UNPRECEDENTED MAINE SUPREME COURT REVERSAL - A HUGE WIN FOR MAINE MORTGAGE LENDERS

Date: 24 January 2024

US Financial Institutions and Services Litigation

By: Morgan T. Nickerson

Not often do courts explicitly reverse their own precedent, especially when that precedent was a unanimous 7-0 opinion issued only a few years earlier. But that is precisely what happened last week when the Supreme Judicial Court of Maine (Maine SJC), in a 4-3 opinion, reversed itself and issued its groundbreaking decision in *Finch v. U.S. Bank*, N.A. *Finch* ends Maine's "court by casino" practice and has sweeping implications for borrowers and lenders statewide.

In 2017, the Maine SJC decided *Pushard v. Bank of America*, ruling that *res judicata* forever barred a lender from enforcing its note or mortgage when a technically defective default notice led to dismissal of an initial foreclosure action. In short, if the default notice to the borrower in an initial suit misstated the amount due to cure or improperly included fees not recoverable, *res judicata* prevented the lender from initiating a second foreclosure action and the borrower received a "free house" free and clear of the mortgage. Given the resulting injustice, lenders again appealed to the Maine SJC seeking a ruling that a failed foreclosure action should not result in a free house. The Maine SJC doubled down, however, affirming *Pushard in Federal National Mortgage Association v. Deschaine* with an express ruling that required a mortgage discharge after a failed foreclosure.[1]

In the wake of *Pushard and Deschaine*, the outlook for many Maine lenders was bleak: lenders risked losing their ability to collect or enforce a mortgage loan if they made even the slightest mistake in a default notice. Many lenders accepted their fate, but others, like a lender represented by our firm in *Finch*, pressed forward with creative arguments to expose the unjust and imbalanced impacts of *Pushard*. Our financial services litigation team argued that the Maine SJC's decisions in *Pushard and Deschaine* ran counter to over 100 years of established Maine title theory jurisprudence. The hope was that the Maine SJC would reconsider its prior rulings in Pushard and Deschaine.

The strategy worked. Last week in *Finch*, the Maine SJC overturned *Pushard* and called into question the legal underpinnings of *Deschaine*. The court held that a technically noncompliant default notice means that a lender cannot accelerate the note. If the lender cannot accelerate the note, then *res judicata* cannot bar a subsequent foreclosure. Now, after *Finch*, lenders can take comfort that a deficient notice will not automatically render their mortgages unenforceable.

A DRACONIAN DECISION: PUSHARD V. BANK OF AMERICA

In *Pushard*, a lender initiated a foreclosure action against borrowers who had defaulted on their monthly mortgage payments.[2] The borrowers asserted a defense that the lender failed to send a compliant default notice under 14

©2005-2026 K&L Gates LLP. All Rights Reserved.

M.R.S. § 6111.[3] The Maine Superior Court entered judgment for the borrowers, finding the lender's default notice defective.[4]

Thereafter, the borrowers filed a separate action in the Superior Court seeking a declaration that they owed nothing on the note and requiring that the mortgage be discharged.[5] While the Superior Court found for the lender, essentially ruling that it was not barred from pursuing another foreclosure based upon a valid default notice, the Maine SJC disagreed.[6] The Maine SJC held that the Superior Court's foreclosure judgment in the borrowers' favor precluded the bank from recovering on the note or mortgage based on *res judicata*.[7] Specifically, the court held that the lender accelerated all of the payment due under the note by filing a foreclosure action. Since the full amount due on the note had been accelerated, res judicata barred a second foreclosure action seeking the same accelerated amounts due.[8] Effectively, the court held that a foreclosure judgment for the borrowers based on a mistake in the lender's default notice renders the note and mortgage forever unenforceable and requires a transfer of title to the borrower, "free and clear of the [lender's] mortgage encumbrance."[9]

THE MAINE SJC REVERSES COURSE: FINCH V. U.S. BANK

Last week, the Maine SJC expressly reversed *Pushard in Finch*. In *Finch*, the borrower again defended against the lender's foreclosure action on the grounds that the bank's default notice failed to comply with 14 M.R.S. § 6111.[10] Bound by *Pushard and Deschaine*, the trial court granted judgment declaring the note and mortgage unenforceable, ordering the lender to discharge the mortgage, and declaring that the borrower held title to the property free and clear of the mortgage.[11]

The lender, represented by our firm, appealed. In the appeal, the lender urged the Maine SJC to overrule *Pushard* on the grounds that title cannot be transferred and a mortgage is not required to be discharged even if a second foreclosure action is barred by *res judicata*.[12] The lender argued that a judgment against a foreclosing lender based, in whole or in part, on a defective notice of default does not render the entire mortgage or the debt that it secures unenforceable.[13]

On January 11, 2024, in a 4-3 decision, the court agreed, expressly overruling *Pushard*, which it re-characterized as having "disproportional and draconian" practical implications.[14] The court held that a lender does not lose its ability to enforce the entire loan or the mortgage due to a defect in the default process.[15] The court reasoned that the failure to comply with a statutory notice meant that the bank could not accelerate the note balance or enforce the mortgage.[16] Thus, the bank's claim for the full amount due on the note and foreclosure of the mortgage was not—and could not have been—litigated for *res judicata* purposes, and a subsequent foreclosure action would not be barred.[17] The result is that mortgage loans are not forever lost when the lender makes a technical mistake.[18]

LOOKING AHEAD: THE PRACTICAL IMPLICATIONS OF FINCH

The lender's success in *Finch* is a victory not only for the lender in that case, but for all lenders in Maine. *Finch* marks a sweeping change in Maine law that will dramatically impact the state's foreclosure jurisprudence. Under *Finch*, foreclosing lenders will no longer face the draconian consequence of a simple error in a default notice resulting in the forfeiture of its note and mortgage. Similarly, borrowers will no longer be incentivized to take every foreclosure case to verdict in hopes of a misstep from the lender resulting in a free house. With Maine's "court by casino" regime overruled by *Finch*, foreclosure cases in Maine will be resolved more quickly and more equitably.

©2005-2026 K&L Gates LLP. All Rights Reserved.

FOOTNOTES

[1] *See Fed. Nat'l Mortg. Ass'n v. Deschaine*, 2017 ME 190, as revised (Dec. 7, 2017).

[2] *Pushard v. Bank of Am.*, N.A., 2017 ME 230, ¶ 3 (2017), overruled by *Finch v. U.S. Bank*, N.A., 2024 ME 2, ¶ 3 (2024).

[3] *Id*. at ¶ 5.

[4] *Id*. at ¶ 4. Specifically, the court held that the bank had failed to prove (1) that it had sent a valid notice before commencing the action, as required by the relevant foreclosure statute, 14 M.R.S. § 6111; (2) a breach of the mortgage, and (3) the amount due.

[5] *Id*. at ¶ 5.

[6] *Id*. at ¶ 9.

[7] *Id*. at ¶ 33.

[8] *Id*. at ¶ 35.

[9] *Id*. at ¶ 36.

[10] *Finch v. U.S. Bank, N.A.*, 2024 ME 2, ¶ 3 (2024).

[11] *Id*.

[12] *Id*.

[13] *Id*. at ¶ 18.

[14] *Id*. at ¶ 5.

[15] *Id*. at ¶ 6.

[16] *Id*. at ¶ 7.

[17] *Id*.

[18] *Id*.

KEY CONTACTS



MORGAN T. NICKERSON
PARTNER

BOSTON
+1.617.261.3134
MORGAN.NICKERSON@KLGATES.COM

©2005-2026 K&L Gates LLP. All Rights Reserved.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.