

Massachusetts Alliance Against Predatory Lending

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AN ACT TO ESTABLISH MANDATORY MEDIATION WITH JUDICIAL REVIEW: FACT SHEET

Senate Bill 673, Main Sponsor: Senator Chandler
House Bill 1355, Main Sponsors: Representatives Pedone, O'Day, Mahoney

What Does This Bill Do?

This Bill requires banks to mediate in good faith with homeowners to identify alternative resolutions before starting foreclosure. It establishes the Massachusetts Foreclosure Mediation Program (MFMP), overseen and administered by the Attorney General. The MFMP will train neutral, third-party mediators in foreclosure alternatives and ensure all borrowers have the option of participating in mediation before foreclosure can begin and access to judicial review if a mutually acceptable mediation agreement cannot be reached.

Three Other Bills Have Been Filed:

Preventing Unnecessary Vacancies of Foreclosed Homes; Clarification of Ownership in Evictions; Judicial Review

How Will the Massachusetts Foreclosure Mediation Program Work?

Banks usually conduct foreclosures in Massachusetts using the power of sale, which is triggered when the banks "accelerate the note". Under current law, foreclosing lenders must first send the homeowner a notice of right to cure at least 150 days before accelerating the note (subject to G.L. c.244 s.35A). This Bill requires the lender to send the same notice to the MFMP. (If no notice of right to cure is required, the lender must send a notice intent to foreclose at least 150 days before accelerating the note.) The MFMP then notifies homeowners of their right to participate in the mediation. Homeowners can then contact the MFMP to schedule a mediation session. The homeowner can do this by mail, telephone, online or in person at designated non-profit agencies.

Before the mediation, the lender will send the homeowner and MFMP a net present value analysis to review. The homeowner will be referred to and encouraged to work with a housing counselor to help determine possible workout options before mediation. The mediation session will be conducted in person, between the homeowner and his/her representative or attorney, and the lender's representative, who must have authority to make an agreement. A second mediation session can be scheduled. A mediated agreement could include a loan modification, including principal reduction, interest rate reduction, or change in the term of the mortgage. If agreement is reached, the homeowner has seven days to sign and return it. The entire mediation process will last no longer than 120 days from the time the homeowner contacts the MFMP. The mediator must certify the lender participated in mediation in good faith.

If the parties cannot make an agreement in mediation, the lender must file a complaint in Superior Court for permission to proceed with the foreclosure. Homeowners can file an answer and defend themselves in the court case. If the lender wins the court case, the lender can proceed with the foreclosure by sale or entry.

Why Do We Need Mandatory Mediation?

Voluntary refinancing programs fall far short of their projected impact. The \$75B federal Home Affordable Modification Program (HAMP) was designed to help 3 to 4 million homeowners by the end of 2012, but by March 2010, there were only 170,000 permanent modifications. The HAMP process takes over 14 months and homeowners send the same documents to lenders an average of 6 times. Borrowers report: extremely long telephone waits to reach lenders; being transferred between departments; and lost paperwork. Most homeowners are denied but not told why and lenders foreclose during the process in violation of HAMP rules.

Massachusetts is the only New England state without mandatory mediation and yet the foreclosure crisis here continues with more foreclosures, more petitions filed, and increasing geographic spread: this increases the negative impacts on Massachusetts families, communities and our economy with an estimated loss of up to \$4.1B per month to our state economy. Foreclosures now occur statewide including in rural communities such as Winchendon and Athol and high income suburbs. RealtyTrac, which follows foreclosures, says "2011 is going to be the peak." Many homeowners have realistic solutions to propose to an authorized representative of their lender and legal claims but do not know how to prove them without legal help. For most distressed homeowners, all that is needed is an opportunity to speak with the lender in a meaningful way, which the Bill would provide.

How Will Mandatory Mediation with Judicial Review Help?

The Bill gives homeowners the ability to review their mortgage directly with the lender and develop a solution satisfactory to both parties in a time period shorter than Massachusetts' present 150 day Right to Cure period. It also provides for both parties the right to a day in court if an agreement cannot be reached in mediation.

Is Mandatory Mediation Working in Other Places?

In other jurisdictions with mandatory mediation laws, approximately half of homeowners respond to offers to mediate. On average, over 50% of homeowners and lenders who sit down to third-party mediation are able to find an agreement that keeps the homeowner in the home. In Connecticut, 40% of homeowners participate in mediation, with 60% staying in their homes as a result. 60-70% of Philadelphia's homeowners go to the initial session with roughly 1/3 remaining in their home long-term. In New York, about 80% of homeowners go to mediation, with about half of those homeowners staying in their homes. Over 20 cities or states require foreclosure mediation (such as Maine, Maryland, Nevada, Vermont, and Providence, RI).

Does Judicial Review Strengthen Mandatory Mediation?

Most jurisdictions with mandatory mediation also have judicial foreclosure. In the 23 states with judicial foreclosure, its existence has been an important incentive to effective mediation; the only mediation program in a non-judicial state that attains the similar high rates of success is Nevada, which allows for judicial review in cases where mediation fails. Philadelphia program found it needed to keep court cases open to ensure actual implementation of mediated agreements. Mediation is proven a less costly diversion, resulting in higher resolution rates when designed in accordance with best practices. Yet, although judicial foreclosure guarantees a right to a day in court, 85% to 95% of borrowers do not appear. This bill incorporates the advantages of mandatory mediation while addressing the downsides of judicial foreclosure – high costs and a high default rate – into a unique, cost-saving procedure: joining mandatory mediation's success with the right to a day in court for both parties only when mediation does not result in agreement. This Bill minimizes costs by scheduling mediation sessions only when a borrower elects to participate and by reducing court involvement only to cases where the parties have engaged in mediation, reducing the number of defaults.

Will Mandatory Mediation with Judicial Review Delay the Foreclosure Process?

No. The Bill specifies that the mediation process will take less time than the Right to Cure period already defined in G.L. 244, s.35A, enacted in 2010. In the instances where mediation results in no satisfactory agreement, a judicial review process will cause some delay; however, relatively few cases are likely to proceed to judicial review, thus limiting the court's case burden and resources wasted on defaults.

Will this Bill cost or save the Commonwealth money?

Foreclosures cost everyone. One foreclosed home has a devastating ripple effect on surrounding home values (In Boston alone, one vacated foreclosure costs neighbors, residents and the City itself from \$190 thousand to \$1.072 million). Volunteer modification programs have not slowed down the rate of foreclosures and have fallen staggeringly short of projected numbers. Lenders are also losing money; in September 2010 alone, mortgage servicer portfolios lost \$2.7 billion in foreclosure sales nationally, or 58% of original principal balances. Loan modifications reduce losses to everyone, even lenders - mortgages modified to forgive a portion of principal lost only 20% of loan balances. The Massachusetts Foreclosure Mediation Program is structured so that program costs are covered by fees, which have successfully provided for mandatory mediation programs across the country. Some costs will be budgeted for foreclosure cases that are not resolved by mediation and proceed to judicial review; however, this will be a fraction of the cost of a full judicial foreclosure process, and a far less costly investment than allowing the foreclosures to continue at current rates.

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