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## LEGISLATIVE NEWS ALERT

Date: April 18, 2006  
To: All Massachusetts Agents  
From: Boston Office  
Re: Mortgage Discharge Law

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After a three-year effort by members of the Real Estate Bar Association to reform the State's mortgage discharge practice, Governor Romney signed the mortgage discharge bill into law last week.

There are many provisions of the new discharge law that are worth noting and which represent an improvement:

- Providing payoffs and discharges in a timely manner;
- Lessening the discharge requirements for mortgages on 1-4 family residential property;
- Allowing for the sufficiency of a corporate succession recital in a recorded document;
- Requiring that a new notice be sent to the person paying off the mortgage, when the discharge is sent directly to that person, who is neither an attorney nor a settlement agent;
- Expanding both the discharge by an attorney's affidavit and the judicial discharge; and
- Reducing the statute of limitations to enforce a mortgage.

**The new statutory provisions take effect 180 days from April 13, 2006.**

### **MORTGAGE PAYOFFS WITHIN 5 DAYS:**

The payoff statement now has to be provided within five (5) business days, shall be valid for 30 days, detailed enough to make full payment, and include a description of pending escrow disbursements. One payoff may be requested free of charge every six months. Penalties for non-compliance are the greater of \$500.00 or the borrower's actual damages, plus reasonable attorneys' fees.

### **MORTGAGE DISCHARGES PROVIDED OR RECORDED WITHIN 45 DAYS:**

Undischarged or ineffectively discharged mortgages have become an increasing problem to the conveyancing attorney. In an attempt to address this issue, the new law contains penalties for failing to provide or record all instruments to clear title in a timely manner.

#### **(a) Mortgagee Penalized for Failure to Provide or Record Discharge**

Within forty-five (45) days of its receipt of the payoff, the mortgagee, mortgage servicer or note holder shall either (i) record a discharge, along with all necessary assignments and supporting documents and provide the closing attorney, settlement agent, or person submitting the payoff with a copy of the aforesaid documents with the recording

information; or (ii) provide the closing attorney, settlement agent, or person submitting the payoff with the discharge, together with all necessary assignments and supporting documentation. Merely providing a copy of the discharge and evidence that the discharge was sent to the registry for recording shall not constitute compliance with this section. Penalties for non-compliance include crediting the mortgagor for all fees charged or withheld for recording (with interest at 6% per annum) and the greater of the amount of such fees that were not refunded or credited plus \$2,500.00, or such borrower's actual damages, plus reasonable attorneys' fees. However, if the mortgagee complies within 30 days of written demand, then damages may be limited to crediting the fees charged to the Borrower, if any, with interest at 6% and Borrower's actual damages.

(b) Attorneys Penalized for Failure to Record Discharge

A closing attorney, settlement agent or other person who receives a proper discharge shall record such discharge within forty-five (45) days. Penalties for non-compliance include crediting the greater of \$2,500.00, or such mortgagor's actual damages, plus reasonable attorneys' fees. However, if the attorney complies within 30 days of written demand, then damages may be limited to actual damages.

**MORTGAGE DISCHARGED BY SERVICER, NOTE HOLDER OR ATTORNEY:**

One notable improvement from prior practice, in some instances, a mortgage encumbering a one-to-four family residence may be discharged by a mortgage servicer or note holder, who is not the holder of record, or by an Attorney.

(a) Mortgage Discharge by Mortgage Servicer who is Not Mortgagee of Record

A mortgage discharged by a mortgage servicer who is not the mortgagee of record and who lacks the necessary supporting documentation under §55B (i.e. an Assignment), may still be valid if the mortgage servicer records with or prior to the recording of said discharge: a servicing agreement, power of attorney, servicing notice letter to borrower and written payoff statement or other supporting documentation evidencing servicer's authority. If such documentation is a copy, it shall be supported by certification that it is a true copy. If such documentation is recorded after the discharge, it shall be accompanied by a Chapter 183 §5B Affidavit.

(b) Mortgage Discharge by Note Holder who is Not Mortgagee of Record

A mortgage may be discharged by a note holder who is not the mortgagee of record if an original or photocopy of the note, with the endorsements thereon evidencing transfer of ownership to the note holder, is recorded as an exhibit to the discharge. If a copy, the note shall be attached to a certificate by the note holder stating that it is a true copy or to an affidavit by an attorney stating that the attorney has seen the original note with endorsements and the copy being recorded is a true copy of the same. If recorded after the discharge, the note shall be accompanied by a Chapter 183 §5B Affidavit and shall marginally reference the recorded discharge.

In the absence of such aforesaid supporting documentation, said discharge under sections (a) and (b) above may be effected by the recording of other documentation, as set forth in more detail in the new statute.

(c) Mortgage Discharged by Attorney's Affidavit Upon 45 Days Notice to Mortgagee

The new law also provides a streamlined process to discharge a mortgage via an attorney's affidavit. Attorneys will be authorized to record an affidavit if there is a failure by the mortgagee, servicer or note holder to record a discharge, along with necessary assignments and supporting documentation, within forty-five (45) days of receiving a

notice of intent to record Affidavit from the Attorney. Said notice may be provided with the payoff funds, however, if the payoff is made and such notice is sent to a servicer or note holder who is not the mortgagee of record, then notice must also be provided to the mortgagee of record. Having not received a notice of inadequate payment during said forty-five (45) days, the attorney may file an affidavit, which should include a copy of the written payoff and cancelled check or a written wire confirmation stating the payee information and amount prescribed in the payoff statement.

**NO FURTHER EVIDENCE NEEDED IF RECORD INSTRUMENT CONTAINS RECITAL OF CORPORATE SUCCESSION:**

Under the new provisions, the legislature has lightened the burden on conveyancers in those situations where the corporate succession in the title is missing entities. Following, a discharge, assignment, partial release or mortgage note that is otherwise recordable and recites the corporate succession from the mortgagee may be relied upon without the need of further record evidence of corporate merger, consolidation, charter amendment, conversion of entity or acquisition of assets.

**MORTGAGEE TO PROVIDE NEW CONSUMER NOTICE:**

When the mortgagee, servicer or note holder elects to provide the discharge to the person transmitting the payoff and that person is someone other than a closing attorney or settlement agent, the discharge must be accompanied by a transmittal letter drafted in accordance with the new statute.

**STATUTE OF LIMITATION TO ENFORCE A MORTGAGE – REDUCED:**

The statute of limitations to enforce a mortgage has been reduced to thirty-five (35) years from the recording thereof if no term is stated in the mortgage or five (5) years from the expiration of the stated term or the maturity date, unless, in either case, the mortgagee records an extension or an acknowledgement or affidavit, stating that the mortgage has not been satisfied prior to the expiration of the period stated herein. In marking the mortgage as discharged on the relevant memorandum of encumbrances, registered land may charge the customary discharge recording fee. If any such mortgage would expire within one (1) year of the effective date of this law, the term shall be extended for a period of one year from said effective date.

**JUDICIAL DISCHARGE AVAILABLE TO MORTGAGOR:**

The remedy of judicial discharge has been expanded to allow a mortgagor, his heirs, successors or assigns, who has some evidence of payoff, is unable to obtain a discharge from the mortgagee, and cannot meet the affidavit or document requirements, to petition the court for discharge. The petition to be filed in the Land Court or Superior Court is not subject to any waiting periods or periods of uninterrupted possession. If sufficient evidence of payoff is lacking, a petition may still be filed, however, the procedure in the previous statute would apply save for newer and shorter minimum possession periods.

**REPEALED:** Disclosures required by Massachusetts Law that were seen as duplicative of federally-mandated disclosures; **RETAINED:** Disclosure by lenders stating the mortgagee's attorney represents the interests of the mortgagee; and **ADDED:** Personal identification numbers, social security numbers, account numbers, etc. may be blackened or whited out.

As always, please feel free to contact our Underwriting Department for further information.