

Law of the Land

## Impending SJC Ibanez, Title Ruling May Invalidate Thousands Of Foreclosures

### Why Real Estate Attorneys Expect The Worst, And What It Means To The Industry

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Framingham real estate attorney Richard Vetstein recently represented a family who had bought a house out of foreclosure about a year ago, then invested in excess of \$100,000 in improvements to the property with the intention of selling it to their daughter. But before they could complete the sale, a title issue came up and put the transaction on hold.

The glitch was the downstream result of a controversial land court decision in the U.S. Bank v. Ibanez foreclosure case, which will soon be heard by the Massachusetts Supreme Judicial Court. The land court ruled that the foreclosure of the Ibanez property was invalid because U.S. Bank did not have assignment at the time of the foreclosure.

Many hundreds, if not thousands, of foreclosed property titles could be similarly invalid all across Massachusetts. Now, attorneys are bracing for a worst case scenario in which a retroactive application of the case's decision could further depress sales of foreclosed properties and tighten an already tight title insurance market.

In Vetstein's client's case, when the original owner was foreclosed upon, the mortgage company did not have a properly recorded assignment. To clear the title, Vetstein had to track



Richard Vetstein

down the original owner in Alabama, and persuade him to sign over the deed to the property.

“They can close now that the title issue is solved, but in a lot of cases that [is] not going to be able to be solved,” said Vetstein. “We were lucky, that’s what it came down to.”

Vetstein, who has blogged on the Ibanez case at length, thinks the court might uphold the Ibanez decision.

### **Retroactive Decision ‘Troubling’**

Prior to the Ibanez decision, many lenders had gotten into the habit of not recording mortgage assignments in a timely manner, or only recording them after a foreclosure, to clean up the title. In the overheated mortgage market of the last few years, mortgages were routinely passed from lender to lender and many buyers were foreclosed upon for unpaid mortgages by lenders that didn’t have assignment at the time of foreclosure.

“On foreclosures that have already been completed, if this decision is or has already been taken at face value, this is a huge problem,” says Laurel Siegel, a Boston real estate attorney and co-chair of the Massachusetts Bar Association’s real estate section. “It’s the retroactive part that’s so troubling. Are we going to bankrupt the title companies?”

Many attorneys share Siegel’s fears. If Ibanez is applied retroactively, then sales of properties that were foreclosed upon and sold and perhaps even sold again could be ruled invalid.

Owners would then have to head to already-clogged land courts to try and clear the title. In some cases, the foreclosure process may even have to start all over again. This would be a disastrous turn for title insurers, who would be stuck with the bill for all the lawyering involved in settling title.

According to Beth Barton, Siegel’s co-chair on the MBA’s real estate section and counsel for regional title insurer CATIC, no title insurers will currently write a policy on properties with a potential title issue. Sales of foreclosed properties are “stopped.”

In cases where sales of foreclosed or formerly foreclosed properties are taking place, Barton says that insurers have had to provide letters of indemnification so the closing can take place.

“It has slowed and frustrated the foreclosure market,” she said. “There’s no way in which it hasn’t.”

### **Pro-Consumer?**



Beth Barton



Laura Siegel

Barton hopes the SJC will rule to have Ibanez applied prospectively. She reasons that mortgage companies are likely to more closely follow the letter of the law. Clearer titles will, of course, make things easier on the title company and remove their liability on older policies where there may be a hitherto unknown Ibanez-style title issue.

Siegel also thinks that a prospective judgment would be best.

“Lenders are now on notice that they need to record their assignments promptly and should be able to comply with this requirement,” she said.

Frank Reynolds, a Lexington real estate attorney with more than 40 years’ experience, said he thinks it’s too early to predict which way the SJC will rule.



Ward P. Graham

“I can’t tell you how it’s going to be decided, but there is an awful lot of equity and public policy involved,” Reynolds said. “The appeal itself is like a little phone book. You could have a short career just becoming an expert on this case.”

It’s widely expected that those representing the lenders will argue for dismissal of the Ibanez verdict or at least for a prospective application of the verdict, and to challenge the factual or legal conclusions arrived at by the land court.

“What they are trying to do is get the courts to recognize that these were [foreclosure] procedures that weren’t challenged prior [to this case],” said Ward P. Graham, a longtime title attorney. The Ibanez decision, he added, “is a radical shift in the application of [Massachusetts General Law 244-14].” For that reason, Graham also thinks that it would make sense for the SJC to apply the decision prospectively.

“Given the current constitution of the court and their tendencies of recent years to be kind of moving towards some pro-consumer decisions, I wouldn’t be surprised if they upheld the land court probably by a slim margin,” Vetstein said. “And so for people who are stuck with an Ibanez issue, that is in essence the worst-case scenario.”

Indeed, it’s unlikely that a “pro-consumer” verdict upholding the Ibanez decision would actually help consumers on the whole. Homebuyers or investors who thought they had gotten a good deal and a clean title on a foreclosed property will instead be saddled with hefty legal bills and an inability to sell their property.

The title issues raised by Ibanez can be solved through a quiet title action, getting an original owner to sign over the deed to the property, as Vetstein did for his clients, and re-doing the foreclosure. All of these procedures are time consuming and unreliable.

### **Clever Maneuvering**

Graham thinks that in the worst-case scenario, if the Ibanez decision is upheld and all foreclosures with an improper assignment are invalidated, there may be one other recourse for perfecting title.

“Most if not all 244-14 Ibanez issued cases may have the benefit of foreclosure by entry,” reasoned Graham.

Whatever procedures for perfecting titles clever attorneys may devise, it seems that few would welcome a flood of new business related to the Ibanez decision.

According to Barton, CATIC is not hiring any new attorneys in anticipation of a raft of Ibanez issues, though they are not laying off anyone. At other insurers, the prospect of Ibanez work has not stemmed the tide of recent layoffs.

“I don’t know of any real estate attorney using Ibanez as a business development opportunity, mainly because solving these title defects, if at all, is incredibly difficult and in some cases impossible,” Vetstein said. “It’s a ‘lose-lose’ in many situations.”

One aspect of the case could potentially provide plenty of work for attorneys. Should the SJC uphold the Ibanez decision, Vetstein reasons that there will be many claims against the foreclosing lenders and the foreclosure attorney, for failing to convey good title.

“There will also be claims for rescission of these transactions,” he added. “There is a class action against lenders and foreclosing attorneys which could encompass many millions in potential damages.”

Barton thinks lenders have and will likely see the worst of it.

“Some of the law firms that represent lenders have had quite a bad season,” she said.