

Hot Topics:

Foreclosure Prevention Law

L. Alexandra Hogan, Esq.
Shatz, Schwartz and Fentin, P.C.
1441 Main Street
Springfield, MA 01103

MASSACHUSETTS FORECLOSURE PREVENTION LEGISLATION

Ch. 194 of Acts of 2012
An Act Preventing Unlawful and
Unnecessary Foreclosures

Effective

- Provisions discussed in this presentation went into effect November 1, 2012

Overview

1. Revised requirements for notices of sale under M.G.L. c. 244, § 14 when mortgages have been assigned
2. Good faith review of “Certain Mortgage Loans”
3. New affidavits required before publishing first notice of sale
 - A. MGL c. 244, § 35B
 - B. Eaton

M.G.L. c. 244, § 14

■ **Unchanged Notice of Sale provisions:**

- Publish 3 successive weeks, the first not less than 21 days before sale
- Send to owner 14 days before sale
- Send to junior interest holders 14 days before sale

M.G.L. c. 244, § 14

Changes:

- Form foreclosure notice specifically requires details of mortgage assignment (book and page)
- Notice of sale will not be valid unless, at the time the notice is mailed, an assignment is recorded in the registry of deeds AND the recording info is referenced in the notice of sale
- This addresses the issue presented in: United States Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 651 (2011)

New: M.G.L. c. 244, § 35B(b)

Good Faith Review

Creditor may not publish notice of foreclosure upon “**certain mortgage loans**” unless it has taken reasonable steps and made a **good faith effort to avoid foreclosure**

What is a “Certain Mortgage Loan”?

A loan to a natural person made primarily for personal, family or household purposes secured at least in part by an owner-occupied residential property **WITH** 1 or more of the following features:

Section 35B Cont'd:

Types of “Certain Mortgage Loans”

1. An intro interest rate that is at least 2% lower than the fully indexed rate
2. Interest-only payments (but does not apply to open end home equity line of credit or construction loan)
3. Payments that do not fully amortize the loan
4. Loan underwritten with less than full documentation of income or assets

Section 35B Cont'd:

Types of “Certain Mortgage Loans”

5. Prepayment penalties exceed those in M.G.L. c. 183, § 56 or Federal law
6. Loan-to-value ratio of 90% or greater and debt ratio exceeds income by 38%
7. Loan-to-value ratio exceeds 95%

Creditor Uncertainty = “Certain Mortgage Loan”

If the creditor cannot determine if the loan has any of the previous features, then creditor must treat it as a “Certain Mortgage Loan” and comply with M.G.L. c. 244, § 35B

What is a good faith review?

Presumed if creditor:

- Reviews financial info to determine an affordable monthly payment
- Attempts to create a loan modification with affordable monthly payment
- Conducts an analysis that compares the net present value of the modified mortgage loan v. the creditor's anticipated net recovery that would result from foreclosure
 - Analysis must be compliant with formula presented by HAMP or other specified programs

New Notice Required under § 35B

- Creditor must send notice to borrower of “certain mortgage loan” of the ability to pursue a modification
- Mailed (regular and certified) at same time as the “right to cure” notice made under M.G.L. c. 244, § 35A(g)
- Copy mailed to the Attorney General’s office

Borrower's Response

Borrower has 30 days to state intent to:

- 1) modify (must provide info requested by creditor at this time - income/debt);
- 2) pursue alternative to foreclosure (short sale/deed in lieu);
- 3) cure; or
- 4) waive cure period and proceed to foreclosure.

If Borrower fails to state intent:

Failure to respond within 30 days
reduces the right to cure from
150 days to 90 days

Creditor's Response:

Creditor must respond to Borrower's letter of intent within 30 days of receipt and provide:

- 1) Statement of borrower's income, debts and obligations as determined by creditor;
- 2) Net present value analysis of mortgage loan;
- 3) Creditor's anticipated recovery at foreclosure;
- 4) Statement of interest of the creditor; and
- 5) A modified mortgage loan or notice that no modification will be offered.

Borrower's response to Creditor's Offer of Modification

- Borrower must respond to creditor's offer to modify within 30 days, stating:
 - Acceptance;
 - Counteroffer (creditor to accept or reject in 30 days); or
 - Waiver of rights and intent to proceed to foreclosure.
- Failure: reduces cure period from 150 to 90 days

Miscellaneous

- Additional counteroffers may be made during the cure period
- Modification negotiations may be done in person or over the phone, but every offer must be in writing and signed by offeror
- Borrower has the right to modify a loan once during every three year period, regardless of the mortgage holder

Affidavit of § 35B Compliance

- BEFORE publishing the notice of foreclosure required by M.G.L. c. 244, § 14, creditor must:
 - Certify compliance with M.G.L. c. 244, § 35B in an affidavit
 - Record affidavit in registry of deeds for the county or district

New: M.G.L. c. 244, § 35C

The Eaton Affidavit

- A creditor shall not publish a notice of sale when the creditor knows or should know that it is neither the mortgage note holder nor the authorized agent of the note holder
- Before publishing the creditor shall certify compliance with Section 35C in an affidavit and record it in the registry of deeds

Effect of 35B and Eaton Affidavits

- An arm's-length third party can rely on the affidavits and will not be liable for failure of the foreclosing party to comply
- The sale will not be set aside for failure to comply
- Filing of the affidavits does not relieve affiant from liability to borrowers for failure to comply

Regulations and Tracking

- The MA Division of Banks will issue regulations to aid with administration or enforcement before the end of this year
- The MA Division of Banks will consult with the Attorney General to track the final outcome of the foreclosure avoidance process under Section 35B and report to the Legislature annually through 2017