



First Circuit Invalidates Foreclosure for Paragraph 19 Non-Compliance in Pre-Foreclosure Cure Notice Despite Notice's Factual Accuracy

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Overview: The United States Court of Appeals for the First Circuit recently held that a notice of default and right to cure ("Cure Notice") potentially misled the borrowers regarding the precise amount of time that the borrowers had to reinstate the loan prior to foreclosure as required by paragraph 19 of the mortgage. As a result, the Court held that the subject foreclosure was **void**. *Thompson v. JPMorgan Chase Bank, N.A.*, No. 18-1559, 2019 WL 493164 (1st Cir. Feb. 8, 2019). In sum, the Court held that the potentially deceptive wording regarding time to cure rendered the Cure Notice invalid. The case was remanded to the district court for further proceedings.

Background: The Borrowers granted a mortgage to a mortgagee in 2006. The mortgage contained the typical requirement in paragraph 22 thereof requiring the mortgagee to provide certain information to borrowers prior to accelerating the loan. After the Borrowers defaulted, a subsequent mortgagee (Chase) sent them a Cure Notice, providing the amount past due and the date by which they could cure the default before acceleration. The Cure Notice complied with paragraph 22 of the mortgage in that it stated that the Borrowers had "the right to reinstate after acceleration of the loan and the right to bring a court action to assert the nonexistence of a default, or any other defense to acceleration, foreclosure and sale." The notice further stated that the Borrowers could "still avoid foreclosure by paying the total past-due amount before a foreclosure sale takes place."

Borrowers claimed that the Cure Notice, despite its compliance with paragraph 22, did not strictly comply with the requirement in paragraph 19 of the mortgage that any reinstatement be paid at least five days prior to a scheduled foreclosure auction (the "Five Day Requirement"). The Cure Notice did not contain any language or warning regarding the Five Day Requirement. The notice simply advised the Borrowers that they could reinstate "before" foreclosure, thus implying (potentially contrary to paragraph 19) that a payment received *less than five* (5) days prior to the foreclosure would be sufficient to reinstate. Despite never having attempted to reinstate the loan, the Borrowers claimed that the Cure Notice's failure to disclose the Five Day Requirement rendered the Cure Notice confusing and potentially deceptive.

Lower Court: Chase moved to dismiss, arguing that the Cure Notice strictly complied with paragraph 22 of the mortgage as required by Massachusetts law. The district court agreed and dismissed the case. The paragraph 19 compliance issue was discussed by the lower court but was determined to be inconsequential in light of the Cure Notice's compliance with paragraph 22's requirements.

Appellate Ruling: On appeal, the Borrowers continued to argue that the Cure Notice did not strictly comply with paragraph 19's Five Day Requirement. The Court recognized that nothing in paragraph 22 mentions the Five Day Requirement and that paragraph 19 itself does not contain any requirement to provide *notice* to the borrowers of the Five Day Requirement. The Court theorized, however, that a lender could rely on the Five Day Requirement to reject an attempt by a borrower to



tender a full reinstatement payment just three days prior to the foreclosure even though paragraph 22 advised them that they could reinstate any time “before a foreclosure sale takes place.” The Court found that because the notice did not fully inform the Borrowers in relation to the expiration of their right to reinstate the loan prior to foreclosure pursuant to the Five Day Requirement, the Cure Notice was potentially deceptive. The Court relied on the strict compliance theory set forth in *Pinti v. Emigrant Mortg. Co.*, 472 Mass. 226, 33 N.E.3d 1213 (2015), in finding that the Borrowers did not need to plead any actual harm or reliance on the potentially deceptive Cure Notice. They needed only to show that the notice was potentially deceptive, even if it was factually accurate, in order to render the notice fatally flawed.

Implications: Unless and until the Massachusetts Supreme Judicial Court rules otherwise, this decision will be used by borrowers to challenge foreclosures based on the failure of a notice of the right to cure to notify them of any time limitations on reinstatements that may exist in a particular mortgage. Unlike the decision in *Pinti*, which expressly applied only to notices that were generated *after* the decision was rendered, the *Thompson* decision does not contain any prospective-only limitation. As a result, borrowers with pending litigation could move to amend their complaints to add a similar allegation. The *Thompson* decision may also impact the insurability of post-foreclosure properties going forward, including those not subject to any prior legal challenge.

Lenders and servicers should immediately review their notices of the right to cure for compliance with *Thompson*. Locke Lord would be happy to assist with that process.

For more information on the matters discussed in this *Locke Lord QuickStudy*, please contact the authors.

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