

# Massachusetts Alliance Against Predatory Lending

[www.maapl.info](http://www.maapl.info)

## FACT SHEET: OPPOSITION TO ACT TO CLEAR FORECLOSED PROPERTIES

### Senate Bill 1981

*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. Denying former owners the right to regain illegally foreclosed property is not the solution.*

### What Does This Bill Do?

The Senate 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 three years going forward and to only one year for those previously foreclosed. The bill provides no notice to homeowners of the Commonwealth of this change to hundreds of years of property rights.

*The bill does not clear title* and so does not fix the problem. Massachusetts courts do not need to determine most title & foreclosure violations because they are violations "by operation of law." They become "fatal" simply if they occur. Rather, this bill only addresses the issue of who is permitted to sue. The violations exist regardless of the presence of a lawsuit or not.

Property rights are constitutionally protected in Massachusetts. The bill strips *residents of their constitutional right* to receive redress through the courts for injuries and wrongs done to themselves and their property (Article 11, *Massachusetts Constitution*).

The bill offers an exemption only *if* the former homeowner sues or is sued and knows to ask *and* can convince a judge they have a non-frivolous claim so as to receive judicial permission to file a copy of their complaint in the Registry of Deeds. Getting such a determination can be hard since court rulings on foreclosed homeowners' claims are still evolving as lenders' illegal procedures are exposed.

While S1981 provides triple, monetary damages if the foreclosing affidavit's signer is found to have lied on it, 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. S1981 misses that reality by offering - instead of our right to fight for and reclaim an illegally foreclosed home – a financial recompense that will never be able to repay what is lost when a home is taken illegally.

### Will S1981 protect innocent, new homeowners who purchase post-foreclosure?

Homeownership and long-term stable rental ensure healthy neighborhoods. *In contrast* the clear majority of new purchasers (58%) are big, cash-only investors - not new owner-occupants or small local investors.

The recording of any legal challenge to title –*lis pendens*– exists specifically to protect future purchasers. 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, individual judges frequently 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.

The only sure protection for new and 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 S1981 attempts to elevate 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 that is determined by the time it is brought be fair? If homeowners who have already been foreclosed had been limited to 1 year in 2008, none of the now common legal bases to overturn a foreclosure could win in court in that time period. What new claims will become winnable in coming months?

S1981 will drown our Civil Court system in legal claims. As the Massachusetts 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 court system will be deluged as homeowners and their advocates rush to file suit on their viable, legal claims in one year. A small percentage of such filings will mean more lawsuits than were filed and tried in the last six years.

### **Lack of any notification to homeowners of diminishment of right to sue and information going forward:**

S1981 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*. Homeowners deserve notification that the state has changed the time period. S1981 includes no provision. Nor would S1981 notify future foreclosed homeowners of their Senate-proposed three year window to sue.

At minimum, S1981 must include notification of homeowner rights in the notices of foreclosures already required by law when a foreclosing entity moves to foreclose.

In addition, S1981 provides no notification of when a foreclosure deed and the subject affidavit will be recorded by the lender. There is no legal deadline for recording; currently deeds are recorded from one to 21 months after auction. No 'foreclosed' homeowner can be expected to check every few days for the date a foreclosure deed is recorded so they know when their window to sue has started.

### **Why facilitate rather than reverse the huge economic loss to the state?**

Conservatively, the 65,000+ Massachusetts foreclosures represent a \$20 billion loss in wealth to the state's households. The vast majority of those foreclosures were done by out of state lenders, who took most of that \$20 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, help them to participate economically and rebuild our economy.

### **Stabilizing Housing Market**

S1981 will not stabilize the housing market. The Mass Alliance Against Predatory Lending, the Mass Bankers Association, and the Commissioner of Banks have all stated publicly that they do not believe the foreclosures are over. Spring 2015 foreclosures have spiked again while 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 from sub-prime lending policies, evidence now shows that the damage was caused by the huge housing bubble. Now that property prices have dropped back down closer to the normal historical curve, those hugely overpriced mortgages are still commonplace 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.

### **S1981 Only Addresses a Small Part of the Widespread Ruination of Titles**

In addition to the problems exposed in the *Ibanez* ruling of a broken chain of title to the mortgage, there are numerous additional examples of other problems in chain of title to mortgage, such as holding the note in the recent *Eaton* decision and a dozen other seminal decisions by our SJC in the last couple of years alone.

These compromise the marketability of title. S1981 does not assist the much larger number - now tens of thousands of homeowners - who will never face a foreclosure (no matter how many payments they make on an over-priced mortgage). Their property record contains the same legal violations. What are the small handful of homeowners to do who will 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? S1981 is a response to the tip of the iceberg. It does not resolve these title problems either for those who have been illegally foreclosed nor 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.