NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report

Relating to

RECORDING OF MORTGAGE SERVICERS

February 2013

This tentative report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the tentative report, please inform the Commission so that your approval can be considered along with other comments.

COMMENTS SHOULD BE RECEIVED BY THE COMMISSION NO LATER THAN

June 1, 2013.

Please send comments concerning this tentative report or direct any related inquiries, to:

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Recording Mortgages Servicers

Introduction

The current law on mortgage recording provides a system for priority and enforceability of mortgages based on recording in the county land records. The system contemplates that each mortgage will be recorded shortly after it is executed, and that if the mortgage is transferred, each assignment will be recorded when it occurs. That system worked well for a substantial period of time, but it assumes that mortgages will not be transferred frequently. The Commission’s work on this subject continued the traditional approach and tacitly made the traditional assumptions. The Report on Title Recording assumes that all mortgage assignments will be recorded. The Report on Satisfaction of Mortgages assumes that the property owner knows who owns the mortgage, can communicate with the owner and the owner will sign the satisfaction or statement of the current balance.

However, over the past years, commercial practices in regard to mortgages have changed. The business that initiates the mortgage may well transfer it immediately. Typically, a mortgage will be transferred a number of times. Some mortgages become security for bonds and are held by a trustee for the bondholders. Others are held and traded through other investment vehicles. A mortgage is managed by a mortgage servicer that usually does not own the mortgage.

When practices began to change, banks tried to develop a system that would obviate the need to prepare and file documents with each transfer. The systems were designed to be analogous to those that track stock ownership. When the mortgage is executed, it is recorded in the name or some initial holder or in the name of the Mortgage Electronic Registration Systems, Inc., MERS, an organization set up to track ownership of mortgages and to be an agent for the owner. See the description of the underlying facts in Bank of New York v. Raftogianis, 418 N.J. Super. 323 (Ch.Div. 2010) and the role of MERS. The filing indicates that the mortgage will be assigned. In other cases, a first recorded assignment occurs, but subsequent assignments are unrecorded. In either case, the first filing serves to protect the priority of the mortgage, but, in itself, does not identify the true beneficial owner of the mortgage. The property owner makes payments to the mortgage servicer which pays the mortgage owner. The property owner does not know who currently holds the mortgage, but the servicer must have that information.

The system works in the many cases, but it causes problems when it conflicts with traditional, chain of title, expectations. The most common example is in regard to satisfaction of mortgages. A property owner who seeks to pay off the mortgage gets a statement of the balance, and when it is paid, gets a satisfaction of mortgage. Both will be signed by the servicer. Anyone examining the land title will see a mortgage held by one party and a satisfaction signed by another. Title insurers have come to accept this anomaly because there will be few situations where the true mortgage owner, whoever it is, has not been paid. However, this discrepancy causes an insecurity in land title that is foreign to our expectations.

The more severe problem concerns authority to foreclose the mortgage. Recent cases illustrate these problems. In Bank of America v. Alvarado, BER-F-47941-08, (Ch.Div. 2011) the
note underlying the mortgage was “lost”. In Bank of New York v. Raftogianis, supra, the note was endorsed in blank so that ownership of the note turned on its possession. In Wells Fargo Bank v. Ford, 418 N.J.Super 592 (App.Div. 2011), and in Deutsche Bank Nat’l Trust Co. v. Wilson, A-1384-09T1 (App.Div. 2011), there was no proof of a written assignment; there was only an affidavit that the note had been assigned.

In theory, only the party that holds the debt may bring an action to foreclose the mortgage. Deutsche Bank Nat’l Trust Co. v. Mitchell, 422 N.J.Super 214 (App.Div. 2011), Bank of New York v. Raftogianis, supra. The party holding the debt is the real party to whom money is owed, not the company that is servicing the loan. See, Bank of New York v. Laks and Einhorn 422 N.J.Super. 201 (App.Div. 2011)

The solution to these problems cannot be reinforcement of current legal expectations. To do so makes it difficult or impossible for legitimate creditors to enforce their rights to foreclosure. See Bank of America v. Alvarado, supra, where the court allowed foreclosure without solid proof of ownership of the mortgage and note where it was obvious that the debtor was in default. But compare, Bank of New York v. Raftogianis, supra and Deutsche Bank Nat’l Trust Co. v. Wilson, supra, where plaintiff was not permitted to foreclose without real proof of ownership.

About 15 to 20% of mortgages are retained in the lending bank’s portfolio, and, normally, that bank also services the mortgage. The current system works adequately for those mortgages. Other mortgage lenders have limited their use of the recording system for significant reasons. It is expensive to prepare documents, have them acknowledged, and file them. As mortgages are treated more and more like other securities, it is inevitable that they will be transferred like shares of stock, informally, without documents that are signed and acknowledged. Changes in the treatment of mortgages have also changed the roles of lenders and their agents. The party that owns the note and mortgage usually owns it as trustee for investors. It may have little actual financial interest in the mortgage. The mortgage is serviced by a separate party. The servicer is the only party that is in a position to know whether the mortgage has been paid or whether it is in default. Mortgage lenders for the majority of mortgages, those that are expected to be transferred several times quickly, have developed systems to track the changes in ownership and servicing of the note and mortgage. These systems are informal in that they are contractual and private rather than governmental.

However, there are important considerations of land title security that informality will not protect. If the wrong party has been paid off to satisfy the mortgage or if the wrong party forecloses on the property, there may be issues that affect subsequent property owners. In addition, there is a public interest that the party bringing the foreclosure action has sufficient authority to settle the action. Without that authority, there may be foreclosure sales that could have been avoided.

The solution to this problem is a system that will serve the purposes of the real estate recording system but is simple enough that lenders are likely to use it. The Commission accepts that the key party from the lender’s standpoint is the servicer. The entity that owns the note, and
therefore the mortgage, is usually a fiduciary for investors, and it has no direct contact with the individual mortgage. Recognizing this new reality, the Commission accepts that the servicer is usually the proper party to attest that the mortgage has been satisfied or to decide that the mortgage is in default and bring a foreclosure action. As a result, it becomes less important that the records of identity of mortgagee be complete, but it becomes important that there be a public record of servicers. While the identity of the servicer is available from MERS for mortgages registered with MERS, and the borrower is informed of the identity of the servicer by letter, there is no public system that records the identity of servicers. As a result, if the servicer acts in its own name to satisfy or foreclose the mortgage, there is a gap in the chain of title between the recorded mortgagee and the satisfaction or foreclosure. This problem can be rectified by creating a public system to record servicers.

What is recommended is a recording system based on that used to record security interests in personal property under Article 9 of the Uniform Commercial Code. To record an assignment of an Article 9 security interest, the secured party completes a short form indicating the new secured party. N.J.S. 12A:9-521. The form is completed and filed electronically. With computerized filing, the fee could be low. The Commission proposes a similar system for identifying servicers. The system is simple enough to be filed easily. Simplicity is key to the success of the system to because recording servicers, like any property recording should be voluntary. Because identification of servicers are to be filed electronically, they must be filed with an entity that is equipped to accept them in that form. That requires that they be filed with the Division of Revenue and Enterprise Services in the State Department of the Treasury.

Statewide filing of mortgage servicers should have no effect on the income of the offices of the county clerks and registers. What is proposed is a new filing. It is not a matter of moving filings from one office to another, it is creating a new filing in a new office. As a result, the county recording offices would not be losing filings and revenue. In fact, the Commission recommendation emphasizes that the county recording offices would retain the all of their important current functions in regard to mortgages. The mortgage would be originally filed in the county. Assignments of mortgages and satisfactions of mortgages would also continue to be filed in the county. The statewide digital system, limited to identification of mortgage servicers could not be used without a book and page number given by the county recording office.

With the digitalized system to identify mortgage servicers, some additional changes to the law will be necessary to implement a system that assumes that the principal actor for the mortgage lender is the servicer. A provision is necessary specifying that if a servicer is identified, only the servicer may foreclose the mortgage. If no servicer is identified, only a person who is the owner of the mortgage and is owed the debt may foreclose the mortgage. This change simplifies the process in the large majority of cases where there is a mortgage servicer. In other cases, normally, the owner will be identified by recorded assignments. Under the current system that would be impractical, but with simple system to identify servicers it should be effective. If the new system is followed the current problems concerning proof of the identity of a mortgage holder should be solved, and the word “robo signing” should be a thing of the past. There will be situations where the true owner is not the record owner because assignments were not filed and cannot be filed after the fact. A provision is made for those situations, but,
consistent with the presumptions that follow from record ownership, proof of ownership must be made in a manner that settles the issue as to all parties.

In addition, the laws on the duty to prepare a document showing that the mortgage has been satisfied must be tightened. It must be clear that only an identified mortgage servicer, or, if there is no identified mortgage servicer, only the record holder of the mortgage is the party that must sign the satisfaction of mortgage. In that way, the chain of title will be clear; the records will show who held the mortgage and that that party has declared it satisfied. Amendments to 46:18-11.3, 46:18-11.4 and 46:18-11.5 to implement this change are made part of this report.

Draft

1. Statewide electronic system for recording mortgage servicers

   a. The Division of Revenue and Enterprise Services shall establish a statewide electronic system to register the identities of mortgage servicers for mortgages that:

      1) encumber real property in the State; and

      2) have been recorded in the office of the appropriate county recording officer.

     b. The Division shall regulate the format and methods of electronic transmissions to the statewide electronic system including the registration of mortgage notes and the designation of mortgage servicers. The Division shall establish protocols to assure the identities of persons making transmissions.

     d. The Division may charge a fee to mortgage holders to register a mortgage note in the electronic system and first designate a mortgage servicer. No other fee shall be charged for transmissions in the electronic system designating a servicer.

     e. The records of the electronic system shall be publicly accessible through the internet.

   COMMENT

   This section establishes a system that allows mortgage holders to register the identity of the mortgage servicer for a mortgage. The system is based on the system that records security interests under Article 9 of the Uniform Commercial Code.

   Use of the system is voluntary. If a mortgage holder wants to register a mortgage servicer, it may do so. A registered mortgage servicer will have full power to administrate the mortgage. If there is no registered servicer, current law applies and the entity that holds the note secured by the mortgage will continue to have all power under the mortgage including those involving its administration.

2. Statewide electronic system, supplementary to county recording of mortgages

   a. The electronic system shall supplement, not supersede, the recording of mortgages with the county recording officers.
b. Assignments of mortgages shall be filed with the county recording officers.

c. Documents indicating satisfaction of mortgages shall be recorded with the county recording officers, not in the statewide electronic system.

d. Information in the statewide electronic system shall be constructive notice to all persons only if the mortgage identified has been recorded with the appropriate county officer.

**COMMENT**

This section emphasizes that the statewide electronic system to register the identities of mortgage servicers does not displace the recording of mortgages with the county recording offices or limit the functioning of those offices in any way. As subsections (a), (b) and (c) make clear, all current functions of the county recording offices are not changed or limited in any way. At present, there is no system for recording the identities of mortgage servicers; this is a new function. Establishing a new system to fulfill a new function will not change the operations or revenue of the county recording offices. Subsection (d) sets out the effect of a registration of a mortgage servicer in the statewide electronic system, that there is a known, established servicer. Later sections give that servicer powers and obligations.

3. Method for designating mortgage servicers

a. The holder of a mortgage may register the mortgage and designate a mortgage servicer by a transmission to the statewide electronic system.

b. The transmission shall be filed electronically and shall include:

(1) the book and page or unique identifying number of mortgage assigned to the mortgage by the recording officer in the county where the mortgage is recorded.

(2) the name of the mortgage debtor,

(3) the street address of the property as it appears on the mortgage

(4) the tax block and lot assigned to the property as it appears on the mortgage, and

(5) the identity of the mortgage note holder; the holder’s mailing address, phone number and email address;

(6) the mortgage servicer and its mailing address, phone number and email address, and

(7) the effective date of the designation.

c. After a servicer has been designated by the holder of a mortgage note, only the designated servicer, may change the designation by designating a new servicer or by terminating its designation as servicer.
d. A mortgage registration service that has established its role as registrar of a mortgage in compliance with regulations of the statewide electronic system may act as agent for the holders of that mortgage and servicers of that mortgage in transmissions to the statewide electronic system designating, changing, or terminating mortgage servicers.

COMMENT

This section establishes the method for registering mortgage services and the information that must be included in the electronic form. Subsection (d) provides a system to allow submissions for a MERS mortgage to come through MERS. In that way, a party that records all information with MERS will not have to make duplicate submissions.

4. Powers of Mortgage Servicers

a. A person who is designated as a mortgage servicer may:

1) accept payments due on the mortgage;

2) act as agent for the mortgage holder in dealings with the mortgage debtor including making modifications in the mortgage obligation that in its discretion serve the interests of the mortgage holder;

3) execute and file a satisfaction of mortgage; and

4) bring an action to foreclose the mortgage and settle the action in a way that in its discretion serve the interests of the mortgage holder;

b. Any person may rely on the authority of a mortgage servicer whose designation is reflected in the statewide electronic system as provided in this act as agent for the holder of the mortgage note.

c. The authority of a mortgage servicer designated in the statewide electronic system continues until it is terminated as provided by this act.

d. The authority of a designated mortgage servicer is not terminated by a change in the holder of a mortgage note.

COMMENT

This section establishes the powers of a registered mortgage servicer. In general terms, the servicer has the power to act for the owner of the mortgage in all matters. Any person may rely on that authority.

5. Requirement for Action for Foreclosure of Mortgage

a. The only parties who may bring an action to foreclose the mortgage are:

(1) the established holder of a mortgage who is owed a debt secured by that mortgage; or
(2) the designated mortgage servicer as identified on the statewide electronic system.

b. A person is an “established holder of a mortgage” if that person is either:

(1) the record holder of the mortgage as established by the latest record of assignment or of original mortgage recording in the records of in the County Recording Officer of the county in which the mortgaged property is located, or

(2) is found to be the holder of the mortgage in a civil action joining as defendants the record holder of the mortgage, the mortgagor, and any other person know to have an interest in the mortgage.

COMMENT

This section allows a designated mortgage servicer to foreclose a mortgage. It does not displace the power of a mortgage holder to foreclose a mortgage even is a mortgage servicer has been registered in the statewide electronic system.

Subsection (b) defines what is meant by “mortgage holder”. In general, the mortgage holder is the entity recorded as such in the county recording office. If another party claims to own the mortgage through unrecorded assignments or through possession of a bearer note or otherwise, that party may establish its rights in a civil action.


46:18-11.3. Penalty

a. (1) If the mortgagee, his agent or assigns fails to comply with the applicable provisions of subsection a. or b. of section 1 of P.L.1975, c.137 (C.46:18-11.2), the mortgagor or the mortgagor's agent may serve the mortgagee or his assigns with written notice of the noncompliance, which notice shall identify the mortgage and the date and means of its redemption, payment and satisfaction. If the mortgagee has not complied within 15 business days after receipt of the written notice from the mortgagor or mortgagor's agent pursuant to this paragraph (1), the mortgagee or his assigns shall be subject to a fine of $50 per day for each day after the 15-day period until compliance, except that the total fine imposed pursuant to this paragraph (1) shall not exceed $1,000.

(2) If the mortgagee, his agent or assigns fails to comply with the applicable provisions of section 1 of P.L.1975, c.137 (C.46:18-11.2), the purchaser or the purchaser's agent may serve the mortgagee or his assigns with written notice of the noncompliance, which notice shall identify the mortgage and the date and means of its redemption, payment and satisfaction. If the mortgagee has not complied within 15 business days after receipt of the written notice from the purchaser or purchaser's agent pursuant to this paragraph (2), the mortgagee or his assigns shall be subject to a fine of $50 per day for each day after the 15-day period until compliance, except that the total fine imposed pursuant to this paragraph (2) shall not exceed $1,000.
b. Of each fine collected pursuant to subsection a. of this section, 100% shall be payable to the private citizen instituting the action. The fine may be collected by summary proceedings instituted by a private citizen or the Attorney General in accordance with "the penalty enforcement law" (N.J.S.2A:58-1 et seq).

c. (1) If a mortgagee, his agent or assigns has not applied to the county recording officer to cancel the mortgage of record pursuant to subsection a. or b. of section 1 of P.L.1975, c.137 (C.46:18-11.2), within the 15 business day period provided by paragraph (1) of subsection a. of this section, the mortgagee shall be liable to the mortgagor for the greater of the mortgagor's actual damages or the sum of $1,000, less any fines recovered by the mortgagor pursuant to paragraph (1) of subsection a. and paragraph (1) of subsection b. of this section. In any successful action to recover damages pursuant to this paragraph (1), the mortgagee shall reimburse the mortgagor for the costs of the action including the mortgagor's reasonable attorneys' fees.

(2) If a mortgagee, his agent or assigns has not applied to the county recording officer to cancel the mortgage of record pursuant to subsection a. or b. of section 1 of P.L.1975, c.137 (C.46:18-11.2), within the 15 business day period provided by paragraph (2) of subsection a. of this section, the mortgagee shall be liable to the purchaser for the greater of the purchaser's actual damages or the sum of $1,000, less any fines recovered by the purchaser pursuant to paragraph (2) of subsection a. and paragraph (2) of subsection b. of this section. In any successful action to recover damages pursuant to this paragraph (2), the mortgagee shall reimburse the purchaser for the costs of the action including the purchaser's reasonable attorneys' fees.

46:18-11.4. Failure to comply; liability for costs of action for cancellation

Any mortgagee or his assigns who fail to comply with section 1 of this act shall be liable to the mortgagor, or his heirs, successors or assigns who have an interest in the mortgaged premises for the cost of any legal action to have the mortgage canceled of record, including reasonable attorneys' fees, but no attorneys' fees shall be allowed unless 20 days written notice is given to the mortgagee prior to institution of suit.

46:18-11.5 Definitions relative to mortgage cancellations

1. As used in this act:

"mortgage" means a residential mortgage, security interest or the like, in which the security is a residential property such as a house, real property or condominium, which is occupied, or is to be occupied, by the debtor, who is a natural person, or a member of the debtor's immediate family, as that person's residence. The provisions of sections 2 and 3 of P.L.1999, c.40 (C.46:18-11.6 and C.46:18-11.7) shall apply to all residential mortgages wherever made, which have as their security a residence in the State of New Jersey, provided that the real property which is the subject of the mortgage shall not have more than four dwelling units, one of which shall be, or is planned to be, occupied by the debtor or a member of the debtor's immediate family as the debtor's or family member's residence at the time the loan is originated.
"Pay-off letter" means a written document prepared by the holder or servicer of the mortgage being paid, which is dated not more than 60 days prior to the date the mortgage is paid, and which contains a statement of all the sums due to satisfy the mortgage debt, including, but not limited to, interest accrued to the date the statement is prepared and a means of calculating per diem interest accruing thereafter.

“Mortgagee” means the person designated as the mortgage servicer in the statewide electronic system maintained by the Division of Revenue and Enterprise Services, or if no person is designated as the mortgage servicer, the holder of the mortgage note reflected in the latest record with the county recording office.

COMMENT

The amendments to 46:18-11.3, 46:18-11.4 and 46:18-11.5 clarify which party has the authority and obligations in regard to cancellation of mortgages. If there is designated mortgage servicer, the servicer has the obligations under these sections. Otherwise, the party that is recorded as mortgage holder in the county recording office has that obligation. If that party no longer has an interest in the mortgage, it can transfer the obligation by recording an assignment of mortgage in the county recording office or the identity of a servicer with the statewide electronic system.