

11-22-2011

The Uncertain Requirement for Recording Assignments of Deeds of Trust

Roger Bernhardt

Golden Gate University School of Law, rbernhardt@ggu.edu

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>

 Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Bernhardt, Roger, "The Uncertain Requirement for Recording Assignments of Deeds of Trust" (2011). *Publications*. Paper 461.
<http://digitalcommons.law.ggu.edu/pubs/461>

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

Midcourse Corrections

The Uncertain Requirement for Recording Assignments of Deeds of Trust

Roger Bernhardt

The decision in *Calvo v HSBC Bank* (2011) 199 CA4th 118, 130 CR3d 815, will certainly affect foreclosure practice—that is, if it survives review by the supreme court and if it is followed by other courts, prospects that I find doubtful. (*Calvo*'s holding that an assignment of a deed of trust is not subject to the preforeclosure recordation requirement of CC §2932.5, on the ground that a deed of trust is not a mortgage, is reported in this issue at p 196.)

The lesson everyone thought they learned in 1933, when the California Supreme Court decided *Bank of Italy Nat'l Trust & Sav. Ass'n v Bentley* (1933) 217 C 644, 20 P2d 940, was that in mortgage law, form does not control, so that when an instrument functioned like a mortgage it should be treated like a mortgage, regardless of whether it looked like a mortgage (as a deed of trust or sale and leaseback, for example, does not). The court's later language in *Monterey S.P. Partnership v W.L. Bangham, Inc.* (1989) 49 C3d 454, 460, 261 CR 587, reported at 12 CEB RPLR 250 (Nov. 1989), dealing with deeds of trust in particular ("In practical effect, if not in legal parlance, a deed of trust is a lien on the property.... [M]ortgagees and trust deed beneficiaries alike hold security interests in property encumbered by mortgages and deeds of trust"), seemed to clinch that matter, and makes it extremely unlikely that that conclusion will change, despite what the *Calvo* court has said to the contrary.

As far as lower court holdings are concerned, *Calvo* cited *In re Salazar* (Bankr SD Cal 2011) 448 BR 514 with disapproval but did not mention two other 2011 federal decisions that reached the same conclusion that CC §2932.5 applies to deeds of trust as well as mortgages—namely, *In re Cruz* (Bankr SD Cal, Aug. 11, 2011, No. 11-01133-MM13) 2011 Bankr Lexis 3080 and *Tamburri v Suntrust Mortgage* (ND Cal, July 6, 2011, No. C-11-2899 EMC) 2011 US Dist Lexis 72202—or three state court of appeal decisions doing the same: *Diamond Heights Village Ass'n, Inc. v Financial Freedom Sr. Funding Corp.* (2011) 196 CA4th 290, 126 CR3d 673, *Aviel v Ng* (2008) 161 CA4th 809, 74 CR3d 200, and *Ung v Koehler* (2005) 135 CA4th 186, 37 CR3d 311. (I commented on some of these cases in prior issues of this Reporter. See *Editor's Take*, 34 CEB RPLR 144 (July 2011) (*Diamond Heights*); *Midcourse Corrections: When First Might Be*

Worst, 31 CEB RPLR 75 (May 2008) (*Aviel*); *Editor's Take*, 29 CEB RPLR 251 (Mar. 2008) (*Ung*.) *Calvo* is rather clearly going against the grain of these holdings.

Technically, [CC §2932.5](#) is ambiguous enough to allow a court to go either way on the question of whether deeds of trust fit under it. There are three sections in the Civil Code that deal with assignments, and the other two of them explicitly include deeds of trust as covered instruments. [Civil Code §2934](#) says “Any assignment of a mortgage and any assignment of the beneficial interest under a *deed of trust* may be recorded, and from the time the same is filed for record operates as constructive notice of the contents thereof to all persons.” (Emphasis added.) [Civil Code §2935](#) asserts that

the record of the assignment of the mortgage or of the assignment of the beneficial interest under the *deed of trust*, is not of itself notice to the debtor, his heirs, or personal representatives, so as to invalidate any payment made by them, or any of them, to the person holding such note, bond, or other instrument. [Emphasis added.]

These sections both stand in contrast to [§2932.5](#), which does not mention deeds of trust but instead provides as follows:

Where a power to sell real property is given to a *mortgagee, or other encumbrancer*, in an instrument intended to secure the payment of money, the power is part of the security and vests in any person who by assignment becomes entitled to payment of the money secured by the instrument. The power of sale may be exercised by the assignee if the assignment is duly acknowledged and recorded. [Emphasis added.]

It is certainly true that the beneficiary of a deed of trust looks like an “encumbrancer” who could easily fit under [§2932.5](#), but why did the terminology get switched if all three sections were designed to have the same scope? (I have always wondered why the legislature wanted to make recordation appear mandatory, as [§2932.5](#) does in foreclosure situations, if its effect is at the same time made so minimal, as it is in [§2935](#) for payment situations.)

The obviously best way to resolve legislative uncertainties is for the legislature itself to step in, and the real resolution of the question of whether [§2932.5](#) should apply only to mortgages, or to deeds of trust as well, ought to come from a clarifying amendment out of Sacramento. That, however, is unlikely to happen, meaning that the question will have to be settled by courts in lieu, and part of their conclusion might be based on a consideration of what purpose is supposed to be accomplished through such a recording requirement as [§2932.5](#) now contains.

It is evident enough that deeds of trust themselves ought to be recorded, to ensure that subsequent potential purchasers and encumbrancers of the property have notice of them and thereby take their proper place in line when claims against the land need to be ranked: Grantees want to be assured their titles are marketable and lenders to be assured that their liens have priority. A mandatory recording requirement like that contained in [CC §1214](#) had to be imposed for real estate markets to operate sensibly.

But the considerations are not the same when we are considering subsequent transfers of a deed of trust that was itself recorded when it was first executed, by virtue of which the world did receive constructive notice of the fact of its existence. That original recordation does not tell the world much else. It does not give any information, for instance, as to how much is owing on the loan secured by the deed of trust, because that depends on (1) the face amount of the promissory note—which is not recorded—as well as (2) the payments that were thereafter made on that note—facts even less likely to appear anywhere in the records. That essential information is obtained by talking to the right persons, rather than by more diligent record searching.

Nor, more relevantly to the transfer issues being considered here, will the records inform anyone about the identity of the person who is entitled to receive the payments that remain owing on that note. [Civil Code §2935](#), quoted above, says that it protects payments not made to the recorded assignee of a deed of trust only when they were made “*to the person holding such note*”—which is nowhere in the records. Even when a mortgage or deed of trust is involved, the debtor’s obligation is to pay the holder of the note, not the holder of the security instrument; the rules of commercial paper trump the rules on mortgage instruments and the effect or noneffect of their recordation.

The facts that (1) recorded mortgage instruments do not inform anyone of the amounts due under the promissory notes they secure and (2) in mortgage transfer situations, payment and priority issues are decided according to possession of the secured notes, rather than on the record identity of the secured parties, inevitably makes the recording of assignments of deeds of trust irrelevant to most outcomes. It certainly may be important for a borrower/trustor to know, or at least be able to find out, who holds her loan, for her to pay it off or to dispute it, but that problem would be better resolved through sensible rules about the giving (and contents) of notices of default and notices of sale or notices of servicing changes, rather than through rules mandating the recording of assignments. What bona fide dispute between a trustor and beneficiary or between rival beneficiaries actually turns on whether the assignment of a deed of trust was recorded, rather than on whether the underlying note was actually paid or transferred? Especially in today’s secondary market, where only MERS’s name may appear in the records—despite countless loan transfers—until a final assignment out of the system is made to a lender about to foreclose (see “Challenges to California Foreclosures Based on MERS Transfers” and “More on Mortgage Transfer Mysteries” at [RogerBernhardt.com](#)), the value of a requirement that the final transfer be recorded is even more obscure.

The *Calvo* judges may have had similar misgivings about the impact that the nonrecordation of the deed of trust had on the underlying merits of that case (or instead suspected that that event was being employed opportunistically to trip up an unwary lender more than to provide any meaningful protection to that borrower). If such was the motivation behind the decision, it may constitute more of a better policy than an authoritative precedent, in light of the many contrary decisions holding the other way on the mortgage/deed of trust distinction. For the time being, lawyers for transferees of loans that have gone into default should make sure that their clients have a good chain of *recorded* assignments before they let the foreclosure sale go forward.

Calvo v HSBC Bank (2011) 199 CA4th 118, 130 CR3d 815

Borrower defaulted on her loan, secured by a deed of trust against her home. The deed of trust granted title to the property and the power to sell on default to the trustee. A new trustee recorded a notice of default and began foreclosure proceedings. There was no notice of an assignment of the deed of trust; only the notice of the substitution of trustee reflected the change, which was recorded on the same day as was the notice of trustee's sale. Borrower sued the successor lender and the Mortgage Electronic Registration Systems, Inc. (MERS) (the lender's agent and nominal beneficiary), seeking to set aside the trustee's sale, alleging a violation of [CC §2932.5](#) (defining *mortgagee's* power to sell real property). The trial court dismissed the complaint on demurrer and the court of appeal affirmed.

Under [CCP §2924\(a\)](#), a "trustee, mortgagee, or beneficiary, or any of their authorized agents, may initiate the foreclosure process." MERS, as both the nominal beneficiary and agent of the original lender and its successor, had the statutory authority to begin foreclosure proceedings. See *Gomes v Countrywide Home Loans, Inc.* (2011) 192 CA4th 1149, 121 CR3d 819 (reported at 34 CEB RPLR 66 (Mar. 2011)). Here, [CC §2932.5](#) did not apply because foreclosure proceedings were begun under the authority granted in the deed of trust, not under a mortgage (which merely creates a lien, but does not transfer title, as does a deed of trust). Borrower simply "alleged no legal basis for setting aside the sale in this case."