

Actual Notice v Constructive Notice

MERS provides Actual Notice between Parties as to Negotiation & Priority of the Negotiable Instrument

MERS Does Not provide Constructive Notice to the World as to assigning a Lien Deed of Trust, i.e.

UCC – Article 9 – Secured Transaction¹

§ 9-102. DEFINITIONS AND INDEX OF DEFINITIONS.

(a) [Article 9 definitions.]

In this article: ...

(28) "**Debtor**" means:

(A) a person having an interest, other than a security interest or other lien, in the collateral, whether or not the person is an obligor;

(B) a seller of accounts, chattel paper, payment intangibles, or promissory notes; or

(C) a consignee.

The MERS registry does provide actual notice to all MERS members as to when a note is negotiated. However, the MERS registry does not provide constructive notice to the world that an assignment of the lien was assigned. The recording statutes were derived in past in part to obliterate secret contracts and prevent fraud. Could it possibly be argued that the MERS registry is the wheel to allow for the return of secret contracts? As an Obligor of a secured note would also be the Grantor of the lien (Deed of Trust) to secure the note, such Obligor and the world would lack constructive notice that the lien has been assigned to a party that can be lawfully identified of record. Without notice the lien has been assigned, the Obligor of the note would not know if payments were being made to the owner of the note. Where the Obligee is the owner of the note as identified of record, an Obligor would have assurance that Obligor's payments are being directed to the correct party. Where the record is void of proper secured party of record, the owner of the note not being identified of record would be limited to taking judicial

¹ Uniform Commercial Code - Article 9 <http://www.law.cornell.edu/ucc/9/article9.htm>

actions limited to the note. Where a subsequent owner of the note is not identified of record as a secured party, the subsequent owner of the note by their own inaction, or inaction of their agent, by not filing of record has deprived themselves of the instrument needed to exercise a foreclosure (Power of Sale.) Where MERS may work for the note, MERS is not a legal replacement for public records and as for foreclosing, the act of exercising a foreclosure requires that both contracts, (Note and Deed of Trust) be enforceable and enforceable by the correct party's..

In short, the MERS registry as a closed system does not provide constructive notice to the world to be sufficient to replace filing of public record.

So the question is: As the grantor and the world is without both actual and constructive notice of a Deed of Trust being assigned from A to B to C to D, is the Deed of Trust enforceable in regards to party D?

MERS registry members might be able to resolve their priority issue regarding payments to the note by virtue of the MERS registry, but the MERS registry does not provide notice sufficient to perfect a subsequent party as a secured party with rights to a lien (Deed of Trust.) Even though UCC Article 9 does not apply to real estate liens as noted in §9-109(d) (2) *a lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but Section 9-333 applies with respect to priority of the lien;* a partial excerpt is provided below.

UCC – Article 9 – Secured Transaction

§ 9-109. SCOPE.

(a) [General scope of article.]

Except as otherwise provided in subsections (c) and (d), this article applies to:

(1) a transaction, regardless of its form, that creates a security interest in personal property or fixtures by contract;

- (2) *an agricultural lien;*
- (3) *a sale of accounts, chattel paper, payment intangibles, or promissory notes;*
- (4) *a consignment;*
- (5) *a security interest arising under Section 2-401, 2-505, 2-711(3), or 2A-508(5), as provided in Section 9-110; and*
- (6) *a security interest arising under Section 4-210 or 5-118.*

(b) [Security interest in secured obligation.]

The application of this article to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this article does not apply.

(c) [Extent to which article does not apply.]

This article does not apply to the extent that:

- (1) *a statute, regulation, or treaty of the United States preempts this article;*
- (2) *another statute of this State expressly governs the creation, perfection, priority, or enforcement of a security interest created by this State or a governmental unit of this State;*
- (3) *a statute of another State, a foreign country, or a governmental unit of another State or a foreign country, other than a statute generally applicable to security interests, expressly governs creation, perfection, priority, or enforcement of a security interest created by the State, country, or governmental unit; or*
- (4) *the rights of a transferee beneficiary or nominated person under a letter of credit are independent and superior under Section 5-114.*

(d) [Inapplicability of article.]

This article does not apply to:

- (1) *a landlord's lien, other than an agricultural lien;*
- (2) *a lien, other than an agricultural lien, given by statute or other rule of law for services or materials, but Section 9-333 applies with respect to priority of the lien;*
- (3) *an assignment of a claim for wages, salary, or other compensation of an employee;*
- (4) *a sale of accounts, chattel paper, payment intangibles, or promissory notes as part of a sale of the business out of which they arose;*
- (5) *an assignment of accounts, chattel paper, payment intangibles, or promissory notes which is for the purpose of collection only;*
- (6) *an assignment of a right to payment under a contract to an assignee that is also obligated to perform under the contract;*
- (7) *an assignment of a single account, payment intangible, or promissory note to an assignee in full or partial satisfaction of a preexisting indebtedness;*
- (8) *a transfer of an interest in or an assignment of a claim under a policy of insurance, other than an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds;*
- (9) *an assignment of a right represented by a judgment, other than a judgment taken on a right to payment that was collateral;*
- (10) *a right of recoupment or set-off, but:*
 - (A) *Section 9-340 applies with respect to the effectiveness of rights of recoupment or set-off against deposit accounts; and*

(B) Section 9-404 applies with respect to defenses or claims of an account debtor;
(11) the creation or transfer of an interest in or lien on real property, including a lease or rents thereunder, except to the extent that provision is made for:
(A) liens on real property in Sections 9-203 and 9-308;
(B) fixtures in Section 9-334;
(C) fixture filings in Sections 9-501, 9-502, 9-512, 9-516, and 9-519; and
(D) security agreements covering personal and real property in Section 9-604;
(12) an assignment of a claim arising in tort, other than a commercial tort claim, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds; or
(13) an assignment of a deposit account in a consumer transaction, but Sections 9-315 and 9-322 apply with respect to proceeds and priorities in proceeds.

§ 9-203. ATTACHMENT AND ENFORCEABILITY OF SECURITY INTEREST; PROCEEDS; SUPPORTING OBLIGATIONS; FORMAL REQUISITES.

(a) [Attachment.]

A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.

(b) [Enforceability.]

Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if:

- (1) value has been given;
- (2) the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party; and
- (3) one of the following conditions is met:
 - (A) the debtor has authenticated a security agreement that provides a description of the collateral and, if the security interest covers timber to be cut, a description of the land concerned;
 - (B) the collateral is not a certificated security and is in the possession of the secured party under Section 9-313 pursuant to the debtor's security agreement;
 - (C) the collateral is a certificated security in registered form and the security certificate has been delivered to the secured party under Section 8-301 pursuant to the debtor's security agreement; or
 - (D) the collateral is deposit accounts, electronic chattel paper, investment property, or letter-of-credit rights, and the secured party has control under Section 9-104, 9-105, 9-106, or 9-107 pursuant to the debtor's security agreement.

(c) [Other UCC provisions.]

Subsection (b) is subject to Section 4-210 on the security interest of a collecting bank, Section 5-118 on the security interest of a letter-of-credit issuer or nominated person, Section 9-110 on a security interest arising under Article 2 or 2A, and Section 9-206 on security interests in investment property.

(d) [When person becomes bound by another person's security agreement.]

A person becomes bound as debtor by a security agreement entered into by another person if, by operation of law other than this article or by contract:

- (1) the security agreement becomes effective to create a security interest in the person's property; or

(2) the person becomes generally obligated for the obligations of the other person, including the obligation secured under the security agreement, and acquires or succeeds to all or substantially all of the assets of the other person.

(e) [Effect of new debtor becoming bound.]

If a new debtor becomes bound as debtor by a security agreement entered into by another person:

(1) the agreement satisfies subsection (b)(3) with respect to existing or after-acquired property of the new debtor to the extent the property is described in the agreement; and

(2) another agreement is not necessary to make a security interest in the property enforceable.

(f) [Proceeds and supporting obligations.]

The attachment of a security interest in collateral gives the secured party the rights to proceeds provided by Section 9-315 and is also attachment of a security interest in a supporting obligation for the collateral.

(g) [Lien securing right to payment.]

The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.

(h) [Security entitlement carried in securities account.]

The attachment of a security interest in a securities account is also attachment of a security interest in the security entitlements carried in the securities account.

(i) [Commodity contracts carried in commodity account.]

The attachment of a security interest in a commodity account is also attachment of a security interest in the commodity contracts carried in the commodity account.

§ 9-201. GENERAL EFFECTIVENESS OF SECURITY AGREEMENT.

(a) [General effectiveness.]

Except as otherwise provided in [the Uniform Commercial Code], a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors.

(b) [Applicable consumer laws and other law.]

A transaction subject to this article is subject to any applicable rule of law which establishes a different rule for consumers and [insert reference to (i) any other statute or regulation that regulates the rates, charges, agreements, and practices for loans, credit sales, or other extensions of credit and (ii) any consumer-protection statute or regulation].

(c) [Other applicable law controls.]

In case of conflict between this article and a rule of law, statute, or regulation described in subsection (b), the rule of law, statute, or regulation controls. Failure to comply with a statute or regulation described in subsection (b) has only the effect the statute or regulation specifies.

(d) [Further deference to other applicable law.]

This article does not:

(1) validate any rate, charge, agreement, or practice that violates a rule of law, statute, or regulation described in subsection (b); or

(2) extend the application of the rule of law, statute, or regulation to a transaction not otherwise subject to it.