Eleventh-Hour Settlements Can Be Packed With Danger

On the eve of a foreclosure sale, there are a number of special considerations if a servicer wants to continue pursuing loss mitigation.

BY BRUCE J. BERGMAN

Loss mitigation has been a watchword of the mortgage servicing industry for some years now, so it is understandable that pursuing some methodology to allow borrowers to save their homes (or other properties, if those are subject to the mortgages) is a common priority.

While arriving at some settlement agreeable to both the lender and borrower would be welcomed sooner rather than later, the dynamics and psychology of the foreclosure scenario tend to present many settlement attempts on the eve of sale. In turn, the eleventh-hour rapprochement is fertile ground for both danger and special considerations - the precise focus of this exploration.

Settlement in the foreclosure arena (it may be denominated by servicers as "loss mitigation" or "home retention") can take a number of forms: reinstatement, payoff, short sale, loan modification or deed in lieu of foreclosure, among others - each with its own nuances and subspecies.


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Assume for this discussion's purposes that with the foreclosure sale imminent, the borrower approaches the servicer suggesting or offering either payoff (in full or some discount, depending upon the circumstances) or reinstatement. Amenable to the entreaty, the servicer wisely hands off the request to the loss mitigation department or loss mitigation personnel.

Propelled by its mission to complete the foreclosure as soon as possible to comply with applicable timelines and to minimize interest accrual - and always unsure if this avowed settlement will ever reach fruition - the foreclosure department understandably continues the action.

And now we arrive at the serious questions raised by such a fact pattern. What special considerations might there be for the settlement? How should the foreclosure department coordinate with the loss mitigation department? What happens if internal communications fail, and the sale is conducted with a settlement in place?

First, there are some settlement mechanics to consider. If the borrower will be writing a check (whether reinstatement or payoff) prior to the sale, unusual finesse may not be required. The right to redeem - to satisfy the mortgage in full - is an absolute right, so long as it is exercised within whatever redemption period applies in the particular state.

In New York and many other states, that ability to redeem continues until the moment the hammer falls at the auction sale. (In more than a few other states, post-sale redemption is permitted.) So, if full payment is properly remitted prior to the sale, that sale must be cancelled. If reinstatement is the form of settlement, the servicer is well advised to have a clear writing setting forth the respective rights of the parties and, likewise, the sale must be cancelled.

Often, though, the borrower intends to sell or refinance the property, or somehow obtain rescue-financing from relatives or friends. But because the money cannot be realized until some days, weeks or months after the scheduled foreclosure sale date, an adjournment of the sale will be requested. It is essential to consult with local counsel to be sure a sale is subject to adjournment in that particular state. Even if the mode of settlement is a loan modification, achieving that may consume more time than the existing sale date affords, again soliciting an adjournment.

Assuming the servicer is amenable to the proposed settlement, the claimed intention to sell the house may be illusory or false. A couple involved in an acrimonious divorce may still be unable to agree upon a sale, notwithstanding one of them swears to the servicer that it can be accomplished.

Even if the borrowers are completely in earnest, and have priced the house at a number which will truly invite a sale, they will need a contract to sell. While a contract of-

Bruce J. Bergman, author of the three-volume treatise "Bergman on New York Mortgage Foreclosures," is a partner with Berkman, Henoch, Peterson & Peddy PC, Garden City, N.Y., and an adjunct associate professor of real estate with New York University's Real Estate Institute. Bergman is also a member of the USFN, the American College of Real Estate Lawyers and the American College of Mortgage Attorneys. He can be reached at (516) 222-6200, ext. 324.