Throw the Book at Them: Testing Mortgagor Remedies in Foreclosure Proceedings After U.S. Bank v. Ibanez

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Testing Mortgagor Remedies in Foreclosure Proceedings
After U.S. Bank v. Ibanez

Claire Alexis Ward¹

Abstract
This article takes one state, Massachusetts, as its focus for a perspective on the residential mortgage foreclosure crisis. U.S. Bank v. Ibanez, in early 2011, signaled a changing tide which began to hold banks accountable for the shoddy practices they frequently used to foreclose. However, the promise of Ibanez was unfulfilled as successor cases failed to follow through with its vision. Mortgagor actions brought in the trial courts to prevent foreclosure have been unsuccessful with the elemental actions based in consumer protection, contract, and equity. However, this article proposes new and novel solutions to force banks to be held accountable for their practices in mortgage lending and foreclosure.

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"Land. Land is certainly the asset which people deem to be their most important 'possession': There is no other 'thing' more important historically in our culture than an interest in land, whether that interest be in a condominium, in a house, or in a farm."²

I. Introduction

The residential foreclosure crisis has been one of the most visible symptoms of the recent recession. The home-price bubble burst in 2007, and we are now in the fifth year of "recovery." In these five years, trillions of dollars in wealth have been erased from the United States economy, billions of dollars in government aid were allocated to save the banks instead of homeowners, and millions of mortgages have been foreclosed. Despite the long, hard fall from the high of 2006, the worst is not yet over:³ One and a half million homes are currently in the foreclosure process, and a quarter of homeowners are currently underwater on their mortgages.⁴

The crisis has no single cause, but it is clear that, in the previous decade, banks created new avenues for making money with mortgage-backed securities and other exotic financial instruments. As the value of these concoctions grew, so did the incentive to grow more of the raw ingredients, the residential mortgages that can then be sliced and diced and cooked until they're unrecognizable, but very profitable. The mortgages that were created in the last decade depended for their success on a healthy economy; these were not conservative loans for well-qualified buyers. When the bubble burst,

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⁴ See National Real Estate Trends, REALTYTRAC, www.realtytrac.com/trendcenter/ (last visited Aug. 20, 2012) (stating nearly 1.5 million homes, or 1 in 686, in the foreclosure process in July 2012); Nick Carey, Americans Brace for Next Foreclosure Wave, REUTERS (Apr. 4, 2012), http://www.reuters.com/article/2012/04/04/us-foreclosure-idUSBRE83319E20120404 (stating that one in four U.S. homeowners is "underwater" on their mortgage, i.e., owes more
homes lost thousands of dollars in value overnight, pushing many mortgages underwater. As the crisis reverberated through the rest of the economy, resulting in millions of layoffs, millions of homeowners no longer had the means to pay their mortgages. The banks at the core of the destruction, who built the machines that created the hunger, stoked the fires, and created the fuel to feed the flames, now want to recover their investments as quickly as possible. The traditional measures for forcing banks to do their due diligence before foreclosing a mortgage did not slow them. As a result, banks rushed to recover their capital, and often initiated foreclosure proceedings without the mortgage, without the note, or without any proof of a legitimate claim to ownership of the loan. Homeowners were the ones who suffered.

While Congress has been the traditional regulator of the mortgage banking industry, in the wake of the 2007 recession, the federal government put billions of dollars into propping up the banks, but largely left homeowners to their own devices. The few pieces of federal legislation that were passed have been narrow in their scope, timid in their goals, and ultimately nearly meaningless in their application. The Massachusetts state legislature has likewise been slow to react, and has not moved to make the changes that would ameliorate harsh effects for homeowners.

This article tracks how powerless homeowners have been to protect their interests in a struggle with the major banks. It takes one small state as its focus for how the traditional forms of consumer protection have failed homeowners in the recent recession. Massachusetts is one of the most consumer-friendly states in the country. In January 2011, the Massachusetts Supreme Judicial Court issued *U.S. Bank v. Ibanez*, a decision that seemed, at the time, to be an aggressive push back against the shoddy practices of the major banks. In the months that followed, several successor cases in the Supreme

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than the value of the home); Joe Nocera, *To Fix Housing, See the Data*, N.Y. TIMES, Nov. 5, 2011, at A19 (quoting one expert who claims that more than ten million mortgages are reasonably likely to default).

Judicial Court did not follow through on that initial promise, instead taking major steps backwards. In the trial courts, mortgagors and their attorneys tried everything—consumer protection actions, contract and tort actions, and equitable actions—to slow the foreclosure process and give homeowners time to sort out solutions and settlements. None of these claims have been successful in slowing the foreclosure train and putting banks to their proof before they can take the most important asset most people will ever have—their home.

The judiciary and legislature have been unable or unwilling to make banks follow the rules. This article posits that banks foreclose mortgages in a quick and dirty manner because it's cheaper; when it stops being cheaper, they'll change their ways. If attorneys and advocates put their litigious energies into a new strategy, what might be called "death by a thousand paper cuts," it might ultimately become cheaper for the banks to reform their mortgage and foreclosure practices voluntarily. To that end, this article suggests some means for convincing the banks that, in fact, it would be a better use of their time and money to comply with the law.

Part Two of this article traces the state-law background, from the basics of mortgages and foreclosure, to the Ibanez decision and the promise that it held, and then on through the successor cases, Bevilacqua and Eaton, which ultimately failed to fulfill Ibanez's promise. Part Three examines the reality in the trial courts. Mortgagors brought well-established consumer protection claims but were thwarted by technical procedural requirements. Mortgagors also used equitable claims to attempt to force the banks to deal fairly with them, with varying degrees of success. Part Four of this article puts forward some new ideas for using the judicial process to hold banks accountable, with the argument that, ultimately, banks might find it cheaper and easier to use their considerable resources proactively to comply with the law.

II. The Current State of Massachusetts Law

A. An Introduction to Home Mortgages and Foreclosure in Massachusetts

When a person borrows a sum of money to buy real estate, the borrower makes a promise to the lender that the money will be repaid. This promise is memorialized in a promissory note (often simply called the "note"). At the same time, the borrower gives security for the promise through the mortgage (or the mortgage note). In Massachusetts, a so-called "title-theory" state, the mortgage gives the mortgagee legal title to the real estate.\(^7\) The homeowner-mortgagor retains a bare equitable title to the property.\(^8\) When the mortgage and note are held separately, the mortgagee holds the mortgage title in trust for the note-holder, and the note-holder has the equitable right to seek assignment of the mortgage to himself.\(^9\) Thus, assignment of the note does not carry with it assignment of the mortgage.\(^10\)

If a borrower defaults on the debt secured by the mortgage, the mortgagee may foreclose on the property, consistent with the terms of the mortgage and the statutory power of sale.\(^11\) Because Massachusetts is a non-judicial foreclosure state,\(^12\) if the mortgagor does not bring an action to stop the foreclosure, it goes forward without judicial intervention.\(^13\) Although borrowers generally have a period

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\(^{7}\) *Ibanez*, 941 N.E.2d at 51; see also *Kinney v. Stevens*, 93 N.E. 586, 587 (Mass. 1911) ("Under the laws of Massachusetts a mortgagee takes, not merely a lien upon the land as security, but he holds the legal title to it, subject to a right of redemption in the mortgagor.").

\(^{8}\) *Ibanez*, 941 N.E.2d at 51.

\(^{9}\) *Id.* at 54 (citing *Barnes v. Boardman*, 21 N.E. 308 (1889)).

\(^{10}\) *Id.* at 53-54.

\(^{11}\) See MASS. GEN. LAWS ch. 183, § 21. The statute grants the power of sale to the mortgagee, his heirs, successors and assigns.


\(^{13}\) See MASS. GEN. LAWS ch. 183, § 21 (statutory power of sale); MASS. GEN. LAWS ch. 244, § 14 (regulating foreclosure procedure); see also *Ibanez*, 941 N.E.2d at 49 ("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.").
of time in which to cure a default, most (if not all) mortgages contain an acceleration clause, which provides that upon default on a term of the note, the balance of the note becomes immediately due.\textsuperscript{14}

Before foreclosing a mortgage, the mortgagee must ensure that the mortgagor is not subject to the protection of the Servicemembers Civil Relief Act (SCRA), which protects members of the military from civil lawsuits while they are on active-duty.\textsuperscript{15} In Massachusetts, the mortgagee must petition the court for a declaration that the mortgagor is not protected by the SCRA.\textsuperscript{16} If the mortgagor is not subject to the protections of the SCRA, the court will issue a declaration to that effect, and the mortgagee may then commence foreclosure proceedings subject to the statutory power of sale.\textsuperscript{17}

Most mortgages in Massachusetts contain language granting the mortgagee the right to foreclose if the mortgagor defaults on the terms of the note, subject to the statutory power of sale.\textsuperscript{18} Importantly, only the mortgagee and his successors and assigns have the right to foreclose.\textsuperscript{19} The statutory power of sale requires a specified foreclosure procedure in order to provide notice to the mortgagor and other interested parties of the mortgagee's intent to foreclose and sell the property at auction, and to give the mortgagor the opportunity to redeem the mortgage by satisfying the balance on the note.\textsuperscript{20} The mortgagee must give notice of the date and time of the foreclosure auction in two ways: (1) by registered mail to the last known address of the mortgagor at least thirty days prior to the sale; and (2)

\textsuperscript{14}If a borrower then pays the balance, the payment is within the terms of the mortgage, and not subject to a pre-payment fee.


\textsuperscript{16}See St.1943 ch. 57, amended by St.1998 ch. 142 (procedure for compliance with the SCRA); Ibanez, 941 N.E.2d at 47 & n.13; Beaton, 326 N.E.2d at 305 ("... actions taken to comply with the [SCRA], such as the steps prescribed by St.1943, c. 57, as amended, are not in themselves mortgage foreclosure proceedings in any ordinary sense.").

\textsuperscript{17}See Ibanez, 941 N.E.2d at 47 & n.13.

\textsuperscript{18}Id. at 49 ("... 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 also MASS. GEN. LAWS ch. 183, § 21 (statutory power of sale); MASS. GEN. LAWS ch. 244, §§ 11-17 (further regulation of the statutory power of sale); Beaton, 326 N.E.2d at 307 (describing foreclosure procedure under the statutory power of sale). Additionally, "[a]n 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." Ibanez, 941 N.E.2d at n.15; see MASS. GEN. LAWS ch. 244, §§ 1-2.

\textsuperscript{19}MASS. GEN. LAWS ch. 183, § 21 ("[U]pon any default in the performance or observance of the foregoing or other condition, the mortgagee or his executors, administrators, successors or assigns may sell the mortgaged premises. . . ").
in a newspaper generally circulated in the town where the property lies, at least once per week, for at least three consecutive weeks, with the first notice published at least twenty-one days prior to the scheduled sale.\textsuperscript{21}

At the appointed date and time for the foreclosure auction, a certified auctioneer must fly a red auction flag\textsuperscript{22} and hold an auction in public.\textsuperscript{23} The highest bidder at the auction is the purchaser of the property. The mortgagee executes a foreclosure deed conveying the land to the purchaser, which should then be recorded at the registry of deeds. In addition, after a foreclosure sale, a mortgagee must file an affidavit with the foreclosure deed at the registry, which states that he followed all necessary procedures in foreclosing the mortgage.\textsuperscript{24} The mortgagor's equitable title and right to redeem the mortgage are extinguished by the foreclosure deed, and the mortgage is discharged at that time.\textsuperscript{25} The purchaser of property at a foreclosure sale takes title in fee simple\textsuperscript{26}, with the right of possession of the property. Until the property is sold at a foreclosure auction, the mortgagor retains the right of redemption.\textsuperscript{27} The right of redemption allows the mortgagor to discharge the mortgage by paying the balance of the debt

\textsuperscript{20}See MASS. GEN. LAWS ch. 183, § 21; MASS. GEN. LAWS ch. 244, § 16.
\textsuperscript{21}Id.
\textsuperscript{22}See Alpino, 2011 WL 1564114, at *6 (citing Aurea Aspasia Corp. v. Crosby, 120 N.E.2d 759, 760-61 (Mass. 1954) for the proposition that "the appearance of an auctioneer, who announced the terms of the sale, and flew a red flag was sufficient to conclude that a foreclosure auction had occurred.").
\textsuperscript{23}MASS. GEN. LAWS ch. 183, § 21 ("by public auction on or near the premises then subject to the mortgage").
\textsuperscript{24}MASS. GEN. LAWS ch. 244, § 15 (2004).
\textsuperscript{25}A mortgagee may foreclose a mortgage, commence a foreclosure auction, and purchase the property herself. Barry v. Dudley, 124 N.E. 815, 816 (Mass. 1933) ("When the plaintiff bought at the foreclosure sale and gave a deed to herself, she ended the equity of redemption of the defendant, and became responsible for the application of the purchase price as though she had received it upon a foreclosure sale to a stranger.").
\textsuperscript{26}MASS. GEN. LAWS ch. 183, § 21.
\textsuperscript{27}MASS. GEN. LAWS ch. 244, § 18 (2004). If the mortgagee does not sell the property at a foreclosure auction, but instead takes possession of the property, the mortgagor has three years to "tender a redemption" of the mortgage. See id. A tender of redemption occurs when the mortgagor pays the balance of the note and satisfies the other terms of the mortgage. Id. If a mortgagee refuses to accept the tender and to discharge the mortgage within the period allowed for redemption, the mortgagor has a right of action for an order of redemption. MASS. GEN. LAWS ch. 244, § 21 (2004).
and discharging any other duties owed in the mortgage.\textsuperscript{28} Thus, until the property is purchased, the mortgagor may pay off the note and avoid foreclosure.

A mortgage, as noted above, is security for the debt memorialized in the note. The note is a contract, and therefore must include all material terms of the debt agreement.\textsuperscript{29} Thus, a note includes the amount of the debt ("the principal") and terms for repaying the debt, including the interest rate, the minimum payment due each month, the length of the term for repaying the debt, and whether the note is an instrument under seal.\textsuperscript{30} The mortgage transfers title of the property to the mortgagee and usually incorporates the terms of the note by reference.\textsuperscript{31} "Without a valid promissory note, a mortgage is generally not enforceable."\textsuperscript{32} The mortgagee can convey his rights under the mortgage by assigning his interest to another party.\textsuperscript{33} The assignee gains everything the mortgagee had under the terms of the

\textsuperscript{28} MASS. GEN. LAWS ch. 244, § 19. The right of redemption is an equitable right, inherent in every mortgage. Flagg v. Mann, 14 Pick. 467, 478 (Mass. 1833) ("It is very well settled, that, if this is to be taken as a security for a loan, no agreement of the parties could impair the right of redeeming, which is incidental to mortgages. The authorities are too clear to that point, to require particular citation.").

\textsuperscript{29} JPMorgan Chase & Co. v. Casarano, 963 N.E.2d 108, 110-11 (Mass. App. Ct. Feb. 28, 2012); see also Haverhill v. George Brox, Inc., 47 Mass. App. Ct. 717, 720 (1999) (stating that the foundational requirements of a valid contract are "offer, acceptance, consideration, and terms setting forth the rights and obligations of the parties."). Most promissory notes are negotiable instruments and subject to Article Three of the Uniform Commercial Code (UCC). A negotiable instrument is an unconditional promise to a pay a fixed amount, with or without interest, payable to the bearer upon demand or at a fixed time. See MASS. GEN. LAWS ch. 106, § 3-104(a) (1998) (defining negotiable instruments).

\textsuperscript{30} Some notes set interest at a fixed rate for the entire term, so that monthly payments remain the same (a "fixed-rate mortgage"). Some notes set the interest rate to an economic indicator, so that the interest rate changes when inflation goes up or down (an "adjustable-rate mortgage," or ARM). Some notes have an introductory period featuring a low or fixed interest rate, which resets to a higher interest rate at the end of the introductory period. Most promissory notes are instruments under seal, which may change some duties under the contract, and in Massachusetts will extend the statute of limitations for actions arising out of the note to twenty years, as opposed to the six year limitation on normal contract actions. See Casarano, 963 N.E.2d at 110-11 & n. 8; see also Unif. Comm. Code § 3-113 & official comment (2004) (negotiable instruments under seal); MASS. GEN. LAWS ch. 260, § 1 (1970) (setting the statute of limitations at twenty years).

\textsuperscript{31} A mortgage may be a contract if it includes all the terms of the promissory note. Holt v. Fed. Deposit Ins. Corp, 216 B.R. 71, 75-76 (D. Mass. 1997); see Casarano, 963 N.E.2d at 111-12 & n. 11 (holding that a mortgage was not enforceable without its note, and was also not a valid contract, because the mortgage did not include material terms of the agreement such as whether the note was payable upon demand or for a specific term, and whether the note was executed under seal).

\textsuperscript{32} Casarano, 963 N.E.2d at 111 (citing Saunders v. Dunn, 55 N.E. 893, 893 (1900)).

\textsuperscript{33} See Ibanez, 941 N.E.2d at 51. As a conveyance of an interest in land, an assignment of a mortgage is subject to the statute of frauds, and therefore must be evidenced by a writing signed by the grantor in order to be effective. Id.; MASS. GEN. LAWS ch. 183, § 3 (2003) ("An estate or interest in land created without an instrument in writing signed by the grantor or by his attorney shall have the force and effect of an estate at will only, and no estate or interest in land shall be assigned, granted or surrendered unless by such writing or by operation of law."); see also MASS. GEN. LAWS ch. 259, § 1 (1902) (statute of frauds). An assignment of a mortgage is a contract, in and of itself, between the grantor and the grantee. Oum v.
mortgage—he simply steps into the shoes of the mortgagee. 34 In order to be effective, a written assignment must be signed by the grantor, and it must state the mortgage it conveys, the grantor-mortgagee who is assigning the mortgage, the grantee-assignee who is receiving the assignment, and the date of assignment. 35 Thus, assignments of the mortgage “in blank” (i.e., where the grantee is not named) are invalid and do not operate as a transfer of an interest in land. 36

An assignee may be any legal entity, usually a bank or other lender. Recently, with the rise of mortgage-backed securities (MBS), many mortgages and notes were assigned to securitization trusts created by banks. Securitization occurs when a group of notes (with their mortgages) are sold by the originating lenders (or any note holder) and pooled together in a trust for the purpose of selling a stream of income to investors. 37 The document which creates the pool of mortgages for securitization must include, inter alia, a list of the mortgages and notes in the trust. 38 Therefore, an executed trust
agreement can operate as an assignment of a mortgage if it purports to presently create a trust out of specified mortgages, and is evidence that the trust presently holds the mortgage.\(^{39}\)

In Massachusetts, deeds granting an interest in title to land must be recorded at the local Registry of Deeds in order to be effective against a successive third party claiming to hold title to the property.\(^{40}\) Mortgages and assignments of mortgages, because they convey title to real property, must also be recorded at the registry in order to be effective against adverse parties.\(^{41}\) The purpose of public land recording systems is to prevent disputes over property rights and to create a history of land ownership for the use of the public.\(^{42}\) Small fees, generally of twenty-five to fifty dollars, are charged by the registry to record documents.\(^{43}\)

In recent decades, a private corporation, the Mortgage Electronic Registration Service (MERS), sought to circumvent the time and expense of recording mortgages and notes.\(^{44}\) MERS acts as a shell company, which can be listed as "mortgagee of record" on legal documents, but which holds no title itself.\(^{45}\) MERS is made up of member organizations, like banks and servicers, who hold all of the mortgages assigned to MERS, and who may then transfer interests in land between themselves, privately, without recording the transfers at a county registry.\(^{46}\) Thus, once MERS is granted an interest

\(^{39}\) See id. In Ibanez, U.S. Bank failed to offer proof it held the Ibanez mortgage because the trust agreement and its schedule of mortgages and loans was not evidence before the judge. Instead, U.S. Bank submitted the private placement memorandum (PPM), which "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." Id. The Ibanez court also considered the LaRace mortgage, which raised similar claims and was considered together with the Ibanez claim in the Land Court. Id. at 45. The Supreme Judicial Court held that the Pooling and Servicing Agreement (PSA) submitted by the LaRace defendants as evidence of assignment of the mortgage would have been sufficient evidence of assignment, except that it failed to identify the mortgage with specificity, and the PSA did not include sufficient evidence that the party purporting to convey the mortgage had a valid assignment at that time. See id. at 52.


\(^{41}\) Id. Recording mortgage assignments is "preferred but not required." Rosa, 821 F. Supp. 2d at 430; see also Ibanez, 941 N.E.2d at 53.

\(^{42}\) See Peterson, supra note 2, at 1364-65.

\(^{43}\) Id. at 1365.

\(^{44}\) Id. at 1370.

\(^{45}\) Id. MERS also never actually holds the note. See Rosa, 821 F. Supp. 2d at 429 ("While MERS never actually holds the note, it is authorized to transfer the mortgage on behalf of a note holder by virtue of its nominee status.").

\(^{46}\) Id.
in property, duly recorded at the local registry, all the subsequent grants between its members go unrecorded until title is conveyed to a non-member mortgagee. In Massachusetts, some courts have questioned MERS’ ability to foreclose a mortgage, but no appellate court has yet addressed this issue.\textsuperscript{47}

\textbf{B. An Entity Seeking to Foreclose Must Hold the Mortgage}

\textit{U.S. Bank v. Ibanez} holds that actual possession of the mortgage, as evidenced by the mortgage document itself (and a valid assignment thereof, if the current holder is not the original mortgagee) is required in order to initiate foreclosure proceedings, and at all relevant times until the property is sold at auction.\textsuperscript{48} A foreclosure sale conducted by a mortgagee that did not strictly adhere to this procedure is void.\textsuperscript{49} A (purported) mortgagee who takes a valid assignment of the mortgage only \textit{after} the foreclosure sale conveys no title to the purchaser at a foreclosure auction, because at the time of the sale, the purported mortgagee held no title.\textsuperscript{50} This "mortgagee" does not hold title until a valid assignment of the mortgage has been duly executed.\textsuperscript{51}

In \textit{Ibanez}, U.S. Bank and others, having foreclosed on two properties which they subsequently purchased at the foreclosure auction, filed complaints in the Massachusetts Land Court seeking a declaration of clear title to the properties.\textsuperscript{52} The Land Court found that the plaintiffs failed to submit sufficient evidence to prove they held the mortgages, and not merely the notes, at the time of foreclosure.\textsuperscript{53} The plaintiffs' request for a declaration of clear title was denied.\textsuperscript{54} The Ibanez mortgage was assigned at least six times between December 1, 2005 when Antonio Ibanez, the mortgagor, gave a

\begin{footnotesize}
\begin{enumerate}
\item See \textit{id.} ("If MERS is named as mortgagee in a recorded mortgage, it is authorized to conduct a foreclosure by power of sale pursuant to [Mass. Gen. Laws ch. 244, § 14].").
\item \textit{Ibanez}, 941 N.E.2d at 53.
\item \textit{Id.} at 50.
\item \textit{Id.} at 51.
\item \textit{Id.}
\item \textit{Id.} at 44; see MASS. GEN. LAWS ch. 240, § 6 (authorizing actions to quiet title, establish title, or to remove a cloud from title).
\item See \textit{Ibanez}, 941 N.E.2d at 55.
\end{enumerate}
\end{footnotesize}
mortgage to Rose Mortgage, Inc., and July 5, 2007, when U.S. Bank sold itself the property at the foreclosure auction.\(^{55}\) Despite identifying itself as the mortgagee throughout the foreclosure process, U.S. Bank did not take an assignment of the Ibanez mortgage until September 2, 2008, more than a year after the foreclosure sale.\(^{56}\)

To maintain the action, "plaintiffs bore the burden of establishing their entitlement to the relief sought . . . not merely to demonstrate better title than the defendants possess, but to prove sufficient title to succeed in the action."\(^{57}\) The statutory power of sale is restricted to "the mortgagee or his executors, administrators, successors or assigns."\(^{58}\) Foreclosure by any other entity than these is void.\(^{59}\) Thus, plaintiffs had the authority to foreclose only if they were the assignees of the mortgage at the time of the foreclosure notice and sale.\(^{60}\) U.S. Bank argued that it was assigned the mortgage by the trust agreement referenced in the private placement memorandum (PPM) which it submitted to the land court.\(^{61}\) However, without the schedule of loans and mortgages that was an exhibit to the agreement, U.S. Bank failed to show that the Ibanez mortgage was among the mortgages to be assigned by the agreement.\(^{62}\) Finally, the Court said that even with the schedule and the trust agreement, U.S. Bank could not show that the entity assigning the mortgage ever held the mortgage to be assigned, because the last recorded mortgage assignment was from Rose Mortgage (the original mortgagee) to Option

\(^{54}\)Id.\(^{55}\) Id. at 45-47.\(^{56}\) Id. at 47.\(^{57}\) Id. at 49 (citing Sheriff's Meadow Found., Inc. v. Bay-Courte Edgartown, Inc., 516 N.E.2d 144 (Mass. 1987) (internal punctuation omitted)).\(^{58}\) MASS. GEN. LAWS ch. 183, § 21; see Ibanez, 941 N.E.2d at 50.\(^{59}\) See id.\(^{60}\) Id. at 51.\(^{61}\) See id. at 46. The trust agreement itself was not in the record before the land court. Id. The trust was made up of a pool of mortgage loans, securitized for use as a financial instrument. See id.\(^{62}\) Id. at 52.
One. Thus, Option One was the mortgage holder at the time of the foreclosure, and U.S. Bank had no legal authority to foreclose.

C. A Purchaser of Property, Bought at a Void Foreclosure Auction, Holds No Title

The concurrence in Ibanez explicitly raised the next question the Supreme Judicial Court would have to address: The effect of an invalid foreclosure 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." In Bevilacqua v. Rodriguez, a mortgage was invalidly foreclosed and the property was sold at auction. A later purchaser brought a "try title action" against the mortgagor, whose mortgage had been foreclosed at the auction. The mortgagor did not appear in court, and could not be located. In the Massachusetts Land Court, Judge Long raised the issue of the plaintiff's standing to bring the try title claim sua sponte. Judge Long ultimately concluded that the plaintiff lacked standing as owner of the property. He dismissed the try title action with prejudice, and the plaintiff appealed.

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63Ibanez, 941 N.E.2d at 52.  
64Id.  
65Id. at 56 (Cordy, J., concurring).  
66Bevilacqua, 955 N.E.2d at 886; see MASS. GEN. LAWS ch. 240, § 1 ("Petition to Compel Adverse Claimant to Try Title"). A petition to try title is an action at law, and notably distinct from an action to quiet title, an in rem action brought under the court's equity jurisdiction. See Bevilacqua, 955 N.E.2d at 889 & n. 5. "The distinction is critical because the plaintiff in a try title action may defeat the specified adverse claims through a default or by showing title that is merely superior to that of the respondent." Id. at n. 5 (citing MASS. GEN. LAWS ch. 240, §§ 2-3; Blanchard v. Lowell, 59 N.E. 114, 114 (Mass. 1901)). "In contrast, a quiet title action required the plaintiff not merely to demonstrate better title to the locus than the defendants possess, but requires the plaintiff to prove sufficient title to succeed in its action." Id. (internal quotation and punctuation omitted); see Ibanez, 941 N.E.2d at 49.  
67Bevilacqua, 955 N.E.2d at 886.  
68Id. at 886, 893. Although Judge Long did not identify the rule under which he dismissed the action, the Supreme Judicial Court noted that "a court's sua sponte motion to dismiss for lack of subject matter jurisdiction is analogous to a party's motion to dismiss" under Rule 12(b)(1) or (6). Id. at 887. Thus, in reviewing the Land Court's decision, the Supreme Judicial Court accepted the factual allegations of the complaint and all favorable inferences drawn from them as true. Id. at 887-88 (citing Ginther v. Commissioner of Ins., 693 N.E.2d 153 (Mass. 1998)).
The facts of Bevilacqua are as follows. On March 18, 2005, Pablo Rodriguez gave a mortgage to MERS; the mortgage was recorded at the Southern Essex County Registry of Deeds. On June 29, 2006, U.S. Bank (as trustee for a trust not further described) executed a foreclosure deed to U.S. Bank (as trustee for another trust, hereafter "U.S. Bank as trustee"), referencing the mortgage and purporting to transfer the property pursuant to a foreclosure auction. A few weeks later, on July 21, 2006, MERS assigned the mortgage to U.S. Bank and the assignment was recorded. On October 9, 2006, U.S. Bank issued a "confirmatory foreclosure deed" to U.S. Bank as trustee and, eight days later, U.S. Bank as trustee executed a quitclaim deed and delivered it to Mr. Bevilacqua. On April 12, 2010, Bevilacqua brought a try title action against Rodriguez alleging that, because MERS had not yet assigned the mortgage to U.S. Bank at the time of the foreclosure, there was a cloud on the title to the property, and that there existed a "possibility of an adverse claim by Rodriguez against Bevilacqua's title to the property."

An action to try title has two stages. First, the petitioner must establish the jurisdictional facts required by the statute. Then, the adverse claimant must either disclaim his interest in the property, or bring an action to assert his claim to it. The Supreme Judicial Court, parsing the language of the try title statute, concluded that two jurisdictional facts are required to establish standing in a try title action: (1) The petitioner must be in possession of the disputed property, and (2) he must hold record title to

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69 Bevilacqua, 955 N.E.2d at 888.
70 Id.
71 Id.
72 Id. A deed is a transfer of an interest in or title to property. In Massachusetts, a quitclaim deed conveys only such interest as the seller has at the time of the conveyance. See MASS. GEN. LAWS ch. 183, § 2 (2003) ("Estate Conveyed by Quitclaim Deed"). The seller under a quitclaim deed does not warrant or imply that the title he conveys is perfect, unclouded by any adverse claims, but only that he has done nothing to imperil the title. See Conte v. Marine Lumber Co., 848 N.E.2d 1246, 1252 (Mass. App. Ct. 2006) (the grantor "[does] not undertake to convey to the [grantee] an indefeasible estate, but only his own title, nor [does] he agree to warrant and defend it against all claims and demands, but only against those derived from himself; by which he must be understood to refer to existing claims or [e]ncumbrances, and not to any title which he might afterwards acquire by purchase or otherwise from a stranger.") (quoting Comstock v. Smith, 30 Mass. 316, 320 (1832)).
73 Bevilacqua, 955 N.E.2d at 888.
74 Id. at 889; MASS. GEN. LAWS ch. 240, § 1.
the property.\textsuperscript{76} Bevilacqua stated in his petition that he resided on the disputed property and, taken as true, this fact was sufficient to meet the first element, of possession.\textsuperscript{77} Bevilacqua also stated that he held record title to the property, but the Land Court found that the facts of the petition did not support this claim.\textsuperscript{78} This issue formed the basis of the Supreme Judicial Court's opinion on appeal.\textsuperscript{79}

Mr. Bevilacqua appeared to have a good argument that he was the owner of the property. He had a deed from U.S. Bank as trustee conveying the property to him, which was promptly recorded at the registry, and he had had nothing to do with the foreclosure auction which had occurred months prior.

Bevilacqua made his claim of ownership under three alternate theories. First he argued that he held record title because he held a deed conveying the property to him from U.S. Bank as trustee.\textsuperscript{80} Second, if the deed was invalid because of problems with the foreclosure, it might operate as an assignment, and he would have legal title as the assignee of U.S. Bank.\textsuperscript{81} Third, even if the deed was invalid because of problems with the foreclosure, and even if it didn't operate like an assignment, Bevilacqua claimed that he was an innocent purchaser for value of the property, who had nothing to do with the foreclosure.\textsuperscript{82} Thus, he argued he should have title valid against any other claimant. The Supreme Judicial Court considered all three arguments, but ultimately found them unpersuasive.

The problem with the first theory, the Court said, was that Mr. Bevilacqua's quitclaim deed was not proof that he held valid title.\textsuperscript{83} If U.S. Bank as trustee lacked title when it executed the quitclaim deed to Bevilacqua, then the quitclaim deed could not convey title. In order to determine if U.S. Bank as trustee had title when it executed the deed to Bevilacqua, it was necessary to determine how U.S.

\footnotesize{\textsuperscript{75}Bevilacqua, 955 N.E.2d at 889; MASS. GEN. LAWS ch. 240, § 1. 
\textsuperscript{76}See Bevilacqua, 955 N.E.2d at 889-91 (citing Blanchard, 59 N.E. at 114); see also MASS. GEN. LAWS ch. 240, § 1 ("If the record title of land is clouded by an adverse claim. . . ").
\textsuperscript{77}See Bevilacqua, 955 N.E.2d at 889.
\textsuperscript{78}See id.
\textsuperscript{79}See id.
\textsuperscript{80}Id. at 891.
\textsuperscript{81}Id. at 893.
\textsuperscript{82}Id. at 896.}
Bank as trustee claimed to have title. U.S. Bank as trustee purchased the property at the foreclosure auction and the property was conveyed by the foreclosure deed. If the foreclosure was invalid, then the foreclosure deed did not transfer good title, or even voidable title, but void title.

The Court held that in attempting to establish his ownership it was not enough for Bevilacqua to show that he held a deed recorded at the registry. As the Court put it, "there is nothing magical in the act of recording an instrument with the registry that invests an otherwise meaningless document with legal effect." Recording is not sufficient in and of itself. . . to render an invalid document legally significant. . . [I]t is the effectiveness of a document that is controlling rather than its mere existence. Accordingly, a single deed considered without reference to its chain of title is insufficient to show 'record title' as required by [the try title statute]. Bevilacqua's deed was meaningless unless his grantor, U.S. Bank as trustee, had good title at the time of the conveyance. The only way to establish this fact was to examine how U.S. Bank as trustee had acquired its title, and how U.S. Bank as trustee's grantor acquired its title, all the way back to Mr. Rodriguez originally granting the title, means of the mortgage, to MERS. The problem, as Mr. Bevilacqua well knew, was that MERS had not assigned the mortgage to U.S. Bank at the time of the foreclosure sale.

The Supreme Judicial Court held that this was an "insurmountable obstacle" for Mr. Bevilacqua, because "the very fact that raises the possibility of an adverse claim—U.S. Bank's lack of authority to foreclose at the time it purported to foreclose—is fatal to Bevilacqua's claim to 'own' the property." If U.S. Bank did not hold title when it foreclosed, it could not transfer title under the foreclosure deed. Ibanez had held that a foreclosure conducted by an entity that did not hold the mortgage it was

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81See Bevilacqua, 955 N.E.2d at 891-92.
84Id. at 891-92; see Arnold v. Reed, 38 N.E. 1132, 1132-33 (Mass. 1894).
85Bevilacqua, 955 N.E.2d at 892.
86Id.; see MASS. GEN. LAWS ch. 240, § 1.
foreclosing was null and void; title remained with the original mortgagee, in this case MERS.  

Bevilacqua commenced his suit precisely because he knew that the power of sale had not been strictly complied with and, thus, after *Ibanez*, Bevilacqua effectively admitted that he did not hold record title to the property.  

At the time of the foreclosure sale, no title passed to the purchaser, so title remained with MERS until it assigned the mortgage to U.S. Bank on July 21, 2006. The mortgage was therefore never actually foreclosed and, at the time of the try title action, U.S. Bank held record title (as assignee of the mortgage granted by Rodriguez). Thus, Bevilacqua could not show that he was the owner of the property.  

In the alternative, Bevilacqua argued that he might have standing in the try title action either as the assignee of the mortgage or as a *bona fide* purchaser for value. The Court held that the first theory would be oxymoronical, and that the second failed on the facts. First, the Court stated it was possible that Bevilacqua might hold the mortgage despite never receiving an express assignment. The Court said, "[I]t is possible for a foreclosure deed, ineffective due to noncompliance with the power of sale, to nevertheless operate as an assignment of the mortgage itself." However, Bevilacqua was not a party to the foreclosure deed. Additionally, because Bevilacqua pleaded that U.S. Bank did not hold an

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87 *Bevilacqua*, 955 N.E.2d at 892-93. "By alleging that U.S. Bank was not the assignee of the mortgage at the time of the purported foreclosure, Bevilacqua is necessarily asserting that the power of sale was not complied with, that the purported sale was invalid, and that his grantor's title was defective." *Id.* at 893 (citing *Ibanez*, 941 N.E.2d at 50).

88 *Id.*

89 *Ibanez*, 941 N.E.2d at 53 ("In the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged."); *see Bevilacqua*, 955 N.E.2d at 892-93.

90 See *id.* at 893.

91 *see id.*

92 *Bevilacqua*, 955 N.E.2d at 893, 896.

93 *Id.* at 893-94.

94 *Id.* at 893 (citing Holmes v. Turner's Falls Co., 8 N.E. 646 (Mass. 1886)). "The theory is that where a deed of real estate shows by its language that it was intended to pass title by one form of conveyance, by which however title could not pass, courts have made the deed effective by construing it as a deed of some other form, notwithstanding the inappropriateness of the language." *Id.* at 893-94 (quoting Kaufman v. Fed. Nat'l Bank, 191 N.E. 422, 424 (Mass. 1934)).
assignment of the mortgage at the time of the foreclosure deed, it would be impossible for that deed to operate as an assignment of the mortgage.\textsuperscript{95}

But, even if Bevilacqua could plead facts to show he was the assignee of the mortgage, he would still be unable to bring the try title action.\textsuperscript{96} As the assignee, in the position of the mortgagee, Bevilacqua would hold legal title to the property; Rodriguez, as the mortgagor, would maintain equitable title to the property, and could redeem the mortgage at any time by paying the balance of the note.\textsuperscript{97} Equitable title (held by the mortgagor) is like the fraternal twin of legal title (held by the mortgagee). The two are not adverse but complimentary. However, a try title action requires that the respondent be an adverse party.\textsuperscript{98} If the foreclosure deed was an assignment from U.S. Bank to U.S. Bank as trustee, and Bevilacqua was an assignee, then Bevilacqua would be in the position of claiming that the mortgage was still in effect, and that Rodriguez was still the mortgagor, holding complimentary equitable title (or an equity of redemption) in the property. Under these circumstances, Rodriguez would not be an adverse party, and Bevilacqua's try title action would fail.\textsuperscript{99}

Finally, Bevilacqua argued that he had standing to bring the try title action as a \textit{bona fide} purchaser for value.\textsuperscript{100} An innocent third-party purchaser may sometimes gain good title from a seller even if the seller did not have perfect title. "Generally, the key question in this regard is whether the transaction is void, in which case it is a nullity that such title never left possession of the original

\textsuperscript{95}Id. at 894.
\textsuperscript{96} See id.; MASS. GEN. LAWS ch. 240, §§ 1-5. "The legal title possessed by a mortgagee is not, therefore, a basis of standing that would be consistent with maintenance of Bevilacqua's action against Rodriguez." \textit{Bevilacqua}, 955 N.E.2d at 895.
\textsuperscript{97}Id. at 895.
\textsuperscript{98}Id.
\textsuperscript{99}Id. The Court stated: "For a plaintiff to both claim record title as holder of a mortgage and to dispute the respondent's continuing equitable title or equity of redemption would be oxymoronic, however, because the only circumstances in which the respondent's rights would not be upheld are circumstances in which there is no mortgage for the plaintiff to hold. This is the circumstance in which Bevilacqua finds himself." \textit{Id.} The Court noted that foreclosure was the "appropriate remedy for a mortgagee seeking to resolve an outstanding equity of redemption." \textit{Id} at n. 10. Thus, if Bevilacqua was the mortgagor, he could cure the defect in his title by re-foreclosing on the property, ending the mortgagor's right of redemption. \textit{See id.} The Court has not yet heard a case pleading such facts.
\textsuperscript{100}Id. at 896 & n. 11. A \textit{bona fide} purchaser for value, also called a good faith purchaser for value, may have an equitable remedy for defects in title arising from irregularities in the transfer of which he had no knowledge. \textit{See id.}
owner, or merely voidable, in which case a bona fide purchaser may take good title.”

101 *Ibanez*

established that a foreclosure sale carried out in violation of the mortgagee's power of sale was wholly void.102 Thus, a seller transferring title after an improper foreclosure transfers void title, which vests no title at all in the purchaser.

Bevilacqua failed to meet the factual prerequisites of "bona fide purchaser for value" status. The Court found that Bevilacqua was not a good faith purchaser for value because he had notice of defects in title, beginning with the order of recording of documents at the Registry of Deeds (showing that the assignment to U.S. Bank occurred after the foreclosure sale).103 Bevilacqua therefore was on notice of potential defects in title when he purchased the property, and could not claim "blissful" ignorance.104

Thus, *Bevilacqua* held that, because U.S. Bank's foreclosure was invalid under the statutory power of sale, Bevilacqua received no title when he subsequently purchased the property. Therefore, Bevilacqua could not bring an action to try title in which his standing rested on his status as owner of the property. As the purchaser of a legally empty and meaningless deed to the property, Bevilacqua did not even have an action against U.S. Bank as trustee, because he received a quitclaim deed which did not warrant that the property was free of any cloud on title. The grantor of the quitclaim deed, U.S. Bank as trustee, warranted only that it had not done anything to imperil the title. It had not, in fact, done anything to imperil the title, because it had not received any title at all by the foreclosure deed. Bevilacqua's remedy would be to take an assignment of the mortgage and re-foreclose the mortgage, extinguishing Rodriguez' equitable title and equity of redemption.

**D. The Mortgagee Must Also Either Hold the Note or be an Agent of the Note Holder**

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101 *Bevilacqua*, 955 N.E.2d at 897 (citing Brewster v. Weston, 126 N.E. 271 (1920)).

102 *Ibanez*, 941 N.E.2d at 50. *See Bevilacqua*, 955 N.E.2d at 897.

103 *Id.*

104 *See id.* (“[P]arties may not 'establish themselves as bona fide purchasers simply by claiming that they were blissfully unaware of' facts to which they closed their eyes.”) (quoting Demoulas v. Demoulas, 703 N.E.2d 1149 (1998)).
Unlike Ibanez and Bevilacqua, Eaton v. Federal National Mortgage Association (FNMA or "Fannie Mae"), asked whether an entity holding only the mortgage, and having no connection to the note, had the statutory power to foreclose. Eaton refinished her home in Roslindale, Massachusetts, on September 12, 2007, for $145,000. She signed a promissory note to the lender, Bank United FSB, and executed a mortgage with MERS "as the mortgagee," and also as "nominee for the lender." MERS later assigned the mortgage to Green Tree and recorded the assignment. The note was endorsed in blank at some unknown time by Bank United. In November 2009, after Ms. Eaton defaulted on her mortgage, Green Tree, as holder of the mortgage, moved to foreclose. Green Tree bought the property at the foreclosure auction and assigned its rights to the bid to Fannie Mae, who recorded the foreclosure deed at the Registry on November 25, 2011.

On January 25, 2012, Fannie Mae brought a summary process action to evict Ms. Eaton from the property. Ms. Eaton, as a counter-claim and defense, argued that Fannie Mae could not evict her because the foreclosure auction was not effective to foreclose her title, since Green Tree did not hold the note at the time of foreclosure. A Superior Court judge found in favor of Ms. Eaton, holding that unity of the note and mortgage was required in order to foreclose. The Supreme Judicial Court accepted a direct appeal.

The primary issue before the Court was whether the term "mortgagee," as used in the Massachusetts foreclosure statutes, refers to an entity holding only the mortgage, or whether an entity

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105 Eaton, 969 N.E.2d at 1120.
106 Id. at 1121.
107 Id. at 1121-22.
108 Id. at 1122.
109 Id.
110 Id.
111 Id. at 1123.
112 Id.
113 Id.
114 Id. at 1123-24.
115 Id. at 1121.
attempting to foreclose must hold both the mortgage and the note to qualify as a "mortgagee" under the statute.\textsuperscript{116} The lower court had held that so-called "unity" of the note and mortgage was required before a foreclosure could occur.\textsuperscript{117} The Supreme Judicial Court, construing the statute to avoid contradictory or nonsensical results, held that the term "mortgagee" in the foreclosure statutes (in particular, Chapter 183, § 21, and Chapter 244, § 14 of the Massachusetts General Laws) must mean the entity holding (1) the mortgage and (2) acting for the note holder, either because the mortgagee himself currently also holds the note, or because the mortgagee has the power to act on behalf of the note holder.\textsuperscript{118}

Importantly, the Supreme Judicial Court disagreed with the lower court's holding. According to the Supreme Judicial Court, the foreclosing mortgagee need not have actual, physical possession of the note at the time of foreclosure.\textsuperscript{119} This is because, the Court stated, "[t]here is no applicable statutory language suggesting that the Legislature intended to proscribe application of general agency principles in the context of mortgage foreclosure sales."\textsuperscript{120} In its decision, the Court also addressed the issue of whether to make its ruling prospective or retroactive. To the relief of the mortgage banking industry and title insurance companies, the Court held that its ruling regarding the meaning of the term "mortgagee" was to be applied prospectively, and thus only mortgagees issuing foreclosure notices on or after June 22, 2012 were required to also hold the note or act as an agent of the note holder.\textsuperscript{121}

The Supreme Judicial Court based its decision on the common law of promissory notes and mortgages, discussed \textit{supra}. Principally, the decision hinged on the rule that a mortgage is a nullity when disconnected from the debt it secures.\textsuperscript{122}

\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Eaton I}, 2011 WL 6379284, at *2.
\textsuperscript{118} \textit{Eaton}, 969 N.E.2d at 1120.
\textsuperscript{119} \textit{Id.} at 1131.
\textsuperscript{120} \textit{Id.}
\textsuperscript{121} \textit{Id.} at 1133.
\textsuperscript{122} \textit{See id.} at 1124-25 (collecting cases).
so long as the mortgagor owes a debt to the note holder.123 As a consequence, the rights of the mortgagee to collect the debt depend upon the rights of the note holder. Unlike many states, Massachusetts allows a note and a mortgage to be separated and to travel separately.124 However, a mortgagee can foreclose under the statutory power of sale only when he acts on behalf of the owner of the beneficial interest, i.e., the note holder.125

For a mortgagor like Ms. Eaton, whose mortgage has already been foreclosed, and who comes to court because the purchaser at the foreclosure sale wishes to evict her, challenging the validity of the foreclosure and sale is one of the only avenues for potential relief. Ms. Eaton argued that she could not be evicted because the new owners did not hold title to her property. According to Ms. Eaton, the foreclosure sale was conducted in violation of the foreclosure statute, and thus was void. Ms. Eaton argued that the mortgagee could foreclose only if it held both the mortgage and note before the statutory notice of foreclosure was sent, and before the sale at foreclosure. Unfortunately for Ms. Eaton and other mortgagors like her, because of the procedural posture in the case—with Ms. Eaton asserting an affirmative defense and counter-claim in an eviction action—Ms. Eaton carried the burden of proving that the foreclosure was invalid. Most mortgagors will have an exceedingly difficult time proving that the mortgagee did not hold the note or act as an agent of the note holder at the time of the foreclosure, especially at the pleading stage, where their claims are vulnerable to a motion to dismiss and the parties have not yet conducted discovery.

A mortgagor may know the identities of the mortgagee and note holder at the time of signing the mortgage and note; after all, the identities are stated right there in the documents, in black and white. After that point, however, both mortgages and notes are routinely assigned away from the original

123 See Eaton, 969 N.E.2d at 1124 (collecting cases) ("legal title held by a mortgagee is 'defeasible upon the payment of money. . . . '" (quoting Perry v. Miller, 112 N.E.2d 805 (1953))).
124 Id. (citing Barnes v. Boardman, 21 N.E. 308 (1889)).
125 Id. at 1125 (quoting Ibanez, 941 N.E.2d 40).
signatories. When a mortgage is assigned, the mortgagor might have notice of the transfer if the assignment is recorded at the registry of deeds. After *Ibanez*, a foreclosing mortgagee must give notice of its identity to a mortgagor through the statutory notice requirements.

However, when a note is transferred from the originating lender, it is frequently endorsed in blank, as was the case with Ms. Eaton's promissory note. A note endorsed in blank becomes "bearer paper," meaning that whoever possesses the piece of paper has the right to the obligation. Additionally, promissory note assignments are not mortgage assignments, which are subject to the statute of frauds and must be put in writing. A person in possession of bearer paper does not need a written assignment to demonstrate his rights; the proof of rightful ownership is the fact of possession of the paper. Without any written record of transfers of ownership of the note, the only way for a mortgagor to know the identity of the true and current note holder is to ask to see the note.

Federal and state law require disclosure of the identity of the note holder by the assignee to the mortgagor. Federal law also requires mortgage servicers to disclose the identity of the note holder to the mortgagor upon written request. Yet mortgagors still routinely do not have this information. Indeed, in Ms. Eaton's case, the Court's record did not show who held the note at the time of

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126 See *Eaton*, 969 N.E.2d at 1122 & n.8
127 See MASS. GEN. LAWS Ch. 106, § 3-109(b) ("An instrument payable to an identified person may become payable to bearer if it is indorsed in blank pursuant to [3-205(b)]."); MASS. GEN. LAWS Ch. 106, § 3-205(b) ("If an indorsement is made by the holder of an instrument and it is not a special indorsement, it is a “blank indorsement”. When indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed."); see also U.S. Bank Nat'l Ass'n v. Twomey, No. 09-CV-5070-F, 2012 WL 2029058 (Mass. Super. Ct. May 23, 2012) (citing *Ibanez* and stating that a holder of a note endorsed in blank also held the equitable right to command the mortgagee to transfer the mortgage to himself).
128 Consumer Credit Cost Disclosure Act, 15 U.S.C. § 1641(g) (2011) ("[N]ot later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer."); 12 C.F.R. § 226.39 (2011) (expanding on the disclosure requirement); 209 C.M.R. 32.39 (2012) (echoing the requirements of federal law).
129 15 U.S.C. § 1641(f) (2011) ("Upon written request by the obligor, the servicer shall provide the obligor, to the best knowledge of the servicer, with the name, address, and telephone number of the owner of the obligation.").
foreclosure, except that Green Tree stipulated in the Superior Court proceedings that it did not hold the note at the time of foreclosure.\textsuperscript{130}

By its holding in \textit{Eaton}, the Supreme Judicial Court created a nearly impossible burden of proof for mortgagors. A mortgagor who claims that the mortgagee did not possess the note at the time of foreclosure (and was not acting as an agent of the note holder) cannot prove that assertion unless she can determine by written records who possessed the note at that time. A mortgagee might subsequently acquire possession of the note and produce it in court, claiming to have held possession at the time of the foreclosure, and the mortgagor will have no way to challenge that claim. Or, a mortgagee might claim at the time of foreclosure to be acting as an agent of the note holder, but if the mortgagor cannot verify that agency relationship and the fact of possession by the note holder, the mortgagor has no grounds for challenging the mortgagee's right to foreclose under the statutory power of sale. This issue of finding the note holder is dealt with in greater depth \textit{infra}.

\section*{III. Federal Courts' Application of Massachusetts Law}

In this chaotic and confused legal environment, mortgagees continued to foreclose, and courts continued to hear the claims of mortgagors seeking to slow or halt the process. Without a great deal of guidance, courts have had to determine which actions mortgagors may successfully maintain against their foreclosing lenders. It is through their trial and error that the next stages of the law are being shaped. Three types of actions by mortgagors are addressed below: statutory actions under Chapter 93A for unfair acts and practices, common-law actions for breach of the duty of good faith and reasonable diligence, and common-law actions in equity, alleging liability by promissory estoppel.

\subsection*{A. Unfair or Deceptive Acts or Practices in Violation of Chapter 93A}

\textsuperscript{130} \textit{Eaton}, 969 N.E.2d at 1122-23.
Chapter 93A is the major Massachusetts consumer protection statute. It broadly describes unfair commercial practices prohibited by and actionable under the statute.\textsuperscript{131} The statute authorizes the Attorney General to act on behalf of the Commonwealth to enjoin defendants from unfair or deceptive practices;\textsuperscript{132} the statute also creates a private right of action for individuals, allowing them to recover damages and obtain equitable relief.\textsuperscript{133} One of the chief benefits of using the statute, instead of, or in addition to, common-law claims, is the availability of double or treble damages, and attorney's fees.\textsuperscript{134}

Individuals alleging a violation of 93A must establish "(1) that the defendant has committed a violation of [Chapter 93A § 2]; (2) injury; and (3) a causal connection between the injury suffered and the defendant's unfair or deceptive method, act, or practice."\textsuperscript{135} Chapter 93A § 2 "proscribes '[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. . . .' The unfairness of an act or practice is determined from all the circumstances."\textsuperscript{136}

In three recent cases, plaintiffs in the Federal District Court in Massachusetts have alleged that mortgagees engaged in unfair or deceptive acts or practices (UDAP) in violation of Massachusetts General Laws Chapter 93A.\textsuperscript{137} All three claims failed to survive the defendants' motions to dismiss for failure to state a claim; however, the orders dismissing the claims do not close the door for other plaintiffs. The 93A statute requires a demand letter be mailed to the adverse party at least thirty days before filing the action, but most homeowners will only begin considering how to stop the foreclosure of their home once they receive notice of the foreclosure, and most will not have a thirty-day window in

\textsuperscript{131} MASS. GEN. LAWS ch. 93A, § 2 (2006) ("(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. . . . (c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter.").
\textsuperscript{132} MASS. GEN. LAWS ch. 93A, § 4 (2006). Courts are empowered to punish violations of injunctions with civil penalties of up to $10,000 per violation. Id.
\textsuperscript{133} MASS. GEN. LAWS ch. 93A, § 9 (2004).
\textsuperscript{134} See id.
\textsuperscript{135} Herman v. Admit One Ticket Agency LLC, 912 N.E.2d 450, 454 (Mass. 2009).
\textsuperscript{136} Id. at 454-55 (quoting MASS. GEN. LAWS ch. 93A, § 2).
which to mail the demand. Thus, many mortgagors will be unable to meet the procedural requirements to bring the action, and will be dismissed on those grounds before a court reaches the merits. Other 93A claims, brought by mortgagors who sought to modify their mortgages but were ultimately unsuccessful, have been filed in conjunction with federal statutory claims. Several of these claims have met the procedural requirement of the 30-day demand letter, and some have succeeded past defendants’ motions to dismiss.

In Juarez v. U.S. Bank National Association, the plaintiff claimed fraud, violations of the foreclosure statutes (Chapter 244 § 14 and § 2), and violations of Chapter 93A, based upon events stemming from the foreclosure of her home. Melissa Juarez bought a single-family home in Dorchester, Massachusetts, a working-class neighborhood in the city of Boston, on August 5, 2005, for $351,000. She obtained two loans from New Century Corporation ("New Century") to finance the purchase, both secured by mortgages. The loan amounts equaled one hundred percent of the purchase price of the home. Juarez defaulted on her mortgage shortly after closing, and U.S. Bank, the assignee of the mortgage, commenced foreclosure proceedings in August 2007. A year later, on July 22, 2008, the property was sold at a foreclosure sale and purchased by U.S. Bank for $325,869.45. Three months later, on October 29, 2008, the assignment of the mortgage from New Century to U.S.

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141 Id. at *1.
143 Juarez, 2011 WL 5330465, at *1. A loan-to-value (LTV) ratio in excess of 80% is typical of many sub-prime mortgage loans. See Fremont, 897 N.E.2d at 554 and text accompanying note 144.
144 Juarez, 2011 WL 5330465, at *1.
Bank was recorded at the Suffolk County Registry of Deeds. The assignment was executed and notarized on October 16, 2008, and indicated a "date of assignment" of June 13, 2007.

The plaintiff's 93A claim alleged that U.S. Bank engaged in unfair and deceptive acts or practices, including failing to comply with the foreclosure statutes (Chapter 244, §§ 2, 14), and foreclosing on the property without any legal right or standing to do so, "both done with full knowledge of the fraudulent nature of the sale." The Federal District Court held that Juarez' complaint did not identify the unfair practice or act which caused her harm. The Court reasons that Juarez had defaulted on her mortgage obligations, which made the property properly subject to foreclosure. She failed to allege a causal connection between U.S. Bank's actions and her loss of equitable title to the property. Therefore, the Court held, Juarez had not pleaded sufficient facts to support a plausible claim, and the court dismissed the 93A claim, along with the remainder of the plaintiff's claims.

Juarez' 93A claim failed for lack of sufficient facts stating causation. By contrast, the Federal District Court in Peterson v. GMAC Mortgage dismissed that plaintiff's 93A claim for procedural and substantive deficiencies. The Petersons gave a mortgage to MERS in 2007. MERS recorded its assignment of the mortgage to GMAC on February 1, 2011. GMAC scheduled a foreclosure sale for June 9, 2011. Three days before the scheduled foreclosure sale, the plaintiffs sent a short sale

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146 Id. at *2. In holding that this assignment did not violate the foreclosure statute (ch. 244, § 14), the court said, "[s]uch confirmatory assignment is entirely consistent with the holding in Ibanez." Id. at *4 (citing, as an example, Kiah v. Aurora Loan Services, LLC, 2011 WL 841282, at *6 (D. Mass. Mar. 4, 2011) (assignment, occurring before notice of sale but not recorded until after sale, was not invalid)).

147 Id.


149 Id. at *10.

150 Id.

151 Id. Because the court allowed the defendant's motion to dismiss for failure to state a claim, the court did not reach the issue of whether dismissal was warranted under Rule 12(b)(7) (dismissal for failure to join a party under Rule 19). Id. at *10 & n.12.


153 Id. at *1. The mortgage secured a loan granted by Prime Mortgage Financial. Id.

154 Id.

155 Id.
package to GMAC.\textsuperscript{156} GMAC did not review the package, stating it would take ten days to review. One day before the scheduled foreclosure sale, the Office of the Attorney General requested a postponement of the foreclosure sale, which GMAC refused. The court held that the plaintiffs' 93A claim was procedurally barred because they had failed to mail the demand letter required by Chapter 93A to the defendants thirty days prior to filing suit.\textsuperscript{157} The court also held that the claim failed substantively because the defendants were under no obligation to consider the short sale package and, thus, did not engage in an unfair practice by failing to do so.\textsuperscript{158}

As in Peterson, the 93A claim in In re Schwartz failed because the procedural requirements of the statute were not met.\textsuperscript{159} The plaintiff's complaint alleged wrongful foreclosure in violation of Chapter 244 § 14 as the basis for the 93A claim.\textsuperscript{160} The Bankruptcy Court stated, "[w]hile it is possible that an unlawful foreclosure constitutes a \textit{per se} violation of Chapter 93A, by failing to send the defendants a demand letter thirty days prior . . . the plaintiff may not pursue such a claim."\textsuperscript{161}

Nevertheless, Chapter 93A can be very effective for addressing wrongdoing which is not specifically banned by statute. Besides individual private actions, the Attorney General may file 93A claims. On December 1, 2011, Massachusetts Attorney General Martha Coakley filed a complaint in the Superior Court of Suffolk County naming several major mortgage lenders as defendants and

\textsuperscript{156} \textit{Id.} In a short sale, a borrower sells the property back to the lender in order to avoid foreclosure. Usually the terms of sale include some cash contribution from the borrower and a promise to repay some of the debt remaining on the principal of the loan. Lenders have complete discretion in deciding whether to accept a borrower's offer of a short sale.

\textsuperscript{157} \textit{Peterson}, 2011 WL 507613, at *5.

\textsuperscript{158} \textit{Id.} at *6.

\textsuperscript{159} \textit{Schwartz}, 2011 WL 1331963, at *3. The matter before the court was the plaintiff's motion for a new trial after the court entered judgment on partial findings for the defendants on March 16, 2011. \textit{Id.} at *1.

\textsuperscript{160} \textit{Id.} at *3. The complaint stated seven counts: 1) violation of MGL ch. 244, § 14; 2) fraud, deceit and misrepresentation; 3) defendant's lien alleged to be void under Bankruptcy Code § 506(d); 4) violation of Chapter 93A; 5) violation of Mass. Code Regs. § 18.21, which forbids a loan servicer to knowingly or recklessly facilitate the illegal foreclosure of real property; 6) intentional infliction of emotional distress; 7) violation of Chapter 93 §§ 24-28, the Collection Agencies Act (CAA), or if the CAA is preempted, the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p. See \textit{id.} at *1-3.

\textsuperscript{161} \textit{Id.} at *3. The court did find that the plaintiff had stated sufficient facts for a new trial on the issue of the defendant's violation of the foreclosure statute, Mass. Gen. Laws ch. 244, § 14.
alleging violations of Chapter 93A. Given the Attorney General's past success in holding mortgage lenders accountable for unfair practices under Chapter 93A, individual plaintiffs should pay close attention to the courts' treatment of the facts surrounding these claims and should adhere closely to the procedural requirements of the statute in order to avoid premature dismissal.

In 2008, Attorney General Coakley successfully litigated a Chapter 93A claim against Fremont Investment and Loan Company. The defendant had originated 14,578 loans to Massachusetts residents over approximately three years, secured by mortgages. Sixty-four percent of those loans were adjustable rate mortgage loans (ARMs), and 38.4 percent were "stated-income" loans, where the lender did not collect any documentation of the borrower's income. The Supreme Judicial Court of Massachusetts affirmed the decision that Fremont had issued "unfair" loans in violation of Chapter 93A. The Court affirmed the trial court's preliminary injunction which required Fremont to give the


163 Fremont, 897 N.E.2d at 551. The loans at issue were originated between January 2004 and March 2007. Id.

164 See id., at 551 & n.7. The Supreme Judicial Court refers to these types of loans collectively as "sub-prime" loans. Id. at 551. Stated-income loans are popularly called "liar's loans" because of the common practice of borrowers to misstate their income in order to obtain a larger loan. See Mark Gimein, Inside the Liar's Loan: How the Mortgage Industry Nurtured Deceit, SLATE.COM (Apr. 24, 2008 11:25 AM), http://www.slate.com/articles/business/moneybox/2008/04/inside_the_liars_loan.html; see also Joe Nocera, In Prison for Taking a Liar Loan, N.Y. TIMES (Mar. 25, 2011), http://www.nytimes.com/2011/03/26/business/26nocera.html (discussing the case of a borrower convicted of the crime of lying on a stated-income loan application, and contrasting this with the Justice Department's apparent lack of interest in prosecuting lenders who originated sub-prime loans without collecting documentation of income).

165 Fremont, 897 N.E.2d at 554 (discussing Superior Court Judge Ralph Gants' decision to issue a preliminary injunction). Specifically, loans with the following combination of characteristics qualified as unfair: 1) ARM loans with an introductory period of three years or less; 2) the introductory rate for the initial period was at least three percent below the
Attorney General advance notice of its intent to foreclose any mortgage, and required Fremont to work with the Attorney General to modify or restructure the offending loans.\textsuperscript{166}

The Attorney General’s actions under Chapter 93A indicate the range and severity of mortgage industry abuses which may be addressed in a consumer protection claim. The recent individual claims demonstrate the pitfalls for mortgagors deciding which claims to include in a complaint. The primary and insurmountable issue for many mortgagors is the requirement that a petitioner mail a demand for relief to the respondent at least thirty days before filing an action alleging a violation of Chapter 93A.\textsuperscript{167} The issue arises because many homeowners will not begin contemplating legal action against a mortgagee until foreclosure proceedings begin.

Under Chapter 244 § 14, a mortgagee must publish notice of the foreclosure for three consecutive weeks prior to the scheduled sale, and must mail notice of the scheduled sale either thirty or fourteen days prior.\textsuperscript{168} A homeowner wishing to file for an injunction to halt a foreclosure sale must do so before the scheduled date of sale, and so generally will be unable to send a demand letter thirty days prior to filing for an injunction. Generally, plaintiffs filing a claim to enjoin foreclosure must plead all their claims arising out of that set of facts, or else waive their right to raise them later. Therefore, a plaintiff cannot usually file a motion for an injunction to halt the foreclosure by claiming invalid foreclosure under Chapter 244 § 14, and then at some later point file a second complaint alleging violation of Chapter 93A based on the same facts of the foreclosure notice and sale.

\textsuperscript{166}Fremont, 897 N.E.2d at 562; see id. at 554.
\textsuperscript{167}See MASS. GEN. LAWS ch. 93A, § 9(3).
\textsuperscript{168}See MASS. GEN. LAWS ch. 244, § 14.
In *Juarez*, the foreclosure sale at issue had taken place two years before, so the plaintiff was able to meet the procedural requirements, although she failed on the substance of her claim. Most plaintiffs are in a position comparable to that in *Peterson*, where they must find an attorney, draft a complaint and try to enjoin the foreclosure of their home all within about a month. The procedural requirements of Chapter 93A will act as a bar in many of those cases. For those who are able to mail a written demand letter to the defendants at least thirty days before they file suit, the substance of their case is likely to be undermined by insufficient facts and the difficulty of fact-finding in the pre-discovery stage of pleading and defending a pleading on a motion to dismiss. Thus, despite the Attorney General's success protecting consumers through Chapter 93A, individuals seeking to halt foreclosure of their home will likely face a difficult task.

**B. Duty of Good Faith and Reasonable Diligence**

The *Ibanez* Court noted in dictum 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.'"169 Three recent federal cases have alleged that a defendant mortgagee breached this duty of good faith and reasonable diligence.

In *Alpino v. JPMorgan Chase Bank National Association*, the homeowners began to have trouble making their mortgage payments. They contacted the mortgagee, JPMorgan Chase Bank ("JPMorgan"), to inquire about a mortgage modification.170 Despite the homeowners' diligent efforts to provide the appropriate paperwork and seek a modification, JPMorgan refused to modify the mortgage.171 When the homeowners fell behind on their mortgage payments, JPMorgan moved to

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171 *Id.*
foreclose. The homeowners also alleged that on the date of the scheduled foreclosure sale, no auctioneer appeared and no auction was held, but JPMorgan nevertheless asserts that it conducted the foreclosure sale and purchased the property. The mortgagors argued that JPMorgan breached its duty of good faith and reasonable diligence in two ways: first, in failing to consider them for a mortgage modification, and second, in failing to hold a foreclosure auction in a reasonable manner.

The defendants moved to dismiss the complaint, and the Federal District Court of Massachusetts found it unnecessary to address the plaintiffs' first theory regarding the defendant's failure to modify the mortgage, holding that the plaintiffs had pleaded sufficient facts to survive a motion to dismiss regarding the failure to hold the foreclosure auction in a reasonable manner. The court reaffirmed that the mortgagee has a duty to protect the mortgagor's interests "by seeking a reasonable foreclosure price and ensuring that the mortgagor has notice of the sale." Failure to get the highest possible price at a foreclosure sale is not, in and of itself, grounds to void the foreclosure sale, but, when combined with other circumstances, the Supreme Judicial Court has voided such sales. The District Court reasoned that the plaintiffs had pleaded sufficient facts regarding the lack of an auctioneer, the lack of an auction flag, and the lack of an auction sale at the place and time stated in the

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172 Id.
173 Id.
174 Id. at *6. The plaintiffs' complaint contained four counts: (1) Breach of the duty of good faith and reasonable diligence; (2) Breach of contract with the United States under the Home Affordable Modification Program (HAMP); (3) Violation of MASS. GEN. LAWS ch. 244, § 14 (regarding the operation of the foreclosure sale); and (4) Intentional infliction of emotional distress. Id. at *1. The court ultimately allowed the motion to dismiss as to counts two and four and denied dismissal on the remaining counts. Id. at *8.
175 Id. at *6.
176 Alpino, 2011 WL 1564114 at *6 (citing Bon v. Graves, 130 N.E. 1023 (Mass. 1914)).
177 See Edry v. Rhode Island Hosp. Trust Nat'l Bank, 201 B.R. 604, 606-07 (D. Mass. Bankr. 1996) (collecting cases); id. at 608 (invalidating the foreclosure sale where the sale price was 45% of the fair market value and the published notice of sale was of the bare legal minimum instead of the more common advertisement in the real estate section of the newspaper); see also West Roxbury Co-op Bank v. Bowser, 87 N.E.2d 113, 115 (Mass. 1949) (holding that even if the sale price was inadequate, without more it did not show a lack of diligence); Cambridge Sav. Bank v. Cronin, 194 N.E. 289, 291 (Mass. 1935) (holding that sale, where plaintiffs bought property for half the amount due on the principal, without more, was not evidence of breach of the duty of diligence).
foreclosure sale notice.\textsuperscript{178} If proven, these facts would evidence a breach.\textsuperscript{179} Taken as true, these facts would implicate the mortgagee's duty to get the highest possible price at the foreclosure sale, and the duty to give the mortgagor adequate notice of the foreclosure auction.\textsuperscript{180}

Similarly, in \textit{Teixeira v. Federal National Mortgage Association}, the homeowners had difficulty making their mortgage payments and sought a modification from the mortgagee Countrywide Home Loans ("Countrywide").\textsuperscript{181} Despite their efforts, the homeowners received notice of the mortgagee's intent to foreclose.\textsuperscript{182} When the homeowners inquired, the mortgagee informed them that there was a problem with their modification paperwork and that they would need to reapply.\textsuperscript{183} The mortgagee offered to mail the mortgagors a new application at least two days before the foreclosure sale, but they never received it.\textsuperscript{184} The foreclosure sale occurred, and the property was allegedly sold at auction, but construction workers on the property that day did not observe anyone holding a public auction.\textsuperscript{185} On the basis of these facts, the homeowners brought an action for breach of the duty of good faith and reasonable diligence, and the defendants moved to dismiss.\textsuperscript{186}

The Federal District Court found that the plaintiffs had pleaded sufficient facts to survive the motion to dismiss because, presuming it to be true that the defendants did not hold a public auction at the time and location it said it did, then it did not provide adequate notice of the foreclosure sale and

\textsuperscript{178} \textit{Alpino}, 2011 WL 1564114 at *6 (citing \textit{Aurea Aspasia Corp. v. Crosby}, 120 N.E.2d 759, 760-61 (Mass. 1954) for the proposition that "the appearance of an auctioneer, who announced the terms of the sale, and flew a red flag was sufficient to conclude that a foreclosure auction had occurred.").

\textsuperscript{179} \textit{Id}

\textsuperscript{180} \textit{Id. See Edry}, 201 B.R. at 606 ("It is [the mortgagee's] duty, for the benefit of the mortgagor whom he represents, so to act in the execution of the power as to obtain for the property as large a price as possible.") (quoting \textit{Clark v. Simmons}, 23 N.E. 108, 108 (Mass. 1890)).


\textsuperscript{182} \textit{Id}

\textsuperscript{183} \textit{Id}

\textsuperscript{184} \textit{Id}

\textsuperscript{185} \textit{Id}

\textsuperscript{186} \textit{Teixeira}, 2011 WL 3101811, at *1. The plaintiffs alleged the same four counts as the plaintiffs in \textit{Alpino}. See 2011 WL 1564114, at *6. The complaint alleged: (1) Breach of the duty of good faith and reasonable diligence; (2) Breach of contract; (3) Violation of \textit{MASS. GEN. LAWS} ch. 244, § 14; (4) Intentional infliction of emotional distress. \textit{Teixeira}, 2011
did not adequately protect the mortgagor's interests. The court did not consider the facts of the alleged failure to negotiate the modification in denying the motion to dismiss.

As *Ibanez* made clear, failure to adhere strictly to the foreclosure notice and sale requirements will render a resulting foreclosure invalid. Plaintiffs in *Alpino* and *Teixeira* pleaded facts to show defects in the required notice and sale under a common-law theory of breach of the duty of good faith and reasonable diligence, and both were successful in succeeding past defendant's motion to dismiss. Notably, these equitable claims were based on the same set of circumstances, regarding the deficient foreclosure auction, as the statutory claims alleging a violation of Massachusetts General Laws Chapter 244 § 14. The remedy for the statutory violation is invalidation of the foreclosure sale, but the remedy for the equitable claim could involve monetary damages.

Additionally, *Alpino* and *Teixeira* stand for the proposition that mortgagees do, in fact, owe mortgagors a duty of good faith and reasonable diligence in foreclosure proceedings. With these common-law duties established, subsequent courts could expand their application beyond this set of circumstances. For instance, mortgagors who sought to modify their mortgage but were unsuccessful could bring a 93A claim for unfair and deceptive acts and practices, often in conjunction with other federal statutory claims. Additionally, in exercising their rights under the statutory power of sale,

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187 *Id.* at *2 (citing *Ibanez*, 941 N.E.2d at 50 n. 16; *Alpino*, 2011 WL 1564114, at *5-6).
188 *Id.* The court did consider the facts of the alleged failure to negotiate a modification with regard to a cause of action for breach of contract, where the plaintiffs alleged that the mortgagee breached its contract with the United States when it failed to consider plaintiff's modification application. The plaintiffs claimed standing as third-party beneficiaries of the Service Participation Agreement (SPA) executed under the Home Affordable Modification Program (HAMP). The court dismissed the claim for breach of contract, finding that the plaintiffs were not intended beneficiaries of the SPA and therefore had no right to enforce the contract. See *id.* at *2-3. Similar claims are discussed infra. One Federal District Court found that violations of HAMP guidelines allowed the plaintiff-mortgagors a cause of action for negligence. *Speleos v. BAC Home Loan Servicing, L.P.*, 755 F. Supp. 2d 304 (D. Mass. 2010) (Gorton, J.).
189 *See Ibanez*, 941 N.E.2d at 49-50.
191 *See Ording*, 2011 WL 99016, at *2 (plaintiffs sought to modify their mortgage and sued mortgage servicer alleging TILA violations and 93A violations when the servicer failed to respond).
mortgagees are subject to a duty of care, and thus claims for breach of the duty of good faith and reasonable diligence might also be accompanied by claims for negligence.

Where *Ibanez* alerted plaintiff-mortgagors to demand proof of the chain of title of the entity seeking to foreclose, these two cases suggest an additional line of investigation and discovery for mortgagors challenging a foreclosure: Who conducted the foreclosure sale? Did it occur at the specified date and time? Were there witnesses? Conspicuously absent from these decisions is a holding on the question of a mortgagee's duty to negotiate a modification, but the equitable doctrine of promissory estoppel may provide an avenue for relief.

**C. Detrimental Reliance or Promissory Estoppel**

To many reasonable people, modification of the mortgage appears to be a desirable alternative to foreclosure when the mortgagor has some ability to pay, and while the residential housing market remains depressed.\(^{192}\) In *Dixon v. Wells Fargo Bank*, the plaintiffs sought an injunction to halt the foreclosure of their mortgage, specific performance of an oral agreement to enter into a loan modification, and damages.\(^{193}\) A preliminary injunction was entered pending the outcome of the litigation, and the defendants moved to dismiss the complaint.\(^{194}\) The homeowners alleged that they had orally agreed to take the steps required for a loan modification with the defendant, and that, as part of this agreement, Wells Fargo instructed them to stop making mortgage payments.\(^{195}\) In addition, the homeowners claimed Wells Fargo requested certain financial documents, which the homeowners

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\(^{194}\) Dixon, 2011 WL 2945795 at *2.

\(^{195}\) *Id.* at *2.
supplied. Nevertheless, Wells Fargo "failed, and effectively refused, to abide by the oral agreement to modify the existing mortgage loan." Wells Fargo then initiated foreclosure proceedings. The homeowners argued that the initiation of foreclosure proceedings indicated that Wells Fargo had not acted sincerely and in good faith when it promised to consider the modification. Wells Fargo, for its part, argued that any promise it made was insufficiently definite to be binding, that the homeowners' reliance on its promise was neither reasonable nor detrimental, and that the promissory estoppel claim was preempted by federal law.

The Federal District Court examined Massachusetts case law establishing a cause of action for "detrimental reliance." An action for detrimental reliance is equivalent to a contract action, and must be proven by all the necessary elements of a contract except consideration. First, a plaintiff must prove that there was a promise which indicates a commitment to act or refrain from acting. Second, the promise, "like any offer, must be sufficiently definite and certain in its terms to be enforceable." "[A]n agreement to enter into a contract which leaves the terms of that contract for future negotiations is too indefinite to be enforced." The District Court noted that Massachusetts had not yet "formally embrace[d] promissory estoppel as more than a consideration substitute," but found that

196 Id.
197 Id.
199 Id.
200 Id.
203 See Dixon, 2011 WL 2945795 at *3; Varadian, 647 N.E.2d at 1179; Loranger, 384 N.E.2d at 179.
205 Id. (quoting Caggiano v. Marchegiano, 99 N.E.2d 861, 865 (Mass. 1951)); see also Moore, 639 F. Supp. 2d at 142.
206 Dixon, 2011 WL 2945795 at *6 (citing Varadian, 647 N.E.2d at 1174 as an example).
Massachusetts had clearly adopted Section Ninety of the Restatement (Second) of Contracts,207 which
"has expressly approved' promissory estoppel's use to protect reliance on indefinite promises."208

"Typically, where the Massachusetts courts have applied the doctrine of promissory estoppel to
enforce an otherwise unenforceable promise, 'there has been a pattern of conduct by one side which has
dangled the other side on a string.'"209 The court considered the fact that the Dixons were not in default
on their mortgage when they sought a modification, but that Wells Fargo told them they had to default
in order to be eligible for a modification:210

In specifically telling the Dixons that stopping their payments and submitting financial
information were the steps necessary to enter into a mortgage modification, Wells Fargo not
only should have known that the Dixons would take these steps believing their fulfillment
would lead to a loan modification, but also must have intended the Dixons to do so. The bank's
promise to consider them for a loan modification if they took these steps necessarily involved as
a matter of fair dealing an undertaking on its part not to foreclosure based upon facts coming
into existence solely from the making of its promise.211

The court examined the traditional reasons why other courts had refused to enforce "agreements
to agree."212 However, the court considered it important that the Dixons were not seeking specific
performance of a promised loan modification.213 Thus, the court stated that "[t]here is no risk that this
Court, were it to uphold the promissory estoppel claim, would be 'trapping' Wells Fargo into a vague,
indefinite, and unintended loan modification masquerading as an agreement to agree."214 The court held

207 Id. (quoting the Restatement (Second) of Contracts, and collecting cases).
208 Id. (citing Michael B. Metzger & Michael J. Phillips, Promissory Estoppel and Reliance on Illusory Promises, 44 Sw.
L.J. 841, 842 (1990), but noting disagreement among authorities).
209 Id. at *7 (quoting Pappas Indus. Parks, Inc. v. Psarros, 511 N.E.2d 621, 622 (Mass. App. 1987)).
210 Id. at *8.
211 Id. (internal punctuation and quotations omitted).
212 See Dixon, 2011 WL 2945795 at *4 (noting that courts have no way of knowing what an ultimate agreement might have
looked like, and that parties "ought to be allowed to step away unscathed if they are unable to reach a deal.").
213 Id. at *5.
214 Id.
that the plaintiffs had stated a claim for promissory estoppel, and found it reasonable to limit any eventual recovery to reliance damages.\footnote{Id. at *10. The court did not speculate as to what those reliance damages might be. Id. at *10 n.2. Having found that the complaint stated a claim for promissory estoppel, the court then addressed the defendant’s argument that such a state-law claim was preempted by the federal regulatory and statutory scheme of the Home Owners’ Loan Act (HOLA), see 12 U.S.C. § 1464, but found that the Dixon’s claim was not barred by HOLA. See id. at *10; id. at *17. Ultimately, the Dixons lost at a jury trial in September 2011. See Entry #71, 1:11CV10358 (D. Mass).}

In his decision, Judge Young noted that three other Federal District Court decisions had also allowed a cause of action for promissory estoppel.\footnote{Dixon, 798 F. Supp. 2d at 349 n.3; see In re Bank of America Home Affordable Modification Program (HAMP) Contract Litigation, 2011 WL 2637222 (D. Mass. July 6, 2011) (slip copy) (Zobel, J.); Bosque v. Wells Fargo Bank, N.A., 762 F. Supp. 2d 342 (D. Mass. Jan. 26, 2011) (Saylor, J.); Durmic v. J.P.Morgan Chase Bank, NA, 2010 WL 4825632 (D. Mass. Nov. 24, 2010) (Stearns, J.).} Those cases involved facts where the plaintiffs' complaints claimed the defendants were liable for breach of contract or, in the alternative, under a theory of promissory estoppel.\footnote{See Speleos, 755 F. Supp. 2d at 309 (discussing the purpose of HAMP and the HAMP guidelines).} The facts were distinguishable from Dixon because in all three cases the plaintiffs had temporary mortgage modifications, called Temporary Period Plans (TPPs), under the Home Affordable Mortgage Program (HAMP).\footnote{See generally, Marissa Diaz, Borrowers May Not Benefit from the Mortgage Settlement Agreement of 2012 Without a True Private Right of Action, 20 AM. U.J. GENDER, SOC. POLY & L. 995, 998 (2012) (a recent discussion of HAMP’s shortcomings and pitfalls); DIANE E. THOMPSON, NAT’L CONSUMER LAW CTR., OVERVIEW OF HAMP (Dec. 10, 2010), available at http://www.nclc.org/images/pdf/conferences_and_webinars/other_webinars/2010/presentations/DianeBasicHAMPwebinarDec2010.pdf (an optimistic early summary of HAMP for use by attorneys).} HAMP was designed to induce banks and other mortgagees to modify existing mortgages in order to enable homeowners to avoid foreclosure.\footnote{Id.} When participating lenders successfully modify a mortgage, the lender receives a one-time lump sum payment from the United States.\footnote{Id.} The program stipulates the requirements for eligible mortgagors, and the rate at which mortgages will be modified.\footnote{Id.} A three-month temporary modification, the TPP, allows a period for lenders to verify a mortgagor’s financial information, and if the mortgagor complies with the terms of the TPP, then HAMP envisions a permanent modification of the mortgage.\footnote{Id.}
In all three cases cited by Judge Young, the plaintiffs alleged that the lenders had breached their contracts by failing to offer a permanent modification after the term of the TPP expired; in the alternative, if no contractual obligation was found, then the plaintiffs alleged the defendants could be held liable for pre-contractual obligations under a theory of promissory estoppel. In all three cases, the courts found that the plaintiffs had alleged sufficient facts to avoid dismissal on both their causes of action. The Dixons did not allege facts like these; nevertheless, the court found that the mortgagee induced the Dixons to rely on its promise to negotiate a mortgage modification. This broadening of the application of promissory estoppel indicates an increasing willingness to hold mortgagees strictly to their word.

Therefore, Dixon indicates that homeowners who engaged with the lender in any type of mortgage modification discussion, negotiation, or agreement should consider alleging liability under theories of promissory estoppel or detrimental reliance. If a mortgagee told a homeowner to default in order to be eligible for modification, or to make different or special payments, then promissory estoppel may be applicable. Homeowners and consumer advocates should consider carefully the facts surrounding any modification discussions in order to determine if promissory estoppel could benefit them.

IV. Finding the Note Holder: A Potential Remedy for an Essential Problem

Eaton makes it clear that the identity of the note holder is a critical fact for anyone trying to defend against a foreclosure. But how can mortgagors determine the identity of the note holder? One possibility is that when the foreclosing mortgagee states his identity as the holder of the mortgage, he will now, post-Eaton, also be required to state his identity as the holder of note, or as the agent of the

\[223 \text{Id.}\]
note holder. This requirement would be mortgagor-friendly, because it would mean that the mortgagee would have to take possession of the note or assert its power to act as the agent of the note holder, before the foreclosure process could begin. At this early stage, we do not yet know if merely stating an agency relationship is sufficient, or if the mortgagee must identify the note holder. However, the lower courts may not construe Eaton as extending to the statutory notice requirements for foreclosure, and other alternatives must be considered.

A combination of federal and state statutes creates disclosure requirements and enforcement mechanisms that may enable a borrower to determine who holds a promissory note. The Truth in Lending Act (TILA) is a federal law designed to protect borrowers by requiring the disclosure of the material terms of a lending agreement. TILA has two disclosure provisions that may help a borrower seeking to delay or avoid foreclosure. First, TILA requires mortgage servicers to disclose the identity of the note holder upon the written request of the borrower. While the statute does not require the disclosure to occur with any specific time frame, the servicer must disclose the identity of the note holder within a "reasonable time." If the servicer does not disclose the identity of the note holder within a reasonable time, the borrower should bring an action in federal district court. Generally, mortgage servicers are not "creditors" under TILA, and are not subject to TILA’s enforcement provisions. TILA does not create a cause of action allowing a borrower to sue a mortgage servicer for

224 See MASS. GEN. LAWS ch. 244, § 21 (requiring notice to be mailed to the mortgagor as well as placed in newspapers of general circulation).
225 Henrietta Eaton raised her claims after the foreclosure had occurred, in a summary process action to avoid eviction. See supra Part II(D).
229 See id.
230 See id. (citing 15 U.S.C. § 1641(f)(1)).
its failure to disclose the identity of the note holder. However, a violation of TILA is a 
prima facie violation of Massachusetts’ main consumer protection statute, Chapter 93A. For this reason, courts 
have held that a borrower may bring a Chapter 93A action against a mortgage servicer alleging that the 
servicer violated TILA by failing to disclose the identity of the note holder. This TILA violation 
constitutes an unfair and deceptive act or practice under Chapter 93A.

In the course of seeking disclosure from the mortgage servicer (and commencing a litigation if 
disclosure is not forthcoming), the borrower is likely to learn the identity of the note holder. At this 
point, several avenues open up to the borrower. First, if foreclosure proceedings have begun, the 
borrower now knows whether the mortgage holder is the same entity as the note holder. If they are 
different entities, then the borrower may be able to force the mortgage holder to affirm that an agency 
relationship exists between itself and the note holder. If the mortgage holder cannot prove that it is the 
agent of the note holder (and assuming that it is not the note holder itself), then the foreclosure cannot 
proceed and the mortgagor may immediately seek an injunction and/or bring an action against the 
mortgagee for violation of the foreclosure procedure statutes, Chapter 93A, and other claims discussed 
 supra. This shifts the burden of proof onto the mortgagee, and avoids the evidentiary problems Ms. 
Eaton faced in the summary process action after the foreclosure had occurred.

Additionally, once the borrower knows the identity of the note holder, the borrower will likely 
have a cause of action against the note holder for TILA violations, 93A violations, and common law 
wrongs. This is because when a note is assigned, the assignee is required to notify the borrower of the

231 See id.
232 Id. at *6 (quoting Barnes v. Fleet Nat. Bank, 370 F.3d 164, 176 (1st Cir. 2004)); see MASS. GEN. LAWS ch. 93A; 940 
C.M.R. 3.16(4).
234 Id. Chapter 93A is discussed in more depth supra Part III(A).
assignment and the change in the identity of the holder of the beneficial interest.\(^{235}\) The assignor is not required to notify the borrower of the assignment. Thus, the mortgagor will not know if her note has been assigned if the assignee fails to fulfill its statutory duty of disclosure. Additionally, since the mortgagor will only know the identity of the assignor, if the mortgagor determines that the note has been assigned to some other creditor, the mortgagor will not know the identity of the assignee. However, if the mortgagor learns the identity of the assignee, perhaps through the procedure discussed above, the mortgagor is eligible for damages and attorney's fees. If the assignee fails to notify the borrower of the assignment, the borrower has a statutory cause of action against the assignee under TILA, as well as under Chapter 93A, and might also allege common-law claims such as negligence or fraud, depending on the specific facts of the case.\(^{236}\)

An important question regarding agency has not yet been addressed. Many of today's mortgages purport to create an agency relationship between a third-party mortgagee and the lender at the time of origination.\(^{237}\) Certainly this is true when MERS acts as mortgagee. The MERS standard mortgage states that MERS is mortgagee "solely as nominee for the lender".\(^{238}\) Eaton did not decide whether this language is sufficient to create an agency relationship empowering the mortgagee to foreclose on behalf of the note holder.\(^{239}\) Other courts have found that MERS is an agent of the lender and his assigns.\(^{240}\)

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\(^{235}\) 15 U.S.C. § 1641(g)(1) (2011) ("the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer"); 12 C.F.R. § 226.39 (2011).

\(^{236}\) See 15 U.S.C. § 1640(a) (2011) ("any creditor who fails to comply with any requirement . . . including any requirement under . . . subsection (f) or (g) of section 1641 of this title . . . with respect to any person is liable to such person. . . .").

\(^{237}\) See Eaton, 969 N.E.2d at 1133-34 & n.29. Of course, traditionally, the mortgagee has been the lender. However, most mortgages today include a third-party as the mortgagee, since most originating lenders intend to sell the obligation on the secondary market shortly after closing. MERS bears a great deal of responsibility for this. See supra Part II.

\(^{238}\) See Eaton, 969 N.E.2d at 1133-34 & n.29

\(^{239}\) See id. "It is not clear what 'nominee' means in this context, but the use of the word may have some bearing on the agency question. We express no opinion whether MERS or Green Tree was acting as agent of the note holder or with the note holder's authority at the time of the foreclosure sale. Eaton is entitled to pursue discovery on this issue in connection with her Superior Court action." Id. at n.29.

\(^{240}\) See Rosa, 821 F. Supp. 2d at 429 (citing In re Lopez, 446 B.R. 12, 18-19 (Bankr. D. Mass. 2011) and collecting cases). "While MERS never actually holds the note, it is authorized to transfer the mortgage on behalf of a note holder by virtue of its nominee status. . . . If MERS is named as mortgagee in a recorded mortgage, it is authorized to conduct a foreclosure by power of sale." Id. at 429-30.
However, because the right to enforce an obligation belongs solely to the party who is owed the obligation, if an agent of the note holder sought to enforce the promissory note by foreclosing the mortgage, the agent must act at the specific instruction of the principal-note holder. A creditor is never required by law to enforce the obligations of the debt, and could choose not to do so. Thus, a mortgagee must be specifically instructed by the note holder that the note holder wishes to recover the obligation in order for the mortgagee to exercise his right to foreclose the mortgage under the statutory power of sale. 241

V. Conclusion

Ibanez stopped the banks in their tracks as they scrambled to acquire the documents needed to foreclose. It marked a hard line between compliance with the statutory requirements and void foreclosure. Bevilacqua and Eaton likewise caused massive disruptions to the foreclosure market in Massachusetts, but provided little or no incentive for banks to comply with the law, and likewise did not provide much in the way of relief for homeowners. This article has demonstrated how the courts have applied these cases in the last two years, and how other causes of action have failed to offer significant aid to mortgagors. Finally, this article proposed a new hardline, this time enforced by individual mortgagors and their attorneys against the powerful banks.

241 The MERS standard mortgage states that, "if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender. . . ." Eaton, 969 N.E.2d at 1122 & n.7 (emphasis added).