Let’s say you are counsel for the seller of an apartment complex in Northeast Philadelphia. Two weeks before closing, you receive a copy of a title report from buyer’s counsel. The report shows two mortgages. One is in favor of ABC Life Insurance Company, the current mortgagee, which will be paid off at closing. The other mortgage, in favor of XYZ Mortgage Company, predates your client’s purchase of the property.

You do some background work and learn that the loan from XYZ Mortgage Company was paid off when your client bought the property in 1996, but the mortgage was never satisfied. You attempt to contact XYZ Mortgage Company to get a satisfaction, but you find out that it went out of business several years ago. What do you do?

This is one of a host of problems that may be encountered in satisfying old mortgage loans. Mortgages get lost; mortgagees go out of business; they move away, they file for bankruptcy; they go into receivership, they become incompetent or die; or sometimes they are just uncooperative. This article deals with some of the problems of satisfying old mortgages and some of the solutions to those problems.

THE BEST PLACE TO START

Whenever possible, the seller should get the original title insurance company, which issued the owner’s title policy when the seller acquired title, to address the problem, whatever it is. The seller’s title company may or may not be willing to accept this responsibility, depending on the circumstances. In the example above, the seller’s title company should have obtained a satisfaction from XYZ Mortgage Company either at or following the closing in 1996. For whatever reason this did not happen, or if it did happen the satisfaction was never recorded; however, since the XYZ loan was paid off at closing in 1996, the seller’s title insurance company would have removed the XYZ mortgage as an exception from the title report and it would not have appeared in the owner’s title policy.

Because of the possibility of liability under the original owner’s policy, the seller’s title insurance company will, in all likelihood, step in and deal with the problem, either by getting the satisfaction or indemnifying the buyer’s title insurance company. In some cases, however, the seller may not be able to shift responsibility for the problem to its title company. For example, if the seller obtained a mortgage loan at or after the time the owner’s policy was issued and subsequently paid off that loan, it would be up to the seller or its counsel to deal with the absence of a satisfaction.

THE LOST MORTGAGE

Until recently, you could not satisfy a mortgage in the city of Philadelphia unless you had the original signed mortgage in hand. The 1956 mortgage satisfaction statute required that in Philadelphia, a satisfaction piece “be accompanied, on presentation for recording, by the original mortgage instrument.” This meant that a lost mortgage had to be discharged either by order of court or, more commonly, by the filing of a document called a release of mortgage. Although the release accomplished the same thing as a satisfaction, it was not as clean because it raised certain questions which could only be answered by reading the document, i.e., whether the underlying debt had been paid off and whether all or only a portion of the property covered by the mortgage had been discharged from the lien of the mortgage.

The problem of the lost mortgage does
not exist any longer. Earlier this year the Commonwealth of Pennsylvania enacted a new law relating to satisfaction of mortgages. The statute, known as the Mortgage Satisfaction Act (MSA), changed the law with respect to mortgage satisfactions in certain respects. A mortgagor is no longer required to present the original mortgage with the satisfaction piece; however, under the legislation, each recorder may elect to adopt a validation procedure requiring that the mortgagee present the original mortgage or a legible copy of the first page of the mortgage, or pay a validation fee established by the recorder. In Philadelphia, the recorder has decided that it will not require any of these in order to record a satisfaction.

UNCOOPERATIVE MORTGAGEE

What do you do if the mortgage debt has been paid off but the mortgagee, for whatever reason, refuses to file a satisfaction? The MSA gives the mortgagor certain remedies against an uncooperative mortgagee. After the mortgage and all required satisfaction and recording costs are paid in full, the mortgagee may send a notice to the mortgagor requesting that it satisfy the mortgage. If the mortgagor fails to satisfy the mortgage within 60 days after payment of the debt and receipt of the mortgagee’s request to satisfy, the mortgagee is obligated to pay the mortgagee a penalty in an amount not exceeding the original loan amount. Mortgagors who desire to exercise their rights under the MSA should keep in mind that the statute is very specific about the form and manner of giving notice to the mortgagee.

Of course, the mortgagor would have to bring legal action to enforce payment of the penalty, and the court is not obligated to impose the maximum penalty. However, the prospect of a judgment for the full amount of the loan should provide sufficient motivation for even the most recalcitrant mortgagee to satisfy a mortgage. Additionally, if the mortgagor is successful in its action to recover penalties, the mortgagee is obligated to pay the costs of the action, including the mortgagor’s attorneys’ fees. It should be noted, however, that the MSA does not authorize the court to order that the mortgage be satisfied of record, so it is possible that recourse to the MSA could leave the underlying title problem unresolved.

OFFICER SATISFACTIONS

Another method of dealing with a missing satisfaction is the so-called settlement officer satisfaction. The MSA empowers a settlement officer who pays off a residential mortgage at closing to satisfy the mortgage in certain circumstances. If the mortgagee fails to satisfy the mortgage within 90 days after it has received payment in full, the settlement officer may send the mortgagee a notice of intent to satisfy. This notice advises the mortgagee that the settlement officer intends to satisfy the mortgage unless, within 60 days after receipt of the notice, the mortgagee either satisfies the mortgage or informs the settlement officer why it should not be satisfied. If the mortgagee has not satisfied the mortgage or given a reason why it should not be satisfied within the 60-day period, the settlement officer may file a settlement officer satisfaction in the form prescribed by the MSA.

There are several factors that limit the utility of settlement officer satisfactions. First, they cannot be used in commercial transactions. They are available only in the case of residential mortgages, which are defined as mortgages on real estate containing four or fewer residential units. Second, only a “settlement officer” may record a settlement officer satisfaction. The MSA defines a settlement officer as a natural person who is a licensed title agent, an employee of an underwriter or an attorney, and who conducted the closing or who directly supervised the closing in which the mortgage was paid in full in accordance with a payoff statement provided by the mortgagee. In other words, a title officer who, in the context of a subsequent transaction, discovers a mortgage that should have been satisfied in connection with a prior transaction is not a “settlement officer” within the meaning of the MSA unless he or she handled the prior transaction also.

Finally, at any time within six years after the date of recording a settlement officer satisfaction, the mortgagee may present for recording a written objection to the satisfaction. If an objection is filed, the settlement officer satisfaction is void and the mortgage is considered unsatisfied. However, the objection is not effective as against bona fide purchasers, mortgagees or judgment creditors whose deed, mortgage or judgment was recorded prior to the time the objection was recorded.

A MISSING MORTGAGEE

While the MSA may be helpful in obtaining a satisfaction in certain circumstances, it is useless where the mortgagee cannot be located. A settlement officer satisfaction cannot be used in such circumstances either, since the MSA requires actual receipt by the mortgagee of the notice of intent to file the satisfaction, as evidenced by a copy of the return receipt attached to the settlement officer satisfaction. Thus, the first step in the process is locating the mortgagee. This may be difficult if the mortgagee has ceased doing business, merged into another entity or changed its name.

There are several Web-based tools that can be used to assist in finding a mortgagee or its officers. The Pennsylvania Department of Banking maintains information regarding the whereabouts of all currently licensed banks, lenders, brokers and other entities at its Web site, http://www.banking.state.pa.us. Personal contact with the Department of Banking may also be helpful if the mortgagee was licensed by the Department of Banking at some point in the past. In other cases, the Web site of the Pennsylvania Department of State, http://www.dos.state.pa.us/DOS/site/default.asp, can be used to search for corporate records filed by the mortgagee under both its current name and old names. These records would normally show the registered address of the entity and its last reported officers. If there is a federal connection, counsel should check available federal sites, such as the institution directory of the FDIC, http://www3.fdic.gov/idasp/.

WHEN ALL ELSE FAILS

If the mortgagee cannot be located, notwithstanding counsel’s best efforts, or if the mortgagee refuses to execute a satisfaction, the only way to deal with the absence of a satisfaction may be an action to quiet title. Under Rule 1061(b)(3) of the Pennsylvania Rules of Civil Procedure, a quiet title action may be brought “to compel an adverse party to file, record, cancel, surrender or satisfy of record … any document, obligation or deed affecting any right, lien, title or interest in land.” Although Rule 1061(b)(3) speaks in terms of compelling the defendant/mortgagee to satisfy the mortgage, Rule 1066(b)(3) makes clear that the court may also enter a final judgment ordering the recorder of deeds to satisfy the
mortgage of record.

The problem with a quiet title action is that if there is an impending closing, counsel may not be able to achieve the desired result within the required timeframe, even if the action is uncontested. In addition to the waiting period for obtaining a default judgment, service of process may be a problem if the defendant cannot be located. Under Rule 410(c), there are several alternatives to personal service, including publication, posting of the property and registered mail to the defendant’s last known address. Pursuant to Rule 430(a), however, these alternative methods of service are available only by special order of court, upon motion of the plaintiff. The motion must be accompanied by an affidavit which demonstrates that the plaintiff made a good faith effort to determine the whereabouts of the defendant.

THE BANK IN RECEIVERSHIP

There may be occasions when counsel will be required to deal with federal agencies, such as the FDIC, in order to obtain a satisfaction. If the mortgagee is in FDIC receivership, the mortgagor must submit a request for a release of lien in writing to the FDIC, along with a readable copy of the mortgage that clearly shows the recording information.

The FDIC also “highly suggests” that the mortgagor send proof that the loan was paid in full (such as a note marked “PAID,” a copy of a settlement sheet or cancelled checks), and a copy of the title report. Once the FDIC receives the required information, it may take up to 30 business days before it acts on the request. For further information about how to obtain a release of lien on real estate from the FDIC go to http://www.fdic.gov/consumers/consumer/information/lien/index.html.

There is no single correct approach to dealing with problems in obtaining a mortgage satisfaction. The specific circumstances will dictate how counsel should proceed in a particular case. In all likelihood, the problem will not be one of ultimately obtaining the satisfaction, but of timing. Accordingly, counsel should obtain a title report and attempt to address the issue as early as possible in the course of the transaction. If counsel anticipates that it will be unable to secure a satisfaction in time for closing, alternatives for dealing the problem, such as indemnification or title escrows, should be explored with the title company and the buyer. •

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