

# New Massachusetts Law Affecting Foreclosures, Evictions, Reverse Mortgage Lending and Mortgage Fraud

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On August 7, 2010, Massachusetts Governor Deval Patrick signed new legislation affecting mortgages, Chapter 258 of the Acts of 2010, “An Act Relative to Mortgage Foreclosures” (the “Act.”) The earliest version of the Act was Senate Bill No. 2406 (known as “An Act to Stabilize Neighborhoods”) which was passed in April 2010 by the Massachusetts Senate. On July 14, 2010, the language was replaced by House Bill No. 4934, as amended, and presented to the Governor for signature. The Act makes sweeping changes to Massachusetts foreclosure law and the required right to cure notice which must be given prior to the commencement of foreclosure. It also provides additional protections for tenants living in foreclosed properties. The Act also creates new requirements for lenders offering reverse mortgages, it creates new mortgage fraud statutes which impose criminal penalties on those who participate in the fraud, and it creates a tax exemption for non-profits that hold real estate to build affordable housing. **Click on the link below for a copy of the Act.**

## Foreclosure Changes – the 150-Day Right to Cure

For foreclosing creditors (“creditors” includes mortgage holders, MERS, servicers), the 90-day right to reinstate found in Massachusetts General Laws, Chapter 244, Section 35A has been completely replaced with a rewritten Section 35A. An important question raised by the Act is “when do the various sections become effective?” The Massachusetts Division of Banks released Frequently Asked Questions (the “FAQs”) that address the effective date issue. The Division opines that because the legislation contained an Emergency Preamble, most of the sections of the Act, including the foreclosure provisions, are effective as of August 7, 2010, when the Act was signed into law. The Division also states that the 150-day notice to cure requirement applies ONLY to mortgagors served a notice to cure after Saturday, August 7, 2010. Thus, where creditors served the old 90-day notices prior to August 7, 2010, there is no requirement that the creditor start the process again and serve 150-day notices. Likewise, for foreclosure sales already in process, creditors may proceed with foreclosure, provided the formerly required 90-day notice of the right to cure has been given, and that notice complied with the prior version of Chapter 35A.

**Click on the link below for a copy of the FAQs**, and note that the Division included a statement that additional questions and answers may be added in the future. Thus, at a later date readers may wish to log on to the Division’s website to determine if there have been any

additions to the FAQs. Go to the Division of Banks page on [www.mass.gov](http://www.mass.gov), and click on “Industry Services” or “Legal Resources” for the FAQs.

New Section 35A extends the 90-day right to a 150-day right to cure for owners of residential properties. The Act defines “residential property” as Massachusetts real estate containing a 1- to 4-family dwelling house, occupied or to be occupied in whole or in part by the mortgagor. Residential property is limited to the mortgagor’s principal residence, and it does not include investment property or a residence that is not the mortgagor’s principal residence such as vacation homes. Further, the Act specifically states that residential property does not include property taken as collateral for a commercial loan. This definition seeks to clarify, therefore, that commercial purpose mortgage loans are not subject to the 150-day right to cure requirement.

Under the Act, acceleration of the mortgage loan may not take place until the 150-day period has expired, and no charges or fees may be imposed by the creditor in connection with the default except for late charges and unpaid payments. Creditors must take care to revise their 90-day right to cure letters as the Act requires substantive additional disclosures must be included in the new 150-day right to cure notice, AND the Act requires that notices of the right to cure are deemed delivered when delivered by hand, or when sent by first class certified mail or similar service by a private carrier to the mortgagor or to the mortgagor’s last known address. The disclosures are found in subsection (h) of new Section 35A, and they are: (1) a statement of the nature of the default and that the mortgagor has a right to cure default; (2) a statement of the date by which the mortgagor must cure the default in order to avoid acceleration of the mortgage and commencement of foreclosure (the date cannot be less than 150 days after service of the notice); and the name, address and local or toll free telephone number of the person to whom the cure payment must be made.

Clause (3) of subsection (h) requires the creditor to disclose that if the mortgagor does not cure the default by the specified date, the creditor may commence foreclosure; (4) the creditor must disclose its name and address, and the telephone number of a representative of the creditor whom the mortgagor may contact if the mortgagor disagrees with the mortgagee’s assertion of the default; (5) the creditor must disclose the name of any current and former mortgage broker or mortgage loan originator; (6) the creditor must disclose that the mortgagor may be eligible for assistance from the Homeownership Preservation Foundation or other foreclosure counseling, and the local and toll free telephone numbers; (7) the creditor must disclose that the mortgagor may sell the property prior to the foreclosure sale and use the proceeds to pay off the mortgage; (8) the creditor must disclose that the mortgagor may redeem the property by paying the total due, prior to foreclosure sale; (9) the creditor must disclose that the mortgagor may be evicted after the foreclosure sale; and (10) the creditor must disclose that the mortgagor may have additional rights, depending on the terms of the mortgage: (i) to refinance and fully repay the mortgage; and (ii) to voluntarily give the creditor a deed-in-lieu of foreclosure.

The Act also requires the notice of the right to cure to include “a declaration, in the language that the creditor has regularly used in its communication with the borrower, appearing

on the first page of the notice stating: "This is an important notice concerning your right to live in your home. Have it translated at once."

There is no statutorily required form for the 150-day notice of the right to cure, nor has the Division of Banks promulgated a form of notice. Contact Patricia Antonelli or Charles Lovell if you would like to obtain a copy of our suggested form of notice.

#### Confusion for Foreclosing Creditors

Confusion abounds in provisions of the Act which appear to give creditors the ability to cut off the 150-day right to cure by negotiating with mortgagors, and in instances where the negotiations are not successful, creditors can proceed with foreclosure BEFORE the end of the 150-day period. We think these provisions of the Act can operate as traps for creditors, and we recommend that creditors proceed with extreme caution. Some creditors may determine that it is safer to just allow the 150-day period to run its course before commencing foreclosure because it may be impossible to comply with all of the requirements to obtain the cut-off right.

For example, subsections (b) and (h)(2) of new Section 35A contain provisions whereby creditors who have negotiated in good faith, but were not successful, seemingly can commence foreclosure before the completion of the 150-day period IF the creditor can certify that it has engaged in a "good faith effort" to negotiate a commercially reasonable alternative to foreclosure. The "good faith effort" had to involve at least one (1) in-person or telephone meeting between the mortgagor and the creditor's representative whereupon the parties were not successful in resolving their dispute. At that point, however, the creditor may commence foreclosure proceedings, but only after a cure period lasting 90 days.

The Act goes into great detail describing what it means for a creditor to make a "good faith effort to negotiate a commercially reasonable alternative to foreclosure." The "good faith effort" includes the creditor making an assessment of the mortgagor's current income and expenses and considering the net present value of receiving modified mortgage payments versus recovery from foreclosure. It is at this point that the language of the Act again becomes ambiguous. In addition to considering the borrower's financial status and loan modification return versus foreclosure return, a "good faith effort" includes a creditor considering its own interests including the interests of its investors, and if the creditor has received government funds, the interests of taxpayers must be considered. The kicker is that the Act requires that the creditor provide the mortgagor with documentation of the creditor's "good faith effort" 10 days prior to the required meeting!

"Documentation" of the "good faith effort" includes a summary of the net present value analysis, options of relief offered to the mortgagor, certification that the options offered by the creditor comply with federal law, and documentation of any other factors considered. So the creditor who seeks to cut off the 150-day period, has to have received all of the relevant documentation from the mortgagor and has to have made its analysis to fulfill the "documentation" requirement all in time to get the documentation delivered to the mortgagor 10 days prior to the meeting.

Creditors who choose to begin foreclosure proceedings prior to the expiration of the 150-day right to cure period (because they have engaged in the “good faith effort” described above), must certify compliance with these provisions in an affidavit. The affidavit must include the time and place of the required meeting, parties who participated, relief the creditor offered to the borrower, a summary of the creditor’s net present value analysis and applicable inputs of the analysis, and a certification that any modification or option offered complies with current federal law or policy. A creditor must provide a copy of the affidavit to the homeowner and file a copy of the affidavit with the Land Court in advance of the foreclosure.

The Act provides that borrowers who fail to respond within 30 days to any mailed communications offering to negotiate a commercially reasonable alternative to foreclosure forfeit the right to a 150-day right to reinstate period. Creditors should note that their mailed communications must be sent by certified first class mail or by private carrier. Similarly, borrowers who receive loan modification offers resulting from the creditor’s good faith effort to negotiate must respond within 30 days. Creditors must send their loan modification offers via first class certified mail or private carrier, and borrowers are deemed to have responded if they respond by facsimile (and the borrower must have a confirmation sheet), proof of delivery by US mail or similar carrier, or record of a telephone call to the creditor captured on a telephone bill or pin register. Again, in this instance, the borrower forfeits the 150-right to cure period if he fails to respond to the creditor’s loan modification offer within 30 days of receipt, although the 90-day right to cure period would govern at this point.

Creditors are free under the Act to offer or accept other foreclosure alternatives such as short sales or deeds-in-lieu of foreclosure, if the borrower requests the alternatives, the borrower rejects a loan modification, or the borrower does not qualify for a loan modification.

#### Additional Cautions

There are many instances of confusing language in the Act. For example, the Act uses the terms “mortgagor”, “borrower” and even “homeowner” somewhat interchangeably. We know that there are instances where the borrower is NOT the mortgagor because the borrower may have signed the note but the borrower does not own the collateral (typically a co-signer situation.) Note that the “borrower’s representative” is defined as a HUD-certified non-profit organization, a Massachusetts approved foreclosure education center or a Massachusetts Homeownership Collaborative approved counseling agency. Loan modification centers and attorneys are not included in the definition of “borrower’s representative.”

As was required with the old 90-day right to cure law, an affidavit demonstrating compliance (whether or not the creditor waits the 150 days) must be filed with the Land Court (or Superior Court) depending upon which court is chosen for the foreclosure action, along with a copy of the 150-day notice of the right to cure (or the 90-day notice of the right to cure if applicable.) Additionally, the Act states that the notice of the right to cure must be “filed” with the Commissioner of the Division of Banks. The Division addressed this question in the FAQs, advising that all of the filing requirements and procedures will remain the same as with the prior 90-day law. In short, we know that the Division of Banks does not accept paper filings. Compliance with this subsection can be accomplished by updating the Division’s foreclosure

website where creditors are required to input the date of the foreclosure sale (if the sale takes place) and the purchase price at foreclosure. Go to the Division of Banks page on [www.mass.gov](http://www.mass.gov), and click on "Online Foreclosure Database" under "Online Services".

#### Effective Dates

As stated above, the emergency preamble in the Act renders the foreclosure provisions effective on August 7, 2010. Thus, for foreclosures already in process (where the 90-day right to cure letters were mailed before August 7, 2010), no new notices must be sent. The 150-day right to cure provisions are only effective until December 31, 2015, as the Act provides that the prior 90-day right to cure law will take the place of the 150-day right to cure law starting on January 1, 2016. The eviction and tenant provisions of the Act are also effective on August 7, 2010. Look for our upcoming eblasts detailing the eviction and tenant protections, the reverse mortgage provisions and new mortgage fraud law.

[Click here for a copy of the Act.](#)

[Click here for a copy of the FAQs.](#)