

TO: Massachusetts Agents

FROM: Old Republic National Title Insurance Company

DATE: February 8, 2011

RE: New Homestead Law

2010 Mass. Acts Chapter 395

In 1980, the Supreme Judicial Court issued its opinion in *Atlantic Savings Bank v. Metropolitan Bank and Trust Co.*, 9 Mass.App.Ct.286, 400 N.E.2d 1290, (1980), which for conveyancers, was a seminal case in the law of Homesteads in Massachusetts. The *Atlantic* Court held that a mortgage executed by a homeowner and his spouse was superior to a prior-recorded Declaration of Homestead. *Atlantic Savings Bank* at 1291. Unfortunately, the case left many other questions unanswered and those issues have been the basis of a great deal of debate and uncertainty in the intervening period. With the passage of the new Homestead Law (2010 Mass. Acts Chapter 395), the legislature has rewritten M.G.L. c. 188 and answered those questions giving conveyancers a clear protocol that had been lacking until now. Effective March 16, 2011, the statute not only codifies the holding in *Atlantic Savings Bank*, it expands the scope of homesteads generally and does away with some of the prior law's more anachronistic provisions.

What follows is a brief overview of some of the new provisions of chapter 188 with a view toward alerting our agents to those provisions of the statute which most impact conveyancing practice. Section numbers are references to the new sections. As always, agents are encouraged to review the statute and contact the Underwriting Department with any questions or concerns.

Automatic Subordination of Prior Homestead (Section 9): As mentioned above, the new statute codifies the holding in *Atlantic Savings Bank*. Specifically, section 9 provides that a when a mortgage is signed by all the owners of the property, a prior-recorded Declaration of Homestead will automatically be subordinate to that mortgage. However, the statute changes prior practice in that it no longer requires a non-titled spouse to sign the mortgage in order to subordinate the homestead to the new mortgage. Further, the mortgage no longer needs to contain subordination language which was a prerequisite to subordination for the SJC in *Atlantic Savings Bank*. Finally, section 9 prohibits a lender from requiring a release of Homestead prior to recording a mortgage.

Automatic Homestead (Section 4): The statute now provides for an automatic homestead without any action required of the owner. The automatic homestead under section four provides for \$125,000.00 protection for the owner and her family. It should be noted, however, that while this is an improvement upon the old statute where no coverage was provided on an automatic basis, the protection provided is still significantly less than the \$500,000 protection provided under the declared homestead option under section five.

Declared Homestead (Section 5): The new statute provides \$500,000.00 protection on the recording of a written Declaration of Homestead. Section 5 provides several requirements for the form of declaration to be recorded, notable among these:

1. Non-title spouse must be identified (§ 5(a)(1)). This is a codification of prior practice and the dictates of *Atlantic Savings Bank*.

2. The homestead declaration cannot be made in a deed (§ 5(c)).
3. Homesteads may now be declared where the home is owned by a trust, and it is anticipated that the trustees would execute the declaration (§ 5(a)(1)). Further, the beneficiaries of the trust should be identified in the declaration (§ 5(a)(1)) and § 1).
4. If the homestead is declared while the owner is single, and the owner is subsequently married, the homestead shall accrue to the benefit of the new spouse, and that benefit shall accrue as of the date of the original filing (§ 5(d)).

Termination (Section 10): Agents will recall many situations where certain inter-family transfers resulted in a homestead's inadvertent termination creating in some cases an undue hardship in contravention of the purposes of the statute. The new statute provides very clear parameters for termination and, as importantly, to prevent inadvertent termination. Under this section, termination must be evidenced by an intent to terminate and be in very specific form:

1. Deed to a non-family member signed by the owner and the non-titled spouse;
2. Release signed by owner and non-owner spouse;
3. By abandonment of the home by the owner, owner's spouse and family;
4. In the case of trusts, a deed or release signed by the trustee or by the release or abandonment by the beneficiary named in the declaration;

Significantly, section 10 provides a safety net for those transactions which are not meant to affect a termination. Consequently, the following conveyances will not affect the homestead:

1. Deeds between spouses or co-owners who individually or jointly hold a homestead;
2. Deeds between a trustee and beneficiary;
3. Deeds between a life tenant and a remainderman, unless in all of the above cases, there is an express release in the deed.

Further, section 10(d) provides that nothing contained in a mortgage will act to terminate a homestead.

Multiple Owners: In a departure from prior practice, the new statute anticipates that a homestead may be declared by multiple owners (§ 5(a) and § 3(a)). That is, each co-tenant, joint owner or tenant by the entirety may declare their own homestead.

Notice (Section 14): The statute requires that the closing attorney provide the mortgagor with a notice of the right to declare a homestead under c. 188. The notice should be signed by the mortgagor to acknowledge receipt and should include inter alia:

1. a summary of the differences between the automatic homestead protections and the declared homestead protections;
2. the enhanced benefits of the declared homestead protections.

Old Homesteads remain in effect under the new c. 188: Finally, the new statute provides that all homesteads currently in effect will remain in full force notwithstanding their failure to comply with provisions of the new statute.

To view the statute in its entirety, please click the link below.

<http://www.malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter395>

Thank you for your attention to this bulletin. If you have any questions concerning this matter, please contact an underwriter at 800-370-6466.