

MINOR DISCREPANCIES IN NOTICE OF DEFAULT ARE INSUFFICIENT TO SET ASIDE FORECLOSURE SALE IN TEXAS

In a [recent ruling](#) favorable to lenders and mortgage loan servicers, the Fifth Circuit of the United States Court of Appeals held that minor, inconsequential discrepancies in a pre-foreclosure notice of default (also sometimes called a “cure notice” or “pre-acceleration notice”) are insufficient grounds for setting aside a foreclosure sale in Texas.

Borrower-plaintiff Guilherme Casalicchio’s deed of trust required the lender to give a notice of default prior to loan acceleration if the borrower breached the deed of trust. This notice of default was required to specify the default, action required to cure the default, a date not less than 30 days from the date the notice is given by which the default must be cured, and that failure to cure the default on or before the specified date would result in loan acceleration and foreclosure.

In this case, the lender BOKF, N.A. had prepared a written notice of default on September 5, 2016 using an automated system. The system calculated the 30-day cure period using September 5, 2016 as the start date and, thus, stated that the “deadline” for Casalicchio to cure the default was October 5, 2016. However, the notice was not actually mailed out until September 12, 2016, a week after it was prepared.

BOKF did not receive any payment sufficient to cure the default by the deadline stated in the notice (October 5) or within thirty days of its mailing (October 12). Nevertheless, BOKF did not accelerate the loan until June 12, 2017. In the several month gap between October 2016 and June 2017, the lender attempted to discuss foreclosure alternatives with Casalicchio, to no avail. On July 4, 2017, BOKF foreclosed and Freddie Mac purchased the property at the foreclosure sale.

Once the eviction process started, Casalicchio filed a lawsuit seeking a declaratory judgment voiding the foreclosure sale, damages, and an injunction preventing his eviction. Casalicchio’s central claims were that the notice of default was defective and the foreclosure sale invalid because the notice’s cure deadline was inaccurate. Specifically, borrower Casalicchio contended that the deed of trust entitled him to at least 30 days to cure the default, and the notice given to him – mailed on September 12, with a stated cure deadline of October 5 – only afforded him 23 days to cure, instead of the contractually required 30 days.

The trial court granted BOKF and Freddie Mac summary judgment, a ruling that was affirmed by the Fifth Circuit on appeal. In a comprehensive opinion, the Fifth

Circuit found that **while the deadline on the notice of default may have been technically incorrect, it was “devoid of any real world significance” because Casalicchio had not made any attempt to cure the default during the time period in question (October 5 – October 12).**

In truth, the Fifth Circuit noted, Casalicchio did not even have sufficient funds to cure the default during that period, so any misstatement of the deadline was inconsequential. Further, as the Court astutely recognized, Casalicchio could have cured the default any time prior to loan acceleration. Notwithstanding what the notice of default said, the actual “cure period” afforded to Casalicchio was over six months – well in excess of the 30 days required in the deed of trust.

More importantly, the Court rejected Casalicchio’s argument that strict, technical compliance with the deed of trust always was required, without regard to practical considerations or the materiality of the alleged breach. Instead, the Court applied a standard more akin to substantial compliance, finding that **if the underlying purpose of the requirement was met – i.e., affording the borrower “a lengthy notice period in which he may cure” – then there would be no basis for vacating an otherwise valid foreclosure sale.**

In sum, the Fifth Circuit’s logical opinion and its rejection of a strict compliance standard are likely to be helpful for lenders and servicers defending against any alleged breach of a deed of trust, not just those pertaining to this specific type of notice.