

Rhode Island General Assembly Clarifies Intent of Foreclosure Mediation Law

Description

In what can only be perceived as a response to a recent Superior Court decision, the Rhode Island General Assembly amended the applicability of the Foreclosure Mediation Law, R.I. Gen. Laws § 34-27-3.2, for the third time in as many years. Among other amendments to this statute, the General Assembly fortified an exemption for certain loans. Specifically, it expressly exempted any mortgagee foreclosing on a mortgage loan with a date of default on or before May 16, 2013 from having to send a notice of the right to mediation to the borrower, an exemption contained in the original iteration of the statute. Changes were also made to § 34-27-3.2(m) to lessen the penalty for failure to comply, which would render the foreclosure *voidable*, not void. The amendments are found in Senate Bill No. 0581 Substitute B and in House Bill No. 6264 Substitute A, which were passed by both the Senate and the House and became law on July 2, 2015.

The Foreclosure Mediation Law first became effective on September 13, 2013. The purpose of the statute was to require certain foreclosing mortgagees to send a notice of a right to mediation to borrowers prior to the mortgage being in default for 120 days. Application of the law required a point of demarcation; in other words, a distinction between which loans would require a notice of mediation and which loans would not. Therefore, certain loans were exempt from the mediation statute – those loans with a default date 120 days prior to September 13, 2013 which was May 16, 2013.

The General Assembly amended the Foreclosure Mediation Law in 2014 by removing the exemption language for loans with a default date prior to May 16, 2013. The 2014 amendment to the Foreclosure Mediation Law was effective on October 6, 2014. As a result of the 2014 amendment which removed the exemption, a borrower challenge to a foreclosure where the mortgagee did not send out a mediation notice was raised in a Superior Court action. In that case, the foreclosing mortgagees did not send out the foreclosure mediation notice because of the exemption which existed in the 2013 version of the Foreclosure Mediation Law.

On May 15, 2015, the Rhode Island Superior Court in *Fontaine v. US Bank Nat'l Ass'n, et al.*, PC 2015-0216, held that the July 2014 version of the Foreclosure Mediation Law, effective October 6, 2014, applied to all individual consumer first-lien mortgage loans that are one-to-four unit, owner-occupied properties where the foreclosure was not initiated prior to October 6, 2014.

This was a striking change given the fact that the 2013 version of the Foreclosure Mediation Law contained an exemption for mortgage loans that were 120 days or more in default as of September 13, 2013. The *Fontaine* decision meant that any mortgagee of pertinent Rhode Island property who initiated foreclosure proceedings after October 6, 2014 *without* sending a mediation notice to mortgagors (regardless of when such loan went into default and the number of days in default), violated the Foreclosure Mediation Law. For such violation, the 2014 version of amended § 34-27-3.2 provides that a penalty may be assessed at the rate of \$1,000 per month for each month after the 121st day after the date of default for each loan. The *Fontaine* Court stated that mortgagees would not be penalized from the 121st day of default, rather, the penalty would run from the date mortgagees became obligated to send the mediation notice (October 6, 2014). More importantly, the *Fontaine*

Court noted that failure to comply with the 2014 version of amended § 34-27-3.2 renders foreclosures void.

Much of that has changed with the 2015 amendments to § 34-27-3.2. As of July 2, 2015, the 2015 amended version of the Foreclosure Mediation Law removed the requirement that mortgage holders and servicers of all mortgage loans with a default date prior to May 16, 2013 send out mediation notices — essentially, reviving the 120 days of default exemption that was in the 2013 version of the Foreclosure Mediation Law.

Despite the 2015 revision to the Foreclosure Mediation Law, title insurers still believe a cloud on title exists on those foreclosures that occurred after October 6, 2014 and before the enactment date of the 2015 amendment to the Foreclosure Mediation Law (July 2, 2015) in reliance on the exemption. As a result, for marketability purposes only, title insurers are requiring that certain mortgagees re-foreclose. We believe that the General Assembly's immediate reaction to *Fontaine* was intended to make it clear that the exemption would run from May 16, 2013 and retroactive to apply to foreclosures already conducted. Unfortunately, the 2015 amendment has not resolved this issue.

Presently, there is a proposal to remove the express exemption from Banking Regulation 5 for loans that were in default 120 days or more prior to September 13, 2013. The proposal to remove the express exemption was issued before the 2015 amendments to the Foreclosure Mediation Law were enacted. Thus, we anticipate that there will be another round of amendments proposed to Banking Regulation 5. A public hearing is scheduled on Banking Regulation 5 for August 13, 2015.

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