

## SERVICING MANAGEMENT

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## FORECLOSURE

## The 30-Day Cure Letter

*Whose Side Will The Court Take If The Notice Isn't Clear And Precise?*

BY BRUCE J. BERGMAN © 1997

**H**ave you ever wondered whose side a court will take when an issue about the 30-day cure letter arises?

It should be no surprise that a court will favor the borrower, however unfair that might seem to the mortgage holder. However, a new case disappointingly highlights the expected concept in the reality of the 30-day cure letter [*Moet II Inc. v. McCarthy*, A.D.2d, 646 N.Y.S.2d 64 (3d Dept. 1996)].

As we have had occasion to note in the past (see "The 'Notice To Cure' Provision," *Servicing Management*, November 1996), a lender contemplating development of a mortgage form would not likely

insert an obligation on the lender's part to announce to a defaulting borrower that there is a default, then generously provide 30 days to cure it. The actuality is that upon default, most lenders would invariably initiate a dialog and would provide some notice or warning.

To make it impossible to begin a foreclosure absent proof of mailing a meticulously worded cure correspondence affording a guaranteed 30-day hiatus, regardless of the egregiousness of the default or how often it has been repeated, seems unduly burdensome. Such, however, is precisely what the widely-used Fannie Mae/Freddie Mac mortgage mandates.

That being so, experienced servicers create the appropriate form letter and initiate a system which assures its mailing in the method likewise required by the mortgage, at least regular mail in the instance of the Fannie Mae/Freddie Mac form. Although there can still be problems, even when this system is assiduously maintained, the more pervasive danger to any mortgage holder is failure to send a letter which does not conform to the precise dictates of the mortgage.

This is just what happened in the new case.



Bruce J. Bergman

**A troubling decision**

The court found that the mortgage clearly listed the steps to be taken in the event of default; significantly, the sending of a notice delinquent, among other things:

- the promise or agreement that the mortgagor failed to keep;

- the action that the mortgagor must take to correct that default;

- a date (at least 30 days from the day on which notice is given) by which the mortgagor must correct the default; and

- that if the mortgagor does not correct the default by the date stated in the notice, the mortgagee may require immediate payment in full, and the mortgagee or another person may acquire the property by means of foreclosure and sale.

But, as the court pointedly observed, the plaintiff's letter contained none of the required information. With no reason offered as to why the notice could be dispensed with, plaintiff's motion for summary judgment was denied.

That left the mortgage holder in an untenable position. Denial of summary judgment meant the case must go to trial. Because the plaintiff could hardly expect to prevail at a trial - after all, the proper letter wasn't sent - the only available choice was to discontinue the foreclosure and start again.

The lesson, then, is obvious: Thou shalt send the letter which mirrors the language of the mortgage. **SM**

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