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# Now UCC Me, Now You Don't: The Massachusetts Supreme Judicial Court Ignores the UCC in Requiring Unity of Note and Mortgage for Foreclosure in *Eaton v. Fannie Mae*

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# NOW UCC ME, NOW YOU DON'T: THE MASSACHUSETTS SUPREME JUDICIAL COURT IGNORES THE UCC IN REQUIRING UNITY OF NOTE AND MORTGAGE FOR FORECLOSURE IN *EATON v. FANNIE MAE*

**Abstract:** On June 22, 2012, in *Eaton v. Federal National Mortgage Association*, the Supreme Judicial Court of Massachusetts upheld a trial court ruling and held that an entity must hold both note and mortgage in order to foreclose properly. Because this represented a significant shift in Massachusetts foreclosure law, the court applied its ruling only prospectively. To support its holding, the court relied on common law and statutory justifications. In so doing, the court did not address pertinent sections of the Uniform Commercial Code (UCC) that could have led to the same outcome. This Comment argues that examining the UCC in the context of mortgage and foreclosure cases could lend clarity to an outmoded and inconsistent area of the law.

## Introduction

Although foreclosure filings have declined somewhat since their peak in 2010, the numbers remain at historically high levels across the nation.[1] Massachusetts is no exception.[2] The increase in foreclosures

[1] *See 1 Million Properties with Foreclosure Filings in First Half of 2012*, RealtyTrac (July 10, 2012), http://www.realtytrac.com/content/foreclosure-market-report/midyear-2012-us-foreclosure-market-report-7291 (showing over 1 million properties with foreclosure filings in the first half of 2012); *2011 Year-End Foreclosure Report: Foreclosures on the Retreat*, RealtyTrac (Jan. 9, 2012), http://www.realtytrac.com/content/foreclosure-market-report/2011-year-end-foreclosure-market-report-6984 (showing over 1.8 million properties in foreclosure in 2011) [hereinafter *2011 Foreclosure Report*]; *Record 2.9 Million U.S. Properties Receive Foreclosure Filings in 2010*, RealtyTrac (Jan. 12, 2011), http://www.realtytrac.com/content/press-releases/record-29-million-us-properties-receive-foreclosure-filings-in-2010-despite-30-month-low-in-december-6309 (showing nearly 2.9 million properties in foreclosure in 2010). In 2010, 4.6% of mortgage loans were in foreclosure, compared to 1.0% in 2005, 1.2% in 2000, and 0.9% in 1990. U.S. Census Bureau, Statistical Abstract of the U.S.: 2012, at tbl.1194 (2012), *available at* http://www.census.gov/compendia/statab/2012/tables/12s1194.pdf. Furthermore, in light of the ever-shifting regulatory landscape, the decrease in foreclosures may be attributable mainly to caution on the part of lenders; in other words, the decrease may be indicative of a delay in foreclosures rather than a recovery. *See 2011 Foreclosure Report*, *supra* ("Foreclosures were in full delay mode in 2011 . . . ." (internal quotation marks omitted)).

has led to a commensurate increase in foreclosure-related litigation.[3] In Massachusetts in 2010, homeowner Henrietta Eaton refused to leave her foreclosed-upon home and, in court to fight eviction, counterclaimed that the foreclosure on her property was improper.[4] The trial court agreed and held that the foreclosing party had not proven the requisite ownership of both note and mortgage.[5] This was significant because, previously in Massachusetts, the foreclosing party typically foreclosed with only the mortgage.[6] On appeal in June 2012, in *Eaton v. Federal National Mortgage Association*, the Massachusetts Supreme Judicial Court ("SJC") upheld the trial court's decision, providing both common law and statutory justifications for its decision.[7] Mindful that its ruling represented a fundamental shift in foreclosure requirements in Massachusetts, the court applied its holding only prospectively, as retroactive application could have clouded title on countless previously foreclosed-upon properties.[8] Although the ruling could have a far-ranging effect on foreclosure practice in Massachusetts, the court missed an opportunity to use the Uniform Commercial Code (UCC) to provide clarity and predictability to this area of the law.[9] Instead, to reach its conclusion, the opinion followed a rather circuitous path through nineteenth-century common law and around the UCC.[10]

Part I of this Comment provides an overview of mortgage law in Massachusetts and reviews the facts of the case.[11] Part II then explains how the court in *Eaton* relied on nineteenth-century common law to inform its interpretation of relevant foreclosure statutes.[12] Finally, Part

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[2] *See Mass. Foreclosure Activity Continues to Climb in March*, Warren Group (Apr. 26. 2012), http://www.thewarrengroup.com/2012/04/mass-foreclosure-activity-continues-to-climb-in-march/ (showing that Massachusetts foreclosure filings were 71.5% greater in the first quarter of 2012 than the same time in 2011).

[3] *See* Press Release, Patton Boggs LLP, MBS Actions Drive Mortgage Litigation Index to Record High (Jan. 9, 2012), *available at* http://www.pattonboggs.com/media/detail.aspx?news=1639 (showing the highest levels of mortgage-related litigation since tracking began in 2007).

[4] Eaton v. Fed. Nat'l Mortg. Ass'n, 969 N.E.2d 1118, 1122–23 (Mass. 2012).

[5] *Id.* at 1123. A "note" is the document laying out the terms of a loan, whereas a "mortgage" is the document that secures the loan with property. *See infra* notes 19–22 and accompanying text (discussing these two terms more thoroughly).

[6] *Eaton*, 969 N.E.2d at 1132–33.

[7] *Id.* at 1121, 1124; *see infra* note 28 (describing Fannie Mae).

[8] *Eaton*, 969 N.E.2d at 1121, 1124.

[9] *See id.* at 1131 & n.26.

[10] *See id.* at 1124–31.

[11] *See infra* notes 15–57 and accompanying text.

[12] *See infra* notes 58–87 and accompanying text.

III notes the near-absence of the UCC from the *Eaton* decision and considers the interplay between the UCC and mortgage law in Massachusetts.[13] Further, Part III argues that courts should give the UCC a more prominent role in governing mortgages, as doing so would increase clarity and predictability for lenders, homeowners, and lawyers.[14]

## I. Mortgage Law, Past and Present

### A. *The Traditional Mortgage and Foreclosure*

A mortgage is the means by which a debt is secured by real property.[15] Its roots in the Anglo-American legal tradition date back nearly a millennium.[16] In medieval times, the security took the form of a conditional conveyance; the borrower would grant land to the lender, with title reverting to the borrower at a prescribed date only if the loan had been repaid.[17]

The mortgage's historical origins as a creature of property law explain its modern form.[18] A borrower and lender today will execute two separate documents if the loan is to be secured by real property: the note and the mortgage.[19] The note describes the loan and the terms of repayment, whereas the mortgage secures the debt by granting the lender (or the mortgagee) an interest in the property of the borrower (or the mortgagor).[20] Upon payment of the underlying

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[13] *See infra* notes 88–106 and accompanying text.

[14] *See infra* notes 88–106 and accompanying text.

[15] Black's Law Dictionary 1101 (9th ed. 2009).

[16] *See* 4 Thomas E. Atkinson et al., American Law of Property 3 (A. James Casner, ed., 1952).

[17] *Id.* at 3–5. This system continued with only minor variations until the courts of equity intervened in the early twelfth century. *See id.* at 3–18 (tracing the mortgage from the twelfth century forward). Finding the absolute forfeiture of land suffered by a delinquent mortgagor unfair, the courts of equity created the right of redemption, giving the mortgagor a certain period of time, determined by the court, to pay the loan and retain the property. *See id.* at 17–18. Foreclosure is the mortgagee's action at the end of that period; the mortgagee literally "forecloses" on the mortgagor's right of redemption. *Id.* at 27.

[18] Restatement (Third) of Prop.: Mortgs. § 1.1 (1997).

[19] *Id.* This is different from a standard secured consumer transaction (such as an automobile loan), where one document lists both the terms of the loan and collateral. *See id.*

[20] *Eaton*, 969 N.E.2d at 1124. Because mortgages are governed by state law, the law varies across state lines. Ann M. Burkhart, *Real Estate Practice in the Twenty-First Century*, 72 Mo. L. Rev. 1031, 1035–36 (2007). In Massachusetts. the interest given to the mortgagee is legal title. *Eaton*, 969 N.E.2d at 1124 (noting that Massachusetts is a "title theory" state). Other states, however, subscribe to a "lien theory" of mortgages, where the mortgage merely creates a nonpossessory interest in the subject property. Restatement (Third) of Prop.: Mortgs. § 4.1 (1997) ("At least 32 states follow the 'lien' theory of mortgage law.").

debt, title is restored to the mortgagor.[21] Although it is a discrete instrument, the mortgage is conceptually bound to the note.[22]

Should the mortgagor fall behind on payments, foreclosure is the process by which the mortgagee terminates the mortgagor's interest in the property.[23] Massachusetts foreclosures are governed by statute and by the text of the mortgage itself; they do not require judicial oversight.[24] The most expedient method of foreclosure is by "power of sale."[25] Here, the mortgagee and mortgagor write into the mortgage that, under certain circumstances, the mortgagee may sell the property at public auction and apply the proceeds to the mortgagor's underlying debt.[26]

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[21] *Eaton*, 969 N.E.2d at 1124.

[22] *Id.* The Supreme Judicial Court (SJC) has referred to the separated mortgage as "a mere technical interest," meaning it afforded few rights to the holder at common law. *See id.* at 1125 (quoting Wolcott v. Winchester, 81 Mass. (15 Gray) 461, 465 (1860)); *infra* notes 61–64 and accompanying text.

[23] *See* Arthur L. Eno, Jr. et al., 28 Mass. Prac., Real Estate Law § 10.1 (4th ed. 2004).

[24] *See* Mass. Gen. Laws ch. 183, § 21 (2010). In other states, foreclosures need judicial approval. Restatement (Third) of Prop: Mortgs. § 3.4 (1997) ("[In] about half of the jurisdictions in the nation . . . a judicial proceeding is the only method of mortgage foreclosure."). But there is one caveat: although Massachusetts foreclosures are non-judicial, the foreclosing party must undertake a short proceeding in the Land Court to determine that the mortgagor is not protected by the Servicemember's Civil Relief Act. *See* Act of Mar. 4, 1943, 1943 Mass. Acts 50 (as amended by Act of May 29, 1998, 1998 Mass. Acts 263) (enacting the requirements of the federal Servicemember's Act); *Eaton*, 969 N.E.2d at 1127 n.14 (noting that Land Court Servicemember's proceedings are "limited" and not directly part of foreclosure proceedings). Interestingly, in January 2013, in *HSBC Bank v. Matt*, the SJC ruled that foreclosing parties must affirmatively establish standing in Servicemember's proceedings, meaning they must show possession of note and mortgage *prior* to foreclosure, not just when challenged afterwards. *See* HSBC Bank USA, N.A. v. Matt, 981 N.E.2d 710, 720–21 (Mass. 2013); Rich Vetstein, *Breaking: Massachusetts SJC Issues Another Important Foreclosure Ruling in* HSBC Bank v. Matt, Mass. Real Est. L. Blog (Jan. 14, 2013), http://www.massrealestatelawblog.com/2013/01/14/massachusetts-sjc-issues-another-landmark-foreclosure-ruling-in-hsbc-bank-v-matt/ (opining that this makes Massachusetts "somewhat closer to a judicial foreclosure state than a non-judicial foreclosure state").

[25] *Eaton*, 969 N.E.2d at 1127 n.16.

[26] Mass. Gen. Laws ch. 183, § 21; *id.* ch. 244, § 11. The triggering circumstance for exercise of the power is generally delinquency on loan payments, as was the case in *Eaton*. *See Eaton*, 969 N.E.2d at 1122. The alternative to foreclosure by power of sale in Massachusetts is foreclosure "by entry," where the mortgagee must peaceably enter the property (evicting the mortgagor) and possess it for three years. Mass. Gen. Laws ch. 244, §§ 1–2; *see* U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 49 n.15 (Mass. 2011). The speedier foreclosure by power of sale has largely eclipsed foreclosure by entry (although mortgagees may pursue both methods simultaneously). *See Eaton*, 969 N.E.2d at 1127 n.15; *Ibanez*, 941 N.E.2d at 49 n.15.

### B. *Securitization Leads to Foreclosure Problems*

Whereas traditionally the note and mortgage were both physical papers held by a single mortgagee, this arrangement began to break down in the late twentieth century as a result of securitization.[27] In securitizing a mortgage, an entity—such as the Federal National Mortgage Association ("Fannie Mae") or an investment bank—buys mortgages from their originating lenders, pools them together, and issues securities to sell to investors.[28] The scope and complexity of securitization, however, led to many errors.[29] Mortgages, as property interests, are generally subject to recording laws when transferred (or "assigned").[30] Notes, conversely, face no such statutory requirement and can be transferred more liberally.[31] As financial institutions bundled and transferred huge numbers of mortgages, records were lost and some legal requirements (some so basic as signatures) were bypassed.[32] The widespread use of the Mortgage Electronic Registration System ("MERS"), a secondary mortgage trading market, to sidestep recording requirements presented further difficulties.[33]

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[27] *See* Kurt Eggert, *The Great Collapse: How Securitization Caused the Subprime Meltdown*, 41 Conn. L. Rev. 1257, 1266 (2009).

[28] *Id.* Not only is ownership of the mortgage transferred (often multiple times), but partial interests in the mortgage may be sold, further increasing the complexity of the system. *Id.* The Federal National Mortgage Association, commonly known as "Fannie Mae," is a government-sponsored institution that purchases mortgages from other lenders, allowing those lenders to have sufficient funding to give out further mortgages. *Who Is Fannie Mae Today?*, Fannie Mae, http://www.fanniemae.com/portal/about-us/company-overview/about-fm.html (last visited Mar. 20, 2013).

[29] *See* Alan M. White, *Losing the Paper—Mortgage Assignments, Note Transfers and Consumer Protection*, 24 Loy. Consumer L. Rev. 468, 469 (2012). For example, many entities began to use "robo-signing" to streamline their securitization work. *Id.* at 469–70. The practice of "robo-signing" became notorious and has been described as "assembly-line signing and notarizing of affidavits for foreclosure cases, mortgage assignments, note allonges and related documents." *Id.*; *see also* Caitlin M. Mulligan, Note, *From AAA to F: How the Credit Rating Agencies Failed America and What Can Be Done to Protect Investors*, 50 B.C. L. Rev. 1275, 1288–90 (2009) (noting the growing complexity of financial products and their contribution to the financial crisis).

[30] Christopher L. Peterson, *Foreclosure, Subprime Mortgage Lending, and the Mortgage Electronic Registration System*, 78 U. Cin. L. Rev. 1359, 1364–66 (2010) (providing a general overview of property recording in the United States).

[31] *See Eaton*, 969 N.E.2d at 1131.

[32] *See* White, *supra* note 29, at 469–70.

[33] *Id.* at 486. Members of MERS (generally banks) may assign mortgages to the MERS corporation, recording the assignment. *See* Phyllis K. Slesinger & Daniel McLaughlin, *Mortgage Electronic Registration System*, 31 Idaho L. Rev. 805, 806 (1995). They then enter the mortgages into the MERS computer database, wherein they may internally transfer a mortgage or any fractional interest to any other member without having to record externally. *See id.* at 807. Thus, although the note (and attendant right to collect payments) is

As a result, when the housing market began to collapse in 2007 and lenders attempted to foreclose, they encountered numerous difficulties producing the requisite documentation that showed ownership of the note and mortgage.[34] Individual mortgage loans had been sliced up, rebundled, and sold so many times that proving ownership was often impossible.[35] Foreclosing parties frequently could locate the note but not the mortgage[36] or—as was the case in *Eaton*—the mortgage but not the note.[37] Depending on prevailing state law, these lapses could invalidate the foreclosures.[38]

In Massachusetts, however, foreclosures could proceed as long as the foreclosing party held the mortgage.[39] Before the SJC decided *Eaton*, the common understanding among the bar and trial courts was that holding both the note and the mortgage was not necessary to foreclose.[40]

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transferred to a new owner, MERS remains the holder of the mortgage in the registry of deeds. Peterson, *supra* note 30, at 1371 ("Once a loan is assigned to MERS, the public land title records no longer reveal who (or what) actually owns a lien on the property in question."). Instead of transferring title outright, a member may also simply designate MERS as "nominee"; in such cases, MERS is the mortgagee of record but the member retains legal title. *See* Slesinger & McLaughlin, *supra*, at 806–07.

[34] White, *supra* note 29, at 474–76 (providing examples of missing documentation). Such documentation is always necessary after the fact if the mortgagor challenges the foreclosure as improper in court—as occurred in *Eaton*—and may also be necessary before foreclosure in states requiring judicial foreclosure. *See Eaton*, 969 N.E.2d at 1123.

[35] *See* White, *supra* note 29, at 474–76.

[36] *See Ibanez.*, 941 N.E.2d at 53–54 (rejecting the argument that plaintiff U.S. Bank's foreclosure was validated by its holding the note alone).

[37] *Eaton*, 969 N.E.2d at 1122–23.

[38] White, *supra* note 29, at 476–83, 489–93 (surveying cases where the foreclosing party did not properly hold note or mortgage).

[39] *See* Wells Fargo Bank, N.A. v. McKenna, No. 11 MISC 447455, 2011 WL 6153419, at *2 n.1 (Mass. Land Ct. Dec. 8, 2011). In 2011, in *Wells Fargo Bank v. McKenna*, a Massachusetts Land Court judge stated that "[t]he correct view of prevailing Massachusetts law is . . . that our common law does not require, for an effective exercise of a mortgage's power of sale, that the note for which the mortgage is security be at that time held by the mortgage holder." *Id.*

[40] *See, e.g.*, *In re* Marron, 455 B.R. 1, 7 (Bankr. D. Mass. 2011) ("Massachusetts law does not require a unity of ownership of a mortgage and its underlying note prior to foreclosure."); *McKenna*, 2011 WL 6153419, at *2 n.1 (holding that a mortgagee does not require the note to foreclose and predicting that the SJC will not require unity of note and mortgage); Adamson v. Mortg. Elec. Registration Sys., Inc., 28 Mass. L. Rptr. 153, 2011 WL 1136462, at *4 (Mass. Super. Ct. Mar. 23, 2011) ("[T]he record mortgagee has the authority to foreclose under the Massachusetts statutory scheme even if it did not hold the Note.").

### C. *Eaton's Mortgage, Foreclosure, and Ensuing Litigation*

In 2007, Henrietta Eaton executed a note with her lender, BankUnited, FSB, granting her a $145,000 loan to refinance her home.[41] As security for the loan, Eaton simultaneously executed a mortgage to MERS, Inc., acting as nominee for BankUnited.[42] The mortgage was subsequently assigned to Green Tree Servicing, LLC ("Green Tree").[43]

After Eaton fell behind on repaying the loan, Green Tree commenced foreclosure proceedings, which culminated in a foreclosure sale late in 2009.[44] Green Tree was itself the highest bidder at the sale; it later assigned its rights to the winning bid to Fannie Mae.[45]

Eaton, however, remained in her home, compelling Fannie Mae to seek eviction via a summary process action in Boston Housing Court early in 2010.[46] As a counterclaim, Eaton alleged that the foreclosure was improper because although Green Tree (the foreclosing party) was in possession of the mortgage, it was not in possession of the corresponding note.[47] Although BankUnited had indorsed the note in blank, its holder at the time of foreclosure was unknown.[48] Without a proper foreclosure, Green Tree's transfer of ownership to Fannie Mae and Fannie Mae's subsequent eviction case would both be invalid.[49] The housing court judge allowed Eaton to seek relief in Superior Court.[50] There, the motion judge granted a preliminary injunction forbidding Fannie Mae from proceeding with its eviction ac-

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[41] *Eaton*, 969 N.E.2d at 1121.

[42] *Id.* at 1121–22.

[43] *Id.* at 1122.

[44] *Id.*

[45] *Id.* at 1122–23.

[46] *Id.*

[47] *Eaton*, 969 N.E.2d at 1123. As discussed previously, this was a novel argument; common practice in Massachusetts was to require only the mortgage to foreclose. *Id.* at 1132; *supra* notes 39–40 and accompanying text. This argument had surfaced already in other states. *See New Foreclosure Defense: Prove I Owe You*, Associated Press, Feb. 17, 2009, *available at* http://www.msnbc.msn.com/id/29242063/ns/business-real_estate/t/new-foreclosure-defense-prove-i-owe-you/#.UPciceQ0WSp (discussing mortgagors' demands that foreclosing mortgagees show ownership of both note and mortgage in Florida and Ohio).

[48] *Eaton*, 969 N.E.2d at 1122–23. Indorsement is the signing of the back of a negotiable instrument to transfer it to another party; if the instrument is signed but no party is named it is "indorsed in blank" and is payable to the bearer. Black's Law Dictionary 844 (9th ed. 2009).

[49] *Eaton*, 969 N.E.2d at 1120–21.

[50] *Id.* at 1123. At the time, the jurisdiction of the housing court to hear mortgage cases was not clear; it has since been confirmed by the SJC in 2011 in *Bank of New York v. Bailey*. 951 N.E.2d 331, 336(Mass. 2011).

tion or otherwise interfering with Eaton's property.[51] Fannie Mae made an interlocutory appeal to the Appeals Court, and the SJC took up the case on its own initiative.[52]

On appeal, Eaton's briefs contained several alternative arguments, one of which was that the UCC dictated that the foreclosure was improper.[53] Eaton argued that under Article 3 of the UCC, which governs negotiable instruments, Green Tree was not entitled to enforce the note by commencing foreclosure.[54] Section 3-301 lists three categories of entities that may enforce a note: (1) holders of the note; (2) non-holders in possession of the note with rights of holders; and (3) former possessors of a note when a note has been dishonored, destroyed, lost, or stolen.[55] Green Tree does not fall into any of the above categories, as it could not prove possession of the note at the time of foreclosure, and the note, produced later for the litigation, was clearly not dishonored, destroyed, lost, or stolen.[56] Therefore, Eaton concluded, Green Tree's enforcement of the note was improper.[57]

## II. The Supreme Judicial Court Prospectively Requires Unity of Note and Mortgage and the Massachusetts Legislature Follows Suit

In spite of being prominently featured in Eaton's brief, the SJC in *Eaton* relegated the UCC to a footnote in the decision, stating that it "perceived nothing in the UCC inconsistent" with requiring the fore-

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[51] *Eaton*, 969 N.E.2d at 1123.

[52] *Id.*

[53] Brief of Appellee at 6–9, *Eaton*, 969 N.E.2d 1118 (No. SJC-11041). Massachusetts, codifies the Uniform Commercial Code (UCC) in chapter 106 of the Massachusetts General Laws, with the section numbering mirroring the original UCC. *See* Mass. Gen. Laws ch. 106 (2010). The Massachusetts codification does not differ from the official UCC in any way relevant to this Comment. *See* The Permanent Editorial Bd. for the UCC, Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes 2 nn.6 & 8 (2011) [hereinafter PEB Report], *available at* http://www.uniformlaws.org/Shared/Committees_Materials/PEBUCC/PEB_Report_111411.pdf (stating that interaction between the UCC and mortgage law is not affected by differing UCC enactments from state to state, except in New York).

[54] Brief of Appellee, *supra* note 53, at 21, 25. Eaton also made this argument in the lower court; although the lower court judge ruled on other grounds, she did mention the UCC in a footnote. *See* Eaton v. Fed. Nat'l Mortg. Ass'n, No. SUCV201101382, 2011 WL 6379284, at *4 n.5 (Mass. Super. Ct. June 17, 2011).

[55] *See* Mass. Gen. Laws ch. 106, § 3-301. A note is dishonored when it "is paid or accepted by mistake and the payor or acceptor recovers payment or revokes acceptance." *Id.* ch. 106, § 3-418.

[56] Brief of Appellee, *supra* note 53, at 25.

[57] *Id.*

closing party to hold the note.[58] Instead, the court focused on the sections of the Massachusetts General Laws dealing with foreclosure: chapters 183 and 244.[59]

The court, however, did not start with the statutory text; it first reviewed common law, reasoning that the statutes' broader legal context would aid its interpretation.[60] Reviewing several cases from the nineteenth century, the court noted that although mortgages have always served as both security for debt and transfer of legal title, the note's security interest must be primary.[61] The court also observed that separating the note and mortgage is technically possible but highly impractical.[62] Thus, if separated from the note it secures, the mortgage "has no value as property" and, at best, is held "as a trust for the benefit of the holder of the note."[63] Given the inefficacy of a separated mortgage, the court concluded that both note and mortgage would be necessary to conduct a foreclosure properly at common law.[64]

Against that backdrop, the court concluded that the provisions of the Massachusetts General Laws that govern foreclosure require unity of note and mortgage.[65] The key to the court's decision was its interpretation of the meaning of "mortgagee."[66] Some sections of the Massachusetts General Laws use the term without reference to the note or underlying debt[67] (and Fannie Mae argued this supported its asser-

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[58] Eaton v. Fed. Nat. Mortg. Ass'n, 969 N.E.2d 1118, 1126–27, 1131 n.26 (Mass. 2012); *see* Brief of Appellee, *supra* note 53, at 21–25. Although the court's statement is technically true, it appears that the foreclosing party must satisfy the requirements of *both* foreclosure statutes and the UCC. *See* PEB Report, *supra* note 53, at 14.

[59] *See Eaton*, 969 N.E.2d at 1126–27, 1129.

[60] *Id.* at 1124, 1129.

[61] *Id.* at 1124, 1129–30.

[62] *See id.* at 1125–26 (quoting Sanger v. Bancroft, 78 Mass. (12 Gray) 365, 367 (1859)).

[63] *Id.* at 1125–26. In Massachusetts, the mortgage does not automatically follow the note, as it does in some other states. *Id.* at 1124. This understanding seemingly reflects a time when both note and mortgage existed only in their original, paper form, and therefore could be separated physically—indeed, the court cites numerous cases from the 1800s. *See id.* at 1124 (citing Barnes v. Boardman, 21 N.E. 308 (Mass. 1889), Morris v. Bacon, 123 Mass. 58 (1877), and Wolcott v. Winchester, 81 Mass. (15 Gray) 461 (1860)).

[64] *Eaton*, 969 N.E.2d at 1125.

[65] *Id.* at 1129.

[66] *See id* at 1129–30.

[67] *See id.* at 1127–28. For example, Massachusetts General Laws chapter 183, § 21, which introduces foreclosure by power of sale, allows the mortgagee to sell the mortgaged property as long as it complies "with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale." Mass. Gen. Laws ch. 183, § 21 (2010). In a similar vein, chapter 244, section 14 allows "[t]he mortgagee

tion that only a mortgage is required to foreclose).[68] The court, however, found these sections ambiguous.[69] To rectify this ambiguity, the court looked to other sections that use "mortgagee" in connection with the note and the underlying debt.[70] For example, Massachusetts General Laws chapter 244, section 17B, which discusses the notice required to seek deficiency judgments after foreclosure, seems to use "mortgagee" interchangeably with "holder of a mortgage note."[71]

Accordingly, after examining the statutory scheme, the court concluded that the legislature must have intended the mortgage-holder and note-holder to be the same person, for two reasons.[72] First, all of the sections discussing the note involve payment to the holder of the mortgage, a nonsensical result if the mortgage-holder is not the holder of the debt as well.[73] Second, this interpretation is consistent with the court's reading of common law.[74] Thus, the court held that, to have properly foreclosed on Eaton's property, the defendants must have held the note or acted as agent of the note-holder.[75]

Because the court's conclusion signified a major change in Massachusetts mortgage law, the court took the unusual step of applying its ruling only prospectively.[76] When interpreting statutes, courts do not claim to be making new law; rather they are "finding" the law that has been there all along.[77] Thus, holdings are typically applied retroactively.[78] In *Eaton*, however, if applied in the standard, retroactive manner, the court's holding could potentially have rendered invalid countless foreclosures stretching decades into the past.[79] Real estate

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. . . upon breach of condition and without action, [to] do all the acts authorized or required by the power [of sale] . . . ." *Id.* ch. 244, § 14.

[68] *Eaton*, 969 N.E.2d at 1127–28.

[69] *Id.* at 1128.

[70] *See id.* at 1128–29.

[71] *Id.* at 1128; *see* Mass. Gen. Laws ch. 244, § 17B. Additionally, chapter 244, section 19 states that one paying to redeem mortgaged property should pay the mortgagee, section 20 mandates that a mortgagee in possession of the mortgaged property deduct rents and profits from the amount due on the mortgage, and section 23 allows a court to order the amount due to be paid to the mortgagee. Mass. Gen. Laws ch. 244, §§ 19, 20, 23.

[72] *Eaton*, 969 N.E.2d at 1128–29.

[73] *See id.*

[74] *Id.* at 1129.

[75] *Id.* at 1131, 1134. The court vacated the injunction and remanded the case to determine whether Green Tree was authorized by the note-holder, as that issue was not raised in the lower courts. *Id.* at 1134.

[76] *See id.* at 1133.

[77] *Id.* at 1132.

[78] *See Eaton*, 969 N.E.2d at 1132.

[79] *See id.* at 1131.

transactions would have been frozen in Massachusetts as prospective sellers found their titles clouded, and untangling the mess would have taken years.[80] Wary of such a result, the court held that its ruling would affect only foreclosures commenced after the date of the decision: June 22, 2012.[81]

Shortly after *Eaton*, the Massachusetts legislature acted to codify some of the elements of the decision.[82] On August 3, 2012, Governor Deval Patrick signed into law "An Act Preventing Unlawful and Unnecessary Foreclosures."[83] The bill contained a number of provisions designed to aid both struggling homeowners and subsequent bona fide purchasers of foreclosed-upon properties.[84] Among these provisions were several elements of the *Eaton* decision.[85] For example, an entity may not commence foreclosure if it "knows or should know" that the mortgagee does not hold the note or act as the note-holder's agent.[86] The law also adopted the court's suggestion in *Eaton* that unity of note and mortgage be averred in affidavit form.[87]

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[80] *See* Brief of the Am. Land Title Ass'n, Amicus Curiae at 1, *Eaton*, 969 N.E.2d 1118 (No. SJC-11041) (arguing that retrospective application would create chaos); Amicus Curiae Brief of the Fed. Hous. Fin. Agency at 3, *Eaton*, 969 N.E.2d 1118 (No. SJC-11041) (same); Brief of the Real Estate Bar Ass'n for Mass. & the Abstract Club Amici Curiae at 5–6, *Eaton*, 969 N.E.2d 1118 (No. SJC-11041) (same).

[81] *Eaton*, 969 N.E.2d at 1133. More specifically, the ruling applied to foreclosures with mandatory notices of sale given after that date. *Id.*

[82] *See* An Act Preventing Unlawful and Unnecessary Foreclosures, ch. 194, 2012 Mass. Acts § 2.

[83] Press Release, Office of Gov. Deval Patrick, Gov. Patrick Signs Foreclosure Prevention Law to Expand Prots. for Homeowners (Aug. 3, 2012), *available at* http://www.mass.gov/governor/pressoffice/pressreleases/2012/2012803-governor-patrick-signs-foreclosure-prevention-law.html.

[84] *See* 2012 Mass. Acts § 2. The bill's most dramatic measure is a requirement that all lenders take steps to avoid foreclosure. *Id.* ("A creditor shall not cause publication of notice of a foreclosure sale . . . unless it has first taken reasonable steps and made a good faith effort to avoid foreclosure."). Lenders gain the benefit of a presumption of compliance if they explore loan modification. *Id.* (granting a presumption of compliance if a creditor determines a borrower's ability to pay, devises a modified payment plan, conducts a cost-benefit analysis comparing the modified plan to foreclosure, and either offers the modified plan to the borrower or furnishes reasons for rejection). Additionally, the new law requires that all mortgage assignments be recorded. *Id.* § 1 ("[N]o notice . . . shall be valid unless . . . an assignment, or a chain of assignments, evidencing the assignment of the mortgage to the foreclosing mortgagee has been duly recorded . . . ."). The SJC suggested this as a best practice in 2011 in *U.S. Bank National Association v. Ibanez*. 941 N.E.2d 40, 53 (Mass. 2011). It does not appear to have any effect on the legality of MERS, as long as assignments to MERS are properly recorded. *See supra* note 33 (explaining MERS).

[85] *See* 2012 Mass. Acts § 2; *Eaton*, 969 N.E.2d at 1129–31, 1133 n.28.

[86] *Id.* ("[A] creditor shall not cause publication of notice of foreclosure . . . when the creditor knows or should know that the mortgagee is neither the holder of the mortgage note nor the authorized agent of the note holder."). Although the facts of *Eaton* concern a

## III. The Supreme Judicial Court's Silence on the Uniform Commercial Code: A Missed Opportunity to Provide Clarity

Instead of wending its way through nineteenth-century common law and struggling with statutory interpretation in *Eaton*, the SJC should have turned to the UCC.[88] As Henrietta Eaton argued in her brief, Article 3 of the UCC would have mandated that Green Tree be entitled to enforce the note before it could foreclose, and without the note Green Tree could not prove it was so entitled.[89] Thus, the UCC could have compelled a ruling for Eaton in a more simple and straightforward manner.[90]

Although the outcome of the case may be in accord with the UCC, the court's failure to address the UCC obfuscates the relationship between the UCC and foreclosures in Massachusetts.[91] In fact, *Eaton* is not the first time the SJC has neglected the UCC in a mortgage context.[92] At least one commentator has tried to explain the

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residential mortgage, the holding does not explicitly confine itself to those terms. *See Eaton*, 969 N.E.2d at 1131. Conversely, the new bill's requirement of unity of note and mortgage applies only to residential mortgages. 2012 Mass. Acts § 2 (defining "mortgage loan" as those loans secured by "residential property").

[87] 2012 Mass. Acts § 2 (mandating that creditors certify compliance via an affidavit recorded at the registry of deeds); *see Eaton*, 969 N.E.2d at 1133 n.28.

[88] *See infra* notes 89–106 and accompanying text.

[89] *See* Mass. Gen. Laws ch. 106, § 3-301 (2010) (delineating who may enforce a negotiable instrument); *see also supra* notes 52–57 and accompanying text (explaining Green Tree's inability to enforce the note under UCC Article 3). As a cautionary note, however, UCC Article 3 applies only to negotiable instruments, and mortgage notes may not always qualify as negotiable instruments. *See* Mass. Gen. Laws ch. 106, § 3-104; PEB Report, *supra* note 53, at 4 n.13 (noting that the question of negotiability of mortgage notes is an open one). The court in *Eaton* did not address the issue. *See* Eaton v. Fed. Nat. Mortg. Ass'n, 969 N.E.2d 1118, 1121–23 (Mass. 2012).

[90] *See* PEB Report, *supra* note 53, at 14 (arguing that legal determinations made under the UCC are often "central" to the outcome of foreclosure cases). UCC Article 9 also could have been relevant to this case. *See id.* at 12. If a note is sold and the associated mortgage is not also transferred, UCC § 9-203(g) explicitly provides that the interest in the mortgage follows the note. Mass. Gen. Laws ch. 106, § 9-203(g); PEB Report, *supra* note 53, at 12. This is a default rule, however, and if the parties agree to separate the note and mortgage, the UCC appears to permit it. *See* PEB Report, *supra* note 53, at 12 n.44. The facts of *Eaton* seem to suggest that this was the case, as the documents explicitly send the note to BankUnited and the mortgage to MERS. *See Eaton*, 969 N.E.2d at 1121–22. If so, Article 9 would not control. *See* PEB Report, *supra* note 53, at 12 n.44.

[91] *See* Mass. Gen. Laws ch. 106, § 3-301; PEB Report, *supra* note 53, at 4.

[92] *See* U.S. Bank Nat'l Ass'n v. Ibanez, 941 N.E.2d 40, 53–54 (Mass. 2011). In 2011, in *U.S. Bank National Association v. Ibanez*, the SJC, without mentioning the UCC, held that a note-holder also needed to hold the mortgage for foreclosure to be proper; the note alone was insufficient. *Id.* This contradicts UCC Article 9's mandate that, absent evidence to the

court's failure to address the UCC by emphasizing the separateness of property law (which governs foreclosure) and contract law (which governs commercial notes).[93] Under this view, the UCC merely contemplates transferring a security interest in the mortgage loan, not the property interest in the mortgage itself.[94] Foreclosure, conversely, is the domain of property law.[95] This argument is accurate as to the history of the law but ignores current reality: property law and the UCC's commercial law may have developed independently, but today they undoubtedly intersect.[96] Centuries-old property concepts are ill-suited to governing the modern, paperless mortgage world.[97] This historical baggage, however, continues to burden courts today.[98] The SJC has come halfway, recognizing that the property interest of the mortgage is merely a vestigial structure left over from the time when a mortgage truly transferred title.[99] The court, however, has yet to take the next step and update the common law to better reflect the realities of the modern mortgage market by integrating the UCC into the analysis.[100]

Addressing the UCC in mortgage and foreclosure contexts would be a big step toward bringing the law into the present day.[101] Whereas Massachusetts property law remains saddled with ancient concepts of questionable utility, the commercial law governing mortgage notes has evolved to embrace modern commercial practices such as electronic

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contrary, the mortgage follows the note—that is, the note-holder presumably also holds the mortgage, even absent independent documentation. *See* Mass. Gen. Laws ch. 106, § 9-203(g); *supra* note 90 (discussing UCC Article 9).

[93] *See* Recent Case, U.S. Bank National Ass'n v. Ibanez, *941 N.E.2d 40 (Mass. 2011)*, 125 Harv. L. Rev. 827, 833 (2012).

[94] *See id.* at 832–33.

[95] *See id.*

[96] *See* White, *supra* note 29, at 470.

[97] *See id.* at 471–76 (examining the application of UCC Article 3 in the context of modern mortgage note transfers).

[98] *See Eaton*, 969 N.E.2d at 1124–26. Such baggage includes not only the separation of note and mortgage and constructive trust theories discussed in *Eaton*, but also title theory mortgages in general. *See id.* The *Restatement* notes that contemporary title theory differs little from lien theory and adopts the lien theory, both to promote uniformity and also to avoid the title theory's conceptual tensions. Restatement (Third) of Prop.: Mortgs. § 4.1 (1997) ("It makes little sense to perpetuate in the modern real estate financing environment a title concept that arose in large measure as a result of now obsolete English usury law.").

[99] *See Eaton*, 969 N.E.2d at 1124–25.

[100] *See id.* at 1131 n.26.

[101] *See id.*

trading and securitization.[102] Any similar attempt to modernize mortgage law, synthesize it with commercial law, and uniformly apply it across all states should be welcomed by homeowners, lenders, and legal practitioners alike.[103] The UCC would be a valuable tool toward this end—indeed, the stated purpose of the UCC is to "simplify, clarify and modernize" commercial law and render it uniform across jurisdictions.[104] Other state courts have not hesitated to invoke the UCC in deciding foreclosure cases; Massachusetts should follow suit.[105] In the meantime, other state courts confronting foreclosure cases should turn to the UCC first, as doing so may swiftly determine the outcome.[106]

## Conclusion

In *Eaton*, the SJC interpreted Massachusetts foreclosure statutes against the backdrop of centuries-old common law, concluding that foreclosure required unity of note and mortgage. This represented a major shift in foreclosure requirements, compelling the court to apply its ruling only prospectively. The decision, however, offers no analysis or application of the UCC, which could have compelled the same result. By omitting any such discussion, the court left the relationship between the UCC and mortgage law in Massachusetts unclear. Although the SJC may not reverse course soon, other courts facing this issue should apply the UCC. Doing so should bring much-

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[102] *See* Restatement (Third) of Prop.: Mortgs. § 4.1 (1997); *see also* Amelia H. Boss, *The Evolution of Commercial Law Norms: Lessons to Be Learned from Electronic Commerce*, 34 Brook. J. Int'l L. 673, 673–75 (2009) (providing a non-UCC example of commercial law moving towards uniformity). For example, many states have codified the Uniform Electronic Transaction Act to govern electronic transactions, records, and signatures. *See, e.g.*, Cal. Civ. Code § 1633.1 et seq. (West 2012); Mass. Gen. Laws ch. 110G (2010).

[103] *See* PEB Report, *supra* note 53, at 1 (noting confusion and inconsistency among judges and attorneys in applying the UCC to foreclosure cases); *cf.* Gregory M. Shaw, Note, *Security Interests in Notes and Mortgages: Determining the Applicable Law*, 79 Colum. L. Rev. 1414, 1414–15 (1979) (arguing that applying UCC Article 9 to mortgages will increase clarity and consistency).

[104] Mass. Gen. Laws ch. 106, § 1-102 (2010).

[105] *See* Deutsche Bank Nat'l Trust Co. v. Mitchell, 27 A.3d 1229, 1235 (N.J. Super. Ct. App. Div. 2011) (applying UCC Article 3 to conclude that the plaintiff did not have the right to enforce a note via foreclosure); Leyva v. Nat'l Default Servicing Corp., 255 P.3d 1275, 1279–81 (Nev. 2011) (applying UCC Article 3 to determine if a lender had the right to foreclose). *But see* Shephard v. Am. Home Mortg. Servs., Inc., No. Civ. 2:09-1916 WBS GGH, 2009 WL 4505925, at *5 (E.D. Cal. Nov. 20, 2009) (holding that UCC Article 3 does not apply to non-judicial foreclosures).

[106] *See* PEB Report, *supra* note 53, at 14 ("[P]roper application of real property law requires proper application of the UCC rules . . . .").

needed and long-overdue clarity to the field of mortgage and foreclosure law.

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