



NEW JERSEY LAW REVISION COMMISSION

Tentative Report Relating to

MORTGAGE RECORDING

May 23, 2013

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S.* 1:12A-8.

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 **August 1, 2013**. Please send comments concerning this Report or direct any related inquiries, to:

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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. Mortgages are managed by mortgage servicers that usually do 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 proper party. The property owner does not know who currently is owed the debt secured by 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 may be signed by the servicer. Anyone examining the land title may see a mortgage recorded in the name of 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 has the authority to enforce 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 with power to enforce the debt is the real party with power to foreclose, 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). However, changes in mortgage practice have made this general principal less definitive and clear. 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.

A small percentage of mortgages is retained in the lending bank’s portfolio, and, normally, that bank also services the mortgage. The current system works adequately for those mortgages. Changes in the treatment of mortgages have also changed the roles of lenders and their agents. The party that holds the note secured by the mortgage usually holds 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 party that is in a position to know whether the mortgage has been paid or whether it is in default.

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. 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 Commission has examined this problem for approximately two years. Interested parties representing County Clerks, land title interests, MERS, banking interests, foreclosure bar,

and others have expressed their positions at Commission meetings or through meetings with staff. There was general agreement that the current situation presents problems; there was less agreement as to possible solutions. The Commission considered a number of proposals that would supplement the current recording system for mortgages. The purpose of each was to allow public records to reflect more information about mortgages so that land title and foreclosure issues would be solved. Each proposal presented real, serious, practical problems.

The Commission now proposes a more limited solution. The problem with foreclosures has been with difficulties in proving that the plaintiff is the proper party to foreclose. This problem can be solved by a firm rule that bases the right to foreclose on the land records. Only the party that the county recording officer's records show to be the mortgagee may bring a foreclosure action. Mortgage lenders can comply with this limitation. While it is impractical to record all assignments for all mortgages, recording an assignment or power of attorney for the very few mortgages that are foreclosed can be accomplished. The proposal provides an escape valve for exceptional cases; a party can establish its ownership of the mortgage in a civil action.

The problem with satisfaction of mortgages is that there are situations where the mortgagee as reflected in the county land records and the party that executes the satisfaction are not the same. The solution is to tighten the laws on the duty to prepare a document showing that the mortgage has been satisfied. It must be clear that only the record mortgagee 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. That party can verify with the real owner or current servicer and then prepare the document. If the record holder has no continuing relationship to the mortgage or its owners, it has the option of filing an assignment to the proper party. 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. If the party recorded as mortgagee no longer exists, earlier Commission proposals now pending before the Legislature as "The Residential Mortgage Satisfaction Act," A3052, would provide a remedy.

An additional issue was raised during the discussions on this report concerning fraud by persons claiming to be servicers of a mortgage. Anecdotally, there can be instances where a criminal writes to mortgage debtors claiming to be the new servicer, signing the letter as the new servicer and forging a signature as the old servicer. These instances are very rare, but have occurred. If the mortgage debtor pays the thief, there is a question of whether he still owes a payment to the real mortgage holder. There is no case law on this subject in New Jersey. The Commission proposes a legislative solution as part of this report.

Proposed Statute and Amendments.

1. Requirement for Action for Foreclosure of Mortgage

a. The only party that may bring an action to foreclose the mortgage is the established holder of a mortgage.

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) 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 only a mortgage holder to foreclose a mortgage 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. The Commission recognizes that for most of the period of the mortgage, the true party that is owed a debt on the mortgage may not be recorded in the county land records as the holder of the mortgage. However, only a small number of mortgages need to be foreclosed. At the time that foreclosure is imminent, an assignment to the true mortgage holder can be recorded. Foreclosure can also be brought in the name of the recorded mortgage holder by another entity if a power of attorney is recorded.

There will be a few situations where assignments cannot be produced at the time of foreclosure, perhaps because the record holder no longer exists. Subsection b(2) provides for those cases. 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.

2. Amendments to 46:18-11.3, 46:18-11.4 and 46:18-11.5.

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

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 holder of the mortgage reflected in the latest record with the county recording office. If the entity that is recorded as the holder of the mortgage is no longer in existence, "mortgagee" means the entity that was authorized to receive the latest payment on the mortgage.

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. 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.

3. Reliance on Designated Mortgage Servicer

A mortgage debtor may rely on the authority of a mortgage servicer that has been designated in the form established for designation of mortgage servicers by federal regulations.

COMMENT

A mortgage debtor is informed of the identity of the mortgage servicer by letter. If the servicer changes, the mortgage debtor will receive a letter stating the change. Mortgage debtors reasonably rely on the information received and make payments to the party indicated. However, there have been cases where, through fraud or mistake, the debtor is misinformed and pays the wrong party. If that happens, the debtor should not have to make a second payment. The risk of loss should be on the mortgage holder who can spread the loss, not on the debtor who cannot. This section establishes the ability of a mortgage debtor to rely on ordinary communications, authorized or not, identifying the mortgage servicer.