

HOUSE No. 02854

The Commonwealth of Massachusetts

PRESENTED BY:

Angelo M. Scaccia

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the passage of the accompanying bill:

An Act relative to judicial foreclosures.

PETITION OF:

NAME:

DISTRICT/ADDRESS:

.....
Angelo M. Scaccia

.....
14th Suffolk

.....
William F. Galvin

.....
Secretary of the Commonwealth

HOUSE No. 02854

By Mr. Scaccia of Boston, a petition (accompanied by bill, House, No. 2854) of Angelo M. Scaccia and William Francis Galvin relative to judicial foreclosures. Joint Committee on the Judiciary.

The Commonwealth of Massachusetts

In the Year Two Thousand Eleven

An Act relative to judicial foreclosures.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Whereas, the General Court finds and declares that a serious public emergency exists with
2 respect to the housing of a substantial number of citizens in the Commonwealth because of
3 mortgage defaults and foreclosures;

4 And whereas the General Court finds that substantial evidence has documented misleading and
5 deceptive practices in violation of statute and regulations of in the procurement of some
6 mortgage documents;

7 And whereas, a substantial number of citizens may be evicted from their homes because of
8 foreclosures, the General Court finds that an emergency regulation of residential real estate
9 foreclosures is necessary.

10 Be it enacted as follows:

11 Section 1. Section 1, of Chapter 185 of the General Laws as appearing in the 2008 Official
12 Edition is hereby amended by inserting after subsection (t) as appearing in line 85 the following
13 new subsection:-

14 “(u) Petition to challenge the validity of foreclosure proceedings where a deed of foreclosure
15 was filed on or before January 7, 2011 where the petitioner alleges that the party or its assign
16 who brought foreclosure did not possess right title and interest in the mortgage that was
17 foreclosed”.

18 Section 2. Chapter 185 of the General Laws as appearing in the 2008 Official Edition is hereby
19 amended by inserting after section 108 the following new section:-

20 “Section 108A. An action brought under this chapter alleging that a foreclosure that occurred
21 before January 7, 2011 was defective because the mortgage or assign did not possess right title
22 and interest in the mortgage that was foreclosed at the time of the foreclosure must bring their
23 action not later than one year after the final passage of this act.

24 Section 3. Section 15, of Chapter 185 as appearing in the 2008 Official Edition is hereby
25 amended by inserting at the end thereof a new paragraph as follows:-

26 “In the case of actions challenging the title in real estate obtained by foreclosure which occurred
27 before January 7, 2011 and where the action alleges that the mortgage or its assign did not
28 possess right title and interest at the time of the foreclosure the Land Court may appoint a special
29 master to determine the facts or it may transfer the action to the appropriate division of the
30 Housing Court or District Court.

31 The General Laws as appearing in the 2004 Official Edition is hereby amended by inserting after
32 chapter 239 a new chapter as follows: -

33 Chapter 239A. Judicial Hearing Before Residential Foreclosure of Mortgages

34 GENERAL

35 Section 1: Definitions

36 (a) "Unemployed person" means a person who is unemployed for purposes of chapter
37 567.

38 (b) "Homeowner" means a person who has an ownership interest in residential real
39 property subject to a mortgage which is the subject of a foreclosure action, and who has owned
40 and occupied such property as his principal residence for a continuous period of not less than two
41 years immediately preceding the commencement of such foreclosure action.

42 (c) "Foreclosure Action" means any process under Chapter 244 of the General Laws or otherwise
43 where a lender seeks to exercise its rights under a mortgage on residential property securing a
44 loan that is in default. A lender must obtain a conditional judgment as part of the process of a
45 Foreclosure Action.

46 (d) "Restructured mortgage debt" means the adjustment by a court of a mortgage debt to
47 give protection from a foreclosure action.

48 (e) "Protection from foreclosure" means a court-ordered restructuring of a mortgage debt
49 designed to eliminate an arrearage in payments on such debt and to provide a period not to
50 exceed six months during which foreclosure is stayed.

51 (f) "Lender" means any person who makes or holds mortgage loans in the ordinary course
52 of business and who is the holder of any first mortgage on residential real estate which is the
53 subject of a foreclosure action.

54 (g) "Underemployed person" means a person whose earned income during the twelve-
55 month period immediately preceding the commencement of the foreclosure action is (A) less
56 than fifty thousand dollars and (B) less than seventy-five per cent of his average annual earned
57 income during the two years immediately preceding such twelve-month period.

58 Section 2: Notice to homeowner of intent to commence foreclosure proceedings and protections
59 from foreclosure

60 (a) No less than twenty-five days prior to a Lender seeking a pre-conditional judgment order
61 under Section 4 of this Chapter, the Homeowner shall receive a notice from the Lender that
62 states in plain and simple English the following:

63 (1) Facts sufficient to identify the mortgage and the parties thereto, including but not limited to,
64 the name of the present holder of the mortgage, the original mortgagee, the lender which intends
65 to foreclose, any servicer or agent acting on his behalf, and the name, address, and working
66 telephone number of the entity responsible for responding to inquiries by the residential
67 mortgage debtor;

68 (2) The nature of the default claimed;

69 (3) The availability of the provisions of Section 3;

70 (4) The availability of the provisions of Section 4;

71 (5) The availability of any other methods to cure the default as provided by law or contract and
72 what performance, including what sum of money, if any, must be tendered to cure the default;

73 (6) The means by which the residential mortgage lender intends to foreclose, if the default is not
74 cured, together with a reasonable estimate of the date on which such foreclosure might occur;

75 (7) That the residential mortgage debtor may be evicted from the property following a
76 foreclosure sale;

77 (b) A Homeowner who receives notice under this Section, must make application for protection
78 from foreclosure under Section 3 and/or request a hearing under Section 4(b) within twenty-five
79 days of receipt of service under this Chapter.

80 (c) No pre-conditional judgment order shall be entered unless the court is satisfied from
81 pleadings or affidavits on file with the court that the Homeowner against whom the foreclosure
82 action is commenced has received the notice required by this Section.

83 (d) If a Homeowner against whom the foreclosure action is commenced did not receive
84 the notice required by this Section at the prescribed time, the court, upon its own motion or upon
85 the written motion of such homeowner, may issue an order staying the foreclosure action for
86 fifteen days during which period the homeowner may apply to the court for protection from
87 foreclosure by submitting an application together with a financial affidavit or request a hearing
88 under Section 4(b).

89 Section 3: Application for protection from foreclosure action. Qualifications. Court
90 determination of eligibility. Stay of foreclosure action.

91 (a) Subject to the provisions of subsection (b), a homeowner who is underemployed or
92 unemployed against whom a foreclosure action is brought may make application, together with a
93 financial affidavit, to the court having jurisdiction under Section 4 of this Chapter if: (1) The
94 mortgage being foreclosed encumbers the residential real property, which property has served as
95 his principal residence, for a period of not less than two years, (2) such homeowner has not had a
96 foreclosure action commenced against him in the preceding seven-year period and (3) such
97 homeowner has not received an emergency mortgage assistance loan and has not applied for
98 emergency mortgage assistance for two years before the application.

99 (b) If the residential real property which is the subject of a foreclosure action is owned by more
100 than one person, (1) no homeowner shall be deemed an unemployed person or an underemployed
101 person, for the purposes of sections Section 3, unless the aggregate earned income of all the
102 homeowners of the residential real property which is the subject of such foreclosure action
103 during the twelve-month period immediately preceding the commencement of the foreclosure
104 action is less than fifty thousand dollars and less than seventy-five per cent of the average
105 aggregate annual earned income during the two years immediately preceding such twelve-month
106 period for all such homeowners and (2) all homeowners of said property other than the
107 homeowner making application in accordance with subsection (a) shall file a financial affidavit
108 in connection with such application.

109 (c) The court shall determine the eligibility of such homeowner for protection from
110 foreclosure pursuant to the provisions of Section 3.

111 (d) In determining the eligibility of a homeowner for protection from foreclosure under
112 the provisions of sections Section 3, the court may consider any relevant facts and shall consider:

113 (1) The likelihood that the homeowner will be able to make timely payments on
114 the restructured mortgage commencing at the end of the restructuring period.

115 (2) The presence of any substantial prejudice to the Lender or any subordinate
116 lien or encumbrance, which would result from a restructuring of the mortgage debt.

117 (e) If it determines that a homeowner who is an underemployed person is eligible for
118 protection from foreclosure, the court in its discretion may order the restructuring of the
119 mortgage debt of such homeowner so as to eliminate any arrearage in payments on the mortgage
120 debt and may allow a restructuring period not to exceed six months. If it determines that a
121 homeowner who is an unemployed person is eligible for protection from foreclosure, the court
122 shall order the restructuring of the mortgage debt to eliminate any arrearage in payments on the
123 mortgage debt and shall order a restructuring period not to exceed six months.

124 (f) As a condition to the granting of a restructuring order, the court may order the homeowner to
125 pay to the lender during the restructuring period an amount not to exceed twenty-five per cent of
126 his net income per month as a means of demonstrating the homeowner's good faith effort to
127 reduce his mortgage indebtedness. For purposes of this section, "net income" shall include any
128 unemployment benefit received by the homeowner.

129 (g) At the conclusion of the restructuring period, the new mortgage debt shall be computed
130 based upon a composite rate of interest. The composite rate of interest shall be a weighted
131 average of the original mortgage interest rate as to the principal balance and the prevailing
132 interest rate as to all sums added to the principal balance to establish the total restructured
133 mortgage debt, except that in the case of a flexible rate, variable rate or similar adjustable rate
134 mortgage note, the provisions of the underlying mortgage note for the re-determination of the

135 interest rate on the mortgage shall continue to apply and remain in full force and effect during
136 the remainder of the term of the mortgage.

137 (h) In determining the restructured mortgage debt, the court shall add the following to the
138 existing principal balance of the mortgage debt: (1) All interest then due the lender and any
139 interest that will be earned to the end of any restructuring period, including interest on any
140 payments advanced by the lender during the restructuring period, such interest to be computed at
141 the rate provided in the mortgage note, (2) real property taxes, (3) premiums for Federal Housing
142 Administration, Veterans' Administration and private mortgage insurance, and (4) court costs,
143 legal fees and any other sums the court determines to be due under the terms of the mortgage
144 indebtedness by the court. The court shall then apply the composite interest rate as provided in
145 subsection (c) of this section to such total restructured debt over the remaining term of the loan.

146 (i) If the court determines the equity the homeowner has in the property and hears testimony
147 from an appraiser produced by the Lender in connection with such determination, (1) the
148 reasonable cost of the appraisal and the appraiser's appearance as a witness shall be part of the
149 court costs to be added to the principal balance pursuant to subdivision (4) of subsection (a) of
150 Section 3(i) if a restructuring order is granted and (2) the reasonable cost of said appraiser's
151 appearance as a witness shall be part of the taxable costs of the action, in addition to the taxable
152 costs for such appraisal and the appraiser's appearance as a witness at a subsequent hearing for a
153 judgment of foreclosure if such order is not granted.

154 (j) The amount of the mortgage debt at the end of any period of restructuring shall in no event
155 exceed either the amount of the original mortgage debt or ninety per cent of the fair market value
156 of the property as determined by an accredited real estate appraiser at the time of restructuring,

157 whichever is greater. The provisions for restructuring the mortgage debt and staying the
158 foreclosure shall apply only if the debt as restructured would not exceed such amount. Any sums
159 added to the existing mortgage debt as a result of a restructuring order shall accrue interest at
160 prevailing market rates after the conclusion of the restructuring period, which rate shall be either
161 fixed or variable depending upon the underlying mortgage note.

162

163 (k) If the court approves the application for protection from foreclosure and restructures the
164 mortgage debt, the foreclosure action shall be stayed for the restructuring period. If, for a period
165 of three months following the end of the restructuring period, there are no further proceedings to
166 continue the foreclosure proceedings based upon a default on the mortgage as restructured, the
167 foreclosure action shall be dismissed. The restructured mortgage debt shall have the same
168 priority as if it had been advanced at the time the mortgage was delivered.

169

170 Section 4: Lender must file an affidavit with the court, Opportunity for hearing on Conditional
171 Judgment.

172 (a) Prior to seeking a conditional judgment under Chapter 244 of the General Laws, a
173 Lender must obtain a pre-conditional judgment order from the housing court in the county where
174 the property to be foreclosed upon sits. If there is no housing court in the county, the Lender
175 must obtain the pre-conditional judgment order from the district court for the county where the
176 property to be foreclosed upon sits.

177 (b) In order to obtain a pre-conditional judgment order from the court, a Lender shall file an
178 affidavit signed under the pains and penalties of perjury stating or otherwise proving the
179 following elements:

180 (1) That the Lender owns a mortgage secured by the homeowner's real property;

181 (2) The mortgage was issued in accordance with the terms, conditions and legal requirements
182 in effect at the time the mortgage was issued; and

183 (3) The homeowner is in default on the mortgage.

184 (b) In an action for a lender to obtain a pre-conditional judgment order, a homeowner
185 shall have the right to request a hearing on the pre-conditional judgment order. The hearing shall
186 proceed as follows:

187

188 (1) The homeowner must request a hearing on the pre-conditional judgment order within 10
189 days of receiving notice pursuant to Section 2(a) of this chapter;

190 (2) At a hearing on the pre-conditional judgment order, all parties in interest shall have the
191 opportunity to present evidence to prove or disprove the truthfulness of the affidavit required by
192 subsection (a) above. The burden shall be upon the Lender to prove the truthfulness of the
193 affidavit required under subsection (a) above.

194 (3) The court must find by order whether or not the Lender has satisfied its obligations under
195 subsection (a) above.

196 [Section 5:

197 (a) The provisions of Chapter 239A shall be read in conformity with other provisions of
198 the Massachusetts General Laws. However, if there is a conflict between the provisions of
199 Chapter 239A and any other provision of Massachusetts General Laws, including but not limited
200 to Chapter 244, the provisions of Chapter 239A shall govern.

201 (b) The provisions of Chapter 239A shall be read in conformity with the Massachusetts
202 Declaration of Rights and the United States Constitution. However if there is a conflict between
203 any provision of Chapter 239A and Massachusetts Declaration of Rights or United States
204 Constitution, that shall not affect the applicability of the remainder of the Chapter.]

205 THE GENERAL LAWS AS APPEARING IN THE 2004 OFFICIAL EDITION IS HEREBY
206 AMENDED BY MODIFYING CHAPTER 244: SECTION 3. DECLARATION BY
207 MORTGAGEES; CONDITIONAL JUDGMENT

208 Section 3. The mortgagee in an action for possession must present the court with a pre-
209 conditional judgment order pursuant to Chapter 239A of the General Laws and may declare on
210 his own seisin, stating that it is in mortgage; and if the court finds upon verdict or otherwise that
211 the plaintiff is entitled to possession of the land for breach of condition, it shall upon motion of
212 either party award a conditional judgment.

213 THE GENERAL LAWS AS APPEARING IN THE 2004 OFFICIAL EDITION IS HEREBY
214 AMENDED BY MODIFYING CHAPTER 244: SECTION 11. MORTGAGES CONTAINING
215 POWER OF SALE; COURT ORDER FOR SALE, TO READ AS FOLLOWS:

216 Section 11. If a conditional judgment has been entered upon a mortgage containing a power of
217 sale, the court shall, instead of issuing a writ of possession, at the request of the plaintiff order
218 the property to be sold pursuant to such power so long as the plaintiff has also met all of the

219 requirements in Chapter 239A of the General Laws. The plaintiff shall thereupon execute the
220 power and do all things required by it or by the court.”