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ARTICLE

SHOW ME YOUR PAPERS: SALES AND ASSIGNMENTS OF SECURED REAL ESTATE LOANS AND THE CALIFORNIA FORECLOSURE PROCESS

by Karl E. Geier*

— "Badges? We ain't got no badges. We don't need no badges! I don't have to show you any stinkin' badges!"

Gold Hat to Dobbs,
in *Treasure of the Sierra Madre* (1948)

— "Gomes has not asserted *any* factual basis to suspect that MERS lacks authority to proceed with the foreclosure. He simply seeks the right to bring a lawsuit to find out *whether* MERS has such authority. No case law or statute authorizes such a speculative suit."

4th District Court of Appeal,
in *Gomes v. Countrywide Home Loans, Inc.* (2011)

The recent foreclosure crisis has brought into focus an area of real property law that until now was rarely controversial—the right and power of an assignee of mortgage indebtedness, acting for itself or through an agent, to foreclose and collect on real property secured debt. Due

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to the proliferation of secondary market transactions, including sales of whole loan portfolios and securitization transactions, the high volume of mortgage transactions in the early 2000's produced an unprecedented number of sales and transfers of the debt interests and the mortgages and deeds of trust to which they relate. Records of such transactions—and files of the original loan documents themselves—were sometimes not created or maintained, and often can be difficult if not impossible to locate. As the loans went into default in equally large numbers, the existence, sufficiency and authenticity of paperwork in the mortgage transfer process has become a focus of conflict and dispute.

The resulting flood of foreclosures and related litigation has produced a number of recent reported appellate decisions concerning the process of transferring real property secured debt instruments and the related security instruments as well as the substitution of trustees and related actions of parties in the foreclosure process. The courts have been filling in gaps in the prior authorities, re-construing statutes and prior case law in sometimes new and surprising ways, and reviewing arcane and sometimes plainly incorrect ancient case law. In so doing, the courts also have been wrestling with the ubiquitous corporate nominee for mortgage lenders, known as MERS (Mortgage Electronic Registration Service, Inc.), which was formed to act as the holder of the beneficial interest in deeds of trust and mortgages in its capacity as the nominal "agent" or "nominee" of the holder of the debt.[1] Sometimes they have been surprisingly tolerant of non-adherence to or sloppiness in following time-honored prudent documentation, transfer and recording processes, while at other times the courts have been sticklers for the formalities and precision in such matters.

The purpose of this article is to summarize and place in context the wide-ranging statutory law and rapidly developing case law reported on these topics over the past two or three years. While many of these decisions arose out of the MERS process, the focus of this article is not on MERS, as such, but rather on legal principles underlying documentation practices that historically focused on negotiation by delivery of the tangible physical instrument and the accompanying recorded assignment of the mortgage or deed of trust securing that instrument. Most of the recent decisional law has arisen in the typically nonjudicial foreclosure of residential mortgages, and so far has only touched on the issues that may arise in the judicial foreclosure and collection process. These issues could be even more significant in the commercial real estate loan con-

text, particularly in litigated foreclosures involving larger loans held in fractionalized form by multiple lenders and their assignees or conduit loans that are securitized, held by unidentifiable owners and serviced by "agents" whose credentials may be stale or undocumented.

Accordingly, this article covers four broad topics in sequence: Part I summarizes the law covering the creation and assignment of negotiable and non-negotiable instruments and contract rights for payment of money. Part II addresses the "parallel universe" of transfers of real property security instruments under California law, which is governed by a different set of rules and raises other considerations for borrowers and lenders. Part III summarizes the case law developments concerning the nonjudicial foreclosure process where there have been repeated transfers of the debt instrument (whether in MERS-related transfers or not) and borrowers have—usually unsuccessfully—sought to force the foreclosing parties to produce the note and other documentation records of transfers referred to in Parts I and II. Finally, Part IV (which will appear separately in the March 2012 issue of the *Miller & Starr Real Estate Newsalert*) reviews the different issues and considerations for transferees of mortgage debt and the possible defenses of borrowers in litigated situations, including judicial foreclosure, receivership and bankruptcy stay relief proceedings, where judicial requirements of standing, real parties in interest, indispensible parties, evidence and burdens of proof may lead to different results than in the courts' largely hands-off treatment of nonjudicial foreclosure.

In many cases, the courts have been faced with fragmentary documentation of assignments or with borrower attacks on the power of self-identified lender representatives or "agents" to foreclose. Despite the spate of reported decisions by California courts that usually, but not always, favor the lender where the nonjudicial foreclosure process was utilized, there are still prudential reasons for lenders and their investors to proceed with caution and be prepared, where possible, to establish the plaintiff's standing, as holder of the secured indebtedness, or agent for that holder, by maintaining and being able to produce admissible evidence of the entire chain of transfers ending in the transfer to the present holder, together with any related powers of attorney, agency agreements or nominee agreements. By the same token, borrowers and their counsel may exploit some of the cases to their advantage either in resisting foreclosures or in pursuing claims for wrongful foreclosure and related relief.

Layered over all of the issues associated with the transfer of the debt and the security is the California nonjudicial foreclosure process—a form of power of sale of the real property security for the benefit of the creditor/beneficiary. Originally devised as a contractual mechanism to avoid the judicial foreclosure process,[2] and sustained against various attacks on due process grounds based on the theory it is a private remedy that does not involve "state action" that would bring into play the Due Process clause of the 14th Amendment to the Constitution,[3] the nonjudicial foreclosure process is by far and away the most common method of foreclosure used by lenders in California. Its relative speed, finality and cost-effectiveness as a nonjudicial remedy has been touted for decades as having the salutary effect of encouraging lenders to make loans in California, theoretically on terms more favorable to *borrowers* due to reduced lender costs and reduced lender risks.[4] However dubious these claims may be as a matter of fact, they have been relied on by the courts as a rationale for protecting the summary nonjudicial default and sale process against various claims of irregularities in the note assignment process,[5] even as the process has become increasingly a creature of statute as the Legislature has seen fit to regulate in detail the process of notifying borrower of default, providing time to cure or reinstate, providing notice of sale, and conducting the trustee's sale.[6] These statutes, in turn, have taken on a life of their own in recent cases that rely on the *statutory* powers of a trustee or beneficiary while downplaying the necessity of a contractual basis for their actions in the first place.[7] It remains to be seen whether California courts will permit sloppiness in the transfer of debt instruments and related security interests and Lenders' agency arrangements in the context of *judicial proceedings*, where the legal issues may be quite different from those involved in a power of sale foreclosure.

I. ASSIGNMENT AND NEGOTIATION OF THE OBLIGATION

A. Overview of Secured Loan Documentation and Transfers

A real property secured transaction involves two distinct components: a debt or other obligation, and a lien or other security interest.[8] The *obligation* can be an agreement for the performance of some act, or it can be a promissory note or other instrument for the payment of money, and it need not necessarily be expressed in a written agreement.[9] (In this article the secured obligation will sometimes be referred to simply as the "note," since by far the most common contract

or obligation secured is a promissory note.) The same *security instrument* may secure more than one such obligation.[10] However, unless there is some debt or obligation secured, a mortgage or deed of trust is ineffective and a nullity.[11] Ordinarily, the security follows the debt, *i.e.*, a security interest is deemed transferred automatically with a transfer of the debt.[12] An effort to transfer the security without transferring the debt is legally ineffective,[13] and may result in loss of the security or uncollectability of the debt.[14]

A mortgage of real property must be in writing, and a deed of trust, which is a grant of real property, also must be in writing.[15] Because a deed of trust or mortgage is considered to convey or create a lien on an interest in real property, it is also subject to the recording laws.[16] Although a mortgage or deed of trust can be created and can validly secure an obligation without being recorded,[17] the recording is necessary in order to establish the priority of the security interest in the real property vis-à-vis the security interests of other creditors. Recordation also assures that a purchaser of the property for value and without actual notice of the prior lien will be nonetheless deemed to have constructive notice of the deed of trust or mortgage and will therefore take title to the property subject to the security interest of the secured creditor.[18] Otherwise, the purchaser without notice takes free and clear of the mortgage or deed of trust and the debt then will be effectively unsecured.[19]

These basic principles of real property secured transactions can become confusing and even misleading, however, when there has been a *transfer* of the note or the security instrument. A series of disparate and sometimes inconsistent statutes govern such matters, in at least four distinct areas, sometimes with unexpected results for unwary lenders and borrowers. First, the statutory scheme governing mortgages and deeds of trust[20] provides for the recording of *assignments* of security interests in real property,[21] but such recording is not required for the effectiveness of an assignment of the debt instrument, and therefore the assignment of the security instrument is not dependent on such recording.[22] Second, for certain types of security (particularly residential mortgages or deeds of trust secured by one to four family dwellings), the statutes require notification of the obligor/mortgagor of the fact that the security instrument has been transferred,[23] or at least that the "servicing" of the debt has been transferred; [24] but one of those statutes has been construed as requiring notice or recording only for a transfer of a *mortgage*, but not a deed of trust.[25] Third, Article 3 of

the Uniform Commercial Code, as adopted in California, governs the assignment or negotiation of certain negotiable "instruments"[26] but Article 9 of the Code apparently (and obscurely) governs the transfer of ownership of some promissory notes, whether or not negotiable,[27] whereas the general provisions of the Civil Code govern the transfer or assignment of most other contract rights that are not "instruments."[28]

None of these statutory schemes directly considers whether the obligation that is transferred is secured by real property, and none of them requires any written assignment of the security instrument when the debt instrument is transferred, much less that the assignment be recorded in a public office. The manner in which a transfer is effected under each of these statutes has ramifications for the *transferee*, as in the case of a negotiable instrument where the transferee, if a holder in due course, may not be subject to certain defenses that otherwise could be asserted by the obligor.[29] The mode of transfer also has ramifications for the *debtor*, who in some cases may be entitled to presentment of the instrument for payment,[30] but in other circumstances may be subjected to foreclosure by a purported transferee without a clear right to confirm that the party demanding payment in fact is the party entitled to payment.[31]

The pervasive influence of MERS has cast many of these principles in new light. The MERS structure allows for the transfer of the debt without recording an assignment of the security interest, which is still held of record by MERS. It has been argued to run contrary to the usual rule that ownership of the security follows the debt, but usually the role of MERS has been upheld as merely the nominee of the true holder and true beneficiary of the deed of trust.[32] When coupled with the frequent sloppiness of paperwork involved in the transfer of notes secured by residential mortgages (where the original note may be in the hands of a repository or lost, and where a series of transfers including holders of securities comprising or backed by "pools" or assemblages of mortgages), the MERS system can make the tracing of actual ownership of the debt and of the deed of trust or mortgage that secures the debt a complex and sometimes insoluble problem—both in terms of *standing* to enforce the debt and to foreclose the security and in terms of evidentiary *proof* of the obligation that is sought to be collected or foreclosed.[33] Similar issues may arise in other contexts, such as the now-common syndication of commercial loans held by multiple noteholders with a contractual agreement appointing an "agent" to hold the security and act in their mutual interests.

B. Assignment of Contractual Obligations Generally

Under the Civil Code, an "obligation" is a legal duty to do or not do a certain thing,[34] and may be created or imposed by contract or the operation of law.[35] The rights of the person to whom performance of the obligation is due (*i.e.*, the obligee) are the property of the obligee and may be transferred by him or her.[36] A loan of money, as defined in the Civil Code,[37] includes an obligation arising from a written contract *for the payment of money* and may be transferred by "indorsement" even if the obligation is non-negotiable.[38] If a contract right or other personal property is transferred, it can be done by a bill of sale and is governed by the rules applicable to grants generally.[39] A claim for money enforceable by judicial action[40] whether it arises out of a tort *or* out of an obligation,[41] may be transferred by indorsement or by a written assignment and without notice to the obligee, but the indorsement, delivery or assignment is not, in and of itself, sufficient to give notice to the obligor so as to invalidate any payments made by him to the transferor.[42] (The latter provision appears to apply only to a *non*-negotiable written promise to pay money, although there is some doubt as to the exact scope of this provision.)[43]

Beyond this, the Civil Code provides no specific method for assignment of the obligee's rights to an obligation created by contract.[44] Any type of property may be "transferred" except as otherwise provided by law.[45] Property generally may be transferred *without* a writing unless a writing is expressly required by law.[46] Under Civ. Code, §1084, when something is transferred, the transfer includes "all its incidents," but a transfer of only one of the "incidents of a thing" does not accomplish a transfer of the thing itself.[47] This has been held to mean, in the context of a note secured by a mortgage, that the assignment of the note carries with it the beneficial interest under a deed of trust that secures it, even without a separate assignment of the deed of trust, recorded or not.[48] Among other things, a mere assignee of an indebtedness ordinarily bears the burden of proof to show the validity of the assignment in an action to collect the debt.[49] The assignee of an indebtedness also is subject to whatever equities or defenses the obligor could assert against the original obligee, and has none of the protections accorded to a holder in due course under Article 3 of the Commercial Code,[50] as discussed in the next section.

C. Assignment or Transfer of Obligations Governed by the Commercial Code

1. Negotiable Instruments

Even though the general mode of transfer established by the aforementioned provisions of the Civil Code would appear to allow a great deal of leeway in the manner of transfer of an obligation, Article 3 of the Commercial Code[51] imposes certain formal requirements for the transfer of those obligations that are subject to its provisions. Article 3 applies only to "negotiable instruments;"[52] other types of contract transfers are governed by the Civil Code provisions discussed above or in some cases by Article 9 of the Commercial Code, which applies to outright sales of both negotiable and non-negotiable *promissory notes*, as discussed below.[53] A "negotiable instrument" generally means an unconditional promise or order to pay a fixed amount of money, with or without interest, that satisfies all the following criteria: (1) it must be payable to the bearer or order either at the time it is issued or when it comes into possession of a holder, (2) it must be payable on demand or at a definite time, and (3) it must not require any other act or performance by the person obligated to pay, other than to provide security, to confess judgment or to waive the benefits of laws intended to protect obligors.[54]

The description in the negotiable instrument of the person to whom the instrument is initially payable is presumed to reflect the intent of the person signing as issuer, or on behalf of the issuer,[55] and has significant consequences regarding the instrument's negotiability. If the note states that it is payable to "bearer" (usually the person in possession of the note), if it does not state a payee, or if it is payable "to order,"[56] or *to the order of* an identified person,[57] it is negotiable. A contractual undertaking to pay money only to a specific identified person, rather than *to the order* of that person, is not "negotiable."[58]

Certain characteristics established by the language of a document at the time it is first issued, or first comes into possession of the holder, may not be altered by indorsement. A note initially payable to a specified person, rather than to "bearer" or "to the order" of that person, cannot *become* negotiable by a subsequent indorsement.[59] On the other hand, a *restrictive indorsement* that purports to limit payment of a negotiable instrument to a specific person is not effective to prevent a further transfer of the instrument provided that person subsequently indorses the instrument "to bearer" or "to the order" of some per-

son.[60] Otherwise, if the document or contract conspicuously and expressly states on its face at the time it is first issued or first comes into possession of the holder, that it is non-negotiable or that it is not an instrument governed by Article 3 of the Commercial Code, it cannot be converted into a negotiable instrument for purposes of Article 3 by indorsement.[61] In that event, transfer of the contract presumably would be governed by the Civil Code provisions discussed above, unless it is a "promissory note transferred in ordinary business," in which case the transfer may be governed by Article 9 of the Commercial Code.

2. Transfers of Negotiable Instruments

Article 3 allows for several methods of transfer of a negotiable instrument, each with different consequences both for the maker or obligor and for the holder or other transferee.

a. Transfer to a "Holder"

First, an instrument may be "negotiated," which has the effect of transferring the instrument itself to the transferee, who then becomes a "holder."[62] A "holder" of an instrument is the person *in possession* of the instrument.[63] Such a "holder" is entitled to enforce the instrument.[64] If the obligation is payable "to bearer," the note is negotiated solely by transfer of possession of the note. If it is payable "to the order of" a specified person, or to that specified person "or order," then both a transfer of possession and indorsement by the transferor to the transferee are required in order for negotiation to occur and for the transferee to be a "holder."[65] If a person acquires possession of a non-bearer note that has not been indorsed, or there is neither an indorsement nor a transfer of possession of the note, the transferee may have the rights of an assignee, but is not a "holder."[66] Also, as was recently held in a decision denying the availability of holder in due course protection against usury claims by the debtor to investors in fractionalized notes,[67] a transferee of only a *fractional interest* in an instrument cannot be a "holder" even with an indorsement of the note; such a person is not a transferee of a negotiable instrument due to the operation of the statute, which provides that if a transferor purports to transfer less than the entire instrument, "negotiation" does not occur, the transferee acquires *no rights* under Article 3 of the UCC, and instead has only the rights of a partial assignee.[68] In such cases, the transferee has only the rights accorded to the assignee of a non-negotiable instrument under the Civil Code, and is subject to all of the defenses the maker may have to the obligation.[69]

b. Transfer to an Assignee

Second, by omission, Article 3 seems to allow for the mere assignment of an instrument, in which case the laws other than Article 3 govern the rights of the assignee.[70] As a general rule, the assignee stands in the shoes of the assignor and is subject to all equities and defenses existing in favor of the maker.[71] Thus, there is a distinction between a "holder" by indorsement who owns and is entitled to enforce the right of payment as the owner of the obligation, and a mere assignee whose rights of enforcement are wholly derivative of the assignor's rights, if any, to enforce the obligation.[72] As summarized by the Sixth District Court of Appeal in *Creative Ventures, LLC v. Jim Ward & Associates*:[73]

> "[W]hen one negotiates an instrument, one transfers the instrument itself. An assignment, on the other hand, usually refers to the transfer of a *cause of action or rights in or concerning property*—as opposed to the particular item of property itself. In the case of assignment, the assignee's rights are derivative of whatever rights the assignor may have. Thus, the general rule is that the assignee takes subject to all equities and defenses existing in favor of the maker. An assignee stands in the shoes of the assignor, taking his or her rights and remedies subject to any defenses the obligor has against the assignor prior to notice of the assignment.[74]

c. Transfer to a "Holder In Due Course"

Third, when an instrument that is negotiable is actually negotiated to a holder by indorsement and delivery, that person may be a "holder in due course." A holder of an instrument is only a holder in due course if the instrument does not bear apparent evidence of forgery or other irregularities or incompleteness that would call into question its authenticity, *and* the holder took the instrument *for value* and in good faith, and *without notice* that the instrument is overdue or that there is an uncured default with respect to payment, and without notice of certain other specified defenses,[75] as well as without notice that the obligor has been discharged due to bankruptcy or insolvency.[76] (Ordinarily, the original payee of an instrument cannot be a holder in due course because it has not been negotiated by indorsement to him or her. Also, as noted above, a fractional interest holder by definition cannot be a "holder" of an instrument and therefore cannot be a holder in due course and is merely an assignee of the transferor.)[77]

A holder in due course takes the rights of the payee/obligee free and clear of a number of defenses that might have been asserted against the original obligee, or against another assignee or holder not in due course.[78] A holder in due course is subject to the following defenses: that the maker had not attained the age of majority, if it would be a defense to a simple contract;[79] duress; lack of legal capacity; illegality of the underlying transaction that nullifies the obligation of the obligor; fraud *in the inducement*; and discharge in insolvency proceedings.[80] However, a holder in due course is *not subject* to other defenses that would be available against an obligee seeking to enforce a simple contract,[81] such as for recoupment by the obligor against the original payee, if other than the holder;[82] rights to rescind the transfer of the instrument held by some other party;[83] or breach of fiduciary duty by the original payee of which the holder lacks actual knowledge.[84] Based on these principles, a holder in due course also takes his or her instrument free of the defense of usury,[85] as well as other defenses such as failure of consideration.[86]

The holder in due course doctrine may be asserted by the successor *obligee* as a counter-measure against defenses asserted by an obligor of the debt, but it is sometimes misunderstood as giving rise to defenses on the part of the *obligor* if the holder is not a holder in due course. This is not the case—a holder in due course may be "immunized" against certain defenses the obligor could otherwise assert, but an assignee, transferee or holder of the instrument also usually has the right to enforce the obligation, without regard to holder in due course status, except to the extent the obligor has a valid defense to the obligation.[87] The fact a holder is not a holder in due course § does not, in itself, give rise to such defenses.[88]

3. Transfer by Sale of a Promissory Note (Negotiable or Not) Under Article 9 of the UCC

Still another mechanism for transfer of an instrument and allowed for by the Commercial Code is found in Article 9 of the Code, in a provision added when revised Article 9 was adopted in 1999.[89] Although Article 9 generally applies only to the creation and enforcement of *security interests* in collateral, it is drafted in such a way as to apply to the transfer of *ownership* of instruments in some cases. In particular, Article 9 governs the *sale* of "rights to payment," including the sale of negotiable notes and some non-negotiable notes, specifically, those non-negotiable notes that are "in ordinary business" transferred by delivery with any necessary indorsement or assignment.[90] Thus, through

what have been characterized as "nomenclature conventions"[91] but that might be more accurately characterized as statutory sleight of hand, Article 9 now applies to a *sale* of a promissory note, as well as to the creation of a security interest in a note, because "security interest" is defined to include either an interest in personal property that *secures* an obligation as well as "any interest of a … buyer of accounts, chattel paper, a payment intangible or a promissory note in a transaction that is subject to Article 9,[92] and Article 9 in turn applies, among other things, to a "sale of accounts, chattel paper, payment intangibles, or promissory notes."[93]

To summarize, as a result of the amendments to Article 9 adopted in 1999, a sale of the ownership interest in a note can occur solely by the purchaser giving value and by the purchaser *either* taking possession of the note pursuant to a "security agreement" [here read "sale agreement"][94] *or* by the seller "authenticating" a "security agreement" [here also read "sale agreement"][95] that describes the note.[96] The note is not required to be indorsed in order for the transferee to become a "party entitled to enforce" the note under the Article 9 scheme, but without *possession* of the note, the transferee is only an owner and not a "party entitled to enforce" the note. In short, as outlined by a recent Report of the Permanent Editorial Board of the Uniform Commercial Code, Article 9 governs transfers of interests in notes that are not otherwise negotiable or negotiated in due course under Article 3, but it does *not* always confer the right to *enforce* on the party who *owns* the note.[97]

If the transferee as part of a sale transaction under Article 9 acquires *possession* of the note, *whether or not it is negotiable*, then the transferee becomes the "holder" and is entitled to enforce it for purposes of Article 3, whether or not it was duly indorsed to the buyer.[98] If the transferee does not acquire possession of the note and therefore is not a holder entitled to enforce the note, the transferring payee may retain the right to enforce it or these rights may pass to the transferee by subsequent delivery, depending on the nature of the transaction as an outright sale or a security interest, only. In these circumstances, Article 9 allows the *holder* of the note to enforce it pursuant to Article 3, rather than the party to whom the ownership is transferred. [99]

Article 3 usually applies only to negotiable instruments, and the rights of a "holder" entitled to enforce a non-negotiable instrument ordinarily would be those of a mere assignee under the Civil Code and the common law. Under Article 9, however, where the obligation of the maker

is a "promissory note" as defined in the Uniform Commercial Code, but not a negotiable instrument, arguably there is no room for operation of the Civil Code principles described above with respect to assignment of "contract rights," at least if one follows the logic of the 1999 revisions. The possible overlap between the Civil Code provisions for assignment of contract rights and claims for money and the obscurely worded and arguably ambiguous terms of Article 9 of the Commercial Code has yet to be considered by any reported case authority. In any event, there are some written contractual obligations to pay money, secured by mortgages or deeds of trust, that are not "promissory notes," as defined, or that are not transferred by delivery or indorsement "in ordinary business." The Civil Code provisions still would apply to such obligations, but the Article 9 revisions, if anything, drive home *the necessity of possession of the note* by one who seeks to enforce it.

As is confusingly stated in the Uniform Commercial Code Comments that accompanied the enactment of Cal. U. Com. Code, §9109, the exact relationship of Article 9 to transfers of secured obligations, and its operation in relation to the general provisions of the Civil Code applicable to transfers not covered by Article 3 of the UCC, may be somewhat open to interpretation:

> "[Comment 4] Although this Article occasionally distinguishes between outright sales of receivables and sales that secure an obligation, neither this Article nor the definition of "security interest" … delineates how a particular transaction is to be classified. That issue is left to the courts ….
>
> "[Comment 5] A 'sale' of … a promissory note or a payment intangible includes a sale of a right in the receivable, such as a sale of a participation interest. The term also includes a sale of an enforcement right. For example, a "[p]erson entitled to enforce "a negotiable instrument [Com. Code, §3301] may sell its ownership rights in the instrument…. [¶] Nothing in [Section 9109] or any other provision of Article 9 prevents the transfer of full and complete ownership of … an instrument or a payment intangible in a transaction of sale. However, as mentioned in Comment 4, neither this Article nor the definition of "security interest" in [Section 1201] provides rules for distinguishing sales transactions from those that create a security interest securing an obligation. This

> Article applies to both types of transactions. The principal effect of this coverage is to apply this Article's *perfection and priority rules* to these transactions."[100]

The italicized phrase in the preceding quotation may lead some to conclude that the principal purpose of Section 9109 of the Commercial Code is to allocate the rights of creditors as among themselves, and not to change the usual rules concerning parties entitled to enforce a "promissory note," negotiable or otherwise, as determined under other bodies of law.

D. Rights to Credit for Payment of Obligations Transferred

The three (or possibly four) alternative means of assigning or transferring ownership of obligations under Article 3, the Civil Code, and Article 9, are not, in and of themselves, dispositive of the right to *enforce* the obligations.[101] On the contrary, Article 3 distinguishes the *ownership* of a negotiable instrument from the right to *enforce* the instrument.[102] The owner of the instrument may or may not be the party entitled to enforce it, and may or may not be the person entitled to be paid. Put a different way, the person obligated to pay a promissory note may not be entitled to credit for a payment made to a holder of the note if the payment is delivered to someone who is not the "person entitled to enforce" the note, whereas a payment made to the "person entitled to enforce" the note is credited against the payor's obligation under the note, even if the "owner" of the note does not receive the funds.[103]

When an obligation is owed to a creditor, the usual rule is that performance must be tendered to the creditor, or to one of the joint creditors, or to another person authorized by the creditor to accept payment.[104] The debtor is required to make the offer of performance at a place designated by the creditor or wherever that person can be found, *at the option of the debtor*, unless a different place is designated in the contract.[105] Upon a tender of payment, the obligation is deemed satisfied and interest ceases on the sum paid.[106] The key issue in such cases, aside from whether the offer of performance is tendered at the proper place, is whether the performance is tendered to the correct "creditor" or collection agent. The risk of rendering performance to the wrong party, if the obligation has been assigned, usually falls on the person tendering performance,[107] even though the assignee seeking to collect the on the debt bears the burden of proving a valid assignment to it—which

includes the burden of proving that the purported assignor had the authority, capacity and power to assign the interest claimed.[108] If the thing transferred is a non-negotiable right to payment of money, the transfer alone is not notice to the obligor of the change in the party entitled to payment, so as to "invalidate" payments made to the transferor, but the obligor who begins making payments to the transferee is clearly at risk if the transferee has not in fact succeeded to rights of payment.[109]

If the obligation is a negotiable instrument, however, the manner in which the instrument has been transferred may affect the right to enforce the obligation under rules established by the Commercial Code. Under Commercial Code §3412, the obligation of the issuer or maker of an instrument is owed (a) to "a person entitled to enforce the instrument," or (b) to an indorser (who negotiated the instrument with recourse) who has paid the instrument on behalf of the obligor under Section 3415; such an endorser is essentially a subrogee of the holder.[110] The "person entitled to enforce" ordinarily is the *holder* of the note, although a non-holder in possession of the note who has the rights of a holder (such as a subrogee of the holder or a person entitled to enforce a lost, stolen or destroyed note) also may be a "person entitled to enforce."[111]

The obligor of a note or other negotiable instrument who makes a payment to a mere assignee of the instrument takes a considerable risk that the holder will be someone other than the person paid. Likewise, if the obligor pays someone claiming to be the agent or nominee of the holder, the person making payment takes a risk that, by not paying the "holder," he or she has not paid the person "entitled to enforce" and will neither receive credit on the debt nor be protected against a subsequent claim for collection of the amount paid. The obligation to pay ordinarily is discharged only by payment of the instrument to a person entitled to enforce it, and if payment is made to one entitled to enforce the obligation, the person making payment receives credit for the payment even if he or she has knowledge of a claim to the instrument by a person other than the person paid.[112] While a person making payment to the wrong party may be entitled to recover the payment from that person,[113] the party entitled to enforce the instrument is still entitled to demand and receive payment and to enforce the instrument for non-payment.[114]

The payment of an obligation, or a release or discharge of an obligation, when the obligation is evidenced by a negotiable instrument subject to Article 3, also can be effective if the payment, release or discharge would be sufficient to discharge an ordinary contract.[115] Thus,

payment to a mere assignee of a note, or a holder not in due course, should be sufficient *provided* the payment is made to the correct person.[116] If an obligation is held by more than one obligee, payment to one of them ordinarily discharges the debt as to all of them.[117] However, the payment, release or discharge is not effective against a holder in due course who lacks notice of the discharge.[118] Thus, the payment or compromise of an indebtedness, if not indorsed on the instrument itself, potentially will not be binding upon a successor holder if the instrument is negotiable.

II. ASSIGNMENT OF THE SECURITY

A. Assignment of Mortgages and Deeds of Trust

Two seemingly axiomatic principles that are well-rooted in California law have proven elusive in recent case developments. The first is that "the security follows the debt." In other words, a transfer of the debt instrument automatically carries with it the security,[119] and a separate assignment of the mortgage[120] or deed of trust[121] is not necessary if the note has been properly transferred. The other principle is that a purported assignment of the security is void and ineffective unless accompanied by an assignment of the note, and the purported assignment or delivery of possession of the mortgage or deed of trust without a transfer of the obligation secured is either completely ineffective and a legal nullity,[122] or else operates to extinguish the security interest, rendering the note unsecured.[123] It appears that the rules governing assignment of a note secured by a mortgage are the same as those applicable to a deed of trust, and specifically that an assignment of the debt carries with it the security, even though the statutory provision which expressly so provides only refers to a mortgage.[124]

Despite the general effectiveness of an assignment of the debt to carry with it an assignment of the security, a number of considerations combine to suggest that the execution and recording of a separate written assignment of the security instrument is advisable. The laws that protect debtors from the risks of "double payment" obligations discussed in the preceding section, as well as the laws that protect property owners and encumbrancers from the effect of off-record transfers, both lead to this conclusion.

Under Civil Code §2934, an assignment of a mortgage or deed of trust may be recorded, and the recording operates as constructive notice of its contents.[125] Thus, a junior encumbrancer or subsequent

transferee is on notice of a prior recorded assignment and of any matters that will be ascertained by making inquiry of the assignee of the deed of trust.[126] However, under Civil Code §2935, the recording does *not* itself act as notice to the *debtor* so as to invalidate payment made to the person *holding* the note.[127] The debtor therefore may continue to make payments to the original payee or a successor *holder* (as permitted under the Commercial Code), even if the debtor has actual knowledge of the assignment of the security instrument,[128] and the rule allowing payment to one entitled to enforce the note thus is unaffected by constructive notice on the part of the obligor on the note. Further, the recording of an assignment of a mortgage only provides *notice* to subsequent purchasers or encumbrancers; it does not operate to deprive the true holder of the indebtedness of the ownership either of the debt or the security, or to give the assignee a right to foreclose the security.[129] To the contrary, an off-record assignment of the note carries with it the security interest under a mortgage or deed of trust, and a later recorded assignment of the trust deed does not take precedence over the prior off-record assignment of the note.[130] However, it does operate as constructive notice to a subsequent assignee of the deed of trust or mortgage.[131] Conversely, a deed of trust that is valid as between the parties but not recorded is not binding upon subsequent encumbrancers who record their interest first, unless they have actual notice of the prior unrecorded instrument.[132]

The Uniform Commercial Code also provides a mechanism for recording an assignment of the security if there has been an off-record transfer of the note but no recorded assignment of the deed of trust or mortgage. In these circumstances, the purchaser of the note or the secured party to whom the note has been hypothecated can record in the office where the real property security instrument has been recorded, a copy of the transfer agreement whereby the note was acquired, together with a *sworn statement* that a default has occurred, and in that event may proceed with a nonjudicial foreclosure.[133]

This leads to the question of whether the transferee of a negotiable instrument who is a holder in due course of that instrument takes with notice that it is secured by a deed of trust or mortgage, and whether holder in due course status can ever be attained by one with constructive notice of a prior *recorded* assignment of the security instrument. Under California law, and the Uniform Commercial Code, the mere fact that the debt is secured by a mortgage or deed of trust does not

preclude negotiability of the note,[134] and a holder in due course of a negotiable instrument (i.e., one to whom it has been indorsed and possession delivered for value given), who takes *without notice of other claims to the instrument*, is entitled to enforce the obligation and is not subject to other defenses of the obligor.[135] If the deed of trust has been assigned of record, it would seem arguable that a subsequent transferee of the note is on notice that another party holds the deed of trust, and therefore may have rights in the note, but there is no dispositive case authority that confirms this.

If a person succeeds to the interest of the note holder, but has actual notice of a prior assignment of the note and security instrument, he or she is by definition subject to the adverse claim of ownership.[136] If the person acquires the status of a holder of the note, but lacks actual notice of a prior recorded assignment of the security instrument, is that person a holder "without notice of other claims" for purposes of Article 3 of the Commercial Code? At least where the party in possession of the note knowingly allows the assignment of a note and deed of trust to another to be recorded, and negligently permits the assignment to be relied upon by subsequent transferees, the holder of the note will be estopped as *a matter of equity* to claim ownership or a pledgee's interest in the assigned note.[137] If the person in possession of the note is innocently unaware of the recorded assignment of the note and security instrument, however, a different result may follow despite the effect of constructive notice arising from the recorded assignment. Unless Article 3 of the Commercial Code is deemed to be altered by the effect of provisions of the Civil Code that pertain to the recording of assignments of mortgages and deeds of trust, the holder without actual notice may retain its rights as a holder despite the recorded assignment of which he or she is unaware.[138]

The interrelationship between the recording laws and the laws governing the negotiation of instruments is not fully resolved under California law. As stated by one court,

> "the evident purpose [of Section 2934 of the Civil Code as it then read] is to make the recordation of the assignment notice to those subsequently deriving title…. There is no express provision in the code to the effect that the recordation of an assignment of a mortgage on real property should in itself operate to defeat the title of an innocent assignee

> for value who took without notice *and prior to the recordation*." (Emphasis added.)[139]

At the time this case was decided, in 1920, however, the statute expressly applied to impart constructive notice *only* to one "subsequently deriving title to the mortgage from the assignor."[140] In 1931, the statute was amended to provide that such recordation "operates as constructive notice of the contents thereof *to all persons*."[141] As a result, at least one bankruptcy court more recently has concluded that an *assignee* of a note cannot "perfect" an interest in the note without recording its interest in the deed of trust that secures it.[142] This decision is not binding on California courts, however, and it involved only assignments of fractional interests in secured notes, and therefore was not governed by the principle of negotiation giving rise to status as a "holder."[143]

The effects upon a *debtor* of the Civil Code provisions governing recording are no less confusing. Under Civil Code §2935, the mere fact that the assignment of a mortgage or deed of trust held as security for a note, bond or other instrument is *recorded* does not "of itself" constitute notice to the debtor "so as to invalidate any payment made …. to the person holding such note, bond or other instrument."[144] If the debtor has no *actual knowledge* of the assignment, the debtor seemingly is entitled to credit for the payment made to the apparent holder, under the holding of *Rodgers v. Parker*, a California Supreme Court decision dating back to 1902.[145] This decision is generally consistent with Article 3 of the Commercial Code. However, as suggested above,[146] the person making payment may not be entitled to credit for the payment if the instrument is later assigned to a holder in due course without actual notice of the payment, if the note or other secured contract document itself has not been indorsed to reflect payment.

Section 2935 does not directly contradict the holder in due course doctrine; to the contrary, it only considers whether the recordation of the assignment of the deed of trust or mortgage "of itself" prevents crediting the debtor with payment. Thus, a holder in due course who lacks knowledge of prior payment or other defenses to payment of the debt evidenced by the instrument is entitled to payment from the debtor, whether or not a notice of assignment was recorded, and whether or not the holder actually knows whether an assignment was recorded.[147] Conversely, a payor who has *constructive notice* of an assignment of the note and the security due to prior recordation of the

assignment is not entitled to credit, as against the assignee and holder of the note, for any payment made to a person who was no longer the holder of the note at the time payment was made, even if the payor lacks actual notice of the assignment.[148]

B. Mandatory Notice of Transfer of Servicing

Where a note is secured by a mortgage or deed of trust on a one to four family residential property, Civ. Code, §2937, subd. (b), requires notification to the borrower or any subsequent obligor under the note whenever there is a transfer of the "servicing" of the indebtedness. Both the person transferring "servicing" and the person assuming responsibility for "servicing" the debt must notify the obligor, in writing, "before the borrower or subsequent obligor becomes obligated to make payments to a new servicing agent," and must send the notice by first class mail, and include the location where payments are to be made.[149] By the express terms of the statute, neither the borrower nor any subsequent obligor is liable to the *holder* of a note, bond or other instrument, or to any servicing agent before notice of the transfer is received.[150]

If a note is subject to the transfer of servicing notice requirements, the apparent effect of this statute is to alter the rights of an obligor vis-à-vis the holder of a note and the assignor and assignee of the debt, *if accompanied by a transfer of servicing*. The statute is not triggered by an assignment or other transfer of the note and deed of trust, but only by a transfer of "servicing." Unfortunately, the statute does not define "servicing" except to state that "servicing agent" does not include the trustee under a deed of trust.[151] Presumably, the term "servicing agent" means the person who actually collects the payment from the borrower, whether it is the holder of the debt instrument or some other person acting as the holder's agent. If a transfer of "servicing" occurs, however, the owner or holder of an indebtedness—even if he or she is a holder in due course—cannot, as against the debtor, claim the right to a prior payment actually made to a predecessor servicing agent before the debtor received the required notice.[152] This would appear to alter the usual rules that place the risk of paying the wrong person primarily on the obligor, both under the Civil Code[153] and under the Commercial Code.[154]

Also, because the statute requires *both* the transferor and the transferee servicing agents to give notice, it raises the implication that a failure by one of the two parties to give the notice may leave the debtor with a defense against a holder who claims the right to be paid despite a payment

made to the prior servicing agent before both parties gave the required notice. This issue has yet to receive analysis in a reported California appellate court decision.

C. Substitution of Trustees and the Power of Sale Foreclosure

The preceding discussion is concerned with the assignment or transfer of the payee's rights under the debt instrument, and effect of such an assignment or transfer as a conveyance of the beneficial interest of a mortgagee or the beneficiary of a deed of trust. In most California secured transactions, a third party trustee is identified in the security instrument, and legal title to the property is ostensibly granted to the trustee, who holds a power of sale for the benefit of the beneficiary.[155] The beneficiary accordingly has the sole power to substitute another person, or itself, for the named trustee at any time, without notice, by executing and recording a substitution of trustee.[156] An assignment of the beneficial interest in the deed of trust implicitly effects an assignment of the right to substitute the trustee.[157] A substitution of the trustee is not a transfer of the debt or of the security for the debt, but only an appointment of a different party to hold and exercise the power of sale.[158]

The California statutory scheme for nonjudicial foreclosures includes a specified procedure for substituting trustees, which requires execution and acknowledgment of the substitution by *all of the beneficiaries* or their successors, except where the obligations secured consist of "a series of notes secured by the same real property or undivided interests in a note secured by real property equivalent to a series transaction," the substitution need only be executed and acknowledged by "the holders of more than 50 percent of the *secured beneficial owners*."[159] If the substitution is by fewer than all of the owners of beneficial interests pursuant to this provision, then it must be accompanied by a separate document *executed under penalty of perjury* to the effect that the statutory requirements are met, which must be executed by "all parties signing the substitution."[160] This document also must be recorded, and when recorded it is conclusive evidence of compliance "in favor of the substituted trustee, *subsequent* assignees of the beneficial interest, and all later bona fide encumbrancers or purchasers of the real property."[161]

Noticeably omitted from this portion of the statute is any provision for execution either of the substitution or the statement under penalty of perjury by an "authorized agent or nominee" of the *beneficiary*. Yet,

in actual practice, substitutions of trustee often are executed by servicing agents or other purported "authorized agents" on behalf of the beneficiaries. Another subsection of the same statute provides, however, that a substituted trustee is deemed authorized to act as trustee for all purposes after the substitution is executed by the mortgagee, beneficiaries, or *by their authorized agents* …. Once recorded, the substitution shall constitute conclusive evidence of the authority of the substituted trustee or his or her agents to act pursuant to this section" (emphasis added).[162] Presumably, therefore, an agent can execute and record the substitution on behalf of the beneficiary, although the statute is hardly a model of clarity. For example, the statute does not require a writing appointing an agent to execute the substitution, and it does not define or provide a method for authenticating a claim by a purported agent that it is authorized to act by the principal (i.e., the holder or beneficiary) or that its authority has not been revoked in some manner.

Despite the seemingly strict statutory limitations on who can execute documentation for the substitution of trustees, the power of an agent to initiate default proceedings under a deed of trust or mortgage containing a power of sale is not so strictly limited. As a general rule, the courts recognize that it is the beneficiary, not the trustee, who is the real party in interest in a deed of trust.[163] "The trustee, mortgagee, or beneficiary, *or any of their authorized agents*" may file a notice of default,[164] and "the mortgagee, trustee, *or other person authorized to make the sale*" may file a notice of trustee's sale.[165] The ultimate party able to control the sale process continues to be the beneficiary and its "authorized agents." Although evidently a trustee must exist to exercise and sell the property pursuant to a power of sale, and there is no provision for the beneficiary to do so, *qua* beneficiary, the beneficiary still may be able to accomplish this by substituting *itself* as trustee.[166] The trustee can be appointed without its consent at any time by action of the beneficiary,[167] can be replaced at any time by unilateral act of the beneficiary,[168] and owes no duty to notify either the beneficiary or the trustor that litigation affecting the property is pending.[169] The beneficiary can elect to forego exercise of the power of sale, and instead sue for judicial foreclosure. The trustee is not a real party in interest in such an action, nor is the trustee entitled to appear in, defend, or prevent the beneficiary from doing so.[170] Given this, the identity of the beneficiary, and the ability of the party claiming status as beneficiary

to demonstrate this status, is far more important in most respects than the identity of the trustee at any given point in time.

D. Assignments of the Beneficiary's Interest and Non-Judicial Foreclosure

In light of the specificity of the statute providing for substitution of the trustee that requires execution, acknowledgment and a statement under penalty of perjury by "the beneficiary," as well the statute establishing the unilateral power of "the beneficiary" to change the identity of the trustee, [171] the statutory provisions governing the assignment of the *beneficial interest* in the mortgage or deed of trust are strangely sparse. Almost as an afterthought, this statutory scheme includes a peculiar provision, Civ. Code, §2932.5, a remnant of the original Field Code adopted (under a different section number) in 1872, which requires notice of an assignment of a security interest in real property containing a power of sale to be "duly acknowledged and recorded" before the assignee can exercise the power of sale.[172] Even though most of the provisions of the Civil Code concerning powers of sale in real property security interests apply equally to mortgages and deeds of trust,[173] in *Stockwell v. Barnum*,[174] a nearly forgotten Second District Court of Appeal decision dating back to 1908, this particular provision was held applicable only to mortgages, not to deeds of trust. Although one federal bankruptcy decision involving a MERS foreclosure held §2932.5 applicable to deeds of trust as well as mortgages,[175] several other bankruptcy court decisions had followed *Stockwell* as the sole reported expression of California law on the subject.[176] (This is in contrast to courts in other states which have disallowed MERS foreclosures entirely if the true beneficiary could not establish a chain of assignments recorded in compliance with the state's recording statutes as required to commence a nonjudicial foreclosure.[177])

The *Stockwell* decision was given new life in 2011 by another Second District Court of Appeal decision. In *Calvo v. HSBC Bank USA, N.A.,* the court followed *Stockwell*, and held that §2932.5 only applies to mortgages, not to deeds of trust. Thus, since mortgages are so uncommon as to be virtually unheard of in California transactions, the *Calvo* court concluded that §2932.5 is "obsolete" and does not apply to virtually *any* real property security instrument in common use in California today.[178] As a result, the law incongruously requires great care in providing notice of a change in the trustee, but no mandatory notice for a change of *beneficiary*, whether or not of record.

It appears the court in *Calvo* felt constrained by the principle of *stare decisis*, given that the *Stockwell* decision was by a panel of the same appellate district court. The court, however, disparaged arguments that the status of a mortgagee of a mortgage and the beneficiary of a deed of trust are practically the same and treated alike under most other provisions of the statutory scheme. In so doing, it left unaddressed the rationale behind Civ. Code, §2932.5, which is obviously that the party foreclosing by power of sale (or directing such a foreclosure) needs to be ascertainable from the record—if for no other reason than for the obligor on the debt to be able to determine whether the purported payee as previously identified has in fact transferred the debt to another who now asserts the failure of performance. In the words of one federal judge, "Considering that the non-judicial foreclosure of one's house is a particularly harsh event, and given the numerous problems I see in nearly every non-judicial foreclosure case I preside over [sic] a procedure relying upon a bank or trustee to self-assess its own authority to foreclose is deeply troubling," particularly where state law establishes a requirement that the beneficiary show a recorded chain of assignments before foreclosing.[179]

The *Calvo* court preferred, however, to follow the ancient *Stockwell* decision rather than to explain why the plain language of section 2932.5, which requires a notarial acknowledgment and recordation of the assignment to occur in order for the assignee to exercise the power of sale where "the power to sell real property is given to a mortgagee, or other encumbrancer, in a instrument intended to service the payment of money,"[180] did not apply where the security interest was memorialized in a deed of trust rather than a mortgage.

Calvo is a discordant decision in an otherwise harmonious body of law that treats deeds of trust and mortgages alike.[181] In relying on *Stockwell*, the *Calvo* court did not mention the language of a California Supreme Court decision of far more recent vintage, *Monterey S. P. Partnership v. W. L. Bangham, Inc*.[182] which in the course of holding that the beneficiary, not the trustee, must be served in an action affecting the collateral, also stated:

> "Even before we declared a deed of trust to be *equivalent to a mortgage with a power of sale* in *Bank of Italy*, … we held that when the beneficiary of the deed of trust, but not the trustee, was a party, "[t]he real party in interest was before the court."

> *… Thus, mortgagees and trust deed beneficiaries alike hold security interests in property encumbered by mortgages and deeds of trust ….*" (emphasis added)[183]

It remains to be seen whether other district courts of appeal will follow the Second District's decision in *Calvo*, but the above quotation would seem to suggest strongly that the beneficiary of a deed of trust, like the mortgagee of a mortgage, and not the trustee, is the true "holder" of an encumbrance containing a power of sale and should be bound by the statute to record its assignment.

III. DEVELOPMENTS IN CASE LAW ARISING OUT OF THE NONJUDICIAL FORECLOSURE PROCESS

Despite the apparent significance of the beneficiary's identity and participation in decisions and documentation of the debt and security, the California courts of appeal have been extremely reluctant to compel the beneficiary or its alleged representatives and nominees to "show their cards" in electing to foreclose by power of sale. A number of state courts in other jurisdictions where foreclosure is normally a form of litigation, or where power of sale foreclosures include some measure of judicial supervision, have insisted upon strict compliance with documentary proof requirements, forcing lenders and their counsel to produce the original promissory note and security instrument to record mortgage assignments, and to demonstrate their status as "holders" of the paper who are clearly entitled to foreclose, or requiring competent witnesses to swear to the evidence of default.[184] Some bankruptcy decisions in California have adopted similar views,[185] but as discussed in this section,[186] the courts of appeal instead have allowed for the conduct of nonjudicial foreclosure proceedings by parties whose credentials, at best, were "not proven," and have adopted a hands-off judicial approach in deference to the presumed legislative purpose of allowing nonjudicial foreclosure to occur without risk of pre-foreclosure litigation except in the most extreme cases.

A. *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 121 Cal. Rptr. 3d 819 (4th Dist. 2011)

The hands-off position of California courts of appeal began with the decision in *Gomes v. Countrywide Home Loans, Inc.*,[187] which refused to allow a homeowner's pre-foreclosure lawsuit seeking to prevent a trustee's sale by Countrywide Home Loans, as a successor owner of the loan after origination by the initial lender, KB Home Mortgage,

and multiple interim transfers. The plaintiff homeowners executed a note and deed of trust in favor of KB Home in connection with a home purchase. The deed of trust identified MERS, "acting solely as a nominee for Lender and Lender's successors and assigns," as the beneficiary. The debt instrument subsequently was transferred several times without the recording of any assignment of the beneficial interest in the deed of trust, which remained in MERS, according to the public records. After the borrower allegedly defaulted, an entity called ReconTrust, which in the court's words "identified itself as an agent for MERS," filed a notice of default and sent it to the borrower along with a declaration signed by an employee of Countrywide which, according to the court, "apparently was acting as the loan servicer."[188]

The borrower's causes of action were pleaded, first, as "wrongful initiation of foreclosure" and second, as "declaratory relief" on the issue of whether Civ. Code, §2924a, "allows a borrower, before his or her property is sold, to bring a civil action to test whether the person electing to sell the property is, or is duly authorized to [do] so by, the owner of the beneficial interest in it."[189]

Because the causes of action were framed as a pre-foreclosure challenge to the nonjudicial foreclosure process, the court based its decision solely on the provisions of Civ. Code, §§2924 through 2924k, and related case law, and concluded that these provisions are a comprehensive statutory scheme intended to provide "a quick, inexpensive and efficient remedy." Since the statutory scheme includes no procedure for the filing of a lawsuit to challenge the authority of the foreclosing party to act for the noteholder after a notice of default or notice of sale have been recorded, the court refused to upset the statutory scheme by allowing such litigation to proceed, and sustained defendant's demurrers.[190] This part of the *Gomes* decision is not based on the status of MERS or the MERS form of deed of trust, and would seemingly apply to *any* pre-foreclosure attack on the sale process based on a claim that the actual or reported noteholder or its alleged agent had not proven their authority to proceed. The court also found, as "an independent ground" for its holding, that the deed of trust in question contained an express contractual acknowledgement by the debtor that MERS was authorized to initiate foreclosure proceedings. As stated by the court, "The deed of trust contains no suggestion that the lender or its successors and assigns must provide [the borrower] with assurances that MERS is authorized to proceed with a foreclosure at the time it is initiated.[191]

In so concluding, the court commented that it was not necessary to decide whether MERS was truly the beneficiary under the deed of trust, because pursuant to Civ. Code, §2924(a)(1), MERS could initiate foreclosure as a nominee (i.e. agent) of *the presumed noteholder*.[192] The court did not explain how the concept of "presumed noteholder" relates to the language of §2924(a)(1), which addresses only the right of the agent for the *beneficiary or trustee* to act, and does not mention a "noteholder," nor did it explain how it determined that the "noteholder" continued to authorize MERS to act in this particular case.[193] In some non-California decisions, the power of MERS to continue to act as agent for the successor holder of the indebtedness after the debt has been transferred has led to judicial disapproval of MERS-instituted foreclosures.[194] Under *Gomes*, however, at least if appointed by a deed of trust, the usual principles of agency and "equal dignities" do not compel an appointed nominee to demonstrate continued authority to act for successors of the original holder of the instrument who appointed the nominee.

Having rejected the argument for allowing a pre-foreclosure suit to establish authority to foreclose non-judicially, the court of appeal in *Gomes* added insult to injury by refusing to permit the homeowner to amend its complaint to allege "on information and belief" that the proper *noteholder* had not authorized the proceeding. No recorded assignments or description of assignments had been made public or available to the borrower/debtor. Since the debtor concededly lacked even the foundational facts establishing why it believed that the incorrect parties had purportedly acted as assignees, the court refused to permit the homeowner to rely on "information and belief" in claiming lack of authority[195]—essentially holding that by keeping the assignments of the debt instrument secret, the creditor parties had precluded the debtor from challenging their ownership of the debt and their fundamental right to enforce the debt at any time prior to the completion of the foreclosure.

While *Gomes* may be the correct, or at least a common sense and practical outcome insofar as it upholds the nonjudicial sale process against unsubstantiated and speculative claims by non-performing borrowers, it remains a troubling decision. It omits any substantive discussion of what it means to be a "holder" of a note with rights to enforce it, or whether a successor noteholder is entitled to enforce the indebtedness or is subject to defenses that can be asserted by litigation prior to completion of the trustee's sale process. No doubt because of the manner in which the action was pleaded (and the fact the plaintiffs were seeking to establish an affirmative precondition to foreclosure

rather than defending on legitimate grounds such as actual performance), it only considers the issue of authority of a purported nominee to initiate foreclosure under the trustee's sale statute. The case suggests, however, that the mere language of authority in the deed of trust forever precludes a demand for credentials of the party seeking to take away the property of the debtor through a nonjudicial foreclosure—for example, by refusing to allow an examination of whether the present, unidentified holder of the indebtedness continues to authorize MERS as its "nominee" to hold the beneficial interest of the deed of trust, when a transfer of the debt instrument necessarily carries with it a transfer of the beneficial interest to a new holder. It also confronts the usual homeowner with the civil equivalent of a Star Chamber proceeding—no right to identify or cross-examine the accusers or the alleged witnesses claiming the right to foreclose, and no ability to go behind the mere notifications and self-identifications of various other nominal players in the secondary market as "agents" for creditors who remain unknown and unseen principals in a proceeding that by its very nature affects valuable property rights of the debtor. Indeed, the principles of agency and "equal dignities" are left out of the analysis, which is based solely on language in a deed of trust whose ownership is concededly unclear and unsubstantiated.

Of course, *Gomes* does not reach the question of whether a homeowner who properly pleaded and could prove tender of payment to proper persons and an absence of default on the debt could defend against the foreclosure, and therefore does not suggest that no such defense could ever exist—but it also does not suggest that such a claim could have validity in the face of the language granting MERS the power to initiate foreclosure without substantiating its actual and continuing authority to act for the "presumptive noteholder."[196] These omissions render *Gomes* a dangerous and potential misleading precedent in situations where the equitable defense of the borrower may be more well-founded, as later cases that rely upon it suggest.

B. *Robinson v. Countrywide Home Loans, Inc.*, 199 Cal. App. 4th 42, 130 Cal. Rptr. 3d 811 (4th Dist. 2011)

After *Gomes*, another panel of judges in the Fourth District Court of Appeal reached the same conclusions in a case in which the litigants were each represented by the same counsel who appeared for the parties in *Gomes*. In *Robinson v. Countrywide Home Loans, Inc.*,[197] the plaintiffs pleaded that Countrywide, "identifying itself as a debt collector and servicer of the loan on the noteholder's behalf," had given

a notice of delinquency and then failed to respond to a borrower's request that it produce a copy of the note and evidence of any sale, transfer or assignment of the note, as well as a beneficiary statement. The plaintiffs also had demanded a beneficiary's statement and payoff demand statement pursuant to Civ. Code, §2943, a request that was also ignored.[198] Instead, another party, self-identified as ReconTrust, who in the court's own words was "*purporting* to act as agent for the beneficiary," went ahead and recorded a notice of default and election to sell. Countrywide never responded to requests "to identify the current beneficiary on the note and deed of trust."[199]

In an opinion that is remarkable both for its brevity and for its lack of appreciation of the ironic, the court of appeal rejected the plaintiff's causes of action seeking damages for "wrongful initiation of foreclosure" and declaratory relief. Citing *Gomes*, it first observed that no "pre-emptive cause of action" for "wrongful initiation" exists in light of the statutory scheme for nonjudicial foreclosure, under Civ. Code, §§2924 to 2924k.[200]

The court in a footnote observed that the borrower who believes the foreclosing entity "lacks standing" can seek to enjoin the trustee's sale or to set it aside,[201] seeming to suggest that the plaintiff's error was seeking damages rather than an injunction. Then, in a statement that may be interpreted as a classic "Catch-22," the court held that since the complaint alleged that foreclosure was instituted by ReconTrust rather than Countrywide or MERS, and did not allege that ReconTrust purported to act for MERS or for Countrywide, but rather alleged that ReconTrust acted for an *unknown* beneficiary, the complaint alleged no "facts upon which such an action could be based with respect to Countrywide or MERS."[202]

The court's conclusion may have been warranted by the manner in which the complaint was framed, and by the plaintiffs' persistent failure to attach the notice of default, and perhaps also because ReconTrust evidently had not demurred to the cause of action and was not included in the appeal.[203] The more significant factor, however, appears to have been reluctance to upset the statutory foreclosure scheme by allowing an action against the presumptive beneficiary (MERS) or the presumptive servicing agent (Countrywide) to be used to stop a default proceeding initiated by *a self-identified agent for an unidentified beneficiary*. The defendants had evidently failed to provide to the debtor information, including the amount due, and to whom it was payable, that they were *statutorily required to provide upon demand*.

The court's conclusion, that "the complaint does not state the name of the beneficiary or whose behalf ReconTrust purported to act," begs the question of what a debtor is supposed to do when faced with demands for payment from faceless, self-identified "agents" and "nominees" for unknown and undisclosed principals, who refuse to comply with statutory disclosure requirements and then try to take away their homes.

C. *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (1st Dist. 2011)

In *Fontenot v. Wells Fargo Bank*,[204] the First District Court of Appeal also proved inhospitable to attacks on assignments in the context of MERS transactions. Unlike the two Fourth District cases discussed above, *Fontenot* was decided *after* the *trustee's sale foreclosure was complete*, and involved an effort by the plaintiff homeowner to recover based on an alleged forbearance agreement by the lenders, based on a theory of "wrongful foreclosure" against the lender and its ostensible agents or nominees. In an opinion focusing largely on strict rules of pleading and criticisms of the plaintiff's briefing and failure to cite to the record or produce copies of documents at the pleading stage, coupled with a limited discussion of the substantive law, the court of appeal found that the trial court had properly sustained demurrers by both MERS (as a party to an alleged forbearance agreement and beneficiary of the deed of trust as the purported nominee of the holder), and Wells Fargo Bank, as the alleged "transferee of servicing" that had completed a foreclosure after an earlier sequence of filings by other parties as alleged agents of the lenders.[205]

The facts of the case are confusing, at least in part because the plaintiff homeowner, who no doubt lacked key information about a series of off-record transactions among MERS and a succession of alleged noteholders, beneficiaries and servicers, was unable to plead to the satisfaction of the court the identity and capacity of the parties who were alleged to have committed the wrongful foreclosure. For example, a forbearance agreement to which Wells Fargo was a party was attached to the complaint, but a subsequent letter from Wells Fargo alleged by the plaintiff to have modified the forbearance agreement was not. The plaintiff alleged "without citation to the record" that Wells Fargo had "taken over servicing," but the court instead identified Wells Fargo as "attorney in fact for HSBC," an alleged assignee of the indebtedness, based on a substitution of trustee recorded by Wells Fargo. (Again, this is an example of a self-identified agent purporting to act for the true holder of the note without providing foundational information, *i.e.*, a copy of the power of attorney which does not appear to have been

in the record of the case nor was its absence noted in any way by the court of appeal). The plaintiff also alleged on various grounds that MERS had purported to assign the debt without having an interest in the note and without being a noteholder (MERS was identified only as a nominee of the lender and beneficiary of the deed of trust).

The court, observing that the substantive law provides for the recording of an assignment of a beneficial interest in a deed of trust but does not require an assignment of the debt instrument itself to be recorded, found the plaintiff's pleading wanting because it failed to allege adequately the manner in which an off record assignment did or did not occur. As stated by the court:

> "The [original] lender *could readily have assigned* the promissory note to HSBC [the apparent assignee of the debt at the time of foreclosure] in *an unrecorded document that was not disclosed to plaintiff*. [Footnote omitted.] To state a claim, plaintiff was required to allege not only that the purported MERS assignment was invalid, but also that HSBC *did not receive an assignment of the debt in any other manner*. There is no such allegation." (Emphases added.)[206]

Since the plaintiff was required to plead that "HSBC did not receive a valid assignment of the debt *in any manner*," said the court, its claim failed, even though the plaintiff had no way of knowing what might have occurred. Again, the court seemed to be requiring a debtor to plead facts which were solely known to the foreclosing parties and not available to him, even though these facts, at least in the abstract, are of great importance to a debtor seeking to avoid double liability—to avoid paying an indebtedness to someone who claims all the remedies of a holder but refuses to demonstrate (or cannot demonstrate) that it is, in fact, the holder of the debt instrument.

The plaintiff's efforts to plead a cause of action for "wrongful foreclosure" against MERS (the named beneficiary as *nominee* of an undisclosed principal) and Wells Fargo (the self-identified "attorney in fact" for the true beneficial interest holder) were further deficient, in the court's view, because the plaintiff had not demonstrated that the "imperfections in the foreclosure process" were prejudicial to her interests. Whereas in *Robinson*, the court had suggested the plaintiffs should have waited until after the trustee's sale to assert the claim of wrongful foreclosure,[207] here, the court relied on the fact that the nonjudicial foreclosure process was already completed and "presumed to

have been conducted regularly and fairly." Further, the borrower had executed a promissory note, which the court (without analysis) stated was a "negotiable instrument," and therefore "a borrower must anticipate it can and might be transferred to another creditor." In the court's view, such an assignment merely substituted one creditor for another, without changing the borrower's obligations, and since she admitted she was in default, and did not allege that the transfer by MERS to HSBC interfered with her efforts to make payment, she could not claim to have been injured by the assignment.[208]

The court's conclusion, that the mere occurrence of off-record assignments by a party (MERS) whose relationship to the status of a "noteholder" is not well defined and whose continued authority to act is, *at best*, unproven, does not constitute a cause of action, is not entirely surprising. It can be inferred from the court's opinion, as in the *Robinson* and *Gomes* decisions, that the *Fontenot* plaintiffs were really trying to make a claim based solely on the confirmed sequence of off-record assignments in MERS-related transactions, and not alleging any specific injury, such as a failure by an undisclosed assignee (or assignor) to give proper credit for payments actually made.[209] It would be unfortunate—and indeed improper—if the case were read to preclude such a claim by a truly non-defaulting debtor who was subjected to such Star Chamber treatment by unidentified persons. However, the language of the opinion does not provide much comfort that such a claim would succeed.

The need to preserve a massive volume of MERS-related mortgages in default against wholesale claims that the MERS process precludes a valid foreclosure have led the state courts of appeal to adopt a fairly hard-nosed stance against efforts to disrupt the nonjudicial sale process by litigation. If a case were to arise in which a homeowner suffered demonstrable injury by reason of the off-record assignment of the debt, potentially a different result would follow—but we have essentially no examples of this from the California courts in the current foreclosure crisis.

D. *Ferguson v. Avelo Mortgage, LLC*, 195 Cal. App. 4th 1618, 126 Cal. Rptr. 3d 506 (2d Dist. 2011)

In an opinion that was subsequently ordered depublished, and can no longer be cited,[210] the Second District Court of Appeal in *Ferguson v. Avelo Mortgage, LLC*,[211] also refused to disrupt the MERS process. In *Ferguson*, the plaintiff sought to invalidate a nonjudicial foreclosure conducted by a successor trustee appointed by an alleged assignee of the note via an off-record assignment (while MERS continued as the

nominal beneficiary of the deed of trust). Consistent with other failed efforts to state a cause of action based upon a MERS-related assignment, the plaintiff failed to allege payment of the indebtedness, and did not contest that it was in default under the debt.[212] Instead, it focused its attack on the assertion that, as the nominee of the lender under a deed of trust, MERS does not possess the promissory note and cannot assign it, absent evidence of an explicit authorization from the original lender.

Noting that federal bankruptcy court decisions on the validity of MERS assignments are not in accord on this issue,[213] the *Ferguson* court relied on *Gomes* and other state court decisions that confirm the principle that by executing a MERS deed of trust, the debtor essentially concedes contractually that MERS has authority to act in the capacity therein defined and to initiate and conduct foreclosures as nominee of the lender or of the assignees of the lender. According to the court, a person whose sole source of "ownership" of the note is an "assignment" of the note by a conceded non-noteholder, MERS, acting as agent for a holder without possession of the note, has all of the rights of a holder to cause enforcement of the security for the debt.[214] (Again, this an issue on which a number of non-California and bankruptcy courts have reached precisely the opposite conclusion, refusing to disregard established UCC Article 3 concepts such as "negotiation," "indorsement," and "possession" of an "instrument" based on a thin contractual authorization by an alleged "agent" whose continuing authority is not proven and who complies with none of the usual formalities for such transfers).[215]

Finding no basis for invalidating a sale due to imperfections in the assignment process itself (a claim the plaintiff essentially abandoned on appeal), the court of appeal in *Ferguson* turned to a different concept—the requirement that one seeking to overturn or stop a foreclosure sale must allege tender of full payment of the debt prior to the trustee's sale in order to state a cause of action. In so doing, the court noted that a power of sale in a deed if trust allows recourse to the security without the necessity of a judicial action, and that the "tender rule" will be applied, *unless it is inequitable to do so*, in order to prevent spurious claims by defaulting debtors that they were injured by mere irregularities in the foreclosure process. Since the debtor made no effort to claim that there had not been a default, and only alleged that the lender should not have been able to foreclose due to various procedural and documentation errors and irregularities, the debtor was precluded from making a successful attack on the completed nonjudicial foreclosure—even though "the beneficiary was not the holder of the original promissory note." In other

words, the tender rule applies even if the foreclosing beneficiary cannot, or refuses, to produce the original note—traditionally, and under both Article 3 and Article 9 of the UCC, the fundamental indicia of a "holder" with the right to enforce (and collect) the note.[216]

Now that the *Ferguson* decision has been ordered de-published, it no longer stands as authority and cannot be cited, but it reflects the continued reluctance of California appellate courts to allow debtors in default to disrupt the nonjudicial sale process by litigation. *Ferguson* was cited and relied upon in the subsequent *Fontenot* decision, which is a reported opinion. Its reasoning continues to pose the question of whether a debtor in default can validly object to a nonjudicial foreclosure *at any time*, regardless how egregious may be the imperfections in the off-record process, without first curing the default or tendering payment in full before the sale occurs.[217] *Ferguson's* analysis, if followed, virtually guarantees the failure of most such claims. It is worth noting that the Ninth Circuit Court of Appeals recently enunciated the same rule, in a case governed by Arizona law but where the court looked to decisions in other states to *predict* the laws in Arizona, observing that claims for wrongful foreclosure typically are allowed, if at all, only *after* foreclosure, and then must be "premised on allegations that the borrower was not in default or on procedural issues that resulted in damages to the borrower," and not solely as claimed imperfections in the assignment of the security or the debt or the identification of persons authorized to act for the note holder.[218]

E. *Herrera v. Deutsche Bank Nat. Trust Co.*, 196 Cal. App. 4th 1366, 127 Cal. Rptr. 3d 362 (3d Dist. 2011)

In a case that is at variance with the trend of other decisions discussed above, the Third District Court of Appeal has held that when a homeowner has sued for wrongful foreclosure *following* a nonjudicial foreclosure sale, a defendant lender seeking summary adjudication on the merits must at least introduce facts supporting its ownership of the debt instrument and right to foreclose, and cannot rely solely on the written documents reflecting assignments of the related security instrument.

In *Herrera v. Deutsche Bank National Company*,[219] the court of appeal refused to take judicial notice of the ownership of the indebtedness based on a chain of recorded assignments of a MERS deed of trust, requiring that the moving party at least produce *admissible evidence* of its ownership of the debt, and thereby establish its right to substitute the trustee who ultimately foreclosed. In this case, a substitution of trustee recited that the party executing it was the assignee of the

deed of trust, but the full chain of actual assignments of the beneficial interest in the deed of trust were not introduced. The appellate court held that the trial court property took judicial notice of the *existence* of recorded documents, but erred in taking judicial notice of the truth of *facts* recited therein (such as a recital in a recorded assignment of deed of trust that the foreclosing bank was a successor beneficiary, without evidence of prior assignments).[220]

Herrera is perhaps merely a road map of how to adduce the undisputed facts on a summary judgment motion, but it also reflects a less deferential judicial attitude concerning the manner and visibility to the borrower of transfers of lenders' interests in negotiable instruments and the related security instruments than is reflected in the preceding decisions. Unlike the preceding decisions, *Herrera* was not decided on demurrer to the claim of wrongful foreclosure, and did not reach the substantive question of whether such a cause of action exists. In *Fontenot,* the court distinguished *Herrera*, and took pains to clarify that a court may take judicial notice of recorded documents *and of their effect* when they are instruments of transfer—even if it is improper to take judicial notice of "factual recitations" contained in the instrument.[221] (In other words, if the lender in *Herrera* had presented and requested judicial notice of a chain of recorded documents establishing its status as successor beneficiary, summary judgment would have been properly granted.)

Probably the most important distinction, however, is that in *Herrera* the purported beneficiary was seeking *affirmative relief* (*i.e.*, the grant of a summary judgment motion) in a litigation context, and not defending the *nonjudicial* foreclosure process against pre-foreclosure judicial intervention. As discussed in Part Two of this article, lenders or their agents who are seeking judicial relief, whether by way of the appointment of a receiver or for relief from the automatic stay of bankruptcy, and most likely in the context of an attempt to foreclose *judicially* under Code Civ. Proc., §726, should prepare to do more than merely *allege* ownership of the debt or rights to enforce it, and should be prepared to produce evidence of a complete chain of assignments to establish that they are the bona fide holders of the indebtedness which they seek to collect by foreclosure.

IV. CONCLUSION OF PART ONE

The overwhelming weight of recent court of appeal decisions in California is to preserve the nonjudicial foreclosure process and protect foreclosing parties from having to "produce the note" or demonstrate their

true holder status as a condition of foreclosing, or to require the self-proclaimed "agents," "nominees" or "attorneys in fact" of the foreclosing beneficiary from producing their "badges" authorizing their action against the debtor. As to whether this tactic will succeed in other proceedings, the law is far from clear. The failure to produce the instrument and either an authenticated record of sale or an indorsement establishing that the note has been negotiated "in blank" or to the holder in whose name the action for judicial foreclosure commenced, if the plaintiff is not the original payee, should be fatal to an action to collect under the Commercial Code, and therefore should lead to a conclusion that the non-holder lacks standing as a real party in interest to foreclose under the Code of Civil Procedure. Such arguments have often prevailed in other states. They have not been definitively litigated in California.

As will be discussed in Part Two of this article, if the debt is not evidenced by an "instrument," and it is not negotiable, arguably the plaintiff will have the burden of proving more than possession and transfer of the instrument, and may bear the affirmative burden to prove ownership in fact and a right to payment, rather than be entitled to any of the presumptions afforded to the holder of an instrument under Article 3 of the Commercial Code. Moreover, a purported "agent" or "nominee" acting for the "holder" may have to produce authenticated and admissible evidence of its continuing authority to represent the purported noteholder (or noteholders) if it attempts to obtain judicial relief. However, there is no definitive authority on these issues, or indeed any directly relevant case law. California courts may just as well be persuaded by the statutory language of Code Civ. Proc., §725a that permits a judicial foreclosure action to be filed by the beneficiary or trustee, without mention of a noteholder and without reference to the requirements of the Commercial Code.[222] By contrast, a lender who pursues relief from stay or other affirmative relief against a bankrupt debtor had better be prepared to show the court a complete chain of assignments and indorsements along with the original instrument, as a number of bankruptcy court decisions have established over the past three years. Again, these issues will be reviewed in the next installment of this article.

[THIS IS THE END OF PART ONE OF THIS ARTICLE. PART TWO WILL ADDRESS THE APPLICABILITY OF THE SUBSTANTIVE LAW GOVERNING TRANSFERS OF THE OBLIGATION AND THE SECURITY IN THE CONTEXT OF A CREDITOR'S EXERCISE OF JUDICIAL REMEDIES, AND WILL APPEAR IN THE MARCH 2012 ISSUE OF THE *MILLER & STARR REAL ESTATE NEWSALERT*.]

NOTES

1. The purposes and practices served by MERS in the residential lending market (and for the consortium of institutional residential mortgage lenders who organized it), are essentially to provide a method for avoiding the recordation of transfers of the beneficiary's interest in the deed of trust as the debt instrument is repeatedly sold, transferred or securitized in the secondary market. See, e.g., *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 1151, 121 Cal. Rptr. 3d 819 (4th Dist. 2011), review denied, (May 18, 2011) and cert. denied, 2011 WL 3608736 (U.S. 2011). See also Robinson, *The Case Against Allowing Mortgage Electronic Registration Systems, Inc. (MERS) to Initiate Foreclosure Proceedings*, 32 Cardoza L. Rev. 1621 (2011) (hereinafter referred to as "Robinson"); Hooge & Williams, Mortgage Electronic Registration Systems, Inc: A Survey of Cases Discussing MERS Authority to Act, published in Norton Bankr. Law Advisor, Aug. 2010 Issue, at 1-24 (Thomson Reuters) (hereinafter referred to as "Hooge & Williams"); Hudspeth, *Clarifying MERS: Does Mortgage Electronic Registration Systems, Inc., Have Authority to Assign the Mortgage Note in a Standard Illinois Foreclosure Action*, 31 N. Ill. U.L. Rev. 1 (2010) (hereinafter cited as "Hudspeth").
2. See 4 Miller & Starr, *California Real Estate 3d*, Ch. 10 (Deeds of Trust and Mortgages), §10:1 at 13 and §10:180 at 549-551 (3d ed. 2003 & Supp. 2011).
3. *Garfinkle v. Superior Court*, 21 Cal. 3d 268, 282, 146 Cal. Rptr. 208, 578 P.2d 925 (1978).
4. E.g., *Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1236, 44 Cal. Rptr. 2d 352, 900 P.2d 601 (1995); *Moeller v. Lien*, 25 Cal. App. 4th 822, 830, 30 Cal. Rptr. 2d 777 (2d Dist. 1994).
5. E.g., *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 271-272, 129 Cal. Rptr. 3d 467 (1st Dist. 2011), discussed at text accompanying notes 204-209, below.
6. See the discussion in *Garfinkle v. Superior Court of Contra Costa County*, *supra*, note 29, 21 Cal. 3d at 278-279.
7. For example, in *Calvo v. HSBC Bank USA, N.A.*, 199 Cal. App. 4th 118, 125, 130 Cal. Rptr. 3d 815 (2d Dist. 2011), review filed, (Oct. 25, 2011), the court looked first to the statute as authorizing foreclosure by the "agent" of a beneficiary and then second to the language of the deed of trust.
8. *Alliance Mortgage Co. v. Rothwell*, 10 Cal. 4th 1226, 1235, 44 Cal. Rptr. 2d 352, 900 P.2d 601 (1995).
9. R. Bernhardt, California Mortgage & Deeds of Trust Practice, §1:10 at 9 (4th ed.); 4 Miller & Starr, *California Real Estate 3d*, Chapter 10 (Deeds of Trust and Mortgages), §10:10 at 42 (3d ed. 2003 & Supp. 2011).
10. *Ricketson v. Richardson*, 19 Cal. 330, 346, 1861 WL 1001 (1861); *Hocker v. Reas*, 18 Cal. 650, 654, 1861 WL 934 (1861). See 4 Miller & Starr, Ch. 10 (Deeds of Trust and Mortgages), §10:175 at 537-538 (3d ed. 2003 & Supp. 2011).
11. *Alliance Mortgage v. Rothwell*, *supra*, note 1, 10 Cal. 4th at 1235; *Western Loan & Building Co. v. Scheib*, 218 Cal. 386, 389-390, 23 P.2d 745 (1933); *Henley v. Hotaling*, 41 Cal. 22, 28, 1871 WL 1307 (1871); *Turner v. Gosden*, 121 Cal. App. 20, 22, 8 P.2d 505 (1st Dist. 1932).
12. Civ. Code, §2936; *Seidell v. Tuxedo Land Co.*, 216 Cal. 165, 170, 13 P.2d 686 (1932).
13. *Kelley v. Upshaw*, 39 Cal. 2d 179, 192, 246 P.2d 23 (1952); *Polhemus v. Trainer*, 30 Cal. 685, 1866 WL 831 (1866).
14. See text accompanying notes 119-125, below, and the authorities cited therein.
15. Civ. Code, §2922 (mortgages); Civ. Code, 1091 (grants). See 4 Miller & Starr, §10:5, at 29-30 (3d ed. 2003 & Supp. 2011).
16. Gov. Code, §27280; Civ. Code, §§1215, 2952. See 5 Miller & Starr, Ch. 11 (Recording and Priorities), §11:4 at 11:21 to 11:23 (3d ed. 2009 & Supp. 2011).
17. Civ. Code, §§1217, 2922, 2952. See *Farmers' Exchange Bank of San Bernardino v. Purdy*, 130 Cal. 455, 457, 62 P. 738 (1900); *Slaker v. McCormick-Saeltzer Co.*, 179 Cal. 387, 388, 177 P. 155 (1918); *Bank of Ukiah v. Petaluma Sav. Bank*, 100 Cal. 590, 591, 35 P. 170 (1893).

18. See, generally, 5 Miller & Starr, Ch. 11 (Recording and Priorities), §§11:60, 11:99 (3d ed. 2009 & Supp. 2011).
19. Civ. Code, §§1107, 1214; *First Fidelity Thrift & Loan Ass'n v. Alliance Bank*, 60 Cal. App. 4th 1433, 1446, 71 Cal. Rptr. 2d 295 (2d Dist. 1998). See *Lee v. Murphy*, 119 Cal. 364, 371, 51 P. 549, 955 (1897) (homestead).
20. Civ. Code, §§2920 et seq.
21. Civ. Code, §2934.
22. *Adler v. Newell*, 109 Cal. 42, 48, 41 P. 799 (1895); *Santens v. Los Angeles Finance Co.*, 91 Cal. App. 2d 197, 202, 204 P.2d 619 (4th Dist. 1949). See 4 Miller & Starr, Ch. 10 (Deeds of Trust and Mortgages), §10:38 at 128-129 (3d ed. 2003 & Supp. 2011).
23. Civ. Code, §2932.5.
24. Civ. Code, §2937, subd. (b). See text accompanying notes 171-182, below.
25. See text accompanying notes 171-182, below.
26. Cal. U. Com. Code, §3102.
27. As discussed in text accompanying notes 89-100, below, the provisions of Article 9 of the Commercial Code (Cal. U. Com Code §§9101 et seq.) govern certain *sales* of "promissory notes" but not necessarily the transfer of rights to *enforce* notes.
28. See text accompanying notes 34-50, below.
29. See text accompanying notes 75-88, below.
30. Cal. U. Com. Code, §§3501, 3502. See text accompanying notes 101-118, below.
31. See text accompanying notes 187-209, below.
32. See text accompanying notes 187-218, below.
33. See Robinson, *supra* note 1, and Hooge & Williams, *supra* note 1, for extended discussion of these issues.
34. Civ. Code, §1427.
35. Civ. Code, §1428.
36. Civ. Code, §1458.
37. Civ. Code, §1912 defines a "loan of money" as "a contract by which one delivers a sum of money to another, and the latter agrees to return at a future time a sum equivalent to that which he borrowed." A loan is always presumed to bear interest unless otherwise expressly stipulated in writing at the time. Civ. Code, §1914.
38. Civ. Code, §1459.
39. Civ. Code, §1053. See Civ. Code, §§1054 to 1056, 1066 to 1085. See also *McCown v. Spencer*, 8 Cal. App. 3d 216, 225, 87 Cal. Rptr. 213 (2d Dist. 1970).
40. Civ. Code, §953 defines a "thing in action" as "a right to recover money or personal property by a judicial proceeding."
41. Civ. Code, §954.
42. Civ. Code, §955.
43. See Civ. Code, §955 (providing that it applies to a transfer of a non-negotiable instrument *other than* one intended to create a security interest pursuant to paragraph (1) or (3) of Civ. Code, §9109, subd. (a), but also providing that it applies to a transfer of an instrument that would be negotiable pursuant to Division 3 of the Commercial Code but for the fact it is "not payable to order or to bearer.") As discussed in Section C.3 of this article (text accompanying notes 89-100, below), the term "security interest" means "sale" under Article 9 when applied to promissory notes. It is unclear whether §955 of the Civil Code therefore does or does not apply to a transfer of a "promissory note." *Cf.* also *Royal Bank Export Finance Co. v. Bestways Distributing Co.*, 229 Cal. App. 3d 764, 766 n.2, 280 Cal. Rptr. 355 (4th Dist. 1991) (decided before the 1998 amendments to the Commercial Code discussed at text accompanying notes 89-100, below).
44. See *McCown v. Spencer*, 8 Cal. App. 3d 216, 225, 87 Cal. Rptr. 213 (2d Dist. 1970) ("If from the entire transaction and the conduct of the parties it clearly appears that the intent of the parties was to pass title to the chose in action, then an assignment will be held to have taken place.").

45. Civ. Code, §1044.
46. Civ. Code, §1052.
47. Civ. Code, §1084. See also Civ. Code, §2936 ("The assignment of a debt secured by a mortgage carries with it the security.").
48. *Lewis v. Booth*, 3 Cal. 2d 345, 349, 44 P.2d 560 (1935) (defective acknowledgement of assignment of deed of trust did not impair effectiveness of indorsement of the note as transferring both the debt and the security). In *Niederer v. Ferreira*, 189 Cal. App. 3d 1485, 1502-1503 n.2, 234 Cal. Rptr. 779 (2d Dist. 1987) an assignment (without indorsement) of a promissory note was held to also assign a guaranty of the note. See also *Niederer v. Ferreira*, 150 Cal. App. 3d 219, 224, 197 Cal. Rptr. 685 (2d Dist. 1983).
49. *Cockerell v. Title Ins. & Trust Co.*, 42 Cal. 2d 284, 292, 267 P.2d 16 (1954); *Neptune Society Corp. v. Longanecker*, 194 Cal. App. 3d 1233, 1242, 240 Cal. Rptr. 117 (4th Dist. 1987); *Security Pacific Nat. Bank v. Chess*, 50 Cal.App.3d 555, 556, 129 Cal. Rptr. 852 (2d Dist. 1976). See *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 270, 129 Cal. Rptr. 3d 467 (1st Dist. 2011).
50. *Creative Ventures, LLC v. Jim Ward & Associates*, 195 Cal. App. 4th 1430, 1447, 126 Cal. Rptr. 3d 564, 74 U.C.C. Rep. Serv. 2d 641 (6th Dist. 2011), review denied, (Aug. 10, 2011); *Music Acceptance Corp. v. Lofing*, 32 Cal. App. 4th 610, 622, 626, 39 Cal. Rptr. 2d 159 (3d Dist. 1995), as modified, (Feb. 22, 1995); *Royal Bank Export Finance Co. v. Bestways Distributing Co.*, 229 Cal. App. 3d 764, 768, 280 Cal. Rptr. 355 (4th Dist. 1991); Restatement Second, Contracts §336.
51. Cal. U. Com. Code, §§3101 to 3605.
52. See text accompanying notes 89-100, below.
53. Cal. U. Com. Code, §3102, subd. (a). Frequently in Article 3, the term "instrument" is used solely; in the context of Article 3 "instrument" and "negotiable instrument" are synonymous. See Cal. U. Com. Code, §3104, subd. (b).
54. Cal. U. Com. Code, §3104, subd. (a).
55. Cal. U. Com. Code, §3110, subd. (a). The modern definition of "negotiable" makes no reference to security for the debt. Accordingly, earlier cases such as *Anderson v. Wickliffe*, 178 Cal. 120, 122, 172 P. 381 (1918) holding to the effect that a note secured by a mortgage cannot be a negotiable instrument, are effectively superseded by the subsequently enacted UCC provisions discussed here.
56. Cal. U. Com. Code, §3109, subd. (a).
57. Cal. U. Com. Code, §3109, subd. (b). See Cal. U. Com. Code, §3104, subd. (a)(1).
58. See Cal. U. Com. Code, §§3104, subd. (l), 3109, subd. (b).
59. Cal. U. Com. Code, §3109, subd. (c). See Cal. U. Com. Code, §3205.
60. Cal. U. Com. Code, §§3109, subd. (c), 3206, subd. (a).
61. Cal. U. Com. Code, §3104, subd. (d).
    The term "conspicuous" has a specified meaning that requires larger type, a different color or other means of setting it off from other text, and a heading in capital letters greater in size and contrasting in color with the other text. Cal. U. Com. Code, §1201, subd. (b)(10).
62. Cal. U. Com. Code, §§3203, subd. (c), 3204.

Creative Ventures, LLC v. Jim Ward & Associates, 195 Cal. App. 4th 1430, 1447, 126 Cal. Rptr. 3d 564, 74 U.C.C. Rep. Serv. 2d 641 (6th Dist. 2011), review denied, (Aug. 10, 2011); *Security Pacific Nat. Bank v. Chess*, 58 Cal. App. 3d 555, 562, 129 Cal. Rptr. 852, 19 U.C.C. Rep. Serv. 544 (2d Dist. 1976).

63. Cal. U. Com. Code, §1201, subd. (b)(21).
64. Cal. U. Com. Code, §3301.
65. Cal. U. Com. Code, §3201, subd. (b). A person cannot be a "holder" if the instrument is not duly indorsed, or unless possession of the note is transferred (Cal. U. Com. Code, §3301, subd. (b)), but a person not in possession of the instrument may be able to enforce the instrument under the special principles and procedures available in case of a lost or destroyed note. Cal. U. Com. Code, §3301, subd. (c). See Cal. U. Com. Code, §3309.

66. Cal. U. Com. Code, §3203, subd. (c).

Creative Ventures, LLC v. Jim Ward & Associates, 195 Cal. App. 4th 1430, 1447-1448, 126 Cal. Rptr. 3d 564, 74 U.C.C. Rep. Serv. 2d 641 (6th Dist. 2011), review denied, (Aug. 10, 2011); *Security Pacific Nat. Bank v. Chess*, 58 Cal. App. 3d 555, 562-566, 129 Cal. Rptr. 852, 19 U.C.C. Rep. Serv. 544 (2d Dist. 1976) (also holding that a separate assignment not contained in an indorsement written on or affirmed by the instrument is not an "indorsement" and the transferee therefore is not a "holder," but a mere assignee).

67. *Creative Ventures, LLC v. Jim Ward & Associates*, 195 Cal. App. 4th 1430, 1447-1448, 126 Cal. Rptr. 3d 564, 74 U.C.C. Rep. Serv. 2d 641 (6th Dist. 2011), review denied, (Aug. 10, 2011).

68. Cal. U. Com. Code, §3203, subd. (d).

See Uniform Commercial Code Comment to §3203, subd. (d): "An indorsement purporting to convey less than the entire instrument does, however, operate as a partial assignment *of the cause of action*. Subsection (d) makes no attempt to state the legal effect of such an assignment, which is left to other law. A partial assignee of an instrument has rights only to the extent the applicable law gives rights, either at law or in equity, to a partial assignee." (Emphasis added.)

69. Civ. Code, §1459. *Creative Ventures, LLC v. Jim Ward & Associates*, 195 Cal. App. 4th 1430, 1447, 126 Cal. Rptr. 3d 564, 74 U.C.C. Rep. Serv. 2d 641 (6th Dist. 2011), review denied, (Aug. 10, 2011).

70. *Neptune Society Corp. v. Longanecker*, 194 Cal. App. 3d 1233, 1242, 240 Cal. Rptr. 117 (4th Dist. 1987); *Security Pacific Nat. Bank v. Chess*, 50 Cal.App.3d 555, 556, 129 Cal. Rptr. 852 (2d Dist. 1976). See *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (1st Dist. 2011).

71. *Creative Ventures, LLC v. Jim Ward & Associates*, 195 Cal. App. 4th 1430, 1447, 126 Cal. Rptr. 3d 564, 74 U.C.C. Rep. Serv. 2d 641 (6th Dist. 2011), review denied, (Aug. 10, 2011), citing *McGarvey v. Hall*, 23 Cal. 140, 1863 WL 637 (1863); Civ. Code, §1469. See also *Benson v. Andrews*, 138 Cal. App. 2d 123, 132, 292 P.2d 39 (2d Dist. 1955); *Bliss v. California Co-op. Producers*, 30 Cal. 2d 240, 244-246, 181 P.2d 369, 170 A.L.R. 1009 (1947); *California Pac. Title & Trust Co. v. Bank of America Nat. Trust & Savings Ass'n*, 12 Cal. App. 2d 437, 445, 55 P.2d 533 (1st Dist. 1936).

72. *Creative Ventures, LLC v. Jim Ward & Associates*, 195 Cal. App. 4th 1430, 1447, 126 Cal. Rptr. 3d 564, 74 U.C.C. Rep. Serv. 2d 641 (6th Dist. 2011), review denied, (Aug. 10, 2011); *Music Acceptance Corp. v. Lofing*, 32 Cal. App. 4th 610, 622, 39 Cal. Rptr. 2d 159 (3d Dist. 1995), as modified, (Feb. 22, 1995); *Royal Bank Export Finance Co. v. Bestways Distributing Co.*, 229 Cal. App. 3d 764, 768, 280 Cal. Rptr. 355 (4th Dist. 1991); Restatement Second, Contracts §336.

73. 195 Cal. App. 4th 1430, 126 Cal. Rptr. 3d 564 (6th Dist. 2011).

74. 195 Cal. App. 4th 1430, 1447 (citations and internal quotations omitted).

75. Cal. U. Com. Code, §3302, subd. (c). This section defines "holder in due course" extensively, and includes additional provisions with respect to (1) notes that are one of a series of notes, (2) notes received in a "bulk sale" not in the ordinary course of business of the transferor, and (3) notes acquired as a successor in interest of an estate or other organization. See Cal. U. Com. Code, §3302, subd. (a)(2), (b), (d). See *Bliss v. California Co-op. Producers*, 30 Cal. 2d 240, 244-246, 181 P.2d 369, 170 A.L.R. 1009 (1947) concerning the effect of notice of default, maturity or dishonor as precluding holder in due course status. See also *Security Pacific Nat. Bank v. Chess*, 50 Cal.App.3d 555, 565-567, 129 Cal. Rptr. 852 (2d Dist. 1976).

76. See Cal. U. Com. Code, §3302, subd. (b).

77. See text accompanying notes 67-69, above, and accompanying footnote citations.

78. See, generally, Cal. U. Com. Code, §§3305, subd. (b), 3306, 3307.

79. For exceptions to this principle, see Fam. Code, §7050 (the "emancipated minor" exception).

80. Cal. U. Com. Code, §3305, subd. (b), referencing §3305, subd. (a)(1).

81. Cal. U. Com. Code, §3305, subd. (b), referencing §3305, subd. (a)(2).

82. Cal. U. Com. Code, §3305, subd. (b), referencing §3305, subd. (a)(3).
83. Cal. U. Com. Code, §3306.
84. Cal. U. Com. Code, §3307.
85. *Nuckolls v. Bank of Cal. Nat. Ass'n*, 10 Cal. 2d 278, 285, 74 P.2d 271 (1937); *Creative Ventures, LLC v. Jim Ward & Associates*, 195 Cal. App. 4th 1430, 1445, 1446, 126 Cal. Rptr. 3d 564, 74 U.C.C. Rep. Serv. 2d 641 (6th Dist. 2011), review denied, (Aug. 10, 2011) (dictum). See also Cal. U. Com. Code Comment, 22A, p.2, 2 West's Am. Cal. U. Com. Code (2002 ed.), foll. 3305.
86. *Bliss v. California Co-op. Producers*, 30 Cal. 2d 240, 248-249, 181 P.2d 369, 170 A.L.R. 1009 (1947); *Gribble v. Mauerhan*, 188 Cal. App. 2d 221, 225, 10 Cal. Rptr. 296 (4th Dist. 1961).
87. Cal. U. Com. Code, §3305, subd. (a). See *Niederer v. Ferreira*, 189 Cal. App. 3d 1485, 1495-1496, 234 Cal. Rptr. 779 (2d Dist. 1987). See also *Randall v. Duff*, 101 Cal. 82, 87-88, 35 P. 440 (1894) (assignee of mortgage equitably entitled to payments due assignor); and cases cited in 4 Miller & Starr, §10:39, n. 16, at p. 131 (right of assignee to enforce mortgage by foreclosure).
88. See Official Comment 2 to Cal. U. Com. Code, §3308, subd. (b), which states generally that once a plaintiff producing the instrument proves entitlement to enforce it, either as a "holder" or as a person with the rights of a holder, the plaintiff is entitled to recover unless the *defendant* proves a defense or claim in recoupment. "Until proof of a defense or claim in recoupment is made, the issue as to whether the plaintiff is a holder in due course does not arise."
89. Cal. U. Com. Code, §9109, subd. (a)(3), Stats. 1999, ch. 991 (S.B. 45), §35, effective July 1, 2001. See Assembly Committee Comment (1999 Addition) to §9109, Comment 4. This section applied the "security interest" provisions of Article 9 to outright sales of promissory notes for the first time. See Assembly Committee Report to Com. Code, §9109, 1999 Addition, Comment 4.
90. Cal. U. Com. Code, §9109, subd. (a) (3) provides that Article 9 (*i.e.*, Division 9 of the California Uniform Commercial Code) applies to a "sale of accounts, chattel paper, payment intangibles, or promissory notes." A "promissory note" for purposes of this section may be a negotiable instrument or it may be a promise to pay money that is not a check and is a non-negotiable instrument "of a type that *in ordinary business* is transferred by delivery with any necessary indorsement or assignment." Cal. U. Com. Code, §9109, subds. (a)(47), (65). (emphasis added)
91. See Report of the Permanent Editorial Board for the Uniform Commercial Code, *Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes* (ALI/NCCUSL, Nov. 14, 2011), at p. 8 (hereinafter cited as the "UCC Mortgage Note Report"). See also Uniform Commercial Code Comment to UCC §9-109 (Cal. U. Com. Code, §9109), Comment 4.
92. Cal. U. Com. Code, §1201, subd. (b)(35).
93. Cal. U. Com. Code, §9109, subd. (a). Article 9 applies even if the "security interest" [i.e., sale] is of a secured obligation that is in turn secured by an interest in real property or other property that is not subject to Article 9. See Cal. U. Com. Code, §9109, subd. (b).
94. Cal. U. Com. Code, §9203, subds. (b)(3), (B). See discussion in the UCC Mortgage Note Report, *supra*, note 91, at pages 8-9.
95. See Cal. U. Com. Code, §9102, subd. (a)(73).
96. Cal. U. Com. Code, §9203, subd. (b)(3)(A). Stats. 1999, ch. 991 (S.B. 45), §35, effective July 1, 2001. See Assembly Committee Comment (1999 Addition) to §9109, Comment. 4.
97. See UCC Mortgage Note Report, *supra*, note 91, *passim*.
98. Cal. U. Com. Code, §§9203, subd. (b), 3301, 3203. If there is no indorsement, the transferee in such a case is "a nonholder in possession of the note who has the rights of the payee by transfer of the note pursuant to [Com. Code, §3203]." UCC Mortgage Note Report, *supra*, note 91, at p. 11.
99. Cal. U. Com Code §§9203, subd. (b), 3203. See discussion in UCC Mortgage Note Report,

supra note 91, at pages 6, 9-10, 11.

100. Uniform Commercial Code Comment [Cal. U. Com. Code, §9109], Comments 4 & 5 (emphasis added).
101. *In re Veal*, 450 B.R. 897, 909-910 (B.A.P. 9th Cir. 2011).
102. See Cal. U. Com. Code, §3301. This section provides as follows: "Person entitled to enforce an instrument means (a) the holder of the instrument, (b) a nonholder in possession of the instrument who has the rights of a holder, or (c) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 3309 [pertaining to lost or destroyed instruments] or subdivision (d) of Section 3418 [pertaining to payment by mistake]. A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."
103. Cal. U. Com. Code, §§3412, 3602, subd. (a). *In re Veal*, 450 B.R. 897, 910-911 (B.A.P. 9th Cir. 2011).
104. Civ. Code, §1488.
105. Civ. Code, §1489.
106. Civ. Code, §1504.
107. Cal. U. Com. Code, §3418, subd. (b). See *Niederer v. Ferreira*, 189 Cal. App. 3d 1485, 1496, 234 Cal. Rptr. 779 (2d Dist. 1987) (persons who had an interest in proceeds of note could sue assignee who received payment, but their potential rights were not a defense to the obligor's obligation to satisfy the note). See also *Rodgers v. Peckham*, 120 Cal. 238, 242, 52 P. 483 (1898) (payment made with notice that another holds the note or mortgage is at the risk of the payor). Among other reasons, the typical institutional lender's promissory note has language by which the maker waives "presentment, notice of dishonor, and demand for payment."
108. See *Neptune Society Corp. v. Longanecker*, 194 Cal. App. 3d 1233, 1242-1243, 240 Cal. Rptr. 117 (4th Dist. 1987).
109. See Civ. Code, §955.
110. Cal. U. Com. Code, §3412. Section 3415 provides for the obligation of an indorser to pay the amount due on the instrument if the instrument is dishonored by the original obligor, and in that event the *indorser* becomes the "person entitled to enforce" the instrument—analogous to the right of subrogation obtained by a surety after paying the principal's debt.
111. Cal. U. Com. Code, §3301. See Cal. U. Com. Code, §3309. The status of a holder with rights to enforce does not always require an indorsement. See text accompanying notes 89-100, above.
112. Cal. U. Com. Code, §§3602, subd. (a), 3306. There are exceptions to this, as when the person making the payment knows the person paid is in wrongful possession of a stolen instrument (§3602, subd. (b)(2)), or when the payment is made in knowing violation of an injunction against payment to a person whose claim to the instrument is contested, or in some cases where the person making the payment accepted an indemnity against loss from the person to whom payment is made against a claim from another person who asserts a claim to the instrument. See Cal. U. Com. Code, §3602, subd. (b)(1).
113. Cal. U. Com. Code, §3418, subd. (b). See *Niederer v. Ferreira*, 189 Cal. App. 3d 1485, 1496, 234 Cal. Rptr. 779 (2d Dist. 1987) (persons who had an interest in proceeds of note could sue assignee who received payment, but their potential rights were not a defense to the obligor's obligation to satisfy the note). See also *Rodgers v. Peckham*, 120 Cal. 238, 242, 52 P. 483 (1898) (payment made with notice that another holds the note or mortgage is at the risk of the payor).
114. *In re Veal*, 450 B.R. 897, 910 (B.A.P. 9th Cir. 2011), citing F. Miller & A. Harrell, The Law of Modern Payment Systems, §6.03[6][b][ii] (2003).
115. Cal. U. Com. Code, §3601, subd. (a).
116. See Civ. Code, §§1473, 1478.

117. Civ. Code, §1475.
118. Cal. U. Com. Code, §3601, subd. (b).

See *Schoen v. Houghton*, 50 Cal. 528, 529-530, 1875 WL 1677 (1875) (purchaser of promissory note without notice of prior release was a "bona fide purchaser" despite failure to inquire of payee why note was sold for less than full value); *Haulman v. Crumal*, 13 Cal. App. 2d 612, 616-617, 57 P.2d 179 (4th Dist. 1936); *Ross v. Title Guarantee & Trust Co.*, 136 Cal. App. 393, 400, 403-404, 29 P.2d 236 (4th Dist. 1934); *Aimo v. Mitchell*, 124 Cal. App. 497, 504, 12 P.2d 1059 (3d Dist. 1932) (stating the rule under prior law). But see *Rodgers v. Parker*, 136 Cal. 313, 316, 68 P. 975 (1902).

119. Civ. Code, §2936 ("The assignment of a debt secured by mortgage carries with it the security").

Lewis v. Booth, 3 Cal. 2d 345, 349, 44 P.2d 560 (1935).

120. *Adler v. Newell*, 109 Cal. 42, 48-49, 41 P. 799 (1895).
121. *Lewis v. Booth*, 3 Cal. 2d 345, 349, 44 P.2d 560 (1935); *Seidell v. Tuxedo Land Co.*, 216 Cal. 165, 170, 13 P.2d 686 (1932) (whereas *Lewis v. Booth* relies upon Civ. Code, §1084 to the effect that the transfer of a thing transfers all of its "incidents," and the lien of a deed of trust is one these "incidents;" *Seidell* relies upon Civ. Code, §2936, even though §2936 refers only to an assignment of a debt secured by a mortgage, not one secured by a deed of trust). See also *Cockerell v. Title Ins. & Trust Co.*, 42 Cal. 2d 284, 291, 267 P.2d 16 (1954); *Santens v. Los Angeles Finance Co.*, 91 Cal. App. 2d 197, 201, 204 P.2d 619 (4th Dist. 1949) ("the transfer of the note carried with it the security"—here a deed of trust).
122. *Kelley v. Upshaw*, 39 Cal. 2d 179, 192, 246 P.2d 23 (1952) (mortgage); *Hyde v. Mangan*, 88 Cal. 319, 327, 26 P. 180 (1891); *Polhemus v. Trainer*, 30 Cal. 685, 688, 1866 WL 831 (1866). See *Johnson v. Razey*, 181 Cal. 342, 344, 184 P. 657 (1919).
123. Restatement (Third) of Property (Mortgages), §5:4 cmt.e (1997) states: "In general a mortgage is *unenforceable* if it is held by one who has no right to enforce the secured obligation." Accordingly, [w]hen a note is split from a deed of trust, "the note becomes as a practical matter unsecured." *In re Veal*, 450 B.R. 897, 915-916 (B.A.P. 9th Cir. 2011) (applying Illinois law, which it observed is the majority rule, while noting that Civ. Code, §2924(a)(1) and some California bankruptcy decisions would appear to hold that one who is not the holder of the obligation—or cannot prove it—still may foreclose the deed of trust).
124. See also §2936; Cal. U. Comm Code, §9607, subd. (b). The latter provision is obscure and not addressed in reported case authority, but its reference to "security interest" must be read as including a *sale* of a promissory note (see text accompanying notes 89-100) which, by the operation of §9607, subd (d), automatically transfers the security. See UCC Mortgage Note Report, *supra* note 91, at 14-15. See also *Domarad v. Fisher & Burke, Inc.*, 270 Cal. App. 2d 543, 553, 76 Cal. Rptr. 529, Blue Sky L. Rep. (CCH) P 70826 (1st Dist. 1969). This decision reviews the authorities cited in footnotes 121 to 122, *supra*, and concludes that a deed of trust, like a mortgage, "is a mere incident of the debt it secures and that an assignment of the debt 'carries with it the security' (Civ. Code, §2936 [other citations omitted]); that a deed of trust is inseparable from the debt and always abides with the debt…; and that a deed of trust has no assignable quality independent of the debt, it may not be assigned or transferred apart from the debt, and an attempt to assign the deed of trust without a transfer of the debt is without effect [citations omitted]." (270 Cal.App.2d at 553-554.) *But see Calvo v. HSBC Bank USA, N.A.*, 199 Cal. App. 4th 118, 123-125, 130 Cal. Rptr. 3d 815 (2d Dist. 2011), review filed, (Oct. 25, 2011) (holding that Civ. Code, §2932.5, which references only "mortgage or other encumbrance" securing a debt, is inapplicable to a deed of trust, citing as controlling authority the decision in *Stockwell v. Barnum*, 7 Cal. App. 413, 416, 94 P. 400 (2d Dist. 1908)).
125. Civ. Code, §2934.
126. See *Triple A Management Co., Inc. v. Frisone*, 69 Cal. App. 4th 520, 539, 81 Cal. Rptr. 2d 669 (5th Dist. 1999).
127. Civ. Code, §2935.
128. Cal. U. Com. Code, §3602, subd. (a). See text accompanying footnotes 101-118, above.

129. *Santens v. Los Angeles Finance Co.*, 91 Cal. App. 2d 197, 202, 204 P.2d 619 (4th Dist. 1949).
130. *Adler v. Newell*, 109 Cal. 42, 48, 41 P. 799 (1895).
131. *Domarad v. Fisher & Burke, Inc.*, 270 Cal. App. 2d 543, 554-555, 76 Cal. Rptr. 529, Blue Sky L. Rep. (CCH) P 70826 (1st Dist. 1969).
132. *County Bank of San Luis Obispo v. Fox*, 119 Cal. 61, 63, 51 P. 11 (1897). See *Bank of Ukiah v. Petaluma Sav. Bank*, 100 Cal. 590, 591, 35 P. 170 (1893).
133. Cal. U. Com. Code, §9607, subd. (b); Official Comment 8 to UCC §9-607. As stated in UCC Mortgage Note Report, *supra* note 91, at 13-14, the purpose of the transfer is solely to provide a record if required by local state laws to initiate a non-judicial foreclosure.
134. *Wilson v. Steele*, 211 Cal. App. 3d 1053, 1061-1062, 259 Cal. Rptr. 851 (2d Dist. 1989), opinion modified, (July 19, 1989) (observing that; Cal. U. Com. Code, §3104 defines "negotiable instrument" without reference to collateral or security, and concluding that repeal of former Civ. Code, §3265 did not preclude negotiability of a secured obligation); *Hayward Lumber & Investment Co. v. Naslund*, 125 Cal. App. 34, 40, 13 P.2d 775 (4th Dist. 1932) (accord, but relying on former Civ. Code, §3265).
135. Cal. U. Com Code §§3301, 3302, subd. (a)(2), 3306.
136. See also *Lee v. Murphy*, 119 Cal. 364, 370-371, 51 P. 549, 955 (1897) (dictum).
137. *Domarad v. Fisher & Burke, Inc.*, 270 Cal. App. 2d 543, 556-557, 76 Cal. Rptr. 529, Blue Sky L. Rep. (CCH) P 70826 (1st Dist. 1969); *Security Mortgage Co. v. Delfs*, 47 Cal. App. 599, 602-603, 191 P. 53 (1st Dist. 1920).
138. See R. Bernhardt, *supra* note 9, §1:30, at 26-27, discussing the effect of Cal. U. Com. Code, §3302(a)(2) and suggesting that *Ross v. Title Guarantee & Trust Co.*, 136 Cal. App. 393, 399, 29 P.2d 236 (4th Dist. 1934) and *Wilson v. Steele*, 211 Cal. App. 3d 1053, 1064, 259 Cal. Rptr. 851 (2d Dist. 1989), opinion modified, (July 19, 1989) lead to this conclusion.
139. *Security Mortgage Co. v. Delfs*, 47 Cal. App. 599, 604, 191 P. 53 (1st Dist. 1920).
140. Code Amendments 1873-74, ch. 612, §258, as reported in Deering's Cal. Codes Annotated, Civ. Code, §2934 (2005).
141. Stat. 1931, ch. 80, §1, as reported in Deering's Cal. Codes Annotated, Civ. Code, §2934 (2005).
142. *Nelson v. Aguirre (In re Cedar Funding)*, 2010 Bankr. Lexis 1006 (2010).
143. See text accompanying notes 67-69, above, discussing the inapplicability to fractional interests of "holder" provisions governing to negotiable instruments under Cal. U. Com. Code, §3203, subd. (d).
144. Civ. Code, §2935.
145. *Rodgers v. Parker*, 136 Cal. 313, 316, 68 P. 975 (1902).
146. See text accompanying notes 101-118, above.
147. See *Haulman v. Crumal*, 13 Cal. App. 2d 612, 616-617, 57 P.2d 179 (4th Dist. 1936) (holder in due course not chargeable with constructive notice of prior attachment of record); *Ross v. Title Guarantee & Trust Co.*, 136 Cal. App. 393, 400, 403-404, 29 P.2d 236 (4th Dist. 1934) (holder in due course not chargeable with constructive notice of lis pendens of record).
148. *Rodgers v. Peckham*, 120 Cal. 238, 242, 52 P. 483 (1898) ("It will be observed that section 2934 does not declare that the record of assignment of a mortgage will operate as notice only to persons subsequently deriving title to the mortgage from the assignor, while the language used in section 2935 clearly imports that such a record would operate as notice to a mortgagor so as to invalidate any payment made by him *to a person not holding the note or mortgage*. And in such cases, if a payment is so made, it must be treated as made at the risk of party making it." (emphasis added)). See also *California Title Ins. & Trust Co. v. Kuchenbeiser*, 20 Cal. App. 11, 12, 127 P. 1039 (1st Dist. 1912).
149. Civ. Code, §2937, subds. (b), (e).
150. Civ. Code, §2937, subd. (g).
151. Civ. Code, §2937, subd. (h).
152. See *Amaral v. Wachovia Mortg. Corp.*, 692 F. Supp. 2d 1226, 1232-1234 (E.D. Cal. 2010) (appearing to allow the possibility of a private cause of action for damages based on

violation of Civ. Code, §2937, while also suggesting that Civ. Code, §1237 could provide a defense to a payment obligation, but finding the debtor's complaint incomplete and insufficient to state a cause of action).

153. Civ. Code, §1488, See text accompanying notes 104-109, above.
154. Cal. U. Com. Code, §3602. See text accompanying notes 111-118, above.
155. See 4 Miller & Starr, *California Real Estate 3d*, Ch. 10 (Deeds of Trust and Mortgage), §10:2 at 14-19 (3d ed. 2003 & Supp. 2011).
156. Civ. Code, §2934a.
157. See Civ. Code, §2934a, subd. (a)(1), which provides that a substitution of trustee may be executed by "all of the beneficiaries under the trust deed, or *their successors in interest*." (emphasis added)
158. *Jones v. First American Title Ins. Co.*, 107 Cal. App. 4th 381, 131 Cal. Rptr. 2d 859 (2d Dist. 2003), as modified on denial of reh'g, (Apr. 23, 2003); *Dimock v. Emerald Properties LLC*, 81 Cal. App. 4th 868, 874, 97 Cal. Rptr. 2d 255 (4th Dist. 2000). In *Jones*, the court held the limitations on the manner of substitution of trustees under §2934a to be waivable by the debtor and, under the circumstances, reformed the substitution in order to avoid setting aside the trustee's sale.
159. Civ. Code, §2934a, subd. (a)(1).
160. Civ. Code, §2934a, subd. (a)(2).
161. Civ. Code, §2934a, subd. (a)(2).
162. Civ. Code, §2934a, subd. (d).
163. *Monterey S. P. Partnership v. W. L. Bangham, Inc.*, 49 Cal. 3d 454, 462-463, 261 Cal. Rptr. 587, 777 P.2d 623 (1989).
164. Civ. Code, §2924, subd. (a)(1).
165. Civ. Code, §2924, subd. (a)(3), (a)(4).
166. *Bank of America Nat. Trust & Savings Ass'n v. Century Land & Water Co.*, 19 Cal. App. 2d 194, 196, 65 P.2d 109 (2d Dist. 1937); *California Trust Co. v. Smead Inv. Co.*, 6 Cal. App. 2d 432, 435, 44 P.2d 624 (2d Dist. 1935). See *More v. Calkins*, 95 Cal. 435, 437-438, 30 P. 583 (1892).
167. *Burns v. Peters*, 5 Cal. 2d 619, 623, 55 P.2d 1182 (1936).
168. See Civ. Code, §2934a, discussed above.
169. *Monterey S. P. Partnership v. W. L. Bangham, Inc.*, 49 Cal. 3d 454, 462-463, 261 Cal. Rptr. 587, 777 P.2d 623 (1989).
170. *Field v. Acres*, 9 Cal. 2d 110, 112-113, 69 P.2d 422 (1937); *Carpenter v. Title Ins. & Trust Co.*, 71 Cal. App. 2d 593, 597, 163 P.2d 73 (2d Dist. 1945).
171. See footnote 157, above, and text accompanying notes 155-170, above.
172. Civ. Code, §2932.5.
173. See, generally, Civ. Code, §§2924-2932.
174. *Stockwell v. Barnum*, 7 Cal. App. 413, 94 P. 400 (2d Dist. 1908).
175. *In re Salazar*, 448 B.R. 814 (Bankr. S.D. Cal. 2011).
176. *Roque v. Suntrust Mortg., Inc.*, 2010 WL 546896 (N.D. Cal. 2010); *Parcray v. Shea Mortgage, Inc.*, 2010 WL 1659369 (E.D. Cal., April 23, 2010); *Caballero v. Bank of America*, 2010 WL 4604031 (N.D. Cal., Nov. 4, 2010).
177. E.g., under Oregon law, *Hooker v. Northwest Trustee Services, Inc.*, 2011 WL 2119103, at *4 (D. Or. 2011) as cited in *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1044 (9th Cir. 2011). See also *Saxon Mortg. Services, Inc. v. Hillery*, No. C-08-4357 CMC, 2008 WL 5170180 (N.D. Cal. 2008); *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619 (Mo. Ct. App. E.D. 2009), reh'g and/or transfer denied, (Apr. 6, 2009) and transfer denied, (June 30, 2009). See also Hudspeth, *supra* note 1, at 9-10 (discussing Illinois law and surveying decisions in other states).
178. *Calvo v. HSBC Bank USA, N.A.*, 199 Cal. App. 4th 118, 125, 130 Cal. Rptr. 3d 815 (2d Dist. 2011), review filed, (Oct. 25, 2011).

179. *Hooker v. Northwest Trustee Services, Inc.*, 2011 WL 2119103, at *13-14, No. 10-3111 (D. Or. 2011).
180. Civ. Code, §2935.5.
181. See, *e.g.*, *Aviel v. Ng*, 161 Cal. App. 4th 809, 816, 74 Cal. Rptr. 3d 200 (1st Dist. 2008) ("mortgage" is equivalent to "deed of trust" for all practical purposes); *Domarad v. Fisher & Burke, Inc.*, 270 Cal. App. 2d 543, 76 Cal. Rptr. 529, Blue Sky L. Rep. (CCH) P 70826 (1st Dist. 1969) (applying Civ. Code, §2936 to deed of trust as well as mortgage).
182. *Monterey S. P. Partnership v. W. L. Bangham, Inc.*, 49 Cal. 3d 454, 261 Cal. Rptr. 587, 777 P.2d 623 (1989); *Diamond Heights Village Ass'n, Inc. v. Financial Freedom Senior Funding Corp.*, 196 Cal. App. 4th 290, 304, 126 Cal. Rptr. 3d 673 (1st Dist. 2011), review denied, (Sept. 21, 2011); *Aviel v. Ng*, 161 Cal. App. 4th 809, 816, 74 Cal. Rptr. 3d 200 (1st Dist. 2008).
183. 49 Cal. 3d at 461. See also *Ung v. Koehler*, 135 Cal. App. 4th 186, 192, 37 Cal. Rptr. 3d 311 (1st Dist. 2005), as modified on denial of reh'g, (Jan. 25, 2006).
184. E.g., *Bevilacqua v. Rodriguez*, 460 Mass. 762, 955 N.E.2d 884 (2011); *U.S. Bank Nat. Ass'n v. Ibanez*, 458 Mass. 637, 941 N.E.2d 40 (2011); *LaSalle Bank Nat. Ass'n v. Lamy*, 12 Misc. 3d 1191(A), 824 N.Y.S.2d 769 (Sup 2006); *Mortgage Electronic Registration Systems, Inc. v. Saunders*, 2010 ME 79, 2 A.3d 289, 294-297 (Me. 2010); *Landmark Nat. Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158, 167 (2009). But see *Stein v. Chase Home Finance, LLC*, 2011 WL 5984286 (8th Cir. 2011) (applying Minnesota law); *Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487, 489 (Minn. 2009). See also *In re Veal*, 450 B.R. 897 (B.A.P. 9th Cir. 2011).
185. E.g., *In re Vargas*, 396 B.R. 511 (Bankr. C.D. Cal. 2008); *In re Walker*, Bankr. Lexis 3721, *6, No. 10-21656-Z-11 (Bankr., E.D. Cal. May 20, 2010); *In re Doble*, 2011 WL 1465559 at *7 & n.15 (Bankr. S.D. Cal. 2011).
186. See text accompanying notes 187-221, below.
187. *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal. App. 4th 1149, 121 Cal. Rptr. 3d 819 (4th Dist. 2011), review denied, (May 18, 2011) and cert. denied, 2011 WL 3608736 (U.S. 2011).
188. 192 Cal. App. 4th at 1151-1152.
189. 192 Cal. App. 4th at 1152.
190. 192 Cal. App. 4th at 1155-1157.
191. 192 Cal. App. 4th at 1157-1158.
192. 192 Cal. App. 4th at 1157, fn.9.
193. In this respect, the court seems to have determined, implicitly, that the UCC Article 3 considerations discussed at text accompanying notes 62-88, *supra*, are immaterial in the nonjudical foreclosure process.
194. E.g., *Landmark Nat. Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158, 167 (2009). To the same effect, see *In re Vargas*, 396 B.R. 511 (Bankr. C.D. Cal. 2008), applying California law.
195. 192 Cal. App. 4th at 1158-1159.
196. The *Gomes* court did, however, suggest another obstacle for the debtor, namely that he had not pled that he is "prepared to tender the amount owing on the Note," citing *Arnolds Management Corp. v. Eischen*, 158 Cal. App. 3d 575, 578, 205 Cal. Rptr. 15 (2d Dist. 1984). *Gomes* did not reach this issue since it concluded no cognizable cause of action had been pleaded anyway. 192 Cal. App. 4th at 1156, n.7. Later decisions have confirmed that failure to tender performance may preclude any claim of wrongful foreclosure based on an alleged irregularity in the assignment process. See text accompanying notes 216-218, below.
197. Ehud Gersten of the Gersten Law Group represented the plaintiffs in both *Gomes* and *Robinson*. Countrywide was represented (and successfully defended) in both cases by Jan Chilton as well as other attorneys of Severson & Werson.
198. 199 Cal. App. 4th at 45. Civ. Code, §2943, subd. (b), requires the beneficiary or its authorized agent to deliver a statement of amounts due and a copy of the note or other evidence of indebtedness within 21 days of written request. If the loan is in default §2943

excuses the beneficiary from doing so if a notice of *sale* has been recorded before receipt of the request, but recording a notice of default does not so excuse the lender.

199. 199 Cal. App. 4th at 44-45 (emphasis added).
200. 199 Cal. App. 4th at 46.
201. 199 Cal. App. 4th at 46, n.5. *But see Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (1st Dist. 2011), where such an effort to challenge the sale after purchase proved equally futile in a MERS contest, in part due to the "presumption of regularity" of a completed trustee's sale. See text accompanying notes 204-209, below.
202. 199 Cal. App. 4th at 47.
203. 199 Cal. App. 4th at 43, n.1.
204. *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 129 Cal. Rptr. 3d 467 (1st Dist. 2011).
205. See the description of facts of *Fontenot*, 198 Cal. App. 4th at 260-263.
206. 198 Cal. App. 4th at 272.
207. See *Robinson v. Countrywide*, 199 Cal. App. 4th at 46 n. 5.
208. *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th at 273.
209. For example, in another part of its opinion, the *Fontenot* court noted that despite being given leave to amend and express direction to attach a letter that allegedly modified a written forbearance agreement she had not performed, the plaintiff persisted in arguing she stated a "cause of action" despite omitting the letter in yet a fourth amended complaint. See 198 Cal. App. 4th at 274-275.
210. *Ferguson v. Avelo Mortg., LLC*, [195 Cal. App. 4th 1618], 126 Cal. Rptr. 3d 586 (Cal. App. 2d Dist. 2011), as modified, (June 20, 2011) and review denied and ordered not to be officially published, (Sept. 14, 2011).
211. *Ferguson v. Avelo Mortg., LLC*, 126 Cal. Rptr. 3d 586 (Cal. App. 2d Dist. 2011), as modified, (June 20, 2011) and review denied and ordered not to be officially published, (Sept. 14, 2011).
212. See 126 Cal. Rptr. at 589-590.
213. See *Saxon Mortg. Services, Inc. v. Hillery*, 2008 WL 5170180, 2008 (N.D. Cal. 2008); *In re Agard*, 444 B.R. 231 (Bankr. E.D. N.Y. 2011). *But see US Bank, N.A. v. Flynn*, 27 Misc. 3d 802, 897 N.Y.S.2d 855, 859 (Sup 2010); *Crum v. LaSalle Bank, N.A.*, 55 So. 3d 266, 269 (Ala. Civ. App. 2009), cert. denied, (Aug. 6, 2010). See also *In re Walker*, 2010 Bankr. Lexis 3781 (Bankr. E.D. Cal., May 20, 2010, No. 10-21656-E-11); *Landmark Nat. Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158, 167 (2009) (both of which the *Ferguson* court contends were inconsistent with *Gomes* on this issue) (126 Cal. Rptr.3d 586, 594 n.4).
214. See discussion at 126 Cal. Rptr.3d 586, 592-594.

The court also found inconsequential and non-actionable a mix-up in the sequencing of a substitution of trustee that was not executed or recorded until three months after the purported substituted trustee had executed and recorded a notice of default,. The court observed that the plaintiff had had three months to complain before a notice of sale was filed, and had not done so. (126 Cal. Rptr.3d at 595.)

215. See, *e.g.*, *LaSalle Bank Nat. Ass'n v. Lamy*, 12 Misc. 3d 1191(A), 824 N.Y.S.2d 769 (Sup 2006). *In re Foreclosure Cases*, 521 F. Supp. 2d 650, 653 (S.D. Ohio 2007); *Landmark Nat. Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158 (2009); *In re Vargas*, 396 B.R. 511, 520 (Bankr. C.D. Cal. 2008). See also *Bellistri v. Ocwen Loan Servicing, LLC*, 284 S.W.3d 619, 623-624 (Mo. Ct. App. E.D. 2009), reh'g and/or transfer denied, (Apr. 6, 2009) and transfer denied, (June 30, 2009); *Bevilacqua v. Rodriguez*, 460 Mass. 762, 955 N.E.2d 884 (2011); *U.S. Bank Nat. Ass'n v. Ibanez*, 458 Mass. 637, 941 N.E.2d 40 (2011).
216. See 126 Cal. Rptr.3d at 591-592, 594 (citing *Jensen v. Quality Loan Service Corp.*, 702 F. Supp. 2d 1183, 1189 (E.D. Cal. 2010); see also *Odinma v. Aurora Loan Services*, 2010 WL 1199886, at p. *4, 2010 U.S. Dist. LEXIS 28347 at p. *13 (N.D. Cal. 2010); see also *Morgera v. Countrywide Home Loans, Inc.*, 2010 WL 160348, at p. *8, 2010 U.S. Dist. LEXIS 2037 at p. *21 (E.D. Cal. 2010); *Lai v. Quality Loan Service Corp.*, 2010 WL

3419179 (C.D. Cal. 2010).

217. *Fontenot*, *supra*, 198 Cal. App. 4th at 268-269.
218. *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1043-1044 (9th Cir. 2011).
219. *Herrera v. Deutsche Bank Nat. Trust Co.*, 196 Cal. App. 4th 1366, 127 Cal. Rptr. 3d 362 (3d Dist. 2011), as modified, (May 31, 2011).
220. 196 Cal. App. 4th at 1375-1378.
221. *Fontenot v. Wells Fargo Bank, N.A.*, 198 Cal. App. 4th 256, 265, 129 Cal. Rptr. 3d 467 (1st Dist. 2011): "[A] court may take judicial notice of the fact of a document's execution, the date the document was recorded and executed, the parties to the transaction in a recorded document, and the document's legally operative language, assuming there is no genuine dispute regarding the document's authenticity. *From this, the court may deduce and rely upon the legal effect of the recorded document, when that effect is clear from its face.*" (198 Cal. App. 4th at 265, emphasis added.)
222. Civ. Code, §725, subd. a. For further discussion of these issues, see Part Two of this article, which will appear in the March 2012 issue of the *Miller & Starr Real Estate Newsalert*.

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