

Case Focus

US Bank v. Ibanez: The Mortgage Industry's Documentation Practices in Focus

By Christopher J. DeCosta

In *US Bank National Association v. Ibanez*, 458 Mass. 637 (2011), the Supreme Judicial Court (SJC) upheld the Massachusetts Land Court's invalidation of two foreclosures. While hailed by some as an indictment of securitized lending-- from a purely legal standpoint, *Ibanez* did not depart in any substantial way from the prior Massachusetts case law of foreclosure. However, *Ibanez* did flatly reject that common practice of relying on post-foreclosure assignments of mortgages as sufficient to validate their authority to foreclose pursuant to Real Estate Bar Association Title Standard No. 58(3). Because that practice was widespread prior to *Ibanez*, many titles derived from such foreclosures may be adversely affected, and many homes may be rendered unmarketable. For foreclosing parties faced with litigation regarding the validity of a foreclosure, *Ibanez* provides some specifics regarding how they might prove legal authority to foreclose where the assignment recorded at the Registry of Deeds was executed after the foreclosure.

The lenders involved in *Ibanez* were trustees of mortgage-backed securitization trusts. They brought non-judicial foreclosure actions as assignees of the original mortgage holders, on the grounds that the borrowers were in default of their mortgages. Each lender relied on a mortgage assignment executed and recorded months *after* its foreclosure sale. After concluding the foreclosures, the lenders were unable to obtain title insurance, and therefore unable to market and sell the properties they had foreclosed on. Consequently, the lenders brought actions to quiet title and for declaratory judgment in the Land



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Court. The lenders sought a declaration that their foreclosures were valid based upon post-foreclosure mortgage assignments.

Initially, neither borrower contested the action. Nonetheless, on the lenders' motion for default judgment, the Land Court entered judgment in favor of the borrowers and against the lenders. The Land Court held that the foreclosures were invalid because the lenders had not been assigned the mortgages until after the foreclosure, and therefore lacked legal authority to conduct the foreclosures under Massachusetts law. The Land Court subsequently denied the lenders motion to vacate the judgment, in which they had argued that they had been assigned the mortgages prior to the foreclosures.

On appeal to the SJC, the lenders argued that although their assignments were executed after the foreclosure, their foreclosures were valid because: 1) According to Title Standard 58(3), "title is not defective by reason of ... the recording of an assignment executed and recorded ... subsequent to foreclosure;" 2) under the rule of *Carpenter v. Longan*, 83 U.S 271 (1872), the promissory note had been assigned before the foreclosure and therefore the mortgages "followed the note;" and 3) the mortgages had previously been assigned by virtue of the execution of mortgage assignments "in blank" (without naming the assignee) and by the express language of the securitization documents that purportedly assigned the mortgages into the trust.

The SJC rejected each of these arguments. First, it disapproved of Title Standard 58(3) insofar as it would allow for a foreclosing party to remedy a defective foreclosure retroactively. A written pre-foreclosure assignment of the mortgage to the foreclosing party must be in place in order to establish the authority of the foreclosing party to institute non-judicial foreclosure proceedings. Accordingly, the lenders could not rely on assignments of mortgages executed after their foreclosures. Second, Massachusetts has not adopted the "mortgage follows the note" view expressed in *Carpenter*. In Massachusetts, assignment of a promissory note secured by a mortgage creates in the endorsee an equitable right to an assignment of the mortgage, but it does not, in and of itself, constitute an assignment.

Third, the lenders had the burden of establishing that the mortgages had been assigned to them *by the time they sent pre-foreclosure notices*. The documents submitted by the lenders simply failed to carry that evidentiary

burden. Unsigned securitization and sale agreements, missing the loan schedules which could have shown that the specific mortgages involved in the foreclosure were assigned to the lenders before the foreclosure were insufficient for this purpose. Likewise, an assignment of a mortgage “in blank” without identifying the assignee does not constitute a valid assignment. For these reasons, the SJC held that the lenders failed to prove that their foreclosures were valid.

For consumers facing foreclosure, *Ibanez* gives another avenue by which to delay a foreclosure, albeit temporarily. There is nothing in *Ibanez* that precludes the lender from simply re-noticing the sale after executing a recordable assignment of mortgage. The reality is that after the original Land Court decision was issued in 2009, lenders reversed many of their foreclosures and conducted them again in compliance with *Ibanez*. Therefore, going forward, these types of defects in foreclosure proceedings should become scarce.

For foreclosing parties, *Ibanez* issues a warning against “utter carelessness” in documenting authority to foreclose. The court took no issue with mortgage securitization arrangements. However, to meet its burden under Massachusetts foreclosure law, the foreclosing party must provide written documentation of a pre-foreclosure assignment to the foreclosing party. The documentation need not be in recordable form and may be confirmed by a post-foreclosure assignment recorded at the Registry of Deeds.

For those many individuals and entities in Massachusetts who purchased real estate the title of which depends on a mortgage foreclosure within the chain of title, *Ibanez* casts a specter that their title may be defective and unmarketable. The path to clear those titles is far from certain and likely dependent, among other things, on the daunting task of reconstructing the off-record documentation of securitized mortgage foreclosures that took place years ago. Whether a good faith purchaser has standing to pursue a quiet title action in such cases may be dependent on how the SJC rules in *Bevilacqua v. Rodriguez*, Massachusetts Land Court, No. 10 MISC 427157 (August 26, 2010), in which the Land Court held that such good faith purchasers do *not* have standing. ■