

Residential Mortgage Foreclosure Reboot: What's New/What's Not in the Post Covid Era



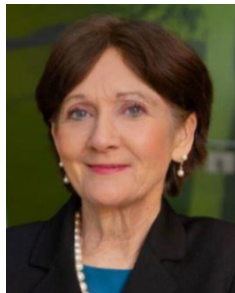
Matthew J. Carbone, Esq.

First American Title Insurance Co.
800 Boylston Street, Suite 2820
Boston, MA 02199
(617) 772-9214
mcarbone@firstam.com

Matthew Carbone is Underwriting Counsel at First American Title Insurance Company. His responsibilities include underwriting all types of transactions from commercial to residential. Prior to joining First American, Matt was an associate at Flynn Law Group, and a litigation and closing attorney at Harmon Law Offices, P.C.

Matt has handled countless post-foreclosure transactions and represented clients in a variety of litigation actions throughout the Commonwealth and in New Hampshire. He has presented education seminars for REBA and at First American on a variety of real estate topics.

Matt received his J.D. from New England School of Law – Boston and his B.A. in Criminal Justice from the University of Delaware.



Julie Moran, Esq.

Orlans PC
204 Second Avenue, Suite 320
Waltham, MA 02451
(781) 790-7824
jmoran@orlans.com

Julie Moran is Senior Executive Counsel at Orlans PC, a 100% women-owned, WBENC-certified law firm where for more than 25 years she has provided legal services to the banking and financial services industry in commercial and residential real estate and mortgage default.

Julie is an author of numerous industry articles, as well as a frequent speaker on regulatory compliance and mortgage foreclosure at both local and national conferences. She is chair of both the Legal Issues Committee of the United States Foreclosure Network (USFN) and the Financial Litigation Services PAC of the National Association of Minority and Women Owned Law Firms (NAMWOLF), is a member of the Board of Directors of both REBA and the Massachusetts Housing Homeownership Advisory Committee. She is a co-founder of Women Executives in Banking and a founding member of the recently instituted Massachusetts Creditors Law Association. She is past chair of the Board of Directors of The Charles River Community Health Center, which provides family-based, affordable health care. She also serves on the Town of Wareham Finance Committee.

Julie received her J.D. from Union University Albany Law School and is a *magna cum laude* graduate of the University of Rochester.

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A title arising out of a non-judicial mortgage foreclosure in typical times presents a unique set of circumstances when it comes to reviewing that process. The COVID-19 pandemic added additional hurdles for all the parties involved to navigate. Below is a small sample of the additional challenges added to the 1-4 family residential non-judicial foreclosure process in the Commonwealth, what the foreclosing mortgagees needed to work through, along with a brief review of what those on the buyer's side should be cognizant of when reviewing title.

I. The COVID Long Tail Underwriting Impacts of Moratoria, Legislation and Emergency Orders

A. Federal Action

1. Coronavirus Aid, Relief & Economic Security Act (the "CARES Act")
 - a. Foreclosure (FC) moratorium applicable to 1-4 family Federally Backed Mortgages ("FBM"). Holders are:
 - i. Federal National Mortgage Association (Fannie Mae)
 - ii. Federal Home Loan Mortgage Corporation (Freddie Mac)
 - iii. Department of Veteran's Affairs (VA)
 - iv. U.S. Department of Agriculture (USDA)
 - v. U.S. Department of Housing & Urban Development (HUD)
 - b. Not applicable to privately held mortgages
 - c. Effective March 18, 2020 (USDA-March 17, 2020) – May 17, 2020;
 - i. FBM holders extended to July 31, 2021
 - d. Activities subject to moratorium
 - i. Initiating/advancing/completing FC
 - ii. Proceeding with a FC related eviction, auction sale or REO sale
 - iii. Loss Mitigation – Servicer must offer forbearance to all borrowers experiencing a COVID 19 hardship upon request
 - e. Exemption: vacant or abandoned property (note- no Massachusetts statutory definition)
2. Moratoria implemented by holders of FBM's
 - a. Effective March 17, 2020 (USDA), otherwise March 18, 2020 – July 31, 2021
 - b. Issued additional mortgage servicing guidelines and requirements to assist Borrowers impacted by COVID.
 - c. Exemption for vacant or abandoned property

3. Bureau of Consumer Financial Protection (CFPB)

- a. Issued “Protections for Borrowers Affected by Covid-19 Emergency Under the Real Estate Settlement Procedures Act” (Final Rule) Reg X, 86 FR 34849
<https://www.consumerfinance.gov/rules-policy/final-rules/protections-for-borrowers-affected-by-covid-19-under-respa/>
- b. Applicability:
 - i. FBM’s
 - ii. Owner occupied property
 - iii. Forward mortgages
- c. No relief for:
 - i. loans at least 120 days delinquent as of March 1, 2020
 - ii. Statute of Limitations expired before January 1, 2022
- d. Effective August 31, 2021 – December 31, 2021
 - i. Fannie Mae/Freddie Mac implemented this rule July 31, 2021 to avoid moratoria gap.
- e. Temporary procedural safeguards
 - i. Servicers must engage in loss mitigation review for borrowers experiencing a COVID financial hardship upon their request before initiation of FC
 - ii. Provided relief from select provisions of the CFPB Mortgage Serving Rules, as amended (certain notices, etc.)
- f. Servicers can proceed with FC only if:
 - i. Property is deemed abandoned under state or local law
 - ii. Servicer sent proper notices/made good faith effort to establish live contact and borrower been unresponsive
 - iii. Borrower submitted a complete loss mitigation application which was fully evaluated
 - iv. Loss mitigation application rejected, appropriate notice has been sent and Borrower appeal denied or not filed; *or*
 - v. Borrower rejected loss mitigation options offered by Servicer; *or*
 - vi. Borrower has failed to perform under loss mitigation agreement

B. Coordinated State and Federal Action

1. Homeowner Assistance Fund (HAF)
 - a. §3206 of American Rescue Plan; \$9.9 billion allocated by U.S. Treasury with minimum grant of \$50 million per state (allocation formula based on unemployment rate and percentage of loans in default)
 - b. States process grant application, collects documents from Servicer and makes award. As of September 1, 2022, Massachusetts set award cap of \$50,000 per borrower. Award is grant; no repayment obligation and is not a taxable event. Massachusetts prohibits dual tracking while application is pending

- c. Eligibility: Borrowers of low/moderate income, who experienced a COVID financial hardship with forward mortgages within conforming loan limits. Must be at least 90 days behind in mortgage payments; applicable to expenses incurred after January 21, 2020.
- d. Funds can be used to cure mortgagee default/avoid FC, pay taxes, insurance, HOA fees, utilities, certain types of home repairs
- e. Treasury reminder: HAF is not a “stand alone” solution to delinquency/financial hardship of a borrower. Servicer must coordinate with investor/agency offerings for loss mitigation.
- f. Massachusetts “Strongly” recommends servicer contact borrower in default and notify of program with outreach letter. Borrowers denied loss mitigation by servicer should be made aware of HAF.
- g. No dual tracking (proceeding with FC) upon notification of receipt by state of HAF application

C. Commonwealth of Massachusetts Action

1. Chapter 65 of the Acts of 2020 – Emergency legislation
 - a. Effective April 20, 2020 – October 17, 2020
 - b. Imposed foreclosure moratorium on initiation of FC on residential property as defined under M.G.L. c. 244, §35B (1-4 family; owner occupied as principal residence)
 - i. Initiation is defined as any action that “cause notice of a foreclosure sale to be published pursuant to said section 14 of said chapter 244; (ii) exercise a power of sale; (iii) exercise a right of entry; (iv) initiate a judicial or non-judicial foreclosure process; or (v) file a complaint to determine the military status of a mortgagor under the federal Servicemembers Civil Relief Act, 50 USC sections 3901 to 4043, inclusive.”
 - ii. Exemption for vacant or abandoned property (undefined)
2. Emergency Orders re gathering limits/masking impacted FC sales at property. <https://www.mass.gov/info-details/covid-19-state-of-emergency>
 - a. Level of concern as to chilling/increased scrutiny of sale and terms of emergency order in place at the time of sale
3. Supreme Judicial Court Third Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (Coronavirus) Pandemic, No. OE-144 (June 24, 2020).
 - a. Tolloed all civil statutes of limitations (SOL) from March 17, 2020- June 30, 2020
 - i. Affects SOL of note and expiration date of mortgage
 - ii. Recent Land court case makes clear tolling applies to all civil SOL’s. *Shaw’s Supermarkets, Inc. v. Melendez*, 173 N.E.3d 356, 488 Mass. 338 (Mass. 2021). SJC held that the plain language of its order, the phrase “all civil statutes of limitations,” was clear and unambiguous. The use of the word “all,” encompassed each and every civil statute of limitations, not just those where the statutory period of limitations expired between March 17, 2020, and June 30, 2020. (106-day tolling period)

- iii. Expiration date of SOL is calculated by determining how many days remained as of March 17, 2020, until the statute of limitation would have expired, and that same number of days will remain as of July 1, 2020 in civil cases. For example, if fourteen (14) days remained as of March 17 before the statute of limitation would have expired in a civil case, then fourteen (14) days will continue to remain as of July 1, before the statute of limitation expires (i.e., July 15).
- b. Impact on mortgage foreclosure
 - i. Tolling extended judgments and executions; must consider when identifying junior lien holders for purposes of notice under M.G.L. Ch 244, §14
 - ii. Tolling extended three-year ripening period for Certificate of Entry
 - iii. Tolling extended foreclosure affidavit protections under M.G.L. Ch 244, §15.

II. Documenting Foreclosures Conducted during COVID

A. FC Moratoria

- 1. Post FC Moratoria affidavits – 50 states/50 forms;100 title agents/100 forms
 - a. Documenting vacancy/abandonment exemption
 - i. Who has requisite knowledge to sign - FC firm, Servicer and/or attorney in fact for mortgagee
 - 1. Will require one or more unexpired Limited Power of Attorney in recordable form if sign as AIF
 - ii. Unsubstantiated affirmations will be deemed insufficient; must provide evidentiary proof
 - iii. Examples of evidentiary proof
 - 1. Copies of series of detailed property preservation reports covering a period of time prior to and during the FC process
 - 2. Utilities shut off date
 - 3. Borrower statement that vacating and no request to regain access
 - iv. Detailed recitations in affidavit as to role/acquisition of personal knowledge of business records of mortgagee/servicer by signatory
 - v. Affidavit should be in recordable form
 - b. Documenting private/portfolio mortgage exemption
 - i. More limited number of these FC were completed during moratoria
 - ii. Investor recitations are important
 - iii. Types of documentary proof of mortgage origin varies
 - c. Best practice is for the foreclosing entity to provide and the buyer to request a moratoria affidavit beyond those loans that went to sale where a vacant or abandoned exemption applied. This helps record title especially where the majority of buyers are what the industry has dubbed “flippers.”

B. “Initiation” of FC During the Moratoria

1. What does “initiate...a non-judicial foreclosure” mean in the sense of the moratoria?
 - a. Does *US Bank v. Schumacher*, 467 Mass. 421 control?
 - b. Or if one proceeded in a conservative manner as to what “initiate” may mean, would that lead to better results in the Commonwealth for all parties?

C. Social Gathering Affidavits

1. Typically requested where FC sale is otherwise valid but held during pendency of a COVID_Emergency Order
2. Affidavit requirements
 - a. Signed by licensed auctioneer who conducted sale/FC attorney who attended with personal knowledge of sale circumstances
 - b. Identification of applicable Emergency Order at time of sale
 - c. Identify where on property sale was held- unenclosed space
 - d. What were the gathering limitations at the time/how many attended?
 - e. How was adherence to social distancing guidelines effectuated?
 - f. Were applicable masking rules adhered to?
 - g. Should affidavit be recorded with deed package?

D. Land Court Affidavit

1. Court promulgated form- “Affidavit Showing FC deed maybe registered notwithstanding FC Moratoria”
 - a. Form reciting circumstances allowing FC.
 - b. Must be completed/executed and filed with FC deed package submitted for registration

III. Insurability Concerns Relative to Foreclosure Titles

Reviewing a recent (less than three years on record without a proper challenge) non-judicial foreclosure in the Commonwealth is an extensive task for buyer’s counsel and their title company. The need for the extensive review on a new or recent foreclosure stems from the statute, or the protections (lack thereof initially) afforded therein, specifically, M.G.L. Ch 244, §1-2, and 15. There are no statutory protections for the parties on the buyer’s side coming out of foreclosure (by Entry or under M.G.L. Ch. 244, §14) until the documents have been on record for three years without a proper challenge. As such, one needs to go behind the foreclosure to review the off-record documents such as the notices of sale, the note, the default/contractual demand letters and determine the occupancy of the property to put their client in the best position possible to get to three years without a challenge that could void their superior claim to title.

A. Massachusetts Form of Acknowledgment

1. Massachusetts Land Court Memorandum dated February 4, 2021, “Forms of Acknowledgment and Powers of Attorney”
<https://www.mass.gov/memorandum/form-of-acknowledgments-and-powers-of-attorney>
2. Requires acknowledgment of deeds, mortgages, powers of attorney/limited powers of attorney used in connection with a conveyance and mortgages regardless of where notarized. Must use Massachusetts form of acknowledgment conforming substantially with statutory form of language (M.G.L. Ch. 222, §15(b)).
3. Critical language – free act and deed; signed voluntarily for its stated purpose.
4. Acknowledgment in compliance with M.G.L. Ch. 222, §15(b) required for registered and recorded land
 - a. Some states do not allow notarization using of out of state form of acknowledgement. Some (Ex.CA) have through recent legislation allowed use of out of state forms of acknowledgment
 - b. Securitized loan pools may have a cascade of LPOA’s with non-compliant acknowledgments. Re-execution with conforming acknowledgment has been the norm.

B. Occupancy Status at Time of FC

1. Properties which are vacant or abandoned or occupied by a party other than the owner at the time of the FC sale
 - a. Occupied properties present complex issues for the buyers and those seeking title insurance, especially due to the litigation risks. Vacant properties don’t necessarily come with the same litigation risks, a summary process action for possession, as such they may be easier for a buyer to get title insurance after a proper review of the FC.
 - b. Duly executed affidavit of sale is conclusive that the power of sale under the mortgage was duly executed and sale was legally compliant with MA law, three years after recordation without a proper challenge. M.G.L. Ch. 244, §15(c) effective January 2, 2016.
 - c. Same protection not afforded foreclosing mortgagee who takes property at FC sale until they sell to a BFP.
2. Properties which are occupied at time of FC through the closing with a third party for consideration (a BFP)
 - a. Due to the lack of statutory protections for the buyers of a foreclosed property, an occupied property presents additional complications for the buyer and a Title Company being asked to insure. See M.G.L. Ch. 244, §15 et seq,
 - b. Validity of the FC can be challenged at any time by owner occupant if records copy of pleading within 60 days of filing.

C. Strict Compliance with Power of Sale

1. Lack of statutory protections until three years after recordation of affidavit of sale under M.G.L. Ch. 244, §15(c) without a challenge requires review of off record FC notices and documents as part of title underwriting

- a. The foreclosing mortgagee needs to be the holder (owner) of the note or the authorized agent of the holder (owner) of the note. *Henrietta Eaton vs. Federal National Mortgage Association & another*. 462 Mass 569
 - i. Lost note affidavits are not effective in Massachusetts
 - ii. The party who lost the note needs to bring the lost note enforcement action, *Zullo v. HMC Assets, LLC, et.al*. MISC 16-000413 – See also, M.G.L. Ch. 106, §3-309
- b. §35A/B right to cure/loan modification notices must substantially comply with 209 CMR 56
 - i. Review form and content of notices for compliance
 - ii. fatal irregularities (incorrect loan balances; missing language; additional enclosures)
 - iii. Party sending notice must be the holder of the mortgage or a servicer entitled to collect the debt on their behalf
 - iv. Addressed and mailed to each mortgagor with proof of timely mailing by certified mail
 - a. deceased borrower
 - v. Validity of right to cure notice - sent once every three years
- c. Acceleration notices
 - i. Must strictly comply with disclosures under Paragraph 22 of the mortgage or relevant notice provision of that mortgage. *Pinti v Emigrant Mortgage Company*, 472 Mass. 226
 - ii. Evidence of timely mailing
- d. Eaton Affidavits, 209 Certification

2. Mortgage Assignments

- a. Assignment recitations must be accurate; assignment chain must be complete and unbroken. Gap assignments have no effect in Massachusetts.
- b. Assignments executed by attorney in fact must be supported by one or more as applicable recorded, valid and unexpired LPOA's
- c. Executed and recorded 209 Certification
- d. Mortgages held by out of state unrecorded trusts (i.e., DE trust)
 - i. Generally arise when agent signed POA on behalf of the trust
 - ii. Title companies generally will insure; Perceive trust as akin to a corporation rather than indefinite reference

D. Massachusetts Land Court

1. SCRA Action – a separate action to the non-judicial foreclosure, but if not done properly, will cloud title

- a. Plaintiff must be current holder of note and mortgage
 - b. Defendant(s) must be current owners of record of the property
 - c. Deceased borrowers – exercise due diligence to locate heirs
 - d. Not subject to Civil Rules of Procedure
 - e. Standing of Plaintiff and Defendant limited *HSBC Bank USA, N.A. Trustee v. Matt*, 464 Mass193
 - f. Plaintiff may not proceed with FC sale until judgment issues
 - g. Sale must be held within three years of the date of the judgment
2. Actions to Quiet Title – Mortgage Reformation, etc.
 - a. Expect substantial (2-3 years) Land Court delays in docketing, judgment

E. FC Deed Package

1. Complete FC deed package: Judgment, executed Deed, POA (unless foreclosing mortgagee employee makes the entry), Certificate of Entry, Affidavit of Sale, Publication Tear Sheet, Eaton Affidavit, other applicable Affidavits and if required, LPOA's and Assignment of Bid
 - a. M.G.L. Ch. 183, §54B – helpful statute for execution of mortgage related documents like, discharges, assignments, foreclosure documents and LPOA's related to mortgage servicing.
2. Additional information to look for in the Affidavit of Sale: general circulation, recitation to postponements, beyond three postponements and depending on the length of the postponements the sale may not be insurable. Also, the affidavit should recite what happened at the auction when dealing with failed bids made in good faith, i.e., include the name and amount of said bid in addition to that bidder's failure to perform.
 - a. Publication in a newspaper, is it the best practice for our current times, digital age?
3. Include reference to recorded POA/LPOA or include recordable form
4. Fallout from COVID rolling forbearance/loss mitigation: Impact of restarts/delays
 - a. Contractual notices and documents expiring/ becoming stale
 - b. Expired/noncompliant POA's and LPOA's cause cascade of delays
 - c. Expiration of mortgages under M.G.L. Ch. 260 §33
 - d. Expiration of SOL of notes
5. Registration of FC deed Package
 - a. Must submit complete FC package for approval before filing
 - b. No checklists used by examiners to review package
 - c. Inconsistent treatment of authority documents
 - d. Some revisiting of prior examiner approvals
 - e. An overworked court staff may lead to delays, be prepared with extensions on the closing with the buyer