turning to § 3-301(a)(2), there is no definition of a “nonholder in possession of the instrument”. In fact, that looks like a contradiction. We get the answer in the Official Comment to § 3-301:

A nonholder in possession of an instrument includes a person that acquired rights of a holder by subrogation or under section 3-203(a). It also includes any other person who under applicable law is a successor to the holder or otherwise acquires the holder’s rights.

Subrogation is not likely to be applicable. However, §3-203(a) is likely to be applicable, and here are relevant parts.

§ 3-203. TRANSFER OF INSTRUMENT; RIGHTS ACQUIRED BY TRANSFER.

(a) An instrument 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.
(b) Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferor to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a transfer, directly or indirectly, from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.

(c) Unless otherwise agreed, if an instrument is transferred for value and the transferee does not become a holder because of lack of indorsement by the transferor, the transferee has a specifically enforceable right to the unqualified indorsement of the transferor, but negotiation of the instrument does not occur until the indorsement is made.

Suppose there is a note with a named payee, in our example, the note payable to Bank of America. Bank of America transfers the note to Deutsche Bank, Trustee for RMBS 1234, but doesn’t endorse it. Deutsche Bank, Trustee is not a holder. However, under the provisions of § 3-203(c), Deutsche Bank, Trustee is entitled to get an endorsement from Bank of America (unless the parties agreed otherwise, which didn’t happen). In the mean time, Deutsche Bank, Trustee, is entitled to enforce it by virtue of § 3-203(b), so long as it can produce the actual note.

**Why this matters**

When promissory notes are securitized, it would be a disaster if the makers of the notes, the homeowners, were able to assert defenses against the new owner. For our example, suppose that the borrowing from Argent Mortgage was founded on consumer fraud. The RMBS doesn’t want to get into a lawsuit over consumer fraud. To protect themselves, securitizers structure transfers to insure that the trust holds notes as a holder in due course. That way, the trust is not exposed to claims of the homeowner.

Holder in due course status is governed by § 3-302. A transferee obtains that status only if the promissory note a) is negotiated to a person who b) takes for value, in good faith, and without knowledge of the defenses of a party.

In the last case above, Deutsche Bank, Trustee, is not a holder in due course, because the note has not been negotiated, merely transferred. § 3-302 says that a person can only be a holder in due course if at the time the note is negotiated, the transferee has no notice of defenses of any party to the note.
Suppose Deutsche Bank, Trustee, tries to enforce the note. The homeowners respond by asserting that Argent Mortgage cheated them in some way into doing the deal, and demanding that Deutsche Bank, Trustee, produce the note.

Deutsche Bank, Trustee, suddenly realizes that this note has only been transferred, not negotiated. It rushes to Bank of America, and demands an indorsement, which Bank of America provides. That is the negotiation of the note. However, at the time of negotiation, Deutsche Bank, Trustee, takes the note with notice of the defense to the note, and cannot be a holder in due course. The homeowners can pursue their claims against Deutsche Bank, Trustee the same way they could against Argent Mortgage.

Suppose that Argent Mortgage didn’t endorse the note to Bank of America, but merely transferred it. Bank of America can’t negotiate the note without the signature of Argent Mortgage. However, if Argent Mortgage is out of business, there is no one who can indorse. No one is a holder in due course, and the homeowner has all defenses against both Bank of America and Deutsche Bank, Trustee.

Conclusion

Banksters say it doesn’t matter, because someone owes money. Legal rights matter. HUD Secretary Shaun Donovan) thinks it’s enough for the banksters to "fix" the problem, presumably by reconstructing paperwork as David Axelrod put it. Whose side is the Administration on?

49 Responses to Legal Issues On Enforcement Of Promissory Notes

1. **hopeful** October 20th, 2010 at 8:52 am

Masaccio, Great example. This idea that the banks could have fixed this problem in a couple of weeks, is just crazy. “Fixing” these documents after the fact raises a bunch of financial questions and problems for the banks.

let’s assume that the transfer of control of these notes is in question. Many of these institutions have recorded the transfer of the recivables on to their books and many of the banks have recognized these transfers as sales. In many of the cases the transfers have been recorded as gains as the difference between their net proceeds and the carrying value of the note.
Under SFAS 140 an entity that transfers a financial asset has surrendered control over all or part of the transferred asset only if all of the following conditions are met:

1. The transferred asset has been isolated from the transferor and its creditors, even in case of bankruptcy.
2. Each transferee has the right to pledge or exchange the asset received and no condition both: a. constrains the transferee from exercising that right; and b. provides more than a trivial benefit.
3. The transferor does not maintain effective control over the transferred assets through: a. an agreement that both entities and obligates the transferor to repurchase or redeem the asset before maturity; or the ability to immediately cause the holder to return the specific assets (except in a “clean up call”).

If these banks have just now discovered some of these note ownership problems, they should now have to go back and restate their financial statements to remove some of these assets and gains from their books. If they some how prove the effective transfer of these assets at a later date they would only recognize the sale at that point, not retroactively. I am very suprised that they haven’t recalled their financial statements yet. It just leads me to believe that their is some even bigger accounting fraud going on here.

- Ann in AZ October 20th, 2010 at 6:08 pm «

I am very suprised that they haven’t recalled their financial statements yet. It just leads me to believe that their is some even bigger accounting fraud going on here.

I’m very surprised that we haven’t seen audits of all the TBTF banks as yet.

  - hopeful October 20th, 2010 at 6:32 pm «

We haven’t seen huge losses from the banks because congress was very instrumental in pushing through accounting changes to mark to market. Although the question of ownership has no factor in mark to market. It will however effect the required capital ratio of the banks. We are actually starting to see some investor lawsuits on the basis of ownership. I suspect the next round of financial statement audits could result in huge losses and litigation for the banks.

- masaccio October 20th, 2010 at 10:31 am «
I should have included a reference to UCC § 1-201(20):

(20) “Holder” with respect to a negotiable instrument, means the person in possession if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is in possession. “Holder” with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

- **mcnetgb** October 20th, 2010 at 6:35 pm «

  Man I Hate to be suckered.

  Can you clarify something for your readers?

  If the conveyance procedures are clearly stipulated in the PSA, then isn’t this post moot, or only relevant for those situations where the PSA was silent?

  How many PSAs are silent as to conveyance procedures?

  - **masaccio** October 20th, 2010 at 7:58 pm «

    None. They all specify the mortgages to be transferred, and the form of the indorsements. Too bad it didn’t happen like that. Those trusts are stuffed with bad paper, that’s why the investors are demanding that the securitizers take the loans back.

- **parsnip** October 20th, 2010 at 11:38 am «

  Thanks for this information, though I still have a hard time grasping the concepts. Does this mean that the ‘endorsed in blank’ notes are bearer instruments, and the holder can foreclose…. or not? What you wrote, if I interpret it correctly, is that if the banks spent the past two weeks going back to the transferrer banks and getting them to ‘negotiate’ the notes, it’s too late only in the cases where the homeowners “respond by asserting that Argent Mortgage cheated them in some way into doing the deal”? Would that require a lawyer and filing suit? What about non-judicial foreclosure states? How are millions of homeowners going to be able to afford to uphold their rights?

  If the homeowners don’t know enough to explain to the judge what you’ve described, then what’s to stop this freight train?
Aren’t there likely to have already been cases (especially in the rocket docket courts) where homeowners told the judge about being swindled by the bank, but without hefty paperwork to prove it, have been foreclosed anyway? How can a borrower prove they were forced into a shitty loan, designed to make them default? wavpeac tells us repeatedly how her servicer refuses to provide an accounting of the charges they keep dunning her for that have caused her to default. Who has paperwork that can prove they were forced to take a subprime instead of a prime loan? Without paperwork how can the UCC and your reasoning actually benefit the homeowners (in this real crooked world)?

Please don’t read a combative tone to my questions. I’m trying hard to understand how the law, UCC, and your theory translates into reality for average people being foreclosed.

From your comment:

“Holder” with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

Does the word ‘goods’ mean the house? Can the house be delivered to the bearer of the note if the mortgage has been severed from the note and the bearer or holder doesn’t have the mortgage?

ubetchaiam October 20th, 2010 at 12:36 pm

Excellent explanation Masaccio but this is strictly rhetorical isn’t it? “Whose side is the Administration on?”

masaccio October 20th, 2010 at 12:41 pm

I’m pretty sure you need a lawyer to get this right on the facts of a specific case. I have looked at a lot of cases, and even lawyers don’t always get it right in specific cases.

I tried to keep this simple, but it isn’t simple; it’s hard to understand and follow, and it’s asking a lot of yourself to teach yourself the applicable law.

I agree that most people can’t protect themselves or assert their legal rights. That is why I ask whose side the Obama Administration is on. Right now, I’d say they are in favor of the banksters, based on their actions and not their pretty words.

BlueFloridian October 20th, 2010 at 2:19 pm
Most definitely the administration is on the side of the Banks. When Axelrod made his statement on the Sunday morning show, that this was a matter of “paperwork” that needed to be straightened out and that there were legitimate foreclosures he was stating the Banks story, hook line and sinker. This is not merely a matter of “paperwork” which can be straightened out with additional paperwork. If the original loans were not transferred to the securitized trusts before the cut off date, thus there being no property on which to issue securities, security fraud was committed. If the Banks and their lawyers recreated documents that were purposefully destroyed and tried to pass the documents off as originals that’s perjury and fraud on the court. If the entities trying to bring the lawsuits no longer exist, that’s fraud. If affidavits were made based on personal knowledge that was really not personal or knowledgeable that’s fraud.

You only need to pick up a few of these files to see a purposeful, systemic scheme of fraud. Yes the consumers might not be able to understand, but the sharpies at the Justice Department and the SEC certainly should know about fraud and schemes to defraud. If Obama was on the side of the homeowners, the Justice Department would be making arrests right now of the owners of the leading foreclosure mills as well as the owners of Lender Processing Services. There is enough information out there for RICO acts, but it is not being done.

- eCAHNomics October 20th, 2010 at 4:04 pm «

  Or, more simply, it’s virtually impossible for the homeowner to commit fraud on the bank.

  - nahant October 20th, 2010 at 4:25 pm «

    Thats for sure, just you try.

- TarheelDem October 20th, 2010 at 4:25 pm «

  There is enough information out there for RICO acts, but it is not being done.

  I would assume that prosecuting a RICO case requires considerable investigative work that would not be publicized. How exactly do you know that the development of RICO cases in Florida is not being done?

  As far as DOJ is concerned, the problem is so widespread and involves several parties that operate across state lines. Sorting out the specific evidence involving
each of these parties is going to take some time. While you might determine from a few files that there is a systemic scheme of fraud, developing a prosecutable case that show exactly how widespread it was takes time.

The problem right now is sorting out from all the foreclosure actions those that are just a matter of paperwork from those that involve actual fraud.

In addition, there is the issue of authenticating the person producing computer-generated or digitally transferred documents.

I will not judge whether something is being done until six months or so from now.

And the first line of investigation are local DAs and state attorneys general. I know that the NC attorney general has begun an investigation of this at the same time he asked for a moratorium on foreclosures.

You only need to pick up a few of these files to see a purposeful, systemic scheme of fraud. Yes the consumers might not be able to understand, but the sharpies at the Justice Department and the SEC certainly should know about fraud and schemes to defraud. If Obama was on the side of the homeowners, the Justice Department would be making arrests right now of the owners of the leading foreclosure mills as well as the owners of Lender Processing Services. There is enough information out there for RICO acts, but it is not being done.

I’d like to see Eliot Spitzer, or somone of equal smarts and grit, start up an “ACORN equivalent,” i.e., an organization that would take up a bunch of these cases, lay out the fraud, and serve ‘em up to various AGs.

There are a LOT of out-of-work lawyers out there, and there’s a LOT of work that needs to be done in this area. Plenty of good could come of it.

Frankly, if I were still on the Mainland, I’d be looking for an opportunity to put into use those now-rusty skills I acquired many years ago in my Real Property Secured Transactions, Remedies, and UCC courses in law school.
You’re right about how this is a challenging concept. People become alcoholics trying to pass “Secured Transactions” and “Creditors Rights” classes in top law schools! And then pray they can answer the essay question on the Bar Exam for those topics.

Having said that, I’d like to offer an analogy to readers about a salient point that you are making. Out of all the law and application, I think there’s a point that needs to be highlighted.

When you sell your home, you have to make Seller Disclosures regarding the conditions of the property. So, if you say on your paperwork that the plumbing is free of defects, then the Buyer expects that to be true. If the Seller filed an insurance claim a year earlier for a busted pipe, had it fixed, and then failed to tell the Buyer about that, we would call it FRAUD and the Buyer could sue the Seller for FRAUD.

But what if the Seller was able to “fix the paperwork” (to quote David Axelrod) and simply get the Insurance Claim “redated” to be AFTER the date of the Seller Disclosures? THEN, the Seller would argue that the Insurance Claim was DATED AFTER the Disclosure. And then the judge would toss the case. IF the only evidence allowed was the paperwork (with no testimony from 3rd parties, etc, proving the paperwork was a fraud).

Now, Masaccio’s point is about how the Holder In Due Course (“HIDC”) (the second bank) only gets to call itself that legal designation if it acquire the note, through negotiation, WITHOUT NOTICE OF the claims of fraud.

But, if the 2nd Bank only NEGOTIATES for the note AFTER acquiring NOTICE, it can’t call itself an HIDC.

So, the Administration and the Banksters are suggesting a “paper fix” just like the one in my analogy – simply REDATE the paperwork for the NEGOTIATION to be PRIOR TO the date that the CLAIM was made known to the 2nd Bank. Its the exact same kind of fraud – the changing of dates to make a legal designation that then protects the party from liability.

And they can call that changing of dates on paper as just “paperwork fixes” but those are a BIG FUCKING DEAL when it comes to WHAT they knew, WHEN they knew it, and WHETHER they had notice of something BEFORE they did something else.

- PeasantParty  October 20th, 2010 at 4:24 pm «
The home buyer is left in the dark on his end of the contract. Yes, I said CONTRACT. When Joe home buyer signed on the dotted line he was promising to pay installments to bank ABC for 30 years to the total amount of principal plus interest.

When bank ABC does a shuffle with the document, home buyer Joe legally should be notified of the plan to move and be able to address the new bank as the other party to the contract. None of those things have happened and most people have no idea just exactly who may think they own the notes now.

Joe home buyer certainly does have redress. He never signed an agreement or promissary note to No name bank!

- AitchD October 20th, 2010 at 4:59 pm

  Honest commercial banks state in writing whether or not the buyer’s mortgage may be sold to a third party. It may even be required by law to disclose an intention like that, depending on the state where the bank is licensed. On the Internet, it’s hard to tell who is where, and what laws apply. On the teevee, those refi ads had their language scroll as fast as the announcer spoke the end disclaimers & disclosures. I think I could hear in some of them, “Ask your doctor if a third mortgage is right for you, and consider all the side effects of a fourth mortgage if you use Cialis or want to get pregnant.”

  - PeasantParty October 20th, 2010 at 5:06 pm

    LOL! True, some of them do say that. But then again, most states require that you have an attorney present at closing. If the attorney did not tell you or show you this note will be sold to someone you do not know of, then said attorney was acting in fiduciary responsibility.

    - PeasantParty October 20th, 2010 at 5:14 pm

      Sheesh! I meant to say NOT ACTING. The closing attorney was not doing due diligence to meet his fiduciary duties for his client.

- pdgrey October 20th, 2010 at 4:59 pm

  Yes! Yes! Yes! Right now after trying to do a search with property taxes and land records I don’t know if I am paying the right loan company. Scared to death to try a Mod, I think that
is a sure way to get into foreclosure. I am on time with payments but house is not worth half what is owed.

- PeasantParty October 20th, 2010 at 5:08 pm «

No house is worth what is owed now. Stay with what you have if you can but still do your research and make copies of the recordings at the court house.

- PeasantParty October 20th, 2010 at 4:27 pm «

Oh yeah, the “administration” is on the bank’s side. The President I don’t think has a clue of what is or has been going on.

- dude October 20th, 2010 at 4:35 pm «

masaccio–

If banks have essentially securitized the bad mortgages, and if they and all the people who buy into these instruments have investors, then aren’t these institutions who list these securities as assets also guilty of lying about the value of their businesses to investors (another level of fraud)? And have these same banks claimed assets (or losses) on their taxes fraudulently?

I suppose what I am building to: aren’t there grounds for many kinds of class-action suits and tax-fraud suits lurking under all this?

- masaccio October 20th, 2010 at 5:51 pm «

Yes, and the suits are cranking up. Today, the NYT reports that Bank of America and JPMorgan Chase have increased reserves for “put-backs” from securitizations by billions.

- TarheelDem October 20th, 2010 at 4:40 pm «

masaccio

How exactly does the MERS system fit into this process of transfers and endorsements?

- masaccio October 20th, 2010 at 6:03 pm «

This post only deals with notes. Mortgages are transferred by assignment in a form specific to each state. As far as I know, MERS only handles mortgages, and it doesn’t do anything
with them except assign them when it is asked to do so. I have no reason to think MERS has a clue about who owns a note at any point in time.

I might be wrong about MERS’ involvement with notes. There are some assignments of mortgages that appear to include assignments of notes. There are rumors that MERS had pile of notes and destroyed them, but I haven’t looked for that.

Securitizations require the owners to transfer the notes to the securitization vehicle in a specific form. If MERS has them, that transfer didn’t happen. It would raise serious issues about whether the vehicle qualifies for treatment as a REMIC, so that the interest income flows through, and isn’t taxed at the vehicle level.

- PeasantParty October 20th, 2010 at 4:48 pm →

I think the banks just bought and sold data to each other like they do with your credit report and banking info. I’ve asked many a sales caller how they got my name and number and it seems to always go back to a bank or savings institute.

Since they felt like they OWNED my personal money history, they probably thought they OWNED the mortgages of all America!

- fuckno October 20th, 2010 at 4:50 pm →

Presently, since the left is reduced to analyzing, arriving at the conclusion that we live under a Kleptocratic Plutocracy, then reanalyzing, ad infinitum additional information, all reenforcing the already identified conclusion; our only hope rests with the T’baggers who, for better or worse, have gotten the gist of the current situation right, and are the only ones putting up a stink.

- dude October 20th, 2010 at 5:09 pm →

pdgrey-
I wrote about my own similar anxiety on David Dayen’s blog entry a night or so ago. Other readers advised I get a new title search and/or hire a lawyer to verify my mortgage paperwork. MERS is on my mortgage. The loan servicer was sold to another bank and that bank merged with another. The title insurance company also merged with another company. And the company I make payments to since day one is yet another company. How did they get in that position?

- pdgrey October 20th, 2010 at 5:17 pm →
Peasant Party, dude, thanks for the response. Not sure I can scrape the money for attorney but my mortgage was sold several times and MERS is involved since 1998. How do you do a title search besides going to the clerks office? And how would I know if things have been back dated or forged?

- PeasantParty October 20th, 2010 at 5:25 pm

Don’t pay an attorney yet! You can do the title search yourself or have the clerks at the court house help you. You do pay them afterall and they are there to help. Some court houses have land sale records on the internet but my BEST advice is to go there yourself. They usually have a computer where you can pull up your name and it will give the number of the deed book and page in that book where your deed was recorded. Check that document and make a copy of it. If anything is different than the one you signed yourself at closing then ask the clerk to help you find the next link in chain! Make copies of all documents and keep them in a safe place. Also, check to see if their is a Lien on the property and exactly who placed the lien and for what. If you happen to owe someone for repairs or whatever that is acceptable until it is paid for.

After you have copies of your official recordings at the court house you have all the ammo you need for now.

- PeasantParty October 20th, 2010 at 5:28 pm

If things are in such a way that you need to get an attorney. I suggest that you hire an attorney that specializes in Real Estate. Please be careful when going for that because many attorneys have very good intentions but real estate law in your state is best argued by the attorney specialist.

- PeasantParty October 20th, 2010 at 5:37 pm

Did you get all that? I know it is a lot of info in a small box. I will try to help all I can. Afterall, I am unemployed at the moment. The official deed can be between two and 6 pages. It must include the surveyor definition/property description which should be labeled as Appendix A or B. On that page, there will be a metes and bounds description of the land and house for property lines, easements, etc. It will also give you the information on the second page of whom the previous owner was and the mortgage company/bank with which you have made contract with.
I didn’t see this response before. That helps. At this point I think WAMU holds the mortgage but I’m really afraid of back dating or something I would not know what to look for. Is there a certain amount of time in a mortgage contract to record a transfer? Or does Chase buying WAMU by default own the mortgage?

YES! Most states require the mortgage/deed be recorded within three days. Some states have a rush to record policy. Since the mortgage on a property and the change of ownership on a deed require recording and are legal documents it is usually three business days.

Thanks so much for you’re help. Tomorrow I will look some more. Are you hard to find in the comments? I guess I mean, do you post every day?

When the FDIC fails a bank (or Thrift in the case of WAMU), the operating entity is left whole and the assets and liabilities (including deposit liabilities) of the failed bank are sold to a purchaser, in this case JPMorgan Chase. A Purchase and Assumption agreement conveys all rights and interest in the assets (loans in the case of a bank) to the purchaser without further assignments or other conveyances of the underlying collateral of the assets.

This is legal. A bank abrogates the due process afforded in a court of law (bankruptcy) to be subjected to the regulatory framework and enforcement mechanisms created by the Glass-Steagall Act. The primary benefit of such an arrangement is the ability to borrow at very low interest rates due to FDIC deposit insurance.
If your residential mortgage loan was held on the WAMU balance sheet, then the loan is likely owned by Chase and you should continue to make your payments or seek a loan modification. If you default, Chase would likely initiate foreclosure proceedings and the foreclosure complaint (assuming that you live in a judicial foreclosure state) would reference the Purchase and Assumption Agreement conveying the loan from the FDIC as receiver for WAMU to Chase. This would substantiate the ownership and claim to the mortgage.

However, if your Loan was serviced by WAMU, and not owned, then it was likely sold to a trust as part of a securitization, and it is likely that the promissory note was not indorsed and the mortgage assigned. However, if Chase retained the servicing rights to the Loan, as part of the Pooling and Servicing Agreement contract for the securitization trust, as part of the purchase of the assets and liabilities of WAMU, it is possible that the FDIC granted Chase a Limited Power of Attorney to formally assign the mortgage to the trust; because technically when WAMU failed the assets not formally assigned or conveyed to the true beneficiaries became the assets of the FDIC. That said, the servicer would not likely formally assign the mortgage until you went into default.

I would continue to try and ascertain the true beneficiary of the mortgage at your local county clerk’s office. However, given that the assets of the FDIC as receiver for WAMU were purchased by Chase, it is likely that there is a well established successor-in-interest to your Loan.

If you are worried, a good solution is to keep records of your payments, by keeping your cancelled checks.

- waypeac October 21st, 2010 at 5:37 am
Just want to add here, that I send in paper checks. GMAC does not send them through, they transfer them electronically through my bank and destroy the paper. I can prove they went through my bank through my statements, but I can’t prove when they received my payment. Or when the back of the check was stamped. No such proof. They love to put your check through after the late date, no matter when you had your bank send it.

- wavpeac October 21st, 2010 at 5:38 am »

Also, they used to charge me 10.00$ per check without notice. No it’s not anywhere in my contract. Just sayin’…it’s some sleazy fraud! They did stop charging for the process when the bankruptcy judge told them to stop.

- PeasantParty October 20th, 2010 at 5:30 pm »

Oh yeah! I forgot to tell you that on the deed book page there should be a date-time stamp by the County Registrar of Deeds. That is how you will know the actual day and time it was recorded and until now still holds as the OFFICIAL LAND DOCUMENT.

- pdgrey October 20th, 2010 at 5:41 pm »

Peasant Party, I actually got that far, except checking against liens. The last document is in 2005 with WAMU but since Chase took them over I’m not sure about who I should be paying.

- PeasantParty October 20th, 2010 at 6:02 pm »

Keep paying as you are now. You must keep up your end of the contract for now. Just keep good records showing you paid and the address it went to. When this mess gets a good deal more attention and looked at under a magnifier then all will change again.

- Mauimom October 20th, 2010 at 5:35 pm »

Let’s assume a couple buys a house with a down payment a loan from Argent Mortgage Co.

I think you’re missing an “and” between “down payment” and “a loan.”

- Ann in AZ October 20th, 2010 at 5:50 pm »
So Masaccio, if you were representing BofA, how would you slither around a mess like this. Wouldn’t you have to do an Affidavit of Lost Note? Then what? I doubt that there is an instrument wherein BofA could claim a right to enforce the note as the “last man standing” in a chain of transfers. So does this mean that the loan is now unenforceable, that the homeowner doesn’t owe the money anymore, or do they still owe the money, but the loan is no longer a secured loan?

Another question is, why should home buyers not be privy to who actually owns their loans? I know that you may take out a loan with some companies, but when they sell the loan to investors, they do not want any contact between homeowner and investor. The company insists on staying in the middle of transactions like short sales, or modifications, whatever. Shouldn’t I be informed as to whom I actually owe money to since I am a principal in the transaction?

- odin007 October 20th, 2010 at 5:52 pm

Check out Obama’s new foreclosure fraud policy on the Huffington Post, the policy of N.O.P. (pronounced nope), NOT OUR PROBLEM!

http://www.huffingtonpost.com/

- earlofhuntingdon October 20th, 2010 at 9:16 pm

Nicely summarized. The UCC has tripped up more than one first and second year law student.

It is a political fraud for the administration to claim that these problems stem from “some missing paperwork”, as if the cat ate B of A or Citibank’s homework. We are dealing with an intentionally crafted system that failed, on purpose, to comply with these and other legal provisions so that the banks could save time and money. They took a gamble such moves would not cost them anything, with the full knowledge that the best internal and external banking lawyers in NYC, SFO and elsewhere could provide.

The banks should internalize the cost of that gamble when it goes sour, as it has done on an international scale. The US government should not bail them out, but protect homeowners from lender predation, through better enforcement of consumer protection, securities and accounting rules, through new legislation, including adding cram down in a bankruptcy reform law, and by sending the message that banksters who make their beds out of offal can’t expect the government to wipe it off for them by hand.

- scribe October 21st, 2010 at 2:49 am
You ask:

From your comment:

“Holder” with respect to a document of title means the person in possession if the goods are deliverable to bearer or to the order of the person in possession.

Does the word ‘goods’ mean the house? Can the house be delivered to the bearer of the note if the mortgage has been severed from the note and the bearer or holder doesn’t have the mortgage?

No, the word ‘goods’ does not mean the house. To understand this you have to look at the definition of “document of title”:

Sec. 1-201(b)(16) “Document of title” includes bill of lading, dock warrant, dock receipt, warehouse receipt or order for the delivery of goods, and also any other document which in the regular course of business or financing is treated as adequately evidencing that the person in possession of it is entitled to receive, hold, and dispose of the document and the goods it covers. To be a document of title, a document must purport to be issued by or addressed to a bailee and purport to cover goods in the bailee’s possession which are either identified or are fungible portions of an identified mass.

In other words, for the purposes of the UCC, a “document of title” does not pertain to the deed or mortgage of the property. Rather, in the context of the UCC, the term “document of title” would pertain to those documents that are used when shipping or trading in quantities of things. For example, a buyer of bulk cement would not require the company shipping it cement to physically deliver the cement into its office. Rather, the delivery guy would bring the bill of lading into the office, hand it over/sign it over, the buyer would accept the bill of lading, and then the cement would be the buyer’s (and the buyer’s responsibility). Similarly, assume a grain elevator which holds lots and lots of grain for lots of farmers. The individual farmer who owned (or sought to purchase) a small portion of the grain in the elevator would get a document (probably called a “warehouse receipt” from the elevator) which would reflect his ownership (or purchase) of that quantity of grain. The grain would stay in the elevator all the time. If the farmer decided he wanted to sell the grain to another farmer, all he would have to do is endorse the warehouse receipt over to the buyer (and now the buyer would own that grain) rather than worry about moving the actual grain to somewhere else.
A third example would come from the movies: a couple of gearhead guys “racing for pink slips”. The loser would sign (endorse) his “pink slip” (slang for a “document of title” for the car) over to the winner, and the winner would own the car.

Remember, the UCC applies only to the “note” portion of the homeowner’s cluster of obligations tied up in owning a home. While the mortgage is a device to secure the note (i.e., make the property into collateral for the note), foreclosure is a creature of each state’s law – not a uniform set of laws nationwide – and the UCC does not apply, because foreclosure is the means and method for changing the right to possessory ownership of the property (collateral – the house and land) from the debtor (homeowner) to the creditor. The repo man repossessing a car is, when you think about it, foreclosing on the car. He is converting the right to possessory ownership of the car from the person who borrowed to buy it and stopped paying, to the creditor who loaned the money. The repo man gets to come out and take the car without a lawsuit because (A) a car is not a house/real property and states’ laws treat rights to houses/real property a lot more carefully than rights to cars, and (B) the law provides for repossession because cars can be moved and hidden pretty easily. Houses can’t.

To come back to the second of your questions:

Can the house be delivered to the bearer of the note if the mortgage has been severed from the note and the bearer or holder doesn’t have the mortgage?

Conceivably the house can be delivered to the bearer, but almost certainly not. Delivering the house (and solely the house) to the holder of the note would be really impractical b/c the kind of delivery you’re thinking about might well entail physically taking the house to the holder of the note. Since the house is usually attached to the land pretty tightly, this is not likely (unless it’s a double-wide….).

More seriously, though, if (as you suppose) “the mortgage has been severed from the note”, the house and land are no longer security (collateral) for the note (indebtedness). Remember, the mortgage is a document which reflects that the house and land have been pledged as collateral for the indebtedness reflected in the note. If the mortgage is severed from the note, the house and land are no longer collateral and the debt reflected in the note is “unsecured”. Credit card debt is “unsecured” – there is no collateral for that debt.
To get to the mortgage being severed from the note, though, you almost certainly have to have had judicial involvement and a decision saying so.

So, to answer the question, you *could* deliver the house to the holder of the note even if the mortgage has been severed from the note, but why would you want to? If the house is no longer collateral b/c the mortgage has been severed from the note, you’re under no obligation to give anything to that creditor – the holder of the note – least of all your house.