CONSIDERATION DOCTRINE AND REGULATORY ARBITRAGE IN MORTGAGE SECURITIZATION

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Abstract

*Our review of mortgage securitization transactions from 2005 to 2007 suggests that many intermediate mortgage transfers structured as promissory note sales involved the exchange of only nominal consideration. The Uniform Commercial Code requires consideration “sufficient to support a simple contract” as a prerequisite for treatment of a transaction as a promissory note sale. The transactions’ status as sales of promissory notes may ultimately determine whether the mortgages were effectively transferred to the trusts intended to hold them on behalf of investors and whether the mortgages are enforceable. Status as a note sale apparently turns on the sufficiency of nominal consideration “to support a simple contract,” so the mortgage securitizations apparently present classic contract-law questions about nominal consideration in a context of contemporary practical importance.*

*Because the effect of treating nominal consideration as sufficient in this context is to permit parties to opt into a regulatory regime that is more favorable to them and less favorable to third parties, the mid-2000s mortgage securitizations present an attractive case for finding nominal consideration ineffective on the ground that it is a sham.*

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# Introduction

Confronted with the foreclosure crisis and robosigning scandal, defenders of the mortgage securitization industry’s past practices have adopted the catchy phrase, “The mortgage follows the note.” Sometimes the catchphrase is cast in more authoritative language: “The Uniform Commercial Code says the mortgage follows the note.” What this means is that *mortgage*-related formalities such as recording assignments of the mortgage upon transfer are irrelevant as long as the associated promissory *note* is properly transferred. This is an important proposition, because the mortgage and note change hands several times in a typical securitization, and mortgage assignments typically were not recorded in mortgage securitizations of the 2000s.

A more accurate (though less catchy) paraphrase of the U.C.C. is, “The Uniform Commercial Code says the mortgage follows the note *if value is given for the note*.” Our review of mortgage securitization documents suggests that in many cases, value may not have been given for the note, so the Uniform Commercial Code does *not* provide that “the mortgage follows the note.” As we explain, the result has significant consequences for foreclosure litigation, for other litigation against players in the securitization process, and for situations where ownership of a securitized mortgage might be contested. One such situation would be bankruptcy of the corporate entities that operate the Mortgage Electronic Registration System.

Our findings also raise a novel question at the intersection of contract and property law. We find that many intermediate transfers in the securitization process apparently were effected for only “nominal” or “token” consideration. For example, hundreds of millions of dollars in mortgage debt apparently were transferred in some cases for $10, in others for certificates entitling the transferor to a subset of the cash generated by what it was transferring. Because the Uniform Commercial Code defines “value” expansively, to include any “consideration sufficient to support a simple contract,” the U.C.C. apparently directs us to determine whether $10 would support a contractual *promise* to transfer hundreds of millions of dollars in debt. But the issue presented has nothing to do with enforcing promises. The parties to each of the intermediate transfers we reviewed are the “sponsor” and “depositor” in the transaction, which are subsidiaries of the same investment bank. The sponsor is not claiming that it does not have to transfer the debt to the depositor. Instead, third parties (borrowers or parties with subsequently arising claims to the mortgage) would argue that they are protected in some way by state laws covering mortgage assignment recording, and the transacting parties would argue that recording laws do not apply because “the mortgage follows the note” when value is given. If the U.C.C. trumps recording statutes as has been claimed, then the *contract* concept of consideration is used to solve the *property* question of required notice to third parties.

The dispute over the sufficiency of nominal consideration is a long-standing one in contract law, pitting freedom of contract against judicial reluctance to enforce gratuitous promises. Even those who are receptive to nominal consideration generally might doubt the sufficiency of consideration in mortgage securitizations, because token consideration is used here not to make a gratuitous promise enforceable but rather to opt into a less burdensome regulatory regime, one that is more favorable to parties to mortgage securitization transactions and less favorable to parties that might otherwise make use of public title records. When a transaction is not an exchange, using the form of exchange to circumvent regulatory rules that protect third parties is more troublesome than doing so simply to render promises legally enforceable.[[4]](#footnote-4)

# Mortgage Securitization, Mortgage Transfer, Mortgage Recording, MERS[[5]](#footnote-5)

What is colloquially called a “mortgage” consists of two contracts, a promissory note containing the borrower’s promise to pay and a security instrument (called the “mortgage” or “deed of trust”) granting a lender a security interest in the real property securing the debt. Mortgage securitizations typically involved several transfers of the promissory note and associated mortgage: from an “originator” to an investment bank subsidiary known as a “sponsor,” from the sponsor to another subsidiary known as the “depositor,” and finally from the depositor to the trustee of a trust charged with holding the mortgages on behalf of investors.[[6]](#footnote-6)

States’ real property recording systems usually permit parties to record the transfer of a mortgage, and many states require recording, either to protect the transferee’s property interest in the mortgage or as a prerequisite for foreclosure.[[7]](#footnote-7) There is no recording requirement applicable to the promissory note. A typical private-label mortgage securitization transaction in the 2000s entailed the transfer of thousands of mortgages from different geographic regions[[8]](#footnote-8) through the several different corporate entities involved in the deal. A given mortgage might be transferred from an originator to a “sponsor” affiliated with the bank arranging the transaction, thence to a “depositor” affiliated with the same bank, and finally to a trust. Figure 1 illustrates the path a securitized mortgage might take and the associated instances of recording.

Figure 1: Mortgage and Promissory Note Transfer with Traditional Recording

SPV

Investors

Underwriter

Borrower

County Recorder

 Promissory note

 Mortgage

 $

 MBS Certificates

 Fees

Depositor

SPV

Investors

Underwriter

Borrower

County Rec.

 Promissory note

 Mortgage

 $

 MBS Certificates

 Fees

Originator

Sponsor

Sponsor

Originator

In the context of mortgage securitization, recording individual mortgage assignments is burdensome because of the large volume of assignments and relatively tight time frame for each transaction.[[9]](#footnote-9) For a transaction involving 10,000 mortgages, each following the originator-sponsor-depositor path, there would be 30,000 separate mortgage assignments. The problem may have been compounded by backlogs at the county recording offices.[[10]](#footnote-10)

The Mortgage Electronic Registration System (“MERS”) was conceived as a substitute for recording mortgage assignments. MERS has been billed as a national electronic database that tracks ownership of mortgage loans.[[11]](#footnote-11) Mortgage securitization participants who are members of MERS can cause a mortgage to be “registered” on MERS and publicly recorded in the name of Mortgage Electronic Registration Systems, Inc., (“MERS, Inc.”) an affiliate of MERSCORP, Inc., the company that operates MERS. MERS, Inc. is supposed to act as a common agent for all MERS’ members, so that recording in the name of MERS, Inc. and tracking ownership transfers on MERS makes it unnecessary to record mortgage assignments. In theory, the public record discloses the existence of the mortgage and the fact that MERS, Inc. holds legal title on behalf of one of MERS’ members, and the private records maintained on MERS track which one of MERS’ members is the current “true” (“beneficial” or “equitable”) owner. In the event of foreclosure, MERS, Inc. assigns the mortgage to the foreclosing party so that that party has legal title at the time of foreclosure. Figure 2 illustrates how a mortgage securitization using MERS would work.

Figure 2: Mortgage and Promissory Note Transfer with MERS Recording

(if foreclosure occurs)

SPV

Investors

Underwriter

Borrower

Originator

Sponsor

Depositor

 Promissory note

 Mortgage

 Virtual Mortgage

 $

 MBS Certificates

 Fees

County Recorder

MERS, Inc.

Presumably because industry participants thought that MERS was an effective substitute for recording mortgage assignments, the practice of recording assignments in mortgage securitizations was all but abandoned in the late 1990s and early 2000s. At the same time, MERS became quite widely used, with some 30 million mortgages recorded on the system.[[12]](#footnote-12) However, its operational practices and underlying theory have come under fire during the foreclosure crisis. Homeowners resisting foreclosure and class action plaintiffs have attacked the system in cases that have generated hundreds of reported decisions,[[13]](#footnote-13) with mixed results for MERS.[[14]](#footnote-14)

At the same time, public officials have become increasingly hostile to MERS. Federal banking regulators determined last year that MERS, Inc. and MERSCORP, Inc. employed “unsafe or unsound” practices,[[15]](#footnote-15) and as a result MERS operates under a federal consent decree that requires operational improvements[[16]](#footnote-16) and potentially additional capital contributions from MERS’ members.[[17]](#footnote-17) It is currently unclear whether MERS will be able to meet the requirements of that decree. MERSCORP and MERS, Inc. also have been sued by the Attorneys General of New York,[[18]](#footnote-18) Delaware,[[19]](#footnote-19) and Massachusetts,[[20]](#footnote-20) and by county recorders in a number of states, including Massachusetts[[21]](#footnote-21) and North Carolina.[[22]](#footnote-22) Law enforcers’ claims against MERSCORP and MERS, Inc. were expressly excluded from the recent “robosigning” settlement with five banks[[23]](#footnote-23) and from New York’s settlement with banks over MERS-related activity.[[24]](#footnote-24) A review of foreclosure documents commissioned by the Assessor-Recorder of the City and County of San Francisco found that MERS apparently was in error about the identity of the mortgage owner 58% of the time[[25]](#footnote-25) and that mortgages recorded on MERS generally had a higher rate of other compliance problems than non-MERS mortgages.[[26]](#footnote-26)

The challenges to MERS have led to increased emphasis on legal theories to address problems arising from failure to record if MERS does not work as intended. The leading theory of this type is that failure to record assignments does not matter because the mortgage “follows the note” under Article 9 of the U.C.C. We now turn to the specifics of that argument.

# Lender Problems that Article 9 Note Sales May Solve

When mortgage assignments are not recorded, two sets of problems for the mortgages’ putative owners may arise: problems of ownership and problems of enforceability. MERS was intended as a complete substitute for recording, but as described above it may not function as intended. If MERS does not function as intended, Article 9 of the Uniform Commercial Code may independently cure the problems of ownership and enforceability that MERS was supposed to solve. This Part explains some problems of mortgage ownership and enforceability that can result from failure to record mortgage assignments and explains how structuring transactions as sales of promissory notes under Article 9 may solve these problems. Although the Article 9 provisions discussed here apparently have not been applied in reported foreclosure cases,[[27]](#footnote-27) the Permanent Editorial Board for the U.C.C. found the Article 9 provisions important enough to warrant issuing a report expressly dealing with their application to mortgage notes in November 2011.[[28]](#footnote-28)

## Problems of Mortgage Ownership

In general, owners record real-property interests in order to protect their ownership claims. They want to make sure that they own what they think they own and that no one can take it away. When mortgage assignments are not recorded, putative owners are exposed to at least two potential ownership-related problems, both of which may be cured if the transaction is a promissory note sale under Article 9.

First, the mortgages may not have been transferred to the transferee at all. In the case of mortgage securitization, the borrower may execute the mortgage in favor of the original lender, but subsequent transfers of the mortgage may not have been recorded. This situation is especially common when the transaction participants use MERS, as the system was intended as a substitute for recording mortgage assignments. The result could be that the securitization vehicle that ultimately was supposed to own the mortgage does not end up owning it and that the mortgage itself is “stuck” in the hands of the originator or MERS.[[29]](#footnote-29) The situation also could arise in states where mortgage recording is affirmatively required,[[30]](#footnote-30) rather than simply required to protect against subsequent claimants.

If the transactions with unrecorded mortgage assignments are all Article 9 note sales, then this problem may be avoided because Article 9 apparently provides that the security interest in the *mortgage* “attaches,” giving the buyer a right that is good against the seller,[[31]](#footnote-31) once the *note* has been described in an authenticated agreement and value has been given.[[32]](#footnote-32) In other words, once parties sign an agreement of purchase and sale that describes the note and the buyer gives value, the buyer’s rights in the mortgage are superior to those of the seller. As between buyer and seller, the mortgage follows the note.

The second ownership problem that a transferee that fails to record its interest may face is a third party’s subsequent claim of ownership. After the transferee pays value for the mortgage, the transferor might assign it to someone else, either fraudulently or by mistake. Indeed, if MERS’ internal controls are as poor as state Attorneys General have alleged,[[33]](#footnote-33) this is a very real possibility. Subsequent claims of ownership also could arise if the originator – or MERS, Inc. itself – goes bankrupt. In this case, the bankruptcy trustee occupies the position of a bona fide purchaser of real property interests from the debtor at the time of the bankruptcy.[[34]](#footnote-34) As mortgages are real property interests under the laws of most states, such subsequent claimants could defeat the unrecorded mortgage ownership claims of the securitization trustee.[[35]](#footnote-35)

 Structuring each transfer as an Article 9 note sale may solve this problem as well. If the note associated with the mortgage is sold in an Article 9 sale, then Article 9 provides that the security interest (that is, the buyer’s ownership interest) in the mortgage is “perfected” immediately without any need to record.[[36]](#footnote-36) That is, the buyer’s ownership interest cannot be defeated by a subsequent purchaser.[[37]](#footnote-37) The mortgage follows the note with respect to third parties, not just buyer and seller.

## Problems of Mortgage Enforceability

Failure to record mortgage assignments also can lead to problems in enforcing a mortgage, and in some cases Article 9 may help cure the problem. In states that permit nonjudicial foreclosure, statutes may require that the foreclosing party be able to demonstrate a chain of assignments.[[38]](#footnote-38) Some states go farther and require that assignments be recorded.[[39]](#footnote-39) Although some courts have held that MERS can be used to satisfy a requirement of a recorded chain of assignments,[[40]](#footnote-40) others are less forgiving.[[41]](#footnote-41) If the transaction is structured as the sale of promissory notes, then Article 9 provides a procedure by which the buyer can become the mortgagee of record and proceed with nonjudicial foreclosure.[[42]](#footnote-42) Although it is far from clear that using this procedure excuses failure to record assignments in states that expressly require it, there is at least a colorable argument that it does.

In judicial foreclosure proceedings, courts may demand that the foreclosing party prove ownership of the mortgage and note.[[43]](#footnote-43) If a transaction is structured as an Article 9 note sale, it seems as though the foreclosing party could simply produce the sale agreement and attached schedules to show that the note was sold at each stage of the chain, as the identification of the note in a transaction where notes are sold for value is enough to create an immediately attached and perfected security interest in both note and mortgage and arguably proves ownership.

Finally, structuring a transaction as an Article 9 sale may help cure another problem, one having to do not with mortgage assignment but with failure to endorse the promissory note. It appears that promissory notes were not endorsed in many securitization transactions. Where the promissory note is negotiable and is not properly endorsed to the party seeking to enforce it, the note may for practical purposes be enforceable only if it was “transferred,” as that term is used in Article 9. In such a case, if the note is negotiable, [[44]](#footnote-44) it will be enforceable only[[45]](#footnote-45) if it was “transferred,” meaning that it was delivered by a party with the power to enforce the note with intent to give the recipient the right to enforce the note.[[46]](#footnote-46) If a transaction is structured as a sale of the promissory note, that is likely to help establish the intent element of transfer. For example, in explaining how transfer may substitute for negotiation, the PEB gives several examples, all involving sales of promissory notes.[[47]](#footnote-47) Thus, whether a note that lacks endorsements is enforceable in the hands of a securitization trustee or its agent may well depend on whether the note was sold in an Article 9 sale.

It is worth noting that structuring a transaction as an Article 9 promissory note sale may not help the transaction participants much in another situation that is common in mortgage litigation: a situation where the party seeking to foreclose cannot produce the note.[[48]](#footnote-48) A party seeking to enforce a promissory note must possess it (if attempting to enforce as a holder or nonholder in possession), or if seeking to enforce the note as a transferee, must prove delivery. Failure to produce the physical note is not invariably fatal, because the U.C.C. contains provisions allowing a party to enforce lost, destroyed, or stolen notes, and apparently contemplates that a note can be “possessed” through an agent. But these provisions do not depend on the transaction’s status as an Article 9 note sale.

In sum, Article 9 appears to provide by its terms that when a note is sold[[49]](#footnote-49) – that is, when “value” is given in exchange for it – the “mortgage follows the note.”[[50]](#footnote-50) The note buyer does not have to worry about subsequent claims of mortgage ownership. This may be in conflict with state real property laws covering recording of mortgage assignments, as discussed below, but it does suggest that mortgage owners are in a better position if promissory notes are sold than if they are not.

# Was Consideration Exchanged in Mortgage Securitizations?

As demonstrated above, if a securitization transaction is structured so that promissory notes[[51]](#footnote-51) are sold “for value” in each transfer, that strengthens the argument that the transaction is valid.[[52]](#footnote-52) Just how helpful it is for a transaction to be structured as a sale of notes is open to question because of the potential conflict between Article 9 and state recording statutes discussed below, but there seems to be little doubt that status as a note sale is at least somewhat helpful.[[53]](#footnote-53) As pertinent to mortgage securitization transactions, the relevant standard for deciding whether notes were transferred for value is whether they were transferred in exchange for consideration “sufficient to support a simple contract.”[[54]](#footnote-54)

We have reviewed a sample of publicly filed documents from existing securitization transactions and found that in most cases the documents do not clearly disclose that value was exchanged for the promissory notes in each stage of the transaction. It appears that some intermediate transfers may have been “paper transfers” in which no real value was exchanged rather than sales of the notes.

A word of caution about the results of our review is in order. It appears that it was not the practice of SEC staff to require that documents establishing the existence of consideration be filed with the Commission.[[55]](#footnote-55) Thus, it is possible that such documents exist and are not in the public record. That said, SEC rules generally require that “material” contracts be filed, so one might expect that documents establishing the existence of consideration would be filed if they exist, regardless of staff requirements. Perhaps more importantly, in most cases our review uncovered documents that purported to be mortgage sale agreements. Even if there is no requirement to file mortgage sale agreements, it seems strange to file a document that calls itself a mortgage sale agreement while holding back another document that sets forth the true terms of the mortgage sale.[[56]](#footnote-56) Thus, although the results of our review must be considered merely suggestive, at least pending further discovery in litigation or investigations, our review does suggest the possibility that the agreements on file mean what they say and that only nominal consideration changed hands in many cases.

Our review covered a sample of residential mortgage securitization transactions from 2005 to 2007. The pool from which the sample was drawn was all deals in the Markit ABX.HE 2006-1, 2006-2, 2007-1, and 2007-2 indices. The Markit ABX.HE index is a widely used credit default swap index for the subprime private-label securitization market. The indices track a fixed set of deals that were selected as benchmarks for the overall performance of the private label mortgage-backed security market. Our pool contained 80 deals from 30 different shelves. We reviewed at least one deal from each shelf for which deal documents were available on EDGAR, [[57]](#footnote-57) for a total of 27 deals from 22 different shelves. We coded the deal documents’ description of the consideration for the sponsor-depositor mortgage transfer, as shown in Table 1.

Table 1: Summary of deal documents’ description of consideration for the sponsor-depositor mortgage transfer in 27 deals from 22 different shelves

|  |  |  |  |
| --- | --- | --- | --- |
| **Consideration** | **“For Value”?** | **Shelf Count** | **Deal Count** |
| Significant cash plus certificates | Yes | 5 | 5 |
| Face value of mortgage loans, plus cash | Yes | 1 | 1 |
| Certificates plus blank cash | Questionable | 3 | 3 |
| Certificates only | Questionable | 5 | 6 |
| $10 plus “good and valuable consideration” | Questionable | 2 | 3 |
| Referenced in documents, but blank or contained in unfiled document | Questionable | 3 | 6 |
| Not referenced | Questionable | 1 | 3 |
| Mixed (some deals in one category above and some in another) | Questionable | 2 | NA |
| Total |  | 22 | 27 |
| Percent Questionable |  | 73% | 78% |

The description of different types of consideration as “for value” is a judgment based on the idea that exchanging the mortgages for certificates representing some subset of the future cash flows from the mortgages, or for plainly nominal consideration such as $10, may not be “for value” as the term is used in connection with Article 9 sales of promissory notes.[[58]](#footnote-58) We discuss this issue in greater detail below.

Based solely on our review of the publicly filed deal documents, it seems that whether the mortgages were exchanged for value at the sponsor-depositor step is questionable in 78% of deals and 73% of shelves. It is possible that other unreferenced, unfiled documents establish that the mortgages were transferred for value. In any event, these results seem surprising. We might have expected to see that the deal documents plainly established that the mortgages were exchanged for substantial cash, as secondary sources describing the mortgage market often indicate.[[59]](#footnote-59)

# Is Nominal Consideration “Sufficient to Support a Simple Contract”?

The concept of “consideration” has a long and vexed history in the common law[[60]](#footnote-60) and continues to be contested.[[61]](#footnote-61) However, it seems to be a fair statement of the mainstream of current positive law that a promise is “supported by consideration” and will be enforced on that basis if the promise is given (and sought) in exchange for something else.[[62]](#footnote-62) Promises that are not supported by consideration will not be enforced under American law unless there is some other basis for enforcing them, such as the promisee’s reasonable reliance.[[63]](#footnote-63) Thus, promises to make gifts will not be enforced on the basis of consideration,[[64]](#footnote-64) although they may be enforced on the basis of reliance.

It is a contract-law chestnut that courts generally will not inquire into the adequacy of consideration, in the sense of using the consideration doctrine to invalidate improvident deals in the absence of fraud, mistake, duress, undue influence, or other invalidating cause.[[65]](#footnote-65) Courts, in other words, are not in the business of deciding appropriate prices and leave that to the market unless there is some compelling reason to step in.

This idea is criticized by scholars who think that courts should take a more aggressive role in policing contracts for fairness. But even setting that type of criticism aside, would a court really enforce a promise to sell a farm for a dollar? Is a “peppercorn” really enough to support enforcement of any promise given in return?[[66]](#footnote-66) Although it comes up frequently in classrooms, the matter is generally thought to be of academic interest only and there is very little authority addressing the question. Hence, for example, Allan Farnsworth’s statement that “it is no surprise that the reports are devoid of cases in which competent sellers appear to have freely and seriously bargained to sell their farms for a dollar.”[[67]](#footnote-67)

What might be a more likely case is that in which a party seeks to render a promise to make a gift enforceable by clothing the promise in the trappings of an exchange, as by saying “In return for $5, I promise to give you my house?” If the $5 did not in any way induce the promise, then at least according to the *Restatement (Second) of Contracts*, courts will reject any effort to enforce the promise on the basis of consideration. The recited consideration is a “sham” and the promise will not be enforced.[[68]](#footnote-68) Other authorities are less willing to inquire into subjective inducement, and contend that recital of consideration in itself manifests a bargained-for exchange.[[69]](#footnote-69)

The *Restatement* also provides that the recital of nominal consideration in a signed writing will render enforceable a promise to keep an offer for an exchange on fair terms open for a reasonable time,[[70]](#footnote-70) but not because the recital is itself “consideration.” Rather, the rationale is that the recital is a purely formal validation device, akin to the seal.[[71]](#footnote-71) It follows that under the Restatement, the recited consideration need not ever be delivered.[[72]](#footnote-72) A fairly recent student comment finds that the majority of courts accept nominal consideration in the context of option and guaranty contracts but require that the consideration be delivered.[[73]](#footnote-73)

When the recited consideration played no part in inducing the exchange, and something that is not an exchange is styled as an exchange to invoke judicial enforceability, it is at most doubtful whether courts will enforce the promise. It is at best unclear whether nominal consideration counts as consideration.[[74]](#footnote-74)

Even if there were substantial authority addressing the issue, its applicability would be limited because mortgage securitizations present the issue of nominal or sham consideration in an unusual context. Typically, issues of consideration come up when courts attempt to decide whether the promisee should be able to enforce the promisor’s promise. Scholars who have discussed the consideration doctrine typically do so in the same way; their focus is on enforceability of promises.[[75]](#footnote-75) But the revisions to Article 9 purport to make consideration a device for selecting recording regimes, not just for deciding whether to enforce promises.[[76]](#footnote-76)

In the case of mortgage securitizations, the promisor (the sponsor) is not resisting enforcement by the promisee (the depositor, which after all is its own corporate affiliate). Instead, the issue is whether the parties to the securitization transaction will benefit from not having to record mortgage assignments at the expense of third parties who might be harmed by failure to enforce the recording rules (subsequent assignees, defaulting borrowers).

It appears that nominal consideration may have been used not just to circumvent limits on enforcement of promises, but to circumvent rules that benefit third parties and in effect to engage in regulatory arbitrage. Nonenforcement of promises “exchanged” for sham consideration may be for good reasons: For example, such promises may be more likely to be falsely asserted, improvidently made, or unworthy of judicial energy,[[77]](#footnote-77) and these reasons may outweigh the countervailing value of freedom of contract in the ordinary case where a promisor resists enforcement. But the case against enforcement seems much stronger when the use of sham consideration permits the parties to the transaction to benefit at the expense of third parties.

# Nominal Consideration in Real Estate Transactions and Mortgage Securitization

The revisions to Article 9 of the Uniform Commercial Code may have created a conflict with longstanding real property recording statutes. Construing “consideration sufficient to support a simple contract” to exclude nominal consideration would avoid the conflict and can be defended *in general* as consistent with an appropriate balance of the interests of contending parties, although doing so could prejudice existing securitization investors.

## The Potential Conflict Between Article 9 and Recording Statutes

Article 9 may not trump recording statutes even if it claims to do so. There appears to be a conflict between revised Article 9 and the real property recording statutes of most states. In most states these statutes continue to provide that an unrecorded mortgage assignment is *void* against a subsequent bona fide purchaser of the land *or of an interest in the land, including a mortgage*, for value without notice of the prior claim to the mortgage.[[78]](#footnote-78) That seems to be in direct conflict with the Article 9 argument presented above. Perhaps recognizing the conflict, some practitioner-written treatises counseled against relying exclusively on the Article 9 argument to obviate recording.[[79]](#footnote-79)

At the same time, other commenters have expressed confidence that Article 9 defeats any recording requirement:

Article 9 makes it as plain as possible that the secured party need not record an assignment of mortgage, or anything else, in the real property records in order to perfect its rights to the mortgage ….

The end result is that a buyer of the promissory note may leave it in the possession of the seller and still have an interest immune from avoidance by the seller’s trustee in bankruptcy under § 544(a) of the Bankruptcy Code. The buyer’s interest is secret. No notice of it is given by change of possession or by public filing of any kind. The buyer’s priority is based solely on the privately authenticated record. So long as the sale to the buyer is evidenced by such a record, the buyer prevails over the trustee under Section 544(a). The result follows not only as to individual notes but also as to notes secured by real estate sold in bulk incident to securitization or secondary market transactions. The notes secured by mortgages may be left in the hands of the originating financial institutions as agents for collection and the outright purchaser will still have a valid interest in bankruptcy. The felt need to facilitate bulk sales of real estate notes overwhelms the historic fear of secret conveyances[[80]](#footnote-80)

Potential conflict between the UCC’s recording and priority system for commercial paper and the real-property system existed even before the revisions to Article 9 became effective in 2001.[[81]](#footnote-81) At least some courts resolved the issue by using the idea that mortgagor and mortgagee “live in different worlds.”[[82]](#footnote-82)

These courts bounded the domains of the competing recording systems by finding that the real estate recording statutes governed transactions in the “mortgagor’s world,” primarily the mortgagor’s sale of the underlying property and the effect of a mortgage release, and the UCC recording system governed transactions in the “mortgagee’s world,” *i.e.*, a sale or pledge of the mortgage and note.[[83]](#footnote-83) In re *SGE Funding Corp*.[[84]](#footnote-84) is an example. There, the court concluded that a mortgage broker’s unrecorded assignment of its interest in promissory notes and mortgages to its funders would be governed by the UCC’s rules and not the recording statutes because it took place in the “mortgagee’s world,”[[85]](#footnote-85) while the “purpose and intent of the recording statutes are to protect those in the “mortgagor’s world.”[[86]](#footnote-86)

Other courts, however, did separately analyze perfection of the note and the mortgage. For example, In re *Maryville Savings & Loan Association*[[87]](#footnote-87) contains a holding that “the U.C.C. does not supersede the law in this state *with respect to liens upon real estate*,”[[88]](#footnote-88) so that a party’s interest in deeds of trust was perfected even though its interest in the related notes was not.[[89]](#footnote-89)

Consistent with the overall thrust of the revisions to Article 9,[[90]](#footnote-90) commentators have assumed that 2000 amendments clarified that “the mortgage follows the note.”[[91]](#footnote-91) And the official commentary to the revised Code provides, “[t]his Article rejects cases such as In re *Maryville Savings & Loan Corp.*”[[92]](#footnote-92) Of course, such statements suggest that the proposition that the mortgage follows the note was nonobvious enough in 2000 to need clarifying.

The drafters of the UCC’s 2000 amendments may have intended to assert the primacy of the UCC recording system over state real property recording laws, but in fact the amendments seem to have created an express conflict. Before the 2000 amendments, the Official Comments to the UCC expressly deferred, first to “local real property law,”[[93]](#footnote-93) later to “other law,”[[94]](#footnote-94) on “the question of the effect on the rights under the mortgage of delivery or non-delivery of the mortgage or of recording or non-recording of an assignment of the mortgagee’s interest.”[[95]](#footnote-95) After the 2000 amendments, Article 9 of the UCC no longer expressly defers to state real property law, but instead apparently purports to resolve the issue itself. But it appears that state real estate recording laws were amended to accommodate the change in the UCC in at most two states.[[96]](#footnote-96)

The UCC’s drafters expressly recognized that when the UCC conflicts with another statute, the other statute may prevail, especially where the other statute “was specifically intended to provide additional protection to a class of individuals engaging in transactions covered by the Uniform Commercial Code.”[[97]](#footnote-97) It seems at least arguable that title recording statutes are “specifically intended to provide additional protection” to purchasers of real property interests and that statutes requiring a chain of recorded assignments as a prerequisite to foreclosure are “specifically intended to provide additional protection” to borrowers.

Moreover, the UCC is to be interpreted “to promote its underlying policies and purposes,” which are “to simplify, clarify, and modernize the law governing commercial transactions,”[[98]](#footnote-98) and “to permit the continuing expansion of commercial practices through custom, usage, and agreement of the parties.”[[99]](#footnote-99) The “Article 9 argument” results in the creation of secret property interests in mortgages and seems to overturn settled commercial expectations and practices. These results may not “simplify, clarify, and modernize the law” or respect “custom [and] usage,” so the UCC’s general interpretive principles disfavor an interpretation of the Code that would reach them. These considerations suggest that the “Article 9 argument” may fail.

The outcome of a case testing the Article 9 argument is uncertain.[[100]](#footnote-100) The UCC drafters expected that resolution of any conflict would depend on “principles of statutory interpretation that specifically address the interrelationship between statutes.”[[101]](#footnote-101) In a case where the securitization trustee relied on Article 9 of the UCC and a subsequent mortgage purchaser relied on the state’s title recording statute, those principles might lead a court to resolve the apparent conflict in many different ways. It could consider legislative history to see if revised Article 9 was intended to overrule state recording statutes. It could consider the overall purpose and likely intent of the Article 9 revision and recording statutes (separate from legislative history) to determine whether it makes sense for Article 9 to override recording. It could simply follow the last-enacted statute (likely to be revised Article 9).[[102]](#footnote-102)

## Minimizing or Avoiding the Conflict

What would happen in litigation if a foreclosure defendant or competing claimant pointed to the failure to record mortgage assignments and the opposing party, a securitization trustee or servicer charged with representing the interests of mortgage investors, relied on Article 9 in a case where only nominal consideration was provided?[[103]](#footnote-103) The court would be confronted with the potential conflict between Article 9 and the state recording statutes. Most likely, the court would not make a wholesale ruling that one body of law or the other prevailed. Instead, under the usual approach to statutory construction, it would try to give effect to both statutes to the extent possible.

One way of doing this would be to find that the term “perfected” under the UCC is limited by state recording statutes—in other words, that the UCC simply does not provide for perfection as against bona fide purchasers of real property for value who take without notice and record first. Perfection under the UCC could apply to other classes of competing claimants, such as judgment lienors or statutory lienors. Although this gives some effect to the UCC’s automatic perfection provisions without doing violence to the preexisting recording statutes, it does significantly undercut the UCC’s provisions, because it effectively renders them inapplicable to real property in states with conflicting statutes.

A narrower approach, applicable where only nominal consideration was provided, would be to find that nominal consideration is not “sufficient to support a simple contract” in the circumstances at hand. As discussed, it is unclear as a general matter whether nominal consideration is or is not “sufficient to support a simple contract.” Moreover, the normative concerns that might guide us in deciding whether nominal consideration is enough to render a promise enforceable are inapplicable and incomplete here, because the issue is not whether the promisee will be able to enforce a promise, although that is what consideration doctrine normally addresses. Instead, the issue is whether providing nominal consideration should strengthen the position of the parties to the securitization transaction as against subsequent claimants or homeowner/borrowers by obviating recording requirements. Put differently, the statute apparently commands the court to use the *contract* concept of consideration to solve the *property* problem of required notice to third parties.

Declining to give effect to nominal consideration is normatively defensible. In general, one reason that the law protects those who have given value is that they will be prejudiced by the loss of what they have given up.[[104]](#footnote-104) Accordingly, in many settings where the law protects those who have given value, it clearly excludes nominal consideration from the definition of value.[[105]](#footnote-105) For example, giving nominal consideration will not make a person a “bona fide purchaser for value” under the real estate recording statutes. If S gives a parcel of land to X and then sells the same parcel of land to Y, Y may be protected if X did not record her claim. But this will be true only if Y is a bona fide purchaser “for value,” meaning that Y actually paid something substantial for the land. Y will not be protected if he provided only nominal consideration.[[106]](#footnote-106) Likewise, the law of unjust enrichment more generally protects bona fide purchasers for value,[[107]](#footnote-107) but only when they give “present value, *excluding* nominal consideration.”[[108]](#footnote-108)

Moreover, there are good reasons to have public title records. Beyond the general benefit of making this information available to the public,[[109]](#footnote-109) public title records can serve important private purposes by enabling borrowers and potential buyers to determine the validity of a mortgage by knowing who the mortgagee is.[[110]](#footnote-110) Although consumer protection statutes may give borrowers a legal entitlement to learn the identity of creditors,[[111]](#footnote-111) a legal entitlement is not necessarily an acceptable substitute for an actual record.

On the other side, there are interests in protecting the security of transactions. Not requiring recording enhances the security of transactions that don’t have to be recorded (these transactions will not be disturbed) while detracting from the security of later transactions involving the same property (subsequent buyers of the property will not have an authoritative way of checking title). It seems likely that the Article 9 revisions were adopted to make mortgage securitizations easier, and the subsequent transactions involving securitized mortgages may be less important in securitizations because the mortgages generally are not resold once they enter the securitization trust.

Also weighing in favor of giving effect to nominal consideration here is that even if gratuitous assignees in general are not prejudiced by declining to respect their transactions, their subsequent assignees may be prejudiced. In the context of mortgage securitization, this is a very real problem because subsequent assignees (the mortgage investors) invariably *did* give value. Subsequent assignees may have been protected by contractual representations and warranties against title defects, but mortgage investors often have failed in asserting contract claims based on breach of representations and warranties for procedural reasons.[[112]](#footnote-112)

Finally, there is the possibility that holding nominal consideration insufficient would disrupt the financial system.[[113]](#footnote-113) Although courts often say they are not supposed to engage in this kind of result-oriented reasoning, there is no doubt that financial disruptions are costly and that this could enter into courts’ thinking.

In sum, whether nominal or token consideration counts as consideration is unclear as a matter of black-letter contract law. It is difficult to weigh the competing interests in the security of commercial transactions and protecting mortgage investors (favoring recognition of nominal consideration) against the interests of borrowers and subsequent assignees and the interest in encouraging the use and preservation of public title records (weighing against recognition of nominal consideration).

A court might be tempted to take the easiest route to avoid the potential conflict between Article 9 (which purports to obviate recording when “consideration” is given) and the recording statutes (which do not recognize their own obviation) by finding that nominal consideration does not count in this particular context. The conclusion would be bolstered by the fact that in the usual real-estate or unjust-enrichment case, where the UCC does not compel use of a special broad definition of “value,” the term “value” would *not* encompass nominal consideration because *in general* there is little prejudice where value is not given.

# Conclusion

Our review raises questions about whether many mortgage transfers in connection with securitization transactions are covered by the provisions of Article 9 of the U.C.C. that may obviate recording of mortgage assignments. It appears that many mortgage transfers were effected for purely nominal consideration. Because the U.C.C.’s anti-recording provisions are triggered when “value” is given, it is not clear that purely nominal consideration suffices. Indeed, finding that nominal consideration is insufficient would allow courts to avoid a potentially troubling conflict between the 2000 U.C.C. revisions and longstanding state property laws.

If in fact only nominal consideration was given in connection with the assignment of promissory notes in many transactions, that casts further doubt on the web of workarounds of state recording laws that the mortgage industry apparently employed in the 2000s. Although the problem of lack of consideration can be solved prospectively by making sure that consideration is exchanged at each step of the process, that does not help existing securitization investors or address the fact that the Article 9 revisions and state recording statutes may be in conflict. Serious consideration should be given to devices for moving back toward a functional, transparent system of mortgage recording that complies with all state laws.[[114]](#footnote-114)

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4. Of course, the decision to render a promise from one party to another legally enforceable can affect third parties. Interestingly, the scholarly discussion of consideration apparently has paid little attention to this issue. *See infra* [↑](#footnote-ref-4)
5. This basic discussion of the operation of MERS is adapted from our related paper, *All in One Basket: The Bankruptcy Risks of a National Agent-Based Mortgage Recording System* (forthcoming, 46 U.C. Davis L. Rev. \_\_) [↑](#footnote-ref-5)
6. For example, in one transaction the authors have reviewed in depth, the GSAMP 2006-HE3 transaction, the sponsor was Goldman Sachs Mortgage Co. and the depositor was GS Mortgage Securities Corp. [↑](#footnote-ref-6)
7. Specifically, many states encourage recording by providing that unrecorded interests, but not recorded interests, are subject to specific types of subsequently arising claims. Other states require that mortgage assignments be recorded. *See* John Patrick Hunt, Nancy Wallace & Richard Stanton, *Mortgage Origination and Data,* App. A*, in* Handbook of Financial Data and Risk Information (forthcoming 2012). [↑](#footnote-ref-7)
8. *See* Prospectus Supplement dated Sept. 7, 2006 for Mortgage Pass-Through Certificates issued by GSAMP Trust 2006-HE3, at S-40 (describing mortgage pool for one transaction as containing 10,736 mortgage loans with aggregate principal balance of $1.6 billion, with no more than 0.23% of the loans secured by properties in any one area). [↑](#footnote-ref-8)
9. Tax rules effectively impose a three-month timeframe on mortgage securitizations by imposing a 100 percent tax on contributions to the securitization vehicle made more than three months after the vehicle’s startup date. *See* 26 U.S.C. § 860G(d). Although this rule covers only one particular type of securitization vehicle, the REMIC (“real estate mortgage investment conduit”), the large majority of residential mortgage securitizations reportedly employ this form. Aequitas Compliance Solutions, Inc., Foreclosure in California: A Crisis of Compliance 17 (Feb. 2012). [↑](#footnote-ref-9)
10. *See* Testimony of R.K. Arnold, President and CEO of MERSCORP, Inc. Before the Subcommittee on Housing and Community Opportunity, House Financial Services Committee, Nov. 18, 2010 at 18 [hereinafter Arnold Testimony] (“[A]t certain time periods, the flow of assignments were [sic] overwhelming the county recorder system, resulting in long backlogs, and in some cases, taking the county recorded over a year to record an assignment.”). [↑](#footnote-ref-10)
11. *See* Arnold Testimony, *supra* note 7, at 16-20 (describing MERS as a mortgage assignment tracking system). [↑](#footnote-ref-11)
12. Arnold Testimony, *supra* note 7, at 1. [↑](#footnote-ref-12)
13. For example, a search in Westlaw’s ALLCASES database on the search term “MERS /s foreclosure” returned 1,056 documents. [↑](#footnote-ref-13)
14. *Compare* HSBC Bank USA v. Gabay, 28 A.3d 1158 (Me. 2011) (rejecting MERS’ claim to be able to assign note along with mortgage); MERS, Inc. v. Saunders, 2 A.3d 289 (Me. 2010) (MERS lacks standing to foreclose because it lacks an interest in the promissory note) *with* Residential Funding Co., L.L.C. v. Saurman, 805 N.W.2d 183 (Mich. 2011) (MERS’ interest in security lien authorized MERS to foreclose by advertisement); Savage v.U.S. Bank, N.A., 19 A.3d 302 (Del. 2011) (rejecting borrowers’ contention that they were entitled to notice of mortgage assignment from MERS to foreclosing bank); RMS Res. Props., LLC v. Miller. \_\_ A.3d. \_\_, 2011 WL 6033011 (Conn. Dec. 13, 2011) (rejecting borrowers’ contention that MERS could not validly be named mortgagee because it was not the lender); Thomas v. BAC Home Loans Servicing, LLP, 2011 WL 6743044, at \*3 (Nev. Dec. 20, 2011) (“MERS as the nominee beneficiary holds the deed of trust for BAC’s benefit”). [↑](#footnote-ref-14)
15. *See* Consent Order, *In re* MERSCORP, Inc., O.C.C. No. AA-EC-11-20, April 13, 2011, at 2. [↑](#footnote-ref-15)
16. *Id.* at 7-9. [↑](#footnote-ref-16)
17. *Id*. at 8. [↑](#footnote-ref-17)
18. Complaint. New York v. JPMorgan Chase et al., Index No. 2768/2012 (N.Y. Sup. Ct. Kings Cty. Feb 3, 2012). [↑](#footnote-ref-18)
19. Verified Complaint, Delaware v. MERSCORP, Inc., CA-NO-6987-CS (Ct. Ch. Del. Oct. 27, 2011) [hereinafter Delaware Complaint]. [↑](#footnote-ref-19)
20. Complaint, Massachusetts v. Bank of America et al., Civ. A. No. 11-4363 (Suffolk Cty. Super. Ct. Dec. 1, 2011) [hereinafter Massachusetts Compaint]. [↑](#footnote-ref-20)
21. *See* Press Release, Commonwealth of Massachusetts Southern Essex District Registry of Deeds, Feb. 22, 2011 (“Essex South Register of Deeds John O’Brien announced today that he will be seeking over 22 million dollars from the Mortgage Electronic Registration System.”) [↑](#footnote-ref-21)
22. *See* Press Release, Guilford County, North Carolina Register of Deeds, March 2, 2011 (“Guilford County Register of Deeds Jeff Thigpen announced today that he will be conferring with [law enforcement officials] as to whether the Mortgage Electronic Registration Service [sic] (MERS) owes Guilford County fees estimated at $1.3 million in lost revenue from mortgage assignments.”). [↑](#footnote-ref-22)
23. *See. e.g.*, Consent Judgment, U.S. v. Citicorp*,* No. 1:12-cv-00361 (D.D.C. April 4, 2012) at G-9*, ¶* 12 (excluding “claims against Mortgage Electronic Registration Systems, Inc. or MERSCORP, Inc. from scope of settlement). [↑](#footnote-ref-23)
24. *See* Noticeof Submission of Additional Settlement Agreements, U.S. v. Bank of America et al., 1:12-cv-00361 (D.D.C. March 13, 2012) Ex. E, ¶ 8 (“Nothing herein shall be construed as waiving any claim or remedy the [New York Attorney General] may pursue in the MERS Lawsuit against MERSCORP, Inc. or Mortgage Electronic Registration Systems, Inc.). [↑](#footnote-ref-24)
25. Aequitas, *supra* note 6. Specifially, Aequitas reviewed 382 residential foreclosure sales in San Francisco from January 2009 to October 2011. *Id.* at 1. In 192 cases, the mortgages were recorded on MERS and MERS purported to have information about the mortgage owners (or “beneficiaries under the deed of trust” in California parlance). *Id.* at 13. In 112 of these cases, or 58%, the beneficiary recorded on MERS was different from the beneficiary named in the Trustee’s Deed upon Sale, the document transferring ownership of the foreclosed property to the new owner at the foreclosure sale. *Id.* [↑](#footnote-ref-25)
26. *Id.* at 13-14. [↑](#footnote-ref-26)
27. A Westlaw search on May 5, 2012 on U.C.C. Sections 9-203 and 9-308 did not turn up any reported cases in which these provisions were applied in litigation relating to real property mortgage transfers. [↑](#footnote-ref-27)
28. *See* Permanent Editorial Board for the Uniform Commercial Code, *Report of the Permanent Editorial Board for the Uniform Commercial Code: Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes*, Nov. 14, 2011. [↑](#footnote-ref-28)
29. *See In re* Agard, 444 B.R. 231, 247 (Bankr. E.D.N.Y. 2011) (use of MERS causes note and mortgage not to travel together, so party seeking to lift bankruptcy stay to enforce foreclosure must “prove not only that it is acting on behalf of a valid assignee of the Note, but also that it is acting on behalf of a valid assignee of the Mortgage,” and finding that MERS “may not validly assign a mortgage based on its nominee status”). [↑](#footnote-ref-29)
30. *See, e.g.,*Texas Local Gov’t Code § 192.007 (“To … transfer … an instrument that is filed, registered, or recorded in the office of the county clerk, a person must file, register, or record another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded”); Ill. Code Ch. 765 § 5/28 (“Deeds, mortgages. powers of attorney, and other instruments relating to or affecting the title to real estate in this state, *shall* be recorded in the county in which such real estate is situated”) (emphasis added); *In re* Foreclosure Cases, 2007 WL 3232430, at \*2 (citing Ohio Rev. Code §§ 1335.04, 5301.23 for proposition that mortgage assignments must be recorded under Ohio law). *But see In re* Williams, 395 B.R. 33, 42-43 (Bankr. S.D. Ohio 2008) (failure to record does not invalidate mortgage under Ohio law). [↑](#footnote-ref-30)
31. *See* U.C.C. § 9-308 cmt. 2 (“This Article uses the term ‘attach’ to describe the point at which the property becomes subject to a security interest.”); U.C.C. § 9-203(a) (“A security interest attaches to the collateral when it becomes enforceable against the debtor with respect to the collateral”). Since the 2000 revisions took effect, U.C.C. Article 9 has treated sales of promissory notes as secured transactions, treating the seller as a “debtor,” U.C.C. § 9-102(a)(28)(B), the buyer as a “secured party,” U.C.C. § 9-102(a)(72)(D), and the notes as “collateral.” U.C.C. § 9-102(a)(12)(B). [↑](#footnote-ref-31)
32. U.C.C. §9-203(g) (security interest in mortgage attaches when security interest in note attaches); U.C.C. § 9-203(b)(2)-(3) (buyer’s security interest in note attaches once buyer has given value and seller has authenticated security agreement describing the collateral). [↑](#footnote-ref-32)
33. *See, e.g.*, New York Attorney General ¶¶ 17, 47-53 (alleging that MERS, Inc. acts through over 20,000 “certifying officers” whom MERS, Inc. does not supervise). [↑](#footnote-ref-33)
34. *See* 11 U.S.C. § 544(a)(3). This possibility is explored in greater depth in our companion paper, *All in One Basket: The Bankruptcy Risks of a National Agent-Based Mortgage Recording System*, *supra* note 2. [↑](#footnote-ref-34)
35. In summer 2011, the authors surveyed the recording statutes of the “Top Ten” mortgage securitization states: the ten states with the largest numbers of mortgages securitized in private transactions. We found that statutes in nine of the top ten states require appear to make the assignee of a mortgage vulnerable to subsequent claimants if the mortgage assignment is not recorded. The states covered in the survey are California, Florida, Texas, Illinois, New York, Arizona, Georgia, Virginia, Michigan, and Maryland. Of these, Georgia is the only state that does not require recording. The survey is on file with the authors. The statutes we surveyed typically do not speak of recording mortgage assignments in so many words; more commonly, they require recording of instruments transferring interests in real property and separately recognize mortgages as real property interests. [↑](#footnote-ref-35)
36. *See* U.C.C. 9-309(4) (buyer’s security interest in promissory note is perfected as soon as it attaches); *id.* § 9-308(e) (buyer’s security interest in the mortgage is perfected as soon as the security interest in the note is perfected). [↑](#footnote-ref-36)
37. U.C.C. 9-308 cmt. 2 (“’Perfected’ means that the security interest has attached and the secured part has taken all the steps required by this Article. …. [I]n general, after perfection the secured party is protected against creditors and transferees of the debtor and in particular, against any representative of creditors in insolvency proceedings instituted by or against the debtor.”). [↑](#footnote-ref-37)
38. *See* Ibanez v. U.S. Bank Nat’l Ass’n, 941 N.E.2d 40, 53 (Mass. 2011) (party seeking judicial declaration of clear title after nonjudicial foreclose must show chain of assignments of mortgage, although assignments do not have to be recorded); *see also* 2011 Hawaii Laws Act 48 (S.B. 651) (requiring party seeking nonjudicial foreclosure to provide borrower with copies of “the original mortgage agreement, and copies of any subsequent agreements and assignments,” and “the promissory note signed by the mortgagor and any endorsements and allonges on the note”). Bills expressly requiring foreclosing parties to demonstrate a chain of recorded mortgage assignments have been introduced in Massachusetts, *see* Bill H.1219 (2011) § 3, and Arizona, *see* 2011 Arizona Senate Bill No. 1259, § 1 (2011), although the Arizona bill apparently was killed in committee. [↑](#footnote-ref-38)
39. Or Rev. Stats. § 86.735 (requiring recorded chain of assignments); Mich. Comp. Laws § 600.3204(3) (requiring “record chain of title” for nonjudicial foreclosure); Minn. Stat. § 580.02(3) (requiring that mortgage “be recorded and, if it has been assigned, that all assignments thereof have been recorded” for foreclosure by advertisement); Calif. Civil Code §2932.5 (requiring recorded assignment in order for an assignee to exercise a power of sale “given to a mortgagee, or other encumbrancer”). Some California state courts have held that Section 2932.5 applies only to true mortgages, and not to deeds of trust, on the theory that a deed of trust reposes the power of sale in the trustee and not the lender. *See* Calvo v. HSBC Bank USA, Inc., 199 Cal. App. 4th 118 (2011), *review denied* Jan. 4, 2012; Stockwell v. Barnum, 7 Cal. App. 413 (1908). A bankruptcy court’s decision that that Section 2932.5 *does* apply to deeds of trust was reversed by the district court. *See In re* Salazar, 444 B.R. 814, 820-24 (Bankr. S.D. Cal. 2011), *rev’d*, 2012 WL 896214 (S.D. Cal. March 15, 2012). [↑](#footnote-ref-39)
40. *See* Residential Funding Co. v. Saurman, 805 N.W.2d 183 (Mich. 2011); Jackson v. MERS, Inc., 770 N.W.2d 487 (Minn. 2009) (use of MERS satisfies state requirement that “all assignments” of a mortgage be recorded in order to foreclose). [↑](#footnote-ref-40)
41. *See* Hooker v. Northwest Trustee Servs., Inc., Civ. No. 10-3111-PA, 2011 WL 2119103, at \*3-\*4 (D. Or. May 25, 2011) (tracking on MERS is not a substitute for recording mortgage assignments as required by Oregon law); Burgett v. Mortgage Elec. Reg. Sys., Inc., No. 09-6244-HO, 2010 WL 4282105 (D. Or. Oct. 20, 2010), at \*3 (mortgage assignments must be recorded as a condition for nonjudicial foreclosure; rejecting use of MERS); Richard v. Deutsche Bank Nat’l Trust Co., CIV. 09-123-AC, 2011 WL 2669084 (D. Or. May 12, 2011) (nonjudicial foreclosure improper where MERS was used instead of recorded assignments: “[W]here all assignments have not been recorded, nonjudicial foreclosure is not permitted”). The District Court reached the same conclusion as this magistrate’s report and recommendation, but expressly declined to decide whether the magistrate’s findings about recording were correct. *See Richard*, 2011 WL 2650735 (D. Or. July 6, 2011). [↑](#footnote-ref-41)
42. U.C.C. §9-607(b). [↑](#footnote-ref-42)
43. *See* Deutsche Bank Nat’l Trust Co. v. Francis, 926 N.Y.S.2d 343 (N.Y. Sup. Ct. 2011) (requiring that party seeking to foreclose prove “ownership of the mortgage” and finding proof lacking where no assignment of mortgage from MERS to foreclosing party was recorded and foreclosing party did not possess mortgage or note); *In re* Foreclosure Cases, 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007) (dismissing foreclosure cases for lack of standing where party attempting to foreclosure could not prove it was the holder and owner of note and mortgage); *In re* Foreclosure Cases, 2007 U.S. Dist. LEXIS 90812 (S.D. Ohio Nov. 27, 2007) (foreclosing party’s failure to produce evidence of legal or equitable assignment of mortgages raised question as to its standing to proceed in federal court). [↑](#footnote-ref-43)
44. The industry appears to have assumed that mortgage promissory notes typically are negotiable, *see* Whitman, although this is contested, *see* Levitin Credit Slips. A similar situation can arise when a party seeks to lift the automatic bankruptcy stay to foreclose and the bankruptcy court requires proof of standing. *See In re* Mims 438 B.R. 52, 56 (Bankr. S.D.N.Y. 2010); *In re* Lippold, 457 B.R. 293 (Bankr. S.D.N.Y. 2011). [↑](#footnote-ref-44)
45. *See* U.C.C. § 3-301 (listing classes of persons entitled to enforce instruments: holders, nonholders in possession, and persons not in possession entitled to enforce pursuant to §3-309). A person in possession of an instrument is a “holder” if the instrument is payable to bearer or to the possessor. U.C.C. § 1-203(1)(b) If an instrument is not in the possession of the original payee and is not endorsed, it will not be “payable” to the possessor, so the possessor will not be a holder. A nonholder may be able to enforce an instrument if it is a transferee. U.C.C. §3-203. A person not in possession can enforce the note only if the person lost possession of the note and could have enforced it at the time of the loss. U.C.C. §3-309(a). [↑](#footnote-ref-45)
46. U.C.C. §3-203(a)-(b). [↑](#footnote-ref-46)
47. *See* PEB, *supra* note 25, at 6, 7. [↑](#footnote-ref-47)
48. *See* Dale A. Whitman, *How Negotiability Has Fouled up the Secondary Mortgage Market, and What to Do About It*, 37 Pepp. L. Rev. 737, 758 (2010) (“While delivery of the note might seem to be a simple matter of compliance, experience during the past several years has shown that, probably in countless thousands of cases, promissory notes were never delivered to market investors or securitizers, and, in many cases, cannot presently b e located at all.”). [↑](#footnote-ref-48)
49. Article 9’s provisions about the mortgage following the note apply not just when the note is sold, but also when it is given as security for a loan. In fact, the 2000 revisions treat note sales and security transactions the same in general, a treatment that has attracted some criticism. *See* Thomas E. Plank, *Assignment of Receivables Under Article 9: Structural Incoherence and Wasteful Filing*, 68 Ohio St. L.J. 231, 235-37 (2007) [↑](#footnote-ref-49)
50. Permanent Editorial Board, *supra* note 26, at 8 (“U.C.C. Section 9-203(g) explicitly provides that the mortgage follows the note.”). Although we generally agree with the PEB’s parsing of the U.C.C.’s language, we cannot help noting that the provision is not quite as transparent as the PEB’s comment would suggest. Section 9-203(g) does not contain the words “the mortgage follows the note.” Instead, it reads in its entirety: “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.” [↑](#footnote-ref-50)
51. Article 9’s rules for sales of promissory notes are the ones that are relevant for this analysis. Article 9 does provide for immediate and automatic perfection of security interests in payment rights other than those embodied in promissory notes, such as payment intangibles and accounts. *See* U.C.C. § 9-309(2) (assigned accounts and payment intangibles); *id*. § 9-309(3) (sold payment intangibles). Indeed, mere assignment without consideration, rather than sale, of payment intangibles and accounts may be sufficient to create perfected security interests in them. Section 9-309(2) provides for perfection upon attachment of a security interest in “an assignment of accounts or payment intangibles,” but Section 9-203 provides that a security interest attaches “to collateral” when “value has been given.” U.C.C. § 9-203(a) & (b)(1). Moreover, Section 9-102(a)(12) defines “collateral” as, *inter alia*, “accounts, chattel paper, payment intangibles, and promissory notes that have been *sold*” (emphasis added). Exactly how Article 9 works when “accounts” and “payment intangibles” are assigned without being sold is unclear from this text. However, the obligation to pay in a typical mortgage transaction seems fairly clearly to fall outside the U.C.C.’s definition of a “payment intangible,” *see* U.C.C. § 9-102(a)(61) (“payment intangible” is a subset of “general intangible”); *id*. § 9-102(a)(42)(“general intangible” excludes “instruments”); *id*. § 9-102(a)(47)(“instrument” includes “any writing that evidences the right to the payment of an obligation”). Because the lender’s right to be paid in a residential mortgage transaction typically is evidenced by a note that evidences the right to payment, no “payment intangible” would be involved or an “account.” *See* U.C.C. § 9-109(a)(2) (“Account” excludes “rights to payment … evidenced by an instrument.”). Thus, the rules for promissory notes, rather than those for payment intangibles or accounts, are the ones that are relevant. [↑](#footnote-ref-51)
52. The mortgage could follow the note automatically if the note is transferred by some means other than an Article 9 sale, such as a negotiation of the note under Article 3 of the UCC, but the argument that the mortgage follows the note is weaker in that case. [↑](#footnote-ref-52)
53. For example, negotiable promissory notes could be transferred under Article 3 by transfer of possession and endorsement. Non-negotiable notes could be transferred by documents of assignment. Neither approach is necessarily a “sale.” As explained below, a sale requires an exchange of the note for value, which may not have occurred in “paper transfers.” [↑](#footnote-ref-53)
54. *See* U.C.C. § 1-204(4). The U.C.C. also provides for three other ways of giving value – extending credit, settling a claim, or accepting as delivery under a *preexisting* contract for purchase – that do not seem relevant here. *See* U.C.C. § 1-204(1)-(3). [↑](#footnote-ref-54)
55. Interview with SEC Staff, Jan. 20, 2012 (interview notes on file with authors). [↑](#footnote-ref-55)
56. In many cases, agreements simply reported a blank for the purchase price. Although the SEC provides a procedure for protecting confidential information, that procedure requires a legend of some kind indicating that information has been redacted. SEC Staff Interview, *supra* note 53. We did not encounter any such legends in the agreements. [↑](#footnote-ref-56)
57. A “shelf” is a group of deals covered by a single “shelf” registration statement. It is reasonable to think that deals from the same shelf are likely to be more similar to one another than deals from different shelves. [↑](#footnote-ref-57)
58. The U.C.C. defines “value” for Article 9 as including “any consideration sufficient to support a simple contract.” U.C.C. § 1-204(4). The question whether recitation of nominal consideration, such as $10 for mortgages worth hundreds of millions of dollars, supports a contract has long bedeviled contract law. The *Restatement (Second) of Contracts* casts the issue in terms of sham consideration: The recitation of nominal consideration cannot transform a promise to make a gift into a contract. Restatement (Second) of Contracts § 71 (1981). The same principle would suggest that an assignment of mortgages cannot be transformed into a sale by reciting nominal consideration. [↑](#footnote-ref-58)
59. *See, e.g.*, Ernst & Young, Financial Reporting Developments: Transfers and Servicing of Financial Assets, Accounting Standards Codification 860 68 (depicting “cash” flowing back through two-step securitization structure from depositor to sponsor). [↑](#footnote-ref-59)
60. *See, e.g.,* Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 Harv. L. Rev. 917 (1974) (tracing evolution away from “substantive doctrine of consideration which allowed the jury to take into account not only whether there was consideration, but also whether it was adequate, before awarding damages.”). [↑](#footnote-ref-60)
61. *See, e.g*.*,* Peter A. Linzer, A Contracts Anthology 271 (2d ed. 1995) (“Bargain held sway as the crux of contract formation during the “classical” period (roughly 1870 to World War II), and it still plays a basic role, particularly in carefully negotiated business dealings.”). [↑](#footnote-ref-61)
62. *See., e.g.*, Restatement (Second) of Contracts § 71(1)-(2) (“To constitute consideration, a performance or a return promise must be bargained for. A performance or a return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”); John Edward Murray,Jr., Murray on Contracts 237 (5th ed. 2011) (“There is no doubt that all courts would consider the bargained-for exchange element essential.”); Joseph A. Perillo & Helen Hadjiyannakis Bender, 2 Corbin on Contracts § 5.1, at 6 (rev. ed. 1995) (“Current usage, no doubt influenced by both Restatements of Contracts, has restricted the term [consideration] to its narrow meaning of bargained-for exchange, ….”) [↑](#footnote-ref-62)
63. *See, e.g*., Restatement (Second) of Contracts §90. [↑](#footnote-ref-63)
64. *See, e.g.,* Murray, *supra* note 59, at 270-71. Whether promises to make gifts to charitable institutions generally are an exception to this proposition is matter of debate. *Id.*at 271-73. [↑](#footnote-ref-64)
65. *Id.* at 255. [↑](#footnote-ref-65)
66. *See* Whitney v. Stearns, 16 Me. 394, 397 (1839); *see also* 2 William Blackstone, Commentaries on the Laws of England 440 (5th ed. 1773) (“[I]n case of leases, always reserving a rent, though it be but a peppercorn [such] … considerations will, in the eyes of the law, convert the gift … into a contract.”). [↑](#footnote-ref-66)
67. E. Allan Farnsworth, Contracts §2.11, at 72 (4th ed. 2004). [↑](#footnote-ref-67)
68. *See* Restatement (Second) of Contracts § 79 cmt. d (“Disparity in value, with or without other circumstances, sometimes indicates that the purported consideration was not in fact bargained for but was a mere formality or pretense. Such a sham or ‘nominal’ consideration does not satisfy the requirement of § 71.)” Section 71 defines “consideration.” *See also id.* Illo. 5 (payment of one cent not consideration for promise to pay $600 in three yearly installments of $200 each). *See* Arthur Linton Corbin, Corbin on Contracts: One Volume Edition § 118, at 176 (1952) (reporting that according to Holmes and the first Restatement of Contracts, consideration need not be the “sole” or “prevailing” inducement for the promise, but must “be enough of an inducement that it is bargained for.”); Corbin, *supra* note 61, at 189-90 (1952) (“The requirement of a sufficient consideration for a promise is not satisfied by a pretense that there is a consideration when in fact there is none. … One dollar given or promised is a sufficient consideration except for a promise of a larger amount of money. But it is not a sufficient consideration where there is no dollar given or promised.”). [↑](#footnote-ref-68)
69. *See* Joseph M. Perillo, Calamari and Perillo on Contracts § 4.6 159 (2009). Perillo recognizes that “[t]he majority of courts have held that it may be shown that the consideration has not been paid and that no other consideration has been given.” *Id.* at 158. [↑](#footnote-ref-69)
70. Restatement (Second) of Contracts § 87(1)(a). [↑](#footnote-ref-70)
71. *See* Restatement (Second) of Contracts § 87 cmt. c; John Edward Murray, Jr., Murray on Contracts § 62[B][4], at 268-69 (5th ed. 2011). [↑](#footnote-ref-71)
72. Restatement (Second) of Contracts § 87 cmt. c. [↑](#footnote-ref-72)
73. *See* Joseph Siprut, *The Peppercorn Reconsidered: Why a Contract to Sell Blackacre for Nominal Consideration Is Not Binding, But Should Be*, 97 Nw. L. Rev. 1809, 1824-25 (2003). [↑](#footnote-ref-73)
74. To be sure, a court might determine that the consideration given in the mortgage securitization transactions we reviewed was not the recited consideration of $10 or a subset of the mortgage cash flows, but instead was supplied by the surrounding business context of the transaction: The sponsor wanted to accomplish the transaction, and the depositor’s assistance in doing so supplied the consideration. Such a broad focus is inconsistent with the formalistic nature of mortgage securitization transactions more generally; for example, bankruptcy remoteness opinions apparently rely on the *separateness* of the sponsor-depositor and depositor-trust transfers. [↑](#footnote-ref-74)
75. For a sampling of relatively recent scholarship fitting this description, *see* Nicholas C. Dranias, *Consideration as Contract: A Secular Natural Law of Contracts*, 12 Tex. Rev. L. & Pol. 267, 326-27 (2008) (proposing to protect autonomy by “returning consideration to its central role in rendering promises morally enforceable”); David Gamage & Allon Kedem, *Commodification and Contract Formation: Placing the Consideration Doctrine on Sounder Foundations*. 73 U. Chi. L. Rev. 1299, 1367 (2006) (proposing reformulation of consideration doctrine to provide “a superior method for determining which promises parties actually desire to have enforced”); Daniel Markovits, *Contract and Collaboration,* 113 Yale L.J. 1417, 1482-83 (2004) (justifying the institution of contract in general, and the doctrine of consideration, in terms of collaboration between contract parties, and observing, “Bargains are in their nature wanted by, and invoke the intentions of, all participants”); Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 Cal. L. Rev. 821 (1997) (arguing that many “gratuitous” promises, such as promises to make one-sided contract modifications or hold offers open, should be enforced, but that simple promises to make gifts motivated by affection should not be enforced); Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 Loy. L.A. L. Rev. 713, 845 (1995) (evaluating consideration doctrine in terms of the desirability of enforcing gratuitous promises and concluding that consideration should not be a necessary condition for presumptive enforceability). Peter Benson, who understands the exchange of promises that satisfy mutual consideration as the transfer of property rights in the promised performances, concludes that “[b]ecause the entitlement is framed as an aspect of the transfer, it can only be between the parties and not as against third parties.” Peter Benson, *The Idea of Consideration*, 61 U. Toronto L.J. 241 (2011). [↑](#footnote-ref-75)
76. Indeed, the consideration doctrine has done much more than decide “which promises should be enforced” for a long time. “Consideration sufficient to support a simple contract” has been one form of “value” in commercial law for a long time, and many aspects of various transactions turn on whether “value,” so defined, was given. For example, giving “value” historically has been a prerequisite for attachment of a purchase money security interest. It would be worthwhile to explore whether the scholarly discussion of consideration doctrine could be usefully expanded in taking this into account. [↑](#footnote-ref-76)
77. See Fuller, *Consideration and Form* (identifying evidentiary, cautionary, and channeling functions of consideration doctrine). [↑](#footnote-ref-77)
78. *See* John Patrick Hunt et al., *supra* note 4. [↑](#footnote-ref-78)
79. *See* Jason H.P. Kravitt et al., Securitization of Financial Assets, § 15.04[A], at 16-157 (“[W]hether the transferee, as owner of the note acquires all rights of the mortgagee without having to record an assignment of the mortgage, is not entirely clear. In addition, there are reasons why recordation of the mortgage may be wise in order for the transferee to obtain the greatest possible rights in the mortgage and in the other ancillary loan documents …)”. [↑](#footnote-ref-79)
80. Julian B. McDonnell & James Charles Smith, Secured transactions Under the U.C.C. § 16.09 (2011). [↑](#footnote-ref-80)
81. *See, e.g.*, Alvin C. Harrell, *Impact of Revised UCC Article 9 on Sales and Security Interests Involving Promissory Notes and Payment Intangibles*, 55 Cons. Fin. L.Q.R. 144, 148 (2001) (“There is … some inevitable interplay (and potential for conflict) between the claims of the holder of a negotiable instrument under UCC Articles 3 and 9, and potentially competing claims under a recorded assignment of the mortgage pursuant to real property law.”). [↑](#footnote-ref-81)
82. The “different worlds” phrase apparently first appeared in Jan Z. Krasnowiecki, J. Gregg Miller & Lloyd R. Ziff, *The Kennedy Mortgage Co. Bankruptcy: New Light Shed on the Position of Mortgage Warehousing Banks*, 56 Am. Bankr. L.J. 325, 334 (1982). [↑](#footnote-ref-82)
83. Krasnowiecki et al., *supra* note 74, at 334. [↑](#footnote-ref-83)
84. 278 B.R. 653 (Bankr. M.D. Ga. 2001). [↑](#footnote-ref-84)
85. 278 B.R. at 662. [↑](#footnote-ref-85)
86. *Id.*. The court in *SGE* relied heavily on In re *Kennedy Mortgage Co*., 17 B.R. 957 (Bankr. D.N.J. 1982), which was also the basis of Krasnowiecki's article. *See supra* note . [↑](#footnote-ref-86)
87. 743 F.2d 413 (6th Cir. 1984). [↑](#footnote-ref-87)
88. 743 F.2d at 416 (emphasis in original). [↑](#footnote-ref-88)
89. 743 F.2d at 416-17. *See also* *In re* Bristol Assocs., 505 F.2d 1056 (3d Cir. 1974); Rucker v. State Exch. Bank, 355 So. 2d 171 (Fla. Dist. Ct. App. 1978). [↑](#footnote-ref-89)
90. *See* Julian B. McDonnell, *Is Revised Article 9 a Little Greedy?*, 104 Com. L.J. 241, 241-42 (1999) (“The U.C.C. specialists devoutly believe in secured credit. With appropriate fanfare, they have introduced changes designed to make it easier for financers to create and perfect security interests in the many different contexts in which secured financing is used … It is as though U.C.C. specialists identified with secured creditors as the Clients, the Good Guys …“). [↑](#footnote-ref-90)
91. *See, e.g.*, McDonnell & Smith, *supra* note 72, § 16.09. [↑](#footnote-ref-91)
92. U.C.C. § 9-109, Official Comment 7. [↑](#footnote-ref-92)
93. U.C.C. § 9-102(3) Official Comment 4 (original). [↑](#footnote-ref-93)
94. *Id*. [↑](#footnote-ref-94)
95. *Id*. [↑](#footnote-ref-95)
96. Our research on the ten states with the largest numbers of mortgages securitized in private-label transactions indicates that at most two states, Florida and Maryland, amended their real property statutes to recognize the primacy of the UCC's priority rules as to mortgage assignments. The results of our survey of state mortgage law are on file with the authors. Both amendments used the phrase “security interest in a mortgage.” A Westlaw search in the STAT-ALL database on this phrase on July 27, 2011 did not locate any additional states that had changed their recording statutes. [↑](#footnote-ref-96)
97. U.C.C. § 1-103 cmt. 3. [↑](#footnote-ref-97)
98. U.C.C. § 1-103(a)(1). [↑](#footnote-ref-98)
99. U.C.C. § 1-103(a)(2). [↑](#footnote-ref-99)
100. *See, e.g.*, Robert M. Lawless & Adam J. Levitin, *Comments on Draft PEB Report*, at 7 n.11 (May 27, 2011) (arguing that it is “implausible” that state legislators intended to upset long-standing state real property law in revising Article 9). [↑](#footnote-ref-100)
101. U.C.C. § 1-103 cmt. 3. [↑](#footnote-ref-101)
102. *But see* Committee on Legal Opinions of the American Bar Ass’n, Comments on Draft PEB Report, at 2 (May 31, 2011) (questioning whether Revised Article 9 “would be effective to change the requirements of real estate recording statutes without making express reference to such statutes” and asserting that “[u]nder many states’ statutory construction rules (e.g., Washington State), passage of a statute may not automatically have the effect of amending or reversing contrary statutory provisions without expressly referring to the supplemental or superseded statutes.”). [↑](#footnote-ref-102)
103. The example presumes that the failure to record mortgage assignments is relevant under applicable state law. [↑](#footnote-ref-103)
104. *See, e.g.,*Restatement (Third) of Restitution & Unjust Enrichment (2010) § 68 cmt. h (“[T]he law seeks to deny protection to purchasers (such as donees) who have not changed position, …”). Note that the Restatement treats a donee as a “purchaser,” but not a “purchaser for value.” *Id.* § 66 cmt. c. [↑](#footnote-ref-104)
105. *See, e.g.*, Restatement (Third) of Restitution & Unjust Enrichment (2010) § 68(1) (“Except as otherwise provided by statute, a purchaser gives value for rights if they are acquired (a) in exchange for present value, excluding nominal consideration; ….”). [↑](#footnote-ref-105)
106. *See* 14 Richard R. Powell & Michael Allan Wolf, Powell on Real Property§ 82.02[2][a], at 82-55 (“While [nominal sums or “love and affection”] *may* be adequate to support a contract, they are not adequate to constitute value under the recording acts”); 14 Richard R. Powell & Michael Allan Wolf, Powell on Real Property§ 82.01[2][b], at 82-10; South Carolina Tax Comm’n v. Belk, 225 S.E.2d 177, 180 (S.C. 1976) (no purchase for value when corporation’s sole owner paid corporation $5 for 700-acre tract of land); Horton v. Kyburz, 346 P.2d 399, 403 (Cal. 1959) (“mere nominal consideration” does not “satisfy the requirement that a valuable consideration must be paid” under the recording laws;” recording laws “protect those … who invest some substantial sum in reliance” on their belief that they are acquiring good title); Alexander v. O’Neil, 267 P.2d 730, 735 (Ariz. 1954) (“The law is … well settled that a nominal consideration does not constitute a valuable consideration within the meaning of the recording statute”); Melendrez v. D & I Investment Co., 26 Cal. Rptr. 2d 413, 425 (Cal. Ct. App. 2005) (objective of recording laws is to protect purchasers who have “invested substantial sums” in good faith). *Compare* Cheatham v. Gregory, 313 S.E.2d 368 (Va. 1984) ($400 payment for 2.5 acres of land in 1973 was “valuable consideration” making the buyer a bona fide purchaser; Virginia law does not require “fair and adequate” consideration). *See also* Restatement (Third) of Restitution & Unjust Enrichment (2010) § 68 Illo. 13 (even if $10 consideration recited in deed and not given is sufficient to support enforceability of a promise, it is inadequate to constitute reciting party as bona fide purchaser). [↑](#footnote-ref-106)
107. Restatement (Third) of Restitution & Unjust Enrichment (2010) § 66. [↑](#footnote-ref-107)
108. Restatement (Third) of Restitution & Unjust Enrichment (2010) § 68(1)(a) (emphasis added). The *Restatement* also recognizes that value is given by undertaking an obligation of future performance or taking additional security for an antecedent debt. *Id.* §68 cmts. b, g. Neither case is obviously applicable to the transactions we reviewed. [↑](#footnote-ref-108)
109. *See* Christopher L. Peterson, *Two Faces: Demystifying the Mortgage Electronic Registration System’s Land Title Theory*, 53 Wm. & Mary L. Rev. 111, 155-60 (2011). [↑](#footnote-ref-109)
110. There appears to be scholarly disagreement over how useful public records have been in this respect. *Compare* Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System,* 78 U. Cin. L. Rev. 1359, 1400-04 (2010) (arguing that MERS threatens to render a useful public mortgage recording system useless), *with* Dale A. Whitman, e-mail to “propertyprof” listserv, March 15, 2012 (“For at least 25 years, and probably much longer, no one could reliably determine who held a mortgage loan by making a title search.”). *See also* MERSCORP, Inc. v. Romaine, 861 N.E.2d 81, 88 (N.Y. 2007) (Kaye, J., dissenting in part) (“[T]he MERS system will render the public record useless”) (cited in Peterson, *supra* note 101). [↑](#footnote-ref-110)
111. *See* Q&A Video, Berkeley Center for Law Business and the Economy Symposium: The Foreclosure Crisis, April 13, 2012, available at http://www.law.berkeley.edu/13033.htm. [↑](#footnote-ref-111)
112. Specifically, plaintiffs have faced contractual requirements that they act through the securitization trustee in bringing claims for breach of representations and warranties, and that the trustee act only if requested by a specified percentage of investors in the deal. Would-be plaintiffs have been unable to assemble the required fraction of investors. [↑](#footnote-ref-112)
113. Large-scale attacks on securitization practices generally have drawn this kind of concern. For example, FHFA’s lawsuit based on $200 billion was attacked on this basis. [↑](#footnote-ref-113)
114. This issue is discussed in greater in depth in *All in One Basket*, *supra* note 2. [↑](#footnote-ref-114)