

Middlesex North Registry of Deeds Fact Sheet

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The Foreclosure Process in Massachusetts

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The foreclosure process is complicated and involves many steps. While each case is different, the following describes what happens in a typical residential foreclosure:

1. In Massachusetts, a mortgage is both a contract and a conveyance of real estate. The borrower signs a promissory note agreeing to repay the borrowed money in accordance with the terms of the note. The borrower also signs a mortgage which is a type of deed because it conveys to the lender an interest in the borrower's real estate. The buyer retains "the equity of redemption" of the property meaning that if the loan is repaid, the lender "redeems" the property by receiving a discharge of mortgage from the lender. If the borrower fails to repay the loan, the lender can "foreclose" the borrower's right to redeem the property by taking possession of or selling the real estate.
2. If the borrower fails to make payments in accordance with the terms of the promissory note, the lender will give the borrower a "notice to cure" the deficiency. If the borrower does not comply, the lender sends the borrower a "notice of acceleration" which means the entire amount of the mortgage becomes due and payable immediately.
3. The foreclosure process has two parts. In the first, the lender files a complaint in the Land Court seeking a declaration that the borrower is not entitled to the protection of the Servicemembers' Civil Relief Act of 2003. The Land Court issues the lender an Order of Notice intended to notify the borrower of the complaint and the procedure for responding.
4. The Land Court directs the lender to serve the Order of Notice upon the borrower, to publish it once in the local newspaper, and to record it in the appropriate Registry of Deeds. (The media sometimes refers to the recorded Order of Notice as a "notice of foreclosure" because it is an indicator that the foreclosure process is under way although not every Order of Notice results in a foreclosure).
5. If the borrower does not respond to the Order of Notice (and only borrowers who are serving in the military have any standing under this statute), the Land Court issues judgment in favor of the lender. As soon as the judgment is issued by the Land Court, the lender may proceed with the actual foreclosure which is completely private with no judicial oversight.
6. The lender prepares a Notice of Sale that includes the date and time of the auction, the 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. The Notice of Sale must also be published in the local newspaper for three successive weeks with the first publication at least 21 days before the sale.
7. The sale is conducted on the property by an auctioneer. The buyer purchases the property "as is" and must sign a Memorandum of Sale immediately. The buyer typically has 30 days to arrange financing. At the closing, the foreclosing lender delivers a Foreclosure Deed to the buyer. The Foreclosure Deed is recorded anywhere from 30 to 90 days after the date of the auction. The foreclosing lender may (and frequently does) purchase the property at the auction.

8. The borrowers are not required to vacate the home at the time of the auction (although they usually do). While they no longer have a right to live in the property, the only way to remove them should they choose to stay is through the Housing Court eviction process which can often take months.
9. While the lender is not required to obtain full fair market value of the property at the auction, the lender does have a fiduciary duty to the borrower to obtain a fair price under the circumstances. (For example, if a property is appraised for \$200,000, the lender cannot take \$10,000 as a high bid. It is unclear where the line is drawn, but 75% of the appraised value of the property used to be considered a safe minimum bid).
10. If the property is sold for more than is owed on the mortgage, the lender retains the amount owed (including interest, penalties and all costs of foreclosure) and pays any surplus to the borrower. In almost all cases, however, the amount realized at the sale is less than is owed the lender. In such a case a "deficiency" results. The deficiency is the total amount owed less the amount realized at the sale. For example, if lender owes \$300,000 but the property is sold at auction for \$200,000, a deficiency of \$100,000 results.
11. Where a deficiency results, the lender may (and often does) file a lawsuit against the borrower on the promissory note seeking a judgment ordering the borrower to pay the deficiency amount.
12. If there are other mortgages or liens on the property that came after the mortgage being foreclosed, the foreclosure extinguishes those junior liens and mortgages. For example, if borrower used two mortgages to purchase the property, a first for \$180,000 and a second for \$70,000 and the holder of the first mortgage forecloses, the second mortgage is wiped out although the holder of the second mortgage may then sue the borrower on the promissory note.
13. Although lenders almost always end up as the purchasers at foreclosure auctions, they almost immediately put the property on the market in search of a third party buyer. These sales are often made at a substantial discount, particularly if the lender is desperate to raise cash or otherwise liquidate real estate assets.