

SERVICING MANAGEMENT

THE MAGAZINE FOR LOAN SERVICING ADMINISTRATORS

VOL. 7, NO. 6 FEBRUARY 1996

FORECLOSURE

Is A Post-Acceleration Check OK?

The Answer Is: It's Both A Business Decision And A Legal Issue

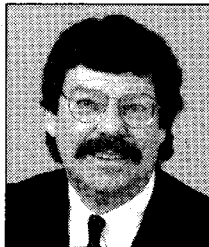
BY BRUCE J. BERGMAN

© 1996, Bruce J. Bergman

Let's answer the question immediately and then explain it in some detail.

Yes, if the check is for *less* than all arrears then due (including legal expenses and disbursements) it can be accepted.

But, it could give the borrower an excuse to launch a defense which might confuse some courts. It then becomes a *business* decision as well as a legal



Bruce J. Bergman

issue, which is why it will be explored in further depth here.

For the legal part (which, of course, cannot be neglected) some background is needed on two concepts: acceleration and waiver. Be-

cause these topics are expansive, our treatment here will be brief, with the suggestion that you observe the footnote and review some articles which have previously analyzed those subjects in more depth.¹

The acceleration part

First, acceleration.

If a Fannie Mae or Freddie Mac mortgage form (or some derivative) is used, a 30-day cure notice must be sent. That notice or correspondence is *not* an acceleration. Rather, it is a required (where the mortgage says so) delineation of the nature of the default, what is needed to cure that default (and how long), with a specification of certain rights the borrower has.

Only when the cure period has expired may the mortgage holder declare due the entire balance of the mortgage. That declaration is the acceleration, which can be accomplished - in New York, for example - either by an appropriately clear correspondence or the presence of

a paragraph in the foreclosure complaint announcing the election to accelerate.

Again in New York, once acceleration occurs, a lender need not accept anything less than full payment of the mortgage balance, *unless* the Fannie or Freddie form is used. In this latter instance, reinstatement must be accepted so long as both prior to judgment *and* for the full amount of all arrears - including legal fees and disbursements.

Next, waiver.

If after acceleration a lender receives a check for all arrears and either negotiates it, or holds it for some period of time which makes it look like an acceptance of the remittance, then there is a waiver of acceleration and continuing the foreclosure would be barred.

Although there is case law (in New York) stating that any act inconsistent with acceleration could be a waiver, it is nevertheless clear that a post-acceleration acceptance of less than the full amount

*Bruce J. Bergman, a partner with Certilman Balin Adler & Hyman in East Meadow, N.Y., is outside counsel to a number of major lenders and servicers and author of the two-volume treatise, **Bergman on New York Mortgage Foreclosures**, Mathew Bender & Co. Inc. (Rev. 1995). He is a member of the National Association of Foreclosure Professionals, the American College of Real Estate Lawyers, an adjunct associate professor of real estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course, and on the faculty of the MBA's School of Mortgage Banking.*

FOOTNOTE:1. "The Assertion of Waiver and the Imposition of Good Sense," New York Law Journal, Oct. 12, 1994, at 5, Col. 5; "Late Payment? Don't Cash That Check!", *Servicing Management*, June 1994, page 68; "Killed By Kindness - The Perils of the Long, Drawn Out Settlement Discussion," New York Law Journal, Oct. 13, 1993, at 5, Co. 2; "The Remedy of Acceleration, Revisited: The Device Can Be A Critical Persuader In The Servicer's Arsenal," *Servicing Management*, October 1993, page 30; "Let Defaulters Know The Payment's Due: Failure To Accelerate The Mortgage Can Complicate The Foreclosure," *Servicing Management*, September 1993, p. 23; "Loose Lips Sink Mortgages - Revisiting the Danger of Oral Agreements in the Workout/Foreclosure Case," 20 Real Property Law Section Newsletter 3, July 1992.

necessary to reinstate is not a waiver.

A little Q & A

Having breezed through some basics, let's ask and answer the practical, everyday questions.

Q: The 30-day cure letter was sent and the borrower was told he was five months in arrears at \$1,000 per month, with late charges of \$100, for total arrears of \$5,100. On the 29th day he sent \$3,000. Must the check be sent back.

A: No. First, wait until the 30th day expires. You cannot and should not do anything until the cure period has expired. Once the 30 days have concluded, the question is, does a default still exist? Because the answer is absolutely "yes," the lender or servicer is now free to accelerate and foreclose. The borrower simply did not cure and there is no need to

return the partial payment - certainly no more need to do so than with any partial payment sent in the normal course.

Q: The cure notice was ignored. After 30 days an acceleration letter was sent. Now, \$6,120 was due and borrower sent \$5,000. Can the check be retained or must it be sent back?

A: Legally, keep it. As a practical matter, it's a business decision.

And in conclusion...

This harkens back to the beginning of this discussion.

Because acceptance after acceleration of less than all arrears is not a waiver, the monies can be retained without jeopardy to continuation of the foreclosure. But not all courts may be so clear on this subject. A borrower choosing to litigate the point, fashioning a so-called waiver

defense, might convince a sympathetic court to find some issue relating to waiver. It could be incorrect (at least in New York), but not the first time such an error would be encountered.

Knowing their position is legally correct, and preferring to deposit all those tardy and deficient payments, some lenders uniformly accept these sums. Others, electing to avoid the possibility of giving a colorable defense to even one litigious borrower, reject all such checks. (It is best to do that through counsel, who returns the check with a stern correspondence advising that nothing less than full reinstatement can be contemplated.)

So, in the end, lenders and servicers facing the situation should weigh law and business, finding which works best for them. **SM**