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House of Cards: Bank Accountability and Foreclosure Fraud

COMMENTARY: by JONATHAN FOXX

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A landmark ruling was issued by the Massachusetts Supreme Court on January 7, 2011, in US Bank v Ibanez.

At the heart of the decision is this question: does a bank have standing to foreclose if it does not have a proper mortgage assignment?

In a case that is likely to act as precedent in other jurisdictions, the highest court in Massachusetts answered: No!

Unpacking the Litigation

Let's first unpack some details of the litigation. The real action begins on March 26, 2009.

Antonio Ibanez (Ibanez) gave a mortgage to Rose Mortgage, Inc. (Rose), the originator. Option One (Option) received the loan transfer and became record holder, through a blank mortgage assignment from Rose. Option eventually stamped its name to the assignment, but then that assignment of mortgage was executed in blank before transfer to Lehman Brothers Bank (Lehman Bank). Subsequently, Lehman Bank transferred it to Lehman Brothers Holdings (Lehman Holdings). Lehman Holdings transferred the loan to Structured Asset Securities Corp. (Structured) in a pool of loans assigned to US Bank (USB), which acted as trustee for Structured's Mortgage Pass-Through Certificates, Series 2006-Z.

Here's the chain: Rose > Option > Lehman Bank > Lehman Holdings > Structured > USB

Also, in an unrelated transaction, the mortgage of Mark and Tammy LaRace (LaRace) was foreclosed on by Wells Fargo (Wells). The LaRace mortgage had been originated by Option One, which transferred it with a blank assignment to Bank of America (BOA). BOA then assigned it to Asset Backed Funding Corporation (ABFC) in a mortgage loan purchase agreement. Finally, ABFC pooled the mortgage with others and assigned it to Wells Fargo, as trustee for the ABFC 2005-OPT 1 Trust, ABFC Asset-Backed Certificates, Series 2005-OPT 1, pursuant to a pooling and servicing agreement.

Here's the chain: Option > BOA > ABFC > Wells

So far, these seem to be typical securitization processes and follow the path of many RMBS pools.

Dates

April 17, 2007: USB filed a complaint to foreclose on the Ibanez mortgage, and in the complaint USB represented that it was the "owner (or assignee) and holder" of the mortgage given by Ibanez for the property. In June, 2007, USB also published in the Boston Globe the notice of the foreclosure sale, identifying itself as the "present holder" of the mortgage.

July 5, 2007: USB (as trustee) and Wells (as trustee), purchased the Ibanez and LaRace properties, respectively, in a foreclosure sale.

The Plot Thickens

Ibanez and LaRace did not initially answer the complaints, so USB and Wells moved for entry of default judgment. In their motions for entry of default judgment, they addressed two issues:

First Issue: The first issue simply dealt with the usual notice requirements to publish foreclosure sales in a general circulation newspaper.

Second Issue: The second issue asserted that USB and Wells were legally entitled to foreclose on the properties where the assignments of the mortgages to them were neither executed nor recorded in the registry of deeds until after the foreclosure sales.

The matter was brought before the Massachusetts Land Court, which is authorized "to quiet or establish the title to land situated in the commonwealth or to remove a cloud from the title thereto."

The USB and Wells complaints sought identical relief:

(1) A judgment that the right, title, and interest of the mortgagors (Ibanez and LaRace) in the property was extinguished by the foreclosure;

(2) A declaration that there was "no cloud" on title arising from publication of the notice of sale in the Boston Globe; and,

(3) A declaration that title was vested in USB and Wells in fee simple. Significantly, both USB and Wells asserted in their complaints that they had become the holder of the respective mortgage through an assignment made AFTER the foreclosure sale.

March 26, 2009: Judgment was entered **AGAINST** USB and Wells.

The judge ruled that the foreclosure sales were invalid because the notices of the foreclosure sales named USB (in the Ibanez foreclosure) and Wells (in the LaRace foreclosure) as the **mortgage holders where they had not yet been assigned the mortgages**. That is, the judge found that USB and Wells **acquired the mortgages by assignment only after the foreclosure sales and thus had no interest in the mortgages being foreclosed at the time of the publication of the notices of sale or at the time of the foreclosure sales**.

Put it this way: the court found that (1) neither USB nor Wells had a valid assignment of mortgage at the time of publication of the notices or at the time of the foreclosure sale, (2) the foreclosure notices failed to identify the "holder" of the mortgage, and (3) the notices were deficient under the applicable requirements of Massachusetts General Law.

Bottom Line: USB and Wells did not have the legal authority as assignees to conduct the foreclosures.

The Plot Thickens Some More

At this point, USB and Wells moved to vacate the judgments.

April 17, 2009: At a hearing on the motions, USB and Wells **conceded that each complaint alleged a post-notice, post-foreclosure sale assignment of the mortgage at issue**, but they now represented to the judge that documents might exist that could show a pre-notice, pre-foreclosure sale assignment of the mortgages.

The judge granted both USB and Wells leave to produce such documents, provided they were produced in the form they existed in at the time the foreclosure sale was noticed and conducted.

USB and Wells then submitted hundreds of pages of documents, which claimed to establish that the mortgages had been assigned to them before the foreclosures, though the assignments were in blank - many of these documents related to the creation of the aforementioned securitized mortgage pools in which the Ibanez and LaRace mortgages were included.

October 14, 2009: The judge denied the motions to vacate judgment, concluding that **the newly submitted documents did not alter the conclusion that USB and Wells were not the holders of the respective mortgages at the time of foreclosure**.

"Having nothing, nothing can he lose." King Henry the Sixth, Shakespeare

The Massachusetts Supreme Court affirmed the following:

- Assignments in blank do not constitute a lawful assignment of the mortgages. A conveyance of real property, such as a mortgage, that does not name the assignee conveys nothing and is void. An assignment of land in blank is not regarded as giving legal title in land to the bearer of the assignment.

- Holding the mortgage note does not mean that the bank has a sufficient financial interest in the mortgage to allow them to foreclose. In Massachusetts, where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage. (The holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment.) Therefore, in the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged.

- To the extent that USB and Wells relied on the proposition that an entity that does not hold a mortgage may foreclose on a property, and then cure the cloud on title by a later assignment of a mortgage, their reliance is "misplaced," because if USB and Wells did not have their assignments to the Ibanez and LaRace mortgages, respectively, at the time of the publication of the notices and the sales, they lacked authority to foreclose under Massachusetts's law and their published claims to be the present holders of the mortgages were false.

- A post-foreclosure assignment may not be treated as a pre-foreclosure assignment simply by declaring an "effective date" that precedes the notice of sale and foreclosure. (This is what took place, for instance, in the case of Option's assignment of the LaRace mortgage to Wells Fargo.) Because an assignment of a mortgage is a transfer of legal title, it becomes effective with respect to the power of sale only on the transfer - it cannot become effective before the transfer.

- Where an assignment is confirmatory of an earlier, valid assignment made prior to the publication of notice and execution of the sale, that confirmatory assignment may be executed and recorded after the foreclosure, and doing so will not make the title defective. A valid assignment of a mortgage gives the holder of that mortgage the statutory power to sell after a default regardless of whether the assignment has been recorded. (That is, where the earlier assignment is not in recordable form or bears some defect, a written assignment executed after foreclosure that confirms the earlier assignment may be properly recorded.) But a "confirmatory assignment cannot confirm an assignment that was not validly made earlier or backdate an assignment being made for the first time." The Court ruled in this case that, based on the record before the judge, USB and Wells failed to prove that they obtained valid written assignments of the Ibanez and LaRace mortgages **before their foreclosures** so the post-foreclosure assignments were not confirmatory of earlier valid assignments.

"Utter Carelessness" from concurring opinion, in US Bank v Ibanez

The Court agreed with the judge that USB and Wells did not demonstrate that they were the holders of the Ibanez and LaRace mortgages at the time that they foreclosed these properties, and therefore failed to demonstrate that they acquired fee simple title to these properties by purchasing them at the foreclosure sale.

The concurring opinion in this case underscores that "what is surprising about these cases is not the statement of principles articulated by the court regarding title law and the law of foreclosure in Massachusetts, but rather the **utter carelessness** with which the plaintiff banks documented the titles to their assets." (My emphasis.)

Implications

U. S. Bank National Association, trustee vs. Antonio Ibanez (USB v Ibanez) is certainly one of the first major cases, decided by a state Supreme Court, affirming that a lack of securitization standards means that a bank which believes it has the power to foreclose on a delinquent borrower actually may not be able to do so.

And if this ruling gets applied in other jurisdictions, it is conceivable that many securitized mortgages in the country cannot be foreclosed upon. Of course, the outcome will depend on applicable state law and the results of future litigation, but it's entirely reasonable to view USB v Ibanez as a case that will set precedent. I do not think there are grounds to appeal this case to the US Supreme Court.

The underlying process that the court found unsatisfactory to prove ownership in foreclosure was purportedly a fairly normal procedure in Massachusetts; that is, most banks endorsed in blank, passing along several assignments of the mortgage. Until this ruling! State laws differ on the determinative features of this decision, so the Massachusetts's decision cannot be applied to another state. In a non-recourse state, a ruling similar to USB v Ibanez could have considerable adverse financial consequences for banks.

Transferring a mortgage without naming the recipient has obviously been a common securitization practice. And, although the banks have argued that the right to a mortgage follows the note it secures when the note is sold, the Court found this contravenes the

applicable Massachusetts law.

In the future, homeowners being foreclosed upon will likely challenge banks to prove that those banks own the mortgages which are subject to foreclosure. The required due diligence is likely to slow down foreclosures.

This case shows that some banks appear to be executing the requirements which are surely essential to their very own financial well-being **only when forced to do so by judicial oversight**. That condition should not be tolerated in these financial institutions, particularly when those institutions have received massive federal bailouts from this nation's taxpayers.

What do you think?

I would welcome your comments.
Please feel free to email me at any time.

LENDERS COMPLIANCE GROUP is the first full-service, mortgage risk management firm in the country, specializing exclusively in mortgage compliance and offering a full suite of hands-on and automated services in residential mortgage banking.

Labels: Banking Industry, Foreclosure, Foreclosure Fraud, Foreclosuregate, Massachusetts, Mortgage Compliance, Repurchases, Securitization, US Bank v Ibanez

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