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FORECLOSURE

The 30-Day Cure Letter

A modest suggestion to lobby for removal of the costly 30-day cure letter.

BY BRUCE J. BERGMAN, © 2000

The 30-day cure letter is a source of more than just mischief. It is genuinely costing servicers many thousands of dollars.

Regular readers of ***Servicing Management*** will recognize this month's subject as some thing approaching a mantra: The 30-day cure letter is a source of more than just mischief.

It is genuinely costing servicers many thousands of dollars in the increasing number of cases where it is raised as an issue, leading again to the salutary urging that the clause should be removed from the standard mortgage form - or at least modified.

To explain, the law in most jurisdictions (and certainly New York is one example) does *not* require that any special kind of notice be given to a defaulting mortgagor before a foreclosure action can be initiated. So, adding 30 days to every mortgage default situation is not a legal obligation. The mortgage contract, however, *can* impose this, and indeed, the standard Fannie Mae/Freddie Mae form does just that.

The essence of this mortgage provision creates, as a prerequisite to acceleration and foreclosure, the sending of a carefully worded letter advising the borrower of the nature of the default, how it can be cured and a delineation of borrowers' rights. It provides 30 days to effectuate the cure, during which period the servicer is powerless to go forward.

This is imposed no matter how often the borrower defaults or how much time has otherwise gone by, and regardless of what other efforts were previously made to notify or deal with the borrower.

Notably, both Fannie Mae and Freddie Mac already mandate other steps and correspondences even before the 30-day letter itself must be generated. These other requirements at the very least considerably reduce whatever need there may have been for the 30-day letter.

Proving it

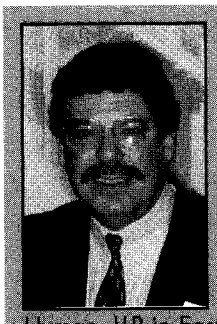
All that time and effort aside, here is the real problem: To create an issue in a foreclosure case, all borrowers need do is say they did not receive the cure letter.

While the core question is not whether the borrower *received* the letter - instead the issue is whether it was sent - the servicer still must prove the letter was sent and that is the ultimate source of the difficulty.

The subject mortgage form requires that notices be transmitted by regular mail. Certified mail return receipt requested can be used, but only in addition to regular mail. But if the borrower does not sign for the receipt - and many are sharp enough not to do so - the certified path provides no relief. In any event, some servicers do not employ using certified mail.

Mail

Assuming the 30-day letter was both correctly worded and sent, how to prove that it really was mailed? The only sure way, and it's not an absolute even then, is for there to be a person at the servicing office who can personally swear in an affidavit that he or she deposited that specific letter in a repository maintained by the United States Postal Service.



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As a practical matter, and given the volume of these letters, there is not likely to be such a person who can so swear. Such letters usually go into a bin and are taken to a mailroom by various unnamed persons so that the best that can be done is to aver that these letters are typically mailed in the normal course. Such a presentation may not be - and sometimes certainly is not - a sufficient level of proof for the courts.

The Draconian consequence of all this is that borrowers are more frequently than ever interposing answers claiming non-receipt of the 30-day cure letter, then forcing the servicer to a motion for summary judgment which, if defeated, then leads to a trial.

And proving the mailing of the 30-day cure letter has been a rocky and uncertain path for servicers.

Although an alternative is to discontinue the foreclosure action, start again and be sure that the 30-day cure letter for this particular borrower is personally mailed by someone who could swear to it, such is hardly a welcome alternative.

Remove the clause

Unfortunately, for every case in which the borrower argues nonreceipt, countless months of interest accrual are consumed by the litigation process (at least in judicial foreclosure states) and considerable legal fees are added to the mix. All this occurs because of the obligation not otherwise required by law to send a 30-day cure letter!

So, the suggestion is that servicers might wish to lobby to have this clause removed. Let it be an option on the part of the servicer. Or, if there is some fear that servicers would not avail themselves of this option, let the mortgage stipulate that failure to send the letter shall not be a defense to any mortgage foreclosure action.

Yet another, albeit less acceptable, modification would be to require the 30-day cure letter, but not beyond occurrence of a second default. That helps a bit, but does not really address the underlying dilemma.

Because it is reasonable to assume that lenders and servicers are very vigorous in their attempts to notify borrowers of defaults and to find any way to settle these accounts and avoid foreclosure, the 30-day cure provision seems to serve only as a safe harbor for litigious borrowers to tie up servicers in court.

It shouldn't be so. SM