

**Recent Legislation Seminar
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I. 60-Day Advance Notice – “Right to Foreclose”
PC 834 – www.state.tn.us/sos/acts/106/pub/pc0834.pdf

a. Introduction – Overview

This was a joint effort of the Tennessee Bar and Tennessee Bankers to attempt to address foreclosures by requiring an advance notice to debtors of their risk so they can take action to seek help before it's too late. Rather than complicate or extend the current foreclosure process the statute was intended to be easy to use and provide certainty to the lenders. Hence the specific requirements (form) of notice; the use of regular mail; direction to HUD, www.HUD.gov, the only federal agency with existing counselors; and the cure provisions for failure to send, 30-day delay at the request of the borrower.

This advance notice would be the first of three notices the borrower should get about the foreclosure in addition to any default notices - 1) advance notice of the lenders right to foreclose (separate mailing in addition to a late payment notice); 2) FDCPA collection notice 30 days before foreclosure starts; and 3) the 21-day foreclosure notice. Notices two and three would be by certified or registered mail; thus, less need for the first notice to be certified to meet due process requirements.

If the notice is timed correctly it should also not delay the current process. Currently, most lenders send debtors a notice after 30 days late, 60 days late, refer debt to collection and send the FDCPA 30-day notice, then the 21-day notice. This takes about 110 days. By this time, the debtor is three to four payments behind, has incurred collection and publication costs, and it is impossible to recover before foreclosure.

While the 60-day notice could be sent at any time, it should be sent the first time the debtor is 30 days late. Hopefully the debtor contacts the lender to find a solution. If not, the lender is still on track to start the collection and foreclosure process after the debtor is 60 days past due. Some lenders may choose to wait until after the debtor is 60 days past due. This will have the effect of delaying the process.

b. Elements for Compliance

1. Notice Required – Advance notice to debtor is required at least 60 days prior to first publication date of actual foreclosure notice (TCA 35-5-101).
2. Properties Applicable – The advance notice applies to owner-occupied one-to-four family residence purchased and occupied as the principal residence of debtor. Advance notice does not apply to:
 - a. Second homes or vacation homes;
 - b. Rental or investment property;
 - c. Commercial property.
3. Who to Send Advance Notice to
 - a. Principal debtor; and
 - b. Any co-debtor or guarantor, but only if the address of the debtor or co-debtor is different from the address of the principal debtor.
4. Where to Send Advance Notice
 - a. Last known address of principal debtor [this is same standard for sending actual foreclosure notice];
 - b. Last known address of co-debtor or guarantor, if different.
5. How to Send Notice
 - a. Legislation only requires notice to be sent by regular mail;
 - b. Must be in a separate mailing;

- c. Lender will need to establish adequate procedures to demonstrate proof of mailing like other business records.
 - i. Log of mailings
 - ii. Copy of notice in file
- d. Lender may, and some practitioners recommend, two mailings on same day – one by regular mail and one additional certified mail or certificate of mailing.

Note: a certified letter provides evidence of both mailing and delivery information. It costs \$2.80. A certificate of mailing provides evidence of mailing but no information on delivery. It costs \$1.15.

Comment - The legislation is specific in that it only requires the advance notice to be sent by regular mail. Unlike the actual foreclosure notice in TCA 35-5-101, which is required to be sent by registered or certified mail, return receipt requested. The advance notice follows a lesser standard than the actual notice. The effectiveness of notice by mail provision is patterned after the UCC notice of sale (TCA 47-9-611) in that it specifically states that it is "sent by regular mail" and "effective upon deposit." There is no duty to confirm that the notice is "received." This process is based on the Tennessee Supreme Court's decision in *Auto Credit of Nashville v. Wimmer* (231 S.W. 3d 896, 2007 Tenn. LEXIS 642 (Tenn. Aug. 16, 2007)).

6. When Notice is Effective

- a. The notice is effective upon deposit with the U.S. Postal Service. The 60-day clock starts running.
- b. The notice is effective for any foreclosure initiated by publication after 60 days and within 12 months.

Comment - The essential purpose of the legislation is to send the debtor a “wake-up call.” This would place the debtor on notice of the risk of losing his/her home. It would also encourage the debtor to contact the lender or other resource to

seek help “before it’s too late.” Thus, lenders and servicers are encouraged to send the advance notice sooner rather than later. This would be not in an effort to accelerate foreclosure, but instead to further the policy of getting the debtor to seek relief.

The timing for sending the notice is within the discretion of the lender or servicer. To prevent a delay in starting an actual foreclosure, the advance notice should be sent as soon as a debtor is delinquent. This could be as soon as i) the debtor incurs a late payment (5-15 days late), or ii) the debtor is in default (30 days late).

Lenders and servicers must use their best judgment to send a timely notice to encourage a response from the debtor.

7. Who Can Send Advance Notice

- a. Advance notice may be sent by:
 - i) The lender;
 - ii) A servicer;
 - iii) An agent of the lender or servicer;
 - iv) The trustee of the deed of trust.

- b. If the advance notice is not sent before the loan is turned over to the trustee for collection, then the trustee will need to send the notice and wait 60 days before commencing foreclosure.

8. Content of Advance Notice

- a. The legislation contains a model form. Lenders should use only this form (sample attached).
- b. The model form contains the information required by the legislation. This includes:
 - i. Information sufficient to contact the lender, servicer, or creditor:
Name
Address

Phone
Fax
Website
Contact Person

- ii. Information sufficient to contact federal government agency responsible for loan modification programs, if any, in existence at time of advance notice, government loan modification program website, and contact information.

Exception: This requirement does not apply if no modification programs are in existence or if the loan would not qualify for any federal government programs.

- c.
 - i. The advance notice must contain the website of the U.S. Department of Housing and Urban Development. www.hud.gov.
 - ii. The advance notice may, but is not required to, provide the website of any other federal government loan modification program.
 - iii. The advance notice does not require including notice of any voluntary industry modification programs that may be available.
- d. A listing of federal government programs is included in an attachment.

Comment - The advance notice is intended to permit the debtor to be aware of any relief programs that are available. The best resources for these are:

- i. The lender or servicer, or
- ii. The Department of Housing and Urban Development.

HUD is the only federal agency that has home ownership counselors available.

9. When is Advance Notice Not Required

- a. Notice is not required for any:
 - i. Judicial sale ordered or conducted by a court;
 - ii. Sale conducted by a trustee in bankruptcy;
 - iii. Sale conducted after a bankruptcy petition is filed and the automatic stay has been lifted by the bankruptcy court; and,
 - iv. Sale conducted if the borrower has obtained a prior loan modification or refinance before July 1, 2010.

- b. Comment - These sales occur after the debtor has already been apprised of the risk of loss or has already sought relief. The additional advance notice would serve no useful purpose, but could be used by the debtor to delay the inevitable foreclosure sale.

10. Duty of Trustee/Limitation of Liability of Trustee/Postponement

- a. The trustee has the duty to:
 - i. Set forth the giving of the notice of the right to foreclose in any notice of foreclosure; and,
 - ii. Recite the giving of the notice in any deed memorializing the sale.

- b. By completing what amounts essentially to “public notice” of compliance, the trustee insulates both himself and a subsequent title insurance company from liability to a third party unless they have actual notice of a defect in the notice.

- c. If the trustee determines at the time of sale that the notice has NOT BEEN SENT, then the trustee shall, on the written request and consent of the debtor, postpone the sale for not less than 30 days or more than 60 days.

- d. During any period of postponement, no republication of the notice of foreclosure under 35-5-101 is required.
- e. Comment - This section highlights several important aspects of the legislation and attempts to address several important legal concerns. As contemplated, the legislation was intended to be a simple “wake-up call” to the debtor. This section demonstrates the legal complexities of the foreclosure process. Many of these issues were raised by the real estate section of the Tennessee Bar only after the legislation was moving through the legislative process.
 - i. Title companies and real estate lawyers view the legislation as an essential new element of the overall foreclosure process.
 - ii. The person sending the advance notice (lender, servicer, agent or trustee) should make sure the notice is correct in its form, contains accurate information, is timely sent, and all aspects are adequately documented.
 - iii. A trustee who determines at the time he/she receives a file for collection that the advance notice has not been sent or cannot determine from the file that the advance notice was sent will want to delay the start of publication and send the advance notice. Otherwise, the trustee will not in good faith be able to complete the notice in the publication and in the memorializing trustee’s deed.
 - iv. The requirement to postpone the sale on the request and with the consent of the debtor is intended as a cure. The trigger for this delay is a written request by the debtor. While there is no duty on the trustee to notify the debtor of the defect, a trustee who proceeds risks that the sale could be later set aside due to a procedural defect.
 - v. The requirement to republish the foreclosure sale is specifically waived during this cure period. Some title insurance companies have taken the position that any postponement of a foreclosure sale beyond 30 days

requires republication. The legislation addresses this specific concern.

11. Transition Period – Effective July 1 or September 1?
 - a. The legislation contains an effective date of July 1, 2010; however, it is effective only for foreclosures that are first published on or after September 1, 2010.
 - b. Comment – The discrepancy in effective and applicable dates is to both prevent a constitutional issue based on impairment of contracts and to permit time for compliance. A debtor who was already in default on July 1 cannot use the new advance notice to unnecessarily delay a pending foreclosure. This would cause the new act to unconstitutionally impair an existing contract.

The gap permits a lender to initiate foreclosure prior to September 1, 2010, without giving the advance notice. However, the lender would have to already be in the foreclosure process with other required notices to use this gap.

II. Attachments

1. Sample Transmittal Letter
2. Sample Notice
3. Public Chapter 834
4. T.C.A. 35-5-101 – Twenty days' notice by publication
5. List of Federal Government Programs – websites
6. Other Resource Material

Bank Name
Address
City, ST Zip

Bank Customer
Address
City, ST Zip

RE: Loan # Borrower Property Address

Dear Customer:

Enclosed you will find a NOTICE OF THE RIGHT TO FORECLOSE required by Tennessee Code Annotated § 35-5-117 to be sent 60 days prior to publishing a notice of foreclosure sale. This is being sent to notify you of our right to foreclose at any time after 60 days and within 12 months from the date of the Notice.

We would be happy to discuss your loan and any options that may be available to you. Please contact our representative noted on the notice.

Sincerely yours,

Your Banker

Sample Notice – Draft

NOTICE OF THE RIGHT TO FORECLOSE

Date of Notice: _____

The holder of the mortgage, deed of trust or other lien on your property has the right to begin the process of foreclosing on the debt and may sell your property at public auction to satisfy the debt at any time after sixty (60) days from the date of this notice of the right to foreclose for a period of twelve (12) months without sending you another notice of right to foreclose.

You should IMMEDIATELY contact the lender, servicer or creditor listed below to discuss repayment options for which you may qualify, or if none are available, foreclosure alternatives such as short sale or deed in lieu of foreclosure. Failure to satisfy your payment obligations may result in loss of your home.

Debt counseling may be available in your area. You can determine if debt counseling is available in your area and locate an approved counselor at the U.S. Department of Housing and Urban Development (HUD) web site at www.HUD.gov.

You may also be eligible for certain Federal loan modifications programs. You should review your options under these programs immediately at the Department of Housing and Urban Development web site (www.HUD.gov) and or at other applicable websites, and consult your lender. If you wish to participate in one of these programs, you must make timely application as required by the program. You should notify the lender, servicer or creditor of your interest in participating in one of these programs.

YOU MUST ACT IMMEDIATELY IF YOU WISH TO TRY TO SAVE YOUR HOME

Name of creditor:

Address of creditor:

Phone: _____ Fax: _____

Web site and e-mail address: _____

Contact person: _____

Government Loan Modification Program Web site and contact information

1. Department of Housing and Urban Development - www.HUD.gov.

Nashville Field Office

235 Cumberland Bend, Ste 200

Nashville, TN 37228-1803

615/736-5600

Knoxville Field Office

710 Locust St, SW

Knoxville, TN 37902-2526

865/545-4370

Memphis Field Office
200 Jefferson Ave, Ste. 300
Memphis, TN 38103-2389
901/544-3367

2. Making Home Affordable – www.makinghomeaffordable.gov
3. Hope for Homeowners – www.HUD.gov

List of Federal Government Agencies, Programs and Websites

I. Federal Government Agencies

- a. Department of Housing and Urban Development – www.HUD.gov
 - i. Listing of this agency is required
 - ii. HUD is only agency with counseling information
 - iii. HUD lists all federal programs
- b. U.S. Department of Treasury – www.treas.gov
 - i. Listing not required
 - ii. General site – Link to Making Home Affordable program
- c. Federal Deposit Insurance Corporation – www.FDIC.gov
 - i. Listing not required
 - ii. General consumer information
 - iii. Link to federal programs
 - iv. Link to FDIC Loan Modification Program Guide ‘Mod in a Box’
 - v. Applies only to Indy Mac Bank – loans held by FDIC
 - vi. Voluntary guidance for all other banks
- d. Office of Comptroller of Currency – www.occ.treas.gov
 - i. Listing not required
 - ii. General consumer information
 - iii. Bank lending guidance

II. Federal Government Foreclosure Programs

The following are the only federal government programs available. There are only three, and they may have limited applicability. There are also private programs, listed later, that are not required to be listed.

- a. Making Home Affordable – www.makinghomeaffordable.com
 - i. HAMP – Home Affordable Modification Program
 - ii. HARP – Home Affordable Refinance Program

Eligibility for both of these programs is limited to mortgages owned or guaranteed by Fannie Mae or Freddie Mac.

- b. HOPE for Homeowners (H4H) – www.HUD.gov
This is a refinance program to help qualifying borrowers refinance existing loans into 30-year fixed rate mortgages insured by FHA.

III. Other Resources/Programs

The following resources/programs are for information only. There is no requirement to include any of these in the advance notice.

- a. HOPE Now – Lender Alliance – www.hopenow.com
This is an alliance of mortgage companies, counselors, investors and other mortgage markets that seek to help borrowers.
- b. Home Ownership Foundation – www.995HOPE.org
Contains information and links to numerous resource sites.