

December 2015

*Practice Groups*

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## *"An Act Clearing Titles to Foreclosed Properties" in Massachusetts ... Maybe*

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On November 25, 2015, Governor Charlie Baker did what his predecessor, Deval Patrick, did not do -- he signed "An Act Clearing Titles to Foreclosed Properties" (the "Act"), which is designed to clear legal title for Massachusetts homeowners who purchased foreclosed homes by limiting the time in which former homeowners can challenge the foreclosure sale. The Act is a much needed legislative fix to address the fallout from a seminal decision from the Massachusetts Supreme Judicial Court ("SJC") that put a cloud on certain foreclosures in Massachusetts. While the Act is retroactive, the effects of the Act will not be realized for at least one year, and there are nuances and exceptions that will need to be considered before any party, including mortgage lenders, servicers, investors, and other financial institutions, can comfortably conclude that title is clear.

### **Background**

In January 2011, the SJC ruled that a foreclosing party must have a written assignment of mortgage at the time of publication of the statutory notice of sale and at the time of the subsequent foreclosure sale.<sup>1</sup> The effect of the SJC's decision in *Ibanez*, which at the time was contrary to industry practice followed by Massachusetts courts and practitioners alike, was to retroactively deem thousands of foreclosures potentially invalid. Simply put, the decision effectively clouded the title of some foreclosure and downstream purchasers.

In 2014, the Massachusetts Legislature sought to provide a mechanism to clear title to those properties. Although the bill passed both the House and Senate, Governor Patrick filed an amendment to the bill in August 2014 that increased the time in which a party was required to challenge a foreclosure from 3 years to 10 years, effectively vetoing the bill. The bill was reintroduced following Governor Baker's election, and in November 2015, Governor Baker signed the bill with the original three-year limitation period.

Until passage of the Act, the primary options for downstream purchasers to seek to clear title were to bring lawsuits to quiet title, seek a quitclaim deed from the prior owner, reforeclose, or work with title companies to clear the title. The Act provides less complicated options, but it may not go far enough.

### **Key Provisions**

*No Relief to Properties Owned by Financial Institutions.* The Act provides no relief to mortgagees, noteholders, servicers, their affiliates, or government entities like the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) that continue to hold title to properties following foreclosure sales. The Act only protects "arm's length third party purchasers for value," defined as a party who

<sup>1</sup> *U.S. Bank Nat'l Assoc. v. Ibanez*, 458 Mass. 637, 648 (2011) (foreclosing entity must be "the assignee[] of the mortgage[] at the time of the notice of sale and subsequent foreclosure sale").

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either (1) purchased the property directly at the foreclosure sale, or (2) purchased the property from the bank or another entity at some point after the foreclosure sale. While foreclosing parties, noteholders, and mortgagees will not benefit directly from the Act on properties that they own, they will benefit from the resolution of title disputes and the insurability of properties they formerly owned or foreclosed.

*Statute of Limitations Period.* The Act establishes a three-year statute of limitations period to bring a challenge to a foreclosure. In addition to restating the mortgagee affidavit requirements of M.G.L. c. 244, § 15, including the provision that the recording of a valid affidavit is “evidence that the power of sale was duly executed,” the Act goes one step further. Specifically, after three years from the date that the mortgagee records a validly executed affidavit, the affidavit serves as “conclusive evidence” that the power of sale was duly executed. The Act also protects an arm’s-length third-party purchaser from liability if the power of sale was not duly exercised. The Act does not, however, similarly protect mortgagees or those signing affidavits on a mortgagee’s behalf.

*Contingencies and Qualifying Events.* The Act is lined with exceptions and exceptions to the exceptions. For example, the three-year statute of limitations does not apply if (1) a person entitled to notice of sale (those parties listed in M.G.L. c. 244, § 14 as having a legal interest, a lien or an encumbrance on the property) files an action or asserts a defense or counterclaim challenging the validity of the foreclosure sale and (2) records a copy of the complaint or pleading that asserts the foreclosure challenge in the registry of deeds for the county where the property lies before the three-year deadline. Further, if a person entitled to notice of sale continues to reside in the property, then the Act does not apply if the person records a copy of the complaint or pleading within the longer of 60 days from the date of the foreclosure challenge or the three-year deadline.

*Retroactive Application.* The Act applies retroactively. To address constitutionality concerns, for mortgagee affidavits recorded prior to the Act, the effective date of the statute of limitations deadline is the longer of the full three-year period or one year from the effective date of the Act, December 31, 2015. Thus, the earliest that anyone will benefit from the title vesting provisions is December 31, 2016.

*Finality of Judgments Entered in Foreclosure Litigation.* The Act codifies the finality of judgments and clarifies the authority of the Massachusetts Housing Court. In 2011, the SJC made clear that the Housing Court has jurisdiction to determine the validity of a foreclosure sale because that determination is needed to decide who has a superior claim to possession of the property.<sup>2</sup> What has not been clear is whether the Housing Court has jurisdiction to make title declarations capable of recording in the local county registries of deeds. Under the Act, any final judgment in a foreclosure challenge, including a judgment issued by the Housing Court, is immediately “conclusive evidence” of the validity of the foreclosure sale if the judgment concludes that the power of sale was conclusively exercised. Conversely, a final judgment that the power of sale was not duly exercised would render the foreclosure sale and mortgagee affidavit void.

*Consequences of Falsifying Affidavits.* Finally, the Act makes any material misrepresentation contained in the mortgagee’s affidavit a *per se* violation of the Consumer Protection Statute, M.G.L. c. 93A.

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<sup>2</sup> *Bank of New York v. Bailey*, 460 Mass. 327, 328 (2011).

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### Open issues

*Shifting the Focus to the Affidavit.* Over the past several years, there has been increased litigation over the sufficiency of the mortgagee affidavit, which operated as presumptive evidence of compliance with the notice of sale requirement.<sup>3</sup> The Act alters the affidavit requirements slightly. Previously, to gain presumptive effect, the affidavit had to show that the requirements of the power of sale and “the statute” (M.G.L. c. 244, § 14) were complied with. Now, however, the affidavit must show compliance with the power of sale and “the law.” The reference to the “law” is broader and more ambiguous than the “statute.” The change is likely intended to account for recent and evolving caselaw including the noteholder status,<sup>4</sup> notice of right to cure under section 35A,<sup>5</sup> notice of right to cure under paragraph 22,<sup>6</sup> and other issues that may need to be captured in the affidavit. Given the conclusive effect of the affidavit after three years, increased affidavit scrutiny and litigation is anticipated.

*Who Can Challenge?* The Act limits foreclosure challenges within the three-year limitation period to those that are entitled to notice of sale. Since those entitled to notice as set forth in M.G.L. c. 244, § 14 do not include tenants or others who have no ownership or other interest in the property, it appears that title challenges by tenants or other occupants will not prevent the vesting of title in an arm’s-length third-party purchaser. It remains to be seen who will actually have standing or other legal ability to make, and rely upon, title challenges.

*Justice Delayed Is Justice Denied.* The earliest the Act will help anyone is December 31, 2016. While the legislature no doubt wanted to preserve the rights of foreclosed owners to bring challenges, waiting another year for that to happen does not benefit any party. Many of these borrowers were foreclosed and left their homes years ago. Innocent third parties have since made these properties their homes and continue to face the threat of ownership challenges, litigation, and further uncertainty.

*To Ibanez and Beyond.* The Massachusetts Legislature clearly intended for the Act to resolve title disputes arising out of the *Ibanez* case. While the Act will no doubt be used for that purpose, the Act could also have a much broader impact. On its face, the Act potentially resolves all foreclosure-related title defects, including but not limited to *Eaton* defects (note status), *Pinti* defects (contractual notice of right to cure), and potentially limitless future title defects. Because the Act is retroactive and silent as to what specific title issues it resolves, a recorded mortgagee affidavit compliant with the earlier version of section 15, which did not require any detail regarding the note or notice of right to cure, could cure those issues as well as *Ibanez* issues. Thus, the Act may end up being a broader fix than intended. The key in any case is the recording of a compliant mortgagee affidavit.

### Conclusion

The Act is welcomed relief to downstream purchasers, prospective homeowners seeking to purchase a property that had a prior foreclosure in its chain-of-title, title insurers, financial institutions, and practitioners that have been working diligently to resolve various title issues

<sup>3</sup> *Fed. Nat’l Mortg. Ass’n v. Hendricks*, 463 Mass. 635, 636 (2012).

<sup>4</sup> *Eaton v. Fed. Nat’l Mortg. Ass’n*, 462 Mass. 569, 571 (2012) (holding foreclosing mortgagee must also hold note or act at the behest of noteholder).

<sup>5</sup> *U.S. Bank Nat’l Ass’n v. Schumacher*, 467 Mass. 421, 422 (2014) (holding 35A not part of the statutory notice of sale).

<sup>6</sup> *Pinti v. Emigrant Mortg. Co., Inc.*, 472 Mass. 226, 227 (2015) (holding mortgage provision requiring notice to cure is term of mortgage requiring strict compliance).

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in Massachusetts following the *Ibanez* decision. The relief, however, will not be felt soon enough. In addition, given the foreclosure litigation already pending in courts throughout Massachusetts, we expect that the Act will no doubt lead to new legal issues that will need to play out in the courts.

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