CALIFORNIA'S NON-JUDICIAL FORECLOSURE TWO-STEP SHOULD BE DANCED TO THE RIGHT TUNE

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Fourth Edition

Important Notice

The information in this paper is not intended as legal advice. Reading this paper does not make the reader the author's client and does not make the author the reader's legal advisor. This work contains the author's thoughts, understandings, and assessments about public matters, which, of course, include laws and judicial pronouncements. It is supported by reference to legal authorities and judgment calls in order to facilitate assessment by those of the legal community wanting to help homeowners threatened with foreclosure in California by persons who have not proven they are owed a debt secured by the house.

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I. THERE IS HOPE FOR CALIFORNIA'S HOMEOWNERS

The foreclosure machine[2] and its clusters of attorneys across California have found that a two-step foreclosure process almost always works to take the house away from the homeowner. The dance has become a traditional pattern of abuse of homeowner rights. Neither California nor the homeowner defense bar has done much to curb the mass taking of homes by persons[3] who have not and are not required through this two-step to prove they are owed a debt secured by those houses.

The California nonjudicial foreclosure two-step involves two movements: a nonjudicial foreclosure followed by an unlawful detainer lawsuit allegedly seeking the eviction of the homeowner. The first movement of this two-step involves application of California's statutory law of residential[4] non-judicial foreclosure. California Civil Code §§ 2924, *et seq* (the "2924 Scheme") authorizes a private person to conduct what the 2924 Scheme establishes as a nonjudicial foreclosure (the "NJF"). The 2924 Scheme applies to loans secured by a deed of trust or a mortgage that contains a power of sale (each of which is referred to herein as a "mortgage lien" or "lien"). The NJF process leads to a foreclosure sale at which the high bidder

[2] Many companies make up what I refer to as the foreclosure machine. They don't refer to themselves this way and I doubt they have badges or secret handshakes that proclaim their membership in what I think is clearly an organized foreclosure network. This network, whether united by common business practices or contractual arrangement, does the bidding of the mortgage finance industry. A foreclosure shop supporting this network may be a bank, loan servicer, foreclosure trustee or law office. My experience and research convince me they are cut from the same cloth, use the same tactics, and have the same vulnerabilities. I coined this descriptive phrase for their group as an educational tool used in my book, *Fighting the Foreclosure Machine* (2012), available at www.amazon.com.

[3] 'Person' meaning an individual or business entity.

[4] This paper is about homeowner rights and residential foreclosures in California. No attempt is made to address commercial or non-residential foreclosure issues.

(the "foreclosure buyer")[5] most often receives a trustee's deed in return for payment[6] of the bid amount. The second movement of this California two-step is the unlawful detainer action or lawsuit in which the person filing the UD falsely or ignorantly claims to want a judgment evicting the homeowner pursuant to California Civil Code of Procedure § 1161a(b)(3) (the "UD" case, process or action).[7]

California's nonjudicial foreclosure two-step has not followed California's substantive law for the past 15 or so years. Pushing, shoving and disregard for homeowner rights is the noise of the routine nonjudicial foreclosure dance. California has law designed to protect homeowners and to afford them a fair and meaningful litigation forum, but homeowners hardly ever use it.

The music of the law I find in California is soothing. It makes the NJF process less intimidating and legally unimportant. Its shows that the UD lawsuit is an improper forum for resolution of issues involving the NJF sale, the filing of the UD case, and the homeowner's right to know if a debt is actually owed to the person demanding payments under threat of foreclosure. Typically, overworked judges are not aware of this music, however, and hear only the incorrect

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[5] The foreclosure buyer is the high bidder at the NJF sale. This person can be the alleged beneficiary under the deed of trust who starts the NJF process or a high bidder who had no previous claim under the mortgage lien. Usually the high bidder is the alleged beneficiary who causes the NJF sale to occur.

[6] Payment can be by cash but often is nothing more than a credit bid of an amount allegedly owed by the homeowner to the person claiming ownership of the deed of trust or mortgage. § 2924h(b) permits the person alleging to own the beneficial interest under the mortgage lien to bid the amount alleged due under that instrument, but there is no requirement under the 2924 Scheme for that person to prove pursuant to applicable law that said person is actually owed a debt secured by the house under that mortgage lien. That means that whatever number is alleged owed under the lien may not what is actually owed the person entitled to enforce the debt, i.e., the alleged amount due is fantasy until it is asserted as due and proven by the person actually entitled to enforce the debt.

[7] CCP § 1161a(b)(3) is the statutory authorization for filing a summary proceeding, i.e., the UD, but only if a NJF sale has happened "in accordance with Section 2924 of the Civil Code, under a power of sale contained in a deed of trust." This is the sole authorization in the judicial system for subjecting the homeowner to a quickie, small claims type of eviction proceeding like a UD case. An NJF sale has to first occur before this § 1161a(b)(3) can be used. The unlawful detainer action is mostly used by landlords to evict tenants, but this paper is not about landlord-tenant matters. It is solely about that the wrongs suffered by homeowners subjected to the UD forum under this statute and how to possibly rectify that problem by using the correct law of California.

legal tune orchestrated by the foreclosure machine. UD judgments appear to be issued in service to case-load management of summary proceedings like the UD case rather than well-reasoned determinations under California's applicable law. The judgments almost never favor the homeowner.

The homeowner should not feel badly about questioning the legal right of the person demanding payment under threat of foreclosure. Being behind on mortgage payments does mean that the homeowner's debt is owed to just whoever demands payment even when that person knows that mortgage payments are not current. A homeowner's payment history is available to many who serve the foreclosure machine so the fact that a person is familiar with payment history cannot be construed as conclusive evidence that that person is or represents the person actually owed the debt by law. California's Supreme Court knows that demands and threats are made by persons with no right to do so. "Banks are neither private attorneys general nor bounty hunters, armed with a roving commission to seek out defaulting homeowners and take away their homes in satisfaction of some other bank's deed of trust." *Yvanova v. New Century Mortgage Corporation*, 62 Cal.4th 919, 938 (2016).

It is reasonable to demand proof that the person wanting payments is actually owed a debt secured by the house. Most businesses have no problem with this concept, but the foreclosure machine does. Its routine is to insinuate rather than prove alleged rights in the debt. No reputable business would balk at giving proof of an invoiced amount, so the common antics of the foreclosure machine are reasonably questioned.

Until the person demanding payments under the loan proves its authority to enforce the debt under the fact-intensive provisions of the Uniform Commercial Code (§ 1101 Com., et seq.,

the "UCC"), that person is not owed the debt.[8] Payment to a person not entitled to enforce the Note leaves the homeowner liable to the person who is actually entitled to enforce the Note, if such person still exists.[9] Finding a way to make the attacking person prove its alleged rights is necessary to good legal health. Managing the California nonjudicial foreclosure two-step is the best way to make certain that the homeowner does not lose money or the house to a person not entitled to either.

II. THE 2924 SCHEME'S NONJUDICIAL FORECLOSURE – THE FIRST MOVE OF THE FORECLOSURE TWO-STEP

A homeowner knows she has missed one or more mortgage payments before a notice of default arrives. The notice references various parts of the 2924 Scheme giving it an appearance of legal importance. The notice demands payment of all arrearages and threatens acceleration of the debt and foreclosure pursuant to the 2924 Scheme if those payments are not made. The notice sounds official and creates a lot of anxiety that is not warranted once California's NJF is better understood.

The word 'foreclosure' commonly means an elimination of the homeowner's rights in the house. Most think foreclosure means that the homeowner loses title, ownership and ultimately possession of the house unless the homeowner finds a way to stop the foreclosure in a court of law. The California nonjudicial foreclosure authorized by the 2924 Scheme uses forms of the

[8] The debt instrument of a routine residential loan (the "Note") is acknowledged as a negotiable instrument. See, *Yvanova*, at 927-928. Division 3 of the UCC is California's law of negotiable instruments and it defines the rights and duties respecting the Note. The right to enforce the Note is a cause of action that requires the person claiming that right to prove with admissible evidence its entitlement to enforce the Note pursuant to § 3301 Com. No such proof means no right to enforce and a homeowner who refuses to honor a demand for payment by a person who has not proven its right is not an event that dishonors the Note or creates a default. § 3501(b)(3).

[9] Payments, even in the form of a taking of the house, to a person not owed the debt under the Note do not reduce the homeowner's debt obligation. §3602(a) Com. (the debt is reduced only for payments made to the person entitled to enforce the Note at the time of the payment or that person's bona fide agent). The UCC has no provision authorizing debt reduction even if a court orders payment to a person not authorized to enforce the Note for itself or the real person entitled to enforce the Note.

word ‘foreclose’ but in a very narrow and technical sense that has nothing to do with how most people view the purpose and result of a foreclosure.

Study of California’s NJF process over the past few years has taken me full circle. Initially, the 2924 Scheme and its use of the word foreclose made me think that the NJF process was an important legal event that would result in loss of the house unless a way was found to stop or avoid the NFJ sale. Now I see that the NJF is not very important to the protection of homeowner rights against false or mistaken claims under the Note and the collateral security instrument, which is usually a deed of trust in California.

In fact, the NJF sale is not a sale of title or ownership of the house and does not eliminate the homeowner’s right to possess the house. Nor does the 2924 Scheme creates a presumption that the NJF process is a statement as to the merit or validity of the mortgage lien or the right of the person pulling the NJF strings[10] to enforce that lien. With a better understanding of the unique substance of the 2924 Scheme, the foreclosure defense bar and its clients can find more and better options for homeowners facing unsupported claims under threat of foreclosure.

Civ. Code § 2924f(b)(8)(A) requires publication of a formal notice of a trustee’s sale[11] and defines what California authorizes to be sold at the NJF sale:

> (8) (A) On and after April 1, 2012, if the deed of trust or mortgage containing a power of sale is secured by real property containing from one to four single-family residences, the notice of sale shall contain substantially the following language, in addition to the language required pursuant to paragraphs (1) to (7), inclusive: NOTICE TO POTENTIAL BIDDERS: If you are considering bidding on this property lien, you should understand that there are risks involved in

[10] A trustee under a deed of trust has no independent authority to initiate or conduct an NJF process without the approval or instruction of the beneficiary under the deed of trust, whether that authorization comes directly from the beneficiary or from an agent who is doing that beneficiary’s bidding. The trustee most often is the person, however, that conducts the issuance of notices and the NJF sale of the 2924 Scheme.

[11] An NJF process is typically started and conducted by a person claiming to be the trustee under the deed of trust. After the NJF sale the trustee issues a trustee’s deed to the high bidder. The trustee is supposed to issue notices and conduct the NJF sale as required under the 2924 Scheme.

> bidding at a trustee auction. You will be bidding on a lien, not on the property itself. Placing the highest bid at a trustee auction does not automatically entitle you to free and clear ownership of the property.

This statutory law defines what the trustee is selling and thereby defines what is conveyed by the trustee's deed to the high bidder at the sale. It makes clear that the only thing being sold and bought at the NJF sale is a lien.

The NJF sale is a sale of an alleged and unproven mortgage lien. California's notice to bidders is as clear as it can be: BUYER BEWARE, because this sale is not a sale of title or ownership of the house. This alert is confirmed by the 2924 Scheme which is also devoid of any representation or warranty that the mortgage lien is legally valid or being sold by a person who has authority by law to sell it.

Lienholders sell mortgage liens every day in private transactions involving only the seller and buyer. The assignment of a deed of trust is an example of such a common and private transaction. This happens without the formal trappings of the NJF process. The NJF sale is a private sale with the added complication of a statutorily required process for selling the mortgage lien. Using the NJF process is the more expensive and time-consuming way to sell a mortgage lien. The benefit to the foreclosure machine is that the NJF sale and resulting trustee's deed give an appearance of state-backed legality that is not present but the appearance is useful in the intimidation of homeowners and the confusion of judges and homeowner defense attorneys. If the foreclosure buyer is, for example, the alleged beneficiary under the deed of trust[12] who

[12] Only the person entitled to enforce the Note actually owns and has the right to enforce the mortgage lien as *Yvanova* affirms. The name on the lien, whether the lender or an alleged successor, may not be the person who is actually the beneficiary at law, even though the beneficiary named in the public land records states otherwise. The 2924 Scheme as applied does not permit homeowners to investigate or demand proof of the identity of the true beneficiary, if any exists, under the deed of trust, so the entire NJF process takes place without the identity of the true beneficiary being determined. As discussed below, the identity of the true beneficiary is not necessary to the NJF process because it has nothing to do with enforcement of the Note or mortgage lien. California's imprecise use of words in the 2924 Scheme is no doubt a significant factor that has led to confusion and deprivation of homeowner rights during the 21st century.

caused the NJF to happen, that person's post-sale ability to brandish a trustee's deed issued pursuant to the 2924 Scheme is a lot more impressive than having a piece of paper that states that the alleged lienholder assigned the alleged lien to the very same alleged lienholder. The formality of the 2924 Scheme creates a misleading sense of importance that the foreclosure machine is and has been using to unfair advantage for too long.

You may not have heard that the NJF process only involves a sale of the mortgage lien. This is not surprising. Section 2924f(b)(8)(A) is not discussed in a single published appellate decision in California as of the writing of this paper. One unpublished decision mentions this statutory section only to state that the court would not discuss it.[13] This statute has been effective since April 1, 2012 as stated in the quoted portion above. The lack of attention to it in California's published case law suggests that homeowners and their attorneys have not known about it.[14] Otherwise, one would expect an appellate case to have discussed a homeowner's concern about the legal substance of an NJF sale in light of Section 2924f(b)(8)(A).[15]

Section 2924f(b)(8)(A) seems to have been added to the 2924 Scheme in order to make the 2924 Scheme consistent with what was already California's law. This section does not appear to have created new law in California. Whether a judge thinks it new or merely restatement of pre-existing law is not terribly important since Section 2924f(b)(B)(A) clearly is California's law now. Historical perspective helps appreciate the merit and consistency of

[13] *Collins v. Nationstar Mortgage, LLC*, Case No. C078530, (CA App 3d Dstr 5/31/18) (unpublished), p 16.

[14] It is possible that one or more foreclosure defense attorneys is already aware of this problem. It is possible that the content of this paper previously has been advanced on behalf of a client and that the particular case was not taken through an appellate process available to my legal search engine. If you are such an attorney, I'd like to hear your experience with the matters discussed in this paper. Please contact me at rmj@esprouts.com.

[15] The lack of decisional law has a positive aspect which may help homeowners in future legal battles. There is no current decisional law that refutes the clear language of § 2924f(b)(8)(A). Any case cited by an opponent in an effort to argue that an NJF sale is a sale of tittle, ownership or right to possession will be distinguishable and unpersuasive because whatever the case cited, it will not likely mention or address the express provision of § 2924f(b)(8)(A).

California's law respecting the NJF and the law applicable to a legal foreclosure, especially when a negotiable instrument, i.e., the Note, is involved.

The following reasoning supports the proposition that the NJF sale involving a Note under California law (i.e., a negotiable instrument), even prior to April 2012, was only a cumbersome sale of an alleged mortgage lien but not a sale of title, ownership or right to possession of the house:

First reasoning

California's lienholder law drives the result of Civ. Code Section 2924f(b)(8)(A). "Notwithstanding an agreement to the contrary, a lien, or a contract for a lien, transfers no title to the property subject to the lien." CA Civ. Section 2888. Regardless the terms of the deed of trust, Section 2888 states that the deed of trust is just a lien that "transfers no title to the property." This statute was enacted in 1872 so it has been California's law for a long time and definitely applies to every residential loan made this century. Section 2888 also has not been discussed in appellate residential foreclosure cases during the 21st century. This too may help explain why homeowners are unfamiliar with California's law regarding what a trustee offers for sale at an NJF sale.

In a 1982 case a beneficiary under a deed of trust filed a lis pendens (notice of a pending law suit) against real estate in his effort to secure payment under the deed of trust but the appellate court required expungement of that lis pendens. The court held that "lien [i.e., the deed of trust] did not transfer any interest in the title" to the property thus making the lis pendens an improper cloud on the land rather than a title interest qualifying for lis pendens protection. *Urez Corporation v. The Superior Court*, 235 Cal.Rptr. 837, 842, 190 Cal.App.3d 1141 (CA App 2d Dstr 1987) (citing Civ.Code, Section 2888).

CCP Section 2924f(b)(8)(A) and CC Section 2888 are consistent. All that a trustee under a deed of trust has to sell is an unproven mortgage lien, not title or ownership of the house. The homeowner continues to own and control both the title and ownership of the house after securing her mortgage debt with a deed of trust. The trustee under that deed of trust has limited rights but does not get title or ownership of the house.

> "Despite the existence and validity of the secured interest created by a deed of trust, the trustor-debtor retains all incidents of ownership with regard to the real property, including the rights of possession and sale. [citation omitted] "The trustee of a deed of trust is not a true trustee, and owes no fiduciary obligations; he merely acts as a common agent for the trustor and the beneficiary of the deed of trust. [citation omitted]" … Consequently, California courts have described the security interest created by a deed of trust as the functional equivalent of "a lien on the property." (emphasis added). *Jenkins v. JP Morgan Chase Bank*, 216 Cal.App.4th 497, 508, 156 Cal.Rptr.3d 912 (CA App 4th Distr 2013), overruled on other matters, by *Yvanova v. New Century Mortgage Corporation*, 62 Cal.4th 919 (2016).
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> '"[U]nder California law, a 'deed of trust' creates a lien on the property in favor of the creditor." *St. Angelo v. Victoria Farms, Inc.*, 38 F.3d 1525, 1534 (9th Cir. 1994), *amended*, 46 F.3d 969 (9th Cir. 1995) (citing *Monterey S.P. P'ship v. W.L. Bangham, Inc.*, 49 Cal. 3d 454, 460 (Cal. 1989) (en banc)). But "a lien does not result in assignment of ownership; "a lien . . . transfers no title to the property subject to the lien.'" *BNY Midwest Tr. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Penn.*, 213 F. App'x 563, 566-67 (9th Cir. 2006) (quoting Cal. Civ. Code § 2888).' *Sparks-Magdaluyo v. New Penn Financial LLC*, Case No. 16-cv-04223-MEJ, p 5 (N.D. CA 1/16/2017).

A homeowner gives limited rights to a trustee under a deed of trust, but not title or ownership of the house and the homeowner retains the right to sell or transfer the house subject to the mortgage lien.

Second reasoning

Malkoskie v. Option One Mortgage Corporation, 188 Cal.App.4th 968 (Calf. App. 2nd Dstr. 2010) involved a question as to the effect of a judgment issued in a UD case regarding title to the house and validity of the NJF process and sale. Here the homeowner stipulated to a judgement in the UD case and was forcibly evicted from the house. She then filed a regular,

unlimited civil action in which she "asserted claims for declaratory relief, quiet title, cancellation of trustee's deed, willful wrongful foreclosure, negligent wrongful foreclosure, wrongful eviction and negligence". *Id.* at 972. She thought that the UD case was only about possession and that she had a right to litigate related substantive legal issues in a regular, unlimited civil case. The California judiciary said she was wrong.

Malkoskie analyzed CCP Section 1161a(b)(3) and the meaning of a UD action filed under that statute, which is the sole legal authority for using the limited case UD format to evict homeowners after an NJF sale. *Malkoskie* affirms that the UD case is supposed to be about the owner regaining possession of its real estate whereas post-NJF sale use of a UD case is actually litigation about title and ownership of the house, the validity of the NJF process and legal causes of action that are rooted in the same facts regarding those matters. *Malkoskie* holds that the UD judgment under CCP Section 116a(b)(3) is a final judgment regarding the title and ownership of the house and the validity of the NJF sale. *Id.* at 973-974. Judgments issued in such cases can have preclusive effect that bar future litigation about title and the foreclosure irregularities and all causes of action grounded in the same factual circumstances. *Id.* at 971. *Malkoskie* effectively holds that courts by judgments resolve issues regarding title, ownership and right to possession of real estate, and that those matters are not resolved or established merely as the result of a privately conducted NJF sale.

Malkoskie relied on the California Supreme Court's decision of *Vella v Hudgins*, 20 Cal.3d 251 (1977) which relied on earlier California law as cited in *Vella*. These and other California decisions exist because an NJF process pursuant to the 2924 Scheme does not establish title or ownership in the high bidder at the foreclosure sale. If the NJF sale had conveyed title or ownership of the house to the foreclosure buyer the only issue for the UD case

would have been getting the court's assistance in delivering possession of the house that had already been conveyed to the foreclosure buyer. That, however, is not what the UD case is about following an NJF sale. California's judiciary makes clear that title and ownership of the house are resolved by court action, not by nonjudicial action of private persons even if they fully comply with the procedural requirements under the 2924 Scheme.

Third reasoning

In 1978 the California Supreme Court in addressing a constitutional challenge to the 2924 Scheme spoke to the legal effect of what the foreclosure buyer acquired by the trustee's deed. *Garfinkle v. Superior Court*, 21 Cal.3d 268 (1978). *Garfinkle* involved an NJF sale followed by the foreclosure buyer's later attempt to evict the homeowner using a UD case. *Garfinkle*, at p 280, in finding no constitutional violation, stated:

> The fact that a purchaser who has acquired rights by virtue of a trustee's deed, like a party who has acquired rights under any other type of contract, may have a right to resort to the courts in order to enforce such previously acquired contractual rights when that becomes necessary, is not sufficient to convert the acts creating these contractual rights into state action.

Observe that California's Supreme Court views the trustee's deed as a contract like "any other type of contract." *Garfinkle* views the trustee's deed as a transfer of contract rights (i.e., transfer of a mortgage lien agreement), not as a conveyance of real property. *Garfinkle* is consistent with Section 2924f(b)(8)(A) and Civ. Code Section 2888.

Fourth reasoning

California's Supreme Court in 2016 affirmed that a foreclosure is legal only if conducted by or for the person actually entitled to enforce the residential loan note (the "Note") pursuant to the Uniform Commercial Code (the "UCC"), and regardless whose name is on the deed of trust

as beneficiary. *Yvanova, Id.* at 927-928.[16] *Yvanova* affirms the UCC as law crucial to determinations as to whether a residential foreclosure is legal. The 2924 Scheme does not mention the UCC and does not mention or require proof of right to enforce the Note. This is because the 2924 Scheme only concerns a complicated way to sell a mortgage lien. The 2924 Scheme is not about who has the right to enforce the Note or that lien. It does not result in a legal foreclosure, so the 2924 Scheme and a resulting NJF sale are not at odds with California's law as summarized by *Yvanova*. The construction and applications of the 2924 Scheme demonstrate that it is not law about a legal foreclosure.

Unfortunately, the 2924 Scheme uses words that have multiple meanings and without clarifying the intended definitions of those words. Negotiable instrument law is not the same as the law applicable to debt not based upon a negotiable instrument as defined by Section 3104 Com. Simple words like debtor, creditor and default have vastly different meanings and requirements of evidentiary proof under these two very different bodies of law. Under the UCC, only the person entitled to enforce the Note has the right to demand payment (i.e., the right to make 'presentment') pursuant to Section 3501(a) Com. There is no default, even if a payment has been missed, until and unless that person comes forward, proves its enforcement right, and makes demand for payment. No other person has a right to enforce the Note so no other person has a right to argue whether or not a default exists. Negotiable instrument law relies on the

[16] *Yvanova* states that the promissory note of the loan is "a negotiable instrument." Id. at 927. California's sole law of negotiable instruments that applies to enforcement of residential loans is Division 3 of the California's Commercial Code, i.e., §§1101, et seq. (the "UCC").

Further, California follows the legal principle that the 'lien follows the debt' which is old common law that is now California statutory law pursuant to § 1084 Civ. and § 9203(g) Com. This means that the person entitled to enforce the Note is the person who owns the deed of trust or mortgage collateralizing that debt and whether or not that person's name is on the security instrument. The bottom line is that the law of negotiable instruments now found in Division 3 of the UCC, guides determinations as to whether a foreclosure is legal, at least when a proper defense is raised against a person who has not proven with admissible evidence its right to enforce the Note.

complex technical provisions of Division 3 of the UCC to resolve the question of who has the right to enforce the Note. Documents like assignments of the mortgage lien found in public land records have little bearing on a legal determination of enforcement rights in the Note. Enforcement of lien debt that is not evidenced by a negotiable instrument, on the other hand, is substantially influenced by land record documents like assignments of the mortgage lien. The 2924 Scheme and related case law make no effort to apply legally correct definitions to those highly technical words. The confusion that has been caused by imprecise use of legal language in the 2924 Scheme has clearly favored the foreclosure machine and disadvantaged homeowners.

California's judiciary regularly rules that the 2924 Scheme is a comprehensive body of law and that courts are not permitted to supplement that law with legal definitions or implicated legal authorities not expressly stated in the 2924 Scheme. See *Debrunner v. Deutsche Bank National Trust Co.*, 204 Cal.App.4th 433, 441 (Cal.App. 6th Dstr. 2012) and *Moeller v. Lien,* 25 Cal.App.4th 822, 830 and 834 (Cal.App. 2nd Dstr. 1994), and the hundreds of cases relying on these decisions. Courts, however, are accustomed to filling in the blanks not expressly stated in a statute regarding legal procedure and definitional subject matter when necessary to application of the statute as intended by the California legislature that enacted it. They are empowered to do this so the legal system can function. Without that authority every statute would have to restate volumes of collateral law and legal definitions which are already part of the legal system.

Judicial interpretations of the 2924 Scheme, however, conclude that there is no need to impose upon the 2924 Scheme detail about debt enforcement from California's UCC and other bodies of law that already define the undefined terms of the 2924 Scheme. Judicial determinations under the 2924 Scheme are an exception to the judiciary's normal standards of legal analysis and statutory construction. Section 2924f(b)(8)(A) shows that this exception is

justified because of the unique substance of an NJF sale, which is not about an effort to enforce or even validate the mortgage lien that is being sold. The 2924 Scheme's lack of definitions and detail about debt enforcement law affirms that the NJF process is not designed to create a legal foreclosure when a Note, i.e., a negotiable instrument, is involved. If an NJF sale was intended to enforce the debt and to transfer the house by foreclosure, the legislature would have made the 2924 Scheme comprehensive as to law applicable to enforcement of a loan that results in a legal foreclosure.

Fifth reasoning

The NJF is not a foreclosure in the conventional sense because it does not transfer title or ownership to the foreclosure buyer. California's Supreme Court holds that no foreclosure is legal unless undertaken by the person entitled to enforce the Note. *Yvanova* (2016), *Id*. Court of Appeal decisions consistently maintain that the 2924 Scheme does not require proof of right in, or possession of, the Note during the NJF process. *Debrunner v. Deutsche Bank National Trust Co.*, 204 Cal.App.4th 433, 441 (Cal.App. 6th Dstr. 2012) ("There is no stated requirement in California's non-judicial foreclosure scheme that requires a beneficial interest in the Note to foreclose."). *Debrunner* is currently followed in federal and California cases. *Yvanova* and the *Debrunner* line of authorities are not in conflict even though one requires compliance with the UCC and the other holds that the UCC is not important to the NJF process. These two legal authorities are not in conflict because they are not addressing the same subject matter. *Yvanova* is discussing a legal foreclosure that is an effort to enforce the Note by foreclosing on the collateral securing payment of that Note. The *Debrunner* line of authorities concern an NJF process which is not about debt enforcement or foreclosure. If this were not so, the California Supreme Court surely would have overruled the long line of NJF related cases that follow *Debrunner* in apparent violation of the necessity of applying the UCC in legal foreclosures as

stated by *Yvanova*. The 2924 Scheme defines the mere sale of the lien as a 'foreclosure.' Sadly, that is misleading, but California has a right to define things as it wishes even if the statutory meaning in the 2924 Scheme is different than that used elsewhere.

Sixth reasoning

California follows the legal principle that the 'lien follows the note' meaning that the person entitled to foreclose does not have to hold an assignment of the deed of trust or mortgage. *Yvanova*, Id. at 927-928; *Lewis v. Booth*, 3 Cal.2d 345, 349 (1935) ("A lien is but an incident of the debt secured, and cannot be transferred apart therefrom. A transfer of the debt carries with it the lien."); Section 1084 Civ. ("The transfer of a thing transfers also all its incidents, unless expressly excepted; but the transfer of an incident to a thing does not transfer the thing itself." Enacted 1872.); and Section 9203(g) Com. (providing that the security for the Note belongs to the person entitled to enforce the Note). This law, however, is not applicable to a challenge of the authority or right to conduct an NJF sale according to the California judiciary. *Basil v. Federal National Mortgage Association*, B251339, pp 12-13 (Cal.App. 2nd Dstr. 2015) (unpublished). Law regarding who has a right in the mortgage lien is not applicable or relevant to the 2924 Scheme because the NJF sale does not involve enforcement of the lien, nor title nor ownership of the house. The identity of the person to whom the mortgage lien belongs is not an issue that has to be resolved when the unproven mortgage lien is sold to a buyer who takes it without representation or warranty from the NJF seller.

Seventh reasoning

California law maintains that only the person entitled to enforce the Note can prosecute a legal foreclosure (*Yvanova, Id.;* and *Fourth Reasoning* and *Fifth Reasong,* above) and also that the mortgage lien belongs to the person entitled to enforce the Note whether or not the person is

the named beneficiary or an assignee of the mortgage lien (*Sixth Reasoning*, above). Section 2924h(b), nevertheless, permits a person claiming beneficial interest in the mortgage lien to make a credit bid at the NJF sale of the alleged but unproven amount due to that person under the mortgage lien. The 2924 Scheme does not require the credit bidder to prove enforcement right in the Note and, therefore, does not require proof that said person is owed a debt secured by the mortgage lien. This too supports the conclusion that the NJF sale does not involve a legal foreclosure when a negotiable instrument is involved[17] and that the NJF sale is only a transfer of an alleged mortgage lien as expressly stated by Section 2924f(b)(8)(A). Otherwise, the 2924 Scheme and its NJF process would require satisfaction of the elements of a legal foreclosure pursuant to the UCC and as required by *Yvanova*. The credit bid of an amount unproven as actually owed to the NJF seller does not impact the homeowner, so the number whether or not true or accurate should not weigh heavily on the homeowner's decision regarding how to respond to the NJF sale.[18]

Eighth reasoning

The 2924 Scheme mentions, but does not define, the term 'bona fide purchaser.' The meaning of that phrase under the 2924 Scheme was addressed in *Melendrez v. D & I Investment, Inc.*, 127 Cal.App.4th 1238 (CA App 6th Dstr 2005). *Melendrez* first explained the meaning of 'bona fide purchaser' when real property is purchased or acquired. It concluded that "[t]he same elements exist to determine whether a party who takes or purchases a lien is a bona fide

[17] California recognizes that the typical residential loan promissory note is a negotiable instrument (*Yvanova,* id.). This paper, accordingly, addresses only the substance of the 2924 Scheme when the debt instrument is a negotiable instrument.

[18] This paper makes no attempt to discuss whether the foreclosure buyer might have a claim against the NJF seller who makes a false or inaccurate credit bid because that issue is not important to homeowner protection.

encumbrancer." at 1255.[19] *Melendrez* obviously understood that the NJF sale was a sale of a lien, and not real estate, or else there would have been no need for discussion about a person who takes or purchases a lien. It equates the 2924 Scheme's use of 'bona fide purchaser' with 'bona fide encumbrancer.' This is another indication that an NJF sale is a sale of an alleged lien, and not a sale of real estate.

Hear the correct legal music of California's foreclosure two-step.

The NJF process appears to be little more than a complicated way of transferring an alleged mortgage lien, whether the security instrument is a mortgage with a power of sale or a deed of trust. The foreclosure machine surely knows the legal substance of the resulting trustee's deed and that the foreclosure buyer has no right to the house unless and until a court of proper jurisdiction later issues a judgment creating that right. The foreclosure machine knows that the trustee's deed is no more of a cloud on the title of the house than the recorded mortgage lien that gets sold under the 2924 Scheme. Neither the NJF sale nor the trustee's deed is important because neither appears to alter the homeowner's legal status. It is time to stop accepting the invitation to dance to the music orchestrated by the foreclosure machine. It wants the homeowner to waste time and money challenging the NJF process and sale. The real fight will be the court battle to follow because the foreclosure buyer, and its successor if applicable, do not own or have rights in the house without first obtaining a court judgment against the homeowner.[20]

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[19] The *Melendrez* court supplemented the 2924 Scheme even though California's judiciary also holds that the 2924 Scheme is 'comprehensive' and may not be supplemented. See, e.g., Fourth Reasoning and Fifth Reasoning, above. This paper makes no effort to evaluate the merit of either position nor the reason for what is ostensibly a contradiction indicative that either the 'comprehensive' proponents are wrong or Melendrez is incorrectly decided.

[20] A homeowner who accepts 'cash for keys' and vacates the house under a settlement agreement usually signs over title of the house. Without that voluntary conveyance of title, the foreclosure buyer or its successor has no right to the house without filing a lawsuit and prevailing.

III. UNLAWFUL DETAINER LAWSUIT FILED PURSUANT TO CCP Section 1161a(b)(3)… THE SECOND MOVE OF THE FORECLOSURE TWO-STEP

The NJF sale does not appear to have any legal effect on the homeowner's ownership or use of the house. The second step of this two-step is, however, a serious matter. The foreclosure machine conducts the NJF for the purpose of suing the homeowner in the UD court. Use of this summary proceeding is available to the foreclosure machine because, and only because, an NJF sale took place. CCP Section 1161a(b)(3). The NJF sale does not alter the homeowner's title, ownership or right to possess the house, but a judgment against the homeowner by a UD court can eliminate those rights.

The foreclosure machine could ignore the NJF process all together and, instead, go directly to a regular court to foreclose on the mortgage lien but that rarely happens. The litigation forum of choice for residential foreclosure is the unlawful detainer action filed pursuant to CCP Section 1161a(b)(3). The UD forum is used because it is does not provide a fair hearing for the homeowner who gets only a quick summary proceeding rather than a meaningful adjudication.

The foreclosure machine has been terribly successful using a UD forum to take homes from California's citizens. That massive success portends continued use of the UD forum as the second step in this infamous foreclosure two-step. That success reflects many years of homeowner defense based on ignorance of the NJF & UD processes which so often left the homeowner unprotected.

The UD case begins with a complaint that identifies the plaintiff who is suing the homeowner (the "UD Plaintiff"). The UD Plaintiff could sue to get the house by foreclosure in a regular, unlimited civil action, but the UD Plaintiff would have to prove its right by law to

enforce the debt secured by the house, consistent with requirements of the UCC and *Yvanova, Id.* The UD process virtually frees the UD Plaintiff from having to address these substantive and controlling legal matters.

UD judgments have been easy to get against homeowners. This may seem contrary to California law stated by *Yvanova* and within the UCC, but it is not. If a judgment is issued against the homeowner in a UD case and not reversed on appeal, the effect is loss of title, ownership and right of possession in the house in addition to monetary damages and affirmance of whatever monetary award may have been given to the winning UD Plaintiff. The UD judgment is legal and binding when not properly challenged.

The UD forum is a rush-to-judgment process that clearly benefits the UD Plaintiff. The homeowner is permitted five days for this and five days for that and the court will let the foreclosing plaintiff set a trial date.[21] This process does not permit reasonable time for preparation, discovery, motion practice or anything necessary to a fair adversarial hearing. The homeowner is pushed into an arena where the judge will show up pretty much convinced that the homeowner should lose the UD case because that is all the judge will have observed for years.

A homeowner does not have to dance this two-step just because that is what the foreclosure machine wants. The homeowner needs to lead rather than follow. Now that we have a better understanding of the NJF part of the foreclosure two-step, the next objective is to eliminate use of the UD form in the second movement of this dance. California's law offers a

[21] UD Plaintiffs are entitled to a legal preference of a quick trial pursuant to Code of Civil Procedure § 1179a. The plaintiff has a right to demand that the trial take place within 20 days after the defendant makes an appearance in the case. CCP § 1170.5(a). There is no such expedited trial preference for plaintiffs in a regular, unlimited civil case in California.

much better option. The UD case can be changed into an unlimited civil case by a judicial process called reclassification.

A. Prepare for the UD Fight

Unless defense funds are boundless, I suggest using time and money resources during the NJF process to prepare for the UD lawsuit that is likely to follow in a month or two after the NJF sale.[22] California courts are accustomed to ruling against homeowners who try to stop or delay an NJF sale. Enter the second movement of the foreclosure machine's two-step by doing something different, e.g., turning the UD case into a fair litigation forum that eliminates the UD Plaintiff's advantage.

Preparation, at a minimum, should include drafting a motion to reclassify the UD case as an unlimited civil case. This work can be accomplished during the NJF process. Adequate time for this work is not available after the UD case is served on the homeowner. Advance preparation will help reduce stress, avoid waste of money, and position the homeowner for a well-organized attack on the UD case and the opponent's claims.

An answer to the UD complaint is required within five days after service of the complaint and summons. CCP Section 1167.3. Having prepared the motion for reclassification before service of the UD lawsuit also makes less stressful the timely completion of tasks like the answer and affirmative defenses[23] to the UD complaint.

[22] If you think the NJF is threatened by mistake, by all means send a letter in hopes the problem will be corrected. Writing a letter is cheap and relatively easy. An honorable person would likely thank you for pointing out a mistake. If you request termination of the NJF process, but it keeps moving forward, preparing for the UD lawsuit makes more sense than expending time and money fighting the right of a person to sell the alleged mortgage lien by an NJF sale.

[23] See Part III.B.5, below, for discussion about the possible use of a demurrer rather than an answer to the UD complaint.

B. Reclassification – Do not accept the UD Forum of the foreclosure two-step.

Reclassification is the process that gives the homeowner the opportunity to make fair and meaningful the legal fight with the UD Plaintiff. California requires reclassification of the UD case as a regular unlimited lawsuit that is an equal opportunity forum. The homeowner needs to use this law and to help the judge understand the necessity of converting the limited UD case into a regular unlimited civil case as permitted and called for under California's law. The homeowner must either challenge the jurisdictional classification of the UD case or accept its validity by silence.

B.1 Why reclassification is necessary.

Reclassification of the UD, a limited civil case, to status as a regular unlimited civil case is the litigation mechanism that will put a heavy burden of proof upon the UD Plaintiff. The homeowner who gets the UD case reclassified gains a lot more options regarding how to best protect the house and defend against the person who makes false or mistaken claims.

An unlimited civil case offers reasonable time within which to prepare the case, plan a comprehensive litigation strategy, and totally change the noise of the foreclosure two-step into workable legal music. For example, a regular unlimited case offers the opportunity to establish by court the homeowner's claims such as the NJF sale was no more than a transfer of an unproven mortgage lien; the UD Plaintiff has no right to enforce the Note and therefore no right to enforce the mortgage lien; the UD case was knowingly filed in violation of the homeowner's rights; the deed of trust is an invalid security instrument if MERS is involved; the entire foreclosure two-step violates collection and fair practices law; the filing of the UD case is attempted wrongful foreclosure (if California recognizes such a cause of action); and that the title to the house should be quieted in favor of the homeowner against all possible defendants who

might assert rights in the mortgage lien. The homeowner's facts, the opponent's lack of facts, and the homeowner's strategic plan will determine what should be sought in that litigation, but at least in a regular lawsuit, the homeowner's claims and counterclaims can be pursued. Reclassification opens the door to meaningful adjudication and improved settlement options. If the judge denies reclassification, the homeowner's opportunity for a successful appeal should be strong because the case will be grounded in the most relevant law regarding the UD Plaintiff's attempt to take the house.

B.2 The UD is an unlimited civil case if all conditions are not satisfied for limited case status pursuant to CCP Section 85.

A case "shall not be treated as a limited civil case unless all of the … conditions are satisfied" under CCP Section 85.[24] A civil case is either limited or unlimited. If the lawsuit is not a limited civil case, it is a regular, unlimited civil case. CCP Section 88.[25] A reclassification motion is filed in order to help the judge understand that the UD action does not satisfy the requirements of CCP Section 85 thereby requiring that the case be reclassified as an unlimited civil action. A case is not entitled to limited status when (1) the 'amount in controversy' is too high or (2) when the legal issues are too complicated for resolution in a summary proceeding like the UD case.

[24] This section controls classification as limited or unlimited. Section 85(c) lists many statutes that identify types of cases which may be limited cases but Section 85 is the statute that looks at the substance of the particular filing and determines pursuant to the criteria of Section 85 whether an otherwise properly classified limited civil case must be reclassified as an unlimited civil case. Observe that Section 85 is not made subservient to those many statutes which ostensibly permit limited case status. Section 86(a)(4) lists as a limited case an "unlawful detainer where the whole amount of damages claimed is twenty-five thousand dollars ($25,000) or less." Section 85 provides the rules regarding whether the complexity of the case permits that limited status and how one would compute the "whole amount of damages" which, of course, is not solely the amount claimed as damages by the UD Plaintiff.

[25] "A civil action or proceeding other than a limited civil case may be referred to as an unlimited civil case." CCP § 88.

B.3 The "amount in controversy" aspect of reclassification.

An important requirement for status as a limited civil case under CCP Section 85(a) is that the 'amount in controversy' must not exceed $25,000. The amount in controversy is not simply the amount stated in the UD complaint by the UD Plaintiff: the law, not the UD Plaintiff's self-serving request for a cash award, controls. *Stern v. Superior Court* (2003), 105 CA4th 223, 234. Amount in controversy "means the amount of the demand, or the recovery sought, or the value of the property, or the amount of the lien, that is in controversy in the action, exclusive of attorneys' fees, interest, and costs." CCP Section 85(a). CCP Section 86(a)(4) states that the "whole amount of damages" must not exceed $25,000. Section 85 provides the list of the different measures of damages that when combined become the whole amount actually sought by the UD action.

An unlawful detainer action filed pursuant to CCP Section 1161a(b)(3) (i.e., the UD case) is an attempt to get title and possession of the house by getting a seemingly sterile judgment of eviction. See Part II, above. A UD complaint alleging that the case is merely about regaining possession of what already belongs to the UD Plaintiff is a fraudulent or ignorant assertion by the UD Plaintiff. When the amount of subject mortgage lien or the market value of the house exceeds $25,000, the amount in controversy exceeds the Section 85(a) limit and the case must be reclassified as an unlimited case. The homeowner, however, concedes the appropriateness of the limited case classification if she does not demand reclassification. Unfortunately, if the homeowner does not object, the UD process becomes the proper forum, even when the amount actually in controversy exceeds $25,000t.

B.*4 Complexity is a factor that requires reclassification.*

CCP Section 85(b) provides that limited civil case status applies only if the "relief sought is a type that may be granted in a limited civil case." *Stern v. Superior Court*, *Id.* at 227 and 230-231 (discussion of elements to consider when determining whether reclassification is warranted).

California law recognizes that lawsuits filed pursuant to CCP Section 1161a(b)(3) are not proper unlawful detainer actions, because these cases are not solely about possession of real estate. The unlawful detainer action has its roots in landlord-tenant law and is designed to address relatively uncomplicated questions like whether the tenant has a right to continued use of the landlord's house or apartment or whether the landlord is entitled to regain possession of the rental unit. The UD case, filed after an NJF sale and pursuant to CCP Section 1161a(b)(3), is about title and ownership of the house and all matters related to the foreclosure two-step. Part II, Second Reasoning, above. A UD judgment against the homeowner resolves all of these matters, even if they are not specifically raised during the UD case. Judgments issued in UD cases can have preclusive effect that block future litigation about these subjects as happened in *Malkoskie*.

California's judiciary recognizes that summary unlawful detainer proceedings are an improper vehicle for dispute resolution regarding title, ownership, and all legal issues raised by the facts of the foreclosure two-step. See, for example, Section 31.3, pp. 31-9 & 31-10, of the California Judges Bench Guide, Benchguide 31, Landlord-Tenant: Unlawful Detainer (the "Benchguide 31")[26]; and *Dr. Leevil, LLC v. Westlake Health Care Ctr.*[27], S241324 (Cal.,

[26] The Benchguide is a public document that has been and hopefully continues to be available online.

[27] This case is cited for having acknowledged that a UD case is an inappropriate forum for complicated legal issues involving title, ownership and the right to enforce the note secured by a lien on a house. This case resolves a dispute between a landlord (Dr. Leevil) and tenant (Westlake). Westlake did not challenge Dr. Leevil's ownership of, or title to, the commercial property. Westlake had not previously owned the property and claimed only a leasehold interest as a tenant. The Court's comments about perfection of interests in the property and title are not relevant to cases involving the 2924 Scheme and application of Section 2924f(b)(8)(A) Civ. Code. The

12/17/2018) (the California Supreme Court criticizes the related Court of Appeal decision (i.e., *Dr, Leevil, LLC v. Westlake Health Care Center* (2017) 9 Cal.App.5th 450) for having indicated that a UD-defendant can reasonably litigate all of a UD-plaintiff's title and ownership claims in an unlawful detainer action, p 13). An unlawful detainer action is the wrong forum within which to address complicated issues about who owns title to property and related legal issues that can properly surface in response to the NJF process and filing of a UD Case.

Due process rights under the California Constitution[28] and the U.S. Constitution[29] are violated when a homeowner is involuntarily subjected to the UD forum because UD processes do not afford a fair and meaningful litigation forum. Every citizen is guaranteed 'due process' regarding their legal rights including their right to protect their property. The UD forum available for post-NJF sale litigation does not provide due process protections *Martin-Bragg v. Moore*, 219 Cal.App.4th 367, 391 (Cal.App. 2nd Dist 2013) ("Each of these cases reflect the courts' recognition that when complex issues of title are involved, the parties' constitutional rights to due process in the litigation of those issues cannot be subordinated to the summary procedures of unlawful detainer"); *Asuncion v. Super. Ct.* 166 Cal.Rptr. 306, 308, 108 CA3d 141, 146 ("The summary nature of unlawful detainer proceedings suggests that, as a practical matter, the likelihood of the defendant's being prepared to litigate the factual issues involved in a fraudulent scheme to deprive him of his property, no matter how diligent defendant he is, is not great"); and *Lynch & Freytag v. Cooper*, 267 Cal.Rptr. 189, 192, 218 Cal.App.3d 603 (Cal.App. 2 Dist., 1990) ("Indeed, the constitutionality of these summary procedures is based on their

substance of the thing sold by the NJF was not an issue in dispute before this Court. Dr. Leevil was the high bidder at an NJF sale and filed a UD eviction action against the tenant. The previous owner of the property was not a party to this lawsuit. This was a classic eviction case, not a case in which the homeowner's title and ownership was going to be lost through the UD action thus resulting in a dispute between the homeowner and the UD Plaintiff.

[28] § 1, Article I, California Constitution.

[29] § 1, 14th Amendment, U.S. Constitution.

limitation to the single issue of right to possession and incidental damages" and "It would obviously be unfair to require the defendant-tenant to defend against ordinary civil actions under the constraints of the summary procedure in unlawful detainer actions"). Reclassification as an unlimited civil case is necessary for proper adjudication of the numerous and complicated issues that arise as a result of the foreclosure two-step and especially the UCC fact-intensive issues regarding whether the UD Plaintiff is entitled to enforce the Note or the incidental mortgage lien.

In a regular, unlimited civil lawsuit, the homeowner would counter with his or her own claims against the UD Plaintiff, and possibly other persons, so that all legal issues and injuries suffered by the homeowner which are based on the facts involved with the foreclosure two-step could be fully resolve as to all the parties. A UD case does not, however, permit the homeowner to file counterclaims or cross-claims [Benchguide 31, Section 31.3, p. 31-9] even though they are reasonable and necessary to a fair and complete adjudication of all disputes between the UD Plaintiff and the homeowner. The unlawful detainer process may be appropriate for resolution of relatively simple landlord-tenant disputes but those rules are not suited to complex litigation. A proper litigation forum would permit UD Plaintiff claims against the homeowner, and vice versa. A proper litigation form would afford reasonable time frames and procedures for investigation, reflection and analysis, motion practice, trial preparation and conduct of the trial. The regular unlimited civil case provides that: the rush-to-judgment procedures of a UD case do not.

An additional example of due process violation by the UD process relates to the inadequate adjudication of the lien claim actually being prosecuted by the UD Plaintiff. A lien is a claim for money that can be satisfied by payment or even offset of amounts owed by the alleged lien holder to the homeowner, but the UD forum does not permit the homeowner to

reduce or eliminate the lien debt even when the UD Plaintiff owes or may owe monetary damages to the homeowner. The homeowner is denied the right to file counterclaims against the UD Plaintiff, as noted above, so the amounts owed to the homeowner are not available to reduce the amount of the lien. The homeowner cannot ask for those damages in the UD case, has no opportunity to prove the amount of damages that should be paid by the UD Plaintiff during that case, and cannot seek them in a different lawsuit because California views the UD judgment as a full and complete disposition of each and every cause of action that is grounded in the same facts underlying this common foreclosure two-step. Part II, Second Reasoning, above. The UD Plaintiff might owe money to the homeowner if the case were a regular unlimited lawsuit, but in the UD forum, the UD Plaintiff cannot be sued or made to pay those amounts and is forever freed of having to do so if the UD judgment is not challenged by the homeowner. This is another example of why the UD forum is an improper forum for post-NJF sale litigation.

B.5 Some relevant reclassification rules and procedural thoughts.

a. A motion to reclassify must be filed within the time allowed to answer the UD lawsuit and the court shall grant the motion "if the case has been classified in an incorrect jurisdictional classification." CCP Section 403.040(a).

b. Once achieved, reclassification is effective as of the commencement of the case, not at the time the motion for reclassification is granted. CCP Section 403.070(a).

c. A fee has to be paid to the Court for reclassification pursuant to CCP Section 403.060, but that fee must be paid by the plaintiff when the Court rules that the case was improperly classified as a UD case. CCP Section 403.040(c)(1).

d. The UD process does not permit the homeowner to file a cross-claim or counterclaim. Benchguide Section 31.3, p 31-09 and Section 31.11, p 31-14.

e. A motion to reclassify the case is a formal appearance in the UD case[30] but not an answer to the UD complaint. Filing the motion does not extend the time within which to answer the UD lawsuit. CCP Section 403.040(a); Benchguide Section 31.11, p 31-14.

f. The caption of the motion should give notice that the case is "a limited civil case to be reclassified as an unlimited case." CCP Section 403.030. Each subsequent filing in the case, regardless the subject matter, should also have this notice in the caption so neither the plaintiff or the judge will have grounds to later say that you did not give sufficient notice of the reclassification effort. Following reclassification the caption should appropriately contain a statement like "reclassified as an unlimited civil case" unless the judge directs otherwise.

g. CCP Section 1170 permits a UD defendant to respond to service of the lawsuit with an "answer or demurrer." Time for answering the UD complaint can be put off or eliminated with use of a demurrer, but I am concerned that its use sends the wrong message. A demurrer is a challenge to the pleading sufficiency of the UD complaint but the Superior Court judges seem to be overworked and under instructions to aggressively push UD cases to a quick trial setting and judgment. I have seen little evidence that Superior Court judges dismiss UD cases in response to a demurrer. Rather than risking that the judge assume that a demurrer is a meritless delaying tactic, I think it best to file a response to the UD complaint that says 'bring it on' but in a proper litigation forum. Hence, the motion to reclassify the UD case as an unlimited civil case is the proper response. If the judge has both a demurrer and a motion for reclassification to decide and limited time, both may receive inadequate attention. Rather than file a demurrer which will not likely be granted but will be a distraction for the judge, it seems best to present fewer pages and matters requiring the judge's attention. This approach should

[30] CCP § 1014.

also lay a solid foundation for appeal should the judge deny reclassification because there is so much supportive California law when a limited civil case based upon CCP Section 1161a(b)(3) is properly challenged. Appeal of a denial of a demur, however, is not particularly strong. The judge has discretion to deny a demur and arguing about whether the judge abused that discretion can be a difficult uphill battle that is not as clearly supported by law as the necessity for reclassification.

The homeowner's unique circumstances or knowledge about the judge to whom the UD case is assigned should be considered in whether to use a demurrer. If no favorable additional factors are present, it is reasonable to respond to service of the UD lawsuit with an answer, affirmative defenses and the motion to reclassify.

C. Identity of the UD Plaintiff is not important to homeowner defense

The UD Plaintiff may be the foreclosure buyer or a successor to that person. Each will have the same difficulty as a UD Plaintiff against the homeowner: neither can claim more than ownership of a purchased mortgage lien that has not been proven to be valid or enforceable by the UD Plaintiff. The foreclosure buyer can transfer to a successor only what the foreclosure buyer got by way of the NJF sale, i.e., an alleged mortgage lien. *Stanley v. Shierry*, 322 P.2d 502, 504, 158 Cal.App.2d 373 (1st Distr. Ct.App. 1958) ("It is obvious that the grant deed conveyed only what the grantor owned at the time of its execution."). Defending against the foreclosure buyer or a successor should produce the same result. Once the UD case is reclassified as an unlimited civil case, the UD Plaintiff, regardless how it got involved, will have to prove with admissible evidence the validity of the mortgage lien, the UD Plaintiff's right to enforce the Note, and thereby the right to enforce that lien.

Section 2924(c) Civ. creates a presumption favoring a 'bona fide purchaser' when the foreclosure buyer has that status. If the text of the trustee's deed states that the NJF sale was conducted in accordance with the 2924 Scheme then the trustee's deed is prima facie evidence that all notices required by the 2924 Scheme were properly issued. This presumption is rebuttable, but a question exists as to the justification for fighting about notices when the result is only a private sale of an unproven mortgage lien.

One can argue there can never be a bona fide purchaser when the mortgage lien sold at the NJF sale is security for a negotiable instrument like the Note. First, acquiring a mortgage lien is not acquisition of real property as expressly stated by Section 2924f(b)(8)(A). Section 2924f(a) defines 'property' as real property and Section 2924f(b)(8)(A) states bidders at the NJF sale are "bidding on a lien, not on the property itself." 'Bona fide purchaser' status applies only to a person who acquires real property. *Melendrez v. D & I Investment, Inc.*, *Id.* at 1250-1252. Secondly, the mortgage lien if valid is merely security for a negotiable instrument like the Note, and California's law maintains that the lien is owned solely by the person entitled to enforce the Note under the UCC. A person cannot be a bona fide purchaser or bona fide encumbrancer if they are on notice that someone else may claim an interest in the lien sold at the NJF sale. *Melendrez, Id.* A buyer of a mortgage lien that is security for payment of a Note is on notice, by California's law (*Yvanova*, Section 9203(g) Com., and Section 1084 Civ.), that the person entitled to enforce the Note owns that lien regardless whose name is on the lien or an assignment of it.

The UD Plaintiff, regardless its status with respect to the mortgage lien sold at the NJF sale, has a lot to prove. The same legal and evidentiary burden is on the foreclosure buyer and

its successor, and regardless whether the foreclosure buyer claims status as a bona fide purchaser pursuant to the 2924 Scheme.

IV. UCC AND RELEVANT HISTORY

The UCC was rarely used to resolve residential foreclosure issues in the 20th century but is now controlling law. It became important when lenders began routinely selling home loans. During the 20th century that seldom happened. Lenders usually made loans, held onto and serviced them in-house, and did their own foreclosures when homeowners failed to pay the debts. The norm of the 21st century is for loans to be sold by the lender thereby exposing the homeowner to later demands for payment and threat of foreclosure by persons who were not party to the loan but claim the right to enforce it. The Note, a routine promissory note used in a residential loan process, is a negotiable instrument. *Yvanova* and Section 3104 Com. That means that the UCC provides the law necessary to resolving whether a person has the right to enforce the Note and the law that protects the homeowner from the person demanding payment who is not entitled to do so.

My search has not turned up a single California foreclosure decision from the 20th century in which the legality of the foreclosure is dependent upon negotiable instrument law. *Yvanova* (2016) clarifies that only the person entitled to enforce the Note can bring about a legal foreclosure. Thus far in this relatively young 21st century, no published California residential foreclosure case has been decided based upon negotiable instrument law of the UCC. A handful of cases mention the UCC but all of those cases were unsuccessful efforts to stop or to overturn an NJF sale. See, Part II, Fourth Reasoning and Fifth Reasoning, above. The homeowner defense in each was reaction to a mistaken concern that the NJF sale had already negated the homeowner's title, ownership and right to possess the house. No California residential

foreclosure case appears to have been decided upon application of the law of negotiable instruments, which is Division 3 of the UCC. It is time to force the foreclosure machine to face the high hurdles of that law in order to prevent the wrong persons from taking homes to which they have no legal entitlement. It is time to engage the California judiciary in determinations of homeowner rights grounded in the very law upon which legal foreclosures must be established.

California foreclosure defense efforts over the past twenty years have focused on the deed of trust, validity of assignments of real estate documents, fraud claims related to documents recorded in the public records, and other topics that have little, if anything, to do with the single most important requirement for a legal foreclosure when a negotiable instrument is involved, i.e., the UCC requirements that must be proven by the person claiming the right to enforce the Note. The mortgage finance industry's switch from 'lenders who held' to what in this century is largely 'lenders who sell' has driven the necessity for learning and understanding application of negotiable instruments law in the residential foreclosure arena.

In 2011 the Permanent Editorial Board for the Uniform Commercial Code was compelled to address for the first time the growing need for knowledge of the UCC in residential foreclosure litigation practice. See *Report on Application of the UCC to Selected Issues Relating to Mortgage Notes,* Permanent Editorial Board for the Uniform Commercial Code, November 14, 2011. The introduction states:

> "Recent economic developments have brought to the forefront complex legal issues about the enforcement and collection of mortgage debt. Many of these issues are governed by local real property law and local rules of foreclosure procedure, but others are addressed in a uniform way throughout the United States by provisions of the Uniform Commercial Code (UCC). Although the UCC provisions are settled law, it has become apparent that not all courts and attorneys are familiar with them. In addition, the complexity of some of the rules has proved daunting."

The law of negotiable instruments under the UCC is not new law, but it is law that was not needed in residential foreclosures during the 20th century. California first enacted the Negotiable Instrument Law in 1917[31] and eventually rolled it into what is now Division 3 of the UCC. It was once an esoteric legal area that is now recognized across the United States as the law necessary to determination of rights in legal foreclosures. Few attorneys or judges have any significant schooling or experience with negotiable instrument law or its applications in residential foreclosures. This is probably a reason that litigation issues and argument in California foreclosure defense and judicial pronouncements discuss many topics but not the UCC's provisions of negotiable instrument law. Much education is needed and the homeowner will have to help the judges learn what will frequently be unfamiliar to most of them.

If you have read my book, *Fighting the Foreclosure Machine*, you know that the UCC is a highly technical, multifaceted and non-intuitive body of law, but a body of law that provides many protections for a homeowner who faces an opponent who does not have UCC-qualified evidence of the right to enforce the Note. Determination of whether the UD Plaintiff is entitled to enforce the Note pursuant to the UCC is complicated but can be mastered with diligence and commitment to properly applying the law.

The UCC is highly technical law, somewhat like the Internal Revenue Code. Understanding one part frequently requires application of other parts. Exhibit D to my book, *Fighting the Foreclosure Machine* is an introductory outline of the pieces of the UCC that may be involved in determining who has the right to enforce the Note. This book is available at www.amazon.com. The UCC is uniform law that has been adopted by every state, but with

[31] The Law of Negotiable Instruments was, in fact, the first uniform law ever adopted by the states, New York having been the first to adopt this uniform body of law in 1895.

varied labels consistent with each state's existent statutory formatting. My book discusses the UCC in the format presented by The American Law Institute and National Conference of Commissioners on Uniform State Laws. California's UCC uses the same organization and number system for all parts relevant to the UCC discussion within *Fighting the Foreclosure Machine*. For example, Article 3, Section 3-301 of the American Law Institute version of the UCC is the same as California's Commercial Code, Division 3, Section 3301 (i.e., Section 3301 Com.). Relating UCC discussion in the book with California's formatting of the UCC is not difficult.

Every state has attorneys and law professors who are well versed in the negotiable instrument law of the UCC but most do not engage in residential foreclosure litigation. Foreclosure defense attorneys in California will have to tackle for what most will be an unfamiliar technical law, but they should be able to do so. They can consult with attorneys well versed in the UCC. I am also available to assist attorneys wishing to make a proper and effective presentation of UCC law on behalf of a homeowner.

There has been a lot of fraud involving residential loans this century. Securitization (i.e., the selling of residential loans to be packaged for use as investments) has driven the need for UCC protections. The mortgage foreclosure industry was fast to sell investment shares in packaged loan pools but lax in attention to detail regarding how to effectively to transfer enforcement rights in Notes in accordance with the UCC. In fact, securitization "gives rise to a pervasive failure among mortgage holders to comply with the technical requirements underlying the transfer of promissory notes …" *Deutsche Bank National Trust Company v. Johnston*, 2016-NMSC 013 (N.M. 2016), at ¶ 21. The foreclosure machine's response to failed documentary support and legally ineffective transfers of Notes has resulted in the foreclosure machine's use of

questionable and sometimes fraudulent foreclosure litigation tactics. "[T]he failure to deliver the original notes with proper indorsements […], the routine creation of unnecessary lost note affidavits, the destruction of the original notes, and the falsification of necessary indorsements . . . is widespread." *Id.* Knowledge of the UCC can help disclose meritless litigation tactics and an opponent's inability to prove what is actually required under the UCC.

V. CONCLUSION

Hopefully, this paper will help homeowners find more and better ways to defend against persons improperly demanding payments under threat of foreclosure. The California nonjudicial two-step has been too effective too long. The NJF sale appears to be unimportant because it does not impact the homeowner's title, ownership or use of the house. The UD case that follows does not appear to have any validity as a legal forum for addressing the many post-NJF sale issues, so it should be reclassified as an unlimited case as required by California law. Homeowner defense can be and should be much better than what has been experienced thus far this century. It is time to take the lead; time to see what the 2924 Scheme is actually about; and time to tell the UD Plaintiff that there will be a legal battle, but in a fair and reasonable litigation forum of the homeowner's choosing. California's courts must be shown why and how to properly apply California law most relevant to the attempted taking of homes. Finding ways to help the judge be better will help the homeowners.