

WHAT CONDUCT CONSTITUTES WAIVER OF ACCELERATION?

In [*Martin v. Federal National Mortgage Association*, No. 15-41104 \(5th Cir. Feb. 22, 2016\)](#), the Fifth Circuit issued its fourth opinion in recent months rejecting a borrower's assertion that a mortgage servicer waived acceleration of a loan by engaging in conduct inconsistent with acceleration. The Court noted that Wells Fargo accepted payments only after the borrower's default in 2009, not after the bank had accelerated the note and that such activity was consistent with the deed of trust related to the loan and did not constitute waiver. Although the Court found that Wells Fargo did not waive acceleration, the portion of the opinion that is instructive for lenders and servicers is the Fifth Circuit's brief description of **post-acceleration conduct that could amount to waiver. This conduct includes:**

- **Accelerating a loan and later accepting a payment.**
- **Representing that a borrower can bring a loan current by making a payment of less than the entire obligation or requesting payment on less than the full amount of the loan after acceleration.**
- **Sending an additional notice of acceleration or communication from which the borrower could infer that a previous notice of acceleration was being abandoned.**

Although the Court mentioned these potential issues, it did not address them in disposing of Martin's claim because Wells Fargo accepted payments only after Martin's default and not after the bank accelerated the note. Further, Wells Fargo never represented that Martin could bring the note current by making payments totaling less than the entire outstanding obligation. Instead, Wells Fargo engaged only in conduct that was contemplated by the deed of trust's non-waiver provisions and acted in accordance with its intent to preserve its right to accelerate and foreclose.

In deciding what actions to take after acceleration, lenders and servicers should review any non-wavier provisions in the operative deed of trust and consider the fact that courts are likely to consider the request for or acceptance of any payment that is less than the entire amount of the outstanding balance on the loan to constitute a waiver.