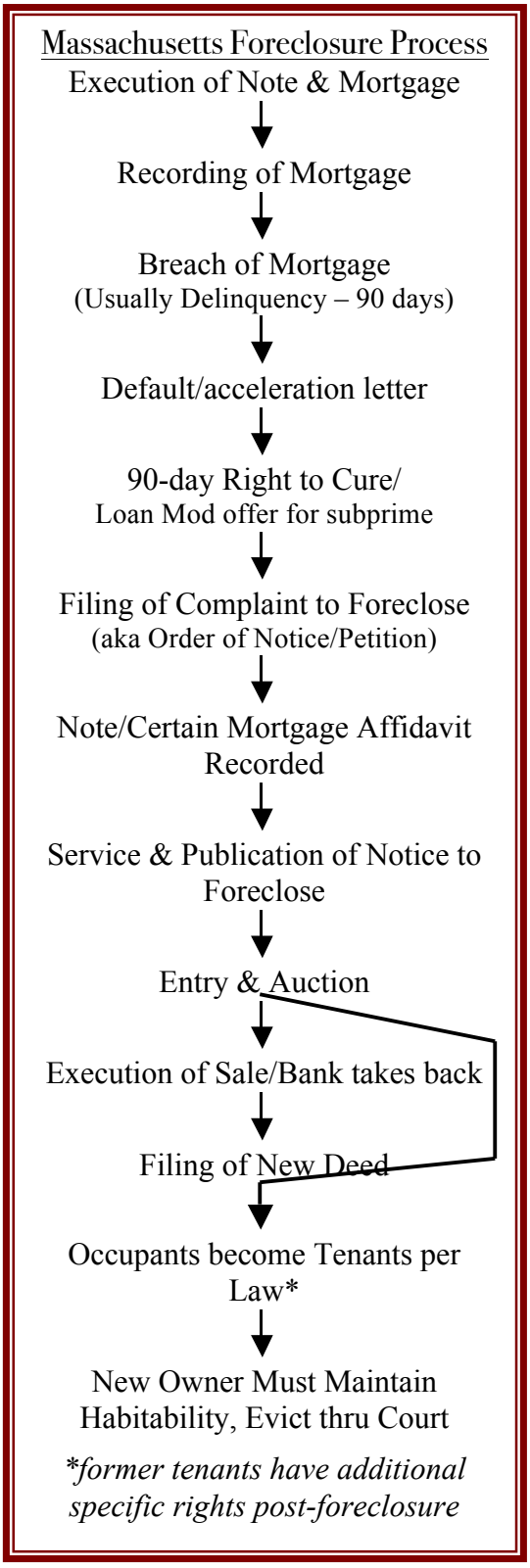
Massachusetts' Non-Judicial Foreclosure Process

What does it mean to be a non-judicial foreclosure state? It means that borrowers do not get a day in court in front of a judge before they are foreclosed upon. It means that Massachusetts built its legal process on a ***strict honor code***. Since foreclosing entities are not required to go in front of a judge, our law literally expects them to behave *even more scrupulously and honestly* than if we did require foreclosures to be reviewed by a judge[1].

In recent years, lenders behaved in ways that were historically unique: mortgages went from being primarily written by bankers, direct employees, to being primarily written by brokers who were subcontractors to mortgage companies. Mortgage companies were not governed by the same legal requirements in home lending that our standard banks have been. Instead of the lender who owned the mortgage billing and otherwise servicing its own loan, lenders contracted these responsibilities out to "servicers", often a division of another bank. Mortgage companies came to be the primary lenders for a brief period of time in the early 2000s. Instead of financing these mortgages themselves, however, they "bundled" many of them into "trusts" so that other investors financed them. The practices and outcomes of this lending period not only undermined the economy worldwide, but also drove mortgage companies out of business in a just a few years.



How then do foreclosures happen in Massachusetts[2]? Lenders allow borrowers to get three months delinquent (behind in monthly payments); then lenders have to wait thru the "right to cure" period and only then can begin the formal foreclosure process. The formal non-judicial foreclosure process in Massachusetts starts with what is called an "order of notice", "complaint" or an "active military service" notification. This foreclosure petition process starts with a filing in Land Court that requires various papers, including the default/right to cure letter and submission of the language for advertisement of the property for auction. Out of that, an active military service letter is sent to borrowers to verify whether somebody on the mortgage (or in the borrowing

[1] The recent *Ibanez [cite]* ruling from Massachusetts Supreme Judicial Court lays out in depth legal precedence for strict adherence required by lenders to each step in the mortgaging and foreclosure process in Massachusetts, pp.14-15, And as Justice Cordy states unequivocably in his concurring opinion "such strict compliance is necessary because Massachusetts is both a title theory State and allows for extrajudicial foreclosure", p.27

[2] Revised from Amanda Zuretti, *Residential Foreclosures, 7th Edition*, Massachusetts Mortgage Association/CATIC

household - it has been interpreted differently at different times) is in active military service. If so, foreclosures are prohibited. If the borrowers do not access the military service protection, judgment enters for the foreclosing entity

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After filing in Land Court, and after Land Court sends out the active military service notice, the foreclosing lender records this notice at the county or district Registry of Deeds. Because of the new law effective August 3, 2012, lenders are then required to record an affidavit known as a Chapter 244, Section 35B and 35C affidavit. In it, the lender attests that it either holds the promissory note, or is acting on behalf of the note holder, as well as holding the mortgage; it also attests that the lender has made a check of the mortgage for certain subprime characteristics, as also required[3].

Once this affidavit is recorded, banks are allowed to continue with the traditional step of publication three times in a newspaper in circulation in the community where the property is located. They must also send notice of foreclosure auction to the owner occupant. They then go ahead with the foreclosure auction at the time either noticed in the paper, or postponed in person through public proclamation to a future date when they can auction the property. In general, a representative of the bank at the auction will also step (set foot) on the property to start the three year period for foreclosure by entry. "Foreclosure by entry" is different way to foreclose in Massachusetts. In this crisis, lenders frequently end up buying the property back themselves or selling it to another lender rather than to private investors or new owner-occupants: most banks are unwilling to accept a low private bid. This practice has led to a backlog of unsold properties and sometimes, research has shown, to not even formally marketing foreclosed properties.

Additional steps are required after the auction sale. Traditionally by law, the entity that purchased at the foreclosure sale is to notify the homeowner of new ownership, as well as notifying the municipality. If, at the time of the foreclosure, monies are bid over the amount of the outstanding debt, the foreclosing lender is supposed to send a letter to the foreclosed homeowner accounting for the expenditures for the foreclosure. A number of municipalities now require various steps to meet sanitary code and, in some communities, the depositing of a cash bond prior to foreclosure. To meet the requirements of the 2010 tenant law, foreclosing entities are supposed to post, deliver, and slip under the door of any potential former tenant a notice notifying them of their right to stay in the property and to rent it if the property was purchased back by a foreclosing entity.

A key component of the first legislation the Massachusetts State House passed was implementing a "right to cure" period – a time period created in hope that voluntary modification negotiations

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[3] The 2012 law included this additional test for mortgages that entered the right to cure period after the August 3, 2012 signing of the new law. Lenders are now required to assess whether those mortgages had subprime characteristics. If the mortgage has those subprime characteristics, lenders must provide a special offer of a loan modification to the homeowner; if that homeowner replies in the manner required, lenders must provide the homeowner with a special by mail negotiation process to verify if the homeowner qualified for a loan modification under that process. If so, the bank must make an offer, the homeowner make a counter offer, and then negotiate a "commercially reasonable" loan modification; that is, a loan modification by which the lender loses less than through foreclosure. Lenders are to share this information with the homeowner. This may well lead to better modification offers.

Be careful: a homeowner who does not follow the by-mail negotiation process properly can end up with only a 90 day – instead of the present 150 days– right to cure period. The certain characteristics considered typical of subprime mortgages are: an introductory interest rate for three years or less; at least two percent lower than the fully indexed rate; interest-only payments; or payments that are less than the regular principal and interest amortized over the life of the loan; not requiring full documentation; having pre-payment penalties; the loan was either over 90% of the value and the borrower was going to be paying more than 38% of their income, or the loan together with other loans was going to exceed 95% of the value of the home.

would happen and be successful. This 90 day right to cure period was inserted after the 90 days of delinquencies and prior to the formal start of the non-judicial foreclosure process (filing in Land Court and the active military service letter).

However, like other governmental policy attempts to make it easier or even to sweeten the pot for lenders to modify loans, the "right to cure" period yielded a *tiny* percentage of loan modifications. In Massachusetts' 2010 omnibus foreclosure legislation, the "right to cure" period was extended to 150 days unless lenders actually participated in loan re-negotiations. In January 2016, the "right to cure" period reverted to 90 days long.

Because of past periods of increased foreclosures, legal advocates got a 1992 court ruling in Massachusetts[4]. This clarified that all occupants in homes post-foreclosure are tenants of the new foreclosing owner, the new landlord. While not extended the full range of rights of traditional tenants, they did get such fundamental rights as rights to a habitable living space and to eviction through court.

Massachusetts therefore entered this crisis with one better buffer to negative impacts of foreclosure than other states: post-foreclosure occupants had a right to eviction by court, not just by informal demands, which are too prone to becoming harassment. In May of 2009, federal legislation extended protections for former tenants post-foreclosure. This required that the step before court eviction, a "notice to quit" letter, had to provide a 90 day period, and not just a standard two to four weeks[5].

In 2010, Massachusetts unanimously passed historic protections for former tenants to be able to stay and pay rent to the lender-foreclosing landlords until buildings are re-sold to a non-lender third party (Mass General Laws Chapter 186a).

[4] From the last predatory lending foreclosure period of the early 1990s, Massachusetts law extended a type of tenant status to occupants post-foreclosure: this tenant-at-sufferance status guaranteed fundamental tenant rights to habitability and to eviction through court. *Attorney General v. Dime Savings Bank, 413 Mass. 284 (1992)*

[5] Protecting Tenants at Foreclosure Act, Pub. L. 111-22 (2009)