SUPREME JUDICIAL COURT

THE COMMONWEALTH OF MASSACHUSETTS
DOCKET NO. SJC-12859

BANK OF NEW YORK MELLON, AS TRUSTEE ON BEHALF OF THE REGISTERED HOLDERS OF ALTERNATIVE LOAN TRUST 2006- J7, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2006-J7
PLAINTIFF-APPELLANT,

v.

ALTON KING, JR., AND TERRI A. MAYES-KING,
DEFENDANTS-APPELLEES.

AMICUS BRIEF IN SUPPORT OF APPELLEES' MOTION FOR RECONSIDERATION

AMICUS BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

Constitutional Provisions

STATEMENT OF ISSUES PRESENTED

A. Can the Massachusetts courts simply choose not to enforce our laws, or pick and choose some laws and not other laws to enforce, in situations not covered by the few exceptions, that is, a counter-Constitutional law or one where the court can show that its enforcement would lead to such an absurd result that it is not enforceable?

B. Can the Massachusetts courts decide not to enforce laws against those as to whom there was a legislative focus to redress well known and historic racist violations?

C. Can the Massachusetts courts decide to not enforce laws specifically written and targeted by the Legislature to address specific mischief?

D. Can the Massachusetts courts completely abrogate their responsibility to enforce our laws by singling out a part of the Massachusetts population and requiring that population to buy justice, contrary to our Constitution, and in violation of the Massachusetts Equal Rights Amendment and the Fourteenth Amendment?

E. Can the Massachusetts courts choose to exempt a sector of non-natural persons from civil and criminal scrutiny, because the courts decide that those damaged do not deserve or cannot afford to pay for justice, in violation of our Constitution?

F. Can the Massachusetts courts recognize and single out a group that is clearly, even based on the court's own behavior, a 'suspect class', to specifically deny them their Constitutional protections?

G. Can the Supreme Judicial Court reverse its historic role of expanding the legal understanding and application of Constitutional protections to include more and more sectors of the Massachusetts population and, instead, use its role as the interpreter of our Constitution to identify a new suspect class to specifically deny Constitutional rights, especially where that lines up with structural racism?

H. If the court ignores the true legislative history and writes its own, would it not be violating Alton King's and

all Massachusetts residents' rights under Article XXX of the Massachusetts Constitution, which provides for the separation of governmental powers?

This Brief is submitted pursuant to Mass. R. App. P. 17 by the Honorable Benjamin Swan as *pro se Amicus.* Your Amicus submits this brief in support of Defendants-Appellants, given the interests of the homeowners of color and "former" homeowners of color of Massachusetts, and of equal justice.

STATEMENT OF INTEREST OF AMICUS

This Court's Amicus represented a predominately African-American inner-city Springfield district in the Massachusetts House of Representatives for 22 years. He served and fought for legislation to protect homeowners targeted with predatory loans, and thus facing foreclosure, throughout this historic foreclosure crisis. He saw his district devastated — and his friends and community are still being devastated.

A long-time lawmaker from western Massachusetts, your Court's Amicus is honored to have been known by some as the "Conscience of the House." He served as a vice chairman of the House Ways and Means Committee.

State Representative Benjamin Swan, now retired, is a civil rights activist who marched with Dr. Martin Luther King, Jr., in Selma, and championed social justice for decades in Springfield and on Beacon Hill.

To have been elected and to have served the residents of the 11th Hampden District has been the greatest honor of your Amicus's life.

ARGUMENT

A. Can the Massachusetts courts simply choose not to enforce our laws, or pick and choose some laws and not other laws to enforce, in situations not covered by the few exceptions, that is, a counter-Constitutional law or one where the court can show that its enforcement would lead to such an absurd result that it is not enforceable?

> "We believe that persistent racial and economic inequalities that continue to manifest broadly in US society are at the root of this crisis and need to be addressed for any policy solutions to be truly successful." Rivera, Cotto-Escalera, Desai, Huezo, Muhammad, Foreclosed: State of the Dream 2008. United For A Fair Economy (2008).

Our Constitution, Part the First, established the authority for the responsibilities of this Court's Amicus as an elected legislator, and for this Court's responsibility to interpret and enforce this hallowed document and the laws of the land:

> **"Preamble.**
>
> It is the duty of the people, therefore, in framing a constitution of government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them.
>
> **Article XXIX.**
>
> It is essential to the preservation of the rights of every individual, his life, liberty, property,

> and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well."

As this Court stated in its famous decision ending slavery and declaring it a nullity (and in the face of major pressure from wealthy white slave owners):

> "But whatever sentiments have formerly prevailed in this particular or slid in upon us by example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind, and to that natural, innate desire of Liberty, with which Heaven (without regard to color, complexion, or … features) has inspired all the human race. **And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves**, sets out with declaring that all men are born free and equal -- **and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and *property*** -- and in short is totally repugnant to the idea of being born slaves. This being the case, I think the idea of slavery is inconsistent with our own conduct and Constitution; and there can be no such thing as perpetual servitude of a rational creature, unless his liberty is forfeited by some criminal conduct or given up by personal consent or contract." *Commonwealth v. Jennison* (Massachusetts, 1783, Unreported), a/k/a the 3rd Quock Walker decision [emphasis added].

Our constitutional obligation, as recognized so early by this Court, must include all branches of our

government doing their respective jobs to recognize structural racism, and work toward equal protection under our Constitution.

In the decision, this Court described Defendant's home in detail (which this Court's Amicus understands the Court had not done in any of its foreclosure or eviction decisions to this date). But it failed to describe the code issues, so often the topic of this Court's decisions, in recognizing how that diminishes value — code violations King has faced racial barriers in getting even inspected, let alone remedied by the purported mortgagee.

This recent struggle to address the infamous structural racism in homeownership, and the even more famous structural racism in the predatory mortgage lending and foreclosure industry (the subject of numerous government lawsuits), has all been dismissed with the racially-coded, "You bought too much house."

It does not escape this reader, nor King nor hundreds of others, that this Court handed down this decision — a historic departure from its role as equal enforcer of our constitutional protections — against an African-American man who had acquired a nice house. This Court stepped out of its constitutional role to

mischaracterize a situation in the service of a racial stereotype.

In contrast, the facts show that this was not a purchase loan, but a refinance. It was two mortgages, not one (King was promised it would become one). The purported mortgages were based on a hugely inflated and never true appraisal. Like the vast majority of people of color mortgagors, this predatory mortgage scheme trapped King, preventing him from selling out from under the mortgage when it became unaffordable.[1] The first mortgage was structured to have an obscured but increasing principal and skyrocketing payment obligations.

And instead of focusing on the perpetrators of these injustices explicitly violating numerous laws — a number of which your Amicus helped to pass - this Court held that it would not care about those widespread perpetrations if King would not give up the necessities of life to buy this Court's attention.

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[1] This Court should remember, from its first encounter with the modern predatory lending industry, that it recognized loans not even as predatory as King's as "presumptively unfair," a violation of our laws and "doomed to fail"; that such loans are unenforceable unless modified to remove their "unfairness" (Fremont). Although King was promised a loan modification to render these loans no longer predatory, it never occurred.

As a former maker of our laws, my role is powerless if this Court abdicates its responsibility to recognize and enforce our laws equally. This Court itself literally published[2] (two weeks before handing down this reprehensible decision to accomplish the opposite):

> "Dear Members of the Judiciary and the Bar:
>
> The events of the last few months have reminded us of what African-Americans know all too well: that too often, by too many, **black lives are not treated with the dignity and respect accorded to white lives.** …
>
> As judges, we must look afresh at what we are doing, or failing to do, to **root out any conscious and unconscious bias in our courtrooms;** to **ensure that the justice provided to African-Americans is the same that is provided to white Americans;** to create in our courtrooms, our corner of the world, a place where all are truly equal.
>
> … **we must also look at what we are doing,** or failing to do, to provide legal assistance to those who cannot afford it; **to diminish the economic … inequalities arising from race…**
>
> And as members of the legal community, we need to reexamine **why, too often, our criminal justice system fails to treat African-Americans the same as white Americans,** and **recommit ourselves to the systemic change needed to make equality under the law an enduring reality for all.** This must be a time not just of reflection but of action.
>
> There is nothing easy about any of this. It will be uncomfortable: difficult conversations, **challenging introspection, hard decisions.** We must recognize

[2] Letter from the Seven Justices of the Supreme Judicial Court to Members of the Judiciary and the Bar (June 3, 2020) https://www.mass.gov/news/letter-from-the-seven-justices-of-the-supreme-judicial-court-to-members-of-the-judiciary-and

> and address **our own biases, conscious and unconscious. We must recognize** and condemn **racism** when we see it in our daily lives.
>
> We must **recognize and confront the inequity and injustice that is the legacy of slavery, of Jim Crow**, … and **challenge the untruths and unfair stereotypes about African-Americans that have been used to justify or rationalize their repression**…" [Emphasis added.]

This Court's constitutional authority is to be impartial. It is time for this Court to assess whether it is capable of equal service to the people, all the people, of this Commonwealth. Will this Court fulfill its role as impartial interpreters? Is this Court committed to enforcing the will of our people as expressed through the fundamental tenets of our Constitution, even against wealthy and powerful financial interests steeped in structural racism? In short, will this Court fulfill its role to enforce our laws, address the clear "mischief" (and racist "mischief") equally for all — in which case it must rescind this decision — or whether it will about-face its traditional role and willfully and/or negligently be the willing facilitator of blatant, unmistakable injustice?

The two exceptions to enforcing our laws and their legislative purpose are if (like the anti-slavery

decision above)[3] a law conflicts with our Constitution, or if it creates a sufficiently “absurd” result.

> Where the language of a statute is clear and unambiguous, "judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." Beaupre v. Cliff Smith & Assocs., 50 Mass. App. Ct. 480, 491 (2000), quoting from Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992).” "Where the words are 'plain and unambiguous' in their meaning, we view them as 'conclusive as to legislative intent.' " Water Dept. of Fairhaven v. Department of Envtl. Protection, 455 Mass. 740, 744 (2010), quoting from Sterilite Corp. v. Continental Cas. Co., 397 Mass. 837, 839 (1986). Courts must follow unambiguous statutory language "unless 'following the Legislature's literal command would lead to an absurd result, or one contrary to the Legislature's manifest intention.' " Providence & Worcester R.R. Co. v. Energy Facilities Siting Bd., 453 Mass. 135 , 142 (2009), quoting from White v. Boston, 428 Mass. 250 , 253 (1998).” Harvard 45 Associates, LLC vs. Allied Properties and Mortgages, Inc., 80 Mass. App. Ct. 203 (2011).

Enforcing all of our laws to ensure legal and non-discriminatory mortgages and foreclosures is clearly constitutional (see Article I as amended at Amendment CVI, and the 14th Amendment); ensuring that homeowners have redress through our courts (Article XI) without having to pay for justice (Article XI) as expressed in the Indigent Court Costs Laws (MGL Chapter 261 §27A-G) is clearly constitutional.

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[3] [A]n act of the Legislature repugnant to the Constitution is void.” Marbury v. Madison, 5 U.S. 137 (1803)

B. Can the Massachusetts courts decide not to enforce laws against those as to whom there was a legislative focus to redress well known and historic racist violations?

The evidence and sources showing the structural racism — its roots, present day practice, and impact, are legion. Amicus mentions only a few here. As Professor James Jennings of Tufts University has stated "The cycle of intergenerational poverty is a legacy of redlining." See Jennings Amicus submitted.

Rick Cohen, a journalist for the *NonProfit Quarterly* magazine, has argued that the crisis reflected structural racism.[4] It was partially a consequence of active targeting of low-income Black and Latino communities for predatory and unjustified higher-cost loans.

The Center for Responsible Lending reported that Blacks and Latinos were easy targets for subprime lending and mortgage manipulation:

> "High levels of segregation create a natural market for subprime lending and cause riskier mortgages, and thus foreclosure, to accumulate disproportionately in racially segregated cities' minority neighborhoods. By definition, segregation creates minority-dominant neighborhoods, which, given the legacy of redlining and institutional

[4] Cohen, R. (2008) A structural racism lens on subprime foreclosure and vacant properties. The Ohio State University, Kirwin Institute for Study of Race and Ethnicity.

> discrimination, continue to be underserved by mainstream financial institutions."[5]

See also, Squires, 2003:[6]

> "Predatory lending can include a range of nefarious practices, including charging higher interest rates without relationship to credit worthiness and targeting communities of color and the elderly with deceptive and high-pressure marketing of mortgages and loan packages."

During the peak years of subprime loan foreclosures,

> "From 2005 to 2009, inflation-adjusted median wealth fell by 66% among Hispanic households and 53% among black households"; "In 2016, the median wealth of white households was $171,000. That is 10 times the wealth of black households ($17,100) — a larger gap than in 2007 — and eight times that of Hispanic households ($20,600), about the same gap as in 2007." Wealth Gaps Rise to Record High Between Whites, Blacks, Hispanics. Social and Demographic Trends, Pew Research Center (July 26, 2011).

In 2017, the racial homeownership gap was at its highest level in 50 years, with 79.1% of white Americans owning a home compared with 41.8% of Black Americans. (Choi, Breaking Down the Black-White Homeownership Gap. Urban Institute (February 21, 2020)). This gap is even

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[5] Rugh, J.S., Massey, D.S. (2010). Racial segregation and the American foreclosure crisis. American Sociological Review, 75 (2) (2010), p.632

[6] Squires, G.D. (2003). The new redlining: Predatory lending in an age of financial service modernization. Sage Race Relations Abstracts, 28 (344).

larger than it was when racist housing practices such as redlining property were legal.

C. Can the Massachusetts courts decide to not enforce laws specifically written and targeted by the Legislature to address specific mischief?

See Reade v. Sec. of the Commonwealth, 472 Mass. 573, 574 (2015):

> "The legislative intent in enacting a statute is to be gathered from a consideration of the words in which it is couched, giving them their ordinary meaning unless there is something in the statute indicating that they should have a different significance; the subject matter of the statute; the pre-existing state of the common and statutory law; **the evil or mischief toward which the statute was apparently directed; and the main object sought to be accomplished by the enactment.**" Meunier's Case, 319 Mass. 421,423 (1946)."

In 1982, the Massachusetts Legislature passed MGL Chapter 183, §64, the anti-redlining statute. This explicitly recognized the targeting of communities with higher percentages of people of color for either no loans or loans with much worse terms; these were predatory based on the race-based "risky area" where they were given out. Further, the statute recognized that individuals might also, regardless of where they lived, be targeted for worse loans. In 1990, the statute was finally amended to include a private right of action.

The Alton Kings of the world and the Springfields of our state should have been protected from these predatory practices under this statute alone. As such practices make a loan illegal, again, Alton King and the neighborhoods this Court's Amicus has represented should have been protected, but have *not been yet*.

In 1996, in reaction to evidence of mortgagees' not disbursing funds to which borrowers obligated themselves under mortgage contracts, Massachusetts passed the Good Funds Statute, MGL Chapter 183, § 63B. To the extent to which this Court has distinguished between a mortgagee and a lender, the Good Funds Statute explicitly provided that the "mortgagee" in the contract you signed was the party to ensure the loan proceeds were disbursed before recordation in a registry of deeds.

This should have made it impossible for an "originator" who did not have their own investment in the mortgage, and who did not actually have anything to do with the disbursement of the loan proceeds, to originate any mortgage loan. If this law had been and were now being enforced, numerous illegal mortgage originations would already have been properly found illegal and not enforced. Again, Alton King's loan involves exactly such a purported mortgagee that could

not legally function under the Good Funds Statute of our state.

The federal Truth In Lending Act has a Massachusetts counterpart, the Massachusetts Debt Collection Practices Act, MGL Chapter 140D. One effect of both statutes is to make all mortgage loans in which the value of the property was overpriced "untrue" and illegal. Again, enforcement of these laws would have protected King, who was actually presented at the closing with two loans (this Court's fact recital does not reflect this point) together originated at $1.411M, well over any value the home ever had. This thus violated the Truth In Lending Act and MGL Chapter 140D. Both laws reopen when a lender tries to foreclose on such a loan, providing the homeowner the right to rescind. Again, if either statutes was or were enforced by this Court, King and all of those similarly discriminated against would be protected, as our Legislature did its job to address this "mischief."

The Executive Branch has played its role by promulgating regulations under 940 CMR Chapters 7 and 8, addressing mortgage origination violations. Although not

exhaustive.[7] 940 CMR Chapters 7 and 8 do enumerate numerous obviously discriminatory and even explicitly referenced racist practices that this Court is also responsible for enforcing. (Origination of the Alton King loan package violated some of these.)

In 2004, the Legislature passed the predatory lending law, MGL Chapter 183C, which recognized the many stages at which predatory lending can harm a borrower. This provides:

> "A borrower may, at any time during the term of a high-cost home mortgage loan, employ any defense, claim, counterclaim, including a claim for a violation of this chapter, after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated

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[7] C.f. Commonwealth v. Fremont Investment & Loan, 459 Mass. 209 (2011): "Chapter 93A creates new substantive rights and, in particular cases, "mak[es] conduct unlawful which was not unlawful under the common law or any prior statute." Kattar v. Demoulas, 433 Mass. 1, 12, 739 N.E.2d 246 (2000), quoting Commonwealth v. DeCotis, 366 Mass. 234, 244 n. 8, 316 N.E.2d 748 (1974). **The statute does not define unfairness, recognizing that "[t]here is no limit to human inventiveness in this field."** Kattar v. Demoulas, supra at 13, 739 N.E.2d 246, quoting Levings v. Forbes & Wallace, Inc., 8 Mass.App.Ct. 498, 503, 396 N.E.2d 149 (1979). What is significant is the particular circumstances and context in which the term is applied. See Kerlinsky v. Fidelity & Deposit Co., 690 F.Supp. 1112, 1119 (D.Mass. 1987), aff'd, 843 F.2d 1383 (1st Cir.1988). It is well established that a practice may be deemed unfair if it is "within at least the penumbra of some common-law, statutory, or other established concept of unfairness." PMP Assocs., Inc. v. Globe Newspaper Co., 366 Mass. 593, 596, 321 N.E.2d 915 (1975). See Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 562-563, 887 N.E.2d 244 (2008), and cases cited."

> or the debt arising from the home loan has been accelerated or the home loan has become 60 days in default, or in any action to enjoin foreclosure or preserve or obtain possession of the home that secures the loan." MGL Chapter 183C, §15(b)(2).

MGL Chapter 183C, like the state Debt Collection Act, recognizes those who are the victims of illegal mortgage origination procedures and have—mortgages with illegal characteristics as having a right to raise such defenses all the way through enforcement of such a loan, including acceleration and foreclosure all the way through a post-purported foreclosure eviction case such this case of King's.

MGL Chapter 183C incorporated long-standing common law principles as to unconscionability. These include the principle that an unconscionable contract is in fact void unless modified. It includes restitution for the time period in which there was an attempt to enforce the contract while it was unconscionable because it was not yet modified. This Court applies those principles of unconscionability, codified in MGL Chapter 183C, in Commonwealth v. Fremont Investment & Loan, 459 Mass. 209 (2011). A mortgage loan that is (i) "doomed to fail" and (ii) where the industry never expected that the borrower could repay, so that they would lose their primary residence, was recognized as presumptively unfair and

presumptively illegal. Such a loan was unconscionable — unenforceable unless modified so it was no longer predatory. Alton King's loan and so many others purportedly "foreclosed" fall squarely within those criteria.

This Court's first exposure to the regular practices of this mortgage industry was in *Fremont*, above. The Court recognized the illegality of targeting a homeowner for a loan that would depend upon a lie about the actual value of the property, and create a principal balance that would trap the homeowner. Then, even if the borrower knew they were in trouble, they could never afford to sell out from under it; they would actually need to put money into the mortgage to afford to sell the home, money that of course they did not have.

In violation of our regulations and laws, in many cases, the industry misrepresented the actual income of the homeowner. As this Court recognized in the *Fremont* decision, the industry had already been warned about these kinds of practices by the Office of the Comptroller of the Currency and the Office of Thrift Supervision in communications to the industry about ignoring its own underwriting criteria.

This Court's *Drakopoulos v. U.S. Bank National Ass'n*, 465 Mass. 775 (2013) decision upheld the Legislature's explicit purpose: Chapter 183C recognizes that an assignee is responsible for the predatory and illegal nature of a loan and must address it — modify it or it is void.

Clearly, this was King's situation: trapped in exactly the kind of loan that this Court recognized as presumptively unfair and illegal under our laws as it was "doomed to fail." The industry was making these loans with the expectation of foreclosing - not the moral and contractual commitment of a 30-year relationship which protects the homeowner.

The *Fremont* decision went on to point out the many ways in which the industry drafted loans with predatory multiple characteristics in order to trap borrowers such as Alton King.

The illegality of such mortgage packages is squarely before this Court. King and those similarly situated deserve enforcement of this statute. As enacted, it is exactly applicable to the mischief that has been perpetrated on King and hundreds of thousands of Massachusetts borrowers.

The huge numbers and vastly disproportionate targeting of such loans to the people of color of this state clearly demonstrates structural racism. While the *Fremont* decision did not directly address discrimination, it did address the power imbalance (where the lending industry only had money to lose) and its regularized illegal practices.

MGL Chapter 93A has been repeatedly amended and strengthened. In fact, this Court upheld the enforcement of MGL Chapter 183C with its presumptive relationship to consumer violations under MGL Chapter 93A in the *Fremont* decision under the powers of the Attorney General to bring such actions (§6).

In fact, *Fremont*, explicitly addressing predatory lending, was the first case of the modern era of predatory lending before this Court. The Option One settlement was similarly patterned on the *Fremont* case.

As legislators, we then further did our job by passing MGL Chapter 244, § 35A, in 2007; this statute incorporated the explicit understanding in the industry of what an acceleration[8] means (the accrual of all

[8] This is technical language that was incorporated into our generally plain language statutes. The technical meaning here of "acceleration" had been established since and universally "understood" and incorporated into this statute: "Virtually all mortgages today contain

arrearages and future value, making the whole loan "due and payable in full").

Over the decades the Legislature has done its job to pass laws to address the "mischief" in which the lending industry has engaged. The evidence is far beyond what is necessary to show the discriminatory, structurally racist intent of the lending industry and its predatory practices, but our form of government works only if all three branches are doing their job.

A number of Legislators engaged in a process with bankers and community advocates to address what everybody recognized was an illegal and burgeoning predatory lending environment. The Dream Report that came out of that commission led to the 2007 passage of MGL Chapter 244, §35A; this focused explicitly on what happens with the "acceleration of the principal balance" of a mortgage.

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acceleration clauses. **In the event of mortgagor default, such a clause gives the mortgagee the right to declare the entire mortgage obligation due and payable. The general validity of these provisions is universally accepted.** An acceleration provision is effective to make the entire mortgage obligation due and payable so long as it is contained in either the mortgage or the obligation it secures." Restatement (Third) of Property: Mortgages, §8.1 (1997).

MGL Chapter 244, §35A, was to protect consumers with accurate, fair and undeceptive communications. These were violated in *Alton King*.

In MGL Chapter 244, §35A's next amended version in 2010, the Legislature recognized what was decided by this Court in the *Fremont* decision: when you have an unconscionable loan, one in violation of Chapter 183C or the penumbra of that statute under MGL Chapter 93A and general consumer protection guidelines, that unconscionable loan had to be modified or it was unenforceable. The 2010 amendment was responsibly made to address the mischief this Court identified and added incentives for pre-foreclosure mediated resolutions such as a loan modification.

That had been the purpose of the creation of the "right to cure" time period in the original statute in 2007. The industry then ignored and publicly stated that they would not use the mediation option in the 2010 amendment; thus, they made it clear to the world that, although this Court had made a decision in the *Fremont* case, the industry planned to ignore it. Again, this statute would have protected Alton King from the illegal foreclosure of his home, if this Court had enforced it

after the violation of the acceleration requirements of our laws.

The Legislature was fully aware of the technical meaning of 'acceleration,' and, actually before the passage of Chapter 244, §35A, had accordingly amended the 'obsolete mortgage statute,' MGL Chapter 260, §33. The mischief here was one of the many violations of the predatory lending period, and the historic wealth gouging that was expressed in the historic housing bubble. The industry was no longer giving out discharges of mortgage, and did not properly address a mortgage that was not being paid. We actually provided a safe harbor for the industry, to record something in the registry of deeds if they had accelerated a mortgage and were still trying to collect on it past its maturity date. The industry has, to our knowledge never used that safe harbor provision. It apparently relied on this and other courts to not enforce the law that we passed to address the mischief they were then engaging in and still do.

After this Court's *Ibanez* decision, we again did our job and amended MGL Chapter 244 §14 to require public notification of the status of the assignments of a mortgage. This Court had found in *Ibanez* that

assignments of mortgage were not being recorded, or did not even exist. The industry had assumed it did not even need to create such assignments.[9]

The industry has continued to violate the *Ibanez* decision and that amendment to MGL Chapter 244 §14 to address the industry's ongoing "mischief". This Court should enforce its own *Ibanez* requirements here: demand all of the assignments required in a securitized trust's Pooling and Servicing Agreement. Again, these do not exist in Alton King's case.

Similarly, the mischief that the Legislature sought to address in MGL Chapter 244 §35B, and MGL Chapter 244 §35C, each separately enforced by this body as is its constitutional obligation, even if it does choose to violate the Constitution and price King out of his right to prosecute his defense, this Court still has an obligation to enforce those laws here and in every such case. Otherwise they render the actions of those of us in the Legislative Branch and their execution by the Executive Branch meaningless. Such a course essentially

[9] In its August, 2015, factsheet in support of the bill eventually known as Senate 2015 (Chapter 141 of the Acts of 2015) the industry described the need to "paper over" its acquisition of a Note as a wrong decision by the SJC in *Ibanez*.

deconstructs our Constitution and how it is required to function.

Fremont is the only case, the initial introduction to subprime lending, that has come in front of this Court. Therefore, one would expect those practices would have created the context in which the Court made *this decision*. Given that introduction, the industry cannot simply be given a pass because the Court has ordered a homeowner (legally indigent) to literally give up their necessities of life if they expect the Court do its sua sponte responsibility of enforcing our laws.

As this court stated in *Eaton v. FNMA,* 462 Mass. 569 (2012), it was to jealously protect against the illegal use of the statutory power of sale, which obviously happened in the *King* case. In this decision, nonetheless, this Court is declaring that it has walked away from that commitment.

This Court cannot walk away from its role in enforcement, or it renders the job that this Court's Amicus, and my colleagues and predecessors have done, in meeting our constitutional obligations to protect the inalienable rights of our people to own property, their homes, hollow and meaningless. Your Amicus has dedicated his life to the equal enforcement of all of our legal

protections and rights for African-Americans, people of color, and all of the people of our communities and state. Your Amicus expects nothing less from this body.

D. Can the Massachusetts courts completely abrogate their responsibility to enforce our laws by singling out a part of the Massachusetts population and requiring that population to buy justice, contrary to our Constitution, and in violation of the Massachusetts Equal Rights Amendment and the Fourteenth Amendment?

All courts recognized King's legal indigency and the non-frivolous nature of his appeal[10] — including this Court.

> "Under the Indigent Court Costs Law, G. L. c. 261, §§ 27A-27G, indigent parties are able to obtain waivers or reductions of various fees and costs (including, for example, filing fees, fees related to the service of process, and appeal bond costs) incurred while litigating a summary process action. See G. L. c. 261, §§ 27A, 27B; Reade v. Secretary of the Commonwealth, 472 Mass. 573, 574 (2015), cert. denied, 136 S. Ct. 1729 (2016) (describing Indigent Court Cost Law's "mechanism for indigent persons to obtain waivers or reductions of court fees and other costs"). The Indigent Court Costs Law exists to "ensur[e] that the doors of the Commonwealth's courts will not be closed to the poor." Reade, supra. The equitable and consistent

[10] *Reade* again: "If … he would be indigent and entitled to relief. See G. L. c. 261, § 27C (4) ("If the court makes a finding of indigency, it shall not deny any request with respect to normal fees and costs . . ."). Under those circumstances, the judge's discretion would be limited to assessing Reade a reasonable partial payment as a substitute for the waiver. See id. at § 27C (6). See also Underwood v. Appeals Court, 427 Mass. 1013, 1013 (1998) ("Requiring litigants to pay a reasonably reduced filing fee, set within their limited financial means, serves the important dual purpose of providing equal access to the courts while simultaneously screening out frivolous claims").

> application of this law is therefore critically important to safeguarding every Massachusetts litigant's ability to "obtain right and justice freely, and without being obliged to purchase it." [Note 14] Art. 11 of the Massachusetts Declaration of Rights." Adjartey v. Central Housing Court, 481 Mass. 830 (2019).

Under the clear and unambiguous language of the applicable statute, Alton King could not be required to give up the necessities of life for this Court to hear him or to enforce our laws against the Plaintiff securitized trust.[11]

> "1974 Senate Doc. No. 1099, § 2. The legislative purpose statement included in the bill made clear that the legislation was focused on providing aid to the poor:
>
> "The General Court hereby finds and declares that many litigants in both civil and criminal cases are unable to secure due process of law and equal protection of the laws in the courts of Massachusetts by reason of being too poor to afford the fees and costs (not including attorneys fees) incident to such litigation.
>
> "Therefore, the purpose of this act is to provide for the absorption, payment or obviation of such fees and costs, initially by the counties and ultimately by the Commonwealth.
>
> "This Act shall be given a liberal construction to the end that its broad and humane purposes may be served."
>
> 1974 Senate Doc. No. 1099, § 1.
>
> The Senate bill was ultimately superseded by 1974 House Doc. No. 5859, which trimmed the definition of indigent to a person who "is unable to pay the fees and costs of the proceedings in which he is

[11] The court is reminded of "The court's modern mission statement [which] derives from the court's historic seal of 1785, which contains a promise made in the Magna Carta -- *Nulli Vendemus Nulli Negabimus Justiciam.* An English translation of this Latin text is "We sell justice to no one; we deny justice to no one".

> involved, or is unable to do so without depriving himself or his dependents of the necessities of life, including food, shelter and clothing," *Reade.*

In fact, this Court has now reversed these Constitutional and well settled standards to ensure court access to the legally indigent. Not only must such access be guaranteed equally to all – including homeowners after a purported foreclosure (especially as they have clear evidence any foreclosure was illegal, void, and of no force or effect) as well, the non-frivolous standard must be equally applied – and Amicus understands it is not enforced against this structurally-racist industry. Only those who are legally indigent are apparently being required to also show a non-frivolous appeal – violating equal rights as litigants accessing our courts.

> "The Supreme Court in [Draper v. Washington, 372 U.S. 487, 499 (1963)], supra at 499, emphasized that its decision which invalidated rules of the State of Washington governing the provision of transcripts to indigent defendants does not prevent a State from applying "nondiscriminatory rules to both indigents and nonindigents in order to guard against frivolous appeals.
>
> The First Circuit has held that the Rodriquez holding, which involved a Federal defendant, is equally applicable to State defendants. Wilbur v. Maine, 421 F.2d 1327 (1st Cir. 1970). …. Nothing in that decision, however, limits the State court's power to screen out frivolous appeals in a nondiscriminatory and fair manner." Pires v. Commonwealth, 373 Mass. 829 (1977)

King meets all the legislative requirements based in his constitutionally guaranteed right to defend his property (both ownership and possession, Article I). How can this Court carve out an exemption from its application of the Constitution to him and tens of thousands of other Massachusetts residents? Under what impartial authority?

E. Can the Massachusetts courts choose to exempt a sector of non-natural persons from civil and criminal scrutiny, because the courts decide that those damaged do not deserve or cannot afford to pay for justice, in violation of our Constitution?

The function of the courts is to be the forum to enforce rights violated: "[I]t is a general and indisputable rule that where there is a legal right, there is also a legal remedy by suit or ac*tion at law whenever that right is invaded."* Marbury v. Madison, 5 U.S. 137 (1803).

However, the courts are not a place for a party to come to complain when it *could not have been injured.*

For that reason, this Court has repeated numerous times that a complaining party (a Plaintiff) must have a right to a remedy; in short, it must have standing and without it the Court lacks subject matter jurisdiction. As recently affirmed for cases in this context:

> "…**where a plaintiff in a summary process action is neither the owner** nor the lessor of the

> property, **the Court must dismiss the complaint with prejudice for lack of subject matter jurisdiction,** regardless of whether a motion to dismiss has been presented by the defendant…" [emphasis added], *Rental Property Management Services v. Hatcher*, 479 Mass. 542 (2018)
>
> "[T]here is no question that the former homeowners can challenge the title of the banks in these summary process actions, and that they can require the banks to establish that title was acquired strictly according to the power of sale provided in the mortgage."[12] *Bank of America, v. Rosa,* 466 Mass. 613 (2013)
>
> "The "statutory power of sale" can be exercised by "the mortgagee or his executors, administrators, successors or assigns." G. L. c. 183, § 21. Under G. L. c. 244, § 14, "[t]he mortgagee or person having his estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person" is empowered to exercise the statutory power of sale. Any effort to foreclose by a party lacking "jurisdiction and authority" to carry out a foreclosure under these statutes is void. Chace v. Morse, 189 Mass. 559, 561 (1905), citing Moore v. Dick," *US Bank as Trustee v. Ibanez* , 458 Mass. 637 (2011).

But here the facts show an illegal, unconscionable and, therefore, unenforceable mortgage. Plaintiff could not own the property. It lacked standing in our courts for Summary Process. The subject matter jurisdiction of summary process actions related to foreclosed properties is provided for in MGL Chapter 239, §1, titled "Persons

[12] Bank of America, N.A v. Ceferino S. Rosa, 466 Mass. 61 (2013).

entitled to Summary Process,"; it provides:

> "[I]f a mortgage of land has been foreclosed by a sale under a power therein contained or otherwise, ..., the person entitled to the land or tenements may recover possession thereof under this chapter." Affirmed in *Rosa.*

In fact, a review of the public record apparently shows that the Plaintiff securitized trust in *Alton King* never executed its founding document and never came into legal existence. (See McKee Amicus brief to follow).

And as this Court itself has held many times, as relied upon in its *Hatcher* decision, the SJC explained that:

> "[B]ecause ***standing is a question of subject matter jurisdiction***, it must be established irrespective of whether it is challenged by an opposing party." Id. (citing Mass. R. Civ. P. 12(h) (3))..... If an issue of standing becomes apparent in such cases, it falls to the judge to inquire into the plaintiff's standing sua sponte." *Matt*, 464 Mass. at 200 (citing *Nature Church v. Assessors of Belchertown*, 384 Mass. 811 (1981). [Emphasis added].
>
> "We have treated such requirements as jurisdictional, and a jurisdictional issue must be decided, regardless of the point at which it is first raised. See *Boston v. Massachusetts Port Auth.*, 364 Mass. 639, 645 (1974). Subject matter jurisdiction cannot be conferred by consent, conduct or waiver. *Second Bank-State St. Trust Co. v. Linsley*, 341 Mass. 113, 116 (1960). Accordingly, this court must take note of lack of jurisdiction whenever it appears, whether by suggestion of a party or otherwise. Mass. R. Civ. P. 12 (h) (3).

> "In the present case .... The point was not raised until after the case had been decided in the Superior Court and reported to the Appeals Court. Nevertheless, we cannot proceed if jurisdiction is lacking". *Litton Business Sys., Inc. v. Commissioner of Revenue*, 420 N.E.2d 339, 383 Mass. 619, 622 (1981). See *Bevilacqua*, above.

This Court cannot avoid reviewing and addressing the issues clearly before it as to this Plaintiff's actions. Even if the Court priced Alton King unconstitutionally out of his additional Constitutional rights, it cannot ignore the illegal acts and structurally racist acts of this Plaintiff and similar actors.

F. Can the Massachusetts courts recognize and single out a group that is clearly, even based on the court's own behavior, a 'suspect class', to specifically deny them their Constitutional protections?

Further, this Court itself in line with *Jennison* and jurisprudence and courts across this country have held that equal protection under the law is the law of the land.

> **"Amendment CVI.**
>
> Article I of Part the First of the Constitution is hereby annulled and the following is adopted:-
>
> All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin."

Here, an industry has explicitly targeted people of color against our Constitution and state law (MGL Chapter 183 §64). That should render this Court's separating out this Plaintiff for lack of prosecution, while denying King and those similarly situated access to our courts, impossible.

Further, even though homeowners (of all races) purportedly foreclosed have not yet been codified or judicially recognized as a protected class, this Court's very decision here makes clear that this is a segment of our society separated out for special denial of rights by a governmental body.[13]

For equal protection, this Court must recognize the nature of its decision and reverse itself:

See Commonwealth v. WASHINGTON W., 457 Mass. 140 (2010):

> "Commonwealth v. King, 374 Mass. 5, 20 (1977), quoting Oyler v. Boles, 368 U.S. 448, 456 (1962). See Pariseau v. Brockton, 135 F. Supp. 2d 257, 263 (D. Mass. 2001), quoting Hayden v. Grayson, 134 F.3d 449, 453 n.3 (1st Cir. 1998) (stating that "the Equal Protection Clause safeguards not merely against invidious classifications such as race, but also against `any arbitrary classification of persons for unfavorable governmental treatment'"). Therefore, "judicial scrutiny is necessary to protect individuals from prosecution based on arbitrary or otherwise impermissible

[13] Judiciaily recognized thus as a "suspect class" requiring recognition for equal protection from such unequal treatment. ("suspect" meaning suspected of being a class — King has worked tirelessly for justice)

> classification." Commonwealth v. Bernardo B., supra at 168."

See further, Commonwealth v. King, 374 Mass. 5, 20 (1977):

> "The classifications set forth in art. 106, supra, with the exception of sex, are within the extensive protection of the Fourteenth Amendment to the United States Constitution and are subjected to the strictest judicial scrutiny. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (race as a suspect classification); Graham v. Richardson, 403 U.S. 365 (1971) (alienage as a suspect classification); Oyama v. California, 332 U.S. 633 (1948) (national origin as a suspect classification); Wisconsin v. Yoder, 406 U.S. 205, 214 (1972) (religious distinction affecting fundamental First Amendment rights). These classifications are permissible only if they further a demonstrably compelling interest and limit their impact as narrowly as possible consistent with their legitimate purpose. See, e.g., Commonwealth v. Henry's Drywall Co., 366 Mass. 539 , 542 (1974); In re Griffiths, 413 U.S. 717, 721-722 (1973)."

G. Can the Supreme Judicial Court reverse its historic role of expanding the legal understanding and application of Constitutional protections to include more and more sectors of the Massachusetts population and, instead, use its role as the interpreter of our Constitution to identify a new suspect class to specifically deny Constitutional rights, especially where that lines up with structural racism?

Whatever pre-judging is expressed in this *King* decision, whatever the history of racial bias and whatever powerful white interests are at play here, this Court must reverse its course, return to its constitutionally authorized role and the tradition of bravery and morality expressed in its *Jennison* decision:

> "But **whatever sentiments have formerly prevailed in this particular or slid in upon us by example of others, a different idea has taken place with the people of America, more favorable to the natural rights of mankind**, and to that natural, innate desire of Liberty, with which Heaven (**without regard to color, complexion, or … features**) has inspired all the human race. **And upon this ground our Constitution of Government, by which the people of this Commonwealth have solemnly bound themselves**, sets out with declaring that all men are born free and equal -- **and that every subject is entitled to liberty, and to have it guarded by the laws, as well as life and *property*** -- and in short is totally repugnant to the idea of being born slaves. This being the case, I think the idea of slavery is **inconsistent with our own conduct and Constitution;….**" [Emphasis added.]

In its own June 3rd letter this Court said it must recognize racism, the role of structural racism in "economic inequality" and "act" even though it may be "hard".

Here, it is simple. This Court must play its constitutional role and render an "impartial interpretation" of the laws that this Court's Amicus and so many other legislators for many decades have worked so hard to pass — to halt and repair the "mischief and evil" this well-recognized illegal and structurally racist industry has perpetrated against communities of color and us all.

H. If the court ignores the true legislative history and writes its own, would it not be violating Alton King's and all Massachusetts residents' rights under Article XXX of the Massachusetts Constitution, which provides for the separation of governmental powers?

This Court's decision in *Bank of New York Mellon v. Alton King* focuses in-depth on only two state statutes: MGL c. 239, § 6 and MGL c. 239, § 5, the waiver provisions of the latter of which my predecessors in the Honorable General Court made explicit would never apply to the former. However, in examining the statutes overly narrowly, this Court has overlooked key legislative developments and purposes of these statutes and the broader statutory scheme within which they function.

Specifically, this Court fails to address the fact that these two statutes were created to address two different "mischiefs." MGL c. 239 § 6 was explicitly passed to create an appeal bond in a specific circumstance where one had not previously existed: post purported foreclosure eviction cases where there was no private contractual basis for rent collection by a purported post-foreclosure purchaser.[14] In contrast, MGL c. 239 § 5 is applicable in, as this Court has phrased it, "classic landlord-tenant" eviction cases. To sustain its holding in the *Alton King* case, this Court must ignore this previously explicated understanding of the

[14] MGL Chapter 186, §3.

distinction between these two statutes, and the clear legislative intent behind them.

Additionally, this decision means that this Court is now completely ignoring its own recognition and holding in *Adjartey*, where this Court recognized that MGL c. 261, §§27A-G, the Indigent Court Costs Law, addresses all waivers of all fees for those who are indigent.

> "Under the Indigent Court Costs Law, G. L. c. 261, §§ 27A-27G, indigent parties are able to obtain waivers or reductions of various fees and costs (including, for example, filing fees, fees related to the service of process, **and appeal bond costs**) incurred while litigating a summary process action." 481 Mass. 830, 840 (2019) [Emphasis added].

In this regard, the *Adjartey* decision presented a clear and logical overview of the Commonwealth's Indigent Court Costs Law that comported with both the Legislature's intent and the constitutional rights to which all state residents are entitled.

> The Indigent Court Costs Law exists to "ensur[e] that the doors of the Commonwealth's courts will not be closed to the poor." The equitable and consistent application of this law is therefore critically important to safeguarding every Massachusetts litigant's ability to "obtain right and justice freely, and without being obliged to purchase it." *Adjartey*, 481 Mass. 830 at 840 [internal citation omitted].

Instead of continuing to develop this logical and Constitutionally harmonious reading of the relevant

statutes, this Court now seeks to mischaracterize the legislative history, thereby denying incorporation of the true legislative intent evidenced by the development of MGL c. 239 §§ 5 and 6.

The Court mistakenly refers to these as interrelated statutes. "We have interpreted the Legislature's use of the same terminology in closely related provisions to reflect their intention that the words are meant to be the same." *Bank of New York Mellon v. King*, 485 Mass. 37, 47 (2020). The Court then goes on to state: "Section 5 (c) provides specific conditions for a subset of appeal bonds in cases where a plaintiff, at the time the appeals bond is set, seeks to recover possession of land or tenements, and § 6 further defines the conditions of bonds in postforeclosure actions." *King*, 485 Mass. 37 at 43.

The actual history of these two statutes shows that their purposes and their development are different, see above and below. §6 is not, nor **has it** ever been, a "subset." Its 'specific conditions' for appeal bonds were provided in MGL Chapter 261 §§27A-G. §6 defines bonds rooted in a separate **situation,** not **a** 'further' situation where no contractual rental history exists between the parties. §6 in fact provides for an *extra*

bond where one was not owed at final judgment; §5 addresses where ongoing expectations of a rental relationship pre-existed. Here, the harmony of the statutes is a**n** explicitly differentiated counterpoint, not a unison.[15]

This Court's mischaracterization of that history (an extremely unusual occurrence) may stem in part from the fact that *this Court does not actually quote any versions of the legislative history of the relevant statutes.* A review of the actual legislative history shows that the legislators began to codify the practice of occasionally waiving costs due to indigency already practiced by the courts of the Commonwealth in 1930. In

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[15] As the Court determined in *Bank of New York v. Apollos,* 2008 Mass. App. Div. 55 (2009), the reasonable rent expectations of a traditional landlord dependent upon a monthly revenue stream are fundamentally different from those of a foreclosing entity that "buys back" at an attempted foreclosure:
"The policy concerns prompting courts to allow rental payments to continue during the pendency of an appeal are not applicable in a mortgage foreclosure case. The legislative intent underlying §5 is 1) to protect against frivolous appeals and 2) to provide some financial protection for landlords during the pendency of appeals. *Kargman*, supra at 113, 359 N.E.2d 971. Clearly, a landlord needs continuing rental payments to maintain the property while a tenant is still in possession. The responsibilities of a mortgagee are different, and might be deemed less immediate than those of a landlord: and the language of §6 articulated a different legislative response to those needs. The policy concerns articulated in *Kargman* are largely inapplicable in mortgage foreclosure cases."

1969 and 1971, the Legislature, my predecessors, explicitly amended statutes in a single act to change the "May" language for judicial waiver to "Shall" language. In that Chapter 347 of the Acts of 1971 (see addendum), the Legislature singled out MGL c. 239, § 5, to add a requirement to address the expectation of rent, unique to appeal situations where a contractual lease relationship and a landlord's ongoing reliance on rental income made that a factor in the waiver provisions unique to that law.

Shortly after that was the consolidation of the Massachusetts Rules of Civil Procedure and the passage of the Indigent Court Costs Law in 1974; this applied to the waiver *of all unaffordable fees and extra fees*, including appeal bonds, made applicable by the Legislature to all judicial actions. This Court has previously acknowledged this legislative intent (see *Adjartey*). This included providing procedure and criteria requirements applicable to all fee related statutes, which would clearly include MGL c. 239, § 6; those requirements thereby fulfill the constitutional requirement that such court costs can be waived by those who are legally indigent, in compliance with Article 11 of Part the First of the Massachusetts Constitution.

§5 is superfluous as to procedures and requirements for waiving appeals bonds for §6 as those were provided for in 1974. No substitute of rent payments given a waiver **of the appeal bond** were included. Given the nascent inclusion of such requirements in the 1971 amendment to §5, such omission must be assumed to be intentional.

> **"In so construing a statute, we may examine it "in connection with [its] development, [its] progression through the legislative body, the history of the times, prior legislation, [and] contemporary 4*4 customs and conditions."** Commonwealth v. Welosky, 276 Mass. 398, 401 (1931). Chipman v. Massachusetts Bay Transp. Authy., 366 Mass. 253, 256 (1974). If the language of a statute is clear and unambiguous it must be given its ordinary meaning, as that language is the principal source of insight into legislative purpose. Bronstein v. Prudential Ins. Co. of America, 390 Mass. 701, 704 (1984). Where, as here, the problems addressed by legislation are "well known; and the Legislature has attempted progressively to deal with them," Hampshire Village Associates v. District Court of Hampshire, 381 Mass. 148, 151-152, cert. denied sub nom. Ruhlander v. District Court of Hampshire, 449 U.S. 1062 (1980), and the contention of the tenant and the decision of the judge rationally advance the proposition that the Legislature meant more than what it said, it is appropriate to **examine the legislative history for guides as to the objects to be accomplished.** See Boston v. Quincy Mkt. Cold Storage Co.,312 Mass. 638, 642 (1942); Murphy v. Bohn, 377 Mass. 544, 547-548 (1979); 2A Sands, Sutherland Statutory Construction § 48.03 (4th ed. 1984). Cf. Mellor v.Berman, 390 Mass. 275, 281-283 (1983)." Jinwala v. Bizzaro, 505 NE 2d 904 - Mass: Appeals Court 1987

In Chapter 667 of Acts of 1975, my legislative predecessors uniquely amended the provisions in MGL c. 239, § 5 as to requirements for a waiver of an existing bond. However, the Court is reminded that ***those bond waiver provisions the Legislature inserted into §5, explicitly distinguished that these do not apply to §6[16] Cases.***

Although the appeal bond waiver provision was initially passed as a single section, that language now appears in three separate subsections of MGL c. 239, §5. (See addended comparison of the original insertion of waiver provisions and the present-day statute). But never in any legislative history has the exclusion of the application of those §5 requirements to MGL c. 239, § 6 cases, been reversed. § 5(c) clearly reflects this: it begins with the clause: "Except as provided in section 6."

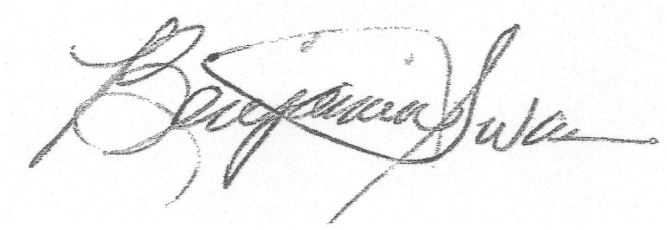
[16] See Bank of America, N.A v. Rosa 466 Mass. 61 (2013): "We will not add words to a statute that the Legislature did not put there, either by inadvertent omission or by design." Fafard v. Lincoln Pharmacy of Milford, Inc., 439 Mass. 512 , 515 (2003), quoting from Commonwealth v. McLeod, 437 Mass. 286 , 294 (2002)." See also Cummings v. Wajda, 325 Mass. 242, 243 (1950), where this Court said, "[s]ummary process is a purely statutory procedure and can be maintained only in the instances specifically provided for in the statute…."

This Court's writing out of that clause in this decision and denying its force and effect thereby functions to amend the legislative intent and the language of the statutes of the Commonwealth. Its simultaneous refusal to apply the statute (MGL Chapter 261 §§27A-G) that the Legislature provided to apply in these situations, is also superseding the province and authority of the Legislature.

These acts are not within the constitutional authority of this body. They represent a collapsing of the separation of powers that our Declaration of Rights guarantees as a protection for all Massachusetts residents of, including Alton King, and that form the cornerstone to our constitutional democracy:

> "Article XXX.
>
> In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

Respectfully submitted,



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ADDENDUM

ADDENDUM TABLE OF CONTENTS

COMPARISON BETWEEN 1975 and PRESENT §5 LANGUAGE BARRED FROM APPLICATION TO §6

(green wording is only one version; colors highlight comparable wording)

Chapter 239 §5 1975 Amendment

If the defendant appeals from a judgment of the superior court, a housing court or a district court, rendered for the plaintiff for the possession of the land or tenements demanded, he shall, **except as provided in section six,** before such appeal is allowed, give bond in such sum as the court orders, payable to the plaintiff, with sufficient surety or sureties approved by the plaintiff or court, or secured by cash or its equivalent deposited with the clerk, in a reasonable amount to be fixed by the plaintiff or court. In an appeal from a judgment of a district court such bond shall be conditioned to enter the action in the superior court for that county at the return day next after the appeal is taken. In an appeal from a judgment of the superior court or a housing court such bond filed shall be conditioned to enter the action in the appeals court. An appeal from a judgment of the superior court or a housing court shall be taken by filing a notice of appeal within six days of entry of judgment. Appeals from judgments of the superior court or a housing court shall otherwise be governed by the Massachusetts Rules of Appellate Procedure. Any bond given shall also be conditioned that the defendant is to pay to the plaintiff, if final judgment is in his favor, all rent accrued at the date of the bond, all intervening rent, and all damage and loss which he may sustain by the withholding of possession of the land or tenements demanded and by any injury done thereto during such withholding, with all costs, until delivery of possession thereof to him.

Chapter 239 §5 Present

(c) **Except as provided in section 6,** the defendant shall, before any appeal under this section is allowed from a judgment of the superior court, a housing court, or a district court, rendered for the plaintiff for the possession of the land or tenements demanded in a case in which the plaintiff continues at the time of establishment of bond to seek to recover possession, give bond in a sum as the court orders, payable to the plaintiff, with sufficient surety or sureties approved by the court, or secured by cash or its equivalent deposited with the clerk, in a reasonable amount to be fixed by the court. In an appeal from a judgment of a district court the bond shall be conditioned to enter the action in the appellate division at the return day next after the appeal is taken. In an appeal from a judgment of the superior court or a housing court the bond filed shall be conditioned to enter the action in the appeals court. Appeals from judgments of the superior court or a housing court shall otherwise be governed by the Massachusetts Rules of Appellate Procedure. The bond shall also be conditioned to pay to the plaintiff, if final judgment is in plaintiff's favor, all rent accrued at the date of the bond, all intervening rent, and all damage and loss which the plaintiff may sustain by the withholding of possession of the land or tenements demanded and by any injury done thereto during the withholding, with all costs, until delivery of possession thereof to the plaintiff.

A certificate of such deposit of cash or its equivalent shall be issued to the depositor by the clerk. In appeals from a district court the deposit shall be transmitted by the clerk with the papers to the clerk of the superior court, who shall thereupon deliver a receipt therefor to such clerk, but in such appeals from a judgment of the superior court or a housing court the deposit shall not be transmitted to the appeals court unless specifically, requested by said appeals court. The superior court or a housing court may give directions as to the manner of keeping such deposit. Upon final judgment for the plaintiff, all money then due to him may be recovered in an action on the bond.
The court shall waive the requirement of such bond or security if it is satisfied that the defendant has a defense which is not frivolous and that he has insufficient funds available to him to furnish the necessary bond or security. The court may require any person for whom such bond or security has been waived to pay in installments as the same becomes due, pending appeal, all or any portion of any rent which shall become due after the date of such waiver, for the continued occupancy of the premises.
Approved October 30,1975.

(d) In appeals from a judgment of the superior court, a housing court or a district court the deposit shall not be transmitted to the appeals court or the appellate division unless specifically requested by said appeals court or appellate division. The superior court, a housing court or a district court may give directions as to the manner of keeping the deposit. Upon final judgment for the plaintiff, all money then due to him may be recovered in an action on the bond provided for in the third paragraph of this section.

(e) A party may make a motion to waive the appeal bond provided for in this section if the party is indigent as provided in section 27A of chapter 261. The motion shall, together with a notice of appeal and any supporting affidavits, be filed within the time limits set forth in this section. The court shall waive the requirement of the bond or security if it is satisfied that the person requesting the waiver has any defense which is not frivolous and is indigent as provided in said section 27A of said chapter 261. The court shall require any person for whom the bond or security provided for in subsection (c) has been waived to pay in installments as the same becomes due, pending appeal, all or any portion of any rent which shall become due after the date of the waiver. A court shall not require the person to make any other payments or deposits. The court shall forthwith make a decision on the motion. If the motion is made, no execution shall issue until the expiration of 6 days from the court's decision on the motion or until the expiration of the time specified in this section for the taking of appeals, whichever is later.

Chap. 346. AN ACT PROVIDING THAT CERTAIN POLICE OFFICERS AND FIRE FIGHTERS SHALL HAVE EQUAL PREFERENCE WITH VETERANS IN THEIR PLACEMENT ON ELIGIBLE LISTS FOR PROMOTION.

Be it enacted, etc., as follows:

Chapter 31 of the General Laws is hereby amended by inserting after section 23B the following section:—

Section 23C. Notwithstanding the provisions of section twenty-three or the provisions of any other law or rule to the contrary, any regular police officer who has served for twenty-five years and who passes an examination for promotion to the grade of lieutenant or higher, and any regular fire fighter who has served for twenty-five years and who passes an examination for promotion to the grade of captain or higher, shall have equal preference with veterans in being placed upon the eligible list for said promotion.

Approved May 27, 1971.

Chap. 347. AN ACT REQUIRING THE WAIVER OF A BOND OF SECURITY FOR THE PAYMENT OF RENT OF AN INDIGENT DEFENDANT IN SUMMARY PROCESS APPEALS AND IN CERTAIN PETITIONS TO VACATE JUDGMENT AND IN CERTAIN WRITS OF REVIEW.

Be it enacted, etc., as follows:

SECTION 1. Section 5 of chapter 239 of the General Laws is hereby amended by striking out the second paragraph, added by chapter 366 of the acts of 1969, and inserting in place thereof the following paragraph:—

The court shall waive the requirement of such bond or security if it is satisfied that the defendant has a defense which is not frivolous and that he has insufficient funds available to him to furnish the necessary bond or security. The court may require any person for whom such bond or security has been waived to pay in installments as the same becomes due, pending appeal, all or any portion of any rent which shall become due after the date of such waiver, for the continued occupancy of the premises.

SECTION 2. Section 17 of chapter 250 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by adding the following two sentences:—The court shall vacate judgment and stay or supersede the execution without requiring bond or surety, if it is satisfied that the petitioner has insufficient funds available to him to furnish the necessary bond or security and that the petitioner has a defense which is not frivolous. If such bond or security is waived, any attachment or other security then outstanding shall continue in force as if such petition had not been filed, and shall not be dissolved if the original judgment is vacated or the execution stayed or superseded.

SECTION 3. Section 24 of said chapter 250 is hereby amended by striking out the last sentence, added by chapter 290 of the acts of 1969, and inserting in place thereof the following two sentences:—The court shall vacate judgment and stay or supersede the execution with-

out requiring bond or security, if it is satisfied that the petitioner has insufficient funds available to him to furnish the necessary bond or security and the petitioner has a defense which is not frivolous. If such bond or security is waived, any attachment or other security then outstanding shall continue in force as if such writ had not been filed, and shall not be dissolved if the original judgment is vacated or the execution is stayed or superseded. *Approved May 27, 1971.*

Chap. 348. AN ACT AUTHORIZING ESTABLISHMENT OF OFF-STREET PARKING FACILITIES IN THE CITY OF SALEM.

Be it enacted, etc., as follows:

SECTION 1. It is hereby declared that excessive curb parking of motor vehicles on the streets of the city of Salem and the lack of adequate off-street parking facilities create congestion, obstruct the free circulation of traffic, diminish property values, and endanger the health, safety and general welfare of the public; that the provision of conveniently located off-street parking facilities at a reasonable cost is therefore necessary to alleviate such conditions; and that the establishment of public off-street automobile parking facilities and fostering the provision of commercial, special purpose, or co-operative off-street automobile parking facilities are decreed to be a proper public or municipal purpose.

SECTION 2. For the purposes of this act (1) public off-street automobile parking facilities are defined as accommodations provided by public authority for the parking of automobiles off the street or highway and open to public use, with or without charge. Such facilities may be publicly owned and publicly operated, or they may be publicly owned and privately operated; (2) commercial off-street automobile parking facilities are defined as accommodations provided by private enterprise for the parking of automobiles off the street or highway, open to public use for a fee; (3) special purpose off-street automobile parking facilities are defined as accommodations provided by public authority or private groups or individuals, for restricted use in connection with public improvements, particular businesses, theaters, hotels and other private enterprises, or combinations thereof, or as adjuncts to housing developments or private residence. Such facilities may or may not be jointly established and operated; (4) co-operative off-street automobile parking facilities are defined as accommodations provided by joint action of public and private interests. Parking facilities may consist of lots, garages or other structures and accessories; they may be surface facilities or facilities above or under the ground.

SECTION 3. The city of Salem is hereby authorized to establish a commission, to be known as the Salem Off-Street Parking Commission, hereinafter called "the commission", for the purpose of establishing public off-street automobile parking facilities and of fostering the provision of commercial, special purpose and co-operative off-street automobile parking facilities within the city of Salem. Such commission shall consist of five members who shall be appointed by the mayor, subject to confirmation by the city council. The commission

OFFICE OF THE SECRETARY, BOSTON, November 26, 1975.

I, Paul Guzzi, Secretary of the Commonwealth, hereby certify that the accompanying statement was filed in this office by His Excellency the Governor of the Commonwealth of Massachusetts at two o'clock and fifteen minutes, P. M., on the above date, and in accordance with Article Forty-eight of the Amendments to the Constitution said chapter takes effect forthwith, being chapter six hundred and sixty-six of the acts of nineteen hundred and seventy-five.

PAUL GUZZI,
Secretary of the Commonwealth.

Chap. 667. AN ACT CLARIFYING THE DISPOSITION OF SUMMARY PROCESS AND SMALL CLAIMS ACTIONS.

Be it enacted, etc., as follows:

SECTION 1. The first paragraph of section 20 of chapter 185A of the General Laws, as appearing in section 36 of chapter 1114 of the acts of 1973, is hereby amended by striking out the first sentence and inserting in place thereof the following sentence: — Proceedings shall be commenced in the housing court as follows: — a criminal case by complaint in like manner as in the district court; a civil action in accordance with the Massachusetts Rules of Civil Procedure, provided however, that a summary process action and a small claims action shall be commenced and administered in accordance with rules promulgated by the housing court subject to the approval of the supreme judicial court.

SECTION 2. Said chapter 185A is hereby further amended by striking out section 24, as amended by section 16 of chapter 700 of the acts of 1974, and inserting in place thereof the following section: —

Section 24. All dispositions of any case, except an action for summary process or an action for small claims, before the housing court, whether interlocutory or final, shall be administered, entered, reported and appealed from as in the superior court.

SECTION 3. Chapter 239 of the General Laws is hereby amended by striking out section 5, as most recently amended by section 1 of chapter 347 of the acts of 1971, and inserting in place thereof the following section:—

Section 5. If the defendant appeals from a judgment of the superior court, a housing court or a district court, rendered for the plaintiff for the possession of the land or tenements demanded, he shall, except as provided in section six, before such appeal is allowed, give bond in such sum as the court orders, payable to the plaintiff, with sufficient surety or sureties approved by the plaintiff or court, or secured by cash or its

equivalent deposited with the clerk, in a reasonable amount to be fixed by the plaintiff or court. In an appeal from a judgment of a district court such bond shall be conditioned to enter the action in the superior court for that county at the return day next after the appeal is taken. In an appeal from a judgment of the superior court or a housing court such bond filed shall be conditioned to enter the action in the appeals court. An appeal from a judgment of the superior court or a housing court shall be taken by filing a notice of appeal within six days of entry of judgment. Appeals from judgments of the superior court or a housing court shall otherwise be governed by the Massachusetts Rules of Appellate Procedure. Any bond given shall also be conditioned that the defendant is to pay to the plaintiff, if final judgment is in his favor, all rent accrued at the date of the bond, all intervening rent, and all damage and loss which he may sustain by the withholding of possession of the land or tenements demanded and by any injury done thereto during such withholding, with all costs, until delivery of possession thereof to him. A certificate of such deposit of cash or its equivalent shall be issued to the depositor by the clerk. In appeals from a district court the deposit shall be transmitted by the clerk with the papers to the clerk of the superior court, who shall thereupon deliver a receipt therefor to such clerk, but in such appeals from a judgment of the superior court or a housing court the deposit shall not be transmitted to the appeals court unless specifically requested by said appeals court. The superior court or a housing court may give directions as to the manner of keeping such deposit. Upon final judgment for the plaintiff, all money then due to him may be recovered in an action on the bond.

The court shall waive the requirement of such bond or security if it is satisfied that the defendant has a defense which is not frivolous and that he has insufficient funds available to him to furnish the necessary bond or security. The court may require any person for whom such bond or security has been waived to pay in installments as the same becomes due, pending appeal, all or any portion of any rent which shall become due after the date of such waiver, for the continued occupancy of the premises. *Approved October 30, 1975.*

Chap. 668. AN ACT PROVIDING FOR THE FINAL DESTRUCTION OF CERTAIN FILES OF THE SPECIAL COMMISSION ESTABLISHED TO MAKE AN INVESTIGATION AND STUDY RELATIVE TO CRIME AND CORRUPTION.

Be it enacted, etc., as follows:

Notwithstanding any contrary provision of law or any vote or action of the special commission established under chapter one hundred and forty-six of the resolves of nineteen hundred

Massachusetts Constitution

PART THE FIRST
A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts

Article CVI.

Article I of Part the First of the Constitution is hereby annulled and the following is adopted:-

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

Article XI. Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

Article XXIX. It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws. [See Amendments, Arts. XLVIII, The Initiative, II, sec. 2, and The Referendum, III, sec. 2, LXVIII and XCVIII.]

Article XXX. In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

IT SHOULD BE NOTED THAT THIS IS NEITHER THE TITLE NOR THE EXACT LANGUAGE OF THE ACT WE PASSED – it is what is posted in the session laws

Chapter 141 of the Acts of 2015

AN ACT CLEARING TITLES TO FORECLOSED PROPERTIES

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same as follows:

SECTION 1. The first paragraph of section 3 of chapter 185C of the General Laws, as appearing in the 2014 Official Edition, is hereby amended by adding the following sentence:- The divisions of the housing court department, subject to section 14 of chapter 244, shall also have jurisdiction of defenses or counterclaims by any party entitled to notice of sale under said section 14 of said chapter 244 or by any party entitled to notice of sale and who continues to occupy the mortgaged premises.

SECTION 2. Chapter 244 of the General Laws is hereby amended by striking out section 15, as so appearing, and inserting in place thereof the following section:-

Section 15. (a) For the purposes of this section, the following words shall have the following meanings unless the context clearly requires otherwise:

"Arm's length third party purchaser for value", an arm's length purchaser who pays valuable consideration, including a purchaser's heirs, successors and assigns, but not including the foreclosing party or mortgage note holder or a parent, subsidiary, affiliate or agent of the foreclosing party or mortgage note holder or an investor or guarantor of the underlying mortgage note including, but not limited to, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation and the Federal Housing Administration.

"Deadline", 3 years from the date of the recording of the affidavit.

(b) The person selling or the attorney duly authorized by a writing or the legal guardian or conservator of the person selling shall, after the sale, cause a copy of the notice and an affidavit fully and particularly stating the person's acts or the acts of the person's principal or ward which shall be recorded in the registry of deeds for the county or district in which the land lies, with a note of reference thereto on the margin of the record of the mortgage deed if it is recorded in the same registry. If the affidavit shows that the requirements of the power of sale and the law have been complied with in all respects, the affidavit or a certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed.

(c) If an affidavit is executed in accordance with this section, it shall, after 3 years from the date of its recording, be conclusive evidence in favor of an arm's length third party purchaser for value at or subsequent to the

foreclosure sale that the power of sale under the foreclosed mortgage was duly executed and that the sale complied with this chapter and section 21 of said chapter 183. An arm's length third party purchaser for value relying on an affidavit shall not be liable for a foreclosure if the power of sale was not duly exercised. Absent a challenge as set forth in clause (i) or (ii) of subsection (d), title to the real property acquired by an arm's length third party purchaser for value shall not be set aside.

(d) Subsection (c) shall not apply if: (i) an action to challenge the validity of the foreclosure sale has been commenced in a court of competent jurisdiction by a party entitled to notice of sale under section 14 or a challenge has been asserted as a defense or a counterclaim in a legal action in a court of competent jurisdiction, including the housing court department pursuant to section 3 of chapter 185C, by a party entitled to notice of sale under said section 14 and a true and correct copy of the complaint or pleading asserting a challenge has been duly recorded before the deadline in the registry of deeds for the county or district in which the subject real property lies or in the land court registry district before the deadline; or (ii) a challenge to the validity of the foreclosure sale is asserted as a defense or counterclaim in a legal action in a court of competent jurisdiction, including the housing court department pursuant to said section 3 of said chapter 185C, by a party entitled to notice of sale under said section 14 who continues to occupy the mortgaged premises as that party's principal place of residence, regardless of whether the challenge was asserted prior to the deadline, and a true and correct copy of any pleading asserting the challenge in the legal action was duly recorded in the registry of deeds for the county or district in which the subject property lies or is duly filed in the land court registry district within 60 days from the date of the challenge or before the deadline, whichever is later.

An attested true and correct copy of the complaint or pleading described in this subsection shall be accepted for recording in the registry of deeds or, in the case of registered land, in the land court registry district.

After the entry of a final judgment in a legal challenge under clause (i) or (ii) and the final resolution of any appeal of that judgment, the affidavit shall immediately become conclusive evidence of the validity of the sale if the final judgment concludes that the power of sale was duly exercised. If the final judgment concludes that the power of sale was not duly exercised, the foreclosure sale and affidavit shall be void. If the final judgment does not determine the validity of the foreclosure sale and the deadline for the affidavit to become conclusive has not expired, any party entitled to notice of sale under section 14 may file or assert another legal challenge to the validity of the foreclosure sale under said clause (i) or (ii).

(e) The recording of an affidavit and the expiration of the deadline shall not relieve an affiant or any other person on whose behalf an affidavit was executed and recorded from liability for failure to comply with this section,

section 14 or any other requirements of law with respect to the foreclosure.

(f) A material misrepresentation contained in an affidavit shall constitute a violation of section 2 of chapter 93A.

SECTION 3. For purposes of an affidavit filed pursuant to section 15 of chapter 244 of the General Laws before the effective date of this act, the term "deadline" in said section shall mean 3 years from the date of the recording of the affidavit or 1 year from the effective date of this act, whichever is later.

SECTION 4. The attorney general, in collaboration with the commissioner of banks, shall work with stakeholders participating in the foreclosure industry and stakeholders participating in foreclosure prevention, reduction or education programs to provide notification of the effects of this act to homeowners facing foreclosure and homeowners who were foreclosed upon. For the purposes of this section "stakeholders" shall include, but not be limited to, participants in the attorney general's HomeCorps program, grant recipients receiving funding to complement the goals of the HomeCorps program, entities providing information to the division of banks to maintain the foreclosure database, consumer assistance providers at the division of banks' foreclosure hotline, foreclosure assistance providers referred by the division of banks and participants in the Pro Bono Foreclosure Assistance Hotline. Notification efforts shall include, and may be limited to, providing notice of the effects of this act on a website operated or maintained by the attorney general and the division of banks.

The attorney general shall report to the clerks of the house of representatives and the senate not later than December 1, 2016 detailing notification efforts and the implementation of this section.

SECTION 5. Except as otherwise provided, this act shall apply to affidavits recorded pursuant to section 15 of chapter 244 of the General Laws before, on or after the effective date of this act.

SECTION 6. This act shall take effect on December 31, 2015.

Chapter 93A, Section 2: Unfair practices; legislative intent; rules and regulations

Section 2. (a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(b) It is the intent of the legislature that in construing paragraph (a) of this section in actions brought under sections four, nine and eleven, the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(c) The attorney general may make rules and regulations interpreting the provisions of subsection 2(a) of this chapter. Such rules and regulations shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of 15 U.S.C. 45(a)(1) (The Federal Trade Commission Act), as from time to time amended.

Section 6: Examination of books and records; attendance of persons; notice

Section 6. (1) The attorney general, whenever he believes a person has engaged in or is engaging in any method, act or practice declared to be unlawful by this chapter, may conduct an investigation to ascertain whether in fact such person has engaged in or is engaging in such method, act or practice. In conducting such investigation he may (a) take testimony under oath concerning such alleged unlawful method, act or practice; (b) examine or cause to be examined any documentary material of whatever nature relevant to such alleged unlawful method, act or practice; and (c) require attendance during such examination of documentary material of any person having knowledge of the documentary material and take testimony under oath or acknowledgment in respect of any such documentary material. Such testimony and examination shall take place in the county where such person resides or has a place of business or, if the parties consent or such person is a nonresident or has no place of business within the commonwealth, in Suffolk county.

(2) Notice of the time, place and cause of such taking of testimony, examination or attendance shall be given by the attorney general at least ten days prior to the date of such taking of testimony or examination.

(3) Service of any such notice may be made by (a) delivering a duly executed copy thereof to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on

behalf of such person; (b) delivering a duly executed copy thereof to the principal place of business in the commonwealth of the person to be served; or (c) mailing by registered or certified mail a duly executed copy thereof addressed to the person to be served at the principal place of business in the commonwealth or, if said person has no place of business in the commonwealth, to his principal office or place of business.

(4) Each such notice shall (a) state the time and place for the taking of testimony or the examination and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs; (b) state the statute and section thereof, the alleged violation of which is under investigation and the general subject matter of the investigation; (c) describe the class or classes of documentary material to be produced thereunder with reasonable specificity, so as fairly to indicate the material demanded; (d) prescribe a return date within which the documentary material is to be produced; and (e) identify the members of the attorney general's staff to whom such documentary material is to be made available for inspection and copying.

(5) No such notice shall contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of the commonwealth; or require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of the commonwealth.

(6) Any documentary material or other information produced by any person pursuant to this section shall not, unless otherwise ordered by a court of the commonwealth for good cause shown, be disclosed to any person other than the authorized agent or representative of the attorney general, unless with the consent of the person producing the same; provided, however, that such material or information may be disclosed by the attorney general in court pleadings or other papers filed in court.

(7) At any time prior to the date specified in the notice, or within twenty-one days after the notice has been served, whichever period is shorter, the court may, upon motion for good cause shown, extend such reporting date or modify or set aside such demand or grant a protective order in accordance with the standards set forth in Rule 26(c) of the Massachusetts Rules of Civil Procedure. The motion may be filed in the superior court of the county in which the person served resides or has his usual place of business, or in Suffolk county. This section shall not be applicable to any criminal proceeding nor shall information obtained under the authority of this section be admissible in evidence in any criminal prosecution for substantially identical transactions.

PART I ADMINISTRATION OF THE GOVERNMENT

TITLE XX PUBLIC SAFETY AND GOOD ORDER

CHAPTER 140D CONSUMER CREDIT COST DISCLOSURE

Section 10 Security interest in property used as dwelling; rescission; liability; application

Section 10. (a) Except as otherwise provided in this section, in the case of any consumer credit transaction, including opening or increasing the credit limit for an openendcredit plan, in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required by this chapter, whichever is later, by notifying the creditor, in accordance with regulations of the commissioner, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the commissioner, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the commissioner, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section. No finance or other charge shall begin to accrue on any such transaction until the termination of the rescission period provided for in this section.

(b) When an obligor exercises his right to rescind under subsection (a), he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within twenty days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, down payment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impractical or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within twenty days

after tender by the obligor, ownership of the property rests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

(c) Written acknowledgment of receipt of any disclosures required under this chapter, or any rule or regulation issued thereunder, by a person to whom information, forms, and a statement is

required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

(d) The commissioner may, if he finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

(e)(1) This section shall not apply to:
(A) a residential mortgage transaction as defined in section one;

(B) a transaction which constitutes a refinancing or consolidation, with no new advances, of the principal balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;

(C) a transaction in which an agency of the commonwealth or any subdivision thereof, is the creditor;

(D) advances under a preexisting openendcredit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

(f) An obligor's right of rescission shall expire four years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding that the information and forms required under this section or any other disclosures required under this chapter have not been delivered to the obligor, except that if (1) the commissioner institutes a proceeding to enforce the provisions of this section within four years after the date of consummation of the transaction, (2) the commissioner finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of

rescission shall expire four years after the date of consummation of the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

(g) In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section thirtytwo not relating to the right to rescind.

(h) An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the commissioner, or a comparable written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.

(i)(1) Notwithstanding the provisions of section thirtyfive, and subject to the time period provided in subsection (f), in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if:

(a) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated;

(b) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the commissioner or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

(2) Notwithstanding the provisions of subsection (f) of section four, and subject to the time period provided in subsection (f) of this section, for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for the purposes of this section if the amount disclosed as the finance charge does not vary from the actual

finance charge by more than thirtyfive dollars or is greater than the amount required to be disclosed under this chapter.

(3) Nothing in this section shall be construed so as to affect a consumer's right of recoupment under the laws of the commonwealth.

(4) The provisions of this subsection shall apply to all consumer credit transactions in existence or consummated on or after September thirtieth, nineteen hundred and ninetyfive.

PART II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS (Chapters 183 through 210)

TITLE I TITLE TO REAL PROPERTY

CHAPTER 183 ALIENATION OF LAND

Section 21 “Statutory power of sale” in mortgage

Section 21. The following “power” shall be known as the “Statutory Power of Sale”, and may be incorporated in any mortgage by reference:

(POWER.)

But upon any default in the performance or observance of the foregoing or other condition, the mortgagee or his executors, administrators, successors or assigns may sell the mortgaged premises or such portion thereof as may remain subject to the mortgage in case of any partial release thereof, either as a whole or in parcels, together with all improvements that may be thereon, by public auction on or near the premises then subject to the mortgage, or, if more than one parcel is then subject thereto, on or near one of said parcels, or at such place as may be designated for that purpose in the mortgage, first complying with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale, and may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity.

Chapter 183, Section 63B: Recordation of real estate mortgage prohibited until proceeds of loan paid to mortgagor

Section 63B. No mortgagee who makes a loan to be secured by a mortgage or lien on real estate located in the commonwealth in conjunction with which, a mortgage deed evidencing the same is to be recorded in a registry of deeds or registry district in the commonwealth, shall deliver said deed or cause the same to be delivered into the possession of such registry of deeds or registry district for the purpose of the recording thereof unless prior to the time said deed is so delivered for recording, said mortgagee has caused the full amount of the proceeds of such loan due to the mortgagor pursuant to the settlement statement relevant thereto given to said mortgagor or in the instance of any such loan in which the full amount of the proceeds due to the mortgagor pursuant to the terms thereof are not to be advanced prior to said recording, so much thereof as is designated in the loan agreement, to be transferred to the mortgagor, the mortgagor's attorney or the mortgagee's attorney in the form of a certified check, bank treasurer's check, cashier's check or by a transfer of funds between accounts within the same state or federally chartered bank or credit union, or by the funds-transfer system owned and operated by the Federal Reserve Banks, or by a transfer of funds processed by an automated clearinghouse; provided, however, that neither the mortgagor's attorney or the mortgagee's attorney shall be required to make disbursements or deliver said proceeds to the mortgagor in such form; provided, however, that the provisions of this section shall not apply to the commonwealth, its agencies or political subdivisions.

Part II
Title I Chapter 183 Section 64

REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

TITLE TO REAL PROPERTY

ALIENATION OF LAND

DISCRIMINATION IN RESIDENTIAL MORTGAGE LOANS ON BASIS OF LOCATION OF PROPERTY

Section 64. No mortgagee shall discriminate, on a basis that is arbitrary or unsupported by a reasonable analysis of the lending risks associated with a residential mortgage transaction, in the granting, withholding, extending, modifying or renewing, or in the fixing of the rates, terms, conditions or provisions of any residential mortgage loan or in any written application therefor on residential real property located in the commonwealth of four or fewer separate households occupied or to be occupied in whole or in part by the applicant, that is within the reasonable service area of such mortgagee, on the basis such property is located in a specific neighborhood or geographical area; provided, however, that it shall not be a violation of this section if the residential mortgage loan is made pursuant to a specific public or private program, the purpose of which is to increase the availability of mortgage loans within a specific neighborhood or geographical area. Nor shall any mortgagee use lending or underwriting standards, policies, systems or practices, that discriminate in practice or that discriminate in effect, on a basis that is arbitrary or unsupported by a reasonable analysis of the lending risks associated with a residential mortgage transaction. The preceding sentence shall not preclude a mortgagee from:

(a) requiring reasonable and uniformly applied application fees,

(b) utilizing income standards which are reasonable in relation to the amount of the loan requested and which shall be disclosed to each prospective applicant, or

(c) uniformly refusing to accept applications because of a lack of lendable funds.

Nor shall any mortgagee make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage in an arbitrary manner or in a manner that is unsupported by a reasonable analysis of the lending risks associated with a residential mortgage transaction, a reasonable person from making or pursuing an application.

The mortgagee shall inform each applicant in writing of the specific reasons for any adverse action on the application for such mortgage loan or for an extension, modification, or renewal of such loan. If the reason for any adverse action taken by a mortgagee is based in whole or in part on the location or condition of the collateral property, the mortgagee shall inform the applicant in writing of the estimated market value of the subject property on which it relied and the lending standards which it used in taking such adverse action. A mortgagee shall not be liable to any seller or agent of the seller of such property on account of the disclosure of the market value of such property estimated according to a reasonable appraisal rendered to the lender as part of the application process.

For the purposes of this section, adverse action shall mean refusal either to grant financing at the terms and for the amount requested or to make a counter offer acceptable to the applicant.

Nothing contained in this section shall preclude a mortgagee from considering sound underwriting practices and the creditworthiness of the applicant in the contemplation of any such loan. Such practices shall include the following:

(a) the willingness and the financial ability of the borrower to repay the loan;

(b) the market value of any real estate proposed as security for any loan;
(c) diversification of the mortgagee's investment portfolio; and

(d) the exercise of judgement and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their affairs.

Any person claiming to have been aggrieved as a result of a violation of this section may bring a civil action in the district court, or housing court where applicable, of the county in which the particular mortgagee involved is located; provided, however, that a person must first exhaust his administrative remedies through the appropriate mortgage review board established pursuant to section fourteen A of chapter one hundred and sixtyseven.

Upon a finding that a mortgagee has committed a violation of this section, the court may award actual damages or punitive damages in the amount of five thousand dollars, whichever is greater, but in no event less than two thousand five hundred dollars, and may, in its discretion, award court costs and attorney's fees.

If the court finds as a fact that any person claiming to have been aggrieved by this section has intentionally misrepresented a material fact in the mortgage application or if the court finds as a fact that the suit is frivolous, the court may award actual damages or punitive damages in the amount of five hundred dollars, whichever is greater, to the mortgagee, and may in its discretion award court costs and attorney's fees.

Chapter 183C

Section 1: **Title**

Section 1. This chapter may be known and cited as the Predatory Home Loan Practices Act.

Section 2: **Definitions**

Section 2. As used in this chapter, the following words shall, unless the context requires otherwise, have the following meanings:—

"Annual percentage rate", the annual percentage rate for a loan calculated according to the Federal Truth In Lending Act (15 U.S.C. 1601 et seq.) and the regulations promulgated thereunder by the federal Bureau of Consumer Financial Protection or chapter 140D and the regulations promulgated thereunder by the commissioner of banks.

"Benchmark rate", the interest rate which the borrower can reduce by paying bona fide discount points; this rate shall not exceed the weekly average yield of United States Treasury securities having a maturity of 5 years, on the fifteenth day of the month immediately preceding the month in which the loan is made, plus 4 percentage points.

"Bona fide loan discount points", loan discount points which are: (1) knowingly paid by the borrower; (2) paid for the express purpose of lowering the benchmark rate; and (3) in fact reducing the interest rate or time-price differential applicable to the loan from an interest rate which does not exceed the benchmark rate.

"Broker", any person who for compensation directly or indirectly solicits, processes, places or negotiates home mortgage loans for others or who closes home mortgage loans which may be in the person's own name with funds provided by others and which loans are thereafter assigned to the person providing the funding of the loans; provided, that broker shall not include a person who is an attorney providing legal services in association with the closing of a home mortgage loan who is not also funding the home loan and is not an affiliate of the lender.

"Commissioner", the commissioner of banks.

"Conventional mortgage rate", the most recently published annual yield on conventional mortgages published by the Board of Governors of the Federal Reserve System, as published in statistical release H.15 or any publication that may supersede it, as of the applicable time set forth in 12 C.F.R. 1026.32(a)(1)(i).

"Conventional prepayment penalty", any prepayment penalty or fee that may be collected or charged in a home loan, and that is authorized by law other than this

chapter, provided the home loan (1) does not have an annual percentage rate that exceeds the conventional mortgage rate by more than 2 percentage points; and (2) does not permit any prepayment fees or penalties that exceed 2 per cent of the amount prepaid.

"High cost home mortgage loan", a consumer credit transaction that is secured by the borrower's principal dwelling, other than a reverse mortgage transaction, a home mortgage loan that meets 1 of the following conditions:—

(i) the annual percentage rate at consummation will exceed by more than 8 percentage points for first-lien loans, or by more than 9 percentage points for subordinate-lien loans, the yield on United

States Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the lender; and when calculating the annual percentage rate for adjustable rate loans, the lender shall use the interest rate that would be effective once the introductory rate has expired.

(ii) Excluding either a conventional prepayment penalty or up to 2 bona fide discount points, the total points and fees exceed the greater of 5 per cent of the total loan amount or $400; the $400 figure shall be adjusted annually by the commissioner of banks on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1.

"Lender", an entity that originated 5 or more home mortgage loans within the past 12 month period or acted as an intermediary between originators and borrowers on 5 or more home mortgage loans within the past 12 month period, provided that lender shall not include a person who is an attorney providing legal services in association with the closing of a home loan who is not also funding the home loan and is not an affiliate of the lender. For the purposes of this chapter, lender shall also mean a broker.

"Obligor", a borrower, co-borrower, cosigner, or guarantor obligated to repay a home mortgage loan.

"Points and fees", (i) items required to be disclosed pursuant to sections 1026.4(a) and 1026.4(b) of Title 12 of the Code of Federal Regulations or 209 CMR 32.04(1) and 209 CMR 32.04(2) of the Code of Massachusetts Regulations, as amended from time to time, except interest or the time-price differential; (ii) charges for items listed under sections 1026.4(c)(7) of Title 12 of the Code of Federal Regulations or 209 CMR 32.04(3)(g) of the Code of Massachusetts Regulations, as amended from time to time, but only if the lender receives direct or indirect compensation in connection with the charge, otherwise, the charges are not included within the meaning of the term "points and fees"; (iii) the maximum prepayment fees and penalties that may be charged or collected under the terms of the loan documents; (iv) all prepayment fees of penalties that are incurred by the borrower if the loan refinances a previous loan made or currently held by the same lender; (v) all

compensation paid directly or indirectly to a mortgage broker, including a broker that originates a home loan in its own name in a table-funded transaction, not otherwise included in clauses (i) or (ii); (vi) the cost of all premiums financed by the creditor, directly or indirectly for any credit life, credit disability, credit unemployment or credit property insurance, or any other life or health insurance, or any payments financed by the creditor directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums or debt cancellation or suspension fees calculated and paid on a monthly basis shall not be considered financed by the creditor. Points and fees shall not include the following: (1) taxes, filing fees, recording and other charges and fees paid to or to be paid to a public official for determining the existence of or for perfecting, releasing or satisfying a security interest; and, (2) fees paid to a person other than a lender or to the mortgage broker for the following: fees for flood certification; fees for pest infestation; fees for flood determination; appraisal fees; fees for inspections performed before closing; credit reports; surveys; notary fees; escrow charges so long as not otherwise included under clause (i); title insurance premiums; and fire insurance and flood insurance premiums, if the conditions in sections 1026.4(d)(2) of Title 12 of the Code of Federal Regulations or 209 CMR 32.04(4)(b) of the Code of Massachusetts Regulations, as amended from time to time, are met. For open-end loans, the points and fees shall be calculated by adding the total points and fees known at or before closing, including the maximum prepayment penalties that may be charged or collected under the terms of the loan documents, plus the minimum additional fees the borrower would be required to pay to draw down an amount equal to the total credit line.

''Total loan amount'', the total amount the consumer will borrow, as reflected by the face amount of the note.

Section 3: **Certification from counselor with third-party nonprofit organization**

Section 3. A creditor may not make a high-cost home mortgage loan without first receiving certification from a counselor with a third-party nonprofit organization approved by the United States Department of Housing and Urban Development, a housing financing agency of this state, or the regulatory agency which has jurisdiction over the creditor, that the borrower has received counseling on the advisability of the loan transaction. Counseling shall be allowed in whole or in part by telephonic means. The commissioner shall maintain a list of approved counseling programs. A high cost home mortgage loan originated by a lender in violation of this section shall not be enforceable. At or before closing a high cost home mortgage loan, the lender shall obtain evidence that the borrower has completed an approved counseling program. Procedural conscionablity

Section 4: **Obligor's ability to make payments; presumption**

Section 4. A lender shall not make a high-cost home mortgage loan unless the lender reasonably believes at the time the loan is consummated that 1 or more of

the obligors, will be able to make the scheduled payments to repay the home loan based upon a consideration of the obligor's current and expected income, current and expected obligations, employment status, and other financial resources other than the borrower's equity in the dwelling which secures repayment of the loan.

There shall be a presumption that the borrower is able to make the scheduled payments if, at the time the loan is made, and based on the monthly payments as calculated based on the index plus the margin at the time the loan is made, in the case of loans with lower introductory rates: (1) the borrower's scheduled monthly payments on the loan, including principal, interest, taxes, insurance, and assessments, combined with the scheduled payments for all other debt, do not exceed 50 per cent of the borrowers documented and verified monthly gross income, if the borrower has sufficient residual income as defined in the guidelines established in 38 CFR 36.4337(e) and VA form 26– 6393 to pay essential monthly expenses after paying the scheduled monthly payments and any additional debt.

Section 5: **Prepayment fees and penalties**

Section 5. A high-cost home mortgage loan shall not contain any provision for prepayment fees or

penalties.

Section 6: **Limitation on financing of points and fees**

Section 6. A high-cost home mortgage loan shall not include the financing of points and fees greater than 5 per cent of the total loan amount or $800, whichever is greater.

Section 7: **Interest rate increases**

Section 7. A high-cost home mortgage loan shall not contain a provision that increases the interest rate after default. This section shall not apply to interest rate changes in a variable rate loan otherwise consistent with the home loan documents provided that the change in the interest rate is not triggered by the event of default or the acceleration of indebtedness.

Section 8: **Limitation on scheduled payments**

Section 8. A high-cost home mortgage loan shall not contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments. This subsection shall not apply when the payment schedule is adjusted to the seasonal or irregular income of the borrower.

Section 9: **Demand for repayment**

Section 9. A high-cost home mortgage loan shall not contain a demand feature that permits the lender to terminate the loan in advance of the original maturity date and to demand repayment of the entire outstanding balance, except in the following circumstances: No acceleration

(1) there is fraud or material misrepresentation by the consumer in connection with the loan that is not induced by the lender, its employees, or agents;

(2) the consumer fails to meet the repayment terms of the agreement for any outstanding balance and after the consumer has been contacted in writing and afforded a reasonable opportunity to pay the outstanding balance as outlined within the repayment terms of the agreement; or

(3) there is any bona fide action or inaction by the consumer that adversely and materially affects the lender's security for the loan, or any right of the lender in such security as provided in the loan agreement.

Section 10: **Periodic payment schedule**

Section 10. A high-cost home mortgage loan shall not contain a payment schedule with regular

periodic payments such that the result is an increase in the principal amount.

Section 11: **No fee to modify or defer payment**

Section 11. A lender shall not charge a borrower a fee or other charge to modify, renew, extend or amend a high-cost home mortgage loan or to defer a payment due under the terms of a high-cost home mortgage loan.

Section 12: **Consolidation of payments**

Section 12. A high-cost home mortgage loan shall not include terms pursuant to which more than 2 periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the borrower.

Section 13: **Forum for disputes**

Section 13. Without regard to whether a borrower is acting individually or on behalf of others similarly situated, any provision of a high cost home mortgage loan that allows a party to require a borrower to assert any claim or defense in a forum that is less convenient, more costly, or more dilatory for the resolution of a dispute than a judicial forum established in the commonwealth where the borrower may otherwise properly bring a claim or defense or limits in any way any claim or defense the borrower may have is unconscionable and void.

Section 14: **Lender's payment of contractor**

Section 14. A lender shall not pay a contractor under a home improvement contract from the proceeds of a high cost home mortgage loan other than (i) by an instrument payable to the borrower or jointly to the borrower and contractor, or (ii) at the election of the borrower, through a third party escrow agent in accordance with terms established in a written agreement signed by the borrower, the lender and the contractor before the disbursement of funds.

Section 15: **Affirmative claims and defenses available; applicability**

Section 15. (a) Any person who purchases or is otherwise assigned a high-cost home mortgage loan shall be subject to all affirmative claims and any defenses with respect to the loan that the borrower could assert against the original lender or broker of the loan; provided that this subsection shall not apply if the purchaser or assignee demonstrates by a preponderance of the evidence that it:

(1) has in place at the time of the purchase or assignment of the subject loans, policies that expressly prohibit its purchase or acceptance of assignment of any high-cost home mortgage loans;

(2) requires by contract that a seller or assignor of home loans to the purchaser or assignee represents and warrants to the purchaser or assignee that either (i) the seller or assignor will not sell or assign any high-cost home mortgage loans to the purchaser or assignee or (ii) that the seller or assignor is a beneficiary of a representation and warranty from a previous seller or assignor to that effect; and

(3) exercises reasonable due diligence at the time of purchase or assignment of home loans or within a reasonable period of time after the purchase or assignment of the home loans, intended by the purchaser or assignee to prevent the purchaser or assignee from purchasing or taking assignment of any high-cost home mortgage loans; provided, however, that reasonable due diligence shall provide for sampling and shall not require loan by loan review.

(b) Limited to amounts required to reduce or extinguish the borrower's liability under the high-cost home mortgage loan plus amounts required to recover costs, including reasonable attorneys' fees, a borrower acting only in an individual capacity may assert claims that the borrower could assert against a lender of the home loan against any subsequent holder or assignee of the home loan as follows:

(1) A borrower may bring an original action for a violation of this chapter in connection with the loan within 5 years of the closing of a high-cost home mortgage loan;

(2) A borrower may, at any time during the term of a high-cost home mortgage loan, employ any defense, claim, counterclaim, including a claim for a violation of this chapter, after an action to collect on the home loan or foreclose on the collateral

securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become 60 days in default, or in any action to enjoin foreclosure or preserve or obtain possession of the home that secures the loan.

(c) This section shall be effective notwithstanding any other provision of law; provided, that nothing in this section shall be construed to limit the substantive rights, remedies or procedural rights available to a borrower against any lender, assignee or holder under any other law. The rights conferred on borrowers by subsections (a) and (b) are independent of each other and do not limit each other.

Section 16: **Default in connection with refinancing**

Section 16. A lender shall not recommend or encourage default on an existing loan or other debt prior to and in connection with the closing or planned closing of a high-cost home mortgage loan that refinances all or any portion of the existing loan or debt.

Section 17: **Application of chapter; violations**

Section 17. (a) This chapter shall apply to any lender who attempts to avoid its application by

dividing any loan transaction into separate parts for the purpose of evading this chapter.

(b) A lender making a high-cost home mortgage loan who, when acting in good faith, fails to comply with this chapter, shall not be considered to have violated this chapter if the lender establishes that either: (1) Within 30 days of the loan closing and prior to the institution of any action under this chapter, the lender notifies the borrower of the compliance failure and makes appropriate restitution and whatever adjustments are necessary are made to the loan, at the choice of the borrower, to either: (i) make the high-cost home mortgage loan satisfy the requirements of this chapter or (ii) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high-cost home mortgage loan; or, (2) the compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance procedures reasonably adapted to avoid the errors, and within 60 days after the discovery of the compliance failure and before the institution of any action under this chapter or the receipt of written notice of the compliance failure, the borrower is notified of the compliance failure, appropriate restitution is made and whatever adjustments are necessary are made to the loan, at the choice of the borrower, to either (i) make the high-cost home mortgage loan satisfy the requirements of this chapter or (ii) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high-cost home mortgage loan. Examples of a bona fide error may include clerical errors, errors in calculation, computer malfunction and programming, and printing errors. An error in legal judgment with respect to a person's obligation under this chapter shall not be considered a bona fide error.

Section 18: **Relief; remedies**

Section 18. (a) A violation of this chapter shall constitute a violation of chapter 93A.

(b) An aggrieved borrower or borrowers may bring a civil action for injunctive relief or damages in a court of competent jurisdiction for any violation of this chapter.

(c) In addition the court shall, as the court may consider appropriate: (1) issue an order or injunction rescinding a home mortgage loan contract which violates this chapter, or barring the lender from collecting under any home mortgage loan which violates this chapter; (2) issue an order or injunction barring any judicial or non judicial foreclosure or other lender action under the mortgage or deed of trust securing any home mortgage loan which violates this chapter; (3) issue an order or injunction reforming the terms of the home mortgage loan to conform to this chapter; (4) issue an order or injunction enjoining a lender from engaging in any prohibited conduct; or (5) impose such other relief, including injunctive relief, as the court may consider just and equitable.

(d) In addition, any lender found to be in violation of this chapter shall be subject to sections 2A and 2D of chapter 167.

(e) Originating or brokering a home loan that violates a provision of this section shall constitute a violation of this chapter.

Section 19: **Regulations**

Section 19. The commissioner shall promulgate regulations necessary to carry out the provisions of this chapter.

Chapter 186, Section 3: Tenancy at sufferance; liability for rent

Section 3. Tenants at sufferance in possession of land or tenements shall be liable to pay rent therefor for such time as they may occupy or detain the same.

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES (Chapters 211 through 262)

TITLE III REMEDIES RELATING TO REAL PROPERTY

CHAPTER 239 SUMMARY PROCESS FOR POSSESSION OF LAND

Section 1 Persons entitled to summary process

Section 1. If a forcible entry into land or tenements has been made, if a peaceable entry has been made and the possession is unlawfully held by force, if the lessee of land or tenements or a person holding under him holds possession without right after the determination of a lease by its own limitation or by notice to quit or otherwise, or if a mortgage of land has been foreclosed by a sale under a power therein contained or otherwise, or if a person has acquired title to land or tenements by purchase, and the seller or any person holding under him refuses to surrender possession thereof to the buyer, or if a tax title has been foreclosed by decree of the land court, or if a purchaser, under a written agreement to purchase, is in possession of land or tenements beyond the date of the agreement without taking title to said land as called for by said agreement, the person entitled to the land or tenements may recover possession thereof under this chapter. A person in whose favor the land court has entered a decree for confirmation and registration of his title to land may in like manner recover possession thereof, except where the person in possession or any person under whom he claims has erected buildings or improvements on the land, and the land has been actually held and possessed by him or those under whom he claims for six years next before the date of said decree or was held at the date of said decree under a title which he had reason to believe good.

Part III Title III Chapter 239 Section 5

COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

REMEDIES RELATING TO REAL PROPERTY

SUMMARY PROCESS FOR POSSESSION OF LAND

APPEAL; BOND; ACTIONS THEREON; WAIVER; APPEAL OF WAIVER OR PERIODIC PAYMENTS; NOTICE OF DECISION

Section 5. (a) If either party appeals from a judgment of the superior court, a housing court, or a district court in an action under this chapter, including a judgment on a counterclaim, that party shall file a notice of appeal with the court within 10 days after the entry of the judgment. An execution upon a judgment rendered pursuant to section 3 shall not issue until the expiration of 10 days after the entry of the judgment.

(b) In an appeal of a judgment of a district court, other than an appeal governed by subsection (c), the appellant shall, before any appeal under this section is allowed, file in the district court a bond payable to the appellee in the penal sum of $100, with surety or sureties as approved by the court, or secured by cash or its equivalent deposited with the clerk, conditioned to satisfy any judgment for costs which may be entered against the appellant in the appellate division within 30 days after the entry thereof.

(c) Except as provided in section 6, the defendant shall, before any appeal under this section is allowed from a judgment of the superior court, a housing court, or a district court, rendered for the plaintiff for the possession of the land or tenements demanded in a case in which the plaintiff continues at the time of establishment of bond to seek to recover possession, give bond in a sum as the court orders, payable to the plaintiff, with sufficient surety or sureties approved by the court, or secured by cash or its equivalent deposited with the clerk, in a reasonable amount to be fixed by the court. In an appeal from a judgment of a district court the bond shall be conditioned to enter the action in the appellate division at the return day next after the appeal is taken. In an appeal from a judgment of the superior court or a housing court the bond filed shall be conditioned to enter the action in the appeals court. Appeals from judgments of the superior court or a housing court shall otherwise be governed by the Massachusetts Rules of

Appellate Procedure. The bond shall also be conditioned to pay to the plaintiff, if final judgment is in plaintiff's favor, all rent accrued at the date of the bond, all intervening rent, and all damage and

loss which the plaintiff may sustain by the withholding of possession of the land or tenements demanded and by any injury done thereto during the withholding, with all costs, until delivery of possession thereof to the plaintiff.

(d) In appeals from a judgment of the superior court, a housing court or a district court the deposit shall not be transmitted to the appeals court or the appellate division unless specifically requested by said appeals court or appellate division. The superior court, a housing court or a district court may give directions as to the manner of keeping the deposit. Upon final judgment for the plaintiff, all money then due to him may be recovered in an action on the bond provided for in the third paragraph of this section.

(e) A party may make a motion to waive the appeal bond provided for in this section if the party is indigent as provided in section 27A of chapter 261. The motion shall, together with a notice of appeal and any supporting affidavits, be filed within the time limits set forth in this section. The court shall waive the requirement of the bond or security if it is satisfied that the person requesting the waiver has any defense which is not frivolous and is indigent as provided in said section 27A of said chapter 261. The court shall require any person for whom the bond or security provided for in subsection (c) has been waived to pay in installments as the same becomes due, pending appeal, all or any portion of any rent which shall become due after the date of the waiver. A court shall not require the person to make any other payments or deposits. The court shall forthwith make a decision on the motion. If the motion is made, no execution shall issue until the expiration of 6 days from the court's decision on the motion or until the expiration of the time specified in this section for the taking of appeals, whichever is later.

(f) Any party aggrieved by the denial of a motion to waive the bond or who wishes to contest the amount of periodic payments required by the court may seek review of the decision as hereinafter provided. If the motion was made in the superior court or a housing court, the request for review shall be to the single justice of the appeals court at the next

sitting thereof. If the motion was made in any district or municipal court, the request for review shall be to the appellate division then sitting pursuant to section 108 of chapter 231. The court receiving the request shall review the findings, the amount of bond or deposit, if any, and the amount of periodic payment required, if any, as if it were initially deciding the matter, and the court may withdraw or amend any finding or reduce or rescind any amount of bond, deposit or periodic payment when in its judgment the facts so warrant.

(g) Any party to the action may file a request for the review with the clerk of the court originally hearing the request to waive bond within the time period provided in this section for filing notice of appeal, or within 6 days after receiving notice of the decision of the court on the motion to waive bond, whichever is the later. The court shall then forward the motion, the court's findings and any other documents relevant to the appeal to the clerk of the court reviewing the decision

which, upon receipt thereof, shall schedule a speedy hearing thereon and send notice thereof to the parties. Any request for review filed pursuant to this section shall be heard upon statements of counsel, memoranda and affidavits submitted by the parties. Further testimony shall be taken if the reviewing court shall find that the taking of further testimony would aid the disposition of the review.

(h) Upon the rendering of a decision on review, the reviewing court shall give notice of the decision to the parties and the defendant shall comply with the requirements of the decision within 5 days after receiving notice thereof. If the defendant fails to file with the clerk of the court rendering the judgment, the amount of bond, deposit or periodic payment required by the decision of the reviewing court within 5 days from receipt of notice of the decision, the appeal from the judgment shall be dismissed. Where a defendant seeks review pursuant to this section, no execution shall issue until the expiration of 5 days from the date defendant has received notice of the decision of the reviewing court.

Part III Title III Chapter 239 Section 6

COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES

REMEDIES RELATING TO REAL PROPERTY

SUMMARY PROCESS FOR POSSESSION OF LAND

CONDITION OF BOND IN ACTION FOR POSSESSION AFTER FORECLOSURE OF MORTGAGE; AFTER PURCHASE

Section 6. If the action is for the possession of land after foreclosure of a mortgage thereon, the condition of the bond shall be for the entry of the action and payment to the plaintiff, if final judgment is in his favor, of all costs and of a reasonable amount as rent of the land from the day when the mortgage was foreclosed until possession of the land is obtained by the plaintiff. If the action is for possession of land after purchase, the condition of the bond shall be for the entry of the action and payment to the plaintiff, if final judgment is in his favor, of all costs and of a reasonable amount as rent of the land from the day that the purchaser obtained title to the premises until the delivery of possession thereof to him, together with all damage and loss which he may sustain by withholding of possession of the land or tenement demanded, and by any injury done thereto during such withholding with all costs. Upon final judgment for the plaintiff, all money then due to him may be recovered in an action on the bond.

Chapter 244 Section 14: **Foreclosure under power of sale; procedure; notice; form**

Section 14. The mortgagee or person having estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person, may, upon breach of condition and without action, perform all acts authorized or required by the power of sale; provided, however, that no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale, notice of the sale has been published once in each of 3 successive weeks, the first publication of which shall be not less than 21 days before the day of sale, in a newspaper published in the city or town where the land lies or in a newspaper with general circulation in the city or town where the land lies and notice of the sale has been sent by registered mail to the owner or owners of record of the equity of redemption as of 30 days prior to the date of sale, said notice to be mailed by registered mail at least 14 days prior to the date of sale to said owner or owners to the address set forth in section 61 of chapter 185, if the land is then registered or, in the case of unregistered land, to the last address of the owner or owners of the equity of redemption appearing on the records of the holder of the mortgage, if any, or if none, to the address of the owner or owners as given on the deed or on the petition for probate by which the owner or owners acquired title, if any, or if in either case no owner appears, then mailed by registered mail to the address to which the tax collector last sent the tax bill for the mortgaged premises to be sold, or if no tax bill has been sent for the last preceding 3 years, then mailed by registered mail to the address of any of the parcels of property in the name of said owner of record which are to be sold under the power of sale and unless a copy of said notice of sale has been sent by registered mail to all persons of record as of 30 days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed, said notice to be mailed at least 14 days prior to the date of sale to each such person at the address of such person set forth in any document evidencing the interest or to the last address of such person known to the mortgagee. Any person of record as of 30 days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed may waive at any time, whether prior or subsequent to the date of sale, the right to receive notice by mail to such person under this section and such waiver shall constitute compliance with such notice requirement for all purposes. If no newspaper is published in such city or town, or if there is no newspaper with general circulation in the city or town where the land lies, notice may be published in a newspaper published in the county where the land lies, and this provision shall be implied in every power of sale mortgage in which it is not expressly set forth. A newspaper which by its title page purports to be printed or

published in such city, town or county, and having a circulation in that city, town or county, shall be sufficient for the purposes of this section.

The following form of foreclosure notice may be used and may be altered as circumstances require; but nothing in this section shall be construed to prevent the use of other forms.

(Form.)

MORTGAGEE'S SALE OF REAL ESTATE.

By virtue and in execution of the Power of Sale contained in a certain mortgage given by . . . . . .<Vy> to . . . . . .<Vy> dated . . . . . .<Vy> and recorded with

.....

Deeds, Book . . . . . .<Vy>, page . . . . . .<Vy>, of which mortgage the undersigned is the present holder, ...<Vy>.

(If by assignment, or in any fiduciary capacity, give reference to the assignment or assignments recorded with . . . . .Deeds, Book . . . . . .<Vy>, page . . . . . .<Vy>, of which mortgage the undersigned is the present holder, ...<Vy>)

for breach of the conditions of said mortgage and for the purpose of foreclosing the same will be sold at Public Auction at . . . . . .<Vy>o'clock, ...<Vy> M. on the . . . . . .<Vy> day of . . . . . .<Vy> A.D. (insert year), ...<Vy> (place) . . . . . .<Vy> all and singular the premises described in said mortgage,

(In case of partial releases, state exceptions.)

To wit: "(Description as in the mortgage, including all references to title, restrictions, encumbrances, etc., as made in the mortgage.)"

Terms of sale: (State here the amount, if any, to be paid in cash by the purchaser at the time and place of the sale, and the time or times for payment of the balance or the whole as the case may be.)

Other terms to be announced at the sale. (Signed) ___
Present holder of said mortgage.___

A notice of sale in the above form, published in accordance with the power in the mortgage and with this chapter, together with such other or further notice,

if any, as is required by the mortgage, shall be a sufficient notice of the sale; and the premises shall be deemed to have been sold and the deed thereunder shall convey the premises, subject to and with the benefit of all restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes, assessments, liens or claims in the nature of liens, and existing encumbrances of record created prior to the mortgage, whether or not reference to such restrictions, easements, improvements, liens or encumbrances is made in the deed; provided, however, that no purchaser at the sale shall be bound to complete the purchase if there are encumbrances, other than those named in the mortgage and included in the notice of sale, which are not stated at the sale and included in the auctioneer's contract with the purchaser.

For purposes of this section and section 21 of chapter 183, in the event a mortgagee holds a mortgage pursuant to an assignment, no notice under this section shall be valid unless (i) at the time such notice is mailed, an assignment, or a chain of assignments, evidencing the assignment of the mortgage to the foreclosing mortgagee has been duly recorded in the registry of deeds for the county or district where the land lies and (ii) the recording information for all recorded assignments is referenced in the notice of sale required in this section. The notice shall not be defective if any holder within the chain of assignments either changed its name or merged into another entity during the time it was the mortgage holder; provided, that recited within the body of the notice is the fact of any merger, consolidation, amendment, conversion or acquisition of assets causing the change in name or identity, the recital of which shall be conclusive in favor of any bona fide purchaser, mortgagee, lienholder or encumbrancer of value relying in good faith on such recital.

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES (Chapters 211 through 262)

TITLE III REMEDIES RELATING TO REAL PROPERTY

CHAPTER 244 FORECLOSURE AND REDEMPTION OF MORTGAGES

Section 35A Right of residential real property mortgagor to cure a default; good faith effort to negotiate for commercially reasonable alternative to foreclosure; response from borrower; affidavit upon initiation of foreclosure proceedings; acceleration of maturity of balance prohibited; notice

[Text of section effective until January 1, 2016. For text effective January 1, 2016, see below.]

Section 35A. (a) As used in this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:

“Borrower”, a mortgagor of a mortgage loan.

“Borrower’s representative”, an employee or contractor of a non-profit organization certified by Housing and Urban Development, an employee or contractor of a foreclosure education center pursuant to section 16 of chapter 206 of the acts of 2007 or an employee or contractor of a counseling agency receiving a Collaborative Seal of Approval from the Massachusetts Homeownership Collaborative administered by the Citizens’ Housing and Planning Association.

“Creditor”, a person or entity that holds or controls, partially, wholly, indirectly, directly, or in a nominee capacity, a mortgage loan securing a residential property, including, without limitation, an originator, holder, investor, assignee, successor, trust, trustee, nominee holder, Mortgage Electronic Registration System or mortgage servicer, including the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. “Creditor” shall also include any servant, employee or agent of a creditor.

“Creditor’s representative”, a person who has the authority to negotiate the terms of and modify a mortgage loan.

“Modified mortgage loan”, a mortgage modified from its original terms including, but not limited to, a loan modified pursuant to 1 of the following: (i) the Home Affordable Modification Program; (ii) the Federal Deposit Insurance Corporation’s Loan Modification Program; (iii) any modification

program that a lender uses which is based on accepted principles and the safety and soundness of the institution and recognized by the National Credit Union Administration, the Division of Banks or any other instrumentality of the commonwealth; (iv) the Federal Housing Agency; or (v) a similar federal refinance plan.

"Mortgage loan", a loan to a natural person made primarily for personal, family or household purposes secured wholly or partially by a mortgage on residential property.

"Net present value", the present net value of a residential property based on a calculation using 1 of the following: (i) the federal Home Affordable Modification Program Base Net Present Value Model, (ii) the Federal Deposit Insurance Corporation's Loan Modification Program; or (iii) for the Massachusetts Housing Finance Agency's loan program used solely by the agency to compare the expected economic outcome of a loan with or without a loan modification.

"Residential property", real property located in the commonwealth having thereon a dwelling house with accommodations for 4 or less separate households and occupied, or to be occupied, in whole or in part by the obligor on the mortgage debt; provided, however, that residential property shall be limited to the principal residence of a person; provided further, that residential property shall not include an investment property or residence other than a primary residence; and provided further, that residential property shall not include residential property taken in whole or in part as collateral for a commercial loan.

(b) A mortgagor of residential property shall have a 150-day right to cure a default of a required payment as provided in the residential mortgage or note secured by the residential property by full payment of all amounts that are due without acceleration of the maturity of the unpaid balance of the mortgage; provided, however, that if a creditor certifies that: (i) it has engaged in a good faith effort to negotiate a commercially reasonable alternative to foreclosure as described in subsection (c); (ii) its good faith effort has involved at least 1 meeting, either in person or by telephone, between a creditor's representative and the borrower, the borrower's attorney or the borrower's representative; and (iii) after such meeting the borrower and the creditor were not successful in resolving their dispute, then the creditor may begin foreclosure proceedings after a right to cure period lasting 90 days. A borrower who fails to respond within 30 days to any mailed communications offering to negotiate a commercially reasonable alternative to foreclosure sent via certified and first class mail or similar service by a private carrier from the lender shall be deemed to have forfeited the right to a 150-day right to cure period and shall be subject to a right to cure period

lasting 90 days. The right to cure a default of a required payment shall be granted once during any 3 year period, regardless of mortgage holder.

(c) For purposes of this section, a determination that a creditor has made a good faith effort to negotiate and agree upon a commercially reasonable alternative to foreclosure shall mean that the creditor has considered: (i) an assessment of the borrower's current circumstances including, without limitation, the borrower's current income, debts and obligations; (ii) the net present value of receiving payments pursuant to a modified mortgage loan as compared to the anticipated net recovery following foreclosure; and (iii) the interests of the creditor; provided, however, that nothing in this subsection shall be construed as prohibiting a creditor from considering other factors; provided, further, that the creditor shall provide by first class and certified mail or similar service by a private carrier to a borrower documentation of good faith effort 10 days prior to meeting, telephone conversation or a meeting pursuant to subsection (b).

(d) A borrower who receives a loan modification offer from the creditor resulting from the lender's good faith effort to negotiate and agree upon a commercially reasonable alternative to foreclosure shall respond within 30 days of receipt of first class or certified mail. A borrower shall be presumed to have responded if the borrower provides: (i) confirmation of a facsimile transmission to the creditor; (ii) proof of delivery through the United States Postal Service or similar carrier; or (iii) record of telephone call to the creditor captured on a telephone bill or pin register. A borrower who fails to respond to the creditor's offer within 30 days of receipt of a loan modification offer shall be deemed to have forfeited the 150-day right to cure period and shall be subject to a right to cure period lasting 90 days.

(e) Nothing in this section shall prevent a creditor from offering or accepting alternatives to foreclosure, such as a short sale or deed-in-lieu of foreclosure, if the borrower requests such alternatives, rejects a loan modification offered pursuant to this subsection or does not qualify for a loan modification pursuant to this subsection.

(f) A creditor that chooses to begin foreclosure proceedings after a right to cure period lasting less than 150 days that engaged in a good faith effort to negotiate and agree upon a commercially reasonable alternative but was not successful in resolving the dispute shall certify compliance with this section in an affidavit. The affidavit shall include the time and place of the meeting, parties participating, relief offered to the borrower, a summary of the creditor's net present value analysis and applicable inputs of the analysis and certification that any modification or option offered complies with current federal law or policy. A creditor shall provide a copy of the affidavit to the homeowner and file a copy of the affidavit with the land court in advance of the foreclosure.

(g) The mortgagee, or anyone holding thereunder, shall not accelerate maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage because of a default consisting of the mortgagor's failure to make any such payment in subsection (b) by any method authorized by this chapter or any other law until at least 150 days after the date a written notice is given by the mortgagee to the mortgagor; provided, however, that a creditor meeting the requirements of subsection (b) that chooses to begin foreclosure proceedings after a right to cure period lasting less than 150 days may accelerate maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage because of a default consisting of the mortgagor's failure to make any such payment in subsection (b) by any method authorized by this chapter or any other law not less than 91 days after the date a written notice is given by the creditor to the mortgagor.

Said notice shall be deemed to be delivered to the mortgagor: (i) when delivered by hand to the mortgagor; or (ii) when sent by first class mail and certified mail or similar service by a private carrier to the mortgagor at the mortgagor's address last known to the mortgagee or anyone holding thereunder.

(h) The notice required in subsection (g) shall inform the mortgagor of the following:—

(1) the nature of the default claimed on such mortgage of residential real property and of the mortgagor's right to cure the default by paying the sum of money required to cure the default;

(2) the date by which the mortgagor shall cure the default to avoid acceleration, a foreclosure or other action to seize the home, which date shall not be less than 150 days after service of the notice and the name, address and local or toll free telephone number of a person to whom the payment or tender shall be made unless a creditor chooses to begin foreclosure proceedings after a right to cure period lasting less than 150 days that engaged in a good faith effort to negotiate and agree upon a commercially reasonable alternative but was not successful in resolving the dispute, in which case a foreclosure or other action to seize the home may take place on an earlier date to be specified;

(3) that, if the mortgagor does not cure the default by the date specified, the mortgagee, or anyone holding thereunder, may take steps to terminate the mortgagor's ownership in the property by a foreclosure proceeding or other action to seize the home;

(4) the name and address of the mortgagee, or anyone holding thereunder, and the telephone number of a representative of the mortgagee whom the

mortgagor may contact if the mortgagor disagrees with the mortgagee's assertion that a default has occurred or the correctness of the mortgagee's calculation of the amount required to cure the default;

(5) the name of any current and former mortgage broker or mortgage loan originator for such mortgage or note securing the residential property;

(6) that the mortgagor may be eligible for assistance from the Homeownership Preservation Foundation or other foreclosure counseling agency, and the local or toll free telephone numbers the mortgagor may call to request this assistance;

(7) that the mortgagor may sell the property prior to the foreclosure sale and use the proceeds to pay off the mortgage;

(8) that the mortgagor may redeem the property by paying the total amount due, prior to the foreclosure sale;

(9) that the mortgagor may be evicted from the home after a foreclosure sale; and

(10) the mortgagor may have the following additional rights, depending on the terms of the residential mortgage: (i) to refinance the obligation by obtaining a loan which would fully repay the residential mortgage debtor; and (ii) to voluntarily grant a deed to the residential mortgage lender in lieu of foreclosure.

The notice shall also include a declaration, in the language the creditor has regularly used in its communication with the borrower, appearing on the first page of the notice stating: "This is an important notice concerning your right to live in your home. Have it translated at once."

The division of banks shall adopt regulations in accordance with this subsection.

(i) To cure a default prior to acceleration under this section, a mortgagor shall not be required to pay any charge, fee or penalty attributable to the exercise of the right to cure a default. The mortgagor shall pay late fees as allowed pursuant to section 59 of chapter 183 and per-diem interest to cure such default. The mortgagor shall not be liable for any attorneys' fees relating to the mortgagor's default that are incurred by the mortgagee or anyone holding thereunder prior to or during the period set forth in the notice required by this section. The mortgagee, or anyone holding thereunder, may also provide for reinstatement of the note after the 150-day notice to cure has ended.

(j) A copy of the notice required by this section and an affidavit demonstrating compliance with this section shall be filed by the mortgagee, or anyone holding thereunder, in any action or proceeding to foreclose on such residential real property.

(k) A copy of the notice required by this section shall also be filed by the mortgagee, or anyone holding thereunder, with the commissioner of the division of banks. Additionally, if the residential property securing the mortgage loan is sold at a foreclosure sale, the mortgagee, or anyone holding thereunder, shall notify the commissioner of the division of banks, in writing, of the date of the foreclosure sale and the purchase price obtained at the sale.

[Text of section as amended by 2010, 258, Sec. 8 effective January 1, 2016. See 2010, 258, Sec. 14. For text effective until January 1, 2016, see above.]

Section 35A. (a) Any mortgagor of residential real property located in the commonwealth, shall have a 90-day right to cure a default of a required payment as provided in such residential mortgage or note secured by such residential real property by full payment of all amounts that are due without acceleration of the maturity of the unpaid balance of such mortgage. The right to cure a default of a required payment shall be granted once during any 5-year period, regardless of the mortgage holder. For the purposes of this section, “residential property”, shall mean real property located in the commonwealth having thereon a dwelling house with accommodations for 4 or less separate households and occupied, or to be occupied, in whole or in part by the mortgagor; provided, however, that residential property shall be limited to the principal residence of a person; provided further, that residential property shall not include an investment property or residence other than a primary residence; and provided further, that residential property shall not include residential property taken in whole or in part as collateral for a commercial loan.

(b) The mortgagee, or anyone holding thereunder, shall not accelerate maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage because of a default consisting of the mortgagor’s failure to make any such payment in subsection (a) by any method authorized by this chapter or any other law until at least 90 days after the date a written notice is given by the mortgagee to the mortgagor.

Said notice shall be deemed to be delivered to the mortgagor: (i) when delivered by hand to the mortgagor; or (ii) when sent by first class mail and certified mail or similar service by a private carrier to the mortgagor at the mortgagor’s address last known to the mortgagee or anyone holding thereunder.

(c) The notice required in subsection (b) shall inform the mortgagor of the following:—

(1) the nature of the default claimed on such mortgage of residential real property and of the mortgagor's right to cure the default by paying the sum of money required to cure the default;

(2) the date by which the mortgagor shall cure the default to avoid acceleration, a foreclosure or other action to seize the home, which date shall not be less than 90 days after service of the notice and the name, address and local or toll free telephone number of a person to whom the payment or tender shall be made;

(3) that, if the mortgagor does not cure the default by the date specified, the mortgagee, or anyone holding thereunder, may take steps to terminate the mortgagor's ownership in the property by a foreclosure proceeding or other action to seize the home;

(4) the name and address of the mortgagee, or anyone holding thereunder, and the telephone number of a representative of the mortgagee whom the mortgagor may contact if the mortgagor disagrees with the mortgagee's assertion that a default has occurred or the correctness of the mortgagee's calculation of the amount required to cure the default;

(5) the name of any current and former mortgage broker or mortgage loan originator for such mortgage or note securing the residential property;

(6) that the mortgagor may be eligible for assistance from the Massachusetts Housing Finance Agency and the division of banks and the local or toll free telephone numbers the mortgagor may call to request this assistance;

(7) that the mortgagor may sell the property prior to the foreclosure sale and use the proceeds to pay off the mortgage;

(8) that the mortgagor may redeem the property by paying the total amount due, prior to the foreclosure sale;

(9) that the mortgagor may be evicted from the home after a foreclosure sale; and

(10) the mortgagor may have the following additional rights, depending on the terms of the residential mortgage: (i) to refinance the obligation by obtaining a loan which would fully repay the residential mortgage debtor; and (ii) to voluntarily grant a deed to the residential mortgage lender in lieu of foreclosure.

The notice shall also include a declaration, appearing on the first page of the notice stating: “This is an important notice concerning your right to live in your home. Have it translated at once.”

The division of banks shall adopt regulations in accordance with this subsection.

(d) To cure a default prior to acceleration under this section, a mortgagor shall not be required to pay any charge, fee, or penalty attributable to the exercise of the right to cure a default. The mortgagor shall pay late fees as allowed pursuant to section 59 of chapter 183 and per-diem interest to cure such default. The mortgagor shall not be liable for any attorneys’ fees relating to the mortgagor’s default that are incurred by the mortgagee or anyone holding thereunder prior to or during the period set forth in the notice required by this section. The mortgagee, or anyone holding thereunder, may also provide for reinstatement of the note after the 90 day notice to cure has ended.

(e) A copy of the notice required by this section and an affidavit demonstrating compliance with this section shall be filed by the mortgagee, or anyone holding thereunder, in any action or proceeding to foreclose on such residential real property.

(f) A copy of the notice required by this section shall also be filed by the mortgagee, or anyone holding thereunder, with the commissioner of the division of banks. Additionally, if the residential property securing the mortgage loan is sold at a foreclosure sale, the mortgagee, or anyone holding thereunder, shall notify the commissioner of the division of banks, in writing, of the date of the foreclosure sale and the purchase price obtained at the sale.

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES
TITLE III REMEDIES RELATING TO REAL PROPERTY
CHAPTER 244 FORECLOSURE AND REDEMPTION OF MORTGAGES
Section 35B Requirement of reasonable steps and good faith effort to avoid foreclosure;; criteria;; notice of right to pursue modified mortgage;; recording of affidavit of compliance

[Text of section applicable as provided by 2012, 194, Sec. 7.]

Section 35B. (a) As used in this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:—

“Affordable monthly payment”, monthly payments on a mortgage loan, which, taking into account the borrower’s current circumstances, including verifiable income, debts, assets and obligations enable a borrower to make the payments.

“Borrower”, a mortgagor of a mortgage loan.

“Certain mortgage loan”, a loan to a natural person made primarily for personal, family or household purposes secured wholly or partially by a mortgage on an owner-occupied residential property with 1 or more of the following loan features: (i) an introductory interest rate granted for a period of 3 years or less and such introductory rate is at least 2 per cent lower than the fully indexed rate;; (ii) interest-only payments for any period of time, except in the case where the mortgage loan is an open-end home equity line of credit or is a construction loan;; (iii) a payment option feature, where any 1 of the payment options is less than principal and interest fully amortized over the life of the loan;; (iv) the loan did not require full documentation of income or assets;; (v) prepayment penalties that exceed section 56 of chapter 183 or applicable federal law;; (vi) the loan was underwritten with a loan-to-value ratio at or above 90 per cent and the ratio of the borrower’s debt, including all housing-related and recurring monthly debt, to the borrower’s income exceeded 38 per cent;; or (vii) the loan was underwritten as a component of a loan transaction, in which the combined loan-to-value ratio exceeded 95 per cent;; provided, however, that a loan shall be a certain mortgage loan if, after the performance of reasonable due diligence, a creditor is unable to determine whether the loan has 1 or more of the loan features in clauses (i) to (vii), inclusive;; and provided, further, that loans financed by the Massachusetts Housing Finance Agency, established in chapter 708 of the acts of 1966 and loans originated through programs

administered by the Massachusetts Housing Partnership Fund board established in section 35 of chapter 405 of the acts of 1985 shall not be certain mortgage loans.

“Creditor”, a person or entity that holds or controls, partially, wholly, indirectly, directly or in a nominee capacity, a mortgage loan securing an owner-occupied residential property, including, but not limited to, an originator, holder, investor, assignee, successor, trust, trustee, nominee holder, Mortgage Electronic Registration System or mortgage servicer, including the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation;; provided, that “creditor” shall also include any servant, employee or agent of a creditor;; and provided, further, that the bodies politic and corporate and public instrumentalities of the commonwealth established in chapter 708 of the acts of 1966 and in section 35 of chapter 405 of the acts of 1985 shall not be a creditor.

“Creditor’s representative”, a person who has the authority to negotiate and approve the terms of and modify a mortgage loan, or a person who, under a servicing agreement, has the authority to negotiate and approve the terms of and modify a mortgage loan.

“Modified mortgage loan”, a mortgage loan modified from its original terms including, but not limited to, a loan modified under 1 of the following: (i) the Home Affordable Modification Program;; (ii) the Federal Deposit Insurance Corporation’s Loan Modification Program;; (iii) any modification program that a lender uses which is based on accepted principles and the safety and soundness of the institution and authorized by the National Credit Union Administration, the division of banks or any other instrumentality of the commonwealth;; (iv) the Federal Housing Administration;; or (v) a similar federal loan modification plan.

“Mortgage loan”, a loan to a natural person made primarily for personal, family or household purposes secured wholly or partially by a mortgage on residential property.

“Net present value”, the present net value of a residential property based on a calculation using 1 of the following: (i) the federal Home Affordable Modification Program base net present value model;; (ii) the Federal Deposit Insurance Corporation’s Loan Modification Program;; (iii) the Massachusetts Housing Finance Agency’s loan program used solely by the agency to compare the expected economic outcome of a

loan with or without a modified mortgage loan;; or (iv) any model approved by the division of banks to consider the total present value of a series of future cash flows relative to a mortgage loan.

“Residential property”, real property located in the commonwealth, on which there is a dwelling house with accommodations for 4 or fewer separate households and occupied, or to be occupied, in whole or in part by the obligor on the mortgage debt;; provided, however, that residential property shall be limited to the principal residence of a person;; provided, further, that residential property shall not include an investment property or residence other than a primary residence;; provided, further, that residential property shall not include residential property taken in whole or in part as collateral for a commercial loan;; and provided, further, that residential property shall not include a property subject to condemnation or receivership.

(b) A creditor shall not cause publication of notice of a foreclosure sale, as required by section 14, upon certain mortgage loans unless it has first taken reasonable steps and made a good faith effort to avoid foreclosure. A creditor shall have taken reasonable steps and made a good faith effort to avoid foreclosure if the creditor has considered: (i) an assessment of the borrower’s ability to make an affordable monthly payment;; (ii) the net present value of receiving payments under a modified mortgage loan as compared to the anticipated net recovery following foreclosure;; and (iii) the interests of the creditor, including, but not limited to, investors.

(1) Except as otherwise specified in a contract, a servicer of pooled residential mortgages may determine whether the net present value of the payments on the modified mortgage loan is likely to be greater than the anticipated net recovery that would result from foreclosure to all investors and holders of beneficial interests in such investment, but not to any individual or groups of investors or beneficial interest holders. The servicer shall act in the best interests of all such investors or holders of beneficial interests if the servicer agrees to or implements a modified mortgage loan or takes reasonable loss mitigation actions that comply with this section. Any modified mortgage loan offered to the borrower shall comply with current federal and state law, including, but not limited to, all rules and regulations pertaining to mortgage loans and the borrower shall be able to reasonably afford to repay the modified mortgage loan according to its scheduled payments. Notwithstanding section 63A of chapter 183, any modified mortgage loan may be made without the consent of the holders of junior

encumbrances and without loss of priority for the full amount of the loan thereby modified and shall not be construed so as to grant to any such holder of a junior encumbrance rights which, except for said revision, the holder would not otherwise have.

(2) A creditor shall be presumed to have acted in good faith and to have complied with this subsection, if, prior to causing publication of notice of a foreclosure sale, as required by section 14, the creditor:

(i) determines a borrower's current ability to make an affordable monthly payment;;

(ii) identifies a modified mortgage loan that achieves the borrower's affordable monthly payment, which may include 1 or more of the following: reduction in principal, reduction in interest rate or an increase in amortization period;; provided, however, that the amortization period shall not be more than a 15-year increase;; provided, further, that no modified mortgage loan shall have an amortization period that exceeds 45 years;;

(iii) conducts a compliant analysis comparing the net present value of the modified mortgage loan and the creditor's anticipated net recovery that would result from foreclosure;; provided, that the analysis shall be compliant if the analysis is in accordance with the formula presented in at least 1 of the following: (A) the Home Affordable Modification Program;; (B) the Federal Deposit Insurance Corporation's Loan Modification Program;; (C) any modification program that a lender uses which is based on accepted principles and the safety and soundness of the institution and authorized by the National Credit Union Administration, the division of banks or any other instrumentality of the commonwealth;; (D) the Federal Housing Administration;; or (E) a similar federal loan modification plan;; and

(iv) either (A) in all circumstances where the net present value of the modified mortgage loan exceeds the anticipated net recovery at foreclosure, agrees to modify the loan in a manner that provides for the affordable monthly payment;; or (B) in circumstances where the net present value of the modified mortgage loan is less than the anticipated net recovery of the foreclosure, or does not meet the borrower's affordable monthly payment, notifies the borrower that no modified mortgage loan will be offered and provides a written summary of the creditor's net present value analysis and the borrower's current

ability to make monthly payments, after which the creditor may proceed with the foreclosure process in conformity with this chapter.

(c) Under this section, for certain mortgage loans, the creditor shall send notice, concurrently with the notice required by subsection (g) of section 35A, of the borrower's rights to pursue a modified mortgage loan. Said notice shall be considered delivered to the borrower when sent by first class mail and certified mail or similar service by a private carrier to the borrower at the borrower's address last known to the mortgagee or anyone holding thereunder. A copy of said notice shall be filed with the attorney general. The process for determining whether a modified mortgage loan is offered shall take no longer than 150 days. Not more than 30 days following delivery of the notice as provided for in this subsection, a borrower who holds a certain mortgage loan shall notify a creditor of: (i) the borrower's intent to pursue a modified mortgage loan which shall include a statement of the borrower's income and a complete list of total debts and obligations, as requested by the creditor, at the time of receipt of the notice;; (ii) the borrower's intent to pursue an alternative to foreclosure, including a short sale or deed-in-lieu of foreclosure;; (iii) the borrower's intent not to pursue a modified mortgage loan and pursue the right to cure period described in section 35A;; or (iv) the borrower's intent to waive the right to cure period and proceed to foreclosure. A borrower who holds a certain mortgage loan and fails to respond to the creditor within 30 days of delivery of the notice provided for in this subsection shall be considered to have forfeited the right to cure period and shall be subject to a right to cure period of 90 days. A borrower shall be presumed to have notified the creditor if the borrower provides proof of delivery through the United States Postal Service or similar carrier. Not more than 30 days following receipt of the borrower's notification that the borrower intends to pursue a modified mortgage loan, a creditor shall provide the borrower with its assessment, in writing, under subsection (b). The assessment shall include, but not be limited to: (i) a written statement of the borrower's income, debts and obligations as determined by the creditor;; (ii) the creditor's net present value analysis of the mortgage loan;; (iii) the creditor's anticipated net recovery at foreclosure;; (iv) a statement of the interests of the creditor;; and (v) a modified mortgage loan offer under the requirements of this section or notice that no modified mortgage loan will be offered. If a creditor offers a modified mortgage loan, the offer shall include the first and last names and contact phone numbers of the creditor's representative;; provided, that the creditor shall not assign more than 2 creditor's representatives responsible for negotiating and approving the terms of

and modifying the mortgage loan. The assessment shall be provided by first class and certified mail. A creditor shall be presumed to have provided the assessment to the borrower if the creditor provides proof of delivery through the United States Postal Service or similar carrier. A borrower who receives a modified mortgage loan offer from a creditor shall respond within 30 days of receipt of the assessment and offer of a modified mortgage loan. The borrower may: (i) accept the offer of a loan modification as provided by the creditor;; (ii) make a reasonable counteroffer;; or (iii) state that the borrower wishes to waive the borrower's rights as provided by this section and proceed to foreclosure. The borrower's response shall be in writing and, if a counteroffer is proposed, shall include substantiating documentation in support of the counteroffer. The response shall be provided by first class and certified mail. A borrower shall be presumed to have responded if the borrower provides proof of delivery through the United States Postal Service or similar carrier. A borrower who fails to respond to the creditor within 30 days of receipt of a modified mortgage loan offer shall be considered to have forfeited the 150 day right to cure period and shall be subject to a right to cure period of 90 days. Where a counteroffer is proposed, the creditor shall accept, reject or propose a counteroffer to the borrower within 30 days of receipt. Under this section, additional offers by both parties shall be considered during the right to cure period;; provided, however, that a borrower may at any time state, in writing, that the borrower wishes to waive the borrower's rights as provided by this section and proceed to foreclosure. Nothing in this section shall be construed as preventing a creditor and a borrower from negotiating the terms of a modified mortgage loan by telephone or in person following the initial offer of a modified mortgage loan by a creditor;; provided, however, that all offers, whether by a creditor or a borrower, shall be in writing and signed by the offeror. The right to a modified mortgage loan, as described in this section, shall be granted once during any 3-year period, regardless of the mortgage holder.

(d) The notice required in subsection (c) shall, at a minimum, include the appropriate contact information for modification assistance within the office of the attorney general;; provided, that, the notice shall be similar in substance and form to the notice promulgated by the division of banks under section 35A.

(e) Nothing in this section shall prevent a creditor from offering or accepting an alternative to foreclosure, such as a short sale or deed-in-lieu of foreclosure, if the borrower requests such alternative, rejects a

modified mortgage loan offer or does not qualify for a modified mortgage loan under this section.

(f) Prior to publishing a notice of a foreclosure sale, as required by section 14, the creditor, or if the creditor is not a natural person, an officer or duly authorized agent of the creditor, shall certify compliance with this section in an affidavit based upon a review of the creditor's business records. The creditor, or an officer or duly authorized agent of the creditor, shall record this affidavit with the registry of deeds for the county or district where the land lies.

The affidavit certifying compliance with this section shall be conclusive evidence in favor of an arm's-length third party purchaser for value, at or subsequent to the resulting foreclosure sale, that the creditor has fully complied with this section and the mortgagee is entitled to proceed with foreclosure of the subject mortgage under the power of sale contained in the mortgage and any 1 or more of the foreclosure procedures authorized in this chapter;; provided, that the arm's- length third party purchaser for value relying on such affidavit shall not be liable for any failure of the foreclosing party to comply and title to the real property thereby acquired shall not be set aside on account of such failure. The filing of such affidavit shall not relieve the affiant, or other person on whose behalf the affidavit is executed, from liability for failure to comply with this section, including by reason of any statement in the affidavit. For purposes of this subsection, the term "arm's-length, third party purchaser for value" shall include such purchaser's heirs, successors and assigns.

(g) On a bi-annual basis, a creditor shall report the final outcome of each loan modification on all mortgage loans for which the creditor sent to a borrower a notice of the right to pursue a modified mortgage loan to the division of banks.

(h) The division of banks shall adopt, amend or repeal regulations to aid in the administration and enforcement of this section, including the minimum requirements which constitute a good faith effort by the borrower to respond to the notice required under subsection (c);; provided, that, such regulations may include requirements for reasonable steps and good faith efforts of the creditor to avoid foreclosure and safe harbors for compliance in addition to those under this section. The division of banks shall make any available net present value models accessible to all creditors.

PART III COURTS, JUDICIAL OFFICERS AND PROCEEDINGS IN CIVIL CASES (Chapters 211 through 262)

TITLE III REMEDIES RELATING TO REAL PROPERTY

CHAPTER 244 FORECLOSURE AND REDEMPTION OF MORTGAGES

Section 35C Creditor actions in violation of chapter

[Text of section added by 2012, 194, Sec. 2 effective November 1, 2012 applicable as provided by 2012, 194, Sec. 7. See 2012, 194, Sec. 9.]

Section 35C. (a) As used in this section, the following words shall, unless the context clearly requires otherwise, have the following meanings:--

"Borrower", a mortgagor of a mortgage loan.

"Creditor", a person or entity that holds or controls, partially, wholly, indirectly, directly or in a nominee capacity, a mortgage loan securing a residential property, including, but not limited to, an originator, holder, investor, assignee, successor, trust, trustee, nominee holder, Mortgage Electronic Registration System or mortgage servicer, including the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation. The term creditor shall also include any servant, employee or agent of a creditor.

"Mortgage loan", a loan to a natural person made primarily for personal, family or household purposes secured wholly or partially by a mortgage on residential property.

"Residential property", real property located in the commonwealth on which there is a dwelling house with accommodations for 4 or fewer separate households and occupied, or to be occupied, in whole or in part, by the obligor on the mortgage debt; provided, however, that residential property shall be limited to the principal residence of a person; provided, further, that residential property shall not include an investment property or residence other than a primary residence; and provided, further, that residential property shall not include residential property taken in whole or in part as collateral for a commercial loan.

(b) A creditor shall not cause publication of notice of foreclosure, as required under section 14, when the creditor knows or should know that the mortgagee is neither the holder of the mortgage note nor the authorized agent of the note holder.

Prior to publishing a notice of a foreclosure sale, as required by section 14, the creditor, or if the creditor is not a natural person, an officer or duly authorized agent of the creditor, shall certify

compliance with this subsection in an affidavit based upon a review of the creditor's business records. The creditor, or an officer or duly authorized agent of the creditor, shall record this affidavit with the registry of deeds for the county or district where the land lies. The affidavit certifying compliance with this subsection shall be conclusive evidence in favor of an arm's- length third party purchaser for value, at or subsequent to the resulting foreclosure sale, that the creditor has fully complied with this section and the mortgagee is entitled to proceed with foreclosure of the subject mortgage under the power of sale contained in the mortgage and any 1 or more of the foreclosure procedures authorized in this chapter; provided that, the arm's- length third party purchaser for value relying on such affidavit shall not be liable for any failure of the foreclosing party to comply and title to the real property thereby acquired shall not be set aside on account of such failure. The filing of such affidavit shall not relieve the affiant, or other person on whose behalf the affidavit is executed, from liability for failure to comply with this section, including by reason of any statement in the affidavit. For purposes of this subsection, the term "arm's-length, third party purchaser for value" shall include such purchaser's heirs, successors and assigns.

(c) A creditor violates this chapter if the creditor imposes upon a third party the cost of correcting, curing or confirming 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 was commenced without the creditor's possession of a valid, written, signed and dated assignment evidencing the assignment of the mortgage, in violation of section 14. A third party may recover all of the third party's costs including reasonable attorneys' fees for having to correct, cure or confirm documentation.

(d) A creditor violates this chapter if the creditor makes statements to a state or federal court related to foreclosure or compliance with this chapter, orally or in writing, that it knows or should know are false, including, but not limited to, statements about the offering of a loan modification, the borrower's history of payments, the validity of the assignment of the mortgage loan, that the creditor is the record holder of the mortgage loan or the creditor's compliance with any other requirements of this chapter.

(e) A creditor violates this chapter if the creditor imposes a fee upon a borrower for goods not rendered or services not performed in connection with a foreclosure.

(f) No person shall give and no person shall accept any portion, split or percentage of any charge made or received for the rendering of a service in connection with a transaction involving a foreclosure upon a mortgage loan other than for services actually performed.

(g) The division of banks may adopt, amend or repeal rules and regulations for the administration and enforcement of this section.

(h) In all circumstances in which an offer to purchase either a mortgage loan or residential property is made by an entity with a tax-exempt filing status under section 501(c)(3) of the Internal Revenue Code, or an entity controlled by an entity with such tax exempt filing status, no creditor shall require as a condition of sale or transfer to any such entity any affidavit, statement, agreement or addendum limiting ownership or occupancy of the residential property by the borrower and, if obtained, such affidavit, statement, agreement or addendum shall not provide a basis to avoid a sale or transfer nor shall it be enforceable against such acquiring entity or any real estate broker, borrower or settlement agent named in such affidavit, statement or addendum.

M.G.L. Chapter. 260 § 33

Part III. Courts, Judicial Officers and Proceedings in Civil Cases Title V. Statutes of Frauds and Limitations

Chapter 260. Limitation of Actions (Refs & Annos) Limitation of Mortgage Foreclosures (Refs & Annos)

§ 33. Obsolete mortgages

No power of sale in any mortgage of real estate shall be exercised and no entry shall be made nor possession taken nor proceeding begun for foreclosure of any such mortgage after the expiration of a period which shall be fifty years from the recording of the mortgage in case of mortgages recorded on or after January first, nineteen hundred and thirteen, and which shall be from the recording of the mortgage until January first, nineteen hundred and sixty-three, in case of mortgages recorded before January first, nineteen hundred and thirteen, unless in either case an extension of the mortgage, or an acknowledgment or affidavit that the mortgage is not satisfied, is recorded within the last ten years of such period. In case an extension of the mortgage or such an acknowledgment or affidavit is so recorded, the period shall continue until ten years shall have elapsed during which there is not recorded any further extension of the mortgage or acknowledgment or affidavit that the mortgage is not satisfied. The period shall not be extended by reason of a longer duration of the debt or obligation secured being stated in the mortgage or in any extension of the mortgage, or otherwise, or by non-residence or disability of any person interested in the mortgage or the real estate, or by any partial payment, agreement, extension, acknowledgment, affidavit or other action not meeting the requirements of this section and sections thirty-four and thirty-five.

Chapter 261, Section 27A: Definitions applicable to Secs. 27A to 27G

Section 27A. As used in sections twenty-seven A to twenty-seven G, inclusive, the following words shall have the following meanings:

"Indigent", (a) a person who receives public assistance under aid to families with dependent children, program of emergency aid for elderly and disabled residents or veterans' benefits programs or who receives assistance under Title XVI of the Social Security Act or the medicaid program, 42 U.S.C.A. 1396, et seq.; (b) a person whose income, after taxes, is 125 per cent or less of the current poverty threshold established annually by the Community Services Administration pursuant to section 625 of the Economic Opportunity Act, as amended; or (c) a person who is unable to pay the fees and costs of the proceeding in which he is involved or is unable to do so without depriving himself or his dependents of the necessities of life, including food, shelter and clothing, but an inmate shall not be adjudged indigent pursuant to section 27C unless the inmate has complied with the procedures set forth in section 29 and the court finds that the inmate is incapable of making payments under the plans set forth in said section 29.

"Fees and costs", fees and costs shall not include attorneys' fees.

"Normal fees and costs", the fees and costs a party normally is required to pay in order to prosecute or defend the particular type of proceeding in which he is involved shall include, but not be limited to, the following: in all civil cases, filing or entry fees, including the surcharges required by section four C of chapter two hundred and sixty-two; fees and related costs for service of process, including publications of a citation when publication is ordered; fees and costs for the issuance or service of a subpoena and witness fees for trial or deposition; jury trial fees; removal fees; costs assessed in a bill of costs; in equity, fees for the issuance of an injunction, restraining order, writ or other process; in the probate and family court department, fees for an amendment of record.

"Extra fees and costs", the fees and costs, in addition to those a party is normally required to pay in order to prosecute or defend his case, which result when a party employs or responds to a procedure not necessarily required in the particular type of proceeding in which he is involved. They shall include, but not necessarily be limited to, the cost of transcribing a deposition, expert assistance and appeal bonds and appeal bond premiums.

"Clerk", the clerk or an assistant clerk or the register or an assistant register.

"Inmate", a person committed to, held by or in the custody of the department of correction or a state, county or federal correctional facility or the treatment center under chapter 123A.

Section 27B: Affidavit of indigency; waiver, substitution or state payment of fees or costs; supplementary affidavits

Section 27B. Upon or after commencing or answering to any civil, criminal or juvenile proceeding or appeal in any court, including but not limited to civil actions, proceedings for divorce or separate support, summary and supplementary processes, and proceedings upon petitions to vacate, for review or, upon appeal in a criminal case, any

party may file with the clerk an affidavit of indigency and request for waiver, substitution or payment by the commonwealth of fees and costs upon a form prescribed by the chief justice of the supreme judicial court and in accordance with the standards set forth in sections twenty-seven C to twenty-seven F, inclusive, and sworn to under oath by the affiant.

An indigent party may subsequently file one or more supplementary affidavits requesting the waiver, substitution or payment by the commonwealth of fees and costs not previously granted at any time while the case is still pending in the original court or elsewhere.

Section 27C: Granting requests for waiver, substitution or state payment

Section 27C. (1) If the affidavit is filed with the complaint or other paper initiating the proceeding, the clerk shall receive the complaint or other paper for filing and proceed as if all regular filing fees had been paid. Such filing shall be conditional until either (a) the affidavit is granted or (b) if the affidavit is denied, the payment of necessary and regular filing fees is made within five days of the denial of the affidavit, or such further time as the court may allow, or within five days of the denial of any appeal relating to the affidavit, whichever is later.

(2) If the affidavit appears regular and complete on its face and indicates that the affiant is indigent, as defined in section twenty-seven A, and requests a waiver, substitution or payment by the commonwealth, of normal fees and costs, the clerk shall grant such request forthwith without hearing and without the necessity of appearance of any party or counsel.

(3) If the affidavit does not appear to satisfy the condition of paragraph (2), the clerk or register shall forthwith bring the affidavit to the attention of the justice or judge, as the case may be. The justice or judge may grant such request forthwith or may have the clerk or register notify the affiant that a hearing will be held on the affidavit within five days. If it appears at the hearing that there is a serious question as to the affiant's indigency, as defined in section twenty-seven A, then before making a finding of indigency, the court shall consider the following facts with respect to the applicant as of the time of hearing, in the immediate past and with respect to the immediate future; his age, education, training, physical and mental ability and number of dependents; gross and net income; regular and extraordinary expense, if any; assets and liabilities; whether or not he is a recipient of public assistance and for what purposes; and any other facts which are relevant to the applicant's ability to pay court costs.

(4) If the court makes a finding of indigency, it shall not deny any request with respect to normal fees and costs, and it shall not deny any request with respect to extra fees and costs if it finds the document, service or object is reasonably necessary to assure the applicant as effective a prosecution, defense or appeal as he would have if he were financially able to pay. The court shall not deny any request without first holding a hearing thereon; and if there is an appeal pursuant to section twenty-seven D following a denial, the court shall, within three days, set forth its written findings and reasons justifying such denial, which document shall be part of the record on appeal.

(5) The clerk of each court shall conspicuously post in the part of his office open to the public a notice informing the public in plain language of the availability of waiver, substitution or payment by the commonwealth of fees and costs for indigent persons.

(6) If the court makes a finding that the applicant could reasonably pay part of the normal fees and costs or extra fees and costs, the court may assess a reasonable partial payment towards said fees or costs and a date by which same is to be paid by the applicant. The court shall not order partial payment without first holding a hearing thereon, and if there is an appeal pursuant to section 27D following such an order, the court shall, within 3 days, set forth its written findings and reasons justifying the order of partial payment, which document shall be part of the record on appeal.

Section 27D: Appeal; notice; record; speedy hearing; stay of proceedings; decision final

Section 27D. In any case where the court denies a request for waiver, substitution or payment by the commonwealth of fees and costs, pursuant to section twenty-seven C or any other provision of law, the applicant may take an appeal as hereafter provided. If the matter arises in the superior, the land, the probate or the housing court departments, the appeal shall be to a single justice of the appeals court at the next sitting thereof. If the matter arises in the juvenile court department, the appeal shall be to the superior court sitting in the nearest county or in Suffolk county. If the matter arises in the district court or Boston municipal court departments, the appeal shall be to the appellate division. Upon being notified of the denial the applicant shall also be advised of his right of appeal, and he shall have seven days thereafter to file a notice of appeal with the clerk or register. Upon receipt of notice of appeal timely filed the clerk or register shall forthwith notify the judge or justice, who shall within three days set forth his written findings and reasons as provided in paragraph (4) of section twenty-seven C. The court denying the request may, with or without motion, stay proceedings pending appeal or issue any other order or process to preserve the rights of the parties pending the appeal. The clerk or register shall then forward the affidavit and request, the court's findings and reasons for denial and any other documents on file relevant to the appeal, to the clerk of the court deciding the appeal, who, upon receipt thereof, shall refer the matter to the court for speedy decision and shall promptly notify the applicant of such decision. The court deciding the appeal may enter a stay or revoke an existing stay or other order, and its decision shall be final with respect to such request."

Section 27E: Repayment; deductions from judgment or settlement; notice; procedure

Section 27E. Any party on whose behalf any fees or costs have been waived or paid by the commonwealth pursuant to sections twenty-seven C or twenty-seven F, or both, shall repay the total amount thereof to the clerk or register of the court if said party shall have recovered, as a result of the proceeding in which said fees or costs were waived or paid, an amount in excess of three times the total amount of said fees and costs. In any case in which any fees or costs have been so waived or paid, the court, upon the waiver or payment of any such fees or costs shall notify all parties of the total amount of said fees and costs to date and that any money judgment or settlement in favor of the party for whom said fees or costs were waived or paid which exceeds three times the total amount thereof shall be deposited with the clerk or register of the court in the following manner. Any party obligated to pay any judgment or settlement exceeding three times the total amount of said fees and costs, or any portion of such a judgment or settlement, shall pay to the clerk or register the total amount of said fees or costs, or if more than one party is so obligated, his proportional share thereof, and deduct the same from such judgment or settlement. The clerk or register shall notify all parties when the total

amount of fees and costs has been so reimbursed. When said notification is received by the party obligated to pay such judgment or settlement or portion thereof, or if no such notification is received after the expiration of thirty days after the payment by said party of such fees or costs or his share thereof, said party shall promptly forward the remainder of the judgment or settlement to the party entitled to it. This procedure shall not be construed to excuse any person on whose behalf any fees or costs have been waived or paid from the obligation to repay the same as provided in this section.

Section 27F: Substitute documents, services or objects at less cost; court order

Section 27F. The court may, upon its own motion or that of any party, order that the document, service or object for which a normal or extra fee or cost would be charged shall be provided by an alternative means at lower or no cost, if the substitute thereby provided is substantially equivalent and the provision thereof does not materially impair the rights of any party. In any such order the court may direct payment by the commonwealth of the cost of any substitute to the same extent that the court would but for this section have ordered payment by the commonwealth for the document, service or object in question.

Section 27G: Payment procedure; public record; report of expenditures

Section 27G. The clerk shall receive from any indigent party or his attorney all bills and vouchers for any document, service or object rendered to said party for which an order for payment by the commonwealth has been issued, and shall transmit said bills and vouchers and an attested copy of said order to the office of the court administrator, who shall make prompt payment thereon.

The office of the court administrator shall keep a record of all payments or waivers made pursuant to this section and of all repayments made pursuant to section twenty-seven E, including therein the name of the party, his attorney if any, the names and addresses of the person or persons to whom payment is made, the dates each was rendered to the party and the charge for each, and the dates payment was made by the office of the court administrator. This record shall be a public record.

The office of the court administrator shall on or before December first of each year make a written report to the general court indicating the amounts and purposes of all expenditures under sections twenty-seven A to twenty-seven G, inclusive, and making such recommendations for change in the law as he deems necessary.

940 CMR: OFFICE OF THE A TTORNEY GENERAL

940 CMR 7.00: DEBT COLLECTION REGULATIONS Section

1. 7.01: Purpose of Regulation

   The purpose of940 CMR 7.00 is to establish standards, by defining unfair or deceptive acts or practices, for the collection of debts from persons within the Commonwealth of Massachusetts.

2. 7.02: Scope

   940 CMR 7.00 applies only to the collection of debts, as defined in 940 CMR 7.00, and no conduct which is not the collection of debts or any part thereof is affected.

3. 7.03: Definitions

   Communication or Communicating means conveying information directly or indirectly to any person through any medium excluding nonidentifying communications.

   Creditor means any person and his or her agents, servants, employees, or attorneys engaged in collecting a debt owed or alleged to be owed to him or her by a debtor and shall also include a buyer of delinquent debt who hires a third party or an attorney to collect such debt provided, however, that a person shall not be deemed to be engaged in collecting a debt, for the purpose of 940 CMR 7.00, if his or her activities are solely for the purpose of serving legal process on another person in connection with the judicial enforcement of a debt.

   Debt means money or its equivalent which is, or is alleged to be, more than 30 days past due and owing, unless a different period is agreed to by the debtor, under a single account as a result of a purchase, lease, or loan of goods, services, or real or personal property, for personal, family or household purposes or as a result of a loan of money which is obtained for personal, family or household purposes whether or not the obligation has been reduced to judgment.

   Debtor means a natural person, or his or her guardian, administrator or executor, present or residing in Massachusetts who is allegedly personally liable for a debt.

Nonidentifying Communication means any communication with any person other than the debtor in which the creditor does not convey any information except the name of the creditor and in which the creditor makes no inquiry other than to determine a convenient time and place to contact the debtor.

Person means any natural person, corporation, trust, partnership, incorporated or unincorporated associationandanyotherlegalentity;provided,however,thatifacreditorcomprisesoremployes more than one natural person, all such individuals shall be deemed to be one and the same "person" with respect to any debt owed or alleged to be owed to such a creditor.

Time-barred Debt means any debt that is not enforceable in a judicial proceeding because the applicable statute of limitations has run.

7.04:

Contact with Debtors

(1) It shall constitute an unfair or deceptive act or practice for a creditor to contact a debtor in any of the following ways:

(a) Threatening to sell or assign to another the obligation of a debtor with an attending representation or implication that the result of such sale or assignment would be that a debtor would lose any defense to the claim or would be subjected to harsh, vindictive or abusive collection attempts;

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940 CMR-66

940 CMR: OFFICE OF THE A TTORNEY GENERAL

Threatening that nonpayment of a debt will result in:

1. Arrest or imprisonment of any debtor; or
2. Seizure, garnishment, attachment, or sale of any property or wages of any person or

the taking of other action requiring judicial order without informing the debtor that there must be in effect a judicial order permitting such action before it can be taken or unless such action is lawful and the creditor intends to take such action; or
3. Any action that cannot legally be taken or that is not intended to be taken.

(c) using profane or obscene language
(d) Communicatingbytelephonewithoutdisclosureofthenameofthebusinessorcompany of the creditor and without disclosure of the first and last name of the individual making such communication or a first name and a personal identifier for such individual such as a code or alias, provided however, that any such individual utilizing a personal identifier shall only use one such personal identifier at all times and provided that a mechanism is established by the

creditor to identify the ,person using such personal identifier;
(e) Causing expense to any debtor in the form of long distance or collect telephone calls, text messaging, download fees, data usage fees, or other similar charges, except the creditor may place non-collect telephone calls to the debtor's place of residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number, subject to the limitations set forth in 940 CMR 7.04(1)(f);
(f) Initiating a communication with any debtor via telephone, either in person or via text messaging or recorded audio message, in excess of two such communications in each seven-day period to either the debtor's residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number and two such communications in each 30-day period other than at a debtor's residence, cellular telephone, or other telephone number provided by the debtor as his or her personal telephone number, for each debt, provided that for purposes of 940 CMR 7.04(l)(f), a creditor may treat any billing address of the debtor as his or her place of residence, and provided further, that a creditor shall not be deemed to have initiated a communication with a debtor if the communication by the creditor is in response to a request made by the debtor for said communication;
(g) Placing telephone calls at times known to be times other than the nonnal waking hours of a debtor, or if normal waking hours are not known, at any time other than between 8:00 A.M. and 9:00 P.M. eastern time;
(h) Placinganytelephonecallstothedebtor'splaceofemploymentifthedebtorhasmade a written or oral request that such telephone calls not be made at the place of employment,

provided, that any oral request shall be valid for only ten days unless the debtor provides written confirmation postmarked or delivered within seven days of such request. A debtor may at any time terminate such a request by written communication to the creditor;
(i) Failing to send the debtor the following notice in writing within 30 days after the first communication to a debtor at his or her place of employment regarding any debt, provided that a copy of the notice shall be sent every six months thereafter so long as collection activity by the creditor on the debt continues and the debtor has not made a \Witten request as described in 940 CMR 7.04(1)(h).

NOTICE OF IMPORTANT RIGHTS
YOU HAVE THE RIGHT TO MAKE A WRITTEN OR ORAL REQUESTTHAT TELEPHONE CALLS REGARDING YOUR DEBT NOT BE MADE TO YOU A T YOUR PLACE OF EMPLOYMENT. ANY SUCH ORAL REQUEST 'WILL BE VALID FOR ONLY TEN DAYS UNLESS YOU PROVIDE WRITTEN CONFIRMATION OF THE REQUEST POSTMARKED OR DELIVERED WITHIN SEVEN DAYS OF SUCH REQUEST. YOU MAY TERMINATE THIS REQUEST BY WRITING TO THE CREDITOR.

(j) Visiting the household of a debtor at times other than the normal waking hours of such debtor, or if normal waking hours are not known, at any time other than between 8:00 A.M. and 9:00 P.M., eastern time provided however that in no event shall such visits, initiated by the creditor, exceed one in any 30-day period for each debt, excluding visits where no person is contacted in the household, unless a debtor consents in writing to more frequent visits, provided, further, that at all times the creditor must remain outside the household unless expressly invited inside by such debtor; and provided further, that visits to the household of a debtor which are solely for the purpose of repossessing any collateral or property of the

creditor (including but not limited to credit cards, drafts, notes or the like), are not limited under 940 CMR 7.04(l)G);

(k) Visitingtheplaceofemploymentofadebtor,unlessrequestedbythedebtor,excluding visits which are solely for the purpose of repossessing any collateral or property of the creditor;
(l) Confrontingorcommunicatinginpersonwithadebtorregardingthecollectionofadebt in a public place, excluding courthouses, the creditor's place of business, other places agreed to by a debtor, offices of an attorney for the creditor, or places where the conversation between the creditor and a debtor cannot be reasonably overheard by any other person not authorized by the debtor;

(m) Stating that the creditor will take any action, including legal action, which in fact is not taken or attempted on such debtor's account, unless an additional payment or a new agreement to pay has occurred within the stated time period. For purposes of 940 CMR 7.04(1)(m), the time period in connection with such statement shall be presumed to expire 14 days from the date the statement is made, unless otherwise indicated by the creditor;

(3) 940 CMR 7.04(l)G) and (l)(m) and (2) shall not apply to telephone, gas and electric utility companies regulated by M.G.L. c. 164 and the Department of Public Utilities, or the Department of Telecommunications and Cable.

Contact with Persons Residing in the Household of a Debtor

(1) Acreditormayassumethatallcontactsdirectedtothedebtor'shouseholdarereceivedeither by the debtor or persons residing in the household of the debtor unless the creditor knows or should know information *to* the contrary.

(2) It shall constitute an unfair or deceptive act or practice for a creditor to imply the fact of a debt, orally or in writing, to persons who reside in the household of a debtor, other than the debtor.

(3) It shall constitute an unfair or deceptive act or practice for a creditor to contact or threaten to contact persons who reside in the household of a debtor, other than the debtor, in any of the following ways:

(a) Using profane or obscene language;
(b) Placing telephone calls, disclosing the name of the business, or company of the creditor, unless the recipient expressly requests disclosure of the business or company name;
(c) Causing expense to any such person in the form of collect or long distance telephone calls, text messaging, download fees, data usage fees or other similar charges;
(d) Engaging any such person in non-identifying communication via telephone with such frequency as to be unreasonable or to constitute harassment to such person under the circumstances, and engaging any person in communications via telephone, initiated by the creditor, in excess of two calls in each seven-day period at a debtor's residence and two calls in each 30-day period other than at a debtor's residence, for each debt;
(e) Placing telephone calls at times known to be times other than the normal waking hours of the person called, or if normal waking hours are not known, at any time other than between 8:00 A.M. and 9:00 P.M. eastern time;

(f) Visiting the place of employment of any such person, unless requested by such person (g) Confronting or communicating in person with any such person regarding the collection of a debt in a public place, excluding courthouses, the creditor's place of business, other places agreed to by the person, offices of the person's attorney or of the attorney for the creditor or debtor, or places where the conversation between the creditor and such person cannot reasonably be overheard by anyone not authorized by such person;

(h) Using language on envelopes or on any other printed or written materials, except materials enclosed in sealed envelopes, indicating or implying that the communication relates to the collection of a debt, which in the normal course of business may be received or examined by any such person residing *in* the household o f a debtor;

(4)
creditor or attorney acting on his or her behalf engaged in collection activities, including notices required prior or subsequent to repossession.

7.06: Contact with Other Persons Regarding a Debt
The following shall apply to contact with persons not covered by 940 CMR 7.04 and 7.05:

(1) It shall constitute an unfair or deceptive act or practice for a creditor to contact or threaten to contact persons in connection with a debt in any of the following ways:

Nothing in 940 CMR 7.05 shall prohibit any contact required by law to be made by a (a) Implying the fact of the debt to any such person;
(b) Using language on envelopes or any other printed or written materials, except materials enclosed in sealed envelopes, indicating or implying that the contact relates to the collection of a debt, which in the normal course of business, may be received or examined by persons other than the debtor;
(c) Causing expense to any person in the form of collect or long distance telephone calls, text messaging, download fees, data usage fees or other similar charges.

The following contacts shall not be deemed unlawful:
(a) Anycontactwithanysuchpersonswhichresultssolelyfromeffortstocontactthedebtor at the debtor's place of residence or at places other than a debtor's residence via telephone pursuant to 940 CMR 7.04(l)(f), provided the creditor limits the contact to disclosing only the first and last name of the individual making such communication on behalf of the creditor or a first name and unique personal identifier established by the creditor to identify the person making such communication, and the telephone number to which the debtor may return the telephone call, unless the recipient expressly requests the disclosure of the business or company name; and provided further, that with respect to contacts made at the debtor's place of employment, the debtor has not made a request pursuant to 940 CMR 7.04(1)(h) that such contact not be made;
(b) Any contact with any such persons made for the purpose of and limited to determining the current location of the debtor, provided the creditor, after making reasonable attempts to locate the debtor, does not have correct information as to the debtor's current residence or location and provided further, that the creditor reasonably believes that the earlier response of such person, if any, is erroneous or incomplete and that such person now has correct or complete locational information, and in no event shall such contacts exceed three per such

person in any 12-month period for each debt. The creditor in making said contacts may reveal only the first and last name of the individual making such communication on behalf of the creditor or a first name and unique personal identifier established by the creditor to identify the person making such communication, unless the recipient expressly requests the disclosure of the business or company name. Any contacts at the debtor's place of employment, made pursuant to 940 CMR 7.06, shall be lawful, unless a request was made by the debtor, pursuant to 940 CMR 7.04(1)(h), that such contacts not be made;

(c) Any contact with respect to such debt to any attorney or other person employing or employed by the creditor, or to any attorney employed by the debtor; to a consumer reporting agency; or, where there are actual negotiations or arrangements for assigning or purchasing or settling of accounts, to potential assignees or purchasers or the like; or to persons who have any interest in property securing all or part of the debt; or to any *bona fide* credit counseling agency not connected to the creditor and designated in writing by the debtor;

(d) Any communication of the fact of such debt by an attorney involved in litigation in connection with such debt, or after a judgment on the debt has been entered by a court of competent jurisdiction; ·
(e) Any contact required by law to be made by a creditor engaged in collection activities, including notices required prior or subsequent to repossession.

General Unfair or Deceptive Acts or Practices

7.07: It shall constitute an unfair or deceptive act or practice to engage in any of the following practices to collect or attempt to collect any debt:

(1) Any false representation that the creditor has information in his or her possession or something of value for the debtor.

(2) Anyknowinglyfalseormisleadingrepresentationinanycommunicationastothecharacter, extent or amount of the debt, or as to its status in any legal proceeding, provided, however, that an incorrect or estimated bill submitted by a gas or electric utility company regulated by M.G.L. c. 164, and the Department of Public Utilities shall not be prohibited by 940 CMR 7.07.

(3) Any false or misleading representation that a creditor is vouched for, bonded by, affiliated with, or is an instrumentality, agency, or official of the state, federal or local government.

(4) Any false or misleading representation that a creditor is an attorney or any other officer of the court.

(5) The use, distribution or sale of any written communication which simulates, or which is falsely represented to be, or which otherwise would reasonably create a false impression that it was, a document authorized, issued or approved by a court, a government official or other governmental authority.

(6) Any representation that an existing obligation of a debtor may be increased by the addition of attorney's fees, investigation fees, service fees, or any other fees or charges, if in fact such fees or charges may not legally be added to the existing obligation.

(7) Any solicitation or obtaining of any written statement or acknowledgement in any form containing an affirmation of any obligation by a debtor who has been adjudicated bankrupt, without clearly and conspicuously disclosing the nature and consequences of such affirmation.

(8) Any false, deceptive, or misleading representation, communication, or means in connection with the collection of any debt or to obtain information concerning a debtor.

(9) Any false or misleading representation or implication that a sale, referral, or other transfer of any interest in a debt shall cause the debtor to:

1. (a) lose any claim or defense to payment of the debt; or
2. (b) become subject to any practice prohibited by 940 CMR 7.00.

(10) Any false or misleading representation or implication that the debtor committed any crime or other conduct in order to disgrace the debtor.

(11) Communicating or threatening to communicate to any person credit information which is known or which should be known to be false including, without limitation, the failure to communicate that a disputed debt is disputed.

(12) Any false or misleading representation or implication that documents are legal processes.

(13) Any false or misleading representation or implication that documents are not legal processes or do not require action by the debtor.

(14) Any false or misleading representation or implication that a creditor operates or is employed by a consumer reporting agency.

(15) Using any business, company or organization name other than the true name of the creditor's business, company or organization.·

(16) The collection *of* any amount (including interest, fees, charges or expenses incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

(17) Requesting or demanding from a debtor a postdated check, draft, order for withdrawal or other similar instrument or method in payment for the debt or any portion thereof, or for a creditor to negotiate such instrument before the due date of the instrument.

(18) Takingorthreateningtotakeanynon-judicialaction*to*effectdispossessionordisablement *of* property if:

(a) there is no present right to possession of the property claimed as collateral through a court order or an enforceable security interest;
(b) there is no present intention to take possession of the property;
(c) the creditor knows or has reason to know that demands for payment and/or legal notices were not directed to the debtor's current address; or

(d) the property is exempt from seizure on execution because its value does not exceed the value for exemption set forth in M.G.L. c. 235, *§ 34,* or the property is otherwise exempt by law from such dispossession or disablement; 940 CMR 7.07(18)(d) shall not apply to first mortgage foreclosures properly conducted in accordance with Massachusetts law.

(19) Taking possession of or selling upon execution property that is exempt from seizure on execution because its value does not exceed the value for exemption set forth in M.G.L. c. 23 5, § 34, or the property is otherwise exempt by law from such dispossession or disablement; 940 CMR 7.07(19) shall not apply to first mortgage foreclosures properly conducted in accordance with Massachusetts law.

(20) Communicating with a debtor regarding a debt by postcard.

(21) Reporting to a consumer reporting agency on transactions or experiences with a debtor in a name other than that of the creditor.

(22) Failing to disclose the telephone number and office hours of the creditor or his agents on all written communications to the debtor.

(23) Requesting any information about the debtor or the debtor's accounts or assets other than information the creditor, in good faith, believes will assist in the collection of the debt owed to the creditor.

(24) Collectingorattemptingtocollectfromanypersonpaymentofanydebtthatthecreditor knows, or has reason to know based on a good faith determination, is a time-barred debt, or seeking or obtaining from any person an admission, affirmation, acknowledgement of a new promise to pay, or any waiver of legal rights or defenses with regard to any debt that the creditor knows or has reason to know is a time-barred debt, unless the creditor discloses that the debt may be unenforceable through a lawsuit because the time for filing suit may have expired, and that the debtor is not required by law to sign any admission, affirmation, or acknowledgement of, or new promise to pay the debt, or to make any payment on the debt, or to waive any rights with regard to the effect of the running of the applicable statute of limitations.

(a) A creditor who makes the following disclosure shall be deemed to have complied with the requirements of 940 CMR 7.07(24):

WEAREREQUIREDBYREGULA TIONOFTHEMASSACHUSETTSA TTORNEY GENERAL TO NOTIFY YOU OF THE FOLLOWING INFORMATION. THIS INFORMATION IS NOT LEGAL ADVICE: THIS DEBT MAY BE TOO OLD FOR YOU TO BE SUED ON IT IN COURT. IF IT IS TOO OLD, YOU CANNOT BE REQUIRED TO PAY IT THROUGH A LAWSUIT. TAKE NOTE: YOU CAN RENEW THE DEBT AND THE ST A TUTEOFLIMIT A TIONSFOR THE FILING OF A LAWSUIT AGAINST YOU IF YOU DO ANY OF THE FOLLOWING: MAKE ANY P A YMENT

ON THE DEBT, SIGN A P APER IN WHICH YOU ADMIT THA T YOU OWE THE DEBT OR IN WHICH YOU MAKE A NEW PROMISE TO PAY; SIGN A PAPER IN WHICH YOU GIVE UP OR WAIVE YOUR RIGHT TO STOP THE CREDITOR FROM SUING YOU IN COURT TO COLLECT THE DEBT. WHILE THIS DEBT MAY NOT BE ENFORCEABLE THROUGH A LAWSUIT, IT MAY STILL AFFECT YOUR ABILITY TO OBTAIN CREDIT OR AFFECT YOUR CREDIT SCORE OR RATING.

(b) In the case of written communications, the disclosures required by 940 CMR 7.07(24)(b) shall.be clear and conspicuous by appearing in a type which is a minimum of eight-point type and said disclosure shall be placed on the front page of the communication;
(c) In the case of oral communications, the disclosures required by 940 CMR 7.07(24)(c) shall be made immediately before or immediately after the first statement requesting payment, or, if no request for payment is made, no later than immediately after reference to the debt is first made.

7.08: Validation of Debts

(1) It shall constitute an unfair or deceptive act or practice for a creditor to fail to provide to a debtor or an attorney for a debtor the following within five business days after the initial communication with a debtor in connection with the collection of a debt, unless the following information is contained in the initial communication or the debtor has paid the debt:

1. (a) The amount of the debt;
2. (b) The name of the creditor to whom the debt is owed;
3. (c) A statement that unless the debtor, within 30 days after receipt of the notice, disputes

the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the creditor; and
(d) A statement that if the debtor notifies the creditor in writing within 30 days after receipt of this notice that the debt, or any portion thereof is disputed, the creditor will obtain verification of the debt and provide the debtor, or an attorney for the debtor, additional materials described in 940 CMR 7.08(2).

(2) If the debtor, or any attorney for the debtor, notifies the creditor in writing within the 30-day period described in 940 CMR 7.08(1), that the debt, or any portion thereof, is disputed, the creditor shall cease collection of the debt, or any disputed portion thereof, until the creditor verifies the. Debt and provides the debtor, or any attorney of the debtor, by first class mail, the following materials:

(a) All documents, including electronic records or images, which bear the signature of the debtor and which concern the debt being collected;
(b) A ledger, account card, account statement copy, or similar record, whether paper or electronic, which reflects the date and amount of payments, credits, balances, and charges concerning the debt, including but not limited to interest, fees, charges or expenses incidental to the principal obligation which the creditor is expressly authorized to collect by the agreement creating the debt or permitted to collect by law;

(c) The name and address of the original creditor, if different from the collecting creditor; and
(d) A copy of any judgment against the debtor.
Pursuant to 940 CMR 7.0& (2), the creditor must provide those materials described in

940 CMR 7.08(2)(a) through (d) which are in the possession, custody or control of the creditor. If the creditor does not possess, have custody of, or control the materials described in 940 CMR 7.08(2)(a) through (d), the creditor shall cease collection of the debt until the creditor has made reasonable efforts to obtain the necessary information and provide this information to the debtor.

9. 7.09: Relation to Other Laws

   940 CMR 7.00 does not exempt any person from complying with existing laws or rules of professional conduct with respect to debt collection practices. 940CMR7.00isnotintendedto supersede or in any way limit rights and protections provided to consumers under 114.6 CMR 13.00, the Health Safety Net Eligible Services Regulations, and state and federal foreclosure laws. .To the extent that any provision of 940 CMR 7.00 is specifically inconsistent with the Massachusetts Rules of Professional Conduct, as currently appearing in Supreme Judicial Court Rule 3:07 and then only to the extent of the inconsistency, 940 CMR 7.00 is not applicable. Provisions of940 CMR 7.00 that contain language substantively identical to provisions within 15 U.S.C. § 1692, *et seq*., the Fair Debt Collection Practices Act, should be interpreted consistently with that Act.

10. 7.10: Preemption by Federal Law

    In the event any conflict exists between the provisions of940 CMR 7.00 and the provisions of Federal statutes or regulations relating to the collection of debts, such Federal law shall control but only to the extent that such Federal law mandates actions or procedures prohibited by 940 CMR 7.00.

REGULA TORY AUTHORITY
940 CMR 7.00: M.G.L. c. 93A, §2(c).

940 CMR 8.00: Section

MORTGAGE BROKERS AND MORTGAGE LENDERS

940 CMR: OFFICE OF THE ATTORNEY GENERAL

1. 8.01: Purpose
2. 8.02: Scope
3. 8.03: Definitions
4. 8.04: Advertising Practices
5. 8.05: Mortgage Disclosures
6. 8.06: Prohibited Practices
7. 8.07: Severability
8. 8.08: Effective Date

8.01: Purpose

940 CMR 8.00 relates to mortgage lenders and mortgage brokers pursuant to the Attorney General's authority in M.G.L. c. 93A, § 2(c). 940 CMR 8.00 is designed to protect Massachusetts consumers seeking residential mortgage loans and to ensure that the mortgage industry is operating fairly and honestly by means of legitimate and responsible business acts and practices that are neither unfair nor deceptive.

940 CMR 8.00 addresses problems experienced by consumers when they seek or obtain mortgage loans for the purchase or initial construction of residential homes, or when consumers refinance an existing loan.

8.02: Scope

940 CMR 8.00 defines unfair or deceptive acts or practices. They are not intended to be all inclusive as to the types of activities prohibited by M.G.L. c. 93A, § 2(a). Acts or practices not specifically prohibited by 940 CMR 8.00 are not necessarily consistent with M.G.L. c. 93A or otherwise deemed legitimate by the absence of regulation here.

940 CMR 8.00 shall cover any mortgage lender or broker advertising or doing business within Massachusetts, regardless of whether or not the lender or broker maintains an office in Massachusetts.

940 CMR 8.00 applies to all residential mortgage loan transactions in the Commonwealth of Massachusetts, as more particularly defined in 940 CMR 8.00, except that it does not apply to either:

(a) reverse mortgages governed by M.G.L. c. 167E, § 7; or
(b) open-end home equity lines of credit. 940 CMR 8.00 also excludes reduced interest rate mortgages originated under the auspices of affordable housing programs which are administered by state, quasi- public, or local government entities.

8.03: Definitions

Advertisement (including the terms "advertise" and "advertising") shall be defined in a manner which is consistent with the definition in 940 CMR 6.00: Retail Advertising, and means any oral, written, graphic, or pictorial statement made by a mortgage broker or lender in any manner in the course of the solicitation of business. Advertisement includes any representation made in a newspaper, magazine, or other publication or on the internet, radio or television or contained in any notice, handbill, sign, billboard, banner, poster, display, circular, pamphlet, catalog, or letter. Advertisement includes any representation disseminated or accessible within Massachusetts if the advertisement is directed to consumers in Massachusetts.

Bait Advertising means an offer to procure, arrange, or otherwise assist a borrower in obtaining a mortgage on terms which the broker or lender cannot, does not intend, or want to provide, or which the broker or lender knows cannot be reasonably provided. Its purpose is to switch borrowers from buying the advertised mortgage loan product to buying a different mortgage loan product, usually at a higher rate or on a basis more advantageous to the broker or lender.

Borrower means any natural person seeking, using, or paying for directly or indirectly, the services of a mortgage lender or broker in connection with a mortgage loan.

Broker Fee means any money, compensation, commission, fee, charge or other valuable consideration directly or indirectly imposed by a mortgage broker for the brokers services in negotiating, placing, finding, or otherwise assisting a borrower in obtaining a mortgage loan. The term broker fee does not include a fee charged by the lender (such as a commitment fee or a lock-in fee), wages or commissions paid to an employee of the mortgage broker or mortgage lender by his or her employer, nor does such term include bona fide and reasonable payments to be remitted to third party service providers, such as appraisal fees or fees for credit reports or payments or remittances to the mortgage lender.

Clear and Conspicuous (including the terms "clearly and conspicuously") shall be defined in a manner which is consistent with the definition in 940 CMR 6.00: Retail Advertising. 940 CMR 6.01: Clear and Conspicuous provides that clear and conspicuous (including the terms "clearly and conspicuously") shall mean that:

the material representation being disclosed is of such size, color, contrast, or audibility and is so presented as to be readily noticed and understood by a reasonable person to whom it is being disclosed.

Further, without limiting the requirements of the preceding sentence, 940 CMR 6.01: Clear and Conspicuous (e) states that a representation in an advertisement is not clear and conspicuous unless:

1. for a printed, written, typed or graphic advertisement, such material representation appears in type which is at least one-third the size of the largest type of information which it modifies and is a minimum of eight point type;
2. for the video portion of a television advertisement, such material representation:

a. is displayed in type not less than 14 scan lines in height;
b. contains letters of a color or shade that noticeably contrast with the background, and the background does not consist of colors and/or images which obscure or detract attention from

the representation or are disparaging to its meaning or importance; and
c. appears on the screen for a duration equal to at least one second for every three words of the material representation but not less than a total of five seconds.

3. for a radio advertisement or the audio portion of a television advertisement, such material representation complies with the requirements of 940 CMR 6.01: Clear and Conspicuous(c).

Commissioner means the Commissioner of Banks.

Commitment for Mortgage Loans (or the word "commitment") means an oral or written agreement to loan or to advance funds for a mortgage loan. A commitment can specify a loan amount, repayment terms, interest rate or conditions necessary to close the loan.

Contractor or Home Improvement Contractor means any person who owns or operates a residential contracting business or who undertakes, offers to undertake, purports to have the capacity to undertake, or submits a bid for, by him or herself or through others, residential contracting work as defined in M.G.L. c. 142A.

Mortgage Broker or Broker means any person, who for compensation or gain, or in the expectation of compensation or gain, directly or indirectly negotiates, places, assists in placement, finds, or offers to negotiate, place, assist in placement or find mortgage loans on residential property for others, or as otherwise defined by M.G.L. c. 255E, § 2 or by the Commissioner. Notwithstanding anything to the contrary in 940 CMR 8.00, the following persons shall not be deemed to be a mortgage broker:

(a) any person who is exempt from the licensing requirements of M.G.L. c. 255E, § 2, provided, however, that individuals who work for or on behalf of brokers that are licensed pursuant to M.G.L. c. 255E, § 2, shall not be exempt from 940 CMR 8.00; and
(b) any financial institution which is regulated by a federal and/or state bank regulatory agency and which, directly or indirectly, negotiates, places, assists in placement, finds, or offers to negotiate, place, assist in placement or find mortgage loans on residential property for a direct or indirect affiliate or subsidiary of such financial institution.

Mortgage Lender or Lender means any person engaged in the business of making mortgage loans or issuing commitments for mortgage loans, including, but not limited to, mortgage lenders licensed or regulated by M.G.L. c. 255E, § 2 or by the Commissioner, and shall include all individuals who work on behalf of such lenders.

Mortgage Loan or Loan means a loan to a natural person primarily for personal, family or household use secured wholly or partially by a mortgage on residential property, or as otherwise defined by M.G.L. c. 255E or by the Commissioner, and shall include loans to refinance a mortgage. "Mortgage loan" or "loan" shall not include either:

(a) reverse mortgages governed by M.G.L. c. 167E, § 7; or (b) open-end home equity lines of credit.

Person means a natural person or organization including a corporation, partnership, association, cooperative or trust or any other legal entity.

No Income Loan Product means a mortgage loan where:

(a) in making its decision whether to underwrite the loan or extend credit, the mortgage lender does not account for or consider, in any manner whatsoever, the prospective borrower's income or employment status; and
(b) that fact is set forth in the lender's written underwriting or loan origination policies governing its No Income Loan Product.

Point means an origination fee, finder's fee, or other fee, premium, service charge, or any other charge calculated as a percentage of the principal amount of the loan or a percentage of the amount financed, however such point may be called, which is charged by a mortgage lender at or before the time the mortgage loan is made as additional compensation for the mortgage loan, or as otherwise defined by M.G.L. c. 183, § 63 or by the Commissioner. A point does not include:

(a) *bona fide* and reasonable fees for actual services performed including, but not limited to, attorney's fees, appraisal fees, credit reporting fees, private mortgage insurance premiums, and title insurance premiums or mortgage broker fees; or
(b) a charge which is credited to closing costs or other costs relating to such loan.

Residential Property means real property located in Massachusetts having thereon a dwelling house with accommodations for four or fewer separate households and occupied, or to be occupied, in whole or in part by the obligor of the mortgage debt, or as otherwise defined in M.G.L. c. 255E.

8.04: Advertising Practices

(1) It is an unfair or deceptive act or practice for a mortgage broker or lender to make any representation or statement of fact in an advertisement if the representation or statement is false or misleading or has the tendency or capacity to be misleading, or if the mortgage broker or lender does not have sufficient information upon which a reasonable belief in the truth of the representation or statement could be based.

(2) It is an unfair or deceptive act or practice for a mortgage broker or lender to advertise without clearly and conspicuously disclosing its business name, and if required to be licensed pursuant to M.G.L. c. 255E, the words broker" or "lender", as applicable, and the license number.

(3) It is an unfair or deceptive act or practice for a mortgage broker to represent in any advertisement that the mortgage broker will fund a mortgage loan.

(4) It is an unfair or deceptive act or practice for a mortgage broker or lender to engage in bait advertising or to misrepresent (directly or by failure to adequately disclose) the terms, conditions or charges incident to the mortgage loan being advertised in any advertisement. Violations of 940 CMR 8.04(4) shall include, but shall not be limited to:

(a) the advertisement of "immediate approval" of a loan application or "immediate closing" of a loan or words of similar import, such as "instant closing";

(b) the advertisement of a "no point" mortgage loan when points are required or accepted by the lender as a condition for commitment or closing;

(c) the advertisement of an incorrect specific number of points required for commitment or closing; (d) the advertisement through terms such as "bad credit no problem" or words of similar import or that an applicant will have unqualified access to credit without clearly and conspicuously disclosing the material limitations on the availability of credit that may exist, such as:

1. requirements for the availability of credit (such as income);
2. that a higher rate or more points may be required for a consumer with bad credit; and 3. that restrictions as to the maximum principal amount of the loan offered may apply.

(e) the use of "avoid foreclosure" or words of similar import in an advertisement unless the advertisement also clearly and conspicuously discloses, that:

1. the borrower must refinance the mortgage in default and/or take a new mortgage loan; 2. the borrower may be required to pay interest rates significantly higher than what other borrowers not facing foreclosures might pay; and
3. the warning that "you may lose your home if you cannot make all the payments or if you miss any of the payments on this loan."

(5) It is an unfair or deceptive act or practice for a mortgage broker or lender who advertises any finance terms to fail to comply with the applicable state and federal advertising Truth-in-lending laws, M.G.L. c. 140D, § 1, et seq. Consumer Credit Cost Disclosure, and 15 U.S.C. § 1601, et seq. Fair Debt Collection Practices Act.

8.05: Mortgage Disclosures

(1) It is an unfair or deceptive act or practice for a mortgage broker or mortgage lender to fail to make any disclosure, or fail to provide any document, to a consumer required by and at the time specified by any applicable state or federal law, regulation or directive.

(2) It is an unfair or deceptive act or practice for a mortgage broker or lender to conceal or to fail to disclose to a borrower any fact relating to the loan transaction, disclosure of which may have influenced the borrower not to enter into the transaction with the broker or lender.

(3) It is an unfair and deceptive act or practice for the mortgage broker or lender to fail to take reasonable steps to communicate the material facts of the transactions in a language that is understood by the borrower. Reasonable steps which shall comply with 940 CMR .8.00 may include but shall not be limited to:

(a) using adult interpreters; and
(b) providing the borrower with a translated copy of the disclosure forms required by any applicable state or federal law, regulation or directive, in a language understood by the borrower.

(4) It is an unfair or deceptive act or practice for a mortgage lender to fail to give to the borrower legible copies of the mortgage deed, promissory note, and the settlement statement when completed or at the time of closing.

8.06: Prohibited Practices

(1) It is an unfair or deceptive act or practice for a mortgage broker or lender to make any representation or statement of fact if the representation or statement is false or misleading or has the tendency or capacity to be misleading, or if the mortgage broker or lender does not have sufficient information upon which a reasonable belief in the truth of the representation or statement could be based. Such claims or representations include, but are not limited to the availability, terms, conditions, or charges, incident to the mortgage transaction and the possibility of refinancing. In addition, other such claims and representations by the broker may include the amount of the brokerage fee, the services which will be provided or performed for the brokerage fee, the borrower's right to cancel any agreement with the mortgage broker, the borrower's right to a refund of the brokerage fee, and the identity of the mortgage lender that will provide the mortgage loan or commitment.

(2) It is an unfair or deceptive act or practice for a broker or lender to charge an application and/or broker fee which significantly deviates from industry-wide standards or is otherwise unconscionable.

(3) It is an unfair or deceptive act or practice for a mortgage broker or lender to accept any broker fee, application fee or other fee, prior to the borrowers receipt of any disclosure forms mandated by 940 CMR 8.05(1). Where the applicable state or federal law specifies that the disclosure form must be provided to a consumer prior to the consummation of the mortgage loan. Notwithstanding the foregoing, an appraisal fee may be accepted if the lender or brokers provides oral or written notice, prior to the receipt of such fee, as to whether the fee is refundable.

(4) It is an unfair or deceptive act or practice for a mortgage broker or lender to engage the services of (another) mortgage broker that will charge the borrower an additional fee without obtaining in advance the written permission of the borrower to charge that fee, the amount of which shall be specified in writing.

(5) It is an unfair or deceptive act or practice for a mortgage broker or lender to directly or indirectly, regardless of the receipt or the expectation of receipt of compensation from the contractor, to:

(a) provide loan application documents to home improvement contractors for use by such contractor in connection with the financing by mortgage loans of home improvement contracts;
(b) use a home improvement contractor as an agent for its business; or
(c) accept mortgage applications from contractors.

940 CMR 8.06(5) shall not prohibit contractors from referring consumers to mortgage brokers or lenders, or lenders from purchasing executed home improvement contracts.

(6) It is an unfair or deceptive act or practice for a mortgage broker or lender to procure or negotiate for a borrower a mortgage loan with rates or other terms which significantly

deviate from industry-wide standards or which are otherwise unconscionable. To determine whether the Annual Percentage Rate (APR), for example, is unconscionable, factors to consider include whether the APR at the time the loan was made is more than, the greater of:

(a) ten percent above the highest domestic "Prime Rate" listed in the Money Rates section of The Wall Street Journal; or
(b) 20% percent; and
whether the APR is consistent with comparable rates for borrowers in similar financial circumstances.

(7) It is an unfair or deceptive act or practice for a mortgage lender to act also as a mortgage broker directly or indirectly in the same mortgage loan transaction, or to violate 209 CMR 42.04(4) or 42.07(4).

(8) It is an unfair or deceptive act or practice for a lender to fail to disburse funds in accordance with any commitment or agreement with the borrower.

(9) It is an unfair or deceptive act or practice for a mortgage broker or lender to conduct business with a person which should be licensed under M.G.L. c. 255E, and which it knows or should know is an unlicensed mortgage broker or lender.

(10) It is an unfair or deceptive act or practice for any mortgage lender to charge a prepayment fee which:

(a) violates M.G.L. c. 183, § 56;
(b) significantly deviates from industry-wide standards; or (c) is otherwise unconscionable.

(11) It is an unfair or deceptive act or practice for a mortgage broker or lender to fail to give to the borrower or his or her attorney the time and reasonable opportunity to review every document signed by the borrower and every document which is required pursuant to 940 CMR 8.00, prior to the disbursement of the mortgage funds.

(12) It is an unfair or deceptive act or practice for a mortgage broker or lender to accept any fees which were not disclosed in accordance with 940 CMR 8.00 or applicable law.

(13) It is an unfair or deceptive act or practice for a mortgage broker or lender to accept any attorneys fees in excess of the fees that have been or will be remitted to its attorneys.

(14) It is an unfair or deceptive act or practice for a mortgage broker or lender to refuse to permit the borrower to be represented by the attorney of his or her choice. Nothing contained herein shall limit the lenders right to choose its own attorney, which may be paid for by the borrower.

(15) It is an unfair or deceptive act or practice for a mortgage broker to arrange or mortgage lender to make a mortgage loan unless the mortgage broker or lender, based on information known at the time the loan is made, reasonably believes at the time the loan is expected to be made that the borrower will be able to repay the loan based upon a consideration of the borrower's income, assets, obligations, employment status, credit history, and financial resources, not limited to the borrower's equity in the dwelling which secures repayment of

the loan (subject, however, to the treatment of No Income Loan Products in 940 CMR 8.06(16)). The determination under 940 CMR 8.06(15) of a borrower's ability to repay a loan shall take into account, without limitation:

(a) the borrower's ability to repay at the fully indexed rate, assuming a fully amortizing repayment schedule, and the resulting scheduled payments that may be charged under the loan accounting for interest rates, financial terms or scheduled payments that may adjust upward; and
(b) the property taxes that are required on the subject property at the time the loan is expected to be made and the reasonably anticipated insurance costs if the loan requires that insurance be maintained on the property, regardless whether the broker or lender will collect an escrow for such taxes or insurance in connection with loan payments.

For purposes of 940 CMR 8.06(15)(a), the "fully indexed rate," with respect to loan rates that may adjust upward, shall mean the index rate prevailing at the date of loan origination plus the margin to be added to it after the expiration of an introductory interest rate. For purposes of illustration, assume that a loan with an initial fixed rate of 7% will reset to the six-month London Interbank Offered Rate (LIBOR) plus a margin of 6%. If the six-month LIBOR rate equals 5.5% at the date of origination, the determination of ability to pay under 940 CMR 8.06(15)(a) shall take into account the borrowers ability to repay at 11.5% (5.5% plus 6%), regardless of any interest rate caps that limit how quickly the fully indexed rate may be reached.

(16) It is an unfair or deceptive act or practice for a mortgage broker or lender to process or make a mortgage loan without documentation to verify the borrower’s income (a so-called "no documentation," "no doc," "stated income" or "limited documentation" loan) unless the broker or lender, as applicable, first provides a written document to the borrower, which must be signed by the borrower in advance of the closing, and which:

(a) identifies the borrower’s income and the source of the income; and
(b) provides detailed information, if true, that by applying for a mortgage loan on a no- or limited documentation basis, the consumer will pay a higher interest rate or increased charges, or have less favorable terms for the mortgage loan (including information concerning the precise increase in interest rate, charges, or the nature of the less favorable terms).

Provided, however, that if a mortgage broker or lender arranges or makes a mortgage loan using a No Income Loan Product, which loans shall remain subject to 940 CMR 8.06(15), the requirement in 940 CMR 8.06(16)(a) shall not apply. It is an unfair or deceptive act or practice for a mortgage lender or broker to process or make a mortgage loan on a no- or limited documentation basis if the stated income provided by the borrower with respect to the no- or limited documentation loan contradicts information previously obtained by the broker or lender with respect to that borrower in connection with the same proposed loan, absent a documented change in circumstances or other documented explanation for the discrepancy between the prior information and latter income representation. Notwithstanding the foregoing, it shall be an unfair or deceptive act or practice for a mortgage lender to underwrite or close a loan without first verifying the employment or income of the borrower when the amount of the income stated is not reasonable for the actual employment status or experience of the borrower known to the lender, or when the borrower's stated employment

or stated income is not reasonable in light of the borrower's circumstances known to the lender.

(17) It is an unfair or deceptive act or practice for a mortgage broker to process, make or arrange a loan that is not in the borrower's interest. Where the financial interest of a mortgage broker conflicts with the interests of the borrower (for example, where the broker's compensation will increase directly or indirectly if the borrower obtains a loan with higher interest rates, increased charges or less favorable terms than those for which a borrower would otherwise qualify), the broker shall disclose the conflict and shall not proceed to process, make or arrange the loan so long as such a conflict exists. It is an unfair or deceptive act or practice for a mortgage broker to disclaim the duty established by 940 CMR 8.06(17) in a written contract or to assert in oral representations that a broker does not have such a duty in communications with the borrower.

(18) It is an unfair or deceptive act or practice for a mortgage lender:

(a) to use a pricing model for its mortgage loans which treats borrowers with similar credit criteria and bona fide qualification criteria differently; or .
(b) to make a mortgage loan when any or all of the cost features of the mortgage loan are based on criteria other than the borrower's credit and other bona fide qualification criteria.

For purposes of 940 CMR 8.06(18), "bona fide qualification criteria" shall mean those account in determining whether to extend a mortgage loan, including by way of example, income, assets, credit history, credit score, income-to-debt ratios or loan-to-value ratios. For purposes of 940 CMR 8.06(18)(b), the term "cost features" shall include, but not be limited to, the interest rate; the index; margin; and other adjustment features if the interest rate is adjustable; points; and prepayment penalties.

If any provision of 940 CMR 8.00 or the application of such provision to any person or circumstances is held to be invalid, the validity of the remainder of 940 CMR 8.00 and the applicability of such provision to other persons or circumstances shall not be affected.

4/4/08 940 CMR – 77

8.08: Effective Date
940 CMR 8.00 is effective on April 4, 2008.

REGULATORY AUTHORITY

940 CMR 8.00: M.G.L. c. 93A, § 2(c).

940 CMR: OFFICE OF THE ATTORNEY GENERAL

Appellate Procedure Rule 17: Brief of an amicus curiae (a) General

A brief of an amicus curiae may be filed only (1) by leave of the appellate court or a single justice granted on motion or (2) when solicited by the appellate court, except that leave shall not be required when the brief is presented by the Commonwealth or its officer or agency. The brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state the reasons why a brief of an amicus curiae is desirable.

(b) Timing

In all cases, an amicus curiae shall file its brief no later than 21 days before the date of oral argument for that case unless the appellate court or a single justice for cause shown shall grant leave for later filing. Any party may request leave from the appellate court or a single justice to file a response to a brief filed by an amicus curiae.

(c) Cover, length, and content

An amicus brief must comply with **Rule 20**. In addition to the requirements of **Rule 20**, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal or neither. An amicus brief need not comply with all the requirements of **Rule 16**, but must include the following:

(1) if the amicus curiae is a corporation, a disclosure statement like that required of parties by **Supreme Judicial Court Rule 1:21**;

(2) a table of contents with page references, in accord with **Rule 16(a)(3)**;

(3) a table of authorities, in accord with **Rule 16(a)(4)**;

(4) a concise statement of the identity of the amicus curiae and its interest in the case;

(5) unless the brief is presented by the Commonwealth or its officer or agency, a declaration that indicates whether

(A) a party or a party's counsel authored the brief in whole or in part;
(B) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief;
(C) a person or entity—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief and, if so, identifying each such person or entity; and

(D) the amicus curiae or its counsel represents or has represented one of the parties to the

present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal, and, if so, identifying the proceeding or transaction, its relevance to the present appeal, and the parties involved;

(6) a summary of argument, in accord with **Rule 16(a)(8)**, if the argument is more than 20 pages in length or more than 4,500 words if produced in a proportionally spaced font;

(7) an argument, which need not include a statement of the applicable standard of review; **(8)** a signature block, in accord with **Rule 16(a)(12)**;

(9) a certificate stating that the brief complies with the requirements of this rule and **Rule 20** and specifying how compliance with the length limit of **Rule 20(a)(3)(E)** was ascertained, by stating either (A) the name, size, and number of characters per inch of the monospaced font used and the number of non-excluded pages, or (B) the name and size of the proportionally spaced font used, the number of non-excluded words, and the name and version of the word-processing program used; and

(10) a certificate of service, in accord with **Rule 13(e)**.
A brief not complying with these rules (including a brief that does not contain a certification)

may be struck from the files by the appellate court or a single justice.

(d) Filing

The same number of copies of the brief of an amicus curiae shall be filed with the clerk and served on each party as required by **Rule 19(d)**.

(e) Oral argument

A motion of an amicus curiae to participate in the oral argument will be granted only for good cause.

Reporter's notes (2019)

Rule 17 was divided into separate subdivisions for clarity and substantively revised as described below.

Rule 17(a) contains the first three sentences of prior Rule 17. The words "or its officer or agency" were added at the end of the second sentence to make it clear that an officer or agency of the Commonwealth may also file an amicus brief as of right. This language was adopted from a similar provision in Fed. R. App. P. 29(a)(2). The phrase "at the request of

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the appellate court" was amended to "when solicited by the appellate court" to clarify when an amicus brief may be filed without leave of court. In accordance with **Rule 17(a)(2)**, an amicus curiae need not move for leave to file a brief in a case where an appellate court has issued an announcement requesting submission of amicus briefs. The words "consent or" were struck because they were redundant of "leave" of court to file an amicus brief.

Rule 17(b) revises the fourth sentence of prior Rule 17 to allow an amicus curiae to file an amicus brief no later than 21 days before the date of oral argument for that case, unless leave is granted for later filing. This is intended to establish an ascertainable date for the filing of an amicus brief on behalf of any party, provide all parties with sufficient time to prepare a response to an amicus brief, and allow the appellate court sufficient time to review any amicus brief or response. **Rule 17(b)** was also amended to explicitly allow any party to seek leave from the appellate court or single justice to respond to any amicus brief.

Rule 17(c) is a new subdivision that governs the cover, length, and content of an amicus brief. An amicus brief must comply with the formatting and length requirements of **Rule 20**. However, an amicus brief does not need to comply with all of the content requirements applicable to a party's brief under **Rule 16**. Instead, **Rule 17(c)** explicitly references certain provisions of **Rule 16** that are applicable to an amicus brief. Text was also added to clarify an amicus brief may be struck by an appellate court or single justice if it does not comply with **Rule 17(c)**.

Rules 17(c)(4) and **(c)(5)** require the amicus curiae to identify its interest in the case in an amicus brief, so that it will be readily apparent to the appellate court when considering the brief. These paragraphs were modelled on Fed. R. App. P. 29(a)(4)(D)-(E), with a few changes. As with the analogous Federal rule, these paragraphs are not intended to require the amicus to disclose mere coordination of arguments or sharing of drafts with a party. The paragraphs are, however, intended to discourage the use of amicus briefs as an instrument to reiterate arguments made by a party to the appeal.

Rule 17(c)(5)(D) requires disclosure concerning whether "the amicus curiae or its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal," in accord with **Aspinall v. Philip Morris Co., Inc., 442 Mass. 381**, 385 n.8 (2004), and **Champa v. Weston Public Schools, 473 Mass. 86**, 87 n.2 (2015). In determining whether another proceeding involves similar issues, the amicus and its counsel need only consider issues that have been explicitly raised in, and that are directly relevant to, the other proceeding and the present appeal. Likewise, in determining whether another proceeding or transaction is at issue in the present appeal, the amicus and its counsel need only consider whether that proceeding or transaction has been explicitly put at issue in the appeal. Similar to Fed. R. App. P. 29(a)(4)(E), the Commonwealth and its officer or agency are exempted from the requirements in **Rule 17(c)(5)**.

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Rule 17(d) contains the last sentence of prior Rule 17 as a stand-alone subdivision. The text "counsel for each party separately represented" was replaced with "each party," consistent with the with the new definition of "party" in **Rule 1(c)**. The cross-reference to **Rule 19(b)** was changed to **Rule 19(d)** to conform to changes in **Rule 19**.

Rule 17(e) contains the fifth sentence of prior Rule 17 as a stand-alone subdivision. The standard for allowing a motion of an amicus curiae to participate in oral argument was changed from "extraordinary reasons" to "good cause" to reflect that an amicus curiae's participation at oral argument may be desirable for a variety of reasons, even if those reasons might not be fairly described as "extraordinary."

Further organizational and stylistic revisions were made to this rule in 2019 in accordance with a global review and revision of all of the Appellate Rules. These revisions are described in the **2019 Reporter's Notes to Rule 1**.

With regard to the preparation of the 2019 Reporter's Notes to this Rule, see the first paragraph of the **2019 Reporter's Notes to Rule 1**. For an overview of the 2019 amendments to the Rules and a summary of the global amendments to the Rules, see **2019 Reporter's Notes to Rule 1, sections I. and II**.

(1997)

The 1997 amendment to Appellate Rule 17 added a new last sentence requiring that the number of copies of an amicus brief to be filed with the appellate court and served on counsel be the same as set forth in **Appellate Rule 19(b)**.

(1979)

Rule 17 is unchanged, its provisions having been incorporated into criminal appellate procedure by former Appeals Court and **Supreme Judicial Court Rules 1:15** (1975: 3 Mass.App.Ct. 803, 366 Mass. 861).

(1973)

No existing rule governs briefs of an amicus curiae. Appellate Rule 17, limiting the right to file such a brief to an amicus who has obtained leave of the full appellate court or a single justice on motion, follows existing practice. It should be noted that the Commonwealth need never obtain leave to file an amicus brief.

Massachusetts Civil Procedure Rule 12: Defenses and Objections - When and How Presented - By Pleading or Motion - Motion for Judgment on Pleadings

[Disclaimer]

(a) When Presented.
(1) After service upon him of any pleading requiring a responsive pleading, a party shall serve

such responsive pleading within 20 days unless otherwise directed by order of the court.

(2) The service of a motion permitted under this rule alters this period of time as follows, unless a different time is fixed by order of the court: (i) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (ii) if the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) Lack of jurisdiction over the subject matter; **(2)** Lack of jurisdiction over the person;
(3) Improper venue;
(4) Insufficiency of process;

(5) Insufficiency of service of process;
(6) Failure to state a claim upon which relief can be granted. **(7)** Failure to join a party under Rule 19;
(8) Misnomer of a party;
(9) Pendency of a prior action in a court of the Commonwealth;

(10) Improper amount of damages in the Superior Court as set forth in G. L. c. 212, §3 or in the District Court as set forth in G. L. c. 218, §19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on any motion asserting the defense numbered (6), to dismiss for

failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. A motion, answer, or reply presenting the defense numbered (6) shall include a short, concise statement of the grounds on which such defense is based.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(10) in subdivision (b) of this rule whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may after hearing order stricken from any pleading any insufficient defense, or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, misnomer of a party, pendency of a

prior action, or improper amount of damages is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a) or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of a party or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Effective July 1, 1974. Amended November 28, 2007, effective March 1, 2008, May 6, 2008, effective July 1, 2008.

Reporter's Notes (2008): Rule 12(b) has been amended to add a new numbered defense, 12(b)(10). This defense permits a defendant to raise by motion to dismiss the issue whether the amount of damages that the plaintiff is reasonably likely to recover meets the requirements of G.L. c. 212, §3 (Superior Court) or G.L. c. 218, §19 (District Court and Boston Municipal Court). Under G.L. c. 212, §3, an action may proceed in the Superior Court "only if there is no reasonable likelihood that recovery by the plaintiff will be less than or equal to $25,000...." Under G.L. c. 218, 19, an action may proceed in the District Court or Boston Municipal Court "only if there is no reasonable likelihood that recovery by the plaintiff will exceed $25,000...." Before the addition of new Rule 12(b)(10), the issue whether the plaintiff met the statutory requirements regarding the $25,000 amount was not included among the defenses enumerated in Rule 12(b), and presumably could be raised only in the answer. With this amendment, the issue may now also be raised by a motion to dismiss. In addition, Rule 12(h) has been amended to provide that failure to raise improper amount of damages in a motion to dismiss or answer constitutes a waiver. Violation of the statutory requirements regarding the $25,000 amount is procedural, not jurisdictional. G.L. c. 212, 3A(b); G.L. c. 218, 19A(b). See Sperounes v. Farese, 449 Mass. 800 (2007). In Sperounes, the Court held that under the statewide one-trial system, a District Court judge must dismiss an action where an objection has been made and where there is a reasonable likelihood the plaintiff will recover more than $25,000. However, where the defendant does not object, a District Court judge has the discretion to dismiss the action sua sponte or to permit it to proceed. Sperounes v. Farese, supra at 806-807.

Reporter's Notes (2008): A 2008 amendment to Rule 12 added a new numbered defense, 12(b)(10), improper amount of damages in the Superior Court, District Court, and Boston Municipal court. This prior amendment was part of a group of amendments to the Massachusetts Rules of Civil Procedure in light of the adoption of the statewide one-trial system for civil cases. This second 2008 amendment to Rule 12 corrects an oversight in the prior group of amendments. The correction changes the language in Rule 12(d) from "defenses specifically enumerated (1)-(9) in subdivision (b)" to "defenses specifically enumerated (1)-(10) in subdivision (b)."

The amendment to 12(d) is technical in nature and merely reflects the additional numbered defense provided by Rule 12(b)(1)-(10).

(1973) Rule 12 prescribes the basic timetable for responsive pleading and the basic mechanism for raising defenses based solely on the pleadings. Rule 56 (Summary Judgments) interrelates with the remedies afforded by Rule 12, especially Rule 12(b)(6) and Rule 12(c). But Rule 56 encompasses matters (as, for example, supporting affidavits) not confined strictly to the pleadings. A court in deciding any motion brought under any part of Rule 12 initially looks only at the pleadings.

Under Rule 12(a)(1) the deadline for filing responsive pleadings is 20 days from receipt of the pleading calling for a response. In actions involving the United States, Federal Rule 12(a) extends this period to 60 days principally to allow the necessary correspondence with the Department of Justice and any other department or agency involved in the litigation. No such extension is necessary in Massachusetts, so Rule 12 makes no special provision for suits against the Commonwealth, its subdivisions, officers, agencies, and the like. Filing any motion under Rule 12 "stops the clock" on the 20-day responding period. The clock resumes when the court either denies the motion or indicates a postponement of its decision until the trial. From the date of notice of the denial or indication, the moving party (the party obligated to respond to the pleading) has 10 days to serve his response unless the court orders otherwise. If the court grants the motion, the pleading is stricken (that is, the complaint is dismissed or the answer is stricken). In Federal practice, the dismissal or the striking is usually conditional; by amending within a period set by the court, or by otherwise eliminating the defect, the pleader can reinstate the pleading. From that point, the party originally required to respond must do so within whatever time may remain of the original period of response, or 10 days, whichever is longer, unless the court orders otherwise, Rule 15(a).

It will be convenient here to consider, out-of-order, motions for more definite statement under Rule 12(e). Because the type of "notice pleading" authorized by the Rules encourages indefinite and generalized complaints, motions for more definite statements are rarely justified. They will generally be granted only if after an indulgent reading the court concludes that the party required to respond to the pleading will not be able fairly to meet the pleading's allegations. If such motion is granted, the court will order that a more definite statement be served within any time the court may order. From receipt of the amended pleading, the opposing party has 10 days to serve his response.

Rule 12(b), taken, with the exception of Rule 12(b) (8) and (9), directly from Federal Rule 12(b), is the heart of the defensive maneuvers previously available in Massachusetts practice: motion to dismiss, special answer, pleas or answer in abatement, plea in bar, and demurrer. The pleader may if he chooses raise any of the nine numbered defenses in his responsive pleading. If, as will much more likely be the case, he elects to raise them by motion, he is bound by three restrictions:

(a) He must make the motion before serving any responsive pleading (Rule 12(b));

(b) He must include in his motion any defense or objection then available (Rule 12(g) and 12(h)(1)); and

(c) If his motion fails to object to personal jurisdiction, venue, process, service of process, or misnomer of a party, he permanently waives any such omitted objection (Rule 12(h)(1)-(2)). The idea here is to conserve judicial time by preventing a defendant from serially raising objections which the plaintiff might well be able to meet. Each of the defects covered by Rule 12(b)(2)-(5) and (8) is curable. Were a defendant permitted to raise such objections one at a time, the court might have to hear and determine as many as five separate motions. By contrast, lack of subject-matter jurisdiction (Rule 12(b)(1)) is generally not curable, and certainly not waivable. Because such a defect is central to the court's basic power to hear the action at all, the issue should remain open throughout, as under prior law. Jones v. Jones, 297 Mass. 198, 202, 7 N.E.2d 1015, 1018 (1937). Failure of a pleading to state a claim upon which relief can be granted, failure to state a legal defense, and failure to join an indispensable party are, true enough, curable defects, in the sense that a pleading may be amended or (frequently though not invariably) a hitherto absent party may be brought into the lawsuit. But such matters are so central to the justiciability of the dispute that failure to raise them by motion should not preclude raising them at an appropriate later stage in the litigation.

It should be emphasized here that although the three "favored" objections must be included in any pre-response motion, failure so to include them merely precludes their being raised by any subsequent or additional pre-pleading motion. They may, however, be raised (Rule 12(h)(2)):

(a) In the response pleading itself;
(b) In a motion for judgment on the pleadings under Rule 12(c); or (c) At the trial on the merits, presumably by motion.

The lack of subject-matter jurisdiction may be raised at any time up to final judgment on appeal, in any way, by any party, or by the court sua sponte.

Under prior Massachusetts practice, the courts resolve the problem of successive proceedings based upon the same facts in different ways, depending upon the classification of the dispute, see Stahler v. Sevinor, 324 Mass. 18, 23, 84 N.E.2d 447, 449 (1949), and cases there cited: (1) if the two actions were both at law, the court ordinarily ordered abatement of the second action; (2) if the two suits were in equity, the plaintiff had to elect dismissal of one; and (3) if one proceeding was at law and the other in equity, the plaintiff likewise had to elect. Rule 12(b)(9) alters these principles. It assumes that the court, rather than the parties, should determine the location of the ultimate litigation; conceivably, for example, the presence in the subsequent action of additional parties might dictate that judicial time and energy would best be conserved by concentrating the litigation in the second court. Whatever the decision, the rule sets up the mechanism to effectuate the court's determination: (a) The court may dismiss the later action; or (b) it may require the parties to stipulate a voluntary dismissal of the prior action. Such stipulation is necessary in order to meet the requirements of Rule 41(a)(1)(ii).

A motion under Rule 12(b)(6), like the traditional demurrer, tests the legal sufficiency of the complaint, counterclaim, or cross-claim. It should be allowed if and only if "it appears to a certainty that [the claiming pleader] is entitled to no relief under any

state of facts which could be proved in support of the claim." 2A Moore, Federal Practice 2245 (original emphasis).

A demurrer looked only to the pleading which it treated. A Rule 12(b)(6) motion may be similarly limited. If, however, in treating the motion, either at the preliminary hearing prescribed in Rule 12(d) or otherwise, the court considers matters outside the pleadings, including uncontroverted allegations by counsel, the motion will be treated as a motion for summary judgment under Rule 56, and all parties, including parties who may not be joining in the original motion, will be afforded an opportunity to present material pertinent to a Rule 56 motion. Under prior practice, a "speaking" demurrer would be dismissed. Davenport v. Town of Danvers, 332 Mass. 580, 582, 126 N.E.2d 530, 531 (1955).

One other distinction between Rule 12(b)(6) and demurrer practice should be noted. In Massachusetts, a demurrer had to stand alone and could not be presented along with other motions or with an answer to the declaration or bill. The Rules encourage, indeed require, concentration of defensive pleadings and motions. Therefore the defense raised by Rule 12(b)(6), whether in motion, answer, or otherwise, may be presented either alone or in combination. A motion under Rule 12(b)(6) must contain a statement of grounds. This closely resembles prior practice, G.L. c. 231, § 16.

Rule 12(c) is designed to cover the rare case where the answer admits all the material allegations of the complaint (or the reply admits all the allegations of the counterclaim) so that no material issue of fact remains for adjudication. Because under Rule 8(d) all allegations in the usual answer (that is, one to which no reply is required or permitted) are taken as denied, a defendant will normally not even be eligible to move for judgment on the pleadings. If, in any event, the court considers matters outside the pleadings, the motion will be treated as one for summary judgment under Rule 56.

The Rules abolish the bill of particulars, see e.g., G.L. c. 231, § 14 (a bill of particulars must be filed in an action on the common counts). Under the principles of notice-pleading espoused by the Rules, a responding party is supposed to obtain clarification of his opponent's vague pleading through use of the various discovery procedures, particularly interrogatories (Rule 33) and depositions (Rule 30). Occasionally, however, a pleading may be so murky that it defies any intelligent response. In that rare case, Rule 12(e) permits the responding party to bring his specific inability to the court's attention and permits the court to order an appropriate amendment.

Rule 12(f) indicates explicitly that although the court may, sua sponte, clean up the pleadings (literally and figuratively) at any time, it may strike an insufficient defense only if the plaintiff takes the initiative. A motion to strike a defense as insufficient is the counterpart of a motion under Rule 12(b)(6), see Lehmann Trading Corp. v. J & H Stolow, Inc., 184 F. Supp. 21, 22 (S.D.N.Y.1960). Although Federal Rule 12(f) makes no provision for the court's consideration of matters outside the pleadings, the federal courts have done so, Wilkinson v. Field, 108 F. Supp. 541, 545 (W.D.Ark.1952), 2A Moore, Federal Practice 2320. Accordingly, the Reporters felt that such provision ought to be made explicit. Under Rule 12(f), as under existing federal practice, a motion to strike an insufficient defense searches the pleadings; in

hearing such a motion, the court may properly dismiss the complaint for failure to state a claim upon which relief can be granted, just as though the defendant had been the moving party under Rule 12(b)(6), Gunder v. New York Times Co., 37 F. Supp. 911, 912 (S.D.N.Y.1941).

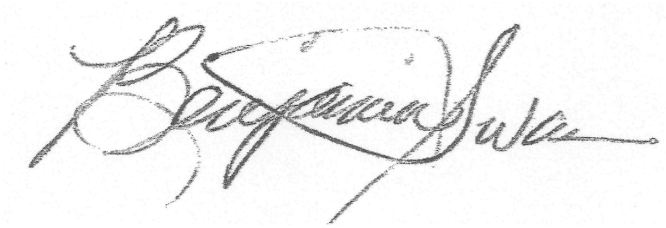
CERTIFICATE OF COMPLIANCE WITH RULE 16(k) and 17

I hereby certify that the foregoing Amici Brief complies, to the best of our knowledge and belief, with the rules of Court pertaining to filing of appellate briefs, including those specified in MRAP 16(k). It is overlength but given legislative history of all the most relevant statutes, Amicus helped pass or stood in the tradition of, he is in a unique position to seek enforcement of our laws and prays acceptance.

It is formatted in compliance with monospaced font, 12-point Courier, requirements.

I also certify that no party or party's counsel authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; no person or entity — other than the amicus curiae — contributed money that was intended to fund preparing or submitting the brief; and nor does Amicus Curiae represent nor has Amicus represented one of the parties to the present appeal in another proceeding involving similar issues, nor was a party or represented a party in a proceeding or legal transaction that is at issue in this appeal.

Respectfully submitted,



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DATE: July 21, 2020

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished on July 21, 2020 by E-Service and US Mail upon the following:

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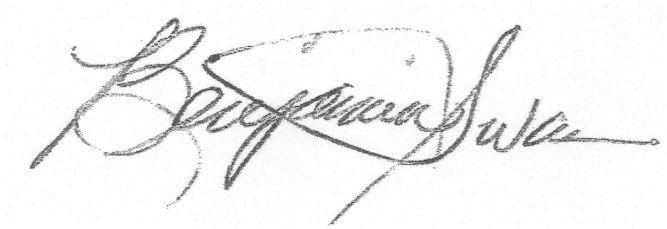

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