

# The Remedy Of Acceleration, Revisited

*The Device Can Be A 'Critical Persuader' In The Servicer's Arsenal*

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**A**s we reviewed in the September issue of *Servicing Management*, the device of acceleration is a critical persuader in the servicer's arsenal. And as economic times move toward a modicum of brightness, the tenets of acceleration become even more important.

That being so, servicers can probably never be too familiar with the basics, nor too facile with the nu-



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ances. With that in mind, we can observe that however a mortgage is structured, the lender or servicer is bound to await payment of the obligation in its normal course. That, of course, is what was bargained for and the way it should be.

## Why wait?

The obvious inquiry is, must the lender wait if there is a breach of the mortgage? With even a marginally well drafted mortgage, the answer is no. That is where the role of acceleration becomes of overriding concern.

If a borrower breaches some

obligation of the mortgage, the servicer has the *option* to declare due the *entire* balance of principal and interest. In other words, the servicer is authorized to create an earlier maturity by accelerating the debt.

Once that option to accelerate has been exercised, the servicer need not accept a tender of past performance, but rather can insist upon payment of the full sum due. Until the full balance of the mortgage is paid, a foreclosure action can go forward.

(With a Fannie Mae mortgage and its derivatives, reinstatement *must* be accepted until judgment of foreclosure and sale issues. So, precisely what the mortgage provides is a point to examine with care.)

## A potent weapon

Mindful that the most common mortgage default is failure to pay, which tends rather universally to be the most strictly enforced default, it should be abundantly apparent that the ability to accelerate is a potent weapon.

Since most servicers prefer to avoid foreclosure actions, as a practical matter a tender even after acceleration will frequently be accepted. But the servicer might condition the acceptance upon additional payment of any costs it may have incurred, such as fees to its counsel. Thus, a servicer is always empowered to waive its acceleration if such is its preference.

The key element, though, is the power that acceleration gives to the servicer to enforce and protect the mortgage obligation.

Where a servicer chooses to adhere to its acceleration, the foreclosure action will follow. Any tender of performance prior to institution of the foreclosure action will be no more effective than any other post acceleration tender.

A servicer's ability to reject a tender of performance or cure of a breach begins when acceleration is accomplished - not when the foreclosure action is begun.

## Servicer's advantages

Among the readily apparent advantages of acceleration are that it:

- gives control to the servicer;
- allows a servicer to deal from a position of strength;
- chastens chronic defaulters (so that, if reinstatement is allowed, the borrower may be less likely to default in the future);
- allows a servicer after acceleration to increase the interest rate on the obligation to comport with current market conditions; and
- empowers the servicer after acceleration to impose new conditions such as correcting deficiencies which the mortgage documents may have contained at the inception.

## Borrower's perspective

From a borrower's perspective, the exercise of acceleration means that:

- a tender of ~~any~~ <sup>any</sup> form of performance can be rejected;
- if tender is rejected, there must be a refinance or a sale of the property, lest whatever equity as exists be lost; and
- if the property is worth less than the debt owed the lender (together with encumbrances senior to the mortgage), the borrower could be personally liable for any deficiency

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remaining after the sale of the property.

Mortgages will almost invariably contain a grace period during which a borrower is free to remit a payment absent any consequence. Fifteen days is the most common grace period, although it could be more, or less. It is strictly a matter of agreement between lender and borrower.

Until such grace period as may be applicable has been expired, the servicer cannot validly accelerate because no default has arisen.

#### Grace periods and defaults

Although grace periods do not usually apply to mortgage defaults, with the conspicuous exception of the obligation to pay, notice and cure periods can find common application. Regardless of what may be typical and customary, any mortgage can contain provisions which might be out of the ordinary.

Therefore, a servicer is well advised to be cognizant of whatever grace, notice or cure periods apply to all aspects of performance or breach of whatever mortgage may be at issue.

One instance of a pervasive notice and cure provision pertains to failure to pay real estate taxes. Perhaps a majority of mortgages will condition acceleration for a real estate tax default upon notice - traditionally 30 days - together with the opportunity to cure the default during that period. Until the time to remedy the default has expired, no ground exists sufficient to underwrite acceleration.

It is always possible that any given mortgage could require notice as a prerequisite to exercising the option to accelerate.

Generally, notice of default or notice that acceleration will ensue is *not* necessary. Whether that is so in a particular case depends upon the nature of the breach and the manner in which the mortgage treats that violation.

In sum, when a lender assesses a desire to accelerate, or when a borrower contemplates the jeopardy acceleration can impose, a clear understanding of precisely what the relevant mortgage clause provides is essential.

#### Avoiding confusion

Because well-schooled servicers are so aware of the perils of accepting any payments made after acceleration has been accomplished, confusion can sometimes arise in differentiating between a payment sent prior to acceleration as opposed to thereafter.

As should be repeatedly stressed, a tender of arrears subsequent to acceleration need not be accepted. That is true whether the supposed tender is for only a portion of the arrears or the full amount of arrears then due.

If the lender chooses to accept a full cure it can do so. But if it retains any sum submitted subsequent to acceleration, it is in danger of facing a cry that it waived the acceleration and the right to proceed with a foreclosure action.

But a sharp practical and legal distinction must be drawn between pre- and post-acceleration remittances.

#### Two scenarios

Suppose, for example, a borrower's monthly mortgage payment is \$4,000. Payments for January, February and March are not made. The grace period for March has expired, but the service has yet to accelerate. Ignoring for the sake of discussion the likelihood that late charges have accrued, the borrower is in arrears in the amount of \$12,000.

For whatever reasons, the borrower tenders a certified check for \$10,000. Should the servicer accept or reject that remittance?

The simple answer is that it can and should be accepted. Surely the servicer would prefer to have \$10,000 in hand. The legal point, though, is that there is not danger to the servicer in accepting payment.

Since an acceleration has not been effectuated, there is nothing to waive. After the check is accepted, which is to the servicer's benefit in any event, the borrower is still in default and the servicer is free to accelerate notwithstanding the payment.

Although the distinction should be clear, change the scenario and assume that after expiration of the March grace period the service *did* accelerate. Now when \$10,000 is tendered, retaining the check could be argued as a waiver of the accomplished acceleration. Such an argument might not be successful in many states, but consultation with your local counsel on the point is recommended.

A practical application of this concept is perhaps more widely encountered when a mortgage mandates a

cure period with notice (typically 30 days) as a prerequisite to acceleration.

Using the same figures as in the prior example, assume that in March the lender sends the appropriate cure notice advising that the sum of \$12,000 must be paid before the expiration of 30 days. The borrower sends a timely remittance, but of \$10,000.

The answer to the query - Should the servicer accept the check? - is once again in the affirmative. There has not yet been an acceleration so there is nothing to waive.

If a full tender of arrears has not been made by the conclusion of the 30-day period, the borrower is still in default. Hence, at the end of the 30 days the lender can properly elect to accelerate if it chooses to do so.

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