

## The Foreclosure Process in Massachusetts

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1. Foreclosure is a complex process by which the holder of a mortgage, upon the failure of the borrower to pay the debt secured by the mortgage, sells or takes possession of the real estate encumbered by the mortgage, thereby terminating the borrower's rights in the real estate. Foreclosures disrupt homeowners, families, communities and investors. Better understanding the process may assist those involved in minimizing the harm that results.
2. Foreclosure is governed by state law. In Massachusetts, statutory changes enacted by the legislature and opinions issued by the Supreme Judicial Court since the foreclosure crisis of the last decade have granted homeowners more procedural protections but have also increased the complexity of this area of the law. The following describes the procedure in Massachusetts.
3. In Massachusetts, a mortgage is both a contract and a conveyance of real estate. The borrower signs a promissory note agreeing to repay the lender in accordance with the terms of the note. The borrower also signs a mortgage which is a type of deed that conveys to the lender an interest in the borrower's real estate. The right conveyed to the lender by the mortgage is the power to foreclose if the borrower defaults on making the required loan payments.
4. Upon granting a mortgage, the borrower retains the equity of redemption. When the borrower repays the loan, the borrower "redeems" the property by recording a discharge of mortgage received from the lender. If the borrower is unable to repay the loan and defaults, the borrower's right to redeem the property is cut off or "foreclosed" by a foreclosure.
5. In the event of a default, the lender will serve the borrower with a notice to cure the deficiency. Massachusetts law<sup>1</sup> provides a right to cure period of 150 days during which the lender and the borrower will attempt to negotiate a modification of the mortgage or some other resolution of the deficiency.<sup>2</sup>
6. If the lender and the borrower cannot agree to a modification of the mortgage, the lender may, after the passage of the 150 day right to cure period, send the borrower a notice of acceleration which means the entire amount owed on the note becomes due and payable immediately.
7. Massachusetts is a non-judicial foreclosure state; the lender schedules and conducts the foreclosure without judicial permission or oversight.
8. However, if the borrower is an individual (as opposed to a corporation), Massachusetts law requires the lender to file a pre-foreclosure lawsuit in Land Court or Superior Court to comply with the Servicemembers' Civil Relief Act (SCRA) which is a federal law that protects persons who serve on active duty in the military from adverse legal consequences

resulting from their service. SCRA does not exempt Servicemembers from foreclosure; it just provides Servicemembers with additional procedural rights.

9. While the SCRA lawsuit is not technically part of the foreclosure process, lenders will almost always comply with SCRA before commencing the foreclosure since to do otherwise would taint the title derived from the foreclosure; at any time in the future, a party could claim protection through SCRA.
10. The sole issue to be determined by the SCRA lawsuit is whether anyone with an ownership interest in the property is entitled to the benefit of SCRA.<sup>3</sup>
11. Upon the filing of the SCRA complaint, the court will issue to the lender an order of notice that provides anyone with an interest in the property notice of the complaint. The lender must serve this order of notice upon the borrower, must publish it once in the local newspaper, and must record it at the registry of deeds.
12. If the borrower is in the military, he or she must file an answer to the complaint which will delay the foreclosure. In most cases, however, the borrower is not in the military, so the court will issue judgment in favor of the lender. Once that happens, the lender may commence the foreclosure process.
13. There are two methods of foreclosure in Massachusetts: foreclosure by exercise of the power of sale contained in the mortgage and foreclosure by entry and possession. Most lenders use both methods simultaneously.
14. Before conducting a foreclosure on owner-occupied residential real estate, Massachusetts law requires the lender to take reasonable steps and make a good faith effort to avoid the foreclosure. This involves the lender comparing the anticipated net recovery from the foreclosure with the net present value of a modified mortgage. The lender must certify that it has done all this by recording an affidavit to that effect at the registry of deeds prior to the first publication of the notice of mortgagee's sale.<sup>4</sup>
15. If the lender intends to bring an action for the amount of any post-foreclosure deficiency against the borrower, the lender must send the borrower (or any other person from whom recovery will be sought) written notice of the intent to foreclose together with a warning of liability for the deficiency at least 21 days prior to the foreclosure auction.<sup>5</sup>
16. Lenders commonly sell the note secured by a mortgage to another lender or an investor. When that happens, the holder of the mortgage must "assign" the mortgage to the new note holder. This is done by recording an assignment of mortgage at the registry of deeds. In the event of a foreclosure, this assignment of mortgage must have been recorded prior to the first publication of the notice of mortgagee's sale. Otherwise the assignee of the mortgage has no authority to foreclose and any foreclosure that is conducted will be nullified.<sup>6</sup>
17. To foreclose by exercise of the power of sale, the lender prepares a notice of mortgagee's sale that includes the date and time of the auction, the required deposit amount, the legal description of the property and identifying information about the mortgage being

foreclosed. This notice of sale must be served upon the borrower and all parties who have an interest in the property and must also be published in the local newspaper one day per week for three successive weeks with the first publication at least 21 days before the sale.

18. On the scheduled day and time, an auctioneer hired by the lender conducts the foreclosure auction on the property, selling the property to the high bidder.
19. The high bidder at the auction immediately signs a memorandum of sale and is typically given 30 days to close the sale. At the closing, the foreclosing lender delivers a foreclosure deed to the buyer. The foreclosure deed will eventually be recorded at the registry of deeds, although there is no time limit within which that must be done.
20. In most Massachusetts foreclosures, the lender conducting the foreclosure is also the high bidder at the auction. This means the lender will execute a foreclosure deed that conveys the property to itself.<sup>7</sup>
21. Because lenders are in the business of making loans, not owning real estate, they typically put properties they have purchased at foreclosure auctions on the market in search of a third party buyer. Between the time of the auction and of a subsequent sale to a third party, properties owned by foreclosing lenders are often called REO which means “real estate owned” [by the lender].
22. While foreclosure by exercise of the power of sale is the primary means of foreclosure in Massachusetts, almost every lender simultaneously conducts a parallel foreclosure by entry and possession.
23. To foreclose by entry and possession, the lender’s representative steps onto the real estate and symbolically takes possession of it, usually moments before the auction begins. Afterwards, the lender executes and records at the registry of deeds a certificate attesting to this possession.
24. Since foreclosure by entry and possession grants the borrower three years to redeem the property by paying the lender the entire amount owed, this method of foreclosure yields title that is unmarketable during the three year redemption period. Despite this, lenders continue to utilize this method of foreclosure as a back up to foreclosure by exercise of the power of sale. (For example, if a flaw is discovered in the auction method of foreclosure three or more years after the auction, the entry and possession foreclosure would vest full title in the foreclosing lender even though the auction foreclosure was invalidated).
25. Both methods of foreclosure cut off the borrower’s ownership interest in the property (auction ends it outright; entry and possession ends it provisionally). However, if the borrower does not voluntarily relinquish possession of the property, the foreclosing lender/new property owner must commence eviction proceedings against the holdover borrower in order to gain legal possession of the property. This is usually done in Housing Court and may take several months to complete.

26. If the foreclosure auction yields more money than is owed, the lender must pay the excess amount to any junior lien holders or, if there are none, to the borrower. However, it is rare to have surplus funds in a foreclosure since the borrower and lender are more likely to resolve the matter short of foreclosure where there is equity in the property.
27. In most foreclosures, the amount realized at the auction is less than is owed to the lender. This leaves a “deficiency” which is the total amount owed on the note less the amount realized at the sale. For example, if the borrower owes \$300,000 and the property is sold at auction for \$200,000, a deficiency of \$100,000 results. Where a deficiency results, the lender may (and often does) file a lawsuit against the borrower on the promissory note seeking a judgment against the borrower in the amount of the deficiency.<sup>8</sup> Whether the lender files such a suit is driven by a number of factors including the borrower’s ability to pay a judgment and by lender concerns over regulators or investors.
28. If there are other mortgages or liens on the property that are junior to the mortgage being foreclosed, the foreclosure extinguishes the security interest of those junior liens and mortgages in the property (although the underlying debts would remain intact, just unsecured).

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<sup>1</sup> MGLA c.244, s.35A

<sup>2</sup> If the mortgage has been insured by the FHA, the mortgagee or the servicer working on behalf of the mortgagee is obligated to follow a number of discrete steps in an effort to avoid foreclosure, as detailed in HUD’s guidebook. A deviation from the prescribed process can be grounds for legal action which can nullify a foreclosure.

<sup>3</sup> The procedure for complying with SCRA varies from state to state. In New Hampshire, for instance, the lender records an affidavit certifying that no one with an interest in the property is serving on active duty in the military.

<sup>4</sup> MGLA c.244, ss.35B & 35C

<sup>5</sup> MGLA c.244, s.17B

<sup>6</sup> *U.S. Bank N.A. v Ibanez*, 458 Mass. 637 (2011)

<sup>7</sup> There are many reasons why the lender may purchase the property. The lender owes the borrower a fiduciary duty to obtain a fair price for the property. The lender may also have internal accounting reasons for purchasing the property at a particular price.

<sup>8</sup> In some states, the borrower’s liability is limited to the proceeds from the auction sale of the house.