THE MASSACHUSETTS SUPREME JUDICIAL COURT HOLDS STATE-MANDATED DEFAULT NOTICE NOT INACCURATE OR DECEPTIVE

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U.S. Complex Commercial Litigation and Disputes Alert

On November 25, 2020, the Massachusetts Supreme Judicial Court (SJC) issued its opinion on a question certified from the First Circuit Court of Appeals regarding whether a mortgage servicer's compliance with a state-mandated default notice could, nonetheless, void foreclosure sales in Massachusetts. Specifically, the SJC examined whether the provision of the state-mandated notice has the potential to "deceive" a borrower where it describes a period for reinstating a loan that is longer than the period set forth in the mortgage contract. The SJC answered the question "no."

The case arose in federal district court in Massachusetts. After the district court dismissed the complaint, plaintiffs took an appeal to the First Circuit. In its initial decision, the First Circuit held that the default notice was "potentially deceptive" and thus did not comply with paragraph 22 of the mortgage and Massachusetts law. The court reasoned that although the notice advised that plaintiffs could avoid foreclosure by paying the total past-due amount before the foreclosure sale took place, it did not advise that plaintiffs must do so no later than five days before the foreclosure sale. Defendant filed a petition for rehearing advising the First Circuit that Massachusetts law mandated the use of the subject language verbatim. In response, the First Circuit certified the following question to the SJC:

> Did [defendant's] statement in the August 12, 2016, default and acceleration notice that "you can still avoid foreclosure by paying the total past-due amount before a foreclosure sale takes place" render the notice inaccurate or deceptive in a manner that renders the subsequent foreclosure sale void under Massachusetts law?

As noted above, the SJC answered the question "no."[1] The SJC held that the default notice was not "potentially deceptive" because, when reading the terms of the mortgage contract as a whole in conjunction with Massachusetts law, "the more generous reinstatement period provided under G.L. c. 244, § 35A, governs over the contractually imposed time limits on reinstatement articulated in paragraph 19" of the mortgage.[2] Thus, because the "five days prior" limitation to reinstatement in paragraph 19 of the mortgage "is superseded by the more generous reinstatement time period specified in the [state] statutory scheme," which requires a servicer to accept a reinstatement payment at any time prior to foreclosure, the SJC held that the default notice complied with Massachusetts law and could not void the foreclosure.[3]

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Upon receipt of the SJC's answer to its certified question, the First Circuit issued a decision affirming the dismissal of the complaint, holding that “[t]he paragraph 22 notice could not have been misleading for omitting paragraph 19's five-day deadline because, in Massachusetts, the five-day deadline does not apply.”4

The SJC opinion represents a significant victory for the financial and mortgage services industries and avoids the threat, posed by the First Circuit's initial decision, to the validity of a large number of Massachusetts foreclosures.

FOOTNOTES

[1] K&L Gates LLP prepared an *amicus brief* on behalf of financial and mortgage services trade organizations.

[2] *See Thompson v. JPMorgan Chase Bank, N.A.*, --- N.E.3d ----, 2020 WL 6931852, at *5 (Mass. Nov. 25, 2020); accord Thompson, 2020 WL 6931852, at *6 (“Reading paragraphs 12 and 16 of the plaintiffs' mortgage together with this applicable regulation makes clear that Chase not only had the contractual option to accept a reinstatement payment at any point prior to foreclosure, it was required to do so.”).

[3] *Id.* at *6.

[4] *Thompson v. JPMorgan Chase Bank, N.A.*, --- N.E.3d ----, 2020 WL 7238390, at *4 (1st Cir. Dec. 9, 2020).

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