

In a Win for Mortgage Servicers, Massachusetts Supreme Court Finds Mandatory Notice of Right to Cure in Notice of Default is Not Potentially Deceptive

2 min read

Dec 7, 2020

By: Samuel C. Bodurtha, Kevin W. Manganaro

Massachusetts moved one step closer to resolving an ongoing debate over pre-foreclosure notices of default that started with the First Circuit's decision in [Thompson v. JPMorgan Chase Bank](#) back in February of 2019. Initially, the First Circuit concluded that a notice of default, which disclosed that borrowers "could still avoid foreclosure by paying the total past-due amount before a foreclosure sale," was potentially misleading because the mortgage only allowed reinstatement five days before the sale. Chase filed a petition for rehearing, joined by numerous *amici*, that demanded reconsideration of the First Circuit's decision on grounds that the potentially misleading language was in fact a mandatory disclosure under the Code of Massachusetts Regulations.

In response to Chase's petition, the First Circuit vacated the initial decision and [certified the following question](#) to the Massachusetts Supreme Judicial Court: "Did the statement in the...default and acceleration notice 'you can still avoid foreclosure by paying the total past-due amount before a foreclosure sale takes place' render the notice inaccurate or deceptive in a manner that renders the subsequent foreclosure sale void under Massachusetts law?" Massachusetts' Supreme Court has now responded to the First Circuit's certified question: "No."



The Supreme Judicial Court's (SJC) decision ends the debate over potentially misleading language when comparing the notice of default's reinstatement disclosure with the mortgage's reinstatement limitations. Where the mortgage requires a notice of default that must strictly comply with certain disclosures—and Massachusetts law mandates additional disclosures in response to a borrower's default—mortgage paragraph 15 allows the lender to issue a hybrid notice that incorporates both state law and contractual disclosures, and the state law notice satisfies corresponding requirements under the mortgage. To the extent there are inconsistent disclosures between the state law notice and the contractual notice, paragraph 16 of the mortgage applies the limitations of applicable law to all obligations of the agreement so that the longer timeframe to reinstate specified under Massachusetts law supersedes the reinstatement provision.

While interpreting the mortgage contract as a whole, the SJC pointed to paragraph 12, which provides the lender with the contractual ability to extend deadlines, including an extended period of time within which a borrower can reinstate. Finally, the SJC responded to the First Circuit's hypothetical concern where a borrower attempts to reinstate three days prior to the foreclosure only to be rebuffed by the lender's reliance on the mortgage's five-day deadline for such a payment. According to the SJC, the lender would be obligated to accept this reinstatement payment under Massachusetts law because it allows a longer reinstatement period. And, because the mortgage discloses the limitations of applicable law on the contract, the borrower is not deceived by and between the two reinstatement provisions.

In addition to denying the First Circuit's concern over a potentially deceptive notice of default, the SJC's opinion addresses a number of lingering questions on the issuance of these notices. First, the decision endorses a lender's use of one "hybrid" notice to provide the borrower both the mandatory contractual and state law disclosures in response to a borrower's default. Second, the opinion continues an ongoing effort by state and federal courts interpreting Massachusetts law to deny borrowers' demands for strict compliance with every single mortgage term. While strict compliance remains mandatory for conditions precedent to the exercise of a statutory power of sale foreclosure, strict compliance does not require a lender to "demonstrate punctilious performance of every single mortgage term."

Hinshaw & Culbertson LLP is a U.S.-based law firm with offices nationwide. The firm's national reputation spans the insurance industry, the financial services sector, professional services, and other highly regulated industries. Hinshaw provides holistic legal solutions—from litigation and dispute resolution, and business advisory and transactional services, to regulatory compliance—for clients of all sizes. Visit www.hinshawlaw.com for more information and follow @Hinshaw on LinkedIn and X.

Topics

Foreclosure, Mortgage, First Circuit Court Of Appeals, Default Notice, Foreclosure Sale