

# Let Defaulters Know The Payment's Due

*Failure To Accelerate The Mortgage Can Complicate The Foreclosure*

BY BRUCE J. BERGMAN

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**A**cceleration is one of those basic, seemingly mundane topics that is so integral a part of the mortgage collection process that its importance may not receive the emphasis it genuinely deserves.

Depending upon the economic cycle, careful employment of acceleration can take on new importance and there are some indications that now is such a time.

Of the many pressing functions of acceleration (and we will explore others later), perhaps none is more critical today than its ability to "lock in" the default and allow the lender or servicer to assure collection of expenses incurred.

To explain: That a borrower has defaulted is meaningful in the sense that some action by the servicer can be taken, but that action is something yet to occur. Until there is an acceleration - the declaration that the entire balance of the mortgage has become due - mortgage foreclosure remains at that moment a theoretical pursuit.

## A practical example

This practical example will make the point:

Borrower defaults on Jan. 1. The grace period expires on Jan. 15 and the usual calls and letters ensue. The just-as-typical promises to pay induce the servicer to refrain from taking more affirmative action for four months. By then, the borrower has stopped promising and is refusing to come to the phone, all the while ignoring each correspondence. In early July, the servicer concludes that foreclosure is the only alternative.

The file goes to counsel, who or-

ders a foreclosure search, thereby incurring a substantial disbursement. The complaint is prepared and just before the attorney can file it with the

court, the borrower tenders seven months arrears.

Because the servicer is obligated to pay both legal fees and disbursements

to its counsel, it has three choices. The servicer can:

■ **Reject the tender and send the check back on the ground that the**



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remittance doesn't cure all arrears. (It's short the legal fees and disbursements.)

But the borrower will argue its absolute right to tender arrears prior to acceleration. The servicer is then faced with the unenviable option of first accelerating solely for the failure to pay the fees and disbursements, not a favorable posture to take before a judge.

■ **Hold the check and accelerate anyway on the theory that the tender was insufficient to cure the arrears.**

But the borrower will argue for a waiver on the lender or servicer's part which, depending upon the language in the mortgage, might very well prevail.

■ **Treat the mortgage as reinstated and absorb the legal fee and disbursement.**

But - and need it be said - this is an unenviable alternative.

#### Lack of foresight

It should be apparent that the neglect to accelerate, with some foresight at least, created a Hobson's choice.

The simple solution would have been to accelerate at some reasonable stage. But the distress of too many recent years has fostered the sense that because so many foreclosures go all the way to sale, issues about the clash between acceleration and tender fade into meaninglessness. Or, where the foreclosure was settled, it didn't happen until perhaps the eve of sale when the borrower finally faced the peril.

While once this was all too accurate, we are now seeing a greater rush to reinstate early. Though this will be an anecdotal observation from servicer to servicer, even if quicker reinstatements (or satisfactions) have not emerged yet, they will, sooner or later. Then, the importance of sage employment of acceleration will become increasingly meaningful, especially

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across a broad portfolio of loans.

#### Additional benefits

Wise use of acceleration has other helpful aspects as well.

Suppose the not-uncommon circumstance of the chronic defaulter. Month after month, year after year, payments have been pursued and the servicer no longer wishes to suffer the time, expense and problems this borrower represents. But servicer and borrower are attached for the life of the loan - in the absence of acceleration. Upon acceleration, however, the servicer need not accept those arrears and may instead re-

quire full satisfaction of the mortgage.

Note, however, that some forms of mortgage, notably the Fannie Mae version in use by institutional lenders throughout the United States, compel acceptance of arrears even after acceleration, so long as prior to issuance of the judgment of foreclosure and sale. Accordingly, whenever asserted here that arrears need not be accepted after acceleration, it presupposes that neither the Fannie Mae form nor mortgages containing similar language have been employed.

Still another corollary benefit to the use of acceleration is to be found.

Assume the unfortunate situation where the mortgage documents neglect to provide recompense for legal fees. In most jurisdictions, absent an attorney's fee clause in the mortgage, no matter how extensive or expensive collection and foreclosure efforts have been, the lender or servicer cannot compel the borrower to pay for such efforts upon a satisfaction of the mortgage. A condition of reinstatement could be the insertion in the mortgage of a binding legal fee provision.

#### Paying the servicer's fees

Even if the mortgage at issue compels acceptance of arrears, the servicer's costs must be paid.

This will most often have a salutary effect upon the borrower who then becomes responsible for those

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expenses. It also confirms - graphically - that the servicer "means business." A demonstration of strength, it is suggested, is a better way to bring a conclusion than mere equivocating.

To carry the idea a step further, all during the collection process interest and arrears are continuing to accrue. In the meanwhile, the property could be deteriorating or otherwise be declining in value. Time may then be the servicer's enemy. Until acceleration, there is not progress. Upon acceleration, the foreclosure can proceed.

Suppose, then, that the first step is begun - preparing the summons and complaint - and, in most states, a document called a *lis pendens*. The borrower is now awakened to the threat of eventual loss of the property. He promises to reinstate and pay the legal fees incurred.

The servicer is prepared to accept such reinstatement. It can then wait for the check or proceed to the next step in the action if the promised check does not arrive. If payment is forthcoming, the problem is over and the lender has incurred no loss. If the check does not arrive, the servicer can proceed to the next plateau in the case.

#### Moving toward foreclosure

That the borrower has not sent the check is of little importance. The servicer is that much closer to the foreclosure sale. If now the borrower finally pays, he is obligated also for the additional legal fees in having carried the action further. Again, the lender loses nothing - all of which was precipitated by judicious use of acceleration.

There is one final item to be considered.

The terms of the mortgage will control the right to accelerate. Some mortgages will not permit acceleration unless and until a borrower has been given some period of notice to cure a default. Only when the notice period has expired with the default uncured may there be an election to accelerate.

Moreover, the mortgage may address the mode of transmission of the letter. Although not common, it might require any notices to be sent by certified mail in which event, of course, the servicer must comply. In most instances, the means of transmittal is regular mail. If such is the case, a recommended procedure is to send the letter by both certified mail return receipt requested and regular mail. The certified letter may bring proof of receipt, which can be helpful in litigation. For the clever borrower who will refuse a certified letter, the regular mail will nevertheless have been received.

No discussion of acceleration will be entirely complete without an examination of all the applicable case law in every state, which is certainly beyond the purpose here. But the concept is clear. The astute servicer can do itself a good turn by resolute use of the power of acceleration provisions.

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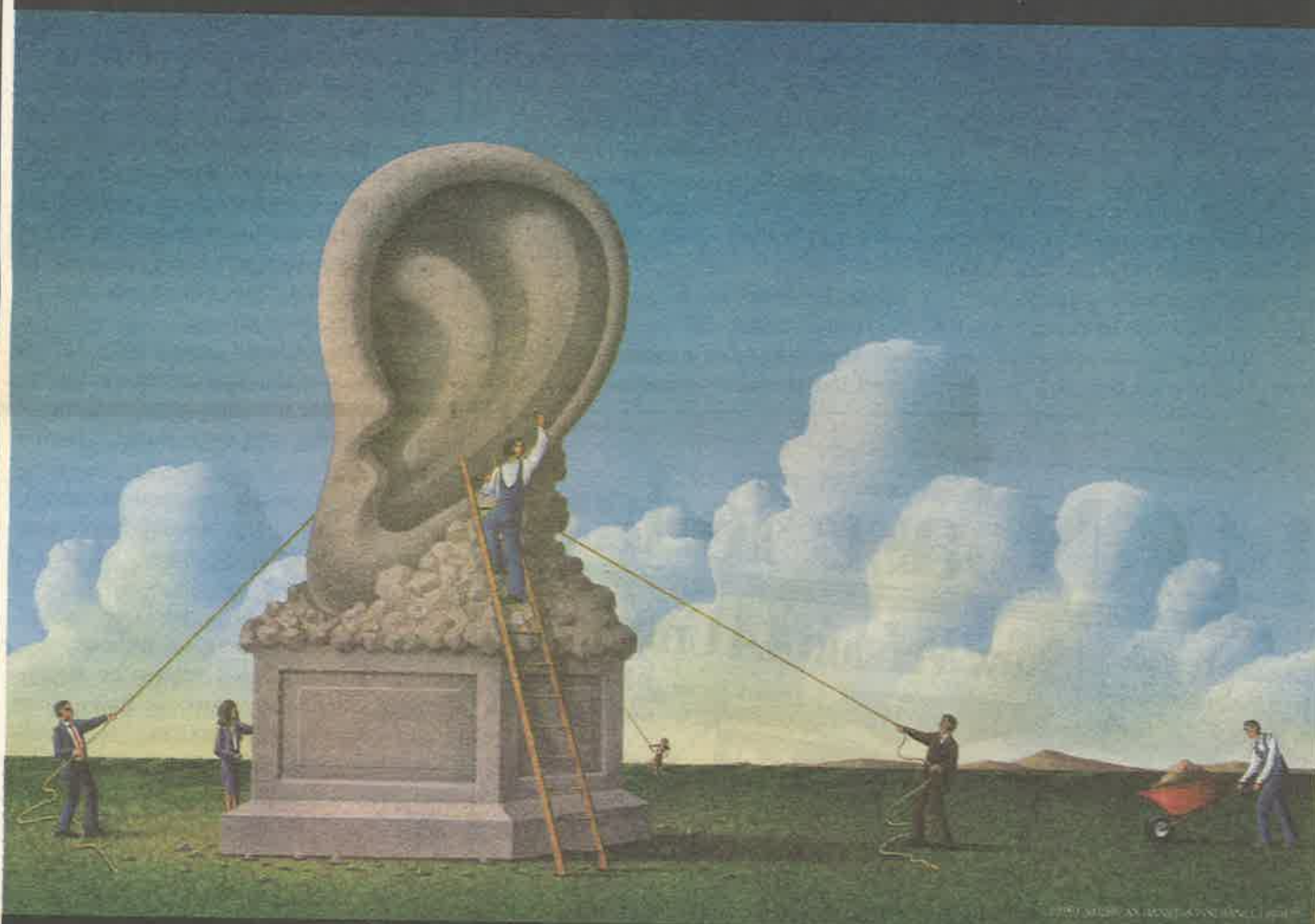
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