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COMMISSIONER OF FINANCIAL REGULATION

# ADVISORY NOTICE

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January 7, 2014

## Advisory: Property Preservation - Nonjudicial Evictions

### Overview

When performed in accordance with applicable local, state, and federal laws, property preservation helps to ensure that lenders and mortgage holders are protected from further damages or costs associated with the property, and helps to keep neighborhoods free from blight. However, the Office of the Commissioner of Financial Regulation ("Office") has recently received complaints pertaining to acts taken on behalf of servicers for the stated purpose of property preservation. The Office is committed to ensuring that state-licensed servicers and their agents comply with laws governing property preservation. Property preservation complaints are subject to the Commissioner's investigatory and enforcement powers as outlined in the Maryland Mortgage Lender Law and accompanying regulations, as well as other Maryland laws, including, but not limited to, the Maryland Mortgage Fraud Protection Act and the Maryland Consumer Protection Act.

### I. Property preservation background

Property preservation, defined broadly, is the process of maintaining the interior and exterior of a building to prevent it from falling into disrepair. Throughout the default process the servicer is responsible for performing all property maintenance functions to ensure that the condition and appearance of the property are maintained satisfactorily. This responsibility includes:

- *Vacancy determinations*
- *Securing*
- *Lawn maintenance*
- *Winterization*
- *Trash removal*

### II. Nonjudicial evictions

While the mortgagee's authority to engage in property preservation usually stems from a breach in its contractual relationship with the mortgagor, this contractual right is conditioned by local, state and federal laws which delineate certain rights for mortgagors and tenants in actual possession of the property.

During the 2013 legislative session, the Maryland General Assembly passed [Senate Bill 642/House Bill 1308](#), effective June 1<sup>st</sup>, 2013, and codified at RP § 7-113, 8-216 and 8A-1102.

*Overview of the new law:*

**A protected resident** includes a grantee, tenant, subtenant, or other person in actual possession by, through, or under an owner or former owner of residential property. It does not include a trespasser or squatter.

**Prohibitions:** A party claiming the right to possession may not (i) lock the protected resident out of the residential property; (ii) engage in willful diminution of services (i.e. intentional interruption of

heat, gas, electric, water etc.) to the protected resident; (iii) take any other action that deprives the protected resident of actual possession. Possession may only be taken from a protected resident in accordance with a writ of possession issued by a court and executed by a sheriff or constable.

**Notice Requirements:** The Act authorizes a party claiming the right of possession to use nonjudicial self-help to take possession of the property if: (i) the party reasonably believes the protected resident has *abandoned* or *surrendered* possession of the property based on a reasonable inquiry into the occupancy status of the property; (ii) provides notice as required by the Act; and (iii) receives no responsive communication to that notice within 15 days after the later of posting or mailing the notice as required by the Act.

**Remedies for Violation:** In addition to those enforcement measures available to the Commissioner of Financial Regulation, the Act specifically provides for private rights of action which may include possession of the property, actual damages, reasonable attorney's fees and costs.

Slightly different provisions apply to tenants under residential leases and tenants in a mobile home park (*see RP §§8-216 and 8A-1102.*)

### **III. Abandonment Determinations and Lock Outs**

Per the [FNMA guidelines](#) for property preservation, determinations as to abandonment require specific documentation, even where there has been notification from a borrower or other verifiable source that the property has been abandoned. Additionally, RP § 7-113(c)(1) requires that a servicer make a reasonable inquiry into the occupancy status of the property before posting notice to an abandoned property. FNMA guidelines require servicers to secure an exterior door or a secondary door for access to the main dwelling of an abandoned property. The guidelines specifically state, however, that only one lock is allowed to be changed for a main dwelling. In the event that the main entrance is the only option for gaining access to the abandoned property, that entrance may be rekeyed per the guidelines.

### **IV. Tenants' Rights**

The Office has received consumer complaints alleging that some tenants have been unable to contact their servicer by calling the telephone number included on a notice of abandonment posted pursuant to RP § 7-113(b)(2)(ii). RP § 7-113's prohibition on nonjudicial evictions applies to tenants as well as homeowners. Thus, a party claiming the right to possession must follow the process outlined in RP § 7-113(b)(2)(ii), including: conducting a reasonable inquiry into the occupancy status of the property, posting notice, and waiting 15 days for a response by a tenant before using self-help to take possession of the property. In order to comply with RP § 7-113, servicers must have procedures in place to allow tenants to contest an abandonment determination during the pre and post-foreclosure period.

### **V. Legality of Inspection fees**

Maryland Code, Commercial Law (CL) § 12-121 governs the legality of lenders' inspection fees in Maryland. Lender's inspection fee is defined in the statute as a fee imposed by a lender to pay for a visual inspection of real property. CL § 12-121 prevents a lender from imposing an inspection fee in connection with a loan secured by residential real property. Under CL § 12-122, a willful violation of § 12-121 carries a fine not exceeding \$500 or imprisonment not exceeding six months, or both.

In *Taylor vs. Friedman*, 344 Md. 572 (1997), the Maryland Court of Appeals held that CL § 12-121's prohibition against imposing a lender's inspection fee in connection with a loan is not limited to fees charged in connection with a settlement. In *Taylor*, when a delinquency continued for more than 45 days from the due date, the lender caused the property to be inspected by an independent entity and charged the mortgagor's account an inspection fee on each such occasion. The Court ruled that CL § 12-121 prevented those charges from being passed on to the mortgagor. *Taylor* remains good law in Maryland and applies to circumstances where a servicer orders a visual inspection of property following default on the terms of a mortgage.

**For More Information**

For any questions or more information, please contact Brian Patrick Weeks, Assistant Attorney General, at 410-230-6359, or via email at [bweeks@dllr.state.md.us](mailto:bweeks@dllr.state.md.us).

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[Summary Maryland Real Property Article 7-112](#)