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Defective Notice to Cure: A Losing Defense for Homeowners Facing Foreclosure

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Gemma Ypparila – After Governor Deval Patrick failed to sign Massachusetts Senate Bill 1987, which was designed to address the chaos resulting from [US Bank v. Ibanez](#) by curing title to foreclosed properties, the mortgage market has nonetheless been steadied thanks to two recent Massachusetts cases. The market has settled down in recent months due in part to the Land Court decision [Daukas v. Dadoun](#), and now an even more recent appeals court decision should further calm the mortgage market for the time being. In [Haskins v. Deutsche Bank National Trust Company](#), the Massachusetts Appeals Court held that the notice to cure, required under M.G.L. c. 244, sec. 35A, sent by the mortgage servicing agent rather than the record holder of the mortgage, complies with the statute.

The Plaintiff homeowner granted a mortgage to Mortgage Electronic Registration Systems, Inc. (“MERS”) pursuant to a refinancing transaction in 2004. The homeowner later defaulted on his loan payment obligations and received a letter dated May 4, 2010 that wrongfully identified the mortgage servicer as the mortgage holder, and notified Plaintiff he had ninety days to cure. Record title to the mortgage at that time was held by MERS and the equitable or beneficial ownership of the loan was held by Deutsche Bank. A second letter was sent seven months later, again wrongfully identifying the servicer as the mortgage holder and notifying homeowner of his right to cure the default, but within 150 days. The Plaintiff did not cure the default and Deutsche Bank obtained a judgment from the Land Court authorizing foreclosure pursuant to the statutory power of sale.

The appeals court looked to the conclusion reached in [U.S. Bank National Association v. Schumacher](#), 467 Mass.421 (2014), and reiterated that “the notice of a borrower’s right to cure a default [the section 35A notice] . . . is not part of the foreclosure process, but instead . . . ‘to give a mortgagor a fair opportunity to cure a default’” before debt acceleration and foreclosure occurs. In *Ibanez*, the Supreme Judicial Court concluded that the terms of the power of sale must be strictly followed because of the substantial power to foreclosure delegated to the mortgage holder. Where the foreclosing party was not the record holder of the mortgage in *Ibanez* the Court concluded that the foreclosure was defective. In *Haskins*, the appeals court made sure to point out that the application of *Ibanez*’s strict adherence to statutory language was inappropriate in the case of a section 35A notice. The overall intent of the statute

is to provide the mortgagor a means by which he or she may contact, obtain information from, or pay the loan balance to a particular party that holds such relevant information. Thus, as long as the entity named falls within the general definitional scope of “mortgagee” (such as the mortgage servicer) and can supply the mortgagor with all “relevant information concerning the loan,” an inaccurate notice of cure rights under section 35A will not necessarily invalidate the foreclosure. The appeals court in Haskins rejects a further avenue for contesting mortgage foreclosures.