

Be Careful What You Wish For: A Harsh Lesson in Contractual Notices

Amundsen Davis Corporate Alert
January 8, 2020

Almost every loan document package contains a provision that dictates how notices should be given to each of the parties. This is done so that there is clarity as to how to give notices, and whether any such notices have been properly sent. Such notice provisions must be strictly followed, else the party sending the notice may find itself on the losing end of contested litigation.

In a recent case, the Appellate Court of Illinois held that a contractually required mortgage acceleration notice was not proved to have been sent in accordance with the terms of the contract because it was sent via “certified mail” rather than “first class mail,” as required by the mortgage. In the case, the lender obtained summary judgment in its favor despite the objections of the defendants that claimed that they never received the required acceleration notice. The lender produced an affidavit from an officer stating that the acceleration notice was sent to the defendants via certified mail, but no proof of delivery existed in the record. The trial court made no specific finding on whether the required acceleration notice had been given.

In reversing, the appellate court noted how the mortgage provided that any notice sent to the borrower would be deemed given “when mailed by first class mail or when actually delivered to Borrower’s notice address if sent by other means.” The appellate court analyzed whether first class mail and certified mail were the same, and held that they are not the same primarily because certified mail will not be delivered if no one signs for it; first class mail, however, is delivered regardless of whether anyone signs for the letter.

The appellate court reversed the judgment of the circuit court and remanded the case for further proceedings because the lender failed to prove service of the notice by first class mail, or by “actual delivery.” On remand, the lender will have to prove that they sent proper notice of acceleration of the mortgage in accordance with its terms. If the lender is unable to prove that they sent the requisite notice to the borrowers, then they may be unable to prevail on their mortgage foreclosure case.

All lenders need to know and understand the language that is contained in their loan documents. While it may seem counter-intuitive to argue that first class mail is better than certified mail, the fact is that if the mortgage states that notice is

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presumed given when sent via first class mail, but will not be presumed with any other form of notice, then first class mail is the only way that notice will be presumed as being given.

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