

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

NO. SJC-11101

HSBC BANK USA, N.A. & ACE SECURITIES CORP.
HOME EQUITY LOAN TRUST SERIES 2005-HE4

Plaintiff-Appellee,

v.

JODI B. MATT

Defendant-Appellant,

ON APPEAL FROM AN ORDER OF FINAL
JUDGMENT FROM THE LAND COURT

AMICUS CURIAE OF GRACE C. ROSS

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II. STATEMENT OF INTEREST OF AMICUS CURIAE

Your amicus in this matter is filing a brief as a friend of the court.

Your pro se amicus is the Coordinator of the Mass Alliance Against Predatory Lending and as part of her responsibilities leads the team of advocates on behalf of homeowners across Massachusetts in state and municipal policy assessment and development to address and reverse the ongoing foreclosure crisis. Your amicus is also responsible for coordination and providing a clearinghouse for legal developments and rulings in the Massachusetts and federal courts on matters relating to foreclosures in Massachusetts. Your amicus brings over 25 years of policy analysis and development at the municipal, state, federal and international levels of government including in the area of housing and advocacy in Massachusetts District and Housing Courts on housing cases.

Your amicus believes this brief is desirable because of its reflection of your amicus' unique position straddling the ongoing legislative changes and discussions in the Massachusetts legislature and tracking of foreclosure settlements with the largest banks and legal arguments as they develop. This brief therefore the intersection of legislative history and to a more limited extent legal precedent in relation to standing in foreclosure matters in the Commonwealth as well as addresses the changes to Massachusetts' foreclosure

statutes that directly impact the basis of the matter before you now. This brief therefore addresses a prior fundamental argument as to the issue of standing in Land Court.

As a long time policy analyst advocate around housing issues and a former tenant who was directly impacted by a foreclosure your amicus has an interest in the instant action and therefore your amicus respectfully submits this brief for your review in this matter.

III. STATEMENT OF THE ISSUES

This brief explores the issue of standing in the Land Court proceedings having to do with the active military service determination. While the court sought briefs on clarification of issues of securitized trusts holding mortgages, this brief addressed the prior issue of standing for a Plaintiff not the present mortgagee and the possibility of real harm to the interest of a future assignee. It also addresses interpretation of the role of the Land Court raised in Matt and the ramifications of changing the normal requirements of full standing to bring action in the Land Court in comparison to the ramifications of a lesser standing requirement in Land Court. It addresses specific statutory changes to the legislatively defined role of Land Court in the foreclosure process, the purpose of the military service members hearing itself, and seeks to clarify the role of Land Court historically as

opposed to since the 2007 statutory definition of the role of the Land Court in the foreclosure process itself.

IV. ARGUMENT

This Honorable Court has solicited amicus briefs on whether the Land Court Judge correctly concluded that a bank had standing to commence an action to determine whether the defendant (alleged to be in breach of her mortgage obligations) was entitled to the benefits of the Servicemembers Civil Relief Act on the ground that the bank had a contractual right to become the holder of the note and mortgage.

The answer must be no because (1) standing must be determined prior to the determination of the outcome of the case and therefore cannot be defined so as to allow the Plaintiff to be unable to fulfill all of the possible orders that flow from the statutory purpose of the proceeding; (2) a Plaintiff cannot have standing based on a potential future interest that can not be shown to be able to be harmed by the outcome as a matter of law; (3) the purpose of Land Court has been statutorily redefined to be part of the foreclosure process thereby the *Beaton vs. Land Court*, (367 Mass. 385) ruling on which the decision in the instant matter was based is superceded and plaintiff must be mortgagee at time of Land Court filing.

A) RE-STATEMENT OF DECISION ON LESSER STANDING REQUIREMENT

The HSBC v. Matt essentially revolves around the issue of standing – standing that needs to be determined before a case is even tried and the outcome of a case is known. Therefore, standing in a Land Court proceeding under Servicemembers Civil Relief Act needs to be defined in the vacuum of knowledge of whether the defendant will be adjudicated to be in active military service or not.

It further revolves around the question of whether there could be a lesser standing than the requirement that the party bringing the action have the power to foreclose. The argument made in the Matt ruling and the attached cases is that it is possible to be a party that does not have the power to foreclose, that a lower standard might be provided for the plaintiff bringing an Servicemembers Civil Relief Act action in Land Court.

Depending heavily on *Beaton vs. Land Court*, 367 Mass. 385, the Honorable Judge Long's ruling may be summarized as follows: first, that the active military service proceeding is a separate and parallel process to the foreclosure process itself; second, as such, that the primary purpose of the Land Court proceeding is to identify if there might be a cloud on the future title post-foreclosure should there be an active military service claim available to somebody that was not properly identified prior to the foreclosure; third, therefore, that as this is primary function of land court and the primary harm to be averted, standing that protects anyone who might experience such

harm is sufficient to be a valid moving party in a hearing to determine active military status; fourth, that this lesser interest might be in fact a future interest in the ownership of the mortgage and/or note prior to the foreclosure; that possible future interest needing to exist in time to exercise and benefit from the foreclosure itself; fifth, that the harm to that future holding could be in the form of a diminishment of the ability to foreclose and/or a lesser value in the property by the time of the foreclosure.

V. STANDING MUST BE APPROPRIATE FOR ALL EVENTUAL RULINGS

Standing in court is determined before the case is heard. As such the requirements for standing in a particular case cannot be dependent on what the outcome in that particular case is going to be. Standing inherently has to be defined to meet whatever the requirements of a judgment will be given that the judgment is yet undecided.

As such, for Land Court, standing has to be defined such that it is robust enough to meet the standards necessary for a determination by the court that the defendant *is in active military service* even if in the majority of cases that will not be the outcome of the decision of the court.

One formulation of requirements for standing:

- **Injury:** The plaintiff must have suffered or imminently will suffer injury—an invasion of a legally protected interest that is concrete and particularized. The

injury must be actual or imminent, distinct and palpable, not abstract. This injury could be economic as well as non-economic.

- **Causation:** There must be a causal connection between the injury and the conduct complained of, so that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party who is not before the court.

- **Redressability:** It must be likely, as opposed to merely speculative, that a favorable court decision will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555

A) PURPOSE OF LAND COURT HEARING REQUIRES PLAINTIFF'S ABILITY TO FORECLOSE OR HALT FORELCOSURE IF DEFENDANT IN ACTIVE MILITARY SERVICE

In the Land Court rulings bundled together under *HSBC v. Matt*, the Honorable Judge Long has in his decisions made a rather extraordinary argument that the primary purpose of Land court hearings is to protect the interest of possible future owners of a piece of property from future claims by a present active military service member that could underlie future litigation.

Functionally and point of fact, the primary purpose of the Land Court process is to protect the interest of active military service members from having their homes seized while they are serving and risking their lives on behalf of the people of the United States. The Land Court process itself is an expression of the seriousness with which such

an action is taken given that a relatively small number of present homeowners are going to be in active military service; the state has found it in its interest to require every entity that might foreclose in the near future upon a resident of Massachusetts to ensure that that resident is not an active military service member.

Honorable Judge Long bases his position on who has a right to bring an active military service case in Land Court premised on an assumption that the lowered bar for proving your standing in such hearings is valid *because somebody is not presently in active military service*, thereby presupposing that the primary purpose of Land Court proceedings is actually not that defined in the enabling statute.

In that case, Land Court's function would be to identify the present mortgagor as the defendant but potentially preclude their ability to access the relief for which the statute and this proceeding were created.

If someone is in active military service, they receive a notice from Land Court to check their status. The purpose of that check is for them to be able to say yes indeed they are in the military and bring that status to the notice of the court and to thereby protect their interest against an entity that has the power to take their home.

Why put into law a complicated and resource intensive process of checking every potential foreclosure for the active military status of the foreclosee if it's primary

purpose is not in fact to protect their rights in the potentially soon-to-occur foreclosure?

The primary function for instance of the seat belt law is so that if you get into a car accident you don't get killed as easily. The primary functional impact of the seat belt law with the millions of times that people follow it is to make people feel a little more constrained when they're driving their car. However, we as a society have not relaxed the tightness of the seat belt requirements because primarily it's uncomfortable to be constrained by the seat belt. To do so, would defeat the primary purpose of a seat belt which is to protect you should a serious accident happen.

Similarly, just because functionally there are not many folks in military service these days and therefore the active military service process in Land Court does not actually turn up very many active military service members does not change the primary purpose of the hearing.

If we loosen the seat belt so that it no longer serves its primary purpose then there's no point in having seat belt requirements or for anybody to use them. Similarly if we loosen the requirements for standing so that if a military service member is identified through the process, the useful information that they need and the useful action of the court – to halt the foreclosure action temporarily based on their status – is completely undermined.

If that its primary purpose is as stated in the statute, it's critically important that the present mortgagor know who has the power to foreclose on them – the present mortgagee. Otherwise, once notified of their ability to exercise their rights to protect their ownership in the home, their action on those rights would be hamstrung by not yet having identified for them who is the opposing party planning to potentially claim their home. The Land Court proceeding would have notified them of a right that they now lack proper information to protect.

Fundamental to the black letter law of our entire legal system and common law itself is the right to know who is the party that is moving against you so that you have the potential to bring defenses to protect yourself against the properly moving party. In fact, it's fundamental to the definition of a defendant in a case such is this that they have the right to know who the plaintiff is with power to take action to honor those rights.

To lower the bar on the standing of who can bring an active military service claim so as not require inclusion of the party with power at that time to postpone the foreclosure as required by statute makes the impact of a ruling preclude its usefulness to a so identified active military service member. The function of the proceeding becomes no longer to identify who's in active military service but solely to protect the rights of future investors in a piece of property themselves.

It is specifically and only in a universe where the assumption that the defendants will not be in active military service, that lowering the bar in this way would make sense.

B) PURPOSE OF LAND COURT IS FIRST TO IDENTIFY ACTIVE MILITARY SERVICE MEMBERS AND PROVIDE THEM INFORMATION TO ACCESS LEGAL PROTECTIONS CONSISTENT WITH BEATON RULING

The Land court decision in Reynolds herewith included in this Honorable Court's deliberations perhaps most clearly lays out the Honorable Judge Long's logic. This decision states based upon the *Beaton* ruling that a "duly recorded judgment from such an action, (that is the active military service action), serves only to show subsequent purchasers that a title derived from a foreclosure sale is not defective for failure to give the protections of the act any person entitled thereto, and this function can also be accomplished through a post foreclosure quiet title action."

In contrast, *Beaton* states more specifically: "Statute 1943, C. 57, as amended, simply establishes procedures whereby mortgagees, in addition to taking all steps necessary to foreclose, can make certain that there will be no cloud on the title following the foreclosure as a result of an interested party having been in, or just released from, military service..." The *Beaton* decision was also made in the context of a case being brought by a party not in military service asking to raise numerous other challenges.

The Reynolds' restatement is not an accurate restatement of the purpose of the active military service action in Land Court as defined in *Beaton*. As *Beaton* says: "so long as the 1940 Relief Act continues in effect, the Commonwealth is not at liberty to eliminate pre-foreclosure proceedings to ascertain whether interested parties are in, or have just been released from, the service." The purpose for which the Land Court proceeding was created is to give notice to every mortgagor in the state that if they are on active military service duty that they have further state protections against a foreclosure action. That's the Land Court hearing's primary function, as *Beaton* concurs, otherwise the proceeding would not even exist.

The secondary function is if it turns out that the defendant is not in active military service and therefore would not have had the right to challenge a mortgage foreclosure because they lack standing. In that case, the Land Court information is recorded to the benefit of future purchasers who then do not have to worry about a violation of the active military service statute in a foreclosure proceeding. To state that it's "only service" is to protect subsequent purchasers, is to completely vitiate the primary reason it exists in law at all.

In J.P. Morgan Chase attached herewith, Honorable Judge Long argued that a service member's action is not a proceeding to judge the validity of foreclosure sale pursuant to the requirements of MGL c. 244, § 14; he

reasons therefore the entity that can bring an action under active military service requirements could be those who have a less controlling interest than would be required to bring a foreclosure sale. Yet if that active military service member status is affirmed, the defendant would be confronted by a plaintiff who although they have the active military service is identified would then not have the powers required in the statute to provide the service member the opportunity to access a temporary halt to the foreclosure preceding. The very purpose of the Act is to provide for somebody an extra layer of protection who is not present to defend their own rights because they are fulfilling a service deemed socially necessary.

Is the court trying to argue that standing - which has to be determined prior to the decision of the court - should not provide what is required for every possible outcome of the case? Should the court decide that somebody has the right to protections under the Active Military Service Act (in a non judicial state where to halt a foreclosure somebody would have to be present and bring a case in Superior Court) Honorable Judge Long stated that Land Court does not serve the function of providing venues for those who are not in a position to proactively take action in another venue? Or a party with lesser level of interest in a mortgage - even a hypothetical future interest in a mortgage - could bring an action where the borrower is ruled an active military service member and

have neither the service member have the access to Superior Court to halt the foreclosure nor have the party that has the power to bring the foreclosure actually know that the Land Court has made such a decision?

VI. VALUE IN LAND IS DETERMINED AT TIME OF TRANSFER OF INTEREST; FUTURE OWNER PAYS REAL VALUE AT TIME OF TRANSFER CANNOT BE HARMED BY LOSS PRIOR TO OWNERSHIP. NOR DOES A DELAY IN TIME TO FORECLOSE CONSTITUTE ANY FORM OF TAKING OR FINANCIAL HARM. POTENTIAL FUTURE ASSIGNEE CAN NOT HAVE STANDING SINCE NO CLEARCUT HARM CAN PROCEED FROM LAND COURT RULING

The Honorable Judge Long has argued that because HSBC as a debt collector or servicer for a future potential creditor is concerned with their future fiduciary or monetary interest this is sufficient for standing, while the proper identification of the creditor for someone in active military service who is a homeowner with an emotional investment, a familial history in a household or home as well as a monetary investment does not require that the moving party to have sufficient standing to provide the statutorily required remedy should the court rule in their favor.

The argument that a future mortgage assignee have standing because they *might be* a debt collector for a future creditor and they have an interest because the value of what they *might have* would decrease if there is a valid challenge to foreclosure because of active military status seems not to consider the fact that the transfer of title is valid only at the time when it happens.

Whatever part of the title is transferred – whether it's access to the responsibilities and rights of title as mortgagee or rights of title as the mortgage holder, at the time of the Land Court hearing, those rights were not in existence yet on behalf of the creditor and HSBC's interest once removed as the debt collector or servicer in this case had not been effectuated yet.

"Nor may a post-foreclosure assignment be treated as a pre-foreclosure assignment simply by declaring an "effective date" that precedes the notice of sale and foreclosure,.... Because an assignment of a mortgage is a transfer of legal title, it becomes effective with respect to the power of sale only on the transfer; it cannot become effective before the transfer. See *In re Schwartz, supra* at 269." *USBank v Ibanez*, 458 Mass. 637, 654 (2011)

By statute, a transfer of title or interest in land such as an assignment as ruled in *Ibanez*, it has to be for consideration and that consideration is the value at the time when the title is transferred. *U.S. Bank National Association v. Ibanez*, 458 Mass. 637, 649 (2011): "Like a sale of land itself, the assignment of a mortgage is a conveyance of an interest in land that requires a writing signed by the grantor. See MGL. c. 183, § 3; *Saint Patrick's Religious, Educ. & Charitable Ass'n v. Hale*, 227 Mass. 175, 177 (1917).

In a "title theory state" like Massachusetts, a mortgage is a transfer of legal title in a property to secure a debt. See *Faneuil Investors Group, Ltd. Partnership v. Selectmen of Dennis*, 458 Mass. 1, 6 (2010).

According to MGL. c.183, § 6. "Every deed presented for record shall contain ...a recital of the amount of the full consideration thereof in dollars or the nature of the other consideration therefor".

If the value in the property has decreased because active military service has been established for the defendant/borrower/mortgagor/debtor, then the value of what would be transferred *based on the value at the time of the transfer of the actual title* would simply be less. Therefore, HSBC on behalf of the Trust – the creditors themselves – would simply pay less for the value of the mortgage which can no longer be foreclosed on at the value that was expected prior to the Land Court ruling and previous to the time of the actual transfer in ownership.

The interest does not exist now and when the interest will be established it will be established based on a value that may have been lessened because the mortgagor is covered by Active Military Service. They are not, in fact, losing any value that they would ever actually possess because the possession hasn't happened yet. That future value might be different than it is today, but it does not

lessen the value of what they would get for what they would pay for it. The purpose of the Land Court hearing is not to appraise the value of a property that a future party might choose to acquire prior to the foreclosure.

In the Land Court ruling, the other loss in value of this potentially future asset to the creditors – the trust investors which HSBC asserts if has a fiduciary responsibility to protect as the debt collector or servicer – is argued to be the possible impact on the ability to conduct a foreclosure sale. In fact, the relief under Active Military Service is a temporarily relief and the ability to foreclose remains.

The only possible impact would be the time period in which that capacity to foreclose might be conducted. A delay in a foreclosure proceeding is not, in fact, a violation of either a mortgage contract (which does not guarantee a certain date by which a foreclosure would have to be effectuated to collect the debt), nor does it represent any measurable taking in the value of the property.

That issue of a delay in sale because of a legislatively recognized social good such as the protection of active military service members was adjudicated by the US. Supreme Court regarding a moratorium on foreclosures sales in general as a matter of legislation. In *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230 (1945), the US Supreme Court upheld a ten year moratorium on all foreclosure sales

during the Great Depression; the decision was that delaying a foreclosure sale for 10 years did not in any way constitute an illegal taking from a mortgage holder who could not foreclose because the legislature had identified the protection of a clear public interest.

Their right to a future ownership of the debt is not somehow depreciated by a ruling that a mortgagor is in active military service which merely gives a temporary delay to the foreclosure proceeding. The reasonable expectation of value by the investor is not clear. Right now property values are falling but if the delay is long enough property values may be rising.

Therefore, neither the delay that would be created by Active Military Service determination would constitute an injury to the party that might pick up this loan, nor would the value of the loan being changed matter because they would get it for due consideration at the time when the title interest was actually transferred.

As there is no proof of any type of guaranteed future harm at all, neither the potential interest of the investors in the Trust, let alone HSBC's potential fiduciary interest, is sufficient to meet the requirement of any type of standing.

VII. RECENT STATUTE REDEFINED LAND COURT AS A PROCEEDING IN FORECLOSURE. THE LESSER STANDING CONCEPT BASED ON THE PROCEEDING BEING PARALELL BUT A NON-FORECLOSURE PROCEEDING IS THEREFORE PRECLUDED.

All understanding of the purpose of any law and its enforcement must flow from the purpose of the enactment of

that law in the first place. Any future amendments to that law made with the consciousness and perspective of the sitting body of legislators and the Executive Branch which signs off on that law or amendment defines the purpose of that law and its enforcement, thereby superseding previous interpretive judgments and precedents set.

For instance, if a law is enacted with a particular statute of limitations or particular limit on damages and a body of law develops based on that legislation, if there's then further legislation later on in our life as a civic society, that changes the statute of limitations – for instance lengthens it – and similarly changes the cap on any damages that might be provided in a legal case, that change in the law would supersede and nullify any body of legal interpretive precedence on those two counts. One need only look at the decision by the legislatures across the country to extend the statute of limitations on sexual abuse of children – recognizing the impact of loss memories that are later recovered – as an obvious and egregious example of that.

While the *Beaton* ruling and subsequent understanding of the role of the Servicemembers Civil Relief Act proceeding in Land Court has been grounded in the idea that it is not a direct component part, a building block of the final case for foreclosure, legislation has since redefined that role.

Since the *Beaton* decision, new legislation defined with specificity the role of these Land Court proceedings as part of the overall foreclosure process in the Commonwealth. Specifically in response to a growing foreclosure crisis in our state, the legislature – understanding that the practice of mortgaging and foreclosures had changed radically during the first decade of this century, chose in 2007 to enact a change to Massachusetts law creating a Right to Cure period, MGL c. 244, § 35a; this legal change became effective in May 2008.

This legislation explicitly identified the need for a time period during which lenders would be strongly encouraged to modify loans rather than foreclosing upon mortgagors. This Right to Cure statute included within it a long list of changes to the then standard language for a default letter in the beginning stages of a potential foreclosure in the Commonwealth. The legislation requires default letters to state explicitly the possibility of foreclosure as a resolution to the situation.

In that legislation, the legislators explicitly stated that: the Right to Cure period, the requirements of that period, at its completion were to be enforced through a mortgagee affidavit to be *filed in the court proceedings of the process of foreclosure itself.*

“A copy of the notice required by this section and an affidavit demonstrating compliance with this section shall be filed by the mortgagee, or anyone holding thereunder, in

any action or proceeding to foreclosure on such residential real property." MGL c. 244, § 35A, (e).

That explicit language identified, in fact, the *only* court proceeding that happens before foreclosure in Massachusetts (as a non-judicial foreclosure state) in all foreclosures. There is in fact only one court venue in which a future foreclosing lender must act. That is in Land Court. Not only was this language passed into law by the General Court of our Commonwealth, it was duly signed by the Executive Branch and similarly interpreted by the Land Court itself; *they concurred through action and guidelines that the court "proceeding to foreclosure" properly referred to Land Court.*

In this particular time period in this extraordinary society-wide situation – where the mortgaging process and the foreclosure process itself has been stretched – and some would argue twisted – in ways completely unforeseen by previous generations, the three branches of government – the Legislative Branch, the Executive Branch and the Judicial Branch of our state, came together in a unity of understanding of the court "proceeding to foreclosure" as the Massachusetts Land Court.

In contrast the Court in *Beaton* stated, "The point to be made here is that actions taken to comply with the 1940 Relief Act, such as the steps prescribed by St. 1943, C. 57, as amended, are not in themselves mortgage foreclosure proceedings in any ordinary sense. Rather, they occur

independently of the actual foreclosure itself and of any judicial proceedings determinative of the general validity of the foreclosure."

This understanding was explicitly changed by legislation in 2007. The 2007 right to cure law was enacted as part of Chapter 244, the foreclosure statute in Massachusetts.

So while *Beaton* in 1975, the Court argued that the active military service notice process carried out through Land Court in our Commonwealth was not in fact a part of the foreclosure process itself, but a separate step in that process, the Legislature, the Executive Branch and the Judicial Branch in a unity of purpose at the beginning of the evidence of the seriousness of the foreclosure crisis unfolding in our Commonwealth, came to a common understanding in 2007/2008: they specifically identified the first "proceeding to foreclose", – and the only step in the foreclosure process that takes place in a court proceeding – as the Land Court hearing itself.

This fundamental redefinition of the Land Court proceeding – as a "proceeding to foreclose" not proceedings "independently of the actual foreclosure" – replaces the *Beaton* interpretation and makes clear that the normal requirements of standing as part of a foreclosure now apply.

The statute is explicit that the mortgagee so identified at that moment must identify itself properly at

the time of the default letter and at the time of filing of the mortgagee affidavit. And that that affidavit is filed simultaneously with the active military service filings in Land Court, the now explicit beginning of the formal foreclosure process in our Commonwealth.

A) RIGHT TO CURE STATUTE REQUIRES PRESENT MORTGAGEE FILE A SWORN AFFIDAVIT ATTESTING TO THEIR PRESENT LEGAL STATUS AS PART OF THEIR LAND COURT FILING AS A STATUTORILY DEFINED 'PROCEEDING TO FORECLOSE. NOT ENFORCING COMPLIANCE WITH THE REQUIREMENT OF THE STATUS AS MORTGAGEE/PLAINTIFF AT THE COMMENCEMENT OF THE LAND COURT PROCEEDING WOULD WORK AGAINST MGL CHAP 244 SEC 35(A) AND ALLOW FAUDULENT FILINGS IN LAND COURT.

The Right to Cure letters were explicitly required by statute to include proper identify the holder of the mortgage. Those letters must be filed with a mortgagee affidavit, the only enforcement mechanism of that Right to Cure period and require explicitly (unlike other affidavits anywhere else in the foreclosure process) that they be signed under pains and penalties of perjury and filed in the Land Court. The decision to have those letters filed in Land Court was done at a time when it was certainly possible that legislators knew and certainly arguably should have known that the Land Court did not have the manpower and resources to review and adjudicate all of those letters and mortgagee affidavits. Yet the legislators legislated that these letters and affidavits were filed in Land Court knowing that this was the one court preceding that took place anywhere during the foreclosure process in our state. The legislators added the gravitas of a court filing to underscore the importance of compliance.

Presumably, these documents are filed as part of the Land Court filings to provide for an ingenious and proactive mortgagor – who is firmly committed to understanding and enacting their rights to try to protect their property – to be able to properly identify and rely upon honestly executed mortgagee affidavit to identify in the default letter, and in the one enforcement venue provided, an accurate assessment of who is the holder of their mortgage at the end of the Right to Cure period and as foreclosure begins.

The process of being allowed to proceed through the many steps required in our non-judicial process has been the subject of rulings by our Supreme Judicial Court repeatedly that as a non-judicial foreclosure state the ‘strict adherence’ to the process of foreclosure by a mortgagee is critical to the integrity of ownership of property, *US Bank National Association v. Ibanez*, 458 Mass. 637 (2011), *Moore v. Dick*, 187 Mass. 207, 211(1905), *Roche v. Farnsworth*, 106 Mass. 509, 513 (1871); it also protects a homeowner’s fundamental right to own property in the Massachusetts Constitution and the Federal Constitution. Protection of the right to ownership of property in fact pre-dates the constitution in Massachusetts, in the declarations of colonists as they started the process of recognizing their right to freedom from a Government of tyranny to hold land and have properly respected rights to hold that land.

Necessary to a property system without judicial foreclosure is that strict adherence. By redefining standing in Land Court, to a weaker and more general definition of standing, Honorable Judge Long in fact moves us farther away from the strict adherence to the foreclosure process in a time period when that strict adherence has been damaged already by numerous different acts by those having an interest in mortgages.

This is hardly the time to allow a loosening of basic legal requirements when there has been a unity of the three branches of our government in understanding the critical nature of *properly identifying the holder of a mortgage at this stage in the foreclosure process.*

The Legislature a statutorily-required affidavit, which by its very name, requires that the present mortgagee be properly identified and that the filing be made as part of the Land Court filings and at the commencement of the Land Court proceeding..

In this context where the legislature, the Executive and the Judiciary itself in facing a new challenge to our entire mortgaging and foreclosure system in our state – the first such in our memorable history perhaps reaching all the way back to court decisions from the 1800s and earlier – recognized that a change had to be made; they collectively redefined the Land Court hearing as explicitly part of the foreclosure process and required the present

mortgagee to file or otherwise perpetrate a fraud upon the Land Court.

In addition, HSBC and the other cases herein referred to where the plaintiff's were variously GMAC, US Bank, J.P. Morgan Chase; all of these various plaintiffs have, in fact, complied with the law that identified Land Court as the venue that was referred to by legislation that created the right to cure period in MGL c. 244, § 35A; they have complied numerous times in filings of mortgagee affidavits where they claimed to be the mortgagee of record at the time when they filed those affidavits simultaneously with their active military service notice filings in Land Court. In these Right to Cure affidavits, they asserted thereby under pangs and penalty of perjury that they were in fact the mortgagee at the time when this was filed in Land Court. Hopefully, Land Court would share the Legislature's concern that plaintiffs are accurately identifying themselves when they bring a case in Land Court and are filing that mortgagee affidavit in compliance with the chapter 244 statute that this is in fact the first action or proceeding in the foreclosure process in Massachusetts. Given the number of foreclosures that all of these plaintiffs have engaged in since May 1, 2008, dozens if not perhaps hundreds or thousands of times they have already sworn exactly that.

Should Honorable Judge Long's reinterpretation of standing as part of the Land Court process based on the

assumption that its requirements of standing do not need to be as strict? He is in fact moving against the 2007 interpretation of our legislature, Executive Branch and the Land Court itself in understanding a need for a much more profound protection of homeowners as the process of foreclosing on their homes moves to its first action in court. This change in role and definition of Land Court and the requirements of accurate identification of mortgagee at both the default/right to cure letter and Land Court filing stages in the delinquency/foreclosure process in our Commonwealth was passed into law long after the *Beaton* decision and in a new context.

This is hardly the time to undermine the legislative attempt in MGL c. 244, § 35A to tighten the reigns as much as they possibly could – their attempt to make sure that mortgagors have as much information about the actual holder of the mortgage as possible at the Land Court stage in the process of foreclosure explicitly part of MLG 244 “the foreclosure” statute in our Commonwealth.

Because of the general criteria required of proper legal standing in a proceeding, because there is no future harm ensured by law from a Land Court ruling to a future assignee and most importantly because Land Court is now explicitly the proceeding to foreclose by 2007 statute and its concurrence by the actions of the Massachusetts General Court, the Governor, the Land Court and the plaintiffs

themselves in numerous other actions filings in Land Court,
the ruling as to the lesser requirements for standing in
Land Court proceedings in HSBC v. Matt must be reversed.