MEMORANDUM

To: **New Jersey Law Revision Commission**

From: **Staff**

Re: **Proposed Mortgage Assignment Project**

Date: **July 11, 2011**

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 which 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 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, ATL-F-7356-09 and the role of MERS. The filing indicates that the mortgage will be assigned. This 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. When the property owner seeks to pay off the mortgage, he gets a statement of the balance, and when it is paid, he 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 he 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, the note underlying the mortgage was "lost". In Bank of New York v. Raftogianis, ATL-F-7356-09, 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. Bank of New York v. Raftogianis, supra. Again, the land records no longer disclose who that party is. In the Bank of New York case, the recorded mortgage indicated that it was held by MERS as "nominee for lender and Lender's successors and assigns." The note and mortgage had been separated and there was no claim that MERS had any rights in regard to the note. The court held that the mortgage holder had no right to foreclose the mortgage if it did not own the note. As a result, the mortgage and note are never really separated; the real owner is the owner of the note. However, practice in this regard is not consistent. Some foreclosure actions are brought by parties with only a limited agency relationship with the owner. MERS, for instance, will sometimes bring a foreclosure action even though its only role is to be the name recorded on the mortgage and to know who the true owner is.

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.

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 suggested 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.

Of course, there must be some differences for a form for assignments of mortgages. First, the form will be shorter because it has a single purpose. Second, the UCC form refers to a file number for the original security interest filing. There is no equivalent, searchable number attached to a mortgage. If one could be assigned when a mortgage is first recorded and an index of those numbers prepared, that would be ideal. However, if this change were made, it would not solve the problem for existing mortgages. As a result, the form proposed uses the property address as it appears on the original mortgage as the identifier. While this identifier is not completely unique, it is specific enough to allow searchers to trace the history of a mortgage. The form also includes the name of the mortgagor as is appears on the original mortgage as a secondary identifier.

The suggested 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.

With the proposed form, some additional changes to the law will be necessary. A provision should be added to the statutes specifying that ownership of a mortgage and note may not be transferred separately. As explained in Bank of New York v. Raftogianis, only the entity that is owed the debt can foreclose the mortgage. And, of course, to foreclose the mortgage, one must own that. As a result, separating the mortgage and note serves no purpose and creates unnecessary technical problems.

Second, the statutes should state that only the record holder of the note and mortgage can foreclose the mortgage. That provision assumes Raftogianis and goes beyond it in requiring filed assignments. This mandatory provision would not be successful in enforcing the current system for filing assignments, but with a simpler form-based system it should be effective. There will be situations where assignments are not filed and cannot be filed after the fact. There must be some provision made for those, but the exception must be drawn tightly enough so that it does not undercut the basic requirement.

We have drafted a proposed form for assignment of mortgages. If there is some interest in the approach proposed, we will attempt to draft statutes to implement it. The Commission will need to decide whether the assignments should be filed with the county recording officers or the statewide Division of Commercial Recording. Either course would require the creation of a new set of files and index.

ASSIGNMENT OF MORTGAGE AND NOTE

Send acknowledgement to: (name and address)

1. Property Address

2. Mortgagor

3. Current mortgage holder authorizing assignment

Organization name

or Individual last name first name middle name suffix

4. New mortgage holder (assignee)

Organization name

or Individual last name first name middle name suffix