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## **ACCELERATION AND WAIVER:** **SHALL WE TAKE THE MONEY AFTER THE FORECLOSURE HAS BEEN** **STARTED?** **THE NEW YORK PERSPECTIVE**

By: [Howard R. Crane](#)

What do Klondike bars and I have in common with collectors and partial payment checks? Well, as it turns out, a lot.

It's a hot day in July, at 4:00 p.m. Late afternoon hunger has set in, but I grin and bear it as my caloric binge from the previous weekend comes to mind. In walks my lovely and thoughtful supervising foreclosure paralegal with a delicious, creamy, cold Klondike bar that she got "just for me". Is it possible to resist this beckoning delicacy? Absolutely – for about 10 seconds, after which, it is gluttonously consumed. Oh well, I tried my hardest, but temptation being what it is ...

Alas, our friend the collector, is sitting at his desk on a hot afternoon in July. It happens to be the last day of the month, and he hasn't met his quota. In comes a check for \$5,000.00 on a partial reinstatement of a \$200,000.00 mortgage, which is \$10,000.00 in arrears. Eureka! The collector can now meet his quota, the manager will be happy, and the lenders' stockholders will benefit. The property happens to be in New York State, and the foreclosure file was sent to Fein, Such & Crane two weeks ago. Luckily, they work so fast that the Notice of Pendency, Summons and Complaint has already been prepared and filed in the County Clerk's office. Not only that, once filed, the papers were instantaneously forwarded to the process server, who served them personally on the borrowers only one day later. No problem? Let's see about that.

As we all know, the general procedure is that once a lender decides to put a mortgage into foreclosure, a "30-day letter" is sent to the borrower. This letter informs the borrower of the default, and advises what must be done within 30 days to correct the default so that the loan will not be sent to foreclosure. This letter is not an acceleration letter. Acceleration, being the operative word used here, is the point at which the full principal and interest due under the loan is demanded, when the borrower theoretically loses the right to continue to pay the loan in monthly installments. The "30-day letter" is a warning, that if the borrower does not do certain things, the lender will accelerate the loan.

So when does the acceleration take place? In almost every case, the acceleration occurs when the Summons and Complaint is served upon the borrowers. The acceleration of the loan gives the lender the right to proceed with the foreclosure, on the theory that the entire sum is now due, and the court can determine that the property will be sold at auction, and the proceeds applied to repay the lender for the full delinquent debt.

What happens to a mortgage foreclosure if sometime during the proceeding, the acceleration which took place at the time of service of the summons and complaint is revoked, withdrawn, or otherwise becomes ineffective? The simple answer to that, under New York State law, is that there is no foreclosure. The loan is no longer ripe for foreclosure, and the action becomes legally insufficient to allow the property to be sold for the payment of the debt.

So let's say, on that hot July day, that the collector accepts the partial tender of arrears, deposits the funds in the lender's account, and congratulates himself upon meeting the quota. Is this a recipe for disaster, and will the mortgage foreclosure be terminated? The answer is, probably not. If the borrower is astute, and has a good attorney, a motion could be made before the court, which may result in a determination that the previous acceleration has been waived. The borrower will argue that the act of accepting partial payment on the note is inconsistent with the acceleration and imposition of the demand for payment in full. It becomes a business decision on the part of the lender as to whether it wishes to accept the tender of partial arrears and deal with the possibility of litigation and delays created by it, or to simply create a policy whereby tenders of partial arrearages will not be accepted on loans that have been sent to foreclosure.

How, one might ask, does the issue of waiver affect forbearance agreements? Under a forbearance agreement, the borrower and lender agree in writing to establish an amount of arrears due and to set forth a scheme where this amount is either partially or fully paid under the written agreement. As the commencement of a foreclosure proceeding is often the inducement to enter into a forbearance agreement, and because partial payments are being accepted on the loan, the question of waiver often arises. Under New York State law, the borrower can agree in writing that no waiver has taken place, whereupon the lender can accept partial payments under the forbearance agreement without being concerned that the borrower will later claim that acceleration has been waived. This "anti-waiver" language should be inserted in every forbearance agreement. We are happy to provide this language to any of our clients who wish to draft their own forbearance agreements; all forbearance agreements drafted by our firm already contain this language.

There are certain related issues that are worthy of consideration under the topic of waiver. They are as follows:

- Is the acceptance of a post-dated check as much of a potential waiver as the acceptance of a currently dated check? The answer is yes.
- What if the lender receives the check, retains it for a period of five days, and then returns the check to the borrower? Has there been a waiver? The answer is no,

under one New York case. What if it were for a period of longer than five days? The answer is that we don't know what a court might say. However, prudence would require that the check be returned no later than five days from the date that it was received.

- What if a partial payment of arrears is made after the entry of the foreclosure Judgment? According to one New York case, the payment is made against the Judgment, and not against the mortgage. Therefore, there is no waiver of acceleration.

- What if payment for the full arrears is made after acceleration. Does this stop the foreclosure? The answer is yes.

- What if a partial payment is made after the 30-day notice period, but before acceleration? Acceptance of this sum is not a waiver. The lender should always accept such a payment. The foreclosure may proceed without re-noticing the borrower.

While this short exposé of the “waiver” issue does not cover every possible eventuality, perhaps it will help in establishing guidelines that may be followed in making the process of loss mitigation and foreclosure more efficient for our lenders. Please do not hesitate to call us if you have questions on this issue or any other aspect of New York Foreclosure Law.

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This Article is a service of the [Foreclosure Practice Area](#) of Fein, Such & Crane, LLP. It does not constitute legal advice nor create an attorney-client relationship. For more information contact either [Alan F. Such](#) at [afs@feinsuch.com](mailto:afs@feinsuch.com) or [Howard R. Crane](#) at [hrcrane@rgcattys.com](mailto:hrcrane@rgcattys.com).

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