NO. SJC-12798

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

MARK R. THOMPSON; BETH A. THOMPSON,

Plaintiffs-Appellees,

v.

JPMORGAN CHASE BANK, N.A.,

Defendant-Appellant.

QUESTION CERTIFIED FROM THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, NO. 18-1559

BRIEF OF AMICI CURIAE AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, BANK POLICY INSTITUTE, INDEPENDENT COMMUNITY BANKERS OF AMERICA, MASSACHUSETTS BANKERS ASSOCIATION, MASSACHUSETTS MORTGAGE BANKERS ASSOCIATION, AND MORTGAGE BANKERS ASSOCIATION IN SUPPORT OF OPENING BRIEF OF DEFENDANT-APPELLANT

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Dated: January 22, 2020

CERTIFIED QUESTION

Did the statement in the August 12, 2016, default and acceleration notice that "you can still avoid foreclosure by paying the total past-due amount before a foreclosure sale takes place" render the notice inaccurate or deceptive in a manner that renders the subsequent foreclosure sale void under Massachusetts law?

CORPORATE DISCLOSURE STATEMENTS

- The American Bankers Association states that it is a non-profit membership organization, that it does not have a parent corporation, and that no corporation, public or private, owns any of its stock.
- The American Financial Services Association states that it is a non-profit membership organization, that it does not have a parent corporation, and that no corporation, public or private, owns any of its stock.
- The Bank Policy Institute states that it is a non-profit membership organization, that it does not have a parent corporation, and that no corporation, public or private, owns any of its stock.
- The Independent Community Bankers of America states that it is a non-profit membership organization, that it does not have a parent corporation, and that no corporation, public or private, owns any of its stock.

- The Massachusetts Bankers Association, Inc. states that states that it is a non-profit membership organization, that it does not have a parent corporation, and that no corporation, public or private, owns any of its stock.

- The Massachusetts Mortgage Bankers Association states that it is a non-profit membership organization, that it does not have a parent corporation, and that no corporation, public or private, owns any of its stock.

- The Mortgage Bankers Association states that it is a non-profit membership organization, that it does not have a parent corporation, and that no corporation, public or private, owns any of its stock.

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STATEMENT OF IDENTITY AND INTEREST

Amici curiae are trade associations that represent the interests of their members, including mortgagees, loan servicers, and other financial services institutions, with respect to matters affecting the residential mortgage loan industry.

- The American Bankers Association ("ABA") is the principal national trade association of the financial services industry in the United States. Founded in 1875, the ABA is the voice for the nation's $13 trillion banking industry and its over one million employees. ABA members provide banking services in each of the fifty states and the District of Columbia. ABA membership includes all sizes and types of financial institutions, including very large and very small banking operations.

- Founded in 1916, the American Financial Services Association ("AFSA") is the national trade association for the consumer credit industry, protecting access to credit and consumer choice. AFSA members provide consumers with many kinds of credit, including traditional installment loans, mortgages, direct and indirect vehicle financing, payment cards, and retail sales finance.

- The Bank Policy Institute ("BPI") is a nonpartisan public policy, research, and advocacy group, and the successor to the Clearing House Association and the Financial Services Roundtable after their merger in 2018. Members of the BPI include universal banks, regional banks, and major foreign banks doing business

in the United States. BPI members employ nearly two million Americans, and they make 72 percent of all loans and nearly half of the nation's small business loans.

- The Independent Community Bankers of America is an association that promotes an environment in which community banks can flourish. With more than 52,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 760,000 Americans, and are the only physical banking presence in one in five U.S. counties.

- The Massachusetts Bankers Association, Inc. is a banking trade group that represents more than 135 banking institutions throughout the Commonwealth, including commercial, savings, and cooperative banks, savings and loan associations, and trust companies. Founded in 1905, its members extend consumer credit in the form of home mortgage loans, automobile credit, and consumer loans. The Massachusetts Bankers Association appears from time to time as an amicus curiae in litigation involving issues of importance to its members. Many of its member banks or their affiliates extend home mortgage loans to consumers in the Commonwealth, and from time to time foreclose on those loans (after all other repayment options are exhausted). The issue posed in this case, namely whether the state-mandated right-to-cure notice sent by Massachusetts Bankers Association member JPMorgan Chase Bank, N.A. ("Chase") could violate state law, bears directly on the foreclosures that its member banks conduct and have conducted.

- Founded in 1976, the Massachusetts Mortgage Bankers Association ("MMBA") is the largest mortgage association in New England and is recognized as one of the most successful in the country. The MMBA offers the most comprehensive member services to over 225 corporate members throughout the region. The MMBA's membership includes depository institutions, mortgage companies and wholesalers, as well as providers to the mortgage industry including title, credit, appraisal, insurance, technology, legal, accounting, and consulting entities.

- The Mortgage Bankers Association ("MBA") is the national association representing the real estate finance industry, an industry that employs more than 280,000 people in virtually every community in the country. Headquartered in Washington, D.C., the association works to ensure the continued strength of the nation's residential and commercial real estate markets; to expand homeownership; and to extend access to affordable housing to all Americans. MBA promotes fair and ethical lending practices and fosters professional excellence among real estate finance employees through a wide range of educational programs and a variety of publications. Its membership of over 2,200 companies includes all elements of real estate finance: mortgage companies, mortgage brokers, commercial banks, thrifts, REITs, Wall Street conduits, life insurance companies, and others in the mortgage-lending field.

STATEMENT PURSUANT TO MASS. R. APP. P. 17(c)(5)

No party's counsel authored the brief in whole or in part. No party or their counsel contributed money that was intended to fund the preparation or submission of the brief. No person—other than amici curiae, their members, or their counsel—contributed money intended to fund the preparation or submission of the brief.[1] No amici curiae or their counsel represents or has represented the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

[1] Amici curiae note that defendant-appellant Chase is a member of ABA, AFSA, BPI, the Massachusetts Bankers Association, and MBA. Chase did not contribute money to any amici curiae intended to fund the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the First Circuit considered a notice setting forth disclosures made pursuant to (1) Chapter 244, Section 35A of the Massachusetts General Laws using the language mandated by the Massachusetts Division of Banks ("DOB") (the "35A Notice"), and (2) the Massachusetts Fannie Mae/Freddie Mac uniform mortgage ("Uniform Mortgage").[2] The question presented is whether the notice was "potentially deceptive" because the reinstatement period required under Section 35A, and as set forth in the notice, provided a more generous period for reinstating the loan than that set forth in the Uniform Mortgage itself (in paragraph 19). Under Massachusetts law, a court is charged with considering a contract such as the Uniform Mortgage in its entirety, including important provisions of the Uniform Mortgage that resolve any tension (if such tension exists) between the 35A Notice and paragraph 19 of the Uniform Mortgage. Accordingly, regardless of whether the standard in Pinti v. Emigrant Mortgage Co., 472 Mass. 226 (2015), or U.S. Bank, N.A. v. Schumacher, 467 Mass. 421 (2014), applies to the notice, Chase strictly complied with its obligations under the Uniform Mortgage and Massachusetts law.

Amici curiae and their members are committed to ensuring that Massachusetts consumers receive clear communications about non-judicial mortgage foreclosure

[2] Thompson v. JPMorgan Chase Bank, N.A., 915 F.3d 801 (1st Cir. 2019).

proceedings. But deference to plaintiffs' erroneous interpretation and treatment of the 35A Notice and the Uniform Mortgage would confuse and harm consumers and threaten to cloud title in a vast number of foreclosed-on Massachusetts properties, including those purchased by third-party homebuyers. Thus, amici curiae urge the Court to answer the certified question in the negative and hold that the subject notice was not inaccurate in a manner that could render a subsequent foreclosure sale void under Massachusetts law.

ARGUMENT

I. The 35A Notice Was Not Deceptive; the Notice Strictly Complied with Massachusetts Law and the Uniform Mortgage.

Section 35A(b) and its accompanying regulations require mortgagees to issue a 35A Notice to Massachusetts borrowers before accelerating a mortgage obligation based on borrower default. See G. L. c. 244, § 35A(b); 209 Code Mass. Regs. § 56.03(1). Section 35A(c) mandates that "the notice required in subsection (b) shall inform the mortgagor … that the mortgagor may redeem the property by paying the total amount due, prior to the foreclosure sale." G. L. c. 244, § 35A(c)(8). DOB regulations (1) mandate that mortgagees "must provide" the notice under Section 35A in accordance with 209 Code Mass. Regs. § 56.04, and (2) prescribe the form of 35A Notice from which mortgagees may not deviate. See 209 Code Mass. Regs. §§ 56.03, 56.04 (35A Notice "must conform to the following …") (emphasis added)).

In this case, Chase issued its 35A Notice with the language mandated by the statute and in the exact form prescribed by the DOB. In particular, pursuant to Section 35A and its regulations, Chase's 35A Notice stated that "[a]fter 11/10/2016, you can still avoid foreclosure by paying the total past due amount before a foreclosure sale takes place." Compare Thompson 35A Notice with DOB-Mandated Form 35A Notice, 209 Code Mass. Regs. § 56.04.

Notwithstanding Chase's strict compliance with the language mandated by Section 35A and the DOB, plaintiffs urge the Court to conclude that the 35A Notice was "potentially deceptive," thereby rendering the subject foreclosure sale void pursuant to Pinti v. Emigrant Mortgage Co., 472 Mass. 226 (2015). Plaintiffs, of course, were not misled by the language of the 35A Notice.[3] See Thompson v. JPMorgan Chase Bank, N.A., 915 F.3d 801, 805 (1st Cir. 2019). Under plaintiffs' erroneous theory, however, the 35A Notice could lead some borrowers to believe they could "wait until a few days before the sale" to cure their default. According to plaintiffs, such a belief would be incorrect because paragraph 19 of the Uniform Mortgage (relating to a borrower's right to reinstate a mortgage after acceleration) purportedly prohibits the borrower from curing within five days of the foreclosure sale. See Pls.' Br. at 10-13, 17-24, 25-32.

[3] Nor did plaintiffs tender the payment required to reinstate their loan at any time before the foreclosure sale. See Thompson, 915 F.3d at 805.

This conclusion ignores the fact that the DOB mandated the language of the 35A Notice. See Pls.' Br. at 12 (stating incorrectly that "the bank is the one writing the notice and has ample opportunity and expertise to make it entirely accurate"). And it fails to give effect to important provisions of the Uniform Mortgage that would have resolved any tension (if such tension exists) between the 35A Notice and paragraph 19. As the Court has held, under Massachusetts law, a court must consider a contract such as the Uniform Mortgage in its entirety and cannot read a discrete provision in isolation. See Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund, 466 Mass. 368, 374 (2013) ("words of a contract must be considered in the context of the entire contract rather than in isolation"). In applying this basic tenet of contract law, there can be no doubt that the Uniform Mortgage itself resolved any tension (to the extent any even exists) between the 35A Notice and paragraph 19 of the Uniform Mortgage.

In particular, paragraph 12 of the Uniform Mortgage provides mortgagees with the ability to extend the deadline for payment, including the period for reinstatement. See R.A. 71. And, critically, paragraph 16 of the Uniform Mortgage provides that all "rights and obligations contained in this Security Instrument are subject to any requirements and limitations of Applicable Law." See R.A. 72. "Applicable Law" is defined to include controlling state statutes and regulations.[4]

[4] The full provision reads: "'Applicable Law' means all controlling applicable

See R.A. 63. Additionally, paragraph 15 of the Uniform Mortgage provides that "[i]f any notice required by this Security Instrument is also required under Applicable Law, the Applicable Law requirement will satisfy the corresponding requirement under this Security Instrument." See R.A. 72. Thus, in construing the Uniform Mortgage in its entirety, the more generous reinstatement provision in the 35A Notice as mandated by state law governs over the period afforded by paragraph 19. See Brigade Leveraged Capital Structures Fund Ltd., 466 Mass. at 374. When considering the mandate of Section 35A and the DOB regulations in conjunction with paragraphs 12, 15, and 16 of the Uniform Mortgage, only one conclusion is possible—namely, a determination that the 35A Notice is not "potentially deceptive."

Nor does the fact that Chase provided plaintiffs with a so-called "hybrid" notice, under Section 35A and paragraph 22 of the Uniform Mortgage, change this result. The form of notice did nothing to alter the fact that the terms of the Uniform Mortgage expressly give effect to the broader protections provided to consumers under Massachusetts law, such as the more generous reinstatement period mandated by Section 35A and the DOB. And regardless of whether the standard in Pinti or in U.S. Bank, N.A. v. Schumacher, 467 Mass. 421 (2014), applied to the notice, Chase

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federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions." R.A. 63.

strictly complied with its obligations under the Uniform Mortgage and Massachusetts law.[5] Moreover, adopting plaintiffs' argument (that mortgagees must provide the reinstatement notice pursuant to paragraph 19 of the Uniform Mortgage) would have the effect of affording borrowers a less generous reinstatement period than that mandated by Section 35A and Massachusetts contract law and routinely provided by amici curiae's members.

II. Adopting Plaintiffs' Position Would Result in Consumer Confusion and Harm.

Adoption of plaintiffs' arguments would place amici curiae's members, who include mortgagees and loan servicers, in a conundrum: The DOB mandates the exact form of the 35A Notice, but plaintiffs assert that language in the DOB-mandated 35A Notice could void a foreclosure sale in instances where the Uniform Mortgage requires provision of notice under paragraph 22. See Pls.' Br. at 10-13, 17-24, 25-32.

Nor is plaintiffs' suggested workaround of any assistance. Failing to recognize the mandatory nature of the 35A Notice language included therein,

[5] In Schumacher, the Court ruled that a Section 35A notice is not related to the foreclosure of mortgages by the exercise of a power of sale, and thus a defect in a Section 35A notice does not render a resulting foreclosure void. See 467 Mass. at 431. In Pinti, the Court ruled that a notice under paragraph 22 of the Uniform Mortgage is related to the exercise of the power of sale. See 472 Mass. at 239, 243. Pinti also recognized that the provision of a Section 35A notice is not subject to a strict compliance standard and that mortgagees are required to issue such notice in the statutorily-mandated form. See 472 Mass. at 239.

plaintiffs suggest that mortgagees provide a different form notice to borrowers. Of course, that would run afoul of the DOB regulations. See 209 Code Mass. Regs. §§ 56.03, 56.04. And if mortgagees were to provide an additional notice to remind borrowers of the reinstatement deadline set forth in paragraph 19 of the Uniform Mortgage, that would not lead to clarity for borrowers. Rather, consumers may perceive the two notices as providing contradictory instructions regarding reinstatement. On the one hand, consumers may read the DOB-mandated 35A Notice (according to plaintiffs) as allowing tender up to the date of the foreclosure sale. On the other hand, plaintiffs would have the putative alternative notice indicate that consumers must tender at least five days prior to the foreclosure sale. Which date is correct, consumers may ask? Plaintiffs' solution would provide no answer to this question and would only serve to work against, and not enhance, the consumer-protection intent of the paragraph 22 notice. See Pinti, 472 Mass. at 236 n.16.

In addition to causing consumer confusion, adopting plaintiffs' arguments would result in other consumer harm. Amici curiae note that consistent with paragraph 12 of the Uniform Mortgage, see R.A. 71, it is a widespread practice in the residential mortgage servicing industry to accept a reinstatement payment up until the date of a foreclosure sale, which benefits borrowers and mortgagees alike. And borrowers do, in fact, cure defaults up to the date of the foreclosure sale. If mortgagees, however, were affirmatively required to disclose the limited only-five-

days-prior-to-foreclosure reinstatement deadline, it may have a chilling effect on borrowers' attempts to reinstate their loan and would lead to foreclosures that otherwise need not have occurred.

Furthermore, the First Circuit's views would not assist consumers either. The First Circuit had held that with respect to the subject notice, mortgagees must use their "imagination to consider every possible way it could be misleading." Thompson, 915 F.3d at 805. Putting aside the fact that the First Circuit's decision ignored Schumacher and the DOB-mandated content of the 35A Notice, the decision invites—if not directs—mortgagees to overwhelm consumers with layers of notifications. This is not what the Court envisioned in either its Schumacher or Pinti decisions. Schumacher, of course, exempts the 35A Notice from the strict-compliance requirement altogether. And not even Pinti purports to require a paragraph 22 notice to reiterate every single term of the mortgage—especially where other terms in the Uniform Mortgage, such as paragraph 19, do not also mandate the provision of notice.

Finally, the First Circuit's instruction to mortgagees to use their "imagination" to remind consumers of each of the terms of the contract at each point in the parties' relationship would render nugatory Massachusetts contract law. In particular, the First Circuit decision would do away with long-standing Massachusetts jurisprudence charging each party to a contract with knowledge of its terms. See,

e.g., Howard v. Harvard Congregational Soc., 223 Mass. 562, 565 (1916) (a party is "bound as a matter of law to know the terms of the contract which it had entered into"). Under that regime, borrowers, such as plaintiffs, are charged with knowledge of the Uniform Mortgage, including that it gives effect to the state-law protections provided to them, namely the reinstatement period disclosed in the 35A Notice. The First Circuit's decision in Thompson, which plaintiffs urge this Court to adopt, would improperly discard that regime.

III. Adopting Plaintiffs' Position Has the Potential to Cloud Title in Thousands of Massachusetts Mortgages and Adversely Impact the Massachusetts Mortgage Industry.

As this Court has recognized, the issuers of the Uniform Mortgage—Fannie Mae and Freddie Mac—"provide the largest source of home mortgage financing in the nation" and that "the use of their standard mortgage form is widespread." Pinti, 472 Mass. at 236 n.16. The Uniform Mortgage has been the primary form of security instrument in Massachusetts residential loan transactions (including plaintiffs' loan) for many years. Id.

Unfortunately, some loans fall into arrears, resulting in foreclosure. According to data maintained by MBA, in each quarter of 2018, approximately 7,000 Massachusetts mortgage loans were 90 days or more delinquent and thus eligible to receive a 35A Notice. Mortgagees initiate several thousands of foreclosure proceedings in Massachusetts each quarter. Most foreclosed

proceedings result in sales to homebuyers and other third parties. If adopted, plaintiffs' position would negatively impact the Massachusetts mortgage industry and housing market because it would call into question virtually all foreclosure sales conducted in the Commonwealth since 2012, the date when the DOB regulations mandating the use of the subject notice went into effect.

For instance, title insurers may well take a conservative view and decline to issue title policies for properties involved in a foreclosure sale conducted after the DOB promulgated the mandated notice language. Without the ability to obtain a title policy, foreclosing mortgagees will be unable to offer marketable title and potential third-party buyers or persons seeking to refinance loans will be unable to obtain financing with respect to foreclosed properties. Servicers may face the prospect of suspending in-process foreclosures or having to re-foreclose on previously foreclosed properties held in real estate owned portfolios. While foreclosure is not the desired outcome of either the lender or borrower at the inception of a mortgage loan, a smoothly-functioning foreclosure system is necessary to return properties to the market, benefiting consumers by increasing housing choice. Each of the above scenarios, however, would stymie such a system and would only serve to exacerbate the Commonwealth's already acute shortage of affordable housing.

And it is not mere speculation that court decisions regarding pre-foreclosure notice procedures can cause difficulties for consumers in the housing market. For instance, it took an act of the Massachusetts Legislature to resolve the potential clouds on title that arose after the decision in U.S. Bank N.A. v. Ibanez, 458 Mass. 637, 655 (2011), which concerned the timing of providing the foreclosure notice required under Chapter 244, Section 14 of the Massachusetts General Laws. See G. L. c. 244, § 15(d) ("An Act Clearing Titles to Foreclosed Properties").

If adopted, plaintiffs' arguments could create similar risk in the housing market. Indeed, following the First Circuit's decision in Thompson, those arguments already have threatened harm thousands of Massachusetts homeowners who purchased properties at foreclosure sales. Counsel for plaintiffs has filed several purported class actions in Massachusetts federal district court seeking to invalidate thousands of foreclosure sales made to Massachusetts homebuyers.[6] The costs and difficulties of investigating and quieting title, of the reduced marketability of homes, and of obtaining title insurance will be borne directly by consumers who own homes with a foreclosure sale in the chain of title involving the type of notice at issue here. Because plaintiffs' arguments fail to recognize the potential harm they could work on Massachusetts homebuyers, the Court should answer the certified question in the

[6] See Makoni v. Ocwen Loan Servicing LP, 4:19-cv-10553; Thevenin v. M&T Bank Corp., 1:19-cv-10131; Yargeau v. Wells Fargo Bank, N.A., 4:18-cv-12652; Wilson v. Fay Servicing, LLC, 1:18-cv-12191.

negative and hold that the subject notice was not inaccurate in a manner that could render a subsequent foreclosure sale void under Massachusetts law.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request, consistent with Chase's opening brief, the Court answer the certified question in the negative.

Respectfully Submitted,

/s/ Andrew C. Glass

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Dated: January 22, 2020

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

MARK R. THOMPSON and BETH A. THOMPSON, Plaintiffs-Appellees, v. JPMORGAN CHASE BANK, N.A., Defendant-Appellant.	No. SJC-12798

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2020, I electronically filed the foregoing brief of amici curiae with the Massachusetts Odyssey File and Serve site and served two copies upon the following counsel by First Class United States mail:

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CERTIFICATE OF COMPLIANCE WITH MASSACHUSETTS RULES OF APPELLATE PROCEDURE

I hereby certify that, to the best of my knowledge, this brief complies with Massachusetts Rules of Appellate Procedure 17 and 20, which pertain to the filing of amici curiae briefs. I further hereby certify that, to the best of my knowledge, this brief complies with the length limit of Massachusetts Rules of Appellate Procedure 20(a)(3)(E) as follows:

1. Exclusive of the exempted portions of the brief, as provided in Mass. R. App. P. 20(a)(2)(D), the brief contains 2,675 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font. The undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Andrew C. Glass
Andrew C. Glass

Dated: January 22, 2020