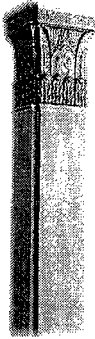


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ROTHMAN, HOFFBERGER & HOLLANDER, LLC



Maryland's New Foreclosure Law May 26, 2010

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AGENDA

- Background on new Maryland Foreclosure Law
- What's new?
- When is compliance required?
- Practice pointers on compliance

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BACKGROUND

- In 2008, the Maryland General Assembly enacted comprehensive changes in the foreclosure process for "residential property."
- ⊗ Definition: "Residential property" means real property improved by 4 or fewer single family dwelling units that are designed principally and are intended for human habitation.
- ▶ *Practice Pointer: The definition of "residential property" does not change from what is in the existing law.*

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- In 2010, Governor O'Malley announced his intent to make further foreclosure reform – foreclosure mediation – a high priority as it related to owner-occupied residential property.
- Countless hours were spent trying to achieve a compromise.
- This initiative resulted in additional requirements and consumer protections being added to Maryland's foreclosure law.

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- The additional requirements primarily apply to "owner-occupied residential property."
- ⊗ Definition: "Owner-occupied residential property" means residential property in which at least one unit is occupied by an individual who has an ownership interest in the property and uses the property as the individual's primary residence.

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- Bill entitled "Residential Property Foreclosure Procedures – Foreclosure Mediation"
- Introduced as House Bill 472
- Signed May 20, 2010 to become Chapter 485 of the 2010 Laws of Maryland
- New law is effective July 1, 2010
- Get a copy at:
<http://mlis.state.md.us/2010rs/billfile/hb0472.htm>

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New Foreclosure Laws

- ✓ Additional information in the form Notice of Intent to Foreclose ("NOI")
- ✓ New documents regarding loan modification and loss mitigation must accompany NOI
- ✓ "Loss mitigation analysis" must be performed for loans secured by owner-occupied residential property

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New Foreclosure Laws

- ✓ Additional \$300 fee to file an Order to Docket or Complaint to Foreclose (OTD) residential property
- ✓ Additional information filed with OTD in connection with residential property
- ✓ New documents regarding loss mitigation must accompany OTD

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New Foreclosure Laws

- ✓ If loss mitigation analysis is not completed at time OTD is filed, then additional filing and mailing required for owner-occupied residential property
- ✓ Owner-occupants have right to "foreclosure mediation"

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Notice of Intent to Foreclose



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EXISTING NOTICE

Notice of Intent to Foreclose: Background

- ▶ Except for certain limited circumstances, an action to foreclose a mortgage or deed of trust ("Order to Docket" or "OTD") on residential property may not be filed until the later of:
 - 90 days after default; or
 - 45 days after the notice of intent to foreclose ("NOI") is sent.

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EXISTING NOTICE

Circumstances that Avoid the Delay in Filing Order to Docket

May ask to be allowed to begin foreclosure on residential property immediately if:

1. Loan was obtained by fraud or deception;
2. No loan payments were ever been made;
3. Property was destroyed; or
4. Default occurred after stay was lifted in a bankruptcy proceeding.

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EXISTING FORM

- At least 45 days before filing OTD on residential property, secured party must send NOI to mortgagor/grantor and to record owner
- Send both by certified and first-class mail
- Copy also sent to the Commissioner of Financial Regulation
- NOI must be in the form prescribed by the Commissioner of Financial Regulation

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NEW FORM

New NOI form will include:

- ▼ Statement recommending that mortgagor/grantor seek housing counseling services
- ▼ Telephone number and internet address of nonprofit and government resources available to assist mortgagors/grantors facing foreclosure
- ▼ Explanation of Maryland foreclosure process and time line

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NEW FORM

New NOI form

- ▶ **Practice Pointer: The additional information will be added to the form NOI by the Commissioner. Be sure to use the new form.**
- ▶ **Practice Pointer: Because NOI is sent in connection with all "residential property," this new NOI form will be sent in connection with some non-owner-occupied properties.**

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New NOI must be accompanied by:

1. "Loss mitigation application"
2. Instructions for completing that application
3. Telephone number to call to confirm receipt of application
4. Description of eligibility for loss mitigation programs applicable to the subject loan
5. Envelope preprinted with address of person responsible for conducting loss mitigation analysis

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1. "Loss mitigation application"

- ☒ Send application form(s) already used by the secured party for loss mitigation programs that are applicable to the subject loan
- ☒ If the secured party does not have its own loss mitigation application form, then use form prescribed by the Commissioner of Financial Regulation

▶ **Practice pointer: It is unclear whether regulations or court rules will require this application to be sent in connection with non-owner-occupied properties.**

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2. Instructions for completing the loss mitigation application
3. Telephone number the homeowner may call to confirm secured party's receipt of the application

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4. Description of eligibility for loss mitigation programs applicable to the subject loan

- Definition: "Loss mitigation program" means an option in connection with owner-occupied residential property that:
 - i. avoids foreclosure through loan modification or other changes to existing loan terms intended to allow mortgagor/grantor to stay in residential property;
 - ii. avoids foreclosure through a short sale, deed in lieu of foreclosure, or other alternative intended to simplify mortgagor's/grantor's relinquishment of the property; or
 - iii. lessens the harmful impact of foreclosure on the mortgagor/grantor.

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5. Envelope preprinted with address of person responsible for conducting loss mitigation analysis

- Definition: "Loss mitigation analysis" means an evaluation of the facts and circumstances of a loan secured by owner-occupied residential property to determine:
 - i. whether a mortgagor/grantor qualifies for a loan modification; and
 - ii. if there will be no loan modification, whether any other loss mitigation program may be made available to the mortgagor or grantor.

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► **Practice Pointer:** *Because of affidavits that must be filed by the secured party along with the Order to Docket (or later in the process), "loss mitigation analysis" will need to be performed in connection with every loan secured by owner-occupied residential property subject to the foreclosure process.*

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Order to Docket or Complaint to Foreclose



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Since 2008, it has been required to include with an order to docket or a complaint to foreclose ("OTD") a mortgage or deed of trust on residential property certain information about the loan originators, the default, and the NOI. It also has been required that the OTD in connection with residential property be accompanied by various documents.

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The new law:


- ☒ Adds a \$300 fee if filing an OTD is for residential property
- ☒ Changes the Notice to mortgagor/grantor that accompanies the OTD for residential property
- ☒ Requires either a final or a preliminary loss mitigation affidavit by the secured party to be filed with the OTD, along with additional documents depending upon which affidavit is filed with the OTD


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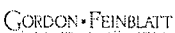
 **File along with OTD either a final loss mitigation affidavit or a preliminary loss mitigation affidavit**

-  Definition: "Final loss mitigation affidavit" means an affidavit that:
 - i. is made by person authorized to act for secured party of mortgage/deed of trust on owner-occupied residential property that is the subject of a foreclosure action;
 - ii. certifies completion of the final determination of loss mitigation analysis; and
 - iii. if denied, provides an explanation for denial of loan modification or other loss mitigation.






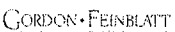
-  Definition: "Preliminary loss mitigation affidavit" means an affidavit that:
 - i. is made by person authorized to act for secured party of mortgage/deed of trust on owner-occupied residential property that is the subject of a foreclosure action;
 - ii. certifies the status of an incomplete loss mitigation analysis; and
 - iii. Includes reasons why the loss mitigation analysis is incomplete.

 **Practice Pointer: The secured party needs to make a business decision whether to proceed with an OTD based on a preliminary affidavit or wait until a final affidavit can be filed.**



The Commissioner of Financial Regulation will issue regulations that provide:

-  The text of the Notice to mortgagor/grantor that accompanies the OTD for residential property
-  A final loss mitigation affidavit form
-  A preliminary loss mitigation affidavit form



Until the Commissioner issues final regulations:

- ☒ The Notice to mortgagor/grantor that accompanies the OTD for residential property should be substantially in the language provided in the statute
- ☒ The final and preliminary loss mitigation affidavit forms should be substantially in the forms set forth at the end of the law (in Section 4)

▶ **Practice Pointer:** *There should be no delay in the foreclosure process if new regulations are not finalized by July 1, 2010.*

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If loss mitigation analysis has not been completed, the secured party files a preliminary loss mitigation affidavit along with:

- ☒ A loss mitigation application and a description of the eligibility requirements for loss mitigation programs offered by the secured party,
- ☒ Instructions for completing the application, including instructions to return the completed application to the attorney handling the foreclosure, and
- ☒ An envelope preprinted with the address of the attorney handling the foreclosure.

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If loss mitigation analysis has been completed,* the secured party files a final loss mitigation affidavit along with:

- ☒ A form the homeowner can use to Request Foreclosure Mediation,
- ☒ An envelope preprinted with the address of the clerk of the court, and
- ☒ An envelope preprinted with the address of the foreclosure attorney.

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NOTE

* Note: Only for purposes of a final loss mitigation affidavit to be filed with the OTD, loss mitigation analysis is not considered complete if the reason for denial or determination of ineligibility for loss mitigation is based on the inability of the secured party either to:

- ☒ Establish communication with mortgagor/grantor, or
- ☒ Obtain all documentation and information necessary to conduct loss mitigation analysis.

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Following Order to Docket or Complaint to Foreclose



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If a preliminary affidavit was filed with the OTD, then the secured party may not go ahead with the foreclosure sale until a final loss mitigation affidavit is:

- ☒ Filed with the court, and
- ☒ Sent to mortgagor/grantor by first class and by certified mail, along with a form Request for Foreclosure Mediation and the envelopes specified earlier

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New Foreclosure

If a preliminary affidavit was filed with the OTD, then the follow up final loss mitigation affidavit:

- ❑ May not be filed earlier than 28 days after the OTD, but
- ❑ Must be filed at least 30 days before the date of a foreclosure sale.

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► Practice Pointer: When the final loss mitigation affidavit is filed, the foreclosure process will go one of two ways. Either: there will be no request for foreclosure mediation and the secured party will proceed to sell the property; or there will be a request for foreclosure mediation and the parties will prepare for and participate in a foreclosure mediation conference.

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Foreclosure Mediation




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 The new law gives mortgagor/grantors who live in the property being foreclosed the right to request "foreclosure mediation."


 Definition: "Foreclosure mediation" means a conference at which the parties in a foreclosure action, their attorneys, additional representatives of the parties, or a combination of those persons appear before an impartial individual to discuss the positions of the parties in an attempt to reach agreement on a loss mitigation program for the mortgagor/grantor.


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 At the foreclosure mediation, the parties and the mediator are to address loss mitigation programs that may be applicable to the subject loan.

 **Practice Pointer:** "Foreclosure mediation" is not really mediation. It is simply a type of settlement conference.

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 As mentioned, the final loss mitigation affidavit (whether filed with the OTD or later) must be accompanied by a form of Request for Foreclosure Mediation

 The Commissioner of Financial Regulation will issue regulations that provide this form

 Until the Commissioner issues final regulations, the form should be substantially as set forth at the end of the law (in Section 4)

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Mortgagor/grantor must file a request for foreclosure mediation with the court no later than:

- ☐ 15 days after service of the OTD if the final loss mitigation affidavit was filed with the OTD, or
- ☐ 15 days after mailing of the final loss mitigation affidavit if the preliminary loss mitigation affidavit was filed with the OTD.

Mortgagor/grantor must:

- ☐ Pay a \$50 filing fee (unless fee is waived by the court), and
- ☐ Mail a copy of the Request to the foreclosure attorney.

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There is a process for the secured party to file a motion to strike the Request for Foreclosure Mediation, but there is a presumption that the mortgagor/grantor is entitled to the mediation unless good cause is shown why foreclosure mediation is not appropriate.

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- ☐ The Office of Administrative Hearings ("OAH") will schedule and conduct foreclosure mediations.
- ☐ Within 5 days after receipt of a Request for Foreclosure Mediation, the court must transmit the Request OAH.
- ☐ OAH must conduct the foreclosure mediation within 60 days after the court transmits the request, except that for good cause, OAH may extend the time for completing the foreclosure mediation for a period not exceeding 30 days.

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Notice

- ☐ OAH will send notice of time when foreclosure mediation will occur.
- ☐ The notice will include instructions regarding documents and information that must be provided by each party to the other party and to the mediator.
- ☐ Required information and documents must be provided no later than 20 days before the scheduled date of the foreclosure mediation.

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Mortgagor/grantor must be present at the foreclosure mediation

- ☐ Mortgagor/grantor may be accompanied by a housing counselor and may have legal representation

Secured party, or a representative of the secured party, must be present at the foreclosure mediation

- ☐ Secured party's representative must have the authority to settle the matter or be able to readily contact a person with authority to settle the matter

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OAH must report the outcome of the request for foreclosure mediation to the court upon the earlier of:

- ☐ 5 days after foreclosure mediation is held; or
- ☐ the end of the 60-day mediation period (plus any extension granted by OAH).

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Foreclosure Sale



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A foreclosure sale may be scheduled if the parties do not reach an agreement at the foreclosure mediation, or the mediation period expires and there is no mediation held.

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Mortgagor/grantor may file a motion to stay the foreclosure sale within 15 days after:

- ☐ the date the foreclosure mediation is held; or
- ☐ if no foreclosure mediation is held, the date OAH files its report with the court.

A motion to stay must allege specific reasons why loss mitigation should have been granted.

Nothing under the foreclosure process law precludes mortgagor/grantor from pursuing any other available remedy or legal defense available.

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NEW YORK STATE BAR ASSOCIATION

When can a foreclosure sale of residential property occur?

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When can a foreclosure sale of residential property occur?

- ☐ If the residential property is not owner-occupied, 45 days after service of the OTD.

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When can a foreclosure sale of residential property occur?


- ☐ If the residential property is owner-occupied and no foreclosure mediation is held, the later of:
 - ☐ 45 days after service of the OTD containing the final loss mitigation affidavit; or
 - ☐ 30 days after a final loss mitigation affidavit is mailed if the OTD contained a preliminary loss mitigation affidavit.

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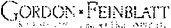
When can a foreclosure sale of residential property occur?

- ☒ If the residential property is owner-occupied and foreclosure mediation is requested, at least 15 days after:
 - ☒ the date foreclosure mediation is held; or
 - ☒ if no foreclosure mediation is held, the date OAH files its report with the court.

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Effective Date and Compliance

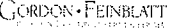


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The new law becomes effective July 1, 2010.

Beginning July 1, 2010, secured party must be ready to:

- ✓ Use new NOI form
- ✓ Include with NOI additional documents (including a "loss mitigation application," instructions, description of loss mitigation programs, and envelope)
- ✓ Perform "loss mitigation analysis"
- ✓ Pay additional \$300 to file OTD
- ✓ Include new Notice with OTD
- ✓ Provide appropriate affidavit and accompanying documents (depending upon what affidavit is used) along with OTD

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➤ The Commissioner is actively working on regulations to prescribe all necessary forms.

- An advisory by the Commissioner dated May 5, 2010 clarifies that an NOI which is compliant with the law at the time it is sent will be legally sufficient if attached to an OTD after the effective date of the new law.

▶ **Practice Pointer: The Commissioner's regulations will be issued as emergency regulations and, in all probability, will be effective before being published in the Maryland Register.**

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➤ The Maryland Rules Committee is actively working on revised court rules to ensure the foreclosure process moves forward in compliance with the law.


- The Committee has sent emergency rules to the Maryland Court of Appeals and those rules will be considered at a June 7, 2010 hearing.

▶ **Practice Pointer: The final Rules will be issued as emergency rules and will be effective before being published in the Maryland Rules volumes.**

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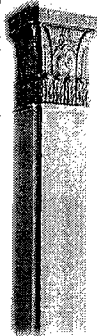
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Questions and Answers



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Thank you!

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