# Assisting Domestic Violence Survivors in Massachusetts Facing Threat of Foreclosure

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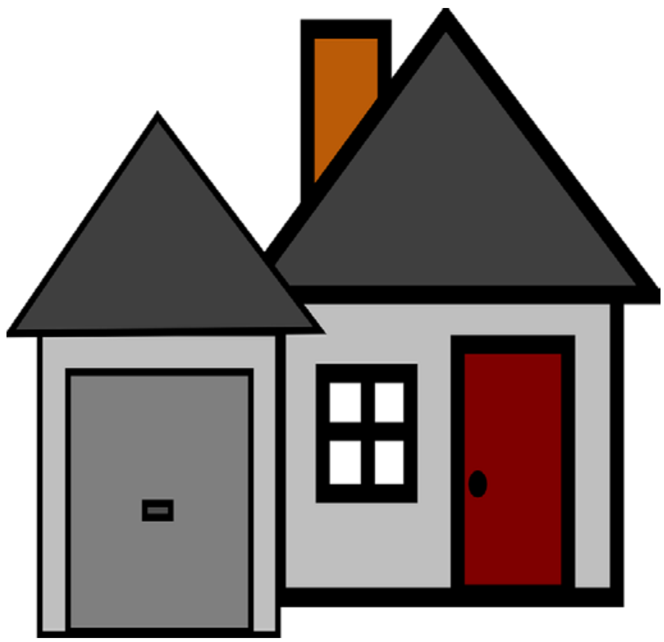
Divorce and separation inevitably lead to financial stresses. An abrupt drop in income can make foreclosure a real concern. In the midst of a challenging transition, survivors of domestic violence need to make informed decisions about their homeownership options. However, the common practices of many mortgage servicers often exacerbate the uncertainties survivors already face.



Even under routine circumstances, mortgage servicers' staff often lack the competence to assist borrowers effectively, and they can be overtly hostile once the mortgage is in default. An abusive partner can use the servicers' incompetence and hostility as tools to sabotage the survivor's efforts to achieve independence.

This issue brief offers advocates tips for assisting survivors to chart a course though the mortgage servicer morass with the goal of allowing their clients to make the decisions about future homeownership that are most appropriate for them. It starts with a general summary of the foreclosure process in Massachusetts and then outlines specific issues that arise for survivors. While it focuses on assisting survivors of domestic violence, the general material may be useful for advocates representing victims of crime as well.

## The Key Players in the Mortgage Industry

**The "owner" of the mortgage loan.** Currently, most home mortgage loans are owned by trusts. These trusts own pools of securitized mortgage debt. The lender that originated the loan likely sold it to a trust right after origination, and that lender is no longer in the picture. Most borrowers do not have any direct dealings with the trust that actually owns their home loan. Instead, the trust contracts with a mortgage servicer, and the servicer is the entity that regularly communicates with the borrower on behalf of the trust.

**The guarantor or insurer of the loan.** Most residential mortgage loans are guaranteed by one of the two Government Sponsored Enterprises (GSEs), Fannie Mae or Freddie Mac. Many other mortgage loans are insured by one of three federal agencies: the Federal Housing Administration (FHA), the Veterans' Administration (VA), or the Department of Agriculture's Rural Housing Service (RHS). These governmental guarantors and insurers are important because they set guidelines for servicing the loans that they back. A servicer must follow these guidelines before it can foreclose. If followed properly, these servicing guidelines can help the survivor avoid foreclosure.

**The mortgage servicer.** Mortgage servicers enter into contracts with the trusts that own mortgage loans. The contract typically authorizes the servicer to handle all routine transactions associated with the loans. The servicers also manage loans in default. Subject to guidelines set by the owner, guarantor, or insurer, a servicer decides when to foreclose and how a foreclosure should proceed. Some servicers are departments of large national banks. Others are companies that specialize only in mortgage servicing. Servicing rights over a pool of loans are often sold by one servicer to another. The federal Consumer Financial Protection Bureau (CFPB) has issued rules that apply to many aspects of mortgage servicing.[1] The CFPB issued these rules under its authority to implement laws that protect borrowers: the Real Estate Settlement Procedures Act (RESPA) and the Truth-in-Lending Act (TILA).

## Loss Mitigation

**What is loss mitigation?** Loss mitigation is a process in which the servicer reviews a borrower facing a financial hardship and attempts to implement an alternative to foreclosure. The review follows guidelines set by the loan's owner, insurer, or guarantor. The goal is to avoid, if feasible, the substantial loss to investors that a foreclosure sale entails.

**Which loss mitigation guidelines apply to a loan?** The GSEs and the federal agencies (FHA, the VA, and RHS) publish loss mitigation guidelines that apply to the loans they insure or guarantee. Borrowers can check an online search engine to find out whether their loan is subject to the guidelines of one of the GSEs.[2] The monthly account statements or loan closing documents may identify insurance charges imposed by one of the three federal agency insurance programs. Borrowers can also send the servicer a Request for Information letter under RESPA and ask the servicer to identify who owns or insures their loan and the servicing guidelines that apply.[3]

**What do typical loss mitigation guidelines allow?** The major loss mitigation guidelines consider first whether the borrower's financial hardship is long- or short-term. Depending on the type of hardship, the guidelines provide options that facilitate either retaining the home or giving up the home without a foreclosure.

**Options for short-term reduction of income.** The most common options when the financial hardship appears to be short-term are forbearance and repayment agreements. Forbearance is an agreement to reduce or suspend payments for a fixed time, with further alternatives to be considered at the end of the forbearance period. Forbearance may be the best option where a survivor faces many months of family court litigation over support and property issues. Repayment agreements are another option, but require the ability to continue making ongoing payments while repaying an arrearage.

**Options for long-term reduction of income.** The major *home retention* option for a borrower facing a long-term reduction of income is a loan modification. The modification can permanently reduce the monthly payment by changing basic loan terms. Typically this occurs by reducing the interest rate, lengthening the time to repay the loan, or postponing the charging of interest on part of the unpaid principal balance.

The most common option for *giving up the home* is a short sale. With this option the servicer agrees to release the mortgage to allow a sale of the home to third party. In a deed-in-lieu of foreclosure the servicer accepts a deed from the borrower and agrees not to foreclose. In both the short sale and deed-in-lieu options the servicer should agree to waive any future liability for the unpaid debt. "Cash for keys" agreements whereby the servicer provides some funds for moving expenses are often negotiated in connection with a short sale or deed in lieu. Both options have tax consequences for the borrower because debt that is forgiven may be treated as income to the borrower.

**The CFPB rules for loss mitigation reviews*.*** Effective in 2014, rules promulgated by the CFPB under its RESPA authority regulate the process of applying to a mortgage servicer for loss mitigation options.[4] The rules create enforceable procedural rights for borrowers, but do not mandate particular substantive outcomes. The procedural rights include notice about the status of an application, a duty to conduct a review once the application is complete, a written decision on the application, and delays of foreclosure so that the application can be reviewed.

# The Massachusetts Foreclosure Process

Like about half the states, Massachusetts allows a servicer to foreclose on a home without the direct involvement of a court.[5] A servicer can use this non-judicial procedure by enforcing a "power of sale" clause inserted into form mortgages. The clause allows the servicer to sell the property at a public auction if the borrower fails to comply with loan terms.[6] To exercise the power of sale the servicer must follow statutory requirements as well as the terms in the mortgage.[7]

## Foreclosure terms and timelines

**Acceleration of the mortgage loan.** When a servicer "accelerates" a mortgage loan, the servicer refuses to continue to allow the borrower to pay off the loan in monthly installments. Instead, the full balance owed must be paid immediately or the servicer will proceed with a foreclosure sale. A Massachusetts statute requires that a servicer give the homeowner a 90-day notice before accelerating a mortgage loan.[8] In addition, most mortgages require that the servicer give a 30-day pre-acceleration notice.[9] Both notices must include specific information about how the borrower can avoid foreclosure.

**Conduct of the foreclosure sale.** Once the loan is accelerated, the servicer must give the borrower a 14-day notice of the date and time of the foreclosure sale.[10] In addition, the servicer must advertise the sale weekly for at least three weeks before the sale.[11] However, a federal regulation prohibits servicers from starting the process of advertisement and sale until the loan is at least 120 days in default.[12] At the foreclosure sale a private auctioneer sells the property to the highest bidder. Often this is the servicer acting on behalf of the loan owner. After the sale, the property is conveyed by deed to the buyer.[13] The buyer can then file an eviction lawsuit in Housing Court. The Housing Court judge can then enter a judgment that authorizes law enforcement officials to remove the occupants and their property from the property.

**Right to cure.** Most mortgages allow the borrower to pay the arrearage (past amount) owed after default (as opposed to the entire unpaid loan balance) up until the time of the foreclosure sale and thereby stop the sale.[14] This right to "cure" a default after acceleration usually requires payment of all foreclosure-related fees and costs in addition to the missed payments.

**Deficiency claims.** If the foreclosure sale does not bring in enough money to pay off the balance due on the loan, the owner of the loan or a debt buyer may later sue the borrower for the amount remaining due. This is called a "deficiency" claim. The servicer must state in the notice of foreclosure sale whether it intends to seek a deficiency judgment.[15] The servicer has two years from the sale to file the deficiency lawsuit.[16] A deficiency claim may be collected as a personal liability from anyone who signed the mortgage note or who later assumed liability for the debt. In most cases, deficiency claims are dischargeable in bankruptcy.

## Defending against a non-judicial foreclosure

A non-judicial foreclosure sale will go forward unless the borrower takes legal action to stop it. This typically means filing a complaint in Superior Court with a request that the court issue an injunction to stop the pending sale. Under Massachusetts law, borrowers can also challenge the validity of a foreclosure sale in the context of a post-sale eviction proceeding. Common defects that may invalidate a foreclosure include: failure to serve notices required by the mortgage and state statutes; the foreclosing party's lack of authority to enforce the promissory note and mortgage; unfair and deceptive acts related to foreclosure (often involving mishandling of loss mitigation); and failure to comply with federal rules for foreclosure of certain government-insured loans, such as FHA loans.

# Getting the Essential Information

**Who signed the mortgage and note?** Two distinct documents make up what we refer to as a "mortgage loan": a promissory note and a mortgage. The note is the written agreement to pay the debt. The mortgage is the agreement to allow the property to serve as collateral for payment of the debt. A person who signs a note personally assumes an obligation to pay the debt. A person who signs the mortgage has an ownership interest in the property (the right to unencumbered title to the property once the debt has been paid). While the same individuals often sign both documents, this is not always the case.

**The survivor who is already a co-borrower.** Servicers typically want to deal only with the "borrower" who signed the note. If your client signed the original note, it should not be difficult to get information from the servicer about the loan. The CFPB's RESPA mortgage servicing rules allow a borrower to send a "Request for Information" letter to a servicer.[17] The letter can ask for documents and other information about the servicing history, including prior notices and loss mitigation activity. The servicer must respond in a fixed time, generally 30 days.

The CFPB has also issued rules that require servicers to send monthly account statements to borrowers.[18] The statements must include detailed information about the status of the account, particularly when the loan is in default.

When the abusive partner no longer lives in the house, the servicer should not require the absent partner's financial information or signature on documents. The Freddie Mac servicing guidelines generally recognize this principle.[19] However, for other loans, it may be necessary to appeal (or "escalate") disputes over demands for unnecessary signatures from an absent or abusive partner.[20]

**The survivor is not a co-borrower**. Survivors who are not signatories to the original note may find that servicers cut them off from account information and prevent them from applying for loss mitigation. This can happen even when the survivor acquired an ownership interest in the property through a family court order or quitclaim deed. RESPA rules effective in 2018 created new procedural rights for these parties who become a "successor-in-interest" through a separation or divorce.[21] If the servicer tries to obstruct a successor's access to information and loss mitigation, the successor should follow three steps.

1. Send the servicer a letter asking to be confirmed as a successor in interest. The letter should identify the survivor and include any appropriate supporting documents showing an ownership interest, such as a court decree or quitclaim deed.[22] This request entitles the sender to rights under RESPA to enforce this limited request.[23] The servicer must then promptly provide information about a reasonable process to confirm successor status.[24] The servicer can only ask for documents that are necessary to show the successor's legal status, such as a copy of a family or probate court order. Upon receipt of the documents the servicer has identified, the servicer must confirm the sender's successor status or state grounds for a contrary decision.

2. A confirmed successor in interest must be treated as a borrower for purposes of the RESPA and TILA servicing rules.[25] The confirmed successor can seek the full range of information about the loan using a Request for Information. The successor can also apply for loss mitigation with enforceable protections under the RESPA rules.[26]

3. The confirmed successor can apply for loss mitigation without assuming personal liability for the loan. After finding out what options are available, the successor will then be in a position to make an informed decision about whether to assume the loan. Fannie Mae, Freddie Mac, and FHA allow for simultaneous applications for loss mitigation and assumption.

## Practical Tips for Family Court Proceedings

**As early as possible include pertinent terms in orders in relief from abuse, divorce, or separation proceedings.** The court should order the opposing partner to cooperate in all aspects of loss mitigation, including signing authorizations to allow the survivor to access all information about the loan. The court should also order the partner to provide information and documentation to the servicer about the partner's domicile and financial support for the survivor's household when the survivor needs it in dealings with the servicer.

**Structure of property agreements.** Execution of a quitclaim deed in addition to clear language in a court order giving sole and exclusive title to the property to the survivor works most effectively in confirming successor status. Language referring only to "exclusive possession" of the property is not sufficient. Advocates should exercise care in agreeing that the survivor will sell the property or refinance. The opposing party's role in these transactions needs to be circumscribed carefully. Refinancing is often not a practical option while the survivor's financial situation remains precarious. It is also helpful to avoid entanglement in efforts to remove a co-borrower from personal liability under the original note. Requiring the absent partner to make mortgage payments as part of a court order as opposed to including sufficient funds for mortgage payments in the support order could invite continuing interference in the survivor's financial affairs.

## Useful Resources

- Fannie Mae Servicing Guide
- Freddie Mac Servicing Guide
- HUD FHA Single Family Housing Policy Handbook 4000.1
- VA Servicer Handbook M26-4
- RHS Direct Single Family Housing Handbook HB-2-3550
- RHS Single Family Housing Guaranteed Loan Program Handbook HB-1-3555
- Mass. Legal Services Foreclosure Defense
- National Consumer Law Center Mortgage Servicing and Loan Modifications (1st ed. 2019)
- National Consumer Law Center, Home Foreclosures (1st ed. 2019)
- National Consumer Law Center: How To Get Legal Help (with link to HUD-approved housing counselors)
- Sarah Bolling Mancini & Alys Cohen, "**Surviving the Borrower: Assumption, Modification, and Access to Mortgage Information after a Death or Divorce**," 43 *Pepperdine L. Rev.* 345 (2016).

# Endnotes

1. 12 C.F.R. §§ 1024.35 to 1024.41 (RESPA) and 12 C.F.R. 1026.41 (TILA).
2. Fannie Mae search: https://legacy.knowyouroptions.com/loanlookup ; Freddie Mac search: https://ww3.freddiemac.com/loanlookup/.
3. 12 C.F.R. § 1024.36
4. 12 C.F.R. § 1024.41.
5. In two very limited instances courts get involved in a non-judicial foreclosure in Massachusetts. First, before proceeding with a non-judicial foreclosure, the servicer must obtain a court order stating that the foreclosure does not involve a borrower who is an active duty servicemember. Second, after the non-judicial foreclosure sale, the servicer must obtain a court order to evict the residents from the property.
6. M.G.L.A. ch. 183 § 21 contents model power of sale clause language for a mortgage.
7. M.G.L.A. ch. 183 § 21.
8. M.G.L.A. ch. 244 § 35A.
9. For example, Fannie Mae and Freddie Mac Standard Security Instrument, ¶ 22.
10. M.G.L.A. ch. 244 § 14
11. *Id.*
12. 12 C.F.R. § 1024.41(f)(1).
13. M.G.L.A. ch. 183 § 21.
14. Fannie Mae and Freddie Mac Standard Security Instrument, ¶ 19.
15. M.G.L.A. ch. 244 § 17B.
16. M.G.L.A. ch. 244 § 17A.
17. 12 C.F.R. § 1024.36(i).
18. 12 C.F.R. § 1026.41.
19. Freddie Mac Servicing Guide Chapter 9206.
20. The guidelines used under the former HAMP modification program are a helpful standard for reference in these disputes. *See* U.S. Dept. of Treasury, *Making Home Affordable Handbook* Version 5.2 Ch. II Sec. 5.7 (December 21, 2017).
21. A "successor in interest" includes someone to whom an ownership interest in property securing a mortgage loan is transferred from a borrower through a "transfer resulting from a decree of a dissolution of marriage, legal separation agreement, or from an incidental property settlement agreement, by which the spouse of the borrower becomes an owner of the property." 12 C.F.R. § 1024.31(2)(4). A successor in interest is protected from exercise of the "due on sale" clauses that are standard mortgage terms. The Garn-St. Germain Act sets out these basic protections. 12 U.S.C. § 1701j-3(d). The RESPA rules adopt the classifications of protected individuals from the Garn-St. Germain Act.

22. 12 C.F.R § 1024.36(i).
23. 12 C.F.R. § 1024.36.
24. 12 C.F.R. § 1024.38(b)(1)(vi).
25. 12 C.F.R. § 1024.30.
26. In cases of requests for information where there are two co-borrowers, the servicer should give information about the terms of the loan, its status, and payment history to either borrower upon request. However, the RESPA rule specifically authorizes a servicer to omit contact information, location information, and personal financial information about a non-requesting co-borrower from a request. 12 C.F.R. § 1024.35(e)(5) and 1024.36(d)(3). The survivor should expressly ask for these confidentiality protections in a request for information.