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# A Look at One State's Right-to-Cure Changes

Massachusetts' recently changed foreclosure law may indicate a nationwide trend

In recent years, many states have amended their mortgage-foreclosure laws in an effort to protect homeowners from the nationwide increase in foreclosures and to minimize the number of real estate-owned (REO) properties. It is difficult, however, for many states to balance the desire to protect homeowners from perceived aggressive creditors with the right of lenders and servicers to avoid economic loss from nonperforming mortgages.

An analysis of Massachusetts' foreclosure law demonstrates this difficulty. Massachusetts, a nonjudicial state, changed its law substantially in 2007 by creating a 90-day right-to-cure period after acceleration of the mortgage. Its goal was to encourage meaningful workout discussions between borrowers and lenders.

Apparently unsatisfied with the number of actual workouts that occurred, the legislature passed another amendment to the foreclosure law this past August, which repealed the 2007 law and created a 150-day right-to-cure period. The new law also adds more required language for the notice lenders must send to borrowers and imposes certain obligations on lenders and servicers before foreclosure can begin.

The definition of mortgages that are covered by the law's provisions is unchanged. Such mortgages are on owner-occupied, primary residences that have four units or less. The new law expressly does not apply to investment or commercial properties.

The 150-day right to cure is the most important provision of the new law, which also attempts to encourage lenders to enter workout discussions by shortening the right-to-cure period if they follow the procedure set out in the statute. Lenders may start foreclosure after 90 days if they have made a good-faith effort to negotiate a commercially reasonable alternative to foreclosure with borrowers; the effort must involve at least one meeting either in-person or on the telephone with borrowers or their representatives.

The law requires lenders to include an explanation of these rights in a notice to borrowers. Borrowers then have 30 days to respond. If they fail to respond, lenders may begin foreclosure after a 90-day right-to-cure period. The 150-day right to cure only has to be offered once in three years.

Lenders must send borrowers, by proof of delivery, documentation of what was considered in coming to the meeting. Lenders must send these considerations 10 days before the meeting.

If they agree to modify the loan, lenders must make the offer in writing. Borrowers have 30 days from receipt to respond by proof of delivery. If they do not respond within 30 days, they forfeit the 150-day right to cure and foreclosure may begin after 90 days.

If lenders intend to begin the foreclosure process less than 150 days after notifying borrowers, then they must execute an affidavit stating that they were unable

to modify the mortgage despite offering borrowers a commercially reasonable alternative to foreclosure. The law sets out the affidavit's contents, which must include a detailed description of the lender's analysis of the borrower's ability to pay the mortgage. The lender must send a copy of the affidavit and the notices to the borrower and to the court.

If they intend to enter good-faith negotiations with borrowers to modify the mortgage, lenders must send an additional notice and start the meeting process prior to acceleration. Assuming the borrower responds and there is a meeting, lenders will have to change their procedures substantially, making it more costly without necessarily significantly shortening the time to acceleration. This is because there is only a 60-day difference between the minimum cure period of 90 days if a workout is attempted and the required cure period of 150 days if no workout is tried.

Unlike many other states, Massachusetts did not choose mandatory mediation or workout negotiations. Therefore, it does not make practical and cost sense for a lender to change its procedures to engage in a time-consuming workout attempt, which may shorten the time it can proceed to foreclosure by only a few days. Faced with this, most lenders likely will opt to wait the additional 60 days rather than attempt workouts.

The new Massachusetts law points out the difficulty legislators find in weighing the protection of homeowners and the right of lenders to be repaid. Mandatory workouts or mediation provides sometimes illusory protection to borrowers, but

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it is costly to lenders and can tie up court dockets in judicial foreclosure states. These past two years have shown that there are no easy solutions to the country's foreclosure problem.

A further implication of the law is its effect on Massachusetts' housing market. The new law keeps the property longer in the hands of owners who likely do not

have the resources to maintain its condition. On the other hand, occupied properties help prevent neighborhood blight and deterioration.

There also appears to be a correlation between the number of REO properties and housing prices. A large number of REOs in an area depresses the value of real estate in general. By extending the

period of time it takes to foreclose, the Massachusetts legislature hopes to maintain real estate values by reducing the number of REOs.

Depending on what happens in Massachusetts, other states may take the approach of extending the time to foreclose as a means to benefit their housing market. ●