

## Arkansas Statutory Foreclosures – An Abundance of Notice

By Courtney Miller

Arkansas is one of many states that have a statutory foreclosure act, allowing lenders to foreclose without filing a lawsuit. Arkansas enacted its Statutory Foreclosure Act (“the Act”) in 1987.<sup>1</sup> Arkansas also allows for judicial foreclosures, but many lenders choose to avail themselves of the statutory foreclosure process when foreclosing upon residential properties because it is often quicker and less expensive than a lengthy court case. While lack of due process has often been used as an argument against statutory foreclosures, the constitutionality of the Act has been upheld by the Arkansas Supreme Court.<sup>2</sup> Moreover, the notice requirements of the standard security instrument and the Act in combination with the notice requirements of the Consumer Financial Protection Bureau (CFPB) result in debtors receiving numerous letters regarding their default, the foreclosure process, and possible options to avoid foreclosure. Arguably, debtors now receive so many notices that they may start opting to simply disregard or ignore many of them.

In *Parker v. BankcorpSouth Bank*, the Arkansas Supreme Court decided that no state action is involved in the Arkansas statutory process, and thus there can be no constitutional due process violation. In the case, the debtor alleged that the Act violated procedural due process because the notice requirement failed to give an individual notice of what to do in the event he or she wanted to contest the propriety of the foreclosure action. Because there is no state action or involvement, the court found there could be no due process violation.<sup>3</sup> Despite the ruling in *Parker* disposing of a due process violation, a common argument against statutory foreclosures continues to be a lack of adequate notice. Upon a close examination of the many notices received by debtors upon default and during the foreclosure process, this argument falls short. In fact, an argument could be made that debtors in a statutory foreclosure in Arkansas receive more notices than debtors in a typical judicial foreclosure action.

In a typical statutory foreclosure in Arkansas, the first notice the borrower receives in the mail is a demand letter, also referred to as a breach letter, which advises the debtor of the default and provides a specific amount of time to cure the default. If not timely cured, the letter advises the debt will be accelerated and the full amount immediately due. There is no statutory guidance on the requirements of the demand letter in Arkansas. Therefore, the terms of the debtor’s security instrument govern. The standard security instrument allows the borrower approximately thirty days to cure the default before acceleration. If the default is not timely cured, the debt is accelerated, and foreclosure commenced.

The first notice the borrower typically receives after acceleration is what is commonly referred to as a Fair Debt Letter, pursuant to the Fair Debt Collection Practices Act.<sup>4</sup> This letter is typically the first communication from the trustee firm conducting the foreclosure for the mortgage servicer. The letter provides the reason for default, the amount of the debt, and the total amount currently due on the loan as of the date of the letter. It also advises the borrower is afforded thirty days from receipt of the letter to dispute the validity of the debt. If the debtor timely disputes the debt, the debt must be validated by

the mortgage servicer prior to proceeding with the foreclosure sale. While the Fair Debt Letter allows thirty days to dispute, many mortgage servicers and their foreclosure counsel will make every effort to provide the debtor proof of validation even when the dispute is not received timely.

Arkansas's Statutory Foreclosure Act also requires the lender to send the debtor a packet of information at least 10 days prior to initiation of the foreclosure action.<sup>5</sup> The packet must be mailed via standard mail to the debtor at either the property address or the debtor's mailing address, and must include the following information and documents: (1) the name of the holder and physical location of the original note; (2) information, including the phone number and internet address, regarding the availability to the debtor of each program for loan modification or forbearance assistance offered; (3) a copy of the note with all required endorsements; (4) a copy of the mortgage or deed of trust, and if in the possession of the mortgage company, each assignment of the mortgage or deed of trust; (5) and if the default is for nonpayment, a copy of the payment history showing the date of default.<sup>6</sup> The Arkansas legislature amended the Act in 2011 to require this packet be sent prior to initiation of the foreclosure. It provides the debtor with the documents and information most often requested before the foreclosure is even initiated. This packet is not required to be sent to debtors when pursuing a judicial foreclosure.

The Act also requires a Notice of Default and Intention to Sale be filed.<sup>7</sup> The Notice of Default must be recorded in the property records, and must be mailed to the debtor and to junior lienholders of record. It must include a bold warning as follows: "YOU MAY LOSE YOUR PROPERTY IF YOU DO NOT TAKE IMMEDIATE ACTION." It must provide the time, date and place of sale; the recording information of the deed of trust or mortgage to be foreclosed; the names of the parties to the mortgage or deed of trust; the legal description and street address of the property; the default for which the foreclosure is made; and the name, address and phone number of the party initiating the foreclosure. It must be mailed within thirty days of its recording, via certified mail and first class mail.<sup>8</sup> The notice must also be published in the newspaper for 4 consecutive weeks prior to sale, and be posted both online and at the county courthouse.<sup>9</sup> The Act also requires the trustee or attorney-in-fact conducting the sale on behalf of the mortgage servicer to record an affidavit confirming compliance with the Act's mailing and publication requirements.<sup>10</sup> By requiring mailing of the Notice of Default by both first class and certified mail to the debtor and junior lienholders, Arkansas's notice requirements are better than those in many other statutory foreclosure states.

Arkansas's Statutory Foreclosure Act provides additional notice requirements when a debtor is denied for loan modification or forbearance assistance. The Act requires the mortgage servicer certify to its trustee or attorney-in-fact conducting the foreclosure that each debtor who applied for loan modification or forbearance assistance was notified that he or she did not meet the criteria for loan modification or forbearance assistance offered. The notification must be sent to the debtor by certified and first class mail at least ten business days before the foreclosure sale.<sup>11</sup>

In addition to the notice requirements of the Arkansas Statutory Foreclosure Act, the CFPB imposes its own set of notice requirements upon mortgage servicers. The rules implemented by the CFPB aim to provide consumers with better tools and information when facing difficulty with mortgage loan obligations, and provide another layer of protection in the foreclosure process. The CFPB's regulations require mortgage servicers to include information about delinquency in a borrower's monthly statement if the borrower's account becomes more than 45 days delinquent. This information must include the date the borrower became delinquent, the amount required to bring the loan current, and the risks of failing to bring the loan current, including the risk of foreclosure.<sup>12</sup> Servicers are also required to send written notice to borrowers no later than the 45<sup>th</sup> day of delinquency. This notice must include a statement encouraging the borrower to contact the mortgage servicer, and must include examples of loss mitigation options which may be available to avoid foreclosure as well as information about housing counseling.<sup>13</sup>

With so many notices sent to a debtor facing statutory foreclosure in Arkansas, it is hard to make an honest "lack of notice" argument against the process. Debtors are provided default information on numerous occasions, including information regarding their right to dispute the debt and how to pursue loss mitigation options. They also receive copies of their note, deed of trust or mortgage, and payment history showing the default. The Notice of Default is not only sent via regular mail, it is also sent via certified mail, posted online and at the county courthouse, and published in the newspaper. By the time of the foreclosure sale, an average debtor facing statutory foreclosure in Arkansas will receive no less than four separate notices, in addition to notices required by the CFPB and investor requirements. With so many notice requirements at both the state and federal level, a lack of notice argument against statutory foreclosures in Arkansas simply doesn't stand up against the facts.

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<sup>1</sup> Ark. Code Ann. §§ 18-50-101 (Supp. 2011).

<sup>2</sup> Parker v. BankcorpSouth Bank, 369 Ark. 300, 253 S.W.3d 918 (2007).

<sup>3</sup> Id. at 307-311, 253 W.S.3d at 923-925.

<sup>4</sup> 15 U.S.C.S. § 1692g.

<sup>5</sup> Ark. Code Ann. § 18-50-103.

<sup>6</sup> Id.

<sup>7</sup> Ark. Code Ann. §18-50-104.

<sup>8</sup> Id.

<sup>9</sup> Ark. Code Ann. §18-50-105.

<sup>10</sup> Ark. Code Ann. §18-50-106.

<sup>11</sup> Ark. Code Ann. §18-50-104.

<sup>12</sup> 12 CFR 1026.41.

<sup>13</sup> 12 CFR 1024.39.