LAREDO & SMITH
In Brief

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Court Rules Mortgage Borrowers Can't Use "Try-Title" to Stop Foreclosure

Following a sharp increase in mortgage foreclosures, in the wake of a steep decline in the housing market, growing numbers of defaulted mortgage borrowers (typically homeowners) and their attorneys seized on the so-called "try-title statute," G.L. c. 240, §§ 1-5, as a simple and low-cost way of forestalling foreclosure.

The try-title statute provides a mechanism for persons claiming possession and record title to a parcel of real estate to bring an action in the Massachusetts Land Court to remove any cloud on the title resulting from an adverse claim to the property. If the plaintiff is able to make a threshold showing of 1) ownership of record title, 2) possession of the property, and 3) the existence of an adverse claim to the property, then the burden shifts to the defendant to prove the validity of the adverse claim.

Faced with foreclosure, mortgage borrowers could use the try-title statute to put their mortgage lender to the task of proving their interest in the mortgage, i.e., their legal right to foreclose. Often this task was deceptively complex, bogged down by unsettled legal questions concerning mortgage loan securitization, mortgage nominees, promissory notes, bank mergers, and the sufficiency of mortgage assignments, among others.

No more. The Massachusetts Supreme Judicial Court has ruled that mortgage borrowers may not use the try-title statute to challenge the validity of a mortgage on their property until *after* the mortgage is foreclosed, resolving a conflict among several judges in the Land Court. *Abate v. Fremont Investment & Loan*, 470 Mass. 821 (2015). *Abate* held that the respective titles to real property of the mortgage borrower (equitable title) and mortgage lender (legal title) are *complementary*, not *adverse*, until the mortgage lender forecloses on its mortgage. Accordingly, *Abate* holds that mortgage borrowers lack standing to bring pre-foreclosure try-title actions against their mortgage lenders.

While *Abate* likely signals the end of the try-title statute's utility for mortgage borrowers, it does not completely relieve mortgage lenders of the burden of proving their legal right to foreclose. After most foreclosures, the purchaser-at-foreclosure (usually the mortgage lender) is required to bring a lawsuit to win possession of the foreclosed property. To succeed, the purchaser is put to the exact same proof as a mortgage lender in a pre-foreclosure try-title action and faces the exact same legal questions concerning mortgage loan securitization, mortgage nominees, promissory notes, bank mergers, and the sufficiency of mortgage assignments, among others. The upshot of *Abate* is that mortgage borrowers can no longer use the try-title statute to force their mortgage lenders to prove their right to foreclose twice.

In the Field

Kane joins L&S as partner

L&S welcomes new Partner Matthew A. Kane and his expertise in financial services litigation and other areas of commercial litigation as the firm expands its business litigation practice. Prior to joining Laredo & Smith, Mr. Kane was an attorney at Bulkley, Richardson and Gelinas, LLP, and also worked for a small litigation firm. He was a law clerk at the City of Boston Law Department and an intern for the Honorable Elizabeth B. Donovan. Mr. Kane is on the SuperLawyers list of Massachusetts "Rising Stars".

Sierra named to MassPort task force

The Massachusetts Port Authority has named L&S Partner José Sierra to its newly formed Latin America Task Force. This task force works with regional business, civic and academic leaders to promote new non-stop service between Latin America and Boston, benefitting the Massachusetts business community.

Partners named SuperLawyers

Partners Marc Laredo and Mark Smith were elected once again as SuperLawyers by the SuperLawyers rating service, a division of Thomson Reuters. The firm is proud of this honor, which comes from being evaluated on 12 indicators of peer recognition and professional achievement.

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