Mortgage Loan Assignments:

A Primer in Two Parts (Part 1)

(with Form)

Joshua Stein

Mortgage loans are now being widely bought and sold among lenders. Purchaser's counsel, however, must be circumspect in such transactions.

MORTGAGE LOANS HAVE, more than ever, become financial assets that trade freely from owner to owner as markets shift and business agendas change. Many institutional lenders now originate mortgages, book some fee income, and sell the mortgages almost immediately. The

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purchasers often package up or unpackage the same mortgages and sell them again. And so on. For many lenders, the concept of originating a mortgage as an asset to hold long-term in portfolio has almost become archaic.

Securitization, the secondary market, changing investment demands, regulatory requirements and incentives, the desire of lenders to increase their fee-based income and decrease their interest-rate exposure, and other changes of attitude in the real estate lending community have all driven the ever-increasing frequency and importance of mortgage assignments.

Moreover, the real estate world knows that whatever can be sold can also be mortgaged or pledged as collateral for a loan. Therefore, with increasing frequency, pools of mortgages will themselves serve as collateral for other obligations—a "collateral assignment" of mortgage loans to secure some other debt.

Whether a mortgage is assigned "absolutely" or "collaterally," the essence of the transaction consists of the transfer of a debt, and the security for that debt, from one lender to another. That is, however, only the beginning of the discussion.

Just as a transfer of ownership of real property raises numerous legal and practical considerations that vary with the nature, use, and location of the particular real property and the parties' business agendas, so too will the transfer of a mortgage loan raise numerous legal and practical concerns. Those concerns will vary with the size, nature, circumstances, and structure of the loan and of the loan assignment transaction, as well as the creditworthiness of the parties.

This article, together with a companion article in the next issue of *The Practical Real Estate Lawyer,* will summarize many of those legal and practical concerns.

Two short articles cannot be exhaustive. Some transactions will raise issues that these articles do not address. Some of the concerns addressed here will sometimes be irrelevant or inapplicable. Moreover, because these articles reflects the author's overall experience in a variety of states and recording offices, the conclusions expressed here should not be relied upon for any particular state or recording office.

THE TRANSFER OF THE LOAN OBLIGATION • Every transfer of a mortgage loan, whether an "absolute" transfer or a limited assignment as "collateral" for another loan, starts with the transfer of the borrower's promissory note from the existing lender to an assignee.

Some ancient cases suggest that the holder of a promissory note can in some circumstances transfer it without even delivering it to the transferee, by merely "intending" to transfer it. Rather than rely on this principle, of course, modern assignees of mortgages will insist that the as-

signor deliver the original promissory note to the assignee, together with originals of all amendments and previous assignments.

Endorsement

The assignor should also endorse the note to the assignee. The assignor will add this endorsement either on the note itself or on a separate piece of paper, an "allonge." The legal effect of an endorsement depends on the law of commercial paper, but the assignor will typically wish to limit its liability as much as possible, such as by stating that the endorsement is "without recourse."

If, however, the assignor transfers the note in accordance with a loan purchase agreement, the purchaser will want to assure that the assignor's efforts to avoid liability under the endorsement do not vitiate the purchaser's rights under the loan purchase agreement.

If the promissory note is being assigned only as collateral, the endorsement should be in blank: "Pay to the Order of _____," with the name of the endorsee left to be filled in later, if the collateral assignment ever becomes an absolute assignment (after default). The endorsement then becomes the equivalent of a blank stock power delivered along with a stock pledge. The endorsement in blank can simplify future realization on the assignee's security.

Lost Notes

What happens if the lender assigning the promissory note can't find it? This question is of more than theoretical interest. Institutional lenders seem to misplace promissory notes with astonishing frequency. The typical series of mergers, reorganizations, relocations, eliminations and rebirths of legal departments, and other disruptions to the lender's business and legal affairs, to say nothing of periodic replacements of outside counsel, often cause minor details like original loan documents to fall between the cracks. When the time comes to sell a loan, no one has any idea where to find the original loan documents.

In this case, the assigning lender will typically deliver an affidavit, stating that the lender has looked for the note, but can't find it. Often a copy of the lost note, from the lender's files, will accompany the affidavit, and the assignor will certify that the copy is accurate. The affidavit will also include the assigning lender's indemnity against any loss suffered if someone else turns out to own the note.

The assignee of a promissory note will typically be willing to rely on a "lost note affidavit," particularly if the assignor that lost the note is a reputable institution. If, however, that assignor is an individual, such as a seller of property who "took back paper," the purchaser may be less willing to rely on the assignor's affidavit. In those cases, the absence of the prom-

issory note may create substantive legal problems and delay or impede the closing.

If the assigning lender remains on reasonably good terms with the borrower, the assignor might solve the problem by having the borrower sign a replacement note, identified as such to protect the borrower from potential double liability. Along similar lines, lenders increasingly include in their loan documents an obligation for the borrower to sign a replacement promissory note if (when?) the lender loses the original note.

Of course, to the extent that the loan documents contemplate that the borrower may execute more than one original note to evidence the same debt, an assignee can never be sure that it possesses "the" one original promissory note—with whatever advantages come from such possession. In practice, the assignee may resolve this concern by asking the borrower to certify exactly how many original notes it has actually signed, and to agree not to sign more original note(s) except at the request of the new assignee.

In some transactions, the borrower will maintain a "registry," basically a private recording system, to keep track of who holds the loan. This approach can reduce the importance of the actual physical note itself, hence prevent any possible issues arising from loss of the note, duplicate notes, and so on.

Lost notes are particularly likely to be a problem if the lender insists on "keeping alive" all previous notes ever executed by a particular borrower even as the loan is modified and restated over time. By giving old notes and mortgages the gift of eternal life, a lender may gain some argument for preservation of priority against intervening liens. Because the lender will typically obtain title insurance for every one of these subsequent transactions, however, the lender's exposure because of intervening liens would seem to be quite minimal. The benefits of preserving old notes and mortgages hardly seem sufficient to justify the sometimes agonizing machinations and complexity (and resulting legal fees) necessary to preserve old notes and mortgages forever, and the related risks of errors and lost documents. (The cost-benefit analysis will be different in a state, such as New York, that taxes mortgages but allows a credit for tax previously paid on continuing liens.)

Notice to Borrower

In many cases, the obligor under a note can continue to make payments to the assignor until the borrower has received actual notice of the assignment. In other words, when making its monthly payments the borrower need not ask every month to confirm that last month's lender is still this month's lender.

Anyone purchasing a loan will want, at a minimum, to immediately

notify the borrower, by some reliable means with proof of delivery, that the loan has been transferred. And if the purchaser has any reason to doubt the reliability of the assignor or the assignor's records of borrowers' addresses, the purchaser will want to go a step further: have the borrower acknowledge that it has received notice of the assignment, and that it will henceforth make payments only to the assignee.

Borrower's Estoppel Certificate

A cautious assignee will, if possible, ask for an estoppel certificate from the borrower. Although an estoppel certificate is not an element of perfecting any assignment, it can confirm the assignor's assurances about the outstanding balance of the loan, the date to which interest has been paid, whether the borrower has tried to assert claims or defenses against the existing lender, whether there is some kind of dispute, and that the borrower is aware of the assignment and will make all future payments to the assignee.

If the loan is being assigned collaterally, rather than absolutely, the estoppel certificate can become an important tool to protect the assignee's security. In a transaction of this type, the assignee's loan to the assignor starts with the assumption that the assigned mortgage loan will continue to have value. A careful collateral assignee will want to expand the estoppel certificate, if possible, into a general acknowledgment and agreement with the borrower, so the assignee can assure that the mortgage loan will continue to have value as collateral.

An assignee might, for example, want the underlying borrower (mortgagor) to agree to make payments on the mortgage loan directly to the assignee, so the assignee can assure those payments are correctly applied—i.e., first to pay the assignee's loan to the assignor. So long as the latter loan is not in default, the assignee might be willing to allow the assignor to collect regular monthly payments of principal and interest, but would probably want the borrower to agree to make any unusual payments—prepayments of principal, payment on maturity, or application of insurance awards against the debt—directly to the assignee.

Direct-pay arrangements like these can protect the assignee against a serious potential loss of security: the risk that the borrower might pay the original lender directly, thus eroding the collateral value of the loan, and yet the payment would not find its way to the assignee. (The risk is analogous to a tenant's prepayment of 10 years of rent just before foreclosure.)

An agreement of this type would cover a number of other issues, all designed to protect the assignee against unexpected loss or destruction of its collateral. The specimen "Notice to Borrower with Borrower's Acknowledgment" after this article sets forth the assurances that a collateral as-

signee might want to seek from the underlying mortgage borrower.

ASSIGNMENT OF THE SECURITY AND OTHER DOCUMENTS • Black-letter law states that "the mortgage follows the note." In other words, once the note has been assigned, the mortgage automatically follows. A careful assignee will, however, still insist on specific assignments both for the mortgage and for any other pieces of the bundle of documents and rights that make up "the loan." Even if the assignor has endorsed and delivered the note, the assignee may want to mention the note, again, in the documents that assign the mortgage and any other elements of the security package.

The following discussion addresses assignment mechanics that apply with equal force to "absolute" and "collateral" assignments of a mortgage loan.

Recordation

To the extent that the original mortgage documents were recorded, the assignee should insist on recording the assignment documents. In doing so, however, the assignee must watch for state-by-state variations, often unpredictable, technical, counterintuitive, and more burdensome than would apply to a deed conveying fee title. Therefore, a careful assignee will check with local counsel or a title company in documenting the assignment of an out-of-state mortgage. The following issues, and others, may arise in trying to record loan assignment documents.

Separate Assignments

For simplicity, the parties may want to assign the mortgage, the note, a recorded assignment of rents, and any other recorded documents through a single assignment that lists everything. Sometimes that works. Sometimes it doesn't. The exceedingly technical mindset of local recording offices will often dictate that any recorded assignment can affect only one previously recorded document, hence dictating a multiplicity of separate assignments.

Property Descriptions

A mortgage assignment document can often identify the mortgage being assigned by mentioning its recording information and, usually, the original parties. The assignor and assignee can significantly streamline their documentation because they usually do not need to develop, check, or attach a description of the real property that the mortgage affects.

In New York, for example, property descriptions are typically not required for mortgage assignments, even though the standard printed form of mortgage assignment most commonly used provides for such an attachment.

In any "mortgage pool" transaction of significant size, it may be cost-effective for the parties to find out ex-

actly which recording offices require a property description for a mortgage assignment, and which don't.

Other Identifying Information: Block and Lot Information

In many counties, the mortgage assignment must include the "block and lot" information for the encumbered real property, as this will be the basis to index the mortgage assignment. If the "block and lot" are missing or wrong, the assignment may be ineffective against third parties. This fact may alone justify involving a title company in the process and asking the title company to issue (or endorse) appropriate title insurance policies to confirm that the mortgage has been validly assigned of record.

Because of the likelihood that a mortgage assignment will be indexed by "block and lot," and because of the generally technical approach taken by recording offices when dealing with these documents, an assignee of multiple mortgages typically will not be able to record a blanket categorical assignment of whatever mortgages the assignor might own in a particular county. Although this approach might seem an expedient way to handle a large pool of geographically concentrated small mortgages, it typically will not work, as each mortgage must be specifically identified at least by its recording information and the block and lot affected.

Some recording offices go a step further. If the mortgage being assigned was previously assigned or amended, they insist that today's mortgage assignment recite the entire history of the mortgage being assigned—starting with the initial recording information and listing every transaction ever since. In a state like New York, where old mortgages never die (they need to live forever to save future mortgage recording tax), any requirement to list the full "chain of title" of a mortgage can become quite burdensome and labor-intensive, as well as a gratuitous source of errors, delays, and problems.

Signature, Acknowledgment, and Recording Issues

In addition to the formalistic considerations discussed above, a mortgage assignment also raises the same considerations as any other recordable document. Must signatures be witnessed? What is the correct form of acknowledgment? Is there a rule that prohibits blue ink? Mandates blue ink? Does the recording office require delivery of a title certificate or "Torrens" certificate? Does the document need to be accompanied by any affidavits or tax returns? The answers to all these questions depend on local law and practice.

Substitution of Trustee

If the mortgage document is actually a "deed of trust," the assignee may wish to replace the original "trustee" with a new one—if, for example, the trustee is an officer of the

assignor. This change typically requires recording a "substitution of trustee" in compliance with local recording requirements.

Ancillary Security Items

If the lender holds any cash deposits, reserves, escrows, lockboxes, or credit enhancement devices in connection with the loan, the assignee will want the benefit of them. As a starting point, they need to be mentioned in the loan assignment document. They should be identified, along with the amount of money involved and exactly where they are being held, so they can be transferred to the assignee. If they are being held by a third party, it may be necessary and sufficient for the third party to acknowledge the rights of the assignee and agree to take directions only from the assignee.

Because of the likelihood of future disputes regarding the amount and application of any of these funds, the assignee will probably want to obtain a full account history in each case, and perhaps even confirm it with the borrower, although this may not be realistic in bulk assignments.

Letters of credit may require reissuance in favor of the assignee. That process is not necessarily automatic, easy, or "as of right," depending on the language of the particular letter of credit.

The assignee must also obtain assignments of the more routine ancillary security and credit support documents, such as an assignment of rents, a guaranty, an environmental indemnity, and so on. These will often be addressed in an "omnibus" assignment document (a "kitchen sink" document) by which the assignor transfers to the assignee a wide range of all possible loan documentation not otherwise specifically addressed in the assignment documents.

Pending Litigation

If the loan being assigned is already in foreclosure or bankruptcy, the assignor should assign all its rights and remedies in those proceedings to the assignee. This can require, among other things, preparation and filing of minor pleadings, assignment of judgment documents, and "transfer of claim" documentation in bankruptcy—all tied to local procedural peculiarities and the stage of the proceedings. Coordinate the process with the assignor's litigation counsel. Absent special considerations, it may be cost-effective for the assignee to continue to use the same counsel.

Introduction to New Lender

Whether or not the assignee gives the borrower a formal legal notice of assignment, the new holder of the loan should promptly introduce itself to the borrower, by sending a so-called "hello letter," with a notice of the new lender's addresses for payments and general correspondence. (Often the "hello letter" will be accompanied by a "goodbye letter" from the

old lender.) Even before the new lender has fully set up the loan on the new lender's computer system, the new lender will usually want to let the borrower know about the assignment and give the name and telephone number of someone to contact if questions arise.

If the purchaser of a loan determines that the seller was lax in administering and enforcing the loan, this is the time to think about retracting any past waivers and putting the borrower on notice that the new holder of the loan intends to be more diligent and hands-on than its predecessor. For example, the "hello letter" might remind the borrower that the loan documents require approval of any leases, and introduce the borrower to the new lender's lease approval procedures.

Assignor Liability

In any document assigning a mortgage or any other loan document, the assignor will often try to negate any liability regarding the loan. Sometimes this is appropriate; sometimes it is not. Much will depend on the contractual context, such as the specific requirements of any loan sale agreement between assignor and assignee. When such an agreement exists, the parties will often attach to the agreement the precise form of assignment documents to be used. Alternatively, they may agree that all assignment documents will state that every transfer is being made "without representation, warranty or covenant except as set forth in" the identified loan sale agreement. Regardless of what the loan sale agreement says, a careful assignee may want the assignor to represent and warrant in the assignment document at least that:

(a) Assignor owns the Loan; (b) Assignor has not previously assigned, transferred, encumbered or hypothecated the Loan or any interest therein; (c) the principal balance of the Loan is $_____; (d) accrued interest on the Loan is $_____; (e) Assignor is not aware of any uncured defaults under the Loan; and (f) this assignment has been duly authorized by Assignor.

ASSIGNMENT OF UCC-1 FINANCING STATEMENTS • Most commercial mortgage lenders obtain from their borrower, as part of their original collateral package, not only a recorded mortgage, but also a UCC-1 financing statement to give the lender a perfected lien on personal property and intangible property related to the real property collateral. When that lender assigns the loan, it should also assign the UCC-1 financing statement, through a separate "assignment" filing, as part of the loan transfer package.

When an assignee starts to think about the assignment of UCC-1 filings, it should first ask whether the assignor's UCC-1 filings have lapsed or expired. The author's experience suggests that renewal of UCC-1 financ-

ing statements is governed by the same institutional forces that govern the retention of original loan documents. In other words, even the most competent and organized institutional lenders are not very good at remembering to file UCC-1 continuation statements.

For many loans more than five years old, UCC-1 filings will have lapsed without continuation. Unless the collateral is a hotel or a furnished apartment building, this gap in security will usually cause no concern to the old lender, the new lender, or anyone else. (You might ask why real estate lenders even bother with UCC searches or filings when they initially close most mortgage loans.)

Assuming the UCC-1 financing statements have not expired or lapsed, the mortgage assignor will need to assign all extant UCC-1 financing statements. This is done using a UCC-3 form, or in California a UCC-2 form. Assignment of a UCC-1 financing statement creates the following additional considerations for the assignee:

UCC Search

To identify the existing UCC filings, the assignee might rely on the assignor's records, or might want to conduct its own searches. The latter choice may cause delay and significant expense, the justification for which may vary depending on the importance of UCC collateral in the particular transaction, the reliability of the assignor, the terms of the larger transaction, and whether the assignee really cares about UCC filings. If the assignee intends to conduct a follow-up search later to confirm proper filing of the UCC assignments, then the assignee may decide to skip the pre-closing search and rely entirely on the later search to validate both the original filings and the assignments.

No "Restart"

An assignment of an existing UCC-1 will not "restart" the lifespan of the existing UCC-1. The assignee will still need to file a continuation statement during the statutory period, usually sometime during the last six months before the fifth anniversary of the original filing, measured without regard to the assignment of the UCC-1.

Lapsed Filings

Lapsed filings must first be reinstated before they can be assigned. Assuming the security agreement includes the right "magic language," lapsed filings can be reinstated with a new filing signed by the secured party alone (presumably the secured party "of record" before the assignment), without the debtor's signature. Priority will, however, be determined by the date of reinstatement. Then the secured party that assigns the loan will need to file an assignment statement.

Qualification To Sign

A continuation statement must typically be filed by the secured party

of record. Thus, if the assignor did not sign, or the assignee did not file, proper UCC-1 assignment documentation (a complete chain of "assignment statement" title from the original "secured party" to the current holder of the loan), any "continuation statement" the assignee might file may be ineffective.

PERFECTION OF A SECURITY INTEREST IN A MORTGAGE LOAN—UCC ISSUES • When a mortgage lender assigns a mortgage loan only as "collateral" for another loan, that assignment transaction raises more UCC issues. The issues are often confusing and full of state-by-state variations. These problems arise because mortgage assignments are perched uneasily on the borderline between UCC transactions and pure real estate transactions.

Although a careful "collateral assignee" of a mortgage may deplore the relative lack of reported cases in this area, it will also not want its transaction to help fill that gap in the future. Therefore, it will err on the side of doing everything that might arguably be necessary to "perfect" its security interest in a collaterally assigned mortgage loan, both under the UCC and under general real estate law. This way the collateral assignee runs no risk of getting the filing wrong and learning that its security interest is unperfected.

Application of UCC

As a general rule, when a lender makes a loan on the security of a collateral assignment of a note and mortgage, it will need to perfect that security interest under the UCC.

The official commentary to the UCC states that Article 9 does not apply to the creation of a real estate mortgage, but "when the mortgagee in turn pledges [the secured] note to secure his own obligation . . ., this Article is applicable to the security interest thus created in the note and the mortgage." *See* U.C.C. §9-102(3) and Official Comment No. 4 (N.Y. language) to §9-102 (Consol.) (hereinafter, "UCC"; all references are to the New York version of the UCC).

On the other hand, UCC §9-104(j) states that Article 9 generally does not apply to "the creation or transfer of an interest in or lien on real estate." A careful assignee may conclude that the reference to "transfer" is intended to refer only to an outright transfer of a lien, but a pledge for security is not an outright transfer and hence is not excluded from the UCC; moreover, UCC §9-102 expressly says the UCC applies to such a pledge. (This interpretation has the advantage of not threatening the interpreter's career if it turns out to be wrong.)

Once the collateral assignee has decided to "perfect" its interest under the UCC, it needs to decide how to go about doing it.

PERFECTION AS TO PROMISSORY NOTES • Under the UCC, a secured party, such as the collateral assignee of a mortgage loan, can perfect a security interest in a promissory note (an "instrument") only by taking possession of the original promissory note. UCC §9-304(1). Filing a UCC-1 financing statement is neither necessary nor sufficient.

Therefore, the collateral assignee—or a bailee acting on its behalf—must take possession of the original physical promissory note and if possible the originals of all previous amendments, endorsements, and assignments. This would, of course, be the first step in closing any loan assignment transaction, whether "absolute" or "collateral."

A collateral assignee may be concerned about the possibility that more "original" counterparts of the promissory note are floating around somewhere. In that case, possession of the "original" might not be as reliable as the UCC suggests it should be. There is no reason to think that a collateral assignee can solve the problem by filing a protective UCC-1 financing statement to "put the world on notice" of the collateral assignee's claim. Such a filing may be irrelevant, because a prospective second collateral assignee of the same promissory note would still be under no obligation to perform a UCC search, and would still be entitled to perfect its security interest based on delivery of the one original counterpart of the promissory note. (This outcome might change if the second collateral assignee actually knew about the one.) A collateral assignee that relies on a lost note affidavit may simply need to hold its breath and depend on the good credit, character, and reputation of whoever lost the note and signed the lost note affidavit.

Perfection as to Mortgages

Once the collateral assignee has perfected its security interest in the promissory note, perfection in the mortgage probably should follow automatically, under established legal principles stating that any assignment of a note automatically carries the mortgage with it.

A collateral assignee particularly concerned about achieving maximum possible certainty and protection against hostile bankruptcy judges might as a protective matter also file a UCC-1 against the mortgage itself, based on loose language in occasional cases suggesting that "the note follows the mortgage" and/or a mortgage might be deemed personal property for some purposes. The assignee might then treat the mortgage as a "general intangible," as to which perfection requires filing. This filing would be in addition to any perfection as to the promissory note.

A separate UCC filing for a collateral assignment of a mortgage is not common or industry-standard practice. Given general principles that "the mortgage follows the note," it would

probably be overkill. The decision should be made on a transaction-wide level and will probably depend on considerations unique to the particular transaction.

The downside to filing a "protective" UCC-1 statement for a mortgage would appear to be fairly limited. First, it would increase transaction costs significantly, as preparation of valid UCC-1 filings is quite detail-intensive. Second, if the assignee insists on making a UCC-1 filing, but then allows it to expire without continuation (the fate of most UCC filings), the assignee gives any bankruptcy judge an open invitation to decide the assignee was "unperfected"—perhaps a wider opening than if the collateral assignee had never made any UCC filing at all against the mortgage. Therefore, if a collateral assignee decides to file against a mortgage, then they must be particularly sure to file a continuation statement at the correct time.

Perfection for Other Documents

If the borrower and lender under the loan being assigned have entered into a loan agreement or any other related or ancillary documents (beyond the note and mortgage), it may be appropriate to file UCC-1's for those documents, depending on the circumstances.

Also, if the structure of the transaction invites an argument that the "original" counterpart of the promissory note is not of essential and fundamentally reliable significance—for example, because the borrower may have signed multiple originals or because the original promissory note is lost and the assignee will be relying on a lost note affidavit—the assignee may be less willing to rely on pure possession of the "original" promissory note as the only way to achieve perfection. In that case, the assignee may also want to modify its UCC-1 financing statement to list in the collateral, for example, any and all rights and claims of the debtor with respect to the loan, including with respect to any lost note affidavits delivered in lieu of promissory notes.

What To File Against

When the assignee obtains a UCC-1 filing to perfect a security interest in loan-related rights, the filing should ideally list every document relating to every loan that is being pledged. It can also include a catchall kitchen-sink clause (e.g., "any and all intangible property and mortgage loans held by the debtor"). Because of judicial concern about overbroad and over-general collateral descriptions, however, an assignee should not rely purely on a kitchen-sink clause. But such a clause is more likely to work as part of a UCC filing than as part of a collateral assignment of mortgages to be filed in the real estate records.

Where To File

Once the assignee has decided to file a UCC-1 financing statement and

has decided how to identify the collateral, they must decide where to file their financing statements.

If the "collateral assignment" transaction occurs entirely in one state, and the mortgages are recorded in that state, then the proper location to file would be: "the department of state and in addition, if the debtor has a place of business in this state and in only one county of this state, also in the office of the filing officer of such county." UCC §9-401(1)(c) (again, New York law).

In a multistate transaction, the UCC generally establishes the following scheme to determine which state's law governs.

If the collateral is an "account" or a "general intangible"—which will include some elements of a mortgage loan—then the law of "the jurisdiction in which the debtor is located" will govern perfection. UCC §9-103(3)(b). For this purpose, a debtor is "located" "at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence." UCC §9-103(3)(d).

For most other UCC collateral—potentially including elements of a mortgage loan beyond the basic note and mortgage—perfection will be governed by "the law of the jurisdiction where the collateral is when the last event occurs on which is based the assertion that the security interest is perfected or unperfected." UCC §9-103(1)(b).

These legal principles suggest the following filing procedures for multistate transactions involving the collateral assignment of mortgage loans:

- *Headquarters of Assignor.* File centrally (i.e., with the Secretary of State) and locally (i.e., in the county or town) based on the headquarters office of the debtor (collateral assignor).

- *Location of Loan Files and/or Closing.* Consider filing centrally and locally based on the office where the loan files are located and/or the county where the collateral assignment transaction is closed.

- *Filings Against Mortgages.* If the assignee decides to file UCC-1's against mortgages (a filing characterized above as "overkill" and quite uncommon in the real world), those will generally follow the same principles, unless the collateral assignor has an office in the county where the mortgaged property is located.

- *Bottom Line.* It may be more burdensome to figure out where to make these filings—and then to remember to maintain them in force—than to actually make them once the relatively few filing locations have been determined.

Other UCC Issues

In preparing its UCC-1 financing statements, the collateral assignee will also need to consider the issues that arise with any other UCC filing, such

as the need to identify the collateral assignee's "representative" or "agent" status where applicable, whether the debtor's signature can appear on a separate sheet, whether the secured party needs to sign, which boxes to check, colors of ink, and numerous other technical requirements that rival those of mortgage assignments in complexity.

APPENDIX

Form of Notice to Borrower with Borrower's Acknowledgment

Note: This document is designed to be entered into between a borrower (the maker of the assigned note) and an assignee ("collateral" or "absolute") of the note, to assure that the borrower is on notice of, and fully bound by, the assignment transaction. For a collateral assignment, this document includes a number of provisions designed to protect the collateral assignee's security. For an absolute assignment, most of those provisions could be deleted and replaced by comparable provisions confirming the full scope of what is being assigned, because the assignor would be completely out of the picture and could not cause trouble. Bracketed language is optional or can be tailored for each transaction.

[Name and Address of Borrower]

Ladies and Gentlemen:

Please refer to: (a) that certain [Promissory Note] dated _____ (the "Note") executed by _____ (the "Maker") in favor of _____ (the "Loan Pledgor"), in the amount of $_____; (b) the [Mortgage], as defined in the Note; (c) all other documents securing Maker's obligations under the Note; and (d) all other "[Loan Documents]" as defined in the Note ("a" through "d," collectively, the "Loan Documents" relating to the "Loan").

You are advised as follows (the "Notice"), effective as of the date of this letter.

Assignment. Loan Pledgor has assigned all the Loan Documents to _____, whose address is _____ (the "Loan Pledgee"). This assignment shall remain in effect unless and until Loan Pledgee has notified Maker otherwise in writing.

Payments. Please refer to the following payments required to be made on account of Maker's obligations under the Loan Documents (collectively, the "Payments"):

i. Regularly scheduled payments of principal (before maturity) and interest (the "Scheduled Periodic Payments");

ii. All prepayments of principal under the Loan, including prepayments arising from application of casualty or condemnation proceeds;

iii. All payments due on account of maturity of the Loan or acceleration thereof before maturity; and

iv. Any and all other payments not provided for in the preceding three paragraphs.

Except to the extent, if any, that Loan Pledgee has instructed Maker otherwise in writing, Maker shall make all Payments only to Loan Pledgee at the address indicated above, or such other address as Loan Pledgee shall specify from time to time by written notice to Maker. Any payments made directly to Loan Pledgor shall be null, void, and of no force or effect, and shall not be deemed to discharge, in whole or in part, or be applied against or reduce, any obligations of Maker under the Loan Documents. [Notwithstanding the foregoing, so long as Loan Pledgee has not notified Maker that Loan Pledgor is in default under Loan Pledgor's obligations to Loan Pledgee, any Scheduled Periodic Payments may be made directly to Loan Pledgor.]

Modifications, Waivers, Etc. No modification, waiver, deferral, or release (in whole or in part) of any Maker's obligations under the Loan Documents, or of any collateral for any obligations under the Loan Documents, shall be effective without prior written consent of Loan Pledgee.

Duplicate Originals. Maker shall not execute any duplicate originals of the Loan Documents, or any of them, except with Loan Pledgee's prior written consent.

No Obligations. Loan Pledgee shall have no obligations or liability under any of the Loan Documents.

Consents. Wherever the Loan Documents provide that Loan Pledgor's consent is required for any matter:

i. Maker shall submit the request for consent to both Loan Pledgor and Loan Pledgee at the same time and by the same means; and

ii. Loan Pledgor's consent shall not be effective unless joined in by Loan Pledgee.

Enforcement. Loan Pledgee may enforce, and give any notices provided for in, the Loan Documents, either in Loan Pledgee's name or in Loan Pledgor's name ("Loan Enforcement"). In doing so, Loan Pledgee may act directly against Maker and Maker's assets (subject however to the terms of the Loan Documents). Loan Pledgee's Loan Enforcement does not need to be

consented to or joined in by Loan Pledgor and does not require any additional documentation to establish Loan Pledgee's authority to prosecute any Loan Enforcement.

Please sign and return to Loan Pledgee one counterpart of the foregoing Notice to Maker to confirm and evidence Maker's agreement to the foregoing.

Very truly yours,

[LOAN PLEDGEE]

Loan Pledgor confirms the above Notice to Maker and directs Maker to comply with the Notice, notwithstanding any contrary instructions or directions that Loan Pledgor may give Maker at any time, unless Loan Pledgee has consented to those contrary instructions or directions in writing.

[LOAN PLEDGOR]

CONFIRMATION BY MAKER

The undersigned, Maker of the foregoing Note and a party to the Loan Documents, confirms the following:

Receipt of Notice. Maker has received the foregoing Notice to Maker. Maker shall comply with and be bound by the foregoing Notice to Maker, including the restrictions on Loan Pledgor's authority with respect to the Loan Documents.

No Default. Neither Maker nor Loan Pledgor is in default under any of the Loan Documents as of the date hereof. The Loan Documents do not entitle Maker to obtain any additional advances on account of the Loan.

No Offsets or Defenses. Maker has no defenses, offsets, counterclaims, deductions, reductions, or rights of recoupment against Maker's obligations under the Loan Documents.

Outstanding Balance. The current outstanding principal balance of the Note is [$_____] [the full stated face amount of the Note]. Interest under the Loan Documents has not been prepaid for a period of more than thirty days after the date hereof.

Copies of Notices. If Maker delivers to Loan Pledgor any notice or claim relating to any of the Loan Document(s) or the transaction from which such Loan Document(s) arose, then Maker shall simultaneously and by the same means deliver to Loan Pledgee a copy of any such notice.

Reliance and Inducement. Loan Pledgee may rely upon all representations and warranties made by Maker in the Loan Document(s). Maker acknowledges that in reliance on the foregoing, Loan Pledgee is providing certain financial accommodations to Loan Pledgor, which financial accommodations Maker would not otherwise provide or be obligated to provide.

Very truly yours,

[MAKER]

Date: _____

PRACTICE CHECKLIST FOR
Mortgage Loan Assignments:
A Primer in Two Parts (Part 1)
(with Form)

More than ever, mortgage loans are increasingly being bought and sold as financial assets, almost like shares of stock. The transfer of a mortgage loan raises many legal and practical concerns based on the nature of the asset.

- In handling the transfer of the loan obligation for the assignee:

☐ Insist on physical delivery of the original promissory note along with the originals of all amendments to the note; and
☐ Insist that the assignor endorse the note to the assignee.
☐ If the assigning lender has lost the note, consider accepting an affidavit if the assignor is a reputable institution.
☐ Assure that the borrower knows of the assignment so it can make payments directly to the assignee.
☐ Ask for an estoppel certificate from the borrower.
☐ Obtain specific assignment of the mortgage and all other documents that constitute the loan.
☐ If the original loan documents were recorded, make sure the assignment documents are recorded.
☐ Find out about and seek the benefit of any ancillary security items. These items might include cash collateral, escrow deposits, letters of credit, and lockboxes.
☐ If the assigned loan is in foreclosure or bankruptcy, have the assignor assign its rights in those proceedings.
☐ Take measures to reduce the assignee's potential liability on the loan.
☐ Through a separate assignment filing, assign any UCC-1 financing statements—after first checking to see whether they have lapsed.
☐ Analyze the applicability of the Uniform Commercial Code to the transaction, especially as to perfection issues.

Mortgage Loan Assignments:

A Primer in Two Parts [Part 2]

[with Form]

Joshua Stein

The success of a mortgage assignment depends on its documentation, its structure, and your prudence in handling both.

THE BOOMING SECONDARY MARKET in mortgage loans has made mortgage assignments a routine and growing part of any real estate finance attorney's practice. The first part of this article, published in the July 1997 issue of *The Practical Real Estate Lawyer,* outlined some issues,

 The author is a partner in the New York office of Latham & Watkins. The author acknowledges the contributions made to this article by his partners Kevin Blauch, Richard L. Chadakoff, Geoff Hurley, James I. Hisiger, Roger H. Kimmel, and Brian Krisberg. All views expressed in this article are the author's alone, as are any mistakes.

both legal and practical, that arise from any assignment of a mortgage loan.

That article addressed both the "collateral" assignment (a mortgage loan pledged as security for the mortgage holder's loan obtained from another lender) and the "absolute" assignment (an outright sale of a mortgage loan). This second installment continues the discussion, and concludes by discussing how to administer the sale and purchase of large mortgage portfolios (including "due diligence") and how to close mortgage loans with an eye toward future assignments.

COLLATERAL ASSIGNMENTS—PARTICULAR CONCERNS • When a lender accepts the pledge of a mortgage loan as collateral security for a second loan, that lender needs to consider several issues unique to the pledge transaction, along with the many other concerns addressed elsewhere in this two-part article.

Those unique issues arise primarily from the collateral assignee's desire to achieve legal perfection of its lien and practical control of an asset that has many moving parts. Issues that a collateral assignee may wish to consider will include the following.

Recording of a Collateral Assignment

The collateral assignee of a mortgage loan will typically record a collateral assignment of the mortgage. This document treats the mortgage as an interest in real estate, the collateral assignment of which is a real estate transaction that should be evidenced in the real estate records, just like an absolute assignment.

Many lenders follow this practice even though, as indicated in the first installment of this article, it might not be strictly necessary. As a general proposition the mortgage follows the note, the UCC governs the note, and the UCC simply requires possession of the note. Most lenders do, however, prefer the added comfort of recording a collateral assignment of the mortgage.

Perhaps they are concerned about a possible ambiguity regarding who has the original note, as discussed previously, or they fear that a debtor-oriented bankruptcy court may seize any opportunity to conclude that a security interest is not perfected. These lenders therefore take the extra step just to be sure, since there is no apparent downside to recording a collateral assignment of mortgage.

A collateral assignment of mortgage amounts to a hybrid between a UCC security agreement (for which normal UCC concerns will apply) and a real estate assignment of note and mortgage (for which all the concerns that arise for any other mortgage assignment will apply).

A sample collateral assignment of mortgage follows this article. The parties may want to use a similar

document to collaterally assign any assignment of leases in place for the underlying mortgage loan.

From a UCC perspective, a collateral assignment of mortgage assures that the lender's security interest has actually "attached" to the mortgage loan—thus satisfying one of the requirements of the UCC. Attachment can be achieved in other ways (such as by an unrecorded collateral assignment or pledge documents), but the lender must be sure that some document, somewhere, actually achieves this crucial step.

Assignments in Blank

A collateral assignee may also want to obtain from the collateral assignor a recordable assignment of mortgage documents already signed by the collateral assignor, but with the name of the assignee blank. These assignments, although not customary, would act as the functional equivalent to the blank note endorsements suggested previously, or a blank stock power given for a stock pledge.

If the collateral assignor defaulted on the loan, the collateral assignee could fill in the blanks in these assignment documents and record them, to prevent subsequent issues relating to the chain of title to the mortgage. Such backup assignments are not, however, legally essential to perfection of the collateral assignee's rights.

For large pools of mortgages, a collateral assignee might save time and money by even leaving blank the identifying information regarding the mortgage being assigned, or leaving it to be set forth in an exhibit to be attached later, if needed. (The use of an exhibit format may, however, create recording problems in some recording offices.)

The collateral assignor would, in the collateral assignment loan documents, specifically authorize the collateral assignee to fill in the information, and then record the assignments, if the collateral assignee ever took title to a mortgage.

Such an arrangement might in some cases even replace the recordation of collateral assignments, particularly if the collateral assignee took possession of the original promissory notes, obtained a separate pledge agreement, and took other steps suggested in these articles.

Collection Account

Particularly if the number or nature of the mortgage loan documents makes it impractical to implement all the perfection measures suggested in this article and its companion in the preceding issue, a collateral assignee may obtain some practical comfort by setting up a lockbox to receive incoming payments on the assigned loans, directly from the borrowers.

The collateral assignor would then notify those borrowers that their loans had been assigned and borrowers should make payments into the lockbox account pending further notice from the collateral assignee. In

some states, notices of this type are actually an element in perfecting any assignment of a loan.

If the underlying mortgage loans already included lockboxes for rent payments from tenants, those lockboxes would be transferred over to the collateral assignee of the mortgage, and the tenants would be advised accordingly. The collateral assignee would then collect the rents and administer the lockboxes, but any payments otherwise payable to the mortgagee would automatically flow into the collateral assignee's lockbox.

This arrangement would give the collateral assignee some assurance of receiving the payments on the underlying mortgage loans. Although the collateral assignor could conceivably send notices to borrowers or tenants rescinding the lockbox arrangements, these notices might constitute fraud and might produce significant adverse consequences for the collateral assignor.

Servicing Files

Delivery of the collateral assignor's servicing files is not an element of lien perfection. On a practical level, however, it is similar to a collection lockbox. Like a lockbox, it can give the collateral assignee greater control over the collateral. This becomes particularly important after the collateral assignor defaults on the loan with the collateral assignee—the precise moment when the collateral assignee will most need information about the loans and the collateral assignor will be least willing to provide it.

Administration

To the extent that the collateral assignee increases its practical control over the loan portfolio through a lockbox or through physical control of the collateral assignor's files, the collateral assignee must then be prepared to live with the structure it has created.

This means the collateral assignee, or its servicer or custodian, must process the lockbox payments in a timely and accurate way. Particularly with a large or complicated loan portfolio, day-to-day servicing may require constant release of loan files. As loans are paid off or sold, the collateral assignee will need to be able to release its security interest and related files and documents, on a loan-by-loan basis.

The process creates a great range of opportunities for error and confusion. It will require resources and attention starting even before the closing of the loan assignment transaction. Often, the collateral assignee will want to engage a third-party servicer or custodian to hold the servicing files on the lender's behalf, and service the collaterally assigned loans.

Foreclosures

If the holder of a mortgage loan completes a foreclosure sale and takes

title to the underlying real estate, the collateral assignee of that mortgage loan should end up with a mortgage directly on that underlying real estate. In some cases, the collateral assignee may prefer instead to receive a collateral assignment of a new mortgage on the same asset—or not to deal with the situation at all, and insist that the borrower pay down the loan by an amount allocable to the foreclosed mortgage.

If a third party purchases the collateral at the foreclosure sale, the sales proceeds need to go directly to the collateral assignee of the mortgage.

The mechanism to achieve all this may vary with state law and other circumstances. From the collateral assignee's perspective, the reliability of this mechanism may represent the weakest link in the chain of the collateral assignee's security.

This is particularly true if the collateral assignee has doubts about the creditworthiness or business ethics of the assignor. In that case, of course, the collateral assignee should perhaps ask larger questions about the transaction.

Absolute Assignment to Custodian

To avoid some of the complexities, issues, risks, and gaps suggested by this article, a collateral assignee may decide that instead of trying to perfect a security interest in the loan, the collateral assignee should require instead that the assignor assign the loan—absolutely and outright—either to the collateral assignee or to a third-party custodian. In either case, the loan would then be held for the mutual benefit of the assignor and collateral assignee, but outside the direct control of the assignor.

As a partial surrogate for this structure, the collateral assignee might obtain pledges of all the ownership interests of the assignor.

Any of these variations raises its own issues, which are outside the scope of these articles.

ABSOLUTE ASSIGNMENTS—PARTICULAR CONCERNS • Each of the following considerations will typically arise only for an "absolute" assignment, although a very careful "collateral" assignee might also want to consider these issues as well, under the theory that any collateral assignment is potentially a future absolute assignment if the transaction goes bad.

Third-Party Servicing; Account Balances

If a mortgage is being serviced by a third-party servicer, the assignor and assignee will need to coordinate the transfer of the loan with the servicer, or replace the servicer, and transfer all files and computer data, as part of the assignment. The same concerns arise if the underlying mortgage documents are being held by a document custodian, or if there is a separate "tax service agreement." The balances of any escrow accounts and replacement

reserves will need to be confirmed, and responsibility for the accounts themselves will need to be transferred.

Tax Sale Filings; "In Rem" Cards

In some municipalities (including New York City), local tax collection procedures impose a special burden on mortgagees, arising from the tax sale process.

As a matter of generally applicable real estate law, if a property owner fails to pay real estate taxes and the tax collectors want to hold a tax sale of the property, they will need to give notice of the sale to the property owner and to holders of other interests in the property. If the taxing authority were a private lienholder, it would simply conduct a title search and then serve notice on everyone who appeared of record.

The New York City tax collectors save themselves the trouble of performing title searches under these circumstances, but at the cost of burdening every real estate finance transaction with another piece of paper. Every mortgagee must make a separate filing with the tax officials—in addition to recording their mortgage—if they want to assure that they will receive notice of any tax sale.

In other words, instead of dealing with the same recording system that a private lienholder would use, the tax collectors establish an entirely separate filing procedure for all mortgages (an extra step for a mortgagee to remember to take, or a pitfall to avoid) simply so the tax collectors can avoid the trouble of conducting title searches for the occasional property that goes into tax lien foreclosure.

In municipalities with procedures like these, any assignee of a mortgage will want to make sure that it obtains and correctly files the necessary piece of paper to obtain notice of any possible future tax sale. In New York City, the requisite filing is called an "in rem" card.

Purchase Price Arrangements and Calculations

In any substantial mortgage purchase transaction, the parties often postpone one important detail until the very last minute: calculating just how much the purchaser must pay for the mortgage being purchased. This calculation will depend on, among other things, the structure and terms of the mortgage assignment transaction, how the mortgages themselves work, and how the parties want to treat incidental pieces of the package such as escrow accounts, reserve accounts, prepaid rent, and debt service.

Payment calculations are not always easy or quick. Left to the last minute, they can significantly delay a closing for two reasons: first, the parties have not thought through the actual steps they need to take in the calculation process (what variables go into calculating the bottom-line purchase price); and, second, the actual

numbers are missing or wrong (often precisely because no one focused on the need for them at the closing).

Parties to the purchase and sale of mortgages should deal with the numbers—particularly the process of identifying exactly which numbers they need to calculate the purchase price, and how to get those numbers—at least a few days before the closing. At the same time, they should figure out exactly where the money should go, and set up wire transfer or other arrangements in advance.

The numbers and the money can easily be handled by someone other than an attorney. If, however, this task is not clearly assigned, in advance, to someone with the time and expertise to handle it, the attorneys will always end up doing it. This will divert them from legal issues and the closing process to numerical and logistical issues that they are neither very good nor very cost-effective at handling. That distraction may itself further delay the closing, and further increase its cost.

TITLE INSURANCE FOR MORTGAGE ASSIGNMENTS • When the holder of a mortgage assigns that mortgage, the existing title insurance for the mortgage will normally travel with the mortgage. The assignee of the mortgage should automatically get the benefit of the old title policy. No one needs to do anything.

The assignee might, however, ask the assignor of the loan to formally assign the title policy along with the loan. The assignor should not have a problem with this request, as long as the assignment amounts to a "quitclaim."

Scope of Coverage

When an existing title policy travels with an assigned loan, the "date of policy" will not change. Therefore, the title coverage will refer only to the state of title as of the date the policy was issued. The policy will continue to insure—for the benefit of the assignee as the new policyholder—only that the mortgage was "good" at the time the policy was issued.

Any events that might have impaired title to the mortgage (i.e., any possible previous assignments of the mortgage, whether collateral or absolute) after the policy was issued are totally outside the coverage provided by the policy.

Therefore, although the title policy covers the validity and priority of the original mortgage (when it was recorded), it provides no comfort regarding intervening assignments, or even releases, by the original mortgagee or the validity of the mortgage assignment itself.

If an assignee is willing to accept this level of coverage, it need only obtain the assignor's title insurance policies (originals or copies), or at least enough information about them to be able to identify them and make a

claim if necessary, and (as noted above) perhaps a formal assignment of those policies.

Title Endorsements

An assignee will often want to go a step further, by asking the title company to endorse the old policies to show the assignee as the insured party. Such an endorsement would, at minimal cost, prevent the title company from arguing that the assignee has no coverage, although such an argument would probably be precluded (at least as of "date of policy") by the policy language itself. Such an endorsement also gives the assignee comfort that the title company believes the mortgage was validly transferred to the assignee.

A careful assignee may view the cost of a policy endorsement (often $25) as a low price to pay for comfort. As an alternative, the assignee might settle for an estoppel certificate or even just a letter from the title company, acknowledging the assignment of the mortgage and the automatic assignment of the corresponding title policy.

Policy Updates

If the original mortgagee (assignor of the mortgage) is willing to represent and warrant that the assignor did not previously assign, encumber, or release the mortgage, the assignee may be willing to live with its rights under the old title policies, even though they date back to the original "date of policy."

If, however, the assignor refuses to provide those assurances, or if there may be complexity or issues relating to the assignor's ownership or transfer of the assigned mortgages, or if the assignor is not creditworthy, then the assignee will probably want its own new title insurance, or at least update endorsements of the old policies. If these are issued at the same time as the original policy, or very soon thereafter, the title company might be willing to issue them at no charge.

Uninsured Searches

An assignee may want to order an uninsured title search, simply to obtain some comfort about the ownership status of the mortgage and the property. The search results can help the assignee evaluate the status of the collateral, and perhaps uncover any prior assignments of the same mortgage.

Title Company Consultation

To the extent that the assignee will obtain any new title coverage, all statements in these articles should be reconfirmed with the title company, which may have its own rules and expectations based on particular quirks of various recording offices. That assistance in preventing mistakes and problems may, just as it does for conveyances of fee title, help justify the title company's fees.

Title Insurance for a Collateral Assignment

When a mortgage is being assigned collaterally (rather than absolutely), the collateral assignee will have the same title insurance agenda as the absolute assignee, and a few other concerns.

First, whether or not the collateral assignee decides to record the collateral assignment of the mortgage, the title company may require that the assignment be recorded before it will issue title insurance for the collateral assignee.

When issued, the title insurance should not merely insure the collateral assignee "as its interest may appear" (i.e., "if the documents say you own it, then we insure that you own it") but should specifically confirm that the documents do in fact create the intended interest as a collateral assignee of the loan; the collateral assignment is valid; and the lender actually holds a collateral interest in the loan.

NECESSITY OF RECORDING MORTGAGE ASSIGNMENTS • In some "absolute assignment" closings, a mortgage assignee will dispense with the recording of the assignment documents, particularly when the assignor is a substantial institutional lender, under the theory that the incremental benefits do not justify the incremental transaction costs and paper. As a result, the assignor of the mortgage remains its record owner, although the mortgage is actually owned by the assignee.

The following discussion suggests issues and considerations that arise from the practice of not recording an absolute assignment of mortgage. (For a collateral assignment, any decision not to record raises a somewhat different set of issues, which are referred to elsewhere in these articles.)

Even more than elsewhere in this article, any descriptions of actual practices and local law are based solely on informal information obtained by the author. They should be specifically verified for particular transactions.

Title Insurance

Title companies will sometimes issue insurance for unrecorded assignments like these, presumably based on issuance of a perpetual "gap" indemnity by a creditworthy assignor.

If the title company were not willing to issue this coverage, a mortgage assignee would either demand an equivalent perpetual indemnity from the assignor, or insist on recording the assignments.

Legal Effect of Not Recording

The law of most states does not require the parties to record a mortgage assignment, although failure to record would (absent title insurance as a substitute, or state-specific statutory

exceptions) deprive the assignee of the normal benefits of the recording statutes.

An assignee may particularly want to record in cases when:

- By statute, the mortgagor can always pay and obtain a release from the record owner of the mortgage;
- A full chain of recorded assignments must be of record in order to validly release or foreclose a mortgage;
- Local law otherwise requires or encourages recordation; or
- The assignee is not comfortable with the credit or business ethics of the assignor.

Specific States

In some states, including Indiana, Mississippi, New Mexico, and the District of Columbia, immediate recording of any mortgage assignment is highly advisable or mandatory.

In other states, it may be necessary to record a full chain of assignment documents to foreclose or release a mortgage (or, in deed of trust states, to substitute the trustee in preparation for foreclosure). The following states may be in this category: California, Florida, Idaho, Illinois, Michigan, Minnesota, Missouri, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, and Utah.

A Georgia statute expressly states that mortgage assignments between substantial institutional parties do not need to be recorded, but seems to imply that the assignee effectively loses any benefit of the recording laws. Ga. Code Ann. §44-14-64 (1997). The net result is not too different from that in any other state.

These lists of states are not necessarily exhaustive or reliable. Check any decision not to record, or to delay recording, with local counsel. As in any other decision to refrain from recording, the assignee must be very comfortable with the assignor's credit.

Caveat

Any decision to refrain from recording leaves open a variety of risks to the assignee—specifically, every risk that the recording system was designed to prevent or control. (The recording system exists for a number of good reasons.)

Any decision not to record a mortgage assignment requires careful consideration by the mortgage assignee and its attorney, including a full disclosure of risks. If the assignee nevertheless proceeds, that decision and the related risk disclosures should be memorialized as appropriate under the circumstances.

An assignee that chooses not to record may place greater weight on the other protective measures suggested in this article, particularly obtaining an estoppel certificate from the underlying borrower.

"RE-CLOSING" THE UNDERLYING LOAN • When a loan is assigned, the assignee (whether absolute or collateral) may have many of the same concerns that arose for the assignor or originator at the time of the original loan closing. These concerns may prompt the assignee to either partially "re-close" the loan being assigned, or at least to consider all risks relating to the underlying mortgage loan and to confirm that those risks have been mitigated or dealt with.

From the assignee's perspective, every delivery at the original closing served a purpose, by mitigating or eliminating one risk or another. The assignee must in theory either repeat the same deliveries or be very comfortable that they are all still valid, correct, and reliable, for the benefit of the assignee. Some further comments:

Contract Rights as Lender

At the original loan closing, the assignor/lender typically obtained a variety of certifications and deliveries: insurance certificate; opinion of counsel; flood hazard certificate; architect's certification; survey certification; environmental report; engineering inspection report; and so on.

If these certifications and deliveries were important, the assignee may want to know if it can safely rely on them. In that case, the assignee should analyze whether the assignee is actually entitled to do so or whether, instead, the assignee should insist on having the certifications reissued as part of the loan assignment transaction. (This issue demonstrates the wisdom of insisting, at the original closing, that all third-party opinions and certificates be automatically assignable to any subsequent holder of the loan—particularly if the lender anticipates assigning the loan at a later date.)

The assignee might, however, conclude that if no issues have yet arisen regarding the correctness of the original certifications, then the assignee can live with the risk.

Insurance

An assignee will want to arrange for certificates of insurance (preferably "evidence of insurance"—ACORD Form 27—rather than mere "certificates of insurance") to be issued or reissued in favor of the assignee. This may require borrower cooperation.

Environmental

Whether or not the loan assignee obtains the right to rely on earlier environmental reports, the assignee may wish to perform an updated Phase I environmental assessment, partly to address the possibility of new contamination since the original closing (if for some reason the assignee believes new contamination is likely).

Second Mortgages

If the mortgage being assigned is a second or other junior mortgage, the

assignee may wish to obtain: an estoppel certificate from the holder of the first mortgage confirming the outstanding balance, that there are no defaults, the scope of loan documents, an acknowledgment of assignment of the second mortgage, etc.; an intercreditor agreement with the first mortgagee (notice, opportunity to cure, etc.); and certified copies of all documents (including amendments to date) secured by or relating to the first mortgage.

Other Due Diligence and Certificates

Particularly for major leases, the collateral assignee may want the tenants to confirm that their leases have not been amended, etc., and may also want to determine whether any tenants have filed bankruptcy or suffered other financial reverses.

Business Context

Although an assignee might be tempted, to some degree, to "re-close" the original loan along the lines suggested above, the assignee may conclude that one reason to purchase an existing loan rather than to originate a new one is precisely to avoid the time, trouble, and effort of a full loan closing. This is particularly true if the assignee has confidence in the assignor's closing procedures and representations and warranties that the closing was handled correctly.

The assignee might, therefore, merely insist on obtaining the benefit of selected third-party deliveries, and not otherwise "re-close" the original loan.

Third-Party Notices

Even if an assignee is willing to take the existing loan as is, without redating all the closing deliveries, the assignee will want to repeat at least one step from the original closing.

The assignee should identify any third parties that should receive notice of the assignee's mortgage, or a change in the identity and address of the mortgage holder. Those third parties can include ground lessors, parties to reciprocal easement agreements, hotel management companies and franchisers, and other third parties that may have undertaken to provide mortgagees with notice and opportunity to cure an underlying borrower's defaults.

Typically those mortgagee protections arise only after the third party has received notice of the existence, name, and address of the mortgagee, so the new holder of a mortgage will want to send that notice as soon as possible. Part of the due diligence process for any loan assignment will therefore consist of identifying those notice recipients and any particular requirements that govern the giving of such notices. Sometimes these notices must be given within a certain short period after the closing, so the addressees will need to be identified quite early in the process.

Assignor-Assignee Contract Issues

Whether a loan assignment is collateral or absolute, both parties should also consider the structure and terms of the larger transaction in which the assignment arises.

For example, in a loan purchase transaction, the purchaser will want as many representations and warranties as possible for the dollars paid. The seller, in contrast, will want to provide as few as possible for the dollars received.

The purchaser will want to be able to resell any loans and assign, as part of the package, any related claims against the assignor. The seller will want to prevent that, and will be concerned instead that the purchaser agree to service the loans; make any future advances that might be required under the loans; and otherwise protect the seller from any other future issues that might arise under the loans assigned.

In a loan secured by other loans, the lender will want covenants to protect the collateral (but may be unwilling to rely purely on the borrower's covenants) and will want a mechanism to prevent cherry-picking or other erosion of collateral strength as loans are released from the pool or paid off.

Each party will also want a variety of conditions, covenants, closing deliveries (including third-party items as referred to in these articles), representations and warranties, remedies for defective loans (perhaps subject to negotiated "thresholds" to filter out minor problems), and other contractual benefits depending on the theory of the transaction.

Those issues, along with issues of underwriting and credit quality, are largely outside the scope of this article. Some of the considerations discussed here will, however, drive part of the contractual agendas of the parties.

Ultimately those agendas will be reflected in a loan purchase and sale agreement to establish a framework for the larger transaction.

"Doing Business" and Licensing

If the assignee is not already active in the state where the mortgage collateral is located, consider whether the assignee may run into trouble under that state's "doing business" or licensing statutes. Most of these statutes do not apply to lenders that merely make or acquire occasional loans, but this should be checked locally. Once a lender takes title, the "doing business" statutes are more likely to apply.

Failure to comply with "doing business" statutes would typically give the borrower a defense when the lender started foreclosure, but the lender could typically defeat the defense, if raised, by filing whatever paper is necessary to comply with the "doing business" statute.

Licensing violations may be more troublesome.

Transfer Taxes

Most states do not tax mortgage assignments, but in a few cases they may incur a tax. It is understood, for example, that a District of Columbia statute would appear to impose a tax on any mortgage assignment, but the local government (at least as of a year or so ago) does not in practice collect such a tax. (Is Marion Barry reading this article?)

Bank Regulation

Statutes and regulations governing the operation of banks may limit a bank's ability to transfer certain loans to its affiliates. *See, e.g.,* 12 U.S.C. §371c(a)(3) (a regulated institution "may not purchase a low-quality asset from an affiliate" unless specified conditions are met).

Regulated lenders are also required to track (and make publicly available the resulting records) their purchases of certain types of mortgage loans, to assist regulators and "public interest" organizations in preventing "redlining." 12 U.S.C. §2803(a)(1).

Truth in Lending Regulation

If the mortgage being assigned encumbers residential real property or is otherwise subject to Truth-in-Lending or other consumer protection rules, state or federal, then the parties will want to assure that they comply with the applicable requirements.

These rules generally contemplate the creation and delivery of one or more (sometimes many more) pieces of paper, all of which must comply with very specific requirements. Those requirements are otherwise outside the scope of these articles.

Lender Transfer Restrictions

Occasionally, loan documents will prohibit or restrict transfers by the lender, although this is unusual.

If pieces of a loan have been "participated out," lender transfer restrictions are much more common and could require, for example, that other participants be given a right of first refusal. The terms of the participation agreement must be considered, both for consent requirements and for other contractual burdens.

In a hotel loan, agreements between the lender and the manager or franchiser may limit who can hold the loan. Similar restrictions may exist if other significant third parties are involved in the loan transaction.

Guaranties and Other Credit Enhancements

If the original loan involved bonds or occupancy leases that were credit-enhanced by government agencies, mortgage insurance, or any other form of third-party credit enhancement (even a routine guaranty), consider whether any special consents or other documentation will be required. The assignee may wish, for example, to require an estoppel certificate from the guarantor or other credit enhancer.

At a minimum, the assignee will want to be extremely comfortable that the credit enhancement "travels with" the loan and has been validly assigned—at least by being specifically listed in the assignment documentation.

Replacement of Trustee

In a deed of trust state, the assignee may wish to replace the "trustee" named under the deed of trust—whether the assignment of the deed of trust is "absolute" or merely "collateral."

The trustee is the party who would actually conduct a foreclosure sale. As a result, the trustee can facilitate or prevent fraud by the collateral assignor. For example, a compliant trustee might, at the collateral assignor's request:

- Hold a sale without requiring delivery of the original note (a definite convenience for the collateral assignor, given that the collateral assignor previously delivered the original note to the collateral assignee);
- If the collateral assignor is the successful credit-bidder, execute a trustee's deed in favor of an affiliate of the collateral assignor rather than to the collateral assignor; and thereby
- Allow the collateral assignor to control the ultimate proceeds of the assigned mortgage (i.e., proceeds from resale of the collateral) free of any interest of the collateral assignee.

Although this sequence of events may seem fraudulent—and therefore far-fetched and paranoid to even suggest—if it were to actually occur it could quietly destroy a good chunk of the collateral without the collateral assignee's knowledge, consent, or involvement.

The collateral assignee may therefore wish to do what it can to control the identity and replacement of the "trustee," such as by recording a notice identifying the new trustee and stating that the trustee cannot be replaced without written concurrence by the collateral assignee. (It can't hurt. It might help.)

Nonrecourse Carveouts

Today, most long-term financing for income-producing commercial real estate assets is still provided on a nonrecourse basis, meaning that the lender is so comfortable with the value and cash flow of the asset that it is willing to look to the asset alone if the borrower defaults.

The limitations and weaknesses of that proposition have in recent years led a profusion of "carveouts" from nonrecourse treatment. Earlier this decade lenders were reminded again that a nonrecourse borrower might not merit the shield of nonrecourse protection if, among other things, it damages the lender's collateral and uses bankruptcy and foreclosure as a sword against the lender.

These concerns are particularly appropriate for a loan secured by a col-

lateral assignment of mortgage loans. Depending on the package of lender protections negotiated in the particular deal, this type of asset may be almost completely within the assignor's control, both maximizing the borrower's ability to destroy the asset (or threaten to do so) as a means to gain leverage with the lender and minimizing the lender's ability to preserve and obtain the benefit of the asset without the borrower's cooperation.

Given these underlying dynamics, a lender that finances mortgage loans based on a pledge of those loans may be particularly reluctant to agree to nonrecourse treatment, and may go a step further and seek personal guaranties tailored to assure the borrower will cooperate—and help preserve the collateral—if the loan ever goes into default. Those discussions are part of the fundamental business structuring of the transaction.

Assignments in Form Only

In some states, such as New York, mortgages are often assigned in the context of refinancings, to save mortgage tax on the new loan.

These formalistic assignments raise relatively few legal or practical issues, other than the need to do the job correctly to assure that the parties achieve the tax savings they intend.

In addition, just as the assigning lender will want to avoid assuming any liability in the transaction, the underlying borrower will want to make sure that any guaranties are released and that no one can argue that the borrower or any of its principals retains any personal liability for the old loan being assigned.

CLOSING PROCESS FOR LOAN ASSIGNMENTS • Many of the closing-related issues addressed in this article will vary by state, and should therefore be checked with local counsel in every case.

If a transaction "won't support the cost of local counsel," attorneys who try to practice another state's law may face significant exposure if they get it wrong. It is not always necessary to get a local counsel opinion; it may be enough to have a brief telephone call with competent local counsel and ask them to provide selected pages from their own document forms.

As a fall-back, there is always Martindale Hubbell, which contains "state law summaries" describing local rules and peculiarities in areas like mortgages and mortgage assignments.

To the extent that local counsel is involved, they are likely to suggest numerous minor improvements to the documents, driven not so much by local law requirements as by the local counsel's desire to add value and demonstrate competence. If the circumstances permit these improvements, they are not a problem. If, however, time or other resources are short it may be necessary to "negotiate" with local counsel to assure that they limit their comments to "need-to" changes as opposed to "nice-to" changes.

Due Diligence

For a loan assignment transaction, any assignee will normally want to conduct appropriate due diligence before proceeding with the transaction. The assignee's due diligence will examine three areas:

- The financial terms of the loan(s);
- Real estate due diligence on the underlying security for the loans; and
- Whether the loans are otherwise satisfactory and were properly closed.

An assignee's requirements will vary with the pricing and timing of the deal; the scope, nature and number of loans being assigned; the representations and warranties being made by the assignor; how long those assurances will survive the closing, if at all; whether the assignee is "deemed" to have waived any problems that could have been discovered from a careful review of the loan files; the assignee's plans for the assigned loans; the assignee's confidence in the assignor; loan-related issues suggested by the various points made in these articles; and other circumstances.

Large loan assignment transactions can, if not properly managed, produce due diligence without end. The incremental cost can rapidly become disproportionate to the benefits achieved.

Practically any due diligence inquiry can be justified (rationalized) as mitigating some risk under some circumstance.

Someone needs to draw a line, however, based on likely costs incurred compared to likely benefits achieved. This is a business decision – an acceptance of risk tomorrow in exchange for due diligence expense saved today – more than a legal decision. If treated as a legal decision, risk reduction will usually win out over cost savings.

Due diligence is otherwise outside the scope of these articles.

The "Data Room"

Particularly in a competitive bulk sale of loans, the seller will often make available all the loan files – including correspondence files that stretch back to the original pre-closing and construction process – in a "data room" (which rarely seems to have windows or air conditioning) and allow the bidders' counsel to review the files to their hearts' content.

The files will often be so chaotic that each bidder spends more time and money trying to figure out and organize the files (something that the seller should have done, once, long ago) than actually reviewing them.

A bidder might instead insist that the "data room" include only the following, arranged in a logical fashion and properly indexed:

- All legally binding documents and agreements;

- Material correspondence for the past year; and
- Other specific items such as appraisals.

Even better, sellers of loans have sometimes assembled well organized copies of the basic information about their loans in books or file folders, and sold each bidder a copy of this information—allowing bidders to review it conveniently and easily without the time, trouble, coordination requirements, and impairment of confidentiality that can arise from the use of a central data room shared by all bidders.

To a loan seller, however, any effort to impose order on chaos creates the risk of liability if the seller makes a mistake. That concern, plus marketplace considerations, might force the bidder to live with whatever the seller decides to offer.

Document Preparation

In a bulk loan sale transaction, the contract will often require the loan purchaser to prepare all the assignment documentation—a "lazy seller" and "caveat emptor" approach that might have been appropriate for Resolution Trust Corporation bulk sales of distressed loans in late 1992, but hardly seems appropriate for full-price sales of loans in 1997.

If the contract requires the purchaser to prepare the loan assignment documents, this places the burden on the party with less familiarity with the loan files. For the transaction as a whole, it probably causes greater expense than if the seller prepared the assignment documents.

On the other hand, particularly if the seller will not provide significant representations and warranties, the purchaser might prefer to prepare the closing documents. That process can be streamlined as follows.

Coordinate with Due Diligence

To the extent that the purchaser will obtain necessary identifying data from the loan files themselves rather than from the title company, the purchaser might want to try to identify the information it will need and collect it at the same time it performs its due diligence review of the files—completing two tasks at the same time.

On the other hand, if during due diligence the loan purchaser is not sure it will be the successful bidder, it might prefer to defer data collection until it knows that it will actually buy the portfolio.

Title Reports

If the purchaser will be obtaining any updated title coverage, it might prefer to obtain as much information as possible (e.g., recording information for prior assignments) from the title reports rather than from the seller's own records in the loan files.

This approach probably saves time and definitely reduces the risk of inconsistency, although it also elimi-

nates an opportunity for cross-checking. (The best source, of course, is a copy of the actual recorded document that is being assigned.)

Automated Document Assembly

A multi-property loan assignment transaction may present an ideal opportunity to use an automated document assembly system to prepare hundreds of closing documents at once from a single loan database.

Title Company Involvement

If the loan purchaser will obtain title insurance, the title company will need to review and approve the assignment documents. It may be possible to save some work by asking the title company in the first instance to prepare some part, or all, of the assignment documents, or at least exhibits identifying the mortgages being assigned. (In some states, it might not be possible to collect this information in a separate exhibit; it must be set forth in the text of the assignment document.)

Title companies will usually try to avoid responsibility in this area. They will try to limit their role to reviewing rather than creating documents. They will say that creating documents, as opposed to reviewing them and confirming their effectiveness, is somehow "the practice of law" and something that title companies cannot do.

Setting aside the merits of this position, the title companies may turn out to be surprisingly flexible about it if you raise the issue as part of a competitive process of choosing which title company will ultimately insure the transaction.

PLANNING AHEAD FOR ASSIGNMENT • Because of the ever-increasing likelihood that any given mortgage will be transferred at some future time, anyone who closes a "new" mortgage loan today should think ahead to make sure that the resulting mortgage will trade easily and without objection.

Even if the particular lender does not envision transferring a mortgage loan, lender's counsel should recognize that the lender's agenda might change.

As the voice of the future, lender's counsel should think about the future in a way that the client might not. Lender's counsel should try to build in flexibility for future assignments, when the lender's inevitable change of agenda occurs. Lender's counsel should consider at least the following points.

Provide for Assignment

It may be appropriate to state in each loan document that if the note is assigned, the other loan documents automatically travel with the note. In addition, perhaps the borrower should agree to be bound by any assignment as soon as the borrower receives notice of it from any source, including the assignee's attorneys. (Although these propositions mostly

restate governing law, an express acknowledgment cannot hurt and might prevent discussions.)

Keep It Simple; Keep It Standard

The more complex and nonstandard a transaction and its documents become, the harder it is for a potential purchaser to understand. Deviation from normal standards also increases the likelihood that a potential purchaser or its counsel will find something to object to in the documents and either refuse to buy the loan at all or demand a discount.

These considerations favor using standard marketplace documents, limiting negotiations, keeping the transaction structure and documents simple, and making every loan as easy as possible to understand and administer. This is particularly important for loans destined for securitization in the capital markets, where the lender should use standard forms developed precisely for such loans. (One example is the "Capital Markets Mortgage" recently released by the Capital Markets Initiative.)

Further Assurances and Estoppel Certificate

The borrower should acknowledge that the lender may assign its position, and the borrower and any guarantors or other credit enhancers should agree to deliver whatever further documents are (reasonably?) required to facilitate an assignment.

Beyond requiring the borrower to provide an estoppel certificate (an almost universal requirement), the documents might also provide that if the borrower fails to respond to an estoppel certificate request within a set time period, they are deemed to have issued an estoppel certificate in a specified form.

If the loan documents require the lender to maintain confidentiality of any financial reports delivered by the borrower, include an appropriate exception to facilitate future transfers of the loan—both actual and prospective.

Certificates and Opinions

Any certificates and opinions that a lender receives at closing should be issued in favor of the initial lender "and its successors and assigns."

Opinions of counsel typically prohibit the lender from even showing the opinion to anyone—including a prospective assignee of the loan. A lender should want that prohibition removed, and replaced with an express right for any assignee of the loan to rely on the opinion.

Notices to Third Parties

In structuring, negotiating and closing mortgage loans, lender's counsel should, when possible, avoid agreeing to any requirement to give third parties notice of any possible future assignment or to obtain consent from anyone.

Instead, lender's counsel will want to try to structure the documentation (e.g., a ground lease) so upon any future recorded assignment of the mortgage, third parties (e.g., ground lessors) will automatically be on notice of the transfer, without any need to remember to give written notice to or obtain consent from the third parties.

Automatic notice of assignment can prevent future pitfalls, mistakes, and embarrassment for the lender—at the possible risk of causing similar problems for the third party subject to "deemed notices."

To the extent that pre-closing "due diligence" identifies the need for third-party notices upon a future assignment, the assignee's counsel should try to memorialize that information in a way that will make it readily available if the lender ever decides to assign the loan.

Letters of Credit

Unless expressly provided for, a letter of credit is not transferable. Even if a letter of credit is transferable, a lender wants to assure that a transfer is simple, unambiguous, totally within the lender's control, and either inexpensive or free. The lender will also want to know that the transfer can be accomplished without any need for the borrower's cooperation.

If a letter of credit is an "evergreen" (automatically renewed unless the issuer gives notice of cancellation), the parties need to think about the following minor practical problem.

After the initial expiry date of the letter of credit, the holder of the letter of credit will not be able to produce a piece of paper confirming that the letter of credit is still in effect. The continued effectiveness of the letter of credit will instead depend on the absence of a cancellation notice from the issuer of the letter of credit—something much harder for the loan assignor to establish.

When a lender accepts an "evergreen" letter of credit, the lender needs a way to satisfy a prospective assignee that the letter of credit was, in fact, automatically renewed and not cancelled. The lender should perhaps ask the letter of credit issuer to agree to provide a "confirmation certificate" at any time, and certainly in conjunction with any transfer of the letter of credit. A lender needs to think of this idea when approving the initial form of the letter of credit.

The assignor may also be willing to bridge the documentation gap by providing the assignee with a surviving representation and warranty as to the status of the letter of credit.

Moving Away from the Original Note

Traditionally, as noted earlier, the law has attached great significance to possession of the original promissory note ("the mortgage follows the note," and so on). Principles like these can create problems when notes are lost. They also produce ambiguity and

confusion in determining how to "perfect" a security interest in a loan.

The legal importance of the "original" promissory note—a concept tied to the traditional law of commercial paper—may be archaic at a time when a secured promissory note has no particular inherent value. In the real world no one would buy or sell a mortgage note by itself as if it were a valuable asset. Purchasers of mortgages typically do not need, expect the benefits of, or qualify for "holder in due course" status; instead, they are buying a collection of rights more in the nature of a routine contract.

In recognition of the diminishing real-world importance of the promissory note, mortgage lenders may want to structure loan documentation to place less emphasis on the original promissory note, and treat the borrower's promise to pay as something more like a normal contract obligation. Under this model, the lender's possession of an original document would not be fundamentally important. Perfection of a security interest would become a simpler matter.

Although lenders would never want to move away from having a piece of paper called a "promissory note"—if only to show it to the court in a foreclosure action—loan documents can expressly provide that transfers of the loan are perfected through the recording and UCC filing systems alone, without regard to the original promissory note. In other words, "the mortgage follows the note" would be replaced by "the note follows the mortgage." The use of a note registry, a private recording system, would serve a similar function.

Earlier comments in this article about the importance of being standard suggest that no lender will rush to explore these ideas. Over time, however, the industry may move in this direction.

Moving Away from Paper

Some of the largest mortgage originators in the country have recently formed Mortgage Electronic Registration Systems, Inc. ("MERS") to document all mortgage transfers electronically starting with a serial numbering scheme (the "Mortgage Identification Number") for all mortgages in the program.

Once a MERS mortgage is originated, the originator will immediately assign the mortgage of record, only once, to MERS. Eventually mortgages may even be originated showing MERS as the mortgagee.

Thereafter, MERS will remain the permanent record holder of the mortgage until it is paid off. All subsequent transfers of interests in the mortgage—whether "absolute," "collateral," or of servicing rights only—will be handled electronically, in the form of data updates in the MERS registry system and database.

MERS began conducting business on-line in May 1997. It now handles only residential mortgage transactions, but the same idea could apply

to commercial mortgages too. More information on MERS can be obtained from the following website: http://www.mersinc.com.

To the extent adopted, MERS should simplify the mortgage transfer process and hence help the mortgage market move even faster and work better than it already does. It will also, within a few years, probably make a good part of this article irrelevant.

A system like MERS could go a step further and render irrelevant some other work done by real estate attorneys, by replacing a good part of the entire recording system with a national real estate database.

All real property could be held of record by a single nominal owner—the real property equivalent of the Depository Trust Company, the record owner of most publicly traded stock. Just as MERS will give every mortgage a Mortgage Identification Number, its progeny could give every tax lot in the country a Property Identification Number. After title to a particular tax lot was deeded into the system, all transfers and other recordings could be handled electronically, by reference to the Parcel Identification Number, using book entries in the database maintained by the nominal owner.

These transactions would take place beyond the reach of the myriad technicalities and documentation requirements created by thousands of recording offices—and potentially beyond the reach of tax collectors.

For that last reason, and because of the likely effect on government jobs in thousands of recording offices (as well as likely opposition from other sources), it would seem unlikely that any such system would be adopted any time soon.

In the meantime, the suggestions in this article will help real estate attorneys close loans, and later transfer them, in a way that meets the needs of the burgeoning secondary market for mortgages.

APPENDIX

Collateral Assignment of Mortgage and Note

_____

and

_____

_____

COLLATERAL ASSIGNMENT OF MORTGAGE AND NOTE

_____

[Date]

This instrument affects real and personal property situated, lying and being in the _____ City of _____, State of _____, known as follows:

Section:	_____
Volume:	_____
Block(s):	_____
Lots(s):	_____
[_____ New York City Only]	_____
Street Address	_____

PREPARED BY AND RECORD AND RETURN TO

_____

Attention: _____

COLLATERAL ASSIGNMENT OF MORTGAGE AND NOTE

_____, a _____ having a principal place of business at _____ ("Assignor"), in consideration of Ten Dollars ($10.00) and other good and valuable consideration received from _____, a _____ having an office at _____ ("Assignee"), receipt of which Assignor acknowledges, does hereby assign, transfer, pledge, deliver, hypothecate and set over to Assignee, and grant Assignee a security interest in (collectively, this "Assignment") all of the following (collectively, the "Collateral"):

A. *Note.* That certain _____ Promissory Note dated _____, made by _____, a _____ (the "Maker") to Assignor in the principal sum of $_____ (the "Note"), the original of which Note Assignor is simultaneously herewith endorsing in blank and delivering to Assignee, including all sums due and payable, or to become due and payable, under the Note;

B. *Mortgage.* That certain _____ Mortgage and Security Agreement dated _____ made by Maker to Assignor [to be] recorded in the Office of the _____, County of _____, State of _____[, on _____, 199_____, at Book _____, Page _____] (the "Mortgage"), with respect to which Mortgage Assignor is simultaneously herewith executing and delivering to Assignee a recordable undated assignment in blank;

C. *Other.* Any and all assignments of rents, security agreements, financing statements, escrow deposits, reserve accounts, letters of credit, guaranties, indemnity agreements, estoppel certificates, certificates, affidavits, nondisturbance agreements, title insurance policies, other insurance policies, and other documents or agreements otherwise securing, evidencing, or relating to Maker's obligations under, or delivered to Assignor in connection with, the foregoing Note and Mortgage or either of them[_____, including any and all "Loan Documents" as defined in the Mortgage];

D. *Rights and Remedies.* All rights and remedies that Assignor might exercise with respect to any and all of the foregoing but for the execution of this Assignment; and

E. *Proceeds.* Any and all proceeds and products of the foregoing, including condemnation awards and insurance proceeds.

ALL FOR THE PURPOSES OF SECURING Assignor's payment and performance of all obligations of Assignor (such obligations of Assignor, collectively, the "Loan") evidenced by the following documents (collectively, together with this Assignment, the "Loan Documents"): (a) that certain _____

Promissory Note dated _____ made by Assignor to Assignee in the principal sum of $_____ or so much thereof as shall have been or may hereafter be advanced; (b) that certain _____ Loan Agreement dated _____ entered into by and between Assignor and Assignee; (c) all those certain _____Loan Documents as defined in the foregoing Promissory Note and Loan Agreement; (d) this Assignment; and (e) all such other present and future agreements and obligations of Assignor as may by their terms state they are secured by this Assignment.

PROVIDED, HOWEVER, that upon Assignor's payment in full of the Loan and performance of all obligations under the Loan Documents, all rights of Assignee hereby created shall cease, terminate, and become void and Assignee, at Assignor's expense, shall execute and deliver such instruments, in recordable form, as Assignor shall reasonably request to cancel the lien hereof on, and the security interest created hereby in, all of the Collateral, and shall return to Assignor the original documents evidencing the Collateral or, as to any document that Assignee cannot locate, a lost document affidavit and indemnity in Assignee's standard form.

AND Assignor hereby agrees with Assignee as follows:

1. REPRESENTATIONS.

Assignor represents and warrants to Assignee as follows:

1.1. *Ownership.* Assignor owns the Collateral and all sums now or hereafter due thereunder, free and clear of all liens, claims, security interests, encumbrances, setoffs, defenses and counterclaims, except for the security interest granted to Assignee by this instrument.

1.2. *Outstanding Balance.* There is unpaid and unconditionally owing to Assignor with respect to the Collateral the principal sum of $_____, with all interest thereon paid and current through the date hereof and through a date no later than thirty days after the date hereof.

1.3. *Status of Collateral.* Maker is not entitled to assert any offset or defense against any of its obligations under the Collateral, nor has Maker asserted any such offset or defense. Assignor has no knowledge of any facts that would impair the validity of the Collateral or result in a diminution of the value or collectibility of the Collateral or Maker's obligations thereunder. Each instrument or document constituting the Collateral is genuine and in all respects what it purports to be. The Collateral has not been altered in any way. All obligations

of Maker under the Collateral are valid, binding, and enforceable against Maker in accordance with their terms. Maker is solvent and is not in default in any of its obligations under the Collateral.

1.4. *No Breach.* Neither the execution and delivery of this Assignment by Assignor nor the consummation of the transactions contemplated hereby nor the fulfillment of the terms hereof will result in a breach of any of the terms or provisions of, or constitute a default under, or constitute an event that with notice or lapse of time or both will result in a breach of or constitute a default under, any agreement, indenture, mortgage, deed of trust, equipment lease, instrument, or other document to which Assignor is a party or conflict with any law, order, rule, or regulation applicable to Assignor of any court or any federal or state government, regulatory body or administrative agency, or any other governmental body having jurisdiction over Assignor or Assignor's properties.

1.5. *Assignor's Address.* Assignor's principal place of business and chief executive office is at the address set forth in the first paragraph of this Assignment. Assignor does not do business under any trade name or fictitious business name.

2. ASSIGNOR'S COVENANTS.

2.1. *Right to Collect.* [_____ Edit/delete as appropriate, such as to reflect any direct-pay arrangements that are in effect.] Except as otherwise expressly provided in this Assignment, so long as no Event of Default (as defined below) shall have occurred: (i) Assignee shall not take any action with respect to the Collateral assigned hereby or the sums payable pursuant to the Collateral, and (ii) Assignor shall receive and collect directly all sums payable to Assignor pursuant to the terms of the Collateral, and may take such action as Assignor may deem necessary or desirable for the enforcement of any right or privilege Assignor may have in respect of the Collateral and, at Assignee's direction, shall take such action as Assignee deems appropriate to maintain the validity of, or to perfect, the security interest granted to Assignee hereby. Upon the occurrence of any Event of Default, Assignor authorizes Assignee, and its employees and agents, at Assignee's option, exercised in the name of Assignor or in the name of Assignee as assignee, to collect any amounts due at any time under any of the Collateral. Assignor shall send to Assignee a copy of any written payment notice given to any Maker concurrently with sending such notice to such Maker.

2.2. *Statements of Collateral.* Assignor shall at any time, and from time to time, upon request of Assignee, deliver to Assignee a certificate executed by an

authorized representative of Assignor setting forth with respect to the Collateral the principal amount of debt outstanding and the total amount of accrued and unpaid interest and such other matters as Assignee shall reasonably request.

2.3. *Performance.* Assignor shall perform all its obligations with respect to the Collateral, whether such obligations arise pursuant to the express terms of the Collateral or pursuant to governing law. If Assignor fails to perform any obligation with respect to the Collateral, then Assignee may do so, and Assignor shall immediately upon demand reimburse Assignor for any cost and expense, including reasonable attorneys' fees, incurred by Assignor in connection with such performance.

2.4. *No Transfers.* Without the prior written consent of Assignee, which Assignee may withhold for any reason or no reason, and except as otherwise expressly provided in the Loan Documents: (i) Assignor shall not further assign, transfer, pledge, or otherwise dispose of, in whole or in part, any Collateral or any of its rights under any Collateral; (ii) no owner of any direct or indirect interest in Assignor shall sell, transfer, convey or assign (by operation of law or otherwise) any direct or indirect interest in Assignor or any part thereof; and (iii) no other transaction shall occur that may result in or produce a change in the ultimate ownership of Assignor. If the Collateral, or any part thereof, is sold, transferred, assigned, exchanged, or otherwise disposed of in violation of these provisions, Assignee's security interest shall continue in such Collateral or part thereof notwithstanding such sale, transfer, assignment, exchange or other disposition, and Assignor shall hold the proceeds thereof in trust in a separate account for Assignee's benefit. Assignor shall, at Assignee's request, transfer such proceeds to Assignee in kind.

2.5. *Consents.* To the extent that, pursuant to the terms of the Collateral, Assignor's consent is required as to any matter, Assignor shall not grant such consent without Assignee's consent, which consent by Assignee shall be subject to the same reasonableness requirements and restrictions (if any) that apply to Assignor pursuant to the Collateral. Assignor shall not consent or agree to any subordination of the Collateral to any other estate or interest (other than routine utility easements) without Assignee's prior written consent, which may be withheld for any reason or no reason. [_____Edit as Appropriate.]

2.6. *Defense and Maintenance of Collateral.* Assignor shall defend the Collateral against all claims and demands of all persons at any time claiming the same or any interest therein except as expressly provided in the Loan Documents. The Collateral shall not be modified or amended in any respect without the prior written consent of Assignee, nor shall any rights or remedies of Assignor,

or obligations of Maker, under any Collateral be waived without the prior written consent of Assignee, which consent Assignee may withhold for any reason or no reason.

2.7. *No Change in Location.* Assignor shall not establish any place of business other than the location in the opening paragraph of this Assignment, or voluntarily or involuntarily change its name, trade name, fictitious business name, identity or corporate structure.

2.8. *Further Assurances.* Assignor shall do, execute, acknowledge and deliver, at Assignor's sole cost and expense, all such further acts, conveyances, assignments, estoppel certificates, notices of assignment, transfers and assurances as Assignee may require from time to time to better assure, convey, assign, transfer, and confirm to Assignee, the rights now or hereafter intended to be granted to Assignee under this Assignment, or under any other instrument under which Assignor may be or may hereafter become bound to convey or assign to Assignee for carrying out the intention or facilitating this Assignment.

2.9. *Protection of Security.* Assignee shall have the right at any time, but shall not be obligated, to make any payments and perform any other acts that Assignee may deem necessary to protect its security interest in the Collateral, including, without limitation, (a) the rights to cure any default or breach by Assignor; (b) the right to pay, purchase, contest or compromise any encumbrance, charge or lien that, in Assignee's judgment, appears to be prior to or superior to the security interest granted hereunder, and to appear in and defend any action or proceeding purporting to affect its security interest in and/or the value of the Collateral, and (c) in exercising any such powers or authority, to pay all expenses incurred in connection therewith, including attorneys' fees. Assignor shall promptly repay all amounts advanced by Assignee in connection with the foregoing. Assignor shall be bound by any such payment made or action taken by Assignee hereunder. Assignee shall have no obligation to make any of the foregoing payments or perform any of the foregoing acts.

3. COLLATERAL ENFORCEMENT BY ASSIGNOR.

3.1. *Assignee's Joinder.* Assignor may not exercise any rights or remedies under any Collateral, or accept a conveyance in lieu of the exercise of such remedies (all, collectively, "Collateral Enforcement") unless such Collateral Enforcement is consented to by Assignee. As between Assignor and Assignee, Assignee agrees to consent to any Collateral Enforcement if Assignor has provided such assurances as Assignee shall require to the effect that all Enforcement Proceeds shall be applied as required by this Assignment. Any Collateral Enforcement shall in all cases be subject to the rights and interests of Assignee hereunder.

3.2. *Enforcement Proceeds.* Without limiting the generality of the foregoing, if, pursuant to any Collateral Enforcement, Assignor receives any funds, property, or other assets (including ownership of any real property previously encumbered by any mortgage constituting part of the Collateral) (the "Enforcement Proceeds"), then such Enforcement Proceeds shall not be the property of Assignor and shall instead be delivered, immediately and directly, to Assignee and not Assignor to be applied as if they were proceeds from the sale of the Collateral.

3.3. *Release of Enforcement Proceeds.* Notwithstanding the foregoing, Assignee agrees that any real property that constitutes Enforcement Proceeds may be delivered to, and shall become the property of Assignor, if and only if simultaneously with receipt thereof, Assignor executes and delivers to and in favor of Assignee a mortgage encumbering such real property, which mortgage shall be in form and substance satisfactory to Assignee and shall secure the Loan.

4. EVENTS OF DEFAULT; REMEDIES.

4.1. *Definition: "Event of Default."* If Assignor shall fail to make any payment required with respect to the Loan and the applicable cure period (if any) provided for under the Loan Documents shall have expired, or if any other Event of Default (as defined in the Loan Documents) shall be existing and unremedied, or if Assignor shall be in default under this Assignment which default has not been cured within ten days after written notice from Assignee, then an "Event of Default" shall be deemed to have occurred under this Assignment.

4.2. *Rights and Remedies.* If any Event of Default shall occur, then Assignee may exercise any right or remedy it may have by law or under any of the Loan Documents. In connection therewith:

Acceleration. Assignee may declare the entire principal of and interest on the Loan and all other sums required to be paid by Assignor pursuant to the Loan Documents to be immediately due and payable.

Notice to Maker. Assignee may direct Maker to make all future payments pursuant to the Collateral directly to Assignee and not to Assignor. [_____Modify to reflect any direct-pay arrangements that may already be in effect.]

Application of Cash. Assignee may, without being required to give any notice except as hereinafter provided, apply the cash, if any, then held, or thereafter acquired, by it on account of the Collateral hereunder to the payment of the Loan and to the payment of any other obligations of Assignor under the Loan Documents, in such order of priority as Assignee shall determine in its sole and absolute discretion.

Sale of Collateral. Assignee may sell the Collateral, or any part thereof, at public or private sale for cash, upon credit or for future delivery, and at such price or prices as Assignee may deem satisfactory, and Assignee may be the purchaser or purchasers of any and all of the Collateral so sold and thereafter hold the same, absolutely, free from any right or claim of whatsoever kind. Upon any such sale, Assignee shall have the right to deliver, assign and transfer to the purchaser thereof the Collateral so sold, all without recourse to Assignor.

Title Sold. Each purchaser at any such sale shall hold the property sold absolutely, free from any claim or right of whatsoever kind, including any equity or right of redemption of Assignor, which hereby specifically waives all rights of redemption, stay, appraisal or marshalling of assets which it has or may have under any rule of law or statute now existing or hereafter adopted. Assignee shall give Assignor 10 days' notice of intention to make any such public or private sale. Any such public sale made by Assignee shall be held at such time or times within ordinary business hours and at such place or places in the _____ Borough of _____, City of _____, or at Assignee's option in the municipality where the real property affected by the Collateral is located, as Assignee may fix in the notice of such sale. At any such sale the Collateral may be sold as an entirety or in separate parcels, as Assignee may determine. Assignee shall not be obligated to make any sale pursuant to any such notice. Assignee may without notice or publication, adjourn any public or private sale made by Assignee or cause the same to be adjourned from time to time by announcement at the time and place fixed for the sale, and such sale may without further notice be made at any time or place to which the same may be so adjourned.

Delivery of Collateral. In case of any sale of all or any part of the Collateral made by Assignee on credit or for future delivery, the Collateral so sold may be retained by Assignee until the selling price is paid by the purchaser thereof, but Assignee shall not incur any liability in case of the failure of such purchaser to take up and pay for the Collateral so sold and, in case of any such failure, such Collateral may again be sold upon like notice.

Judicial Foreclosure. Instead of exercising the foregoing power of sale, Assignee may, at its option (with no obligation to do so), proceed by a suit or suits at law or in equity to foreclose this Assignment and sell the Collateral, or any portion thereof, under a judgment or decree of a court or courts of competent jurisdiction.

Conveyance Documents. Assignor hereby appoints Assignee (or such person(s) as Assignee shall designate in writing) as Assignor's attorney in fact, which agency is coupled with an interest, to execute in Assignor's name any and all documents that may be necessary or appropriate to consummate any trans-

fer of any Collateral pursuant to any exercise of remedies by Assignee under this Assignment. In addition to the foregoing, Assignor hereby authorizes Assignee, in Assignee's own name, to execute, deliver and record any assignments of any Collateral that may be necessary or appropriate to implement any transfer thereof pursuant to any exercise of remedies by Assignee under this Assignment. Any such assignment(s) shall be fully effective to divest and convey to the assignee(s) named therein full title to the Collateral, free of any right, title, claim or interest of Assignor.

Holding of Collateral. Assignee may hold the Collateral and apply all proceeds thereof against the Loan.

4.3. *Application of Proceeds.* The proceeds of any sale of all or any part of the Collateral made by Assignee in exercising its remedies for an Event of Default shall be applied by Assignee as follows in the following order:

Costs and Expenses. To payment of the costs and expenses of such sale, including reasonable compensation to Assignee and its agents and counsel;

Loan Balance. To payment of the principal of and interest and prepayment premium, if any, on the Loan and to the payment of any other obligations of Assignor under any documents relating to such Loan, under any instrument or document executed in connection therewith, and under this Assignment, all in such order as Assignee shall see fit; and

Remaining Funds. To payment to Assignor, or its successor or assigns, or as a court of competent jurisdiction may direct, of any surplus then remaining from such proceeds.

4.4. *Delivery of Books and Records.* If Assignee holds a foreclosure or other sale with respect to any Collateral, or otherwise exercises any rights or remedies under the Loan Documents or applicable law pursuant to which Assignor is divested of title to any Collateral, then Assignor shall within 10 days thereafter deliver to the transferee of such Collateral any and all correspondence, books, records and documentation in Assignor's possession, or in the possession of any affiliate of Assignor, relating to such Collateral.

4.5. *No Duty of Care.* Assignee shall have no duty or obligation to care for the Collateral or to take any actions to protect the value of the Collateral or any rights or privileges the Assignor might have with respect thereto, except that Assignee shall exercise reasonable care in the physical preservation of items of Collateral in Assignee's possession. Assignee shall have no obligation to take any actions to preserve any rights that Assignor or any other party may have against any third party with respect to any item of Collateral.

4.6. *Waivers.* Assignor waives all rights of notice and hearing of any kind prior to Assignee's exercise of its rights from and after the occurrence of an Event of Default to repossess the Collateral with or without judicial process or to replevy, attach or levy upon the Collateral. Assignor waives the posting of any bond otherwise required of Assignee in connection with any judicial or nonjudicial process or proceeding to obtain possession of, replevy, attach or levy upon Collateral or other security for the Obligations, to enforce any judgment or other court order entered in favor of Assignee, or to enforce by specific performance, temporary restraining order or preliminary or permanent injunction this Assignment or any other Loan Document.

4.7. *Remedies Not Exclusive.* The remedies set forth above shall not be exclusive. Assignee shall have available to it any and all other remedies with respect to the Collateral that may be available to a secured party pursuant to the Uniform Commercial Code. Assignee may exercise its rights under this Assignment independently of any other collateral or guaranty that Assignor may have granted or provided to Assignee in order to secure payment and performance of the Loan. Assignee shall be under no obligation or duty to foreclose or levy upon any other collateral given by Assignor to secure the Loan or to proceed against any guarantor before enforcing its rights under this Assignment. The remedies granted herein shall be cumulative and the exercise of any one remedy shall not preclude the exercise of any other, and any repossession or retaking or sale of the Collateral pursuant to this Assignment shall not operate to release Assignor or any other collateral or security held by Assignee with respect to the Loan until full payment of any deficiency has been made in cash

5. MISCELLANEOUS.

5.1. *Attorney in Fact.* Assignor hereby irrevocably appoints Assignee its attorney in fact, coupled with an interest and therefore irrevocable, to give notices or payment instructions to the Maker in accordance with this Assignment; to take any actions necessary or desirable, in Assignee's sole discretion, to collect the amounts due under the Collateral, including compromising any amounts due under any item of Collateral and acknowledging satisfaction of the Maker's liability thereunder; to execute and deliver any documents that this Assignment requires Assignor to execute and deliver to Assignee; to take any other actions that this Assignment requires Assignor to take; to endorse and cash checks and other instruments representing proceeds of Collateral; and to perform any and all other acts as Assignee in its sole judgment reasonably exercised shall deem necessary or desirable with respect to this Assignment, including the signing and filing of any financing statements necessary or appropriate for the Collateral.

5.2. *No Waiver.* No failure by Assignee to exercise, and no delay in exercising, any right, power or remedy under this Assignment shall operate as a waiver thereof; nor shall any single or partial exercise by Assignee of any right, power, or remedy under any Loan Document preclude any other or further exercise thereof or the exercise of any other right, power, or remedy. The remedies in this Assignment are cumulative and are not exclusive of any remedies provided by law.

5.3. *Notices.* All notices hereunder shall be in writing and shall be deemed to have been sufficiently given or served for all purposes when delivered in person or sent by nationally recognized overnight delivery service to any party hereto at its address above stated or at such other address of which it shall have notified the party giving such notice in writing as aforesaid.

5.4. *Amendment.* This Assignment may not be amended or modified orally.

5.5. *Assignee's Costs and Expenses.* Assignor shall within five days after demand reimburse Assignee for any costs and expenses, including reasonable attorneys' fees, incurred by Assignee in exercising its rights, and enforcing its rights and remedies, under this Assignment or with respect to the Collateral.

5.6. *JURY TRIAL WAIVER.* THE PARTIES WAIVE JURY TRIAL IN ANY DISPUTE RELATED TO OR ARISING FROM THIS ASSIGNMENT OR THE INTERPRETATION OR ENFORCEMENT HEREOF.

5.7. *Governing Law.* This Assignment shall be governed by and construed in accordance with the law of the State of _____, except to the extent that the laws of the State of _____ require that the laws of the State of _____ govern this Assignment and the exercise of rights and remedies hereunder.

5.8. *Nonrecourse.* [_____ Delete/modify as applicable.] The Nonrecourse Clause, as defined in _____, is incorporated by reference in this Assignment as if set forth in full verbatim.

IN WITNESS WHEREOF, Assignor has caused this Assignment to be duly executed as of the date set forth above.

_____**Signature Blocks**

ACKNOWLEDGMENTS

PRACTICE CHECKLIST FOR

Mortgage Loan Assignments: A Primer in Two Parts (Part 2) (with Form)

An assignment of a mortgage interest may be either "absolute" or "collateral." A collateral assignment is security for the mortgage holder's loan from another lender. An absolute assignment is an outright sale of the mortgage holder's interest.

- When acquiring a loan (an "absolute" assignment):

☐ Coordinate the transfer of the loan with any third-party servicer;
☐ Don't wait until the last minute to calculate the price of the mortgage being purchased;
☐ Consider requesting the formal assignment of the title insurance policy and consider requesting the company to endorse old policies to show the purchaser as the insured; and
☐ Consider the possible need for a title search and other title insurance coverage.

- When a lender accepts the pledge of a mortgage loan as collateral security, the lender should consider taking the following measures:

☐ Record the collateral assignment;
☐ Obtain an assignment in blank—a recordable assignment of mortgage documents signed by the collateral assignor, but with the name of the assignee left blank;
☐ Establish a collection lockbox, particularly if implementation of other control measures is not practical; and
☐ Obtain control of the assignor's servicing file to gain further control over the collateral.

- In either an absolute or collateral assignment:

☐ Consider the structure and terms of the larger transaction of which the assignment is a part (representations, warranties, covenants, etc.);
☐ Determine whether the assignee can obtain the benefit of third-party opinions, certificates, and deliveries from the original loan closing;

- ☐ Consider the effect of "doing business" or licensing statutes;
- ☐ Check for any local taxes on mortgage transfers;
- ☐ If the mortgage encumbers residential property, check Truth-in-Lending and similar statutes and regulations; and
- ☐ Take the other steps suggested in the first installment of this article.

• To make new loans more marketable:

- ☐ Provide in each loan document that if the note is assigned, the other loan documents travel with the note;
- ☐ At every step of the closing process, keep in mind the likelihood that the loan will be transferred to another lender and structure the documents accordingly;
- ☐ Try to use standard documents accepted by the capital markets. Keep the documents and transaction structure simple; and
- ☐ Have the borrower acknowledge that the lender may assign the loan and have the borrower and guarantors agree to provide necessary documentation for an assignment.