

2015

# PROPERTY—FORECLOSURE; IS IT BY ENTRY OR FOR EASE OF ENTRY? ISSUES OF FAIRNESS REGARDING THE MASSACHUSETTS FORECLOSURE BY ENTRY PROVISION

Brittani Morgan

*Western New England University School of Law*

Follow this and additional works at: <http://digitalcommons.law.wne.edu/lawreview>

---

### Recommended Citation

Brittani Morgan, *PROPERTY—FORECLOSURE; IS IT BY ENTRY OR FOR EASE OF ENTRY? ISSUES OF FAIRNESS REGARDING THE MASSACHUSETTS FORECLOSURE BY ENTRY PROVISION*, 37 W. New Eng. L. Rev. 91 (2015), <http://digitalcommons.law.wne.edu/lawreview/vol37/iss1/4>

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact [pnewcombe@law.wne.edu](mailto:pnewcombe@law.wne.edu).

PROPERTY—FORECLOSURE; IS IT BY ENTRY OR FOR EASE OF ENTRY?  
ISSUES OF FAIRNESS REGARDING THE MASSACHUSETTS FORECLOSURE  
BY ENTRY PROVISION

INTRODUCTION

Imagine Mary, a thirty-six year-old widowed mother with five small children, working three jobs to provide for her family. The young mother is a homeowner and in a debtor/creditor relationship with a lending bank. Mary does not make much income, but from what she does make, most goes toward paying the mortgage on her home, maintaining the house, and providing food and clothing for her children. She is as hard working as they come and does nothing without putting her children's best interests first.

As the end of the year approaches, the cold weather really begins to set in, and Mary worries about how she will afford the high cost of heating her home in order to keep her children warm. At the same time, she dreads the thought that the holidays are around the corner and knows how heartbroken her children will be when they do not get all of the expensive toys they so desperately asked for. What is just about the last thing on her mind? Her mortgage.

However, Mary is a responsible homeowner and makes her last monthly payment on the mortgage for the year. Although she remembered to make the mortgage payment, the renewal notice for her homeowners insurance got lost in the mail, and Mary never renewed the policy. Insuring the building on the mortgaged property happens to be one of the conditions of the mortgage agreement between Mary and the lending institution. Consequently, she has unknowingly defaulted on a condition of her mortgage. As the home is located in Massachusetts, the lending institution decides that because it has been running into problems foreclosing by power of sale,<sup>1</sup> it will foreclose by open and peaceable entry and continued possession.<sup>2</sup> The lender has one of its associates gather two witnesses and make an entry upon the property. The entry happens to occur at 10:00 P.M., well after Mary has gone to

---

1. The term of art "foreclosure by power of sale" will be discussed in greater detail later in the Note. *See* discussion *infra* Part I.B.3.

2. "Foreclosure by open and peaceable entry and continued possession" will be discussed in further detail later in the Note. *See* discussion *infra* Part I.B.2.

sleep. The three enter upon the mortgaged land in the dark of night, wearing their entirely black suits. A certificate of entry is produced, which the witnesses sign. Following the entry, the certificate is recorded at the local registry of deeds. All of this happens without any process actually informing Mary of these events.

Consequently, three years later, Mary receives a letter in the mail informing her that a foreclosure by entry was initiated on her property, and the three-year redemption period in which she had the opportunity to redeem the property has ended. The letter further advises Mary that an action for eviction will commence, and once the eviction is completed, she will have thirty days to vacate the previously mortgaged land. This does not seem to be a just administration of the law, nor does it appear to promote fairness to a mortgaging homeowner. However, this is exactly what could happen under Massachusetts law.<sup>3</sup> Given the recent foreclosure crisis, which affected mortgaging homeowners across the United States, this provision seems to be unnecessarily burdensome on homeowners.<sup>4</sup>

The Massachusetts foreclosure by entry statutory provision extends as far back as the eighteenth century, if not further.<sup>5</sup> Foreclosure by entry was used frequently in the eighteenth and nineteenth centuries as the primary method of foreclosure.<sup>6</sup> Since then, its prevalence has dwindled, and in recent years, this method has been used as a secondary method of foreclosure.<sup>7</sup> The provision seemingly had more significance in the past when it was used in order to foreclose on mortgaged properties that were abandoned or when the homeowner was absent for long periods of time.<sup>8</sup> A thorough analysis proves that the foreclosure

---

3. See MASS. GEN. LAWS ch. 244, §§ 1-2 (2012).

4. *Subprime Mortgage Crisis*, UNIVERSITY OF NORTH CAROLINA, 1, <http://www.stat.unc.edu/faculty/cji/fys/2012/Subprime%20mortgage%20crisis.pdf> (last visited Mar. 23, 2015).

5. See *Swift v. Mendell*, 62 Mass. 357, 359 (1851) (holding that “the leading purpose of the open and peaceable entry, and the subsequent possession required by the statute of 1785 . . . [was] to give ample and full notice to the mortgagor.”). However, the foreclosure by entry statute has not been at issue recently given the minimal cases dealing with it in recent years.

6. See generally 6 BAXTER DUNAWAY, *THE LAW OF DISTRESSED REAL ESTATE* § 69:16 (2013).

7. “The vast majority of foreclosures in Massachusetts involve both the sale method and the entry method.” *Id.*

8. Most cases involving a dispute regarding a foreclosure by entry are from the nineteenth century. See generally *Ellis v. Drake*, 90 Mass. 161 (1864); *Lennon v. Porter*, 71 Mass. 318 (1855); *Bennett v. Conant*, 64 Mass. 163, 167 (1852); *Fay v. Valentine*, 22 Mass. 418, 425 (1827); *Skinner v. Brewer*, 21 Mass. 468 (1827); *Thayer v. Smith*, 17 Mass. 429 (1821).

by entry provision no longer holds the same worth in modern day society, aside from the fact that it provides mortgagees with an unfair advantage in the foreclosure process.<sup>9</sup>

The foreclosure by entry provision allows a lender to enter upon the mortgaged premises in the presence of two witnesses who substantiate the entry without alerting the homeowner of the entry and impending foreclosure.<sup>10</sup> After recording a certificate of entry in the local registry of deeds, a three-year redemption period begins to run, during which the mortgagor has the opportunity to redeem the property.<sup>11</sup> Once the redemption period ends, the mortgagor's rights cease to exist.<sup>12</sup> This Note calls into question the effectiveness of this redemption period in allowing homeowners to exercise their right to redeem the premises when the homeowner is not aware of the ongoing foreclosure.

Furthermore, this Note argues that this method of foreclosure places an undue burden on mortgagors faced with the process of foreclosure and is unsettling in regards to public policy. The foreclosure by entry provision in Massachusetts lacks clarity and direction in its requirements, and the relevant case law does nothing to refine the standards.<sup>13</sup> This Note presents the concern that the foreclosure by entry provision either needs to be revised legislatively or judicially and

---

9. The prevalence of cases involving foreclosure by entry related disputes are significantly disproportionate from the nineteenth century to the twenty-first century, which evidences the movement from using foreclosure by entry as a primary method of foreclosure to using it as a secondary or back up method to foreclose by power of sale. *See generally* cases cited *supra* note 8; *HS Land Trust LLC v. Gonzalez*, 2012 WL 5362885 (Mass. Land Ct. Oct. 30, 2012); *Singh v. 207-211 Main St., LLC*, 937 N.E.2d 977 (Mass. App. Ct. 2010); *Pellegrini v. Silva*, 876 N.E.2d 498 (Mass. App. Ct. 2007).

10. "A mortgagee may, after breach of condition of a mortgage of land, recover possession of the land mortgaged by an open and peaceable entry thereon, if not opposed by the mortgagor or other person claiming it, or by action under this chapter . . ." MASS. GEN. LAWS ch. 244, § 1 (2004).

11. *Id.*

12. "[A]nd possession so obtained, if continued peaceably for three years from the date of recording of the memorandum or certificate as provided in section two, shall forever foreclose the right of redemption." *Id.*

13. *See e.g., HS Land Trust LLC*, 2012 WL 5362885 (stating that the mortgagee's possession continues up until the mortgagor acts adverse to the mortgagee's possession, but gives no example of what an adverse action might include); *Cunningham v. Davis*, 56 N.E. 2 (Mass. 1900) (stating that in order to interrupt the possession of the mortgagee, the mortgagor must act adversely to such possession; however, there is no discussion of what would constitute an adverse act); *Walker v. Thayer*, 113 Mass. 36 (1873) (plaintiffs were found not to have entered with force and violence when they used a crow bar to remove the window fasteners, and defendant's opposition to entry was found sufficient by throwing hot water at the plaintiffs and hitting one with a stick, but no clear answer was given as to what would constitute force and violence on the part of the mortgagee, or what would comprise an insufficient opposition to an entry on the part of the mortgagor).

additionally updated to include more modern standards. If revision is not possible, the provision should be repealed in order to establish fairness to all parties involved in the foreclosure process.

Section I of this Note explains what a foreclosure is, when it can be instituted, the effect it has on the mortgage, and outlines the various methods and types of foreclosure available. Part I.A details the nature of a foreclosure by examining the mortgage process, discussing the theories behind mortgage, and explaining the equity of redemption. Part I.B describes the various methods of foreclosure available and the requirements of each. Part I.C discusses the foreclosure crisis that the United States experienced in 2007, the impact it had on homeowners, and its continued effect on mortgages to date.

Section II of this Note argues that the Massachusetts “foreclosure by entry” statutory provision unfairly burdens homeowners who are subject to the foreclosure process. Part II.A analyzes the process of a foreclosure by entry in Massachusetts to highlight the burdens imposed on the homeowner by the lack of a requirement of actual notice to the mortgagor. Further, it compares the purported constructive notice requirement of a foreclosure by entry with the actual notice requirement of foreclosure by power of sale to highlight the inefficacy of the former. Part II.B discusses the removal of the thirty-day limit to record the certificate of entry at the registry of deeds from the date of the entry. Further, it proposes that there should be some sort of time limitation on the recording of the certificate so as not to give the mortgagee all of the control in the foreclosure process.

Section III of this Note focuses on statutory concerns that are raised in examining the foreclosure by entry provision. This section maintains that the longstanding case law on this topic is vastly outdated, and that due to inconsistencies and ambiguities, legislative and/or judicial clarification is necessary. Part III.A discusses the statutory requirement that the mortgagee make an open and peaceable entry, and argues that there is no clear definition of such an entry. Part III.B explores the requirement of an open and continued possession by the mortgagee, and specifically looks at what the courts mean by “actions taken by the mortgagor adverse to the mortgagee.”<sup>14</sup> Part III.B further discusses the concerns raised by the lack of clarity in the statute and inconsistency in the case law, and proposes that legislative clarification is necessary.

Section IV of this Note focuses on the issues of practicality that arise in the context of foreclosure by entry. Part IV.A explores the

---

<sup>14</sup> See *infra* note 208.

common usage of foreclosure by entry, discusses the relationship between the foreclosure by entry and the foreclosure by sale statutes, and argues that it is used as a fall back measure that significantly advantages the mortgagee. Part IV.B explores the mortgagor's potential options for redeeming the property during the three-year period and argues that there is not much, if anything, the homeowner can do to defend against a foreclosure by entry, unlike a foreclosure by power of sale. Part IV.C questions the relevance of the foreclosure by entry provision given the recent protections that the Supreme Judicial Court of Massachusetts has implemented and legislation that has been passed to safeguard homeowners in light of the foreclosure crisis. Part IV.C also discusses the possible arguments that lending institutions could raise in support of the validity of such foreclosures.

## I. FORECLOSURE IN MASSACHUSETTS

### A. *What is Foreclosure?*

The right to foreclose is best described as the right to cut off completely a borrower's or mortgagor's right to redeem given by equity.<sup>15</sup> After the foreclosure, by condition of the mortgage, the estate of the mortgagee or purchaser at a foreclosure sale becomes absolute at law.<sup>16</sup> Although it is most commonly referred to as a foreclosure of a mortgage, what is actually foreclosed is the mortgagor's right to redeem ownership of the land from the mortgagee.<sup>17</sup> The mortgagee's right to foreclose is fundamental in the nature of the mortgage process and accrues upon the breach of a condition, the performance of which the mortgage is intended to secure.<sup>18</sup>

Basically, foreclosure is a process in which a lending institution attempts to recover the balance of a loan from the borrower's security when the borrower has stopped making payments to the lender or defaulted on the loan in some other fashion.<sup>19</sup> It is important to note that

---

15. *Shepard v. Richardson*, 11 N.E. 738, 747 (Mass. 1887).

16. *Id.* "The debtor is the 'mortgagor . . . the creditor is the 'mortgagee,'" and "a 'mortgage' is the document used to create the security interest in land." ROGER BERNHARDT & ANN M. BURKHART, *REAL PROPERTY IN A NUTSHELL*, 343 (5th ed. 2005). In discussion regarding mortgages and foreclosure, the homeowner-borrower is termed the "mortgagor," and the bank-lender is referred to as the "mortgagee." Edith Lank, *Mortgagee VS. Mortgagor*, REALTY TIMES REAL ESTATE NEWS AND ADVICE (Oct. 27, 2013, 4:48 PM), [http://realtytimes.com/consumeradvice/mortgageadvice1/item/23342-19990114\\_mtgevsmtgr](http://realtytimes.com/consumeradvice/mortgageadvice1/item/23342-19990114_mtgevsmtgr).

17. 5 HERBERT THORNDIKE TIFFANY, *THE LAW OF REAL PROPERTY*, § 1512 (3d ed. 1939). *See, e.g., Bevilacqua v. Rodriguez*, 955 N.E.2d 884, 894 (Mass. 2011).

18. TIFFANY, *supra* note 16, § 1512.

19. *See, e.g., BLACK'S LAW DICTIONARY* 719 (9th ed. 2009) (defining foreclosure as

there are various approaches to execute a foreclosure, and the procedures used tend to vary depending on the geographic location.<sup>20</sup> In Massachusetts, the most common types of foreclosures used by mortgagees are the foreclosure by power of sale and the foreclosure by entry.<sup>21</sup>

### 1. Mortgage Basics

When a person borrows money to purchase real estate, the borrower promises the lender that the money will be repaid.<sup>22</sup> This assurance of repayment is memorialized in a promissory note, often simply referred to as the “note.”<sup>23</sup> Concurrently, the borrower provides security for the promise to repay by means of a mortgage.<sup>24</sup> In Massachusetts, a mortgage typically arises when the owner of real property owes a debt, commonly to a bank or financial institution, which lends the owner the funds necessary to acquire the real estate.<sup>25</sup> Subsequently, the owner conveys the property to the lender subject to defeasance upon payment of the remaining debt.<sup>26</sup> If and when the mortgagor pays the debt owed, the mortgagee’s interest in the real property ceases to exist, and the mortgage is satisfied.<sup>27</sup> In Massachusetts, it has been long established that a mortgage is a conveyance giving a mortgagee title to the land, which is subject to defeasance upon performance of the condition.<sup>28</sup>

---

“[a] legal proceeding to terminate a mortgagor’s interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property.”).

20. “Foreclosure processes are different in every state.” Secretary Shaun Donovan, *Foreclosure Process*, U.S. DEP’T OF HOUS. & URBAN DEV. (March 17, 2014, 2:34 PM), [http://portal.hud.gov/hudportal/HUD?src=/topics/avoiding\\_foreclosure/foreclosureprocess](http://portal.hud.gov/hudportal/HUD?src=/topics/avoiding_foreclosure/foreclosureprocess).

21. “The vast majority of foreclosures in Massachusetts involve both the sale method and the entry method.” 6 BAXTER DUNAWAY, *supra* note 6, § 69:16.

22. Claire Alexis Ward, *Throw the Book at Them: Testing Mortgagor Remedies in Foreclosure Proceedings after U.S. Bank v. Ibanez*, 66 CONSUMER FIN. L. Q. REP. 269 (2012); see U.S. Bank Nat. Ass’n v. Ibanez, 941 N.E.2d 40 (Mass. 2011).

23. Ward, *supra* note 21; see generally U.S. Bank Nat. Ass’n, 941 N.E.2d 40.

24. Ward, *supra* note 21; see Ibanez, 941 N.E.2d 40; see, e.g., BLACK’S LAW DICTIONARY 1101 (9th ed. 2009) (defining mortgage as “[a] conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms.”). See generally Ibanez, 941 N.E.2d 40.

25. 14C MASS. PRAC., *Mortgages* § 15.105 (4th ed. 2009); see GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW, § 1.1, 1 (5th ed. 2007).

26. 14C MASS. PRAC., *supra* note 24, § 15.105.; see NELSON & WHITMAN, *supra* note 24, § 1.1, at 1.

27. 14C MASS. PRAC., *supra* note 24, § 15.105.; see Pineo v. White, 70 N.E.2d 294, 296 (Mass. 1946).

28. 28 MASS. PRAC., *Real Estate Law* § 9.2 (4th ed. 2004); see generally Pineo, 70

## 2. Theories of Mortgage

There are three different theories regarding the general nature of a mortgagee's interest in the land in the United States.<sup>29</sup> The recognized theories are the title theory, the lien theory, and the intermediate theory, which is a combination of both the title and lien theories.<sup>30</sup>

Massachusetts is among the minority of states that follow the "title-theory" of mortgages<sup>31</sup> in which the mortgage gives the mortgagee legal title to the real estate.<sup>32</sup> Under the title theory the homeowner-mortgagor maintains merely equitable title to the property.<sup>33</sup> When the mortgage is held separately from the note, the mortgagee holds title in trust for the note holder, who has the equitable right to seek assignment of the mortgage to itself.<sup>34</sup> A mortgage therefore splits the title in two parts, the legal title retained by a mortgagee, and the equitable title held by the mortgagor.<sup>35</sup> The rationale behind this theory is that up until default and subsequent foreclosure, the mortgagor maintains full control and possession of the property.<sup>36</sup> The practical application is that a mortgagor can otherwise deal with the property as his own estate, conditioned on the mortgage.<sup>37</sup> The main aspect of the transfer of title to the mortgagee is to allow the mortgaged property to be available as

---

N.E.2d 294.

29. 33 BALDWIN'S OH. PRAC. REAL EST. LAW, *Mortgages—Lien, Title, and Intermediate Theories* § 33:2 (2003).

30. *Id.*

31. *See, e.g.*, BLACK'S LAW DICTIONARY 476 (9th ed. 2009) (defining deed of trust as "[a] deed conveying title to real property to a trustee as security until the grantor repays a loan. This type of deed resembles a mortgage.").

32. "Massachusetts is among the minority of about ten states, including five of the New England states, which follow the 'title' theory of mortgages." 14C MASS. PRAC., *supra* note 24, § 15.105. *See* NELSON & WHITMAN, *supra* note 24, § 4.1, at 193, n.11; Ward, *supra* note 21; "Massachusetts follows the title theory of mortgages. Thus, a mortgage takes the form of a deed of conveyance of real property, transferring a fee interest to the mortgagee, defeasible upon the performance of the conditions stated therein." 14C MASS. PRAC., *supra* note 24, § 15.116.

33. Ward, *supra* note 21; *see* U.S. Bank Nat. Ass'n v. Ibanez, 941 N.E.2d 40 (Mass. 2011). *See, e.g.*, BLACK'S LAW DICTIONARY 1622 (9th ed. 2009) (defining equitable title as "[a] title that indicates a beneficial interest in property and that gives the holder the right to acquire formal legal title. Before the Statute of Uses (1536), an equitable title was enforceable only in a court of chancery, not of law.").

34. Ward, *supra* note 21; *see* Ibanez, 941 N.E.2d at 53.

35. "This means that when a mortgage is executed, a fee interest is conveyed to the mortgagee subject to defeasance upon performance of the conditions stated in the mortgage, the mortgagor retaining an 'equity of redemption' and the right to possession." 14C MASS. PRAC., *supra* note 24, § 15.105. *See* Pineo v. White, 70 N.E.2d 294, 296 (Mass. 1946).

36. 14C MASS. PRAC., *supra* note 24, § 15.105; *see* Ewer v. Hobbs, 46 Mass. 1, 3 (1842).

37. 14C MASS. PRAC., *supra* note 24, § 15.105; *see* Ewer, 46 Mass. at 3.

security.<sup>38</sup> From a societal standpoint, the mortgagor is viewed as the practical owner of the real property that is mortgaged.<sup>39</sup> Thus, fulfillment of all the conditions of the mortgage allow for the mortgagor to be discharged of the mortgage obligations so as to eliminate a cloud upon the record title to the property.<sup>40</sup>

There is one significant differentiating factor between the title theory and the lien theory in regards to the nature of a mortgage.<sup>41</sup> The title theory allows for a mortgagee to enter into possession of the mortgaged premises upon default and prior to instituting foreclosure proceedings, whereas under the lien theory, the mortgagee has no inherent right of possession until a foreclosure is instituted.<sup>42</sup> The lien theory requires the mortgagee to wait for the foreclosure of the mortgaged property and allows the mortgagee to obtain satisfaction for the mortgagor's debt from the proceeds of the foreclosure sale.<sup>43</sup> This nuance is why foreclosure by entry is not available in lien theory states, and thus does not raise any issue.<sup>44</sup>

### 3. Redemption Periods

When the right of redemption came to be recognized, it also became necessary for there to be a limited time within which this right to redeem could be exercised.<sup>45</sup> The rationale behind such an approach was to provide justice to the mortgagee.<sup>46</sup> When the mortgagor's right of redemption is foreclosed, the real estate is no longer mortgaged land.<sup>47</sup>

---

38. 14C MASS. PRAC., *supra* note 24, § 15.105; *see* Krikorian v. Grafton Co-op. Bank, 44 N.E.2d 665, 666 (Mass. 1942).

39. 14C MASS. PRAC., *supra* note 24, § 15.105; *see* City of Boston v. Quincy Mkt. Cold Storage & Warehouse Co., 45 N.E.2d 959, 966 (Mass. 1942).

40. 14C MASS. PRAC., *supra* note 24, § 15.105; *see* Pineo, 70 N.E.2d at 296.

41. 55 AM. JUR. 2d *Mortgages* § 470 (2007); *see generally* Maglione v. BancBoston Mortg. Corp., 557 N.E.2d 756 (Mass. App. Ct. 1990).

42. 55 AM. JUR. 2d *Mortgages* § 470 (2007); *see generally* Maglione, 557 N.E.2d 756.

43. 55 AM. JUR. 2d *Mortgages* § 470 (2007); *see generally* Maglione, 557 N.E.2d 756.

44. "Strict foreclosure by entry and possession is a concomitant of the title theory of mortgages, and makes absolute the title which the mortgagee already has by destroying the mortgagor's equity of redemption; it does not work under the lien theory of mortgages." 55 AM. JUR. 2d *Mortgages* § 470 (2007). *See* Adair v. Kona Corp., 452 P.2d 449, 453 (Haw. 1969).

45. TIFFANY, *supra* note 16, § 1518. *See* 4 JAMES KENT, KENT'S COMMENTARIES 181 (14th ed. 1896); RICHARD HOLMES COOTE, A TREATISE ON THE LAW OF MORTGAGES 990 (2nd ed. 1850).

46. TIFFANY, *supra* note 16, § 1518. *See* 4 KENT, *supra* note 44, at ,181; COOTE, *supra* note 44, at 990.

47. Santiago *ex rel.* Santiago v. Alba Mgmt., Inc., 928 N.E.2d 359, 363 (Mass. App. Ct. 2010).

Rather, the former mortgagee then becomes the owner of both the legal and equitable interests in the property and the mortgage no longer exists.<sup>48</sup> There are two variations of the mortgagor's right to redeem, which include the equity of redemption and the statutory right of redemption.<sup>49</sup> In differentiating between the two variants, it is helpful to think that equity of redemption is the period prior to the foreclosure, and statutory redemption is the period subsequent to the foreclosure.<sup>50</sup>

a. *Equity of Redemption*

The equity of redemption is a concept that gives a mortgagor in default the right to recover property prior to a foreclosure sale by paying not only the remaining principal, but also the accrued interest and all other costs that are due.<sup>51</sup> Such is the case for a foreclosure by entry, where an equitable right of redemption continues for a period of three-years after the initial entry is made, and the foreclosure is not complete until that right of redemption ends.<sup>52</sup>

b. *Statutory Redemption Period*

In many states there is a right, prescribed by statute, to endure for a specified period to redeem the property after foreclosure.<sup>53</sup> The statutes expressly provide that a right of redemption shall continue for a certain

---

48. *Id.* "The mortgagor's equitable title and right to redeem the mortgage are extinguished by the foreclosure deed, and the mortgage is discharged at that time." Ward, *supra* note 21.

49. *See, e.g.*, BLACK'S LAW DICTIONARY 620 (9th ed. 2009) (discussing the equity of redemption, stating that "[a] defaulting mortgagor with an equity of redemption has the right, until the foreclosure sale, to reimburse the mortgagee and cure the default" and further stating that "[i]n many jurisdictions, the mortgagor also has a statutory right to redeem within six months after the foreclosure sale.").

50. *See, e.g.*, BLACK'S LAW DICTIONARY 1548 (9th ed. 2009) (defining statutory right of redemption); *see, e.g.*, BLACK'S LAW DICTIONARY 620 (9th ed. 2009) (defining equity of redemption).

51. *See, e.g.*, BLACK'S LAW DICTIONARY 620 (9th ed. 2009) (defining equity of redemption as "[t]he right of a mortgagor in default to recover property before a foreclosure sale by paying the principal, interest, and other costs that are due"). TIFFANY, *supra* note 16, § 1500. Essentially the equity of redemption ends with the foreclosure, whether it is the foreclosure sale or the ending of the three-year period of possession in the case of foreclosure by entry.

52. TIFFANY, *supra* note 16, § 1500. *See* Clark v. Crosby, 101 Mass. 184 (1869).

53. TIFFANY, *supra* note 16, § 1500. *See, e.g.*, BLACK'S LAW DICTIONARY 719 (9th ed. 2009) (defining statutory right of redemption as "[t]he right of a mortgagor in default to recover property after a foreclosure sale by paying the principal, interest, and other costs that are owed, together with any other measure required to cure the default. This statutory right exists in many states but is not uniform."). Essentially the statutory redemption period begins to run when the foreclosure takes place, so it would begin when the foreclosure sale is effectuated or after the three-year period of possession in a foreclosure by entry.

period of time after default by the mortgagor.<sup>54</sup> Hence, this type of redemption is best thought of as an added period that some legislatures have created to allow the mortgagor more time after the foreclosure sale is executed or the three-year period of possession expires to redeem the land.<sup>55</sup> However, there is no such statutory redemption period in Massachusetts.<sup>56</sup> Therefore, once a foreclosure sale is executed and/or the three-year period of possession in a foreclosure by entry ends, the mortgage is forever foreclosed.<sup>57</sup>

#### 4. When Foreclosure Can Be Instituted

Generally, the mortgagee can initiate a foreclosure at a time specified within the mortgage documents.<sup>58</sup> Typically, the process of foreclosure is started by some specified period of time after a mortgagor's default of a condition in the mortgage.<sup>59</sup> Under statutes allowing foreclosure by entry and possession, the right to initiate foreclosure proceedings does not begin to accrue until there has been a "distinct breach of the condition of the mortgage or failure of performance."<sup>60</sup> A foreclosure by power of sale may only be implemented if there is a default of the type stipulated in the mortgage document as authorizing the exercise of the power of sale.<sup>61</sup> Breaching a mortgage by defaulting on a condition specified within the mortgage could include: the mortgagor's stopping payment on the debt owed to the mortgagee; not paying the amount owed in a timely fashion; not paying the taxes due on the property; or even not securing insurance on the mortgaged property, as in the hypothetical example given above.<sup>62</sup>

---

54. See, e.g., BLACK'S LAW DICTIONARY 719 (9th ed. 2009) (defining statutory right of redemption).

55. See, e.g., BLACK'S LAW DICTIONARY 719 (9<sup>th</sup> ed. 2009).

56. 2 BAXTER DUNAWAY, *supra* note 6, at app. 20A.

57. *Id.* See MASS. GEN. LAWS ch. 244, § 18 (2012) (stating "[t]he mortgagor . . . may, after breach of condition, redeem the land mortgaged, unless the mortgagee . . . has obtained possession of the land . . . and has continued that possession for three years, or . . . the land has been sold pursuant to a power of sale contained in the mortgage deed.").

58. See, e.g., Fannie Mae/Freddie Mac Uniform Security Instrument Form 3022 for a Massachusetts Mortgage, *available at* <http://www.freddiemac.com/uniform/unifsecurity.html> (permitting the commencement of foreclosure proceedings following a thirty-day notice period to the borrower).

59. *Id.*

60. 59 C.J.S. *Mortgages* § 723 (2009); MASS. GEN. LAWS ch. 244, § 1 (2012).

61. 59 C.J.S. *Mortgages* § 656 (2009).

62. 28 MASS. PRAC., *supra* note 27 § 9.6.

### 5. Judicial Versus Non-Judicial Foreclosure

There are two distinct processes of foreclosure that are followed in this country.<sup>63</sup> One is a judicial or court-supervised foreclosure, and the other is a non-judicial foreclosure where there is no court involvement.<sup>64</sup> Judicial foreclosure, available in every state and required by many, involves a sale of the mortgaged property under the supervision of a court.<sup>65</sup> The lender initiates the foreclosure by filing a lawsuit against the mortgagor in which all the parties involved must be notified of the impending foreclosure, and a judicial decision is subsequently announced after exchanged pleadings.<sup>66</sup> In a judicial foreclosure, proceeds from the sale of the property first go toward paying the costs of administering the foreclosure, then satisfying the mortgage, then to any other potential lien holders, and finally to the mortgagor if there are any proceeds remaining.<sup>67</sup>

By contrast, in a non-judicial foreclosure, the lender forecloses by exercising the power of sale in the mortgage or by entry and possession with little or no judicial oversight.<sup>68</sup> Thus the non-judicial foreclosure process is, from the mortgagee's perspective, generally much less time-consuming, easier, and less expensive than a judicial foreclosure while accomplishing the same result.<sup>69</sup> Due to the fact that Massachusetts is a non-judicial foreclosure state, unless the mortgagor brings an action to discontinue the foreclosure, the foreclosure proceeds without any type of judicial intervention.<sup>70</sup>

### B. *Methods of Foreclosure*

The various types of foreclosure that exist today all stem from the original method of strict foreclosure, which simply vested title in the mortgagee after the redemption period expired.<sup>71</sup> The different methods

---

63. Other than strict foreclosure. 6 BAXTER DUNAWAY, *supra* note 6, § 64:4; see discussion *infra* Parts I.B.2-3.

64. 6 BAXTER DUNAWAY, *supra* note 6, § 64:4.

65. See BLACK'S LAW DICTIONARY 719 (9th ed. 2009).

66. See BAXTER DUNAWAY, *supra* note 6, §§ 16:1-16:45.

67. *Id.*

68. See, e.g., BLACK'S LAW DICTIONARY 719 (9th ed. 2009) (defining non-judicial foreclosure as "[a] foreclosure method that does not require court involvement."); Elizabeth Renuart, *Property Title Trouble in Non-Judicial Foreclosure States: The Ibanez Time Bomb?*, 4 WM. & MARY BUS. L. REV. 111, 146 (2013).

69. Renuart, *supra* note 67, at 171; 2 BAXTER DUNAWAY, *supra* note 6, § 17:1.

70. MASS. GEN. LAWS ch. 244, § 14 (2012); Ward, *supra* note 21.

71. TIFFANY, *supra* note 16, § 1518; see 4 KENT, *supra* note 44, at 181; COOTE, *supra* note 44, at 990.

that eventually developed allow a foreclosure to be effectuated by judicial action,<sup>72</sup> by bill in equity,<sup>73</sup> by entry and continuation of possession for three years,<sup>74</sup> and by auction sale executed under the statutory power of sale within a mortgage.<sup>75</sup> Massachusetts is a non-judicial foreclosure state; thus, the most prevalent methods of foreclosure are foreclosure by power of sale included in the mortgage and foreclosure by entry and possession.<sup>76</sup> It is commonplace to foreclose a mortgage by exercise of a power of sale and, as a backup, by open and peaceable entry upon the premises to ensure the validity of the foreclosure.<sup>77</sup>

### 1. Strict Foreclosure

Before the courts of equity recognized the equity of redemption, there was no need for foreclosure since the mere breach of a condition vested an absolute estate in the mortgagee.<sup>78</sup> Upon the development of the equity of redemption, strict foreclosure—at one time the only method of foreclosure—vested the title to the land in the mortgagee.<sup>79</sup> However, since the introduction of a foreclosure by sale of the land, this method of foreclosure has acquired the distinctive name of “strict foreclosure.”<sup>80</sup> Strict foreclosure does not involve any type of sale.<sup>81</sup> In a typical strict

---

72. See discussion *supra* Part I.A.5; discussion *infra* Part I.B.4.

73. MASS. GEN. LAWS ch. 185, § 1 (2012).

74. MASS. GEN. LAWS ch. 244, § 1 (2012).

75. MASS. GEN. LAWS ch. 244, § 11 (2012); 6 BAXTER DUNAWAY, *supra* note 6, § 69:16.

76. In re Loucheschi LLC, 496 B.R. 41, 46 (Bankr. D. Mass. 2013) (“There are four ways to foreclose a mortgage under Massachusetts law: (1) by peaceable entry . . . (2) by sale under a statutory power of sale . . . (3) by action, and (4) by a bill in equity . . . . The third method is seldom used and the fourth is available only in extraordinary circumstances.”); see MASS. GEN. LAWS ch. 244, §§ 1, 3-10, 11-15, 17 (2012); MASS. GEN. LAWS ch. 185, § 1(k) (2012).

77. 6 BAXTER DUNAWAY, *supra* note 6, § 69:16 (“It is the usual practice to foreclose mortgages by both open and peaceable entry and exercise of power of sale. The reasoning being that if there should happen to be a defect in the exercise of the power of sale the foreclosure by entry would ripen into a completely valid foreclosure with the expiration of three years from the entry.”).

78. TIFFANY, *supra* note 16, § 1518; see 4 KENT, *supra* note 44, at 181; COOTE, *supra* note 44, at 990.

79. See, e.g., BLACK’S LAW DICTIONARY 719 (9th ed. 2009) (defining strict foreclosure as “[a] rare procedure that gives the mortgagee title to the mortgaged property — without first conducting a sale — after a defaulting mortgagor fails to pay the mortgage debt within a court-specified period.”). TIFFANY, *supra* note 16, § 1518.

80. TIFFANY, *supra* note 16, § 1518. See generally 4 KENT, *supra* note 44, at 181; 3 LEONARD A. JONES, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY, ch. 34, §§ 1960–1962 (8th ed. 1928).

81. 2 BAXTER DUNAWAY, *supra* note 6, at app. 20A.

foreclosure transaction, the mortgagor is assigned a “law day” before which he or she must redeem the property or be forever foreclosed of any equity in such property.<sup>82</sup> Should no one redeem the property, the title becomes absolute in the foreclosing mortgagee on the day after the last law day.<sup>83</sup> In strict foreclosure, there is no statutory redemption; rather, the court has the sole discretion to determine the amount of time allowed for redemption based upon the equity in the property.<sup>84</sup>

In general, strict foreclosure has not been a favored method of foreclosure in this country because it is likely to result in surrendering the entire property on account of a debt significantly less than the value of the real estate itself.<sup>85</sup> Currently, strict foreclosure is not allowed in most states, but is a permissible method of foreclosure in some.<sup>86</sup> This form of foreclosure is also recognized in some states as an acceptable form of proceeding under special circumstances, but states are careful only to allow it when it is not calculated to prejudice any of the involved parties’ interests.<sup>87</sup> Strict foreclosure by entry and possession has been characterized as a “concomitant of the title theory of mortgages,” making absolute the title which the mortgagee already holds by extinguishing the mortgagor’s equity of redemption, and does not work under the lien theory of mortgages.<sup>88</sup>

## 2. Foreclosure by Entry

A unique variation on strict foreclosure exists in Maine, Massachusetts, New Hampshire, and Rhode Island.<sup>89</sup> Similar to strict foreclosure, in terms of vesting an absolute estate in the land in the mortgagee, is foreclosure by peaceable entry of the mortgagee upon the mortgaged premises, and the mortgagee’s retention of possession

---

82. *Id.*

83. *Id.*

84. *Id.*

85. TIFFANY, *supra* note 16, § 1518.

86. *See, e.g.,* BLACK’S LAW DICTIONARY 719 (9th ed. 2009) (defining strict foreclosure, noting that “[t]he use of strict foreclosure is limited to special situations except in those few states that permit this remedy generally.”). TIFFANY, *supra* note 16, § 1518.

87. TIFFANY, *supra* note 16, § 1518; *see generally* Wornat Dev. Corp. v. Vakalis, 529 N.E.2d 1329 (Mass. 1988).

88. *Adair v. Kona Corp.*, 452 P.2d 449, 453 (Haw. 1969) (quoting GEORGE EDWARD OSBORNE, HANDBOOK ON THE LAW OF MORTGAGES 908 (1951)) (“Strict foreclosure is thought of as . . . as merely destorying [sic] all interest of the mortgagor in the property, leaving the mortgagee’s title to it free and clear. A requirement, therefore, is that the mortgagee must have legal title. Where he has only a legal lien with legal title in the mortgagor, it obviously will not work.”). *See also* TIFFANY, *supra* note 16, § 1512; 55 AM. JUR. 2D *Mortgages* § 470 (2007).

89. 3 PATTON & PALOMAR ON LAND TITLES § 542 (3d ed. 2003).

thereafter for a specified time.<sup>90</sup> In the case of foreclosure by entry in Massachusetts, three years after an open and peaceable entry is made upon the mortgaged premises due to a default on the part of the mortgagor, a mortgagee acquires an unencumbered title to the property, free of the mortgagor's equity of redemption.<sup>91</sup> Thus, once a foreclosure by entry has occurred and the three-year period has expired, the mortgage no longer exists because the mortgagee then owns both the legal and equitable title to the property.<sup>92</sup> The statutory provision requires that either a memorandum of the entry be made on the mortgage deed and signed by the mortgagor or a certificate of entry signed under oath by two competent witnesses be made and recorded.<sup>93</sup>

In Massachusetts, a foreclosure by entry is commonly made at the time a foreclosure by sale is commenced, and a certificate of entry is recorded subsequent to the foreclosure deed and affidavit.<sup>94</sup> The rationale behind employing both methods of foreclosure concurrently is that any potential defect in a foreclosure sale becomes irrelevant after the three-year right of redemption period expires.<sup>95</sup> A consistent notion in the realm of foreclosure law is that the mortgagor is entitled to notice of the mortgagee's intention to exercise its right to foreclose on the property.<sup>96</sup> In a foreclosure by entry and possession, such notice is said to be given by recording a certificate or memorandum of the entry in the appropriate registry of deeds.<sup>97</sup>

### 3. Foreclosure by Power of Sale

Within the category of non-judicial foreclosure is the foreclosure by power of sale, which is authorized if a power of sale clause is included in

---

90. TIFFANY, *supra* note 16, § 1519.

91. 28 MASS. PRAC., *supra* note 27, § 10.12; *see* Swift v. Mendell, 62 Mass. 357, 357 (1851).

92. Santiago ex rel. Santiago v. Alba Mgmt., Inc., 928 N.E.2d 359, 364 (Mass. App. Ct. 2010).

93. MASS. GEN. LAWS ch. 244, § 18 (2012); Fitchburg Co-op. Bank v. Normandin, 128 N.E. 415, 416 (Mass. 1920).

94. 28 MASS. PRAC., *supra* note 27, § 10.12 (stating that “[i]n such a case, it is important to make the entry first before conducting the sale; once the sale is made title passes to the high bidder and the mortgagee no longer has anything to convey.”). *See* Grabel v. Michelson, 8 N.E.2d 764, 765 (Mass. 1937).

95. 28 MASS. PRAC., *supra* note 27, § 10.12. *See e.g.*, 6 BAXTER DUNAWAY, *supra* note 6, § 69:16.

96. 3 PATTON & PALOMAR, *supra* note 88, § 542; *see* Barnes v. Boardman, 25 N.E. 623, 624 (Mass. 1890).

97. 3 PATTON & PALOMAR, *supra* note 88; *see* Wornat Dev. Corp. v. Vakalis, 529 N.E.2d 1329, 1332 (Mass. 1988).

the mortgage.<sup>98</sup> The foreclosure sale process involves an auction sale of the real estate by the mortgage holder without any court supervision.<sup>99</sup> The power of sale foreclosure has advantages from the perspective of the mortgagee, including the relatively short period of time required to foreclose and the fact that it cuts off the mortgagor's right of redemption.<sup>100</sup> In this type of foreclosure, the mortgagor retains the equity of redemption up until the property is sold at auction.<sup>101</sup> The equity of redemption gives the mortgagor the opportunity to discharge the mortgage by satisfying the balance on the note and settling any other duties owed in the mortgage.<sup>102</sup> Therefore, the mortgagor has the chance to pay off the amount owed on the note and potentially avoid foreclosure any time up until the property is purchased at the foreclosure auction.<sup>103</sup>

Foreclosure by power of sale requires a specific procedure in order to provide sufficient notice to the mortgagor and other interested parties of the mortgagee's intent to foreclose and sell the real estate at auction.<sup>104</sup> Not only must the mortgagee abide by the notice requirement in order to effectuate the foreclosure by sale, but must also do so to hold a party liable for any deficiency between the net proceeds of the foreclosure sale and the amount due on the note.<sup>105</sup> The notice requirement provides, in relevant part, that the mortgagee must send a notice to "all persons of record as of 30 days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed."<sup>106</sup> Such a requirement ensures that all of the parties involved in the foreclosure and the parties interested in purchasing the property at the foreclosure sale will be notified of the impending

---

98. *See, e.g.*, BLACK'S LAW DICTIONARY 719 (9th ed. 2009) (defining power-of-sale clause as "[a] provision in a mortgage or deed of trust permitting the mortgagee or trustee to sell the property without court authority if the payments are not made.").

99. *See* BLACK'S LAW DICTIONARY 719 (9th ed. 2009) (defining power-of-sale foreclosure as "[a] foreclosure process by which, according to the mortgage instrument and a state statute, the mortgaged property is sold at a non-judicial public sale by a public official, the mortgagee, or a trustee."). *See, e.g.*, BLACK'S LAW DICTIONARY 719 (9th ed. 2009) (defining foreclosure sale as "[t]he sale of mortgaged property, authorized by a court decree or a power-of-sale clause, to satisfy the debt.").

100. 6 BAXTER DUNAWAY, *supra* note 6, § 69:16.

101. Ward, *supra* note 21, at 271.

102. MASS. GEN. LAWS ch. 244, § 18 (2012); Ward, *supra* note 21.

103. Ward, *supra* note 21.

104. MASS. GEN. LAWS ch. 183, § 21 (2012); Ward, *supra* note 21.

105. MASS. GEN. LAWS ch. 244, § 14 (2012); 6 BAXTER DUNAWAY, *supra* note 6, § 69:21; *see* Com. v. Bank of Am., No. 11-4363-BLS1, 2012 WL 6062747, 6 (Mass. Super. Ct. Dec. 3, 2012).

106. MASS. GEN. LAWS ch. 244, § 14 (2012); 6 BAXTER DUNAWAY, *supra* note 6, § 69:21.

foreclosure.<sup>107</sup>

#### 4. Foreclosure by Action

A foreclosure by action or judicial foreclosure is extremely rare in Massachusetts.<sup>108</sup> Such a foreclosure is typically used only when the statutory power of sale is unavailable in the terms prescribed in the mortgage.<sup>109</sup> Due to the fact that it is “[a] costly and time-consuming . . . method by which the mortgaged property is sold through a court proceeding requiring many standard legal steps,” foreclosure by judicial action is rarely used in Massachusetts and some other states.<sup>110</sup>

#### C. *Foreclosure Crisis: Happenings, Impact & Continued Ramifications*

The United States foreclosure crisis is an ongoing and unresolved situation that began in 2007.<sup>111</sup> As a result of this widespread epidemic of foreclosures initiated by large corporate lenders, more mortgagors have entered the foreclosure process than ever.<sup>112</sup> The economic crisis engrossing the U.S. began when “large numbers of homeowners defaulted on poorly underwritten subprime mortgage loans.”<sup>113</sup> The mortgage crisis was caused, in part, by the Great Recession and the abundance of unemployment, which subsequently led to further financial crisis beginning around the year 2008.<sup>114</sup> During that initial crisis

---

107. This notion follows due process norms set out in *Mullane v. Cent. Hanover Bank & Trust Co.* in terms of notifying the parties. 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”). See discussion *infra* Part II.A, n.143.

108. Francis J. Nolan, *Real Estate Title Practice in Massachusetts*, in MASSACHUSETTS CONTINUING LEGAL EDUCATION § 17.2 (2013).

109. *Id.*

110. See, e.g., BLACK’S LAW DICTIONARY 719 (9<sup>th</sup> ed. 2009) (defining judicial foreclosure).

111. See FEDERAL RESERVE BOARD, THE U.S. HOUSING MARKET: CURRENT CONDITIONS AND POLICY CONDITIONS 3 (2012), available at <http://federalreserve.gov/publications/other-reports/files/housing-white-paper-20120104.pdf>.

112. “At the same time, an unprecedented number of households have lost, or are on the verge of losing, their homes.” *Id.* at 1. See, e.g., Paul Kiel, *The Great American Foreclosure Story: The Struggle for Justice and a Place to Call Home*, PROPUBLICA, Apr. 10, 2012, <http://www.propublica.org/article/the-great-american-foreclosure-story-the-struggle-for-justice-and-a-place-t/single>.

113. Renuart, *supra* note 67, at 111.

114. “The Great Recession brought two waves of foreclosure suits. The first was the collapse of the designed-to-fail mortgages frequently arranged by unscrupulous mortgage brokers. . . . The unemployment crisis caused the second wave of foreclosures.” Daniel Bahls & Katherine Hunt, *Abhorring a Forfeiture: The Importance of Equitable Jurisdiction in a*

period, banks were becoming extremely aggressive and did not have patience for homeowners who fell behind on their mortgage payments.<sup>115</sup> In a three-month period in 2010, there was a fourteen percent increase in the number of homeowners receiving default notices.<sup>116</sup>

During the years following the initial crisis period in 2008, many inconsistencies occurred and, in February of 2012, five of the largest mortgage servicers agreed to a settlement with the federal government and forty-nine states for their deceptive mortgage practices, known as the National Mortgage Settlement.<sup>117</sup> This settlement required the lenders to provide approximately twenty-six billion dollars in relief to distressed homeowners, resulting in the second largest civil settlement in U.S. history, following the Tobacco Settlement.<sup>118</sup> The gravity of the crisis is demonstrated by the fact that by April of 2012, more than four million home mortgages had been foreclosed since the crisis began in 2007.<sup>119</sup> Furthermore, in September of 2012, one out of every 248 households in this country received a notice of foreclosure.<sup>120</sup> It is important to note that a foreclosure's impact stretches beyond the homeowners by affecting the surrounding neighborhoods and towns as a whole.<sup>121</sup> Moreover, a foreclosure negatively impacts the sale of homes

---

*Foreclosure Crisis*, 41 STETSON L. REV. 779, 784-85 (2012).

115. "That increase signals banks are moving more aggressively now against borrowers who have fallen behind on their mortgage payments than they have since industrywide [sic] foreclosure processing problems emerged last fall." *Sharp Rise in Foreclosures as Banks Move in*, NBC NEWS (Oct. 13, 2011), [http://www.nbcnews.com/id/44885991/ns/business-real\\_estate/t/sharp-rise-foreclosures-banks-move](http://www.nbcnews.com/id/44885991/ns/business-real_estate/t/sharp-rise-foreclosures-banks-move). See Bahls & Hunt, *supra* note 113, at 784-85 (discussing the collapse of the designed-to-fail mortgages frequently arranged by unscrupulous mortgage brokers).

116. "The number of U.S. homes that received a first-time default notice during the July to September quarter increased 14 percent compared to the second quarter of the year . . ." *Sharp Rise*, *supra* note 114.

117. Nelson D. Schwartz, & Julie Creswell, *Mortgage Plan Gives Billions to Homeowners, but With Exceptions*, N.Y. TIMES, 9 Feb. 2012, available at [http://www.nytimes.com/2012/02/10/business/states-negotiate-26-billion-agreement-for-homeowners.html?hp&\\_r=0](http://www.nytimes.com/2012/02/10/business/states-negotiate-26-billion-agreement-for-homeowners.html?hp&_r=0).

118. *Id.*

119. *Kiel*, *supra* note 111.

120. Dan Levy & Prashant Gopal, *N.Y. Area Leads Rise in Foreclosure Filings*, THE SEATTLE TIMES (Oct. 25, 2012), available at [http://seattletimes.com/html/business/technology/2019526047\\_foreclosuresrealtytracxml.html](http://seattletimes.com/html/business/technology/2019526047_foreclosuresrealtytracxml.html) ("Stockton, Calif., led the 20 metro areas with the highest rates of foreclosure filings, at one in 67 households, more than three times the U.S. average of one in 248.").

121. G. THOMAS KINGSLEY ET AL., THE IMPACTS OF FORECLOSURE ON FAMILIES AND COMMUNITIES (The Urban Institute 2009), available at [http://www.urban.org/UploadedPDF/411909\\_impact\\_of\\_forclosures.pdf](http://www.urban.org/UploadedPDF/411909_impact_of_forclosures.pdf). ("In some cases, where there are only a few foreclosures and steps are taken to minimize the time the properties stand vacant, impacts may be slight. In contrast, where the number of foreclosures is sizeable in a compact area, there may well be

in surrounding neighborhoods with the increase in foreclosures causing declines in the sale value of neighboring properties.<sup>122</sup> In addition, areas with higher rates of foreclosure often experience more crime, such as abandoned houses being broken into.<sup>123</sup> The negative impact of foreclosures has led to an extension of the housing crisis.<sup>124</sup>

Since the beginning of the foreclosure crisis, there have been many changes to protect homeowners in the form of proposed legislation, judicial decisions, and programs implemented to provide assistance to current mortgagors facing impending foreclosure.<sup>125</sup> Most significantly, courts have been scrutinizing whether the lending parties initiating foreclosures against mortgagors have the right to take this action absent the authority to enforce the note and mortgage.<sup>126</sup> An example of this scrutiny is the recent decision in Massachusetts of *U.S. National Bank Association v. Ibanez*, in which the Massachusetts Supreme Judicial Court voided two foreclosure sales because the foreclosing parties did not hold the mortgage.<sup>127</sup> In *Ibanez*, the court held that a foreclosure by

---

strong secondary effects on nearby properties and the impact on the neighborhood as a whole can be dramatic.”).

122. “Housing foreclosures likely have little neighborhood impacts if there are few foreclosures in a neighborhood and the foreclosed housing can resell quickly. However, when there are both many foreclosures along with a sluggish housing market, foreclosures can lead to neighborhood destabilization, which should cause house prices to further fall.” William H. Rogers & William Winter, *The Impact of Foreclosures on Neighboring Housing Sales*, 31(4) JOURNAL OF REAL ESTATE RESEARCH 455-79 (2009), available at [http://aux.zicklin.baruch.cuny.edu/jrer/papers/pdf/past/vol31n04/04.455\\_480.pdf](http://aux.zicklin.baruch.cuny.edu/jrer/papers/pdf/past/vol31n04/04.455_480.pdf). G. THOMAS KINGSLEY ET AL., *supra* note 120 (“The Center for Responsible Lending has made estimates of possible national and state impacts on property values, . . . They now project that around 2.2 million foreclosures of subprime loans will occur primarily in late 2008 through the end of 2009, and that 40.6 million homes in neighborhoods will suffer price declines averaging \$8,667 per home, resulting in a \$352 billion total decline in property values.”).

123. “In 2005 and 2006, there was an annual average of 1.7 violent crime incidents per 100 houses in high-foreclosure clusters, almost three times the 0.6 average for the comparison group.” G. THOMAS KINGSLEY ET AL., *supra* note 120, at 18.

124. “The conventional view among many policy analysts has been that the rising tide of foreclosures will cause deep declines in the sales values of neighboring properties, extending the housing crisis into local fiscal policy.” Rogers & Winter, *supra* note 121, at 455-79.

125. *Avoiding Foreclosure*, U.S. DEP’T HOUSING AND URBAN DEV. (Nov. 3, 2013), [http://portal.hud.gov/hudportal/HUD?src=/topics/avoiding\\_foreclosure](http://portal.hud.gov/hudportal/HUD?src=/topics/avoiding_foreclosure) (“Home Affordable Modification Program (HAMP): HAMP lowers your monthly mortgage payment to 31 percent of your verified monthly gross (pre-tax) income to make your payments more affordable.”) (“Home Affordable Refinance Program (HARP): If you are current on your mortgage and have been unable to obtain a traditional refinance because the value of your home has declined, you may be eligible to refinance through HARP . . . designed to help you refinance into a new affordable, more stable mortgage.”).

126. Renuart, *supra* note 67, at 111.

127. *U.S. Bank Nat. Ass’n v. Ibanez*, 941 N.E.2d 40, 55 (Mass. 2011); see Renuart,

power of sale must adhere strictly to the statutory requirements, especially that the mortgagee be the holder of the mortgage at the time it moves to foreclose.<sup>128</sup> The decision in *Ibanez* is one of many in Massachusetts that has held that in order to foreclose under the power of sale, the mortgagee must strictly adhere to the relevant statutes.<sup>129</sup> Based upon the dicta in the relevant decisions and the recent legislative reforms requiring lenders to act in good faith and take reasonable precautionary steps in order to avoid foreclosure, it seems as though *Ibanez* is the beginning of an era of protecting homeowners.<sup>130</sup>

## II. PUBLIC POLICY CONCERNS SURROUNDING THE FORECLOSURE BY ENTRY PROVISION

Let us think again about the hypothetical example outlined in the Introduction. Mary, the young widowed mother with five small children, working three jobs, was faced with foreclosure due to her failure to procure homeowners insurance. The lending institution decided to foreclose by entry and possession. Mary was not actually made aware of the entry because it was made late at night. After three years passed, Mary received a letter indicating that the three-year equity of redemption on the real estate had been foreclosed, and that she should vacate the land. This section of the Note analyzes the policy concerns that are raised when such a major property interest is affected without making the mortgaging homeowner truly cognizant of the approaching foreclosure.

### A. *Recording of the Certificate—Sufficient Notice to the Mortgagor?*

In 1975, the Supreme Judicial Court of Massachusetts stated that it did not seem possible for a foreclosure to be made without the mortgagor having first received some form of notice of the proposed foreclosure and an opportunity to defend against it.<sup>131</sup> This notion promotes fairness to a mortgagor, given that the mortgagor's equity of redemption in the

---

*supra* note 67.

128. Renuart, *supra* note 67, at 143. See *U.S. Bank Nat. Ass'n*, 941 N.E.2d 40.

129. *Ibanez*, 941 N.E.2d at 55; see *Eaton v. Fed. Nat. Mortgage Ass'n*, 969 N.E.2d 1118, 1126 (Mass. 2012); *Bevilacqua v. Rodriguez*, 955 N.E.2d 884, 892 (Mass. 2011).

130. Renuart, *supra* note 67, at 158. See MASS. GEN. LAWS ch. 244, §§ 35A, 35B (2012). See *Ibanez*, 941 N.E.2d at 50 (where the court emphasized the significance of the requirement that the mortgagee give notice to the mortgagor, stating “[t]he manner in which the notice of the proposed sale shall be given is one of the important terms of the power, and a strict compliance with it is essential to the valid exercise of the power,” and noting that the “mortgagor is entitled to know who is foreclosing.”).

131. *Beaton v. Land Court*, 326 N.E.2d 302, 307 (Mass. 1975).

property is at stake. Indeed, over a century earlier, in *Thayer v. Smith*, the court held that the entry of a mortgagee was not sufficient to commence a foreclosure without actual notice to the mortgagor, or open and continued possession.<sup>132</sup> However, as the statute currently reads, there is no requirement that a mortgagee actually notify the mortgagor of an entry.<sup>133</sup> All that is required is that the certificate or memorandum be recorded.<sup>134</sup>

Ordinarily, a mortgagor is entitled to receive notice of the mortgagee's intention to exercise his or her right to foreclose the mortgage on the property, given in compliance with statutory requirements.<sup>135</sup> However, a mortgagee in actual occupation after breach of condition has a right to enter peaceably in the presence of witnesses to foreclose without actually notifying the mortgagor of his intention to do so or of the fact that it has been done.<sup>136</sup> This is because compliance with the statute and recording the certificate or memorandum of entry allegedly provides constructive notice to all persons involved.<sup>137</sup> The Massachusetts statutory provision governing foreclosure by open and peaceable entry and possession provides:

A mortgagee may, after breach of condition of a mortgage of land, recover possession of the land mortgaged by an open and peaceable entry thereon, if not opposed by the mortgagor or other person claiming it, or by action under this chapter; and possession so obtained, if continued peaceably for three years from the date of recording of the memorandum or certificate as provided in section two, shall forever foreclose the right of redemption.<sup>138</sup>

Nowhere in the statute does it expressly state that actual notice must be sent or presented to the mortgagor.<sup>139</sup> The statutory provision regarding the certificate of entry provides in relevant part:

[A] memorandum of the entry shall be made on the mortgage deed and signed by the mortgagor or person claiming under him, or a certificate, under oath, of two competent witnesses to prove the entry

---

132. *Thayer v. Smith*, 17 Mass. 429, 429 (1821).

133. MASS. GEN. LAWS ch. 244, § 1 (2012); 5 MASS. PRAC., *Methods Of Practice* § 13:11 (4th ed. 2000); see *Joyner v. Lenox Sav. Bank*, 76 N.E.2d 169, 174 (Mass. 1947).

134. MASS. GEN. LAWS ch. 244, § 1 (2012); 5 MASS. PRAC., *supra* note 133, § 13:11; see *Joyner*, 76 N.E.2d at 174.

135. 59 C.J.S. *Mortgages* § 726 (2009); see *Barnes v. Boardman*, 25 N.E. 623 (Mass. 1890).

136. 59 C.J.S. *Mortgages* § 726 (2009); see *Hobbs v. Fuller*, 75 Mass. 98, 98 (1857).

137. 59 C.J.S. *Mortgages* § 726 (2009); see *Joyner*, 76 N.E.2d at 175.

138. MASS. GEN. LAWS ch. 244, § 1 (2012).

139. *Id.*

shall be made. Such memorandum or certificate shall after the entry . . . be recorded in the registry of deeds for the county or district where the land lies . . . .<sup>140</sup>

Thus, in order for a foreclosure by entry to be effective, either: (1) the memorandum must be entered on the mortgage and signed by the mortgagor, which provides actual notice, or (2) the certificate must be recorded in the registry of deeds, which supposedly provides constructive notice to the parties involved of the impending foreclosure.<sup>141</sup>

In *Fletcher v. Cary*, the court held that the recording of the certificate of entry “is a full and authoritative notice to all persons of the fact and date of the mortgagee’s peaceable entry” as well as the mortgagee’s intent to foreclose the property.<sup>142</sup> The *Fletcher* court supported its analysis by stating that “[i]t is not an entry for the purpose of literally ousting and expelling the mortgagor . . . it is for the purpose of giving ‘ample and full notice to the mortgagor that his right of redeeming will be gone in three years.’”<sup>143</sup> The court went so far as to state that so long as the entry is duly recorded, “it is wholly immaterial whether the owner of the equity of redemption had actual knowledge of it or not.”<sup>144</sup> Further, over a century later, the Supreme Judicial Court of Massachusetts reaffirmed this notion in holding that the recorded certificate of entry required by statute provides sufficient notice of the mortgagee’s intent to foreclose by entry and possession.<sup>145</sup> This line of authority begs the question whether, in fact, this method of giving notice to the mortgagor through recording of a certificate at the registry of deeds does give ample and full notice to the mortgagor of the impending foreclosure.

As Massachusetts follows the title theory of mortgages, the mortgagee holds the legal title to the mortgaged property, and the mortgagor retains an equity of redemption in the property.<sup>146</sup> The statutory provisions, giving a considerable time after the entry is made in which the real estate may be redeemed, are said to mitigate the severity of foreclosing by an open and peaceable entry as opposed to foreclosure

---

140. *Id.* § 2.

141. *Id.*

142. *Fletcher v. Cary*, 103 Mass. 475, 477 (1870).

143. *Id.* at 477.

144. *Id.* at 478.

145. *Wornat Dev. Corp. v. Vakalis*, 529 N.E.2d 1329, 1332 (Mass. 1988).

146. *Araserv, Inc. v. Bay State Harness Horse Racing & Breeding Ass’n, Inc.*, 437 F. Supp. 1083, 1092 (D. Mass. 1977).

by power of sale.<sup>147</sup> In Massachusetts, there is a three-year period following the initial entry in which the mortgagor may seek to redeem his rights in the property before his equity of redemption is forever foreclosed.<sup>148</sup> Although three years seems to be a fair allowance for a redemption period, this would not effectively act as a mitigating factor if the mortgagor is never made aware of the entry itself. Arguably, a mortgagor who stops paying on a mortgage and never attempts to cure the default with the mortgagee would likely be aware that his or her real estate might be foreclosed upon. In addition, it is possible that if a power of sale foreclosure is executed at the same time as a foreclosure by entry, the mortgagor could conceivably have inquiry notice of the latter.<sup>149</sup> However, it is also possible that a mortgagor could default in some other way in which he or she may not be as aware of the possibility of foreclosure, such as not renewing the insurance on the property, in which case the redemption period would not serve its intended purpose.<sup>150</sup>

After a mortgagor's breach of a condition of the mortgage, "an entry or an attempt to gain possession on the part of the mortgagee is presumed to be for the purpose of foreclosure."<sup>151</sup> Therefore, if a mortgagor in breach of a condition of the mortgage were to witness the mortgagee entering upon the property in the presence of two witnesses, the mortgagor could presume that it is for the purpose to foreclose.<sup>152</sup> Furthermore, due to the fact that the statutory provision allows for a memorandum on the mortgage signed by the mortgagor, it is also possible for the mortgagor to gain notice of the foreclosure by signing that memorandum.<sup>153</sup> However, it seems that the majority of foreclosure by entry cases involve a certificate signed in the presence of two

---

147. TIFFANY, *supra* note 16, § 1519; *see* Frankowich v. Szczuka, 71 N.E.2d 761 (Mass. 1947).

148. MASS. GEN. LAWS ch. 244, § 1 (2012).

149. *See, e.g.*, BLACK'S LAW DICTIONARY 719 (9th ed. 2009) (defining inquiry notice as "[n]otice attributed to a person when the information would lead an ordinarily prudent person to investigate the matter further."). However, this could be discounted by the notion of an ordinarily prudent person. Such a person might assume that if they are only made aware of the foreclosure executed under the power of sale in their mortgage, that that is the extent of the foreclosure proceedings with which they are a party of.

150. This is akin to the situation in the hypothetical example given in the Introduction, where a mortgaging homeowner does not re-procure insurance on the mortgaged real estate. *See* discussion *supra* Introduction.

151. Walker v. Thayer, 113 Mass. 36, 38-39 (1873).

152. *Id.* at 36.

153. MASS. GEN. LAWS ch. 244, §§ 1, 2 (2012); *see* Fitchburg Co-op. Bank v. Normandin, 128 N.E. 415, 415-16 (Mass. 1920).

witnesses rather than a memorandum signed by the mortgagor.<sup>154</sup> Therefore, by default, recording a certificate of entry is the more prevalent method, and thus the likelihood that the mortgagor would be put on notice is decreased.<sup>155</sup>

In the more recent decision of *Pellegrini v. Silva*, the Massachusetts Appellate Court affirmed the notion that the recorded certificate of entry required by statute is ample notice of the mortgagee's intent to foreclose by entry and possession.<sup>156</sup> In support of its decision, the court reasoned that the mortgagors, as landowners, had a duty to monitor their title.<sup>157</sup> Moreover, the court noted that, "[f]or more than [one hundred fifty] years, courts in the Commonwealth have repeatedly affirmed that a duly recorded entry is sufficient notice under this statute."<sup>158</sup> The alleged constructive notice that stems from the recording of the certificate of entry is in contrast to actual notice, which is required by statute for foreclosures by power of sale.<sup>159</sup> The object of the provision regarding the memorandum or certificate necessary to effectuate a foreclosure by entry is to give notice to all persons involved.<sup>160</sup> However, based upon both the available case law and notions of common sense, it seems as though providing this type of purported constructive notice does not accomplish the task of delivering notice to all parties, and that actual notice should in fact be required.<sup>161</sup>

---

154. See 28 MASS. PRAC., *supra* note 27, § 10.1 (offering a checklist for conducting a foreclosure under a statutory power of sale, including having an "officer or mortgagee make entry onto the property before two witnesses and execute a Certificate of Entry attesting the same.").

155. *Id.*

156. *Pellegrini v. Silva*, 876 N.E.2d 498 (Mass. App. Ct. 2007).

157. *Id.*

158. *Id.*

159. MASS. GEN. LAWS ch. 244, § 14 (2012) ("The mortgagee . . . may . . . perform all acts authorized or required by the power of sale; provided, however, that no sale . . . shall be effectual to foreclose a mortgage, unless, previous to such sale, notice of the sale has been published once in each of 3 successive weeks, . . . in a newspaper published in the city or town where the land lies . . . and notice of the sale has been sent by registered mail to the owner or owners of record of the equity of redemption as of 30 days prior to the date of sale . . ."). However, it is questionable whether the recording act requires the homeowner to check for the presence of such certificates.

160. *Lennon v. Porter*, 71 Mass. 318, 319 (1855). If a contractor were to file a mechanics lien against a property, most states require that before the mechanics lien can be attached the contractor must give notice of the lien to the homeowner. 28 MASS. PRAC., *supra* note 27, § 11.18. It would seem logical to require the same actual notice requirement for attaching a certificate of entry to effectuate a foreclosure on mortgaged property.

161. It has been argued that not only does the foreclosure by entry provision unfairly burden mortgagors, but also that "[a]s it is presently practiced in Massachusetts, with the sanction of our state courts, foreclosure by entry violates the constitutional principle of fundamental fairness . . . [and that] [t]here must be at least actual 'reasonable notice' to the

Furthermore, the view that lay homeowners can and should periodically check the record title for their property at the registry of deeds is not realistic.<sup>162</sup> As a practical matter, absent some specific reason to check the record title of their property, ordinary people do not make it a custom to consult the registry of deeds records concerning their property.<sup>163</sup> Requiring mortgagors to continually refer to the registry of deeds to guarantee that there is no certificate of entry recorded on their property to ensure that they are not the subject of an impending foreclosure “is akin to requiring citizens check court dockets periodically to learn whether they have been sued, in lieu of requiring service of civil process on each defendant.”<sup>164</sup> This is an interesting comparison, and in fact, is a strong parallel lending weight to the assertion that burdening the homeowner with such a responsibility is simply not realistic.

In the arena of foreclosure, where such a fundamental property right is at stake, it seems fairly apparent that the mortgagor should receive actual notice<sup>165</sup> of the institution of a foreclosure by entry and the beginning of the ensuing three-year redemption period. In order to establish actual notice to all parties involved in the foreclosure by entry process, usually consisting predominantly of the mortgagor(s), the use of personal service or certified mail service can be required.<sup>166</sup>

---

borrower that a foreclosure by entry is about to occur.” 28 MASS. PRAC., *supra* note 27, § 10.12; *see e.g.*, *Snyder v. Com. of Mass.*, 291 U.S. 97, 127-28 (1934) (“[W]hether it affect property or liberty or life, the Fourteenth Amendment commands the observance of that standard of common fairness. . . . It is fundamental that there can be no due process without reasonable notice and a fair hearing.”). Furthermore, in *Pellegrini v. Silva*, the court held that because the mortgagee satisfied the notice requirements of the statute, the case presented “no occasion to determine whether the due process clause even has any applicability to non-judicial mortgage foreclosures.” 876 N.E.2d 498 (Mass. App. Ct. 2007).

162. 28 MASS. PRAC., *supra* note 27, § 10.12; *see Pellegrini*, 876 N.E.2d (“[T]he Silvas, as landowners, had a duty to monitor their title. Pellegrini had no duty to provide notice beyond that required by the governing statute.”).

163. 28 MASS. PRAC., *supra* note 27, § 10.12 (“Unless there is some specific reason to do so, (such as a pending sale, refinance, construction loan disbursement, or perhaps some perceived danger of attachment or levy on execution), ordinary people do not as a practical matter make it a habit to consult registry of deeds records concerning their property.”).

164. *Id.* *See Jones v. Flowers*, 547 U.S. 220, 223 (2006) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), holding that “[b]efore a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner ‘notice and opportunity for hearing appropriate to the nature of the case.’”). As the same fundamental right to property is at stake in the realm of taxation as well as foreclosure, it allows for the inference that the same notice requirement should be applied.

165. *See, e.g.*, BLACK’S LAW DICTIONARY 719 (9th ed. 2009) (defining actual notice as “[n]otice given directly to, or received personally by, a party.”).

166. 28 MASS. PRAC., *supra* note 27, § 10.12. *See, e.g.*, BLACK’S LAW DICTIONARY 719 (9th ed. 2009) (defining personal service as “[a]ctual delivery of the notice or process to

B. *Should There Be a Time Limit on Recording the Certificate?*

The Massachusetts foreclosure by entry provision was developed early on and has gone through extensive changes in its requirements.<sup>167</sup> Prior to 1785, any lawful entry by the mortgagee after a broken condition and the lapse of three years worked a foreclosure.<sup>168</sup> At that point, it was provided that the mortgagor might redeem, unless the mortgagee had entered in presence of two witnesses, and continued in peaceable possession for three years.<sup>169</sup> Up until 1991, there was an added requirement, which provided that “a certificate under oath of two competent witnesses shall be made and recorded within 30 days of the entry.”<sup>170</sup> With this time limit imposed on the recording of the certificate of entry, if the certificate was recorded more than thirty days following the date of entry, the entry was invalidated, and any subsequent foreclosure relying on that entry was ineffectual.<sup>171</sup>

By amendment in 1991, however, the time limits for recording the mortgagee’s affidavit and/or the certificate of entry have been removed.<sup>172</sup> Therefore, the three-year redemption period for certificates of entry to cure sale defects does not begin to run until the certificate is in fact recorded, no matter when that occurs.<sup>173</sup> This concept seems to disadvantage the mortgagor because it gives absolute control to the mortgagee in regards to when to record the certificate, which begins the three-year redemption period.<sup>174</sup> Due to the fact that the mortgagor

---

the person to whom it is directed.”). See *Receipt for Certified Mail*, USPS.COM [https://store.usps.com/store/browse/productDetailSingleSku.jsp?productId=P\\_FORM\\_3800&categoryId=priority-mail](https://store.usps.com/store/browse/productDetailSingleSku.jsp?productId=P_FORM_3800&categoryId=priority-mail) (last visited Mar. 25, 2015) (providing that the receipt for certified mail provides the sender with “a mailing receipt and, upon request electronic verification that an article was delivered or that a delivery attempt was made.”). By requiring the use of personal service or certified mail it would ensure that the mortgaging homeowner is actually made aware of the approaching foreclosure and thus the three-year period of redemption.

167. See *Mortgages—Foreclosure—Recordation*, Mass. Legis. Serv. Ch. 157 (H.B. 5752) (1991). See generally *Nolan, supra* note 107, § 17.4.1. See *Swift v. Mendell*, 62 Mass. 357, 359 (1851).

168. *Whitney v. Guild*, 77 Mass. 496, 501 (1860).

169. *Id.* at 501.

170. *Fitchburg Co-op. Bank v. Normandin*, 128 N.E. 415, 416 (Mass. 1920). See *Mortgages—Foreclosure—Recordation*, Mass. Legis. Serv. Ch. 157 (H.B. 5752) (1991).

171. See *Fitchburg Co-op. Bank*, 128 N.E. at 416.

172. See *Mortgages—Foreclosure—Recordation*, Mass. Legis. Serv. Ch. 157 (H.B. 5752) (1991).

173. 15A MASS. PRAC., *Mortgage* § 28:82 (4th ed. 2008). “Prior to 1991, the mortgagee was required to record the certificate of entry within thirty days . . . . Currently, a delay in the recording of a certificate of entry only serves to delay the start of the three-year redemption period.” *NOLAN, supra* note 107, § 17.4.1.

174. The statute does not include a limitation on when the mortgagee is able to record the certificate of entry, which gives way for the inference that the mortgagee remains in

could stand to lose their stake in the property, it would seem reasonable to allow for either the redemption period to begin running on the date of the entry,<sup>175</sup> or to require the certificate to be recorded within a specified period from the date of the entry.<sup>176</sup> Therefore, the fact that there is no longer a requirement to record the certificate of entry at the time of the entry or soon thereafter adds preventable uncertainty and difficulty in providing notice to the mortgagor.<sup>177</sup>

### III. STATUTORY ISSUES REGARDING THE FORECLOSURE BY ENTRY PROVISION

Chapter 244, sections one and two of the Massachusetts General Laws, which allow for the entry of a mortgagee upon the premises for breach of a condition of the mortgage and for the purpose of foreclosure, require an entry be “peaceable” and “open.”<sup>178</sup> It is usually stated that the entry “is peaceable if not opposed by the mortgagor or other person claiming the premises; and . . . open if made in the presence of two competent witnesses whose certificate thereof is sworn to and duly recorded . . . where the land lies.”<sup>179</sup> Under this view, the entry is “peaceable” if unopposed by the mortgagor and “open” if made in the presence of two competent witnesses.<sup>180</sup> Both of these statutory requirements have been interpreted fairly broadly.<sup>181</sup>

#### A. *The Open and Peaceable Entry: Just What Does it Entail?*

The statute provides that a mortgagor may make an open and peaceable entry upon the mortgaged property if not opposed by the

---

control of the process. MASS. GEN. LAWS ch. 244, § 2 (2012).

175. This would seem to be a just resolution only if the mortgagor signed the memorandum, which would ensure that the mortgagor received actual notice of the entry.

176. This requirement would apply if the certificate of entry was used.

177. A time limit on the recording of the certificate seems to be a good provision that was removed because without it, one could imagine a scenario where a homeowner witnesses the mortgagee making an entry and immediately goes to check the registry of deeds but sees nothing recorded. The homeowner periodically consults the registry over the next few weeks, and still nothing is recorded, and the mortgagor subsequently forgets about the entry. Then, several years later, the mortgagee could take the certificate of entry that was produced but not yet recorded, record it, and then three years from that date, the foreclosure would be effectuated.

178. *Thompson v. Kenyon*, 100 Mass. 108, 108 (1868); MASS. GEN. LAWS ch. 244, § 2 (2012).

179. *Thompson*, 100 Mass. at 108; MASS. GEN. LAWS ch. 244, § 2.

180. *Thompson*, 100 Mass. at 108; 14C MASS. PRAC., *supra* note 24, § 15.129.

181. See discussion *supra* Introduction, note 12; *Ellis v. Drake*, 90 Mass. 161, 163 (1864) (where the mortgage was found to have been successfully foreclosed by entry and possession even though the entry was made in secret during the nighttime).

mortgagor or other person claiming the premises.<sup>182</sup> What constitutes open and peaceable and what it takes to oppose the mortgagee is left open-ended and leaves such interpretation open for a case-by-case analysis.<sup>183</sup> Not only does this provide for much confusion in terms of construing the statute, but also the lack of direction from the legislature prevents administrative ease that is desired from a statute.<sup>184</sup>

An entry on one of multiple lots included within the same mortgage has proven sufficient to satisfy the entry requirement of the statute, even though the properties may be distant from each other.<sup>185</sup> Therefore, because in such a situation the mortgagor cannot be present at all of the locations, it leaves open the possibility that the mortgagor would be completely unaware of the so-called “open” entry. Furthermore, it is no valid objection to an entry that it was made in the nighttime, and an entry may also be upheld even if carried out in secret.<sup>186</sup> By allowing for such seemingly secret entries to satisfy the openness requirement of the statute, mortgagees are significantly advantaged as they may institute a foreclosure without the mortgagor’s knowledge.<sup>187</sup> Further, an analysis of these outcomes leaves one wondering what constitutes an entry that is not open if an entry done at night or in secret satisfies the requirement of openness.<sup>188</sup>

In *Walker v. Thayer*, the mortgagee was found not to have entered with force and violence when a crow bar was used to remove the window fasteners on the mortgagor’s house.<sup>189</sup> However, the mortgagor’s resistance to such entry, which included throwing hot water at the mortgagee and hitting him with a stick, was found to be sufficient to oppose the entry.<sup>190</sup> This case seems to leave open for interpretation the issue of what constitutes a “non-peaceable” entry if effectively breaking into the premises was found to be peaceable.<sup>191</sup> Further, the

---

182. MASS. GEN. LAWS ch. 244, § 1 (2012); *Walker v. Thayer*, 113 Mass. 36, 39 (1873).

183. See discussion of *Walker v. Thayer supra* Introduction, note 13.

184. ANNE WAGNER & SOPHIE CACCIAGUIDI-FAHY, *OBSCURITY AND CLARITY IN THE LAW: PROSPECTS AND CHALLENGES* xiii (2008) (stating that “[i]t is important to note that the concept of clarity has progressively moved to the mainstream of legal scholarship.”).

185. *Ellis v. Drake*, 90 Mass. 161, 163 (1864).

186. *Id.* at 163; *Fletcher v. Cary*, 103 Mass. 475, 477 (1870).

187. *Ellis*, 90 Mass. at 163 (entry on the premises was made in secret during the nighttime, and was upheld as a valid entry). A mortgagor would not be aware of such an entry as it was purposely done covertly.

188. *Id.* at 163; *Fletcher*, 103 Mass. at 477.

189. *Walker v. Thayer*, 113 Mass. 36, 38 (1873).

190. *Id.* at 38.

191. *Id.* at 38.

case law is not clear as to whether anything less aggressive than throwing boiling water at the mortgagee will constitute a sufficient opposition.<sup>192</sup> These situations present the problem that a mortgagor cannot oppose an entry of which he or she is unaware due to the fact that the entry is made at night, in secret, or on a different tract of land held by the mortgagor under the same mortgage. It follows logically that in order for a mortgagor to effectively oppose the mortgagee's entry, the mortgagor must first be aware of the entry.

The courts' longstanding holdings regarding the "open and peaceable entry" requirement seem to give an overbroad definition of both terms.<sup>193</sup> Moreover, the relevant cases on this issue date back to the eighteenth century, and it seems as though much of the case law is simply outdated.<sup>194</sup>

B. *What, if Anything, Interrupts Such Possession Gained Through Entry?*

The current rule of law seems to hold that, "the entry by the mortgagee for condition broken, in the presence of two witnesses, and a certificate thereof duly sworn to . . . and duly recorded, are all that is necessary to effect a foreclosure."<sup>195</sup> In fact, cases that have interpreted the foreclosure by entry statute "have long held that a mortgagee who has made peaceful entry on the property and duly recorded a certificate of entry need not do anything further to establish possession."<sup>196</sup> Thus, it has been held that once an entry is made, in the absence of anything to the contrary, it can be assumed that the mortgagee's possession was sufficient to satisfy the statute.<sup>197</sup> The Supreme Judicial Court of Massachusetts<sup>198</sup> established that the possession the mortgagee is required to acquire and maintain to effectuate a foreclosure by entry is not a personal occupation of the mortgaged estate by himself.<sup>199</sup> The statutory requirements have been characterized as "a formal entry, and a

---

192. *Id.* at 38.

193. See discussion *supra* Introduction, note 12; discussion *supra* Part III, note 180.

194. See, e.g., *Walker v. Thayer*, 113 Mass. 36 (1873); *Ellis v. Drake*, 90 Mass. 161 (1864); *Lennon v. Porter*, 71 Mass. 318 (1855); *Bennett v. Conant*, 64 Mass. 163, 167 (1852); *Fay v. Valentine*, 22 Mass. 418, 425 (1827); *Skinner v. Brewer*, 21 Mass. 468 (1827); *Thayer v. Smith*, 17 Mass. 429 (1821).

195. *Ellis*, 90 Mass. at 163-64.

196. *HS Land Trust LLC v. Gonzalez*, No. 11 MISC. 446482(KCL), 2012 WL 5362885, \*2 (Mass. Land Ct. Oct. 30, 2012).

197. *Singh v. 207-211 Main St., LLC*, 937 N.E.2d 977, 978 (Mass. App. Ct. 2010).

198. Hereinafter "SJC."

199. *Fletcher v. Cary*, 103 Mass. 475, 477 (1870).

constructive rather than a literal taking of possession.”<sup>200</sup>

Due to the fact that actual physical possession by the mortgagee is not required,<sup>201</sup> it is hard to imagine what the mortgagor can do to defend against or oust the mortgagee’s possession. In fact, in *HS Land Trust LLC v. Gonzalez*, a judge of the Massachusetts Land Court held that the mortgagee was able to establish possession despite the fact that for nearly two decades, he never resided on the property, paid no taxes, purchased no insurance, collected no rent, and the property had been conveyed several times.<sup>202</sup> Therefore, *HS Land Trust LLC* reaffirmed that entering upon the property and recording its certificate of entry is all that is necessary for a mortgagee to establish possession of the mortgaged property.<sup>203</sup>

The judge reasoned that because the mortgagee had fulfilled both of those requirements, it did all it was required by law to do.<sup>204</sup> The court reasoned that once the mortgagee had successfully acquired possession by making an entry and recording the necessary certificate, “[the] possession [then] continue[d] until the mortgagor [took] some act that [was] adverse to the mortgagee’s possession.”<sup>205</sup> The judge held that the mortgagee was not required to do anything more than what was done, and that the mortgagee’s inaction could not be construed as an intent to waive the rights it gained by making a peaceable entry.<sup>206</sup>

However, over a century earlier in *Lennon v. Porter*, the SJC held it was well established that “a mortgagor, especially after entry, cannot disseize his mortgagee, or defeat his right of possession.”<sup>207</sup> The court went on to state that “[a]ll such acts are held to be done in subordination to the title of his mortgagee.”<sup>208</sup> Yet in the same opinion, the court stated that the object of the foreclosure by entry provision is to “give notice to all persons concerned . . . after such entry, and the lapse of three years therefrom, if no steps are taken to redeem, the mortgagee’s estate becomes absolute, and all who claim under the original

---

200. *Id.* at 477.

201. This is inferred from the lack of an actual notice requirement in the statute. MASS. GEN. LAWS ch. 244, § 1 (2012).

202. *HS Land Trust LLC v. Gonzalez*, No. 11 MISC. 446482(KCL), 2012 WL 5362885, \*2 (Mass. Land Ct. Oct. 30, 2012).

203. *Id.* at 2.

204. *Id.*

205. *Id.*

206. *Id.* at 2-3.

207. *Lennon v. Porter*, 71 Mass. 318, 320 (1855).

208. *Id.* at 320. (It seems that the SJC in *Lennon* stated nothing could be done by the mortgagor to defeat the mortgagee’s possession after an entry. However, in *HS Land Trust LLC*, the Land Court held possession continues until an adverse act by the mortgagor). No. 11 MISC. 446482(KCL), 2012 WL 5362885, \*3 (Mass. Land Ct. Oct. 30, 2012).

mortgagor . . . are barred.”<sup>209</sup> A few years prior to the decision in *Swift* was that of *Ayres v. Waite*, in which the court pointed to the dictum found in *Cholmondely v. Clinton, 2 Meriv. 360*, stating,

[T]hat the mortgagor cannot disseise the mortgagee, because, . . . the mortgagor’s possession is not properly his own, but that of the mortgagee. The seisin of the mortgagor, although his own for some purposes, is the seisin of the mortgagee, in what regards their reciprocal relations and rights; and the disseisin of the mortgagor is the disseisin of the mortgagee.<sup>210</sup>

Therefore, both of these cases, from 1855 and 1852 respectively, firmly commanded the proposition that there was nothing a mortgagor could do to disturb the mortgagee’s possession.<sup>211</sup> This apparent discrepancy within the decision in *Lennon* and between it and the court in *HS Land Trust* emphasizes the need for clarification.<sup>212</sup>

However, the apparent discrepancy between the two aforementioned holdings seems to be resolved in part by the case of *Holmes v. Turner’s Falls Lumber Co.*, which stated that to constitute a disseisin of a mortgagee by a mortgagor, it must be made known to the mortgagee that the mortgagor or his grantees made some claim adverse to the mortgagee.<sup>213</sup> The court noted in their opinion that there were expressions in its reports to the effect that a mortgagor cannot disseise his mortgagee.<sup>214</sup> Yet, the court reasoned that the statement of the law generally made is that “neither the mortgagor nor his grantee holds adversely to the mortgagee *until he has distinctly disclaimed holding under him*, and asserted title in himself.”<sup>215</sup> Therefore, the court seems to have noticeably recognized that previous decisions had stated that the mortgagor could not do anything to disseize the mortgagee, and held to the contrary that the mortgagor could in fact establish an adverse holding to the mortgagee.<sup>216</sup>

Additionally, in *Long v. Richards*, the court addressed the apparent inconsistency, noting that it “would be odd if statutory language, which seems so clearly to require possession of a kind which is recognized as capable of interruption, should be held to have created a purely fictitious

---

209. *Lennon*, 71 Mass. at 319.

210. *Ayres v. Waite*, 64 Mass. 72, 74-75 (1852).

211. *Lennon*, 71 Mass. at 320; *Ayres*, 64 Mass. at 74-75.

212. *Lennon*, 71 Mass. at 320; *HS Land Trust LLC*, 2012 WL 5362885 at \*2-3.

213. *Holmes v. Turner’s Falls Lumber Co.*, 23 N.E. 305, 310 (Mass. 1890).

214. *Id.* at 310.

215. *Id.* at 310-11 (emphasis added) (quoting EMORY WASHBURN ET AL., A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY 154 (5<sup>th</sup> ed. 1887)).

216. *Id.* at 310.

and constructive possession, with which no one could interfere.”<sup>217</sup> However, the court in *Long* went on to state, “we take the tradition of the court as we find it, and, on any question of title, apply it as it has been applied.”<sup>218</sup> It seems that the court in *Long* realized that not only was there noticeable disconnect between the longstanding court holdings and logic, but also that the consistently upheld notion of the unbeatable possession simply did not make sense.<sup>219</sup>

In *Beaton v. Land Court*, the court noted that even if the mortgagor violates the conditions of the mortgage and the mortgagee commences foreclosure proceedings, the mortgagor still might redeem the mortgaged property and obtain an accounting by appropriate proceedings before the foreclosure is completed.<sup>220</sup> Moreover, this issue was discussed in the more recent case of *Pellegrini v. Silva*, where it was held to be the mortgagor’s responsibility to file suit or otherwise oppose the mortgagee’s occupancy during the three-year period after the mortgagee recorded notice of her entry in order for the mortgagee’s possession to be interrupted.<sup>221</sup> Therefore, the current interpretation of the possession requirement of the foreclosure by entry provision is that the mortgagor is able to overcome the mortgagee’s possession.<sup>222</sup> However, what constitutes such requisite opposition by the mortgagor is far from clear.<sup>223</sup> As neither the statutory provisions nor the relevant case law describes just what an act adverse to the mortgagee is, the issue lends itself to a case-by-case analysis in which certain acts of the mortgagor are determined to be adverse to the mortgagee or not.<sup>224</sup> Further, with all that is needed to meet the requirements being an entry and recording of a certificate, it seems as though it would be rather simple for the mortgagee to establish possession without actual notice to the mortgagor and nearly impossible for the mortgagor to interrupt such acquired possession.<sup>225</sup>

---

217. *Long v. Richards*, 48 N.E. 1083, 1086 (Mass. 1898).

218. *Id.* at 1086.

219. *Id.* at 1086.

220. *Beaton v. Land Court*, 326 N.E.2d 302, 307 (Mass. 1975).

221. *Pellegrini v. Silva*, 876 N.E.2d 498, n.4 (Mass. App. Ct. 2007).

222. *Id.* at n.4.

223. See discussion *supra* Introduction, note 13.

224. See generally *HS Land Trust LLC v. Gonzalez*, No. 11 MISC. 446482(KCL), 2012 WL 5362885 (Mass. Land Ct. Oct. 30, 2012) (mortgagor’s continued possession for over eighteen years was found not to be adverse to the mortgagee); *Bennett v. Conant*, 64 Mass. 163 (1852) (mortgagee’s allowing the mortgagor to continue in possession of the real estate was found not to be adverse to the mortgagee’s possession).

225. The relevant holdings have recognized entries made in secret and unbeknownst to the mortgagor, and case law does not articulate any standard test or factors that need to be met in order to constitute acts adverse to the mortgagee’s possession. See e.g., *Ellis v. Drake*, 90

In *Pellegrini v. Silva*, the occurrence of disputes between the mortgagor and mortgagee, and the fact that the mortgagee was in possession of the property before the date upon which she began the foreclosure by entry, did not render her entry defective under the statute.<sup>226</sup> Additionally, allowing the mortgagor to remain on the mortgaged premises has been held not to be adverse to the mortgagee's possession.<sup>227</sup> The court in *Bennett v. Conant* went further to state that after an entry should the mortgagee permit the mortgagor to occupy such premises, as a matter of lenience or mutual convenience, without any agreement to waive the entry, "the mortgagor must be taken to be the tenant at will<sup>228</sup> of the mortgagee."<sup>229</sup> Hence, the possession of the mortgagor would, in effect, be for the possession of the mortgagee, and therefore not adverse as it would not interrupt the continuity of the mortgagee's legal possession.<sup>230</sup> Thus, if the mortgagor continues in possession of the premises, he is but a sort of tenant at sufferance to the mortgagee because that possession of the mortgagor is merely permissive and at sufferance of the mortgagee.<sup>231</sup>

Likewise, in *Cunningham v. Davis*, the court reaffirmed that after such an entry to foreclose, the mortgagor and those claiming under him became tenants at sufferance of the mortgagee.<sup>232</sup> The court noted that in the absence of any evidence of an adverse holding, the mortgagor and those claiming under him are assumed to hold under the mortgagee, and that their possession is his during the three years until the completion of the foreclosure.<sup>233</sup>

In *Swift v. Mendell*, the court noted that there was no importance in the fact that there was no change in the mortgagor's occupation of the land.<sup>234</sup> The court reasoned that there is an obvious distinction between

---

Mass. 161 (1864); *Lennon v. Porter*, 71 Mass. 318 (1855); *Bennett*, 64 Mass. at 167; *Fay v. Valentine*, 22 Mass. 418, 425 (1827); *Skinner v. Brewer*, 21 Mass. 468 (1827); *Thayer v. Smith*, 17 Mass. 429 (1821); *Singh v. 207-211 Main St., LLC*, 937 N.E.2d 977 (Mass. App. Ct. 2010); *Pellegrini*, 876 N.E.2d 498; *HS Land Trust*, 2012 WL 5362885.

226. *Pellegrini*, 876 N.E.2d.

227. *Bennett*, 64 Mass. at 167.

228. The court seems to use the terms "tenant at will" and "tenant at sufferance" interchangeably in referring to the mortgagor who remains in possession of the foreclosed real estate. See e.g., *Bennett*, 64 Mass. 163 (characterizing the mortgagor as a tenant at will of the mortgagee); *Ayres v. Waite*, 64 Mass. 72, 74 (1852) (referring to the mortgagor as a tenant at will or at sufferance of the mortgagee); *Fay*, 22 Mass. at 425 (denoting the mortgagor as a tenant at will of the mortgagee).

229. *Bennett*, 64 Mass. at 167.

230. *Id.* at 167.

231. *Ayres*, 64 Mass. at 74.

232. *Cunningham v. Davis*, 56 N.E. 2, 5 (1900).

233. *Id.* at 5.

234. *Swift v. Mendell*, 62 Mass. 357, 358 (1851).

the occupation and possession of an estate.<sup>235</sup> It is clear that the line of authority on this issue stands for the proposition that the mortgagor's continued possession is considered to be for the possession of the mortgagee.<sup>236</sup> However, the cases conflict with regards to whether the mortgagor has the ability to oppose the mortgagee's possession by an act adverse to the mortgagee.<sup>237</sup> Furthermore, there is no well-defined standard for establishing when an act rises to the level of being adverse to the mortgagee.<sup>238</sup> All of these problems present with the Massachusetts foreclosure by entry statute call for legislative or judicial clarification.

#### IV. PRACTICAL ISSUES STEMMING FROM THE FORECLOSURE BY ENTRY PROVISION

##### A. *Foreclosure By Entry as a Fallback—Advantages of the Mortgagee*

It is common practice for mortgagees to use foreclosure by entry and foreclosure by power of sale concurrently.<sup>239</sup> Oftentimes, a mortgagee employs both foreclosure methods concurrently by making a peaceable entry on the premises and recording a certificate thereof so as to initiate the foreclosure by entry process, while at the same time beginning the process of exercising a power of sale in the mortgage.<sup>240</sup> In doing so, the mortgagee is able to ensure that in the case of some defect arising in one of the methods used, the mortgagor's equity of redemption will be foreclosed by the proper employment of the other

---

235. “[W]e consider that the mortgagor continued as before, occupying the premises; but the difference is, that after the entry to foreclose, he held as tenant to the mortgagee and in subordination to his right of possession.” *Id.* at 358.

236. *Ayres v. Waite*, 64 Mass. at 74-75.

237. *See e.g.*, *Holmes v. Turner's Falls Lumber Co.*, 23 N.E. 305 (Mass. 1890) (stating that in order for the mortgagor to dispossess the mortgagee it must be made known to the mortgagee that the mortgagor made some claim adverse to the mortgagee); *Lennon v. Porter*, 71 Mass. 318 (1855) (stating that the mortgagor cannot dispossess its mortgagee, or defeat its right of possession because all acts are considered to be done in subordination to the title of the mortgagee); *Ayres*, 64 Mass. at 72 (stating that the mortgagor cannot dispossess the mortgagee because the mortgagor's possession is not his own).

238. The statute provides no clear direction to what would constitute an act adverse to the mortgagee. MASS. GEN. LAWS ch. 244, § 1 (2012). None of the relevant cases provide a standard either. *See e.g.*, *Holmes*, 23 N.E. 305; *Lennon*, 71 Mass. 318; *Ayres*, 64 Mass. 72.

239. *Harlow Realty Co. v. Cotter*, 187 N.E. 118, 119 (1933). “Although either [foreclosure by power of sale or foreclosure by entry] can be used individually, the ‘belt and suspenders’ combination of both methods [of foreclosure] serves best to provide a title that is insulated from collateral attack in both the short and the long term.” *Nolan, supra* note 107, § 17.4.

240. 14C MASS. PRAC., *supra* note 24, § 15.127; *Harlow Realty Co. v. Cotter*, 187 N.E. at 119 (stating “[i]t is common practice for mortgagees to use both these methods of foreclosure concurrently.”).

method.<sup>241</sup> This stems from the notion that foreclosure by entry allows a ground for a claim of clear title separate from the foreclosure by power of sale.<sup>242</sup> Massachusetts's system allows foreclosing parties to correct defects in their authority to foreclose on property after the completion of a sale by utilizing the foreclosure by entry procedure.<sup>243</sup> It seems as though allowing the mortgagee to employ two distinct methods of foreclosure at the same time does nothing more than to ensure that the mortgagee is able to foreclose.<sup>244</sup>

B. *Available Remedies to Homeowners for Redeeming the Premises and Defending Against Foreclosures By Entry*

The most obvious defense against a foreclosure is that the mortgagor did not in fact default on any of the conditions of the mortgage.<sup>245</sup> Another defense is that the party foreclosing lacked "jurisdiction and authority" to effect such foreclosure.<sup>246</sup> This notion was recently affirmed in the landmark case of *U.S. Bank Nat. Ass'n v. Ibanez*, in which the SJC of Massachusetts held foreclosure sales to be invalid because the purchasers failed to show they were the mortgage holders at the time of foreclosure.<sup>247</sup>

Another possible defense against a foreclosure by entry is waiver.<sup>248</sup> A waiver may either be express or implied by conduct inconsistent with an intention to retain the benefit of the entry and complete the foreclosure in that fashion.<sup>249</sup> The mortgagor's continued possession

---

241. 14C MASS. PRAC., *supra* note 24, § 15.127; *see* Grabel v. Michelson, 8 N.E.2d 764, 765 (Mass. 1937) (foreclosure by entry and possession was valid even though there may have been irregularities in the exercise of the power of sale in the mortgage).

242. *U.S. Bank Nat'l. Ass'n v. Ibanez*, 941 N.E.2d 40, 49 n.15 (Mass. 2011).

243. MASS. GEN. LAWS ch. 244, §§ 1, 2 (2012); *see* Renuart, *supra* note 67, at 149.

244. The notion that the only purpose the provision serves is a safety net for mortgagees is further demonstrated by an excerpt from a practice guide stating that, "[s]ince the Land Court requirements for notice tend to be more strict than those of the Superior Court, it may be faster and more economical to bring the proceeding in the appropriate Superior Court." 15A MASS. PRAC., *supra* note 172, § 28:82. Furthermore, there are normal methods to remedy a defective foreclosure, which raises the issue of why such remedies exist if it can be done by utilizing the foreclosure by entry as an alternative foreclosure. Rather, it follows logically that because those other methods of remedying are available, foreclosure by entry should not be used in place of them.

245. *See* MASS. GEN. LAWS ch. 244, § 1 (2012).

246. *Bank of N.Y. Mellon Corp. v. Wain*, No. 12 MISC 459002(AHS), 2012 WL 5475849, 6 (Mass. Land Ct. Nov. 9, 2012) (quoting *U.S. Bank Nat'l Ass'n*, 941 N.E.2d at 50).

247. *U.S. Bank Nat'l. Ass'n*, 941 N.E.2d at 44.

248. "Entry under foreclosure is subject to waiver, and a foreclosure by entry may be opened by agreement." 59 C.J.S. MORTGAGES § 729 (2009). *See* *Botham v. McIntier*, 36 Mass. 346, 346 (1837).

249. 59 C.J.S. MORTGAGES § 729 (2009); *see* *Joyner v. Lenox Sav. Bank*, 76 N.E.2d 169, 174 (Mass. 1947).

after formal entry of the mortgagee for foreclosure “under circumstances strongly indicating that the real relation between the parties is that merely of debtor and creditor,” may suffice to show a waiver.<sup>250</sup> If, after an entry for foreclosure, the mortgagee accepts a new security for the same debt, it constitutes a waiver of the entry.<sup>251</sup> Conversely, the mere receipt of rents and their subsequent application to payment of amounts due on the mortgage debt does not establish a waiver of the entry to foreclose if the total currently outstanding on the debt is not paid off completely.<sup>252</sup>

In *Fay v Valentine*, the trial court held that a mortgagee’s entry for the purpose of effectuating a foreclosure by entry, while she had an action pending for recovery of possession, could not be considered as intended for the purpose of foreclosure.<sup>253</sup> The court noted that had the mortgagee discontinued the suit for possession of the premises, the result might have been otherwise.<sup>254</sup> However, the court reasoned that for the mortgagee to pursue the action at the cost of the mortgagor, it should be construed to be a waiver of her right to foreclose under that entry.<sup>255</sup>

#### C. *The Provision’s Relevancy in Light of the Recent Foreclosure Crisis*

From the perspective of the mortgagor, the foreclosure by entry provision seems as though its only purpose is to ensure that mortgagees can foreclose on real estate.<sup>256</sup> However, the perspective of the mortgagee is that there should be a way for mortgage lenders to foreclose after a period of time if the homeowner is found to be absent. In this case, the mortgagee is able to utilize the foreclosure by entry provision as a way of maintaining a type of administrative ease in foreclosing on a mortgaged property when the mortgagor is nowhere to be found.<sup>257</sup> In such a situation where the mortgagor is absent for a long period of time, logic indicates it is significantly more cost-effective to foreclose by entry and continued possession rather than by power of sale

---

250. 59 C.J.S. MORTGAGES § 729 (2009); see *Trow v. Berry*, 113 Mass. 139, 147 (1873).

251. 59 C.J.S. MORTGAGES § 729 (2009); see *Trow*, 113 Mass. at 147.

252. *Joyner*, 76 N.E.2d at 174; 59 C.J.S. MORTGAGES § 729 (2009).

253. *Fay v. Valentine*, 22 Mass. 418, 425 (1827).

254. *Id.* at 425.

255. *Id.* at 425.

256. 14C MASS. PRAC., *supra* note 24, § 15.127 (“A mortgagee may, and often does, employ both of the commonly used foreclosure methods concurrently . . . [T]he mortgagee can ensure that if there is some defect in one of the methods used, the mortgagor’s right of redemption will be foreclosed by the . . . other method.”). There is no other reason for instituting a foreclosure by entry in addition to a sale other than a backup to ensure the foreclosure is effectuated.

257. MASS. GEN. LAWS ch. 244, § 1 (2012).

or by any other available method.

However, an obvious counterargument to the position that foreclosure by entry is necessary in order for administrative ease in foreclosing on properties with absent mortgagors is that sanitary codes and public policy concerns regarding abandoned property now serve that purpose.<sup>258</sup> Essentially, the modern day enactments have replaced the need for such a method of foreclosure.<sup>259</sup> Therefore, it seems as though the foreclosure by entry provision should be revised to incorporate a requirement that it need only be utilized when the mortgagor is absent for a specified period of time, in order to better accomplish the intended purpose of the statute while eliminating the burden from existing homeowners.

#### CONCLUSION

The Massachusetts foreclosure by entry statutory provision is vague and overbroad. Not only does the statute lack clarity in definition and application, but the cases that apply it are inconsistent and simply emphasize the ambiguity present within the statute. The statute's lack of an actual notice requirement places an undue burden on mortgagors to consult the registry of deeds periodically to check whether a certificate of entry has been recorded against their property in order to determine whether they are subject to a foreclosure. Moreover, the fact that there is no time limit on the recording of the certificate of entry gives the mortgagee an unfair advantage in regards to deciding when the redemption period during which the mortgagor is able to redeem the premises begins to run.

In addition to burdening the mortgagor, allowing for "constructive" notice to constitute ample notice to the mortgagor is simply an unrealistic expectation. Furthermore, the statute's usage of an "open and peaceable entry" and "continued possession" accomplishes nothing in the way of clarification.<sup>260</sup> The cases interpreting the statute fail in a similar fashion because the line of authority seems to be inconsistent and outdated in modern society.<sup>261</sup> Additionally, the foreclosure by entry

---

258. 14B MASS. PRAC., SUMMARY OF BASIC LAW § 12.82 (4th ed. 2007); *see* MASS. GEN. LAWS ch. 111, § 127A-I (2012).

259. MASS. GEN. LAWS ch. 244, § 1 (2012).

260. MASS. GEN. LAWS ch. 244, § 1 (2012).

261. *See e.g.*, *Holmes v. Turner's Falls Lumber Co.*, 23 N.E. 305 (Mass. 1890); *Fletcher v. Cary*, 103 Mass. 475 (1870); *Ellis v. Drake*, 90 Mass. 161, 163 (1864); *Lennon v. Porter*, 71 Mass. 318 (1855); *Ayres v. Waite*, 64 Mass. 72 (1852); *Swift v. Mendell*, 62 Mass. 357 (1851); *Bennett v. Conant*, 64 Mass. 163 (1852); *Fay v. Valentine*, 22 Mass. 418 (1827); *Skinner v. Brewer*, 21 Mass. 468 (1827); *Thayer v. Smith*, 17 Mass. 429 (1821); discussion of *Walker v. Thayer* *supra* Introduction, note 13.

provision does not accomplish anything that sanitation codes and current public policy concerns would not.<sup>262</sup>

The burdens that the Massachusetts foreclosure by entry provision places on mortgagors are best understood when they are viewed practically as illustrated by the above-mentioned example. Applying the law as it now stands to the hypothetical first posed, Mary, the young mother, would be without any legal remedy against the foreclosure and would have no choice but to be subjected to an eviction proceeding, subsequently compelling her to vacate the land. However, if Massachusetts had an actual notice requirement, Mary would have been informed that the foreclosure by entry had been initiated, and she would have realized that she lacked insurance on the mortgaged property.

Thus, the presence of an actual notice requirement would have alerted Mary to the problem, and she would have been able to obtain the requisite insurance and ultimately could have avoided a devastating situation three years later.<sup>263</sup> Furthermore, if foreclosure could only be instituted when the mortgagor is absent for a long period of time, it would not be allowed in Mary's case, and therefore, a foreclosure by power of sale which requires actual notice would have been instituted and led to the same result as above.

Therefore, the statute should be legislatively revised and judicially clarified in order to allow for a purer understanding of the statutory requirements and to permit a more unified application of the doctrine. Requiring actual notice to be given to the mortgagor would ensure fairness to all of the parties involved in the foreclosure by entry process. Re-implementing the thirty-day recording limitation would also be a beneficial modification. Doing so would prevent the mortgagee from making the entry and waiting to record the certificate for a long period of time, which effectively conceals when the redemption period begins to run.

*Brittani K. Morgan\**

---

262. 105 MASS. CODE REGS. 410.001-410.990.

263. That is assuming that the mortgagee did not accelerate the mortgage, or even if the mortgage was accelerated, that the mortgagee consented to the mortgagor's request that the mortgage be reinstated.

\* J.D., Western New England University School of Law, 2015. This Note is dedicated to my late father who instilled in me the belief that I was capable of anything and whose sudden passing taught me that our time is too limited to lead anything but an enjoyable life, and for that I will be forever grateful. My sincerest gratitude goes to my mother, Mary, and my other half, Ian, for their continued love and support and adding the much needed balance to my life.