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Title clearing act will burden conveyancers, have racist impact

By: Justin M. Perrotta and Michael Pill March 17, 2016

Senate bill S.2015, entitled "An act clearing title to foreclosed properties," replaced G.L.c. 244, §15 governing foreclosure sale affidavits with an entirely new section.

For future foreclosures, the rights of wrongfully foreclosed homeowners are cut off after three years. G.L.c. 244, §15(c) and (d). For foreclosures occurring more than three years before the act's effective date of Dec. 31, 2015, the right of people wrongfully forced from their homes to challenge a foreclosure is cut off on Dec. 30, 2016, even if the mortgage lender had no right to foreclose and the foreclosure was wholly invalid.

Thus, the act shifts the cost for the misdeeds of those who created the 2008 housing crash from corporate entities that caused it onto the backs of former homeowners — who often are lower-income victims of predatory loans and disproportionally people of color.

A damning indictment of racist impact came in an Oct. 12, 2015, open letter to state lawmakers from the president of the New England Area Conference of the NAACP (National Association for the Advancement of Colored People), representing 13 Massachusetts NAACP branches, and 15 leading state public officials, activists and academicians of color.

The NAACP open letter states that the act codifies "illegal, racially discriminatory lending practices and causes additional harm to our communities of color." It ratifies "lending practices that have ravaged many communities in our state, *it specifically codifies waivers for illegal practices which differentially harmed communities of color* [italics in original]." It does this by "dramatically shorten[ing] the centuries-old time limit during which one can sue to get property back if illegally taken … from 20 years to 3 years for foreclosures in the future and a *mere one year for over 68,000+ households that have been foreclosed already* [italics in original]." The reason for this discriminatory impact is that "a much higher percentage of subprime mortgages were targeted at communities of color."

The letter goes on to explain that "Massachusetts ranks 50th with the largest disparity in home ownership between white folks and people of color. Our state is bottom of the heap!" The act will "[c]odify and allow those illegal, subprime lending and foreclosure practices that have exacerbated this situation over the last 15 years. It will make it almost impossible for communities of color to repair the illegalities perpetrated during those foreclosures."

In addition to its racist impact, the act is unfair to everyone whose house was taken away illegally. Yarmouthport attorney Rockwell Ludden points out in a Nov. 25, 2015, open letter to Gov. Charlie Baker that the act is "a device by which to launder an illegal foreclosure." It "establishes by legislative fiat an irrefutable presumption … thus giving the banking industry and its fellow travelers license to make an end-run around having to demonstrate, clearly and convincingly, that when they enforce a loan, they have the legal and contractual right to do so."

Ludden's letter (at pages 17-35) also addresses the act's "constitutional infirmities." The issues he raises include impairment of contracts and due process, with the latter breaking down into subcategories that include fundamental fairness, substantive due process, taking of property without compensation, procedural due process and equal protection.

Ludden concludes with these words (at pages 35-36):

"[The act] stands for the untenable proposition that the Commonwealth may use its police powers to give private interests an open season to skirt the moral and legal consequences of an economic crisis to which they themselves have made a very large and significant contribution — private interests who now say that it would be too inconvenient for them to do the honorable thing and own up to what they have done, let alone clean up the mess they were instrumental in creating.

"This is made all the more unconscionable by the strong likelihood that for every foreclosure that is discovered to be wrongful within a three-year period, countless others will pass unnoticed because the homeowner, knowing that she is behind in her monthly payments, simply takes the industry at its word and believes that she has no choice but to

move on."

Ludden's words are especially applicable to lower-income homeowners most often victimized by predatory mortgage lending. Often unaware of their legal rights, believing that they cannot afford an attorney, and often intimidated by bullying tactics of foreclosing mortgage lenders and their lawyers, they give up and lose their home.

The act makes a mockery of the American ideal (and constitutional guarantee) of equal protection of the laws. In the words of Anatole France: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, beg in the streets, and steal bread." "The Red Lily" (Le Lys Rouge), ch. 7 (1894) (see 1898 English translation at page 91).

An attorney unable to assist homeowners in foreclosure can refer them to the Massachusetts Alliance Against Predatory Lending at http://maapl.info.

A letter to legislators from law professor Alfred Brophy focused on the contracts clause. U.S. Const. Article I, secs. 9, 10 ("No State shall … pass any … ex post fact Law, or Law impairing the Obligation of Contracts … ."). Citing mortgage borrower rights confirmed by such cases as *Commonwealth v. Freemont Investment & Loan*, 452 Mass. 733 (2008), and *U.S. National Bank Assoc. v. Ibanez*, 458 Mass. 637 (2010), Brophy concludes as follows (italics in original):

"Legislation that seeks to *retroactively* deprive mortgagors of those rights, which have been recognized by the Supreme Judicial Court, interferes with the contractual rights of those mortgagors. The United States Supreme Court has repeatedly recognized that state legislation that interferes with the obligations of contracts (including private contracts) violates the U.S. Constitution's Contracts Clause."

Last but by no means least, the act creates a significant practical problem for title examiners and conveyancing attorneys. A circular definition in the new G.L.c. 244, §15(a) defines an "[a]rm's length third party purchaser for value" as follows (numbers in brackets added as an aid in parsing the statutory language; italics added to identify problem areas for title examination):

"an arm's length purchaser who pays valuable consideration, including a purchaser's heirs, successors and assigns, but not including the

[1] foreclosing party or

[2] mortgage note holder or

[3] *a parent, subsidiary, affiliate or agent of the foreclosing party or mortgage note holder or*

[4] *an investor or guarantor of the underlying mortgage note* including, but not limited to,

[i] the Federal National Mortgage Association,

[ii] the Federal Home Loan Mortgage Corporation and

[iii] the Federal Housing Administration."

Defining an "arm's length third party purchaser for value" as "an arm's length purchaser who pays valuable consideration" is circular because the definition simply repeats the term being defined.

The above-quoted list of items following the word "including" in section 15(a) is not much help, as the rules of statutory construction deem the word to be non-limiting.

For example: "The use of the word 'including' in [G.L.c. 258,] §10(c) indicates that the enumeration of intentional torts in the section is not an all-inclusive list. See 2A C. Sands, Sutherland Statutory Construction §47.23, at 194 (4th ed. 1984)." *Connerty v. Metropolitan District Commission*, 398 Mass. 140, 149 n. 8 (1986), abrogated on other grounds by *Jean W. v. Commonwealth*, 414 Mass. 496 (1993).

In *Downer & Co., LLC v. STI Holding, Inc.*, 76 Mass. App. Ct. 786, 795-796 and n. 24 (2010), the court cited 2A Singer & Singer, Sutherland Statutory Construction §47.23, at 417 (7th ed. 2007), for the proposition that "[w]hen 'include' is utilized, it is generally improper to conclude that entities not specifically enumerated are excluded."

These cases reflect the weakening of the old Latin maxim "expressio unius est exclusio alterius" ("expression of one is exclusion of another"). The current disfavor with which it is viewed by the SJC was made clear in *Case of Sellers*, 452 Mass. 804, 813 (2008), and *Boland v. George S. May Intern. Co.*, 81 Mass. App. Ct. 817, 824 n. 9 (2012).

Amherst title examiner Bonnie MacCracken's Oct. 14, 2015, open letter to state representatives explains that the "information necessary to ascertain if a purchaser is a subsidiary, affiliate, or agent of the foreclosure party or

mortgage note holder or an investor or guarantor of the underlying mortgage note … is not available from the records at the Registry of Deeds."

She points out that "[t]itle examiners would need access to a corporation's private records, including financial, for determining relationships between the foreclosing party and the third party purchaser."

McCracken's open letter identifies a fundamental contradiction between the act and the more limited requirements for a title examination under G.L.c. 93, §70 and the Real Estate Bar Association Title Standards when she points out that "[e]xamining corporate records is outside the normal scope of a title examination."

Examination of record title generally is limited to records in the Registries of Deeds and Probate, with occasional forays into municipal records such as tax assessors' maps.

Hopefully title insurance carriers will insure against foreclosure sale buyers not being "a parent, subsidiary, affiliate or agent of the foreclosing party or mortgage note holder or an investor or guarantor of the underlying mortgage note … ." G.L.c. 244, §15(a).

We recommend that attorneys add an exception to their certificates of title, making it clear that the lawyer certifying title is not also certifying that a mortgage foreclosure sale purchaser is an "arm's length third-party purchaser" within the meaning of G.L.c. 244, §5(a).

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