

Assigning Loan Documents: Practical Reminders

By: Timothy Davis and Patrick Haggerty

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The recent Supreme Court of Delaware case *J.M. Shrewsbury v. The Bank of New York Mellon*, CA No. N15L-03-108 (Del. 2017), provides a reminder of the importance of clearly documenting the assignment of loan documents. The Court's holding requires that prior to the assignee of a mortgage loan filing suit on the note or mortgage, the assignee must have received both an allonge/ assignment of the note and an assignment of the mortgage. The case is a reminder of the importance of maintaining a precise chain of title when assigning loan documents. The facts of the case as described below demonstrate the need to make sure that you "don't leave the note behind."

The Case

In 2007, J.M. Shrewsbury and Kathy Shrewsbury signed a promissory note in favor of Countrywide Home Loans, Inc. Concurrently, the Shrewsburys were granted a mortgage to secure their obligations under the note, which mortgage encumbered real property in Delaware. In 2011, the mortgage was assigned to The Bank of New York Mellon (Bank). In 2013, the Shrewsburys requested and received a copy of the original note, which contained no indication that the note had been assigned. Neither party disputed the fact that the Shrewsburys stopped making mortgage payments in 2010.

The Bank commenced a mortgage foreclosure action in 2015 in the Superior Court of the State of Delaware, *Bank of N.Y. Mellon v. Shrewsbury*, C.A. No. N15L-03-108 CLS (Del. Super. Ct. Feb. 17, 2016). In holding in favor of the Bank, the Superior Court found that the Bank need only show that it had a valid assignment of the mortgage to enforce its rights. The Shrewsburys appealed the decision to the Court.

In reversing and remanding the decision of the Superior Court, the Court followed its reasoning in *Iowa-Wisconsin Bridge Co. v. Phoenix Finance Corporation*, *Iowa-Wisconsin Bridge Co. v. Phoenix Finance Corporation*, 25 A.2d 383, 389 (Del. 1942), stating that a debt is an essential requisite to a mortgage. While persuaded by wide-ranging case law and other respected authorities, the Court's decision relied most heavily on the United States Supreme Court case *Carpenter v. Longan*, 83 U.S. 271 (1872), holding that the "note and mortgage are inseparable; the former as essential, the latter as an incident. An assignment of the note carries the mortgage with it, while an assignment of the latter alone is a nullity."

Practical Reminders

While this case involved a residential transaction, important considerations can be applied in commercial mortgage transactions whether in connection with construction, bridge or permanent mortgage financing, a loan sale, a transfer of a loan to an affiliate of the original lender, or other assignment of the loan.

Practical reminders include:

1. Make sure that the chain of title is precise when assigning the mortgage, the note and other collateral documents such as assignments of leases and rents, guarantees and UCC's. Don't leave the note "behind."

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2. Assign and endorse the note by allonge so that the chain of title is complete. Firmly affix the allonge(s) to the underlying note.
3. Keep good records of all documentation, including recorded (*i.e.* the mortgage an assignment of mortgage) and unrecorded documents. Retain originals in a safe place (such as under the control of a custodian or servicer or in a vault) and copies of all loan documents including assignment documents.
4. When the loan is assigned, always deliver the original note along with the original allonge.

Members of our Real Estate and Finance Groups regularly handle commercial real estate financing and sales transactions throughout the country. If you have questions or would like further information, please contact Tim Davis (davist@whiteandwilliams.com; 215.864.6829) or Pat Haggerty (haggertyp@whiteandwilliams.com; 215.864.6811).

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