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Changes in Foreclosure Laws Could Affect Banks

By Michael G. Cortina

Effective January 1, 2009, many new laws took effect. Many of these laws have little to nothing to do with banking. However, today's economy and the continually rising swell of foreclosures has caused a number of new laws that modify the existing Illinois Mortgage Foreclosure Law ("IMFL"). The intent of most of these changes is to protect homeowners, not to harm financial institutions. However, failure of banks to abide by these new changes could prove costly in the end.

Most of these changes came about in Public Act 95-961. This Act made three (3) changes to the IMFL: (1) requires a statutory notice to be attached to the summons served with a complaint in a foreclosure action; (2) requires a mortgagee or a mortgagee's agent to provide an accurate "payoff demand statement" within ten (10) business days after receipt of a request in a foreclosure action; and (3) provides for reasonable attorneys' fees and court costs to a defendant who prevails in a motion, affirmative defense or counterclaim, or in the foreclosure action itself.

1. Statutory Notice

The notice that must now be attached to all foreclosure summonses filed after January 1, 2009 is a list of ten (10) items that essentially provide legal advice to the mortgagor. The notice informs the mortgagor about the right to possess the property, of ownership, reinstatement and redemption, the right to receive any surplus after a sale, the availability of workout options, the right to obtain payoff amounts, suggests obtaining advice and contacting an attorney, and advises the mortgagor to proceed with caution.

This new law also requires that the notice be attached to all mortgage foreclosure summonses and be in both English and Spanish. Regardless of the language spoken by the mortgagors they must all receive this notice in these two (2) languages. While the notice provides warnings and information that could be helpful to mortgagors, it also provides a possibility of liability to a bank.

What would happen if the notice was not attached to the summons? Or, what would happen if the notice was only in Spanish, and not in English? Obviously, the notice would be defective and not in compliance with the IMFL, but are there other problems that could arise?

Arguments could be made that the failure to attach the notice to the summons in English and Spanish violates the IMFL. The IMFL is a statutory codification of the "common law strict foreclosure," the method used to foreclose prior to the law becoming a part of the body of Illinois statutory law. The IMFL, therefore, must be complied with strictly. Any deviation from the rules and formats set forth by the IMFL could be a defense to the case and could result in dismissal of the foreclosure.



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Other than the obvious problem of having the case dismissed and needing to begin the foreclosure process anew, the question of payment of the mortgagor's attorney's fees could exist if the case were dismissed on this technicality. The third change in the IMFL is that if the mortgagor prevails in any motion, affirmative defense or counterclaim, or in the foreclosure action itself, they are entitled to recover reasonable attorneys' fees. Financial institutions must therefore use caution and ensure that their chosen counsel complies with this notice provision, or they could be responsible for payment of a mortgagor's attorneys' fees.

2. Payoff Demand Statement

During a foreclosure, within ten (10) days of receiving a payoff demand statement from a mortgagor or the mortgagor's agent, the mortgagee or the mortgagee's agent must provide, at no charge, a payoff statement to the mortgagor. The willful failure of the mortgagee to provide the payoff statement shall result in liability for the mortgagee for any actual damages sustained by the failure to obtain the payoff. If no actual damages were incurred, then the liability will be \$500.00.

In order to comply with the payoff demand, the following information must be given to the mortgagor: (1) the information necessary to calculate the payoff amount on a per diem basis for the lesser of a period of thirty (30) days or until the date scheduled for judicial sale, (2) estimated charges (stated as such) that the mortgagee reasonably believes may be incurred within thirty (30) days from the date of preparation of the payoff demand statement, and (3) the loan number for the obligation to be paid, the address of the mortgagee, the telephone number of the mortgagee and, if a banking organization or corporation, the name of the department, if applicable, and its telephone number and facsimile phone number.

3. Attorneys' Fees

As noted above, if a mortgagor prevails on any motion, affirmative defense or counterclaim, or in the foreclosure action itself, the court may award reasonable attorneys' fees. A defendant who exercises rights of reinstatement or redemption shall not be considered to be the "prevailing party" for purposes of this new law.

This law gives rights to mortgagors that previously did not exist. Illinois follows the "American Rule," which says that each party pays for their own attorney unless a contract or statute allows fees to shift to the other party. Very few, if any, mortgage documents provide mortgagors the right to have their attorneys' fees be paid by the mortgagee even if the mortgagor prevails in a foreclosure proceeding. This change in the IMFL, however, gives mortgagors new rights.

One interesting part of this new law is that it specifically states that it shall not abrogate contractual terms in the mortgage or other written agreements between the mortgagor and the mortgagee. This means that if the mortgage contained language where the mortgagor waived its rights to attorneys' fees under section 15-1510 of the IMFL, the attorneys' fee provision would be nullified. Financial institutions should review their loan documents and consult with legal counsel regarding the prospect of amending the documents to make such a change.

The final change that could affect financial institutions became effective August 14, 2008, in Public Act 95-826. This change in the IMFL requires a mortgagee to send a notice, by first class mail, to the mortgagor that informs the mortgagor of his or her rights to remain in the property thirty (30) days after an order of possession is entered following a judicial sale. This amendment only applies to residential real estate. The notice must be sent to the address of the mortgagor noted on the mortgagor's appearance, or, if no appearance has been filed in the case, to the common address of the property at issue in the foreclosure. There is no requirement under this amendment as to when the notice must be sent. Therefore, the mortgagee can send the notice before, during, or after the judicial sale.

These changes in the IMFL are aimed at curing the evils associated with mass foreclosures and cases filed when no event of default has actually occurred. So long as financial institutions follow their internal guidelines and abide by requirements under the loan documents, they should not fear these changes.

The Credit Agreements Act: A Defense to Lender Liability

By Michael G. Cortina

For years lenders feared lawsuits based on the theory of “lender liability” based on oral commitments made to the borrower to lend money. Often when the borrower faced financial losses the borrower sued their lender claiming the lender breached its oral commitment to lend. Now, however, such theories of lender liability have no merit. The Credit Agreements Act can act as a complete defense to such claims.

In the late 1980’s, a financial institution in California was sued for lender liability based upon a claimed breach of its oral commitment to lend money to a borrower. The borrower prevailed and the financial institution was hit with a multi-million dollar judgment. The reaction from the California legislature was the creation of a statute that made oral commitments to lend a nullity. Many states, including Illinois, followed suit. Today, the Credit Agreements Act protects Illinois lenders from claims of breaches of oral commitments to lend.

The Act, found at 815 ILCS 160/0.01 *et seq.* specifically provides that a debtor may not maintain an action on or in anyway related to a credit agreement (which is defined to include a commitment

to lend money for business purposes) unless the agreement is in writing, expresses a commitment to lend money, sets forth the relative terms and conditions, and is signed by the debtor and the creditor. Since its inception, courts have refused to hold Illinois lenders liable for alleged breaches of oral commitments to lend.

Despite the fact that this statute has been in existence for several years, debtors and guarantors still try to claim breaches of oral commitments. In the case of *LaSalle Business Credit, Inc. v. Lapidus*, the guarantors claimed defenses of fraud and economic distress based upon alleged oral representations and breaches thereof by the lender. The District Court for the Northern District of Illinois, in 2003, held that the Credit Agreements Act prevented the guarantors from even raising such defenses because they were based on alleged oral statements of the lender.

Clearly, any claims of lender liability in Illinois based on oral commitments to lend should fail. However, lenders should still be cautious in their conversations with debtors. While the Act should be a complete defense to lenders, defending against claims of lender liability based on oral agreements takes time and money. No one wants to be dragged to court to defend themselves against even the most frivolous of claims. To avoid such problems, lenders should continue to make only written commitments to lend and avoid any conversations that a debtor could try to claim as an oral commitment to lend.

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