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Symposium

Mortgage Documentation Mess Sand in the Gears: Wrong or no paperwork, flawed assignments, robo signatures, class actions and defenses

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Sand in the Gears: Wrong or No Paperwork, Flawed Assignments, Robo Signatures, Class Actions and Defenses
Summary of *U.S. Bank, Nat'l Ass'n. v. Ibanez* and MERS Cases

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U.S. Bank, Nat'l Ass'n. v. Ibanez, Nos. 08 MISC 384283 (KCL), 08 MISC 386755 (KCL), 2009 WL 3297551 (Mass. Land Ct., October 14, 2009)

On October 14, 2009, Judge Keith C. Long of the Massachusetts Land Court held that foreclosing lenders in Massachusetts must possess "valid" assignments of mortgages in recordable form prior to publishing or mailing notices of foreclosure sale. Judge Long's decision in *U.S. Bank Nat'l Ass'n. v. Ibanez*, Nos. 08 MISC 384283 (KCL), 08 MISC 386755 (KCL), 2009 WL 3297551 (Mass. Land Ct., October 14, 2009) ("*Ibanez*") carries the possibility of voiding hundreds, if not thousands of foreclosure sales throughout the Commonwealth.

In the case, two foreclosing entities, U.S. Bank, N.A. as Trustee and Wells Fargo Bank, N.A. as Trustee, each purporting to be the trustee of a securitized trust (collectively, the "Trustees"), filed Land Court complaints seeking declaratory judgments validating two foreclosure sales of properties owned by the Laraces and Mr. Ibanez respectively. Judge Long noted that the relevant recorded assignments into the foreclosing Trusts were executed after the foreclosure sale but contained recitations of "effective dates" which were dates prior to the date of the notice of sale. On March 26, 2009, the Land Court, *sua sponte*, informally joined the two Land Court actions and dismissed the complaints holding that the back-dated assignments were not valid and as such, the foreclosing Trusts were not the holders of the mortgages at the time of notice of sale as required by M.G.L. c. 244, § 14. The foreclosing Trusts filed motions to vacate the orders of dismissal.

The foreclosing Trusts argued that the securitization agreements transferring ownership of the mortgage loans to the Trusts were sufficient to confer upon the Trusts the status of holder of the mortgage. In rejecting the Trusts' arguments, Judge Long relied on the "fact" that the securitization agreements required valid assignments in recordable form. Judge Long found that the Trusts' failure to possess assignments in recordable form which were executed prior to the notice of sale was fatal to their claim that they were the holders of the mortgage when they noticed the sale.

The Land Court was also not persuaded that the assertion that the Trusts were the holders of the related promissory notes meaning that the Trusts were also the holders of the mortgages. Citing Massachusetts case law going back to 1889, Judge Long noted that Massachusetts has

failed to adopt the majority position followed by most states that the mortgage "follows the note." Instead, a transferee of a note in Massachusetts is granted nothing more than an equitable right to obtain an assignment of the corresponding mortgage. Having failed to timely obtain an assignment, the Trusts could not be considered mortgage holders.[1]

The Trusts timely appealed Judge Long's decision, and the appeal is currently pending before the Massachusetts Supreme Judicial Court. Evidencing the importance of the issues presented, amicus curiae briefs have been filed by the Attorney General of Massachusetts and the National Consumer Law Center in support of Judge Long's decision, and by the Real Estate Bar Association for Massachusetts in support of the Trusts' position.

The issues to be determined on appeal are wide-ranging, and their determination will have significant effects on real estate titles and on the foreclosure industry. The Trusts have argued that the two relevant securitization agreements validly assigned the mortgages and notes, and that the Land Court's requirement that the assignment be "in recordable form" was without a basis in the law. The Trusts also argue that blank mortgage assignments were in conformity with the securitization agreements and, in combination with the clear intent to assign evidenced by the securitization agreements, validly assigned the mortgages. The Trusts also claim that the former homeowners lack standing to enforce the securitization agreements; that the Trusts have sufficient financial interest to foreclose; and that the back-dated assignments confirmed the prior transfer of the notes and mortgages pursuant to the securitization agreements and the blank assignments. Finally, to the extent the Land Court's ruling is upheld, the Trusts, as well as the Real Estate Bar Association, seek to have its application limited to prospective foreclosures only.

The entities seeking to have the Land Court judgment upheld raise a number of issues. These entities supporting the borrowers first argue that the securitization agreements do not constitute valid transfers of the mortgages and, therefore, the Trusts were not the holders of the mortgages when they sent out notices of the foreclosure sales. They claim that the chain of title from the originating lenders through the securitization process is deficient and that the

[1] *Weinberg v. Brother*, 263 Mass. 61(1928); *Barnes v. Boardman,* 149 Mass. 106 (1889); *Morris v. Bacon*, 123 Mass. 58 (1877); *First Nat'l Bank of Cape Cod v. North Adams Hoosac Savings Bank*, 7 Mass. App. Ct. 790 (1979); *See also In re Ivy Properties, Inc.*, 109 B.R. 10 (Bankr. D. Mass. 1989) ("[U]nder Massachusetts common law the assignment of a debt carries with it the underlying mortgage, without necessity for the granting or recording of a separate mortgage assignment").

securitization agreements were never introduced as evidence in the Land Court, constituting a waiver of the argument and an attempt to cite to documents not part of the Land Court record.[2] These entities go on to attack the validity of the blank assignments, the separation of the notes from the mortgages, and the prospective application of the Land Court ruling. Oral arguments were held on October 7, 2010.

It is unclear at this point how the Supreme Judicial Court will rule. In order to ensure that the issue is actually resolved, it is hoped by the creditor side that even if the instant judgment is upheld based on the alleged waiver of the securitization agreement argument by the Trusts, the Supreme Judicial Court will provide dicta as to whether, if such securitization agreements were provided to the Land Court, they would have constituted sufficient evidence of an assignment of the mortgage. Just as importantly, if the Land Court judgment is upheld, from the creditors' side it is similarly hoped, that the judgment is applied prospectively. Retroactive application of the Land Court's decision would serve to cloud title to hundreds, if not thousands of previously foreclosed homes. This is not simply a matter of creditors re-foreclosing to correct the deficiency in an assignment of mortgage; rather, many of the affected homes are now owned by innocent buyers who bought at foreclosure or after foreclosure as post-foreclosure REO properties who would face significant consequences if their chains of title are invalid.

[2] The Land Court was presented with a Private Placement Memorandum that summarizes and further explains the actual securitization agreements. The securitization agreements themselves were not submitted to the Land Court.

Cases Involving Mortgage Electronic Registration System ("MERS")

I. Overview

Mortgage Electronic Registration Systems and MERSCORP, Inc.[3] (collectively "MERS") are related entities that operate an electronic registry designed to track servicing rights and ownership of mortgage loans in the United States. Founded in 1995, there are estimates that as many as 65 million mortgages are registered within the MERS System. Creditors and loan servicers enter into contractual arrangements to become "MERS members". Fannie Mae, Freddie Mac and Ginnie Mae allow their mortgages to be registered on the MERS System.

A typical MERS scenario involves the creditor in a mortgage transaction nominating MERS as the nominee of the originating creditor and its assignees. The naming of MERS as nominee for the creditor can also occur after the loan is originated as a result of the recording of an assignment of a mortgage to MERS. Thus, a review of the land evidence records will show the MERS is the record title holder of the mortgage, although MERS' name will not appear on the note, and the beneficial interest in the mortgage remains with the original creditor or its assignee. The naming of MERS as the nominal mortgagee allows the MERS registry to track all future mortgage loan and mortgage loan servicing transfers or other assignments of the mortgage loan unless and until ownership is transferred to an entity that is not a MERS member. MERS serves as a central source of information and tracking system allowing creditors, investors, loan servicers, foreclosure attorneys and consumers to obtain information about the servicer and the beneficial holder of mortgage loans.

The use of MERS as the nominee for the benefit of the creditor and its assignees has become the subject of numerous challenges and litigation since the inception of the mortgage crisis. Many of the challenges center around MERS' standing to initiate foreclosures. The following cases contain these challenges.

II. Decisions that are Favorable to MERS (the assignment and transfer of a mortgage to MERS as nominee for the benefit of the lender, the trustee and

[3] MERSCORP, Inc. tracks the beneficial ownership interests in, and servicing rights to, mortgage loans as they change hands from and to its members through the life of the loan (as long as the holder and its assignees are members of MERS). Mortgage Electronic Systems, Inc. ("MERS"), a wholly owned subsidiary of MERSCORP, Inc., acts as the mortgagee or beneficiary (as "nominee" for the creditor and its successors and assigns).

other transferees/assignees in the mortgage loan process does not adversely impact the right to foreclose on a mortgage)

***Kiah v. Aurora Loan Servs., LLC*, C.A. 2010-cv-40161, 2010 U.S. Dist. LEXIS 121252 (D. Mass. Nov. 16, 2010)**

This action arose out of borrower's request for declaration that the mortgage on record is legally null and void. The record indicated that Federal National ..Mortgage Association ("Fannie Mae") owned the debt while Aurora Loan Services, LLC services the loan. Although Aurora alleged that the note and mortgage were assigned to it in June 2007, there was no assignment of mortgage on record at the Registry of Deeds until January 19, 2010. The Assignment assigned the mortgage to Aurora and included a recitation of an "Effective Date" of June 9, 2007, even though the assignment was not executed by MERS until January 6, 2010.

Borrower's failure to challenge the validity of the assignment of the note to Aurora was fatal to his claim. "By law, the transfer of the note automatically transfers the underlying security, even without a formal assignment." Accordingly, any rights in the mortgage were transferred to Aurora with the note, and MERS had the power to act as the agent of the note holder, even after transfer to a new holder. Even if the original lender sold its interest in the note, "MERS retained the power to transfer the mortgage on behalf" of the successor. Therefore, even though MERS did not have a beneficial interest in the property, it nonetheless could transfer the mortgage on behalf of the beneficial owner. Regarding the validity of the Assignment itself, "Massachusetts law requires only that the assignment of mortgage be executed and recorded prior to the publication of the notice of sale."

***In re Woodberry*, 383 B.R. 373 (Bankr. S.C. 2008)**

In a bankruptcy action, Wells Fargo Bank, N.A., doing business as America's Servicing Co. ("ASC") serviced a loan on behalf of U.S. Bank National Association, as Trustee for the Structured Asset Investment loan Trust Mortgage Pass-Through Certificates, Series 2005-8 ("Trust"). ASC brought a motion for relief from the automatic stay ("the Motion") without an assignment of mortgage on record. The Debtor challenged ASC's standing as either the correct "party in interest" or the "real party in interest" to seek relief from the stay.

The underlying obligation was made between the debtor and South Star Funding, LLC ("South Star") in the principal amount of $68,400 (the "Note"). Contemporaneously therewith, debtor granted a mortgage to MERS, as nominee for South Star, on her home (the "Mortgage"). The Mortgage defined MERS as nominee of "the Lender" South Star. An allonge to the Note was endorsed in blank. After origination, the loan was transferred to the Trust and ASC, as the servicer. The Motion established that ASC was in possession of the Note and Mortgage as custodian on behalf of the Trust. ASC also collected payments and had the authority to foreclose.

Looking to the "party in interest" standard, the court determined that such status is not restricted to creditors, but is determined on a case-by-case basis. However, because ASC was in possession of the Note (endorsed in blank) and Mortgage at the time the Motion was filed, albeit on behalf of the Trust, ASC was vested as an owner or holder with right to payments thereunder. Accordingly, ASC was a creditor and met the party in interest standard. Going one step further, the Court determined that because as a mortgage servicer, ASC had a contractual duty to collect payments under the Note and Mortgage as well as to foreclose, it was the "real party in interest." Therefore, the court found ASC had standing to file the Motion.

***Mortgage Electronic Registration Systems, Inc. v. Nebraska Dept. of Banking and Finance*, 270 Neb. 529 (2005); 704 N.W. 2d 784 (Neb. 2005)**

MERS appealed an order of the Nebraska Department of Banking and Finance (the "Department") that declared that MERS is a "mortgage banker" under Nebraska law subjecting MERS to licensing and registration requirements. The determining issue was whether MERS "acquires" mortgage loans under *Neb. Rev. Stat.* § 45-702(6). After reviewing MERS's services and the "Terms and Conditions" it enters into with its members, the Court found that MERS does not acquire "any loan or extension of credit secured by a lien on real property" and has "no independent right to collect on any debt." Accordingly, MERS is not subject to Nebraska's licensing and registration requirements as a "mortgage banker."

***MERSCORP, Inc. v. Romaine*, 2006 NY Slip Op. 9500; 8 N.Y.3d 90, 861 N.E.2d 81 (2006)**

MERS sought a declaration that the Suffolk County Clerk (the "Clerk") must record and index MERS mortgages when presented as well as MERS assignments and discharges. The

Clerk is imposed with the ministerial duty of recording and indexing instruments affecting real property. Accordingly the Clerk must accept MERS mortgages when presented for recording. Additionally, because MERS is the nominee for the mortgagee of record, when MERS acknowledges instruments, such as assignments and discharges, the Clerk is also required to file and record these as well.

***Jackson v. Mortgage Electronic Registration Systems, Inc.*, 770 N.W.2d 487 (Minn. 2009)**

The United States District Court for the District of Minnesota certified a question to the Supreme Court of Minnesota as:

> Where an entity, [MERS], serves as mortgagee of record as nominee for a lender and the lender's successors and assigns and there has been no assignment of the mortgage itself, is an assignment of the ownership of the underlying indebtedness for which the mortgage serves as security an assignment that must be recorded prior to the commencement of a mortgage foreclosure by advertisement under Minn.Stat. ch. 580.

The Supreme Court of Minnesota, when looking to Minnesota's foreclosure by advertisement statutory scheme answered the above question in the negative. MERS remains the mortgagee as nominee of record despite transfers of the underlying debt between entities who are bound by the MERS membership contract. As a result of the MERS system, the Minnesota Legislature passed an amendment to the Recording Act that expressly permits nominees to record 'an assignment, satisfaction, release, or power of attorney to foreclose. Despite the legislature's apparent approval of the MERS system, MERS must still abide strictly by the recording statute.

The Minnesota Supreme Court found that, despite the fact that a transfer of the underlying obligation is not recorded, the MERS system adequately follows Minnesota's statutory scheme because the legislature specifically refers to the security aspect of the mortgage rather than the debt. Therefore, the statutory requirement to record assignments of mortgage does not require assignments of the promissory note. Additionally, Minnesota has not required the recording of "mere equitable" interests to foreclose by advertisement. Accordingly MERS, as the mortgagee of record, does not lose legal title when the mortgagee transfers interests in the promissory note. The Minnesota Supreme Court rejects the argument that transfers of mortgage

notes to MERS are transfers that must be recorded before foreclosure finding that even though an assignment of the promissory note with no accompanying assignment of the security instrument constitutes a mere equitable assignment of the mortgage, it does not by operation of law need to be recorded to meet the requirements necessary to commence a foreclosure by advertisement.

***Mortgage Electronic Registration Systems, Inc. v. Revoredo*, 955 So.2d 33 (Fla.3d DCA 2007)**

The Third District Court of Appeal of Florida agreed with the earlier decision by the Second District Court in *Mortgage Electronic Registration Systems, Inc. v. Azize*, 965 So.2d 151 (Fla.2d DCA 2007), and overturned the holding of the lower court that dismissed a mortgage foreclosure brought by MERS. The lower court erroneously concluded that although MERS acted "essentially as a collection and litigation agent for the current owner of notes and mortgages, [MERS] could not establish its standing to proceed." The Court viewed those jurisdictions that encountered difficulties with MERS finding the problem arises by trying to "shoehorn a modern innovative instrument of commerce into nomenclature and legal categories which stem essentially from the medieval English land law." The Court sided with the "clear majority of cases which have considered MERS's standing to maintain mortgage foreclosure proceedings[,]" finding that MERS has standing to foreclose.

***Saxon Mortgage Services , Inc. v. Hillery*, No. C-08-4357 EMC, 2008 WL 517180 (ND. Cal. Dec. 9, 2008)**

***In re Mortgage Electronic Registration Systems, Inc. (MERS) Litigation*, No. 2:09-md-2110, 2010 WL 4038788 (D. Ariz. Sept. 30, 2010)**

***Commonwealth Property Advocates, LLC v. MERS*, No. 2:10-CV 340 TS, 2010 WL 3743643 (D. Utah Sept. 20, 2010)**

***Taylor v. Deutsche Bank Nat'l Trust*, No. 5D09-4035, 2010 WL 3056612 (Fla. App. Aug. 6, 2010)**

***MERS v. Bellistri*, No. 4:09-CV-731 CAS, 2010 WL 2720802 (E.D. Mo. July 1, 2010)**

***Silvas v. GMAC Mortgage, LLC*, CV-09-265-PHX-GMS, 2009 WL 4573234 (D. Ariz. Jan. 5, 2010)**

***Diessner v. MERS*, 618 F.Supp. 2d 1184 (D. Ariz. 2009)**

***Jackson v. MERS*, 770 N.W.2d 487 (Minn. 2009)**

***Reynoso v. Paul Financial, LLC*, No. 09-3225 SC, 2009 WL 3833298 (N.D. Cal. Nov. 16, 2009)**

***Farahani v. Cal-Western Recon. Corp.*, No. 09-194, 2009 WL 1309732 (N.D. Cal. May 8, 2009)**

***Vazquez v. Aurora Loan Services*, No. 2:08-cv-01800-RCJ-RJJ, 2009 WL 1076807 (D. Nev. Apr. 20, 2009)**

***Trent v. MERS*, 288 Fed. App'x 571 (11th Cir. 2008)**

***In re Smith*, 366 B.R. 149 (Bankr. D. Colo. 2007)**

***MERS v. Ventura*, CV054003168S, 2006 WL 1230265 (Conn. Super. Apr. 20, 2006)**

III. Decisions that Take Issue with MERS

***Landmark National Bank v. Kesler*, 289 Kan. 528, 216 P.3d 158 (2009)**

In a fact pattern similar to *Southwest Homes*, supra, MERS was not given notice of a judicial foreclosure action. In this matter, Landmark National Bank ("Landmark") filed a petition to foreclose against borrowers and the original lender of a mortgage junior to Landmark's, Millenia Mortgage Corp. ("Millenia") for which MERS was the mortgagee as nominee for Millenia. Subsequent to the origination of the Millenia loan, the underlying obligation was transferred to Sovereign, but MERS remained the mortgagee, as nominee, of record. Prior to the foreclosure action, the borrower filed a Bankruptcy petition in which he named Sovereign as a creditor.

On the same day Landmark filed a motion to confirm the sale of property; Sovereign filed an answer to the foreclosure petition. A week later, Sovereign filed a motion to set aside or vacate judgment arguing that MERS was a contingently necessary party and, because Landmark did not name MERS, Sovereign did not receive notice of the proceedings.

The Supreme Court of Kansas upheld the appellate court's finding that MERS was not a contingently necessary party and MERS' due process rights were not violated. The mortgage document's notice provision provides that notices should be sent to "the Lender." Millenia, as the last recorded "lender," was named in the foreclosure action. The Court also noted that Sovereign was on constructive notice of borrower's default due to borrower's bankruptcy notice.

Also, Sovereign did not register according to the legislative registration requirement for parties that desire service of litigation involving real estate. Therefore, the failure to name and serve MERS as a defendant in a foreclosure action in which the lender of record (and MERS's principal) had been served was not a fatal defect.

***Mortgage Electronic Registration Systems, Inc. v. Saunders*, 210, ME 79; 2 A.3d 289 (Me. 2010)**

Borrowers appealed an entry of summary judgment in favor of Deutsche Bank National Trust Company ("Deutsche") on a complaint for foreclosure brought by MERS. Initially, the motion brought by MERS was denied; however, Deutsche was subsequently substituted as a party for MERS and moved immediately for reconsideration of the motion for summary judgment, which was granted in favor of Deutsche. Borrowers challenged both MERS's standing as well as the procedural grounds that led to Deutsche's entry of summary judgment.

Despite the covenants and terms of the mortgage itself, the Court determined that under Maine foreclosure law, 14 M.R.S. §§ 6321-6325, particularly, MERS is not a "mortgagee" and, therefore, does not have the requisite prudential standing (versus constitutional standing) to bring a judicial foreclosure in a Maine Court. In so reasoning, the Court determined that the only express power granted to MERS itself was the right to record the mortgage; every other reference to MERS was "solely as the 'nominee' to the lender." Based on those terms and under Maine foreclosure law, the "mortgagee" is the "party that is entitled to enforce the *debt obligation* that is secured by the mortgage." Because MERS is not vested with the power to enforce the note, MERS did "not show that it has suffered an injury fairly traceable to an act of the mortgagor and that the injury is likely to be redressed by the judicial relief sought[,]" which is a distinction between judicial and non-judicial foreclosure states.

***Mortgage Electronic Registration Systems, Inc. v. Southwest Homes of Arkansas*, 2009 Ark. 252 (2009); 301 S.W. 3d 1 (Ark. 2009)**

A junior mortgagee, Southwest Homes of Arkansas ("Southwest"), filed a petition to foreclose on mortgaged property of which a deed of trust naming MERS, as nominee for the original lender, Pulaski Mortgage Company ("Pulaski"), was in first priority position. In judicially foreclosing, Southwest served notice on Pulaski, but not MERS. Without an answer filed by Pulaski, a Decree of Foreclosure was entered and the property sold to Southwest. MERS

moved for relief, arguing that it was a necessary party. The lower court found that MERS was not a necessary party.

In addition to the usual parties to a MERS mortgage – borrower/mortgagor, lender, and MERS, as nominee for lender, its successors and assigns – the deed of trust includes a trustee. "[T]he trustee is limited in use of the title to passing title back to the grantor/borrower in the case of payment, or to the lender in the event of foreclosure." Under a deed of trust, the trustee's duties are limited to (1) upon default undertaking foreclosure; and (2) upon satisfaction of the debt, to reconvey the deed of trust. Therefore, under a deed of trust, the necessary parties are the borrower, the lender (Pulaski) and the trustee. MERS is the agent for the lender, but is not the trustee and the deed of trust did not convey title to MERS. MERS is not the beneficiary "even though it is so designated. Thus, under the statutes, and under the common law . . . , a deed of trust grants to the trustee powers MERS purports to hold. Those powers were held by [the] trustee. Those powers were not conveyed to MERS." Because MERS's purported powers rested with the trustee, the Court found that MERS held no authority to act as an agent and holds no property interest in the mortgaged land. Therefore, MERS was not a necessary party.

The concurring opinion found that MERS was not a necessary party pursuant to the finding in *Landmark National Bank v. Kesler*, 40 Kan. App. 2d 325, 192 P.3d 177 (2008), *conf.* 289 Kan. 528, 216 P.3d 158 (2009), which found that because the principal/lender received notice, the failure to serve MERS was not fatal.

***Rinegard-Guirma v. Bank. of America*, No. 10-1065-PK, 2010 WL 3945476 (D. Or. Oct. 6, 2010)**

***In re Allman*, No. 08-31282-elp7, 2010 WL 3366405 (Bankr. D. Or. August 24, 2010)**

***In re Box*, No. 10-20086, 2010 WL 2228289 (Bankr. W.D. Mo. June 3, 2010)**

***In re Hawkins*, No. BK-s-07-13593-LBR, 2009 WL 901766 (Bankr. D. Nev. Mar. 31, 2009)**

Standing in Mortgage-Related Bankruptcy Cases in Massachusetts

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These materials summarize standing issues in actions based on mortgages in Massachusetts Bankruptcy Court. Part A briefly summarizes the standing requirements for certain mortgage-related actions. Part B indicates how certain parties can prove that they have the status on which their standing is premised. Part C briefly summarizes certain recent Massachusetts bankruptcy cases in which standing was an issue.

A. Standing in Mortgage Actions

Standing has both constitutional and prudential aspects. As a constitutional matter, standing requires that a claimant present an actual or imminent injury that is traceable to the conduct of the defendant and can be redressed by the court. *Davis v. Fed. Election Comm'n*, 128 S.Ct. 2759 (2008). Standing is a threshold issue that determines whether the court has power to entertain a suit. *In re Newcare Health Corp.*, 244 B.R. 167, 170 (B.A.P. 1st Cir. 2000) (citing *Warth v. Seldin,* 95 S.Ct. 2197 (1975)). A defect in standing therefore cannot be waived and must be raised by any party or the court whenever they arise. *In re Newcare*, 244 B.R. at 170 (quoting *U.S. v. AVX Corp.,* 962 F.2d 108, 116 n. 7 (1st Cir. 1992)). Courts also impose prudential limitations on themselves in order to limit their role. In particular, considerations that "militate against standing, principally concern whether the litigant (1) asserts the rights and interests of a third party and not his or her own, (2) presents a claim arguably falling outside the zone of interests protected by the specific law invoked, or (3) advances abstract questions of wide public significance essentially amounting to generalized grievances more appropriately addressed to the representative branches." *In re Newcare*, 244 B.R. at 170 (quoting *Benjamin v. Aroostook Medical Center, Inc.,* 57 F.3d 101, 104 (1st Cir. 1995). Application of the standing requirements to mortgage cases will depend on the specific relief being sought.

1. Standing to File a Proof of Claim

Under Federal Rule of Bankruptcy Procedure 3001(b), a proof of claim shall generally be executed by the creditor. A creditor is defined in the Bankruptcy Code as a person, corporation or other entity owed a debt by the debtor. 11 U.S.C. §101(10). In addition to the actual owner of the note, an authorized agent of the creditor may file a proof of claim on the creditor's behalf. *See* F. R. Bankr. P. 3001(b). Therefore, a mortgage servicer may also file a proof of claim on the note owner's behalf if authorized by the servicing agreement or otherwise.

Rule 3001 provides specific information that must be provided when filing a proof of claim. This includes a copy of the writing on which a claim is based, specifically the promissory note, mortgage or security agreement, and evidence that the security agreement has been perfected. *See* F.R. Bankr. P. 3001; Official Bankruptcy Form 10. A proof of claim properly filed which includes the evidence required by Rule 3001 is prima facie evidence of a claim, which may only be rebutted with "substantial evidence" from an objecting party. *See* F.R. Bankr. P. 3001(f); *In re Long*, 353 B.R. 1, 13 (Bankr. D. Mass. 2006). Where this information has not been included, the court may allow an amended proof of claim to be filed. *See Brown v. Ameriquest Funding II, LLC*, 431 B.R. 309, 315 (Bankr. D. Mass. 2010) (allowing mortgage holder who failed to attach note and mortgage to proof of claim to amend conditioned on payment of debtor's attorneys fees for related adversary proceeding).

2. Standing to File a Motion for Relief from Stay

Relief from stay can be sought by a "party in interest". 11 U.S.C. § 362(d). The test for whether one is a party in interest in the First Circuit has been described as whether a party has a colorable claim to the property. *In re Maisal*, 378 B.R. 19, 21 (Bankr. D. Mass. 2007). The owners of the note and mortgage are parties in interest. Some courts have found that it is necessary for the interest in the note or mortgage to be in the hands of the movant at the time the

motion for relief from stay is filed. *In re Maisal*, 378 B.R. at 22 (holding that no standing to seek relief from stay existed where assignment was dated four days after filing of motion). While decisions across jurisdictions have varied somewhat, servicers of mortgages have generally been held to be parties in interest in Massachusetts. Mortgage servicers are parties in interest "by virtue of their pecuniary interest in collecting payments under terms of the notes and mortgages that they service" *In re Hayes*, 393 B.R. 259, 267 (Bankr. D. Mass. 2008), (citing *In re Woodberry*, 383 B.R. 373 (Bankr. D. S.C. 2008), and *In re Conde-Dedonato*, 2008 WL 2873356 at *2 (Bankr. E..D.N.Y. July 22, 2008)).

Massachusetts Local Bankruptcy Rule 4001-1(b)(2)(F) requires that a party provide a chain of title when seeking relief from stay. Specifically, if requesting authority to foreclose pursuant to a mortgage or security interest, the motion is required to state, among other things, "the original holder of the obligations secured by the security interest and/or mortgage and every subsequent transferee, if known to the movant, and whether the movant is the holder of that obligation or an agent of the holder." MLBR 4001-1(b)(2)(F).

3. Standing to Foreclose on Real Estate

Generally, under Massachusetts law, the mortgagee may foreclose on real estate. M.G.L. c. 244 §§ 1, 14; *see also In re Hayes*, 393 B.R. at 268. The mortgagee can generally foreclose without being the holder of the note. *See In re Huggins*, 357 B.R. at 182-84. The mortgagee must be the rightful owner of the mortgage at the time of the foreclosure, as later acquisition or the expectation of later acquisition does not satisfy Massachusetts law. *See In re Schwartz*, 366 B.R. at 269 (Bankr. D. Mass. 2007). However, if the assignment is executed prior to publication and foreclosure, but not recorded until after, the foreclosure is not invalid. *In re Bailey*, 437 B.R. 721, 728-29 (Bankr. D. Mass 2010) (citing *U.S. Bank National Ass'n v. Ibanez*, 2009 WL 795201 at *8 (Mass Land Ct. March 26, 2009)). While not specifically addressed in

Massachusetts thus far, at least one jurisdiction has held that the motions for relief from stay cover the property rather than the movant and, therefore, a foreclosing party need not necessarily be the same party that sought relief from the stay. *See Reusser v. Wachovia Bank, N.A.*, 525 F.3d 855, 861 (9th Cir. 2008) (finding it immaterial that bankruptcy court order regarding relief from stay obtained by the servicer did not specifically name the holder of the deed of trust later seeking foreclosure).

B. Demonstrating Role of Party for Purposes of Standing

1. ***Owner of a Note***

Generally, a party may show its standing as owner of a note by demonstrating that it was either the original holder of the note or a party to which the note was validly transferred. If the moving party is the original lender, the party can meet its burden as to ownership by introducing evidence of the original loan. *See In re Maisal*, 378 B.R. at 22 (quoting *In re Parrish*, 326 B.R. 708, 720 (Bankr. N.D. Ohio 2005)). Enforcement of a note can also be sought by a non-holder in possession of the note who has the rights of a holder. M.G.L. c. 106 § 3-301.

As a negotiable instrument, a note may generally be transferred in accordance with Article 3 of the Uniform Commercial Code as adopted in Massachusetts. Notes are usually transferred by endorsement. An endorsement in blank of a note converts the note to a bearer instrument which is negotiable by transfer of possession alone. M.G.L. c. 106 §§ 3-205(b), 3-109(a)(2); *see also First Nat'l Bank of Cape Cod v. North Adams Hoosac Sav. Bank*, 7 Mass App. Ct. 790, 796 (1979). Therefore, if a note has been endorsed in blank, a party that proves that it is the current holder in the note has established its ownership and the standing rights that ownership entails.

2. Demonstrating Ownership of a Mortgage

Similarly, an original mortgagee need only point to the originally recorded mortgage to prove its status. However, an assignee of a mortgage generally must show chain of title in Massachusetts. Specifically, if the party acquired the mortgage from the original lender or from another party who acquired it from the original lender, the claimant can meet its burden through evidence that traces the loan from the original lender to the party. *See In re Maisal*, 378 B.R. at 22 (quoting *In re Parrish*, 326 B.R. 708, 720 (Bankr. N.D. Ohio 2005)).

In order to show chain of title, a plaintiff must produce a valid written assignment. This is required because under Massachusetts law (unlike most states), granting of a mortgage vests title with the mortgagee and title passes with the mortgage. *Faneuil Investors Group, L.P. v. Bd. Of Selectman of Dennis*, 75 Mass App. Ct. 260, 264-65 (2009). Because the mortgage constitutes an interest in real property, the statute of frauds applies and requires that an assignment of a mortgage be in writing. *See In re Samuels*, 415 B.R. 8, 20 (Bankr. D. Mass. 2009) (citing *Warden v. Adams*, 15 Mass. 233 (1818)). Unlike a note endorsement, an assignment of a mortgage cannot be in blank, because a deed which fails to name the grantee is not valid in Massachusetts. *Burns v. Lynde*, 6 Allen 305 (1863); *Flavin v. Morrissey*, 327 Mass. 217, 219 (1951).

In *Ibanez*, the Land Court held, in a decision being reviewed by the Supreme Judicial Court, that mortgage assignments must be in recordable form. *Ibanez*, 2009 WL 3297551 at *11 (Mass Land Ct. Oct. 14, 2009). The foreclosing parties in Ibanez argue that the requirement of a written mortgage assignment is satisfied by a Pooling and Servicing Agreement executed between the depositor, the trustee and the servicer of the mortgage trust. The Land Court disagreed, concluding that the agreement between the securitization entities stating that each had a right to an assignment of the mortgage is not itself a recordable assignment. *Id*. Oral argument

on the Ibanez appeal was held on October 7 and a ruling resolving the issue is expected soon. For more discussion on *Ibanez*, please see the materials provided along with this paper.

What is clear is that it is not necessary for an assignment to be recorded in order to be valid. Assignment of mortgage may be recorded at any time before, or even after, foreclosure. *See e.g. Lamson & Co. v. Abrams*, 305 Mass 238 (1940); *Montague v. Dawes*, 94 Mass. 397 (1866).

MERS has been held to have standing on the basis of its being as nominee mortgagee named in a recorded mortgage. *In re Huggins*, 357 B.R. 180, 185 (Bankr. D. Mass. 2006). Please see the materials provided along with this paper for a more involved discussion of MERS-related issues.

3. Demonstrating Authority as Servicer

A servicer's standing is in certain situations premised on its being authorized to take action on the owner's behalf. As such, a party who is the servicer of a mortgage loan must, in addition to establishing the rights of the holder, indentify itself as an authorized agent for the holder. *See In re Maisal*, 378 B.R. at 22 (quoting *In re Parrish*, 326 B.R. 708, 720 (Bankr. N.D. Ohio 2005). This can often be done by introducing the servicing agreement which includes authorization within its provisions or a power of attorney authorizing the servicer's actions. If servicing authority is found in a servicing agreement related to a mortgage security trust, the servicer must show that the mortgage is part of the trust. *See In re Jones*, 2008 WL 4539486 at *5 (Bankr. D. Mass. Oct. 3, 2008) (servicing agreement missing exhibit detailing which loans were in the trust led to finding that servicer lacked standing).

C. Recent Massachusetts Bankruptcy Court Cases

1. In re Huggins, 357 B.R. 180 (Bankr. D. Mass. 2006)

MERS sought relief from the automatic stay and debtor opposed the motion. The note identified MERS as the mortgagee acting solely as nominee for the mortgage lender, and granted MERS full mortgage rights in respect of the property, including power of sale. The debtor contended that MERS did not have a property or ownership interest in the rights of the mortgage lender and thus was not a real party in interest allowed to collect on the note or enforce the mortgage. The Court held that MERS as nominee had all the customary rights of a mortgagee under Massachusetts law and was allowed to act under the mortgage on the lender's behalf.

2. In re Maisels, 378 B.R. 19 (Bankr. D. Mass. 2007)

Wells Fargo filed a motion for relief from stay seeking to foreclose on the Maisels' property. The Court sought additional evidence from Wells Fargo because, while it stated it was holder of the note and mortgage, the documents it submitted in support of its motion indicated that Option One Mortgage Corporation ("Option One"), the original lender, was holder of the note and mortgage. Wells Fargo responded by filing an assignment to it from Option One dated four days after filing of the Motion for Relief from Stay. The Court held that Wells Fargo did not have standing to seek relief at the time that it filed its motion for relief from stay.

3. In re Schwartz, 366 B.R. 265 (Bankr. D. Mass. 2007)

HomeEq Servicing Corporation ("HomeEq") filed a motion for relief from stay to evict the debtor from her property, a foreclosure sale having been conducted by Deutsche Bank prior to the commencement of bankruptcy proceedings. The debtor contended that HomeEq had failed to show that Deutsche Bank was the proper party to foreclose. HomeEq had sent a validation of debt letter claimed to be the servicing agent for Ocwen Federal Bank ("Ocwen") but was not able to offer any evidence that MERS, as nominee, or First NLC, as mortgage lender had ever

assigned the mortgage to Ocwen. Deutsche Bank conducted the mortgage sale and purchased the property at the sale but only was able to produce an assignment that was signed after the foreclosure sale. The court denied the motion for relief from stay and warned that in the future, it would not sift through the documents presented unprompted but rather would dismiss the motion summarily if the relevant facts were not presented to it.

4. In re Nosek, 386 B.R. 374 (Bankr. D. Mass 2008)

The court issued an order to show cause why sanctions should not be imposed. Ameriquest Mortgage Company ("Ameriquest") was the original servicer on a note and mortgage when executed in 1997. Ameriquest assigned the note and mortgage to Norwest Bank, Minnesota, N.A. ("Norwest") later that year but referred to itself during bankruptcy proceedings subsequent to its assignment to Norwest as the "holder" of the note and mortgage, failing to reveal that it was not the holder of either until later in the case. The court held that Ameriquest, Norwest and their counsel acted unreasonably in misrepresenting Ameriquests status as holder in violation of Rule 9011, which indicates that counsel signing pleadings are certifying that their contentions are supported to their knowledge based on a reasonable inquiry. The Court imposed sanctions totaling $650,000 on the parties, including $250,000 on Ameriquest.

After an the District Court affirmed, the First Circuit held that the Bankruptcy Court had imposed an excessive sanction on Ameriquest for characterizing itself as the holder of the mortgage rather than the servicer. ***609 F.3d 6 (1st Cir. 2010).*** It reduced the amount of the sanction from $250,000 to $5,000.

5. In re Hayes, 393 B.R. 259 (Bankr. D. Mass. 2008)

Hayes contested the standing of Deutsche Bank, as trustee to seek relief from stay and oppose her objection to a proof of claim filed by the purported servicer of the mortgage. Deutsche Bank sought to establish its standing by introducing the pooling and servicing agreement ("PSA") for the trust that it maintained the Hayes mortgage was a part of and a separate confirmatory assignment made by the current servicer under authority of a limited power of attorney. The court concluded that Deutsche Bank failed to provide adequate chain of title from the original holder of the mortgage. First, it concluded that by failing to produce a schedule of the loans in the trust pool, it did not establish that the mortgage was owned by the trust. Second, it stated that the limited power of attorney under which the servicer assigned the loan to Deutsche Bank on behalf of the original lender did not include the ability to assign the mortgage under the circumstances it was assigned within its scope. Additionally, the Court held that Deutsche Bank failed to prove that the original mortgage lender had created a servicing relationship with the servicer filing the proof of claim because the original lender was not party to the pooling and servicing agreement and there was no evidence that it had assigned the mortgage to any of the parties to it.

However, the Court granted a motion by Deutsche Bank for reconsideration upon introduction of additional evidence. *See* **Order dated January 29, 2009, case no. 07-13967-JNF [Docket No. 562]**. An amended proof of claim filed by Deutsche Bank included the previously missing schedule showing that the mortgage was subject to the PSA and an assignment of the mortgage that served to ratify the assignment previously held invalid as outside the terms of the power of attorney granted to the servicer. The Court found that Deutsche Bank had cured the previous defects in its evidence and that it had standing to asserts its claim.

6. In re Jones, No. 07-15662-JNF, 2008 WL 4539486 (Bankr. D. Mass. Oct. 3, 2008)

Carrington Mortgage Services ("Carrington") filed a claim as successor to New Century Mortgage Corporation ("New Century"). The debtor objected to Carrington's standing as successor servicer and as holder of the mortgage. The debtor had executed a mortgage with Ameripath Mortgage Corporation ("Ameripath"), which recorded it. Ameripath assigned the note but not the mortgage to New Century. New Century, a mortgage trust and Deutsche Bank, as trustee, entered into a servicing agreement, under which New Century as master servicer. However, the parties failed to introduce a list of the mortgages included in the trust. Ameripath subsequently recorded an assignment from it to Deutsche Bank. Deutsche Bank then filed a complaint in Land Court seeking to foreclose on the property. New Century then recorded an assignment of the mortgage to it from Ameripath, despite the fact that an assignment to Deutsche Bank had already been recorded. Additionally, New Century's rights as servicer were sold to Carrington and Deutsche Bank executed a limited power of attorney to Carrington but did not grant it the authority to execute assignments except in certain unrelated circumstances. Finally, New Century executed an assignment of the mortgage to Carrington, after the debtor had filed its voluntary chapter 7 petition.

The Court found, first, that although Carrington was a valid successor to New Century as servicer to the trust, there was no evidence that the debtor's mortgage was actually part of the trust and therefore no evidence of Carrington's standing as servicer of the mortgage. Second, the court found that because the mortgage had been previously assigned by Ameripath to Deutsche Bank, the assignment from Ameripath to New Century did not establish New Century as ever being holder of the mortgage, tainting its assignment to Carrington. As Deutsche Bank was owner of the mortgage, Carrington lacked standing to file a proof of claim. The Court indicated

that if the proper chain of ownership could be established to show Carrington had standing, an amended proof of claim could be filed.

7. In re Samuels, 415 B.R. 8 (Bankr. D. Mass. 2009)

Samuels objected to Deutsche Bank's secured claim as trustee under a PSA, arguing that Deutsche Bank did not have standing because it did not hold the note or own the mortgage. The claim was originally filed by AMC Mortgage Services, Inc. ("AMC") as servicer for Argent as creditor without attaching the note or mortgage. After further evidence was given, including the note and the mortgage, the debtor objected on the ground that there was no evidence that AMC was holder of note or owner of the mortgage. A motion to amend the proof of claim to correctly name Deutsche Bank as the creditor rather than Argent was made by the new servicer, Citi Residential Lending, Inc. ("Citi"). The amended proof of claim, which the court allowed, included a confirmatory assignment of the note and mortgage from Argent to Deutsche Bank and a limited power of attorney from Argent to Citi. While the debtor conceded that the Note had been endorsed in blank and transferred to Deutsche Bank, it maintained that there were defects in the chain of title of the mortgage.

The Court first concluded that the proof of claim did not enjoy prima facie validity under Rule 3001 because authority to execute the confirmatory assignment attached from Citi on behalf of Argent to Deutsche Bank was not within the limited power of attorney. However, the Court went on to hold that Deutsche Bank had met its burden of proving ownership of the mortgage by submitting a wider power of attorney which authorized the assignment by Citi from Argent to Deutsche Bank and ratified all prior assignments within its scope. The Debtor further argued that the assignment directly from Argent to Deutsche Bank violated the terms of the PSA by omitting a required intervening depositor and therefore was invalid. The Court held that adherence to the terms of the PSA had no bearing on the validity of the assignment for purposes

of Deutsche Bank's standing. Additionally, the Court found no merit in the argument that execution of the confirmatory assignment after filing of the debtor's bankruptcy petition violated the automatic stay. The Court granted summary judgment for Deutsche Bank overruling Samuels' objection to the proof of claim.

8. In re Brown, 431 B.R. 309 (Bankr. D. Mass. 2010)

AMC Mortgage Servicers, Inc. ("AMC") as loan servicer filed a proof of claim on behalf of Argent Mortgage Company, LLC ("Argent") but failed to attach a copy of either the note or the mortgage, as required by Federal Rule of Bankruptcy Procedure 3001. Deutsche Bank, as trustee, having already filed a motion for relief from stay, sought leave to amend AMC's proof of claim. Deutsche Bank submitted documents establishing that it was holder of both the note and mortgage. Despite finding the existence of prejudice to the debtor, the Court allowed Deutsche Bank to amend the claim. However, it ordered Deutsche Bank to pay the debtor's attorneys fees related to the objection and adversary proceeding.

9. In re Bailey, 437 B.R. 721 (Bankr. D. Mass. 2010)

Wells Fargo sought dismissal of an adversary complaint brought by Bailey to invalidate a prepetition foreclosure sale of her residence on the ground that Wells Fargo was not the holder of the mortgage at the time of the sale. The debtor, noting that the registry of deeds contained only a mortgage to Shawmut Mortgage Company ("Shawmut") and an assignment from Washington Mutual Bank ("WaMu") to Wells Fargo, argued that a gap in the chain of title demonstrated a lack of evidence on record which invalidated the foreclosure under *Ibanez* and *Schwartz*. Wells Fargo contended that there was a valid but unrecorded assignment from Shawmut to WaMu and that under Massachusetts law, an assignment need not be recorded to be valid. The Court held that, under *Ibanez*, a foreclosure is not rendered invalid if the holder had a valid assignment that was executed prior to publication and foreclosure but not recorded until later. Rather, a

foreclosing party need only be the holder of the mortgage and able to prove their status upon request. The Court did not dismiss, finding the need for further facts to decide the determinative issue, whether Wells Fargo was actually the holder at the time of the foreclosure.

10. In re Shapoval, No. 10-30175-HJB, [Docket No. 70] (Bankr. D. Mass. Nov. 19, 2010)

Wells Fargo, as trustee, sought relief from the stay. The debtor had previously opposed a proof of claim, which was filed by Wells Fargo with a copy of the note. The note attached the proof of claim did not have an endorsement but Wells Fargo subsequently filed a copy of an allonge to the mortgage note. The debtor objected to the lift stay motion claiming Wells Fargo lacked standing. The court reviewed Massachusetts law and found that an endorsement made on an allonge is valid but the allonge must be affixed to the original instrument. The Court ordered an evidentiary hearing to determine if the allonge was actually affixed to the original note and, if so, when.

11. In re Wilson, No. 08-1243-FJB, 2010 WL 4934936 (Bankr. D. Mass. Nov. 30, 2010)

Wilson brought an adversary proceeding for reconsideration of a claim and a determination that Deutsche Bank, as trustee under a PSA, was neither owner of the mortgage nor holder of the note. First, the debtor argued that Deutsche Bank was not holder of the note because the note did not contain a valid endorsement to bearer or to Deutsche Bank at the time it was filed. In finding that an endorsement made on the note was valid, the court held that the timing of the endorsement in blank was immaterial because the issue was whether Deutsche Bank was holder of the note not whether it was holder of the note at the time it filed its proof of claim. Second, with regard to the mortgage, the Court held, consistent with *Samuels*, that when an assignment violates a PSA, giving rise to unfavorable regulatory, contractual or other consequences, neither the PSA nor the consequences render the assignment invalid. Deutsche

Bank had a valid assignment from the original lender and therefore was the owner of the mortgage. The Court granted summary judgment for Deutsche Bank and dismissed the adversary proceeding on its merits.

D. Conclusion

The cases discussed above highlight the technicalities of proving standing in cases where mortgages have been securitized or otherwise transferred. Parties attempting to enforce claims, seek relief from the stay or foreclose on mortgages face the task of demonstrating to the court their standing to do so with sufficient clarity to please its increasingly rigorous standards. It is helpful for parties to provide as much information as possible as an initial matter to avoid needless litigation or a delay exercising their remedies.

E. Disclaimer

This presentation summarizes certain cases, arguments and developments under Massachusetts law, and is for educational purposes only. It should not be attributed as either the views of the authors or of the presenters or of their clients, and does not purport to apply to particular fact situations or to state all potentially-applicable legal principles.