STATUTE OF LIMITATIONS ISSUES JUMP COASTS HITTING THE PACIFIC NORTHWEST AND SOUTHWEST

CAN WAIVING ACCELERATION AVOID THE STATUTE OF LIMITATIONS' BAR TO FORECLOSURE?

by Jamin S. Neil, Esq. and T. Robert Finlay, Esq.
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There are many who hope the expression "time heals all wounds" will prove to apply to the financial crisis of 2008-2009, but that same passage of time has an alternate -- and potentially severe -- consequence for mortgage lenders and servicers ("Servicers"): the loss of their ability to enforce the loan after they accelerate the debt.

The expiration of the statute of limitations ("SOL") on a Servicer's right to foreclose has long been an issue in New York and Florida. But, it is becoming an increasingly common defense and attack raised by property owners in the Pacific Northwest and Southwest as well. Opportunistic investors in states like Arizona are scouring title records, looking to acquire loans that have long been in default without the completion of a judicial or non-judicial sale. Borrowers too, in states like Oregon, Washington and Utah, are jumping on the bandwagon, claiming that the Servicer is prohibited, by its delay, from now foreclosing on the loan. Consequently, Servicers must take a close look at their loan portfolio to determine whether the SOL has run or is close to expiring. Most importantly, Servicers must know what can be done to stop any further running of the SOL clock.

For Servicers to understand their options, they must first understand what a SOL is and the risk of letting it expire. In the most simplistic terms, a SOL is the outward time limit of when a Servicer can enforce its Deed of Trust following a particular default. For example, if the SOL is six (6) years, the Servicer must complete its foreclosure within 6 years. If the Servicer fails to foreclose within 6 years, it is arguably prevented from ever foreclosing on its lien, effectively giving the borrower or owner the property free and clear of the Deed of Trust. Needless to say, this is a less than desirable result!

The key question for any outward limit is what triggers the clock to start running on the SOL? Contrary to popular belief, it is not the default itself that starts the clock running; but, rather the issuance of a notice from the Servicer declaring the loan to be in default and that all sums are immediately due (*i.e.* acceleration). The problem is that, in many instances, the debt was accelerated long ago (often by a prior servicer as part of a previous foreclosure attempt). In that event, the current Servicer could have a ticking time bomb on its hands.

The SOL defense is generally raised years after a notice of acceleration has issued. At that point, Servicers (and their legal teams) are left scrambling to review the entire loan file to determine when the first acceleration occurred, whether there were any tolling events preventing the SOL from having already run, and, most importantly, was the loan ever "de-accelerated".

As we are now several years removed from the height of the financial crisis, the **six year** SOL on foreclosures in Arizona, Oregon, Washington and Utah are becoming an increasingly bigger problem for Servicers in these states. Indeed, because Servicers may not be aware that acceleration of the loan arguably starts the SOL running, proving that the loan was de-accelerated (or that the running of the statute was tolled) may prove crucial to avoiding the bar to foreclosure.[1] This article discusses the applicable SOL period in all four states, what events or actions Servicers take that could commence its running, Servicers' ability to waive acceleration and the need to create further precedent confirming this right.

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State	Limitations Period	Accrual Date	Acceleration
ARIZONA 	Six years for foreclosure under a deed of trust.[2]	The statute begins to run either on the due date of each matured installment payment[3] or, as to unmatured future installments, the date on which the Servicer exercises the deed of trust's optional acceleration clause.[4]	Occurs when a Servicer undertakes some affirmative act to make clear to the borrower that the Servicer has accelerated the obligation.[5] Demanding full payment before all installments are due and filing suit to collect the entire debt are arguably sufficient affirmative acts to constitute acceleration.[6]
OREGON 	Six years for an action on the Note. Ten years for foreclosure under a deed of trust.[7] It is unsettled in Oregon whether a non-judicial foreclosure is barred if the limitations period on an action under the Note has already expired. Accordingly, Servicers should exercise caution and utilize the 6 year limitations period.	Where an instrument gives the creditor an election to accelerate maturity of the debt and it is accelerated, the statute of limitations begins to run from the time of the election to accelerate.[8]	An affirmative act evidencing an intention to exercise the option to accelerate is required.[9]
WASHINGTON 	Six years for foreclosure under a deed of trust.[10]	The statute begins to run when the amount becomes due.[11] The full amount becomes due either upon maturity of the note or if an obligation to pay in installments is fully accelerated.[12]	Acceleration requires some affirmative act by the Servicer, in a clear and unequivocal manner, which effectively apprises the borrower that the Servicer has exercised its right to accelerate the payment date.[13] This exercise of the option may take different forms including, but not limited to: Giving the borrower formal notice that the whole debt is declared due; or by the commencement of an action to recover the debt.[14]

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State	Limitations Period	Accrual Date	Acceleration
UTAH	Six years for an action on the Note (not a non-judicial foreclosure).[15] Recent case law provides that even if an action under the Note is barred by the limitations period, the Deed of Trust may still be valid and enforceable.[16] However, this issue is not settled in Utah. Accordingly, Servicers should exercise caution and utilize the 6 year limitations period	An action for recovery of a debt may be brought within the applicable statute of limitations from the date: (a) the debt arose; (b) a written acknowledgment of the debt or a promise to pay is made by the debtor; or (c) a payment is made on the debt by the debtor.[17] However, acceleration of all amounts due triggers the running of the SOL as to the entire debt.[18]	An affirmative act evidencing an intention to exercise the option to accelerate is required. It appears from recently case law that a loan can be de-accelerated to stop the running of the statute. The Deed of Trust's maturity date commences the SOL on non-judicial foreclosure.[19]

NON-JUDICIAL FORECLOSURE

If the Servicer has not already sent notice to the borrower advising that the loan was accelerated, the question arises as to whether the initiation of non-judicial foreclosure proceedings suffices to start the running of the statute. Although there are no decisions from the above states addressing whether (or at what stage) the initiation of non-judicial foreclosure proceedings might constitute an acceleration of all amounts due under the loan, it is arguably analogous to the commencement of a foreclosure lawsuit and, thus, *could* constitute an affirmative act demonstrating acceleration.

WAIVER OF ACCELERATION (OR DE-ACCELERATION)

In general, the exercise of an option to accelerate is not irrevocable, and a Servicer who has exercised the option of considering the whole amount due may subsequently waive this right and permit the obligation to continue in force under its original terms.[20] The waiver may be express or implied.[21]

The requirements for establishing waiver of an optional acceleration under a Deed of Trust have not yet been set in Arizona, Oregon and Washington;[22] however, courts in Florida, New York, Texas and Utah have unanimously held that Servicers can waive the acceleration.[23] As the Florida and New York decisions are in the context of judicial foreclosure sales, the decisions from Texas and Utah relating to non-judicial foreclosures are most applicable to Arizona, Oregon and Washington where the primary mode of foreclosure is non-judicial.

In Texas, Arizona, Oregon and Washington, "waiver" is defined as the intentional relinquishment of a known right that can be implied as well as express.[24] Texas courts intermingle the terms waiver and abandonment in reference to de-acceleration and conclude that when a Servicer sends a subsequent notice of default and intent to accelerate to a borrower, such notice abandons any prior acceleration as a matter of law. This abandonment or waiver of acceleration effectively restores the note's original maturity date.[25]

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Stated differently, a subsequent notice of default unequivocally manifests a Servicer's intent to abandon the previous acceleration and provides the borrower with an opportunity to avoid foreclosure if he or she cures the arrearage. Accordingly, the SOL ceases to run at this point.[26] While this may be the law in Texas, there are no appellate decisions reaching the same conclusion in Arizona, Oregon, Washington or Utah. However, the logic behind Texas decisions could arguably cross borders into these states as well.

Servicers should look to their loan files for correspondence and notices indicating whether the loan was no longer accelerated and, therefore, that a prior acceleration was waived. Most Servicers' loan history notes will not indicate a change in the loan's accelerated or de- accelerated status, but rather will only reflect the commencement or cancellation of foreclosure proceedings. It is nonetheless crucial for Servicers to provide evidence that the loan was not still accelerated after a particular foreclosure was cancelled.

BEST PRACTICES TO AVOID LETTING THE "SOL" RUN

Unfortunately, "what's done is done" in the context of a SOL that has already expired. But, Servicers can prevent the expiration of another SOL next week, next month or next year by taking certain steps to protect its loan portfolios. For starters, it is essential to identify which loans may be close to surpassing the six year SOL in Arizona, Oregon, Washington and Utah. To do that, a Servicer must audit its defaulted loans in these states to determine when the SOL may have started to run. Once this cross-section of loans has been identified, the Servicer or its legal counsel should identify which loans are at imminent risk of hitting the six year mark. If the foreclosure on those loans cannot be completed before the SOL expires, the Servicer should consider taking overt steps to waive prior accelerations.

After the loans at immediate risk are addressed, Servicers may next want to consider implementing procedures to "flag" loans as they near the expiring SOL. And, remember to check for SOL risk on any incoming servicing transfers!

Of course, none of this should be relied upon as legal advice. Before addressing any SOL issues in Arizona, Oregon, Washington, Utah or any other state, Servicers should consult with their in-house legal counsel or hire outside counsel.

For additional reference, please see the ***Statute of Limitations Chart*** on pages 23-24.

If you have questions about the subject matter of this article, the applicable SOL in any states on the West Coast or in the Southwest, desires assistance in auditing your loan portfolios or developing SOL protocol, please feel free to contact Robert Finlay at rfinlay@wrightlegal.net, who will coordinate with our team of attorneys in Arizona, Oregon, Washington and Utah.

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FOOTNOTES: STATUTE OF LIMITATIONS ISSUES

[1] A variety of terms are used to describe de-acceleration, including: waiver, abandonment; revocation; and rescission.

[2] A.R.S. § 33-816 and A.R.S. § 12-548(A)(1).

[3] *Navy Fed. Credit Union v. Jones*, 187 Ariz. 493, 494, 930 P.2d 1007, 1008 (App. 1996).

[4] *Id*.

[5] *Baseline Fin. Servs. v. Madison*, 229 Ariz. 543, 544, 278 P.3d 321, 322 (App. 2012).

[6] *Id*.

[7] ORS § 12.080; ORS § 86.815 and ORS § 88.110. Oregon also has a statutory exception to the 10 year statute of limitations codified at ORS § 88.120.

[8] *Fed. Recovery of Wash., Inc. v. Wingfield*, 162 Ore. App. 150, 156-57, 986 P.2d 67, 71 (1999).

[9] *Salishan Hills, Inc. v. Krieger*, 62 Ore. App. 84, 90, 660 P.2d 160, 164 (1983).

[10] *Walcker v. Benson & McLaughlin*, 79 Wn. App. 739, 743, 904 P.2d 1176, 1178 (1995) (The six year statute of limitations on an action for a contract in writing applies to the foreclosure of a mortgage on real property. Since Washington's deed of trust statute, RCW 61.24, does not refer to any limitation period for non-judicial foreclosures, the limitation period for foreclosure of mortgages applies.).

[11] *Westar Funding, Inc. v. Sorrels*, 157 Wn. App. 777, 239 P.3d 1109, 1113 (Wash. Ct. App. 2010).

[12] *Kirsch v. Cranberry Fin., LLC*, No. 69959-8-I, 2013 Wash. App. LEXIS 2871, 2013 WL 6835195, at *4 (Wash. Ct. App. Dec. 23, 2013).

[13] *Glassmaker v. Ricard*, 23 Wn. App. 35, 38, 593 P.2d 179 (1979).

[14] *Weinberg v. Naher*, 51 Wn. 591, 594, 99 P. 736 (1909).

[15] UCA § 78B-2-309.

[16] *Koyle v. Sand Canyon Corp.*, 2:15-cv-00239 (May 2016).

[17] UCA § 78B-2-113.

[18] *Olsen v. Fair Co.*, 216 UT App 46, 369 P.3d 473, 479; see also *Koyle v. Sand Canyon Corp.*, 2:15-cv-00239 (May 2016); *Anderson v. Davis*, 2008 UT App 86 (Utah Ct. App. 2008); *Cottage Capital, LLC v. Red Ledges Land Dev.*, 2015 UT 27, 345 P.3d 642 (Utah 2015).

[19] *Koyle v. Sand Canyon Corp.*, 2:15-cv-00239 (May 2016); *Anderson v. Davis*, 2008 UT App 86 (Utah Ct. App. 2008); *Cottage Capital, LLC v. Red Ledges Land Dev.*, 2015 UT 27, 345 P.3d 642 (Utah 2015).

[20] 11 Am. Jur. 2d Bills and Notes § 170 (2nd 2015).

[21] *Id*.

[22] The Arizona Court of Appeals has discussed revocation of acceleration in the context of a judicial foreclosure action in an unpublished opinion. See *Wood v. Fitz-Simmons*, No. 2 CA-CV 2008-0041, 2009 Ariz. App. Unpub. LEXIS 1431, at *5 (App. Mar. 6, 2009). The Oregon Supreme Court, however, concluded that a Servicer may waive its previous election to accelerate and reinstate the terms of the note so long as the borrower does not change his or her position in reliance on the acceleration. *W. Portland Dev. Co. v. Ward Cook, Inc.*, 246 Ore. 67, 71, 424 P.2d 212, 214 (1967).

[23] See *Deutsche Bank Tr. Co. Ams. v. Beauvais*, 41 Fla. L. Weekly 933 (Dist. Ct. App. 2016) ("[U]pon dismissal [of a judicial foreclosure action], acceleration of a note and mortgage is abandoned with the parties returned to the status quo that existed prior to the filing of the dismissed action, leaving the lender free to accelerate and foreclose on subsequent defaults."); *Fed. Nat'l Mortg. Ass'n v. Mebane*, 208 A.D.2d 892, 894, 618 N.Y.S.2d 88, 89 (App. Div. 1994) ("[A] lender may revoke its election to accelerate all sums due under an optional acceleration clause in a mortgage provided that there is no change in the borrower's position in reliance thereon…"); *Denbina v. Hurst*, 516 S.W.2d 460, 463 (Tex. Civ. App. 1974) (explaining that a holder may "waive the exercise of the option" to accelerate a note after it "already exercised its option"); *Dallas Joint Stock Land Bank*, 167 S.W.2d at 247 (holding that a Servicer may "waive or rescind" its option to accelerate after exercising it); *Koyle v. Sand Canyon Corp.*, 2:15-cv-00239 (May 2016) (a beneficiary or trustee can unilaterally cancel a default under circumstances such as here where the default has not been cured and no mutual agreement has been reached by the parties). While the cases in these States differ on what constitute a waiver of the acceleration, they all agree that a Servicer can waive the acceleration.

[24] See *Ray v. Tucson Med. Ctr.*, 72 Ariz. 22, 32 (1951); *Gable v. State*, 203 Ore. App. 710, 730, 126 P.3d 739, 751 (2006); *Gage v. Langford*, 582 S.W.2d 203, 207 (Tex. Civ. App. 1979); *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 511 (Tex. 2015); *Schuster v. Prestige Senior Mgmt., LLC*, 193 Wn. App. 616, 631-633 (2016).

[25] *Khan v. GBAK Props.*, 371 S.W.3d 347, 354 n.1 (Tex. App. 2012); *Phillips v. JPMorgan Chase Bank, N.A.*, No. A-16-CA-287-SS, 2016 U.S. Dist. LEXIS 63843, at *8 (W.D. Tex. May 14, 2016) *citing Khan v. GBAK Props.*, 371 S.W.3d 347, 356 (Tex. App. 2012).

[26] *Phillips*, 2016 U.S. Dist. LEXIS 63843, at *8 *citing Boren v. U.S. Nat'l Bank Ass'n*, 807 F.3d 99, 105 (5th Cir. 2015).

STATUTE OF LIMITATIONS CHART

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Statute of Limitations Chart

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	Arizona	California	Nevada	New Mexico
SOL Timeframe	• Sue on the Note: 6 years • Judicial Foreclosure: 6 years • Non-Judicial Foreclosure: 6 years (completed within this time)	• Sue on the Note: 4 years • Judicial Foreclosure: 4 years • Non-Judicial Foreclosure: No SOL. However, the Marketable Record Title Act bars trustee sales after 10 years from maturity or 60 years after DOT recording if no maturity listed.	• Sue on the Note: 6 years • Judicial Foreclosure: 6 years • Non-Judicial Foreclosure: No SOL. Instead, there is a "Statute of Repose" (10 years from maturity.)	• Sue on the Note: 6 years • Judicial Foreclosure: 6 years • Non-Judicial Foreclosure: None, however, non-judicial sales are rare.
What tolling is permitted, i.e. can we carve out time in Bankruptcy, Mediation or Litigation?	Bankruptcy may toll the SOL if it expires while the bankruptcy case is active. The Borrower's absence from the State may also toll the SOL. Equitable tolling or pending litigation may toll the SOL, however, these tolling options are less clearly available for enforcement of loans and deeds of trust.	Bankruptcy may toll the SOL if it expires while the bankruptcy case is active. The Borrower's absence from the State may also toll the SOL. Equitable tolling or pending litigation may toll the SOL, however, these tolling options are less clearly available for enforcement of loans and deeds of trust.	Bankruptcy may toll the SOL if it expires while the bankruptcy case is active. The Borrower's absence from the State may also toll the SOL. Equitable tolling or pending litigation may toll the SOL, however, these tolling options are less clearly available for enforcement of loans and deeds of trust.	Bankruptcy may toll the SOL if it expires while the bankruptcy case is active. The Borrower's absence from the State may also toll the SOL. Equitable tolling or pending litigation may toll the SOL, however, these tolling options are less clearly available for enforcement of loans and deeds of trust.
What event determines the start date of the SOL Timeframe? Is it due date, demand date or first legal action?	The date of each default under the Note. However, acceleration of all amounts due and owing triggers the running of the SOL as to the entire debt. An affirmative act by the creditor is needed to invoke acceleration where the Note/Deed of Trust contain an optional acceleration clause (most do). It is unclear, but likely, that a loan can be de-accelerated to stop the running of the statute. Absent acceleration, it is the maturity date of the loan that triggers the running as to the entire debt.	The date of each default to file suit under the Note. However, acceleration of all amounts due and owing triggers the running of the SOL as to the entire debt. An affirmative act by the creditor is needed to invoke acceleration where the Note/Deed of Trust contain an optional acceleration clause (most do). It is unclear, but likely, that a loan can be de-accelerated to stop the running of the statute. The Deed of Trust's maturity date commences the SOL on non-judicial foreclosure.	The date of each default under the Note. However, acceleration of all amounts due and owing triggers the running of the SOL as to the entire debt. An affirmative act by the creditor is needed to invoke acceleration where the Note/Deed of Trust contain an optional acceleration clause (most do). It is unclear, but likely, that a loan can be de-accelerated to stop the running of the statute. Absent acceleration, it is the maturity date of the loan that triggers the running as to the entire debt.	The SOL begins to run at maturity of the Note. However, if there is an acceleration clause, the SOL begins to run as of the date of the default in the payment of interest.

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	Oregon	Washington	Utah
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