

Defective Mortgage Acknowledgments In Massachusetts

Lenders of troubled mortgages upon Massachusetts real property should carefully review their mortgages to avoid potential invalidation of such mortgages in bankruptcy. Bankruptcy courts in Massachusetts have led the charge in avoiding mortgages containing defects in notary clauses.

Massachusetts law requires that a validly executed acknowledgement be attached to a mortgage as a prerequisite to recording the mortgage in the registry of deeds.

The Bankruptcy Code affords bona fide purchaser status to bankruptcy trustees, allowing them to set aside a defective mortgage and recover the value of such mortgage for the benefit of unsecured creditors. In such instances, the unfortunate lender with a defective mortgage is relegated to becoming a general unsecured creditor and receiving a distribution in proportion to its claim vis-à-vis other unsecured creditors.

In finding that strict formalities must be observed in the execution of acknowledgements, bankruptcy courts have invalidated mortgages containing defects including the failure to include language that the execution of the mortgage is the borrower's free act and deed, the failure to insert the borrower's name in the blank space of the acknowledgment, the inclusion of names other than the borrower in the mortgage acknowledgment, and the failure by a power of attorney to state that the mortgage was being executed as the *borrower's* free act and deed. Although some of these issues are presently under review on appeal, lenders holding mortgages upon Massachusetts property should carefully review mortgage acknowledgment clauses to minimize the risk of potential avoidance of the mortgage upon a bankruptcy filing by a borrower. Such a review should take place before steps are taken to enforce a default, or foreclose upon a mortgage, which may accelerate a borrower's decision to seek bankruptcy protection. If a potential defect is discovered, lenders should consult with counsel to cure such defect before bringing any enforcement action.

It should be noted that neighboring states such as Maine and Connecticut have statutes that limit the types of defects that are actionable and provide a brief two-year time frame for bringing actions to challenge the validity of an instrument containing such defects. Bills containing similar restrictions were introduced in the Senate and House in Rhode Island in February 2015.