

First Circuit Expands Strict Compliance Review of a Pre-Foreclosure Notice of Default Beyond Disclosure of a Borrower's Rights

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By: Samuel C. Bodurtha

An ever-expanding review of pre-foreclosure notices of default experienced its latest chapter in the First Circuit's recent decision reversing dismissal of suit in [Aubee v. Selene](#). In *Aubee*, the borrowers challenged the notice of default they received prior to foreclosure on the grounds that the notice inserted additional language that was misleading and deceptive. The Aubees' mortgage included the standard Paragraph 22 notice of default disclosures requiring the mortgage lender to inform a borrower of 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 to acceleration and sale. The Aubees' notice of default stated: "*You have the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default and/or the right to bring a court action to assert the non-existence of a default or any other defense to acceleration, foreclosure and/or sale of the property.*" The Rhode Island federal court dismissed the case because the notice of default provided the Aubees with all disclosures mandated under Paragraph 22, but the First Circuit reversed.

The First Circuit conceded that the notice of default included all words describing a borrower's rights to reinstate and to bring court action. The court's issue, however, centered on the notion that the notice informed the borrower of their rights in a misleading manner that could cause a reasonable borrower to misunderstand how to assert them. The court reviewed strict compliance precedent in Rhode Island, [Woel v. Christiana Trust](#), and in Massachusetts, including [Pinti v. Emigrant](#) and [Thompson v. JPMorgan Chase](#), and concluded that both jurisdictions require that a notice of default be both accurate and not deceptive. The court focused on the "not deceptive" requirement to find that a notice of default fails to strictly comply with Paragraph 22 if it is reasonably likely to mislead borrowers about how to assert their rights, even as it informs them of those rights. Turning their attention to the Aubees' notice of default, use of the term "and/or" to connect the rights disclosed rendered the notice easily susceptible to confusion. In addition, splitting the disclosure of rights available to assert in a foreclosure proceeding from the rights to bring in a court action caused reasonable confusion over whether a

borrower would have to initiate court action to assert their rights or simply wait for a foreclosure proceeding against them, which a mortgage lender in Rhode Island is not required to file. The mortgage lender argued that these disclosures accounted for Rhode Island's allowance of judicial or non-judicial foreclosure sales, but the court refused to accept this position because the notice did not explain the context for asserting rights in a court action as opposed to in response to a foreclosure proceeding. The notice could easily mislead a borrower into thinking they have the option to choose to assert their rights in response to a foreclosure proceeding or by pursuing their own court action regardless of whether a mortgage lender pursued a judicial or non-judicial sale.

The First Circuit's decision in *Aubee* potentially expands strict compliance review beyond whether mandatory disclosures were provided in a notice of default to include further a review of whether a reasonable borrower was confused or misunderstood their rights. This additional level of review results from the insertion of additional language beyond the mandatory Paragraph 22 disclosures. Hinshaw will continue to monitor and report on decisions impacting the validity of pre-foreclosure notices.

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