

# **Part II – Housing Fraud v Securities Fraud**

## **True Sales Up to the Security Trust? - Non GSE**

Owner/Payee (OP1) of the Secured Mortgage Note executes a true sale of the Secured Mortgage Note per the trust creation documents (i.e., Pooling and Servicing Agreement, Private Place Memorandum) to an Aggregator/Securitizer (OP2).

### **The Procedure:**

#### **Originator prior or concurrently with registering on the MERS registry:**

a) Current industry practice: Originator

- (1) Scans the Mortgage Loan Package which consists of the Secured Mortgage Note, verifiable proof the Security Instrument has been permanently perfected of record in OP1's name, and all accompanying documents into a purported transferable record.
- (2) Stores the tangibles with custodian for benefit of subsequent purchaser of the transferable record.
- (3) Or worse, destroys the tangibles.
- (4) Prepares a process request to transfer of control over the authoritative copy as registered within the MERS registry to the Aggregator / Securitizer / Sponsor.
- (5) Upon receipt of funding, executes the transfer of control over the transferable record to the Aggregator / Securitizer / Sponsor.
- (6) Executes the process request to transfer control of the transferable record to Aggregator / Securitizer / Sponsor. Here the MERS registry acts as replacement for a Bailor.
  - A. ESIGN, UETA or the UCC does not provide supporting law for scanning of a negotiable instrument into a transferable record.

B. ESIGN and UETA both specifically exclude negotiable instrument as defined in UCC Article 3.

b) Where the Originator and Aggregator / Securitizer / Sponsor have agreed, the originator upon receiving funds verified via MERS, control over the transferable record is automatically transferred from the originator to the Aggregator / Securitizer / Sponsor.

1. It may be a legal possibility that a transferable record can be created electronically, but where such transferable record is secured by a real property lien, to be in compliance with many states real property recording laws, the subsequent owner of the transferable record must perfect of record his interest in the real property so as not to break the chain of title (chain of secured party's.)

c) Aggregator / Securitizer / Sponsor in accordance with the trust's documents must execute a true sale of the transferable record to the Depositor of the trust.

d) Prior or concurrently with the Aggregator / Securitizer / Sponsor's true sale,

i) Copies of the transferable records to be included within the trust are transmitted to the rating agencies.

(1) Rating Agency rates the contents of the transferable record.

(2) Rating Agency does not rate the legality of negotiation.

ii) Copies of the transferable records to be included within the trust are transmitted to the NIM insurer.

(1) NIM insurer values the coverage based upon contents of the transferable record. (SWAP coverage/Credit Enhancement)

(2) Rating Agency does not rate the legality of negotiation.

iii) Copies of the transferable records to be included within the trust are transmitted to the trustee of the trust for compliance review.

- (1) Trustee is knowledgeable of transferable record and registration upon the MERS registry and method of assigning control over the transferable record.
- e) As noted above, there potentially could be three (3) concurrent existing copies of the authoritative copy being most likely in PDF, XML or a Smartdoc format floating around in cyberspace.
- a. For cyber junkies who evolved with the electronic cyber era, it is known that file copying can be accomplished at the binary level of 0s and 1s. If duplication is done in such fashion it would be impossible to ascertain from the original authoritative copy that a copy of the authoritative copy exists.
  - b. The duplicate authoritative copy would be an exact copy of the source authoritative copy.
  - c. As it is possible that an exact duplicate of the authoritative copy can exist at the same time as the authoritative copy, it would be impossible to claim any authoritative copy is the one and only.
    - i. The MERS registry as being unmonitored would lack a definitive method of determining if one and only one authoritative copy exist.
  - d. Current security measures available would only detect a change in the file structure of the file under review; such security measure(s) would not be able to determine if other copies of the authoritative copy exist.
  - e. Therefore, it is impossible to state any particular transferable record is the one and only authoritative copy as copies technically could exist.
- f) Aggregator / Securitizer / Sponsor in accordance with the governing trust documents via the MERS registry, automatically relinquishes control of the transferable record to the Depositor.
- i) Here MERS again acts as the Bailor between the Aggregator / Securitizer / Sponsor and the Depositor.

- g) Depositor in accordance with the governing trust documents via the MERS registry automatically relinquishes control of the transferable record to the Trustee as a true sale whereas the payment is receipt of the securities certificates.
- i) Here MERS again acts as the Bailor between the Depositor and the Trustee.
  - h) The Trustee has control over the authoritative copy for the benefit of the Investors that bought the certificates.
  - i) Trustee purports to have control over the custodian that holds the tangible notes endorsed in blank from the originator in trust for the benefit of the Investors.
  - j) Here is where the banks argue that UCC 9 attachment and perfection apply to a transferable record and if one looks closer, one would see that the transferable record process being used is not in compliance with all applicable laws.

## **Conclusion Part II**

**The buying and selling of a scanned transferable record is not the same as the buying and selling of a Secured Mortgage Note.**

### **Part I**

<http://www.scribd.com/doc/83684723/Part-I>

# **God or Mammon**

# **Choose Wisely**

# “Excerpt”

## The End of Mortgage Securitization?

### Electronic Registration as a Threat to Bankruptcy Remoteness

by John Patrick Hunty, Richard Stanton and Nancy Wallace, August 12, 2011

<http://faculty.haas.berkeley.edu/stanton/papers/pdf/mers.pdf>

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#### Footnote 229

*“This can be understood as the inquiry in other contexts where a party possesses some but not all of the attributes of ownership. Generally, when a party (the bailor) places **personal property** in the custody of another (the bailee), the bailee’s ability to pass good title to a bona fide purchaser may depend on whether the bailee has clothed itself in the incidents of ownership. Under the traditional common law of bailments, a bailee could acquire power to pass good title through the owner’s decision to clothe the bailee with indicia of ownership.” When one party (the consignor) places **personal property** in the care of another party (the consignee) to sell, the consignee can pass good title to the property, even if it sells the property in violation of the consignment agreement. See U.C.C. § 2-403(2) (“Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.”); Padgett, *Uniform Commercial Code Section 2-403(2): The Authority of a Bailee to Convey Title*, 21 U. Fla. L. Rev. 24 (1968). The details of the consignor-consignee relationship are not the buyer’s problem, and the consignor is able to pass more extensive rights than it possesses. See, e.g., *Little, Brown & Co. v. American Paper Recycling Co.*, 824 F. Supp. 11, 16 (D. Mass. 1993). (while consignee may have been able to transfer [consignor’s] title to [goods] to [a purchaser], section 2-403 plainly would not vest title or ownership rights” in consignee.”)*