

# Massachusetts Enacts Comprehensive Foreclosure Reform

## Two Year Effort To Overhaul Foreclosure Practices

On August 3, 2012, Massachusetts Governor Deval Patrick signed into law what's been called the new **Foreclosure Prevention Law**. The text of the law can be found at [House Bill No. 4323](#). The new law makes significant changes to existing foreclosure practices, and also attempts to clean up the recent turmoil surrounding defective foreclosure titles after the *U.S. Bank v. Ibanez* and *Eaton v. FNMA* rulings, an issue for which I've been advocating for years. It goes into effect on Nov. 1, 2012. A quick summary is as follows with details below:



- New requirement that mortgage assignments be recorded
- New mandatory requirement to offer loan modifications and mediation to qualified borrowers
- New *Eaton* foreclosure affidavit confirming ownership of note/mortgage loan
- Protection for third party buyers of foreclosed properties

## Mortgage Assignments Must be Recorded

Going forward, a foreclosure may not proceed unless the entire chain of mortgage assignments from the original mortgagee to the foreclosing entity is recorded. This is a statutory codification of the recommendation of the SJC in [U.S. Bank v. Ibanez case](#), and should provide some well-needed clarity for titles. Under the new law, no foreclosure notice will be valid unless “(i) at the time such notice is mailed, an assignment, or chain of assignments, evidencing the assignment of the mortgage to the foreclosing mortgagee has been duly recorded in the registry of deeds . . . and (ii) the recording information for all recorded assignments is referenced in the notice of sale required in this section.”

Unfortunately, the new law does not address defective foreclosure titles created before the *Ibanez* decision, as we were hoping. Accordingly, folks who are still waiting for legislative help to cure their defective foreclosure titles may be left without a remedy.

## Mandatory Loan Modification Efforts

In a provision pushed hard by housing advocates, the new law will require mortgage lenders to attempt to offer loan modifications instead of foreclosing. The qualification standards are rather complex and beyond the scope of this post. In sum, if the net present value of a modified mortgage exceeds the anticipated net recovery at foreclosure, the lender has to offer the borrower a modification.

Importantly, the new law provides immunity in favor of *bona fide* purchasers of foreclosed properties from claims by disgruntled borrowers that the lenders did not follow the loan modification rules.

### **New Eaton Affidavit**

The new law also incorporates the SJC's recent holding in [Eaton v. Fannie Mae](#), where the SJC held that a foreclosing lender must be both the assignee of the mortgage *and* be either note holder or acting on behalf of the note holder. New Section 35C prohibits a creditor from publishing a foreclosure notice if the creditor "knows or should know that the mortgagee is neither the holder of the mortgage note nor the authorized agent of the note holder." It also requires the creditor to record an affidavit swearing to its compliance with the new section. The affidavit will shield third-party buyers from title claims, but will *not* shield creditors from potential liability to the borrowers. Eaton suggested the use of affidavits, but now the statute requires it. Creditors cannot pass the cost of any corrective documentation upon borrowers or third parties.

### **Impact?**

As with any major reform legislation, there will be a learning curve for foreclosing lenders and foreclosure attorneys to get documentation and systems in place to comply with the new requirements. We could potentially see additional litigation coming out of this new law brought by borrowers who feel they were not given a "fair shake" at a loan modification. From a real estate title perspective, the new law is a step in the right direction, but I was very disappointed that nothing was done to help folks who are still saddled with *Ibanez* title defects. This was the perfect opportunity to address that issue, and I'm afraid it won't come up again.



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