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KEEP YOUR RECEIPTS: ILLINOIS APPELLATE COURT FINDS THAT PARAGRAPH 22 NOTICE SENT CERTIFIED MAIL IS NOT PRESUMED TO BE GIVEN UPON MAILING

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Fannie Mae/Freddie Mac uniform mortgages are so ubiquitous that many in the servicing industry have certain provisions committed to memory. For example, paragraph 22 requires that notice be sent to the borrower prior to acceleration and enumerates the content of such notice (the "Notice of Acceleration"). In defense to foreclosure, borrowers often cite to paragraph 22 and claim no such Notice of Acceleration was given.

In response, to this defense, a foreclosing plaintiff will often provide an affidavit attaching the Notice of Acceleration and attesting that the Notice of Acceleration was mailed in accordance with its usual and customary business practices. The affidavit relies on Paragraph 15 of the uniform mortgage which states that any notice given to the borrower in connection with the mortgage is "deemed to be given to the Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means."

Typically, the filing of the mailing affidavit successfully rebuts the defense that the notice was not given and allows the foreclosing Plaintiff to prevail on summary judgment. However, a recent decision in the Illinois Appellate Court has given new life to this defense.

In *Deutsche Bank v. Roongseang* 2019 IL App (1st) 180948 (opinion filed December 2, 2019), Illinois' First District Appellate Court held that where a Notice of Acceleration is sent via *certified mail*, there is no presumption of delivery. The appellate court scrutinized the language of paragraph 15 and found that notices sent via *first class mail* are deemed to be given upon mailing. However, where a notice is mailed via *certified mail* it is considered to be "by other means" as provided for in paragraph 15. Accordingly, proof of actual delivery was required in order to establish that a paragraph 22 Notice of Acceleration was given. In *Roongseang,* the trial court's entry of judgment was reversed and it was remanded because the plaintiff failed to produce the return receipt from the certified mailing which gave rise to an issue of fact as to whether the Notice of Acceleration was actually given, i.e. whether notice was actually received by the borrowers.

The opinion in *Roongseang* also narrowed or undercut recent Illinois case law that had a chilling effect on the ability to raise a successful defense based on the failure to give the paragraph 22 Notice of Acceleration. In *Bank of New York Mellon v. Wojcik,* 2019 IL App (1st) 180845, the Appellate Court found that a Notice of Acceleration defense in a foreclosure action was forfeited where there was a general denial that all required notices were duly and properly sent. *Wojcik,* at ¶21 (stating that "courts have repeatedly recognized that a mere general denial of the performance of the conditions precedent of a contract in a party's responsive pleading, without allegations of specific facts, results in forfeiture of the issue of the performance of the conditions precedent of a contract"). In *Roongseang,* the court narrowed the application of *Wojik* by finding the allegation that the notice was not sent is sufficient to plead a notice

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of acceleration defense. *Roongseang* also undercut the holding in *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780 which held that the failure to perform the condition precedent of sending notice pursuant to the mortgage is not an affirmative defense. However, in *Roongseang,* the Notice of Acceleration defense was raised as an *affirmative* defense and allowed to proceed as such. The opinion also quickly rejected any argument about substantial compliance or harmless error without much analysis or acknowledging a recent opinion, *U.S. Bank N.A. v. Gold,* 2019 IL App (2d) 180451 in the adjoining Second District of Illinois which held that where a notice of acceleration is technically defective under the terms of the mortgage, it will not provide a defense to foreclosure where there is no prejudice suffered by the defendant.

The issue in *Roongseang* was an issue of first impression in Illinois which could lead to additional challenges invoking the paragraph 22 notice of acceleration defense. The production of the signed return receipt showing actual delivery of the Notice of Acceleration should be sufficient to prove compliance with paragraph 22, if the Notice was sent via certified mail. The additional evidentiary requirements in contested litigation and burden of record keeping may outweigh any benefits of certified mailing. If notice is sent certified or by other means, be sure to keep your receipts.

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