



## Tennessee Enacts Foreclosure Reform Requiring Additional Notice to Homeowners

Foreclosure rates remain high in Tennessee, as elsewhere around the country, and public sentiment continues to push for foreclosure reform or any method of relief for homeowners. Following the national trend toward additional homeowner protections in state foreclosure laws and procedures, on Tuesday, April 27, the Governor signed into law a bill intended to help homeowners avoid foreclosure by requiring lenders provide additional notice of the right to foreclose, as well as providing information regarding resources for homeowners.

### Summary of the Bill

Under current law, any foreclosure sale of land pursuant to a deed of trust or mortgage requires advertisement of the foreclosure sale in some newspaper published in the county in which the property is located. The first notice by publication must occur at least 20 days prior to the foreclosure sale.

The new bill requires that at least 60 days prior to the first publication of a notice of foreclosure sale, the bank or trustee (the "Lender") must send the borrower a notice of its right to foreclose (the "Right to Foreclose Notice"). The Right to Foreclose Notice must contain sufficient information to permit the borrower to contact the Lender as well as federal government officials responsible for any existing loan modification programs to discuss the borrower's account and the options that may be available to the borrower. The Lender must provide information about parties authorized by the Lender to assist borrowers in applying for such loan modification programs. The Right to Foreclose Notice must include the website address for HUD. We would be happy to provide a copy of the form of Right to Foreclosure Notice upon request.

The Right to Foreclose Notice must be sent by regular mail to the last known mailing address of the principal borrower and any co-borrower or guarantor. The Right to Foreclose Notice is effective upon deposit with the U.S. postal service and for any foreclosure sale initiated by publication, after 60 days and within 12 months of sending such notice.

### Owner Occupied Residence

The bill applies only to owner occupied residences, which is defined as "one-to-four family residence purchased and occupied as the principal residence of the [borrower]." Accordingly, these notice requirements do not apply to commercial properties.

### Effective Date

The bill goes into effect on July 1, 2010 and applies to foreclosures first published after September 1, 2010.

### Exclusions

The bill does not apply to (i) any sale conducted if the borrower has obtained a prior loan modification or refinance before July 1, 2010, (ii) a sale conducted by a trustee in bankruptcy, (iii) any judicial sale or (iv) a sale conducted after a bankruptcy petition is filed and the automatic stay has been lifted.

April 2010

### AUTHORS



**Brooks R. Smith**

615.252.2344

[brooks.smith@babc.com](mailto:brooks.smith@babc.com)



**Matthew B. Mattingly**

615.252.4630

[mmattingly@babc.com](mailto:mmattingly@babc.com)

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## **Procedural History**

Right or wrong, banks and other lending institutions have been receiving the lion's share of blame for their alleged unwillingness to work with borrowers as it relates to home loan delinquencies and subsequent foreclosures. With the metaphorical barbarians at the gates, the lobbies of both the Board of Governors of the Tennessee Bar Association and the Tennessee Bankers Association pushed for measured reform of the foreclosure process.

The effort was intended to circumvent or avoid the threat of potentially much more cumbersome and problematic legislation which had been offered. Because homeowners often do not understand the effect of delinquency in mortgage payments, it is expected that the new notice requirements will allow the borrower an opportunity, and the means and direction, to discuss the delinquency with the Lender.

## **Open Issues**

In essence, this bill extends the foreclosure process by, at a minimum, 60 days. Tennessee's foreclosure process is one of the shortest, and quickest, in the nation. One significant and repeated complaint of borrowers has been that banks are not responding until the borrower has stopped making payment, at which point the default process and ensuing foreclosure process is often too far gone. Requiring this Right to Foreclose Notice and the attendant obligations of the Lender and providing the additional 60 days is expected to alleviate this problem.

From a title insurance perspective, there is a concern regarding insuring title subsequent to foreclosure without absolute confirmation that the additional notice has been provided. The legislation attempts to address this by stating that the additional notice shall be set forth in both the actual notice of foreclosure as well as the subsequent deed conveying the property and shall be conclusory. However, the legislation notes that such conclusory evidence must be "without notice of any actual defect in the notice".

The legislation does not specify the ramifications to the bank or foreclosing party in the event this notice is not provided in compliance with the new law. Presumably, the foreclosure would be invalid, but confusion could be created in the event an innocent third party purchases a foreclosed property down the chain of title.

## **Conclusion**

With the overriding sensitivity to the borrower's plight in this incredibly difficult economic climate, the Tennessee legislature has added requirements that do not appear on their face to create a new and overly burdensome obligation of the Lender and will hopefully realize the intended benefits.

### **Office Locations**

#### **ALABAMA**

One Federal Place  
1819 Fifth Avenue North  
Birmingham, AL 35203  
(205) 521-8000

200 Clinton Avenue West  
Suite 900  
Huntsville, AL 35801  
(256) 517-5100

The Alabama Center for Commerce  
401 Adams Avenue  
Suite 780  
Montgomery, AL 36104  
(334) 956-7700

#### **MISSISSIPPI**

188 E. Capitol Street  
Suite 400  
Jackson, MS 39201  
(601) 948-8000

#### **NORTH CAROLINA**

100 North Tryon Street  
Suite 2690  
Charlotte, NC 28202  
(704) 332-8842

#### **TENNESSEE**

1600 Division Street  
Suite 700  
Nashville, TN 37203  
(615) 244-2582

#### **WASHINGTON, DC**

1133 Connecticut Avenue NW,  
12th Floor  
Washington, DC 20036  
(202) 393-7150

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