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May 27, 2011

Ms. Deanne Dissinger
Associate Deputy Director
American Law Institute

VIA ELECTRONIC MAIL

RE: Draft Report of the Permanent Editorial Board for the Uniform Commercial Code –
UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership
and Enforcement of those Notes and the Mortgages Securing Them

Dear Ms. Dissinger:

In response to John Sebert's Memorandum of March 29, 2011, the American College of Commercial Finance Lawyers, Inc. wishes to offer the comments below on the Draft Report of the PEB on the UCC Rules Applicable to the Assignment of Mortgage Notes and to the Ownership and Enforcement of Those Notes and the Mortgages Securing Them ("Draft Report"). The College would therefore be appreciative if you would forward this letter to the members of the Permanent Editorial Board ("PEB").

Background

The American College of Commercial Finance Lawyers, Inc. (ACCFL or the College) is a professional organization dedicated to promoting the field of commercial finance law through

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education, legislative reform and the recognition of distinguished practitioners, jurists and academics. The College offers a venue to promote and recognize outstanding achievement and advances in the field of commercial finance law. ACCFL was founded in 1991 by a group of lawyers active in the Commercial Financial Services Committee (now the Commercial Finance Committee) of the Business Law Section of the American Bar Association with the following objectives:

- to promote high standards of professional and ethical responsibility in the practice of commercial finance law;

- to make available to the Bar, and to the general public, authoritative educational materials in the field of commercial finance law;

- to speak upon matters of interest and importance to commercial finance law;

- to practice before legislative, administrative and regulatory bodies, and elsewhere; and

- to promote improvement of skills in the field of commercial finance law by recognizing lawyers for excellence in writing and excellence in program presentations.

Of particular interest to the College is the recognition of those individuals who have not only attained a high degree of skill in the field of law, but who have helped others in the field by sharing their knowledge.

The views expressed in this letter are solely those of the College. This letter reflects a consensus of the Board of Regents, as the governing body of the College, as well as certain other Fellows of the College. It does not, however, necessarily reflect the views of individual Fellows, officers or Regents of the College or their firms, organizations, or associations on any particular point.

General Agreement

First and foremost, the College wishes to express its general agreement with the Draft Report. Specifically, the College agrees that there is need for the PEB to address the issues that the Draft Report discusses and the College also agrees with the statements of law made in the Draft Report. Nothing said below is intended to detract from this general endorsement.

Suggestions

On page 5, the Draft Report illustrates a situation in which a nonholder in possession has the right to enforce the note. In connection with this discussion, the Draft Report states that the nonholder in possession may find it “more difficult” to prove its right to enforce because to do so the nonholder in possession must “demonstrate the purpose of the delivery of the note to it.” The College agrees with this statement but thinks it would be useful if the Draft Report added an illustration or example, perhaps in a footnote, of proof that would suffice. The example would explain that documents evidencing an assignment of servicing power to the person in possession should be sufficient, even if those documents do not evidence who has beneficial ownership of the note. This point is implied in the discussion on pages 6-8, but should be made more expressly. In order to assure that such an illustration is supported by the language of the UCC itself, perhaps some other concepts need to be imported into the illustration. It may be useful to emphasize that, under 3-308(b), the person in possession must “prove[] entitlement to enforce the instrument under Section 3-301.” This means that the person must prove both that it acquired the note by delivery and that that the delivery was for the stated purpose. The UCC states the burden of proof. According to 3-103(a), “prove” means to meet the “burden of establishing” as defined in 1-201, i.e., the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence. With that background, a useful illustration may be something like the following:

If, for example, a servicer is able to bear its burden of proof in establishing that (i) it has acquired possession of the note by delivery from the payee, another holder or any other person with the right to enforce,¹ and (ii) the stated purpose of delivery of the note was to enable the servicer to enforce it, then the servicer will be able to enforce the note, even though it is not a holder or owner of the note. Although dependent on applicable state law outside the UCC, if the servicer is able to produce an admissible and enforceable agreement between the transferor of the note and the servicer, such as a servicing agreement, which clearly states that the transferor is delivering the note to the servicer, *inter alia*, to enable the servicer to enforce the note, the trier of fact could determine that the servicer has borne its burden of proof in establishing the requisite facts that would entitle the servicer to enforce the note.

On page 8, the Draft Report states that “the law is clear [that] . . . the sale of a mortgage note

¹ The negative implication of 3-203(b) is that the transferor who makes the delivery must be the payee, another holder or another person with the right to enforce.

not accompanied by a separate conveyance of the mortgage securing the note does not result in a separation of the mortgage from the note.” The College fully agrees with this statement but suggests that the clarity of the point would be further evidenced if the Draft Report noted, possibly in footnote 38, that Article 9 does indeed govern this point. Specifically, the Draft Report should note that while Article 9 generally excludes from its scope the creation or transfer of a lien on real property, § 9-109(d)(11)(A) has an exception that facilitates the rule of § 9-203(g), as to the transfer, and 9-308(e), as to its perfection without recording in the real estate records. *See also* § 9-109(b) & cmt. 7, 9-203(g) & cmt. 9 and 9-308(e) & cmt. 6.

The phrasing of Question Four seems only partially related to the discussion under it. Question Four may be asking the wrong question. It asks whether a person may take steps. The obvious answer is “yes.” The real question is, what steps may the person take? The Report begins to answer the question with two negative statements (emphasis added):

In some states, a party without a recorded interest in a mortgage *may not* enforce the mortgage non-judicially.

In such states, even though the buyer of a mortgage note (or a creditor to whom a security interest in the note has been granted to secure an obligation) automatically obtains corresponding rights in the mortgage, this may be *insufficient* as a matter of applicable real estate law to enable that buyer or secured creditor to enforce the mortgage upon default of the maker if the buyer or secured creditor does not have a recordable assignment.

It might be useful for the Report to recast these statements more positively. Consider the following:

As explained above,[FN 39] the buyer of a mortgage note (or a creditor to whom a security interest in the note has been granted to secure an obligation) automatically obtains corresponding rights in the mortgage. These rights may be sufficient under the applicable real estate law to enable that buyer or secured creditor to enforce the mortgage upon default of the maker, either judicially, non-judicially, or both. For example, when the buyer or secured creditor is the person entitled to enforce the mortgage note under Article 3 of the UCC and the applicable real estate law enables the person entitled to enforce a mortgage note also to enforce the mortgage, then the buyer or secured creditor would be entitled to enforce the mortgage. The law of some states, however, may limit enforcement of a mortgage to the mortgagee of record. If the buyer or secured creditor has not previously acquired a recordable

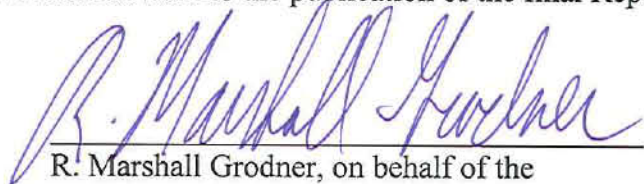
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assignment from the seller or debtor, it may, of course, attempt to obtain such an assignment at the time it seeks to enforce the mortgage; however, such an attempt may be unsuccessful. [FN 40]

Article 9 of the UCC provides an alternative mechanism by which a buyer or secured creditor may become entitled to enforce a mortgage non-judicially in those states that limit enforcement to the mortgagee of record and allow for non-judicial enforcement. UCC Section 9-607(b) provides that

Note that this indicative formulation (1) adds an example of when Article 3 may indirectly determine who is entitled to enforce the mortgage, (2) makes the point that an assignee may well have obtained a recordable assignment at the time it acquired its interest in the note and mortgage, and (3) moves to the second paragraph the point about non-judicial foreclosure not being available in every state.

We would like to thank those members of the PEB who worked extremely hard in the preparation of the Draft Report, and we look forward to the publication of the final Report.



R. Marshall Grodner, on behalf of the
Liaison Committee to the Permanent Editorial Board,
American College of Commercial Finance Lawyers, Inc.
R. Marshall Grodner, Member
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RMG/grm

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