

# Late Payment? Don't Cash That Check!

*By Doing So, You Could Be Waiving Your Right To Accelerate The Mortgage*

BY BRUCE J. BERGMAN

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**N**obody ever said it was easy. Lenders and servicers ought to be able to be as gracious, friendly, accommodating and amenable as they wish - and as they would universally be urged to be - without fear that such a bent would be turned upon them to their detriment. But it can happen just that way.



Bruce J. Bergman

The point is perhaps presented most practically by asking whether lenders and servicers would generally be pleased to accept a mortgage installment which was but a few days late. Almost invariably the answer is obviously, and appropriately, "yes." This would generally be the case for any time prior to expiration of the grace period and probably just as true after the grace period.

Except for the particularly unusual cases, lenders and servicers do not typi-

cally choose to accelerate the balance due on the mortgage until the arrears are outstanding for a number of months, usually three, and in some cases more. Thus, as a practical matter, the acceptance of late payments before acceleration is a regular and absolutely standard occurrence. After all, the choice would be to create hard feelings, legal dilemmas, and enormous extra time and paperwork in resolving disputes about rejected payments which were only marginally tardy.

That mortgage holders recognize this as apparent, and that some courts from time to time do not, is equally true.

## An unfortunate ruling

Although case law varies around the country, there is for example an unfortunate case in New York (in 1971) holding that acceptance of but one prior late payment was a waiver of the right to accelerate when the lender received another late payment.

Another decision supported a

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defense of waiver against foreclosure where there had been five prior late remittances of mortgage payments.

There are explanations for these holdings and considerable nuance to their formulations. Nevertheless, the fact remains that there is some room for a defaulting borrower in a not uncommon situation to assault a lender or servicer because the latter did precisely what the borrower would have wanted - accepted in the past some or many late payments.

A newer case on the subject (*Home Savings of America v. EBT Realty Corp.*, N.Y.L.J., Jan. 6, 1993, at 25, Col. 3 [Sup. Ct., Queens Co., Lerner,

*Bruce J. Bergman, a partner in the East Meadow, N.Y. law firm of Certilman Balin Adler & Hyman, is counsel to major lenders and servicers and an adjunct associate professor of real estate with New York University's Real Estate Institute, where he teaches the mortgage foreclosure course. He is author of the two-volume treatise, Bergman on New York Mortgage Foreclosures, Mathew Bender & Co. ©1990.*

J.) highlights the danger, but then presents the saving standard solution.

#### A recent decision

Here, the defendant borrower opposed the inevitable summary judgment motion in the mortgage foreclosure action, alleging that when during the prior loan history tenants were late in paying rent, the borrower landlords were also late in submitting mortgage payments. However, said the borrowers, the late payments, together with late charges, were always accepted by the plaintiff.

But then the lender changed its pattern. The facts were that the December and January payments were sent late and were held by the lender until mid-February. A few days later, the lender returned those late payments and declared a default, refusing to accept a tender for that February.

In March, the lender wrote to the defendants confirming the status of the defaults and stating that an additional 10 days would be afforded to bring the account current. The letter contained a warning that upon failure to timely remit all the arrears, a foreclosure would be

commenced. The payment was not made and that brought the case to the point under consideration.

The court found no issue sufficient to defeat the lender. The borrower was unable to submit evidence demonstrating the plaintiff's "knowledgeable acceptance of late payments over an extended period which would constitute a waiver of the right to insist upon timely payments."

#### A neutralized defense

The court went on to observe - quite correctly - that even assuming that the plaintiff's conduct had led the borrower to believe that strict compliance with the terms of the mortgage was not required, the defense was neutralized by the neglect of the borrower to tender arrears after definitively learning by letter of the plaintiff's intent to insist upon strict compliance with the terms of the mortgage.

It is this latter holding which is the key to the case, at least as far as lenders and servicers are concerned.

There is considerable likelihood that most mortgages which become the subject of foreclosure will have had some prior history of late pay-

ments which, of course, the lender or servicer accepted. That being so, the possibility that a borrower could argue that it had been lulled into a false sense of security of cavalierly submitting payments at its pleasure could find favor under some circumstances.

Obviously, most often this is not a problem because the defense is habitually disingenuous in any event. But it *can* be raised, and it *could* in some atypical instances be valid.

#### Pre-emptive strikes?

Does that mean that the lender or servicer must in every case take the pre-emptive step of sending a special letter to head off the attack?

The answer generally is no, but lenders and servicers should be aware that where a defense like this could be raised, there *is* an advance cure, and it is something to be considered.

The especially litigious or wily borrower could present the situation where a pre-acceleration letter demanding adherence to the terms of the mortgage be sent. If such a letter is sent, it will negate any claim that prior acceptance of late payments was a waiver.

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