
*Mortgage Loan Securitization
and Post-Foreclosure Eviction Defense*

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Securitization of Mortgage Loans

- Until the 1970s, banks were portfolio lenders
- In the 1970s, they began to **securitize** mortgage loans
 - Pooling
 - Selling as bonds, pass-through securities, collateralized mortgage obligations
 - Slicing and dicing for investors

Who Owns our Clients' Loans?

- Community banks and credit unions
 - Often kept loans in portfolio since origination
- Government-Sponsored Enterprises (GSEs)
 - i.e. Fannie Mae and Freddie Mac
- Private investors
 - e.g. purchasers of distressed debt
- Securitized Trusts
 - Called “private label securitizations”
 - Loans are held by trustee on behalf of bondholders
 - Most common holders of subprime loans

Securitization Leads to Eviction Defenses

- Fast-moving mortgage market let to sloppiness at every level
- Loans changed hands many times
- Lack of documentation of these transfers
- Banks foreclosed when they could not prove that they owned the loan (or the mortgage)
- In some cases, foreclosures were done in the name of a completely unrelated party

Mortgage Loans – The Parties

- Lender / Originator
- Sponsors and / or Depositors
- Holder / Investors
- Servicer
- Mortgage Electronic Registration Systems (“MERS”)
- Get this information from the Pooling and Servicing Agreement (“PSA”) or Prospectus

Post-foreclosure legal defenses

- Foreclosing without holding the Mortgage
- Foreclosing without holding the Note
- Improper Assignment
 - US Bank v. Ibanez
- Violation of IRS REMIC rules
- Foreclosure by MERS
- Failure to Comply with GL Ch 244 §14

Mortgage Documents – the Note

- Borrower's obligation to repay the loan
- Negotiable instrument – UCC Article 3
- Two methods of Transfer
 - Negotiation - endorsing in blank or expressly to recipient
 - On last page
 - On an attachment to the Note – an “allonge”
 - If endorsed in blank, physical holder owns the obligation
 - By Assignment, but assignee loses holder in due course protection

Foreclosure Without the Note

- Traditionally, notes and mortgages were held together, and were kept for the life of the loan
- The law has not been updated with modern transactions, and often the note was not transferred before the foreclosure process
- It is crucial not only to ask for the Note, but to ask when the Note was transferred (for Notes endorsed in blank)
- No written decision in our favor. One against: Valerio v. U.S. Bank, 716 F.Supp.2d 124 (D.Mass 2010) (based on 244 14 “mortgagee” language)
- Specific cases to look for this: where the Servicer is the foreclosing entity, even if the Servicer is the mortgagee of record; where MERS is the foreclosing entity

Mortgage Documents – the Mortgage

- Permits holder to foreclose if Note is breached
- Recorded at Registry of Deeds by county
- Transferred only by Assignment
 - Assignments are not required to be recorded generally
 - Except for registered land
- Assignments in blank have no effect (*Ibanez*)

Improper Mortgage Assignment

- Assignment after the foreclosure process has begun
- Assignment in blank
- Assignment in violation of the Pooling & Servicing Agreement
 - Acts of a Trustee in violation of Trust documents are void. NY CLS EPTL § 7-2.4
- Assignment before the pooling and servicing agreement
- Assignment more than 90 days after the “Startup Date” under REMIC (Real Estate Mortgage Investment Conduit) Rules.
- Assignment skipping the intermediary steps

MERS Foreclosures

- MERS is authorized to conduct a power of sale under the mortgage in MA: *In re Huggins*, 357 BR 180 (MA Bk, 2006)
- Other states have found otherwise. *MERS v. Johnston*, 2009 Vt. Super. LEXIS 15, directly criticizes *Huggins*.
- Contracts argument: The mortgage generally calls MERS-as-nominee the “mortgagee” and the originator the “lender,” and gives the right to foreclose to the lender (not to the mortgagee).

Compliance with GL Ch. 244 § 14 & 15

- All aspects of Mass General Laws Ch. 244 § 14 and 15 should have been followed
 - Notice to homeowner
 - Publication
 - Foreclosure Affidavit must state “fully and particularly” the requirements of the power of sale have been complied with to establish the power of sale was duly executed.