

MA Supreme Judicial Court Affirms Land Court Ruling in Ibanez Decision

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Lenders and consumers alike have anxiously awaited the outcome of the Massachusetts Supreme Judicial Court's (the "SJC's") review of the Massachusetts Land Court's 2009 landmark decision in *U.S. Bank, Nat'l Ass'n. v. Ibanez*, where two mortgage foreclosures were invalidated because the foreclosing lenders were not able to produce sufficient proof of mortgage ownership. Multiple mortgage assignments and securitization agreements are now common practice in the mortgage industry, and consumer advocates have come to find that dotting the "i's" and crossing the "t's" with respect to mortgage transfers may be the Achilles heel for some lenders. The Land Court's Ibanez decision was significant for its finding that only fully executed assignments in recordable form are sufficient to prove mortgage ownership, rejecting other forms of evidence, such as securitization and pooling agreements.

The SJC is one of the first state supreme courts to weigh in on the evidence necessary for foreclosing lenders to demonstrate that they validly hold mortgages they are attempting to foreclose. Last week the suspense ended. On January 7, 2011, the SJC issued its opinion in the Ibanez case that makes clear that the foreclosing lender must be able to document ownership of the mortgage to be foreclosed before issuing notices of foreclosure. Importantly, however, the SJC did not restrict evidence of mortgage ownership to fully executed assignments in "recordable form," as the Land Court had found. Rather, the SJC

noted that a foreclosing lender may document its ownership in many ways, including securitization agreements.

The underlying cases leading to the SJC decision arose when U.S. Bank, N.A. and Wells Fargo Bank, N.A., trustees of securitized trusts, filed complaints in the Massachusetts Land Court seeking to validate foreclosure sales each had conducted purportedly as trustee of a securitized trust that held the foreclosed mortgages as part of a pool. The Land Court found that the lenders could not prove that they held valid assignments of the mortgages prior to foreclosing under the Massachusetts statutory power of sale. The evidence of ownership produced by U.S. Trust included an assignment executed "in blank" and an assignment dated more than a year after the foreclosure sale. Wells Fargo held an assignment that was signed ten months after the foreclosure sale, but with a stated "effective date" several weeks prior to the sale. Finding this evidence insufficient to document the lenders' ownership interest in the mortgages at the time that they were foreclosed, the Land Court held that the foreclosures were invalid and dismissed the complaints. Both lenders asked the Land Court to vacate the orders of dismissal, arguing that securitization agreements transferring ownership of the mortgage loans were sufficient to confer the status of holder of the mortgage prior to the foreclosure sales. The Land Court rejected these arguments and found that failure to possess assignments in recordable form that were executed prior to the notice of sale was fatal to the lenders' claims that they were holders of the mortgages at the time when they sent out notices of foreclosure and advertised the sales.

On appeal, the SJC agreed with the conclusions of the Land Court that the U.S. Bank and Wells Fargo foreclosures were invalid because the lenders had insufficient evidence of ownership. However, it is important to note that the SJC did not adopt the Land Court's restrictive view concerning the documentation a lender must present to prove ownership of a mortgage prior to foreclosure; the SJC

expressly rejected the Land Court's finding that lenders must have an assignment in recordable form prior to issuing notices of foreclosure. While the SJC agreed that lenders may have other evidence of ownership (such as executed securitization agreements that sufficiently identify the mortgage subject to foreclosure), the SJC found insufficient certain documentation frequently relied upon by lenders as proof of ownership including post-sale assignments, assignments with a "retroactive effective date" and assignments "in blank." The SJC also concluded that evidence of ownership of the promissory note alone is insufficient to prove ownership of the mortgage because in Massachusetts the mortgage does not "follow the note."

The Ibanez opinion makes it clear that a party seeking to foreclose a mortgage in Massachusetts must have a valid assignment from the originating mortgagee and all subsequent assignees, and the chain of ownership must be unbroken. While recording assignment(s) of mortgage is not required, the SJC noted that it is "better practice." Short of possessing such valid assignment(s), however, the lender must be prepared to demonstrate that the mortgage was contractually transferred by executed written agreements assigning the loan to the pool, where the schedule of loans clearly and specifically identifies the mortgage being assigned. The foreclosing lender also must be able to demonstrate that its predecessor validly held the mortgage at the time of assignment, as did each prior assignor at the time of assignment.

The effects of the Ibanez case on the industry are uncertain. On the one hand, the holding -- that to fulfill the statutory power of sale requirements, a foreclosing party must be "[t]he mortgagee or his administrators, successors or assigns" -- does no more than apply legal principles and requirements already well established in Massachusetts law. The SJC acknowledged as much, by stating that the ruling is not limited to prospective foreclosures because it does not reflect a change in the law. On the other hand, the decision rejects a

practice by some foreclosing entities in Massachusetts (that rely on assignments in the form criticized by the SJC), and it contradicts REBA Title Standard No. 58(3) issued by the Massachusetts Real Estate Bar Association ("REBA") providing that "title is not defective by reason of ... [t]he recording of an assignment of Mortgage executed either prior, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record, by the Assignee." More unsettling is a concurring opinion issued in Ibanez raising questions, without elaboration, about the potential effects of the decision on third parties who purchased homes from lenders after a foreclosure.

Going forward, it is clear that lenders seeking to foreclose in Massachusetts must make certain that they can document ownership of the mortgage at issue, with no gaps in the chain of ownership, before sending out a notice of sale. Additionally, lenders with Massachusetts foreclosures should consider auditing their internal foreclosure procedures and mortgage ownership documentation in order to be prepared to answer demands from third parties, such as buyers and title insurers, seeking confirmation that foreclosures are valid under Ibanez.

Take-aways from Ibanez in brief:

- Foreclosing parties are subject to strict compliance with foreclosure law in conducting power of sale foreclosures in Massachusetts
- Foreclosure by a party that has not been assigned the mortgage has no standing, and the foreclosure is void
- Where the mortgage is assigned after origination, the foreclosing party must have validly been assigned the mortgage prior to noticing the foreclosure sale
- A valid mortgage assignment is NOT limited to an assignment of mortgage in recordable form; parties can show documentary evidence of the assignment of mortgage (e.g., a signed

securitization agreement that specifically identifies the subject mortgage)

- A mortgage is a conveyance of an interest in real property, and it must contain the name of an assignee to be valid (assignments of mortgage in blank are void)
- The mortgage does not “follow the note” in Massachusetts; the mortgage holder holds the mortgage in trust for the purchaser of note; the note purchaser has equitable right to obtain an assignment of mortgage
- REBA Title Standard No. 58(3) is not to be interpreted as allowing an entity that does not hold a mortgage to foreclose and then cure the cloud on title by a later assignment of mortgage stating a backdated “effective date”(“effective date” language is not operative – the date the assignment was executed is operative)
- REBA Title Standard No. 58(3) is effective for a confirmatory assignment that is confirmatory of an earlier, valid assignment (can be used to cure a defect in earlier assignment)
- Ibanez ruling is not prospective because Ibanez decision is not a change in common law (holding not limited to future foreclosures)