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Potential Remedies in Mortgage Lending Transactions

Jared M. Slade

Author Contact Information:

Jared M. Slade
Alston & Bird LLP
Dallas, TX
jared.slade@alston.com
214.922.3424

JARED M. SLADE
ALSTON & BIRD LLP
2200 ROSS AVE., STE. 2300
Dallas, TX 75201
jared.slade@alston.com
214.922.3424

Jared M. Slade is a partner in the Dallas office of Alston & Bird LLP, where he has practiced since 2011. His practice focuses primarily on financial services litigation and commercial disputes, including real estate litigation matters. He has represented plaintiffs and defendants in trials and arbitrations. He has represented lenders, borrowers, servicers, trustees, banks, landlords, and tenants in a variety of matters.

Jared earned his undergraduate degree from Harvard College in 2003. He obtained a JD from Duke University School of Law in 2007. He is licensed to practice law in both Texas and Florida and is admitted to practice before all federal district and appellate courts in Texas.

You had suspected it was likely coming and had prepared. But you still were not looking forward to it. The borrower is officially in default. Now what?

First and always, read the documents. Even if the deal was based on a form. Even if the deal was based on *your* form. Freedom of contract remains paramount in Texas, subject to certain procedural and substantive protections for borrowers, homeowners, and citizens. Confirming what you can do pursuant to your contract is the first step. It is also important to define how you go about doing what you can do. Many hours of sleep have been lost by diligent attorneys who woke with worries about who was supposed to be given notice of what by when. Outlining your next steps is a must.

This article focuses on what comes after that and how you go from default to desired outcome, assuming that you are complying with any limitations outlined in the underlying agreements. To parrot Stephen Covey, begin with the end in mind. What you choose to do will be governed by the outcome you hope to achieve. The outcome largely turns on what your client ultimately wants – title to the security given for the loan, monetary damages, or something in between. You may, for a variety of reasons, elect to pursue one over

another or multiple paths at the same time.

I. Acquiring Title

Assuming the obligation is secured, a primary option will be acquiring title to the property. This approach is highly technical, meaning a prudent attorney will re-check her authority regardless of how many times she has previously and successfully fulfilled all of her myriad obligations.

That is especially true in light of the Covid-19 pandemic. Regulators, governments, and courts have all imposed additional obligations and restrictions that may impact any particular act you seek to take, whether delaying an action, requiring additional or different posting or publication, or limiting the pages that may be filed without leave of court. Cross-checking the applicable regimes will reduce the likelihood of making a technical error that, at best, will complicate the expediency of securing the result you seek or, at worst, will frustrate your ability to secure the relief your client seeks.

It will come as no surprise to anyone reading this paper that, “[u]nder Texas law, ‘the terms set out in a deed of trust must be strictly followed.’” *Casalicchio v. BOKF, N.A.*, 951 F.3d 672, 673 (5th Cir. 2020) (quoting *Univ. Sav. Ass'n v.*

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