Massachusetts Supreme Judicial Court Voids Foreclosures for Failure to Demonstrate Status as Mortgage Holders

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In a major blow to banks foreclosing in non-judicial foreclosure states, Massachusetts' highest court today upheld a lower court ruling that voided the foreclosure of two homes by Wells Fargo and U.S. Bancorp on the grounds that they failed to make the required showing that they were the holders of the mortgages at the time the foreclosures were commenced. Although the underlying statutory framework limits the ruling's impact outside of Massachusetts, the holding in *U.S. Bank N. A. v. Ibanez* and *Wells Fargo Bank NA v. LaRace et al* (Massachusetts Supreme Judicial Court, No. SJC-10694) nevertheless creates problems for banks defending similar collateral attacks throughout the country.

The mortgages in question in these cases were held by different trusts that were assigned the loans after origination. As is typical in these transactions, the original lenders executed mortgage assignments in blank, and the current holders possessed both the assignments in blank and the original notes. On the other hand, the evidence on record did not show that the mortgage were actually assigned to the trusts. Under Massachusetts law, the foreclosing entity must, by statute, be one of the enumerated parties authorized to foreclose under Mass. G.L. c. 183, § 21, and c. 244, § 14. The parties who foreclosed were not one of the enumerated entities.

Based on this statutory framework, the Supreme Judicial Court rejected the arguments: (1) that the assignments in blank were effective assignments in their own right; (2) that, because the trusts possessed the mortgage note, they had a sufficient financial interest in the mortgage to allow them to foreclose; (3) the post-sale assignments were sufficient to establish their authority to foreclose; and (4) the post-sale assignments were sufficient when taken in conjunction with the evidence of a pre-sale assignment.

The court concluded that the mortgage holder has significant power in foreclosures without judicial oversight and, as a result, such mortgage holders must be held strictly to the law's requirements. Failure to do so will void the foreclosure sale, the court maintained. Most damaging, the court likewise rejected plaintiffs' request that the ruling be prospective in its application.

Notwithstanding the above ruling, the court suggested how banks could properly transfer mortgages in Massachusetts via securitization trusts: "The executed agreement that assigns the pool of mortgages, with a schedule of the pooled mortgage loans that clearly and specifically identifies the mortgage at issue as among those assigned, may suffice to establish the trustee as the mortgage holder." The court further cautioned, however, that "there must be proof that the assignment was made by the party that itself held the mortgage."

Although consumer advocates will doubtless argue to the contrary, the case should not have a significant legal impact outside of Massachusetts. Massachusetts only grants the "current mortgagee" standing to foreclose: "The mortgagee or person having his estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person" is empowered to exercise the statutory power of sale. See Ibanez, quoting Mass. G.L. 244-14. Contrast that with, for example, Connecticut's more liberal standing rule: "When any mortgage is foreclosed by the person entitled to receive the money secured thereby but to whom the legal title to the mortgaged premises has never been conveyed, the title to such premises shall [after the redemption period expires] vest in him in the same manner and to the same extent as such title would have vested in the mortgagee if he had foreclosed...." Ct. Gen. Stat. 49-17 (emphasis added). Under nearly identical facts, a Connecticut appellate court rejected the borrower's standing arguments in *Chase Home Finance v. Fequiere*, 989 A.2d 606 (Conn. App. 2010) essentially holding that the mortgage follows the note (the traditional rule).

Should you have any questions about this regulatory change or need additional information, please contact **Richard E. Gottlieb**, Director of the Firm's Financial Industry Group, at 312-627-2196, or **Arthur B. Axelson** the author of this alert and

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