

FAILURE TO STRICTLY COMPLY WITH THE REQUIREMENTS OF THE MORTGAGE INVALIDATES A FORECLOSURE SALE

Breach letters have been heavily litigated in many states, but up until now, Alabama has generally stayed out of the fray. Not any longer. In September 2017, the Supreme Court of Alabama found that failure to strictly comply with the requirements of the mortgage invalidates a foreclosure sale. *Ex Parte Turner*, ___ Ala___ (2017). In this case, after the borrowers defaulted on their loan, the loan servicer sent a letter notifying them of its intent to foreclose on the property (the “Default Letter”). The mortgage required the Default Letter to include certain information including that the borrower had the “right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale”. The Default Letter instead stated “[y]ou have the right to reinstate your loan after legal action has begun. You also have the right to assert in foreclosure, the non-existence of a default or any other defense to acceleration and foreclosure.”

The foreclosure was handled by an out-of-state firm. The borrowers ultimately filed suit against the servicer alleging that the foreclosure was void because the notice they received did not explicitly inform them of their right to bring a court action challenging the foreclosure. The Court of Civil Appeals upheld the foreclosure sale in determining that the notice to the borrowers, which undisputedly did not inform them of their right to initiate legal action, nevertheless substantially complied with the notice requirement set forth in the mortgage. The borrowers appealed arguing that Alabama law required strict compliance with the terms of the mortgage rather than mere substantial compliance. In its analysis, the Supreme Court of Alabama relied upon a decision from the Supreme Judicial Court of Massachusetts, *Pinti v. Emigrant Mortgage Co.*, 472 Mass. 226 (2015), which held that a non-judicial foreclosure was void because the default letter failed to inform the mortgagors of their right and need to initiate legal action to challenge the validity of the foreclosure. In following this logic, the Supreme Court of Alabama reversed the decision of the Appellate Court holding that a failure to strictly comply with the requirements of the mortgage, **SPECIFICALLY FAILURE TO NOTIFY THE BORROWERS OF THEIR RIGHT TO INITIATE LEGAL ACTION, INVALIDATES FORECLOSURE** The dissent noted that the law merely required substantial compliance, and that the Default Letter substantially complied with the mortgage because it put the borrowers on notice of their

responsibility to cure their default and that, if they did not, the debt would be accelerated and the mortgage foreclosed upon.

Servicers should be extra careful in their breach letter review process to ensure full and complete accuracy. Alabama law does not require breach letters; however, the standard GSE mortgage does require a breach letter be sent. The required contents of the letter and notice requirements will be set forth in the mortgage. It is important that counsel representing servicers in Alabama have an intricate understanding of the local laws and best-practices so that servicers can successfully navigate around this potential liability.