Massachusetts Alliance Against Predatory Lending

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FACT SHEET: OPPOSE ACT TO CLEAR TITLE TO FORECLOSED PROPERTIES

Senate Bill 1987

# Massachusetts' Supreme Judicial Court has declared thousands of foreclosures void and homeowner rights violated. Massachusetts has a problem going forward with hundreds of thousands of titles to property, 65,000 of which were "foreclosed" homes. S1987’s attempt to deny former owners the right to regain illegally foreclosed property is not the same as clearing titles and is not the solution. It disparately impacts women and communities of color foreclosed on early in the crisis before the SJC recognized the many lender illegalities in foreclosure.

## What Does This Bill Do? It does nothing to clear title – it attempts to exclude the party most likely to sue.

The Senate version of the bill shortens the time to overturn an illegal foreclosure after filing a foreclosure deed and accompanying affidavit from the long standing, 20 year statute of limitations to 3 years for future auctions and to only one year for those previously foreclosed. The bill provides no notice to MA homeowners of this curtailing of long-standing, property rights. In passing the bill on July 23rd, 2014, House leadership changed the bill to limit the decrease from 20 years to 10 for both present and future foreclosed homeowners. This change will at least protect homeowners in the present crisis.

The bill offers an exemption only if the former homeowner sues or is sued, knows to ask and can convince a judge to give permission to file a copy of their complaint in the Registry of Deeds. Getting such an allowance can be hard since court rulings on foreclosed homeowners' claims against lenders' illegal procedures are still evolving.

While S1987 provides triple, monetary damages if the foreclosing lender is found to have lied on its affidavit, the home in which people raised their children, invested all their incomes and participated in their communities is forever gone. A home is not just a financial investment. S1987 misses that reality: denying our right to fight for and reclaim an illegally foreclosed home and limiting judgment to financial recompense which can never repay what is lost when a home is taken illegally.

## Will S1987 protect innocent, new homeowners who purchase post-foreclosure?

The clear majority of new purchasers (58%) are big, cash-only investors – not new owner-occupants or small local investors. Only homeownership and long-term stable rental ensure healthy neighborhoods.

The recording of any legal challenge to title –*lis pendens*– exists specifically to protect future buyers.

However, only a judge can approve such a filing (G.L. Chapter 184 sect. 15). When legal rulings evolve so quickly, judges are learning like the rest of us. Prior to each recent major SJC ruling in foreclosed homeowners' favor, most judges ruled against those same legal claims, declaring arguments "frivolous" when homeowners attempted to appeal. Judges have not been able to fully assess what will or will not be determined a "frivolous challenge" in the near future and thus merit recording in the Registry now. If a homeowner is permitted to record the initial claim, they are also laid open to counter-suits that their filing was frivolous.

S1987 does nothing to clear title. The now common problems of broken chains of title to mortgages and missing notes means there may be other parties besides former homeowners who have rights unaffected by S1987. The only sure protection for new or old homeowners will be swift adjudication of or another remedy to the now numerous valid challenges to post-foreclosure titles and broken chains of ownership of mortgages and notes.

## Can the foreclosure deed affidavit be considered as "conclusive evidence" of a valid foreclosure?

The foreclosure affidavit filed at the Registry in a foreclosure is a purposefully abbreviated form created by the legislature to memorialize the bare bones of a foreclosure. As has been adjudicated by the Massachusetts Supreme Judicial Court in two decisions in the last two years:

"The statutory form was intended as an alternative to the more lengthy form prescribed by G.L. c. 244, §

15,... The purposes of a statutory form are...: to be recorded with the foreclosure deed and "secure the preservation of evidence that the conditions of the power of sale... have been complied with... *Such an*

*affidavit is not conclusive proof of compliance with G.L. c. 244,* § *14.*"

The statutory affidavit covers none of the legal challenges that have been the critical breakthrough defenses against illegal foreclosures in the last few years: a mortgage having sub-prime characteristics, a broken chain of title to the mortgage, lacking an enforceable note, proper service on the homeowner of the notice of the auction, strict compliance with the right to cure period, etc. The affidavit S1987 attempts to elevated to a "conclusive evidentiary" status would require creation of a lengthier affidavit to cover the most salient issues. The abbreviated version used for decades cannot be elevated to proof of legal foreclosure. "Evidence" by its very nature must be the subject of scrutiny in court. "Conclusive evidence" without adjudication is a legal impossibility.

## Can a curtailed time period to sue be fair when courts broaden the number of winnable offenses monthly?

Can the outcome of a lawsuit best predicted by the date it is brought be fair? If previously foreclosed homeowners had been limited to 1 year in 2008, none of the now common legally successful challenges to foreclosure could win in court then. What new claims will become winnable in coming months?

S1987 will drown our Civil Court system in legal claims. As the state judiciary has grasped the many problems in the procedures of mortgaging and foreclosure of homes, they have moved to enforce our laws more and more completely. A significant percentage of the 65,000+ households that were foreclosed since 2007 now have valid and potentially winnable legal challenges to regain their title. The Massachusetts courts will be deluged as homeowners and their advocates rush to file suit on now viable claims within one year. A small percentage of such filings (1,300) will mean slightly fewer lawsuits in one year than were filed in the last six!

## S1987 unjustly lacks any notification to former or present homeowners of vast cut in right to sue

S1987 provides a one year window for the over 65,000 foreclosed homeowners since 2007 to sue and get a copy of their complaint recorded at the local registry of deeds, rather than the traditional 20, a serious curtailment of traditional rights. The House bill, as amended, improves a still flawed bill by increasing the period to 10 years. Homeowners deserve notification that the state has changed the time period. S1987 includes no provision. Nor would S1987 notify future foreclosed homeowners of their Senate-proposed three year window to sue.

A homeowner will not know when their clock to sue starts. No Massachusetts law requires a deadline for recording a foreclosure deed and subject affidavit. S1987 does not fix this nor require notification to the supposed former homeowner of the filing. Currently deeds are recorded from 1 to 21 months after auction. No 'foreclosed' homeowner can be expected to check every week for the date a foreclosure deed is recorded.

## Shouldn’t laws reverse the huge economic loss to the state rather than make that impossible?

Conservatively, the 65,000+ Massachusetts foreclosures represent a $20-$40 billion loss in wealth to the state's households. The vast majority of those foreclosures were done by out of state lenders, who took almost all of those billion out of our state. It is well recognized that the loss of value in a home represents a concomitant loss of spending power representing additional billions of dollars of lost economic activity and spending in the Commonwealth. Studies also show concomitant unemployment and job losses, negative health impacts, much lower school performance by children, the tearing apart of the fabric of our communities, losses in property tax revenue to our municipalities, increase in crime and its concomitant costs. We should support our residents to get their homes back, receive justice they deserve, bring their pillaged wealth back and rebuild our economy.

## Our Housing Market is Still Unstable: S1987 does not help

S1987 will not stabilize the housing market. MAAPL, the Mass Bankers Association, and Commissioner of Banks all stated publicly that they do not believe foreclosures are over. Spring 2014 foreclosures spiked again: March, April and May’s petitions to foreclose and June auctions more than doubled. Percentages over the prior year were still far higher than the height of the then believed to be devastating foreclosure crisis of the early 1990s.

While the initial cause of the foreclosures and damage to our housing market appeared to be sub-prime lending policies, evidence now shows that the damage was caused by the huge housing bubble. Now that property prices have dropped down closer to the normal historical curve, those hugely overpriced mortgages are still common place in our state. These continue to destabilize neighborhoods and our housing market as a whole. Surface solutions that allow some properties to be purchased more easily will not address the underlying problems or the continuing accumulation of damages from the foreclosures that have happened already.

## S1987 Only Claims to Address a Small Part of the Widespread Ruined Titles in our Registries

In addition to the problems exposed in the Ibanez ruling of “broken chain of title to the mortgage,” numerous additional examples of other chain of title to mortgage problems exist, such as the recent Eaton decision’s on “holding the note” and a dozen others highlighted in seminal, SJC decisions in the last couple years alone. These problems compromise the marketability of title. Their property record contains the same legal violations. What are the homeowners to do who face these problems each and every month over the next 30 to 50 years when they or their heirs go to refinance or sell their home? S1987 is a response to the tip of the Housing Bubble/Housing Crash iceberg. It does not resolve title problems either for those who have been illegally foreclosed or the much larger percentage of homeowners who will face these problems in the decades going forward. Damage to titles can be located. The state should commit to finding them and providing a genuine repair.

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