

MEMO

To: Registry Districts

From: Edmund A. Williams

Date: March 22, 2014

Subject: Mortgage Foreclosures of Timeshares (G.L. ch. 183B, § 29A)
Foreclosure of Timeshare Condominium Liens (G. L. ch. 183B, § 29B)

Chapter 183B, Section 29 has been amended and Sections 29A (mortgage foreclosures of timeshare units) and 29B (timeshare lien forfeitures) added to the chapter.

MORTGAGE FORECLOSURES OF TIMESHARES (G.L. ch. 183B, § 29A)

Ch. 183B, § 29A replaces Chapter 244 as the statute under which mortgages on timeshare units are foreclosed. Under the new statute, servicemember judgments are not required (183B § 29A(b)) but see 183B, § 29A(c) which allows a mortgage holder to seek a declaration pursuant to the act.

Publication pursuant to 183B § 29A(e)1(i) need only be made one time, not three.

After the sale, an affidavit is to be executed by the foreclosing mortgagee (holder of the mortgage according to the statute) attesting to compliance with the particular provisions of the section and stating that the holder has attempted in good faith and with reasonable precaution, to determine whether any person subject to foreclosure proceedings under this section is entitled to protection under the SCRA.

The buyer is to register the deed and affidavit within 90 days from the date of sale or 90 days after the receipt of the deed, whichever is later.

The Chief Title Examiner or his/her designee shall approve these timeshare mortgage foreclosure deeds upon presentation of the deed and affidavit. A copy of the publication shall be attached to the affidavit.

FORECLOSURE OF TIMESHARE CONDOMINIUM LIEN (G.L. ch. 193B, § 8B)

Ch. 183B, § 29B allows for non-judicial foreclosure (forfeiture) for non-payment of assessments as they relate to timeshares. This section allows for an auction after notice as provided therein, including publication one time at least 30 days prior to the sale.

As in Section 29A, an affidavit of compliance as to all of the provisions of Section 29B is to be executed, this time by the Condominium Association or Trust. SCRA protection is again addressed by the affidavit.

If the unpaid assessments for a timeshare are forfeited under this section, an S Case under Land Court Guideline 10 would not be necessary.

The Chief Title Examiner or his/her designee shall approved the Auctioneer's Release Deeds and the accompanying affidavit by Interval Owners Association, counsel or managing entity.

Summary

Sections 29A and 29B are practically identical procedurally. No SCRA case will be required for mortgage foreclosures and no S Case will be required for common expense lien foreclosures. In both instances, approval by the Land Court is required.

Attached are copies of Chapter 183B, § 29, § 29A and § 29B.

CHAPTER 183B § 29

Section 29. (a) A person who has a duty to make assessments for time-share expenses shall have a lien on a time-share for any assessment levied against that time-share or fines imposed against its owner from the time the assessment or fine becomes due. In the case of either a time-share estate or a time-share license, the lien shall be enforced pursuant to section 29B. Unless the time-share instrument otherwise provides, fees, charges, late charges, fines, interest, collection agency fees and reasonable attorney's fees charged pursuant to clauses (8) and (9) of subsection (a) of section 20 shall be enforceable as assessments under this section. If an assessment is payable in installments, the full amount of the assessment shall be a lien from the time the first installment thereof becomes due.

(b) A lien created under this section shall be prior to all other liens and encumbrances on a time-share except: (i) liens and encumbrances recorded before the recording of the time-share instrument; (ii) mortgages or security interests on the time-share recorded before the due date of the assessment or the due date of the first installment payable on the assessment; (iii) liens for real estate taxes and other governmental assessments or charges against the time-share; and (iv) liens for unpaid taxes of the owner collectible pursuant to chapter 62C, and liens for unpaid child support obligations of the owner collectible pursuant to chapter 119A, provided that liens for such taxes or child support obligations were recorded before the due date of the assessment or the due date of the first installment payable on the assessment. This subsection shall not affect the priority of mechanics' or materialmen's liens. Liens on a time share unit, arising under this section or otherwise, shall not be subject to chapter 188.

(c) The lien created under this section shall be automatic as a matter of law, but a claim or notice of lien may be recorded in the applicable registry of deeds for a time-share estate or as required in the controlling time-share instruments for a time-share. A lien shall be dissolved upon the issuance and recording of a statement by the association pursuant to subsection (e) showing no assessment to be due and owing.

(d) This section shall not prohibit actions to recover sums for which subsection (a) creates a lien or precludes an association from recourse by any contractual or other remedy permitted by law.

(e) The lien created under this section shall include costs, including collection agency fees, reasonable attorneys' fees and all forfeiture costs incurred by the association. A person who has a duty to make assessments for time-share expenses shall furnish to a time-share owner, purchaser, mortgagee or a closing attorney or settlement agent, upon written request, a statement recordable in form setting forth the amount of unpaid assessments currently levied against the owner's time-share and may charge a reasonable fee for the preparation of such statement. The statement shall be furnished within 10 business days after the receipt of the request. Any time-share owner, purchaser, mortgagee, or a closing attorney or settlement agent, who is a recipient of the statement shall be entitled to rely on the contents thereof, and whoever furnished the statement may collect from such recipient only those sums of money that are set forth therein from the recipient; provided, however, that the recipient pays any amounts stated as due and owing and any amounts which subsequently may become due and owing within 60 days of the date of the

statement, including collection charges, late fees, interest and additional assessments as stated therein.

(f) No time-share owner shall be exempt from liability for contribution toward the time-share liability expenses by waiver of the use or enjoyment of any of the common areas and facilities or by abandonment of the time-share or otherwise; and no time-share owner shall be entitled to an offset, deduction or waiver of time-share liability expenses or other charges levied or lawfully assessed by the association.

CHAPTER 183B, § 29A

Section 29A. The rights of a time-share owner shall be subject to forfeiture in accordance with clauses (a) to (g), inclusive, for breach of condition of any mortgage, which for the purpose of this section shall include any security instrument including, but not limited to, a mortgage, trust deed or other similar instrument encumbering a time-share.

(a) Upon default, and after all applicable cure periods have expired, the holder of a mortgage shall provide written notice of default to the time-share owner at the last known address thereof by certified and first class mail and provide a reasonable opportunity to cure of not less than 90 days from the date of the mailing of the notice letter.

(b) Prior to offering a time-share for sale for breach of condition of a mortgage, the holder thereof shall attempt in good faith and with reasonable precaution which, for the purpose of this section shall not require separate proceedings under section 57 of the acts of 1943, to determine whether any person subject to forfeiture proceedings under this section is entitled to protection under the Service members Civil Relief Act of 2003, 50 U.S.C. App. §. 517, hereinafter referred to as "SCRA".

(c) Nothing herein contained shall prevent a holder of a mortgage from seeking a determination under section 57 of the acts of 1943 that a time-share owner is not entitled to benefits under SCRA or, if a time-share owner is entitled to the benefits under SCRA, a determination of said time-share owner's rights under SCRA.

(d) With respect to forfeiture proceedings based upon breach of condition of a security instrument encumbering a time-share license, the holder thereof shall have the option to; (i) foreclose in the manner prescribed in the time-share instrument or, if not prescribed, in accordance with this section; or (ii) to sell, by public or private sale, conducted in accordance with Part 6 of Article 9 of chapter 106.

(e) If, after expiration of the 90-day period, the time-share owner has not cured the default in the manner prescribed and the holder of the mortgage has determined in good faith and with reasonable precaution that the time-share owner is not entitled to protection under SCRA, the holder of the mortgage shall conduct a public auction sale under the following conditions:

(1)(i) notice of such sale shall be published once in a public newspaper with a general circulation in the town or county in which the time-share property is situated and not less than 30 days before the date of the sale, calculated by excluding the date of publication of the first notice and the date of sale;

(ii) at least 30 days prior to the date of sale, a written notice of the time, date and place of the auction shall be mailed, by certified mail and by first class mail to the last known address of the time-share owner of record and to the last known address of all parties having a lien or other interest of record in the time-share estate junior to the mortgage that is the subject of forfeiture proceeding;

(iii) such notice shall contain: the name of the time-share owner and the original mortgagee; the date, book and page or document number of the mortgage; the date, time and place of the sale; a general description of the time-share; and the terms of the sale; provided, however, that if more than 1 time-share is to be included in the sale, all such time-shares may be combined into 1 notice of sale, with 1 property description being given as set forth in clause (iv); and

(iv) notice of sale pursuant to this section shall be printed in substantially the following form:

SALE OF TIME-SHARE ESTATE UNDER M.G.L. C. 183B, SECTION 29A.

By virtue of M.G.L. c. 183B, Section 29A and in execution of the Power of Sale contained in a certain Mortgage (or Mortgages, if more than one) on the time-share estate (or estates, if more than one) given by the time-share owner (or owners, if more than one) set forth below for breach of the conditions of said Mortgage and for the purpose of foreclosing, the same will be sold at Public Auction commencing at ____ on , 20__ at , Massachusetts, being all and singular the premises described in said Mortgage. (For each Mortgage, list name and address of the timeshare owner and the original Mortgagee, a general description of the time-share estate and the date and book and page number or document number of the Mortgage).

TERMS OF SALE: (State the deposit amount to be paid by the purchaser at the time and place of the sale, and the times(s) for payment of the balance or the whole as the case may be. The time share estates, if more than one, may be sold in individual lots or as a group.) Other terms to be announced at the sale.

Signed____

Holder of security instrument, or counsel; and

(v) the printed notice required under clause (iv) published in accordance with this section, together with such other or further notice, if any, shall be deemed a sufficient notice of the sale and the time-share shall be deemed to have been sold, and the instrument conveying the time-share from the foreclosing entity shall transfer the time-share subject to, and with the benefit of, all restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes, assessments and security instruments recorded prior to the mortgage that is the subject of forfeiture proceedings, whether or not reference to such restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes, assessments or security instruments is made in the instrument of conveyance; provided, however, that no purchaser at such sale shall be bound to complete the purchase if there are encumbrances, other than those included in the notice of sale, which are not stated at the sale and included in the foreclosing entity's contract with the purchaser; and, provided further, that no such notice of sale shall be held to be invalid by reason of any error or irregularity which is neither substantial nor misleading.

(i) unless the notice of sale otherwise provides, the sale shall take place on the time-share property.

(ii) the sale shall be by public auction, conducted by a Massachusetts licensed auctioneer and, at the discretion of the auctioneer, the auctioneer may dispense with the reading of the names of the time-share owners (if there is more than one), the description of time-share (if there is more than one) and the recording information (if there is more than one instrument).

(iii) all rights of redemption of the time-share owner shall be extinguished upon the sale of a time-share pursuant to this section;

(iv) the association, its manager, the holder of the mortgage, and any time-share owner may bid at the sale and the successful buyer at such sale shall take title to the time-share free and clear of any and all outstanding obligations of the prior time-share owner to the association, except that if the buyer intends to use the time-share during the same fiscal year of the association in which the time-share was purchased, the buyer shall be obligated to pay the assessment for that year;

(v) upon closing, the holder of the mortgage shall provide the buyer with:

(A) a deed or other appropriate instrument transferring the rights to the time-share;

(B) an affidavit of sale attesting to compliance with all requirements of the forfeiture proceedings pursuant to this section and that the holder has attempted in good faith and with reasonable precaution, to determine whether any person subject to forfeiture proceedings under this section is entitled to protection under the SCRA; and

(C) a resale certificate as required by section 42, if requested by the buyer.

(vi) the buyer shall record the deed or other instrument and the affidavit of sale with the appropriate registry of deeds not more than the later of 90 days after the sale date or 90 days after receipt of the deed from the holder of the mortgage and upon such recording, the buyer shall be deemed to be a bona fide purchaser of such time-share and shall not be subject to claims by the prior owner thereof that the forfeiture proceedings under this section are invalid under SCRA; and

(vii) within 30 days after the closing and delivery of the deed or other instrument and affidavit of sale, the holder of the mortgage shall mail a notice detailing the results of the sale to the last known address of the former time-share owner and all parties which held a junior interest to that of such holder.

(f) In the event of a breach of the conditions of a mortgage on a time-share granted prior to the effective date of this section, the holder of the mortgage may conduct forfeiture proceedings of the interest of the time-share owner in the time-share under this section; provided, however, that if, at the same time the holder gives written notice of default to the time-share owner as provided in clause (a), the holder also gives written notice to the time-share owner stating that unless the time-share owner objects in writing to the non-judicial forfeiture within the 90-day period required by said clause (a), the holder will proceed to institute forfeiture proceedings pursuant to this section. The holder shall explain in the notice that the time-share owner has the right to a

judicial foreclosure conducted pursuant to chapter 244 if the owner asserts the objection within the specified time period and shall include with the notice an objection form together with an envelope addressed to the holder. Failure of a time-share owner to object in a timely manner as required by this clause shall be deemed a waiver of the owner's right to a foreclosure pursuant to chapter 244, which may include judicial foreclosure in a court action.

(g) In the case of a mortgage in which the term or maturity date of the mortgage is stated, section 33 of chapter 260 prohibiting the exercise of a power of sale, entry, possession or commencement of foreclosure proceedings after 5 years from the expiration of the term or maturity date shall not apply to forfeiture proceedings on mortgages for which an extension of the mortgage or acknowledgment or affidavit that the mortgage is not satisfied pursuant to sections 33 and 34 of chapter 260 has been recorded. For the purposes of this clause, completion of forfeiture proceedings shall be deemed to have occurred upon the recording of the deed and affidavit referenced in subclause (vi) of paragraph (2) of subsection (e).

CHAPTER 183B, § 29B

Section 29B. The rights of a time-share owner shall be subject to forfeiture in accordance with clauses (a) to (d), inclusive, for non-payment of assessments.

(a) Upon default in payment of assessments, and after all applicable cure periods have expired, the association shall provide written notice of default in payment of assessments to the time-share owner at the last known address thereof by certified and first class mail and shall provide a reasonable opportunity to cure of not less than 90 days from the date of the mailing of the notice letter.

(b) Prior to offering a time-share for sale for nonpayment of assessments, the association shall attempt in good faith and with reasonable precaution, to determine whether any person subject to forfeiture proceedings under this section is entitled to protection under the Service members Civil Relief Act of 2003, 50 U.S.C. App. §. 517, hereinafter "SCRA", in the same manner as set forth in clauses (b) and (c) of section 29A.

(c) With respect to forfeiture proceedings based upon nonpayment of assessments by the owner of a time-share license, the person or entity entitled to receive such payments shall have the option to: (i) foreclose in the manner prescribed in the time-share instrument or, if not prescribed, in accordance with this section; or (ii) sell by public or private sale, conducted in accordance with Part 6 of Article 9 of chapter 106 of the General Laws.

(d) If, after the expiration of the 90-day period, the time-share owner has not cured the default in the manner prescribed and the association has determined in good faith and with reasonable precaution that the time-share owner is not entitled to protection under SCRA, the association shall conduct a public auction sale under the following conditions:

(1)(i) notice of such sale shall be published once in a public newspaper with a general circulation in the town or county in which the time-share property is situated not less than 30 days before the date of the sale, calculated by excluding the date of publication of the first notice and the date of sale;

(ii) at least 30 days prior to the date of sale, a written notice of the time, date and place of the auction shall be mailed, by certified mail and first class mail, to the last known address of the time-share owner of record, and to the last known address of all parties having a lien or other interest of record in the time-share estate or time-share license that is junior to the assessment lien and to any party holding a first mortgage or first security interest of record on the time-share estate or time-share license.

(iii) the notice shall contain the name of the time-share owner, the book and page or document number of the deed or other instrument evidencing such time-share owner's fee interest, lease or license, as applicable, the date, time and place of the sale, a general description of the time-share, and the terms of the sale. If more than 1 time-share is to be included in the sale, all such

time-shares may be combined into 1 notice of sale, with 1 property description being given as set forth herein below;

(iv) the notice of forfeiture proceedings with respect to a lien for nonpayment of assessments on a time-share estate shall be printed in substantially the following form:

NOTICE OF SALE OF TIME-SHARE ESTATE OR ESTATES UNDER M.G.L. CHAPTER
183B, SECTION 29B.

By virtue of M.G.L. c. 183B, Section 29B and the constituent instruments of the ____ (name and address of time-share property), establishing a lien pursuant to M.G.L. c. 183B, Section 29 (a) on the time-share (or time-shares, if more than one) held by the time-share owner (or owners, if more than one) listed below, the time-share (or time-shares, if more than one) will be sold at Public Auction commencing at ____ on , 20__ at , Massachusetts. (For each time-share, list name and address of the time-share owner or owners, a general description of the time-share and the book and page or document number of the deed or other instrument evidencing such time-share owner's fee interest, lease, or license, as applicable).

TERMS OF SALE: (State the deposit amount to be paid by the purchaser at the time and place of the sale, and the times(s) for payment of the balance or the whole as the case may be. The time-share estates, if more than one, may be sold in individual lots or as a group.) Other terms to be announced at the sale.

Signed ____

Lienholder, or counsel; and

(v) the printed notice required under clause (iv), published in accordance with this section, together with such other or further notice, if any, shall be deemed a sufficient notice of the sale and the time-share shall be deemed to have been sold, and the instrument conveying the time-share from the foreclosing entity shall transfer the time-share subject to, and with the benefit of, all restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes, assessments and security instruments recorded prior to the recording of the notice of lien, whether or not reference to such restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes, assessments or security instruments is made in the said instrument of conveyance; provided, however, that no purchaser at such sale shall be bound to complete the purchase if encumbrances exist, other than those included in the notice of sale, which are not stated at the sale and included in the foreclosing entity's contract with the purchaser; and provided further, no such notice of sale shall be held to be invalid by reason of any error or irregularity which is neither substantial nor misleading.

(2)(i) Unless the notice of sale otherwise provides, the sale shall take place on the time-share property;

(ii) the sale shall be by public auction, conducted by a Massachusetts licensed auctioneer and at the discretion of the auctioneer, the auctioneer may dispense with the reading of the names of the time-share owners if there is more than one, the description of time-share if there is more than one and the recording information if there is more than one instrument.

(iii) all rights of redemption of the time-share owner shall be extinguished upon the sale of a time-share pursuant to this section;

(iv) the association, its manager, and any time-share owner may bid at the sale and the successful buyer at such sale shall take title to the time-share free and clear of any and all outstanding obligations of the prior time-share owner to the association, except that if the buyer intends to use the time-share during the same fiscal year of the association in which the time-share was purchased, the buyer shall be obligated to pay the assessment for that year;

(v) upon closing, the association shall provide the buyer with:

(A) a deed or other appropriate instrument transferring the rights to the time-share;

(B) an affidavit of sale attesting to compliance with all requirements of the forfeiture proceedings pursuant to this section and that the holder has attempted in good faith and with reasonable precaution, to determine whether any person subject to forfeiture proceedings under this section is entitled to protection under the SCRA; and

(C) a resale certificate as required by section 42, if requested by the buyer.

(vi) the buyer shall record the deed or other instrument and the affidavit of sale with the appropriate registry of deeds no more than the later of 90 days after the sale date, or 90 days after the receipt of the deed from the association. Upon such recording, the buyer shall be deemed to be a bona fide purchaser of the time-share and shall not be subject to claims by the prior owner thereof that the forfeiture proceedings under this section are invalid under SCRA; and

(vii) within 30 days after the closing and delivery of the deed or other instrument and affidavit of sale, the association shall mail a notice detailing the results of the sale to the last known address of the former time-share owner and all parties which held a junior interest to that of the holder.