

DAILY NEWS »**Outside the Box, But Inside the Law**

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Michigan Paves the Way with Creative Techniques to Legally Avoid Costly Delays, Hasten Foreclosure and REO Sales

When it comes to loss mitigation, quicker is almost always better. If the ultimate goal of every foreclosure is a clean, quick REO sale, avoiding delay by using creative methods can substantially improve results. Although missing or unrecorded assignments lead to unnecessary delay, simple techniques are available to expedite the foreclosure process and subsequent REO sale. Outside the box—but inside the law—is often the best place to be.

In today's postsubprime environment, mortgages (and their underlying loans) are often bought and sold in bulk by investors many times over. Frequently, these loans are serviced by the same servicing entity despite the change in investors holding the debt and mortgage. Due to the number of the loans sold in a bundle, current investors or their servicers do not always hold written assignments for each mortgage purchased. Many of these loans go into default before the new owner of the loan can actually obtain a formal written assignment of mortgage, and in some circumstances, to avoid long and costly delays in foreclosing, investors may decide to record affidavits with the register of deeds attesting to their ownership of the mortgage so they can proceed with the foreclosure sale pending receipt of formal written assignment from the prior investor.

In the absence of a formal written assignment, many foreclosures and REO sales have been needlessly delayed by failure to recognize the validity of recorded affidavits of ownership, evidencing ownership of a mortgage in states which don't require that all assignments be recorded. Fundamental due process notwithstanding, and taking into account that a party foreclosing a mortgage must own the mortgage before a foreclosure proceeds, legal requirements and procedures vary from state to state. As a result, most national title insurance companies have difficulty establishing uniform underwriting practices with respect to the assignment issue and can often fail to recognize important distinctions regarding state-specific legal requirements. Michigan is a good example of this. With some of the highest REO numbers in the country, it is vitally important to investors and banks with large Michigan assets to understand how this issue can needlessly delay resale of REO properties.

Statutory Requirements for Foreclosure

It is a basic premise that a mortgagee must own the indebtedness in order to begin foreclosure. Michigan, along with many other states, allows statutory foreclosure of mortgages by advertisement. Michigan statute MCL section 600.3204 says a mortgagee may foreclose a mortgage by advertisement if:

- (1) (a) A default in a condition of the mortgage has occurred, by which the power to sell became operative.
 - (b) An action or proceeding has not been instituted, at law, to recover the debt secured by the mortgage or any part of the mortgage.
 - (c) The mortgage containing the power of sale has been properly recorded.
 - (d) The party foreclosing the mortgage is either the owner of the indebtedness or of an interest in the indebtedness secured by the mortgage or the servicing agent of the mortgage.
- (2) If a mortgage is given to secure the payment of money by installments, each of the installments mentioned in the mortgage after the first shall be treated as a separate and independent mortgage.
- (3) If the party foreclosing a mortgage by advertisement is not the original mortgagee, a record chain of title shall exist prior to the date of sale under section 3216 evidencing the assignment of the mortgage to the party foreclosing the mortgage.

Prior to 1994, section 600.3204(3) actually read, "That the mortgage containing such power of sale has been duly recorded; and if it shall have been assigned that all the assignments thereof shall have been recorded." In 1993, after the Michigan Supreme Court remanded the case for reconsideration, the Michigan Court of Appeals in *Arnold v DMR Financial Services (No. 90-00778)* held all assignments of the mortgage had to be recorded before a sheriff's sale could take place. The court of appeals based its decision on the plain meaning of the statute as it was written prior to the 1994 amendment.

Legislature Enacts Change

In 1994, following the court of appeals ruling in *Arnold*, the Michigan legislature amended the statute due to concerns raised by mortgage experts. Specifically, attorneys for the mortgagees argued the true purpose of the statute was to simply enable the mortgagor to find out what entity was claiming the right to foreclose so the mortgagor would be able to negotiate to retain his property. In fact, there is no general requirement that assignments of mortgages be recorded under Michigan law. In light of this, the purpose of the statutory requirement in MCL section 600.3204 is to notify the mortgagor as to who owns the mortgage. A mortgagee has the statutory right to foreclose a mortgage which it owns and that is in default. Since there is no legal requirement to record notice of the transfer of a mortgagee's interest outside of the foreclosure statute, the legislature only required the mortgagee to record evidence it owns the mortgage.

In amending the statute, the legislature recognized the record title didn't need to reflect every entity that had owned the note, but only that evidence exists as to the mortgagee that currently claimed ownership in the note, giving rise to the right to foreclose by advertisement. The legislature removed specific language requiring assignments be recorded, replacing it with the simple requirement that a record chain of title exist showing the assignment if the party foreclosing a mortgage is not the original mortgagee.

Record Chain of Title

With the enactment of the 1994 amendment, the statute no longer required every mortgage assignment be recorded prior to the sheriff's sale, but only that a record chain of title exists evidencing the assignment of the mortgage to the party foreclosing the mortgage. Blacks Law Dictionary (8th Ed. 2004) defines chain of title as "the ownership history of a piece of land, from its first owner to the present one." Evidence is defined as "something (including testimony, documents, and tangible objects) that tends to prove or disprove the existence of an alleged fact" Based on the clear meaning of MCL 600.3204(3) as amended, an affidavit attesting to the ownership of the mortgage that's recorded prior to the sheriff's sale is sufficient evidence to show the ownership of the mortgage being foreclosed.

Formal Written Assignment Not Required

There's a common misperception among many industry professionals regarding the sufficiency of recording affidavits attesting to ownership of a mortgage prior to the sheriff's sale. The recent Michigan case of *Davenport v HSBC Bank USA, 275 Mich App 344 (2007)* is often misunderstood and incorrectly applied. Careful reading of the opinion shows the case simply stands for the established, elementary position that an entity cannot foreclose a mortgage unless it owns the mortgage. In *Davenport*, the foreclosing entity admitted it didn't own the loan at the time it starting publication to begin foreclosure.

Where an affidavit is recorded to show ownership of a mortgage, this case is not on point. In fact, the foreclosing entity does own the mortgage and has affirmed its ownership and complied with the statutory requirement by recording a document evidencing an assignment and sufficient to put the mortgagor on notice as to ownership.

Contrary to popular belief, the traditional mortgage "assignment" document most title companies and lay people are familiar with was not created by statute. It's merely a form that has been accepted over the years to show that the loan and security were sold to another party. By simply requiring that evidence of the assignment be recorded in the chain of title prior to the sheriff's sale, the legislature was no longer requiring that any specific document be used, but only that *some notice* be recorded to show another party now owns the loan. In fact, there's statutory authority that affidavits can be recorded in place of assignments to prove ownership of a lien. As stated in the comment section of Chapter 16.13 of the Michigan Land Title Standards, the Uniform Commercial Code allows a sworn affidavit to be used to satisfy the requirement that an ownership interest in the mortgage be recorded to foreclose the mortgage by advertisement. This supports the legitimacy of using recorded affidavits when a traditional assignment is not available.

In Michigan, the legislature understood the difficulties servicers faced in trying to obtain and record every assignment from the origination lender to the foreclosing investor. By passing the 1994 amendment, the legislature changed an overly burdensome law from requiring that all assignments be recorded prior to the foreclosure sale to a more reasonable one that simply requires recorded notice. The notice must be sufficient for a mortgagor to be able to determine who the current owner of the mortgage is so he or she can negotiate a payoff to keep the property. The foreclosing assignee of a mortgagee can comply with this state law by recording an affidavit or other evidence sufficient to place the mortgagor on notice as to the identity of mortgagee.

Certainly, investors must prove ownership of their interests in a mortgage before foreclosing, but it is important to recognize there are many ways to accomplish this in the chain of title while still complying with statutory requirement of notice. Real estate professionals should exploit the benefits intended by the Michigan statutes as amended. Although considered by some to be "outside the box," the use of recorded affidavits evidencing ownership can in many circumstances be very beneficial to the industry as a whole.

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