Massachusetts Alliance Against Predatory Lending

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Comments of Grace C Ross of the Mass Alliance Against Predatory Lending In Opposition to Senate 774: An Act clearing titles to foreclosed properties

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My name is Grace Ross, the Coordinator of the Mass Alliance Against Predatory Lending. First I want to thank the chair people and committee members for having me today in front of you to testify.

The legislation – Senate Bill 774 that I'm here to testify in opposition to, in fact, came about because of some very serious concerns which we share. This proposed bill does not address those very widespread problems. It focuses a small minority of properties whose titles are likely to be clouded; seeking to strengthen a law that does not touch on the primary problem identified. But it would preclude long established rights for homeowners even though it does not address the identified problem.

1. This legislation addresses a tiny percentage of the properties with titles clouded by recent practices – because the vast majority have not/will not be foreclosed upon in this period.

2. This legislation does not address the title-clouding issue that proposers stated they sought to address – that is problems with assignments. The statutory form of the MGL Chap 244 sect 15 affidavit that the industry standardly uses does not even mention assignments.

3. The statutory form this bill seeks to strengthen addresses few aspects of the foreclosure process; this has been and is routinely signed in violation of state personal signature requirements (not signed under personal knowledge).

4. This legislation attempts to vastly curtail the time for former homeowners to address foreclosure violations to 3 years post foreclosure. Most violations are addressed by existing statutes with existing 4, 6 or 20 year statutes of limitation

5. Because of the wide-ranging and multiple mortgaging and foreclosure irregularities/illegalities being adjudicated presently, valid legal claims are constantly shifting – it would be capricious to shorten a time period for legal claims when every few months what is legally possible changes

6. The filing of this affidavit is not determined by law and can happen at any point post-sale from one month to 18 months in our experience. It is recorded with no notice to the former homeowner. Yet this bill would have this recording trigger the 3 year window to sue.

7. 61,000+ foreclosures have happened since the beginning of 2007, the vast majority will have been foreclosed more than 2 & ½ years if this passes into law – meaning 10,000s

of homeowners will have only 6 months to file potentially valid claims in the unannounced six month period until implementation.

This bill appears to have been proposed to remedy two conflated problems. One, there has always been a history of certain number of titles to property that had some defect. The people who tried to purchase that property or did purchase it and then later on found out there was a problem with it have been handicapped by our property system; we don't have judicial foreclosure and, therefore, do not legally capture other defects that might have existed. It can be quite expensive depending out how far back you have to go to get those defects corrected.

This has gotten tangled up with a much more recent problem: the number of folks who've tried to purchase properties that have been victim to the recent rampant foreclosures of our ongoing crisis. I've been pleased in working with Senator Moore's Chief of Staff to share stories about what she's been hearing and ones I hear through family members of our various grassroots anti-foreclosure networks across the state. In trying to purchase foreclosed properties potential buyers reports problems that may take them six months to a year to remedy; sometimes it will take much too long to be remedied. These recent defects are because of problems directly related to the mortgaging and foreclosure violations. These violations are known now to be rampant in our property records system. These need correction.

Already existing remedy

Most examples tell of folks going far out of their way to remedy a title defect after the fact; they find previous owners somewhere in the recent chain of title and pay them off in one way or another to get them to sign something to clear the title. These same violations we are find in the foreclosure process of homeowners and recently former homeowners who are fighting to stop or reverse an illegal foreclosure.

These potential buyers are in the same boat as any other third party. They are covered by a new remedy on the books thanks to last summer's foreclosure bill; this removes the need for Senate 774. Chapter 244 section 35-C subsection C says that any creditor who violates Chapter 244 if there's a cost to a third party for "correcting, curing, or confirming documentation relating to the sale, transfer, or assignment of a mortgage loan" that those costs to cure the defect from an invalid foreclosure are recoverable along with attorney fees.

The larger banks responsible for many of the foreclosures our recent report and our next about-to-be-released report showing that most violations are part of their standard operating forms and procedures. They have drained money out of our state, often illegally, and with these sorts of situations are costing people in our state additional money beyond the incredible loss of value and stability and damage to our communities of the foreclosures themselves. The additional cost to our people trying to clean up that documentation should be required to put money back in to fix if the legal defects they left behind.

Stated problem is bad assignments impairing title especially in new purchases

I am particularly pleased to submit this testimony after having the honor of hearing the specific concerns and reasoning of the title insurance lawyers who have been so focused on concerns from which this legislation arises. They named specifically chain of assignment concerns for all properties going forward.

This legislation then proposes a solution unrelated to the problems it is stated to address:

1. S774 seeks to give the affidavit generally filed under Chapter 244 section 15 (the foreclosure affidavit filed with foreclosure deeds) conclusory authority in validating a foreclosure. S774 is irrelevant to the issue of valid assignments as the statutory form of this affidavit does not mention anything relevant to chain of title[1]. While legislation from 2012 created new language related to assignments, it did not change the statutory form NOR does S774 seek only to defined as conclusory affidavits that include assignment language.

   S774 does not remedy the stated issue in the clouding of titles

2. Secondly, S774 would only relate to title issues for property that passes through foreclosure – since it is operational only through Chapter 244; even with the unprecedented number of foreclosures, they represent only a small percentage of all the properties in our state. As such the vast majority of questionable filings affecting title are of properties on which a 244 15 affidavit will never be filed.

   S774 even if effective would not be relevant in the vast majority of clouded titles

Stated problem now rampant in property records; vast majority will never be touched by S774.

While we have been and continue to experience historically unprecedented rates of foreclosures, these questionable legal practices that underlie many of them, were incorporated into many tens of thousands of recorded legal documents in our registries. The problematic assignments which are the stated purpose of S774 were used in standard operating procedures often of the biggest national and international lenders. Since 2000 or 2002 when the housing prices took off, the vast majority of the market shifted from local portfolio loans to these big players. By 2004, most loans were no longer originated locally. Mortgages were transferred many more times in the last dozen years than probably any other period. There is well over 5 times as many properties that will never foreclose than we will experience by the end of the crisis.

To provide one example: there is a common practice in assignments made by MERS that even MERS itself, in all its corporate documents and member agreements (according to the Attorney General of New York, among others), says in beyond their legal powers. We did a quick review for this one violation in MERS assignments of one registry in Massachusetts and then extrapolated to the rest of the state registries based on their relative size. There may be

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are needed to see this picture.

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between 25,000 and 83,500 of these assignments in Massachusetts recorded between 2002 and 2012. Just this one example goes far beyond the number of Massachusetts foreclosures and foreclosures that included this violation.

And this is just one easily identifiable and consistently recognized violation.

The focus on only properties that experience foreclosure will miss the vast majority of assignment problems that may cloud a title. There is in fact no evidence to our knowledge that critical legal irregularities in assignments are more likely to exist in properties that experience during this crisis. Perhaps the focus on foreclosed properties is completely reflective that these are the properties most likely to be considered for purchase right now; perhaps, the assignment violations are more prevalent among non-foreclosed properties and S774 will provide a semblance of correction diverting our attention from the much more dangerous, long term and ongoing impairments that we need to correcting now.

S774's mechanism for enforcement inadequate, irrelevant to identified problem

The enforcement mechanism here, that the bill relies on, is the foreclosure affidavit that's supposed to be in compliance with MGL Chap 244, sect. 15. The SJC ruling in *Hendricks* acknowledges that the presently-used statutory foreclosure affidavit form does not meet the standard of MGL Chap 244, sect. 15, that is needed in court. It is not specific enough to enumerate what you would need to enumerate to show that a foreclosure actually followed our laws. The statutory form in use is an abbreviated form *created simply and specifically to clarify in the Registry records* that the general framework of what was done to foreclose was compliant with our laws.

Given that we have an SJC decision already acknowledging that the affidavit here referenced in this legislation is insufficient to prove all the evidence needed to show compliance with the statutory power of sell; this affidavit then is simply an inappropriate affidavit through which to limit people's rights around many possible violations.

Enforcement affidavit is almost always executed in violation of state/federal statutory requirements

I have left you a copy of MAAPL's report on the legal validity of these very affidavits from the five megabanks that were part of the national mortgage settlement, known as the "AG Settlement". The report demonstrates that not one of these very affidavits that proposers are asking the legislature to rely upon is compliant with the legal requirements of affidavits. State and federal law require signers of affidavits sign upon personal knowledge (or as keepers of the records upon review of standard business practices). In the report, the attached legal decisions show that none of these affidavits are compliant with the requirements that they be signed under personal knowledge – the colloquial term being robo-signing. In other words, they're signed by somebody assuming that the legal documentation that they have been handed is, in fact, compliant with our laws and signing to that effect even though they *may or may not have been*; nor would they know *because they did not check them*.

I would be happy to provide each of you with the almost 200 affidavits that we researched in this study. Those 200 affidavits now reflect an almost certainty of non-compliance of all affidavits by the five settlement banks even since July 5th of last year when they promised no more robo-signed documents; the study samples represent literally thousands of such affidavits. There has been no change in the robo-signing practices of the major banks not just the five settlement

banks; non local banks as a whole continue to sign these affidavits not based on personal knowledge.

You are being asked to pass a law for affidavits that the SJC has adjudicated at the top court are inadequate as proof of compliance based on the statutory form provided and used. We have shown these are endemically robo-signed in violation of state and federal requirements for signing based on personal knowledge or personal review of the business records. We have seen no change in the behavior of the banks even when they are under a federal settlement agreement around the veracity of these affidavits.

I am at your service to literally walk your staff through: (a) exactly how these affidavits are non-compliant; (b) why they are always non-compliant with statutory requirements of being under personal knowledge; and (c) the common violations that they do not assess properly and are not reflected in the affidavits. The lack of violations identification make all of them invalid based on their content not just on the fact that they are not signed based on personal knowledge.

S774 won't solve identified problem; will damage homeowner rights.

On the other hand, **this bill is of great concern to us.**

It basically **creates a pseudo statute of limitations to any challenge to a foreclosure for someone to get their home back. While monetary damages mean something, they don't make up for the memories of the marks on a wall of a child's height as they grew up, they don't make up for the memories of your first night in your new home as a newlywed or the tears and joys of raising children and no home is replaceable with another home.**

A home is inherently irreplaceable, not 'fungible'

The legal concept that I was exposed in this effort around foreclosures is the lack of fundability. That is: one house no matter how much similar the value and price and whatever style of the building, is never the same as the home that you had to give up.

The fact that this legislation will make it impossible to get the real remedy – to save or to get your home returned to you when there has been a violation of the foreclosure or mortgaging process is just not an acceptable alternative. As our top courts said in their famous *Ibanez* ruling that **"Massachusetts give mortgagees an awesome power to foreclosure without judicial oversight" and it is truly an awesome power.** It is not one that in any sense should be codified even when there have been violations because a homeowner only gets three years from the date of some affidavit filed with foreclosures in our state. That is not an acceptable measuring stick.

S774 provides no notice for beginning of three year window for legal action

People are not notified when that foreclosure affidavit is filed; thus, they won't know when their window of three year opportunity to sue opens. This bill provides no alerts so people will know they only have three years; this would become a huge cutback on a core due process right to your right to property.

S774 provides no notice of dramatic change in rights, shortening of statutes of limitations

This bill also provides **no notification that our laws will dramatically change: the statutes of limitations for some of the violations of people's property rights are 20 years right now**;

you are contemplating cutting those by more than a sixth. People will not know that their rights have been decimated in that way.

S774 provides a 6-month window for legal action for vast majority of foreclosures from crisis

In addition, the legislation would only give people the **sixth month until enactment to file a case if they were foreclosed upon two and half years or more before the passage of this legislation**. Therefore, in the vast majority of recent foreclosures, they would only have that six months window before it's technically enacted in which they would be able to sue at all.

6-month window is very short for potentially 40,000+ to take legal action

Six months is completely unreasonable for a number of reasons. In a non-judicial state, this is especially difficult for because homeowners would have to:

1) know when that window started,
2) know when that window closed,
3) get assistance to understand what is a very complicated foreclosure process because we're a non judicial state with very complicated laws.
People who are trying to do advocacy in this field and lawyers constantly describe to me how completely confusing our system is. Assuming folks could figure that out, close to half of their claims are likely to be consumer law violations. For consumer law violations in our state, they would have to:
4) send out the required 30 days demand letter. They have to wait 30 days for a response before they can even file.

So six months is six months minus the amount of time it takes to find out this window has briefly opened for you, figuring out what violations occurred, sending out a demand letter, waiting for 30 days and then starting your legal process.

61,000 + foreclosures have happened since the clear-cut escalation of foreclosures in our state. This law would provide 40,000+ of those folks with only six months from the passage of this bill to file a case if they so choose. Among other thing, whoever takes responsibility for passage of this bill will be roundly disliked by our judiciary if they have suddenly got 500 to several thousand cases dropped on them in a six month period. It is completely unrealistic for our judiciary to handle that level of filings.

Now is not the appropriate time to do this: foreclosure legal interpretations in rapid flux.

The precedent setting cases that are finally coming relatively quickly have all happened since the beginning of 2011 (I went through the list). Seminal cases like Ibanez were finally decided January of 2011. Bailey which has changed our entire Housing Court system in relation to foreclosure came down in August of 2011. Eaton in the summer of 2012, Bevilacqua, all of which represent significant clarification of the rights of homeowners have happened in the last year and a half.

This legislation cannot be passed right now with this three year window. We have no idea what the legal changes in our system will be in the next three years around foreclosures, but they're going to be significant. They are mostly going to be about protecting homeowners rights. It is determinative when you file your case if one of these seminal cases is in the works and you don't know about it. Then a decision gets made that could've protected your rights in some way that you unaware of – in fact the legal community was unaware of it. This would be grossly

unfair especially for the folks who would have to file in the six months period after the enactment of this legislation.

Many of these seminal cases, Eaton, for instance, took two and a half years from when Eaton's foreclosure was before Eaton got a decision on what was happening. That means everybody else foreclosed around that time when Eaton was potentially with the same violation in their case would be pre-empted from that defense. It took two and a half years for that to even be a viable option for folks to win a new right. It was four and a half years between when Bailey filed and when that decision finally came down.

A three year window – when the law is changing like this and people's rights are finally beginning to be enforceable – is just grossly unfair to tens of thousands of people who have found themselves unprotected; this is especially true even when there are legal violations in their case that may still be becoming legally recognized because our legal system has been turned so upside down.

The seminal Fremont case brought by the Attorney General when it was finally decided applied to loans from more than four years earlier. It is grossly unfair to not give people their opportunity to take advantage of clarifications of our legal system that they had a right to before their window to sue might be closed.

The reach of each of the decisions just mentioned impacts from many thousands to tens of thousands of foreclosures. These violations are only now beginning to get adjudicated even though they are endemic through the entire system.

Property system deeply damaged: need sweeping clean-up not ineffective misguided action that includes inappropriate curtailment of rights

We need a way to clean up our property system, but that has to be by actually cleaning up and bringing into compliance the mortgaging and foreclosure procedures that have been completely askew.

Using an affidavit that has been ruled legally inadequate as proof of compliance, overwhelmingly not signed based on personal knowledge as required legally for all affidavits and does not even reference the most common identified problem is clearly off-the-mark.

No particular calendar day will be appropriate when our entire legal system is trying to get back on its feet. Enforceable rights for homeowners are in monthly flux and creating a shortened arbitrary window will mean capricious access to whatever enforcement opportunities have been created to date.

Such an arbitrary cut off creates a russian-roulette situation for homeowners. They will be provided no notice of this sweeping legal change to their rights, nor notification of when their potentially only 6 month window of opportunity opens.

It may be almost as harsh for the courts to be put under pressure of an incredibly short timeline to try to sort out dozens of systemic problems.

It's not fair to any of us to create this situation.

*MAAPL eagerly awaits an opportunity to meet with interested parties and begin to pound out the **needed real solutions to this untenable mess in our recordation system. One we identified in 2008** when we started talking to legislators about our concerns generated by pulling back the curtain on the basis of this crisis.*