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FORECLOSURE

A View From The Trenches

Let's Examine The Other Side Of Loss Mitigation

BY BRUCE J. BERGMAN

Lest this polemic be seen as controversial, at variance with prevailing wisdom, offensive or in any number of other odious categories, let us hasten to affirm:

Effective loss mitigation efforts are a major ally of mortgage servicing and well deserve the significant attention they receive.

And while sometimes (e.g. when successful) loss mitigation is a perfect substitute for a foreclosure action, it is not always so by any means. The point is not to suggest any diminution in loss mitigation zeal, but rather to urge both caution and awareness of the need not to unduly stall the foreclosure action while awaiting achievement of loss mitigation success.

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The impetus for this discussion is some recent emphasis by counsel that forging through a foreclosure is best put aside in favor of more responsive communication with distressed borrowers. Attempting to rebut such a posture is akin to being unpatriotic. It is not, though, that the statement is wrong, just that it is incomplete.

Yes, of course, if a borrower makes any effort to find a solution to the dilemma, it should be entertained so perhaps some way could be found to reach an amiable conclusion. But there is more to it than that.

A few words of perspective

The reference here is not to loss mitigation procedures prior to conveyance of a defaulted mortgage to foreclosure counsel. Breadth and duration of initial loss mitigation by servicers is a function of sound business decisions and investor guidelines. How deeply loss mitigation impedes the foreclosure process once the attorney has been directed to proceed is the issue.

Here are some outline points to consider.

- Foreclosures are typically constrained by fairly strict time frames. Time consumed in loss mitigation (if unsuccessful) could result in guidelines exceeded.
- Some borrowers are simply insincere: they are hoping to stall rather than genuinely reinstate payoff of the mortgage.
- Other borrowers are in earnest, but may simply lack the wherewithal to honor even the most favorable of terms.
- What borrowers can do or desire to do can sometimes be influenced by their representatives whose entreaties, for a variety of reasons, may be detrimental to the settlement process.
- Lenders' and servicers' attorneys - pressed to meet deadlines - may not have the time, the manpower or the expertise to participate deeply in the negotiation process - which is best left to specialists on servicers' staff where ultimate decision making reposes anyway.

Judicial actions

The importance of the noted

thoughts is particularly acute in judicial foreclosure states where the foreclosure process is more tortuous and time consuming. Each stage of the foreclosure case is a prerequisite to the next, and each must be methodically pursued.

In general terms, assuming a lender or servicer desires to accept some settlement offer, a possible error is to halt the efforts awaiting resolution, in an attempt to be gracious and not increase the burden of legal fees to be borne by the defaulting borrower. Some lenders or servicers may take this position because the borrower has "promised" to pay or deliver a deed in lieu or enter into a modification.

Yet, it could be rhetorically asked, what if the promise to pay in 10 or 20 or 30 days was overly optimistic - or disingenuous at the outset - as experience dictates can sometimes or often be the case? Then, the lender or servicer is stalled for weeks, or months, with only promises in hand and the foreclosure action no nearer to completion.

Rather than allow the borrower's ability, or perhaps more accurately, inability, to pay or otherwise settle, control the progress of the case, it is usually recommended that the action continue apace. In any event, continuation of the foreclosure should not cost the lender or servicer anything additional in legal expense if the matter is eventually settled or if the property brings the full upset price. (It does expose the borrower to a greater liability for legal fees, but there is *some* cost attendant to prosecuting the case.)

A closer look

As an example, upon receipt of the acceleration letter, a borrower may call the lender or servicer seeking reinstatement and offer or promise to pay the arrears. The lender or servicer may very well view this favorably. (With a Fannie Mae/Freddie Mac uniform mortgage reinstatement must be accepted up until judgment.)

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At the same time, though (in the judicial foreclosure jurisdiction), counsel has started the machinery to prepare the summons, complaint and *lis pendens*. In any event, the borrower should be directed to have contact only with the lender's attorney who then, as directed by the lender or servicer, must decide whether to refrain from preparing the pleadings while awaiting the promised reinstatement, or whether to proceed with the action notwithstanding the "promise."

This is a business decision, not a legal one. If the borrower's promise is entirely sincere and supported by the ability to deliver the requisite sum with reasonable dispatch (or settle in some other fashion), there is little danger in relying on the representation. The problem is the great difficulty in assessing borrowers' good faith and financial wherewithal.

Although subjective and not based upon empirical studies, familiarity with foreclosure cases leads to the conclusion that more often than not the borrower's pledge will not be timely kept. Assuming such is the case the majority of the time, thought should be given to continuing case progress until sufficient monies are actually paid or until some other form of settlement is achieved.

The next level

Again, for a typical judicial state, at the next level in the foreclosure - obtaining and analyzing the foreclosure search as a basis to prepare the summons, complaint and *lis pendens* - the lender and counsel should again evaluate whether to continue to the following step.

Each pleading is filed with the court and placed on record with the county clerk in the county where the mortgaged premises are situated. An action is instituted by the filing of the initial pleadings. The summons and complaint are then served upon the defendants in the action.

Having been served with process, the borrower awakens and pledges to pay all arrears within 30 days, including late charges, legal fees and disbursements incurred. Nevertheless, the time for all defendants to answer expires in less than 30 days, at which time the action could proceed to the next plateau; for example, appointment of a referee to compute.

Completing that next step would increase the legal fee for which the borrower should be liable.

Where the lender or servicer is willing to accept reinstatement of the mortgage, a choice must then be addressed. Should lender or servicer wait the 30 days or proceed with the appointment of a referee?

Careful consideration

The second option should be carefully considered. While it is correct that the lender or servicer's attorney will be entitled to a fee commensurate with bringing the case to the point of referee's appointment (whatever the quantum of that sum), the additional expense is justifiably to be paid by the borrower. While there could be compelling reasons - which should be evaluated-to wait the 30 days, across a portfolio of mortgages, the likelihood is that most cases will be enmeshed in delay awaiting the promised payments.

In the event lender or servicer's counsel advises borrower that nothing will be done for 30 days, pending receipt of the reinstatement, an

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action which could have gone forward must stop. That 30th day must be entered into counsel's diary. If on that day payment has not arrived, only then can the attorney go forward - although specific permission may first have to be obtained from the servicer and that presents a potential of a few more days added to the process.

Multiplying this scenario through tens, hundreds or thousands of case files underscores the burdens, extra time and jeopardy to efficiency created by delaying in anticipation of promised payments.

Put it in writing

In addition, the lender or servicer is wisely concerned that any forbearance understanding be carefully reduced to a clear writing, lest the terms of the agreement become a point to litigate.

On balance then, vigor should be beneficial most of the time, with a lender or servicer free to temper

that approach when special circumstances warrant. The point is just as applicable at later stages of the foreclosure.

A borrower can and should be unequivocally told that an action goes forward until the day the sum is received (or some other settlement is definitively concluded) and until that time, whatever legal expenses emerge are the borrower's responsibility. This tends to ensure faster settlements upon terms most favorable to the lender or servicer.

None of this means that loss mitigation is any less appealing or consequential. Counsel should always take borrowers' communications very seriously and should timely transmit any and all to the lender or servicer to evaluate.

But every call or letter is hardly a panacea. Anticipation of settling a case should be tempered with an appreciation of the consequences of delay.

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