

**THE DEVIL IS IN THE DETAILS:
WHEN DID THE TRUST ACQUIRE THE NOTES AND MORTGAGES -
A STUDY OF 4,580 FLORIDA ASSIGNMENTS**

BY LYNN E. SZYMONIAK, JUNE 5, 2011

In 2010, mortgage bankers involved with mortgage-backed securities adopted a mantra: "The mortgage follows the note." Tom Deutsch, Executive Director of the American Securitization Forum ("ASF"), appeared before the U.S. Senate Banking Committee, and in speeches to mortgage bankers, to argue that \$7 trillion dollars of securitized mortgage debt was transferred in a legally sound matter.

The mantra became necessary as revelations piled up that mortgages had not been assigned to mortgage-backed trusts in the manner described in the trusts documents. The most important trust document, the "Pooling and Servicing Agreement ("PSA"), spells out in the definitions section that "mortgage file" documents include the promissory note, the mortgage, a mortgage assignment and a title insurance policy. The trusts promised investors that they would obtain these documents for each loan in the pool of loans that make up the trusts.

The manner in which the trust acquires the documents is also set out – usually in Section 2.01 of the PSA – which is usually titled "Conveyances of Mortgages." This section specifies that the note itself should be the original note, indorsed to the trust or indorsed in blank. This recognizes that the trust was not the original lender and there were intervening owners of the note. The mortgage also needs to reflect that the trust is the owner of the mortgage. While notes are indorsed, usually on the last page of the note itself, mortgages are assigned, most often in a separate document.

Many trust specify that the mortgage must be assigned to the trust. Some trusts allowed the mortgage to be assigned "in blank" if such assignment would be acceptable under the laws of the state where the property was located. A mortgage assigned "in blank" means that the name of the new owner, or assignee, is not specified. The name of the entity acquiring the mortgage is the only item that may be left blank on an assignment made "in blank."

There were widespread problems with assignments in blank. In most states, the question of the validity of a blank assignment was undecided.

In addition to the legal issue presented, there were massive technical difficulties. On many assignments, other information was also left blank – particularly the effective date of the assignment. Under the terms of the PSA, assignments were to have been delivered to the trust “in recordable form.” This meant that even assignments with the assignee unspecified were supposed to have been signed and dated by the prior owner so that only the name of the trust could be inserted and the assignment filed if necessary.

Many trusts obtained assignments, in blank, signed by an officer of the lender. A loan made by American Brokers Conduit, for example, was signed by an officer of American Brokers Conduit and notarized in Suffolk County, New York, where American Brokers Conduit was located. On tens of thousands of mortgages, however, the lender was not the mortgagee and, therefore, could not be the assignor. On these loans, Mortgage Electronic Registration Systems, Inc. (“MERS”) was identified as the mortgagee.

At some point, this problems appears to have been recognized on many assignments. On these documents, where the name of the trust has been hand-written into the document – an attempt has also been made to change the name of the assignor so that the words “Mortgage Electronic Registration Systems Incorporated as Nominee For” are inserted (hand-written) above the name of the assignor. These “Assignor-fixed” documents, however, are signed by an officer of the Lender, not MERS, and the signer identifies himself/herself as an officer of the Lender – not MERS.

On still other Assignments, the County and State where the document was notarized was also left blank. When the documents were filed, this information was also added – hand-written – to the document. Instead of the place of notarization, however, the place where the property was located was inserted. As a result, on many assignments, the Notary stamp states that the Notary is qualified in Suffolk County, New York (the location of American Home Mortgage) but the County and State where the document was notarized are identified as, for example, Lee County, Florida.

Many trusts did not require assignments for all loans in the asset pool. Many trusts permitted MERS loans to simply be transferred on the MERS system to the trust by the closing date of the trust. But even with MERS loans, the mortgage assignments prepared by the servicers from 2008 – 2011 (years after the closing dates of most of the trusts) showed that the loans were still registered on the MERS system in the names of the original lenders.

With these many problems with the original mortgage assignments, it is not surprising that the ASF began aggressively asserting that mortgage assignments are not even necessary because of the common law principle that “the mortgage follows the note.” The ASF reported that 13 major law firms agreed with the ASF.

Lesser-paid, but more objective authorities, particularly Georgetown Law Professor Adam Levitin, wrote an article/post, “The Big Fail,” after the U.S. Bankruptcy Court decision for the District of New Jersey in Kemp v. Countrywide Home Loans, Inc., where evidence was presented that the note never was delivered to the trust. Professor Levitin posited “failure to properly transfer the mortgage meant that the mortgages were never actually securitized.”

The issue of mortgage assignments became increasingly important, because of the widespread appearance of fraudulent and forged mortgage assignments to mortgage-backed trusts, produced by over a dozen mortgage servicing companies, from 2008 through 2011.

With the filing of these servicer-produced documents, the problem of missing documents was transformed into a problem of fraudulent documents. Moreover, these assignments not only call in to question whether and when the trusts received the mortgages – they also call in to question whether and when the trusts received the NOTES. Almost all of these servicer-made assignments also purported to assign the NOTES.

An examination was made of every assignment of mortgage filed in three Florida counties, Hillsborough, Lee and St. Lucie, to six groups of trusts: Bear Stearns, GSAMP, GSAA, Morgan Stanley, Structured Asset Investment Loans (“SAIL”) and Structured Asset Mortgage Investments (“SAMI”) trusts for a three-year period, 2008 – 2010. Every Assignment of Mortgage also included the PROMISSORY NOTE in the Assignment. There were no original documents (contemporaneously dated to correspond to the trust closing dates) in

the 4,580 assignments filed in the three Florida counties. All of these assignments were prepared by mortgage servicers years later.

When did the Bear Stearns, GSAMP, GSAA, Morgan Stanley, SAIL, and SAMI trusts acquire the mortgages **AND NOTES** that were the pooled assets of the trusts? According to these documents, in every case where an effective date was stated, the mortgages **AND NOTES** were not assigned to the trusts until several years after the closing dates of the trusts.

A small percentage of these assignments state that the originals were lost or destroyed, but do not state when this loss or destruction occurred, other than "on or before..." a date that corresponds to the filing of the foreclosure action. A small percentage also states that the assignments took place "on or before" a certain date, leaving the actual date unspecified.

Only a very few assignments state in the document title that the assignment was an "Assignment of Mortgage and Promissory Note." Most do not mention the promissory note in the title of the document, but include language in the mortgage assignment that specifically states that the note is also being assigned.

Typically, the language regarding the promissory notes is included at the end of the first paragraph on these assignments stated as follows:

"...together with the Note of Obligation described in said Mortgage(s), and the money due and to become, due thereon, with interest therein provided."

Another common version states, immediately after the legal description:

"...together with the Note and indebtedness secured thereby."

Still another version states, immediately after the legal description:

"Together with the note and each and every other obligation described in said mortgage and the money due and to become due thereon."

A fourth version states:

"...together with the note of obligation described in said Mortgage(s),

and the money due and to become, due thereon, with interest as therein provided."

There is also a version that claims attorney's fees:

"Together with any and all notes and obligations therein described or referred to, the debt respectively secured thereby and all sums of money due and to become due thereon, with interest thereon, and attorney's fees and all other charges."

The DocX version states:

"...the following described mortgage, securing the payment of a certain promissory note(s) for the sum listed below, together with all rights therein and thereto, all liens created or secured thereby, all obligations therein described, the money due and to become due thereon with interest, and all rights accrued or to accrue under such mortgage."

These documents show that the note followed the mortgage – and not vice-versa. An examination of these assignments shows that the parties to the transfer effectuated the transfer of the mortgages and notes years after the trusts closed.

If the Trusts did not acquire these mortgages and notes until years after the closing dates of the trusts, what was in those pools of loans sold to investors? **The trusts seem to have sold a list of loans they intended to acquire.**

A very few of these Assignments seem to recognize the problem of the Trust acquiring the mortgages and notes many years after the trust closing dates and include the following language:

"Assignor hereby acknowledges that this assignment is being recorded as a formality pursuant to the requirements set forth under § 701.02, but that such be the intention of the parties herein that delivery of the subject note and mortgage be established as evidenced by electronic or physical delivery, of the note and mortgage and related documents that such delivery occurred on occurred prior to date of any litigation, hereto for, and that date be the delivery date has been established by the expressed intention of the parties, herein."

(Note: this is the EXACT wording of the paragraph - despite what

appears to be obvious errors and nonsense.)

In Hillsborough County in 2008, 2009, and 2010, there were 641 Assignments to Bear Stearns Trusts; 298 Assignments to GSAMP Trusts; 163 Assignments to GSAA Trusts; and 746 Assignments to Morgan Stanley Trusts, 153 Assignments to SAIL Trusts; 429 Assignments to SAMI Trusts; or 2,430 Assignments total.

In Lee County in 2008, 2009, and 2010, there were 506 Assignments to Bear Stearns Trusts; 203 Assignments to GSAMP Trusts; 188 Assignments to GSAA Trusts; 607 Assignments to Morgan Stanley Trusts, 100 Assignments to SAIL Trusts; 373 Assignments to SAMI Trusts; or 1,789 Assignments total.

In St. Lucie County in 2008, 2009, and 2010, there were 78 Assignments to Bear Stearns Trusts; 61 Assignments to GSAMP Trusts; 24 Assignments to GSAA Trusts; 161 Assignments to Morgan Stanley Trusts, 11 Assignments to SAIL Trusts; 26 Assignments to SAMI Trusts; or 361 Assignments total.

Courts will be deciding issues related to the assignments of mortgages and notes for years to come.

Did servicers produce millions of assignments of mortgages and notes to trusts with the effective dates of the assignments wrongly states – usually by several years?

If the original documents were missing, did the trustees, document custodians and accountants report to the Securities & Exchange Commission that they had discovered a failure to comply with Regulation AB, Item 1122(d)(4)(ii): "Mortgage loan and related documents are safeguarded as required by the transaction agreements." The transaction agreements, including the PSAs, almost universally told investors that the mortgage documents – defined as the indorsed note, the mortgage and the mortgage assignment – would be safely kept in the fireproof vault of the document custodian.

Did the securitizers and subsequent trustees and custodians make thousands of false statements to investors and the SEC about obtaining and maintaining the loan documents?

Have foreclosures by trusts gone forward where the evidence of ownership of the note, the mortgage or both has been manufactured by the trusts or their agents?

What is the most equitable relief for investors and homeowners? The recovery of the American economy rests on this answer.