

## Commercial Property - USA

Court invalidates foreclosures based on ineffective mortgage assignments

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### Background

Multiple assignments of mortgage loans from one lender to another are common, particularly in the securitisation market where mortgage loans are pooled, sold and assigned to a securitisation trustee, then converted into mortgage-backed securities and sold to investors. The enforceability of remedies under the mortgage loan documents, including foreclosure remedies, is important to the assignee of the mortgage loan. Generally, foreclosure remedies may be exercised only by the then holder of the mortgage. In many transactions, the note and the mortgage are assigned and physically transferred, pursuant to assignment documents, to a trustee that holds the note, the mortgage and other loan documents on behalf of investors.

As discussed in the American Securitisation Forum white paper on the subject,<sup>(1)</sup> in many states, even where a mortgage is not specifically assigned to the assignee of the note, the mortgage is considered to be automatically assigned to the assignee of the note under the common law rule that 'the mortgage follows the note'. However, some states do not follow the general common law rule and require a mortgage to be specifically assigned to the assignee of the note.

In its recent decision in the joint case *US Bank National Association v Antonio Ibanez* and *Wells Fargo Bank v Mark A LaRace*,<sup>(2)</sup> the Massachusetts Supreme Judicial Court held that a foreclosure in Massachusetts may be exercised only by the then holder of the mortgage, and that a clear chain of title must be established to show that the party foreclosing is the valid holder of the mortgage. The court held that the two securitisation trustees had failed to make the required showing that they were the holders of the mortgages at the time of foreclosure.

### Facts

The *Ibanez* decision consisted of two appeals from trial court rulings that were disposed of in one consolidated opinion. The facts of each case are similar. In each case, a Massachusetts property owner received a loan secured by a mortgage in favour of the originating lender. Each mortgage was recorded and the originating lender executed an assignment of the mortgage in 'blank', meaning that the name of the assignee was unspecified. Each loan was then assigned multiple times and eventually pooled, sold and assigned to a securitisation trustee with other mortgage loans and securitised. The trustee in each case foreclosed on the property and purchased the property back at the foreclosure sale. Months after each foreclosure sale, the record holder of the mortgage executed and recorded an assignment of the mortgage to the trustee. The trustee in each case then brought a quiet title action in trial court to declare that it held clear title to the property.

### Decision

The trial court in each case rejected the trustee's quiet title action on the grounds that the trustee could not establish title to the mortgage before commencing foreclosure proceedings. On appeal, the Massachusetts Supreme Judicial Court affirmed both trial court rulings. It held that under Massachusetts law, the foreclosing entity must hold the mortgage at the time of the notice and sale in order to identify itself as the present holder in the notice of sale and in order to have the authority to foreclose under the power of sale. The court rejected the evidence and arguments presented by each trustee to establish title to the mortgages.

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#### *Securitisation documents*

The trustees first argued that the mortgages were assigned to them pursuant to certain securitisation documents, such as private placement memoranda, trust agreements and pooling and servicing agreements. One trustee presented a private placement memoranda given to prospective investors which stated that notes and mortgages were intended to be assigned to a trustee. However, the court held that the private placement memoranda stated only an intent to assign the mortgage and did not constitute a present assignment of the mortgage to the trustee. The trustee also presented a pooling and servicing agreement assigning certain mortgage loans set forth on a schedule attached to the agreement. However, the copy of the agreement presented to the court did not have a schedule attached to the agreement. Therefore, the court held the agreement to be an insufficient assignment.

The other trustee presented a similar agreement assigning certain mortgage loans set forth on a schedule attached to the agreement. The court held the agreement to be an insufficient assignment because the schedule attached to the agreement "failed to identify with adequate specificity" the subject mortgage as one of the mortgages assigned by the agreement. Furthermore, the court held that even if the securitisation agreements clearly assigned the mortgage to the trustee from the assignor executing the securitisation agreements, the trustees had not established a clear chain of title of prior assignments from the record holder of the mortgage to the assignor under the securitisation documents. Although the court held that the securitisation documents in these cases were insufficient to establish assignment of the mortgages, it did not preclude the assignment of mortgages pursuant to securitisation documents in all cases. The court stated:

*"Where a pool of mortgages is assigned to a securitised trust, the executed agreement that assigns the pool of mortgages, with a schedule of the pooled mortgages that clearly and specifically identifies the mortgage at issue as among those assigned, may suffice to establish the trustee as the mortgage holder."*

Furthermore, the court held that an assignment of a mortgage need not be recorded or in recordable form in order for a mortgage to be effectively assigned.

#### *Assignments in 'blank'*

The trustees further argued that the assignments in 'blank' executed by the record holder of the mortgages were effective assignments of the mortgages. However, the court held that under Massachusetts law, a mortgage assignment that does not name the assignee conveys nothing and is void. Therefore, such assignments in 'blank' were not effective assignments of the mortgages.

#### *Underlying mortgage notes*

The trustees then argued that they had a sufficient interest in the mortgages to allow them to foreclose because they held the underlying mortgage notes. However, the court held that, unlike other states which follow the general rule that 'the mortgage follows the note', "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". Instead, the mortgage holder holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of mortgage. Therefore, although the purchaser of the note has an equitable right to the mortgage, the mortgage must still be assigned to the purchaser of the note as a condition precedent to the exercise of remedies under the mortgage.

#### *Post-foreclosure assignments*

Finally, the trustees argued that the assignments executed and recorded after the foreclosure were sufficient to establish their authority to foreclose, when taken together with evidence of an assignment before the foreclosure. However, the court held that a mortgage must be assigned to the foreclosing entity before the foreclosure and that an assignment of the mortgage cannot be executed following the foreclosure to clear up title. Furthermore, the court held that an assignment executed following the foreclosure cannot be treated as a pre-foreclosure assignment simply by declaring an effective date that precedes the foreclosure.

#### **Comment**

Although the *Ibanez* decision is binding only in Massachusetts, the case illustrates the importance for lenders, loan servicers and securitisation trustees of understanding state foreclosure laws to ensure that the necessary documents and procedures are followed in foreclosure proceedings.

For further information on this topic please contact [Kenneth M Jacobson](#) or [Devan H Popat](#) at *Katten Muchin Rosenman LLP* by telephone (+1 312 902 5200), fax (+1 312 902 1061) or email ([kenneth.jacobson@kattenlaw.com](mailto:kenneth.jacobson@kattenlaw.com) or [devan.popat@kattenlaw.com](mailto:devan.popat@kattenlaw.com)).

#### **Endnotes**

(1) "Transfer and Assignment of Residential Mortgage Loans in the Secondary Mortgage

Market", November 16 2010.

(2) *US Bank National Association, as Trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z v Antonio Ibanez and Wells Fargo Bank, NA, as Trustee for ABFC 2005-OPT 1 Trust, ABFC Asset Backed Certificates, Series 2005-OPT 1 v Mark A LaRace*, No 10694 (D Mass, January 7 2011).

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