PROMISES, PROMISES

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Recent years have seen a trend in mortgage lending litigation toward promissory estoppel claims based on promises allegedly made to defaulted borrowers in the course of loss mitigation. Typical promissory estoppel claims are that the servicer supposedly promised to postpone or cancel an impending foreclosure, or modify the loan terms, or even that it would accept tardy payments or payments of less than the amount owed.

As a preliminary matter, these claims are rarely supported by the facts. Despite this, sometimes these claims survive an early demurrer or motion to dismiss. As described below, there are steps that a servicer can take to reduce exposure to promissory estoppel claims, and effectively defend claims that are made.

As a general rule, a servicer's gratuitous oral promise to postpone a foreclosure sale or alter loan obligations is unenforceable. (*Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 690.) However, under the doctrine of promissory estoppel a promise may be binding where the promisor "should reasonably expect a substantial change of position, either by act or forbearance, in reliance on his promise, if injustice can be avoided only by its enforcement." (*Youngman v. Nevada Irrigation Dist.* (1969) 70 Cal.2d 240, 249.) A borrower asserting promissory estoppel must prove (1) a promise that is clear and unambiguous in its terms; (2) detrimental reliance by the borrower; and (3) the reliance must be both reasonable and foreseeable.

The California Court of Appeal has applied this doctrine in two recent mortgage lending cases to enforce specific oral prom*ises by loan servicers. In Garcia v. World Savings, FSB* (2010) 183 Cal.App.4th 1031, the borrower told the servicer that was about to obtain a high-cost loan secured by other property and use the proceeds to reinstate the defaulted loan. The servicer orally promised to postpone foreclosure to allow time for the loan to close, but then proceeded with the sale. Unaware that the foreclosure had gone forward, the borrower finalized and was then stuck with the high-cost loan. The borrower's promissory estoppel claim survived summary judgment.

In *Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, the borrower had filed for chapter 7 bankruptcy protection that she intended to convert to chapter 13 in order to avoid foreclosure. The servicer promised to work with the borrower to reinstate and modify the loan on unspecified terms if she no longer pursued relief in the bankruptcy court. Relying on this promise, the borrower did not oppose a motion to lift the bankruptcy stay convert to chapter 13, but the servicer then proceeded with foreclosure without negotiating. The Court held that the promissory estoppel claim was sufficiently alleged.

These two cases are widely cited by borrowers to pursue all kinds of perceived promises, real or imagined. This is an incorrect application of the law. Both cases are confined to their unique and unusual facts that differentiate them from so many other cases. Indeed, *Garcia and Aceves* do not change the standards: borrowers must still satisfy several requirements to pursue a viable promissory estoppel claims.

Many alleged promises are simply too ambiguous to be enforceable. A bare promise to consider the borrower for a loan modification does not sufficiently define the scope of the duty promised. (See *Clark v. Wachovia Mortgage* (C.D.Cal., June 9, 2011) 2011 WL 9210348, at *3.) Statements that use hedging language, are speculative or indicate that someone other than the person making the statement had the authority to make the final decision regarding a loan modification or foreclosure postponement are not enforceable.

Many borrowers also find it difficult to show that they detrimentally relied on the promise, i.e., experienced an "irremediable change of position" in reliance on the alleged promise. (*Wilson v. Bailey* (1937) 8 Cal.2d 416, 424.) In particular, where the injury alleged as a result of reliance on the promise is that the borrower made payments that he or she was already obligated to make under the loan agreement, no claim for promissory estoppel is stated. (See, e.g., *Perez v. Wells*

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pared to large depository institutions.

Unlike the Federal Banking Agencies, the CFPB has no safety and soundness responsibilities, and has been issuing as part of its examination letters directives that are quite burdensome to non-banks such as mortgage lenders. Specifically, the CFPB has been issuing what many commentators view as informal enforcement orders that are couched as supervisory letters, and which contain directives that order corrective actions on the part of the company that was examined. Up until this juncture, companies have been unable to resist this form of regulatory coercion because of the implied threat that an informal directive could easily be converted into a formal enforcement order.

In such a situation, a mortgage company might well benefit on making use of a second set of eyes on the examination facts and conclusions. Although there is always the possibility of some form or retaliation, the imposition of expensive or unnecessary compliance tasks on balance may make the filing of an appeal worth the risk and effort.

In addition, it also should be noted that the CFPB has not been in existence for a sufficient amount of time to permit enforcement paradigms and related policy positions to have been thoughtfully considered and disseminated to the examination staff. Stated another way, even though the CFPB has indicated that enforcement actions themselves cannot be appealed through this process (there is an administrative hearing process available), if the underlying basis for a punitive directive is an examination finding, the filing of an appeal attacking the underlying facts justifying the enforcement order might constitute a fruitful avenue to consider.

Finally, from a strategic perspective the appeals process should be considered as part of a covered company's toolbox when examination concerns arise. During the examination itself, the use of the CFPB's ombudsman should be employed—whose job it is to ensure that the CFPB's examination staff complies with established procedure (but not factual conclusions). Following the completion of an adverse examination, the CFPB has now created a management appeals process that requires senior CFPB staff to review and to judge the appropriateness of examination findings, including the basis for objectionable enforcement actions—while at the same time affording a mortgage lender an additional bite at the apple to negotiate a more favorable settlement. Should neither of the two review procedures prove successful, there remains the administrative hearing process should a mortgage lender determine that either the factual conclusions adopted by the CFPB or the remedial measures prove to be unacceptable.

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Fargo Bank, N.A. (N.D.Cal., Aug. 29, 2011) 2011 WL 3809808, at *21.) Courts have also rejected Aceves-style claims that the borrower could or would have pursued bankruptcy where the borrower took no action toward pursuing bankruptcy protection. (See Clark, supra, 2011 WL 9210348, at *4.)

Likewise, if the borrower was unable to reinstate the loan and unlikely to qualify for a meaningful modification, the alleged promise to postpone foreclosure several weeks may well amount to nothing more than delaying the inevitable. In fact, for this reason the potential exposure for a broken promise may be limited even if the borrower survives summary judgment and succeeds at trial. Looming over most of these cases is the simple fact that the property normally lacks significant equity—that is, the foreclosure, even if pursued despite a supposed oral promise to stop, still caused no monetary loss to the borrower.

Of course, the best strategy is to reduce exposure to such claims altogether, which requires good loss mitigation training. Personnel handling communications with defaulted borrowers must carefully avoid making promises that are not in writing through approved channels. Any forbearance or modification of loan terms should be made in writing and explicitly agreed to by both parties. There should be no commitment to postponing a foreclosure sale until the new date is set and confirmed.

Sometimes defaulted borrowers hear only what they want, and some promissory estoppel claims are inevitable. But with good training and practices, servicers should be able to reduce their exposure to promissory estoppel claims.

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