A Must Watch Case: *Eaton v. Federal National Mortgage Association (FNMA)*

Massachusetts High Court Signaling Impending Doom For MERS And Securitized Mortgage Lenders

The Massachusetts Supreme Judicial Court has just issued an unusual order in the very important ***Eaton v. Federal National Mortgage Association*** case, indicating its deep concern over whether its ruling will have a disastrous impact on foreclosure titles and, if so, whether its ruling should be applied prospectively rather than retroactively.

As outlined in my prior post on the case, the Court is considering the controversial question of whether a foreclosing lender must possess both the promissory note and the mortgage in order to foreclose. If the SJC rules against lenders, it could render the vast majority of securitized mortgage foreclosures defective, thereby creating mass chaos in the Massachusetts land recording and title community. If you thought *U.S. Bank v. Ibanez* was bad, *Eaton v. FNMA* could be the Nuclear Option!

The text of the order is as follows:

> ORDER : Having heard oral argument and considered the written submissions of the parties and the various amici curiae, the court hereby invites supplemental briefing on the points described below. Supplemental briefs shall not exceed fifteen pages and shall be filed on or before January 23, 2012. 1. It has been claimed that requiring a unity of the mortgage and the underlying promissory note, in order for there to be a valid foreclosure, would cloud any title that has a foreclosure in the chain of title, regardless of how long ago the foreclosure occurred. The parties are invited to address whether they believe that such a requirement would have such an effect, and if so, what legal or practical measures exist that might limit the consequences of such a requirement. 2. It also has been suggested that, if the court were to hold that unity of the mortgage and note is required under existing law, the court's holding should be applied prospectively only. The parties are invited to indicate on what authority they believe (or do not believe) the court could make such a holding prospective only.

Reading into this order, perhaps a majority of the justices are already leaning towards ruling against the lenders and want to limit the potentially disastrous effect it could have on existing titles and pending and future foreclosures. Interestingly, lenders in the ***U.S. Bank v. Ibanez*** case asked the SJC to apply its ruling prospectively, but it declined, thereby leaving hundreds to thousands of property owners and title insurers to clean up toxic foreclosure titles.

In my opinion, an adverse ruling against lenders in *Eaton* could be the apocalyptic scenario, rendering open to challenge any title with a previous foreclosure in it and inserting a fatal wedge into the current securitized mortgage system. Hopefully this time around the Court is more

sensitive to how its ruling will impact the real estate community. It will be interesting to see how this case continues to develop. We will continue to monitor it.

***Richard D. Vetstein, Esq.** is an experienced **Massachusetts real estate litigator and attorney**. Please **contact him** if you are dealing with a Massachusetts foreclosure title dispute.*