



# Real Estate Chaos Averted

## SJC Strikes a Balance in Eaton Case

**O**n June 22, 2012, the Massachusetts Supreme Judicial Court (SJC) issued a decision in the case of Eaton v. Federal National Mortgage Association, resolving a number of inconsistent decisions among Massachusetts Superior courts, the Land Court and U.S. District Court on the issue of whether there must be “unity” of the note and mortgage for a mortgagee to be entitled to foreclose on a defaulted borrower.

Said differently, must a party hold both the note and the mortgage before it can foreclose on a homeowner? Some courts have said yes, others no. The issue is now resolved.

Henrietta Eaton was the owner of a property in Roslindale, Mass. Eaton originally gave a mortgage to Mortgage Electronic Registration Systems, Inc. (“MERS”). Sometime thereafter, MERS assigned the mortgage to Green Tree Servicing, LLC. The assignment did not reference an assignment of the note evidencing the loan made by BankUnited to Eaton. After defaulting on her payments, Green Tree foreclosed on the mortgage. Green Tree then assigned its rights as high bidder to Federal National Mortgage Association (“FNMA”) and FNMA became record owner of the property. FNMA then filed an action to evict Eaton.

Eaton hired counsel to challenge her eviction and filed action in Suffolk Superior Court to obtain an injunction against FNMA to prevent her eviction. Through the Superior Court action, Eaton also sought to invalidate the foreclosure sale. Eaton’s primary argument was Green Tree was not the holder of the note when

it foreclosed, thus rendering it unauthorized to conduct it. If Eaton were correct, the sale would be invalid and Green Tree would have to acquire the note from the current holder and foreclose a second time.

The stakes were extremely high. The negative implications of a unity requirement would call into question nearly every foreclosure sale conducted in the recent past and beyond.

The SJC ruled that unity of the note and mortgage is required as a prerequisite to foreclosure. The Court interpreted the term “mortgagee” as “the person or entity then holding the mortgage and also either holding the mortgage note or acting on behalf of the note holder.” As a result, in order for a party to foreclose on a homeowner, that party must be the holder of the mortgage (the lien on the property) as well as the holder of the note (the instrument which evidences the debt incurred by the borrower to obtain the property).


The court struck a balance with its decision in two ways. Firstly, the decision is prospective. Thus, any foreclosure previously done cannot be challenged as not complying with the unity mandate of Eaton. The Eaton decision will only be a requirement for foreclosures conducted after the decision. Secondly — and more importantly — the decision provides that the foreclosing party may “act on the behalf of the note holder.” If a foreclosing mortgagee does not have physical possession of the note, it can obtain an affidavit or other documentation from the holder of the note stating that the party holding the mortgage is authorized to foreclose on behalf

of the note holder, making the logistics of foreclosure far easier for mortgagees.

Arguably, issuing a prospective decision was beneficial to the entire real estate industry, including consumers, as there is now certainty in the legal viability of the tens of thousands of foreclosures in the recent economic downturn.

### Mortgagee Can Act on Behalf of Note Holder

The second and more important balance striking accomplished by the SJC was the language of the decision allowing for a mortgagee to be “acting on behalf of the note holder” as an alternative to actual physical possession of the note. Since mortgages were bought and sold by banks to other banks or financial institutions, often without proper assignments, notes often stayed with the original lender or had an unclear chain of title. While this issue was in part the result of oversight and the need to quickly turn new mortgages into securities, lenders also based their practice on their good faith belief that Massachusetts law did not require a mortgagee to hold the note in order to foreclose.

The worst-case scenario of a retroactive decision strictly requiring actual physical possession of the note by the mortgage holder would have had profound effects on the real estate market in Massachusetts. Perhaps most importantly, the world of real estate has not been thrown into chaos and disorder. 

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