

The attached article concerning  
**Foreclosure Law and Related Remedies  
in Massachusetts**

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## MASSACHUSETTS

**PLEASE NOTE: AS THIS CHAPTER GOES TO PRESS, THE MASSACHUSETTS LEGISLATURE IS CONSIDERING A NUMBER OF BILLS WHICH, IF PASSED, MAY IMPOSE ADDITIONAL REQUIREMENTS ON LENDERS FORECLOSING ON RESIDENTIAL PROPERTY.**

### I. FORECLOSURE PROCESS

#### A. Notice of Default/Acceleration

##### 1. Does this state require written notice of default and acceleration?

Lenders making loans secured by commercial or multi-family (more than 6 units)<sup>1</sup> property are not statutorily required to provide written notice of default and acceleration. Most mortgage documents, however, do contain provisions requiring written notice of defaults and/or acceleration.

Pursuant to legislation recently enacted (Chapter 206 of the Acts of 2007, amending MASS. GEN. LAWS ch. 244 to add new section 35A), a lender holding a mortgage on a one to four family owner-occupied residential property must give written notice to the mortgagor informing the mortgagor of the nature of the default and of mortgagor's right to cure, the date by which mortgagor must cure to avoid acceleration or foreclosure, which date cannot be less than 90 days after service of the notice, and names, addresses and phone numbers of persons to whom payment is to be tendered and a representative of the mortgagee, the name of the broker and originator, if applicable, and local or toll free phone numbers the mortgagor may call to obtain assistance.

##### 2. Is this requirement waivable, and if so, how?

No.

##### 3. Are there statutory requirements for how the notice must be sent and can one notice of default and acceleration be sent simultaneously?

The statute sets forth the content of the notice in detail. The notice must set forth the fact that if the mortgagor does not cure the default by the specified date, the mortgagee may foreclose.

##### 4. Would service of the summons and complaint satisfy the notice requirement?

**RESIDENTIAL PROPERTY.**

### I. FORECLOSURE PROCESS

#### A. Notice of Default/Acceleration

##### 1. Does this state require written notice of default and acceleration?

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**5. Are there any limitations on the lender's right to accelerate the debt based on the nature of the default that has occurred (e.g., monetary versus non-monetary, material versus immaterial default)?**

There are no limitations on a lender's right to accelerate a commercial loan secured by commercial or multi-family (more than 6 units) property based on the nature of the default. The notice and 90 day right to cure prior to acceleration applies to a default of a required payment on a mortgage note secured by a one to four family owner-occupied residential dwelling. *See* MASS. GEN. LAWS ch. 244 § 35A added by Chapter 206 of the Acts of 2007, § 11.

**B. Limitations on Procedure and Enforcement**

**1. Election of Remedies**

**(a) Does this state have a type of foreclosure procedure that could be characterized as an election of remedies (e.g., prohibits suit on the note if mortgage foreclosure proceedings are pending and vice versa)?**

Massachusetts foreclosure law does not require an election of remedies.

**(b) When must the election be made, at the outset or at the conclusion of the proceeding?**

Not applicable.

**2. Security First Requirements**

**(a) Does this state have a type of foreclosure procedure that could be characterized as a security first (e.g., the lender must foreclose the mortgage before suit can be brought on the note)?**

No, there is no requirement that the lender foreclose before suing on the note; however, if the lender subsequently forecloses, the suit on the note becomes a deficiency action subject to the notice requirements of MASS. GEN. LAWS ch. 244, § 17B.

**3. One Action Rule**

**(a) Does this state have a type of foreclosure procedure that could be characterized as a one action rule (e.g., the lender can either foreclose the mortgage or sue on the note, but not both)?**

Massachusetts does not have a one action rule. A lender may foreclose and sue on the note; however, the provisions of MASS. GEN. LAWS ch. 244, § 17B do require notice to be given by a foreclosing lender 21 days prior to the foreclosure sale to any party from whom the lender will seek to collect a deficiency. The form of the notice is set forth in the statute. It informs the recipient of the lender's intention to foreclose and of the recipient's potential liability for any deficiency in the proceeds of sale. The lender is required to execute an affidavit concerning the mailing of the notice within 30 days after the sale. Provided that the notice is properly given and the affidavit duly signed and sworn, the lender may both foreclose and seek a deficiency

judgment. An action to recover a deficiency must be commenced within two years after the date of the foreclosure sale or, if the principal of the note is not due until after the sale, two years after the time when the cause of action for the principal accrues, whichever is later. MASS. GEN. LAWS ch. 244, § 17A. The provisions of §§ 17A and 17B cannot be waived. MASS. GEN. LAWS ch. 244, § 17C.

**(b) What are the sanctions for violating the rule?**

Not applicable.

**(c) Can an election be changed? How?**

Not applicable.

**4. Limitations on Deficiency Actions**

**(a) Are there any general or specific instances when a deficiency judgment cannot legally be obtained (e.g., judicial versus nonjudicial foreclosure, purchase money debt, mortgages on one to four family residential property versus commercial property, acreage mortgaged)?**

There are no statutory impediments to obtaining a deficiency judgment in any particular instance, provided the required notice has been given.

**(b) Are there any fair value limitations on the deficiency (e.g., the deficiency is calculated based on the difference between the judgment amount and the fair market value of the property rather than the amount of the successful bid at the foreclosure sale)?**

There is no statutory fair value limitation on the deficiency. A recent decision in the First Circuit, quoting from a 1993 case, stated that, “absent evidence of bad faith or improper conduct . . . mere inadequacy of price will not invalidate a foreclosure sale unless the price is so gross as to indicate bad faith or lack of reasonable diligence.” *States Resources Corp. v. The Architectural Team, Inc.*, 433 F.3d 73, 81 (1st Cir. 2005), quoting *Resolution Trust Corp. v. Carr*, 13 F.3d 425, 430 (1st Cir. 1993). (The case *Durrett v. Washington National Insurance Co.*, 621 F.2d 201, 203 (5th Cir. 1980), resulted in lenders bidding a significant percentage—70 percent was indicated in *Durrett*—of the appraised fair market value of a property in foreclosure in order to avoid having the foreclosure sale attacked as a fraudulent conveyance in bankruptcy proceedings. This approach was explicitly rejected by the Supreme Court in *BFP v. Resolution Trust Corporation*, 511 U.S. 531, 545 (1994), which held that, absent malfeasance, “a fair and proper price or a ‘reasonably equivalent value,’ for a foreclosed property, is the price in fact received at the foreclosure sale, so long as all the requirements of the State’s foreclosure laws have been complied with.”)

**(c) What is the effect of a choice of law provision in the loan documents on the applicability of deficiency laws?**

Massachusetts has honored another state’s statute of limitation in a case where the choice of law provision called for New Hampshire law to apply, finding that New Hampshire had a

more significant relationship to a deficiency action where properties were located in New Hampshire. *Newburyport Five Cents Sav. Bank v. MacDonald*, 48 Mass. App. Ct. 904, 718 N.E.2d 404, *review denied*, 431 Mass. 1106, 733 N.E.2d 126 (1999).

## 5. Additional Questions Relative to Limitations on Procedure and Enforcement

- (a) **How do any limitations on procedure and enforcement influence the lender's enforcement strategies?**

Not applicable.

- (b) **What tactics must a lender follow to preserve its right to a deficiency judgment in the foreclosure action, power of sale exercise or in a separate action?**

See discussion in Section I.B.3.a above. The law that governs an action for deficiency judgment is the law that governs the promissory note, not the mortgage.

- (c) **What impact do any limitations on procedure and enforcement have on the enforcement of guaranties? What impact do they have on the enforcement of an assignment of rents? What impact do they have on the drawing on a letter of credit or exercising rights under an escrow?**

If the guarantor is not also the maker of the note, then the notice requirement of MASS. GEN. LAWS ch. 244, § 17B is not applicable. *JER SKW Services, Inc. v. Gold*, 428 Mass. 520, 702 N.E.2d 1178 (1998). *See also Senior Corp. v. Perine*, 16 Mass. App. Ct. 967, 452 N.E.2d 1160 (1983), *review denied*, 390 Mass. 1103, 454 N.E.2d 1276 (1983); *Hurley v. Merowitz*, 55 Mass. App. Ct. 920, 774 N.E.2d 1168 (2002); *F.D.I.C. v. Hopping Brook Trust*, 941 F. Supp. 256 (D. Mass. 1996), *aff'd*, 117 F.3d 639 (1st Cir. 1997). However, good practice in Massachusetts is to send the Section 17B notice to guarantors, as well as makers of the note.

There is no impact on assignments of rent, letters of credit or escrows.

- (d) **May lenders waive the right to a deficiency judgment to obtain other rights (e.g., shorten or extinguish redemption rights, expedite the foreclosure sale)?**

Not applicable. If a lender pursues a deficiency, a borrower then has the opportunity to raise defenses and counterclaims.

- (e) **How and when, in relation to the foreclosure action, may a deficiency judgment be obtained?**

An action to recover a judgment for a deficiency must be commenced within two years of the date of the foreclosure sale or, if the principal is not due until after the foreclosure sale, then two years after date when cause of action for principal accrues. MASS. GEN. LAWS ch. 244, § 17A.

- (f) **How is the amount of the deficiency calculated?**

The deficiency is the difference between the amount due on the note (including interest, late fees, costs) and the proceeds from the foreclosure sale, assuming no bad faith or improper conduct. *See FDIC v. Precision Molding Co.*, U.S.D.C. Civ. A. No. 91-10365-Z, 1994 WL 51625 (D. Mass. Jan. 5, 1993).

**(g) Is there a procedure for surplus monies?**

In the event of a surplus, the mortgagee is a stakeholder only. The lender is obligated to distribute any surplus to junior lienholders in order of their priority and, if all junior lienholders are paid, to the mortgagor. A lender can file an interpleader action requesting a court to supervise the distribution of any surplus. Pursuant to MASS. GEN. LAWS ch. 183, § 27 as amended by Chapter 206 of the Acts of 2007, § 4, the holder of a mortgage must provide the mortgagor within 60 days after the receipt of sale proceeds a written notice containing an itemized accounting of the disposition of the proceeds from a foreclosure sale.

**(h) Is there any federal or state case law or any statutes in this state as to whether a suit can be brought on a note or guaranty in this state if foreclosure proceedings are pending in another state and vice versa?**

*See* discussion in *Wornat Development Corp. v. George Vakalis*, 403 Mass. 340, 529 N.E.2d 1329 (1988) where the lender foreclosed on Vermont property securing a note then commenced a deficiency action in Massachusetts. The court allowed the deficiency action even though the lender had not complied with the Massachusetts notice requirement.

*See also Newburyport Five Cents Sav. Bank v. MacDonald*, 48 Mass. App. Ct. 904, 718 N.E.2d 404, *review denied*, 431 Mass. 1106, 733 N.E.2d 126 (1999), where the court applied New Hampshire's statute of limitations to a deficiency action brought in Massachusetts following foreclosure of New Hampshire properties.

**(i) Are there any additional distinctions in enforcement among mortgages secured by residential, commercial (including multi-family) or agricultural properties?**

OWNER-OCCUPIED RESIDENTIAL PROPERTY

A number of different Massachusetts statutes limit a lender's rights with respect to loans secured by one to four family owner-occupied residential properties and loans secured by the borrower's principal dwelling. MASS. GEN. LAWS ch. 183, §§ 56, 57 limit the amount of prepayment penalties. MASS. GEN. LAWS ch. 183, § 59 limits the amount of late charges.

A notice concerning the right to cure defaults must be sent to the mortgagor of a one to four family owner-occupied property pursuant to MASS. GEN. LAWS ch. 244, § 35A.

If the term of a mortgage is longer than the term of the note it secures, the note must renew. MASS. GEN. LAWS ch. 183, § 60.

Interest must be paid on tax escrows. MASS. GEN. LAWS ch. 183, § 61.

Fees and points must be disclosed in advance. MASS. GEN. LAWS ch. 140D.

Every mortgage and assignment of mortgage secured by a one to four family owner-occupied residential property in which a mortgage broker is involved must contain the name, post office address and license number of the mortgage broker and, if applicable, mortgage originator or a notation that no mortgage broker or loan originator was involved. MASS. GEN. LAWS ch. 183, § 6D.

Pursuant to MASS. GEN. LAWS ch. 183, § 63A, the holder of a mortgage on one to four family owner-occupied residential real estate can, at the request of the mortgagor, change an adjustable or variable rate to a fixed rate, extend the term or change the amount of the periodic payments and may charge a fee not to exceed one percent of the outstanding balance in connection with such revision.

Pursuant to MASS. GEN. LAWS ch. 184, § 17B½, no mortgagee who makes a loan to a first time home loan borrower to be secured by a mortgage on a one to four family owner-occupied residential property shall make a subprime loan at a variable or adjustable rate of interest unless the mortgagor affirmatively opts in writing for the variable or adjustable rate and receives certification from an approved third-party nonprofit counseling program.

*See also* MASS. GEN. LAWS ch. 183C for additional limitations imposed on lenders of high cost home mortgage loans.

#### AGRICULTURAL, HORTICULTURAL, RECREATIONAL, AND FOREST LANDS

If the mortgaged property has been assessed as agricultural, horticultural, recreational or forest lands, then ninety days advance notice of a foreclosure sale must be sent to the mayor and city council or board of selectman, the planning board, the board of assessors and the conservation commission of the municipality in which the property is located. An affidavit concerning the same must be recorded with the foreclosure deed. MASS. GEN. LAWS ch. 61, § 8, ch. 61A, § 14, ch. 61B, § 9. For land within an agricultural incentive area (MASS. GEN. LAWS ch. 40L, § 4), thirty days notice must be given to the governmental bodies listed above plus to the Commissioner of the Department of Food and Agriculture.

THERE ARE NO ADDITIONAL DISTINCTIONS IN ENFORCEMENT RELATING TO COMMERCIAL PROPERTIES.

### **C. Judicial Foreclosures**

#### **1. Are judicial foreclosures allowed in this state? For a mortgage? For a deed of trust? Are judicial foreclosures customary?**

Judicial foreclosure is of limited benefit and rarely used in Massachusetts. It is employed almost exclusively in cases where, through inadvertence, the mortgage instrument does not contain a statutory power of sale. The statutory power of sale, defined in MASS. GEN. LAWS ch. 183, § 21 and discussed below, provides the nearly universal method of foreclosure in Massachusetts and is nonjudicial.

The relevant judicial foreclosure statutes, MASS. GEN. LAWS ch. 244, §§ 1 to 36, allow a mortgagee to bring suit when a condition of the mortgage has been breached and to seek a conditional judgment. The conditional judgment establishes the amount of payment or other performance due. If the condition of the mortgage is not sooner paid or performed, within two months after the conditional judgment the court enters an execution for possession, entitling the mortgagee to enter into possession of the mortgaged property. Once it has done so, however, the mortgagee must maintain open and peaceable possession for three years before the mortgagor's right of redemption is extinguished.

In addition, a related statute, MASS. GEN. LAWS ch. 244, § 11, provides for a judicial proceeding leading to a judgment for sale of the mortgaged premises under the statutory power of sale (rather than a writ of possession) if the condition of the mortgage is not paid or performed within two months after entry of the conditional judgment. For the court to order this relief, however, the mortgage must contain a power of sale clause. Because the statutory power of sale can be employed by the mortgagee without judicial involvement, however, it is extremely rare for lenders to make use of these judicial foreclosure provisions of the general laws. Lenders instead proceed with foreclosure by exercise of the statutory power of sale and by entry, discussed below.

While foreclosure is routinely accomplished by a nonjudicial power of sale method, accompanied by entry (discussed below), Massachusetts is unique among the states in requiring, in many instances, a foreclosing mortgagee to obtain first the judgment of either the Land Court or the Superior Court under the Servicemembers Civil Relief Act, P.L. 108-189 (2003), found in 50 U.S.C.A. App. §§ 501-596 (SCRA). The action is brought in the state courts pursuant to state-implementing legislation (Chapter 57 of the Acts of 1943, as amended). Mortgagees bring proceedings under the SCRA before foreclosing on property when the record title is not held by a corporation, a limited partnership, a limited liability partnership, a limited liability company, a business trust with transferable shares, or a general partnership, all of the partners of which appear of record to be one of the foregoing types of entities. In all other cases, namely, those involving individual owners, many general partnership owners, and nominee trustee owners, lenders first obtain a judgment under the SCRA to establish that the record owner is not entitled to the benefits of the SCRA. Subsequent purchasers and title insurers look for a SCRA judgment when reviewing titles coming out of a foreclosure sale, unless the property was owned by one of the entities as to which such proceedings are not required.

The process of obtaining a SCRA judgment varies slightly, depending on the court in which the proceeding is brought. The Land Court and the Superior Court have concurrent jurisdiction to hear SCRA cases. SCRA proceedings are very limited in scope. The only issue to be determined is whether the record owner is within the category of persons protected by the Act, that is those in military service who are faced with foreclosure for defaults based on obligations entered into prior to their entry into military service. No other issues, such as those relating to the merits of the underlying loan transaction or the lender's conduct in connection with the loan, are permitted to be raised or decided in a SCRA proceeding.

When the lender selects the Land Court, which hears the majority of SCRA cases, the proceeding is begun by filing a complaint on a printed form. An order of notice then issues with a return date that is approximately six weeks later. Service must be made on the record owner by

certified or registered mail, by publication as directed by the Court, and by recording a copy of the order of notice with the appropriate land records. After the return date, the mortgagee may seek a default judgment permitting it to foreclose by entry and by exercise of the statutory power of sale. The judgment can take several weeks (or longer) to issue after the lender's return is filed. With this judgment in hand, the mortgagee can proceed to foreclose under the statutory power of sale and by entry. The remainder of the foreclosure process takes place outside the judicial system. A former requirement for post-foreclosure sale judicial confirmation of sales has been repealed. Chapter 496 of the Acts of 1991. The various Superior Courts have different, though largely similar, procedures concerning SCRA cases brought before them.

**2. What is the time frame to complete a judicial foreclosure?**

See above discussion regarding limited use of judicial foreclosure in Massachusetts.

**3. Does the mortgagor have statutory redemption rights in addition to the equitable right of redemption? What is the statutory redemption period? Does it vary based on the type of property or other factor?**

See above discussion regarding limited use of judicial foreclosure in Massachusetts.

**4. Does the statutory redemption period start to run before or after the foreclosure sale?**

See above discussion regarding limited use of judicial foreclosure in Massachusetts.

**5. Is the statutory redemption period waivable, and if so, how?**

See above discussion regarding limited use of judicial foreclosure in Massachusetts.

**6. Are there any statutory reinstatement rights, and if so, what are they, are they waivable, and how?**

See above discussion regarding limited use of judicial foreclosure in Massachusetts.

**7. Do other parties (e.g., junior lenders) have redemption rights?**

See above discussion regarding limited use of judicial foreclosure in Massachusetts.

**8. Is anyone disqualified from bidding (such as the mortgagee or mortgagor)?**

See above discussion regarding limited use of judicial foreclosure in Massachusetts.

**9. What are the associated costs?**

See above discussion regarding limited use of judicial foreclosure in Massachusetts.

**10. Is there a sale by sheriff or other official? What is the cost? Are the costs negotiable or non-negotiable?**

See above discussion regarding limited use of judicial foreclosure in Massachusetts.

**11. Are there trustee fees? What are they? Are they negotiable or non-negotiable?**

See above discussion regarding limited use of judicial foreclosure in Massachusetts.

**12. What are the advertising costs?**

See above discussion regarding limited use of judicial foreclosure in Massachusetts.

**13. Is there a transfer tax? How is it calculated?**

Judicial foreclosure is not used.

**14. Are there any other relevant considerations?**

See above discussion regarding limited use of judicial foreclosure in Massachusetts.

**15. What is the process? (Please include information regarding necessary parties, statutorily required notices and grace periods, marshaling requirements, and any other relevant considerations.)**

See above discussion regarding limited use of judicial foreclosure in Massachusetts.

**D. Nonjudicial Foreclosures**

**1. Does this state permit a nonjudicial foreclosure?**

The nearly universal method of foreclosure in Massachusetts is by exercise of the statutory power of sale contained in the mortgage, combined with entry for the purpose of foreclosure. Although the procedure for executing a statutory power of sale is governed by statute (MASS. GEN. LAWS ch. 244, §§ 11 to 36; *see also* MASS. GEN. LAWS ch. 183, § 21), and although in certain cases the mortgagee first will obtain a judgment under the SCRA authorizing it to proceed with foreclosure, the actual conduct of the foreclosure sale is a nonjudicial process. To utilize this method of foreclosure, the mortgage must contain the language that for any breach of the terms of the mortgage, the mortgagee has the statutory power of sale.

**2. What requirements must be met?**

Prior to exercising the power of sale, notice must be published once in each of three successive weeks, the first such publication to be not less than 21 days before the sale date, in a newspaper published in the town where the land lies or in a newspaper with general circulation in the town where the land lies. Notice must also be sent by registered mail to the owner of record of the property as of thirty days prior to the date of sale, such notice to be mailed at least 14 days prior to the date of sale. MASS. GEN. LAWS ch. 244, § 14. The statute contains a form of notice and sets forth the addresses of the owner that the mortgagee should use. A copy of the notice must be sent by registered mail to all persons of record as of thirty days prior to the sale date holding an interest in the property junior to the mortgage being foreclosed, such notice also to be mailed at least 14 days prior to the sale date. Junior lienors may waive notice. After the

sale, a copy of the notice and the affidavit of the mortgagee (or its attorney authorized in writing) must be recorded in the registry of deeds. MASS. GEN. LAWS ch. 244, § 15.

### **3. What is the timeframe to complete a foreclosure by sale?**

Once a SCRA judgment has been obtained (or if none is required because of the type of entity owning the property), the entire process can take approximately five to 12 weeks to accomplish, assuming no litigation, bankruptcy filing, or other obstacle. Pursuant to the provisions of recently adopted MASS. GEN. LAWS ch. 244, § 35A, mortgagors of one to four family owner-occupied residences must be given a 90 day cure period prior to acceleration. Certain subprime lenders are also having foreclosure actions stayed by the attorney general.

### **4. Does the mortgagor (and others) have redemption rights?**

### **5. Does the statutory redemption period start to run before or after the foreclosure sale?**

A right of redemption exists in the mortgagor until the consummation of the sale taking place pursuant to the statutory power of sale. MASS. GEN. LAWS ch. 244, § 18. Until then, a mortgagor has the right to redeem by tendering payment or performance as required in the mortgage. In general, once the mortgage debt has been accelerated, a mortgagor tendering a cure is required to pay the full accelerated amount, with all accruals, charges, costs, and expenses, in order to redeem. Once the statutory power of sale has been fully executed, the bidding concluded, and the contract of sale is executed, the right of redemption is barred. *In re Mellino*, 333 B.R. 578 (Bankr. D. Mass. 2005) This assumes, of course, the full, accurate, and lawful exercise of the power of sale in conformity with the statute and the loan instruments.

Most mortgagees who foreclose using the statutory power of sale also, as a separate method, foreclose by making entry onto the premises for the purpose of foreclosure. MASS. GEN. LAWS ch. 244, § 1 provides that a mortgagee holding possession of a property openly, peaceably, and continuously for three years will foreclose the right of redemption of the mortgagor. Most lenders make formal entry (and record the certificate of entry required by the statute. MASS. GEN. LAWS ch. 244, § 2) no later than immediately before conducting the sale under the statutory power of sale. In this way, lenders and title insurers derive comfort that, should there be a later discovery of irregularity in the conduct of the sale under the statutory power of sale, the right of redemption of the mortgagor will nevertheless be extinguished at the expiration of the three year period of possession.

### **6. Is the statutory redemption period waivable, and if so how?**

There is no statutory redemption period. The mortgagor may redeem until consummation of the sale. See Section D.5 above.

### **7. Are there any statutory reinstatement rights available?**

As of this date, in general, there is no statutory right in a mortgagor to require reinstatement of the loan transaction following a default. If the loan documents so provide, a mortgagee may accelerate and make the entire principal balance, together with interest, penalties and costs, due upon default; this amount is the amount required to redeem before the

consummation of the sale under the statutory power of sale. Pursuant to MASS. GEN. LAWS ch. 244, § 35A, a lender must give a mortgagor of a one to four family owner-occupied residential property a 90-day cure period. If the mortgagor cures within the stated period, the loan is reinstated.

**8. Is anyone disqualified from bidding?**

No, anyone may bid at the sale.

**9. What are the associated costs of the nonjudicial foreclosure?**

A sale under the statutory power of sale is conducted on behalf of the mortgagee by a licensed auctioneer. The fees of auctioneers are not statutorily established and are subject to considerable negotiation. Depending on the nature of the property, and the variety and degree of services expected of the auctioneer, the costs can range from several thousand dollars in the case of sale of a modest residential property to hundreds of thousands of dollars in the case of large commercial premises. Some auctioneers will structure a payment schedule that involves a percentage of the high bid amount (comparable to a brokerage commission), particularly in cases where a third-party bidder, rather than the mortgagee, makes the purchase at the foreclosure sale.

Advertising fees can be substantial. In addition to the legal notice advertisement required under the statute governing the process of foreclosing by exercise of the statutory power of sale, discussed above, which can amount to several hundred dollars or considerably more, depending on the length of the descriptive information for the particular property and the paper used for publication, most lenders also publish display advertisements in the business and real estate sections of the daily newspapers and in other publications. See discussion in Section I.D.12 below.

**10. Is there sale by a sheriff or others? What is the cost? Are the costs negotiable or non-negotiable?**

No sheriff is required for the foreclosure process. See discussion in Section I.D.9 above concerning the auctioneer's fees.

**11. Are there trustee fees? What are they? Are they negotiable or non-negotiable?**

No trustee fees are required.

**12. What are the advertising costs?**

As noted above, advertising fees can be substantial. In addition to the legal notice advertisement required under the statute governing the foreclosure by power of sale, most lenders also publish display advertisements in the business and real estate sections of the daily newspapers and in other publications. Frequently, brochures featuring the property are mailed to the brokerage community and other interested parties. Information is also posted on the auctioneer's website. A mortgagee foreclosing under a power of sale must act in good faith and exercise reasonable diligence in an effort to secure a fair price for the property. As a result, in most foreclosures of commercial property, display advertising is the norm. See *Pemstein v.*

*Stimpson*. 36 Mass. App. Ct. 283, 630 N.E.2d 608 (1994), *review denied*, 418 Mass. 1103, 636 N.E. 2d 279 (1994).

**13. Is there a transfer tax? How is it calculated?**

The foreclosure deed that is recorded following the foreclosure sale is not immune from the statutory requirement applicable to all deeds that an excise tax be paid to the Commonwealth of Massachusetts in connection with a conveyance. MASS. GEN. LAWS ch. 64D, §§ 1 to 13.<sup>2</sup> Unless the parties to the transaction are exempt under the statute, the foreclosure deed will be taxed at the time of recording at the rate of \$4.56 per thousand dollars of consideration paid. In certain counties, surcharges apply. Although the statutory liability for the deed stamp excise tax is on the person who makes or signs the deed (MASS. GEN. LAWS ch. 64D, § 2) some foreclosing lenders provide in the foreclosure terms of sale for the high bidder to reimburse the foreclosing lender for this amount. By statute, every deed (including a foreclosure deed) presented for record must recite the full consideration, which in the foreclosure context generally means the amount of the high bid. MASS. GEN. LAWS ch. 183, § 6.

**14. Are there any other relevant considerations?**

Not applicable.

**15. What is the process? (Please include information regarding necessary parties, statutorily required notices and grace periods, marshaling requirements, and any other relevant considerations.)**

As noted above, under the statute governing the process for foreclosure under statutory power of sale (MASS. GEN. LAWS ch. 244, § 14) a form of notice, included within the statute, must be served upon certain parties and published in the manner prescribed by the statute. The statute requires that the notice be published prior to the date of the sale once in each of three successive weeks in a newspaper, the locality of which is provided for in the statute.

In addition, notice must be sent to the owner of record, as well as to all persons holding a record interest in the mortgaged premises (as of 30 days prior to the date of sale) that is junior to the mortgage being foreclosed. These parties must receive a copy of the mortgagee's notice of sale by registered mail sent at least fourteen days prior to the date of sale. The statute is strictly construed, and failure to comply with any of the notice requirements can render a foreclosure ineffectual, however, holders of junior interests in the property may waive the right to receive notice. Additional notices are required in the event the mortgagee intends to seek a deficiency judgment after the sale or if there are federal tax liens encumbering the record title to the property.

The foreclosure sale is a public sale conducted by a licensed auctioneer on behalf of the mortgagee on the mortgaged premises (or some part of them) at the date and time appointed in the notice given by the mortgagee. *See* MASS. GEN. LAWS ch. 183, § 21. As noted above, it is customary for a foreclosing mortgagee, immediately prior to beginning the sale under the

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<sup>2</sup> The deed stamp chapter does not apply to any deed to which any of the following are a party: the Commonwealth, a city or town of the Commonwealth, or the United States or any of their agencies.

statutory power of sale, to make entry in the presence of witnesses as required by the statute and to have a certificate of entry executed for the purpose of beginning the three-year period for foreclosure of the equity of redemption following entry.

At the sale, the auctioneer typically reads the mortgagee's notice of sale, as well as the text of a memorandum of sale (a contract to be signed between the auctioneer, on behalf of the mortgagee, and the high bidder at the conclusion of the bidding) prior to the start of bidding. A deposit check in the amount prescribed by the notice of sale is required to be displayed before a party is qualified to bid, although this requirement does not apply to the holder of the mortgage.

Terms of sale typically provide for delivery of the deed in exchange for the balance of the high bid purchase price within some number of days following the sale; anywhere from 15 to 60 days is typical. The closing typically takes place at the office of the mortgagee or its counsel after that interval has expired, although in cases where the lender is the successful high bidder it may consummate the transaction sooner. The foreclosure deed and other foreclosure papers, including the certificate of entry (MASS. GEN. LAWS ch. 244, § 20) and foreclosure affidavit with exhibits, including a copy of the notice of sale (MASS. GEN. LAWS ch. 244, § 15), are then recorded. The mortgagee's bid is, to the extent it does not exceed the total outstanding amount secured by the mortgage, a credit bid.

#### **E. Comparison**

- 1. Are there any advantages or disadvantages to proceeding judicially versus nonjudicially, especially regarding the costs and time (the impact on the right to a deficiency is addressed in the "Limitations on Procedure and Enforcement" section)?**

As noted above, judicial foreclosure is extremely rare in Massachusetts.

- 2. If your state statutes provide for both judicial and nonjudicial foreclosures, can a lender elect to do either after the loan is first made (i.e., does the lender's choice of a mortgage document versus a deed of trust limit what type of action it can take later)?**

Deeds of trust are not used in Massachusetts. A lender will always elect to foreclose under a power of sale assuming the mortgage contains the necessary language.

#### **F. Miscellaneous**

- 1. Do any statutory provisions permit friendly foreclosures?**

There are no statutory provisions on the subject of friendly foreclosures.

- 2. Are there any special steps for foreclosure of a leasehold mortgage?**

There are no special steps statutorily required for the foreclosure of a leasehold mortgage, although obviously the provisions of the leasehold mortgage and the lease must be carefully observed.

### **3. Does this state permit a private sale?**

No.

## **II. APPRAISALS**

### **A. Are there any value limits on foreclosure bid prices?**

No, the sale must be conducted in good faith and the lender must use reasonable diligence to obtain a fair price. Whether a lender has met the reasonable diligence standard is determined by looking at the advertising for the sale, whether the proceedings have been open and whether notice has been given to interested parties. *See Pemstein v. Stimpson*, 36 Mass. App. Ct. 283, 630 N.E.2d 608 (1994), *review denied*, 418 Mass. 1103, 636 N.E. 2d 279 (1994).

### **B. Is a third-party MAI appraisal required for a foreclosure sale?**

Although no statutory provision currently requires a lender to obtain an appraisal prior to conducting a foreclosure sale, as a practical matter, a lender will find it very difficult to foreclose without a current and accurate appraisal. An appraisal that is up-to-date, accurate, and reliable may be required by title insurers to underwrite the title emerging from the foreclosure sale. Despite the holding in the *BFP v. Resolution Trust* case, title insurers may look for a bid amounting to a fair percentage of appraised value as a condition to offering title coverage (particularly with respect to creditors' rights) to parties who hold under a foreclosure deed.

Although no clear case law establishes the requirement, many lenders, as a rule of thumb, bid in a way that will produce a high bid of approximately 70 percent of the value of the property at the foreclosure sale. MASS. GEN. LAWS ch. 109A, § 4(b) provides that a regularly conducted non-collusive foreclosure sale is not subject to attack under state law as a fraudulent conveyance. Nevertheless, because this issue still may be raised in bankruptcy proceedings after the sale, and as a defense in a deficiency action, lenders, title insurers, and subsequent purchasers are all concerned about the sale having taken place at a fair percentage of the appraised value of the property. *See Edry v. Rhode Island Hospital Trust*, 201 B.R. 604 (Bankr. D. Mass. 1996).

### **C. Are there any cases interpreting or applying the BFP case regarding fraudulent conveyance challenges to a foreclosure sale in this state?**

The most recent cases in Massachusetts state that absent evidence of bad faith or improper conduct, mere inadequacy of price will not invalidate a foreclosure sale unless the price is so gross as to indicate bad faith or lack of reasonable diligence. *States Resources Corp. v. The Architectural Team, Inc.*, 433 F.3d 73 (1st Cir. 2005). *See also Noone v. St. Cyr*, 188 B.R. 710, 712 (Bankr. D. Mass. 1995).

## **III. ENFORCEMENT OF GUARANTIES/CARVE-OUTS FROM EXCULPATION**

### **A. Are there any issues that need to be identified regarding enforcement of a guaranty or personal liability for diversion of rents, fraud, environmental loss, etc.?**

Massachusetts has a usury statute, MASS. GEN. LAWS ch. 271, § 49, that precludes certain charges, expenses and interest above the annual rate of 20 percent, although this statute does not control most regulated lenders or those lenders who file notices with the Attorney General's office. In addition, certain statutes provide certain borrowers with additional interest rate protections. *See, e.g.*, MASS. GEN. LAWS ch. 140, §§90, 91 (loans of less than \$1,000); MASS. GEN. LAWS ch. 140, §§ 90A to 90E (applicable to certain junior mortgage loans secured by specified types of residential real estate having an assessed value of not over \$40,000); MASS. GEN. LAWS ch. 140, § 96 (pertaining to the making of small loans primarily for personal, family, or household purposes).

For a recent case involving the enforceability of a guaranty, *See Blue Hills Office Park LLC v. J.P. Morgan Chase Bank*, 477 F. Supp. 2d 366 (D. Mass. 2007).

**B. Are there any issues that need to be identified regarding enforcement and recovery of late charges, default interest, and prepayment charges?**

MASS. GEN. LAWS ch. 183, § 59 limits lenders holding mortgages on certain mortgagor-occupied residential property (dwelling house for four or less separate households or condominium units) from requiring a late charge or penalty for any payment made within 15 days from the date it is due. The same statute also limits the amount of penalties or late charges in such loans to 3 percent of the amount of principal and interest overdue. Loans secured by first mortgages on mortgagor-occupied dwelling houses of four or less separate households are subject to certain limits on prepayment penalties. The limit generally is the lesser of the balance of the first year's interest or three months' interest; if payment is made within 36 months of the note for the purpose of institutional refinancing, an additional payment equal to three months' interest may be required. MASS. GEN. LAWS ch. 183, § 56. Imposing a prepayment penalty in cases where such property is taken for any public purpose is also prohibited. MASS. GEN. LAWS ch. 183, § 57. *See also* MASS. GEN. LAWS ch. 183C.

**C. How are mechanic's liens handled (e.g., priority/process to foreclose, bonding)?**

Mechanic's liens are governed by the provisions of MASS. GEN. LAWS ch. 254. In general, that chapter establishes that mechanic's liens (except certain liens in limited circumstances involving the provision of labor on sites) require the timely recording of a notice of contract to begin the process of establishing the lien and to assign the priority for that lien. Later steps in the process, including further timely recordings and institution of a lawsuit, are required to be followed for the lien to remain effective. The statute provides for waivers and subordinations to be delivered by contractors upon receipt of payment. Liens may be bonded over with lien bonds. A mechanic's lien junior to the mortgage being foreclosed will be extinguished in the same manner as any other junior lien; the holder of the lien is given notice pursuant to the foreclosure statute (MASS. GEN. LAWS ch. 244, § 14) and its lien will not survive the consummation of the mortgage foreclosure sale process.

#### **IV. REVENUE CAPTURE PRIOR TO FORECLOSURE**

**A. Assignment of Rents**

## **1. Are there any specific issues regarding notices or the timing of invoking an assignment of rents?**

To create an enforceable lien in rents, Massachusetts courts require an express action to collect rents. Courts, however, had been split over the extent of action a lender needed to take to protect itself in a bankruptcy proceeding. *Cf. In re Harvey Rd. Assoc. VIII*, 140 B.R. 302 (Bankr. D. Mass. 1992); *In re Cantonwood Assoc. Ltd. P'ship*, 138 B.R. 648 (Bankr. D. Mass. 1992); *In re Concord Mill Ltd. P'ship*, 136 B.R. 896 (Bankr. D. Mass. 1992); *In re Ashford Apartments Ltd. P'ship*, 132 B.R. 217 (Bankr. D. Mass. 1991); *In re Milford Common J.V. Trust*, 117 B.R. 15 (Bankr. D. Mass. 1990); *In re Ledgemere Land Corp.*, 116 B.R. 338 (Bankr. D. Mass. 1990); *In re Prichard Plaza Assoc. Limited P'ship*, 84 B.R. 289 (Bankr. D. Mass. 1988), *abrogation recognized by In re 229 Main Street Ltd. P'ship*, 262 F.3d 1 (1st Cir. 2001). In 1993, the Bankruptcy Court addressed this split, holding that recording an assignment of rents at the time the loan is made perfects the lender's interest for cash collateral purposes. *Prudential Ins. Co. of Am. v. Boston Harbor Marina Co.*, 159 B.R. 616 (Bankr. D. Mass. 1993). The holding in *Prudential* was codified by the Bankruptcy Reform Act of 1994, 11 U.S.C. § 552(b)(2). The Bankruptcy Reform Act provides that a mortgagee holding a perfected security interest in a mortgagor's rents (e.g., a recorded assignment of leases and rents) before bankruptcy is filed may treat post-petition rents as cash collateral entitled to adequate protection. *Id.*

In a non-bankruptcy context, the actions required to perfect the lender's interest in rents remain uncertain under Massachusetts law. See discussion in Section V below.

## **B. Receiverships**

Massachusetts law does not provide for receiverships of real property. The Massachusetts legislature, however, has been debating adopting the Uniform Assignments of Leases and Rents Act, which would create a form of receivership. See H.R. 1278, 185th Leg. (Mass. 2007); H.R. 3335, 183rd Leg. (Mass. 2003) (later reintroduced as a petition).

## **C. Sequestration of Rents**

### **1. Does your state have a sequestration of rents statute?**

No, Massachusetts does not have a sequestration of rents statute.

## **D. Escrows/Letters of Credit**

### **1. Are there any specific requirements for cashing letters of credit or exercising rights under escrows (i.e., notice) to be considered?**

There are no specific statutory provisions for exercising rights under escrows. Letters of credit, on the other hand, are regulated by statute. They become enforceable when transmitted to either the beneficiary or the person requested to advise the beneficiary and the letter is neither revocable nor transferable, unless such conditions are explicitly stated in the letter of credit. MASS. GEN. LAWS ch. 106, § 5-106; MASS. GEN. LAWS ch. 106, § 5-112. If a letter of credit is without a stated expiration, it expires one year after the date of issuance. MASS. GEN. LAWS ch. 106, § 5-106. If the letter is perpetual, it expires five years after the date of issuance. *Id.*

## **E. Temporary Restraining Orders**

### **1. Can temporary restraining orders be obtained to intercept rent before a receiver is appointed? When is the TRO perfected?**

Although Massachusetts does not provide for receiverships of real property, a TRO can be obtained under the same standards applicable to other litigation matters. The issuance of a TRO is wholly within the discretion of the court. *Zottu v. Electronics Heating Corp.*, 334 Mass. 442, 445, 135 N.E.2d 920, 923 (1956). Massachusetts law entitles a party to a preliminary injunction, such as a TRO, where (1) the party is reasonably likely to succeed on the merits of its claim; (2) it will suffer irreparable harm in the absence of injunctive relief; and (3) the harm outweighs any injury that the other party will suffer if the injunction is granted. *See* MASS. R. CIV. P. 65(a); *T&D Video, Inc. v. City of Revere*, 423 Mass. 577, 580, 670 N.E.2d 162, 164-65 (1996). The Massachusetts Rules of Civil Procedure provide that a TRO may be obtained *ex parte* if the moving party clearly demonstrates from specific facts shown by affidavit or verified complaint “that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition.” MASS. R. CIV. P. 65(a).

## **V. PERFECTION OF THE ASSIGNMENT OF RENTS**

### **A. What action is needed to perfect an assignment under state law? Is it perfected by filing of the record?**

Massachusetts state courts have not decided what action is needed to perfect an assignment of rents. But federal courts, interpreting what state courts would do, have held that to perfect a security interest in the future rents of real property a party need only record a mortgage and an assignment of rents with the appropriate registry of deeds. *Indian Motorcycle Assoc. III Ltd. P’ship v. Mass. Hous. Fin. Agency*, 66 F.3d 1246, 1253 (1st Cir. 1995); *see also* discussion in Section IV.A. above. Recording an assignment of leases and rents before bankruptcy is filed allows the mortgagee to treat post-petition rents as cash collateral entitled to adequate protection under federal bankruptcy law. 11 U.S.C. § 552(b)(2); *Prudential Ins. Co. of Am. v. Boston Harbor Marina Co.*, 159 B.R. 616 (Bankr. D. Mass. 1993).

### **B. If the assignment is not perfected before a bankruptcy petition is filed, can it be perfected post petition?**

No, an assignment must be perfected before a bankruptcy petition is filed. *See generally Prudential Ins. Co. of Am. v. Boston Harbor Marina Co.*, 159 B.R. 616 (Bankr. D. Mass. 1993).

### **C. Does Massachusetts recognize an absolute assignment of rents causing the rents not to be included in the borrowers assets? What is necessary for an assignment of rents to be characterized as absolute? Would the use of a lockbox/cash management account cause an assignment to be absolute?**

Massachusetts case and statutory law have not recognized an absolute assignment of rents. *See* discussion in Section V.A above. Massachusetts bankruptcy courts have not been unanimous in their treatment of absolute language as it relates to assignment of rents. *Cf. In re Geary’s Bottled Liquors v. Independence One Financial Services (In re Geary’s Bottled*

*Liquors*), 184 B.R. 408, 413 (Bankr. D. Mass. 1995) (stating that when an assignment of rents is absolute rather than conditional nothing further needs to “be done to obtain [11 U.S.C. ] § 363 protection.”); *Lyons v. Federal Savings Bank (In re Lyons)*, 193 B.R. 637, 648-649 (Bankr. D. Mass. 1996) (where an assignment of rents is incorporated into the loan documents and is “conditioned upon default and will terminate upon satisfaction of the debt,” the assignment constitutes additional security for the loan and is therefore not absolute in nature).

## **VI. DEEDS IN LIEU OF FORECLOSURE**

### **A. What are the required documents?**

Although not required, it is customary to obtain an affidavit from the mortgagor stating that the mortgagor is not insolvent and that the transaction is a straightforward conveyance, not an equitable mortgage. Such an affidavit is helpful in the event of any later claim that the mortgagee agreed to hold and reconvey title once the mortgagor paid the mortgagor loan arrearages.

A true deed in lieu of foreclosure is typically given in exchange for the borrower’s release from personal liability. To the extent that the deed is given to the holder of the mortgage, merger of title may result and loss of the mortgage lien may occur. This can be prevented by a clear statement of contrary intent on the record. Preferably, the property should be conveyed to a separate entity affiliated with the mortgagee. This should preserve the mortgage and potentially allow the mortgagee to later foreclose out junior liens, if necessary.

### **B. Does any statute govern the ability/process to convey equity of redemption?**

No statute specifically governs the conveyance of the equity of redemption in a deed in lieu situation. Statutes, however, do control equity of redemption matters in the context of mortgage foreclosure sales. MASS. GEN. LAWS ch. 244, §§ 13, 14 (unless the defendant is seized in fee simple in possession of the whole equity of redemption of the land demanded, all parties interested in the equity of redemption must be notified before an order for sale can be made).

### **C. Is there any case law on executory deed transactions (e.g., a deed in escrow as part of a workout or the initial closing)?**

A deed in escrow is typically held by the lender subject to specified conditions. Until the conditions are met, the deed is not delivered and may not be released from escrow. Delivery of the deed should be made to a stranger and not the grantee. Delivery to the grantee could make the delivery take effect immediately, notwithstanding that the conditions of escrow have not been satisfied. *Fairbanks v. Metcalf*, 8 Mass. 230 (1811).

Executory deed transactions raise issues about whether the deed in escrow is an attempt to deprive the mortgagor of its right to redeem, which exists until the foreclosure sale is completed. Deeds given in escrow as part of a workout or restructuring may be viewed as invalid because they “clog the equity of redemption.” See *Marple v. Wyo. Prod. Credit Ass’n*, 750 P.2d 1315, 1320 (Wyo. 1988); *West v. Reed*, 55 Ill. 242, 244 (1870); see also *Humble Oil & Ref. Co. v. Doerr*, 303 A.2d 898, 905 (N.J. Ch. 1973).

**D. Can the deed be taken subject to the mortgage?**

Although it is common to negotiate a complete release from the indebtedness as part of a deed in lieu transaction, a deed in lieu may be given with the mortgagor's agreement to remain liable for a portion of the debt. Despite the rules of merger, it is possible to structure a deed in lieu transaction so that the mortgage remains outstanding. By preserving the existing mortgage, the mortgagee may retain its collateral in case a bankruptcy trustee or other creditor seeks to void the deed as a fraudulent conveyance.

**E. What are the estimated costs of an owner's title insurance policy? What are the dollar figures per thousand dollars of coverage? Are these negotiable or non-negotiable?**

Massachusetts title insurance coverage, other than for small amounts typical of residential transactions, are negotiable. If title is acquired through the mortgagee or an appropriate affiliate, lenders may have continuing coverage under their existing lender's title insurance policy.

**F. Are there any specific local issues to be considered?**

The mortgagee of real estate who takes a deed in lieu of foreclosure from the mortgagor is a "purchaser" of that property within the meaning of the construction lien statute. This entitles the mortgagee to priority over subcontractor liens on the property, where the subcontractor recorded notice after the deed in lieu of foreclosure. MASS. GEN. LAWS ch. 254, § 7: *J & W Wall Sys., Inc. v. Shawmut First Bank & Trust Co.*, 413 Mass. 42, 594 N.E.2d 859 (1992).

**VII. TAXES**

**A. Does the state sell tax certificates for delinquent taxes? Can the mortgagee or an affiliate buy these?**

No, Massachusetts does not sell tax certificates for delinquent taxes. Municipalities, however, can sell the right to collect delinquent taxes, referred to as a tax receivable, although this authority is rarely invoked. MASS. GEN. LAWS ch. 60, § 2C.

**B. How long after the delinquency is the tax certificate sold?**

The municipality may sell a tax receivable at any time after the taxes can no longer be paid by the taxpayer without interest or penalty. MASS. GEN. LAWS ch. 60, § 2C(b).

**C. How long is the period to redeem?**

Prior to the filing of a petition for foreclosure of all redemption rights, which generally may not be filed until six months after the sale or taking, any person having an interest in the land for which a tax is owed may redeem by paying the amount of the tax, plus interest and costs, and any subsequent unpaid taxes. Further, if the tax collector accepts partial payments, foreclosure of the redemption right may be delayed for up to 2 years. MASS. GEN. LAWS ch. 60, §§ 62, 65. To redeem after a petition for foreclosure has been filed, a party seeking redemption must file an answer to the petition to foreclose with the Land Court. MASS. GEN. LAWS ch. 60, § 68. Although whether a party may redeem is within the discretion of the Land Court, Massachusetts

law favors redemption. Accordingly, the courts broadly interpret the redemption statutes to allow redemption by a financially capable party. *Town of Lynnfield v. Owners Unknown*, 397 Mass. 470, 473-74, 492 N.E.2d 86, 89 (1986).

#### **D. Are redemption rights assignable?**

While the matter is not free from doubt, redemption rights are generally not considered to be assignable. Only a person claiming an interest in the land may seek to redeem. However, mortgagees and other creditors are considered to have an "interest in the land" sufficient to claim the right of redemption. MASS. GEN. LAWS ch. 60, §§ 62, 68; *see, e.g., Union Trust Co. v. Reed*, 213 Mass. 199, 99 N.E. 1093 (1912) (attaching creditor).

#### **E. What is the interest rate (or other penalties or charges) accruing on unpaid taxes?**

Overdue taxes bear interest at a rate of 14 percent per year unless the property is taken or sold by the municipality for unpaid taxes. MASS. GEN. LAWS ch. 59, § 57. If the property is taken or sold by the municipality for unpaid taxes, interest accrues at a rate of 16 percent per year as of the date of the sale or taking until the redemption right is exercised. MASS. GEN. LAWS ch. 60 § 62. The fees of the tax collector, including for example, costs incurred for preparing a written notice of delinquency, for recording an affidavit and for the issuance and delivery of a warrant to an officer, are prescribed by statute and added to the amount of tax due. MASS. GEN. LAWS ch. 60, § 15.

#### **F. Property Tax Assessments**

##### **1. What is the date of annual assessment for all lienable taxes of whatever name?**

Massachusetts real property is assessed on January 1 of each year. MASS. GEN. LAWS ch. 59, §§ 2A, 18. The municipal tax year, referred to as the fiscal year, begins on July 1 and ends on June 30. MASS. GEN. LAWS ch. 44, §§ 56, 56A.

##### **2. What is the last date for filing an appeal of the assessment?**

Owners, or in some cases mortgagees, who wish to challenge the amount of an assessment may do so by filing an application for abatement with the local assessors. MASS. GEN. LAWS ch. 59, § 59. In general, the owner has 30 days after the mailing of the first bill containing the property assessment to file the application, usually around February 1.

The Appellate Tax Board has jurisdiction over appeals from the denial of abatement applications. MASS. GEN. LAWS ch. 59, §§ 59, 64. The appeal must be filed within three months of the assessor's decision. *Id.* The procedures for filing applications and appeals are complex and errors are often jurisdictionally fatal.

### **3. Does a foreclosure or deed in lieu trigger a reassessment?**

No, but it may be taken into account in the subsequent year's tax assessment. *See, Se. Reg'l Planning and Econ. Dev. Dist. v. Town of Dartmouth*, 6 Mass. App. Ct. 209, 374 N.E.2d 350 (1978).

## **G. State and Local Conveyance Taxes**

### **1. Are these taxes applicable in a foreclosure?**

Massachusetts imposes a deed excise tax on the transfer of real estate. MASS. GEN. LAWS ch. 64D, § 1. This tax is applicable whenever consideration exceeds \$100. *Id.* The current tax rate is \$2.28 for every \$500 of consideration, except in Barnstable County where the current rate is \$2.85. *Id.*; 1969 Mass. Acts 412; 1988 Mass. Acts 352. Any fractional part of \$500, except the initial \$100 of consideration, is taxed just as an additional \$500 of consideration would be. MASS. GEN. LAWS ch. 64D, § 1. For example, \$1001 of consideration would have the same tax liability as \$1500 of consideration.

The tax is paid by the person making or signing the deed. It is collected through a deed stamp and any deed without a stamp can be refused for recording by the registry of deeds. MASS. GEN. LAWS ch. 64D, § 6B. The tax due is determined by the consideration for the deed, which must be recited on the face of the deed.

If a deed in lieu transaction is structured so that the mortgage remains in place and the property is conveyed subject to the mortgage, the amount of outstanding debt may be deducted from the value of the property. MASS. GEN. LAWS ch. 64D, § 1. But *see* Massachusetts Department of Revenue Directive No. 88-18.

Both Martha's Vineyard and Nantucket levy an additional surcharge on real estate transfers. *See* 1985 Mass. Acts c. 736, as amended; 1983 Mass. Acts c. 669, as amended. Currently the surcharge is 2 percent of the total value of the real estate transferred.

### **2. Can the lender avoid conveyance taxes by making a nominal bid?**

The deed excise tax is calculated on the amount bid at the foreclosure sale. Given typical foreclosure bidding procedures, lenders do not generally bid a nominal amount at the foreclosure sale.

### **3. Are these taxes applicable in a deed in lien?**

Yes. *See* Section VII.G.1.

## **VIII. BANKRUPTCY CONSIDERATIONS**

### **A. Please explain the position of federal courts in this state on:**

#### **1. Absolute Priority Rule**

The absolute priority rule is subject to the new value exception. This new value exception provides that the "objection of an impaired senior class [of claim holders] does not bar junior claim holders from receiving or retaining property interests in the debtor reorganization, if they contribute new capital in money or money's worth, reasonably equivalent to the property's value, and necessary for successful reorganization of the restructured enterprise." *Beal Bank, S.S.B. v. Waters Edge Ltd. P'ship*, 248 B.R. 668, 678 (Bankr. D. Mass. 2000) (quoting *Bank of Am. Nat'l Trust & Sav. Assoc. v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 442 (1999)).

## **2. Negative Amortization**

There are no cases directly on point, but in dicta courts have expressed reluctance at striking down mortgages that call for negative amortization, unless the lender misrepresented or omitted facts about the nature of the loan. *See Salois v. Dime Sav. Bank of N.Y., FSB*, 128 F.3d 20 (1st Cir. 1997); *In re Bjolmes Realty Trust*, 134 B.R. 1000, 1007 n.14 (Bankr. D. Mass. 1991).

## **3. Hotel Room Receipts as Rent**

11 U.S.C. § 552(b)(2) explicitly states that an interest in post-petition rents can be perfected before bankruptcy is filed, but there is no Massachusetts federal case law directly on point. However, courts have held that proceeds derived from parking lot operations constitute rents from real property. *In re Ashford Apartments Ltd. P'ship*, 132 B.R. 217 (Bankr. D. Mass. 1991).

## **4. Market Interest Rates**

Massachusetts bankruptcy courts calculate a rate that reflects the risk of the investment. To reflect the risk, a court will take into account the proposed forced loan, including rates for uncoerced loans of this general type, the value of the collateral, and the Debtor's prospects. *In re P.J. Keating Co.*, 168 B.R. 464, 473 (Bankr. D. Mass. 1994).

## **5. Waiver of Right to Automatic Stay**

A pre-petition waiver of the automatic stay protection is not self-executing and does not preclude either third parties or the debtor from contesting the granting of relief. The creditor must petition for relief from stay and, pursuant to 11 U.S.C. § 362(g)(1), the party seeking relief from the automatic stay has the burden to establish that the debtor does not have any equity in the property. 11 U.S.C. § 362(g)(1). If the party seeking relief establishes a lack of equity, the burden shifts to the debtor to show the property is necessary for an effective reorganization. 11 U.S.C. § 362(g)(2); *Compass Bank for Sav. v. Billingham (In re Graves)*, 212 B.R. 692, 696 (Bankr. D. Mass. 1997); *In re Powers*, 170 B.R. 480, 484 (Bankr. D. Mass. 1994).

## **6. Bad Faith Filings**

The First Circuit has imposed a good faith requirement for the conversion of chapter 7 claims to chapter 13 claims and vice versa. *In re Marrama*, 430 F.3d 474, 481, 520-21 (1st Cir. 2006). *aff'd*, 127 S. Ct. 1105 (2007). However, on June 6, 2007, the First Circuit acknowledged that the initial good faith filing requirement has split the circuits and remains an issue of first impression in its courts. *Fields Station LLC v. Capitol Food Corp.*, No. 06-2327, 2007 U.S. App.

LEXIS 13028, at \*4-5 (1st Cir. June 6, 2007). Still, lower courts have addressed the issue and the Massachusetts Bankruptcy Court has rejected the good faith filing requirement. *In re Victoria Ltd. P'ship*, 187 B.R. 54 (Bankr. D. Mass. 1995). The *Victoria Limited Partnership* court denied all of the creditor's grounds for finding bad faith, including filing bankruptcy multiple times; filing on the eve of foreclosure; filing to avoid the creditor's state court judgment; filing as a litigation tactic; having few unsecured creditors; engaging in improper conduct by not complying with the parties' stipulation; having a single asset, the mortgaged property; and lacking the possibility of reorganization. *Id.* at 55.

## **7. New Value Exception**

See discussion in Section VIII.A.1 above.

## **8. Bankruptcy-Proofing Devices**

There is no federal law in Massachusetts on bankruptcy-proofing devices, but Massachusetts bankruptcy courts have held that nominee trusts, which can be used to conceal the ownership of assets from public disclosure, may not obtain relief under the Bankruptcy Code. *In re Marrama*, 445 F.3d 518, 520-21 (1st Cir. 2006); *In re Eastmare Dev. Corp.*, 150 B.R. 495 (Bankr. D. Mass. 1993). Instead, the filing is deemed to be on behalf of the off-record beneficiary.

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