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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP Nos. AZ-10-1055-MkKiJu
) AZ-10-1056-MkKiJu
HOWARD RICHARD VEAL, JR., and) (Related Appeals)*
SHELLI AYESHA VEAL,)
) Bk. No. 09-14808
Debtors.)

HOWARD RICHARD VEAL, JR.;
SHELLI AYESHA VEAL,
Appellants,

v.

O P I N I O N

AMERICAN HOME MORTGAGE SERVICING,)
INC.; WELLS FARGO BANK, N.A., as)
Trustee for Option One Mortgage)
Loan Trust 2006-3 Asset-Backed)
Certificates, Series 2006-3, and)
its successor and/or assignees,)
Appellees.)

Argued and Submitted on June 18, 2010
at Phoenix, Arizona

Filed - June 10, 2011

Appeal From The United States Bankruptcy Court
for the District of Arizona

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

Appearances: Trucly D. Pham of John Joseph Volin, P.C., argued
for Appellants Howard Richard Veal, Jr. and Shelli

*While not formally consolidated, these two related appeals
were heard at the same time, and were considered together. This
single disposition applies to both appeals, and the clerk is
directed to file a copy of this disposition in each appeal.

1 Ayesha Veal; and Kevin Hahn of Malcolm Cisneros
2 argued for Appellees American Home Mortgage
3 Servicing, Inc. and Wells Fargo Bank, N.A., as
4 Trustee for Option One Mortgage Loan Trust 2006-3
Asset-Backed Certificates, Series 2006-3, and its
successors and/or assignees.

5 Before: MARKELL, KIRSCHER and JURY, Bankruptcy Judges.

6
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* * * * *

1 **I. INTRODUCTION**

2 In the first of these two related appeals, debtors and
3 appellants Howard and Shelli Veal (the "Veals") challenge the
4 bankruptcy court's order granting relief from the automatic stay
5 under § 362(d)¹ to appellee Wells Fargo Bank, N.A., as Trustee
6 for Option One Mortgage Loan Trust 2006-3, Asset-Backed
7 Certificates Series 2006-3 ("Wells Fargo").² In the second
8 appeal, the Veals challenge the bankruptcy court's order
9 overruling their objection to a proof of claim filed by appellee
10 American Home Mortgage Servicing, Inc. ("AHMSI"). This proof of
11 claim relates to the same obligation that is the focus of Wells
12 Fargo's motion for relief from the automatic stay.

13 In each appeal, the issue presented is whether the appellee
14 established its standing as a real party in interest to pursue
15 the relief it requested. With respect to Wells Fargo's request
16 for relief from the automatic stay, we hold that a party has
17 standing to seek relief from the automatic stay if it has a
18 property interest in, or is entitled to enforce or pursue
19 remedies related to, the secured obligation that forms the basis
20 of its motion. With respect to AHMSI's proof of claim, we hold
21 that a party has standing to prosecute a proof of claim involving
22

23
24 ¹Unless specified otherwise, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
26 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, Rules 1001-9037, and all "Civil Rule" references are
to the Federal Rules of Civil Procedure.

27 ²The bankruptcy court had jurisdiction under 28 U.S.C.
28 §§ 1334 and 157(b) (2) (B) and (G), and we have jurisdiction under
28 U.S.C. § 158.

1 a negotiable promissory note secured by real property if, under
2 applicable law, it is a "person entitled to enforce the note" as
3 defined by the Uniform Commercial Code.

4 Applying these holdings, in the relief from stay appeal, we
5 determine that the record does not support the bankruptcy court's
6 finding that Wells Fargo had standing. We thus REVERSE the
7 bankruptcy court's relief from stay order. In AHMSI's claim
8 objection appeal, the bankruptcy court did not make findings
9 necessary to determine AHMSI's standing as a person entitled to
10 enforce the Veals' obligations, so we must VACATE the claim
11 objection order and REMAND for further proceedings.

12 **II. FACTS**

13 The Veals do not dispute that, in August 2006, Shelli Veal
14 executed a promissory note (the "Note") in favor of GSF Mortgage
15 Corporation ("GSF"). To secure her payment obligations under the
16 Note, Ms. Veal also executed a mortgage (the "Mortgage") in favor
17 of GSF covering certain real property located in Springfield,
18 Illinois (the "Property").

19 On June 29, 2009, the Veals filed a chapter 13 bankruptcy.
20 The Veals listed AHMSI on their Schedule D as a secured creditor.
21 This schedule, submitted under penalty of perjury, stated that
22 the Veals owed AHMSI \$150,586.92 (the "Veal Loan"), and that
23 AHMSI held security on the Property securing that indebtedness.
24 At no point did the Veals' schedules ever list the Veal Loan as
25 disputed. The Veals similarly referred to AHMSI as a secured
26 creditor in their chapter 13 plan and in their amended chapter 13
27 plan. At the time this appeal was submitted, the Veals had not
28 confirmed their plan.

1 A. *AHMSI's Proof of Claim and the Veals' Claim Objection*

2 On July 18, 2009, AHMSI filed a proof of secured claim. In
3 the proof of claim, AHMSI stated that it was filing the claim on
4 behalf of Wells Fargo as Wells Fargo's servicing agent.

5 In addition to an itemization of the claim amounts, AHMSI
6 attached the following documents to the proof of claim:

7 (1) a copy of the Note, showing an indorsement from GSF
8 to "Option One";

9 (2) a copy of the Mortgage;

10 (3) a copy of a recorded "Assignment of Mortgage"
11 assigning the Mortgage from GSF to Option One Mortgage
12 Corporation ("Option One"); and

13 (4) a letter dated May 15, 2008, signed by Jordan D.
14 Dorchuck as Executive Vice President and Chief Legal Officer
15 of AHMSI, addressed to "To Whom it May Concern" (the
16 "Dorchuck Letter").

17 On its face, the Dorchuck Letter states that AHMSI acquired
18 Option One's mortgage servicing business.

19 The Dorchuck Letter is just that; a letter, and nothing
20 more. Mr. Dorchuck does not declare that his statements are made
21 under penalty of perjury, nor does the document bear any other of
22 the traditional elements of admissible evidence. No basis was
23 laid for authenticating or otherwise admitting the Dorchuck
24 Letter into evidence at any of the hearings in this matter.
25 Indeed, the Veals objected to its consideration as evidence.³

26
27 ³The Veals stated in a memorandum filed with the bankruptcy
28 court that "[t]his [Dorchuck] letter is not admissible [sic]

(continued...)

1 On November 5, 2009, the Veals filed an objection to AHMSI's
2 proof of claim. Approximately a month later, the Veals filed a
3 memorandum of points and authorities in support of their claim
4 objection. Among other objections, the Veals contended that
5 AHMSI lacked standing. According to the Veals, AHMSI needed to
6 establish that it was authorized to act as servicing agent on
7 behalf of Wells Fargo, and that either AHMSI or Wells Fargo had
8 to be qualified as holders of the Note, within the meaning of
9 Arizona's version of the Uniform Commercial Code. The Veals
10 argued that the proof of claim exhibits did not establish any of
11 these necessary facts.⁴

12 On November 19, 2009, AHMSI filed its opposition to the
13 Veals' claim objection. The opposition contained no legal
14 argument and virtually no evidence. Almost a page long, the
15 opposition simply rehashed the contents of AHMSI's proof of
16 claim. AHMSI also attached to the opposition duplicate copies of
17 some of the same documents that it had previously attached to the
18 proof of claim, again without any apparent compliance with the
19 rules of evidence, as AHMSI provided no declaration
20 authenticating any of the documents attached thereto.

21
22
23

³(...continued)
24 evidence of anything." The bankruptcy court did not rule on this
25 objection.

26 ⁴The Veals also argued that there were several defects in
27 the chain of mortgage assignments between GSF and Wells Fargo,
28 but the Veals emphasized that the key defect was the failure to
establish that either AHMSI or Wells Fargo qualified as the
holder of the note.

1 *B. Wells Fargo's Relief from Stay Motion and the Veals'*
2 *Response*

3 Meanwhile, on October 21, 2009, Wells Fargo filed a motion
4 for relief from stay to enable it to commence foreclosure
5 proceedings against the Property. Wells Fargo alleged in the
6 motion that it was a secured creditor pursuant to a first
7 priority mortgage. None of the three exhibits attached to the
8 motion, however, directly supported this allegation: its first
9 exhibit was a copy of the same Mortgage that AHMSI attached to
10 its proof of claim; its second exhibit was an itemization of
11 postpetition amounts due; and its final exhibit was a copy of the
12 Veals' Schedules A and D. Wells Fargo submitted no other
13 documents with its motion. As a result, Wells Fargo presented no
14 evidence as to who possessed the Note and no evidence regarding
15 any property interest it held in the Note.

16 On November 5, 2009, the Veals responded to the relief from
17 stay motion. They argued that Wells Fargo lacked standing to
18 prosecute the relief from stay motion and that Wells Fargo was
19 not the real party in interest. The Veals also submitted no
20 evidence with their response; rather, they relied on the absence
21 of evidence submitted in support of the relief from stay motion.⁵

22
23 ⁵The Veals did refer the bankruptcy court to documents
24 available on the website of the Securities Exchange Commission
25 supposedly related to the alleged securitization of the Veal
26 Loan, but there is no indication in the record whether the
27 bankruptcy court actually looked at or considered these
28 documents.

 These documents, had they been properly authenticated, might
have filled some (but not all) of the gaps in the evidence. For
instance, the documents contained a Pooling and Serving Agreement
(continued...)

1 Wells Fargo did not file a written reply in support of its
2 relief from stay motion. It did, however, file two separate
3 papers, each entitled "Notice of Supplemental Exhibit." The
4 first notice, filed on November 10, 2009, attached a single
5 exhibit - a copy of the same Note that AHMSI had attached to its
6 proof of claim. The second notice, filed on February 1, 2010,
7 contained two exhibits: (a) a copy of the same assignment of
8 mortgage that AHMSI had attached to its proof of claim, and (b) a
9 copy of a subsequent assignment of mortgage, dated November 10,
10 2009 - after the date of filing of the relief from stay motion -
11 assigning the rights under the Mortgage from "Sand Canyon
12 Corporation formerly known as Option One Mortgage Corporation" to
13 Wells Fargo. Neither of these assignments were authenticated.

14 These assignments were important. They purported not only
15 to transfer the Mortgage to each named assignee, but also to
16 transfer other rights as well. The purported assignment from GSF
17 to Option One, for example, stated that it assigned not only the
18 Mortgage, but also "the note(s) and obligations therein described
19 and the money due and to become due thereon with interest, and
20
21

22 ⁵(...continued)
23 ("PSA") for a securitization trust. The PSA identifies and
24 appoints Option One as servicer for the trust assets and
25 identifies Wells Fargo as trustee of the trust. Further, the
26 schedules attached to the PSA appear to identify the Veal Loan as
27 one of the trust assets. Thus, the PSA, had it been properly
28 authenticated and admitted, would have tied both Option One and
Wells Fargo to the Veal Loan. The PSA did not, however, identify
AHMSI in any capacity, including its alleged role as successor
servicer or subservicer of the Veal Loan. The PSA is similarly
unhelpful as to the current holder of the Note.

1 all rights accrued or to accrue under such Mortgage.”⁶

2 The purported assignment from Option One to Wells Fargo was
3 different, however, and more limited. It purported to transfer
4 the following described mortgage, *securing the payment*
5 *of a certain promissory note(s) for the sum listed*
6 *below, together with all rights therein and thereto,*
7 *all liens created or secured thereby, all obligations*
8 *therein described, the money due and to become due*
9 *thereon with interest, and all rights accrued or to*
10 *accrue under such mortgage.*

11 Thus, unlike the assignment from GSF to Option One, the
12 purported assignment from Option One to Wells Fargo does not
13 contain language effecting an assignment of the Note. While the
14 Note is referred to, that reference serves only to identify the
15 Mortgage. Moreover, unlike the first assignment, the record is
16 devoid of any indorsement of the Note from Option One to Wells
17 Fargo. As a consequence, even had the second assignment been
18 considered as evidence, it would not have provided any proof of
19 the transfer of the Note to Wells Fargo. At most, it would have
20 been proof that only the Mortgage, and all associated rights
21 arising from it, had been assigned.⁷

22 ⁶This contractual assignment of the Note was superfluous
23 given the indorsement on the original note. See Uniform
24 Commercial Code § 3-204.

25 ⁷One might argue that the clauses in the assignment which
26 follow the italicized appositive phrase are broad enough to pick
27 up the Note, and thus effect a transfer of it. They do, after
28 all, purport to transfer “all rights therein and thereto, . . .
all obligations therein described, [and] the money due and to
become due thereon with interest.” But given the carve out of
the Note at the beginning of the sentence, the relative pronouns
“therein,” “thereto,” and “thereon” more naturally refer back to
the obligations contained in the Mortgage itself, such as the
obligation to insure the Property, and not to an external
obligation such as the Note. It would be odd indeed if, after

(continued...)

1 C. *Joint Hearing on the Claim Objection and the Relief*
2 *from Stay Motion*

3 After several continuances of each matter, on February 3,
4 2010, the bankruptcy court held a joint hearing on the Veals'
5 claim objection and Wells Fargo's relief from stay motion.
6 Neither party presented evidence at the hearing, and the court's
7 Local Rules prohibited them from presenting live testimony at
8 this initial hearing unless the court had ordered otherwise. See
9 Bankr. D. Ariz. R. 9014-2(a).⁸ Indeed, the bankruptcy court
10 referred to the hearing on the relief from stay motion as a
11 preliminary hearing, thereby indicating that a subsequent
12 evidentiary hearing would be set if necessary. See Bankr. D.
13 Ariz. R. 4001-1(i)(2).⁹

14 _____
15 ⁷(...continued)
16 referring to the Note but not explicitly making it the object of
17 the transfer (as the initial assignment from GSF did), the words
18 were made to curl back and pick up the Note just because the
19 Mortgage mentioned the Note among its many terms. Although the
20 clauses might be sufficiently vague to permit parol evidence to
21 clarify their intended meaning, no such evidence was offered or
22 requested.

23 ⁸Bankr. D. Ariz. R. 9014-2(a) provides:

24 **Hearings on Contested Matters**

25 (a) Initial Hearing without Live Testimony.
26 Pursuant to Bankruptcy Rule 9014(e), all hearings
27 scheduled on contested matters will be conducted
28 without live testimony except as otherwise ordered by
the court. If, at such hearing, the court determines
that there is a material factual dispute, the court
will schedule a continued hearing at which live
testimony will be admitted.

⁹Bankr. D. Ariz. R. 4001-1(i)(2) provides:

Automatic Stay - Relief From

(i) Procedure Upon Objection.

(continued...)

1 Both parties presented oral argument, after which the
2 bankruptcy court ruled from the bench. The bankruptcy court
3 overruled the Veals' claim objection and granted the relief from
4 stay motion. The court found that the documents presented
5 adequately reflected Wells Fargo's standing, and the court stated
6 that the issue of who qualified as holder of the note was
7 irrelevant. According to the bankruptcy court, "At minimum, they
8 [Wells Fargo] have demonstrated they are an assignee of the debt
9 and the mortgage has apparently been assigned to them."

10 Notwithstanding this statement, the bankruptcy court made no
11 findings regarding AHMSI's standing generally, or more
12 specifically regarding whether AHMSI had established that it was
13 Wells Fargo's authorized agent.

14 The Veals timely appealed both orders.

15 III. DISCUSSION

16 The Veals challenge Wells Fargo's standing to seek relief
17 from the stay and AHMSI's standing as a real party in interest
18 with respect to the proof of claim it filed. Standing is a legal
19 issue that we review de novo. Wedges/Ledges of Cal., Inc. v.
20 City of Phoenix, 24 F.3d 56, 61 (9th Cir. 1994); Kronemyer v. Am.
21 Contractors Indem. Co. (In re Kronemyer), 405 B.R. 915, 919 (9th
22

23 ⁹(...continued)

24 (2) Relief may be granted or denied at the
25 preliminary hearing based upon the affidavits,
26 declarations, and other supporting documentation
27 filed as part of the motion or objection if the
28 opposing party's affidavits, declarations and
supporting documentation fail to establish the
existence of a material issue of fact that
requires an evidentiary hearing.

1 Cir. BAP 2009).

2 A. *Standing in Mortgage Cases*

3 A federal court may exercise jurisdiction over a litigant
4 only when that litigant meets constitutional and prudential
5 standing requirements. Elk Grove Unified Sch. Dist. v. Newdow,
6 542 U.S. 1, 11 (2004). Standing is a “threshold question in
7 every federal case, determining the power of the court to
8 entertain the suit.” Warth v. Seldin, 422 U.S. 490, 498 (1975).
9 See also Arizona Christian Sch. Tuition Org. v. Winn, 131 S. Ct.
10 1436, 1442 (2011); City of Los Angeles v. County of Kern, 581
11 F.3d 841, 845 (9th Cir. 2009).

12 1. Constitutional Standing

13 Constitutional standing requires an injury in fact, which is
14 caused by or fairly traceable to some conduct or some statutory
15 prohibition, and which the requested relief will likely redress.
16 Winn, 131 S. Ct. at 1442; Sprint Commc’ns Co. v. APCC Servs.,
17 Inc., 554 U.S. 269, 273-74 (2008); United Food & Comm’l Workers
18 Union Local 751 v. Brown Grp., Inc., 517 U.S. 544, 551 (1996).

19 Both Wells Fargo and AHMSI satisfy the relatively minimum
20 requirements of constitutional standing: they each have shown
21 injury in fact, causation, and redressability. Injury in fact is
22 shown with respect to Wells Fargo by the automatic stay’s
23 prohibition on its right to exercise its alleged remedies against
24 the Veals, and with respect to AHMSI by the effect of claim
25 allowance procedures on its ability to receive a distribution
26 from the Veals’ estate. Causation exists by the simple fact that
27 neither Wells Fargo nor AHMSI may exercise their nonbankruptcy
28 remedies due to the existence of the automatic stay. Finally,

1 redressability exists in each case because the relief requested,
2 if appropriate, would address and remedy the claimed injury.

3 2. Prudential Standing

4 Even though Wells Fargo and AHMSI may meet the
5 constitutional minima for standing, this determination does not
6 end the inquiry. They must also show they have standing under
7 various prudential limitations on access to federal courts.
8 Prudential standing “embodies judicially self-imposed limits on
9 the exercise of federal jurisdiction.” Sprint, 554 U.S. at 289
10 (quoting Elk Grove, 542 U.S. at 11); County of Kern, 581 F.3d at
11 845.

12 In this case, one component of prudential standing is
13 particularly applicable. It is the doctrine that a plaintiff
14 must assert its own legal rights and may not assert the legal
15 rights of others. Sprint, 554 U.S. at 289; Warth, 422 U.S. at
16 499; Oregon v. Legal Servs. Corp., 552 F.3d 965, 971 (9th Cir.
17 2009).

18 Here, the Veals allege that neither Wells Fargo nor AHMSI
19 have shown they have any interest in the Note or any right to be
20 paid by the Veals. They seek to invoke prudential standing
21 principles which generally provide that a party without the legal
22 right, under applicable substantive law, to enforce an obligation
23 or seek a remedy with respect to it is not a real party in
24 interest. Doran v. 7-Eleven, Inc., 524 F.3d 1034, 1044 (9th Cir.
25 2008). If the Veals’ contention is correct as to AHMSI and Wells
26 Fargo, then both creditors failed to satisfy their prudential
27 standing burden.

1 3. Prudential Standing and the Real Party in Interest
2 Doctrine

3 This formulation of the prudential standing doctrine,
4 however, conflates somewhat with the real party in interest
5 doctrine found in Rule 7017.¹⁰ While at least one prominent
6 authority maintains that the third party standing doctrine and
7 the real party in interest requirement are legally distinct, 6A
8 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal
9 Practice and Procedure, Civil § 1542 (3d ed. 2010), another
10 authority succinctly summarizes the practical distinction:
11 “Generally, real parties in interest have standing, but not every
12 party who meets the standing requirements is a real party in
13 interest.” 4 Moore’s Federal Practice § 17.10[1], at p.17-15 (3d
14 ed. 2010) (footnotes omitted).

15 As a result, if neither Wells Fargo nor AHMSI is a real
16 party in interest, we need not parse the remaining differences
17 between standing and real party in interest status. We thus
18 concentrate on real party in interest status and whether Wells
19 Fargo or AHMSI met their burden of demonstrating that they
20
21
22

23 ¹⁰Rule 7017 incorporates Civil Rule 17, and is applicable
24 here through Rule 9014(c).

25 Some cases have suggested that Civil Rule 17(a), requiring
26 the “real party in interest” to prosecute federal civil
27 litigation in its own name, can effectuate the prudential
28 limitation on third-party standing. See, e.g., Dunmore v. United
States, 358 F.3d 1107, 1112 (9th Cir. 2004); In re Hayes, 393
B.R. 259, 267 (Bankr. D. Mass. 2008). However, whatever the
practical result of Civil Rule 17's application, the two remain
distinct legal requirements, as discussed below.

1 qualified as real parties in interest.¹¹

2 4. Real Party in Interest Status and Its Policies

3 Civil Rule 17(a)(1) starts simply: "An action must be
4 prosecuted in the name of the real party in interest." Although
5 the exact definition of a real party in interest may defy
6 articulation, its function and purpose are well understood. As
7 stated in the Advisory Committee Notes for Civil Rule 17,

8 In its origin the rule concerning the real party in
9 interest was permissive in purpose: it was designed to
10 allow an assignee to sue in his own name. That having
11 been accomplished, the modern function of the rule in
12 its negative aspect is simply to protect the defendant
against a subsequent action by the party actually
entitled to recover, and to insure generally that the
judgment will have its proper effect as res judicata.

13 Notes of Advisory Committee on 1966 Amendments to Rule 17. See
14 also U-Haul Int'l, Inc. v. Jartran, Inc., 793 F.2d 1034, 1039
15 (9th Cir. 1986) ("The modern function of the rule . . . is
16 simply to protect the defendant against a subsequent action by
17 the party actually entitled to recover, and to insure generally
18 that the judgment will have its proper effect as res judicata.")
19 (quoting Advisory Committee Notes to the 1966 amendment of Civil
20 Rule 17).

21 _____
22 ¹¹In all of its various aspects, the standing issue is an
23 inherently factual inquiry into the nature of the rights
24 asserted, see, e.g., Sprint, 554 U.S. at 271-73, and the party
25 asserting that it has standing bears the burden of proof to
26 establish its standing. Summers v. Earth Island Inst., 555 U.S.
488, ___, 129 S.Ct. 1142, 1149 (2009) (the movant "bears the
burden of showing that he has standing for each type of relief
sought"); Bennett v. Spear, 520 U.S. 154, 167-68 (1997); Hasso v.
27 Mozsgai (In re La Sierra Fin. Servs., Inc.), 290 B.R. 718, 726
28 (9th Cir. BAP 2002). These cases require that the movant bear
the burden of proving both constitutional and prudential
standing.

1 In this regard, most real party in interest inquiries focus
2 on whether the plaintiff or movant holds the rights he or she
3 seeks to redress. See Moore's, supra, § 17.10[1]. Was, for
4 example, the plaintiff a party to the contract sought to be
5 enforced? Did it have some other interest in the contract?

6 But in some cases, statutory or common law recognizes
7 relationships in which parties may sue in their own name for the
8 benefit of others. In these cases, real party in interest
9 doctrine potentially alters results: it allows these third
10 parties to sue in their own name on actions in which they may not
11 have the ultimate or direct personal stake in the matter. A
12 guardian, for example, may sue on behalf of his or her ward, even
13 though the recovery is solely the ward's. Civil Rule
14 17(a)(1)(C). A bailee may sue in its own name for damage to
15 goods entrusted to it, even though it does not own them. Civil
16 Rule 17(a)(1)(D). Even assignees for collection may, under
17 certain circumstances, sue in their own name on their assignor's
18 debt. See Sprint, 554 U.S. at 284 (dictum); Staggers v. Otto
19 Gerdau Co., 359 F.2d 292, 294 (2d Cir. 1966); Kilbourn v. Western
20 Sur. Co., 187 F.2d 567, 571-72 (10th Cir. 1951).

21 Real party in interest doctrine thus melds procedural and
22 substantive law; it ensures that the party bringing the action
23 owns or has rights that can be vindicated by proving the elements
24 of the claim for relief asserted. It also has another key
25 aspect, as the Advisory Committee Notes acknowledge: if the party
26 bringing the action loses on the merits, it ensures that the
27 person defending the action can preclude anyone from ever seeking
28 to vindicate, or collect on, that claim again.

1 instrument,¹⁵ Article 3 provides rules governing the payment of
2 the obligation represented by and reified in the Note.¹⁶

3 Article 3, however, deals primarily with payment obligations
4 surrounding a negotiable instrument, and the identification of
5 the proper party to be paid in order to satisfy and discharge the
6 obligations represented by that negotiable instrument. As will
7 be seen, Article 3 does not necessarily equate the proper person
8 to be paid with the person who owns the negotiable instrument.

10 ¹⁵See UCC § 3-102 ("This Article applies to negotiable
11 instruments."). The term "negotiable instrument" is defined in
12 UCC § 3-104(a) to mean:

13 an unconditional promise or order to pay a fixed amount
14 of money, with or without interest or other charges
15 described in the promise or order, if it:

16 (1) is payable to bearer or to order at the time
17 it is issued or first comes into possession of a
18 holder;

19 (2) is payable on demand or at a definite time;
20 and

21 (3) does not state any other undertaking or
22 instruction by the person promising or ordering payment
23 to do any act in addition to the payment of money, but
24 the promise or order may contain (i) an undertaking or
25 power to give, maintain, or protect collateral to
26 secure payment, (ii) an authorization or power to the
27 holder to confess judgment or realize on or dispose of
28 collateral, or (iii) a waiver of the benefit of any law
intended for the advantage or protection of an obligor.

¹⁶Article 3 carries forward and codifies venerable
commercial law rules developed over several centuries during
which negotiable instruments played a much different role in
commerce than they do today. As stated by Grant Gilmore, Article
3 is not unlike a "museum of antiquities – a treasure house
crammed full of ancient artifacts whose use and function have
long since been forgotten." Grant Gilmore, Formalism and the Law
of Negotiable Instruments, 13 Creighton L. Rev. 441, 461 (1979).
His following quotation is apt and often-repeated:
"codification . . . preserve[d] the past like a fly in amber".
Id.

1 Nor does it purport to govern completely the manner in which
2 those ownership interests are transferred. For the rules
3 governing those types of property rights, Article 9 provides the
4 substantive law.¹⁷ UCC § 9-109(a) (3) (Article 9 "applies to . .
5 . a sale of . . . promissory notes").¹⁸ Article 9 includes
6 rules, for example, governing the effect of the transfer of a
7 note on any security given for that note such as a mortgage or a
8 deed of trust.¹⁹ As a consequence, Article 9 must be consulted
9 to answer many questions as to who owns or has other property
10 interest in a promissory note. From this it follows that the
11 determination of who holds these property interests will inform
12 the inquiry as to who is a real party in interest in any action
13 involving that promissory note.

14 As a result, this opinion examines the relevant provisions
15

16 ¹⁷Unlike Article 3, Article 9 is a relatively recent
17 innovation which attempts, among other things, to regularize
18 nonpossessory financing. It was last completely revised in 1999,
19 although there are currently amendments to that version being
20 offered for adoption by the states.

21 ¹⁸UCC § 9-109(a) (3) states that Article 9 applies to any
22 sale of a "promissory note," which is defined in § 9-102(a) (65)
23 as "an instrument that evidences a promise to pay a monetary
24 obligation, [or] does not evidence an order to pay" In
25 turn, an "instrument" under Article 9 is defined as "a negotiable
instrument or any other writing that evidences a right to the
payment of a monetary obligation, is not itself a security
agreement or lease, and is of a type that in ordinary course of
business is transferred by delivery with any necessary
indorsement or assignment." UCC § 9-102(a) (47).

26 ¹⁹See UCC § 9-203(g) ("The attachment of a security interest
27 in a right to payment or performance secured by a security
28 interest or other lien on personal or real property is also
attachment of a security interest in the security interest,
mortgage, or other lien.").

1 of Article 3 and Article 9 as they apply to the Veals' Note and
2 Mortgage, as each Article may provide substantive law that shapes
3 the relevant real party in interest inquiry.

4 2. Article 3 of the UCC and the Concept of a "Person
5 Entitled to Enforce" a Note

6 Article 3 provides a comprehensive set of rules governing
7 the obligations of parties on the Note, including how to
8 determine who may enforce those obligations and to whom those
9 obligations are owed. See UCC § 3-102; Miller & Harrell, supra,
10 § 1.02. Contrary to popular opinion, these rules do not
11 absolutely require physical possession of a negotiable instrument
12 in order to enforce its terms. Rather, Article 3 states that the
13 ability to enforce a particular note - a concept central to our
14 standing inquiry - is held by the "person entitled to enforce"
15 the note. UCC § 3-301.

16 A thorough understanding of the concept of a "person
17 entitled to enforce" is key to sorting out the relative rights
18 and obligations of the various parties to a mortgage transaction.
19 In particular, the person obligated on the note - a "maker" in
20 the argot of Article 3²⁰ - must pay the obligation represented by
21 the note to the "person entitled to enforce" it. UCC § 3-412.
22 Further, if a maker pays a "person entitled to enforce" the note,
23 the maker's obligations are discharged to the extent of the
24 amount paid. UCC § 3-602(a). Put another way, if a maker makes
25 a payment to a "person entitled to enforce," the obligation is
26 satisfied on a dollar for dollar basis, and the maker never has

27
28 ²⁰See UCC § 3-103(a)(7).

1 to pay that amount again. Id. See also UCC § 3-602(c).

2 If, however, the maker pays someone other than a "person
3 entitled to enforce" - even if that person physically possesses
4 the note the maker signed - the payment generally has no effect
5 on the obligations under the note.²¹ The maker still owes the
6 money to the "person entitled to enforce," Miller & Harrell,
7 supra, ¶ 6.03[6][b][ii], and, at best, has only an action in
8 restitution to recover the mistaken payment. See UCC § 3-418(b).

9 At least two ways exist in which a person can acquire
10 "person entitled to enforce" status.²² To enforce a note under
11 the method most commonly employed, the person must be the
12 "holder" of the note. UCC § 3-301(i).

13 The concept of a "holder" is set out in detail in UCC
14 § 1-201(b)(21)(A), providing that a person is a holder if the
15 person possesses the note and either (i) the note has been made
16 payable to the person who has it in his possession²³ or (ii) the

17
18 ²¹The 2002 Amendments to Article 3 provided a limited
19 exception for notes transferred without notice to the maker. UCC
20 § 3-602(b). See 2 James J. White & Robert S. Summers, Uniform
Commercial Code § 16-12, at 146 (5th ed. 2008).

21 ²²Another method is uncommon and does not require possession
22 of the note. Under UCC § 3-301(iii), a person may be a "person
23 entitled to enforce the note" if, among other things, "the person
24 cannot reasonably obtain possession of the instrument because the
25 instrument was destroyed, its whereabouts cannot be determined,
26 or it is in the wrongful possession of an unknown person or a
27 person that cannot be found or is not amenable to service of
28 process." UCC § 3-309(a)(3). The burden of showing these
factual predicates is on the person attempting to enforce the
negotiable instrument. Here, however, the Note is not alleged to
be lost or stolen.

²³The person in possession of the note must be identified as
(continued...)

1 note is payable to the bearer of the note. This determination
2 requires physical examination not only of the face of the note
3 but also of any indorsements.²⁴

4 The Veals contend that only a holder may enforce the Note,
5 or seek relief from the automatic stay to enforce it. Their
6 analysis is incomplete, for Article 3 provides another way in
7 which an entity can become a "person entitled to enforce" a
8 negotiable instrument. This third way involves the person
9 attaining the status of a "nonholder in possession of the [note]
10 who has the rights of a holder." UCC § 3-301(ii). This
11 definition, however, seems at odds with itself; one can
12 legitimately ask how a person who is not the holder of a note
13 possesses the rights of a holder?

14
15 ²³(...continued)

16 such. This concept of identification begins with the issuance of
17 a note to a payee. To be covered by Article 3, the note must be
18 negotiable, which generally means the note must have "words of
19 negotiability;" that is, the note must be initially payable to
20 the stated payee, "or order." The two words "or order" have come
21 to mean that the person identified for purposes of "holder"
22 status generally needs to be identical with the last listed
23 indorser on the note (assuming the note has not become a bearer
24 instrument).

25 So if A makes a note payable to "B or order," and B indorses
26 the note to C, C is a holder if C is in possession. If D steals
27 the note from C, D is not the holder, even if he forges C's
28 indorsement. The process of transfer is called "negotiation,"
which UCC § 3-201(a) defines as "a transfer of possession,
whether voluntary or involuntary, of an instrument by a person
other than the issuer to a person who thereby becomes its
holder."

²⁴This would include checking to see if any purported
allonge was sufficiently affixed as required by UCC § 3-204(a).
See In re Weisband, 427 B.R. 13, 19-20 (Bankr. D. Ariz. 2010); In
re Shapoval, 441 B.R. 392, 394 (Bankr. D. Mass. 2010).

1 The answer to this question involves a combination of
2 history and practicality. Non-UCC law can bestow this type of
3 status; such law may, for example, recognize various classes of
4 successors in interest such as subrogees or administrators of
5 decedent's estates. See Comment to UCC § 3-301. More commonly,
6 however, a person becomes a nonholder in possession if the
7 physical delivery of the note to that person constitutes a
8 "transfer" but not a "negotiation." Compare UCC § 3-201
9 (definition of negotiation) with UCC § 3-203(a) (definition of
10 transfer). Under the UCC, a "transfer" of a negotiable
11 instrument "vests in the transferee any right of the transferor
12 to enforce the instrument." UCC § 3-203(b). As a result, if a
13 holder transfers the note to another person by a process not
14 involving an Article 3 negotiation - such as a sale of notes in
15 bulk without individual indorsement of each note - that other
16 person (the transferee) obtains from the holder the right to
17 enforce the note even if no negotiation takes place and, thus,
18 the transferee does not become an Article 3 "holder." See
19 Comment 1 to UCC § 3-203.

20 This places a great deal of weight on the UCC's definition
21 of a "transfer." UCC § 3-203(a) states that a note is
22 transferred "when it is delivered by a person other than its
23 issuer for the purpose of giving to the person receiving delivery
24 the right to enforce the instrument." As a consequence, while
25 the failure to obtain the indorsement of the payee or other
26 holder does not prevent a person in possession of the note from
27 being the "person entitled to enforce" the note, it does raise
28 the stakes. Without holder status and the attendant presumption

1 of a right to enforce, the possessor of the note must demonstrate
2 both the fact of the delivery and the purpose of the delivery of
3 the note to the transferee in order to qualify as the "person
4 entitled to enforce."

5 3. Article 9 and Transfers of Ownership and Other
6 Interests in a Promissory Note

7 The "transfer" concept is not only bound up in the
8 enforcement of the maker's obligation to pay the debt evidenced
9 by the note, but also in the ownership of those rights. Put
10 another way, one can be an owner of a note without being a
11 "person entitled to enforce."²⁵ This distinction may not be an
12 easy one to draw, but it is one the UCC clearly embraces. While
13 in many cases the owner of a note and the person entitled to
14 enforce it are one and the same, this is not always the case, and
15 those cases are precisely the cases in which Civil Rule 17 would
16 require joinder of the real party in interest.

17
18 ²⁵The converse is also true: one can be a "person entitled
19 to enforce" without having any ownership interest in the
20 negotiable instrument, such as when a thief swipes and absconds
21 with a bearer instrument. See Comment 1 to UCC § 3-301. The
22 ability of a thief to legitimately obtain payment on bearer
23 instruments, such as bearer bonds, has factored in literature and
24 film focusing on the dark side of humanity. See, e.g., F. Scott
25 Fitzgerald, The Great Gatsby ch. 9 (1925) (part of Gatsby's
26 downfall connected with the theft or falsification of bearer
27 bonds); Die Hard (Twentieth Century Fox Film Corp. 1988) (thieves
28 masquerading as international terrorists seek to steal a highly
valuable trove of bearer bonds); Beverly Hills Cop (Paramount
Pictures 1984) (friend of protagonist is murdered for stealing
bearer bonds from a drug operation's kingpin).

Bearer bonds in the United States (but not internationally)
were essentially eliminated in 1982 by the imposition of high tax
penalties on their issuance. See Tax Equity and Fiscal
Responsibility Act of 1982, Pub. L. 97-248, § 47109, 96 Stat. 596
(codified at 26 U.S.C. § 4701(a)).

1 This distinction further recognizes that the rules that
2 determine who is entitled to enforce a note are concerned
3 primarily with the maker of the note. They are designed to
4 provide for the maker a relatively simple way of determining to
5 whom the obligation is owed and, thus, whom the maker must pay in
6 order to avoid defaulting on the obligation. UCC § 3-602(a),
7 (c). By contrast, the rules concerning transfer of ownership and
8 other interests in a note identify who, among competing
9 claimants, is entitled to the note's economic value (that is, the
10 value of the maker's²⁶ promise to pay). Under established rules,
11 the maker should be indifferent as to who owns or has an interest
12 in the note so long as it does not affect the maker's ability to
13 make payments on the note. Or, to put this statement in the
14 context of this case, the Veals should not care who actually owns
15 the Note - and it is thus irrelevant whether the Note has been
16 fractionalized or securitized - so long as they do know who they
17 should pay. Returning to the patois of Article 3, so long as
18 they know the identity of the "person entitled to enforce" the
19 Note, the Veals should be content.²⁷

20 Initially, a note is owned by the payee to whom it was

21
22 ²⁶As well as any indorser's obligation to pay. See UCC § 3-
415(a).

23
24 ²⁷To re-emphasize the oft-overlooked point: Article 3 is
25 sufficiently flexible to allow a single identified person to be
26 both the "person entitled to enforce" the note, and an agent for
27 all those who may have ownership interests in a note. This point
28 reflects the view that so long as the maker's obligation is
discharged by payment, the maker should be indifferent as to
whether the "person entitled to enforce" the note satisfies his
or her obligations, under the law of agency, to the ultimate
owners of the note.

1 issued. If that payee seeks either to use the note as collateral
2 or sell the note outright to a third party in a manner not within
3 Article 3,²⁸ Article 9 of the UCC governs that sale or loan
4 transaction and determines whether the purchaser of the note or
5 creditor of the payee obtains a property interest in the note.
6 See UCC § 9-109(a) (3).

7 With very few exceptions, the same rules that apply to
8 transactions in which a payment right serves as collateral for an
9 obligation also apply to transactions in which a payment right is
10 sold outright. See UCC § 9-203. Rather than contain two
11 parallel sets of rules - one for transactions in which payment
12 rights are collateral and the other for sales of payment rights -
13 Article 9 uses nomenclature conventions to apply one set of rules
14 to both types of transactions. This is accomplished primarily by
15 defining the term "security interest," found in UCC
16 § 1-201(b) (35),²⁹ to include not only an interest in property
17 that secures an obligation, but also the right of a purchaser of
18 a payment right such as a promissory note. Cf. UCC § 1-
19 201(b) (35) (The term "security interest" also "includes any
20 interest of a consignor and a buyer of accounts, chattel paper, a
21 payment intangible, or a promissory note in a transaction that is
22 subject to Article 9.").

23 Here, neither AHMSI nor Wells Fargo was the initial payee of
24 the Note. Due to this fact, each was required to demonstrate

26 ²⁸That is, it transfers a note in a manner not contemplated
by Article 3.

27 ²⁹Article 9 explicitly incorporates definitions found in
28 Article 1. UCC § 9-102(c).

1 facts sufficient to establish its respective standing. See note
2 11, supra. In this regard, facts that would be sufficient for
3 AHMSI are different from those that would be sufficient for Wells
4 Fargo. As to Wells Fargo, it had to show it had a colorable
5 claim to receive payment pursuant to the Note, which it could
6 accomplish either by showing it was a "person entitled to
7 enforce" the Note under Article 3, or by showing that it had some
8 ownership or other property interest in the Note. As to AHMSI,
9 as it sought a distribution from the estate in payment of the
10 Note, it had to show that it was a "person entitled to enforce"
11 the Note, or was the agent of such a person.

12 *C. Wells Fargo's Lack of Standing to Seek Relief from the*
13 *Automatic Stay*

14 Wells Fargo sought relief from the automatic stay to
15 foreclose on the Property. The automatic stay, however, prevents
16 "all proceedings relating to a foreclosure sale." Mann v. ADI
17 Invs., Inc. (In re Mann), 907 F.2d 923, 926-27 (9th Cir. 1990).
18 As a result, to take any action other than filing a proof of
19 claim, Wells Fargo had to seek relief from the stay.

20 1. Standing to Seek Relief from Automatic Stay

21 Under § 362(d), the bankruptcy court may grant relief from
22 the automatic stay "[o]n request of a party in interest." The
23 Bankruptcy Code does not define the term "party in interest."
24 "Status as 'a party in interest' under § 362(d) 'must be
25 determined on a case-by-case basis, with reference to the
26 interest asserted and how [that] interest is affected by the
27 automatic stay.'" Kronemyer, 405 B.R. at 919 (quoting In re
28 Woodberry, 383 B.R. 373, 378 (Bankr. D.S.C. 2008)).

1 Our prior precedent is appropriately lenient with respect to
2 standing for stay relief. This Panel said in Kronemyer that
3 “[c]reditors may obtain relief from the stay if their interests
4 would be harmed by continuance of the stay.” Kronemyer, 405 B.R.
5 at 921. Collier uses a similarly expansive statement: “Any party
6 affected by the stay should be entitled to seek relief.”
7 3 Collier on Bankruptcy ¶ 362.07[2] (Henry Sommer and Alan
8 Resnick, eds., 16th ed. 2011).

9 This test expands or contracts to match the interests sought
10 to be asserted. A servicer, for example, might be delegated all
11 its principal’s rights, or it could simply be asserting its
12 separate right to be paid out of the mortgage payments. Cf.
13 CWCapital Asset Mgmt., LLC v. Chicago Props., LLC, 610 F.3d 497,
14 500-01 (7th Cir. 2010) (“The servicer is much like an assignee
15 for collection, who must render to the assignor the money
16 collected by the assignee’s suit on his behalf (minus the
17 assignee’s fee) but can sue in his own name without violating
18 Rule 17(a).”); In re Hayes, 393 B.R. 259, 267 (Bankr. D. Mass.
19 2008) (“[S]ervicers are parties in interest with standing by
20 virtue of their pecuniary interest in collecting payments under
21 the terms of the notes and mortgages they service.”); In re
22 Woodberry, 383 B.R. 373, 379 (Bankr. D.S.C. 2008). In either
23 event, the servicer has standing to request some relief from the
24 automatic stay.

25 But Kronemyer does not precisely address the discrete issue
26 presented here: whether Wells Fargo’s interests are “harmed by
27 the continuance of the stay.” The answer to that question
28 requires examination of both the nature of stay litigation

1 generally and the specific nature of the nonbankruptcy rights
2 Wells Fargo seeks to vindicate.

3 Relief from stay proceedings such as the one brought by
4 Wells Fargo are primarily procedural; they determine whether
5 there are sufficient countervailing equities to release an
6 individual creditor from the collective stay. One consequence of
7 this broad inquiry is that a creditor's claim or security is not
8 finally determined in the relief from stay proceeding. Johnson
9 v. Righetti (In re Johnson), 756 F.2d 738, 740-41 (9th Cir. 1985)
10 ("Hearings on relief from the automatic stay are thus handled in
11 a summary fashion. The validity of the claim or contract
12 underlying the claim is not litigated during the hearing.");
13 Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 33 (1st Cir.
14 1994) ("We find that a hearing on a motion for relief from stay
15 is merely a summary proceeding of limited effect . . ."); First
16 Fed. Bank v. Robbins (In re Robbins), 310 B.R. 626, 631 (9th Cir.
17 BAP 2004).

18 As a result, stay relief litigation has very limited claim
19 preclusion effect, in part because the ultimate resolution of the
20 parties' rights are often reserved for proceedings under the
21 organic law governing the parties' specific transaction or
22 occurrence. Stay relief involving a mortgage, for example, is
23 often followed by proceedings in state court or actions under
24 nonjudicial foreclosure statutes to finally and definitively
25 establish the lender's and the debtor's rights.³⁰ In such

26
27 ³⁰An obvious exception to this paradigm occurs when the
28 bankruptcy court has already sustained a claim objection to a
(continued...)

1 circumstances, the concern of real party in interest
2 jurisprudence for avoiding double payment is quite reduced.

3 Given the limited nature of the relief obtained through a
4 motion for relief from the stay, the expedited hearing schedule
5 § 362(e) provides, and because final adjudication of the parties'
6 rights and liabilities is yet to occur, this Panel has held that
7 a party seeking stay relief need only establish that it has a
8 colorable claim to enforce a right against property of the
9 estate. United States v. Gould (In re Gould), 401 B.R. 415, 425
10 n.14 (9th Cir. BAP 2009); Biggs v. Stovin (In re Luz Int'l,
11 Ltd.), 219 B.R. 837, 842 (9th Cir. BAP 1998). See also Grella,
12 42 F.3d at 32.

13 2. Wells Fargo's Argument Regarding Standing

14 Although expansive, this principle is not without limits.
15 In granting Wells Fargo's motion for relief from stay, the
16 bankruptcy court found that Wells Fargo had established a
17 "colorable claim" based on two of Wells Fargo's exhibits: (1) a
18 copy of an assignment of mortgage from GSF (the original lender)
19 to Option One (the "GSF Assignment"); and (2) a copy of an
20 assignment of mortgage from Sand Canyon Corporation formerly
21 known as Option One Mortgage Corporation to Wells Fargo (the
22 "Sand Canyon Assignment"). According to the bankruptcy court,
23 whoever possessed or held rights in the Note was irrelevant.

24
25 ³⁰ (...continued)
26 movant's proof of claim. In such cases, the doctrine that
27 security depends on the debt it secures controls, and with the
28 debt disallowed, the movant normally cannot pursue the real
property security outside of bankruptcy. See 4 Richard R.
Powell, Powell on Real Property, § 37.27[2] (2000).

1 A bankruptcy court's determinations regarding stay relief
2 are reviewed for an abuse of discretion, Kronemyer, 405 B.R. at
3 919. The abuse of discretion test involves two distinct
4 determinations: first, whether the court applied the correct
5 legal standard; and second, whether the factual findings
6 supporting the legal analysis were clearly erroneous. United
7 States v. Hinkson, 585 F.3d 1247, 1261-63 (9th Cir. 2009) (en
8 banc).

9 If the court failed to apply the correct legal standard,
10 then it has "necessarily abuse[d] its discretion." Cooter & Gell
11 v. Hartmarx Corp., 496 U.S. 384, 405 (1990). This prong of the
12 determination is considered de novo. Hinkson, 585 F.3d at 1261-
13 62. If the court applied the correct legal standard, the inquiry
14 then moves to whether the factual findings made were clearly
15 erroneous. Id. at 1262. Under Hinkson, factual findings are
16 clearly erroneous if they are "illogical, implausible, or without
17 support in inferences that may be drawn from the record." Id. at
18 1263. See also Rule 8013.

19 Against these high standards, the Veals pursue two different
20 arguments. Initially, they argue that the GSF Assignment is
21 invalid because it bears an undated notarial acknowledgment.
22 They also argue that the Sand Canyon Assignment is invalid
23 because it was not executed until after the Veals filed for
24 bankruptcy and after Wells Fargo filed its relief from stay
25 motion. See In re Maisel, 378 B.R. 19, 21-22 (Bankr. D. Mass.
26 2007) (denying relief from stay because movant's standing was
27 dependent on an assignment of mortgage dated after the filing of
28 the relief from stay motion).

1 3. Wells Fargo's Lack of a Connection to the Note

2 The Veals' first argument would seem to require a factual
3 investigation of the circumstances under which the Mortgage and
4 the subsequent assignments were signed. But we need not remand
5 for that determination. The Veals have a second argument, and it
6 has merit. They assert that, as a matter of law, the bankruptcy
7 court applied an incorrect legal principle in determining that
8 Wells Fargo had an ownership or other property interest in the
9 Note. The Veals argue that had the bankruptcy court applied the
10 correct test, it would have found that Wells Fargo had not
11 established such an interest, and thus its asserted rights under
12 the Mortgage did not constitute a colorable claim to enforce a
13 right against property of the estate.

14 The key to this argument is that, under the common law
15 generally, the transfer of a mortgage without the transfer of the
16 obligation it secures renders the mortgage ineffective and
17 unenforceable in the hands of the transferee. Restatement
18 (Third) of Property (Mortgages) § 5.4 cmt. e (1997) ("in general
19 a mortgage is unenforceable if it is held by one who has no right
20 to enforce the secured obligation").³¹ As stated in a leading
21 real property treatise:

22 When a note is split from a deed of trust "the note
23 becomes, as a practical matter, unsecured." Restatement
24 (Third) of Property (Mortgage) § 5.4 cmt. a (1997).
25 Additionally, if the deed of trust was assigned without
the note, then the assignee, "having no interest in the
underlying debt or obligation, has a worthless piece of
paper."

26
27 ³¹It does not, of course, affect the obligations which have
28 been secured; only the rights to security for those obligations
are affected.

1 4 Richard R. Powell, Powell on Real Property, § 37.27[2] (2000).
2 Cf. In re Foreclosure Cases, 521 F. Supp. 2d 650, 653 (S.D. Ohio
3 2007) (finding that one who did not acquire the note which the
4 mortgage secured is not entitled to enforce the lien of the
5 mortgage); In re Mims, 438 B.R. 52, 56 (Bankr. S.D.N.Y. 2010)
6 ("Under New York law 'foreclosure of a mortgage may not be
7 brought by one who has no title to it and absent transfer of the
8 debt, the assignment of the mortgage is a nullity.'") (quoting
9 Kluge v. Fugazy, 536 N.Y.S.2d 92, 93 (N.Y. App. Div. 1988)).

10 In this case, Illinois law governs the issues related to the
11 Mortgage's enforcement,³² and Illinois follows this rule.

12 Illinois . . . courts treat a mortgage as incident or
13 accessory to the debt, and, an assignment of a mortgage
14 without the note as a nullity. In order for the
15 Illinois . . . courts to enforce a mortgage assignment,
16 the assignor must assign the underlying debt secured by
17 the mortgage debt. It is axiomatic that any attempt to
18 assign the mortgage without transfer of the debt will
19 not pass the mortgagee's interest to the assignee.

17 Yorke v. Citibank (In re BNT Terminals, Inc.), 125 B.R. 963, 970
18 (Bankr. N.D. Ill. 1990) (citing Krueger v. Dorr, 161 N.E.2d 433,
19

20
21 ³²The Mortgage contains a choice of law provision, which
22 states that the law of the state where the real property is
23 located applies to "this Security Instrument." The Property is
24 located in Illinois, so this clause would require application of
25 Illinois law to issues concerning enforcement of the Mortgage.

26 This choice of law provision is consistent with the common
27 law. See Restatement (Second) of Conflict of Laws § 229. As
28 will be seen later, the Note is governed by the law of Arizona.
See note 41, infra. The application of different choice of law
rules to the Note and the Mortgage is consistent with the common
law: "Issues which do not affect any interest in the land,
although they do relate to the foreclosure, are determined, on
the other hand, by the law which governs the debt for which the
mortgage was given." Id.

1 440-41 (Ill. App. Ct. 1959); Moore v. Lewis, 366 N.E.2d 594, 599
2 (Ill. App. Ct. 1977); Commercial Prods. Corp. v. Briegel, 242
3 N.E.2d 317, 321 (Ill. App. Ct. 1968); and Lundy v. Messer, 167
4 N.E.2d 278, 279 (Ill. App. Ct. 1960)).

5 This rule appears to be the common law rule. See, e.g.,
6 Restatement (Third) of Property (Mortgage) § 5.4 (1997);
7 Carpenter v. Longan, 83 U.S. 271, 274-75 (1872) ("The note and
8 mortgage are inseparable; the former as essential, the latter as
9 an incident. An assignment of the note carries the mortgage with
10 it, while an assignment of the latter alone is a nullity.");
11 Orman v. North Alabama Assets Co., 204 F. 289, 293 (N.D. Ala.
12 1913); Rockford Trust Co. v. Purtell, 183 Ark. 918 (1931).³³
13 While we are aware that some states may have altered this rule by
14 statute, that is not the case here.³⁴

15
16 ³³The Restatement also sets up a general presumption that
17 the transfer of a mortgage normally includes an assignment of the
18 obligation it secured. Id. § 5.4(b) ("Except as otherwise
19 required by the Uniform Commercial Code, a transfer of a mortgage
20 also transfers the obligation the mortgage secures unless the
parties to the transfer agree otherwise"). But as we have
previously noted, see text accompanying note 7 supra, the
mortgage assignment to Wells Fargo did not also assign the Note.

21 ³⁴We are aware of statutory law and unreported cases in this
22 circuit that may give lenders a nonbankruptcy right to commence
23 foreclosure based solely upon their status as assignees of a
24 mortgage or deed of trust, and without any explicit requirement
25 that they have an interest in the note. See, e.g., Cal. Civil
26 Code §§ 2924(a)(1) (a "trustee, mortgagee or beneficiary or any
27 of their authorized agents" may conduct the foreclosure process);
28 2924(b)(4) (a "person authorized to record the notice of default
or the notice of sale" includes "an agent for the mortgagee or
beneficiary, an agent of the named trustee, any person designated
in an executed substitution of trustee, or an agent of that
substituted trustee."); Putkkuri v. Recontrust Co., No. 08cv1919,
(continued...)

1 As a result, to show a colorable claim against the Property,
2 Wells Fargo had to show that it had some interest in the Note,
3 either as a holder, as some other "person entitled to enforce,"
4 or that it was someone who held some ownership or other interest
5 in the Note. See In re Hwang, 438 B.R. 661, 665 (C.D. Cal. 2010)
6 (finding that holder of note has real party in interest status).
7 None of the exhibits attached to Wells Fargo's papers, however,
8 establish its status as the holder, as a "person entitled to
9 enforce," or as an entity with any ownership or other interest in
10 the Note.

11 Not surprisingly, Wells Fargo disagrees. It argues that it
12 submitted documents in support of its relief from stay motion
13 which established a "colorable claim" against property of the

14 ³⁴(...continued)
15 2009 WL 32567 at *2 (S.D. Cal. Jan. 5, 2009) ("Production of the
16 original note is not required to proceed with a non-judicial
17 foreclosure."); Candelo v. NDex West, LLC, No. 08-1916, 2008 WL
18 5382259 at *4 (E.D. Cal. Dec. 23, 2008) ("No requirement exists
19 under the statutory framework to produce the original note to
20 initiate non-judicial foreclosure."); San Diego Home Solutions,
21 Inc. v. Recontrust Co., No. 08cv1970, 2008 WL 5209972 at *2 (S.D.
22 Cal. Dec. 10, 2008) ("California law does not require that the
23 original note be in the possession of the party initiating
24 non-judicial foreclosure."). But see In re Salazar, ___ B.R.
25 ___, 2011 WL 1398478 at *4 (Bankr. S.D. Cal. 2011) (valid
26 foreclosure under California law requires both that the
27 foreclosing party be entitled to "payment of the secured debt"
28 and that its "status as foreclosing beneficiary appear before the
sale in the public record title for the [p]roperty."). We
express no view of the interaction of these statutes and real
party in interest requirements under Civil Rule 17.

Ultimately, the minimum requirements for the initiation of
foreclosures under applicable nonbankruptcy law will shape the
boundaries of real party in interest status under Civil Rule 17
with respect to relief from stay matters. As a consequence, the
result in a given case may often depend upon the situs of the
real property in question.

1 estate. In this regard, it cites In re Robbins, 310 B.R. 626,
2 631 (9th Cir. BAP 2004) (which in turn cites Grella, 42 F.3d at
3 32). However, neither Robbins nor Grella dealt with a challenge
4 to the movant's standing which, as we have said, is an
5 independent threshold issue. Simply put, the colorable claim
6 standard set forth in Robbins does not free Wells Fargo from the
7 burden of establishing its status as a real party in interest
8 allowing it to move for relief from stay, as this is the way in
9 which Wells Fargo satisfies its prudential standing requirement.

10 In particular, because it did not show that it or its agent
11 had actual possession of the Note, Wells Fargo could not
12 establish that it was a holder of the Note, or a "person entitled
13 to enforce" the Note.³⁵ In addition, even if admissible, the
14 final purported assignment of the Mortgage was insufficient under
15 Article 9 to support a conclusion that Wells Fargo holds any
16 interest, ownership or otherwise, in the Note. Put another way,
17 without any evidence tending to show it was a "person entitled to
18 enforce" the Note, or that it has an interest in the Note, Wells
19 Fargo has shown no right to enforce the Mortgage securing the
20 Note. Without these rights, Wells Fargo cannot make the
21 threshold showing of a colorable claim to the Property that would
22 give it prudential standing to seek stay relief or to qualify as
23 a real party in interest.

24 Accordingly, the bankruptcy court erred when it granted
25 Wells Fargo's motion for relief from stay, and we must reverse

27 ³⁵As indicated above, see note 22 supra, there is no
28 argument that the note is lost or destroyed.

1 that ruling.

2 *D. AHMSI's Lack of Standing to File Proof of Claim*

3 AHMSI's proof of claim presents similar issues, but in a
4 different context. An order overruling a claim objection can
5 raise legal issues (such as the proper construction of statutes
6 and rules) which we review de novo, as well as factual issues
7 (such as whether the facts establish compliance with particular
8 statutes or rules), which we review for clear error. Campbell v.
9 Verizon Wireless (In re Campbell), 336 B.R. 430, 434 (9th Cir.
10 BAP 2005); Heath v. Am. Express Travel Related Servs. Co. (In re
11 Heath), 331 B.R. 424, 428-29 (9th Cir. BAP 2005).

12 The Veals contend that AHMSI's purported claim - as opposed
13 to any security for that claim - is subject to objection under
14 Article 3 of the UCC. If correct, their nonbankruptcy objection
15 provides a sufficient basis for disallowance of the claim.
16 § 502(b)(1). When ruling on such an objection, the bankruptcy
17 court makes a substantive ruling that binds the parties in all
18 other proceedings and may finally adjudicate the parties'
19 underlying rights. As stated in Katchen v. Landy, 382 U.S. 323
20 (1966):

21 The bankruptcy courts "have summary jurisdiction to
22 adjudicate controversies relating to property over
which they have actual or constructive possession."

23 Id. at 327 (quoting Thompson v. Magnolia Petroleum Co., 309 U.S.
24 478, 481 (1940)). Courts have adopted this characterization of
25 the effect of claim objection proceedings under the somewhat
26 different, and more expansive, jurisdictional structure in place
27 under the 1978 Bankruptcy Code. EDP Med. Computer Sys., Inc. v.
28 United States, 480 F.3d 621, 624 (2d Cir. 2007); Siegel v. Fed.

1 Home Loan Mortg. Corp., 143 F.3d 525, 529-30 (9th Cir. 1998);
2 Bank of Lafayette v. Baudoin (In re Baudoin), 981 F.2d 736, 742
3 (5th Cir. 1993).

4 Consistent with this view, orders in claim objection
5 proceedings have been given issue and claim preclusive effect.

6 As stated in Katchen,

7 The normal rules of *res judicata* and collateral
8 estoppel apply to the decisions of bankruptcy courts.
9 More specifically, a creditor who offers a proof of
10 claim and demands its allowance is bound by what is
11 judicially determined; and if his claim is rejected,
12 its validity may not be relitigated in another
13 proceeding on the claim.

14 382 U.S. at 334 (citations omitted). In short, a claims
15 objection proceeding in bankruptcy takes the place of the state
16 court lawsuit or other action because such actions are
17 presumptively stayed by the operation of § 362.³⁶

18 The Veals challenge AHMSI's status as the real party in
19 interest to file a proof of claim with respect to the Note. This
20 argument stands on somewhat different grounds than the similar
21 objection to Wells Fargo's stay relief. Unlike a motion for

22 ³⁶The process, of course, is sufficiently flexible to allow
23 bankruptcy courts in appropriate cases to defer to nonbankruptcy
24 courts to liquidate and settle the parties' claims and
25 contentions. See, e.g., Sonnax Indus., Inc. v. Tri Component
26 Prods. Corp. (In re Sonnax Indus., Inc.), 907 F.2d 1280, 1286 (2d
27 Cir. 1990); Goya Foods, Inc. v. Unanue-Casal (In re
28 Unanue-Casal), 159 B.R. 90, 96 (D. P.R. 1993), aff'd, 23 F.3d 395
(1st Cir. 1994); Busch v. Busch (In re Busch), 294 B.R. 137, 141
n.4 (10th Cir. BAP 2003) (collecting cases); Truebro, Inc. v.
Plumberex Specialty Prods., Inc. (In re Plumberex Specialty
Prods., Inc.), 311 B.R. 551, 557-58 (Bankr. C.D. Cal. 2004).

The bankruptcy court, however, has exclusive jurisdiction
over the estate property that will be distributed on such claim,
28 U.S.C. § 1334(e), and exclusive jurisdiction over the
distribution of estate property.

1 relief from the stay, the claim allowance procedure has finality,
2 as § 502(b)(1) explicitly directs a bankruptcy court to disallow
3 a claim if a legitimate nonbankruptcy law defense exists. Again,
4 unlike motions for relief from the automatic stay, there will be
5 no subsequent determination of the parties' relative rights and
6 responsibilities in another forum. The proceedings in the
7 bankruptcy court are the final determination. As a result, Civil
8 Rule 17's policy of preventing multiple liability is fully
9 implicated.

10 AHMSI apparently conceded that Wells Fargo held the economic
11 interest in the Note, as it filed the proof of claim asserting
12 that it was Wells Fargo's authorized agent. Rule 3001(b) permits
13 such assertions, and such assertions often go unchallenged. But
14 here the Veals did not let it pass; they affirmatively questioned
15 AHMSI's standing. In spite of this challenge, AHMSI presented no
16 evidence showing any agency or other relationship with Wells
17 Fargo and no evidence showing that either AHMSI or Wells Fargo
18 was a "person entitled to enforce" the Note. That failure should
19 have been fatal to its position.

20 1. The Lack of Findings on Central Issues

21 The filing of an objection to claim initiates a contested
22 matter, subject to the procedures set forth in Rule 9014. See
23 Advisory Committee Notes accompanying Rule 3007.³⁷ In contested
24 matters, a bankruptcy court must make findings of fact, either

25
26 ³⁷The Advisory Committee Notes accompanying the original
27 version of Rule 3007, promulgated in 1983, in relevant part state
28 that "[t]he contested matter initiated by an objection to a claim
is governed by rule 9014." The Advisory Committee Notes
accompanying the 2007 amendments do not alter this view.

1 orally on the record, or in a written decision. See Rule 9014(c)
2 (incorporating Rule 7052, which in turn incorporates Civil Rule
3 52).³⁸ These findings must be sufficient to enable a reviewing
4 court to determine the factual basis for the court's ruling.
5 Vance v. Am. Hawaii Cruises, Inc., 789 F.2d 790, 792 (9th Cir.
6 1986). Although the bankruptcy court here overruled the Veals'
7 objection to AHMSI's proof of claim, it did so without making any
8 findings or even any statements regarding the factual basis for
9 the court's conclusion that AHMSI had standing to file the proof
10 of claim.³⁹ It simply held that being an assignee (or agent of
11 the assignee) of the Mortgage was sufficient.

12 Even when a bankruptcy court does not make formal findings,
13 however, the BAP may conduct appellate review "if a complete
14 understanding of the issues may be obtained from the record as a
15 whole or if there can be no genuine dispute about omitted
16 findings." Gardenhire v. Internal Revenue Serv. (In re
17 Gardenhire), 220 B.R. 376, 380 (9th Cir. BAP 1998), rev'd on
18 other grounds, 209 F.3d 1145 (9th Cir. 2000) (citing Vance, 789
19

20 ³⁸Civil Rule 52(a)(1) provides in relevant part:

21 (a) Findings and Conclusions.

22 (1) In General. In an action tried on the facts
23 without a jury or with an advisory jury, the court must
24 find the facts specially and state its conclusions of
25 law separately. The findings and conclusions may be
26 stated on the record after the close of the evidence or
27 may appear in an opinion or a memorandum of decision
28 filed by the court.

26 ³⁹Given the lack of documentation provided in response to
27 the Veals' objection, it is not surprising that the bankruptcy
28 court made no findings on the disputed factual issues. See note
7, supra.

1 F.2d at 792; Magna Weld Sales Co. v. Magna Alloys & Research
2 Pty., Ltd., 545 F.2d 668, 671 (9th Cir. 1976)). See also Jess v.
3 Carey (In re Jess), 169 F.3d 1204, 1208-09 (9th Cir. 1999);
4 Swanson v. Levy, 509 F.2d 859, 860-61 (9th Cir. 1975). After
5 such a review, however, when the record does not contain a clear
6 basis for the court's ruling, we must vacate the court's order
7 and remand for further proceedings. See, e.g., Alpha Distr. Co.
8 v. Jack Daniel Distillery, 454 F.2d 442, 452-53 (9th Cir. 1972);
9 Canadian Comm'l Bank v. Hotel Hollywood (In re Hotel Hollywood),
10 95 B.R. 130, 132-34 (9th Cir. BAP 1988).

11 We have conducted such a review of the record, and we have
12 found nothing in the record that establishes AHMSI's standing to
13 file the proof of claim. Neither party offered any testimony,
14 either by way of declaration or by way of live testimony of
15 witnesses, to support their respective positions on these
16 contested factual issues. None of the documents attached to the
17 parties' papers show that AHMSI was the servicing agent of Wells
18 Fargo, let alone a servicing agent of a "person entitled to
19 enforce" the Note.⁴⁰

20 When debtors such as the Veals challenge an alleged
21 servicer's standing to file a proof of claim regarding a note
22 governed by Article 3 of the UCC, that servicer must show it has
23 an agency relationship with a "person entitled to enforce" the
24 note that is the basis of the claim. If it does not, then the
25 servicer has not shown that it has standing to file the proof of

26
27 ⁴⁰See text accompanying note 7, above. In addition, the
28 documents presented, especially the Dorchuck Letter, are subject
to a host of evidentiary problems.

1 claim. See, e.g., In re Minbatiwalla, 424 B.R. 104, 108-11
2 (Bankr. S.D.N.Y. 2010); Hayes, 393 B.R. at 266-70; In re Parrish,
3 326 B.R. 708, 720-21 (Bankr. N.D. Ohio 2005).

4 The bankruptcy court here apparently concluded as a matter
5 of law that the identity of the person entitled to enforce the
6 Note was irrelevant. Its analysis followed the Mortgage instead
7 of the Note. We disagree. In the context of a claim objection,
8 both the injury-in-fact requirement of constitutional standing
9 and the real party in interest requirement of prudential standing
10 hinge on who holds the right to payment under the Note and hence
11 the right to enforce the Note. In re Weisband, 427 B.R. 13, 18-
12 19 (Bankr. D. Ariz. 2010). See also U-Haul, 793 F.2d at 1038
13 (holding that real party in interest is the "party to whom the
14 relevant substantive law grants a cause of action"). In other
15 words, Wells Fargo (or AHMSI as Wells Fargo's servicer) must be a
16 "person entitled to enforce" the Note in order to qualify as a
17 creditor (or creditor's agent) entitled to file a proof of claim.
18 Otherwise, the estate may pay funds to a stranger to the case;
19 indeed, the primary purpose of the real party in interest
20 doctrine is to ensure that such mistaken payments do not occur.

21 2. Analysis of the Record and AHMSI's Status as a
22 "Person Entitled to Enforce" the Note

23 Here, Shelli Veal apparently signed the Note in Arizona.
24 Given the lack of a choice of law clause in the Note, Arizona law
25 would presumptively govern who has rights to enforce the Note.⁴¹

26
27 ⁴¹For the purpose of determining who is the real party in
28 interest to enforce the Note, the forum state's choice of law

(continued...)

1 Under Arizona's uniform adoption of the UCC, a note's maker has a
2 valid objection to the extent that the claimant is not a "person
3 entitled to enforce" the Note. Ariz. Rev. Stat. Ann. § 47-3301.
4 As stated before, AHMSI presented no evidence as to who possessed
5 the original Note. It also presented no evidence showing
6 indorsement of the note either in its favor or in favor of Wells
7 Fargo, for whom AHMSI allegedly was servicing the Veal Loan.
8 Without establishing these elements, AHMSI cannot establish that
9 it is a "person entitled to enforce" the Note. The Veals would
10 thus have a valid claim objection under § 502(b)(1).

11 Citing Campbell, 336 B.R. at 432, AHMSI essentially argues
12 that the Veals are estopped or have waived their standing
13 arguments. They point to "admissions" in the Veals' bankruptcy
14 schedules and their chapter 13 plan, which both list AHMSI as a
15 secured creditor with a lien on the Property.

16 We disagree. What these writings evidence is far from clear
17 on this record. In addition to the conclusion AHMSI advances,

18
19 ⁴¹(...continued)
20 rules determine which state's substantive law applies. 6A Federal
21 Practice and Procedure, at § 1544. Arizona's applicable choice
22 of law statute provides in relevant part that, in the absence of
23 an agreement between the parties, Arizona's version of the UCC
24 applies to transactions "bearing an appropriate relation" to the
25 state of Arizona. Ariz. Rev. Stat. Ann. § 47-1301 (2011). The
26 Veals, who are the makers of the Note, reside in Arizona and
27 apparently executed the Mortgage and the Note in Arizona. (The
28 Mortgage bears a notarial acknowledgment with a Notary's stamp
showing that the Notary is commissioned in Maricopa County,
Arizona.) These uncontested facts evidence a sufficient
relationship with Arizona to justify application of Ariz. Rev.
Stat. Ann. § 47-1301. See Barclays Discount Bank Ltd. v. Levy,
743 F.2d 722, 724-25 (9th Cir. 1984) (applying California's
counterpart to Ariz. Rev. Stat. Ann. § 47-1301 under similar
circumstances).

1 they might also tend to show: (1) that AHMSI was the current loan
2 servicer, but not a "person entitled to enforce" the Note, (2)
3 that AHMSI was the holder of the Note, (3) that AHMSI was the
4 only entity currently dunning the Veals for payment on the Note,
5 or (4) that someone had highjacked the payment stream, and up
6 until the claims objection, the Veals had been duped.

7 Campbell, on which AHMSI relies, stands for the unremarkable
8 proposition that the bankruptcy court may give evidentiary weight
9 to sworn statements in the debtor's schedules. Campbell, 336
10 B.R. at 436. Campbell does not say that a debtor's schedules are
11 necessarily and finally determinative of all facts contained
12 therein. Id. This argument may also be an attempt to win an
13 argument not present in this appeal: nothing in the record
14 indicates that the bankruptcy court made any findings of the sort
15 AHMSI asserts based on the contents of the Veals' schedules or
16 plan. Nor is it our role to make such findings.

17 AHMSI further argues that Campbell and Heath validate the
18 manner in which it filed its proof of claim, and thus it is
19 entitled to the evidentiary benefits of Rule 3001(f). Rule
20 3001(f) provides that an otherwise compliant proof of claim is
21 prima facie evidence of the validity and amount of the claim.
22 AHMSI asserts that since its proof of claim met the standards set
23 forth in Campbell and Heath, the Veals had the burden of
24 production of documents to sustain their objection. As a
25 consequence, according to AHMSI, the Veals' failure to offer any
26 evidence to counter the validity of AHMSI's claim meant that the
27 bankruptcy court could not have erred in overruling the Veals'
28 claim objection.

1 Neither Campbell nor Heath dealt with claim objections based
2 on lack of standing. As noted above, standing is an independent
3 threshold issue in all federal civil litigation. Warth, 422 U.S.
4 at 498; County of Kern, 581 F.3d at 845. As indicated
5 previously, the plaintiff or movant bears the burden of proof
6 with respect to its own standing, see note 11 supra, and AHMSI
7 did not meet that burden here.

8 Moreover, under a careful reading of the entirety of Rule
9 3001, standing is a prerequisite to the evidentiary benefits set
10 forth in Rule 3001(f). On its face, Rule 3001(f) says that a
11 proof of claim is prima facie evidence of the validity and amount
12 of the claim if it is both executed and filed in accordance with
13 the Rule, and Rule 3001(b) requires that a claim be executed by
14 the creditor or its authorized agent. Simply put, if a claim is
15 challenged on the basis of standing, the party who filed the
16 proof of claim must show that it is either the creditor or the
17 creditor's authorized agent in order to obtain the benefits of
18 Rule 3001(f). Instead of obviating standing requirements, Rule
19 3001 conditions the availability of the presumptions contained in
20 Rule 3001(f) upon the creditor first satisfying the standing
21 requirement contained within Rule 3001(b). To hold otherwise
22 would undermine the requirements of both constitutional and
23 prudential standing and the important principles those
24 requirements safeguard.

25 In sum, the bankruptcy court's order overruling the Veals'
26 claim objection must be vacated and this matter remanded to allow
27 the bankruptcy court to render findings on the disputed factual
28 issues. On remand, the determination of who is the "person

1 entitled to enforce" the Note, and of AHMSI's alleged
2 authorization to service the Veal Loan, may necessitate an
3 evidentiary hearing, but we leave that decision to the bankruptcy
4 court.

5 **IV. CONCLUSION**

6 For all of the foregoing reasons, the bankruptcy court's
7 order granting Wells Fargo's relief from stay motion is REVERSED,
8 and the order overruling the Veals' claim objection is VACATED
9 and REMANDED for further proceedings consistent with this
10 opinion.