

# De la Frazzle Dazzle

November 15, 2011

Many a child hopefully learned that once caught stealing a candy bar, blaming another (he said so, US to Europe) did not offer an escape from punishment. Herewith, the parent's intentions were not to punish the child, but to educate the child so the child would know the difference between right and wrong.

The 50 states are nearly divided equally as to whether a state is a Title Theory state or a Lien Theory. A Lien Theory state uses a Deed of Trust (lien) whereas a Title Theory state will use a Mortgage. Many a learned has already written clear and precise articles describing Title and Lien Theory; in addition, case law also exists to support both theories. Actually, it is not theory, but that of black letter law.

All attempts will be made to write this writing so that my European readers may have a better understanding of the failure(s) that occurred in lenders action in funding purchases bought in Lien Theory states. The writer will use the laws of state of Texas as example.

A Texas Deed of Trust is a lien securing a note. Under the Deed of Trust, the buyer would grant legal title of the property to a Trustee as agent for the lender while buyer would retain equitable title to the property. Equitable title allows the buyer to enjoy the property. Were the buyer to be in default of the terms of the note or the Deed of Trust, the Trustee, who has been afforded legal authority under the Deed of Trust to act as Legal Title holder would have legal standing to sell the property and convey Equitable Title away from the buyer. NOTE: legal standing of the Trustee (Subsequent Trustee) is dependent upon all applicable laws having been followed.

Texas Local Government Code §192.001 states Mortgages and Deed(s) of Trust shall be filed of record, where other statutes state the filing is to take place within the county that the property resides in.

Applicable laws addressing the note can be found in Article 3 of the Uniform Commercial Code and the states equivalent, for Texas, the Business and Commerce Code. As most all states have adopted, with variation, the Uniform Commercial Code, the writer will use UCC as reference. Whereas the note (Instrument) is not to be negotiable the laws are few, i.e. and IOU between Obligor (Borrower) and Obligee (Lender). Herewith, if Obligor refuses

to pay the Obligee according to the terms of the note, the Obligee has an enforceable right to file suit in a court of equity to collect monies owed, or secure a judgment against the Obligor.

The UCC laws applying to a non negotiable instrument are the same laws that apply to a negotiable instrument. The differences, where many of the laws do not apply to a non-negotiable instrument they do apply to a negotiable instrument. Where the instrument is negotiable, the lender that owns the instrument made by the Obligor is the Payee with rights as Holder in Due Course to enforce the instrument.

Now that we know the lender is the Payee and where such lender does not want to wait the time to be repaid, the lender then elects to sell his interest in the instrument to another party (subsequent purchaser.) To sell his interest in the instrument to a subsequent purchaser the UCC requires the lender to endorse the note as the Indorser. The UCC allows that the lender may endorse the note without naming the subsequent Payee or by naming the subsequent Payee. Where the instrument is negotiated (sold) “In Blank” (lack of identity of subsequent Indorsed, Payee), rights of the instrument can be enforced by the subsequent Payee being in possession, caveat, the UCC also provides that rights to the instrument are not conveyed until negotiation is complete which would require the current holder of the instrument to identify oneself as the Indorsee thus becoming the Instrument’s Payee (current Lender).

Where multiple sells of the Instrument are present (in this example, shall use 3 sales), all Indorser’s and Indorsee’s signatures must be upon the face of the instrument for each intervening party to have had rights. Original Payee becomes the Indorser to an Indorsee where such Indorsee becomes the second Payee with rights to the instrument. This Second Payee then would become the Indorser of the instrument to further sell the instrument to a third Indorsee who then would become the Third Payee (current Lender) with rights to enforce the instrument. Where the intervening Indorser’s and Indorsee’s are not identified is not of a grave concern to the Third Payee as being in possession of the Instrument signed “In Blank”, for all the third Payee would need to do is become the Indorsee of the Instrument and then the third Payee would be afforded all the rights to the Instrument. Therefore, possession of the Instrument indorsed “In Blank” would be payable to the bearer (possessor) of the Instrument.

For LRW, where the Instrument is a Non-Secured Instrument, the lack of identity of the intervening owners is not relevant to enforcement of the Instrument by the possessor.

In the ole country days of banking, it was not a normal practice to sell the Instrument. Still, the country bank wanted more protection than the Instrument offered alone and thus the Obligor of the Instrument pledged the real property as collateral to secure the Instrument. As Mortgages required costly court actions, Lenders migrated to using Deed of Trusts where such states allowed and such Deeds of Trust do not require court action to invoke the "Power of Sale Clause." Regardless of whether such state is a Title Theory state or a Lien Theory state, the chain of indorsements of the note must match the chain of title filed of public record. Herewith, if the intervening Indorser's and Indorsee's are absent the chain of negotiation the public records would be absent of a proper chain of title. Absence equals non compliance considering the statement that all applicable laws that appear in most if not all Mortgages or Deed of Trusts will be complied with.

With Lenders electing to use a Deed of Trust in lieu of a Mortgage, one must note a Deed of Trust is a lien and thus the Secured Instrument not only needs to comply with the UCC but must comply with the lien laws of the state. Additional recording statutes may apply, and it is these limited statutes the Lender's agent (MERS) claim to be in compliance, maybe, maybe not. Looking even further, Texas Local Government's statute §192.007 is not found within the recording statutes. Where there is a break in the chain of indorsements, there would be break in MERS being an agent for an unknown Payee (Lender), for one cannot be an agent for an unknown. Were a Lenders unwisely argues that the secondary market's documents provide the names of the missing intervener's, and where such same documents require a chain of true sales noting all intervening parties we must ask, why does not these intervening names for perfection not appear of record? Turning to Texas Local Government Code §192.007 it is wisely written into the statute that any action that affects and instrument already on file requires a subsequent action to be filed of record. Thusly, when a Secured Instrument is sold to a subsequent party (Payee) for whatever reason, the Payee would then need named as the perfected party of record, if such filing is not timely executed, perfection would expire by operation of law.

*Example, Payee1 sells the Secured Instrument to unknown payee2 who then intern sells it to payee3 and payee2 does not timely perfect the lien (security) in their name but*

*elects to further sell the Instrument only sells a Unsecured Instrument, additionally, payee3 has not been assigned of record any interest that it can perfect of record. It is a logical and legal impossibility for MERS to claim to be the agent of Payee1 on a Secured Instrument as the Instrument is owned by a subsequent payee. MERS by lack of a lawful negotiation and assignments of the lien cannot be an agent with standing. For those states that are Mortgage Theory, MERS under similar thinking lacks standing to invoke a court's jurisdiction.*

When one reads the statutes on perfection, one needs to clearly note that filing for priority and filing for perfection are not the same. Very true, most all case law dwells on whom has standing as the senior lien holder and who held junior lien status.

The lack of identifying the intervening parties in a Secured Instrument is still not fatal to enforcing the Instrument. However, if one attempts to collect an indebtedness in a manner not legally available, as by power of sale, where if such collection attempt fails; highly probable that collateral estoppels and res judicata would prevent a second bite at the fruit by trying to collect on the Instrument itself.

Bill Murray portrayed a soldier in the movie Stripes executing an impressive display of weapon handling. The commanding officer inquired as to what type of training was obtained. Whereas Bill Murray as the actor noted it was Army training and their drill sergeant had been blown up.

For what MERS and the creators of MERS created was not a movie and what they created was nothing more than a time bomb ticking away. But many a real life has and will be destroyed until justice prevails.

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