

Commentary

What Insurers Need To Know When Investigating And Adjusting Mortgagee Claims

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Insurance carriers have recently seen an increase in claims made by mortgagees for damage to insured property (e.g., theft, vandalism and arson), both before and after properties are acquired by mortgagees at foreclosure sales. In light of the current state of the national housing market, and the mortgage fraud crisis, this likely will be a continuing trend. This article is intended as a guide to assist insurance companies in the investigation and adjustment of claims made by mortgagees, principally in the State of New York. While some of the information below is generally applicable to mortgagee claims regardless of the foreclosure status of the property, this article also addresses specific factual scenarios in

which an insured's property has been acquired by a mortgagee and a loss occurred either before or after that acquisition.

In addition, some portions of this article contain claims handling points ("Claims Points") that can be used in the investigation of mortgagees' claims.

A Mortgagee's Rights

Under New York law, a mortgage clause in a standard insurance policy creates independent and separate insurance coverage for the mortgagee's interest. In order to determine what rights, if any, a mortgagee has under the policy, one must first look to the language of the mortgage clause. A homeowner policy's mortgage clause often will contain the following language:

If a mortgagee is named in this policy, any loss payable under Coverage A or B will be paid to the mortgagee and you, as interests appear. If more than one mortgagee is named, the order of payment will be the same as the order of precedence of the mortgages.

If we deny your claim, that denial will not apply to a valid claim of the mortgagee, if the mortgagee:

- a. Notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;

- b. Pays any premium due under this policy on demand if you have neglected to pay the premium; and
- c. Submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and Loss Payment apply to the mortgagee.

It is important to keep in mind that the standard mortgage clause language has been interpreted by New York courts to mean that actions or inactions of a named insured cannot invalidate an otherwise valid claim of a mortgagee.¹ Perhaps the most classic example of an act by a named insured that will not invalidate a claim of a mortgagee is that of arson.² In addition, other intentional acts, violations of the fraud/concealment provision of the policy, lack of cooperation on the part of the insured, failure to give prompt/immediate notice of the loss, and fraud or misrepresentation in the application by the insured will not invalidate an otherwise valid mortgagee's claim.³

A Mortgagee's Obligations Under A Policy

As noted above, the insurance policy controls what rights, if any, a mortgagee has under the policy. Similarly, the policy also controls what obligations a mortgagee has prior to asserting a claim. It is important to note that, aside from the obligations in the mortgage clause, a mortgagee has no other specific obligations in the presentment of a claim or during the insurer's subsequent investigation thereof. Specifically, a mortgagee is not bound by the requirements of the policy's cooperation clause, which New York courts have held applies *only* to the named insured.⁴ Accordingly, a mortgagee is obligated to comply only with the provisions of the mortgage clause.

Notice

Insurance policies require that a mortgagee must have a "valid" claim. In order for the claim to be valid, the mortgagee must first have notified the insurer of "any change in ownership, occupancy or substantial change in risk of which [it] is aware."⁵ Notice issues most commonly come about in a foreclosure situation where the ownership and occupancy of the insured location has changed. Generally, if a mortgagor defaults on a loan, the mortgagee will send an

inspection company to check on the property (its collateral). The first notice to the insurer of a change in ownership or occupancy will usually occur at that time. The inspection company will issue a report to the mortgagee noting the condition and status of the insured location, namely, whether the property is occupied, vacant or damaged in some manner.

As noted above, the mortgage clause only obligates the mortgagee to "notify" the insurer of any change in ownership, occupancy or substantial change in risk. The policy, however, does not expressly denote a time by which the mortgagee must make the notification. Unlike the notice provisions in a policy that require *an insured* to provide notice of the loss "promptly," "as soon as is practical," or "immediately,"⁶ the mortgage clause typically is silent as to the timing of a mortgagee's notice.

While there are no New York cases addressing the issue of the timing of the mortgagee's notice, it is likely that a New York court would apply a "reasonableness" standard as to the time by which a mortgagee must notify the insurer of a change in ownership or risk.⁷

Claims Points:

1. Determine the date that the mortgagee notified the insurer of the loss.
2. Determine the relevant policy period.
3. Determine when the mortgagee first became aware of any change in occupancy, ownership or substantial change in risk.
4. Request that the mortgagee provide its file maintained in connection with the foreclosure action, including, but not limited to, a copy of any and all inspection reports obtained prior to instituting the foreclosure action.
5. Request that the mortgagee provide a copy of the inspection company's file maintained in connection with the property inspection and/or provide an authorization to obtain the inspection company's file.
6. If the insured property has been or is currently in foreclosure, retrieve all of the rel-

evant documents directly from the court, including, but not limited to, the summons and complaint, judgment of foreclosure and sale, referee's report, plaintiff's affirmation of costs and fees, and referee's deed.

7. Obtain a copy of the mortgage.

The Foreclosure Process

According to standard mortgage clauses, a mortgagee will be paid on a claim "as [its] interests appear." Ordinarily, a mortgagee has an interest in the property up to the full amount of the mortgage debt. Over the years, as an insured pays down the mortgage debt, the mortgagee's interest decreases because the debt is decreasing. If a homeowner defaults on his or her mortgage obligation, the mortgagee can initiate a foreclosure action. In a foreclosure action, the mortgagee's objective is to satisfy the remaining debt.

A foreclosure action is commenced with the filing of a summons and complaint. At some point, generally after the mortgagor has failed to answer the complaint, a judgment of foreclosure and sale will be entered by the court and filed with the clerk's office. The judgment of foreclosure and sale sets forth, among other things, the amount of the remaining debt owed to the mortgagee (together with interests and costs), establishes a means of disposing of the property (foreclosure sale) and transfers title to the property to a court-appointed referee. Subsequent to the filing of the judgment, a foreclosure sale takes place at the direction of the referee and the property is sold to the highest bidder. Generally, either a third party bids at the foreclosure sale or the mortgagee purchases the property by "bidding in" at the sale. Subsequent to the foreclosure sale, the referee must transfer the deed to the property to the new owner (i.e., the mortgagee or some other third party purchaser).

With any foreclosure analysis, it is imperative to remember that the operative event in terminating the mortgagee's interest under the policy is the actual date of the transfer of the referee's deed to the mortgagee (or other successful bidder), and not the date when the judgment of foreclosure and sale is entered. New York courts have held that the judgment of foreclosure "is final and an adjudication of all questions at issue. However, to bar the interests of parties in the

mortgaged premises, it is necessary that the judgment be followed by a valid sale."⁸ A valid sale of property can only occur with a valid transfer of title.

Deficiencies And Insurable Interest

Debt Paid In Full

In general, a mortgagee has an insurable interest in the mortgage debt attached to the property. To the extent that debt remains subsequent to a foreclosure sale, a mortgagee would have an insurable interest in the remainder. However, under New York law, if a mortgagee purchases the property by bidding in the full amount of the remaining mortgage debt, the mortgagee's insurable interest is terminated.

The "bidding in" of the full amount of the mortgage debt by the mortgagee at the foreclosure sale alters the mortgagee's insurable interest in that it terminates that interest. To that end, New York courts have held that "it is well settled that full or partial extinguishment of the debt itself, whether prior to the loss or subsequent to the loss, precludes to the extent thereof, any recovery by the loss-payable mortgagee for the plain and sole reason that the debt, itself, has been to that extent extinguished."⁹

As an example, assume that a homeowner has defaulted on a \$100,000 mortgage, and that \$50,000 remains unpaid (inclusive of interest, costs and fees). At the foreclosure sale, the mortgagee bids \$50,000, and there are no higher bids. Since the mortgagee bid in the full amount of the debt (\$50,000), there is no deficiency, *i.e.*, no remaining balance. As there is no remaining debt, the mortgagee's insurable interest is terminated, and, thus, it can have no recovery under the policy.

Deficiency (Debt) Remaining After Foreclosure Sale

In order for a mortgagee's insurable interest to survive a foreclosure sale, a part of the mortgage debt must remain unsatisfied. In that situation, New York courts have held the following:

[t]o the extent that a deficiency exists after foreclosure and sale, the debt remains, and an insurable interest in the mortgagee as loss payee of the mortgage clause of the fire policy survives. That the mortgagee should retain an

insurable interest, notwithstanding foreclosure and sale of the property, as long as some portion of the debt remains outstanding, is consistent with the provision in subdivision 4 of section 254 of the Real Property Law that the fire policies insuring the property shall be held by the mortgagee or his representatives "as a collateral and further security" for the payment of the mortgage debt.¹⁰

In a situation where the debt has not been satisfied at the foreclosure sale, a deficiency remains in which a mortgagee may have an insurable interest, so long as a deficiency judgment is taken — a situation that will be more fully described below.

As an example, assume that a homeowner has defaulted on a \$100,000 mortgage, and that \$50,000 remains unpaid (inclusive of interest, costs and fees). At the foreclosure sale, the mortgagee bids \$40,000, and there are no other bidders. The bid of \$40,000 leaves a \$10,000 deficiency remaining (\$50,000 unpaid mortgage balance minus \$40,000 bid = \$10,000 deficiency). Since there is a remaining deficiency, the mortgagee retains an insurable interest equal to the amount of the deficiency, which is \$10,000.

Deficiency Judgment

As noted above, if a mortgage debt is not fully satisfied after the foreclosure sale, a deficiency may remain. However, the existence of a deficiency does not, in and of itself, create a continuing insurable interest in the mortgage debt in the absence of a properly filed deficiency judgment.

In New York, a mortgagee's insurable interest must be preserved through the filing of a deficiency judgment. The right of a mortgagee to seek a deficiency judgment is codified in New York Real Property Actions and Proceedings Law §1371(2), which states that a deficiency judgment may be brought within "ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser."¹¹ If the mortgagee fails to bring a deficiency action within that time, the proceeds obtained at the foreclosure sale will be deemed to be in full satisfaction of the debt.¹² If a deficiency judgment is filed, a mortgagee retains an insurable interest up to that amount. However, if a mortgagee fails to file a deficiency judgment, its debt is deemed

to be satisfied in full, and, therefore, it has no continuing insurable interest in the property.

In a situation where a mortgagee does not take a deficiency judgment within 90 days, its insurable interest is extinguished by the foreclosure sale. As such, a mortgagee's claim for a loss occurring *after* the sale would be as an "owner" of the property and not as mortgagee. Because the mortgage clause of the policy only insures the mortgagee "as [its] interests appear," *i.e.*, as mortgagee/loss payee and not as a named insured, the mortgagee would have no insurable interest for any loss occurring after the date of the foreclosure sale, since its insurable interest as a loss payee was extinguished by the failure to obtain and file a deficiency judgment.

Claims Points:

1. Conduct a search of court records to determine if the mortgagee has filed a deficiency judgment.
2. Determine if the deficiency judgment was filed within 90 days of the transfer of the property to the mortgagee (date of the referee's deed).
3. If the deficiency judgment was filed after 90 days from the date of transfer, the mortgagee no longer retains an insurable interest in the remaining mortgage debt.

Here are three examples. First, assume that a foreclosure sale took place on January 1, 2010, and a \$10,000 deficiency remained. Following the foreclosure sale, the mortgagee obtained title from the referee on or about February 1, 2010. Assume further that after title was transferred to the mortgagee on February 1, 2010, the mortgagee failed to file a deficiency judgment in the amount of \$10,000. Pursuant to New York law, the mortgagee would no longer have an insurable interest, and the foreclosure sale would be considered to have fully satisfied the mortgage debt. In this situation, the mortgagee could not recover under the policy.

As another example, assume that a foreclosure sale took place on January 1, 2010, and a \$10,000 deficiency remained. Following the foreclosure sale,

the mortgagee obtained title from the referee on or about February 1, 2010. Assume further that after title was transferred to the mortgagee on February 1, 2010, the mortgagee properly filed a deficiency judgment on March 1, 2010 in the amount of \$10,000. Pursuant to NY RPAPL §§1371(2), because the deficiency was filed within 90 days from the "delivery of the proper deed of conveyance to the purchaser," the mortgagee would retain an insurable interest up to the amount of the deficiency, and, thus, it could recover to that extent under the policy.

Now, assume that a foreclosure sale takes place on January 1, 2010, and a \$10,000 deficiency remained. Following the foreclosure sale, the mortgagee obtained title from the referee on or about February 1, 2010. Assume further that after title was transferred to the mortgagee on February 1, 2010, the mortgagee filed a deficiency judgment in the amount of \$10,000 on May 1, 2010. Pursuant to NY RPAPL §§1371(2), because the deficiency was not filed within 90 days from the "delivery of the proper deed of conveyance to the purchaser," the mortgagee would no longer have an insurable interest in the deficiency, and its debt would be considered satisfied as of the date of the foreclosure sale.¹³

Exceptions To A Mortgagee's Failure To File A Deficiency Judgment

A situation may arise where a mortgagee has purchased a property at a foreclosure sale, and rather than obtain a deficiency judgment, the mortgagee seeks to be reimbursed under an "insurance proceeds" clause contained in the mortgage contract.¹⁴ Some mortgage contracts contain a clause pursuant to which the insured, in the event of a default, assigns his or her right to any insurance proceeds to the mortgagee (Note: this is not an attempt to assign the policy, only the proceeds of the claim). The mortgagee seeks to recover the proceeds pursuant to its contract with the insured, rather than as a loss payee under a mortgage loss payable clause of the insurance policy.

New York courts have allowed recovery in that situation, finding that, while the foreclosure sale extinguishes the mortgage debt, it does not extinguish the mortgage contract.¹⁵ These courts were dealing with situations where the loss occurred *prior* to the foreclosure sale. Indeed, recovery by a mortgagee for a post-foreclosure loss would be precluded because the

"insurance proceeds" clause is purely derivative, *i.e.*, the mortgagee can only recover the proceeds if the insured/homeowner is entitled to them pursuant to the terms of the mortgage agreement.

Claims Points:

1. Obtain a copy of the mortgage, and determine if it contains an "insurance proceeds" clause. Analyze the mortgage in conjunction with the referee's report to determine the extent of the remaining debt, if any, existing after the sale of the property, which may constitute "insurance proceeds."
2. It is important to note that the language of an "insurance proceeds" clause may differ between various mortgage lenders, and, therefore, it is imperative that each clause be carefully analyzed on a case-by-case basis to determine the exact nature and extent of the named insured's assignment to the mortgagee.

As an example, assume that a loss occurred on January 1, 2010, which was prior to the transfer of title from the referee to the mortgagee. Assume further that the property was sold to the mortgagee at a foreclosure sale and the mortgagee retained a \$10,000 deficiency, but failed to file a deficiency judgment. The insured's insurable interest was extinguished on the date of the title transfer, and he or she would only have an interest in any insurance proceeds over the amount of the remaining mortgage debt (surplus). Despite failing to preserve its deficiency within 90 days, the mortgagee, per the "insurance proceeds" clause, retains an interest as to the insurance proceeds up to the amount of the deficiency, and can collect if the claim is otherwise valid.

As another example, assume that a loss occurred on January 1, 2010, which was *after* title was transferred from the referee to the mortgagee. Assume further that the property was sold to the mortgagee at a foreclosure sale and there was a \$10,000 deficiency, but the mortgagee failed to file a deficiency judgment. The insured's insurable interest was extinguished on the date of the title transfer. Although there is a deficiency remaining, the mortgagee would not be entitled to any insurance proceeds, because the

“insurance proceeds” clause is only enforceable if the insured was entitled to collect proceeds. In the event of a post-foreclosure loss, the insured is not entitled to collect, because his or her interest has been extinguished, and, similarly, the mortgagee would also not be entitled to collect under the “insurance proceeds” clause in the mortgage, because the insured is not entitled to collect.

What About Post-Foreclosure Loss?

In order to determine what rights, if any, a mortgagee has in insurance proceeds where a loss occurs subsequent to the foreclosure sale, one must first look to the results of the foreclosure sale itself, *i.e.*, was there a deficiency. If the debt was fully satisfied, and there was no deficiency, then the mortgagee’s insurable interest was extinguished, and it would have no rights to any insurance proceeds. However, if a deficiency judgment was taken, then the mortgagee would have an insurable interest in a post-foreclosure loss up to the amount of the deficiency, so long as the loss occurred within the applicable policy period.

As an example, assume that a mortgagee has made a claim for a loss that occurs subsequent to the date of the foreclosure sale. If the mortgagee bid in the full amount of the debt at the foreclosure sale, the debt is satisfied and the mortgagee has no insurable interest in the insured property or any insurance proceeds.

Additionally, assume that a mortgagee has made a claim for a loss that occurs subsequent to the date of a foreclosure sale. If there was a deficiency remaining after the foreclosure sale, and the mortgagee properly filed a deficiency judgment, the mortgagee would have an insurable interest in any insurance proceeds up to the amount of the deficiency. So, if an insured property sustained \$100,000 worth of damage and a \$10,000 deficiency remained after a foreclosure sale, a mortgagee would have an insurable interest up to \$10,000 of the insurance proceeds for a loss that occurred subsequent to a foreclosure sale, so long as the loss occurred within the policy period and the claim is otherwise valid.

Conclusion

In the investigation of any claim by a mortgagee where the property has been foreclosed, it is imperative that the relevant court documents be retrieved

as soon as possible. The documents will help to determine if the mortgagee has complied with the notice provisions of the mortgage clause, and whether the mortgagee retains any insurable interest in the property. Once the extent of the mortgagee’s interest is known, the claim can be adjusted accordingly.

Guide For Claims Investigation

1. Determine the date of the loss. Did the loss occur within the policy period?
2. Determine all mortgage lien holders attached to the insured property.
3. Determine if the property is in foreclosure or whether title has already been transferred to the mortgagee and/or a third party.
4. Obtain all foreclosure documents directly from the court, including, but not limited to, the summons and complaint, judgment of foreclosure and sale, referee’s report, and referee’s deed.
5. Determine the ownership status of the property.
 - a. If title has been transferred to the mortgagee, determine the date of transfer based upon a review of the referee’s deed; and
 - b. Determine if the loss occurred prior or subsequent to the transfer date.
6. Determine if the referee reported a deficiency between the judgment award listed in the judgment of foreclosure and sale and the sale price to the mortgagee reflected in the referee’s deed.
7. Conduct a search of court records to determine if the mortgagee filed a deficiency judgment in order to preserve its interest in the remaining mortgage debt.
 - a. Determine if the deficiency judgment was filed within 90 days of the transfer of the property to the mortgagee (date of referee’s deed).

8. Determine the date when the mortgagee first became aware of any change in occupancy, ownership or substantial change in risk.
9. Request that the mortgagee provide its file maintained in connection with the foreclosure action.
10. Require an authorized representative of the mortgagee to execute a Sworn Statement in Proof of Loss.
11. Require that the mortgagee attach to the fully executed sworn statement in proof of loss and affidavit, signed by an officer of the corporation, setting forth the following information:
 - a. The exact name of the entity holding the mortgage on the property as of the date of loss;
 - b. The exact name of the entity holding the mortgage on the property as of the date that the sworn statement in proof of loss is executed;
 - c. The principal balance and any accrued interest owed on the mortgage as of the date of loss;
 - d. The principal balance and any accrued interest owed on the mortgage as of the date that the sworn statement in proof of loss is executed;
 - e. The date that the last payment was made by the mortgagor;
 - f. A representation as to whether or not foreclosure proceedings have been initiated;
 - g. A representation as to whether the mortgagee maintained any other insurance on the property and, if so, set forth the name of the insurer and the policy number. If a claim was submitted to that insurer, set forth the claim number and a brief description of the status of that claim;¹⁶
 - h. Copies of any and all assignments of the mortgage or the mortgagee's interest;
 - i. Copies of any and all inspection reports, appraisal reports, occupancy reports, or any documents relating to the property currently in the possession of the mortgagee.
 - j. A copy of any and all inspection report's obtained prior to instituting the foreclosure action.
 - k. A copy of the building damage estimate.
12. Request that the mortgagee provide a copy of the inspection company's file maintained in connection with the property inspection and/or provide an authorization to obtain the file.
13. Inspect and document the insured location for evidence of vacancy (vandalism), illegal occupancy and illegal use (squatters).¹⁷ Note the physical condition of the premises, including the landscaping, and the condition of the interior, if accessible, including taking note of the existence of any furniture, personal property and the status of the property's utilities, *e.g.*, was the water, heat and electric service turned on.
 - a. You may wish to consider requesting the utility records for the property and/or an authorization to obtain same.
14. Obtain a copy of the mortgage and determine if it contains an "insurance proceeds" clause.

Endnotes

1. *See, Agriculver Profit Sharing Plan v. Dryden Mut. Ins. Co.*, 145 A.D.2d 811, 812, 535 N.Y.S.2d 797 (3d Dep't 1988).
2. *See, Murray v. North Country Ins. Co.*, 277 A.D.2d 847, 716 N.Y.S.2d 820 (3d Dep't 2000).
3. *See gen., Syracuse Sav. Bank v. Yorkshire Ins. Co.*, 301 N.Y. 403, 407 (1950) (a mortgagee's interest is "free from invalidation" by the insured's "act[s] or neglect").

4. See, United States Fid. & Guar. Co. v. Annunziata, 67 N.Y.2d 229, 231, 501 N.Y.S.2d 790 (1986) (“a mortgagee named in a fire insurance policy containing a standard mortgage clause is not obligated to comply with the provisions of the policy requiring the named insured to submit to an examination under oath”).
5. Aside from the obligations imposed upon the mortgagee pursuant to the mortgage clause, in order for a mortgagee’s claim to be valid, the claimed loss must be a covered event under the policy, e.g., fire. Naturally, a mortgagee is not entitled to recover on a claim that would otherwise be excluded from coverage, e.g., flood or earth movement.
6. See, Eveready Ins. Co. v. Chavis, 150 A.D.2d 332, 333, 540 N.Y.S.2d 860 (2d Dep’t 1989) (“Policy provisions containing like terms, such as ‘immediate notice,’ ‘notice as soon as practicable’ and ‘notice as soon as reasonably possible,’ have all been interpreted to require that notice be given within a reasonable time under the circumstances”); see also, DiGuglielmo v. Travelers Prop. Cas., 6 A.D.3d 344, 766 N.Y.S.2d. 542 (1st Dep’t 2004); Power Auth. of N.Y. v. Westinghouse Elec. Corp., 117 A.D.2d 336, 502 N.Y.S.2d 420 (1st Dep’t 1986).
7. See gen., First American Sav. F.A. v. Newark Ins. Co., 1990 U.S. Dist. LEXIS 10833, *10 (E.D. Pa. 1990), citing, 6A Appleman, *Insurance Law and Practice* §4165, at pp. 492-494 (“[A] mortgagee was also protected where a reasonable time had not elapsed after he acquired knowledge, in which to inform the insurer, or where the insurance could not have been cancelled before the loss even if notice had been given”); Travers v. Annuity Brokerage Co., 34 S.W.3d 156, 165, 2000 Mo. App. LEXIS 1632 (Mo. App. 2000) (when a policy is silent, notice is to be given within a reasonable time); Lumbermen’s Mut. Cas. Co. v. J. Corrigan Thomas, 555 So. 2d 67 (Sup. Ct. Miss. 1989) (court held that where the policy was silent, a mortgagee’s two week delay in providing the insurer with notice of vacancy was reasonable); Independent Fire Ins. Co. v. NCNB Nat’l Bank, 517 So. 2d 59, 63 (Fla. 1st DCA 1987) (when policy is silent, notice to be given within a reasonable time); Goodman v. Quaker City Fire and Marine Ins. Co., 241 F.2d 432 (1st Cir. 1957) (in the context of notice of loss, a mortgagee was required to furnish the insurer with notice within a reasonable time, and notice made less than two months after the loss held reasonable as a matter of law).
8. Dulberg v. Ebenhart, 68 A.D.2d 323, 327, 417 N.Y.S.2d 71 (1st Dep’t. 1979) (internal citations omitted).
9. Whitestone Sav. & Loan Assn. v Allstate Ins. Co., 28 N.Y.2d 332, 336, 321 N.Y.S.2d 862 (1971) (internal citations omitted); see Bellusci v. Citibank N.A., 204 A.D.2d 843, 844, 611 N.Y.S.2d 958 (3d Dep’t 1994) (satisfaction of debt terminates mortgagee’s insurable interest); Builders Affiliates, Inc. v. North River Ins. Co., 91 A.D.2d 360, 363, 459 N.Y.S.2d 41 (1st Dep’t. 1983) (same).
10. Builders Affiliates, 91 A.D.2d at 363.
11. NY CLS RPAPL §1371(2).
12. See Wash. Mut. Bank, F.A. v. Allstate Ins. Co., 48 A.D.3d 554, 852 N.Y.S.2d 201 (2d Dep’t. 2008); Bellusci v. Citibank N.A., 204 A.D.2d 843, 844, 611 N.Y.S.2d 958 (3d Dep’t 1994) (“If the foreclosure sale produces a deficiency and the mortgagee fails to procure a deficiency judgment, the proceeds of the sale, regardless of the amount, are deemed to be in full satisfaction of the mortgage debt”).
13. See gen., Wash. Mut. Bank, F.A., *supra*, 48 A.D.3d at 554.
14. By way of an example, the following clause was contained in a mortgage we recently reviewed:

Borrower’s Obligation To Maintain Hazard Insurance Or Property Insurance

If Lender acquires the Property under Paragraph 21 below, all of my rights in the insurance policies will belong to Lender. Also, all of my rights in any proceeds which are paid because of damage that occurred before the Property is acquired by Lender or sold will belong to Lender. However, Lender’s rights in those proceeds will not be greater than the Sums Secured immediately before the Property is acquired by Lender or sold.

15. See, TIG Ins. Co. v. Wilshire Credit Corp., 269 A.D.2d 524, 703 N.Y.S.2d 501 (2d Dep't 2000); GMS Capital Corp. v. Siegmund Spiegel/Baldur Peter, P.C., 251 A.D.2d 542, 674 N.Y.S.2d 733 (2d Dep't 1998); L.G.H. Enterprises v. Kadilac Mortg. Bankers, Ltd., 225 A.D.2d 735, 640 N.Y.S.2d 155 (2d Dep't 1996); Melino v. National Grange Mut. Ins. Co., 213 A.D.2d 86, 630 N.Y.S.2d 123 (3d Dep't 1995). The Melino case involved a pre-foreclosure loss where the mortgagee bid the full amount of the mortgage debt, thus leaving no deficiency. The Melino Court permitted the mortgagee to recover the policy proceeds pursuant to an "insurance proceeds" clause in the mortgage contract. Melino, 213 A.D.2d at 88. The Melino court held that a "mortgagee is not entitled to a windfall or double recovery. The mortgagee [is] only entitled to recover the difference between the balance formerly owed under the mortgage, plus interest, and the fair market value of the property, with the remainder of the insurance proceeds due the mortgagor." Id. at 89.
16. On occasion, particularly in the case of a delinquent mortgagor, the mortgagee will obtain additional insurance on the property. If the property is insured by two insurers on the date of loss, the policies' respective "other insurance" provisions will apply, and may result in a reduction of the first insurer's ultimate liability on a pro rata basis.
17. If the property is vacant, it will be important to determine the length of the vacancy, and the steps taken by the mortgagee subsequent to the inspections to safeguard the home, e.g., boarding up the doors and windows or changing the locks. Based upon evidence of prolonged vacancy and/or evidence of squatters or vandals, the insurer's exposure may have been increased due to the mortgagee's delay in notification. See *gen.*, DeVanzo v. Newark Ins. Co., 44 A.D.2d 39, 42, 353 N.Y.S.2d 29 (2d Dep't 1974) ("the vacancy clause in fire insurance policies was undoubtedly designed to protect the insurer against an exposure to a risk which it did not desire to undertake — since an empty building in common experience is more vulnerable to fire loss than an occupied building"); Majtan v. Madison Mut. Ins. Co., 249 A.D.2d 867, 868, 672 N.Y.S.2d 458 (3d Dep't 1998) ("[a]n increase in the hazard insured against takes place when a new use is made of the property, or when its physical condition is changed from that which existed when the policy was written, and the new use or changed condition increases the risk assumed by the company"; "abandonment and disrepair are factors which can increase a fire hazard") (internal citations omitted). ■