REBA Title Standard No. 58
Out of Order Recording of Mortgage Discharges and Assignments

A title is not defective by reason of:

1. The recording of a discharge executed by a Mortgagee who holds record title to the mortgage notwithstanding the subsequent recording of an assignment by the discharging Mortgagee to a third party, regardless of whether the assignment was dated prior, or subsequent, to the discharge;

2. The recording of a discharge executed by a Mortgagee who did not hold record title to the mortgage at the time of the discharge, where Assignment(s) of Mortgage to the discharging Mortgagee, whether executed prior, or subsequent, to the recorded discharge, are subsequently recorded;

3. The recording of an Assignment of Mortgage executed either prior, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record, by the Assignee. However, if the Assignment is not dated prior, or stated to be effective prior, to the commencement of a foreclosure, then a foreclosure sale after April 19, 2007 may be subject to challenge in the Bankruptcy Court, see *In re Sima Schwartz*, 366 B.R. 265 (Bankr.D.Mass. April 19, 2007).

Comments

(a) Subsection 1 summarizes the "conclusiveness" clause of M.G.L. c 183, § 54.

(b) Subsection 2 is only intended to cover the situation where the record plainly shows a pattern of assignments, or discharges, which appear to be dated, or recorded, out of sequence.

(c) Subsection 3 is based on Montague v. Dawes, 12 Allen 397 (1866). Further, where a note has been transferred to Endorsee, Endorsor holds mortgage in a Resulting Trust for Endorsee, even if there is no assignment of it. Weinberg v. Brother, 263 Mass. 61, 160 N.E. 403 (1928), Young v. Miller, 26 Gray 152, 154 (1856). Purchaser of the note can thereafter enforce in equity an assignment of the mortgage. First National Bank of Cape Cod v. North Adams Hoosac Savings Bank, 7 Mass. App.Ct. 790, 391 N.E. 2d 689 (1979); Wolcott v. Winchester, 15 Gray 461, 465 (1860).

The subsequent recorded assignment of mortgage has the effect of a decree in equity, confirming rights of the note holder under the resulting trust. It further serves as an estoppel by deed validating the actions taken by note holder prior to recording of assignment. See also 28 Massachusetts Practice Series Park (2d ed.) § 492, Eno & Hovey (3d ed.) § 9.49.

Caveat

Neither M.G.L. c.183, s.21 (Statutory Power of Sale) nor M.G.L. c.244, ss. 1 and 14 (foreclosures by Entry and Power of Sale) require record title as a condition to foreclosure. The Bankruptcy Court for the District of Massachusetts, however, in In re Sima Schwartz, supra, held that where the Assignment was not signed until after the foreclosure sale, the foreclosure was invalid.

Adopted May 8, 1995
Amended May 5, 2008 to add second sentence to Subsection 3 and Caveat

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

HAMPDEN, ss.

U.S. BANK NATIONAL ASSOCIATION, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z, Plaintiff, v. ANTONIO IBANEZ, Defendant.	MISC. CASE NO. 384283 (KCL)
LASALLE BANK NATIONAL ASSOCIATION, as trustee for the certificate holders of Bear Stearns Asset Backed Securities I, LLC Asset-Backed Certificates Series 2007-HE2, Plaintiff, v. FREDDY ROSARIO, Defendant.	MISC. CASE NO. 386018 (KCL)
WELLS FARGO BANK, N.A., as trustee for ABFC 2005-OPT 1 Trust, ABFC Asset Backed Certificates Series 2005-OPT 1, Plaintiff, v. MARK A. LARACE and TAMMY L. LARACE, Defendants.	MISC. CASE NO. 386755 (KCL)

JUDGMENT

The above-captioned cases, each brought pursuant to G.L. c. 240, § 6 to "remove a cloud from the title" of the properties in question, present two issues, one in common and the other in

three variations. Each arises from a foreclosure sale of property in Springfield. The first issue is whether the Boston Globe, in which the notices of foreclosure sale were published, was "a newspaper with general circulation in the town where the land lies" (Springfield) within the meaning of G.L. c. 244, § 14 at the times of publication. The second is whether the published notices, which named the plaintiffs as the foreclosing parties even though they had no record interest in the property at the time of either publication or foreclosure, complied with G.L. c. 244, § 14.

For the reasons set forth in the court's Memorandum and Order on Plaintiffs' Motions for Entry of Default Judgment of this date, I find and rule that none of the three foreclosures at issue in these lawsuits were rendered invalid because notice was published in the Boston Globe. I also find and rule that LaSalle Bank's foreclosure in Rosario was not rendered invalid by its failure to record the assignment reflecting its status as holder of the mortgage prior to the foreclosure since it was, in fact, the holder by assignment at the time of the foreclosure, it truthfully claimed that status in the notice, and it could have produced proof of that status (the unrecorded assignment) if asked. Finally, I find and rule that the other two foreclosures (U.S. Bank's in Ibanez and Wells Fargo Bank's in Larace) are invalid because the notices (which named those entities) failed to name the mortgage holder as required by G.L. c. 244, § 14. They were not assigned an interest in those mortgages until after the foreclosure sales had taken place.

SO ORDERED.

By the court (Long, J.)

Attest:

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Deborah J. Patterson, Recorder

Dated: 26 March 2009

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT
LAND COURT DEPARTMENT

HAMPDEN, ss.

U.S. BANK NATIONAL ASSOCIATION, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z, Plaintiff, v. ANTONIO IBANEZ, Defendant.	MISC. CASE NO. 384283 (KCL)
LASALLE BANK NATIONAL ASSOCIATION, as trustee for the certificate holders of Bear Stearns Asset Backed Securities I, LLC Asset-Backed Certificates Series 2007-HE2, Plaintiff, v. FREDDY ROSARIO, Defendant.	MISC. CASE NO. 386018 (KCL)
WELLS FARGO BANK, N.A., as trustee for ABFC 2005-OPT 1 Trust, ABFC Asset Backed Certificates Series 2005-OPT 1, Plaintiff, v. MARK A. LARACE and TAMMY L. LARACE, Defendants.	MISC. CASE NO. 386755 (KCL)

MEMORANDUM AND ORDER ON PLAINTIFFS' MOTIONS FOR ENTRY OF DEFAULT JUDGMENT

Introduction and Facts

The above-captioned cases, each brought pursuant to G.L. c. 240, § 6 to "remove a cloud from the title" of the properties in question, present two issues, one in common and the other in three variations. Each arises from a foreclosure sale of property in Springfield. The first issue is whether the *Boston Globe*, in which the notices of foreclosure sale were published, was "a newspaper with general circulation in the town where the land lies" (Springfield) within the meaning of G.L. c. 244, § 14 at the times of publication.[1] The second is whether the published notices, which named the plaintiffs as the foreclosing parties even though they had no record interest in the property at the time of either publication or foreclosure, complied with G.L. c. 244, § 14.

The variations of the second issue are as follows. In *Ibanez*, U.S. Bank National Association,[2] in whose name notice was published and sale took place, had no interest in the mortgage being foreclosed (either recorded or unrecorded) at the time of publication or sale. Complaint to Remove Cloud from Title at 2, ¶ 3; 3, ¶ 8 (Sept. 12, 2008) (filed in Misc. 384283) (hereinafter, the "Ibanez Complaint"). Further, there was nothing in the notice to indicate that it was acting (or purporting to act) as someone else's agent, much less the agent of the principal. Motion for Entry of Default Judgment at 3 (Jan. 30, 2009) (filed in Misc. 384283) (hereinafter, the "Ibanez Motion"). U.S. Bank only acquired an interest in the *Ibanez* mortgage by assignment

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[1] The notice in *Rosario* was published on June 5, 12, and 19, 2007 for auction to take place on June 26, 2007. Complaint to Remove Cloud from Title at 2, ¶ 5; 3, ¶ 8 (Oct. 16, 2008) (filed in Misc. 386018) (hereinafter, the "Rosario Complaint"). The notices in *Ibanez* and *Larace* were published on June 14, 21, and 28, 2007 for auctions to take place on July 5, 2007. Complaint to Remove Cloud from Title at 2, ¶ 5; 3, ¶ 8 (Sept. 12, 2008) (filed in Misc. 384283) (hereinafter, the "Ibanez Complaint"); Complaint to Remove Cloud from Title at 2, ¶ 5; 3, ¶ 8 (Oct. 23, 2008) (filed in Misc. 386755) (hereinafter, the "Larace Complaint").

[2] I refer to the plaintiffs by bank name (U.S. Bank, LaSalle Bank, and Wells Fargo Bank) solely for ease of reference. None of these banks hold the mortgages in question for *themselves*. Instead, they are the servicing trustees of the securitized mortgage pools identified in the case captions, which are the actual beneficial owners of the mortgages. Neither the details of the pools nor the particulars of the trust agreements are relevant for purposes of this Memorandum and Order, which assumes that the pools were duly and properly formed and compliant with all applicable laws, that the mortgages in question were properly included in those pools, and that the banks, as trustees, had full authority to act as they did.

nearly fourteen months *after* the auction took place. Ibanez Complaint at 2, ¶ 3; 3, ¶ 8.

In *Larace*, Wells Fargo Bank, in whose name notice was published and sale took place, also had no interest in the mortgage being foreclosed (either recorded or unrecorded) at the time of publication or sale. Complaint to Remove Cloud from Title at 2, ¶ 3; 3, ¶ 8 (Oct. 23, 2008) (filed in Misc. 386755) (hereinafter, the "Larace Complaint"). There also was nothing to indicate that it was acting (or purporting to act) as someone else's agent, much less the agent of the principal. Motion for Entry of Default Judgment at 2-3 (Feb. 2, 2009) (filed in Misc. 386755) (hereinafter, the "Larace Motion"). However, it acquired the mortgage by assignment ten months after the sale, with the assignment declaring an effective date prior to foreclosure (April 18, 2007). Larace Complaint at 2, ¶ 3.

In *Rosario*, LaSalle Bank, in whose name notice was published and sale took place, was the unrecorded holder of the mortgage at the time of publication and sale, but did not record the assignment reflecting that interest until over a year after the sale. Complaint to Remove Cloud from Title at 2, ¶ 3; 3, ¶ 8 (Oct. 16, 2008) (filed in Misc. 386018) (hereinafter, the "Rosario Complaint").

In each of these cases, the bank was the only bidder at the foreclosure sale. Stipulation of Walter Porr, Esq., Counsel for Plaintiffs (Feb. 11, 2009 oral argument).[3] In *Ibanez*, the bank bought the property for $94,350, which was $16,437.27 less than the amount of the outstanding loan ($110,787.27) and $16,650 (15%) less than the bank's calculation of the property's actual market value ($111,000). Ibanez Complaint at 3, ¶ 8; Aff. of Walter H. Porr, Jr., Ex. G (Jan. 30, 2009). In *Larace*, the bank bought the property for $120,397.03, which was the amount of the outstanding loan plus "all outstanding fees and costs" and $24,602.97 (17%) less than the bank's

[3] I may consider such stipulation as an admission binding on the plaintiffs for purposes of these motions. *White v. Peabody Constr. Co., Inc.*, 386 Mass. 121, 126 (1982).

calculation of the property's actual market value ($145,000). Larace Complaint at 3, ¶ 8; Aff. of Walter H. Porr, Jr., Ex. E (Feb. 2, 2009). In *Rosario*, the bank bought the property for $136,000. Rosario Complaint at 3, ¶ 8. Unlike *Ibanez* and *Larace*, the record in *Rosario* does not include information on the amount of the outstanding loan or the market value of the property.

According to the plaintiffs, despite their successful bids and their subsequent recording of all the relevant documents, they cannot obtain title insurance for the properties — making them effectively unsaleable — unless and until these issues are resolved in their favor. They have thus brought these actions seeking such relief. In each of these cases, the defendants (the mortgagors/equity holders of the properties at issue) have been served, failed to respond, and have been defaulted. The plaintiffs have moved for entry of default judgment. The issues were clearly identified before those motions were heard and the parties were given full opportunity to submit whatever affidavits or other admissible materials they believed necessary for adjudication of those issues. Notice of Docket Entry (Jan. 7, 2009) (filed in each case).

Based on the record before me and for the reasons discussed below, I find and rule that the *Boston Globe* was "a newspaper of general circulation" in Springfield at the time of the notices and sales and thus meets that requirement of G.L. c. 244, § 14. I also find and rule that LaSalle Bank's foreclosure in *Rosario* was not rendered invalid by its failure to record the assignment reflecting its status as the holder of the mortgage prior to the foreclosure since it was, in fact, the holder by assignment at the time of the foreclosure, it truthfully claimed that status in the notice, and it could have produced proof of that status (the unrecorded assignment) if asked.[4] Finally, I find and rule, however, that the other two foreclosures (U.S. Bank's in *Ibanez* and Wells Fargo Bank's in *Larace*) are invalid because the notices that named those entities failed to name the mortgage holder as of the date of the sale as required by G.L. c. 244, § 14. Neither

[4] The notices gave its agent's (counsel for the foreclosure) name and address.

U.S. Bank nor Wells Fargo Bank had been assigned the mortgages at the time notice was published and sale took place. Neither an intention to do so in the future nor the backdating of a future assignment meets the statute's strict requirement that the holder of the mortgage *at the time notice is published and auction takes place* be named in the notice.

Analysis

Whether Publication in the Boston Globe Was Sufficient to Meet the Requirements of G.L. c. 244, § 14

G.L. c. 244, § 14 requires notification of a foreclosure sale to be published "in a newspaper, if any, published in the town where the land lies or in a newspaper with general circulation where the land lies" for that sale to be valid. *See Bottomly v. Kabachnick*, 13 Mass. App. Ct. 480, 484 (1982) ("The manner in which the notice of the proposed sale shall be given is one of the important terms of the power and a strict compliance with it is essential to the valid exercise of the power."). The purpose behind that requirement is easily discerned and simply stated. It is to ensure, for the benefit of the mortgagor whose equity interest is about to diminish or disappear and who may face personal liability for the full amount of any deficiency, that a sufficient number of likely bidders learn of the sale so that competition, and thus the highest price, will result. *See Roche v. Farnsworth*, 106 Mass. 509, 513 (1871) ("There is the more reason for this [requiring strict adherence to the statute's notice provisions], where the power [of sale] is made to a mortgagee, who is interested merely for himself, and has opportunities for collusion and for taking unfair advantage of the mortgagor."). Underlying the notice requirement is the notion that most of the interested and likely bidders will either live or work locally or, if from afar, expect the local newspapers to carry the relevant notices.

The plaintiffs in these cases did not choose "a newspaper . . . published in the town where the land lies" or even, for that matter, the newspaper with the greatest local circulation. That

would have been, for both these criteria, the *Springfield Republican*. Instead, they chose the *Boston Globe* for reasons of cost and convenience. According to plaintiffs' counsel, the *Globe* has competitive advertising rates and its legal notices advertising department is able to receive electronically-transmitted notices from foreclosing parties, immediately acknowledge that receipt, and promptly publish notices. The record does not indicate, and counsel did not know, if the *Springfield Republican* has similar rates or capacities.

G.L. c. 244, § 14, however, does not require publication in a locally-published newspaper, in the newspaper with greatest circulation, or even on the day with the greatest circulation.[5] It is enough to publish in "a newspaper with general circulation in the town where the land lies . . . ." G.L. c. 244, § 14. The statute does not contain an explicit definition of "general circulation," none appears anywhere in the relevant statutory provisions (those governing foreclosures), and counsel has not directed the court's attention to any relevant decisions of our appellate courts. Thus, the familiar tools of statutory interpretation must be employed.

> [A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated. Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense. Words that are not defined in a statute should be given their usual and accepted meanings, provided that those meanings are consistent with the statutory purpose. We derive the words' usual and accepted meanings from sources presumably known to the statute's enactors, such as their use in other legal contexts and dictionary definitions.

Seideman v. City of Newton, 452 Mass. 472, 477-78 (2008) (internal quotations and citations

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[5] The circulation data submitted for both the *Springfield Republican* and the *Boston Globe* show that their Sunday editions have their largest readership. The notices in each of these cases were published on weekdays.

omitted).

Black's Law Dictionary is such a source. *See id.* at 478; *Thurdin v. SEI Boston, LLC*, 452 Mass. 436, 453 (2008) (both citing Black's). It defines "newspaper" as "a publication for general circulation, usually in sheet form, appearing at regular intervals, usually daily or weekly, and containing matters of general public interest, such as current events." Black's Law Dictionary at 1069 (8th ed. 2004). "Newspaper of general circulation" is defined as "a newspaper that contains news and information of interest to the general public, rather than to a particular segment, and that is available to the public within a certain geographic area." *Id.* The *Boston Globe* met each of these tests in Springfield at the time the notices were published. It was a "publication for general circulation" in Springfield.[6] It "contain[ed] matters of general public interest," such as national and international news, sports, and business coverage. And it was available in Springfield on a daily basis during the times in question, both through subscription and single-copy sales at stores and by vendors.

The *Globe* also was a newspaper that, for the times in question, met the statute's intent of reaching a broad audience of likely bidders. While it had a fraction of the *Springfield Republican*'s circulation (the *Republican* sold somewhere between 21,959 and 24,733 copies in Springfield on an average weekday during the relevant time period),[7] the *Globe*'s figures (somewhere between 1,400 and 1,600 copies in Springfield during the relevant time period)[8] were nonetheless significant and sufficiently "general" in the context of Springfield's overall

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6 *See* circulation figures discussed immediately below.

7 The *Republican* sold 21,959 copies in Springfield on March 7, 2007, and 24,733 copies in Springfield on March 28, 2008. Supplemental Aff. of Walter H. Porr, Jr. at Exs. A, B (Feb. 3, 2009) (filed in the *Larace* case). On March 7, 2007, it sold an additional 11,985 copies in the immediately adjacent towns of West Springfield, Longmeadow and East Longmeadow. *Id.* On March 28, 2008, it sold an additional 14,720 copies in those same adjacent localities. *Id.*

8 The *Globe* sold 1600 copies in Springfield on October 24, 2006 and 1,400 copies in Springfield on October 23, 2007. Aff. of Walter H. Porr, Jr. at Exs. B, C (Feb. 2, 2009) (filed in the *Larace* case). It sold an additional 896 copies on October 24, 2006 and an additional 674 copies on October 23, 2007 in the immediately adjacent towns of West Springfield, Longmeadow and East Longmeadow. *Id.*

population at the times in question.[9] The *Globe*'s status as one of New England's major newspapers also makes it likely to reach a large, additional audience of institutional and other bidders.[10, 11]

In short, while far from the best alternative, the *Globe* was good enough to meet the statutory test at the times in question. It was "a newspaper with general circulation in the town where the land lies" when the notices were published and thus sufficed under G.L. c. 244, § 14.[12]

Whether Publication Occurred in the Name Required by G.L. c. 244, § 14

G.L. c. 244, § 14 requires that notice of a foreclosure auction be given not only to the mortgagor and "all persons of record" holding junior interests in the property (by registered mail), but also by publication in a newspaper of general circulation at least "once in each of three successive weeks, the first publication to be not less than twenty-one days prior to the date of sale." The purpose of such publication, as previously noted, is to ensure, for the benefit of the mortgagor whose equity interest is about to diminish or disappear and who may face personal liability for the full amount of any deficiency, that a sufficient number of likely bidders learn of the sale so that competition, and thus the highest price, will result.[13] *See Roche*, 106 Mass. at

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[9] According to the U.S. Census data submitted by the plaintiffs, there were approximately 57,000 households in Springfield during this time period. *Id.* at Ex. D.

[10] This is also true of the *Springfield Republican* and, as shown by their comparative circulation data, even more so in the Pioneer Valley area. Supplemental Aff. of Walter H. Porr, Jr. at Exs. A, B.

[11] The record did not indicate, and counsel did not know, if the notices at issue in these cases appeared statewide or only in more localized editions of the *Globe*. For purposes of this Memorandum and Order, I make the conservative assumption that they appeared only in an edition circulated in Springfield and the neighboring Pioneer Valley area.

[12] This ruling is not intended, and should not be construed, as a finding that the *Globe* meets the statutory test in Springfield for any times other than those at issue in these cases. The drop-off in the *Globe*'s circulation in Springfield between October 24, 2006 and October 23, 2007 (1,600 to 1,400 copies — a 12.5% reduction in a single year from an already small figure) suggests that foreclosure notices published subsequent to October 2007 may need to be assessed on a case-by-case basis.

[13] It is also for the benefit of junior creditors, whose chances for recovery may be diminished or eliminated by the foreclosure if there is are insufficient proceeds from the foreclosure to cover all liens. *See* G.L. c. 183, § 27 (disposition of proceeds of foreclosure sale); *Wiggin v. Heywood*, 118 Mass. 514, 516 (1875); *Pioneer Credit Corp. v. Bloomberg*, 323 F. 2nd 992, 993-94 (1st Cir. 1963) (foreclosure of senior encumbrance discharges junior liens whose holders are made parties to the proceeding).

513. It is thus, broadly speaking, a consumer protection statute and, as the courts have repeatedly made clear, one that requires "strict compliance" with its notice provisions. *Bottomly v. Kabachnick*, 13 Mass. App. Ct. 480, 484 (1982) and cases cited therein.

One of those requirements is that the notice identify "the holder of the mortgage." *Id.* at 483. Failure to do so renders the "sale void as a matter of law." *Id.* at 484. The purpose of this requirement and the need for "strict compliance" is readily discerned. As even a cursory glance at the current caseload of this court reveals, titles arising from mortgage foreclosures can have many problems. These include the most fundamental: Did the party conducting the foreclosure have the authority to do so and, if challenged, can it prove that it had such authority? In short, will a purchaser at the foreclosure sale get good title and will get it in prompt fashion? These are increasingly important questions in the current deteriorating real estate market and are not small concerns. It is increasingly rare for a mortgage to remain with its originating lender. Often, as here, mortgages are assigned to other entities, and then assigned yet again into large securitized pools.[14] Often, as here, the paperwork lags far behind. Sometimes mistakes are made.[15] Mistakes can only be corrected, if at all, through confirmatory documents (which the borrower may not so easily agree to) or litigation. With so many foreclosed properties available for purchase, why bid on a property with even the possibility for such trouble? Why bid on a property when the foreclosing party cannot produce all the documents (including proper mortgage assignments in recordable form) that would give good title? Why take the risk that the foreclosing party will be able to produce the documents promptly after the auction takes place,

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[14] In *Ibanez*, for example, the mortgage was originally granted to Rose Mortgage, Inc., then assigned to Option One Mortgage Corporation, then assigned to American Home Mortgage Servicing, Inc., and then assigned to the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z, of which U.S. Bank is currently the trustee. Ibanez Complaint at 2, ¶ 3. *Larace* and *Rosario* have similar histories.

[15] *See, e.g., LaSalle Bank National Association, as trustee for Merrill Lynch First Franklin Mortgage Loan Trust, Mortgage Loan Asset-Backed Certificates, Series 2007-1 v. Truong*, Land Court Misc. Case No. 390707 (KCL) (assignment made, servicemembers action brought and judgment entered, G.L. c. 244, § 14 notices published, foreclosure conducted, and foreclosure deeds issued in incorrect name).

that those documents will be complete and in proper form, or even (in this era of failed and failing institutions) that the foreclosing party will still be in existence, with intact files and knowledgeable employees able to find those files so that the proper paperwork can be completed? Since these concerns affect the ability to obtain clear, marketable title, why bid a reasonable market value instead of a discount price to account for that risk?

None of this is the fault of the mortgagor, yet the mortgagor suffers due to fewer (or no) bids in competition with the foreclosing institution. Only the foreclosing party is advantaged by the clouded title at the time of auction. It can bid a lower price, hold the property in inventory, and put together the proper documents at any time it chooses. And who can say that problems won't be encountered during this process? It is interesting that it took the plaintiff (the foreclosing party and successful bidder) almost *fourteen months* after the auction to obtain its assignment in *Ibanez* and *ten months* after the auction in *Larace*.[16] Would any reasonable third-party bidder have been willing to wait that long, trusting that no other issues would arise?[17] Only in *Rosario* was the assignment (showing that the foreclosing party held the mortgage and could convey title as a result of the sale) in hand and ready for recording at the time of the auction sale.

The plaintiffs defend the validity of their post-foreclosure assignments (in *Ibanez* and *Larace*) and post-foreclosure recording of their assignments (in all cases), making essentially three arguments. First, they say that the language of G.L. c. 244, § 14 does not require that the

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[16] The foreclosure auction in *Ibanez* took place on July 5, 2007. Ibanez Complaint at 3, ¶ 8. The mortgage was not assigned to U.S. Bank until September 2, 2008. *Id.* at 2, ¶ 3. The foreclosure auction in *Larace* took place on July 5, 2007. Larace Complaint at 3, ¶ 8. The mortgage was not assigned to Wells Fargo until May 7, 2008. *Id.* at 2, ¶ 3.

[17] There may be an innocent explanation for the delay (*i.e.*, a rational business reason for waiting months to document the assignment), but none was offered or apparent in the record. Moreover, such an explanation is unlikely given the many months of delay, the deteriorating real estate market, the properties' carrying costs (upkeep, security, and real estate taxes) and the bank's desire for cash. Surely, each of these was a powerful incentive to move as quickly as possible.

notice name the holder of the mortgage. They agree that the form of foreclosure notice included in the statute contains that requirement *explicitly* (the signature line on that form is labeled "Present holder of said mortgage" and its text contains both the representation "of which mortgage the undersigned is the present holder" and the command "if by assignment, or in any fiduciary capacity, give reference"), but contend that these are not *statutory* requirements because the statute permits "alter[ation] [of the form] as circumstances require" and does not "prevent the use of other forms." G.L. c. 244, § 14 (Form).

This argument is unpersuasive, for three reasons. First, it ignores *Bottomly v. Kabachnick*, which states that the notice in that case "was defective *because it failed to identify the holder of the mortgage*, thereby rendering the first foreclosure sale *void as a matter of law*." 13 Mass. App. Ct. at 483-84 (citing *Roche v. Farnsworth*, 106 Mass. 509 (1871)) (emphasis added).[18, 19] Second, it ignores the "fundamental precept[]" that "[c]ourts must ascertain the intent of a statute from *all its parts* and from the subject matter to which it relates . . . ." *DeGiacomo v. Metropolitan Property & Casualty Ins. Co.*, 66 Mass. App. Ct. 343, 346 (2006) (emphasis added). The form of foreclosure notice included in G.L. c. 244, § 14 is a part of that statute, indicative of its intent, and clearly contemplates (as *Bottomly* holds) that the present holder of the mortgage be identified in the notice. There is nothing to indicate that *this* aspect of

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[18] *Roche* invalidated a mortgage foreclosure sale because the notice, *inter alia*, failed to name the holder of the mortgage at the time of the foreclosure sale (defendant George B. Farnsworth). 106 Mass. 509, 513 (1871). This omission and the other failings in the notice were "inconsistent with the degree of clearness that ought to exist in such an advertisement." *Id.*

[19] One can become the "holder of the mortgage" (an interest in land) only by a writing satisfying the statute of frauds, G.L. c. 259, § 1, in recordable form. Thus, the plaintiffs' contention at oral argument that G.L. c. 244, § 14's requirement of "holder" status was satisfied by the assignment of the promissory notes secured by the mortgages to the securitized pools (apparently done by contract documents referencing them generally, along with hundreds or thousands of other such notes) fails. In any event, no such documents were included in the record, so any arguments based upon them are unsupported and waived. Moreover, there is nothing in the record to indicate when the promissory notes were assigned and the record is unambiguously clear that the *mortgages* were assigned on the dates referenced herein.

the notice could be "altered."[20] *See* G.L. c. 244, § 14. Indeed, at oral argument, plaintiffs' counsel conceded that the current practice is to obtain and record all assignment documents before publication and commencement of foreclosure proceedings. Third, the language in the body of the statute clearly contemplates that the "holder of the mortgage" is the entity to give notice, as indicated by its reference to notices to be mailed "to the last address of the owner or owners of the equity of redemption *appearing on the records of the holder of the mortgage* . . . ." G.L. c. 244, § 14 (emphasis added).

The plaintiffs' second argument is that the statute should be read "in its practical application, purpose and effect [to] uphold the exercise of the power of sale even though the assignment of the mortgage was recorded afterwards." Second Supplemental Memorandum of Law in Support of Motion for Entry of Default Judgment at 5 (Feb. 16, 2009) (filed in *Larace*). This argument is made in two parts. First, the plaintiffs argue that the mortgagor "had ample time and opportunity to exercise his rights in equity to challenge the foreclosure at the time it was ongoing and failed to do so." This contention (which places the burden and expense of a lawsuit on the mortgagor and allows a statutory violation with potentially severe adverse consequences to proceed unchecked if a lawsuit is not brought) is contrary to the "consumer protection" nature of the statute. The defaulting mortgagor is often a layperson, unfamiliar with law and legal proceedings, and often financially distressed and thus without resources to hire counsel.[21] Second, the plaintiffs' argument that the mortgagor already knows the identity of the

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[20] Plaintiffs cite *146 Dundas Corp. v. Chemical Bank*, 400 Mass. 588, 593 (1987), for the proposition that the precise form of notice contained in G.L. c. 244, § 14 is not mandatory. True enough. But the inclusion of that form in G.L. c. 244, § 14 reflects the Legislature's intent regarding the *contents* of the notice, the suggested notice contains *two* places for "the present holder" of the mortgage to be identified (including a blank line to "give reference" if the mortgage is held by assignment), and there is nothing in *146 Dundas Corp.* that holds (or even suggests) that such an identification can be omitted from an alternate form of notice.

[21] These cases are perfect examples. None of the defendants ever came to court or filed a responsive pleading even though they had meritorious defenses. There is no suggestion that the mortgagors "waited until the owner may have added largely to the estate, or it has increased in value by a general rise, before bringing [a claim for

assignee of his mortgage from his RESPA notices[22] and thus cannot credibly complain, *Id.*, completely misses the point of the publication requirement. As noted above, its purpose is to notify potential *bidders* who do *not* have that information and whose bids may be chilled by concerns over the foreclosing party's inability to show, in recordable form, an assigned interest in the mortgage it purports to foreclose. Based upon the facts of these cases, such chilling is not speculative. In each of the two cases for which market value information was provided (*Ibanez* and *Larace*), the plaintiff purchased the property at the foreclosure auction for significantly less than that value (15% and 17%, respectively). *See* discussion, *supra* at 3-4.

Even the plaintiffs' argument premised on a general notion of "practical application, purpose and effect" fails. As current practice shows, there is nothing difficult or inhibitive in a requirement that assignment documents be in place at the time of notice and auction. That is precisely what the plaintiffs do now. Those documents must be created, executed and recorded before title can pass in any event, so no additional time or expense is incurred by having them ready at the time of publication and auction sale. Having the assignments in place in recordable form at the time of publication and auction avoids the chilling effects on bidding described above. Interpreting the statute in this manner thus not only comports with its language and the intent inferred from that language, but also with common sense and a rational policy objective. *See DiGiacomo*, 66 Mass. App. Ct. at 346 (statutes to be interpreted "so as to render the legislation effective, consonant with sound reason and common sense").

The plaintiffs' third argument is that both case law and prevailing title practice support their contention that post-notice/post-auction assignment, so long as the ultimate assignee was the foreclosing party, suffices under G.L. c. 244, § 14. I disagree and discuss each of this

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redemption]." *Montague v. Dawes*, 12 Allen (94 Mass.) 397, 400 (1866).

[22] Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2601, *et seq.*

argument in turn.

Bottomly is the most recent case construing the notice provisions of the statute and is the starting point for the proper interpretation of the earlier cases and proper title practice. As noted above, *Bottomly* unequivocally holds that a notice that fails to identify the holder of the mortgage is defective, thereby rendering the "foreclosure sale void as a matter of law." 13 Mass. App. Ct. at 483-84. None of the cases cited by the plaintiffs either hold or suggest the contrary.

The first case plaintiffs cite is *Montague v. Dawes*, 12 Allen (94 Mass.) 397 (1866). *Montague* predates the publication provisions of G.L. c. 244, § 14, which were not enacted until 1877, so it is unclear what, if any, guidance it gives on the notice issue.[23, 24] What it *does* hold, and *only* holds, is that title derived from a foreclosure sale by an assignee of a mortgage *in possession of that assignment at the time of the auction* is not defeated by the fact that the assignment was not *recorded* until after the foreclosure took place, so long as the mortgagor is aware of the assignment and it is "unaccompanied with the suggestion that it was not recorded

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[23] The foreclosure in *Montague* took place under St. 1857, c. 229, which allowed sales to take place with "such notices . . . as are authorized or required by such power [of sale in the mortgage deed]," so long as a copy of that notice and an affidavit by the mortgagee "set[ting] forth his acts in the premises fully and particularly" were filed in the registry of deeds within thirty days after the sale. The statutory requirement for published notice was not enacted until 1877, which provided the following:

> No sale under and by virtue of a power of sale contained in any mortgage of real estate shall be valid and effectual to foreclose said mortgage, unless previous to such sale notice of the same shall have been published once a week, the first publication to be not less than twenty-one days before the date of sale, for three successive weeks, in some newspaper, if there be any, published in the city or town wherein the mortgaged premises are situated; but nothing herein shall avoid the necessity of also giving notice of such sale in accordance with the terms of the mortgage.

St. 1877, c. 215. It would not be surprising if it came about, in part, as a result of the practices exemplified in the fact pattern and condemned by the court in *Montague v. Davis*. 14 Allen (96 Mass.) 369, 374 (1867) ("Here the notice proved ineffectual to attract purchasers, as might reasonably have been anticipated from the meagre information it contained, its irresponsible character, and the place of sale selected, remote from the premises to be sold.").

[24] Although not statutorily required at the time, the power of sale in *Montague* apparently contained a publication requirement of some form or fashion. *See Montague*, 12 Allen (94 Mass.) at 400 (referring to "public notice by advertisement of the time and place of sale"). The form and type of notice, however, was apparently never placed in issue since the defendant "aver[red] that the notices and affidavit required by statute were duly made and recorded" and the plaintiff "nowhere charg[ed] that the sale was wrongfully made . . . [or] that there was any irregularity in the proceedings." *Id.* at 399.

from improper motives, or that in some way the circumstance actually affected the sale by misleading purchasers or otherwise . . . ."[25] *Id.* at 400. Thus, it is directly applicable to *Rosario* (where the foreclosing party, LaSalle Bank, was correctly named in the notice as the holder of the mortgage and was ready, willing and able to produce its assignment, in recordable form, at the time of auction) and *inapplicable* to *Ibanez* and *Larace* (where the named foreclosing party had not been assigned the mortgage at the time of notice and auction, either on or off record).

The plaintiffs next cite the Rule 1:28 Memorandum and Order in *Federal Deposit Corporation v. Kefelas*, 62 Mass. App. Ct. 1121, 2005 WL 277693 (2005), for the proposition that the foreclosure notice need not contain the name of the holder of the mortgage in order for the sale to be valid. As a pre-February 26, 2008 unpublished opinion, *Federal Deposit Corporation* has no precedential value. Order Amending Appeals Court Rule 1:28 (Nov. 25, 2008). Even so, when closely examined, *Federal Deposit Corporation* does not reflect the holding plaintiffs argue. The notice in that case stated that the Bank of New England ("BNE") was the mortgage holder when, in fact, that bank had failed and substantially all of its assets (including the Kefelas mortgage) had transferred to a "bridge bank," New Bank of New England ("NBNE"). *Federal Deposit Corp.*, 2005 WL 277693 at *1. The Appeals Court failed to see why, under these circumstances, "the change in name was significant" and thus refused to invalidate the foreclosure sale. *Id.* at 2-3. This is completely consistent with *Bottomly*. NBNE was, for foreclosure purposes, effectively the same entity as BNE and, given the general knowledge that BNE had failed and its assets acquired by NBNE, likely no one could have been confused or had their bid chilled.

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[25] Samuel Rice, the original mortgagee, assigned the note and mortgage to Henry Dawes on June 19, 1862. Mr. Dawes conducted the foreclosure sale on August 11, 1862, *after* he was assigned the mortgage, and conveyed the property to John Dunbar, who purchased it at Dawes' request. Dunbar then conveyed it to Dawes on August 20, 1862. Dawes later conveyed it to a Mr. Hassam, who conveyed it Lydia Hawes. The case involved the mortgagor's (George Montague) attempt to redeem the property, which the court denied.

The plaintiffs' final citation is REBA Title Standard No. 58, "Out of Order Recording of Mortgage Discharges and Assignments."[26] It provides, in relevant part, "[a] title is not defective by reason of . . . [t]he recording of an Assignment of Mortgage executed either prior, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record, by the Assignee." REBA Title Standard No. 58. The accompanying note states that this portion of the standard "is based on *Montague v. Dawes*, 12 Allen 397 (1866)." *Id.* (Comment). No explanation is given and no authority other than *Montague* is cited or discussed. So far as I can tell, this aspect of REBA Title Standard No. 58 has never been reviewed or ruled upon by a court at any level. I have great respect for REBA and the work of its committees, and the *initial* portion of its standard is certainly a correct reading of G.L. c. 244, § 14 and *Montague* ("[a] title is not defective by reason of . . . [t]he recording of an Assignment of Mortgage executed . . . prior . . . to foreclosure . . . ."). But the *latter* portion (relating to assignments made *after* notice is published and sale has occurred) misconstrues the statute, the holding in *Montague*, and the teachings of *Bottomly* and *Roche*. As discussed above, G.L. c. 244, § 14 requires publication in the name of the holder of the mortgage for the foreclosure sale to be valid. *Bottomly*, 13 Mass. App. Ct. at 483-84. It does so to assure potential bidders that the foreclosing party can promptly deliver good title and to prevent "opportunities for collusion and for taking unfair advantage of the mortgagor." *See Roche*, 106 Mass. at 513. The best practice, of course, is to put the assignment on record prior to notice publication so it is available for all to examine. At the very least, the assignment should be fully executed and available, in recordable form, at the time of the foreclosure sale. *Montague*, 12 Allen at 400. To allow a foreclosing party, without any interest in the mortgage at the time of the sale (recorded or unrecorded), to conduct the sale in these circumstances, bid, and then acquire good title by later assignment is completely contrary

[26] REBA is the Real Estate Bar Association for Massachusetts, a private organization.

to G.L. c. 244, § 14's intent and commands.

Conclusion

For the foregoing reasons, none of the three foreclosures at issue in these lawsuits were rendered invalid because notice was published in the *Boston Globe*. LaSalle Bank's foreclosure in *Rosario* was not rendered invalid by its failure to record the assignment reflecting its status as holder of the mortgage prior to the foreclosure since it was, in fact, the holder by assignment at the time of the foreclosure, it truthfully claimed that status in the notice, and it could have produced proof of that status (the unrecorded assignment) if asked. The other two foreclosures (U.S. Bank's in *Ibanez* and Wells Fargo Bank's in *Larace*) are invalid because the notices (which named those entities) failed to name the mortgage holder as required by G.L. c. 244, § 14. Judgment shall enter accordingly.

SO ORDERED.

By the court (Long, J.)

Attest:

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Deborah J. Patterson, Recorder

Dated: 26 March 2009