

REPRINTED FROM

SERVICING MANAGEMENT

THE MAGAZINE FOR LOAN SERVICING PROFESSIONALS

VOL. 10, NO. 1 SEPTEMBER 1998

F ORECLOSURE

Court Rules On Late Charges

In New York, If A Borrower Doesn't Pay Assessed Late Charges, You Can Foreclose - But Do You Want To?

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In residential mortgage cases, late charges do not often accumulate to significance. Nonetheless, they are a component of the mortgage debt and lenders and servicers should (and wisely do) include late charges in the calculation of the amounts ow-

ing on the mortgage.

Two possible questions relating to late charges then arise:

■ Are they really collectible?

■ Is failure to pay a basis to accelerate and foreclose?

The obvious response to both inquiries from any lender would be an incredulous, why not? And in the end the courts agree (in New York), but that concurrence is of very recent vintage.

Enforcing the late charge

Concerning the first question, collectibility, although lenders and

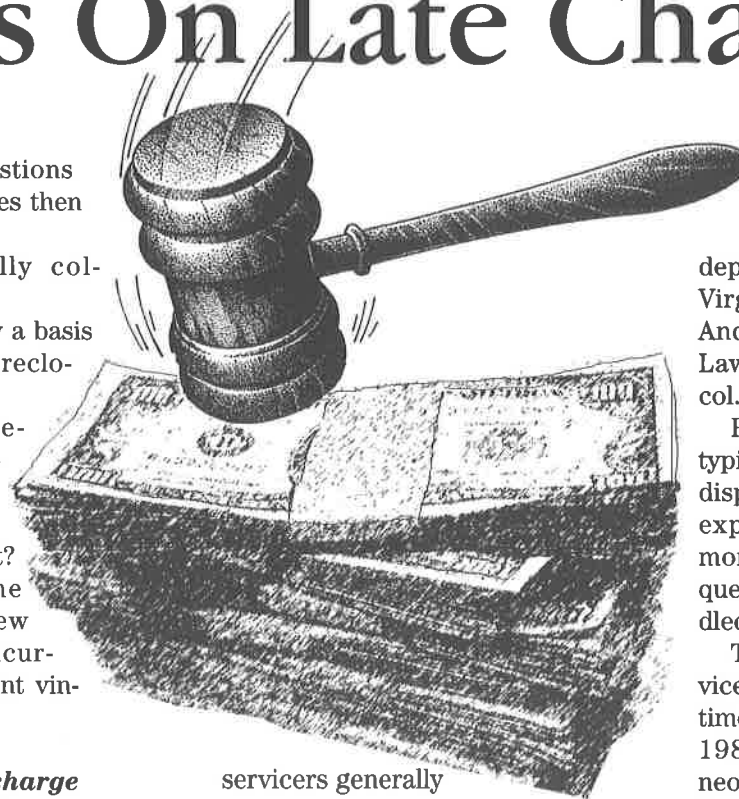
servicers generally proceeded upon the obvious presumption that late charges were en-

forceable if the mortgage so provided, until quite recently, the issue wasn't clear at all.

(That topic was addressed in depth in "Confirmed At Last - Yes Virginia, There Are Late Charges, And In New York Too," New York Law Journal, Jan. 26, 1994, at 5, col. 2.)

Perhaps because late charges typically were not big numbers, any dispute wasn't worth the time and expense for either mortgagee or mortgagor to litigate. As a consequence, they were usually just handled without court involvement.

The problem for lenders and servicers in New York was that the first time late charges were litigated (in 1987), an odd and patently erroneous decision was issued. (Reis v. Decker, 135 Misc.2d 741, 516 N.Y.2d 851 [1987])



That ruling seemed to say that later charges were unavailable to a foreclosing lender! It then took two later cases, one in 1991, and an even clearer on point holding in 1993, to solidify the concept that late charges were indeed specifically compensable in a mortgage fore-



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closure case. (*Barrow v. Rocksprings Management Co.*, 169 A.D.2d 585, 564 N.Y.S.2d 437 [1st Dept. 1991]; *Centerbank v. D'Asaro*, 158 Misc.2d 92, 600 N.Y.S.2d 1015 [1993])

So, certainly in New York, there is no issue. Late charges are collectible - up to acceleration.

Can you foreclose?

Once having surmounted that hurdle, there remained the very practical question of whether a lender could foreclose if the only unpaid items were late charges. This too is akin to a subject we discussed on these pages in July 1996 ("A Cause For Acceleration - If A Borrower 'Misstates' Information On An Application, What Happens?", page 46), which was whether foreclosure could ensue founded upon false information in a mortgage application. The answer to that other inquiry was yes, and is likewise in the affirmative regarding late charges.

There is no question that failure to pay principal and interest is actionable.

A new case confirms the concept (*Home Sav. of America v. Coconut Island Properties*, 226 A.D.2d 1138, 641 N.Y.S.2d 481 [4th Dept. 1996]), only there, the late charge was denominated a "service charge."

Here are the straightforward facts. The mortgage note obliged the borrower to pay on demand a service charge equal to 6% of unpaid principal and interest for any late payment. Further, the note authorized acceleration for default in payment of any sum due pursuant to that note. In

turn, the mortgage wrapped it all up in a neat package, empowering the lender to accelerate upon default in any provision of the note.

What is especially interesting and helpful about the recent case is that it so strongly supports the inviolability of the mortgage contract, which is somewhat unusual in New York. There is no question that failure to pay principal and interest is actionable. So too is breach of the due on sale provision, failure to insure and demolition without consent. But the result of other defaults is less certain and much more fact sensitive. So a ruling that even two unpaid late charges is a ground for foreclosure is heartening.

Whether a lender or servicer would choose to foreclose solely for failure to pay late charges is problematic at best - unless the charges represented a significant sum. Nevertheless, it is helpful to know what weapons are in the lender/servicer arsenal when an issue arises. **SM**