

Residential Foreclosure (MA)

A Practical Guidance® Practice Note by Adam Sherwin, The Sherwin Law Firm



Adam Sherwin
The Sherwin Law Firm

This practice note explains the residential foreclosure process in Massachusetts. The note addresses (1) pre-foreclosure requirements, (2) the foreclosure process, (3) deficiency judgments, (4) borrower defenses, and (5) post-foreclosure eviction. Residential foreclosures in Massachusetts require strict compliance with statutory and regulatory requirements and this guidance will help counsel for both lenders and borrowers as they navigate this process.

For guidance on residential lending in Massachusetts, see [Fannie Mae Mortgages \(MA\)](#) and [Fannie Mae Notes \(MA\)](#). For guidance on foreclosure generally, see [Foreclosure of Real Property](#).

For guidance on COVID-19-triggered foreclosure restrictions that may protect certain residential properties from foreclosure, see [COVID-19 Residential Foreclosure Restrictions: Client Alert Digest](#).

Legal Framework and Basic Terms

Massachusetts is a nonjudicial foreclosure state and permits mortgagees to foreclose without filing a court action. Although the law recognizes foreclosure by entry and judicial foreclosure as alternative means of initiating a foreclosure, a nonjudicial foreclosure sale (known as a foreclosure by power of sale) is the most common means of foreclosure in Massachusetts.

To avoid confusion, it is important to have a basic understanding of the relevant terms associated with foreclosure law. While nonlawyers use many of the terms below interchangeably, using them properly avoids any uncertainty in this area of law.

The purchase of residential property generally requires the signing of two documents: (1) a promissory note, which is the loan to purchase the property, and (2) a mortgage, a security agreement that allows its holder (the mortgagee) to obtain possession of the property through foreclosure against the borrower (the mortgagor).

Although it is common to use the phrase “paying my mortgage” when discussing a mortgage loan payment, a mortgage is only a security agreement that a borrower gives a lender as a condition for borrowing money. While the most common means of defaulting on a mortgage comes from not making the required mortgage loan payments, most mortgages state that a breach can also occur if a borrower damages the property or transfers their interest in the property without the lender’s permission. It is, however, exceptionally rare for a mortgagee in Massachusetts to pursue a foreclosure on grounds other than a loan payment default. Most mortgages permit a mortgagee, upon breach of the mortgage, to demand that the mortgagor immediately pay the loan balance, known as acceleration.

It is rare for a mortgagor to have the same mortgagee throughout the life of the mortgage loan. Initial lenders (known as the mortgage originator) commonly sell mortgage loans on a secondary market, often to government-sponsored enterprises such as Fannie Mae or Freddie Mac, or to private securitized trusts. After such a sale, the day-to-day handling of the loan, including collecting loan payments and handling customer inquiries, is generally done by a loan servicer, who is an authorized agent of the loan owner.

In Massachusetts, mortgages are filed in the land records (a process known as recording). These land records are found in the Registry of Deeds by county, and are [available online](#).

Following a foreclosure, a foreclosure deed is commonly recorded, stating the conveyance of the property following the foreclosure sale, with the name of the person purchasing the property.

Pre-foreclosure Requirements and Considerations

SCRA Case

While not a formal part of the foreclosure process, the most common means of starting a foreclosure action is through the filing of a Servicemembers Civil Relief Act (SCRA) complaint, which is most often done in Land Court. (The [Massachusetts Land Court Department](#) is based in Boston but serves the entire Commonwealth. Its jurisdiction is limited to disputes related to real property.) The SCRA offers a mortgagor who is in active military services some protections against foreclosure, and filing an SCRA case determines whether or not the mortgagor is entitled to this relief. A mortgagor who is not in the active military service generally has few, if any defenses, in such a case. *HSBC Bank USA v. Matt*, 464 Mass. 193 (2013). A mortgagee who pursues such a case must, in addition to filing the court action, record a notification of this case in the appropriate Registry of Deeds.

A copy of a mortgagee's notice under Mass. Ann. Laws ch. 244, § 35A and affidavit demonstrating compliance with this law must be filed in one of these cases. Land Court, additionally, has specific forms that must be completed for the filing of one of these cases.

After the filing and service of such a case, a borrower who wishes to invoke the benefits of the SCRA must file an answer. If a borrower does not file an answer, the court will enter judgment for the mortgagee by default. Thereafter, the mortgagee will proceed with foreclosure.

Statutory Notice, Right to Cure, and Loan Modification Review

Massachusetts requires a mortgagee, prior to accelerating the mortgage loan or otherwise enforcing the mortgage due to a loan default, to offer the mortgagor 90 days to cure a default. Mass. Ann. Laws ch. 244, § 35A. Along with a right to cure, the law requires the inclusion of specific notices and disclaimers to the mortgagor. (Many practitioners use

the [Right to Cure Your Mortgage Default](#) found on the Commonwealth's [website](#).) A mortgagee's failure to comply with this law may provide the mortgagor, prior to foreclosure, with grounds for an equitable court action against the mortgagee.

As discussed below, most residential mortgage agreements similarly required a 30-day right to cure the loan default (commonly known as "paragraph 22").

Massachusetts similarly requires, for specific types of mortgage loans, that a mortgagee make a good-faith effort to avoid foreclosure by reviewing the loan for possible modification. Mass. Ann. Laws ch. 244, § 35B. The review must occur before the publication of a foreclosure sale notice. An affidavit of compliance for this law must be recorded in the land records prior to the publishing of a foreclosure sale notice. Mass. Ann. Laws ch. 244, § 35B(f). A form of notice advising the mortgagor of the right to a loan review can be found [here](#).

Notice Required by Paragraph 22 of the Standard Mortgage

The majority of mortgages in the United States use a mortgage agreement prepared by Fannie Mae and Freddie Mac. This mortgage agreement typically includes a requirement that a lender provide a borrower with a right to cure the mortgage loan default, along with a number of other disclosures, prior to loan acceleration and the foreclosure sale. The requirement is typically found in paragraph 22 of the mortgage agreement.

It is common for lenders to send a single notice to comply with both paragraph 22 and Mass. Ann. Laws ch. 244, § 35A—a state law, discussed above, that also requires a right to cure before foreclosure. This state law includes a greater number of specific disclosures to the borrower than paragraph 22.

A lender is required to strictly comply with paragraph 22 as part of the nonjudicial foreclosure process. The seminal case for this matter is *Pinti v. Emigrant Mortgage*, where the Supreme Judicial Court held that an error in stating one of the required disclosures from paragraph 22 made the underlining foreclosure void. *Pinti v. Emigrant Mortgage Company*, 472 Mass. 226 (2015). This holding, however, applies only to foreclosures where a paragraph 22 default notice was sent after July 17, 2015. Strict compliance is not required for the requirements of Mass. Ann. Laws ch. 244, § 35A. *U.S. Bank National Association v. Schumacher*, 467 Mass. 421 (2014).

Although not required under the law, mortgagees should record an affidavit certifying compliance with paragraph 22 of the mortgage. Mass. Ann. Laws ch. 183, § 5B.

FHA Mortgage Requirements

Special attention must be paid to mortgage loans that the Federal Housing Administration (FHA) insures. FHA loans generally use a different mortgage agreement than the standard mortgage discussed above, and required a mortgagee—in addition to the other typical nonjudicial foreclosure requirements—to comply with various HUD regulations incorporate into the mortgage.

The most noteworthy of these regulations is the “face-to-face meeting requirement” prior to loan acceleration and foreclosure. 24 C.F.R. § 203.604. A lender’s failure to strictly comply with this requirement is fatal to a foreclosure’s validity. *Wells Fargo v. Cook*, 87 Mass. App. 382 (2015).

Foreclosure by Power of Sale

Massachusetts requires strict compliance with the requirements for a nonjudicial foreclosure. *U.S. Bank v. Ibanez*, 458 Mass. 637, 646 (2011). If a foreclosure sale does not comply with statutory requirements, it is “wholly void.” *United States Bank Nat’l Ass’n v. Ibanez*, 458 Mass. 637, 646 (2011), citing *McCreevey v. Charlestown Savings Bank*, 294 Mass. 480, 484 (1936).

To foreclose by power of sale, a mortgagee must:

- Send the mortgagor, by registered mail, a notice of the foreclosure sale at least 14 days before the home is sold
- Send notice of the foreclosure sale, to all persons of record as of 30 days prior to the date of sale holding an interest in the home junior to the mortgage being foreclosed (As with notice to the mortgagor, this notice must be sent by registered mail, at least 14 days before the property is sold.)
- Publish the notice of the foreclosure sale for three successive weeks, the first publication to be not less than 21 days before the day of sale, in a newspaper, if any, published in the town where the land lies or in a newspaper with general circulation in the town where the land lies
- Perform an auction sale of the property at the date, time, and location stated in the foreclosure sale notice

Mass. Ann. Laws ch. 244, § 14.

A copy of the foreclosure sale notice and affidavit must be recorded in the land records after the foreclosure sale. Mass. Ann. Laws ch. 244, § 15. A mortgagee is similarly required to notify all residential tenants of the premises, the office of the assessor or collector of taxes, and providers of water or sewer services of the foreclosure sale. Mass. Ann. Laws ch. 244, § 15A.

Assignments and Third-Party Loan Servicers

At the time of the foreclosure notice and sale, the mortgagee must be the holder of the subject mortgage. *U.S. Bank N.A. v. Ibanez*, 458 Mass. 637 (2011). If the mortgagee holds the mortgage through a mortgage assignment, the notice of sale must include the chain of mortgage assignments with all recording information. Mass. Ann. Laws ch. 244, § 14.

At the time of the foreclosure notice and sale, the mortgagee must also be the holder of the underlying promissory note, or act as an authorize agent of the note holder. *Eaton v. Federal National Mortgage Association*, 462 Mass. 569 (2012). Massachusetts law does allow for the enforcement of a lost, destroyed, or stolen promissory note under specific circumstances. Mass. Ann. Laws ch. 106, § 3-309.

By regulation, a “third party loan servicer shall certify in writing the basis for asserting that the foreclosing party has the right to foreclose, including but not limited to, certification of the chain of title and ownership of the note and mortgage from the date of the recording of the mortgage being foreclosed upon. The third party loan servicer shall provide such certification to the borrower with the notice of foreclosure provided pursuant to Mass. Ann. Laws ch. 244, § 14, and shall also include a copy of the note with all required endorsement.” 209 Mass. Code Regs. 18.21A(2)(c).

Many of the errors that lead to defective foreclosures come from a mortgagee’s failure to strictly comply with these requirements. The Supreme Judicial Court has criticized the “utter carelessness with which the plaintiff banks documented the titles to their assets,” and is not forgiving for mistakes made in the foreclosure process. *U.S. Bank N.A. v. Ibanez*, 458 Mass. 637, 655 (2011) (Cordy, J., concurring). These problems can be avoided by using a detailed checklist and carefully reviewing each of the applicable laws and regulations prior to starting a foreclosure.

Foreclosure Sale

Foreclosure sales are conducted by public auction, at the time and location listed in the published foreclosure sale notice. It is common for the mortgagee to attend the auction and bid on the property. Mortgagees are often the highest bidders at foreclosure auctions and purchase the property, especially when the mortgage arrearage is large. A foreclosure sale can be continued, without additional publication, through a public proclamation.

Following the foreclosure sale, a foreclosure deed is recorded, listing the name of party who purchased the property, as well as an affidavit of sale.

Foreclosure by Entry and Judicial Foreclosures

Foreclosure by entry is an alternative means of performing a foreclosure, which lenders tend to initiate around the time of a nonjudicial foreclosure sale. Mass. Ann. Laws ch. 244, §§ 1–2. A mortgagee, after a breach of a mortgage, may “recover possession of the land mortgaged by an open and peaceable entry thereon, if not opposed by the mortgagor or other person claiming it, or by action under this chapter; and possession so obtained, if continued peaceably for three years from the date of recording of the memorandum or certificate as provided in section two, shall forever foreclose the right of redemption.” Mass. Ann. Laws ch. 244, § 1. If such an entry is made without a judgment, the mortgagee must record a certificate of entry in the land records. Mass. Ann. Laws ch. 244, § 2.

A mortgagor must challenge a foreclosure by entry within three years of such a recording or lose their right to redeem the mortgage. *Singh v. 207-211 Main St., LLC*, 78 Mass. App. Ct. 901 (2010).

It is common for mortgagees to initiate an entry onto a property around the time of the nonjudicial foreclosure sale. Doing so is considered a backup option in the event that the nonjudicial foreclosure is void.

Although Massachusetts law permits judicial foreclosure, such cases are extremely rare.

Deficiency Judgments

A borrower is entitled to any surplus from a foreclosure sale after payment of the mortgage and any other liens on the property, and the mortgagee is required to provide a borrower with an accounting of the foreclosure sale. Mass. Ann. Laws ch. 183, § 27.

If the mortgagor still owes the mortgagee money after the foreclosure sale, it can pursue a deficiency judgment. The action must be brought within two years after the foreclosure sale. Mass. Ann. Laws ch. 244, § 17A. Under Mass. Ann. Laws ch. 244, § 17B, a mortgagee who wishes to pursue a deficiency judgment must provide notice of this to the mortgagor prior to the foreclosure sale.

Although it is rare mortgagees to pursue such claims following a foreclosure sale, a borrower defending against a foreclosure sale should be mindful of the possibility and ensure that any settlement includes a waiver of liability for any deficiency. Liability for a deficiency judgment can also usually be discharged through bankruptcy.

Foreclosure Defenses

Foreclosure defenses generally consist of (1) assertions that the foreclosing entity failed to strictly comply with foreclosure requirements explained above and (2) equitable actions challenging a mortgagee’s right to foreclose.

A third-party buyer of a foreclosure property, who has no knowledge of a potential foreclosure defense from a former homeowner, may be entitled to raise a bona fide purchaser defense, and avoid liability for many of the legal challenges discussed below. *Bevilacqua v. Rodriguez*, 460 Mass. 762, 777–78 (2011). In addition, Massachusetts law provides a three-year deadline for a former homeowner’s challenge of the validity of a foreclosure against an arm’s length third-party purchaser for value. Mass. Ann. Laws ch. 244, § 15(c). An exception, however, exists for a former homeowner still residing at the subject property.

Settling vs. Defending a Foreclosure

Before deciding whether to defend against a foreclosure, careful thought should be given to the realistic outcomes available for a homeowner. Although there are numerous foreclosure relief services advertised online, few, if any, homeowners in Massachusetts have been able to eliminate a mortgage on their property and obtain a “free” home. The most realistic options for most homeowners facing foreclosure are (1) a loan modification where the existing lender agrees to restructure the loan to make the payments more affordable or (2) a refinancing of the loan through another lender. In addition, homeowners who have already been foreclosed on may be able to negotiate a purchase of the home from the mortgagee or third-party buyer.

These options, of course, are dependent upon a homeowner having sufficient income. If a homeowner cannot qualify for a loan modification or refinance, many lenders will consider a short sale of the property or acceptance of a deed in lieu of foreclosure to avoid the foreclosure process. Some lenders will similarly consider offering monetary relocation assistance to homeowners as an incentive to leave a foreclosed home.

Additional Defenses

In addition to the foreclosure defenses noted above, Massachusetts courts have permitted defenses to foreclosure based upon the Consumer Protection Law (Chapter 93A), breach of the duty of good faith and reasonable diligence, and upon a showing that the foreclosure sale was “fundamentally unfair.” *Federal National Mortgage Association v. Rego*, 474 Mass. 329 (2016); *Sandler v. Silk*, 292 Mass. 493 (1935); *U.S. Bank v. Schumacher*, 467 Mass. 421, 433 (2014) (Gants, J., concurring).

Defenses That Are Not Recognized in Massachusetts

Massachusetts courts have rejected the following challenges to foreclosure:

- **Improper mortgage assignment.** A mortgagor only has a right to challenge a mortgage assignment on the grounds that it is void, and not merely voidable. *Bank v. Wain*, 85 Mass. App. Ct. 498 (2014). Massachusetts law gives a presumption of validity to mortgage assignments that comply with a number of requirements of the law. Mass. Ann. Laws ch. 183, § 54B. Courts have upheld the use of the Mortgage Electronic Registration Systems, Inc. (MERS) for assigning mortgages. *Culhane v. Aurora Loan Servs. of Neb.*, 708 F.3d 282 (1st. Cir. 2013).
- **Improper loan securitization.** Residential mortgage loans are commonly sold on the secondary market and pooled into investment securities, through a complex process known as securitization. Massachusetts courts have largely rejected attempts by borrowers to challenge a foreclosure's validity on the grounds that the mortgagee failed to comply with any portion of the loan securitization process. *U.S. Bank National Association v. Bolling*, 90 Mass. App. Ct. 154 (2016).
- **Obsolete mortgage statute.** Massachusetts law prohibits the enforcement of a mortgage 35 years after the recording of the mortgage (if no expiration term or maturity date is stated in the mortgage) or five years from a mortgage with an expiration term of maturity date. Mass. Ann. Laws ch. 260, § 33. These deadlines, however, are not triggered through the acceleration of the underlining mortgage loan. *Nims v. Bank of New York Mellon*, 97 Mass. App. Ct. 123 (2020).
- **Discharge in bankruptcy.** While a bankruptcy may discharge a mortgagor's personal liability on the underlining promissory note, bankruptcy does not eliminate a mortgagee's ability to foreclose. *Nims v. Bank of New York Mellon*, 97 Mass. App. Ct. 123, 129 (2020).
- **Post-foreclosure notices.** A mortgagee's failure to comply with a post-foreclosure sale notice does not invalidate a foreclosure sale. *Turra v. Deutsche Bank*, 476 Mass. 1020 (2017).

Lender's Failure to Comply with Loss Mitigation Requirements

A lender is generally under no obligation to offer a mortgagee a loan modification or any other loss mitigation in lieu of foreclosure. *Santos v. U.S. Bank National Association*, 89

Mass. App. Ct. 687, 701 (2016). However, as explained above (see Pre-foreclosure Requirements and Considerations), state law requires lenders to review borrowers with certain mortgage loans for a loan modification. Mass. Ann. Laws ch. 244, § 35B.

A lender's pattern of misconduct when reviewing a loan modification can be a violation of Chapter 93A. *Young v. Wells Fargo*, 717 F.3d 224, 241-42 (2013) (1st. Cir. 2013); *Hanrahan v. Specialized Loan Servicing*, No. 14-10397-PBS, Memorandum and Order on Motion to Dismiss, at 10 (Oct. 23, 2014). Chapter 93A includes equitable relief as a possible remedy for such misconduct. *Federal National Mortgage Association v. Rego*, 474 Mass. 329, 337-38 (2016).

Federal law also regulates a lender's handling of a loan modification application, including detailed requirements on the receipt and review of this requested loss mitigation. 12 C.F.R. § 1024.41. Violation of these regulations may entitle borrowers to damages. 12 U.S.C. § 2605(f).

Failure to comply with Mass. Ann. Laws ch. 244, § 35B, 2 C.F.R. § 1024.41, and a handful of other pre-foreclosure loan servicing laws and regulations are per se violations of Chapter 93A. 209 CMR 18.21A(1); 209 CMR 18.22(1).

A lender's failure to comply with an executed loan modification agreement may provide a borrower with a breach of contract cause of action. *In re Bank of Am. Home Affordable Modification Program (HAMP) Contract Litig.*, 2011 U.S. Dist. LEXIS 72079 (D. Mass. July 6, 2011).

Post-foreclosure Evictions

General Procedures

Although Massachusetts is a nonjudicial foreclosure state, a foreclosing entity (or a third-party buyer of a foreclosed property) must still bring an eviction case (known in Massachusetts as a summary process action) against the former homeowner or other occupants of the property. Some consider Massachusetts a hybrid state for foreclosure because a mortgagee does not need a court order to foreclose, but does need a court order to obtain possession of the premises. These eviction cases are typically filed in either district court or housing court and allow for a trial by jury.

In addition to possession, a claimant bringing a post-foreclosure eviction can seek use and occupancy payments from the former homeowner and other occupants. Mass. Ann. Laws ch. 186, § 3. Use and occupancy is awarded based upon the fair market value of the property. *Lowell Housing Authority v. Save-Mor Furniture Stores, Inc.*, 346 Mass. 426, 431 (1963).

Prior to filing a case, a mortgagee should serve the former homeowner and all occupants of the property with a notice to quit. A 72-hour notice to quit is most commonly for these cases. Although case law suggests that such a notice to quit is not a mandatory requirement for a post-foreclosure eviction, most courts strongly prefer that such notice be given before the start of a case. Service of a notice to quit by a constable or sheriff is prima facie evidence of service. Mass. Ann. Laws ch. 41, § 94.

The affidavit of sale required under Mass. Ann. Laws ch. 244, § 15 is sufficient for a mortgagee to make a prima facie case for eviction. *Federal National Mortgage Association v. Hendricks*, 463 Mass. 635 (2012). If the affidavit is defective, a mortgagee may rely on extrinsic evidence to prove the foreclosure's validity, such as testimony from the persons that handled the foreclosure sale. *O'Meara v. Gleason*, 246 Mass. 136, 138-39 (1923).

When pursuing an eviction case for a mortgagee, it is important to be familiar with the evidentiary requirements. Land records may be introduced into evidence, but certified records from the Registry of Deeds are required. Mass. G. Evid. § 803(8)(14). A mortgagee seeking use and occupancy against a former homeowner is similar required to show the fair market value of the property, which is most commonly done through a real estate broker or agent. *Lowell Housing Authority v. Save-Mor Furniture Stores, Inc.*, 346 Mass. 426, 431 (1963).

Defenses to Post-foreclosure Eviction

A former homeowner is permitted to raise an eviction defense by challenging the validity of the underlining foreclosure sale. *Bank of N.Y. v. Bailey*, 460 Mass. 327, 333

(2011). A former homeowner is similarly permitted to raise an equitable challenge to the title of the subject property. *Bank of America v. Rosa*, 446 Mass. 613 (2013).

Defenses to such cases are usually found by reviewing the foreclosure notice of sale and all other documents associated with the foreclosure process. The rules for summary process permit a request for written discovery concurrently with the filing an answer—an option that a defendant in one of these cases should always take advantage of Mass. R. Civ. P. 7.

Third-party buyers of foreclosed properties should be particularly careful with post-foreclosure evictions. Although the third-party buyer did not perform the foreclosure sale, it still needs to prove that the sale strictly complied with the law and must be prepared to defend against any defenses that a former homeowner raises on such matters.

A former homeowner wishing to appeal a post-foreclosure eviction decision must pay a bond and use and occupancy for the duration of the appeal. Mass. Ann. Laws ch. 239, § 6. A court may waive this bond requirement, but still required the former homeowner to pay and use and occupancy as a condition for appeal. *Bank of New York Mellon v. King*, 485 Mass. 37 (2020).

Additional protections exist for tenants living in foreclosed properties. Mass. Ann. Laws ch. 186A, § 1.

Post-foreclosure evictions come with a strict 10-day deadline for filing a notice of appeal. Mass. Ann. Laws ch. 239, § 5. Failure to comply with this deadline can be grounds for an appeal's dismissal. *Wells Fargo Bank, National Association v. Mondri*, 98 Mass. App. Ct. 280 (2020).

Adam Sherwin, Founder, The Sherwin Law Firm

Adam T. Sherwin, founder of The Sherwin Law Firm, has years of experience assisting homeowners, landlords, and tenants with a wide array of real estate matters, including boundary disputes, zoning appeals, and landlord-tenant matters. He has represented clients in real estate litigation, with appearances in most courts across Massachusetts.

Since 2018, Adam has been named as a Massachusetts Super Lawyers Rising Star.

This document from Practical Guidance®, a comprehensive resource providing insight from leading practitioners, is reproduced with the permission of LexisNexis®. Practical Guidance includes coverage of the topics critical to practicing attorneys. For more information or to sign up for a free trial, visit [lexisnexis.com/practical-guidance](https://www.lexisnexis.com/practical-guidance). Reproduction of this material, in any form, is specifically prohibited without written consent from LexisNexis.