Brian Davies

Subject: FW: UCC JUDGE BUFORD Ayers ABI -20090212-113015 (2)

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Dan
Excellant!!

On my substitution of trustee, U.S. Bank (securities trustee) signed (a squiggle, looks like a forgery/fake) and they stamped 'as attorney in fact' for Chase Home (servicer).

Granted this substitution of trustee also was backdated to NOD date with handwritten 'effective 4-12-07' recorded on 6-15-07.

AND the substitution was done out of sequence --- prior to US Bank being assigned the deed. So effectively, I had two concurrent, overlapping trustees for a period of time (several months).
I did point this out to the UD judge.

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The following is my opinion. There are many lawyers who do not understand the nuances of the UCC (especially UCC 3 [negotiation] and UCC 9 [Secured Transactions]), but you should get one that does.

The note is conveyed by indorsement and transfer. If the note is indorsed in blank it is conveyed by transfer only (or possession?)

The Deed of Trust is transferred by assignment. The assignment doesn't necessarily have to be recorded (in all states?). In Washington it appears the assignments do NOT need to be recorded but the transfer has to be reported anyway so that a transfer tax can be paid. In the good old days this was fine because a lender who purchased the loan received both the note and the Deed of Trust. In the modern times this is not what happens because the securitizing parties do not need (or care about) the Deed of Trust. They are lazy because they have no skin in the game.

The Deed of Trust always follows the note. However, if you split the Deed of Trust from the note, this is a nullity. The two cannot be brought back together (somewhere I have the reason why).

The beneficiary of a secured transaction must be the obligee (usually the payee of the note), otherwise the Deed of Trust in its favor is meaningless. This means when MERS is named as the beneficiary, the Deed of Trust is meaningless (there is no encumbrance). When MERS isn't named the beneficiary (such as if New Century is named as the lender on the note AND they are the beneficiary of the Deed of Trust), then the Deed of Trust in its favor is NOT meaningless UNTIL such time as they are split. This usually occurs relatively quickly when the note is transferred into the trust and the Deed of Trust stays with the originator. At that point the Deed of Trust becomes meaningless. This is proven the moment the servicer (or whoever) creates an assignment using MERS or the originator (either one not having any interest in the note or Deed of Trust, that is to say they are not the real beneficiaries).

Substitution of Trustee is important in California because all the beneficiaries must sign the Substitution of Trustee OR >50% of the beneficiaries must sign the Substitution of Trustee [in a securitized transaction], of which the servicer CANNOT sign. Most that I have seen the servicer signs them (with power of attorney) or MERS signs them. Either way this means the Substitution of Trustee is ineffective (because the legislative INTENT was that the REAL beneficiaries would sign).

Once a note is indorsed and without recourse is written, this means the new holder has NO RECOURSE. Doesn't this shield the indorser, previous indorsers and the maker (which is you) from further liability? If the note isn't paid, they have no recourse to demand payment. See the following from Black's Law Dictionary ...

All from Black's Law Dictionary

Maker: (2) A person who signs a promissory note. See Note (1). (3) DRAWER.

Drawer: [...]; the maker of a note or draft. See MAKER.

Indorsement: the placing of a signature, sometimes with an additional notation, on the back of a negotiable isntrument to transfer or guarantee the instrument or to acknowledge payment

- **qualified indorsement**: An indorsement that passes title to the instrument but limits the indorser' liability to later holders if the instrument is later dishonored

Indorser: A person who transfers a negotiable instrument by indorsement

Indorsee: A person to whom a negotiable instrument is transferred for indorsement

Negotiable Instrument: A written instrument that (1) is signed by the maker or drawer, (2) includes an unconditional promise or order to pay a specified sum of money, (3) is payable on demand or at a definite time, and (4) is payable to order or to bearer.

Recourse: (3) The right of a holder of a negotiable instrument to demand payment from the drawer or indorser if the instrument is dishonored. See WITH RECOURSE; WITHOUT RECOURSE.

Without Recourse: (In an indorsement) without liability to subsequent holders. * With this stipulation, one who indorses an instrument indicates that he or she has no further liability to any subsequent holder for payment.

Estoppel: A bar that prevents one from asserting a claim or right that contradicts [...] what has been legally established as true.

Now why is there NEVER a holder in due course of our promissory notes when they are pooled in securitization?

Note that under UCC 3-104(e) our promissory note is a "note" because it is a "promise"

Note that under UCC 3-104(e) our promissory note is a "draft" when indorsed with "pay to the ORDER of" - and at this point the person entitled to enforce the instrument can treat it as either a note OR a draft

U.C.C. - ARTICLE 3 - NEGOTIABLE INSTRUMENTS
..PART 1. GENERAL PROVISIONS AND DEFINITIONS

§ 3-104. NEGOTIABLE INSTRUMENT.

- (a) Except as provided in subsections (c) and (d), "**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:
    - (1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;
    - (2) is payable on demand or at a definite time; and
    - (3) 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 (i) an undertaking or power to give, maintain, or protect collateral to secure payment, (ii) an authorization or power to the holder to confess judgment or realize on or dispose of collateral, or (iii) 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 subsection (a), except paragraph (1), and otherwise falls within the definition of "check" in subsection (f) 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 Article.
- (e) An instrument is a "**note**" if it is a promise and is a "**draft**" if it is an order. If an instrument falls within the definition of both "note" and "draft," a person entitled to enforce the instrument may treat it as either.
- (f) "**Check**" means (i) a draft, other than a documentary draft, payable on demand and drawn on a bank or (ii) a cashier's check or teller's check. An instrument may be a check even though it is described on its face by another term, such as "money order."
- (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 (i) on another bank, or (ii) payable at or through a bank.
- (i) "**Traveler's check**" means an instrument that (i) is payable on demand, (ii) is drawn on or payable at or through a bank, (iii) is designated by the term "traveler's check" or by a substantially similar term, and (iv) 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.

Note that under UCC 3-106(a), our promise or order is rendered conditional when the rights or OBLIGATIONS with respect to the promise or order are stated in another writing (this would be the Prospectus Supplement and the Pooling and Servicing Agreement which add numerous obligors to the transaction as well as change the order and priority of how the payments are applied, the rights of the parties, etc).

§ 3-106. UNCONDITIONAL PROMISE OR ORDER.

- (a) Except as provided in this section, for the purposes of Section 3-104(a), a promise or order **is unconditional unless it states** (i) an express condition to payment, (ii) that the promise or order is subject to or governed by another writing, **or** (iii) **that rights or obligations with respect to the promise or order are stated in another writing**. A reference to another writing does not of itself make the promise or order conditional.

- (b) A promise or order is not made conditional (i) by a reference to another writing for a statement of rights with respect to collateral, prepayment, or acceleration, or (ii) because payment is limited to resort to a particular fund or source.

- (c) If a promise or order requires, as a condition to payment, a countersignature by a person whose specimen signature appears on the promise or order, the condition does not make the promise or order conditional for the purposes of Section 3-104(a). If the person whose specimen signature appears on an instrument fails to countersign the instrument, the failure to countersign is a defense to the obligation of the issuer, but the failure does not prevent a transferee of the instrument from becoming a holder of the instrument.

- (d) If a promise or order at the time it is issued or first comes into possession of a holder contains a statement, required by applicable statutory or administrative law, to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee, the promise or order is not thereby made conditional for the purposes of Section 3-104(a); but if the promise or order is an instrument, there cannot be a holder in due course of the instrument.

Remember - pursuant to UCC 3-104(b) "**Instrument**" means a negotiable instrument.

We already know that our "note" or "draft" is conditional, this means it is NOT a negotiable instrument, and thus not an instrument as that term is defined in UCC 3-104(b). This means there CANNOT be a holder in due course (because a holder in due course applies to instruments).

Under 3-106(d), if I am wrong about the negotiability of the promissory note (that it actually is an instrument, which is a negotiable instrument), there still cannot be a holder in due course. Why? Because the PSA and/or Prospectus states "to the effect that the rights of a holder or transferee are subject to claims or defenses that the issuer could assert against the original payee". And, the investors who purchased certificates from the trust received that information BEFORE or at the same time as they acquired the loans (i.e. UCC 3-106(d) "... first comes into possession of a holder ...").

§ 3-302. HOLDER IN DUE COURSE.

- (a) Subject to subsection (c) and Section 3-106(d), "**holder in due course**" means the holder of an instrument if:
    - (1) the instrument when issued or negotiated to the holder does not bear such apparent evidence of forgery or alteration or is not otherwise so irregular or incomplete as to call into question its authenticity; and
    - (2) the holder took the instrument (i) for value, (ii) in good faith, (iii) without notice that the instrument is overdue or has been dishonored or that there is an uncured default with respect to payment of another instrument issued as part of the same series, (iv) without notice that the instrument contains an unauthorized signature or has been altered, (v)

without notice of any claim to the instrument described in Section 3-306, and (vi) without notice that any party has a defense or claim in recoupment described in Section 3-305(a).

- (b) Notice of discharge of a party, other than discharge in an insolvency proceeding, is not notice of a defense under subsection (a), but discharge is effective against a person who became a holder in due course with notice of the discharge. Public filing or recording of a document does not of itself constitute notice of a defense, claim in recoupment, or claim to the instrument.

- (c) Except to the extent a transferor or predecessor in interest has rights as a holder in due course, a person does not acquire rights of a holder in due course of an instrument taken (i) by legal process or by purchase in an execution, bankruptcy, or creditor's sale or similar proceeding, (ii) by purchase as part of a bulk transaction not in ordinary course of business of the transferor, or (iii) as the successor in interest to an estate or other organization.

- (d) If, under Section 3-303(a)(1), the promise of performance that is the consideration for an instrument has been partially performed, the holder may assert rights as a holder in due course of the instrument only to the fraction of the amount payable under the instrument equal to the value of the partial performance divided by the value of the promised performance.

- (e) If (i) the person entitled to enforce an instrument has only a security interest in the instrument and (ii) the person obliged to pay the instrument has a defense, claim in recoupment, or claim to the instrument that may be asserted against the person who granted the security interest, the person entitled to enforce the instrument may assert rights as a holder in due course only to an amount payable under the instrument which, at the time of enforcement of the instrument, does not exceed the amount of the unpaid obligation secured.

- (f) To be effective, notice must be received at a time and in a manner that gives a reasonable opportunity to act on it.

- (g) This section is subject to any law limiting status as a holder in due course in particular classes of transactions.

Now let's discuss commingled goods ... California has this law also but it is easier to read under the NY UCC. Washington has their version also (I am fairly sure). This would apply to the trust fund (commingled loans), the payments of principal and interest (or otherwise) deposited into a pooled account, and probably more.

N.Y. UCC. LAW § 9--336 : NY Code - Section 9--336: Commingled Goods

(a) "Commingled goods." In this section, "commingled goods" means **goods that are physically united with other goods in such a manner that their identity is lost in a product or mass**.

(b) No security interest in commingled goods as such. **A security interest does not exist in commingled goods as such**. However, a security interest may attach to a product or mass that results when goods become commingled goods.

(c) Attachment of security interest to product or mass. If collateral becomes commingled goods, a security interest attaches to the product or mass.

(d) Perfection of security interest. If a security interest in collateral is perfected before the collateral becomes commingled goods, the security interest that attaches to the product or mass under subsection (c) is perfected.

(e) Priority of security interest Except as otherwise provided in subsection (f), the other provisions of this part determine the priority of a security interest that attaches to the product or mass under subsection (c).

(f) Conflicting security interests in product or mass If more than one security interest attaches to the product or mass under subsection (c), the following rules determine priority:

(1) A security interest that is perfected under subsection (d)

has priority over a security interest that is unperfected at the time the collateral becomes commingled goods.

(2) If more than one security interest is perfected under subsection (d), the security interests rank equally in proportion to the value of the collateral at the time it became commingled goods.

So, there is NO encumbrance on your house because the note is "conditional" and commingled. Plus the Deed of Trust has been rendered meaningless (either at inception or shortly thereafter). Plus you are probably missing indorsements or an improper allonge is attached. The assignment is not effective and the substitution of Trustee is not effective.

Because of this the obligation is NOT enforceable (if there is an obligation and if the obligation has not been extinguished). What about the default?

The servicers are REQUIRED and OBLIGATED to make your payments (these are conditions that were attached to the note rendering it conditional, that is non-negotiable). They are required to keep track of this information in anothr set of books. My PSA says:

> **The Master Servicer shall maintain and provide to any successor master servicer a detailed accounting on a loan-by-loan basis as to amounts advanced by, sold, pledged or assigned to, and reimbursed to any Advancing Person.**

The monthly certificateholder statements show that the servicers are paying these amounts. They only show the amounts in aggregate though. The loan level files sometimes show these payments are being made (the principal is going down every month as scheduled).

So the servicer is sending the principal and interest payments on to the trustee and to the investors who purchased certificates from the trust, even when the homeowner does not make these payments. Again, my PSA says:

> **The Subservicer will also be required, pursuant to the Subservicing Agreement, to advance on such scheduled date of remittance amounts equal to any scheduled monthly installments of principal and interest less its Subservicing Fees on any Mortgage Loans for which payment was not received by the Subservicer. This obligation to advance with respect to each Mortgage Loan will continue up to and including the first of the month following the date on which the related Mortgaged Property is sold at a foreclosure sale or is acquired by the Trust Fund by deed in lieu of foreclosure or otherwise.**

and

> **Subservicer Advance: Any delinquent installment of principal and interest on a Mortgage Loan which is advanced by the related Subservicer (net of its Subservicing Fee) pursuant to the Subservicing Agreement.**

A default occurs when the Servicer fails to make a payment when due. Plus, they have to notify the ratings agencies when a servicer fails to pay an advance (this would probably cause the ratings agency to lower the ratings for the certificates).

So if the payments are current, why are the foreclosing? The Notice of Default and Notice of Sale are incorrect, which is a false accounting. Additionally they are FDCPA violations because debt collectors may not:

- collect amounts not authorized by the agreement creating the debt
- falsely represent “the character, amount, or legal status of the debt”
- use unfair and deceptive acts and practices

Debt collectors may not falsely represent "the character, amount, or legal status of any debt," § 1692e(2)(A)

Debt collectors may not use various "unfair or unconscionable means to collect or attempt to collect" a consumer debt, § 1692f and are not allowed to collect on a debt not “authorized by the agreement creating the debt,” § 1692f(1)

The Act imposes upon "debt collector[s]" who violate its provisions (specifically described) "[c]ivil liability" to those whom they, e.g., harass, mislead, or treat unfairly. § 1692k

In your lawsuit or bankruptcy, did the court receive an affidavit from the servicer stating the amount you owed? Did it disclose that these payments had already been made and that you really owed them to the sub-servicer, master servicer and/or trustee (who each cannot enforce the power of sale)? If not this is a false accounting and multiple violations of the FDCPA, and in California this violates the RFDCPA (for anything that violates the FDCPA) and is a violation of the Business and Professions Code 17200 (deceptive acts and practices).

For me the FDCPA is important because it is fairly easy to get a summary judgment (I won 3 out of 5 requests for summary judgment in an FDCPA/RFDCPA case in 2004) and because if you win on this you get attorneys fees. So this can cover the cost (or some of the cost) of litigation. But the FDCPA has a statute of limitations of 1 year and most are missing out on this as they focus on the foreclosure and saving the house. Remember, the Supreme Court has stated that the debt collector is subject to a penalty of up to $16,000 dollar a day while they are not in compliance with 1692(g) - see the attached case.

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Ok I have reviewed this document from Brian Davies. Brian THANK YOU.
This clears up all questions about the UCC. I have highlighted pertinent parts.

The bearer bond thing will NOT work in residential mortgages.

Additionally, the KEY here is, and I say again, if your mortgage was TRANSFERRED while in DEFAULT
there cannot be a "holder" in due course. As such, only the original lender can lawfully bring a foreclosure actions.
If you were, are, gonna be foreclosed upon by ANY party other than the original lender and your mortgage WAS in
default at the time the foreclosing party took possession, they CANNOT be the holder in due course. They are reduced to nothing more than a "debt collector" and will receive pennies on the doller in Bk court.

Please review the ENTIRE document. it will be to your benefit to do so.