CORRECTION:

In Volume 97 No. 2 Mass. Law Review (Dec. 2015), the article on close-corporation disputes contained an error on page 26 at footnote 50 and in the related main text, regarding futility as a basis for avoiding the statutory demand requirement before bringing a derivative action. The main text has been corrected to read, “Previously, Massachusetts courts had adopted an exception to the shareholder demand requirement if it was clear that a demand would be futile, but that exception was later eliminated,” and the accompanying footnote has been corrected to read, “Compare Johnston v. Box, 453 Mass. 569, 578 n.15 (2009) (recognizing elimination of the futility exception), with Pupecki v. James Madison Corp., 376 Mass. 212, 218 (1978) (excusing shareholder demand in a derivative suit brought by a minority shareholder in a close corporation).”

These changes have been made to the electronic copy of the article on the Massachusetts Bar Association’s website. The Editorial Board and the authors wish to thank readers Edward Cooley, Esq. of Quincy and Alan Kovacs, Esq. of Newton for calling this to our attention. — Editors
A GUIDE TO GATHERING AND USING LEGISLATIVE HISTORY IN MASSACHUSETTS

By Sean J. Kealy

INTRODUCTION

Lawyers must have the ability to interpret statutory language. Whether during criminal or civil litigation, advising a client on recent statutory changes or appearing before an administrative agency, the importance of statutes to the modern legal world is unquestioned. Although some jurists, notably Justice Antonin Scalia, question whether there can be such a thing as “legislative intent” and disregard materials that may be instructive to the court, most jurisdictions not only accept evidence of legislative intent, but seek it out. As Massachusetts Supreme Judicial Court Justice Robert Cordy wrote:

While researching legislative history in Massachusetts can be a tremendous challenge, where a question involving the Legislature’s intent is a close one, the legislative history can often be a decisive factor in determining which side is to prevail. The legislative history and knowing how it supports your position can make the difference between a good argument and a really compelling one.

Unfortunately, gathering legislative history in Massachusetts is difficult at best. Unlike Congress, Massachusetts does not have anything analogous to the comprehensive Congressional Record, informative committee reports, or a systematic archive of relevant records used to draft and justify bills. In fact, finding Massachusetts legislative history is more like a treasure hunt and the previous guides have become dated.

This article seeks to provide a reliable map for the practitioner seeking useful legislative materials beneath the Gold Dome. The first part of the paper briefly describes the uses of legislative history by federal and state courts and the evidence of legislative intent upon which judges have relied in the past. The second part describes the Massachusetts legislative process that creates evidence of the legislature’s and governor’s intent behind a law. This part also offers a guide to the most common citations a researcher may find in a legislative search. Part three covers how to find legislative history in Massachusetts, including: the available sources of information; reconstructing a complete procedural history for a statute; and a description of the evidence that may be helpful and where to find that information. Finally, there are two appendices, one with a checklist for finding legislative history and the other a list of useful contact information.

I. THE USE OF LEGISLATIVE HISTORY

Amazingly, in more than 300 years of American jurisprudence, there has never been an agreed-upon method for how judges should interpret statutory language. Some judges, most significantly Justice Scalia, limit their inquiries to the statutory language passed by the legislature, as understood by the rest of the legal code and the traditional canons of construction. Justice Scalia argues that it is useless for a judge to try and understand the mind or “psychoanalyze” the legislature, and that historical legislative material not actually voted...
upon is extraneous at best, and misleading at worst. One could argue that judges with little or no experience in the legislative process may overlook relevant evidence of legislative history or give undue weight to some other bit of the legislative record.

A. Massachusetts Practice

Most Massachusetts courts will start the interpretive process by attempting to determine the plain meaning of the statutory language. The Massachusetts Supreme Judicial Court has held that where the statutory language is clear and not open to multiple interpretations, there is no need to consider extrinsic aids. Still, a strict textualist reading of a statute is often criticized by scholars who contend that it allows great latitude to judges, especially when paired with the traditional canons of construction, to make the law say what they want it to say rather than to effectuate the will of the legislature.

Few judges, however, are strict adherents to Justice Scalia’s philosophy of textualism; Justices Frankfurter and Breyer have been among the majority of judges who will rely on available historical materials if the plain meaning of the statute is unclear. Professor William Eskridge recently predicted that courts will rely even more on legislative history materials as technology makes state legislative materials more readily available.

Massachusetts courts are clearly empowered to look for “reliable guideposts” that will help them construe legislative intent. These extrinsic aids can be extremely broad, and can include “the statute’s ‘progression through the legislative body, the history of the times, prior legislation, contemporary customs and conditions and the system of positive law of which they are part.’” In some instances, the court may make “an especially thorough inquiry into legislative motive, including ‘such circumstantial and direct evidence of intent as may be available.’” In other cases, the court has looked for legislative intent by considering “the cause of [the law’s] enactment, the mischief or imperfection to be remedied and the main object to

4. Justice Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, 29-36 (Princeton University Press, 1997). Rather than relying on legislative history, Justice Scalia prefers a textualist reading of statutes. *Id. at* 23-25. Justice Scalia quotes with approval a concurrence by Justice Robert H. Jackson: “When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of congressmen and act according to the impression we think this history should have made on them. Never having been a congressman, I am handicapped in that weird endeavor. That process seems to me not interpretable. The Members of Congress intended otherwise... except to the extent that intent is manifested in the only remnant of ‘history’ that bears the unanimous endorsement of the majority in each House: the text of the enrolled bill that became law.” (emphasis in original)). Others argue that legislative history may be manufactured and is, therefore, inherently deceptive. For example, it is often noted that a great deal of what is printed in the Congressional Record was never spoken on the floor of Congress but was inserted afterward. The statements or material appear to be part of the debate, but there was, in fact, no opportunity to question or debate the material in an open session of a chamber. See generally Gregg v. Barnett, 771 F.2d 539, 540-41 (1st Cir. 1985) (discussing the Revise Privilege that allows members of Congress to insert or revise floor comments in the Congressional Record).

5. See supra note 4.


8. See William Popkin, *Materials on Legislation: Political Language and the Political Process*, 541-42 (5th ed. Foundation Press, 2009) (“Textualism... seems to transform statutory interpretation into a kind of exercise in judicial ingenuity. The textualist judge treats questions of interpretation like a puzzle to which it is assumed there is one right answer. The task is to assemble the various pieces of linguistic data, dictionary definitions, and canons into the best (most coherent, most explanatory) account of the meaning of the statute. This exercise places a great premium on cleverness. In one case the outcome turns on the placement of a comma, in another on the inconsistency between a comma and rules of grammar, in a third on the conflict between quotation marks and the language of the text.”) (quoting Thomas W. Merrill, “Textualism and the Future of the Chevron Doctrine,” 72 WASH. U.L.Q. 351, 372 (1994)).


be accomplished, to the end that the purpose of its framers may be effectuated."

At times, the use of extrinsic aids in Massachusetts can be extensive and can even be used to overcome a plain reading of the statute. In Finch v. Commonwealth Health Insurance Connector, the Supreme Judicial Court held that, although the plain text might have supported the commonwealth’s argument that a change to the state’s health laws was not discriminatory, the legislative history provided “persuasive evidence of legislative purpose” to the contrary. The court cited a bill reported by the Senate Ways and Means Committee; the comments of the Senate Ways and Means Committee chair as reported in the Boston Globe; the conference committee report; the governor’s message and amendment on the pertinent section; changes made to the bill as a result of the governor’s message; the governor’s signing statement; the lack of statements within the legislative record that supported the commonwealth’s theory of the case; and the evolution of successor statutes. The court, therefore, effectively used a variety of aids to determine legislative intent and overcome a possible plain meaning reading of the statute.

The First Circuit Court of Appeals has also relied upon Massachusetts legislative history if it is available. The “abortion clinic buffer zone” cases provide an example of legislative history’s aids to the court’s decision. In the two McGuire v. Reilly cases, although the court stated that the “Legislature’s subjective intent is both unknown and unknowable,” the court looked to the available legislative record to determine if a statute restricting protests near reproductive health centers met the strict scrutiny requirements for restrictions on First and Fourteenth Amendment rights. The detailed legislative history was largely provided in an amicus brief submitted by one of the bill’s sponsors, Senator Cynthia Creem. The court relied upon the original bill filed in 1999; testimony from the Criminal Justice Committee hearing on the bill that established a history of harassment and intimidation near reproductive health clinics; written statements from bill sponsors to the committee, explaining the need for a new statute; an advisory opinion by the Massachusetts Supreme Judicial Court on the constitutionality of the Senate’s proposal; and the Senate’s engrossed bill, which included an extensive “findings and purposes” section. In 2007, the legislature amended the buffer zone law to address problems with enforcement identified by law enforcement agencies. Once again, in McCullen v. Coakley, the federal courts decided whether the statute violated protestors’ rights to free speech. In those cases, the District Court relied upon transcripts from the Joint Committee on Public Safety and Homeland Security’s hearing on the bill; the act’s emergency preamble stating that public safety required the law to take effect immediately; and a written opinion by the Attorney General to the Boston and Brookline Police describing the Act’s modification to the law. The First Circuit Court of Appeals likewise cited hearing testimony from law enforcement officers, clinic workers, and legislators describing the difficulties enforcing the 1999 statute and a lack of arrests.

B. Specific Evidence of Legislative Intent

What extrinsic evidence may be offered to prove legislative intent? The answer depends on the situation. As Justice Frankfurter wrote, "No item of evidence has a fixed or even average weight. One or another may be decisive in one set of circumstances, while of little value elsewhere. A painstaking, detailed report by a Senate Committee bearing directly on the immediate question may settle the matter. A loose statement even by a chairman of a committee, made impromptu in the heat of debate, less informing in cold type than when heard on the floor, will hardly be accorded the weight of an encyclical.

Courts have previously relied on the following types of evidence:

- court decisions from other jurisdictions;


15. Finch, 461 Mass. at 239.

16. Id. (citing S. Doc. 3, 186th Gen. Ct., 1st Sess. at §77 (Mass. 2009)).


19. Finch, 461 Mass. at 241 (citing H. Doc. 4139, 186th Den. Ct., 1st Sess. (Mass. 2009)). In Massachusetts, the governor does not have to either veto or sign a bill enacted by the legislature, but may return the bill with suggested changes and a message explaining his objections or proposed changes. See Mass. Const. pt. II, Art. II, amended by Art. LVI and Art. XC, §3.


21. Id. at 241-42 (citing H. Doc. 4206, 186th Gen. Ct., 1st Sess. (Mass. 2009)).

22. Id. at 242 ("Neither the governor, the chairman of the Senate Ways and Means Committee, nor any other legislator made reference to the national immigration policy of PRWORA.").
• titles; 37
• documents created during the legislative process; 38
• bill analysis; 39
• floor statements of legislators; 40
• amendments during the legislative process; 41
• preambles; 42


The evidentiary value of the various summaries found in a committee’s files may vary, however. At times advocacy groups — including corporations, nonprofit organizations, unions, trade associations, and executive agencies — will produce documents with a clear point of view and one-sided opinions on various provisions of the bill. This information may be very pertinent to how the legislature saw the state of the law at the time or the circumstances that required a legislative fix. These documents, however, may also contain biased opinions on the law or effects of potential legislation. Summaries prepared by legislative staff should, however, have the greatest evidentiary value.

40. Bd. of Appeals of Hanover, 363 Mass. at 353 n.13 (relying upon a statement made in debate by an individual legislator as quoted by the State House News Service (SHNS)). The Legislative Research Bureau report points out that relying on floor statements reported by the privately operated SHNS is “unusual.” Mass. H. 172-5882 at 44. At other times, the court has held that statements made and opinions held by individual legislators are an inappropriate source from which to discover the intent of legislation or the meaning of the statute’s language, even when the meaning is not clear. McKenney v. Commission on Judicial Conduct, 377 Mass. 790, 799 (1979).

41. Finch, 461 Mass. at 240 (court relied upon revised language contained in a conference committee report; amendments proposed by the governor; and the partial adoption of those amendments); Passatempo v. McMenimen, 461 Mass. 279, 288-89 (2012) (court relied on addition of certain provisions in third and final readings); Bd. of Appeals of Hanover, 363 Mass. at 497 (court relied upon an examination of the changes incorporated in the House Committee on Ways and Means redraft).

42. An emergency preamble is a procedural mechanism used by the legislature to make a law effective immediately, rather than 90 days after it has been signed by the governor. See art. 48, “The Referendum, of the Constitution of the Commonwealth;” Vittandos v. Sidduth, 41 Mass. App. Ct. 515, 518 (1996). Although the preamble often contains a very short or broadly worded rationale for the need to declare the statute an emergency measure, courts have used them to help interpret statutory language. See McCullen v. Coakley, 571 F.3d 167, 176 (1st Cir. 2009); Commonwealth v. Milican, 449 Mass. 298, 305 (2007). Although statements regarding the scope or purpose of an act found in a preamble “may aid in the construction of doubtful clauses,” the preamble cannot control the plain language of the statute. Brennan v. The Governor, 405 Mass. 390, 395-96 (1989). Along these lines, a general statement in the preamble that the law is meant to increase criminal penalties does not mean that all of the statute’s provisions should be seen as penal in nature. Gordon v. Registry of Motor Vehicles, 75 Mass. App. Ct. 47, 51 (2009) (“General statements in the preamble of a statute do not control its specific provisions.”).

43. Findings of fact made by the legislature within a statute have precedential value, and the court is not free to hold a law inapplicable to a case because it disagrees with the fact determinations on which the rule was explicitly or implicitly based. Massachusetts Med. Soc’y v. Dukakis, 637 F. Supp. 684, 689-90 (Mass. 1989).


45. Finch, 461 Mass. at 240-41.

46. Id. at 242 (“Neither the governor, the chairman of the Senate Ways and Means Committee, nor any other legislator made reference to the national immigration policy of PWORA.”).

a court is fact and case specific. Therefore, the Massachusetts State Library librarians suggest that it “can be helpful to review all legislative documents listed in the bill history and to examine all texts of amendments in order to reconstruct the development of the law.” Any one of these documents can be illuminating with an understanding of the legislative process.

C. The Challenge

The problem with legislative history in Massachusetts is not that judges refuse to consider it, but that materials rarely exist in an organized, accessible manner. All too often, legislative history was either nonexistent or unhelpful in interpreting a statute or general law. A lack of legislative history often forces courts to rely on other methods to discern legislative purpose or to clarify an ambiguity. Courts often rely on textual methods of interpretation, including plain language, reading the statute as a whole and traditional report views of the statute. When interpreting a statute, judges rely on legislative history to resolve matters of statutory interpretation, such as statutory interpretation. They also rely on legislative history to resolve matters of legislative process. They are, of course, the primary source of interpretation. Rotondi v. Contributing Ret. Appeal Bd., 15 Mass. App. Ct. 19, 21 (1982), the court could not find legislative history “which sheds light upon the legislative intent in adding the language at issue, which has remained substantially unchanged since its insertion by St. 1950, ch. 670, § 2.” The amendment “living together,” within a retirement benefit statute, had to be resolved by looking at analogous statutes and cases under the Workmen’s Compensation Act.

50 / Massachusetts Law Review

48. City of New Bedford v. New Bedford, Woods Hole, Martha’s Vineyard and Nantucket S.S. Auth’y, 330 Mass. 422, 429 (1935). When interpreting St. 1948 ch. 544, the court relied upon the report and recommendations of a special commission set up by a legislative resolve to investigate the subject of water transportation between New Bedford, Woods Hole, Martha’s Vineyard and Nantucket. The court stated, “We may consider this report for any light it may shed upon the construction of the Act of 1948.” Id.


51. If a statute is read in a particular way by the legal community, and the legislature “acquiesces” to this interpretation by a long period of inaction, the court has held that this is strong evidence of the statute’s proper meaning. Clark v. Moody, 17 Mass. 145, 148 (1821); Tremont Tower and Condo, LLC v. George BH Macomber Co., 436 Mass 677, 686-87 (2002) (widespread industry practice, standing alone, does not necessarily dictate interpretation of a statute, but the practice may be helpful discerning the legislature’s intent); Xtra Inc. v. Commissioner of Revenue, 380 Mass. 277, 281 (1980) (long-held construction by the commissioner of Revenue, 380 Mass. 277, 281 (1980) (long-held construction by the accounting profession of a tax statute persuasive as to statute’s meaning).

52. Interpretations by commentators, while not controlling, are useful for discerning the intent of the legislature in enacting a law and the public’s understanding regarding the enactment. See Wilcox v. Riverside Park Enters., Inc., 399 Mass. 533, 539 n.14 (1987) (citing C. Dallas Sands & Norman J. Singer, Sutherland’s Statutes and Statutory Construction, 2A §49.08 (4th ed. 1984)).

53. The courts give substantial deference to the expertise and statutory interpretation of the agency charged with primary responsibility for administering a statute. A state administrative agency has considerable leeway in interpreting a statute it is charged with enforcing, unless a statute unambiguously bars the practice may be helpful discerning the legislature’s intent); Xtra Inc. v. Commissioner of Revenue, 380 Mass. 277, 281 (1980) (long-held construction by the accounting profession of a tax statute persuasive as to statute’s meaning).


56. Finch, 461 Mass. at 242 n.8.


60. For example, in Donnelly v. Contributory Ret. Appeal Bd., 15 Mass. App. Ct. 19, 21 (1982), the court could not find legislative history “which sheds light upon the legislative intent in adding the language at issue, which has remained substantially unchanged since its insertion by St. 1950, ch. 670, § 2.” The ambiguous language, “living together,” within a retirement benefit statute, had to be resolved by looking at analogous statutes and cases under the Workmen’s Compensation Act. Id. This, however, is not always the case. In Greaney, 1995 WL 1146185, at *5 n.3, the court rejected the use of outside sources to discern legislative intent, such as commentary from the Boston Bar Journal that detailed the events leading to the enactment of the Equal Rights Act.

61. This is, of course, the primary source of interpretation. Rotondi v. Contributing Ret. Appeal Bd., 463 Mass 644, 648 (2012) (the language of the statute is the principal source of insight into legislative purpose.) The court in Rotondi stated “that statutory language should be given effect consistent with its plain meaning and in light of the aim of the Legislature unless to do so would achieve an illogical result.” Id. (quoting Sullivan v. Brookline, 435 Mass. 353, 360 (2001)).

62. Rotondi, 463 Mass. at 648 (quoting Cote-Whitacre v. Department of Pub. Health, 446 Mass. 350, 358 (2006) (Spina, J. concurring)) (“Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and courts must interpret the statute so as to render the legislative effect, effective consonant with reason and common sense.”).
canons of statutory interpretation such as ejusdem generis. Courts may also look to similar statutes or case law in other jurisdictions to clarify a statute’s meaning. In Ortiz v. Hampden County, for example, the Massachusetts Appeals Court relied upon interpretations of the Federal Tort Claims Act and an Alaska case to interpret a Massachusetts statute. In another case, Anawan Insurance Agency Inc. v. Division of Insurance, the Appeals Court relied on a presumption that subsequent amendments indicate legislative intention when it could not find legislative history or appellate decisions on a statute.

The main obstacle to using legislative history is the lack of a central archive of legislative materials. In 1982, the Legislative Research Bureau called for a central repository of materials that reveal legislative intent, with a uniform policy on retaining relevant material, “to insure that the raw data used by the researcher, sponsor, bill drafter and other parties would be available for an extended period of time.” To date, this has not happened. Because there is no central archive of legislative materials, a careful researcher must look for documents in several places. Knowing the legislative process, and the path any given bill took through it, gives the researcher a sense of where to look for key legislative history documents. The next section will give a brief description of the legislative process.

II. Massachusetts Legislative Process

The legislative process in any jurisdiction is complex, governed by established rules and is meant to subject all legislative proposals to scrutiny from many perspectives. The process allows multiple drafters, with perhaps widely divergent goals in mind, to refine proposed legislation. Part A briefly describes the primary stages of legislation: bill filing; committee review and revision; the readings and floor debate; conference committees; and executive action. Part B describes the various citations that are useful for legislative history researchers.

A. Legislative Process Stages

1. Bill Filing

During each two year session of the Legislature, as many as 6,000 bills from a variety of sources may be filed for consideration. Most bills are filed by legislators, who electronically file the bill language and a petition with the House and Senate clerks by the “filing deadline,” a few weeks after a new legislative session begins. A small percentage of bills are “late filed” during the rest of the session. The governor may also file bills at any time by sending an executive message, petition, and bill to the House clerk. Other entities can also produce bills, including a joint standing committee; a ways and means or ethics committee; state administrative agencies; executive officers such as the attorney general, treasurer, secretary of state and auditor; municipalities; special commissions; and any state citizen or

63. Sheehan v. Weaver, 467 Mass. 734, 472-43 (2014); Banuski v. Dorfman, 438 Mass. 242, 244 (2002). This traditional rule of construction indicates a more limited contextual meaning for a word that in isolation might have a broader meaning.


67. See the efforts of Boston University School of Law to collect and make available legislative documents. See infra text following note 171.

68. The General Court operates under three sets of rules available in their entirety on the legislature’s website. The Joint Rules may be found at: http://www.malegislature.gov/people/clerksoffice/jointrules. The Senate Rules may be found at: http://malegislature.gov/people/clerksoffice/senate/rules. The House Rules may be found at either: http://malegislature.gov/people/clerksoffice/house/rules, or http://mass.gov/legis/journal/desktop/2013/houserules.pdf. The Manual of the General Court is published for each session and includes not just the rules but also information on the current legislators. The manual is available for sale in the State Bookstore, which is located at the State House, Room 116.

69. Bills enacted by the legislature and signed by the governor are either “acts” or “resolves.” Acts typically amend the Massachusetts General Laws and have a general effect. Resolves have a more limited effect, often to establish a special committee or investigate a specific issue. For a specific issue and make findings and legislative recommendations. The commission concludes its business, it will present its report to the general court and it will receive either a House or Senate document number. Often, commissions are required to file with both chambers, in which case the clerks will decide what number to assign the report. Commission reports for most of the 20th century can be found in the book, Index of Special Commission Reports Authorized by the General Court, 1900-1988, with an update covering reports through 1994. The index is arranged by subject keyword, with references to the year of the report and House or Senate document number. State Library of Mass., supra note 3, at 1.2.4.
group.80 The House and Senate clerks assign each filed bill a number, and refer the bill to the appropriate committee for review and revision.

2. Committee Review

Nearly every bill will, at some point, be reviewed by at least one of the legislature's 28 joint committees.81 The joint committees are bipartisan and comprised of six senators and eleven representatives.82 The committees are led by co-chairs, with one appointed by the Senate President and the other by the House Speaker.83 The committees are obligated to hold public hearings on each of the bills assigned to them,84 but given the large volume of matters assigned to some of the committees, up to 50 similar bills may be grouped together into a single hearing. Notices of such hearings are sent to the Senate and House clerks and are published on the legislature's official website.85 Committees conduct hearings according to the committee rules, which are on file with the clerks.86 At most hearings, the committee will typically hear from anyone who wishes to speak for or against a bill, including other legislators, government officials, representatives of groups or organizations, lobbyists, and people speaking on their own behalf. The committee will also typically receive written testimony or exhibits which complement the oral testimony.87

After holding a hearing, the committee typically informally "studies" the matter for a period of time when the committee staff gathers more information on the subject, seeks out proposed amendments, meets with proponents and opponents, and consults with other members and chamber leadership.88 When the chairs are ready to move a bill out of committee, they schedule an "executive session," which may or may not be open to the public.89 The committee may vote on the original bill, but it is more likely to have amended the original language. In the event that it has amended the original language, the committee must then decide to which chamber to report the bill.90 Unlike Congressional committee reports, these reports are perfunctory.91 A bill reported with a recommendation that affects state finances will then be referred to either the House or Senate Committee on Ways and Means.92

80. The Constitutional Right to Petition guarantees that all citizens and groups can have a bill filed on their behalf by their member of the House or Senate. Mass. Const. pt. 1, art. XIX. Citizens may also file petitions under the right to free petition, but without the endorsement of a senator or representative. Petitions are typically held by the clerks. State Library of Mass., supra note 3, at 1.2.1. If the member agrees with the proposal, he or she will often sign onto the petition and become the legislative sponsor of the bill. If the member does not agree with the proposal, she will file the petition and become the legislative sponsor of the bill. By the Request of a Citizen’s Name, signaling her disagreement to her colleagues. The Constitution also allows the electorate to approve changes to the general laws through the initiative process. These rules are filed with the clerks and are public records.

81. See Mass. Gen. Ct. Joint R. 1. The joint committees, which are created and governed by Joint Rule 1, consist of: Children, Families & Persons with Disabilities; Community Development and Small Businesses; Consumer Protection and Professional Licensure; Economic Development and Emerging Technologies; Education; Elder Affairs; Election Laws; Environment, Natural Resources and Agriculture; Financial Services; Health Care Financing; Higher Education; Housing; Judiciary; Labor & Workforce Development; Mental Health & Substance Abuse; Municipalities and Regional Government; Public Health; Public Safety & Homeland Security; Public Service; Revenue; State Administration and Regulatory Oversight; Telecommunications, Utilities & Energy; Tourism, Arts & Cultural Development; Transportation; and Veterans & Federal Affairs. See http://www.malegislature.gov/Committees/Joint/rules. Within four weeks of appointment, the joint committees must adopt rules of procedure. These rules are filed with the clerks and are public records. See Mass. Gen. Ct. Joint R. 1. The House and the Senate also have standing committees that are comprised entirely of members from that chamber. The Senate standing committees consist of: Bills in the Third Reading; Bonding; Capital Expenditures & State Assets; Post Audit & Oversight; Ethics & Rules; Global Warming & Climate Change; Steering & Policy; and Ways & Means. See Mass. Senate R. 12. The House standing committees are: Bills in the Third Reading; Bonding; Capital Expenditures & State Assets; Post Audit & Oversight; Ethics; Global Warming & Climate Change; Steering, Policy & Scheduling; Ways & Means; Personnel & Administration; and Floor Divisions. See Mass. House R. 17. The standing committees, however, typically have a more limited role and may only consider bills sent to them by a joint committee.


84. Mass. Gen. Ct. Joint R. 1B (a joint standing committee shall hold a public hearing on each matter referred to it in each legislative session); Mass. Gen. Ct. Joint R. 1D (hearings to be open to the public).

85. Mass. Gen. Ct. Joint R. 1D (a hearing schedule must be sent to the clerks at the beginning of a session from the start of the session until the fourth Wednesday in June). The list for hearings can be found on the legislature's home page at: http://www.malegislature.gov/Events/Hearings. This page lists each committee hearing and where it will take place. Most hearings take place in the State House, but some are conducted outside of the building. A limited number of hearings are also videotaped, which will be noted on the web page.

86. See Mass. Gen. Ct. Joint R. 1 (committees must submit committee rules to clerks within four weeks of appointment).

87. Since few of the hearings have been recorded, submitting written testimony is a good way to put an organization's or person's views "on record" with the committee. Written testimony will also typically be circulated to committee members who could not attend the hearing.

88. See, e.g., Mass. Senate R. 16A.


91. The members of a committee, but more often just the chair from the chamber where the bill will be reported, will sign a card that states the bill is being reported by her committee with an "ought to pass," "ought not to pass," "ought to pass with an amendment" or "discharged to another committee" recommendation. See Mass. Gen. Ct. Joint R. 10A. The House and Senate rules govern how a chamber processes adverse reports. Typically, the chamber will vote to accept the report and the bill dies. Occasionally, the chamber will resubmit the bill to the reporting or another committee for further study. See Mass. Senate R. 30; Mass. House R. 32. A committee may also place bills into a “study order,” which allows the committee to sit and work on legislation during recesses. The vast majority of bills sent to study never reemerge for further consideration. See Mass. Gen. Ct. Joint R. 10A. Interestingly, Mass. Gen. Ct. Joint R. 13 allows committee members to include a “brief statement of intent with all papers intended for presentation to the general court,” but such a statement is not required. See Mass. Gen. Ct. Joint R. 13. In practice, such statements are rarely, if ever, filed. Further, bills and resolves reported by a joint committee shall be made available to all members electronically and to the public via the internet. See Mass. Gen. Ct. Joint R. 6.

92. If the potential associated cost of a proposed bill exceeds $100,000, the reporting joint committee is required to file a fiscal note with its report that details the estimated cost or the fiscal impact of the proposed legislation. These fiscal notes are to be filed with the clerks and made available to the public. See Mass. Gen. Ct. Joint R. 4A; Mass. Senate R. 27; Mass. House R. 33. See also Mass. Gen. Laws ch. 3, §38A.
3. Readings and Floor Action

Bills that survive the committee process are given three readings in each branch of the legislature.93 When a bill is read for the first time at a session it appears in the House or Senate Journal as favorably reported by a committee. At this point, no debate is permitted, but the bill is either referred back to a committee or placed on the calendar for a second reading.94 Bills in second reading are often “held” in the House or Senate committees on Steering and Policy or Rules until the leadership wishes to take a matter up for debate.95 A majority vote is required to advance a bill from second to third readings and debate is permitted during the second and third readings. Bills ordered to a third reading are sent to the Committee on Bills in the Third Reading, which works closely with the chamber’s legal counsel to ensure that the bill is constitutional and properly drafted.96 Either branch may defeat, amend or substitute new language for a bill during second and third readings.97 If a bill is significantly changed at any point in the process, the clerk for the chamber making the changes may assign the bill a new number to distinguish it from the original proposal. Once a branch votes in favor of a bill it is considered to be “engrossed” and sent to the other branch to repeat the readings process.98 If the second branch makes changes to the bill, it must be returned to the originating chamber for concurrence.

4. Conference Committees

If the two chambers continue to disagree about the exact language of the bill, the presiding officers and minority leaders appoint a six-person conference committee.99 Three members, including one member of the minority party who voted for the engrossed bill, are appointed to represent each chamber. A conference committee is often given great latitude to redraft the bill to reach an agreement between the chambers. If the conference committee can resolve the differences in policy and drafting and gain the approval of at least two members of each chamber, the revised language is sent to the two chambers for a vote on engrossment.100 The final bill is then “enacted,” first by the House and then the Senate. After enactment in the Senate, the bill is sent to the governor for his “approbation.”101

5. Executive Action

After receiving the enacted bill, the governor has 10 days to consider and decide what to do with the bill. If he signs it, any amendments to the General Laws typically become effective 90 days after approval.102 If the legislature or governor attaches an “emergency preamble” to the legislation, the changes to the General Laws take effect immediately.103 The governor may also send the bill back to the legislature with amendments, often with an explanatory message.104 The legislature may then debate the amendments and repeat the enactment procedure.105 The governor may also veto the legislation, in which case the bill is sent back to the chamber where it originated for a debate and vote to override the veto.106 A two-thirds vote in both chambers is required to override a veto.107 If the governor takes no action within ten days, the bill becomes a law without his or her signature.108 If, however, the legislature goes out of session during the ten days and the governor fails to sign the bill, the legislation dies by a “pocket veto.”

B. Citations

Researching legislative history involves finding and using several citations. The most common are citations to the Massachusetts General Laws, to session laws and to bills.

93. See Mass. Senate R. 23 (no bill shall be proposed or introduced unless received from the House or a committee); and Mass. Senate R. 28 and Mass. House R. 39 (no bill or resolve shall be engrossed without three readings on three several days). The bills are read by their title, unless an objection is made. See, e.g., Mass. Senate R. 29.
95. These committees do not issue reports, but rather simply make scheduling priorities. See Mass. Senate R. 32A (Committee on Steering & Policy); Mass. House R. 7A (Committee on Steering, Policy and Scheduling); Mass. House R. 7B (Committee on Rules); Mass. House R. 41 (Committee on Steering & Policy).
96. See Mass. Gen. Ct. Joint R. 22A; Mass. Senate R. 33; Mass. House R. 22. Upon engrossment, the clerks send bills to the Committees on Bills in the Third Reading of the two branches, which, acting jointly, examine the bills to “ensure accuracy in the text, that the legislation is correct as to form, that references to previous amendments to any particular law are correct, and to ensure proper consistency with the language of existing statutes.” Mass. Gen. Ct. Joint R. 22A. This work is coordinated with the Senate and House Counsels, with the approval of the majority and minority leadership of each branch. The Committees on Bills in the Third Reading may make needed corrections that are not substantive. Id.
97. See, e.g., Mass. Senate R. 31 & 31A (amendment process). All matters before the House and Senate must be posted online for the members and the public 24 hours in advance of all roll call votes. Mass. Senate R. 33A; Mass. House R. 33A.
98. See Mass. Senate R. 26; Mass. House R. 34 & 35. The clerks make the results available on the official general court website within 48 hours of the vote. See Mass. Senate R. 8A; Mass. House R. 84A. A clerk may waive this requirement if circumstances dictate, but paper copies must be available. Id.
100. Id.
102. Mass. Const., art. XLVIII. Days are counted in succession, including holidays and weekends, and acts become effective at 12:01 a.m. on the 91st day. This delay allows citizens to initiate the Referendum Petition process to repeal unpopular legislation. The Massachusetts Legislative Reporting Service printed a list of acts and their effective dates in the Guide To Massachusetts General and Special Acts until the Reporting Service ceased operations in 2008. The guide is available at the State Library, and can also now be found on Instatrac. See www.instatrac.com (MassTrac).
104. See Mass. Const., pt. II, art. II.
107. Id.
1. Massachusetts General Laws

The Massachusetts General Laws are the codified version of the aggregate session laws passed during the long legal history of the commonwealth. These statutory laws are organized by subject matter into five parts and 282 chapters.\(^{109}\) The commonwealth has published an official edition of the General Laws every two years since 1984.\(^{110}\) Private legal publishers such as West and Lexis publish annotated versions of the General Laws and after each section will note the various session laws that amended that particular statute.

Examples: M.G.L. ch. 272 §5
          272 M.G.L. 5

2. Session Laws, or the Acts & Resolves

When the legislature passes a bill and it is signed by the governor, it is called a session law. The session law may be an act or a resolve, and depending on the law’s complexity, may amend several parts of the General Laws. The session law may also contain provisions, such as establishing a special commission or an appropriation, that is never included in the General Laws. This is especially true in the annual budget, which may include hundreds of “outside sections” that amend the laws. The Secretary of State numbers session laws chronologically according to when the bill becomes law. These are the chapters of the session’s legislation. A researcher should note all of the session laws that created or amended a General Law.

Examples: 2012 Acts 45 Section 3
          St. 2012, ch. 45 §3

3. Bill Numbers

The House and Senate clerks assign a number to each document, or bill, they receive. These include proposed acts, proposed resolves, messages from the governor, study orders, etc. If a bill is significantly changed during the legislative process, the clerks may assign the revised document a new bill number.

Examples: 2013 HB 1234 (House Bill)
          H. 1234 (House Bill)
          2011 SB 684 (Senate Bill)
          S. 684 (Senate Bill)

III. FINDING LEGISLATIVE HISTORY

By tracing how a bill moved through the legislative process, the documents collected and created by the legislature during the process, and how the bill language was — or was not — changed, a researcher may find clues as to legislative intent. In this part, section A will describe the several resources available, both on the internet and in more traditional locations such as the State Library and the State Archives. Section B will describe how to reconstruct a comprehensive procedural history for a particular bill. Section C will describe the documents that may be produced during the legislative process. For each of the second and third parts, I will reference how to find key information through the various web-based and traditional sources.

A. Sources of Legislative History

I. Traditional Resources

The State Library of Massachusetts

Established in 1826, the State Library has an extensive collection of legislative documents and is a federal and state depository for official documents.\(^{111}\) Legislative history research is one of the most common types of research with which the staff assists patrons. The library holds hard copies of the Acts and Resolves, bill language and the Journals of the legislature going back to the colonial era. The library also keeps the Bulletin of Committee Work and Legislative Record, which records the activities of the legislature.

The library offers a growing amount of information online, including Acts and Resolves since 1692; nearly every bill ever filed;\(^{112}\) House Journals since 2001 and Senate Journals since 1986;\(^{113}\) and records for special legislative commission reports, state documents and legal treaties, some going back as far as 1802.\(^{114}\) Finally, library patrons can access materials produced by sources that normally require a subscription. Library patrons can access the State House News Service (SHNS)\(^{115}\) archives by using microfiche for SHNS files from 1972 to 1986, as well as online materials from 1986 on the library’s computers.\(^{116}\)

Archives of the Commonwealth of Massachusetts

The Archives of the Commonwealth of Massachusetts is a division of the Secretary of State’s Office. The Archives collects, arranges, and preserves records that were produced by the state government, but which are no longer being actively used by the government. There are two categories of records kept by the Archives: records that the Archives has a legal mandate to receive and hold, and records those that, although there is no legal obligation to preserve, the Archives believes worthy of preserving and has acquired by a mutual agreement with an office or agency.\(^{117}\) The Archives also keeps a variety of legislative papers including Journals of the General Court dating from 1628, Acts and Resolves from 1686, legislative

109. An unofficial version of the general laws may be accessed at: http://www.malegislature.gov/laws. Some of the commonwealth’s laws date from the time of the state’s founding in 1780 and even back to the colonial period. Recodifications took place in 1836, 1860, 1882, 1902, 1921 and 1932. Each revision added all new laws to the code, deleted repealed laws, restructured chapters and removed extra verbiage. Mass. Legislative Research Bureau, Determination of Legislative Intent, H. 172-5882, 2nd Sess. at 33-34 (1982). In 1982, the Legislative Research Bureau reported that, “It has been suggested that another recodification is long overdue, but at this writing, none has been completed.” Id. at 34. Thirty-two years later, there still has been no serious attempt at recodification.


documents, dating to 1775, and a wealth of documents generated by the Executive branch, including the governor’s legislative files from 1964 to 2006.

Individual Legislator and Committee Offices

Various legislative offices will have files on pieces of legislation on which they worked. These files may be found with the sponsor of a bill, the committee office or senate chair’s office for committees that considered the bill, and the offices of members who worked on the bill during a conference committee. The quality of these files varies greatly; they are often thrown away at the end of a session, and they are only rarely transmitted to either the State Library or Archives. After determining all of the stops a bill made during the legislative process, each of the relevant offices should be contacted to see what it has and may be willing to share.

2. Internet Sources
The Legislature’s Website

The legislature’s website should be the researcher’s first stop. It is free, contains very useful information about the legislators, committees, rules and legislation, and is fairly easy to use, and seems to be improving all the time. From the web page, one can find links to the state Constitution, the General Laws, session laws and the Legislature’s rules.

Westlaw Next

Westlaw, the electronic legal research tool, offers some legislative information. It is, however, an amalgamation of publicly-available information that requires a subscription and can become quite expensive depending on the researcher’s skill navigating Westlaw’s databases and search engines. Although Westlaw is useful for making sure that the researcher has not missed anything, better, cheaper options exist.

MassTrac

MassTrac, also known as “InstaTrac,” is a private company that provides a bill tracking service for its subscribers. The company’s website holds a wealth of material on the Massachusetts Legislature and bills dating to the 1995 to 1996 session, with more comprehensive coverage after 2005. This service tracks bill text and procedural history, committee hearings and agendas, bill testimony, press releases, news on the executive branch and legislator contact information. The public can access MassTrac free of charge at the State Library.

State House News Service

The State House News Service (SHNS) is a privately-owned news service consisting of several reporters with offices located in the State House. Although a private entity, SHNS has historically produced unbiased and reliable information with a lack of editorial comment. SHNS sells its reporting to other news outlets and to individual and organizational subscribers. The SHNS can be a rich resource for legislative history. The service includes reports on what was said on the floor during formal session debate, reports on what transpired during committee hearings, articles written about specific bills, video and audio archives that include press conferences on issues or bills, and an archive of press releases issued by legislators or executive branch officials. The public can also access the service free of charge at the State Library.

B. Reconstructing a Bill’s Procedural History

Reconstructing the path a bill took through the legislative labyrinth is an essential first step to collecting legislative history. By reviewing every action taken on a proposal, often under several bill numbers, the researcher assembles a complete picture of which committees and legislators had an influence on the formation of the statute. Traditionally, this task required going to a law library and piecing together the bill history by using the Bulletin of Committee Work and Legislative Record, commonly known as the “Bulletin.” For statutes passed before 1997, one must still use the Bulletin and other printed materials. For more recent statutes, however, a tremendous amount of information is now on the internet. This section will describe how to reconstruct a bill’s procedural history by using the legislature’s web page. To illustrate this process, I will show the bill history for a 2013 law, “An Act Relative to Background Checks.”

The legislature’s website has a page entitled “Session Laws,” where one can search the acts passed since 1997 and the resolves passed since 2001. From this page, the session laws are searchable by year, chapter or keyword. It is often easiest to click on the year the statute became law and browse the list of statutes. As is true in the Bulletin, the statutes are arranged by year and chapter, in the chronological order the statute was signed by the governor.
By clicking on the session laws for 2013, the researcher will see that An Act Relative to Background Checks was the 77th act of the year. Also listed are the date the statute was approved by the governor, and the bill number that the statute carried when enacted:

CHAPTER 77: AN ACT RELATIVE TO BACKGROUND CHECKS (see Senate, No. 1839)
Approved by the governor, September 3, 2013

The entry contains two hyperlinks. The chapter number link leads to the text of the statute. The bill number link leads to a tremendous amount of information, including:

Bill S.1839 188th (Current)
An Act relative to background checks
The committee on Ways and Means, to whom was referred the Senate Bill relative to the protection of children (Senate, No. 1136); reports, recommending that the same ought to pass with an amendment substituting a new draft entitled “An Act relative to background checks” (Senate, No. 1839)

Sponsors: Senate Committee on Ways and Means
Status:

The bill number link also leads to the following tabs: “Current Bill Text,” “Bill History Roll Call,” and “Miscellaneous.”

The “Current Bill Text” tab provides the bill language as it was reported by the Ways and Means Committee; the “Roll Call” tab shows that the vote in the Senate was unanimous and provides a pdf showing how each senator voted; and the “Miscellaneous” tab in this instance tells the researcher that the bill had an emergency preamble. The most useful tab may be “Bill History.” In this instance the history for S.1839 is:

**Actions for Bill S.1839**

<table>
<thead>
<tr>
<th>Date</th>
<th>Branch</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>7/30/2013</td>
<td>Senate</td>
<td>Reported from the committee on Senate Ways and Means.</td>
</tr>
<tr>
<td>7/30/2013</td>
<td>Senate</td>
<td>Recommended new draft of S1136.</td>
</tr>
<tr>
<td>7/30/2013</td>
<td>Senate</td>
<td>Substituted as a new draft for S1136.</td>
</tr>
<tr>
<td>7/30/2013</td>
<td>Senate</td>
<td>Ordered to a third reading.</td>
</tr>
<tr>
<td>7/30/2013</td>
<td>Senate</td>
<td>Read third.</td>
</tr>
<tr>
<td>7/30/2013</td>
<td>Senate</td>
<td>Passed to be engrossed — Roll Call #141 [YEAS 39 — NAYS 0].</td>
</tr>
<tr>
<td>7/31/2013</td>
<td>House</td>
<td>Referred to the committee on House Ways and Means.</td>
</tr>
<tr>
<td>8/12/2013</td>
<td>House</td>
<td>Bill reported favorably by committee and referred to the committee on House Steering, Policy and Scheduling.</td>
</tr>
<tr>
<td>8/22/2013</td>
<td>House</td>
<td>Committee reported that the matter be placed in the Orders of the Day for the next sitting.</td>
</tr>
</tbody>
</table>

This, however, is not the complete procedural history of the background check law, but only the portion after the Ways and Means Committee issued a redrafted version of the bill. This history notes that S. 1839 replaced S. 1136, and the page provides a hyperlink for the earlier bill. By following that link, there is a tab with the original bill language, the three original sponsors under “Miscellaneous” and a further procedural history:

**Actions for Bill S.1136**

<table>
<thead>
<tr>
<th>Date</th>
<th>Branch</th>
<th>Action</th>
</tr>
</thead>
<tbody>
<tr>
<td>1/22/2013</td>
<td>Senate</td>
<td>Referred to the committee on Public Safety and Homeland Security.</td>
</tr>
<tr>
<td>1/22/2013</td>
<td>House</td>
<td>House concurred.</td>
</tr>
<tr>
<td>5/20/2013</td>
<td>Joint</td>
<td>Hearing scheduled for 05/21/2013 from 10 a.m.—12 p.m. in B-1.</td>
</tr>
<tr>
<td>6/6/2013</td>
<td>Senate</td>
<td>Bill reported favorably by committee and referred to committee on Senate Ways and Means.</td>
</tr>
<tr>
<td>7/30/2013</td>
<td>Senate</td>
<td>Committee recommended ought to pass with an amendment, substituting therefore a new draft, see S1839.</td>
</tr>
<tr>
<td>7/30/2013</td>
<td>Senate</td>
<td>Rules suspended.</td>
</tr>
<tr>
<td>7/30/2013</td>
<td>Senate</td>
<td>New draft substituted (see S1839).</td>
</tr>
</tbody>
</table>

The researcher knows that they now have the complete history because it begins at the beginning of the legislative session — January of an odd-numbered year — and the bill was referred to a joint committee, which is where nearly every bill goes for “first reading” consideration.

With the complete history, the researcher can tell every step the bill made during the legislative process, what documents related to the bill were probably produced, and which legislators or staff members may be able to provide those documents or other information.

The procedural history can also be found on Westlaw within the “State Materials” database by using the General Laws citation. Once you fill in the form with the desired general law chapter and section, Westlaw provides the current statutory language with “credits” at the end of the page. The credits section provides hyperlinks to each session law that amended that particular chapter and section.

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131. See id.
133. In this instance, the House appears to have passed the bill by a voice vote, so roll call information is not available for that branch.
134. See supra note 132.
135. Id.
136. See www.malegislature.gov/bills/188/senate/s1136/history.
137. The database string is: State Materials > Massachusetts > Massachusetts Statutes & Court Rules > Tools & Resources > Massachusetts Statutes Find-Template.

On the MassTrac homepage, a researcher can simply type “background checks,” in the search field and several results appear. One of the results is “SB 1839 An Act Relative to Background Checks,” which brings the researcher to a page with a great deal of information on the statute, including S. 1839’s procedural history. There is also a tab for “Related,” which gives a link to the previous version of the bill, S. 1136, where one can find the statute’s earlier procedural history. The Background Check statute, and its related information, may also be found by scrolling to the first screen to the left of the home page and searching the “Session Laws,” which links to a list of the various laws passed during the current and past sessions.

C. Legislative Documents

1. The Journal

The House and the Senate both keep a journal of the official proceedings. Unlike the Federal Congressional Record, however, it is not a verbatim transcript of debate. The Massachusetts Journal is a barebones record of the legislature’s daily business, which may include the various motions, rulings from the chair, assignments of bills to committees, the reports of the committees, amendments and new versions of the bill, and votes. The Journals will record the results of each of these votes, and for roll call votes, will list how each legislator voted. The Journals also record the rulings by the clerks and presiding officers for each chamber. These rulings, as in the case of whether an amendment goes beyond the scope of a bill, may give clues as to legislative intent. Occasionally the journal will include a floor speech, usually a legislator’s first or final speech to the chamber, or if a legislator wants to create an evidentiary record of legislative intent. Although minimal, the Journals are useful for finding amendments, roll call votes, and occasionally rulings from the chair on parliamentary matters.

The State Library and the State Archives have complete Journals going back to the colonial era. In addition, the State Library is in the process of producing a complete digitized version of the Journals for their website. Currently, the legislature’s website has the Senate Journals starting in 1998 and House Journals since 2001. The journals are also searchable at WestlawNext.

2. Committee Documents

The committees are the workhorses of any legislature. Armed with subject matter expertise and institutional memory, committee members and staff scrutinize legislation, gather evidence, and amend or redraft the original bill. A committee may gather a tremendous amount of material useful to constructing a legislative history, including: hearing testimony; letters of support; research and data; legal analysis; discarded versions of the bill; and at times, reports on the committee’s findings and recommendations. The committee files offer a window into evidence that the committee found credible, that which it dismissed, and the legislative language that it thought would properly address the issue at hand. This section will provide a description of these documents and where to find them.

Where to Find Committee Documents

The documents that are generated or gathered by a committee include hearing testimony, member’s letters of support, committee summaries and analysis, memoranda, bill revisions, and committee reports.

Key to any search for committee documents is to request the assistance of the staff for both the House committee and Senate chair. Both committee co-chairs will have staff devoted to committee work, led by either a “committee counsel” or “research director.” The House and Senate, however, approach committee assignments and staffing differently, which may affect the quality of their records. Senate committee chairs will hire a staff member or two to focus on committee business. When the senator is assigned to chair a new committee, however, the entire staff moves with the senator and the counsel or director focuses on the business of the new committee. The outgoing committee staff may or may not hand off their committee files to their successors.

In the House, chairs have a committee staff separate from their personal staff. When a new House chair is named to a committee, she inherits the committee staff from the outgoing chair. This arrangement has several benefits such as continuity, institutional memory, a high level of expertise, a better developed system for keeping files and records, and better developed policies and practices for sharing those documents with the public.

The House and Senate staffs generally collaborate well on committee business, including drafting bill summaries and distributing information submitted to the committee both to other committee members and to their respective chambers. Still, there may be differences in the records received and kept by the two committee staffs. For example, some documents will be seen as more important by one staff, certain outside groups may be more comfortable working with one chair or the other, and some testimony may be tailored depending on the legislative stage or for a particular chamber.


139. The Massachusetts Legislature conducts the majority of its business through two types of votes: voice votes and roll call votes. The Senate also conducts “standing votes,” where senators in favor of a motion stand at their places within the Senate chamber. The results of these votes are recorded in the Journal, but not which individual senators voted or how they voted. Typically, standing votes are used to determine whether there is enough support in the chamber to force a roll call vote.

140. A member of the branch must move that the remarks be reprinted in the Journal and the body must give its assent.

141. Siegel presentation, supra note 112. Subject to funding, the Journals will be digitized shortly after the library completes digitizing the legislative documents.

142. See www.mass.gov/legis/journal.

143. WestlawNext: State Materials > Massachusetts > Massachusetts Statutes & Court Rules > Massachusetts Legislative History > Journals.

144. The telephone numbers for the House Committee and Senate Chair’s offices are listed on each committee page on the legislature’s website. See http://www.malegislature.gov/committees/joint. Unfortunately, the Massachusetts Legislature website does not list staff members. Instatrac, however, does have a list of staff and their contact information that is updated regularly. See www.instatrac.com.

145. Documents created during the legislative process are exempt from laws requiring public inspection. See MASS. GEN. LAWS ch. 4, §7 (cl. 26h); MASS. GEN. LAWS ch. 66, §10. Some offices take the position that any time documents are shared with the public, this exemption is weakened. For this reason, some offices will not provide legislative documents to the public. Other offices, however, will provide access to any document that they do not consider privileged in some way.
Although the committee files can be a great resource, the keeping and archiving of these important documents is haphazard. Depending on the staffer, the file may be complete and organized or poorly kept. There is also the persistent problem of limited filing space causing a biennial purge of files to make room for the new session’s bill files.

Committee action and documents may provide valuable insight into legislative intent. It is essential, however, to contact the staff for both the House and Senate to get as complete a picture as possible of what information was before the committee and why the committee made particular changes to the bill.

Hearing Testimony

Every bill filed in the General Court is, by rule, given a hearing during the legislative session. While the committee may invite specific people to testify on a matter, these hearings are open to the public and anyone who wishes to address the committee on a matter being heard may do so. The testimony gives a reliable record of the social problem with which the legislature was wrestling, the facts it had before it, potential options, and objections to certain proposals.

Anyone may offer both oral and written testimony, although oral testimony is most common. Oral statements may be extensive or limited to just five or even three minutes due to time constraints. Committee members have an opportunity to question the witness. Committee chairmen also encourage witnesses to submit written testimony, before, during and after a hearing, which allows witnesses to go into greater detail about their positions than can be accomplished in a three or five minute oral statement. Such written statements also increase the pool of people offering an opinion on an issue. Committee staff distribute written testimony to the committee members, and often retain one or more copies for their files.

Recordings of committee hearings are fairly limited. Since 1992, the public television station WGBH has recorded selected hearings for broadcast. These recordings are archived in the State Library for public viewing. Although there are currently no hearing recordings on the legislature’s website, the legislature’s broadcast services site has some video of hearings starting in April, 2007. On the reporting side, the SHNS often covers hearings and reports on who appeared and what was said. MassTrac also reports on the witnesses appearing on particular bills and has a “Testimony” section on its site that lists oral and written testimony for selected recent bills.

Often the best source for written hearing testimony is the committee staff. Staff will gather testimony submitted by advocates or critics of a bill and keep copies in their files. The committee staff will also often take detailed notes of hearing witnesses and what was said. Even if the committee files are incomplete or unavailable, it is often possible for the committee staff to provide a list of witnesses for a particular hearing. A researcher could then contact the witnesses directly for a copy of their submitted testimony.

Summaries and Bill Analyses

Bills may be summarized several times during the legislative process, depending on their complexity and whether they have been amended. Committee staff summarize each bill for the committee in preparation for the bill’s hearing. Most bill summaries are one page long and composed of standard information such as the bill number, sponsors, committee assignment, similar bills, the outcomes of similar bills in previous legislatures, short statements of what the relevant existing law is, and what the bill purports to do. Summaries may be more detailed if the bill has a high profile, is particularly controversial, or the staff anticipates the committee taking action in the near future. If a committee chooses to combine several bills into one or significantly redrafts a bill that has been previously heard, the staff will often write a summary of the new bill before it is reported from the committee. Summaries may show how a bill developed and give insight into what the legislature meant to accomplish through redrafts and amendments.

Other legislative offices may also prepare summaries. The House and Senate Ways and Means Committees may prepare summaries on both a bill’s substance and its fiscal impact on the state budget. The Senate and House Counsel’s offices may prepare new summaries during third reading review in preparation for a caucus or floor debate. Finally, conference committees often produce both summaries and so-called “crosswalks” while resolving the language differences between House and Senate versions of the bill. The crosswalk can be a particularly valuable document because it will summarize similar provisions from the House, Senate and Conference versions of the bill side-by-side.

The committee staff and the House and Senate Counsel's offices may retain copies of the various summaries produced for a bill.

Memoranda

Committee staff may also create legal and policy memoranda for the benefit of the committee chairs and other legislators. Such memoranda may summarize the positions of various advocates and offer potential compromises, summarize the staff’s findings and recommendations after investigating a particular question, or lay out strategy for maneuvering a bill through the post-committee legislative process. A chair may also write a memorandum to the Speaker or Senate President explaining a bill, describing how the committee amended the bill, the policy choices made, and laying out potential courses of action for the chamber as a whole.

Although these memos could be very revealing as to legislative intent, they are meant for internal use only, and the staff may will show who testified and the bills on which they testified.

146. See supra note 84.
147. State Library of Mass., supra note 3 at 1.10.2.
149. State House News Service, www.shns.com. For high-profile hearings, accounts may be found in the mainstream media such as the Boston Globe or Boston Herald and on the local television and radio stations.
150. Although MassTrac’s reports on testimony before committees are becoming more extensive, the site may not contain a complete list of oral or written testimony.
151. The committee staff typically will keep the sign-in sheet for hearings that

58 / Massachusetts Law Review
consider them confidential or even protected by the attorney-client privilege. Therefore, such documents are often withheld even if an outsider is given access to the bill file.

If available at all, these documents can only be obtained through the committee staff.

Committee Reports

In Congress, a committee’s work on a bill — the hearings, witness testimony, analysis, bill language amendments and intent — are synthesized into a committee report. These reports are often the primary tool for non-committee members to understand the bill prior to floor debate, and later for courts and executive agencies to determine legislative intent. Unfortunately, reports like these are exceedingly uncommon in Massachusetts. In Massachusetts, committee “reports” of a bill given to another committee, the Senate, or the House are perfunctory; they consist of a simple card stating that a bill, group of bills or a redrafted version of a bill “ought to pass,” “ought not to pass,” is to be placed in a study order, or is being discharged to another committee. The card may note which committee members voted against the recommendation or abstained from the vote. Otherwise there is little information to be gleaned from these reports.

At times, a committee will release a substantive report. The committee chair may decide to issue such a report if her staff has done a great deal of research on a subject and wishes to explain to other legislators and the public why the committee is making particular recommendations. For instance, the Public Safety Committee issued a report on gang violence in 2005 to explain its recommendations to create a witness protection program and amend several criminal statutes such as witness intimidation, perjury and misleading a police officer.

The standard committee reports are available from the House and Senate Clerks. The substantive reports are often available from the appropriate committee staff and may be archived in the State Library. The Legislative Research Bureau’s reports may be found on the New England Law School’s library website.

3. Member’s Letters

Legislators frequently write advocacy letters to their colleagues on bills they file or in which they have an interest. Although not as lengthy or detailed as the written testimony submitted during hearings, these letters may contain insight into the thinking of key legislators and what they hope to accomplish with a particular bill. Such letters may also shed light on how and why the bill has been changed as it moves through the legislature. A bill sponsor may write several letters during the legislative process. For example, a sponsor may write a letter to the committee chairman requesting a hearing or proposing “friendly amendments” to the bill during the committee review; to the chair of the Ways and Means Committee concerning the bill’s policy or potential costs; to the presiding officer of his or her chamber asking for a floor debate; or to a conference committee finalizing the bill’s drafting. Because the relevant committee chairs remain involved with a bill throughout the process, they are often copied on the letters and retain them in their files.

A researcher should check with each of the offices where a bill stopped during the legislative process. Staff for the substantive committee, Ways and Means, and conference committee members may all retain members’ letters from various points in the process.

4. Floor Debate

The floor debate on a bill can be a rich source for understanding the legislative intent behind a piece of legislation. Some members will use their floor speeches or planned colloquies with other members to establish a record of legislative intent for the benefit of agencies and courts attempting to interpret the law. The debate on amendments may be particularly instructive because it is an opportunity for members to focus on specific aspects of the bill.

The House of Representatives began video recording its formal proceedings in November, 1987, and the Senate followed suit in January, 1996. The State Library is the depository for the official recordings of the House and Senate and serves as a public inspection area. Currently, video of recent House and Senate floor debates are available at the legislature’s website under “Archived Video.” The legislature has another website which has broadcast services and video archives for Senate and House floor debates dating to April, 2007.

The SHNS reports on the House and Senate’s formal session debates. Although these reports are not a verbatim or official transcript, they are extremely detailed and offer a good sense of how the debate proceeded, what arguments for and against a bill were offered to the membership, and the understanding of the various key members as to the intent and purpose of a bill.

5. Revisions to the Bill

A reliable way of discerning legislative intent is to compare various drafts of a bill to see how it evolved prior to becoming law. A joint committee’s most important task may be to revise bills in light of evidence gathered during the hearing and review process and according to the committee members’ priorities. Revisions in committee are often the result of negotiations between the House and

155. See http://archives.lib.state.ma.us/bitstream/handle/2452/207364/ocm68567540.pdf?sequence=1. In addition, the Legislative Research Bureau produced substantive research reports on a variety of issues during its existence from 1900 to 1996.


157. See Siegel presentation, supra note 112. Special reports are indexed and catalogued by the State Library. See, e.g., Index to Special Reports Authorized by the General Court of the Commonwealth of Massachusetts January 1994—December 2005 (State Library of Massachusetts, 2006) and Index to Special Reports Authorized by the General Court of the Commonwealth of Massachusetts 1988—March 1994 (State Library of Massachusetts, 1994). These documents can be found on the State Library’s online catalog at www.mass.gov/lib.

158. See www.portia.nesl.edu. Northeastern has digitized the reports from 1964 to 1994.

159. The House also audio recorded its proceedings from November, 1984 until video recording began. See State Library of Mass., supra note 3 at 1.10.2.

160. Id.

161. Id.


Senate chairs. Reading a committee redraft in light of the testimony it gathered on the issue can be very illuminating as to legislative intent. Certain provisions can be traced to a particular advocate or opponent, or may indicate that the committee members found an acceptable compromise between competing positions.

The bill may be revised several times after it leaves committee, revised again by another committee such as Ways and Means, on the chamber floor, during third reading or by a conference committee. All changes could offer significant insight into legislative intent.

The best, albeit tedious, way to determine how the bill was amended is to compare various versions of the bill provision-by-provision, and perhaps even word-by-word. For recent bills, having the various versions of the bill in electronic form certainly makes this process easier. Committee files will often contain several revisions to the original bill before it was reported by a committee, offering insight that cannot be found by comparing “official” versions of the bill. Floor amendments are particularly useful because they usually seek to do something specific to the bill, are often accompanied by a floor speech by the sponsor, and through the vote, may offer a clear statement of what the chamber thought of the change. Researchers can find these amendments in the Journals, in committee files, and in reports by State House News and MassTrac. Finally, materials such as crosswalk summaries from a conference committee may be extremely helpful. Committee staff often retain these documents in their files.

6. The Legislative Package

The Legislative Package contains the original bill petition with the names of all of the petitioners, various amendments to the bill, and sometimes materials created during the legislative process, such as letters of support. The State Archives has a Legislative Package for every law passed since 1775.

7. The Governor’s Legislative Files (Bill Folder)

The Bill Folder contains materials created by the governor’s office for enacted bills. This material may include correspondence between the governor’s office and proponents and opponents of the bill, the product of any research done by the governor’s office, opinions of the governor’s legal counsel, and any other material that may have been considered by the executive branch. If the governor was involved in the formation of the bill prior to enactment, as is often the case, there may be significant materials that reveal legislative intent. The governor’s request for amendments after enactment, the legislature’s acceptance or rejection of those amendments, and veto messages may also show legislative intent.

The State Archives retains the folders on laws created between 1964 and 2006. The most recent folders, typically from the past two to three years, are kept in the Secretary of State’s Publications Office.

8. The Legislative History Project

In 1982, the Legislative Research Bureau called for a central repository of materials that reveal legislative intent. The Bureau offered some possibilities for who would operate such a repository, and called for a uniform policy on retaining relevant material. “To insure that the raw data used by the researcher, sponsor, bill drifter and other parties would be available for an extended period of time.” To date, this has not happened.

The Legislative Clinics Program at Boston University School of Law, however, has made an effort in recent years to gather and systematically store primary materials related to legislative history. Every student who has taken a legislative clinic since 2007 has chosen a recently enacted statute and gathered as much legislative history material as possible. This ongoing project serves two uses: first, it teaches the students what documents are generated during the legislative process and gives them an appreciation for how difficult gathering a complete record of a statute’s development can be; second, the resulting materials will be easily accessible to everyone on the Internet. This will allow practitioners, researchers, legislators and agencies to search primary materials to better understand the legislature’s intent. Information on Boston University Law School’s Legislative History Project may be found on Dome, the author’s website.

Conclusion

The legislative history of a statute may be crucial to fully understand and settle ambiguities in the law. Despite the textualist critique, most judges appreciate the greater understanding that can come from examining evidence generated during the legislative process. Although Massachusetts has been a notoriously difficult jurisdiction within which to find legislative history in the past, it can and should be done wherever possible. By understanding the legislative process and knowing where to look for documents related to legislative history, valuable information can be found. Finally, innovations such as the Boston University Legislative History Project may make it much easier to access valuable legislative history documents in the future.

164. See Siegel presentation, supra note 112.
166. The Legislative Research Bureau suggested that the governor’s analysis and understanding of the meaning of the legislation may not have been shared with the legislators or widely circulated in the legislative branch, and may therefore be of limited value. See Mass. Legislative Research Bureau, Determination of Legislative Intent, H. 172-5882, 2nd Sess. (1982). Still, the governor has the constitutional powers to file legislation, offer amendments to enacted bills and veto legislation, making that office an integral part of the legislative process. The governor’s understanding of a bill, whether circulated or not, should still be considered valuable information.

167. See Siegel presentation, supra note 112.
168. The Publications Office also operates the State Bookstore, which is in the State House, Room 116, and which may be reached at (617) 727-2834. The public may make arrangements to view the folder.
170. The bureau suggested either the Clerk’s Offices, the Secretary of State’s Office or the State Library. Id.
171. Id. at 57-58.
172. See sites.bu.edu/dome.
APPENDIX A — CHECKLIST FOR GATHERING LEGISLATIVE HISTORY

- Assemble the needed citations: General Laws affected, Session Law citations, relevant bill numbers;
- Reconstruct the bill’s complete procedural history;
- Examine the House and Senate Journals for the days the legislature worked on the bill;
- Contact the original bill’s legislative sponsor for materials collected during the legislative process;
- Refer to MassTrac or State House News Service for reports on who testified and what was said at committee hearings;
- Contact the House and Senate staff for each of the committees that considered the legislation to find materials collected during the legislative process;
- Contact witnesses who testified at hearings to obtain copies of the written testimony submitted to a committee (if unavailable from committee staff);
- Refer to MassTrac or the State House News Service for reports on the floor debate;
- Refer to the legislature’s website and the State Library to see if video of the floor debate is available;
- Assemble a complete list of amendments and whether they were adopted or rejected;
- Contact the members of the conference committee (if applicable) for materials generated during the conference process;
- Assemble the governor’s official messages, amendment recommendations and veto messages and signing statements;
- Contact the governor’s Governmental Affairs office or the State Archives to obtain access to the Bill Folder;
- Refer to State House News Service for related press releases or relevant audio and video files.

APPENDIX B — SOURCE CONTACT INFORMATION

- State Library: The State House, 24 Beacon Street, Room 341, Boston, MA 02133; (617) 727-2590; www.mass.gov/lib
- State Library’s Special Collections: State House, Room 55; (617) 727-2595
- Massachusetts State Archives: 220 Morrissey Boulevard, Dorchester MA; (617) 727-2816; Email: archives@sec.state.ma.us. Website: http://www.sec.state.ma.us/arc
- Secretary of State’s Publication Office and State Bookstore, State House, Room 116, (617) 727-2834
- Governor’s Governmental Affairs Office: State House, Room 161; (617) 725-4005
- The legislature’s website: www.malegislature.gov
- Senate President’s Office: State House, Room 332; (617) 722-1500; www.mass.gov
- Senate Clerk’s Office: State House, Room 335; (617) 722-1276
- Senate Counsel’s Office: State House, Room 200; (617) 722-1470
- Speaker of the House’s Office: State House, Room 356; (617) 722-2500
- House Clerk’s Office: State House, Room 145; (617) 722-2356
- House Counsel’s Office: State House, Room 139; (617) 722-2360
- State House News Service: State House, 24 Beacon Street, Room 4XX, Boston, MA 02133; (617) 722-2439; www.statehousenews.com.
- InstaTrac / MassTrac: www.instatrac.com; (617) 292-1800
Case Comment

Abate v. Fremont Investment & Loan: Defining “Adverse Claim” in Try Title Actions

INTRODUCTION

In the wake of the so-called “foreclosure crisis,” a once obscure statute providing a mechanism for resolving title disputes has been dusted off and pulled into the limelight by plaintiffs’ attorneys looking for a way to challenge foreclosures as defective, or to prevent them from happening in the first place. The “try title” statute, Massachusetts General Laws chapter 240, sections 1 through 5, was first enacted in 1851 with its current version adopted in 1893, and has been called “something of an anachronism” by the Supreme Judicial Court (SJC). The current version of the statute states:

If the record title of land is clouded by an adverse claim, or by the possibility thereof, a person in possession of such land claiming an estate of freehold therein or an unexpired term of not less than ten years, and a person who by force of the covenants in a deed or otherwise may be liable in damages, if such claim should be sustained, may file a petition in the land court stating his interest, describing the land, the claims and the possible adverse claimants so far as known to him, and praying that such claimants may be summoned to show cause why they should not bring an action to try such claim.2

“The statute serves to identify and hale into court those who are asserting rights at odds with the plaintiff’s title, and to give them the opportunity to ‘put up or shut up,’ at risk of losing any interest they may have in the land if they do not formally press their claims.”3

In summary, the statute creates a two-part proceeding where: (i) the petitioner brings a case setting forth certain jurisdictional facts resulting in the issuance of a summons directed to the adverse party; and (ii) in response, the adverse claimant brings an action to assert his title claim or forever relinquishes it.4 The statute’s plain language makes clear that the land court has exclusive jurisdiction over try title petitions.5

In Bevilacqua, the SJC considered standing under the try title statute for the first time in more than a century, when a post-foreclosure real estate owner attempted to use the try title mechanism to cure a title defect arising from a “missing assignment.”6 The SJC held in Bevilacqua that the post-foreclosure owner could not use a try title action to cure this defect because he lacked the “record title” that is a statutory prerequisite to bringing the petition, due to the missing assignment.7

Building on its decision in Bevilacqua, the SJC has now resolved a split among land court justices about another aspect of the try title statute — whether an “adverse claim” exists as between a mortgagee and mortgagor when a foreclosure has not yet occurred. In Abate v. Fremont Investment & Loan,8 the SJC held that the availability of try title actions for mortgagors is limited to situations where the challenged foreclosure has already occurred. Notably, although this is arguably Abate’s most important holding, the SJC was not required to reach the issue in order to resolve the matter before it. The remainder of the opinion offers a useful primer on try title actions more generally.

THE FACTS

On June 17, 2005, Thomas C. Abate granted a mortgage to Mortgage Electronic Registration Systems Inc. (MERS) as nominee for Fremont Investment & Loan in the property known as 14 Owatonna Street, Newton.9 An assignment of the mortgage from MERS to Deutsche Bank National Trust Co., as trustee for

4. See Bevilacqua, 460 Mass. at 766.
6. Bevilacqua, 460 Mass. at 765-66, 767. A “missing assignment” or “Ibanez” problem occurs where the purportedly foreclosing mortgagee is named in the pre-foreclosure notices required by Mass. Gen. Laws ch. 244, §14 and/or conducts the foreclosure sale before that entity has actually received title to the property through an assignment. U.S. National Bank Assoc. v. Ibanez, 458 Mass. 637, 639, 653-54 (2010). It is very often the case that the original mortgagee named in a Massachusetts mortgage is Mortgage Electronic Registration Systems Inc. (MERS), as nominee for the lender/note holder. Prior to foreclosure, MERS assigns the mortgage to the entity that will actually conduct the sale. (A more detailed description of the MERS system can be found in Cullane v. Aurora Loan Services of Nebraska, 708 F.3d 282 (1st Cir. 2013)). Before the land court’s decision in Ibanez, it was common for conveyancers to send or publish statutorily required pre-foreclosure notices in the name of the foreclosing entity before the MERS assignment had actually been executed. See Ibanez, 458 Mass. at 653 (referencing Title Standard No. 58(3), issued by the Real Estate Bar Association for Massachusetts).
7. See Bevilacqua v. Rodriguez, 460 Mass. 762, 780 (2011). In its opinion in Bevilacqua, the SJC commented that the try title structure is a direct reflection on the limitations inherent in the common law writ of entry that preceded the statute, and the statute “may now be something of an anachronism when it is considered that modern statutes are far more flexible than the common law writ.” Id. at 766 n.3. The writ of entry required the plaintiff to show disseisein by a trespasser, which meant that the remedy was only available to plaintiffs who were “held out” — that is, were not in possession of the property to which they were seeking to establish title. This led to the cumbersome requirement that a plaintiff in possession who wished to establish title would have to abandon the property in order to regain it. Recognizing that this was an unreasonable thing to ask of a plaintiff in possession, the legislature enacted the try title statute . . . .” Abate v. Fremont Inv. & Loan, No. 12 MISC 464855(RBF), 2012 WL 6115613, at *3 (Mass. Land Ct. Dec. 10, 2012) (internal citations omitted) (Abate I).
9. Id. at 823.
Carrington Mortgage Loan Trust, Series 2005-FRE1, Asset Backed Pass-Through Certificates, dated Nov. 16, 2010, was recorded on Dec. 3, 2010.10 Abate was in possession of the property from 2005 forward, and throughout the litigation.11 Abate filed for bankruptcy in 2010.12 Having obtained relief from the automatic stay, Deutsche Bank conducted a foreclosure by sale pursuant to Massachusetts General Laws chapter 244, sections 11 through 17, on March 28, 2012.13 Deutsche Bank recorded a foreclosure deed conveying the property to itself on October 5, 2012.14

Abate filed his action in land court in May 2012, claiming that the assignment was invalid (and, thus, so was the foreclosure) on a variety of theories.15 There was no dispute that Abate had been in possession of the property since 2005 and remained in possession when his petition was filed and throughout the legal proceedings.16 Deutsche Bank and Carrington filed a motion to dismiss on July 31, 2012.17 Abate argued that a motion to dismiss was not procedurally proper, and that once he met the jurisdictional elements of a try title claim, Deutsche Bank and Carrington should have been required to bring an action trying title.18

The land court judge dismissed Abate’s petition after concluding that none of the grounds on which Abate challenged the assignment were viable.19 MERS’s subsequent “me too” motion to dismiss was also allowed, on the same grounds that applied to Deutsche Bank and for the additional reason that MERS no longer claimed any interest in the property (having effectively assigned its interest).20 The Abate case was then transferred to the SJC on its own motion.21

The Try Title Statute

As the SJC explained, the purpose of a try title action is “to allow the person holding record title to compel an adverse claimant to prove the merits of the adverse claimant’s interest in the property.”22 As mentioned above, the try title statute “contemplates a two-step procedure in which the substantive merits of the parties’ respective claims are determined at a trial.”23 According to the SJC, the “first step” in a try title action “requires that the petitioner must satisfy the jurisdictional elements of the statute.”24 If the jurisdictional elements are satisfied, then the “second step” in a try title action requires that the adverse claimant either: (i) bring an action to assert his or her claim of title, or (ii) disclaim an interest in the property.25 “A successful petition filed under the try title statute results only in a judgment requiring a party with a claim to the subject property to come forward and try their title, or otherwise be barred.”26 “In practice, however, the defendant in a try title case usually files a declaratory judgment claiming title as a counterclaim, and the courts will combine both claims into a single action in order to determine title.”27

Standing Explained

On appeal, Abate argued that the trial court incorrectly ignored the distinction between the first and second steps of the try title procedure.28 The SJC disagreed, holding that the merits of Abate’s claim that the assignment was invalid were determinative of both Abate’s standing to bring the action and the land court’s subject matter jurisdiction.29 In so doing, the SJC provided the bar with much-needed guidance on the procedural issues raised by the try title statute.

The court explained that in the “first step” of a try title case, the petitioner must establish three jurisdictional elements: (1) that he holds “record title” to the subject property; (2) that he is a person “in possession” of the property; and (3) that an “adverse claim” clouds the record title.30 If all three of those elements are not satisfied, the court lacks subject matter jurisdiction over the claim. “Standing,” however, is comprised only of the first two elements — that the petitioner has both record title and possession.31

In arguing that the trial court should not have addressed the merits of his claim in the “first step” of a try title action, Abate relied on case law stating that the question of who has the “better title” does not arise in the first step.32 The SJC held that “[t]he rule that ‘better title’ is to be determined in the second step, however, does not preclude consideration of the issue presented in the defendants’
motion to dismiss.”33 Noting its ruling’s consistency with its prior decision in Bevilacqua, the SJC held in Abate: “Where, as here, the determination of standing, and ultimately jurisdiction, necessarily reaches and effectively negates the merits of petitioner’s claim, the two-step procedure is not abrogated.”34

**The Motion to Dismiss Standard**

The SJC recognized in Abate and in Bevilacqua that, although a plaintiff is typically required to prove jurisdictional facts through evidence if those facts are challenged by an opposing party, in a try title action this practice might result in collapsing the two steps.35 Accordingly, in Abate, the court adopted a “unique” standard of review for motions to dismiss brought in try title cases.36 First, the petitioner must allege the three jurisdictional elements of: (i) record title; (ii) possession; and (iii) actual or possible adverse claim. The facts required for standing — record title and possession — are then subject to challenge through introduction of adverse evidence.37 The petitioner bears the burden of proving standing by a “preponderance of the evidence.”38 The allegations related to the third jurisdictional fact are, however, entitled to a presumption of truth because determining those facts at the outset of the case would conflate the two-step process into one.39 “In this way, we harmonize the two-step try title procedure with the traditional use of the rules of civil procedure as a device for raising jurisdictional issues before a court.”40

**Abate’s Standing**

As to the land court’s substantive ruling that none of the defects Abate perceived in the assignment were viable bases for concluding its invalidity, the SJC determined that Abate waived his right to appellate review because he did not argue the merits of Judge Foster’s decision.41 Accordingly, we need not, and therefore do not, decide whether the judge properly concluded that none of the claimed infirmities in the assignment plausibly sets forth any basis on which the assignment could be found to be void or invalid.42 In affirming the entry of a dismissal with prejudice, the SJC explained that although “dismissals for lack of subject matter jurisdiction are ordinarily without prejudice because dismissal for lack of jurisdiction is typically not an adjudication on the merits . . . the judge correctly considered the merits of Abate’s claims as a necessary step in determining the absence of his record title.”43 Accordingly, the SJC upheld the dismissal with prejudice as proper, without reaching the merits of the underlying rulings on the substance of Abate’s claims.44

**Abate’s Primary Holding: Defining an “Adverse Claim”**

Although the SJC’s discussion of standing vis-à-vis a motion to dismiss in try title actions is very useful, Abate’s most significant holding is on a topic not squarely presented in the appeal. Specifically, it was undisputed in Abate that a foreclosure had already occurred — and thus, there could be no legitimate argument that the respective claims of Abate and Deutsche Bank were not “adverse” for purposes of Massachusetts General Laws chapter 240, section 1.45 Nonetheless,” the court wrote, “because the issue may arise in future try title actions between a mortgagor and a mortgagee, we take this opportunity to resolve the conflict in the Land Court try title decisions on the adverse claim element of subject matter jurisdiction.”46

The conflict the SJC referenced was between land court judges following the view first expressed as dicta in Justice Foster’s Abate I decision, on the one hand, and the opposing view expressed by Justice Piper in Varian.47 In Abate I, the court wrote that, based on the try title statute’s history:

> [A] plaintiff in possession and with record title cannot bring a try title action to compel a purported mortgagee to try its mortgage title before a foreclosure. The try title act may be used to challenge a party’s claim to hold a mortgage only after that party has foreclosed, because it is only after foreclosure that the mortgagee has a claim of superior title. . . . Before foreclosure, a lender’s mortgage is not a claim of superior title giving rise to a try title claim. A mortgage estate and the underlying equitable estate, in the form of the equity of redemption, “are prima facie consistent with each other.” . . . It is only upon a foreclosure that the mortgagee claims that it has eliminated the mortgagor’s equity of redemption and now holds a title in the property superior to the mortgagor’s. If all that Abate was alleging in the complaint was that there is uncertainty over who holds the Mortgage, he would not have a try title claim.48

34. *Abate* v. Fremont Inv. & Loan, 470 Mass. 821, 828 (2015). “Standing may be considered under either rule 12(b)(1) or rule 12(b)(6)” of the Rules of Civil Procedure. *Id.* at 828; see also *id.* at 823 n.4. But, at footnote 5 of *Abate*, the SJC opined that although the land court did not cite it, Rule 12(b)(1) was a better fit because “[t]he judge was properly allowed to review materials outside of the petition in deciding subject matter jurisdiction.” *Id.* at 823 n.5. Moreover, “as a component of subject matter jurisdiction, a party may challenge or a judge may consider, sua sponte, standing under Rule 12(b)(1) at any time.” *Id.* at 828. “Here, because standing is a requirement of subject matter jurisdiction, that issue was properly considered by the Land Court judge even though not expressly cited by the respondents in their motion to dismiss.” *Id.* at 829.
35. See *id.* at 829.
36. See *id.* at 829-30.
37. *Id.* at 830.
38. *Id.*
39. *Id.*
41. *Id.* at 833.
42. *Id.* at 833.
43. *Id.* at 836.
44. *Id.*
45. *Id.*
46. “A try title action is only available where “the record title of land is clouded by an adverse claim.” Mass. Gen. Laws ch. 240, §1 (emphasis supplied).
48. *Id.* See *id.* at 826 n.12.
In Varian, however, the court expressed the opposite view. There, the court held that a mortgagor who admitted the existence of the mortgage could bring a try title action prior to foreclosure to require the purported mortgagee to prove its title.\(^{49,50}\) In so doing, the judge relied upon Brewster v. Seeger,\(^{51}\) where the defendant, Elsie S. Seeger, claimed that a person named Perry, the original mortgagee, received the mortgage in his capacity as Seeger’s guardian when Seeger was a minor child.\(^{52}\) Perry assigned the mortgage to a third party, but only after Seeger had reached adulthood.\(^{53}\) The assignee, apparently having accepted payment of the secured sum, discharged the mortgage.\(^{54}\) The plaintiffs, Frank Brewster and another, then bought the land.\(^{55}\) Seeger claimed that the mortgage had never been validly assigned (or discharged) and that she was entitled to foreclose.\(^{56}\) Brewster, on the other hand, claimed that no mortgage was in existence because the mortgage had been discharged prior to Brewster’s purchase of the land.\(^{57}\) The court held that the legal title had been conveyed to Perry as grantee, that Seeger’s reaching maturity had no effect on the title, and that Perry had the right to transfer the title to his assignee—leaving Seeger with no rights in the land at all.\(^{58}\)

Finding Brewster analogous, the land court judge wrote in Varian: “Admitting that they (the Varians) have granted a mortgage to some party does not prevent them from arguing that Bank of N.Y. is not that party. As between the mortgagor and a stranger—who holds no title but nonetheless claims to—clearly there is an adverse relationship.”\(^{59}\) Ultimately, however, the SJC sided with the Abate I court’s view, holding: “We conclude that where a mortgagor challenges the right of the mortgagee to foreclose, the ‘adverse claim’ element of a try title action is sufficiently alleged only if the foreclosure has already occurred.”\(^{60}\)

Relying on its prior opinion in Bevilacqua, the SJC explained that “[a]s between mortgagor and mortgagee, the title interests are not, as a matter of law, adverse. Because a mortgagor and a mortgagee hold complementary claims of title, the law fashions a relationship that is in equipoise, which stands until either the mortgagor satisfies the debt or the mortgagee forecloses. Following the law of Bevilacqua, neither is superior or inferior to the other.”\(^{61}\)

The SJC reconciled its decision in Abate with Brewster, the case relied on by the land court judge in Varian, by holding that where “the very existence of a mortgage” is called into question, a try title action may lie even prior to foreclosure.\(^{62}\) In Brewster, “the petitioner claimed that the mortgage had been discharged, and that, therefore, it no longer existed.”\(^{63}\) Thus, the adverse claim element alleged in Brewster rested on a completely different and legally sustainable footing. The rules regarding separate but complementary title interests did not in that case preclude the necessary showing of an adverse claim.\(^{64}\)

**Public Policy: Other More Suitable Remedies**

Finally, it is notable that even as the SJC went to great lengths in Abate to explain the mechanics of how the “anachronistic” try title statute will operate in the context of modern foreclosure-related litigation, it noted that a try title action might not be the best course of action for a mortgagor seeking to challenge a foreclosure. “We are mindful that in Massachusetts, a nonjudicial foreclosure state, a mortgagee may foreclose without prior judicial intervention. As we have noted, however, a property owner has other, and perhaps more suitable, remedies available to him or her.”\(^{65}\) Specifically, the SJC cited the procedural mechanisms of: (i) a declaratory judgment action;\(^{66}\) (ii) an action to quiet title;\(^{67}\) and (iii) a motion for an injunction;\(^{68}\) as potentially superior to a try title action in the foreclosure context.\(^{69}\) “In addition, a property owner in a foreclosure is protected by our requirement of strict adherence to the law in each of the nonjudicial foreclosure procedures available to a mortgagee.”\(^{70}\) Accordingly, the court wrote, “[w]e discern no prejudice to a party’s rights” in Abate’s holding that a try title claim does not lie prior to foreclosure.

— Jennifer E. Greaney

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50. As noted in Varian, 2013 WL 453721 at **1, 3, in Lemelson v. U.S. Bank National Assoc., 721 F.3d 18 (1st Cir. 2013), the First Circuit adopted the reasoning in Abate I, holding that “[u]ncertainty as to who holds a valid mortgage does not provide the requisite adversity to cloud a mortgagee’s claim of equitable title.” Lemelson, 721 F.3d at n.7. The U.S. District Court for the District of Massachusetts expressed its disagreement with the Abate I analysis in Jepson v. Deutsche Bank National Trust Co., 969 F.Supp.2d 202 (D. Mass. 2013). Although the District Court judge entered an order consistent with Lemelson, he commented that a mortgagor may allege that a purported mortgagee is actually “a stranger to the title,” and, “[i]n the procedural posture required by a motion to dismiss . . . such uncertainty as to the holder of the mortgage would, in fact, be sufficiently adverse for the purposes of the try title statute.” Jepson, 969 F. Supp.2d at 206-07. In Abate, the SJC acknowledged both the First Circuit’s view in Lemelson and the District Court’s view as expressed in Jepson. See Abate, 470 Mass. at 826 n.12.
51. 173 Mass. 281 (1899).
52. See id. at 282.
53. Id.
54. Id.
55. Id.
56. Id.
58. Id. at 283.
61. Id. at 835.
62. See id. at 834.
63. Id. at 835.
64. Id.
65. Id.
70. Id.
We learned from an early Chief Justice of the Supreme Court, John W. Marshall, that corporations are “a mere creature of the law, invisible, intangible and incorporeal” but “citizens” for purposes of federal jurisdiction. The Supreme Court has since taught us that corporations enjoy First Amendment freedom of speech, no less so than corporeal persons, and similarly freedom of religion. Corporations also enjoy attorney-client privilege in seeking legal advice and in the conduct of internal investigations, due process rights, and privacy rights. But one of the remaining areas of what may be called, with irony, discrimination against corporations, is that they are denied prison sentences, or government-imposed failure. That is so, at least for those too big to jail or too big to fail.

Too Big to Fail: How Prosecutors Compromise with Corporations (Too Big to Jail), by Professor Brandon Garrett of the University of Virginia School of Law, tracks the use of prosecutorial agreements for: (a) non- or deferred prosecution if corporate wrongdoing is corrected; or (b) guilty pleas with agreed sanctions and a remedial program, all designed to rehabilitate the corporation to the benefit of the public and direct stakeholders, rather than imprison executives or levy excessive fines that would destroy the corporation. Such rehabilitation arrangements are rarely extended to natural persons or small business corporations. The book covers 300 non- or deferred-prosecution agreements (N/DPAs) and 2,000 guilty pleas with a breakdown by categories of offenses and defendants, and extensive analysis of rationales for the agreements and successes/failures in implementation.

The United States Department of Justice (DOJ) instituted the modern form of N/DPAs in the United States Attorneys’ Manual, including the 2003 Thompson memo, which listed eight factors to consider when deciding whether a non- or deferred-prosecution agreement is warranted: (1) seriousness of the offense; (2) perverseness; (3) firm history of similar conduct; (4) timely voluntary disclosure of the wrongdoing and cooperation; (5) remedial action (such as firing wrongdoers); (6) harm to shareholders of a prosecution; and (7) adequacy of prosecuting individuals and of civil or administrative remedies. The press release of Attorney General Alberto Gonzales announcing the manual change emphasized the DOJ’s concern for the possible effect of criminal prosecution on an organization’s innocent workers and even the national economy—i.e., too big to jail. Other significant implicit factors may have included the cost and difficulty of prosecution. There also was the earlier collapse of the Arthur Andersen accounting firm after its trial due to public shaming and, as a felon, loss of eligibility to audit public companies (ironic since its conviction was reversed after the collapse), which may have added to other pressure to create a formal structure for considering N/DPAs. In a later case after the Thompson memo, KPMG, accused of enabling fraudulent tax shelters, received a deferred prosecution agreement while prosecution of individuals (not top-level officers) proceeded. The book also recounts, among many post-Thompson examples, the aftermath of the Texas City refinery explosion in 2005, resulting in private settlements with injured workers and probation for British Petroleum; the failure of J.P. Morgan to report suspicious activity in Bernard Madoff’s accounts ($1.7 billion fine); British Petroleum’s paying $2.75 billion in community service awards for the Deepwater Horizon disaster; and an apology by StyleCraft Furniture (printed in Mandarin and English


7. The “too big to fail” trope goes back a century but had its widest recognition in the 2007-2008 financial cases. See Andrew Ross Sorkin, Too Big to Fail: Inside the Battle to Save Wall Street (Viking Press 2009) (Too Big to Fail). One earlier venture into service of a failing financial institution was the much criticized 1998 Federal Reserve rescue of Long-Term Capital Management. See Roger Lowenstein, When Genius Failed: The Rise and Fall of Long-Term Capital Management (Random House 2001).

8. Too Big to Fail at 78-80; Too Big to Jail at 56.


10. Too Big to Jail at 59-60.

11. Too Big to Fail at 41-44.

for Chinese and U.S. markets) for importation of baby cribs made with treaty-protected Indonesian wood.

Professor Garrett's research reveals that large companies have been treated with a leniency ordinarily reserved for children. He studied agreements and guilty pleas with conditions for deferred or non-prosecution and found inconsistent and lenient filings with half of the NDAPs having no fines at all. The role of the judge in approving such dispositions is usually deferential. The sentencing colloquy can be conducted with an attorney for the corporation; a corporate officer need not appear. Organizational Sentencing Guidelines were instituted by the United States Sentencing Commission in 1991, but at a low scale, and even when punishment levels were raised, the guideline usage was upset by the Supreme Court's 2005 decision in United States v. Booker, making the "sentencing guidelines" guides, not mandates. Compliance programs of acceptance of responsibility and probation can result in elimination or dramatic reduction of the fines and other sanctions. Corporate parents regularly escaped punishment when they could offer up a subsidiary for sacrifice.

Too Big to Jail argues that remaining needs include assessment of the impact of non-prosecution or deferred prosecution on the agreeing corporations, durability of the reforms and impact on and confidence of corporate constituencies (e.g., customers, employees, investors/lenders, potential joint ventures). The effects on prosecutor morale and "legislative fatigue" are also worth studying. Do prosecutors accept the argument for more aggressive prosecution or reject it as futile, accept the NDPA as a mandated result and focus their resources, energies and passions on other activities? This book provides a good baseline for further studies of such issues.

The history of monitors is also reviewed, but Garrett finds monitors to be often ineffective. Selection of monitors sometimes has the appearance, if not the fact, of impropriety. The book provides a context of constitutional rights of corporations with significant opportunities for corporations to defeat what prosecutors may regard as strong cases. Sometimes prosecutorial deliberate misconduct or fumbling are the reasons for failure. The book also looks critically at the rating organizations, Standard & Poor's and Moody's, and sub-prime lenders. The DOJ dealt with them through civil, not criminal, prosecution.

Too Big to Jail recognizes that there have been reductions of corporate misbehavior and of public perceptions of immunity of large corporations and more would come with greater transparency and greater recognition by the federal government of the need to "get it right," given the size, seriousness and complexity of crime that can occur in the corporate setting. Professor Garrett says that corporate prosecutions themselves are too big to fail.

Professor Garrett calls for transparency, more reliable monitoring and sanctioning of recidivism, as well as steps to create a culture of compliance that avoids criminal acts or civil liability for wrongful conduct. He also advocates a greater self-reporting regimen complementing greater access to information by regulatory agencies, and greater will of the agencies to do their job. Is this pie in the sky in an era of money-controlled politics and subservient legislators? Not necessarily. A growing populist reaction to abusive practices of some large business entities in the United States and abroad has provided a consensus for forcing reform on the too-big entities. In turn, the business entities and their officers and employees endeavor to bend towards propriety and away from impropriety as a matter of ethics, morality and pride, as well as legal compliance. It is also necessary, in this reviewer's opinion, to look beyond the option of criminal prosecution and instead focus on curbing misconduct through administrative and civil actions by government agencies and through lawsuits by private plaintiffs. The corrective effect of tort law enforcement can be a powerful complement to government actions when not unduly restricted by mandatory private arbitration in consumer or employment contracts of adhesion, class action restrictions, when not unduly restricted by mandatory private arbitration in consumer or employment contracts of adhesion, class action restrictions, legal action restrictions and legal standing constraints.

Events subsequent to this book's 2014 publication do show some progress. On May 20, 2015, the DOJ achieved a new round of guilty pleas that provided for five international banks to plead guilty to antitrust violations and pay six billion dollars in fines for currency manipulations by a self-styled "cartel." Notably, the guilty pleas came from bank holding companies, contrary to prior practice of throwing subsidiaries and lower level officers under the proverbial bus.

The same plea deal had the DOJ revoking a prior non-prosecution

14. Another study, published after publication of Too Big to Jail, shows effects of NDAPs on corporate governance and tracks NDPA elements of producing financial records, adopting a compliance code and infrastructure with a chief compliance officer, waiver of statutes of limitations and other rights, such as a right to object to admissibility of some kinds of evidence, and to indictment. Wolf A. Kaal and Timothy A. Lane, "The Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993–2013," 70 (1) BUSINESS LAWYER 6 (ABA Business Law Section, Winter 2014–2015).
16. Too Big to Jail at 238.
17. See generally, Philosophical Foundations of the Law of Torts (Oxford Univ. Press 2014, John Oberdeck (Ed.)).
19. Id.
agreement with UBS over the manipulation of LIBOR benchmark interest rates because of new similar misconduct by the bank.  

20. The plea deal included assurances to the banks that, notwithstanding admission to felonies, waiver of right to suspend licensed activity will be granted by regulatory agencies (the Securities Exchange Commission, United States Treasury and state agencies), i.e., they will not suffer banishment from their accustomed lines of business.  

So, we still have too big to fail and too big to destroy or jail, but with an increased degree of naming and shaming with permission to continue business under looming threat of withdrawal of that act of grace in case of recidivism.  

22. Some will criticize these plea agreements as still too soft, arguing that stronger efforts at investigation, prosecution and penalties are needed. The LIBOR interest rate manipulation fraud, which was at the core of the crimes and punishment, was described in Too Big to Jail with attention to the inadequacy of prosecution up to that time. If a new version of the book is published now or soon it could tell a different story. Indeed, on September 10, 2015, the DOJ announced its determination to prosecute high level corporate officers as well as corporations.  

Too Big to Jail is worthwhile as an explanation of the genesis of the modern system of N/DPAs and of their evolving strengths and weaknesses, and should not be taken as proof of a need to scrap N/DPAs. To the contrary, there is a good case for such agreements when properly conceived and implemented. If anything, agreements should be extended to small businesses and individuals, and that would be a policy of trickle-down prosperity worthy of the name.

— Jerry Cohen

20. Id.
21. Id.
22. Antitrust laws were the prosecution vehicle for this crackdown on financial crimes where prosecution under peculiarities in banking laws would have been more difficult. It was the first instance of the DOJ’s Antitrust Division using an N/DPA in a major case.