Concurrent
Breakout

Mortgage Foreclosure Meltdown: Flawed Affidavits, Improper Securitizaton and Breaks in the Title Chain

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Educational Materials

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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.

***Ringegard-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)**

ABI WINTER LEADERSHIP CONFERENCE
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RESOLVED:
A MORTGAGE SERVICER LACKS STANDING AS A REAL PARTY IN INTEREST

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These materials[1] summarize several prominent decisions by bankruptcy courts faced with deciding whether to grant relief to purported lenders, servicers and/or their agents in bankruptcy cases. These cases address the constitutional standing and real party in interest status of parties where they cannot show they hold the past due note or that they are entitled to enforce it.

INTRODUCTION

In the past decade, electronic information and data transmission have increased the speed at which we do business. These seemingly efficient tools have made it easier for banks to transfer funds and buy and sell notes without leaving a paper trail. However, now that the real estate bubble has burst, courts are demanding to see the paper trail for promissory notes before allowing lenders to foreclose on real property. As required by the Constitution, courts must confirm that a lender actually has standing and will benefit from the court granting relief from an automatic stay before the court can do so. Below is a brief description of the concepts related to standing and real parties in interest, followed by a summary of several different cases addressing these issues.

DISCUSSION

In the cases below, the courts discuss whether the party seeking relief from the automatic stay has standing to bring the motion and/or is the real party in interest. Many courts use the terms of standing and real party in interest interchangeably because the two concepts are closely related, but they do have distinct requirements. Standing has both constitutional and prudential (*i.e.* self-imposed) requirements. The real party in interest question is really the prudential component of the overall standing analysis, while injury-in-

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[1] These materials were prepared by Ford Elsaesser and Rudy J. Cerone.

fact is a constitutional requirement. Both requirements must be met before a court can grant relief from the automatic stay. In addition, a party also has standing to seek relief if it has the authority to act on behalf of an entity that has standing. Therefore, a nominee or agent will have to prove both (1) that it is an agent with the authority to act on behalf of the principal and (2) that the principal has both constitutional standing and prudential standing. However, even if a party has standing, the agent must prosecute the action in the name of the real party in interest and not in its own name.

The standing requirement is "an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 US 555, 560 (1992). This constitutional doctrine requires that a claimant must present an actual or imminent injury that is fairly traceable to the defendant's conduct and redressable by a favorable ruling. *Davis v. Fed. Election Comm'n*, 128 S.Ct. 2759 (2008). The standing question is a threshold issue, required before a court may entertain a suit. *Warth v. Seldin*, 422 U.S. 490, 495 (1975). Thus, if a lender cannot prove standing, the court has no authority to hear its motion for relief from stay and it must dismiss the motion.

Prudential requirements also require that a party bringing a motion be the real party in interest. Rule 17 of the Federal Rules of Civil Procedure ("FRCP") requires "[a]n action must be prosecuted in the name of the real party in interest." Fed. R. Civ. P. 17. The purpose is to ensure the party bringing forth the action is the party who "possesses the substantive right being asserted under the applicable law." 6A Wright, Miller & Kane, *Federal Practice and Procedure* § 1541 (Westlaw current through 2009 update). This reflects the fact that the federal judiciary also adheres to certain prudential principles concerning standing. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). The real party in interest inquiry is one of the prudential

considerations the judiciary self-imposes to limit the role of courts in democratic society. *See, e.g., In re Village Rathskeller*, 147 B.R. 665, 668 (Bankr. S.D.N.Y. 1992). Because it applies in bankruptcy proceedings, parties must adhere to Rule 17 in order to seek relief from automatic stay. Rules 9014 and 7017, Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"); *In re Hwang*, 396 B.R. 757, 766 (Bankr. C.D. Cal. 2008).

The cases in this discussion illustrate potential standing and real party in interest issues arising in bankruptcy proceedings. While the Mortgage Electronic Registration Systems ("MERS") promised to streamline mortgage transactions and cut costs, this service often results in a series of unrecorded transfers or transfers to parties outside the servicer's system that can complicate knowing how a note traveled through the system and whether a party really has standing to seek foreclosure. The cases below demonstrate how some creditors and servicers failed to show they had standing or were, or were acting on behalf of, the real party in interest.

IN RE HWANG

The Bankruptcy Court for the Central District of California reconsidered its denial of IndyMac Federal Bank's ("IndyMac Bank") motion for relief from automatic stay. *Hwang*, 396 B.R. at 760. In this case, IndyMac transferred ownership of the note to an unknown party, but never transferred possession of the note. *Id.* The court found that, despite IndyMac Bank being entitled to enforce the note against the debtors, it was not the real party in interest because it was not ultimately entitled to the payments made on the note, so the court affirmed its denial of IndyMac Bank's motion for relief from automatic stay. *Id.* at 766-67.

The original payee and beneficiary of the deed was Mortgageit, Inc. ("Mortgageit"). *Id.* However, Mortgageit later transferred it to IndyMac Bank. *Id.* at 761. Mortgageit was a

MERS member, but MERS lost its rights when the deed passed to IndyMac Bank. *Id.* IndyMac Bank later sold the note to "unidentified 'investors' through Freddie Mac" while retaining physical possession of the note. *Id.* IndyMac Bank argued it was the authorized servicing agent for the new owner. *Id.* at 761-62. However, the court rejected this argument since IndyMac Bank admitted it did not know who the owner was and submitted no evidence of any such agreement. *Id.* However, the court found that IndyMac Bank was entitled to enforce the promissory note since it is a negotiable instrument, and under California law, the holder of a negotiable instrument has the right to enforce it. *Id.* at 762-63. For any instrument payable to a particular person, the holder is required to prove both (1) that it is in possession of the instrument and (2) that the instrument is payable to that person. *Id.* Here, IndyMac Bank can enforce the note because it has possession of the note which is payable to IndyMac Bank. *Id.* Since IndyMac Bank never delivered the note to the new owner, the right to enforce the note never passed and IndyMac Bank remains the holder of the note, retaining the right to enforce it. *Id.* at 763-65.

However, to prosecute the action in its own name, IndyMac Bank also must be the real party in interest. *Id.* at 766. The court found that a party may have constitutional standing, but still not be the real party in interest (*i.e.,* have prudential standing) if the substantive right belongs to someone else. *Id.* at 767-68. In this case, even though IndyMac Bank was entitled to demand and receive payment from debtors, the payments actually belonged to the new owner, not IndyMac Bank. *Id.* at 764-65.

Even if IndyMac Bank proved it was the servicing agent for the owner of the note, it must bring the action in the real party in interest's name rather than its own name, or join that party to the action to satisfy FRCP 19. *Id.* at 770-71. The purpose of FRCP 19 is to join "all

persons whose joinder would be desirable for a just adjudication of the matter." *Id.* In this case, joinder is required because "as a practical matter [failure to join will] impair . . . the person's ability to protect the interest." *Id.* at 771. Here, adjudicating the motion without joining the owner jeopardizes the owner's ability to protect its interest. *Id.* Since the court gave IndyMac Bank more than two months to join the new owner, but IndyMac failed to do so, the court denied the motion for relief from automatic stay. *Id.* at 772.

IN RE HAYES

In *Hayes,* the court noted that "mortgage servicers are parties in interest with standing by virtue of their pecuniary interest in collecting payments under the terms of the notes and mortgages they service." *In re Hayes,* 393 B.R. 259, 267 (Bankr. D. Mass. 2008) (*citing In re Woodberry,* 383 B.R. 373, 379 (Bankr. D.S.C. 2008); and *In re Conde-Dedonato,* 391 B.R. 247 (Bankr. E.D.N.Y. 2008)). However, Deutsche Bank National Trust Company, in its capacity as Trustee under a securitization Pooling and Servicing Agreement (a "PSA"), the moving party under the stay relief motion, did not prove that the mortgage at issue ever was assigned to the Depositor under the PSA. *Id.* at 268. The court noted that both it and the debtor "are entitled to insist that the moving party establish its standing in a motion from a relief from stay through the submission of an accurate history of the claim of ownership of the mortgage. Absent such proof, relief from the stay is unwarranted and a proof of claim filed by the moving party, to which an objection is filed, must be disallowed." *Id.* at 269.

Consequently, the court denied Deutsche Bank's stay relief motion and sustained the debtor's claim objection without prejudice to reconsideration upon the filing of an amended proof of claim by the proper party. *Id.* at 270 (*citing* Bankruptcy Code § 502(j) and Bankruptcy Rule 3008); *see also In re Wells,* 407 B.R. 873, 881-83 (Bankr. N.D. Ohio 2009)

(disallowing proof of claim in a chapter 13 case because the Trustee under a PSA and its servicer failed to prove that the Trustee had standing to file the proof of claim). Ominously for counsel for the mover, the court noted that inaccurate representations about the moving party's status as a holder may constitute a violation of Bankruptcy Rule 9011 and may warrant sanctions under 28 U.S.C. § 1927. *Hayes,* 393 B.R. at 269; s*ee also In re Fitch,* 2009 WL 1514501 (Bankr. N.D. Ohio, May 28, 2009) (the court ordered an audit of any cases in its district in which MERS filed affidavit of default and, if any incorrect affidavits were filed, ordered counsel to appear at an adjoined hearing).

IN RE JACOBSON

In this case, the Bankruptcy Court for the Western District of Washington denied the motion for relief from automatic stay because the moving party, UBS AG, could not show it had standing, nor that it had authority to act for anyone that did have standing. *In re Jacobson*, 402 B.R. 359, 369 (Bankr. W.D. Wash. 2009). UBS AG purported to represent ACT as servicer of the note. *Id.* The court cited Hwang, noting that even if the moving party is the noteholder's agent, it does not make the agent a real party in interest. *Id.* at 366. To have standing to prosecute the motion in the name of the real party in interest, the court required UBS AG to show it had authority to act on the noteholder's behalf. *Id.* at 367. Since UBS AG made no such showing, and it was not the real party in interest, the court denied the motion. *Id.* at 770.

Execution of the original note was on behalf of Castle Point Mortgage ("Castle Point") and listed MERS as a beneficiary "solely as nominee for lender and lender's successors and assigns." *Id.* at 362. Castle Point later sold the note to ACT Properties, LLC ("ACT") in an unrecorded transaction. *Id.* However, UBS AG admitted that Wells Fargo held the note. *Id.* at

363. The court questioned, as did the court in *Hwang*, whether ACT itself would even qualify as the holder given that someone endorsed it in blank and another had possession of the note. *Id.* at 369.

As both an admonition and suggestion to MERS, the court instructed that it is possible to prove the identity of the various holders and servicers by putting forth evidence and stated that some courts require such evidence to be admissible before considering it. *Id.* at 367. The evidence put forth by UBS AG did not meet any standards of admissibility, and the court further commented on its ineffectiveness. *Id.* UBS AG submitted a conclusory declaration by a "bankruptcy specialist" stating he was a custodian of the records, knew them to be a true copy of the originals made at the time of the events in the ordinary course of business. *Id.* at 368. Although no business records were submitted, the court opined that the "bare assertion that one works for the company and is familiar with its recordkeeping procedures is not sufficient . . . to establish the person is sufficiently knowledgeable about the subject of the testimony." *Id.* The testimony needs to express information warranting the conclusion that the records presented are what they purport to be. *Id.*

Unlike *Hwang*, the movant here asserted that it was the servicer of the note and acting on behalf of the holder. In addition, neither UBS AG nor ACT had actual possession of the note and thus neither appeared to have any right to enforce it. *Id.* at 370. While establishing that UBS AG is the agent rather than the noteholder seems like it might be an easier standard to meet, it must still show it is the agent of ACT. *Id.* Even if it could, it must also show ACT is the real party in interest and join ACT as a party or litigate in its name instead of its own name. *Id.* Because UBS AG was not the real party in interest nor could it show it was acting on behalf of the real party in interest, the court denied the motion for relief from stay. *Id.*

IN RE SHERIDAN

In this case, the Bankruptcy Court for the District of Idaho considered a stay relief motion brought by MERS as nominee for HSBC Bank USA ("HSBC"). *In re Sheridan*, 2009 WL 631355 (Bankr. D. Idaho, Mar. 12, 2009). MERS not only asserted it was nominee, but also characterized itself as a "secured creditor and Claimant." *Id.* at *1. MERS was designated a beneficiary on the Deed of Trust and as nominee for the noteholder at the time of execution. *Id.* at *6 The court still found this insufficient, as there was no showing made as to who the current noteholder was. The court also held MERS was not an actual beneficiary, despite the Deed naming it one, since no actual economic benefit accrued to it. *Id.* at * 4.

The Promissory Note and Deed of Trust identified the lender as Fieldstone Mortgage Company ("Fieldstone"), and the Deed also identified MERS as nominee and beneficiary for the noteholder and all its successors and assigns. *Id.* at * 4. The Promissory Note also stated that "anyone who takes this Note by transfer and who is entitled to receive payments . . . is called the Note Holder." *Id.* at *1. MERS argued that it had authority to act for the current noteholder, whoever that was, since it was named as a beneficiary and nominee for all successors and assigns. *Id.* at *4. Even if the court agreed, there is still the issue of the Note not indicating any transfer to other parties. *Id.* at *5. Therefore, Fieldstone appeared to be the current noteholder, and MERS did not purport to represent Fieldstone at any time. *Id.* at *4. The court denied the motion for relief from stay for two reasons: (1) It found the "titular designation" of MERS as "beneficiary" on the Deed insufficient to establish it as such; and (2) there was no evidence or explanation presented showing whether HSBC had any current interest in the note. *Id.*

Merely naming a party as a beneficiary of an instrument is not sufficient to make it one. *Id.* The court looked to Idaho Code § 45-1502(1) which defines a beneficiary for purposes of the trust deed statute as "the person for whose benefit a trust deed is given." *Id.* Therefore, MERS was not a beneficiary under Idaho Code because the trust deed benefits the noteholder, which appeared to be Fieldstone in this case. *Id.* In addition, the language used in the Deed of Trust was confusing as it also stated that MERS will act "solely as nominee for Lender and Lender's successors and assigns." *Id.* Because MERS was not a beneficiary under Idaho Code and the language of the Deed was ambiguous, the court held that MERS was not a real party in interest and could not bring the motion in its own name. *Id.*

Even if MERS was properly acting as the agent of the real party in interest there was no showing that HSBC, or even Fieldstone, had any current interest in the note. *Id.* If there had been, the action must still be brought in the real party in interest's own name, not its agent's. *Id.* Later MERS submitted a "supplemental affidavit" stating that it had obtained an original copy of the Note, which now indicated an endorsement. *Id.* at *5. The court found the affidavit improper for several reasons. But, even had the court been able to consider it, the affidavit would not have assisted MERS since there was neither a date nor any indication of who the transferor or the transferee was. *Id.* at *6. Even if Fieldstone had endorsed the note in blank it would not have established HSBC or Fieldstone as the noteholder since Idaho Code provides it "may be negotiated by transfer of possession alone until specially indorsed." *Id.* The court held, "the only entity that MERS could conceivably represent as agent/nominee would be [Fieldstone]. But MERS does not represent [Fieldstone] . . . and, in fact, . . . conten[ds] that [Fieldstone] is no longer a party in interest." *Id.* at *6.

Because MERS was unable to establish that it was a real party in interest with standing, or even that it represented such, the court denied the motion for relief from stay. *Id.; accord, In re Vargas,* 396 B.R. 511 (Bankr. C.D.Cal. 2008) (because MERS was not the holder of the note, and because only the holder of a negotiable promissory note is entitled to enforce same, the stay relief was denied).

IN RE MITCHELL

Mitchell is the lead case for a number of motions to lift stay filed in MERS' own name or filed in the name of MERS as nominee for another. *In re Mitchell*, 2009 WL 1044368 (Bankr. D. Nev., Mar. 31, 2009). The Bankruptcy Court for the District of Nevada handled the motions in a joint hearing because each of the cases had substantially similar issues regarding MERS' standing. *Id.* at *1. MERS withdrew the motions to lift stay in all but four of the cases and, in this opinion, the court issued orders in two of the cases. *Id.* Like *Sheridan*, this court denied the motions in both cases because MERS was not the noteholder nor did it show the authority to act on behalf of one who was the noteholder. *Id.* at *4.

Similar to *Sheridan*, MERS argued it had standing because the deeds of trust either named it as a beneficiary or as the nominee of the beneficiary. *Id.* The court noted that merely naming MERS a beneficiary does not give it any rights to enforce the note. *Id.* at 3. The court found that, since MERS had no rights to any payments, servicing rights or any rights to secured properties, it was not a beneficiary. *Id.* The court also found similar ambiguities in the language of the deeds of trust and in MERS' brief regarding whether MERS argued it had standing in its own right, or as the nominee, or both. *Id.* Even if MERS was a beneficiary of the note, that alone would be insufficient to confer standing. *Id.* For MERS to foreclose, it must show that it had possession of the note and the deed of trust or it had authority to act as

agent for the entity that did. *Id.* at *4. Because MERS was not the beneficiary or the holder of the deed of trust, nor was there evidence that the principal it purported to act on behalf of were either of these, the court denied the motions for relief from stay. *Id.* at *6.

<u>IN RE WILHELM</u>

In a recent decision, the Bankruptcy Court for the District of Idaho further expounded on the requirements for lenders to show standing when seeking relief from the automatic stay. *In re Wilhelm,* 407 B.R. 392 (Bankr. D.Idaho 2009). In his decision, Judge Myers held that the movants in five different actions for relief from stay lacked standing to bring such motions because: (1) they were not named on the notes at issue; (2) the notes were not indorsed in blank or to any specific person or entity (such as the movants); (3) the movants failed to prove that they held the notes; and (4) the movants were not proper assignees of the notes even though they argued that MERS assigned the notes to them because the notes named MERS as beneficiary acting solely as nominee with no right to assign the notes.

The court found that "there are two threshold questions in each of these motions: (1) Have Movants established an interest in the notes? (2) Are Movants entitled to enforce the notes?" *Id.* at 398. The court held that the Movants failed to provide any admissible proof to answer either question in their favor and, in fact, the notes attached to several declarations contradicted the information contained in the declarations. In reaching its decision, the court did add one important admonition to counsel: "In general, counsel should gather the appropriate documents and factual data *before* filing the motions (as required by Rule 9011 in any event), rather than attempting to cure patently defective motions with serial supplemental filings." *Id.* at 403 (emphasis in original).

IN RE FORECLOSURE CASES

Standing and real party in interest problems occur outside of bankruptcy courts in foreclosure actions themselves. In *In re Foreclosure Cases,* 2007 WL 3232430, *2 (N.D. Ohio, Oct. 31, 2007), the United States District Court for the Northern District of Ohio dismissed fourteen (14) foreclosure actions filed by Deutsche Bank National Trust Company ("DB"), as Trustee under a PSA for certain asset-backed pooled mortgage facilities because the DB failed to establish diversity jurisdiction and standing. In the foreclosure actions, Judge Christopher Boykin issued an Order requiring DB to prove that it was the holder and owner of the underlying notes and mortgages that were the basis for each of the foreclosure actions. DB was required to file a copy of the executed Assignment demonstrating that DB was the holder and owner of the Note and Mortgage as of the date the Complaint was filed. The original lender was reflected as the mortgagee and no assignment to DB was reflected in the chain of title. Under Ohio law, assignments of mortgages are subject to recording requirements. Therefore, in addition to execution of a mortgage assignment, recording may also be required to establish standing.

DB produced Mortgage Assignments dated after the date of the original foreclosure complaint. These Mortgage Assignments were attached to pleadings in support of DB's position that the Mortgage Assignments were sufficient to establish standing to prosecute the foreclosure actions, even though such Mortgage Assignments were entered into after the commencement of the foreclosure actions. The Court disagreed. It found that DB was not the holder of the notes when the complains were filed and dismissed all 14 foreclosure actions. The dismissals were without prejudice to re-file at a later date.

Other recent, notable cases dealing with standing issues in state law foreclosure proceedings are: *Mortgage Electronic Registration System, Inc. v. Southwest Homes of Ark.,* 302 S.W. 3d 1 (Ark. 2009) (MERS is not a necessary party in a deed of trust foreclosure because it is neither the trustee nor the beneficiary under the deed of trust); *Landmark Nat'l Bank v. Kesler,* 216 P.3d 158 (because MERS is not a lender, it is not a necessary party in a mortgage foreclosure action and has no due process right to intervene; the court describes MERS, variously, as a "straw man" and a "front man" for its financial institution members); *Goodyke v. BNC Mortgage, Inc.,* 2009 WL 2971086 (D.Ariz., Sept. 11, 2009) (because a nonjudicial foreclosure in Arizona does not require presentation of the original note before commencing the foreclosure proceedings, debtors' "show me the note" argument in support of an action to enjoin the foreclosure lacks merit).

CONCLUSION

The cases discussed above highlight the failure of several lenders to keep adequate records of transfers of underlying notes. Without a proper paper trail, lenders cannot show that they have standing or are the real parties in interest entitled to bring a motion for relief from the automatic stay or a subsequent foreclosure action. In addition, attorneys should take note of how courts will regard conclusory affidavits in support of these motions as well as the potential for Rule 11 land mines when taking a client's averments regarding the ownership of a note or deed at face value without making a reasonable and independent inquiry before submitting such statements to a court.

DISCLAIMER

This presentation summarizes certain cases, arguments and developments, and is for educational purposes only. It should not be attributed as the views either of the authors, of their firm or of their clients.

TABLE OF RECENT AUTHORITIES REGARDING STANDING ISSUES

1. **Stay Relief Cases**

In re Lopez, 2010 WL 1636040 (Bankr. D. Ariz., Apr. 19, 2010)

In re Sheridan, 2009 WL 631355 (Bankr. D. Id., Mar. 12, 2009)

In re Weisband, 427 B.R. 13 (Bankr. D. Ariz. 2010)

In re Emrich, 2009 WL 3816174 (Bankr. N.D. Cal., Nov. 12, 2009)

In re Jacobson, 402 B.R. 359 (Bankr. W.D. Wash. 2009)

In re Gramajo, 2009 WL 2824786 (Bankr. N.D. Cal., Apr. 24, 2008)

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

2. **Claims Objections Cases**

In re Brown, 2010 WL 1571160 (Bankr. D. Mass. Apr. 19, 2010)

In re Minbatiwalla, 424 B.R. 104 (Bankr. S.D. N.Y. 2010)

In re Curry, 2009 WL 2424534 (Bankr. N.D. Tex., Aug. 3, 2009)

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

In re Williams, 395 B.R. 33 (Bankr. S.D. Ohio 2008)

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

3. **Adversary Proceedings/Foreclosure Cases**

In re Brown, 2010 WL 1571160 (Bankr. D. Mass. Apr. 19, 2010)

Dumesnil v. Bank of America, N.A., 2010 WL 1408889 (D. Ariz., Apr. 7, 2010)

Rhoads v. Washington Mutual Bank, F.A., 2010 WL 1408888 (D. Ariz., Apr. 7, 2010)

Newbeck v. Washington Mutual Bank, 2010 WL 291821 (N.D. Cal., Jan. 19, 2010)

In re Williams, 395 B.R. 33 (Bankr. S.D. Ohio 2008)

4. **Sanctions Cases**

In re Lee, 408 B.R. 893 (Bankr. C.D. Calif. 2009)

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SJC-10694

U.S. BANK NATIONAL ASSOCIATION, trustee[1] vs. ANTONIO IBANEZ (and a consolidated case[2,3]).

Suffolk. October 7, 2010. - January 7, 2011.

Present: Marshall, C.J., Ireland, Spina, Cordy, Botsford, & Gants, JJ.[4]

Real Property, Mortgage, Ownership, Record title. Mortgage, Real estate, Foreclosure, Assignment. Notice, Foreclosure of mortgage.

Civil actions commenced in the Land Court Department on September 16 and October 30, 2008.

Motions for entry of default judgment and to vacate judgment were heard by Keith C. Long, J.

The Supreme Judicial Court granted an application for direct appellate review.

R. Bruce Allensworth (Phoebe S. Winder & Robert W. Sparkes, III, with him) for U.S. Bank National Association & another.
Paul R. Collier, III (Max W. Weinstein with him) for Antonio Ibanez.
Glenn F. Russell, Jr., for Mark A. LaRace & another.
The following submitted briefs for amici curiae:
Martha Coakley, Attorney General, & John M. Stephan, Assistant Attorney General, for the Commonwealth.

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[1] For the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z.

[2] Wells Fargo Bank, N.A., trustee, vs. Mark A. LaRace & another.

[3] The Appeals Court granted the plaintiffs' motion to consolidate these cases.

[4] Chief Justice Marshall participated in the deliberation on this case prior to her retirement.

Kevin Costello, Gary Klein, Shennan Kavanagh & Stuart Rossman for National Consumer Law Center & others.
Ward P. Graham & Robert J. Moriarty, Jr., for Real Estate Bar Association for Massachusetts, Inc.
Marie McDonnell, pro se.

GANTS, J. After foreclosing on two properties and purchasing the properties back at the foreclosure sales, U.S. Bank National Association (U.S. Bank), as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z; and Wells Fargo Bank, N.A. (Wells Fargo), as trustee for ABFC 2005-OPT 1 Trust, ABFC Asset Backed Certificates, Series 2005-OPT 1 (plaintiffs) filed separate complaints in the Land Court asking a judge to declare that they held clear title to the properties in fee simple. We agree with the judge that the plaintiffs, who were not the original mortgagees, failed to make the required showing that they were the holders of the mortgages at the time of foreclosure. As a result, they did not demonstrate that the foreclosure sales were valid to convey title to the subject properties, and their requests for a declaration of clear title were properly denied.

Procedural history. On July 5, 2007, U.S. Bank, as trustee, foreclosed on the mortgage of Antonio Ibanez, and purchased the Ibanez property at the foreclosure sale. On the same day, Wells Fargo, as trustee, foreclosed on the mortgage of Mark and Tammy LaRace, and purchased the LaRace property at that foreclosure sale.

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[5] We acknowledge the amicus briefs filed by the Attorney General; the Real Estate Bar Association for Massachusetts, Inc.; Marie McDonnell; and the National Consumer Law Center, together with Darlene Manson, Germano DePina, Robert Lane, Ann Coiley, Roberto Szumik, and Geraldo Dosanjos.

In September and October of 2008, U.S. Bank and Wells Fargo brought separate actions in the Land Court under G. L. c. 240, § 6, which authorizes actions "to quiet or establish the title to land situated in the commonwealth or to remove a cloud from the title thereto." The two complaints sought identical relief: (1) a judgment that the right, title, and interest of the mortgagor (Ibanez or the LaRaces) 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 the plaintiff trustee in fee simple. U.S. Bank and Wells Fargo each asserted in its complaint that it had become the holder of the respective mortgage through an assignment made after the foreclosure sale.

In both cases, the mortgagors -- Ibanez and the LaRaces -- did not initially answer the complaints, and the plaintiffs moved for entry of default judgment. In their motions for entry of default judgment, the plaintiffs addressed two issues: (1) whether the Boston Globe, in which the required notices of the foreclosure sales were published, is a newspaper of "general circulation" in Springfield, the town where the foreclosed properties lay. See G. L. c. 244, § 14 (requiring publication every week for three weeks in newspaper published in town where foreclosed property lies, or of general circulation in that town); and (2) whether the plaintiffs were legally entitled to foreclose on the properties where the assignments of the mortgages to the plaintiffs were neither executed nor recorded in

the registry of deeds until after the foreclosure sales. The two cases were heard together by the Land Court, along with a third case that raised the same issues.

On March 26, 2009, judgment was entered against the plaintiffs. The judge ruled that the foreclosure sales were invalid because, in violation of G. L. c. 244, § 14, the notices of the foreclosure sales named U.S. Bank (in the Ibanez foreclosure) and Wells Fargo (in the LaRace foreclosure) as the mortgage holders where they had not yet been assigned the mortgages. The judge found, based on each plaintiff's assertions in its complaint, that the plaintiffs 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.

The plaintiffs then moved to vacate the judgments. At a

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[6] The uncertainty surrounding the first issue was the reason the plaintiffs sought a declaration of clear title in order to obtain title insurance for these properties. The second issue was raised by the judge in the LaRace case at a January 5, 2009, case management conference.

[7] The judge also concluded that the Boston Globe was a newspaper of general circulation in Springfield, so the foreclosures were not rendered invalid on that ground because notice was published in that newspaper.

[8] In the third case, LaSalle Bank National Association, trustee for the certificate holders of Bear Stearns Asset Backed Securities I, LLC Asset-Backed Certificates, Series 2007-HE2 vs. Freddy Rosario, the judge concluded that the mortgage foreclosure "was not rendered invalid by its failure to record the assignment reflecting its status as holder of the mortgage prior to the foreclosure since it was, in fact, the holder by assignment at the time of the foreclosure, it truthfully claimed that status in the notice, and it could have produced proof of that status (the unrecorded assignment) if asked."

hearing on the motions on April 17, 2009, the plaintiffs conceded that each complaint alleged a postnotice, postforeclosure sale assignment of the mortgage at issue, but they now represented to the judge that documents might exist that could show a prenotice, preforeclosure sale assignment of the mortgages. The judge granted the plaintiffs 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. In response, the plaintiffs submitted hundreds of pages of documents to the judge, which they claimed established that the mortgages had been assigned to them before the foreclosures. Many of these documents related to the creation of the securitized mortgage pools in which the Ibanez and LaRace mortgages were purportedly included.

The judge denied the plaintiffs' motions to vacate judgment on October 14, 2009, concluding that the newly submitted documents did not alter the conclusion that the plaintiffs were not the holders of the respective mortgages at the time of foreclosure. We granted the parties' applications for direct appellate review.

Factual background. We discuss each mortgage separately, describing when appropriate what the plaintiffs allege to have happened and what the documents in the record demonstrate.

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[9] On June 1, 2009, attorneys for the defendant mortgagors filed their appearance in the cases for the first time.

[10] The LaRace defendants allege that the documents submitted the judge following the plaintiffs' motions to vacate judgment are not properly in the record before us. They also allege that several of these documents are not properly authenticated. Because we affirm the judgment on other grounds, we do not address these concerns, and assume that these documents are

The Ibanez mortgage. On December 1, 2005, Antonio Ibanez took out a $103,500 loan for the purchase of property at 20 Crosby Street in Springfield, secured by a mortgage to the lender, Rose Mortgage, Inc. (Rose Mortgage). The mortgage was recorded the following day. Several days later, Rose Mortgage executed an assignment of this mortgage in blank, that is, an assignment that did not specify the name of the assignee. The blank space in the assignment was at some point stamped with the name of Option One Mortgage Corporation (Option One) as the assignee, and that assignment was recorded on June 7, 2006. Before the recording, on January 23, 2006, Option One executed an assignment of the Ibanez mortgage in blank.

According to U.S. Bank, Option One assigned the Ibanez mortgage to Lehman Brothers Bank, FSB, which assigned it to Lehman Brothers Holdings Inc., which then assigned it to the Structured Asset Securities Corporation, which then assigned the mortgage, pooled with approximately 1,220 other mortgage loans, to U.S. Bank, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z. With this last assignment, the Ibanez and other loans were pooled into a trust and converted into mortgage-backed securities that

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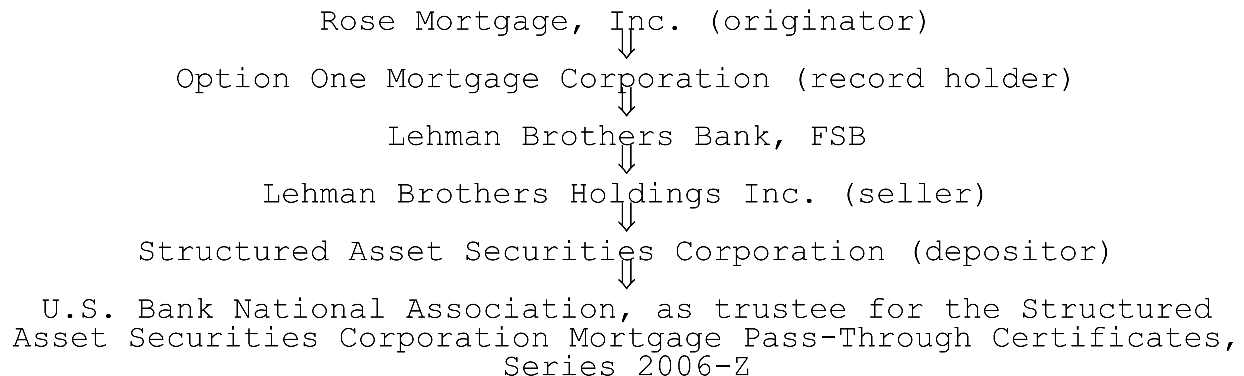
properly before us and were adequately authenticated.

[11] This signed and notarized document states: "FOR VALUE RECEIVED, the undersigned hereby grants, assigns and transfers to _______ all beneficial interest under that certain Mortgage dated December 1, 2005 executed by Antonio Ibanez . . . ."

[12] The Structured Asset Securities Corporation is a wholly owned direct subsidiary of Lehman Commercial Paper Inc., which is in turn a wholly owned, direct subsidiary of Lehman Brothers Holdings Inc.

can be bought and sold by investors -- a process known as securitization.

For ease of reference, the chain of entities through which the Ibanez mortgage allegedly passed before the foreclosure sale is:



According to U.S. Bank, the assignment of the Ibanez mortgage to U.S. Bank occurred pursuant to a December 1, 2006, trust agreement, which is not in the record. What is in the record is the private placement memorandum (PPM), dated December 26, 2006, a 273-page, unsigned offer of mortgage-backed securities to potential investors. The PPM describes the mortgage pools and the entities involved, and summarizes the provisions of the trust agreement, including the representation that mortgages "will be" assigned into the trust. According to the PPM, "[e]ach transfer of a Mortgage Loan from the Seller [Lehman Brothers Holdings Inc.] to the Depositor [Structured Asset Securities Corporation] and from the Depositor to the Trustee [U.S. Bank] will be intended to be a sale of that Mortgage Loan and will be reflected as such in the Sale and Assignment Agreement and the Trust Agreement, respectively." The PPM also specifies that "[e]ach Mortgage Loan will be identified

in a schedule appearing as an exhibit to the Trust Agreement." However, U.S. Bank did not provide the judge with any mortgage schedule identifying the Ibanez loan as among the mortgages that were assigned in the trust agreement.

On April 17, 2007, U.S. Bank filed a complaint to foreclose on the Ibanez mortgage in the Land Court under the Servicemembers Civil Relief Act (Servicemembers Act), which restricts foreclosures against active duty members of the uniformed services. See 50 U.S.C. Appendix §§ 501, 511, 533 (2006 & Supp. II 2008). In the complaint, U.S. Bank represented that it was the "owner (or assignee) and holder" of the mortgage given by Ibanez for the property. A judgment issued on behalf of U.S. Bank on June 26, 2007, declaring that the mortgagor was not entitled to protection from foreclosure under the Servicemembers Act. In June, 2007, U.S. Bank also caused to be published in the Boston Globe the notice of the foreclosure sale required by G. L. c. 244, § 14. The notice identified U.S. Bank as the "present holder" of the mortgage.

At the foreclosure sale on July 5, 2007, the Ibanez property was purchased by U.S. Bank, as trustee for the securitization trust, for $94,350, a value significantly less than the outstanding debt and the estimated market value of the property. The foreclosure deed (from U.S. Bank, trustee, as the purported holder of the mortgage, to U.S. Bank, trustee, as the purchaser)

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[13] As implemented in Massachusetts, a mortgage holder is required to go to court to obtain a judgment declaring that the mortgagor is not a beneficiary of the Servicemembers Act before proceeding to foreclosure. St. 1943, c. 57, as amended through St. 1998, c. 142.

and the statutory foreclosure affidavit were recorded on May 23, 2008. On September 2, 2008, more than one year after the sale, and more than five months after recording of the sale, American Home Mortgage Servicing, Inc., "as successor-in-interest" to Option One, which was until then the record holder of the Ibanez mortgage, executed a written assignment of that mortgage to U.S. Bank, as trustee for the securitization trust. This assignment was recorded on September 11, 2008.

The LaRace mortgage. On May 19, 2005, Mark and Tammy LaRace gave a mortgage for the property at 6 Brookburn Street in Springfield to Option One as security for a $103,200 loan; the mortgage was recorded that same day. On May 26, 2005, Option One executed an assignment of this mortgage in blank.

According to Wells Fargo, Option One later assigned the LaRace mortgage to Bank of America in a July 28, 2005, flow sale and servicing agreement. Bank of America then assigned it to Asset Backed Funding Corporation (ABFC) in an October 1, 2005, 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 (PSA).

For ease of reference, the chain of entities through which the LaRace mortgage allegedly passed before the foreclosure sale is:

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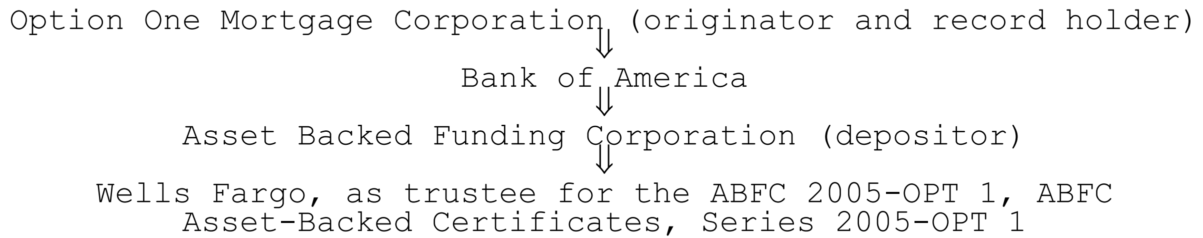
[14] The Land Court judge questioned whether American Home Mortgage Servicing, Inc., was in fact a successor in interest to Option One. Given our affirmance of the judgment on other grounds, we need not address this question.



Wells Fargo did not provide the judge with a copy of the flow sale and servicing agreement, so there is no document in the record reflecting an assignment of the LaRace mortgage by Option One to Bank of America. The plaintiff did produce an unexecuted copy of the mortgage loan purchase agreement, which was an exhibit to the PSA. The mortgage loan purchase agreement provides that Bank of America, as seller, "does hereby agree to and does hereby sell, assign, set over, and otherwise convey to the Purchaser [ABFC], without recourse, on the Closing Date . . . all of its right, title and interest in and to each Mortgage Loan." The agreement makes reference to a schedule listing the assigned mortgage loans, but this schedule is not in the record, so there was no document before the judge showing that the LaRace mortgage was among the mortgage loans assigned to the ABFC.

Wells Fargo did provide the judge with a copy of the PSA, which is an agreement between the ABFC (as depositor), Option One (as servicer), and Wells Fargo (as trustee), but this copy was downloaded from the Securities and Exchange Commission website and was not signed. The PSA provides that the depositor "does hereby transfer, assign, set over and otherwise convey to the Trustee, on behalf of the Trust . . . all the right, title and interest of the Depositor . . . in and to . . . each Mortgage Loan identified on the Mortgage Loan Schedules," and "does hereby

deliver" to the trustee the original mortgage note, an original mortgage assignment "in form and substance acceptable for recording," and other documents pertaining to each mortgage.

The copy of the PSA provided to the judge did not contain the loan schedules referenced in the agreement. Instead, Wells Fargo submitted a schedule that it represented identified the loans assigned in the PSA, which did not include property addresses, names of mortgagors, or any number that corresponds to the loan number or servicing number on the LaRace mortgage. Wells Fargo contends that a loan with the LaRace property's zip code and city is the LaRace mortgage loan because the payment history and loan amount matches the LaRace loan.

On April 27, 2007, Wells Fargo filed a complaint under the Servicemembers Act in the Land Court to foreclose on the LaRace mortgage. The complaint represented Wells Fargo as the "owner (or assignee) and holder" of the mortgage given by the LaRaces for the property. A judgment issued on behalf of Wells Fargo on July 3, 2007, indicating that the LaRaces were not beneficiaries of the Servicemembers Act and that foreclosure could proceed in accordance with the terms of the power of sale. In June, 2007, Wells Fargo caused to be published in the Boston Globe the statutory notice of sale, identifying itself as the "present holder" of the mortgage.

At the foreclosure sale on July 5, 2007, Wells Fargo, as trustee, purchased the LaRace property for $120,397.03, a value significantly below its estimated market value. Wells Fargo did not execute a statutory foreclosure affidavit or foreclosure deed until May 7, 2008. That same day, Option One, which was still

the record holder of the LaRace mortgage, executed an assignment of the mortgage to Wells Fargo as trustee; the assignment was recorded on May 12, 2008. Although executed ten months after the foreclosure sale, the assignment declared an effective date of April 18, 2007, a date that preceded the publication of the notice of sale and the foreclosure sale.

Discussion. The plaintiffs brought actions under G. L. c. 240, § 6, seeking declarations that the defendant mortgagors' titles had been extinguished and that the plaintiffs were the fee simple owners of the foreclosed properties. As such, the plaintiffs bore the burden of establishing their entitlement to the relief sought. Sheriff's Meadow Found., Inc. v. Bay-Courte Edgartown, Inc., 401 Mass. 267, 269 (1987). To meet this burden, they were required "not merely to demonstrate better title . . . than the defendants possess, but . . . to prove sufficient title to succeed in [the] action." Id. See NationsBanc Mtge. Corp. v. Eisenhauer, 49 Mass. App. Ct. 727, 730 (2000). There is no question that the relief the plaintiffs sought required them to establish the validity of the foreclosure sales on which their claim to clear title rested.

Massachusetts does not require a mortgage holder to obtain judicial authorization to foreclose on a mortgaged property. See G. L. c. 183, § 21; G. L. c. 244, § 14. With the exception of the limited judicial procedure aimed at certifying that the mortgagor is not a beneficiary of the Servicemembers Act, a mortgage holder can foreclose on a property, as the plaintiffs did here, by exercise of the statutory power of sale, if such a power is granted by the mortgage itself. See Beaton v. Land

Court, 367 Mass. 385, 390-391, 393, appeal dismissed, 423 U.S. 806 (1975).

Where a mortgage grants a mortgage holder the power of sale, as did both the Ibanez and LaRace mortgages, it includes by reference the power of sale set out in G. L. c. 183, § 21, and further regulated by G. L. c. 244, §§ 11-17C. Under G. L. c. 183, § 21, after a mortgagor defaults in the performance of the underlying note, the mortgage holder may sell the property at a public auction and convey the property to the purchaser in fee simple, "and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity." Even where there is a dispute as to whether the mortgagor was in default or whether the party claiming to be the mortgage holder is the true mortgage holder, the foreclosure goes forward unless the mortgagor files an action and obtains a court order enjoining the foreclosure. See Beaton v. Land Court, supra at 393.

Recognizing the substantial power that the statutory scheme affords to a mortgage holder to foreclose without immediate judicial oversight, we adhere to the familiar rule that "one who sells under a power [of sale] must follow strictly its terms. If

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[15] An alternative to foreclosure through the right of statutory sale is foreclosure by entry, by which a mortgage holder who peaceably enters a property and remains for three years after recording a certificate or memorandum of entry forecloses the mortgagor's right of redemption. See G. L. c. 244, §§ 1, 2; Joyner v. Lenox Sav. Bank, 322 Mass. 46, 52-53 (1947). A foreclosure by entry may provide a separate ground for a claim of clear title apart from the foreclosure by execution of the power of sale. See, e.g., Grabiel v. Michelson, 297 Mass. 227, 228-229 (1937). Because the plaintiffs do not claim clear title based on foreclosure by entry, we do not discuss it further.

he fails to do so there is no valid execution of the power, and the sale is wholly void." Moore v. Dick, 187 Mass. 207, 211 (1905). See Roche v. Farnsworth, 106 Mass. 509, 513 (1871) (power of sale contained in mortgage "must be executed in strict compliance with its terms"). See also McGreevey v. Charlestown Five Cents Sav. Bank, 294 Mass. 480, 484 (1936).

One of the terms of the power of sale that must be strictly adhered to is the restriction on who is entitled to foreclose. The "statutory power of sale" can be exercised by "the mortgagee or his executors, administrators, successors or assigns." G. L. c. 183, § 21. Under G. L. c. 244, § 14, "[t]he mortgagee or person having his estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person" is empowered to exercise the statutory power of sale. Any effort to foreclose by a party lacking "jurisdiction and authority" to carry out a foreclosure under these statutes is void. Chace v. Morse, 189 Mass. 559, 561 (1905), citing Moore v. Dick, supra. See Davenport v. HSBC Bank USA, 275 Mich. App. 344, 347-348 (2007) (attempt to foreclose by party that had not yet been assigned mortgage results in "structural defect that goes to

[16] We recognize that a mortgage holder must not only act in strict compliance with its power of sale but must also "act in good faith and . . . use reasonable diligence to protect the interests of the mortgagor," and this responsibility is "more exacting" where the mortgage holder becomes the buyer at the foreclosure sale, as occurred here. See Williams v. Resolution GGF Oy, 417 Mass. 377, 382-383 (1994), quoting Seppala & Aho Constr. Co. v. Petersen, 373 Mass. 316, 320 (1977). Because the issue was not raised by the defendant mortgagors or the judge, we do not consider whether the plaintiffs breached this obligation.

the very heart of defendant's ability to foreclose by advertisement," and renders foreclosure sale void).

A related statutory requirement that must be strictly adhered to in a foreclosure by power of sale is the notice requirement articulated in G. L. c. 244, § 14. That statute provides that "no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale," advance notice of the foreclosure sale has been provided to the mortgagee, to other interested parties, and by publication in a newspaper published in the town where the mortgaged land lies or of general circulation in that town. Id. "The manner in which the notice of the proposed sale shall be given is one of the important terms of the power, and a strict compliance with it is essential to the valid exercise of the power." Moore v. Dick, supra at 212. See Chace v. Morse, supra ("where a certain notice is prescribed, a sale without any notice, or upon a notice lacking the essential requirements of the written power, would be void as a proceeding for foreclosure"). See also McGreevey v. Charlestown Five Cents Sav. Bank, supra. Because only a present holder of the mortgage is authorized to foreclose on the mortgaged property, and because the mortgagor is entitled to know who is foreclosing and selling the property, the failure to identify the holder of the mortgage in the notice of sale may render the notice defective and the foreclosure sale void. See

[17] The form of foreclosure notice provided in G. L. c. 244, § 14, calls for the present holder of the mortgage to identify itself and sign the notice. While the statute permits other forms to be used and allows the statutory form to be "altered as circumstances require," G. L. c. 244, § 14, we do not interpret this flexibility to suggest that the present holder of the mortgage need not identify itself in the notice.

Roche v. Farnsworth, supra (mortgage sale void where notice of sale identified original mortgagee but not mortgage holder at time of notice and sale). See also Bottomly v. Kabachnick, 13 Mass. App. Ct. 480, 483-484 (1982) (foreclosure void where holder of mortgage not identified in notice of sale).

For the plaintiffs to obtain the judicial declaration of clear title that they seek, they had to prove their authority to foreclose under the power of sale and show their compliance with the requirements on which this authority rests. Here, the plaintiffs were not the original mortgagees to whom the power of sale was granted; rather, they claimed the authority to foreclose as the eventual assignees of the original mortgagees. Under the plain language of G. L. c. 183, § 21, and G. L. c. 244, § 14, the plaintiffs had the authority to exercise the power of sale contained in the Ibanez and LaRace mortgages only if they were the assignees of the mortgages at the time of the notice of sale and the subsequent foreclosure sale. See In re Schwartz, 366 B.R. 265, 269 (Bankr. D. Mass. 2007) ("Acquiring the mortgage after the entry and foreclosure sale does not satisfy the Massachusetts statute"). See also Jeff-Ray Corp. v. Jacobson, 566 So. 2d 885, 886 (Fla. Dist. Ct. App. 1990) (per curiam) (foreclosure action could not be based on assignment of mortgage dated four months after commencement of foreclosure proceeding).

The plaintiffs claim that the securitization documents they

[18] The plaintiffs were not authorized to foreclose by virtue of any of the other provisions of G. L. c. 244, § 14: they were not the guardian or conservator, or acting in the name of, a person so authorized; nor were they the attorney duly authorized by a writing under seal.

submitted establish valid assignments that made them the holders of the Ibanez and LaRace mortgages before the notice of sale and the foreclosure sale. We turn, then, to the documentation submitted by the plaintiffs to determine whether it met the requirements of a valid assignment.

Like a sale of land itself, the assignment of a mortgage is a conveyance of an interest in land that requires a writing signed by the grantor. See G. L. c. 183, § 3; Saint Patrick's Religious, Educ. & Charitable Ass'n v. Hale, 227 Mass. 175, 177 (1917). In a "title theory state" like Massachusetts, a mortgage is a transfer of legal title in a property to secure a debt. See Faneuil Investors Group, Ltd. Partnership v. Selectmen of Dennis, 458 Mass. 1, 6 (2010). Therefore, when a person borrows money to purchase a home and gives the lender a mortgage, the homeowner-mortgagor retains only equitable title in the home; the legal title is held by the mortgagee. See Vee Jay Realty Trust Co. v. DiCroce, 360 Mass. 751, 753 (1972), quoting Dolliver v. St. Joseph Fire & Marine Ins. Co., 128 Mass. 315, 316 (1880) (although "as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands," mortgagee has legal title to property); Maglione v. BancBoston Mtge. Corp., 29 Mass. App. Ct. 88, 90 (1990). Where, as here, mortgage loans are pooled together in a trust and converted into mortgage-backed securities, the underlying promissory notes serve as financial instruments generating a potential income stream for investors, but the mortgages securing these notes are still legal title to someone's home or farm and must be treated as such.

Focusing first on the Ibanez mortgage, U.S. Bank argues that

it was assigned the mortgage under the trust agreement described in the PPM, but it did not submit a copy of this trust agreement to the judge. The PPM, however, described the trust agreement as an agreement to be executed in the future, so it only furnished evidence of an intent to assign mortgages to U.S. Bank, not proof of their actual assignment. Even if there were an executed trust agreement with language of present assignment, U.S. Bank did not produce the schedule of loans and mortgages that was an exhibit to that agreement, so it failed to show that the Ibanez mortgage was among the mortgages to be assigned by that agreement. Finally, even if there were an executed trust agreement with the required schedule, U.S. Bank failed to furnish any evidence that the entity assigning the mortgage -- Structured Asset Securities Corporation -- ever held the mortgage to be assigned. The last assignment of the mortgage on record was from Rose Mortgage to Option One; nothing was submitted to the judge indicating that Option One ever assigned the mortgage to anyone before the foreclosure sale. Thus, based on the documents submitted to the judge, Option One, not U.S. Bank, was the mortgage holder at the time of the foreclosure, and U.S. Bank did not have the authority to foreclose the mortgage.

Turning to the LaRace mortgage, Wells Fargo claims that, before it issued the foreclosure notice, it was assigned the LaRace mortgage under the PSA. The PSA, in contrast with U.S.

[19] Ibanez challenges the validity of this assignment to Option One. Because of the failure of U.S. Bank to document any preforeclosure sale assignment or chain of assignments by which it obtained the Ibanez mortgage from Option One, it is unnecessary to address the validity of the assignment from Rose Mortgage to Option One.

Bank's PPM, uses the language of a present assignment ("does hereby . . . assign" and "does hereby deliver") rather than an intent to assign in the future. But the mortgage loan schedule Wells Fargo submitted failed to identify with adequate specificity the LaRace mortgage as one of the mortgages assigned in the PSA. Moreover, Wells Fargo provided the judge with no document that reflected that the ABFC (depositor) held the LaRace mortgage that it was purportedly assigning in the PSA. As with the Ibanez loan, the record holder of the LaRace loan was Option One, and nothing was submitted to the judge which demonstrated that the LaRace loan was ever assigned by Option One to another entity before the publication of the notice and the sale.

Where a plaintiff files a complaint asking for a declaration of clear title after a mortgage foreclosure, a judge is entitled to ask for proof that the foreclosing entity was the mortgage holder at the time of the notice of sale and foreclosure, or was one of the parties authorized to foreclose under G. L. c. 183, § 21, and G. L. c. 244, § 14. A plaintiff that cannot make this modest showing cannot justly proclaim that it was unfairly denied a declaration of clear title. See In re Schwartz, supra at 266 ("When HomEq [Servicing Corporation] was required to prove its authority to conduct the sale, and despite having been given ample opportunity to do so, what it produced instead was a jumble of documents and conclusory statements, some of which are not supported by the documents and indeed even contradicted by them"). See also Bayview Loan Servicing, LLC v. Nelson, 382 Ill. App. 3d 1184, 1188 (2008) (reversing grant of summary judgment in favor of financial entity in foreclosure action, where there was

"no evidence that [the entity] ever obtained any legal interest in the subject property").

We do not suggest that an assignment must be in recordable form at the time of the notice of sale or the subsequent foreclosure sale, although recording is likely the better practice. Where a pool of mortgages is assigned to a securitized trust, the executed agreement that assigns the pool of mortgages, with a schedule of the pooled mortgage loans that clearly and specifically identifies the mortgage at issue as among those assigned, may suffice to establish the trustee as the mortgage holder. However, there must be proof that the assignment was made by a party that itself held the mortgage. See In re Samuels, 415 B.R. 8, 20 (Bankr. D. Mass. 2009). A foreclosing entity may provide a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage. See In re Parrish, 326 B.R. 708, 720 (Bankr. N.D. Ohio 2005) ("If the claimant acquired the note and 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 claimant"). The key in either case is that the foreclosing entity must hold the mortgage at the time of the notice and sale in order accurately to identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale (or the foreclosing entity must be one of the parties authorized to foreclose under G. L. c. 183, § 21, and G. L. c. 244, § 14).

The judge did not err in concluding that the securitization

documents submitted by the plaintiffs failed to demonstrate that they were the holders of the Ibanez and LaRace mortgages, respectively, at the time of the publication of the notices and the sales. The judge, therefore, did not err in rendering judgments against the plaintiffs and in denying the plaintiffs' motions to vacate the judgments.

We now turn briefly to three other arguments raised by the plaintiffs on appeal. First, the plaintiffs initially contended that the assignments in blank executed by Option One, identifying the assignor but not the assignee, not only "evidence[] and confirm[] the assignments that occurred by virtue of the securitization agreements," but "are effective assignments in their own right." But in their reply briefs they conceded that the assignments in blank did not constitute a lawful assignment of the mortgages. Their concession is appropriate. We have long held that a conveyance of real property, such as a mortgage, that does not name the assignee conveys nothing and is void; we do not regard an assignment of land in blank as giving legal title in land to the bearer of the assignment. See Flavin v. Morrissey, 327 Mass. 217, 219 (1951); Macurda v. Fuller, 225 Mass. 341, 344 (1916). See also G. L. c. 183, § 3.

Second, the plaintiffs contend that, because they held the mortgage note, they had 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

[20] The plaintiffs have not pressed the procedural question whether the judge exceeded his authority in rendering judgment against them on their motions for default judgment, and we do not address it here.

mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage. Barnes v. Boardman, 149 Mass. 106, 114 (1889). Rather, 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. Id. ("In some jurisdictions it is held that the mere transfer of the debt, without any assignment or even mention of the mortgage, carries the mortgage with it, so as to enable the assignee to assert his title in an action at law. . . . This doctrine has not prevailed in Massachusetts, and the tendency of the decisions here has been, that in such cases the mortgagee would hold the legal title in trust for the purchaser of the debt, and that the latter might obtain a conveyance by a bill in equity"). See Young v. Miller, 6 Gray 152, 154 (1856). In the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged. This common-law principle was later incorporated in the statute enacted in 1912 establishing the statutory power of sale, which grants such a power to "the mortgagee or his executors, administrators, successors or assigns," but not to a party that is the equitable beneficiary of a mortgage held by another. G. L. c. 183, § 21, inserted by St. 1912, c. 502, § 6.

Third, the plaintiffs initially argued that postsale assignments were sufficient to establish their authority to foreclose, and now argue that these assignments are sufficient when taken in conjunction with the evidence of a presale

assignment. They argue that the use of postsale assignments was customary in the industry, and point to Title Standard No. 58 (3) issued by the Real Estate Bar Association for Massachusetts, which declares: "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." To the extent that the plaintiffs rely on this title standard for 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 this proposition is contrary to G. L. c. 183, § 21, and G. L. c. 244, § 14. If the plaintiffs did not have their assignments to the Ibanez and LaRace mortgages at the time of the publication of the notices and the sales, they lacked authority to foreclose under G. L. c. 183, § 21, and G. L. c. 244, § 14, and their published claims to be the present holders of the mortgages were false. Nor may a postforeclosure assignment be treated as a pre-foreclosure assignment simply by declaring an "effective date" that precedes the notice of sale and foreclosure, as did Option One'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

[21] Title Standard No. 58 (3) issued by the Real Estate Bar Association for Massachusetts continues: "However, if the Assignment is not dated prior, or stated to be effective prior, to the commencement of a foreclosure, then a foreclosure sale after April 19, 2007 may be subject to challenge in the Bankruptcy Court," citing In re Schwartz, 366 B.R. 265 (Bankr. D. Mass. 2007).

transfer; it cannot become effective before the transfer. See In re Schwartz, supra at 269.

However, we do not disagree with Title Standard No. 58 (3) that, 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 whether the assignment has been recorded. See G. L. c. 183, § 21; MacFarlane v. Thompson, 241 Mass. 486, 489 (1922). 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. See Bon v. Graves, 216 Mass. 440, 444-445 (1914). A confirmatory assignment, however, cannot confirm an assignment that was not validly made earlier or backdate an assignment being made for the first time. See Scaplen v. Blanchard, 187 Mass. 73, 76 (1904) (confirmatory deed "creates no title" but "takes the place of the original deed, and is evidence of the making of the former conveyance as of the time when it was made"). Where there is no prior valid assignment, a subsequent assignment by the mortgage holder to the note holder is not a confirmatory assignment because there is no earlier written assignment to confirm. In this case, based on the record before the judge, the plaintiffs failed to prove that they obtained valid written assignments of the Ibanez and LaRace mortgages before their foreclosures, so the postforeclosure assignments were not

confirmatory of earlier valid assignments.

Finally, we reject the plaintiffs' request that our ruling be prospective in its application. A prospective ruling is only appropriate, in limited circumstances, when we make a significant change in the common law. See Papadopoulos v. Target Corp., 457 Mass. 368, 384 (2010) (noting "normal rule of retroactivity"); Payton v. Abbott Labs, 386 Mass. 540, 565 (1982). We have not done so here. The legal principles and requirements we set forth are well established in our case law and our statutes. All that has changed is the plaintiffs' apparent failure to abide by those principles and requirements in the rush to sell mortgage-backed securities.

Conclusion. For the reasons stated, we agree with the judge that the plaintiffs 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.

Judgments affirmed.

CORDY, J. (concurring, with whom Botsford, J., joins). I concur fully in the opinion of the court, and write separately only to underscore 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. There is no dispute that the mortgagors of the properties in question had defaulted on their obligations, and that the mortgaged properties were subject to foreclosure. Before commencing such an action, however, the holder of an assigned mortgage needs to take care to ensure that his legal paperwork is in order. Although there was no apparent actual unfairness here to the mortgagors, that is not the point. Foreclosure is a powerful act with significant consequences, and Massachusetts law has always required that it proceed strictly in accord with the statutes that govern it. As the opinion of the court notes, such strict compliance is necessary because Massachusetts is both a title theory State and allows for extrajudicial foreclosure.

The type of sophisticated transactions leading up to the accumulation of the notes and mortgages in question in these cases and their securitization, and, ultimately the sale of mortgaged-backed securities, are not barred nor even burdened by the requirements of Massachusetts law. The plaintiff banks, who brought these cases to clear the titles that they acquired at their own foreclosure sales, have simply failed to prove that the underlying assignments of the mortgages that they allege (and would have) entitled them to foreclose ever existed in any

legally cognizable form before they exercised the power of sale that accompanies those assignments. The court's opinion clearly states that such assignments do not need to be in recordable form or recorded before the foreclosure, but they do have to have been effectuated.

What is more complicated, and not addressed in this opinion, because the issue was not before us, is the effect of the conduct of banks such as the plaintiffs here, on a bona fide third-party purchaser who may have relied on the foreclosure title of the bank and the confirmative assignment and affidavit of foreclosure recorded by the bank subsequent to that foreclosure but prior to the purchase by the third party, especially where the party whose property was foreclosed was in fact in violation of the mortgage covenants, had notice of the foreclosure, and took no action to contest it.