

Right to cure foreclosure defense under M.G.L. chapter 244 section 35A in Massachusetts, an update.

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A significant and potent weapon in the arsenal of foreclosure defense litigants and attorneys was curtailed greatly earlier this month by the Supreme Judicial Court of Massachusetts with its decision *U.S. Bank, N.A. v. Schumacher*. The question was whether Mass. Gen. Laws c. 244 § 35A was one of the statutes “relating to the foreclosure of mortgages by the exercise of a power of sale” under Mass. Gen. Law c. 183 § 21. If it was, then banks would have needed to comply with § 35A strictly. In practical terms it meant that any violation of the statute’s requirements, regardless how minor and (more importantly) whether any true “damage” was caused by the violation, would be enough to undo the foreclosure. Unfortunately for homeowners, the Court answered in the negative.

Now, as a practical consequence of the decision, and as the concurrence in *Schumacher* pointed out, a homeowner needs to bring suit alleging a violation of § 35A to the Superior Court for equitable relief prior to the foreclosure to stop it. The other option is to raise the § 35A violation in the eviction process *as a counterclaim*. However, now a homeowner must not only show a violation, but also that the violation “rendered the foreclosure process so fundamentally unfair that [the homeowner] is entitled to affirmative equitable relief” in order to undo the foreclosure. *U.S. Bank, N.A. v. Schumacher*, 467 Mass. 421, 433 (2014).

Keep in mind that prior to this decision, some housing courts ruled that § 35A needed to be complied with strictly, and a violation was sufficient to show the foreclosure did not transfer ownership. Litigants and their attorneys showed violations of § 35A and were able to undo a foreclosure in the eviction process stage. This occurred often enough that it was, as stated, a commonly used weapon in the arsenal of the competent foreclosure defense litigant/attorney. This is now no longer.

Based on this author’s experience in the foreclosure defense field since the Great Recession started, it is his opinion that for all intents and purposes, the practical effect of *Schumacher* will be to reduce the use of a violation of § 35A to undo a foreclosure to being a rare occurrence. (This was a big win for the banks.)

In the event that you are contemplating defending against a foreclosure in Massachusetts, feel free to give this office a call.

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Right to cure/violation in right to cure letter/stop foreclosure in Massachusetts/defend  
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