

IN THE SUPREME COURT OF OHIO

SRMOF 2009-1 Trust,	:	
	:	Case No. 2014-0485
Plaintiff-Appellee,	:	
	:	Certified Conflict from Butler County
vs.	:	Court of Appeals, 12th Appellate District
	:	
Shari Lewis, et al.,	:	Court of Appeals Case Nos. CA2012-11-239
	:	and CA2013-05-068
Defendant- Appellant.	:	

MERIT BRIEF OF APPELLEE SRMOF 2009-1 TRUST

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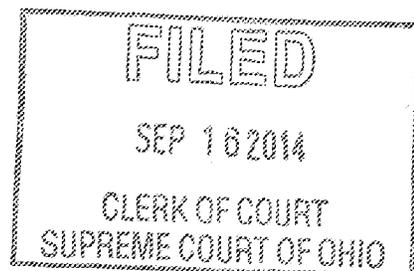


TABLE OF CONTENTS

I.	Introduction	1
II.	Facts.	4
III.	Argument.....	10
	A. The Appeal Should Be Dismissed	10
	B. Alternatively, The Court Should Affirm On The Merits By Answering The Certified Question With One Of Three Alternative Propositions Of Law.....	12
	First Proposition of Law in Response to Certified Question	12
	To invoke common pleas court jurisdiction in a foreclosure action, the plaintiff may show standing by either an interest in the note or the mortgage.	
	1. Summary.	12
	2. Standing.....	13
	3. A Mortgage Can Be Enforced Independently Of A Note.	14
	4. By Virtue Of Its Rights Under The Mortgage And The Assignments, The Trust Had Standing To Commence This Action.	19
	Second Proposition of Law in Response to Certified Question.....	21
	Except as otherwise required by Ohio Revised Code Chapter 13, a transfer of a note or mortgage presumptively transfers the other, unless the parties to the transfer intended to sever them from one another.	
	1. Summary.	22
	2. The Law Presumes That Notes And Mortgages Stay Together.	22
	3. Applying The Presumption In This Case.	23
	Third Proposition of Law in Response to Certified Question.....	26
	Where a mortgagor agrees in the mortgage that the mortgagee and its assigns may enforce the right to foreclose, an assignee of the mortgage has standing to invoke the jurisdiction of a common pleas court to foreclose the mortgage.	
	1. Summary.	26
	2. A Mortgagor May Agree By Contract That An Assignee Of A Mortgage Has The Right To Seek Foreclosure.....	26
	3. Ms. Lewis Agreed The Trust Could Bring The Foreclosure Action.....	28
	C. The Court Should Not Adopt Ms. Lewis’s Proposition Of Law Or The Ninth District’s Holding In McFerren.	29
	1. Ms. Lewis’s Arguments Have No Merit.	29
	2. The Ninth District’s Holding Is Incorrect.	33
IV.	Conclusion.....	35
	CERTIFICATE OF SERVICE	38
	APPENDIX.....	A

TABLE OF AUTHORITIES

Cases	Page(s)
<i>BAC Home Loans Servicing, LP v. McFerren</i> , 9th Dist. Summit No. 26384, 2013-Ohio-3228	<i>passim</i>
<i>Bank of New York Mellon v. Frey</i> , 6th Dist. Sandusky No. S-12-044, 2013-Ohio-4083	14, 20, 30
<i>Bank of New York Mellon v. Burke</i> , 12th Dist. Butler No. CA2012-12-245, 2013-Ohio-2860	1, 33
<i>Bank of New York Mellon v. Herres</i> , 2d Dist. Montgomery No. 25890, 2014-Ohio-1539	1, 33
<i>Bank of New York Mellon v. Matthews</i> , 6th Dist. Fulton No. F-12-008, 2013-Ohio-1707	1, 9, 22, 33
<i>Bank of New York v. Dobbs</i> , 5th Dist. Knox No. 2009-CA-000002, 2009-Ohio-4742	<i>passim</i>
<i>State ex rel. Barclays Bank PLC v. Court of Common Pleas of Hamilton Cty., Ohio</i> , 74 Ohio St.3d 536, 1996-Ohio-286, 660 N.E.2d 458	13
<i>Bradfield v. Hale</i> , 67 Ohio St. 316, 65 N.E. 1008 (1902)	<i>passim</i>
<i>Bresnik v. Beulah Park Ltd. Partnership, Inc.</i> , 67 Ohio St.3d 302, 1993-Ohio-19, 617 N.E.2d 1096	31
<i>The Broadview Savings & Loan Co. v. Crow</i> , 8th Dist. Cuyahoga, 1982 Ohio App. LEXIS 12139 (Dec. 30, 1982)	14
<i>Brown v. Borchers Ford, Inc.</i> , 50 Ohio St.2d 38, 361 N.E.2d 1063 (1977)	11
<i>Bucci v. Lehman Brothers Bank, FSB</i> , 68 A.3d 1069 (R.I. 2013)	<i>passim</i>
<i>Chase Home Fin., LLC v. Dunlap</i> , 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484	<i>passim</i>
<i>CitiMortgage, Inc. v. Loncar</i> , 7th Dist. Mahoning No. 11-MA-174, 2013-Ohio-2959	1, 33

<i>CitiMortgage, Inc. v. Patterson</i> , 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894	1, 33
<i>Cleveland v. Shaker Heights</i> , 30 Ohio St.3d 49, 50, 507 N.E.2d 323 (1987)	13, 14
<i>Cranberry Fin., LLC v. S&V Partnership</i> , 186 Ohio App.3d 275, 2010-Ohio-464, 927 N.E.2d 623	14, 32, 33
<i>State ex rel. Dallman v. Court of Common Pleas</i> , 35 Ohio St.3d 176, 298 N.E.2d 515 (1973)	13
<i>Doyle v. West</i> , 60 Ohio St. 438, 54 N.E. 469 (1899)	<i>passim</i>
<i>Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Serv.</i> , 113 Ohio St.3d 226, 864 N.E.2d 68, 2007-Ohio-1687	26, 29, 33
<i>Edgar v. Haines</i> , 109 Ohio St. 159, 141 N.E. 837 (1923)	11, 21
<i>Fed. Home Loan Mortg. Corp. v. Koch</i> , 11th Dist. Geauga No. 2012-G-3084, 2013-Ohio-4423	<i>passim</i>
<i>Fed. Home Loan Mortg. Corp. v. Rufo</i> , 11th Dist. Ashtabula 2012-Ohio-5930	22
<i>Fed. Home Loan Mortg. Corp. v. Schwartzwald</i> , 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214	1, 8, 9, 13
<i>Fed. Home Loan Mortg. Corp. v. Trissell</i> , 2d Dist. Montgomery No. 25935, 2014-Ohio-1537	22
<i>Fifth Third Bank v. Hopkins</i> , 177 Ohio App.3d 114, 2008-Ohio-2959 (9th Dist. Ct. App.).....	14, 32, 33
<i>First Place Bank v. Blythe</i> , 7th Dist. Columbiana No. 12-CO-27, 2013-Ohio-2550	15, 20
<i>Fisher v. Mossman</i> , 11 Ohio St. 42 (1860).....	15, 30, 32
<i>HSBC Bank USA, N.A. v. Sherman</i> , 1st Dist. Hamilton No. C-120302, 2013-Ohio-4220.....	1, 33
<i>Hurd v. Robinson</i> , 11 Ohio St. 232 (1860).....	14, 33

<i>Kernohan v. Durham</i> , 48 Ohio St. 1, 26 N.E.2d 982 (1891)	<i>passim</i>
<i>Kernohan v. Manss</i> , 53 Ohio St. 118, 41 N.E. 258 (1895)	<i>passim</i>
<i>Kincaid v. Erie Ins. Co.</i> , 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207	13
<i>Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.</i> , 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E. 2d 121	13
<i>Pincelli v. Ohio Bridge Corp.</i> , 5 Ohio St.2d 41, 44, 213 N.E.2d 356 (1966)	11
<i>ProgressOhio.org, Inc. v. JobsOhio</i> , 139 Ohio St.3d 520, 2014-Ohio-2382.....	14
<i>Sierra Club v. Morton</i> , 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972).....	13
<i>Spence v. Insurance Co.</i> , 40 Ohio St. 517 (1884).....	14, 32, 33
<i>State v. Sullivan</i> , 81 Ohio St. 79, 90 N.E. 146 (1909)	31
<i>U.S. Bank, N.A. v. Flynn</i> , 27 Misc.3d 802, 897 N.Y.S.2d 855 (Supreme Ct. 2010).....	<i>passim</i>
<i>U.S. Bank, N.A. v. Gray</i> , 10th Dist. Franklin No. 12AP-953, 2013-Ohio-3340	1, 8, 33
<i>U.S. Bank, N.A. v. Rex Station, Ltd.</i> , 2d Dist. Montgomery No. 26019, 2014-Ohio-1857	<i>passim</i>
<i>Weaver v. Bank of New York Mellon</i> , 10th Dist Franklin No. 11AP-1065, 2012-Ohio-4373	15, 32
<i>Wells Fargo Bank, N.A. v. Dawson</i> , 5th Dist. Stark No. 2013CA00095, 2014-Ohio-269	22
<i>Whitelock v. Gilbane Bldg. Co.</i> , 66 Ohio St.3d 594, 613 N.E.2d 1032, 1993-Ohio-223	10

Statutes

R.C. 1301.103	31
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R.C. 1301.201	24
R.C. 1301.302	28
R.C. 1303.02	30
R.C. 1303.03	30
R.C. 1303.15	28
R.C. 1303.22	25, 31
R.C. 1303.25	24
R.C. 1303.31	24, 29, 30, 31
R.C. 1303.58	33
R.C. 5301.32	3, 31

Other Authorities

Ohio Const. Art. IV, Section 4(B)	13
Restatement of the Law 3d, Property-Mortgages Section 5.4	<i>passim</i>
S.Ct.Prac.R. 8.04.....	10
UCC § 3-117.....	29
UCC § 3-203	12, 21

I. Introduction.

This case involves standing in a foreclosure action. In *Schwartzwald*, the foreclosing plaintiff conceded that it had neither an interest in the note nor the mortgage at the time of filing, but argued that any defect in standing could be cured by a post-filing assignment. *Fed. Home Loan Mortg. Corp. v. Schwartzwald*, 134 Ohio St.3d 13, 2012-Ohio-5017, 979 N.E.2d 1214, ¶ 28. The Court held that a lack of standing could not be cured and that “because [the plaintiff] failed to establish an interest in the note *or* mortgage at the time it filed suit, it had no standing to invoke the jurisdiction of the common pleas court.” *Id.* (emphasis added).

Since *Schwartzwald*, eight Ohio District Courts of Appeal have decided that a plaintiff has standing to commence a foreclosure action by showing an interest in *either* the note *or* the mortgage. *Bank of New York Mellon v. Herres*, 2d Dist. Montgomery No. 25890, 2014-Ohio-1539, ¶ 29; *Fed. Home Loan Mortg. Corp. v. Koch*, 11th Dist. Geauga No. 2012-G-3084, 2013-Ohio-4423, ¶¶ 34-40; *HSBC Bank USA, N.A. v. Sherman*, 1st Dist. Hamilton No. C-120302, 2013-Ohio-4220, syllabus paragraph 3; *U.S. Bank, N.A. v. Gray*, 10th Dist. Franklin No. 12AP-953, 2013-Ohio-3340, ¶¶ 27-35; *CitiMortgage, Inc. v. Loncar*, 7th Dist. Mahoning No. 11-MA-174, 2013-Ohio-2959, ¶ 16; *Bank of New York Mellon v. Burke*, 12th Dist. Butler No. CA2012-12-245, 2013-Ohio-2860, ¶ 16; *Bank of New York Mellon v. Matthews*, 6th Dist. Fulton No. F-12-008, 2013-Ohio-1707, ¶ 15; *CitiMortgage, Inc. v. Patterson*, 8th Dist. Cuyahoga No. 98360, 2012-Ohio-5894, ¶ 22. The Ninth District Court of Appeals has required a plaintiff to show an enforceable interest in *both* the note *and* the mortgage. *BAC Home Loans Servicing, LP v. McFerren*, 9th Dist. Summit No. 26384, 2013-Ohio-3228, ¶ 13.

Here, Appellee SRMOF 2009-1 Trust (the “Trust”) received an assignment of the Note and Mortgage prior to filing its Complaint. Appellant Shari Lewis (“Lewis”) does not deny the assignment, but argues that the Trust did not show that it could enforce the Note on the date that

the Complaint was filed, and that the assignment of the Note and Mortgage was a “nullity.” (Appellant’s Br. 6-12.) The Twelfth District held that whether the Trust had an enforceable interest in the Note is immaterial because the Trust held an interest in the Mortgage. (Appellate Decision ¶ 17.) The Twelfth District certified a conflict with the Ninth District’s decision in *McFerren*:

In order to establish standing in a foreclosure action and invoke the jurisdiction of the common pleas court, must a plaintiff establish at the time complaint for foreclosure is filed that it has an interest in both the note and mortgage, or is it sufficient if the plaintiff demonstrates an interest in either the note or the mortgage?

As a threshold matter, the Court need not decide that question because this case presents different facts and a different legal question than the Ninth District addressed in *McFerren*. In *McFerren*, the plaintiff sought a judgment under both the note and mortgage but only showed standing under the mortgage; here, because Ms. Lewis’s personally liability for the debt under the Note was discharged in bankruptcy, the Trust seeks to only enforce the Mortgage. Additionally, the assignment of the mortgage in *McFerren* did not expressly state that it was also assigning the interest in the note; in this case, the assignment expressly transferred an ownership interest in the Note to the Trust. Because of these differences, there is no need to address the issue posed by the Twelfth District. This appeal should be dismissed.

If the Court decides to answer the certified question, the Trust respectfully requests that the Court answer the question and affirm the decision below by adopting any one of three alternative propositions of law:

1. To invoke common pleas court jurisdiction in a foreclosure action, the plaintiff may show standing by either an interest in the note or the mortgage.
2. Except as otherwise required by Ohio Revised Code Chapter 13, a transfer of a note or mortgage presumptively transfers the other, unless the parties to the transfer intended to sever them from one another.

3. Where a mortgagor agrees in the mortgage that the mortgagee and its assigns may enforce the right to foreclose, an assignee of the mortgage has standing to invoke the jurisdiction of a common pleas court to foreclose the mortgage.

As to the First Proposition of Law, R.C. 5301.32 authorizes an assignment of an interest in a mortgage, and the common law has long recognized that an interest in a mortgage can be assigned, giving the assignee standing. See *Kernohan v. Manss*, 53 Ohio St. 118, 133-34, 41 N.E. 258 (1895) (“*Kernohan II*”) (assignee of an interest in a mortgage receives legal title to the mortgage and an equitable interest and chose in action in the debt). Even where someone else is the note holder, or where the note interest cannot be enforced at all, the assignee of the interest in the mortgage may enforce that interest. *Kernohan v. Durham*, 48 Ohio St. 1, 18, 26 N.E.2d 982 (1891) (“*Kernohan I*”) (in some circumstances, the interest of the assignee of the mortgage is superior to the interest of the holder of the note); *Bradfield v. Hale*, 67 Ohio St. 316, 321-24, 65 N.E. 1008 (1902) (mortgagee can bring action to enforce the mortgage where the note cannot be enforced).

As to the Second Proposition of Law, the law imposes a rebuttable presumption that if the note or mortgage has been transferred, there was also a transfer of the other. *U.S. Bank, N.A. v. Rex Station, Ltd.*, 2d Dist. Montgomery No. 26019, 2014-Ohio-1857, ¶¶ 21-22, jurisdiction declined 2014-0947 (Sept. 3, 2014). That presumption is overcome only if it is shown that the parties to the transfer specifically intended to sever the mortgage from the note. This is the approach of the Restatement of the Law 3d, Property-Mortgages (the “Restatement”).

As to the Third Proposition of Law, notes and mortgages are contracts that govern the rights of the parties. If a mortgagor agrees in the mortgage that an assignee of the mortgage has the same right to foreclose, courts should enforce that contract. *Bucci v. Lehman Brothers Bank*,

FSB, 68 A.3d 1069, 1081 (R.I. 2013) (an assignee of a mortgage interest has standing by terms of the mortgage which state that assignees can foreclose).

II. Facts.

Ms. Lewis executed a Note dated November 21, 2001, payable to First Union Mortgage Corporation (“First Union”). (Compl., Ex. A, Supp. S-4 to S-6.) First Union indorsed the Note in blank. (*Id.* at S-6.)

Ms. Lewis also executed a Mortgage dated November 21, 2001. (Compl., Ex. B, Supp. S-7.) The Mortgage identifies First Union as the “Lender.” (*Id.* at S-8.) The Mortgage refers to the Note, and the Note refers to the Mortgage. (Compl., Ex. A, Supp. S-6; Compl., Ex. B, Supp. S-8.) The Mortgage identifies Mortgage Electronic Registration Systems, Inc. (“MERS”) as the “mortgagee,” and that MERS is “acting solely as a nominee for Lender and Lender’s successors and assigns.” (Compl., Ex. B, Supp. S-7.)

In Paragraph 1 of the Mortgage, Ms. Lewis promised to pay the debt evidenced by the Note. (*Id.* at S-10.) If Ms. Lewis broke that promise, and does not cure the default, then Paragraph 22 of the Mortgage provides that “Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding.” (*Id.* at S-19.)

The Mortgage states that MERS (as nominee for the Lender and its successors) is empowered to exercise all of the Lender’s rights, including the right to file a judicial proceeding to foreclose the Mortgage: “MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests [that Ms. Lewis granted under the Mortgage], including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument.” (*Id.* at S-9.) This power extends to “the successors and assigns of MERS[.]” (*Id.*)

Thus, assignees of the Mortgage receive the contractual right that Ms. Lewis granted to the Lender under Paragraph 22 of the Mortgage to file a judicial proceeding to foreclose the Mortgage. (*Id.* at S-9 and S-19.)

The Mortgage imposes obligations on Ms. Lewis independent from and in addition to her promises under the Note. For example, under the Mortgage, Ms. Lewis promised that the property was unencumbered except for encumbrances of record, and that she had the right to mortgage, grant and convey the property. (*Id.* at S-9.) Ms. Lewis promised to maintain hazard insurance and agreed that if she did not, then the mortgagee could purchase insurance and charge her for it. (*Id.* S-12.) Ms. Lewis made promises about how the proceeds of eminent domain proceedings would be treated. (*Id.* S-15.) Ms. Lewis promised not to cause or permit the presence, use, disposal, or storage of hazardous substances at the property. (*Id.* S-18.) Ms. Lewis also promised to pay taxes and assessments attributable to the property, and agreed that if she did not, that the mortgagee could pay those and charge those amounts to her. (*Id.* S-11.) None of these obligations are imposed by the Note. (Compl., Ex. A., Supp. S-4 to S-6.)

On June 18, 2008, Ms. Lewis filed a Chapter 7 bankruptcy petition in the United States Bankruptcy Court for the Southern District of Ohio. (Am. Motion for Summary Judgment, Ex. A, Supp. S-61.) On October 14, 2008, she received a discharge, and her bankruptcy case was terminated on September 22, 2009. (*Id.* See also Compl., ¶ 4, Supp. S-2.)

After her bankruptcy discharge, Ms. Lewis made payments to prevent foreclosure of the Mortgage until August 2010, when she made her last payment to Wells Fargo Bank, N.A. (“Wells Fargo”). (Answer, at 2, Supp. S-34.)

On December 7, 2010, Wells Fargo executed a Lost Note Affidavit And Indemnification Agreement (the “Lost Note Affidavit”) in favor of Selene Finance, LP (“Selene”). (Notice of

Filing Lost Note Affidavit, Ex. A, Supp. S-50.) The Lost Note Affidavit states that it attaches a “true and correct copy” of the Note and states that the original’s location is unknown. (*Id.*) The copy of the Note attached to the Lost Note Affidavit includes a blank indorsement by First Union, as well as an allonge that refers to the Note and bears another blank indorsement that is signed by “Wells Fargo Bank, N.A., Successor By Merger to Wachovia Bank, N.A., Formerly Known As First Union National Bank.” (*Id.* at S-53 to S-54.)

On January 7, 2011, Ms. Lewis was sent a letter notifying her that “ownership of your mortgage loan has been acquired by SRMOF Trust 2009-1” “effective 12/7/10.” (Lewis Opposition to Summary Judgment, Attachment 6, Supp. S-82.) The letter told Ms. Lewis that “transfer of ownership of your mortgage loan to SRMOF Trust 2009-1 has not been publicly recorded.” (*Id.*) The letter also informed Ms. Lewis that “Wells Fargo Bank, N.A. is the servicer of your loan until 1/12/2011” and that after that date “your new loan servicer will be Selene Finance L.P.” (*Id.*) On January 19, 2011, Selene sent Ms. Lewis a letter to welcome her as a new customer. (*Id.*, Attachment 4, Supp. S-80.) Afterward, Ms. Lewis participated in “mortgage negotiations” with Selene (Answer, at 2, Supp. S-34), which unfortunately failed.

On June 9, 2011, MERS executed an Assignment of Mortgage (the “First Assignment”) to Wells Fargo. (Compl., Ex. C, Supp. S-23.) In addition to assigning the Mortgage, the First Assignment assigned “all notes and obligations therein described or referred to, the debt respectively secured thereby and all sums of money due and to become due thereon, with interest thereon, and attorney’s fees and all other charges.” (*Id.*)

On August 8, 2011, Wells Fargo executed an Assignment of Mortgage (the “Second Assignment”) to Selene. (Compl., Ex. D, Supp. S-26.) In addition to assigning the Mortgage, the Second Assignment also assigned “all notes and obligations therein described or referred to,

the debt respectively secured thereby and all sums of money due and to become due thereon, with interest thereon, and attorney's fees and all other charges." (*Id.*)

On August 24, 2011, Selene executed an Assignment of Mortgage (the "Third Assignment") to Appellee, SRMOF 2009-1 Trust (the "Trust"). (Compl., Ex. E, Supp. S-29.) In addition to assigning the Mortgage, the Third Assignment again assigned "all notes and obligations therein described or referred to, the debt respectively secured thereby and all sums of money due and to become due thereon, with interest thereon, and attorney's fees and all other charges." (*Id.*)

On August 30, 2011, the First, Second, and Third Assignments were sequentially recorded in Butler County. (Notice of Filing of the Assignments of Mortgage, Supp. S-37; Affidavit in Support of Amended Motion for Summary Judgment, ¶ 5 and Exs. D-F.)

On August 31, 2011, the Trust filed the Complaint, attaching copies of the Note (indorsed in blank), the Mortgage, and the Assignments. The Complaint did not seek a personal judgment against Ms. Lewis on the Note because her personal liability thereunder was discharged in bankruptcy. (Compl., ¶ 4, Supp. S-2.) On September 28, 2011, Ms. Lewis filed her Answer.

On October 12, 2011, the Trust moved for summary judgment. The Trust filed an Affidavit that day which stated that "Plaintiff's records contain a Note executed by Shari Lewis, aka Shari Frances Lewis secured by a Mortgage in the amount of \$141,600, for a property located at 103 South 1st Street, Trenton, OH 45067." (Aff., ¶ 6.) Ms. Lewis did not file a response.

On July 19, 2012, the Trial Court filed an order that stated that it was advised that the Trust would present the original Note to Ms. Lewis's counsel, and ordered that the presentment

occur at the courthouse on the record. (Entry Ordering Original Note To Be Presented To Court.)

On July 27, 2012, the Trust filed a Notice with a copy of the Lost Note Affidavit. (Notice of Filing Lost Note Affidavit, Supp. S-48.) On August 14, 2012, the Trust filed an amended motion for summary judgment, which asserted that although the Trust could not present the original Note, the Trust was nevertheless entitled to foreclose because the Trust had the original Lost Note Affidavit. (Am. Motion for Summary Judgment, at 2.)

On August 28, 2012, the Trust filed a Notice to withdraw the amended motion for summary judgment, stating that it located the original Note and that it would stand on the original motion for summary judgment. (Notice To Withdraw Am. Motion for Summary Judgment, at 1.)¹

On September 14, 2012, the Trust appeared in the Trial Court with the original Note and Mortgage and presented them for inspection. (Trial Decision at 11, Appellant's Appx. A-3.)

On October 19, 2012, the Trial Court entered summary judgment in favor of the Trust. (Decision And Entry Granting Plaintiff's Motion For Summary Judgment.) On October 31, 2012, the Trial Court entered the final judgment. (In Rem Judgment Entry And Decree Of Foreclosure.) That is the same day this Court published its decision in *Schwartzwald*.

¹ Ms. Lewis asserts that "the first time SRMOF came in possession of the note was a year after it filed this lawsuit" (Appellant's Br. at 5) and "the record is clear that SRMOF was not in possession of original [sic] note when it file suit" (*id.* at 7) and the Trust "did not obtain possession of the note until a year after suit was filed" (*id.*) The record does not establish these assertions. Nothing in the record conclusively establishes exactly where the Note was on the date the Complaint was filed, or whether the person in possession of the Note held it as an agent for the Trust. An unauthenticated email of the Trust's counsel placed in the record by Ms. Lewis suggests that the original Note may have been in Wells Fargo's possession (Lewis Opposition to Summary Judgment, Attachment 5, Supp. S-81), and the Lost Note Affidavit provides that Wells Fargo was holding the Note for the benefit of Selene and its assigns (i.e. the Trust). (Notice of Filing Lost Note Affidavit, Ex. A, Supp. S-50.) On that score, a foreclosure plaintiff has standing if the note is in the possession of its agent or bailee. *Gray*, 2013-Ohio-3340, ¶ 25.

On November 28, 2012, Ms. Lewis appealed to the Twelfth District. (Notice Of Appeal.) On February 1, 2013, Ms. Lewis moved in the Trial Court to vacate the judgment. (Motion To Vacate Judgment.) The Trial Court denied that motion on April 5, 2013, and Ms. Lewis appealed that decision. (Decision And Entry Denying Defendant’s Motion To Vacate.) The Twelfth District consolidated the appeals and affirmed.

The Twelfth District rejected Ms. Lewis’s argument that the record did not include sufficient evidence to demonstrate that the Trust had standing to foreclose the mortgage. (Appellate Decision, ¶ 17, Appellant’s Appx. A-2.) The Twelfth District noted that in *Schwartzwald* this Court had stated that standing could be shown by either an interest in the note “or” the mortgage. (*Id.* ¶ 15.) The Twelfth District noted that other District Courts of Appeal cited this Court’s use of the disjunctive “note or mortgage” in *Schwartzwald*, and also cited cases that explained how under the Restatement a rebuttable presumption arises that the assignee of an interest in a mortgage also received the interest in the note. (*Id.* ¶ 16, citing *Koch*, 2013-Ohio-4423, and *Matthews*, 2013-Ohio-1707.) As the Sixth District stated in *Matthews*:

This court has adopted the reasoning set forth in the Restatement of the Law 3d, Property-Mortgages, Section 5.4(b) at 380 (1997), which provides, “Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the [note] the mortgage secures unless the parties to the transfer agree otherwise.”

Matthews, 2013-Ohio-1707, ¶ 15. Other District Courts of Appeal have adopted the presumption under the Restatement that a transfer of an interest in the note transfers an interest in the mortgage. *Rex Station, Ltd.*, 2014-Ohio-1857, ¶¶ 21-22; *Bank of New York v. Dobbs*, 5th Dist. Knox No. 2009-CA-000002, 2009-Ohio-4742, ¶¶ 27-36. *See also Chase Home Fin., LLC v. Dunlap*, 4th Dist. Ross No. 13CA3409, 2014-Ohio-3484, ¶¶ 13-20.

On March 12, 2014, the Twelfth District certified a conflict with the Ninth District’s decision in *McFerren*. In that case, the Ninth District referred to part of a Comment and an

Illustration from the Restatement to conclude that a mortgage assignment alone could not effect standing:

A party who only has the mortgage but no note has not suffered any injury given that bare possession of the mortgage does not endow its possessor with any enforceable right absent possession of the note. *See* Restatement of the Law 3d, Property, Mortgages, Section 5.4(e) [sic – **should be Comment e**], at 385 (1996) (“[I]n general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation.”). In other words, possession of the mortgage is of no import unless there is possession of the note. While it is possible to assign a mortgage and retain possession of the note, “[t]he practical effect of such a transaction is to make it impossible to foreclose the mortgage, unless the transferee is also made an agent or trustee of the transferor * * *.” Restatement, Section 5.4(c) [sic – **should be Illustration 6**], at 384. *See also id.* (noting that UCC 3-203 likely requires courts to disregard a mortgage assignment when the negotiable note is not also delivered); Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System's Land Title Theory*, 53 Wm. & Mary L. Rev. 111, 119 (2011), fn. 34 (compiling cases from many jurisdictions finding that the note and the mortgage are inseparable and that the assignment of a mortgage alone is a nullity).

McFerren, 2013-Ohio-3228, ¶ 12 (emphasis and corrections added). The Ninth District did not address Section 5.4(b) of the Restatement, which is the provision upon which other District Courts of Appeal have relied.

III. **Argument.**

A. **The Appeal Should Be Dismissed.**

As an initial matter, this case does not present the Court with a conflict which it needs to address. To answer a certified conflict: (1) the asserted conflict must be on the same question; (2) the alleged conflict must be on a rule of law (not facts); and (3) the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by another district court of appeals.

Whitelock v. Gilbane Bldg. Co., 66 Ohio St.3d 594, 596, 613 N.E.2d 1032, 1993-Ohio-223.

This Court may dismiss a case “as having been improvidently certified” where there is no conflict. S.Ct.Prac.R. 8.04. The Court may find there is no conflict where resolution of another

point of law could determine the action. See *Brown v. Borchers Ford, Inc.*, 50 Ohio St.2d 38, 40, 361 N.E.2d 1063 (1977) (“There is no reason for a Court of Appeals to certify its judgment as conflicting with that of another Court of Appeals where, as here, the point upon which conflict exists has no arguable effect upon the judgment of the certifying court.”), quoting *Pincelli v. Ohio Bridge Corp.*, 5 Ohio St.2d 41, 44, 213 N.E.2d 356 (1966).

Here, there is no need for this Court to answer the question that has been certified. First, in *McFerren*, the plaintiff relied on an assignment of *mortgage* to show standing to enforce the *note*. *McFerren*, 2013-Ohio-3228, ¶ 12. Here, that issue is not presented. The Trust did not seek to enforce the Note against Ms. Lewis, and therefore does not need to rely on the Assignments to show any ability to do so.

This case thus presents a different legal question than what was presented to the Ninth District. In *McFerren*, the legal issue was whether an assignment of the mortgage gave the plaintiff standing to enforce the note; in this case, the legal issue is whether an assignment of a mortgage gives the plaintiff the right to enforce the mortgage. There is no conflict.

Second, the cases are factually different. In *McFerren*, the assignment only stated that it had transferred the interest in the mortgage, and did not expressly assign the note. Here, in contrast, the Assignments transferred *both* the Note *and* the Mortgage. (*Compare* Compl., Exs. C-E, *with* Assignment of Mortgage from *McFerren*, Appellee Appx. A-1.) That is no small difference; even if the Assignments did not effectively represent a *negotiation* of the Note to the Trust, they nevertheless assigned the ownership rights in the Note to the Trust. *Edgar v. Haines*, 109 Ohio St. 159, 163-64, 141 N.E. 837 (1923) (rights to negotiable instruments may be assigned without either a negotiation or a transfer under the UCC) (“It cannot be doubted that any legislative attempt to deny the right of a holder of a part interest in a negotiable instrument to sell

and transfer such interest would be unconstitutional.”). *See also* UCC § 3-203, Cmt. 1 (“Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend upon whether the instrument was transferred under Section 3-203.”). Accordingly, even if this case did present the question of whether an assignment of a mortgage is sufficient to give a plaintiff standing to enforce a note (and it does not), the Assignments in this case state that they transfer ownership rights in the Note, a fact not present in *McFerren*, thus presenting another legal question not answered by the Ninth District.

The case was improvidently certified. The appeal should be dismissed.

B. Alternatively, The Court Should Affirm On The Merits By Answering The Certified Question With One Of Three Alternative Propositions Of Law.

The certified question is:

In order to establish standing in a foreclosure action and invoke the jurisdiction of the common pleas court, must a plaintiff establish at the time complaint for foreclosure is filed that it has an interest in both the note and mortgage, or is it sufficient if the plaintiff demonstrates an interest in either the note or the mortgage?

If this Court decides to reach the merits, the Court should answer this question by adopting any one of three different alternative propositions of law.

First Proposition of Law in Response to Certified Question

To invoke common pleas court jurisdiction in a foreclosure action, the plaintiff may show standing by either an interest in the note or the mortgage.

1. Summary.

For over a century Ohio law has held that an assignee of an interest in a mortgage has enforceable legal and equitable interests. *Kernohan II*, 53 Ohio St. at 133-34 (a mortgage assignee has legal title to the mortgage and an equitable interest and “chose in action” in the

debt);² *Kernohan I*, 48 Ohio St. at 18 (holding that a mortgage assignee had the right to enforce and obtain judgment when someone else possessed the note). The Trust had standing to seek foreclosure even if the Trust had been assigned only the Mortgage on the date of the Complaint.

2. Standing.

Common pleas courts have original jurisdiction over “justiciable matters.” Ohio Const. Art. IV, Section 4(B). Justiciable cases are real and substantial controversies between adverse parties with stakes in the outcome. *State ex rel. Barclays Bank PLC v. Court of Common Pleas of Hamilton Cty., Ohio*, 74 Ohio St.3d 536, 542, 1996-Ohio-286, 660 N.E.2d 458; *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207, at ¶ 17.

Standing is a component of justiciability. *Schwartzwald*, 2012-Ohio-5017, at ¶¶ 21-22; *State ex rel. Dallman v. Court of Common Pleas*, 35 Ohio St.3d 176, 179, 298 N.E.2d 515 (1973). Standing depends upon whether a party “has a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.” *Cleveland v. Shaker Heights*, 30 Ohio St.3d 49, 50, 507 N.E.2d 323 (1987). If no statute authorizes the “invocation of the judicial process,” then the issue of standing “depends on whether the party has alleged ... a ‘personal stake in the outcome of the controversy.’” *Id.*, quoting *Sierra Club v. Morton*, 405 U.S. 727, 732, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972). A party may allege a stake either directly or in a representative capacity. *State ex rel. Dallman*, 35 Ohio St.3d at syllabus. Because it is required “to invoke” the jurisdiction of the court, standing is evaluated “as of the commencement of suit.” *Schwartzwald*, 2012-Ohio-5017, at ¶ 24.

² A “chose in action” is a “proprietary right in personam, such as a debt owed by another person” or “the right to bring an action to recover a debt, money, or thing.” *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121, at ¶ 19.

Standing is not coterminous with winning. “Standing does not depend on the merits of the plaintiff’s claim.” *ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, ¶ 7. “Rather, standing depends on whether the plaintiffs have alleged such a personal stake in the outcome of the controversy that they are entitled to have a court hear their case.” *Id.* See also *Cleveland*, 30 Ohio St.3d at 50.

3. A Mortgage Can Be Enforced Independently Of A Note.

Notes and mortgages are separate contracts. *Cranberry Fin., LLC v. S&V Partnership*, 186 Ohio App.3d 275, 2010-Ohio-464, 927 N.E.2d 623, ¶ 29, citing *Hurd v. Robinson*, 11 Ohio St. 232, 234 (1860); *Fifth Third Bank v. Hopkins*, 177 Ohio App.3d 114, 2008-Ohio-2959, ¶ 16 (9th Dist. Ct. App.). They have different remedies: an action on a note is a proceeding against the maker personally for the balance due; an action on a mortgage seeks to terminate the owner’s interest in property. See *Spence v. Insurance Co.*, 40 Ohio St. 517, 520-21 (1884) (“separate actions may therefore be maintained, one to foreclose and the other for a personal judgment”).

Note and mortgage interests may be enforced at the same time, or they can be enforced independently and separately in different, and even successive, actions. *Doyle v. West*, 60 Ohio St. 438, 444, 54 N.E. 469 (1899) (foreclosure of a mortgage may be had without pursuing a claim on the note; determination in a foreclosure action of the question of fact about the amount outstanding under the note would be res judicata in a subsequent separate action brought on the note); *Bank of New York Mellon v. Frey*, 6th Dist. Sandusky No. S-12-044, 2013-Ohio-4083, ¶¶ 14-15 (mortgagee may seek to enforce the mortgage only); *Hopkins*, 2008-Ohio-2959, ¶ 18 (claims on mortgage and note may be brought independently); *The Broadview Savings & Loan Co. v. Crow*, 8th Dist. Cuyahoga Nos. 44690, 44691, 45002, 1982 Ohio App. LEXIS 12139, *7 (Dec. 30, 1982) (because they are distinct causes of action that may be pursued separately, a

dismissal with prejudice of a prior foreclosure action did not bar a subsequent action filed to enforce the note).

A person with an interest in the mortgage may enforce it, even when the note is not enforceable. *Bradfield*, 67 Ohio St. at 321-24 (mortgagee can bring action to enforce the mortgage, even where the note is barred); *Fisher v. Mossman*, 11 Ohio St. 42, 45-46 (1860) (where an action can no longer be brought upon the note, the mortgage may be enforced if brought within the statute of limitations for enforcing mortgages); *Weaver v. Bank of New York Mellon*, 10th Dist. Franklin No. 11AP-1065, 2012-Ohio-4373, ¶¶ 9, 14 (*in rem* action to proceed on mortgage may proceed even if the *in personam* claim on the note is barred). For example, if a debtor's obligation on a note is discharged in bankruptcy (like Ms. Lewis's Note obligation—*see* Compl. ¶ 4, Supp. S-2), the mortgage survives and may be enforced. *First Place Bank v. Blythe*, 7th Dist. Columbiana No. 12-CO-27, 2013-Ohio-2550, ¶ 35.

A mortgage is sometimes referred to as an “incident” of a debt owed under a note. *Kernohan II*, 53 Ohio St. at 133. In some cases, the satisfaction of an interest in the note may discharge the right to enforce a mortgage if the *only* thing secured by the mortgage was the debt *under the note*. In that circumstance, enforcement of the mortgage interest is dependent upon whether monies are owed under the note, and the former can be characterized as a “mere incident” of the latter. *See Kernohan II*, 53 Ohio St. at 133 (a mortgage to secure several notes is a “mere incident” of the note debts if the mortgage “has no determinate value *apart from the notes*”) (emphasis added).

But given the terms of modern mortgages, mortgages should not be characterized as a “mere incident” of the note. As illustrated by the Mortgage in this case, mortgages may impose additional, independent contract obligations upon the mortgagor that are not imposed under the

note or enforced by an action on the note. For example, mortgages may include a covenant of title from the mortgagor; relief for breach of that covenant may be had only in an action brought under the mortgage, not the note. (Compl., Ex. B, Supp. S-9.) Mortgages often include provisions addressing rights to insurance or eminent domain proceeds; the rights to those proceeds are independent of the note. (*Id.*, S-12 and S-15.) Mortgagors may promise not to cause or permit the presence, use, disposal, or storage of hazardous substances at the property; those obligations are not created by the note. (*Id.*, S-18.) These contract rights, provided by and enforced under the mortgage, exist independent of the note.

Similarly, mortgages typically include promises that a mortgagor will maintain hazard insurance and state that the mortgagee may purchase such insurance if the mortgagor fails to maintain it and then charge the cost to the mortgagor. (Compl., Ex. B, Supp. S-12.) They also typically provide that the mortgagee may pay taxes and assessments attributable to the property, and charge those to the mortgagor. (*Id.*, S-11.) Those costs, and other similar advances under a mortgage, are separate contract obligations secured by the mortgage but are *not* obligations under the note.

An example will illustrate the differences. Assume “A” and “B” execute a note, while “A” and “C” execute a mortgage against Blackacre with the provisions that are the same as the Mortgage in this case. A and C have the obligation under the mortgage to keep Blackacre in good repair; B makes no such promise. B has promised to pay the Note and is personally liable for not doing so; C had made no such promise. The contracts are related, but exist independently, imposing separate obligations.

Enforcement of the mortgage can occur independent of the note. Using the example above, assume that in breach of the mortgage, A and C fail to procure insurance, and the

mortgagee incurs expenses to so. C is liable for those expenses, B is not. Assume B pays off the principal and interest under the note in full, so that the note has been fully satisfied and returned to A and B. The expenses incurred by the mortgagee to care for Blackacre are still recoverable under the mortgage, and the mortgagee may foreclose on the mortgage to recover them, even though the obligation under the note has been extinguished.

Thus, as mortgages have become increasingly complex, it is not accurate today to state that the note is always the only contract that “represents the debt,” since a mortgagor may have other obligations independent of the note. There is no reason why a mortgagee cannot enforce its rights, or assign them to someone else, or foreclose the mortgage to satisfy them.

That is particularly true where—as here—the personal liability of the obligor under the note has been extinguished. In such case, the mortgage interest is not a “nullity,” even though the note interest is barred by discharge (or payment, or statute of limitations, or some other defense to the note). Mortgage interests have separate legal significance, independent of the note which they secure.

There is another complication. There are occasions where a mortgagee will have rights superior to the rights of the note holder. This Court’s decision in *Kernohan I* is an example. In that case, Durham signed two promissory notes in favor of McGill, which were secured by a mortgage. *Kernohan I*, 1891 Ohio LEXIS 105, at *2. Durham later signed a new note in favor of McGill to satisfy the first two notes. *Id.* He also signed a new mortgage. *Id.* McGill was supposed to return the first two notes to Durham, but he never did. *Id.* Instead, McGill gave them, along with the original mortgage, to Kinney as security for debt McGill owed Kinney. *Id.*

McGill also owed another debt to Kernohan, and as security for that debt, McGill executed an assignment to Kernohan of the new mortgage that Durham had executed for McGill.

Id. at *3. The assignment also referred to the new note (which had replaced the two old notes that McGill had failed to return to Durham and instead gave to Kinney). *Id.* McGill also forged a copy of the new note, kept the original for himself, and gave the forged note to Kernohan. *Id.*

McGill then delivered the original new note to a third person, Coddington, as security for a debt McGill owed to Coddington. *Id.* McGill promised to also deliver to Coddington the new mortgage (which McGill had already given to Kernohan), but never did. *Id.* at *4. As a result of these transactions: (1) Kinney held the two old Durham notes and the old Durham mortgage, which had been replaced by the new Durham note and new Durham mortgage; (2) Kernohan held the original of the new Durham mortgage and a forged copy of the new Durham note; and (3) Coddington held the original of the new Durham note and had been promised the new Durham mortgage.

Kinney filed an action against Durham on the two old notes and to foreclose the old mortgage, and named Kernohan as a party. *Id.* at *1. Coddington was made a party, and he and Kernohan both asserted competing claims to collect the debt owed by Durham and to foreclose. *Id.* The trial court entered judgment for Kernohan (who was assigned the new Durham mortgage and note), and Coddington appealed. *Id.* at *5. The court of appeals held that Coddington's interest was superior to Kernohan's and ordered reversal and remand. *Id.* at *6. Upon further appeal, this Court reversed the decision and judgment of the court of appeals, and reinstated the judgment of the trial court. 48 Ohio St. at 25.

This Court held that although Coddington possessed the original new Durham note, his interest was inferior to the earlier assignment interest of Kernohan. *Id.* at 17-23. Kernohan had a claim of ownership by virtue of the assignment, and Coddington had a claim of ownership by

virtue of his possession of the original note indorsed to Coddington. Both claimed a stake in the loan.

This Court resolved who had the superior stake by applying the rule that a party who takes an unpaid note after maturity of the loan is on notice that “there is something wrong with it” (because it has not been paid) and holding that Coddington should be treated as standing in “no better position than McGill” (whose interest in the note was inferior to Kernohan’s interest because of the assignment). *Id.* at 19. This Court explained that “the outstanding equitable title in Kernohan to the note in question, was an equity attaching to the instrument itself, which he might assert against Coddington, the indorsee, after maturity.” *Id.* at 20. This Court held that Kernohan was entitled to enforce the loan because he was assigned the mortgage, even though he did not have the original note. *Id.* at 25.

Because mortgages may impose different (and additional) obligations beyond those incurred under a note, because mortgagors may not be obligated under a note, and because there are circumstances where the law will permit a mortgagee to enforce a mortgage in preference to the holder of the note, the position adopted by the Ninth District—that in every case, the plaintiff must possess a right in both the note *and* mortgage, is incorrect. The Court can resolve this matter by adopting a much simpler proposition of law: “To invoke common pleas court jurisdiction in a foreclosure action, the plaintiff may show standing by either an interest in the note or the mortgage.”

4. By Virtue Of Its Rights Under The Mortgage And The Assignments, The Trust Had Standing To Commence This Action.

Applying the law to the record before it, this Court should conclude that the Trust had a stake in the outcome sufficient to invoke the Trial Court’s jurisdiction.

The Mortgage was assigned to the Trust before the Complaint. (Compl., Exs. C-E, Supp. S-23 to S-31; Notice of Filing of the Assignments of Mortgage, Supp. S-37 to S-46; Affidavit in Support of Amended Motion for Summary Judgment, ¶ 5 and Exs. D-F.) The Mortgage created obligations independent of the Note, and by virtue of the Assignments, the Trust had a sufficient interest to commence an action to enforce them. *See Kernohan II*, 53 Ohio St. at 133-34 (a mortgage assignee has legal title to the mortgage and an equitable interest and “chose in action” in the debt).

This would have been true even if the Trust did not have the legal right to enforce the Note. *No one has the right to enforce the Note against Ms. Lewis*. The Trust could not seek to enforce a claim on the Note against Ms. Lewis because she had received a bankruptcy discharge. (Compl., ¶ 4, Supp. S-2.) The Trust only sought to enforce the rights under the Mortgage that survived the bankruptcy. *First Place Bank*, 2013-Ohio-2550, ¶ 35. While a proceeding on the Mortgage claim may involve a finding of fact about how much of the Note remains unpaid (for the purpose of distributing proceeds from the foreclosure sale), there was no need to show the ability or right to enforce the Note. *Doyle*, 60 Ohio St. at 444 (foreclosure of a mortgage may be had without pursuing a claim on the note; determination in a foreclosure action of the question of fact about the amount outstanding under the note would be res judicata in a subsequent separate action brought on the note); *Frey*, 2013-Ohio-4083, ¶¶ 14-15 (mortgagee may seek to enforce the mortgage only).

Even if the Trust had to further demonstrate some interest in the Note, the record shows that the Trust has such an interest—the Trust was assigned ownership of the Note. (Compl., Exs. C-E, Supp. S-23 to S-31; Notice of Filing of the Assignments of Mortgage, Supp. S-37; Affidavit in Support of Amended Motion for Summary Judgment, ¶ 5 and Exs. D-F.) As this Court

recognized in *Kernohan I*, there are circumstances where a person may be entitled to enforce a mortgage, even if someone else has the right to enforce the Note. In this case, even if there were someone else who claimed the legal right to enforce the Note (and there is not), the Trust's claim to ownership of the Note gave it a legal stake sufficient to commence an action to foreclose. *Edgar*, 109 Ohio St. at 163-64 (rights to negotiable instruments may be assigned without either a negotiation or a transfer under the UCC) ("It cannot be doubted that any legislative attempt to deny the right of a holder of a part interest in a negotiable instrument to sell and transfer such interest would be unconstitutional."). *See also* UCC § 3-203, Cmt. 1 ("Ownership rights in instruments may be determined by principles of the law of property, independent of Article 3, which do not depend upon whether the instrument was transferred under Section 3-203.").

As the owner of the Note on the date the Complaint was filed, the Trust had a stake in the outcome of the case because the Trust owned the Note debt which would be satisfied from the proceeds of the foreclosure sale. *Edgar*, 109 Ohio St. at 164-67 (holding that party who had not been properly negotiated or transferred rights in a negotiable instrument, nevertheless still held a non-negotiable and assignable chose in action to the payment under the note).

The record shows that the Trust was assigned the Mortgage as well as the Note before the Complaint was filed. The rights under the Mortgage and its claim to ownership under the Note gave the Trust standing. This Court should adopt the First Proposition of Law and affirm.

Second Proposition of Law in Response to Certified Question

Except as otherwise required by Ohio Revised Code Chapter 13, a transfer of a note or mortgage presumptively transfers the other, unless the parties to the transfer intended to sever them from one another.

1. Summary.

Even if the assignment of a mortgage or a claim of ownership rights in the note were not enough to demonstrate standing (and under Ohio law, they are—*see* First Proposition of Law *supra*), this Court should still affirm the decision below by adopting the proposition of law that the interests in notes and mortgages are presumed to follow one another.

2. The Law Presumes That Notes And Mortgages Stay Together.

When a note is transferred, assigned, or negotiated, the law presumes that the parties to that transaction also intended to transfer the mortgage with the note—the law presumes that the right to enforce the mortgage “follows” the right to enforce the note. *Rex Station Ltd.*, 2014-Ohio-1857, ¶ 21 (“Historically, Ohio courts have recognized that ‘the negotiation of a note operates as an equitable assignment of the mortgage, even though the mortgage is not assigned or delivered.’”), quoting *Koch*, 2013-Ohio-4423, ¶ 36.

The inverse is also true—the right to enforce the note presumptively follows the assignment of the right to enforce the mortgage. *Dunlap*, 2014-Ohio-3484, ¶¶ 13-20; *Rex Station, Ltd., supra*, ¶¶ 21-22,; *Koch, supra*, ¶ 36; *Dobbs*, 2009-Ohio-4742, ¶¶ 27-36. *See also Fed. Home Loan Mortg. Corp. v. Trissell*, 2d Dist. Montgomery No. 25935, 2014-Ohio-1537, ¶¶ 14-15; *Wells Fargo Bank, N.A. v. Dawson*, 5th Dist. Stark No. 2013CA00095, 2014-Ohio-269, ¶ 23; *Matthews*, 2013-Ohio-1707, ¶ 15; *Fed. Home Loan Mortg. Corp. v. Rufo*, 11th Dist. Ashtabula No. 2010 CV 795, 2012-Ohio-5930, ¶ 44.

These are also the rules of advocated by the American Law Institute. “A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.” Restatement § 5.4(a). This is the “mortgage follows note” rule. Similarly, “Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also

transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.” Restatement § 5.4(b). This is the “note follows mortgage” rule.

The reason for the presumption is that “it is nearly always sensible to keep the mortgage and the right of enforcement of the obligation it secures in the hands of the same person ... because separating the obligation from the mortgage results in a practical loss of efficacy of the mortgage.” Restatement Cmt. a. “When the right of enforcement of the note and the mortgage are split, the note becomes, as a practical matter, unsecured. This result is economically wasteful and confers and unwarranted windfall on the mortgagor.” *Id.* “It is conceivable that on rare occasions a mortgagee will wish to disassociate the obligation and the mortgage, but that result should follow only upon evidence that the parties to the transfer so agreed.” *Id.*³

3. Applying The Presumption In This Case.

Here, both the presumption and independent evidence showed that the Trust had standing to enforce the Note when the Trust filed the Complaint.

The Note was originally payable to First Union. (Compl., Ex. A, Supp. S-1.) The Mortgage was executed in favor of MERS as nominee for First Union and First Union’s successors and assigns. (Compl., Ex. B, Supp. S-7.) First Union indorsed the Note in blank. (Compl., Ex. A, Supp. S-6.) The record shows that Wells Fargo received and had possession of the Note—Wells Fargo added an allonge containing a blank indorsement and signed an affidavit showing that it at one point had possession of the Note. (Notice Of Lost Note Affidavit, Supp.

³ The final portion of this section of the Restatement states “[a] mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures.” Restatement § 5.4(c). That rule does not operate in a vacuum—it operates with the other rules in Section 5.4 which *presume* that note and mortgage interests travel together. In any event, that portion of the Restatement does not address cases where the mortgagor undertakes promises that are independent of the note (for example, promises in the mortgage to pay property taxes or to protect the property from hazardous substances), or cases (such as *Kernohan I*) in which the mortgagee is entitled to enforce the note in preference to the note holder.

S-50 to S-54.) Ms. Lewis herself admits that she was making payments to Wells Fargo and negotiating with Wells Fargo. (Answer, at 2, Supp. S-34.) These facts show that in December 2010 (when the Lost Note Affidavit had been executed) Wells Fargo was a person entitled to enforce the Note as a “holder” of a blank-indorsed negotiable instrument. R.C. 1303.31(A)(1); R.C. 1301.201(B)(21)(a); R.C. 1303.25(B).

There was no evidence that the Note and Mortgage were intended to have been severed from one another (quite the opposite—the Lost Note Affidavit is evidence that they were intended to be *kept together*). As a result, the law presumes that Wells Fargo has the rights in *both* the Note and the Mortgage (although for recording purposes, in the County Recorder’s office MERS was still holding the Mortgage as “nominee” for First Union’s successor—Wells Fargo). *Rex Station Ltd., supra*, ¶ 21; Restatement § 5.4(a) (mortgage follows note).

The record also reflects that Ms. Lewis received a letter dated January 7, 2011 which notified her that “ownership of your mortgage loan has been acquired by SRMOF Trust 2009-1” “effective 12/7/10” and that Selene would be her new loan servicer after January 12, 2011. (Lewis Opposition to Summary Judgment, Attachment 6, Supp. S-82.) Ms. Lewis also negotiated with Selene. (Answer, at 2, Supp. S-34.)

Thereafter, on June 9, 2011, MERS formally assigned the Mortgage to Wells Fargo by way of the First Assignment. (Compl., Ex. C, Supp. S-23.) On August 8, 2011, Wells Fargo executed the Second Assignment to document the assignment of both the Note and Mortgage to Selene. (Compl., Ex. D, Supp. S-26.)

The record does not reflect that possession of the Note was delivered by Wells Fargo to Selene at that time. But, because there is no evidence that the Note and Mortgage were intended to be severed from one another, the law presumes that Selene acquired the rights to enforce *both*

the Note and the Mortgage. *Dunlap, supra*, ¶¶ 13-20; *Rex Station, Ltd., supra*, ¶¶ 21-22; *Koch, supra*, ¶ 36; *Dobbs, supra*, ¶¶ 27-36; Restatement § 5.4(b) (note follows mortgage). Because the transfer of the Note was presumed to accompany the Mortgage, that transfer vested Selene with the rights that Wells Fargo had to enforce the note. R.C. 1303.22(B) (“Transfer of an instrument, whether or not the transfer is a negotiation, vests in the transferee any right of the transferee to enforce the instrument, including any right as a holder in due course, but the transferee cannot acquire rights of a holder in due course by a direct or indirect transfer from a holder in due course if the transferee engaged in fraud or illegality affecting the instrument.”).

Thereafter, on August 24, 2011, Selene executed the Third Assignment to document the assignment of both the Note and Mortgage to the Trust. (Compl., Ex. E, Supp. S-29.) The record does not reflect that possession of the Note was delivered by Selene to the Trust at that time. But, because there is no evidence that the Note and Mortgage were intended to be severed from one another, the law presumes that the Trust thereafter has the rights in *both* the Note and the Mortgage. *Dunlap, supra*, ¶¶ 13-20; *Rex Station, Ltd., supra*, ¶¶ 21-22; *Koch, supra*, ¶ 36; *Dobbs, supra*, ¶¶ 27-36; Restatement § 5.4(b) (note follows mortgage). Because the transfer of the Note is presumed to go along with the Mortgage, that transfer vested the Trust with the rights that Selene had to enforce the note (i.e. the rights transferred to it from Wells Fargo to enforce the Note as a holder of a blank-indorsed instrument). R.C. 1303.22(B). The Trust filed the Complaint a week later, on August 31, 2011. (Compl., Supp. S-1.)

Finally, it is undisputed that prior to judgment the Trust possessed the original Note, and presented it in open court. (Trial Decision at 11, Appellant’s Appx. A-3.)

Even if the law required the Trust to show an interest in the Note in order to foreclose the Mortgage (and it does not), the record shows that the Trust had that right. The Trust was

transferred the Mortgage before the Complaint was filed, which was presumptively accompanied by a transfer of the Note. There is no evidence that the parties to any of the transfers of the Note or Mortgage intended to sever them from one another. As a result, the presumption that the Note and Mortgage interests stayed together applies; even if standing to foreclose a mortgage required proof of the right to enforce the note, the Trust had standing. This Court should adopt the Second Proposition of Law and affirm.

Third Proposition of Law in Response to Certified Question

Where a mortgage agrees in the mortgage that the mortgagee and its assigns may enforce the right to foreclose, an assigned of the mortgage has standing to invoke the jurisdiction of a common pleas court to foreclose the mortgage.

1. Summary.

Independent of principles that would apply in the absence of contrary contractual provisions, because Ms. Lewis contractually agreed that a mortgage assignee—like the Trust—has the right to bring an action to foreclose the Mortgage, this Court should enforce that promise.

2. A Mortgagor May Agree By Contract That An Assignee Of A Mortgage Has The Right To Seek Foreclosure.

Courts enforce contracts as they are written. *Dugan & Meyers Constr. Co. v. Ohio Dep't of Admin. Serv.*, 113 Ohio St.3d 226, 864 N.E.2d 68, 2007-Ohio-1687, ¶ 29 (“courts are powerless to save a competent person from the effects of his own voluntary agreement”). The fact that a provision may work a hardship is not determinative; courts enforce the parties’ bargain, and may not rewrite a contract or reallocate risk. *Id.*

A mortgagor may agree in the mortgage that an assignee of the mortgage has a contractual right to come into court to seek foreclosure. *Bucci*, 68 A.3d at 1081 (a mortgage assignee has the authority by contract to file and seek foreclosure where the mortgage so

provides); *U.S. Bank, N.A. v. Flynn*, 27 Misc.3d 802, 804-07, 897 N.Y.S.2d 855 (Supreme Ct. 2010) (terms of mortgage themselves conferred standing to seek foreclosure upon mortgage assignee) (citing numerous cases from several jurisdictions).

In *Bucci*, the Supreme Court of Rhode Island had to determine “whether a nominee of a mortgage lender, who holds only legal title to the mortgage, but who is not the holder of the accompanying promissory note, may exercise the statutory power of sale and foreclose on the mortgage.” 68 A.3d at 1072. The Court held that the nominee could do so. *Id.* The Supreme Court of Rhode Island noted the contractual nature of notes and mortgages and explained that the mortgagors had given the right to foreclose by the terms of the mortgage itself:

Within the mortgage is a provision that says: “Borrower does hereby mortgage, grant and convey to MERS, (solely as nominee for Lender and Lender’s successors and assigns) and to the successors and assigns of MERS, with Mortgage Covenants upon the Statutory Condition and with the Statutory Power of Sale, the [mortgaged] property ***.” The mortgage further provides:

“Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument, but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender’s successors and assigns) has the right to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property ***.”

These provisions are clear and leave no room for interpretation. The plaintiffs [i.e. the mortgagors who were seeking to enjoin MERS from proceeding with foreclosure] explicitly granted the statutory power of sale and the right to foreclose to MERS, and consequently, MERS has the contractual authority to exercise that right.

Although there is a later provision in the mortgage that empowers the “Lender” to invoke the statutory power of sale, in our opinion the trial justice was correct when he found that that subsequent provision did “not negate the previous language in the [m]ortgage directly granting MERS *** the right to” foreclose and

sell the property. Thus, plaintiffs have agreed to grant MERS the power of sale.

Id. at 1081. In short, a party to whom the mortgagor expressly granted the right to foreclose necessarily has standing to file an action to foreclose.

3. Ms. Lewis Agreed The Trust Could Bring The Foreclosure Action.

By the express terms of the Mortgage itself, Ms. Lewis contractually agreed that the mortgagee and its successors and assigns had the right to seek enforcement by foreclosure. The Mortgage states MERS is the “mortgagee” and that MERS is “acting solely as a nominee for Lender and Lender’s successors and assigns.” (Compl., Ex. B, Supp. S-7.) Ms. Lewis promised under Paragraph I of the Mortgage to pay the debt evidenced by the Note. (*Id.*, S-10.) The Mortgage provides that if Ms. Lewis breaks that promise, and does not cure the default, then “Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may foreclose this Security Instrument by judicial proceeding.” (*Id.*, S-19.) It further expressly states: “MERS (as nominee for Lender and Lender’s successors and assigns) has the right: to exercise any or all of those interests [that Ms. Lewis granted under the Mortgage], *including, but not limited to, the right to foreclose and sell the Property*; and to take any action required of Lender including, but not limited to, releasing and cancelling this Security Instrument.” (*Id.*, S-9) (emphasis added). The grant of rights under the Mortgage to MERS extends to “the successors *and assigns* of MERS[.]” (*Id.*) (emphasis added). Thus, by the terms of the Mortgage itself, the Trust has standing to foreclose. *Bucci*, 68 A.3d at 1081; *Flynn*, 27 Misc.3d at 804-07.

These provisions are consistent with the UCC. *See* R.C. 1301.302(A) (unless expressly prohibited by the Code, the effect of the Code “may be varied by agreement”); R.C. 1303.15 (“the obligation of a party to an instrument to pay the instrument may be modified,

supplemented, or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement”). A mortgage is such a separate agreement from the note. UCC § 3-117, Official Cmt. 1 (“The separate agreement might be a security agreement or mortgage or it might be an agreement that contradicts the terms of the instrument.”).

As an assignee of the Mortgage, the Trust received the contractual authority under the Mortgage to file a judicial proceeding to foreclose, regardless of whether the Trust could also qualify as a “holder” of the Note or other party entitled to enforce the Note under R.C. 1303.31. *Bucci*, 68 A.3d at 1081; *Flynn*, 27 Misc.3d at 804-07.

This Court should not re-write the Mortgage. *Dugan & Meyers Constr. Co.*, 2007-Ohio-1687, ¶ 29. Ms. Lewis expressly contracted to allow MERS and assignees of the Mortgage to foreclose. *Bucci*, 68 A.3d at 1081; *Flynn*, 27 Misc.3d at 804-07. Even if the law otherwise permitted only those with the rights to enforce a note to enforce a mortgage, the parties to this case agreed to a different arrangement. The Trust had standing.

C. The Court Should Not Adopt Ms. Lewis’s Proposition Of Law Or The Ninth District’s Holding In McFerren.

1. Ms. Lewis’s Arguments Have No Merit.

Ms. Lewis’s Proposition of Law is:

In order to establish standing in a foreclosure action and invoke the jurisdiction of the common pleas court, a plaintiff must possess the right to enforce the debt secured by the mortgage.

(Appellant’s Br. at i.) The Court should reject this Proposition because it contradicts long-standing precedent, *Kernohan 2*, 53 Ohio St. at 133-34 and *Kernohan 1*, 48 Ohio St. at 25, fails to account for the law that a mortgage can be enforced separately from the note it secures, *Doyle*,

60 Ohio St. at 444 and *Frey*, 2013-Ohio-4083, ¶¶ 14-15, fails to account for the law that a mortgage can be enforced even when the note cannot, *Bradfield*, 67 Ohio St. at 321-24 and *Fisher*, 11 Ohio St. at 45-46, misstates the application of the law of enforceable instruments and mortgages, and ignores the terms of the Mortgage.

Ms. Lewis argues that the right to enforce the Mortgage should be governed by showing that the plaintiff meets the standards to enforce a negotiable instrument under R.C. 1303.31, and since the Trust supposedly cannot meet those standards, it cannot enforce the Mortgage. (Appellant's Br. at 6-8, and 12.) The first problem with using R.C. 1303.31 as the measure for standing to enforce a mortgage is that this section only applies to negotiable instruments. R.C. 1303.02(A) ("This chapter applies to negotiable instruments."); R.C. 1303.03(A) (defining negotiable instruments). R.C. 1303.31 does not apply to instruments or documents which do not meet that definition. R.C. 1303.02(A). The Mortgage is not a negotiable instrument. The Trust is not asserting a claim to enforce the Note, but rather is pursuing a claim to foreclose the Mortgage. *See* First Proposition of Law *supra*.

As explained above, while related, notes and mortgages can (and do) contain independent promises. A mortgagee can foreclose on a mortgage even if a note is no longer enforceable. *Bradfield*, 67 Ohio St. at 321-24; *Fisher*, 11 Ohio St. at 45-46. Because there are independent promises in a mortgage, the mortgage can be enforced independently of the note. Moreover, an assignee of a mortgage may be entitled to foreclose even when someone else is the holder of the note. *Kernohan I*, 48 Ohio St. at 25. The Trust has standing to enforce the Mortgage without having to show that it is a "person entitled to enforce" a negotiable instrument.

The second problem with relying on R.C. 1303.31 is that it does not address the provisions of the Mortgage which expressly permit the Trust to foreclose the Mortgage. *Bucci*,

68 A.3d at 1081; *Flynn*, 27 Misc.3d at 804-07. R.C. 1303.31 does not abdicate the common law. “Statutes are to be read and construed in the light of and with reference to the rules and principles of the common law in force at the time of their enactment, and in giving construction to a statute the legislature will not be presumed or held, to have intended a repeal of the settled rules of the common law *unless the language employed by it clearly expresses or imports such intention.*” *Bresnik v. Beulah Park Ltd. Partnership, Inc.*, 67 Ohio St.3d 302, 304, 1993-Ohio-19, 617 N.E.2d 1096 (emphasis in original), quoting *State v. Sullivan*, 81 Ohio St. 79, 90 N.E. 146, paragraph three of the syllabus (1909). *See also* R.C. 1301.103(B) (“Unless displaced by the particular provisions of Chapters ... 1303., ... of the Revised Code, the principles of law and equity ... supplement their provisions.”).

The third problem is that even if R.C. 1303.31 applied to this case (and it does not), the assignment of the Mortgage to the Trust raised a rebuttable presumption as a matter of law that the Note had also been transferred to the Trust. *See* Second Proposition of Law *supra*. Because the transfer of the Note is presumed to go along with the Mortgage, *Dunlap, supra*, ¶¶ 13-20 and *Rex Station, Ltd., supra*, ¶¶ 21-22 and *Koch, supra*, ¶ 36 and *Dobbs, supra*, ¶¶ 27-36 and Restatement § 5.4(b), that presumed transfer vested the Trust with the rights that Selene had under the UCC to enforce the Note (i.e. Wells Fargo’s rights to enforce the Note as a holder of a blank-indorsed instrument). R.C. 1303.22(B). Ms. Lewis’s arguments based on R.C. 1303.31 have no merit.

Ms. Lewis also argues that mortgage assignments are “nullities.” (Appellant’s Br. at 8-11.) But mortgage assignments are authorized by statute in Ohio, R.C. 5301.32, and she misconstrues the long-standing common law precedent that an assignment of an interest in a mortgage transfers legal and equitable rights and a chose in action in the debt. *E.g. Kernohan II*,

supra; *Kernohan I, supra*. Ms. Lewis cites a portion of *Kernohan II* for the proposition that a mortgage is “not a fit subject of assignment” (Appellant’s Br. at 9, citing *Kernohan 2*, 53 Ohio St. at 133), but that overstates what this Court intended to convey in that decision. This Court was not suggesting that there is no such thing as a mortgage assignment. Rather, this Court was explaining that if the mortgage is actually severed from the debts it secures, then it would not be fit for assignment and an assignment in that circumstance would effectively be a “nullity.” *Kernohan II*, 53 Ohio St. at 133 (“Where given to secure notes it has no determinate value apart from the notes, and, *as distinct from them* [i.e. if severed from them], is not a fit subject of assignment.”) (emphasis added).

Ms. Lewis’s “nullity” argument also fails to account for the nature of modern day mortgages, which do more than simply secure only debt due under the note, and the independent nature and remedy provided by mortgages in Ohio. *Bradfield*, 67 Ohio St. at 321-24 (mortgagee can bring claims even where note enforcement is barred); *Doyle*, 60 Ohio St. at 444 (foreclosure of a mortgage may be had without pursuing a claim on the note); *Spence*, 40 Ohio St. at 520-21 (notes and mortgages provide separate remedies that can be separately maintained); *Fisher*, 11 Ohio St. at 45-46 (where an action can no longer be brought upon the note, the mortgage may still be enforced); *Weaver*, 2012-Ohio-4373, ¶¶ 9, 14 (*in rem* action to proceed on mortgage may still proceed even if the *in personam* claim on the underlying note is barred); *Cranberry Fin., LLC*, 2010-Ohio-464, ¶ 29 (notes and mortgages are separate contracts); *Hopkins*, 2008-Ohio-2959, ¶ 16 (same).

Ms. Lewis further argues that finding standing in a mortgage assignee would “expose” a mortgagor to “double liability on the same debt.” (Appellant’s Br. at 12-13.) As an initial matter, that is an impossible hypothetical risk, as the record conclusively shows that the Trust

has the original Note, and that she received a bankruptcy discharge. (Trial Court Decision at 11; Compl., ¶ 4, Supp. S-2.)

Second, there is a right of restitution that would permit recovery from the party who wrongfully received payment. R.C. 1303.58.

Third, and in any event, that is a risk that Ms. Lewis contractually agreed to take. (Compl., Ex. B, Supp. S-7, S-9 to S-10, S-19.) Courts enforce parties' contracts, not rewrite them. *Bucci*, 68 A.3d at 1081; *Flynn*, 27 Misc.3d at 804-07. See *Dugan & Meyers Constr. Co.*, 2007-Ohio-1687, ¶ 29.

All of Ms. Lewis's arguments fail.

2. The Ninth District's Holding Is Incorrect.

This leaves the Ninth District's decision in *McFerren*, 2013-Ohio-3228. The Ninth District was incorrect on multiple levels.

First, the Ninth District is the only Court to condition standing to foreclose on showing a right to enforce *both* the note *and* the mortgage. Compare *Herres*, 2014-Ohio-1539, ¶ 29; *Koch*, 2013-Ohio-4423, ¶¶ 34-40; *Sherman*, 2013-Ohio-4220, syllabus paragraph 3; *Gray*, 2013-Ohio-3340, ¶¶ 27-35; *Loncar*, 2013-Ohio-2959, ¶ 16; *Burke*, 2013-Ohio-2860, ¶ 16; *Matthews*, 2013-Ohio-1707, ¶ 15; *Patterson*, 2012-Ohio-5894, ¶ 22.

Second, *McFerren* does not mention or address *Kernohan I* or *Kernohan I2*. *McFerren* does not address whether mortgages are contracts in their own rights, distinct from (although related to) notes that they secure. E.g. *Cranberry Fin., LLC*, 2010-Ohio-464, ¶ 29, citing *Hurd*, 11 Ohio St. at 234; *Hopkins*, 2008-Ohio-2959, ¶ 16. *McFerren* does not address prior precedent which holds that mortgages can be enforced independently from the notes they secure, and even if the notes cannot be enforced. E.g. *Bradfield*, 67 Ohio St. at 321-24; *Doyle*, 60 Ohio St. at 444; *Spence*, 40 Ohio St. at 520-21.

McFerren also does not address the rule of law that presumes that a transfer of a note or mortgage is presumptively accompanied by a transfer of the other. *E.g. Dunlap*, 2014-Ohio-3484, ¶¶ 13-20; *Rex Station, Ltd., supra*, ¶¶ 21-22.; *Koch, supra*, ¶ 36; *Dobbs*, 2009-Ohio-4742, ¶¶ 27-36; Restatement § 5.4(a) and (b).

Instead, the Ninth District referred to a Comment and an Illustration from Restatement Section 5.4 which only apply when there is evidence that the transfer parties specifically intended severance of the note from the mortgage. The Ninth District cited Comment e for the proposition that “in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation.” *McFerren*, 2013-Ohio-3228, ¶ 12. But the Ninth District did not apply the next two sentences of the Comment, which state: “For example, assume that the original mortgagee transfer the mortgage *alone* to A and the promissory note that it secures to B. Since the obligation is not enforceable by A [because the facts assume that the mortgage was transferred “alone”—i.e. that the note and mortgage were intended to be severed (or, in other words, that the presumption does not apply)], A can never suffer a default and hence cannot foreclose the Mortgage.” Restatement § 5.4, Cmt. e (emphasis added).

Likewise, the Ninth District’s opinion says:

“While it is possible to assign a mortgage and retain possession of the note, [t]he practical effect of such a transaction is to make it impossible to foreclose the mortgage, unless the transferee is also made an agent or trustee of the transferor or otherwise has authority to foreclose in the transferor’s behalf.”

McFerren, 2013-Ohio-3228, ¶ 12, quoting Restatement § 5.4, Illustration 6 (incorrectly cited to in *McFerren* as “Section 5.4(c)”). But the Ninth District omitted the most important part of that Comment:

It is possible for a mortgagee to assign the mortgage while retaining full ownership of the obligation, *but only if the parties so agree*. See Illustration 7. The practical effect of such a transaction

is to make it impossible to foreclose the mortgage, unless the transferee is also made an agent or trustee of the transferor or otherwise has authority to foreclose in the transferor's behalf. See Comment e.

Restatement § 5.4, Illustration 6 (emphasis added to portion omitted in *McFerren*).

The problem with *McFerren* is that the Ninth District never cited the rules of presumption under the Restatement, let alone apply them. Had the Ninth District applied Section 5.4(b)'s rule, the mortgage assignment in *McFerren* would have resulted in the presumption of the transfer of the interest in the note, and since it appears that there was no evidence in *McFerren* of an intent to sever the note from the mortgage, the Ninth District would have then affirmed the summary judgment for the plaintiff, instead of reversing and remanding the case for further proceedings.

This Court should not follow *McFerren*. This Court should either dismiss the appeal for having been improvidently accepted for review, or preserve its long-standing precedent and the approach of all of the other courts of appeal by adopting one of the Trust's three, alternative Propositions of Law to answer the certified question and affirm the judgment below.

IV. Conclusion.

The Court should dismiss this appeal because the Twelfth and Ninth District decisions are not in irreconcilable conflict. The Ninth District considered the legal question of whether a plaintiff could show standing to enforce a *note* by an assignment of the mortgage; but the Twelfth District only had to consider whether a plaintiff could show standing to enforce a *mortgage* by an assignment of the mortgage. Further, the assignment in this case expressly transferred both the note and the mortgage. The decisions do not present a certifiable conflict. This appeal should be dismissed.

Alternatively, on the merits, this Court should affirm the judgment below by adopting any one of the three alternative propositions of law. As to the First Proposition, Ohio's common law has long recognized that mortgage assignees have the right to seek foreclosure of the mortgage because the assignee has legal title to the mortgage and an equitable interest and chose in action in the debt. Moreover, mortgage interests are independently enforceable. The interest in the Mortgage and the interest in the Note were both assigned to the Trust before the Complaint date. The Trust requests that the Court hold that the Trust had standing by answering the certified question with the First Proposition of Law: "To invoke common pleas court jurisdiction in a foreclosure action, the plaintiff may show standing by either an interest in the note or the mortgage."

Alternatively, it is nearly always sensible to keep a note and mortgage together. As a result, the law creates a presumption that the debt secured by a mortgage follows along with an assignment of the mortgage. The Trust was assigned the interest in the Mortgage, which presumptively transferred the interest in the Note (even if the Note had not been expressly assigned, and it was). The Trust requests that the Court hold that the Trust had standing by answering the certified question with the Second Proposition of Law: "Except as otherwise required by Ohio Revised Code Chapter 13, a transfer of a note or mortgage presumptively transfers the other, unless the parties to the transfer intended to sever them from one another."

Alternatively, a mortgagor may empower a mortgage assignee to seek foreclosure by agreeing in the mortgage that an assignee can bring the judicial proceeding to foreclose. Ms. Lewis contractually agreed that an assignee of the interest in the Mortgage—like the Trust—could foreclose. The Trust requests that the Court hold that the Trust had standing by answering the certified question with the Third Proposition of Law: "Where a mortgage agrees in the

mortgage that the mortgagee and its assigns may enforce the right to foreclose, an assignee of the mortgage has standing to invoke the jurisdiction of a common pleas court to foreclose the mortgage.”

Respectfully submitted,

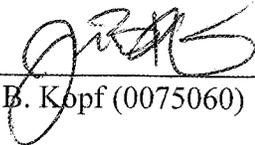


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Counsel for SRMOF 2009-1 Trust

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2014, I served a copy of the foregoing Merit Brief by ordinary U.S. Mail, postage prepaid, upon Andrew M. Engel, Esq., Kendo, Alexander, Cooper & Engle LLP, 7071 Corporate Way, Suite 201, Centerville, Ohio 45459, counsel for Defendant-Appellee Shari Lewis.



John B. Kopf (0075060)

APPENDIX

McFerren Assignment A-1

R.C. 1301.103 A-2

R.C. 1301.201 A-3

R.C. 1301.302 A-4

R.C. 1303.02 A-5

R.C. 1303.03 A-6

R.C. 1303.15 A-7

R.C. 1303.22 A-8

R.C. 1303.25 A-9

R.C. 1303.58 A-10

R.C. 5301.32 A-11

Restatement of the Law 3d, Property-Mortgages Section 5.4 A-12

32
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LS&R No.: 201054136
CHL

ASSIGNMENT OF MORTGAGE

Bo A

KNOW ALL MEN BY THESE PRESENTS, that the undersigned, Mortgage Electronic Registration Systems, Inc. as nominee for Quicken Loans, Inc. its successors and assigns, whose address is 1901 E Voorhees Street, Suite C, Danville, IL 61834, does hereby assign to BAC Home Loans Servicing, LP fka Countrywide Home Loans Servicing LP, whose address is 7105 Corporate Drive, Mail Stop PTX-C-35, Plano, TX 75024, all of its interest in that certain mortgage from Garrick P. McFerren, An Unmarried Man to Mortgage Electronic Registration Systems, Inc. as nominee for Quicken Loans, Inc. its successors and assigns, dated February 19, 2008, recorded March 12, 2008, Instrument number 55524666, in the office of the Summit County Recorder, and secured by the following real estate:

Land situated in the City of Green in the County of Summit in the State of OH
Known as being all of Lot No. 91 of the Mystic Pointe Subdivision as recorded in Plat Cabinet N, Slides 201 to 224 of Summit County Records, and all amendments thereto.

PROPERTY ADDRESS: 3209 Deborah Court, Uniontown, OH 44685

IN WITNESS WHEREOF, Mortgage Electronic Registration Systems, Inc. as nominee for Quicken Loans, Inc. its successors and assigns has set its hand on the date set forth below.

Mortgage Electronic Registration Systems, Inc. as
nominee for Quicken Loans, Inc. its successors and
assigns

By: 
*Printed Name *CECILIA RODRIGUEZ*
*Title *ASSISTANT SECRETARY*

**APPENDIX
A-1**



John A Donofrio, Summit Fiscal Officer

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Pg: 1 of 3
04/19/2011 07:49A
AS 60.00

STATE OF _____ }
 COUNTY OF _____ } SS.
 On _____ before me _____, Notary Public,
 State of _____, personally appeared _____,
 _____ (Title), of Mortgage Electronic Registration Systems, Inc. as nominee
 for Quicken Loans, Inc. its successors and assigns, personally known to me (or proved to me
 on the basis of satisfactory evidence) to be the person whose name is subscribed to the within
 instrument and acknowledged to me that he/she executed the same in his/her authorized
 capacity, and that by his/her signature on the instrument the person, or the entity upon behalf
 of which the person acted, executed the instrument.

WITNESS my hand and official seal.

 Notary Public
 My Commission Expires:

This instrument was prepared by:
 LERNER, SAMPSON & ROTHFUSS
 A Legal Professional Association
 P.O. Box 5480
 Cincinnati, OH 45201-5480

JML

*(See Attached
 Acknowledgment)
 (M) 3/16/11*

ACKNOWLEDGMENT

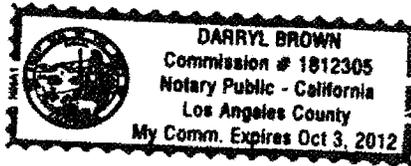
State of California
County of Ventura

On March 16, 2011, before me, Darryl Brown, Notary Public
(insert name and title of the officer)

personally appeared Cecilia Rodriguez
who proved to me on the basis of satisfactory evidence to be the person ~~or~~ whose name ~~is~~ ~~are~~ subscribed to the within instrument and acknowledged to me that ~~he~~ ~~she~~ ~~they~~ executed the same in ~~his~~ ~~her~~ ~~their~~ authorized capacity ~~(ies)~~, and that by ~~his~~ ~~her~~ ~~their~~ signature ~~s~~ on the instrument the person ~~s~~, or the entity upon behalf of which the person ~~s~~ acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature Darryl Brown (Seal)

*Attached to Assignment of Mortgage
Re: McFerren*

ⓓ 3/16/11

1301.103 Construction of Uniform Commercial Code to promote its purposes and policies; applicability of supplemental principles of law - UCC 1-103.

Part 1. General Provisions

(A) Chapters 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., and 1310. of the Revised Code must be liberally construed and applied to promote their underlying purposes and policies

, which are :

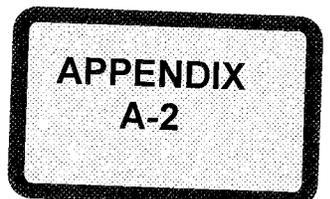
- (1) To simplify, clarify, and modernize the law governing commercial transactions;
- (2) To permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and
- (3) To make uniform the law among the various jurisdictions.

(B) Unless displaced by the particular provisions of Chapters 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., and 1310. of the Revised Code

, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement their provisions .

Cite as R.C. § 1301.103

History. Renumbered from § 1301.02 and amended by 129th General Assembly File No.9, HB 9, §1, eff. 6/29/2011.



1301.201 General definitions - UCC 1-201.

Part 2. General Definitions and Principles of Interpretation

- (A) Unless the context otherwise requires, words or phrases defined in this section, or in the additional definitions contained in Chapter 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., or 1310. of the Revised Code, that apply to particular chapters or sections therein, have the meanings stated.
- (B) Subject to definitions contained in Chapter 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., or 1310. of the Revised Code, that apply to particular chapters or sections therein:
- (1) "Action", in the sense of a judicial proceeding, includes recoupment, counterclaim, set-off, suit in equity, and any other proceeding in which rights are determined.
 - (2) "Aggrieved party" means a party entitled to pursue a remedy.
 - (3) "Agreement", as distinguished from "contract", means the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in section 1301.303 of the Revised Code.
 - (4) "Bank" means a person engaged in the business of banking and includes a savings bank, savings and loan association, credit union, and trust company.
 - (5) "Bearer" means a person in control of a negotiable electronic document of title or a person in possession of a negotiable instrument, negotiable tangible document of title, or certificated security that is payable to bearer or indorsed in blank.
 - (6) "Bill of lading" means a document of title evidencing the receipt of goods for shipment issued by a person engaged in the business of directly or indirectly transporting or forwarding goods. The term does not include a warehouse receipt.
 - (7) "Branch" includes a separately incorporated foreign branch of a bank.
 - (8) "Burden of establishing" a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence.
 - (9) "Buyer in ordinary course of business" means a person that buys goods in good faith, without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind. A person buys goods in the ordinary course if the sale to the person comports with the usual or customary practices in the kind of business in which the seller is engaged or with the seller's own usual or customary practices. A person that sells oil, gas, or other minerals at the wellhead or minehead is a person in the business of selling goods of that kind. A buyer in ordinary course of business may buy for cash, by exchange of other property, or on secured or unsecured credit, and may acquire goods or documents of title under a preexisting contract for sale. Only a buyer that takes possession of the goods or has a right to recover the goods from the seller under Chapter 1302. of the Revised Code may be a buyer in ordinary course of business. "Buyer in ordinary course of business" does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt .

(10) "Conspicuous", with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is "conspicuous" or not is for decision by the court. Conspicuous terms include the following:

(a) A heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and

(b) Language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language.

(11) "Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes.

(12) "Contract", as distinguished from "agreement", means the total legal obligation that results from the parties' agreement as determined by Chapters 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., and 1310. of the Revised Code as supplemented by any other applicable laws.

(13) "Creditor" includes a general creditor, a secured creditor, a lien creditor, and any representative of creditors, including an assignee for the benefit of creditors, a trustee in bankruptcy, a receiver in equity, and an executor or administrator of an insolvent debtor's or assignor's estate.

(14) "Defendant" includes a person in the position of defendant in a counterclaim, cross-claim, or third-party claim.

(15) "Delivery" with respect to an electronic document of title means voluntary transfer of control and with respect to an instrument, a tangible document of title, or chattel paper, means voluntary transfer of possession.

(16) "Document of title" means a record (i) that in the regular course of business or financing is treated as adequately evidencing that the person in possession or control of the record is entitled to receive, control, hold, and dispose of the record and the goods the record covers and (ii) that purports to be issued by or addressed to a bailee and to cover goods in the bailee's possession which are either identified or are fungible portions of an identified mass. The term includes a bill of lading, transport document, dock warrant, dock receipt, warehouse receipt, and order for delivery of goods. An electronic document of title means a document of title evidenced by a record consisting of information stored in an electronic medium. A tangible document of title means a document of title evidenced by a record consisting of information that is inscribed on a tangible medium.

(17) "Fault" means a default, breach, or wrongful act or omission.

(18) "Fungible goods " means :

(a) Goods of which any unit , by nature or usage of trade, is the equivalent of any other like unit ; or

(b) Goods that by agreement are treated as equivalent.

(19) "Genuine" means free of forgery or counterfeiting.

(20) "Good faith," except as otherwise provided in Chapter 1305. of the Revised Code, means honesty in fact and the observance of reasonable commercial standards of fair dealing.

(21) "Holder" means :

(a) The person in possession of a negotiable instrument

that is payable either to bearer or to an identified person that is the person in possession

;

(b) The person in possession of a negotiable tangible document of title if the goods are deliverable either to bearer or to the order of the person in possession; or

(c) The person in control of a negotiable electronic document of title.

(22) "Insolvency proceeding" includes an assignment for the benefit of creditors or other proceeding intended to liquidate or rehabilitate the estate of the person involved.

(23) " Insolvent" means:

(a) Having generally ceased to pay debts in the ordinary course of business other than as a result of a bona fide dispute;

(b) Being unable to pay debts as they become due; or

(c) Being insolvent within the meaning of federal bankruptcy law.

(24) "Money" means a medium of exchange currently authorized or adopted by a domestic or foreign government . The term includes a monetary unit of account established by an intergovernmental organization or by agreement between two or more countries.

(25) "Organization" means a person other than an individual.

(26) "Party", as distinguished from "third party", means a person that has engaged in a transaction or made an agreement subject to Chapters 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., and 1310. of the Revised Code.

(27) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, public corporation, or any other legal or commercial entity.

(28) "Present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain by use of either an interest rate specified by the parties if that rate is not manifestly unreasonable at the time the transaction is entered into or, if an interest rate is not so specified, a commercially reasonable rate that takes into account the facts and circumstances at the time the transaction is entered into.

(29) "Purchase" means taking by sale, lease, discount, negotiation, mortgage, pledge, lien, security interest, issue or reissue, gift, or any other voluntary transaction creating an interest in property.

(30) "Purchaser" means a person that takes by purchase.

(31) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(32) "Remedy" means any remedial right to which an aggrieved party is entitled with or without resort to a tribunal.

(33) "Representative" means a person empowered to act for another, including an agent, an officer of a corporation or association, and a trustee, executor, or administrator of an estate.

(34) " Right" includes remedy.

(35) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. "Security interest" includes any interest of a consignor and a buyer of accounts, chattel paper, a payment intangible, or a promissory note in a transaction that is subject to Chapter 1309. of the Revised Code. "Security interest" does not include the special property interest of a buyer of goods on identification of those goods to a contract for sale under section 1302.42 of the Revised Code , but a buyer may also acquire a "security interest" by complying with Chapter 1309. of the Revised Code. Except as otherwise provided in section 1302.49 of the Revised Code, the right of a seller or lessor of goods under Chapter 1302. or 1310. of the Revised Code to retain or acquire possession of the goods is not a "security interest", but a seller or lessor may also acquire a "security interest" by complying with Chapter 1309. of the Revised Code. The retention or reservation of title by a seller of goods notwithstanding shipment or delivery to the buyer under section 1302.42 of the Revised Code is limited in effect to a reservation of a "security interest."

" Whether a transaction in the form of a lease creates a "security interest" is determined pursuant to section 1301.203 of the Revised Code.

(36) "Send" in connection with any writing, record, or notice means :

(a) To deposit in the mail or deliver for transmission by any other usual means of communication with postage or cost of transmission provided for and properly addressed and, in the case of an instrument, to an address specified thereon or otherwise agreed, or if there be none to any address reasonable under the circumstances ; or

(b) In any other way to cause to be received any record or notice within the time it would have arrived if properly sent .

(37) "Signed" includes using any symbol executed or adopted with present intention to adopt or accept a writing.

(38) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(39) "Surety" includes a guarantor or any other secondary obligor.

(40) "Term" means a portion of an agreement that relates to a particular matter.

(41) "Unauthorized signature" means a signature made without actual, implied, or apparent authority . The term includes a forgery.

(42) "Warehouse receipt" means a document of title issued by a person engaged in the business of storing goods for hire.

(43) "Writing" includes printing, typewriting, or any other intentional reduction to tangible form. "Written" has a corresponding meaning.

Cite as R.C. § 1301.201

History. Renumbered from § 1301.01 and amended by 129th General Assembly File No.9, HB 9, §1, eff. 6/29/2011.

1301.302 Variation by agreement - UCC 1-302.

Part 3. Territorial Applicability and General Rules

(A) Except as otherwise provided in division (B) of this section or elsewhere in Chapter 1301., 1303., 1304., 1305., 1307., 1308., 1309., or 1310. of the Revised Code, the effect of provisions of Chapters 1301., 1303., 1304., 1305., 1307., 1308., 1309., and 1310. of the Revised Code may be varied by agreement.

(B) The obligations of good faith, diligence, reasonableness, and care prescribed by Chapter 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., or 1310. of the Revised Code may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever Chapter 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., or 1310. of the Revised Code requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.

(C) The presence in certain provisions of Chapter 1301., 1302., 1303., 1304., 1305., 1307., 1308., 1309., or 1310. of the Revised Code of the phrase "unless otherwise agreed", or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.

Cite as R.C. § 1301.302

History. Added by 129th General Assembly File No.9, HB 9, §1, eff. 6/29/2011.

1303.02 Subject matter - UCC 3-102.

(A) This chapter applies to negotiable instruments. It does not apply to money, to payment orders governed by sections 1304.51 to 1304.85 of the Revised Code, or to securities governed by Chapter 1308. of the Revised Code.

(B) If there is a conflict between this chapter and either sections 1304.01 to 1304.40 or Chapter 1309. of the Revised Code, the provisions of sections 1304.01 to 1304.40 or Chapter 1309. of the Revised Code govern.

(C) If any provision of this chapter is inconsistent with any regulation of the board of governors of the federal reserve system or any operating circular of the federal reserve banks, the regulation or the operating circular supersedes the provision of this chapter to the extent of the inconsistency.

Cite as R.C. § 1303.02

History. Effective Date: 07-01-2001

1303.03 Negotiable instrument - UCC 3-104.

(A) Except as provided in divisions (C) and (D) of this section, "negotiable instrument" means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it meets all of the following requirements:

- (1) It is payable to bearer or to order at the time it is issued or first comes into possession of a holder.
- (2) It is payable on demand or at a definite time.
- (3) It does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain any of the following:
 - (a) An undertaking or power to give, maintain, or protect collateral to secure payment;
 - (b) An authorization or power to the holder to confess judgment or realize on or dispose of collateral;
 - (c) A waiver of the benefit of any law intended for the advantage or protection of an obligor.

(B) "Instrument" means a negotiable instrument.

(C) An order that meets all of the requirements of divisions (A)(2) and (3) of this section and otherwise falls within the definition of "check" is a negotiable instrument and a check.

(D) A promise or order other than a check is not an instrument if, at the time it is issued or first comes into possession of a holder, it contains a conspicuous statement, however expressed, to the effect that the promise or order is not negotiable or is not an instrument governed by this chapter.

(E)

(1) "Note" means an instrument that is a promise.

(2) "Draft" means an instrument that is an order.

(3) If an instrument is both a "note" and a "draft," a person entitled to enforce the instrument may treat it as either.

(F) "Check" means either of the following:

(1) A draft, other than a documentary draft, payable on demand and drawn on a bank;

(2) A cashier's check or teller's check.

An instrument may be a "check" even though it is described on its face as a "money order" or by another term.

(G) "Cashier's check" means a draft with respect to which the drawer and drawee are the same bank or branches of the same bank.

(H) "Teller's check" means a draft drawn by a bank on another bank or payable at or through a bank.

(I) "Traveler's check" means an instrument that meets all of the following conditions:

(1) It is payable on demand.

(2) It is drawn on or payable at or through a bank.

(3) It is designated by the term "traveler's check" or by a substantially similar term.

(4) It requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the instrument.

(J) "Certificate of deposit" means an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money. A "certificate of deposit" is a note of the bank.

Cite as R.C. § 1303.03

History. Effective Date: 08-19-1994

1303.15 Other agreements affecting instrument - UCC 3-117.

Subject to applicable law regarding exclusion of proof of contemporaneous or previous agreements, the obligation of a party to an instrument to pay the instrument may be modified, supplemented, or nullified by a separate agreement of the obligor and a person entitled to enforce the instrument, if the instrument is issued or the obligation is incurred in reliance on the agreement or as part of the same transaction giving rise to the agreement. To the extent an obligation is modified, supplemented, or nullified by an agreement under this section, the agreement is a defense to the obligation.

Cite as R.C. § 1303.15

History. Effective Date: 08-19-1994

1303.22 Transfer of instrument - rights acquired by transfer - UCC 3-203.

(A) An instrument is transferred when it is delivered by a person other than its issuer for the purpose of giving to the person receiving delivery the right to enforce the instrument.

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

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

(D) If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur, the transferee of that instrument obtains no rights under this chapter, and the transferee of that instrument has only the rights of a partial assignee.

Cite as R.C. § 1303.22

History. Effective Date: 08-19-1994

1303.25 Special indorsement - blank indorsement - anomalous indorsement - UCC 3-205.

(A) A "special indorsement" means an indorsement that is made by the holder of an instrument, whether payable to an identified person or payable to the bearer, and that identifies a person to whom it makes the instrument payable. An instrument, when specially indorsed, becomes payable to the identified person and may be negotiated only by the indorsement of that person. section 1303.08 of the Revised Code applies to special indorsements.

(B) "Blank indorsement" means an indorsement that is made by the holder of the instrument and that is not a special indorsement. When an instrument is indorsed in blank, the instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed.

(C) The holder may convert a blank indorsement that consists only of a signature into a special indorsement by writing above the signature of the indorser words identifying the person to whom the instrument is made payable.

(D) "Anomalous indorsement" means an indorsement made by a person who is not the holder of the instrument. An "anomalous indorsement" does not affect the manner in which the instrument may be negotiated.

Cite as R.C. § 1303.25

History. Effective Date: 08-19-1994

1303.58 Payment or acceptance by mistake - UCC 3-418.

(A) Except as provided in division (C) of this section, if the drawee of a draft pays or accepts the draft and the drawee acted on the mistaken belief that payment of the draft had not been stopped pursuant to section 1304.32 of the Revised Code, or that the signature of the drawer of the draft was authorized, the drawee may recover the amount of the draft from the person to whom or for whose benefit payment was made or, in the case of acceptance, may revoke the acceptance. The rights of the drawee under this division are not affected by a failure of the drawee to exercise ordinary care in paying or accepting the draft.

(B) Except as provided in division (C) of this section, if an instrument has been paid or accepted by mistake and the case is not covered by division (A) of this section, the person paying or accepting, to the extent permitted by the law governing mistake and restitution, may recover the payment from the person to whom or for whose benefit payment was made or, in the case of acceptance, may revoke the acceptance.

(C) The remedies provided by division (A) or (B) of this section may not be asserted against a person who took the instrument in good faith and for value or who in good faith changed position in reliance on the payment or acceptance. This division does not limit remedies provided by section 1303.57 or 1304.36 of the Revised Code.

(D) Notwithstanding section 1304.25 of the Revised Code, if an instrument is paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance under divisions (A) or (B) of this section, the instrument is deemed not to have been paid or accepted and is treated as dishonored, and the person from whom payment is recovered has rights as a person entitled to enforce the dishonored instrument.

Cite as R.C. § 1303.58

History. Effective Date: 08-19-1994

5301.32 Assignment or partial release by separate instrument.

A mortgage may be assigned or partially released by a separate instrument of assignment or partial release, acknowledged as provided by section 5301.01 of the Revised Code. The separate instrument of assignment or partial release shall be recorded in the county recorder's official records. The county recorder shall be entitled to charge the fee for that recording as provided by section 317.32 of the Revised Code for recording deeds. The signature of a person on the assignment or partial release may be a facsimile of that person's signature. A facsimile of a signature on an assignment or partial release is equivalent to and constitutes the written signature of the person for all requirements regarding mortgage assignments or partial releases.

In a county in which the county recorder has determined to use the microfilm process as provided by section 9.01 of the Revised Code, the county recorder may require that all assignments and partial releases of mortgages be by separate instruments. The original instrument bearing the proper endorsement may be used as the separate instrument.

An assignment of a mortgage shall contain the then current mailing address of the assignee.

Cite as R.C. § 5301.32

History. Amended by 130th General Assembly File No. 41, HB 72, §1, eff. 1/30/2014.

Effective Date: 02-01-2002

**APPENDIX
A-11**

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TOC: Restatement 3d, Property: Mortgages - Rule Sections > Chapter 5- Transfers of Mortgaged Real Estate and Mortgages > **§ 5.4 Transfer of Mortgages and Obligations Secured by Mortgages.**

Restatement of the Law, Third, Property (Mortgages), § 5.4

Restatement of the Law, Third, Property (Mortgages)
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Chapter 5 - Transfers of Mortgaged Real Estate and Mortgages

Restat 3d of Property: Mortgages, § 5.4

§ 5.4 Transfer of Mortgages and Obligations Secured by Mortgages.

- (a) A transfer of an obligation secured by a mortgage also transfers the mortgage unless the parties to the transfer agree otherwise.
- (b) Except as otherwise required by the Uniform Commercial Code, a transfer of a mortgage also transfers the obligation the mortgage secures unless the parties to the transfer agree otherwise.
- (c) A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures.

COMMENTS & ILLUSTRATIONS:

a. Introduction. This section deals with transfers of mortgages and their associated obligations by an original mortgagee to a successor, or from one successor to another. Such transfers occur in what is commonly termed the secondary mortgage market, as distinct from the primary mortgage market in which mortgage loans are originated by lenders to borrowers.

The essential premise of this section is that it is nearly always sensible to keep the mortgage and the right of enforcement of the obligation it secures in the hands of the same person. This is so because separating the obligation from the mortgage results in a practical loss of efficacy of the mortgage; see Subsection (c) of this section. When the right of enforcement of the note and the mortgage are split, the note becomes, as a practical matter, unsecured. This result is economically wasteful and confers an unwarranted windfall on the mortgagor.

It is conceivable that on rare occasions a mortgagee will wish to disassociate the obligation and the mortgage, but that result should follow only upon evidence that the parties to the transfer so agreed. The far more common intent is to keep the two rights combined. Ideally a

transferring mortgagee will make that intent plain by executing to the transferee both an assignment of the mortgage and an assignment, indorsement, or other appropriate transfer of the obligation. But experience suggests that, with fair frequency, mortgagees fail to document their transfers so carefully. This section's purpose is generally to achieve the same result even if one of the two aspects of the transfer is omitted.

This section applies whether the transfer is outright or is given as collateral or security for some other obligation. When an obligation secured by a mortgage is transferred as collateral for another debt, the person receiving the security interest will generally wish to perfect that interest under U.C.C. Article 9. However, the principles of this section will operate to keep the obligation and the mortgage united whether or not perfection is achieved. Perfection as to the obligation will also constitute perfection as to the mortgage.

b. Transfer of the obligation also transfers the mortgage. A transfer in full of the obligation automatically transfers the mortgage as well unless the parties agree that the transferor is to retain the mortgage. The objective of this rule, as noted above, is to keep the obligation and the mortgage in the same hands unless the parties wish to separate them. This result is sometimes justified on the ground that "all the authorities agree that the debt is the principal thing and the mortgage an accessory," as the United States Supreme Court put it in 1872 in *Carpenter v. Longan*, 83 U.S. (16 Wall.) 271, 21 L.Ed. 313 (1872).

Ownership of a contractual obligation can generally be transferred by a document of assignment; see Restatement, Second, Contracts § 316. However, if the obligation is embodied in a negotiable instrument, a transfer of the right to enforce must be made by delivery of the instrument; see U.C.C. § 3-203 (1995). The principle of this subsection, that the mortgage follows the note, applies to either form of transfer of the note. Moreover, it applies even if the transferee does not know that the obligation is secured by a mortgage. See Illustrations 1-3.

Recordation of a mortgage assignment is not necessary to the effective transfer of the obligation or the mortgage securing it. However, assignees are well advised to record. One reason is that, if the assignment is not recorded, the original mortgagee appears in the public records to continue to hold the mortgage. If the mortgagee and mortgagor subsequently enter into and record a purported discharge or modification of the mortgage without the assignee's knowledge or involvement, and the real estate is then transferred to a good faith purchaser for value, the latter is entitled to rely on the record. The result is to prevent the assignee from enforcing the mortgage, in its original form, against the purchaser.

c. Transfer of the mortgage also transfers the obligation. When ownership of a mortgage is assigned to another, Subsection (b) of this section provides that the obligation secured by the mortgage is likewise transferred unless the parties agree that the obligation be retained by the transferor. In effect, the obligation will "follow" the mortgage even if not expressly mentioned in any document of transfer. The reason, as noted above, is that this is ordinarily what the parties desire and expect when a mortgage is assigned. Thus this section is designed to carry out the parties' intention even though they, through ignorance or inadvertence, have not fully documented it. See Illustrations 5 and 6. If the obligation is only partially owned by the transferor, or if the obligation is subject to prior liens or security interests, only the interest of the transferor in the obligation passes to the transferee.

d. Competing transfers of obligations and mortgages. This section's focus is on the relationship between the transferor and transferee of obligations and mortgages that secure them. It does not purport to resolve conflicts resulting from multiple purported transfers by a transferor to

competing transferees. That subject is complex and is governed by other bodies of law, including the recording acts and the Uniform Commercial Code, that are beyond the scope of this Restatement.

e. Mortgage may not be enforced except by a person having the right to enforce the obligation or one acting on behalf of such a person. As mentioned, in general a mortgage is unenforceable if it is held by one who has no right to enforce the secured obligation. For example, assume that the original mortgagee transfers the mortgage alone to A and the promissory note that it secures to B. Since the obligation is not enforceable by A, A can never suffer a default and hence cannot foreclose the mortgage. B, as holder of the note, can suffer a default. However, in the absence of some additional facts creating authority in A to enforce the mortgage for B, B cannot cause the mortgage to be foreclosed since B does not own the mortgage. See Illustration 8.

This result is changed if A has authority from B to enforce the mortgage on B's behalf. For example, A may be a trustee or agent of B with responsibility to enforce the mortgage at B's direction. A's enforcement of the mortgage in these circumstances is proper. See Illustration 9. The trust or agency relationship may arise from the terms of the assignment, from a separate agreement, or from other circumstances. Courts should be vigorous in seeking to find such a relationship, since the result is otherwise likely to be a windfall for the mortgagor and the frustration of B's expectation of security. See Illustration 10.

1. Mortgagor borrows money from Mortgagee and gives Mortgagee a nonnegotiable promissory note for the amount borrowed and, to secure payment of the note, a mortgage on Blackacre. Mortgagee subsequently executes a separate "Assignment of Promissory Note" transferring ownership of the note to Assignee, but makes no mention and no express assignment of the mortgage. By this transfer Assignee becomes the owner of both the note and the mortgage.

2. The facts are the same as Illustration 1, except that the note is negotiable, and that rather than executing an assignment of the note to Assignee, Mortgagee delivers the note to Assignee for the purpose of giving Assignee the right to enforce the note. By this transfer Assignee becomes the owner of both the note and the mortgage.

3. The facts are the same as Illustration 1 or Illustration 2, except that Assignee has no knowledge that the note is secured by a mortgage. The result is the same as in Illustrations 1 and 2.

A transfer of the obligation with a retention of the mortgage is possible, but only if the transferor and transferee so agree. See Illustration 4. If the full obligation is transferred without the mortgage, the effect of such a transfer under Subsection (c) of this section is to make it impossible to foreclose the mortgage, and hence to make it practically a nullity, unless the transferor is also made the transferee's agent or trustee with authority to foreclose in the transferee's behalf. See Comment e.

4. Mortgagor borrows money from Mortgagee and gives Mortgagee a nonnegotiable promissory note for the amount borrowed and, to secure payment of the note, a mortgage on Blackacre. Mortgagee subsequently executes an "Assignment of Promissory Note" transferring ownership of the note to Assignee, which expressly provides that "the mortgage securing this note is not assigned to Assignee, but is retained as Mortgagee's property." By this transfer Assignee becomes the owner of the note, but not of the mortgage.

There is one situation in which a retention of the mortgage by the transferor of the obligation may be sensible and desirable. That is where the obligation is bifurcated. This may occur, for example, because the original mortgagee transfers only a partial interest in the secured obligation while retaining the residue, or because the obligation is represented by two notes and the original mortgagee transfers one of them while retaining the other. The obligation or the mortgage may, of course, contain terms either authorizing or prohibiting such transfers, and stating how the real estate mortgage is to be dealt with in the event of such a partial transfer of the obligation.

If these documents do not deal with the matter, the parties to the transaction, if well advised, will expressly agree as to the disposition of the security, and thus may express the intent mentioned in § 5.4(a). They may agree either that the mortgage is to pass to the transferee, or that it is to be retained by the transferor. Conceivably, they may agree that it is to be divided between the parties on some basis. If no specific intent is expressed by the parties, either in the original documents or at the time of the transfer, the effect of a partial transfer of the obligation, under § 5.4(a), will be to bifurcate the mortgage as well, and to transfer a proportionate interest in it to the partial transferee of the obligation, leaving the remainder in the transferor's hands. This result is cumbersome, but there is no fair and feasible alternative if the parties fail to agree on the disposition of the mortgage.

5. Mortgagor borrows money from Mortgagee and gives Mortgagee a nonnegotiable promissory note for the amount borrowed and, as security for payment of the note, a mortgage on Blackacre. Mortgagee negotiates a sale of the loan to Assignee. Mortgagee executes an assignment of the mortgage to Assignee, but the assignment makes no express mention of the note. Ownership of the note passes to Assignee with the mortgage despite the absence of any express transfer of the note.

6. The facts are the same as Illustration 5, except that instead of executing an assignment of the mortgage, Mortgagee executes and delivers a deed of Blackacre to Assignee. The result is the same as in Illustration 5.

It is possible for a mortgagee to assign the mortgage while retaining full ownership of the obligation, but only if the parties so agree. See Illustration 7. The practical effect of such a transaction is to make it impossible to foreclose the mortgage, unless the transferee is also made an agent or trustee of the transferor or otherwise has authority to foreclose in the transferor's behalf. See Comment e.

7. Mortgagor borrows money from Mortgagee and gives Mortgagee a nonnegotiable promissory note for the amount borrowed and, to secure payment of the note, a mortgage on Blackacre. Mortgagee subsequently executes an assignment of the mortgage to Assignee, but the assignment expressly provides that "ownership of the promissory note secured by this mortgage is retained by Mortgagee, and Assignee acquires no interest in it." Assignee becomes the owner of the mortgage but not owner of the promissory note. Unless Assignee is authorized by Mortgagee to do so on Mortgagee's behalf, Assignee may not foreclose the mortgage.

If the mortgage obligation is a negotiable note, Uniform Commercial Code § 3-203 (1995) is generally understood to make the right of enforcement of the note transferrable only by delivery of the instrument itself to the transferee. Hence, when a mortgage is assigned but the negotiable note it secures is not delivered, the courts may find it necessary to disregard the rule of Subsection (b) in order to effectuate the Code.

Institutional purchasers of loans in the secondary mortgage market often designate a third party, not the originating mortgagee, to collect payments on and otherwise "service" the loan

for the investor. In such cases the promissory note is typically transferred to the purchaser, but an assignment of the mortgage from the originating mortgagee to the servicer may be executed and recorded. This assignment is convenient because it facilitates actions that the servicer might take, such as releasing the mortgage, at the instruction of the purchaser. The servicer may or may not execute a further unrecorded assignment of the mortgage to the purchaser. It is clear in this situation that the owner of both the note and mortgage is the investor and not the servicer. This follows from the express agreement to this effect that exists among the parties involved. The same result would be reached if the note and mortgage were originally transferred to the institutional purchaser, who thereafter designated another party as servicer and executed and recorded a mortgage assignment to that party for convenience while retaining the promissory note. Again, the parties' agreement that ownership of the note should remain in the purchaser would be enforced.

Occasionally a mortgagee may wish to assign the mortgage in full, but to retain a partial interest in the obligation. For example, if the mortgage secures two notes, the mortgagee might transfer one note (along with the mortgage) and retain the other. There is no objection to such a transaction if the parties so agree. The portion of the obligation remaining in the mortgagee's hands will be unsecured, while the portion acquired by the transferee will be secured by the entire mortgage.

8. The facts are the same as Illustration 4. If Mortgagor defaults in payment of the promissory note, Assignee may sue on the note, but neither Mortgagee nor Assignee may enforce the mortgage.

9. The facts are the same as Illustration 4, except that the assignment of the note further states, "Mortgagee is hereby designated agent of Assignee with a duty to foreclose the mortgage upon Assignee's request." If Mortgagor defaults in payment of the promissory note, Assignee may sue on the note, and Mortgagee must foreclose the mortgage if directed by Assignee to do so, subject to the provisions of § 8.2.

10. The facts are the same as Illustration 4, except that Mortgagee has often served as Assignee's agent in the past with authority to foreclose mortgages held by Assignee. A court is warranted in finding on the basis of this pattern of prior conduct that Mortgagee is Assignee's agent for purposes of foreclosing the instant mortgage. Upon such a finding, Mortgagee must foreclose the mortgage if directed by Assignee to do so, subject to the provisions of § 8.2.

REPORTERS NOTES: *Introduction, Comment a.* General commentaries on the transfer of mortgages and their associated obligations include 1 G. Nelson & D. Whitman, *Real Estate Finance Law* §§ 5.27-5.35 (3d ed. 1993); G. Glenn, *Mortgages* § 314 (1943); Ellis & Lowry, *A Comprehensive Note Purchase Guide (with Forms)*, Part I, *Prac. Real Estate Lawyer* 45 (July 1987); Part II, *Prac. Real Estate Lawyer* 49 (Sept. 1987); Bautista & Kennedy, *The Imputed Negotiability of Security Interests Under the Code*, 38 *Ind. L.J.* 574 (1963); Note, *Transfer of the Mortgagee's Interest in Florida*, 14 *U. Fla. L. Rev.* 98 (1961); Britton, *Assignment of Mortgages Securing Negotiable Notes*, 10 *Ill. L. Rev.* 337 (1915).

The mortgage becomes useless in the hands of one who does not also hold the obligation because only the holder of the obligation can foreclose; see *In re Atlantic Mortg. Corp.*, 69 B.R. 321 (Bankr.E.D.Mich.1987); *Swinton v. Cuffman*, 213 S.W. 409 (Ark.1919); *Stribling v. Splint Coal Co.*, 5 S.E. 321 (W.Va.1888). When a separation of the two has occurred, some courts have imposed a constructive trust on the mortgage in favor of the holder of the obligation in order to make it available for foreclosure; see *Lawrence v. Knap*, 1 *Root (Conn.)* 248, 1 *Am.Dec.* 42 (1791); *Pettus v. Gault*, 71 A. 509 (Conn.1908); *Kinna v. Smith*, 3 *N.J.Eq.* 14 (1834); *Rembert v. Ellis*, 17 S.E.2d 165 (Ga. 1941), noted 137 *A.L.R.* 479. The essential desirability of avoiding a separation of the obligation and the mortgage has been explained thus:

Among the "gems" and "free offerings" of the late Professor Chester Smith of the University of Arizona College of Law was the following analogy. The note is the cow and the mortgage the tail. The cow can survive without a tail, but the tail cannot survive without the cow.

Best Fertilizers of Arizona, Inc. v. Burns, 571 P.2d 675, 676 (Ariz.Ct. App.1977), reversed on other grounds, 570 P.2d 179 (Ariz.1977). See also Carpenter v. Longan, 83 U.S. (16 Wall.) 271, 21 L.Ed. 313 (1872).

Transfer of the obligation also transfers the mortgage, Comment b. Illustrations 1 and 2 are supported by *In re Ivy Properties, Inc.*, 109 B.R. 10 (Bankr.D.Mass.1989); *In re Union Packing Co.*, 62 B.R. 96 (Bankr. D.Neb.1986); *First National Bank v. Larson*, 17 B.R. 957, 965 (Bankr. D.N.J.1982); *Rodney v. Arizona Bank*, 836 P.2d 434 (Ariz.Ct.App.1992); *Campbell v. Warren*, 726 P.2d 623 (Ariz.Ct.App.1986) (an assignment of a portion of the payments from a promissory note automatically transfers a *pro tanto* interest in the mortgage that secures the note); *Domarad v. Fisher & Burke, Inc.*, 76 Cal.Rptr. 529 (Cal.Ct.App.1969); *Margiewicz v. Terco Properties*, 441 So.2d 1124 (Fla.Dist.Ct.App.1983); *Moore v. Lewis*, 366 N.E.2d 594 (Ill. App. Ct. 1977); *Jones v. Titus*, 175 N.W. 257 (Mich. 1919); *Goetz v. Selsor*, 628 S.W.2d 404 (Mo.Ct.App.1982); *Kernohan v. Manss*, 41 N.E. 258 (Ohio 1895); *Bartlett Estate Co. v. Fairhaven Land Co.*, 49 Wash. 58, 94 P. 900 (1908). See generally G. Glenn, *Mortgages* § 314 (1943).

See also Ala. Code § 8-5-24: "The transfer of a . . . note given for the purchase of lands . . . passes to the transferee the lien of the vendor of the lands"; Ariz. Rev. Stat. § 33-817: "The transfer of any contract or contracts secured by a trust deed shall operate as a transfer of the security for such contract or contracts"; West's Ann. Cal. Civil Code § 2936: "The assignment of a debt secured by a mortgage carries with it the security."

Some cases reach the same result as this subsection by finding that the transferor of the note is a constructive trustee of the mortgage for the benefit of the transferee. See, e.g., *Pettus v. Gault*, 71 A. 509 (Conn. 1908); *Rembert v. Ellis*, 17 S.E.2d 165, 137 A.L.R. 479 (Ga. 1941); *Kinna v. Smith*, 3 N.J.Eq. 14 (1834).

Illustration 3 is based on *Mankato First National Bank v. Pope*, 89 N.W. 318 (Minn.1902). See also *Edwards v. Bay State Gas Co.*, 184 Fed. 979 (C.C. Del. 1911); *Holland Banking v. See*, 130 S.W. 354 (Mo.Ct.App.1910); *Betz v. Heebner*, 1 Pen. & W. 280 (Pa. 1830).

With respect to Illustration 4, there is substantial authority that the note and the mortgage are "inseparable." Several of the cases cited above in connection with Illustrations 1 and 2 so state; see *Hill v. Favour*, 84 P.2d 575 (Ariz.1938). However, under this Restatement a separation of the two rights is permissible if the parties so intend, although under Subsection (c) of this section the person who then owns the mortgage is generally unable to enforce it.

A partial transfer of the obligation effects a partial or *pro tanto* transfer of the mortgage as well, in the absence of contrary intent. See *Allen v. Hamman Lumber Co.*, 34 P.2d 397 (Ariz.1934); *Anderson Banking Co. v. Gustin*, 146 N.E. 331 (Ind.Ct.App. 1925); *New England Loan & Trust Co. v. Robinson*, 76 N.W. 415 (Neb. 1898); *Hyman v. Sun Ins. Co.*, 175 A.2d 247 (N.J. Super. Ct. 1961). However, the case law offers little guidance as to the practical management of such a bifurcated mortgage. Who has the power to make decisions regarding foreclosure, forbearance, and the like? Presumably the courts will permit those holding a majority interest in the obligation and mortgage to decide these questions, but the matter is unclear. See *Perkins v. Chad Devel. Corp.*, 157 Cal.Rptr. 201 (Cal. Ct.App.1979), holding that where the mortgage is held by two co-owners, either of them has the power to foreclose without the consent of the other.

Questions may also arise concerning the relative priority of the parties in the proceeds of

mortgage foreclosure. Modern case law generally treats them as pro-rata participants if there is no contrary agreement. See *Perkins v. Chad Devel. Corp.*, 157 Cal.Rptr. 201 (Cal.Ct.App.1979); *Domeyer v. O'Connell*, 4 N.E.2d 830 (Ill. 1936); *Farr v. Hartley*, 81 P.2d 640 (Ut.1938); 1 G. Nelson & D. Whitman, *Real Estate Finance Law* § 5.35 (3d ed. 1993); G. Glenn, *Mortgages* § 318 (1943). Well-advised parties will, of course, enter into a "participation agreement" dealing with all of these issues.

Transfer of the mortgage also transfers the obligation, Comment c. Illustration 5 is based on *Gregg v. Williamson*, 98 S.E.2d 481 (N.C.1957) (statement in margin of public records assigning a mortgage had the effect of transferring the note as well). See *United States v. Freidus*, 769 F.Supp. 1266 (S.D.N.Y.1991); *Seabury v. Hemley*, 56 So. 530 (Ala. 1911); *Andrews v. Townshend*, 1 N.Y.S. 421 (N.Y. Super. Ct. 1888); *Loveridge v. Shurtz*, 70 N.W. 132 (Mich.1897); *Foster v. Trowbridge*, 40 N.W. 255 (Minn.1888). See also *Lawson v. Estate of Slaybaugh*, 619 S.W.2d 910 (Mo.Ct.App.1981) (while an assignment of the mortgage without the note is ordinarily a nullity, it might be held to transfer the note if that was the intention of the assignor); *In re United Home Loans, Inc.*, 71 B.R. 885 (W.D.Wash.1987) (where mortgage is assigned by document which states that the debt is also being transferred, ownership of the note passes to the assignee even though the note is not indorsed or delivered). See Kan. Stat. Ann. § 58-2323: "The assignment of any mortgage as herein provided shall carry with it the debt thereby secured."

There is also substantial contrary authority, holding that an assignment of the mortgage without the obligation is a nullity. That authority is not followed by this Restatement. See *In re Hurricane Resort Co.*, 30 B.R. 258 (Bankr.Fla.1983); *Hill v. Favour*, 84 P.2d 575 (Ariz.1938); *Domarad v. Fisher & Burke, Inc.*, 76 Cal.Rptr. 529 (Cal.Ct.App.1969) (dictum); *Hamilton v. Browning*, 94 Ind. 242 (1883); *Pope & Slocum v. Jacobus*, 10 Iowa 262 (1859); *Van Diest Supply Co. v. Adrian State Bank*, 305 N.W.2d 342 (Minn.1981); *Kluge v. Fugazy*, 536 N.Y.S.2d 92 (N.Y.App.Div.1988); *Miller v. Berry*, 104 N.W. 311 (S.D.1905). See Note, *Transfer of the Mortgagee's Interest in Florida*, 14 U. Fla. L. Rev. 98 (1961).

Illustration 6 is based on *Carr v. Dorenkamper*, 556 N.E.2d 1333 (Ind. Ct.App.1990) (quitclaim deed, effective as an "equitable assignment"). See also *Welsh v. Phillips*, 54 Ala. 309, 25 Am.Rep. 679 (1875) (warranty deed); *Ruggles v. Barton*, 79 Mass. (13 Gray) 506 (1859); *Hinds v. Ballou*, 44 N.H. 619 (1863) (quitclaim deed); *Welch v. Priest*, 90 Mass. (8 Allen) 165 (1864) (release effective to transfer mortgage and obligation). See generally *Rollison, Priorities in the Law of Mortgages*, 9 Notre Dame Law. 50 (1933).

There is substantial older authority that a conveyance of the land by the mortgagee is a nullity rather than a transfer of both the mortgage and the obligation. See *Peters v. Jamestown Bridge Co.*, 5 Cal. 334, 63 Am.Dec. 134 (1855); *Carter v. Bennett*, 4 Fla. 283, 347 (1852); *Delano v. Bennett*, 90 Ill. 533 (1878); *Johnson v. Cornett*, 29 Ind. 59 (1867); *Swan v. Yapple*, 35 Iowa 248 (1872); *Farnsworth v. Kimball*, 91 A. 954, 956 (Me.1914); *Smith v. Smith*, 15 N.H. 55, 65 (1844); *Devlin v. Collier*, 22 A. 201 (N.J. 1891); *Merritt v. Bartholick*, 36 N.Y. 44 (1867). This Restatement does not follow that authority; since the mortgage is plainly an interest in real estate, it is difficult to see why a deed of the land should not be construed as assigning it.

Competing transfers of obligations and mortgages, Comment d. The principle permitting a subsequent good faith purchaser of a note to prevail over a prior assignee of the mortgage who did not obtain the note is supported by *In re Vermont Fiberglass, Inc.*, 44 B.R. 505 (Bankr.D.Vt. 1984); *Nazar v. Southern*, 32 B.R. 761 (Bankr.Kan.1983); *Second Nat. Bank v. Dyer*, 184 A. 386 (Conn.1936); and *Price v. Northern Bond & Mortg. Co.*, 297 P. 786 (Wash. 1931). The conclusion favoring the second taker is more probable when the note is negotiable; see generally 1 G. Nelson & D. Whitman, *Real Estate Finance Law* § 5.34 (3d ed. 1993); G. Glenn, *Mortgages* § 315.2 (1943).

Mortgage may not be enforced except by the owner of the obligation or one acting on behalf of the owner, Comment d. Illustration 8 is explained as follows in *In re Belize Airways Limited*, 7

B.R. 604, 606 (Bankr.S.D.Fla.1980):

To allow the assignee of a security interest [who did not also acquire the note] to enforce the security agreement would expose the obligor to a double liability, since a holder in due course of the promissory note clearly is entitled to recover from the obligor. Section 3-305, Uniform Commercial Code.

See also G. Glenn, Mortgages § 314 (1943):

To transfer the mortgage and keep the debt would be futile at best. . . . The transfer would be ineffectual, because the mortgagee's real interest in the property is a security interest. A mortgagee who parts with this security to a stranger, loses its benefit, nor can the stranger profit, unless he was a *bona fide* purchaser, a case that can happen if the mortgage has taken the form of an absolute deed.

By analogy, U.C.C. § 1-201(37) (1995) defines a security interest as "an interest in personal property . . . which secures payment or performance of an obligation." Case law construing the Code holds that a security interest is unenforceable in the absence of its underlying obligation. See *Bank of Lexington v. Jack Adams Aircraft Sales*, 570 F.2d 1220 (5th Cir.1978). Hence, "in order for a creditor to have lien rights in the property of a debtor, the creditor must hold an enforceable obligation against the debtor"; *In re G.O. Harris Financial Corp.*, 51 B.R. 100 (Bankr. S.D.Fla.1985). See *Sobel v. Mutual Development Inc.*, 313 So.2d 77 (Fla. Dist.Ct.App.1975).

Because a transfer of the mortgage without the obligation is essentially futile, a court may strain to find that the holder of the mortgage holds it in trust for the benefit of the owner of the obligation. See *Boruchoff v. Ayvasian*, 79 N.E.2d 892 (Mass. 1948).

CROSS REFERENCES: Section 5.5, Effect of Performance to the Transferor After Transfer of an Obligation Secured by a Mortgage.

Legal Topics:

For related research and practice materials, see the following legal topics:

Real Property Law > Financing > Mortgages & Other Security Instruments > Transfers > General Overview 

Source: **Legal > Secondary Legal > Jurisprudences, Restatements and Principles of the Law > Property > Mortgages > Restatement of the Law 3d, Property (Mortgages) - Rule Sections** 

TOC: Restatement 3d, Property: Mortgages - Rule Sections > Chapter 5- Transfers of Mortgaged Real Estate and Mortgages > **§ 5.4 Transfer of Mortgages and Obligations Secured by Mortgages.**

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