



MASSACHUSETTS FORECLOSURE REVIEW GUIDE

Introductory note: Title insurance underwriting for Massachusetts properties with one or more foreclosures appearing in the chain has undergone a number of important changes in recent years. This guide is designed to help you determine whether a foreclosure was handled properly. If you have any questions or need assistance, please contact Title Counsel in one of CATIC's Massachusetts branch offices.

- Confirm that the mortgagor had good title to the property at the time of granting the mortgage.
- Confirm that the mortgage was properly executed:
 - Confirm that all owners of record were listed as mortgagors.
 - Confirm that all named mortgagors executed the mortgage.
 - Confirm that the mortgage was properly acknowledged.
 - Confirm that the mortgage contains a sufficient legal description of the property.
 - If the mortgagor is an entity, confirm that the signor had appropriate authority to execute the mortgage.
- Confirm that the mortgage terms permit the mortgagee to invoke the statutory power of sale in the event of the mortgagor's default.
- Review the chain of assignments of the mortgage (if any) to confirm that the foreclosing mortgagee is the holder of record of the mortgage.
- Confirm that all assignments in the chain linking the original mortgagee to the foreclosing mortgagee were duly recorded prior to the time of mailing notices of the foreclosure sale under GL c. 244, § 14.
 - Note: For any foreclosure for which the statutory notices of sale were mailed prior to November 1, 2012, the assignment(s) may be recorded prior or subsequent to the foreclosure auction, provided that they were at least executed prior to the date of first publication of the notice of sale.
 - Note: For purposes of determining the execution date of an assignment, a stated "effective date," which pre-dates the execution date, is disregarded.



- Confirm that an affidavit has been recorded with respect to GL c. 244, §§ 35B and 35C:
 - The affiant should state that the affidavit is made under oath or as a sworn statement, and that it is made of the affiant's own personal knowledge.
 - The affidavit should include a detailed description of the basis of the affiant's claimed personal knowledge, with reference to the sources of information relied upon as well as a statement as to why those sources are accurate and reliable.
 - The affidavit should be signed under the pains and penalties of perjury, and should be acknowledged with a jurat.
 - With respect to § 35B, the affidavit should recite either (1) that the requirements of § 35B have been complied with, or (2) that § 35B is not applicable to the foreclosed mortgage.
 - With respect to § 35C, the affidavit should recite that the foreclosing mortgagee is either (1) the holder of the promissory note secured by the foreclosed mortgage, or (2) the authorized agent of the holder of said promissory note.
 - The affidavit must be dated prior to the first publication date of the mortgagee's notice of foreclosure sale.
 - Note: The affiant may be an officer/employee of the foreclosing mortgagee who purports to hold one of the positions listed in GL c. 183, § 54B. It is also acceptable if the affiant is an officer/employee purporting to hold one of these positions for a third-party servicer, provided there exists an effective power of attorney of record from the foreclosing mortgagee to the third-party servicer which authorizes the servicer to execute the affidavit on behalf of the foreclosing mortgagee.
 - Note: GL c. 244, §§ 35B and 35C became effective November 1, 2012. As such, no affidavit of compliance with these sections is required if first publication occurred prior to this date.
 - Note: GL c. 244, §§ 35B and 35C apply only to certain mortgages securing 1-4 family residential property. In cases where these sections are inapplicable (e.g., the property subject to foreclosure consists exclusively of commercial property), the affidavit of compliance is not required.
 - Note: Compliance with GL c. 244, §§ 35B and 35C may be attested to in a single affidavit, or in separate affidavits.



- Confirm that an Order of Notice has been duly recorded indicating that the mortgagee has filed a complaint under the Servicemember’s Civil Relief Act (the “SCRA”) seeking authority to foreclose the mortgage in question.
 - For SCRA actions commenced subsequent to January 14, 2013, the plaintiff named in the SCRA complaint must be the mortgagee of record.
 - All holders of equity of redemption in the property must be named as defendants.
 - Note: SCRA actions are required only where the equity of redemption is held by an individual (including heirs or devisees of a deceased record owner), or by the trustee of a trust (except for a so-called business trust, where the beneficial interest in the trust is divided into transferrable shares). SCRA actions are not required where the equity of redemption is held by a corporation, limited liability company, business trust, or other entity.

- Confirm that the SCRA judgment has been duly recorded, and states that the judgment was issued prior to the date of the foreclosure auction and entry.
 - Note: If the property is registered land, the SCRA judgment may be registered as part of the Foreclosure Deed.

- Confirm that a Certificate of Entry has been duly recorded:
 - The person making entry on behalf of the mortgagee should be an officer/employee of the foreclosing mortgagee who purports to hold one of the positions listed in GL c. 183, § 54B. It is also acceptable if the person making entry is foreclosure counsel, or an officer/employee purporting to hold one of these positions for a third-party servicer, provided there exists an effective power of attorney of record from the foreclosing mortgagee to foreclosure counsel or the third-party servicer which authorizes the making of entry on behalf of the foreclosing mortgagee.
 - The entry must be signed by two witnesses, and acknowledged in the form of a jurat.
 - Note: Foreclosure by entry is its own independent means of foreclosure that is separate and distinct from foreclosure by exercise of the power of sale in a mortgage. The foreclosing mortgagee’s entry “ripens” upon the passage of 3 years from the recording of a Certificate of Entry. Although



it is common practice for a foreclosing mortgagee to make entry and record a Certificate of Entry in conjunction with a foreclosure by power of sale in the mortgage, a Certificate of Entry is not technically required where the power of sale in the mortgage was duly executed.

- Confirm that the Foreclosure Deed has been duly recorded:
 - The Foreclosure Deed will consist of at least three individual documents: (1) the Foreclosure Deed itself; (2) the Affidavit of Sale; and (3) a copy of the published newspaper advertisement of the foreclosure sale (sometimes referred to as the “tear sheet”). An Assignment of Bid will also be recorded as part of the Foreclosure Deed, if applicable.
 - The Foreclosure Deed should list the foreclosing mortgagee as grantor, and the high bidder (or the high bidder’s assignee) as grantee.
 - The consideration stated in the Foreclosure Deed should match the amount of the winning bid as recited in the Affidavit of Sale.

- Confirm that the Affidavit of Sale has been duly executed:
 - The Affidavit must be made under oath.
 - The Affidavit must indicate the occurrence of a default on the part of the mortgagor.
 - The Affidavit must indicate that notice of the sale was published once in each of three successive weeks, the first publication of which was not less than twenty-one days before the day of the sale, in a newspaper published in the city or town where the land lies or in a newspaper with general circulation in the city or town where the land lies.
 - The Affidavit must indicate that the foreclosing mortgagee complied with GL c. 244, § 14 by mailing the required notices by certified mail, return receipt requested.
 - The Affidavit must indicate that notices were sent to the IRS in accordance with 26 USC § 7425(c), in the event that the IRS held one or more liens junior to the mortgage being foreclosed.
 - The Affidavit must state that the foreclosing mortgagee caused the premises to be sold at the time and place advertised, or that the sale was postponed by public proclamation to a specified future date. Any subsequent postponements should also be specifically referenced,



including the date to which the auction was further postponed. The auction should be postponed no more than six times.

- The Affidavit must state that the auction was conducted by a licensed auctioneer.
 - The Affidavit must identify the winning bidder and the amount of the winning bid.
 - The Affidavit must state that the winning bid was the highest bid made at the auction. If the winning bid was not the highest bid, the Affidavit must include a recitation as to the failure of higher bidder(s) to perform.
 - The Affidavit must be acknowledged using a jurat.
 - Note: The affiant may be foreclosure counsel, or an officer/employee of the foreclosing mortgagee who purports to hold one of the positions listed in GL c. 183, § 54B. It is also acceptable if the affiant is an officer/employee purporting to hold one of these positions for a third-party servicer, provided there exists an effective power of attorney from the foreclosing mortgagee to the third-party servicer which authorizes the servicer to execute the affidavit on behalf of the foreclosing mortgagee.
- Examine the newspaper advertisement attached to the Affidavit of Sale:
- The date, time and place of the auction must be stated.
 - The recording information for the mortgage being foreclosed must be referenced.
 - For advertisements mailed and published on and after November 1, 2012, the recording information for all assignments must be referenced.
 - The advertisement must include a legal description of the premises being auctioned, which matches the legal description as stated in the mortgage.
- Confirm that a post-foreclosure “*Eaton*” affidavit has been recorded:
- The affiant should state that the affidavit is made under oath or as a sworn statement, and that it is made of the affiant’s own personal knowledge.
 - The affidavit should include a detailed description of the basis of the affiant’s claimed personal knowledge, with reference to the sources of information relied upon as well as a statement as to why those sources are accurate and reliable.
 - The affidavit should be signed under the pains and penalties of perjury, and should be acknowledged with a jurat.



- The affidavit must be executed after the date of the foreclosure sale.
 - The affidavit must state that at the time of the foreclosure sale, the foreclosing mortgagee was either (1) the holder of the promissory note; or (2) the authorized agent of the holder of the promissory note.
 - Note: The affiant may be an officer/employee of the foreclosing mortgagee who purports to hold one of the positions listed in GL c. 183, § 54B. It is also acceptable if the affiant is an officer/employee purporting to hold one of these positions for a third-party servicer, provided there exists an effective power of attorney of record from the foreclosing mortgagee to the third-party servicer which authorizes the servicer to execute the affidavit on behalf of the foreclosing mortgagee.
 - Note: The *Eaton* affidavit is required for all mortgage foreclosure sales for which notice of sale under GL c. 244, § 14 was given subsequent to June 22, 2012.
- Confirm that a “*Pinti*” affidavit has been recorded:
- The affiant should state that the affidavit is made under oath or as a sworn statement, and that it is made of the affiant’s own personal knowledge.
 - The affidavit should include a detailed description of the basis of the affiant’s claimed personal knowledge, with reference to the sources of information relied upon as well as a statement as to why those sources are accurate and reliable.
 - The affidavit should be signed under the pains and penalties of perjury, and should be acknowledged with a jurat.
 - The affidavit must state either (1) that the notice of default required under the terms of the foreclosed mortgage was sent prior to July 18, 2015; or (2) that all notices, requirements and conditions precedent to foreclosure under the terms of the foreclosed mortgage were made and/or satisfied in strict compliance with the terms of the mortgage.
 - Note: The affiant may be an officer/employee of the foreclosing mortgagee who purports to hold one of the positions listed in GL c. 183, § 54B. It is also acceptable if the affiant is an officer/employee purporting to hold one of these positions for a third-party servicer, provided there exists an effective power of attorney of record from the foreclosing mortgagee to the third-party servicer which authorizes the servicer to execute the affidavit on behalf of the foreclosing mortgagee.



- Note: The *Pinti* decision is applicable to mortgage foreclosure sales of properties for which the notice of default was sent to the mortgagor after July 17, 2015. It is generally not possible to ascertain, from a review of the record title alone, when the notice of default was sent, and thus, whether the *Pinti* decision is applicable to the foreclosure. As a general rule of thumb, a *Pinti* affidavit should be recorded whenever the SCRA complaint was filed after July 17, 2015. However, in certain fact-determinative circumstances, a *Pinti* affidavit may be deemed unnecessary, even where the SCRA complaint was filed after this date. Please contact your CATIC underwriter if you have questions regarding the applicability of *Pinti* to a particular foreclosure.
- Confirm that all interested parties were duly notified of the foreclosure auction:
 - Per GL c. 244, § 14, notice of the sale must be sent by registered mail to all owners of record of the equity of redemption as of 30 days prior to the date of sale, with the notices being mailed at least 14 days prior to the sale.
 - Per GL c. 244, § 14, notice of the sale must also be sent by registered mail to all persons and entities of record as of 30 days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed, with the notice being mailed at least 14 days prior to the sale.
 - Per 26 USCA 7425, notice of the sale must also be sent by registered mail to the Internal Revenue Service if a federal tax lien junior to the foreclosed mortgage is recorded at least 30 days prior to the date of the foreclosure sale. Notice to the IRS must be sent at least 25 days prior to the sale.
 - Note: The IRS may redeem the property sold at foreclosure within 120 days of the date of the sale for the successful bid price. Therefore, absent a waiver by the IRS of its redemption rights, title is not insurable following a foreclosure which wipes out a junior federal tax lien until after the 120-day redemption window has expired.
 - Note: Copies of the foreclosure sale notices can generally be obtained from foreclosure counsel upon request. It is necessary to review only copies of the sale notices that were sent. The registered mail “green card” return receipts need not be separately reviewed.
 - Note: Special notice provisions also apply to liens arising under chapters 61, 61A, 61B and 40L of the Massachusetts General Laws, as well as land subject to a restriction pursuant to GL c. 184, § 33.



- Examine the Bankruptcy Court records available on the PACER system:
 - A mortgagor's pre-auction Bankruptcy petition gives rise to an automatic stay, which prohibits the mortgagee from proceeding with foreclosure or any other efforts to collect a debt owed by the mortgagor.
 - In order to proceed with the foreclosure, the mortgagee must either wait until the borrower's bankruptcy case is closed or dismissed, or obtain relief from the automatic stay from the Bankruptcy Court.
 - Note: Where a mortgagor is in Bankruptcy, a foreclosure undertaken without the Bankruptcy Court's approval will be invalid.

- Confirm that the property is unoccupied:
 - Any foreclosed property where the former mortgagor remains in possession is generally considered uninsurable.
 - A foreclosed property occupied by holdover tenants other than the former mortgagor may be insurable.
 - Note: If a foreclosed property for which you are requested to issue title insurance policies is occupied, please contact CATIC underwriting for further instructions.

- If you discover a problem with the foreclosure, review GL c. 244, § 15 and the recorded Affidavit of Sale to determine whether the issue is one that has been (or may soon be) cured by the passage of time:
 - Substantial amendments to GL c. 244, § 15 were signed into law by Governor Charlie Baker on November 25, 2015.
 - Among other things, the new act, which took effect on December 31, 2015, established a statute of repose. After the statutory period of repose passes without challenge, a duly executed Affidavit of Sale becomes conclusive evidence in favor of a third-party purchaser for value at or subsequent to a foreclosure sale that the foreclosure was conducted properly.
 - The statute of repose is three years from the date of recording of the Affidavit of Sale, except in the case of affidavits recorded prior to the effective date of the act, for which the statute of repose will run three



years from the affidavit's recording date, or one year from the effective date of the act, whichever is later.

- The primary impact of the legislation is that most so-called *Ibanez* foreclosure defects were repaired as of January 1, 2017.
- Although informally dubbed the "*Ibanez* fix bill" by many real estate practitioners, the act is broadly worded and may serve to cure other foreclosure defects as well upon the passage of the statute of repose. Please contact one of CATIC's Massachusetts Title Counsel if you have questions regarding the application of the curative provisions of GL c. 244, § 15 to your foreclosure.