

In the *Sciarratta* case, the borrower sued for wrongful foreclosure on the ground that the entity conducting the foreclosure sale "had no interest in either the underlying debt or the subject property." 247 CA4th at 555.

There is no question that *Yvanova* holds that a borrower has standing to bring such an action. The difficulty here lies in the proof the borrower adduced. She proved that Chase Bank, the corporate successor of original lender (WaMu), had executed and recorded two conflicting assignments of the deed of trust—the first to Deutsche Bank in April 2009 and the second to Bank of America about seven months later. Bank of America instigated the foreclosure; **the borrower argued that its assignment of the deed of trust must have been void because the assignor had previously assigned the same deed of trust to a different party.**

The court was fully convinced by the borrower's argument, but it is wrong. The reason is that, for purposes of determining who can enforce the note or foreclose the deed of trust, the assignments described above are completely irrelevant. **What is significant for this purpose is not who holds an assignment of the deed of trust, but rather who has the right to enforce the note.** As the *Yvanova* court put it, "The borrower owes money not to the world at large but to a particular person or institution, and only the person or institution entitled to payment may enforce the debt by foreclosing on the security." 62 C4th at 938.

The parties and the court seem to have completely missed the fact that **THE RIGHT TO ENFORCE THE DEBT ISN'T DETERMINED BY ASSIGNMENTS OF THE DEED OF TRUST.** Again, to quote *Yvanova*, "The deed of trust, moreover, is inseparable from the note it secures, and follows it even without a separate assignment." 62 C4th at 927. Thus, the deed of trust follows the note, not the other way around.

How then is the right to enforce the note transferred? Since this was a residential loan, it almost certainly was written on the standard Fannie Mae/Freddie Mac residential note form. Virtually every case treating the matter has held that this note is a negotiable instrument. (There isn't space here to go into the details of that analysis, but see, e.g., *HSBC Bank USA, N.A. v Gouda* (NJ Super Ct App Div, Dec. 17, 2010, No. A-1983–09T2) 2010 NJ Super Unpub Lexis 3029 (unpublished opinion); *Thornley v U.S. Bank, N.A.* (Tenn Ct App, June 30, 2015, No. M2014–00813-COA-R3-CV) 2015 Tenn App Lexis 521.)

If the note was negotiable, transfers are governed by UCC Article 3. Again, omitting lots of detail in the interest of brevity, **under Article 3, transfers of the**

right of enforcement of negotiable notes are accomplished not by a document assigning them, but by delivery of the original note itself. (This generally works fine for nonnegotiable notes as well, but they can also be transferred in some states by a separate document of assignment.) Thus, in *Sciarratta*, what the parties and the court should have been concerned with is whether Bank of America, as the foreclosing party, had possession of the note. *All the talk about void assignments is irrelevant because the deed of trust will follow the note, with or without an assignment.*

The *Sciarratta* court may be excused to some extent by the misdirection that arises from the *Yvanova* opinion. After carefully explaining, as quoted above, that foreclosure can be done only by the party that has the right to enforce the note, the *Yvanova* opinion goes on to talk about deed of trust assignments as if they had something to do with the right of enforcement of the note—even though they don't.

This isn't rocket science; plenty of other courts have gotten it right. See, e.g., *Thomas v Wells Fargo Bank, N.A.* (Ala Civ App 2012) 116 So3d 226; *CitiMortgage, Inc. v Gaudio* (Conn App 2013) 68 A3d 101; *Rose v Wells Fargo Bank, N.A.* (DC 2013) 73 A3d 1047; *Wells Fargo Bank, N.A. v Morcom* (Fla App 2013) 125 So3d 320; *U.S. Bank, N.A. v McConnell* (Kan App 2013) 305 P3d 1; *Deutsche Bank Nat'l Trust Co. v Matthews* (Okla 2012) 273 P3d 43; *Dow Family, LLC v PHH Mortgage Corp.* (Wis App 2013) 838 NW2d 119. The California courts have lagged behind and continue to grope in semi-darkness on this subject. Some serious work remains to be done.—*Dale A. Whitman*

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