

Department of Legislative Services
Maryland General Assembly
2010 Session

FISCAL AND POLICY NOTE

House Bill 1118

(Delegate Niemann)

Environmental Matters

Real Property - Foreclosures of Residential Property - Loss Mitigation and Settlement

This emergency bill requires a notice of intent to foreclose to be accompanied by an application for a loss mitigation program in which the secured party participates that applies to the borrower's loan. The bill further requires an order to docket or a complaint to foreclose a mortgage or deed of trust on residential property to include payment of a \$100 filing fee and be accompanied by either a preliminary or final loss mitigation affidavit. The bill allows a homeowner to stay a foreclosure proceeding only if the homeowner meets certain criteria and timely files a specific petition to stay the foreclosure sale along with an approved homeowner's financial worksheet. The bill also creates a special fund, capitalized by the new filing fee, administered by the Department of Housing and Community Development (DHCD) and requires the Commissioner of Financial Regulation to adopt regulations to prescribe the form and content of specified loss mitigation affidavits and related documents.

Fiscal Summary

State Effect: Potential significant general fund expenditure increase for the Judiciary beginning in FY 2010. Special fund revenues and expenditures increase significantly beginning in FY 2010 for DHCD as the new special fund is capitalized and used to provide assistance.

Local Effect: Potential significant expenditure increase for circuit courts as discussed below.

Small Business Effect: Potential minimal.

Analysis

Bill Summary:

Additional Requirements for Notice of Intent to Foreclose

The bill requires a notice of intent to foreclose to be accompanied by an application for a loss mitigation program in which the secured party participates that is applicable to the borrower's loan. Under the bill, the borrower and the record owner of the property must be sent the following documents along with the notice of intent to foreclose and the applicable loss mitigation application:

- instructions for completing the loss mitigation application;
- a telephone number and a time to call to confirm receipt of the homeowner's application;
- a stamped envelope addressed to the individual or entity that is responsible for conducting any loss mitigation for the loan; and
- a timeline and outline for the foreclosure process as prescribed in regulations set forth by the Commissioner of Financial Regulation.

Preliminary or Final Loss Mitigation Affidavit to Accompany an Order to Docket

An order to docket or complaint to foreclose a mortgage or deed of trust on residential property must include payment of a \$100 filing fee and be accompanied by:

- if a loss mitigation analysis has been completed or is inapplicable, (1) a final loss mitigation affidavit in a form prescribed by the Commissioner of Financial Regulation, and (2) a worksheet documenting certain calculations used to deny any modification or other loan mitigation; or
- if a loss mitigation analysis applies to the borrower's loan but has not been completed, a preliminary loss mitigation affidavit in a form as prescribed by the Commissioner of Financial Regulation.

Under the bill, a preliminary loss mitigation affidavit must certify the steps taken by the secured party or the secured party's designee regarding a loss mitigation analysis of the borrower's loan and any additional steps that will be taken to ensure compliance. In contrast, a final loss mitigation affidavit must certify that the secured party or the secured party's designee has fully complied with any loss mitigation analysis applicable to the borrower's loan.

The bill defines “loss mitigation analysis” as an evaluation of temporary and permanent options intended to prevent foreclosure of the homeowner’s owner-occupied primary residence through (1) a loan modification intended to allow the homeowner to stay in the residential property; or (2) foreclosure alternatives intended to simplify the homeowner’s relinquishment of the residential property. The bill further requires the Commissioner of Financial Regulation to adopt regulations to prescribe the form and content of the final loss mitigation affidavit, the preliminary loss mitigation affidavit, the homeowner challenge petition, and certain related documents.

If an order to docket or complaint to foreclose a mortgage concerns owner-occupied property and is accompanied by a final loss mitigation affidavit, a homeowner’s challenge petition, a homeowner’s worksheet, and specified stamped, pre-addressed envelopes must also be included.

However, if the order to docket or complaint to foreclose is accompanied by a preliminary loss mitigation affidavit, a loss mitigation application, instructions, telephone number, and a stamped pre-addressed envelope must accompany the order to docket or complaint to foreclose. Additionally, if a preliminary loss mitigation affidavit is filed, the borrower must be sent the following by first-class mail and certified mail at least 30 days before the foreclosure sale:

- a final loss mitigation affidavit and homeowner’s worksheet; and
- a homeowner’s challenge petition, homeowner’s worksheet, and certain stamped, pre-addressed envelopes.

Residential Foreclosure Process and the Homeowner Challenge Petition

Under the bill, a foreclosure sale of residential property may not occur until the later of (1) at least 45 days after service of process that includes a final loss mitigation affidavit; or (2) at least 30 days after the mailing of a final loss mitigation affidavit. The bill stays a foreclosure proceeding if both the homeowner challenge petition and the homeowner’s worksheet are filed timely.

Within 15 days after receipt of the petition and worksheet, the court must determine whether the homeowner’s challenge raises a sufficient objection to the final loss mitigation affidavit. If the court determines the homeowner has raised a sufficient objection to the final loss mitigation affidavit, the court must order the parties to attend a settlement conference to review the final information in the loss mitigation affidavit.

At the settlement conference, the borrower may be represented by counsel and may be accompanied by a representative of a housing counseling agency approved by DHCD. The secured party must be represented by an individual authorized to modify the loan and may participate in the settlement conference remotely by telephone or video connection.

Based on the findings at the settlement conference and any pleadings or court filings, the court may continue to stay the proceedings or dismiss the stay and must state the reasons for its decision as part of the record. If the court determines the secured party did not properly conduct the loss mitigation analysis, the stay of the proceedings remains in place until the secured party complies with the court's findings. If the court determines that the loss mitigation analysis was completed properly, the court must remove the stay and allow the foreclosure to proceed.

Housing Counseling Fund

The bill creates the Housing Counseling Fund administered by DHCD to assist nonprofit housing counselors and other nonprofit entities with providing:

- legal assistance to homeowners who are trying to avoid foreclosure or manage foreclosure proceedings; and
- homebuyer education, housing advice, or financial counseling for homeowners and prospective homeowners.

The fund consists of the \$100 filing fee that accompanies an order to docket or complaint to foreclose a mortgage or deed of trust, investment earnings, money appropriated in the State budget to the fund, and any other money from any other source accepted for the benefit of the fund.

Current Law: A “settlement conference” is a conference at which the parties, their attorneys, or both appear before an impartial person to attempt to resolve a dispute by agreement or by means other than trial. A settlement conference may include neutral case evaluation and neutral fact-finding, and the impartial person may recommend the terms of an agreement. The participants may accept or reject the recommended settlement. (*See* Md. Rule 17-102(h).)

Foreclosure Process – Filing

“Residential property” is defined as real property improved by four or fewer single-family dwelling units designed principally and intended for human habitation. Except under specified circumstances, an action to foreclose a mortgage or deed of trust on residential property cannot be filed until the later of 90 days after a default in a condition on which

the mortgage or deed of trust states that a sale may be made or 45 days after a notice of intent to foreclose is sent. (*See Real Property Article § 7-105.1(a)-(b).*)

A written notice of intent to foreclose must be sent to the borrower and the record owner at least 45 days before the filing of an action to foreclose a mortgage or deed of trust on residential property. This notice must be sent by certified mail, postage prepaid, return receipt requested, and by first-class mail. A copy of the notice must also be sent to the Commissioner of Financial Regulation in the Department of Labor, Licensing, and Regulation (DLLR). The notice must be in the form that the commissioner prescribes by regulation and contain specified information. (*See Real Property Article § 7-105.1(c).*)

An order to docket or a complaint to foreclose a mortgage or deed of trust on residential property must contain specified information and be accompanied by specified documents.

Service of Process

A copy of the order to docket or complaint and all other papers filed with it must be served by either personal delivery to the borrower, or by leaving the papers with a resident of suitable age and discretion at the borrower's dwelling house or usual place of abode. (*See Real Property Article § 7-105.1(d).*)

If at least two good faith efforts to complete service of process on different days have not succeeded, the plaintiff may effect service by (1) filing an affidavit with the court describing the good faith efforts to complete service; (2) mailing a copy of the order to docket or complaint and all accompanying papers by certified mail, return receipt requested, and first-class mail to the borrower's last known address; and (3) posting a copy of the order to docket or complaint and all accompanying papers in a conspicuous place on the property subject to the mortgage or deed of trust. The individual making service of process must file proof of service with the court in accordance with the Maryland Rules. A foreclosure sale of residential property may not occur until at least 45 days after service of process is made. (*See Real Property Article § 7-105.1(e).*)

Notice of a Proposed Foreclosure Sale to the Record Owner, Occupants, and Subordinate Interest Holders

At the same time the borrower is served with all required documents, the person authorized to sell the residential property must send written notice to all occupants of the property. The notice must inform the occupants that a foreclosure sale of the property may occur at any time after 45 days from the date of the notice. The notice must also state that the person could be evicted, even if the person is a tenant and has paid all rent due and otherwise complied with the terms of the lease.

Within 10 to 30 days before a foreclosure sale of residential property, the person authorized to sell the property must notify the record owner of the property and any holder of a subordinate mortgage, deed of trust, or other subordinate interest, including a judgment, of the time and place of the sale. Written notice must also be sent to all occupants no earlier than 30 days and no later than 10 days prior to the date of the foreclosure sale, and a final notice must be sent after the entry of a judgment awarding possession of the property and before any attempt to execute the writ of possession. The person giving each notice must file an affidavit of compliance in the foreclosure proceeding after each notice is sent. If the foreclosure sale is postponed, no additional notice is required to be sent to the occupants of the property. (*See Real Property Article §§ 7-105.2, 7-105.3, 7-105.9.*)

Notice of the time, place, and terms of a foreclosure sale of residential property must be published in a newspaper of general circulation at least once a week for three successive weeks, with the first publication at least 15 days before the sale and the last not more than one week before the sale. (*See Md. Rule 14-210(a).*)

Cure of Loan Default

The borrower of a mortgage or deed of trust on residential property has the right to cure a default and reinstate the loan at any time up to one business day before a foreclosure sale by paying all past-due payments, penalties, and fees. Upon request, and within a reasonable time, the secured party or the secured party's authorized agent must notify the borrower or the individual's attorney of the amount necessary to cure the default and reinstate the loan, as well as instructions for delivering the payment. (*See Real Property Article § 7-105.1(h).*)

Background:

State Response to the Mortgage Crisis

The State's multifaceted approach to the foreclosure crisis has involved legislative reforms of mortgage lending laws, extensive consumer outreach efforts, and enhanced mortgage industry regulation and enforcement. Legislation passed during the 2008 and 2009 sessions:

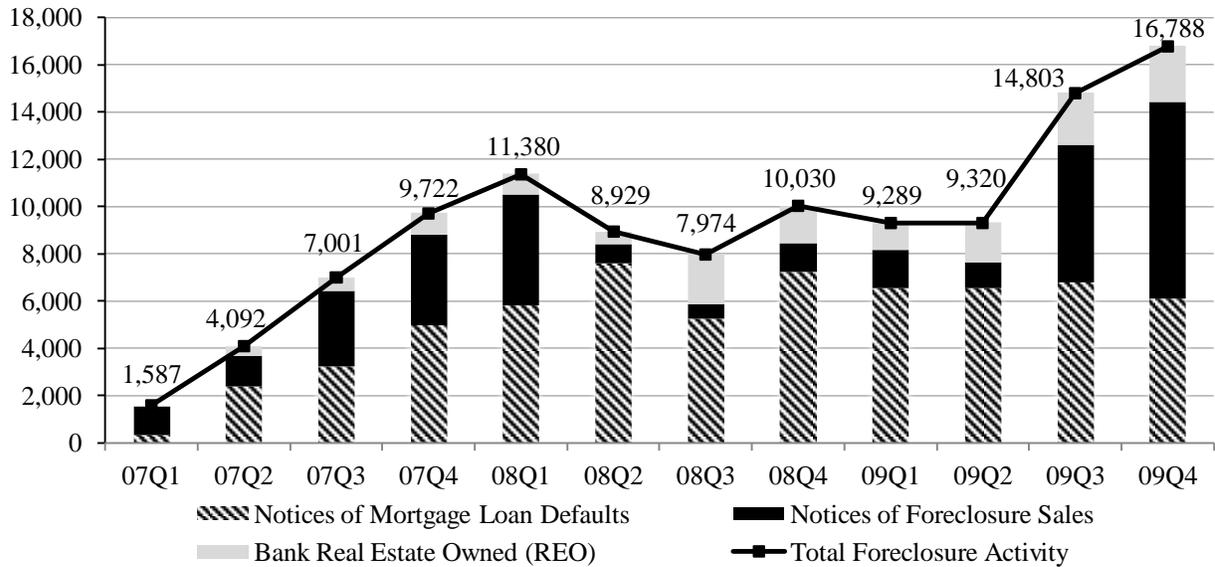
- created the Mortgage Fraud Protection Act, Maryland's first comprehensive mortgage fraud statute;
- tightened mortgage lending standards and required a lender to give due regard to a borrower's ability to repay a loan;

- prohibited foreclosure rescue transactions and granted the Commissioner of Financial Regulation additional enforcement powers;
- reformed the foreclosure process to provide homeowners with greater time and additional notices before their properties are sold; and
- required additional notices to be given to residential tenants renting properties pending foreclosure.

Consumer outreach efforts include statewide public workshops to assist distressed homeowners, in coordination with the Maryland Foreclosure Prevention Pro Bono Project. Since July 2008, over 1,000 volunteer attorneys trained through the project have provided free legal advice at foreclosure solutions workshops and represented borrowers referred from nonprofit housing counseling agencies. The project is coordinated by the Pro Bono Resource Center of Maryland in collaboration with other State agencies, the Maryland State Bar Association, and other nonprofit housing counseling service providers. In addition to the project, the State has sponsored more than 200 public foreclosure solution workshops attended by approximately 25,000 homeowners.

Despite the impact of extensive State legislative and consumer outreach efforts, **Exhibit 1** shows that total foreclosure activity in Maryland continues to increase as State residents feel the effects of rising unemployment and declining home values. The figures in Exhibit 1 incorporate data from DHCD's quarterly foreclosure reports that track documents filed in all three phases of the foreclosure process, including notices of mortgage loan default, notices of foreclosure sales, and properties that have been foreclosed on and repurchased by lenders. As shown in Exhibit 1, total foreclosure activity in the State has risen 67% year-over-year from the fourth quarter of 2008 to the fourth quarter of 2009, and over 13% from the third quarter of 2009 to the fourth quarter of 2009.

Exhibit 1
Total Foreclosure Activity in the State
First Quarter 2007 – Fourth Quarter 2009



Source: Department of Legislative Services using DHCD quarterly report data attributed to RealtyTrac

Although research from the Federal Reserve Bank of Richmond indicates that Maryland’s mortgage delinquency and foreclosure rates are lower than the national average, **Exhibit 2** shows that both subprime and prime delinquencies and foreclosures continue to rise.

Exhibit 2
Maryland Owner-occupied Loan Statistics
September 2008-2009

	<u>September</u> <u>2008</u>	<u>March</u> <u>2009</u>	<u>September</u> <u>2009</u>
Owner-occupied Subprime Loans			
90+ Days Past Due	13.4%	19.6%	23.4%
Foreclosure	8.0%	9.9%	11.4%
Owner-occupied Prime Loans			
90+ Days Past Due	1.5%	2.4%	3.6%
Foreclosure	0.9%	1.6%	1.9%

Source: Federal Reserve Bank of Richmond using data from Lender Processing Services Applied Analytics (September 2009)

From September 2008 to September 2009, the percentage of prime loans in Maryland more than 90 days delinquent rose from 1.5% to 3.6%. Over the same period, the foreclosure rate of prime loans more than doubled from 0.9% to 1.9%. According to the Federal Reserve Bank of Richmond, more than 23% of owner-occupied subprime loans in the State were more than 90 days overdue.

Federal Efforts to Promote Loan Modifications

Created in March 2009 and implemented two months later, the federal Home Affordable Modification Program (HAMP) was designed to facilitate loan modifications for qualifying homeowner occupants who are at risk of default or already in default, experiencing financial hardship, and meet other specified criteria. Participation in HAMP is mandatory for lenders that benefited from federal assistance through the U.S. Treasury’s Financial Stability Plan. Many of the nation’s largest loan servicers are required to participate in HAMP, as more than 85% of the outstanding mortgages in the country are covered under the program.

Exhibit 3 shows the number of active trial loan modifications and permanent modifications offered to Maryland homeowners from May through December 2009.

**Exhibit 3
HAMP Activity by State
May-December 2009**

<u>State</u>	<u>Active Trial Loan Modifications</u>	<u>Permanent Loan Modifications</u>	<u>Total</u>
Maryland	25,847	2,270	28,117
Virginia	19,791	1,898	21,689
Pennsylvania	18,459	1,388	19,847
District of Columbia	1,428	108	1,533

Source: FinancialStability.gov, Monthly Making Home Affordable Report (December 2009)

Homeowners seeking a loan modification under HAMP must have unpaid principal balances below the Fannie Mae and Freddie Mac conforming loan limit of \$729,750 (for a single-family home). To participate, an eligible home may not be investor-owned and may not be vacant or condemned. Loans subject to modification must have been originated on or before January 1, 2009, and may only be modified once under HAMP.

In determining HAMP eligibility, the lender must analyze a borrower’s net present value (NPV) for modification versus foreclosure. The NPV calculation includes the

borrower's payment history and credit score to predict (1) how likely the borrower will cure the loan default; and (2) the lender's potential losses incurred on the loan in the event of foreclosure based on geographic real estate trends. All borrowers must fully document income, including a signed copy of the most recent tax return, two most recent pay stubs, and a signed affidavit of financial hardship. The program requires participating loan servicers to follow a specific "waterfall" process in modifying loans to achieve a target monthly payment of 31% of the borrower's gross monthly income that includes first lowering the interest rate of the loan and then extending the term.

Maryland Foreclose Mediation Workgroup and Other States' Loan Modification Efforts

Over the course of six to eight weeks in fall 2009, the Governor convened a workgroup of various stakeholders at DHCD to explore the various options for instituting a foreclosure mediation program in the State. The workgroup examined the existing foreclosure process in the State and analyzed the advantages and disadvantages of other states' existing mediation programs. The ultimate goal was to draw upon other states' models to design a Maryland-specific program that would complement and help facilitate the success of the federal HAMP program.

Nevada's foreclosure mediation program was one of several analyzed by the Maryland foreclosure mediation workgroup. Under the Nevada program, homeowners who receive a foreclosure notice have 30 days from the date of the notice to opt-in to the state mediation program. The program is overseen by the Nevada judiciary and requires good faith participation from borrowers, lenders, and loan servicers. The Nevada Supreme Court promulgates mediation rules and requires lenders and servicers to disclose their loan modification analyses to the mediator during a mediation session.

Nevada's foreclosure mediation program is entirely self-funded through a \$400 fee split evenly between the borrower and lender. An additional \$50 fee increase is imposed on parties filing a foreclosure notice. From July 1, 2009, through December 1, 2009, more than 3,400 Nevada homeowners who received notices of default requested mediation. As of December 11, 2009, the Nevada Supreme Court has appointed and trained 170 mediators participating in Nevada's Foreclosure Mediation Program. From July 1 through November 15, the Nevada judiciary reports the following statistics concerning its program:

Notices of default filed:	29,242
Requests for mediation:	3,446 (11.7%)
Mediations conducted:	372
Mediations scheduled:	876
Cases to be scheduled:	1,402

In the first four and a half months of Nevada's program, 29,242 notices of default had been filed. However, that figure includes commercial and nonowner occupied properties that are ineligible for Nevada's Foreclosure Mediation Program.

State/Local Fiscal Effect: Legislative Services estimates that DHCD special fund revenues could increase by \$420,300 in fiscal 2010 and \$1,681,200 in fiscal 2011. This estimate assumes a constant rate of notices of foreclosure sales.

Using data from DHCD quarterly foreclosure reports, Maryland homeowners received 16,812 notices of foreclosure sales in calendar 2009. Thus, since each order to docket or complaint to foreclose must be accompanied by an additional \$100 filing fee, special fund revenues increase beginning in fiscal 2010. Out-year special fund revenues cannot be reliably estimated due to difficulties in forecasting the State foreclosure rate in fiscal 2012 and beyond and the expiration of HAMP on December 31, 2012.

Special fund expenditures in DHCD increase beginning in fiscal 2010 to assist nonprofit housing counselors and other nonprofit entities in providing legal assistance to homeowners who are trying to avoid foreclosure. Expenditures could increase significantly beginning in fiscal 2010 for the Judiciary to establish and administer foreclosure-related settlement conferences. *For illustrative purposes only*, expenditures for circuit courts could increase by approximately \$120,000 in fiscal 2010 and \$480,000 in fiscal 2011. This estimate assumes 10% of the 16,812 Maryland homeowners who received notices of foreclosure sales will utilize a court-ordered settlement conference to review the information contained in the final loss mitigation affidavit. For a settlement conference to be scheduled, a homeowner must meet strict eligibility requirements by (1) timely filing a homeowner challenge petition and financial worksheet; and (2) raising a sufficient objection to the secured party's final loss mitigation affidavit as determined by the court. Thus, this estimate assumes a 10% eligibility rate. This is lower than Nevada's 11.7% foreclosure mediation program participation rate which also allows borrowers to opt-in to mediation upon receiving a foreclosure notice.

The Administrative Office of the Courts notes that the per diem rate for a retired circuit court judge is \$571. Assuming retired circuit court judges will be conducting 1,681 settlement conferences at an average rate of two conferences per day in the first full year of implementation, circuit court expenditures increase by \$479,925 for 840.5 working days at a rate of \$571 per day. However, it is important to note that a sufficient number of retired judges may not be available to conduct the potentially large number of foreclosure-related settlement conferences. Costs incurred by the circuit courts may increase significantly if third-party mediators or other neutral parties must be hired and trained to handle the projected workload of foreclosure-related settlement conferences.

This estimate does not account for the full range of costs likely to be incurred by the Judiciary including the availability of case management tools and the likely need for additional office space. Likewise, costs may increase minimally for other agencies such as DLLR, DHCD, and the Office of the Attorney General to handle additional inquiries and complaints. However, given the newly created Housing Counseling Fund, the impact of any new inquiries under the bill should be mitigated as such inquiries may be able to be referred for assistance to nonprofits.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Federal Reserve Bank of Richmond; State of Nevada Judiciary; U.S. Department of the Treasury – MakingHomeAffordable.gov; Baltimore Preservation Housing Coalition; RealtyTrac; Department of Housing and Community Development; Judiciary (Administrative Office of the Courts); Department of Labor, Licensing, and Regulation; Department of Legislative Services

Fiscal Note History: First Reader - February 24, 2010
ncs/kdm

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