

January 13, 2011 | Posted By

[BANKS LOSE IMPORTANT FORECLOSURE CASE IN MASSACHUSETTS HIGH COURT](#)

US Bancorp and Wells Fargo & Co. lost a foreclosure case in Massachusetts' highest court last week that will likely make foreclosures more difficult in Massachusetts, and could also influence other courts in the clash between bank foreclosure practices and state real estate law.

The state Supreme Judicial Court upheld a judge's decision holding that two foreclosures were invalid because the banks did not prove they owned the mortgages. In both cases, the mortgage was pooled with other mortgages into a trust and converted into mortgage-backed securities that can be bought and sold by investors. US Bank was the trustee of one of the trusts, and Wells Fargo was the trustee of the other trust. In both cases, the back-up documentation provided to the court did not clearly demonstrate that the mortgage had been transferred to the trust. In fact, in both cases a written assignment of the mortgage to the trust was executed and recorded months after the completion of the foreclosure. The assignment to Wells Fargo as trustee declared an effective date that preceded the publication of the notice of sale (one of the conditions for a foreclosure in Massachusetts) and the foreclosure sale. In upholding the lower court's decision, the court stated that "the judge did not err in concluding that the securitization documents submitted by [US Bank and Wells Fargo] failed to demonstrate that they were the holders of the...mortgages...at the time of the publication of the notices [of sale] and the sales. The judge, therefore, did not err in rendering judgments against [US Bank and Wells Fargo]." A judge in a concurring opinion added that he was surprised by "the utter carelessness with which [US Bank and Wells Fargo] documented the titles to their assets."

One of the arguments made by US Bank and Wells Fargo was that, because they held the mortgage note, they had a sufficient financial interest in the mortgage to allow them to foreclose. The law of many states provides that the mortgage follows the note, so that if a party has possession of the note, it is presumed to have good title to the mortgage. Massachusetts, however, is not one of those states. In Massachusetts, where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage. Rather, the holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment. In the absence of a valid written assignment of a mortgage or a court order of assignment (neither of which were provided by either US Bank or Wells Fargo), the mortgage holder remains unchanged.

While it remains to be seen whether banks will be permitted to get away with shoddy documentation in states where the law is that the mortgage follows the note, this decision

nevertheless should serve as a warning to banks and other lenders to have their recordkeeping in order prior to commencing foreclosure proceedings.

U.S. Bank v. Ibanez, 10694, Supreme Judicial Court of Massachusetts (Boston)

Authored by:

[Sherwin F. Root](#)

(213) 617-5465

sroot@sheppardmullin.com