ReedSmith

New Jersey Bankers Consider Mortgage Assignment Process Reform

16 March 2012

Authors: Robert M. Jaworski

On February 6, 2012, the Residential Lending and Loan Servicing Committee (the “Committee”) of the New Jersey Bankers Association forwarded to the Committee’s members a draft of a report on mortgage assignments in New Jersey (the “Draft Report”). The Committee asked the members to advise the Committee as to any comments or concerns that they may have about the Draft Report. Several financial services attorneys in the Reed Smith Princeton office are active committee members. Overall, the Draft Report appears to be an attempt to modernize the process of recording New Jersey mortgage assignments.

The Draft Report begins by describing how the mortgage recording system in New Jersey was traditionally intended to operate, with every assignment of a mortgage loan being recorded in the appropriate county recorder’s office promptly following its execution. (We note, however, that the law did not require assignees of mortgages to record their assignments. The law merely provided them with certain protections if they did.) The Draft Report then explains that the increased frequency of loan sales (much of it a by-product of the securitization process), the high costs associated with recording assignments of mortgages transferred as part of those sales, and the use of servicers to manage (typically without owning) the mortgages, caused the system to become impractical. (An additional factor, not mentioned in the Draft Report, was lost and misrecorded assignments in the land records.) This, in turn, led to the creation of Mortgage Electronic Registration Systems, Inc. (“MERS”) as a way to avoid the problem.

With respect to the issue of cost, we note that the fee to record an assignment of mortgage in New Jersey is $30 for the first page and $10 for each additional page, plus an additional $10 for entering the marginal notation of the assignment. In the not uncommon circumstance where a loan is table-funded, pooled with a group of similar mortgages and then securitized, numerous assignments of the mortgage would be necessary, thereby exponentially increasing the cost.

MERS was an attempt to avoid this problem. Under the MERS system, MERS would take the initial assignment of the mortgage at closing as nominee of the mortgage owner. Whenever a

loan was transferred to another owner, MERS would continue to be the assignee, but as nominee of the new mortgage owner. Since the named assignee remained the same, it was not thought necessary to record an assignment of mortgage and no additional fees would be incurred. This worked reasonably well until recently, when a dramatic increase in defaults and resulting foreclosures focused attention on the role of MERS, leading to numerous court challenges.*

The Draft Report suggests that the mortgage recording system might be improved by simplifying it to make it likely that mortgage lenders and assignees will use it, rather than try to avoid it. The suggestion is to make the system similar to the system in place to record security interests in personal property under Article 9 of the Uniform Commercial Code. Specifically, assignments of mortgages would be permitted to be filed with the Division of Commercial Recording ("DCR") or in the county recorder's office where the property is located, using a simple one-page form suggested by the Committee, at a cost that the Committee recommends be capped at $25. The Committee's thinking is that under such a system, mortgages could be recorded far more easily and with considerably less expense than under the current system.

The Draft Report further proposes to change the law to specify that only a person who is the "established holder of a mortgage" and is owed a debt secured by that mortgage can foreclose the mortgage. The "established holder" would normally be the record holder as identified in the record of assignments of mortgages at the DCR or in the county recording office of the county in which the property is located, but could be a person other than the record holder if such person is found to be the holder in a civil action in which the record holder, the mortgagor and any other person known to have an interest in the property are joined as defendants.

Additionally, the Draft Report proposes to allow for the recording of an appointment of a mortgage servicer with the DCR and to give the servicer specified powers (i.e., the power to accept payments on the mortgage, to act as agent for the mortgagee in dealings with the mortgage debtor, to execute and file a satisfaction of mortgage, and to execute and file a form with the DCR terminating its appointment and substituting a new servicer). Model forms to record the appointment of a servicer, and to record the termination of a servicer's appointment and the appointment of a successor servicer, are included in the Draft Report.

Finally, the Draft Report suggests statutory language to effect all of the changes that it proposes.

Reed Smith has substantial expertise in this area and has worked closely with the Association in many different capacities. Our mortgage securitization legal team, our Princeton-based financial services regulatory lawyers, and our financial services litigators (who have defended numerous claims of defective foreclosure practices, including claims challenging the MERS system), can assist you in studying this proposal and presenting comments and suggestions to the Committee. Should the proposal more forward into the legislative arena, we can also assist you in working with the Association and/or help you decide how best to approach legislators during these sensitive times in the industry.

Anyone seeking additional information or assistance regarding the issues addressed in the Draft Report should reach out to Bob Jaworski, Len Bernstein, Hank Reichner, Travis Nelson, Dan Peck or Colleen McDonald.

---

* To date, most of these challenges have been unsuccessful. The most significant decision in this regard is *In RE Mortgage Electronic Registration Systems (MERS) Litigation*, MDL Docket No. 09-2199-JAT (D. Ariz., Sept. 30, 2011). This was a multi-district litigation in which the court rejected claims that naming MERS as a beneficiary on deeds of trust impermissibly splits the deeds from the promissory notes making them unenforceable. As a result, the court dismissed 72 member complaints. New and different challenges, however, continue to crop up, including a class action filed by Washington County, Pennsylvania, seeking (i) damages arising out of the failure to record assignments whenever a note secured by a MERS mortgage was transferred, and (ii) a declaration that completed foreclosures in the name of MERS or based on assignments by MERS' certifying officers were ineffective. *County of Washington v. U.S. Bank National Association* (W.D. Pa., 2:11-cv-01405).

About Reed Smith

Reed Smith is a global relationship law firm with more than 1,600 lawyers in 23 offices throughout the United States, Europe, Asia and the Middle East.

The information contained herein is intended to be a general guide only and not to be comprehensive, nor to provide legal advice. You should not rely on the information contained herein as if it were legal or other professional advice.

The business carried on from offices in the United States and Germany is carried on by Reed Smith LLP of Delaware, USA; from the other offices is carried on by Reed Smith LLP of England; but in Hong Kong, the business is carried on by Reed Smith Richards Butler. A list of all Partners and employed attorneys as well as their court admissions can be inspected at the website **http://www.reedsmith.com/**.

© Reed Smith LLP 2012. All rights reserved.