

# Massachusetts Alliance Against Predatory Lending

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## AN ACT TO PROTECT TITLE TO REAL ESTATE: FACT SHEET

House #3500, Main Sponsor: Representatives Frank Moran & Paul Mark

### What Does This Bill Do?

This bill protects the real estate title of everyone who has a home, farm, or business property in the Commonwealth, and who either has a mortgage or takes out a mortgage loan on it; it requires anyone who accepts an assignment of the mortgage to record that assignment in the appropriate Registry of Deeds within 30 days. Upon payoff, the bill requires that the owner's promissory (mortgage) note be returned to him or her, marked "Paid in Full." It also requires mortgage statements to identify who services the mortgage, who owns the mortgage and who holds the mortgage note.

The bill therefore bolsters business creation. Up to 70% of the credit that new U.S. businesses receive comes from mortgages on entrepreneurs' homes. Hernando de Soto, *The Magic of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, pp. 6, 84 (Basic Books, 2000). Banks lend only if title is clear.

This bill will rectify common clouds on title (only one of which are the infamous Ibanez clouds). These can result when the complicated modern transfers of tens of millions of mortgages and notes are undertaken.

A "safe harbor" provision gives financial institutions 60 days to record all outstanding assignments of mortgage.

The bill requires that a copy of the mortgage note be recorded in the appropriate Registry before a Notice of Foreclosure by Sale is published, and that, within 60 days of foreclosure, the foreclosure deed be recorded. A "safe harbor" provision allows 90 days to record of all outstanding foreclosure deeds. The bill abolishes the archaic, non-judicial procedure of foreclosure (without notification) by entry and possession.

It establishes a fine of \$100 per day for late notification to a municipality, under section 15A of G.L. chapter 244, that a foreclosing party has taken possession of a property, whether or not the mortgage has been foreclosed. A "safe harbor" provision allows 30 days after the Act's effective date to provide notifications still outstanding.

The bill adds a criminal violation of knowingly having a false or fraudulent document concerning title to real property filed with a court or recorded in a Registry of Deeds. It institutes a means for notification of Registers of Deeds of legal developments affecting their operations by the Attorney General.

**Other Bills Filed include:** *An Act for a Foreclosure Review Session of Superior Court, An Act to Establish the Resolution Trust Fund*

### How Will the Reliable Land Title Act Work?

The Act will work by requiring complete, transparent, reliable documentation, on the public record in the Registries of Deeds, of the transactions by a lender and any successor financial institutions concerning a given mortgage. The bill requires all mortgages to name, and to be indexed in the Registries by, the real parties in interest, that is, the borrower (mortgagor) and the lender (mortgagee). It further requires each lender, and each successive owner of the mortgage, if any, to document the mortgage's chain of title, from each assignor to the next assignee, on the public record in the appropriate Registry. It likewise requires documents labeled "affidavit" to meet legal requirements for affidavits.

Upon payoff, the bill requires that the mortgage note with all intervening endorsements to be returned to the borrower and marked "Paid in Full." This lets the borrower verify that the mortgage discharge is valid, and protects him or her from any other party's still having legal right to collect on the note.

### Why Do We Need This Legislation?

We need this legislation so that the land title records in our 21 Registries of Deeds can again show who owns what interest in what land. ***This has been the purpose since our first recording statute, in 1640:*** to have a public record that shows "what estate or interest other men may have in any houses, lands, or other

hereditaments they are to deal in....” 1 Mass. Colonial Records 306 (1640), quoted in Nexon, Philip J., *The Beginnings of Property Law in Massachusetts*, 2010 ed. at Sec. 1.4.1.

We need that clarity as well for registered land, land to which the Commonwealth has determined and guarantees title. Then-Governor Russell stated the purpose of a land registration system in 1891: “to ascertain the state of the title to any piece of land brought under it by simply inspecting the certificate on record [in the Registry]... for the **protection of the small land owners and the borrowers upon mortgage**”. Its purposes to include: “the ownership by the people, to the greatest possible extent, of the homes in which they live ... so obviously desirable that I need not dwell upon [it].”

Starting in the late 1990s, however, the way in which large banks pooled mortgage loans into jumbo Mortgage-Backed Security trusts introduced uncertainties in title. A mortgage note is like a check. Via successive endorsements, the note can be rapidly sold and transferred from party to party and into a Mortgage-Backed Security trust. Fannie Mae and other financial institutions that buy mortgage loans require that the mortgage, as well as the mortgage note, be conveyed through the same succession of parties and thereby into the same trust.

But a mortgage is an interest in land, and land is legally different. Since 1677, in order to transfer an interest in land, Massachusetts has required a writing signed by the person granting the interest. This is still our law: section 1, G.L. chapter 259. Thus, every endorsement of a mortgage note should have a correlated assignment of the mortgage, signed by the grantor and notarized, to the same party as the endorsee on the note. However, this is not always the case. As to the foreclosure in *U.S. Nat'l Bank Ass'n, trustee, v. Ibanez*, 458 Mass. 637, 650 (2011), the Supreme Judicial Court found, “U.S. Bank failed to furnish any evidence that the entity assigning the mortgage ... ever held the mortgage to be assigned.” The SJC therefore held the foreclosure to be void. Title to Mr. Ibanez's home remains clouded. Furthermore, such situations are apparently not rare.

“[W]hat is surprising about these cases is not the statement of principles articulated by the court regarding title law and the law of foreclosure in Massachusetts, but rather the utter carelessness with which the plaintiff banks documented the titles to their assets.” *Ibanez*, Cordy, J. with whom Botsford, J., joined.

As to foreclosure by entry and possession, this archaic, non-judicial procedure serves nowadays only as a belt-and-suspenders for flawed foreclosures by sale. A bank representative sets foot on the property; files an affidavit in the Registry; and the bank waits 3 years. If a foreclosed owner fails to learn of this and object, it serves as an independent form of foreclosure that effectively covers for any defects in a foreclosure by sale of the property.

**How Will This Bill Help?** Requiring prompt recordation of any assignment of mortgage will help to keep title to mortgaged homes and other mortgaged property marketable. Enforcing G.L. c. 244, s. 15A's requirement that a foreclosing party taking possession of a property notify the municipality within 30 days will help to prevent foreclosure-related blight, as will requiring that foreclosure deeds be recorded within 60 days.

**Any Evidence/History that this will help?** Registries of deeds were created in 1640 because without a public library system, ownership of properties was already a mess. The history of recording deeds, mortgages, and title to other interests in Massachusetts real property has been effective from at least 1640 to the mid-1990s.

**Will this Bill cost or save the Commonwealth money?** It will increase revenue. Large banks' failure for more than a decade and a half to record their assignments of mortgages has cost the Commonwealth and counties millions of dollars in unpaid Registry of Deeds fees.

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**MAAPL MEMBERS/SUPPORTING ORGANIZATIONS:** *Action for Boston Community Development, Inc., Action for Regional Equity, Alliance of Providers of Legal Services to Individuals Facing Foreclosure, ARISE for Social Justice, Arlington Community Trabajando, Boston Tenants Coalition, Brazilian Women's Group, Brockton Interfaith Community, Carpenters Local 40, Carpenters Local 107, Charles Hamilton Houston Institute For Race & Justice, Chelsea Collaborative, Chinese Progressive Association, City Life/Vida Urbana, Coalition for Social Justice, Community Economic Development Ctr of S.E. MA, Community Labor United, Democratic Socialists of America, Dorchester People for Peace, Era Key Realty Services, ESAC, Fair Housing Center of Greater Boston, Greater Boston Legal Services, Greater Four Corners Action Coalition, Green-Rainbow Party of MA, Harvard Legal Aid Bureau, Homeowner Options for MA Elders, Jewish Alliance for Law and Social Action, Lawrence Community Works, Lawyers' Committee for Civil Rights Under Law, Lynn United for Change, Legal Assistance Corporation of Central Mass, Mass Advocates for Children, Mass AFL-CIO, Mass Coalition for the Homeless, Mass Community Action Network, Massachusetts Fair Housing Center, Mass Jobs With Justice, Mass Law Reform Institute, Mass Welfare Rights Union, Merrimack Valley Labor Council, NAACP N.E. Area Council, National Community Reinvestment Coalition, National Consumer Law Center, National Lawyers Guild, Neighbor-to-Neighbor, Neighborhood Legal Services, New England United for Justice, North Shore Labor Council, Oiste?, Organization for a New Equality, Painters District Council 35, Pleasant St. Neighborhood Network Center, Southbridge Community Connections, Springfield No One Leaves Coalition, Survivors Inc., Northeast Region, Union of Minority Neighborhoods, United Auto Workers Mass CAP, United Food & Commercial Workers 1445, United For a Fair Economy, United Steel Workers Local 5696, Volunteer Lawyers Project, Worcester Anti-Foreclosure Team*