Attention Mortgage Servicers: Beware the St. Germain Act When It Comes To Due On Sale Clauses

By Deborah S. Lapin

When it comes to the plaintiffs' bar in the area of "wrongful foreclosure" cases, sharing notes among counsel regarding successful causes of action is the norm. A recent spike in cases relating to the Garn- St. Germain Depository Institutions Act of 1982, 12 USC 1701j-3 (the "St. Germain Act") suggests that the act may be one of the "claims du jour". Simply put, the St. Germain Act prohibits the exercise of "due-sale-clauses" due to the death of a borrower and the corresponding transfer of ownership the property which typically follows. The statute, however, does not preclude foreclosure if a payment default occurs after the borrower's death. With that said, recent claims demonstrate a trend of conflating the death of a borrower and a corresponding payment default in an effort to declare foreclosures to be a prohibited exercise of the due on sale clause under the act.

By way of background, the St. Germain Act restricts the enforcement of "due-on-sale" clauses under certain circumstances. The statute defines a "due-on-sale-clause" as "a contract provision which authorizes a lender, at its option, to declare due and payable sums secured by the lender's security instrument if all or any part of the property, or an interest therein, securing the real property loan is sold or transferred without the lender's prior written consent." The St. Germain Act delineates the circumstances under which a "due-on-sale" clause may not be exercised. These circumstances include: (1) a transfer by devise, descent, or operation of law on the death of a joint tenant or tenant of the entirety; (2) a transfer to a relative resulting on the death of a borrower; and (3) a transfer where the spouse or children of the borrower become an owner of the property.

While application of the St. Germain Act may be complex depending upon varying factual scenarios, servicers should be aware of the act and pay special attention to situations where the servicer has knowledge that the borrower is deceased. If foreclosure is contemplated shortly after the death of a borrower, and there is a corresponding payment default, best practice would suggest that any communications with the borrower's heirs (whether oral as reflected in a servicing

log) or written be clear that any foreclosure is not predicated on the death of the borrower, but rather, on the failure to receive payments when due in accordance with the terms of the mortgage. It should also be noted that, while not the focus of this article, the CFPB has long-standing guidance with regard to interacting with heirs of a deceased borrower which must also be considered by a servicer.