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## Consumer Finance Litigation

### Florida Supreme Court Finds That the Statute of Limitations Does Not Prevent a Subsequent Foreclosure Action Based on Payment Defaults Occurring After the Dismissal of the First Foreclosure Suit with Prejudice

**Action Item: If a prior foreclosure action has been dismissed with prejudice, mortgagees may bring new actions to foreclose on mortgages based upon post-dismissal payment default, so long as the new action is brought within five years of the new default.**

Florida Statute section § 95.11(2)(c) states that the statute of limitations to foreclose a mortgage is five years. At first glance, this seems fairly cut and dry. However, the question of how to apply the statute of limitations in subsequent mortgage foreclosure cases where the mortgagee's prior foreclosure suit was dismissed has been the subject of significant litigation and scholarly debate in Florida for almost a decade. On November 3, 2016, the Florida Supreme Court issued its long awaited decision in *Bartram v. U.S. Bank, N.A.*, SC14-1265, which provided some clarity to the issue but left plenty to parse. The Court ultimately held that where a mortgagee's prior foreclosure action was dismissed with prejudice, its subsequent foreclosure case is not barred by the statute of limitations so long as (1) the newly alleged default date post-dates the dismissal of the first action and (2) the subsequent lawsuit is filed within five years of the newly alleged default date.

In *Bartram*, a borrower defaulted on his mortgage loan by failing to remit payment for the month of January 2006 and the mortgagee, U.S. Bank, N.A. ("U.S. Bank"), filed suit to foreclose on May 16, 2006. The case was dismissed with prejudice on May 5, 2011 after U.S. Bank's counsel failed to appear at a case management conference. In 2012, the borrower filed a lawsuit for quiet title to the property, claiming that the five statute of limitations had run and the mortgage was therefore unenforceable. The trial court entered a judgment in favor of the borrower, which stripped the mortgage from the property, and U.S. Bank appealed. The Fifth District Court of Appeal reversed the trial court's decision and certified the question to the Florida Supreme Court.

In its November 3, 2016 opinion affirming the Fifth District's decision, the Florida Supreme Court explained that a mortgagee can bring consecutive foreclosure actions against a mortgagor because each new default of a mortgage installment contract creates a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action. Therefore, the Court held that "with each subsequent default, the statute of limitations runs from the date of each

new default providing the mortgagee the right, but not the obligation to accelerate all sums then due under the note and mortgage.” It follows, “the statute of limitations on the balance under the note and mortgage would not continue to run after an involuntary dismissal, and thus the mortgagee would not be barred by the statute of limitations from filing a successive foreclosure action premised on a ‘separate and distinct default’” within five years of said default. Importantly, the Court also held that an involuntary dismissal with prejudice of a prior foreclosure action does not change the analysis that a mortgagee can bring a subsequent foreclosure action pursuant to each subsequent default under the installment contract so long as the new default date post-dates the dismissal of the first action.

The *Bartram* Court seemingly disregarded the long-standing line of cases, which hold that a mortgagee’s acceleration of the loan, rather than the borrower’s default date, triggers the statute of limitations. The Court found that, even after the mortgagee declares the loan accelerated in the foreclosure complaint, the reinstatement provision of the mortgage allows a borrower to cure the default by paying only the past due amount and not the full balance. Thus, even though the foreclosure complaint declares that the loan is accelerated, the loan remains an installment contract. The Court reasoned that only the Final Judgment of Foreclosure actually renders the acceleration effective because only then is the borrower required to pay the full amount of indebtedness under the loan.

The takeaway from *Bartram* is that mortgagees and mortgage servicers must evaluate the litigation history of the loan before refiling a foreclosure action where a prior case was dismissed. If the prior foreclosure action was dismissed without prejudice, the mortgagee should ensure that the previously noticed default date is within five years of when the subsequent suit will be filed. If the prior action was dismissed with prejudice, e.g. after a nonjury trial, summary judgment, etc., the mortgagee should reissue a breach letter that alleges a default of the loan, which post-dates the dismissal of the prior foreclosure action.

While the *Bartram* decision brings much needed clarity to whether/when a mortgagee may bring a new foreclosure action after a prior action has been dismissed with prejudice, numerous other matters remain undecided and dictate that a mortgagee proceed with caution. For example, questions remain as to whether the statute of limitations is triggered by the default date or by the acceleration of the note, as held in previous cases (see e.g. *Snow v. Wells Fargo Bank, N.A.*, 156 So. 3d 538 (Fla. 3d DCA 2015)); and how the amount due should be calculated for purposes of the subsequent foreclosure. This second question may also raise issues under the Fair Debt Collection Practices Act/ Florida Consumer Collection Practices Act, and may also affect the responses by servicers to Requests for Information under Regulation X of the Real Estate Settlement Procedures Act.

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