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Henrietta Eaton and the Boston Foreclosure Party

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On June 22nd, 2012 the Massachusetts supreme court ruled on a very simple principle, that is to say a foreclosure by sale requires the foreclosing mortgagee, at the time of the sale, to hold both the mortgage and the underlying mortgage note. the Case is Henrietta Eaton vs. Federal National Mortgage Association.

This may seem simple enough to the casual reader, except virtually no entities foreclosing on securitized mortgages in Massachusetts or elsewhere in the last five years (when the question has been especially relevant) possessed both of these items.

A Look Back to October 2011

On October 10th, 2011 the article Eaton – Dividing the Mortgage Loan and Affirming the Consequent was published, although much was said in the article there is one part which now seems particularly prescient:

> *"However, the impasse for banks is the fact, that even if the court recognizes the authority of MERS to assign the mortgage to the foreclosing entity (usually the servicer), the following conditions still must be met:*
>
> *a) The assignment must still be a valid assignment (most are not)*
>
> *b) There must also be a valid assignment of the note to establish who exactly owns the debt.*
>
> *The vast majority of these loans were sold into securitization trusts and are merely endorsed "in blank" (if they can even be found in the trust at all). Most schedules attached to the trust documents include little or no information on the details of the particular loans (as was the case in Ibanez), or sometimes include the address of particular properties, but no information on the borrowers, or curiously the loan amounts. Other failures include post-dated or otherwise invalid notarizations, and fraudulent signatures etc., which are all suggestive of fraud.*
>
> *Given this, to speak of Eaton merely as a question over the validity of MERS and its assignments is incorrect. Even if Eaton is not affirmed by the SJC, the issue of validly conveyed notes, remains of vital importance.*
>
> *That having been said, we believe the Appellants chances of prevailing are precisely zero, or maybe less. Taken together with Ibanez, this means serious problems for the bond holders in these securitization trusts and their bank administrators. With all the nuance of every day speak we could muster, we think it is put best by saying just; "some of the*

AAPL Amvona Analysts CSCO Deductive Reasoning DELL Eaton Economics Financial Alchemy Foreclosure FRPT GD GLD Gold Haiti HDD Hedge Funds HIT HPQ Ibanez IBM INTC Investment Philosophy James KO Luke Matthew Moore's Law MSFT NKE Orthodoxy PPC SAFM Securitization Silver SJC SKX SLV Social Justice Speculation

debt-servants might escape". That isn't to say that all measures won't be taken to try to prevent this outcome."

In the ruling, the SJC affirmed that a) past assignments were in fact invalid in so far as they did not conform to statutory requirements that the foreclosing party also be the holder of the loan or an assignee thereof and b) that there must be a valid assignment of the note.

In Their Own Words

The SJC specifically commented in the ruling:

"The defendants argue that by its plain, unambiguous terms, this section authorized Green Tree, as the assignee of MERS, to foreclose because Eaton's mortgage identified MERS, its successors and assigns as the "mortgagee" with the "power of sale." We disagree that § 14 is unambiguous. The section is one in a set of provisions governing mortgage foreclosures by sale, and that set in turn is one component of a chapter of the General Laws devoted generally to the topic of foreclosure and redemption of mortgages. The term "mortgagee" appears in several of these statutes, and its use reflects a legislative understanding or assumption that the "mortgagee" referred to also is the holder of the mortgage note."

And further:

"In accordance with these principles, and against the background of the common law as we have described it in the preceding section, we construe the term "mortgagee" in G.L. c. 244, § 14, to mean a mortgagee who also holds the underlying mortgage note. The use of the word "mortgagee" in § 14 has some ambiguity, but the interpretation we adopt is the one most consistent with the way the term has been used in related statutory provisions and decisional law, and, more fundamentally, the one that best reflects the essential nature and purpose of a mortgage as security for a debt... ("The function of a mortgage is to employ an interest in real estate as security for theperformance of some obligation.... Unless it secures an obligation, a mortgage is a nullity")."

Needless to say the defendants in Eaton complained loudly about the possibility of a retroactive ruling, why? Because there have been an average of 1.6 million nationwide foreclosure starts per year for the past five years - the vast majority of which in all likelihood began with an invalid notice of foreclosure sale (and subsequently an invalid sale) under the Eaton ruling.

To quote the SJC decision:

"The defendants and several amici argue, to varying degrees, that an interpretation of "mortgagee" in the statutes governing mortgage foreclosures by sale that requires a mortgagee to hold the mortgage note will wreak havoc with the operation and integrity of the title recording and registration systems by calling into question the validity of any title that has a foreclosure sale in the title chain. This follows, they claim, because although a foreclosing mortgagee must record a foreclosure deed along with an affidavit evidencing compliance with G.L. c. 24, § 14, see G.L. c. 244, § 15; see also G.L. c. 183, § 4, there are no similar provisions for recording mortgage notes; and as a result, clear record title cannot be ascertained because the validity of any prior foreclosure sale is not ascertainable by examining documents of record. They argue that if this court requires a mortgagee to have a connection to the underlying debt in order to effect a valid foreclosure, such a requirement should be given prospective effect.

In the exceptional circumstances presented here, and for the reasons that we have discussed, we exercise our discretion to hold that the interpretation of the term "mortgagee" in G.L. c. 244, § 14, and related statutory provisions that we adopt in this opinion is to apply only to mortgage foreclosure sales for which the mandatory notice of sale has been given after the date of this opinion."

Can the importance of this one line be overstated?

> *"...clear record title cannot be ascertained because the validity of any prior foreclosure sale is not ascertainable by examining documents of record."*

This is the same as saying, the banks are the arbiters of land ownership for disputed transactions through June 22nd, 2012, not the judiciary, because the most vital records involving debt ownership were privatized without democratic process sometime ago.

The good news for the banks is that they got what they wanted, sort of. They are "off the hook" for up to 9 M bad foreclosure notices and related sales that had either taken place, or that will take place and were noticed before June 22nd, 2012. However, in their comments the SJC also has implicated the problem of MERS, a private registry for land records.

The banks can get away with this fraud and the transfer of perhaps trillions in land wealth because they followed a few smart steps, here they are in summary form:

a. Privatize the transfers of legal title (different than "record title" in title theory states) - i.e. mortgage security instruments (MERS)

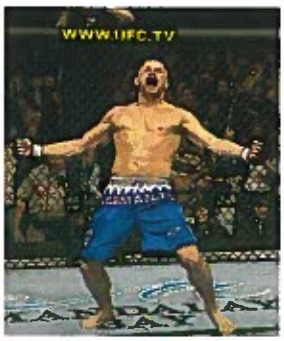
b. Separate the Mortgage from the Note at real estate closings

c. Assign the mortgage to the "black-box" MERS, owned by the banks

d. Send the Note to the Bermuda Triangle where it can be bought, sold, traded, rehypothecated or shredded in a beautiful low tax jurisdiction

e. Destroy five years of public land records in the process so the problem is so big, the judiciary will have to conclude that the "circumstances" are "exceptional"

Even if you are just a bitter "dead-beat" homeowner, you have to concede those American bankers are enterprising. If they can take down an entire country like Greece using something complex such as currency swaps, do you think they can't take down your local county recorder (John O'Brian excepted) with something as simple as a private database?



If bankers were the athletic type, you could think of them celebrating the decision sort of like "Chuck Liddell" celebrates in the "Octagon".

The reasoning the SJC provided for making the ruling "*prospective*" which in their own admission is unusual, is that:

> *"..we recognize there may be significant difficulties in ascertaining the validity of a particular title if the interpretation of "mortgagee" that we adopt here is not limited to prospective operation..."*

10 words which cannot be overlooked nor overstated, they are "judge speak" for "*property rights have been destroyed*", aka the foundation upon which our entire modern US economy rests, they are worth contemplating:

> *"...significant difficulties in ascertaining the validity of a particular title..."*

Ok, ok, the banks won, they got away with fraud, the party is over, everyone can go home (or to their car, or the shelter, or the park bench or wherever they sleep at night) - right?

Not quite - there are two small data points that appear to also matter:

1) 2.8 million Americans are 12 months or more behind on their mortgages.

2) Since 2007, 19% of all borrowers (~9 million borrowers) have gone >90 days delinquent on their mortgages, or have had their mortgage liquidated.

In other words, one in five people who held a mortgage since 2007 have defaulted in varying degrees on those obligations.

It may be relevant that these 9 M folks (who defaulted between 2007 and June 22nd, 2012) probably did not fully understand that they had been paying their monthly mortgage payments (before they defaulted) to a party that had absolutely no interest in the debt they committed to repaying. In other words, their cash was depleted through payments to a stranger to the loan transaction. This mysterious party (usually called a "sub-servicer") that they had been paying had no legal interest in their property and parenthetically no legal right to foreclosure either. Finally it is far from clear that this group understood that they had purchased their largest asset at a radically inflated value as a result of a securitization process that rehypothecated the debt time and again - most had no hope of knowing the financial alchemy that can cause home prices to rise by double digits for so many years.

The result: the largest decline in real estate prices in US history, that even Nobel laureates in economics couldn't forecast, and that caused one of the greatest shifts in wealth to only the smallest percentage of society's members.

Even if these people had the money and the will to pay their mortgages, they would not have known fully, prior to the Eaton ruling that is, that doing so would get them no closer to the goal of a clear title.

9 Million Down 50 Million to Go (give or take a few million)

Eaton is part of a trifecta that also includes the recent Ibanez and Bevilacqua rulings, and which make the Massachusetts SJC a beacon of light for other state Supreme courts to follow in what otherwise has seemed at times an indifferent, nescient, or corrupt judiciary.

Maybe there was something to Moody's recent downgrade of (JPM), (BAC), (C), (GS) and (MS) after all. Of course it may be impossible to calculate what the exact losses to the nations five larges banks would be if the number of foreclosures in the next five years only mirrored that of the last, but needless to say it has the prospect of reaching beyond mere Billions since it is estimated that approximately 8.5 trillion in securitized mortgages remain outstanding. The potential expense would stem not only from fraudulent foreclosures, but the fact that it may become altogether impossible to foreclosure on American families using existing "naked" mortgage liens and it seems the value of homes with clouded titles is not very high given Uncle Sam's planned "Real Estate Fire Sale".

But all is not lost - whatever the banks might lose on foreclosures, if anything, they hope to make up for in other ways.

Roger Arnold, chief economist for ALM Advisors of Pasadena, California, in a column for RealMoney on August 11, 2011 has called the strategy:

> *"The largest transfer of wealth from the public to private sector is about to begin. The federal government will be bulk-selling the massive portfolio of foreclosed homes now owned by HUD, Fannie Mae and Freddie Mac to private investors — vulture funds."*

Arnold continued with:

> *"These homes, which are now the property of the U.S. government, the U.S. taxpayer, U.S. citizens collectively, are going to be sold to private investor conglomerates at extraordinarily large discounts to real value. You and I will not be allowed to participate. These investors will come from the private-equity and hedge-fund community, Goldman Sachs (GS) and its derivatives, as well as foreign sovereign wealth funds that can bring a billion dollars or more to each transaction."*

According to a recent article by William Jasper:

> *"Who are some of the other high-rollers lining up for the restricted Fannie/Freddie/HUD fire sale? According to the Wall Street Journal, they include Lewis Ranieri, regarded as "the godfather" of mortgage finance for developing mortgage-backed securities (MBS) and collateralized mortgage obligations (CMOs), the financial weapons of mass destruction that played a key role in the economic meltdown.*
>
> *Another, says the Journal, is hedge fund titan Paulson & Co., headed by John Paulson.*
>
> *Forbes magazine, which in 2012 listed Paulson as #61 among the world's billionaires and #17 among the "Forbes 400," says that he "became a billionaire in 2007 by shorting subprime securities, earning a $3.5 billion payout." What Forbes doesn't mention in its flattering profile is that Paulson, like Ranieri, was a major architect of the house of cards built on CMOs and other fraudulent debt instruments — euphemistically called "synthetic derivatives" — that Paulson marketed through Goldman Sachs.*
>
> *And, of course, the power brokers at Goldman Sachs, JPMorganChase, and Citigroup, who have already reaped billions of taxpayer and investor dollars from the financial havoc they helped cause — as well as from the bailouts that followed — are salivating at the thought of even greater lucre to be made in the newly created homes-for-rent market...*
>
> *These privileged mega-investors could "instantaneously become the largest improved real estate owners and landlords in the world," notes Roger Arnold. "The U.S. taxpayer will get pennies on the dollar for these homes and then be allowed to rent them back at market rates."*

What about the other 50 M homeowners who assigned their mortgages to MERS (not knowing the implications) that now have bifurcated mortgage loans that can likely never be re-coupled thanks to the complexities of the securitization process and the desire of the banks to make the (tax exempt) Trusts entirely bankruptcy remote? These homeowners will find out about Eaton sooner or later. These 50 M souls may begin to ask important and valid questions about where exactly their mortgage checks go every month and whether or not they will ever obtain clear title to their home sometime between June 22nd, 2012 and the next thirty years.

What the SJC reveals is that the "homes-for-rent" market is not new at all, it was established with modern mortgage securitization practices. 50 M Americans may eventually know that they have been part of this new market all along, and that they can not be legally foreclosed on with any conventional understanding of the law. Above all they may come to see that it is only through their choices that the spectre of American serfdom may yet be halted.

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