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TITLE TROUBLES

With Ibanez Ruling, SJC Provides Ample Opportunity For Recording Assignments

Door Left Open For Post-Foreclosure Confirmatory Assignments, Assuming Validity Of Prior Assignment

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SPECIAL TO BANKER & TRADESMAN

Most initial reactions to the Massachusetts Supreme Judicial Court's recent decision in the Ibanez case seem to be panic. Numerous financial reporting companies, including Reuters, are associating a drop in bank stock prices to the Ibanez decision.

Concern among analysts is that the decision may bring to a halt, or at least slow, the foreclosure process by banks which hold mortgages securitized during the last decade, or void others already completed.

But a close look at Ibanez suggests those fears are exaggerated. While Ibanez clearly states that a foreclosing lender must be able to demonstrate that it was the lawful owner of the mortgage being foreclosed at the commencement of the foreclosure process, Ibanez also provides guidance on available remedial action when that is not the case.

In Ibanez, the foreclosing lender, U.S. Bank, claimed to be the holder of the mort-

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gage by virtue of an undocumented assignment of numerous mortgages as part of a securitized loan pool. The court sought, but U.S. Bank could not provide, adequate written evidence of that assignment. As a result, the court concluded that the notice of sale was defective and the foreclosure sale void. Because Massachusetts is a title

state, the court's demand for a proper record chain of title is not that surprising.

Confirming Title

The court took great pains to note that an assignment need not be in recordable form at the time the statutory notice of sale was given or the subsequent foreclosure sale occurred, although the court did note that that was the "better practice." The key, according to the court, was that the foreclosing lender must own and prove ownership of the mortgage at the time of the notice of sale in order to have the legal authority to foreclose, specifically referencing Massachusetts Title Standard 58(3), which permits confirmatory assignments.

The court noted that recording of a confirmatory assignment, even after the foreclosure sale, will not render title defective, provided the confirmatory assignment confirms a prior valid assignment. If the prior assignment was defective or did not exist,

Continued on Next Page

SJC Ruling Provides Opportunity For Recording Assignments

Continued from Previous Page

a confirmatory assignment will be meaningless.

In situations where a foreclosing lender holds a valid assignment, but the assignment is not of record and the foreclosure process has begun, there would appear to be two choices: dismiss the pending foreclosure action and start over; or record a confirmatory assignment. If it chooses to record a confirmatory assignment, the lender will have the burden of proving – on the record – that the confirmatory assignment is just that, namely, the confirmation of a prior valid assignment. If no such assignment ever existed, the lender will be forced to first obtain such an assignment and then restart its foreclosure process.

Statute Of Limitations

Massachusetts also permits foreclosure by entry. This requires three years of pos-

session by the lender before title vests. The Ibanez foreclosure was voided in March 2009, nearly two years ago. Most lenders responded to the lower court's decision by securing proper documentation of assignments for subsequent foreclosures. Thus, many "defective" foreclosures may be "remedied" by simply waiting out the three year period; although it is questionable whether the certificates of entry will be effective absent recorded evidence of a valid assignment prior to recordation of the certificate of entry.

The Ibanez decision makes it very clear that a thorough analysis should be undertaken to confirm that, prior to publishing a notice of sale, the lender identified in the notice of sale holds a valid assignment of the mortgage – preferably of record. In situations where foreclosures have already occurred, it may be prudent for the foreclosing lender (assuming it still holds title)

to review its files and determine whether, at the time it began the foreclosure process, it held a valid assignment of record. Following the court's guidance in Ibanez will confirm that marketable title will vest in the ultimate record title holder, which is in everyone's best interest.

An unfortunate consequence of the Ibanez decision is an apparent cloud on title held by innocent bona fide purchasers of foreclosed real estate, such as the plaintiff in Francis Bevilacqua vs. Pablo Rodriquez. The SJC confirmed the importance of that issue by accepting direct appellate review of the Land Court's August 26, 2010 decision in Bevilacqua. We are all anxiously awaiting that decision. ■

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