

In denying summary judgment as to liability, the court expressly held that there existed at least one genuine issue of material fact as related to the claims set forth by the defendant in his special defenses and, accordingly, the case would be set down for trial.

Massachusetts Supreme Judicial Court Affirms Ibanez

by Patricia Antonelli and Thomas J. Enright

Partridge Snow & Hahn LLP
USFN Member (MA, RI)

 Lenders and consumers alike have anxiously awaited the outcome of the Massachusetts Supreme Judicial Court's (SJC) 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 Massachusetts SJC is one of the first state supreme courts to weigh in on the evidence necessary for foreclosing lenders to demonstrate they validly hold mortgages that they are attempting to foreclose. The suspense has 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.

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, 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*.

Editor's Note: Due to space constraints, this printed article is condensed. To view the full article, which includes discussion of the underlying cases and convenient, bulleted take-aways, go to the article library at www.usfn.org.

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