HUFFPOST BUSINESS

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Posted: January 10, 2011 09:34 AM

Massachusetts Courts to Banks on Foreclosures: The Law Matters

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On Friday the Massachusetts Supreme Judicial Court upheld a controversial decision by Land Court Judge Keith C. Long, who ruled in the case of two Springfield, MA homeowners that the foreclosures were invalid because the mortgages were not officially recorded as being owned by the foreclosing banks, US Bancorp and Wells Fargo.

The reaction from Wall Street came shortly after the decision was announced. Within a couple of hours Wells Fargo shares were down nearly 4 percent at $30.92, while U.S. Bancorp was down 1.4 percent at $25.93, Bank of America stock was down 2.8 percent, JPMorgan fell 3.7 percent, and the KBW Bank Index, which includes all four lenders, was down 2.3 percent.

In short, the Supreme Court upheld the March 2009 decision of the lower court that a bank can't foreclose on a home if it doesn't own the mortgage. You can read the 16-page decision here.

This simple statement would seem like a no-brainer, but as a result of fast and loose securitized mortgage lending practices, the ownership of a mortgage could potentially be divided and transferred multiple times by the lenders. As I pointed out in a post back in November, in one week alone there were 808 mortgage transfers in just one county in Massachusetts.

The documentation for these transfers (i.e., the assignments at the Registry of Deeds) on the other hand often lags far behind - in many cases months, or even years after the foreclosure has taken place. This makes it difficult and sometimes impossible to determine who owned what and when.

Add to an already confusing chain of events, and consider that many notes, as well as mortgages, were signed "in blank", shuffled around from one lender to the next and put into trusts well past the legal limit allowed and you've got a mess of epic proportions.

In the past, a bank representative or attorney for the bank would walk into court, point out that the "deadbeat homeowners" weren't paying their mortgage and the family would get kicked out. Many states adopted non-judicial foreclosure policies to alleviate unnecessary paperwork and court time. The premise being that a bank would never foreclose on a property on which the payments were being made and were certain that they owned. That worked fine and made sense when you knew who owned your loan and you owed the money to a local bank or credit union. The bank had your mortgage and your note and the Registry of Deeds has a solid record of it. If there was a transfer - something that might happen once or twice in the life of a loan, if at all, the banks would go down to the Registry of Deeds, file the assignment, pay the fee, and go on with their day. You, the borrower, would start sending your monthly checks to another bank.

Glenn Russell, one of the attorneys to have argued this case and who represented Mark and Tammy LaRace, one of the Springfield homeowners said, "In most cases banks foreclose without any detailed examination of the securitization process of the loan. After all, the homeowner hasn't paid or has missed payments and the foreclosure goes through without anyone really questioning the legality or legitimacy of the foreclosure."

Then the art of securitization came along and mortgages started being traded like baseball cards at recess, sliced up into pieces, and loaded into pools, trusts, and whatever new intricate financial instrument Wall Street dreamed up. Servicers started handling loans instead of your neighborhood bank and MERS (Mortgage Electronic Registration System) was invented to further allow banks to bypass millions of dollars in fees to county registries. Of course with all of these transactions flying around in the hands of people who quite possibly didn't understand what they represented and as we've seen in the recently exposed robo-signing fiasco didn't know what they were signing, there was a lot of room for mistakes ... a lot of mistakes.

Mortgage fraud investigator Steve Dibert of MFI-Miami said, "Seventy percent of the loans we investigate are flawed due to recordation, PSA violations, etc."

As the *Boston Globe* reported:

During the housing boom, millions of mortgages were packaged into bonds and sold to investors, a process that resulted in lengthy and tangled paper trails that can obscure ownership. Many lenders believed they could complete foreclosure transactions and later

produce formal proof they held a mortgage. Today's ruling makes it clear that the practice will not be allowed in Massachusetts.

The time-line of the case started, simply enough, back in 2007 when Wells Fargo and U.S. Bancorp began foreclosure proceedings against two separate delinquent borrowers. Neither borrower fought the proceedings; Massachusetts is a non-judicial state in which courts do not oversee foreclosures, so both banks seized the Springfield, MA properties without any trouble or pesky legal challenges.

In the fall of 2008 the banks tried to list the foreclosed properties in the Boston Globe. According to Mass law, like many states, foreclosure sales must be listed in a newspaper of general circulation in the county or town where the property is located, so the Globe asked the bank to get an okay from the Land Court. This is where Judge Long comes in - in March 2009.

Judge Keith C. Long had no problem with the properties being listed in the Globe, but to the shock of the attorneys he also wanted them to prove that they had legal standing to foreclose on the properties they had repossessed in the first place. He gave them until October (seven months) to get the proper paperwork together and come back and show how they had acquired the mortgage and prove that they had legal standing.

In October 2009 Judge Long examined the paperwork the banks came back with and determined that the mortgage "note" that proves who the owner is had not been properly transferred when the banks auctioned off the houses.

Judge Long found that Option One Mortgage Corp., which early in the "chain of title" owned the mortgages, erred in assigning the mortgages without naming who they were transferred to -- so- called "blank assignments."

The Supreme Court agreed:

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").

Judge Long's decision hit on the sensitive issue of the "assignment of mortgages in blank." In their crazed fury to aggregate and sell and then resell mortgages, many mortgage documents were transferred without explicitly naming to whom the note or mortgage was being sold.

The banks have argued (and tried to with Long) that this practice is legal. The argument being that everyone's doing it and it is standard practice in the industry. Long didn't buy

it. "These blank mortgage assignments were never recorded and they were not legally recordable," he wrote in his ruling.

Where it gets interesting, is rather than take a loss and accept the ruling from a lower court - a decision that in retrospect must now seem like a good idea, in their contempt and utter lack of respect for the law, they decided to appeal to a higher authority. The Massachusetts Supreme Judicial Court, who upheld, unanimously, the lower court's decision.

We agree with the [land court] 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," the justices said in their opinion.

Under; Massachusetts law, in order to sell the borrowers home at a foreclosure auction, the foreclosing entity must actually be the "holder" of the right to foreclose contained in a borrowers' mortgage at the time the auction takes place.

"Looking into the not so distant future, I predict Judge Long's ruling will be hailed as one of the great Judicial opinions of all time, with regards to its impact," Attorney Glenn Russell said.

Essex County Register of Deeds John O'Brien, who in November requested that Attorney General Martha Coakley investigate whether major lenders had devised a scheme to avoid paying assignment fees when transferring mortgages from one entity to another, issued the following statement on Friday:

The Massachusetts Supreme Court has ruled that these Major Banks must follow the same laws as everyone else and that assignments are not optional in Massachusetts. It's obviously they didn't want the public to know what they were doing, coupled with their greed in trying to deliberately avoid the payment of the required recording fees, has placed them in the mess that they are in today.

This is a huge win for the taxpayers, this case will send shock waves throughout the MERS community as they now have been exposed, and they are going to have to get their checkbooks out and reimburse the taxpayers. These major banking conglomerates deliberate scheme to not file the proper paperwork together with the "robo-signers scandal" are the major reasons why our housing market is in the economic turmoil it is in today.

Massachusetts Attorney General Martha Coakley issued her own statement making her opinion about the financial industry clear.

We continue to suffer from the fallout of the lending crisis. There are thousands of people in our state who have lost their homes and many more still in danger of losing them. This decision affirms our belief that the onus should be on the banks and other holders of notes

to follow proper procedures before initiating foreclosure on any Massachusetts homeowner.

In their careless and hasty stampede to securitize loans, the banks moved at their own peril. Whether by robo-signing or failing to properly transfer title, these financial institutions created this real estate chaos. They should bear the brunt and the cost of the remedy.

As for the spin coming from the banks as they try to deflect this, Attorney Glenn Russell had this to say on his site:

As I represented one of the parties in the Land Court cases (the LaRace family), it is very interesting to listen to the so called "experts" opine on Judge Long's ruling, saying that "at best this will delay foreclosures, but that is about it." These are uninformed and usually self-serving statements made by real estate professionals. Left unsaid is the fact that under G.L. c. 244 Section 14, in order to foreclose, the foreclosing entity must also prove that it is the holder of the borrowers mortgage note as well. The complexity of the securitization process can present difficult issues for lender to overcome.

Generally the parties involved in the securitization process of your mortgage did not follow the mandates under the prospectus supplement and pooling and servicing agreement governing the securitized trust that the note and mortgage are in. Additionally problematic for foreclosing entities, is the situation whereby the lender has already sold a property to an innocent third party (that it didn't really own, according to Judge Long's decision).

Taking into consideration that the Massachusetts Supreme Court is widely considered one of the best courts in the country, there's a good chance that other states will soon follow this decision.

Judge Long and the six jurists of the Massachusetts Supreme Court sent a very clear message to the banks on Friday: This is the law... And the law matters.

Join the hundreds of homeowners and tell your mortgage horror story and help us fight together at ShameTheBanks.org