

A Brief Overview of the Massachusetts Foreclosure Law and Process

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The foreclosure process in Massachusetts is governed by statute, G.L. c. 244, the mortgage contracts, and guidelines established by investors or insurers (such as Fannie Mae, Freddie Mac, FHA, VA and RHS). Under the Fannie Mae and Freddie Mac uniform mortgage and note, for example, lenders are required to provide borrowers with a notice of default specifying what mortgage covenants have been breached and how the borrower can cure the breach to avoid acceleration of the note. Similarly, the two corporations and insurers such as the FHA have extensive guidelines and handbooks that outline how delinquent mortgages should be serviced and what steps should be taken in the pre-foreclosure process. This brief summary will outline the statutory process, but advocates are advised to check the mortgage documents and investor and insurer guidelines for supplemental requirements.¹

There are several ways to foreclose a mortgage in Massachusetts: by entry and continuous possession for three years; by sale under the statutory power of sale contained in the mortgage or by action. The most frequently exercised option is foreclosure by power of sale, G.L. c. 244, § 14, coupled with entry onto the property.² A foreclosure by action is rarely used. Mortgagees must strictly follow the requirements outlined in the statute, G.L. c. 244, §§ 1 et seq., or the sale may be invalid.³

Prior to initiating a foreclosure the mortgagee must establish that it has a right to foreclose and that it is the true owner of the mortgage. At a minimum, this means establishing that there has indeed been a breach of a valid and legally enforceable mortgage. If the lender chooses to use the power of sale process, the statutory power of sale in G.L. c. 183 § 21 which authorizes the mortgagee to sell the property for breach of covenants of the mortgage, must be in or referenced in the mortgage. In addition, the party prosecuting the foreclosure must have the right to do so. In *U.S. National Bank v. Ibanez*, 2009 WL 3297551 (Mass. Land Ct. March 26, 2009), the Land Court invalidated two foreclosures where the trustees did not possess a valid written mortgage assignment

¹ Both Fannie Mae and Freddie Mac have established toll-free telephone numbers and a website to provide information on the loans they own or securitize. For Fannie Mae, call 1-800-7FANNIE or check www.fanniemae.com/homeaffordable. For Freddie Mac, call 1-800-FREDDIE or check www.freddiemac.com/avoidforeclosure/. The guides outlining their policies are also available online. Fannie Mae's Single-Family Selling and Servicing Guide is available at <https://www.efanniemae.com/sf/guides/ssg/#sgpdfv>; and Freddie Mac's Single-Family Seller/ Servicer Guide is available at <http://www.freddiemac.com/singlefamily/>. Private investors often adopt Fannie Mae or Freddie Mac's guidelines as their own.

² Typically, entry is made at the time of the foreclosure sale. If there is a defect in the power of sale process, the creditor can rely on the entry process to gain possession of the property after the expiration of the three year right of redemption.

³ Note also that foreclosure sales are also subject to common law requirements, most notably mortgagees are required to use good faith and reasonable diligence to protect the interest of borrowers. See *Cambridge Sav. Bank v. Cronin*, 289 Mass 379 (1935).

at the time the notice of sale was published and the sale took place. The notice of sale failed to name the true holder of the mortgage as of the date of the sale as required by G.L. c. 244, § 14.

The formal foreclosure process starts with the acceleration of the mortgage -- calling the entire balance of the mortgage due and owing immediately. A notice or letter accelerating the loan is usually required by the note and mortgage. If this is the first communication with the homeowner, the letter should contain disclosures required by the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 (g).

Prior to acceleration of the mortgage, borrowers living in owner-occupied residential real properties with four or less households are entitled to a ninety-day period to cure the default on the mortgage without incurring foreclosure fees and costs. G.L. c. 244, § 35A. During this period, the consumer is not responsible for paying attorneys fees or any other fee, penalty or charge attributable to the exercise of the right to cure the default, except for late fees. Real estate taxes, hazard insurance, condominium fees and municipal charges (e.g., for water and sewer) paid by the servicer during the ninety day period may be collected. Div. of Banks Opinion Letter No. 09-016 (June 25, 2008).

In limited circumstances, borrowers have a one hundred and fifty day period to cure the default. Under a new law, effective August 7, 2010, the creditor must certify that it has engaged in a good faith effort to negotiate a commercially reasonable alternative to the foreclosure. G.L. c. 244, § 35A. A good faith effort involves at least one meeting by phone or in person between the creditor's representative and the borrower, borrower's attorney or representative. Any person representing the creditor in that meeting must have the authority to negotiate the terms of and fully modify a mortgage loan. At least 10 days prior to the meeting, the creditor must provide the borrower with documentation of such good faith efforts. The statute does not outline what such pre-meeting documentation entails, but to demonstrate "good faith efforts" the creditor is, at a minimum, required to evaluate of the borrower's financial circumstance including a review of the borrower's current income, debts and obligations; and perform a net present value analysis to determine whether the loan should be modified. G.L. c. 244, § 35A(c). The result of this analysis, and the applicable input data should be available before the scheduled meeting.

If the creditor does not or cannot certify that it has engaged in a good faith effort then, prior to acceleration of the mortgage, the homeowner must be given a one hundred and fifty day period to cure the default without incurring foreclosure fees and costs. G.L. c. 244, § 35A(b). This one hundred and fifty day right to cure must be granted at least once every three year period, regardless of who holds the mortgage. If the creditor can certify that it has engaged in a good faith effort then it must do so in the form of an affidavit that includes the time and place of the meeting, parties participating, relief offered to the borrower, and a summary of the net present value analysis and applicable inputs of the analysis. The affidavit must also include a certification that any modification or option offered to the homeowner complies with current federal law or

policy. G.L. c. 244, § 35A(f). The creditor must provide a copy of the affidavit to the homeowner and file a copy with the Land Court in advance of the foreclosure.

Statutorily Required Pre-Foreclosure Notices

The homeowner is required to receive several notices prior to acceleration of the mortgage or sale of the property. The ninety-day notice of default and right to cure must be sent prior to acceleration of the mortgage. The notice gives the homeowner ninety days to cure the default without incurring foreclosure fees and costs. G.L. c. 244, § 35A(d). The notice, mailed or delivered to the homeowner at the last known address, should include the amount of the claimed default, the date to cure the default and the name and address of the mortgagee or assignee. An affidavit evidencing compliance with this notice provision and a copy of the notice must be filed in any action or proceeding to foreclose on the property and with the Division of Banks. G.L. c. 244, § 35A(e).

Homeowners entitled to the one hundred and fifty day right to cure must also be sent a notice prior to acceleration of the mortgage. G.L. c. 244, § 35A(h). However, this notice must be sent by first class or certified mail or delivered to the homeowner at the last known address. The notice should include the amount of the claimed default, the date to cure the default and the name and address of the mortgagee or assignee. An affidavit evidencing compliance with this notice provision and a copy of the notice must be filed in any action or proceeding to foreclose on the property and with the Division of Banks. G.L. c. 244, § 35A(j). Additionally, as discussed above, if the creditor is able to certify compliance with the statute, and thus deprive the homeowner of the 150 day right to cure, the homeowner must receive a copy of that affidavit certifying compliance.

Homeowners with second mortgages of \$1,500 or less must to be given a Notice of Intent to Foreclose at least 15 days prior to the sale of the property. However, the property must be an owner-occupied, one-to-six family home with an assessed value of the \$40,000 or less. Notice must be sent registered mail. G.L. c. 140, §§ 90A, 90B.

There is also a specific notice provision for high-cost mortgages. Before accelerating a loan covered by the Predatory Home Loan Practices Act, Mass. Gen. L. ch. 183C, §§ 1-19, the lender must notify the homeowner in writing and offer a reasonable opportunity to pay the outstanding balance. 183C, § 9. In addition, a high-cost home loan made without compliance with the counseling requirement is unenforceable. G.L. c. 183C, § 3. A court that finds a violation of the statute has the power to rescind the high-cost home loan, bar the lender from collecting, enjoin judicial or non-judicial foreclosure or other lender action, reform the terms of the high-cost home mortgage, enjoin other prohibited conduct, and provide other relief. G.L. c. 183C, § 18. Borrowers in foreclosure may raise violations of the statute against the assignee (unless the assignee exercises due diligence and takes other precautions to avoid accepting assignment of high-cost home loans) as a defense or counterclaim, or in an action to enjoin foreclosure or preserve or regain possession. G.L. c. 183C, § 15.

Though coming later in the process, the notice of sale is an important notice that is sent to each owner with an equity of redemption. A form of notice is outlined in the statute, though it may be altered and other forms may be used. G.L. c. 244, § 14. However, as discussed with *Ibanez* above, this notice must contain the name of the party holding the mortgage and making the sale. The notice of sale is sent to borrowers by registered mail at least 14 days before the sale. The notice of sale is also published in a newspaper - once a week for 3 consecutive weeks beginning at least 21 days before sale. G.L. c. 244, § 14.

To reserve the right to pursue a deficiency balance in the event the foreclosure auction does not bring in enough money to satisfy the entire debt, the lender must send written notice at least 21 days before the sale. The mailing of the notice must be confirmed by an affidavit executed within 30 days of the sale. G.L. c. 244, § 17B. Both the notice and affidavit are procedural prerequisites to collecting a deficiency balance. See *Framingham Sav. Bank v. Turk*, 40 Mass. App. Ct. 384 (1996).

The Land Court Process

Once the loan is accelerated, a complaint is filed in Land Court. The only issue in the Land Court (or less commonly the Superior Court) action is whether the homeowner is entitled to the protection of the Servicemembers Civil Relief Act, 50 U.S.C. §§ 501-596 ("SCRA"). The SCRA requires a court order prior to a foreclosure, sale, or seizure of property while the service member is on active duty.⁴ The homeowner cannot bring any other defenses in this proceeding. See *Beaton v. Land Court*, 367 Mass. 385 (1975).

The mortgagee will obtain a judgment from the Land Court evidencing compliance with the SCRA prior to holding a foreclosure sale. The complaint, affidavits and proposed notices are filed with the Land Court. The Land Court's Order of Notice is sent to the homeowner by registered or certified mail or hand delivered; the notice gives the homeowner a deadline to respond if they believe they are covered by the SCRA. The notice is also published in the newspaper (at least 21 days before the return date) and recorded.

The Sale and Post Sale Process

After judgment enters a foreclosure sale will be scheduled. The sale is held on or near the property. The auctioneer will typically have also advertised the sale of the property, though this extra advertising is not required by the statute.

⁴ This protection used to extend until ninety days after the end of active duty. However, in 2008 Congress changed this extended period of protection to nine months after the end of active duty. This extension will remain in effect until December 31, 2010, then will revert once again to ninety days from the end of active duty. If the lender forecloses during this protective period without a court order, the sale is invalid and the lender may be subject to criminal prosecution. Even a threat to foreclose without a court order in violation of the SCRA is likely a violation of federal or state debt collection law.

As mentioned above, most power of sale foreclosures are coupled with entry and possession. While attending the foreclosure auction, the mortgagee's attorney will make an entry on to the property and file a certificate of entry (signed by two witnesses and notarized) with the registry of deeds. The recordation of the certificate of entry triggers a three year waiting period, after which the right of redemption is extinguished. There is no right of redemption after the foreclosure sale. G.L. c. 244, § 18.

The property is sold to the winning bidder. The memorandum of sale is executed. The execution of the memorandum terminates the borrower's right of redemption, and a bankruptcy filing cannot stop the foreclosure process. *In re Dow*, 250 B.R. 6 (Bankr. D. Mass. 2000). The memorandum of sale usually requires the winning bidder to pay a deposit and deliver the remaining funds within 30 days. After the sale, an affidavit showing compliance with the statutory requirements will be recorded. G.L. c. 244, § 15. This affidavit must demonstrate that both the statute and the power of sale have been complied with. A foreclosure deed will be recorded and ownership transferred to the winning bidder. The mortgagee conveying title must notify all residential tenants and taxing and other municipal authority of the sale within 30 days. G.L. c. 244, § 15A.

The borrower is entitled to any surplus in the sale proceeds. A provision added in 2007 requires an itemized accounting of the disposition of the proceeds (sale price, legal fees, auctioneer fee, publication costs and other fees) within 60 days of receiving the funds unless the foreclosure is subject to further legal proceedings. G.L. c. 183, § 27.