

BULLETIN

Old Republic National Title Insurance Company

TO: ALL MA AGENTS

DATE: 4-10-09

RE: Court says assignments must be dated prior to commencement of foreclosure

In recent days, the Land Court has decided several cases which significantly alter current foreclosure procedure. Specifically, the Court has called into question the practice of recording post-dated assignments subsequent to foreclosure in order to vest the foreclosing mortgagee with title. Until recently, foreclosing mortgagees who did not have title at the time of the foreclosure auction could correct this defect by recording an assignment which had an "effective date" prior to the date of the auction, preferably prior to the date of the order of notice under the Servicemembers Civil Relief Act. This practice, suggested in the Bankruptcy case of In Re Schwartz, 366 B.R. 265, was promulgated by REBA in its amendment of Title Standard No. 58.

However, in three recent cases, two separate Land Court judges have implicitly rejected Title Standard No. 58 and held that after-recorded assignments are not acceptable. In those cases, Judge Long and subsequently Judge Scheier voided foreclosure sales where the foreclosing mortgagee was not the actual holder of the mortgage at the time of its foreclosure in contravention of MGL c. 244, § 14. In U.S. Bank National Association v. Ibanez, Misc. Case No. 384283, LaSalle Bank National Association v. Rosario, Misc. Case No. 386018, and Wells Fargo Bank v. Larace, Misc. Case No. 386755, Judge Long voided two of the foreclosures because assignments were neither recorded nor even in existence prior to the commencement of the foreclosure. In Federal National Mortgage Association v. Alas, Misc. Case No. 384854, Judge Scheier similarly voided a foreclosure sale where the assignment was recorded after the foreclosure sale even though the assignment recited that it was effective prior to the foreclosure.

Consequent to the foregoing, Old Republic will no longer insure titles devolving through a foreclosure unless the mortgagee can demonstrate of record that it was the holder of the mortgage at the time of the commencement of the foreclosure. Therefore, if the mortgagee is relying on an assignment for its title, that assignment must be dated and acknowledged prior to the beginning of the foreclosure process. Assignments which are dated and acknowledged prior to start of the foreclosure may be recorded with the foreclosure documents, however, preferred practice would be to record same prior to the foreclosure auction.

We will continue to monitor developments regarding these cases and the issues they present. We will revise our underwriting guidelines as appropriate.

As always, if you have any questions, please contact the Underwriting Department at 800-370-6466.