

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

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# The COVID Long Tail - Underwriting Impacts of Moratoria, Legislation and Emergency Orders

- Federal Action – Foreclosure, eviction & REO sales moratoria; forbearance/loss mitigation relief
  - Legislative/Regulatory action
    - Coronavirus Aid, Relief & Economic Security Act (“CARES Act”)
    - Government agencies/investors
    - Bureau of Consumer Financial Protection (CFPB)
  - Effective dates and applicability
  - Exemptions

# The COVID Long Tail (Continued)

- Coordinated Federal/State Action
  - Homeowner Assistance Fund (HAF)
    - \$9.9 billion allocated (minimum \$50 million per state)
    - MA- maximum grant:\$50,000 per eligible homeowner
    - Borrower eligibility/limitations on use of funds
    - State creates program, requirements for awards
    - Agreement between state and mortgage servicers:
      - Prohibits FC “dual tracking” while application is pending
      - Must incorporate HAF into their loss mitigation solution

# The COVID Long Tail (Continued)

- Massachusetts Action
  - Chapter 65 of the Acts of 2020 FC moratorium
    - Effective April 20 - October 17,2020
    - Applicability
    - Exemptions
  - Emergency Orders –gathering limits/ masking
  - SJC Order No. OE-144 (June 24,2020)
    - Tolloed all civil statutes of limitation
    - Effect on mortgage FC titles

# Documenting Foreclosures Conducted during COVID

- Foreclosure Moratoria
  - Post FC Moratoria Affidavits
    - Evidentiary proof versus unsubstantiated affirmations
    - Who has authority to execute/business records recitation
  - Interpreting moratoria against foreclosure “Initiation”
    - Does *US Bank v. Schumacher*, 467 Mass. control?
  - Social Gathering Affidavits
    - Requirements
  - Land Court Affidavit

# Foreclosure Titles and Insurability

- Inadequate statutory protections for newly completed foreclosure
  - Thorough review of all recorded/off record documents for legal compliance
  - Consider use of title company checklists/guidelines
- MA Form of acknowledgment
  - Compliance with MA G. L. Ch. 222 §15 (b) – deeds, mortgages
  - Challenges of non compliant acknowledgments in POA's and LPOA's
- Occupancy status - MA G.L.Ch.244 §15(c)
  - Vacant versus occupied

# Foreclosure Titles and Insurability (Continued)

- Confirmation of strict compliance with power of sale
  - Lack of statutory protection before 3 years after Affidavit of Sale recordation
  - Foreclosing Mortgagee must be the mortgage and either the holder of the Note or the authorized agent of the holder of the Note – Holder of the Note means Owner of the Note
    - Lost note affidavits alone are not effective; enforcement action required
  - Substantial compliance of §35A/B right to cure/loan modification notices with 209 CMR 56
  - Strict compliance with Par 22 of a conventional mortgage or other relevant notice provisions of mortgage
  - Eaton Affidavits, 209 Certifications, Mortgagee's sale and publication

# Foreclosure Basics Refresher

- MA Land Court SCRA action
  - Judicial determination current owner not entitled to SCRA benefits
  - Failure to obtain judgment creates cloud on title
  - Plaintiff must be current holder of note and mortgage
  - Deceased owner (s) – exercise due diligence to locate heirs
  - Standing limitations – see *HSBC Bank USA, N.A. Trustee v. Matt*
  - FC sale must occur within 3 years of judgment for the judgment to be insurable



# Foreclosure Basics Refresher (Continued)

- Careful and comprehensive review of FC Deed package
  - Judgment
  - Affidavit of sale
    - Recitations as to sale/bidding outcome
  - Executed deed
    - POA/LPOA if applicable
  - Certificate of Entry
  - Eaton and other applicable affidavits
- Registered Land - Complete FC deed package must be approved for filing
  - Overloaded court may create approval delays

# COVID Fallout: Rolling Loss Mitigation/Restarts/Delays

- COVID-19 create mortgage servicing turmoil/introduced constantly changing requirements
  - Forbearance initiatives/additional loss mitigation programs created opportunities for home owners to avoid FC
  - Industry consolidation, loan portfolio sales/transfers caused delays
  - Myriad impacts of lengthening of FC process timelines
    - Stale and expired notices
    - Expired authority documents
    - Expiration of mortgages under MA G. L. Ch. 260 §33
    - Expiration of Statute of Limitation of notes

**QUESTIONS?**

**THANK YOU!**