Ten Dollars for 10,736 Mortgages: Should Nominal Consideration Supersede Real Property Recording Law

John P Hunt, University of California - Davis
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John Patrick Hunt, Richard Stanton, and Nancy Wallace

Abstract

Our review of mortgage securitization transactions from 2005 to 2007 suggests that many intermediate mortgage transfers structured as promissory note sales involved the exchange of only nominal or other dubious consideration. The Uniform Commercial Code requires consideration “sufficient to support a simple contract” as a prerequisite for treatment of a transaction as a promissory note sale. Treatment as a sale triggers the Code’s “mortgage follows the note” provisions, which may protect transactions from claims that the mortgages involved are unenforceable, are vulnerable to competing claimants, or were never transferred in the first place. Mortgage securitization transactions are potentially exposed to all these problems because the mortgage transfers were not recorded under state real property laws.

Thus, in many cases, the Code apparently provides that state recording laws are effectively inapplicable in many respects if nominal consideration is sufficient to “support a simple contract.” Academic opinion is divided over whether nominal consideration should be effective. But the nominal-consideration debate is fundamentally beside the point here, because it focuses on whether promises should be enforced, not on whether third parties will be protected by recording statutes. Because the academic debate is inapplicable and because caselaw is sparse, a court confronting this problem should weigh the competing substantive policy considerations involved: security and efficiency of transactions on one hand, and the importance of transparent public land title records on the other. These are the same issues that policymakers should consider when evaluating prospective changes to title recording systems.
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I. INTRODUCTION

“'The mortgage follows the note’ is becoming the signature phrase of the mortgage and foreclosure crisis.”¹ One of this statement’s many possible meanings is that mortgage-related formalities such as recording assignments of the mortgage upon transfer are irrelevant as long as the associated promissory note is properly transferred. This proposition is important, because the mortgage and note change hands several times in a typical securitization,² and mortgage assignments generally were not recorded in mortgage securitizations of the 2000s.³ Whether the mortgage follows the note therefore may determine in many cases, involving many millions of mortgages, whether a transaction was properly carried out or not, whether the mortgages in the transaction are enforceable, and whether mortgage ownership is secure against competing claims.

This Article focuses on an important variant of that phrase: “'The Uniform Commercial Code says the mortgage follows the note,’ or more accurately, "The Uniform Commercial Code says the mortgage follows the note if value is given for the note.”⁴ Our review of mortgage securitization documents suggests that in many cases, value may not have been given for the note. When this is the case, the Uniform Commercial Code does not provide that “the mortgage follows the note.”⁵ As we explain, the result has significant consequences for foreclosure

¹ See AMERICAN SECURITIZATION FORUM, TRANSFER AND ASSIGNMENT OF RESIDENTIAL MORTGAGE LOANS IN THE SECONDARY MORTGAGE MARKET, Sept. 16, 2010, at 1 (arguing that this principle resolves many issues related to mortgage transfer). A search in the ALLCASES database of Westlaw on July 23, 2012 reveals that 75 of the 117 occasions on which courts used the phrase were in or after October 2007.
² See infra Part II.
⁴ See infra Part III.
⁵ Even in cases where value is not given, the mortgage may follow the note under the common law rather than the U.C.C. This is an unsettled issue of non-uniform state law, and the explanations given for the proposition
litigation and for situations where ownership of a securitized mortgage might be contested. One such situation would be bankruptcy of the corporate entities that operate the Mortgage Electronic Registration System.6

Our findings also raise an interesting question at the intersection of contract and property law. We find that many intermediate transfers in the securitization process apparently were effected for only “nominal” or recited consideration. For example, hundreds of millions of dollars in mortgage debt apparently were transferred in some cases for recited consideration of $10 “and other good and valuable consideration,” and in others for certificates entitling the transferor to a subset of the cash generated by what it was transferring. Because the Uniform Commercial Code defines “value” expansively, to include any “consideration sufficient to support a simple contract,” the U.C.C. apparently directs us to determine whether $10 would support a contractual promise to transfer hundreds of millions of dollars in debt, and tells us that the answer may determine who owns the mortgage.

But the issue presented has nothing to do with enforcing a promise to transfer the debt. The parties to each of the intermediate transfers we reviewed are the “sponsor” and “depositor” in the transaction, which are subsidiaries of the same investment bank. The sponsor is not trying to get out of transferring the debt to the depositor. Instead, if mortgage assignment recording became an issue, third parties (borrowers or parties with subsequently arising claims to the mortgage) would argue that they benefit in some way from state laws covering mortgage assignment recording, and the transacting parties would argue that recording laws do not apply because “the mortgage follows the note” when value is given. If the U.C.C. trumps recording

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6 This possibility is discussed in greater depth in our related paper, All in One Basket: The Bankruptcy Risks of a National Agent-Based Mortgage Recording System (forthcoming, 46 U.C. DAVIS L. REV. __ (2012)).
statutes as some commentators suggest, then the contract concept of consideration, specifically the adequacy of recited nominal consideration, is used to solve the property question of required notice to third parties.

Whether nominal consideration is sufficient is a long-standing question of contract law, pitting freedom of contract against judicial reluctance to enforce gratuitous promises. There is little judicial authority on the effectiveness of nominal consideration, but it appears that nominal consideration is rarely given effect outside the specialized context of option and gift contracts. Under a straightforward application of black-letter law, such as it is, it is at most unclear in many transactions whether value was given and therefore whether the U.C.C.’s mortgage-follows-the-note provisions were triggered.

Moving from black-letter law to the normative realm, we might turn to the factors that courts and (more usually) scholars have taken into account in thinking about nominal consideration. But the conversation about nominal consideration is inapplicable to whether parties should or should not have to record their interests in mortgages in order to protect them. The debate over nominal consideration is a debate over what kinds of promises should be enforced, not what kinds of formalities do or should apply to property transfers. Even those who are receptive to nominal or recited consideration in general might doubt its efficacy in this context. This is because the transaction parties would be using recited consideration not to make a gratuitous promise enforceable but rather to opt into a less burdensome regulatory regime, one that is more favorable to parties to mortgage securitization transactions and less favorable to parties that might otherwise make use of public title records. When a transaction is not an

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7 See Julian B. McDonnell & James Charles Smith, Secured Transactions Under the U.C.C. § 16.09 (2011) (“Article 9 makes it as plain as possible that the secured party need not record an assignment of mortgage, or anything else, in the real property records in order to perfect its rights to the mortgage.”).
exchange, using the form of exchange to circumvent regulatory rules that protect third parties seems more troublesome than doing so simply to render promises legally enforceable.  

Because the cases are so sparse, the relationship between the U.C.C. and recording law so uncertain, and the scholarly discussion of nominal consideration so inapplicable to this problem, the question whether the U.C.C. protects existing mortgage securitizations apparently cannot be answered with confidence by a straightforward application of settled legal principles. Instead, courts called upon to resolve disputes over the failure to record mortgage assignments in securitization transactions would have to apply the same considerations that policymakers more generally should think about in designing title-transfer systems prospectively, weighing the interests in efficiency and security of transactions against the interest in open and public title records and in public control over the property regime.

II. MORTGAGE SECURITIZATION, MORTGAGE TRANSFER, MORTGAGE RECORDING, MERS

What is colloquially called a “mortgage” has two parts, a promissory note containing the borrower’s promise to pay and a security instrument (called the “mortgage” or “deed of trust”) granting a lender a security interest in the real property securing the debt. Mortgage securitizations typically involved several transfers of the promissory note and associated mortgage: from an “originator” to an investment bank subsidiary known as a “sponsor,” from

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8 Of course, the decision to render a promise from one party to another legally enforceable can affect third parties. Interestingly, the scholarly discussion of consideration apparently has paid little attention to this issue. See discussion infra Part

9 This basic discussion of the operation of MERS is adapted from our related paper, All in One Basket, supra note 6.

the sponsor to another subsidiary known as the “depositor,” and finally from the depositor to the trustee of a trust charged with holding the mortgages on behalf of investors.11

![Figure 1: Mortgage and Promissory Note Transfer with Traditional Recording](image)

States’ real property recording systems usually permit parties to record the assignment of a mortgage,12 and various negative consequences potentially flow from failing to record assignments.13 There is no recording requirement applicable to the promissory note. A typical private-label mortgage securitization transaction in the 2000s entailed the transfer of thousands of mortgages from different geographic regions14 through the several different corporate entities

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11 For example, in one transaction the authors have reviewed in depth, the GSAMP 2006-HE3 transaction, the sponsor was Goldman Sachs Mortgage Co. and the depositor was GS Mortgage Securities Corp.

12 See Nelson & Whitman, supra note 10, at 456 (there are “very few jurisdictions in which the recording acts do not apply to mortgage assignments”).

13 Specifically, many states encourage recording by providing that unrecorded interests, but not recorded interests, are subject to specific types of subsequently arising claims. Other states require that mortgage assignments be recorded. See John Patrick Hunt, Nancy Wallace & Richard Stanton, Mortgage Origination and Data, App. A, in HANDBOOK OF FINANCIAL DATA AND RISK INFORMATION (forthcoming 2012). See also discussion infra Part III.

14 See Prospectus Supplement dated Sept. 7, 2006 for Mortgage Pass-Through Certificates issued by GSAMP Trust 2006-HE3, at S-40 (describing mortgage pool for one transaction as containing 10,736 mortgage loans with aggregate principal balance of $1.6 billion, with no more than 0.23% of the loans secured by properties in any one area).
involved in the deal. Figure 1 illustrates the path a securitized mortgage might take and the associated instances of recording.

In the context of mortgage securitization, recording individual mortgage assignments is burdensome because of the large volume of assignments and relatively tight time frame for each transaction.\(^{15}\) For a transaction involving 10,000 mortgages, each following the originator-sponsor-depositor-SPV path, there would be 30,000 separate mortgage assignments. The problem may have been compounded by backlogs at local recording offices.\(^{16}\)

The Mortgage Electronic Registration System (“MERS”) was conceived as a substitute for recording mortgage assignments. MERS has been billed as a national electronic database that tracks ownership of mortgage loans.\(^{17}\) Mortgage securitization participants who are members of MERS can cause a mortgage to be “registered” on MERS and publicly recorded in the name of Mortgage Electronic Registration Systems, Inc., (“MERS, Inc.”) an affiliate of MERSCORP Holdings, Inc., the company that operates MERS.\(^{18}\) MERS, Inc. is supposed to act as a common agent for all MERS’ members, so that recording in the name of MERS, Inc. and tracking ownership transfers on MERS makes it unnecessary to record mortgage assignments. In theory, the public record discloses the existence of the mortgage and the fact that MERS, Inc.

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\(^{15}\) Tax rules effectively impose a three-month timeframe on mortgage securitizations by imposing a 100 percent tax on contributions to the securitization vehicle made more than three months after the vehicle’s startup date. See 26 U.S.C. § 860G(d). Although this rule covers only one particular type of securitization vehicle, the REMIC (“real estate mortgage investment conduit”), the large majority of residential mortgage securitizations reportedly employ this form. AQUITAS COMPLIANCE SOLUTIONS, INC., FORECLOSURE IN CALIFORNIA: A CRISIS OF COMPLIANCE 17 (Feb. 2012). The pooling and servicing agreement that governs a given transactions likewise may impose a deadline by which mortgages must be conveyed to the trust.

\(^{16}\) See Testimony of R.K. Arnold, President and CEO of MERSCORP, Inc. Before the Subcommittee on Housing and Community Opportunity, House Financial Services Committee, Nov. 18, 2010 at 18 [hereinafter Arnold Testimony] (“[A]t certain time periods, the flow of assignments were [sic] overwhelming the county recorder system, resulting in long backlogs, and in some cases, taking the county recorded over a year to record an assignment.”).

\(^{17}\) See Arnold Testimony, supra note 16, at 16-20 (describing MERS as a mortgage assignment tracking system).

\(^{18}\) MERSCORP Holdings, Inc. was previously known as MERSCORP, Inc. E-mail from Karmela Lejarde to John Patrick Hunt, May 24, 2012.
holds legal title on behalf of one of MERS’ members, and the private records maintained on
MERS track which one of MERS’ members is the current “true” (“beneficial” or “equitable”) owner. In the event of foreclosure, MERS, Inc. assigns the mortgage to the foreclosing party so that that party has legal title at the time of foreclosure. Figure 2 illustrates how a mortgage securitization using MERS would work.\(^\text{19}\)

Figure 2: Mortgage and Promissory Note Transfer with MERS Recording

Presumably in part because industry participants thought that MERS was an effective substitute for recording mortgage assignments, in part because recording has been thought to provide only limited benefits to transacting parties,\(^\text{20}\) and in part because recording tens of thousands of transfers per deal was impractical, mortgage assignments were not recorded in mortgage securitizations, at least in the late 1990s and early 2000s.\(^\text{21}\) At the same time, MERS

\(^{19}\) It appears that in some cases the mortgage may not have followed the originator-sponsor-depositor chain at all. See Bank of America, N.A. v. Bassman LBT, 2012 Ill. App. LEXIS 487, at *3-*4 (construing record as showing that securitized mortgage was never conveyed to sponsor or depositor).

\(^{20}\) See, e.g., NELSON & WHITMAN, supra note 10, at 464 (“After reviewing all of the issues related to recording mortgage assignments . . . , one must conclude that for the most part, recording is not very important.”).

\(^{21}\) See White, supra note 3, at 484-85.
became quite widely used, and some 30 million mortgages are now recorded on the system. However, MERS’ operational practices and underlying theory have come under fire during the foreclosure crisis. Homeowners resisting foreclosure and class action plaintiffs have attacked the system in cases that have generated hundreds of reported decisions, with mixed results for MERS.

At the same time, public officials have become increasingly hostile to MERS. Federal banking regulators determined last year that MERS, Inc. and MERSCORP, Inc. employed “unsafe or unsound” practices, and as a result MERS operates under a federal consent decree that requires operational improvements and potentially additional capital contributions from MERS’ members. It is currently unclear whether MERS will be able to meet the requirements of that decree. MERSCORP and MERS, Inc. also have been sued by the Attorneys General of New York, Delaware, and Massachusetts, and by county recorders in a number of states.

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22 See NELSON & WHITMAN, supra note 10, at 466 (MERS “has already proven to be a remarkable success.”).
24 For example, a search in Westlaw’s ALLCASES database on the search term “MERS /s foreclosure” returned 1,056 documents.
25 Compare HSBC Bank USA v. Gabay, 28 A.3d 1158 (Me. 2011) (rejecting MERS’ claim to be able to assign note along with mortgage); MERS, Inc. v. Saunders, 2 A.3d 289 (Me. 2010) (MERS lacks standing to foreclose because it lacks an interest in the promissory note) with Residential Funding Co., L.L.C. v. Saurman, 805 N.W.2d 183 (Mich. 2011) (MERS’ interest in security lien authorized MERS to foreclose by advertisement); Savage v. U.S. Bank, N.A., 19 A.3d 302 (Del. 2011) (rejecting borrowers’ contention that they were entitled to notice of mortgage assignment from MERS to foreclosing bank); RMS Res. Props., LLC v. Miller, __ A.3d. __, 2011 WL 6033011 (Conn. Dec. 13, 2011) (rejecting borrowers’ contention that MERS could not validly be named mortgagee because it was not the lender); Thomas v. BAC Home Loans Servicing, LLP, 2011 WL 6743044, at *3 (Nev. Dec. 20, 2011) (“MERS as the nominee beneficiary holds the deed of trust for BAC’s benefit”).
27 Id. at 7-9.
28 Id. at 8.
including Massachusetts,\textsuperscript{32} North Carolina,\textsuperscript{33} and Louisiana.\textsuperscript{34} Law enforcers’ claims against MERSCORP and MERS, Inc. were expressly excluded from the recent “robosigning” settlement with five banks\textsuperscript{35} and from New York’s settlement with banks over MERS-related activity.\textsuperscript{36} A review of foreclosure documents commissioned by the Assessor-Recorder of the City and County of San Francisco concluded that MERS apparently was in error about the identity of the mortgage owner 58\% of the time\textsuperscript{37} and that mortgages recorded on MERS generally had a higher rate of other compliance problems than non-MERS mortgages.\textsuperscript{38}

The challenges to MERS have led to increased emphasis on legal theories to address problems arising from failure to record if MERS does not work as intended. The leading theory of this type is that failure to record mortgage assignments does not matter because the mortgage “follows the note.” One critical version of this argument is that Article 9 of the U.C.C. provides that the mortgage follows the note. The Permanent Editorial Board for the Uniform Commercial Code, a body composed of academics and practitioners, issued a report in November 2011

\begin{footnotes}
\footnote{32 \textit{See} Press Release, Commonwealth of Massachusetts Southern Essex District Registry of Deeds, Feb. 22, 2011 (“Essex South Register of Deeds John O’Brien announced today that he will be seeking over 22 million dollars from the Mortgage Electronic Registration System.”)}
\footnote{33 \textit{See} Press Release, Guilford County, North Carolina Register of Deeds, March 2, 2011 (“Guilford County Register of Deeds Jeff Thigpen announced today that he will be conferring with [law enforcement officials] as to whether the Mortgage Electronic Registration Service [sic] (MERS) owes Guilford County fees estimated at $1.3 million in lost revenue from mortgage assignments.”)}
\footnote{34 First Amended Complaint, Welborn et al. v. Bank of New York et al. (M.D. La. April 17, 2012) ¶ 1 (“Plaintiffs bring this action against corporate entities that conspired to avoid payment of recording fees from 2002 through present ….”).}
\footnote{35 \textit{See}, \textit{e.g.}, Consent Judgment, U.S. v. Citicorp, No. 1:12-cv-00361 (D.D.C. April 4, 2012) at G-9, ¶ 12 (excluding “claims against Mortgage Electronic Registration Systems, Inc. or MERSCORP, Inc. from scope of settlement.”)}
\footnote{37 \textsc{Aequitas, supra} note 15. Specifically, Aequitas reviewed 382 residential foreclosure sales in San Francisco from January 2009 to October 2011. \textit{Id.} at 1. In 192 cases, the mortgages were recorded on MERS and MERS purported to have information about the mortgage owners (or “beneficiaries under the deed of trust” in California parlance). \textit{Id.} at 13. In 112 of these cases, or 58\%, the beneficiary recorded on MERS was different from the beneficiary named in the Trustee’s Deed upon Sale, the document transferring ownership of the foreclosed property to the new owner at the foreclosure sale. \textit{Id.}}
\footnote{38 \textit{Id.} at 13-14.}
\end{footnotes}
concluding that Code does provide that the mortgage follows the note when the note is sold or used as collateral for a loan.\textsuperscript{39} At least some courts have relied on the Board’s analysis of the Code’s text,\textsuperscript{40} with which we do not take issue. We now turn to the specifics of that argument.

\section*{III. TRANSACTION PROBLEMS THAT ARTICLE 9 NOTE SALES MAY SOLVE}

When mortgage assignments are not recorded, two sets of problems for the mortgages’ putative owners may arise: problems of ownership and problems of enforceability.\textsuperscript{41} MERS was intended as a complete substitute for recording, but as described above it may not reliably function as intended. Whether MERS was used in a transaction or not, Article 9 of the Uniform Commercial Code may independently cure the problems of ownership and enforceability that may arise when mortgage assignments are not recorded.\textsuperscript{42} This Part explains some problems that could result from failure to record mortgage assignments and explains how structuring transfers as sales of promissory notes under Article 9 may solve these problems. Although the Article 9 provisions discussed here apparently have not been applied in reported foreclosure cases,\textsuperscript{43} the issue has been interesting enough to generate both the Permanent Editorial Board’s report and a number of comments on the report from law professors. Although most professors who offered comments criticized the report’s overall direction, questioning whether the U.C.C. was the exclusive authority for matters the report addressed and whether the factual settings assumed in


\textsuperscript{40} See In re Veal, 450 B.R. 897, 908 n.12 (9th Cir. B.A.P. 2011); In re Jackson, 451 B.R. 24, 30 (Bankr. E.D. Cal. 2011).

\textsuperscript{41} Compare Permanent Editorial Board, supra note 39, at 8 (distinguishing between owner of promissory note and person entitled to enforce it).

\textsuperscript{42} Article 3 of the Uniform Commercial Code, which specifies how the right to enforce a negotiable promissory note can be transferred, contains the Code’s provisions on questions of transfer of the right to enforce negotiable promissory notes. See Permanent Editorial Board, supra note 39, at 4 (Article 3 provides a “largely complete set of rules” governing the obligations of parties on negotiable notes).

\textsuperscript{43} A Westlaw search on May 5, 2012 on U.C.C. Sections 9-203 and 9-308 did not turn up any reported cases in which these provisions were applied in litigation relating to real property mortgage transfers.
the Report reflect reality, there was little disagreement with the Board’s reading of the Code’s text.

A. Problems of Mortgage Ownership

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

First, the mortgages may not have been transferred to the transferee at all. In the case of mortgage securitization, the borrower may have executed the mortgage in favor of the original lender, but subsequent transfers of the mortgage may not have been recorded. This situation is especially common when the transaction participants use MERS, as the system was intended as a substitute for recording mortgage assignments. The result could be that the securitization vehicle that ultimately was supposed to own the mortgage does not end up owning it and that the mortgage itself is “stuck” in the hands of the originator or MERS. The situation also could

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44 See Robert M. Lawless, Adam J. Levitin, Christopher L. Peterson, Katherine Porter, Elizabeth Renuart, and Alan White, Letter to Permanent Editorial Board, May 27, 2011 (professors from University of Illinois, Georgetown, University of Utah, University of Iowa, Albany Law School, and Valparaiso University conclude, “A U.C.C. PEB report is simply an inappropriate forum for addressing major policy issues. Doing so under the guise of a technical report does serious harm to the credibility and reputation of the ALI and NCCUSL.”).

45 See Kenneth Kettering, E-mail re Draft Report of the PEB, March 30, 2011 (“The Draft Report is a lucid description of the U.C.C. provisions that pertain to the matters covered by the report.”). At least one academic did take issue with the Board’s interpretation of the Code. See Bruce A. Campbell, Comments on U.C.C. PEB Report on U.C.C. Rules on Assignment of Mortgage Notes, at 1 (emeritus professor at University of Toledo concludes “The Draft Report is thus, overall, a substantial oversimplification, and an oversimplification which distorts analysis and reaches dubious conclusions, potentially misleading lawyers, diplomats, and courts”).

46 This follows from the proposition that the real property recording acts function by protecting bona fide purchasers who take without notice of prior claims, and by providing that recording provides constructive notice of prior claims to prospective purchasers. See 14 RICHARD R. POWELL & MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY § 82.01[3], at 82-11 to 82-12 (2011).

47 See In re Agard, 444 B.R. 231, 247 (Bankr. E.D.N.Y. 2011) (use of MERS causes note and mortgage not to travel together, so party seeking to lift bankruptcy stay to enforce foreclosure must “prove not only that it is acting
arise in states where mortgage recording is affirmatively required, rather than simply required to protect against subsequent claimants.

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

The second ownership problem that a transferee that fails to record its interest may face is a third party’s subsequent claim of ownership. After the transferee pays value for the mortgage, the transferor might assign it to someone else, either fraudulently or by mistake. Indeed, if MERS’ internal controls are as poor as state Attorneys General have alleged and as the federal

on behalf of a valid assignee of the Note, but also that it is acting on behalf of a valid assignee of the Mortgage,” and finding that MERS “may not validly assign a mortgage based on its nominee status”.

See, e.g., TEXAS LOCAL GOV’T CODE § 192.007 (“To … transfer … an instrument that is filed, registered, or recorded in the office of the county clerk, a person must file, register, or record another instrument relating to the action in the same manner as the original instrument was required to be filed, registered, or recorded”); ILL. CODE CH. 765 § 5/28 (“Deeds, mortgages, powers of attorney, and other instruments relating to or affecting the title to real estate in this state, shall be recorded in the county in which such real estate is situated”) (emphasis added); IOWA CODE § 558.11 (“evidence of title shall be filed with the recorder of deeds”); id. § 558.59 (“[e]very instrument shall be recorded as soon as practicable”); In re Foreclosure Cases, 2007 WL 3232430, at *2 (citing OHIO REV. CODE §§ 1335.04, 5301.23 for proposition that mortgage assignments must be recorded under Ohio law). But see In re Williams, 395 B.R. 33, 42-43 (Bankr. S.D. Ohio 2008) (failure to record does not invalidate mortgage under Ohio law).

See U.C.C. § 9-308 cmt. 2 (“This Article uses the term ‘attach’ to describe the point at which the property becomes subject to a security interest.”); U.C.C. § 9-203(a) (“A security interest attaches to the collateral when it becomes enforceable against the debtor with respect to the collateral”). Since the 1999 revisions took effect, U.C.C. Article 9 has treated sales of promissory notes as secured transactions, treating the seller as a “debtor,” U.C.C. § 9-102(a)(28)(B), the buyer as a “secured party,” U.C.C. § 9-102(a)(72)(D), and the notes as “collateral.” U.C.C. § 9-102(a)(12)(B).

See U.C.C. §9-203(g) (security interest in mortgage attaches when security interest in note attaches); U.C.C. § 9-203(b)(2)-(3) (buyer’s security interest in note attaches once buyer has given value and seller has authenticated security agreement describing the collateral).

See NELSON & WHITMAN, supra note 10, at 457-62.
consent decree suggests, it is quite possible that MERS could be used to facilitate such a transfer. Subsequent claims of ownership also could arise if the transferor – or MERS, Inc. itself – goes bankrupt. In this case, the bankruptcy trustee occupies the position of a bona fide purchaser of real property interests from the debtor at the time of the bankruptcy. As mortgages are real property interests under the laws of most states, such subsequent claimants could defeat the unrecorded mortgage ownership claims of the securitization trustee. The trustee also has the power of a judicial lien creditor, and potentially could reach the mortgages under this power.

Structuring each transfer as an Article 9 note sale may solve this problem as well. If the note associated with the mortgage is sold in an Article 9 sale, then Article 9 provides that the security interest (that is, the buyer’s ownership interest) in the mortgage is “perfected” immediately without any need to record. That is, the buyer’s ownership interest cannot be

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52 See, e.g., New York Attorney General ¶¶ 17, 47-53 (alleging that MERS, Inc. acts through over 20,000 “certifying officers” whom MERS, Inc. does not supervise).

53 See 11 U.S.C. § 544(a)(3). This possibility is explored in greater depth in our companion paper, All in One Basket: The Bankruptcy Risks of a National Agent-Based Mortgage Recording System, supra note 6.

54 In summer 2011, the authors surveyed the recording statutes of the “Top Ten” mortgage securitization states: the ten states with the largest numbers of mortgages securitized in private transactions. We found that statutes in nine of the top ten states require appear to make the assignee of a mortgage vulnerable to subsequent claimants if the mortgage assignment is not recorded. The states covered in the survey are California, Florida, Texas, Illinois, New York, Arizona, Georgia, Virginia, Michigan, and Maryland. Of these, Georgia is the only state that does not require recording. The survey is on file with the authors. The statutes we surveyed typically do not speak of recording mortgage assignments in so many words; more commonly, they require recording of instruments transferring interests in real property and separately recognize mortgages as real property interests. See Hunt et al., supra note 13, App. A.


56 See U.C.C. § 9-309(4) (buyer’s security interest in promissory note is perfected as soon as it attaches); id. § 9-308(e) (buyer’s security interest in the mortgage is perfected as soon as the security interest in the note is perfected). Although the U.C.C. provides that a secured party “may perfect a security interest in tangible negotiable documents” and certain other property “by taking possession of the collateral,” id. § 9-313(a), it does not appear that possession substitutes for giving value in light of § 9-203(b)’s provision that any security interest “enforceable against the debtor and third parties … only if … value has been given” and § 9-203(a)’s provision that a security interest “attaches to collateral when it becomes enforceable against the debtor with respect to the collateral, unless an agreement expressly postpones the time of attachment.”
defeated by a subsequent purchaser.\textsuperscript{57} Provided the U.C.C.’s use of “perfected” prevails over the real-property recording statutes, the mortgage follows the note with respect to third parties, not just buyer and seller.\textsuperscript{58}

Critically, Article 9 protects the promissory note buyer as just described only if the buyer gives “value” for the note. The cited provisions operate by specifying when “security interests”\textsuperscript{59} in the notes attach and are perfected. But Article 9 is quite clear that a security interest does not come into being until “value” is given.\textsuperscript{60}

\textsuperscript{57} U.C.C. § 9-308 cmt. 2 (“‘Perfected’ means that the security interest has attached and the secured part has taken all the steps required by this Article. …. [I]n general, after perfection the secured party is protected against creditors and transferees of the debtor and in particular, against any representative of creditors in insolvency proceedings instituted by or against the debtor.”).

\textsuperscript{58} See discussion infra Part VI. A. As described later in this paper, there are questions about whether value was given when the mortgage was transferred from sponsor to depositor. This is an intermediate stage of the mortgage securitization. Assuming value was given at the originator-sponsor step and the depositor-trust step, and assuming that “perfection” under the U.C.C. is equivalent to recording under the real-property statutes, the question arises whether perfecting the security interest in the originator-sponsor transaction and the depositor-trust transaction cures the failure to perfect the interest in the sponsor-depositor transaction. One might draw an analogy to plain-vanilla real estate transactions and view the transfers starting with the sponsor-depositor transaction as out-of-chain transfers. Although there is no unanimity on how to treat out-of-chain transfers, some commenters view ignoring the recording of out-of-chain transfers as the preferable approach. Alternatively, for negotiable promissory notes, one might argue that SPV is a holder in due course and therefore protected from the depositor’s failure to give value. See U.C.C. § 3-306 (“a holder in due course takes free of the claim to the instrument”). It is not clear how many mortgage promissory notes are negotiable. Moreover, this argument appears to rely on the nonobvious propositions that the HDC’s “taking free of claims” is a “security interest” under Article 9 and that HDC doctrine can be applied to closely connected parties such as the depositor and SPV.

\textsuperscript{59} The 1999 revisions changed the Uniform Commercial Code by calling the buyer’s interest in a promissory note a “security interest,” the same term used for the interest of a lender who takes the note as collateral for a loan. See Permanent Editorial Board, supra note 28, at 8-9 (“Article 9 uses nomenclature conventions to apply one set of rules to both types of transactions” [transactions in which notes are sold and transactions in which they are collateral]. This is accomplished primarily by defining the term ‘security interest’ to include not only an interest in property that secures an obligation but also the right of a buyer of a payment right in a transaction governed by Article 9.”). This change has been criticized. See Thomas E. Plank, Assignment of Receivables Under Article 9: Structural Incoherence and Wasteful Filing, 68 OHIO ST. L.J. 231, 235-37 (2007).

\textsuperscript{60} See U.C.C. §§9-203(a) (“A security interest attaches to collateral when it becomes enforceable against the debtor with respect to the collateral”); 9-203(b) (“Except as otherwise provided in subsections (c) through (i), a security interest is enforceable against the debtor and third parties with respect to the collateral only if: (1) value has been given”). None of the other subsections of § 9-203 provides for enforceability without giving value. See also Permanent Editorial Board, supra note 39, at 9 (“three criteria must be fulfilled in order for the owner of a mortgage note effectively to create a ‘security interest’ (either an interest in the note securing an obligation or the outright sale of the note to a buyer) in it. The first two criteria are straightforward – ‘value’ must be given …”); JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 1185 (6th ed, 2010) (“value must be given” to create an enforceable Article 9 security interest).
Promissory notes that are negotiable may be transferred under Article 3 of the U.C.C., for example by endorsement and delivery. No requirement to give value applies to such transfers, but the special U.C.C. provisions providing for immediate attachment and perfection of the security interest in the mortgage would not apply either. The right to enforce the note can pass without value being given, but it does not follow that ownership of the note or the right to enforce the mortgage, also passes in such a case. In other words, the U.C.C. does not say that "the mortgage follows the note" in this type of transfer. Rather, transaction participants would be forced to rely on a non-U.C.C. principle that "the mortgage follows the note." This is a matter of non-uniform state law. Some courts have rejected the proposition outright. And most cases embracing the proposition deal with enforcement of the mortgage against homeowners, not disputes over ownership of the mortgage. As the very existence of the Permanent Editorial Board’s report explaining the Article 9 provisions suggests, parties are on firmer ground when note transfers are sales for value under U.C.C. Article 9.

B. Problems of Mortgage Enforceability

Failure to record mortgage assignments also can lead to problems in enforcing a mortgage, and in some cases Article 9 may help cure the problem. In states that permit

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61 See Permanent Editorial Board, supra note 39, at 5.
62 See U.C.C. § 3-301 ("A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument."); Permanent Editorial Board, supra note 43, at 8 ("The rules that determine whether a person is a person entitled to enforce a note do not require that person to be the owner of the note, and a change in ownership of the note does not necessarily bring about a concomitant change in the identity of the person entitled to enforce the note. This is because the rules that determine who is entitled to enforce a note and the rules that determine whether the note, or an interest in it, have been effectively transferred serve different functions.").
63 See, e.g., CAL. CIVIL CODE §2936 ("The assignment of a debt secured by mortgage carries with it the security.").
64 See, e.g., In re Marron, 455 B.R. 1, 6 (Bankr. D. Mass. 2011) ("Massachusetts, unlike many other states, does not subscribe to the theory that the mortgage "follows the note"); Ibanez, Agard, Maryville [this is all that turned up on a search of "mortgage follows the note" in ALLCASES]
nonjudicial foreclosure, statutes may require that the foreclosing party demonstrate a chain of assignments. Some states go farther and require that assignments be recorded. Although some courts have held that MERS can be used to satisfy a requirement of a recorded chain of assignments, others are less forgiving. If the transaction is structured as the sale of promissory notes, then Article 9 provides a procedure by which the buyer can become the mortgagee of record and proceed with nonjudicial foreclosure. Although it is far from clear that using this procedure excuses failure to record assignments in states that expressly require it, there is at least a colorable argument that it does.

In judicial foreclosure proceedings or when the borrower is in bankruptcy so that creditors must get an order lifting the bankruptcy stay to proceed with foreclosure, courts may

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66 See Ibanez v. U.S. Bank Nat’l Ass’n, 941 N.E.2d 40, 53 (Mass. 2011) (party seeking judicial declaration of clear title after nonjudicial foreclose must show chain of assignments of mortgage, although assignments do not have to be recorded); see also 2011 Hawaii Laws Act 48 (S.B. 651) (requiring party seeking nonjudicial foreclosure to provide borrower with copies of “the original mortgage agreement, and copies of any subsequent agreements and assignments,” and “the promissory note signed by the mortgagor and any endorsements and allonges on the note”). Bills expressly requiring foreclosing parties to demonstrate a chain of recorded mortgage assignments have been introduced in Massachusetts, see Bill H.1219 (2011) § 3, and Arizona, see 2011 Arizona Senate Bill No. 1259, § 1 (2011), although the Arizona bill apparently was killed in committee.

67 OR REV. STATS. § 86.735 (requiring recorded chain of assignments); MICH. COMP. LAWS § 600.3204(3) (requiring “record chain of title” for nonjudicial foreclosure); MINN. STAT. § 580.02(3) (requiring that mortgage “be recorded and, if it has been assigned, that all assignments thereof have been recorded” for foreclosure by advertisement); CALIF. CIVIL CODE §2932.5 (requiring recorded assignment in order for an assignee to exercise a power of sale “given to a mortgagee, or other encumbrancer”). Some California state courts have held that Section 2932.5 applies only to true mortgages, and not to deeds of trust, on the theory that a deed of trust reposes the power of sale in the trustee and not the lender. See Calvo v. HSBC Bank USA, Inc., 199 Cal. App. 4th 118 (2011), review denied Jan. 4, 2012; Stockwell v. Barnum, 7 Cal. App. 413 (1908). A bankruptcy court’s decision that that Section 2932.5 does apply to deeds of trust was reversed by the district court. See In re Salazar, 444 B.R. 814, 820-24 (Bankr. S.D. Cal. 2011), rev’d, 2012 WL 896214 (S.D. Cal. March 15, 2012).

68 See Residential Funding Co. v. Saurman, 805 N.W.2d 183 (Mich. 2011); Jackson v. MERS, Inc., 770 N.W.2d 487 (Minn. 2009) (use of MERS satisfies state requirement that “all assignments” of a mortgage be recorded in order to foreclose).

69 See Hooker v. Northwest Trustee Servs., Inc., Civ. No. 10-3111-PA, 2011 WL 2119103, at *3-*4 (D. Or. May 25, 2011) (tracking on MERS is not a substitute for recording mortgage assignments as required by Oregon law); Burgett v. Mortgage Elec. Reg. Sys., Inc., No. 09-6244-HO, 2010 WL 4282105 (D. Or. Oct. 20, 2010), at *3 (mortgage assignments must be recorded as a condition for nonjudicial foreclosure; rejecting use of MERS); Richard v. Deutsche Bank Nat’l Trust Co., Civ. 09-123-AC, 2011 WL 2669084 (D. Or. May 12, 2011) (nonjudicial foreclosure improper where MERS was used instead of recorded assignments: “[W]here all assignments have not been recorded, nonjudicial foreclosure is not permitted”). The District Court reached the same conclusion as this magistrate’s report and recommendation, but expressly declined to decide whether the magistrate’s findings about recording were correct. See Richard, 2011 WL 2650735 (D. Or. July 6, 2011).

70 U.C.C. §9-607(b).
demand that the foreclosing party prove ownership of the mortgage and note,\textsuperscript{71} and even nonjudicial foreclosures may be challenged after the fact if the foreclosing party does not own the mortgage and note.\textsuperscript{72} If transfers are structured as Article 9 note sales, a court could accept the sale agreements and attached schedules to show that the note was sold at each stage of the chain, as the identification of the note in a transaction where notes are sold for value is enough to create an immediately attached and perfected security interest in both note and mortgage and arguably proves ownership.

Finally, structuring a transaction as an Article 9 sale may help cure another problem, one having to do not with mortgage assignment but with failure to endorse the promissory note. It appears that promissory notes were not endorsed in many securitization transactions. Where the promissory note is negotiable and is not properly endorsed to the party seeking to enforce it, the note may for practical purposes be enforceable only if it was “transferred,” as that term is used in Article 3. In such a case, if the note is negotiable,\textsuperscript{73} it will be enforceable only\textsuperscript{74} if it was

\textsuperscript{71}Deutsche Bank Nat’l Trust Co. v. Francis, 926 N.Y.S.2d 343 (N.Y. Sup. Ct. 2011) (requiring that party seeking to foreclose prove “ownership of the mortgage” and finding proof lacking where no assignment of mortgage from MERS to foreclosing party was recorded and foreclosing party did not possess mortgage or note); In re Foreclosure Cases, 2007 WL 3232430 (N.D. Ohio Oct. 31, 2007) (dismissing foreclosure cases for lack of standing where party attempting to foreclosure could not prove it was the holder and owner of note and mortgage); In re Foreclosure Cases, 2007 U.S. Dist. LEXIS 90812 (S.D. Ohio Nov. 27, 2007) (foreclosing party’s failure to produce evidence of legal or equitable assignment of mortgages raised question as to its standing to proceed in federal court).

\textsuperscript{72}See, e.g., Eaton v. Federal Nat’l Mortg. Ass’n (Mass. June 22, 2012) (in post-sale challenge to nonjudicial foreclosure in Massachusetts, holding that party must hold mortgage and hold mortgage note or act on behalf of note holder in order to be a “mortgagor” authorized to carry out nonjudicial foreclosure under a power of sale).

\textsuperscript{73}A recent survey of the caselaw finds that courts have typically assumed that mortgage promissory notes are negotiable. See Dale A. Whitman, \textit{How Negotiability Has Fouled up the Secondary Mortgage Market, and What to Do About It}, 37 PEPP. L. REV. 737, 755 (2010), although Ronald Mann has argued that most form mortgage promissory notes are not negotiable. See Ronald J. Mann, \textit{Searching for Negotiability in Payment and Credit Systems}, 44 UCLA L. REV. 951 (1997). A similar situation can arise when a party seeks to lift the automatic bankruptcy stay to foreclose and the bankruptcy court requires proof of standing. See \textit{In re Mims} 438 B.R. 52, 56 (Bankr. S.D.N.Y. 2010); \textit{In re Lippold}, 457 B.R. 293 (Bankr. S.D.N.Y. 2011).

\textsuperscript{74}See U.C.C. § 3-301 (listing classes of persons entitled to enforce instruments: holders, nonholders in possession, and persons not in possession entitled to enforce pursuant to §3-309). A person in possession of an instrument is a “holder” if the instrument is payable to bearer or to the possessor. U.C.C. § 1-203(1)(b) If an instrument is not in the possession of the original payee and is not endorsed, it will not be “payable” to the possessor, so the possessor will not be a holder. A nonholder may be able to enforce an instrument if it is a
“transferred” as that term is used in Article 3, meaning that it was delivered by a party with the power to enforce the note with intent to give the recipient the right to enforce the note.\textsuperscript{75} If a transaction is structured as a sale of the promissory note, that is likely to help establish the intent element of transfer. For example, in explaining how transfer may substitute for negotiation, the Permanent Editorial Board gives several examples, all involving sales of promissory notes.\textsuperscript{76} Thus, whether a negotiable note that lacks endorsements is enforceable in the hands of a securitization trustee or its agent may depend on whether the note was sold in an Article 9 sale.

Again, “value” must be given in order for the transaction to benefit from each of these potentially helpful provisions. Each of them depends on the existence of a “security interest” under Article 9, and a security interest arises only if “value” is given:\textsuperscript{77} the Code provides that a security interest is “enforceable against the debtor and third parties with respect to the collateral only if value has been given.”\textsuperscript{78}

Although structuring a transaction as a promissory note sale may help the participants in several ways, it does not seem to help in another situation that is common in mortgage litigation: one where the party seeking to foreclose cannot produce the note.\textsuperscript{79} A party seeking to enforce a negotiable promissory note generally must possess it,\textsuperscript{80} although the U.C.C. contains provisions allowing a party to enforce lost, destroyed, or stolen notes under some circumstances,\textsuperscript{81} and

\textsuperscript{75} U.C.C. §3-203(a)-(b).
\textsuperscript{76} See Permanent Editorial Board, supra note 39, at 6, 7.
\textsuperscript{77} See supra Part III. A.
\textsuperscript{78} See 9-203(b).
\textsuperscript{79} See Whitman, supra note 73, at 758 (2010) (“While delivery of the note might seem to be a simple matter of compliance, experience during the past several years has shown that, probably in countless thousands of cases, promissory notes were never delivered to market investors or securitizers, and, in many cases, cannot presently be located at all.”).
\textsuperscript{80} U.C.C. §3-301 (providing for enforcement by holder or by nonholder in possession of instrument); id. § 1-201(b)(21)(A) (‘holder’ is a “person in possession of a negotiable instrument”).
\textsuperscript{81} U.C.C. § 3-309. The U.C.C. also contains a provision covering notes paid or accepted by mistake, which does not seem relevant here. U.C.C. §3-418(d).
apparently contemplates that a note can be “possessed” through an agent. But these provisions do not depend on the transaction’s status as an Article 9 note sale.

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

IV. WAS CONSIDERATION GIVEN FOR NOTES IN MORTGAGE SECURITIZATIONS?

As demonstrated above, if a securitization transaction is structured so that promissory notes are sold “for value” in each transfer, that strengthens the position of the transacting

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82 See U.C.C. § 9-313 cmt. 3 (“[I]n determining whether a particular person has possession, the principles of agency apply.”).

83 Article 9’s provisions about the mortgage following the note apply not just when the note is sold, but also when it is given as security for a loan. In fact, the 1999 revisions treat note sales and security transactions the same in general, a treatment that has attracted some criticism.

84 Permanent Editorial Board, supra note 39, at 8 (“U.C.C. Section 9-203(g) explicitly provides that the mortgage follows the note.”). Without taking issue with the PEB’s ultimate interpretation of the U.C.C.’s text, we cannot help noting that the provision is not quite as transparent as the PEB’s comment would suggest. Section 9-203(g) does not contain the words “the mortgage follows the note.” Instead, it reads in its entirety: “The attachment of a security interest in a right to payment or performance secured by a security interest or other lien on personal or real property is also attachment of a security interest in the security interest, mortgage, or other lien.” U.C.C. § 9-203(g); see also id. cmt. 9 (“Subsection (g) codifies the common-law rule that a transfer of an obligation secured by a security interest or other lien on personal or real property also transfers the security interest or lien”).

85 Article 9’s rules for sales of promissory notes are the ones that are relevant for this analysis. Article 9 does provide for immediate and automatic perfection of security interests in payment rights other than those embodied in promissory notes, such as payment intangibles and accounts. See U.C.C. § 9-309(2) (assigned accounts and payment intangibles); id. § 9-309(3) (sold payment intangibles). Indeed, mere assignment without consideration, rather than sale, of payment intangibles and accounts may be sufficient to create perfected security interests in them. Section 9-309(2) provides for perfection upon attachment of a security interest in “an assignment of accounts or payment intangibles,” but Section 9-203 provides that a security interest attaches “to collateral” when “value has been given.” U.C.C. § 9-203(a) & (b)(1). Moreover, Section 9-102(a)(12) defines “collateral” as, inter alia, “accounts, chattel paper, payment intangibles, and promissory notes that have been sold” (emphasis added). Exactly how Article 9 works when “accounts” and “payment intangibles” are assigned without being sold is unclear from this text. However, the obligation to pay in a typical mortgage transaction seems fairly clearly to fall outside the U.C.C.’s definition of a “payment intangible,” see U.C.C. § 9-102(a)(61) (“payment intangible” is a subset of “general intangible”); id. § 9-102(a)(42) (“general intangible” excludes “instruments”); id. § 9-102(a)(47) (“instrument” includes “any writing that evidences the right to the payment of an obligation”). Because
parties as against defaulting borrowers and competing claimants.\textsuperscript{86} Just how helpful it is for a transaction to be structured as a sale of notes is open to question because of the potential conflict between Article 9 and state recording statutes discussed below, but there seems to be little doubt that status as a note sale is at least somewhat helpful.\textsuperscript{87} As pertinent to mortgage securitization transactions, the relevant standard for deciding whether notes were transferred for value is whether they were transferred in exchange for consideration “sufficient to support a simple contract.”\textsuperscript{88}

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

A word of caution about the results of our review is in order. It appears that it was not the practice of SEC staff to require that documents establishing the existence of consideration be filed with the Commission.\textsuperscript{89} Thus, it is possible that such documents exist and are not in the public record. That said, SEC rules generally require that “material” contracts be filed, so one
might expect that documents establishing the existence of consideration would be filed if they exist, regardless of staff requirements. Perhaps more importantly, in most cases our review uncovered documents that purported to be mortgage sale agreements. Even if there is no requirement to file mortgage sale agreements, it seems strange to file a document that calls itself a mortgage sale agreement while holding back another document that sets forth the true terms of the mortgage sale. Thus, although the results of our review must be considered merely suggestive, at least pending further discovery in litigation or investigations, our review does suggest the possibility that the agreements on file mean what they say and that only nominal consideration changed hands in many cases.

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

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90 In many cases, agreements simply reported a blank for the purchase price. Although the SEC provides a procedure for protecting confidential information, that procedure requires a legend of some kind indicating that information has been redacted. SEC Staff Interview, supra note 89. We did not encounter any such legends in the agreements.

91 A “shelf” is a group of deals covered by a single “shelf” registration statement. It is reasonable to think that deals from the same shelf are likely to be more similar to one another than deals from different shelves.
Table 1: Summary of deal documents’ description of consideration for the sponsor-depositor mortgage transfer in 27 deals from 22 different shelves

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

The description of different types of consideration as “for value” is a judgment based on the idea that exchanging the mortgages for certificates representing some subset of the future cash flows from the mortgages, or for plainly nominal consideration such as $10, may not be “for
value” as the term is used in connection with Article 9 sales of promissory notes.\textsuperscript{92} We discuss this issue in greater detail below.

Based solely on our review of the publicly filed deal documents, it seems that whether the mortgages were exchanged for value at the sponsor-depositor step is questionable in 78% of deals and 73% of shelves. It is possible that other unreferenced, unfiled documents establish that the mortgages were transferred for value. In any event, these results seem surprising. We might have expected to see that the deal documents plainly established that the mortgages were exchanged for substantial cash, as secondary sources describing the mortgage market often indicate.\textsuperscript{93}

V. \textsc{Is Nominal Consideration “Sufficient to Support a Simple Contract”?}

Although the U.C.C. apparently turns “consideration” into a test for whether mortgage recording rules apply, the concept’s normal function is to determine whether courts will enforce promises. “Consideration” historically has functioned in common-law legal systems to separate enforceable promises from unenforceable ones. It is often said that promises “supported by consideration” generally will be enforced, and that promises that are not “supported by consideration” generally will not be enforced.\textsuperscript{94} As explained, the U.C.C.’s “mortgage follows
the note” provisions apply if “value,” equated to “consideration sufficient to support a simple contract,” is given.

Under current doctrine, a promise is “supported by consideration” only if it is, in form or in substance, sought and given in exchange for the consideration. This is the “bargain theory” of consideration. It may be contrasted with the older “benefit/detriments” theory of consideration, under which a contract is “supported by consideration” if each promise involved in the contract grants benefits to the promisee or imposes detriments on the promisor (or both). The bargain theory, unlike the benefit/detriments theory, insists that the promise be given in order to get the consideration and that the consideration be given in order to get the promise (or the thing promised).

Despite the general acceptance of bargain theory in current U.S. law, scholars and courts continue to disagree over whether the promise must in substance be exchanged for the consideration or whether it is enough for the parties to adopt the form of an exchange. For example, it is enough to recite that the promise is given “in consideration of” a “peppercorn,” or of a nominal amount of money like the $10 we have seen in some mortgage securitizations.

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95 See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 71(1)-(2) (“To constitute consideration, a performance or a return promise must be bargained for. A performance or a return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.”); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS 237 (5th ed. 2011) (“There is no doubt that all courts would consider the bargained-for exchange element essential.”); JOSEPH A. PERILLO & HELEN HADJYANNAKIS BENDER, 2 CORBIN ON CONTRACTS § 5.1, at 6 (rev. ed. 1995) (“Current usage, no doubt influenced by both Restatements of Contracts, has restricted the term [consideration] to its narrow meaning of bargained-for exchange, ….”). To be sure, not all authorities are convinced. See also PETER A. LINZER, A CONTRACTS ANTHOLOGY 271 (2d ed. 1995) (“Bargain held sway as the crux of contract formation during the “classical” period (roughly 1870 to World War II), and it still plays a basic role, particularly in carefully negotiated business dealings.”).

96 DANIEL MARKOVITS, CONTRACT LAW AND LEGAL METHODS 798 (2012).

97 One implication of the “bargain theory” is that promises to make gifts generally will not be enforced on the basis that they are supported by consideration, although they may be enforced on the basis of the promisee’s reliance or for other reasons. See, e.g., MURRAY, supra note 95, at 270-71. Whether promises to make gifts to charitable institutions generally are an exception to this proposition is matter of debate. Id. at 271-73.

98 See Whitney v. Stearns, 16 Me. 394, 397 (1839); see also 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 440 (5th ed. 1773) ("[I]n case of leases, always reserving a rent, though it be but a peppercorn [such] … considerations will, in the eyes of the law, convert the gift … into a contract.").
If the owner of thousands of mortgages promises to sell them “in consideration of $10,” is the recitation of $10 consideration enough to make the promise to deliver enforceable? What if the $10 is not paid at all? What if the $10 is paid but the landowner does not make the promise with the intention, or apparent intention, of inducing the $10 payment? This is the debate over nominal consideration.100

Let us begin with the caselaw. Although judicial authority on nominal consideration is scarce101 and although many older statements of the law affirm that nominal consideration is effective,102 the only recent piece in the law-review literature that addresses the question concludes (on the basis of a very few cases) that “the view that nominal consideration can be used to support a gratuitous promise … simply cannot be maintained in light of the case law bearing on the subject.”103 The author concludes that nominal consideration is effective only for option and guaranty contracts, and then only when the nominal consideration is in fact

99 Although the “bargain” theory of consideration focuses on whether the consideration induced the promise, suggesting an inquiry into the promisor’s subjective intent, many authorities state that consideration should be evaluated objectively or conventionally, consistent with the prevailing objective view of contract formation. See, e.g., OLIVER WENDELL HOLMES, THE COMMON LAW 293 (1881), RESTATEMENT (SECOND) OF CONTRACTS §71 cmt. b; MARKOVITS, supra note 96, at 829-30. 838-39.

100 In many of the transaction documents we reviewed, mortgages were exchanged for certificates issued as part of the transactions. The certificates entitle the owner to a subset of the cash flows generated by the mortgages in the deal. See 2 JASON H.P. KRAVITT ET AL., SECURITIZATION OF FINANCIAL ASSETS § 16.02[B], at 16-15 (MBS certificates are designed so that “required amortization from the mortgage pool will equal or exceed the scheduled payments of interest, at the related coupon rate, and principal on the pay-through mortgage-backed securities”) (2010). The exchange of mortgage loans that will generate cash flows for a subset of the generated cash flows seems identical in principle to the “promise to pay a sum of money in return for a smaller sum of money, with the sums delivered simultaneously, that Corbin found not to be good consideration. See ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: ONE VOLUME EDITION § 129, at 188-89 (“mathematically certain relationship” in which the smaller sum is less valuable renders the smaller sum not good consideration for the larger sum).

101 Compare E. ALLAN FARNSWORTH, CONTRACTS §2.11, at 72 (4th ed. 2004) (“[I]t is no surprise that the reports are devoid of cases in which competent sellers appear to have freely and seriously bargained to sell their farms for a dollar”).

102 See, e.g., Krell v. Codman, 154 Mass. 454, 456 (1891) (Holmes, J.) (“Consideration is as much a matter of form as the seal.”); RESTATEMENT (FIRST) OF CONTRACTS § 84 illo. 1. See also Victor P. Goldberg, Desperately Seeking Consideration: The Unfortunate Impact of U.C.C. Section 2-306 on Contract Interpretation, 68 OHIO ST. L.J. 103, 108 (2007) (“traditional doctrine held that even a peppercorn would do”).

delivered. Contemporary contracts scholars continue to be divided on whether nominal consideration is generally effective as a matter of positive law, and it appears to remain an unsettled question.

Turning from caselaw to theories of consideration, at the risk of oversimplifying we may consider two polar views. One view, the “formal” conception, holds that consideration should be understood as a formal device that a party may use to make a “formal contract” – a promise that is enforceable because of the form in which it is given. Reciting “in consideration of $10 in hand paid” and (possibly) handing over the $10 should serve to make a promise enforceable through compliance with form, just as affixing a seal to a document once did. Formal contracts have a long history, may be commercially useful, and serve the goals of freedom of contract (at least if “freedom of contract” is “freedom of promise”). Because of the decline

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104 Even in these contexts, courts generally require that the recited consideration actually be delivered. See also JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS, § 4.6, at 158 (in nominal-consideration settings, “[t]he majority of courts have held that it may be shown that the consideration has not been paid and that no other consideration has been given.”).

105 Compare W. Bradley Wendel, Explanation in Legal Scholarship: The Inferential Structure of Doctrinal Legal Analysis, 96 CORNELL L. REV. 1035, 1071 (2011) (“It is certainly a puzzle why contract law treats a peppercorn as adequate consideration while using a seal is treated as a ‘mere formality,’ not satisfying the consideration requirement.”) with Gregory Klass, Three Pictures of Contract, 83 N.Y.U. L. REV. 1726, 1757 (2008) (“Where a purported consideration is ‘a mere formality or pretense,’ the law treats it as nominal and insufficient to satisfy the consideration requirement. The peppercorn rule denies enforcement precisely when the parties most clearly wanted it.”).


107 See ERIC MILLS HOLMES, 3 CORBIN ON CONTRACTS § 10.14, at 399-400 (“Neither a consideration, as now defined, nor subsequent action in detrimental reliance on a promise is necessary to make the sealed promise enforceable.”).

108 See HOLMES, supra note 107, §10.2, at 346 (rev. ed. 1996) (“Legal formalities were the basis of the earliest method for making a valid contract.”). Holmes reports that “[t]he great majority of American jurisdictions have changed the common law of sealed instruments in important respects through legislative action,” id. §10.18, at 417, but finds that “the law of seals is not dead, but is alive, and apparently vital in at least half our jurisdictions.” Id. at 418. See also U.C.C. § 2-203 (rendering seals inoperative in contracts for the sale of goods).

109 See PERILLO, supra note 104 § 4.6, at 158 (6th ed. 2009) (“minority and commercially sounder view” is that recited consideration is sufficient).

110 See CHARLES FRIED, CONTRACT AS PROMISE 35 (1981) (“Freedom of contract is freedom of promise and … the intrusions of the standard doctrines of consideration can impose substantial if random restrictions on perfectly rational projects.”); E. Allan Farnsworth, Promises to Make Gifts, 43 AM. J. COMP. L. 359, 371 (1995) (“profoundly paternalistic effect” of abolition of the seal); Andrew Kull, Reconsidering Gratuitous Promises, 21 J.
of the seal, there is no reliable way to make formal contracts, except for contracts of certain types such as negotiable instruments. Thus, it is argued, nominal consideration should be given effect so that parties will have a way of making formal contracts. This is especially important in the commercial context, where donative promises are rare and, perhaps, where the consideration requirement is likely to be used as a technicality by parties seeking to avoid a bad bargain. The formal conception finds support in the work of Oliver Wendell Holmes, the drafters of the First Restatement of Contracts, Lon Fuller (at least to some extent) and contemporary authorities including Joseph Perillo (at least for the commercial context) and Charles Fried. Perhaps most recently, Celia Taylor has presented a Swiftian defense of formal contracts, although she does not fully embrace nominal consideration.

LEGAL STUD. 39, 65 (1992) (“[a]ll gratuitous promises are presumptively beneficial to the promisor at the time the promise is made”).

111 See Holmes, supra note 107, §10.2, at 354 (“By accepting substitutes, the formal contract under seal ceased to function as a legal formality. When form does not operate as form, it becomes irrelevant.”). Celia Taylor has proposed the return of the seal, in all its formality, to its former status. See Celia Taylor, My Modest Proposal, 18 ST. THOMAS L. REV. 117, 118-19 (2005).

112 See Holmes, supra note 107, § 10.21, at 455.

113 See Siprut, supra note 103, at 1847-51. Compare Taylor, supra note 111, at 120 (nominal consideration does not serve the cautionary and channeling functions of form as well as the seal).

114 Perillo, supra note 104, § 4.16, at 193. Proponents of formal consideration are often hostile to the consideration requirement more generally.

115 See Perillo, supra note 104, at 154 (“One may question the adequacy of a legal system which refuses to enforce a promise such as this: ‘In consideration of your forty years of faithful service, you will be paid a pension of $200 a month.’”).

116 Holmes, supra note 99, at 273 (consideration is “a form as much as a seal”).

117 RESTATEMENT (FIRST) OF CONTRACTS § 84, illo. 1 (where father wants to make a binding promise give his son land and makes a written offer to “sell” the land for $1, son’s promise to pay $1 supports the father’s promise to convey the land). Despite the embrace of nominal consideration in this context, the Restatement (First) does provide that in general consideration must be “bargained for and given in exchange for the promise”). Id. § 75.

118 Lon Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 823 (1941) (suggesting that “nominal consideration actually handed over” is “perhaps the only device[] that could “achiev[e] the formal desiderata” and replace the seal as a “blanket formality” that “suffices to make any kind of promise, not immoral or illegal, enforceable”).

119 2 JOSEPH M. PERILLO & HELEN HADJYANNAKIS BENDER, CORBIN ON CONTRACTS § 5.17 (rev. ed. 1995) (“Commercial contracts such as options and credit guaranties should be enforceable without consideration”).

120 Fried, supra note 110, at 39.

121 Taylor, supra note 111.
Another view, the “substantive” conception, conceives consideration as the “price” for the promise. According to this view, a promise is not “supported by consideration” unless the consideration was sought and given in exchange for the promise. If no price is paid for the promise, the promise is not enforceable. Nominal consideration typically is not the price of a promise in a contract – the sponsor in a mortgage securitization does not transfer hundreds of millions worth of mortgages to the depositor in order to get the $10 recited in the agreement, or to get some subset of the cash flows from the mortgages it is giving up – so according to the substantive view nominal consideration is not sufficient. The Restatement (Second) of Contracts embraces this view as a general matter, providing that promises generally are not enforceable unless they are in fact given in exchange for something else, so that nominal consideration is ineffective. But the Restatement (Second) recognizes exceptions, providing that nominal consideration suffices for option and guaranty contracts on the ground that

122 It is worth noting that neither the “formal” nor the “substantive” theory as described here authorizes general inquiry into the adequacy of consideration. If a buyer promises to pay a high price for something, the formal theory asks whether the transaction was cast in the form of a bargain, and the substantive theory asks whether the promise to pay was in fact induced (or perhaps apparently induced) by the buyer’s desire for the purchased item. Neither is concerned with whether the price was too high or low. Although it seems fair to describe contemporary doctrine as not concerned with adequacy of consideration, this apparently was not always the case. See Morton J. Horwitz, The Historical Foundations of Modern Contract Law, 87 HARV. L. REV. 917, 924 (1974) (identifying 18th-century “substantive doctrine of consideration which allowed the jury to take into account not only whether there was consideration, but also whether it was adequate, before awarding damages.”).

123 See RESTATEMENT (SECOND) OF CONTRACTS § 79 comment d (“Disparity in value, with or without other circumstances, sometimes indicates that the purported consideration was not in fact bargained for but was a mere formality or pretense. Such a sham or ‘nominal’ consideration does not satisfy the requirement of § 71.”) Section 71 defines “consideration.” See also id. Illo. 5 (payment of one cent not consideration for promise to pay $600 in three yearly installments of $200 each). See ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS: ONE VOLUME EDITION § 118, at 176 (1952) (reporting that according to Holmes and the first Restatement of Contracts, consideration need not be the “sole” or “prevailing” inducement for the promise, but must “be enough of an inducement that it is bargained for.”); id. at 189-90 (1952) (“The requirement of a sufficient consideration for a promise is not satisfied by a pretense that there is a consideration when in fact there is none. … One dollar given or promised is a sufficient consideration except for a promise of a larger amount of money. But it is not a sufficient consideration where there is no dollar given or promised.”).

124 RESTATEMENT (SECOND) OF CONTRACTS § 71; id. Illo. 5 (where father wants to make a binding promise to pay his son $1,000 and offers to do so in “exchange” for a book worth less than $1, no consideration for promise to pay where both parties know the transaction is a “mere pretense”).

125 RESTATEMENT (SECOND) OF CONTRACTS §§77(1)(a) (“An offer is binding as an option contract if it is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time”).
giving effect to nominal consideration in such contracts is commercially useful.\textsuperscript{127} Adherents of the substantive view tend to believe that there are good reasons to enforce promises that are in substance given and sought in exchange for something else. For example, it is sometimes said that exchanges taken as a group are more likely to be value-increasing than gift promises,\textsuperscript{128} or that enforcing gift promises would excessively decrease their supply.\textsuperscript{129}

The substantive conception is criticized on the ground that insisting on the fact of a bargain without inquiring into its substance, even if logically possible, is pointless. In theory, courts generally will not inquire into the “adequacy of consideration.”\textsuperscript{130} That is, courts will not use the consideration doctrine to police the substantive fairness of bargains.\textsuperscript{131} What makes bargains \textit{qua} bargains so special, no matter what they are? If we don’t care about the substance of the bargain, why not enforce promises made under seal, or with recited nominal consideration?\textsuperscript{132} Although some scholars, notably including Daniel Markovits,\textsuperscript{133} have attempted an explanation, the question remains outstanding, as does the related question whether

\begin{footnotesize}
\begin{enumerate}
\item[126] \textsc{Restatement (Second) of Contracts} \textsection{} 88(a) “A promise to be a surety for the performance of a contractual obligation, made to the obligee, is binding if the promise is in writing and signed by the promisor and recites a purported consideration.”.
\item[127] \textsc{Restatement (Second) of Contracts} \textsection{} 87 cmt. b, \textsection{} 88 cmt. a. The recited consideration need not ever be delivered. \textsc{Id.} \textsection{} 87(c).
\item[128] Fuller, supra note 118, at 815.
\item[130] \textsc{Restatement (Second) of Contracts} \textsection{} 79 cmt. c (“Ordinarily, therefore, courts do not inquire into the adequacy of consideration.”).
\item[131] Courts will, however, invalidate contracts on the basis of misrepresentation, duress, undue influence, and so forth, and the inadequacy of consideration may help establish the existence of these problems.
\item[132] Markovits, supra note 96, at 819-20.
\item[133] Markovits argues that a promise involves recognition of the promisee’s personality because the promisor “comes to take the promisee’s ends as her own and, moreover, to treat him – his will – as an end.” Bargains are entitled to special status because they entail mutual recognition of personality and thus avoid, for example, the possibility of enforcing a one-sided promise that denies the promisor’s personality, such as a promise given by a low-caste person to a high-caste person in a society that denies enforceability to promises made by high-caste persons to low-caste persons. Markovits, supra note 96, at 824-26; \textit{see also} Daniel Markovits, \textit{Contract and Collaboration}, 113 \textit{Yale L.J.} 1417, 1471-81 (2004).
\end{enumerate}
\end{footnotesize}
the emphasis on factual (subjective) bargain is consistent with the objective theory of contract formation.\textsuperscript{134}

It is possible to combine the “formal” and “substantive” views and examine the enforceability of promises on a case-by-case or type-by-type basis. One might conclude that some promises should be enforced if part of a true exchange, others if they are made with recited consideration, and still others without meeting either requirement. This is the general approach of Lon Fuller’s \textit{Consideration and Form}.\textsuperscript{135} Fuller examines unrelied-on gratuitous transfers, half-completed exchanges, fully executory agreements, and other types of transactions, evaluating the strength of the substantive bases for promise enforcement (private autonomy, reliance, unjust enrichment) and the likelihood that the functions of formal requirements (evidentiary, cautionary, and channeling\textsuperscript{136}) are met in each context.\textsuperscript{137} Despite this careful application of the idea that different formal requirements are appropriate in different contexts, Fuller does come close to endorsing actually delivered nominal consideration as a “blanket formality” substituting for the seal,\textsuperscript{138} suggesting that designating and delivering nominal consideration serves the evidentiary, cautionary, and channeling functions well enough that enforcement is desirable even if the substantive reasons for enforcement are weak.\textsuperscript{139} The

\textsuperscript{134} \textit{See} PERILLO, \textit{supra} note 104 § 4.6, at 159 (2009) (Restatement (First) of Contracts and Oliver Wendell Holmes supported giving effect to recited consideration “on the ground that the recital of the token objectively manifests a bargained-for exchange”). However, as Perillo notes, “[t]he majority of courts have held that it may be shown that the consideration has not been paid and that no other consideration has been given.” \textit{Id.} at 158.

\textsuperscript{135} Fuller, \textit{supra} note 118, at 816-22.

\textsuperscript{136} Form serves an “evidentiary” function if it provides “evidence of the existence and purport of the contract,” Fuller, \textit{supra} note 118, at 800. a “cautionary” function if it “act[s] as a check against inconsiderate action,” \textit{id.}, and a “channeling” function if “serves … to mark or signalize the enforceable promise; [and] furnishes a simple and external test of enforceability,” in other words if it “offers channels for the legally effective expression of intention.” \textit{Id.} at 801.

\textsuperscript{137} Fuller, \textit{supra} note 118, at 814-22.

\textsuperscript{138} Fuller, \textit{supra} note 118, at 823.

\textsuperscript{139} \textit{See} Fuller, \textit{supra} note 118, at 820 (endorsing decisions holding that a promise to make a gift may be made binding through the payment of nominal consideration). This is noteworthy because Fuller argues that in general “on ‘substantive’ grounds the balance … inclines away from judicial intervention” to enforce unrelied-on
Restatement (Second) of Contracts likewise can be understood as adopting the type-by-type approach, because it embraces the substantive theory of consideration in general, but contains exceptions for option and guaranty contracts on the ground of commercial usefulness.\footnote{140}

This review of approaches to the consideration doctrine permits three observations. First, as a matter of positive law it is doubtful whether nominal consideration generally is effective.\footnote{141} There is a serious issue here about existing securitizations. To the limited extent courts have addressed the issue, they apparently find in most instances that nominal consideration is \textit{not} effective.

A court might decide to resolve the question whether value was given in mortgage securitizations by asking whether “nominal consideration” is “sufficient,” and might well answer bin the negative. Indeed, under the straightforward black-letter approach, the phrase “simple contract” in the U.C.C. suggests that nominal consideration is not sufficient. A “simple contract” is one that is not a “formal contract” or “specialty.” The difference is that a “simple contract” is enforceable because of consideration, and a “formal contract” is enforceable \textit{not} because of consideration but because it meets formal requirements. The \textit{Restatement} explains its treatment of nominal consideration for option and guaranty contracts along these lines: the recital of nominal consideration is not itself “consideration” sufficient to support a simple contract, but

\footnote{140} See discussion \textit{supra}.\footnote{141} To be sure, a court might determine that the consideration given in the mortgage securitization transactions we reviewed was not the recited consideration of $10 or a subset of the mortgage cash flows, but instead was supplied by the surrounding business context of the transaction: The sponsor wanted to accomplish the transaction, and the depositor’s assistance in doing so supplied the consideration. \textit{Compare} Kull, \textit{supra} note 110, at 39 (asserting that practical importance of consideration has decreased because of “a more realistic readiness to find consideration in the business motives behind business transactions”). Such a broad focus is inconsistent with the formalistic nature of mortgage securitization transactions more generally; for example, bankruptcy remoteness opinions apparently rely on the \textit{separateness} of the sponsor-depositor and depositor-trust transfers.
rather something different: a purely formal validation device.\footnote{See Restatement (Second) of Contracts § 87 cmt. c; John Edward Murray, Jr., Murray on Contracts § 62[B][4], at 268-69 (5th ed. 2011).} Even if nominal consideration makes a promise enforceable, it does so because the promise is part of a formal contract, not a simple contract.\footnote{See Eric Mills Holmes, 3 Corbin on Contracts (Joseph M. Perillo, ed. 1996) §10.18, at 423; Restatement (Second) of Contracts § 6 cmt. a (distinguishing between “formal” and “informal” or ‘simple’ contracts); Murray, supra note 95 §16 (“The antithesis of the formal contract is the informal contract, which is sometimes also called a simple contract or bargain.”).} Even if nominal consideration makes a contract enforceable, it does not make the contract enforceable as a simple contract, so nominal consideration wouldn’t suffice.

Second, we may question whether the U.C.C.’s “consideration sufficient to support a simple contract” is helpful. That phrase seems to contemplate that there is a single type of consideration that works for all “simple contracts.” But our review has shown that this is doubtful.

Third, despite the U.C.C.’s directing us to the concept of “value sufficient to support a simple contract,” neither the caselaw nor the scholarly literature on consideration is particularly relevant to whether failure to record mortgage assignments should have negative consequences. Although the revisions to Article 9 apparently purport to make consideration a device for selecting recording regimes,\footnote{Indeed, the consideration doctrine has done much more than decide “which promises should be enforced” for a long time. “Consideration sufficient to support a simple contract” has been one form of “value” in commercial law for a long time, and many aspects of various transactions turn on whether “value,” so defined, was given. For example, giving “value” historically has been a prerequisite for attachment of a purchase money security interest. It would be worthwhile to explore whether the scholarly discussion of consideration doctrine could be usefully expanded in taking this into account.} issues of consideration typically come up when courts attempt to decide whether the promisee should be able to enforce a promise. Scholars who have discussed the subject typically do so in the same way; their focus is on enforceability of promises.\footnote{See Nicholas C. Dranias, Consideration as Contract: A Secular Natural Law of Contracts, 12 Tex. Rev. L. & Pol. 267, 326-27 (2008) (proposing to protect autonomy by “returning consideration to its central role in rendering promises morally enforceable”); David Gamage & Allon Kedem, Commodification and Contract Formation: Placing the Consideration Doctrine on Sounder Foundations. 73 U. Chi. L. Rev. 1299, 1367 (2006) (proposing reformulation of consideration doctrine to provide “a superior method for determining which promises parties actually desire to have enforced”); Daniel Markovits, Contract and Collaboration, 113 Yale L.J. 1417, 1482-83 (2004) (justifying the institution of contract in general, and the doctrine of consideration, in terms of}
case of mortgage securitizations, the promisor (the sponsor) is not resisting enforcement of a promise by the promisee (the depositor, which after all is its own corporate affiliate). Instead, the issue is whether the parties to the securitization transaction will benefit from not having to record mortgage assignments and will do so at the expense of third parties who might be harmed by failure to enforce the recording rules (subsequent assignees, defaulting borrowers).

In this context, nominal consideration functions, and may have been used, not to invoke enforcement of promises, but to circumvent rules that benefit third parties and in effect to engage in regulatory arbitrage. Whatever the merits of nominal consideration in the ordinary contract context, the case against enforcement seems much stronger when the use of nominal consideration permits the parties to the transaction to benefit at the expense of third parties.

If it were generally accepted that nominal consideration generally suffices, then a court might be tempted to proceed syllogistically from the statute’s command to treat as “value” any “consideration sufficient to support a simple contract”: “nominal consideration is sufficient to support a simple contract,” so nominal consideration is “value.” But because the law is not clear, and because precedent and scholarship about nominal consideration do not bear on the question presented, it seems likely that courts would look to underlying policy issues to decide the question.

collaboration between contract parties, and observing, “Bargains are in their nature wanted by, and invoke the intentions of, all participants”); Taylor, supra note 111, at 117 (“unfortunate fate of donative promises”); Melvin Aron Eisenberg, The World of Contract and the World of Gift, 85 Cal. L. Rev. 821 (1997) (arguing that many “gratuitous” promises, such as promises to make one-sided contract modifications or hold offers open, should be enforced, but that simple promises to make gifts motivated by affection should not be enforced); Mark B. Wessman, Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration, 29 Loy. L.A. L. Rev. 713, 845 (1995) (evaluating consideration doctrine in terms of the desirability of enforcing gratuitous promises and concluding that consideration should not be a necessary condition for presumptive enforceability); Kull, supra note 110; Goetz & Scott, supra note 129. Peter Benson, who understands the exchange of promises that satisfy mutual consideration as the transfer of property rights in the promised performances, concludes that “[b]ecause the entitlement is framed as an aspect of the transfer, it can only be between the parties and not as against third parties.” Peter Benson, The Idea of Consideration, 61 U. Toronto L.J. 241 (2011).
VI. RESOLVING THE EFFECT OF NOMINAL CONSIDERATION IN MORTGAGE SECURITIZATIONS

The mortgage-follows-the-note provisions of Article 9 of the Uniform Commercial Code may be in conflict with longstanding real property recording statutes. Finding that nominal consideration is insufficient to trigger the mortgage-follows-the-note provisions would avoid the conflict and thus might be a tempting alternative for a court faced with the issue. More generally, courts would be likely to turn to policy considerations in light of the limited quantity and applicability of caselaw and scholarship on the question of nominal consideration.

A. The Potential Conflict Between Article 9 and Recording Statutes

Article 9 may not trump recording statutes even if it claims to do so. There appears to be a longstanding conflict between the principle that “the mortgage follows the note” and the real property recording statutes of most states. In most states these statutes provide that an unrecorded mortgage assignment is void against a subsequent bona fide purchaser of the land or of an interest in the land, presumably including a mortgage, for value without notice of the prior claim to the mortgage.\(^{146}\) This apparent conflict has caused a long-standing anxiety in the real estate finance profession about how to perfect an interest in a mortgage.\(^{147}\)

Although the U.C.C. revisions seem to adopt the mortgage-follows-the-note principle in a reasonably unambiguous way, and although the Code comments seem to assert that these provisions override competing law,\(^{148}\) it does not seem that the real estate recording statutes were

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\(^{146}\) See John Patrick Hunt et al., *supra* note 13.

\(^{147}\) This issue is discussed in detail in the related paper, *On the Proposition “The Mortgage Follows the Note.”*

\(^{148}\) Before the most recent revision, the Official Comments to the U.C.C. expressly deferred, first to “local real property law,” later to “other law” on “the question of the effect on the rights under the mortgage of delivery or non-delivery of the mortgage or of recording or non-recording of an assignment of the mortgagee’s interest.” U.C.C. § 9-102 cmt. 4 (original and revised versions). After the recent amendments, the Official Comments no longer defer to state real property law. See U.C.C. § 9-308(g) & cmt. 6.
in general amended to recognize the U.C.C.'s supremacy.\textsuperscript{149} Thus, to the extent that there was a conflict between the recording statutes and the principle that the mortgage follows the note before the U.C.C. was revised, it apparently continues after the revisions.

Apparently recognizing the conflict, a leading treatise counseled against relying exclusively on the proposition that the mortgage follows the note, under Article 9 or otherwise, instead of recording.\textsuperscript{150} At the same time, other commentators, consistent with the overall thrust of the revisions to Article 9, \textsuperscript{151} have expressed confidence that Article 9 defeats any recording requirement:

Article 9 makes it as plain as possible that the secured party need not record an assignment of mortgage, or anything else, in the real property records in order to perfect its rights to the mortgage …. \textsuperscript{152}

It is unclear how a court perceiving a conflict between the U.C.C. mortgage-follows-the-note provisions and state real property law,\textsuperscript{153} would resolve that conflict.\textsuperscript{154} Although the comments on the mortgage-follows-the-note provision no longer defer to state law, the Code’s

\textsuperscript{149} Our research on the ten states with the largest numbers of mortgages securitized in private-label transactions indicates that at most two states, Florida and Maryland, amended their real property statutes to recognize the primacy of the U.C.C.'s priority rules as to mortgage assignments. The results of our survey of state mortgage law are on file with the authors. Both amendments used the phrase “security interest in a mortgage.” A Westlaw search in the STAT-ALL database on this phrase on July 27, 2011 did not locate any additional states that had changed their recording statutes.

\textsuperscript{150} See 2 KRAVITT, supra note 100, § 15.04[A], at 16-157 (“[W]hether the transferee, as owner of the note acquires all rights of the mortgagee without having to record an assignment of the mortgage, is not entirely clear. In addition, there are reasons why recordation of the mortgage may be wise in order for the transferee to obtain the greatest possible rights in the mortgage and in the other ancillary loan documents …”).

\textsuperscript{151} See Julian B. McDonnell, Is Revised Article 9 a Little Greedy?, 104 COM. L.J. 241, 241-42 (1999) (“The U.C.C. specialists devoutly believe in secured credit. With appropriate fanfare, they have introduced changes designed to make it easier for lenders to create and perfect security interests in the many different contexts in which secured financing is used … It is as though U.C.C. specialists identified with secured creditors as the Clients, the Good Guys …”).

\textsuperscript{152} JULIAN B. MCDONNELL & JAMES CHARLES SMITH, SECURED TRANSACTIONS UNDER THE U.C.C. § 16.09 (2011); see also

\textsuperscript{153} A recent student case comment argues that there is no conflict between Massachusetts real property recording statutes and the U.C.C. because the mortgage follows the note as a “security interest” but not as a “real property interest.” Case Comment, Massachusetts Supreme Judicial Court Unanimously Voids Foreclosure Sales Because Securitization Trusts Cold Not Demonstrate Clear Chains of Title to Mortgages, 125 HARV. L. REV. 827, 832 (2012). The case comment’s author does not further flesh out this intriguing suggestion.

\textsuperscript{154} See, e.g., Robert M. Lawless & Adam J. Levitin, Comments on Draft PEB Report, at 7 n.11 (May 27, 2011) (arguing that it is “implausible” that state legislators intended to upset long-standing state real property law in revising Article 9).
drafters recognized in general that when the U.C.C. conflicts with another statute, the other statute may prevail, especially where the other statute “was specifically intended to provide additional protection to a class of individuals engaging in transactions covered by the Uniform Commercial Code,”¹⁵⁵ a description that at least arguably covers the recording statutes.¹⁵⁶

In general, the U.C.C. drafters expected that resolution of any conflict would depend on “principles of statutory interpretation that specifically address the interrelationship between statutes.”¹⁵⁷ In a case where the securitization trustee relied on Article 9 and a subsequent mortgage purchaser relied on the state’s title recording statute, those principles might lead a court to resolve the apparent conflict in many different ways. It could consider legislative history to see if revised Article 9 was intended to overrule state recording statutes. It could consider the overall purpose and likely intent of the Article 9 revision and recording statutes (separate from legislative history) to determine whether it makes sense for Article 9 to override recording. It could simply follow the last-enacted statute (likely to be revised Article 9).¹⁵⁸

B. Nominal Consideration, Article 9 and the Recording Statutes

What would happen in litigation if a foreclosure defendant or competing claimant pointed to the failure to record mortgage assignments and the opposing party, a securitization trustee or servicer charged with representing the interests of mortgage investors, relied on Article 9 in a

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¹⁵⁵ U.C.C. § 1-103 cmt. 3.
¹⁵⁶ Specifically, it seems at least arguable that title recording statutes are “specifically intended to provide additional protection” to purchasers of real property interests and that statutes requiring a chain of recorded assignments as a prerequisite to foreclosure are “specifically intended to provide additional protection” to borrowers. ¹⁵⁷ U.C.C. § 1-103 cmt. 3.
¹⁵⁸ But see Committee on Legal Opinions of the American Bar Ass’n, Comments on Draft PEB Report, at 2 (May 31, 2011) (questioning whether Revised Article 9 “would be effective to change the requirements of real estate recording statutes without making express reference to such statutes” and asserting that “[u]nder many states’ statutory construction rules (e.g., Washington State), passage of a statute may not automatically have the effect of amending or reversing contrary statutory provisions without expressly referring to the supplemental or superseded statutes.”).
The court would be confronted with the potential conflict between Article 9 and the state recording statutes. Most likely, the court would not make a wholesale ruling that one body of law or the other prevailed. Instead, under the usual approach to statutory construction, it would try to give effect to both statutes to the extent possible.

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

A narrower approach, applicable only to nominal-consideration cases, would be to find that nominal consideration is not “sufficient to support a simple contract” in the circumstances at hand. As discussed, it is unclear as a general matter whether nominal consideration is or is not “sufficient to support a simple contract.” Moreover, the normative concerns that might guide us in deciding whether nominal consideration is enough to render a promise enforceable are inapplicable and incomplete here, because the issue is not whether the promisee will be able to enforce a promise, although that is what consideration doctrine normally addresses. Instead, the issue is whether providing nominal consideration should strengthen the position of the parties to the securitization transaction as against subsequent claimants or homeowner/borrowers by

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159 The example presumes that the failure to record mortgage assignments is relevant under applicable state law.
obviating recording requirements. Put differently, the statute apparently commands the court to use the contract concept of consideration to solve the property problem of required notice to third parties.

Although simply holding nominal consideration insufficient is an attractive way out of the conflict, a more robust approach would be to consider expressly what policies are relevant to mortgage securitizations where nominal consideration was employed.

First, why does the U.C.C. perfection rule require “value”? In general, one reason that the law protects those who have given value is that they will be prejudiced by the loss of what they have given up. Accordingly, in many settings where the law protects those who have given value, it clearly excludes nominal consideration from the definition of value. For example, giving nominal consideration will not make a person a “bona fide purchaser for value” under the real estate recording statutes. If S gives a parcel of land to X and then sells the same parcel of land to Y, Y may be protected if X did not record her claim. But this will be true only if Y is a bona fide purchaser “for value,” meaning that Y actually paid something substantial for the land. Y will not be protected if he provided only nominal consideration. Likewise, the

160 See, e.g., RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT (2010) § 68 cmt. h (“[T]he law seeks to deny protection to purchasers (such as donees) who have not changed position, …”). Note that the Restatement treats a donee as a “purchaser,” but not a “purchaser for value.” Id. § 66 cmt. c.
161 See, e.g., RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT (2010) § 68(1) (“Except as otherwise provided by statute, a purchaser gives value for rights if they are acquired (a) in exchange for present value, excluding nominal consideration; …. ”).
162 See 14 RICHARD R. POWELL & MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY § 82.02[2][a], at 82-55 (“While [nominal sums or “love and affection”] may be adequate to support a contract, they are not adequate to constitute value under the recording acts”); 14 RICHARD R. POWELL & MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY § 82.01[2][b], at 82-10; South Carolina Tax Comm’n v. Belk, 225 S.E.2d 177, 180 (S.C. 1976) (no purchase for value when corporation’s sole owner paid corporation $5 for 700-acre tract of land); Horton v. Kyburz, 346 P.2d 399, 403 (Cal. 1959) (“mere nominal consideration” does not “satisfy the requirement that a valuable consideration must be paid” under the recording laws; “recording laws “protect those … who invest some substantial sum in reliance” on their belief that they are acquiring good title); Alexander v. O’Neil, 267 P.2d 730, 735 (Ariz. 1954) (“The law is … well settled that a nominal consideration does not constitute a valuable consideration within the meaning of the recording statute”); Melendrez v. D & I Investment Co., 26 Cal. Rptr. 2d 413, 425 (Cal. Ct. App. 2005) (objective of recording laws is to protect purchasers who have “invested substantial sums” in good faith). Compare Cheatham v. Gregory, 313 S.E.2d 368 (Va. 1984) ($400 payment for 2.5 acres of land in 1973 was “valuable consideration” making the buyer a bona fide purchaser; Virginia law does not require
law of unjust enrichment more generally protects bona fide purchasers for value, but only when they give “present value, excluding nominal consideration.”

Second, what policies are implicated by permitting parties who have not given real value to opt out of recording statutes? There are good reasons to have public title records. Beyond the general benefit of making this information available to the public, public title records can serve important private purposes by enabling borrowers and potential buyers to determine the validity of a mortgage by knowing who the mortgagee is. Although consumer protection statutes may give borrowers a legal entitlement to learn the identity of creditors, a legal entitlement is not necessarily an acceptable substitute for an actual record.

Third, there are interests in protecting the security of transactions. Not requiring recording enhances the security of transactions that don’t have to be recorded (these transactions will not be disturbed) while detracting from the security of later transactions involving the same property (subsequent buyers of the property will not have an authoritative way of checking title).

It seems likely that the Article 9 revisions were adopted to make mortgage securitizations easier,

“fair and adequate” consideration). See also RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT (2010) § 68 Illo. 13 (even if $10 consideration recited in deed and not given is sufficient to support enforceability of a promise, it is inadequate to constitute reciting party as bona fide purchaser).

The Restatement also recognizes that value is given by undertaking an obligation of future performance or taking additional security for an antecedent debt. Id. §68 cmts. b, g. Neither case is obviously applicable to the transactions we reviewed.

165 See Christopher L. Peterson, Two Faces: Demystifying the Mortgage Electronic Registration System’s Land Title Theory, 53 WM. & MARY L. REV. 111, 155-60 (2011); Board of Selectmen v. Lindsay, 829 N.E.2d 1105, 1110 (Mass. 2005) (“[B]ecause of the long-recognized inevitability and ubiquity of controversies over land, the Massachusetts Bay Colony enacted a recording act as early as 1640 for the declared purpose that ‘every man may may know what estate or interest other man may have in houses, lands, or other heriditaments they are to deal.’”).
166 There appears to be scholarly disagreement over how useful public records have been in this respect.

and the subsequent transactions involving securitized mortgages may be less important in securitizations because the mortgages generally are not resold once they enter the securitization trust.

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

Finally, there is the possibility that holding nominal consideration insufficient would disrupt the financial system. Although courts often say they are not supposed to engage in this

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168 U.C.C. provisions not discussed in detail in the Permanent Editorial Board’s report may protect the interests of downstream assignees that gave value. For example, if the SPV gave value for the promissory notes, it might be protected by the “holder in due course” doctrine from competing claims to the notes. See Kettering, supra note 45 (asserting that a holder in due course acquires a security interest in the instrument). This argument has several prerequisites: The notes must be negotiable. See Mann, supra note 73 (arguing that most mortgage notes are nonnegotiable). The SPV must take in good faith. The notes must actually be transferred or endorsed. The parties to the transaction must not be too “closely connected” for the holder in due course doctrine to apply. See Nelson & Whitman, supra note 10, at 416 (explaining that when transferor and transferee are “closely connected,” transferee may not benefit from holder in due course status). All of these propositions are subject to doubt and are likely to be fact-specific. More generally, if the depositor had the “power to transfer rights in” the note even though it did not itself own an interest in the note under Article 9, then the U.C.C.'s text seems to support the idea that the SPV could obtain a perfected security interest in the note from the depositor even despite the fact that the depositor did not give value. See U.C.C. §9-203(b)(2). When an entity that does not itself have an ownership interest can nevertheless pass rights in a nonnegotiable note is a fact-specific question, as is whether the parties complied with the endorsement and/or delivery requirements for transferring an interest in a negotiable note. See U.C.C. §9-203 cmt. 6 (“in accordance with basic personal property conveyance principles, the baseline rule is that a security interest attaches only to whatever rights a debtor may have”).

169 Specifically, plaintiffs have faced contractual requirements that they act through the securitization trustee in bringing claims for breach of representations and warranties, and that the trustee act only if requested by a specified percentage of investors in the deal. Would-be plaintiffs have been unable to assemble the required fraction of investors.

170 Large-scale attacks on securitization practices generally have drawn this kind of concern. For example, FHFA’s $200 billion lawsuit was attacked on this basis.
kind of result-oriented reasoning, there is no doubt that financial disruptions are costly and that this could enter into courts’ thinking.

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

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

VII.  CONCLUSION

Our review raises questions about whether many mortgage transfers in connection with securitization transactions are covered by the provisions of Article 9 of the U.C.C. that may obviate recording of mortgage assignments. It appears that many mortgage transfers were effected for purely nominal consideration. It is unclear in general whether nominal consideration suffices to make a contractual promise enforceable at all, much less as a “simple” (as opposed to
a “formal”) contract. Because the U.C.C.’s mortgage-follows-the-note provisions are triggered when “value” is given, and “value” is defined as consideration sufficient to support a simple contract, it is not clear that purely nominal consideration suffices to invoke whatever protection the U.C.C. offers.

One may question whether it makes sense at all to define the scope of the real property recording statutes in terms of whether consideration sufficient to support a contract is given in exchange for a mortgage transfer, but when nominal consideration is involved the analysis becomes bizarre. Because of the decline of the seal and the need for a secure way to make a promise legally enforceable, we should give effect to nominal consideration, thus triggering the mortgage-follows-the-note provisions of the U.C.C. and avoiding application of the recording statutes? Or, alternatively, because exchange promises are generally more important than gift promises, nominal consideration should not be given effect, so the mortgage-follows-the-note provisions of the U.C.C. are not triggered and the recording statutes do apply?

Neither of these approaches really addresses the substantive questions presented by recording of mortgage assignments. Indeed, to articulate these approaches at all is to highlight the concerns law professors expressed about attempting to resolve important policy issues relating to the mortgage crisis through technical application of the U.C.C.

Because the application of the U.C.C.’s provisions to mortgage securitization is so unclear, a court confronted with the mortgage-follows-the-note argument in a nominal-consideration case should move to consideration of the underlying policy questions presented: What are the merits of the public land title recording system relative to the private ownership perfection system contemplated by the U.C.C.? How does one weigh the interest in security of transactions against the interest of those who may be harmed by failure to record mortgage
assignments? And, inevitably, what are the effects of the possible decisions on financial stability?

Courts may be poorly situated to weigh these considerations, but engaging them directly seems likely to lead to better results than simply asking whether nominal consideration supports a simple contract. Even apart from the fact that the question has rarely been considered, courts’ and scholars’ efforts to answer the question have been guided by concerns that do not bear on the substantive issues at play here, so simply following precedent leads to arbitrary results. Poorly situated or not, the courts are stuck with the legacy of the snarled legal framework for mortgage transfer. They have had to deal with it in cases about mortgage enforceability, and they may well have to deal with it in cases about mortgage ownership.

Looking forward, policymakers should try to avoid recurrence of this problem. They should consider adopting a unified solution for land title law that brings the efficiency and security that transaction participants need together with the degree of transparency about real property interests that the public interest requires. From a technological point of view, it is easy to imagine a national electronic system that provides secure, transparent title records at low cost. But, as has so often been the case in dealing with the financial crisis and its aftermath, the most difficult problems are political. ¹⁷¹

¹⁷¹ This issue is discussed in greater detail in All in One Basket, supra note 6.