

# Happy New Year! Massachusetts Finally Acts to Clear Titles on Foreclosed Properties

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Governor Charlie Baker has signed into law Senate Bill No. S2015 (Chapter 141 of the Acts of 2015). This new legislation, which became effective on December 31, 2015, is in response to the Supreme Judicial Court's decision in *U.S. Bank National Association v. Ibanez*, 458 Mass. 637 (2011) and its progeny. It helps clear up title defects arising out of the common practice of lenders' assigning their mortgages.

The *Ibanez* decision, which applied retroactively, created a cloud on the titles to perhaps thousands of properties conveyed through mortgage foreclosures. Prior to *Ibanez*, it was common practice for the foreclosing party to conduct foreclosure proceedings before the formal execution of a mortgage assignment.<sup>1</sup> In *Ibanez*, U.S. Bank, the foreclosing party, was assigned the mortgage after the foreclosure sale was completed. The Court found the foreclosure defective, as U.S. Bank was not the holder of the mortgage at the time of the sale. Accordingly, any foreclosure where the foreclosing party was not the holder of the mortgage at the time of the sale was defective under *Ibanez*. Purchasers at or subsequent to such a defective foreclosure did not have clear title.<sup>2</sup>

The curative legislation addresses the issue by creating deadlines for challenges to the validity of a foreclosure sale. After the statutory deadline elapses, a properly executed affidavit of sale from the foreclosure will be conclusive evidence in favor of an arm's length third-party purchaser for value at or subsequent to a foreclosure sale that the sale was conducted properly. For affidavits of sale recorded prior to December 15, 2015, the statutory deadline is the **later of**:

- a) 3 years following the recording of an affidavit of sale from the foreclosure; or
- b) December 31, 2016.

For all affidavits of sale recorded after December 31, 2015, the deadline to challenge a foreclosure sale is 3 years following the recording of the affidavit.

Only an "Arm's Length third party purchaser for value" including the purchaser's heirs, successors, and assigns, will be protected by the passing of the statutory deadline. An arm's length third party purchaser does not include the foreclosing party or mortgage note

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holder, or a parent, subsidiary, affiliate or agent of the foreclosing party or mortgage note holder.

While the new legislation will clear title on hundreds to thousands of properties, it is not without its opponents. Opponents of the bill state that the legislation protects those who committed defective foreclosures, while ignoring people who lost their homes.<sup>3</sup>

Despite some opposition, the new legislation became effective on December 31, 2015, and by December 31, 2016, many owners will have clear title to properties once clouded by *Ibanez*.

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<sup>1</sup> *Ibanez, Bevilacqua made simple for the non-conveyancer*, Guidi, Thomas L. **Lawyers Journal**, January 2012, <http://www.massbar.org/publications/lawyers-journal/2012/january/ibanez,-bevilacqua-made-simple-for-the-non-conveyancer>

<sup>2</sup> *Id.*

<sup>3</sup> *Real estate bar lauds new title-clearing law, Others wary of fix for 'Ibanez problem'*, Olson, Kris, **Massachusetts Lawyer's Weekly**, December 10, 2015

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