

Legal Fees in Your Mortgage

By Bruce J. Bergman

Mr. Bergman, author of the two-volume treatise, *Bergman on New York Mortgage Foreclosures*, Matthew Bender & Co., Inc. (Rev. 1996), is a partner with Certilman Balin Adler & Hyman in East Meadow, New York, outside counsel to a number of major lenders and servicers and an Adjunct Associate Professor of Real Estate with New York University's Real Estate Institute where he teaches the mortgage foreclosure course. He is also a member of the National Foreclosure Professionals, the American College of Real Estate Lawyers and on the faculty of the Mortgage Bankers Association of America School of Mortgage Banking.

May we begin with the most obvious of observations? The goal of a mortgage lender is to lend money and to do so at a profit.

Developing business and originating loans in the *raison d'être*. For some lenders, servicing is just an incidental, secondary pursuit, while for others it represents a profit center. Whether servicing itself is viewed as important or not, a lender cer-

Every mortgage should have a legal fee provision and it does not require a high level of drafting skill to accomplish the task.

tainly should recoup all that *could* be available when the collection or foreclosure process becomes the path to follow.

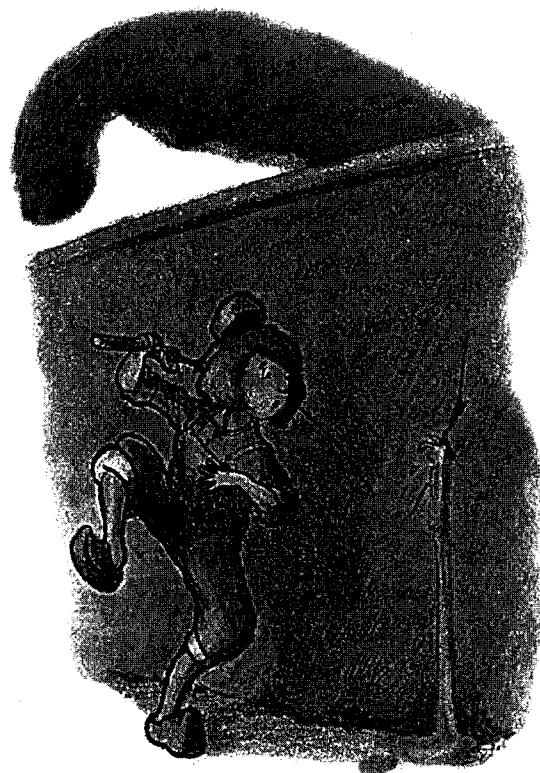
With that said, it remains surprising that

some lenders still use various forms of mortgage which do *not* provide reimbursement for legal fees. Think about it for a brief moment. If the mortgage contains even a rudimentary legal fee clause, then upon satisfaction of the mortgage there is virtual assurance that some – if not all – of the lender's legal expense in the foreclosure will be recovered. Absence of the clause assures the opposite: that *no* portion of the legal fees will be obtained. Although more details will follow, the lesson should be immediately clear and apparent. Every mortgage should have a legal fee provision and it does not require a high level of drafting skill to accomplish the task.

The practicality of all this is readily discernible. This then leads to two circumstances to examine – reinstatement and payoff. As a matter of law (in New York, for example, as it is in other jurisdictions), a lender may freely reject a tender of arrears made after a proper acceleration.

(continued on page 66)

It's hard to believe that such a technologically advanced company could be inspired by a little boy.



Like the little hero of Holland who saved his town from certain catastrophe, Palma LaZar & Ulsh protects lenders from the disastrous effects of regulatory non-compliance. PLU has achieved an unparalleled level of service combined with superior technology. Striking this balance may seem too good to be true, but PLU has done it effectively for more than 20 years. For more information on how PLU can protect you against regulatory non-compliance call PLU at 800-624-2546.



PALMA LAZAR & ULSH, L.L.C.

Flood Hazard Compliance since 1974

219 Rittenhouse Circle • Bristol, PA 19007
ph: 800.624.2546 • fax: 800.527.0568



Wholesale Lending

(from page 37)

increases, the maximum fee that the borrower is obligated to pay should be correspondingly reduced. Thus, the borrower should have the opportunity to "buy up" or "buy down" the broker fee by paying a higher or lower interest rate. A lender could mitigate the impact of this policy by increasing its overall pricing limits.

Obviously, this last suggestion will be the most controversial and difficult for the industry to implement. However, RESPA and state law present significant impediments to a pricing policy which permits the broker to increase its overall compensation solely on the basis of the interest rate. Even if RESPA could be interpreted to allow such a compensation policy based upon the reasoning in *Inland Mortgage* (i.e., the fee is payment for a "good actually provided"), the laws of many states, including California, require that a broker both provide full disclosure and act in the borrower's "best interests." If a broker negotiates a higher interest for the sole purpose of increasing its overall compensation, and a lower interest rate was in fact available to the borrower, the broker will have difficulty claiming that he or she has acted in a borrower's best interests by negotiating a higher interest rate.

Conclusion – Is wholesale lending getting too risky? Maybe for some, however, by adopting some of the suggestions noted above, even if a wholesale lender's risk may not be eliminated, its risk of claims from fee hungry class action lawyers may be reduced. The only solution that will truly protect lenders and brokers is legislative – both Congress and HUD must recognize that the borrower is well protected as long as the borrower has been made fully aware of the amount and nature of a broker's compensation. Until that time, the legitimate efforts of lenders and brokers to increase the supply of credit in this country will be inhibited and the cost of credit to borrowers will be unnecessarily increased. ■

Legal Fees

(from page 42)

That is because the lender became entitled by virtue of that acceleration to the full balance of the mortgage. Consequently, a lender's unequivocal rejection of a post-acceleration tender of arrears is authorized.

Significantly, if a lender is free to decline payment of arrears after acceleration, it is also empowered to impose conditions upon the acceptance of that which it could otherwise refuse. So, even if a mortgage for some reason did not contain a legal fee clause (although the message here is that such should never be the case), in the instance of a borrower's desire to reinstate, a lender could demand reimbursement for legal fees incurred. Failure to remit would result in lender's rejection of arrears.

Although the law in New York, as well as other states is undisputed on this point, note significantly that the mortgage can change the situation. For example, the widely used Fannie Mae/Freddie Mac form of mortgage obliges a lender to accept reinstatement at any time up to the issuance of the judgment of foreclosure and sale. The privilege is available, however, only if all reasonable legal fees are paid.

Whether it is local state law or the mortgage document controls, reinstatement generally does not involve the courts. Legal fees will properly be paid as a condition of reinstatement without judicial intervention. Accordingly, important though a legal fee clause is for a mortgage, it plays no role in the *reinstatement* scenario.

But payoff or satisfaction presents a different case. A borrower always has the right to redeem the mortgage – that is, pay it in full – until the property is struck down at the auction sale. (That's the rule in New York at least. In some other states a post-sale redemption period is in force.) Payoff means remitting *all* sums

due. If such an absolute right exists, then only charges imposed by the mortgage (and whatever statutes may be applicable) can be assessed. A legal fee provision in a mortgage will support repayment of counsel fees. If the clause is not contained in the mortgage, though, any obligation to pay lender's counsel just doesn't exist. (Again, this is true in New York and many other states). This, then, should underscore most affirmatively why a legal fee paragraph is an essential part of any well crafted mortgage.

When the provision is actually effective is a different issue and will certainly vary with the facts of each case and the interpretations in the various states. Although the well recognized American rule is that each party to a lawsuit must bear its own counsel fees, that maxim can be altered either by statute or contractual agreement between the parties, i.e., in the mortgage. Some states do impose legal fees by statute although most leave it to the contract of the parties.

If the provision appears only in the mortgage note, it is likely to be unenforceable. What used to be called the title company form of mortgage in New York does not provide for legal fees to a foreclosing lender. Whether the pre 1991 Fannie Mae/Freddie Mac mortgage form is sufficient for a legal fee award is problematical and a number of cases in New York have ruled that it is not. The new form (as of October 1991) clearly does offer counsel fees to the foregoing plaintiff.

Nuance about where the clause may be and how effective the chosen words are presents a subject too broad for this discussion. Really it's not difficult to draft a lucid, understandable legal fee provision. That the legal fee clause is often – or at least sometimes – a point of contention or worse, occasionally isn't even in the mortgage at all is the greater mystery. ■

Copyright 1996 by Bruce J. Bergman, all rights reserved.

Survival of the Fittest

(from page 46)

representatives at various points throughout the process.

MLCC has found that client preference and the drive for improved efficiencies make a strong case for a single point of contact during the loan decision process.

To better match structure to function, MLCC realigned and consolidated several job functions to create one client contact for loan applicants to direct questions or who call applicants for clarification or additional supporting documentation. Although a team of MLCC employee partners manages the loan throughout

the process, the client works with one person as the loan decision is being made.

In the Information Age, it is also critical for the structure of lenders' information systems to follow function. To support the continuing expansion of products and to support a new front-end pre-qualification system, MLCC has transferred numerous systems functions from a mainframe environment to a PC LAN (Local Area Network).

Other technological improvements that can offer lenders an edge are:

- Access to information and the ability to request an application on the Internet
- Online availability of reports

- Voice-response units that enable clients to check account balances or obtain other information
- Specialized software for custom report writing
- Broad data access through LAN and WAN systems networks

Clearly, survival in the home equity industry for the '90s and beyond requires continual evolution – an evolution where lenders keep pace with the market environment, incorporate variations superior to existing ones and that continually evaluate and modify structures for increased effectiveness.

Those who are willing to break with tradition and establish a distinct identity – based on products, features and/or world-class service – have the strongest opportunity to thrive well into the 21st century. ■