By Bruce J. Bergman

Preparing the Forbearance Agreement In-House

In these times of unprecedented pressure on lenders and servicers to settle foreclosure cases, the forbearance agreement—always a common approach in any event—becomes all the more meaningful and relevant. While there are compelling reasons why such agreements should be prepared by lenders' counsel, there are occasions where the mortgage holder may prefer, or feel compelled, to itself prepare the agreement.

To accommodate that, lenders and servicers will likely have forms available for that purpose. The broad variety of obvious permutations aside, regular questions from servicers suggest that some basics are still well worthy of presentation—even in the brief form necessitated by the format of these columns.

So, here are some concepts and provisions to consider when preparing a forbearance agreement. These thoughts presume that 1) the structure is that a borrower will be making up arrears over time and that the mortgage holder will forbear during that period; and 2) the length of this agreement will be modest to make it understandable and palatable to the borrower, to solicit brisk turnaround time and to keep expense to a minimum on both sides.

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While the thoughts here also apply to commercial cases, those agreements will typically be far more detailed and nuanced. Therefore, the most compelling application of these concepts is to the residential foreclosure.

'Whereas' provisions

For the agreement to be best understood, it is helpful to begin with a series of "whereas" provisions. These outline the documents involved—i.e., the note and mortgage or such other documents as are relevant, recite the stage the case has achieved and the goal of the parties in entering into the agreement. It is appropriate for the initial paragraph of the forbearance agreement thereafter to incorporate by reference the whereas provisions as if they were part of the actual agreement section.

Acknowledgment of service/waiver of defenses

Servicers will recognize that borrowers are always ready to oppose a foreclosure claiming that they were not served or interposing hosts of defenses. If there is to be a forbearance, then the lender or servicer should know that such opposition has been disposed of, and so it is an essential part of a forbearance agreement to obtain an acknowledgment of service and a waiver of defenses.

That important point noted, in New York, for example, servicers are now barred from imposing a waiver of defenses upon borrowers in a forbearance agreement. Consulting local law or regulation in this regard can be meaningful.

Release of plaintiff

If the borrower has interposed a counterclaim against the foreclosing plaintiff in the case—hardly uncommon—that certainly should be not only withdrawn, but a release as to it should be part of the forbearance agreement. Indeed, even if the borrower has not yet launched a counterclaim, obtaining a release so that a future counterclaim could be banished is appropriate.

Schedule of payments

While precision in listing the payments to be made during the course of the forbearance agreement is essential, it is recommended that the dates be noted as those upon which payments are to be received. Without that, there can always be confusion and debate about when something was submitted.

Associated with this is a recitation that payments, if not wired, must be submitted in some acceptable form—i.e., good bank or certified check, subject to collection.

No discontinuance of action

Mindful that there is no assurance that a borrower will comply with the terms of the forbearance agreement, discontinuing the foreclosure action, only having to start it anew and losing all that precious time should there be a default, is hardly recommended. The most a lender or servicer should do is hold the foreclosure in place contemplating performance of the agreement. Should there be a default, then the plaintiff is able to proceed with the action from where it had been stopped, not having to repeat all prior steps.

Some lenders even provide that the action will continue notwithstanding the forbearance agreement, but only up to the point of a judgment of foreclosing and sale having been issued. Then the plaintiff is poised to conduct a sale (and not go through all the intermediate steps) the moment a default might ensue. This is certainly something to consider.

The issue of notice

While it is certainly preferable that the agreement provide that in the event of a default the foreclosure action simply proceeds, borrowers will request, and servicers may be inclined in any event to provide, notice of default. If that is to be done, notice should be relatively brief. Moreover—and here is the critical point—there should be a limit on how many times notice is to be provided.

Once or twice, perhaps a third time, should be the limit. Otherwise, the servicer becomes a collection agency all over again, facing defaults at every point, sending notices and waiting for new performance. It is hardly efficient to proceed that way.

Covering other mortgage defaults

Noting that a mortgage will invariably provide that the borrower must pay insurance and taxes, a default in honoring the mortgage as to those aspects should also be a default under the forbearance agreement—and it should so recite.

Interpretation of agreement

If there is some confusion, i.e. ambiguity, in an agreement, pervasive law is that it is construed most strongly against the drafter—for the purposes of this discussion, the lender or servicer. Therefore, a provision is recommended that treats interpretation as neutral, not being held against the party who prepared it.

Agreeing not to oppose motion to lift stay

Even though a forbearance agreement exists, that does not impede a borrower who might wish to file a petition in bankruptcy—something that could not be waived in any event. Upon such a filing, a lender would typically move to lift the automatic stay as soon as possible.

While there usually will be good reason for such a motion to be granted, a borrower could nonetheless oppose that motion and perhaps cause delay. Therefore, a provision in the forbearance agreement that the borrower will not oppose a motion to lift a stay in the event a bankruptcy is filed can be helpful. Not all courts will enforce such a provision by any means, but some will. It is worthy of consideration.

It should be apparent that there are other provisions that could be included in a forbearance agreement. Nonetheless, those listed here highlight some of the most important ones, and when thinking about what terms to employ, these can be a good roadmap.

Bruce J. Bergman is a member of Berkman, Henoch, Peterson, Peddy & Fenchel PC, Garden City, New York. He is the author of a three-volume text, *Bergman on New York Mortgage Foreclosures*, (LexisNexis Matthew Bender & Co. [rev. 2012]) and a member of the USFN. He can be reached at b.bergman@bhpp.com.