The 'Notice To Cure' Provision

Found In The Mortgage, It Can Create Real Problems For Servicers

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If one ever wonders how some courts view a mortgage foreclosure, just think about their treatment of the "notice to cure" provision. "Sacred" is frequently too conservative an adjective.

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This cure notification ought to be one of those routine, mechanical tasks which precedes a foreclosure and most of the time it is. But on those occasions when the process goes awry, or is perceived that way by a court, the consequences are severe: However far a foreclosure has proceeded, it can be dismissed.

Why the fuss? Good question.

Understanding the basics

Some basics will help.

In the various states there isn't necessarily any requirement that some "announcement" be given before a mortgage foreclosure action can begin. Nor is there typically any imperative that a defaulting borrower be given an opportunity in writing to purge the default. There is absolutely no mandate for either of these in New York, for example.

But even in those states which impose no pre-foreclosure notification, the mortgage itself could so dictate. That is precisely what the Fannie Mae/Freddie Mac Uniform Instrument does, found in the latest version in paragraph 21 titled "Lender's Rights If Borrower Fails To Keep Promises and Agreements."

If a lender thought about it, preparing and sending a notice which grafts more than 30 days onto the collection or foreclosure process (with a potential for error or mischief as well) would be an idea quickly discarded.

After all, it is only the rarest exception when a lender does not volitionally call or write to the borrower concerning the default.

Briefly, this is what the notice

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to cure paragraph says:

Except in the instance of breach of the due on sale clause (paragraph 17), a lender may accelerate the mortgage - without making any further demand for payment - so long as three conditions are fulfilled.

Not surprisingly, one condition is that some default exists. Another is that the breach remains uncured after a special cure notice is sent. The last condition (although numerically the second) directs that the notice to be sent sets forth:

(i) The promise or agreement that I failed to keep;

(ii) The action that I must take to correct the default;

(iii) A date by which I must correct the default. That date must be at least 30 days from the date on which the notice is given;

(iv) That if I do not correct the default by the date stated in the notice, Lender may require immediate payment in full, and Lender or another person may acquire the Property by means of foreclosure and sale;

(v) That if I meet the conditions stated in Paragraph 18 above, I will have the right to have Lender's enforcement of this Security Instrument discontinued and to have the Note and this Security Instrument remain fully effective as if immediate payment in full had never been required; and

(vi) That I have the right in any lawsuit for foreclosure and sale to argue that I did keep my promises and agreements under the Note and under this Security Instrument, and to present any other defenses that I may have.

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Not an acceleration

Observe immediately that this required cure letter is not a correspondence which declares an acceleration.

The cure notice is a prerequisite (or condition precedent) to acceleration, but it is not the same thing. Sending an acceleration letter is no substitute for the cure notification and indeed would be of no effect unless the cure notice was first sent.

A basic dilemma should then be immediately apparent. No acceleration - and therefore no foreclosure - will be valid without this pre-acceleration notice (so long, of course, as the mortgage requires it.)

With that threshold truism in mind, here are some points which have been a source of trauma for lenders and servicers:

■ The letter must be prepared and sent before a foreclosure can be initiated.

■ A file should not be delivered to foreclosure counsel unless and until the cure notice has been mailed.

■ The ability to accelerate - and thus foreclose - does not even exist until the 30-day cure period has expired with the default still outstanding.

Sending the letter

How the letter is sent is also a factor.

The Fannie Mae/Freddie Mac form dictates the mode of sending in accord with paragraph 14. That paragraph specifies either delivery or mailing by first class mail.

Certified or registered mail does not comply with the mortgage. Employing certified mail return receipt requested (registered mail adds the component of insurance, which seems irrelevant), presents a method to prove receipt, but it should be used only *in addition* to regular first class mail. Even the added certified mail may be of limited utility because a wily borrower can refuse delivery.

Assuming first class mail is religiously adhered to, what happens if a crafty borrower claims never to have received the correspondence?

In New York, at least, proof that the mailing took place is sufficient and a claim of non-receipt is of no moment. This suggests that proof should be in the lender's or servicer's file for those occasions when a guileful borrower will challenge the mailing.

Two choices in this regard can be considered. One is to prepare an affidavit of service by mail for each cure notice. A more expensive and labor intensive alternative is to obtain a proof of mailing from the post office for each such letter.

The content's the crux

No matter how meticulous a lender or servicer may be in mailing

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the cure notice, the *content* of the letter is critical.

The letter is obligated to mirror the points elucidated in paragraph 21 (B), which was quoted earlier. Each of those must be in the letter. (That becomes an effort only the first time the form letter is prepared.) Significantly, any inaccuracy here can torpedo the effectiveness of the letter.

Harkening back to the jaundiced view taken by the courts on this subject leads to a disheartening and confusing fairly recent case decision [*Manufacturers & Traders Trust Company v. Korngold, Misc.2d, 618 N.Y.S.2d 744 (1994)*].

Here, a mortgage containing the standard cure provision was given to MidAtlantic, which assigned the mortgage to M&T. In turn, M&T apparently engaged MidCoast as its servicer. When a default ensued, the 30-day cure letter was dutifully sent by the servicer.

Borrower defended the foreclosure on the ground that because MidCoast was neither the lender nor its successor, compliance with the cure provision was lacking, thus rendering acceleration ineffectual. The court agreed with the borrower and M&T was fortunate that the remedy was denial of summary judgment instead of dismissal of the case.

A troublesome decision

This decision is particularly troublesome because it adds still another peril to the notice dilemma: that a servicer may not be capable of sending the cure correspondence. Closer examination reduces the concern.

In this case, MidCoast asserted that it was M&T's agent and attempted to prove that by its own statement. But M&T itself had to be the party to assert the agency so this is a problem easily surmounted.

The next issue which disturbed the court was lack of evidence that the borrower had ever been notified of MidCoast's role as agent, another hurdle readily overcome. So the court was prepared to entertain summary judgment anew upon plaintiff's demonstration both that MidCoast was its agent and that borrower had reason to know of MidCoast's authority to act for plaintiff.

In the end, this case is disturbing not so much for the principles it presents - although those are annoying - but as a dismaying reminder of the pitfalls surrounding the seemingly elementary notice clause.

The notice to cure provision remains a trap for the unwary and even the wary. Caution and diligence in this realm are ever important. SM