Recording Assignments of Mortgages

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. The transfer of mortgages is facilitated by the separation of the note (which is secured by the mortgage) from the mortgage itself. Shortly after closing, the note is endorsed in blank by the party that originated the mortgage. That is intended to make the note a bearer instrument under Article 3 of the Uniform Commercial Code so that any party that possesses the note has the legal authority to enforce it.

As a result of these changes, many of our legal concepts have reduced significance. The current law is based on the notion that there is a party that holds the mortgage and that party is recorded in the land records. With current practice, the land records usually do not disclose the identity of the mortgage holder. A substantial percentage of mortgages are recorded in the name of Merscorp Holdings (MERS) or are recorded with the indication that the mortgage will be transferred to MERS. MERS is an organization set up to track ownership of mortgages and to be an agent for the owner; it never owns the mortgage loan or services it. See the description of the underlying facts in Bank of New York v. Raftogianis, 417 N.J. Super. 467 (ch. div. 2010) on the role of MERS. In another substantial percentage of cases, a large financial institution originates the mortgage and records it in its own name. That party usually transfers the mortgage quickly, but it may retain the role of servicer of the mortgage. These two types of mortgage origination, between them, probably account for 90% of new mortgages. In either of these cases, the filing does not identify the true beneficial owner of the mortgage; it serves only to protect the priority of the mortgage.

The purpose of the mortgage is to secure a loan evidenced by a note. As a result, it is often said that the mortgage follows the note. As noted in Raftogianis, there is no function for a mortgage separate from the note. As a result, the ownership of the mortgage is dependent on ownership of the note. Since it has been signed in blank, the note is owned by its bearer, the party that possesses it. At the time of closing, the physical note is consigned to an institution that stores and retrieves notes, but does not own them. The bearer of the note is the party that has
constructive possession, but not actual possession, of the note. It has been suggested that in the future, mortgage notes will be in a digital record. That change will make the issue of possession even more complicated.

Moreover, the concept of ownership of a mortgage has also been altered by changes in practice. The bearer of the note, the mortgage holder, does not have a true, beneficial interest in the mortgage. That party is a fiduciary for investors who have instruments based on parts of many mortgages. The mortgage holder’s rights are nominal; it is representing the interests of others.

Probably the most important player in current mortgage practice is the mortgage servicer. The property owner makes payments to the mortgage servicer which pays the mortgage owner which applies the proceeds to the investors. Typically, the mortgage servicer has authority to make all decisions concerning enforcement of the mortgage subject to written guidelines of the mortgage holder. If the mortgage is foreclosed, it is by decision of the servicer. When the mortgage is paid, it is the servicer that files a satisfaction of mortgage. For the most part, current law does not reflect the role or significance of mortgage servicers. While current law does allow the filing of a satisfaction of mortgage by an agent of the mortgage holder, it does not provide a mechanism to determine who that agent is and what is its authority.

The current system works well with the small minority of mortgages, those that are held and serviced by the originator or a recorded assignee. However, it does not reflect the majority of modern mortgage practice, and its limitations cause problems. First, 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. There is a greater problem when a mortgage was paid years before, but a satisfaction of mortgage was never recorded. It may be impossible for the property owner to know who the mortgage holder or servicer were, and without that information, it may be difficult to clear title to the property.

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, the note underlying the mortgage was “lost”. In Bank of New York v. Raftogianis, the note was endorsed in blank so that ownership of the note turned on its possession. In Wells Fargo Bank v. Ford, A-3627-06T, and in Deutsche Bank Nat’l Trust Co. v. Wilson, A-1384-09T1, 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. Deutche Bank National Trust Co. v. Mitchell, A-4925-09 (App.Div., August, 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, A-4221-09 (App.Div. August 2011).
In none of these cases was the foreclosing party the recorded mortgage holder. In each case the issue was whether the party had the authority to enforce the note. In most of these cases, the note was asserted to be a bearer instrument making the issue turn on possession, often, constructive possession. Adding this complication to the foreclosure process, serves no one’s interest.

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, A-1384-09T1, supra, where plaintiff was not permitted to foreclose without real proof of ownership.

Mortgage holders abandoned 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. 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.

Changes to the system must focus on the practicalities of the situation rather than the old legal concepts. It is necessary to identify the particular needs that the system must meet and then design changes that will achieve them. First, the system must produce security of land title. There must always be an ascertainable chain of title that shows clearly whether there is a mortgage on the property. Second, the system must be fair, it must allow a legitimate claimant to enforce the mortgage, and it must protect property owners by guaranteeing that they are litigating against real parties that have the power to settle cases and convey good title.

First, a provision is necessary specifying that a party, to foreclose a mortgage 1) is the recorded mortgage holder, 2) has a legal right to collect the debt, and 3) has the authority to negotiate and settle the claim. Normally, the owner will be identified by recorded assignments. Under the current system for filing assignments that would be impractical, but with a simpler form-based system it should be effective. 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.

Second, there must be a provision clarifying which party has the duty and which parties have the authority to execute a satisfaction of mortgage. The party with the ultimate duty must be clearly identifiable from land records. Any party with authority must be one whose authority is clear from land records.
Another part of 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 to record assignments. 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 such a security interest, the secured party completes and signs a one-page form indicating the new secured party. 12A:9-521. The filing fee is $25. The Commission proposes a statutory form for assignment of mortgages. The form is short and should be simple enough to be filed easily. Simplicity of the form is key to the success of the system to restore recording of mortgage assignments. The form would be filed with the county recording officers who would record it and index it in the name of the mortgage debtor and the property address.

Of course, there must be some differences for a form for assignments of mortgages. First, the form is shorter because it has a single purpose. Second, the UCC form refers to a file number for the original security interest filing. The equivalent number attached to a mortgage is the book and page number or unique identifying number assigned by the county recording office. That number will identify the mortgage. The form proposed uses the property address as it appears on the original mortgage and the name of the mortgage debtor as is appears on the original mortgage as secondary identifiers. If the assignments are indexed both by the name of the borrower and the address of the property, it should be possible to allow searchers to trace the history of a mortgage.

The proposed form requires only a signature, not acknowledgement. The main purpose of acknowledgement was to assure that filed documents were not fraudulent. It is not clear that acknowledgement really now serves that purpose to any significant degree. It is not required for UCC forms, and no problem seems to have arisen. The criminal law provides serious penalties for filing fraudulent documents. See, 2C:21-3. That sanction should be sufficient. Similarly, the proposed form does not require a formal description of the land subject to the mortgage. That description is unnecessary in this context to identify the mortgages that is being assigned.

A last part of the proposal allows the recording of a mortgage servicer and gives certain powers to that servicer. This proposal recognizes that mortgage servicers are now a significant part of the mortgage system. Borrowers deal almost exclusively with servicers and rely on them to process payments and to certify that the mortgage is paid. A second proposed statute empowers a recorded mortgage servicer and includes a group of forms to record the appointment of a mortgage servicer.
1. Requirement for Action for Foreclosure of Mortgage.

   a. A person may bring an action to foreclose a mortgage only if the person:
      
      (1) is an established holder of a mortgage,
      
      (2) is legally entitled to collect the debt secured by that mortgage, and
      
      (3) has the authority to settle or compromise the action.

   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 assignment of mortgages at the Division of Commercial Recording or 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 mortgagor, the record holder of the mortgage, and any other person know to have an interest in the mortgage.

   Comment

   This section places three requirements for plaintiffs in foreclosure. The first is that the plaintiff be the party that is recorded as the holder of the mortgage. That requirement encourages the use of the land records to identify the current mortgage holder and assures security of land title. There is an escape clause, subsection (b)(2) that allows a party not recorded to establish its identity as mortgage holder in a civil action.

   The second requirement is that the plaintiff establish its legal claim to payment. That is established law. The requirement is usually satisfied by demonstrating that the plaintiff is owner or bearer of the note secured by the mortgage. The third requirement, that the plaintiff have authority to settle the case is necessitated by the Fair Foreclosure Act, 2A:50-53, -56, which requires the creditor to file a notice of intention to foreclose and to state what actions of the debtor are necessary to forestall foreclosure. An agent without real authority cannot fairly fulfill this requirement.

2. Duty to provide satisfaction of mortgage for filing.

   a. Any duty to provide a document for recording evidencing satisfaction of a mortgage shall rest on the party that is recorded as the mortgage holder.

   b. That duty may be satisfied by providing a document:

      (1) signed and acknowledged by the mortgage holder,

      (2) signed and acknowledged by a party recorded as the servicer of the mortgage, or

      (3) signed and acknowledged by an agent for the mortgage holder and a document establishing the agent’s authority signed and acknowledged by the mortgage holder.

   COMMENT

   This section places the duty to document satisfaction of a mortgage squarely on the recorded mortgage holder. That will assure clear chains of land title; the same party that is recorded as the mortgage holder will be recorded as documenting satisfaction of the mortgage. It allows a servicer to provide the documentation when the servicer’s authority is recorded. Again, that provides clear land title. When a property owner needs to prove that there is no current mortgage on the property, the owner can know who must be contacted to provide documentation. The duty specified by this section provides a burden on a
recorded mortgage holder that no longer has an interest in the mortgage, but it is a burden that can be handled easily. All that is necessary is that when the mortgage holder assigns its interest in the mortgage, it records the assignment.


   a. In addition to any other method allowed by law to record the assignment of a mortgage for one mortgage holder to another, an assignment may be recorded by filing the form provided by this statute with the Division of Commercial Recording.

   b. The assignment shall be substantially in the following form:

**ASSIGNMENT OF MORTGAGE AND NOTE**

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<thead>
<tr>
<th>Send acknowledgement to: (name and address)</th>
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1. Property Address

2. Mortgage Debtor

3. Book and page or unique identifying number of mortgage.

4. Current mortgage holder authorizing assignment

   Organization name

   or Individual last name    first name    middle name    suffix

5. New mortgage holder (assignee)

   Organization name

   or Individual last name    first name    middle name    suffix
6. Date of assignment

c. The Division of Commercial Recording shall index assignments of mortgages filed as provided in this section by name of the mortgagor and by the address of the property as shown on the form.


   a. The appointment of a mortgage servicer may be recorded by filing the form provided by this statute with the Division of Commercial Recording.

   b. The appointment of a mortgage servicer shall be substantially in the following form:

   APPOINTMENT OF MORTGAGE SERVICER

   Send acknowledgement to: (name and address)

   1. Property Address

   2. Mortgage debtor

   3. Book and page or unique identifying number of mortgage.


   Organization name

   or Individual last name    first name    middle name    suffix
5. Mortgage servicer

Organization name

or Individual last name  first name  middle name  suffix

6. Date of appointment


   a. A person who is recorded as a mortgage servicer may act for the mortgage holder by
      1) accepting payments due on the mortgage;
      2) acting as agent for the mortgagor in dealings with the mortgage debtor;
      3) executing and filing a satisfaction of mortgage; and
      4) executing and filing a form terminating its authority and substituting a new servicer.

   b. A mortgagor may rely on the authority of a mortgage servicer whose appointment is
      recorded as provided in this act as agent for the mortgage holder.

   c. The authority of a recorded mortgage servicer continues until it is terminated by filing
      the form provided by this statute with the Division of Commercial Recording.

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

4. Termination of authority of Mortgage Servicer; substitution of new servicer.

   a. The authority of a mortgage servicer may be terminated by a filing with the Division of
      Commercial Recording substantially in the form provided by this section.

   b. The filing may include the appointment of a successor mortgage servicer.
**TERMINATION OF MORTGAGE SERVICER; APPOINTMENT OF SUCCESSOR**

Send acknowledgement to: (name and address)

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<th>1. Property Address</th>
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<th>2. Mortgage debtor</th>
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<th>3. Book and page or unique identifying number of mortgage.</th>
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<th>4a. Mortgage holder terminating authority of mortgage servicer and appointing successor.</th>
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<td>Organization name</td>
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<td>or Individual last name first name middle name suffix</td>
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<th>4b. Mortgage servicer terminating its authority and appointing successor mortgage servicer.</th>
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<td>Organization name</td>
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<td>or Individual last name first name middle name suffix</td>
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<th>5. Successor Mortgage servicer</th>
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<td>Organization name</td>
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<td>or Individual last name first name middle name suffix</td>
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6. Date of termination and appointment of successor