

MEMORANDUM

March 29, 2011

From: John A. Sebert, Chair, Permanent Editorial Board for the Uniform Commercial Code (PEB)

Re: Draft Report of the PEB on the UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership and Enforcement of Those Notes and the Mortgages Securing Them

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, as well as by rules of evidence and civil procedure, but others are addressed in a uniform way throughout the United States by provisions of the Uniform Commercial Code (UCC). Although the UCC provisions have been settled law for a number of years, 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 Code has prepared this Draft 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 mortgage on real property. Of course, the UCC does not resolve all issues in this field. Most particularly, the enforcement of real estate mortgages by foreclosure is primarily the province of a state's real property law (although determinations made pursuant to the UCC are typically relevant under that law).

This is a draft report that does not represent the final views of the PEB, the American Law Institute, or the Uniform Law Commission on the matters discussed in this report. The PEB is distributing this Draft Report broadly seeking comment on the draft, and we strongly encourage those interested in these matters to provide comments to ALI Associate Deputy Director Deanne Dissinger at ddissinger@ali.org. When submitting comments please identify your representation of or affiliation with stakeholders, as well as your expertise and experience in the mortgage and foreclosure area.

Comments should be received by May 28, 2011. After the end of the comment period, the PEB will review all of the comments that have been received and will make appropriate revisions to the draft before issuing the report as a final report of the PEB.

PERMANENT EDITORIAL BOARD FOR THE UNIFORM COMMERCIAL CODE

DRAFT REPORT

UCC RULES APPLICABLE TO THE ASSIGNMENT OF MORTGAGE NOTES AND TO THE OWNERSHIP AND ENFORCEMENT OF THOSE NOTES AND THE MORTGAGES SECURING THEM

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 have been settled law for a number of years, 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 mortgage on real property. Of course, the UCC does not resolve all issues in this field. Most particularly, the enforcement of real estate mortgages by foreclosure is primarily the province of a state's real property law (although determinations made pursuant to the UCC are typically relevant under that law).

Background

Two Articles of the UCC apply to the transfer, ownership, and enforcement of mortgage notes:

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 4, *infra*, for important information about variations among different versions of Article 3 of the UCC.

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."

- In cases in which the notes fulfill the technical requirements of negotiability,³ Article 3 of the UCC⁴ provides rules governing the obligations of parties on the notes and the enforcement of those obligations.
- In cases involving either negotiable or non-negotiable notes, Article 9 of the UCC⁵ 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 Articles to provide guidance in:

- Identifying the person who is entitled to enforce the payment obligation of the maker⁶ of a mortgage note, and to whom the maker owes that obligation; and
- 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.⁷ Moreover, these rules displace any inconsistent common law rules that might have otherwise governed those questions.⁸

³ Those requirements are set out in UCC § 3-104.

⁴ 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 than the 1990 or 2002 texts.

⁵ 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 24 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 have not yet been enacted by any state) are not germane to the matters addressed in this Report.

⁶ 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 of an indorser is different than 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.

⁷ 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 UCC so indicates (see, *e.g.*, UCC § 9-602) or when the variation would disclaim obligations of good faith, diligence, reasonableness, or care prescribed by the UCC. 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.

⁸UCC § 1-103(b). As noted in Official Comment 2 to UCC § 1-103:

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 the note on the mortgage securing it?
- May a person to whom an interest in the note has been transferred, but who has not taken a recordable assignment of the mortgage, take steps to become the assignee of record of the mortgage securing the note?⁹

Question One – Who is The Person Entitled to Enforce a Mortgage Note and to Whom the Obligation to Pay the Note is Owed?

If the mortgage note is a negotiable instrument,¹⁰ 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 to whom those obligations are owed. The following discussion analyzes the application of these rules to that determination in the case of mortgage notes that are negotiable instruments.¹¹

In the context of 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.¹² Several issues are resolved by that determination. Most particularly:

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.

⁹ 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).

¹⁰ See UCC § 3-104 for the requirements that must be fulfilled in order for a payment obligation to qualify as a negotiable instrument.

¹¹ 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.

¹² The concept of “person entitled to enforce” a note is not synonymous with “owner” of the note. 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.

- (i) the maker’s obligation on the note is to pay the amount of the note to *the person entitled to enforce the note*,¹³
- (ii) the maker’s payment to *the person entitled to enforce the note* results in discharge of the maker’s obligation,¹⁴ 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.¹⁵

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

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, for this purpose, may include possession by a third party such as an agent)¹⁶:

- 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 indorsement¹⁷ 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.¹⁸
- 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

¹³ 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.)

¹⁴UCC § 3-602. In states that have enacted the 2002 Official Text of UCC Article 3, 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.

¹⁵ See UCC §§ 3-502. See also UCC § 3-602.

¹⁶ See UCC § 1-103(b). 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

¹⁷ 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.

¹⁸UCC Section 3-205 contains the rules concerning the effect of various types of indorsement on the party to whom a note is payable.

subrogation or estate administration, by which one person is the successor to or acquires another person's rights.¹⁹ It can also occur if the delivery of the note to that person constitutes a "transfer" (as that term is defined in UCC Article 3, see below) because transfer of a note "vests in the transferee any right of the transferor to enforce the instrument."²⁰ 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 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.²¹
- 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."²² 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

¹⁹ See Official Comment to UCC § 3-301.

²⁰ UCC § 3-203(b).

²¹ 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).

²² 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 a federal district court opinion in which the issue was raised.

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 may enforce the note, but the court may not enter judgment in favor of the person unless the court finds that the maker is adequately protected against loss that might occur because if the note subsequently reappears.²³

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. It does not address who “owns” the note. While in many cases the owner of a note and the person entitled to enforce it are the same person, as explained earlier this is not always the case. 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, relate to who, among competing claimants, is entitled to the economic value of the note, a matter as to which the maker is indifferent so long as it does not affect whom the maker must pay.

Initially, a note is owned by the payee to whom it was issued. 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.²⁴ In addition, however, Article 9 governs the sale of most payment rights, including the sale of both negotiable and non-negotiable notes.²⁵ With very few exceptions, the same 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 –

²³ See UCC § 3-309(b). This subsection goes on to state that “Adequate protection may be provided by any reasonable means.”

²⁴ UCC § 9-109(a)(1).

²⁵ 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).

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 but also the right of a buyer of a payment right in a transaction governed by Article 9.²⁶ As a result, for purposes of Article 9, the buyer of a promissory note has a “security interest” in the note, and the rules that apply to security interests that secure an obligation also apply to transactions in which a promissory note is sold.²⁷

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 given²⁸ and the debtor/seller must have rights in the note.²⁹
- The third criterion may be fulfilled in either one of two ways. Either the debtor must “authenticate”³⁰ a “security agreement”³¹ that describes the note³² or the secured party must take possession³³ of it pursuant to the debtor’s security agreement.³⁴

²⁶ 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.

²⁷ Similar nomenclature conventions define “debtor” to include the seller of a payment right, “secured party” to include the buyer of a payment right, and “collateral” to include a sold payment right. See UCC §§ 9-102(a)(28), (72), (12).

²⁸ 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.

²⁹ 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.

³⁰ This term is defined to include signing and its electronic equivalent. See UCC § 9-102(a)(7).

³¹ 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).

³² 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.

³³ 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.” UCC § 9-313(c) also contains a rule under which possession by a non-agent (such as a bailee) may constitute possession by the secured party if the person authenticates a record acknowledging that it holds the collateral for the secured party’s benefit. Possession as contemplated by UCC § 9-313 is also possession for purposes of UCC § 9-203. See UCC § 9-203, Comment 4.

³⁴ UCC §§ 9-203(b)(3)(A)-(B).

- 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.
- 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 can be a different person than the person entitled to enforce the note.)³⁵

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).³⁶

Question Three – What is the Effect of Transfer of an Interest in the 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 formally assign the mortgage that secures payment of the note? UCC Section 9-203(g) explicitly provides that the mortgage automatically follows the note: “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.)

Thus, while this matter has engendered some confusion,³⁷ the law is clear,³⁸ and the sale of a mortgage note not accompanied by a separate conveyance of the mortgage securing the note does not result in a separation of the mortgage from the note.

³⁵ 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 contract and agency law. See, e.g., UCC §§ 3-306 and 9-315(a)(2).

³⁶For 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. (Of course, application of the perfection and priority rules can result in the transferee either being subordinate to the rights of a competing claimant or being extinguished by the rights of the competing claimant.)

³⁷See, e.g., the discussion of this issue in *U.S. Bank v. Ibanez*, 458 Mass. 637, 2011 WL 38071 (Mass. 2011), at slip op. p. 10. 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

Question Four – May a Person to Whom an Interest in the Note Has Been Transferred, but Who Has not Taken a Recordable Assignment of the Mortgage, Take Steps 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,³⁹ 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 creditor may, of course, 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.⁴⁰

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 party’s sworn affidavit in recordable form stating that default has occurred⁴¹ and that the secured party is entitled to enforce the mortgage non-judicially.⁴²

of the mortgage, but did not address the effect of Massachusetts’s subsequent enactment of UCC § 9-203(g) on those precedents. Of course, application of UCC § 9-203(g) would result in the conclusion that the holder of the note in question had an interest in the mortgage securing the note only if the holder demonstrated that it had an attached security interest (including the interest of a buyer) in the note. Such a conclusion would not, of itself, mean that the holder can enforce the mortgage without a recordable assignment to it. That matter is the province of real property law and is addressed, in part, in the discussion of Question 4 below.

³⁸ Official 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.”

³⁹ See discussion of Question Three, *supra*.

⁴⁰ 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,

⁴¹ The 2010 amendments to Article 9 (promulgated by the American Law Institute and the Uniform Law Commission but not yet enacted) 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.

⁴² Of course, UCC § 9-607(b) does not address other conditions that must be satisfied for judicial or non-judicial enforcement of a mortgage.

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.

Of course, 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 underlying UCC rules.