
COMMONWEALTH OF MASSACHUSETTS
Supreme Judicial Court

WORCESTER, SS.

No. SJC-11490

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR BEAR STEARNS ASSET-
BACKED SECURITIES TRUST 2004-AC4,
Plaintiff-Appellee,

v.

EDNA SCHUMACHER AND JOHN SCHUMACHER,
Defendants-Appellants.

ON APPEAL FROM A FINAL JUDGMENT OF
THE HOUSING COURT DEPARTMENT OF THE TRIAL COURT

**BRIEF OF THE ATTORNEY GENERAL ON BEHALF OF THE
COMMONWEALTH OF MASSACHUSETTS, AMICUS CURIAE**

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QUESTIONS PRESENTED

1. Whether a failure to strictly comply with the notice provisions of G.L. c. 244, § 35A renders an extrajudicial foreclosure sale void, voidable, or otherwise affects its validity.

2. Whether a section 35A notice that lists the name and address of the mortgage servicer, and which identifies as the current mortgagee an entity to whom the mortgage eventually was but had not yet been assigned, satisfies the statutory requirement that the notice provide the name and address of the mortgagee, or anyone holding thereunder.

STATEMENT OF THE CASE¹

Prior Proceedings

The present action originated in a summary process eviction case against the Defendant-Appellant John Schumacher,² wherein Plaintiff-Appellee U.S. Bank National Association, as Trustee for Bear Stearns Asset-Backed Securities Trust 2004-AC4 ("U.S. Bank"), claimed a right to possession of Mr. Schumacher's home on the basis of an extrajudicial foreclosure auction. App. 11.

Mr. Schumacher alleged that because the notice

¹ Pursuant to Rule 16(b) of the Massachusetts Rules of Appellate Procedure, the Attorney General agrees with and adopts the statement of the case set forth by the Appellant. However, for ease of reference, the case background is also briefly stated here.

² U.S. Bank also named Edna Schumacher in its summary process eviction complaint; however, she was deceased at the time the case was commenced.

provided by U.S. Bank pursuant to G.L. c. 244, § 35A failed to accurately identify the current holder of the mortgage, the foreclosure sale was void and thus U.S. Bank lacked a superior right of possession. App. 14. ~~Following a jury-waived trial in the spring of 2012,~~ the Housing Court granted judgment for possession and costs to U.S. Bank. App. 49-51. Mr. Schumacher then filed the present appeal, which was transferred to this Court, sua sponte, on July 17, 2013.

Statement of Facts

In 2004, the Schumachers granted a mortgage on their home to Union Federal Bank of Indianapolis (the "Mortgage"), which then assigned the Mortgage to Mortgage Electronic Registration Systems, Inc., ("MERS"). App. 19-20. On November 16, 2008, a purported section 35A notice of default and right to cure (the "right to cure notice") was mailed to the Schumachers. App. 20. The right to cure notice was printed on the letterhead of the Mortgage's servicer, America's Servicing Company ("ASC"); however, ASC's position relative to the Mortgage was not identified in the notice. App. 82.

The right to cure notice identified U.S. Bank as the "current mortgagee." It is undisputed, however,

that on November 16, 2008, MERS was the mortgagee, not U.S. Bank. App. 20. Approximately four months later, MERS assigned the Mortgage to U.S. Bank. App. 20.

In October 2009, U.S. Bank conducted an extrajudicial foreclosure sale of Mr. Schumacher's home, at which time it purchased the property from itself. App. 20. In April 2010, U.S. Bank initiated the present summary process action to evict Mr. Schumacher. App. 11.

INTERESTS OF THE AMICUS CURIAE

The Attorney General has "broad common law and statutory powers to represent the public interest." Commonwealth v. Mass. CRINC, 392 Mass. 79, 88 (1984); see also Commonwealth v. Adams, 416 Mass. 558, 566-67 (1993) (the Attorney General is "an elected official charged with the duty of protecting the public interest"). She has both a general statutory mandate and, in many instances, a specific statutory mandate, to protect the public interest. Id. In addition, the Attorney General has a common law duty to represent the public interest and to enforce public rights. Lowell Gas Co. v. Attorney General, 377 Mass. 37, 48 (1979).

-As the state's chief law enforcement officer, the Attorney General has a direct interest in the

implementation and enforcement of the laws of the Commonwealth, and, in particular, in those laws designed to protect consumers. In the realm of property conveyance and foreclosure, the laws are designed (among other things) to protect consumers by ensuring a fair and reasonable process. This is particularly so because Massachusetts law permits foreclosures without judicial oversight. Given this absence of supervision, foreclosing entities must be held to a more exacting standard, namely, "strict compliance" with the state's body of foreclosure laws. U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 646 (2011).

Maintaining this bright line around the foreclosure statutes is the primary means to ensure that consumers are protected during the foreclosure process in the manner intended by the Legislature. It also ensures - for all stakeholders - an orderly and transparent process. And where the Legislature has provided homeowners with explicit protections, such as those set forth in section 35A, a lender's failure to carefully observe those protections should not be countenanced.

SUMMARY OF ARGUMENT

As a statute that relates directly to the foreclosure process, section 35A requires strict compliance. The statute was passed as an emergency consumer protection law in 2007, as the foreclosure crisis rapidly unfolded. By its plain terms, section 35A is a necessary step in this state's process of extrajudicial foreclosure. And, as this Court held in Ibanez (cited above and passim), a failure to strictly comply with a foreclosure law such as section 35A renders any subsequent foreclosure void ab initio (below, pp. 6-16).

At a minimum, strict compliance with section 35A requires that the 35A "right to cure" notice accurately list the mortgagee. The language of the statute is unequivocal: the foreclosing entity "shall inform" the mortgagor, by written notice, of inter alia "the mortgagee or anyone holding thereunder, and the telephone number of a representative of the mortgagee whom the mortgagor may contact if the mortgagor disagrees with the mortgagee's assertion that a default has occurred." To satisfy this statutory requirement, the written notice must identify the mortgagee at the time the notice is issued (below, pp. 16-24).

Here, by incorrectly identifying the "mortgagee" in the 35A notice, U.S. Bank failed to strictly comply with section 35A. Accordingly, the notice was defective and the subsequent foreclosure was void (below, pp. 25-26).

ARGUMENT

I. Ibanez and Its Progeny Require Strict Compliance with the Statutory Power of Sale and All Statutes Relating to the Foreclosure of Mortgages.

In U.S. Bank National Association v. Ibanez, 458 Mass. 637 (2011), Bevilacqua v. Rodriguez, 460 Mass. 762 (2011), and Eaton v. Federal National Mortgage Association, 462 Mass. 569 (2012), this Court confirmed that a party may not exercise the statutory power of sale to foreclose upon a person's home without first holding the mortgage. Moreover, those cases reiterated well-settled Massachusetts law that in order to foreclose the mortgagor's right of redemption in a mortgage by exercising the statutory power of sale, the foreclosing party must strictly comply with the terms of that power of sale.³ Ibanez, 458 Mass. at 646; see also McGreevey v. Charlestown Five Cents Sav. Bank, 294

³ The "power of sale" refers to both the statutory power of sale created by G.L. c. 183, § 21 and the power of sale specifically included in most mortgages, which allows a mortgagee to invoke the statutory power of sale. Eaton, 462 Mass. at 579-80 and 579 n.13.

Mass. 480, 484 (1936) (affirming "the general rule ... that conditions precedent to the execution of a power of sale must be strictly complied with"); Roche v. Farnsworth, 106 Mass. 509, 513 (1871) (power of sale in mortgage "must be executed in strict compliance with its terms").

The statutory power of sale, set forth in G.L. c. 183, § 21, requires that the party seeking to exercise the power "first comply with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale" (emphasis added). See also Ibanez, 458 Mass. at 646 ("where a mortgage grants a mortgage holder the power of sale ... it includes by reference the power of sale set out in G.L. c. 183, § 21").

Massachusetts requires strict compliance with the power of sale, due to the "substantial power" the extrajudicial foreclosure scheme "affords to a mortgage holder to foreclose without immediate judicial oversight[.]" Ibanez, 458 Mass. at 646. Because of this grant of authority, Massachusetts courts "adhere to the familiar rule that 'one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power, and the

sale is wholly void.'" Ibanez, 458 Mass. at 646, quoting Moore v. Dick, 187 Mass. 207, 211 (1905). In other words, the party seeking to foreclose by sale must both be the mortgagee and strictly comply with all foreclosure-related laws. Otherwise, he lacks the requisite "jurisdiction and authority," and it follows that a foreclosure sale conducted by such party is "void," a legal nullity. Ibanez, 458 Mass. at 647, citing Chace v. Morse, 189 Mass. 559, 561 (1905); accord Bevilacqua, 460 Mass. at 778.

In Eaton, the Court confirmed the public policy basis, dating back to the mid-19th century, for requiring strict compliance - as opposed to substantial compliance or less - with the Commonwealth's foreclosure laws:

The power of sale evolved in order to meet the increase of business transactions requiring loans and the desire to have a more speedy process of foreclosing than was furnished by suit or entry. . . . "[However, the power] will be jealousy watched, and declared void for the slightest unfairness or excess."

Eaton, 462 Mass. at 580 n.15 (quoting 1 F. Hilliard, Mortgages 119 (1856)).

In short, strict compliance with the statutory foreclosure scheme provides an essential protection to distressed homeowners. Because foreclosure is

extrajudicial and involves a uniquely important collateral – the borrower’s home – it is hardly surprising that Massachusetts statutes demand strict compliance with foreclosure rules. G.L. c. 183, § 21; Ibanez, 458 Mass. 637.

This case requires the Court, once again, to determine the parameters of “strict compliance” in the context of the statutory scheme governing foreclosure.

A. Section 35A is One of the Statutory Requirements in Massachusetts Relating to Foreclosure.

The primary set of laws governing the foreclosure process in Massachusetts is chapter 244 of the General Laws, which the Legislature entitled “Foreclosure and Redemption of Mortgages.” This set of laws was designed to create an orderly and predictable foreclosure process and, no less important, to provide a layer of protection for consumers, given that the mortgagee is vested with the power to take a person’s home. See U.S. Bank Nat’l. Ass’n v. Ibanez, Land Ct., Nos. 384283, 386018, 386755 (Mar. 26, 2009), S.C., 458 Mass. 637 (2011).

In 2007, the Legislature amended chapter 244 by enacting “An Act Protecting and Preserving Home Ownership,” in response to the then-emerging

foreclosure crisis. St. 2007, c. 206, § 11 (Addendum at 1-15).⁴ Section 35A's right to cure notice was part of this direct response from the Legislature to surging rates of foreclosure.⁵ (Addendum at 4-5.)

In its original version, which governs this case, the Act entitled borrowers to a 90-day period to cure any alleged default on their mortgage loan without accruing attorney's fees or certain other charges.⁶

⁴ Section 35A was approved on November 29, 2007 and took effect May 1, 2008. St. 2007, c. 206, § 21 (Addendum at 4-5, 15).

⁵ The right to cure period and notice requirement were recommended by a working group organized to address the escalating foreclosure crisis. See Massachusetts Division of Banks *et al.*, Report of the Mortgage Summit Working Groups at 16-18 (April 11, 2007) (accessed on 10/10/13 at www.mass.gov/ocabr/consumer/banks-banking/loans-and-mortgages/report-of-the-mortgage-summit-working-groups.html) (the "Mortgage Summit Report"). These requirements were designed to address infirmities in the foreclosure process that had proven particularly harmful to homeowners, including (i) inadequate notice of a foreclosure sale (as little as two weeks); (ii) absence of any mandated right to cure (some borrowers lost their homes despite having funds to pay the arrearage); and, (iii) absence of any pre-foreclosure opportunity for homeowners to raise valid defenses, such as fraud or unfair lending practices. See Mortgage Summit Report at 16. The Mortgage Summit Report recommendations were the basis of House Bill 4085, which was the initial version of what subsequently became section 35A. See "An Act Implementing the Division of Banks Mortgage Summit Recommendations," 2007 House Doc. No. 4085 (Addendum at 16-20).

⁶ The statute was amended in 2010 to provide additional protection to borrowers through an extended 150-day
(footnote continued)

Specifically, the law prohibited the "mortgagee, or anyone holding thereunder" from "enforc[ing] the mortgage because of a default . . . by any method authorized by this chapter [chapter 244] or any other law until at least 90 days after the date a written notice is given by the mortgagee to the mortgagor."

G.L. c. 244, § 35A(b), as inserted by St. 2007, c. 206, § 11 (Addendum at 4-5). This "written notice" and the accompanying grace period to cure a default are essential parts of the foreclosure process.

Thus, by its very terms, section 35A is a statute "related to foreclosure" (as referenced in G.L. c. 183, § 21).⁷ The party seeking to foreclose must strictly comply with all of section 35A's requirements, not just

(footnote continued)

right to cure period, or as an alternative, an in-person meeting with the "creditor," St. 2010, c. 258, § 7. The notice in the present case was issued in 2008, thus it is reviewed pursuant to the language of the original 2007 law. (Addendum at 4-5).

⁷ Although in Ibanez, 458 Mass. at 645-646, and Eaton, 462 Mass. at 582, the Court listed G.L. c. 244, §§ 11-17C as "statutes relating to the foreclosure of mortgages by the exercise of the power of sale," the Court did not declare this list exhaustive. The present appeal is the first time the Court has reviewed section 35A's place in the foreclosure scheme. By its plain language, section 35A is a statute "related to foreclosure" and one of the requirements of a valid foreclosure sale.

those the party deems important.⁸

B. The Requirements of Section 35A's Written Notice are Explicit and Mandatory.

The language governing section 35A's "written notice" requirement is explicit and mandatory. G.L. c. 244, §

35A(c) (Addendum at 4-5). The notice "shall inform" the mortgagor of:

1. The nature of the default claimed on such mortgage of residential real property and of the mortgagor's right to cure the default by paying the sum of money required to cure the default;
2. The date by which the mortgagor shall cure the default to avoid acceleration, a foreclosure or other action to seize the home, which date shall not be less than 90 days after service of the notice and the name, address and local or toll free telephone number of a person to whom the payment or tender shall be made;
3. That, if the mortgagor does not cure the default by the date specified, the mortgagee, or anyone holding thereunder, may take steps to terminate the mortgagor's ownership in the property by a

⁸ Numerous lower courts have reached this same conclusion. See, e.g., Ross v. Deutsche Bank Nat'l Trust Co., U.S. Dist. Ct., No. 12-10586 (D. Mass. March 27, 2013) ("Because the notice requirement is part of the [Massachusetts] statutory scheme regulating foreclosure, mortgagees seeking to foreclose must comply strictly with the notice requirement."); Silva v. Deutsche Bank Nat'l Trust Co., Middlesex Super. Ct., No. 12-3951 (Nov. 14, 2012); Federal Home Loan Mtge. Corp. v. McIntosh, Hous. Ct., No. 11-SP-4387 (Feb. 21, 2013). However, other lower courts have reached a different conclusion. See, e.g., Courtney v. U.S. Bank, N.A., U.S. Dist. Ct., No. 12-12181 (D. Mass Feb. 6, 2013); HSBC Bank USA, N.A. v. Brown, Hous. Ct., No. 12H84-SP-003218 (July 16, 2013) (requiring only "substantial compliance" with the 35A notice).

foreclosure proceeding or other action to seize the home; and

4. The name and address of the mortgagee, or anyone holding thereunder, and the telephone number of a representative of the mortgagee whom the mortgagor may contact if the mortgagor disagrees with the mortgagee's assertion that a default has occurred or the correctness of the mortgagee's calculation of the amount required to cure the default.⁹

G.L. c. 244, § 35A(c)(1)-(4) (Addendum at 4-5).

The 35A notice thus must detail the current status of the mortgage loan, including information necessary for the borrower to "disagree with" the mortgagee's asserted default, to cure the default, or pursue some other loss mitigation option. If this information is missing or wrong, the borrower is left without the recourse the law seeks to provide.

C. The Details of the 35A Notice are Critical to Achieving the Goals of the Legislature in Enacting Section 35A.

Each component that the Legislature required in a 35A notice is critical to the purpose of that notice,

⁹ The notice must also state "(5) the name of any current and former mortgage broker or mortgage loan originator for such mortgage or note securing the residential property; and (6) that the mortgagor may be eligible for assistance from the Massachusetts Housing Finance Agency and the division of banks and the local or toll free telephone numbers the mortgagor may call to request this assistance." G.L. c. 244, § 35A(c)(5)-(6) (Addendum at 5).

which is to arm the borrower with the information necessary to cure, or if applicable contest, the alleged default or the stated cure amount. Indeed, as the Mortgage Summit Report makes clear (see above n. 5), the legislation that became section 35A was drafted specifically to address inadequate notice prior to foreclosure, and the absence of any mandated opportunity for the borrower to cure or challenge the default, or raise a valid legal defense.

In adopting these new foreclosure requirements, the Legislature's explicit goal was to provide distressed homeowners with time and a fair opportunity (a necessary component of which is accurate information) to challenge the validity of an impending foreclosure sale before it occurs.

Moreover, as this Court recognized in Ibanez, the mortgagor is "entitled to know who is foreclosing and selling the property, the failure to identify the holder of the mortgage in the notice of sale may render the notice defective and the foreclosure sale void." Ibanez, 458 Mass. at 648. The same reasoning applies here: the borrower is entitled to know how to contact the mortgagee asserting the default, what that mortgagee claims is the default amount, and that the

mortgagee "may take steps to terminate" the borrower's ownership in the property if the borrower does not act within a specified time. G.L. c. 244, § 35A(c)(1)-(4) (Addendum at 4-5).

Like the notice of sale at issue in *Ibanez* (G.L. c. 244, § 14), the section 35A right to cure notice requirement is an unequivocal mandate giving borrowers explicit and important rights in the foreclosure process. It should be enforced strictly. Where the Legislature intended that only substantial compliance with a foreclosure-related statute be sufficient, it knew how to say so. E.g., G.L. c. 244, § 17B (governing post-foreclosure action by mortgagee to collect on a deficiency and requiring pre-foreclosure notice to borrower; stating, however, that such notice need only "substantially" follow statutory form).¹⁰

¹⁰ The Court in *Eaton* recognized the notice in G.L. c. 244, § 17B as a section "closely related to § 14." 462 Mass. at 582. Section 17B, by its very terms, allows for "substantial" compliance; thus 17B notices may rightly be reviewed according to this less rigid standard. However, section 35A contains no such qualifying language. Instead, it states unequivocally that a compliant notice shall include all the requisite information. The Legislature's omission of "substantial compliance" language should be given effect. Cf., e.g., Protective Life Ins. Co. v. Sullivan, 425 Mass. 615, 621 (1997) ("Legislature's omission of language in one statute, and inclusion of same language in other statutes, indicates that Legislature in fact intended to omit that language where it is absent," citing

(footnote continued)

It can hardly be disputed that failing to observe the right to cure period prior to advancing the foreclosure process or allowing attorneys' fees to accumulate would violate section 35A and void any subsequent foreclosure. See, e.g., Heath v. Seterus, Inc., U.S. Dist. Ct., No. 13-11176 (D. Mass. July 23, 2013). But, as discussed above, no less important is the accuracy and completeness of the information required in the 35A notice. Therefore, an inaccurate or incomplete notice does not "strictly comply" and is a violation of section 35A, thus rendering void a subsequent foreclosure.

II. In Order to Strictly Comply, a Section 35A Notice Must Correctly Identify the Mortgagee.

One piece of information required in the 35A notice is "the name and address of the mortgagee, or anyone holding thereunder." G.L. c. 244, § 35A(c)(4) (Addendum at 4). Though it may seem axiomatic, strict compliance with section 35A requires that this information be accurate at the time the notice is issued. Moreover, the term "mortgagee" has a specific meaning in the statutes governing foreclosure; namely,

(footnote continued)

Commonwealth v. LeBlanc, 407 Mass. 70, 75 (1990)); Hayes v. Retirement Bd. of Newton, 425 Mass. 468, 475-76 (1997) (similar).

the current holder of the mortgage. Ibanez, 458 Mass. at 648 (only "present holder" of a mortgage may foreclose).

A. "Mortgagee" in Section 35A Necessarily Means the Then-Current Holder of the Mortgage.

This Court has repeatedly held that the term "mortgagee" as used in Massachusetts foreclosure statutes means "the person or entity who has the present authority to foreclose on the security instrument at issue." HSBC Bank USA, N.A. v. Matt, 464 Mass. 193, 204 n.10 (2013) (emphasis added). That is, only "the person or entity then holding the mortgage and also either holding the mortgage note or acting on behalf of the note holder" may foreclose.¹¹ Eaton, 462 Mass. at 571. See also Wolcott v. Winchester, 15 Gray (81 Mass.) 461, 465 (1860) (defendant, purchaser of a mortgage without the note, "must have known that the possession of the debt was essential to an effective mortgage, and that without it he could not maintain an

¹¹ Though a "mortgagee" may also be the holder of the note, whether a section 35A notice that only identifies the noteholder as the "mortgagee" is sufficient is not before the Court, nor is the question of whether the "mortgagee" must also hold the note at the time the notice is sent. But section 35A seems directed to both entities: it restricts the mortgagee from "enforc[ing] the mortgage" absent compliance (§ 35A(b), Addendum at 4), yet the noteholder is the entity owed the debt and to whom the cure amount must ultimately be tendered.

action to foreclose the mortgage"); Howe v. Wilder, 11 Gray (77 Mass.) 267 (1858).

The only entity with legal authority to foreclose is the entity that currently holds the mortgage. As the Commonwealth is a "title theory" state, borrowers

relinquish legal title to their home to secure a debt (the mortgage loan) when they grant a mortgage. Ibanez, 456 Mass. at 649. And while the mortgage is an "interest in land" that may be conveyed (assigned), only the then-current mortgagee holds legal title in the subject property. Ibanez, 456 Mass. at 649.

Accordingly, only this mortgagee is entitled to foreclose under the power of sale. G.L. c. 183, § 21. Conversely, "[i]n the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged."

Ibanez, 456 Mass. at 653.¹²

¹² In Ibanez, the subject foreclosure sales were deemed void because the plaintiff banks "simply failed to prove" the existence of the underlying assignments of the mortgages before they "exercised the power of sale that accompanies those assignments." 456 Mass. at 656 (Cordy, J., concurring). Because the banks did not hold the mortgages, they had no authority to conduct the foreclosure sales; thus the sales were void - as if they had never occurred.

B. Use of the Term "Mortgagee" in Section 35A is Plain on Its Face and Must Be Read in a Manner Consistent with Related Statutes and Case Law.

The plain language of section 35A comports with this Court's interpretation of the term "mortgagee" in the opinions noted above. For a period of at least 90 days, section 35A explicitly prohibits the "mortgagee, or anyone holding thereunder" from foreclosing under the mortgage power of sale because of default. G.L. c. 244, § 35A(b) (Addendum at 4). Per Ibanez, only the current mortgage holder can "enforce" (foreclose under) the mortgage. Ibanez, 456 Mass. at 647. Further, the section 35A notice must inform the borrower that if the default is not cured, the mortgagee "may take steps to terminate the mortgagor's ownership in the property by a foreclosure proceeding." G.L. c. 244, § 35A(c) (3) (Addendum at 4). Because only the then-present holder of the mortgage "may take steps to terminate the mortgagor's ownership in the property," there can be little doubt that, for purposes of section 35A, the meaning of "mortgagee" is "the person or entity then holding the mortgage" (Eaton, 462 Mass. at 584) and who thereby is authorized to move forward with a foreclosure (Ibanez, 456 Mass. at 648-49).

Moreover, the term "mortgagee" in section 35A must

be interpreted consistently with that term's use throughout the foreclosure statutes and related decisional law. As the Court discussed at length in Eaton, "when similar words are used in different parts of a statute, the meaning is presumed to be the same throughout." 462 Mass. at 583 (citing Booma v. Bigelow-Sanford Carpet Co., 330 Mass. 79, 82 (1953)). Courts also "construe statutes that relate to the same subject matter as a harmonious whole." Eaton, 462 Mass. at 583 (cites omitted). Given "the presumption that the Legislature intends the same term to have the same meaning where it has used that term in different but related statutes" (Eaton, 462 Mass. at 585 n.23), the term "mortgagee" in section 35A must be understood to refer to the same "mortgagee" as that referenced in other foreclosure-related statutes (and as discussed in Eaton and Ibanez, among other cases).

Section 35A "cannot reasonably be read to allow a party to declare itself as the mortgagee, when it is not, and have that notice be effective against the mortgagor." Federal Nat'l Mtge. Ass'n v. Farrell, Quincy Dist. Ct., No. 12-SU-1352 (April 18, 2013) (reconsidered on other grounds). Thus, a section 35A notice that incorrectly identifies the mortgagee is

fatally flawed (see above n.8, listing numerous lower courts that have so concluded).

C. An Entity Does Not "Hold" the Mortgage or Under the Mortgage Merely By Virtue of Servicing the Mortgage Loan.

Because the "mortgagee" is the entity then holding the mortgage, simply naming the mortgage servicer (as distinct from the mortgagee or noteholder) cannot satisfy the 35A notice requirement that the "mortgagee, or anyone holding thereunder," be identified. Servicers plainly do not "hold" a mortgage simply by virtue of servicing the mortgage debt, nor do they hold "under" a mortgage absent a properly executed assignment, which is the method by which any subsequent entity may become a mortgagee.¹³ See Bravo-Buenrostro v. OneWest Bank, F.S.B., Suffolk Super. Ct., No. 11-03961, slip op. at 6 (May 31, 2012) ("[t]he most logical reading of Section 35A's 'anyone holding thereunder' is that the term refers to a current holder by virtue of an assignment from a prior mortgage holder.").

In addition, the applicable dictionary definition

¹³ The servicer of a mortgage has no legal or equitable interest in the mortgage loan or mortgage lien. Indeed, servicing rights and obligations are sold and transferred separate and apart from the mortgage. The mortgagee remains the same irrespective of such transfers; his interest can be conveyed only if the mortgage itself is assigned.

of "hold" is "to possess by a lawful title." Black's Law Dictionary 800 (9th ed. 2009). This is consistent with the statutes related to foreclosure which equate the "holder" of the mortgage with the mortgagee. See, e.g., G.L. c. 244, § 14 (form of foreclosure sale notice must be signed by "present holder of said mortgage").

In short, unless the mortgage servicer is also the holder of the mortgage, it cannot be the mortgagee. Any attempt to reinterpret the definition of mortgagee that ignores this fundamental requirement is contrary to well-settled law and, indeed, to common sense. A pure servicer "holds" neither the mortgage, nor the rights to the underlying debt and, as such, is not a party with any independent authority to enforce the mortgage.¹⁴

¹⁴ The Court's second question for amici asked whether a section 35A notice is statutorily deficient if it identifies a servicer and inaccurately identifies the mortgagee, as was the case here. For the reasons discussed herein, such a notice plainly fails to comply with the statute because the proper mortgagee was not identified. That is not to say anything precludes also identifying the servicer in the notice, even where the servicer is not the mortgagee. Indeed, the Division of Banks' 2012 regulation implementing section 35A (though not applicable to this case) authorizes servicers to issue 35A notices and be identified therein. 209 Code Mass. Regs. § 56.02. Identification of the servicer in the notice, however, in no way obviates the statutory requirement that the notice identify the then-current

(footnote continued)

D. The Legislature Considered and Rejected a Bill Allowing the 35A Notice to Identify the Mortgage Servicer as an Alternative to the Mortgagee.

In enacting the bill that was ultimately codified as section 35A, the Legislature specifically considered whether identification of the servicer could suffice in the 35A right to cure notice. The legislative history shows that first the House passed a bill requiring the notice to identify the name and address of the "mortgagee." 2007 House Doc. No. 4306 (Addendum at 21, 23). The bill was submitted to the Senate, where it was rewritten, and the new version allowed identification of either the "mortgagee or servicer" in the notice. See 2007 Senate Doc. No. 2382 (Addendum at 42, 45) (emphasis added). See also 2007 House Doc. No. 4387 (describing the Senate's replacement of House Bill 4306 with Senate Bill 2382) (Addendum at 31). The House declined to adopt the Senate's proposed amendments. 2007 House Doc. No. 4387 (Addendum at 31).

The competing bills were submitted to conference committee and the resulting bill, House Bill 4387, removed the option to identify the "servicer" in the

(footnote continued)
mortgagee, or anyone holding thereunder. § 35A(c) (4)
(Addendum at 4).

notice. 2007 House Doc. No. 4387 (Addendum at 34). It was this latter version - House Bill 4387, later codified as G.L. c. 244, § 35A - that was swiftly passed by the Legislature and signed into law. St. 2007, c. 206, § 11 (Addendum at 1, 4-5, 15). Thus, the Legislature specifically considered and ultimately rejected the possibility of alternatively naming the servicer in the section 35A notice.

A court "will not add words to a statute that the Legislature did not put there, either by inadvertent omission or by design[.]" Commonwealth v. McLeod, 437 Mass. 286, 294 (2002). See also Duracraft Corp. v. Holmes Prods. Corp., 427 Mass. 156, 164 (1998) ("it is inappropriate for a judge to reinsert the rejected condition"); Dartt v. Browning-Ferris Indus., 427 Mass. 1, 8 (1998) ("we will not add to a statute a word that the Legislature had the option to, but chose not to, include"). Here it is clear that the Legislature rejected including "servicer" as an alternative to "mortgagee" in the final law. Accordingly, there is little doubt that listing the "servicer" as the mortgagee was not what the Legislature intended and does not satisfy section 35A.

III. By Incorrectly Identifying the "Mortgagee" in the 35A Notice, U.S. Bank Failed to Strictly Comply with Section 35A, Rendering the Notice Defective and the Foreclosure Void.

Here, U.S. Bank issued a purported 35A notice on November 16, 2008. This notice identified U.S. Bank as the "mortgagee" (App. 82) when in fact the mortgagee at that time was MERS (App. 20). MERS did not assign the mortgage to U.S. Bank until March 10, 2009, approximately four months later. App. 20. U.S. Bank was not the holder of the mortgage when the notice was issued. Thus, to identify it therein as the "mortgagee" was plainly incorrect, rendering the notice defective. At the time the section 35A notice issued, U.S. Bank had no authority to initiate or advance foreclosure proceedings, or otherwise to "take steps to terminate the mortgagor's ownership in the property." See G.L. c. 244, § 35A(c)(3) (Addendum at 4). Indeed, at that point in time, there is no evidence U.S. Bank had any rights whatsoever vis-à-vis the subject mortgage.

By failing to issue a valid section 35A notice, U.S. Bank did not strictly comply with the statutory power of sale in the mortgage or under Massachusetts foreclosure law. The bank thus had no authority to initiate or advance any step in the foreclosure process (including publishing the notice of sale and conducting

the foreclosure auction). See G.L. c. 183, § 21; G.L. c. 244, § 14. Because U.S. Bank had no authority to conduct the foreclosure sale, the sale is void and a legal nullity.

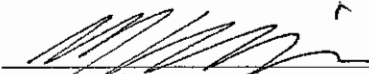
CONCLUSION

For the foregoing reasons, the Court should hold that (i) section 35A is a statute "relating to the foreclosure of mortgages by the exercise of a power of sale" and thus requires strict compliance; (ii) "strict compliance" with section 35A requires that the 35A notice correctly list the mortgagee (the holder of the mortgage) as of the date the notice is issued; and (iii) a failure to correctly list the mortgagee on the 35A notice renders void any subsequent foreclosure. Applying these principles, the Court should reverse the judgment of the Housing Court and order judgment for possession to the borrower, Mr. Schumacher.

Respectfully submitted,

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