PRACTICE FOCUS / CIVIL PROCEDURE

Cases misapplied to foreclosure statute of limitations

Commentary by Michael Cotzen

I write this in response to Brian Hole and Phil Rothschild's April 15 article on the five-year statute of limitations in mortgage foreclosure actions.

As an attorney who has handled many foreclosure defense cases, including multiple cases that were dismissed based on the expiration of the statute of limitations, I write to express my opinion that Messrs. Hole and Rothschild are misapplying the *Singleton* and *Olympia* cases in a manner in which the Florida Supreme Court and the Fourth District Court of Appeal, respectively, could not have possibly anticipated. To believe otherwise would render the statute of limitations meaningless in foreclosure actions.


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As discussed in the prior article, under Section 95.11(2)(c), Fla. Stat., the statute of limitations to foreclose a mortgage in Florida is five years. The time to file a lawsuit where the mortgage contains an optional acceleration clause (which is nearly all residential mortgages) begins to run when the lender accelerates the amount due under the mortgage.

Acceleration, which is when the lender declares all subsequent payments due as a result of the default that has occurred, can happen in a variety of ways, most often through written notice to the borrower or by a lender filing a foreclosure action.

Importantly, since the acceleration is optional, the lender is not required to accelerate but instead can foreclose on the amount of the prior default. Lenders, however, virtually always accelerate in an attempt to obtain a judgment against the borrower for the entire amount due under the terms of the mortgage.

ACTION BARRED?

The lender cannot have it both ways. It cannot accelerate the amounts due and then, if it does not prevail in the lawsuit, decelerate and then reaccelerate the same payments to avoid the statute of limitations bar.

By accelerating, the lender has already declared all sums under the mortgage due and owing. If the lender does not prevail in its foreclosure case, it may file a second lawsuit against the borrower, but only if that lawsuit is timely under the five-year statute of limitations.

Messrs. Hole and Rothschild are correct that some recent federal trial judges have found that the *Singleton* and *Olympia* cases permit a lender to file a subsequent foreclosure lawsuit even though five years had passed after acceleration because of the apparent ability to "reaccelerate."

In these cases, however, either the borrower represented himself pro se, failed to file a response to a motion to dismiss, and/or filed a response that utterly failed to distinguish the *Singleton* case. Simply put, in these cases, the federal trial judges did not hear the other side of the story, which is that *Singleton* is easily distinguishable and cannot apply to the statute of limitations.

Most state trial judges have ruled for the borrower where lenders have attempted to use the *Singleton* res judicata decision to argue that a foreclosure action was not barred under the statute of limitations.

Bay Circuit Judge Thomas Ellinor and Miami-Dade Circuit Judge Peter Lopez both recently held that the *Singleton* case "concerns only the application of res judicata in an action to collect discrete payments under an installment contract. Singleton ... is wholly irrelevant to the issue of the statute of limitations."

NONSENSE

Lenders are consistently misinterpreting the Florida Supreme Court's *Singleton* opinion and the Fourth District's *Olympia* opinion in a manner that is inconsistent with the meaning and purpose of the statute of limitations.

These cases solely involve an analysis of the application of res judicata, and these courts never discussed the applicability of the statute of limitations to situations where the lender had previously accelerated the amounts owed under the mortgage.

To apply these cases to permit lenders to file suit despite the passing of five years would render the statute of limitations meaningless. Lenders would then be allowed to file suit against a borrower whenever it wanted, despite the statutory restriction preventing it from doing so.

Obviously, such an interpretation makes no sense and would permit lenders to refile their cases over and over for as long as they want until they ultimately prevail, a result that would be completely inequitable and unreasonable.

There are no other causes of action where the statute of limitations is a moving target that a plaintiff can magically extend at any time.

Lenders have a clear deadline to file their foreclosure lawsuits—five years from acceleration. Courts should not allow for an exception in foreclosure cases whereby a plaintiff can unilaterally extend the statute of limitations just because they have missed their statutory deadline.

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