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# Texas Justices Told Lender's Docs Leave Borrowers In 'Limbo'

By **Catherine Marfin**

Law360 (October 25, 2023, 5:39 PM EDT) -- An attorney for a Houston-area couple told the Texas Supreme Court on Wednesday that lenders shouldn't be allowed to reset the clock on the foreclosure timeline by demanding full repayment of mortgage loans using multiple notices, saying that letting banks "play with borrowers like toys" forces homeowners to live "under a constant threat of foreclosure."

Jeffrey C. Jackson of Jeffrey Jackson & Associates PLLC, counsel for Sugar Land homeowners Thomas Moore Jr. and Linda Moore, told the court that while the state's rules of civil procedure allow a lender to walk back a demand for full repayment on a loan as long as the borrower is given a written notice, the four notices given to the Moores don't comply.

He said the court didn't need to look any further than the title of the full repayment notices, which are known as notices to accelerate.

"Within the written paragraphs of this notice, there is buried in the fourth paragraph language suggesting that the lender was abandoning or rescinding the prior acceleration under the statute," Jackson said. "The court should not give effect to that language because the overarching point of the letter is to accelerate the loan."

While the lenders have contended that each notice of acceleration the Moores were given in 2016 and 2017 included language taking back prior notices, Jackson said the court should give the most weight to how allowing that process will affect average Texans.

"No reasonable borrower looking at that letter could reasonably interpret that as a rescission of acceleration because there was no point in time where the loan was actually not accelerated," Jackson said. "A borrower reading these notices is under the constant threat of foreclosure, but the fact that they're never in an unaccelerated status leaves them in limbo."

The Moores obtained a $170,700 mortgage loan in May 2004 secured by their home in Sugar Land, Texas, southwest of Houston, according to court documents. The original lender was Option One Mortgage Corporation, which assigned the loan to Wells Fargo.

The deed of trust, which serves as the basis for all foreclosure proceedings against the Moores, included an optional acceleration clause. The clause gave Wells Fargo and the loan's servicer, PHH Mortgage, the ability to demand full repayment if the Moores fell behind on their mortgage.

Under state law, before a lender can demand repayment, a notice of intent to accelerate has to be sent to the borrowers.

The Moores told the state's high court that the first notice of intent to accelerate was sent to them on Oct. 1, 2015, followed by an acceleration notice in February 2016. Under state law, lenders have four years from an acceleration notice to foreclose on a property.

The Moores were given four acceleration notices after February 2016 — two later that same year and two in 2017, but a sale never occurred.

The Moores sued Wells Fargo and PHH Mortgage in August 2020, claiming the statute of limitations had passed without a foreclosure. A federal judge granted the lenders' motion for summary judgment, ruling that they had properly rescinded the February 2016 notice.

On appeal, the Fifth Circuit said questions remained about whether a lender can rescind a prior acceleration notice and reaccelerate a loan at the same time, and whether the action would void the loan's reacceleration or rescission. The Texas Supreme Court **agreed** to hear oral argument on the issue in July.

On Wednesday, Wells Fargo counsel Daniel Durell of Locke Lord LLP told the court that the state's civil procedure rules don't include any specifics on how a rescission or an acceleration notice should be written.

"Would it matter if there was a 60-page letter with all sorts of things about real property rights, and then on page 47 there was a little notice of rescission?" Justice Evan A. Young asked.

"Nothing in the statute requires the notice to be in any particular form," Durell replied. "Nothing requires the notice to have any particular title. Nothing in the statute prohibits the notice from including any additional information."

Durell added that the lenders' choice to accelerate the Moores' loan is less severe given the terms of the contract.

"This harsh remedy of acceleration isn't so harsh if there's a contractual right after acceleration to do what acceleration is supposed to say you can't do, which is cure the default," Durell said. "Because that's present in this case, the common law rule requiring a notice of intent to accelerate does not apply."

He added that the second certified question before the court — whether a simultaneous notice, if not permissible, voids the loan's reacceleration or rescission — is clearly answered by Texas Civil Practices and Remedies Code Section 16.038, which was quoted by both sides Wednesday.

"Subsection E makes clear that a rescission does not affect how or when a new limitation period begins to run on a reacceleration," Durell said. "The rescission statute is not intended to determine whether a loan has been reaccelerated or not. … There's no ambiguity."

Jackson countered that the statute "implies some period of time" between a notice of acceleration and the actual acceleration, indicating that each subsequent acceleration notice should have come with its own notice of intent to accelerate first.

The Moores are represented by Jeffrey C. Jackson of Jeffrey Jackson & Associates PLLC.

Wells Fargo and PHH Mortgage Corp. are represented by Daniel G. Durell of Locke Lord LLP.

The case is Linda Moore at al. v. Wells Fargo Bank et al., case number 23-0525, in the Supreme Court of Texas.

--Editing by Michael Watanabe.