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Florida Mortgage Statute of Limitations: Why It's Becoming a Problem and What We Can Do About It

Florida courts are working through a new legal issue that threatens the enforceability of mortgages there. When foreclosure cases were filed over five years ago and were later dismissed, property owners began claiming that the statute of limitations prevents their mortgage holders ("lenders") from enforcing the note and mortgage. They are fighting foreclosures and seeking to cancel mortgages with this argument. This article lays out the legal issues, explains where legal uncertainty exists, and suggests ways that mortgage documents and mortgage servicing procedures can be adapted to protect lenders, investors and servicers.

The Legal Threat

Florida's statute of limitations on foreclosures is five years. For a variety of reasons, thousands of foreclosures were filed more than five years ago and were then dismissed – either voluntarily by the lenders or by the courts. Borrowers and investors are now arguing that when those cases were filed, the full mortgage balance was accelerated, and the statute of limitations began to run against all future payments. Therefore, five years after the case was filed, the statute of limitations bars a second foreclosure action, they argue.

Borrowers and real estate investors have used this argument as both a shield and a sword. They have used it as a shield to defend against repeat foreclosures, and they have used it as a sword in quiet title lawsuits seeking to cancel mortgage liens.

Uncertainty in the Courts

Trial courts handled this issue inconsistently at first. Some canceled mortgages outright; some declined to cancel mortgages but dismissed foreclosures as time barred; and others allowed the foreclosures to continue. More recently, lenders have won important battles. Two intermediate appellate courts and several federal trial courts in Florida have ruled that mortgages cannot be canceled.

However, the war is far from over.

The first appellate court case, *U.S. Bank v. Bartram*[1], is now before the Florida Supreme Court. Four parties in the case and five *amici curiae* ("friends of the court") intend to file briefs. Of these nine, two support the bank and seven oppose the bank. A $650,000 mortgage hangs in the balance. Moreover, the result could impact thousands of similar Florida mortgages worth hundreds of millions.[2] The Florida Supreme Court has the option whether or not to hear *Bartram*. If it does, the Court could uphold, modify or reverse the lower appellate court's ruling that the mortgage is valid.

Another appellate court followed *Bartram* and explicitly ruled that mortgages cannot be canceled until five years after maturity.[3] That makes two of Florida's five District Courts of Appeal on the side of lenders. The other three districts have not published opinions on the issue.

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Muddy Waters

Even when lenders win, imprecise legal opinions leave muddy waters in their wake.

Bartram is a prime example. The appellate court ruled that dismissal of the bank's first foreclosure case did not bar a second one, but only if the second one was "a foreclosure action *for default in payments occurring after the order of dismissal* in the first foreclosure…."[4] There is no apparent basis for requiring the second case to be based on a default after the order of dismissal in the first case. Any default within five years prior to the second case is within the statute of limitations and should be a viable basis for the second case. According to *Bartram*, a borrower could start submitting regular payments immediately after dismissal of his first foreclosure case and arguably prevent a second foreclosure even though the payments are several years in arrears.

Accounting Nightmare

Another concern raised in several cases is the indication that mortgage payments delinquent more than five years are uncollectible.[5] If true, that could be an expensive loss of principal, interest and escrow advances. It could also pose an accounting nightmare as servicers struggle to make servicing platforms reflect reductions in principal balances, accrued interest accounts, and escrow accounts based on court rulings that do not match the transaction history of the loan.

Loan Documents Support Full Debt Accounting

This potential accounting nightmare should be averted in most cases if courts pay close attention to the loan documents. Fannie Mae/Freddie Mac standard residential loan documents (and the like) include "full debt" promises by the borrower. Since the borrower promises to pay the full debt with interest (not just a series of installments) courts should not deduct the amount of "time barred" installments. For example, the note in Bartram contains the following payment terms. Paragraph 1: "… I promise to pay $650,000…, plus interest…." Paragraph 3: "If on March 1, 2035, I still owe amounts under this Note, I will pay those amounts in full on that date…." The mortgage contains similar language: "Borrower shall pay when due the principal of, and interest on, the debt evidenced by the Note…." Paragraph 1.

These terms obligate the borrower to pay the full debt even where courts rule that installments more than five years old are uncollectible.

Ways to Further Strengthen Loan Documents

Some minor revisions to standard loan documents would enable the mortgage industry to exert control over future cases and reduce the room for judicial interpretation.

First, add "deceleration" clauses. Although Florida courts seem to have accepted the concept of deceleration[6], there would be less room for judicial interpretation if the loan documents contained an express *deceleration* provision, much like the express *acceleration* provision in most notes and mortgages.

This provision should state that the lender can withdraw an acceleration of the debt at any time and that acceleration is automatically withdrawn by the dismissal of any lawsuit on the note or mortgage.

Second, add express language in which the borrower promises he "will pay the full debt even if some or all of the installment payments become unenforceable by operation of law."

Ways to Strengthen Default Servicing

Default loan servicing procedures and foreclosure procedures can also be updated to help lenders.

Send notices of deceleration whenever a case is dismissed. Even if there is no express deceleration provision in the loan documents, the lender is on higher ground with a deceleration notice than without.

Lastly, servicers can instruct foreclosure counsel when they file repeat foreclosure cases to allege *two separate breach dates* in the complaint. The first date should be the contractual due date according to the note. This is important for transparency and for calculating the correct debt balance when the time for judgment arrives. The second date should be a date after dismissal of the previous case in order to meet *Bartram's* "after the order of dismissal" requirement – at least until the Florida Supreme Court speaks. The complaint should clearly state that it is being filed based on the second breach.

Conclusion

Dismissed foreclosures in Florida have raised a high stakes legal issue: Did the filing of the dismissed case accelerate all future payments so that five years later no legal action can be filed? While the tide of judicial opinion currently favors the mortgage industry, it is too early to tell how it will turn out. Nevertheless, there are concrete steps the mortgage industry can take to create more favorable conditions in future cases and leave less room for judicial interpretation. P

1 *U.S. Bank Nat. Ass'n v. Bartram*, 140 So. 3d 1007 (Fla. 5th DCA 2014).

2 One putative class plaintiff alleged there are 50,000 mortgages affected by this issue. *Torres v. Countrywide Home Loans, Inc.*, Case No. 14-20759-CIV-KMW (U.S. S.D.Fla. July 29, 2014).

3 *Evergrene Partners, Inc. v. Citibank, N.A.*, 39 Fla. L. Weekly D1342 (Fla. 4th DCA 2014)

4 *Bartram* at 1014..

5 *Id. (certified question); Isaacs v. Deutsch*, 80 So. 2d 657, 660 (Fla. 1955); *Cent. Home Trust. Co. of Elizabeth v. Lippincott*, 392 So. 2d 931, 933 (Fla. 5th DCA 1980).

6 *Singleton v. Greymar Associates*, 882 So. 2d 1004, 1008 (Fla. 2004); *Veredecia v. Bank of New York*, Case No. 13–62035–CIV, 2014 WL 3767668 (U.S. S.D.Fla. July 31, 2014).