

SENATE No. 673

The Commonwealth of Massachusetts

PRESENTED BY:

Harriette L. Chandler

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 to establish mandatory foreclosure mediation with judicial review.

PETITION OF:

NAME:	DISTRICT/ADDRESS:
Harriette L. Chandler	
Sal N. DiDomenico	Middlesex, Suffolk, and Essex
James B. Eldridge	
Patricia D. Jehlen	
Thomas M. McGee	Third Essex and Middlesex
Michael O. Moore	
Michael F. Rush	Suffolk and Norfolk
Karen E. Spilka	
Cory Atkins	14th Middlesex
Sean Garballey	23rd Middlesex
John J. Mahoney	13th Worcester
James J. O'Day	14th Worcester
Denise Provost	27th Middlesex
John W. Scibak	2nd Hampshire
Ellen Story	3rd Hampshire
Martha M. Walz	8th Suffolk
Denise Andrews	2nd Franklin
Geraldo Alicea	6th Worcester

Linda Dorcena Forry

.....
12th Suffolk

SENATE No. 673

By Ms. Chandler, a petition (accompanied by bill, Senate, No. 673) of Harriette L. Chandler, Sal N. DiDomenico, James B. Eldridge, Patricia D. Jehlen and other members of the General Court for legislation to establish mandatory foreclosure mediation with judicial review. The Judiciary.

The Commonwealth of Massachusetts

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In the Year Two Thousand Eleven
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An Act to establish mandatory foreclosure mediation with judicial review.

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 Massachusetts General Laws is hereby amended in
2 section 35A, subsection (b), by striking the words “provided, however, that if a creditor certifies
3 that: (i) it has engaged in a good faith effort to negotiate a commercially reasonable alternative to
4 foreclosure as described in subsection (c); (ii) its good faith effort has involved at least 1
5 meeting, either in person or by telephone, between a creditor’s representative and the borrower,
6 the borrower’s attorney or the borrower’s representative; and (iii) after such meeting the
7 borrower and the creditor were not successful in resolving their dispute, then the creditor may
8 begin foreclosure proceedings after a right to cure period lasting 90 days. A borrower who fails
9 to respond within 30 days to any mailed communications offering to negotiate a commercially
10 reasonable alternative to foreclosure sent via certified and first class mail or similar service by a
11 private carrier from the lender shall be deemed to have forfeited the right to a 150-day right to
12 cure period and shall be subject to a right to cure period lasting 90 days. The right to cure a
13 default of a required payment shall be granted once during any 3 year period, regardless of

14 mortgage holder.” In subsection (c) inserting after the word “section”, “and §35B”; and striking
15 the words “provided, further, that the creditor shall provide by first class and certified mail or
16 similar service by a private carrier to a borrower documentation of good faith effort 10 days prior
17 to meeting, telephone conversation or a meeting pursuant to subsection (b).” by replacing in
18 (h)(10) “The division of banks shall adopt regulations in accordance with the subsection.” with
19 “The Attorney General shall adopt regulations in accordance with this subsection..” and by
20 striking subsections (c), (d), (f) and (g) and adding the words “and §35B” after the words “this
21 section” to subsection (k)

22 SECTION 2. Chapter 244 of the Massachusetts General Laws is hereby amended after
23 section 35A by adding the following new section:-

24 Section 35B: Massachusetts Foreclosure Mediation Program and Judicial Review

25 1) Establishment of the Massachusetts Foreclosure Mediation Program. Not later than
26 ninety (90) days after the enactment of this legislation, the Attorney General shall establish the
27 Massachusetts Foreclosure Mediation Program (MFMP) and promulgate regulations as
28 necessary and appropriate to implementing such a mediation program. The Attorney General
29 shall also set standards for training mediators in foreclosure mediation, loss mitigation and
30 alternatives to foreclosure.

31 2) Notice of Right to Mediation. When a mortgagee of residential real property sends a
32 notice of right to cure pursuant to §35A to the mortgagor, it shall also send a copy to the
33 Massachusetts Foreclosure Mediation Program (MFMP). The MFMP shall then send to the
34 mortgagor the notice of right to mediation, offering the mortgagor the opportunity to participate
35 in mediation. If a notice of right to cure is not required, the mortgagee shall send a notice of

36 intent to foreclose to the MFMP and the mortgagor at least one hundred and fifty (150) days
37 before initiating foreclosure; the MFMP shall then send the mortgagor the notice of right to
38 mediation. The MFMP will also telephone mortgagors to inform them of their right to
39 participate in mediation. If the mortgagor elects to participate in mediation, he/she will have the
40 opportunity to negotiate a commercially reasonable alternative to foreclosure with the mortgagee
41 with the assistance of a neutral third-party mediator. A commercially reasonable alternative may
42 include but shall not be limited to a modification of the loan, principal, interest rate or term of the
43 mortgage. If an agreement is not reached in mediation, the mortgagee must seek court
44 permission to proceed with foreclosure under power of sale or entry as set forth in this chapter of
45 the Massachusetts General Laws. If the mortgagor does not elect to participate in mediation,
46 foreclosure may proceed in accordance with the provisions of this chapter of the Massachusetts
47 General Laws.

48 3) Duty to Engage in Good Faith Mediation. If a mortgagor elects to participate in the
49 Massachusetts Foreclosure Mediation Program (MFMP), a mortgagee shall not accelerate the
50 note or otherwise initiate foreclosure proceedings unless the mediator has certified that the
51 mortgagee participated in the MFMP and engaged in mediation in good faith; made all
52 reasonable efforts to find an alternative to foreclosure; and that any agreement is in full
53 compliance with all state and federal guidelines. Engaging in good faith mediation shall include
54 a review of the borrower's financial situation including but not limited to evaluating the
55 mortgagor's eligibility for all loan modification programs, including providing a written net
56 present value (NPV) analysis. Failure to comply with this section shall constitute a defense to
57 the foreclosure.

58 4) Administration of the Massachusetts Foreclosure Mediation Program.

59 a. The notice of right to mediation shall be promulgated by the Attorney General, and
60 shall include a declaration in the five most common languages other than English, appearing on
61 the first page and stating: “This is an important notice regarding a possible foreclosure of your
62 home. Have it translated immediately.” The mortgagor will also be provided with a self-
63 addressed, stamped envelope in which to return a form electing to participate in mediation. The
64 mortgagor or his/her representative may also indicate his/her intention to participate in mediation
65 via telephone, online, or in-person at designated non-profit agencies.

66 b. An in-person mediation session shall be conducted between the
67 mortgagor and his/her representative and/or housing counselor, and the mortgagee's
68 representative, who must have authority to negotiate alternatives to foreclosure, including but not
69 limited to a modification of the loan, principal, interest rate or term of the mortgage. As early as
70 possible but no later than five (5) days before the scheduled mediation, the mortgagee shall
71 provide proof of ownership and a written net present value analysis to the mortgagor and the
72 MFMP. Where required, the mortgagee shall bring additional documents supporting the net
73 present value analysis to the mediation session.

74 c. Borrowers will be referred to and encouraged to work with a non-profit housing
75 counseling agency. If the initial mediation session does not result in an agreement, the parties
76 may agree to a second mediation session.

77 d. The mediation period shall conclude not more than one hundred and
78 twenty (120) days after the mortgagor elects to participate in mediation. During this time the
79 mortgagee shall not accelerate the note or otherwise initiate foreclosure proceedings.

80 e. If mediation results in an agreement, the mortgagor shall have not fewer
81 than seven (7) days to review and sign the mediation agreement and return it to the MFMP and
82 the mortgagee. The mortgagor shall not be required to waive any legal rights or defenses by
83 entering into a mediation agreement. All mortgage modifications shall be recorded in the
84 appropriate registry of deeds.

85 f. Any costs necessary to establish and operate the Massachusetts
86 Foreclosure Mediation Program shall be borne by the parties to the mediation as set forth in the
87 regulations; and by the filing fee for foreclosure complaints pursuant to paragraph 5 below. A
88 mortgagor's portion of the fee shall not exceed 15% of the total cost of the mediation. A
89 mortgagor's inability to pay for mediation shall not be a bar to participation in the MFMP.

90 5) Judicial Requirement for Mediation Without Agreement. If the mediation process
91 does not result in an agreement, the mortgagee must file in Superior Court a Complaint to
92 Proceed with Foreclosure under power of sale or entry. The mortgagor can file an answer to
93 such action and can raise all legal and equitable defenses. If judgment for the mortgagee enters,
94 the mortgagee may complete foreclosure by power of sale or entry pursuant to this chapter of the
95 Massachusetts General Laws.