



FORECLOSURE PROCEDURES IN MASSACHUSETTS

POST IBANEZ

**REBA Affordable Housing Committee &
CHAPA Foreclosed Property Initiative
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Presenter

Kurt A. James, Esquire

Rackemann, Sawyer & Brewster P.C.

160 Federal Street

Boston, MA 02110

617-951-1154

kjames@rackemann.com



Massachusetts Foreclosure Law Prior to Ibanez

- **M.G.L. c. 244, Section 14:**
 - ❖ No express requirement that notice name the “holder of the mortgage”
 - ❖ Does require notice to “owner... appearing on the records of the holder of the mortgage” (emphasis added)
 - ❖ Form of foreclosure notice included in statute includes representation “of which mortgage the undersigned is the present holder”
 - ❖ Statute does not require use of this form and allows changes to form



Pre-Ibanez Foreclosure Law (cont.)

- **Bottomly v. Kabachnick, 13 Mass. App. Ct. 480 (1982):**
 - ❖ Foreclosure notice must identify the holder of the mortgage
 - ❖ Failure to do so renders the sale “void as a matter of law”
 - ❖ Construes G.L. c. 244 as a consumer protection statute, one that requires “strict compliance” with its notice provisions



Pre-Ibanez Foreclosure Law (cont.)

- Montague v. Dawes, 12 Allen (94 Mass.) 397 (1866).

“ title derived from a foreclosure sale by an assignee of a mortgage in possession of that assignment at the time of the auction is not defeated by the fact that the assignment was not recorded until after the foreclosure took place, so long as the mortgagor is aware of the assignment and it is ‘unaccompanied with the suggestion that it was not recorded from improper motives, or that in some way the circumstance actually affected the sale by misleading purchasers or otherwise”
- Note: Montague predates the publication provisions of M.G.L. c. 244, §14, which were not enacted until 1877.



Pre-Ibanez Foreclosure Law (cont.)

- Eno & Hovey, 28 Mass. Prac. Section 9.49(4th Ed., 2004):

“In summary, the rule is that the mortgage follows the note and the record holder of the mortgage holds it in trust for the holder of the note”.
- See also: Weinberg v. Brother, 263 Mass. 61, 160 N.E. 403 (1928); Young v. Miller, 26 Gray 152, 154 (1856)



Pre-Ibanez Foreclosure Law (cont.)

- **REBA Title Standard No. 58: Out of Order Recording of Mortgage Discharges and Assignments:**

“[a] title is not defective by reason of ... [t]he recording of an Assignment of Mortgage executed either prior, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record, by the Assignee. However, if the Assignment is not dated prior, or stated to be effective prior, to the commencement of foreclosure, then a foreclosure sale after April 19, 2007 may be subject to challenge in Bankruptcy Court.”



The Ibanez Case

- **Land Court Decision on March 26, 2009**
- **Consolidated three (3) separate (and factually different) cases:**
 - ❖ **U.S. Bank National Association v. Ibanez**
 - ❖ **LaSalle Bank National Association v. Rosario**
 - ❖ **Wells Fargo Bank, N.A. v. Larace**
- **Ironically, all three (3) cases were initiated by the banks seeking declaratory judgment on sufficiency of notice**



Ibanez - Summary

- **Foreclosing lender had no interest in the mortgage being foreclosed (either recorded or unrecorded) at the time of publication or sale.**
- **Foreclosing lender bought the property at auction for less than the amount of the outstanding loan and less than the fmV of the property.**
- **Lender was sole bidder.**



Larace – Summary

- Foreclosing lender had no interest in the mortgage being foreclosed (either recorded or unrecorded) at the time of publication or sale but
- it acquired the mortgage by assignment 10 months after the sale, with the assignment declaring an effective date prior to foreclosure
- Foreclosing lender bought the property at auction for the amount of the outstanding loan but less than the fmV of the property.
- Lender was sole bidder.



Rosario - Summary

- Foreclosing lender was the unrecorded holder of the mortgage at the time of publication and sale
but
- It did not record the assignment until more than a year after the sale.
- No information in record on the amount of the outstanding loan or the market value of the property.
- Lender was sole bidder.



Ibanez Decision

- **LaSalle Bank's foreclosure in Rosario was upheld as foreclosing lender held (albeit unrecorded) title to the mortgage**
- **U.S. Bank's foreclosure in Ibanez and Wells Fargo's foreclosure in Larace were held invalid as the foreclosure notices failed to name the mortgage holders**



Policy Considerations

- **Pro Ibanez Holding:**

- ❖ **If there is uncertainty regarding whether the foreclosing lender is the holder of the mortgage, this will discourage bidders, thereby chilling the sale and reducing the purchase price to mortgagor**
 - **Note, in Ibanez and Larace, the sales price was below fmv**
- ❖ **Requiring foreclosing lenders to “dot all ‘I’s” slows down rate of foreclosures**



Policy Considerations (cont.)

- **Contra Ibanez Holding:**
 - ❖ **Retroactive effect of decision creates cloud on titles and penalizes thousands of prior innocent purchasers**
 - ❖ **Uncertainty resulting from decision prevents REO sales and redevelopment of blighted neighborhoods**
 - ❖ **Compare In re Nosek, 386 B.R. 374 (Bankr. D. Mass. 2008) and similar bankruptcy cases in which only the foreclosing lender penalized for failure**



Practical Considerations

- **Contra Ibanez Holding:**

- ❖ **Mortgagors can challenge process prior to sale**
- ❖ **Potential purchasers do not conduct title examinations prior to bidding and can ascertain information by calling auctioneer or foreclosing lender**
 - **If lack of record title to the mortgage chills the sale, there is no rationale for distinguishing Rosario**



Practical Considerations (cont.)

■ Pro Ibanez Holding:

- ❖ Foreclosing lenders have the ability to obtain and record assignments prior to foreclosures
- ❖ Mortgagors are frequently unrepresented by an attorney, unfamiliar with the foreclosure process and financially distressed



Present Status of Decision

- Plaintiffs have filed motions to dismiss
- REBA has filed a Statement of Interest requesting that the court find:

“that the notices in both the Ibanez and Larace cases are legally sufficient notwithstanding the lack of an executed, recordable assignment in the physical possession of the party conducting the auction sale where there has been no evidence of prejudice to the borrower nor commercially unreasonable chilling of any of the subject sales”.



Present State of Title Insurance

- **I. ORT: “Old Republic will no longer insure titles devolving through a foreclosure unless the mortgagee can demonstrate of record that it was the holder of the mortgage at the time of the commencement of the foreclosure.” Commencement has been defined as filing of the Order of Notice pursuant to the SCRA.**
- *Without reviewing actual docket entries at the Land Court in Boston, Rainen Law Office, will characterize the judge’s signature date on the order of notice filed in the registry of deeds as the “filing date.” You may wish to verify the actual filing date.*



Present State of Title Insurance (cont.)

- **II. CATIC will insure if “At the time of the notice of publication, the foreclosing mortgagee has in its possession an assignment of mortgage that is dated prior to the notice of publication and which clearly vests title in it as the mortgagee.”**
- ***RLO cannot determine “possession” from execution and acknowledgement dates at the registry of deeds as they are an evidentiary matter. The essential nature of “Possession” implies delivery, typically proved by recording or an order of court as in the LaSalle case. Thus, we interpret “possession” as an Assignment actually recorded prior to first publication per to c. 244 §14.***



Present State of Title Insurance (cont.)

III. Fidelity, Chicago, Ticor, Lawyers Title Insurance and Commonwealth Land will decline to insure unless the Assignment is executed & recorded before first publication date pursuant to C. 244 §14.

- ***This memo does not speak to "possession." RLO will treat only Assignments actually recorded prior to publication as valid.***
- **However, the Fidelity companies' memo also adds: "...we believe that cautious foreclosure attorneys will ascertain that a mortgagee conducting a foreclosure proceeding is the holder of the mortgage in writing as of the date the Servicemembers' petition is filed."**



Present State of Title Insurance (cont.)

- **IV. Stewart Title Guaranty Company requires that the recorded Assignment be dated prior to the date of the first publication under c. 244, §14 or they will not insure.**



Present State of Title Insurance (cont.)

- V. First American: "...will no longer insure titles based on foreclosure sales unless either:
- 1) At the time of the notices publication, the foreclosing entity is in possession of an instrument that vests title into it as a mortgagee, or [AS EACH OF THE ABOVE COMPANIES HAS STATED];
- 2) The title to the property has been insured by [THIS COMPANY] after the date of the foreclosure; or
- 3) [THIS COMPANY] is indemnified by another title insurance company for any loss our company may suffer as a result of the defective foreclosure sale."