

Massachusetts Alliance Against Predatory Lending

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FACTSHEET: OPPOSE ACT "CLEARING" TITLE TO FORECLOSED PROPERTIES

Senate Bill 2015 (formerly S1981)

Massachusetts' Supreme Judicial Court has declared 1000s of foreclosures void and homeowner rights violated. Massachusetts has a problem going forward with hundreds of thousands of titles to property, 68,000+ of which were "foreclosed" homes. Denying homeowners the right to regain illegally foreclosed property is not the answer.

What Does This Bill Do?

The filers of this bill are asking the MA legislature to reverse decisions of the Supreme Judicial Court enforcing Massachusetts law and protecting the constitutional property rights of Massachusetts homeowners during a historic predatory lending and foreclosure period that impacted tens of thousands of Massachusetts homeowners.

This bill attempts to determine that a previous foreclosure (even if it was illegal) will have no impact on the validity of the title to the property passed to an arm's length third party purchaser. It does nothing to repair the actual defects that legally rest in the title. Instead, it attempts to exclude claimants from this process, regardless of the facts surrounding an illegal foreclosure.

If the affidavit filed with the foreclosure deed is executed in statutory form according to the opinion of the title lawyer in a particular case, the title lawyer would be able to treat the violations of the foreclosure as if non-existent.

If a particular title lawyer makes such a decision, the rights of foreclosed Massachusetts homeowners, some 68,000 plus, affected by the foreclosure crisis thus far, would have only one year to sue to regain their home. For hundreds of years, homeowners have had 20+ years to sue to regain their home. The homeowner would also receive no direct notice that their rights were curtailed from 20 years to 1 year.

In this bill, homeowners foreclosed in the future would have only a three year window to sue, if a title lawyer determined the affidavit was executed in statutory form. **Title insurance industry leaders have stated that they consider the validity of the affidavits filed with foreclosure deeds "Questionable at best"** (*Banker & Tradesman*, Sept. 7, 2015). Nonetheless, they ask this legislature to use these affidavits to remove MA homeowners' longstanding constitutional rights to property. The bill purports to provide a safe haven for homeowners who find out about this bill curtailing their window to sue to regain their home if they have pleadings from an offensive lawsuit and file it at the registry of deeds. This "safe haven" would require a judge's permission.

The bill also includes possibility of receiving triple damages if a homeowner can convince a judge that their property was taken illegally; however, the statute of limitations is 4 years and the bill severely limits access to such damages. Further, no provision is made for ensuring that such funds are available or ensuring that the court would provide such a remedy. Today, there are numerous lenders that originated predatory loans who are out of business. Unlike an imminent domain acquisition of a property against the will of the homeowner, this bill does not guarantee full compensation even in cases in which the foreclosure is found to be illegal.

Reversing SJC Decisions That Enforce Our Laws even though 40-60,000 Foreclosures illegal

The filers of this bill claim title problems are caused because the SJC is requiring them to follow centuries old MA law. In fact, the SJC decisions affirm laws in place for hundreds of years, a fact that industry players should have known. Our homeowners' protections are now being affirmed. Industry estimates 40,000 foreclosures have a legal claim now; MAAPL estimates 60,000. MA homeowners have a right to justice.

While foreclosures started in earnest in 2005, the SJC decisions this bill seeks to reverse did not begin until 2011. The vast majority of homeowners foreclosed in this crisis, therefore, even if they went to court, had judges who had received little or no guidance about enforcing MA homeowners' constitutional rights. Now, SJC decisions come as often as every 6 weeks. The vast majority are enforcing MA laws that make foreclosures void.

Will S2015 protect arms-length, new homeowners who purchase post-foreclosure?

Homeownership and long-term, stable rental ensure healthy neighborhoods. *In contrast*, a clear majority of new purchasers (58%) are big, cash-only investors and banks—**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 tried 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 would merit recording in the Registry. 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 affidavit S2015 attempts to elevate to a “conclusive evidentiary” status was described by top title insurers as “questionable at best” (Sept. 7, 2015, *Banker & Tradesman*), and cannot be elevated to proof of legal foreclosure. The legislature purposefully created the abbreviated recorded foreclosure affidavit form created to memorialize the bare bones of a foreclosure. As has been adjudicated by the SJC in two recent decisions:

“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 critical to breakthrough defenses against illegal foreclosures in recent years: mortgage with sub-prime terms, broken chain of mortgage title, lack of an enforceable note, proper service on the homeowner of the auction notice, strict compliance with the right to cure period. To cover most salient issues requires a lengthier affidavit. “Evidence” cannot be “conclusive” without scrutiny in court.

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

If homeowners “foreclosed” in 2008 had been limited to 1 year, not one of the now common legal bases to overturn a foreclosure could win in court. What new claims will become winnable in coming months?

S2015 will drown our Civil Court system in legal claims. As our state judiciary has grasped the many problems in the mortgaging and foreclosure of homes, they have moved to enforce our laws more and more completely. A significant percentage of the 68,000+ households foreclosed since 2005 now have valid and potentially winnable legal challenges to regain their title. Our court system will be deluged as homeowners and second mortgagees rush to file suit in one year. A small percentage of such filings will mean more lawsuits filed and tried in the last six years.

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

S2015 provides a one year window for the 68,000+ foreclosed homeowners since 2005 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 constitutional right*. Homeowners deserve notification. S2015 includes none. Nor would S2015 notify future foreclosed homeowners of the 3-year window to sue. At minimum, **S2015 must include notification of homeowner rights in the notices of foreclosures already required by law when a foreclosing entity moves to foreclose.**

In addition, S2015 provides no notification of recording a foreclosure deed and the subject affidavit by the lender. Currently deeds are recorded from one to 21 months after auction. No “foreclosed” homeowner can be expected to check every few days for a recorded foreclosure deed to know when their window to sue has started.

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

Conservatively, the 68,000+ Massachusetts foreclosures represent a \$25 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

S2015 will not stabilize the housing market. MAAPL, the Mass. Bankers Association, and the Commissioner of Banks all stated publicly the foreclosures drop was temporary. The level was never as low as the peak of the early 1990s. Foreclosures have been spiking for over a year now.

While the initial cause of the foreclosures and damage to our housing market appeared to be from sub-prime lending policies, the real damage was caused by the huge housing bubble. Property dropped back down closer to the normal historical curve, those hugely overpriced mortgages are still common in our state. These continue to destabilize neighborhoods and our housing market. Surface solutions allow some properties to be purchased more easily not addressing the underlying problems or accumulating damages from the ongoing past foreclosures.

S2015 Only Addresses a Small Part of the Widespread Ruination of Titles

On top of the problems exposed in the *Ibanez* ruling including broken chain of title to the mortgage, there are numerous more problems such as notification (*Bailey*), holding the note (*Eaton*), mortgage compliance (*Pinti*). These compromise the marketability of title. S2015 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 discovering these problems every month over the next 30 to 50 years as they or their heirs go to refinance or sell their home? S2015 is a response to the tip of the iceberg. It does not resolve title problems for any mortgagors. The state can provide a Court for genuine repairs.

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