

Deceased Borrowers and Mortgage Servicers Under the CARES Act



MACKIE WOLF
ZIENTZ MANN



*Written by: Daniel G. Van Slyke,
Associate Attorney*

Section 4022 of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) enacted on March 27, 2020 includes two provisions that seemingly halt much work of mortgage servicers: a borrower’s right to request forbearance and a moratorium on foreclosures. However, the CARES Act impacts deceased borrowers differently, thereby leaving open avenues for mortgage servicers to continue their work during the economic slump caused by the Coronavirus.

The Forbearance Request. The forbearance request applies to any federally backed mortgage loan secured by a lien on residential property. From February 15, 2020 to June 30, 2020, a borrower on such a

loan may request forbearance by submitting a request to the loan servicer that affirms the borrower is experiencing a financial hardship because of the COVID-19 emergency. Upon receiving the request, the servicer must grant the forbearance for 180 days, during which the servicer may not add to the loan amounts any additional fees, penalties, or interest based on payments missed. CARES § 4022(b)–(c).

Applying the Forbearance Request to Deceased Borrowers. Under Texas law, the borrower or debtor on a mortgage agreement is the party to the deed of trust and not that party’s heirs or devisees. Deceased borrowers do not experience financial hardship. Therefore, where all borrowers who signed a deed of trust are deceased, the forbearance provision of the CARES Act should not apply.

Prohibited Activities Under the Moratorium. The entire CARES Act moratorium follows: “Except with respect to a vacant or abandoned property, a servicer of a Federally backed mortgage loan may not initiate any judicial or non-judicial

foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale for not less than the 60-day period beginning on March 18, 2020.” CARES § 4022(c)(2). Because the sixtieth day after March 18, 2020 is a Sunday, mortgage servicers effectively cannot engage in the prohibited activities until Monday May 18, 2020.

The moratorium prohibits four activities: (1) initiate a foreclosure process; (2) move for a foreclosure judgment or order of sale; (3) execute a foreclosure-related eviction; and (4) execute a foreclosure sale. The third and fourth are self-explanatory. We may tentatively interpret the meaning of the first and second prohibited activities by considering them in the light of Regulation X, which uses the same phrases for activities prohibited upon receipt of a completed loss mitigation application. 12 C.F.R. § 1024.41.

Concerning the first prohibited activity, Regulation X states that the servicer may not “make the first notice or filing required to commence or initiate the foreclosure process under applicable law before evaluating the borrower’s complete application.” 12 C.F.R. § 1024.41(c). The first notice or filing required by applicable law applies to the earliest document state law requires to be recorded or published to initiate the

foreclosure process. Under the Texas Property Code, the earliest document required to be recorded or published is the notice of sale. Filing an action for foreclosure may also constitute a first “filing” for the purpose of initiating the foreclosures process.

Regarding the second prohibited activity, Regulation X prohibits mortgage servicers, upon receipt of a complete loss mitigation application, from moving for “foreclosure judgment or order of sale.” 12 C.F.R. § 1024.41(g). In the context of Regulation X, the 11th Circuit recently defined the prohibited activity as “a substantive and dispositive motion that seeks authorization from a court to conduct a foreclosure sale.” *Landau v. Roundpoint Mortg. Servicing Corp.*, 925 F.3d 1365, 1371 (11th Cir. 2019).

Applying the Moratorium to Deceased Borrowers. Whether for living or deceased borrowers, the CARES Act entirely blocks execution of foreclosure-related evictions or foreclosure sales until Monday May 18, 2020. The CARES Act similarly blocks the filing of any initial pleadings in actions seeking authorization for foreclosure or the filing of any motions for final judgment authorizing foreclosure in such actions, including an Application for Foreclosure in a probate proceeding.

However, the CARES Act does not prevent mortgage servicers from seeking relief through other avenues where borrowers are deceased. The servicer may apply for the appointment of a dependent administrator in a probate proceeding or submit an authenticated secured claim in an open probate proceeding. Because the claim itself is not a motion for judgment or an order authorizing foreclosure, the CARES Act moratorium should not apply. Similarly, a servicer may petition for a receiver to sell the real property. An order authorizing sale of real property in a probate proceeding does not authorize foreclosure, and such an

order may enable the deceased borrower's estate to preserve equity while also providing the mortgagee with relief in the form of a full payoff through a third-party sale.

Finally, the moratorium does not apply where the property is vacant or abandoned, which is the case in many instances of deceased borrowers. Therefore where the borrower is deceased, the servicer should investigate whether the property is vacant or abandoned and, if it is, proceed with any appropriate foreclosure remedies despite the Coronavirus emergency.

Here is the link to the CARES Act: <https://www.congress.gov/bill/116th-congress/house-bill/748/text>