

Nip Assignment Snags In The Bud

A company that buys mortgages and assumes it is the assignee could be in for quite a shock during a foreclosure action.

Especially for servicers who receive phone calls from people wanting to buy property in foreclosure - and from servicers' own counsel pleading for a copy of the assignment of mortgage - the subject of assignments is worth some perusal.

First, this is a much broader topic than might be imagined, so though we won't explore it all with stultifying detail, we can begin at the beginning - when the servicer itself is buying a portfolio of mortgages. That may not be your department, but if those involved stumble, it *becomes* your problem.

When your organization is buying mortgages, they need to be assigned to your company as assignee. Too obvious, you say? Well, it is obvious, but how then to explain why so often when a foreclosure is to be instituted the party who is supposed to own the mortgage doesn't?

For example, servicer D sends a defaulted loan package to counsel to foreclose in the name of D. The attorney orders the requisite foreclosure search and learns to everyone's surprise that the mortgage is owned by servicer C.

It could be that the assignment was sent for recording and is just not of record yet. Or it was lost in



"Yes, they are my mortgages! I know they are."

transit. Maybe the assignment was never even prepared or, if prepared and sent to D, was somehow misplaced. Whatever the circumstances, this is a genuine problem.

There is yet another unpleasant scenario - the break in the chain of title. C *did* assign the mortgage to D and, thankfully, everyone was careful enough to have it duly recorded. The only problem is that when A originated the mortgage and assigned it to B, B never assigned it to C. That is the break in the chain. This means that as far as the world is concerned,

D doesn't really own the mortgage.

The ultimate technical and overwhelmingly critical practical peril is that in most states *only* the owner and holder of the mortgage can foreclose it. So the party who needed to be the plaintiff in the foreclosure (maybe you) can't be.

What remedial steps D can take to cure this momentous defect will vary from state to state, but it is likely to be problematic and will surely add time and expense to the foreclosure process.

If the mortgage never goes into default - or at least never requires foreclosure - then this infirmity about missing assignments presumably never becomes a headache. That seems logical enough, but it is not so. Something is still there to bedevil the unwary.

When someday that mortgage is paid in full, the servicer must issue a

satisfaction. In many states, however, the satisfaction cannot emanate from a party who doesn't own the mortgage. (This is the tail end of the problem that only the owner of a mortgage can foreclose it.) Thus, an infirmity with an assignment means that D can't satisfy its borrower's paid mortgage. (There is usually a solution, but it means going to court and spending money.)

We won't speculate as to why all this happens. Perhaps saying that people make mistakes suffices. Why it occurs as often as it does is the particularly perplexing part because it is such an elemental concept. Being reminded of the problem can perhaps help the process of avoiding it.

Another thought in the assignment arena arises from a different perspective. D owns the mortgage with no question about the chain of assignments or the assignment directly into D. But the delayed foreclosure of that mortgage is proving uneconomical. Getting rid of the mortgage - selling and assigning it - is a mode of settlement or resolution to consider when circumstances permit.

Servicers in this situation who encounter those unfamiliar with foreclosure will frequently be asked by a variety of people whether they can purchase the property in foreclosure. The answer, of course, is "yes," but not from the servicer.

It is only the *owner* of the property who can sell. The lender or servicer has an interest in the real property, and by virtue of that interest and the ultimate result of the mortgage foreclosure action, the servicer may even succeed to title. Until the servicer may become the owner, though, it is not possessed of the title and consequently cannot sell it.

The lender or servicer can, however, sell its lien position, that is, assign the mortgage. Although the servicer would prefer to be paid in full - and most often is - it can elect to assign the mortgage for something less than the entire amount due. In common parlance, this is referred to as selling at a discount.

Regardless of the extent of the monetary sums paid for assignment of the mortgage, upon assignment the matter is usually concluded as far as the assigning servicer is concerned. The mortgage has been paid,

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and the assignee takes whatever position the first servicer had with the obligation to prosecute the foreclosure - or not - devolving to that assignee.

From the assignee's point of view, it becomes the holder of the mortgage with all the rights and infirmities which the assignor had. The private (as opposed to institutional) assignee may be content to hold the mortgage as an investment and, assuming it is possible, settle the case in some fashion with the defaulting mortgagor.

Most often though, the private assignee's goal is to become the owner of the property in foreclosure. That may or may not occur at the foreclosure sale, and it depends in part upon how much money the assignee wishes to expend for ownership. The institutional assignee will service the mortgage like any other.

To explain how the numbers would work upon a foreclosure sale, suppose the sum due upon the mortgage in foreclosure is \$460,000. By the time a prospective assignee approaches the foreclosing plaintiff, the amount due is \$500,000, inclusive of interest, costs, disbursements, allowances and legal fees.

If the assignee is willing to pay the full sum due, then at an ultimate foreclosure sale, its upset price would be precisely what it paid for the assignment - together with whatever compensable sums would have subsequently accrued.

Assignee can't lose

Insofar as the property is worth the amount paid for the assignment, or if ownership of the property has some other value to the assignee not related to a dispassionate monetary analysis, the assignee cannot lose. If no person bids at the foreclosure sale, the assignee would bid some nominal amount - but not be required to actually pay it - and therefore would become the owner of the property.

Assuming the upset price at the sale to be \$500,000, the assignee as the holder of the mortgage can continue the bidding up to the upset price. Once an outside bidder has reached that amount, the assignee can refrain from further bidding and thereby recoup its entire investment. It will not have obtained title, but neither will any loss have been incurred.

If ownership remains the ultimate goal, the assignee can, of course, bid above the upset price. Then, any sums in excess of the upset price must actually be remitted to the referee at the closing, such amounts then to become surplus monies. If the bidding ceases there, the assignee will have invested further funds, but it will own the property. **SM**

NAMES

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appointed **Richard Ward** executive vice president of the real estate service corporation. Ward, the former director of real estate business for Microsoft's HomeAdvisor.com, will oversee the management of the TransactionPoint platform, public records, lending solutions and MLS software products and services.

WELTMAN, WEINBERG & REIS CO.

Weltman, Weinberg & Reis Co., a creditor rights law firm, has added **Theresa Fortunato**, **Donald Mausar** and **Robert Rutkowski** as new partners.

Fortunato currently manages the legal action recovery practice area, and Mausar concentrates on complex collections. Both are based in the firm's Cleveland office. Rutkowski oversees credit union representa-

tion and is located in the Brooklyn Heights, Ohio, operations center.

PACIFIC USA HOLDINGS CORP.

David J. Vida Jr. has been promoted to president of Pacific USA Holdings Corp.'s PSB lending division with responsibility for managing the mortgage servicing operations. He was previously senior vice president of the parent company in charge of business development and planning. He joined PUSA, based in Plano, Texas, last April. **SM**

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