Massachusetts Alliance Against Predatory Lending

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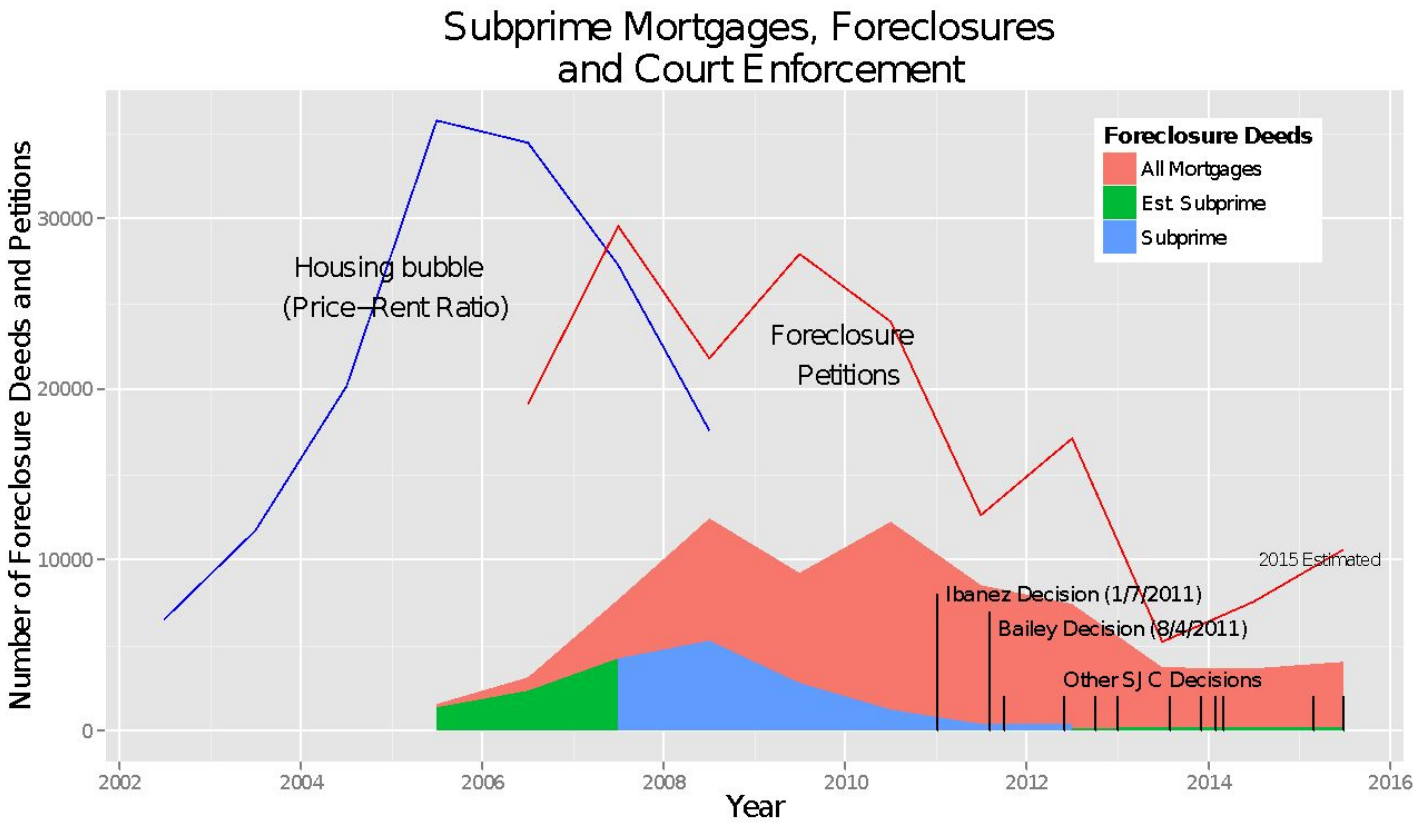
FACT SHEET: Who is Harmed/Who is Helped by Senate 2015 (formerly S1981)?



This graph shows the first publically visible point in the foreclosure pipeline, the petitions. It shows their record-shattering peak, the still historic level even at the most recent low point, and the returning significant increase of foreclosures.

The **solid area shows the historic number of foreclosure deeds** and the estimated percentage of the worst type of subprime mortgages (numerous mortgages also have one or more subprime characteristics, but these are in with traditional prime). This is a historic number of recorded foreclosure deeds, even compared to the, then dramatic, foreclosure crisis in the early 1990's. Foreclosure deeds (often recorded well after the auction) are also climbing again.

Against the timing of the foreclosure deeds finally being recorded, is when the Supreme Judicial Court of Massachusetts began the process of enforcing Massachusetts laws that determine foreclosures void by operation of law. **The vast majority of the foreclosure deeds filed** (and even a higher percentage of the auctions themselves**) occurred before the SJC decisions**, which have continued and increased **to re-enforce the constitutional rights of Massachusetts homeowners** against an illegal taking of their property. **Courts were not even hearing evidence of illegal foreclosure.**

In the background is the historic housing bubble itself, beyond the height of the housing bubble before the Great Depression. This recent housing bubble features a greater fall in home values than was seen in the Great Depression–especially in Massachusetts, which had one of the most overheated housing markets. The incentivizing of the selling of subprime mortgages drove the most profitable (and illegal) practices that drove up the bubble. But the best predictor of a foreclosure is not a subprime mortgage, but how overpriced the home was at the time of mortgage acquisition.

Because one of the characteristics of the worst of the subprime mortgages was no money down, those mortgages were most vulnerable to foreclosure as soon as property values started to drop. **The vast majority of the subprime mortgages were targeted disproportionately to people of color, women heads of household and members of other protected classes. These foreclosures occurred first, before Courts had guidance on the illegalities involved.**

How many post-foreclosure "owners" are owner-occupants?

A small percentage. The vast majority of purchasers at auctions until late 2012 were the parties claiming the mortgage at the time of foreclosure. By the summer of 2013, the number of cash-only purchasers reached historic levels of 49-58%. 18% is the historic norm; it was 30-36% in August of 2012. All cash purchasers focus on buying "distressed" homes. A higher percentage of post foreclosed buyers, therefore, are very wealthy investors–many not state residents. Of the less than half of other purchasers, the next largest chunk is financed investors. The parties claiming to have the mortgage still buy a very large percentage of these properties, while most of those foreclosed were owner-occupants, whereas a small percentage of new owners are owner-occupants.

The math: Conservatively, the vast majority of the 41,585 foreclosures from 2007 through 2010 were bought by the lender. Many still sit vacant. Another chunk of those foreclosures were bought by cash-only investors. The Real-Estate Owned properties (REOs) have mostly gone to investors–some of whom were smaller purchasers who flipped the homes. Perhaps 10,000 of these homes are in the hands of new owner-occupants. Since 2011, 20,456 foreclosures have taken place. A large minority of them were purchased back by the lender; 11,000+ were purchased by large investors who turned them into rental properties, and small investors also purchased. Perhaps 5,000 went to new owner-occupants.

Studies also show that the majority of purchases in areas with significant numbers of foreclosures are by investors. Most large investors turn these properties into rentals rather than flipping them. The very neighborhoods where most subprime foreclosures occurred are where new owner-occupants are shut out by cash-only purchasers. Those homeowners most likely to have been foreclosed early on in the hardest-hit neighborhoods are the least likely to be suing to regain a home purchased by a new owner-occupant.

If a foreclosed homeowner did not sue, did they even have an opportunity to pass up?

As the graph shows, the vast majority of foreclosures occurred and their deeds were recorded prior to the SJC's rulings re-imposing Massachusetts real property: the first being January 2011 *Ibanez* decision. Given that we are a non-judicial state, the vast majority of judges had never even seen a foreclosure lawsuit, and had no guidance until 2011. The SJC continues to make numerous decisions trying to settle the laws, including the July *Pinti* decision reaffirming that the mortgage contract must be complied with.

So no, most of those foreclosed in this crisis have not had the opportunity to have the illegality of their foreclosure enforced through the courts. The vast majority of cases are post-"foreclosure" eviction cases; homeowners are winning more and more in this, the only legal setting where the bank must first prove a legal foreclosure. But eviction courts were not reviewing the underlying foreclosures until the *Bailey* decision of August, 2011; by then some 51,697 of the 68.000+ foreclosures had happened.

Foreclosed homeowners winning these post-foreclosure eviction cases will not be protected if S2015 passes. Housing Court judges cannot order the bank or post-foreclosure owner to return the deed to the homeowner. Without homeowners being notified that they must do so, few have filed a copy of their court ruling in the Registry of Deeds as S2015 requires. Without a registry filing, many dozens now living in a home ruled theirs by Housing Court will lose it after one year if S2015 is passed. An increasing number of homeowners win their homes back, including rulings providing clear proof that thousands of foreclosures were illegal even though those homeowners would have lost in court if they had sued when first foreclosed. Even before homeowners were winning in court, post-foreclosure lawsuits have created both time and leverage for 100s of households buying their homes back.

Real loan modifications may be the answer but for most, it's too little too late

In the *Fremont* decision, the SJC made clear that the correct solution to a subprime mortgage was a loan modification. However, the vast majority of loan modifications until late 2011 exasperated the situation, not making an offer that would correct the underlying illegalities in the mortgage characteristics or be affordable. A very small percentage of homeowners were even able to reach the point of being offered a permanent loan modification, and studies show that borrowers of color received a disproportionally smaller number of loan modifications. Even through the middle of 2014, the percentage of loan modifications remained low; 28 servicers of loans had to settle with the U.S. Justice Department because of illegally losing loan modification paperwork and requiring an average of 6 loan modification attempts. Even with the 2012 loan modification law in Massachusetts, those special modifications are not producing any guarantee of a loan modification that is affordable and recognizes the depth of the predatory nature of any particular model. In short, while a loan modification is the answer, they were unavailable to well over 50,000 if those illegally foreclosed in Massachusetts.

Does S2015 protect the new buyer of foreclosed properties?

While the title insurance industry can set its own criteria for insuring, titles clouded by foreclosure have created legal problems that must be sorted out legally. Foreclosures create 3 potential problems: 1) *procedural* in not following the rules for foreclosure, 2) *broken chain of title* to the mortgage, thus the foreclosing entity was not the party with the power to foreclose, and 3) violations of the mortgage contract. A read-through of S2015 shows *the bill does not provide corrective measures for any type of problem that can void a foreclosure*.

Whether S2015 passes or not, post-foreclosure titles remain damaged. That will affect "marketability" of title. Title insurers may successfully bar former owners from suing to regain their home, but **title lawyers will do their own different assessments of clouded title, as Title Insurance lobbyists point out**. If the banks feel the cloud devalues a property, they may refuse to finance it at the terms and rates an unclouded title commands, or refuse to loan anything. Titles only clear by operation of law after 50 years.

Homes sold via foreclosure experience prices discounted historically 23%. 2014 discount runs at ~47%. As *Massachusetts Lawyers Weekly* commented in "Proposed change in foreclosure bill [S2015] went too far":

> "But the reality is that individuals or investors who bought the foreclosed properties paid a deeply discounted price. To obtain those prices, they knowingly assumed the risk that the original owners might challenge title down the road."

How many foreclosed? How many subprime?

If the right to sue to regain an illegally foreclosed home were shortened from twenty to ten years, the vast majority–~66,770 from beginning of 2005 through July 2014 (the period we have statistics for)–of homeowners foreclosed in this crisis would retain their right to regain their home by showing the illegality of their foreclosure. If the bill only permitted homeowners foreclosed in the last 5 years to sue to regain their home, more than half of those foreclosed in this crisis would lose their right to a day in court.

Readily available statistics show the early years of the foreclosures were mostly subprime mortgages (by 2007 numbers were dropping, but ~55% were subprime). By 2009, 30% of foreclosures were subprime. By 2010/2011, less reliable figures put those percentages at ~5%. These mortgages were generally written by mortgage companies–not banks constrained by banking regulations–and specifically targeted communities of color and women heads of household. In 2008, the state Supreme Judicial Court's *Fremont* decision declared these loans "presumptively unfair," "doomed to fail" and illegal under Massachusetts law. The more well-off the borrowers, the wider the racial divide in percentages being given subprime mortgages. A standard prime mortgage may mean the homeowner pays about 2.25 times the value of the home over the life of the loan; a subprime mortgage can cost 6 times the value over the loan's life.

Subprime mortgages disproportionately sold to people of color were overwhelmingly foreclosed in 2005-2009. Between 2005-2009, the median wealth of Latinos dropped 66%; of Blacks, 53%; of Asians, 54%–and yes, the vast percentage of the loss was housing related.

However, the best predictor of foreclosure is being underwater (where the mortgage is worth more than the value of the home). Given the huge property value ramp-up and then crash, once property values in Massachusetts had been dropping for a couple of years, many prime mortgage borrowers who borrowed during the bubble had their equity wiped out and were underwater. Foreclosures then continued with prime mortgagors trapped in underwater loans as the economy continued to flounder.

How to Ensure Real Clarity of Title

MAAPL believes the actual legislative goal should be clear titles and mortgages based on real property values, with owner-occupants stabilizing our neighborhoods as much as possible. **We need a Court Venue to *actually* clear title both for those already foreclosed and new purchasers *faster for those seeking clear title now.*** A Court will accomplish this better than denying genuine legal access to foreclosed homeowners with legitimate, increasingly winnable challenges while not actually clearing titles for new buyers. Such a Court will clear the records, keep properties marketable and unimpaired for generations to come, and provide a venue to address the truly "King Solomon" problem when new owner-occupants and legitimate previous owners both end up with a claim. It will also allow the cross-field expertise of judges whose present separate venues address different aspects of foreclosures to be brought together in one court district or session–and it will create a clearly designated, time-limited place for those challenging a foreclosure to be heard while encouraging them to get a valid challenge addressed sooner rather than later.

2012 state legislation already provides basis to sue a bank that clouded title in foreclosure.

S2015 does not clear title; state law provides a means for doing so *paid for by the entity that clouded the title.* Chapter 244 section 35(c) subsection (c) states: "A third party may recover all of the third party's costs including reasonable attorneys' fees for having to correct, cure or confirm documentation... relating to the sale, transfer or assignment of a mortgage loan, including, but not limited to, costs related to curative actions taken because a foreclosure ...."

References

- Figures on # of foreclosures: Warren Group
- Figures on percentage subprime: Mass. Housing Partnership and Federal Reserve Bank of Boston™
- Figures on percentage of purchasers cash-only and investors: National Association of Realtors® and RealtyTrac®
- Information on numbers of cases won based on particular new precedents are based on informal figures from the Legal Services community and private bar attorneys representing homeowners and tenants.

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