

## **No Waiver by Accepting Payments After Default but Before Acceleration**

The U.S. Court of Appeals for the Fifth Circuit recently held **that a mortgagee did not waive or abandon its right to foreclose by accepting payments after a default by the borrower, but before acceleration, when no representations were made to the borrower that payments less than the full obligation would bring the loan current.**

A copy of the opinion is available at: [Link to Opinion](#).

A borrower obtained a loan secured by a deed of trust (“DOT”). The DOT obligated the borrower to make monthly payments and gave the mortgagee the right to accelerate and foreclose in the event of a default.

The DOT contained the following non-waiver provisions:

12. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification or amortization of the sums secured by this [DOT] granted by Lender to Borrower or any Successor in Interest of Borrower shall not operate to release the liability of Borrower or any Successors in Interest of Borrower. . . . Any forbearance by Lender in exercising any right or remedy including, with-out limitation, Lender’s acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

In December 2009, the borrower informed the mortgagee he could not make his monthly payment on time. His December 2009 payment was made late, but the borrower alleged he made his subsequent payments on time through June 2011.

Sixteen months later, the borrower allegedly returned from vacation to find that the mortgagee had returned his two mortgage payments for May and June 2011. The mortgagee had also initiated foreclosure proceedings. The mortgagee sold the property at foreclosure sale over a year later

The borrower sued the mortgagee in state court where summary judgment was granted in favor of the mortgagee. The plaintiff borrower then brought a second state suit against the mortgagee which was dismissed with prejudice.

The plaintiff mortgagee then brought a state law quiet title action against the foreclosure purchaser claiming that the mortgagee waived its right to foreclose by

accepting payments for 16 months after the initial default, and thus could not sell the home to the foreclosure purchaser. The purchaser removed the action to federal court where the district court dismissed the plaintiff borrower's claim. The plaintiff borrower appealed.

On appeal, the plaintiff borrower argued that the DOT's non-waiver provisions did not apply because he only sought to have the note reinstated and was not attempting to avoid liability under the note. The Fifth Circuit rejected this argument as frivolous.

Next, the plaintiff borrower claimed that the mortgagee waived its right to accelerate and foreclose by accepting his payments for 16 months after the initial default before accelerating the note, and by failing to foreclose until three years after default.

Analyzing the plaintiff borrower's argument, the Court cited precedent noting that the plaintiff borrower misread the three recent rulings his argument relied upon.

The relevant Fifth Circuit rulings involved mortgagees that sent notices of acceleration after defaults by the borrowers. The borrowers in each case argued that Section 16.035 of the Texas Civil Practices and Remedies Code barred the lenders' right to foreclose because more than four years had passed since the lenders first accelerated the notes. However, the Fifth Circuit found in each case that the mortgagees had not violated the four-year statute of limitations in Section 16.035 of the Texas Civil Practices and Remedies Code.

The Court held that the mortgagees in the other cases had either waived or abandoned the initial acceleration by accepting additional payments after acceleration or by representing that the borrowers could bring the loans current by making payments less than the entire obligation.

The Fifth Circuit found that the reasoning behind its other rulings did not apply here, because the mortgagee here accepted payments after the borrower's default, but did not accept payments after the note was accelerated.

In addition, the Court, noted, the mortgagee here never made any representations to the borrower that the note could be made current by making payments less than the entire outstanding obligation.

For these reasons, the Fifth Circuit held that the DOT's non-waiver provision allowed the mortgagee to accept payments less than the entire obligation or defer acceleration and foreclosure after default without waiving any of its rights.

Therefore, the Court held, the mortgagee only engaged in conduct that was contemplated by the DOT's non-waiver provisions and consistent with its intent to preserve the right to accelerate and foreclose.

Accordingly, the Fifth Circuit affirmed the district court's dismissal.