



New State Breach Letter Requirements: Using Pre-Foreclosure Notices to Delay and Avoid Foreclosure

Chuck Houston

Vice President & Assistant General Counsel
Carrington Mortgage Services, LLC



Significant Recent Activity Directed Toward Foreclosure Delay and Avoidance

- Notices Designed to Delay Foreclosure
 - California S.B. 1137
 - Colorado H.B. 1402
 - Georgia S.B. 531
 - Maryland S.B. 216 / H.B. 365
 - Massachusetts Chapter 206
 - New York S. 8143-A
 - Virginia S.B. 797
- Notices/Programs Designed to Avoid Foreclosure
 - Connecticut H.B. 5577 & EMAP Program
 - Michigan S.B. 749
 - Pennsylvania S.B. 486 & PHFA Program



Recent State Laws Impacting Foreclosure Timelines

State	<i>Identifier</i>	<i>Effective Date</i>	<i>Delay Impact</i>
California	S.B. 1137	September 6, 2008	30 days
Colorado	H.B. 1402	August 1, 2008	60 days
Connecticut	H.B. 5577	July 1, 2008	30 days
Georgia	S.B. 531	May 13, 2008	15 days
Maryland	S.B. 216 / H.B. 365	April 3, 2008	89 days
Massachusetts	Chapter 206	May 1, 2008	90 days ¹
Michigan	S.B. 749	May 21, 2008	180 days ²
New York	S. 8143-A	September 1, 2008	150 days
Pennsylvania	S. B. 486	September 5, 2008	30 days
Virginia	S. B. 797	July 1, 2008 ³	40 days

¹ Only required once every five years.

² Only for service members who meet certain requirements.

³ Sunsets in 2010.

How to Audit for Compliance

- #1: Confirm the loan is subject to the notice / program.
- #2: Review breach / “NOI” / pre-foreclosure notices for content.
 - Does the notice contain the content required by the statute?
- #3: Review for compliance with timelines.
 - Did the notice go out too soon / too late?
- #4: Review for delivery.
 - Did the notice go to the proper recipient?
 - Did it go to the proper address?



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California S.B. 1137

- Effective September 6, 2008.
- Only applies to residential mortgage loans secured by the Mortgagor's principal residence and originated between January 1, 2003 and December 31, 2007.
- Mortgagee must wait at least 30 days after contacting (or exercising "due diligence" attempting to contact) the Mortgagor before providing a notice of default.
- The new notice is part of the "due diligence" requirement.
 - The Mortgagee must first attempt to contact the Mortgagor by sending a first-class letter that includes a toll-free telephone number to find a HUD-certified housing counseling agency.
 - That's it! Statute is unclear on other required content – presumably a method of contacting the Mortgagee to discuss foreclosure avoidance options would be recommended.



California S.B. 1137 (cont.)

- After sending the first-class letter, the Mortgagee must attempt to contact the Mortgagor by telephone at least three times at different hours and on different days.
 - Lingerin^g Questions:
 - Can the telephone calls begin on the date of the first class letter?
 - If you have multiple telephone numbers for a Mortgagor, must you call all numbers three times?
 - What about co-borrowers?
 - No need to call if the Mortgagor’s primary and secondary telephone numbers on file with the Mortgagee are disconnected.
- After waiting two weeks from the third telephone call, and receiving no response from the Mortgagor, the Mortgagee must send the Mortgagor a certified letter, return receipt requested.
 - No special content required – presumably the same content as the first-class letter is acceptable.



California S.B. 1137 (cont.)

- Exceptions:
 - The Mortgagor has surrendered the property (a letter confirming surrender or delivery of the keys to the property);
 - The Mortgagor has contracted with an organization, person, or entity whose “primary business” is advising people who have decided to leave their homes on how to extend the foreclosure process and avoid their contractual obligations to Mortgagees;
 - (Huh? How can a Mortgagee determine another company’s “primary business”? Solution: Don’t rely on this exception.)
 - The Mortgagor has a pending bankruptcy.



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Colorado H.B. 1402

- Effective for foreclosure actions filed on or after August 1, 2008.
- Applies to residential mortgage loans
 - Definition: a loan that is primarily for personal, family or household use and that is secured by a security instrument on residential real estate upon which is constructed or intended to be constructed a single- or multi-family dwelling.
- New notice required to the Mortgagor at least 30 days after default and at least 30 days before filing a notice of election and demand.
 - The notice must include contact information for the Colorado Foreclosure Hotline and the Mortgagee's loss mitigation representative or department.
 - No new notice required for subsequent defaults on same loan within next twelve months.



Connecticut H.B. 5577

- Effective July 1, 2008.
- Connecticut's Emergency Mortgage Assistance Program ("EMAP") is now mandatory.
- Applies to a mortgage on a one-to-four family owner occupied residence that is not FHA-insured.
- Exceptions:
 - Commercial mortgages.
 - Previous recipient of EMAP assistance (unless Mortgagor reinstated mortgage and has not be delinquent for six consecutive months since reinstatement).
 - Other defaults under the mortgage.



Connecticut H.B. 5577 (cont.)

- No judgment of foreclosure or foreclosure sale may be brought unless:
 - Mortgagee has given a homeowner notice of its intent to foreclose by registered or certified mail, postage prepaid at the address of the property which is secured by the mortgage.
 - Notice must notify homeowner of their right to 60 days to have a face-to-face meeting, telephone or other conference with the Mortgagee or a face-to-face meeting with a consumer credit counseling agency to attempt to resolve his or her delinquency or default and contact the Connecticut Housing Finance Authority (CHFA) about EMAP if they are unsuccessful in doing so.
 - Program officials have made a determination on the homeowner's application for emergency mortgage assistance.



Connecticut H.B. 5577 (cont.)

- The CHFA shall make a determination of eligibility for EMAP payments within 30 calendar days after the date of receipt of the homeowner's application. During that 30-day period, no judgment of strict foreclosure or any judgment ordering foreclosure by sale may be entered.

- If:
 - (i) the homeowner fails to meet with the Mortgagee or
 - (ii) the homeowner does not comply with any of the time limitations specified in the notice or
 - (iii) the homeowner's application is not filed by the date 30 days after the date of any default in payment under the agreement or
 - (iv) the homeowner's application for EMAP assistance is not approved by the date 30 calendar after the date of receipt of the homeowner's application,

then the Mortgagee may proceed with foreclosure.



Georgia S.B. 531

- Effective May 13, 2008.
- Relates to nonjudicial foreclosures only.
- The new law extends the time period for notice of foreclosure by 15 days: a Mortgagee must give notice of the initiation of foreclosure sale proceedings to the debtor at least 30 days (used to be 15) before the date of the proposed foreclosure.
- The law provides for the content of the notice that must be provided to the debtor:
 - the name, address, and telephone number of the individual or entity who shall have full authority to negotiate, amend, or modify all terms of the mortgage with the debtor.



Maryland S.B. 216 / H.B. 365

- Effective April 3, 2008.
- Mortgagee may not file an action to foreclose a mortgage or deed of trust on residential property until the later of 90 days after default or 45 days after sending a Notice of Intent to Foreclose to the Mortgagor or grantor and the record owner, with a copy to the Commissioner of Financial Regulation.
- Exceptions:
 - (1) the loan was obtained by fraud or deception;
 - (2) no payments have ever been made on the loan;
 - (3) the subject property has been destroyed; or
 - (4) the default occurred after the stay has been lifted in a bankruptcy proceeding.
- The Commissioner of Financial Regulation has promulgated emergency regulations on the form for the Notice of Intent to Foreclose, codified in the Code of Maryland Regulations § 09.03.11 (2008). The regulations are effective during an “emergency status” period than began April 10, 2008, and will expire November 19, 2008.
- The Commissioner of Financial Regulation issued an Advisory Notice on April 7, 2008 that addresses some of the features of the bill, including the requirements relating to the Notice of Intent to Foreclose.



Massachusetts Chapter 206

- Effective May 1, 2008.
- New written notice to Mortgagor required. Notice must contain:
 - the nature of the default claimed and the Mortgagor's right to cure the default by paying the sum of money required to cure the default;
 - the date by which the Mortgagor must cure the default to avoid acceleration, a foreclosure or other action to seize the home, which date shall not be less than 90 days after service of the notice and the name, address and local or toll-free telephone number of a person to whom the payment or tender shall be made;
 - statement that, if Mortgagor does not cure the default by the date specified, the Mortgagee may initiate foreclosure;
 - the name and address of the Mortgagee or agent, and the telephone number of a representative whom Mortgagor may contact regarding disagreement with Mortgagee's assertion of default has occurred or the correctness of the Mortgagee's calculation of the amount required to cure;
 - the name of any current and former mortgage broker or mortgage loan originator for such mortgage or note; and
 - statement that the Mortgagor may be eligible for assistance from the Massachusetts Housing Finance Agency and the Division of Banks and the local or toll-free telephone numbers the Mortgagor may call to request this assistance.



Massachusetts Chapter 206 (cont.)

- The Mortgagee cannot accelerate because of default until at least 90 days after the date a written notice is given to the Mortgagor.
- The Mortgagee must file a copy of the notice with the Commissioner of the Division of Banks, and must also file a copy of the notice in any action or proceeding to foreclose on the property.
- The Division of Banks has issued Frequently Asked Questions concerning Chapter 206, which can be found at www.mass.gov.



Michigan S.B. 749

- Effective May 21, 2008, but applies only to mortgages entered into after the effective date.
- Permits a Michigan court to stay foreclosure proceedings for up to six months if the homeowner is an active duty member of the military. To be eligible, the homeowner must have entered into the mortgage before becoming a service member or must be deployed overseas at the time of the foreclosure proceedings.



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Michigan S.B. 749 (cont.)

- Definitions:
 - A “service member” is defined to mean “an individual who is in military service and is a member of the armed services or reserve forces of the United States or a member of the Michigan national guard.”
 - “Military service” is defined to include:
 - active duty (further defined as “full-time duty in the active military service of the United States,” but not full-time national guard duty);
 - for a member of the national guard, service of more than 30 consecutive days authorized by the President or Secretary of Defense in response “to a national emergency declared by the president and supported by federal money”; or
 - “[a] period during which the service member is absent from active duty because of sickness, wounds, leave, or other lawful cause.”
- Exceptions:
 - Where the court determines that the homeowner’s active military service has not materially affected his or her ability to comply with the terms of the mortgage obligation.



New York S. 8143-A

- Effective September 1, 2008.
- Includes the requirement that a Mortgagee send notice to the Mortgagor of a high-cost, subprime, or nontraditional loan at least 90 days before commencing legal action to foreclose against the Mortgagor.
 - A high-cost loan is defined in the state's existing anti-predatory lending law.
 - A non-traditional home loan is defined as a payment option adjustable rate mortgage or an interest-only loan consummated between January 1, 2003 and September 1, 2008.
 - A subprime loan is separately defined for purposes of this provision and includes certain loans originated between January 1, 2003 and September 1, 2008 for which the annual percentage rate exceeds the yield on comparable Treasury securities as of the 15th day of the month in which the loan was consummated by three percentage points for a first lien loan (or by five percentage points for a subordinate lien loan), disregarding any initial or introductory rate.



New York S. 8143-A (cont.)

- The notice must be in 14-point type, contain the language set forth in the bill, and have attached a list of at least five government approved housing counselors in the Mortgagor 's area.
 - The 90 day period specified in the notice will not apply (or will cease to apply) if the Mortgagor files for an adjustment of debts or for an order for relief from the payment of debts, or ceases to occupy the mortgaged property as his or her principal dwelling.
 - However, the Mortgagee is only required to provide one notice per 12 month period for the same Mortgagor and loan.



Pennsylvania S.B. 486

- Effective September 5, 2008.
- Applies generally to loans not more than twenty-four months delinquent or not in default for more than twenty-four months that are secured by a lien on Pennsylvania real property on which there is located a one to two family owner-occupied residence that constitutes the Mortgagor's principal residence.
- New notice must be in plain language and specifically state that the recipient of the notice may qualify for financial assistance under the Homeowner's Emergency Mortgage Assistance Program.



Pennsylvania S.B. 486 (cont.)

- It must also contain the telephone number and address of a local consumer credit counseling agency.
- The notice also must advise the Mortgagor of his delinquency or other default under the mortgage including an itemized breakdown of the total amount past due and that such Mortgagor has 30 days (plus three for mailing) to have a face-to-face meeting with a consumer credit counseling agency to attempt to resolve the delinquency or default by restructuring the loan payment schedule or otherwise.
- The Mortgagee or other person sending the notice to the Mortgagor must simultaneously send a copy of each notice issued to the agency by regular mail, facsimile, electronic mail or another means of electronic transfer in accordance with agency guidelines. In lieu of sending a copy of each notice, the Mortgagee or other person charged with sending the notice may provide the agency, within 30 days of the end of each calendar quarter, a report listing the notices sent during the prior calendar quarter arranged by property address including zip code.



Virginia S.B. 797

- Effective July 1, 2008.
- Applies to “high risk mortgage loans” defined as a loan made by a mortgage Mortgagee and secured by a first lien on the Mortgagor’s primary dwelling unit that
 - (1) is not subject to the jurisdiction of an active bankruptcy proceeding;
 - (2) is not in active foreclosure with sale scheduled to occur within 30 days; and
 - (3) either
 - (a) has an APR, effective as of the date of origination, exceeding the yield on U.S. Treasury securities having comparable periods of maturity by five or more percentage points, or
 - (b) had total “points and fees” (as defined under HOEPA) payable on the loan of greater than seven percent of the total loan amount, as shown on the Mortgagor’s note or debt instrument, at or before loan closing.
- Requires a Mortgagee to provide written notice to a Mortgagor at least 10 business days before sending a notice of acceleration of the balance due following the Mortgagor’s default.



Virginia S.B. 797 (cont.)

- The notice must include
 - an itemization of all past due amounts causing the loan to be in default, and
 - statement of any charges that must be paid in order to bring the loan current;
 - statement that if the Mortgagor contacts the Mortgagee on or before the date specified, using the telephone number specified, the Mortgagee must provide the Mortgagor at least 30 additional calendar days from the date of that contact before sending the Mortgagor a notice of acceleration; and
 - Statement that if the Mortgagor fails to contact the Mortgagee by the date specified, the Mortgagee has the option to send notice of acceleration and to require immediate repayment of all sums owed under the loan agreement.
- In addition to providing notice, if a Mortgagor makes a request using the process describe above to request additional time to pursue options to avoid foreclosure, the mortgage Mortgagee must give the Mortgagor at least an additional 30 calendar days from the date of that contact before sending the Mortgagor a notice of acceleration. The Mortgagee is not required to provide more than one 30-day extension to a Mortgagor in connection with the same loan.



Don't Forget About the Note!

- Standard Fannie / Freddie Mortgage / DOT Requires Notice of Breach and Opportunity to Cure:
 - “The notice shall specify:
 - (a) the default;
 - (b) the action required to cure the default;
 - (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and
 - (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property.”
 - “The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. “



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Don't Forget About the Note! (cont.)

- The notice is also subject to the “Notice” provisions of the DOT / mortgage.
 - “All notices given by Borrower or Lender in connection with this Security Instrument must be ***in writing.***”
 - “Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by ***first class mail*** or ***when actually delivered to Borrower’s notice address if sent by other means.***”
 - “Notice to any one Borrower shall constitute notice to all Borrowers ***unless Applicable Law expressly requires otherwise.***”
 - “The notice address shall be the ***Property Address unless Borrower has designated a substitute notice address by notice to Lender.***”



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Questions / Comments





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Carrington Mortgage Services, LLC

