

Memorandum in Opposition, with Alternative

REAL PROPERTY LAW SECTION

RPLS #2

May 27, 2013

S. 44
A. 1082

By: Senator Peralta
By: M. of A. Weinstein
Senate Committee: Judiciary
Assembly Committee: Judiciary
Effective Date: On the 90th day after it shall
have become a law

AN ACT to amend the real property law, in relation to the recording of a transfer or assignment of a mortgage interest.

LAW AND SECTION REFERRED TO: Amends the Real Property Law by adding a new Section 291-j.

THE REAL PROPERTY LAW SECTION OPPOSES THIS LEGISLATION, AND SUGGESTS AN ALTERNATIVE

THE REAL PROPERTY LAW SECTION OPPOSES THIS LEGISLATION, AND SUGGESTS AN ALTERNATIVE, because

1. **It is not limited to residential 1-4 family loans.**
2. **It imposes new and impractical recording requirements.**
3. **Recording the new mortgage ownership assignment document is not a practical or workable method for borrowers readily to contact their lenders to discuss their loans.**
4. **The ninety-day deadline for recording presents an unprecedented burden and risk on lenders, title insurers, counsel and recording officers.**
5. **There is a viable alternative to achieve the goals of the bill, namely to require residential mortgage holders (or their servicers, agents or designees), as a condition to closing the loan, to furnish the identity of the mortgage holder and full contact information, as described in the alternative below.**
6. **A626-B, as amended on 2/13/2012, appears to reverse the intent of the bill, as we understand it. It refers to a mortgage or assignment of mortgage made “by” a non-natural person. Presumably, the legislation is intended to disclose the address and telephone number of the non-natural person “to” whom the mortgage or assignment of mortgage was given, not the other way around.**

Summary of Position

The Real Property Law Section continues to appreciate, and endorse, the need for better and more direct communication between lenders and homeowners. However, the proposed bill -- which is not limited to residential 1-4 family mortgage loans -- appears to be flawed in several material respects and is unnecessary.

Our Section is not opposed to a workable, efficient and easily implemented procedure whereby homeowners are notified of the identity of holders of the loans. Indeed, such a system already exists under federal law and there are considerable consequences for violating the federal law.

The recording of a new, self-styled “mortgage ownership assignment document” as contemplated in the proposed legislation should not be the method by which borrowers ascertain whom to contact to discuss their loans. In fact, while the actual mortgages and assignments of mortgages should be and are recorded, recording is not a very practical method to get information to homeowners. Thus, the proposed legislation fails to meet its intended, and otherwise laudable, objective.

Moreover, the proposed legislation requires the recording of mortgages and assignments of mortgage, together with the mortgage ownership assignment ownership document, not later than ninety days after the “acknowledgement” or proof of such instrument.

This presents a new and wholly unprecedented burden and risk on mortgage lenders, title insurers, counsel, and the recording officers themselves. Through no fault of any of these parties to the process (e.g., pure administrative backlog or the packaging of loans acquired on the secondary market), these documents may not -- indeed, in many cases cannot -- be recorded within ninety days. There should be no affirmative obligation to record within ninety days. The only result of any such failure should continue to be, as throughout our history, the legal implications of race/notice and priority of lien.

We believe there is a much easier, more effective and less radical way to afford homeowners access to their mortgage lenders, as we describe below. Accordingly, for the reasons set forth below, the Real Property Law Section opposes the proposed legislation, and suggests a viable alternative.

Analysis

This bill is opposed for the following reasons:

Surprisingly -- and alarmingly -- the bill is not limited to residential 1-4 family or consumer loans. There should be absolutely no change to the existing law or additional requirements as respects commercial real estate loans in New York.

The parties to commercial mortgages, invariably represented by counsel, are fully aware of their respective “contact persons.” Commercial mortgages are typically negotiated among sophisticated business persons and the borrower representatives have relationships and contacts with their lenders on a regular basis. They have little need for a separate recorded mortgage owner assignment document containing information they already have.

There are several provisions in federal law that have established valuable protections for homeowners that meet all of the objectives and requirements of the proposed bill.

(i) RESPA --

(a) The Real Estate Settlement Procedures Act ("RESPA") requires mortgage loan servicers to notify borrowers in writing when any assignment, sale or transfer of the servicing of the loan occurs. See 12 USC 2605(b)(1).

(b) Each transferee servicer to whom the loan servicing is assigned, sold or transferred must provide a separate notification to the borrower that it is the new servicer. See 12 USC 2605(b)(1). RESPA imposes liability for damages and attorneys' fees on servicers that fail to comply with these and other requirements in loan servicing.

(ii) Truth in Lending --

Pursuant to the Truth in Lending Law, servicers are already required to provide the name, address and telephone number of the owner of the mortgage loan, upon request from the borrower. See 15 USC 1641(f)(2). This is "real time information," unlike the document called for by the proposed bill which would immediately become out of date upon a subsequent transfer.

There should be no requirement to record within ninety days. This time period is both onerous and, in many instances, impractical. The repercussions of such failure are well-settled in the law of race/notice and priority of lien -- and should not be disturbed or altered, especially without a full consideration of all of the implications of this new and unprecedented requirement. If there is any time requirement at all within which to record it should be not less than one hundred eighty days.

The proposed bill is an open invitation to inadvertent, costly and misleading mistakes that will lead to unnecessary litigation and homeowner expense -- not to mention liability, or claims liability, for failure to record timely. The litigation cost and exposure could be immeasurable, and is wholly unwarranted.

The goal -- consumer access to mortgage lenders -- is not met by implementing a system where the consumer must search through county clerk records in order to ascertain basic contact information regarding the lender.

The legislation is unduly burdensome. Thousands of mortgages may be assigned to a servicer. The holders of the mortgages may be different. The requirement to record a separate (and largely duplicative) mortgage ownership assignment document is unwieldy, costly and onerous. Lenders will factor the burden -- and the risk of mis-recording certain information -- in their pricing of loans. This added cost will also be passed on to the consumer.

Each of these is a serious and legitimate reason the legislation should not be enacted. Taken as a whole, they demonstrate that the legislation would be unfair, overly sweeping in scope, and filled with risk and potential for unnecessary litigation. Once the impact of these proposed requirements sets in, the result will be a palpable chill in the resumption of consumer-favorable lending practices and pricing in New York that our economy, and our consumers, so vitally need.

Suggested Alternative Approach

We continue to recommend, as we have done before, and we would ardently support, an alternative to the proposed legislation. We suggest the implementation of a state-wide program, limited to 1-4 family residential mortgage loans, where every mortgage note holder (or its servicer, agent or designee) must, as a condition to the closing of the loan, and with consequences for failure to comply:

Furnish to the borrower, at the closing, the information required in the mortgage ownership assignment document, to wit: the identity of the note holder or servicer, the name, address, direct-dial telephone number of the person having responsibility and authority for administering, modifying and enforcing the loan and the date that the mortgage of assignment was acknowledged or proved.

Furnish to the borrower, at the closing, a web address whereby the borrower can type a loan number and obtain immediate contact information (including current direct-dial telephone number and e-mail address) and access to the individual responsible for the loan.

Furnish a written update notice to the borrower within twenty days after any assignment or transfer of the mortgage containing the identity and appropriate contact information of the person having responsibility and authority for administering, modifying and enforcing the loan.

Furnish a written update notice to the borrower within twenty days of any change in the identity of the person having responsibility for the loan.

Contain a notation, in a clear place, on each monthly mortgage statement that includes the name and contact information (as aforesaid) of the current person having responsibility for the loan.

The foregoing procedures, consistent with -- and amplifying -- the requirements of federal law, can be implemented and required on a state-wide basis for all 1-4 family residential mortgage loans. These procedures will help accomplish the important goal of making sure every homeowner can easily and regularly contact a representative of the lender having direct responsibility for the loan.

These procedures will be far more effective and beneficial to homeowners than a confusing, cumbersome, mistake-prone and impractical recording of the mortgage ownership assignment documents that homeowners cannot readily access or understand.

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The Real Property Law Section of the New York State Bar Association **OPPOSES** the passage of this legislation and respectfully requests that the Legislature consider, in lieu of the proposed bill, the alternative proposed notification and contact procedures outlined above.

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