

# CLIENT ADVISORY

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## “Close and Bill?” Avoid the Dismissal Debacle

By Larry R. Rothenberg, Esq.

“Close and Bill,” is a deceptively simple three-word message to a foreclosure attorney, which often cries out for clarification. Unless the attorney is also advised of the reason underlying the “close and bill” instruction, a case could be dismissed under circumstances that could cause regret.

If a foreclosure is dismissed and must be recommenced, additional court costs and other expenses including attorney’s fees are incurred, not to mention the loss due to the delay. Worse yet, are the cases that are dismissed twice. In Ohio and many other judicial foreclosure states, a second voluntary dismissal could operate as a bar to a third case based on the same cause of action.

Loan servicers can avoid unintended dismissals by providing the reasons for the “Close and Bill” instructions. The attorney can then offer advice as to whether a dismissal would be premature or inadvisable at that time. The following are eight situations where improved

communications with the attorney can avoid misunderstandings and disappointment.

### 1. The Loan Mod Mishap

“Close and bill due to Loan Modification Agreement” begs the question as to whether the loan servicer has actually received the signed agreement together with any required payment. If the parties have merely orally agreed to the terms and the signed agreement is still to be delivered, it is premature to dismiss the foreclosure. In order to avoid ambiguity and possible error, instructions to close and bill due to a Loan Modification Agreement should expressly confirm whether the signed agreement actually has been received. If not, the case should not be dismissed. If the attorney is informed that a Loan Modification Agreement is involved, the attorney can also provide advice as to whether the Loan Modification Agreement should be filed for record.

### 2. The Forbearance Fiasco

If the parties have entered into a forbearance agreement, rather than instructing the attorney to close and bill, the

attorney should be advised of the forbearance agreement, and directed to hold the foreclosure in abeyance as long as the court will allow it. In Ohio and many other states, if the borrower breaches the agreement, the foreclosure can then be reactivated without the need for a new breach letter or recommencement of the foreclosure. Some courts do not allow foreclosures to be held in abeyance for long, but until the court takes action to dismiss the case, the fact that the borrower has promised to make partial payments should not be a reason to dismiss the case voluntarily right away. It is also preferable to provide the attorney with a copy of the forbearance agreement. The attorney should have a copy of the signed agreement on hand in the event the loan servicing is subsequently transferred or the loan is sold, and the attorney is retained by the new servicer or investor.

### 3. Reinstatement Remorse

Occasionally, a loan servicer, after dealing directly with the borrower, reports that it has received a reinstatement payment, without having checked with the attorney as to the

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amount of fees and costs incurred. Before giving a reinstatement quote, the loan servicer should verify with the attorney as to the fees and any costs, which should be included in the quote. When the total amount is received by the loan servicer, the servicer should confirm to the attorney that it has received the reinstatement payment including the fees and costs, in addition to advising the attorney to "Close and Bill." Also, beware of the bounced or fraudulent reinstatement check. Good funds should be obtained before having the foreclosure dismissed.

#### **4. The Deed-in-Lieu Downer**

If a Deed-in-Lieu has been agreed to but not yet signed and delivered by the borrower, it is obvious that a dismissal of the foreclosure would be premature. Moreover, even if the signed Deed-in-Lieu has been delivered, the foreclosure should not be dismissed until it has been determined that up to the minute that the Deed-in-Lieu is recorded, there are no liens on the property other than liens the lender is willing to assume. Protecting against other liens is the reason why most attorneys recommend obtaining an updated title exam right before the deed is filed for record, and an Owner's Policy of Title Insurance. The foreclosure should not be dismissed until it has been confirmed that the title is acceptable and the deed is recorded.

#### **5. The Loan Sale Snafu**

If the loan has been sold or the servicing is being transferred, the attorney should be advised to issue a final billing for fees and costs to date, and the contact name, address and phone number for the buyer or new servicer. The foreclosure should not be dismissed unless the buyer or new servicer so desires. If a foreclosure based on the same claim has previously been dismissed voluntarily, another voluntary dismissal at this point could prejudice the rights of the buyer of the loan. Such a voluntary dismissal, especially if it is a second dismissal, could be a violation of the terms of the sale agreement, exposing the servicer to liability.

#### **6. The Attorney Substitution Stumble**

If a servicer, or a subsequent servicer after a transfer of servicing, desires to refer a pending foreclosure to a different firm for completion, instructions to the original firm merely to "Bill and Close," could be misinterpreted as an instruction to dismiss the case. In order to avoid a misunderstanding and an erroneous dismissal, the original firm should be advised that the file is being reassigned to the new firm, and that the original firm is to forward its file to the new firm for completion of the foreclosure. The new firm can then file a notice of change of counsel, and can proceed with the foreclosure where the original firm left it.

#### **7. The Walk-Away Washout**

An inspection of the property may have revealed that the property has very limited value, the loan servicer might decide that it is not worth incurring additional fees or costs to proceed with a Sheriff's Sale. However, the charge-off/walk-away decision often seems to come after the Sheriff's Sale has already been scheduled and published. The loan servicer should check with the attorney to determine whether all of the fees and costs may have already been incurred. If so, there is often nothing to lose by allowing the Sheriff's Sale to proceed. In Ohio, the lender is not required to enter a bid and the chance that a third-party might enter a bid resulting in at least some recovery on the loan would certainly be preferable to walking away with nothing.

#### **8. The Third-Party Foreclosure Flub**

If the loan has been reinstated, or a Loan Modification Agreement or Forbearance Agreement have been consummated (but the loan is not paid in full), the attorney should not be advised to close the file in a third-party foreclosure situation. Rather the attorney should be instructed to continue monitoring the case. Unless the plaintiff in the third-party foreclosure case has also resolved its debt and is dismissing the foreclosure, the attorney should continue to monitor the proceedings and take whatever action is necessary to protect the mortgage.

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If the attorney interprets an instruction to “close and bill” to mean that the client’s claim is to be dismissed, the mortgage might be unprotected if third-party foreclosure action is concluded with a Sheriff’s Sale.

### Conclusion

Erroneous dismissals are painful. Attorneys should ask servicers for clarification of “Bill and Close” instructions in appropriate cases. However, misunderstandings can easily be avoided simply by adding a few words to the “Bill and Close” communication to the attorney.

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*If you have any questions on this information, please contact Mr. Larry R. Rothenberg, Esq.*

*Larry Rothenberg is a Partner managing the Foreclosure/Evictions department of the Cleveland office of Weltman, Weinberg & Reis Co., L.P.A. He is the author of the Ohio Jurisdictional Section contained in the treatise, “Dunaway, The Law of Distressed Real Estate”. The firm handles foreclosures and related litigation throughout Ohio, Kentucky, Indiana, Illinois, Pennsylvania and Michigan. Larry can be reached at (216) 685-1135 or via e-mail at [lrothenberg@weltman.com](mailto:lrothenberg@weltman.com).*

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