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THE COMING EVOLUTION

EMBRACING THE NEW DNA OF THE INDUSTRY

62

SETTING THE TONE

Field Services Companies Should Welcome Change in 2016

66

TACKLING TITLE

3 Tips to Keep you From Dropping the Ball

70

SOLID AS A ROCK

At 30, MCS is a Force To Be Reckoned With

74

CLEAR AS MUD

How Courts are Interpreting Compliance with HUD Regulations



How courts are interpreting compliance with HUD regulations for contact with the borrower and counseling.



It is common knowledge that mortgage foreclosures have decreased significantly in the last year. This decline has not only impacted mortgage foreclosure law firms throughout the country but has also had an effect on the cottage industry of “foreclosure defense.” The small boutique firms and solo practitioners that engage in foreclosure defense have seen their pool of clients shrink significantly and many are moving out of the practice area. As defense counsels compete for clients, one of the most recent and effective strategies to prolong foreclosure actions is alleging failure to comply with borrower counseling requirements on FHA loans as mandated by HUD

regulations. A substantial factor contributing to the success of this tactic is that the judiciary is widely split on how to treat these allegations.

WHAT IS HUD COUNSELING?

Borrowers alleging failure to comply with HUD regulations typically will cite to either 12 U.S.C. §1701x(e)(5) or 24 CFR §203.604. Motions for Summary Judgment and Answer and Affirmative Defenses many times will reference face-to-face meetings and HUD counseling interchangeably. It is important to note that HUD counseling requirements will typically be misquoted by borrowers, perhaps understandably so.

The National Housing Act is found at 12 U.S.C. §1701, et seq. with accompanying regulations promulgated under Title 24: Housing and Urban Development. Both the National Housing Act and Title 24 are extremely lengthy and encompass a wide

variety of issues. Section 1701x deals mainly with notification and eligibility counseling requirements for low to moderate income families, while 24 C.F.R §203.604 sets out more specific guidelines as to when contact with the mortgagor must occur. Nothing in either section actually indicates that “HUD counseling” must take place. Instead, §203.604 simply indicates that the mortgagee must have a “face-to-face interview” with the borrower.

The National Housing Act authorizes the Secretary of HUD to, “make grants to nonprofit organizations experienced in the provision of homeownership counseling... and to assist in the establishment of nonprofit homeownership counseling organizations.” The National Housing Act defines home

ownership counseling as, “counseling related to homeownership and residential mortgage loans.” The Act outlines clear criteria that a homeowner must meet in order to be eligible for counseling: 1) the home must be their primary residence, not assisted; 2) the inability to make payments is due to involuntary loss of income due to death, divorce, involuntary job loss, a significant increase in basic expenses due to divorce, damage, or repair to the property, large property tax increase, or increased medical expenses, and 3) the homeowner’s income must not exceed the threshold established by HUD as low to moderate income.

The Act requires notification of availability of homeownership counseling, “to any eligible homeowner who fails to pay any amount by the date the amount is due under a home loan.” The notification under the Act is required within 45 days of failure to make a payment due. Generally all that is required is that the notice inform the homeowner that “homeownership counseling” is offered by the creditor, a nonprofit organization, or that they can attain a list of nonprofit organizations offering counseling by calling a toll free number for HUD. Most notices of default either include information regarding counseling organizations or provide the toll free number for HUD, which is sufficient to show compliance.

CLEAR AS MUD



“As defense counsels compete for clients, one of the most recent and effective strategies to prolong foreclosure actions is alleging failure to comply with borrower counseling requirements on FHA loans as mandated by HUD regulations.”

CONTACT WITH THE MORTGAGOR

On the other hand, 24 CFR §203.604 has more detailed requirements for contact with the mortgagor. Under Title 24, Part 203, governs Single Family Mortgage Insurance and it is divided into three parts: Subpart A, which specifies eligibility requirements and underwriting procedures for HUD insured loans; Subpart B, which outlines contract rights and obligations between the mortgagee and The Commissioner; and Subpart C which details servicing responsibilities. Subpart C contains §203.604, entitled Contact with the Mortgagor, which specifically states that, “the mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting.”

There are two specific deadlines during which the face-to-face interview must occur, depending on the status of the loan. Generally, the interview must occur, “before three full monthly installments due on the mortgage are unpaid.” However, “if default occurs in a repayment plan arranged other than during a personal interview,” then the deadline is, “within 30 days after such default and at least 30 days before foreclosure is commenced.” Title 24 defines default as the, “fail[ure] to make any payment or to perform any other obligation under the mortgage, and such failure continues for a period of 30 days.” In addition, the date of default is defined as 30 days after the first failure to make a monthly payment or otherwise perform under the contract. The lender has only a four-month window to show compliance with the notification requirement.

THE PATH OF LEAST RESISTANCE: COMPLIANCE

In order to comply, the mortgagee must either have a face-to-face interview or make

a reasonable effort to arrange such a meeting, unless one of the exceptions applies. There are five exceptions: 1) the mortgagor does not reside on the property; 2) the property is not within 200 miles of the mortgagee, its servicer or a branch of either; 3) mortgagor has clearly indicated that he will not cooperate in the interview; 4) a repayment plan is entered into and payments thereunder are current; and 5) the reasonable effort to arrange a meeting is unsuccessful. For loans being referred to foreclosure, the repayment plan exception will not apply because the borrower will not be current on their payments. The most used exceptions are that the borrower does not live on the property, no branch within 200 miles and that a reasonable effort to arrange a meeting was unsuccessful. The reasonable effort exception, however, is commonly misunderstood.

A reasonable effort is explicitly defined as the sending of at least one letter and making one trip to see the mortgagor at the mortgaged property. A lender is normally in possession of proof of the letters sent to the mortgagor. Generally, obtaining proof of the letters to the mortgagor is not the hurdle, it is obtaining proof of the trip to the mortgaged property. This can be especially difficult for loans that are subsequently service released or sold. The trip to the property is required unless the property is more than 200 miles of the mortgagee or the mortgagor doesn't reside in the property.

Recently, litigation has centered around the method by which the letter is sent. In order to comply, the letter must be, “certified by the Postal Service as having been dispatched.” The Eleventh Circuit, governing Florida, Georgia and Alabama, has held that while a letter sent via Federal Express with delivery confirmation did not strictly comply with the certified mail

requirement, it was enough for substantial compliance.

Various sections of Title 24 and the National Housing Act specify that failure to service FHA insured mortgages in accordance with the regulations may result in a civil penalty action filed by the Mortgage Review Board or withdrawal of HUD's approval of the mortgage. The question becomes, what, if anything, can a borrower do if he or she feels that the mortgagee has failed to comply with HUD regulations.

DO BORROWERS HAVE STANDING TO ENFORCE? DEPENDS ON THE STATE

“The National Housing Act and the regulations promulgated thereunder deal only with the relations between the mortgagee and the government, and give the mortgagor no claim to duty owed nor remedy for failure to follow ... No evidence exists demonstrating that Congress intended to create a private cause of action under the National Housing Act.” *Roberts v. Cameron-Brown Co.* “The Court assumes without deciding that [borrower] may assert claims based on [bank's] failure to comply with these HUD Regulations.” *Rourk v. Bank of Am. Nat. Ass'n.* These two decisions aptly demonstrate the confusion surrounding this issue. Courts throughout the country are widely split not only whether the issue can even be raised, but also to what extent it can be raised.

Some courts refuse to recognize claims regarding compliance with HUD regulations altogether. Other courts have allowed a borrower to bring a breach of contract claim for failure to comply with HUD regulations clearly referenced in the mortgage.

The Middle District of Florida rejects borrowers-claims altogether, finding that the National Housing Act, “does not expressly confer a right upon mortgagors, and there is no basis to conclude that Congress intended to imply a private cause of action.”

The First and the Fourth District Courts of Appeal in Florida allow the issue to be raised as an affirmative defense, but reject the contention that compliance with HUD regulations is a condition precedent. While the Fifth DCA has not issued a written opinion, it recently Per Curiam affirmed a trial court's determination that compliance with HUD regulations can be raised as an affirmative defense.

It is clear that there is still much to be decided as it pertains to a borrower's ability to challenge compliance with HUD regulations. As the case law in this area of law emerges, perhaps it will shed more light on this otherwise murky issue.