Minnesota Courts Provide Troubling Clarification on Dual Tracking Laws

Minnesota has its own dual tracking law, the Minnesota Mortgage Foreclosure Dual Tracking law, enacted in 2013 and codified as Minn. Stat. § 582.043. The state law is somewhat similar to the CFPB rules on dual tracking, but has a large difference often initially overlooked by mortgage servicers: while the CFPB rules give borrowers a deadline to apply for loss mitigation of 37 days before the foreclosure sale to qualify for dual tracking protections, the Minnesota statute gives borrowers a more generous deadline of up to 7 days prior to the date of the foreclosure sale. The CFPB dual tracking rules also exclude more borrowers from protection, including borrowers who received bankruptcy relief or have already gone through the loss mitigation application process, among others.

Minnesota's dual tracking law contains certain, important provisions that are relatively vague. Recent court decisions could provide some clarification though for those latter provisions. Unfortunately, the clarification provided by these recent decisions goes against the common understanding and practice with respect to the dual tracking statute.

The Minnesota dual tracking statute addresses three different points in a foreclosure: (a) prior to the time a mortgage servicer refers a loan to an attorney for foreclosure, (b) after a loan has been referred to an attorney for foreclosure, but prior to the time a foreclosure sale has been scheduled, and (c) after a foreclosure sale has been scheduled by a foreclosure attorney, but before midnight on the seventh business day prior to a foreclosure sale date. During each of these periods, the statute prohibits a mortgage servicer from moving forward with foreclosure activity unless, (1) the servicer determines that the mortgagor is not eligible for a loss mitigation option, the servicers informs the mortgagor of this determination in writing, and the applicable appeal period has expired without an appeal or the appeal has been properly denied; (2) where a written offer is made and a written acceptance is required, the mortgagor fails to accept the loss mitigation offer within the time specified in the offer or within 14 days after the date of the offer, whichever is longer; or (3) the mortgagor declines a loss mitigation offer in writing. The statute also prohibits a mortgagor from conducting a foreclosure sale while the mortgagor is complying with the terms of a trial or permanent loan modification or other loss mitigation option, including if a short sale has been approved by all necessary parties and proof of funds or financing have been provided to the servicer.

According to the language of the statute, it is clear that if a mortgage servicer has received an application before a foreclosure has been referred to an attorney, the mortgage servicer must not refer the foreclosure until the conditions of the statute have been fulfilled. In contrast, the statute appears less clear as to what steps the mortgage servicer can take after a loan has already been referred to an attorney for foreclosure once a loss mitigation application has been received. After that point, the statute provides that if loss mitigation activity is pending, the servicer "shall not move for an order of foreclosure, seek a foreclosure judgment, or conduct a foreclosure sale." Further, if the servicer receives a loss mitigation application after the foreclosure sale has been scheduled, but before midnight on the seventh business day prior to the foreclosure sale date, the servicer must "halt the foreclosure sale" and evaluate the application.

The predominant method of foreclosing mortgages in Minnesota is through non-judicial foreclosure by advertisement proceedings. That method involves serving various notices and publishing a notice of foreclosure sale for six consecutive weeks. The final point of the foreclosure sale can be postponed to later dates by publishing the postponements and serving additional notices.

As mentioned, the dual tracking statute contains the vague phrase "halt the foreclosure sale" to identify what a mortgage servicer must do after a loss mitigation application has been received by the statutory deadline. That term is not contained in any other foreclosure statute and is undefined. "Halting a foreclosure sale" could mean that a mortgage servicer must stop an upcoming foreclosure sale and postpone it to a later date if a timely application is received. However, since Minnesota is a "stop and restart state" for foreclosures, halting the foreclosure sale could also mean that the foreclosure sale must be cancelled altogether with foreclosure proceedings restarted later for a new foreclosure sale date if still needed.

Currently, the most common practice for mortgage servicers receiving loss mitigation applications in Minnesota appears to be postponing foreclosure sales rather than terminating foreclosure proceedings altogether if they need more time to complete a loss mitigation application review and denial process. Borrowers' attorneys typically accept this course of action and routinely request foreclosure sale postponements while citing the dual tracking statute, rather than demand that the entire foreclosures be terminated.

However, recent cases indicate foreclosure proceedings must be cancelled in their entirety if timely loss mitigation applications are submitted to mortgage servicers.

In *Gray v. Bank of New York Mellon*, 2016 U.S. Dist. Lexis 66642 (D.Minn. 2016), a federal district court judge appeared to have misquoted the dual tracking statute in holding that non-judicial foreclosure proceedings must be stopped in their entirety once a loss mitigation application is timely submitted. In that case, the borrower submitted a loan modification application to the mortgage servicer and then received a notice of foreclosure sale two days later. Prior to the date of the foreclosure sale, the mortgage servicer denied the application and gave the borrower 30 days to appeal the decision. The borrowers filed an appeal with the mortgage servicer, and the mortgage servicer had the sale conducted during the appeal period.

While the Gray court properly identified that "the statute states that servicers must 'halt' the foreclosure sale" after receiving timely loss mitigation applications, that court later identified that "the statute requires servicers to 'halt' the foreclosure, which means that all proceedings should be suspended or stopped pending an application review." (emphasis added). The *Gray* court ultimately held that the borrowers' allegation that the mortgage servicer "continued to pursue foreclosure" after receiving the loan modification application stated a viable claim for a violation of the dual-tracking statute. The broader holding of the *Gray* court and its analysis of the statute was surprising given that the court could have easily focused solely on the fact that the foreclosure sale was held during the alleged appeal period, in contravention of the plain language of the statute.

While the *Gray* decision appears to have resulted from a possible misreading of the Minnesota dual tracking statute, that court may not be alone in interpreting the statute to require the termination of foreclosure proceedings in their entirely upon the submission of a timely loss mitigation application by a borrower. The *Gray* court cited *Mann v. Nationstar Mortgage, LLC*, 2015 U.S. Dist. Lexis 87772 (D. Minn. 2015) in its decision. However, the borrowers in *Mann* did not even claim the mortgage servicer was required to stop all foreclosure proceedings after they submitted their loss mitigation application for review. Instead, the borrower in that case claimed that the mortgage servicer violated the dual tracking statute "based on its failure to postpone the Sheriff's Sale" despite having timely received a loss mitigation application. Despite that narrow claim, the *Mann* court made a broad ruling, writing that "the purpose of the dual tracking statute is to prevent mortgage servicers from having it both ways: a servicer cannot 'pursue mortgage foreclosure" while also considering a borrower's timely submitted application." Regardless, the *Mann* court ultimately focused on whether the foreclosure sale should have been halted or conducted, whereas the *Gray* court also focused on whether the entire foreclosure proceedings should have been stopped instead of just the point of sale.

The Minnesota Court of Appeals has also looked at this issue, and appears to be consistent with the federal district courts. In an unpublished decision, the Minnesota Court of Appeals wrote, “when a servicer receives a loss-mitigation application, it must halt ‘foreclosure proceedings’ until the application has been processed.” *Wells Fargo Bank, N.A. v. Lansing*, 2015 Minn. App. Unpub. Lexis 132 (MN Ct. App. 2015). That court also appears to have disregarded that language of the Minnesota dual tracking statute requires the halting of the foreclosure sale, rather than the halting of the foreclosure proceedings.

In addition, the Minnesota dual tracking statute does not define what a loss mitigation “application” is and whether a loss mitigation application must actually be complete to trigger the statute’s protections or whether a partial application could qualify. Given the trend of the recent cases, a mortgage servicer would be wise to treat even partial applications as qualifying for dual tracking protections under this statute.

None of the foregoing cases are actually binding precedent in Minnesota, since they are either federal district court level decisions or unreported. Regardless, the safest approach for servicers would be to stop foreclosure proceedings in their entirety during the pendency of loss mitigation applications or other activities in the current environment until binding precedent holds otherwise. Failure to take this conservative route could result in an invalidated foreclosure and an award of attorneys’ fees to borrowers under the Minnesota dual tracking statute.