

HOUSE DOCKET, NO.

XXXXX

FILED ON: 05/18/2012

HOUSE No. 04096

The Commonwealth of Massachusetts

PRESENTED BY:

Brian S. Dempsey

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:

preventing unlawful and unnecessary foreclosures. . .

PETITION OF:

NAME:

Brian S. Dempsey

DISTRICT/ADDRESS:

3rd Essex

HOUSE No. 04096

House bill No. 4087, as changed by the committee on Bills in the Third Reading and as amended and passed to be engrossed by the House. May 16, 2012.

The Commonwealth of Massachusetts

In the Year Two Thousand Twelve

preventing unlawful and unnecessary 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 SECTION 1. Chapter 244 of the General Laws is hereby amended by striking out section 14, as
2 appearing in the 2010 Official Edition, and inserting in place thereof the following section:-
3 Section 14. The mortgagee or person having estate in the land mortgaged, or a person authorized
4 by the power of sale, or the attorney duly authorized by a writing under seal, or the legal
5 guardian or conservator of such mortgagee or person acting in the name of such mortgagee or
6 person, may, upon breach of condition and without action, perform all acts authorized or
7 required by the power; but no sale under such power shall be effectual to foreclose a mortgage,
8 unless, previous to such sale, notice thereof has been published once in each of 3 successive
9 weeks, the first publication to be not less than 21 days before the day of sale, in a newspaper, if
10 any, published in the town where the land lies or in a newspaper with general circulation in the
11 town where the land lies and notice thereof has been sent by registered mail to the owner or
12 owners of record of the equity of redemption as of 30 days prior to the date of sale, said notice to

13 be mailed by registered mail at least 14 days prior to the date of sale to said owner or owners to
14 the address set forth in section 61 of chapter 185, if the land is then registered or, in the case of
15 unregistered land, to the last address of the owner or owners of the equity of redemption
16 appearing on the records of the holder of the mortgage, if any, or if none, to the address of the
17 owner or owners as given on the deed or on the petition for probate by which he acquired title, if
18 any, or if in either case no owner appears, then mailed by registered mail to the address to which
19 the tax collector last sent the tax bill for the mortgaged premises to be sold, or if no tax bill has
20 been sent for the last preceding 3 years, then mailed by registered mail to the address of any of
21 the parcels of property in the name of said owner of record which are to be sold under the power
22 of sale and unless a copy of said notice of sale has been sent by registered mail to all persons of
23 record as of 30 days prior to the date of sale holding an interest in the property junior to the
24 mortgage being foreclosed, said notice to be mailed at least 14 days prior to the date of sale to
25 each such person at the address of such person set forth in any document evidencing the interest
26 or to the last address of such person known to the mortgagee. Any person of record as of 30 days
27 prior to the date of sale holding an interest in the property junior to the mortgage being
28 foreclosed may waive at any time, whether prior or subsequent to the date of sale, the right to
29 receive notice by mail to such person under this section and such waiver shall be deemed to
30 constitute compliance with such notice requirement for all purposes. If no newspaper is
31 published in such town, or if there is no newspaper with general circulation in the town where
32 the land lies, notice may be published in a newspaper published in the county where the land lies,
33 and this provision shall be implied in every power of sale mortgage in which it is not expressly
34 set forth. A newspaper which by its title page purports to be printed or published in such town,
35 city or county, and having a circulation therein, shall be sufficient for the purpose.

36 The following form of foreclosure notice may be used and may be altered as circumstances
37 require; but nothing herein shall be construed to prevent the use of other forms.

38 (Form.)

39 MORTGAGEE'S SALE OF REAL ESTATE.

40 By virtue and in execution of the Power of Sale contained in a certain mortgage given by.....
41 to..... dated..... and recorded with

42

43 Deeds, Book....., page....., of which mortgage the undersigned is the present
44 holder,.....

45 (If by assignment, or in any fiduciary capacity, give reference to the assignment or assignments
46 recorded withDeeds, Book....., page....., of which mortgage the undersigned is the
47 present holder,.....)

48 for breach of the conditions of said mortgage and for the purpose of foreclosing the same will be
49 sold at Public Auction at.....o'clock,..... M. on the..... day of..... A.D. (insert
50 year),..... (place)..... all and singular the premises described in said mortgage,

51 (In case of partial releases, state exceptions.)

52 To wit: "(Description as in the mortgage, including all references to title, restrictions,
53 encumbrances, etc., as made in the mortgage.)"

54 Terms of sale: (State here the amount, if any, to be paid in cash by the purchaser at the time and
55 place of the sale, and the time or times for payment of the balance or the whole as the case may
56 be.)

57 Other terms to be announced at the sale.

58 (Signed) _____

59 Present holder of said mortgage. ____

60 A notice of sale in the above form, published in accordance with the power in the mortgage and
61 with this chapter, together with such other or further notice, if any, as is required by the
62 mortgage, shall be a sufficient notice of the sale; and the premises shall be deemed to have been
63 sold, and the deed thereunder shall convey the premises, subject to and with the benefit of all
64 restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes,
65 assessments, liens or claims in the nature of liens, and existing encumbrances of record created
66 prior to the mortgage, whether or not reference to such restrictions, easements, improvements,
67 liens or encumbrances is made in the deed; but no purchaser at the sale shall be bound to
68 complete the purchase if there are encumbrances, other than those named in the mortgage and
69 included in the notice of sale, which are not stated at the sale and included in the auctioneer's
70 contract with the purchaser.

71 In the event a mortgagee holds a mortgage pursuant to an assignment, for purposes of this
72 section and section 21 of chapter 183, no notice pursuant to this section shall be valid unless (i)
73 at the time such notice is mailed, an assignment, or a chain of assignments, evidencing the
74 assignment of the mortgage to the foreclosing mortgagee has been duly recorded in the registry
75 of deeds for the county or district where the land lies, and (ii) the recording information for all

76 recorded assignments is referenced in the notice of sale required in this section. The notice shall
77 not be defective if any holder within the chain of assignments either changed its name or merged
78 into another entity during the time it was the mortgage holder; provided, that it is recited within
79 the body of the notice the fact of any merger, consolidation, amendment, conversion or
80 acquisition of assets causing the change in name or identity, the recital of which shall be
81 conclusive in favor of any bona fide purchaser, mortgagee, lienholder or encumbrancer of value
82 relying in good faith thereon.

83 SECTION 2. Said chapter 244 is hereby further amended by adding the following two sections:-

84 Section 35B. (a) As used in this section, the following words shall, unless the context clearly
85 requires otherwise, have the following meanings:-

86 “Affordable monthly payment”, a borrower’s ability to make monthly payments on a mortgage
87 loan, taking into account the borrower’s current circumstances, including income, debts and
88 obligations.

89 “Borrower”, a mortgagor of a mortgage loan.

90 “Certain mortgage loan,” a loan to a natural person made primarily for personal, family or
91 household purposes secured wholly or partially by a mortgage on an owner-occupied residential
92 property with 1 or more of the following loan features:

93 (i) an introductory interest rate granted for a period of 3 years or less and such introductory
94 rate is at least 2 per cent lower than the fully indexed rate;

95 (ii) interest-only payments for any period of time, except in the case where the mortgage
96 loan is an open-end home equity line of credit;

97 (iii) a payment option feature, where any 1 of the payment options is less than principal and
98 interest fully amortized over the life of the loan;

99 (iv) the loan did not require full documentation of income or assets;

100 (v) prepayment penalties that exceed section 56 of chapter 183 or applicable federal law;

101 (vi) the loan was underwritten with a loan-to-value ratio at or above 90 per cent and the ratio
102 of the borrower's debt, including all housing-related and recurring monthly debt, to the
103 borrower's income exceeded 38 per cent; or

104 (vii) the loan was underwritten as a component of a loan transaction wherein the combined
105 loan-to-value ratio was above 95 per cent. For the purposes of this section, loans financed by the
106 Massachusetts Housing Finance Agency, established by Chapter 708 of the Acts of 1966, as
107 amended, and loans originated through programs administered by the Massachusetts Housing
108 Partnership Fund Board established in Section 35 of Chapter 405 of the Acts of 1985, as
109 amended, shall not be certain mortgage loans;

110 "Creditor", a person or entity that holds or controls, partially, wholly, indirectly, directly, or in a
111 nominee capacity, a mortgage loan securing an owner-occupied residential property, including,
112 without limitation, an originator, holder, investor, assignee, successor, trust, trustee, nominee
113 holder, Mortgage Electronic Registration System or mortgage servicer, including the Federal
114 National Mortgage Association or the Federal Home Loan Mortgage Corporation. "Creditor"
115 shall also include any servant, employee or agent of a creditor. Notwithstanding the forgoing, the
116 bodies politic and corporate and public instrumentalities of the Commonwealth established by
117 Chapter 708 of the Acts of 1966, as amended, and established in section 35 of Chapter 405 of the
118 Acts of 1985, as amended, shall not be a Creditor for purposes of this section.

119 “Creditor’s representative”, a person who has the authority to negotiate and approve the terms of
120 and modify a mortgage loan.

121 “Modified mortgage loan”, a mortgage modified from its original terms including, but not
122 limited to, a loan modified pursuant to 1 of the following: (i) the Home Affordable Modification
123 Program; (ii) the Federal Deposit Insurance Corporation’s Loan Modification Program; (iii) any
124 modification program that a lender uses which is based on accepted principles and the safety and
125 soundness of the institution and authorized by the National Credit Union Administration, the
126 division of banks or any other instrumentality of the commonwealth; (iv) the Federal Housing
127 Administration; or (v) a similar federal loan modification plan.

128 “Mortgage loan”, a loan to a natural person made primarily for personal, family or household
129 purposes secured wholly or partially by a mortgage on residential property.

130 “Net present value”, the present net value of a residential property based on a calculation using 1
131 of the following: (i) the federal Home Affordable Modification Program Base Net Present Value
132 Model, (ii) the Federal Deposit Insurance Corporation’s Loan Modification Program, (iii) the
133 Massachusetts Housing Finance Agency’s loan program used solely by the agency to compare
134 the expected economic outcome of a loan with or without a modified mortgage loan, or (iv) any
135 model approved by the division of banks to consider the total present value of a series of future
136 cash flows relative to a mortgage loan.

137 “Residential property”, real property located in the commonwealth having thereon a dwelling
138 house with accommodations for 4 or less separate households and occupied, or to be occupied, in
139 whole or in part by the obligor on the mortgage debt; provided, however, that residential
140 property shall be limited to the principal residence of a person; provided, further, that residential

141 property shall not include an investment property or residence other than a primary residence;
142 provided, further, that residential property shall not include residential property taken in whole or
143 in part as collateral for a commercial loan; and provided, further, that residential property shall
144 not include a property subject to condemnation, receivership, or proceedings in United States
145 bankruptcy court.

146 (b) A creditor shall not publish notice of a foreclosure sale, as required by section 14, upon
147 certain mortgage loans unless it has first taken reasonable steps and made a good faith effort to
148 avoid foreclosure. The determination of whether a creditor has taken reasonable steps and made
149 a good faith effort to avoid foreclosure shall mean that the creditor has considered: (i) an
150 assessment of the borrower's current circumstances including, without limitation, the borrower's
151 current income, total debts and obligations; (ii) the net present value of receiving payments
152 pursuant to a modified mortgage loan as compared to the anticipated net recovery following
153 foreclosure; and (iii) the interests of the creditor, including, without limitation, investors.

154 (1) Except as otherwise specified in a contract, a servicer of pooled residential mortgages may
155 determine whether the net present value of the payments on the modified mortgage loan is likely
156 to be greater than the anticipated net recovery that would result from foreclosure to all investors
157 and holders of beneficial interests in such investment, but not to any individual or groups of
158 investors or beneficial interest holders, and shall be deemed to act in the best interests of all such
159 investors or holders of beneficial interests if the servicer agrees to or implements a modified
160 mortgage loan or takes reasonable loss mitigation actions that comply with this section. Any
161 modified mortgage loan offered to the borrower shall comply with current federal and state law,
162 including, without limitation, all rules and regulations pertaining to mortgage loans and the

163 borrower shall be able to reasonably afford to repay the modified mortgage loan according to its
164 scheduled payments.

165 (2) A creditor shall be presumed to have acted in good faith and deemed to comply with this
166 subsection, if, prior to publishing a notice of a foreclosure sale, as required by section 14, the
167 creditor:

168 (i) determines a borrower's current ability to make monthly payments, reasonably taking into
169 account the borrower's current circumstances, including income, debts and obligations;

170 (ii) identifies a modified mortgage loan that achieves the borrower's affordable monthly
171 payment, which may include 1 or more of the following: reduction in principal; reduction in
172 interest rate; or an increase in amortization period but not more than a 15-year increase not to
173 exceed a 45-year amortization period;

174 (iii) conducts an analysis comparing the net present value of the modified mortgage loan and the
175 creditor's anticipated net recovery that would result from foreclosure, such analysis shall be
176 deemed compliant if in accordance with the formula presented in 1 of the following: (i) the
177 Home Affordable Modification Program; (ii) the Federal Deposit Insurance Corporation's Loan
178 Modification Program; (iii) any modification program that a lender uses which is based on
179 accepted principles and the safety and soundness of the institution and authorized by the National
180 Credit Union Administration, the division of banks or any other instrumentality of the
181 commonwealth; (iv) the Federal Housing Administration; or (v) a similar federal loan
182 modification plan; and

183 (iv) either (A) in all circumstances where the net present value of the modified mortgage loan
184 exceeds the anticipated net recovery at foreclosure, agrees to modify the loan in a manner that

185 provides for the affordable monthly payment, or (B) in circumstances where the net present
186 value of the modified mortgage loan is less than the anticipated net recovery of the foreclosure,
187 or does not meet the borrower's affordable monthly payment, notifies the borrower that no
188 modified mortgage loan will be offered and provides a written summary of the creditor's net
189 present value analysis and the borrower's current ability to make monthly payments, after which
190 the creditor may proceed with the foreclosure process in conformity with this chapter.

191 (3) The division of banks may adopt, amend or repeal rules and regulations to aid in the
192 administration and enforcement of this section, including regulations that determine further
193 requirements for reasonable steps and good faith efforts to avoid foreclosures and that provide
194 safe harbors for compliance in addition to that set forth in this section.

195 (c) In accordance with this section, for certain mortgage loans, the creditor shall send notice,
196 concurrently with the notice required by subsection (g) of section 35A, of the borrower's rights
197 to pursue a modified mortgage loan. Said notice shall be deemed to be delivered to the
198 mortgagor when sent by first class mail and certified mail or similar service by a private carrier
199 to the mortgagor at the mortgagor's address last known to the mortgagee or anyone holding
200 thereunder. A copy of said notice shall be filed with the commissioner of the division of banks
201 and the office of the attorney general. The time frame for determining whether a modified
202 mortgage loan is offered shall occur within 150 days. No more than 30 days following delivery
203 of the notice as provided for in this section, a borrower who holds a certain mortgage loan shall
204 notify a creditor of (i) the borrower's intent to pursue a modified mortgage loan which shall
205 include a statement of the borrower's income and a complete list of total debts and obligations at
206 the time of receipt of the notice; (ii) the borrower's intent to pursue an alternative to foreclosure,
207 including a short sale or deed in lieu of foreclosure; (iii) the borrower's intent not to pursue a

208 modified mortgage loan and pursue the right to cure period described in section 35A; or (iv) the
209 borrower's intent to waive the right to cure period and proceed to foreclosure. A borrower who
210 holds a certain mortgage loan and fails to respond to the creditor within 30 days of delivery of
211 the notice provided for in this section shall be deemed to have forfeited the right to cure period
212 and shall be subject to a right to cure period of 90 days. A borrower shall be presumed to have
213 notified the creditor if the borrower provides proof of delivery through the United States Postal
214 Service or similar carrier. No more than 30 days following receipt of the borrower's notification
215 that the borrower intends to pursue a modified mortgage loan, a creditor shall provide the
216 borrower with its assessment in writing pursuant to subsection (b). The assessment shall include,
217 but not be limited to: (i) a written statement of the borrower's income, debts and obligations as
218 determined by the creditor; (ii) the creditor's net present value analysis of the mortgage loan; (iii)
219 the creditor's anticipated net recovery at foreclosure; (iv) a statement of the interests of the
220 creditor; and (v) a modified mortgage loan offer pursuant to the requirements of this section or
221 notice that no modified mortgage loan will be offered. Where a modified mortgage loan is
222 offered, the offer shall include the first and last name(s) and contact phone number(s) of the
223 creditor's representative. The assessment shall be provided by first class and certified mail. A
224 creditor shall be presumed to have provided the assessment to the borrower if the creditor
225 provides proof of delivery through the United States Postal Service or similar carrier. A borrower
226 who receives a modified mortgage loan offer from a creditor shall respond within 30 days of
227 receipt of the assessment and offer of a modified mortgage loan. The borrower may: (i) accept
228 the offer of a loan modification as provided by the creditor; (ii) make a reasonable counteroffer;
229 or (iii) state that the borrower wishes to waive the borrower's rights as provided by this section
230 and proceed to foreclosure. The borrower's response shall be in writing and, where a

231 counteroffer is proposed, shall include substantiating documentation in support of the
232 counteroffer. The response shall be provided by first class and certified mail. A borrower shall
233 be presumed to have responded if the borrower provides proof of delivery through the United
234 States Postal Service or similar carrier. A borrower who fails to respond to the creditor within 30
235 days of receipt of a modified mortgage loan offer shall be deemed to have forfeited the 150-day
236 right to cure period and shall be subject to a right to cure period of 90 days. Where a counteroffer
237 is proposed, the creditor shall accept, reject or propose a counteroffer to the borrower within 30
238 days of receipt. Pursuant to this section, additional offers by both parties shall be considered
239 during the right to cure period; provided, however, that a borrower may at any time state, in
240 writing, that the borrower wishes to waive the borrower's rights as provided by this section and
241 proceed to foreclosure. Nothing in this section shall be construed as preventing a creditor and a
242 borrower from negotiating the terms of a modified mortgage loan by telephone or in person
243 following the initial offer of a modified mortgage loan by a creditor; provided, however, that all
244 offers, whether by a creditor or a borrower, shall be in writing and signed by the offeror. The
245 right to a modified mortgage loan, as described in this section, shall be granted once during any
246 3-year period, regardless of the mortgage holder.

247 (d) The notice required in subsection (c) shall, at a minimum, include the appropriate contact
248 information for modification assistance within the office of the attorney general. The division of
249 banks shall adopt regulations in accordance with this subsection. including the minimum
250 requirements which constitute a good faith effort by the borrower to respond to the notice. The
251 notice shall be similar in substance and form to the notice promulgated by the division of banks
252 in accordance with section 35A.

253 (e) Nothing in this section shall prevent a creditor from offering or accepting alternatives to
254 foreclosure, such as a short sale or deed-in-lieu of foreclosure, if the borrower requests such
255 alternatives, rejects a modified mortgage loan offer or does not qualify for a modified mortgage
256 loan pursuant to this section.

257 (g) Prior to publishing a notice of a foreclosure sale, as required by section 14, the creditor, or
258 where the creditor is not a natural person, an officer or duly authorized agent of the creditor,
259 shall certify compliance with this section in an affidavit based upon a review of the creditor's
260 business records. The creditor, or an officer or duly authorized agent of the creditor, shall record
261 this affidavit with the registry of deeds for the county or district where the land lies.

262 The affidavit shall be conclusive evidence in favor of an arm's-length third party purchaser for
263 value, at or subsequent to the resulting foreclosure sale, that the foreclosing party identified or
264 referred to as the holder of the foreclosed mortgage in the affidavit has fully complied with this
265 section and is entitled to proceed with foreclosure of the subject mortgage pursuant to the power
266 of sale contained in the mortgage and any one or more of the foreclosure procedures authorized
267 in this chapter. For purposes of this subsection, the term "arm's-length, third party purchaser"
268 shall include such purchaser's heirs, successors and assigns.

269 Section 35C. (a) As used in this section, the following words shall, unless the context clearly
270 requires otherwise, have the following meanings:

271 "Borrower", a mortgagor of a mortgage loan.

272 "Creditor", a person or entity that holds or controls, partially, wholly, indirectly, directly, or in a
273 nominee capacity, a mortgage loan securing a residential property, including, without limitation,
274 an originator, holder, investor, assignee, successor, trust, trustee, nominee holder, Mortgage

275 Electronic Registration System or mortgage servicer, including the Federal National Mortgage
276 Association or the Federal Home Loan Mortgage Corporation. "Creditor" shall also include any
277 servant, employee or agent of a creditor.

278 "Mortgage loan", a loan to a natural person made primarily for personal, family or household
279 purposes secured wholly or partially by a mortgage on residential property.

280 "Residential property", real property located in the commonwealth having thereon a dwelling
281 house with accommodations for 4 or less separate households and occupied, or to be occupied, in
282 whole or in part by the obligor on the mortgage debt; provided, however, that residential
283 property shall be limited to the principal residence of a person; provided, further, that residential
284 property shall not include an investment property or residence other than a primary residence;
285 and provided, further, that residential property shall not include residential property taken in
286 whole or in part as collateral for a commercial loan.

287 (b) A creditor shall not publish notice of foreclosure, pursuant to section 14, when it knows or
288 should know that it is not the present holder of the mortgage loan, including, without limitation,
289 if the creditor is not the original mortgagee and commences foreclosure without possessing a
290 valid written, signed and dated assignment evidencing the assignment of the mortgage.

291 (c) A creditor violates this chapter if it imposes upon a third party the cost of correcting, curing,
292 or confirming documentation relating to the sale, transfer, or assignment of a mortgage loan,
293 including, without limitation, a creditor shall bear the costs related to curative actions taken
294 because a foreclosure was commenced without the creditor's possession of a valid, written,
295 signed, and dated assignment evidencing the assignment of the mortgage, in violation of section

296 14. A third party may recover all of its costs including its reasonable attorney's fees for having
297 to correct, cure, or confirm documentation.

298 (d) A creditor violates this chapter if it makes statements to a state or federal court related to
299 foreclosure or compliance with this chapter, orally or in writing, that it knows or should know
300 are false, including, without limitation, statements about the offering of a loan modification, the
301 borrower's history of payments, the validity of the assignment of the mortgage loan, that the
302 creditor is the record holder of the mortgage loan, or the creditor's compliance with any other
303 requirements of this chapter.

304 (e) A creditor violates this chapter if the creditor imposes a fee upon a borrower for goods not
305 rendered or services not performed in connection with a foreclosure.

306 (f) No person shall give and no person shall accept any portion, split, or percentage of any
307 charge made or received for the rendering of a service in connection with a transaction involving
308 a foreclosure upon a mortgage loan other than for services actually performed.

309 (g) The division of banks may adopt, amend or repeal rules and regulations for the administration
310 and enforcement of this section.

311 (h) In all circumstances in which an offer to purchase either a mortgage loan or residential
312 property is made by an entity with a tax-exempt filing status under Section 501 (c)(3) of the
313 Internal Revenue Code, or an entity controlled by an entity with such tax exempt filing status, no
314 Creditor shall require as a condition of sale or transfer to any such entity any affidavit, statement,
315 agreement or addendum limiting ownership or occupancy of the residential property by the
316 Borrower and, if obtained, such affidavit, statement, agreement or addendum shall not provide a
317 basis to avoid a sale or transfer nor shall it be enforceable against such acquiring entity or any

318 real estate broker, Borrower, or settlement agent named in such affidavit, statement or
319 addendum.

320 SECTION 3. The division of banks shall, in consultation with the office of the attorney general,
321 annually track the resolution of certain mortgage loans and provide a report of said results to the
322 joint committee on financial services within 90 days of the end of each calendar year through
323 December 31, 2017.

324 SECTION 4. The law shall take effect upon its passage. Said sections 2 shall not apply to such
325 mortgages where the notice pursuant to section 35A of chapter 244 has been sent.