

September 24, 2007

Industry Bulletin No. 02-2007**Mortgage Foreclosure - Additional Statutory Requirements - Chapter 458 of the Laws of 2007**

Chapter 458 of the Laws of 2007 was signed by Governor Spitzer on, and became effective on, August 1, 2007. It enacts a new section 1320 of the Real Property Actions and Proceedings Law (RPAPL), and it amends section 3215 (g)(3)(iii) of the Civil Practice Law and Rules (CPLR).

RPAPL SECTION 1320

Section 1320 of the RPAPL is applicable to a mortgage foreclosure action in which the property being foreclosed is "residential property containing not more than three units". For our underwriting purposes this new requirement shall be applicable to a mortgage foreclosure action of: (i) a 1-3 family residence, or (ii) up to three individual residential condominium units, even if the mortgaged property includes one or more of a separate garage space, storage unit, or maids unit.

In your examination of a foreclosure action commenced on or after August 1, 2007, affecting the above described property, you must be certain that the summons contains the following notice in bold face in the following form (this Notice is in addition to the usual requirements applicable to a summons):

NOTICE**YOU ARE IN DANGER OF LOSING YOUR HOME**

If you do not respond to this summons and complaint by serving a copy of the answer on the attorney for the mortgage company who filed this foreclosure proceeding against you and filing the answer with the court, a default judgment may be entered and you can lose your home.

Speak to an attorney or go to the court where your case is pending for further information on how to answer the summons and protect your property.

Sending a payment to your mortgage company will not stop this foreclosure action.

YOU MUST RESPOND BY SERVING A COPY OF THE ANSWER ON THE ATTORNEY FOR THE PLAINTIFF (MORTGAGE COMPANY) AND FILING THE ANSWER WITH THE COURT.

No title coming through a mortgage foreclosure action commenced on or after August 1, 2007, foreclosing a mortgage on "residential property containing not more than three units" may be insured if the Summons does not contain the Notice set forth above.

The above NOTICE is in addition to the notice required by Real Property Actions and Proceedings Law, section 1303. Please see our Underwriting Bulletins 2007-03 and 2007-03a for our underwriting guidelines on that topic.

CPLR SECTION 3215 (g)(3)(iii)

CPLR 3215 (g)(3)(i) (correct) provides, in part, that "(w)hen a default judgment based upon nonappearance is sought against a natural person in an action based upon nonpayment of a contractual obligation an affidavit shall be submitted that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at his place of residence ...". (emphasis added) The amendment to 3215 (g)(3)(iii) now makes this additional notice before a default judgment may be entered against a natural person applicable to "residential mortgage foreclosure actions".

A. No definition of a "residential mortgage foreclosure action" is given. However, for our underwriting purposes, since the enactment of new RPAPL section 1320 and the amendment to CPLR 3215 (g)(3)(iii) are both contained in Chapter 458 of the Laws of 2007, we will presume that the legislature intended the amendment to CPLR 3215 (g)(3)(iii) to apply to the same type of property as is covered by RPAPL 1320, discussed above.

B. No definition of "natural person" is given in the statute. Since trustees of a trust are often a mortgagor, the question that may arise is whether a trustee of a trust who made a mortgage that is in default is a "natural person" for

September 24, 2007

the purposes of CPLR 3215 (g)(3)(iii). Until such time as the courts answer that question, for our underwriting purposes you are to treat a trustee of a trust as a natural person in conjunction with this underwriting bulletin.

C. The amendment to CPLR 3215 (g)(3)(iii) is applicable to residential mortgage foreclosure actions commenced on or after the effective date of the amendment (August 1, 2007).

However, Chapter 458 does not indicate whether the amendment is applicable to residential mortgage foreclosure actions commenced prior to August 1, 2007. For our underwriting purposes, the following rules apply regarding default judgments in an action commenced prior to August 1, 2007:

- a) No objection to title need be raised based on the failure to give the additional notice required by CPLR 3215 (g)(3)(iii) if the default judgment was entered prior to August 1, 2007;
- b) No title is to be insured if the default judgment is entered on or after August 1, 2007, unless the additional notice required by CPLR 3215 (g)(3)(iii) was given.¹

D. Among the ways to serve the summons and complaint, is to leave the S&C with someone of suitable age and discretion at the defendant's dwelling place or usual place of abode (CPLR 308(2)) or by nailing the S&C to the door of the defendant's dwelling place or usual place of abode (CPLR 308(4)). In both of those two situations, there must also be a separate mailing of the S&C to, among other places, the defendant's last known residence. The mailing of the S&C pursuant to CPLR 3215 (g)(3)(iii) is IN ADDITION to the mailing required under CPLR 308 (2) or (4). There is nothing that prohibits the mailing of the additional notice under CPLR 3215 (g)(3)(iii) to be made at the same time as the mailing under CPLR 308 (2) or (4), but they must be in separate envelopes and there must be a separate affidavit of mailing for the mailing under CPLR 3215 (g)(3)(iii).²

E. You need to ascertain whether a natural person who has been named as a defendant in the foreclosure action has been made a defendant for the purposes of obtaining a money judgment based on a guarantee to pay the obligation secured by the mortgage. If there is such an individual guarantor, no default judgment may be taken against that individual unless a copy of the S&C has also been mailed to that individual guarantor pursuant to CPLR 3215 (g)(3)(iii). We recognize that the obligation of a guarantor of the debt secured by the mortgage is not normally a title issue. However, since the guarantor's obligation is so intertwined with the mortgagor's failure to pay the note secured by the mortgage, no title is to be insured if the judgment of foreclosure obtained on or after August 1, 2007, also contains a judgment against a natural person guarantor that was based on a default by the guarantor unless the additional notice required by CPLR 3215 (g)(3)(iii) was given to the natural person guarantor.

If you have any questions please, contact us at 631-424-6100.

¹ The remedy afforded a defaulting party who has not been given the additional notice required by CPLR 3215(g)(3)(iii) is to vacate the default judgment. Until such time as we receive guidance on the application of the amendment to CPLR 3215(g)(3)(iii), we take this position to protect our proposed insured when title is being conveyed by a referee in a residential mortgage foreclosure action.

² Note that the affidavit of mailing of the additional notice required by CPLR 3215 (g)(3)(iii) will not be a separate entry on the Clerk's minutes. The affidavit of the additional mailing will be found in the application to the Court for the default judgment. If the additional mailing under CPLR 3215 (g)(3)(iii) was not made, title may not be insured if the defaulting homeowner is a natural person.