

Massachusetts Land Court Reaffirms Controversial *Ibanez* Ruling Invalidating Thousands Of Foreclosures

© Richard D. Vetstein, Esq. October 14, 2009

On October 14, 2009, Massachusetts Land Court Judge Keith Long reaffirmed his controversial ruling made back in March 2009 that invalidated foreclosure proceedings involving two Springfield homes because the lenders did not hold clear titles to the properties at the time of sale. A copy of the decision can be found [here](#).

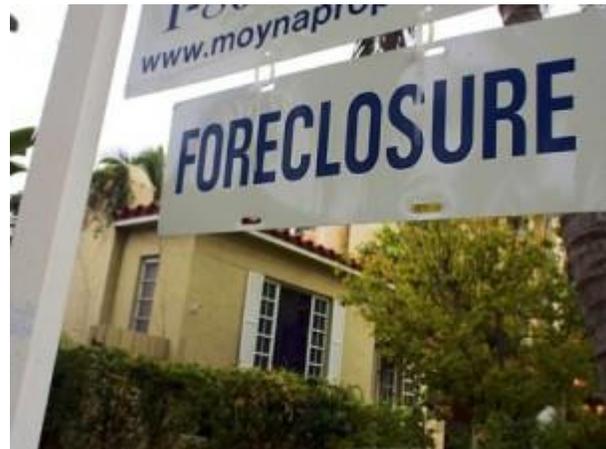
As I outlined in my prior [post](#) on this case, the problem the Land Court dealt with in this case is what happens when modern securitized mortgage lending practices meets outdated foreclosure laws. When mortgages are packaged to Wall Street investors, the ownership of a mortgage loan may be divided and freely transferred numerous times on the lenders' books. But the mortgage loan documentation actually on file at the Registry of Deeds often lags far behind.

The Ruling

Judge Long ruled that foreclosures were invalid when the lender failed to bring the ownership documentation (known as an assignment) up-to-date until after the foreclosure sale had already taken place. An assignment is a legal document confirming that a mortgage loan has been transferred from one lender to another.

Assignments must be recorded with a registry of deeds so anyone researching a property's title can track the loan's origin and ownership.

Oftentimes, as in the *Ibanez* case, lenders will sell bundles of loan and record backdated assignments with an effective date before the first foreclosure notice. Judge Long effectively prohibited this practice.



Despite the lender's attempt to convince him otherwise, Judge Long came out (again) in favor of consumers:

The issues in this case are not merely problems with paperwork or a matter of dotting i's and crossing t's. Instead, they lie at the heart of the protections given to homeowners and borrowers by the Massachusetts legislature. To accept the plaintiffs' arguments is to allow them to take someone's home without any demonstrable right to do so, based upon the assumption that they ultimately will be able to show that they have that right and the further assumption that potential bidders will be undeterred by the lack of a demonstrable legal foundation for the sale and will nonetheless bid full value in the expectation that that foundation will ultimately be produced, even if it takes a year or more. The law recognizes the

troubling nature of these assumptions, the harm caused if those assumptions prove erroneous, and commands otherwise.

Judge Long also had some choice words for lenders:

[T]he problem the [lenders] face (the present title defect) is entirely of their own making as a result of their failure to comply with the statute and the directives in their own securitization documents... What the plaintiffs truly seek is a change in the foreclosure sale statute (G.L. c. 244, § 14), which can only come from the legislature.

What Now?

That's a good question and one not readily answerable. To be sure, the current state of flux and confusion surrounding foreclosure titles affected by an *Ibanez* issue will remain intact until an appellate court considers the case or some action by the Legislature (which may be unlikely). Given the importance of the decision, I predict that the Massachusetts Supreme Judicial Court will take the unusual step of taking the case directly from the Land Court.

As for what happens in the year or so the case may be in appellate limbo, I asked an in house counsel for a leading title insurance company, and his response was essentially that it's going to take a fair amount of time and research to figure this one out. If there's an existing [title insurance policy](#) on the property, some but not all of the title companies may be willing to insure over the problem. If there's no title policy in place, affected parties are going to have to ride this one out for awhile.

Once title insurance companies offer some further guidance, I will post it here.

My Two Cents

While I see both sides of the argument, the decision is troubling to me because Judge Long gave short shrift to the fundamental legal principle that the mortgage follows the note. A valid mortgage is security for some type of underlying obligation, whether it's a loan or the promise to do something in the future. There's no question that the millions (or billions) of dollars in loans secured by all these mortgages were validly transferred from one bank/lender to securitized lenders. The money was lent and it didn't just evaporate into the ether. If the lenders can ultimately demonstrate ownership of the underlying loan which follows the mortgage and produce a valid assignment (albeit late), why isn't this enough? The borrowers owe the money, and now after this ruling they are immunized from foreclosure by what many folks in the real estate industry view as elevating form over substance.

“For many years, real estate attorneys in Massachusetts have understood that the assignment of a mortgage can be recorded at any time and be effective,” Christopher S. Pitt, chairman of the Title Standards Committee of the Real Estate Bar Association tells [Massachusetts Lawyers Weekly](#).

Now that doesn't mean lenders don't need to get their act together. They do. The net effect of this decision will be that lenders must get loan documentation up to date and recorded promptly. Indeed, the *Ibanez* loan changed ownership at least four times prior to foreclosure — without any of this appearing on the public record. Two of those entities (Lehman Brothers and its subsidiary) are currently in bankruptcy and a third (Option One) has ceased operations. This is a huge wake up call to the securitized lending industry.

But the question remains, what about all the foreclosures that have already been conducted? And the new homeowners who own these properties and are now saddled with unresolvable title defects? What about these “innocent victims” and the neighborhoods blighted by foreclosed properties which cannot be sold? I guess we can all blame Wall Street once again...

The Consumer Advocate's Point of View

[Attorney Meyer Potashman](#) of [Greater Boston Legal Services](#) which filed a brief in the *Ibanez* case offers this analysis:

This case has the potential to do a lot of damage (or rather reveal the damage that foreclosing lenders did over the past few years), but I think Judge Long was completely right about the law. Both the statute and all of the securitization documents were clear, and these foreclosures violated both of them. These banks had sophisticated lawyers who knew real estate law when they planned to securitize these loans, but they never bothered to consult their own agreements when the time came to actually securitize, or foreclose, on the loans. As a result, mortgages were never properly transferred, and the foreclosing lenders never had the right to foreclose.

As with any controversial legal decision, there's always compelling arguments for both points of view.

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