

The Commonwealth of Massachusetts

Lead sponsors: Senator Chandler, Representative Pedone

An Act to Establish Mandatory Foreclosure Mediation with Judicial Review

AMENDMENTS TO G.L. c. 244 §35A:

Chapter 244 §35A of the Massachusetts General Laws is hereby amended in subsection (b) by striking the words “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.” In subsection (c) inserting after the word “section”, “**and §35B**”; and striking the words “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).” by replacing in (h)(10) “The division of banks shall adopt regulations in accordance with the subsection.” with “**The Attorney General shall adopt regulations in accordance with this subsection.**” and by striking subsections (c), (d), (f) and (g) and adding the words “**and §35B**” after the words “this section” to subsection (k)

INSERT NEW §35B after the end of §35A:

Section 35B: Massachusetts Foreclosure Mediation Program and Judicial Review

1) Establishment of the Massachusetts Foreclosure Mediation Program. Not later than ninety (90) days after the enactment of this legislation, the Attorney General shall establish the Massachusetts Foreclosure Mediation Program (MFMP) and promulgate regulations as necessary and appropriate to implementing such a mediation program. The Attorney General shall also set standards for training mediators in foreclosure mediation, loss mitigation and alternatives to foreclosure.

2) Notice of Right to Mediation. When a mortgagee of residential real property sends a notice of right to cure pursuant to §35A to the mortgagor, it shall also send a copy to the Massachusetts Foreclosure Mediation Program (MFMP). The MFMP shall then send to the mortgagor the notice of right to mediation, offering the mortgagor the opportunity to participate in mediation. If a notice of right to cure is not required, the mortgagee shall send a notice of intent to foreclose to the MFMP and the mortgagor at least one hundred and fifty (150) days before initiating foreclosure; the MFMP shall then send the mortgagor the notice of right to mediation. The MFMP will also telephone mortgagors to inform them of their right to participate in mediation. If the mortgagor elects to participate in mediation, he/she will have the opportunity to negotiate a commercially reasonable alternative to foreclosure with the mortgagee with the assistance of a neutral third-party mediator. A commercially reasonable alternative may include but shall not be limited to a modification of the loan, principal, interest rate or term of the mortgage. If an agreement is not reached in mediation, the mortgagee must seek court permission to proceed with foreclosure under power of sale or entry as set forth in this chapter of the Massachusetts General Laws. If the mortgagor does not elect to participate in mediation, foreclosure may proceed in accordance with the provisions of this chapter of the Massachusetts General Laws.

3) Duty to Engage in Good Faith Mediation. If a mortgagor elects to participate in the Massachusetts Foreclosure Mediation Program (MFMP), a mortgagee shall not accelerate the note or otherwise initiate foreclosure proceedings unless the mediator has certified that the mortgagee participated in the MFMP and engaged in mediation in good faith; made all reasonable efforts to find an alternative to foreclosure; and that any agreement is in full compliance with all state and federal guidelines. Engaging in good faith mediation shall include a review of the borrower's financial situation including but not limited to evaluating the mortgagor's eligibility for all loan modification programs, including providing a written net present value (NPV) analysis. Failure to comply with this section shall constitute a defense to the foreclosure.

4) Administration of the Massachusetts Foreclosure Mediation Program.

a. The notice of right to mediation shall be promulgated by the Attorney General, and shall include a declaration in the five most common languages other than English, appearing on the first page and stating: "This is an important notice regarding a possible foreclosure of your home. Have it translated immediately." The mortgagor will also be provided with a self-addressed, stamped envelope in which to return a form electing to participate in mediation. The mortgagor or his/her representative may also indicate his/her intention to participate in mediation via telephone, online, or in-person at designated non-profit agencies.

b. An in-person mediation session shall be conducted between the mortgagor and his/her representative and/or housing counselor, and the mortgagee's representative, who must have authority to negotiate alternatives to foreclosure, including but not limited to a modification of the loan, principal, interest rate or term of the mortgage. As early as possible but no later than five (5) days before the scheduled mediation, the mortgagee shall provide proof of ownership and a written net present value analysis to the mortgagor and the MFMP. Where required, the

mortgagee shall bring additional documents supporting the net present value analysis to the mediation session.

c. Borrowers will be referred to and encouraged to work with a non-profit housing counseling agency. If the initial mediation session does not result in an agreement, the parties may agree to a second mediation session.

d. The mediation period shall conclude not more than one hundred and twenty (120) days after the mortgagor elects to participate in mediation. During this time the mortgagee shall not accelerate the note or otherwise initiate foreclosure proceedings.

e. If mediation results in an agreement, the mortgagor shall have not fewer than seven (7) days to review and sign the mediation agreement and return it to the MFMP and the mortgagee. The mortgagor shall not be required to waive any legal rights or defenses by entering into a mediation agreement. All mortgage modifications shall be recorded in the appropriate registry of deeds.

f. Any costs necessary to establish and operate the Massachusetts Foreclosure Mediation Program shall be borne by the parties to the mediation as set forth in the regulations; and by the filing fee for foreclosure complaints pursuant to paragraph 5 below. A mortgagor's portion of the fee shall not exceed 15% of the total cost of the mediation. A mortgagor's inability to pay for mediation shall not be a bar to participation in the MFMP.

5. Judicial Requirement for Mediation Without Agreement. If the mediation process does not result in an agreement, the mortgagee must file in Superior Court a Complaint to Proceed with Foreclosure under power of sale or entry. The mortgagor can file an answer to such action and can raise all legal and equitable defenses. If judgment for the mortgagee enters, the mortgagee may complete foreclosure by power of sale or entry pursuant to this chapter of the Massachusetts General Laws.