

In early 2014, the Massachusetts Supreme Judicial Court will publish its decision in US Bank, N.A. v. Schumacher on whether a *Default Notice* that does not “strictly comply” with M.G.L. c. 244, §35A renders a foreclosure sale void.

Passed in 2007, M.G.L. c. 244, §35A amended the *Acceleration; Remedies* paragraph of the standard Massachusetts Fannie Mae/Freddie Mac mortgage. Specifically, §35A requires the *Default Notice* to contain ten points of information and give the borrower 150-days to cure their default.

Despite its innocuous appearance, to date §35A has resulted in hundreds of judicially invalidated foreclosure sales. This has been a byproduct of a flawed understanding of the *Notice of Default’s* role in the foreclosure process.

To this point, prior to §35A, the standard 30-day *Default Notice* was viewed as a function of the mortgage contract: satisfying the condition precedent in the *Acceleration; Remedies* paragraph on a mortgagee’s ability to accelerate the debt and thereafter foreclose. Given the *Default Notice’s* contractual nature, when challenged by a mortgagor during REO proceedings, the applicable legal standard was whether it substantially complied with the requirements of the *Acceleration; Remedies* paragraph.

Following the passage of §35A however, the mortgagor’s bar claimed that the *Default Notice* was no longer a function of contract, but rather one of statute. As such, they argued, the *Default Notice* was now part of the Massachusetts statutory foreclosure scheme and in that capacity required “strict compliance” with each of §35A’s ten parts not only for the debt to be properly accelerated, but for any subsequent foreclosure to be valid.

The flaw in this argument is that while §35A may have beefed up the *Default Notice’s* substance, it did not change the fact that the *Notice* still served to satisfy the condition precedent noted above. Fundamentally therefore, it remained a function of the mortgage contract and as such the substantial compliance standard should have remained the applicable legal standard.

Some Massachusetts judges adopted the mortgagor bar’s “strict compliance” argument, and with *Default Notices* sent by servicers almost always containing a deviation from at least one of §35A’s ten requirements these judges have invalidated hundreds of foreclosures since 2008. In the process, they have created issues concerning the marketability of properties across Massachusetts containing a post-2008 foreclosure sale.

The goal is for the Massachusetts Supreme Judicial Court to appreciate not only these legal intricacies, but more importantly the far reaching impact their decision will have on the Massachusetts real estate economy. A decision which recognizes that substantial compliance is sufficient will not only prevent foreclosures from being invalidated but will also assist in clearing title issues and aid the recovery of Massachusetts real estate. Failing this, 2014 and beyond should see yet another wave of REO title litigation in Massachusetts.