Violating State Law: Continuing Practice by Settlement Banks in Massachusetts Foreclosures

By

Grace C Ross on behalf of the
Mass Alliance Against Predatory Lending

August 5th, 2013

The Mass Alliance Against Predatory Lending (MAAPL) is a coalition of over 70 member and supporting organizations – community organizations, housing counseling agencies, legal services groups, labor and others – founded to arrest the impacts of the foreclosure crisis in Massachusetts through grassroots organizing, homeowner/tenant education, legal strategies and policy initiatives.

MAAPL member/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, No One Leaves – Springfield, 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.

Grace C Ross has been the coordinator of the Mass Alliance Against Predatory Lending for more than five years. She has coordinated all activities including being the Alliance's lobbyist, helping to write, negotiate and gain the passage of Massachusetts' recent foreclosure-related laws. Her background includes almost 30 years of policy work. She holds a Masters in Education in Counseling and Consulting Psychology; her education includes several courses in statistical analysis and her thesis in experimental and statistical research.

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Executive Summary

Violating State Law: Continuing Practice by Settlement Banks in Massachusetts Foreclosures reports on a review of the compliance with state law and requirements of affidavits being signed under personal knowledge by the five megabanks that are party to the national settlement, known as the "Attorneys General's Settlement". Mass Alliance Against Predatory Lending reviewed the *Right to Cure* letters sent to borrowers under a 2007 Massachusetts law and the accompanying affidavit. This is the second of the two types of affidavits required in all foreclosures in Massachusetts up until this time. Like MAAPL/GoLocal's first report, this report documents the ongoing widespread violation of the state's foreclosure process by the five settlement banks.

The first report from the Mortgage Settlement Monitor for the 'Attorneys General's settlement' came out August 29th, 2012. The *First Take* report stated that the settlement banks claimed 100% compliance with legal requirements that all affidavits be signed on personal knowledge and with state's laws as of July 5, 2012. Having seen no improvement in legal compliance by its hundreds of homeowners and dozens of lawyers, MAAPL felt compelled to test these banks' claim to legal compliance. MAAPL sought to assess the propriety of claiming that the reports to the Settlement Monitor were fraudulent in regards to their practices in the Commonwealth of Massachusetts.

Massachusetts does not have judicial foreclosure; homeowners do not get a day in court where a judge reviews the validity of foreclosure-required documents. It is an "honor-code" state dependant on banks' unsupervised compliance with state law.

MAAPL identified all recorded Land Court notices from the five settlement banks in one of the state's larger Registry of Deeds, Worcester. MAAPL pulled associated copies of the *Right to Cure* letters and the affidavits attesting to their legal compliance from Land Court. These letters were then checked for compliance with state law.

The five banks – Bank of America, JP Morgan Chase, Wells Fargo, Citi, and GMAC as part of Allied Group – filed 151 copies of letters from the reported date of 100% compliance with these two legal metrics in the Worcester Registry of Deeds through November 19, 2012. Our results showed *100% non-compliance with state laws and requirement that affidavits be signed based on personal knowledge.* If this practice has continued statewide, very rough estimates project potentially as many as 9000+ such violations since July 5th in our Commonwealth.

- *August 5, 2013*

Forward

MAAPL is very proud to provide our second report on assessing the veracity of the compliance claims by the 5 megabanks party to the so-called "Attorneys General's settlement". This research was done as a direct result of the anecdotal experience of our homeowners and lawyers dealing with the largest foreclosing lenders. Their procedures regarding, for instance, signing affidavits based on personal knowledge or compliance with key Massachusetts laws appears endemically non-compliant. These behaviors do not seem to change regardless of various court agreements.

MAAPL used its broad reach with homeowners' organizing together on the ground, lawyers statewide, and many different types of member groups including such electeds as a Register of Deeds to accomplish this detailed study of the claims of compliance by the settlement banks.

There are too many that contributed in more ways than we can name to make this report, the legal enforcement of the law we review here and our overall work possible – we thank you all every day as we reach for a just resolution to this crisis.

Grace C Ross, Coordinator
Mass Alliance Against Predatory Lending

Introduction

On August 29th, 2012, the Settlement Monitor for the five largest foreclosing lenders and the Attorneys General and five Federal Agencies released his first report: *First Take: Progress Report from the Monitor of the National Mortgage Settlement*.

This report from the Mortgage Settlement Monitor was not required by the settlement; the first required reports will be submitted to the Federal District Court for the District of Columbia in the second quarter of 2013. But this was the Monitor's introduction to the public, a summary of the initial reports to him from the five megabanks covered by the settlement and announcement of how the public and advocates could post their reports to the Monitor.

The Settlement Monitor included the following in his report:

> **"Office of Mortgage Settlement Oversight Introduction**
> On April 5, 2012, the Settlement1 went into effect when the United States District Court for the District of Columbia entered five separate consent judgments that settled claims of alleged improper mortgage servicing practices against five major mortgage servicing organizations:
> • Bank of America, N.A. ("Bank of America")
> • CitiMortgage, Inc. ("Citi")
> • Ally Financial, Inc., Residential Capital LLC, and GMAC Mortgage, LLC ("Ally")
> • J.P. Morgan Chase Bank, N.A. ("Chase")
> • Wells Fargo & Company and Wells Fargo Bank, N.A. ("Wells")
>
> **"The governments and government agencies participating in the Settlement (the "government parties") were:**
> • The U.S. Department of Housing and Urban Development
> • The U.S. Department of Justice
> • Attorneys general from 49 states and the District of Columbia
> • Various state mortgage regulatory agencies
> • Other releasing parties, including the Consumer Financial Protection Bureau and the U.S. Department of Treasury
>
> "The Settlement contains 304 actionable Servicing Standards. Each Servicer has agreed to a timeline by which it will phase in the implementation of these Servicing Standards. That timeline sets milestones at 60 days, 90 days, and 180 days from the entry of the Consent Judgments: June 4, 2012, July 5, 2012, and October 2, 2012.
>
> "By July 5, each of the Servicers had implemented between 35 and 72 percent of the Servicing Standards. Four of the five Servicers had implemented more than half of the standards. According to information the Servicers have provided to me [the monitor has not reviewed or certified these reports], the following Servicing Standards are among those in place as of the date of this report: Servicers state the following about documents (affidavits, sworn statements, and Declarations) filed in bankruptcy and foreclosure proceedings. Such documents:

- are based on the affiant's personal knowledge;
- fully comply with all applicable state law requirements;
- are complete with required information at time of execution;
- are signed by hand of affiant (except for permitted electronic filings) and dated; and
- shall not contain false or unsubstantiated information."

These sections immediately grabbed the curiosity of the leadership of the Mass Alliance Against Predatory Lending – with 7 grassroots organizations seeing hundreds of households struggling against foreclosure and eviction every month and dozens of lawyers active in the courts, we had seen no noticeable change in behavior.

In mid-January of 2012, MAAPL with its media partner GoLocal Worcester released it's 1st report researching the veracity of the five settlement banks' claim to the settlement monitor of compliance with signing all affidavits under personal knowledge; that is no longer robo-signing affidavits. Our report, *Robo-signing: Continuing Practice by Settlement Banks in Massachusetts Foreclosures*, reviewed one of the affidavits required in all foreclosures in Massachusetts, foreclosure affidavits attached to every foreclosure deed.

The results of our first report were:

> "Using the standard for personal knowledge laid out in the settlement agreement, which conforms also with MA law, the foreclosure affidavits in two of the MA registries executed since the date by which the settlement banks reported to the monitor they were 100% in compliance with the legal requirements for signing under personal knowledge, shows that **their procedures remained 100% non-compliant with MA law and with the requirements for personal knowledge**.
>
> Given the 100% non-compliance in two of MA twenty-one registries and given that that non-compliance is based on the standard operating procedures of the five settlement banks, we believe it is completely safe to generalize our results. To assume non-compliance at least in the vast majority of all foreclosure affidavits recorded in MA since the July 5th date for claimed total compliance by the five settlement banks is a valid conclusion to draw from our research."

This report's results provide no real hope for the veracity of the settlement banks' claims that they now sign affidavits on personal knowledge or comply with state law.

Background

Massachusetts is a non-judicial foreclosure state; that means homeowners do not get a day in court prior to the foreclosure of their home. Massachusetts, therefore, has relied upon the "strict" compliance by foreclosing lenders to its laws; we are an "honor-code" state especially dependent upon unsupervised compliance with our laws. Arguably, violations of our foreclosure statues are even more reprehensible than such violations in judicial states; in such states, violations may be caught in their judicial proceeding.

Today, a Massachusetts homeowner who falls behind in payments first reaches the default point and since May 1 of 2008, receives a vastly expanded default letter, here known as a "right to cure" letter. They then enter a 90 or 150 day right to cure period. If they cannot arrange to cure the default by working with the lender during this period, at the end of this period, the lender files in Land Court for a very narrow legal proceeding to ascertain if the owner-occupant is in active military service. Once this proceeding is completed, the lender may move to schedule and provide required notices for the foreclosure auction.

Massachusetts' Right to Cure Law

In 2007 as the foreclosure crisis was just barely beginning, the Massachusetts legislature passed a piece of omnibus legislation. Part of it was expected to have a major impact on forestalling foreclosures. At the time, the number of foreclosures seemed significant but the majority of people had no idea that it was but the barest beginning. The legislation's centerpiece was the creation of a Right to Cure period. Conceptually, the legislature felt if it created a period of "stop action," the banks would then have space to genuinely negotiate with people and hopefully find alternatives to foreclosure. The 90-day Right to Cure period law was augmented by changes to traditional default letters sent to borrowers when they are three months delinquent; these changes were to inform and encourage negotiations on both sides. At the end of the period if the lender continues with foreclosure, compliance is sworn in an affidavit. As well, brokers and originators had to be licensed going forward and significant funds were provided for housing counselors.

The Right to Cure process (MGL Chapter 244 35(a) below):

Once a homeowner reached the default point (three months delinquent in their mortgage payments) instead of the standard default letter used across the country, a Right to Cure letter was to be created. It must include: (a) an explicit identification of the Right to Cure Period; (b) identify additional resources for homeowners, but also (c) provide homeowners with additional information relevant for their use in negotiations; and it must be (d) sent by the mortgage-holder.

The 90-day Right to Cure period going forward started when the new Right to Cure letter – with the additional required information – was sent. At the end of the Right to Cure period, a copy of that Right to Cure/Default letter along with the mortgagee affidavit attesting to the mortgagee's compliance with the Right to Cure period requirements were to be submitted in the first "court proceeding" in the actual foreclosure process itself.

As a non-judicial state, in fact, the only time that these cases come in front of a judge is in Land Court. So, in addition to the active military service filing and the language of the notification of the foreclosure auction, banks/mortgagees were now required to file the mortgagee affidavit swearing to having complied with the Right to Cure statue and a copy of the newly defined Right to Cure letter. A copy was also to be filed with the Massachusetts Division of Banks.

The new Right to Cure statute became effective May of 2008. In August of 2010, the Right to Cure statute was amended to make the Right to Cure 150 days and change the resource agencies required to be listed in the Right to Cure letter.

There has been widespread non-compliance with this statue and the content of the right to cure letters specifically. The first major legal win overturning the validity of a foreclosure based on non-compliance with the Right to Cure statute, Mass General Laws Chapter 244, section 35a, was *Bravo-Buenrostro* on May 31, 2011[1]. Numerous anti-foreclosure cases have now been won based on this statute and some have been lost as this new law is being interpreted by our courts. Overwhelmingly, even the decisions that do not invalidate the foreclosure do not rule that the Right to Cure letters are compliant; they mostly allow the foreclosure for other legal reasons.

By reviewing these letters from the five settlement banks, MAAPL assessed whether they were, in fact, in complete compliance with two of the legal metrics as of July, 2012 as reported: compliance with the state law and only signing affidavits under personal knowledge. Because the state law requires a signing and filing of an affidavit by the mortgagee or their agent certifying compliance of their right to cure letter with state law "under Pains & Penalties of Perjury," the accuracy of these mortgagee affidavits goes to both compliance with the state law and with whether these mortgagee affidavits were signed under personal knowledge.

[1] *Bravo-Buenrostro v. OneWest Bank, F.S.B. and others*, Suffolk Superior Court No. 11-03961 (May 31, 2011; Fahey, J.)

Methodology

The settlement monitor's August *First Take* report said he had received reports from the settlement banks by July 5th stating that all state laws were now being complied with and affidavits were now being signed from personal knowledge (which could include the review of business records). MAAPL chose to assess the settlement banks post-July 5th compliance with the Massachusetts *Right to Cure* law that applied to all owner-occupied foreclosures since May 1, 2008 and their accompanying affidavits filed in the course of every foreclosure.

These affidavits are one of two that have existed in the MA foreclosure process for the last few years. Our previous report addressed the foreclosure affidavit filed with every foreclosure deed. This second mortgagee affidavit is completed earlier and filed with the Land Court proceeding.

Rather than do a random sampling and meeting such research randomization requirements, we committed to a comprehensive assessment of all settlement bank *Right to Cure* letters and their accompanying affidavits executed from July 5th through November 19th, 2012. We focused on the Worcester Registry of Deeds. The 151 letters represent those filed with 100% of complaints recorded by the five settlement banks in Worcester Massachusetts Registry of Deeds.

As these are all the 5 megabank complaints filed in this period, the associated letters represent a complete sample, with a smaller margin of error than a standard random sampling set. Therefore, these results can be extrapolated to all registries in Massachusetts with a high degree of certainty.

MAAPL pulled all complaints recorded and noted the land court case filing numbers. These documents that are recorded at the Registry of Deeds (and are variously referred to as "complaints", "petitions" or "orders of notice") are a copy of the active military service notice filed in Massachusetts Land Court. We then went to Land Court and pulled all of these *Right to Cure* letters and their accompanying *Mortgagee Affidavits* that are filed with the Land Court as required in the Servicemembers Civil Relief Act ("SCRA") proceedings in Massachusetts.

We have reviewed the Right to Cure statue, MGL Chapter 244, section 35(a) and created a checklist of all the statutory requirements (Appendix A). Our practice is to check (1) the letter for compliance with the additional special language requirements of the statute itself. We then review (2) the mortgage and assignments to establish the mortgagee of record on the date from the copy of the filed Right to Cure letter. We review (3) the affidavit for claiming compliance both to identify the mortgagee at the time that it was signed and to confirm sworn compliance.

For the purpose of this study – to assess whether the letters were compliant or not – MAAPL only needed to establish one legal violation as opposed to identifying multiple violations. We identified the violations that appeared to be standard to each of the five settlement banks' letters and tested for that violation first. If that violation existed that was sufficient to show non-compliance for the purposes of this study, and that the accompanying affidavit is not based on actual review of legal compliance of the letter and therefore not sworn on personal knowledge – described these days as "robosigned".

For instance, Bank of America letters (also reflected in the letters under Countrywide letterhead) standardly violate the requirement that the letter name either the originator of the mortgage or the broker that originated the mortgage. Bank of America typically does not provide either of these two pieces of information; we first sought this violation in their letters.

Similarly the Right to Cure law requires that an actual person (i.e. a single point of contact) be identified as the bank contact in these letters for purposes of further information. In the JP Morgan Chase letters, typically there was not a person named; therefore, we sought that violation in the JP Morgan set of letters, etc.

A critical legal requirement is that the mortgagee, their successor or assigns must send the letter. MAAPL only reviewed this in-depth for letters without other obvious violations. Other research has shown that this is a common violation in up to ~2/3rds of Right to Cure letters. Even in mortgagee affidavits signed months after Right to Cure letters are sent – at the very end of the Right to Cure period – an affiant signing for an institution other than the mortgagee of record swears in more than a third of the cases examined in smaller, less robust studies than this one[2].

In the letters themselves, MAAPL found clear-cut, across the board, repetitive non-compliance by four of the five banks: J.P. Morgan Chase, Bank of America, the Allied Group and Wells Fargo. CitiMortgage/CitiBank also violated the statute in 100% of its filings but their violations are more complex (see below).

The most ironic – if irony is proper in the context of people having their homes threatened with or taken by foreclosure in violation of the law – example is the standard Bank of America Right to Cure letter. It explicitly states, as a requirement of state law, that the bank must provide the borrower with "the following information"; then, *they do not provide it*. The Bank of America letters state:

> "Applicable law requires the disclosure of the following information; the mortgage brokers associated with this loan are/were: we were unable to ascertain this information; the mortgage loan originators associated with this loan are/were: we are unable to ascertain this information."

Bank of American then attaches a mortgagee affidavit swearing compliance. Even a cursory read through the standard Bank of America letter will identify for the affiant on the mortgagee affidavit that the bank is required to provide this missing information by Massachusetts law. Instead, they go ahead and sign that the letter is compliant. Either the bank's signers did not even cursorily read through or they knowingly lied under Pains and Penalties of Perjury. This is the most clear-cut example of robosigning.

[2] Both MAAPL in the winter of 2011/2012 did a non-random review of Right to Cure letters and Attorney Jamie Ranney did over a year earlier. Together, these reviews were of 64 cases. In all 61 the Right to Cure letters included clear elements of non-compliance. In 2/3s the Right to Cure letter did not name or incorrectly names the mortgagee of record at that time. !/3 of the mortgagee affidavits executed at the end of the Right to Cure period were signed not on behalf of the mortgagee of record at that time.

Results

Of the 151 complaints from the settlement banks during this time period filed in the Worcester registry of deeds, the largest number, 56 came from Bank of America; 44 from Wells Fargo; 31 from JP Morgan Chase; 13 from Citibank/Citimortgage; and 7 from GMAC, part of the Allied Group. Of these, 8 associated letters were ineligible for review; they were missing or unavailable to research.

The results are set out in the table below. 100% were non-compliant. Because we sought only one statutory violation in each case, most of the letters were at least non-compliant for the defect typical of that bank. (appendix 2 – sample letters and accompanying mortgagee affidavits)

In addition, there were also disturbing examples of non-compliance that render any legal verification of compliance impossible; for instance, when statutorily required copies of the Right to Cure letter to the homeowner are replaced with computer generated letters providing no legal copy as proof or when legally-required information is redacted to stymie its assessment. As these copies are required to be filed as proof of compliance with statutory requirements, these examples show a flagrant disregard for even the appearance of compliance; in the accompanying affidavit, the signer swears that the attached letter is a copy even when it is clearly not. These underscore the likelihood that affiants on the mortgagee affidavits were never even shown what they were attesting to and their institutions did not require they be informed signatories.

Name of Bank	Number of Cases	Number non-compliant	Reason(s) for non-compliance
Bank of America	56 (3 not reviewed)	53 (100%)	No broker/originator named 100%
Wells Fargo Bank, N.A.	44 (3 not reviewed)	41 (100%)	No bank contact named - 36 Not a copy of the letter – 3 No broker/originator named – 1 Wrong mortgagee named - 1
JP Morgan Chase	31 (2 not reviewed)	31 (100%)	No bank contact named 100%
Citibank/CitiMortgage	13	13 non-compliant (100%)	No bank contact named – 2 Wrong mortgagee named – 3 Dates/$ redacted – 1 $ redacted – 3
Allied Group: GMAC	7	7 (100%)	No bank contact named 100%
	151 (8 not reviewed)	143 (100%)	

100% of the Chase letters contain the violation of not naming a contact at Chase. The GMAC letters violate more fundamental provisions of the law in that they are not actual copies of the letters themselves; they appear to be computer-generated letters that, therefore, cannot be used to verify whether the Right to Cure letters sent to the homeowner are compliant or not.

Wells Fargo Bank, N.A.'s common violation is similarly not naming the name of a contact at the Bank. That violation excluded form compliance 36 of 41 Wells Fargo letters reviewed. 3 letters did not even reach that level of review: the document submitted into these 3 cases was not an actual copy of a right to cure letter and so could not comply. The two remaining Wells Fargo letters reviewed did name a contact; in addition, one of these lacked identification of either broker or originator. One required the most time consuming review of the record to ascertain the

mortgagee of record at the time; it did not list the correct mortgagee. While we did not engage in this time-consuming review for this fundamental violation in most letters, even one is a bad sign.

Of the five banks, only the content of CitiBank/CitiMortgage's letters approached compliance with the state law. While the standard format of the letter itself may approach compliance, the bank violated the filing process with Land Court because they redacted required elements. Redaction denies the courts their ability to verify compliance of these elements if they choose to; the very point in requiring filing them in one of our courts.

Specific timelines are to be explicit in the letters. The law requires an identification of the date of the letter and the day by which payment must be received for the mortgagor to cure during the right to cure period. Four Citi letters have redacted all dates and all monetary amounts. Three additional CitiBank/CitiMortgage letters have "only" redacted the monetary amounts. The redaction of the monetary amounts may then hide the inclusion of fees that are illegal to charge during the right to cure period. This time period was not created to allow an additional ramp up in charges to the homeowner; in that case, the right to cure period itself would likely make payoff prohibitive for the homeowner. Three Citibank/Citimortgage letters failed to name a contact at the bank in addition to the possible violations obscured by redaction.

Since we had to review the Citibank/Citimortgage letters in more detail to find violations, it is only in this set that we reviewed all the letter for perhaps the most serious violation: naming a mortgagee other than the mortgage-holder of record on the date of the letter. In this small set of thirteen letters, five of the Citibank/Citimortgage letters showed this violation. Only three letters originated by Citibank/ Citimortgage did not contain this violation. The others with redacted dates made impossible the comparison with the timing of assignments; they may also all have violated the requirement of naming the present mortgagee of record.

Conclusions

The five settlement banks in the sample provided Right to Cure letters that were 100% non-compliant with state law. Massachusetts state law has required these letters since May 1st of 2008 in all residential foreclosures. The settlement was supposed to represent a sea change for the better. If this is the supposed improvement, then the implication is that they have been non-compliant the entire time.

With four of the banks, the violations are part of their standard letter. For Citibank/CitiMortgage, the fifth bank, they violated the law in a greater variety of aspects; mostly their filing procedures made proof of compliance impossible. While their form letter looks potentially compliant, in five to possibly eight of their thirteen letters, even the mortgagee was wrongly named.

Since compliance of all of these Right to Cure letters requires attestation in a mortgagee affidavit, their violation is compounded by a fraudulent affidavit which is also entered in the state's Land Court; this affidavit becomes then a fraud on our courts. This act of filing becomes another violation of these settlement banks' claim to 100% compliance with state law in their report to the settlement monitor.

This all compounds the serious reality that these violative letters become a vehicle for the five settlement banks to fraudulently foreclose on the homeowners of Massachusetts.

Violating State Law examines 100% of the letters the five settlement banks filed in one of Massachusetts 21 Registries of Deeds. MAAPL's results can be extrapolated to imply similar violations if all the Right to Cure letters were reviewed that are associated with the recorded active military service notices by the settlement banks in all the state's registries post July 5th, 2012; that is the date their reports to the Settlement monitor claim 100% compliance with state law and affidavits signed on personal knowledge. Multiplying by the size of the Worcester Registry in comparison with the registries across our state and the continuing number of Land Court filings, a very rough estimate of the number of the Right to Cure filings by these banks from July 5, 2012 through the end of April, 2013, provides projections of possibly 9000+ more such fraudulent documents.

Perhaps most concerning, Massachusetts' 2007 Foreclosure Right to Cure law was explicitly written to encompass the strongest possible enforcement in a non-judicial state. Massachusetts has no legal forum in which all foreclosure documents must be review by a judge so their accuracy may be adjudicated. Creating an affidavit sworn explicitly under pains and penalty of perjury and then requiring that it be filed in a court setting, was the state legislature, governor and court authorities' strongest signal to the financial industry of the seriousness of this law.

When the Massachusetts legislature passed and Governor signed the 2007 law requiring these sworn documents be filed in "the first court proceeding" as part of our state's foreclosure process, the legislators were no doubt aware that the Land Court does not and has not had staff since the early 1990s to review every filing's details to ensure its accuracy. Instead, while these documents are not reviewed, they are submitted to a court by lawyers who are officers of the court – and must meet the highest ethical standard in filings.

Creating the highest standard of ethical and legal behavior possible in a non-judicial state was the strongest act possible for an honor code state. Yet, the statistics MAAPL has uncovered here speak for themselves of national banks' commitment to comply with our honor code – the legal requirements in Massachusetts' foreclosure process. The lenders' compliance with the Right to Cure statute does not show any appreciable change in their behavior since signing the national settlement and the date thereafter when they claimed 100% compliance with state laws.

The state Supreme Judicial Court stated in its seminal ruling: "As Massachusetts gives mortgagees the awesome power to foreclose without judicial oversight, mortgagees must strictly comply with the statutory requirements." U.S. Bank Nat. Ass'n v. Ibanez, 458 Mass. 637 (2011).

And yet, these five banks continue to violate our state laws, legal requirement for signing affidavits and their own reports in the largest national settlement to date.

Call to Action

The Massachusetts Alliance Against Predatory Lending calls upon our Attorney General – who has been so committed to this consumer issue and addressing the wide-reaching impacts of the foreclosure crisis, and upon the Settlement Monitor himself to address the fact that our research unquestionably shows that at least in one state, our Commonwealth of Massachusetts, the five settlement banks have inaccurately represented their compliance both with the personal knowledge requirement for legal documents in the foreclosure process and compliance with state law, the two first claims of meeting the legal metrics required by the national settlement agreement.

MAAPL – and the aggrieved homeowners of Massachusetts – call upon both offices to take immediate, swift, and unequivocal action.

TO: Grace Ross, Mass Alliance Against Predatory Lending
FROM: Jamie Ranney, Esq.
DATE: April 27, 2013
RE: Comments on Defects in Default/Right to Cure letters under G.L. c. 244, s. 35A

Summary:

This memo outlines the widespread and fatal defects contained in an extremely high percentage of the "default/right to cure" letters required to be sent to defaulted/defaulting borrowers under residential mortgages pursuant to under Mass. General Laws Chapter 244 Section 35A (G.L. c. 244, s. 35A).

This memo will outline various defects in the letters themselves, in the Massachusetts Division of Bank's ("DOB") regulations regarding the letters, and other violation(s) of law – including perjury - in the "Mortgagee's Affidavit(s)".

Chapter 244, s. 35A was passed by the legislature in 2007 and became effective on May 1, 2008. It provided that a 90 day "right to cure" period be extended to a borrower before the mortgage could be accelerated and foreclosure proceedings commenced. On August 8, 2010, the legislature amended the provisions of c. 244, s. 35A to expand the right to cure period to 150 days. Both the 2008 and 2010 versions of the statute require notices to be sent to the borrower that contained specific information and that the letter be filed "in any action or proceeding to foreclose on such residential real property."

The c. 244, s. 35A letters and Mortgagee's Affidavit(s) are required to be filed in the Massachusetts Land Court (typically) in Servicemembers Civil Relief Act ("SCRA") cases.

In 2011, it became apparent that the default/right to cure letters being filed in the Land Court in SCRA cases was/were defective and not in accordance with the law.

On or about January 6, 2012, I sent a report of nineteen (19) default/right to cure letters in foreclosure matters – together with complete accompanying documentation to David J. Cotney, the Commissioner of the DOB. The DOB is the state agency charged with not only warehousing copies of the default/right to cure letters (a copy is required to be sent to the Division of Banks under the statute and the DOB is required to report statistics based thereon), but the DOB is also the state agency charged with developing regulations related to the requirements of G.L. c. 244, s. 35A.

A copy of this report was also copied to the Attorney General's office to Gov. Deval Patrick's office and to the office of my state representative, Tim Madden.

No acknowledgment of the receipt of the case study and its findings, let alone a response from either DOB the Attorney General's office or Gov. Patrick's office was ever received. Rep. Madden acknowledged receipt of the study and subsequently introduced legislation on this and other foreclosure –related subjects.

A copy of this report is Appendix 3.

Right to Cure Letter Defects

In an extremely high percentage of foreclosure related cases – almost 100% - the default/right to cure letters purportedly sent to borrowers pursuant to c. 244, s. 35A are clearly defective and not in compliance with the law.

It is undisputed that a foreclosure cannot lawfully take place under Massachusetts law without compliance with G.L. c. 244, s. 35A(g) (the 2010 version of the statute; identical to the 2008 version).

(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**;"*

In almost every case, the default/right to cure notice(s) come from the "loan servicer" and not the "mortgagee" as required by the statute. In a high percentage of cases, Mortgage Electronic Registration Systems, Inc. ("MERS") is the "mortgagee" under the mortgage instrument. Despite the prevalence of MERS as a "mortgagee", and despite having reviewed hundreds of default/right to cure letters, I have never seen a default/right to cure notice from MERS.

Interestingly, when the DOB created regulations relative to compliance with c. 244, s. 35A on or about March 12, 2012 (209 CMR 56.00), the DOB – clearly sensing the problem that the banks themselves had created in providing tens of thousands if not hundreds of thousands of inaccurate and defective default/right to cure letters promulgated the following definition of the word "mortgagee" (209 CMR 56.02):

"Mortgagee: an entity to whom property is mortgaged, the mortgage creditor or lender *including, but not limited to, **mortgage servicers**, lenders in a mortgage agreement and any agent, servant or employee of the mortgagee* or any successor in interest or assignee of the mortgagee's rights, interests or obligations under the mortgage agreement."

It is unclear whether my January 6, 2012 report prompted the DOB to expand the definition of the word "mortgagee" to include loan servicers because of the breadth of the problem I identified to them in January 2012.

The DOB's definition of "mortgagee" however (to include loan servicers, etc.) conflicts irreconcilably with the definition of a "mortgagee" as defined by the Supreme Judicial Court in two (2) cases in 2012 and 2013.

See Fannie Mae v. Eaton, 462 Mass. 569 (2012) and *HSBC Bank USA, N.A. v. Matt*, 464 Mass. 193 (2013). According to the SJC in *Eaton* and *Matt*, a "mortgagee" under Massachusetts law is a party that either 1.) holds (defined as "owns"; see *Eaton* FN#2) both the note and mortgage, or

2.) lawfully "stands in the shoes" of the holder of the note and mortgage. *See Eaton supra.* at 571; *see also Matt* at FN#10.[3]

A loan servicer certainly does not "own" the note and mortgage in the context of residential loan setting, so it cannot be a "mortgagee" under the first prong of a proper *Eaton/Matt* analysis.

A loan servicer may – or may not – "stand in the shoes" of the owner and holder of the note and mortgage . This status would, of course, be completely unknown to a borrower and thus defeat, entirely, the purpose(s) behind the requirements of the default/right to cure statute, i.e. to provide borrowers with information as to *who owns and may legally foreclose on their loan*. Further, where Massachusetts law generally allows for a "split" of note and mortgage interests (see *Eaton*, supra), a loan servicer that purportedly met the "second prong" of an *Eaton/Matt* analysis certainly could not become a "mortgagee" unless and until a valid, written assignment were executed and recorded on the land records and an affidavit attesting to ownership is also recorded (see G.L. c. 244, s. 14; G.L. c. 244, s. 35C). Thus, a borrower's note and mortgage would have to be legally assigned to a loan servicer in order that they be considered a "mortgagee" under *Eaton, Matt* and the DOB's definition.

Moreover, the DOB's new and expansive definition of the word "mortgagee" conflicts with the actual documentation that exists on the public land records and leads to an absurd result. In the context of so-called MERS mortgages, MERS – a ubiquitous electronic database owned by the biggest banks in the country - is always the "mortgagee" under the mortgage contract. MERS never sends out default/right to cure letters to borrower because they are nothing more than an electronic tracking device. But MERS is listed on the public land records as the record "mortgagee" – in MERS mortgage cases - when default/right to cure letters are sent out to the borrower. How can MERS be the record "mortgagee" on the land records while a loan servicer is also the "mortgagee" for the purposes of a default/right to cure letter? How many "mortgagees" can there be for one (1) loan? According to the DOB – there can be multiple mortgagees at one time. This is, of course, an absurd result.

Finally, the form default/right to cure letter provided by the DOB in 209 CMR 56.04 (to which "strict" compliance is required accord to the language of the regulation) has numerous locations to insert the name of the "mortgagee". The first requires the letter writer to identify the "mortgagee" *with whom* the borrower has a mortgage. Clearly that is/was and never would be the loan servicer. Most often it is MERS. The form letter then identifies that the payments be made to the "mortgagee" – who may or may not be the loan servicer. It also identifies an option where the borrower – to get out of the purported default - can transfer the title to the "mortgagee" to settle their default – is that the loan servicer? Typically not. If one does a "deed in lieu" as this language suggest the borrower may – the title is typically transferred to the owner of the loan – not the loan servicer.

[3] "We use the term "mortgagee" to mean the person or entity who has the present authority to foreclose on the security instrument at issue. In the context of mortgages, this refers to 'the person or entity then holding the mortgage and also either holding the mortgage note or acting on behalf of the note holder."

The lawful "mortgagee" is the entity that owns and holds the note and mortgage according to the public land records under the original mortgage or by a valid and lawful written assignment that is duly recorded for the world to see.

Almost universally the default/right to cure notices I have examined – auto-generated *en masse* by default servicing software run by loan servicers – fail(s) to properly identify the "mortgagee" (or one "holding under the mortgagee") as required by the plain language of c. 244, s. 35A as of the date that the notice was sent to a defaulting borrower.

A typical defect – as described above - is that the default/right to cure letter will be defective because it identifies the *loan servicer* instead of the required "mortgagee". For example, in most Wells Fargo loans, the "owner" is typically identified as "Wells Fargo Home Mortgage" when the mortgagee of record is actually "Wells Fargo Bank, N.A.". Wells Fargo Home Mortgage is a loan servicer and a "division" of Wells Fargo Bank, N.A. It is not, however, Wells Fargo Bank, N.A. At minimum the different names of the entities would be confusing to an unsophisticated borrower.

Other default/right to cure notices will identify (sometimes correctly, sometimes not) the securitized "trust" into which the loan was supposedly deposited - as the "mortgagee" (or sometimes the "owner") of the borrower's loan. In these cases, an assignment of the mortgage (usually from MERS) universally does not happen for many months *after* the sending of the default/right to cure notice. This is because there are only two (2) reasons to assign a MERS loan under MERS rules. 1.) the mortgagee is no longer a MERS member and thus the loan is considered "de-activated" from MERS and an assignment out of MERS is required, and 2.) so that the loan can be foreclosed (which will not take place until at least 150 days from the date of the default letter under c. 244, s. 35A).

Still other default/right to cure letters fail to identify a "mortgagee" – anywhere - at all.

Many also fail to identify the mortgage originator – even where the mortgage originator is the current mortgagee (or the current loan servicer – many times the loan servicer is the originator who then sold the loan and maintained only the "servicing rights").

Finally, others will fail to include information required by the DOB (names and phone numbers of contacts to help the borrower).

Numerous courts are invalidating foreclosure sales – typically in post-foreclosure eviction cases - on the basis of defective default/right to cure notices having been given prior to foreclosure.

See Bravo-Buenrostro v. OneWest Bank, F.S.B. and others, Suffolk Superior Court No. 11-03961 (May 31, 2011; Fahey, J.), pp. 8-12. Judge Fahey's analysis and application of G.L. c. 244, § 35A in *Bravo-Buenrostro* is simple, comprehensive and persuasive. In *Bravo-Buenrostro*, a s. 35A default/right to cure notice was submitted to the court and relied on by the foreclosing party to establish that the statutory default/right to cure notice was sent prior to a foreclosure. This required a detailed analysis by the court – over four (4) pages) - to determine if

the s. 35A letter complied with the requirements of the statute. The *Bravo-Buenrostro* court ultimately held that it did not comply.

Judges across the Commonwealth are coming to the conclusion that a failure to strictly comply with the requirements of c. 244, s. 35A should result in the dismissal of a post-foreclosure summary process action(s).

As the Land Court stated in *BONYMC v. Kerr et al.,* 12 MISC 459002 (Nov. 9, 2012):

"A foreclosing entity, however, must *strictly adhere* to the entire statutory scheme for foreclosures. The ninety day notice requirement is a procedural safeguard set in place by the legislature to protect mortgagors. If Plaintiff did not comply with 244, § 35A, their foreclosure would be invalid." (emphasis in original).

More recently Judge Young of the U.S. District Court made a similar holding in *Ross v. Deutsche Bank Nat'l Trust Co.,* 12-cv-10586 (WGY) (Mar. 27, 2013)*:*

> "Because the notice requirement [set forth in G.L. c. 244, § 35A] is part of the Massachusetts statutory scheme regulating foreclosure, ***mortgagees seeking to foreclose must comply strictly with the notice requirement***." (emphasis added).

See also, *e.g.*, *FHLMC v. Medina*, N.E.Hsg.Ct. No. 11-SP-1883 (February 25, 2013); *FHLMC v. McIntosh,* N.E.Hsg.Ct. No. 11-SP-4387 (February 21, 2013); *FHLMC v. Sensini*, N.E.Hsg.Ct. No. 12-SP-0871 (December 31, 2012) ("Whether the falsehoods [in the purported 35A Notice] resulted from scofflaw misconduct or from mere sloppiness is not material... [I]t is well established that strict compliance with the terms of the mortgage and with the applicable statues is required."); *Deutsche Bank v. Gomez*, N.E.Hsg.Ct. No. 12-SP-3619 (March 13, 2013) ("The plaintiff or its predecessor was required to give a factually correct and legally sufficient notice...actual prejudice resulting from defects and irregularities in foreclosure procedures need not be shown in order to challenge the validity of the ensuing deed and title."); *FNMA v. Rosa*, N.E.Hsg.Ct. No. 11-SP-3897 ("The mortgagor, or anyone holding thereunder, shall not accelerate...or otherwise enforce the mortgage...by any method...or any other law until a written notice is given..."(citing G.L. c. 183, § 21)). Other state courts have dismissed a complaint to foreclose for failure to strictly comply with their respective statutory pre-foreclosure notice requirements. *Wells Fargo v. Nubia Dominguez et al.*, Docket No. A-0539-11T3, slip op. at 1-3 (N.J. Super. Ct. App. Div. 2006).

As suggested in my case study in January 2012, this trend, if it continues, and there is no reason to believe that it will not, calls into question the validity of every non-judicial foreclosure that has taken place in Massachusetts involving c. 244, s. 35A letters sent out on or after May 1, 2008.

If the default/right to cure provisions of c. 244, s. 35A were not followed – the foreclosure(s) were unlawful. Period.

There is no applicable statute of limitations for a borrower to bring suit against parties that unlawfully foreclosed on them as a result of improper notices.

A defective foreclosure – and subsequent unlawful eviction from their homes – based on defective statutory notice(s) may give borrowers substantial claims against foreclosing entities and their agents.

Third parties who supposedly purchased foreclosure homes would be left without legal title. They simply never bought anything at the sale since the sale could not have legally taken place.

Title insurance companies who were foolish enough to insure foreclosed titles would be subject to claims by parties that purchased foreclosed homes and obtained title insurance thereon.

Mortgagee Affidavit Non-Compliance

Perhaps, the most troubling aspect of the defects that almost universally appear in the default/right to cure letters are evidenced in the Mortgagee's Affidavit(s) required under c. 244, s. 35A. Where the default/right to cure letters fail to comply with the proper information required by the statute, the associated "Mortgagee's Affidavit(s)" are unequivocally false and fraudulent since they must attest that the proper notice under c. 244, s. 35A was sent to the borrower.

This appears to represent a significant fraud on the court(s) – particularly the Land Court in SCRA cases (which,under the recent *Matt* decision are essentially unchallengeable proceedings unless a borrower is in the military).

Foreclosure "mill" attorneys –without ever apparently having checked as to whether the default/right to cure letters comply with the statute (they are, after all sent out from the loan servicers so the foreclosure mill lawyers may never even see them) – thereafter file the default/right to cure letter(s) and Mortgagee's Affidavits (that they created and sent to the loan servicer for execution) with the Land Court to show purported compliance with the default/right to cure provisions of c. 244 s. 35A. The Land Court (or on occasion the Superior Court) then relies on this documentation to issue judgment(s) in SCRA cases.

Since Massachusetts is a "non-judicial" foreclosure state, prior to August 3rd, 2012 the statutorily-required Mortgagee's Affidavit(s) was/were the only document(s) in the Massachusetts foreclosure process where someone on the bank side is required to attest under the pains and penalties of perjury that an action required by statute related to foreclosure has, in fact, been performed.[4]

The Mortgagee's Affidavit(s) however is/are always "robo-signed" by representative(s) of the loan servicer.

[4] G.L. c. 244, s. 35B now contains separate and additional affidavit requirements attesting to the legal ownership of the note and mortgage prior to foreclosure.

The reason that one can easily reach this conclusion is that it is quite clear that a low-paid representative of a loan servicer executing an already-completed "Mortgagee's Affidavit" (in say, Ohio or Minnesota or South Carolina) would have *no idea* as to whether a proper notice was sent to the borrower in Massachusetts under c. 244, s. 35A.

It is highly doubtful that any such a signer ever reviewed a default/right to cure letter as part of a file review before signing the Mortgagee's Affidavit or, in any case, would have any knowledge as to what compliance with c. 244, s. 35A actually involves.

The executed Mortgagee's Affidavit is submitted by an attorney to the Land Court (or Superior Court) in SCRA cases (the only judicial "proceeding" involving foreclosure in Massachusetts) – thus, that attorney has represented to the court that the Mortgagee's Affidavit is accurate and truthful when it almost never is.

The Mortgagee's Affidavit - submitted in all Land Court cases (or any SCRA cases filed in Superior Court) – is clearly referenced in c. 244, s. 35A. The Land Court requires – as a matter of filing procedure - that a copy of the c. 244, s. 35A default/right to cure notice be filed along with a Mortgagee's Affidavit in all SCRA cases.[5] This requirement – under c. 244, s. 35A, has been revised to require further swearing to the holding of the note as well athe mortgage in response to the 2012 revision(ws) of Massachusetts Laws.
seehttp://www.mass.gov/courts/courtsandjudges/courts/landcourt/mortgage-affidavit.pdf

The Statutes:

The operative section of c. 244, s. 35A - effective May 1, 2008 - is as follows (passed as Chapter 206 of the Acts of 2007). I have highlighted the important sections.

SECTION 11. Said chapter 244 is hereby further amended by inserting after section 35 the following section:

— Section 35A.

(a) Any mortgagor of residential real property located in the commonwealth consisting of a dwelling house with accommodations for 4 or less separate households and occupied in whole or in part by the mortgagor, 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.

(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**

[5] See http://www.mass.gov/courts/courtsandjudges/courts/landcourt/mortgage-affidavit.pdf

a written notice is given by the mortgagee to the mortgagor. Said notice shall be deemed to be delivered to the mortgagor when delivered to the mortgagor or when mailed 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**; and

(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.**

(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.

The foregoing version of c. 244, s.35A was in effect from May 1, 2008 to August 7, 2010 when c. 244, s. 35A was amended again - via Chapter 258 of the Acts of 2010. This amendment extended the notice requirements for the default letters from 90 days to 150 days and added options to avoid foreclosure, etc.
The operative section of the 2010 version of c. 244, s. 35A is as follows. I have highlighted the important provisions which are essentially identical to the pre-2010 version – just re-ordered and re-numbered.

SECTION 7 (effective august 7, 2010). Chapter 244 of the General Laws is hereby amended by striking out section 35A, as appearing in the 2008 Official Edition, and inserting in place thereof the following section:-

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.

Conclusion:

The vast majority of defaulting/defaulted homeowners in Massachusetts have never received a valid and compliant c. 244, s. 35A letter. The vast majority of the accompanying Mortgagee Affidavits are fraudulent; they are not based on the personal knowledge of the affiant and/or the attorney that prepared such an affidavit knew or should have known that the contents thereof were false and fraudulent. Any non-judicial foreclosures based on the failure to provide proper notice as required by the Right to Cure statute, c. 244, s. 35A – are illegal, invalid and void.

Jamie Ranney, Esq.
April 27, 2013

BIO of Jamie Ranney, Esq.

Jamie Ranney grew up on Nantucket, MA. He graduated from Vermont Law School in 1999 with his law degree and a master's degree in Environmental Law. Upon returning to Nantucket, Jamie worked as a general practitioner.

In early 2009 Jamie was approached by an elderly couple who came to see him on the eve of being evicted from their home. They had been foreclosed on a $1.3 million dollar loan that had an interest rate of over 14%. The couple had paid more than $100,000.00 in closing costs to obtain this loan. The couple's stated income on their loan application was just over $4,000.00 per month, yet the monthly payments on the loan were more than $17,000.00 per month. Jamie took this case and began to learn about foreclosure in Massachusetts and what a fraud-ridden process it had become. Two and a half years later, the elderly couple's eviction case settled before going to the jury when the bank knew it would lose.

Between 2009 and present Jamie has taken on approximately 180 foreclosure defense cases in various stages of the process – pre-foreclosure, at foreclosure, post-foreclosure evictions, etc. This work, along with general consumer protection matters – i.e. credit card and student loan debt defense and fair debt collection claims, etc., – now represents his entire practice.

Jamie – though based on Nantucket - now practices all over the Commonwealth in federal courts (federal district court, federal bankruptcy court, the First Cir. Court of Appeals), various county superior and district courts, the MA Land Court, the MA Appeals Court, the Appellate Div. of the MA District Court and various housing and small claims courts.

Jamie currently lives on Nantucket with his wife Erin with whom he grew up. They have five children ranging in age from 8 months to 13 years. They also have a dog named Jack.