

# HOUSE . . . . . No. 2854

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## The Commonwealth of Massachusetts

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PRESENTED BY:

*Angelo M. Scaccia*

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*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 adoption of the accompanying bill:

An Act relative to judicial foreclosures.

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PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
<i>Angelo M. Scaccia</i>	<i>14th Suffolk</i>	<i>1/21/2011</i>
<i>William F. Galvin</i>	<i>Secretary of the Commonwealth</i>	

# HOUSE . . . . . No. 2854

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By Mr. Scaccia of Boston, a petition (accompanied by bill, House, No. 2854) of Angelo M. Scaccia and William F. Galvin relative to judicial foreclosures. The Judiciary.

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## The Commonwealth of Massachusetts

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In the Year Two Thousand Eleven  
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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  
2   with 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  
5   misleading and deceptive practices in violation of statute and regulations of in the procurement  
6   of some mortgage documents;

7           And whereas, a substantial number of citizens may be evicted from their homes because  
8   of 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  
12 Official Edition is hereby amended by inserting after subsection (t) as appearing in line 85 the  
13 following new subsection:-

14           “(u) Petition to challenge the validity of foreclosure proceedings where a deed of  
15 foreclosure was filed on or before January 7, 2011 where the petitioner alleges that the party or  
16 its assign 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  
19 hereby amended by inserting after section 108 the following new section:-

20           “Section 108A. An action brought under this chapter alleging that a foreclosure that  
21 occurred before January 7, 2011 was defective because the mortgage or assign did not possess  
22 right title and interest in the mortgage that was foreclosed at the time of the foreclosure must  
23 bring their 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  
27 occurred before January 7, 2011 and where the action alleges that the mortgage or its assign did  
28 not possess right title and interest at the time of the foreclosure the Land Court may appoint a  
29 special master to determine the facts or it may transfer the action to the appropriate division of  
30 the Housing Court or District Court.

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

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

### GENERAL

#### Section 1: Definitions

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

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

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

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

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

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

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

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

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

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

(2) The nature of the default claimed;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(g) At the conclusion of the restructuring period, the new mortgage debt shall be computed based upon a composite rate of interest. The composite rate of interest shall be a weighted average of the original mortgage interest rate as to the principal balance and the



prevailing interest rate as to all sums added to the principal balance to establish the total restructured mortgage debt, except that in the case of a flexible rate, variable rate or similar adjustable rate mortgage note, the provisions of the underlying mortgage note for the re-determination of the interest rate on the mortgage shall continue to apply and remain in full force and effect during the remainder of the term of the mortgage.

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

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

(j )The amount of the mortgage debt at the end of any period of restructuring shall in no event exceed either the amount of the original mortgage debt or ninety per cent of the fair market value of the property as determined by an accredited real estate appraiser at the time of restructuring, whichever is greater. The provisions for restructuring the mortgage debt and staying the foreclosure shall apply only if the debt as restructured would not exceed such amount. Any sums added to the existing mortgage debt as a result of a restructuring order shall accrue interest at prevailing market rates after the conclusion of the restructuring period, which rate shall be either fixed or variable depending upon the underlying mortgage note.

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

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

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

178 must obtain the  $\neg$  pre-conditional judgment order from the district court for the county where the  
179 property to be foreclosed upon sits.

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

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

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

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

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

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

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

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

[Section 5:

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

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

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

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

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

219 Section 11. If a conditional judgment has been entered upon a mortgage containing a  
220 power of sale, the court shall, instead of issuing a writ of possession, at the request of the  
221 plaintiff order the property to be sold pursuant to such power so long as the plaintiff has also met  
222 all of the requirements in Chapter 239A of the General Laws. The plaintiff shall thereupon  
223 execute the power and do all things required by it or by the court.”