

# Massachusetts Foreclosure Case Law Update, Legislative Developments & Trends 2013

May 13, 2013

Mass Mortgage Bankers Association  
2d Annual Conference

Paul J. Mulligan, Esq.  
Orlans Moran, PLLC  
Waltham MA 02454

# I. Eaton v. Fannie Mae

(462 Mass. 569, June 22, 2012)

“ Facts:

- “ Fannie Mae was purchaser/assignee of bid after foreclosure sale.
- “ Fannie Mae filed a summary process eviction case against former owner.
- “ Borrower, Henrietta Eaton filed complaint in Superior Court in order to obtain an injunction to prevent Fannie Mae from taking possession of the house.
- “ Eaton argued that foreclosing mortgagee did not hold note at the time of the foreclosure, so foreclosure is void.
- “ Fannie Mae argued that history of foreclosure in MA only required assignment of mortgage.
- “ Superior Court held granted the injunction stating that common law in MA provides that a foreclosing mortgagee must hold the note in order to foreclose.

## Eaton v. Fannie Mae (con't)

- “ SJC ruling: Foreclosing entity must be holder of mortgage of record AND holder of note OR an authorized agent of the note holder.
- “...we construe the term "mortgagee" in [G. L. c. 244, § 14](#), to mean a mortgagee who also holds the underlying mortgage note” (*Id* at 584).
- “...however, we do not conclude that a foreclosing mortgagee must have physical possession of the mortgage note in order to effect a valid foreclosure. There is no applicable statutory language suggesting that the Legislature intended to proscribe application of general agency principles in the context of mortgage foreclosure sales. Accordingly, we interpret [G. L. c. 244, §§ 11-17C](#) (and particularly [§ 14](#)), and [G. L. c. 183, § 21](#), to permit one who, although not the note holder himself, acts as the authorized agent of the note holder, to stand ‘in the shoes’ of the ‘mortgagee’ as the term is used in these provisions” (*Id* at 586).

## Eaton v. Fannie Mae (con't)

- “ We exercise our discretion to hold that the interpretation of the term “mortgagee” in [G. L. c. 244, § 14](#), and related statutory provisions that we adopt in this opinion is to apply only to mortgage foreclosure sales for which the mandatory notice of sale has been given after the date of this opinion+ (*Id.* at 588-589).
  
- “ Important Footnotes:
  - “ #2 ¶ the term “note holder” is used to refer to a person or entity owning the mortgage note+ (*Id.* At 571).
  
  - “ #28 ¶ It would appear that at least with respect to unregistered land, a foreclosing mortgage holder such as Green Tree may establish that it either held the note or acted on behalf of the note holder at the time of a foreclosure sale by filing an affidavit in the appropriate registry of deeds pursuant to G. L. c. 183, § 5B. The statute allows for the filing of an affidavit that is “relevant to the title to certain land and will be of benefit and assistance in clarifying the chain of title.” Such an affidavit may state that the mortgagee either held the note or acted on behalf of the note holder at the time of the foreclosure sale. See G. L. c. 183, § 54B+ (*Id.* at 589).

## II. Chapter 194 of the Acts of 2012

effective August 3, 2012, except Sections 1, 2 and 5, which are effective November 1, 2012

<http://www.malegislature.gov/Laws/SessionLaws/Acts/2012/Chapter194>

### Three Main Items:

1. Revised Requirements for Notices of Sale under MGL c. 244 §14 for mortgages that have been assigned to the foreclosing entity
2. Provides new requirement for foreclosing Creditors to conduct a “good faith review” of borrowers of “Certain Mortgage Loans” for foreclosure avoidance prior to publishing first Notice of Sale
3. Mandates execution and recording of two new affidavits prior to publishing first notice of sale:
  - a. Affidavit of Compliance with new MGL c. 244 §35B, and
  - b. Pre-Sale Eaton Affidavit

# Chapter 194 of the Acts of 2012

## Also:

- “ Extends time for in-person counseling requirement to take effect in Reverse Mortgage Laws (MGL c. 167E, §7A and c. 171 §65C1/2)
- “ Establishes Task Force for study of reduction of post-foreclosure vacancies and foreclosure mediation programs
- “ Mandates the tracking of outcomes of loan modifications under new law by DOB and AG (to sunset December 31, 2017)
- “ Provides that the DOB shall provide regulations to aid in the administration and enforcement of the new law
- “ Enables immediate applicability of Section 2 (loan modification review for Certain Mortgage Loans) for borrowers who had not been sent a Notice of Right to Cure prior to August 3, 2012

# Overview of Sections: Section 1

## **Section 1: Revises MGL c. 244 §14 re: assignments of mortgage**

- “ Completely replaces the current MGL. c. 244 sec 14. – though mostly minor changes
- “ Requires the recording of all assignments of mortgage into the foreclosing entity prior to sending out the Notice of Sale ("NOS") under MGL c. 244 §14:
  - “in the event a mortgagee holds a mortgage pursuant to an assignment, no notice under this section shall be valid unless (i) at the time such notice is mailed, an assignment, or a chain of assignments, evidencing the assignment of the mortgage to the foreclosing mortgagee has been duly recorded in the registry of deeds for the county or district where the land lies and (ii) the recording information for all recorded assignments is referenced in the notice of sale required in this section.”

# Section 1

- Requires recording information for all assignments of mortgage to be included in the NOS and amends the statutory form of NOS to include the recording information of the assignment(s):

%Form.)

MORTGAGEE'S SALE OF REAL ESTATE.

By virtue and in execution of the Power of Sale contained in a certain mortgage given by..... to..... dated..... and recorded with.....Deeds, Book....., page....., of which mortgage the undersigned is the present holder,.....

(If by assignment, or in any fiduciary capacity, give reference to the assignment or assignments recorded with .....Deeds, Book....., page....., of which mortgage the undersigned is the present holder,.....)

for breach of the conditions of said mortgage and for the purpose of foreclosing the same will be sold at Public Auction at.....o'clock,..... M. on the..... day of..... A.D. (insert year),..... (place)..... all and singular the premises described in said mortgage, (In case of partial releases, state exceptions.)

To wit: %Description as in the mortgage, including all references to title, restrictions, encumbrances, etc., as made in the mortgage.)+

Terms of sale: (State here the amount, if any, to be paid in cash by the purchaser at the time and place of the sale, and the time or times for payment of the balance or the whole as the case may be.)

Other terms to be announced at the sale.

(Signed) \_\_\_\_\_

Present holder of said mortgage.\_\_\_\_+



# Section 1

The amendments to MGL c. 244 §14 codify the precatory language in the SJC's Ibanez decision that:

"We do not suggest that an assignment must be in recordable form at the time of the notice of sale or the subsequent foreclosure sale, although recording is likely the better practice." *United States Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 651 (Mass. 2011)(emphasis added).

# Overview of Sections: Section 2

## **Section 2: Two New Sections Added to MGL c. 244: secs. 35B and 35C.**

- “ §35B – Prior to publishing a Notice of Sale, Creditor must make a good faith attempt to avoid foreclosure for “Certain Mortgage Loans”
- “ **§35B(f) – Pre-sale Affidavit of Compliance with 35B**
- “ Prior to publishing a Notice of Sale, a Creditor must **execute** an affidavit, after review of business records, stating that the foreclosing entity is either the holder of the note or authorized agent of the holder of the note and must record the affidavit.
  
- “ **§35C (b) – Pre-sale “Eaton” affidavit**
- “ Prior to publishing a Notice of Sale, a Creditor must **execute** an affidavit, after review of business records, stating that the foreclosing entity is either the holder of the note or authorized agent of the holder of the note and must record the affidavit.
  
- “ **Best Practice** – Record the notice before publishing the Notices of Sale
- “ **Best Practice** – Publishing = mailing OR publishing in a newspaper
- “ **REBA Form of Affidavit** – a combined affidavit 35B and 35C
- “ The recorded affidavit protects a **third party** who later purchases the property from subsequent loss of the property.

## Section 2: New MGL c. 244 §35B

- “ **35B (a)** introduces definitions of a number of newly defined concepts including that of a "Certain Mortgage Loan" ("CML") and "Affordable Monthly Payment".
  
- “ Certain Mortgage Loan (“CML”): A CML is broadly defined as a loan with any one of these features:
  - “ an introductory interest rate which is 2% or more below the fully indexed rate,
  - “ allows interest only payments (other than HELOC's),
  - “ payments that fail to fully amortize the loan,
  - “ is underwritten based on less than full documentation,
  - “ certain prepayment penalties,
  - “ an LTV at or above 90% and debt ratio of more than 38% or
  - “ an LTV that exceeded 95%.

## Section 2: New MGL c. 244 §35B (cont.)

- “ If despite due diligence the Creditor cannot determine that the loan is not a CML, it must assume it is and comply with Section 35B.
- “ Loans made by the MA Housing Finance Agency are not considered CML's.
- “ "Affordable Monthly Payment": monthly payments which a borrower is able to make, taking into account verifiable income, debts, assets and obligations
- “ **35B (b)** Prior to publishing a notice of sale on a CML, the Creditor must have "taken reasonable steps and made a good faith effort to avoid foreclosure" before publishing the NOS.
  - “ An proposed loan modification review process which achieves a presumption of good faith is provided in Subsection 35B (b)(2).
  - “ It provides that a Creditor should:
    - “ review a Borrower's financial information to determine what an "Affordable Monthly Payment" would be,
    - “ attempt to fashion a loan modification which achieves the Affordable Monthly Payment, and
    - “ conduct a "compliant analysis" to compare the Net Present Value of the modified loan with the net recovery of the foreclosed loan under HAMP or other specified programs.

## Section 2: New MGL c. 244 §35B (cont.)

- “ To begin the process, the Creditor must send an additional notice to a Borrower of a CML of the right to pursue a "modified mortgage loan" by 1st class and certified mail. This notice must be mailed concurrently with the RTC under MGL c. 244 §35A.
  - “ A copy of the notice must be filed with the Division of Banks ("DOB") and the Attorney General's ("AG") office.
  - “ The form of notice and information in the notice will be similar to the RTC format promulgated by the DOB. It must also include the AG's loan modification assistance telephone number.
- “ **Process Steps and Timeline**
  - “ After “delivery” of the notice, Borrower then has 30 days from the to respond to the notice, select a foreclosure avoidance alternative and provide the required financial information
  - “ The Creditor then has 30 days to provide the Borrower with a detailed assessment of its review and demonstration of its good faith efforts to avoid foreclosure including making an offer or declining to offer a loan modification.
  - “ The Borrower has 30 days to accept or decline such offer or provide a counteroffer, in which event the Creditor has 30 days to accept or reject the counteroffer.
  - “ The deadline for completion of the loan modification process is 150 days which aligns with the RTC period.

## Section 2: New MGL c. 244 §35B (cont.)

- “ Subsection (f) If good faith attempt does not result on a modification or other foreclosure avoidance, the Creditor must execute an affidavit, after review of its business records, certifying that it complied with this section before it publishes a Notice of Sale and record the affidavit at registry of deeds.
- “ Recorded affidavit protects a third party who later purchases the property from subsequent loss of the property.
- “ Borrowers who don't respond waive their right to a loan modification review under the statute, and their 35A RTC period is shortened from 150 to 90 days.
- “ The subsection further provides that the "right to a modified mortgage loan" .. "shall be granted once during any 3-year period".
- “ Creditor and Borrower can also agree to any other alternative to foreclosure.
- “ Creditor must report to the DOB the outcome of all loan modifications for which a notice was sent on a biannual basis.
- “ DOB shall “adopt, amend or repeal regulations” to aid with administration or enforcement of the subsection.

## Section 2: New MGL c. 244 §35C

### “ **§35C – Additional Foreclosure Requirements**

- “ Subsection 35C (c) provides that a Creditor violates this chapter if it assesses costs and fees to a "third party" for any actions it must take to correct, obtain or confirm documentation of its right or authority to foreclose or assign the mortgage.
- “ Subsection 35C (d) provides that a Creditor violates this chapter if it makes statements that it "knows or should know are false" in state or federal court about any part of the foreclosure or loss mitigation proceedings.
- “ Subsection 35C (e) provides that a Creditor violates this chapter if it charges a fee or cost for services that were not actually rendered or performed in connection with the foreclosure.

## Section 2: New MGL c. 244 §35C: Other components

- “ Subsection 35C (f) prohibits a person from fee splitting or giving or receiving a fee in connection with a foreclosure for services which were not actually rendered or earned.
- “ Subsection 35C (g) provides the DOB may adopt, amend or repeal rules and regulations with respect to compliance with and enforcement of Section 35C.
- “ Subsection 35C (h) prohibits a Creditor from conditioning the sale of the property to a charitable buyer (like Boston Community Capital) on the former borrower not living in or owning the property.



## Overview of Sections: Sections 3 and 4

- “ Section 3 – modifies the two statutes (MGL c. 167E, §7A and c. 171 §65C1/2) which require in-person counseling for reverse mortgage borrowers. The implementation deadline is extended to August 1, 2014.
- “ Section 4 – Task Force of 13 members established to:
  - “ Study ways in which the commonwealth can prevent “unnecessary vacancies” after foreclosures
    - “ Continued occupancy by homeowners until executed P+S
    - “ Interplay with landlord-tenant law
  - “ Conduct review and evaluation of current mediation programs in the U.S.
    - “ Models, effectiveness, re-default, costs and procedures
    - “ Funding for such programs
  - “ Task Force must submit findings by December 31, 2013

# Overview of Sections: Sections 5 - 10

## “ **Sections 5, 8, 10. Tracking of loan modification outcomes**

“ The MA Division of Banks in consultation with the Attorney General will track the final outcomes of the foreclosure avoidance process on CML's under Section 35B and report to the Legislature annually through 2017.

## “ **Section 6. Section 35B Regulations**

“ Relative to Section 35B, the Division of Banks may "adopt, amend or repeal rules and regulations" with respect to administration and enforcement, establish minimum requirements which constitute "good faith efforts" and "safe harbors" for compliance by Creditors.

## “ **Section 9. Delayed effective date**

“ This section provides for a delayed effective date of November 1, 2012 for Sections 1, 2 and 5. However, the last minute inclusion of the language in Section 7 discussed below substantially changes this.

## “ **Section 7. Exception to the delayed effective date**

“ Section 7 was a late addition by the drafters of the Act and provides in pertinent part:

“ "Notwithstanding the effective date of section 2, the provision of section 2 shall apply to any person receiving notice under section 35A of Chapter 244 of the General Laws " (the RTC).. " after the effective date of this act; provided, further, that if a Creditor has sent the right to cure notice described in said section 35A of said chapter 244 after the effective date of this act, the Creditor shall send the notice described in section 35B of said chapter 244 if the borrower would otherwise qualify for such notice."

“ This provision was inserted in an attempt to ensure that Creditors didn't use the "loophole" of the delayed effective date and send out a flood of RTC notices in the period before November 1, 2012.

“ The DOBs guidance issued immediately following the effective date of the statute confirmed that Section 2 is immediately effective for borrowers who had not yet received a section 35A RTC prior to the August 3, 2012.

# Form of 35B and 35C Affidavit

**AFFIDAVIT REGARDING NOTE SECURED  
BY MORTGAGE BEING FORECLOSED  
MGL c. 244 sec. 35B and 35C**

**Property Address:** PROPERTY ADDRESS

**Mortgage:** MORTGAGORS to ORIGINAL MORTGAGEE, dated MORTGAGE DATE recorded at COUNTY County (DISTRICT District) Registry of Deeds in Book BOOK Page PAGE. Assigned to \_\_\_\_\_ by assignment recorded in said Deeds in Book BOOK Page PAGE. [as needed for multiple assignments: Assigned to \_\_\_\_\_ by assignment recorded in said Deeds in Book BOOK Page PAGE.]

**Foreclosing Mortgagee:** [NAME OF HOLDER OF MORTGAGE OF RECORD/NTFI]

Property Address: PROPERTY ADDRESS

The undersigned, \_\_\_\_\_, having personal knowledge of the facts herein stated, under oath deposes and says as follows:

# Form of 35B and 35C Affidavit

I am: [Check One]

An officer or employee of **Foreclosing Mortgagee**, where I hold the office of

\_\_\_\_\_.

An officer or employee of a duly authorized agent of **Foreclosing Mortgagee**, under a Power of Attorney which is still in full force and effect as of the date hereof.

Based upon my review of the business records of **[AFFIANT'S EMPLOYER]**, I certify that:

[Check One]

The requirements of M.G.L. c. 244 sec. 35B have been complied with.

G.L. c. 244, § 35B is not applicable to the above mortgage.

Based upon my review of the business records of **[AFFIANT'S EMPLOYER]**, I certify that the **Foreclosing Mortgagee** is: [Check One]

the holder of the promissory note secured by the above mortgage.

the authorized agent of the holder of said promissory note.

### III. HSBC Bank USA, N.A., Trustee v. Jodi B. Matt (464 Mass. 193, January 14, 2013)

- “ The Massachusetts Supreme Judicial Court (“SJC”) issued its ruling in the HSBC Bank, N.A., Trustee v. Jodi Matt case (SJC-11101) on January 14, 2013.
- “ Facts:
  - “ Plaintiff filed an SCRA action in the Land Court prior to commencing foreclosure under power of sale in the subject mortgage.
  - “ Plaintiff had an assignment of mortgage of record prior to filing the action.
  - “ The assignment came from an entity that at the time of the execution of the assignment was in active Chapter 11 bankruptcy.
  - “ Defendant challenged plaintiff’s standing to file the action, stating that an assignment executed by an entity in active bankruptcy was void.
  - “ Per the Land Court judge, at hearing, regardless of the effectiveness of the assignment, the plaintiff proved that it had the contractual right to become the holder of the mortgage via a mortgage loan purchase agreement and therefore proved its standing to file the action, having SOME legal right in the mortgage loan.

## Matt Decision (con't)

“ SJC Decision: In order to have standing in the SCRA suit filed prior to foreclosure sale, a plaintiff must be a “mortgagee” (holder of mortgage of record and either the holder [read “owner”] of note or an agent for the holder [read “owner”] of the note), bringing the Eaton analysis back in time to the point of filing the SCRA case.

## Matt Decision (con't)

- “ In a partial ruling in favor of lenders, the SJC explicitly ruled that unless defendants are entitled to the protections of the SCRA, they are not permitted to file any response or objection. This terminated the Land Court’s prior practice of scheduling a show cause hearing when a defendant filed an answer challenging plaintiff’s standing.
- “ Prior to the SJC’s decision in this case, the Land Court had consistently ruled that due to the limited nature of the SCRA proceeding, that Eaton analysis did not apply to Plaintiff’s standing in an SCRA case, and that a Plaintiff need only show that it was the holder of the mortgage of record in order to survive a challenge to standing.

## Matt Decision (con't)

- “ The SJC stated that “[g]oing forward, to establish standing in servicemember proceedings, plaintiffs must present such evidence as may be necessary and appropriate in the circumstances reasonably to satisfy the judge as to their status as mortgagees or agents thereof.”
- “ So, although a defendant not entitled to the protection of the SCRA can no longer challenge standing, the SJC put the burden on the judge to make a determination of Plaintiff’s standing to bring the action.
- “ In a footnote (17), the SJC stated that “[t]he judge may, but need not, consider an affidavit filed by a plaintiff pursuant to the Rules of the Land Court and G.L. c. 244 §35A, as sufficient to meet this burden.”
- “ The 35A affidavit is the “Mortgagee’s Affidavit” which is required to be filed with the SCRA action in which the Plaintiff certifies that the mortgagee or its predecessor sent the 90 or 150 day breach letter required under G.L. c.244 §35A. However, that affidavit form made no mention of the Plaintiff relationship to the underlying note.



## Matt Decision (con't)

- “ As a result, in mid-February 2013, the Land Court issued a new form of the Mortgagee’s Affidavit. In it the Plaintiff must make an averment about its relationship to the Note similar to that contained in the new pre-sale 35C affidavit required as a result of the August 3, 2012 Massachusetts foreclosure law (c. 194 of the Acts of 2012).
- “ **The Land Court has stated that it will no longer accept the prior form of 35A affidavit as of March 1, 2013.**

# New 35A Affidavit

COMMONWEALTH OF MASSACHUSETTS  
LAND COURT  
DEPARTMENT OF THE TRIAL COURT  
MORTGAGEE'S AFFIDAVIT

Defendant(s)/Mortgagor(s): \_\_\_\_\_

Property Address: \_\_\_\_\_  
\_\_\_\_\_

- 1) The undersigned makes oath and says that it is (check one):
- The Mortgagee of the Mortgage which is the subject of this proceeding, in that it is the person or entity currently holding both the subject Mortgage and the note;  
**or**
  - The Mortgagee of the Mortgage which is the subject of this proceeding, in that it is the person or entity currently holding the subject Mortgage and is acting on behalf of the current holder of the note;  
**or**
  - Acting on behalf of the person(s) or entity(ies) currently holding the subject Mortgage and the note.

**AND**

# 35A Affidavit cont.

2) The undersigned further makes oath and says that (check one):

- Notice(s) to Defendant(s)/Mortgagor(s) has/have been given in compliance with Massachusetts General Laws, Chapter 244, Section 35A, as amended (COPY OF NOTICE ATTACHED);
- or**
- No notice has been given because no notice is required under Massachusetts General Laws, Chapter 244, Section 35A, as amended.

Signed under the pains and penalties of perjury on \_\_\_\_\_.

# IV. Trends

- “ 1. DOB regulations regarding 35B – still not yet finalized
- “ 2. 35A Challenges in post-foreclosure evictions
- “ 3. City Mediation Ordinances
  - “ Lynn – veto override vote 5/15/2013
  - “ Lawrence – effective 5/23/2013