



ALAN WILSON  
ATTORNEY GENERAL

August 12, 2013

The Honorable Timothy L. Nanney  
Register of Deeds, Greenville County  
301 University Ridge, Suite 1300  
Greenville, South Carolina 29601

Dear Mr. Nanney,

You seek an opinion of this Office concerning the electronic recording of mortgage satisfactions pursuant to S.C. Code § 29-3-330(c)(i) in situations where the original mortgage, deed of trust, or other instrument securing payment has been lost or destroyed. By way of example, you provide a copy of a "Satisfaction of Security Instrument" document that was electronically recorded with the Mecklenburg County Register of Deeds Office in Charlotte, North Carolina. The "Original Secured Party" on the document is listed as Mortgage Electronic Registration Systems, Inc. (MERS), a third party entity that the original borrower and lender agree is entitled to act as mortgagee on behalf of the lender. It contains language stating "[t]his satisfaction terminates the effectiveness of the security instrument." It is signed by the Assistant Vice President of MERS, and is witnessed and notarized by a single notary public. At the bottom of the document is language stating: "Recording Requested and Prepared By: ReconTrust Company, N.A." According to its website, ReconTrust Company, N.A., "provides Document Custody, Default, and Lien Release services" for Bank of America. You specifically ask whether a similar electronically recorded document purporting to satisfy a mortgage can be filed in South Carolina pursuant to S.C. Code § 29-3-330(c)(i).

After further discussion, it is our understanding your concern is with national banks and/or third party entities that act as mortgagee on their behalf. These banks have expressed reluctance to record documents satisfying a mortgage, deed of trust, or other instrument in cases where the original has been lost or destroyed. Their reluctance in such situations is based on the language in § 29-3-330(c)(i) requiring a person recording a satisfaction instrument to also record an affidavit representing that he or she "is at the time of the satisfaction a *bona fide owner and holder* of the mortgage, deed of trust, or other instrument ...." (Emphasis added). One concern is that these third party entities are not "bona fide owners" for purposes of § 29-3-330(c)(i) and thus are not authorized to execute such an instrument. Furthermore, it is your understanding that most other states have no such "bona fide owner" affidavit requirement associated with their statutes governing the execution of satisfaction documents. Thus, these banks or other entities are also hesitant to record satisfaction instruments in South Carolina where the original mortgage or other instrument has been lost or destroyed as they find compliance with § 29-3-330(c)(i) to be burdensome in comparison to the laws of other states.

Law/Analysis

In 2008, the General Assembly adopted the Uniform Real Property Electronic Recording Act (URPERA). See Act No. 210 of 2008 (codified at S.C. Code §§ 30-6-10 et seq.). The General Assembly described the purpose of URPERA as follows:

The Uniform Real Property Electronic Recording Act was drafted to remove any doubt about the authority of the recorder to receive and record documents and information in electronic form. Its fundamental principle is that any requirements of state law describing or requiring that a document be an original, on paper, or in writing are satisfied by a document in electronic form. Furthermore, any requirement that the document contain a signature or acknowledgment is satisfied by an electronic signature or acknowledgement. The act specifically authorizes a recorder, at the recorder's option, to accept electronic documents for recording and to index and store those documents.

....

Act 210, § 1.

Pursuant to § 30-6-40(b):

(b) A register:<sup>1</sup>

- (1) who implements any of the functions listed in this section shall do so in compliance with the standards promulgated through regulation by the Office of the Secretary of State;
- (2) may receive, index, store, archive, and transmit electronic documents.
- (3) may provide for access to, and for search and retrieval of, documents and information by electronic means.
- (4) who accepts electronic documents for recording shall continue to accept paper documents as authorized by state law and shall place entries for both types of documents in the same index.
- (5) may convert paper documents accepted for recording into electronic form.
- (6) may convert into electronic form information recorded before the register began to record electronic documents.

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<sup>1</sup> See § 30-6-20(defining "register" as used in the URPERA as "the official, including the register of deeds, register of [mesne] conveyances, or clerk of court, charged with the recording and indexing duties in Chapter 5 of Title 30").

(7) may accept electronically any fee that the register is authorized to collect pursuant to Section 8-21-310.

(8) may agree with other officials of a state or a political subdivision thereof, or of the United States, on procedures or processes to facilitate the electronic satisfaction of prior approvals and conditions precedent to recording and the electronic payment of fees.

§ 30-6-40(b).

If a register of deeds or other official responsible for recording and indexing has elected to accept electronic records, § 30-6-30 provides that documents which are recordable in a paper format may be validly recorded in electronic format in accordance with the following:

(a) If a law requires, as a condition for recording, that a document be an original, be on paper or another tangible medium, or be in writing, the requirement is satisfied by an electronic document satisfying this chapter.

(b) If a law requires, as a condition for recording, that a document be signed, the requirement is satisfied by an electronic signature.

(c) A requirement that a document or a signature associated with a document be notarized, acknowledged, verified, witnessed, or made under oath is satisfied if the electronic signature of the person authorized to perform that act, and all other information required to be included, is attached to or logically associated with the document or signature. A physical or electronic image of a stamp, impression, or seal need not accompany an electronic signature.

§ 30-6-30. Furthermore, § 30-6-60 states that "[i]n applying and construing this Uniform Act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among the states that enact."

With the above provisions of URPERA in mind, we now look to the relevant provisions § 29-3-330 which sets forth the law governing the satisfaction of mortgages, deeds of trust, or other instruments securing the payment of money and being a lien upon real property. Situations in which the original mortgage or other instrument has been lost or destroyed are governed by subsection (c)(i) which states:

(c)(i) In case the original mortgage, deed of trust, or other instrument securing the payment of money and being a lien upon real property has been lost or destroyed it may be satisfied, either by the owner and holder of the instrument in person or his personal representative or duly authorized attorney in fact, by an instrument in writing duly executed in the presence of two witnesses and acknowledged pursuant to the Uniform Recognition of Acknowledgments Act in Chapter 3, Title 26, and in addition **the person executing the satisfaction shall make an affidavit that he or the person he represents is at the time of the satisfaction a bona fide owner and holder of the mortgage, deed of trust, or other instrument securing the payment of money and being a lien upon real**

**property and that has not been assigned, hypothecated, or otherwise disposed of. The affidavit must be recorded along with the satisfaction.** The maker of any affidavit which is false is guilty of perjury and punished as by law provided for the punishment of perjury.

§ 29-3-330(c)(i) (emphasis added).

Looking at the plain language<sup>2</sup> of the above provision, it is clear that the sample electronically recorded satisfaction instrument provided would not meet the recording requirements of § 29-3-330(c)(i) if filed in South Carolina. While the document is notarized, it was not executed in the presence of two witnesses and is not accompanied by the requisite affidavit. Furthermore, although the provisions of URPERA permit such satisfaction instruments to be accepted for recording in electronic form, nowhere in URPERA is there expressed a manifest intent to supersede or nullify the aspects of prior legislation setting forth the conditions that must be met for a document to be valid and recordable. Thus, despite the enactment of URPERA a satisfaction instrument must still be executed in the presence of two witnesses, notarized, and accompanied by the affidavit required by § 29-3-330(c)(i).

We are not persuaded by the concerns expressed that third party entities such as MERS who, by agreement, act as mortgagee on behalf of the original lender (usually national banks) lack the authority to make the affidavit required by § 29-3-330(c)(i) because they are not a "bona fide owner and holder" of the mortgage. That provision only requires the person executing the satisfaction to "make an affidavit that he *or the person he represents* is at the time of the satisfaction a bona fide owner and holder of the mortgage, deed of trust, or other instrument ...." § 29-3-330(c)(i) (emphasis added). Even assuming such a third party entity acting as mortgagee for the original lender is not the "bona fide owner and holder" of the mortgage for purposes of § 29-3-330(c)(i), we believe they are at least considered the representative of the bona fide owner and holder for purposes of that provision. Therefore, we believe such third party entities are authorized to execute such satisfaction instruments and make the affidavit required by § 29-3-330(c)(i).

You also indicate that national banks and other third party entities who serve as mortgagees in numerous states may find it cumbersome to comply with South Carolina's laws governing the satisfaction of mortgages as compared to the laws of other states. By way of example, and as evidenced in the sample satisfaction instrument you have provided, we note North Carolina law concerning the execution of a satisfaction instrument is less stringent. As set forth in N.C. Gen. Stat. § 45-36.10(a):

(a) A document is a satisfaction of a security instrument if it does all of the following:

- (1) Identifies the type of security instrument, the original parties to the security instrument, the recording data for the security instrument, and the office in which the security instrument is recorded.
- (2) States that the person signing the satisfaction is the secured creditor.

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<sup>2</sup> See Harris v. Anderson County Sheriff's Office, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009) ("[Courts] will give words their plain and ordinary meaning, and will not resort to a subtle or forced construction that would limit or expand the statute's operation").

(3) Reserved.

(4) Contains language terminating the effectiveness of the security instrument.

(5) Is signed by the secured creditor and acknowledged as required by law for a conveyance of an interest in real property.

Furthermore, North Carolina law provides the following standard form for such instruments:

(a) Standard Form.--No particular phrasing is required for a satisfaction of a security instrument. The following form, when properly completed, is sufficient to satisfy the requirements of G.S. 45-36.10(a):

“SATISFACTION OF SECURITY INSTRUMENT

(G.S. 45-36.10; G.S. 45-37(a)(7))

The undersigned is now the secured creditor in the security instrument identified as follows:

Type of Security Instrument: (identify type of security instrument, such as deed of trust or mortgage)

Original Grantor(s): (Identify original grantor(s), trustor(s), or mortgagor(s))

Original Secured Party(ies): (Identify the original beneficiary(ies), mortgagee(s), or secured party(ies) in the security instrument)

Recording Data: The security instrument is recorded in Book .... at Page .... or as document number ..... in the office of the Register of Deeds for ..... County, North Carolina.

This satisfaction terminates the effectiveness of the security instrument.

Date:

\_\_\_\_\_  
(Signature of secured creditor)

[Acknowledgment before officer authorized to take acknowledgments]”

N.C. Gen. Stat. § 45-36.11(a).<sup>3</sup>

Unlike S.C. Code § 29-3-330(c)(i), the preceding statutes do not require, in cases where the original mortgage is lost or destroyed, that a satisfaction instrument be executed in the presence of two witnesses or that it be accompanied by an affidavit asserting that the person executing it is a bona fide

<sup>3</sup> North Carolina has also adopted URPERA. See N.C. Gen. State. §§ 47-16.1 to -16.7.

owner and holder of the mortgage or a representative of such person. Thus, if the General Assembly finds that § 29-3-330(c)(i) currently imposes too heavy a burden on national banks and other lenders who conduct business in numerous states that have less stringent recording standards in such situations, it can certainly amend that provision. The preceding North Carolina statutes simply serve as an example of how the General Assembly could accomplish this.

Nonetheless, we note that such national banks and their third party representatives have chosen to transact business in the State of South Carolina; thus, as a result their own actions they may be subject to our State's laws. See § 36-2-803 (S.C. courts have personal jurisdiction over cause of action arising from person's conduct including, *inter alia*, transacting business in State, having an interest in real property in State, or entering into contract to be performed in whole or in part in State); State v. NV Sumatra Tobacco Trading Co., 379 S.C. 81, 666 S.E.2d 218 (2008) (holding court had personal jurisdiction over cigarette manufacturer even though it was organized in Indonesia, was not registered to do business in S.C., had no office in S.C., and no representative that had been to S.C.; sale of corporation's cigarettes in all 50 states established it had "purposely availed itself of conducting business in all 50 states, including South Carolina," and thus has sufficient minimum contacts in S.C. for purposes of due process). Therefore, these banks and their third party representatives should be aware that their refusal or failure to enter satisfaction after full payment and a proper request for such may subject them to substantial penalties under § 29-3-320 which provides:

Any holder of record of a mortgage having received such payment, satisfaction, or tender as aforesaid who shall not, by himself or his attorney, within three months after such certified mail, or other form of delivery, with a proof of delivery, request and tender of fees of office, repair to the proper office and enter satisfaction as aforesaid shall forfeit and pay to the person aggrieved a sum of money not exceeding one-half of the amount of the debt secured by the mortgage, or twenty-five thousand dollars, whichever is less, plus actual damages, costs, and attorney's fees in the discretion of the court, to be recovered by action in any court of competent jurisdiction within the State. And on judgment being rendered for the plaintiff in any such action, the presiding judge shall order satisfaction to be entered on the judgment or mortgage aforesaid by the clerk, register, or other proper officer whose duty it shall be, on receiving such order, to record it and to enter satisfaction accordingly.

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§ 29-3-320.

### Conclusion

It is the opinion of this Office that the sample satisfaction instrument provided from North Carolina would not meet the requirements of S.C. Code § 29-3-330(c)(i) concerning the execution of such instruments in cases where the original mortgage or other instrument securing payment is lost or destroyed. Specifically, it was not executed in the presence of two witnesses and does not contain a separate affidavit made by the executor asserting that he, or the person he represents, is the "bona fide owner and holder of the mortgage, deed of trust, or other instrument securing the payment of money ...." § 29-3-330(c)(i). Although in 2008 the General Assembly did enact URPERA permitting a register of

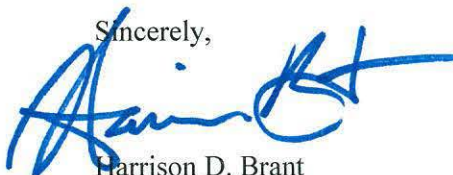
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deeds to accept electronically documents such as a satisfaction instrument which have traditionally been recorded in paper format, no provision in URPERA expresses a manifest intent to supersede or nullify the recording requirements for certain instruments set forth by prior legislation such as § 29-3-330(c)(i). Thus, pursuant to § 29-3-330(c)(i) a satisfaction instrument must still be executed in the presence of two witnesses and be accompanied by the requisite affidavit.

We do not believe that third party entities who, by agreement, act as mortgagee on behalf of national banks lack the authority to execute the affidavit required by § 29-3-330(c)(i) on the basis they are not a "bona fide owner and holder of the mortgage ...." The language of that provision expressly allows such an affidavit to be executed by a person who represents the bona fide owner and holder of the mortgage. Therefore, it is our opinion such a third party entity named as the mortgagee by agreement is considered the representative of the bona fide owner and holder for purposes of § 29-3-330(c)(i).

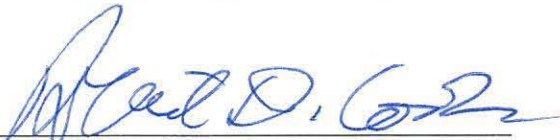
While we recognize national banks and/or their third party representatives may find compliance with S.C. Code § 29-3-330(c)(i) to be cumbersome in comparison to the recording laws of other states, they have chosen to transact business in South Carolina; thus, as a result their own actions they may be subject to our State's laws. With that in mind, these national banks and/or their third party representatives should be aware that their refusal or failure to enter satisfaction after full payment of the debt owed and a proper request for satisfaction may subject them to substantial financial penalties under § 29-3-320. We note, however, that if the General Assembly finds § 29-3-330(c)(i) currently imposes too heavy a burden upon these national banks and/or their third party representatives who conduct business in numerous states that have less stringent recording standards in such situations, it can certainly amend the law as it sees fit to make compliance with § 29-3-330(c)(i) less burdensome.

Sincerely,



Harrison D. Brant  
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook  
Solicitor General