

SJC decision deepens foreclosure morass

Who could have imagined that the choice to publish a foreclosure notice in the Boston Globe instead of the Springfield Republican would cast doubt on the titles of thousands of Massachusetts homeowners? Yet this publication issue sparked the pivotal case of *U.S. Bank v. Ibanez* (Jan. 7, 2011), where the Supreme Judicial Court held that state law requires a foreclosing party to hold good title to a mortgage when it begins foreclosure.

The original case focused on whether publication in the Globe satisfied the requirements of the foreclosure statute. The judge said that publication was fine, but then, out of the blue, ruled the foreclosure void because the bank did not hold a valid assignment of mortgage when it began foreclosure proceedings. The SJC agreed.

On the day the SJC issued its *Ibanez* decision, bank stocks plummeted across the nation. Investors recognized the danger inherent in homeowner disarray, lender uncertainty and title confusion. A concurring opinion in *Ibanez* questioned how the decision might affect third-party purchasers who relied in good faith on banks' foreclosure titles.

Cue *Bevilacqua v. Rodriguez* (Oct. 18, 2011). In *Bevilacqua*, the bank received an assignment of its mortgage executed after it had already begun foreclosure. It then deeded the property to *Bevilac-*

qua, who filed a petition with the Land Court, claiming that his title was better than the defaulting borrower's. The Land Court disagreed, and *Bevilacqua* appealed.

The SJC, standing behind *Ibanez*, held that the bank had no right to foreclose because it was not holding a valid mortgage assignment when it executed the foreclosure deed. With the foreclosure voided, *Bevilacqua* no longer had a valid deed, and thus did not hold record title, a prerequisite to maintaining the Land Court action. The SJC dismissed the case because of *Bevilacqua's* lack of standing, dealing another blow to homeowners whose titles remain clouded

by *Ibanez*.

When the SJC took *Bevilacqua*, there was hope that the decision would quiet the title turmoil created by *Ibanez*. Those of us more familiar with these cases doubted that *Bevilacqua* would solve the *Ibanez* chaos. Nonetheless, we wished the SJC would figure out how to give relief to distraught homeowners.

While the Legislature has thus far resisted intervention, such action may be necessary to rescue the legions of Massachusetts homeowners whose titles are affected by improper bank foreclosures.

Edward M. Bloom is a partner at Sherin and Lodgen LLP and president of The Real Estate Bar Association for Massachusetts. **Seth A. Malamut** is an associate at Sherin and Lodgen.

**EDWARD M.
BLOOM
AND
SETH A.
MALAMUT**